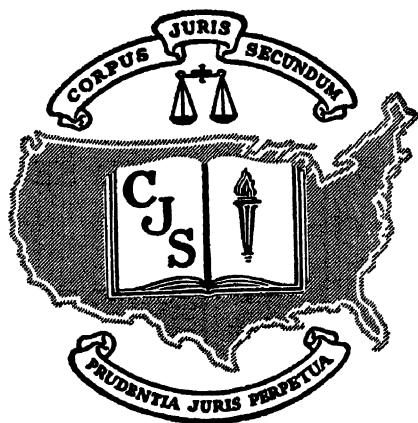


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CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE
AMERICAN LAW.

AS DEVELOPED BY
ALL REPORTED CASES

By
FRANCIS J. LUDS
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and
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of *Corpus Juris*. When the searcher may wish to consult earlier authorities, a specific reference to *Corpus Juris* makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined products of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A		Am.L.Rec.	American Law Record (Ohio)
A.2d	Atlantic Reporter	Am.L.Reg.	American Law Register
Abb.	Atlantic Reporter Second Series	Am.L.Reg.N.S.	American Law Register New Series
Abb.Adm.	Abbott (U.S.)	Am.Law.Reg.O.S.	American Law Register Old Series
Abb.App.Dec.	Abbott's Admiralty (U.S.)	Am.L.Rev.	American Law Review
Abb.Dec.	Abbott's Appeals Decisions (N.Y.)	Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Abb.N.Cas.	Abbott's Decisions (N.Y.)	Am.Law Inst.	American Law Institute, Restatement of the Law
Abb.Pr.	Abbott's New Cases (N.Y.)	Am.Negl.Cas.	American Negligence Cases
Abb.Pr.N.S.	Abbott's Practice (N.Y.)	Am.Negl.R.	American Negligence Reports
A'Beck.Res.	Abbott's Practice New Series (N.Y.)	A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Judgm.	A'Beckett's Reserved Judgments (Vict.)	Am.Prob.	American Probate
[1917] A.C.	[1917] Appeal Cases (Can.)	Am.Prob.N.S.	American Probate New Series
[1918] A.C.	Law Reports [1918] Appeal Cases (Eng.)	Am.Pr.	American Practice
Acton	Acton (Eng.)	Am.R.	American Reports
Adams	Adams Reports (N.H.)	Am.R.&Corp.	American Railroad & Corporation
A.D.2d	Appellate Division Second Series (N.Y.)	Am.R.Rep.	American Railway Reports
Add.	Addison (Pa.)	Am.S.R.	American State Reports
Add.Eccl.	Addams' Ecclesiastical (Eng.)	Am.St.R.D.	American Street Railway Decisions
A.&E.	Adolphus & Ellis (Eng.)	And.	Anderson (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law	Andr.	Andrews (Eng.)
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice	Ann.Cas.	American & English Annotated Cases
Aik.	Aikens (Vt.)	Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
A.K.Marsh.	A. K. Marshall (Ky.)	Anstr.	Anstruther (Eng.)
Ala.	Alabama	Anth.N.P.	Anthony's Nisi Prius (N.Y.)
Ala.App.	Alabama Appellate Court	App.D.C.	Appeal Cases (D.C.)
Alaska	Alaska	App.Cas.	Law Reports Appeal Cases (Eng.)
Alb.L.J.	Albany Law Journal	App.Div.	Appellate Division (N.Y.)
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Alc.&N.	Alcott & Napier (Eng.)	Ark.	Arkansas
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)	Ark.Just.	Arkley's Justiciary (Sc.)
Aleyn	Aleyn (Eng.)	Arn.	Arnold (Eng.)
Alison Pr.	Alison's Practice (Sc.)	Arn.&H.	Arnold & Hodges (Eng.)
Allen	Allen (Mass.)	Ashm.	Ashmead (Pa.)
Allen (N.B.)	Allen, New Brunswick	Aspin.	Aspinall's Maritime Cases (Eng.)
Alta.L.	Alberta Law	Atk.	Atkyn (Eng.)
A.L.R.	American Law Reports	Austr.C.L.R.	Commonwealth Law Reports, Australia
A.L.R.2d	American Law Reports, Second Series	Austr.Jur.	Australian Jurist
Am.Bankr.	American Bankruptcy (U.S.)	Austr.L.T.	Australian Law Times
Ambl.	Amblar (Eng.)		
A.M.C.	American Maritime Cases		
Am.Corp.Cas.	American Corporation Cases		
Am.Cr.	American Criminal		
Am.D.	American Decisions		
Am.&E.Corp.Cas.	American & English Corporation Cases		
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series		
Am.&Eng.Ency. Law	American and English Encyclopedia of Law		
Am.&Eng.Pat. Cas.	American & English Decisions in Equity		
Am.&E.Eq.D.	American and English Patent Cases		
Am.&Eng.R.R. Cas.	American and English Railroad Cases		
Am.Electr.Cas.	American Electrical Cases		
Am.&E.R.Cas.	American & English Railroad Cases		
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series		
Am.J.Int.L.	American Journal of International Law		
Am.L.J.	American Law Journal (Pa.)		
Am.L.J.N.S.	American Law Journal New Series (Pa.)		
		Bacon Abr.	Bacon's Abridgment (Eng.)
		Bail.Eq.	Bailey's Equity (S.C.)
		Bailey	Bailey's Law (S.C.)
		B.&Ad.	Barnewall & Adolphus (Eng.)
		B.&Ald.	Barnewall & Alderson (Eng.)
		Baldw.	Baldwin (U.S.)
		Balf.Pr.	Balfour's Practice (Sc.)
		Ball&B.	Ball & Beatty (Ir.)
		Bank&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
		Bann.	Bannister (Eng.)
		Bann.&A.	Banning & Arden (U.S.)
		Barb.	Barbour (N.Y.)
		Barb.Ch.	Barbour's Chancery (N.Y.)
		B.&Arn.	Barron & Arnold (Eng.)
		Barn.	Barnardiston King's Bench (Eng.)
		Barn.Ch.	Barnardiston Chancery (Eng.)
		Barnes	Barnes' Practice Cases (Eng.)
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		Batty	Batty (Ir.)
		B.&Aust.	Barron & Austin (Eng.)
		Baxt.	Baxter (Tenn.)
		Bay	Bay (S.C.)
		B.&B.	Broderip & Bingham (Eng.)
		B.C.	British Columbia
		B.&C.	Barnewall & Cresswell (Eng.)
		B.&Macn.	Browne & Macnamara (Eng.)
		B.D.&O.	Blackham, Dundas & Osborne (Ir.)
		Beatty	Beatty (Ir.)

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CLApp. Clark's Appeal Cases (Eng.)
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Coff.Prob. Coffey's Probate (Cal.)
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 Peake N.P. Peake's Nisi Prius (Eng.)
 Pearce C.C. Pearce's Reports in Dearsly's (Eng.)
 Pearson Pearson (Pa.)
 Peck Peck (Tenn.)
 Peck.El.Cas. Peckwell's Election Cases (Eng.)
 Pennew. Pennewill (Del.)
 Pennyp. Pennypacker (Pa.)
 Penr.&W. Penrose & Watts (Pa.)
 Perry & Kn. Perry & Knapp Election Cases (Eng.)
 Pet. Peters (U.S.)
 Pet.Adm. Peters' Admiralty (U.S.)
 Pet.C.C. Peters' Circuit Court (U.S.)
 Phil. Phillips (Eng.)
 Phil. Phillip (N.C.)
 Phila. Philadelphia (Pa.)
 Philippine Philippine
 Phillim. Phillimore Ecclesiastical (Eng.)
 Pick. Pickering (Mass.)
 Pig.&R. Pigott & Rodwell (Eng.)
 Pig.Rec. Pigott's Recoveries (Eng.)
 Pinn. Pinnney (Wis.)
 Pittsb. Pittsburgh (Pa.)
 P.&K. Perry & Knapp (Eng.)
 P.L.J. Pittsburgh Legal Journal (Pa.)
 P.L.J.N.S. Pittsburgh Legal Journal New Series (Pa.)
 Plowd. Plowden (Eng.)
 Pollexf. Pollexfen (Eng.)
 Poph. Popham (Eng.)
 Port. Porter (Ala.)
 Posey Posey's Unreported Cases (Tex.)
 Puerto Rico Puerto Rico
 Puerto Rico Fed. Puerto Rico Federal
 Pow.Surr. Powers' Surrogate (N.Y.)
 P.R.&D.El.Cas. Power, Rodwell & Dew's Election Cases (Eng.)
 Prec.Ch. Precedents in Chancery (Eng.)
 Pr.Edw.Is. Prince Edward Island
 Price. (Eng.)
 Price Pr.Cas. Price's Practice Cases (Eng.)
 Prideaux & Cole (Eng.)
 Prob.[1917] Law Reports, Probate Division (Eng.)
 Prob.Rep. Probate Reports (Eng.)
 Pr.Rep. Practice Reports (Eng.)
 P.Wms. Peere-Williams (Eng.)
 P.U.R. Public Utilities Reports
 Pyke Pyke (Can.)

Q

Q.B. Queen's Bench (Adolphus & Ellis New Series) (Eng.)

[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)	Sandf.Ch.	Sandford's Chancery (N.Y.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)	Sask.L.	Saskatchewan Law
Queensl.J.P.	Queensland Justice of the Peace	Saund.	Saunders (Eng.)
Queensl.L.	Queensland Law	Saund.&C.	Saunders & Cole (Eng.)
Queensl.L.J.	Queensland Law Journal	Sau.&Sc.	Sausse & Scully (Ir.)
Que.L.	Quebec Law	S.Austr.L.	South Australia Law
Que.Pr.	Quebec Practice	Sav.	Savile (Eng.)
Que.Q.B.	Quebec Official Reports Queen's Bench	Sawy.	Sawyer (U.S.)
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Que.Super.	Quebec Official Reports Superior Court	Say.	Sayer (Eng.)
Quincy	Quincy (Mass.)	S.C.	South Carolina
R		[1907]S.C.	Court of Session Cases (Sc.)
Rand.	Randolph (Va.)	Scam.	Scammon (Ill.)
Rap.Jud. Q.C.S.	Rapport's Judicials de Quebec Cour Superieure	S.C.Eq.	South Carolina Equity
Rawle	Rawle (Pa.)	Sch.&Lef.	Schoales & Lefroy (Ir.)
R.C.L.	Ruling Case Law	Sch.Leg.Rec.	Schuylkill Legal Record (Pa.)
R.&Can.Cas.	Railway & Canal Cases (Eng.)	Sch.Reg.	Schuylkill Register (Pa.)
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Redf.	Redfield's Surrogate (N.Y.)	Sc.Jur.	Scottish Jurist
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)	S.C.L.	South Carolina Law
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Reeve Eng.L.	Reeve's English Law	Scott	Scott (Eng.)
Reports	Reports (Eng.)	Scott N.R.	Scott's New Reports (Eng.)
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Rept.t.Finch	Cases temp. Finch (Eng.)	Sc.Sess.Cas.	Scotch Court of Session Cases
Rept.t.Hard.	Lee's Reports <i>tempore</i> Hardwicke (Eng.)	S.Ct.	Supreme Court Reporter (U.S.)
Rept.t.Holt	Reports <i>tempore</i> Holt (English Cases of Settlement)	S.D.	South Dakota
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Rev.Crit.	Revue Critique (Can.)	S.E.2d	South Eastern Reporter Second Series
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Rev.de Legis.	Revue de Legislation (Can.)	Sel.Cas.Ch.	Select Cases in Chancery (Eng.)
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Rev.Rep.	Revised Reports (Eng.)	Selw.	Selwyn's Nisi Prius (Eng.)
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Rice	Rice (S.C.)	Sess.Cas.	Court of Session Cases (Eng.)
Rich.	Richardson (S.C.)	Shan.	Shannon (Tenn.)
Rich.C.P.	Richardson's Practice Common Pleas (Eng.)	Shaw	Shaw (Sc.)
Ridg.	Ridgeway's Reports <i>tempore</i> Hardwicke (Eng.)	Shaw & D.	Shaw & Dunlop (Sc.)
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 West. Westmoreland County Law Journal (Pa.)
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 White&T.Lead. White & Tudor's Leading Cases in Equity (Eng.)
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 Willes Wilmot's Notes (Eng.)
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 W.Jones William Jones (Eng.)
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 Wkly.L.Gaz. Weekly Law Gazette (Oh.)

Wkly.N.C.	Weekly Notes of Cases (Pa.)	W.W.&H.	Willmore, Wollaston & Hodges (Eng.)
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LAW REVIEWS AND LAW JOURNALS

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Ala.L.Rev.	Alabama Law Review	Mass.L.Q.	Massachusetts Law Quarterly
Albany L.Rev.	Albany Law Review	Mercer, Beasley	
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B.U.L.Rev.	Boston University Law Review	Miss.L.J.	Mississippi Law Journal
Brooklyn L.Rev.	Brooklyn Law Review	Mo.L.Rev.	Missouri Law Review
Calif.L.Rev.	California Law Review	Montana L.Rev.	Montana Law Review
Camb.L.J.	Cambridge Law Journal	Neb.L.B.	Nebraska Law Bulletin
Chi.-Kent Rev.	Chicago-Kent Review	N.J.L.J.	New Jersey Law Journal
Colum.L.Rev.	Columbia Law Review	N.J.L.Rev.	New Jersey Law Review
Com.L.J.	Commercial Law Journal	N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Cornell L.Q.	Cornell Law Quarterly	Notre Dame Law.	Notre Dame Lawyer
Detroit L.Rev.	Detroit Law Review	N.C.L.Rev.	North Carolina Law Review
Dick.L.Rev.	Dickinson Law Review	Okla.L.Rev.	Oklahoma Law Review
Fed.B.A.J.	Federal Bar Association Journal	Oreg.L.Rev.	Oregon Law Review
Fla.L.J.	Florida Law Journal	Phil.L.J.	Philippine Law Journal
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Geo.L.J.	Georgetown Law Journal	St. John's L.Rev.	St. John's Law Review
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Ind.L.J.	Indiana Law Journal	Temp.L.Q.	Temple Law Quarterly
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J.Comp.Leg.	Journal of the Society of Comparative Legislation	Tex.L.Rev.	Texas Law Review
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy	Tul.L.Rev.	Tulane Law Review
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law	U.Chi.L.Rev.	University of Chicago Law Review
John Marshall L. Q.	The John Marshall Law Quarterly	U.Cin.L.Rev.	University of Cincinnati Law Review
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CORPUS JURIS SECUNDUM

VOLUME ONE HUNDRED ONE

WORKMEN'S COMPENSATION

This Title includes compensation provided by Workmen's Compensation Acts for injury to or death of employees arising out of and in course of their employments; persons and employments within such acts; persons entitled to compensation and persons liable therefor; public funds for payment of compensation and contributions thereto; special provisions for insurance of liability or for self-insurance; administrative boards, commissions, and officers; proceedings for determination of compensation and review thereof; payment of compensation, and assignment or transfer thereof or of right thereto; and acceptance or rejection of such acts and effect thereof on other rights and liabilities.

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XIX. PROCEEDINGS TO SECURE COMPENSATION—Continued

N. REVIEW—Continued

14. DETERMINATION AND DISPOSITION OF PROCEEDING

§ 782. In General

- a. Administrative review
- b. Judicial review

a. Administrative Review

On appeal to the full board or commission, it may affirm, reverse, modify, or adopt the decision of the hearing officer.

Ordinarily, the hearing officer, examiner, referee, or single member of the board or commission is regarded as a mere agent of the compensation board or commission,²³ and no appeal to the courts lies from the award of the referee or hearing officer, but only from the determination of the board.²⁴ The setting aside of the board's order does not reinstate the order of the hearing officer.²⁵

On appeal to the full board or commission, it may affirm, reverse, modify, or adopt the decision of the hearing officer,²⁶ and may substitute its own findings for those of the single member or referee,²⁷

may reverse such findings,²⁸ and may make such award as the facts found by it require,²⁹ without taking additional testimony or evidence,³⁰ or holding a new hearing,³¹ but where this is done the board must do so formally, making distinct findings of fact.³² Where the board reverses the referee's finding of lack of jurisdiction, it should afford the employer an opportunity to cross-examine before determining the case on the merits.³³

In the absence of statutory authority the industrial board cannot set aside findings of an arbitration board³⁴ or referee.³⁵ An award by an arbitration board may be modified on appeal to the full board given the power of review where the act evidently contemplates a trial de novo on appeal.³⁶

As a general rule, the determination by the full board supersedes the decision of the hearing officer, referee, or single member,³⁷ and it has been held that, on appeal to the board, it is its duty to make a new and independent order or award.³⁸ Under

23. Pa.—Romansky v. Locust Coal Co., Com.Pl., 47 Sch.Leg.Rec. 108—Ready v. Miners Journal Newspaper Co., Com.Pl., 42 Sch.Leg.Rec. 110.

24. Ky.—Spencer v. Chavies Coal Co., 132 S.W.2d 746, 260 Ky. 152.

25. Okl.—Adams v. City of Anadarko, 210 P.2d 151, 202 Okl. 72.

26. Ga.—Cleveland-Oconee Lumber Co. v. Anderson, 178 S.E. 753, 50 Ga.App. 613.

Mass.—Wozniak's Case, 13 N.E.2d 297, 299 Mass. 471.

Mich.—Wing v. Aten, 25 N.W.2d 561, 316 Mich. 365.

N.Y.—Lampman v. Leonard Hospital, 116 N.Y.S.2d 826, 280 App.Div. 1028.

N.C.—Ruth v. Carolina Cleaners, 174 S.E. 445, 206 N.C. 540.

Okl.—Fischbach & Moore of Tex. v. State Indus. Commission, 203 P.2d 422, 201 Okl. 170.

Pa.—Christel v. Eriacher, Com.Pl., 33 Berks Co. 205—Mazzaccaro v. Jermyn-Green Coal Co., Com.Pl., 45 Lack.Jur. 18, affirmed 36 A.2d 828, 154 Pa.Super. 618—Mittrick v. Glen Alden Coal Co., Com.Pl., 38 Luz.Leg. Reg. 245—Shemanchick v. M. & S. Coal Co., Com.Pl., 46 Sch.Leg.Rec. 56, appeal quashed 74 A.2d 764, 167 Pa.Super. 350.

Wash.—Nelson v. Department of Labor and Industries, 115 P.2d 1014, 9 Wash.2d 621.

W.Va.—Turner v. State Compensation Com'r, 17 S.E.2d 617, 123 W. Va. 673.

Wis.—Milwaukee County v. Industrial Commission, 272 N.W. 46, 224 Wis. 302.

Power to "modify" award is power to change award, thus, to increase as well as to reduce it.

Iowa.—Jarman v. Collins-Hill Lumber & Coal Co., 286 N.W. 526, 226 Iowa 1247.

Inducing settlement

Board may not set aside an award for sole purpose of inducing a settlement by parties.

N.Y.—Miller v. Lisk Mfg. Co., 30 N. Y.S.2d 857, 263 App.Div. 772.

27. Cal.—Evans v. Industrial Acc. Commission, 162 P.2d 488, 71 C.A. 2d 244.

Mass.—Minns' Case, 190 N.E. 843, 286 Mass. 459.

Pa.—Waslin v. Conlon Coal Co., 62 A.2d 120, 163 Pa.Super. 368—Barton v. Pittsburgh Coal Co., 173 A. 678, 113 Pa.Super. 454.

71 C.J. p 1360 note 19.

28. Pa.—Fillman v. Wolfe, 100 Pa. Super. 306.

71 C.J. p 1360 note 20.

29. Pa.—Calderwood v. Consolidated Lumber & Supply Co., 91 Pa.Super. 189.

30. Cal.—Evans v. Industrial Acc.

Commission, 162 P.2d 488, 71 C.A. 2d 344.

Pa.—Sames v. Borough of Perkasio, 100 Pa.Super. 402.

31. Pa.—Calderwood v. Consolidated Lumber & Supply Co., 91 Pa.Super. 189.

32. Pa.—Johnson v. State Workmen's Insurance, 100 Pa.Super. 12.

33. N.Y.—Commissioner of Taxation and Finance v. Oceanic Service Corp., 97 N.Y.S.2d 401, 276 App. Div. 725.

34. Mich.—Jones v. St. Joseph Iron Works, 180 N.W. 374, 212 Mich. 174.

35. Pa.—Johnson v. State Workmen's Insurance, 100 Pa.Super. 12.

36. Mich.—Margenovitch v. Newport Mining Co., 181 N.W. 994, 213 Mich. 272.

37. Ind.—Russell v. Johnson, 46 N. E.2d 219, 220 Ind. 649.

Ky.—Cornett v. Fordson Coal Co., 32 S.W.2d 984, 236 Ky. 209.

Mass.—Brewer's Case, 138 N.E.2d 354—Khachadoorian's Case, 110 N.E. 2d 115, 329 Mass. 625—McLean's Case, 80 N.E.2d 40, 323 Mass. 35—In re Spalla's Case, 69 N.E.2d 665, 320 Mass. 416.

W.Va.—Vento v. State Compensation Com'r, 44 S.E.2d 626, 130 W. Va. 577.

38. Okl.—Edmonds v. Skelly Oil Co., 231 P.2d 360, 204 Okl. 471.

some statutes, it is provided that the review of an award shall not affect money previously paid.³⁹ The board may alter the award in favor of a nonappealing party.⁴⁰

In the absence of anything in the statute giving it such authority, the board or commission is without the power to remand on reviewing the award of an arbitrator⁴¹ or one of its members,⁴² but it is ordinarily held that the board may remand the matter for further proceedings by the hearing officer.⁴³ It has been indicated that the board may not make a finding as to a matter not determined by the referee or hearing officer, but must remand as to such matter.⁴⁴ An application to the commission for remand of a case to the trial commissioner for further testimony should be supported by some showing as to the nature and materiality of such testimony and as to why it could not be, or was not, produced;⁴⁵ and where not so supported, the denial of a request to remand is not erroneous.⁴⁶ On remand, further proceedings must be in compliance with the mandate of the board.⁴⁷

Where the act provides for review by a board and requires concurrence of a majority thereof, the decision must fill the statutory requirements.⁴⁸ Under some statutes, it is provided that only those members of the board who participate in the hearing of the appeal may participate in the making of the decision;⁴⁹ and a board member who heard the case but did not participate in the hearing of the appeal may not participate in the board's determination of the appeal.⁵⁰ A majority of the members of the board are sufficient to hear an appeal,⁵¹ and a decision may be rendered by a majority of those participating in the hearing of the appeal.⁵²

According to some authorities, the order of the hearing officer is affirmed where the board is equally divided;⁵³ but other authorities hold that in such case there is no award or decision, and the matter remains undetermined.⁵⁴ The denial of a petition for review is, in substance, an affirmance.⁵⁵ On affirmance the finding of the single member must be taken as that of the board.⁵⁶

The language of the board's order is immaterial

39. N.C.—Green v. Briley, 87 S.E.2d 213, 242 N.C. 196.

Rival claimants

Where death benefits were paid in good faith by employer to decedent's mother after a hearing on her claim at which it was judicially determined that she was next of kin entitled to all benefits, industrial commission properly denied claim by decedent's wife, who had been separated from decedent more than five months before his death but who knew where he was living and who had failed to make inquiry as to his whereabouts for more than a year after their separation, but industrial commission did not have jurisdiction to grant relief to wife against decedent's mother.

N.C.—Green v. Briley, *supra*.

40. Ga.—Burel v. Liberty Mut. Ins. Co., 193 S.E. 791, 56 Ga.App. 716.
Iowa.—Jarman v. Collins-Hill Lumber & Coal Co., 236 N.W. 526, 226 Iowa 1247.

41. Ill.—Garden City Foundry Co. v. Industrial Commission, 138 N.E. 122, 307 Ill. 76.
71 C.J. p 1355 note 40.

42. Ga.—Home Acc. Ins. Co. v. Williams, 126 S.E. 868, 33 Ga.App. 540.

43. Fla.—Ft. Pierce Growers Ass'n v. Storey, 21 So.2d 451, 155 Fla. 769.

Ind.—Inland Steel Co. v. Eries, 49 N.E.2d 382, 114 Ind.App. 119.

Mich.—Smith v. Wilson Foundry & Machine Co., 296 N.W. 654, 296 Mich. 484.

Okl.—Shell Pipe Line Corp. v. Newman, 278 P.2d 238.

Pa.—Messer v. Reading Co., 18 A.2d 75, 143 Pa.Super. 240—Conley v. Allegheny County, 188 A. 385, 124 Pa.Super. 303.

Viti v. Conlon Coal Co., Com.Pl., 37 Luz.Leg.Reg. 203.

W.Va.—Hudson v. State Compensation Commissioner, 5 S.E.2d 108, 121 W.Va. 461—Glenn v. State Compensation Commissioner, 189 S.E. 705, 118 W.Va. 203.

Number of witnesses

Section of workmen's compensation act limiting each party to two medical expert witnesses, where evidence of additional witnesses would be cumulative, limits proceedings prior to final order, and where final order of trial commissioner denying an award has been vacated by industrial commission en banc and cause remanded, trial commissioner thereafter conducting proceeding may consider any additional evidence necessary in order to determine question presented.

Okl.—Shell Pipe Line Corp. v. Newman, 278 P.2d 238.

44. W.Va.—Vento v. State Compensation Com'r, 44 S.E.2d 626, 130 W.Va. 577.

45. Okl.—Skaggs v. Bennett Van & Storage, 226 P.2d 419, 204 Okl. 32.

46. Okl.—Skaggs v. Bennett Van & Storage, *supra*.

47. Okl.—Bristow v. State Indus. Commission of Okl., 317 P.2d 237.
W.Va.—Nicely v. State Compensation Com'r, 32 S.E.2d 231, 127 W.Va. 249.

48. Mass.—Berninger v. Chelsea Clock Co., 147 N.E. 897, 253 Mass. 52.

71 C.J. p 1360 note 25.

Signing of award

Statutes do not require three members of compensation commission to sign award made on review.

Mo.—Beck v. Kansas City Public Service Co., App., 48 S.W.2d 213.

49. Okl.—Special Indem. Fund v. Taylor, 188 P.2d 866, 199 Okl. 571.

50. Okl.—Special Indem. Fund v. Taylor, *supra*.

51. Okl.—Special Indem. Fund v. Taylor, *supra*.

52. Okl.—Special Indem. Fund v. Taylor, *supra*—Brown & Root v. Dunkelberger, 162 P.2d 1013, 196 Okl. 116—Burba v. State Indus. Commission, 157 P.2d 199, 195 Okl. 344.

53. Minn.—Fenland v. City of St. Paul, 9 N.W.2d 349, 215 Minn. 94—Nelson v. Creamery Package Mfg. Co., 9 N.W.2d 320, 215 Minn. 25—Barlau v. Minneapolis-Moline Power Implement Co., 9 N.W.2d 6, 214 Minn. 564.

54. Okl.—Special Indem. Fund v. Frapp, 180 P.2d 134, 198 Okl. 503—Higgs v. State Indus. Commission, 170 P.2d 240, 197 Okl. 281.

Wis.—State v. Industrial Commission, 289 N.W. 769, 233 Wis. 461.

55. S.D.—Peterson v. John Morrell & Co., 267 N.W. 227, 64 S.D. 425.

56. Mass.—Burns' Case, 165 N.E. 670, 266 Mass. 516.

as long as its intention is clear.⁵⁷ Under some statutes, the decision of the board or commission need not specify any details,⁵⁸ nor need it contain any findings.⁵⁹ An order of the board reciting its approval of the decision of the hearing officer, referee, or single member is a sufficient disposition of the case.⁶⁰ However, under other statutes, the board is required to render a written decision containing its findings of fact and conclusions of law.⁶¹ Where the board makes its own findings, it is not required to specify its acceptance or rejection of particular findings by the referee.⁶²

Where the board entertains an appeal, it necessarily holds that it is timely.⁶³ The board should comply with such restrictions with respect to the time to dispose of the appeal as may be imposed by statute.⁶⁴

Under some statutes there is no provision for

reconsideration by the board after it renders a final decision,⁶⁵ although it is usually held that the board may withdraw or change its order prior to the expiration of the time to appeal,⁶⁶ but not thereafter.⁶⁷ The granting of a rehearing for the purpose of introducing additional evidence rests in the board's discretion.⁶⁸

b. Judicial Review

Except as restricted by statute, the court, on review of a compensation proceeding, may make such order as justice requires.

Except as limited and restricted by the acts⁶⁹ which, in some jurisdictions, have been held to limit the action of the court to affirmance or annulment of the award,⁷⁰ on review of an award, the court may be authorized to make such orders with respect thereto as justice may require,⁷¹ or which the com-

57. Okl.—Crockett v. J & J Min. Co., 242 P.2d 133, 206 Okl. 177.

Order held sufficient

Okl.—Crockett v. J & J Min. Co., supra.

58. Ga.—Southeastern Express Co. v. Edmondson, 119 S.E. 39, 30 Ga.App. 697.

Mass.—Paterno's Case, 165 N.E. 391, 266 Mass. 323.

59. Okl.—Capshaw v. Lawson, 149 P.2d 333, 194 Okl. 237.

60. Ga.—Roberson v. Lumbermen's Mut. Cas. Co., 89 S.E.2d 270, 92 Ga. App. 572.

Ky.—Webb v. Montgomery Ward & Co., 197 S.W.2d 90, 303 Ky. 152.

Routine approval by workmen's compensation board of referee's award granting compensation for total and permanent disability without intention to make it a final award of full board did not constitute a final disposition of case subject only to appeal to circuit court so as to preclude review by full board on motion of employer.

Ky.—Walker v. Lebanon Stone Co., 229 S.W.2d 163, 312 Ky. 624.

61. Colo.—O. P. Skaggs Co. v. Nixon, 50 P.2d 55, 97 Colo. 314—U. S. Fidelity & Guaranty Co. v. Industrial Commission of Colorado, 45 P.2d 895, 96 Colo. 571.

R.I.—Cairo v. Sayles Finishing Plants, 116 A.2d 188.

S.C.—Brown v. C. G. Gunter, Inc., 69 S.E.2d 596, 221 S.C. 159.

Where award is affirmed, a new decree or award need not be entered.
R.I.—Cairo v. Sayles Finishing Plants, 116 A.2d 188.

62. Mo.—Oertel v. John D. Streett & Co., App., 285 S.W.2d 87.

63. N.Y.—Gray v. Williams Press,

Inc., 166 N.Y.S.2d 876, 4 A.D.2d 920.

64. Wis.—Milwaukee County v. Industrial Commission, 272 N.W. 46, 224 Wis. 302.

Statute as directory

Failure of industrial commission to act on petition for review of examiner's findings and orders within ten days of filing of petition as required by statute was not jurisdictional, and commission could thereafter act on petition, since statute was merely "directory."

Wis.—State v. Industrial Commission, 289 N.W. 769, 233 Wis. 461.

65. Mich.—Guss v. Ford Motor Co., 265 N.W. 515, 275 Mich. 30.

Mo.—Lewis v. Kansas Explorations, 187 S.W.2d 524, 238 Mo.App. 697.

66. Ind.—Mace v. Ertel Mach. Co., 27 N.E.2d 55, 910, 108 Ind.App. 301.

Wash.—Wiles v. Department of Labor and Industries of State, 209 P. 2d 462, 34 Wash.2d 714.

67. Pa.—Kempovitz v. Glen Alden Coal Co., Com.Pl., 32 Luz.Leg.Reg. 110.

68. Mass.—Gramolini's Case, 101 N. E.2d 750, 328 Mass. 86.

69. U.S.—Associated Indemnity Corporation v. Marshall, C.C.A.Or., 71 F.2d 235.

S.D.—Montange v. C. A. Wagner Const. Co., 278 N.W. 176, 66 S.D. 48.

Power limited by statutory provisions

Power of circuit court is limited by statutory provisions, which authorize such court, on review by writ of certiorari, to confirm or set aside decision and, if it is set aside, to enter decree justified by facts and required by law or remand cause to commission for further proceedings.

Ill.—Thompson v. Industrial Commission, 37 N.E.2d 350, 377 Ill. 587.

70. Utah.—Buckingham Transp. Co. v. Industrial Commission, 72 P.2d 1077, 93 Utah 342—Continental Casualty Co. v. Industrial Commission, 221 P. 852, 63 Utah 59.

Wis.—Rhineland Paper Co. v. Industrial Commission, 258 N.W. 384, 216 Wis. 623.

Disposition in summary manner

Ky.—Phil Hollenbach Co. v. Hollenbach, 204 S.W. 152, 181 Ky. 262, 13 A.L.R. 524.

60 C.J. p 1011 note 27 [a].

71. U.S.—Merritt v. American Mut. Liability Ins. Co., C.C.A.Tex., 67 F.2d 777.

Fla.—Florence Citrus Growers Ass'n v. Parrish, 36 So.2d 369, 160 Fla. 685—Cone Bros. Contracting Co. v. Allbrook, 16 So.2d 61, 153 Fla. 829.

Ill.—Swift & Co. v. Industrial Commission, 44 N.E.2d 842, 381 Ill. 77.

La.—Woodfin v. Paul, Rice & Levy, Inc., App., 53 So.2d 299.

Okl.—Rodriguez v. Utilities Engineering & Const., 281 P.2d 946—Allison v. Bareco Oil Co., 225 P.2d 167, 203 Okl. 615.

71 C.J. p 1351 note 30.

Supervisory jurisdiction

Where compensation case was before supreme court under its supervisory jurisdiction, it could make any disposition of it permitted by law.

La.—Wade v. Calcasieu Paper Co., 86 So.2d 540, 229 La. 702.

Basic justice and common honesty require that reviewing court be fair to both employee and employer in workmen's compensation cases.

Cal.—Mercer-Fraser Co. v. Industrial Acc. Commission, 251 P.2d 955, 40 C.2d 102.

mission should have made.⁷²

As discussed in detail *infra* §§ 783-789, the reviewing court may affirm, modify, reverse, annul, or set aside the award or decision, dismiss the case, remand the matter, or enter final judgment.⁷³ The court, on review of an award, may, on a confession of error, reverse, vacate, or modify the award.⁷⁴ The only function of the reviewing court is, it has been said, to determine what kind of decree should be entered on a decision by the board.⁷⁵

No action on review is proper where no appeal is taken.⁷⁶ The reviewing court may not act against one not a party to the appeal.⁷⁷ Where the interests of the parties are independent, reversal as to the parties appealing does not necessitate reversal as to the parties not appealing.⁷⁸

Matters not raised or decided below are not to be decided by the reviewing court.⁷⁹ The court may not determine the case on the merits where the compensation authorities have not done so.⁸⁰ On review of a finding of the commission that it had no jurisdiction because the injury did not appear to have been received in the course of employment, the court cannot determine the extent of disability⁸¹ or amount of compensation⁸² under a statute providing that the court, having determined the em-

ployee's right to compensation, shall certify such finding or verdict to the commission which will order payment of compensation in the manner provided by the act. On appeal from an order of the commission refusing to reopen the case, the court should confine itself to determining whether the case should be reopened.⁸³

The court on review cannot require the employer to supply, or the employee to submit to, an operation.⁸⁴ The maxim "*de minimus non curat lex*" has been applied on review of compensation proceedings.⁸⁵

Where testimony taken on reconsideration after appeal from the first award of the commission has no bearing on the pivotal point in the case, the appeal from the first award may be considered although there is no appeal from the award made on reconsideration.⁸⁶ Where a decision of a commission is reversed and remanded, and no appeal is taken from the order within the time allowed for such appeal, it cannot be reviewed on appeal from a decision of the commission made after remand.⁸⁷

Time for decision. A decision of the reviewing court will not be delayed merely because a higher court may, in compensation cases pending before it, modify a conclusion previously announced by it and reach a conclusion more favorable to a party.⁸⁸

72. Okl.—*Scruggs Bros. & Bill Garage v. State Industrial Commission*, 221 P. 470, 94 Okl. 187.

73. U.S.—*Yellow Cab Transit Co. v. Overcash*, C.C.A.Mo., 133 F.2d 228. Fla.—*Florence Citrus Growers Ass'n v. Parrish*, 36 So.2d 369, 160 Fla. 685.

Ill.—*Weymer v. Industrial Commission*, 88 N.E.2d 841, 404 Ill. 271.

Kan.—*Employers' Liability Assur. Corp. v. Matlock*, 98 P.2d 456, 151 Kan. 293, 127 A.L.R. 461.

Mo.—*Wood v. Wagner Elec. Corp.*, App., 192 S.W.2d 579, quashed in part on other grounds 197 S.W.2d 647, 355 Mo. 670—*Caldwell v. Melbourne Hotel Co.*, App., 116 S.W.2d 232, opinion quashed on other grounds State ex rel. Melbourne Hotel Co. v. Hostetter, 126 S.W.2d 1189, 344 Mo. 472.

N.J.—*Schaible v. Champenois & Co.*, 37 A.2d 193, 131 N.J.Law 436, affirmed 40 A.2d 626, 132 N.J.Law 417.

More criticism

District court of appeal may annul or affirm award of industrial accident commission, but has no power merely to criticize it.

Cal.—*Western Pac. R. Co. v. Industrial Accident Commission*, 61 P. 2d 459, 17 C.A.2d 119.

74. Okl.—*Osage Coal & Mining Co.*

v. Sassetti, 265 P. 766, 130 Okl. 127.

75. Mass.—*Walsh's Case*, 183 N.E. 421, 281 Mass. 228—*Di Giovanni's Case*, 151 N.E. 91, 255 Mass. 241.

76. Hawaii.—*De Grace v. Young*, 27 Hawaii 476.

77. La.—*Belaire v. Elder*, App., 49 So.2d 508.

78. Okl.—*Rippee v. Rippee*, 279 P.2d 944.

Tex.—*Federal Underwriters Exchange v. Hinkle*, Civ.App., 167 S.W.2d 307, error refused.

79. Ariz.—*Ujevich v. Inspiration Consol. Copper Co.*, 33 P.2d 599, 44 Ariz. 16.

Conn.—*Blanton v. Wheeler & Howes Co.*, 99 A. 494, 91 Conn. 226, Ann. Cas.1918B 747.

Ind.—*Stinson v. Fisher*, 5 N.E.2d 670, 103 Ind.App. 136.

N.Y.—*Wood v. Queen City Neon Sign Co.*, 121 N.Y.S.2d 888, 282 App.Div. 106—*Culver v. Sevilla Home for Children*, 40 N.Y.S.2d 184, 266 App.Div. 705, appeal denied 41 N.Y.S.2d 957, 266 App.Div. 760.

R.I.—*Botelho v. J. H. Tredennick, Inc.*, 12 A.2d 282, 64 R.I. 326.

Wash.—*Powers v. Department of Labor and Industries*, 30 P.2d 983, 177 Wash. 21.

W.Va.—*Henley v. State Compensation Com'r*, 38 S.E.2d 380, 129 W. Va. 15—*Billings v. State Compensation Com'r*, 16 S.E.2d 804, 123 W. Va. 498.

80. Wash.—*Baker v. Department of Labor and Industries*, 42 P.2d 13, 181 Wash. 85.

81. Ohio.—*Fisher Body Co. v. Cheffe*, 171 N.E. 31, 122 Ohio St. 142.

82. Ohio.—*Fisher Body Co. v. Cheffe*, *supra*.

83. Md.—*R. N. McCulloh & Co. v. Restivo*, 136 A. 54, 152 Md. 60.

84. Tex.—*Texas Employers' Ins. Ass'n v. Tally*, 125 S.W.2d 544, 132 Tex. 547—*Tally v. Texas Employers' Ins. Ass'n*, 102 S.W.2d 180, 129 Tex. 134.

Great Am. Indem. Co. v. Gravel, Civ.App., 297 S.W.2d 371—*Federal Underwriters Exchange v. Bobbitt*, Civ.App., 125 S.W.2d 1084.

85. La.—*Mitchell v. Littlejohn Transp. Co.*, App., 10 So.2d 651—*Lomas v. J. A. Bentley Lumber Co.*, App., 182 So. 377.

86. N.Y.—*In re Behrens*, 176 N.Y.S. 28, 188 App.Div. 66.

87. Md.—*Emmitsburg R. Co. v. Lowe*, 145 A. 197, 157 Md. 47.

88. Cal.—*City of Pasadena v. Industrial Accident Commission of California*, 200 P. 370, 53 C.A. 407.

§ 783. Affirmance

The award or decision in compensation proceedings will be affirmed where no prejudicial error appears.

The reviewing court will affirm the award or decision below where there is no error requiring re-

versal,⁸⁹ where it is not manifestly erroneous,⁹⁰ and is supported by the evidence⁹¹ and the findings.⁹² The judgment will be affirmed where the correct result has been reached⁹³ even though it may have been reached on the wrong grounds.⁹⁴

89. Ariz.—Eagle Indem. Co. v. Hadley, 218 P.2d 488, 70 Ariz. 179.
Cal.—State Compensation Ins. Fund v. Industrial Accident Commission, 132 P.2d 590, 56 C.A.2d 413.
Conn.—Mathurin v. City of Putnam, 71 A.2d 599, 136 Conn. 381.
Ga.—Bituminous Cas. Corp. v. Powell, 65 S.E.2d 825, 84 Ga.App. 235.
Ill.—Swift & Co. v. Industrial Commission, 44 N.E.2d 842, 351 Ill. 77.
Ind.—City of Huntington v. Fisher, 41 N.E.2d 532, 111 Ind.App. 703.
Ky.—McArter v. Busse, 249 S.W.2d 712.
La.—Powers v. Allied Chemical & Dye Corp., App., 45 So.2d 214, rehearing refused 46 So.2d 332.
Mich.—Leenknecht v. McCormick Industries, 84 N.W.2d 851, 349 Mich. 430—Samels v. Goodyear Tire & Rubber Co., 26 N.W.2d 742, 317 Mich. 149—Anderson v. General Motors Corp., Oldsmobile Division, 22 N.W.2d 108, 313 Mich. 630.
Minn.—Wolner v. State, Department of Social Security, Division of Public Institutions, Anoka State Hospital, 5 N.W.2d 67, 213 Minn. 96.
Mo.—Burgstrand v. Crowe Coal Co., 77 S.W.2d 97, 236 Mo. 119.
N.Y.—La Monica v. Mangels Stores, 141 N.Y.S.2d 860, 286 App.Div. 908—McCarthy v. Smith, 108 N.Y.S.2d 258, 279 App.Div. 699—Whitney v. Elmwood Elec. Co., 96 N.Y.S.2d 852, 277 App.Div. 821—Greener v. Van Buren Products Co., 78 N.Y.S.2d 20, 273 App.Div. 931—Slawinski v. J. H. Williams & Co., 76 N.Y.S.2d 888, 273 App.Div. 826, affirmed 81 N.E.2d 93, 298 N.Y. 546, reargument denied 82 N.E.2d 29, 298 N.Y. 634—Zaboraki v. Newman Bros. Grain Co., 68 N.Y.S.2d 585, 271 App.Div. 1043—Albright v. Buffalo Niagara Elec. Corp., 60 N.Y.S.2d 348, 270 App.Div. 868—Dougherty v. E. W. Bliss Co., 57 N.Y.S.2d 585, 269 App.Div. 911—Dioguardi v. City of New York, 44 N.Y.S.2d 666, 266 App.Div. 1050—Casarino v. A. W. Hopeman & Sons Co., 37 N.Y.S.2d 882, 265 App.Div. 897, appeal denied 39 N.Y.S.2d 630, 265 App.Div. 1019, affirmed 52 N.E.2d 581, 291 N.Y. 687—Hinkelbein v. First Nat. Bank of Mt. Vernon, 37 N.Y.S.2d 178, 264 App.Div. 967, appeal denied 38 N.Y.S.2d 374, 265 App.Div. 885—Strand v. Harris Structural Steel Co., 34 N.Y.S.2d 737, 264 App.Div. 799, appeal denied 36 N.Y.S.2d 434, 264 App.Div. 924—Frey v. Reinike, 30 N.Y.S.2d 915, 263 App.Div. 769—Hut v. Lejack Holding Corp., 30

N.Y.S.2d 35, 262 App.Div. 978, appeal denied 32 N.Y.S.2d 144, 263 App.Div. 753—Cohen v. S. Blechman & Sons, 26 N.Y.S.2d 71, 261 App.Div. 1033—Jodlowski v. Empire Milk Trucking Corp., 26 N.Y.S.2d 69, 261 App.Div. 1030—Kowal v. Advance Spray Painting Co., 16 N.Y.S.2d 958, 258 App.Div. 1013—Ruttenbur v. Chataqua Storage & Transfer Co., 11 N.Y.S.2d 879, 257 App.Div. 880—Whitmyre v. International Business Machines Corp., 291 N.Y.S. 742, 249 App.Div. 678, affirmed 8 N.E.2d 278, 274 N.Y. 61, reargument denied 11 N.E.2d 734, 275 N.Y. 532—Spinks v. American Mfg. Co., 255 N.Y.S. 31, 246 App.Div. 875.
N.C.—Brown v. L. H. Bottoms Truck Lines, 40 S.E.2d 476, 227 N.C. 65, opinion adhered to 42 S.E.2d 71, 227 N.C. 299.
Ohio.—Herman v. Industrial Commission, App., 46 N.E.2d 448.
Okl.—Shell Oil Co. v. State Indus. Commission, 279 P.2d 316—Banning v. Peru-Laclede Syndicate, 65 P.2d 967, 179 Okl. 382.
Pa.—Cope v. Philadelphia Toilet Laundry & Supply Co., 74 A.2d 775, 167 Pa.Super. 205.
Wittlinger v. Borough of Millersville, Com.Pl., 51 Lanc.L.Rev. 135—Kirby v. Carnegie-Illinois Steel Corp., Com.Pl., 90 Pittsb.Leg.J. 131, affirmed 21 A.2d 123, 145 Pa.Super. 121.
R.I.—Marszalkowski v. Rusakovich, 124 A.2d 244.
S.D.—Salmon v. Denhart Elevators, 30 N.W.2d 644, 72 S.D. 110, opinion adhered to 33 N.W.2d 167, 72 S.D. 263.
Tex.—Federal Underwriters Exchange v. Tubbe, Civ.App., 193 S.W.2d 563.
Wash.—Kraleovich v. Department of Labor and Industries, 161 P.2d 661, 23 Wash.2d 640.
Wis.—Spencie v. Industrial Commission, 287 N.W. 690, 232 Wis. 506.
71 C.J. p 1352 notes 32, 54.
90. La.—Tyson v. Baker, App., 12 So.2d 54, rehearing refused 12 So.2d 468—Tickles v. E. I. Dupont De Nemours & Co., App., 191 So. 764.
71 C.J. p 1352 note 53.
91. Ark.—J. L. Williams & Sons v. Moore, 177 S.W.2d 761, 206 Ark. 766.
Ga.—Russell v. Shelton, 1 S.E.2d 225, 59 Ga.App. 496.
Idaho.—Stroschelm v. Shay, 120 P.2d 267, 63 Idaho 360.
Ind.—Craddock Furniture Corp. v. Nation, 54 N.E.2d 295, 115 Ind.

App. 62, rehearing denied 55 N.E.2d 121, 115 Ind.App. 62.
N.Y.—Zuccolo v. Bruno De Paoli & Co., 57 N.Y.S.2d 176, 275 App.Div. 733—Brady v. Behr-Manning Corp., 53 N.Y.S.2d 378, 274 App.Div. 949, affirmed 57 N.E.2d 52, 299 N.Y. 643—Heary v. Draudt, 30 N.Y.S.2d 230, 262 App.Div. 1051, affirmed 42 N.E.2d 602, 258 N.Y. 593, and Ahrens v. Draudt, 42 N.E.2d 603, 288 N.Y. 592—Tatum v. New York World's Fair, 1939, 30 N.Y.S.2d 30, 262 App.Div. 981—Lasky v. Frederick, 14 N.Y.S.2d 753, 258 App.Div. 756, appeal denied 24 N.E.2d 28, 281 N.Y. 886—Mayo v. Special Mach. Tool Engineering Works, 9 N.Y.S.2d 239, 256 App.Div. 863, reargument denied 11 N.Y.S.2d 243, 256 App.Div. 1014. Appeal denied, 30 N.E.2d 397, 280 N.Y. 852—Tarantola v. Nilsson, 293 N.Y.S. 1023, 250 App.Div. 797—Hinz v. United Dry Dock, 293 N.Y.S. 766, 250 App.Div. 792.
N.C.—Swink v. Carolina Asbestos Co., 186 S.E. 258, 210 N.C. 303.
Okl.—Oklahoma Utilities Co. v. Johnson, 66 P.2d 10, 179 Okl. 456.
Pa.—Youch v. Pittsburgh Terminal Coal Corporation, 180 A. 30, 118 Pa. Super. 396.
71 C.J. p 1352 note 51.
92. N.Y.—Doyle v. Century Circuit, 18 N.Y.S.2d 337, 259 App.Div. 765, appeal denied 20 N.Y.S.2d 413, 259 App.Div. 933, appeal denied, 27 N.E.2d 818, 283 N.Y. 778—Koprd v. Cadillac Motor Car Division, 14 N.Y.S.2d 751, 258 App.Div. 765.
71 C.J. p 1352 note 52.
93. Ga.—American Mut. Liability Ins. Co. v. Dyer, 95 S.E.2d 725, 94 Ga.App. 619.
La.—Powell v. Travelers Ins. Co., App., 58 So.2d 563.
71 C.J. p 1352 note 55.
94. U.S.—Eschbach v. Contractors, Pacific Naval Air Bases, C.A.III., 181 F.2d 860.
Cal.—Martin v. Industrial Acc. Commission, 187 P.2d 101, 82 C.A.2d 737.
Ga.—Wisebram Dept. Store v. Bowman, 89 S.E.2d 547, 92 Ga.App. 587.
Miss.—Jackson v. Fly, 60 So.2d 782, 215 Miss. 303, motion sustained in part 63 So.2d 536, 215 Miss. 303.
71 C.J. p 1352 note 56.
Findings wrong
Superior court, on appeal from accident commission's decision, was not precluded from affirming commission's decision if court should find that decision was correct but that commission's findings were wrong.

but it may not affirm an award on grounds not considered below.⁹⁵ Where prejudicial error exists, affirmance is not proper.⁹⁶

An award will be affirmed notwithstanding the failure of the board or commission to find a fact essential to support its award where the record discloses, with reasonable and satisfactory certainty, a preponderance of evidence in favor of the existence of such essential fact.⁹⁷ On an appeal by defendant from a judgment against him, plaintiff may, by a motion to dismiss, raise the question whether the questions of law involved are so doubtful as to require the filing of briefs; and, if on the resulting hearing the court is fully satisfied that no grounds for a reversal exist, an affirmance will be ordered.⁹⁸ It has been held to be inconsistent to affirm the award and to dismiss the appeal.⁹⁹ On affirmance new findings need not be made.¹ An

affirmance of an award is final unless remanded for further proceedings.²

§ 784. Modification

As a general rule, the reviewing court may amend or revise a compensation award or decision.

Under some statutes, the court may affirm or set aside a compensation award, but may not modify it.³ Where the board or commission has continuing jurisdiction to modify an award from time to time, it has been held that a court may not modify but may only affirm or annul an award.⁴

As a general rule, however, the reviewing court may modify or revise a compensation award or decision⁵ and may correct a finding as to the extent of the disability,⁶ correct an error in designation of the member injured,⁷ correct the amount of the

Md.—Moore v. Clarke, 187 A. 887, 171 Md. 39, 107 A.L.R. 924.

95. Ariz.—Goodyear Aircraft Corp., Ariz. Division, v. Gilbert, 181 P.2d 624, 65 Ariz. 379.

Cal.—Martin v. Industrial Acc. Commission, 187 P.2d 101, 82 C.A.2d 737.

96. Ga.—Lumbermen's Mut. Cas. Co. v. Cowart, 59 S.E.2d 15, 81 Ga.App. 423.

Me.—Shoemaker's Case, 51 A.2d 484, 142 Me. 321.

97. Colo.—Frink Dairy Co. v. Industrial Commission of Colorado, 239 P. 727, 78 Colo. 71.

Wis.—Kannenberg Granite Co. v. Industrial Commission of Wisconsin, 250 N.W. 821, 212 Wis. 651.

98. Kan.—Cain v. National Zinc Co., 146 P. 1165, 148 P. 251, 94 Kan. 679, 681.

71 C.J. p 1353 note 58.

99. Mo.—Starks v. J. A. Schaefer Const. Co., 123 S.W.2d 579, 234 Mo. App. 279.

1. N.J.—Fontaine v. United Engineers & Constructors, 170 A. 856, 12 N.J.Misc. 220.

S.D.—Bragstad v. Integrity Mut. Casualty Co., 212 N.W. 864, 51 S.D. 167.

2. Minn.—Orcutt v. Trustees of Wesley M. E. Church, 218 N.W. 550, 174 Minn. 153.

3. Ariz.—Schnatzmeyer v. Industrial Commission, 276 P.2d 534, 78 Ariz. 112—Eagle Indem. Co. v. Hadley, 218 P.2d 488, 70 Ariz. 179—Magma Copper Co. v. Aldrete, 216 P.2d 392, 70 Ariz. 48—Matlock v. Industrial Commission, 215 P.2d 612, 70 Ariz. 25—Kennecott Copper Corp. v. Industrial Commission, 158 P.2d 887, 62 Ariz. 516—Red Rover Copper Co. v. Industrial Commission, 118 P.2d 1102, 58 Ariz. 203, 137 A.

L.R. 740—Paramount Pictures v. Industrial Commission, 106 P.2d 1024, 56 Ariz. 217, 352.

Award erroneous in part

Where compensation award was erroneous in part under law requiring awards to be either affirmed or set aside in toto, award was set aside and matter remanded to industrial commission.

Ariz.—Magma Copper Co. v. Naglich, 131 P.2d 357, 60 Ariz. 43.

4. Utah.—Buckingham Transp. Co. v. Industrial Commission, 72 P.2d 1077, 93 Utah 342—Aitna Life Ins. Co. v. Industrial Commission, 252 P. 567, 69 Utah 102.

5. Ala.—Tombrello Coal Co. v. Fortenberry, 29 So.2d 125, 248 Ala. 640.

Fla.—Food Machinery Corp. v. Baldwin, 186 So. 796, 136 Fla. 369.

Ga.—Standard Acc. Ins. Co. v. Gulledge, 71 S.E.2d 571, 86 Ga.App. 493—American Mut. Liability Ins. Co. v. Savage, 174 S.E. 363, 49 Ga. App. 106.

Ky.—Consolidated Coal Co. v. Jennings, 33 S.W.2d 647, 236 Ky. 705.

La.—Wade v. Calcasieu Paper Co., App., 95 So.2d 725—Freeman v. World Ins. Co., App., 61 So.2d 892—Fisher v. Williams Lumber Co., App., 51 So.2d 116—Jackson v. W. Horace Williams Co., App., 12 So. 2d 22—Thompson v. Leach & McClain, App., 11 So.2d 109, rehearing denied 11 So.2d 925—Schneider v. Travelers' Ins. Co., App., 172 So. 580—James v. Dear & Johnson, App., 172 So. 25.

Mo.—Clapp v. Brown Shoe Co., App., 291 S.W.2d 209—Kelly v. Howard, 123 S.W.2d 584, 233 Mo.App. 474.

N.J.—Ryan v. St. Vincent De Paul Roman Catholic Church, 124 A.2d 315, 41 N.J.Super. 206.

N.Y.—Vleck v. Parry, 1 N.E.2d 468, 270 N.Y. 371.

R.I.—M. & M. Transp. Co. v. Della Posta, 62 A.2d 654, 74 R.I. 514, 71 C.J. p 1353 note 33, p 1353 note 62.

Evidence undisputed

Where evidence in workmen's compensation proceeding is undisputed and uncontradicted, a law question arises and court is authorized to modify industrial commission's award in accordance with applicable law.

Mo.—Gantner v. Fayette Brick & Tile Co., App., 286 S.W.2d 415.

Obvious clerical error would be corrected by court.

N.Y.—Cardamone v. Leskiewicz, 290 N.Y.S. 261, 248 App.Div. 842.

Okl.—Sun Oil Co. v. Farris, 87 P.2d 958, 184 Okl. 406.

R.I.—Simone v. W. & H. Jewelry Co., 192 A. 807, 58 R.I. 348.

Partnership

Where award of industrial commission granting compensation for death of employee was improperly entered against a partnership by name, and counsel for partnership had read into record existence of such partnership and names of partners, circuit court had authority to direct that judgment confirming award be entered against copartners as such, and not against partnership by name as award was stated.

S.C.—King v. Wesner, 16 S.E.2d 289, 198 S.C. 49.

6. La.—Breland v. Rainold-Van Denburgh, Inc., App., 24 So.2d 882—Turner v. Standard Oil Co. of Louisiana, 1 La.App. 665.

7. Okl.—Skelly Oil Co. v. Collins, 74 P.2d 619, 181 Okl. 428—Oklahoma Pipe Line Co. v. Putnam, 18 P.2d 1095, 162 Okl. 52.

award,⁸ by reducing it where excessive⁹ or increasing it where too small,¹⁰ correct the period during which compensation shall be paid,¹¹ fix the date when the payments should begin,¹² and make provision for payment of interest on the award.¹³

The award cannot be amended so as to allow an amount greater than authorized by the pleadings.¹⁴ Where the judgment appealed from allows the exact amount asked for in the petition for compensation, it will not be modified to increase such amount.¹⁵ Notwithstanding evidence to support a finding of an average weekly wage of a certain amount, where the amount pleaded is smaller the judgment based on the amount found must be reduced.¹⁶ In the absence of authority in the act it has been held that a trial court cannot modify an award by reducing the period where the fixing of the period was a matter for discretion of the commission.¹⁷

It has been affirmed¹⁸ and denied¹⁹ that a de-

crec may be modified in favor of one who has not appealed. The court on appeal may amend the judgment with respect to witness' fees²⁰ and costs,²¹ and may correct a provision as to attorney's fees.²² In a proper case, the award will be modified to permit claimant to participate in a state fund.²³ The award will be modified when based on provisions of an amendment to an act where the act as it was before amendment applies.²⁴

No amendment can be made where the award is supported by the findings;²⁵ and where the commission has discretion in making an award, and its decision is supported by evidence, the court will not modify it.²⁶ Where there is a conflict of evidence on the question of notice of injury to the employer, without which notice no award could be made, and the arbitrator made an award but his finding was that notice was not given, the judgment cannot be modified on the ground that since an award was made, the "not" must be regarded as a clerical error, but must be reversed.²⁷

8. Cal.—Truck Ins. Exchange v. Industrial Acc. Commission, 226 P. 2d 583, 36 C.2d 646.

La.—Smith v. Consolidated Underwriters, App., 53 So.2d 264—Quick v. W. Horace Williams Co., App., 14 So.2d 313—Crier v. Kent Piling Co., App., 12 So.2d 472—Mickley v. T. J. Moss Tie Co., App., 189 So. 331—Biggs v. Libbey-Owens-Ford Glass Co., App., 178 So. 639. N.H.—Morone v. Cody, 115 A.2d 650, 99 N.H. 479.

Okl.—Gulf Oil Corp. v. Kyes, 151 P. 2d 785, 194 Okl. 367—Oklahoma Oil Corp. v. Tuttle, 103 P.2d 516, 187 Okl. 467—W. E. Shepherd & Son v. Hood, 95 P.2d 619, 185 Okl. 635—J. B. Klein Iron & Foundry Co. v. State Industrial Commission, 93 P. 2d 751, 185 Okl. 424.

71 C.J. p 1353 note 65.

Credit for payments

Award of industrial commission granting compensation for total permanent disability should be corrected so as to allow credit for compensation already paid claimant. Okl.—McKissick Products Corp. v. Gardner, 250 P.2d 718.

9. La.—Von Herr v. American Employers' Ins. Co., App., 187 So. 85. Okl.—Hazel-Atlas Glass Co. v. Greenwood, 61 P.2d 639, 178 Okl. 69.

Tex.—Liberty Mut. Ins. Co. v. Taylor, Civ.App., 244 S.W.2d 350. Va.—Lynchburg Foundry Co. v. Irvin, 16 S.E.2d 646, 178 Va. 265.

71 C.J. p 1353 note 66.

Remittitur

Insurance carrier could not complain of error in awarding compensation without deduction for prior payments, where employee in answer

filed remittitur alleged to be for full amount claimed to have been paid, which was not contested.

Tex.—American Surety Co. of New York v. Underwood, Civ.App., 74 S. W.2d 551, error refused.

Credit for payments

Where employer had paid employee compensation, decree awarding compensation would be amended to allow employer credit for such compensation paid.

La.—Ebarb v. Southern Industries Co., App., 78 So.2d 553.

10. Kan.—Orendoc v. Kaw Steel Const. Co., 291 P. 952, 131 Kan. 366.

La.—Book v. Police Jury of Concordia Parish, App., 59 So.2d 157—Woodward v. Blair, App., 197 So. 920.

Pa.—Barbaryka v. Henderson Coal Co., 36 A.2d 341, 154 Pa.Super. 402.

11. La.—Kilpatrick v. Triangle Drilling Co., App., 146 So. 758.

N.Y.—Lippencott v. E. I. Du Pont De Nemours & Co., 67 N.Y.S.2d 166, 271 App.Div. 941.

R.I.—Morel v. E. Turgeon Const. Co., 68 A.2d 23, 76 R.I. 25.

Tenn.—Moore v. Hines, 95 S.W.2d 928, 170 Tenn. 456.

12. La.—Hatch v. Kilpatrick, App., 142 So. 202.

Okl.—Farmers Union Co-op. Ass'n v. Leemhuis, 147 P.2d 989, 194 Okl. 169—Skelly Oil Co. v. Goodwin, 32 P.2d 67, 168 Okl. 141.

13. Mass.—Warren's Case, 172 N.E. 254, 272 Mass. 127.

71 C.J. p 1353 note 70.

14. La.—Fisher v. Williams Lumber Co., App., 51 So.2d 116.

15. La.—Books v. Keen & Woolf Oil Co., 120 So. 99, 9 La.App. 288.

16. Tex.—Maryland Casualty Co. v. Sledge, Civ.App., 46 S.W.2d 442.

17. Mo.—Harbour v. Gardner, App., 38 S.W.2d 295.

18. R.I.—Martin v. Narragansett Electric Lighting Co., 142 A. 225, 49 R.I. 265.

19. La.—Pointe Coupee Electric Membership Corp. v. Pettey, App., 6 So.2d 764.

20. La.—Edmond v. Waller's Inc., App., 193 So. 214.

21. La.—Hammer v. Lazarone, App., 87 So.2d 765.

22. La.—Richmond v. Employers' Liability Assur. Corp., App., 31 So. 2d 442.

N.M.—Wright v. Schultz, 231 P.2d 937, 55 N.M. 261.

23. Ohio.—Marion Steam Shovel Co. v. Hunter, 172 N.E. 422, 35 Ohio App. 239.

24. Minn.—State v. District Court of Rice County, 159 N.W. 755, 134 Minn. 324.

25. Colo.—Lindsay v. Industrial Commission of Colorado, 236 P. 1005, 77 Colo. 424.

26. Okl.—Arrow Gasoline Co. v. Holloway, 254 P. 98, 122 Okl. 257.

27. Ill.—Ridge Coal Co. v. Industrial Commission, 131 N.E. 637, 298 Ill. 532.

On modifying an award it is held that the court cannot declare that the award made by it shall not be subject to modification.²⁸

§ 785. Reversal

Where there is prejudicial error, the court will reverse a compensation award or decision.

The court will reverse a compensation award or decision where there is prejudicial error,²⁹ where a jurisdictional prerequisite is lacking,³⁰ where there is a failure to make proper and necessary findings,³¹ the findings are erroneous³² or insufficient,³³ or where the award is ambiguous.³⁴

An award has been reversed for misconduct of a deputy commissioner in examining witnesses,³⁵ for

28. Kan.—Consolidated Cement Co. v. Baker, 254 P. 415, 129 Kan. 543.
29. Conn.—Jones v. Town of Hamden, 29 A.2d 772, 129 Conn. 532.
Ga.—Employers Liability Assur. Corp. v. Hollifield, 90 S.E.2d 681, 93 Ga.App. 51—Womack v. U. S. Fidelity & Guaranty Co., 69 S.E.2d 512, 55 Ga.App. 564—American Mut. Liability Ins. Co. v. Kent, 21 S.E.2d 51, 71 Ga.App. 453—Bituminous Casualty Corp. v. Elliott, 28 S.E.2d 392, 70 Ga.App. 325—Wilson v. Swift & Co., 23 S.E.2d 261, 68 Ga.App. 701—Bituminous Casualty Corp. v. Lockett, 16 S.E.2d 614, 65 Ga.App. 829.
Ind.—Weir v. Coridan, 31 N.E.2d 83, 108 Ind.App. 589—Homan v. Belleville Lumber & Supply Co., 8 N.E.2d 127, 104 Ind.App. 96.
Iowa.—Hamilton v. P. E. Johnson & Sons, 276 N.W. 841, 224 Iowa 1097.
Ky.—Patton v. Travis, 133 S.W.2d 956, 298 Ky. 678.
La.—Brister v. Miller, App., 178 So. 284.
Me.—Hinckley's Case, 11 A.2d 485, 136 Me. 403.
Mich.—Green v. Sears, Roebuck & Co., 274 N.W. 331, 280 Mich. 568—Coggrove v. Gogebic County Poor Commission, 258 N.W. 205, 270 Mich. 29.
Minn.—Simon v. Village of Plainview, 54 N.W.2d 32, 237 Minn. 136.
Miss.—Williams Bros. Co. v. McIntosh, 84 So.2d 692, 226 Miss. 553.
Mo.—Moore v. R. C. Can Co., App., 229 S.W.2d 272—Stepanek v. Mark Twain Hotel, App., 104 S.W.2d 761.
N.H.—McQueeney v. A. A. Mooney Furniture Co., 63 A.2d 249, 95 N.H. 313.
N.J.—Catell v. Bayonne Associates, 65 A.2d 617, 3 N.J.Super. 122.
Burdick v. Liberty Motor Freight Lines, 25 A.2d 14, 128 N.J.Law 229.
N.Y.—Ognibene v. Rochester Mfg. Co., 80 N.E.2d 749, 298 N.Y. 85.
Benz v. Knights of St. John Club, 108 N.Y.S.2d 348, 279 App. Div. 695, reargument and appeal denied 111 N.Y.S.2d 924, 279 App. Div. 967, affirmed 109 N.E.2d 343, 304 N.Y. 802—Tillow v. Daystrom Corp., 78 N.Y.S.2d 720, 273 App. Div. 1045—Röder v. Northern Maytag Co., 71 N.Y.S.2d 187, 272 App. Div. 838, affirmed 78 N.E.2d 470, 297 N.Y. 196—Gowing v. Brownville Bd. Co., 68 N.Y.S.2d 2, 271

App.Div. 940—Noble v. Nicholson & Galloway, 67 N.Y.S.2d 159, 271 App.Div. 940—Higgins v. August Krazeise, Inc., 66 N.Y.S.2d 692, 271 App.Div. 907—Toole v. Carborundum Co., 63 N.Y.S.2d 97, 270 App. Div. 969—Schepis v. Geo. H. Garlock & Son, 60 N.Y.S.2d 242, 270 App.Div. 863, motion denied 69 N.Y.S.2d 348—Gross v. Capitol Hat Block Co., 41 N.Y.S.2d 362, 266 App.Div. 508, appeal denied 44 N.Y.S.2d 103, 266 App.Div. 586—Abrams v. Albany County, 41 N.Y.S.2d 355, 266 App.Div. 807—Kohls v. J. J. Belotte & Son Const. Co., 32 N.Y.S.2d 435, 263 App.Div. 919—Hawkins v. Hotel Statler, 22 N.Y.S.2d 405, 260 App.Div. 818—Heimroth v. Elk Transp. Corp., 19 N.Y.S.2d 1015, 259 App.Div. 944, reargument denied 22 N.Y.S.2d 528, 260 App.Div. 814, appeal denied Heimroth v. Elk Transp. Co., 29 N.E.2d 671, 284 N.Y. 597—Doyle v. Century Circuit, 10 N.Y.S.2d 844, 256 App.Div. 1021.
Okl.—Campbell Oil Co. v. Elledge, 61 P.2d 223, 177 Okl. 601—Harris Meat & Produce Co. v. Brown, 59 P.2d 280, 177 Okl. 317—Davis Big Chief Mining Co. v. Hughes, 56 P.2d 823, 176 Okl. 464.
Pa.—Sheaffer v. Penn Dairies, 56 A.2d 368, 161 Pa.Super. 583—Strunk v. E. D. Huffman & Sons, 19 A.2d 539, 144 Pa.Super. 429—Plum v. Hotel Washington, 189 A. 792, 125 Pa.Super. 280.
O'Conner v. George Browns Sons, Com.Pl., 29 Del.Co. 339.
Tex.—Texas Emp. Ins. Ass'n v. Mahlow, Civ.App., 304 S.W.2d 161—Martin v. Travelers Ins. Co., Civ. App., 196 S.W.2d 544.
Utah.—Salt Lake City v. Industrial Commission, 139 P.2d 887, 103 Utah 595.
71 C.J. p 1352 note 34, p 1354 note 87.
30. Fla.—Anderson v. Jarrell, 25 So. 2d 490, 157 Fla. 212.
Ga.—Arnold v. Indemnity Ins. Co., 95 S.E.2d 29, 94 Ga.App. 493.
Tex.—Employers' Liability Assur. Corporation v. Williams, Civ.App., 81 S.W.2d 186, error dismissed.
31. Ala.—West Point Mfg. Co. v. Bennett, 83 So.2d 308, 263 Ala. 571—Alabama Textile Products Corp. v. Grantham, 82 So.2d 204, 263 Ala.

179—Bass v. Cowikee Mills, 58 So. 2d 589, 257 Ala. 250.
Ind.—Smulski v. Austin Co., 17 N.E.2d 489, 106 Ind.App. 1.
Ky.—Kinker v. American Radiator & Standard Sanitary, Inc., 268 S.W.2d 948.
N.Y.—Lynch v. Fort Orange Paper Co., 106 N.Y.S.2d 891, 278 App. Div. 1031—Jackson v. Bethlehem Steel Co., 98 N.Y.S.2d 634, 277 App. Div. 912, appeal dismissed 95 N.E.2d 44, 301 N.Y. 651—Nash v. Riverside & Dan River Cotton Mills, 84 N.Y.S.2d 740, 274 App.Div. 1018—Spang v. Moser Studio, 28 N.Y.S.2d 948, 262 App.Div. 319.
Okl.—Massachusetts Bonding & Insurance Co. v. Welch, 146 P.2d 995, 194 Okl. 22.
S.C.—Shillinglaw v. Springs Cotton Mills, 40 S.E.2d 502, 209 S.C. 379.
Tenn.—M. B. McMahan Lumber Co. v. Ownby, 232 S.W.2d 12, 191 Tenn. 143.
71 C.J. p 1354 note 88.

Remand

(1) Where there was evidence that deceased workman at time of his death was concurrently employed by two employers, which would permit use of total earnings in determining average weekly wage for compensation purposes, failure of industrial board to find on that issue did not have effect of a finding against claimants and require a reversal, but required a remand to board with directions to make appropriate finding.
Ind.—Sprout & Davis v. Toren, 78 N.E.2d 437, 118 Ind.App. 384.

(2) Remand generally see *infra* § 788.

32. Me.—Farwell's Case, 142 A. 862, 127 Me. 249.
71 C.J. p 1354 note 89.

33. Ga.—Employers Liability Assur. Corp. v. Hollifield, 90 S.E.2d 681, 93 Ga.App. 51—Automatic Sprinkler Corp. of America v. Rucker, 73 S.E.2d 609, 87 Ga.App. 375.

Mont.—Lunardello v. Republic Coal Co., 53 P.2d 87, 101 Mont. 94.

34. Okl.—James v. M. P. Thomas & Co., 113 P.2d 386, 189 Okl. 54.

35. N.Y.—Vissaggio v. New York Consol. R. Co., 176 N.Y.S. 109, 188 App.Div. 49.

evidence,⁶² or where the findings are insufficient.⁶³ The decision may be set aside where the compensation authorities disregarded evidence having probative force.⁶⁴

An award may be vacated where the parties so stipulate and their stipulation is supported by the record,⁶⁵ or where there is a confession of error,⁶⁶ or where, after having taken evidence, the board adds parties defendant and makes an award against them on the evidence previously taken.⁶⁷

Annulment of an award has the same effect as a reversal of a judgment.⁶⁸ Unless otherwise ordered on the annulment or setting aside of an award, the case goes back to the compensation authorities for reconsideration.⁶⁹ Where the court sets aside an award without further direction, the defeated party is entitled to a retrial of the issues before the commission.⁷⁰ Where an award is made by a deputy commissioner and is modified by the board on appeal, if the award of the board is set aside the award by the deputy commissioner remains in force.⁷¹ An award against an employer, over whom the commission had never acquired jurisdiction, will not be set aside or annulled on application of insurer of

another employer.⁷² Where the act provides for arbitration by consent or order, and limits the questions before the arbitrator to the amount of compensation unless other issues are expressly referred, on an employer's consenting to arbitrate without referring any questions the only issue is the amount of compensation so that on review the award cannot be cancelled, although the court finds that the injury did not arise out of, or in the course of, the employment.⁷³ Where it is necessary on appeal materially to reduce an award, a finding and approval of attorney's fees should be vacated so that it may be adjusted in connection with the reduced award.⁷⁴

§ 787. Dismissal or Nonsuit

In a proper case, the court may dismiss the proceeding or the appeal.

Where an award is vacated as a matter of law, the court may dismiss the proceeding.⁷⁵ Where there is no evidence to support the finding of a commission on which it concluded it had jurisdiction the court, on appeal from the award, may dismiss the proceeding.⁷⁶ It has been held that the court cannot, on review, dismiss the proceeding for lack of evidence to support the findings of the commission,

62. Utah.—Spencer v. Industrial Commission, 20 P.2d 618, 81 Utah 511.

Hearsay

In compensation proceeding for death of employee who was found in pool of blood and with fractured skull several blocks from place of employment, award of compensation would be set aside where based on statements, not shown to be res gestæ, made by employee to wife day following injury and on statements thereafter made to others.

Mich.—Sadjak v. Parker-Wolverine Co., 274 N.W. 719, 281 Mich. 84.

Transcript of criminal case

Award of compensation based on transcript of testimony given in criminal proceeding was set aside and proceedings remanded to industrial commission for further consideration.

N.C.—Citizens Bank & Trust Co. v. Reid Motor Co., 5 S.E.2d 318, 216 N.C. 432.

63. Cal.—Pierson v. Industrial Acc. Commission, 220 P.2d 794, 98 C.A. 2d 598—Whitaker v. Industrial Acc. Commission, 220 P.2d 793, 98 C.A.2d 838.

Okl.—Butts v. Rose Drilling Co., 304 P.2d 986—Laister v. Ozark Nursery Co., 290 P.2d 395—Kelley v. Roger Givens Wholesale Millwork, 281 P.2d 944—Morris v. State Indus. Commission, 268 P.2d 895—Cummins v. State Indus. Commission,

264 P.2d 721—Special Indem. Fund of Okl. v. Hewes, 214 P.2d 240, 202 Okl. 356—McCarthy v. Forbes Painting & Decorating Co., 198 P.2d 212, 200 Okl. 555—Adams v. City of Anadarko, 130 P.2d 159, 198 Okl. 484.

64. Me.—Robitaille's Case, 34 A.2d 473, 140 Me. 121.

65. Okl.—Frates v. State Industrial Commission, 25 P.2d 300, 165 Okl. 149.

66. Okl.—Special Indem. Fund v. Sadler, 228 P.2d 632, 204 Okl. 224—Special Indem. Fund v. Dole, 223 P.2d 1086, 203 Okl. 550—Mayo Hotel Co. v. Barney, 95 P.2d 627, 185 Okl. 609—Pillsbury Flour Mills Co. v. McNeill, 95 P.2d 235, 185 Okl. 574—Southwestern Brewing Corp. v. Cothrum, 84 P.2d 609, 184 Okl. 63. 71 C.J. p 1355 note 16.

67. Okl.—J. B. Barnes Drilling Co. v. Phillips, 26 P.2d 766, 166 Okl. 154.

68. Utah.—Denver & R. G. W. R. Co. v. Industrial Commission of Utah, 279 P. 612, 74 Utah 316.

Failure to appeal

Where superior court judgment setting aside compensation award and entering final judgment for lump sum was not appealed from for more than two years, claimant's application for further compensation under award was properly denied, because award no longer existed.

Ga.—Wilkins v. Travelers Ins. Co., 182 S.E. 628.

69. Cal.—West v. Industrial Acc. Commission of Cal., 180 P.2d 972, 79 C.A.2d 711.

70. Utah.—American Smelting & Refining Co. v. Industrial Commission of Utah, 10 P.2d 918, 179 Utah 302.

71. Mich.—Beaudry v. Burroughs Adding Mach. Co., 214 N.W. 401, 239 Mich. 410.

72. Cal.—Standard Accident Ins. Co. v. Industrial Accident Commission, 11 P.2d 401, 123 C.A. 443.

73. Kan.—Wilson & Co. v. Ward, 202 P. 862, 110 Kan. 177.

74. Okl.—Kansas City Structural Steel Co. v. Yarber, 5 P.2d 160, 153 Okl. 121.

75. Mich.—Lyons v. Ford Motor Co., 48 N.W.2d 154, 330 Mich. 684.

Okl.—London Guarantee & Accident Co. v. Miller, 57 P.2d 1150, 177 Okl. 126.

Remand or nonsuit

Plaintiff who prosecuted suit for compensation in forma pauperis suffered no loss from being nonsuited instead of having case remanded, since only difference, ordinarily, between nonsuit and remand of case is with respect to costs involved in bringing new suit.

La.—Doby v. Canulette Shipbuilding Co., App. 156 So. 51.

76. N.C.—Aycock v. Cooper, 163 S. E. 569, 202 N.C. 500.

but should remand it for further hearing.⁷⁷ Where a contest of an award has been transferred from one court to another the court from which it was transferred cannot thereafter dismiss the contest.⁷⁸ Where the parties to a review have stipulated for the return of the record to the commission for amendment, the cause is no longer before the reviewing court so that its order quashing the writ of certiorari and dismissing the suit is void.⁷⁹

Where the court is authorized to try the case de novo on appeal from a decision of the compensation authorities, it may dismiss the action⁸⁰ without prejudice.⁸¹ An employer, having brought suit to set aside an award, and the employee or claimant having filed a cross action, the employer cannot take voluntary dismissal or nonsuit.⁸²

In a proper case, the court will dismiss the appeal.⁸³ A statute providing that an appeal shall be determined within a stated time has been construed as merely directory, so that the failure to determine the appeal within the stated time does not effect an

automatic dismissal of the appeal.⁸⁴ The dismissal of an appeal without prejudice does not bar a subsequent appeal.⁸⁵

§ 788. Remand

On review of compensation proceedings, the court may remand the case subject to statutory limitations on the exercise of such power.

Whether a cause may be remanded on review depends in large measure on the provisions of the statutes.⁸⁶ The power to remand to the board or commission may be implied⁸⁷ and it has been held that the cause may be remanded for new trial where justice requires it even though the statute does not expressly authorize it.⁸⁸

Where the act provides that on appeal the court may grant or refuse compensation, or increase or diminish an award, it has been held without jurisdiction to remand,⁸⁹ and where it must affirm, reverse, or modify the award it is without power to remand without reversal or modification.⁹⁰ How-

77. Ky.—Madden v. Black Mountain Corporation, 36 S.W.2d 848, 238 Ky. 53.

78. Tex.—Peeples v. Texas Indemnity Ins. Co., Civ.App., 22 S.W.2d 151.

79. Ill.—Checker Taxi Co. v. Industrial Commission, 174 N.E. 849, 343 Ill. 139.

80. Tex.—Williams v. Safety Casualty Co., Civ.App., 97 S.W.2d 729, reversed on other grounds 102 S.W.2d 178, 129 Tex. 184.

81. Neb.—Chilen v. Commercial Casualty Ins. Co., 283 N.W. 366, 135 Neb. 619.

Reinstatement of order appealed from

Dismissal of district court without prejudice, on motion of plaintiff, of trial de novo after dismissal by compensation commissioner of plaintiff's petition for modification of compensation award and for further compensation, did not operate to reinstate order appealed from.

Neb.—Chilen v. Commercial Casualty Ins. Co., supra.

82. Tex.—Texas Employers' Ins. Ass'n v. Romero, Civ.App., 45 S.W.2d 333.

71 C.J. p 1355 note 32.

83. Md.—Allen v. Glenn L. Martin Co., 52 A.2d 605, 188 Md. 290, appeal dismissed 68 S.Ct. 86, 332 U.S. 749, 92 L.Ed. 336.

84. Pa.—Jeloneck v. Jarecki Mfg. Co., Com.Pl., 27 Erie Co. 21, affirmed Jeloneck v. Jarecki Mfg. Co., 43 A.2d 430, 157 Pa.Super. 609—Werner v. City of Pittsburgh, Com.Pl., 87 Pittsb.Leg.J. 118—Gaich v. Paul Kerlin Const. Co., Com.Pl., 33 West.

L.J. 261, affirmed 85 A.2d 642, 170 Pa. 535.

Wash.—Sawyer v. Department of Labor and Industries, 296 P.2d 706, 48 Wash.2d 761.

Settlement

Court properly dismissed claimant's appeal from compensation award to him where he had accepted amount of award in final settlement of all compensation claims, notwithstanding acceptance was made subject to review, as provided by law.

Ga.—Kent v. U. S. Fidelity & Guaranty Co., 137 S.E. 887, 54 Ga.App. 400.

Omission of necessary party

Appeal from award of industrial board must be dismissed where party who was adverse to appellant in judgment was not named as appellee in either caption or body of assignment of error, notwithstanding notice of appeal was served on such adverse party, and that such adverse party was mentioned in assignment as having had some connection with case before industrial board.

Ind.—Leicht v. Snow Hill Mining Corp., 200 N.E. 427, 101 Ind.App. 584.

Premature appeal

Me.—Guthrie v. Mowry, 184 A. 895, 134 Me. 256.

Negligence of clerk

La.—Johnson v. Wyble, App., 55 So. 2d 711.

84. N.J.—Temple v. Storch Trucking Co., 68 A.2d 828, 3 N.J. 42.

Ten Eleven Corp. v. Brunner, 53 A.2d 350, 135 N.J.Law 558.

85. Mont.—Splith v. Stuart, 299 P. 2d 106.

86. Decision set aside

Cause under the workmen's occupational diseases act may be remanded by circuit court to industrial commission only where decision of industrial commission is set aside by circuit court on writ of certiorari, and not where decision of industrial commission is found to be in accordance with law and not against manifest weight of evidence.

Ill.—Grollemond v. Industrial Commission, 126 N.E.2d 211, 5 Ill.2d 541.

Suit to enjoin enforcement of compensation order

Court in suit to enjoin enforcement of alleged illegal compensation order of deputy commissioner is without authority, either on behalf of employee or employer, to remand case to present more testimony or the same testimony in a different light.

U.S.—McDonough v. Monahan, D.C. Me., 30 F.Supp. 315.

87. Me.—Martin's Case, 132 A. 520, 125 Me. 221—Gauthier v. Penobscot Chemical Fiber Co., 113 A. 28, 120 Me. 73.

88. Vt.—O'Boyle v. Parker-Young Co., 112 A. 385, 95 Vt. 58.

89. Kan.—Attebery v. Griffin Const. Co., 312 P.2d 598, 181 Kan. 450—Employers' Liability Assur. Corp. v. Matlock, 98 P.2d 456, 181 Kan. 293, 127 A.L.R. 461.

71 C.J. p 1355 note 35.

90. Md.—Allen v. Glenn L. Martin Co., 52 A.2d 605, 188 Md. 290, appeal dismissed 68 S.Ct. 86, 332 U.S. 749, 92 L.Ed. 336.

ever, where the power of a court on review of an award is limited to affirming or setting it aside in toto, it has been held that the effect of an order setting aside an award is to remand it to the board or commission for new trial.⁹¹ Where the court is authorized to remand only on setting aside the order or award, it may not remand where the setting aside of the award is not proper.⁹² Where the act requires the court to remit for further hearing on sustaining appellant's exception to the award, it is erroneous to fail to do so.⁹³

Where the statute specifies the grounds for re-

mand, the court may not remand on any other ground.⁹⁴ Under some statutes, the court cannot remand for the taking of additional testimony where there has been a full hearing and a final award.⁹⁵ It has been held that the court cannot remand for a new hearing on the ground that the findings are against the weight of the evidence.⁹⁶

As a general rule, subject to statutory limitations on the exercise of such power, the court on review of compensation proceedings may remand the matter⁹⁷ for a further hearing⁹⁸ or to take additional

Wash.—Boone v. Department of Labor and Industries, 24 P.2d 454, 174 Wash. 123.

Wis.—Kaegi v. Industrial Commission, 255 N.W. 845, 232 Wis. 16.

Remand for additional testimony

(1) Reviewing court in compensation cases has no power to remand case in order that additional testimony may be presented.

U.S.—Lacomastic Corp. v. Parker, D. C.Md., 54 F.Supp. 138.

(2) After certification of the record to court of common pleas on appeal from industrial commission, court of common pleas was required to hear the case on the record and transcript certified to it by the commission and had no jurisdiction to remand record to commission for the purpose of taking additional testimony on behalf of claimant.

Ohio.—Firth v. Industrial Commission of Ohio, App., 145 N.E.2d 215.

(3) On appeal, in compensation case, from order of the department of labor and industries, superior court, by rendering judgment directing department to reopen the case and have claimant examined by three disinterested physicians, assumed a supervisory power over the department which it did not possess.

Wash.—Ivey v. Department of Labor and Industries, 102 P.2d 683, 4 Wash.2d 162.

91. Ariz.—King v. Alabam's Freight Co., 12 P.2d 294, 296, 40 Ariz. 383.

92. Wis.—Tadin v. Industrial Commission, 61 N.W.2d 309, 255 Wis. 375—Alblon v. Indus. Commission, 231 N.W. 249, 202 Wis. 15.

93. Pa.—Caruso v. Commonwealth, 39 Pa.Super. 238.

94. Mo.—Gonzales v. Johnston Foil Mfg. Co., App., 305 S.W.2d 45—Estes v. General Chemical Clay Co., App., 93 S.W.2d 295.

95. S.C.—Parrott v. Barfield Used Parts, 34 S.E.2d 802, 206 S.C. 381.

96. Pa.—Mucichuck v. John A. Eichleay, Jr., Co., 200 A. 916, 132 Pa. Super. 347.

97. Cal.—Simmons Co. v. Industrial Acc. Commission, 161 P.2d 702, 70

C.A.2d 664—National Automobile Ins. Co. v. Industrial Accident Commission, 55 P.2d 344, 12 C.A.2d 377—Sperry Flour Co. v. Industrial Acc. Commission, 260 P. 565, 86 C. A. 206.

Conn.—Kearns v. City of Torrington, 177 A. 725, 119 Conn. 522—Glodenis v. American Brass Co., 170 A. 146, 118 Conn. 29.

Fla.—Hardy v. City of Tarpon Springs, 81 So.2d 503.

Ga.—Free v. Associated Indem. Corp., 53 S.E.2d 325, 78 Ga.App. 839—Hartford Accident & Indemnity Co. v. Cox, 12 S.E.2d 110, 63 Ga. App. 763.

Ill.—Grollemond v. Industrial Commission, 126 N.E.2d 211, 5 Ill.2d 541.

Ky.—Low Moisture Coal Co. v. Vandersiver, 260 S.W.2d 395—Searcy v. Three Point Coal Co., 134 S.W.2d 228, 280 Ky. 683.

La.—Kimble v. Colfax Lumber & Creosoting Co., App., 73 So.2d 5.

Mass.—Moore's Case, 110 N.E.2d 764, 330 Mass. 1.

Minn.—Romani v. Ancker Hospital, 69 N.W.2d 497, 244 Minn. 185—Swider v. Pillsbury Mills, 42 N.W. 2d 560, 231 Minn. 210—Simpson v. Gold, 22 N.W.2d 923, 221 Minn. 528.

N.J.—Huber v. New England Tree Expert Co., 65 A.2d 514, 2 N.J. 53.

Rubeo v. Arthur McMullen Co., 189 A. 662, 117 N.J.Law 574, conformed to 193 A. 797, 118 N.J.Law 530, affirmed 198 A. 843, 120 N.J. Law 182—Ruoff v. Blasi, 186 A. 581, 117 N.J.Law 47, affirmed 191 A. 877, 118 N.J.Law 314.

Cason v. Overman, 54 A.2d 183, 25 N.J.Misc. 385.

N.Y.—Brown v. Central Coal Co., 161 N.Y.S.2d 712, 3 A.D.2d 867—Husing v. Medical Laboratories, 135 N.Y.S. 2d 157, 235 App.Div. 13—Trillas v. Weimet Film Co., 119 N.Y.S.2d 639, 281 App.Div. 932, affirmed 118 N.E.2d 599, 306 N.Y. 779—Hourigan v. Walsh Const. Co., 53 N.Y.S.2d 584, 269 App.Div. 715—Glass v. Hudson Glass Co., 19 N.Y. S.2d 918, 259 App.Div. 947.

Okl.—James Const. Co. v. Aylor, 42 P.2d 528, 171 Okl. 173.

Pa.—Dougher v. Lummus Co., 136 A. 2d 132, 184 Pa.Super. 615—Sandy v. Hazle Brook Coal Co., 10 A.2d 533, 133 Pa.Super. 581—Weeks v. Lehigh Portland Cement Co., 176 A. 850, 116 Pa.Super. 514.

Slavitsky v. Glen Alden Coal Co., 81 Pa.Dist. & Co. 373.

Holmes v. Suburban Supply Warehouse, Com.Pl., 29 Del.Co. 32—Grigsby v. Ferguson & Edmondson Co., 94 Pittsb.Leg.J. 473—Robson v. Carnegie Coal Corp., Com.Pl., 21 Wash.Co. 20.

Vt.—Pitts v. Howe Scale Co., 1 A.2d 695, 110 Vt. 27.

Wis.—Dryden v. Lincoln County, 16 N.W.2d 799, 246 Wis. 283, 71 C.J. p 1352 note 35.

Effect on jurisdiction

(1) When workmen's compensation proceeding was remanded from superior court, where it was pending on appeal, to industrial commission, superior court surrendered its jurisdiction, and industrial commission acquired jurisdiction for all purposes, notwithstanding order stated that proceeding was remanded for specific purpose.

N.C.—Butts v. Montague Bros., 179 S.E. 799, 208 N.C. 186.

(2) Court cannot remand and at the same time, by its order remanding to the commission and requiring it to certify the record with its findings back to the court, retain jurisdiction over the cause.

Ill.—Kudla v. Industrial Commission, 168 N.E. 298, 336 Ill. 279—Western Shade Cloth Co. v. Industrial Commission, 156 N.E. 796, 325 Ill. 570.

Compared with recommitment to master

Superior court had the same right to recommit a compensation proceeding to the industrial board for further findings that it would have in equity to recommit a case to a master.

Mass.—Evans' Case, 13 N.E.2d 27, 299 Mass. 435.

98. Ga.—Atlanta Transit System, Inc. v. Harcourt, 95 S.E.2d 41, 94

testimony or evidence,⁹⁹ even though such evidence could, with ordinary diligence, have been presented at the original hearing.¹ Under some statutes, a remand may be granted where there is newly discovered evidence,² but under other statutes, the court is without power to order a remand on this

- Ga.App. 503—U. S. Fidelity & Guaranty Co. v. Brown, 23 S.E.2d 443, 68 Ga.App. 706.
- Ind.—Bakers Consulting Bureau v. Julian, 6 N.E.2d 737, 103 Ind.App. 218.
- Mass.—Nagle's Case, 37 N.E.2d 474, 210 Mass. 193.
- Minn.—Manthe v. Employers Mut. Cas. Co., 58 N.W.2d 758, 239 Minn. 368.
- N.C.—Rankin v. Brown Mfg. Co., 193 S.E. 389, 212 N.C. 357.
- Okl.—Bristow v. State Indus. Commission of Okl., 317 P.2d 237.
- Pa.—Ricchetti v. DiMarco Bros., 54 Pa. Dist. & Co. 653.
- Mulhollen v. Philipsburg Coal Co., Com.Pl., 15 Cambria 160—Imboden v. Union Premier Stores, Com.Pl., 53 Dauph.Co. 257—Walsh v. Penn Anthracite Mining Co., Com.Pl., 42 Lack.Jur. 17—Bazilevich v. Childs Co., Com.Pl., 87 Pittsb.Leg.J. 452—Romanosky v. Locust Coal Co., Com.Pl., 44 Sch. Leg.Rec. 194—Curran v. James Regulator Co., Com.Pl., 8 Sch.Reg. 9—Shiel v. McDonald Mining Co., Com.Pl., 32 Wash.Co. 166.
- R.I.—Jacob v. Moshassuck Transp. Co., 125 A.2d 184—Egan v. Walsh-Kaiser Co., 56 A.2d 854, 73 R.I. 399—Dorfman v. Rosenthal Ackerman Millinery Co., 13 A.2d 268, 64 R.I. 498.
- Vt.—Belfore v. Vermont State Highway Department, 187 A. 797, 108 Vt. 396.
- 71 C.J. p 1356 note 43.
99. U.S.—United Fruit Co. v. Cardillo, D.C.N.Y., 104 F.Supp. 81—Luckenbach S. S. Co. v. Norton, D.C. Pa., 41 F.Supp. 105.
- Ga.—Employers Mut. Liability Ins. Co. v. Anderson, 100 S.E.2d 611, 96 Ga.App. 509—Rutland v. Vaughn, 100 S.E.2d 609, 96 Ga.App. 499—Hood v. Jackson, 59 S.E.2d 45, 81 Ga.App. 465.
- Idaho.—Fields v. Buffalo-Idaho Mining Co., 40 P.2d 114, 55 Idaho 212.
- Ill.—Conreux v. Industrial Commission, 188 N.E. 457, 354 Ill. 456.
- Iowa.—Davis v. Bjorenson, 293 N.W. 829, 229 Iowa 7.
- Ky.—H. H. Waegner & Co. v. Moock, 197 S.W.2d 254, 303 Ky. 222.
- La.—Halphen v. St. Mary Sugar Co-op., Inc., App., 91 So.2d 912—Osborne v. Rednour, App., 88 So.2d 250—Newman v. Zurich General Acc. & Liability Ins. Co., App., 87 So.2d 230—Banks v. Kent Piling Co., App., 87 So.2d 138—Mamon v. Farnsworth & Chambers Const. Co., App., 86 So.2d 764—Jones v. Remington Rand, Inc., App., 86 So.2d 628—Roy v. Guillot, App., 84 So. 2d 469—Betz v. Travelers Ins. Co., App., 68 So.2d 666—Brown v. Mansfield Hardwood Lumber Co., App., 50 So.2d 116—Gagliano v. Boh Bros. Const. Co., App., 44 So.2d 732—Pierce v. Bituminous Cas. Corp., App., 38 So.2d 527—Lindsey v. Twin City Motor Co., App., 181 So. 598—Perkins v. Mills Engineering & Construction Co., App., 179 So. 318—Riviere v. McClintic-Marshall Corp., App., 177 So. 99—Cannon v. Tremont Lumber Co., App., 175 So. 881—Desadier v. Central Lumber Co., App., 173 So. 578.
- Mass.—Varano's Case, 134 N.E.2d 453, 334 Mass. 153.
- Miss.—Reyer v. Pearl River Tung Co., 68 So.2d 442, 219 Miss. 211—Federated Mut. Implement & Hardware Ins. Co. v. Spencer, 67 So.2d 878, 219 Miss. 68—Karr v. Armstrong Tire & Rubber Co., 61 So. 2d 789, 216 Miss. 132.
- Mo.—Hogue v. Wurdack, App., 298 S.W.2d 492—Buecker v. Roberts, App., 200 S.W.2d 529.
- N.J.—Alberts v. Keystone Commissary Co., 131 A.2d 430, 45 N.J. Super. 71.
- Huber v. New England Tree Expert Co., 61 A.2d 59, 137 N.J.Law 549, affirmed 65 A.2d 514, 2 N.J. 51—Grant v. Grant Casket Co., 60 A.2d 817, 137 N.J.Law 463, affirmed 65 A.2d 520, 2 N.J. 15.
- N.Y.—Wright v. Pleasant Waste Material Co., 160 N.Y.S.2d 607, 3 A. D.2d 333—Cullen v. Board of Education, City of Watervliet, N. Y., 142 N.Y.S.2d 189, 286 App.Div. 908—Geoghan v. Francis Leggett Premier Food, 137 N.Y.S.2d 506, 285 App.Div. 911—Canty v. American Brake Shoe Co., 135 N.Y.S.2d 800, 284 App.Div. 1077—Capierseo v. Bonsignore, 130 N.Y.S.2d 596, 283 App.Div. 976—Wilson v. Rochester Products Division, General Motors Corp., 125 N.Y.S.2d 324, 282 App. Div. 973—Segretto v. Miles, 109 N. Y.S.2d 427, 279 App.Div. 831—Jackson v. Bethlehem Steel Co., 98 N. Y.S.2d 634, 277 App.Div. 912, appeal dismissed 95 N.E.2d 44, 301 N.Y. 681—Beiter v. Miller, 48 N.Y. S.2d 42, 267 App.Div. 1021.
- N.C.—Thompson v. Johnson Funeral Home, 179 S.E. 801, 208 N.C. 178.
- Okl.—1800 Restaurant, Inc. v. Gossett, 262 P.2d 437—De Shazer v. Nail, 250 P.2d 456, 207 Okl. 446—E. G. Nicholas Const. Co. v. State Indus. Commission, 250 P.2d 221, 207 Okl. 428.
- Pa.—Willk v. Budd Co., 100 A.2d 127, 174 Pa.Super. 108—Novak v. State Workmen's Ins. Fund, 173 A. 827, 113 Pa.Super. 555.
- Foster v. State Workmen's Ins. Fund, Com.Pl., 48 Dauph.Co. 301—Collision v. Union City Chair Co., Com.Pl., 22 Erie Co. 77—Boehner v. Gasket Supply Co., Com.Pl., 57 Montg.Co. 110—Grigsby v. Ferguson & Edmondson Co., Co., 94 Pittsb.Leg.J. 473—Stelzig v. Jones & Laughlin Steel Corp., Com.Pl., 90 Pittsb.Leg.J. 544—Kolesnik v. Pressed Steel Car Co., Com.Pl., 87 Pittsb.Leg.J. 528—Speakman v. Shenandoah Citizens Water & Gas Co., Com.Pl., 9 Sch.Reg. 51—Baker v. Newstein, Com.Pl., 22 Wash.Co. 58.
- R.I.—Perez v. Columbia Granite Co., 62 A.2d 658, 74 R.I. 503.
- 71 C.J. p 1356 note 44.
- Equivalent to new trial**
- Remitting a compensation case to determine a basic question of fact is the equivalent of ordering a new trial on that issue.
- Pa.—Dosen v. Union Collieries Co., 29 A.2d 354, 150 Pa.Super. 619.
1. Ga.—Hartford Accident & Indemnity Co. v. Cox, 11 S.E.2d 661, 191 Ga. 143, answers to certified questions conformed to 12 S.E.2d 110, 63 Ga.App. 763.
2. La.—Soudelier v. Travelers Ins. Co., App., 72 So.2d 771—Johnson v. Brown Paper Mill Co., App., 35 So.2d 774—McClung v. Delta Shipbuilding Co., App., 34 So.2d 70—Vilce v. Travelers Ins. Co., App., 18 So.2d 243.
- Minn.—Sorenson v. La Pompadour, Inc., 246 N.W. 114, 187 Minn. 665.
- N.C.—Tindall v. American Furniture Co., 4 S.E.2d 894, 216 N.C. 306—Byrd v. Gloucester Lumber Co., 176 S.E. 572, 207 N.C. 253.
- Discretion**
- Exercise by superior court of power to remand compensation proceeding to industrial commission for rehearing on ground of newly discovered evidence rests on judge's discretion, ordinarily not subject to review.
- N.C.—Byrd v. Gloucester Lumber Co., supra.
- Showing held insufficient to warrant remand for taking of newly discovered evidence.**
- La.—Landry v. Gilger Drilling Co., App., 92 So.2d 482—Ebarb v. Southern Industries Co., App., 78 So.2d 553—Weeks v. Consolidated Underwriters, App., 58 So.2d 289—Diggins v. Salley & Ellis, App., 199 So. 442.
- Showing held sufficient**
- La.—Soudelier v. Travelers Ins. Co., App., 72 So.2d 771.

ground.³ The court may remand the case for incorporation of evidence or other matters into the record,⁴ to allow an amendment of the pleadings,⁵ to correct the award,⁶ to determine the proper amount of compensation,⁷ to make further findings,⁸ to correct a finding,⁹ or to make findings consistent.¹⁰

The case may be remanded where the appeal is improper,¹¹ an adequate hearing was not held,¹² all interested persons were not made party,¹³ claimant died pending the appeal,¹⁴ the record is incomplete or

3. Ga.—Continental Casualty Co. v. Caldwell, 189 S.E. 406, 55 Ga.App. 17.

Limits of rule

Rule that court may not remand a workmen's compensation case for the taking of additional or newly discovered evidence has no application to the taking of additional testimony by joint board on a reconsideration of an issue made necessary by the board's having proceeded on a fundamentally wrong basis in a prior hearing.

Wash.—Olympia Brewing Co. v. Department of Labor & Industries of State, 208 P.2d 1181, 34 Wash.2d 498.

4. La.—Anderson v. St. Paul Mercury Indem. Co., App., 81 So.2d 86—Stevens v. Vernon Timber Co., App., 171 So. 864.

Okl.—Lunsford v. Texas Co., 268 P. 200, 131 Okl. 185.

5. La.—Brown v. Edwards, App., 160 So. 173, followed in Hall v. Edwards, 160 So. 174.

71 C.J. p 1357 notes 52, 53.

6. Conn.—Witchekowski v. Falls Co., 136 A. 565, 105 Conn. 737.

Attorney's fees

Mass.—Whittaker's Case, 66 N.E.2d 785, 319 Mass. 582.

7. Me.—Strout's Case, 140 A. 377, 126 Me. 579.

Pa.—Miller v. Colgate-Palmolive Peet Co., Com.Pl., 29 West.L.J. 61.

8. U.S.—Cyr v. Crescent Wharf & Warehouse Co., C.A.Cal., 211 F.2d 454.

Ala.—Diamond Coal Co. v. White, 77 So.2d 372, 262 Ala. 112.

Ariz.—Martin v. Industrial Commission, 257 P.2d 596, 75 Ariz. 403.

Ark.—Paragould Laundry & Dry Cleaning Co. v. Rogers, 197 S.W.2d 567, 210 Ark. 764—Long-Bell Lumber Co. v. Mitchell, 177 S.W.2d 920, 206 Ark. 854.

Cal.—California Compensation Ins. Co. v. Industrial Acc. Commission, 251 P.2d 348, 115 C.A.2d 142—Piereson v. Industrial Acc. Commission, 220 P.2d 794, 98 C.A.2d 598—Whittaker v. Industrial Acc. Commission, 220 P.2d 793, 98 C.A.2d 838.

Colo.—U. S. Fidelity & Guaranty Co. v. Industrial Commission, 259 P.2d 869, 128 Colo. 68.

Conn.—McQuade v. Town of Ashford, 35 A.2d 842, 130 Conn. 478.

Del.—Carey v. Bryan and Rollins, 105 A.2d 201, 9 Terry 395.

D.C.—Vendemia v. Cristaldi, 221 F.2d 103, 95 U.S.App.D.C. 230.

Fla.—Moses v. R. H. Wright & Son, Inc., 90 So.2d 330—Blount v. State Road Dept., 87 So.2d 507—Foxworth v. Florida Indus. Commission, 86 So.2d 117—Cook v. Highway Cas. Co., 82 So.2d 679—Hardy v. City of Tarpon Springs, 81 So.2d 503.

Ga.—American Mut. Liability Ins. Co. v. Gore, 99 S.E.2d 238, 95 Ga. App. 885—Ideal Mut. Ins. Co. v. Ray, 88 S.E.2d 428, 92 Ga.App. 273.

Ind.—Stoner v. Howard Sober, Inc., App., 141 N.E.2d 458—Poke v. Peerless Foundry Co., 119 N.E.2d 905, 124 Ind.App. 544—Stoner v. Howard Sober, Inc., 118 N.E.2d 504, 124 Ind.App. 581—Sprout & Davis v. Toren, 78 N.E.2d 437, 118 Ind.App. 354—Hayes Freight Lines v. Martin, 77 N.E.2d 900, 118 Ind.App. 139.

Ky.—Hayes Freight Lines, Inc. v. Burns, 290 S.W.2d 836—Jones v. Crummies Creek Coal Co., 264 S.W. 2d 294—H. H. Wagner & Co. v. Moock, 197 S.W.2d 254, 303 Ky. 222.

Me.—Guthrie v. Mowry, 184 A. 895, 134 Me. 256.

Minn.—Chillstrom v. Trojan Seed Co., 65 N.W.2d 888, 242 Minn. 471—Kaplan v. Alpha Epsilon Phi Sorority, 42 N.W.2d 342, 230 Minn. 547.

Mo.—Culberson v. Daniel Hamm Drayage Co., 286 S.W.2d 813.

Woodward v. J. J. Grier Co., App., 252 S.W.2d 844—Moore v. R. C. Can Co., App., 229 S.W.2d 272—Powell v. Ford Motor Co., App., 78 S.W.2d 572.

N.Y.—Nagorka v. Goldstein, 167 N.Y. S.2d 118, 4 A.D.2d 904—McCann v. Hyal Luncheonette Co., 135 N.Y.S. 2d 823, 284 App.Div. 1079.

Okl.—Roxana Petroleum Corporation v. Park, 31 P.2d 615, 168 Okl. 15.

Pa.—Bogan v. Smoothway Const. Co., 130 A.2d 207, 183 Pa.Super. 170—Icenhour v. Freedom Oil Works Co., 7 A.2d 152, 136 Pa.Super. 318—Straub v. Edward G. Budd Mfg. Co., 175 A. 704, 115 Pa.Super. 395.

Eggert v. General Elec. Co., Com. Pl., 34 Erie Co. 36—Matylewicz v. Hudson Coal Co., Com.Pl., 53 Lack. Jur. 9—Andrioli v. Hudson Coal Co., Com.Pl., 39 Luz.Leg.Reg. 56—McFarland v. Wolfe, Com.Pl., 72 Montg.Co. 484—Carlo v. Pressed Steel Car Co., Co., 104 Pittsb.Leg. J. 34—DiIanni v. Dravo Corp., Co., 95 Pittsb.Leg.J. 305—Fawcett v. Ashcraft, Com.Pl., 26 Wash.Co. 108.

Tenn.—Etter v. Blue Diamond Coal Co., 215 S.W.2d 803, 187 Tenn. 407.

71 C.J. p 1356 note 47.

9. Cal.—Holt v. Industrial Acc. Commission, 255 P.2d 438, 117 C.A. 2d 373—Industrial Indem. Co. v. Industrial Acc. Commission, 229 P. 2d 2, 103 C.A.2d 249.

Mo.—Seifert v. Heil Packing Co., App., 52 S.W.2d 579.

10. N.H.—Desrosiers v. Dionne Bros. Furniture, Inc., 92 A.2d 916, 97 N. H. 525.

71 C.J. p 1357 note 49.

11. Mich.—Lucas v. Ford Motor Co., 300 N.W. 87, 299 Mich. 280.

Appeal premature

Ga.—Rose City Foods v. Usry, 71 S. E.2d 649, 86 Ga.App. 307.

12. Mich.—Cardott v. Chevrolet Motor Co., 256 N.W. 356, 268 Mich. 378.

N.Y.—Gruttaduria v. Imperial Metal Mfg. Co., 294 N.Y.S. 451, 250 App. Div. 242—Summers v. Mohawk Valley Roofing Corp., 283 N.Y.S. 677, 245 App.Div. 412.

Pa.—DiMaria v. Superior Bronze Corp., Com.Pl., 38 Erie Co. 59.

13. N.Y.—Skorepa v. Capek, 42 N. Y.S.2d 734, 266 App.Div. 898, affirmed 56 N.E.2d 740, 293 N.Y. 738.

N.D.—Burkhardt v. State, 42 N.W.2d 670, 77 N.D. 232.

Partner

Common pleas court which, on appeal from compensation bureau, found that employee suffered compensable injury could not remand the case for purpose of bringing in employer's partner as a party respondent even if affirmation of judgment against employer without his partner would jeopardize rights of employer's insurance carrier.

N.J.—Belvidere v. Waldron, 30 A.2d 596, 129 N.J.Law 587.

Rival claimants

Where woman who had obtained judgment on her claim for workmen's compensation benefits as widow of deceased employee had not been party to proceedings brought by another woman on her claim for benefits as widow of same employee, order of county court remanding both alleged widows' causes to workmen's compensation division for further proceedings to determine which actually was widow was nugatory as to widow not a party.

N.J.—Minter v. Minter, 114 A.2d 455, 35 N.J.Super. 439.

14. Mass.—Steuterman's Case, 82 N. E.2d 601, 323 Mass. 454.

inadequate,¹⁵ there is an error of law,¹⁶ an erroneous rule of law has been applied to the evidence,¹⁷ or the case was tried or determined on an erroneous theory.¹⁸

The case may also be remanded where evidence was improperly rejected,¹⁹ the findings or order is ambiguous,²⁰ insufficient or incomplete,²¹ incon-

Okl.—Indian Territory Illuminating Oil Co. v. Pettyjohn, 65 P.2d 415, 179 Okl. 222.

15. Mass.—Moore's Case, 110 N.E.2d 764, 330 Mass. 1—Belezarian's Case, 31 N.E.2d 4, 307 Mass. 557—Di Clavio's Case, 199 N.E. 732, 293 Mass. 259—Flander's Case, 199 N.E. 309, 293 Mass. 157.
N.Y.—Wanamaker v. Selfridge, 7 N.Y.S.2d 430, 255 App.Div. 892, order resettled 10 N.Y.S.2d 219, 356 App.Div. 870.

Failure to file statement of findings as required by the act warrants a remand to the board with instructions to make the award in strict compliance with the act.

U.S.—Howard v. Monahan, D.C.Tex., 33 F.2d 220.

71 C.J. p 1358 note 94.

Appellant not at fault

Where opponents in compensation proceeding appealed from award of deputy commissioner, and, after opponents' attorney and department of labor and industry had vainly requested department's reporter several times to file transcript of testimony taken before commissioner, department affirmed award because of opponents' failure to file transcript, award was vacated and case remanded to department for hearing on testimony taken by reporter or before department, since opponents had been deprived of their day in court. Mich.—Wilcox v. Heinz, 287 N.W. 756, 275 Mich. 649.

Transcript unavailable

On a proper showing that a transcript from the industrial commission, essential to final determination by the reviewing court, cannot, through no fault of the parties, be secured, the cause will be remanded for new trial.

Okl.—Harry Tidd Const. Co. v. Meade, 9 P.2d 919, 156 Okl. 144—Buckner v. Dillard, 5 P.2d 360, 153 Okl. 145.

Record held sufficient so that remand was not ordered.

Mass.—Flaherty's Case, 56 N.E.2d 880, 316 Mass. 719.

16. N.Y.—Brown v. New York State Training School for Girls, 11 N.Y.S.2d 849, 256 App.Div. 767.

N.C.—Stanley v. Hyman-Michaels Co., 22 S.E.2d 570, 222 N.C. 257—McGill v. Town of Lumberton, 3 S.E.2d 324, 215 N.C. 752.

Okl.—Sinclair Prairie Oil Co. v. Stevens, 148 P.2d 176, 194 Okl. 109—Manhattan-Long Const. Co. v. Breedlove, 138 P.2d 827, 192 Okl. 656—National Tank Co. v. Gold, 95 P.2d 235, 185 Okl. 574—Briscoe

Const. Co. v. Miller, 85 P.2d 420, 184 Okl. 136.

S.C.—Logan v. Williams Furniture Co., 33 S.E.2d 78, 206 S.C. 83.

Change in law

(1) In determining what justice requires for purpose of making proper disposition of an action brought to review an order of state industrial commission, supreme court will consider any change in law which has supervened since judgment being reviewed was rendered and recognize such a change as may affect result in trial tribunal by vacating order or award without prejudice in order that cause may be remanded and commission may be free to act by dealing appropriately with controversy in light of law declared in a similar case subsequent to order or award under review.

Okl.—Allison v. Bareco Oil Co., 225 P.2d 167, 203 Okl. 615.

(2) Where it was indicated that a decision of the state industrial board denying award of death benefits was based on a decision of the appellate division which had been reversed by the court of appeals before the instant proceeding was heard on appeal, and an award of benefits could have been sustained by recognized authority under the facts, decision would be reversed and matter remitted to the board for further consideration and for the taking of further proof.

N.Y.—Welz v. Markel Service, 41 N.Y.S.2d 395, 266 App.Div. 757.

(3) Where claimant's case was not open and pending on effective date of provision of compensation law governing procedure and payment of compensation after previous disallowance of claim, award was reversed and claim remitted.

N.Y.—Fallon v. New York Color & Chemical Co., 295 N.Y.S. 526, 251 App.Div. 769, affirmed 11 N.E.2d 760, 275 N.Y. 573.

17. Colo.—State Compensation Ins. Fund v. Mattivi, 106 P.2d 463, 106 Colo. 461.

Minn.—Romani v. Ancker Hospital, 69 N.W.2d 497, 244 Minn. 185—Kaplan v. Alpha Epsilon Phi Sorority, 42 N.W.2d 342, 230 Minn. 547.

N.C.—Stanley v. Hyman-Michaels Co., 22 S.E.2d 570, 222 N.C. 257.

R.I.—Zielonka v. U. S. Rubber Co., 58 A.2d 627, 74 R.I. 82—Campbell v. Walsh-Kaiser Co., 51 A.2d 530, 72 R.I. 358.

Tenn.—M. B. McMahan Lumber Co. v. Ownby, 232 S.W.2d 12, 191 Tenn. 143.

71 C.J. p 1356 note 45.

18. Ga.—Borden Co. v. Dollar, 100 S.E.2d 607, 96 Ga.App. 489.

Mo.—Fear v. Ebony Paint Mfg. Co., 181 S.W.2d 559, 238 Mo.App. 560.

N.M.—Gonzales v. Sharp & Fellows Contracting Co., 153 P.2d 676, 48 N.M. 528.

Tex.—Texas Emp. Ins. Ass'n v. Mahlow, Civ.App., 304 S.W.2d 161.

19. Colo.—Industrial Commission of Colorado v. Fotis, 149 P.2d 657, 112 Colo. 423.

Ky.—Searcy v. Three Point Coal Co., 134 S.W.2d 228, 280 Ky. 683.

Mo.—Smith v. Smith, 237 S.W.2d 84, 361 Mo. 894.

N.J.—Paluk v. United Color & Pigment Co., 49 A.2d 585, 134 N.J.Law 601.

N.Y.—Agnew v. Montgomery Ward & Co., 116 N.Y.S.2d 724, 280 App.Div. 1008—Sammis v. Queens Borough Gas & Electric Co., 12 N.Y.S.2d 286, 257 App.Div. 58—Petak v. R. H. Macy & Co., 3 N.Y.S.2d 71, 254 App.Div. 617.

20. Mass.—Dillon's Case, 140 N.E.2d 169—Sztella's Case, 130 N.E.2d 573, 333 Mass. 335—Blanco's Case, 33 N.E.2d 313, 308 Mass. 574.

Minn.—Caddy v. R. Maturi & Co., 14 N.W.2d 393, 217 Minn. 207.

N.Y.—Monahan v. Remington Rand, Inc., 161 N.Y.S.2d 167, 3 A.D.2d 876—Goldman v. Bondson Press, 146 N.Y.S.2d 917, 1 A.D.2d 706—MacIntosh v. United Traction Co., 125 N.Y.S.2d 100, 282 App.Div. 909.

Okl.—Morgan v. Cunningham, 288 P.2d 410—Fischbach & Moore of Tex. v. State Indus. Commission, 203 P.2d 422, 201 Okl. 170—Corzine v. Compress, 164 P.2d 625, 196 Okl. 259—James v. M. P. Thomas & Co., 113 P.2d 386, 189 Okl. 52.

21. Colo.—Metros v. Denver Coney Island, 129 P.2d 911, 110 Colo. 40.

Conn.—Altman v. Hill, 129 A.2d 358, 144 Conn. 233—McQuade v. Town of Ashford, 35 A.2d 842, 130 Conn. 478—Kenyon v. Swift Service Corp., 184 A. 643, 121 Conn. 274.

D.C.—Del Vecchio v. Bowers, 67 F.2d 751, 62 App.D.C. 327, certiorari granted 55 S.Ct. 916, 295 U.S. 728, 79 L.Ed. 1679.

Fla.—Coleman v. Burnup & Sims, Inc., 95 So.2d 895.

Ga.—Sweetman v. Hartford Acc. & Indem. Co., 99 S.E.2d 548, 96 Ga. App. 243.

Idaho.—Dyre v. Kloefer & Cahoon, 134 P.2d 610, 64 Idaho 612—In re MacKenzie, 83 P.2d 113, 54 Idaho 481.

Ind.—Carnegie-Illinois Steel Corp. v. Robinson, 58 N.E.2d 937, 115 Ind. App. 299.

sistent,²² based on incompetent evidence,²³ or not supported by the evidence;²⁴ where the evidence is not clear or sufficient²⁵ or does not show the extent

- Ky.—Kentucky Utilities Co. v. Hammons, 116 S.W.2d 298, 273 Ky. 375—Aden Mining Co. v. Hall, 66 S.W.2d 41, 252 Ky. 163.
- Mass.—Berthiaume's Case, 102 N.E.2d 412, 328 Mass. 186—Dillon's Case, 85 N.E.2d 69, 324 Mass. 102—Cradlock's Case, 37 N.E.2d 508, 310 Mass. 116, 146 A.L.R. 116.
- Minn.—Olson v. Griffin Wheel Co., 15 N.W.2d 511, 218 Minn. 42, 156 A.L.R. 1235.
- N.J.—Rojewski v. Pennington Dairy Farms, 192 A. 746, 118 N.J.Law 335—Putton v. American Oil Co., 155 A. 35, 116 N.J.Law 382.
- Putton v. American Oil Co., 181 A. 651, 13 N.J.Misc. 825.
- N.Y.—McCaffrey v. Pelham Manor Police Dept., 160 N.Y.S.2d 359, 3 A.D.2d 772—Zygmunt v. Certain-Ted Products Corp., 53 N.Y.S.2d 771, 269 App.Div. 15.
- N.C.—Thomason v. Red Bird Cab Co., 70 S.E.2d 706, 235 N.C. 602—Cook v. Bemis Lumber Co., 7 S.E.2d 378, 217 N.C. 161—Farmer v. Bemis Lumber Co., 7 S.E.2d 376, 217 N.C. 158.
- Ohio.—Greer v. Industrial Commission of Ohio, App., 46 N.E.2d 679.
- Okl.—Morgan v. Cunningham, 288 P.2d 410—McDuffie v. Nash Neon Sign Co., 215 P.2d 839, 202 Okl. 563—Special Indem. Fund of Okl. v. Hewes, 214 P.2d 240, 202 Okl. 356—Grant & Engle Tubing Co. v. Coplin, 63 P.2d 79, 178 Okl. 426—Evans-Wallower Lead Co. v. Byrd, 51 P.2d 497, 174 Okl. 626—Southwestern Light & Power Co. v. Pittman, 50 P.2d 298, 174 Okl. 296.
- Pa.—Behanna v. Meyers, 44 A.2d 600, 158 Pa.Super. 208—Gavula v. Sims Co., 38 A.2d 482, 155 Pa.Super. 206—Caviston v. Lang, 31 A.2d 566, 152 Pa.Super. 51—Bauman v. Spokas, 23 A.2d 211, 146 Pa.Super. 530—Matkosky v. Midvale Co., 18 A.2d 102, 143 Pa.Super. 197—Query v. Allegheny Pittsburgh Coal Co., 15 A.2d 564, 141 Pa.Super. 517—Beppler v. State Workmen's Insurance Fund, 8 A.2d 727, 137 Pa.Super. 287—Garrahan v. Glen Alden Coal Co., 5 A.2d 437, 135 Pa.Super. 307—Roveran v. Franklinshire Worsted Mills, 183 A. 78, 124 Pa.Super. 119—Ellis v. Jones & Laughlin Steel Co., 169 A. 263, 111 Pa.Super. 252.
- Nixon v. Allegheny Pittsburgh Coal Co., 55 Pa.Dist. & Co. 509—Matthews v. General Steel Castings Corp., 53 Pa.Dist. & Co. 335—Matthews v. General Steel Castings Corp., 53 Pa.Dist. & Co. 331, 32 Del. Co. 358.
- Bohn v. Caloric Stove Corp., Com. Pl., 46 Berks Co. 118—Frank v. State Workmen's Ins. Fund, Com. Pl., 7 Chest.Co. 130—DiMaria v. Superior Bronze Corp., Com.Pl., 38 Erie Co. 59—Schiavone v. Glen Alden Coal Co., Com.Pl., 56 Lack.Jur. 5—Christman v. Allen Commonwealth Bldg. Co., Com.Pl., 20 Leh. L.J. 65, 11 Som.Leg.J. 162—Wiencoski v. Glen Alden Coal Co., Com. Pl., 43 Luz.Leg.Reg. 215—Marcinkewicz v. Glen Alden Coal Co., 37 Luz.Leg.Reg. 369—Gerwell v. Auto Radiator Hospital, Com.Pl., 36 Luz.Leg.Reg. 88—Matelivicz v. Susquehanna Collieries Co., Com.Pl., 34 Luz.Leg.Reg. 147—Rogoskie v. Lehigh Val. Coal Co., Com.Pl., 33 Luz.Leg.Reg. 94—Steremchuk v. Jeddo-Highland Coal Co., Com.Pl., 32 Luz.Leg.Reg. 442—Grigarski v. Glen Alden Coal Co., Com.Pl., 31 Luz.Leg.Reg. 357—In re Workmen's Compensation—Adequacy of Findings of Fact by Board, Com.Pl., 23 West.L.J. 209.
- R.I.—Catoia v. Eastern Concrete Products Co., 124 A.2d 864—Stillwater Worsted Mills v. Mehegan, 98 A.2d 267, 80 R.I. 440—Dorfman v. Rosenthal Ackerman Millinery Co., 13 A.2d 268, 64 R.I. 498.
- S.C.—Frady v. Pacific Mills, 99 S.E.2d 398, 231 S.C. 601—Gray v. Laurens Mill, 99 S.E.2d 36, 231 S.C. 488.
- Tenn.—Spradling v. Bituminous Cas. Corp., 187 S.W.2d 626, 182 Tenn. 443—W. C. Sharp Drug Stores v. Hansard, 144 S.W.2d 777, 176 Tenn. 595.
- Wis.—Wagner v. Industrial Commission, 79 N.W.2d 264, 273 Wis. 553, rehearing denied and mandate amended on other grounds 80 N.W.2d 456, 273 Wis. 553—Schaefer & Co. v. Industrial Commission, 265 N.W. 393, 220 Wis. 384.
- 71 C.J. p 1356 note 47.
- Undisputed testimony**
- Where industrial board made no finding as to certain material issues, appellate court had no authority to find ultimate facts in first instance, even on undisputed testimony, and matter was required to be remanded to industrial board for further findings and entry of award based thereon.
- Ind.—Cole v. Sheehan Const. Co., 53 N.E.2d 172, 222 Ind. 274.
22. Mich.—Jez v. Jackson Bumper Division, Houdaille-Hershey Co., 10 N.W.2d 327, 306 Mich. 111.
- N.C.—Thomason v. Red Bird Cab Co., 70 S.E.2d 706, 235 N.C. 602.
- Pa.—Walsh v. Penn Anthracite Mining Co., 24 A.2d 51, 147 Pa.Super. 328.
- Lenhart v. National Portland Cement Co., Com.Pl., 29 North.Co. 346—Twigger v. West Penn Power Co., Com.Pl., 25 West.L.J. 182.
23. Ky.—Three Rivers Oil Corpora-
- tion v. Harper, 79 S.W.2d 972, 258 Ky. 253.
- Okl.—Mid-Union Drilling Co. v. Graham, 68 P.2d 619, 184 Okl. 514.
24. Ind.—Bass Foundry & Mach. Co. v. Christopoulos, 88 N.E.2d 692, 119 Ind.App. 568.
- Ky.—Kentucky Utilities Co. v. Hammons, 116 S.W.2d 298, 273 Ky. 375.
- Mo.—Morrow v. Orscheln Bros. Truck Lines, 161 S.W.2d 138, 235 Mo.App. 1166—Lamker v. Schiller, App., 136 S.W.2d 371—Carlton v. Henwood, 115 S.W.2d 172, 232 Mo.App. 165—Hartzell v. Sloan, App., 111 S.W.2d 942.
- N.J.—De Marco v. No-Worry Chemical Co., 31 A.2d 185, 130 N.J.Law 40.
- Rivers v. American Radiator & Standard Sanitary Corp., 48 A.2d 311, 24 N.J.Misc. 223.
- Pa.—Solop v. Centralia Collieries Co., 101 A.2d 163, 174 Pa.Super. 606—Cubit v. City of Philadelphia, 10 A.2d 853, 138 Pa.Super. 325—Sandy v. Hazle Brook Coal Co., 10 A.2d 833, 138 Pa.Super. 581—Beals v. State Workmen's Insurance Fund, 200 A. 178, 131 Pa.Super. 418.
- Hummel v. Philadelphia & Reading Coal & Iron Co., Com.Pl., 41 Sch.Leg.Rec. 66—Yasovich v. American Zinc & Chemical Co., Com.Pl., 17 Wash.Co. 188.
- Wis.—Wagner v. Industrial Commission, 80 N.W.2d 456, 273 Wis. 553—Delta Oil Co. v. Industrial Commission, 77 N.W.2d 749, 273 Wis. 285.
25. La.—Benefield v. Zach Brooks Drilling Co., App., 59 So.2d 710—Pelt v. Hilmyer, Deutsch, Edwards, App., 190 So. 151.
- N.Y.—Fleischner v. Imperial Linoleum & Carpet Co., 122 N.Y.S.2d 471, 282 App.Div. 784—Edmonds v. D. Kalfayan & Son, 50 N.Y.S.2d 241, 268 App.Div. 838, appeal denied 51 N.Y.S.2d 748, 268 App.Div. 934—Toomey v. Union Bag & Paper Corp., 44 N.Y.S.2d 660, 266 App.Div. 1046.
- Pa.—Collier v. Kaufmann & Baer Co. (Gimbel's), 43 A.2d 9, 352 Pa. 412.
- Gibson v. Blower's Paint Service, 14 A.2d 154, 140 Pa.Super. 216—Meyers v. Lehigh Valley Transp. Co., 10 A.2d 879, 138 Pa.Super. 569—Yost v. Susquehanna Pipe Line Co., 10 A.2d 863, 138 Pa.Super. 502—Peak v. Pennsylvania R. Co., 184 A. 295, 121 Pa.Super. 373—Komar v. Pennsylvania R. Co., 184 A. 293, 121 Pa.Super. 385.
- Patulonis v. Locust Mountain Coal Co., Com.Pl., 6 Sch.Reg. 364—Halusic v. Ellsworth Colliery Co., Com.Pl., 21 Wash.Co. 97.

of the disability,²⁶ where it appears that certain evidence was overlooked²⁷ or a material issue was not considered,²⁸ where the decision was based on an erroneous finding,²⁹ where the amount or computation of the award is erroneous,³⁰ or where there is a confession of error.³¹

As discussed infra § 789, unless its power is restricted by statute, the reviewing court may enter final judgment and need not remand the case where no facts remain to be developed or determined, but a remand is necessary where the facts have not been fully developed or a matter remains open for determination,³² and it has been held that the court should not make final disposition of the case where

it appears that, through inadvertence or otherwise, the facts have not been fully developed.³³ Where claimant has failed to establish his right to compensation, the case may nevertheless be remanded where it appears probable that on a further hearing he will be able to do so,³⁴ but a remand will not be ordered where it does not appear that claimant has additional evidence to offer.³⁵ On the other hand, it has been held error to remand a case to give claimant who failed to prove his case another opportunity to do so,³⁶ and the case should not be remanded to give the employer or insurer another opportunity to present evidence which should have been presented at the original hearing.³⁷ Where a judgment

Disagreement of medical experts

(1) Where determination of paramount issue in compensation case depended on testimony of physicians with respect to hernia, and physicians were numerically equally divided in opinion as to whether claimant had a hernia, and there was a paucity of lay testimony, court of appeal was justified in declining to adjudicate issue on employer's appeal and would set aside judgment for claimant and remand case for further proceedings.

La.—Mason v. Southern Kraft Corp., App., 6 So.2d 757.

(2) In suit by employee to recover compensation the mere fact that medical experts were equally divided in their opinion as to nature and extent of injuries is not a sufficient reason for remanding case unless other evidence makes it impossible for the court to arrive at a proper decision.

La.—Miller v. W. Horace Williams Co., App., 8 So.2d 734.

26. Mo.—Smith v. National Lead Co., App., 228 S.W.2d 407.

Neb.—Schmidt v. City of Lincoln, 290 N.W. 250, 137 Neb. 546—Steward v. Deuel County, 289 N.W. 877, 137 Neb. 516.

Okl.—A. K. Spalding Const. Co. v. Walden, 268 P.2d 247.

27. N.Y.—Bogart v. Shepard Niles Crane & Hoist Corp., 6 N.Y.S.2d 1016, 255 App.Div. 170.

Imboden v. Union Premier Stores, Com.Pl., 53 Dauph. Co. 257.

28. Me.—Drouin v. Ellis C. Snodgrass Co., 23 A.2d 631, 138 Me. 145.

29. N.Y.—Love v. Thatcher Mfg. Co., 296 N.Y.S. 328, 251 App.Div. 47, appeal dismissed 11 N.E.2d 735, 275 N.Y. 533.

30. Conn.—LaRosa v. Liebman, 27 A.2d 385, 129 Conn. 234.

Ky.—Stumbo & Vance Coal Co. v. Tackett, 300 S.W.2d 232.

Okl.—J. B. Klein Iron & Foundry Co. v. State Industrial Commission, 93 P.2d 751, 185 Okl. 424—Briscoe

Const. Co. v. Miller, 85 P.2d 420, 184 Okl. 136—Sheffield Steel Corp. v. Barton, 84 P.2d 17, 183 Okl. 624.

31. Okl.—Special Indem. Fund v. Dole, 223 P.2d 1086, 203 Okl. 550—McQueen & Johnson v. Morgan, 111 P.2d 1079, 188 Okl. 574—Block v. Williams, 42 P.2d 342, 171 Okl. 171—Utley v. Phelan, 33 P.2d 498, 168 Okl. 411—Devonian Oil Co. v. Wilson, 31 P.2d 582, 167 Okl. 625—Silverman v. McMartin, 30 P.2d 155, 167 Okl. 417.

71 C.J. p 1357 note 56.

Where both parties are asking for modification, remand is proper.

La.—Horn v. Louisiana Highway Commission, 135 So. 711, 17 La.App. 238.

Suggestion of remand

Suggestion of the employees' compensation commission that proceeding to set aside commission's order be remanded to deputy commissioner for further hearing did not authorize court to remand case.

U.S.—McDonough v. Monahan, D.C. Me., 30 F.Supp. 315.

32. Conn.—Dinck v. Gellatly Const. Co., 45 A.2d 585, 132 Conn. 478—Bourget v. Overhead Door Co., 183 A. 381, 121 Conn. 127.

Ga.—American Mut. Liability Ins. Co. v. Sims, 8 S.E.2d 408, 62 Ga. App. 424—Bituminous Casualty Co. v. Dyer, 7 S.E.2d 415, 62 Ga.App. 279.

Ky.—Brewer v. Millich, 276 S.W.2d 12.

Mich.—Nevels v. Walbridge Aldinger Co., 270 N.W. 272, 278 Mich. 214.

Okl.—Special Indem. Fund v. Bramlett, 206 P.2d 972, 201 Okl. 415.

Pa.—Stohan v. Rockhill Coal Co., 14 A.2d 229, 140 Pa.Super. 146—Hein v. Ludwig, 179 A. 917, 118 Pa. Super. 152.

Kost v. Sterling Coal Co., Com. Pl., 18 Cambria 29.

S.D.—Salmon v. Denhart Elevators, 30 N.W.2d 644, 72 S.D. 110, opinion adhered to 33 N.W.2d 167, 72 S.D. 263.

Tex.—Texas Emp. Ins. Ass'n v. Arabia, Civ.App., 277 S.W.2d 267—Great Am. Indem. Co. v. Kingsbery, Civ.App., 201 S.W.2d 611, error refused no reversible error—Fidelity & Casualty Co. of New York v. Cogdill, Civ.App., 164 S.W.2d 217, error refused.

Va.—Winston v. City of Richmond, 83 S.E.2d 728, 196 Va. 403.

W.Va.—Miles v. State Compensation Com'r, 67 S.E.2d 34, 136 W.Va. 183.

33. Conn.—Steedley v. General Elec. Co., 86 A.2d 179, 138 Conn. 482—Tsoukalas v. Bolton Mfg. Co., 37 A.2d 357, 130 Conn. 658—Herbst v. Hat Corp. of America, 31 A.2d 329, 130 Conn. 1—France v. Munson, 192 A. 706, 123 Conn. 102—Kenyon v. Swift Service Corp., 184 A. 643, 121 Conn. 274—Bourget v. Overhead Door Co., 183 A. 381, 121 Conn. 127.

Delay in claiming error

Where claimant, asserting a neurotic condition causing total incapacity, and the absence of suitable work, failed to file a motion to correct the finding of the commissioner, who made an award for twenty per cent disability, the case would not be remanded for the filing of such a motion, after a lapse of five years.

Conn.—Guerrera v. W. J. Megin, Inc., 34 A.2d 873, 130 Conn. 423.

34. Conn.—Tsoukalas v. Bolton Mfg. Co., 37 A.2d 357, 130 Conn. 658—Kearns v. City of Torrington, 177 A. 725, 119 Conn. 522—Glodenis v. American Brass Co., 170 A. 146, 118 Conn. 29.

Pa.—Griffin v. National Mining Co., 193 A. 447, 127 Pa.Super. 588—Satonik v. Jeddo Highland Coal Co., 193 A. 445, 127 Pa.Super. 584.

35. Pa.—Easton v. Elk Tanning Co., 195 A. 648, 129 Pa.Super. 535—McGrath v. Herzog, 190 A. 550, 126 Pa.Super. 229.

36. Ill.—Grollemond v. Industrial Commission, 126 N.E.2d 211, 5 Ill. 2d 541.

37. Pa.—McDermott v. Sun Indem-

for plaintiff is erroneous for failure to prove a material matter he is not entitled to a remand so as to provide him with further opportunity to produce proof.³³ Where there is no evidence before the reviewing court and it appears that the judgment below was entered inadvertently, the court will remand instead of rendering judgment.³⁹

On appeal from a dismissal of a claim for compensation for lack of jurisdiction the court must, on reversal, remand for rehearing on the merits of the claim and cannot itself make an award.⁴⁰ Where claimant has been denied compensation on the ground that he is not entitled to participate in a state fund, and on appeal it appears that he has a right to participate, the cause must be remanded for determination of the amount of compensation.⁴¹ Where in proceedings under the statute the parties are entitled to a complete and final disposition of the cause, failure to determine the nature and extent of the disability, if any, necessitates remanding the cause.⁴² Where a claim was not made in time, and no excuse was pleaded, but the evidence showed incapacity which would excuse, the cause should be remanded rather than dismissed.⁴³ Where, however, the insufficiency of the excuse offered by

claimant is shown by his own testimony the cause will not be remanded.⁴⁴

Where no relevant evidence has been produced to sustain the findings of the board, it is not necessary, on reversing the award, to remand the cause,⁴⁵ but it has been held that where the evidence relied on for proof of a material matter lacks legal competency, on reversal of the decision the cause must be remanded for further hearing.⁴⁶ Remand for further findings is unnecessary where the reversal is on a question of law.⁴⁷

The power to remand rests in the discretion of the court⁴⁸ and should be exercised whenever the ends of justice require such action.⁴⁹ The exercise of the power depends on the particular circumstances.⁵⁰ A remand will not be ordered where it is not necessary or will not serve the interests of justice,⁵¹ or where a remand would be useless or futile.⁵² A case will not be remanded for the finding of subsidiary facts where the evidence would not warrant a finding contrary to the general finding of the compensation authorities,⁵³ or where the result would not be affected⁵⁴ or where there is no other or additional evidence to be presented.⁵⁵ The court will not remand for a finding as to an imma-

nity Co. of New York, 198 A. 499, 131 Pa.Super. 60.

33. Kan.—Odrowski v. Swift & Co., 162 P. 268, 99 Kan. 163, 631.

39. Ala.—Ex parte U. S. Cast Iron Pipe & Foundry Co., 99 So. 912, 211 Ala. 159.

40. N.J.—Jayson v. Pennsylvania R. Co., 127 A. 169, 101 N.J.Law 159. 71 C.J. p 1357 note 58.

41. N.D.—Light v. North Dakota Workmen's Compensation Bureau, 222 N.W. 952, 57 N.D. 487.

42. Neb.—G. A. Steinheimer Co. v. Podkovich, 241 N.W. 287, 122 Neb. 710.

43. Tex.—Georgia Casualty Co. v. Ward, Civ.App., 221 S.W. 298.

44. Tex.—Petroleum Casualty Co. v. Fulton, Civ.App., 63 S.W.2d 1068.

45. Pa.—Vorbhoff v. Mesta Mach. Co., 133 A. 256, 286 Pa. 199.

46. Pa.—Kocher v. Kocher Estate, 150 A. 468, 300 Pa. 206. 71 C.J. p 1357 note 69.

47. Pa.—Anderson v. Baxter, 132 A. 358, 255 Pa. 443. Berlin v. Crawford, 86 Pa.Super. 283.

48. N.C.—Tindall v. American Furniture Co., 4 S.E.2d 894, 216 N.C. 306.

Wis.—Schaefer & Co. v. Industrial Commission, 265 N.W. 393, 220 Wis. 334.

49. La.—McClung v. Delta Shipbuilding Co., App., 33 So.2d 438, rehearing refused 34 So.2d 70.

Discretion held not abused by denial of remand. N.C.—Tindall v. American Furniture Co., 4 S.E.2d 894, 216 N.C. 306.

50. N.J.—Calicchio v. Jersey City Stock Yards Co., 14 A.2d 465, 125 N.J.Law 112.

51. Conn.—Rossi v. Thomas F. Jackson Co., 181 A. 539, 120 Conn. 456.

La.—Huderston v. American Mut. Liability Co., App., 14 So.2d 489—Wiley v. Frost Lumber Industries, App., 11 So.2d 285—Mickley v. T. J. Moss Tie Co., App., 139 So. 331—Hennen v. Louisiana Highway Commission, App., 178 So. 654—Wood v. Peoples Homestead & Savings Ass'n, App., 177 So. 466—Reynolds v. Forcum-James Co., App., 158 So. 606—Doby v. Canulette Shipbuilding Co., App., 156 So. 51.

N.J.—Lilly v. Todd, 83 A.2d 21, 15 N.J.Super. 1.

N.Y.—Berrafato v. Grinnell Co., 152 N.Y.S.2d 503, 2 A.D.2d 722.

Okl.—Bareco Oil Co. v. Green, 154 P. 2d 72, 194 Okl. 580.

Pa.—Gruber v. La Russe, Co., 95 Pittsb.Leg.J. 361—Baumeister v. Pittsburgh Parking Garages, Com. Pl., 91 Pittsb.Leg.J. 51.

Wis.—State v. Industrial Commission, 76 N.W.2d 362, 272 Wis. 409.

52. Conn.—Mages v. Alfred Brown, Inc., 193 A. 780, 123 Conn. 188.

N.J.—Miceli v. Erie R. Co., 33 A.2d 586, 130 N.J.Law 448, affirmed 37 A.2d 123, 131 N.J.Law 427.

Pa.—Heinrich v. Charles W. Young & Co., 43 Pa.Dist. & Co. 269.

McLaughlin v. Baldwin Locomotive Works, Com.Pl., 35 Del.Co. 246.

Wis.—Liberty Foundry v. Industrial Commission, 288 N.W. 752, 233 Wis. 177.

53. Mass.—Roney's Case, 56 N.E.2d 859, 316 Mass. 732.

Pa.—Bele v. Pittsburgh Terminal Coal Corp., 21 A.2d 450, 146 Pa. Super. 65.

Dependency

Where the evidence would not warrant a finding contrary to the general finding of the reviewing board that compensation claimant was not a "dependent" of deceased employee, case would not be remanded to the reviewing board for the finding of subsidiary facts.

Mass.—Roney's Case, 56 N.E.2d 859, 316 Mass. 732.

54. Mo.—Stamps v. Century Elec. Co., App., 225 S.W.2d 493.

Pa.—Bonzani v. Hillman Coal & Coke Co., 28 A.2d 329, 150 Pa.Super. 356—James v. Shapiro, 5 A.2d 815, 135 Pa.Super. 550.

55. Pa.—Stevens v. Taylor, 10 A.2d 886, 138 Pa.Super. 335.

terial matter,⁵⁶ nor will it remand because of a failure to make a finding where the evidence as to the issue is undisputed or conclusive.⁵⁷ A remand should not be ordered for the taking of testimony which is essentially cumulative.⁵⁸ The court should not remand the case for the taking of additional evidence with respect to a theory advanced for the first time on appeal.⁵⁹

Where the evidence is sufficient the cause will not be remanded for further evidence,⁶⁰ nor will it be remanded for further findings where the finding, although insufficient, is right under the evidence⁶¹ or the evidence can be regarded as a finding of fact.⁶² Where the decision is correct, the case will not be remanded for more detailed findings.⁶³

The cause need not be remanded for a purely technical reason.⁶⁴ Where an improper provision for interest is separable from an award, it may be annulled without remand, and the award otherwise affirmed.⁶⁵ An act providing for review after the lapse of a year on the ground of change in the employee's condition does not authorize a remand for the purpose of obtaining proof of change since the trial.⁶⁶ Under a provision for modification of a compensation judgment or for review at any time after one year, a compensation case will not be remanded

for the taking of testimony as to an alleged increase in plaintiff's wage-earning capacity since the trial, where the year has almost expired, as this would deprive judgments of all stability or value.⁶⁷ Where the rights of the parties are unaffected by the failure of a commissioner to make another a party to the proceeding, the cause need not be remanded.⁶⁸ Where findings of a referee are too meager, and the commission, while it should not have done so in the particular case, made additional findings, the correctness of which is conceded, the court need not remand the cause.⁶⁹ Where there is evidence to support the findings of the board, and additional evidence on appeal strengthens the board's decision, the case should not be remanded for further hearing.⁷⁰

Where an award is reversed and remanded, the cause stands as if the award had not been made.⁷¹ Where the court remands to the compensation authorities for more specific findings, the case is still pending in the court,⁷² but a general remand terminates the jurisdiction of the court.⁷³ The court will not consider issues as to which the case is to be remanded for the taking of further testimony.⁷⁴

Instructions on remand. Subject to such limitations as may exist on its jurisdiction and power, the

58. La.—Washington v. Atlantic & Gulf Stevedores, Inc., App., 84 So. 2d 745.

Mo.—Fuytinck v. Burton W. Duenke Bldg. Co., App., 280 S.W.2d 449.

N.C.—Rankin v. Brown Mfg. Co., 193 S.E. 389, 212 N.C. 357.

57. Mo.—May v. Ozark Central Tel. Co., App., 272 S.W.2d 845.

58. La.—Teekell v. Travelers Ins. Co., App., 83 So.2d 536—Hickman v. Neeb Kearney & Co., App., 78 So.2d 234—Wallace v. Aetna Cas. & Sur. Co., App., 68 So.2d 685—Davis v. Swift & Co., App., 68 So. 2d 670—Johnson v. Brown Paper Mill Co., App., 35 So.2d 774.

Mass.—Rasso's Case, 85 N.E.2d 332, 324 Mass. 190.

59. N.J.—Huber v. New England Tree Expert Co., 61 A.2d 59, 137 N.J.Law 549, affirmed 65 A.2d 514, 2 N.J. 53.

60. Ga.—Thompson-Weinman Co. v. Yancey, 82 S.E.2d 725, 90 Ga.App. 213—Automatic Sprinkler Corp. of America v. Rucker, 73 S.E.2d 609, 87 Ga.App. 375.

La.—Godeaux v. Travelers Ins. Co., App., 58 So.2d 427—Pelt v. Hillyer, Deutsch, Edwards, App., 190 So. 151.

N.C.—Blevins v. Teer, 16 S.E.2d 659, 220 N.C. 135.

Wis.—Gallenberg v. Industrial Commission, 68 N.W.2d 550, 269 Wis. 40. 71 C.J. p 1357 note 64.

61. Colo.—Picardi v. Industrial Commission of Colorado, 199 P. 420, 70 Colo. 266.

62. Colo.—Winteroth v. Industrial Commission of Colorado, 22 P.2d 865, 93 Colo. 38. 71 C.J. p 1357 note 66.

63. Colo.—Bransall v. Industrial Commission, 251 P.2d 935, 126 Colo. 556.

64. Mich.—Suggs v. Ternstedt Mfg. Co., 206 N.W. 490, 232 Mich. 599. 71 C.J. p 1357 note 67.

65. Cal.—United Dredging Co. v. Industrial Accident Commission, 267 P. 763, 92 C.A. 110.

66. La.—Lasyone v. Grant Timber & Manufacturing Co. of Louisiana, 2 La.App. 522.

67. La.—Daniels v. Shreveport Production & Refining Corporation, 92 So. 341, 151 La. 800. 71 C.J. p 1358 note 74.

68. U.S.—Houston Ship Channel Stevedoring Co. v. Sheppard, D.C. Tex., 57 F.2d 259.

69. Pa.—Gurski v. Susquehanna Coal Co., 104 A. 801, 262 Pa. 1.

70. Mont.—Radonich v. Anaconda Copper Mining Co., 8 P.2d 658, 91 Mont. 437.

71. Ill.—Western Shade Cloth Co. v. Industrial Commission, 156 N.E. 796, 325 Ill. 570.

72. Pa.—Costello v. Schumacher, 173 A. 732, 114 Pa.Super. 296—Ellis v. Jones & Laughlin Steel Co., 169 A. 263, 111 Pa.Super. 252.

Matthews v. General Steel Castings Co., Com.Pl., 34 Del.Co. 79—Rosenberger v. Mar-Bern Coal Co., Com.Pl., 9 Sch.Reg. 298.

New appeal not required

Where the workmen's compensation board has found that disability ceased on a certain date and, claimant having appealed, the court concludes that the evidence is insufficient to support such a finding and remits the record to the board for the purpose of determining the correct date, and the board reviews the evidence and fixes a new termination date, the record should thereupon be returned to the court, which retains jurisdiction based on claimant's original exceptions; claimant is not required to take another appeal from the second finding.

Pa.—Capriotti v. Philadelphia Inquirer Co., 48 Pa.Dist. & Co. 271, affirmed 40 A.2d 880, 156 Pa.Super. 509.

Matthews v. General Steel Castings Co., Com.Pl., 34 Del.Co. 79.

73. Pa.—Matthews v. General Steel Castings Co., supra.

74. Mich.—Wing v. Clark Equipment Co., 282 N.W. 170, 286 Mich. 343.

reviewing court may remand a compensation case with instructions,⁷⁵ such as that the parties be permitted to present additional evidence,⁷⁶ that particular evidence be received⁷⁷ that a particular finding be corrected,⁷⁸ that findings be made as to a particular matter,⁷⁹ that the award be properly computed,⁸⁰ or that costs be allowed.⁸¹

The court may, when it remands a cause to the board for further proceedings, state the questions requiring a further hearing⁸² and give such other instructions as may be proper,⁸³ such as ordering the commission to proceed in accordance with the findings of the court,⁸⁴ or directing reopening, where refusal to reopen is fraudulent or an abuse of discretion,⁸⁵ or directing that proper notice be given of the review by the board or commission.⁸⁶ Where the commission has failed properly to apply the law

to the facts found, the reviewing court should do so, remanding the case with directions for the entry of a proper judgment.⁸⁷

Where, on review, the court remands the cause to the board or commission for further proceedings, it has been held essential that proper instructions be given the board or commission,⁸⁸ but, in the absence of any statutory requirement, the mandate must be regulated by the facts and circumstances of the particular case.⁸⁹ A judgment recommitting the case and citing the reasons for the judgment has been held to indicate sufficiently the matters for determination.⁹⁰

While there is authority that the reviewing court may not direct the commission to award compensation,⁹¹ it has been held that on the reversal of a

75. U.S.—Hillcone S. S. Co. v. Stefan, C.C.A.Cal., 136 F.2d 965.
 Colo.—O. P. Skaggs Co. v. Nixon, 50 P.2d 55, 97 Colo. 314.
 Conn.—France v. Munson, 192 A. 706, 123 Conn. 102.
 Ind.—Continental Roll & Steel Foundry Co. v. Slocum, 41 N.E.2d 635, 111 Ind.App. 438.
 Mich.—Willard v. Globe Housewrecking Co., 292 N.W. 558, 294 Mich. 42.
 Mo.—Wills v. Berberich's Delivery Co., 98 S.W.2d 569, 339 Mo. 856.
 Caldwell v. Melbourne Hotel Co., App., 116 S.W.2d 232, opinion quashed on other grounds State ex rel. Melbourne Hotel Co. v. Hostetter, 126 S.W.2d 1189, 344 Mo. 472.
 N.H.—Vallee v. Spaulding Fibre Co., 197 A. 697, 89 N.H. 285, rehearing denied 199 A. 894, 89 N.H. 558.
 Okl.—Commander Mills v. Stanstill, 89 P.2d 60, 180 Okl. 202.
 Or.—Vader v. State Industrial Accident Commission, 98 P.2d 714, 163 Or. 492.
 Pa.—Strait v. Gulf Oil Co., 14 A.2d 168, 140 Pa.Super. 464.
 Mazzaccaro v. Jermy-Green Coal Co., Com.Pl., 45 Lack.Jur. 18, affirmed 36 A.2d 828, 154 Pa.Super. 618—Goe v. American Window Glass Co., Com.Pl., 88 Pittsb.Leg.J. 183.
 S.C.—Dameron v. Spartan Mills, 44 S. E.2d 465, 211 S.C. 217.

Remand for further proceedings

- In decision setting aside industrial commission's decision under workmen's compensation act on review thereof by certiorari, circuit court may state questions requiring further hearing and give other proper instructions, but the only remanding order authorized by statute is remand for further proceedings.
 Ill.—Thompson v. Industrial Commission, 37 N.E.2d 350, 377 Ill. 587.
 76. Pa.—Bogan v. Smoothway Const. Co., 136 A.2d 207, 183 Pa.Super. 170.

77. La.—Beard v. Coal Operators Cas. Co., App., 61 So.2d 255.
 Mo.—Smith v. Smith, 237 S.W.2d 84, 361 Mo. 894.
 78. Mich.—Willard v. Globe Housewrecking Co., 292 N.W. 558, 294 Mich. 42.
 79. Colo.—Industrial Commission v. Dorchak, 47 P.2d 396, 97 Colo. 142.
 Idaho.—Clayton v. Hercules Mining Co., 119 P.2d 890, 63 Idaho 301—Smith v. Mercy Hospital, 95 P.2d 580, 60 Idaho 674.
 Ind.—Guevara v. Inland Steel Co., 88 N.E.2d 398, 120 Ind.App. 47, transfer denied, 90 N.E.2d 347, 228 Ind. 135.
 Mass.—Whittaker's Case, 66 N.E.2d 785, 319 Mass. 582—Evans' Case, 13 N.E.2d 27, 299 Mass. 435.
 Mich.—Zelinkas v. Ford Motor Co., 293 N.W. 732, 294 Mich. 494.
 N.J.—Gilligan v. International Paper Co., 122 A.2d 888, 21 N.J. 557.
 N.C.—Stanley v. Hyman-Michaels Co., 22 S.E.2d 570, 222 N.C. 257.
 Pa.—Icenhour v. Freedom Oil Works Co., 7 A.2d 152, 136 Pa.Super. 318.
 Lenhart v. National Portland Cement Co., Com.Pl., 29 North.Co. 346.
 R.I.—Di Robbio v. Firesafe Builders Products Corp., 60 A.2d 724, 74 R.I. 337.
 S.D.—McFarling v. Rierson's, Inc., 291 N.W. 574, 67 S.D. 191.
 Vt.—Wilkins v. Blanchard-McDonald Lumber Co., 52 A.2d 781, 115 Vt. 89.
 80. Fla.—Dennis v. Brown, 93 So.2d 584.
 Idaho.—Goasland v. City of Pocatello, 102 P.2d 650, 61 Idaho 435.
 Ind.—Short v. Kerr, 9 N.E.2d 114, 104 Ind.App. 118.
 Kan.—Vera v. Swift & Co., 56 P.2d 96, 143 Kan. 593.
 Okl.—Special Indem. Fund v. Goad, 281 P.2d 179.

Final order

- Where the court remands with directions to ascertain the amount of compensation to which claimant is entitled, such order is final.
 Ill.—Porter v. Industrial Commission, 186 N.E. 110, 352 Ill. 392.
 81. S.D.—Millage v. Canton Twp., 38 N.W.2d 755, 73 S.D. 26.
 82. Ga.—Kell v. Bridges, 48 S.E.2d 780, 77 Ga.App. 424.
 Ill.—Porter v. Industrial Commission, 186 N.E. 110, 352 Ill. 392.
 83. Ill.—Porter v. Industrial Commission, supra.
 84. Conn.—Santos v. Publix Theatre Corporation, 142 A. 745, 108 Conn. 159.
 Wash.—Bryant v. Department of Labor and Industries, 22 P.2d 667, 173 Wash. 240.
 85. Colo.—Industrial Commission of Colorado v. Lockard, 9 P.2d 286, 90 Colo. 333.
 86. Colo.—Industrial Commission of Colorado v. Nissen's Estate, 267 P. 791, 84 Colo. 19.
 71 C.J. p 1358 note 93.
 87. Wis.—Employers' Mut. Liability Ins. Co. v. McCormick, 217 N.W. 738, 195 Wis. 410.
 88. Ga.—Austin Bros. Bridge Co. v. Whitmire, 121 S.E. 345, 31 Ga.App. 560.
 89. Ind.—Inland Steel Co. v. Lambert, 118 N.E. 162, 66 Ind.App. 246.
 90. Ga.—Maryland Casualty Co. v. Bartlett, 142 S.E. 189, 37 Ga.App. 777.
 91. Ind.—Heffin v. Red Front Cash & Carry Stores, 75 N.E.2d 662, 225 Ind. 517.
 Gary Railways v. Garling, 88 N. E.2d 571, 120 Ind.App. 36.
 Mo.—Williams v. Laclede-Christy Clay Products Co., App., 227 S.W. 2d 507.
 71 C.J. p 1358 note 97.

denial of compensation the court may direct that an award be made,⁹² although it may not go further and direct what the award should be.⁹³ However, where the facts are not in dispute and only questions of law are involved, the court may remand with directions as to the award to be entered.⁹⁴ Where the evidence does not require a finding by the board that the accident arose out of, and in the course of, the employment, a remand with instruction to enter an award is improper.⁹⁵

Although the court may remand with directions that a finding be made on an issue, it may not instruct as to what the finding shall be,⁹⁶ unless the evidence is undisputed.⁹⁷ Where the court is authorized to determine the facts de novo, it may not remand to the compensation authorities for findings in accordance with the views of the court.⁹⁸

The court may not order the compensation authorities to enter an award against one not a party to the proceedings.⁹⁹ The board should not be ordered to consider a matter which it has already properly considered.¹

The court may, on remand, on reversing an order of the board or commission, order payment of compensation subsequent to the date of the order appealed from.² Where an appeal from a referee's order suspending payments of compensation until claimant submitted to medical examination was set aside, on remand the order should provide that pay-

ments continue until the employer petitions the board for an order directing claimant to submit to such examination.³

Mistrial. Where an award is invalid because the commission disregarded a fundamental requisite of law the award cannot be reviewed,⁴ but under a statute giving the appellate court original jurisdiction it may on review declare a mistrial and remand the cause to the commission.⁵

Motions to remand must be presented to the proper court having the power to remand,⁶ and a motion to recommit with direction to enter an award should be in writing.⁷ The motion need not be supported by affidavit.⁸ Remand will be denied where the motion for such relief is not timely made⁹ or where the showing in support of the motion is insufficient.¹⁰ Where a suit for compensation was dismissed because brought too late, a motion to remand because a prior suit was instituted, interrupting the operation of the statute, will not be granted where no showing is made in support of the averment in the motion and there is nothing in the record to support such action by the court.¹¹ An application for a change in the award because of changed conditions should be made in the lower court and not by way of a motion for remand.¹²

Notice. Where the appellate court remands for further hearing, failure to give the employer notice of such disposition is immaterial where he appears

92. U.S.—Furlong v. O'Hearne, D.C. Md., 144 F.Supp. 266, affirmed, C.A., 240 F.2d 958.

Colo.—Industrial Commission of Colorado v. Di Nardi, 87 P.2d 494, 103 Colo. 591—Industrial Commission of Colorado v. Wetz, 66 P.2d 812, 100 Colo. 161.

Ga.—Thompson-Weinman Co. v. Yancey, 82 S.E.2d 725, 90 Ga.App. 213. Idaho.—Fields v. Buffalo-Idaho Mining Co., 40 P.2d 114, 55 Idaho 212.

93. Ky.—Columbus Min. Co. v. Pelfrey, 237 S.W.2d 847—Ajax Coal Co. v. Stanfill, 236 S.W.2d 880, 314 Ky. 628—Joseph W. Greathouse Co. v. Yenowine, 193 S.W.2d 758, 302 Ky. 159—Black Motor Co. v. Spicer, 160 S.W.2d 336, 290 Ky. 111.

94. Ind.—City of Fort Wayne v. Hazlett, 23 N.E.2d 610, 107 Ind.App. 184.

95. Ga.—U. S. Casualty Co. v. Hen-son, 158 S.E. 614, 43 Ga.App. 198.

96. Mo.—Horrell v. Chase Hotel, App., 174 S.W.2d 881.

N.Y.—Volinsky v. Reliable Waste & Rag Co., 52 N.E.2d 107, 291 N.Y. 224.

Pa.—Fronko v. U. S. Sanitary Mfg. Co., 39 A.2d 363, 155 Pa.Super. 636

—Niemi v. Asplundh Tree Expert Co., 36 A.2d 851, 154 Pa.Super. 600

—Roberts v. John Wanamaker, Philadelphia, 30 A.2d 189, 151 Pa. Super. 297—Wellinger v. Borough of Brackenridge, 27 A.2d 716, 149 Pa.Super. 394—Gondak v. Wilson Gas Coal Co., 25 A.2d 854, 148 Pa. Super. 566.

97. Minn.—Kennedy v. Thompson Lumber Co., 26 N.W.2d 459, 223 Minn. 277.

Okl.—Brooks v. A. A. Davis & Co., 254 P. 66, 124 Okl. 140.

98. N.J.—Dobrowolski v. Glowacki, 54 A.2d 758, 136 N.J.Law 167.

99. Okl.—Gilbreath v. Killoren Elec. Co., 229 P.2d 570, 204 Okl. 347.

1. Mass.—Lopes' Case, 179 N.E. 343, 277 Mass. 581—Sciola's Case, 128 N.E. 666, 236 Mass. 407.

Utah.—Stanley v. Industrial Commission, 8 P.2d 770, 79 Utah 228.

2. Or.—West v. State Industrial Accident Commission, 237 P. 980, 115 Or. 404.

3. Pa.—Gabersek v. Hillman Coal & Coke Co., 162 A. 503, 107 Pa.Super. 1.

4. Okl.—Illinois Oil Co. v. Grand-staff, 246 P. 832, 118 Okl. 101.

5. Okl.—Illinois Oil Co. v. Grand-staff, supra.

6. Mass.—Johnson's Case, 136 N.E. 563, 242 Mass. 489.

7. Conn.—Blanton v. Wheeler & Howes Co., 99 A. 494, 91 Conn. 226, Ann.Cas.1918B 747.

8. Mass.—Nagle's Case, 37 N.E.2d 474, 310 Mass. 193.

9. Mass.—Kumar's Case, 199 N.E. 918, 293 Mass. 405.

10. La.—Jones v. International Paper Co., App., 11 So.2d 555—Richardson v. Southern Kraft Corporation, App., 5 So.2d 24.

Uncontested affidavit

A motion to recommit compensation proceedings to reviewing board supported by affidavit which was not agreed to be true, although affidavit was undisputed, was properly denied, since court was not bound to believe facts stated in affidavit but might utterly discredit them.

Mass.—Wozniak's Case, 13 N.E.2d 297, 299 Mass. 471.

11. La.—Boykins v. Hartford Accident & Indemnity Co., App., 149 So. 889.

12. N.M.—Norvell v. Barnsdall Oil Co., 70 P.2d 150, 41 N.M. 431.

at the hearing under the order and introduces evidence.¹³

§ 789. Judgment or Decree

Under the practice in some jurisdictions, the court reviewing a compensation order or award may enter a final judgment.

In some jurisdictions the reviewing courts may, on appeal from decisions of the board or commission, render final judgment¹⁴ and issue execution.¹⁵ In other jurisdictions the reviewing court may, where it does not modify, reverse, remand, or set aside a decision of the board or commission, render judgment in accordance with it,¹⁶ but on reversal, modification, or setting aside of the decision it must remand, having no power in such a case to enter a judgment.¹⁷ Where the compensation act requires, as a prerequisite to the issuance of writ of

certiorari, a bond by the employer conditioned on payment of the award and costs, the reviewing court cannot enter a money judgment and order execution to issue thereon,¹⁸ but may only confirm or set aside the award and enter a decision justified by law, or remand for further proceedings.¹⁹

Unless its power to do so is restricted by statute, the court may enter final judgment and need not remand the case where no facts remain to be determined or developed.²⁰ Thus, where the only questions involved are questions of law, and a determination of them finally disposes of the case, the court should enter judgment.²¹ However, as discussed supra § 788, a remand is ordinarily necessary where questions of fact remain to be determined. Where the court on appeal hears additional testimony, it may grant an award without re-submitting the case to the compensation board.²²

13. Ill.—Belleville Brick & Tile Co. v. Industrial Commission, 137 N.E. 401, 305 Ill. 577.

14. Mass.—Rocha's Case, 14 N.E.2d 133, 300 Mass. 121.
71 C.J. p 1359 note 5.

When judgment becomes final

Provision of workmen's compensation act that a compensation order shall become effective when filed in office of commission and unless reversed or modified on appeal shall become final at expiration of thirty days thereafter means that a certified copy of compensation order as affirmed, modified, or reversed by circuit court shall be filed in office of industrial commission and shall become final unless reversed or modified by supreme court on an appeal taken within thirty days after entry of judgment of circuit court.

Fla.—Foster v. Cooper, 194 So. 331, 142 Fla. 148.

15. Tex.—Lumbermen's Reciprocal Ass'n v. Warner, Civ.App., 231 S.W. 545, affirmed Com.App., 245 S.W. 664.

16. Mo.—State v. Missouri Workmen's Compensation Commission, 8 S.W.2d 897, 320 Mo. 893.

Howes v. Stark Bros. Nurseries & Orchards Co., 22 S.W.2d 839, 223 Mo.App. 793.

17. Mo.—Burgstrand v. Crowe Coal Co., 62 S.W.2d 406, 333 Mo. 43.
71 C.J. p 1359 note 8.

18. Ill.—J. E. Crowder Seed Co. v. Industrial Commission, 179 N.E. 518, 347 Ill. 86.
71 C.J. p 1360 note 9.

19. Ill.—National Malleable Castings Co. v. Industrial Commission, 137 N.E. 520, 306 Ill. 146.
71 C.J. p 1360 note 10.

20. U.S.—Doty v. Travelers Ins. Co., D.C.Tex., 31 F.Supp. 186.

Colo.—Zelle v. Industrial Commission of Colorado, 65 P.2d 1429, 100 Colo. 116.

Conn.—Tsoukalas v. Bolton Mfg. Co., 37 A.2d 357, 130 Conn. 658.

D.C.—Weeks v. Behrend, 135 F.2d 258, 77 U.S.App.D.C. 341.

Fla.—Sweat v. Allen, 200 So. 348, 145 Fla. 733.

Ga.—Georgia Ins. Service v. Lord, 62 S.E.2d 402, 83 Ga.App. 28—Glens Falls Indem. Co. v. Clark, 43 S.E. 2d 752, 75 Ga.App. 453.

Idaho.—Fields v. Buffalo-Idaho Mining Co., 40 P.2d 114, 55 Idaho 212.

Ky.—Kenmont Coal Co. v. Clark, 171 S.W.2d 242, 294 Ky. 226.

La.—Richardson v. Southern Kraft Corp., App., 5 So.2d 24—Horton v. W. U. Tel. Co., App., 200 So. 44.

Mo.—Kristanik v. Chevrolet Motor Co., 70 S.W.2d 890, 335 Mo. 60.

Sanderson v. Producers Commission Ass'n, App., 241 S.W.2d 273—Gantner v. Fayette Brick & Tile Co., App., 236 S.W.2d 415—Platies v. Theodorow Bakery Co., App., 79 S.W.2d 504.

Pa.—Haas v. Brotherhood of Transp. Workers, 44 A.2d 776, 158 Pa.Super. 291—Thatcher v. Weinstein, 35 A. 2d 549, 154 Pa.Super. 368—Buck v. Arndt, 34 A.2d 823, 153 Pa.Super. 632—Caviston v. Lang, 31 A.2d 566, 152 Pa.Super. 51—Apker v. Crown Can Co., 28 A.2d 551, 728, 150 Pa. Super. 302—Gibson v. Blower's Paint Service, 14 A.2d 154, 140 Pa. Super. 216—Ward v. Bucyrus-Erie Co., 199 A. 362, 131 Pa.Super. 18—Hein v. Ludwig, 179 A. 917, 118 Pa. Super. 152.

Filipczak v. Erie Forge Co., 50 Pa.Dist. & Co. 1, 26 Erie Co. 85—Levitin v. Belmar Moving and Storage Co., 43 Pa.Dist. & Co. 147, 89 Pittsb.Leg.J. 575.

Dunkelberger v. Rosedale Knitting Co., Com.Pl., 35 Berks Co. 337

—Horvath v. Berwind-White Coal Mining Co., Com.Pl., 18 Cambria 118—Matelivcz v. Susquehanna Collieries Co., Com.Pl., 35 Luz.Leg. Reg. 284, affirmed 24 A.2d 115, 147 Pa.Super. 479—Kirby v. Carnegie-Illinois Steel Corp., Com.Pl., 90 Pittsb.Leg.J. 131, affirmed 21 A.2d 123, 145 Pa.Super. 121—Fedock v. Haddock Mining Co., Com.Pl., 41 Sch.Leg.Rec. 92.

Tenn.—Brooks v. Memphis Compress & Storage Co., 216 S.W.2d 746, 188 Tenn. 115.

Tex.—Williams v. Safety Casualty Co., Civ.App., 97 S.W.2d 729, error granted.

Wis.—Motor Castings Co. v. Industrial Commission, 262 N.W. 577, 217 Wis. 204.

Witness fees

Where district court dismissed an employee's compensation suit but court of appeal rendered judgment in his favor, he was entitled to have fees of his medical witnesses taxed as costs as prayed for, and court of appeal would do so rather than remand case; record being sufficient to enable court to fix fees.

La.—Valentine v. Southern Advance Bag & Paper Co., App., 20 So.2d 814.

Where only error lay in amount of award, which supreme court corrected, supreme court could direct entry of a correct judgment, retrial not being required.

N.J.—Flanagan v. Charles E. Green & Son, 2 A.2d 180, 121 N.J.Law 327, affirmed 5 A.2d 742, 122 N.J.Law 424.

21. Pa.—Wheeler v. National Nayle Grip Co., 43 A.2d 391, 149 Pa.Super. 596.

22. Mont.—O'Neil v. Industrial Accident Fund, 81 P.2d 688, 107 Mont. 176.

The judgment on appeal should not invade the exclusive province of the compensation authorities.²³ The reviewing court has been held to be without authority, on an appeal from an award, to enter a final judgment pursuant to a settlement between the parties not approved by the compensation authorities.²⁴ The court may not make an award where the board never made findings of fact and rulings of law as required by the act,²⁵ or direct an award of compensation on review of an order of the commission dismissing a claim on the ground that it had no jurisdiction,²⁶ or enter a judgment or decree against an insolvent subcontractor where the cause was never put at issue as to him and no decree was asked against him in the trial court.²⁷ The judgment must not attempt to adjudicate the rights of one not a party to the appeal.²⁸ A compensation case cannot be finally determined on appeal where the appellate court is unable to determine whether the trial court under a proper construction of the statute would have held claimant's evidence sufficient to establish his claim.²⁹ Where

on appeal the jury's verdict increases the award, but is unsupported by evidence, the court may properly render judgment notwithstanding the verdict.³⁰

Under some statutes, the court on affirming an award is not authorized to enter a money judgment,³¹ whereas under other statutes, the court is required to do so.³² It has been held that on appeal from the rejection of a claim, the court, on determining that claimant is entitled to an award, should determine the amount of the award,³³ but in other jurisdictions, the court is without power to make an award and must remit the matter to the compensation authorities.³⁴

Where a party dies after the submission of the appeal, the court may enter its decision nunc pro tunc as of the date of the submission.³⁵ Where the court has no jurisdiction over the case, its judgment is void.³⁶

Form and contents. The judgment must conform to the act,³⁷ and must state specifically the things required by the statute,³⁸ and disclose con-

23. S.C.—Ward v. Dixie Shirt Co., 76 S.E.2d 605, 223 S.C. 448.

24. Ga.—Wilkins v. Travelers Ins. Co., 182 S.E. 628, 52 Ga.App. 142.

Ky.—Workmen's Compensation Board of Kentucky v. Abbott, 278 S.W. 533, 212 Ky. 123, 47 A.L.R. 789.

25. Ky.—Octavia J. Coal Mining Co. v. Calloway, 38 S.W.2d 250, 238 Ky. 438.

26. N.C.—Francis v. Carolina Wood Turning Co., 169 S.E. 654, 204 N.C. 701.

27. Tenn.—Odum v. Sanford & Treadway, 299 S.W. 1045, 156 Tenn. 202.

28. Hawaii.—Hanatani v. Calistro, 31 Hawaii 638.

29. Conn.—Bratz v. Harry Maring, Jr., Inc., 164 A. 388, 116 Conn. 186.

30. Wash.—Frich v. Department of Labor and Industries, 13 P.2d 67, 169 Wash. 252.

31. Colo.—L. B. Cole Produce Co. v. Industrial Commission, 228 P.2d 808, 123 Colo. 278.

32. Pa.—Bordo v. Grayek, 7 A.2d 142, 136 Pa.Super. 124—Cavanaugh v. Luckenbach S. S. Co., 189 A. 789, 125 Pa.Super. 275.

Future payments

(1) Court of common pleas, in affirming compensation award by workmen's compensation board, should enter judgment for total amount stated by award, or ordered to be payable, whether then due and accrued or payable in future installments, and amounts should be expressed in money.

Pa.—Virtue v. J. Lee Plummer, Inc., 170 A. 443, 111 Pa.Super. 476.

(2) It was improper for court of common pleas in entering judgment in compensation case to liquidate amount due on that date.

Pa.—Dosen v. Union Collieries Co., 29 A.2d 354, 150 Pa.Super. 619—Strait v. Gulf Oil Co., 14 A.2d 168, 140 Pa.Super. 464.

33. N.D.—Pearce v. North Dakota Workmen's Compensation Bureau, 279 N.W. 601, 68 N.D. 318.

34. Pa.—Apker v. Crown Can Co., 28 A.2d 551, 728, 150 Pa.Super. 302.

35. Okl.—M. & W. Mining Co. v. Lee, 182 P.2d 759, 199 Okl. 76.

36. Wash.—Wiles v. Department of Labor and Industries of State, 209 P.2d 462, 34 Wash.2d 714.

37. Mass.—Ambrose's Case, 138 N.E. 2d 630.

N.J.—Mutual Chemical Co. of America v. Minniti, 3 A.2d 131, 121 N.J. Law 449, affirmed 8 A.2d 296, 123 N.J.Law 262.

Pa.—Cole v. Keystone Public Service Co., 194 A. 237, 128 Pa.Super. 489—Graham v. Hillman Coal & Coke Co., 186 A. 400, 122 Pa.Super. 579. 71 C.J. p 1361 note 28.

Written determination of merits

On appeal to county court in a workmen's compensation case, county court judge must file with clerk of court a determination in writing of merits of controversy.

N.J.—Gagliano v. Botany Worsted Mills, 80 A.2d 125, 13 N.J.Super. 1.

Burden on prevailing party

An employer, who is moving party in taking a cause from bureau to

common pleas, must, if he prevails on appeal, see that a determination is made by pleas in accordance with practice.

N.J.—Mutual Chemical Co. of America v. Minniti, 3 A.2d 131, 121 N.J. Law 449, affirmed 8 A.2d 296, 123 N.J.Law 262.

Finding decision on constitutionality of statute

Where determination of constitutionality of statute increasing rate of compensation was pending in supreme court, superior court, in affirming compensation award under such statute, provided that no execution should issue for any amount in excess of previously established rate until after decision of supreme court with provision that, if act were found to be unconstitutional, judgment should be opened as to all amounts in excess of compensation payable under prior statute.

Pa.—Bird v. Brown, 41 A.2d 881, 157 Pa.Super. 49—Curran v. James Regulator Co., 41 A.2d 443, 157 Pa. Super. 44.

Notice

Word "notify," in statute requiring superior court to notify parties of its decree in workman's compensation proceeding, commonly imports that notice shall actually reach parties; notice may be given by mail in absence of other controlling provisions.

Mass.—Petition of Liberty Mut. Ins. Co., 9 N.E.2d 718, 298 Mass. 75.

38. S.D.—Barwin v. Independent School Dist. of Sioux Falls, 248 N. W. 257, 61 S.D. 275.

clusion of the court on each specific question before it.³⁹ In some jurisdictions the judgment must follow the form of a decree in equity,⁴⁰ and must be such as the record requires.⁴¹

Under the various statutes and practice, it has been held that it is not necessary that a judgment affirming an award repeat the terms of the award.⁴² While the court should rule on each exception, a general affirmance is in effect a ruling on each and every exception to the findings of fact and conclusions of law.⁴³ The recital of the award in a judgment of affirmance is not prejudicial error.⁴⁴ Where the award is enforceable only through appropriate proceedings in court, a mere affirmance without the essentials of a judgment of the court is improper.⁴⁵ A judgment of reversal need not contain a recital that there was prejudicial error in order to be effective.⁴⁶ It is proper to order in the final decree continuation of the rate of weekly payment subject to the provisions of the compensation act.⁴⁷ On appeal from the bureau in a compensation proceeding the determination of the court need not be supported by specific findings of facts which may be submitted and considered on review to sustain it;⁴⁸ but a finding of permanent incapacity,

where merely a conclusion of the jury drawn from previous findings, may be disregarded.⁴⁹ It has been held not erroneous to render a judgment for a lesser amount than the verdict authorizes where, on the indication of the court that it thought the verdict excessive on the question of incapacity, claimant filed a remittitur of a portion of the percentage of incapacity and judgment was rendered accordingly.⁵⁰

Provision for compensation paid. The judgment on appeal should be made with respect to previous payments made because of the injury.⁵¹

Lump sum awards. On appeal from an order of the commission denying compensation, a lump or fixed sum should not be awarded,⁵² but where such an award is made the judgment cannot be collaterally attacked.⁵³

Interest. A judgment affirming an award may properly provide for interest thereon.⁵⁴

Certification of judgment to board. The judgment should provide for notification thereof to the board and direct it to enter an award accordingly,⁵⁵ but failure to certify it to the board is error which may be corrected by the court.⁵⁶ Where, on appeal

39. Colo.—Industrial Commission v. Ernest Irvine, 213 P. 829, 72 Colo. 573.

Fraud

In proceeding to review order of workmen's compensation commission on ground that award was procured by fraud, judgment in which it was specifically found that award was supported by evidence and should be affirmed, after recitals that evidence of fraud had been considered and that court found generally against appellants, held sufficient ruling on application to set aside award for fraud.

Mo.—Phillips v. Air Reduction Sales Co., 85 S.W.2d 551, 337 Mo. 587.

40. Mass.—Johnson's Case, 136 N.E. 563, 242 Mass. 489.

Recording

Legislature in enacting statute with respect to review of compensation orders did not intend to repeal, modify, or render inoperative statute relating to records and dockets to be kept by clerk of circuit court, or statute requiring decrees in equity when signed by judge to be recorded in chancery order book of court.

Fla.—Foster v. Cooper, 194 So. 331, 142 Fla. 148.

41. Mass.—Case of Pierce, 92 N.E. 2d 245, 325 Mass. 649—Rocha's Case, 14 N.E.2d 133, 300 Mass. 121. 71 C.J. p 1361 note 32.

42. Ky.—Benito Mining Co. v. Girdner, 111 S.W.2d 571, 271 Ky. 87.

Clerical error

Where workmen's compensation board awarded twelve dollars per week for three hundred thirty-five weeks and circuit court affirmed board's award, recitation in circuit court's judgment that compensation should be paid at rate of twenty-one dollars per week was a clerical error, and purpose and effect of judgment was to sustain award of board.

Ky.—Benito Mining Co. v. Girdner, supra.

Items of award

Judgment of circuit court that award of compensation commission "was in all things approved" without specifying funeral expenses, which were included in award, held sufficient to include such item, especially where commission's award was part of record.

Mo.—Helsey v. Tide Water Oil Co., App., 92 S.W.2d 922.

43. N.C.—Stewart v. Duncan, 80 S. E.2d 764, 239 N.C. 640—Fox v. Cramerton Mills, 35 S.E.2d 869, 225 N.C. 580.

44. N.C.—Russell v. Western Oil Co., 174 S.E. 101, 206 N.C. 341.

45. Mass.—Varano's Case, 134 N.E. 2d 453, 334 Mass. 153—Frennier's Case, 63 N.E.2d 461, 318 Mass. 635—Webb's Case, 61 N.E.2d 340, 318 Mass. 357.

71 C.J. p 1361 note 33.

46. Miss.—Hill v. United Timber & Lumber Co., 68 So.2d 420.

47. Mass.—Korobchuk's Case, 183 N. E. 67, 280 Mass. 412. 71 C.J. p 1361 note 34.

48. N.J.—Dreyfus v. Lutz Co., 142 A. 433, 6 N.J.Misc. 608, affirmed 146 A. 913, 106 N.J.Law 566.

49. Or.—Chebot v. State Industrial Accident Commission, 213 P. 792, 106 Or. 660.

50. Tex.—General Accident Fire & Life Ins. Corporation v. Bundren, Com.App., 283 S.W. 491.

51. Mass.—Johnson's Case, 136 N. E. 563, 242 Mass. 489. 71 C.J. p 1361 note 40.

52. Ohio.—State ex rel. Schindler v. Industrial Commission of Ohio, 186 N.E. 872, 127 Ohio St. 39—Roma v. Industrial Commission of Ohio, 119 N.E. 461, 97 Ohio St. 247.

53. Ohio.—State v. Industrial Commission, 126 N.E. 317, 100 Ohio St. 399.

54. Mo.—Floyd v. A. Y. McDonald Mfg. Co., 46 S.W.2d 251, 226 Mo. App. 444—Howe v. Stark Bros. Nurseries & Orchards Co., App., 22 S.W.2d 839.

55. Idaho.—Cooper v. Independent Transfer & Storage Co., 19 P.2d 1057, 52 Idaho 747.

Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414.

56. Ky.—Black Mountain Corpora-

from an award, the cause is tried before a court and jury, the jury's award, if not appealed from, should be certified to the commission and treated as though originally rendered by it.⁵⁷

Reopening and revising. The judgment on appeal may provide for reopening the matter as justice may require⁵⁸ for change in conditions⁵⁹ or for showing in the trial court a cessation of the disability for which compensation is awarded on appeal.⁶⁰ Where a commission is vested with discretion to reopen a case, the reviewing court cannot order the case reopened.⁶¹ However, a statute authorizing a board to review its decision has been held not applicable to a court so as to give it revisory authority over its judgment in a suit to set aside an award,⁶² but its power is the same and subject to the same limitations as in other cases,⁶³ and where the statute fails so to provide, it cannot reserve revisory power over its judgment,⁶⁴ which,

on expiration of the term and time for appeal, becomes final.⁶⁵

Default. If the appellate court improperly renders a default against the commission, application to set aside the default should be made by the commission to such court where the statute gives it the power to set aside a default in proper cases.⁶⁶

§ 790. Further Proceedings before Board, Commission, or Trial Court

Proceedings subsequent to an appeal must be in accordance with the opinion and order of the appellate court.

The compensation authorities must proceed in accordance with the directions contained in an order remanding the case to them.⁶⁷ Where the case is remanded with directions to make more specific findings as to certain matters, the compensa-

tion v. Humphrey, 277 S.W. 833, 211 Ky. 533.

57. Ohio.—Roma v. Industrial Commission of Ohio, 119 N.E. 461, 97 Ohio St. 247.

58. Ky.—Broadway & Fourth Ave. Realty Co. v. Metcalfe, 20 S.W.2d 988, 230 Ky. 800.

59. Mass.—Korobchuk's Case, 183 N. E. 67, 260 Mass. 412—Johnson's Case, 136 N.E. 563, 242 Mass. 489.

60. La.—Sears v. Peytral, 92 So. 561, 151 La. 971.

Change in condition possible

District court erred in adjudging that compensation claimant should be paid compensation through remainder of his life, where it was possible that his condition might improve, and that total disability might not continue throughout his life.

N.D.—Bergstrand v. North Dakota Workmen's Compensation Bureau, 287 N.W. 631, 69 N.D. 447.

61. Colo.—Winteroth v. Industrial Commission of Colorado, 22 P.2d 865, 93 Colo. 38.

62. U.S.—Watson v. Employers' Liability Assur. Corporation, D.C. Tex., 23 F.2d 682, affirmed, C.C.A., 28 F.2d 1010.

71 C.J. p 1362 note 51.

63. Tex.—Federal Surety Co. v. Cook, 24 S.W.2d 394, 119 Tex. 89.

64. Tex.—Federal Surety Co. v. Cook, supra.

65. Tex.—Federal Surety Co. v. Cook, supra.

66. Or.—Butterfield v. State Industrial Accident Commission, 226 P. 216, 111 Or. 149.

71 C.J. p 1360 note 18.

67. Ill.—Northwestern University v. Industrial Commission, 99 N.E.2d

18, 409 Ill. 216—Wilhelm v. Industrial Commission, 77 N.E.2d 174, 399 Ill. 80—Brown Shoe Co. v. Industrial Commission, 30 N.E.2d 4, 374 Ill. 500.

Ind.—Guevara v. Inland Steel Co., 95 N.E.2d 714, 121 Ind.App. 390—School City of Hammond v. Moriarty, 85 N.E.2d 273, 119 Ind.App. 206—Cole v. Sheehan Const. Co., 57 N.E.2d 625, 115 Ind.App. 303.

Mich.—Jones v. General Motors Corp., Fisher Body Detroit Division, 17 N.W.2d 770, 310 Mich. 605.

Ohio.—State ex rel. Waller v. Industrial Commission of Ohio, 55 N.E. 2d 800, 143 Ohio St. 475—State ex rel. Moore v. Industrial Commission, 47 N.E.2d 767, 141 Ohio St. 241.

Carr v. Marion Masonic Temple Co., 64 N.E.2d 138, 76 Ohio App. 287—State ex rel. Waller v. Industrial Commission, App., 50 N.E.2d 680, affirmed 51 N.E.2d 643, 142 Ohio St. 193—State ex rel. Truman v. Industrial Commission, 23 N.E. 2d 971, 62 Ohio App. 313.

Okl.—Bramlett v. Luper Transp. Co., 258 P.2d 895—Globe Indemnity Co. v. Christian, 27 P.2d 830, 167 Okl. 78.

Pa.—Costello v. Schumacher, 173 A. 732, 114 Pa.Super. 296.

Roland v. Frantz, Com.Pl., 35 Berks Co. 117—D'Ianni v. Dravo Corp., Co., 95 Pittsb.Leg.J. 305—Rummel v. Philadelphia & Reading Coal & Iron Co., Com.Pl., 43 Sch. Leg.Rec. 125—Squarcia v. Industrial Collieries Corp., Com.Pl., 29 Wash.Co. 29.

W.Va.—Nicely v. State Compensation Com'r, 32 S.E.2d 231, 127 W. Va. 249.

71 C.J. p 1362 note 56.

Compliance presumed

Supreme court must assume that on rehearing after it has set aside commission's award commission will properly consider facts as set forth by supreme court.

Ariz.—Matlock v. Industrial Commission, 215 P.2d 612, 70 Ariz. 25.

Failure to reconsider issue

Where industrial board denied award for death benefit and appellate division reversed decision and remitted matter for further consideration and board granted an award solely on assumed direction of appellate division without reconsidering issues, decision of appellate division affirming award was reversed and matter was remitted to board for a determination of issues.

N.Y.—Bergman v. Mergenthaler Linotype Co., 61 N.E.2d 513, 294 N.Y. 204.

Death of claimant

Under statute providing that court must enter final judgment when a party to an action dies after a decision but before entry of final judgment, and appeals under workmen's compensation law shall be subject to law and practice applicable to appeals in civil actions, a right to death benefits vested in deceased employee's widow when supreme court reversed decision of industrial board that claim was not compensable and remitted claim, and award was payable to her estate on her death.

N.Y.—Walsh v. Tidewater Oil Sales Co., 33 N.Y.S.2d 874, 263 App.Div. 514, appeal denied In re Grave's Estate, 35 N.Y.S.2d 280, 264 App. Div. 745, motion dismissed 43 N.E. 2d 79, 288 N.Y. 679, appeal dismissed 53 N.E.2d 847, 292 N.Y. 509.

tion board's authority is limited to doing so.⁶⁸ In such case, the appeal is regarded as still pending before the court, so that where the board makes a second award no new appeal is necessary.⁶⁹ Where, on insurer's appeal, the cause was remitted to the industrial accident board because of the diminution of the record, the board had no authority to make a new finding, but simply to complete the record according to the facts and return it, "diminution of the record" meaning incompleteness in the statement of the proceedings.⁷⁰ A further hearing must be held and evidence received where necessary in order to comply with the mandate.⁷¹ On remand for

determination of the extent of permanent partial disability the commission need not determine whether the maximum improvement has been reached,⁷² and the percentage of disability may be determined on the testimony taken at the first hearing where this is sufficient.⁷³

In the absence of specific directions or restriction, the compensation authorities are free to proceed as they see fit as long as their proceedings are not inconsistent with the mandate or opinion of the court.⁷⁴ The full jurisdiction of the compensation board reattaches on the setting aside of an award and a general remand of the case.⁷⁵ A judgment

68. Pa.—Diaz v. Jones & Laughlin Steel Corp., 88 A.2d 801, 170 Pa. Super. 680—Flock v. Pittsburgh Terminal Coal Corp., 13 A.2d 881, 140 Pa. Super. 232—Soroka v. Philadelphia & Reading Coal & Iron Co., 10 A.2d 904, 138 Pa. Super. 296—Serafini v. West End Coal Co., 200 A. 245, 131 Pa. Super. 476—Costello v. Schumacher, 173 A. 732, 114 Pa. Super. 296.
Hilton v. Edwards Memorial Church, 50 Pa. Dist. & Co. 341.
Hummel v. Philadelphia & Reading Coal & Iron Co., Com. Pl., 41 Sch. Leg. Rec. 66.

Exceptions to findings

Workmen's compensation board, on making new or additional findings in a case remitted to it by a court of common pleas for that purpose, must afford parties an opportunity to file exceptions thereto, and must dispose of such exceptions if filed, before returning record to court.

Pa.—Hilton v. Edwards Memorial Church, 50 Pa. Dist. & Co. 341.

Disposition of case

Where workmen's compensation proceeding was remitted to compensation board by court of common pleas for more specific findings of fact to enable court to decide questions on appeal, referee, to whom claim was referred, was in error in concluding, as a matter of law, that claimant was not entitled to compensation and in entering an order of dismissal.

Pa.—Diaz v. Jones & Laughlin Steel Corp., 88 A.2d 801, 170 Pa. Super. 680.

69. Pa.—Driscoll v. McAllister Bros., 144 A. 89, 294 Pa. 169.

Groner v. Board of Public Education of City (School Dist.) of Pittsburgh, 33 A.2d 271, 152 Pa. Super. 381.

Ready v. Miners Journal Newspaper Co., Com. Pl., 42 Sch. Leg. Rec. 110.

70. Mass.—In re Doherty, 109 N.E. 887, 222 Mass. 98.

71 C.J. p 1362 note 62.

71. Mass.—In re Derinza, 118 N.E. 942, 229 Mass. 435.

N.Y.—Culver v. Sevilla Home for Children, 40 N.Y.S.2d 184, 266 App. Div. 705, appeal denied 41 N.Y.S.2d 957, 266 App. Div. 760.

Ohio.—State ex rel. Waller v. Industrial Commission, App., 50 N.E.2d 680, affirmed 51 N.E.2d 643, 142 Ohio St. 193.

Okl.—Pioneer Mills Co. v. Webster, 99 P.2d 507, 156 Okl. 616—Nichols Transfer & Storage Co. v. Pate, 49 P.2d 225, 173 Okl. 582—Frick-Reid Supply Co. v. Hunter, 43 P.2d 145, 171 Okl. 348.

Pa.—Ellis v. Jones & Laughlin Steel Co., 169 A. 263, 111 Pa. Super. 252.
O'Donnell v. P. & R. C. & I. Co., Com. Pl., 6 Sch. Leg. Rec. 265.

72. Ga.—Liberty Mut. Ins. Co. v. Clay, 168 S.E. 79, 46 Ga. App. 558.

73. Ga.—Liberty Mut. Ins. Co. v. Clay, supra.

74. Cal.—Winthrop v. Industrial Acc. Commission, 29 P.2d 850, 220 C. 114.

Colo.—Contes v. Metros, 144 P.2d 782, 111 Colo. 561.

Ind.—School City of Hammond v. Moriarity, 93 N.E.2d 367, 120 Ind. App. 663—Burton Shields Co. v. Steele, 85 N.E.2d 263, 119 Ind. App. 216.

Ky.—Blue Bird Min. Co. v. Litteral, 249 S.W.2d 713.

Mass.—Szettella's Case, 130 N.E.2d 573, 333 Mass. 335.

Mo.—Caldwell v. J. A. Kreis & Sons, App., 72 S.W.2d 201.

Ohio.—State ex rel. Waller v. Industrial Commission, App., 50 N.E.2d 680, affirmed 51 N.E.2d 643, 142 Ohio St. 193.

Okl.—Fournier Stucco & Plastering Co. v. Greer, 104 P.2d 423, 187 Okl. 589.

Pa.—Wildman v. Pennsylvania Dept. of Highways, 43 A.2d 342, 157 Pa. Super. 301.

Wienoski v. Glen Alden Coal Co., Com. Pl., 45 Luz. Leg. Rec. 73—Woloszynski v. Locust Coal Co., Com. Pl., 46 Sch. Leg. Rec. 176.

Transcript of prior hearing

Where compensation proceeding was continued after claimant's death pending appeal, by order of department of labor and industry substituting widow of claimant as party plaintiff for purpose of determining her rights as dependent and case remanded, admitting transcript of testimony by deputy commissioner, taken at first hearing when claimant was living, at hearing on claim of widow at second hearing was not error, since death abated compensation claim only in so far as claimant was concerned.

Mich.—Mooney v. Copper Range R. Co., 27 N.W.2d 603, 318 Mich. 120.

Addition of party

Where appellate division reversed a decision of state industrial board denying an application by compensation claimant to have his case closed in order that it might later be reopened and an award made in his favor against special fund for reopened cases, and remitted matter to board for further action, under remission fund for reopened cases was entitled to be joined and heard as a party before payment to claimant from its fund could be ordered.

N.Y.—Kiriloff v. A. G. W. Wet Wash Laundry, 27 N.E.2d 11, 282 N.Y. 466.

75. U.S.—Gay v. E. H. Moore, Inc., D.C. Okl., 26 F. Supp. 749.

Colo.—Contes v. Metros, 144 P.2d 782, 111 Colo. 561.

Okl.—Fournier Stucco & Plastering Co. v. Greer, 104 P.2d 423, 187 Okl. 589—Marland Oil Co. v. Sans, 51 P.2d 751, 175 Okl. 131.

Pa.—Lettrich v. Allegheny Steel Co., 27 A.2d 257, 149 Pa. Super. 680.

Utah.—Buckingham Transp. Co. v. Industrial Commission, 72 P.2d 1077, 93 Utah 342.

71 C.J. p 1264 note 37.

Determination by unemployment commission

On remand, industrial accident commission was free to exercise its independent judgment in evaluating

setting aside an award does not prohibit the commission from reopening the case⁷⁶ or affect its jurisdiction to proceed with a determination of the rights of the parties except as it may be limited by the decision of the court.⁷⁷

Thus, the compensation board may permit an amendment of the pleadings⁷⁸ or the presentation of additional evidence,⁷⁹ may make new findings⁸⁰ and a new award,⁸¹ and may have a complete new hearing.⁸² Where a commissioner's jurisdiction is continuing, on remand to him to determine claim-

ant's earning capacity he may enter an award for total incapacity,⁸³ and, after reversal, a board having continuing jurisdiction may again hear and determine the cause.⁸⁴

Unless required by the mandate, the compensation authorities need not receive new evidence and may proceed on the evidence previously received.⁸⁵ A repetition of the evidence presented at the original hearing is not necessary,⁸⁶ and the board has discretion as to whether or not to receive additional evidence.⁸⁷ The board may restrict the rehearing to

evidence and making findings as to degree of workmen's compensation claimant's disability and his probable earnings, if any, irrespective of any determination thereof which department of employment might have made in allowing his claim for unemployment compensation for same period.

Cal.—California Compensation Ins. Co. v. Industrial Acc. Commission of Cal., 277 P.2d 442, 128 C.A.2d 797.

Review by new appeal

(1) Where there is a general remand, a new appeal is necessary to review the subsequent action of the board.

Pa.—Groner v. Board of Public Education of City (School Dist.) of Pittsburgh, 33 A.2d 271, 152 Pa. Super. 381.

(2) Where superior court directed department to rate claimant for disability, claimant's remedy, if dissatisfied with rating, held appeal to joint board, not petition to court for show cause order.

Wash.—Powers v. Department of Labor and Industries, 30 P.2d 983, 177 Wash. 21.

(3) Where circuit court reversed decision of industrial commission and directed that it hear additional evidence, new decision of industrial commission could be reviewed only by a new and independent writ of certiorari.

Ill.—Elles v. Industrial Commission, 30 N.E.2d 615, 375 Ill. 107.

(4) Where circuit court reversed decision of industrial commission and directed that it hear additional evidence and claimants sought a review of second award by certiorari, failure of court to enter a new case on docket as provided by court rules did not affect jurisdiction of court, since requirements are merely directory to clerk.

Ill.—Elles v. Industrial Commission, *supra*.

76. Utah.—McGarry v. Industrial Commission of Utah, 232 P. 1090, 64 Utah 592, 39 A.L.R. 306.

77. Utah.—McGarry v. Industrial Commission of Utah, *supra*.

78. Minn.—Simpson v. Gold, 22 N.W.2d 923, 221 Minn. 528.

79. Ala.—Alabama By-Products Corp. v. Winters, 176 So. 183, 234 Ala. 566.

Cal.—Nielsen v. Industrial Acc. Commission, 29 P.2d 552, 220 C. 118, modified on other grounds 30 P.2d 995, 220 C. 118.

Colo.—Contes v. Metros, 144 P.2d 782, 111 Colo. 561.

Ind.—Cole v. Sheehan Const. Co., 57 N.E.2d 625, 115 Ind.App. 303.

Minn.—Simpson v. Gold, 22 N.W.2d 923, 221 Minn. 528.

Pa.—Ellis v. Jones & Laughlin Steel Co., 169 A. 263, 111 Pa. Super. 252.

Wis.—Duluth-Superior Milling Co. v. Industrial Commission, 276 N.W. 300, 226 Wis. 187.

71 C.J. p 1362 note 59.

80. Pa.—Icenhour v. Freedom Oil Works Co., 7 A.2d 152, 136 Pa. Super. 318.

De novo consideration

(1) Where judgment in compensation case awarding disability compensation was reversed and case remanded to determine whether disability resulted from accident or from disability attributable to natural progress of preëxisting disease, compensation authorities on remittitur properly considered case de novo on that issue.

Pa.—Lipstok v. Haddock Min. Co., 41 A.2d 425, 156 Pa. Super. 644, affirmed 44 A.2d 553, 353 Pa. 139—Roland v. Frantz, 41 A.2d 423, 156 Pa. Super. 640—Dosen v. Union Collieries Co., 29 A.2d 354, 150 Pa. Super. 619.

(2) Where case was remitted to compensation board for determination of a basic question of fact, board was not bound by findings or action of prior board, any more than a court when sitting as a fact-finding body rehearing a case is bound by findings of a prior court, or a jury on a retrial is bound by verdict of a former jury.

Pa.—Lipstok v. Haddock Min. Co., *supra*—Roland v. Frantz, *supra*.

81. Colo.—Contes v. Metros, 144 P.2d 782, 111 Colo. 561.

82. Ariz.—Schnatzmeyer v. Industrial Commission, 276 P.2d 534, 78 Ariz. 112.

Conn.—Glodenis v. American Brass Co., 170 A. 146, 118 Conn. 29.

Mo.—Fear v. Ebony Paint Mfg. Co., 181 S.W.2d 559, 238 Mo.App. 560—Caldwell v. J. A. Kreis & Sons, App., 72 S.W.2d 201.

Okl.—Boen v. State Indus. Commission, 212 P.2d 457, 202 Okl. 258—State Highway Commission v. Clark, 11 P.2d 112, 156 Okl. 119.

Pa.—Weeks v. Lehigh Portland Cement Co., 176 A. 850, 116 Pa. Super. 514.

Private reconsideration

Where award of industrial commission had been set aside by supreme court and industrial commission then reconsidered matter informally without petitioner being given an opportunity to be present and to cross-examine witnesses, such reconsideration was not a trial de novo to which petitioner was entitled and was not sufficient hearing on which to base a new award.

Ariz.—Schnatzmeyer v. Industrial Commission, 276 P.2d 534, 78 Ariz. 112.

83. Conn.—Reiley v. Carroll, 147 A. 818, 110 Conn. 282.

71 C.J. p 1363 note 81.

84. Okl.—Associated Employers' Reciprocal & Missouri Valley Bridge Co. v. State Industrial Commission, 211 P. 491, 88 Okl. 80.

85. N.Y.—Culver v. Sevilla Home for Children, 40 N.Y.S.2d 184, 266 App. Div. 705, appeal denied 41 N.Y.S.2d 957, 266 App.Div. 760.

Okl.—Skelly Oil Co. v. Gage, 45 P.2d 766, 172 Okl. 493.

Utah.—Denver & R. G. W. R. Co. v. Industrial Commission of Utah, 279 P. 612, 74 Utah 316.

86. Mass.—In re Lacione, 116 N.E. 485, 227 Mass. 269.

Minn.—Frederickson v. Burns Lumber Co., 207 N.W. 499, 166 Minn. 212.

87. Minn.—Frederickson v. Burns Lumber Co., *supra*.

certain issues.⁸⁸ After remand it is discretionary with the lower tribunal to allow time for further investigation with the possible view of taking additional testimony on a disputed point.⁸⁹ A claimant, on a second hearing before the industrial commission on remand after review by the supreme court, is not entitled to introduce further testimony on the question of failure to give notice of the original order, having waived the failure by not giving evidence thereon on the first motion for rehearing.⁹⁰

Where the remand is for a finding on an issue, a rehearing is not required where the evidence on the issue was sufficiently developed at the earlier hearing;⁹¹ the compensation authorities may consider the evidence presented at the prior hearing, and where no new evidence is offered may base the finding solely on such evidence.⁹² A member of the commission who joined in the decision that was set

aside is not disqualified to act as hearing officer on a remand of the case.⁹³

On remand by a higher court to a lower court, the lower court must proceed in accordance with the mandate of the higher court,⁹⁴ and need not consider any issue other than those it is directed to determine.⁹⁵ On a reversal of the overruling of a demurrer, claimant is entitled to an opportunity to amend his pleading.⁹⁶ On reversal of a judgment the cause must be retried where the judge who tried it in the first instance has gone out of office,⁹⁷ unless the parties agree to submit it on the evidence already taken;⁹⁸ and the trial court cannot be ruled to correct the record by an amended finding of facts.⁹⁹

In the absence of a further appeal, the decision of the court on review of a compensation award or decision constitutes the law of the case as far as subsequent proceedings are concerned,¹ and an is-

88. Ind.—*School City of Hammond v. Moriarity*, 93 N.E.2d 367, 120 Ind.App. 663.

89. Neb.—*Venuto v. Carter Lake Club*, 151 N.W. 377, 105 Neb. 568. 71 C.J. p 136 note 87.

90. Okl.—*Roop v. Gypsy Oil Co.*, 9 P.2d 917, 156 Okl. 138.

91. Del.—*Carey v. Bryan & Rollins*, 117 A.2d 240, 10 Terry 337.

Okl.—*Luper Transp. Co. v. Bramlett*, 282 P.2d 732.

92. Okl.—*Armour & Co. v. Moore*, 270 P.2d 303.

93. Okl.—*Folsom Auto Supply v. Bristow*, 275 P.2d 706.

94. La.—*Lindsey v. Twin City Motor Co.*, App., 181 So. 598.

R.I.—*Rigo v. Walsh-Kaiser Co.*, 55 A.2d 558, 73 R.I. 319.

New evidence

Where court of appeal determined that accident had occurred and remanded case for reception of additional evidence with respect to employee's disability, finding of trial court on remand that plaintiff did not suffer any compensable injuries as result of accident, supported by motion pictures taken surreptitiously after original trial and disclosing that employee had agility of an acrobat, warranted denial of compensation.

La.—*McClung v. Delta Shipbuilding Co.*, App., 39 So.2d 754.

96. La.—*Biggs v. Libbey-Owens-Ford Glass Co.*, App., 178 So. 639.

98. Tex.—*American Fidelity & Casualty Co. v. Bradley*, Civ.App., 70 S.W.2d 645, error dismissed.

97. N.J.—*West Jersey Trust Co. v. Philadelphia, etc., R. Co.*, 95 A. 753, 88 N.J.Law 102, reversed on other

grounds 101 A. 1055, 90 N.J.Law 730—*Long v. Bergen County Ct. C. P.*, 86 A. 529, 84 N.J.Law 117.

98. N.J.—*West Jersey Trust Co. v. Philadelphia, etc., R. Co.*, 95 A. 753, 88 N.J.Law 102, reversed on other grounds 101 A. 1055, 90 N.J.Law 730.

99. N.J.—*Long v. Bergen County Ct. C. P.*, 86 A. 529, 84 N.J.Law 117.

1. Ariz.—*Ocean Accident & Guarantee Corporation v. Kennison*, 37 P. 2d 370, 44 Ariz. 352.

Cal.—*United Dredging Co. v. Industrial Accident Commission*, 284 P. 922, 208 C. 705.

Helmick v. Industrial Accident Commission, App., 137 P.2d 867—*Maxfield, Wilton & Associates v. Industrial Accident Commission*, 78 P.2d 266, 25 C.A.2d 663.

Ga.—*Woodruff v. Miller*, 172 S.E. 738, 48 Ga.App. 305.

Idaho.—*Zapantis v. Central Idaho Min. & Mill. Co.*, 136 P.2d 154, 64 Idaho 498—*Clayton v. Hercules Mining Co.*, 127 P.2d 762, 64 Idaho 34.

Ind.—*City of Connersville v. Adams*, 105 N.E.2d 912, 122 Ind.App. 581—*School City of Hammond v. Moriarity*, 93 N.E.2d 367, 120 Ind.App. 663.

Mich.—*Dodge v. General Motors Corp.*, Buick Motor Div., 32 N.W. 2d 726, 321 Mich. 503.

N.J.—*McBride v. Royal Laundry Service, Inc.*, 129 A.2d 738, 44 N.J. Super. 114.

N.Y.—*Jones v. Schenectady Boys Club*, 93 N.Y.S.2d 764, 276 App.Div. 878.

N.D.—*Desautel v. North Dakota Workmen's Compensation Bureau*, 28 N.W.2d 378, 75 N.D. 405.

Ohio.—*State ex rel. Moore v. Industrial Commission*, 47 N.E.2d 767, 141 Ohio St. 241—*State ex rel. Gaddis v. Industrial Commission*, 15 N.E.2d 146, 133 Ohio St. 553.

State ex rel. Waller v. Industrial Commission, App., 66 N.E.2d 148—*State ex rel. Winterfield v. Industrial Commission*, App., 62 N.E.2d 503.

Okl.—*Wm. A. Smith Const. Co. v. Price*, 83 P.2d 160, 183 Okl. 443.

Wash.—*De Stoop v. Department of Labor and Industries*, 95 P.2d 1026, 1 Wash.2d 340.

W.Va.—*Rapp v. State Compensation Com'r*, 27 S.E.2d 588, 126 W.Va. 227.

Jurisdiction

Rule that judgment of reviewing court is conclusive on question of lower tribunal's jurisdiction as well as on questions of law is applicable to compensation proceedings.

Mo.—*Ferguson v. Ozark Distributing Co.*, 117 S.W.2d 399, 233 Mo.App. 68.

Minor defect

Under statute allowing courts to disregard errors or defects in proceeding which do not affect substantial rights of adverse party, where court disregarded misnomer of employer-defendant in workmen's compensation application as immaterial, amended application filed to correct such error related back to, and became part of, original application, with result that claim was not barred by statute of limitations.

Ky.—*George H. Rommel Co. v. Greenwell*, 273 S.W.2d 46.

Ruling as to sufficiency of evidence

W.Va.—*Rapp v. State Compensation Com'r*, 27 S.E.2d 588, 126 W.Va. 227.

sue determined on appeal is not to be reconsidered and redetermined by the compensation authorities.² The compensation board may not disregard adjudications on review by changing findings of fact on the same evidence,³ nor may a commissioner proceed further after a decree enjoining enforcement of his award.⁴

After a judgment on appeal establishing claimant's right to compensation, the board cannot reverse or deny that right,⁵ but such a ruling requires an award fixing the amount to which claimant is entitled,⁶ although the board or commission may vary the amount of the award⁷ or award a lump sum.⁸ Where a reviewing court renders judgment that claimant is entitled to participate in a compensation fund, the commission must recognize the judgment as requiring some compensation for disability and must inquire into the extent of the disability.⁹ A decision of the court on a common-law certiorari declaring proceedings and order of the board to be void is not *res judicata* of matters presented on a second claim before the board,¹⁰ and a reversal on an issue of employment is not *res judicata* on the question of which of two companies was the insurance carrier.¹¹ On reversal and remand for lack of evidence of earning capacity the board should not deny any further compensation.¹²

It has been held that an appeal from its decision deprives the commission of any further power be-

yond carrying into execution the judgment of the appellate tribunal.¹³ Where the judgment of the court is final unless it remands with directions, in the absence of directions the board or commission cannot grant a new hearing.¹⁴ Where the board or commission has found that disability has ceased before the hearing and award, which is affirmed on appeal, the affirmance has been held to be final so as to preclude further hearings by the board or commission.¹⁵ Decisions on review being mandatory and not advisory, the commission cannot, as a general rule, reopen a case after its award has been affirmed, and reach a conclusion at variance with its original view and the law as stated by the court affirming the award.¹⁶ However, in a proper case, the compensation authorities may reopen the case after affirmance;¹⁷ an affirmance of an award does not preclude the reopening of the case on a question not before the appellate court.¹⁸ After remand, the compensation authorities may reopen the case on the ground of fraud or mistake¹⁹ or may modify the award.²⁰

Where the matter has been determined on appeal, the board's continuing authority to change or modify its awards is to some extent terminated,²¹ and may be exercised only where there is a change in the situation after the appeal.²² In some jurisdictions the board has power and jurisdiction to reopen a claim after a reversal and dismissal, and to take new evidence and make new findings;²³ and

2. Cal.—*Maxfield, Wilton & Associates v. Industrial Accident Commission*, 78 P.2d 266, 25 C.A.2d 663.

Mich.—*Dodge v. General Motors Corp.*, Buick Motor Div., 32 N.W. 2d 726, 321 Mich. 503.

Mont.—*State ex rel. Miller v. Industrial Accident Board*, 56 P.2d 1087, 102 Mont. 206.

N.J.—*Natural Products Refining Co. v. Court of Common Pleas*, 15 A. 2d 754, 125 N.J.Law 309.

Siberry v. National Sulphur Co., 185 A. 533, 14 N.J.Misc. 447.

Ohio.—*State ex rel. Moore v. Industrial Commission*, 47 N.E.2d 767, 141 Ohio St. 241.

State ex rel. Waller v. Industrial Commission, App., 50 N.E.2d 680, affirmed 51 N.E.2d 643, 142 Ohio St. 193.

Okl.—*Reints v. Diehl*, 317 P.2d 750.

3. Utah.—*American Smelting & Refining Co. v. Industrial Commission*, 24 P.2d 309, 84 Utah 117. 71 C.J. p 1363 note 88.

4. U.S.—*Rothschild & Co. v. Marshall, C.C.A.Wash.*, 51 F.2d 897. 71 C.J. p 1362 note 70.

5. N.D.—*Gotchy v. North Dakota*

Workmen's Compensation Bureau, 194 N.W. 663, 49 N.D. 915.

6. Md.—*Emmitsburg R. Co. v. Lowe*, 145 A. 197, 157 Md. 47.

7. N.D.—*Gotchy v. North Dakota Workmen's Compensation Bureau*, 194 N.W. 663, 49 N.D. 915.

8. N.D.—*Gotchy v. North Dakota Workmen's Compensation Bureau*, *supra*.

9. Ohio.—*State v. Industrial Commission of Ohio*, 169 N.E. 572, 121 Ohio St. 472.

10. Ill.—*Baer's Express & Storage Co. v. Industrial Board of Illinois*, 118 N.E. 412, 282 Ill. 44.

11. Okl.—*U. S. Casualty Co. v. State Industrial Commission of Oklahoma*, 248 P. 637, 118 Okl. 301.

12. N.Y.—*Angelo v. Strauchen*, 243 N.Y.S. 392, 230 App.Div. 134.

13. Ohio.—*State v. Industrial Commission of Ohio*, 148 N.E. 100, 112 Ohio St. 553.

14. Minn.—*Orcutt v. Trustees of Wesley M. E. Church*, 218 N.W. 550, 174 Minn. 153.

15. Kan.—*Gant v. Price*, 10 P.2d 1082, 135 Kan. 333.

16. Cal.—*United Dredging Co. v. In-*

dustrial Accident Commission, 234 P. 922, 208 C. 705.

17. N.Y.—*Hendler v. Cayton Bakery*, 60 N.Y.S.2d 231, 270 App.Div. 862 —*Ventresco v. Perini & Sons*, 41 N.Y.S.2d 328, 266 App.Div. 806.

18. N.Y.—*Di Donato v. Rosenberg*, 176 N.E. 822, 256 N.Y. 412.

19. Ky.—*Hendricks v. Kentucky & Va. Leaf Tobacco Co.*, 229 S.W.2d 953, 312 Ky. 849—*Kingston-Pocahontas Coal Co. v. Maynard*, 4 S.W.2d 702, 223 Ky. 725.

20. N.Y.—*McCulla v. American Locomotive Co.*, 276 N.Y.S. 999, 243 App.Div. 662.

21. N.Y.—*Jones v. Schenectady Boys Club*, 93 N.Y.S.2d 764, 276 App.Div. 879.

22. N.Y.—*Jones v. Schenectady Boys Club*, *supra*.

23. N.Y.—*Whitmyre v. International Business Machines Corp.*, 8 N.E.2d 278, 274 N.Y. 61, reargument denied 11 N.E.2d 734, 275 N.Y. 532 —*McMahon v. Gretzula*, 196 N.E. 586, 267 N.Y. 573—*Di Donato v. Rosenberg*, 176 N.E. 822, 256 N.Y. 412.

McMahon v. Gretzula, 262 N.Y. S. 793, 238 App.Div. 877.

the board may, in a proper case, reopen the claim and grant reformation of the insurance policy.²⁴

Motion to require further proceeding. After reversal of an award and dismissal of the claim, on motion of the court to determine if the board may reopen the claim for a rehearing, and asking that it be directed to do so, it is not the proper duty of the court to advise the industrial board as to its duty in the matter of a rehearing of the claim.²⁵

Notice. Further proceedings before the board or commission require that proper notice be given the parties,²⁶ although notice has been held unnecessary where the questions have been fully determined.²⁷

Review of second award. Where a second award is made in accordance with an order of the reviewing court vacating the original award and remanding the cause, one who feels aggrieved by the second award must institute a new and separate action to review it,²⁸ and cannot question it by appealing from the judgment remanding the original award.²⁹

Proceedings after reversal of second award. Where the original award was vacated and the sec-

ond award was reversed, the industrial commission had jurisdiction to hear the cause anew in accordance with a supreme court mandate.³⁰

§ 791. Rehearing

Ordinarily, the reviewing court has the power to rehear and modify its judgment prior to the time that it becomes final.

Ordinarily the court reviewing a compensation award or order has the power, in its discretion, to modify its judgment prior to the time it becomes final by the expiration of the term or the time to appeal.³¹ It has been held that the time within which the court may set aside its judgment is not extended by a motion for a new trial.³² Under some statutes, the court may not modify its judgment, even prior to the expiration of the time to appeal.³³

A petition for rehearing on the ground that the court overlooked a finding of the board will be dismissed where it appears that, while the particular matter was in fact mentioned by the board, there was no finding as to it.³⁴ A rehearing need not be granted for the purpose of correcting an error in the percentage of earning capacity allowed, as this may be corrected without doing so,³⁵ by sup-

24. N.Y.—*McMahon v. Gretzula*, supra.

25. N.Y.—*Strand v. Harris Structural Steel Co.*, 255 N.Y.S. 228, 234 App.Div. 341.

26. Mo.—*Brocco v. May Department Stores Co.*, App., 55 S.W.2d 322, 71 C.J. p 1363 note 93.

27. Md.—*Emmitsburg R. Co. v. Lowe*, 145 A. 197, 157 Md. 47, 71 C.J. p 1364 note 99.

28. Wis.—*Van Domelon v. Town of Vanden Broeck*, 249 N.W. 60, 212 Wis. 22.

29. Wis.—*Van Domelon v. Town of Vanden Broeck*, supra.

30. Okl.—*Marland v. State Industrial Commission*, 4 P.2d 1018, 153 Okl. 49.

31. U.S.—*Kwasizur v. Cardillo*, C. A.P., 175 F.2d 235, certiorari denied 70 S.Ct. 150, 338 U.S. 880, 94 L.Ed. 540.

Conn.—*France v. Munson*, 3 A.2d 78, 125 Conn. 22.

Ill.—*Zisook v. Industrial Commission*, 106 N.E.2d 156, 347 Ill.App. 178.

Miss.—*M. T. Reed Const. Co. v. Martin*, 63 So.2d 528, 215 Miss. 472.

Pa.—*Curran v. James Regulator Co.*, 36 A.2d 187, 154 Pa.Super. 261—*Zimmer v. Closky*, 186 A. 403, 122 Pa.Super. 142.

Tex.—*U. S. Fidelity & Guaranty Co. v. Davis*, Civ.App., 212 S.W. 239.

Wash.—*Lane v. Department of Labor and Industries*, 209 P.2d 380, 34 Wash.2d 692.

Form of judgment may be altered. Conn.—*France v. Munson*, 3 A.2d 78, 125 Conn. 22.

After expiration of term

Where, in a compensation case, a rehearing before compensation court is waived and appeal had direct to district court, trial is de novo in district court, and court has authority to try and determine cause in equity, so that statutes vesting district court with power to vacate or modify its own judgments, after term in which judgments are made, are applicable to workmen's compensation cases.

Neb.—*Miller v. Schlereth*, 36 N.W. 2d 497, 151 Neb. 33.

Default judgment

(1) Rule that judgment cannot be opened after end of term does not apply to judgment entered in statutory proceeding or by default, and, hence, court was not precluded from opening default judgment on appeal from compensation award because term at which it was entered had expired at time petition to open was filed.

Pa.—*Curran v. James Regulator Co.*, 36 A.2d 187, 154 Pa.Super. 261.

(2) In workmen's compensation proceeding, setting aside default judgment was not abuse of discretion where legal defense existed that

statute containing schedule of awards on which default judgment was entered did not apply to proceeding.

Wash.—*Yeck v. Department of Labor and Industries*, 176 P.2d 359, 27 Wash.2d 92.

Writ of error coram nobis

Alleged error of judge of superior court in dismissing certiorari proceedings to review decision of industrial commission in denying compensation under workmen's compensation act, for want of prosecution, was an error of law and not of fact, and therefore alleged error could not be corrected at subsequent term on motion in nature of a writ of error coram nobis.

Ill.—*Zisook v. Industrial Commission*, 106 N.E.2d 156, 347 Ill.App. 178.

32. Mo.—*Urban v. S. P. Boggess & Son*, App., 66 S.W.2d 157.

33. Kan.—*Gray v. Hercules Powder Co.*, 165 P.2d 447, 160 Kan. 767.

Workmen's compensation act is complete in itself, and general provisions of law do not apply.

Kan.—*Gray v. Hercules Powder Co.*, supra.

34. Mich.—*Winn v. Adjustable Table Co.*, 163 N.W. 906, 159 N.W. 372, 193 Mich. 127.

35. La.—*Legrand v. U. S. Sheet & Window Glass Co.*, 2 La.App. 549—*Turner v. Standard Oil Co. of Louisiana*, 1 La.App. 665.

plemental opinion.³⁶ A rehearing for newly discovered evidence is properly denied where such evidence would not have been conclusive.³⁷ Rehearing will not be granted to correct a judgment by including therein a provision required by law where such provision is contained in the judgment by operation of law.³⁸

§ 792. Successive Appeals

As a general rule, the law as decided on an appeal governs on a subsequent appeal.

Although there is some authority to the contrary,³⁹ the rule that the law as laid down on a first appeal is the law of the case and governs subsequent appeals is generally held to apply to appeals from awards in compensation cases.⁴⁰ Matters not in any way considered on the first appeal are properly considered on a second appeal.⁴¹ Where the statute requires the court to remit the record for further hearing on reversal of an award, it need not continue to remit on a subsequent appeal from the board.⁴²

15. PROCEEDINGS FOR FURTHER REVIEW

§ 793. Nature and Form of Remedy

A further review in workmen's compensation cases must be in accordance with statutory requirements, and generally it is by appeal as in civil actions or proceedings.

A further review after a court review in workmen's compensation cases must be in accordance with statutory requirements, if any.⁴³ Under vary-

36. La.—Legrand v. U. S. Sheet & Window Glass Co., 2 La.App. 549.

37. Ill.—National Malleable Castings Co. v. Industrial Commission, 137 N.E. 520, 306 Ill. 146.

38. La.—Hemphill v. Tremont Lumber Co., 25 So.2d 625, 209 La. 855.

39. Fla.—Alcoma Citrus Co-op. v. Isom, 30 So.2d 528, 159 Fla. 10.

Original proceeding

Since workmen's compensation proceedings do not constitute a "judicial case" until brought into circuit court by appeal, and as judicial proceeding, it is an original one in circuit court, doctrine of "law of the case" does not apply to judgments and decrees of circuit court in such proceedings.

Fla.—Alcoma Citrus Co-op. v. Isom, *supra*.

40. Cal.—Helmick v. Industrial Accident Commission, App., 137 P.2d 867—Morrison v. Industrial Accident Commission, 109 P.2d 767, 42 C.A.2d 685.

Ill.—Brown Shoe Co. v. Industrial Commission, 30 N.E.2d 4, 374 Ill. 500.

Ind.—Stoner v. Howard Sober, Inc., App., 141 N.E.2d 458—Guevara v. Inland Steel Co., 95 N.E.2d 714, 121 Ind.App. 390.

Kan.—Thorp v. Victory Cab Co., 246 P.2d 273, 173 Kan. 383.

Md.—Victory Fireworks & Specialty Co. v. Saxton, 185 A. 123, 170 Md. 446.

Mich.—Samels v. Goodyear Tire & Rubber Co., 35 N.W.2d 265, 323 Mich. 251.

Mo.—Choate v. Dunaway, App., 254 S.W.2d 298—Bomar v. J. A. Kreiss & Sons, App., 72 S.W.2d 205.

Neb.—Miller v. Schlereth, 42 N.W.2d 865, 152 Neb. 805.

N.H.—Vallee v. Spaulding Fibre Co., 199 A. 894, 89 N.H. 558.

N.J.—Temple v. Storch Trucking Co., 125 A.2d 297, 41 N.J.Super. 397.

N.Y.—Waterman v. Jamaica Hospital, 30 N.Y.S.2d 31, 262 App.Div. 978—Exelbert v. Klein & Kavanaugh, 285 N.Y.S. 15, 246 App.Div. 873.

N.C.—McGill v. Town of Lumberton, 11 S.E.2d 873, 218 N.C. 586.

Ohio.—Lidyard v. General Fireproofing Co., 24 N.E.2d 635, 62 Ohio App. 500.

Okl.—Davon Oil Co. v. State Industrial Commission, 61 P.2d 579, 177 Okl. 612—London Guarantee & Accident Co. v. Miller, 57 P.2d 1150, 177 Okl. 126—Pinkston Hardware Co. v. Hart, 46 P.2d 501, 172 Okl. 566—Oklahoma Portland Cement Co. v. State Industrial Commission, 32 P.2d 389, 168 Okl. 330.

71 C.J. p 1364 note 10.

A question presented in petition for rehearing on prior appeal in compensation proceeding was res judicata of such question where supreme court affirmed award.

Mich.—Samels v. Goodyear Tire & Rubber Co., 35 N.W.2d 265, 323 Mich. 251.

Sufficiency of evidence

Former determination by supreme court of appeals that evidence then in case did not warrant an award of compensation became "law of the case," precluding allowance of any compensation on claim in absence of additional evidence as, with that already in case, would establish claim asserted.

W.Va.—Rapp v. State Compensation Com'r, 27 S.E.2d 588, 126 W.Va. 227.

Implied decision

Where former appeal in compensation proceeding necessarily involved question whether workman was engaged in employment at time of injury, and such question was impliedly decided against employer, al-

though not discussed, it would not be reviewed again on subsequent appeal.

Tex.—Traders & General Ins. Co. v. Powell, 110 S.W.2d 559, 130 Tex. 375.

Refusal to permit autopsy

Where, under law of case, question of liability in workmen's compensation proceeding could not be further litigated, award to which petitioners were entitled under law of case could not be denied because petitioners refused to permit an autopsy.

Cal.—Morrison v. Industrial Accident Commission, 109 P.2d 767, 42 C.A.2d 685.

Appeal from denial of compensation

Statute relating to appeals from orders of industrial commission requiring commission to pass on every issue raised in claim and, if claim is denied, to state grounds on which it was denied, evidenced purpose to avoid multiplicity of appeals by requiring appeal to disclose all reasons for denial of claim so that claimant's right to participate in fund may be settled finally in one appeal.

Ohio.—State ex rel. Moore v. Industrial Commission, 47 N.E.2d 767, 141 Ohio St. 241.

41. Ind.—Standard Cabinet Co. v. Landgrave, 132 N.E. 661, 76 Ind. App. 593.

N.Y.—Wanamaker v. Selfridge, 19 N.Y.S.2d 973, 259 App.Div. 493, reargument denied 22 N.Y.S. 527, 260 App.Div. 814, affirmed 34 N.E.2d 385, 285 N.Y. 699.

Wash.—Merchant v. Department of Labor and Industries, 165 P.2d 661, 24 Wash.2d 410.

42. Pa.—Houlehan v. Pullman Co., 124 A. 640, 280 Pa. 402—Riley v. Carnegie Steel Co., 119 A. 832, 276 Pa. 82.

43. Mo.—State ex rel. Missouri

ing constitutional provisions, compensation acts, and codes and rules of procedure, judgments and decrees of the courts on review of decisions of compensation boards or commissions are regarded as judgments or decrees in suits or proceedings at law or equity within the terms of a practice act providing for appeals from judgments in such cases,⁴⁴ or they are considered the same as, or in the same category as, judgments or decrees of the court in civil cases with respect to their further review in the appellate courts, or the further review is to be taken in the same manner and subject to the same limitations as is provided in civil actions.⁴⁵

The remedy for further review has been held to be by appeal,⁴⁶ writ of error,⁴⁷ on exceptions,⁴⁸ or certiorari;⁴⁹ and under some acts which do not

provide a statutory procedure for appeal, a petition to transfer has been held to perform the functions of a writ of error and to be sufficient to present the case to the higher court for consideration.⁵⁰ The right of further review by appeal or writ of error has been held to exist regardless of the fact that the compensation act makes no provision for such review.⁵¹

Under some acts, further appellate proceedings in compensation cases are required to conform to the practice in equity, except that questions of fact are not open to review as they are in an ordinary appeal in equity;⁵² and further appellate review on questions of law may be obtained only by appeal, and not by bill of exceptions.⁵³ Under other acts and rules of practice a writ of error is held not a

Gravel Co. v. Missouri Workmen's Compensation Commission, 113 S. W.2d 1034, 234 Mo.App. 232, 71 C.J. p 1364 note 14.

Of an appellate nature

After review by industrial commissioner of a workmen's compensation award, proceeding for further appeal and review is of an appellate nature and where such review is to be had is not a matter of venue.

Iowa.—Minnesota Val. Canning Co. v. Rehnblom, 49 N.W.2d 553, 242 Iowa 1112.

44. Ill.—Christensen v. R. W. Bartelmann Co., 273 Ill. 316, 112 N.E. 686.

71 C.J. p 1365 note 16.

45. S.C.—McDonald v. Palmetto Theaters, 11 S.E.2d 444, 196 S.C. 38.

Tex.—Lafeld v. Maryland Casualty Co., 33 S.W.2d 187, 119 Tex. 466.

71 C.J. p 1364 note 14 [b].

46. Fla.—Boca Raton Club v. Duff, 63 So.2d 624—Stansell v. Marlin, 14 So.2d 592, 153 Fla. 431—Dupree v. Elleman, 191 So. 65, 139 Fla. 809—Weaver-Loughridge Lumber Co. v. Coleman, 191 So. 16, 139 Fla. 823.

Iowa.—Griffith v. Norwood White Coal Co., 294 N.W. 741, 229 Iowa 496.

Me.—Rowe v. Keyes Fibre Co., 129 A.2d 210, 152 Me. 317—Girouard's Case, 71 A.2d 682, 145 Me. 62.

Md.—Egeberg v. Maryland Steel Products Co., 58 A.2d 684, 190 Md. 374.

Mass.—Pierce's Case, 92 N.E.2d 245, 325 Mass. 649.

Mo.—State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission, 113 S.W.2d 1034, 234 Mo.App. 232.

N.C.—Anderson v. Wray Plumbing & Heating Co., 76 S.E.2d 458, 238 N. C. 133.

S.C.—McDonald v. Palmetto Theaters, 11 S.E.2d 444, 196 S.C. 38.

Wash.—State ex rel. Burkhard v. Superior Court for Clark County, 120 P.2d 477, 11 Wash.2d 600.

71 C.J. p 1364 note 14 [a], [b], p 1365 note 17.

Statutory purpose

(1) Purpose of compensation law permitting appeal is to protect parties against errors of law.

Md.—Moore v. Clarke, 187 A. 887, 171 Md. 39, 107 A.L.R. 924.

(2) Apparent purpose of provisions of workmen's compensation act for appeals to supreme court from judgments of circuit courts on appeals from awards or orders of industrial commission is to have such judgments reviewed by supreme court as on writs of error to correct harmful errors and not reviewed as on discretionary constitutional writ of certiorari.

Fla.—South Atlantic S. S. Co. of Delaware v. Tutson, 190 So. 675, 139 Fla. 405.

Cross appeal

On appeal from unauthorized award of district court in modification of its previous award, claimant's cross appeal from previous award may properly be treated simply as appeal therefrom.

Kan.—Gray v. Hercules Powder Co., 165 P.2d 447, 160 Kan. 767.

After additional testimony

Where court of common pleas erroneously reversed decision of compensation board in favor of claimant, claimant was not obliged to appeal then, but could produce additional testimony before referee in support of claim and appeal if court of common pleas on considering additional testimony was still of same opinion.

Pa.—Rosenberger v. Mar-Bern Coal Co., 30 A.2d 153, 151 Pa.Super. 373.

47. Ill.—Zisook v. Industrial Commission, 106 N.E.2d 156, 347 Ill. App. 178.

71 C.J. p 1364 note 14 [c], p 1365 note 18.

48. Me.—Rowe v. Keyes Fibre Co., 129 A.2d 210, 152 Me. 317—Girouard's Case, 71 A.2d 682, 145 Me. 62.

49. Del.—Le Tourneau v. Consolidated Fisheries Co., 51 A.2d 862, 4 Terry 540.

71 C.J. p 1364 note 14 [d].

To bring up record

A writ of certiorari to bring up claimant's original petition by way of appeal from award of industrial accident board denying compensation was proper, where transcript did not contain original petition and record did not show if original petition was filed within time allowed by law.

Tex.—Traders & General Ins. Co. v. Mills, Civ.App., 108 S.W.2d 219, error dismissed.

Questions for which certiorari will lie

(1) Where debatable factual question is presented.

N.J.—Jackson v. New York Shipbuilding Corp., 191 A. 289, 15 N.J. Misc. 367.

(2) Where debatable legal question is presented.

N.J.—Fischbein v. Real Estate Management, 34 A.2d 412, 21 N.J.Misc. 386, reversed on other grounds 37 A.2d 199, 131 N.J.Law 495, affirmed 40 A.2d 649, 132 N.J.Law 418.

(3) To review decision of court of common pleas with respect to percentage of disability.

N.J.—Jensen v. Kraft Cheese Co., 37 A.2d 828, 132 N.J.Law 8.

50. Ind.—Warren v. Indiana Telephone Co., 26 N.E.2d 399, 217 Ind. 93.

51. Tex.—Lafeld v. Maryland Casualty Co., 33 S.W.2d 187, 119 Tex. 466.

52. Mass.—Pierce's Case, 92 N.E.2d 245, 325 Mass. 649.

53. Mass.—Nagle's Case, 37 N.E.2d 474, 310 Mass. 193—In re Cripp, 104 N.E. 565, 216 Mass. 586, Ann.

proper method of reviewing compensation cases, but an appeal must be taken⁵⁴ or an action in equity to set the judgment aside will lie, provided the judgment is not void on its face.⁵⁵ Certiorari, it has been held, is not a proper method for further review and does not lie, where a further review by appeal is authorized;⁵⁶ nor will mandamus lie where the party has a plain, speedy, and adequate remedy by appeal.⁵⁷

The rules of procedure and practice applicable in civil cases generally apply to appeals and writs of error.⁵⁸

Bill of review. A claimant's proceeding in the nature of a bill of review attacking an agreed judgment of compensation is an equitable proceeding governed by the principles of equity.⁵⁹

Preference on docket. Under some acts, a further review of a compensation case is not entitled to preference on the docket of the higher court.⁶⁰

§ 794. Jurisdiction

The jurisdiction of the higher court may be questioned at any stage of the proceedings on a further appeal from a reviewing court in a compensation case; jurisdiction may not be conferred on the higher court by consent.

On a further appeal from a reviewing court in a compensation case, the question of jurisdiction of the higher court over the subject matter may be raised at any stage of the proceedings.⁶¹ Jurisdiction may not be conferred on the higher court by consent.⁶² In accordance with the rules applicable in civil actions generally, as discussed in Appeal and Error § 41, the lower court must have had jurisdiction to make the decision appealed from in order for the appellate court to have jurisdiction.⁶³ A decree which the reviewing court in a compensation case was without jurisdiction to make cannot be appealed from,⁶⁴ and the higher court is not bound to give it any effect.⁶⁵

A higher court does not have jurisdiction of a further appeal in a compensation case where the

Cas.1915B 828—Pigeon v. Employers' Liability Assur. Corporation, 102 N.E. 932, 216 Mass. 51, Ann. Cas.1915A 737—In re Employers' Liability Assur. Corporation, 102 N.E. 697, 215 Mass. 497, L.R.A. 1916A 306—In re American Mut. Liability Ins. Co., 102 N.E. 693, 215 Mass. 480, Ann.Cas.1914B 372.

Decrees in lower court required

Judge of superior court is without power to report workmen's compensation case to supreme judicial court without making decision or entering a decree and in absence of a decree there is nothing before court. Mass.—Pierce's Case, 92 N.E.2d 245, 325 Mass. 649.

54. Mo.—Baker v. Massey Harris Co., App., 49 S.W.2d 1060. 71 C.J. p 1365 note 19.

55. Mo.—Tokash v. Workmen's Compensation Commission, 139 S.W. 2d 978, 346 Mo. 100.

56. Fla.—Boca Raton Club v. Duff, 63 So.2d 624—Weaver-Loughridge Lumber Co. v. Coleman, 191 So. 16, 139 Fla. 823—South Atlantic S. S. Co. of Delaware v. Tutson, 190 So. 675, 139 Fla. 405.

Wash.—State ex rel. Burkhard v. Superior Court for Clark County, 120 P.2d 477, 11 Wash.2d 600.

Insufficient to give review intended

A review by supreme court on certiorari of judgment of circuit court in workmen's compensation case would fall short of sphere of review as contemplated by statute.

Fla.—Stansell v. Marlin, 14 So.2d 892, 153 Fla. 421.

57. Wash.—State ex rel. Burkhard v. Superior Court for Clark County, supra.

58. Ill.—Carlson v. Avery Co., 196 Ill.App. 262.

Rules governing direct writs of error

Except where otherwise specifically provided by statute, rules of practice and procedure governing appeals and writs of error in compensation cases reviewed on appeal by superior court and brought by writ of error to court of appeals are same as prevailing rules in state as to direct writs of error.

Ga.—King v. Western Union Telegraph Co., 187 S.E. 888, 54 Ga.App. 388.

59. Tex.—Texas Employers Ins. Ass'n v. Arnold, Civ.App., 114 S.W. 2d 636, error dismissed.

Claimant must prove both a meritorious claim and freedom from negligence in failing to assert it.

Tex.—Texas Employers Ins. Ass'n v. Arnold, supra.

60. Miss.—Hill's Dependents v. United Timber & Lumber Co., 62 So.2d 776, 221 Miss. 473—Plumbing & Heating Service v. Strickland, 49 So.2d 243.

61. Mo.—Kendrick v. Sheffield Steel Corp., App., 166 S.W.2d 590.

Higher court held to have jurisdiction

Where insurance carrier duly filed motion for new trial, excepted to action of trial court in overruling motion, and perfected appeal from judgment in suit to set aside compensation award, court of civil appeals acquired jurisdiction generally over parties and subject matter.

Tex.—Lloyds Guarantee Assurance v. Ryno, Civ.App., 177 S.W.2d 307, error refused.

Higher court held not to have acquired jurisdiction of writ of error to review judgment in workmen's compensation case, where citation in error was served subsequent to effective date of statute prohibiting reviews by writ of error.

Tex.—United Employers Cas. Co. v. Smith, Civ.App., 150 S.W.2d 277.

62. *Fund for Reopened Cases cannot confer jurisdiction by consent.* N.Y.—Kiriloff v. A. G. W. Wet Wash Laundry, 27 N.E.2d 11, 282 N.Y. 466.

63. Mo.—State ex rel. Brown & Williamson Tobacco Corporation v. Missouri Workmen's Compensation Commission, 132 S.W.2d 683, 234 Mo.App. 384.

Tex.—Texas Employers Ins. Ass'n v. Booth, Civ.App., 113 S.W.2d 231, reversed on other grounds Booth v. Texas Employers' Ins. Ass'n, 123 S.W.2d 322, 132 Tex. 237.

64. Mass.—Sciola's Case, 128 N.E. 666, 236 Mass. 407.

Decision on unauthorized appeal

Where first reviewing court is without jurisdiction to entertain appeal from unauthorized award by a compensation board or commission, higher court has no jurisdiction of appeal from judgment of first reviewing court.

Tex.—General Am. Cas. Co. v. Rosas, Civ.App., 275 S.W.2d 570, refused no reversible error.

65. Mass.—Sciola's Case, 128 N.E. 666, 236 Mass. 407.

amount in controversy is less than the minimum amount required in order to confer appellate jurisdiction on it.⁶⁶ After review of an award or decision of a compensation commissioner, board, or commission, the place where a further review is to be had is not a matter of venue,⁶⁷ and in order properly to effect such a further appeal, the statute governing the place in which the appeal must be taken must be followed.⁶⁸ Under some acts and practice it is held that on further appeal of an award or decision of a compensation board or commissioner, the higher court has no original jurisdiction, but is limited solely to a review of questions of law decided by the lower court.⁶⁹

Insanity of party. On further review by writ of error of an award of a compensation board or commission, the higher court has no jurisdiction to determine a question as to the insanity of a party to the writ for the purpose of appointing a guardian ad litem for him.⁷⁰

§ 795. Decisions Reviewable

- a. In general
- b. Final decisions

a. In General

Ordinarily, an appeal or other further review may be taken in a proper case from a judgment or decree of a court reviewing an award or decision of a compensation board, bureau, or commission, provided the judgment or decision appealed or otherwise reviewed is a judicial decision.

As a general rule, an appeal or other further review may be taken in a proper case from a judgment or decree of a court reviewing an award or decision of a compensation board, bureau, or commission.⁷¹ Where, however, a compensation act is regarded as providing only a limited appeal to a lower court, no appeal will lie from the decisions of such court.⁷²

In accordance with the rule applicable in civil actions generally, as discussed in Appeal and Error § 47, a further review can only be taken from a judicial decision.⁷³ A mere decision as to claim-

66. Ky.—Consolidated Coal Co. v. Jennings, 33 S.W.2d 647, 236 Ky. 705.

67. Iowa.—Minnesota Val. Canning Co. v. Rehnbloom, 49 N.W.2d 553, 242 Iowa 1112.

68. Iowa.—Minnesota Val. Canning Co. v. Rehnbloom, *supra*.

County of injury

Where appeal in workmen's compensation proceeding was not taken to district court of county wherein injury occurred, ruling of district court which overruled special appearance and motion to dismiss was erroneous.

Iowa.—Minnesota Val. Canning Co. v. Rehnbloom, *supra*.

69. Kan.—Justice v. Continental Can Co., 257 P.2d 564, 174 Kan. 539.

70. Ga.—Sutton v. Macon Gas Co., 167 S.E. 543, 46 Ga.App. 299.

71. N.C.—Thomason v. Red Bird Cab Co., 70 S.E.2d 706, 235 N.C. 602.

Ohio.—Richards v. Industrial Commission, 127 N.E.2d 402, 163 Ohio St. 439.

S.D.—McFarling v. Rierson's, Inc., 291 N.W. 574, 67 S.D. 191.

Wash.—State ex rel. Burkhard v. Superior Court for Clark County, 120 P.2d 477, 11 Wash.2d 600.

Appeal from, or other review of, decision in action on award see *infra* § 844.

New trial

An order granting new trial in compensation proceeding on ground that court erred in admitting testimony over objection of claimant was at most an "error of law" and not

an "abuse of discretion" so as to be appealable.

Ohio.—Malone v. Industrial Commission, 36 N.E.2d 52, 86 Ohio App. 505.

Certiorari held proper to review order of court reversing order dismissing petition for compensation filed with compensation bureau where debatable question was presented as to whether employee's death was due to natural causes or to accident arising out of employment.

N.J.—Bernstein Furniture Co. v. Kelly, 172 A. 41, 12 N.J.Misc. 395.

Decree denying review is not a "decree based upon a memorandum of agreement" within statute denying an appeal from decree in compensation case where decree is based on a memorandum of agreement.

Mass.—Employers' Liability Assur. Corp. v. Dileo, 10 N.E.2d 251, 298 Mass. 401.

Appeal held proper

(1) Generally.

Mass.—Rocha's Case, 14 N.E.2d 133, 300 Mass. 121.

Pa.—Miles v. Masters, 97 A.2d 36, 374 Pa. 127.

(2) A judgment refusing to open default judgment against employer on appeal from compensation award was appealable to superior court.

Pa.—Curran v. James Regulator Co., 36 A.2d 187, 154 Pa.Super. 261.

(3) Where full commission reversed decision of single member and denied compensation claimants' claim, reinstatement by court of award of single member was equivalent to an order affirming award of

commission, for purposes of an appeal from judgment of court.

S.C.—McDonald v. Palmetto Theaters, 11 S.E.2d 444, 196 S.C. 38.

Appeal held not proper

(1) Generally.

Mass.—Virta's Case, 192 N.E. 98, 287 Mass. 602.

(2) Appeal does not lie from judgment of supreme court affirming judgment of common pleas court, notwithstanding previous order of supreme court discharging rule to show cause why certiorari should not be allowed, as discharge of such rule amounted to refusal of writ or vacation of fictitious allocatur.

N.J.—Wedgest v. Globe Porcelain Co., 15 A.2d 760, 125 N.J.Law 438.

(3) Where employee did not claim a review of either decision of single member of board in favor of employer's insurer filed in different years, it was within jurisdiction of superior court to enter decree based on such decisions, but appeal would not lie from superior court decree.

Mass.—Rocha's Case, 14 N.E.2d 133, 300 Mass. 121.

72. Kan.—Norman v. Consolidated Cement Co., 274 P. 233, 127 Kan. 643.

71 C.J. p 1365 note 25.

73. Time judicial status arises

A perfected appeal from industrial commission to court under workmen's compensation act confers jurisdiction for first time in judicial department of state government and it is then regarded as having originated in court and becomes for first time a judicial case with respect to right of appeal.

ant's rights, without judgment being entered, is not appealable,⁷⁴ nor is the finding of a court on review of a compensation award appealable without proper entry of a decree on the finding, even though a rescript containing the finding is duly filed.⁷⁵ Where an appeal in a compensation case is subject to the same restrictions as in civil actions, the appellate court has no jurisdiction to entertain an appeal from an inferior court on its answer to a question certified to it by the board or commission, there being in such case no judicial decision.⁷⁶

Appeals may, where permitted by the act, be taken from part of a judgment or order on review of an award.⁷⁷ Orders not part of the judgment appealed from cannot be made the basis of an appeal or cross appeal.⁷⁸ Matters which, although discussed below, had no effect on the award do not present any question for review.⁷⁹ When a judgment has been rendered it is appealable, and the fact that it is entered in the wrong judgment book does not affect the right to appeal.⁸⁰ Under some acts, a judgment of the reviewing court may be considered by a higher court on further review where the question involved is of sufficient public interest.⁸¹

Where the act provides that, where no appeal is taken from an award, the court, on the filing of a certified copy of the award, shall enter judgment

thereon, no appeal will lie from an order of such court denying a new trial after rendition of such a judgment where no appeal was taken from the award.⁸²

Notwithstanding a provision that findings of fact by the board on appeal from a decision of a referee shall be final, the court on appeal from the decision of the board may reverse the board on its finding where the board treated the appeal from the referee as involving a question of law and, hence, could not itself make any separate findings.⁸³

A refusal by a court to allow a writ of certiorari to review a determination of a compensation board or bureau is not subject to review by a higher court where the exercise by the lower court of its right to review by certiorari is purely discretionary, even though an appeal provided by statute has not been taken from the determination of the board or bureau.⁸⁴ Certiorari will not lie to review an order entered by the reviewing court with the consent of the party seeking the further review affirming the award or decision of the compensation board or bureau.⁸⁵ The higher court will not entertain a petition for certiorari to review a decision in which the lower court, in determining the compensability of the injury, properly construed and correctly applied to the evidence a decision of the higher court construing the statute involved.⁸⁶

Fla.—Duval Engineering & Contracting Co. v. Johnson, 16 So.2d 290, 154 Fla. 9.

Matter held not separate award

Where judgment remanded case to commissioner to consider motion to correct commissioner's findings, effect of commissioner's action on motion was to correct record of appeal which was already pending in higher court, and ruling was not a separate and independent award requiring another appeal in order to present case therein.

Conn.—France v. Munson, 3 A.2d 78, 125 Conn. 22.

Disposition of injunction proceeding by which compensation order was suspended or set aside, in whole or in part, is appealable.

D.C.—Swofford v. International Mercantile Marine Co., 113 F.2d 179, 72 App.D.C. 225.

74. N.J.—Roach v. Yellow Cab, 160 A. 415, 10 N.J.Misc. 777.

Where ruling, decision, or opinion of court, no judgment or final order being entered in accordance therewith, does not have effect of a judgment and is not reviewable.

Mo.—McCoy v. Simpson, 125 S.W.2d 833, 344 Mo. 215.

Decisions not reviewable

Appeal from decision of first re-

viewing court that county board of education was not subject to workmen's compensation act, without waiting for court to enter judgment, was erroneous.

Md.—Clauss v. Board of Education of Anne Arundel County, 30 A.2d 779, 181 Md. 513.

75. R.I.—Jules Desurmont Worsted Co. v. Julian, 183 A. 846, 56 R.I. 97.

Finding in rescript not decree

Finding of court in rescript duly filed, after hearing on petition for review of compensation agreement or award, does not have legal effect of decree, so as to authorize review within two years after filing of rescript.

R.I.—Jules Desurmont Worsted Co. v. Julian, *supra*.

76. N.Y.—In re Workmen's Compensation Fund, 119 N.E. 1027, 224 N.Y. 13.

71 C.J. p 1365 note 28.

77. Wis.—William Rahr Sons Co. v. Industrial Commission of Wisconsin, 163 N.W. 169, 166 Wis. 28.

78. Order overruling motion made after judgment

Where after entry of judgment in circuit court employer appealed, and

compensation claimant filed certified copy of award of compensation board and moved court to render judgment in accordance therewith, and court overruled motion, order could not be made basis for cross appeal.

Ky.—Owensboro Wagon Co. v. Adams, 217 S.W.2d 637, 309 Ky. 302.

79. Conn.—Pascoal v. Mortenson, 145 A. 149, 109 Conn. 39.

80. Fla.—Dupree v. Elleman, 191 So. 65, 139 Fla. 809.

81. Ga.—U. S. Fidelity & Guaranty Co. v. Skinner, 5 S.E.2d 9, 138 Ga. 823, conformed to 5 S.E.2d 378, 60 Ga.App. 826.

82. Idaho.—Kelley v. Prouty, 19 P. 2d 1061, 52 Idaho 743.

83. Pa.—McCauley v. Imperial Woolen Co., 104 A. 617, 261 Pa. 312.

84. N.J.—Staubach v. Cities Service Oil Co., 31 A.2d 804, 130 N.J.Law 157.

85. N.J.—Federovitch v. Pantasote Leather Co., 9 A.2d 799, 123 N.J.Law 510.

86. Ga.—Slaten v. Travelers Ins. Co., 30 S.E.2d 822, 197 Ga. 856.

Satisfied judgment. A judgment which has been satisfied in full is not subject to a further appeal.⁸⁷

Trivial error in the amount of an award which can be corrected by the court below will not warrant issuance of a writ of certiorari to review an affirmation of the award by the lower court.⁸⁸

b. Final Decisions

As a general rule, the decision of a lower court on review of an award or decision of a compensation board or

commission must be final in order to be appealable or otherwise subject to further review.

In accordance with the rule applicable in civil actions generally, as discussed in Appeal and Error § 92, except as may otherwise be provided by statute or rule,⁸⁹ the decision of the lower court on review of an award or decision in a compensation case must be final in order to be appealable or otherwise subject to review.⁹⁰ A judgment or decision of a reviewing court which affirms the award or decision of the compensation board or commission,⁹¹

87. Mont.—Paulich v. Republic Coal Co., 33 P.2d 514, 97 Mont. 224.

88. N.J.—Mountain Ice Co. v. Gurda, 157 A. 255, 9 N.J.Misc. 1294.

89. Iowa.—Hagmeier v. Dryden Rubber Division of Sheller Mfg. Corp., 66 N.W.2d 111, 245 Iowa 1121.

71 C.J. p 1365 note 31.

Court unable to correct own error

An employee was not precluded from maintaining certiorari to review order of common pleas court remanding compensation proceeding to compensation bureau for purpose of joining employer's partner as a party, on ground that order did not finally adjudicate parties' rights, since certiorari will lie where tribunal cannot correct its own error, and common pleas court lost jurisdiction by remanding case.

N.J.—Belvidere v. Waldron, 30 A.2d 596, 129 N.J.Law 587.

Where substantial right denied

(1) Interlocutory order is not appealable unless it deprives appellant of a substantial right which he might lose if order is not reviewed before final judgment.

N.C.—Edwards v. City of Raleigh, 81 S.E.2d 273, 240 N.C. 137.

(2) Order of commission denying defendants' motion to have claimant examined by a medical specialist after claimant's request at first hearing that hearing be held over for medical testimony was granted, resulted in deprivation of a substantial right of defendants, and although no award had been made by commission, order was similar to intermediate order entered in law action prior to final judgment which affects merits, and therefore was appealable before final award.

S.C.—Cord v. E. H. Hines Const. Co., 67 S.E.2d 677, 220 S.C. 355.

90. Conn.—France v. Munson, 192 A. 706, 123 Conn. 102.

Iowa.—Hagmeier v. Dryden Rubber Division of Sheller Mfg. Corp., 66 N.W.2d 111, 245 Iowa 1121.

Ky.—Green River Fuel Co. v. Sutton, 84 S.W.2d 79, 266 Ky. 288.

Mass.—Connery's Case, 138 N.E.2d 595; Batchon's Case, 132 N.E.2d 406, 333 Mass. 605.

Mo.—Graves v. O. F. Elliott, Inc., 195 S.W.2d 750, 238 Mo.App. 1145, affirmed 197 S.W.2d 977, 355 Mo. 751.

N.J.—Povoa v. Manuel Viera Const. Co., 57 A.2d 365, 136 N.J.Law 650 —Paluk v. United Color & Pigment Co., 49 A.2d 553, 131 N.J.Law 601 —Law v. Joseph Dixon Crucible Co., 49 A.2d 576, 134 N.J.Law 591.

Tex.—Associated Indemnity Corporation v. Torbett, Civ.App., 72 S.W.2d 1109.

71 C.J. p 1365 note 32.

Rule especially applicable

Prompt payment of benefits to injured workman for both temporary and permanent disability is essence of workmen's compensation legislation, so that judicial abhorrence for piecemeal appeals applies with greater emphasis in workmen's compensation litigation.

N.J.—Grogan v. William J. Scully, Inc., 126 A.2d 41, 42 N.J.Super. 174.

Essentials of final decree

It is essential to a final decree that it make a final disposition of employee's claim either by ordering it dismissed or by ordering payment to employee of a fixed amount, and fact that amount of weekly payments is subject to change does not prevent decree from being final.

Mass.—In re Pereira's Case, 47 N.E.2d 766, 313 Mass. 774.

Decision held final and appealable

(1) Generally.

Ill.—Zisook v. Industrial Commission, 106 N.E.2d 156, 347 Ill.App. 178.

Mo.—Kendrick v. Sheffield Steel Corp., Civ.App., 166 S.W.2d 590.

N.Y.—Vleck v. Parry, 1 N.E.2d 468, 270 N.Y. 371.

Ohio.—Richards v. Industrial Commission, 127 N.E.2d 402, 163 Ohio St. 439.

(2) Order of court requiring claimant to elect whether to proceed against commission or an employer who allegedly had not paid into compensation fund for a deceased employee.

Ohio.—Wegley v. Snyder, 62 N.E.2d 299, 77 Ohio App. 241.

(3) Order of court refusing to strike off an appeal from compensa-

tion board, even though it affirmatively appeared from pleadings that court had no jurisdiction of appeal because taken too late.

Pa.—Banks v. McClain, 40 A.2d 905, 156 Pa.Super. 512.

Decision held not final and appealable

(1) Generally.

Mass.—In re Pereira's Case, 47 N.E.2d 766, 313 Mass. 774.

N.Y.—Kirilloff v. A. G. W. Wet Wash Laundry, 27 N.E.2d 11, 282 N.Y. 466.

Tex.—Tally v. Texas Employers' Ins. Ass'n, 102 S.W.2d 180, 129 Tex. 134.

(2) Court judgment, reversing workmen's compensation division's order dismissing workman's compensation petition for lack of jurisdiction.

N.J.—Grogan v. William J. Scully, Inc., 126 A.2d 41, 42 N.J.Super. 174.

(3) Court order expressly holding disability of compensation claimant temporary and making award for specified number of weeks until he is able to pursue gainful occupation.

Fla.—International Minerals & Chemical Corp. v. Tucker, 55 So.2d 720.

(4) Order denying motion for new trial.

U.S.—Libby, McNeill & Libby v. Alaska Indus. Bd., C.A.Alaska, 215 F.2d 781.

(5) Judgment of court denying claimant's motion to open judgment in compensation case.

Conn.—Osterlund v. State, 30 A.2d 393, 129 Conn. 591.

(6) Court ruling on motion to direct workmen's compensation commissioner to take steps necessary properly to present issues for consideration by court on appeal from commissioner's order, even though ruling may be assigned as error on appeal from final judgment.

Conn.—France v. Munson, 192 A. 706, 123 Conn. 102.

91. Iowa.—Hagmeier v. Dryden Rubber Division of Sheller Mfg. Corp., 66 N.W.2d 111, 245 Iowa 1121.

71 C.J. p 1365 note 32 [a] (1), (2).

or reverses it,⁹² or which dismisses an appeal from the award of the compensation commission⁹³ or a suit to set aside an award or decision of a compensation board or commission,⁹⁴ is final and appealable.

Under some acts, a judgment or decision of a reviewing court which reverses or sets aside an award or decision of a compensation board or commission and remands the case for further proceedings with power to make a different award, so that the prevailing party before the board or commission loses the benefit of the award or decision in his favor, is regarded as final and subject to further appeal.⁹⁵ Under other acts, an order or de-

cision of a reviewing court remanding the cause to the compensation board or commission for further action is regarded as interlocutory and not final so as to be appealable⁹⁶ or reviewable by certiorari,⁹⁷ as where the case is remanded for the purpose of taking additional evidence, or of making new findings of fact, or both,⁹⁸ or where a case which has been dismissed by the compensation board without a hearing on the ground that it was *res judicata* is recommitted to the board for a hearing.⁹⁹

A judgment or decision of a reviewing court, however, is appealable where it remands the case to the compensation board or commission with directions to find certain facts in accordance with the opinion of the court,¹ or where it reverses or sets

Approval of findings

Judgment which, after setting out award of commission in *hæc verba*, recited that findings of commission were approved and affirmed at cost of employer and insurer, for which execution should issue, was appealable as a final judgment.

Mo.—Lamker v. Schiller, App., 136 S.W.2d 371.

92. Iowa.—Hagmeier v. Dryden Rubber Division of Sheller Mfg. Corp., 66 N.W.2d 111, 245 Iowa 1121.

Wash.—Lowe v. Department of Labor and Industries, 66 P.2d 848, 189 Wash. 650.

93. Mo.—Graves v. O. F. Elliott, Inc., 197 S.W.2d 977, 355 Mo. 751.

Wash.—State ex rel. Burkhard v. Superior Court for Clark County, 120 P.2d 477, 11 Wash.2d 600.

94. Dismissal without words of limitation

Tex.—Stubbs v. Traders and General Ins. Co., Civ.App., 127 S.W.2d 352.

95. Ga.—American Mut. Liability Ins. Co. v. Kent, 30 S.E.2d 599, 197 Ga. 733, conformed to 31 S.E.2d 81, 71 Ga.App. 453, disapproving ruling in King v. W. U. Tel. Co., 187 S.E. 888, 54 Ga.App. 388.

Butler v. Fidelity & Cas. Co. of N. Y., 76 S.E.2d 813, 88 Ga.App. 620—Bituminous Casualty Corp. v. Harris, 24 S.E.2d 803, 68 Ga.App. 889—U. S. Fidelity & Guaranty Co. v. Brown, 23 S.E.2d 443, 68 Ga.App. 706.

Ky.—Kenmont Coal Co. v. Clark, 171 S.W.2d 242, 294 Ky. 226—Inland Steel Co. v. Newsome, 136 S.W.2d 1077, 281 Ky. 681—Searcy v. Three Point Coal Co., 134 S.W.2d 228, 280 Ky. 683.

96. Ill.—ACF Industries, Inc. v. Industrial Commission, 134 N.E.2d 764, 8 Ill.2d 552—Thompson v. Industrial Commission, 37 N.E.2d 350, 377 Ill. 537—Brown Shoe Co. v. Industrial Commission, 20 N.E.2d 566, 371 Ill. 273—Dunavan v.

Industrial Commission, 189 N.E. 283, 355 Ill. 444.

Mass.—Batchon's Case, 132 N.E.2d 400, 333 Mass. 605—In re Pereira's Case, 47 N.E.2d 766, 313 Mass. 774.

N.J.—Grogan v. William J. Scully, Inc., 126 A.2d 41, 42 N.J.Super. 174.

Pa.—Bogan v. Smoothway Const. Co., 130 A.2d 207, 183 Pa.Super. 170—Messikomer v. Baldwin Locomotive Works, 115 A.2d 853, 178 Pa. Super. 537—Puskarich v. Puskarich, 102 A.2d 191, 174 Pa.Super. 581—Wilke v. Budd Co., 100 A.2d 127, 174 Pa.Super. 108.

71 C.J. p 1365 note 32 [b] (3).

Failure formally to remand

Order reversing and setting order of compensation board suspending compensation until claimant should comply with employer's request that he should undergo physical examination by employer's physicians, was not a final judgment and could not be reviewed, even though court did not formally remand cause to commission.

Ill.—Moffat Coal Co. v. Industrial Commission, 73 N.E.2d 423, 397 Ill. 196.

Interlocutory orders held not appealable

(1) Order of court referring compensation case to compensation board or commission for determination on specific issue.

Colo.—Industrial Commission v. Dorchak, 47 P.2d 396, 97 Colo. 142.

(2) Decision that evidence supported commissioner's finding of compensable injury but that case should be remanded for further proceedings.

Iowa.—Hagmeier v. Dryden Rubber Division of Sheller Mfg. Corp., 66 N.W.2d 111, 245 Iowa 1121.

(3) Judgment remanding compensation case to commissioner for determination on merits of a motion to correct a supplemental finding and award reopening an original award denying an application for

compensation and to complete record by incorporating newly discovered evidence on which opening of award was predicated.

Conn.—Luliewicz v. Eastern Malleable Iron Co., 12 A.2d 779, 126 Conn. 522.

(4) Court order which reversed decision of compensation board denying compensation award to claimant and remitted claim to board for purpose of making award.

N.Y.—Falk v. Midland Dairy Co., 195 N.E. 199, 266 N.Y. 559.

97. N.J.—Pova v. Manuel Viera Const. Co., 57 A.2d 363, 136 N.J. Law 650.

To secure admission of erroneously excluded evidence

N.J.—Paluk v. United Color & Pigment Co., 49 A.2d 585, 134 N.J. Law 601.

98. Conn.—Burdick v. U. S. Finishing Co., 22 A.2d 629, 128 Conn. 284. Ill.—Joyce Bros. Storage & Van Co. v. Industrial Commission, 73 N.E.2d 262, 399 Ill. 456.

Ill.—Cooke v. Groveland Coal Mining Co., 276 Ill.App. 521.

N.J.—Grogan v. William J. Scully, Inc., 126 A.2d 41, 42 N.J.Super. 174.

Pa.—Puskarich v. Puskarich, 102 A.2d 191, 174 Pa.Super. 581—Shemanchick v. M. & S. Coal Co., 74 A.2d 764, 167 Pa.Super. 350—Davis v. Midvale Co., 56 A.2d 294, 162 Pa.Super. 171—Radonich v. Pine Hill Coal Co., 45 A.2d 922, 158 Pa.Super. 636—Behanna v. Meyers, 44 A.2d 600, 158 Pa.Super. 208—Diaz v. Jones & Laughlin Steel Corp., 38 A.2d 387, 155 Pa.Super. 177—Gondak v. Wilson Gas Coal Co., 25 A.2d 854, 148 Pa.Super. 566.

99. Mass.—Batchon's Case, 132 N.E.2d 400, 333 Mass. 605.

1. Pa.—Messikomer v. Baldwin Locomotive Works, 115 A.2d 853, 178 Pa.Super. 537—De Battisti v. Anthony Laudadio & Son, 74 A.2d 784, 167 Pa.Super. 38—Strickland

aside the award or decision of the board or commission and remands the case with directions to the board or commission to make a certain award,² or for action consistent with the opinion of the court,³ or where it remands the case to the board with directions to make a distinct finding with respect to a particular matter, which remand is erroneous because the finding ordered is immaterial and unnecessary in view of another finding of fact by the board.⁴

Where the question is one wholly of law, so that it is not necessary that the record be remitted for the entry of the only possible order under the ruling of the court, the fact that it does remit the record for entry of a modified award will not render its order any the less final and appealable.⁵ An appeal from an order of remand has been permitted where the parties cannot go outside of the agreed facts in the presentation of their cause and a further hearing by the compensation commission would be inconvenient, expensive, and futile.⁶ An order which merely remands the case to the board or commission with directions to make an award in compliance with the requirements of the statutes by separating its findings of law and fact is not final and appealable.⁷

A decision of the court confirming the order of the board or commission, made under directions of the court on a former review is reviewable.⁸ It has also been held that a court order remanding a workmen's compensation case to the compensation board or commission for further proceedings is final and appealable where a statute requires the reviewing court either to affirm, reverse, or modify the decision of the commission and, hence, the remanding order is without authority.⁹ An order of a com-

pensation board remanding the record to a referee for the taking of additional testimony is interlocutory only, and where it has been affirmed on appeal a further appeal may not be taken to a higher court.¹⁰

After the cause has been reconsidered by the compensation board or commission and its ultimate award or decision sustained on review, proceedings for further review bring up the entire record, including the order of the first reviewing court remanding the cause, as discussed *infra* § 803.

Where a judgment dismissing a workmen's compensation claimant's attempted appeal from an award of a compensation board has become final because not appealed from, the higher court does not have jurisdiction to consider whether the judgment is erroneous, but it will consider the effect of such judgment.¹¹

Postponement of finality. A motion for new trial postpones the finality of the judgment until overruled or until a prescribed time after it is filed.¹²

§ 796. Right of Review

An appeal or other authorized form of review may be taken from a judgment or decree of a court reviewing an award or decision in a compensation case by a party in interest who is aggrieved or adversely affected by the judgment or decree; but, ordinarily, one who is not a party, or who is not aggrieved or adversely affected by the judgment or decision in the lower court cannot appeal therefrom.

In general, an appeal or other appropriate form of review may be taken from the judgment or decree of a court reviewing an award or decision in a compensation case by a party in interest who is a person aggrieved or may be adversely affected by the judgment or decree;¹³ but one who is not a

v. Baugh & Sons Co., 11 A.2d 547, 139 Pa.Super. 273.

Erroneous scope of review

Where court applied erroneous scope of review, in that it examined the record to determine whether there was sufficient evidence to support board's conclusions rather than whether there had been capricious disregard of competent evidence, its order of remission for further findings consistent with its opinion was appealable.

Pa.—*Bogan v. Smoothway Const. Co.*, 130 A.2d 207, 183 Pa.Super. 170.

2. *Conn.*—*Burdick v. U. S. Finishing Co.*, 22 A.2d 629, 128 Conn. 284.
Ky.—*Department of Highways v. Giles*, 146 S.W.2d 37, 284 Ky. 846.
Pa.—*Leftwich v. Colonial Aluminum Smelting Corp.*, 136 A.2d 182, 184 Pa.Super. 622—*Messikomer v. Bald-*

win Locomotive Works, 115 A.2d 853, 178 Pa.Super. 537—*Puskarich v. Puskarich*, 102 A.2d 191, 174 Pa.Super. 581—*Kline v. Kiehl*, 43 A.2d 616, 157 Pa.Super. 392—*Parisi v. Freedom Oil Co.*, 27 A.2d 255, 150 Pa.Super. 260.

3. *Pa.*—*Leftwich v. Colonial Aluminum Smelting Corp.*, 136 A.2d 182, 184 Pa.Super. 622.

4. *Pa.*—*Bakaisa v. Pittsburgh & W. V. R. Co.*, 27 A.2d 769, 149 Pa.Super. 203.

5. *Pa.*—*Puskarich v. Puskarich*, 102 A.2d 191, 174 Pa.Super. 581.

6. *N.C.*—*Edwards v. City of Raleigh*, 81 S.E.2d 273, 240 N.C. 137.

7. *Ky.*—*Green River Fuel Co. v. Sutton*, 84 S.W.2d 79, 260 Ky. 288.

8. *Ill.*—*American Manganese Steel*

Co. v. Industrial Commission, 77 N.E.2d 689, 399 Ill. 272.

9. *Md.*—*Allen v. Glenn L. Martin Co.*, 52 A.2d 605, 188 Md. 290, appeal dismissed 68 S.Ct. 86, 332 U.S. 749, 92 L.Ed. 336.

10. *Pa.*—*Shemanchick v. M. & S. Coal Co.*, 74 A.2d 764, 167 Pa.Super. 350.

11. *Tex.*—*Miller v. Lloyds Alliance*, Civ.App., 259 S.W.2d 777, refused no reversible error.

12. *Mo.*—*Seabaugh's Dependents v. Garver Lumber Mfg. Co.*, 200 S.W.2d 55, 355 Mo. 1153.

13. *Md.*—*Egeberg v. Maryland Steel Products Co.*, 58 A.2d 684, 190 Md. 374.

Minn.—*Tankar Gas v. Lumbermen's Mut. Casualty Co.*, 9 N.W.2d 754, 215 Minn. 265, 146 A.L.R. 1223.

party in the lower court,¹⁴ or who has not been aggrieved or adversely affected by the judgment or decision in the lower court¹⁵ cannot appeal therefrom. Where the losing party is allowed a specified number of days within which to appeal from the judgment or decision in the first reviewing court, he is entitled to it as a matter of right, and neither the first reviewing court nor the compensation board or commission may take any proceedings which deprive him of that right.¹⁶

A party is entitled to except to the judgment rendered against him in the lower court;¹⁷ but one against whom the claim for compensation was originally filed, but against whom an award was not made, and who was not a party to the cause on appeal to the lower court, may not urge exceptions to the judgment rendered.¹⁸ A claimant is not entitled to a review of a judgment affirming a dismissal by a board or commissioner of a hearing on a claim not authorized by statute.¹⁹ Where the court on appeal decides which of two insurers is to

be liable for compensation, the aggrieved insurer may have this determination reviewed.²⁰

An appeal from a judgment on an award may, in a proper case, be taken by the board or commission.²¹ Where the board or commission had no authority to intervene in an appeal from an award on which the reviewing court made an award against insurer, it has no right to appeal from the judgment of the reviewing court.²² Where, however, the board was a party to the appeal below, it has the same right to further review as any party in other civil actions.²³

The action of the court below on appeal is not reviewable on further appeal as to a claimant who has filed no cross appeal.²⁴ Where the commission decides adversely to a party who takes an appeal therefrom, but on appeal by another party the award is reversed, no appeal from the reversal can be had by the party failing to appeal from the decision of the commission.²⁵ Where only the insurance car-

Mo.—McClain v. Kansas City Bridge Co., 88 S.W.2d 1019, 338 Mo. 7.

Pa.—Jones v. Philadelphia & Reading Coal & Iron Co., 36 A.2d 252, 154 Pa.Super. 465.

Wash.—Hutchings v. Department of Labor and Industries, 167 P.2d 444, 24 Wash.2d 711.

Right of review restricted to persons or parties injuriously affected or aggrieved by judgment, order, or decree complained of generally see Appeal and Error § 183.

Claimant may obtain further review of award of compensation made against employer but in favor of alleged insurer on ground that there was no valid contract of insurance between employer and insurer at time of employee's injury.

Ga.—Rosson v. Bituminous Cas. Co., 6 S.E.2d 139, 61 Ga.App. 306.

Employer and insurance carrier who denied liability to successful claimant, second wife of deceased employee, on ground that her marriage was void, were entitled to appeal from judgment, notwithstanding neither wife appealed therefrom.

Fla.—Hillyer & Lovan v. Florida Industrial Commission, 19 So.2d 838, 155 Fla. 144.

Employer participating in hearings before compensation board and before superior court was entitled to appeal from adverse judgment of court without a formal attempt to intervene.

Wash.—Cole v. Department of Labor and Industries, 93 P.2d 413, 200 Wash. 296—Hoff v. Department of Labor and Industries of Washington, 88 P.2d 419, 198 Wash. 257.

Treasurer of commonwealth as custodian of special fund from which employer's insurer sought reimbursement was a party in interest entitled to appeal from an adverse decision.

Mass.—McLean's Case, 93 N.E.2d 233, 326 Mass. 72.

Waiver of right

In compensation proceeding, fact that attorney of compensation insurer, after hearing in superior court, presented to judge two forms of decrees, one in insurer's favor and other holding insurer liable was not tantamount to consent to unfavorable decree or waiver of insurer's right to appeal.

Mass.—Ward's Case, 190 N.E. 25, 286 Mass. 72.

14. R.I.—Milner v. 250 Greenwood Ave. Corp., 78 A.2d 358, 78 R.I. 5.

15. Md.—Consolidated Home Equipment Corp. v. State Accident Fund, 13 A.2d 340, 178 Md. 679.

Mo.—McClain v. Kansas City Bridge Co., 88 S.W.2d 1019, 338 Mo. 7.

N.D.—Pearce v. North Dakota Workmen's Compensation Bureau, 276 N.W. 917, 68 N.D. 78.

Heirs of deceased employee

Person who held power of attorney from compensation claimant's heirs could not maintain appeal from decree declaring compensation award void, since compensation due, if any, was payable to claimant's personal representative rather than to heirs.

Mich.—Brownwell Corporation v. Carney, 287 N.W. 387, 290 Mich. 82.

16. Ga.—American Mut. Liability Ins. Co. v. Ellison, 62 S.E.2d 656, 82 Ga.App. 712.

Readjudication

First reviewing court and compensation board may not, independent of rights which may accrue as a result of appeal, readjudicate any of issues already adjudicated by them.

Ga.—American Mut. Liability Ins. Co. v. Ellison, supra.

17. Ga.—City of Brunswick v. King, 14 S.E.2d 760, 65 Ga.App. 44.

18. Ga.—City of Brunswick v. King, supra.

19. N.J.—Sassarro v. Wright Aeronautical Corp., 52 A.2d 151, 135 N.J.Law 366.

20. Md.—Nathan v. Parks, 164 A. 179, 164 Md. 117.

21. Ky.—Workmen's Compensation Board of Kentucky v. Abbott, 278 S.W. 533, 212 Ky. 123, 47 A.L.R. 789.

Deputy commissioner can appeal from judgment enjoining enforcement of his award under Longshoremen's Compensation Act.

U.S.—Henderson v. Glens Falls Indemnity Co., C.C.A.La., 134 F.2d 320, certiorari denied 63 S.Ct. 1175, 319 U.S. 756, 87 L.Ed. 1709.

22. Ga.—Department of Industrial Relations v. Travelers' Ins. Co., 171 S.E. 169, 47 Ga.App. 553.

23. Or.—Dragicevic v. State Industrial Accident Commission, 230 P. 354, 112 Or. 569.

24. Ky.—Darby Harlan Coal Co. v. Fee, 283 S.W. 438, 214 Ky. 470.

25. Iowa.—Dille v. Plainview Coal Co., 250 N.W. 607, 217 Iowa 827.

rier, and not the employer, appealed from the award of a referee, subsequent appeals of the employer are nullities.²⁶

Under some acts, codes, and rules of procedure, persons who participated in the trial of the case are denied the right of appeal by writ of error.²⁷

Absence of formal order. A person prosecuting an appeal has been held to waive a purely procedural defect, such as the failure in the lower court to enter a formal order, and thereafter such appeal will not be disregarded as a nullity on the ground that it was taken from a nonexistent order.²⁸

Unauthorized joinder. The right of a party to have the judgment reviewed in a higher court is not prejudiced by the unauthorized or ill advised joining by another in the bill of exceptions.²⁹

26. Pa.—Coccaro v. Herman Coal Co., 20 A.2d 916, 145 Pa.Super. 81.

27. Tex.—Petroleum Casualty Co. v. Garrison, Civ.App., 174 S.W.2d 74, error refused.

What constitutes participation

(1) Insurer who was duly cited and filed answer but was not represented at trial and whose counsel did not participate therein, did not participate in "actual trial" of suit within statute denying right of review by writ of error to one who participates in actual trial of a case. Tex.—Petroleum Casualty Co. v. Garrison, Civ.App., 174 S.W.2d 74, error refused.

(2) Action of insurer which filed a petition in form of a bill of review to set judgment aside but subsequently dismissed that proceeding and brought case up by writ of error did not constitute participation in "actual trial" of suit within statute so as to preclude insurer's right to appeal by writ of error. Tex.—Petroleum Casualty Co. v. Garrison, Civ.App., 174 S.W.2d 74, error refused.

28. N.J.—Temple v. Storch Trucking Co., 125 A.2d 297, 41 N.J.Super. 397.

29. Ga.—City of Brunswick v. King, 14 S.E.2d 760, 65 Ga.App. 44.

30. La.—Troquille v. Lacaze's Estate, 63 So.2d 139, 222 La. 611.

N.M.—Reck v. Robert E. McKee General Contractors, Inc., 287 P.2d 61, 59 N.M. 492.

Pa.—Diaz v. Jones & Laughlin Steel Corp., 88 A.2d 801, 170 Pa.Super. 680—Richards v. E. T. Fraim Lock Co., 45 A.2d 382, 158 Pa.Super. 414.

R.I.—Leva v. Caron Granite Co., 124 A.2d 534.

Issues not available for first time on appeal

(1) Whether workmen's compensation claimant had right to select physician to treat him for injury and

amount and reasonableness of medical expenses.

Ark.—Green v. Lion Oil Co., 220 S.W.2d 409, 215 Ark. 305.

(2) Whether interest was payable on compensation payments.

Ark.—Tinsman Mfg. Co. v. Sparks, 201 S.W.2d 573, 211 Ark. 554.

La.—Troquille v. Lacaze's Estate, 63 So.2d 139, 222 La. 611.

31. U.S.—Stansfield v. Lykes Bros. S. S. Co., C.C.A.Tex., 124 F.2d 999.

Ill.—Town of Cicero v. Industrial Commission, 59 N.E.2d 354, 404 Ill. 487.

N.J.—Petersen v. Foundation Co., 25 A.2d 1, 128 N.J.Law 234.

Ohio.—Miles v. Electric Auto-Lite Co., 15 N.E.2d 532, 133 Ohio St. 613.

71 C.J. p 1366 note 44.

Burden of preserving error

Where jury answered special issues relating to total disability in favor of claimant, employer was partly aggrieved by jury's failure to answer special issue with respect to partial disability, and therefore employer had burden of preserving such error.

Tex.—Lewis v. Texas Emp. Ins. Ass'n, 246 S.W.2d 599, 151 Tex. 95.

Questions of procedure

Where claimant did not raise below any question as to procedure which presented for determination nature of his employment, but agreed with employer that major question for consideration on appeal was that of casual employment, claimant waived his right to object to procedure adopted.

Pa.—Parisi v. Freedom Oil Co., 27 A.2d 255, 150 Pa.Super. 260.

Number of objections

Assignments of error based on objections that plainly pointed out error complained of will be considered

§ 797. Presentation and Reservation Below of Grounds for Review

As a general rule, except with respect to matters apparent on the record and fundamental error, questions not raised and properly preserved for review in the first reviewing court, or under some circumstances, in the compensation board or commission, may not be raised and considered for the first time on further review.

In general, in accordance with the rules governing appeals in civil actions generally, as discussed in Appeal and Error §§ 223-390, on further appeal errors may not be presented for the first time in the higher court.³⁰ Objections and questions will not be considered by the higher court where they were not properly raised and presented³¹ by timely action by the party complaining³² in the court below,³³ or, in a proper case, before the original or a re-

regardless of large number of objections made.

Tex.—Traders & General Ins. Co. v. Richardson, Civ.App., 144 S.W.2d 420, error dismissed, judgment correct.

32. Tex.—Lewis v. Texas Emp. Ins. Ass'n, 246 S.W.2d 599, 151 Tex. 95. Angelina Cas. Co. v. Ryan, Civ. App., 282 S.W.2d 310, error refused no reversible error—Southern Underwriters v. Erwin, Civ.App., 134 S.W.2d 720, error granted.

Questions of procedure or jurisdiction

A defendant wishing to raise questions of procedure or jurisdiction at trial of workmen's compensation case in court of common pleas should make timely objection by motion or other objection before introduction of evidence.

Ohio.—Miles v. Electric Auto-Lite Co., 15 N.E.2d 532, 133 Ohio St. 613.

33. Kan.—Evans v. Board of Ed. of Hays, 284 P.2d 1068, 178 Kan. 275 —Jones v. W. U. Tel. Co., 192 P.2d 141, 165 Kan. 1.

Ky.—Bartley v. Bartley, 280 S.W.2d 549—Crummies Creek Coal Co. v. Hensley, 144 S.W.2d 206, 284 Ky. 243—Black Star Coal Co. v. Powers, 68 S.W.2d 30, 252 Ky. 736.

Md.—Charles Freeland & Sons, Inc. v. Couplin, 126 A.2d 606, 211 Md. 160—Oxford Cabinet Co. v. Parks, 22 A.2d 481, 179 Md. 680.

Mass.—Paltio's Case, 90 N.E.2d 826, 325 Mass. 356.

N.J.—Fink v. City of Paterson, 129 A.2d 746, 44 N.J.Super. 129.

Breheny v. Essex County, 45 A.2d 700, 134 N.J.Law 129—Furferi v. Pennsylvania R. Co., 181 A. 898, 116 N.J.Law 70—Datz v. Union Hill Hudson Corporation, 178 A. 737, 115 N.J.Law 246.

Funari v. Standard Sanitary Mfg. Co., 177 A. 431, 13 N.J.Misc. 226,

viewing compensation board or commission, or a | commissioner,³⁴ or both.³⁵ Also, on such ap-

affirmed 151 A. 44, 115 N.J.Law 506.

N.C.—Greene v. Spivey, 73 S.E.2d 435, 236 N.C. 435.

Ohio.—Goldberg v. Industrial Commission of Ohio, 3 N.E.2d 364, 131 Ohio St. 393.

Or.—Keefer v. State Industrial Accident Commission, 135 P.2d 806, 171 Or. 405.

Pa.—Johnson v. J. H. Terry & Co., 126 A.2d 793, 152 Pa.Super. 253.

S.C.—Frier v. South Carolina Penitentiary, 56 S.E.2d 752, 216 S.C. 84.

Tenn.—Greenville Cabinet Co. v. Ramsey, 260 S.W.2d 157, 195 Tenn. 409.

Tex.—Texas State Highway Dept. v. Fillmon, 242 S.W.2d 172, 150 Tex. 460—Texas Employers' Ins. Ass'n v. Mallard, 182 S.W.2d 1000, 143 Tex. 77—Great American Indemnity Co. v. Sams, 176 S.W.2d 312, 142 Tex. 121—Traders & General Ins. Co. v. Garry, 143 S.W.2d 370, 135 Tex. 290.

Texas Emp. Ins. Ass'n v. Sevier, Civ.App., 279 S.W.2d 473, refused no reversible error—Texas Indem. Ins. Co. v. Watson, Civ.App., 207 S.W.2d 99, reversed on other grounds 210 S.W.2d 959, 147 Tex. 40—Texas Emp. Ins. Ass'n v. Ferguson, Civ. App., 204 S.W.2d 197, error refused no reversible error—Traders & General Ins. Co. v. Yarbrough, Civ. App., 181 S.W.2d 305, error refused—Aetna Cas. & Sur. Co. v. Dixon, Civ.App., 145 S.W.2d 620, error refused—United Employers Casualty Co. v. Daniels, Civ.App., 142 S.W.2d 607—United Employers' Casualty Co. v. Burk, Civ.App., 140 S.W.2d 571, error dismissed—Texas Indemnity Ins. Co. v. Stevens, Civ.App., 135 S.W.2d 272, error dismissed, judgment correct—Uselton v. Southern Underwriters, Civ.App., 131 S.W.2d 1040, error dismissed, judgment correct—Federal Underwriters Exchange v. Bullard, Civ. App., 128 S.W.2d 126—Traders & General Ins. Co. v. Porter, Civ. App., 124 S.W.2d 900, error refused—Traders & General Ins. Co. v. Crouch, Civ.App., 113 S.W.2d 650, error dismissed—Fidelity & Casualty Co. of New York v. McLaughlin, Civ.App., 106 S.W.2d 815, affirmed 135 S.W.2d 955, 134 Tex. 613—Peeples v. Texas Indemnity Ins. Co., Civ.App., 22 S.W.2d 151.

Matter abandoned on appeal to lower court

N.C.—Penland v. Bird Coal Co., 97 S.E.2d 432, 246 N.C. 26.

On voir dire

(1) Statement made by juror on voir dire examination concerning matter whether employee had notified employer of accident and not objected to at time statement was made, was not of harmful nature and

its effect could have been cured by proper instruction by court.

Tex.—Texas Emp. Ins. Ass'n v. Kennedy, Civ.App., 303 S.W.2d 440, error refused no reversible error.

(2) Disclosure by prospective juror on voir dire examination, in response to questions of counsel, even though procedure was irregular, could not serve as basis for reversal in absence of timely objection.

Tex.—Texas Emp. Ins. Ass'n v. Schanen, Civ.App., 263 S.W.2d 614.

Failure to submit judgment to attorney general

Judgment could not be challenged for failure to comply with statute directing that no certificate of judgment shall be placed on record until it has been submitted to attorney general, where no effort was made in trial court to correct its journal in accordance with requirements of statute.

Ohio.—Lemmon v. Industrial Commission, App., 63 N.E.2d 845.

Failure to file cross action

Where employee relying on erroneous assumption that county court lacked jurisdiction to try suit to set aside an award of compensation by industrial accident board, did not file cross action in county court seeking to recover compensation, or introduce any evidence tending to show his right thereto, judgment setting aside award could not be reversed, notwithstanding contention that, if given opportunity, employee could by competent evidence establish his right to compensation.

Tex.—Morris v. Maryland Cas. Co., Civ.App., 130 S.W.2d 1080.

Fraud

Where defendant insurer did not plead that its insured, which was a partnership, had been guilty of fraud in withholding names of all individuals comprising partnership and that but for such fraud it would not have issued its policy, contention on appeal that there was no such partnership as jury found existed at time employee sustained fatal injury could not be sustained.

Tex.—Continental Fire & Cas. Ins. Corp. v. Drummond, Civ.App., 220 S.W.2d 922, error refused no reversible error.

34. Mass.—Demetre's Case, 78 N.E.2d 140, 322 Mass. 95—Indrisano's Case, 30 N.E.2d 538, 307 Mass. 520.

Pa.—Karoly v. Jeddo-Highland Coal Co., 73 A.2d 214, 166 Pa.Super. 571—Nesbit v. Vandervort & Curry, 193 A. 393, 123 Pa.Super. 58.

Kaplafka v. Hammond Coal Co., Com.Pl., 44 Sch.Leg.Rec. 208.

Wash.—Puget Sound Bridge & Dredging Co. v. Department of Labor and Industries, 174 P.2d 957, 26 Wash.2d 550.

Errors committed in connection with original proceedings before a compensation tribunal may not, unless objection is then and there made, be considered in a further review of original proceedings.

Ky.—Billiter & Willey v. Hatfield, 40 S.W.2d 326, 239 Ky. 816.

71 C.J. p 1238 note 36.

Cross appeal to lower court was required for contention before commission of appellee in such court to be considered on further appeal.

N.J.—Jensen v. Kraft Cheese Co., 37 A.2d 828, 132 N.J.Law 8—Bobertz v. Hillside Tp., 19 A.2d 801, 126 N.J.Law 416.

35. U.S.—Moore Dry Dock Co. v. Pillsbury, C.A.Cal., 169 F.2d 988—Stansfield v. Lykes Bros. S. S. Co., C.C.A.Tex., 124 F.2d 999.

Colo.—Bransall v. Industrial Commission, 251 P.2d 935, 126 Colo. 556.

Ill.—Shell Oil Co. v. Industrial Commission, 119 N.E.2d 224, 2 Ill.2d 590—Central Pattern & Foundry Co. v. Industrial Commission, 29 N.E.2d 511, 374 Ill. 300.

Iowa.—Green v. Jones County, 16 N.W.2d 238, 235 Iowa 564.

Ky.—Hayden v. Elkhorn Coal Corp., 238 S.W.2d 138—Fordson Coal Co. v. Palko, 138 S.W.2d 456, 282 Ky. 397.

Mo.—Wigger v. Consumers Co-op. Ass'n, App., 301 S.W.2d 56.

N.J.—Calabria v. Liberty Mut. Ins. Co., 71 A.2d 550, 4 N.J. 64.

Grotsky v. Charles Grotsky, Inc., 12 A.2d 856, 124 N.J.Law 572—Alexander v. Cunningham Roofing Co., 11 A.2d 41, 124 N.J.Law 390, affirmed 15 A.2d 612, 125 N.J.Law 277.

Pa.—Golinski v. Odin Stove Mfg. Co., 48 A.2d 95, 159 Pa.Super. 457—Wilkinson v. United Parcel Service of Pa., 43 A.2d 408, 158 Pa.Super. 22—Palermo v. North East Preserving Works, 15 A.2d 44, 141 Pa.Super. 211—Treski v. Glen Alden Coal Co., 191 A. 391, 126 Pa.Super. 346.

Kaplafka v. Hammond Coal Co., Com.Pl., 44 Sch.Leg.Rec. 208.

S.C.—Price v. Horton Motor Lines, 23 S.E.2d 744, 201 S.C. 484—Hamilton v. Little, 15 S.E.2d 662, 197 S.C. 434.

Wash.—Ramsay v. Department of Labor & Industries, 218 P.2d 765, 36 Wash.2d 410, opinion adhered to 227 P.2d 855, 36 Wash.2d 410.

71 C.J. p 1238 notes 35, 37.

Right to appeal

Where lower court on motion of industrial commission heard workmen's compensation case on merits, failure of industrial commission to raise question of claimant's right to appeal to court of common pleas waived error in proceeding in court of common pleas.

peal appellant is restricted to the theory on which the case was tried below.³⁶

In order that points involving the action of an intermediate reviewing court may be considered on a further appeal, it may be necessary that it appear that the points have been brought to the attention of such court in a specific manner.³⁷ The objections below must be clear and point out distinctly the matter to which the party objects,³⁸ and an objection to the finding of the court below should be specific.³⁹

These rules have been applied to questions with respect to venue,⁴⁰ the capacity or right to file a claim or sue for compensation,⁴¹ the capacity to be sued,⁴² defects of parties or in the name of a party,⁴³ the addition or substitution of parties,⁴⁴ the denial by the commission of a motion to join others as defendants,⁴⁵ the pleadings,⁴⁶ lack of opportunity for oral argument before the compensation commission,⁴⁷ the failure of the jury to answer special issues,⁴⁸ the findings,⁴⁹ the judgment,⁵⁰ the propriety

Ohio.—*Newland v. Industrial Commission of Ohio*, 19 N.E.2d 780, 60 Ohio App. 104.

Matters held not reviewable in higher court

(1) Affirmative defense with respect to whether employer was a self-insurer or an employer of three or more persons.

Ohio.—*Miles v. Electric Auto-Lite Co.*, 15 N.E.2d 532, 133 Ohio St. 613.

(2) Failure to make an allowance to claimant for attorney's fees in compensation court.

Neb.—*Faulhaber v. Roberts Dairy Co.*, 24 N.W.2d 571, 147 Neb. 631.

(3) Sufficiency of reasonable cause why claim for total incapacity should not be barred for failure to file it with board within specified time.

Mass.—*Fennell's Case*, 193 N.E. 835, 289 Mass. 89.

(4) Questions not submitted to deputy commissioner.

U.S.—*Bethlehem Steel Co. v. Parker*, C.C.A.Md., 163 F.2d 334.

D.C.—*Maryland Cas. Co. v. Cardillo*, 107 F.2d 959, 71 App.D.C. 160.

Objections held preserved

Where trial court determined that evidence supported commissioner's finding of compensable injury but remanded case for further proceedings, defendants' objections to decision on this fact issue and to claimed lack of jurisdiction of trial court to remand would be preserved to them on an appeal from final judgment in case.

Iowa.—*Hagmeier v. Dryden Rubber Division of Sheller Mfg. Corp.*, 68 N.W.2d 111, 245 Iowa 1121.

38. Tex.—*Baker v. Highway Ins. Underwriters, Civ.App.*, 209 S.W.2d 979, refused no reversible error—*Traders' & General Ins. Co. v. Line*, Civ.App., 70 S.W.2d 787, error dismissed.

General denial to cross action

Party's failure to file general denial to employee's cross action in suit to set aside compensation award would not, on appeal, be treated as an admission of all material allegations in cross action, where action was tried as though a general denial had been interposed, and hence such failure

would not preclude consideration of assignments of error.

Tex.—*Texas Employers' Ins. Ass'n v. Marsden*, 114 S.W.2d 558, 131 Tex. 258.

Traders' & General Ins. Co. v. Tillman, Civ.App., 119 S.W.2d 142, error dismissed.

Proper tribunal

Where case was tried by all parties on theory that court in which suit was tried was proper tribunal in which to try it, a different theory may not be presented on appeal in higher court for first time.

Tex.—*Security Mut. Casualty Co. v. Woodard*, Civ.App., 146 S.W.2d 281, error dismissed, judgment correct.

Extent of injury

Contentions on appeal that injury to foot and leg affected nervous system and that attempted use thereof resulted in pain could not be substituted for allegations of petition in compensation suit that injury affected only foot and leg.

Tex.—*Traders' & General Ins. Co. v. Marrable*, Civ.App., 126 S.W.2d 746, error dismissed.

37. Or.—*Streby v. State Industrial Accident Commission*, 215 P. 586, 107 Or. 314.

71 C.J. p 1245 note 9.

38. Tex.—*Texas Emp. Ins. Ass'n v. McMullin*, Civ.App., 279 S.W.2d 699, refused no reversible error—*Texas Emp. Ins. Ass'n v. Reid*, Civ.App., 209 S.W.2d 1016—*Allied Underwriters v. Spillman*, Civ.App., 145 S.W.2d 703, error refused.

39. Conn.—*Thompson v. Twiss*, 97 A. 328, 90 Conn. 444, L.R.A.1916E 506.

71 C.J. p 1366 note 45.

40. Tex.—*Texas Emp. Ins. Ass'n v. Johnson*, Civ.App., 254 S.W.2d 427, refused no reversible error.

Proper county

Ohio.—*Miles v. Electric Auto-Lite Co.*, 15 N.E.2d 532, 133 Ohio St. 613.

41. U.S.—*Parker v. Motor Boat Sales, Va.*, 62 S.Ct. 221, 314 U.S. 244, 86 L.Ed. 184, rehearing denied 62 S.Ct. 477, 314 U.S. 716, 86 L.Ed. 570.

Tex.—*Texas Indemnity Ins. Co. v. Hubbard*, Civ.App., 138 S.W.2d 626, error dismissed, judgment correct.

42. Legal entity capable of being sued

Contention that insurance carrier was entitled to peremptory instruction at trial for want of proof that it was a legal entity capable of being sued and having judgment rendered against it, as such, was not available to insurance carrier, where employee, in pleadings, had set out nature and identity of carrier, which under such name and as such entity appealed from award of industrial accident board and invoked jurisdiction of trial court.

Tex.—*Federal Underwriters Exchange v. Arnold*, Civ.App., 127 S.W.2d 972, error dismissed, judgment correct.

43. Tex.—*Traders' & General Ins. Co. v. Garry*, 143 S.W.2d 370, 135 Tex. 290.

44. Md.—*Bramble v. Shields*, 127 A. 44, 146 Md. 494.

45. Iowa.—*Elliott v. Wilkinson*, 81 N.W.2d 925.

46. Neb.—*Franzen v. Blakley*, 52 N.W.2d 833, 155 Neb. 621.

Matters not considered in higher court

Tex.—*Watson v. Texas Indem. Ins. Co.*, 210 S.W.2d 989, 147 Tex. 40.

General Ins. Corp. v. Wickersham, Civ.App., 235 S.W.2d 215, error refused no reversible error—*Casualty Underwriters v. Flores*, Civ.App., 125 S.W.2d 371, error dismissed, judgment correct.

Failure to allege jurisdictional facts under venue statute could not be raised for first time on appeal.

Tex.—*Baker v. Highway Ins. Underwriters*, Civ.App., 209 S.W.2d 979, refused no reversible error.

47. Ill.—*Plano Foundry Co. v. Industrial Commission*, 190 N.E. 255, 356 Ill. 186.

48. Tex.—*Lewis v. Texas Emp. Ins. Ass'n*, 246 S.W.2d 599, 151 Tex. 95. *Davis v. Texas Emp. Ins. Ass'n*, Civ.App., 257 S.W.2d 755.

49. Tex.—*Security Mut. Casualty Co. v. Woodard*, Civ.App., 146 S.W.2d 281, error dismissed, judgment correct.

50. Form of judgment in court be-

of a lump sum award,⁵¹ the authenticity or sufficiency of the record,⁵² the final character of the order or award of the compensation board which was appealed to the lower court,⁵³ and questions of constitutional law.⁵⁴

These rules also apply to questions with respect

to the admissibility of evidence,⁵⁵ the refusal of the board or commission to receive newly discovered evidence,⁵⁶ and the sufficiency of the evidence.⁵⁷ An objection to the admissibility of evidence must state the basis on which the objection is made, and grounds not stated may not be considered on further appeal.⁵⁸

low will not be considered for first time in higher court.

Tex.—Travelers Ins. Co. v. Calcote, Civ.App., 205 S.W.2d 56, error refused no reversible error.

51. Fla.—St. Johns River Shipbuilding Co. v. Wells, 22 So.2d 632, 156 Fla. 67.

Failure of real parties in interest to object

Fla.—St. Johns River Shipbuilding Co. v. Wells, 22 So.2d 632, 156 Fla. 67.

52. Ill.—Plano Foundry Co. v. Industrial Commission, 190 N.E. 255, 356 Ill. 186.

53. Ky.—Crummies Creek Coal Co. v. Hensley, 144 S.W.2d 206, 284 Ky. 243.

54. **Constitutional validity of compensation act.**

Ohio.—Goldberg v. Industrial Commission of Ohio, 3 N.E.2d 364, 131 Ohio St. 399.

71 C.J. p 1238 note 37 [a] (2).

Before board or commission

Question of constitutional law not raised before compensation board or commission, but attempted to be raised for first time on hearing of an appeal to intermediate court, has been held not properly raised for decision on a writ of error to higher court.

Ga.—Taylor v. Smith, 83 S.E.2d 602, 211 Ga. 5, appeal transferred, see 85 S.E.2d 52, 91 Ga.App. 125—Burnett v. Burnett, 72 S.E.2d 459, 209 Ga. 353, error transferred, see 73 S.E.2d 569, 87 Ga.App. 322.

55. U.S.—Employers Mut. Cas. Co. v. Johnson, C.A.Tex., 201 F.2d 153—Aetna Cas. & Sur. Co. v. Rhine, C.C.A.Tex., 152 F.2d 368.

Mass.—Charron's Case, 120 N.E.2d 754, 331 Mass. 519.

Mo.—Bicanic v. Kroger Grocery & Baking Co., App., 117 S.W.2d 650.

Tex.—Texas Emp. Ins. Ass'n v. Hale, Civ.App., 188 S.W.2d 899, affirmed 191 S.W.2d 472, 144 Tex. 432—United Employers Cas. Co. v. Smith, Civ. App., 145 S.W.2d 249, error refused.

Wash.—Merritt v. Department of Labor & Industries of State, 251 P.2d 158, 41 Wash.2d 633—Seth v. Department of Labor and Industries, 152 P.2d 976, 21 Wash.2d 691.

71 C.J. p 1245 note 12.

Necessity for ruling

Where it did not appear that trial court ever ruled on defendant's ob-

jection to admission of claimant's wage slips and income tax returns, or that these documents had ever been admitted, defendant could not complain of erroneous admission of such documents, particularly where claimant had, without objection, testified to their contents.

Tex.—Texas Emp. Ins. Ass'n v. Moore, Civ.App., 284 S.W.2d 175, error refused no reversible error.

Request to strike or instruct not to consider

Where counsel for insurer in compensation case objected to testimony that medical witness had given and court sustained objection, but insurer made no request to strike testimony or any request for an instruction that jury not consider testimony, failure of court to take action was not reversible error.

Texas Emp. Ins. Ass'n v. Hodnett, Civ.App., 216 S.W.2d 301, refused no reversible error.

Reviewing board

A question of evidence in a compensation case is not brought to supreme judicial court unless shown to have been raised and saved before reviewing board.

Mass.—Perrotta's Case, 64 N.E.2d 19, 318 Mass. 737—Donlan's Case, 58 N.E.2d 4, 317 Mass. 291—Indrisano's Case, 30 N.E.2d 538, 307 Mass. 520.

Limited objection

Objection against admission of notice of injury and claim for compensation on ground that instruments were admissible only for jurisdictional purposes, thus carrying implication that they were admissible for a limited purpose when under circumstances they were not admissible for any purpose, was insufficient to present error on appeal.

Tex.—Traders & General Ins. Co. v. Weatherford, Civ.App., 124 S.W.2d 423, error dismissed judgment correct.

Objections held preserved for consideration on appeal

Mass.—Gallant's Case, 95 N.E.2d 536, 326 Mass. 507.

56. Ga.—Grooms v. Globe Indem. Co., 88 S.E.2d 504, 92 Ga.App. 387.

57. Mass.—Hummer's Case, 59 N.E.2d 295, 317 Mass. 617.

Mo.—Fitzgerald v. Fisher Body St. Louis Co., Kansas City Division, 130 S.W.2d 975, 234 Mo.App. 269, opinion quashed in part on other

grounds State ex rel. Fisher Body St. Louis Co. v. Shain, 137 S.W.2d 546, 345 Mo. 962.

Tex.—Security Mut. Casualty Co. v. Woodard, Civ.App., 146 S.W.2d 281, error dismissed, judgment correct—Traders & General Ins. Co. v. Porter, Civ.App., 124 S.W.2d 900, error refused—Safety Casualty Co. v. Staggs, Civ.App., 99 S.W.2d 682, error dismissed.

Only basis for consideration

Where question of insufficiency of evidence to sustain judgment was not properly raised, appellate court could consider evidence only to determine whether there was any evidence in record which would support judgment rendered.

Tex.—Texas Indem. Ins. Co. v. Dunn, Civ.App., 221 S.W.2d 922.

Evidence not questioned at compensation hearing

D.C.—Maryland Cas. Co. v. Cardillo, 107 F.2d 959, 71 App.D.C. 160.

Evidence of resulting injury

Failure to object to special issue on ground that there was no evidence to prove several of resulting injuries specified in employee's petition waived right to urge such objection on appeal, especially where injuries specified were alleged as results of injuries for which compensation was sought and not as primary injuries themselves.

Tex.—Southern Underwriters v. Wright, Civ.App., 142 S.W.2d 297.

58. U.S.—Employers Mut. Cas. Co. v. Johnson, C.A.Tex., 201 F.2d 153.

Ill.—Town of Cicero v. Industrial Commission, 89 N.E.2d 354, 404 Ill. 487.

Tex.—Texas Emp. Ins. Ass'n v. Melton, Civ.App., 304 S.W.2d 453, error refused no reversible error—Traders' & General Ins. Co. v. Bulis, Civ.App., 75 S.W.2d 965, reversed on other grounds 104 S.W.2d 488, 129 Tex. 362—New Amsterdam Casualty Co. v. Luddeke, Civ.App., 72 S.W.2d 942.

Objections held sufficient to permit consideration on appeal

Tex.—Texas Emp. Ins. Ass'n v. Shiflet, Civ.App., 276 S.W.2d 942, refused no reversible error.

Objections held insufficient to permit consideration on appeal

Tex.—Aetna Cas. & Sur. Co. v. Davis, Civ.App., 196 S.W.2d 35.

The rules precluding consideration of errors for the first time on further appeal also apply to questions with respect to the instructions,⁵⁹ the submission of issues,⁶⁰ and the failure or refusal to direct a verdict or give a peremptory instruction.⁶¹ Objections to a charge or instruction must point out distinctly the matter objected to and the grounds of the objection,⁶² and submit a correct and proper instruction;⁶³ and the failure to instruct with respect to a particular matter constitutes no ground for reversal and will not be considered by the higher court where a request for such instruction was not made in the lower court.⁶⁴ Where the lower court has attempted to submit an issue but does it defectively or erroneously, an objection and exception to the submission is sufficient to preserve the point without preparing a proper charge and request that it be given.⁶⁵ Objections to the arguments and conduct of counsel may not be raised for the first time on a further review;⁶⁶ but the failure to object to im-

59. U.S.—*Williams v. Pacific Emp. Ins. Co.*, C.A.Tex., 194 F.2d 490.

Tex.—*Commercial Standard Ins. Co. v. Robinson*, Civ.App., 126 S.W.2d 1026, reversed on other grounds 151 S.W.2d 795. 137 Tex. 184—*Travelers' Ins. Co. v. Peters*, Civ. App., 250 S.W. 310.

Vt.—*Sivret v. Knight*, 109 A.2d 495, 118 Vt. 343—*Morrill v. Charles Bianchi & Sons*, 176 A. 416, 107 Vt. 50.

Wash.—*White v. Department of Labor and Industries*, 248 P.2d 566, 41 Wash.2d 276.

Omissions

Where plaintiff in compensation case made no request for further instructions, he could not assign as error on appeal an instruction which erred, if at all, on side of omission. Ohio.—*Hunter v. Industrial Commission*, App., 130 N.E.2d 399—*Lemmon v. Industrial Commission*, App., 63 N.E.2d 845.

Objections held insufficient

U.S.—*Pacific Emp. Ins. Co. v. French*, C.A.Tex., 224 F.2d 739.

60. Tex.—*Texas Emp. Ins. Ass'n v. Yother*, Civ.App., 306 S.W.2d 730, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Riggsby*, Civ.App., 273 S.W.2d 681—*Texas Emp. Ins. Ass'n v. Reid*, Civ.App., 209 S.W.2d 1016—*Allied Underwriters v. Spillman*, Civ.App., 145 S.W.2d 703, error refused—*Traders & General Ins. Co. v. Jenkins*, Civ. App., 144 S.W.2d 350—*Federal Underwriters Exchange v. Arnold*, Civ. App., 127 S.W.2d 972, error dismissed, judgment correct—*Consolidated Underwriters v. Lee*, Civ. App., 107 S.W.2d 482, error dismissed—*New Amsterdam Casualty Co. v. Luddeke*, Civ.App., 72 S.W. 2d 342.

Manner of submission of special issues

Tex.—*Federal Underwriters Exchange v. Porterfield*, Civ.App., 182 S.W.2d 847, error refused.

Failure to prepare

Failure to submit or charge on particular issue may not be reviewed on appeal where party did not prepare and present such issue to court and request its submission.

Tex.—*Texas Indemnity Ins. Co. v. Arant*, Civ.App., 171 S.W.2d 913, error refused—*Traders & General Ins. Co. v. Scogin*, Civ.App., 146 S.W.2d 1014, error dismissed, judgment correct—*Federal Underwriters Exchange v. Price*, Civ.App., 145 S.W.2d 951, error dismissed, judgment correct—*Southern Underwriters v. Stubblefield*, Civ.App., 130 S.W.2d 385—*Southern Underwriters v. Parker*, Civ.App., 129 S.W.2d 735, error refused—*Traders & General Ins. Co. v. Blacett*, Civ. App., 96 S.W.2d 420, error dismissed.

61. Ohio.—*Davidson v. Industrial Commission*, App., 82 N.E.2d 866. Tex.—*Traders & General Ins. Co. v. Blacett*, Civ.App., 96 S.W.2d 420, error dismissed.

Failure to stand on exception

Where trial judge overruled defendant's motion for directed verdict at conclusion of testimony in compensation proceeding, and defendant did not stand on its exception to such ruling but proceeded with its defense, defendant could not urge on appeal that ruling was prejudicial to defendant.

Ohio.—*Davidson v. Industrial Commission*, App., 82 N.E.2d 866.

62. Or.—*Wilson v. State Indus. Acc. Commission*, 219 P.2d 138, 189 Or. 114.

Objections held too general, vague, and indefinite

Tex.—*Texas Emp. Ins. Ass'n v. Hudgins*, Civ.App., 294 S.W.2d 446, error refused no reversible error—*Security Mut. Casualty Co. v. Woodard*, Civ.App., 146 S.W.2d 281, error dismissed, judgment correct—*Southern Underwriters v. Parker*, Civ.App., 129 S.W.2d 738, error refused—*Traders & General Ins. Co. v. Locklear*, Civ.App., 119 S.W.2d 153, error dismissed.

71 C.J. p 1245 note 9 [a] (1).

Objections in lower court held sufficient

Tex.—*Lewis v. American Sur. Co.*, 184 S.W.2d 137, 143 Tex. 286—*Texas Employers' Ins. Ass'n v. Mallard*, 182 S.W.2d 1000, 143 Tex. 77.

Objection held insufficient

Tex.—*Security Mut. Casualty Co. v.*

Woodard, Civ.App., 146 S.W.2d 281, error dismissed, judgment correct.

63. Tex.—*Texas Emp. Ins. Ass'n v. Melton*, Civ.App., 304 S.W.2d 453, error refused no reversible error.

Definition

Where compensation insurer, in objection to charge of court defining "total incapacity" and "producing cause," did not tender to trial court a substantially correct definition or explanatory instruction, insurer could not complain of such ruling on appeal.

Tex.—*Great American Indemnity Co. v. Sams*, 176 S.W.2d 312, 142 Tex. 121.

64. Tex.—*Texas Emp. Ins. Ass'n v. Reid*, Civ.App., 209 S.W.2d 1016—*Texas Emp. Ins. Ass'n v. Hale*, Civ. App., 188 S.W.2d 899, affirmed 191 S.W.2d 472, 144 Tex. 432.

65. Tex.—*Southern Underwriters v. Blair*, Civ.App., 144 S.W.2d 641.

66. Tex.—*Whitener v. Traders & General Ins. Co.*, 289 S.W.2d 233—*Wade v. Texas Emp. Ins. Ass'n*, 244 S.W.2d 197, 150 Tex. 557.

Texas Emp. Ins. Ass'n v. Scott, Civ.App., 233 S.W.2d 171, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Ferguson*, Civ. App., 204 S.W.2d 197, error refused no reversible error—*Traders & General Ins. Co. v. Little*, Civ.App., 188 S.W.2d 786, refused for want of merit—*Maryland Cas. Co. v. Landry*, Civ.App., 147 S.W.2d 290, error dismissed, judgment correct—*Culpepper v. Lloyds America*, Civ.App., 140 S.W.2d 330, error dismissed, judgment correct—*Maryland Cas. Co. v. Jackson*, Civ.App., 139 S.W.2d 631, error dismissed, judgment correct.

Time of objection

(1) Failure to object to improper argument of counsel at time it was made was held to waive error so that it would not be considered on appeal.

Tex.—*Wade v. Texas Emp. Ins. Ass'n*, 244 S.W.2d 197, 150 Tex. 557.

Highway Ins. Underwriters v. Coleman, Civ.App., 239 S.W.2d 131, refused no reversible error—*Texas Employers' Ins. Ass'n v. Peppers*, Civ.App., 133 S.W.2d 165, error dismissed, judgment correct.

proper argument of counsel will not preclude a party from raising the issue on appeal, where the prejudicial effects of the argument could not have been obviated by an instruction from the court.⁶⁷

Where a compensation act provides that an intermediate appellate court should, before rendering judgment, transmit to the compensation commission, for its determination, issues which appear not to have been presented to the commission on the original hearing before it, such issues must, on proper application of a party to the action, be transmitted to the commission by the intermediate court rather than by a higher appellate court before which a review of the proceedings before the intermediate court is sought.⁶⁸

Manifest and fundamental error; jurisdiction. Under some acts and practice, the jurisdiction of the lower court must be questioned by timely ob-

jection in order for it to be considered on further appeal;⁶⁹ and it must appear that the want of jurisdiction of such court was brought to its attention by specific statements rather than by mere conclusions.⁷⁰

Generally, however, in conformity with recognized limitations and exceptions to the rule requiring objections to be made in the lower court in order for questions to be reviewable in the higher court, as discussed in Appeal and Error §§ 242, 245, it may be unnecessary for a question apparent on the record to be first raised in the court below in order to be reviewed in the higher court.⁷¹ Manifest⁷² and fundamental⁷³ error, apparent on the record, may be raised and considered for the first time in the higher court. Generally, the question of jurisdiction may be urged and considered in the higher court, regardless of whether or not it was urged be-

(2) Improper argument was held not to constitute reversible error, where no objection was made thereto until assigned as error in motion for new trial.

Tex.—Safety Casualty Co. v. Wright, 160 S.W.2d 235, 138 Tex. 492.

Angelina Cas. Co. v. Ryan, Civ. App., 252 S.W.2d 310, error refused no reversible error—Texas Emp. Ins. Ass'n v. Rigsby, Civ.App., 273 S.W.2d 681.

Request for court to act

In order to claim error because of misconduct of counsel in his argument to jury, an objection alone is not sufficient, but court must be requested to act, unless misconduct was so flagrant that no instruction would cure it.

Wash.—Seth v. Department of Labor and Industries, 152 P.2d 976, 21 Wash.2d 691.

Proper preservation of objection to argument required

Tex.—Texas Emp. Ins. Ass'n v. George, Civ.App., 238 S.W.2d 218, error refused no reversible error.

Objection held not properly preserved
Tex.—American General Ins. Co. v. Dennis, Civ.App., 280 S.W.2d 620.

Change of grounds

Where counsel objected to argument of opposing counsel, but appeal brief of objection stated different grounds than were stated in objection, it could not properly be considered on appeal.

Tex.—Houston Fire & Cas. Ins. Co. v. Ford, Civ.App., 241 S.W.2d 158, refused no reversible error.

Reply arguments

Where purportedly improper arguments of plaintiff's attorney in workmen's compensation case were made in reply to arguments by defendant's attorney and no objection had been

made to such arguments, impropriety of arguments could not be urged on appeal.

Tex.—Highway Ins. Underwriters v. Coleman, Civ.App., 239 S.W.2d 131, refused no reversible error.

Curable impropriety

Improper argument of such a nature that trial court could have cured impropriety if objection had been made, does not constitute reversible error where objection was made for first time in motion for new trial.

Tex.—Texas Emp. Ins. Ass'n v. Rigsby, Civ.App., 273 S.W.2d 681.

67. Tex.—Loper v. Lumbermen's Lloyds, Civ.App., 269 S.W.2d 353, reversed on other grounds Lumbermen's Lloyds v. Loper, 269 S.W.2d 367, 153 Tex. 404.

Failure to object to earlier argument

Where defendant's subsequent argument in workmen's compensation case went beyond limits reached by earlier argument, even though they contained some similar statements, failure to object to earlier argument did not preclude plaintiff from claiming error in subsequent argument.

Tex.—Loper v. Lumbermen's Lloyds, Civ.App., 269 S.W.2d 353, reversed on other grounds Lumbermen's Lloyds v. Loper, 269 S.W.2d 367, 153 Tex. 404.

68. Colo.—Tavenor v. Royal Indemnity Co., 272 P. 3, 84 Colo. 521. 71 C.J. p 1233 note 83.

69. Objection held too late

Where employers obtained an order transferring an appeal from a workmen's compensation award from court of one county to court of another and on second appeal case was transferred back to court of first county on employers' application, employers could not thereafter challenge jurisdiction of such court, par-

ticularly where employers waited until court affirmed award, since one of courts had jurisdiction of appeal.

Mo.—State ex rel. Carnahan v. Dorris, App., 168 S.W.2d 167.

70. Or.—Strebby v. State Industrial Accident Commission, 215 P. 586, 107 Or. 314.
71 C.J. p 1245 note 10.

71. Ky.—Workmen's Compensation Board v. U. S. Coal & Coke Co., 245 S.W. 900, 196 Ky. 833.

71 C.J. p 1238 note 39.

72. U.S.—Brown v. Alaska Indus. Bd., C.A.Alaska, 224 F.2d 680.

73. Tex.—ICT Ins. Co. v. Gunn, Civ. App., 294 S.W.2d 435, error refused no reversible error.

Failure of jury to answer questions submitted on partial incapacity in accordance with instruction was fundamental error, requiring reversal of judgment for employee.

Tex.—Traders & General Ins. Co. v. Patton, Civ.App., 92 S.W.2d 1083, error dismissed.

Matters held not to constitute fundamental error

(1) Generally.

Tex.—Commercial Standard Ins. Co. v. Robinson, Civ.App., 126 S.W.2d 1026, reversed on other grounds 151 S.W.2d 795, 137 Tex. 184.

(2) Assignment of error challenging jurisdiction of trial court because of alleged absence of showing that injury occurred in county of suit, did not assign a fundamental error which could be raised for first time on appeal.

Tex.—Security Mut. Casualty Co. v. Woodard, Civ.App., 146 S.W.2d 281, error dismissed, judgment correct.

low,⁷⁴ such as jurisdiction of the subject matter,⁷⁵ or jurisdiction dependent on the timeliness of the appeal from the compensation board or commission to the first reviewing court.⁷⁶

An alleged fatal jurisdictional defect because of the failure to file, or the insufficient filing, with the commission of the claim for compensation may not, however, be made for the first time in the higher court;⁷⁷ nor can objection be made for the first time in the higher court to the form of the award, even though urged as a jurisdictional defect.⁷⁸ The jurisdiction of the compensation director to make a compensation award on a tardy or late application for a hearing cannot be questioned for the first time on further appeal to the higher court.⁷⁹ Moreover, appellant in the higher court cannot

charge error to the lower court because of its failure to hold that the compensation commission should not have taken jurisdiction of the case because the compensation commission of another state had already taken jurisdiction of it, where the question was never raised or considered in the lower court.⁸⁰

Exceptions. Under various acts and practice, exceptions are required in order to reserve questions for review on further appeal from the lower court.⁸¹ The exceptions must specify the questions to be considered on the further review.⁸² A general or single exception to the judgment of the lower court does not bring up for review the particular findings of fact or the sufficiency of the evidence to support them, but only the single question of whether the findings of fact support the judgment,⁸³ or it chal-

74. Md.—Holland Mfg. Co. v. Thomas, 110 A. 209, 136 Md. 77.

71 C.J. p 1238 note 38.

At any stage of proceedings

Or.—Meanev v. State Industrial Accident Commission, 232 P. 789, 113 Or. 371.

75. N.J.—Fury v. New York & L. B. R. Co., 22 A.2d 286, 127 N.J.Law 354, certiorari denied New York & L. B. R. Co. v. Fury, 62 S.Ct. 800, 315 U.S. 815, 86 L.Ed. 1213.

Ohio.—Goldberg v. Industrial Commission of Ohio, 3 N.E.2d 364, 131 Ohio St. 399.

S.C.—Black v. Town of Springfield, 60 S.E.2d 554, 217 S.C. 413.

Practice not encouraged

Colo.—Industrial Commission v. Plains Utility Co., 259 P.2d 282, 127 Colo. 506.

After final disposition

Supreme court had jurisdiction to determine question not raised in circuit court, as to industrial commission's power to determine matters relating to injury and disability after final disposition of such items by commission.

Wis.—Sheehan v. Industrial Commission, 76 N.W.2d 343, 272 Wis. 595.

76. Md.—Holland Mfg. Co. v. Thomas, 110 A. 209, 136 Md. 77.

77. S.C.—King v. Wesner, 16 S.E.2d 289, 198 S.C. 49.

78. S.C.—King v. Wesner, 16 S.E.2d 289, 198 S.C. 49.

79. Ga.—Pruitt v. Ocean Accident & Guarantee Corporation, 173 S.E. 238, 48 Ga.App. 730.

80. S.C.—Ham v. Mullins Lumber Co., 7 S.E.2d 712, 193 S.C. 66.

81. Mass.—Indrisano's Case, 30 N.E. 2d 538, 307 Mass. 520.

N.C.—Worsley v. S. & W. Rendering Co., 80 S.E.2d 467, 239 N.C. 547—Fox v. Cramerton Mills, 35 S.E.2d 869, 225 N.C. 580—Rader v. Queen

City Coach Co., 35 S.E.2d 609, 225 N.C. 537.

Pa.—McDermott v. Sun Indemnity Co. of New York, 198 A. 499, 131 Pa.Super. 60.

Tex.—Texas Employers Ins. Ass'n v. Wright, Civ.App., 118 S.W.2d 432, error dismissed.

Vt.—Sivret v. Knight, 109 A.2d 495, 118 Vt. 313.

Wash.—White v. Department of Labor and Industries, 248 P.2d 566, 41 Wash.2d 276—Champagne v. Department of Labor and Industries, 156 P.2d 422, 22 Wash.2d 412.

71 C.J. p 1245 note 12.

Necessity and sufficiency of exceptions in order to reserve questions for review in civil actions generally see Appeal and Error §§ 324-344.

Duty of lower court to rule

On appeal from award of industrial commission, reviewing court should overrule or sustain each and every exception addressed to alleged errors of law so that party aggrieved by rulings may except thereto and present question for further review.

N.C.—Worsley v. S. & W. Rendering Co., 80 S.E.2d 467, 239 N.C. 547.

Specific exceptions to general ruling

Where judge of lower court affirms all findings of fact and conclusions of law without ruling seriatim on each of specific exceptions, it is in effect a ruling on each and all such exceptions, and in such case party appealing to supreme court is not precluded from filing specific exceptions to each ruling on which he wishes to base an assignment of error.

N.C.—Stewart v. Duncan, 80 S.E.2d 764, 239 N.C. 640.

In appeal to board

A party who fails to except to a material finding of fact by referee or to his failure to find a specific fact on appeal to workmen's compensation board may not question referee's

findings on appeal from common pleas to superior court.

Pa.—Karoly v. Jeddo-Highland Coal Co., 73 A.2d 214, 166 Pa.Super. 571—Wilkinson v. United Parcel Service of Pa., 43 A.2d 408, 158 Pa. Super. 22—Forsythe v. Harrison Tp. Bd. of Ed., 43 A.2d 366, 157 Pa. Super. 433—Nesbit v. Vandervort & Curry, 193 A. 393, 128 Pa.Super. 58.

Reasons for affirmance

Where defendant raised, in his motion for judgment non obstante veredicto, question of plaintiff's election to follow his common-law remedy, and trial court, while not expressly sustaining such contention, did set aside verdict of jury and render judgment in defendant's favor, defendant was not required to except to judgment as prerequisite to citing election of complainant to follow common-law remedy as another reason why judgment of trial court was correct one.

Tex.—Garza v. U. S. Fidelity & Guaranty Co., Civ.App., 251 S.W.2d 781, refused no reversible error.

82. N.C.—Rader v. Queen City Coach Co., 35 S.E.2d 609, 225 N.C. 537.

Exceptions held insufficient

Wash.—Peterson v. Department of Labor and Industries, 157 P.2d 298, 22 Wash.2d 647.

83. N.C.—Stewart v. Duncan, 80 S.E.2d 764, 239 N.C. 640—Wyatt v. Sharp, 80 S.E.2d 762, 239 N.C. 655—Worsley v. S. & W. Rendering Co., 80 S.E.2d 467, 239 N.C. 547—Greene v. Spivey, 73 S.E.2d 488, 236 N.C. 435—Parsons v. Swift & Co., 68 S.E.2d 296, 234 N.C. 580—Brown v. L. H. Bottoms Truck Lines, 40 S.E.2d 476, 227 N.C. 65, opinion adhered to 42 S.E.2d 71, 227 N.C. 299—Fox v. Cramerton Mills, 35 S.E.2d 869, 225 N.C. 580—Rader v. Queen City Coach Co., 35 S.E.2d 609, 225 N.C. 537.

lenges only the conclusions of law on the facts so found.⁸⁴

Petition for review. Under some acts and practice, the higher court will not review the findings and award of the compensation commission unless the particular ground of objection is presented by petition to review the award.⁸⁵ Where there was no petition to review the award of the compensation commission, a judgment of the lower court modifying the commission's award will be reversed by the higher court for lack of jurisdiction over the subject matter by the lower court, even though that point was not raised in the lower court.⁸⁶

Motion for new trial. In some jurisdictions, errors, or designated errors, must be made the basis of a motion for a new trial as a prerequisite to

their consideration by a higher court on a further review of the compensation case,⁸⁷ unless the failure to do so is excused under an exception to the rule.⁸⁸ Such a motion has been held necessary where issues were raised and considered by the first reviewing court which were not before the compensation board,⁸⁹ but not necessary where no evidence was heard by the first reviewing court⁹⁰ and the case was tried in the lower court entirely on the record certified to it by the compensation board or commission.⁹¹ Such a motion is not required in order for the higher court to review fundamental error.⁹²

Under some practice and procedure, a motion for new trial covers the whole record and is no longer a motion for raising only what were formerly matters of exception. The motion, however, is not nec-

Two questions

An exception to judgment of lower court affirming or reversing an award of workmen's compensation or a denial of a claim for workmen's compensation presents two questions, namely, are facts found sufficient to support judgment, and does any error of law appear on face of record. N.C.—Horn v. Sandhill Furniture Co., 95 S.E.2d 521, 245 N.C. 173.

Questions presented by particular exceptions

Exception to judgment was held sufficient under facts of case to bring up for review single question of law whether written contract between claimant's intestate and alleged employer established relationship of employer and employee as found by industrial commission or whether intestate was an independent contractor as contended by employer.

N.C.—Brown v. L. H. Bottoms Truck Lines, 42 S.E.2d 71, 227 N.C. 299.

84. Mo.—Seabaugh's Dependents v. Garver Lumber Mfg. Co., 200 S.W. 2d 55, 355 Mo. 1153.

N.C.—Parsons v. Swift & Co., 68 S.E. 2d 296, 234 N.C. 580.

85. Colo.—Stearns-Roger Mfg. Co. v. Casteel, 261 P.2d 228, 128 Colo. 289 —Industrial Commission v. Plains Utility Co., 259 P.2d 282, 127 Colo. 506.

Defines limits of inquiry

A petition to industrial commission for review of its award of compensation defines limits of inquiry for supreme court on review of judgment of district court setting aside award and dismissing claim, and errors or objections, mentioned in complaint or assignments of error, but not specified in such petition, will not be considered by such court.

Colo.—Industrial Commission v. Calumet Fuel Co., 114 P.2d 297, 108 Colo. 133.

86. Colo.—Industrial Commission v. Martinez, 77 P.2d 646, 102 Colo. 31.

87. Tex.—Meyer v. Great Am. Indem. Co., 279 S.W.2d 575, 154 Tex. 408—Insurers Indemnity & Insurance Co. v. Associated Indemnity Corporation, 162 S.W.2d 666, 139 Tex. 286.

Boyd v. Texas Emp. Ins. Ass'n, Civ.App., 207 S.W.2d 709—Travelers Ins. Co. v. Calcote, Civ.App., 205 S.W.2d 56, error refused no reversible error—Texas Indemnity Ins. Co. v. Warner, Civ.App., 159 S.W.2d 173, error refused—Garrett v. U. S. Fidelity & Guaranty Co., Civ.App., 77 S.W.2d 1066, reversed on other grounds U. S. Fidelity & Guaranty Co. v. Garrett, 105 S.W. 2d 868, 129 Tex. 587.

Necessity and sufficiency of motion for new trial in civil actions generally see Appeal and Error §§ 352-388.

Prior rule

Tex.—Commercial Standard Ins. Co. v. Robinson, 151 S.W.2d 795, 137 Tex. 184.

Insufficiency of evidence

Where question of insufficiency of evidence to sustain judgment was not raised by motion for new trial, appellant was not entitled to raise it for first time in appellate court.

Tex.—Texas Indem. Ins. Co. v. Dunn, Civ.App., 221 S.W.2d 922.

Improper argument

Error presented by improper argument of counsel, not based on testimony, advising jury of answers to make to issues so as to avoid inconsistency, to which no exception was reserved at time, could be complained of for first time on motion for new trial.

Tex.—Traders & General Ins. Co. v. Ofield, Civ.App., 105 S.W.2d 359, error dismissed.

Cross assignments of errors in a compensation case which were not brought to attention of lower court by motion for new trial or appeal from judgment, need not be considered by higher court.

Mont.—Best v. London Guarantee & Accident Co., 47 P.2d 656, 100 Mont. 32.

88. Tex.—Insurers Indemnity & Insurance Co. v. Associated Indemnity Corporation, 162 S.W.2d 666, 139 Tex. 286.

Rejection of jury finding

Where a litigant has been deprived of judgment based on a motion to disregard a finding by jury, party aggrieved thereby can complain on appeal without having first complained in a motion for a new trial. Tex.—Great Am. Indem. Co. v. Meyer, Civ.App., 285 S.W.2d 276.

89. Ky.—Clover Fork Coal Co. v. Scoggins, 91 S.W.2d 543, 263 Ky. 424.

90. Ky.—Elkhorn Coal Co. v. Stout, 168 S.W.2d 332, 293 Ky. 51. 71 C.J. p 1368 note 74 [a].

91. Ark.—Ledbetter v. Adams, 230 S.W.2d 21, 217 Ark. 329—Springdale Monument Co. v. Allen, 223 S.W.2d 802, 215 Ark. 788. 71 C.J. p 1245 note 13.

92. Tex.—Insurers Indemnity & Insurance Co. v. Associated Indemnity Corporation, 162 S.W.2d 666, 139 Tex. 286.

Matter held fundamental error

Entering judgment against party contrary to verdict of jury absolving him, in absence of proper motion for such judgment, was fundamental error which could be reviewed despite lack of motion for new trial.

Tex.—Insurers Indemnity & Insurance Co. v. Associated Indemnity Corporation, 162 S.W.2d 666, 139 Tex. 286.

essary in order to preserve, for further review, the proceedings and evidence had before the compensation commission,⁹³ although on further appeal from the lower court on the issue of whether the award of the compensation commission was procured by fraud, the contention of appellant must be stated in a motion for new trial in order to be reviewable.⁹⁴ Under other acts and practice, a motion for new trial is not necessary in order to obtain a further review of a workmen's compensation case on the merits,⁹⁵ but in order to obtain a review of errors of law which allegedly occurred during the trial in the court below, a motion for new trial must be timely filed, assigning such errors therein.⁹⁶ Under still other acts and practice the failure to file a motion for new trial within the proper time does not affect the appellate jurisdiction of the higher court, but it does preclude a consideration of the case on the weight of the evidence.⁹⁷

§ 798. Parties

All persons necessary to a final determination of the matter in issue are necessary parties on the further review of a compensation case.

In general, all persons necessary to a final determination of the matter in issue must be made parties

on appeal, or other appropriate form of review, from the judgment or decree of a court reviewing an award or decision of a compensation board or commission.⁹⁸ No objection for nonjoinder of parties can be made where the nonjoinder was the fault of appellant.⁹⁹

Where the appeal in the first reviewing court was dismissed after a jury had returned a verdict for claimant and he died after giving notice of further appeal, if the higher court holds that the jury verdict was proper, judgment should be entered as of the date of the verdict so as to avoid abatement; but if the higher court holds that a new trial is required, the action should then be considered abated.¹

§ 799. Taking and Perfecting Proceedings for Review

- a. In general
- b. Time for taking and perfecting

a. In General

An appeal from, or other form of review of, a judgment or decree in a proceeding reviewing an award or decision in a compensation case must be properly taken in accordance with the governing statutes and rules of practice.

93. Mo.—Seabaugh's Dependents v. Garver Lumber Mfg. Co., supra—Phillips v. Air Reduction Sales Co., 85 S.W.2d 55, 337 Mo. 587.

Buchanan v. Nicozisis, App., 78 S.W.2d 492.

94. Mo.—Phillips v. Air Reduction Sales Co., 85 S.W.2d 551, 337 Mo. 587.

95. Neb.—Hansen v. Paxton & Vierling Iron Works, 284 N.W. 352, 135 Neb. 867.

Trial de novo

A motion for new trial is not a necessary prerequisite in order for supreme court to search record, try case de novo thereon, and render such judgment as should have been rendered.

Neb.—Peek v. Ayres Auto Supply, 51 N.W.2d 387, 155 Neb. 233.

96. Neb.—Peek v. Ayres Auto Supply, supra.

97. Ohio.—Brooks v. Industrial Commission, 49 N.E.2d 580, 71 Ohio App. 295.

98. Ga.—Board of Road and Revenue Com'rs of Candler County v. Collins, 35 S.E.2d 758, 94 Ga.App. 562.

Designation as "et al"

Where statement of appeal designated appellees as named person "et al," quoted phrase was without effect and appeal was against named person only.

Ky.—Inland Gas Corp. v. Flint, 255 S.W.2d 1006.

Board, bureau, or commission

Board or commission should be made a party to appeal.

Ky.—Black Mountain Corporation v. Black, 294 S.W. 820, 220 Ky. 85.

N.D.—Henderson v. Scott, 10 N.W.2d 490, 72 N.D. 616.

Dependent of deceased employee receiving award was a proper party defendant to bill of exceptions brought by common-law wife of deceased.

Ga.—Grooms v. Globe Indem. Co., 81 S.E.2d 551, 90 Ga.App. 68.

Minor son of deceased employee held necessary party.

Ga.—Blue Top Cab Co. v. Donaldson, 92 S.E.2d 23, 93 Ga.App. 366.

Guardian appointed for minor is a necessary party on appeal from decision affirming award granting compensation.

Ga.—Utica Mut. Ins. Co. v. Rolax, 75 S.E.2d 205, 87 Ga.App. 733.

Insurance carrier held properly added as party defendant.

Ga.—Harper v. National Traffic Guard Co., 36 S.E.2d 842, 73 Ga. App. 385.

Death of party

(1) Where notice of appeal was filed before death of injured employee, appeal was perfected and vested jurisdiction in higher court to

review and adjudicate question of validity of judgment, and if revivor in name of executrix of plaintiff's estate was improper, it was nothing more than irregularity which did not affect jurisdiction of court.

Ohio.—Scott v. Industrial Commission, App., 105 N.E.2d 831.

(2) Where injured employee died after filing notice of appeal, if there was any irregularity in revivor in name of executrix of his estate in higher court, such irregularity could have been corrected by counsel by timely action, and if there had been any denial of proper representation of cause of plaintiff, court would take any appropriate steps to assure such representation, and any party who has interest in judgment could be substituted.

Ohio.—Scott v. Industrial Commission, supra.

(3) Where defendant in compensation proceeding died pending appeal, and no representative of his estate was appointed, judgment could not be entered on appeal which would affect estate of such defendant.

Conn.—Lucarelli v. Earle C. Dodds, Inc., 186 A. 641, 121 Conn. 640.

99. Tex.—Georgia Casualty Co. v. Campbell, Civ.App., 266 S.W. 854.

1. Wash.—Carl v. Department of Labor and Industries, 234 P.2d 487, 38 Wash.2d 890.

In accordance with the rules applicable in civil actions generally, as discussed in Appeal and Error §§ 425-427, an appeal from, or other form of review of, a judgment or decree in a proceeding reviewing an award or decision in a compensation case must be properly taken,² and must be in accordance with the rules of practice in the higher court.³ Under some acts and practice such appeals must be taken and prosecuted in the same manner and form and with the same effect as other appeals to the court.⁴ A motion to set aside an order of the full board, denying the employee compensation, and granting the right to appeal, has been held not proper procedure.⁵

Under various compensation acts and rules of practice, notice of appeal is required in order to take and properly perfect a further appeal to a higher court;⁶ and under some acts, codes, and rules of practice, the appeal is perfected and the higher court given jurisdiction by the proper and timely service and filing of a written notice of appeal with the lower court,⁷ or by the filing of a notice of appeal in the office of the clerk of the first reviewing court and depositing therein the docket fee required by law within the time prescribed.⁸

Where appeals are taken by serving notice of appeal on the adverse party or his attorney and the clerk of the trial court, service of such notice on all adverse parties or their attorneys is necessary to give the higher court jurisdiction of the case.⁹ Notice by the employer and insurer must be served on claimants as adverse parties, as well as on the attorney-general, appearing for the commission and the clerk of court.¹⁰ Also, notice of appeal must be served on claimants, even though they do not appear in an action to set aside an award, decided adversely to the employer, who appeals.¹¹ Where a notice of appeal is entitled "In the matter of the appeal of" claimant, it is immaterial that on appeal the title is changed to name claimant as claiming against the commission.¹²

The denial of a writ of error has the effect of leaving the judgment of the first reviewing court stand as it was entered and it is *res judicata* on the merits in subsequent proceedings.¹³ An appeal from a final decree of the first reviewing court has been held to vacate such decree.¹⁴ Proceedings for further review may properly be taken under the provisions of the law in force at the time of the

2. Md.—*Clauss v. Board of Education of Anne Arundel County*, 30 A.2d 779, 181 Md. 513.
71 C.J. p 1366 note 49.

Bill of review held sufficient

Mass.—*Employers' Liability Assur. Corp. v. Dileo*, 10 N.E.2d 251, 298 Mass. 401.

Fleadings held insufficient to justify setting aside of former final judgment rendered in original suit.

Tex.—*Texas Emp. Ins. Ass'n v. Scott*, Civ.App., 242 S.W.2d 915.

Motion to stay appeal denied

Md.—*Egeberg v. Maryland Steel Products Co.*, 58 A.2d 684, 190 Md. 374.

Effect of noncompliance

Provision of compensation act relating to appeal contemplates that, if there is default in required appellate procedure, superior court retains jurisdiction of cause and on motion of any party may proceed as though no claim of appeal had been made.

R.I.—*George A. Fuller Co. v. Mancini*, 54 A.2d 392, 78 R.I. 178.

Briefs

On appeal from judgment confirming an award, higher court would consider only briefs filed therein and would not consider briefs employer had filed with board.

Ky.—*Cornett-Lewis Coal Co. v. Day*, 226 S.W.2d 951, 312 Ky. 221.

Burden of presenting additional grounds

Where employer and insurance carrier were respondents before industrial commission on review of findings of hearing commissioner, and before circuit court on appeal by claimant from findings of commission, it was not necessary for employer and insurance carrier to submit additional sustaining grounds for former decisions favorable to them.
S.C.—*Wallace v. Campbell Limestone Co.*, 17 S.E.2d 309, 198 S.C. 196.

3. N.C.—*Anderson v. Wray Plumbing & Heating Co.*, 76 S.E.2d 458, 238 N.C. 138.

4. Pa.—*Wilkinson v. United Parcel Service of Pa.*, 43 A.2d 414, 158 Pa. Super. 84.

5. Ind.—*Udell v. Leedy Mfg. Co.*, 153 N.E. 816, 85 Ind.App. 562.

6. Idaho.—*Hutton v. Davis*, 53 P.2d 345, 56 Idaho 231.

Ohio.—*Richards v. Industrial Commission*, 127 N.E.2d 402, 163 Ohio St. 439.

Wash.—*Strmich v. Department of Labor & Industries of State*, 222 P.2d 663, 37 Wash.2d 218.

Necessity for notice of appeal in civil actions generally see Appeal and Error § 590.

Written notice of appeal must be filed with the clerk of district court.

Kan.—*Souden v. Rine Drilling Co.*, 92 P.2d 74, 150 Kan. 239.

Notice of appeal held sufficient

Ill.—*Zisook v. Industrial Commission*, 106 N.E.2d 156, 347 Ill.App. 178.

7. Wash.—*Strmich v. Department of Labor & Industries of State*, 222 P.2d 663, 37 Wash.2d 218.

Amendment of notice of appeal held proper

Ohio.—*Richards v. Industrial Commission*, 127 N.E.2d 402, 163 Ohio St. 439.

8. Neb.—*Miller v. Peterson*, 85 N.W. 2d 700, 165 Neb. 344.

9. Wis.—*Falk v. Industrial Commission*, 45 N.W.2d 161, 258 Wis. 109.

Guardian, to whom compensation award to infant dependent of deceased employee was payable must be served.

Idaho.—*Hutton v. Davis*, 53 P.2d 345, 56 Idaho 231.

10. Wis.—*Frontier Mining Co. v. Industrial Commission of Wisconsin*, 169 N.W. 312, 168 Wis. 157.

11. Wis.—*Sherwood v. Redfield*, 175 N.W. 782, 171 Wis. 91.

12. Or.—*Butterfield v. State Industrial Accident Commission*, 226 P. 216, 223 P. 941, 111 Or. 149.

13. Ill.—*Union Asbestos & Rubber Co. v. Industrial Commission*, 114 N.E.2d 345, 415 Ill. 367.

14. Mass.—*Nagle's Case*, 37 N.E.2d 474, 310 Mass. 193.

judgment appealed from rather than under the law as subsequently amended.¹⁵

Necessity for motion for new trial. Appellants have been held not required to file a motion for new trial in a first reviewing court in order to take a further appeal,¹⁶ at least where the first reviewing court reviewed only the record of proceedings before the compensation commission and did not try the case.¹⁷

Affidavit. Where the statute requires filing of an affidavit as a prerequisite to an appeal, where judgment has been rendered against both the employer and insurer and only the employer files an affidavit, the attempted appeal of insurer cannot be heard.¹⁸

Leave to appeal has been held unnecessary where appeal is a matter of right,¹⁹ although leave to appeal has been granted in the interest of expedition where delay in awarding compensation for injury to an employee has been shocking.²⁰ A formal order allowing an appeal has been held not required in order to appeal from a judgment or decree in a proceeding to set aside a compensation order or award,²¹ and an approval of an appeal bond has been held in legal effect an allowance of an appeal from such a judgment or decree.²² Under some acts leave to appeal is required in order to appeal from an interlocutory judgment.²³

Citation. The issuance of citation has been held not to be necessary and not to be jurisdictional on appeal from a judgment or decree in a proceeding

to set aside a compensation order or award,²⁴ and the issuance of citation may be waived.²⁵

Service of bill of exceptions. Where a statute or the rules of practice so require on writ of error the bill of exceptions must be served on all necessary parties to the appeal.²⁶ In the absence of statutes permitting it, service of the bill of exceptions by registered mail is improper as not in compliance with the manner prescribed.²⁷

Entry or docketing. Where, under a statute which requires entry forthwith in the appellate court, an appeal has been taken and a motion in the court below to dismiss because not entered forthwith in the appellate court has been denied, in an argument of the case on its merits in the appellate court a second such motion will be denied.²⁸

Questions reserved for advice of higher court. Under permissive statute the intermediate court can reserve a workmen's compensation case for the advice of the higher court without any appeal or judgment when the facts are not in dispute.²⁹

Rehearing. An employer in whose favor the decision was made by the compensation board or commission is not barred from appealing from a judgment of reversal by the court to which such decision was appealed because of his failure to have applied for a rehearing before the compensation board or commission, since the party who lost before the board or commission was the only one who had occasion to apply for a rehearing and to appeal.³⁰

15. Ill.—H. W. Clark Co. v. Industrial Commission, 126 N.E. 579, 291 Ill. 561.

16. Mo.—Seabaugh's Dependents v. Garver Lumber Mfg. Co., 200 S.W. 2d 55, 355 Mo. 1153.

Neb.—Hansen v. Paxton & Vierling Iron Works, 284 N.W. 352, 135 Neb. 867.

17. Mo.—Jenneman v. Consolidated Underwriters, 100 S.W.2d 458, 340 Mo. 273.

Motion on issue decided favorably to appellant

Where claimants filed affidavit in first reviewing court purporting to present issue of fraud, employer and insurer, whose motion to strike affidavit was sustained, were not required to file motion for new trial on such ruling in order to maintain appeal from judgment of court reversing award.

Mo.—Jenneman v. Consolidated Underwriters, supra.

18. Mo.—Wheat v. E. A. Whitney & Son, App., 34 S.W.2d 158.

19. N.Y.—Fineman v. Camp Ga-Ha-Ga, 180 N.E. 105, 258 N.Y. 423.

Leave to appeal denied where appellant was entitled to appeal as a matter of right.

N.Y.—Hendler v. Cayton Bakery, 32 N.Y.S.2d 89, 263 App.Div. 910.

20. N.Y.—Rowe v. Patrick McGovern, Inc., 14 N.Y.S.2d 640, 257 App. Div. 1095.

21. U.S.—Crescent Wharf & Warehouse Co. v. Pillsbury, C.C.A.Cal., 93 F.2d 761, certiorari denied 58 S.Ct. 1038, 304 U.S. 571, 82 L.Ed. 1536.

22. U.S.—Burley Welding Works v. Lawson, C.C.A.Fla., 141 F.2d 964—Crescent Wharf & Warehouse Co. v. Pillsbury, C.C.A.Cal., 93 F.2d 761, certiorari denied 58 S.Ct. 1038, 304 U.S. 571, 82 L.Ed. 1536.

23. N.J.—Grogan v. William J. Scully, Inc., 126 A.2d 41, 42 N.J.Super. 174.

24. U.S.—Crescent Wharf & Warehouse Co. v. Pillsbury, C.C.A.Cal., 93 F.2d 761, certiorari denied 58 S.Ct. 1038, 304 U.S. 571, 82 L.Ed. 1536.

Only purpose of citation is to give notice to appellee so that he may appear and be heard in appellate court. U.S.—Crescent Wharf & Warehouse Co. v. Pillsbury, supra.

25. U.S.—Crescent Wharf & Warehouse Co. v. Pillsbury, supra.

Appearance

Issuance of citation is waived by appellee by appearing generally in court and filing brief on merits before filing motion to dismiss.

U.S.—Crescent Wharf & Warehouse Co. v. Pillsbury, supra.

26. Guardian of minor claimant must be served

Ga.—Utica Mut. Ins. Co. v. Rolax, 75 S.E.2d 205, 87 Ga.App. 733.

27. Ga.—Cox v. Bibb Mfg. Co., 164 S.E. 97, 45 Ga.App. 158.

28. Mass.—In re Moran, 119 N.E. 956, 230 Mass. 500.
71 C.J. p 1367 note 68.

29. Conn.—Smith v. State, 88 A.2d 117, 138 Conn. 620.

30. Wash.—Cole v. Department of Labor and Industries, 93 P.2d 413, 200 Wash. 296.

Stay of execution. It has been held to be optional with the party appealing to the higher court whether or not there shall be a supersedeas.³¹ In order that the appeal may operate as a supersedeas he must comply with the terms and conditions prescribed therefor by statute and rule,³² which, under some statutes, are the same as are required in cases other than compensation cases.³³

In order that an appeal may operate as a supersedeas it must, under some acts and practice, be accompanied by a prescribed bond and must have been taken and perfected within a prescribed time.³⁴ Under others, the filing of an appeal bond and the entry of an appeal to the higher court from a judgment of the first reviewing court affirming the compensation award supersedes the execution of the award.³⁵ Where the statutes applicable to appeals in civil actions generally require a supersedeas bond in order to stay execution pending the outcome of the appeal, it is proper to require such bond in an appeal in compensation cases in the absence of anything to the contrary in the compensation act.³⁶

An interlocutory injunction granted in a pro-

ceeding to enjoin and set aside a compensation award should be restored during the pendency of an appeal from a decree dismissing the proceeding.³⁷ A supersedeas on an appeal from a judgment denying an injunction against the enforcement of an award does not operate as a pendente lite injunction within an act prohibiting a stay of amounts payable under an award pending final decision or under a rule with respect to appeals from a judgment refusing an injunction.³⁸

Where the party appealing fails to obtain a stay or supersedeas, the other party may go on with the case or not, at his pleasure, the subsequent proceedings being taken at his peril.³⁹

b. Time for Taking and Perfecting

An appeal or other form of review of a judgment or decree of a court reviewing an award or decision in a compensation proceeding must be taken within the time prescribed by statute or rule of court.

An appeal from the judgment or decree of a court reviewing an award or decision in a compensation proceeding,⁴⁰ or from a judgment or de-

31. Ga.—American Mut. Liability Ins. Co. v. Ellison, 62 S.E.2d 656, 82 Ga.App. 712.

32. Pa.—Wilkinson v. United Parcel Service of Pa., 43 A.2d 414, 158 Pa. Super. 84.

Rules governing first appeal

Provisions governing practice on appeal from compensation board or commission to lower court are not applicable on a further appeal to a higher court.

Pa.—Wilkinson v. United Parcel Service of Pa., supra.

S.C.—McDonald v. Palmetto Theaters, 11 S.E.2d 444, 196 S.C. 38.

33. S.C.—McDonald v. Palmetto Theaters, supra.

Appeal from money judgment

A statute prescribing conditions for a supersedeas on appeal from a judgment directing payment of money applies to a judgment entered by a court on an award in a compensation case, notwithstanding payment of some or all of award may be in future installments.

Pa.—Wilkinson v. United Parcel Service of Pa., 43 A.2d 414, 158 Pa. Super. 84.

34. Pa.—Wilkinson v. United Parcel Service of Pa., supra.

Supersedeas bond held sufficient

Tex.—Petroleum Casualty Co. v. Garrison, Civ.App., 174 S.W.2d 74, error refused.

35. Fla.—Dupree v. Elleman, 191 So. 65, 139 Fla. 809.

Appeal from denial of stay

Where employer and insurance car-

rier, who appealed from judgment of court, gave notice of intention to appeal from order denying a stay and requiring compensation to be paid under award, and perfected proper bond, employer and insurance carrier were entitled to a stay.

S.C.—McDonald v. Palmetto Theaters, 14 S.E.2d 273, 196 S.C. 400.

Injunction against denial of stay

Where employer and insurance carrier, who had perfected proper bond and were entitled to a stay, gave notice of intention to appeal from order denying a stay and requiring compensation to be paid under award, they were entitled to an injunction on rule to show cause where all parties concerned were accorded full opportunity to present and argue their respective contentions.

S.C.—McDonald v. Palmetto Theaters, 11 S.E.2d 444, 196 S.C. 38.

36. Kan.—Paul v. Skelly Oil Co., 7 P.2d 73, 134 Kan. 636.

37. U.S.—Gulf Oil Corporation v. McManigal, D.C.W.Va., 49 F.Supp. 75.

38. U.S.—Standard Dredging Corp. v. Henderson, C.C.A.Ala., 150 F.2d 78.

39. Ga.—American Mut. Liability Ins. Co. v. Ellison, 62 S.E.2d 656, 82 Ga.App. 712.

Entry of award

On appeal from judgment reversing board's denial of compensation, claimant, a supersedeas not having been procured, may have an award entered in his favor by board and

that award affirmed by superior court during pendency of appeal, but such proceedings are rendered nugatory if judgment is reversed.

Ga.—American Mut. Liability Ins. Co. v. Ellison, supra.

Payment of compensation

Where a stay or supersedeas was not obtained on further appeal, insurance carrier must pay weekly compensation awarded injured employee pending carrier's appeal to supreme court.

S.C.—Bannister v. Shepherd, 4 S.E. 2d 7, 191 S.C. 165.

40. Iowa.—Griffith v. Norwood White Coal Co., 294 N.W. 741, 229 Iowa 496.

Kan.—Brower v. Sedgwick County, 45 P.2d 835, 142 Kan. 7.

Pa.—Messikomer v. Baldwin Locomotive Works, 115 A.2d 853, 178 Pa. Super. 537.

Wis.—Falk v. Industrial Commission, 45 N.W.2d 161, 258 Wis. 109.

71 C.J. p 1367 note 57.

Time requirements held mandatory Fla.—Dupree v. Elleman, 191 So. 65, 139 Fla. 809.

Extension

Courts have no authority to extend return day of appeals.

Fla.—Dupree v. Elleman, supra.

Amendment to entry of appeal attempting to change return day so as to bring it within prescribed period is ineffectual where prescribed time for taking appeal had expired before attempt to amend was made.

Fla.—Dupree v. Elleman, supra; South Atlantic S. S. Co. of Fla.

cree in a proceeding to set aside or enjoin a compensation order or award⁴¹ must be taken within the time after rendition of the judgment or decree specified by the compensation act or rule of practice in the particular jurisdiction. Also, writs of certiorari must be timely,⁴² and writs of error must be sued out within the time fixed for the return of the record to the commission.⁴³ Further, notice of appeal must be served and filed within the prescribed time.⁴⁴

The time allowed for taking and perfecting an appeal or other form of review ordinarily runs from the time of rendition of final order, judgment, or decree in the first reviewing court,⁴⁵ and not from the date on which the journal entry of judgment was filed.⁴⁶ Where, however, a motion for new trial is filed, the time allowed for taking and

perfecting an appeal or other form of review generally commences to run on the overruling of the motion, rather than from the date of rendition of the judgment or decree,⁴⁷ although the contrary has also been held.⁴⁸

Under some acts and practice, the higher court is without jurisdiction to review the order or judgment of the lower court where the appeal is not taken and perfected within the prescribed time;⁴⁹ but under other acts an appeal will not be quashed because not taken within the prescribed time where notice of judgment was not given to the attorney for appellant,⁵⁰ or a party who, by accident or mistake, has failed to appeal within the time prescribed therefor may petition the full court for leave to appeal, which may be granted on terms.⁵¹

ware v. Tutson, 190 So. 675, 139 Fla. 405.

Appeal held timely

- (1) Generally.
U.S.—Rupert v. Todd Shipyards Corp., C.A.Cal., 236 F.2d 559.
Fla.—Foster v. Cooper, 194 So. 331, 142 Fla. 148.
Ga.—American Mut. Liability Ins. Co. v. Ellison, 62 S.E.2d 656, 82 Ga. App. 712.
Pa.—McDermott v. Sun Indemnity Co. of New York, 198 A. 499, 131 Pa.Super. 60.

(2) Appeal from order dismissing motion to quash appeal in compensation case filed within seven days of entry of order dismissing motion.
Pa.—Miles v. Masters, 97 A.2d 36, 374 Pa. 127.

41. Appeal held timely

- U.S.—Henderson v. Glens Falls Indemnity Co., C.C.A.La., 134 F.2d 330, certiorari denied 62 S.Ct. 1175, 319 U.S. 756, 87 L.Ed. 1709.

42. N.J.—Cole v. Brunswick Leather Goods Corp., 68 A.2d 569, 1 N.J.Super. 190.

Application for certiorari held timely

- N.J.—Law v. Joseph Dixon Crucible Co., 49 A.2d 576, 134 N.J.Law 591.

43. Colo.—Hull v. Denver Tramway Corporation, 50 P.2d 791, 97 Colo. 528.

71 C.J. p 1367 note 53.

Excuse

Absence of judge which prevented signing of bill of exceptions afforded no excuse for failure to sue out writ of error within prescribed period.

Colo.—Hull v. Denver Tramway Corporation, *supra*.

44. Fla.—Boca Raton Club v. Duff, 69 So.2d 624.

Service of notice of appeal on all adverse parties required

Wis.—Falk v. Industrial Commission, 45 N.W.2d 161, 258 Wis. 109.

With clerk of court

Wash.—Strmich v. Department of Labor & Industries of State, 222 P.2d 663, 37 Wash.2d 213.

Extension

Time for filing written notice of appeal cannot be extended by filing post-judgment motions.

Kan.—Souden v. Rine Drilling Co., 92 P.2d 74, 150 Kan. 239.

Service of notice of appeal held too late, notwithstanding service on time was impossible because sheriff's office was closed when letter requesting service arrived.

Wis.—Falk v. Industrial Commission, 45 N.W.2d 161, 258 Wis. 109.

45. Kan.—Brower v. Sedgwick County, 45 P.2d 835, 142 Kan. 7.

Pa.—McDermott v. Sun Indemnity Co. of New York, 198 A. 499, 131 Pa.Super. 60.

71 C.J. p 1367 note 57 [a].

Date from which return day determined

Fla.—South Atlantic S. S. Co. of Delaware v. Tutson, 190 So. 675, 139 Fla. 405.

Amendment

An amendment merely striking from final order of circuit court name of a corporation not a party to cause was not such an amendment as would change time of rendition of final judgment with respect to which time for appeal must be determined.

Fla.—South Atlantic S. S. Co. of Delaware v. Tutson, *supra*.

Decision granting limited rehearing was not a final disposition of cause from which time to file writ of review ran.

La.—Jones v. Williams, 89 So.2d 744, 215 La. 1.

Formal entry of judgment

Appellant is required to serve proposed case and exceptions within prescribed time after notice of appeal, even though there has been no formal entry of judgment.

S.C.—McCants v. West Virginia Pulp & Paper Co., 76 S.E.2d 614, 223 S. C. 467.

46. Fla.—South Atlantic S. S. Co. of Delaware v. Tutson, 190 So. 675, 139 Fla. 405.

Kan.—Brower v. Sedgwick County, 45 P.2d 835, 142 Kan. 7.

47. Mo.—Seabaugh's Dependents v. Garver Lumber Mfg. Co., 200 S.W. 2d 55, 355 Mo. 1153.

Neb.—Hansen v. Paxton & Vierling Iron Works, 234 N.W. 352, 135 Neb. 867—Saxton v. Sinclair Refining Co., 250 N.W. 655, 125 Neb. 468.

48. Kan.—Ferguson v. Palmolive-Peet Co., 233 P. 503, 129 Kan. 516.

49. Fla.—Davis v. Combination Awning & Shutter Co., 47 So.2d 436.

Kan.—Brower v. Sedgwick County, 45 P.2d 835, 142 Kan. 7.

Wis.—Falk v. Industrial Commission, 45 N.W.2d 161, 258 Wis. 109.

Appeal from interlocutory judgment N.J.—Grogan v. William J. Scully, Inc., 126 A.2d 41, 43 N.J.Super. 174.

Return day

Where appeal was not made returnable within prescribed time higher court's potential jurisdiction of appeal was not properly invoked.

Fla.—Dupree v. Ellerman, 191 So. 65, 139 Fla. 809—South Atlantic S. S. Co. of Delaware v. Tutson, 190 So. 675, 139 Fla. 405.

50. Pa.—Godfreid v. Rockhill Coal & Iron Co., 109 A. 577, 111 Pa.Super. 296.

51. Mass.—Petition of Liberty Mut. Ins. Co., 2 N.E.2d 712, 293 Mass. 75.

Failure to notify party of decree constitutes accident or mistake ex-

Ordinarily, appeals must be taken at the judgment term of court,⁵² but where a motion for new trial and in arrest of judgment and a bill of exceptions are required before one can perfect an appeal, the appeal may be taken at a subsequent term.⁵³ Where a bill of exceptions is not required, the filing of it in the term following that in which a motion for new trial was denied is not too late.⁵⁴

A statute providing that a compensation order as affirmed, modified, or reversed by the first reviewing court shall be filed in the office of the compensation commission and shall become final unless reversed or modified by the higher court on an appeal taken within a specified time after the entry of judgment of the first reviewing court does not require the order as affirmed, modified, or reversed to be filed in the office of the commission before an appeal may be taken from the order or judgment of the first reviewing court to a higher court.⁵⁵

§ 800. Assignment of Error

On a further review of the judgment or decree of a court reviewing an award or decision of a compensation board or commission, an assignment or specification of errors or a statement of the reasons or grounds for re-

view is essential to a review of the claimed error where required by statute or rule of court; which assignment or specification of errors or reason for review must be clear and definite and distinctly point out the claimed error.

In accordance with the rule applicable in civil actions generally, as discussed in Appeal and Error §§ 1218-1242, an assignment or specification of errors or a statement of the reasons or grounds for appeal is essential, where required by statute or rule, to appellate review of the judgment or decree of a court reviewing an award or decision of a compensation board or commission.⁵⁶ Under such practice, errors not so raised and presented need not be considered by the higher court,⁵⁷ even though they were raised in the lower court,⁵⁸ or even though the questions were argued in the higher court.⁵⁹ Where the reason for appeal is that the decree is against the law, points which are necessarily based on facts and evidence cannot be considered,⁶⁰ and findings of the lower court not attacked by proper assignment of error are binding on the reviewing court⁶¹ and on appellant.⁶²

Fundamental errors, however, may be considered by the higher court, even though not assigned.⁶³

cusing his failure to appeal within time prescribed therefor.
Mass.—Petition of Liberty Mut. Ins. Co., 9 N.E.2d 718, 298 Mass. 75.

Motion denied

Motion for permission to appeal on ground of newly discovered evidence was denied in case in which no appeal was taken within statutory period, where facts alleged in support of motion were not considered material to pertinent issues and no question of accident, mistake, or unforeseen cause was urged.

R.I.—Moulis v. Kennedy's, Inc., 108 A.2d 512, 82 R.I. 364.

52. Mo.—State ex rel. May Department Stores Co. v. Haid, 38 S.W.2d 44, 327 Mo. 567.

71 C.J. p 1367 note 61.

53. Mo.—Murphy v. St. Louis County Water Co., App., 54 S.W.2d 69—Barlow v. Shawnee Inv. Co., App., 48 S.W.2d 35.

54. Ky.—Mary Helen Coal Corporation v. Hensley, 35 S.W.2d 533, 237 Ky. 348.

55. Fla.—Dupree v. Elleman, 191 So. 65, 139 Fla. 809.

56. Iowa.—Hassbroch v. Weaver Const. Co., 67 N.W.2d 549, 246 Iowa 622.

R.I.—Wanskuck Co. v. Puleo, 82 A.2d 372, 78 R.I. 447.

57. Ill.—Shell Oil Co. v. Industrial Commission, 119 N.E.2d 224, 2 Ill. 2d 590.

Kans.—Jones v. W. U. Tel. Co., 192 P. 2d 141, 165 Kan. 31.

N.M.—Reck v. Robert E. McKee General Contractors, Inc., 287 P.2d 61, 59 N.M. 492.

N.C.—Glance v. Pilot Throwing Co., 80 S.E.2d 759, 239 N.C. 668—Worsley v. S. & W. Rendering Co., 80 S.E.2d 467, 239 N.C. 547—Matthews v. Carolina Standard Corp., 60 S.E.2d 93, 232 N.C. 229—Rader v. Queen City Coach Co., 35 S.E.2d 609, 225 N.C. 537.

Pa.—Kennedy v. Holmes Const. Co., 24 A.2d 451, 147 Pa.Super. 348.

Tex.—Traders & General Ins. Co. v. Little, Civ.App., 188 S.W.2d 786, refused for want of merit—United Employers Casualty Co. v. Daniels, Civ.App., 142 S.W.2d 607.

Omission of reading of pleadings

If just grounds existed for not reading to jury a particular part of employee's pleadings, and trial court "for good cause to be stated in record" should have directed omission of such reading and accompanying statement, such action should have been timely requested by insurance carrier and refusal to grant request, if any, presented for review as involving an abuse of discretion.

Tex.—Southern Underwriters v. Erwin, Civ.App., 134 S.W.2d 720, error granted.

Matters reviewable

Supreme court will review only such exceptive assignments of error as are properly made to judgment of superior court alone, and its review is limited to consideration of

assignments as to matters of law in trial in superior court.

N.C.—Horn v. Sandhill Furniture Co., 95 S.E.2d 521, 245 N.C. 173—Lewter v. Abercrombie Enterprises, 82 S.E.2d 410, 240 N.C. 399.

58. Iowa.—Elliott v. Wilkinson, 81 N.W.2d 925.

59. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, C.C.A.Mass., 102 F.2d 299, certiorari denied 59 S. Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

60. R.I.—New England Transp. Co. v. Rodrigues, 101 A.2d 242, 81 R.I. 205.

61. Tex.—National Indemnity Underwriters of America v. Rocamontes, Civ.App., 110 S.W.2d 228, error dismissed.

62. Tex.—Federal Underwriters Exchange v. McDaniel, Civ.App., 140 S.W.2d 979, error dismissed, judgment correct.

63. Constitutionality of compensation law

Portion of appellees' brief containing appellees' argument in support of constitutionality of workmen's compensation law, which trial court had held unconstitutional, would not be stricken by supreme court on motion of appellants because appellees had filed no cross appeal or cross assignments of errors.

Miss.—Walters v. Blackledge, 71 (S. 2d 433, 224 Miss. 435.

Also, an assignment of error is not necessary where the appellant claims that, at the time of the injury, the employee was without any statutory right to recover compensation, as such question, going to the foundation of the right of action, arises on the face of the record without formal presentation by assignment of error.⁶⁴

Conformable to the rule applicable in civil actions generally, as discussed in Appeal and Error § 1253, assignments or specifications of error or reasons of appeal must, to be of any avail, be clear and definite and point out wherein the lower court erred.⁶⁵ Where, however, a compensation claimant himself prosecutes his appeal, and his reasons of appeal and assignment of errors are very informal, the higher court will consider his claims as far as they are presented on the record.⁶⁶ Where compensation cases follow the course of equity, ordinary questions

as to the decision as it appears in the decree may be presented under general reasons of appeal, but any grievance resulting from an erroneous ruling on some particular matter during the course of the trial, whether evidentiary or otherwise, should be made the subject of a separate and specific reason of appeal.⁶⁷

Where the court on appeal from a decision of the board adopted the findings of the referee in sustaining claimant's exceptions, a proper form of assignment of error on appeal is to assign the action of the court in sustaining the exceptions.⁶⁸ A specification that the evidence adduced showed as a matter of law that the person for whose injury compensation is claimed was an independent contractor requires the higher court to determine if the lower court correctly applied the law to the facts of the case.⁶⁹

64. Tex.—Lumbermen's Reciprocal Ass'n v. Ryan, Civ.App., 299 S.W. 701.

65. Tex.—Texas Emp. Ins. Ass'n v. Hale, 191 S.W.2d 472, 144 Tex. 432. 71 C.J. p 1367 note 70.

Assignments of error held improperly grouped for consideration
Tex.—United Employers Casualty Co. v. Knight, Civ.App., 139 S.W.2d 613, error dismissed, judgment correct.

Exceptions to judgment

(1) Exceptions to signing and rendition of judgment of lower court raise only question as to whether error in matters of law appear on face of record.

N.C.—Willingham v. Bryan Rock & Sand Co., 82 S.E.2d 68, 240 N.C. 281.

(2) Where only assignment of error presented on appeal is based on exception to signing of judgment by superior court approving compensation award by industrial commission, only question raised is as to whether facts found by industrial commission support award.

N.C.—Berry v. Colonial Furniture Co., 60 S.E.2d 97, 232 N.C. 303—Rader v. Queen City Coach Co., 35 S.E.2d 609, 225 N.C. 537.

Findings of fact

(1) When it is claimed that findings of fact made by industrial commission and approved by superior court are not supported by evidence, exceptions and assignments of error in relation thereto must specifically and distinctly point out alleged error.

N.C.—Willingham v. Bryan Rock & Sand Co., 82 S.E.2d 68, 240 N.C. 281—Worsley v. S. & W. Rendering Co., 80 S.E.2d 467, 239 N.C. 547.

(3) Where appeal entries and assignments of error by defendants ap-

pealing from judgment of superior court affirming award of full commission did not bring up for review findings of fact of full commission, or evidence on which they were based, judgment would be affirmed, if it was supported by findings of fact.
N.C.—Glace v. Pilot Throwing Co., 80 S.E.2d 759, 239 N.C. 668.

Assignments or specifications of error held sufficient

(1) Generally.

Ga.—Adams v. Glens Falls Indemnity Co., 199 S.E. 783, 58 Ga.App. 668—Hennessee v. Jennings, 172 S.E. 583, 48 Ga.App. 188.

Kan.—McDonald v. Rader, 277 P.2d 652, 177 Kan. 249.

N.C.—Lewter v. Abercrombie Enterprises, 82 S.E.2d 410, 240 N.C. 399.

Tex.—Independent Eastern Torpedo Co. v. Herrington, 95 S.W.2d 377, 128 Tex. 17.

Texas Emp. Ins. Ass'n v. Hunter, Civ.App., 255 S.W.2d 944, reversed on other grounds 260 S.W.2d 884, 152 Tex. 438.

(2) An assignment of error which distinctly specifies as error a finding of fact constituting an issue necessary to support judgment appealed from is sufficient.

Tex.—Hartford Accident & Indemnity Co. v. Harris, Civ.App., 138 S.W.2d 277.

Assignments or specifications of error held insufficient

(1) Generally.

Conn.—France v. Munson, 3 A.2d 78, 125 Conn. 22.

Mo.—Oertel v. John D. Streett & Co., App., 285 S.W.2d 87.

N.C.—Willingham v. Bryan Rock & Sand Co., 82 S.E.2d 68, 240 N.C. 281.

Tex.—Traders & General Ins. Co. v. Looklear, Civ.App., 119 S.W.2d 153, error dismissed—Texas Employers

Ins. Ass'n v. Wright, Civ.App., 118 S.W.2d 433, error dismissed. 71 C.J. p 1367 note 70 [a].

(2) Held too general.

N.C.—Rader v. Queen City Coach Co., 35 S.E.2d 609, 225 N.C. 537.

(3) Point or assignment of error held "multifarious" and too general to be considered on appeal.

Tex.—Texas Emp. Ins. Ass'n v. Logsdon, Civ.App., 278 S.W.2d 893, refused no reversible error.

(4) Allegation of error that in workmen's compensation cases appellate courts may examine record and set aside decision of industrial commission merely stated an abstract proposition of law and presented no issue for decision on appeal from judgment affirming final award of industrial commission.

Mo.—Coleman v. Hercules Powder Co., App., 284 S.W.2d 32.

(5) Where appellant's exceptions to charge of lower court cover many pages of transcript, appellant's assignment of error assailing a definition given by lower court which did not show by reference to transcript what objections were urged by appellant to definition will be overruled, since court will not read transcript to ascertain what objections were.

Tex.—Federal Underwriters Exchange v. Popnoe, Civ.App., 140 S.W.2d 484, error dismissed.

66. Conn.—Engelhard v. Capewell Mfg. Co., 74 A.2d 476, 137 Conn. 32.

67. R.I.—Wanskuck Co. v. Puleo, 82 A.2d 872, 78 R.I. 447.

68. Pa.—Chase v. Emery Mfg. Co., 113 A. 840, 271 Pa. 265.

69. U.S.—Travelers Ins. Co. v. Curtis, C.A.Tex., 223 F.2d 827.

An assignment of error objecting to the jurisdiction of the court on the ground that the appeal from the decision of the compensation board should have been taken to a court in another county is without merit where the court is a court of general jurisdiction and the action was commenced therein by the filing of the appeal.⁷⁰

The successful party in the first reviewing court may assign error in a cross bill of exceptions on his exceptions pendente lite.⁷¹ The higher court, however, cannot reform the judgment so as to give an appellee employee additional workmen's compensation where his claim therefor is not brought to the higher court by cross assignment.⁷² The appeal by appellant has been held not to give the higher court jurisdiction to consider cross assignments by one appellee as against a coappellee.⁷³

In brief. Under some acts and practice, no assignments of error, assignments of cross error, formal joinder in error, specification of points, or cross specification of points is required to be filed, but in lieu thereof each party is required to state clearly and briefly in his brief the grounds on which he relies in seeking a reversal or modification of the judgment or the correction of adverse findings, orders, or rulings of the lower court.⁷⁴ Under other acts and practice, errors of law which allegedly occurred during the trial in the court below must, sub-

sequent to their assignment in a motion for new trial, also be assigned and discussed in the brief filed in the higher court, or they will not ordinarily be considered.⁷⁵

In motion for new trial. Under some acts and practice, the motion for a new trial constitutes the assignments of error on appeal and the assignments of error therein must clearly state the points of objection.⁷⁶

§ 801. Record

A record prepared in accordance with the statutes and rules is a prerequisite to consideration of an appeal or other form of review of the judgment or decree of a court reviewing an award or decision of a compensation board or commission; and the record must show such matters as are necessary for a consideration of the questions presented for review and limits the matters which may be considered.

In general, in accordance with the rule applicable in civil actions generally, as discussed in Appeal and Error § 680, a record prepared in accordance with the statutes and rules is a prerequisite to a consideration of an appeal or other form of review of the judgment or decree of a court reviewing an award or decision of a compensation board or commission; and the record must show such matters as are necessary for a consideration of the questions presented for review.⁷⁷ The record must

70. Idaho.—Thacker v. Jerome Co-op. Creamery, 106 P.2d 863, 61 Idaho 726.

Proper method

Relief should have been sought by petition to have cause transferred to proper county.

Idaho.—Thacker v. Jerome Co-op. Creamery, *supra*.

71. Ga.—American Mut. Liability Ins. Co. v. Satterfield, 76 S.E.2d 730, 88 Ga.App. 395.

Gross error held not required

Where, in motion for judgment non obstante veredicto, defendant raised question of plaintiff's election to follow his common-law remedy, and trial court, while not expressly sustaining such contention, did set aside verdict of jury and render judgment in defendant's favor, defendant was not required to file cross assignments or cross points of error as pre-requisite to citing election of complainant to follow common-law remedy as another reason why judgment of trial court was correct one.

Tex.—Garza v. U. S. Fidelity & Guaranty Co., Civ.App., 251 S.W.2d 781, refused no reversible error.

72. Tex.—Fidelity & Casualty Co. of New York v. McLaughlin, Civ.App., 106 S.W.2d 315, affirmed 135 S.W.2d 955, 134 Tex. 613.

73. Tex.—Republic Underwriters v. Glover, Civ.App., 72 S.W.2d 314, error dismissed.

74. Cases decided under former rule Colo.—Gregorich v. Oliver Coal Co., 166 P.2d 993, 114 Colo. 481—Morfat Coal Co. v. Cometa, 51 P.2d 593, 97 Colo. 573.

75. Neb.—Peek v. Ayres Auto Supply, 51 N.W.2d 387, 155 Neb. 233.

76. Tex.—Traders & General Ins. Co. v. May, Civ.App., 168 S.W.2d 267, error refused.

Proper assignment of error held not shown

Tex.—Traders & General Ins. Co. v. May, *supra*.

77. Mass.—Connery's Case, 138 N.E. 2d 595.

Tex.—King v. Federal Underwriters Exchange, 191 S.W.2d 855, 144 Tex. 531.

Submission on appeal papers

Where attorney general in behalf of employee brought compensation proceedings to supreme court and filed an abstract of record and a brief in support of his contentions and no appearance or brief was filed by employer, cause would be decided on appeal papers filed by attorney general through his written direction to that effect.

Wyo.—Claim of Heil, 197 P.2d 692, 65 Wyo. 175.

At time of application for appeal

No record can be considered, save and except that which is before higher court at time application for appeal is filed.

Mo.—Wilson v. Brownfield Const. Co., 74 S.W.2d 377, 228 Mo.App. 898.

At time record made

Propriety of a proceeding in which plaintiff in workmen's compensation case was asked concerning his conviction of felony and his voluntary and incriminating answer must be tested on appeal by record made at the time.

Tex.—Culpepper v. Lloyds America, Civ.App., 140 S.W.2d 330, error dismissed, judgment correct.

Matters filed after trial

Affidavit filed after trial in lower court was not included in record of lower court, but for purpose of appeal it was marked as an exhibit for identification.

U.S.—Wm. Spencer & Son Corp. v. Lowe, D.C.N.Y., 59 F.Supp. 463, affirmed, C.C.A., 152 F.2d 847, certiorari denied 66 S.Ct. 1012, 323 U.S. 837, 90 L.Ed. 1613.

Record on prior appeal

Where record on prior appeal in

show the jurisdiction of the court below,⁷⁸ and the rendition of a final or otherwise appealable judgment or decision in the lower court.⁷⁹ Under some acts and practice, the record on appeal before the higher court includes evidence taken before the compensation commission.⁸⁰ In the absence of any statute so requiring, a complete transcript of the testimony is not necessary on appeal.⁸¹ The transcript should incorporate only the parts of the record considered by the compensation board or commission

and the first reviewing court as essential to a review.⁸² The responsibility of perfecting the record and lodging it in the higher court rests on the party appealing,⁸³ and it is the duty of the complaining party to show by the record that error occurred.⁸⁴

In accordance with the rule applicable in civil actions generally, as discussed in Appeal and Error § 1142, the court on appeal is bound by the record.⁸⁵ Matters outside the record cannot be considered.⁸⁶

which petition was held insufficient and cause was remanded for new trial was in custody of court and was a part of official records of court, court would look to record to make a fair comparison between former pleadings and those before court on plaintiff's appeal.

Tex.—Federal Underwriters Exchange v. Hinkle, Civ.App., 167 S. W.2d 307, error refused.

Evidence in narrative form

Rule requiring evidence to be in narrative form and not by question and answer must be applied in compensation cases.

N.C.—Anderson v. Wray Plumbing & Heating Co., 76 S.E.2d 458, 238 N. C. 138.

Insurance policy

Where employee sought recovery against compensation insurer, and neither purported policy nor copy thereof appeared in record, court of civil appeals could not take cognizance of contents of policy.

Tex.—Southern Underwriters v. Adams, Civ.App., 113 S.W.2d 558, error dismissed.

Particular matters shown

(1) Record was held to disclose that court of common pleas made its findings from testimony before it independently of proceedings before compensation bureau.

N.J.—City of Paterson v. Smith, 20 A.2d 323, 126 N.J.Law 571.

(2) Record was held to show that argument of counsel was warranted by evidence and by reasonable deductions to be drawn therefrom.

Tex.—Texas Employers' Ins. Ass'n v. Drayton, Civ.App., 173 S.W.2d 782, error refused.

Statement in transcript limiting issues on appeal held not warranted by record.

S.C.—Wallace v. Campbell Limestone Co., 17 S.E.2d 309, 188 S.C. 196.

Record held not to show reversible error with respect to cross-examination and testimony of party concerning his conviction of felony and sentence to penitentiary.

Tex.—Culpepper v. Lloyds America, Civ.App., 146 S.W.2d 330, error dismissed, judgment correct.

Record held to justify compensation award

Fla.—Star Fruit Co. v. Canady, 32 So.2d 2, 159 Fla. 438.

Record held sufficient

Wash.—Russell v. Department of Labor and Industries of Washington, 78 P.2d 960, 194 Wash. 565.

78. Tex.—Traders & General Ins. Co. v. Lockwood, Civ.App., 138 S. W.2d 539, error dismissed, judgment correct.

71 C.J. p 1368 note 81.

Court in county of injury

Where suit to set aside award of industrial accident board was brought in county other than that in which injury occurred and on trial, insurance carrier pleaded to jurisdiction and proved that injury, if any, occurred in another county to which court immediately transferred case, and, after case was transferred to such county, petition was not changed with respect to naming place of injury, action of court in county wherein injury occurred in retaining jurisdiction and rendering judgment was not fundamental error.

Tex.—Traders & General Ins. Co. v. Lockwood, supra.

79. Matter in transcript

Failure of abstract to disclose entry of final judgment was not fatal to jurisdiction of court of appeals when fact of rendition of final judgment appeared in transcript.

Mo.—Kendrick v. Sheffield Steel Corp., App., 166 S.W.2d 590.

80. Mo.—Wilson v. Brownfield Const. Co., 74 S.W.2d 377, 228 Mo.App. 893.

To determine sufficiency of evidence

Higher court will examine transcript of record before compensation commission, certified by such commission to lower court and filed therein, in order to determine sufficiency of evidence to sustain all elements necessary to claimant's right to compensation.

Ohio.—McKibben v. Stuhlberg, 68 N. E.2d 810, 77 Ohio App. 540.

81. Or.—Enneberg v. State Industrial Accident Commission, 167 P. 310, 88 Or. 436.

71 C.J. p 1368 note 77.

82. Ky.—Cornett-Lewis Coal Co. v. Day, 226 S.W.2d 951, 812 Ky. 221.

83. Fla.—Orange Homes Co. v. Burnette, 29 So.2d 449, 158 Fla. 625.

84. Tex.—Southern Underwriters v. Erwin, Civ.App., 134 S.W.2d 720, error granted.

Evidence

Admission of testimony that employee complained of pain is not shown to constitute error, where record did not show that testimony was not admissible as *res gestæ*.

Tex.—Southern Underwriters v. Erwin, supra.

Ruling on objection

Objections to definition by court of partial incapacity could not be considered on appeal, where record failed to show that purported objections and exceptions to definition were ruled on by trial court.

Tex.—Traders & General Ins. Co. v. Locklear, Civ.App., 119 S.W.2d 153, error dismissed.

85. Mont.—Doty v. Industrial Accident Fund, 59 P.2d 782, 102 Mont. 511.

Wash.—Karlson v. Department of Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310.

71 C.J. p 1368 note 79.

Matters held within record

Tex.—Consolidated Underwriters v. Foxworth, Civ.App., 196 S.W.2d 87.

Record before lower court

(1) Higher court acts on record that was before lower court, and if record is defective it should be amended in lower court, since higher court can judicially know only what appears in record which was before lower court.

N.C.—Penland v. Bird Coal Co., 97 S.E.2d 432, 246 N.C. 26.

(2) Matters which were not in record before lower court but which are sent up with transcript to higher court are no more a part of record in higher court than they were in lower court, and may not be made so by certificate of court below.

N.C.—Penland v. Bird Coal Co., supra.

86. Mich.—Curley v. Beryllium Corp., 270 N.W. 282, 278 Mich. 23.

Mont.—Doty v. Industrial Accident Fund, 59 P.2d 782, 102 Mont. 511.

71 C.J. p 1368 note 89.

A party, however, cannot be heard to say that, because the record on appeal before the higher court does not show certain exhibits, they are not in the departmental record, where on his appeal to the lower court he offered and omitted such exhibits from the departmental record as he chose.⁸⁷

The higher court is limited to a consideration of such questions as are properly presented by the record or requisite part thereof, and matters not contained in the record or as to which the record is insufficient to enable the higher court to determine whether or not there was error will not be reviewed.⁸⁸ Matters objected to must be established by the record in order for the higher court to consider them,⁸⁹ and they must be considered in the light of the record as a whole.⁹⁰ The higher court will not review instructions which are not in the record,⁹¹ and in the absence of a statement of facts or some positive finding or certificate showing that the record contains all the material evidence, instructions involving factual issues which necessarily depend on the evidence may not be reviewed.⁹²

The question whether a finding or conclusion is correct cannot be determined where the record does

not fix the facts on which it is based.⁹³ Questions of fact or with respect to the sufficiency of the evidence to support the verdict or judgment, or a finding or determination of the lower court on a particular matter cannot be considered by the higher court where the evidence with respect thereto is not in the record.⁹⁴ The higher court cannot review a judgment sustaining a motion for a directed verdict where the evidence is not brought up before it.⁹⁵ Also, alleged error in the admission or rejection of evidence will not be considered on further appeal where the record fails to disclose what evidence was admitted or rejected.⁹⁶

The higher court cannot review an award of the compensation commission where the record consists of a printed abstract containing only the proceedings had in the lower court and no transcript of the record of the compensation commission.⁹⁷

In accordance with the rule in civil actions generally, as discussed in Appeal and Error § 785, a bill of exceptions, case, statement of facts, or authorized substitute therefor has been held unnecessary where the record proper adequately discloses the matters presented for review,⁹⁸ and are unnecessary

Record as made up by commissioner

In compensation case, supreme court and circuit court on appeal must limit their consideration to matter appearing in record as made up by industrial commissioner. S.D.—Andersen-Nelson v. L. G. Everist, Inc., 276 N.W. 257, 65 S.D. 568.

Addenda to brief labeled "Decision of Deputy Commissioner at First Hearing," which was not returned with writ of certiorari as part of proceedings to review judgment reversing compensation bureau's award, was not properly before supreme court and hence not reviewable. N.J.—Tucker v. Frank J. Beltramo, Inc., 186 A. 321, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301.

87. Wash.—Anderson v. Department of Labor and Industries, 242 P.2d 514, 40 Wash.2d 210.

88. Wash.—McIntyre v. Department of Labor and Industries, 159 P.2d 904, 23 Wash.2d 119.

89. Tex.—Texas Emp. Ins. Ass'n. v. Logsdon, Civ.App., 278 S.W.2d 898, refused no reversible error.

90. Tex.—U. S. Fidelity & Guaranty Co. v. Lewis, Civ.App., 266 S.W.2d 194, refused no reversible error.

91. Wash.—McIntyre v. Department of Labor and Industries, 159 P.2d 904, 23 Wash.2d 119.

92. Wash.—Hodgen v. Department of Labor and Industries of Washington, 78 P.2d 945, 194 Wash. 541.

93. Amount of compensation

Reviewing court could not determine amount due dependent of deceased employee where record did not disclose wages of decedent on which compensation must be computed.

La.—Caddo Contracting Co. v. Johnson, 64 So.2d 177, 222 La. 796.

Timely notice of injury

Where finding did not fix date when employee's right to compensation for pneumoconiosis first arose, court could not determine whether commissioner's conclusion that notice was seasonably given was correct, and decision of superior court based on assumption that injury dated from certain date was unwarranted.

Conn.—Rossi v. Thomas F. Jackson Co., 169 A. 617, 117 Conn. 608.

94. U.S.—Crescent Wharf & Warehouse Co. v. Pillsbury, C.C.A.Cal., 93 F.2d 761, certiorari denied 58 S. Ct. 1038, 364 U.S. 571, 82 L.Ed. 1536.

Kan.—Addington v. Hall, 160 P.2d 649, 160 Kan. 268.

Wash.—Hodgen v. Department of Labor and Industries of Washington, 78 P.2d 949, 194 Wash. 541—Hunter v. Department of Labor and Industries, 68 P.2d 224, 190 Wash. 380.

Where no statement of facts filed

Wash.—Nylander v. Department of Labor and Industries, 288 P.2d 470, 47 Wash.2d 543—Gullin v. Department of Labor & Industries, 285 P.

2d 159, 39 Wash.2d 216—Chase v. Department of Labor and Industries of State, 219 P.2d 111, 36 Wash.2d 518.

Evaluation of evidence must be on basis of record only.

Fla.—U. S. Cas. Co. v. Maryland Cas. Co., 55 So.2d 741.

Affidavit filed in lower court

Supreme court cannot consider affidavit filed in office of clerk of superior court and contained in transcript sent to supreme court.

Wash.—Sizemore v. Department of Labor and Industries, 219 P.2d 120, 36 Wash.2d 520.

Failure of trial court to take judicial notice of a judgment in which it was claimed claimant had recovered a sum in addition to a previous award as a result of injury suffered at a time when he was engaged in an extra-hazardous occupation would not be considered.

Wash.—Chase v. Department of Labor and Industries of State, 219 P.2d 111, 36 Wash.2d 518.

95. U.S.—Lux v. Western Casualty Co., C.C.A.Tex., 107 F.2d 1002.

96. Ohio.—Industrial Commission of Ohio v. St. John, 193 N.E. 343, 128 Ohio St. 640.

97. Mo.—Harris v. Harris, App., 150 S.W.2d 760.

98. Ark.—Herron Lumber Co. v. Neal, 172 S.W.2d 253, 206 Ark. 1082.

71 C.J. p 1368 note 74.

unless evidence was heard in the reviewing court,⁹⁹ or unless issues were raised and considered by the court which were not before the compensation board.¹ Where the only facts that may be considered are in the departmental record and that is before the higher court as part of the transcript on appeal, a statement of facts is not necessary to enable the higher court to consider questions of fact.²

Where a bill of exceptions is necessary, it must be prepared, served, settled, and filed in accordance with the requirements of the statutes and rules of practice.³ Under some acts and practice, a statement of facts must be agreed to by both parties or

approved by the trial judge in order to be considered on appeal.⁴ A bill of exceptions or statement of facts is but a part of the record and it is unnecessary to incorporate therein that which is itself already a part of the record, such as the departmental record, where it has been filed in the lower court and is included in the transcript on appeal.⁵

A bill of exceptions, case, statement of facts, or other prescribed mode by which to bring matter into the record, containing all matters material to the question raised for review and necessary to enable the higher court to pass thereon, is required in order to obtain a review of matters which do not sufficiently appear from the record proper,⁶ such as

Bill of exceptions held unnecessary
where workmen's compensation proceeding was tried on record made before compensation commission and authenticated copy of such record was filed in supreme court as part of record made in lower court.
Ark.—Herron Lumber Co. v. Neal, supra.

Bill of exceptions held necessary
on appeal from grant of involuntary nonsuit.
Or.—Hart v. State Industrial Acc. Commission, 38 P.2d 698, 148 Or. 692.

In Missouri

(1) Under a statute making transcript of entire proceedings, including evidence taken before compensation commission, record of cause in circuit court on appeal, such record is reviewable on appeal from judgment of circuit court in the absence of bill of exceptions.
Mo.—Buchanan v. Nicozisis, App., 78 S.W.2d 492.
71 C.J. p 1368 note 74 [a].

(2) On further proceedings in circuit court to review compensation commission's award on ground that it was procured by fraud, usual rules of bills of exceptions apply.
Mo.—Phillips v. Air Reduction Sales Co., 85 S.W.2d 551, 337 Mo. 587.
99. Ky.—Elkhorn Coal Co. v. Stout, 168 S.W.2d 332, 293 Ky. 51.
Mo.—Urban v. S. P. Boggess & Son, App., 66 S.W.2d 157.
71 C.J. p 1368 note 75.

1. Ky.—Clover Fork Coal Co. v. Scoggins, 91 S.W.2d 543, 263 Ky. 424.
2. Wash.—Boeing Aircraft Co. v. Department of Labor and Industries, 156 P.2d 640, 22 Wash.2d 423.

Where cause was submitted in lower court on departmental record
Wash.—Reid v. Department of Labor and Industries, 77 P.2d 589, 194 Wash. 108.

3. Neb.—Ratay v. Wylie, 22 N.W.2d 622, 147 Neb. 201.

Jurisdiction of lower court to entertain appeal from compensation commission was held question proper for higher court to decide, even though bill of exceptions was not signed by judge of lower court.
Ohio.—Patterson v. Industrial Commission of Ohio, 34 N.E.2d 243, 67 Ohio App. 289.

Contents

A bill of exceptions should include only proceedings and evidence offered and received at trial de novo of a compensation case, and not an omnibus transcript thereof containing additional and nonpertinent proceedings had and evidence received in proceedings before industrial commission.

Ohio.—Rockey v. Armour Fertilizer Works, 28 N.E.2d 1009, 64 Ohio App. 497.

Failure to authenticate

(1) Higher court will refuse to consider a bill of exceptions filed in lower court on appeal from compensation award, and which was never offered or received in evidence at hearing in lower court and was filed in higher court, on appeal from judgment of lower court affirming award, without being certified, allowed, or authenticated as required by statute.
Neb.—Gillmore v. State, 28 N.W.2d 296, 148 Neb. 10.

(2) A bill of exceptions would be quashed where not settled by district court or approved by defendants.
Neb.—Adkisson v. Gamble, 9 N.W.2d 711, 143 Neb. 417.

Exceptions held not presented on appeal

Where record failed to show that judge of superior court ruled on any of specific exceptions to findings of fact and conclusions of law of industrial commission or that employer excepted to failure of judge to make such rulings, such exceptions were not presented on appeal.
N.C.—Parsons v. Swift & Co., 68 S.E.2d 296, 234 N.C. 530.

Bill of exceptions held sufficient
Ga.—Hood v. Jackson, 59 S.E.2d 45, 81 Ga.App. 465.
Ohio.—Scherder v. Industrial Commission, 55 N.E.2d 340, 73 Ohio App. 172.

4. Tex.—Highway Ins. Underwriters v. Le Beau, Civ.App., 184 S.W.2d 671, reversed on other grounds 187 S.W.2d 73, 143 Tex. 589.

Mere statement from court reporter not agreed to by parties or approved by court is not sufficient to constitute a proper transcript of proceedings purported to be described therein.

Tex.—Highway Ins. Underwriters v. Le Beau, supra.

Amendment to pleadings

Where it appeared from marginal notation on alleged trial amendment to pleadings attached to motion to supplement record that amendment was filed fourteen days after entry of final judgment, court could not consider amendment for any purpose even though accompanying motion was a statement signed by court reporter that attorney dictated trial amendment to reporter during trial.
Tex.—Highway Ins. Underwriters v. Le Beau, supra.

5. Wash.—Sheppard v. Department of Labor and Industries, 70 P.2d 792, 191 Wash. 80—Hunter v. Department of Labor and Industries, 68 P.2d 224, 190 Wash. 380.

Departmental record which had been duly filed in superior court was properly in record before supreme court as part of transcript on appeal.

Wash.—Boeing Aircraft Co. v. Department of Labor and Industries, 156 P.2d 640, 22 Wash.2d 423.

6. Portion of record available

A statement of facts is required to determine how much of record of compensation was read in first reviewing court, stricken, or held inadmissible, and hence what portion of it was still available to claimant.

alleged error in the exclusion of testimony,⁷ the instruction of a verdict,⁸ or the refusal of requested instructions.⁹ They are also required in order to obtain a review of questions pertaining to requests for interrogatories, exceptions to instructions, or the effect to be given to exhibits,¹⁰ or to the grant of a new trial on the ground that substantial justice had not been done.¹¹

The absence of a statement of facts, bill of exceptions, or other form of record containing the evidence does not require a dismissal of the appeal, since the higher court may always consider the question of whether the findings or verdict support the judgment, and whether the judgment is proper under the law.¹² The question presented where there is no report before the higher court of the testimony and findings is whether it was possible on any evidence which could have been introduced for the court below to have reached the determination which it did.¹³ Where a bill of exceptions is necessary, in its absence the court on appeal can consider only such errors as are fundamental.¹⁴ Where the

question of jurisdiction has been raised on the appeal, it has been held not necessary to file a bill of exceptions in order to confer jurisdiction on the higher court.¹⁵ A bill of exceptions has been held to control a conflict between its provisions and those of a statement of facts.¹⁶

Time of making and filing. The record on further appeal should be made up and filed within the prescribed time.¹⁷ This rule applies to a transcript of the record,¹⁸ but where the filing of the transcript within the prescribed time is not a jurisdictional act, the failure to do so will not defeat the appeal.¹⁹ A statement of facts filed after the time prescribed by statute will, on motion, be stricken.²⁰ Where a bill of exceptions is necessary, it must be presented and settled or authenticated within the prescribed time.²¹

Alteration of record. Where the record shows an alteration, showing election to come within the act, in the absence of any claim before the commission and the lower court that the alteration was made after certification and approval, the employ-

Wash.—Nylander v. Department of Labor and Industries, 288 P.2d 470, 47 Wash.2d 548.

7. Tex.—May v. Consolidated Underwriters, Civ.App., 170 S.W.2d 295, error refused.

Facts intended to be proved

A ruling sustaining an objection to questions propounded is not reviewable where bill of exceptions fails to show what facts were expected to be proved.

Tex.—Texas Employers' Ins. Ass'n v. Ray, Civ.App., 68 S.W.2d 290, error refused.

8. Tex.—Berndt v. Texas Indemnity Ins. Co., Civ.App., 141 S.W.2d 728.

9. Tex.—Ferrell v. Texas Emp. Ins. Ass'n, Civ.App., 194 S.W.2d 585.

10. Wash.—Nylander v. Department of Labor and Industries, 288 P.2d 470, 47 Wash.2d 548.

11. Wash.—Cabe v. Department of Labor and Industries, 215 P.2d 400, 35 Wash.2d 695.

Even though departmental record is before court

Wash.—Cabe v. Department of Labor and Industries, *supra*.

12. Wash.—Hodgen v. Department of Labor and Industries of Washington, 78 P.2d 949, 194 Wash. 541.—Hunter v. Department of Labor and Industries, 68 P.2d 224, 190 Wash. 380.

Only question reviewable

In absence of a statement of facts, only question left is whether findings and conclusions support judgment.

Wash.—Simmons v. Department of Labor and Industries, 27 P.2d 567, 175 Wash. 290.

13. Mass.—Watson's Case, 78 N.E.2d 683, 322 Mass. 581.

Award for legal services

Record held not to authorize disturbance by higher court of amount allowed.

Mass.—Watson's Case, *supra*.

14. Tex.—Texas Employers' Ins. Ass'n v. Nelson, Civ.App., 292 S.W. 651.

15. Or.—Meaney v. State Industrial Accident Commission, 282 P. 789, 113 Or. 871.

16. Tex.—Texas Emp. Ins. Ass'n v. Boyd, Civ.App., 199 S.W.2d 257.

17. Time of application

Record need not necessarily be filed at time a writ of error is sought. Colo.—Hull v. Denver Tramway Corporation, 50 P.2d 791, 97 Colo. 523.

18. Immaterial matters

Where no point was made by counsel of fact that transcript bore file mark two days after return day of appeal, it would be disregarded by higher court.

Fla.—Foster v. Cooper, 194 So. 381, 142 Fla. 148.

Particular times for filing

Neb.—Dobesh v. Associated Asphalt Contractors, 288 N.W. 32, 137 Neb. 1, vacated on other grounds 289 N.W. 369, 137 Neb. 342.

19. Neb.—Miller v. Peterson, 85 N.W.2d 700, 165 Neb. 344.

Failure of clerk of lower court to file transcript within time prescribed by compensation act does not defeat appeal.

Neb.—Miller v. Peterson, *supra*.

Former rule

Neb.—Dobesh v. Associated Asphalt Contractors, 288 N.W. 32, 137 Neb. 1, vacated on other grounds 289 N.W. 369, 137 Neb. 342.

20. Wash.—Hunter v. Department of Labor and Industries, 68 P.2d 224, 190 Wash. 380.

21. Neb.—Gilmore v. State, 26 N.W. 2d 296, 148 Neb. 10.

Jurisdictional

Tender of bill of exceptions to judge of superior court for certification within prescribed time from date of rendition of judgment complained of is essential to jurisdiction of higher court to review judgment.

Ga.—Proctor v. U. S. Fidelity & Guaranty Co., 187 S.E. 253.

General law controls time where compensation act contains no specific provision as to time for filing a bill of exceptions.

Neb.—Fallis v. Vogel, 290 N.W. 461, 137 Neb. 598.

Recital of date

Recital of date in bill of exceptions immediately preceding signature of attorneys is equivalent to recital that bill of exceptions was not tendered for certification before such date.

Ga.—Proctor v. U. S. Fidelity & Guaranty Co., 187 S.E. 253, 53 Ga. App. 776.

er cannot urge on writ of error that it was exempt under the classification in the act.²³

Correction. Under some acts and practice, the higher court, in a proper case, will permit a correction of the record.²³ Errors or omissions in the record must be corrected in the court below.²⁴

Statement in brief. It has been held that a statement in the brief filed in the higher court by appellant that there was no evidence to prove certain resulting injuries specified in claimant's petition will be accepted as correct in the absence of challenge by claimant.²⁵

22. Ill.—Indian Hill Club v. Industrial Commission, 140 N.E. 871, 309 Ill. 271.

23. **Correction by filing of supplemental transcript**
Neb.—Dobesh v. Associated Asphalt contractors, 289 N.W. 369, 137 Neb. 342.

Correction to show judgment entry

Where supreme court had no jurisdiction of appeal because no judgment had been entered by district court after district court made a finding in favor of claimant supreme court would give parties twenty days in which to have proper judgment entered nunc pro tunc and to have record corrected to show such judgment.

Iowa.—Crowe v. De Soto Consol. School Dist., 66 N.W.2d 859, 246 Iowa 38.

Remand for correction.

(1) Where claimant died while appeal from determination of compensation bureau was pending in common pleas court, claimant's widow was substituted in his stead, and judgment was rendered in favor of widow, but record did not disclose cause of death, record on further appeal would be remanded for correction and amplification as to persons entitled to award and their respective interests and also as to amount and extent of award.
N.J.—Williams v. New Jersey State Highway Dept., 34 A.2d 889, 131 N.J.Law 108.

(2) A purely formal, nonjurisdictional omission of a formal order of dismissal in record in compensation proceeding, replaced by letter of referee, which was treated as a formal order by parties, and could be corrected by nunc pro tunc order of amendment, was such an omission as reviewing court in interest of justice could disregard without remanding record, or holding case pending application for corrective action in trial court.

N.J.—Ruoff v. Blasi, 131 A. 877, 118 N.J.Law 314.

(3) On appeal from judgment of county court to which workmen's compensation award was appealed, higher court would not remand cause to compensation division for a more complete record where request to enlarge record had not been diligently pursued in county court.

N.J.—Kelson v. Star Elec. Motor Co., 90 A.2d 514, 21 N.J.Super. 15.

24. Ill.—Heckard v. Industrial Commission, 137 N.E. 172, 353 Ill. 197.

25. Tex.—Southern Underwriters v. Wright, Civ.App., 142 S.W.2d 297.

26. Tex.—Traders & General Ins. Co. v. Davis, 149 S.W.2d 88, 136 Tex. 187.

Matters considered

On motion to dismiss claimant's appeal because judgment awarding compensation was satisfied in full before notice of appeal was given, questions whether district court erred in refusing to include interest on deferred payments and in decreeing that employer was entitled to credit for sums paid prior to judgment are not reviewable.

Mont.—Paulich v. Republic Coal Co., 33 P.2d 514, 97 Mont. 224.

Effect of dismissal

Where application for writ of error to review decision in workmen's compensation suit contained no assignment attacking rulings of lower court on question concerning whether claimants proved good cause for not filing their claim with compensation board within time required by law, supreme court which dismissed application, did so without approving holding of lower court on such question.

Tex.—Traders & General Ins. Co. v. Davis, 149 S.W.2d 88, 136 Tex. 187.

Death of injured employee

Death of injured employee after dismissal of his petition for compensation by compensation bureau does not require dismissal of appeal from judgment of supreme court affirming judgment of common pleas court affirming board's order, but his widow and dependents should receive amount representing temporary

§ 802. Dismissal of Appeal

In a proper case, a further appeal or other form of review of a judgment or decree of a court reviewing an award or decision in a workmen's compensation case may be dismissed.

In a proper case, a further appeal or other form of review of a judgment or decree of a court reviewing an award or decision in a workmen's compensation case may be dismissed.²⁶ Such a further review may be dismissed where the case has become moot,²⁷ where the parties have made a voluntary settlement of the claims of claimant,²⁸

and permanent disability until time of his death, plus customary expenses, in case of finding for petitioner.

N.J.—Bollinger v. Wagaraw Bldg. Supply Co., 6 A.2d 396, 122 N.J.Law 512.

Dismissal held proper

La.—Carpenter v. Madden, 98 So.2d 209, 233 La. 840.

Appeal or other proceeding for review held not dismissable

(1) Generally.

Ga.—Zurich General Accident & Liability Ins. Co. v. Lawson, 200 S.E. 559, 59 Ga.App. 265.

Idaho.—In re MacKenzie, 46 P.2d 73, 55 Idaho 663.

Ky.—Columbus Mining Co. v. Sanders, 159 S.W.2d 14, 289 Ky. 438.

Mo.—Dyche v. Bostian, App., 229 S.W.2d 25, affirmed 233 S.W.2d 721, 361 Mo. 122.

S.C.—Hines v. Pacific Mills, 51 S.E. 2d 383, 214 S.C. 125.

Wash.—Roellich v. Department of Labor and Industries, 148 P.2d 957, 20 Wash.2d 674.

(2) Compensation commission, which did not contest appeal to lower court on ground that claimant had no right of appeal but answered to merits, cannot obtain dismissal of claimant's appeal from judgment of lower court on ground that it was without jurisdiction.

Ohio.—Newland v. Industrial Commission of Ohio, 19 N.E.2d 780, 60 Ohio App. 104.

27. Kan.—Ellis v. Kroger Grocery & Baking Co., 152 P.2d 869, 159 Kan. 226.

Attempted settlement was held not to make case moot where act prohibited settlements, even though awardee was a minor and court had authorized his guardian to make settlement.

U.S.—Henderson v. Glens Falls Indemnity Co., C.C.A.La., 134 F.2d 320, certiorari denied 63 S.Ct. 1175, 319 U.S. 786, 87 L.Ed. 1709.

28. La.—Rogers v. City of Hammond, 183 So. 245, 190 La. 1005.

where the error involved is merely clerical and correctable by the court below, and the amount involved is too small to give the appellate court jurisdiction,²⁹ where no judgment entry was made in the lower court,³⁰ where at the time of entry of appeal and the return day thereof in the higher court the judgment appealed from had not been filed with the clerk of the lower court,³¹ where the bill of exceptions was not served on a necessary party on the appeal,³² where the appeal or writ of error was not taken and perfected within the prescribed time,³³ where the return day of the appeal was after the prescribed time,³⁴ or where the notice of appeal was not served or filed within the required time³⁵ or in accordance with other prescribed requirements.³⁶

An appeal from a decision affirming an award disallowing compensation may be dismissed where there was no finding as to the cause of the injury.³⁷ Where, after a case had been remitted and the commission had made a final award subsequent to the death of claimant, which was affirmed on appeal, on findings, disclosing claimant's death, a further appeal will be dismissed, no substitution having been made as required.³⁸

An appeal from a judgment affirming an award will not be dismissed for a mere misnomer,³⁹ or because of the failure to serve the appellee with a citation to answer the appeal, where such negligence was due to the negligence of the clerk of court.⁴⁰ Also, an appeal or writ of error will not be dis-

missed for a defect in the supersedeas bond, since any defect of substance or form may be cured by amendment.⁴¹

While the commencement of a new action based on the same matter involved in a decision appealed from may generally require dismissal of the appeal, this rule has been held not to be applied to the filing of a new claim for compensation to avoid the bar of limitations in the event of an adverse decision on appeal from a judgment reversing an allowance of compensation.⁴²

§ 803. Scope and Extent of Review

General rules as to the scope and extent of review, particularly those applicable on further review of the action of public administrative bodies, apply on further judicial review of compensation proceedings.

General rules as to the scope and extent of review, particularly those applicable on further review of the action of public administrative bodies, apply on further judicial review of compensation proceedings.⁴³ Technically speaking, the court on further review reviews the action of the lower court, not the action of the compensation authorities.⁴⁴ The scope and extent of the review is limited by the law in force at the time of the judgment under review.⁴⁵ On appeal from the first final order of the lower court, the entire record, including a prior order by the lower court remanding the case to the compensation commission, is brought up for review.⁴⁶ An unappealed from change in the com-

29. Ky.—Consolidated Coal Co. v. Jennings, 33 S.W.2d 647, 236 Ky. 705.

30. Iowa.—Crowe v. De Soto Consol. School Dist., 66 N.W.2d 859, 246 Iowa 38.

31. Fla.—Foster v. Cooper, 194 So. 381, 142 Fla. 148.

32. Ga.—Grooms v. Globe Indem. Co., 81 S.E.2d 851, 90 Ga.App. 62—Utica Mut. Ins. Co. v. Rolax, 75 S.E.2d 205, 87 Ga.App. 733.

33. Colo.—Hull v. Denver Tramway Corporation, 50 P.2d 791, 97 Colo. 523.

Kan.—Brower v. Sedgwick County, 45 P.2d 835, 142 Kan. 7.

34. Fla.—Dupree v. Elleman, 191 So. 65, 139 Fla. 809—South Atlantic S. S. Co. of Delaware v. Tutson, 190 So. 675, 139 Fla. 405.

35. Fla.—Boea Raton Club v. Duff, 63 So.2d 624.

N.Y.—Landes v. Lupton, 116 N.E. 1056, 221 N.Y. 574.

36. Fla.—Boea Raton Club v. Duff, 63 So.2d 624.

37. Conn.—Porter v. City of New Haven, 135 A. 293, 105 Conn. 894.

38. N.Y.—O'Esau v. El. W. Bliss, 121 N.E. 362, 224 N.Y. 701.

39. Mo.—Barlow v. Shawnee Inv. Co., App., 48 S.W.2d 35.

40. La.—Johnson v. Wyble, App., 55 So.2d 711.

41. Tex.—Petroleum Casualty Co. v. Garrison, Civ.App., 174 S.W.2d 74, error refused.

42. Iowa.—Dille v. Plainview Coal Co., 250 N.W. 607, 217 Iowa 827.

43. Ky.—Sandlick Coal Co. v. Hughes, 239 S.W.2d 258.

Tex.—Texas Employers' Ins. Ass'n v. Portley, 263 S.W.2d 247, 153 Tex. 62.

Texas Emp. Ins. Ass'n v. Chitwood, Civ.App., 199 S.W.2d 806—Southern Underwriters v. Erwin, Civ.App., 134 S.W.2d 720, error granted—Consolidated Underwriters v. Lee, Civ.App., 107 S.W.2d 482, error dismissed.

Appeal by layman

Where compensation claimant, who was a layman, prosecuted compensation case in his own behalf in superior court and, before supreme court of errors, supreme court of errors followed its usual liberal policy

where a layman appears pro se and considered claimant's claims as far as they were fairly presented on record. Conn.—Osterlund v. State, 30 A.2d 393, 129 Conn. 591.

Rival claimants

Where there are rival claimants, each seeking to be recognized as widow of decedent, an appeal taken by either of such claimants, or by employer and insurance carrier from circuit court judgment, has effect of bringing entire case before appellate court for review. Miss.—Hill v. United Timber & Lumber Co., 68 So.2d 450.

Change in circumstances

Pa.—Strouse v. Quaker Knitting Mills, 46 A.2d 526, 159 Pa.Super. 39.

44. N.J.—Callochio v. Jersey City Stock Yards Co., 14 A.2d 465, 125 N.J.Law 112.

N.C.—Worsley v. S. & W. Rendering Co., 86 S.E.2d 467, 239 N.C. 547.

45. Ill.—Paradise Coal Co. v. Industrial Commission, 135 N.E. 26, 89 Ill. 38.

46. Ill.—ACF Industries, Inc. v. Industrial Commission, 134 N.E.2d

pensation commissioner's decision made by the lower court is not subject to attack before the higher court on consideration of a question reserved for the higher court by the lower court.⁴⁷

Subsequent review is generally confined to questions properly presented in the lower court,⁴⁸ and the court may decline to pass on an alleged error not urged or argued before it.⁴⁹ Rulings not appealed from will not be reviewed.⁵⁰

The appellate court cannot receive additional evidence,⁵¹ and will not consider matters not properly in the record before it.⁵² The action of the lower court in refusing to consider an issue properly presented is subject to review.⁵³ A question as to the

admissibility of evidence which will arise on a retrial of the action may be considered.⁵⁴

An unappealed from ruling on a prior appeal of the case will ordinarily be treated as the law of the case,⁵⁵ but the reviewing court is not bound by the directions given the compensation commission by the lower appellate court on a prior appeal.⁵⁶ Customs and decisions of the board or commission are not controlling on the reviewing court,⁵⁷ nor are the directions of the lower court on remanding the cause to the commission.⁵⁸ Instructions not objected to are treated as the law of the case,⁵⁹ and findings of fact not objected to will be treated as established.⁶⁰

764, 8 Ill.2d 552—Northwestern University v. Industrial Commission, 99 N.E.2d 18, 409 Ill. 216—Peoples Gas Light & Coke Co. v. Industrial Commission, 89 N.E.2d 808, 405 Ill. 73—Joyce Bros. Storage & Van Co. v. Industrial Commission, 78 N.E.2d 262, 399 Ill. 456—American Manganese Steel Co. v. Industrial Commission, 77 N.E.2d 689, 399 Ill. 272—Brown Shoe Co. v. Industrial Commission, 30 N.E.2d 4, 374 Ill. 500.
N.Y.—Daus v. Gunderman & Sons, 28 N.E.2d 914, 283 N.Y. 459.
47. Conn.—Wilson v. Largay Brewing Co., 3 A.2d 668, 125 Conn. 109.
48. Kan.—Copenhaver v. Sykes, 160 P.2d 235, 160 Kan. 238.
Me.—Shoemaker's Case, 51 A.2d 484, 142 Me. 321.
Md.—Bethlehem Steel Co. v. Mayo, 177 A. 910, 168 Md. 410.
Mass.—Perrotta's Case, 64 N.E.2d 19, 318 Mass. 787—Wnukowski's Case, 5 N.E.2d 3, 296 Mass. 63.
Mont.—O'Neil v. Industrial Accident Fund, 81 P.2d 688, 107 Mont. 176.
N.J.—Fink v. City of Paterson, 129 A.2d 746, 44 N.J.Super. 129.
Pa.—Wilkinson v. United Parcel Service of Pa., 43 A.2d 408, 158 Pa. Super. 22.
R.I.—Santilli v. Original Bradford Soap Works, Inc., 131 A.2d 235, modified on other grounds Santilli v. Liberty Mut. Ins. Co., 134 A.2d 834—Ruggiero v. Brown & Sharpe Mfg. Co., 43 A.2d 51, 71 R.I. 178.
U.S.—Travelers Ins. Co. v. Calcote, Civ.App., 205 S.W.2d 56, error refused no reversible error—Federal Underwriters Exchange v. Bullard, Civ.App., 128 S.W.2d 126—Gulf Casualty Co. v. Taylor, Civ.App., 67 S.W.2d 415, error dismissed.
Wash.—Leary v. Department of Labor and Industries, 140 P.2d 292, 18 Wash.2d 532—Cooper v. Department of Labor and Industries, 118 P.2d 942, 11 Wash.2d 248.
Wis.—Tadin v. Industrial Commission, 61 N.W.2d 309, 265 Wis. 375—Hills Dry Goods Co. v. Industrial

Commission, 267 N.W. 905, 222 Wis. 439, certiorari denied Hills Bros. Dry Goods Co. v. Klicka, 57 S.Ct. 430, 300 U.S. 654, 81 L.Ed. 864.
49. Del.—Koeppel v. E. I. Du Pont De Nemours & Co., 194 A. 847, 8 W.W.Harr. 542.
Ky.—Black Mountain Corp. v. Seward, 121 S.W.2d 4, 275 Ky. 177.
Mass.—Brek's Case, 138 N.E.2d 748.
Mo.—Meintz v. Arthur Morgan Trucking Co., 132 S.W.2d 1010, 345 Mo. 251.
N.J.—Hi-Heat Gas Co. v. Dickerson, 170 A. 44, 12 N.J.Misc. 151, affirmed 174 A. 483, 113 N.J.Law 329.
50. Or.—Bell v. State Industrial Accident Commission, 74 P.2d 55, 157 Or. 653.
51. Tex.—Federal Underwriters Exchange v. Craighead, Civ.App., 168 S.W.2d 699, error refused.
52. U.S.—Tyler v. Lowe, C.C.A.N.Y., 138 F.2d 867.
Tex.—American Mut. Liability Ins. Co. v. Corbell, Civ.App., 289 S.W.2d 423.
Wash.—Lindsey v. Department of Labor & Industries, 213 P.2d 316, 35 Wash.2d 370—Sweitzer v. Department of Labor and Industries, 34 P.2d 350, 177 Wash. 28.
53. Md.—Dembeck v. Bethlehem Shipbuilding Corporation, 170 A. 158, 166 Md. 21.
54. Md.—Spence v. Bethlehem Steel Co., 197 A. 302, 173 Md. 539.
55. Ga.—American Mut. Liability Ins. Co. v. Kent, 81 S.E.2d 81, 71 Ga. App. 453—Travelers Ins. Co. v. Reid, 186 S.E. 387, 54 Ga.App. 13—Woodruff v. Miller, 172 S.E. 738, 48 Ga.App. 305.
N.Y.—Heath v. State, 103 N.Y.S.2d 397, 278 App.Div. 8, affirmed 101 N.E.2d 764, 303 N.Y. 658.
N.C.—Hill v. Du Bose, 75 S.E.2d 401, 237 N.C. 501.
Tex.—Texas Emp. Ins. Ass'n v. Vineyard, Civ.App., 296 S.W.2d 538, error refused no reversible error—Traders & General Ins. Co. v. Boyd, Civ.App., 146 S.W.2d 488, error dis-

missed, judgment correct—Texas Employers' Ins. Ass'n v. Tally, Civ. App., 122 S.W.2d 1095, error refused 125 S.W.2d 544, 132 Tex. 547.
Wash.—Gange Lumber Co. v. Rowley, 155 P.2d 802, 22 Wash.2d 250, appeal dismissed 66 S.Ct. 125, 326 U.S. 295, 90 L.Ed. 85.

Prior reversal

Where court of civil appeals on former appeal reversed judgment for claimants in compensation proceedings on ground that evidence was insufficient to support verdict, but holding of court of civil appeals was reversed by supreme court which held that since evidence was conflicting court of civil appeals was without authority to substitute its findings for that of jury, and on subsequent appeal from judgment for claimants, evidence was substantially same as on former appeal, court of civil appeals was not required by law of case to reverse judgment on ground of insufficiency of evidence, since it was duty of court of civil appeals to follow supreme court.

Tex.—Texas Indem. Ins. Co. v. Halliburton, Civ.App., 235 S.W.2d 499, error refused no reversible error.

56. Ill.—Brown Shoe Co. v. Industrial Commission, 30 N.E.2d 4, 374 Ill. 500.

57. Wash.—Burchett v. Department of Labor & Industries, 261 P. 802, 268 P. 746, 146 Wash. 85.

58. Ill.—Raffaella v. Industrial Commission, 157 N.E. 206, 326 Ill. 166. 71 C.J. p 1369 note 2.

59. Wash.—Noland v. Department of Labor and Industries, 262 P.2d 765, 43 Wash.2d 588—White v. Department of Labor and Industries, 248 P.2d 566, 41 Wash.2d 276—Karlson v. Department of Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310.

60. N.C.—Brinkley v. United Feldspar & Minerals Corp., 97 S.E.2d 419, 246 N.C. 17—Conner v. U. S. Rubber Co., 94 S.E.2d 486, 244 N.C. 516.

Matters not necessary to decision on review will not ordinarily be passed on by the reviewing court,⁶¹ but it may do so.⁶² On proceedings to review a judgment for attorney's fees in favor of an employee, the question of the amount of the award of compensation is not reviewable.⁶³ Where the lower court erroneously dismissed an appeal from the commission, but granted certiorari on the ground that there was no remedy by appeal, and determined every question which could have been raised by appeal, the higher court, after determining that appeal is proper, need not determine whether the certiorari was properly issued.⁶⁴

Where the ruling of the lower court on an issue is proper on one ground, it is not necessary to consider its propriety on other grounds.⁶⁵ Where the grounds on which the lower court acted do not appear, its action will be upheld if it can be sustained on any theory,⁶⁶ and where the judgment below is correct, it is immaterial that incorrect reasons were assigned for the action taken.⁶⁷

Moot or academic questions will not be decided.⁶⁸

A question as to payment of compensation pending appeal is moot where no payments were made and, in the meantime, an act was passed suspending such payments.⁶⁹

Waiver of grounds. Where insurer appealed from the decree and also from the denial of its motion to recommit to the board, the appeal from such denial must be treated as waived when not referred to in the brief or argued at the bar.⁷⁰ A party cannot complain on review of an erroneous ruling⁷¹ or instruction⁷² which he invited or requested, or in which he acquiesced.⁷³ One who introduces a certificate of the record of the board cannot object to its sufficiency.⁷⁴ One seeking compensation under a special provision for awards for hernia could not assign as error refusal to make award under general provisions of the act.⁷⁵ Where both parties to a compensation case alleged that the injury was sustained in a certain county, on appeal of insurer a reversal cannot be had for want of evidence that the injury was sustained in such county.⁷⁶ The parties are usually restricted on appeal to the theory on which the case was tried in the lower court.⁷⁷

Wash.—Godwin v. Department of Labor and Industries, 310 P.2d 239, 50 Wash.2d 209.

61. Ark.—Birchett v. Tuf-Nut Garment Mfg. Co., 189 S.W.2d 574, 205 Ark. 483.

Conn.—Nicotra v. Bigelow, Sanford Carpet Co., 189 A. 603, 122 Conn. 353.

Fla.—Lovejoy Co. v. Ackis, 16 So.2d 297, 153 Fla. 878.

Mont.—Griffin v. Industrial Accident Fund, 106 P.2d 346, 111 Mont. 110.

Ohio.—Furnis v. Industrial Commission, 45 N.E.2d 782, 71 Ohio App. 146.

Pa.—DeFelice v. Jones & Laughlin Steel Corp., 8 A.2d 465, 137 Pa. Super. 191.

S.C.—Frier v. South Carolina Penitentiary, 56 S.E.2d 752, 216 S.C. 84, 71 C.J. p 1370 note 7.

62. Wis.—Milwaukee Basket Co. v. Industrial Commission of Wisconsin, 181 N.W. 308, 173 Wis. 391, 71 C.J. p 1370 note 8.

63. Ill.—St. Louis Pressed Steel Co. v. Schorr, 135 N.E. 766, 303 Ill. 476.

64. Iowa.—Hoover v. Central Iowa Fuel Co., 176 N.W. 945, 188 Iowa 943.

65. Mass.—Wozniak's Case, 13 N.E. 2d 297, 289 Mass. 471.

N.J.—Stefanik v. Ocean Accident & Guarantee Corp., 186 A. 778, 14 N. J. Misc. 708.

66. Mo.—Snavey v. Delmar Hotel Co., App., 84 S.W.2d 188.

Tex.—Texas Employers' Ins. Ass'n v. Hamilton, Civ.App., 95 S.W.2d 767, error dismissed.

67. Md.—Moore v. Clarke, 187 A. 887, 171 Md. 39, 107 A.L.R. 924.

68. N.D.—Feist v. North Dakota Workmen's Compensation Bureau, 80 N.W.2d 100.

R.I.—Vizzacco v. Priscilla Worsted Mills, 86 A.2d 657, 79 R.I. 222.

S.C.—Smith v. Southern Builders, 24 S.E.2d 109, 202 S.C. 88.

69. Ky.—Wallins Creek Collieries Co. v. Hicks, 287 S.W. 713, 216 Ky. 262.

70. Mass.—Fernald's Case, 134 N.E. 347, 240 Mass. 567.

71. Ga.—Crowe v. St. Paul-Mercury Indem. Co., 76 S.E.2d 848, 88 Ga. App. 482.

Tex.—Traders & General Ins. Co. v. Stone, Civ.App., 258 S.W.2d 409—Texas Emp. Ins. Ass'n v. Hunter, Civ.App., 255 S.W.2d 944, reversed 260 S.W.2d 884—Texas Emp. Ins. Ass'n v. Evers, Civ.App., 242 S.W. 2d 906, refused no reversible error—Travelers Ins. Co. v. Calcote, Civ.App., 205 S.W.2d 56, error refused no reversible error—Federal Underwriters Exchange v. Sandel, Civ.App., 166 S.W.2d 147, error refused—Southern Underwriters v. Hodges, Civ.App., 141 S.W.2d 707, error refused—Uselton v. Southern Underwriters, Civ.App., 131 S.W.2d 1040, error dismissed, judgment correct.

Error not waived

Tex.—Texas Emp. Ins. Ass'n v. Shiftet, Civ.App., 276 S.W.2d 942, refused no reversible error.

72. Tex.—Southern Underwriters v.

Boswell, 158 S.W.2d 280, 138 Tex. 255.

Harris v. New Amsterdam Casualty Co., Civ.App., 150 S.W.2d 431, error dismissed, judgment correct—Federal Underwriters Exchange v. Hightower, Civ.App., 142 S.W.2d 963, error dismissed, judgment correct—Southern Underwriters v. Thomas, Civ.App., 181 S.W.2d 409, error dismissed, judgment correct—Traders & General Ins. Co. v. Durbin, Civ.App., 119 S.W.2d 595, error dismissed.

73. Ohio.—Iles v. Industrial Commission, App., 46 N.E.2d 815.

Tex.—Texas Emp. Ins. Ass'n v. Hicks, Civ.App., 237 S.W.2d 699, error refused no reversible error.

74. Mont.—Dosen v. East Butte Copper Mining Co., 254 P. 880, 73 Mont. 579.

75. Tex.—Ellis v. U. S. Fidelity & Guaranty Co., Civ.App., 6 S.W.2d 811.

76. Tex.—Lafeld v. Maryland Casualty Co., 33 S.W.2d 187, 119 Tex. 466.

77. Tex.—Safety Casualty Co. v. Wright, 160 S.W.2d 238, 138 Tex. 492.

Question not briefed

Failure to argue a point in brief of petitioner was a waiver thereof and point was not required to be considered by supreme court.

Ill.—Shell Oil Co. v. Industrial Commission, 119 N.E.2d 224, 2 Ill.2d 590.

Vt.—Pitts v. Howe Scale Co., 1 A.2d 695, 110 Vt. 27.

and a party may be estopped to take a position in the appellate court contrary to the position he took in the lower court.⁷⁸

Agreements limiting review. An agreement between counsel that the only issue involved in the appeal was the constitutionality of the statute does not preclude the court from considering the question of whether the work in which the employee was engaged was within the act, where the record before the court was sufficient for determination of such question.⁷⁹ An agreement that the case should be determined in accordance with the disposition of another claimant's appeal waives questions not involved in such other appeal.⁸⁰

Questions of jurisdiction are not removed from the case by waiver or estoppel;⁸¹ but the jurisdiction of the court below to render judgment against insurer on reversing an order of the board cannot be questioned by an insurer who, while not formally on the record as a party, conducted the entire controversy including the appeals from the board and the court below, the employer never denying liability or resisting an award.⁸²

§ 804. — Parties Entitled to Allege Error

One who did not join in the appeal cannot allege error.

One who did not join in the appeal cannot al-

lege error.⁸³ Thus a respondent who does not file a cross appeal may not allege error.⁸⁴ Where the employer appeals from an award but claimant takes no cross appeal, his objection to modification of the award by the appellate court cannot be considered on the employer's appeal from that court,⁸⁵ and an appeal by an insurer gives the employer no right to be heard on review where he took no appeal from the award of the board;⁸⁶ but it has been held that an employer's failure to appeal from a favorable judgment affirming denial of compensation, although both the court and the commission overruled his contention that deceased employee was engaged in interstate commerce, did not prevent the employer's raising the question on claimant's appeal.⁸⁷ On claimant's appeal from the action of the lower court on the employer's appeal from the award of the compensation commission, claimant could not obtain review of a ruling of the commission from which he did not appeal.⁸⁸

§ 805. — Presumptions

On further judicial review of compensation proceedings, the appellate court will indulge all reasonable presumptions in support of the action of the lower court.

In accordance with general rules, the appellate court, on further judicial review of compensation proceedings, will indulge all reasonable presumptions in support of the action of the lower court.⁸⁹

78. N.J.—Fink v. City of Paterson, 129 A.2d 746, 44 N.J.Super. 129.

Reasonable misapprehension as to law

In suit arising under Texas Workmen's Compensation Law, insurer which took position that determinative question in case was whether employee had in fact been employed in Texas to do work in Louisiana, was not prevented from asserting on appeal that material question was whether employee's work in Louisiana was done under and pursuant to an employer-employee status of work and service existing in Texas, particularly in view of authoritative decision by supreme court of Texas handed down shortly after trial of case in lower court.

U.S.—Associated Indemnity Corp. v. Scott, C.C.A.Tex., 103 F.2d 203.

79. Pa.—Blake v. Wilson, 112 A. 126, 263 Pa. 469, 15 A.L.R. 726.

80. Wash.—Broome v. Department of Labor & Industries of State of Wash., 213 P.2d 477, 35 Wash.2d 445.

81. Colo.—Industrial Commission v. Plains Utility Co., 259 P.2d 282, 127 Colo. 506.

Del.—Knox v. Georgia-Pacific Plywood Co., 130 A.2d 347.

82. Pa.—Chase v. Emery Mfg. Co., 113 A. 840, 271 Pa. 265.

83. Ga.—City of Brunswick v. King, 14 S.E.2d 760, 65 Ga.App. 44.

Iowa.—Jarman v. Collins-Hill Lumber & Coal Co., 286 N.W. 526, 226 Iowa 1247.

Or.—Bell v. State Industrial Accident Commission, 74 P.2d 55, 157 Or. 653.

Tex.—Hinkle v. Federal Underwriters Exchange, Civ.App., 152 S.W.2d 387, error refused.

84. U.S.—Angelina Cas. Co. v. Blumitt, C.A.Tex., 235 F.2d 764.

Kan.—Brown v. Olson Drilling Co., 124 P.2d 451, 155 Kan. 230.

La.—Fruge v. Pacific Emp. Ins. Co., 76 So.2d 719, 226 La. 530—Morgan v. American Bitumuls Co., 47 So. 2d 739, 217 La. 968.

Mass.—Mosesso's Case, 99 N.E.2d 859, 327 Mass. 525.

Tex.—Texas Employers' Ins. Ass'n v. Lightfoot, 162 S.W.2d 929, 139 Tex. 304.

Wis.—Ruehlw v. Industrial Commission of Wisconsin, 251 N.W. 451, 213 Wis. 240.

85. Ky.—U. S. Coal & Coke Co. v. Gorenz, 272 S.W. 382, 269 Ky. 370.

86. N.C.—McPherson v. Henry Motor Sales Corporation, 160 S.E. 238,

201 N.C. 303, appeal dismissed 52 S. Ct. 499, 236 U.S. 527, 76 L.Ed. 1269.

87. Mo.—Morrison v. Terminal R. R. Ass'n, App., 57 S.W.2d 775.

88. N.C.—Archie v. Greene Bros. Lumber Co., 23 S.E.2d 834, 222 N. C. 477.

89. U.S.—Burley Welding Works v. Lawson, C.C.A.Fla., 141 F.2d 964.

Fla.—Johnson v. Johnson, 51 So.2d 421—Star Fruit Co. v. Canady, 32 So.2d 2, 159 Fla. 483—Protectu Awning Shutter Co. v. Cline, 16 So. 2d 342, 154 Fla. 30—Cone Bros. Contracting Co. v. Allbrook, 16 So. 2d 61, 153 Fla. 329.

Ga.—Burnett v. King, 77 S.E.2d 772, 83 Ga.App. 771—Hood v. Jackson, 59 S.E.2d 45, 81 Ga.App. 465.

Kan.—Burns v. Topeka Fence Erectors, 254 P.2d 285, 174 Kan. 136—Rothman v. Globe Const. Co., 235 P.2d 981, 171 Kan. 572.

Ky.—Cornett-Lewis Coal Co. v. Day, 226 S.W.2d 951, 312 Ky. 221.

Md.—M. P. Moller Motor Car Co. v. Unger, 170 A. 777, 166 Md. 198.

Mo.—Rue v. Eagle-Picher Lead Co., 70 S.W.2d 124, 228 Mo.App. 114.

Mont.—Anderson v. Amalgamated Sugar Co., 37 P.2d 552, 38 Mont. 23.

Neb.—Keenan v. Consumers Public Power Dist., 40 N.W.2d 261, 152 Neb. 54.

use of a member as is obvious from observation or examination by an ordinary layman.⁶¹

Control over disbursements from a subsequent injury fund is normally vested in the compensation authorities.⁶² The state official intrusted with the custody of the subsequent injury fund has no

discretionary power with respect to its disbursement.⁶³

Fund for reopened cases. In New York a special fund has been set up for the payment of stale claims.⁶⁴ Liability against the fund for reopened cases arises only under the precise conditions set

580—Special Indem. Fund v. Smith, 242 P.2d 159, 206 Okl. 185.

Loss of hearing

(1) The word "member," as used in special indemnity fund act relating to a physically impaired person, does not include the ear.

Okl.—Special Indem. Fund of State v. Stone, 207 P.2d 263, 201 Okl. 465.

(2) Workman, who had lost the hearing in one ear in a previous accident, was not a physically impaired person, within meaning of special indemnity fund act, so as to be entitled to compensation from the fund on the loss of hearing of other ear as the result of another accident arising out of, and in the course of, his employment.

Okl.—Special Indem. Fund of State v. Stone, supra.

Loss of fingers

Employee who had lost two fingers was a "physically impaired person" within the special indemnity fund act, and, when thumb of the same hand was amputated because of subsequent injury resulting in additional permanent disability so that degree of disability caused by combination of both disabilities was materially greater than that which would have resulted from subsequent injury, remainder of disability after termination of employer's payment of per cent of disability which would have resulted from the subsequent injury alone was payable out of the special indemnity fund.

Okl.—Special Indem. Fund v. Duff, 191 P.2d 584, 200 Okl. 57.

61. Okl.—Special Indem. Fund of State v. Stone, 207 P.2d 263, 201 Okl. 465—Special Indem. Fund of Okl. v. Wade, 189 P.2d 609, 199 Okl. 547—Special Indem. Fund v. Cornish, 185 P.2d 467, 199 Okl. 257—Special Indem. Fund of State v. Keel, 164 P.2d 996, 196 Okl. 315.

Walk with a limp due to injury which caused right leg to be an inch shorter than left leg made claimant a physically impaired person for purpose of fixing liability upon special indemnity fund for subsequent eye injury.

Okl.—Special Indem. Fund v. Dimpel, 207 P.2d 776, 201 Okl. 526.

Limp or back injury

(1) A pre-existing injury to a hip or back does not bring claimant within the statute.

Okl.—Special Indem. Fund of Okl. v. Wade, 189 P.2d 609, 199 Okl. 547.

(2) A hip injury that results directly in partial permanent disability to a leg is an injury to the leg and may be combined with a subsequent injury under the special indemnity fund act.

Okl.—Special Indem. Fund of Okl. v. Wade, supra.

Loss of use of finger

An employed person who has formerly lost the use of an index finger by reason of same becoming stiffened is a physically impaired person whose impairment is obvious and apparent from examination by an ordinary layman within workmen's compensation act relating to an award against the special indemnity fund.

Okl.—Special Indem. Fund of Okl. v. Gambrell, 164 P.2d 240, 196 Okl. 203.

Commission's determination must be supported by competent evidence

Okl.—Special Indem. Fund v. Osborne, 272 P.2d 392.

Evidence held sufficient

Okl.—Special Indem. Fund v. Osborne, supra—Special Indem. Fund of Okl. v. Gambrell, 164 P.2d 240, 196 Okl. 203.

62. Minn.—Senske v. Fairmont & Waseca Canning Co., 45 N.W.2d 640, 232 Minn. 350.

Power to compromise claims

Control over the allowance of disability benefits from the publicly administered special compensation funds is wholly vested in the industrial commission, and no other official or department, in behalf of the state or in behalf of anyone else, has such ownership in or supervision over the fund as to empower them to compromise disability benefits or to make recommendations which are a material factor in the exercise of the industrial commission's discretion.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

Claim against state

The special compensation fund is a fund which belongs to industry and is a public fund only in the sense that the public welfare is highly involved with its proper administration, and the injured workman's right to total disability benefits from the fund is not based upon

any direct financial obligation of the state.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

Attorney general

(1) An employee's claim for total disability benefits from the special compensation fund is not in the nature of a claim against the state which may be compromised and settled by the attorney general, and the attorney general's recommendation of such a compromise is not a material factor in ascertaining whether the industrial commission has abused its discretion in declining to approve such settlement.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

(2) The attorney general may properly appear in workmen's compensation cases in behalf of the custodian of the special compensation fund in so far as that official's purely ministerial function is concerned.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

(3) In the performance of his official duties, the opinions and recommendations given by attorney general to industrial commission are entitled to the greatest respect, but such opinions and recommendations cannot control or become a material factor in the exercise of the commission's discretion as to allowance or denial of disability benefits from the special compensation fund.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

63. Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

Duty to resist illegal disbursements

While the state treasurer's ministerial role gives him no discretionary control over payment of disability benefits from special compensation fund, the treasurer does have, by virtue of the inherent nature of his custodianship of the funds, a right and a duty, for the preservation of the fund, to resist disbursements and invasions which have no basis in law.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

64. N.Y.—Kaplan v. Wirth & Birnbaum, 92 N.E.2d 919, 301 N.Y. 121.

Longo v. M & F Auto Wreckers, 165 N.E.2d 900, 4 A.D.2d 902—Koepec v. Buffalo Brake Beam-Acme Steel & Malleable Iron Works, 156 N.Y.S.2d 329, 2 A.D.2d 246, motion

and the burden is on the appellant to show error.⁹⁰ Thus it has been presumed in support of the judgment appealed from that the proceedings were regular and legal,⁹¹ that the appeal to the lower court was timely,⁹² that claims of error not specifically ruled on were considered and overruled,⁹³ that a witness was competent,⁹⁴ that admissible evidence was not rejected,⁹⁵ that inadmissible evidence was not considered,⁹⁶ that there was evidence warranting the ruling made,⁹⁷ that facts supporting the judgment were found,⁹⁸ that conflicts in the evidence were resolved in support of the judgment,⁹⁹ and that the findings were correct¹ and were supported by the evidence.²

Where the record is silent as to the grounds for a ruling, the reviewing court may assume that the grounds were sufficient,³ but where a finding is not made the court cannot make assumptions as to what the evidence would show on the matter.⁴ A fact will not be presumed in the face of evidence to the contrary.⁵

It will be presumed that the claim is within the compensation law.⁶ Where the lower court reversed a decision of the board awarding compensation, claimant must produce the evidence to show that the board was justified in making the award, since there is no presumption that there was evidence sufficient to sustain the board.⁷ Where the compensa-

N.J.—*Seller v. Robinson*, 95 A.2d 153, 24 N.J.Super. 559, affirmed 99 A.2d 422, 13 N.J. 307.

Ohio.—*Wehrle v. General Motors Corp.*, App., 80 N.E.2d 702—*Gerstanzang v. Industrial Commission of Ohio*, 87 N.E.2d 632, 77 Ohio App. 385.

Okl.—*Cavender v. Wofford Drilling Co.*, 123 P.2d 261, 190 Okl. 291.

Pa.—*Banks v. McClain*, 40 A.2d 905, 156 Pa.Super. 512.

Tex.—*Texas Reciprocal Ins. Ass'n v. Stadler*, 166 S.W.2d 121, 140 Tex. 96—*Maryland Casualty Co. v. Brown*, 115 S.W.2d 394, 131 Tex. 404.

Angelina Cas. Co. v. Ryan, Civ. App., 282 S.W.2d 810, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Roys*, Civ.App., 281 S.W.2d 753, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Logsdon*, Civ.App., 278 S.W.2d 893, refused no reversible error—*St. Paul Mercury Indem. Co. v. Tarver*, Civ.App., 272 S.W.2d 795, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Hale*, Civ. App., 242 S.W.2d 796—*United Employers Cas. Co. v. Smith*, Civ.App., 145 S.W.2d 249, error refused—*Maryland Cas. Co. v. Jackson*, Civ. App., 139 S.W.2d 631, error dismissed, judgment correct—*Southern Underwriters v. Tullios*, Civ. App., 131 S.W.2d 102, affirmed 151 S.W.2d 789, 136 Tex. 408—*Traders & General Ins. Co. v. Mills*, Civ. App., 108 S.W.2d 219, error dismissed—*Central Surety & Insurance Corporation v. French*, Civ.App., 72 S.W.2d 699, error dismissed.

Wash.—*Lawe v. Department of Labor and Industries*, 66 P.2d 848, 139 Wash. 650.

71 C.J. p 1370 note 23.

Recital in judgment that employee waived recovery for partial incapacity imported highest evidence of verity on appeal.

U.S.—*Baggett v. Texas Employers' Ins. Ass'n*, Civ.App., 70 S.W.2d 469, error refused.

90. Fla.—*Heller Bros. Packing Co. v. Kendricks*, 20 So.2d 387, 155 Fla. 428—*Florida Forest and Park Service v. Strickland*, 18 So.2d 251, 154 Fla. 472—*Cone Bros. Contracting Co. v. Allbrook*, 16 So.2d 61, 153 Fla. 829—*Forehand v. Manly*, 2 So.2d 864, 147 Fla. 287—*City of Lakeland v. Burton*, 2 So.2d 731, 147 Fla. 412—*City of St. Petersburg v. Mosedale*, 1 So.2d 878, 146 Fla. 784—*Cone Bros. Contracting Co. v. Massey*, 198 So. 802, 145 Fla. 56—*Firestone Auto Supply & Service Stores v. Bullard*, 192 So. 865, 141 Fla. 282.

Wash.—*Ames v. Department of Labor and Industries*, 74 P.2d 1027, 193 Wash. 215.

91. Ohio.—*Miles v. Electric Auto-Lite Co.*, 15 N.E.2d 532, 133 Ohio St. 613.

Wash.—*Hodgen v. Department of Labor and Industries of Washington*, 78 P.2d 949, 194 Wash. 541.

92. Mo.—*Cottingham v. General Material Co.*, App., 70 S.W.2d 101.

Administrative appeal

Where timeliness of an appeal from a referee's decision to the board is not questioned for a great length of time, it will be assumed that the appeal was timely.

Pa.—*Reiter v. Garman*, 163 A. 74, 107 Pa.Super. 269.

93. N.C.—*Fox v. Cramerton Mills*, 35 S.E.2d 869, 225 N.C. 580.

94. Kan.—*Holler v. W. S. Dickey Clay Mfg. Co.*, 139 P.2d 846, 157 Kan. 355, 148 A.L.R. 1131.

95. Colo.—*National Fuel Co. v. Arnold*, 214 P.2d 784, 121 Colo. 220.

96. Tex.—*Texas Employers' Ins. Ass'n v. Hamilton*, Civ.App., 95 S.W.2d 767, error dismissed.

97. Wash.—*Switzer v. Department of Labor and Industries*, 34 P.2d 350, 177 Wash. 28.

98. N.C.—*Moore v. Engineering & Sales Co.*, 199 S.E. 605, 214 N.C. 424.

Tex.—*Walker v. Texas Emp. Ins. Ass'n*, 291 S.W.2d 298.

Texas Emp. Ins. Ass'n v. Hudgins, Civ.App., 294 S.W.2d 446, error refused no reversible error—*Aetna Cas. & Sur. Co. v. Bailes*, Civ.App., 285 S.W.2d 886, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Ewing*, Civ.App., 285 S.W.2d 880, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Logsdon*, Civ.App., 278 S.W.2d 893, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Hicks*, Civ.App., 237 S.W.2d 699, error refused no reversible error—*Texas Employers Ins. Ass'n v. Reed*, Civ.App., 150 S.W.2d 858, error dismissed, judgment correct—*Texas Indemnity Ins. Co. v. Stevens*, Civ.App., 135 S.W.2d 272.

99. Mo.—*Moscicki v. American Foundry Mfg. Co.*, App., 103 S.W.2d 491.

1. N.C.—*Rader v. Queen City Coach Co.*, 35 S.E.2d 609, 225 N.C. 537.

2. Kan.—*Addington v. Hall*, 160 P.2d 649, 160 Kan. 268.

Neb.—*Gilmore v. State*, 26 N.W.2d 296, 148 Neb. 10.

Wash.—*Sizemore v. Department of Labor and Industries*, 219 P.2d 120, 36 Wash.2d 520—*Strmich v. Department of Labor and Industries*, 59 P.2d 372, 186 Wash. 649.

3. Conn.—*Osterlund v. State*, 30 A.2d 393, 129 Conn. 591.

4. Colo.—*O. P. Skaggs Co. v. Nixon*, 50 P.2d 55, 97 Colo. 314.

5. Mass.—*Petition of Liberty Mut. Ins. Co.*, 9 N.E.2d 713, 298 Mass. 75.

6. N.Y.—*Hoffman v. New York Cent. R. Co.*, 49 N.E.2d 136, 290 N.Y. 277.

7. Ill.—*David Bradley Mfg. Works v. Industrial Board of Illinois*, 119 N.E. 615, 283 Ill. 463.

tion claim was dismissed for lack of jurisdiction, no implication of a decision on the merits may be drawn.⁸

While it may be presumed that the harm resulting from an improper argument was cured by the court's instruction,⁹ improper argument clearly calculated to prejudice the jury will be presumed to have had that effect.¹⁰

Where the lower court is one of limited statutory jurisdiction, its jurisdiction will not be presumed but must appear affirmatively from the record.¹¹ Where the validity of the award is directly attacked, no presumption in favor of jurisdiction or due process can be indulged,¹² but, in the absence of objection, jurisdiction of the court below will be presumed.¹³

§ 806. — Discretion of Lower Court

The exercise of discretion by the lower court on review of compensation proceedings will not be reviewed or disturbed on further judicial review except for abuse of discretion.

In accordance with general rules, the exercise of discretion by the lower court on review of compensation proceedings will not be reviewed or disturbed on further judicial review¹⁴ except where such discretion has been abused.¹⁵ Thus the court on appeal will not review the lower court's action with respect to requiring medical examinations of claimants on appeal,¹⁶ or its determination of the number of weeks over which payments shall extend,¹⁷ or its allowance of a petition for suspension of a decree ordering payments of compensation,¹⁸ or its determination that the cause constitutes a special case within the act providing for lump-sum awards in such cases,¹⁹ its refusal of a rehearing,²⁰ the denial of a motion to vacate the judgment entered on the award,²¹ or allowance of costs against plaintiff in an action to set aside an award.²²

This rule has also been applied with respect to the lower court's rulings on postponements and continuances of the case,²³ the court's refusal to permit further evidence in chief after that phase of the case has been closed,²⁴ and its action in recommending,²⁵ or refusing to recommit,²⁶ the cause to

8. Ohio.—*Furnis v. Industrial Commission*, 45 N.E.2d 782, 71 Ohio App. 146.

9. Tex.—*Texas Emp. Ins. Ass'n v. Roberts*, Civ.App., 281 S.W.2d 104.—*Traders & General Ins. Co. v. Stone*, Civ.App., 258 S.W.2d 409.—*Hartford Accident & Indemnity Co. v. Vick*, Civ.App., 155 S.W.2d 664.

10. Tex.—*Traders & General Ins. Co. v. Crouch*, Civ.App., 113 S.W.2d 650, error dismissed.

11. Wash.—*Wiles v. Department of Labor and Industries of State*, 209 P.2d 462, 34 Wash.2d 714.

12. Idaho.—*Cook v. Massey*, 220 P. 1088, 38 Idaho 264, 35 A.L.R. 200.

13. Tex.—*Texas Employers' Ins. Ass'n v. Fitzgerald*, Civ.App., 292 S.W. 925, reversed on other grounds, Com.App., 296 S.W. 509.

14. Conn.—*France v. Munson*, 3 A.2d 78, 125 Conn. 22.

Tex.—*United Employers Casualty Co. v. Marr*, Civ.App., 144 S.W.2d 973, error dismissed, judgment correct.—*Texas Indemnity Ins. Co. v. Hubbard*, Civ.App., 133 S.W.2d 626, error dismissed, judgment correct.

Second operation

In view of fact that compensation statutes make no provision for a second operation of an employee who has suffered a disabling injury, question whether employee who had submitted to first unsuccessful operation for correction of hernia should be required to submit to a second operation was within sound discretion of trial judge, and when his de-

termination was supported by evidence it would not be disturbed by appellate court.

Tenn.—*Greenville Cabinet Co. v. Ramsey*, 260 S.W.2d 157, 195 Tenn. 409.

Refusal of certiorari

Discretionary refusal of a single justice of supreme court to allow certiorari should not be lightly disturbed.

N.J.—*Swift & Co. v. Von Volkum*, 34 A.2d 897, 131 N.J.Law 83, affirmed 40 A.2d 572, 132 N.J.Law 344.—*Davies v. Onyx Oil & Resin Co.*, 33 A.2d 357, 130 N.J.Law 381.

Compared with action on motion for new trial

Ga.—*Davis v. Bibb Mfg. Co.*, 43 S.E.2d 780, 75 Ga.App. 515.

15. Iowa.—*Page v. City of Osceola*, 5 N.W.2d 593, 232 Iowa 1126. S.C.—*Poole v. Saxon Mills*, 6 S.E.2d 761, 192 S.C. 339.

Wis.—*Kaegi v. Industrial Commission*, 235 N.W. 845, 232 Wis. 16.

Amendment of pleadings

Supreme court, in determining whether trial court abused its discretion in denying workmen's compensation claimant's right to file amended complaint, was required to consider substance and effect of proposed amendments, and their bearing on rights of parties.

Wis.—*Kaegi v. Industrial Commission*, *supra*.

16. Tex.—*Associated Emp. Lloyds v. Tullios*, Civ.App., 197 S.W.2d 210, error refused no reversible error. 71 C.J. p 1372 note 34.

17. Ill.—*Shell Oil Co. v. Industrial Commission*, 119 N.E.2d 224, 2 Ill. 2d 590.

71 C.J. p 1372 note 35.

18. Mass.—*Massachusetts Bonding & Ins. Co. v. Peloquin*, 113 N.E. 574, 225 Mass. 30.

19. Tex.—*Lumbermen's Reciprocal Ass'n v. Behnken*, Civ.App., 226 S.W. 154, affirmed 246 S.W. 72, 112 Tex. 103, 28 A.L.R. 1402.

20. Mass.—*Lopes' Case*, 179 N.E. 343, 277 Mass. 581.—*Devine's Case*, 129 N.E. 414, 236 Mass. 538.

71 C.J. p 1372 note 38.

21. Ill.—*Liberty Foundries Co. v. Industrial Commission*, 124 N.E. 559, 289 Ill. 601.

22. Wis.—*Ninneman v. Industrial Commission of Wisconsin*, 176 N.W. 909, 171 Wis. 190.

23. Miss.—*Thompson v. Armstrong Cork Co.*, 93 So.2d 831.

24. Neb.—*Sbarra v. Middle States Creameries*, 2 N.W.2d 26, 140 Neb. 813.

25. Conn.—*Tsoukalas v. Bolton Mfg. Co.*, 37 A.2d 357, 130 Conn. 658.—*Glodenis v. American Brass Co.*, 170 A. 146, 118 Conn. 29.

Ga.—*U. S. Fidelity & Guaranty Co. v. Washington*, 139 S.E. 359, 37 Ga. App. 140.

26. Conn.—*Tsoukalas v. Bolton Mfg. Co.*, 37 A.2d 357, 130 Conn. 658.—*Glodenis v. American Brass Co.*, 170 A. 146, 118 Conn. 29.

71 C.J. p 1372 note 40.

the compensation commission. While ordinarily the recommitment of a case to the board for further hearing is within the discretion of the judge of the lower court, where it appears that the action was taken solely to direct a reconsideration of correct rulings of law or findings of fact based on the due consideration of all questions of law or evidence the action of the judge may be reviewed.²⁷ While the amount of allowance to a partial dependent is to be determined in the exercise of sound discretion, an allowance of the maximum to one dependent in a very small degree may be reviewed.²⁸

§ 807. — Questions of Law or Fact, Findings, and Verdict

- a. In general
- b. Applications of rules

a. In General

On further review, the appellate court is normally re-

stricted to questions of law, and the extent to which it may review questions of fact is governed by the statutes, the scope of review in the court below, and whether evidence was received in the court below.

As discussed supra § 669 et seq, much diversity exists as to the procedure for the review of compensation awards and as to the scope of review in such proceedings, and such variations must be considered in determining the scope and extent of review of questions of law and fact, findings, and verdicts on further review.²⁹ The scope of further review may, of course, be limited or expanded by statute.³⁰

Where, as is the usual practice, evidence is received only at the hearing conducted by the compensation authorities, and not in the court which directly reviews the award, the appellate court before which the matter may be brought for further review is normally restricted to questions of law³¹ and may not review or disturb the fact findings of the compensation authorities³² where such findings

27. Mass.—Sciola's Case, 128 N.E. 666, 236 Mass. 407.

28. Ohio.—Industrial Commission v. Drake, 184 N.E. 465, 103 Ohio St. 628.

29. Md.—Townsend Grace Co. v. Ackerman, 143 A. 122, 158 Md. 34. 71 C.J. p 1369 note 90.

30. Wis.—Northwestern Iron Co. v. Industrial Commn., 142 N.W. 271, 154 Wis. 97, L.R.A.1916A 366, Ann. Cas.1915B 877.

71 C.J. p 1390 notes 46, 47.

Grounds for new trial

The court may consider all assignments of error which are proper grounds for new trial, including the weight of the evidence.

Ohio.—Piascik v. Industrial Commission of Ohio, 143 N.E. 533, 109 Ohio St. 570.

31. Me.—Case of Kilpinen, 175 A. 314, 133 Me. 183.

Miss.—City of Moss Point v. Collum, 92 So.2d 456.

Mo.—State ex rel. Kroger Grocery & Baking Co. v. Hostetter, 98 S.W.2d 683, 339 Mo. 630.

N.C.—Worsley v. S. & W. Rendering Co., 80 S.E.2d 467, 239 N.C. 547.

Pa.—Werner v. Allegheny County, 83 A.2d 451, 153 Pa.Super. 10—Artac v. Union Collieries Co., 27 A.2d 782, 149 Pa.Super. 449—Hoon v. State Workmen's Ins. Fund, 27 A.2d 776, 149 Pa.Super. 236—Rossi v. Hillman Coal & Coke Co., 20 A.2d 879, 145 Pa.Super. 103—Reckner v. General Water Co., 200 A. 297, 131 Pa.Super. 538—Sayre v. Textile Mach. Works, 195 A. 736, 129 Pa. Super. 520—Kazeroski v. Susque-

hanna Collieries Co., 193 A. 356, 127 Pa.Super. 259—Puzio v. Susquehanna Collieries Co., 191 A. 222, 126 Pa.Super. 488—Kelly v. Ochiltree Elec. Co., 190 A. 166, 125 Pa. Super. 161—Trovato v. W. J. McCahan Sugar Refining Co., 186 A. 163, 122 Pa.Super. 499—Trojanowska v. Sonman Shaft Coal Co., 185 A. 860, 123 Pa.Super. 17—Knisely v. Knisely, 182 A. 51, 120 Pa.Super. 140—Haywood v. Henrietta Coal Co., 180 A. 34, 118 Pa.Super. 371—Balinski v. Press Pub. Co., 179 A. 897, 118 Pa.Super. 89—Swingle v. Mill Creek Coal Co., 176 A. 828, 116 Pa.Super. 97.

S.C.—Price v. B. F. Shaw Co., 77 S.E.2d 491, 224 S.C. 89—Raley v. City of Camden, 72 S.E.2d 572, 222 S.C. 303—Windham v. City of Florence, 70 S.E.2d 553, 221 S.C. 350—Sligh v. Newberry Elec. Co-op., 58 S.E.2d 675, 216 S.C. 401—Green v. Grinnell Co., Inc., 48 S.E.2d 644, 213 S.C. 116—Ervin v. Myrtle Grove Plantation, 32 S.E.2d 877, 206 S.C. 41—Elrod v. Union Bleachery, 30 S.E.2d 73, 204 S.C. 481—Lanford v. Clinton Cotton Mills, 30 S.E.2d 36, 204 S.C. 423—Murdaugh v. Robert Lee Const. Co., 194 S.E. 447, 185 S.C. 497.

Wis.—Gant v. Industrial Commission, 56 N.W.2d 525, 263 Wis. 64—Eckhardt v. Industrial Commission, 7 N.W.2d 841, 242 Wis. 325—International Harvester Co. v. Industrial Commission, 265 N.W. 193, 220 Wis. 376.

71 C.J. p 1369 notes 95-98, p 1375 note 71, p 1385 notes 7-13, p 1386 notes 14, 15.

Admission of evidence; findings

Where the functions of the lower

court are confined to a review of the record brought before it from the board or commission, its rulings on evidence and refusal to make findings are not reviewable.

S.D.—Leach v. J. I. Case Threshing Mach. Co., 219 N.W. 884, 53 S.D. 13.

Writ of review

La.—Edwards v. Shreveport Creosoting Co., 21 So.2d 878, 207 La. 699.

32. Colo.—U. S. Fidelity & Guaranty Co. v. Industrial Commission of Colorado, 45 P.2d 895, 96 Colo. 571. Conn.—Shedlock v. Cudahy Packing Co., 60 A.2d 514, 134 Conn. 672.

Iowa.—Brandhorst v. Galloway Co., 1 N.W.2d 651, 231 Iowa 436.

N.Y.—Hoffman v. New York Cent.

R. Co., 49 N.E.2d 136, 290 N.Y. 277.

Pa.—White v. John B. Kelly, Inc., 101 A.2d 395, 174 Pa.Super. 262—Garvin v. Philadelphia Transp. Co., 94 A.2d 72, 173 Pa.Super. 15.

S.C.—Lanford v. Clinton Cotton Mills, 30 S.E.2d 36, 204 S.C. 423—Hamilton v. Little, 15 S.E.2d 662, 197 S.C. 434.

71 C.J. p 1373 note 60, p 1374 note 70, p 1375 notes 73-75, p 1377 note 76, p 1386 notes 16, 17, p 1387 notes 18, 19.

Specific findings

Where the court on appeal from a judgment affirming an award has the findings of the specific circumstances surrounding the accident, these, rather than the general conclusions drawn therefrom by the board, are to control its decision.

N.Y.—McInerney v. Buffalo & S.R. Corporation, 121 N.E. 866, 225 N.Y. 130.

of fact are supported by sufficient,³³ substantial,³⁴ | competent³⁵ evidence,³⁶ or where the findings are

33. Ark.—John Bishop Const. Co. v. Orlicek, 272 S.W.2d 820, 224 Ark. 182; 273 S.W.2d 538—Hughes v. Tapley, 177 S.W.2d 429, 206 Ark. 739.
- Colo.—Montgomery Ward & Co. v. Industrial Commission, 94 P.2d 689, 105 Colo. 22.
- Pa.—Bonzani v. Hillmann Coal & Coke Co., 28 A.2d 329, 150 Pa.Super. 356—Cavanaugh v. Luckenbach S. S. Co., 189 A. 789, 125 Pa.Super. 275—Knisely v. Knisely, 182 A. 51, 120 Pa.Super. 140.
- S.C.—Green v. Grinnell Co., Inc., 48 S.E.2d 644, 213 S.C. 116—Dickey v. Springs Cotton Mills, 39 S.E.2d 501, 209 S.C. 204—Carter's Dependents v. Palmetto State Life Ins. Co., 38 S.E.2d 905, 209 S.C. 67.
34. U.S.—Charles H. Bacon Co. v. Howell, C.A.Tenn., 197 F.2d 333—Warner Co. v. Norton, C.C.A.Pa., 137 F.2d 57, affirmed 64 S.Ct. 747, 321 U.S. 565, 88 L.Ed. 931.
- Ark.—John Bishop Const. Co. v. Orlicek, 272 S.W.2d 820, 224 Ark. 182, 273 S.W.2d 538—Chicago Mill & Lumber Co. v. Fulcher, 256 S.W.2d 723, 221 Ark. 903—Simmons Nat. Bank v. Brown, 195 S.W.2d 539, 210 Ark. 311.
- Colo.—Metros v. Denver Coney Island, 129 P.2d 911, 110 Colo. 40.
- Ga.—Cooper v. Lumbermen's Mut. Casualty Co., 175 S.E. 577, 179 Ga. 256, conformed to 176 S.E. 106, 49 Ga.App. 517.
- Ettna Cas. & Sur. Co. v. Johnson, 29 S.E.2d 818, 70 Ga.App. 698.
- Ky.—Eastern Coal Corp. v. Thacker, 290 S.W.2d 468—Ajax Coal Co. v. Collins, 106 S.W.2d 617, 269 Ky. 222.
- Miss.—Welborn v. Joe N. Miles & Sons Lumber Co., 97 So.2d 734—Williams Bros. Co. v. McIntosh, 84 So.2d 692.
- Mo.—Frazier v. National Bearing Division, American Brake Shoe Co., 250 S.W.2d 1008—Mershon v. Missouri Public Service Corp., 221 S.W.2d 165, 35 Mo. 257—Jenneman v. Consol. Underwriters, 190 S.W.2d 458, 340 Mo. 273.
- Brown v. Krey Packing Co., App., 271 S.W.2d 234—Starchman v. Kansas Explorations, App., 225 S.W.2d 354—Dees v. Mississippi River Fuel Corp., App., 192 S.W.2d 635—Neidert v. United Transports, App., 167 S.W.2d 404—Lutman v. American Shoe Mach. Co., 151 S.W.2d 701—Reed v. Sensenbaugh, 86 S.W.2d 383, 229 Mo.App. 833.
- N.C.—Nissen v. City of Winston-Salem, 175 S.E. 310, 206 N.C. 382.
- Pa.—Widdis v. Collingdale Millwork Co., 84 A.2d 259, 169 Pa.Super. 612—Heinz v. Jones & Laughlin Steel Corp., 48 A.2d 635, 157 Pa.Super. 735—Wolfe v. Wolf, 42 A.2d 366, 157 Pa.Super. 181—Franko v. Sanitary Mfg. Co., 39 A.2d 363, 155 Pa.Super. 636—Schach v. Hazle Brook Coal Co., 38 A.2d 423, 155 Pa.Super. 242—McGurty v. Ruskin Dining Room, 34 A.2d 374, 153 Pa.Super. 535—Lakott v. Armour & Co., 25 A.2d 77, 147 Pa.Super. 597—Joebon v. Reitz Coal Co., 7 A.2d 11, 136 Pa.Super. 25—Thompson v. Cone-maugh Iron Works, 175 A. 45, 114 Pa.Super. 247.
- S.C.—Elrod v. Union Bleachery, 30 S.E.2d 73, 204 S.C. 481—Green v. City of Bennettsville, 15 S.E.2d 334, 197 S.C. 313—Cokeley v. Robert Lee, Inc., 14 S.E.2d 889, 197 S.C. 157—Rice v. Brandon Corp., 2 S.E.2d 740, 190 S.C. 229—Rudd v. Fairforest Finishing Co., 200 S.E. 727, 189 S.C. 188.
- S.D.—Hehn v. Aberdeen Glass Co., 48 N.W.2d 827, 74 S.D. 50.
- 71 C.J. p 1381 note 87, p 1388 note 24.
35. Ark.—Hughes v. Tapley, 177 S.W.2d 429, 206 Ark. 739.
- Colo.—Colorado Fuel & Iron Corp. v. Alitto, 273 P.2d 725, 130 Colo. 130—Montgomery Ward & Co. v. Industrial Commission, 94 P.2d 689, 105 Colo. 22.
- Ga.—Chevrolet-Atlanta Division, General Motors Corp. v. Nash, 59 S.E.2d 681, 81 Ga.App. 671—Hall v. Kendall, 59 S.E.2d 421, 81 Ga.App. 592—Bituminous Cas. Corp. v. Southwell, 51 S.E.2d 729, 78 Ga.App. 609—Bituminous Cas. Corp. v. Wilkes, 49 S.E.2d 816, 77 Ga.App. 764—Glens Falls Indem. Co. v. Clark, 43 S.E.2d 752, 75 Ga.App. 453—Watkins v. Hartford Acc. & Indem. Co., 43 S.E.2d 549, 75 Ga.App. 462.
- Ind.—Clark v. Hughey, 117 N.E.2d 360, 233 Ind. 134.
- Mo.—Powers v. Universal Atlas Cement Co., App., 261 S.W.2d 512—Tuller v. Railway Exp. Agency, 235 S.W.2d 404, 241 Mo.App. 68—Hicks v. Gus Gillerman Iron & Metal Co., App., 188 S.W.2d 749.
- N.C.—Blalock v. City of Durham, 92 S.E.2d 758, 244 N.C. 208—Hinkle v. City of Lexington, 79 S.E.2d 220, 239 N.C. 105—Rice v. Thomasville Chair Co., 76 S.E.2d 311, 238 N.C. 121—Fox v. Cramerton Mills, 35 S.E.2d 869, 225 N.C. 580—Dearn v. Biltwell Chair & Furniture Co., 23 S.E.2d 810, 222 N.C. 433—Graham v. Wall, 16 S.E.2d 691, 220 N.C. 84—Casey v. Board of Ed. of City of Durham, 14 S.E.2d 852, 219 N.C. 739—Beach v. McLean, 14 S.E.2d 515, 219 N.C. 521—Citizens Bank & Trust Co. v. Rid Motor Co., 5 S.E.2d 318, 216 N.C. 432—Lassiter v. Carolina Tel. & Tel. Co., 1 S.E.2d 542, 215 N.C. 227—Moore v. Engineering & Sales Co., 199 S.E. 605, 214 N.C. 424—Bettitt v. Wood-Owen Trailer Co., 189 S.E. 279, 214 N.C. 235—Early v. W. H. Basnight & Co., 198 S.E. 577, 214 N.C. 103.
- Pa.—Witters v. Harrisburg Steel Corp., 132 A.2d 762, 183 Pa.Super. 450—Susman v. Kaufmann's Dept. Store, 128 A.2d 173, 182 Pa.Super. 467—Golinski v. Odin Stove Mfg. Co., 48 A.2d 95, 159 Pa.Super. 457—Franko v. U. S. Sanitary Mfg. Co., 39 A.2d 363, 155 Pa.Super. 636—Wydra v. Philadelphia & Reading Coal & Iron Co., 34 A.2d 326, 153 Pa.Super. 529—Turian v. William Clark-Rea Coal Co., 33 A.2d 639, 153 Pa.Super. 105—Bowers v. Schell's Bakery, 31 A.2d 442, 152 Pa.Super. 112—Weitz v. Weitz, 7 A.2d 83, 136 Pa.Super. 191—Joebon v. Reitz Coal Co., 7 A.2d 11, 136 Pa.Super. 25—Madajewski v. Susquehanna Collieries Co., 4 A.2d 809, 135 Pa.Super. 181—Uditsky v. Kravovitz, 2 A.2d 525, 133 Pa.Super. 186—Benci v. Vesta Coal Co., 200 A. 308, 131 Pa.Super. 435—Ciello v. D. J. Kennedy Co., 200 A. 147, 131 Pa.Super. 492—Thompson v. Cone-maugh Iron Works, 175 A. 45, 114 Pa.Super. 247—Melody v. Bornot, Inc., 170 A. 408, 112 Pa.Super. 174.
- S.C.—Leonard v. Georgetown County, 95 S.E.2d 777, 230 S.C. 388—Mason v. Woodside Mills, 80 S.E.2d 344, 225 S.C. 15—Hiers v. Brunson Const. Co., 70 S.E.2d 211, 221 S.C. 212—Teigue v. Appleton Co., 68 S.E.2d 878, 221 S.C. 52—Lamb v. Pacolet Mfg. Co., 43 S.E.2d 353, 210 S.C. 490—Young v. Sonoco Products Co., 41 S.E.2d 860, 210 S.C. 146—Radcliffe v. Southern Aviation School, 40 S.E.2d 626, 209 S.C. 411—Ripley v. Anderson Cotton Mills, 40 S.E.2d 508, 209 S.C. 401—Dickey v. Springs Cotton Mills, 39 S.E.2d 501, 209 S.C. 204—Sullivan's Next of Kin v. Greenville Auto Sales, 36 S.E.2d 801, 203 S.C. 68—Elrod v. Union Bleachery, 30 S.E.2d 73, 204 S.C. 481—McDonald v. Palmetto Theatres, 13 S.E.2d 602, 196 S.C. 460—Cole's Next of Kin v. Anderson Cotton Mills, 4 S.E.2d 908, 191 S.C. 458.
- Wis.—Walter v. Industrial Commission, 59 N.W.2d 463, 264 Wis. 522—International Harvester Co. v. Industrial Commission, 265 N.W. 193, 220 Wis. 376—Kolman v. Dvorak, 262 N.W. 622, 219 Wis. 139.
- 71 C.J. p 1379 note 78, p 1388 note 21.
36. Colo.—U. S. Fidelity & Guaranty Co. v. Industrial Commission, 259 P.2d 869, 123 Colo. 68.
- Conn.—Shedlock v. Cudahy Packing Co., 60 A.2d 514, 134 Conn. 672.
- Del.—Le Tourneau v. Consolidated Fisheries Co., 51 A.2d 852, 4 Terry 540.
- Ga.—Short v. Glendale Mills, Inc., 97 S.E.2d 541, 95 Ga.App. 238—Armour & Co. v. Price, 37 S.E.2d 534, 78 Ga.App. 676.

based on conflicting evidence,³⁷ or are not unreasonable³⁸ or clearly and manifestly against the weight of the evidence.³⁹

This rule is obviously applicable on appeal from an affirmance of the determination by the compensation authorities.⁴⁰ It also applies where the lower court has set aside the findings of the compensation authorities,⁴¹ and the findings of the com-

pensation authorities, if supported by sufficient evidence, must be reinstated on further review.⁴²

The statute usually provides that the compensation board or commission is to determine the facts, and its determination will be followed although the actual hearing was conducted by an examiner, hearing officer, or referee,⁴³ whose findings were con-

Mass.—Luczek's Case, 141 N.E.2d 526.
—Nouses' Case, 96 N.E.2d 234, 326 Mass. 797—Wozniak's Case, 13 N.E.2d 297, 299 Mass. 471.

N.C.—Evans v. Tabor City Lumber Co., 59 S.E.2d 612, 232 N.C. 111—Moore v. Engineering & Sales Co., 199 S.E. 605, 214 N.C. 424.

Pa.—Susman v. Kaufmann's Dept. Store, 128 A.2d 173, 182 Pa.Super. 467—Kaim v. Burkholder and Johnson, 127 A.2d 752, 182 Pa.Super. 460—White v. Morris and Old Republic Ins. Co., Intervener, 127 A.2d 748, 182 Pa.Super. 454—Nelson v. Borough of Greenville, 124 A.2d 675, 181 Pa.Super. 438—McClemens v. Penn Auto Parts, 124 A.2d 623, 181 Pa.Super. 542—Toland v. Murphy Bros., 94 A.2d 156, 172 Pa.Super. 484—Moore v. Hunt Min. Co., 60 A.2d 560, 163 Pa.Super. 94—Eldridge v. Blue Ridge Textile Co., 52 A.2d 339, 160 Pa.Super. 578—McGarvey v. Butler Consol. Coal Co., 43 A.2d 623, 157 Pa.Super. 353—Evrancik v. Coal Min. Co. of Graceton, 27 A.2d 767, 150 Pa.Super. 27—Petrovan v. Rockhill Coal & Iron Co., 196 A. 516, 139 Pa.Super. 58.

S.C.—Hiers v. Brunson Const. Co., 70 S.E.2d 211, 221 S.C. 212—Buff v. Columbia Baking Co., 53 S.E.2d 879, 215 S.C. 41—White v. Carolina Power & Light Co., 53 S.E.2d 872, 215 S.C. 25—Gory v. Monarch Mills, 37 S.E.2d 291, 208 S.C. 86—Hamilton v. Little, 15 S.E.2d 662, 197 S.C. 434.

Wis.—Giant Grip Mfg. Co. v. Industrial Commission, 74 N.W.2d 182, 271 Wis. 533—Kerin v. Industrial Commission, 2 N.W.2d 223, 239 Wis. 617—Woman's Home Companion Reading Club v. Industrial Commission, 285 N.W. 745, 231 Wis. 371.

71 C.J. p 1379 note 77, p 1380 notes 82, 84, 85, p 1381 notes 86, 88, p 1382 note 89, p 1383 note 90, p 1388 notes 20–25, p 1389 notes 26, 27.

37. Colo.—Hamilton v. Industrial Commission, 289 P.2d 639, 132 Colo. 403—Deline v. Indus. Commission, 116 P.2d 916, 108 Colo. 351.

Conn.—Shedlock v. Cuddeback Packing Co., 60 A.2d 514, 194 Conn. 472.

Pa.—Garvin v. Philadelphia Brass Co., 94 A.2d 723, 175 Pa.Super. 36.

Mo.—McCarty v. Western Packing & Ebbm, 34 A.2d 394, 150 Pa.Super. 505.

Knisely v. Knisely, 182 A. 51, 120 Pa.Super. 140.

S.C.—Knight v. Shepherd, 4 S.E.2d 906, 191 S.C. 452.

71 C.J. p 1380 notes 79–81, 83, p 1388 note 22, p 1390 note 41.

38. Colo.—Montgomery Ward & Co. v. Industrial Commission, 263 P.2d 817, 128 Colo. 465.

Mo.—Moore v. International Shoe Co., App., 213 S.W.2d 215.

39. Ill.—De Bartolo v. Indus. Commission, 30 N.E.2d 677, 375 Ill. 103.

Miss.—Lawson v. Traxler Gravel Co., 90 So.2d 204—Wallace v. Copiah County Lumber Co., 77 So.2d 316, 223 Miss. 90, certiorari denied 75 S.Ct. 901, 349 U.S. 986, 99 L.Ed. 1288, rehearing denied 76 S.Ct. 42, 350 U.S. 856, 100 L.Ed. 761—Smith v. St. Catherine Gravel Co., 71 So.2d 221, 220 Miss. 462.

S.D.—Bruns v. Stedman, 82 N.W.2d 845.

40. Ark.—Dundee Woolen Mills v. Chism, 219 S.W.2d 628, 215 Ark. 126.

Colo.—O. P. Skaggs Co. v. Nixon, 72 P.2d 1102, 101 Colo. 203—Wood v. Indus. Commission, 66 P.2d 806, 100 Colo. 209.

Ga.—Hardware Mut. Cas. Co. v. Mullis, 43 S.E.2d 122, 75 Ga.App. 233—American Casualty Co. v. Adams, 176 S.E. 62, 49 Ga.App. 427—Clark v. Fisher Body Co., 175 S.E. 265, 49 Ga.App. 260—Campbell Coal Co. v. Render, 173 S.E. 245, 48 Ga.App. 547.

Ill.—Hudson Johnson Co. v. Industrial Commission, 190 N.E. 685, 356 Ill. 424.

Kan.—Meredith v. Seymour Packing Co., 40 P.2d 325, 141 Kan. 244—Shapland v. Ferguson Furniture Co., 33 P.2d 145, 139 Kan. 768.

Ky.—Kabai v. Majestic Collieries Co., 170 S.W.2d 357, 293 Ky. 783—Leckie Collieries Co. v. Branham, 122 S.W.2d 776, 275 Ky. 748.

Miss.—City of Moss Point v. Collum, 92 So.2d 456—Brown Buick Co. v. Smith's Estate, 52 So.2d 664.

Mo.—Tokash v. General Baking Co., 163 S.W.2d 554, 349 Mo. 767—Weaver v. Norwich Pharmacal Co., 149 S.W.2d 346, 247 Mo. 995.

Buckley v. Elmira Coal Co., 104 S.W.2d 725.

9th Cir.—Gutierrez v. Western Union Tel. Co., App., 239 S.W.2d 217.

N.C.—Brown v. L. H. Bottoms Truck Lines, 42 S.E.2d 71, 227 N.C. 299—Rader v. Queen City Coach Co., 35 S.E.2d 609, 225 N.C. 537—Nissen v. City of Winston-Salem, 175 S.E. 310, 206 N.C. 888.

Pa.—Bepler v. Boyd & Co., 27 A.2d 692, 149 Pa.Super. 542—Pegee v. Ricchini, 12 A.2d 330, 140 Pa.Super. 56—Balanti v. Stineman Coal & Coke Co., 200 A. 236, 131 Pa.Super. 844—Barr v. Atlantic Elevator Co., Super., 187 A. 815.

S.C.—Burnett v. Appleton Co., 37 S.E.2d 269, 208 S.C. 53.

Heavy burden on appellant

A party attacking a finding by the commissioner upon conflicting evidence which was sustained by the superior court has a heavy burden to overcome the presumption that the concurrent finding by two competent tribunals is correct.

Conn.—Driscoll v. Jewell Belting Co., 114 A. 109, 96 Conn. 295.

Where there is any evidence of probative value to support workmen's compensation board's finding, judgment affirming board's award thereon must be affirmed by court of appeals.

Ky.—Kabai v. Majestic Collieries Co., 170 S.W.2d 357, 293 Ky. 783.

Verdict approved by trial court

Award in compensation case approved by superior court, with respect to sufficiency of evidence, occupies status of verdict approved by trial judge.

Ga.—Campbell Coal Co. v. Render, 173 S.E. 245, 48 Ga.App. 547.

41. U.S.—Lumber Mut. Cas. Ins. Co. v. O'Keeffe, C.A.N.Y., 217 F.2d 720.

Iowa.—Gifford v. Iowa Mfg. Co., 51 N.W.2d 119, 243 Iowa 145.

Mo.—Kopolow v. Zavodnick, App., 177 S.W.2d 647.

S.C.—Smith v. Southern Builders, 24 S.E.2d 109, 202 S.C. 83.

42. Mo.—Wilson v. Brownfield Const. Co., 74 S.W.2d 377, 228 Mo. App. 398.

43. Ark.—Parker Stave Co. v. Hines, 190 S.W.2d 620, 209 Ark. 433.

Wis.—Woman's Home Companion Reading Club v. Indus. Commission, 285 N.W. 745, 231 Wis. 371.

The court is not the fact-finding body in compensation proceedings and could not add a finding of fact to referee's decision, and the court

trary to those made by the commission.⁴⁴ It is frequently stated that the findings of the compensation authorities are to be given the same force and effect as the verdict of a jury.⁴⁵ It is not for the court on further review to try the case de novo,⁴⁶ to weigh the evidence,⁴⁷ to pass on the credibility

of witnesses,⁴⁸ or to substitute its judgment for that of the compensation authorities.⁴⁹

The sufficiency of the evidence to support the findings of the compensation authorities is a question of law,⁵⁰ and the court on further review may consider whether the findings are supported by suf-

could not impose a finding of fact on the compensation board, but could only review the board's action if it made a finding which was not supported by evidence.

Pa.—Mancini v. Pennsylvania Rubber Co., 24 A.2d 151, 147 Pa.Super. 359.

44. Ark.—Parker Stave Co. v. Hines, 190 S.W.2d 620, 209 Ark. 438.

Ga.—Fortson v. American Sur. Co., 89 S.E.2d 671, 92 Ga.App. 625.

Mass.—Murphy's Case, 30 N.E.2d 681, 307 Mass. 610.

45. Ark.—Grimsley v. Manufacturers Furniture Co., 276 S.W.2d 64, 224 Ala. 769—American Cas. Co. v. Jones, 276 S.W.2d 41, 224 Ark. 731

—Pearson v. Faulkner Radio Service Co., 247 S.W.2d 964, 220 Ark. 368—Green v. Lion Oil Co., 220 S.W.2d 409, 215 Ark. 305—Hobbs

Western Co. v. Craig, 192 S.W.2d 116, 209 Ark. 630—Parker Stave Co. v. Hines, 190 S.W.2d 620, 209

Ark. 438—Sturgis Bros. v. Mays, 188 S.W.2d 629, 208 Ark. 1017—

Ozan Lumber Co. v. Garner, 187 S.W.2d 181, 208 Ark. 645—Elm Springs Canning Co. v. Sullins, 180

S.W.2d 113, 207 Ark. 257—Fordyce Lumber Co. v. Shelton, 179 S.W.2d 464, 206 Ark. 1134—Hughes v. Tap-

ley, 177 S.W.2d 429, 206 Ark. 739.

Mo.—Blahut v. Liberty Creamery Co., App., 145 S.W.2d 506—Green v. Wagner Elec. Corp., App., 131 S.W.2d 862.

S.C.—Holland's Estate v. Valley Falls Mill, 199 S.E. 412, 188 S.C. 364.

71 C.J. p 1383 notes 91, 92, p 1389 notes 28, 29.

46. Ark.—John Bishop Const. Co. v. Orlicek, 272 S.W.2d 820, 224 Ark. 182; 273 S.W.2d 538, 224 Ark. 182

—Green v. Lion Oil Co., 220 S.W.2d 409, 215 Ark. 305—Solid Steel Scissors Co. v. Kennedy, 171 S.W.2d 929, 205 Ark. 958.

47. U.S.—U. S. Fidelity & Guaranty Co. v. Britton, 188 F.2d 674, 83 U.S.App.D.C. 293—Associated General Contractors of America v. Cardillo, 106 F.2d 327, 70 App.D.C. 303.

Ill.—Murrelle v. Indus. Commission, 46 N.E.2d 1007, 382 Ill. 128.

Ky.—Abbott v. Grissom-Rakestraw Lumber Co., 279 S.W.2d 227—H. H. Wagner & Co. v. Moock, 197 S.W.2d 254, 303 Ky. 222—McKnelly v. Gaddis, 218 S.W.2d 1, 309 Ky. 698

—Inland Steel Co. v. Newsome, 186 S.W.2d 1077, 281 Ky. 681—Leckie

Collieries Co. v. Branham, 122 S.W.2d 776, 275 Ky. 748.

Mo.—Walker v. Pickwick Hotel, App., 211 S.W.2d 55—Ashwell v. U. S. Seed Co., App., 167 S.W.2d 950

—Gilden v. Dorsa Dresses, App., 160 S.W.2d 484—Cobler v. Leonhard Confectionery Co., App., 138

S.W.2d 728—Hatfield v. Southwestern Grocer Co., App., 104 S.W.2d 717—Gibson v. St. Joseph Lead

Co., 102 S.W.2d 152, 232 Mo.App. 234—Snively v. Delmar Hotel Co.,

App., 84 S.W.2d 188.

Pa.—Diehl v. General Baking Co., 86 A.2d 801, 349 Pa. 235—Tracey v. M. & S. Coal Co., 69 A.2d 184, 165

Pa. 569.

Dougher v. Lummus Co., 136 A.2d 132, 184 Pa.Super. 615—Hager

v. Bethlehem Mines Corp., 133 A.2d 567, 183 Pa.Super. 498—Nelson

v. Borough of Greenville, 124 A.2d 675, 181 Pa.Super. 488—Copello v. New Shawmut Min. Co., 116 A.2d

104, 179 Pa.Super. 227—Strouse v. Quaker Knitting Mills, 46 A.2d 526,

159 Pa.Super. 39—Heinzel v. Jones & Laughlin Steel Corp., 43 A.2d

635, 157 Pa.Super. 454—Schwirian v. Fort Pitt Steel Casting Co., 33

A.2d 527, 153 Pa.Super. 56—Senchak v. Tech Food Products Co., 31

A.2d 746, 152 Pa.Super. 247—Caviston v. Lang, 31 A.2d 566, 152 Pa.

Super. 51—Wise v. Air Sho Radio Service Corp., 30 A.2d 211, 151 Pa.

Super. 110—Rossi v. Hillman Coal & Coke Co., 20 A.2d 879, 145 Pa.

Super. 108—Rudolph v. Shannopin Coal Co., 18 A.2d 329, 142 Pa.Super.

389—Russell v. Scott Paper Co., 13 A.2d 81, 140 Pa.Super. 84—Logue v.

Gallagher, 3 A.2d 191, 133 Pa.Super. 570—Hockenberry v. State

Workmen's Ins. Fund, 2 A.2d 536, 133 Pa.Super. 249—Burrell v. In-

land Collieries Co., 193 A. 439, 127 Pa.Super. 510—Puzio v. Susque-

hanna Collieries Co., 191 A. 222, 126 Pa.Super. 488—Hill v. Thomas

S. Gassner Co., 188 A. 382, 124 Pa. Super. 217—Tuttle v. Holland Fur-

nace Co., 169 A. 462, 111 Pa.Super. 290.

S.C.—Roper v. Kimbrell's of Greenville, Inc., 99 S.E.2d 52, 281 S.C. 453.

S.D.—Stowsand v. Jack Rabbit Lines, 58 N.W.2d 298, 75 S.D. 11.

Wis.—Brouwer Realty Co. v. Industrial Commission, 62 N.W.2d 577,

266 Wis. 73—Spencie v. Industrial Commission, 287 N.W. 690, 232

Wis. 506—General Acc. Fire & Life

Assur. Corp. v. Industrial Commission, 271 N.W. 385, 223 Wis. 635

—Hills Dry Goods Co. v. Industrial Commission, 258 N.W. 336, 217

Wis. 76.

71 C.J. p 1375 note 72.

48. Mo.—Snively v. Delmar Hotel Co., App., 84 S.W.2d 188.

Pa.—Tracey v. M. & S. Coal Co., 69 A.2d 184, 165 Pa.Super. 569—Make-

ta v. Butcher, 45 A.2d 256, 158 Pa. Super. 519—Visnic v. Westmore-

land Coal Co., 38 A.2d 539, 155 Pa. Super. 199—Swingle v. Mill Creek

Coal Co., 176 A. 828, 116 Pa.Super. 97.

Wis.—Keller v. Industrial Commission, 72 N.W.2d 740, 271 Wis. 225.

49. Ill.—Crepps v. Industrial Commission, 85 N.E.2d 5, 402 Ill. 606

—Gudeman Co. v. Industrial Commission, 77 N.E.2d 807, 399 Ill. 279

—Chicago & Ill. Midland Ry. Co. v. Indus. Commission, 199 N.E. 828,

362 Ill. 257.

Mo.—Long v. Mississippi Lime Co. of Mo., App., 257 S.W.2d 167—Moore

v. International Shoe Co., App., 213 S.W.2d 215.

N.C.—Evans v. Tabor City Lumber Co., 59 S.E.2d 612, 232 N.C. 111.

Pa.—Copello v. New Shawmut Min. Co., 116 A.2d 104, 179 Pa.Super.

227—Harris v. Sachse, 52 A.2d 375, 160 Pa.Super. 607—Schrock v.

Stonycreek Coal Co., 33 A.2d 522, 152 Pa.Super. 599—Marmon v. Union

Collieries Co., 7 A.2d 156, 135 Pa.Super. 582.

S.C.—McWilliams v. Southern Bleachery & Print Works, 57 S.E.2d 26, 216 S.C. 121.

Wis.—Brouwer Realty Co. v. Industrial Commission, 62 N.W.2d 577,

266 Wis. 73.

71 C.J. p 1390 note 42.

50. Ark.—Parker Stave Co. v. Hines, 190 S.W.2d 620, 209 Ark. 438—

Bales v. Service Club No. 1, Camp Chaffee, 187 S.W.2d 321, 208 Ark. 692.

Mo.—Dehoney v. B-W Brake Co., 271 S.W.2d 565.

Walker v. Pickwick Hotel, App., 211 S.W.2d 55—Coleman v. Brown

Strauss Corp., App., 210 S.W.2d 587—Jones v. Remington Arms

Co., App., 209 S.W.2d 156.

Pa.—McClemens v. Penn Auto Parts, 124 A.2d 623, 181 Pa.Super. 542—

Puskarich v. Puskarich, 162 A.2d 191, 174 Pa.Super. 581.

ficient evidence⁵¹ even though the determination of the compensation authorities was affirmed on appeal to the lower court.⁵² On subsequent review, the court is not bound by the determination of the lower court as to the sufficiency of the evidence to support the findings of the compensation agency, but will make its own independent determination of that matter.⁵³ The court on further review is not

bound by findings not supported by the evidence⁵⁴ or based on stipulated⁵⁵ or undisputed⁵⁶ facts. It has been held that where the fact findings of the compensation authorities are against the party having the burden of proof, the court will consider, not whether the findings are supported by competent evidence, but whether competent evidence was capriciously disregarded.⁵⁷

51. U.S.—Mattison v. Brown, C.A. Ill., 197 F.2d 414.

Colo.—U. S. Fidelity & Guaranty Co. v. Industrial Commission of Colorado, 45 P.2d 895, 96 Colo. 571.

D.C.—Friend v. Britton, 220 F.2d 820, 95 U.S.App.D.C. 139, certiorari denied Harry Alexander Inc. v. Friend, 76 S.Ct. 72, 350 U.S. 836, 100 L.Ed. 745.

Iowa.—Bruner v. Klassi, 44 N.W.2d 866, 241 Iowa 1007.

Ky.—Tyler-Couch Const. Co. v. Elmore, 264 S.W.2d 56—Cornett-Lewis Coal Co. v. Day, 226 S.W.2d 951, 312 Ky. 221—Wisconsin Coal Corp. v. Haddix, 134 S.W.2d 232, 230 Ky. 676.

La.—Hamphill v. Tremont Lumber Co., 25 So.2d 625, 209 La. 885.

Mass.—Duggan's Case, 53 N.E.2d 90, 315 Mass. 355.

Miss.—Employers' Ins. Co. of Ala. v. Dean, 86 So.2d 307.

Mo.—Tebeau v. Baden Equipment & Const. Co., App., 295 S.W.2d 134—Long v. Mississippi Lime Co. of Mo., App., 257 S.W.2d 167—Mabry v. Tiffany Stand Co., App., 235 S.W.2d 863—Douglas v. St. Joseph Lead Co., App., 231 S.W.2d 258—Moore v. International Shoe Co., App., 213 S.W.2d 215—Hendrickson v. Riss & Co., App., 104 S.W.2d 1046.

N.C.—Lewter v. Abercrombie Enterprises, 82 S.E.2d 410, 240 N.C. 399

—Evans v. Tabor City Lumber Co., 59 S.E.2d 612, 232 N.C. 111.

Pa.—Safin v. Jones & Laughlin Steel Corp., 70 A.2d 703, 166 Pa.Super. 142—Maskovyak v. Sonman Shaft Coal Co., 38 A.2d 345, 155 Pa.Super. 411—Schrock v. Stonycreek Coal Co., 33 A.2d 522, 152 Pa.Super. 599

—Werner v. Allegheny County, 33 A.2d 451, 153 Pa.Super. 10—Bucci v. Lincoln Coal Co., 14 A.2d 859, 140 Pa.Super. 538—Goettel v. Pittsburgh Coal Co., 14 A.2d 844, 140 Pa.Super. 516—Pavik v. Glen Alden Coal Co., 14 A.2d 161, 140 Pa.Super. 165—Peggie v. Ricchini, 12 A.2d 830, 140 Pa.Super. 56—Porto v. Philadelphia & Reading Coal & Iron Co., 10 A.2d 29, 137 Pa.Super. 596—Bepier v. State Workmen's Ins. Fund, 8 A.2d 727, 137 Pa.Super. 287—Fegan v. The Maccabees, 2 A.2d 511, 133 Pa.Super. 283—Kitchen v. Hartraft, 193 A. 475, 130 Pa.Super. 452—Freeman v. Salem Reformed Church, 190 A. 159,

125 Pa.Super. 367—Malini v. Saltsburg Coal Mining Co., 181 A. 330, 119 Pa.Super. 356.

S.C.—Gurley v. Mills Mill, 80 S.E.2d 745, 225 S.C. 46—Mason v. Woodside Mills, 80 S.E.2d 344, 225 S.C. 15—Telgue v. Appleton Co., 68 S.E.2d 378, 221 S.C. 52—Buff v. Columbia Baking Co., 53 S.E.2d 879, 215 S.C. 41—Shillinglaw v. Springs Cotton Mills, 40 S.E.2d 502, 209 S.C. 379—Branch v. Pacific Mills, 32 S.E.2d 1, 205 S.C. 353—Jones v. Anderson Cotton Mills, 31 S.E.2d 447, 205 S.C. 247—Strawhorn v. J. A. Chapman Const. Co., 24 S.E.2d 116, 202 S.C. 43—Reeves v. Carolina Foundry & Mach. Works, 9 S.E.2d 919, 194 S.C. 403—Layton v. Hammond-Brown-Jennings Co., 3 S.E.2d 492, 190 S.C. 425.

S.D.—Schindler v. Manchester Bisquit Co., 24 N.W.2d 76, 71 S.D. 336—Wilhelm v. Narregang-Hart Co., 279 N.W. 549, 66 S.D. 155.

Wis.—Miller Rasmussen Ice & Coal Co. v. Industrial Commission, 57 N.W.2d 736, 263 Wis. 538—Burt Bros. v. Industrial Commission, 39 N.W.2d 382, 255 Wis. 488—F. A. McDonald Co. v. Industrial Commission, 26 N.W.2d 165, 250 Wis. 134—Prentiss Wabers Products Co. v. Industrial Commission, 283 N.W. 557, 230 Wis. 171.

71 C.J. p 1389 note 96, p 1384 note 94, p 1385 notes 3, 4, p 1389 notes 31, 33, p 1390 notes 34—40.

52. Ill.—Mirific Products Co. v. Industrial Commission, 191 N.E. 208, 356 Ill. 645.

Mo.—Brown v. R. J. Brown Co., 172 S.W.2d 645, 351 Mo. 557.

53. Ill.—Olympic Commissary Co. v. Industrial Commission, 20 N.E.2d 86, 371 Ill. 164.

54. Iowa.—Oswalt v. Lucas County, 270 N.W. 847, 222 Iowa 1099.

N.C.—Logan v. Johnson, 10 S.E.2d 653, 218 N.C. 200.

S.D.—Hehn v. Aberdeen Glass Co., 48 N.W.2d 827, 74 S.D. 50.

71 C.J. p 1384 note 93.

Fact conclusively established

In compensation proceeding for injury to back, even if the board had not in effect found an abnormal pre-existing condition, superior court would be obliged to act as though the board had found an abnormal pre-existing condition in claimant's back where the evidence of the abnormal

pre-existing condition was so conclusive that any other finding would amount to error of law.

Pa.—Rupchak v. Westinghouse Elec. & Mfg. Co., 54 A.2d 309, 161 Pa. Super. 228.

55. Iowa.—Oswalt v. Lucas County, 270 N.W. 847, 222 Iowa 1099.

56. Ill.—Olney Seed Co. v. Industrial Commission, 38 N.E.2d 24, 403 Ill. 587.

Md.—Moore v. Clarke, 187 A. 887, 171 Md. 39, 107 A.L.R. 924.

Pa.—Antonio v. Pennsylvania R. Co., 38 A.2d 705, 155 Pa.Super. 277—Niblett v. Pennsylvania R. Co., 23 A.2d 62, 146 Pa.Super. 587.

S.D.—Bruns v. Stedman, 82 N.W.2d 845.

Wis.—Duluth-Superior Milling Co. v. Industrial Commission, 275 N.W. 515, 226 Wis. 187, rehearing denied 276 N.W. 300, 226 Wis. 187.

71 C.J. p 1384 notes 96—98, p 1385 note 99, p 1389 note 30.

Depositions

Where depositions of witnesses testifying before industrial accident board were presented to district judge on appeal from board's order denying compensation to injured employee and brought before supreme court on appeal from judgment reversing such order, supreme court must examine such evidence and determine value thereof.

Idaho.—Webb v. Gem State Oil Co., 55 P.2d 1302, 56 Idaho 465.

Lump-sum award

On appeal, whether, on undisputed facts, an order for a lump-sum computation of compensation award is authorized by workmen's compensation act is a question of law.

Mo.—England v. Missouri Gravel Co., 129 S.W.2d 50, 235 Mo.App. 190.

57. Pa.—Ede v. Ruhe Motor Corp., 136 A.2d 151, 154 Pa.Super. 603—Carnachione v. Hotel William Penn, 132 A.2d 400, 184 Pa.Super. 26—Irvin v. Plymouth Meeting Rubber Division Linear, Inc., 126 A.2d 491, 182 Pa.Super. 280—Schaefer v. Central News Co., 118 A.2d 263, 179 Pa.Super. 559—Solop v. Centralia Collieries Co., 101 A.2d 163, 174 Pa.Super. 606—Doleff v. Wilkie Buick Co., 45 A.2d 395, 153 Pa.Super. 453—Visnic v. Westmoreland Coal Co., 38 A.2d 539, 155 Pa.Super. 199—McGurty v. Ruskin Dining Room, 34 A.2d 374, 153 Pa.

In determining the sufficiency of the evidence to support the finding of the compensation authorities the court considers the evidence in the light most favorable to the finding,⁵⁸ and considers only the evidence favorable to the finding,⁵⁹ but the court considers all of the evidence in determining whether the finding is contrary to the overwhelming weight of the evidence.⁶⁰

On further review, the court may consider questions of law,⁶¹ such as whether or not the law has been properly applied to the facts⁶² or whether the

findings justify the award,⁶³ and in the adjudication of questions of law the determinations of the compensation authorities and the lower court are not binding.⁶⁴

Jurisdiction. It has been held that the findings of the compensation authorities as to jurisdictional facts are not conclusive and that it is the duty of the court on further review to determine the jurisdictional facts on all of the evidence without regard to the findings by the compensation commission.⁶⁵

Super. 535—Schrock v. Stonycreek Coal Co., 33 A.2d 522, 152 Pa.Super. 599.

58. Ark.—Grimsley v. Manufacturers Furniture Co., 276 S.W.2d 64, 224 Ark. 769—John Bishop Const. Co. v. Orlicek, 272 S.W.2d 820, 224 Ark. 182—John Bishop Const. Co. v. Orlicek, 273 S.W.2d 538, 224 Ark. 182—Sherwin-Williams Co. v. Yeager, 239 S.W.2d 1019, 219 Ark. 20—Springdale Monument Co. v. Allen, 226 S.W.2d 42, 216 Ark. 426—Campbell v. Athletic Min. & Smelting Co., 223 S.W.2d 499, 215 Ark. 773—Green v. Lion Oil Co., 220 S.W.2d 409, 215 Ark. 305—Employers' Cas. Co. v. U. S. Fidelity & Guaranty Co., 214 S.W.2d 774, 214 Ark. 40—Andrews v. Gross & Jones Tie Co., 204 S.W.2d 783, 211 Ark. 999—Ozan Lumber Co. v. Garner, 187 S.E.2d 181, 208 Ark. 645—Elm Springs Canning Co. v. Sullins, 180 S.W.2d 113, 207 Ark. 257—Hughes v. Tapley, 177 S.W.2d 429, 206 Ark. 789.

Ga.—Travelers Ins. Co. v. Clark, 197 S.E. 650, 58 Ga.App. 115.

Iowa.—Rose v. John Deere Ottumwa Works, 76 N.W.2d 756, 247 Iowa 900—Brewer v. Central Const. Co., 43 N.W.2d 131, 241 Iowa 799—Pohler v. T. W. Snow Const. Co., 33 N.W. 2d 416, 239 Iowa 1018.

La.—Jones v. Hunsicker, 177 So. 576, 188 La. 468.

Mo.—Damore v. Encyclopedia Americana, 290 S.W.2d 105—Tokash v. General Baking Co., 163 S.W.2d 554, 349 Mo. 767—Weaver v. Norwich Pharmacal Co., 149 S.W.2d 846, 347 Mo. 995.

Teel v. F. Burkart Mfg. Co., App., 271 S.W.2d 259—Becherer v. Curtiss-Wright Corp., App., 194 S.W. 2d 740—Kataman v. Zink, App., 180 S.W.2d 253, 238 Mo.App. 253—Gholson v. Scott, App., 130 S.W.2d 216.

N.C.—Edwards v. Piedmont Pub. Co., 41 S.E.2d 592, 227 N.C. 184—Haynes v. Feldspar Producing Co., 22 S.E. 2d 275, 222 N.C. 163—Doggett v. South Atlantic Warehouse Co., 194 S.E. 111, 212 N.C. 599.

Pa.—Washko v. George L. Rueckno, 121 A.2d 456, 180 Pa.Super. 466—Brown v. Ross Motor Lines, 110 A. 2d 332, 177 Pa.Super. 369—Patter-

son v. Philadelphia Dairy Products Co., 110 A.2d 797, 177 Pa.Super. 195—Haddfield v. American Soc. of Composers, Authors & Publishers, 101 A.2d 423, 174 Pa.Super. 394—Fanning v. Apawana Golf Club, 82 A.2d 584, 169 Pa.Super. 180—Premaza v. Hanze, 61 A.2d 778, 163 Pa.Super. 412—Lambing v. Consolidation Coal Co., 54 A.2d 291, 161 Pa.Super. 346—Shank v. Consolidation Coal Co., 54 A.2d 289, 161 Pa.Super. 304—Harris v. Sachse, 52 A.2d 375, 160 Pa.Super. 607—Strouse v. Quaker Knitting Mills, 46 A.2d 526, 159 Pa.Super. 39—Heinzel v. Jones & Laughlin Steel Corp., 43 A.2d 635, 157 Pa.Super. 454—Brown v. Union Collieries Co., 33 A.2d 786, 153 Pa.Super. 293—Kennedy v. Holmes Const. Co., 24 A.2d 451, 147 Pa.Super. 348—Gravatt v. State Workmen's Ins. Fund, 14 A.2d 143, 140 Pa.Super. 435—Roebuck v. Swift & Co., 3 A.2d 953, 134 Pa.Super. 357—Zbirowski v. John T. Lewis & Bros. Co., 196 A. 606, 130 Pa.Super. 222—Franks v. Point Marion Bridge Co., 193 A. 421, 128 Pa.Super. 269—Baumann v. Howard J. Ehmke Co., 190 A. 343, 126 Pa.Super. 108—Trimboth v. Penn Mut. Life Ins. Co., 181 A. 383, 119 Pa.Super. 371—Melini v. Saltsburg Coal Mining Co., 181 A. 330, 119 Pa.Super. 356.

S.D.—Johnson v. Chicago & N. W. Ry. Co., 7 N.W.2d 145, 69 S.D. 111.

71 C.J. p 1371 note 27.

Finding set aside by lower court

In reviewing circuit court judgment setting aside compensation award in favor of employee, evidence was construed most favorably to employee.

Ill.—Ferguson & Lange Foundries v. Industrial Commission, 43 N.E.2d 684, 380 Ill. 185.

59. Mo.—Tokash v. General Baking Co., 163 S.W.2d 554, 349 Mo. 767—Weaver v. Norwich Pharmacal Co., 149 S.W.2d 846, 347 Mo. 995.

McCarthy v. American Car & Foundry Co., App., 145 S.W.2d 486—Vogt v. Ford Motor Co., App., 138 S.W.2d 634—Fitzgerald v. Fisher Body St. Louis Co., Kansas City Division, 130 S.W.2d 975, 234 Mo.

App. 269, opinion quashed in part State ex rel. Fisher Body St. Louis Co. v. Shain, 137 S.W.2d 546, 345 Mo. 962.

71 C.J. p 1371 note 28.

60. Mo.—Damore v. Encyclopedia Americana, 290 S.W.2d 105—Spradling v. International Shoe Co., 270 S.W.2d 28, 364 Mo. 938.

61. Ariz.—Cavness v. Industrial Commission, 243 P.2d 459, 74 Ariz. 27.

Mass.—Moore's Case, 3 N.E.2d 5, 294 Mass. 557.

Pa.—Ede v. Ruhe Motor Corp., 136 A.2d 151, 184 Pa.Super. 603—Wahs v. Wolf, 42 A.2d 166, 157 Pa.Super. 181—Rosenberry v. Gillan Bros., 197 A. 523, 130 Pa.Super. 469—Trojanowska v. Sonman Shaft Coal Co., 185 A. 860, 123 Pa.Super. 17.

71 C.J. p 1373 notes 61–68, p 1385 note 5, p 1390 note 43.

Construction of compensation act is question of law which may be reviewed by courts, even though erroneous conclusion of law has mistakenly been labeled finding of fact by referee or board.

Pa.—Wahs v. Wolf, 42 A.2d 166, 157 Pa.Super. 181.

62. Pa.—Kracoski v. Bernice White Ash Coal Co., 130 A.2d 190, 183 Pa.Super. 155—Schrock v. Stonycreek Coal Co., 33 A.2d 522, 152 Pa.Super. 599—Rosenberry v. Gillan Bros., 197 A. 523, 130 Pa.Super. 469—Freeman v. Salem Reformed Church, 190 A. 159, 125 Pa.Super. 367—Melini v. Saltsburg Coal Mining Co., 181 A. 330, 119 Pa.Super. 356.

Wis.—Gomber v. Industrial Commission, 261 N.W. 409, 219 Wis. 91.

71 C.J. p 1369 note 97, p 1385 notes 1, 2, p 1389 note 32, p 1393 notes 68, 69.

63. N.Y.—Saxon v. Erie R. Co., 116 N.E. 983, 221 N.Y. 179.

71 C.J. p 1369 note 98.

64. Ill.—Arview v. Industrial Commission, 114 N.E.2d 698, 415 Ill. 522—Math. Igler's Casino v. Industrial Commission, 68 N.E.2d 773, 394 Ill. 320.

71 C.J. p 1393 notes 70, 71.

65. Mo.—State ex rel. Federated

Trial de novo in lower court. As discussed supra § 765 et seq, in some jurisdictions, on judicial review of the award in a compensation case, the matter is tried de novo, with provision made for the reception of evidence and a jury trial. While the reviewing court may determine questions of law,⁶⁶ on further appeal the verdict or findings of fact in the lower court will not be reviewed or disturbed⁶⁷ where supported by substantial⁶⁸ evidence,⁶⁹ or not

clearly against the manifest weight of the evidence,⁷⁰ or unless clearly wrong⁷¹ or when the evidence is conflicting⁷² or such that reasonable men might differ.⁷³

The reviewing court will not weigh the evidence,⁷⁴ but it may determine whether the evidence is sufficient to justify submission to the jury⁷⁵ and whether it is adequate to sustain the facts found by the jury.⁷⁶ The court on further review may also

Metals Corp. v. Nelson, 117 S.W.2d 361, 233 Mo.App. 268.
N.C.—*Buchanan v. State Highway and Public Works Commission*, 7 S.E.2d 382, 217 N.C. 173.
S.C.—*Horton v. Baruch*, 59 S.E.2d 545, 217 S.C. 48—*Younginer v. J. A. Jones Const. Co.*, 54 S.E.2d 545, 215 S.C. 135—*Holland v. Georgia Hardwood Lumber Co.*, 51 S.E.2d 744, 214 S.C. 195—*Gordon v. Hollywood-Beaufort Package Corp.*, 49 S.E.2d 718, 213 S.C. 438—*Watson v. Wannamaker & Wells*, 48 S.E.2d 447, 212 S.C. 506—*McDowell v. Stilley Plywood Co.*, 41 S.E.2d 872, 210 S.C. 173.

Interstate commerce

Superior Court is not bound by deductions of referee or compensation board with respect to character of employment, whether interstate or intrastate, but must draw its own conclusions from evidence, since question is one of paramount federal law.

Pa.—*Scarborough v. Pennsylvania R. Co.*, 35 A.2d 603, 154 Pa.Super. 129—*Velia v. Reading Co.*, 137 A. 495, 124 Pa.Super. 199—*Mazucco v. Pennsylvania R. Co.*, 186 A. 255, 122 Pa.Super. 293.

Place of injury

Circuit court of appeals is not bound by federal employees' compensation commissioner's findings as to place of injury resulting in death, since jurisdiction of commissioner is involved, but findings of commissioner, concurred in by district judge, will not be reversed unless clearly wrong.

U.S.—*Wood Towing Corporation v. Parker*, C.C.A.Va., 76 F.2d 770.

Navigable river

In proceeding for compensation for death of employee who was drowned as result of accident which occurred on Assonet River, trial justice's finding that river was a navigable stream of the United States was not conclusive on claimant's appeal, but such finding would not be disturbed by supreme court, where it did not appear from claimant's brief and argument that she had raised question of nonnavigability on appeal.

R.I.—*Asselin v. Blount*, 14 A.2d 496, 65 R.I. 299, reargument denied, 16 A.2d 328, 65 R.I. 443.

66. Tex.—*Standard Accident Ins. Co. v. Williams*, Com.App., 14 S.W.2d 1015.

71 C.J. p 1390 note 48.

67. U.S.—*Fidelity & Casualty Co. of New York v. McKay*, C.C.A.Tex., 73 F.2d 828.

Or.—*Hinkle v. State Industrial Acc. Commission*, 97 P.2d 725, 163 Or. 395.

Tex.—*Texas Emp. Ins. Ass'n v. Yother*, Civ.App., 306 S.W.2d 730, error refused no reversible error—*Traders & General Ins. Co. v. Wilson*, Civ.App., 147 S.W.2d 866.

71 C.J. p 1390 notes 49, 50, p 1390 note 51, p 1391 notes 52-54.

Finding on stipulated facts

Where plaintiff appealed to circuit court from order of state industrial accident commission rejecting compensation claim, circuit court's findings on stipulated facts had effect of verdict and were conclusive on supreme court if supported by substantial evidence.

Or.—*Brazeale v. State Indus. Acc. Commission*, 227 P.2d 804, 190 Or. 565.

68. Nev.—*Crosby v. Nevada Indus. Commission*, 308 P.2d 60.

Or.—*Ramsey v. State Indus. Acc. Commission*, 77 P.2d 1109, 159 Or. 43.

Tenn.—*P. H. Reynolds & Co. v. McKnight*, 148 S.W.2d 357, 177 Tenn. 228.

Tex.—*Traders & General Ins. Co. v. Burns*, Civ.App., 118 S.W.2d 391—*Maryland Casualty Co. v. Moore*, Civ.App., 74 S.W.2d 769, affirmed 102 S.W.2d 1118, 129 Tex. 174.

71 C.J. p 1392 note 60.

"Scintilla"

Under provision of workmen's compensation act that jury's decision of fact question, made on appeal from industrial accident commission's order, is binding and conclusive on courts, the "scintilla" rule does not apply and jury's fact finding must be based on substantial evidence.

Or.—*Dickison v. State Indus. Acc. Commission*, 107 P.2d 104, 165 Or. 306.

69. Tex.—*Texas Emp. Ins. Ass'n v. Blanton*, Civ.App., 266 S.W.2d 276, refused no reversible error—*Texas Emp. Ins. Ass'n v. Crain*, Civ.App., 269 S.W.2d 905, refused no revers-

ible error—*Texas Emp. Ins. Ass'n v. Daniels*, Civ.App., 257 S.W.2d 150—*Oefinger v. Texas Emp. Ins. Ass'n*, Civ.App., 243 S.W.2d 469, error refused—*Associated Emp. Lloyds v. Groce*, Civ.App., 194 S.W.2d 103, error refused no reversible error—*Maryland Cas. Co. v. Hearn*, Civ.App., 188 S.W.2d 262, affirmed 190 S.W.2d 62, 144 Tex. 317—*Federal Underwriters Exchange v. Porterfield*, Civ.App., 182 S.W.2d 847, error refused—*Traders & General Ins. Co. v. Turner*, Civ. App., 149 S.W.2d 593, error dismissed, judgment correct—*Maryland Cas. Co. v. Brown*, Civ.App., 95 S.W.2d 537, error refused.

71 C.J. p 1392 notes 55-63.

70. Or.—*Conley v. State Indus. Acc. Commission*, 266 P.2d 1061, 200 Or. 474.

71. D.C.—*Metropolitan Casualty Ins. Co. of New York v. Hoage*, 72 F.2d 175, 63 App.D.C. 307.

72. Tex.—*Halliburton v. Texas Indem. Ins. Co.*, 218 S.W.2d 877, 147 Tex. 133—*Fidelity & Cas. Co. of N. Y. v. McLaughlin*, 135 S.W.2d 955, 134 Tex. 613.

71 C.J. p 1392 notes 57, 58.

73. Tex.—*St. Paul Mercury Indem. Co. v. Tarver*, Civ.App., 272 S.W.2d 795, error refused no reversible error—*Traders & General Ins. Co. v. Rooth*, Civ.App., 268 S.W.2d 539, error refused no reversible error.

74. Tex.—*Zurich Gen. Acc. & Liability Ins. Co. v. Hill*, Civ.App., 251 S.W.2d 948, error refused no reversible error.

Wash.—*Preston Mill Co. v. Department of Labor and Industries of State*, 268 P.2d 1017, 44 Wash.2d 532.

Preponderance of evidence is not in question on review.

Tex.—*Texas Indem. Ins. Co. v. Arant*, Civ.App., 171 S.W.2d 916, error refused.

Wash.—*Husa v. Department of Labor and Industries of State of Washington*, 146 P.2d 191, 20 Wash.2d 114.

75. Tex.—*Zurich Gen. Acc. & Liability Ins. Co. v. Hill*, Civ.App., 251 S.W.2d 948.

76. Tex.—*Zurich Gen. Acc. & Liability Ins. Co. v. Hill*, supra.

71 C.J. p 1392 note 64.

determine whether the conclusion below is against the overwhelming weight and preponderance of the evidence.⁷⁷ Its determination of this question is final and may not be reviewed on further appeal to the highest court.⁷⁸ The highest court may only consider the question of whether there is any evidence to support the verdict,⁷⁹ in the disposition of which the court may look only to the evidence supporting the verdict.⁸⁰

While it has been held that, in determining the sufficiency of the evidence to support the verdict or finding below, the court will view the evidence most favorably to the verdict or finding⁸¹ and will consider only the evidence in favor of the verdict or finding,⁸² it would appear that the latter rule is limited to the question of whether or not the evidence requires a contrary verdict or finding as a matter of law, as where the claimed error is in submitting the case to the jury or not directing a verdict,⁸³ and that where the contention is that the verdict

or finding is against the overwhelming weight and preponderance of the evidence the court is required to consider all of the evidence.⁸⁴ Where the verdict below was directed, the appellate court will consider the evidence in the light most favorable to the party against whom the verdict was directed.⁸⁵

Where the lower court's ruling on a motion for a new trial involves a question of fact, the lower court's determination of the question, where supported by the evidence, will be accepted.⁸⁶

In *Florida*, the determination of the facts by the lower court on the record made before the compensation authorities is to be accorded that degree of consideration which is given to the findings of a chancellor in an ordinary chancery suit.⁸⁷ Thus, the findings of the circuit court will ordinarily be sustained if supported by substantial evidence.⁸⁸ On review, the supreme court must determine whether the circuit court observed the substantial

77. *Tex.—Texas Emp. Ins. Ass'n v. Etheredge*, 272 S.W.2d 869, 154 Tex. 1.

Texas Emp. Ins. Ass'n v. Foreman, Civ.App., 262 S.W.2d 248—*Texas Emp. Ins. Ass'n v. Moran*, Civ.App., 261 S.W.2d 855, error dismissed—*Pacific Indem. Co. v. Sanders*, Civ.App., 216 S.W.2d 288.

71 C.J. p 1393 note 65.

78. *Tex.—Texas Emp. Ins. Ass'n v. Etheredge*, 272 S.W.2d 869, 154 Tex. 1.

79. *Tex.—Texas Emp. Ins. Ass'n v. Etheredge*, *supra*.

80. *Tex.—Texas Emp. Ins. Ass'n v. Etheredge*, *supra*.

81. *Tex.—Halliburton v. Texas Indem. Ins. Co.*, 213 S.W.2d 677, 147 Tex. 133—*Watson v. Texas Indem. Ins. Co.*, 210 S.W.2d 989, 147 Tex. 40—*Fidelity & Cas. Co. of N. Y. v. McLaughlin*, 135 S.W.2d 955, 134 Tex. 613.

Texas Emp. Ins. Ass'n v. Cecil, Civ.App., 285 S.W.2d 462, error refused no reversible error—*St. Paul Mercury Indem. Co. v. Tarver*, Civ.App., 272 S.W.2d 795, error refused no reversible error—*Insurance Co. of Tex. v. Anderson*, Civ.App., 272 S.W.2d 772, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Trapp*, Civ.App., 258 S.W.2d 112, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Christian*, Civ.App., 239 S.W.2d 900, error refused—*Trinity Universal Ins. Co. v. Rose*, Civ.App., 217 S.W.2d 426, error refused no reversible error—*Aetna Cas. & Sur. Co. v. Isensee*, Civ.App., 211 S.W.2d 613, error refused no reversible error—*Travelers Ins. Co. v. Calcote*, Civ.

App., 205 S.W.2d 56, error refused no reversible error—*Associated Emp. Lloyds v. Groce*, Civ.App., 194 S.W.2d 103, error refused no reversible error—*Associated Emp. Lloyds v. Self*, Civ.App., 192 S.W.2d 902—*Traders & General Ins. Co. v. Diebel*, Civ.App., 188 S.W.2d 411, refused for want of merit—*American General Ins. Co. v. Amerson*, Civ.App., 187 S.W.2d 912, refused for want of merit—*Texas Emp. Ins. Ass'n v. Morgan*, Civ.App., 187 S.W.2d 603, refused for want of merit—*Texas Emp. Ins. Ass'n v. Moser*, Civ.App., 152 S.W.2d 390—*Traders & General Ins. Co. v. Jaques*, Civ.App., 131 S.W.2d 133, error dismissed, judgment correct—*Safety Cas. Co. v. Staggs*, Civ.App., 99 S.W.2d 682, error dismissed.

Directed verdict

On appeal granting motion for peremptory instruction, testimony would be reviewed in light most favorable to appellants, conflicting evidence would be disregarded, and every reasonable intendment indulged in favor of appellants.

Tex.—Atkinson v. U. S. Fidelity & Guaranty Co., Civ.App., 235 S.W.2d 509, error refused no reversible error—*Young v. Safety Cas. Co.*, Civ.App., 168 S.W.2d 884, error refused.

82. *Tex.—St. Paul Mercury Indem. Co. v. Tarver*, Civ.App., 272 S.W.2d 795, error refused no reversible error—*Insurance Co. of Tex. v. Anderson*, Civ.App., 272 S.W.2d 772, error refused no reversible error—*Texas Emp. Ins. Ass'n v. Frazier*, Civ.App., 259 S.W.2d 242, error refused no reversible error—*Associated Emp. Lloyds v. Groce*, Civ.

App., 194 S.W.2d 103—*Associated Emp. Lloyds v. Self*, Civ.App., 192 S.W.2d 902, error refused no reversible error—*Great Am. Indem. Co. v. Beaupre*, Civ.App., 191 S.W.2d 888, refused no reversible error—*Texas Emp. Ins. Ass'n v. Morgan*, Civ.App., 187 S.W.2d 103—*Maryland Cas. Co. v. Wilson*, Civ.App., 108 S.W.2d 260, error dismissed.

83. *Tex.—Tex. Emp. Ins. Ass'n v. Etheredge*, 272 S.W.2d 869, 154 Tex. 1.

84. *Tex.—Tex. Emp. Ins. Ass'n v. Etheredge*, *supra*.

85. *Tex.—Elder v. Aetna Cas. & Sur. Co.*, 236 S.W.2d 611, 149 Tex. 620.

86. *Tex.—Associated Emp. Lloyds v. Self*, Civ.App., 192 S.W.2d 902, error refused no reversible error.

87. *Fla.—Orange Homes Co. v. Burnette*, 29 So.2d 449, 158 Fla. 625—*Heller Bros. Packing Co. v. Lewis*, 20 So.2d 385, 155 Fla. 430—*Duval Engineering & Contracting Co. v. Johnson*, 16 So.2d 290, 154 Fla. 9—*Cone Bros. Contracting Co. v. Allbrook*, 16 So.2d 61, 153 Fla. 829—*City of St. Petersburg v. Mosedale*, 1 So.2d 878, 146 Fla. 784—*Dixie Laundry v. Wantzell*, 200 So. 860, 145 Fla. 569—*Cone Bros. Contracting Co. v. Massey*, 198 So. 802, 145 Fla. 56—*Firestone Auto Supply & Service Stores v. Bullard*, 192 So. 865, 141 Fla. 282—*Ocala Mfg. Ice & Packing Co. v. Preskitt*, 187 So. 168, 136 Fla. 796.

88. *Fla.—Gregory v. McKesson & Robbins*, 54 So.2d 682—*Star Fruit Co. v. Canady*, 32 So.2d 2, 159 Fla. 488.

evidence rule and whether its order is correct under the law.⁸⁹

In Kansas, on appeal from the compensation commissioner, the district court makes an independent determination of the law and the facts on the record of the proceedings before the compensation authorities; questions of fact are to be determined

by the district court, and on further appeal, the supreme court is limited to questions of law.⁹⁰ The findings of fact made by the district court are conclusive⁹¹ if there is any evidence from which a reasonable inference may be drawn to sustain such findings,⁹² or if they are supported by substantial competent evidence,⁹³ or if the evidence is conflicting,⁹⁴ even though the findings by the district

89. Fla.—Stuyvesant Corp. v. Waterhouse, 74 So.2d 554—International Minerals & Chemical Corp. v. Tucker, 55 So.2d 720.

90. Kan.—Snedden v. Nichols, 317 P.2d 448, 181 Kan. 1052—Rutledge v. Sandlin, 310 P.2d 950, 181 Kan. 369—Fitzwater v. Boeing Airplane Co., 309 P.2d 681, 181 Kan. 158—Beaver v. Tammany Industries, 304 P.2d 501, 180 Kan. 440—Bender v. Salina Roofing Co., 295 P.2d 662, 179 Kan. 415—Evans v. Board of Bd. of Hays, 284 P.2d 1068, 178 Kan. 275—Neff v. Henry Wagner Transport Co., 281 P.2d 1109, 177 Kan. 738—McDonald v. Rader, 277 P.2d 652, 177 Kan. 249—Kober v. Beech Aircraft Corp., 276 P.2d 335, 177 Kan. 53—Angleton v. Foster Wheeler Const. Co., 276 P.2d 325, 177 Kan. 134—Silvers v. Wakefield, 270 P.2d 259, 176 Kan. 259—Burton v. Western Iron & Foundry Co., 249 P.2d 688, 173 Kan. 506—Shue v. La Gesse, 245 P.2d 966, 173 Kan. 309—Rothman v. Globe Const. Co., 235 P.2d 981, 171 Kan. 572—Duncan v. W. M. Davidson Const. Co., 227 P.2d 95, 170 Kan. 520—Davis v. C. F. Braun & Co., 223 P.2d 958, 170 Kan. 177—Keltner v. Swisher, 211 P.2d 75, 168 Kan. 184—Alexander v. Chrysler Motor Parts Corp., 207 P.2d 1179, 167 Kan. 711—Burk v. American Dist. Tel. Co., 163 P.2d 402, 160 Kan. 519—Rubins v. Lozier-Broderick & Gordon, 163 P.2d 364, 160 Kan. 499—Murphy v. I. C. U. Const. Co., 148 P.2d 771, 158 Kan. 541—Long v. Lozier-Broderick & Gordon, 147 P.2d 705, 158 Kan. 400—Holler v. W. S. Dickey Clay Mfg. Co., 139 P.2d 846, 157 Kan. 355, 148 A.L.R. 1131—Carrington v. British Am. Oil Producing Co., 138 P.2d 463, 157 Kan. 101—Employers' Liability Assur. Corp. v. Matlock, 98 P.2d 466, 151 Kan. 293, 127 A.L.R. 461—Souden v. Rine Drilling Co., 92 P.2d 74, 150 Kan. 239—Gardner v. Ark Warehouse Co., 80 P.2d 1066, 143 Kan. 190—Vigola v. Labor Exchange Coal Co., 67 P.2d 421, 145 Kan. 889—Junkin v. Acme Foundry & Machine Co., 65 P.2d 263, 145 Kan. 284—Brown v. Shellabarger Mill & Elevator Co., 50 P.2d 919, 142 Kan. 476—Woods v. Jacob Dold Packing Co., 41 P.2d 748, 141 Kan. 363, modified on other grounds 43 P.2d 786, 141 Kan. 748—Vollers

v. Procter & Gamble Mfg. Co., 41 P.2d 723, 141 Kan. 451—Suttle v. Marble Produce Co., 34 P.2d 116, 140 Kan. 13.

71 C.J. p 1372 notes 46-58.

Supreme court does not weigh conflicting evidence

Kan.—Thorp v. Victory Cab Co., 246 P.2d 273, 173 Kan. 383—Shue v. La Gesse, 245 P.2d 966, 173 Kan. 309—Jones v. W. U. Tel. Co., 192 P.2d 141, 165 Kan. 1—Long v. Lozier-Broderick & Gordon, 147 P.2d 705, 158 Kan. 400—Goss v. McJunkin Flying Service, 143 P.2d 659, 157 Kan. 684—Mihoover v. Winter Live Stock Commission Co., 125 P.2d 363, 155 Kan. 432.

Supreme court cannot re-examine facts

Kan.—Scott v. Kansas Western Pipe Line Co., 146 P.2d 866, 158 Kan. 160.

Motion for additional finding of fact
Workmen's compensation act did not provide for a post trial motion for trial court to make an additional finding of fact and, on appeal, supreme court could not pass on the motion, which was denied by trial court, since to do so would be to pass on a question of fact.

Kan.—Holloway v. Consolidated Gas, Oil & Mfg. Co., 102 P.2d 987, 152 Kan. 129.

Power to direct finding

Jurisdiction of supreme court being limited to law questions on appeal from district court's workman's compensation award, supreme court is without power to direct what finding district court should make on disputed fact question.

Kan.—Gray v. Hercules Powder Co., 165 P.2d 447, 160 Kan. 767.

91. Kan.—Barr v. Builders, Inc., 296 P.2d 1106, 179 Kan. 617—Shobe v. Tobin Const. Co., 292 P.2d 729, 179 Kan. 43—Andrews v. Bechtel Const. Co., 267 P.2d 469, 175 Kan. 885—Burns v. Topeka Fence Erectors, 254 P.2d 285, 174 Kan. 136—Walker v. Arrow Well Servicing Co., 186 P.2d 104, 163 Kan. 776—Burk v. American Dist. Tel. Co., 163 P.2d 402, 160 Kan. 519—Johnson v. Voss, 106 P.2d 648, 152 Kan. 586.

71 C.J. p 1372 notes 49, 50.

92. Kan.—Neild v. Eldridge, 283 P.2d 250, 178 Kan. 159—Cooper v. Helmerich & Payne, 178 P.2d 242, 162 Kan. 547—Addington v. Hall,

160 P.2d 649, 160 Kan. 268—Cook v. Harry Dobson Sheet Metal Works, 142 P.2d 709, 157 Kan. 576—Briney v. Hopper Const. Co., 73 P.2d 1110, 146 Kan. 927.

93. Kan.—Attebery v. Griffin Const. Co., 312 P.2d 598, 181 Kan. 450—Rutledge v. Sandlin, 310 P.2d 950, 181 Kan. 369—Fitzwater v. Boeing Airplane Co., 309 P.2d 681, 181 Kan. 158—Bender v. Salina Roofing Co., 295 P.2d 662, 179 Kan. 415—Peterson v. Hill Packing Co., 290 P.2d 322, 178 Kan. 697—Coble v. Williams, 282 P.2d 425, 177 Kan. 743—Peters v. Peters, 276 P.2d 302, 177 Kan. 100—Hillyard v. Lohmann-Johnson Drilling Co., 211 P.2d 89, 168 Kan. 177—Pearson v. Electric Service Co. of Pensacola, 201 P.2d 643, 166 Kan. 300—Jones v. W. U. Tel. Co., 192 P.2d 141, 165 Kan. 1—Workman v. Johnson Bros. Const. Co., 190 P.2d 863, 164 Kan. 478—Burk v. American Dist. Tel. Co., 163 P.2d 402, 160 Kan. 519—Stanley v. United Iron Works Co., 160 P.2d 708, 160 Kan. 243—Schroeder v. American Nat. Bank, 121 P.2d 186, 154 Kan. 721—De Vault v. Southern Kansas Stage Lines, 100 P.2d 627, 151 Kan. 697—Taylor v. Missouri Pac. R. Co., 73 P.2d 62, 146 Kan. 668—Vigola v. Labor Exchange Coal Co., 67 P.2d 421, 145 Kan. 889—Butler v. White Eagle Oil Refining Co., 34 P.2d 120, 140 Kan. 202—Fernandez v. Edgar Zinc Co., 27 P.2d 239, 138 Kan. 735—Cornell v. Cities Service Gas Co., 27 P.2d 228, 138 Kan. 607.

71 C.J. p 1372 note 52.

Term "substantial evidence" when applied by supreme court in reviewing an award under workmen's compensation act means evidence possessing something of substance and relevant consequence and carrying with it fitness to induce conviction that award is proper, or furnishing substantial basis of fact from which issue tendered can be reasonably resolved.

Kan.—Barr v. Builders, Inc., 296 P.2d 1106, 179 Kan. 617.

94. Kan.—Kaufman v. Co-operative Refinery Ass'n of Coffeyville, 225 P.2d 129, 170 Kan. 325—Davis v. C. F. Braun & Co., 223 P.2d 958, 170 Kan. 177—Keltner v. Swisher, 211 P.2d 75, 168 Kan. 184—Neal v. Boeing Airplane Co., 167 P.2d 643, 161 Kan. 322—Everett v. Kansas Pow-

court conflict with those made by the compensation authorities.⁹⁵ The supreme court is concerned only with the fact findings of the district court and not with those made by the compensation commissioner.⁹⁶

While the supreme court may not weigh the evidence,⁹⁷ the question of whether or not the findings of the lower court are supported by the evidence is one of law⁹⁸ which will be determined by the supreme court.⁹⁹ The court will set aside a finding without support in the evidence.¹ In determining whether the findings of the district court are supported by the evidence, the supreme court will view the evidence in the light most favorable to the find-

ings of the district court,² and will consider only the evidence which supports the findings.³

In Maryland, as considered supra § 770, on appeal from the industrial commission, the court is required at the request of either party to submit the questions of fact to a jury, and the verdict of the jury is to be accorded the same effect on review as in other civil actions.⁴ Where the lower court enters a judgment notwithstanding the verdict, the question for review is whether or not it was proper for the court to submit the question to the jury.⁵ Where the appeal is from the refusal of the court to direct a verdict, the evidence in support of the verdict must be accepted as true.⁶ It appears that

er Co., 165 P.2d 595, 160 Kan. 712
—Brown v. Olson Drilling Co., 124 P.2d 451, 155 Kan. 230—Smith v. Sonken-Galamba Corp., 88 P.2d 1114, 149 Kan. 698.

71 C.J. p 1372 note 53.

95. Kan.—Cook v. Harry Dobson Sheet Metal Works, 142 P.2d 709, 157 Kan. 576.

96. Kan.—Burns v. Topeka Fence Erectors, 254 P.2d 285, 174 Kan. 136.

97. Kan.—Willbeck v. Grain Belt Transp. Co., 313 P.2d 725, 181 Kan. 512—Shobe v. Tobin Const. Co., 292 P.2d 729, 179 Kan. 43—Gangel v. Cook Saw Mill, 265 P.2d 853, 175 Kan. 673—Bell v. A. D. Allison Drilling Co., 264 P.2d 1069, 175 Kan. 441—Burns v. Topeka Fence Erectors, 254 P.2d 285, 174 Kan. 136—Vocke v. Eagle-Picher Co., 215 P.2d 185, 168 Kan. 703—Conner v. M & M Packing Co., 199 P.2d 458, 166 Kan. 98—Richards v. J-M Service Corp., 188 P.2d 939, 164 Kan. 316—McMillin v. City of Salina, Water Dept., 184 P.2d 201, 163 Kan. 575—Woodfill v. Lozier-Broderick & Gordon, 149 P.2d 620, 158 Kan. 703—McMillan v. Kansas Power & Light Co., 139 P.2d 354, 157 Kan. 355.

Original findings

In compensation proceedings supreme court has no jurisdiction to make original findings.

Kan.—Thorp v. Victory Cab Co., 240 P.2d 128, 172 Kan. 384.

98. Kan.—Beaver v. Tammany Industries, 304 P.2d 501, 180 Kan. 440—Shobe v. Tobin Const. Co., 292 P.2d 729, 179 Kan. 43—Peterson v. Hill Packing Co., 290 P.2d 822, 178 Kan. 697—Coble v. Williams, 282 P.2d 425, 177 Kan. 723—Hilyard v. Lohmann-Johnson Drilling Co., 211 P.2d 89, 168 Kan. 177—McMillin v. City of Salina, Water Dept., 184 P.2d 201, 163 Kan. 575—Abbott v. Southwest Grain Co., 176 P.2d 899, 162 Kan. 316—Hall v. Kornfeld-Harper

Well Servicing Co., 151 P.2d 688, 159 Kan. 70—Long v. Lozier-Broderick & Gordon, 147 P.2d 705, 158 Kan. 400—Goss v. McJunkin Flying Service, 143 P.2d 659, 157 Kan. 684—Cook v. Harry Dobson Sheet Metal Works, 142 P.2d 709, 157 Kan. 576—Holler v. W. S. Dickey Clay Mfg. Co., 139 P.2d 846, 157 Kan. 355, 148 A.L.R. 1131—Carlington v. British Am. Oil Producing Co., 138 P.2d 463, 157 Kan. 101—Woodring v. United Sash & Door Co., 103 P.2d 837, 152 Kan. 413—Williams v. Cities Service Gas Co., 99 P.2d 822, 151 Kan. 497—Gardner v. Ark Warehouse Co., 80 P.2d 1066, 148 Kan. 190—Smith v. Cudahy Packing Co., 64 P.2d 582, 145 Kan. 36.

Undisputed evidence

Only where evidence in workmen's compensation proceeding is undisputed is question one of law for appellate review.

Kan.—Fitzwater v. Boeing Airplane Co., 309 P.2d 681, 181 Kan. 158.

99. Kan.—Snedden v. Nichols, 317 P.2d 448, 181 Kan. 1052—Johnson v. Skelly Oil Co., 312 P.2d 1076, 181 Kan. 655—Fitzwater v. Boeing Airplane Co., 309 P.2d 681, 181 Kan. 158—Barr v. Builders, Inc., 296 P.2d 1106, 179 Kan. 617—Angleton v. Foster Wheeler Const. Co., 276 P.2d 325, 177 Kan. 134—Burns v. Topeka Fence Erectors, 254 P.2d 285, 174 Kan. 136—Cook v. Harry Dobson Sheet Metal Works, 142 P.2d 709, 157 Kan. 576.

Evidence sufficient to support finding to contrary

Kan.—Aguilera v. C and S Well Service, 289 P.2d 1062, 178 Kan. 545—Angleton v. Foster Wheeler Const. Co., 276 P.2d 325, 177 Kan. 134—Kauffman v. Co-operative Refinery Ass'n of Coffeyville, 225 P.2d 129, 170 Kan. 325.

1. Kan.—Hall v. Armour & Co., 113 P.2d 145, 153 Kan. 656.

2. Kan.—Attebery v. Griffin Const. Co., 312 P.2d 598, 181 Kan. 450—

Fitzwater v. Boeing Airplane Co., 309 P.2d 681, 181 Kan. 158—Pinkston v. Rice Motor Co., 303 P.2d 197, 180 Kan. 205—Barr v. Builders, Inc., 296 P.2d 1106, 179 Kan. 617—Peterson v. Hill Packing Co., 290 P.2d 822, 178 Kan. 697—Kober v. Beech Aircraft Corp., 276 P.2d 335, 177 Kan. 53—Silvers v. Wakefield, 270 P.2d 259, 176 Kan. 259—Andrews v. Bechtel Const. Co., 267 P.2d 469, 175 Kan. 885—Shue v. La Gesse, 245 P.2d 966, 173 Kan. 309—Rothman v. Globe Const. Co., 235 P.2d 981, 171 Kan. 572—Goss v. McJunkin Flying Service, 143 P.2d 659, 157 Kan. 684—Hudson v. Salina Country Club, 84 P.2d 854, 148 Kan. 697.

3. Kan.—Vocke v. Eagle-Picher Co., 215 P.2d 185, 168 Kan. 703—Conner v. M & M Packing Co., 199 P.2d 458, 166 Kan. 98—Richards v. J-M Service Corp., 188 P.2d 939, 164 Kan. 316—Walker v. Arrow Well Servicing Co., 186 P.2d 104, 163 Kan. 776—Abbott v. Southwest Grain Co., 176 P.2d 839, 162 Kan. 315—Lane v. St. Louis Smelting & Refining Co., 163 P.2d 362, 166 Kan. 495—Stanley v. United Iron Works Co., 160 P.2d 708, 160 Kan. 243—Hall v. Kornfeld-Harper Well Servicing Co., 151 P.2d 688, 159 Kan. 70—Waltrip v. Acme Foundry & Mach. Co., 78 P.2d 898, 147 Kan. 781.

4. Md.—Great A. & P. Tea Co. v. Hill, 95 A.2d 84, 201 Md. 63—Atlantic Refining Co. v. Forrester, 25 A.2d 667, 180 Md. 517.

5. Md.—Petrelli v. Kimball Tyler Co., 48 A.2d 169, 186 Md. 604—Spencer v. Chesapeake Paperboard Co., 47 A.2d 385, 186 Md. 522.

6. Md.—Patapsco & Back Rivers R. Co. v. Davis, 117 A.2d 568, 208 Md. 149—Webb v. Johnson, 74 A.2d 7, 195 Md. 587—Baltimore & O. P. Co. v. Zapp, 64 A.2d 139, 192 Md. 402—B.L.R. 2d 460—J. Newman & Co. v. Collett, 199 A. 386, 182 Md. 165, 109 A.L.R. 327.

where the lower court decides the case without a jury on the record of the proceedings before the commission, on a further appeal to the court of appeals, the court must weigh the evidence.⁷ By stipulation of the parties, the scope of review may be limited to the legal sufficiency of the evidence to sustain the claim.⁸

In *Montana*, where the lower court affirms the findings of the compensation authorities, the function of the court on further appeal is limited to determining whether or not the findings are supported by substantial evidence.⁹ Where the lower court, on receiving additional evidence makes findings contrary to those made by the agency, it has been held that the reviewing court will itself determine where the preponderance of the evidence lies;¹⁰ but it has also been held that the findings of the lower court, supported by the evidence, will not be disturbed without regard to whether the evidence is sufficient to support the contrary findings of the board.¹¹ It has also been stated that where the lower court re-

views on the record before the commission or where the additional evidence received by the lower court is unimportant, the lower court will be reversed and the findings of the board reinstated unless the evidence clearly preponderates against the findings of the board;¹² but where substantial additional evidence is introduced in the lower court, its findings will not be reversed unless the evidence clearly preponderates against them.¹³ Where the facts are undisputed, the supreme court is free to make its own findings.¹⁴ Where all the evidence is in written form, the supreme court is in as good a position to determine the merits as the lower court or the compensation board.¹⁵

In *Nebraska*, where appeal is taken to the supreme court from a judgment of the district court on an appeal from the compensation court, the supreme court is required to consider the case de novo on the record below where the findings of fact are not conclusively supported by the evidence.¹⁶ However, where the evidence is conflicting and cannot

Demurrer

On appeal by employer, whose demurrer prayer was denied in compensation proceeding, court of appeals was required to assume as true all natural and legitimate inferences from evidence in favor of claimant, and to resolve in favor of claimant all conflicts in evidence. *Md.—Great A. & P. Tea Co. v. Hill*, 95 A.2d 84, 201 Md. 630.

7. *Md.—Rice v. Revere Copper & Brass*, 48 A.2d 166, 186 Md. 561.

8. *Md.—Stancil v. H. B. Davis Co.*, 117 A.2d 577, 208 Md. 191.

Presumptions

Court of appeals assumed truth of all evidence tending to sustain claim and of all inferences fairly deducible from it, and did not weigh conflicting evidence to determine its comparative weight, but decided only whether there was any evidence legally sufficient to permit finding sought by claimant.

Md.—Stancil v. H. B. Davis Co., supra.

9. *Mont.—Cartwright v. Industrial Acc. Fund*, 147 P.2d 909, 115 Mont. 596—*Nigretto v. Indus. Acc. Fund*, 106 P.2d 178, 111 Mont. 88—*Woin v. Anaconda Copper Mining Co.*, 43 P.2d 663, 99 Mont. 163—*Anderson v. Amalgamated Sugar Co.*, 37 P.2d 552, 98 Mont. 23.

10. *Mont.—Best v. London Guarantees & Accident Co.*, 47 P.2d 656, 106 Mont. 32—*Woin v. Anaconda Copper Mining Co.*, 43 P.2d 663, 99 Mont. 163.

71 C.J. p 1393 notes 66, 67.

11. *Mont.—Peltz v. Industrial Acc. Bd.*, 264 P.2d 709, 127 Mont. 316—

O'Neill v. Industrial Acc. Fund, 81 P.2d 688, 107 Mont. 176.

12. *Mont.—Tweedie v. Industrial Acc. Bd.*, 53 P.2d 1145, 101 Mont. 256—*Birdwell v. Three Forks Portland Cement Co.*, 40 P.2d 43, 98 Mont. 483.

13. *Mont.—Kustudia v. Industrial Acc. Bd.*, 258 P.2d 965, 127 Mont. 115—*Wierl v. Anaconda Copper Min. Co.*, 156 P.2d 838, 116 Mont. 524—*Tweedie v. Industrial Acc. Bd.*, 53 P.2d 1145, 101 Mont. 256.

14. *Mont.—Birdwell v. Three Forks Portland Cement Co.*, 40 P.2d 43, 98 Mont. 483.

15. *Mont.—Kearney v. Industrial Accident Board*, 1 P.2d 69, 90 Mont. 228.

16. *Neb.—Miller v. Peterson*, 85 N.W.2d 700, 165 Neb. 344—*Eschenbrenner v. Employers Mut. Cas. Co.*, 84 N.W.2d 169, 165 Neb. 32—*Towner v. Western Contracting Corp.*, 82 N.W.2d 253, 164 Neb. 235—*McCauley v. Harris*, 82 N.W.2d 30, 164 Neb. 216—*Haufe v. American Smelting & Refining Co.*, 79 N.W.2d 570, 163 Neb. 329—*Fidelity & Cas. Co. of N. Y. v. Kennard*, 75 N.W.2d 553, 162 Neb. 220—*Feagins v. Carver*, 75 N.W.2d 379, 162 Neb. 116—*Jones v. Yankee Hill Brick Mfg. Co.*, 73 N.W.2d 394, 161 Neb. 404—*Peek v. Ayres Auto Supply*, 71 N.W.2d 204, 160 Neb. 658—*Murray v. National Gypsum Co.*, 70 N.W.2d 394, 160 Neb. 463—*Knudsen v. McNeely*, 66 N.W.2d 412, 159 Neb. 227—*Cole v. Cushman Motor Works*, 65 N.W.2d 330, 159 Neb. 97—*Chiles v. Cudahy Packing Co.*, 64 N.W.2d 459, 158 Neb. 713—*Kra-*

Jeski v. Beem, 60 N.W.2d 651, 157 Neb. 586—*Dietz v. State*, 59 N.W.2d 587, 157 Neb. 324—*Miller v. Livestock Buying Co.*, 58 N.W.2d 596, 157 Neb. 51—*Gilbert v. Metropolitan Utilities Dist. of Omaha*, 57 N.W.2d 770, 156 Neb. 750—*Schneider v. Village of Shickley*, 57 N.W.2d 527, 156 Neb. 683—*Anderson v. Bituminous Cas. Co.*, 52 N.W.2d 814, 155 Neb. 590—*Shamburg v. Shamburg*, 45 N.W.2d 446, 153 Neb. 495—*Peek v. Ayres Auto Supply*, 44 N.W.2d 321, 153 Neb. 239—*Tucker v. Paxton & Gallagher Co.*, 43 N.W.2d 522, 153 Neb. 1—*Miller v. Schlereth*, 42 N.W.2d 865, 152 Neb. 805—*Solheim v. Hastings Housing Co.*, 37 N.W.2d 212, 151 Neb. 264—*Helder v. Stoughton*, 35 N.W.2d 814, 150 Neb. 741—*Ratay v. Wylie*, 22 N.W.2d 622, 147 Neb. 201—*Hassmann v. City of Bloomfield*, 20 N.W.2d 592, 146 Neb. 608—*Zanski v. Yellow Cab & Baggage Co.*, 9 N.W.2d 302, 143 Neb. 340—*Brown v. City of Omaha*, 4 N.W.2d 564, 141 Neb. 587—*Kucera v. Village of Prague*, 3 N.W.2d 201, 141 Neb. 180—*Schmidt v. City of Lincoln*, 290 N.W. 250, 137 Neb. 546—*City of Lincoln v. Jordan*, 270 N.W. 508, 131 Neb. 879—*Metropolitan Dining Room v. Jensen*, 254 N.W. 405, 126 Neb. 765.

71 C.J. p 1393 notes 74, 75, p 1369 note 91.

Equity action

A workmen's compensation case is a civil action, equitable in character, and so triable by supreme court on appeal.

Neb.—Peek v. Ayres Auto Supply, 51 N.W.2d 387, 155 Neb. 313.

be reconciled, the supreme court will consider the fact that the lower court observed the witnesses and gave credence to the testimony of some witnesses rather than the contradictory testimony of others;¹⁷ and findings of fact supported by sufficient evidence or based on substantially conflicting evidence will not be reversed unless clearly wrong.¹⁸

In *New Jersey*, on appeal from the county court in a compensation case, the superior court is empowered to review the facts and make independent findings thereon.¹⁹ However, this power is permissive and appellant is not entitled to its exercise as a matter of right,²⁰ and the power will not be exercised unless it is clear that the determination of the county court is wrong²¹ and that the ends of justice require the exercise of the power.²² The power is to be exercised sparingly²³ and not simply on the ground that the findings of the county court are in conflict with those made by the compensa-

tion authorities,²⁴ although such conflict is a factor inducing the exercise of the power.²⁵ The power of the superior court to make independent findings of fact may be exercised even where the findings made by the county court are in accord with those of the compensation authorities.²⁶ Where the county court reversed the compensation authorities on a matter not raised on the appeal, the superior court has exercised its power to make independent findings of fact.²⁷ Similarly, the superior court has exercised such power where the county court failed to make findings.²⁸

The findings of fact by the county court are entitled to great weight.²⁹ It is the findings of the county court, rather than those of the compensation authorities, that are to be given determinative weight,³⁰ and where the findings of the county court are supported by sufficient evidence, they normally will not be disturbed³¹ unless the court is

17. Neb.—*Cole v. Cushman Motor Works*, 65 N.W.2d 330, 159 Neb. 97—*Chiles v. Cudahy Packing Co.*, 64 N.W.2d 459, 158 Neb. 713—*Krajeski v. Beem*, 60 N.W.2d 651, 157 Neb. 586—*Dietz v. State*, 59 N.W.2d 587, 157 Neb. 324—*Rahfeldt v. Swanson*, 52 N.W.2d 261, 155 Neb. 482—*Beam v. Goodyear Tire & Rubber Co.*, 42 N.W.2d 293, 152 Neb. 663—*Meeester v. Schultz*, 38 N.W.2d 739, 151 Neb. 614—*Sporcic v. Swift & Co.*, 30 N.W.2d 891, 149 Neb. 246, modified on other grounds 31 N.W.2d 404, 149 Neb. 489—*Ames v. Sanitary Dist. No. 1 of Lancaster County*, 2 N.W.2d 530, 140 Neb. 879—*Sbarra v. Middle States Creameries*, 2 N.W.2d 26, 140 Neb. 813—*City of Omaha v. Casaubon*, 294 N.W. 389, 138 Neb. 608—*Donker v. Central West Public Service Co.*, 280 N.W. 168, 134 Neb. 892—*Cunningham v. Armour & Co.*, 276 N.W. 893, 133 Neb. 598—*Hudson v. City of Lincoln*, 258 N.W. 398, 128 Neb. 202—*Truka v. McDonald*, 257 N.W. 232, 127 Neb. 780—*Great Western Sugar Co. v. Hewitt*, 257 N.W. 61, 127 Neb. 790—*Sherman v. Great Western Sugar Co.*, 255 N.W. 772, 127 Neb. 505.
18. Neb.—*Lange v. Department of Roads and Irrigation*, 3 N.W.2d 194, 141 Neb. 167—*Schirmer v. Cedar County Farmers Tel. Co.*, 296 N.W. 875, 139 Neb. 132—*City of Fremont v. Lea*, 213 N.W. 820, 115 Neb. 565.
19. N.J.—*Rodriguez v. Michael A. Scaturchio, Inc.*, 126 A.2d 378, 42 N.J.Super. 341—*Van Note v. Combs*, 95 A.2d 12, 24 N.J.Super. 529—*Lilly v. Todd*, 83 A.2d 21, 15 N.J.Super. 1—*Donofrio v. Haag Bros.*, 77 A.2d 42, 10 N.J.Super. 258.
20. N.J.—*Folsom v. Magna Mfg.*

Co., 82 A.2d 434, 14 N.J.Super. 363—*Donofrio v. Haag Bros.*, 77 A.2d 42, 10 N.J.Super. 258.

21. N.J.—*Robinson v. Federal Tel. & Radio Corp.*, 130 A.2d 386, 44 N.J.Super. 294—*Reynolds v. General Motors Corp. (Hyatt Bearings Division)*, 123 A.2d 555, 40 N.J.Super. 484—*Seller v. Robinson*, 95 A.2d 153, 24 N.J.Super. 559, affirmed 99 A.2d 422, 13 N.J. 307—*Trusky v. Ford Motor Co., Lincoln-Mercury Division*, 88 A.2d 235, 19 N.J.Super. 100—*McGowan v. Peter Doelger Brewing Co.*, 77 A.2d 46, 10 N.J.Super. 276—*Galloway v. Ford Motor Co.*, 71 A.2d 657, 7 N.J.Super. 18, affirmed 75 A.2d 855, 5 N.J. 396.
22. N.J.—*Ricciardi v. Marcalus Mfg. Co.*, 135 A.2d 339, 47 N.J.Super. 90—*Mewes v. Union Bldg. & Const. Co.*, 131 A.2d 561, 45 N.J.Super. 88—*Augustin v. Bank Bldg. & Equipment Corp.*, 130 A.2d 70, 44 N.J.Super. 242—*Hagerman v. Lewis Lumber Co.*, 98 A.2d 632, 24 N.J.Super. 120, affirmed 99 A.2d 513, 13 N.J. 315—*Folsom v. Magna Mfg. Co.*, 82 A.2d 434, 14 N.J.Super. 363—*Gaeta v. Scott Paper Co.*, 81 A.2d 808, 14 N.J.Super. 261—*Gagliano v. Botany Worsted Mills*, 80 A.2d 125, 13 N.J.Super. 1—*Donofrio v. Haag Bros.*, 77 A.2d 42, 10 N.J.Super. 258—*McGranahan v. General Motors Corp., Linden Division*, 73 A.2d 603, 8 N.J.Super. 148.
23. N.J.—*Vandenberg v. John De Kuyper & Son*, 69 A.2d 581, 5 N.J.Super. 440.
24. N.J.—*Lipscombe v. Loizeaux Lumber Co.*, 79 A.2d 483, 12 N.J.Super. 276—*Galloway v. Ford Motor Co.*, 71 A.2d 657, 7 N.J.Super. 18, affirmed 75 A.2d 855, 5 N.J. 396

—*Vandenberg v. John De Kuyper & Son*, 69 A.2d 581, 5 N.J.Super. 440.

25. N.J.—*Carpenter v. Calco Chemical Division of American Cyanamid Co. of Bound Brook*, 66 A.2d 177, 4 N.J.Super. 53.
26. N.J.—*Condon v. Smith*, 117 A.2d 272, 37 N.J.Super. 320, affirmed 120 A.2d 460, 20 N.J. 557.
27. N.J.—*Gaeta v. Scott Paper Co.*, 81 A.2d 808, 14 N.J.Super. 261.
28. N.J.—*Zaklukiewicz v. Western Elec. Co.*, 84 A.2d 463, 16 N.J.Super. 189.
29. N.J.—*Ricciardi v. Marcalus Mfg. Co.*, 135 A.2d 339, 47 N.J.Super. 90—*Martin v. Snuffy's Steak House*, 134 A.2d 789, 46 N.J.Super. 425—*Augustin v. Bank Bldg. & Equipment Corp.*, 130 A.2d 70, 44 N.J.Super. 242—*Nolan v. Pabco Corp.*, 125 A.2d 903, 42 N.J.Super. 129—*Runk v. Rickenbacher Transp. Co.*, 106 A.2d 554, 31 N.J.Super. 350.
30. N.J.—*Bialko v. H. Baker Milk Co.*, 118 A.2d 412, 38 N.J.Super. 169—*Giambattista v. Thomas A. Edison, Inc.*, 107 A.2d 801, 32 N.J.Super. 103—*O'Reilly v. Roberto Homes*, 107 A.2d 9, 31 N.J.Super. 387—*Gagliano v. Botany Worsted Mills*, 80 A.2d 125, 13 N.J.Super. 1—*Lipscombe v. Loizeaux Lumber Co.*, 79 A.2d 483, 12 N.J.Super. 276—*Donofrio v. Haag Bros.*, 77 A.2d 42, 10 N.J.Super. 258.
31. N.J.—*Walsh v. Kotler*, 134 A.2d 458, 46 N.J.Super. 206—*Giambattista v. Thomas A. Edison, Inc.*, 107 A.2d 801, 32 N.J.Super. 103—*Gaeta v. Scott Paper Co.*, 81 A.2d 808, 14 N.J.Super. 261—*Donofrio v. Haag Bros.*, 77 A.2d 42, 10 N.J.Super. 258.

well satisfied that the findings are mistaken.³²

Particular weight is given to the fact findings of the county court where they agree with those made by the compensation authorities.³³ The power to make independent findings of fact is not normally exercised where the county court affirmed the findings of the compensation authorities,³⁴ and where such findings are supported by sufficient evidence, they will not be disturbed,³⁵ particularly where the evidence presents a question of credibility;³⁶ but the court will reverse a finding not supported by sufficient evidence.³⁷

Where the question is one of law, the agree-

ment of the compensation tribunal and the county court is of persuasive but not determinative weight in the superior court.³⁸

On further appeal, the supreme court will not weigh the evidence;³⁹ and the judgment of the superior court is conclusive where a question of fact or the inference to be drawn from the facts is presented by the proofs.⁴⁰

Under the prior constitutional provisions governing the courts, on certiorari from a judgment of the court of common pleas reviewing a determination by the compensation authorities, the supreme court was required to make an independent determination of the law and the facts,⁴¹ even when the compen-

Much weight

Superior court should accord much weight to finding of fact of county court and should not disturb it unless well satisfied that finding is a mistaken one, even though county court did not hear witnesses, but determined case from a reading of same evidence as that before superior court.

N.J.—Vandenberg v. John De Kuyper & Son, 69 A.2d 581, 5 N.J.Super. 440.

32. N.J.—Green v. De Furia, 112 A.2d 747, 34 N.J.Super. 521, reversed on other grounds 116 A.2d 19, 19 N.J. 290.

33. N.J.—Nolan v. Pabco Corp., 125 A.2d 903, 42 N.J.Super. 129—Arrington v. Goldstein, 92 A.2d 630, 23 N.J.Super. 103—Trusky v. Ford Motor Co., Lincoln-Mercury Division, 88 A.2d 235, 19 N.J.Super. 100—Jensen v. Wilhelms Const. Co., 87 A.2d 365, 18 N.J.Super. 372—Becker v. Union City, 85 A.2d 539, 17 N.J.Super. 212.

34. N.J.—Abelitt v. General Motors Corp., 135 A.2d 14, 46 N.J.Super. 475—Snoden v. Borough of Watchung, 101 A.2d 583, 29 N.J.Super. 41, affirmed 104 A.2d 841, 15 N.J. 376—Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division, 78 A.2d 403, 11 N.J.Super. 338—Coronato v. Public Service Coordinated Transport, 66 A.2d 196, 4 N.J.Super. 1.

35. N.J.—Hagerman v. Lewis Lumber Co., 93 A.2d 632, 24 N.J.Super. 120, affirmed 99 A.2d 513, 13 N.J. 315—Chapman v. Atlantic Transp. Co., 91 A.2d 502, 21 N.J.Super. 589—Becker v. Union City, 85 A.2d 539, 17 N.J.Super. 212—Giacchi v. Richmond Bros. Co., 78 A.2d 109, 11 N.J.Super. 76, opinion adhered to 79 A.2d 438, 12 N.J.Super. 308—Girési v. E. I. DuPont de Nemours & Co., 71 A.2d 725, 7 N.J.Super. 41—Morgan v. Letwenske, 69 A.2d 889, 6 N.J.Super. 67—Calabria v. Liberty Mut. Ins. Co., 68 A.2d 283, 4 N.J.

Super. 523, affirmed 71 A.2d 550, 4 N.J. 64—Coronato v. Public Service Coordinated Transport, 66 A.2d 196, 4 N.J.Super. 1.

36. N.J.—Kuperstein v. Gude & Cole Corp., 72 A.2d 531, 7 N.J.Super. 200.

37. N.J.—Nolan v. Pabco Corp., 125 A.2d 903, 42 N.J.Super. 129—Mahoney v. Nitro Form Co., 114 A.2d 863, 36 N.J.Super. 116, reversed on other ground 120 A.2d 454, 20 N.J. 499—Giacchi v. Richmond Bros. Co., 78 A.2d 109, 11 N.J.Super. 76, opinion adhered to 79 A.2d 438, 12 N.J.Super. 308.

Palpably erroneous

To warrant reversal of concordant factual determinations of workmen's compensation division and county court in a workmen's compensation case, it must appear that findings are palpably erroneous and so plainly unjustified by evidence that interests of justice necessitate their nullification. N.J.—Duncan v. T. I. McCormack Trucking Co., 128 A.2d 722, 43 N.J. Super. 352.

38. N.J.—Buerkle v. United Parcel Service, 93 A.2d 327, 26 N.J.Super. 404.

Where there was no factual dispute in workmen's compensation proceeding, appellate division of superior court was not bound by "two court rule" providing that where two independent and distinct tribunals, such as division of workmen's compensation and county court have reached same conclusion on an issue of fact, conclusion so reached should not lightly be disturbed by reviewing court.

N.J.—Condon v. Smith, 117 A.2d 272, 37 N.J.Super. 320, affirmed 120 A.2d 460, 20 N.J. 557.

Dismissal of claim as matter of law

On appeal from dismissal of action in county court for workmen's compensation on basis of determination that, as matter of law, claim was not actionable, every reasonable inference from proof had to be resolved

in favor of prima facie compensability.

N.J.—Augelli v. Rolans Credit Clothing Store, 109 A.2d 439, 33 N.J. Super. 146.

39. N.J.—Jochim v. Montrose Chemical Co., 68 A.2d 623, 3 N.J. 5—Grant v. Grant Casket Co., 65 A.2d 520, 2 N.J. 15.

40. N.J.—Calabria v. Liberty Mut. Ins. Co., 71 A.2d 550, 4 N.J. 64—Jochim v. Montrose Chemical Co., 68 A.2d 623, 3 N.J. 5—Grant v. Grant Casket Co., 65 A.2d 520, 2 N.J. 15.

Palpable error

Where two lower courts considered facts in a proceeding for workmen's compensation and reached concurrent findings, supreme court would not make a new and independent finding unless error in concurrent findings was so palpable that a new finding by it was necessary to insure essential justice.

N.J.—Pfahler v. Eclipse Pioneer Division of Bendix Aviation Corp., 122 A.2d 644, 21 N.J. 486.

41. N.J.—Moses v. Federal Shipbuilding & Dry Dock Co., 61 A.2d 44, 137 N.J.Law 568—Wall v. F. Ferguson & Son, 61 A.2d 7, 137 N.J.Law 541—Bodnar v. Florence Pipe Foundry & Mach. Co., 54 A.2d 234, 136 N.J.Law 15, affirmed 59 A.2d 247, 137 N.J.Law 205—Lagman v. Wm. Spencer & Son Corp., 52 A.2d 144, 135 N.J.Law 379—Lohndorf v. Peper Bros. Paint Co., 52 A.2d 61, 135 N.J.Law 352—Pacifico v. Carpenter Steel Co., 50 A.2d 894, 135 N.J.Law 204—Grummisch v. Barney Const. Co., 49 A.2d 438, 134 N.J.Law 578, affirmed 61 A.2d 510, 1 N.J. 30—Thackston v. Lansdell Co., 49 A.2d 140, 134 N.J. Law 520—Csont v. Standard Brands, 48 A.2d 573, 134 N.J.Law 395—Breheny v. Essex County, 45 A.2d 700, 134 N.J.Law 129—Owens v. Bennett Air Service, 45 A.2d 320, 133 N.J.Law 540, affirmed 51 A.2d 111, 135 N.J.Law 467—Giles v. W.

sation authorities and the lower court were in accord in their findings.⁴² However, in such case, the findings of fact below were not lightly disturbed⁴³ where there was evidence to support them⁴⁴ or where the evidence was in conflict.⁴⁵ The court might reach a factual result contrary to that reached in either the lower court or the compensation bu-

reau.⁴⁶ The court would intervene more freely where the lower court and the compensation authorities had disagreed as to the facts.⁴⁷

On appeal from the supreme court to the court of errors and appeals, the evidence was not weighed⁴⁸ and the court would not reverse if there was evidence to support the finding of the supreme court⁴⁹

E. Beverage Corp., 43 A.2d 286, 133 N.J.Law 137, affirmed 46 A.2d 728, 134 N.J.Law 234—D. Kaltman & Co. v. Itzkowitz, 43 A.2d 284, 133 N.J.Law 191—Mixon v. Kalman, 42 A.2d 809, 133 N.J.Law 113—Miceli v. Erie R. Co., 33 A.2d 586, 130 N.J.Law 448, affirmed 37 A.2d 123, 131 N.J.Law 427—Colarusso v. Bahto, 27 A.2d 210, 128 N.J.Law 537—Pierce v. Jersey Cent. Power & Light Co., 21 A.2d 311, 127 N.J.Law 71—Rotino v. J. P. Scanlon, Inc., 19 A.2d 777, 126 N.J.Law 419—McCadden v. West End Bldg. & Loan Ass'n, 17 A.2d 65, 126 N.J.Law 1, affirmed 21 A.2d 737, 127 N.J.Law 245—Stetser v. American Stores Co., 11 A.2d 51, 124 N.J.Law 228—Beerman v. Public Service Coordinated Transport, 9 A.2d 890, 123 N.J.Law 479—Bollinger v. Wagaraw Bldg. Supply Co., 6 A.2d 396, 122 N.J.Law 512—Gilbert v. Gilbert Mach. Works, 6 A.2d 213, 122 N.J.Law 533—Grotsky v. Charles Grotsky Inc., 3 A.2d 149, 121 N.J.Law 461, affirmed 12 A.2d 856, 124 N.J.Law 572—Berman v. Levenstein, 1 A.2d 332, 121 N.J.Law 139—Harrison v. Garlitti, 197 A. 377, 120 N.J.Law 64—Anderson v. Federal Shipbuilding & Dry Dock Co., 191 A. 455, 118 N.J.Law 55.

42. N.J.—McCrae v. Eastern Aircraft, Trenton Division, General Motors Corp., 59 A.2d 376, 137 N.J.Law 244—Fischbein v. Real Estate Management, 37 A.2d 199, 131 N.J.Law 495, affirmed 40 A.2d 649, 132 N.J.Law 413—American Cyanamid Co. v. Bortos, 36 A.2d 394, 131 N.J.Law 339, affirmed 40 A.2d 545, 132 N.J.Law 327—Reis v. Breeze Corporations, 28 A.2d 304, 129 N.J.Law 138—Grotsky v. Charles Grotsky, Inc., 3 A.2d 149, 121 N.J.Law 461, affirmed 12 A.2d 856, 124 N.J.Law 572—De Santis v. Turner Const. Co., 1 A.2d 202, 120 N.J.Law 590—Anderson v. Federal Shipbuilding & Dry Dock Co., 191 A. 455, 118 N.J.Law 55.

Patton v. American Oil Co., 181 A. 651, 13 N.J.Misc. 825.

Consent judgment

Supreme Court, on certiorari to review order affirming bureau's order with consent of claimant's attorney, should not examine proofs and weigh evidence.

N.J.—Föderovitch v. Pantazote

Leather Co., 9 A.2d 799, 123 N.J.Law 510.

43. N.J.—Grummisch v. Barney Const. Co., 61 A.2d 510, 1 N.J. 80. Chatham v. Public Service Elec. & Gas Co., 61 A.2d 211, 137 N.J.Law 579—Stewart v. Wright Aeronautical Corp., 56 A.2d 880, 136 N.J.Law 450—Pacifico v. Carpenter Steel Co., 50 A.2d 894, 135 N.J.Law 204—Wright v. Westinghouse Elec. & Mfg. Co., 49 A.2d 502, 134 N.J.Law 581, affirmed 52 A.2d 537, 135 N.J.Law 460—Capuano v. Wright Aeronautical Corp., 47 A.2d 891, 134 N.J.Law 339—Truex v. Fulton Cornice & Skylight Work, 47 A.2d 585, 134 N.J.Law 310—Roma v. Associated Transport, 47 A.2d 337, 134 N.J.Law 279—Prawatchke v. Sheffield Farms Co., 46 A.2d 68, 134 N.J.Law 92—McGhee v. Raritan Copper Works, 44 A.2d 388, 133 N.J.Law 376—Koeppel v. Irvington Window Cleaning Co., 44 A.2d 209, 133 N.J.Law 303—Martin v. Hasbrouck Heights Bldg. Loan & Sav. Ass'n, 41 A.2d 898, 132 N.J.Law 569—Glanton v. Shafto, 41 A.2d 200, 132 N.J.Law 474, affirmed 44 A.2d 104, 133 N.J.Law 234—American Cyanamid Co. v. Bortos, 36 A.2d 394, 131 N.J.Law 339, affirmed 40 A.2d 545, 132 N.J.Law 327—Swift & Co. v. Von Volkum, 34 A.2d 397, 131 N.J.Law 83, affirmed 40 A.2d 572, 132 N.J.Law 344—Davies v. Onyx Oil & Resin Co., 33 A.2d 357, 130 N.J.Law 381—Reis v. Breeze Corporations, 28 A.2d 304, 129 N.J.Law 138—Hentz v. Janssen Dairy Corp., 6 A.2d 409, 122 N.J.Law 494—De Santis v. Turner Const. Co., 1 A.2d 202, 120 N.J.Law 590—Anderson v. Federal Shipbuilding & Dry Dock Co., 191 A. 455, 118 N.J.Law 55. Salomone v. Ansetta, 194 A. 798, 16 N.J.Misc. 96—Patton v. American Oil Co., 181 A. 651, 13 N.J.Misc. 825—Funari v. Standard Sanitary Mfg. Co., 177 A. 431, 13 N.J.Misc. 226, affirmed, 181 A. 44, 115 N.J.Law 506—Yoma Kenzi Yoshida v. Nichols, 170 A. 824, 12 N.J.Misc. 197.

Persuasive circumstance

Although workmen's compensation law casts on supreme court duty of appraising evidence and making independent findings of fact, concurrence of tribunals below in factual conclusion is a persuasive circumstance, especially where one of them had ad-

vantage of personal observation of witnesses and their demeanor and manner of testifying.

N.J.—Schmidt v. Atlantic Refining Co., 38 A.2d 889, 132 N.J.Law 196, affirmed 42 A.2d 201, 133 N.J.Law 39.

44. N.J.—Brighton v. Borough of Rumson, 50 A.2d 485, 135 N.J.Law 81—Delanoy v. New Jersey Dairy Laboratories, 33 A.2d 348, 130 N.J.Law 407.

45. N.J.—Voight v. McEwan Bros., 179 A. 850, 13 N.J.Misc. 587, affirmed 182 A. 853, 116 N.J.Law 218.

46. N.J.—Rubeo v. Arthur McMullen Co., 189 A. 662, 117 N.J.Law 574, conformed to 193 A. 797, 118 N.J.Law 530, affirmed 198 A. 843, 120 N.J.Law 182.

47. N.J.—Reis v. Breeze Corporations, 28 A.2d 304, 129 N.J.Law 138—Anderson v. Federal Shipbuilding & Dry Dock Co., 191 A. 455, 118 N.J.Law 55.

48. N.J.—Owens v. Bennett Air Service, 51 A.2d 111, 135 N.J.Law 467—Carr v. Federal Shipbuilding & Drydock Co., 50 A.2d 657, 135 N.J.Law 148—Silberman v. National Egg & Product Co., 39 A.2d 94, 132 N.J.Law 143—Cohen v. Kafer, 36 A.2d 421, 131 N.J.Law 328—Pilkington v. State Highway Department, 15 A.2d 636, 125 N.J.Law 444—Fountain v. Booth & Flinn, 5 A.2d 741, 122 N.J.Law 427—Berman v. Levenstein, 1 A.2d 332, 121 N.J.Law 139.

49. N.J.—Temple v. Storch Trucking Co., 68 A.2d 328, 3 N.J. 42—Bilyou v. George E. Brewster & Son, 68 A.2d 630, 3 N.J. 3.

N.J.—Cappadonna v. Passaic Motors, 61 A.2d 282, 137 N.J.Law 661—Cancello v. Federal Shipbuilding & Dry Dock Co., 61 A.2d 46, 137 N.J.Law 646—Link v. Eastern Aircraft, Linden Division, General Motors Corp., 57 A.2d 8, 136 N.J.Law 540—Knapp v. C. F. Mueller & Co., 54 A.2d 777, 136 N.J.Law 186—Fusco v. Cambridge Piece Dyeing Corp., 50 A.2d 870, 135 N.J.Law 160—Carr v. Federal Shipbuilding & Drydock Co., 50 A.2d 657, 135 N.J.Law 148—American Cyanamid Co. v. Bortos, 40 A.2d 545, 132 N.J.Law 327—Pennsylvania Mfrs. Cas. Ins. Co. v. Sommerbeck, 35 A.2d 719, 131 N.J.Law 159—Wadge v. Crestwood Acres, 29 A.2d 896, 129 N.J.Law 400—Molnar v. American Smelting

or if the evidence is in conflict,⁵⁰ but the court would examine the evidence to determine whether or not it raised a question of fact,⁵¹ and would reverse a judgment not sustained by competent evidence.⁵²

In North Dakota, on appeal to the supreme court from the judgment of the district court on review of a determination by the compensation authorities, the supreme court determines the case de novo.⁵³

In Ohio, under a provision authorizing a jury trial on the record before the compensation authorities as to jurisdictional matters, on a further appeal to the court of appeals, that court will not weigh the evidence,⁵⁴ and will construe the evidence most

favorably to the judgment appealed from.⁵⁵ The verdict of the jury or of the court sitting as the trier of the facts is given the same effect as in other civil actions,⁵⁶ and the verdict or finding of the lower court will be reversed where it is contrary to the conclusion that reasonable men would reach.⁵⁷

In Rhode Island prior to the amendment of the statute to provide for an appeal from the compensation authorities directly to the supreme court, it was provided that the superior court could determine the case de novo on appeal from the compensation authorities, and that the findings of the superior court, if supported by legal evidence, were binding on the supreme court in the absence of fraud.⁵⁸ The supreme court could not consider the

& Refining Co., 24 A.2d 392, 128 N.J.Law 11—Rotino v. J. P. Scanlon, Inc., 19 A.2d 777, 126 N.J.Law 419—Pilkington v. State Highway Department, 15 A.2d 636, 125 N.J.Law 444—Alexander v. Cunningham Roofing Co., 15 A.2d 612, 125 N.J.Law 277—General Cable Corp. v. Levins, 11 A.2d 61, 124 N.J.Law 223—Fountain v. Booth & Flinn, 5 A.2d 741, 122 N.J.Law 427—Cirillo v. United Engineers & Constructors, 3 A.2d 596, 121 N.J.Law 511—Rubeo v. Arthur McMullen Co., 198 A. 843, 120 N.J.Law 182—Berlinger v. Medal Silk Co., 174 A. 558, 113 N.J.Law 476.

50. N.J.—Cancello v. Federal Shipbuilding & Dry Dock Co., 61 A.2d 46, 137 N.J.Law 646—Dorion v. Federal Shipbuilding & Dry-Dock Co., 59 A.2d 9, 137 N.J.Law 185—Van Ness v. Borough of Haledon, 56 A.2d 888, 136 N.J.Law 623—Westinghouse Elec. & Mfg. Co. v. Wright, 52 A.2d 537, 135 N.J.Law 460—Wehrle v. Sherwin-Williams Co., 46 A.2d 777, 134 N.J.Law 233—Glanton v. Shatto, 44 A.2d 104, 133 N.J.Law 284—Mixon v. Kallman, 42 A.2d 309, 133 N.J.Law 113—Kovalchuck v. Simpson & Brown, 189 A. 89, 117 N.J.Law 400—Voight v. McEwan Bros., 182 A. 853, 116 N.J.Law 218—Lebits v. General Cable Corporation, 170 A. 612, 112 N.J.Law 381.

51. N.J.—Berman v. Levenstein, 1 A.2d 382, 121 N.J.Law 139.

52. N.J.—Link v. Eastern Aircraft, Linden Division, General Motors Corp., 57 A.2d 8, 136 N.J.Law 540—Fusco v. Cambridge Piece Dyeing Corp., 50 A.2d 870, 135 N.J.Law 160—Cirillo v. United Engineers & Constructors, 3 A.2d 596, 121 N.J.Law 511.

53. N.D.—Gullikson v. North Dakota Workmen's Compensation Bureau, 23 N.W.2d 826—Bernardy v. Beas, 23 N.W.2d 874, 75 N.D. 377.

Under prior statute, court could not consider case de novo.

N.D.—Gotchy v. North Dakota Workmen's Compensation Bureau, 194 N.W. 663, 49 N.D. 915.

54. Ohio.—McKibben v. Stuhlberg, 68 N.E.2d 810, 77 Ohio App. 540.

55. Ohio.—Huston v. Industrial Commission of Ohio, 85 N.E.2d 531, 87 Ohio App. 33—McKibben v. Stuhlberg, 68 N.E.2d 810, 77 Ohio App. 540.

56. Ohio.—Black v. Carnegie-Illinois Steel Corp., 124 N.E.2d 759, 97 Ohio App. 223.

57. Ohio.—McDaniel v. Ohio Edison Co., App., 34 N.E.2d 990.

58. R.I.—Jacob v. Moshassuck Transp. Co., 125 A.2d 184—Laptev v. Moore Fabrics, Inc., 123 A.2d 398—Langanke v. Bradford Dyeing Ass'n, 119 A.2d 728—Bishop v. Centredale Textile Co., 115 A.2d 353—Patchis v. Sunray Mills, Inc., 114 A.2d 679—Brown & Sharpe Mfg. Co. v. Campo, 113 A.2d 377—Der Vartanian v. Narragansett Hotel, 113 A.2d 371—Providence Window Cleaning Co. v. Robidoux, 112 A.2d 523—Cruso v. Yellow Cab Co. of Providence, 106 A.2d 734, 82 R.I. 158—Hope Bldg. Co. v. Douglas, 105 A.2d 199, 82 R.I. 1—Narragansett Hotel, Inc. v. Mallozzi, 103 A.2d 355, 81 R.I. 389—Gagne v. Weintraub's Silk & Fabric Shops, Inc., 98 A.2d 854, 80 R.I. 498—Fasetti v. Brusa, 98 A.2d 838, 81 R.I. 88—A. D. Juilliard & Co. v. Catanese, 97 A.2d 878, 80 R.I. 420—Campisani v. Sun Dial Optical Co., 96 A.2d 582, 80 R.I. 307—Menzies v. King, 95 A.2d 853, 80 R.I. 247—De Filippo v. Gilbane Bldg. Co., 89 A.2d 848, 79 R.I. 462—Antosia v. Crown Worsted Mills, 86 A.2d 553, 79 R.I. 208—Burns v. Rhode Island Tool Co., 85 A.2d 925, 79 R.I. 169—Ferguson v. George A. Fuller Co., 82 A.2d 856, 78 R.I. 412—E. H. Smith Co. v. Martin, 82 A.2d 848, 78

R.I. 438—Davis v. Monowatt Elec. Corp., 81 A.2d 701, 78 R.I. 284—De Asis v. Fram Corp., 81 A.2d 280, 78 R.I. 249—Blumenthal & Co. v. Jucknik, 81 A.2d 135, 78 R.I. 246—Esmond Mills, Inc. v. Mollo, 78 A.2d 365, 78 R.I. 27—LeClair v. Textron Mills, 75 A.2d 309, 77 R.I. 818—Leonardo v. Uncas Mfg. Co., 75 A.2d 188, 77 R.I. 245—Corsini v. Gaspee Transp. Co., 74 A.2d 242, 77 R.I. 154—Lindia v. Walsh-Kaiser Co., 73 A.2d 765, 77 R.I. 104—Campbell v. Walsh-Kaiser Co., 73 A.2d 239, 77 R.I. 67—Conti v. Washburn Wire Co., 72 A.2d 842, 77 R.I. 31—Behrie v. London Guarantee & Acc. Co., 68 A.2d 63, 76 R.I. 106, reargument denied 69 A.2d 504, 76 R.I. 106, certiorari denied London Guarantee & Acc. Co. v. Behrie, 70 S.Ct. 627, 339 U.S. 928, 94 L. Ed. 1349—Ottone v. Franklin Process Co., 71 A.2d 780, 76 R.I. 431—Burke v. Fram Corp., 70 A.2d 601, 76 R.I. 359—Fulford Mfg. Co. v. Lupoli, 67 A.2d 846, 75 R.I. 488—Romano v. Napolitano, 67 A.2d 840, 75 R.I. 512—Meierovitz v. George A. Fuller Co., 67 A.2d 45, 75 R.I. 378—Ucci v. Hathaway Bakeries, 66 A.2d 433, 75 R.I. 341—Fresselli v. Washburn Wire Co., 64 A.2d 686, 75 R.I. 144—Bucci v. H. P. Hood & Sons, 62 A.2d 768, 75 R.I. 8—M. & M. Transp. Co. v. Della Posta, 62 A.2d 654, 74 R.I. 514—Capasso v. Firesafe Builders Products Corp., 62 A.2d 201, 74 R.I. 458—Di Robbio v. Firesafe Builders Products Corp., 60 A.2d 724, 74 R.I. 337—Chicoria v. Kenyon Piece Dye-works, 60 A.2d 492, 74 R.I. 760—Shortall v. Brown & Sharpe Mfg. Co., 60 A.2d 143, 74 R.I. 237—Hemphill v. Provencher, 59 A.2d 540, 74 R.I. 173—Taci v. U. S. Rubber Co., 58 A.2d 921, 74 R.I. 113—Ferguson v. George A. Fuller Co., 58 A.2d 810, 74 R.I. 98, reargument denied 60 A.2d 723, 74 R.I. 98—Colalucia v. George A. Fuller Co., 58 A.2d 500, 74 R.I. 63—Vidmar v.

weight or credibility of the evidence,⁵⁹ or determine the inferences to be drawn from the testimony.⁶⁰ Questions of law could be reviewed by the supreme court⁶¹ and a mixed question of law

and fact was subject to review in so far as it involved a question of law.⁶² Whether the superior court acted on the basis of legal evidence was a question of law subject to review,⁶³ but the supreme

bin, 58 A.2d 109, 73 R.I. 508—Baccari v. W. T. Grant Co., 56 A.2d 552, 73 R.I. 376—De Lallo v. Queen Dyeing Co., 56 A.2d 174, 73 R.I. 325—Plouffe v. Taft-Peirce Mfg. Co., 54 A.2d 417, 73 R.I. 215—Johnson v. Lanifero, 54 A.2d 412, 73 R.I. 238—Atlantic Rayon Corp. v. Macedo, 53 A.2d 756, 73 R.I. 157—Rosewater v. Jean's Inc., 53 A.2d 490, 72 R.I. 489—Blau v. Walsh-Kaiser Co., 53 A.2d 330, 73 R.I. 27—Gorham Mfg. Co. v. Viselli, 52 A.2d 517, 72 R.I. 427—Lorraine Mfg. Co. v. Apolony, 50 A.2d 616, 72 R.I. 258—Medici v. U. S. Rubber Co., 50 A.2d 142, 72 R.I. 248—Starnino v. George A. Fuller Co., 48 A.2d 361, 72 R.I. 91—Antonelli v. Walsh-Kaiser Co., 47 A.2d 863, 72 R.I. 1—Walsh-Kaiser Co. v. Branch, 47 A.2d 860, 72 R.I. 16—Russell v. Liberman, 46 A.2d 858, 71 R.I. 448—Rachiele v. George A. Fuller Co., 46 A.2d 718, 71 R.I. 446—Parmentier v. Moore Fabric Co., 45 A.2d 876, 71 R.I. 369—Papauskas v. Reynolds Machinery Co., 44 A.2d 426, 71 R.I. 297—Ruggiero v. Brown & Sharpe Mfg. Co., 43 A.2d 51, 71 R.I. 178—Mahoney v. Merchants & Miners Transp. Co., 38 A.2d 156, 70 R.I. 195—Fossum v. George A. Fuller Co., 38 A.2d 148, 70 R.I. 191—George v. Lamson Oil Corp., 30 A.2d 856, 69 R.I. 81—General Scrap Iron v. La Porte, 26 A.2d 618, 68 R.I. 98—Marconi v. Bartlett Scrap Iron Co., 19 A.2d 766, 66 R.I. 409—Bride v. Cathedral Art Metal Co., 19 A.2d 317, 66 R.I. 331—Mederos v. McLeod, 14 A.2d 22, 65 R.I. 177—Olneyville Wool Combing Co. v. Di Donato, 13 A.2d 817, 65 R.I. 154—Condon v. First Nat. Stores, 13 A.2d 684, 65 R.I. 129—Dorfman v. Rosenthal Ackerman Millinery Co., 13 A.2d 268, 64 R.I. 498—Rogers v. Ray's Market, 12 A.2d 736, 64 R.I. 437—Botelho v. J. H. Tredennick, Inc., 12 A.2d 282, 64 R.I. 326—Di Libero v. Middlesex Const. Co., 9 A.2d 848, 63 R.I. 509—Garabedian v. Gorham Mfg. Co., 9 A.2d 46, 63 R.I. 452—Enos v. Industrial Trust Co., 4 A.2d 915, 62 R.I. 263—Broughay v. Mowry Grain Co., 200 A. 768, 61 R.I. 221—La Point v. Pendleton, 200 A. 464, 61 R.I. 121, reargument denied 4 A.2d 927, 61 R.I. 413—Chirico v. Kappler, 200 A. 447, 61 R.I. 128—Reynolds v. Freemasons Hall Co., 198 A. 553, 60 R.I. 343—Silva v. Bristol & Warren Water Works, 181 A. 414, 55 R.I. 337—Natalia v. United Electric Rys. Co., 171 A. 632, 54 R.I. 183.

Positive and negative findings

Under workmen's compensation act

there is no distinction made between positive and negative findings, and negative findings, in absence of fraud, are conclusive if supported by legal evidence.

R.I.—De Fusco v. Ochee Spring Water Co., 124 A.2d 867.

Written evidence

Supreme court being precluded by statute from adjudicating facts in workman's compensation case, fact that case was decided solely on official transcript of evidence and doctors' written reports by another superior court justice than one who presided at hearing because of his subsequent retirement did not alter rule that fact findings of superior court are conclusive, in absence of fraud, and such decision cannot be disturbed by supreme court on appeal, unless justice who decided case misconceived evidence.

R.I.—Egan v. Walsh-Kaiser Co., 56 A.2d 854, 73 R.I. 399.

Fraud

Where matter of fraud legitimately arises for first time in workmen's compensation case after case has been heard on merits in superior court, court in which case then is pending may be asked, after giving opposing party an opportunity to be heard, to provide some method for having fraud issue tried.

R.I.—Campisani v. Sun Dial Optical Co., 96 A.2d 582, 80 R.I. 307.

59. R.I.—Chase v. General Elec. Co., 115 A.2d 683—Hind v. Brown & Sharpe Mfg. Co., 115 A.2d 343—Brown & Sharpe Mfg. Co. v. Camp, 113 A.2d 377—Der Vartanian v. Narragansett Hotel, 113 A.2d 371—Providence Window Cleaning Co. v. Robidoux, 112 A.2d 523—Bullock v. U. S. Rubber Co., 107 A.2d 424, 82 R.I. 308—Cruso v. Yellow Cab Co. of Providence, 106 A.2d 734, 82 R.I. 158—Hope Bldg. Co. v. Douglas, 105 A.2d 199, 82 R.I. 1—Erbe v. A. D. Juilliard & Co., 98 A.2d 856, 81 R.I. 37—Gagne v. Weintraub's Silk & Fabric Shops, Inc., 98 A.2d 854, 80 R.I. 498—A. D. Juilliard & Co. v. Catanese, 97 A.2d 873, 80 R.I. 420—Bahry v. City Fabrics, Inc., 97 A.2d 589, 80 R.I. 411—Imperial Knife Co. v. Calise, 97 A.2d 579, 80 R.I. 428—Priscilla Worsted Mills v. Vizzacco, 96 A.2d 835, 80 R.I. 342—Quillen v. O. D. Purington Co., 94 A.2d 247, 80 R.I. 165—Antosia v. Crown Worsted Mills, 86 A.2d 553, 79 R.I. 205—E. E. Smith Co. v. Martin, 82 A.2d 843, 78 R.I. 438—DiFiore v. U. S. Rubber Co., 79 A.2d 925, 78 R.I. 124—Conti v. Washburn Wire Co., 72 A.2d 842, 77 R.I.

81—Grieco v. American Silk Spinning Co., 66 A.2d 640, 75 R.I. 356—Zielonka v. U. S. Rubber Co., 65 A.2d 460, 75 R.I. 249—Emma v. A. D. Juilliard & Co., 63 A.2d 786, 75 R.I. 94—Ostby & Barton Co. v. Curcio, 63 A.2d 784, 75 R.I. 82—Bennett v. Grand Union Tea Co., 62 A.2d 324, 74 R.I. 480—Capasso v. Firesafe Builders Products Corp., 62 A.2d 201, 74 R.I. 458—Berkshire Fine Spinning Associates v. Label, 60 A.2d 871, 74 R.I. 6—Hemphill v. Provencher, 59 A.2d 540, 74 R.I. 173—Wareham v. U. S. Rubber Co., 54 A.2d 372, 73 R.I. 207—Atlantic Rayon Corp. v. Macedo, 53 A.2d 756, 73 R.I. 157—Rosewater v. Jean's Inc., 53 A.2d 490, 72 R.I. 489—Blau v. Walsh-Kaiser Co., 53 A.2d 330, 73 R.I. 27—Walsh-Kaiser Co. v. Yeager, 50 A.2d 776, 72 R.I. 238—Antonelli v. Walsh-Kaiser Co., 47 A.2d 863, 72 R.I. 1—Russell v. Liberman, 46 A.2d 858, 71 R.I. 448—George v. Lamson Oil Corp., 30 A.2d 856, 69 R.I. 81.

60. R.I.—Imperial Knife Co. v. Calise, 97 A.2d 579, 80 R.I. 428—Frue v. United Elec. Rys. Co., 94 A.2d 595, 80 R.I. 198—Cornell-Dubilier Elec. Corp. v. Manocchiola, 89 A.2d 823, 79 R.I. 466—Spolidoro v. U. S. Rubber Co., 50 A.2d 773, 72 R.I. 269—Barker v. Narragansett Racing Ass'n, 16 A.2d 495, 65 R.I. 489, reargument denied 17 A.2d 23, 65 R.I. 489.

Undisputed evidence

General rule that court on appeal can draw inferences from undisputed evidence is inapplicable in workmen's compensation cases because of provision of compensation act that, in absence of fraud, findings of fact by superior court shall be conclusive.

R.I.—St. Goddard v. Potter & Johnson Machine Co., 81 A.2d 20, 69 R.I. 90.

61. R.I.—Laroche v. Hickory House, Inc., 96 A.2d 830, 80 R.I. 334—Emma v. A. D. Juilliard & Co., 63 A.2d 786, 75 R.I. 94—Foy v. A. D. Juilliard & Co., Atlantic Mills Division, 7 A.2d 670, 63 R.I. 233, reargument denied 8 A.2d 869, 63 R.I. 314.

62. R.I.—Mancini v. Superior Court, 82 A.2d 390, 78 R.I. 373—Foy v. A. D. Juilliard & Co., Atlantic Mills Division, 7 A.2d 670, 63 R.I. 233, reargument denied 8 A.2d 869, 63 R.I. 314.

63. R.I.—Cruso v. Yellow Cab Co. of Providence, 106 A.2d 734, 82 R.I. 158—Burns v. Rhode Island Tool Co., 85 A.2d 925, 79 R.I. 169—Budington v. General Insulated Wire

court was not concerned with the evidence in conflict with the findings of the superior court.⁶⁴ The legal effect of certain evidence was a question of law subject to review.⁶⁵

In *Washington*, the scope of review on appeal to the supreme court from the judgment of the superior court depends on whether or not there was a jury trial in the superior court; where the lower court determined the case on the record before the compensation authorities without a jury, the appeal is heard by the supreme court *de novo*⁶⁶ and the statutory presumption that the findings of the compen-

sation authorities are correct applies despite findings to the contrary by the superior court.⁶⁷

However the verdict of the jury has the same effect as in law actions⁶⁸ and will not be disturbed on appeal where it is supported by substantial evidence.⁶⁹ The supreme court cannot weigh the evidence⁷⁰ but may consider its adequacy to support the verdict of the jury.⁷¹ The statutory presumption that the findings of the compensation authorities are correct goes out of the case where the jury decides the questions of fact properly submitted to it,⁷² and the evidence must be viewed from the

Co., 68 A.2d 109, 76 R.I. 170—*Fulford Mfg. Co. v. Lupoli*, 67 A.2d 846, 75 R.I. 488—*Bennett v. Grand Union Tea Co.*, 62 A.2d 324, 74 R.I. 480—*Capasso v. Firesafe Builders Products Corp.*, 62 A.2d 201, 74 R.I. 458—*Berkshire Fine Spinning Associates v. Label*, 60 A.2d 871, 74 R.I. 6—*Rosewater v. Jean's Inc.*, 53 A.2d 490, 72 R.I. 489—*Blau v. Walsh-Kaiser Co.*, 53 A.2d 330, 73 R.I. 27—*Barker v. Narragansett Racing Ass'n*, 16 A.2d 495, 65 R.I. 489, reargument denied 17 A.2d 23, 65 R.I. 489—*Foy v. A. D. Juilliard & Co., Atlantic Mills Division*, 7 A.2d 670, 63 R.I. 233, reargument denied 8 A.2d 869, 63 R.I. 314.

64. R.I.—*Burns v. Rhode Island Tool Co.*, 35 A.2d 925, 79 R.I. 169—*Egan v. Walsh-Kaiser Co.*, 56 A.2d 854, 73 R.I. 399.

65. R.I.—*Corry v. Commissioned Officers' Mess (Open)*, 81 A.2d 689, 78 R.I. 264—*Silvia v. Newport Shipyard*, 58 A.2d 397, 74 R.I. 42.

66. Wash.—*Guy F. Atkinson Co. v. Webber*, 131 P.2d 421, 15 Wash.2d 579, opinion adhered to *Atkinson v. Webber*, 137 P.2d 814, 15 Wash.2d 579—*Hoff v. Department of Labor and Industries of Washington*, 88 P.2d 419, 198 Wash. 257—*Hodgson v. Department of Labor and Industries of Washington*, 78 P.2d 949, 194 Wash. 541—*Peterson v. Department of Labor and Industries*, 33 P.2d 650, 178 Wash. 15—*Spier v. Department of Labor and Industries*, 29 P.2d 679, 176 Wash. 374.

67. Wash.—*Guy F. Atkinson Co. v. Webber*, 131 P.2d 421, 15 Wash.2d 579, opinion adhered to *Atkinson v. Webber*, 137 P.2d 814, 15 Wash.2d 579—*Schafer Bros. Logging Co. v. Department of Labor and Industries*, 104 P.2d 747, 4 Wash.2d 720—*Zenkich v. Department of Labor and Industries*, 63 P.2d 427, 189 Wash. 25.

Affirmance by lower court

A decision of department of labor and industries, supported by weight of evidence and confirmed by superior court in proceeding to recover

compensation for employee's death, must be affirmed on appeal to supreme court, in view of statutory provision declaring it *prima facie* correct.

Wash.—*Kirk v. Department of Labor and Industries*, 74 P.2d 227, 192 Wash. 671.

Hearing before examiner

In compensation proceeding, evident conclusions and deductions of joint board and trial court are entitled to some weight, although evidence was taken before an examiner.

Wash.—*MacRae v. Department of Labor and Industries of Washington*, 54 P.2d 1017, 185 Wash. 343.

68. Wash.—*Rambeau v. Department of Labor and Industries*, 163 P.2d 133, 24 Wash.2d 44.

Prior law

Prior to effective date of act providing that verdicts in workmen's compensation cases shall have same force and effect as in actions at law, verdict in jury case was merely advisory and it would have been error to treat it as mandatory and binding.

Wash.—*McLaren v. Department of Labor and Industries*, 107 P.2d 230, 6 Wash.2d 164.

Judgment notwithstanding verdict

(1) On appeal from judgment entered non obstante veredicto in compensation case, reviewing court will search entire record only for purpose of finding evidence which tends to support verdict.

Wash.—*Halder v. Department of Labor and Industries of State*, 268 P.2d 1020, 44 Wash.2d 587.

(2) Under statute providing that verdicts rendered in workmen's compensation cases shall have same force and effect as in actions at law, primary inquiry on assignment that trial court erred in granting judgment notwithstanding verdict is whether there was any evidence to support verdict.

Wash.—*McLaren v. Department of Labor and Industries*, 107 P.2d 230, 6 Wash.2d 164.

Directed verdict

In passing on sufficiency of evidence to present a case to a superior court jury in a workman's compensation case, supreme court will review all evidence and all reasonable inferences therefrom in light most favorable to claimant.

Wash.—*Dieckman v. Department of Labor and Industries*, 301 P.2d 763, 49 Wash.2d 378—*Dayton v. Department of Labor & Industries of Wash.*, 278 P.2d 319, 45 Wash.2d 797.

69. Wash.—*Wissink v. Department of Labor & Industries*, 245 P.2d 1006, 40 Wash.2d 672—*Ehman v. Department of Labor and Industries*, 206 P.2d 787, 33 Wash.2d 584—*Merchant v. Department of Labor and Industries*, 165 P.2d 661, 24 Wash.2d 410—*Hastings v. Department of Labor and Industries*, 163 P.2d 142, 24 Wash.2d 1—*Peterson v. Department of Labor and Industries*, 157 P.2d 298, 22 Wash.2d 647—*Roellich v. Department of Labor and Industries*, 148 P.2d 957, 20 Wash.2d 674.

Scintilla

Under statute providing that a verdict in workmen's compensation cases has same force as a verdict in actions at law, a verdict in compensation case must stand if there is any substantial evidence, as distinguished from a mere scintilla of evidence, to support it.

Wash.—*Darling v. Department of Labor and Industries*, 109 P.2d 1034, 6 Wash.2d 651.

70. Wash.—*Husa v. Department of Labor and Industries of State of Washington*, 146 P.2d 191, 20 Wash.2d 114.

71. Wash.—*Cline v. Department of Labor and Industries*, 313 P.2d 687, 50 Wash.2d 614.

72. Wash.—*Preston Mill Co. v. Department of Labor and Industries of State*, 268 P.2d 1017, 44 Wash.2d 532—*Gilham v. Department of Labor and Industries*, 128 P.2d 645, 14 Wash.2d 359.

standpoint most favorable to the verdict.⁷³

b. Applications of Rules

The rules as to the scope of further judicial review have been applied on review of particular questions of law and fact.

The general rules, discussed supra subdivision a of this section, as to the scope and extent of review,

on further appeal, of questions of law and fact, findings, and verdict have been applied in reviewing the various questions that arise in compensation cases, such as whether the employment was covered by the statute,⁷⁴ whether the injury was compensable, as due to an accident arising out of, and in the course of, employment,⁷⁵ whether such accident caused the

73. Wash.—*Rambeau v. Department of Labor and Industries*, 163 P.2d 133, 24 Wash.2d 44—*Gilham v. Department of Labor & Industries*, 128 P.2d 645, 14 Wash.2d 359.

74. U.S.—*Travelers Ins. Co. v. Curtis*, C.A.Tex., 223 F.2d 827—*Tyler v. Lowe*, C.C.A.N.Y., 138 F.2d 867. Colo.—*Chaney v. Industrial Commission*, 207 P.2d 816, 120 Colo. 111—*Rhodes v. Indus. Commission*, 61 P.2d 1035, 99 Colo. 271.

Ga.—*Aetna Cas. & Sur. Co. v. Daniel*, 55 S.E.2d 854, 80 Ga.App. 383—*Hardware Mut. Cas. Co. v. Norrington*, 80 S.E.2d 777, 71 Ga.App. 265.

Iowa.—*Yergey v. Montgomery Ward & Co.*, 30 N.W.2d 153, 239 Iowa 258.

Kan.—*Snedden v. Nichols*, 317 P.2d 448, 181 Kan. 1052—*Attebery v. Griffin Const. Co.*, 312 P.2d 598, 181 Kan. 450—*Evans v. Board of Ed. of Hays*, 284 P.2d 1068, 178 Kan. 275—*Keltner v. Swisher*, 211 P.2d 75, 168 Kan. 184—*Dressler v. Dressler*, 208 P.2d 271, 167 Kan. 749—*Davis v. Julian*, 107 P.2d 745, 152 Kan. 749.

Ky.—*Ruth Bros. v. Roberts*, 109 S.W.2d 800, 270 Ky. 339.

Mo.—*Choate v. Dunaway, App.*, 254 S.W.2d 298—*Knapp v. Potashnick Truck Service, App.*, 135 S.W.2d 1084.

Mont.—*Grief v. Industrial Acc. Fund*, 93 P.2d 961, 108 Mont. 519.

N.J.—*Mahoney v. Nitroform Co.*, 120 A.2d 454, 20 N.J. 499—*Plantanida v. Bennett*, 111 A.2d 412, 17 N.J. 291.

Van Ness v. Borough of Haledon, 56 A.2d 888, 136 N.J.Law 623—*Criscone v. Iacono*, 197 A. 48, 119 N.J.Law 452.

N.C.—*Brown v. L. H. Bottoms Truck Lines*, 42 S.E.2d 71, 227 N.C. 299—*Bell v. Williamson Lumber Co.*, 41 S.E.2d 281, 227 N.C. 173—*Beach v. McLean*, 14 S.E.2d 515, 219 N.C. 521.

Ohio.—*Case v. Industrial Commission*, 23 N.E.2d 652, 62 Ohio App. 219.

Or.—*Bowser v. State Indus. Acc. Commission*, 185 P.2d 891, 182 Or. 42.

S.C.—*Miles v. West Virginia Pulp & Paper Co.*, 48 S.E.2d 26, 212 S.C. 424.

Tex.—*Halliburton v. Texas Indem. Ins. Co.*, 213 S.W.2d 677, 147 Tex. 183—*Fidelity & Cas. Co. of N. Y.*

v. McLaughlin, 135 S.W.2d 955, 134 Tex. 613—*Blankenship v. Royal Indem. Co.*, 95 S.W.2d 366, 128 Tex. 26.

Texas Emp. Ins. Ass'n v. Lightfoot, Civ.App., 158 S.W.2d 321, modified on other grounds 162 S.W.2d 929, 139 Tex. 304—*Traders & General Ins. Co. v. Wood*, Civ.App., 148 S.W.2d 975, error dismissed, judgment correct—*Travelers Ins. Co. v. Beasley*, Civ.App., 140 S.W.2d 542, error refused.

Wis.—*Gant v. Industrial Commission*, 56 N.W.2d 525, 263 Wis. 64—*Montreal Min. Co. v. Industrial Commission*, 272 N.W. 828, 225 Wis. 1.

75. U.S.—*C. F. Lytle Co. v. Whipple*, C.C.A.Wash., 156 F.2d 155—*Maryland Cas. Co. v. Lawson*, C.C.A.Fla., 101 F.2d 732.

Colo.—*State Compensation Ins. Fund v. Batis*, 183 P.2d 891, 117 Colo. 1. Conn.—*Winzler v. United Aircraft Corp.*, 42 A.2d 655, 132 Conn. 113.

D.C.—*Williams v. American Emp. Ins. Co.*, 107 F.2d 953, 71 App.D.C. 153, certiorari denied *American Emp. Ins. Co. v. Williams*, 60 S.Ct. 722, 309 U.S. 682, 84 L.Ed. 1025.

Fla.—*Cone Bros. Contracting Co. v. Allbrook*, 16 So.2d 61, 153 Fla. 829—*Cone Bros. Contracting Co. v. Massey*, 198 So. 802, 145 Fla. 56.

Ga.—*Thornton v. Hartford Acc. & Indem. Co.*, 32 S.E.2d 816, 198 Ga. 786, opinion conforming to 32 S.E.2d 864, 72 Ga.App. 48.

Georgia Marble Co. v. McBee, 83 S.E.2d 253, 90 Ga.App. 406—*Massachusetts Bonding & Ins. Co. v. Turk*, 66 S.E.2d 364, 84 Ga.App. 547—*Georgia Ins. Service v. Lord*, 62 S.E.2d 402, 83 Ga.App. 28.

Iowa.—*Page v. City of Osceola*, 5 N.W.2d 593, 232 Iowa 1126.

Kan.—*Brandon v. Lozier-Broderick & Gordon*, 163 P.2d 384, 160 Kan. 506—*Miller v. K. S. Flint Rig Co.*, 122 P.2d 734, 155 Kan. 66—*Hale v. Derry*, 61 P.2d 895, 144 Kan. 555.

Ky.—*Stout v. Elkhorn Coal Co.*, 160 S.W.2d 31, 289 Ky. 736.

Mo.—*State ex rel. Kroger Grocery & Baking Co. v. Hostetter*, 98 S.W.2d 683, 339 Mo. 630.

Palmer v. Knapp-Monarch Co., App., 247 S.W.2d 341—*Duff v. St. Louis Min. & Mill. Corp.*, App., 245 S.W.2d 472; reversed on other grounds 255 S.W.2d 792, 363 Mo. 944—*Coonce v. Farmers Ins. Exchange, App.*, 228 S.W.2d 825—

Thurber v. Allied Motors Co., App., 150 S.W.2d 1109.

N.J.—*Lester v. Elliott Bros. Trucking Co.*, 114 A.2d 8, 18 N.J. 434—*Grant v. Grant Casket Co.*, 65 A.2d 520, 2 N.J. 15.

Jacobson v. Kaminsky, 74 A.2d 320, 8 N.J.Super. 279.

Link v. Eastern Aircraft, Linden Division, General Motors Corp., 57 A.2d 8, 136 N.J.Law 540—*Strauss v. Wright Aeronautical Corp.*, 52 A.2d 412, 135 N.J.Law 871, affirmed 57 A.2d 56, 136 N.J.Law 483—*Giles v. W. E. Beverage Corp.*, 43 A.2d 286, 133 N.J.Law 137, affirmed 46 A.2d 728, 134 N.J.Law 234—*Tracey v. South River Lumber Co.*, 34 A.2d 2, 130 N.J.Law 529—*Pitchenick v. New York Folding Box Co.*, 30 A.2d 40, 129 N.J.Law 399—*Jones v. Court of Common Pleas of Essex County*, 28 A.2d 98, 129 N.J.Law 58—*Pierce v. Jersey Cent. Power & Light Co.*, 21 A.2d 311, 127 N.J.Law 71—*Fountain v. Booth & Flinn*, 5 A.2d 741, 122 N.J.Law 427.

N.M.—*Stevenson v. Lee Moor Contracting Co.*, 115 P.2d 342, 45 N.M. 354.

N.C.—*McKenzie v. City of Gastonia*, 22 S.E.2d 712, 222 N.C. 328—*Foy v. Maudlin Motor Co.*, 14 S.E.2d 521, 219 N.C. 864—*Lassiter v. Carolina Tel. & Tel. Co.*, 1 S.E.2d 542, 215 N.C. 227—*Davis v. Mecklenburg County*, 199 S.E. 604, 214 N.C. 469—*Brooks v. Carolina Rim & Wheel Co.*, 196 S.E. 835, 213 N.C. 518—*Lockey v. Cohen, Goldman & Co.*, 196 S.E. 342, 213 N.C. 356.

Ohio.—*Cavanaugh v. Industrial Commission*, 26 N.E.2d 215, 63 Ohio App. 256.

Pa.—*Ricketts v. Bell Tel. Co. of Pa.*, 115 A.2d 818, 178 Pa.Super. 588—*Hall v. Carnegie Institute of Technology*, 87 A.2d 87, 170 Pa.Super. 459—*Wolsko v. American Bridge Co.*, 44 A.2d 873, 158 Pa.Super. 339—*Conley v. Pittsburgh Coal Co.*, 43 A.2d 605, 157 Pa.Super. 567—*Hohman v. George H. Soffel Co.*, 43 A.2d 361, 157 Pa.Super. 274, affirmed 46 A.2d 475, 354 Pa. 31—*Carl v. American Window Glass Co.*, 38 A.2d 98, 152 Pa.Super. 475—*Thomas v. De Commene*, 3 A.2d 41, 133 Pa.Super. 489—*Miller v. Keystone Appliances*, 2 A.2d 598, 135 Pa.Super. 354—*Baumann v. Howard J. Ehlman Co.*, 190 A. 343, 126 Pa.Super. 168—*Petrulo v. M.*

death or disability,⁷⁶ the extent and duration of the | amount and period of compensation,⁷⁹ questions in-
injury or disability,⁷⁷ the medical testimony,⁷⁸ the

- O'Herron Co., 186 A. 397, 122 Pa. Super. 163.
- S.C.—Branch v. Pacific Mills, 32 S.E. 2d 1, 205 S.C. 353.
- Tex.—Lewis v. American Sur. Co., 184 S.W.2d 137, 143 Tex. 286—Carter v. Travelers Ins. Co., 120 S.W.2d 581, 132 Tex. 288.
- Texas Emp. Ins. Ass'n v. Hunter, Civ.App., 255 S.W.2d 944, reversed on other grounds 260 S.W.2d 884, 152 Tex. 438—Highway Ins. Underwriters v. Roberts, Civ.App., 224 S.W.2d 903, error refused no reversible error—Yates v. Pacific Indem. Co., Civ.App., 193 S.W.2d 266, error refused no reversible error—Texas Emp. Ins. Ass'n v. Crosby, Civ. App., 123 S.W.2d 743.
76. Kan.—Richards v. J-M Service Corp., 183 P.2d 939, 164 Kan. 316—Walker v. Arrow Well Servicing Co., 186 P.2d 104, 163 Kan. 776.
- Ky.—Humble v. Liggett & Myers Tobacco Co., 239 S.W.2d 469—Fordson Coal Co. v. Palko, 138 S.W.2d 456, 282 Ky. 397.
- Md.—Stancil v. H. B. Davis Co., 117 A.2d 577, 208 Md. 191.
- Mo.—Fitzgerald v. Fisher Body St. Louis Co., Kansas City Division, 130 S.W.2d 975, 234 Mo.App. 269, opinion quashed in part State ex rel. Fisher Body St. Louis Co. v. Shain, 137 S.W.2d 546, 345 Mo. 962.
- Mont.—Nigretto v. Industrial Acc. Fund, 106 P.2d 178, 111 Mont. 83.
- N.J.—Aromando v. Rubin Bros. Drug Sales Co., 136 A.2d 11, 47 N.J. Super. 286—Fox v. City of Plainfield, 77 A. 2d 281, 10 N.J. Super. 464.
- Ciocca v. National Sugar Refining Co. of N. J., 12 A.2d 130, 124 N.J. Law 329.
- Matthews Const. Co. v. Ranallo, 181 A. 901, 13 N.J. Misc. 878, affirmed 187 A. 372, 117 N.J. Law 148—Beach Const. Co. v. Sullivan, 179 A. 847, 13 N.J. Misc. 582.
- Ohio.—Bowling v. Industrial Commission, 60 N.E.2d 479, 145 Ohio St. 23.
- Scurry v. Industrial Commission of Ohio, App., 89 N.E.2d 688—Iles v. Industrial Commission, App., 46 N.E.2d 815—Industrial Commission of Ohio v. Frazier, 7 N.E.2d 815, 54 Ohio App. 401.
- Pa.—Bonzani v. Hillman Coal & Coke Co., 28 A.2d 329, 150 Pa. Super. 356—Orlando v. Pennsylvania R. Co., 3 A.2d 220, 133 Pa. Super. 588.
- S.C.—Windham v. City of Florence, 70 S.E.2d 553, 221 S.C. 350.
- Tex.—Liberty Mut. Ins. Co. v. Murphy, Civ.App., 205 S.W.2d 398—Texas Emp. Ins. Ass'n v. Wilkerson, Civ.App., 199 S.W.2d 288, error refused no reversible error—Texas Emp. Ins. Ass'n v. Watkins, Civ. App., 185 S.W.2d 296.
77. Kan.—Miller v. Massman Const. Co., 219 P.2d 429, 169 Kan. 499—Alexander v. Chrysler Motor Parts Corp., 207 P.2d 1179, 167 Kan. 711—Conner v. M & M Packing Co., 199 P.2d 458, 166 Kan. 98—Hardin v. Beck Min. Co., 199 P.2d 186, 166 Kan. 95—Cowan v. Geo. W. Kerford Quarry Co., 72 P.2d 999, 146 Kan. 682.
- Nev.—Crosby v. Nevada Indus. Commission, 308 P.2d 60.
- N.J.—Buerkle v. United Parcel Service, 98 A.2d 327, 26 N.J. Super. 404—Cancellio v. Federal Shipbuilding & Dry Dock Co., 61 A.2d 46, 137 N.J. Law 646.
- Koval v. Natural Products Refining Co., 55 A.2d 885, 25 N.J. Misc. 489.
- Pa.—Jones v. Philadelphia & Reading Coal & Iron Co., 36 A.2d 172, 154 Pa. Super. 513—Artac v. Union Collieries Co., 27 A.2d 782, 149 Pa. Super. 449—Hughes v. H. Kellogg & Sons, 13 A.2d 98, 139 Pa. Super. 580—Marmon v. Union Collieries Co., 7 A.2d 156, 135 Pa. Super. 582—Petrulo v. M. O'Herron Co., 186 A. 397, 122 Pa. Super. 163.
- R.I.—Burns v. Rhode Island Tool Co., 85 A.2d 925, 79 R.I. 169—Wanskuck Co. v. Puleo, 82 A.2d 872, 78 R.I. 447.
- S.C.—Parrott v. Barfield Used Parts, 34 S.E.2d 802, 206 S.C. 381—Murdaugh v. Robert Lee Const. Co., 194 S.E. 447, 185 S.C. 497.
- Tex.—Travelers Ins. Co. v. Carter, Civ.App., 298 S.W.2d 231, error refused no reversible error—Texas Emp. Ins. Ass'n v. Moran, Civ.App., 261 S.W.2d 855, error dismissed—Texas Emp. Ins. Ass'n v. Grantom, Civ.App., 252 S.W.2d 1001, refused no reversible error—Traders & General Ins. Co. v. Anderson, Civ. App., 246 S.W.2d 290, error refused—Texas Emp. Ins. Ass'n v. Scott, Civ.App., 233 S.W.2d 171, error refused no reversible error—Traders & General Ins. Co. v. Heath, Civ. App., 197 S.W.2d 130, error refused no reversible error—Fitzgerald v. Southern Surety Co. of New York, Civ.App., 75 S.W.2d 298, error dismissed.
78. Neb.—Bolen v. Buller, 9 N.W.2d 204, 143 Neb. 237.
- N.J.—Young v. Sheffield Farms Co., 56 A.2d 868, 136 N.J. Law 489, affirmed 61 A.2d 46, 137 N.J. Law 605.
- Ohio.—Peer v. Industrial Commission of Ohio, 15 N.E.2d 772, 134 Ohio St. 61.
- Pa.—Wheeler v. National Nayle Grip Co., 43 A.2d 391, 142 Pa. Super. 596—Mullin v. Ebert, 40 A.2d 872, 156 Pa. Super. 481—Shashua v. Vesta Coal Co., 29 A.2d 441, 146 Pa. Super. 161—Horwath v. Edward G. Budd Mfg. Co., 191 A. 675, 127 Pa. Super. 154—Puzio v. Susquehanna Collieries Co., 191 A. 222, 126 Pa. Super. 488.
- R.I.—Pepe v. American Silk Spinning Co., 38 A.2d 474, 70 R.I. 309.
- Tex.—Gulf Cas. Co. v. Hughes, Civ. App., 230 S.W.2d 293—Service Mut. Ins. Co. of Tex. v. Blain, Civ.App., 135 S.W.2d 745, error dismissed, judgment correct.
- Wash.—Halder v. Department of Labor and Industries of State, 263 P. 2d 1020, 44 Wash.2d 537.
79. U.S.—Southern S. S. Co. v. Norton, C.C.A. Pa., 101 F.2d 825.
- D.C.—Liberty Mut. Ins. Co. v. Britton, 243 F.2d 659, 100 U.S. App. D.C. 236.
- Fla.—Intercontinent Aircraft Corp. v. Pickton, 16 So.2d 292, 154 Fla. 8.
- Kan.—Gray v. Hercules Powder Co., 165 P.2d 447, 160 Kan. 767.
- Neb.—Lange v. Department of Roads and Irrigation, 3 N.W.2d 194, 141 Neb. 167.
- N.J.—Toohey v. Gorman, 12 A.2d 873, 125 N.J. Law 41.
- Pa.—Jones v. Philadelphia & Reading Coal & Iron Co., 36 A.2d 172, 154 Pa. Super. 513—Madajewski v. Susquehanna Collieries Co., 4 A.2d 809, 135 Pa. Super. 181.
- S.C.—Parrott v. Barfield Used Parts, 34 S.E.2d 802, 206 S.C. 381—Price v. Horton Motor Lines, 23 S.E.2d 744, 201 S.C. 484—Phillips v. Dixie Stores, 195 S.E. 646, 186 S.C. 374.
- S.D.—Millage v. Canton Twp., 38 N.W.2d 755, 73 S.D. 26—Hansen v. Dakota Transp. Co., 273 N.W. 261, 65 S.D. 277.
- Tex.—Southern Underwriters v. Samanie, 155 S.W.2d 359, 137 Tex. 531—Maryland Cas. Co. v. Moore, 102 S.W.2d 1118, 129 Tex. 174.
- Texas Emp. Ins. Ass'n v. Jones, Civ.App., 281 S.W.2d 98—American Emp. Ins. Co. v. Climer, Civ.App., 220 S.W.2d 697—Consolidated Underwriters v. Foxworth, Civ.App., 196 S.W.2d 87—Texas Emp. Ins. Ass'n v. Hale, Civ.App., 138 S.W.2d 899, affirmed 191 S.W.2d 472, 144 Tex. 432—Traders & General Ins. Co. v. Diebel, Civ.App., 188 S.W.2d 411, refused for want of merit—Traders & General Ins. Co. v. Wilson, Civ.App., 147 S.W.2d 866—Southern Underwriters v. Grimes, Civ.App., 146 S.W.2d 1058, error dismissed, judgment correct—Lott v. American Sur. Co. of N. Y., Civ. App., 140 S.W.2d 928—Texas Emp. Ins. Ass'n v. Hevelow, Civ.App., 136 S.W.2d 981, error dismissed, judgment correct—Traders & General Ins. Co. v. Daniel, Civ.App., 131 S.W.2d 276, error dismissed, judgment correct—Texas Emp. Ins. Ass'n v. Crosby, Civ.App., 123 S.W.2d 743.

volving marital status and dependency;⁸⁰ the propriety of the proceedings to secure compensation⁸¹ and questions involving the claim and notice of injury.⁸²

§ 808. — Harmless or Prejudicial Errors

On further review, the action of the lower court will

not be disturbed for error not prejudicial to the complaining party.

In accordance with the rules governing appeals generally, on further appeal of a compensation award, the judgment will be reversed where error prejudicial to appellant has been committed;⁸³ but errors which did the complaining party no injury

2d 748—Traders & General Ins. Co. v. O'Quinn, Civ.App., 111 S.W.2d 859, error refused—Southern Underwriters v. Stubblefield, Civ.App., 108 S.W.2d 557—Maryland Cas. Co. v. Pedraza, Civ.App., 107 S.W.2d 624, error dismissed by agreement. Wash.—Ames v. Department of Labor and Industries, 74 P.2d 1027, 193 Wash. 215.
Wyo.—Grantham v. Union Pac. Coal Co., 289 P.2d 220, 69 Wyo. 199.

80. U.S.—Turnbull v. Cyr, C.A.Cal., 188 F.2d 455.
Del.—Koeppel v. El. I. Du Pont De Nemours & Co., 194 A. 847, 3 W.W. Harr. 542.

Kan.—Dean v. Hodges Bros., 224 P. 2d 1028, 170 Kan. 333—Ica May Lines v. Hudson Oil Co., 68 P.2d 1096, 146 Kan. 143—Junkin v. Acme Foundry & Mach. Co., 65 P.2d 263, 145 Kan. 284.

Md.—Bethlehem-Fairfield Shipyard v. Rosenthal, 45 A.2d 79, 185 Md. 416.
Mo.—Scott v. Wheelock Bros., 209 S. W.2d 149, 357 Mo. 480.

N.J.—Alexander v. Cunningham Roofing Co., 15 A.2d 612, 125 N.J. Law 277—Bower v. Metal Compounds Corp., 3 A.2d 164, 121 N.J. Law 421, affirmed Bower v. Metal Compound Corp., 5 A.2d 699, 122 N.J. Law 380.

Ohio.—Miller v. Industrial Commission, 110 N.E.2d 481, 158 Ohio St. 551.

Pa.—Buradus v. General Cement Products Co., 52 A.2d 205, 356 Pa. 349.

Yanofchick v. State Workmen's Ins. Fund, 100 A.2d 387, 174 Pa. Super. 182—Rowbottom v. Elchleay Engineering Corp., 20 A.2d 894, 145 Pa. Super. 177—Baker v. Mitchell, Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co., Intervener, 17 A.2d 738, 143 Pa. Super. 50—Kelly v. Hudson Coal Co., 179 A. 753, 119 Pa. Super. 405.

S.D.—Peterson v. John Morrill & Co., 270 N.W. 651, 65 S.D. 76.

Tex.—Traders & General Ins. Co. v. Stanaland, Civ.App., 189 S.W.2d 55, affirmed 195 S.W.2d 118, 145 Tex. 105.

81. Ohio.—Industrial Commission of Ohio v. Frazier, 7 N.E.2d 815, 54 Ohio App. 401.

Pa.—Cosenza v. General Baking Co., 24 A.2d 735, 147 Pa. Super. 591.

Tex.—Uselton v. Southern Underwriters, Civ.App., 131 S.W.2d 1040, error dismissed, judgment correct.

Misconduct of jury

Tex.—Maryland Cas. Co. v. Hears, 190 S.W.2d 62, 144 Tex. 317.

Travelers Ins. Co. v. Carter, Civ. App., 298 S.W.2d 231, error refused no reversible error—Texas Emp. Ins. Ass'n v. Ewing, Civ.App., 285 S.W.2d 880, error refused no reversible error—Uselton v. Southern Underwriters, Civ.App., 131 S. W.2d 1040, error dismissed, judgment correct.

Instructions to jury

Tex.—Travelers Ins. Co. v. Lowe, Civ. App., 304 S.W.2d 694, error refused no reversible error.

82. U.S.—Anchor Cas. Co. v. Wolff, C.A.Tex., 181 F.2d 741—Pacific Emp. Ins. Co. v. Pillsbury, C.C.A. Cal., 88 F.2d 443.

Ala.—Sloss-Sheffield Steel & Iron Co. v. Watts, 184 So. 201, 236 Ala. 636.
Fla.—Borden's Dairy v. Zanders, 42 So.2d 539.

Ill.—International Harvester Co. v. Industrial Commission, 103 N.E.2d 109, 410 Ill. 543—United Air Lines v. Industrial Commission, 4 N.E.2d 487, 364 Ill. 346—Gray Knox Marble Co. v. Industrial Commission, 2 N.E.2d 60, 363 Ill. 210.

Kan.—Fitzwater v. Boeing Airplane Co., 309 P.2d 681, 181 Kan. 158—Moore v. Dolase Bros. Co., 236 P.2d 55, 171 Kan. 575—Smith v. Sonken-Galamba Corp., 88 P.2d 1114, 149 Kan. 693.

Md.—Champness v. Glenn L. Martin Co., 66 A.2d 396, 193 Md. 188.

N.D.—Pearce v. North Dakota Workmen's Compensation Bureau, 274 N. W. 587, 67 N.D. 512.

Ohio.—Industrial Commission of Ohio v. Frazier, 7 N.E.2d 815, 54 Ohio App. 401.

Okl.—Cupit v. Dancu Chemical Co., 316 P.2d 593.

Or.—Woodridge v. Arens, 98 P.2d 1, 164 Or. 410, reheard 102 P.2d 717, 164 Or. 410.

Tex.—Texas State Highway Dept. v. Fillmon, 242 S.W.2d 172, 150 Tex. 460.

Dodson v. Travelers Ins. Co., Civ. App., 278 S.W.2d 242, refused no reversible error—Texas Emp. Ins. Ass'n v. Fowler, Civ.App., 140 S.W. 2d 545, error refused—Hayes v. Commercial Standard Ins. Co., Civ. App., 140 S.W.2d 250, error refused Commercial Standard Ins. Co. v. Hayes, 142 S.W.2d 897, 135 Tex. 288.

83. U.S.—Williams v. Pacific Emp. Ins. Co., C.A.Tex., 194 F.2d 490—Standard Acc. Ins. Co. v. Terrell, C.A.Tex., 180 F.2d 1.

Ga.—American Mut. Liability Ins. Co. v. Gore, 99 S.E.2d 238, 95 Ga. App. 885.

Ky.—Black Motor Co. v. Spicer, 160 S.W.2d 336, 290 Ky. 111.

Md.—Mayor and City Council of Baltimore v. Perticone, 188 A. 797, 171 Md. 268.

N.J.—Gaeta v. Scott Paper Co., 81 A. 2d 808, 14 N.J. Super. 261.

N.M.—Gerrard v. Harvey & Newman Drilling Co., 282 P.2d 1105, 59 N.M. 262—Martin v. La Motte, 237 P.2d 923, 55 N.M. 579.

Ohio.—Perry v. Industrial Commission, 117 N.E.2d 34, 160 Ohio St. 520—Hallworth v. Republic Steel Corp., 91 N.E.2d 690, 153 Ohio St. 349.

Ball v. Youngstown Sheet & Tube Co., App., 142 N.E.2d 874—Carr v. Marion Masonic Temple Co., 64 N. E.2d 138, 76 Ohio App. 287—Kennedy v. Industrial Commission, 42 N. E.2d 720, 69 Ohio App. 13—Booth v. Industrial Commission, 22 N.E. 2d 502, 61 Ohio App. 173—Hite v. Industrial Commission of Ohio, 18 N.E.2d 518, 59 Ohio App. 438—Gillen v. Industrial Commission of Ohio, 17 N.E.2d 663, 59 Ohio App. 241—Industrial Commission v. Austin, 1 N.E.2d 649, 51 Ohio App. 469.

Pa.—Leftwich v. Colonial Aluminum Smelting Corp., 136 A.2d 182, 184 Pa. Super. 622—Hughes v. McCartney, 23 A.2d 345, 147 Pa. Super. 44.

S.D.—Hansen v. Dakota Transp. Co., 273 N.W. 261, 65 S.D. 277.

Tex.—Texas General Indem. Co. v. Scott, 253 S.W.2d 651, 152 Tex. 1—Postal Mut. Indemnity Co. v. Ellis, 169 S.W.2d 482, 140 Tex. 570—Commercial Standard Ins. Co. v. Robinson, 151 S.W.2d 795, 137 Tex. 184—Texas Employers' Ins. Ass'n v. Roberts, 139 S.W.2d 80, 135 Tex. 123—Carter v. Travelers Ins. Co., 120 S.W.2d 581, 132 Tex. 288.

Travelers Ins. Co. v. Carter, Civ. App., 298 S.W.2d 231, error refused no reversible error—Thompson v. Employees Lloyds, Civ.App., 282 S.W.2d 643, error refused no reversible error—Texas Emp. Ins. Ass'n v. Curry, Civ.App., 290 S.W. 2d 767, error refused no reversible error—Texas Emp. Ins. Ass'n v. Butler, Civ.App., 287 S.W.2d 198, error refused no reversible error

will not justify disturbing the decision below,⁸⁴ as | where the error is cured by the instructions of the

—Traders & General Ins. Co. v. Whitener, Civ.App., 279 S.W.2d 152, reversed on other grounds, Sup., 289 S.W.2d 233—Insurance Co. of Tex. v. Sides, Civ.App., 279 S.W.2d 114, error refused no reversible error—Traders & General Ins. Co. v. Rockey, Civ.App., 278 S.W.2d 490, refused no reversible error—Texas Emp. Ins. Ass'n v. Shiftlet, Civ. App., 276 S.W.2d 942, refused no reversible error—U. S. Fidelity & Guaranty Co. v. Lewis, Civ.App., 266 S.W.2d 194, refused no reversible error—Thomas v. Employers Reinsurance Corp., Civ.App., 252 S.W.2d 777—Texas Emp. Ins. Ass'n v. Thames, Civ.App., 236 S.W.2d 203, error refused—Trinity Universal Ins. Co. v. Chafin, Civ.App., 229 S.W.2d 942, error refused no reversible error—Texas Emp. Ins. Ass'n v. Harkey, Civ.App., 208 S.W.2d 915, affirmed 208 S.W.2d 919, 146 Tex. 504—Travelers Ins. Co. v. McCown, Civ.App., 206 S.W.2d 668, error dismissed—Associated Emp. Lloyds v. Landin, Civ.App., 205 S.W.2d 662, error refused no reversible error—Texas Emp. Ins. Ass'n v. Wade, Civ.App., 197 S.W.2d 203, error refused no reversible error—Travelers Ins. Co. v. Epps, Civ. App., 191 S.W.2d 100, refused no reversible error—Texas Employers Ins. Ass'n v. Hale, Civ.App., 167 S.W.2d 575, error refused—Federal Underwriters Exchange v. Hinkle, Civ.App., 167 S.W.2d 307, error refused—Aetna Cas. & Sur. Co. v. Block, Civ.App., 161 S.W.2d 872—Consolidated Underwriters v. Dunn, Civ.App., 155 S.W.2d 431, error dismissed by agreement—Texas Indemnity Ins. Co. v. Phillips, Civ. App., 153 S.W.2d 503, error dismissed—United Employers Casualty Co. v. Oden, Civ.App., 150 S.W.2d 114, error dismissed, judgment correct—United Employers Casualty Co. v. Smith, Civ.App., 145 S.W.2d 249, error refused—Maryland Casualty Co. v. Foote, Civ.App., 139 S.W.2d 602, error refused—Federal Underwriters Exchange v. Simpson, Civ.App., 137 S.W.2d 132—Texas Employers Ins. Ass'n v. Thrash, Civ.App., 136 S.W.2d 905, error dismissed, judgment correct—Commercial Standard Ins. Co. v. Davis, Civ.App., 135 S.W.2d 794, error dismissed, 137 S.W.2d 1, 134 Tex. 487—Texas Employers Ins. Ass'n v. Pierson, Civ.App., 135 S.W.2d 550—Federal Underwriters Exchange v. Bullard, Civ.App., 128 S.W.2d 126—Texas Reciprocal Ins. Ass'n v. Stadler, Civ.App., 126 S.W.2d 706, error dismissed, judgment correct—Texas Fire & Casualty Underwriters v. Watson, Civ.App., 126 S.W.2d 496, error refused—Traders & General Ins. Co. v. Kin-

caid, Civ.App., 116 S.W.2d 863—Republic Underwriters v. Greenhaw, Civ.App., 114 S.W.2d 362—Traders & General Ins. Co. v. Crouch, Civ.App., 113 S.W.2d 650, error dismissed—Traders & General Ins. Co. v. Offield, Civ.App., 105 S.W.2d 359, error dismissed. Wash.—Cunningham v. Department of Labor & Industries, 235 P.2d 291, 39 Wash.2d 238—Dieso v. Department of Labor and Industries, 216 P.2d 752, 36 Wash.2d 53. Wis.—Madison Airport Co. v. Industrial Commission, 285 N.W. 757, 231 Wis. 256. **84.** Cal.—Ocean Accident & Guarantee Corp. v. Industrial Accident Commission of California, 101 P.2d 704, 38 C.A.2d 601. Ga.—City of Hapeville v. Preston, 16 S.E.2d 774, 65 Ga.App. 835. Idaho.—Dillard v. Jones, 72 P.2d 705, 58 Idaho 273—In re Mackenzie, 46 P.2d 73, 55 Idaho 663. Kan.—Richards v. J-M Service Corp., 188 P.2d 939, 164 Kan. 316. Ky.—Stearns Coal & Lumber Co. v. Roberts, 168 S.W.2d 573, 293 Ky. 75—Hardy-Burlingham Mining Co. v. Hurt, 69 S.W.2d 1030, 253 Ky. 534. Md.—Moore v. Clarke, 137 A. 887, 171 Md. 89, 107 A.L.R. 924. Mass.—Dillon's Case, 85 N.E.2d 69, 324 Mass. 102. N.J.—Calicchio v. Jersey City Stock Yards Co., 14 A.2d 465, 125 N.J.Law 112—Comparr v. James Reading, Inc., 3 A.2d 802, 121 N.J.Law 591. N.C.—Johnson v. Foreman-Blades Lumber Co., 4 S.E.2d 334, 216 N.C. 123—Holmes v. M. G. Brown Co., 178 S.E. 569, 269 N.C. 785. Ohio.—Newland v. Industrial Commission of Ohio, 19 N.E.2d 780, 60 Ohio App. 104. Pa.—Tofalori v. Donatelli Granite Co., 43 A.2d 534, 157 Pa.Super. 311—Hughes v. McCartney, 23 A.2d 345, 147 Pa.Super. 44—Flock v. Pittsburgh Terminal Coal Corp., 13 A.2d 881, 140 Pa.Super. 232. S.C.—McPherson v. American Mut. Liability Ins. Co., 37 S.E.2d 136, 208 S.C. 76. S.D.—Humphreys v. Frank Schuknecht, Jr., Const. Co., 279 N.W. 246, 66 S.D. 112. Tex.—Whitener v. Traders & General Ins. Co., 289 S.W.2d 233—Texas Emp. Ins. Ass'n v. Poe, 253 S.W.2d 645, 152 Tex. 18—Hood v. Texas Indem. Ins. Co., 209 S.W.2d 345, 146 Tex. 522—Stanaland v. Traders & General Ins. Co., 195 S.W.2d 118, 145 Tex. 105—Fidelity & Casualty Co. of New York v. McLaughlin, 135 S.W.2d 955, 134 Tex. 613. Texas General Indem. Co. v. Mannhalter, Civ.App., 290 S.W.2d 360—Texas Emp. Ins. Ass'n v. Hadley, Civ.App., 289 S.W.2d 809—Texas Emp. Ins. Ass'n v. McMullin,

Civ.App., 279 S.W.2d 699, refused no reversible error—Texas Emp. Ins. Ass'n v. Sevier, Civ.App., 279 S.W.2d 473, refused no reversible error—Texas Emp. Ins. Ass'n v. Baker, Civ.App., 278 S.W.2d 419, refused no reversible error—Texas Emp. Ins. Ass'n v. Elder, Civ.App., 274 S.W.2d 144, affirmed, Sup., 282 S.W.2d 371—Texas Emp. Ins. Ass'n v. Hughey, Civ.App., 266 S.W.2d 456, refused no reversible error—Traders & General Ins. Co. v. Gray, Civ.App., 257 S.W.2d 327—Texas Emp. Ins. Ass'n v. Hale, Civ.App., 242 S.W.2d 796—Houston Fire & Cas. Ins. Co. v. Ford, Civ.App., 241 S.W.2d 158, refused no reversible error—Texas Emp. Ins. Ass'n v. Scott, Civ.App., 233 S.W.2d 171, error refused no reversible error—Highway Ins. Underwriters v. Dempsey, Civ.App., 232 S.W.2d 117—Texas Emp. Ins. Ass'n v. Patterson, Civ.App., 231 S.W.2d 898, error refused—Looney v. Traders & General Ins. Co., Civ.App., 231 S.W.2d 785, error refused no reversible error—Texas Emp. Ins. Ass'n v. Tanner, Civ.App., 213 S.W.2d 277, refused no reversible error—Texas Emp. Ins. Ass'n v. Hodnett, Civ. App., 216 S.W.2d 301, refused no reversible error—Maryland Cas. Co. v. Gideon, Civ.App., 213 S.W.2d 848—Texas Emp. Ins. Ass'n v. Reid, Civ.App., 209 S.W.2d 1016—Associated Employers Lloyds v. Wiggins, Civ.App., 208 S.W.2d 705, refused no reversible error—Texas Emp. Ins. Ass'n v. Applegate, Civ. App., 205 S.W.2d 412, error refused no reversible error—Traders & General Ins. Co. v. Stanaland, Civ. App., 202 S.W.2d 702, error refused no reversible error—Lewis v. Texas Emp. Ins. Ass'n, Civ.App., 197 S.W.2d 137, error refused no reversible error—Consolidated Underwriters v. Foxworth, Civ.App., 196 S.W.2d 87, error granted—Texas Emp. Ins. Ass'n v. Hale, Civ. App., 188 S.W.2d 899, affirmed 191 S.W.2d 472, 144 Tex. 432—Superior Lloyds of America v. Foxworth, Civ.App., 178 S.W.2d 724, error refused—Postal Mut. Indemnity Co. v. James, Civ.App., 154 S.W.2d 148, error refused—United Employers Casualty Co. v. Summerour, Civ. App., 151 S.W.2d 247, error dismissed, judgment correct—Southern Underwriters v. Lewis, Civ. App., 150 S.W.2d 162—United Employers Cas. Co. v. Bezek, Civ. App., 146 S.W.2d 473, error dismissed—Service Mut. Ins. Co. of Texas v. White, Civ.App., 138 S.W.2d 273, error refused—Southern Underwriters v. Erwin, Civ.App., 134 S.W.2d 720, error granted—Texas Fire & Casualty Underwriters v. Blair, Civ.App., 130 S.W.2d

court⁸⁵ or by the verdict, findings, or judgment.⁸⁶

One cannot complain of a ruling on appeal which is favorable to him,⁸⁷ or does not affect him,⁸⁸ as where the error, if any, in the award is favorable to the complaining party.⁸⁹

The rule that the judgment below will not be reversed for harmless errors has been applied where the alleged error was as to a ruling on the pleadings,⁹⁰ the burden of proof,⁹¹ the admission or exclusion of evidence,⁹² the submission or failure

409, error dismissed, judgment correct—Texas Indemnity Ins. Co. v. Briggs, Civ.App., 128 S.W.2d 861, error dismissed, judgment correct—Traders & General Ins. Co. v. Huntsman, Civ.App., 125 S.W.2d 431, error dismissed, judgment correct—Texas Employers' Ins. Ass'n v. Crosby, Civ.App., 123 S.W.2d 743—Southern Underwriters v. Jordan, Civ.App., 122 S.W.2d 260—Traders' & General Ins. Co. v. Nunley, Civ.App., 80 S.W.2d 383, error refused—Employers' Liability Assur. Corporation v. Sims, Civ.App., 67 S.W.2d 445, error refused. Wash.—Purdy & Whitfield v. Department of Labor and Industries, 120 P.2d 558, 12 Wash.2d 131, 71 C.J. p 1393 note 77.

85. Tex.—Texas Emp. Ins. Ass'n v. Curry, Civ.App., 290 S.W.2d 787, error refused no reversible error—Texas Emp. Ins. Ass'n v. Sevier, Civ.App., 279 S.W.2d 473, refused no reversible error—Texas Emp. Ins. Ass'n v. Baker, Civ.App., 278 S.W.2d 419, refused no reversible error—St. Paul Mercury Indem. Co. v. Tarver, Civ.App., 272 S.W.2d 795, error refused no reversible error—Texas Emp. Ins. Ass'n v. Crain, Civ.App., 259 S.W.2d 905, refused no reversible error—Texas Emp. Ins. Ass'n v. Hale, Civ.App., 242 S.W.2d 796—Houston Fire & Cas. Ins. Co. v. Ford, Civ.App., 241 S.W.2d 158, refused no reversible error—Texas Emp. Ins. Ass'n v. Hodnett, Civ.App., 216 S.W.2d 301, refused no reversible error.

86. Tex.—Phillips v. Texas Emp. Ins. Ass'n, Civ.App., 306 S.W.2d 188—Texas Emp. Ins. Ass'n v. Roberts, Civ.App., 281 S.W.2d 104—Texas Emp. Ins. Ass'n v. Rigby, Civ.App., 278 S.W.2d 681—Southern Underwriters v. Yocham, Civ.App., 140 S.W.2d 841, error dismissed, judgment correct—Southern Underwriters v. Cooper, Civ.App., 138 S.W.2d 563, error dismissed, judgment correct. Vt.—Sivret v. Knight, 109 A.2d 495, 118 Vt. 343.

87. Mo.—Harris v. Harris, App., 150 S.W.2d 760. N.J.—Mutual Chemical Co. of America v. Minniti, 3 A.2d 131, 121 N.J.Law 449, affirmed 3 A.2d 296, 123 N.J.Law 262. Ohio.—Ryan v. Industrial Commission, App., 36 N.E.2d 486. Pa.—Zelazny v. Seneca Coal Mining Co., 119 A.2d 487, 275 Pa. 397,

Dosen v. Union Collieries Co., 29 A.2d 354, 150 Pa.Super. 619.

88. Tex.—General Acc. Fire & Life Ins. Corporation v. Bundren, Com.App., 283 S.W. 491.

Consolidated Underwriters v. Saxon, Civ.App., 250 S.W. 447, reversed on other grounds, Com.App., 265 S.W. 143.

89. Ill.—Wells Bros. Co. v. Industrial Commission, 121 N.E. 256, 285 Ill. 647.

71 C.J. p 1370 note 14.

90. Tex.—Texas Emp. Ins. Ass'n v. Patterson, Civ.App., 231 S.W.2d 898, error refused—Bedner v. Federal Underwriters Exchange, Civ.App., 133 S.W.2d 214, error dismissed, judgment correct—Federal Underwriters Exchange v. Eber, Civ.App., 126 S.W.2d 769, error dismissed, judgment correct.

71 C.J. p 1394 note 78.

91. Ky.—Garmead Coal Co. v. Mabe, 222 S.W.2d 829, 310 Ky. 801.

Tex.—Texas Emp. Ins. Ass'n v. Mincey, Civ.App., 255 S.W.2d 262, refused no reversible error—Texas Emp. Ins. Ass'n v. Moyer, Civ.App., 236 S.W.2d 231—Southern Underwriters v. Alvidrez, Civ.App., 140 S.W.2d 355, error refused.

71 C.J. p 1394 note 79.

92. U.S.—Pacific Emp. Ins. Co. v. French, C.A.Tex., 224 F.2d 739—Robertson v. National Sur. Corp., C.A.Tex., 208 F.2d 642—Fidelity & Cas. Co. of N. Y. v. Williams, C.A. Tex., 198 F.2d 128.

Ky.—Tierney Mining Co. v. Myers, 132 S.W.2d 312, 280 Ky. 5.

La.—Reeves v. Union Sulphur Co., App., 193 So. 399.

Md.—Baltimore & O. R. Co. v. Zapf, 64 A.2d 139, 192 Md. 403, 6 A.L.R.2d 400—Krell v. Maryland Drydock Co., 41 A.2d 502, 184 Md. 428—Thompson v. Standard Wholesale Phosphate & Acid Works, 13 A.2d 328, 178 Md. 305—Parks & Hull Appliance Corp. v. Reimsnyder, 9 A.2d 648, 177 Md. 280—J. Norman Geipe, Inc. v. Collett, 190 A. 836, 172 Md. 165, 109 A.L.R. 387.

Mo.—McCoy v. Simpson, 139 S.W.2d 950, 346 Mo. 72.

Mont.—Paulich v. Republic Coal Co., 103 P.2d 4, 110 Mont. 174.

Neb.—Ramsey v. Kramer Motors, 52 N.W.2d 799, 155 Neb. 584.

N.J.—Galloway v. Ford Motor Co., 75 A.2d 855, 5 N.J. 396.

Nolan v. Pabco Corp., 126 A.2d 393, 42 N.J.Super. 129—Hagerman v. Lewis Lumber Co., 93 A.2d 632,

24 N.J.Super. 120, affirmed 99 A.2d 513, 13 N.J. 315.

Pitchenick v. New York Folding Box Co., 24 A.2d 376, 128 N.J.Law 206, affirmed 30 A.2d 40, 129 N.J. Law 399.

N.M.—Apodaca v. Allison & Haney, 258 P.2d 711, 57 N.M. 315.

Ohio.—Brumage v. Industrial Commission of Ohio, 129 N.E.2d 844, 164 Ohio St. 255.

Morrissey v. Industrial Commission, 128 N.E.2d 815, 98 Ohio App. 213—Kemp v. Industrial Commission, 122 N.E.2d 14, 96 Ohio App. 391—Gnat v. Packard Elec. Division General Motors Corp., App., 88 N.E.2d 811—Davidson v. Industrial Commission, App., 82 N.E.2d 866—Wehrle v. General Motors Corp., App., 80 N.E.2d 702—Abbott v. Industrial Commission, 74 N.E.2d 625, 80 Ohio App. 7—Gillen v. Industrial Commission of Ohio, 17 N.E.2d 663, 59 Ohio App. 241.

Or.—Conley v. State Indus. Acc. Commission, 266 P.2d 1061, 200 Or. 474. S.C.—Dickey v. Springs Cotton Mills, 39 S.E.2d 501, 209 S.C. 204.

Tex.—Walker v. Texas Emp. Ins. Ass'n, 297 S.W.2d 398—Whitener v. Traders & General Ins. Co., 289 S.W.2d 233—Foreman v. Texas Emp. Ins. Ass'n, 241 S.W.2d 977, 150 Tex. 468, opinion conformed to Texas Emp. Ins. Ass'n v. Foreman, Civ. App., 262 S.W.2d 248.

Texas Emp. Ins. Ass'n v. Jones, Civ.App., 307 S.W.2d 133, refused no reversible error—Traders & General Ins. Co. v. McDaniel, Civ. App., 305 S.W.2d 659—Texas Emp. Ins. Ass'n v. Melton, Civ.App., 304 S.W.2d 458, error refused no reversible error—Texas Emp. Ins. Ass'n v. Hall, Civ.App., 295 S.W.2d 478, error refused no reversible error—Cottrell v. Texas Emp. Ins. Ass'n, Civ.App., 293 S.W.2d 219, refused no reversible error—Texas Emp. Ins. Ass'n v. Chancellor, Civ. App., 292 S.W.2d 360, error refused no reversible error—Transport Ins. Co. v. Cossaboon, Civ.App., 291 S.W.2d 746, refused no reversible error—Texas Emp. Ins. Ass'n v. George, Civ.App., 288 S.W.2d 218, error refused no reversible error—Texas Emp. Ins. Ass'n v. Spivey, Civ.App., 286 S.W.2d 197, error refused no reversible error—American General Ins. Co. v. Dennis, Civ.App., 280 S.W.2d 620—Traders & General Ins. Co. v. Rokey, Civ.App., 278 S.W.2d 490, refused no reversible error—Texas Emp. Ins. Ass'n v. Baker, Civ.App., 278 S.W.2d 419, refused

to submit issues,⁹³ giving or refusal of instructions,⁹⁴ or where the alleged error related to such

no reversible error—Texas Emp. Ins. Ass'n v. Polk, Civ.App., 269 S.W.2d 532, refused no reversible error—Texas Emp. Ins. Ass'n v. Hughey, Civ.App., 266 S.W.2d 456, refused no reversible error—Texas Emp. Ins. Ass'n v. Fish, Civ.App., 266 S.W.2d 435, refused no reversible error—Traders & General Ins. Co. v. Gray, Civ.App., 257 S.W.2d 327—American Motorists Ins. Co. v. Black, Civ.App., 253 S.W.2d 678—Glicrease v. Hartford Acc. & Indem. Co., Civ.App., 252 S.W.2d 715—Texas Emp. Ins. Ass'n v. Allgood, Civ.App., 252 S.W.2d 589, refused no reversible error—National Auto. & Cas. Ins. Co. v. Layman, Civ.App., 248 S.W.2d 993—Texas General Indem. Co. v. Scott, Civ. App., 246 S.W.2d 228, reversed on other grounds 253 S.W.2d 651, 152 Tex. 1—Texas Emp. Ins. Ass'n v. Henthorn, Civ.App., 240 S.W.2d 392, refused no reversible error—Texas Emp. Ins. Ass'n v. Scott, Civ.App., 233 S.W.2d 171, error refused no reversible error—Associated Emp. Lloyds v. Cherry, Civ.App., 232 S.W.2d 438, error refused no reversible error—Pacific Emp. Ins. Co. v. Barnett, Civ.App., 230 S.W.2d 331, error refused no reversible error—Maddox v. Texas Indem. Ins. Co., Civ.App., 224 S.W.2d 495, error refused no reversible error—Texas Emp. Ins. Ass'n v. Bounds, Civ. App., 218 S.W.2d 496, error granted—Texas Emp. Ins. Ass'n v. Hodnett, Civ.App., 216 S.W.2d 301, refused no reversible error—Texas Emp. Ins. Ass'n v. Reid, Civ.App., 209 S.W.2d 1016—Pacific Emp. Ins. Co. v. Gage, Civ.App., 199 S.W.2d 537, error refused no reversible error—Lewis v. Texas Emp. Ins. Ass'n, Civ.App., 197 S.W.2d 187, error refused no reversible error—Texas Emp. Ins. Ass'n v. Wright, Civ.App., 196 S.W.2d 887, error refused no reversible error—Yates v. Pacific Indem. Co., Civ.App., 193 S.W.2d 266, error refused no reversible error—Texas Emp. Ins. Ass'n v. Hale, Civ.App., 188 S.W.2d 899, affirmed 191 S.W.2d 472, 144 Tex. 432—Superior Lloyds of America v. Foxworth, Civ.App., 178 S.W.2d 724, error refused—Federal Underwriters Exchange v. Morton, Civ.App., 167 S.W.2d 267, error refused—Texas State Highway Department v. Butler, Civ.App., 153 S.W.2d 878, error refused—Texas Employers' Ins. Ass'n v. Lightfoot, Civ.App., 153 S.W.2d 321, modified on other grounds 162 S.W.2d 929, 139 Tex. 304—United Employers Cas. Co. v. Beade, Civ.App., 146 S.W.2d 473, error dismissed—Allied Underwriters v. Spillman, Civ.App., 145 S.W.2d 706, error refused—United Employers Casualty Co. v. Marr, Civ.

App., 144 S.W.2d 973, error dismissed, judgment correct—Service Mut. Ins. Co. of Texas v. White, Civ.App., 138 S.W.2d 273, error refused—Texas Employers Ins. Ass'n v. Hevolow, Civ.App., 136 S.W.2d 931, error dismissed, judgment correct—Southern Underwriters v. Erwin, Civ.App., 134 S.W.2d 720, error granted—Texas Employers' Ins. Ass'n v. Peppers, Civ.App., 133 S.W.2d 165, error dismissed, judgment correct—Traders & General Ins. Co. v. Belcher, Civ.App., 126 S.W.2d 35, error refused—Gulf Casualty Co. v. Archer, Civ.App., 118 S.W.2d 976, error dismissed—Traders & General Ins. Co. v. Garry, Civ.App., 118 S.W.2d 340, affirmed 143 S.W.2d 370, 135 Tex. 290—Traders & General Ins. Co. v. Wilkins, Civ.App., 115 S.W.2d 1165, error dismissed—Maryland Casualty Co. v. Drummond, Civ.App., 114 S.W.2d 356, error refused—Texas Employers' Ins. Ass'n v. Clack, Civ.App., 112 S.W.2d 526, affirmed 132 S.W.2d 399, 134 Tex. 151—Texas Employers' Ins. Ass'n v. Hamilton, Civ.App., 95 S.W.2d 767, error dismissed—Western Casualty Co. v. Ratliff, Civ. App., 76 S.W.2d 185—Indemnity Ins. Co. of North America v. Wright, Civ.App., 69 S.W.2d 438, error dismissed—Liberty Mut. Ins. Co. v. Boggs, Civ.App., 66 S.W.2d 787, error dismissed—Traders' & General Ins. Co. v. Williams, Civ. App., 66 S.W.2d 780. Wash.—Hutchings v. Department of Labor and Industries, 167 P.2d 444, 24 Wash.2d 711—McIntyre v. Department of Labor and Industries, 159 P.2d 904, 23 Wash.2d 119—Purdy & Whitfield v. Department of Labor and Industries, 120 P.2d 858, 12 Wash.2d 131.

71 C.J. p 1394 note 80.

93. U.S.—Talamantez v. Aetna Cas. & Sur. Co., C.A.Tex., 193 F.2d 406. Md.—Cumberland Motor Sales v. Hilliker, 122 A.2d 329, 210 Md. 70. Tex.—Associated Indem. Corp. v. Kujawa, 268 S.W.2d 122, 153 Tex. 814—National Mut. Casualty Co. v. Lowery, 148 S.W.2d 1089, 136 Tex. 188—Federal Underwriters Exchange v. Cest, 123 S.W.2d 332, 132 Tex. 299.

Texas Emp. Ins. Ass'n v. Jones, Civ.App., 307 S.W.2d 133, error refused no reversible error—Texas General Indem. Co. v. Bridwell, Civ. App., 304 S.W.2d 131, refused no reversible error—Consolidated Cas. Ins. Co. v. Newman, Civ.App., 300 S.W.2d 160, error refused no reversible error—Texas Emp. Ins. Ass'n v. Huggins, Civ.App., 284 S.W.2d 448, error refused no reversible error—Superior Ins. Co. v. Burnes, Civ.App., 278 S.W.2d 984, refused no reversible error—Texas

Emp. Ins. Ass'n v. Mincey, Civ. App., 255 S.W.2d 262, refused no reversible error—Texas Emp. Ins. Ass'n v. Allgood, Civ.App., 252 S.W.2d 589, refused no reversible error—Pacific Emp. Ins. Co. v. Brasher, Civ.App., 234 S.W.2d 698, error refused no reversible error—Texas Emp. Ins. Ass'n v. Spivey, Civ.App., 231 S.W.2d 760, error refused no reversible error—Southern Underwriters v. Cooper, Civ.App., 138 S.W.2d 563, error dismissed, judgment correct—Federal Underwriters Exchange v. Simpson, Civ.App., 137 S.W.2d 132—Southern Underwriters v. Erwin, Civ.App., 134 S.W.2d 720, error granted—Federal Underwriters Exchange v. Carroll, Civ.App., 130 S.W.2d 1101—Texas Fire & Casualty Underwriters v. Blair, Civ.App., 130 S.W.2d 409, error dismissed, judgment correct—Texas Indemnity Ins. Co. v. Briggs, Civ.App., 128 S.W.2d 861, error dismissed, judgment correct—Traders & General Ins. Co. v. Ray, Civ.App., 128 S.W.2d 80, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Hamor, Civ.App., 97 S.W.2d 1041.

71 C.J. p 1395 note 81.

94. U.S.—Hartford Acc. & Indem. Co. v. Black, C.A.Tex., 193 F.2d 971, rehearing denied 194 F.2d 1005.

Md.—Paul Const. Co. v. Powell, 88 A.2d 837, 200 Md. 168—Sun Cab Co. v. Powell, 77 A.2d 783, 196 Md. 572—Miller v. James McGraw Co., 42 A.2d 237, 184 Md. 529—Parks & Hull Appliance Corporation v. Reimsnyder, 9 A.2d 648, 177 Md. 280.

Ohio.—Logsdon v. Industrial Commission, App., 67 N.E.2d 823, affirmed 57 N.E.2d 75, 143 Ohio St. 508—Furnis v. Industrial Commission, 45 N.E.2d 782, 71 Ohio App. 146—Toledo Edison Co. v. Tullis, 1 N.E.2d 324, 51 Ohio App. 417.

Or.—King v. State Indus. Acc. Commission, 309 P.2d 159, opinion adhered to 315 P.2d 148.

Tex.—Eubanks v. Texas Emp. Ins. Ass'n, 246 S.W.2d 467, 151 Tex. 67—Texas Emp. Ins. Ass'n v. McKay, 210 S.W.2d 147, 146 Tex. 569—Great American Indemnity Co. v. Sams, 176 S.W.2d 312, 142 Tex. 121—Southern Underwriters v. Boswell, 158 S.W.2d 280, 138 Tex. 255. Consolidated Underwriters v. Duncan, Civ.App., 282 S.W.2d 888, error refused no reversible error—Texas Emp. Ins. Ass'n v. Trap, Civ.App., 258 S.W.2d 112, refused no reversible error—Texas Emp. Ins. Ass'n v. Reid, Civ.App., 209 S.W.2d 1016—Traders & General Ins. Co. v. Stansland, Civ.App., 199 S.W.2d 702, error refused no reversible error—Consolidated

matters as misconduct of the court,⁹⁵ counsel,⁹⁶ | ceeding,⁹⁸ the computation of the award,⁹⁹ or the
or the jurors,⁹⁷ the mode and conduct of the pro-

derwriters v. Foxworth, Civ.App., 196 S.W.2d 87, error granted—Federal Underwriters Exchange v. Sandel, Civ.App., 166 S.W.2d 147, error refused—Texas State Highway Department v. Reeves, Civ. App., 161 S.W.2d 357, error refused—Southern Underwriters v. Alvirez, Civ.App., 140 S.W.2d 355, error refused—Traders & General Ins. Co. v. Lockwood, Civ.App., 138 S.W.2d 589, error dismissed, judgment correct—Service Mut. Ins. Co. of Texas v. White, Civ.App., 138 S.W.2d 278, error refused—Traders & General Ins. Co. v. Boysen, Civ. App., 123 S.W.2d 1016, error dismissed, judgment correct—Federal Underwriters Exchange v. Crow, Civ.App., 118 S.W.2d 1073, error dismissed—Traders & General Ins. Co. v. Slusser, Civ.App., 110 S.W.2d 598, error dismissed—Texas Employers' Ins. Ass'n v. Phillips, Civ. App., 109 S.W.2d 1088, error dismissed—Traders' & General Ins. Co. v. Nunley, Civ.App., 80 S.W.2d 883, error refused—Republic Underwriters v. Glover, Civ.App., 72 S.W.2d 814, error dismissed.

Vt.—Sivret v. Knight, 109 A.2d 495, 118 Vt. 348.

Wash.—Devlin v. Department of Labor and Industries of Washington, 78 P.2d 952, 194 Wash. 549.

71 C.J. p 1395 note 82.

95. N.J.—Rotino v. J. P. Scanlon, Inc., 15 A.2d 336, 752, 125 N.J.Law 227, affirmed 19 A.2d 777, 126 N.J. Law 419.

Tex.—Texas Emp. Ins. Ass'n v. Logsdon, Civ.App., 278 S.W.2d 893, refused no reversible error—Associated Emp. Lloyds v. Cherry, Civ. App., 232 S.W.2d 438, error refused no reversible error—United Employers Cas. Co. v. Curry, Civ.App., 152 S.W.2d 862—United Employers Casualty Co. v. Marr, Civ.App., 144 S.W.2d 973, error dismissed, judgment correct.

96. Tex.—Whitener v. Traders & General Ins. Co., 289 S.W.2d 233—Lumbermen's Lloyds v. Loper, 269 S.W.2d 867, 153 Tex. 404—Texas Emp. Ins. Ass'n v. Poe, 253 S.W.2d 645, 152 Tex. 18—King v. Federal Underwriters Exchange, 191 S.W.2d 855, 144 Tex. 531—Federal Underwriters Exchange v. Bickham, 157 S.W.2d 856, 138 Tex. 128.

Lumbermen's Ins. Corp. v. Goodman, Civ.App., 304 S.W.2d 139, error refused no reversible error—Transport Ins. Co. v. Burditt, Civ. App., 294 S.W.2d 248—Transport Ins. Co. v. Cossaboon, Civ.App., 291 S.W.2d 746, refused no reversible error—Gulf Cas. Co. v. Jones, Civ. App., 290 S.W.2d 334, error refused no reversible error—Texas Emp.

Ins. Ass'n v. Hadley, Civ.App., 289 S.W.2d 809—Texas Emp. Ins. Ass'n v. George, Civ.App., 288 S.W.2d 218, error refused no reversible error—Texas Emp. Ins. Ass'n v. Roberts, Civ.App., 281 S.W.2d 104—Texas Emp. Ins. Ass'n v. Cruz, Civ.App., 280 S.W.2d 388, error refused no reversible error—Texas Emp. Ins. Ass'n v. Sevier, Civ.App., 279 S.W.2d 473, error refused no reversible error—Texas Emp. Ins. Ass'n v. Logsdon, Civ.App., 278 S.W.2d 893, refused no reversible error—Texas Emp. Ins. Ass'n v. Baker, Civ.App., 278 S.W.2d 419, refused no reversible error—Texas Emp. Ins. Ass'n v. Rigsby, Civ.App., 273 S.W.2d 681—Traders & General Ins. Co. v. Stone, Civ.App., 258 S.W.2d 409—Gilcrease v. Hartford Acc. & Indem. Co., Civ.App., 252 S.W.2d 715—Texas Emp. Ins. Ass'n v. Thames, Civ. App., 252 S.W.2d 228, refused no reversible error—Texas Emp. Ins. Ass'n v. Noel, Civ.App., 269 S.W.2d 835, error refused no reversible error—Texas Emp. Ins. Ass'n v. Hale, Civ.App., 242 S.W.2d 796—Houston Fire & Cas. Ins. Co. v. Ford, Civ.App., 241 S.W.2d 158, error refused no reversible error—Highway Ins. Underwriters v. Coleman, Civ.App., 239 S.W.2d 181, refused no reversible error—Highway Ins. Underwriters v. Phillips, Civ.App., 234 S.W.2d 278—Texas Emp. Ins. Ass'n v. Scott, Civ.App., 233 S.W.2d 171, error refused no reversible error—Highway Ins. Underwriters v. Dempsey, Civ.App., 232 S.W.2d 117—Looney v. Traders & General Ins. Co., Civ.App., 231 S.W.2d 735, error refused no reversible error—Texas Emp. Ins. Ass'n v. Davis, Civ.App., 228 S.W.2d 257, error refused—Texas Emp. Ins. Ass'n v. Brown, Civ.App., 226 S.W.2d 233, error refused no reversible error—Highway Ins. Underwriters v. Roberts, Civ.App., 224 S.W.2d 903, error refused no reversible error—Texas Emp. Ins. Ass'n v. Crow, Civ.App., 218 S.W.2d 230, affirmed 221 S.W.2d 235, 143 Tex. 113, 10 A.L.R.2d 913—Texas Emp. Ins. Ass'n v. Wells, Civ.App., 207 S.W.2d 693, refused no reversible error—Texas Emp. Ins. Ass'n v. Ferguson, Civ.App., 204 S.W.2d 197, error refused no reversible error—Consolidated Underwriters v. Foxworth, Civ.App., 196 S.W.2d 87, error granted—Traders & General Ins. Co. v. Carlisle, Civ.App., 162 S.W.2d 751—Maryland Cas. Co. v. Landry, Civ.App., 147 S.W.2d 290, error dismissed, judgment correct—United Employers Casualty Co. v. Marr, Civ.App., 144 S.W.2d 973, error dismissed, judgment correct

—Traders & General Ins. Co. v. Maxwell, Civ.App., 142 S.W.2d 685, error dismissed, judgment correct—Southern Underwriters v. Yocham, Civ.App., 140 S.W.2d 341, error dismissed, judgment correct—Culpepper v. Lloyds America, Civ.App., 140 S.W.2d 330, error dismissed, judgment correct—Maryland Casualty Co. v. Jackson, Civ. App., 139 S.W.2d 631, error dismissed, judgment correct—Southern Underwriters v. Schoolcraft, Civ.App., 139 S.W.2d 330, modified on other grounds 158 S.W.2d 991, 138 Tex. 323—Federal Underwriters Exchange v. Bickham, Civ.App., 136 S.W.2d 880, affirmed 157 S.W.2d 356, 138 Tex. 128—Uselton v. Southern Underwriters, Civ.App., 131 S.W.2d 1040, error dismissed, judgment correct—Traders & General Ins. Co. v. Boysen, Civ.App., 123 S.W.2d 1016, error dismissed, judgment correct—Republic Underwriters v. Brown, Civ.App., 117 S.W.2d 157, error dismissed—Texas Employers Ins. Ass'n v. Little, Civ. App., 96 S.W.2d 677, error dismissed.

97. Tex.—Childers v. Texas Emp. Ins. Ass'n, 273 S.W.2d 587, 154 Tex. 88.

Travelers Ins. Co. v. Carter, Civ. App., 298 S.W.2d 231, error refused no reversible error—Texas Emp. Ins. Ass'n v. Hicks, Civ.App., 237 S.W.2d 699, error refused no reversible error—Maryland Cas. Co. v. Gideon, Civ.App., 213 S.W.2d 848—Texas Employers Ins. Ass'n v. Moser, Civ.App., 152 S.W.2d 390.

98. N.J.—Temple v. Storch Trucking Co., 68 A.2d 828, 3 N.J. 42.

N.C.—Stewart v. Duncan, 80 S.E.2d 764, 239 N.C. 640.

Pa.—Flock v. Pittsburgh Terminal Coal Corp., 13 A.2d 881, 140 Pa. Super. 232.

Tex.—Texas Emp. Ins. Ass'n v. Applegate, Civ.App., 205 S.W.2d 412, error refused no reversible error—Texas Emp. Ins. Ass'n v. Ferguson, Civ.App., 196 S.W.2d 677—Texas Emp. Ins. Ass'n v. Hale, Civ.App., 188 S.W.2d 899, affirmed 191 S.W.2d 472, 144 Tex. 432—Traders & General Ins. Co. v. Davis, Civ.App., 147 S.W.2d 908, error dismissed, 149 S.W.2d 88, 136 Tex. 187—Federal Underwriters Exchange v. Rigsby, Civ.App., 130 S.W.2d 1105, error dismissed, judgment correct. 71 C.J. p 1396 note 83.

99. U.S.—Pacific Emp. Ins. Co. v. French, C.A.Tex., 224 F.2d 739—Hartford Acc. & Indem. Co. v. Murphy, C.C.A.Tex., 158 F.2d 506—Continental Cas. Co. v. Little, C.C.A. Tex., 152 F.2d 728.

verdict or findings.¹

A finding of willful misconduct of the employee, barring a compensation claim, makes immaterial any error in rulings on other issues.² Although the court could have corrected an error of law on the record, remanding the case to the board, with directions, is harmless where no prejudice results.³ A verdict of guilty is a mere irregularity not constituting reversible error.⁴

§ 809. Determination and Disposition of Cause

On further judicial review of compensation proceedings, the court may grant such necessary relief as the case may warrant.

On further judicial review of compensation proceedings, the court may grant such necessary relief as the particular case may warrant,⁵ but the court cannot afford relief not authorized by the compensation act.⁶ Where the issues are separable, the court may affirm as to some and remand as to others.⁷ The appellate court may continue the award of compensation pending the appeal notwithstanding appellant has superseded the judgment of

the court below affirming the award of the board.⁸ Where respondent files a remittitur of that part of the judgment tainted with error, the appellate court may enter an appropriate decree.⁹ The possibility that changed circumstances may have rendered the decree appealed from inappropriate in view of the lapse of time since evidence was heard does not call for action by the reviewing court in view of the availability of a remedy in the lower court.¹⁰

The appeal will be dismissed where the lower court did not have jurisdiction of the case¹¹ or where appellant with full knowledge of the facts voluntarily accepts the benefits of the judgment appealed from.¹² The court will not determine the liability of a person not a party to the appeal.¹³

Where it appears that the proper procedure for appeal to the court below was not taken, no relief will be afforded on appeal from its decision affirming the award of the commission.¹⁴ Where the judge of the superior court, in passing on an appeal from an award of the commission, has no discretionary power to set aside the award, a judgment affirming the commission's award will not be

Tex.—General Ins. Corp. v. Wickersham, Civ.App., 235 S.W.2d 215, error refused no reversible error—Industrial Lloyds v. Denum, Civ. App., 160 S.W.2d 966, error refused—United Employers Casualty Co. v. Summerour, Civ.App., 151 S.W.2d 247, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Warren, Civ.App., 149 S.W.2d 182, error refused—Associated Indemnity Corp. v. McGrew, Civ. App., 142 S.W.2d 567, affirmed 160 S.W.2d 912, 138 Tex. 583—Commercial Standard Ins. Co. v. Davis, Civ.App., 135 S.W.2d 794, error dismissed, 137 S.W.2d 1, 134 Tex. 487—Traders & General Ins. Co. v. Patterson, Civ.App., 123 S.W.2d 766, error dismissed—Southern Underwriters v. Jordan, Civ.App., 122 S.W.2d 260—Traders & General Ins. Co. v. O'Quinn, Civ.App., 111 S.W.2d 859, error refused.
71 C.J. p 1396 note 84.

1. Tex.—Associated Indemnity Corp. v. McGrew, 160 S.W.2d 912, 138 Tex. 583.

Texas Emp. Ins. Ass'n v. Martinez, Civ.App., 284 S.W.2d 198—Baker v. Highway Ins. Underwriters, Civ.App., 209 S.W.2d 979, refused no reversible error—Wickson v. Service Mut. Ins. Co. of Texas, Civ.App., 163 S.W.2d 668, error refused—Traders & General Ins. Co. v. Burns, Civ.App., 118 S.W.2d 391—Fidelity & Casualty Co. of New York v. McLaughlin, Civ. App., 106 S.W.2d 815, affirmed 135

S.W.2d 955, 184 Tex. 613—Fidelity & Casualty Co. of New York v. Eber, Civ.App., 97 S.W.2d 267.

Wis.—McCune v. Industrial Commission, 50 N.W.2d 683, 260 Wis. 499.

2. Md.—Harris v. R. P. Dobson & Co., 132 A. 374, 150 Md. 71.

3. Ky.—J. F. Hardymon Co. v. Kaze, 43 S.W.2d 678, 241 Ky. 252.

4. Ill.—Kannenberg v. Deere & Mansur Co., 203 Ill.App. 607.

5. U.S.—Great Am. Indem. Co. v. Ortiz, C.A.Tex., 193 F.2d 43.

General provisions inapplicable

Workmen's compensation act prescribes a complete and exclusive procedure of its own, and therefore civil code provisions relating to power of supreme court to enter judgment on appeal, under certain circumstances, as justice may require, and civil code provisions relating to other matters, may not be borrowed to supplement provisions of workmen's compensation act.

Kan.—Justice v. Continental Can Co., 257 P.2d 564, 174 Kan. 539.

6. Pa.—Simon v. Fine, 74 A.2d 674, 167 Pa.Super. 386.

7. U.S.—Great Am. Indem. Co. v. Ortiz, C.A.Tex., 193 F.2d 43.

8. Ky.—Employers' Liability Assur. Corporation v. Gardner, 263 S.W. 743, 204 Ky. 216.

9. Tex.—Texas Employers' Ins. Ass'n v. Lightfoot, 162 S.W.2d 929, 139 Tex. 304.

10. Mass.—Whitehead's Case, 45 N. E.2d 839, 312 Mass. 611.

11. Tex.—American Surety Co. of New York v. Mays, Civ.App., 157 S.W.2d 444, error refused.

12. Mo.—Fear v. Ebony Paint Mfg. Co., 181 S.W.2d 559, 238 Mo.App. 560.

13. Liability of insurance carriers

In workmen's compensation proceedings brought by employee who allegedly lost his left eye as result of infection caused by dust particles entering his eye while he was engaged in cleaning up operations entailing shoveling debris into wagon, wherein it appeared that employee had been industrially blind in his left eye at time of his employment and that after his employment, but prior to enucleation, he had sustained impairment of right eye vision as result of industrial accident, insurer affording coverage at time of right eye injury not being a party to appeal taken by employer and its (different) insurer from award in its (different) case, supreme court would not determine liability of each of insurance carriers with respect to claims for injuries to respective eyes.

Kan.—Justice v. Continental Can Co., 257 P.2d 564, 174 Kan. 539.

14. Iowa.—Keys v. American Bridge & Tile Co., 170 N.W. 295, 185 Iowa 140.

set aside because of the failure of the court to approve the commission's finding of fact.¹⁵

§ 810. — Affirmance

On further judicial review, the judgment below will be affirmed where no error appears.

Where the record before the court on further review of a compensation proceeding shows nothing improper, the judgment must be affirmed.¹⁶ Where the appellate court is equally divided, the judgment below will be affirmed.¹⁷ An affirmance may be en-

tered pursuant to an agreement of the parties.¹⁸

Affirmance is proper where the judgment is correct despite an error in the findings¹⁹ or the procedure.²⁰ A judgment which is excessive may be affirmed on condition that there is a remittitur of the excess.²¹ Where rules of court require briefs on appeal, for failure to comply therewith, a judgment affirming an award may be affirmed.²²

A judgment remanding the cause to the commission for further evidence to support its findings must

15. Ga.—Blanchard v. Savannah River Lumber Co., 149 S.E. 793, 40 Ga.App. 416.

16. U.S.—Safety Cas. Co. v. Brown, C.A.Tex., 229 F.2d 889—Travelers Ins. Co. v. Branham, C.C.A.Va., 136 F.2d 873.

Conn.—Engelhard v. Capewell Mfg. Co., 74 A.2d 476, 137 Conn. 32.

Fla.—Mobley v. Pasco Packing Co., 60 So.2d 662—Upshaw v. Renuart Lumber Yards, 9 So.2d 806, 152 Fla. 242—Hardware Mut. Casualty Co. v. Carlton, 8 So.2d 665, 150 Fla. 729—Winn-Lovett Grocery Co. v. Stevens, 198 So. 834, 145 Fla. 151, amended on other grounds 198 So. 835, 145 Fla. 209—Cohen v. Sloan, 188 So. 331, 137 Fla. 335, rehearing denied 190 So. 14, 138 Fla. 752.

Ky.—Cornett v. Fordson Coal Co., 32 S.W.2d 984, 236 Ky. 209—Department of Highways v. Matney, 161 S.W.2d 617, 290 Ky. 440.

La.—Caddo Contracting Co. v. Johnson, 64 So.2d 177, 222 La. 796.

Mo.—Juhl v. Hussman-Ligonier Co., App., 154 S.W.2d 396.

Neb.—Eorn v. Gooch Feed Mill Co., 58 N.W.2d 626, 157 Neb. 125.

N.J.—Korman v. Hygrade Food Products Corp., 35 A.2d 699, 131 N.J. Law 188.

N.C.—Blythe v. Wellborn, 25 S.E.2d 555, 223 N.C. 857.

Ohio.—Liesin v. Industrial Commission of Ohio, 26 N.E.2d 206, 136 Ohio St. 403.

Or.—McPherson v. State Industrial Accident Commission, 127 P.2d 844, 169 Or. 190.

R.I.—Bishop v. Frank Morrow Co., 30 A.2d 110, 68 R.I. 513.

Tex.—Josey v. Maryland Casualty Co., Civ.App., 153 S.W.2d 259, error refused—Federal Underwriters Exchange v. McDaniel, Civ.App., 140 S.W.2d 379, error dismissed, judgment correct.

71 C.J. p 1387 note 95.

Effect of affirmance

(1) Affirmance by reviewing court of judgment of trial court in workmen's compensation case had effect of making that judgment the judgment of the reviewing court.

Tex.—Morton v. Federal Underwriters

Exchange, Civ.App., 173 S.W.2d 515.

(2) Where compensation case was affirmed by court of civil appeals, trial court lost jurisdiction of case and properly refused to consider new evidence.

Tex.—Texas Emp. Ins. Ass'n v. Elder, 282 S.W.2d 371.

(3) Affirmance by reviewing court of judgment for claimant in workmen's compensation proceeding rendered moot question of whether supersedeas should have been granted.

D.C.—Harris v. Britton, 218 F.2d 45, 95 U.S.App.D.C. 32.

Constitutionality of statute

Judgment awarding compensation would be affirmed subject to determination in pending appeal of reasonableness of compensation schedules of 1937 Act.

Pa.—Mattey v. Jones & Laughlin Steel Corp., 38 A.2d 410, 155 Pa. Super. 360—Barbaryka v. Henderson Coal Co., 36 A.2d 341, 154 Pa. Super. 402.

Death of party

Judgment dismissing appeal from compensation award making effective award as against one of two defendants without regard to rights or liabilities of codefendant except as they were incidentally involved would be affirmed, notwithstanding death of codefendant pending appeal, where claim might originally have been made against surviving defendant alone.

Conn.—Lucarelli v. Earle C. Dodds, Inc., 136 A. 641, 121 Conn. 640.

Limitations on scope of review

In workmen's compensation case, limitations on scope of review on appeal from superior court decree dismissing claim on petition for review of decision of industrial accident board, which dismissed claim for lack of jurisdiction, did not preclude affirmance of decree.

Mass.—Rocha's Case, 14 N.E.2d 133, 300 Mass. 121.

Counsel fee

(1) Where compensation referee made award in favor of claimant and allowed him twenty-five per cent

for attorney's fee, and award was reversed by industrial commission, and circuit court then reversed and set aside final award of commission and entered judgment for plaintiff in stated amount, and that judgment was affirmed by supreme court, award of referee allowing attorney's fee passed out of case.

Mo.—Sanderson v. Producers Commission Ass'n, App., 241 S.W.2d 273.

(2) Where question of attorney's fees was never raised in trial court on appeal from an award of commission, such court cannot, after affirmance of its judgment and remand to it for execution, enter a judgment for attorney's fees.

Ohio.—State v. Industrial Commission of Ohio, 155 N.E. 798, 116 Ohio St. 261.

17. Ga.—State Highway Dept. of Ga. v. Turner, 32 S.E.2d 805, 198 Ga. 795.

N.C.—Suiter v. Swift & Co. Fertilizer Works, 20 S.E.2d 293, 221 N.C. 541—Elmore v. General Amusements, 19 S.E.2d 5, 221 N.C. 535—Johnston v. Halifax Paper Co., 199 S.E. 20, 214 N.C. 828.

Pa.—Breniman v. G. A. Stiles Co., 98 A.2d 424, 173 Pa.Super. 237—Oldendorf v. Pennsylvania R. Co., 81 Pa.Super. 181.

Va.—Wright Motor Co. v. Steinhilber, 162 S.E. 192, 157 Va. 793.

Wis.—Radtko Bros. & Kortsch Co. v. Industrial Commission, 3 N.W.2d 679, 240 Wis. 410.

18. Tex.—Cassels v. Service Mut. Ins. Co. of Texas, Civ.App., 157 S.W.2d 423.

19. Md.—Moore v. Clarke, 187 A. 887, 171 Md. 39, 107 A.L.R. 924.

20. U.S.—Taylor v. McManigal, C.C. A.Mich., 89 F.2d 583.

Ga.—Bibb Mfg. Co. v. Alford, 179 S.E. 912, 51 Ga.App. 287.

21. Tex.—Federal Underwriters' Exchange v. Popnoe, Civ.App., 140 S.W.2d 434, error dismissed.

22. Ill.—McGarry v. Industrial Commission, 125 N.E. 313, 290 Ill. 577.

Tex.—Bittle v. Service Mut. Ins. Co. of Texas, Civ.App., 103 S.W.2d 221.

be affirmed where it does not appear that the facts cannot be established.²³ An order affirming an award will be affirmed by the appellate court where, by lapse of time, the appeal may be deemed abandoned.²⁴ Where, on remand with directions, the lower court enters a judgment which is properly construed to comply with the directions when read in the light of a statutory provision for payment of compensation, it will be affirmed on appeal therefrom.²⁵ Where the facts necessary to support an award are not affirmatively disproved, an order remanding the cause to the commission for insufficiency of evidence will be affirmed.²⁶

§ 811. — Modification

On further review, the court may modify or correct the judgment in a proper case.

23. Ga.—Maryland Casualty Co. v. Bartlett, 142 S.E. 189, 37 Ga.App. 777.
24. S.D.—Melquist v. Dakota Printing Co., 221 N.W. 84, 53 S.D. 430.
25. Wash.—Parker v. Industrial Insurance Department, 183 P. 82, 108 Wash. 235.
26. Ga.—Maryland Casualty Co. v. Bartlett, 142 S.E. 189, 37 Ga.App. 777.
27. Pa.—Thomas v. Susquehanna Collieries Co., 25 A.2d 98, 148 Pa. Super. 161—Wilbert v. Commonwealth of Pennsylvania Second Injury Reserve Account, 17 A.2d 732, 143 Pa. Super. 37—Ceccato v. Union Collieries Co., 15 A.2d 401, 141 Pa. Super. 440.
- R.I.—E. E. Smith Co. v. Martin, 82 A.2d 843, 78 R.I. 438.
- Tex.—Safety Casualty Co. v. Long, 152 S.W.2d 1102, 137 Tex. 209.
- Travelers Ins. Co. v. Calcote, Civ. App., 205 S.W.2d 56, error refused no reversible error—Maryland Casualty Co. v. Marshall, Civ. App., 14 S.W.2d 337.
- A clerical error in fixing amount of weekly compensation payable may be corrected at any stage of proceedings, even in superior court.
- Pa.—Barbaryka v. Henderson Coal Co., 36 A.2d 341, 154 Pa. Super. 402.
- Agreement of parties**
- Where court of civil appeals acquired jurisdiction generally over parties and subject matter of suit to set aside compensation award, court could properly reform judgment in accordance with agreement and joint request of both parties to correct fundamental error in computing amount of judgment.
- Tex.—Lloyds Guarantee Assurance v. Ryne, Civ. App., 177 S.W.2d 807, error refused.
- Judgment otherwise proper would

- be reformed to comply with applicable statutes relating to judgments in favor of infants.
- Tex.—Travelers Ins. Co. v. Calcote, Civ. App., 205 S.W.2d 56, error refused no reversible error.
28. Ill.—Centralia Coal Co. v. Industrial Commission, 128 N.E. 554, 294 Ill. 325.
29. Tex.—Southern Casualty Co. v. Morgan, Civ. App., 299 S.W. 476, affirmed, Com. App., 12 S.W.2d 200, rehearing denied, Com. App., 16 S.W.2d 533.
30. Tex.—Maryland Casualty Co. v. Merchant, Civ. App., 81 S.W.2d 794—Georgia Casualty Co. v. McClure, Civ. App., 239 S.W. 644, affirmed Com. App., 261 S.W. 800.

Interest

(1) Judgment would be reformed so as to omit provision for interest which employee failed to claim in his pleadings.

Tex.—Texas Indemnity Ins. Co. v. Briggs, Civ. App., 128 S.W.2d 861, error dismissed, judgment correct.

(2) Error in entering judgment allowing interest on past-due workmen's compensation payments to claimant not suing for interest did not require reversal of award by court of additional compensation for total incapacity, as judgment could be reformed and affirmed.

Tex.—Zurich General Acc. & Liability Ins. Co. v. Young, Civ. App., 202 S.W.2d 338, error refused no reversible error.

Costs

Where plaintiff instituted suit in forma pauperis for workmen's compensation benefits, and judgment for employer inadvertently assessed costs of court against him, judgment would be modified absolving plaintiff from payment of any costs.

La.—Williams v. Sewerage & Water Bd. of New Orleans, App., 68 So. 2d 582.

As in civil actions generally, on appeal from judgments in actions on awards in compensation cases, on further review, the court may in a proper case modify or correct the judgment.²⁷ The court may remedy clerical errors in descriptions of injuries,²⁸ and may modify the judgment to provide for its review as required by statute.²⁹ It may strike out erroneous allowances and affirm the judgment as reformed,³⁰ or reduce the judgment to a proper amount.³¹

Where a mathematical error has been made in computing the compensation award, the court may correct it.³² Where a judgment contains an improper or void provision the judgment will be modified by eliminating such provision.³³

31. Ala.—Wilson & Co. v. Curry, 68 So.2d 548, 259 Ala. 685.
- La.—Godeaux v. Travelers Ins. Co., App., 58 So.2d 427—Hayes v. Louisiana Long Leaf Lumber Co., App., 51 So.2d 855.
- Miss.—Cumbest Mfg. Co. v. Pinkney, 84 So.2d 421.
- Neb.—Elliott v. Gooch Feed Mill Co., 24 N.W.2d 561, 147 Neb. 612.
- Pa.—Cimo v. State Workmen's Ins. Fund, 1 A.2d 919, 133 Pa. Super. 51.
- Tex.—National Mut. Cas. Co. v. Lambert, Civ. App., 149 S.W.2d 1086, error dismissed, judgment correct—Traders & General Ins. Co. v. Turner, Civ. App., 149 S.W.2d 593, error dismissed, judgment correct.
- 71 C.J. p 1297 note 10.

Possibility of remarriage

In compensation action, award of benefits to widow in lump sum computed without taking into account probability of her remarriage would be corrected by computing amount taking into account probability of remarriage.

Miss.—U. S. Fidelity & Guaranty Co. v. Smith, 52 So.2d 351, 211 Miss. 573.

Interest rate

Where judgment for workmen's compensation provided for interest at six per cent, judgment would be reformed to provide interest at four per cent.

Tex.—General Ins. Corp. v. Handy, Civ. App., 287 S.W.2d 622, refused no reversible error—Traders & General Ins. Co. v. Durrette, Civ. App., 258 S.W.2d 346.

32. Kan.—Holler v. W. S. Dickey Clay Mfg. Co., 139 P.2d 846, 157 Kan. 355, 148 A.L.R. 1131.
- Tex.—Texas Emp. Ins. Ass'n v. Breckman, Civ. App., 228 S.W.2d 814, error refused no reversible error.
33. Mo.—Palm v. Southwest

The court cannot modify the amount of the award unless there are sufficient conceded facts in the record to justify such action.³⁴ On appeal from a judgment affirming an award for a lump sum without pleading and evidence of a proper rate of discount, the court cannot reform the judgment to allow recovery of the weekly payments where claimant has not waived his right to try the issue of lump sum settlement below.³⁵

Where no error appears, the judgment will not be modified.³⁶ A respondent who has not filed a

cross appeal may not obtain a modification of the judgment in his favor.³⁷

§ 812. — Reversal

On further review, the judgment in a compensation case will be reversed where erroneous.

On further review, the judgment in a compensation case will be reversed where erroneous,³⁸ but, as discussed supra § 808, the judgment will not be reversed for harmless error, and it has been held that an award of compensation will not be reversed

Missouri Wholesale Liquor Co., App., 176 S.W.2d 528—Carlton v. Henwood, App., 115 S.W.2d 172.

Tex.—Union Indemnity Co. v. Drake, Civ.App., 42 S.W.2d 839.

34. Mo.—Fear v. Ebony Paint Mfg. Co., 181 S.W.2d 559, 238 Mo.App. 560.

35. Tex.—Texas Employers' Ins. Ass'n v. Henson, Com.App., 48 S.W.2d 970, vacated on other grounds to allow waiver on rehearing, Com.App., 52 S.W.2d 247.

36. Mass.—Brek's Case, 138 N.E.2d 748.

37. Mass.—Mosesso's Case, 99 N.E.2d 859, 327 Mass. 525.

38. Colo.—Alson Inv. Co. v. Youngquist, 108 P.2d 228, 107 Colo. 1. Ga.—Arnold v. Indemnity Ins. Co., 95 S.E.2d 29, 94 Ga.App. 493.

Idaho.—Pierstorff v. Gray's Auto Shop, 74 P.2d 171, 58 Idaho 438.

La.—Harris v. Traders & General Ins. Co., 8 So.2d 289, 200 La. 445.

Md.—Claus v. Board of Education of Anne Arundel County, 30 A.2d 779, 181 Md. 513—Dembeck v. Bethlehem Shipbuilding Corporation, 170 A. 158, 166 Md. 21.

Mo.—Holland v. Missouri Electric Power Co., App., 104 S.W.2d 277—Atkinson v. W. H. Edwards & Sons, App., 74 S.W.2d 860.

Pa.—Conti v. Butler Consol. Coal Co., 82 A.2d 528, 169 Pa.Super. 276—Nickolay v. Hudson Coal Co., 67 A.2d 828, 164 Pa.Super. 550—Mikos v. Union Collieries Co., 7 A.2d 102, 136 Pa.Super. 10—Kloskowski v. Hudson Coal Co., 198 A. 689, 130 Pa.Super. 490.

Tex.—Knipe v. Texas Emp. Ins. Ass'n, Civ.App., 234 S.W.2d 274, affirmed Texas Emp. Ins. Ass'n v. Knipe, 239 S.W.2d 1006, 150 Tex. 313—Barboza v. Service Mut. Ins. Co. of Texas, Civ.App., 125 S.W.2d 1095, error dismissed, judgment correct—Consolidated Underwriters v. Strawther, Civ.App., 109 S.W.2d 791—Whitfield v. Traders & General Ins. Co., Civ.App., 106 S.W.2d 359—Texas Employers' Ins. Ass'n v. Van Pelt, Civ.App., 68 S.W.2d 514.

Wash.—Erickson v. Department of Labor and Industries of State of Wash., 294 P.2d 644, 48 Wash.2d 458.

Effect of judgment of reversal

(1) Judgment of supreme court reversing judgment of court of appeals which reversed judgment of superior court affirming workmen's compensation award became judgment of court of appeals and its prior judgment was vacated and judgment of superior court was affirmed.

Ga.—Ocean Accident & Guarantee Corporation v. Carter, 12 S.E.2d 414, 63 Ga.App. 844.

(2) Reversal of judgment of district court awarding compensation to sister of deceased employee, on employer's appeal, held not to restore to widow benefit of award made by compensation commissioner, where widow did not appeal from judgment of district court.

Kan.—Tisdale v. Wilson & Co., 43 P.2d 1064, 141 Kan. 885.

(3) Where employer and insurance carrier appealing from superior court judgment reversing award of board of workmen's compensation denying compensation did not procure a supersedeas, claimant had a right to have an award entered in his favor by board, and right to have award affirmed by superior court pending appeal, but such subsequent proceedings were rendered nugatory by judgment of court of appeals reversing judgment of superior court and affirming original award denying compensation.

Ga.—American Mut. Liability Ins. Co. v. Ellison, 62 S.E.2d 656, 82 Ga.App. 712.

(4) Judgment of county court acting in excess of its jurisdiction in setting aside findings of workmen's compensation board was a nullity and reversal thereof would in effect reinstate order of board without necessity of remitting record for further proceedings.

Pa.—Bogavich v. Westinghouse Elec. & Mfg. Co., 57 A.2d 598, 162 Pa. Super. 888.

(5) Where employer ceased payment of compensation awarded in first action and compensation claimant then brought a second original action for additional compensation in which compensation judge increased award but allowed credit for compensation previously paid, on reversal of a district court judgment reversing award in second action compensation claimant was entitled to award made by compensation judge in second action.

Neb.—Rexroat v. State, 7 N.W.2d 163, 142 Neb. 596.

(6) Where court affirmed a decision of industrial accident commission, a reversal of judgment of court carried with it a reversal of commission's order.

Md.—Porter v. Bethlehem-Fairfield Shipyard, 53 A.2d 668, 138 Md. 668.

(7) Where effect of mandate of supreme court on reversal was to require trial to set aside prior order on industrial commission in its entirety, including prior findings of fact, no findings of fact remained on which to base a claim of res judicata on a subsequent appeal.

Wis.—M. & M. Realty Co. v. Industrial Commission, 64 N.W.2d 413, 267 Wis. 52.

(8) Where court affirmed a decision of industrial accident commission which denied claimant all relief to which he was entitled, a reversal of judgment of court carried with it a reversal of commission's order so far as it was adverse to employee's claim.

Md.—Porter v. Bethlehem-Fairfield Shipyard, supra.

General principles

On motion to vacate judgment, entered in district court to enforce industrial commission's award, on ground of mistake of fact, court must be governed by same considerations and principles that govern vacation of any judgment of district court.

Minn.—Maffett v. Citizens Bank, 270 N.W. 596, 193 Minn. 480.

unless such action is demanded by justice and equity.³⁹

On appeal the affirmance of an award will be reversed where the court failed to pass on a question of law,⁴⁰ and a reversal of an award will itself be reversed where the award was supported by competent evidence.⁴¹ Where the lower court in a suit to set aside an award dismissed the cause for failure to give notice of dissatisfaction before filing suit, its judgment will be reversed where the failure to give notice before filing suit prejudiced no one, and notice was in fact given thereafter.⁴² The rule that a judgment granting a first new trial will not be disturbed where the law and the facts do not require the verdict does not apply to a review of a judgment setting aside an award of the commission which may be reversed.⁴³

Where, in a suit to set aside an award, insurer impleaded a third person, the judgment will not be reversed because the award against insurer was larger than the judgment in favor of insurer against the third person.⁴⁴ A judgment for claim-

ant on appeal from an award denying compensation must be reversed where based on an erroneous conclusion of law that the court is not bound by the provisions of the compensation act.⁴⁵ On such an appeal the judgment will not be reversed for matters not affecting the merits,⁴⁶ such as informalities in the verdict.⁴⁷ On appeal to a court from an order of a board, where the court has no power to substitute its findings for those of the board a decision by it, reversing the board's order, must be reversed where it can be supported only by findings made by the court.⁴⁸

§ 813. — Remand

On further review, the court may remand the case to the lower court or may direct the lower court to remand the matter to the compensation authorities.

As in civil actions generally, on further review, the court may remand a cause to the lower court on appeal from its judgment in actions on compensation awards, or may direct the lower court to remand the matter to the compensation authorities.⁴⁹

39. La.—Brannon v. Zurich General Acc. & Liability Ins. Co., App., 59 So.2d 836.

40. Pa.—Reitmyer v. Coxe Bros. & Co., 107 A. 739, 264 Pa. 372. 71 C.J. p 1397 note 14.

41. Ga.—American Mut. Liability Ins. Co. v. Lindsey, 11 S.E.2d 512, 68 Ga.App. 658.

Mo.—Kasper v. Liberty Foundry Co., App., 54 S.W.2d 1002.

42. Tex.—Hart v. Texas Employers' Ins. Ass'n, Civ.App., 42 S.W.2d 798.

43. Ga.—Maryland Casualty Co. v. England, 129 S.E. 446, 34 Ga.App. 354.

44. Tex.—Fidelity Union Casualty Co. v. Riley, Civ.App., 26 S.W.2d 682.

45. Or.—Miller v. State Industrial Accident Commission, 165 P. 576, 84 Or. 507.

46. Ill.—Armour & Co. v. Industrial Board of Illinois, 113 N.E. 138, 273 Ill. 590. 71 C.J. p 1398 note 21.

47. Ill.—Dragovich v. Iroquois Iron Co., 109 N.E. 999, 269 Ill. 478.

48. Pa.—Shumkas v. Philadelphia & Reading Coal & Iron Co., 101 Pa. Super. 401.

49. U.S.—Great Am. Indem. Co. v. Ortiz, C.A.Tex., 193 F.2d 43—O'Hearne v. Maryland Cas. Co., C.A. Va., 177 F.2d 979—Texas Compensation Ins. Co. v. Heard, C.C.A. Tex., 98 F.2d 548.

Colo.—Industrial Commission v. Martinez, 77 P.2d 646, 102 Colo. 31—

Industrial Commission v. Carpenter, 76 P.2d 418, 102 Colo. 22.

Conn.—Dinck v. Gellatly Const. Co., 45 A.2d 585, 132 Conn. 479.

Fla.—Chiles v. E. M. Scott Const. Co., 91 So.2d 173—Glass v. G. A. Miller Co., 65 So.2d 749.

Ga.—Ideal Mut. Ins. Co. v. Ray, 88 S. E.2d 428, 82 Ga.App. 273.

Kan.—Justice v. Continental Can Co., 257 P.2d 564, 174 Kan. 539.

Ky.—Warner v. Lexington Roller Mills, 233 S.W.2d 988, 314 Ky. 1—Hardy-Burlingham Mining Co. v. Hurt, 69 S.W.2d 1030, 253 Ky. 534.

La.—Edwards v. Louisiana Forestry Commission, 60 So.2d 449, 221 La. 818—Cockrell v. Penrod Drilling Co., 39 So.2d 429, 214 La. 951—Harkness v. Olcott Stone Motors, 14 So.2d 773, 203 La. 947.

Mass.—Case of Ward, 190 N.E. 25, 286 Mass. 72.

Mo.—Arnold v. Wigdor Furniture Co., 281 S.W.2d 789.

Mitchell v. Knutson, 137 S.W.2d 648, 234 Mo.App. 332—Caldwell v. Melbourne Hotel Co., 129 S.W.2d 26, 235 Mo.App. 175.

Neb.—Peek v. Ayres Auto Supply, 44 N.W.2d 321, 153 Neb. 239.

N.H.—Colby v. Varney, 82 A.2d 604, 97 N.H. 130.

N.J.—Minter v. Bendix Aviation Corp., 130 A.2d 809, 24 N.J. 128.

Gagliano v. Botany Worsted Mills, 80 A.2d 125, 13 N.J.Super. 1. N.Y.—Bergman v. Mergenthaler Linotype Co., 61 N.E.2d 513, 294 N.Y. 204.

Ohio.—Gardner v. Industrial Commission of Ohio, 78 N.E.2d 802, 148 Ohio St. 141.

Or.—Coblentz v. State Indus. Acc. Commission, 279 P.2d 503, 203 Or. 258.

Pa.—Cowan v. Bunting Gilder Co., 49 A.2d 270, 159 Pa.Super. 573—Strait v. Gulf Oil Co., 14 A.2d 168, 140 Pa. Super. 464—Ceccato v. Union Collieries Co., 8 A.2d 422, 137 Pa. Super. 174—Icenhour v. Freedom Oil Works Co., 7 A.2d 152, 136 Pa. Super. 313—Gerrahan v. Glen Alden Coal Co., 5 A.2d 437, 135 Pa. Super. 367.

R.I.—Burns v. Rhode Island Tool Co., 85 A.2d 925, 79 R.I. 169.

S.C.—Lamb v. Pacolet Mfg. Co., 43 S.E.2d 353, 210 S.C. 490—Mack v. Branch No. 12, Post Exchange, Fort Jackson, 35 S.E.2d 838, 207 S.C. 258.

Tenn.—Ledford v. Miller Bros. Co., 253 S.W.2d 552, 194 Tenn. 467.

Tex.—City of Austin v. Powell, 299 S.W.2d 273—Meyer v. Great Am. Indem. Co., 279 S.W.2d 575, 154 Tex. 408—Halliburton v. Texas Indem. Ins. Co., 213 S.W.2d 677, 147 Tex. 133—Insurers Indemnity & Insurance Co. v. Associated Indemnity Corp., 162 S.W.2d 666, 139 Tex. 236.

American Mut. Liability Ins. Co. v. Corbell, Civ.App., 289 S.W.2d 423—Hardware Mut. Casualty Co. v. Riddle, Civ.App., 142 S.W.2d 312—Federal Underwriters Exchange v. Dorman, Civ.App., 137 S.W.2d 100, error dismissed, judgment correct—Consolidated Underwriters v. Trevino, Civ.App., 124 S.W.2d 861.

Wash.—Olympia Brewing Co. v. Department of Labor & Industries of State, 208 P.2d 1181, 34 Wash.2d 498—Miller v. Department of Labor

The court may remand the case where the pleadings do not support the judgment,⁵⁰ where the evidence is insufficient,⁵¹ where the findings are insuf-

ficient⁵² or further findings are needed,⁵³ where the findings are contradictory,⁵⁴ where the lower

bor and Industries of Washington, 94 P.2d 764, 200 Wash. 674.

Wis.—Hills Dry Goods Co. v. Industrial Commission, 267 N.W. 905, 222 Wis. 439, certiorari denied Hills Bros. Dry Goods Co. v. Klicka, 57 S.Ct. 430, 300 U.S. 654, 81 L.Ed. 864.

Exercise of power depends on circumstances

Where workmen's compensation bureau awarded compensation on ground accident "could have been" proximate cause of fatal disease, court of common pleas could have remanded cause to bureau for performance of bureau's duty to make a specific finding and determination, and, on certiorari, supreme court could so remand cause where common pleas court failed to do so, but whether supreme court would exercise its power to remand would depend on the particular circumstances. N.J.—Calicchio v. Jersey City Stock Yards Co., 14 A.2d 465, 135 N.J. Law 112.

New evidence

In workmen's compensation proceeding wherein supreme court entered judgment determining that one of two claimants was widow of employee, but before judgment became final a witness was discovered who without dispute was legally married to successful claimant during time she allegedly was married to employee, supreme court had authority to remand proceeding to circuit court so that new evidence could be presented and rights of parties determined according to true facts.

Miss.—Hill v. United Timber & Lumber Co., 78 So.2d 247, 221 Miss. 473.

Counsel fees

(1) Appellate court was without power to reverse judgment in favor of employee under compensation act and remand the cause to trial court as between insurance carrier and employee who had agreed on a settlement and at same time retain jurisdiction over appeal so far as it affected the award of attorney's fees to counsel for employee who was not a party to the suit or the appeal. Tex.—Consolidated Underwriters v. Trevino, Civ.App., 124 S.W.2d 861.

(2) Where workmen's compensation claimant successfully appealed from judgment notwithstanding verdict and trial court had not determined fee of his attorney, court of civil appeals would reverse judgment and remand cause with instructions to render judgment on verdict and determine attorney's fees.

Tex.—Deas v. Safety Cas. Co., Civ. App., 190 S.W.2d 750, refused for

want of merit—Reid v. Associated Employers Lloyds, Civ.App., 164 S.W.2d 584, error refused.

Interpretation of mandate is, in first instance, for lower court.

Wis.—Hills Dry Goods Co. v. Industrial Commission, 267 N.W. 905, 222 Wis. 439, certiorari denied Hills Bros. Dry Goods Co. v. Klicka, 57 S.Ct. 430, 300 U.S. 654, 81 L.Ed. 864.

Proceedings after remand

Fla.—Lyng v. Rao, 87 So.2d 108.

Ga.—Ideal Mut. Ins. Co. v. Ray, 96 S.E.2d 377, 94 Ga.App. 785—Hood v. Jackson, 70 S.E.2d 94, 85 Ga. App. 708.

La.—Wade v. Calcasieu Paper Co., App., 95 So.2d 725.

N.J.—Temple v. Storch Trucking Co., 125 A.2d 297, 41 N.J.Super. 397.

Pa.—Meehan v. City of Philadelphia, 136 A.2d 178, 184 Pa.Super. 659.

Wis.—M. & M. Realty Co. v. Industrial Commission, 64 N.W.2d 413, 267 Wis. 52—Standard Oil Co. (Indiana) v. Industrial Commission, 1 N.W.2d 874, 239 Wis. 457—Hills Dry Goods Co. v. Industrial Commission, 282 N.W. 612, 229 Wis. 515—Hills Dry Goods Co. v. Industrial Commission, 267 N.W. 905, 222 Wis. 439, certiorari denied Hills Bros. Dry Goods Co. v. Klicka, 57 S.Ct. 430, 300 U.S. 654, 81 L.Ed. 864.

Motion to postpone submission of appeal and to appoint commissioner and remand workmen's compensation suit to hear further evidence, would be stricken out on ground that procedure prayed for was not authorized either by rules of civil procedure or by statute.

Tex.—Texas Emp. Ins. Ass'n v. Scott, Civ.App., 233 S.W.2d 171, error refused no reversible error.

50. Tex.—Texas Employers Ins. Ass'n v. Watkins, Civ.App., 135 S.W.2d 296—Traders & General Ins. Co. v. Marrable, Civ.App., 126 S.W.2d 746, error dismissed.

51. Ky.—James v. Elkhorn Piney Coal Mining Co., 127 S.W.2d 823, 277 Ky. 765.

Pa.—Valent v. Berwind-White Coal Min. Co., 94 A.2d 197, 172 Pa.Super. 305—Bird v. Brown, 25 A.2d 857, 148 Pa.Super. 534—Battalene v. State Work Relief Compensation Fund, 200 A. 198, 131 Pa.Super. 430—Cimo v. State Workmen's Ins. Fund, 193 A. 283, 127 Pa.Super. 49.

71 C.J. p 1398 note 26.

Number of hearings

Supreme Court reversing judgment on ground of insufficiency of evidence would not return case to workmen's compensation board for further evidence, where case was heard

by three different referees and many hearings were held before workmen's compensation board.

Pa.—Eberst v. Sears Roebuck & Co., 6 A.2d 577, 334 Pa. 505.

52. Colo.—O. P. Skaggs Co. v. Nixon, 50 P.2d 55, 97 Colo. 314.

La.—Meyers v. Southwest Region Conference Ass'n of Seventh Day Adventists, 88 So.2d 381, 230 La. 310.

Neb.—Peek v. Ayres Auto Supply, 44 N.W.2d 321, 153 Neb. 239.

N.C.—Evans v. Tabor City Lumber Co., 59 S.E.2d 612, 232 N.C. 111.

Pa.—Friel v. Sun Shipbuilding & Drydock Co., 101 A.2d 171, 174 Pa.Super. 320—Kenny v. Esslinger's Brewery, 55 A.2d 554, 161 Pa.Super. 451.

Tex.—Consolidated Underwriters v. Langley, 170 S.W.2d 463, 141 Tex. 78.

53. Kan.—Thorp v. Victory Cab Co., 240 P.2d 128, 172 Kan. 384.

N.J.—Gagliano v. Botany Worsted Mills, 80 A.2d 125, 13 N.J.Super. 1.

N.C.—Evans v. Tabor City Lumber Co., 59 S.E.2d 612, 232 N.C. 111.

N.D.—Burkhardt v. State, 53 N.W.2d 394, 78 N.D. 818.

Pa.—Leber v. Naftulin, 115 A.2d 768, 179 Pa.Super. 22—Allen v. Patterson-Emerson-Comstock, Inc., 119 A.2d 832, 180 Pa.Super. 286.

Tex.—American Mut. Liability Ins. Co. v. Corbell, Civ.App., 239 S.W.2d 423.

71 C.J. p 1398 note 27.

Further evidence

In proceeding for compensation for partial dependency on deceased employee, where full hearing had been had, but case was recommitted to industrial accident board to state evidential basis of its determination of amount of employee's contribution toward support of dependents, parties were not entitled to have further evidence received.

Mass.—Case of Ward, 190 N.E. 25, 286 Mass. 72.

Amplification of finding

Court will sustain general finding of reviewing board in compensation case if possible, and will be slow to order case recommitted to board for amplification of its findings on issue not shown to have been fairly brought to attention of board and seriously put in dispute.

Mass.—Blanchard's Case, 138 N.E.2d 762.

54. Pa.—Babis v. Mount Jacob Cemetery Co., 118 A.2d 588, 179 Pa. Super. 616—Wynskie v. Philadelphia & Reading Coal & Iron Co., 95 Pa.Super. 279.

court failed to fix the amount of the award,⁵⁵ where the pleadings and evidence fail to show an excuse for not filing the claim in time,⁵⁶ for correction of the order for judgment,⁵⁷ or where the lower court allowed compensation on an erroneous theory.⁵⁸

Where no facts remain to be determined or developed, the court on further review may enter final judgment and need not remand the case.⁵⁹ On review of a judgment affirming an award the court will not remand for detailed findings where the evidence is undisputed but will regard the evidence as though it were the findings.⁶⁰ A judgment approving the board's order dismissing a compensation claim will not be reversed for reference to the board to make separate factual findings required by statute, where no valid claim for additional compensation existed.⁶¹ The case will not be remanded for the taking of evidence on an immaterial matter.⁶² Where findings are undisputed and there is no jus-

tification for remand, the court may, on reversing, render judgment,⁶³ but a remand is necessary where the case has not been fully developed or a matter remains open for determination.⁶⁴

Where the court on further review is authorized to make an independent determination of the facts, as discussed supra § 807, it tends to make a final disposition of the case rather than to remand it where it does not appear that additional evidence can be presented.⁶⁵ The matter should be remanded where it appears probable that a deficiency in the evidence may be cured on a further hearing.⁶⁶ The appellate court should not make a final disposition of the case where it is of the opinion that, through inadvertence or otherwise, the facts have not been fully developed.⁶⁷ Thus, in the interests of justice, the court may remand the case to permit the presentation of evidence which the parties failed to present at the original hearing.⁶⁸

55. Miss.—*Mills v. Jones' Estate*, 57 So.2d 496, 213 Miss. 680.

56. Tex.—*Employers' Liability Assur. Corporation v. Francis*, Civ. App., 300 S.W. 137.

57. Pa.—*Johnson v. Baldwin Locomotive Works*, 98 Pa.Super. 28.

58. Tex.—*Travelers' Ins. Co. v. Richmond*, Com.App., 291 S.W. 1085.

59. U.S.—*Travelers Ins. Co. v. Burden*, C.C.A.Tex., 94 F.2d 880.

Iowa.—*Gifford v. Iowa Mfg. Co.*, 51 N.W.2d 119, 243 Iowa 145.

Mass.—*Flaherty's Case*, 56 N.E.2d 880, 316 Mass. 719.

Pa.—*Gliallonardo v. St. Joseph's College*, 111 A.2d 178, 177 Pa.Super. 87—*Diaz v. Jones & Laughlin Steel Corp.*, 88 A.2d 801, 170 Pa.Super. 680—*Rovere v. Interstate Cemetery Co.*, 63 A.2d 388, 164 Pa.Super. 233—*Rupchak v. Westinghouse Elec. & Mfg. Co.*, 54 A.2d 809, 161 Pa.Super. 228—*Roberts v. John Wanamaker, Philadelphia*, 30 A.2d 189, 151 Pa.Super. 297.

Tex.—*Hood v. Texas Indem. Ins. Co.*, 209 S.W.2d 345, 146 Tex. 522—*Southern Underwriters v. Gallagher*, 136 S.W.2d 590, 135 Tex. 41—*Petroleum Cas. Co. v. Dean*, 122 S.W.2d 1053, 132 Tex. 320—*Texas Employers' Ins. Ass'n v. Burnett*, 105 S.W.2d 200, 129 Tex. 407.

Traders & General Ins. Co. v. Jones, Civ.App., 201 S.W.2d 185, error refused no reversible error—*Federal Underwriters Exchange v. Hightower*, Civ.App., 161 S.W.2d 338, error refused—*Texas Fire & Casualty Underwriters v. Seearl*, Civ.App., 158 S.W.2d 865, error refused—*Fort Worth Lloyds v. Roberts*, Civ.App., 154 S.W.2d 832, error refused—*Republic Underwriters v. Terrell*, Civ.App., 126 S.W.2d 752.

Absence of finding

(1) Ordinarily, in compensation case, subsidiary findings are required in order that reviewing court may determine whether ultimate finding was based on correct principles of law, but further findings were not necessary and case would not be remanded to superior court where it sufficiently appeared that employee, at time of his death, was engaged in business affairs of his employer and received fatal injuries arising from risk of street.

Mass.—*Hamel's Case*, 132 N.E.2d 403, 333 Mass. 628.

(2) An award of compensation by compensation bureau was affirmed notwithstanding conclusion of bureau did not contain specific finding of facts on which conclusion justifying award was based, where independent study of proofs of supreme court led to same conclusion.

N.J.—*Rojeski v. Pennington Dairy Farms*, 192 A. 746, 118 N.J.Law 335.

60. Colo.—*Prouse v. Industrial Commission of Colorado*, 194 P. 625, 69 Colo. 332.

61. Ky.—*Cornett v. Fordson Coal Co.*, 32 S.W.2d 934, 236 Ky. 209.

62. Pa.—*Grazer v. Consolidated Vultee Aircraft Co.*, 55 A.2d 538, 161 Pa.Super. 434.

63. Tex.—*Texas Indemnity Ins. Co. v. Dill*, Civ.App., 42 S.W.2d 1059, affirmed, Com.App., 63 S.W.2d 1016.

64. Idaho.—*Smith v. McHan Hardware Co.*, 48 P.2d 1102, 56 Idaho 48.

Pa.—*Landis v. Fisher Body Division, General Motors Corp.*, 119 A.2d 645, 140 Pa.Super. 332—*Lowe v. L. & E. Transp. Co.*, 27 A.2d 666, 149 Pa.Super. 431—*Crain v. Free Methodist Church*, 175 A. 293, 115 Pa.Super. 253.

Tex.—*Godwin v. Texas Emp. Ins. Ass'n*, 195 S.W.2d 347, 145 Tex. 100.

General Ins. Corp. v. Smith, Civ. App., 232 S.W.2d 785, error refused no reversible error—*Maryland Cas. Co. v. Abbott*, Civ.App., 131 S.W.2d 171, error dismissed, judgment correct—*Federal Underwriters Exchange v. Arnold*, Civ.App., 127 S.W.2d 972, error dismissed, judgment correct—*Consolidated Underwriters v. Strawther*, Civ.App., 109 S.W.2d 791—*Texas Employers' Ins. Co. v. Jones*, Civ.App., 70 S.W.2d 791, affirmed *Jones v. Texas Employers Ins. Ass'n*, 99 S.W.2d 903, 128 Tex. 437.

71 C.J. p 1398 note 34.

Where disputed fact questions were present and undecided, supreme court, on appeal from district court judgment affirming Industrial Commissioner's award of compensation, must remand case for further proceedings. Iowa.—*Stufflebean v. City of Fort Dodge*, 9 N.W.2d 281, 233 Iowa 433.

65. Mont.—*Tweedie v. Industrial Accident Board*, 53 P.2d 1145, 101 Mont. 256.

N.J.—*Calicchio v. Jersey City Stock Yards Co.*, 14 A.2d 485, 125 N.J.Law 112.

66. Md.—*Langenfelder v. Jones*, 15 A.2d 422, 178 Md. 421.

67. Conn.—*Steedley v. General Elec. Co.*, 86 A.2d 179, 138 Conn. 432—*Dinck v. Gellatly Const. Co.*, 48 A.2d 585, 132 Conn. 479—*McQuade v. Town of Ashford*, 35 A.2d 842, 140 Conn. 478—*St. John v. U. P. Steele & Co.*, 25 A.2d 54, 128 Conn. 698—*Kenyon v. Swift Service Corp.*, 134 A. 643, 121 Conn. 444.

68. La.—*Wade v. Calhoun Paper Co.*, 88 So.2d 644, 229 La. 170.

On reversal of a judgment on appeal from an award the reviewing court will reverse and remand, but will not render judgment where the evidence is insufficient to enable it to compute the compensation to be awarded,⁶⁹ or where there is no sufficient evidence to show jurisdiction or the lack of it,⁷⁰ and where the lower court was without jurisdiction of the appeal because no notice of appeal was given, the reviewing court will remand, rather than render judgment.⁷¹

Where the court below was without jurisdiction on appeal the court will reverse and remand for dismissal rather than dismiss⁷² notwithstanding an award denying compensation was affirmed on appeal.⁷³ Under the practice in some jurisdictions, where the judgment is reversed as against the weight of the evidence, the appellate court cannot render final judgment but must remand the case for a new trial.⁷⁴ The appellate court may not enter judgment contrary to the findings of the jury and, in such case, the matter must be remanded.⁷⁵ Where the lower court is authorized only to confirm or set aside an award made by the compensation authorities, the higher court may not fix the amount of the award and direct the lower court to enter judgment for that amount.⁷⁶

Where the case was tried on the wrong theory, it must be remanded for a complete retrial.⁷⁷

Remand with directions. On further review, the court may remand the case with directions as to the action to be taken.⁷⁸ Where a retrial is not necessary, the appellate court may remand the case with directions as to the judgment to be entered.⁷⁹ On appeal from an order of the court below remanding a cause to the board or commission instead of entering final judgment, the reviewing court may remand to the lower court with instructions to enter a final judgment.⁸⁰ Where the court below reversed an award allowing compensation, the reviewing court may in a proper case remand with instruction to the lower court to enter judgment for claimant.⁸¹ Where the question of relationship of employer and employee was not litigated before the commission, a judgment vacating the award should be reversed and remanded with instructions to remand to the commission for determination of the question.⁸² On remand the court may direct amendment of claimant's application for compensation.⁸³

The lower court must comply with the order or directions of the higher court.⁸⁴

§ 814. — New Trial

On further review of a compensation case, the court may grant a new trial.

Where the court on further review reverses the judgment of the lower court, it may direct a new trial.⁸⁵ Where the court on review affirms a judg-

69. Tex.—Texas Employers' Ins. Ass'n v. Villarreal, Civ.App., 1 S.W. 2d 692—Stowell v. Texas Employers' Ins. Ass'n, Civ.App., 259 S.W. 311.

70. Tex.—Petroleum Casualty Co. v. Crow, Civ.App., 16 S.W.2d 917.

71. Tex.—New Amsterdam Casualty Co. v. Hough, Civ.App., 277 S.W. 794.

72. Mo.—Morrison v. Terminal R. R. Ass'n, App., 57 S.W.2d 775.

71 C.J. p 1898 note 36.

73. Mo.—Morrison v. Terminal R. R. Ass'n, App., 57 S.W.2d 775.

74. Ohio.—Gardner v. Industrial Commission of Ohio, 73 N.E.2d 802, 148 Ohio St. 141.

Tex.—Gulf Cas. Co. v. Hughes, Civ. App., 230 S.W.2d 293—Pacific Indem. Co. v. Sanders, Civ.App., 216 S.W.2d 238—Southern Underwriters v. Garlepy, Civ.App., 105 S.W.2d 760, error dismissed.

75. Tex.—Texas Employers' Ins. Ass'n v. Bauer, Civ.App., 128 S.W. 2d 840, error dismissed, judgment correct.

76. Wis.—Rhineland Paper Co. v. Industrial Commission, 258 N.W. 384, 216 Wis. 623.

77. Mo.—Fear v. Ebony Paint Mfg.

Co., 181 S.W.2d 559, 238 Mo.App. 560.

Tex.—Williams v. Safety Cas. Co., 102 S.W.2d 178, 129 Tex. 184.

78. U.S.—Kobilkin v. Pillsbury, C.C. A.Cal., 103 F.2d 667, affirmed 60 S.Ct. 465, 309 U.S. 619, 84 L.Ed. 983, rehearing denied 60 S.Ct. 584, 309 U.S. 695, 84 L.Ed. 1035—Twin Harbor Stevedoring & Tug Co. v. Marshall, C.C.A.Wash., 103 F.2d 513.

Colo.—Black Diamond Fuel Co. v. Frank, 64 P.2d 797, 99 Colo. 528.

Mass.—Lysaght's Case, 103 N.E.2d 259, 328 Mass. 281.

N.J.—Minter v. Bendix Aviation Corp., 130 A.2d 809, 24 N.J. 128.

Mo.—Neidert v. United Transports, App., 167 S.W.2d 404.

Pa.—Roland v. Frantz, Com.Pl., 37 Berks Co. 1.

Tex.—Eastep v. Travelers Ins. Co., Civ.App., 235 S.W.2d 732.

Remand to fix fees of expert witnesses

La.—Hemphill v. Tremont Lumber Co., 25 So.2d 625, 209 La. 835.

79. Tex.—Garcia v. Texas Indem. Ins. Co., 209 S.W.2d 333, 146 Tex. 418.

Norwich Union Indemnity Co. v. Willson, Com.App., 67 S.W.2d 225.

Knipe v. Texas Emp. Ins. Ass'n, Civ.App., 234 S.W.2d 274, affirmed Texas Emp. Ins. Ass'n v. Knipe, 239 S.W.2d 1006, 150 Tex. 318.

80. Pa.—Rakie v. Jefferson & Clearfield Coal & Iron Co., 103 A. 302, 259 Pa. 534.

81. Pa.—Kovach v. Union Drawn Steel Co., 99 Pa.Super. 302.

82. Wis.—Wisconsin Granite Co. v. Industrial Commission of Wisconsin, 242 N.W. 191, 208 Wis. 270, followed in Wisconsin Granite Co. v. Industrial Commission, 242 N.W. 195, 208 Wis. 282.

83. Ill.—Consumers' Co. v. Industrial Commission, 146 N.E. 539, 315 Ill. 592.

84. Ga.—Orvin v. National Sur. Corp., 78 S.E.2d 91, 88 Ga.App. 785.

85. U.S.—Martin v. Texas Emp. Ins. Ass'n, C.A.Tex., 193 F.2d 645.

Md.—Consolidated Engineering Co. v. Feikin, 52 A.2d 913, 188 Md. 420.

Tex.—Texas Emp. Ins. Ass'n v. Collins, 295 S.W.2d 902—American Gen. Ins. Co. v. Jones, 255 S.W.2d 502, 152 Tex. 99—Federal Underwriters Exchange v. Tubbe, 183 S.W.2d 444, 143 Tex. 216.

Dillard v. Traders & General Ins. Co., Civ.App., 271 S.W.2d 825.

ment of the lower court affirming an award it cannot, in the absence of proper grounds, and as a matter of favor, grant a new trial.⁸⁶ Unless so permitted by the compensation act, the reviewing court cannot grant a new trial for newly discovered evidence.⁸⁷

§ 815. Rehearing

An application for rehearing of the appeal is addressed to the discretion of the court.

As in a case on appeals generally, an application for the rehearing of an appeal in a compensation case is addressed to the discretion of the court.⁸⁸

The court will refuse a petition for a rehearing where all the questions raised were fully argued and considered by the court in reaching its original conclusion.⁸⁹ A party cannot obtain a rehearing of the appeal on the basis of new factual matter⁹⁰ or on the basis of errors not previously urged.⁹¹ The general rule denying a rehearing to a litigant who is not diligent is not to be applied in all strictness in compensation cases.⁹² A rehearing will not be granted after affirmance of a judgment sustaining an award where the evidence warrants the conclusions of the reviewing court as to the raising of particular issues.⁹³

16. LIABILITY ON BOND OR SECURITY

§ 816(1). In General

General rules apply as to liability on appeal bonds in compensation cases.

The general rules, as discussed in Appeal and Error § 2004 et seq, as to liability on appeal bonds apply with respect to liability on appeal bonds in compensation cases.⁹⁴ The principal and surety on appeal bond are liable for the payment of the award where the award is affirmed⁹⁵ or if the appeal is dismissed.⁹⁶ Liability on an appeal bond does not extend to any and all awards that may be rendered in connection with the case,⁹⁷ but does extend to such award as may be made in order to comply with the mandate of the appellate court if the award sought to be reviewed is affirmed in whole or part.⁹⁸

Liability on a bond given on certiorari from an award is terminated when the award is set aside on the ground of lack of jurisdiction.⁹⁹ The surety

on a bond filed to obtain a review of a compensation award is not liable for the payment of a subsequent award made after the setting aside of the award appealed from.¹ Where the appeal is successful, the surety is discharged and is not liable for the costs imposed on the appellant by reason of a further appeal.²

An employer's bond required to obtain certiorari to review a decision of the board may continue in effect many years, where periodical compensation payments are directed,³ and operates to secure payment of the award under final determination of the case adversely to claimant by the supreme court on writ of error to review the judgment of the circuit court.⁴ The surety on an appeal bond is discharged from liability where the act authorizing a claimant to procure a lump sum settlement, subject to rejection by the employer, was amended after the bond

New trial before compensation authorities

Supreme court has power, through its mandate to circuit court, to authorize industrial commission to undertake further proceeding in nature of a new trial by directing that circuit court remand record to commission for further proceeding.

Wis.—*M. & M. Realty Co. v. Industrial Commission*, 64 N.W.2d 413, 267 Wis. 52.

86. Wis.—*Pruno v. Industrial Commission*, 203 N.W. 330, 204 N.W. 576, 187 Wis. 358.

87. Ga.—*Corpus Juris* quoted in *Continental Casualty Co. v. Caldwell*, 189 S.E. 408, 410, 55 Ga.App. 147.

Wis.—*Town of Albion v. Industrial Commission*, 231 N.W. 249, 202 Wis. 15.

88. Ohio.—*Scott v. Industrial Commission*, App., 105 N.E.2d 831.

89. S.C.—*Smith v. Southern Builders*, 24 S.E.2d 109, 202 S.C. 83.

90. R.I.—*Foy v. A. D. Juilliard & Co., Atlantic Mills Division*, 8 A.2d 869, 63 R.I. 314.

91. Tex.—*Consolidated Underwriters v. Trevino*, Civ.App., 124 S.W.2d 861.

92. Conn.—*McCulloch v. Pittsburgh Plate Glass Co.*, 140 A. 114, 107 Conn. 164.

93. Tex.—*Texas Employers' Ins. Ass'n v. Heuer*, Civ.App., 11 S.W.2d 566.

94. Ill.—*De Vries v. United Employers' Corp.*, 33 N.E.2d 728, 309 Ill. App. 639—*Cooke v. Groveland Coal Mining Co.*, 276 Ill.App. 521.

Okl.—*Commercial Cas. Ins. Co. v. Ables*, 185 P.2d 907, 199 Okl. 288.

95. Ind.—*Rickert v. Schreiber*, 66 N.E.2d 769, 116 Ind.App. 621.

96. Ill.—*Matthews v. Trinity Universal Ins. Co.*, 69 N.E.2d 368, 329 Ill.App. 455, appeal dismissed 73 N.E.2d 284, 397 Ill. 174.

97. Okl.—*Home Indemnity Co. v. Dungan*, 61 P.2d 637, 178 Okl. 46—*Home Indemnity Co. of N. Y. v. Matkin*, 50 P.2d 688, 174 Okl. 378. 71 C.J. p 1399 note 54.

98. Okl.—*Home Indemnity Co. v. Dungan*, 61 P.2d 637, 178 Okl. 46—*Home Indemnity Co. of N. Y. v. Matkin*, 50 P.2d 688, 174 Okl. 378. 71 C.J. p 1399 notes 52, 53.

99. Ill.—*De Vries v. United Employers' Corp.*, 33 N.E.2d 728, 309 Ill.App. 639.

1. Okl.—*Home Indemnity Co. of New York v. Matkin*, 50 P.2d 688, 174 Okl. 378.

2. Tenn.—*Coker v. Armco Drainage & Metal Products Co.*, 236 S.W.2d 980, 192 Tenn. 10.

3. Ill.—*Nierman v. Industrial Commission*, 161 N.E. 115, 329 Ill. 623.

4. Ill.—*Gierts v. Snyder*, 185 N.E. 57, 302 Ill. 618.

was given so as to take away the option of rejection, and the surety is not liable for a lump sum settlement awarded after the passage of such amendment.⁵

Where the employer paid the award on his insurer's insolvency, the employer can recover the payment from the surety on the appeal bond.⁶

§ 816(2). Determination of Liability

The compensation commission may be authorized to determine liability on an appeal bond.

Where a bond is required before the review of a commission's award, the commission may, after its award has been sustained, determine the liability of the surety on the bond.⁷ The reviewing court is not, it has been held, authorized to render judgment on the appeal bond on affirming an award.⁸

An action against the surety on the bond, on the theory of subrogation, may be maintained in any court of general jurisdiction.⁹

O. COSTS, EXPENSES, AND ATTORNEY'S FEES

§ 817. Attorney's Fees

The right to, and the liability for, attorney's fees is discussed infra §§ 818-822.

Examine Pocket Parts for later cases.

§ 818. — Right to

The right to attorney's fees in workmen's compen-

sation cases is wholly dependent on the provisions of the compensation acts, and fees are allowable only in such proceedings and in such circumstances as the statutes permit.

An allowance for an attorney's fee cannot be made unless expressly authorized by the compensation act,¹⁰ and then only in the proceeding in which

5. Ill.—Bassett v. American Surety Co. of New York, 210 Ill.App. 477.

6. Okl.—Home Indemnity Co. v. Coin, 61 P.2d 1067, 178 Okl. 25.

7. Okl.—Detroit Fidelity & Surety Co. v. Robbins, 29 P.2d 110, 167 Okl. 296.

71 C.J. p 1399 note 51.

8. Okl.—McArthur Oil Co. v. Brock, 17 P.2d 686, 161 Okl. 244.

9. Okl.—Home Indemnity Co. v. Coin, 61 P.2d 1067, 178 Okl. 25.

10. Ga.—Wilson v. Maryland Cas. Co., 30 S.E.2d 420, 71 Ga.App. 184.
Neb.—Fidelity & Cas. Co. of N. Y. v. Kennard, 75 N.W.2d 553, 162 Neb. 220—Franzen v. Blakley, 52 N.W.2d 833, 155 Neb. 621—Faulhaber v. Roberts Dairy Co., 24 N.W.2d 571, 147 Neb. 631—Rexroat v. State, 9 N.W.2d 305, 143 Neb. 333.

N.J.—Haberberger v. Myer, 71 A.2d 717, 4 N.J. 116—Selken v. Todd Dry Dock, 67 A.2d 131, 2 N.J. 469.
Caputo v. Best Foods, 105 A.2d 445, 30 N.J.Super. 552, modified on other grounds 111 A.2d 261, 17 N.J. 259.

Yeager v. Brown Bros., 37 A.2d 287, 131 N.J.Law 463, affirmed 40 A.2d 571, 132 N.J.Law 361—Stetser v. American Stores Co., 15 A.2d 627, 125 N.J.Law 275.

N.D.—Corpus Juris quoted in Wallace v. Workmen's Compensation Bureau, 293 N.W. 192, 196, 70 N.D. 193.

Ohio.—McCamey v. Payer, 22 N.E.2d 127, 135 Ohio St. 680—State ex rel. Gordon v. Industrial Commission of Ohio, 294 N.E. 438, 129 Ohio St. 212.

Or.—Davis v. State Industrial Accident Commission of Oregon, 66 P.2d 279, 156 Or. 393.

Pa.—In re Miegocki, Com.Pl., 34 Luz. Leg.Reg. 257.
71 C.J. p 1399 note 59.

Attorney's fee not authorized as costs

La.—Scott v. Fulton Bag & Cotton Mills, App., 65 So.2d 397.

N.D.—Boe v. State, 299 N.W. 253, 71 N.D. 132, followed in Bateman v. State, 299 N.W. 257, 71 N.D. 139.
71 C.J. p 1399 note 59 [b].

Attorney representing employer

Workmen's compensation policy, obligating insurer to defend for employer all suits and proceedings instituted against employer and obligating insurer to pay costs taxed against employer in any legal proceeding defended by insurer, did not authorize court to fix compensation of attorney representing employer in workmen's compensation proceeding and assess such compensation against insurer; and a statute providing that on rendition of a judgment against an insurer in favor of beneficiary under any policy, there shall be adjudged against insurer and in favor of beneficiary a reasonable sum as compensation for his attorneys cannot be employed to place on an insurance carrier in workmen's compensation proceeding burden of indemnifying employer or employee for cost of services rendered by counsel.

Fla.—Great Am. Indem. Co. v. Smith, 24 So.2d 42, 156 Fla. 662.

Question for court

In action for compensation, whether plaintiff should be allowed attor-

ney's fees is question for court, not jury.

N.M.—Robinson v. Mitty Bros., 94 P.2d 99, 43 N.M. 357.

Burden to establish right to attorney's fees is on compensation claimant.

Fla.—Balatsos v. Nebraska Ave. Cafe & Liquor Store, 30 So.2d 633, 159 Fla. 71.

Prevailing party

(1) Where compensation bureau dismissed claim and was reversed by Court of Common Pleas which awarded compensation, and judgment was ultimately reversed by supreme court, claimant was not prevailing party, and hence not entitled to attorney's fees.

N.J.—Seiken v. Todd Dry Dock, 67 A.2d 131, 2 N.J. 469.

(2) Where employee's widow to whom an award had been made prevailed on initial issue of fraud, and interpleader action instituted by employer was intimately related with that issue, widow was entitled to allowance of counsel fees and costs for services rendered on interpleader action in several courts.

N.J.—Minter v. Bendix Aviation Corp., 130 A.2d 809, 24 N.J. 123.

Minor

Allowance of attorney's fees is authorized in a proceeding by a minor for injuries sustained while employed in an occupation prohibited to such a minor by labor laws.

N.J.—Sullivan v. Komorowski, 106 A.2d 377, 31 N.J.Super. 262.

Effect of invalidity of statute

Invalidity of amendatory provision of workmen's compensation statute raising fees of prevailing claimant's

the statute authorizes the allowance.¹¹ Under some statutes a claim for legal services must be made or presented to the commission.¹² An award of compensation is a prerequisite to an award of attorney's fees.¹³

Under some compensation acts provision is made for the allowance of attorney's fees,¹⁴ some authorizing them in special instances, as where the employer refuses or willfully neglects to comply with

the requirements of the compensation act as to insuring his liability thereunder;¹⁵ but this provision does not apply to refusal to pay compensation awarded where the employer has complied with the requirements.¹⁶ Under other provisions such fees are allowed where, after the award of compensation, the employer does not institute proceedings for its review, and refuses to pay it.¹⁷ Likewise, attorney's fees may be awarded where compensation is not paid within the time prescribed by the statute,¹⁸ or where

attorney and making one-half of such fees chargeable against employer did not affect valid provisions of prior statute with respect to attorney fees. Ky.—Vestal Lumber Co. v. Clark, 268 S.W.2d 954—Burns v. Shepherd, 264 S.W.2d 685.

Statute held not retroactive

Fla.—Hardware Mut. Casualty Co. v. Carlton, 9 So.2d 359, 151 Fla. 288.

11. Ga.—Corpus Juris cited in Patterson v. Curtis Pub. Co., 198 S.E. 102, 104, 58 Ga.App. 211.

N.D.—Corpus Juris quoted in Wallace v. Workmen's Compensation Bureau, 293 N.W. 192, 196, 70 N.D. 193. Ohio.—State ex rel. Gordon v. Industrial Commission of Ohio, 194 N.E. 418, 129 Ohio St. 212.

Tex.—Texas Employers' Ins. Ass'n v. Nunemaker, Civ.App., 278 S.W. 889.

Statute strictly construed

Wash.—Boeing Aircraft Co. v. Department of Labor and Industries, 178 P.2d 164, 26 Wash.2d 51.

On final award

Where employer paid wages to employee during disability, and compensation board made an award as reimbursement and directed that fee of claimant's attorney should be fixed when final award was made and continued case, matter of fee was within discretion of board under compensation statute.

N.Y.—Rubinfeld v. Department of Taxation & Finance, 104 N.Y.S.2d 431, 278 App.Div. 879.

Proceedings in which fees not authorized

Where petition to have employer held in contempt for failure to pay compensation benefits for total incapacity after employee had been re-employed and then laid off in a general layoff, was vigorously contested by employer, but there was nothing improper or malicious in conduct of employer, request of employee for counsel fees would be denied.

R.I.—Zielonka v. U. S. Rubber Co., 74 A.2d 246, 77 R.I. 169.

12. Okl.—Burch v. Slick, 31 P.2d 110, 167 Okl. 639.

13. Fla.—Virginian, Inc. v. Ponder, 72 So.2d 781.

N.M.—Fresquez v. Farnsworth & Chambers Co., 231 P.2d 1102, 60 N.

M. 384—Perez v. Fred Harvey, Inc., 224 P.2d 524, 54 N.M. 339.

N.J.—Yeager v. Brown Bros., 37 A.2d 287, 131 N.J.Law 463, affirmed 40 A.2d 571, 132 N.J.Law 361.

R.I.—Erbe v. A. D. Juilliard & Co., 114 A.2d 842.

Filing of a workmen's compensation claim does not in and of itself justify an award of attorney's fee. Fla.—Paul Smith Const. Co. v. Florida Indus. Commission, 93 So.2d 735.

14. Ky.—Vanderpool v. Goose Creek Mining Co., 170 S.W.2d 32, 293 Ky. 719.

N.J.—Maxwell v. Raymond Wochner, Inc., 181 A. 180, 13 N.J.Misc. 805.

N.C.—Perdue v. State Board of Equalization, 172 S.E. 396, 205 N.C. 730.

Ohio.—McCamey v. Payer, 22 N.E.2d 127, 135 Ohio St. 660.

Okl.—Woodard v. Nipper, 285 P.2d 208—Special Indem. Fund v. Hobbs, 164 P.2d 980, 196 Okl. 318.

71 C.J. p 1399 note 61.

It is not unlawful or against public policy for attorneys to represent claimants for workmen's compensation before industrial commission of Ohio and to charge and receive therefor reasonable attorneys' fees and compensation for such professional services out of workmen's compensation awards granted by commission.

Ohio.—Thornton v. Graham, 6 Ohio Supp. 289.

Where employee re-employed after injury

Under compensation act, attorneys of employee who recovered an award were entitled to recover fee from employer notwithstanding employer at time of application for fee was still paying employee a sufficient wage to be entitled to full credit for weekly compensation due under award.

Ky.—Warner v. Lexington Roller Mills, 233 S.W.2d 988, 314 Ky. 1.

15. Ga.—Wilson v. Maryland Cas. Co., 30 S.E.2d 426, 71 Ga.App. 184—Overton-Green Drives-It-Yourself System, v. Cook, 16 S.E.2d 50, 65 Ga.App. 274—Russell v. Shelton, 1 S.E.2d 225, 59 Ga.App. 496—Elliot & Harrissing Mach. Co. v. Howard, 200 S.E. 340, 59 Ga.App. 62—Dur-

ham Land Co. v. Kilgore, 194 S.E. 49, 56 Ga.App. 785—McCoy v. Southern Lumber Co., 143 S.E. 611, 38 Ga.App. 251.

Penalty

Provision of compensation act relating to assessment of damages against an employer in increased compensation and fees of claimant's counsel embodies a penalty, and must be strictly construed.

Ga.—Dunn v. American Mut. Liability Ins. Co., 13 S.E.2d 902, 64 Ga. App. 509.

Employee not entitled to compensation

Awarding attorney's fees against employer for failure to comply with statutes requiring insurance in licensed company or deposit of security was authorized, although employee was not entitled to compensation.

Ga.—Castle v. Imperial Laundry & Dry Cleaning Co., 8 S.E.2d 547, 62 Ga.App. 184.

16. Ga.—Dunn v. American Mut. Liability Ins. Co., 13 S.E.2d 902, 64 Ga.App. 509.

17. N.M.—Wells v. Gulf Refining Co., 79 P.2d 321, 42 N.M. 378. 71 C.J. p 1399 note 63.

Refusal to pay essential

Neb.—Redfern v. Safeway Stores, 16 N.W.2d 196, 145 Neb. 288—Wilson v. Brown-McDonald Co., 278 N.W. 254, 184 Neb. 211, 116 A.L.R. 702. 71 C.J. p 1399 note 63 [b].

18. Fla.—Andrews v. Strecker Body Builders, Inc., 92 So.2d 521—Rutherford v. Seven-Up Bottling Co., 83 So.2d 269.

La.—Cummings v. Albert, App., 86 So.2d 727—Wallace v. Aetna Cas. & Sur. Co., App., 68 So.2d 685—Richard v. Traders & General Ins. Co., App., 62 So.2d 533.

Tex.—Maryland Cas. Co. v. Lewis, Civ.App., 245 S.W.2d 548, affirmed in part and reversed in part on other grounds 252 S.W.2d 155, 151 Tex. 480.

Effect of offer to pay compensation. Letter from insurance carrier advising that it stood ready and willing to pay compensation in satisfaction with accident in question, but, pending that investigation and report,

the employer unsuccessfully resists payment of an award;¹⁹ but if, within the prescribed time the employer or insurer recognizes the compensable nature of the claim and begins payment, an award of attorney's fees is not justified.²⁰ Under some statutes attorney's fees may be awarded where the insurer discontinues or withholds payment capriciously, unlawfully, arbitrarily, and without probable cause;²¹ but attorney's fees will not be allowed where insurer did not act arbitrarily or capriciously.²²

Some provisions authorize an allowance of at-

torney's fees against insurer but not against the employer.²³ Under some provisions a settlement of a claim for compensation may defeat an allowance of attorney's fees if the settlement is made before knowledge of the employment of the attorney was brought home to the employer and his insurer.²⁴ Notice to the employer that claimant had hired attorneys constitutes notice to insurer.²⁵ Under some compensation acts the fee of the attorney representing claimant before the board or in a suit brought to set aside its final decisions is to be paid out of the amount recovered by claimant.²⁶ A statute pro-

mination of lawful beneficiaries was function of industrial commission, was not such compliance with requirements of act as would avoid invoking its requirement to pay claim, and successful claimants were by statute entitled to award of attorneys' fees to be paid by carrier, since willingness to pay "compensation" is not same as willingness to pay a specific claim.

Fla.—Great Am. Indem. Co. v. Williams, 85 So.2d 619.

Nonpayment pending investigation

(1) Compensation insurance carrier of an employer has a reasonable time to investigate a claim, and no penalty should be imposed on carrier for reasonably investigating a claim; time for such investigation being always relevant.

Fla.—Balatsos v. Nebraska Ave. Cafe & Liquor Store, 30 So.2d 633, 159 Fla. 71.

(2) Where employer's insurance carrier did not deny liability, and differential of time between notice of claim and first hearing was used by carrier to make needful investigations of claims, but in meantime all but one of claimants were receiving their regular salaries and remaining claimant had benefit of loan or advance in excess of deceased employee's salary, it was proper not to assess attorney's fees against carrier.

Fla.—Balatsos v. Nebraska Ave. Cafe & Liquor Store, supra.

(3) Where insurance carrier was ready and willing to pay compensation, but question existed as to which of five claimants were proper beneficiaries, burden was on industrial commission or deputy commissioner to make investigation to determine this question, and claimants were entitled to representation at investigation, and attorneys' fees could be imposed against carrier under statute.

Fla.—Great Am. Indem. Co. v. Williams, 85 So.2d 619.

Necessity of demand

Statutory provision for payment of attorney's fees in compensation pro-

ceedings is predicated on failure to make payment within sixty days after demand, and where no such period has elapsed, award of attorney's fees would be improper.

La.—Moore v. Travelers Ins. Co., App., 79 So.2d 507.

19. Fla.—Lockett v. Smith, 72 So.2d 817.

Construction of statute

Salutary purpose of provision of compensation act that if employer or insurance carrier unsuccessfully resists payment of compensation awarded employee by industrial commission, reasonable attorney's fee shall also be awarded him, should not be nullified by restrictive interpretation, and any doubt as to its construction will be resolved in employee's favor.

Fla.—Lockett v. Smith, 72 So.2d 817.

20. Fla.—Paul Smith Const. Co. v. Florida Indus. Commission, 98 So. 2d 735.

21. La.—Carrington v. Consolidated Underwriters, 89 So.2d 399, 230 La. 939.

Patterson v. Cargo Services, Inc., App., 95 So.2d 49—Gloston v. Coal Operators Cas. Co., App., 85 So.2d 100—Frige v. Pacific Emp. Ins. Co., App., 71 So.2d 625, affirmed 76 So.2d 719, 226 La. 530—Daigle v. Great Am. Indem. Co., App., 70 So. 2d 697.

Payments by another employer

Continued wage payments to a workmen's compensation claimant, after her injury, by another employer, would not excuse insurer of claimant's employer at time of her injury from withholding payment of weekly compensation or absolve it from liability for attorney's fees imposed for arbitrary and capricious failure to pay compensation due a disabled employee.

La.—Guillory v. Coal Operators Cas. Co., App., 95 So.2d 201.

22. La.—Carrington v. Consolidated Underwriters, 89 So.2d 399, 230 La. 939.

Helms v. Employers Mut. Liability Ins. Co. of Wis., App., 95 So.2d 46—Flanagan v. Welch, App., 98

So.2d 36—Hebert v. Hartford Acc. & Indem. Co., App., 88 So.2d 243—Williams v. Southern Advance Bag & Paper Co., App., 87 So.2d 165—Welch v. Newport Industries, Inc., App., 86 So.2d 704—Lyons v. Swift & Co., App., 86 So.2d 613—Lacy v. Employers Mut. Liability Ins. Co. of Wis., App., 86 So.2d 605—Washington v. Atlantic & Gulf Stevedores, Inc., App., 85 So.2d 714—Hall v. Pipe Line Service Corp., App., 85 So.2d 706—Clements v. Liberty Mut. Ins. Co., App., 85 So. 2d 675—Todd v. Sunnyland Contracting Co., App., 85 So.2d 537—Champagne v. Houston Fire & Cas. Ins. Co., App., 85 So.2d 106—Teekell v. Travelers Ins. Co., App., 83 So.2d 536—Michel v. Maryland Cas. Co., App., 81 So.2d 36—Moore v. Travelers Ins. Co., App., 79 So.2d 507—Monk v. Coal Operators Cas. Co., App., 76 So.2d 82—Madison v. Hornsby, App., 69 So.2d 616.

Tex.—Pacific Indem. Co. v. Woodall, Civ.App., 253 S.W.2d 490, error refused.

23. La.—Guillory v. Reimers-Schneider Co., App., 94 So.2d 134—Ortego v. Southern Industries Co., App., 88 So.2d 73—Todd v. Sunnyland Contracting Co., App., 85 So.2d 537.

Uninsured employer

Provision in workmen's compensation act for twelve per cent of award as damages and for reasonable attorney's fees for arbitrary failure to pay compensation is a penalty applicable only to insurers who capriciously refuse to pay benefits within sixty days after proof of loss and did not apply to an employer who was uninsured.

La.—Clifton v. Arnold, App., 87 So. 2d 386.

24. Ky.—Vestal Lumber Co. v. Clark, 268 S.W.2d 954.

25. Ky.—Vestal Lumber Co. v. Clark, supra.

26. U.S.—W. J. McCahan Sugar Refining Co. v. Norton, D.C.Pa., 34 F. 2d 449, affirmed, C.C.A., 43 F.2d

viding that fees of attorneys under the act shall be reasonable and measured according to the workman's station and shall be approved by the court does not impose such fee as additional liability on the employer.²⁷ Attorney's fees expended by insurer in successfully defending a common-law action wrongfully brought by the employee against the employer to recover for injuries suffered cannot be credited by the compensation board or commission on the amount awarded the employee as compensation under the act.²⁸ It has been held that the board has no power to adjudicate between the attorney of record and counsel with respect to allowance of fees.²⁹

Proceeding on self-insurer's bond. In a proceeding against the surety on a self-insurer's bond to enforce an award of the commission against the employer, even though the bond provides for the payment of reasonable attorney's fees, where the amount of the award and the attorney's fees combined exceed the penal sum of the bond, the award of attorney's fees, to the extent that the combined

award exceeds the amount of the bond, must be disallowed.³⁰

Unnecessary proceedings. The court does not err in failing to fix claimant's attorney's fees as provided in the compensation act where defendant is willing and ready to pay the amount due plaintiff and the proceedings are wholly unnecessary and produce nothing.³¹ Under a statute which provides for the assessment of a reasonable attorney's fee against a party who, without reasonable ground, has brought, prosecuted, or defended proceedings under the workmen's compensation act, a party who acts on a reasonable and honest, although mistaken, opinion is not liable for such attorney's fees.³² Fees may not be awarded where the action is defended and continued on reasonable grounds.³³

Appointment of legal representation. In some jurisdictions the compensation act provides for the payment of the expenses of the appointment of a legal representative of a deceased employee where such legal representative is required for the carrying out of the provisions of the compensation act.³⁴

505, certiorari denied 51 S.Ct. 212, 282 U.S. 899, 75 L.Ed. 792.

71 C.J. p 1399 note 64.

Amount recovered

Where attorney's contract for fees in a workman's compensation case provided that he was to receive certain percentage of amount recovered, amount of attorney's fee would be based on percentage of money actually received by claimant and his personal representative and not on a percentage of original award entered, since word recovered as used in contract meant actual receipt of money by claimant.

Ga.—Wilson v. Maryland Cas. Co., 30 S.E.2d 420, 71 Ga.App. 184.

27. La.—Bouchon v. Southern Surety Co., 81 So. 854, 151 La. 503.

Arbo v. Maryland Cas. Co., App., 29 So.2d 380.

28. Ky.—Beattyville Co. v. Sizemore, 261 S.W. 620, 203 Ky. 7.

29. N.Y.—Pindek v. Israel, 290 N.Y. S. 716, 248 App.Div. 909.

30. Cal.—Hartford Accident & Indemnity Co. v. Industrial Accident Commission, 13 P.2d 699, 216 C. 40.

31. Ala.—Ex parte Shaw, 97 So. 694, 210 Ala. 185.

N.J.—Cook v. Central R. Co. of New Jersey, 5 A.2d 488, 122 N.J.Law 406, affirmed 11 A.2d 28, 124 N.J.Law 126.

Mazzarella v. Compo-Site, Inc., 26 A.2d 276, 20 N.J.Misc. 182, affirmed 45 A.2d 488, 133 N.J.Law 590, affirmed 48 A.2d 917, 134 N.J.Law 616.

Proceeding not unnecessary

Where insurance carrier offered to pay employee regular compensation but refused to pay fifty per cent additional compensation, and employee was required to employ counsel to establish his right to additional compensation, allowance of attorney's fees to employee was justified.

N.M.—Janney v. Fullroe, Inc., 144 P. 2d 145, 47 N.M. 423.

32. U.S.—Sunny Point Packing Co. v. Faigh, C.C.A.Alaska, 63 F.2d 921. Va.—Honaker & Feeney v. Hartley, 124 S.E. 220, 140 Va. 1. 71 C.J. p 1400 note 69.

33. Ga.—Maryland Casualty Co. v. Stephens, 47 S.E.2d 108, 76 Ga.App. 723—Dunn v. American Mut. Liability Ins. Co., 13 S.E.2d 902, 64 Ga.App. 509.

Idaho.—In re Foster, 287 P.2d 282, 77 Idaho 26—Passmore v. Austin, 253 P.2d 800, 73 Idaho 484.

Defense on reasonable ground a question of fact

Ga.—Wilson v. Maryland Cas. Co., 30 S.E.2d 420, 71 Ga.App. 184.

34. Mass.—Mellon's Case, 121 N.E. 18, 231 Mass. 399. 71 C.J. p 1400 note 70.

Determination of right to compensation

Attorney's right to compensation for services in a compensation case, including services rendered in connection with appointment of legal representative of deceased employee, is determinable under workmen's compensation act in proceeding between attorney and employee or his legal representative, dependents or

other persons to whom compensation may be payable.

Mass.—Whittaker's Case, 66 N.E.2d 785, 319 Mass. 582.

Duty of insurer to pay

Mass.—Whittaker's Case, supra.

Nature of services

Services rendered by attorney in connection with appointment of legal representative of deceased employee ordinarily are not "services rendered in connection with a compensation case" within statute making attorneys' fees for services rendered in connection with such a case subject to approval of industrial accident board; but where appointment of legal representative of deceased employee is required to comply with compensation law, legal services in connection with such appointment are "services in connection with compensation case," and, if such services are not furnished by insurer, compensation therefor is a part of attorneys' fees for services under workmen's compensation act so as to be subject to approval of industrial accident board.

Mass.—Whittaker's Case, supra.

Effect of findings

Finding of industrial accident board that attorney for claimant was not entitled to be paid by claimant for services rendered in having claimant appointed administratrix meant that board found that attorney was not entitled to be paid for such services as a part of his fees in workmen's compensation case.

Mass.—Whittaker's Case, 66 N.E.2d 785, 319 Mass. 582.

Lay representative. Under a compensation act which provides that a party litigant before the commission may be represented by one not admitted to practice law and authorizes the commission to fix and determine and allow as a lien against the award a reasonable attorney's fee for legal services, it is proper for the commission to fix the amount to be paid a lay representative of claimant for his services.³⁵

§ 819. — On Appeal or Proceeding to Set Aside Award

Attorney's fees are allowable on appeals from decisions in workmen's compensation proceedings only when, and under such terms and conditions as, authorized by statute.

35. Cal.—Eagle Indemnity Co. v. Industrial Accident Commission of California, 18 P.2d 341, 217 C. 244.

36. N.J.—Comparrì v. James Reading, Inc., 3 A.2d 802, 121 N.J.Law 591.

71 C.J. p 1400 note 74.

Fee fixed by trial court

(1) In compensation proceeding, reviewing court could not fix the fees to which counsel for claimant were entitled, since such was function of trial court.

Wash.—Johnson v. Department of Labor and Industries of Washington, 100 P.2d 382, 3 Wash.2d 287.

(2) Determination of employer's liability to injured workman for compensation claimed is "proceeding" in both district and appellate courts, but statutory authority to allow additional attorneys' fees is reposed in trial court alone.

N.M.—New Mexico State Highway Department v. Bible, 34 P.2d 295, 38 N.M. 372.

Fee fixed by commission or board
Or.—King v. State Indus. Acc. Commission, 318 P.2d 272—Franklin v. State Indus. Acc. Commission, 274 P.2d 279, 202 Or. 237.

Utah.—Ellis v. Industrial Commission, 64 P.2d 363, 91 Utah 432.

Wash.—Harbor Plywood Corp. v. Department of Labor and Industries of State of Wash., 295 P.2d 310, 48 Wash.2d 553.

37. Ga.—Dunn v. American Mut. Liability Ins. Co., 13 S.E.2d 902, 64 Ga.App. 569.

Idaho.—Jones v. Boise Produce & Commission Co., 177 P.2d 157, 67 Idaho 287.

N.J.—Koerner v. J. L. Hass Co., 18 A.2d 295, 18 N.J.Misc. 323.

Wash.—Borenstein v. Department of Labor and Industries, 306 P.2d 223, 49 Wash.2d 674.

Term "legal proceedings" in provision of workmen's compensation

law providing that costs of legal proceedings should include attorney's fees to be fixed by trial court means proceedings on appeal to court of common pleas from action of industrial commission.

Ohio.—Carson v. Beall, 3 N.E.2d 729, 55 Ohio App. 245.

Absence of appeal

Statute prohibiting attorney, engaged in appeal to superior court from order of joint board of department of labor and industries on application for rehearing by party aggrieved by department's order, from charging or receiving any fee therein exceeding reasonable fee fixed by court is inapplicable, in absence of such appeal, and word "therein" has no reference to services of attorney before joint board or in supreme court on appeal from superior court.

Wash.—Bodine v. Department of Labor and Industries, 190 P.2d 89, 29 Wash.2d 879.

Proceedings to procure

(1) Approved practice obtaining in supreme court for awarding attorney's fees in workmen's compensation cases is on appropriate motion filed in cause, and request should be separated from an assertion of claimant.

Fla.—City of Miami v. Portz, 80 So. 2d 30—Perrin v. Tanner Grocery Co., 46 So.2d 836.

(2) Where no service of motion of claimant's attorneys for allowance of additional attorneys' fees over and above twenty-five per cent allowed by workmen's compensation commission was had on attorneys for employer and compensation insurance carrier on appeal from award of commission, supreme court would not pass on motion.

Miss.—Jackson Ready-Mix Concrete v. Young, 93 So.2d 645.

(3) Proper pleading with respect to attorney's fees in workmen's com-

penensation suit was necessary to warrant court fixing fee and entering judgment therefor.
Tex.—Employers' Liability Assur. Corporation v. Sims, Civ.App., 67 S.W.2d 445, error refused.

In the absence of statute authorizing the allowance of attorney's fees to claimant in appeals from the decision in a workmen's compensation proceeding, the court is without power to do so,³⁶ and any party in order to be entitled to attorney's fees must come within the provisions of the act.³⁷ Provisions authorizing attorney's fees where the employer does not institute proceedings for the review of the award, and refuses to pay it, do not include any attorney fees sustained by the employee in having the award reviewed in the circuit court or in the supreme court.³⁸

In some jurisdictions the compensation act provides for the allowance of a reasonable attorney fee to the party prevailing on an appeal from an award.³⁹ Thus, under some compensation acts,

Cal.—Rosslow v. Janassen, 29 P.2d 287, 136 C.A. 467, followed in Rosslow v. Mulcrevy, 29 P.2d 289, 136 C.A. 787.

38. Ill.—Board of Education of High School Dist. No. 502 of Bureau County v. Industrial Commission, 140 N.E. 39, 308 Ill. 445.

39. U.S.—Libby, McNeill & Libby v. Alaska Indus. Bd., C.A.Alaska, 191 F.2d 262, certiorari denied 72 S.Ct. 359, 342 U.S. 913, 96 L.Ed. 683—Libby, McNeill & Libby v. Alaska Indus. Bd., C.A.Alaska, 191 F.2d 260, certiorari denied 72 S.Ct. 359, 342 U.S. 913, 96 L.Ed. 683—Zeller v. Associated Indemnity Corp., C. C.A.Or., 92 F.2d 453.

Mass.—Franklin's Case, 129 N.E.2d 906, 333 Mass. 236—Green's Case, 111 N.E.2d 204, 330 Mass. 63—Dillon's Case, 85 N.E.2d 69, 344 Mass. 102.

N.J.—Fitzsimmons v. Federal Shipbuilding & Dry Dock Co., 71 A.2d 641, 4 N.J. 110.
Robertz v. Township of Hillside, 15 A.2d 796, 125 N.J.Law 321, affirmed 19 A.2d 801, 126 N.J.Law 416—Slayback Van Order Co. v. Eiben, 177 A. 671, 115 N.J.Law 17.

Zahrer v. H. H. Robertson Co., 4 A.2d 354, 17 N.J.Misc. 53—Marotta v. Fabi, 180 A. 545, 13 N.J.Misc. 690.

N.M.—Dudley v. Ferguson Trucking Co., 297 P.2d 313, 61 N.M. 168—Hathaway v. New Mexico State Police, 263 P.2d 690, 57 N.M. 747—Sallee v. Calhoun, 131 P.2d 276, 46 N.M. 468—Points v. Willis, 97 P.2d 374, 44 N.M. 31.

N.C.—Gant v. Crouch, 31 S.E.2d 705, 243 N.C. 604—Brooks v. Carolina

where the employer or insurer refuses to abide by the award of the compensation commissioner and appeals, but fails to reduce the award, the employee is entitled to an allowance of a reasonable attorney's fee.⁴⁰ Where, however, on such appeal, the compensation awarded is reduced, attorney's fees

for services in the court may not be taxed against the employer⁴¹ nor may they be awarded where the employee and not the employer appeals.⁴² Further, where the appeal is on a question involving a reasonable difference of opinion, attorney's fees will not be allowed.⁴³ Under some compensation

Rim & Wheel Co., 196 S.E. 835, 213 N.C. 518.

71 C.J. p 1400 note 76.

Employer successful on appeal

(1) An attorney's fee for services performed in circuit court is allowed to an employer under compensation act on successful appeal by employer seeking relief from burden of assessment against his class following an award by department of labor and industries, where controversy is between an injured workman or dependents of a deceased workman, and department.

Wash.—Boeing Aircraft Co. v. Department of Labor and Industries, 173 P.2d 164, 26 Wash.2d 51.

(2) Where employer was successful in an appeal from joint board of department of labor and industries to a superior court, such court properly awarded an attorney's fee to employer to be paid out of administrative fund of the department.

Wash.—St. Paul & Tacoma Lumber Co. v. Department of Labor and Industries, 144 P.2d 250, 19 Wash. 2d 639.

Losing party

(1) Where employee failed to sustain his claim on appeal in workmen's compensation proceeding, employee was not entitled to any attorney's fee in prosecuting appeal.

N.M.—Rowland v. Reynolds Elec. Engineering Co., 282 P.2d 689, 55 N. M. 287.

(2) A motion in court of appeals to fix fees of appellants' attorney after such court's reversal of district court's judgment, reversing and setting aside award of compensation under Longshoremen's Compensation Act, and remand of cause for further proceedings in district court, must be denied, as such further proceedings should include allowance of just and proper claims for legal services rendered before deputy commissioner, in district court, and on appeal.

U.S.—Henderson v. Avondale Marine Ways, C.A.La., 205 F.2d 518.

40. Neb.—Haler v. Gering Bean Co., 81 N.W.2d 152, 163 Neb. 748—Knudsen v. McNeely, 66 N.W.2d 412, 159 Neb. 227—Anderson v. Cowger, 65 N.W.2d 51, 153 Neb. 772—Krajcski v. Beem, 60 N.W.2d 651, 157 Neb. 586—Schneider v. Village of Shickley, 57 N.W.2d 437, 156 Neb. 683—Anderson v. Bituminous Cas. Co., 52 N.W.2d 414, 155 Neb. 590—Shamburg v. Sham-

burg, 45 N.W.2d 446, 153 Neb. 495—Miller v. Schlereth, 42 N.W.2d 865, 152 Neb. 805—Solheim v. Hastings Housing Co., 37 N.W.2d 212, 151 Neb. 264—Werner v. Nebraska Power Co., 31 N.W.2d 315, 149 Neb. 408—Sporcic v. Swift & Co., 30 N.W.2d 891, 149 Neb. 246, modified on other grounds 31 N.W.2d 404, 149 Neb. 489—Faulhaber v. Roberts Dairy Co., 24 N.W.2d 571, 147 Neb. 631—McRae v. A. W. Ulrich, Inc., 22 N.W.2d 697, 147 Neb. 214—Gilmore v. Department of Roads and Irrigation, 20 N.W.2d 918, 146 Neb. 647—Bronson v. City of Fremont, 9 N.W.2d 218, 143 Neb. 281—Chatt v. Massman Const. Co., 293 N.W. 105, 138 Neb. 288—Perkins v. Young, 274 N.W. 596, 133 Neb. 234.

71 C.J. p 1400 note 80.

State as employer

Under statute providing that if employer in compensation case appeals to district court or supreme court and fails to obtain reduction in amount of award, costs may be allowed for reasonable attorney's fee against employer, state, where impleaded under the "second injury" provision of the statute, would not be an "employer," and employee could not recover attorney's fees arising on state's appeals to district court and supreme court.

Neb.—Franzen v. Blakley, 52 N.W. 2d 833, 155 Neb. 621.

Award in supreme court

(1) Words "in like manner," in provision of compensation act authorizing attorney's fees on appeals to district court and "in like manner" on appeals to supreme court, refer to provision dealing with granting of fees in district court, and authorize supreme court to allow fees in a like manner as district court.

Neb.—Sporcic v. Swift & Co., 31 N.W.2d 404, 149 Neb. 489—Rexroat v. State, 9 N.W.2d 305, 143 Neb. 333.

(2) Employee, who resisted action brought by employer, employer's compensation carrier and another in compensation court on ground that employee's injury did not arise out of, and in course of, her employment and, therefore, was not within compensation act, who brought action at common law for employer's alleged negligence, who appealed from award of compensation entered by workmen's compensation court who succeeded in having action vacated,

and dismissed in district court, but who was not successful in supreme court, was not entitled to have attorney's fees allowed and taxed as costs.

Neb.—Fidelity & Cas. Co. of N. Y. v. Kennard, 75 N.W.2d 553, 162 Neb. 220.

41. Neb.—Solheim v. Hastings Housing Co., 37 N.W.2d 212, 151 Neb. 264—Bronson v. City of Fremont, 9 N.W.2d 218, 143 Neb. 281—Truka v. McDonald, 257 N.W. 232, 127 Neb. 730—City of Fremont v. Lea, 213 N.W. 820, 115 Neb. 565.

Change of date of commencement of compensation

In workmen's compensation proceeding wherein employer appealed to district court from action of compensation commissioner, and on appeal date of commencement of payment under award was fixed at later date than that fixed by commissioner, such change amounted to "reduction of award" and hence district court was deprived of authority to allow attorney's fee for plaintiff's attorney.

Neb.—Sporcic v. Swift & Co., 31 N.W.2d 404, 149 Neb. 489—Mulvey v. City of Lincoln, 287 N.W. 450, 131 Neb. 279.

42. Neb.—Elliott v. Gooch Feed Mill Co., 23 N.W.2d 262, 147 Neb. 309—Lee v. Lincoln Cleaning & Dye Works, 15 N.W.2d 330, 145 Neb. 124—Rexroat v. State, 9 N.W.2d 305, 143 Neb. 333.

71 C.J. p 1401 note 82.

Where compensation denied in compensation court

An attorney's fee is not allowable in district court where an employee seeking compensation is denied recovery in compensation court and on appeal to district court an award of compensation is made.

Neb.—Schirmer v. Cedar County Farmers Tel. Co., 296 N.W. 375, 139 Neb. 182.

43. Idaho.—Smith v. University of Idaho, 170 P.2d 404, 67 Idaho 22.

Neb.—Jackson v. Ford Motor Co., 214 N.W. 631, 115 Neb. 758.

Ohio.—Burnett v. Industrial Commission, 98 N.E.2d 41, 87 Ohio App. 441.

Wyo.—In re Iles, 113 P.2d 516, 57 Wyo. 76.

Appeal on reasonable grounds. Appeal from award of compensation board directing employer and its insurance carrier to pay attorney's fees.

acts an attorney's fee may be allowed the employee where insurer appeals to a reviewing board and the employee receives some compensation even though the amount is reduced.⁴⁴

Where, on successful appeal from the order of the commission, claimant is entitled to attorney's fees, he cannot recover attorney's fees where by negotiation he secures a cancellation of an order of the board terminating his compensation and a reinstatement of his compensation.⁴⁵ In a proceeding to set aside a compensation award minor defendants, on successfully defending the award, are entitled to have a reasonable attorney's fee for the attorney ad litem appointed to represent them taxed as a part of the costs.⁴⁶ Under a compensation act which provides that, where insurer fails or refuses to obey a compensation award and fails or refuses to bring suit to set it aside claimant on bringing suit and securing judgment sustaining such award is entitled, in addition to the award, to a reasonable attorney's fee for the prosecution of the claim, the failure of insurer to make the husband of claimant a party

to a suit to set aside the compensation award is not such an error as renders the suit to set aside the award of no effect so as to entitle claimant to an allowance for attorney's fees in her attempt to enforce the award.⁴⁷ Where counsel is employed on a contingent basis, to receive a specified percentage of any increase in compensation then being paid to claimant, and no increase is procured, a refusal to award attorney's fees is proper.⁴⁸

Some statutory provisions have been held limited in application to reviews on appeal from the award of the compensation commission;⁴⁹ and to have no application to other appeals⁵⁰ or to review by certiorari;⁵¹ but under other provisions attorney's fees may be allowed in such case.⁵²

Increase of amount on appeal. A power given the trial court to fix a reasonable fee will not permit a court on appeal to increase the amount allowed because of the labor involved in the appeal.⁵³ In some jurisdictions, however, under the statutes therein, the industrial commission⁵⁴ or the appellate court⁵⁵ may award an additional fee to the at-

ney's fees directly to claimant's attorney after employer had settled with claimant and paid him a lump sum without consulting claimant's attorney had merit, and hence claimant's motion for additional attorney's fees on ground that appeal was without reasonable grounds was properly denied.

Ga.—Dunagan v. Marell Farms, Inc., 99 S.E.2d 236, 95 Ga.App. 857.

44. Mass.—Ahmed's Case, 179 N.E. 684, 278 Mass. 180, followed in Butler's Case, 179 N.E. 690, 278 Mass. 218.

N.J.—Di Meglio v. Slonk Const. Co., 2 A.2d 470, 121 N.J.Law 366, affirmed 5 A.2d 691, 122 N.J.Law 379.

45. Wash.—Cloquet v. Department of Labor & Industries of Washington, 268 P. 602, 148 Wash. 229.

46. Tex.—Norwich Union Indemnity Co. v. Smith, 298 S.W. 403, 117 Tex. 103, answering certified questions, Civ.App., 3 S.W.2d 120, affirmed, Com.App., 12 S.W.2d 558.

47. Tex.—Indemnity Ins. Co. of North America v. Jago, Civ.App., 12 S.W.2d 817, reversed on other grounds 36 S.W.2d 980, 120 Tex. 204.

71 C.J. p 1401 note 87.

48. Mo.—Werner v. Pioneer Cooperative Co., App., 155 S.W.2d 319.

49. N.J.—Roxbury Tp. v. Plumstead, 162 A. 198, 10 N.J.Misc. 1034.

Proceeding for mandamus

Statute providing that in proceedings brought against workmen's compensation bureau cost of such

proceedings including a reasonable attorney's fee shall be taxed against bureau, does not authorize district court to allow an attorney's fee, except in a case where an appeal is taken from final action of bureau in denying right of a claimant to participate at all in workmen's compensation fund, and has no application to a proceeding for purpose of obtaining a writ of mandamus to allow inspection of bureau's records. N.D.—Wallace v. Workmen's Compensation Bureau, 293 N.W. 192, 70 N.D. 193.

50. N.J.—Roxbury Tp. v. Plumstead, 162 A. 198, 10 N.J.Misc. 1034.

51. N.J.—Toner v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, 26 A.2d 699, 128 N.J.Law 511.

71 C.J. p 1400 note 79.

52. Allowance by lower court

(1) Unusual statutory provisions for lower court to allow counsel fees for work done in upper courts can apply only within statutory limits, which are where judgment of court of common pleas is reviewed in compensation cases on certiorari in upper courts.

N.J.—King v. Western Electric Co., 12 A.2d 151, 18 N.J.Misc. 199.

(2) Under statute authorizing court of common pleas to make allowance of reasonable attorney fee to prevailing party on appeal in compensation proceeding, court of errors and appeals was without authority to make allowance for attorney fees

for services rendered in certiorari proceeding instituted by claimant in supreme court and for services rendered on two appeals by claimant to court of errors and appeals.

N.J.—Stetser v. American Stores Co., 15 A.2d 627, 125 N.J.Law 275.

"Party prevailing" as used in workmen's compensation act providing for allowance of attorney's fees to successful party in supreme court on certiorari and in court of appeals on appeal means party ultimately prevailing when matter is finally set at rest.

N.J.—D. Kaltman & Co. v. Itzkowitz, 43 A.2d 284, 133 N.J.Law 191—Comparr v. James Readding, Inc., 3 A.2d 802, 121 N.J.Law 591.

On opposition to certiorari

Under statute authorizing common pleas court to allow attorney's fee to party prevailing on certiorari, attorney's fee may not be awarded in common pleas court to counsel who prevails in opposition to allowance of certiorari to review a judgment in compensation case.

N.J.—Swift & Co. v. Von Volkum, 37 A.2d 283, 131 N.J.Law 464.

53. Wash.—Boyd v. Pratt, 130 P. 371, 72 Wash. 306.

54. Va.—Welding Engineers v. Shuffeberger, 27 S.E.2d 903, 182 Va. 59.

55. U.S.—Radcliff Gravel Co. v. Henderson, C.C.A.Ala., 138 F.2d 549, certiorari denied 64 S.Ct. 638, two cases, 321 U.S. 782, 88 L.Ed. 1074—Fidelity & Casualty Co. of New York v. Henderson, C.C.A.La.,

torney of a claimant successful on the appeal, for services in the appellate court.

Necessity to object to fee in lower court. Objections to the allowance or disallowance of attorney's fees may not be considered for the first time on appeal.⁵⁶

§ 820. — Amount

The amount of attorney's fees allowable is generally

regulated by statute, and is ordinarily fixed by the board or court before which the proceedings are had, subject to statutory limitations on the amount which may be awarded.

Ordinarily, under the various compensation acts, the compensation board or commission or the court before which claimant presents his claim for compensation may fix the amount of the fee of claimant's attorney in the proceeding for compensation.⁵⁷

128 F.2d 1019—Salmon Bay Sand & Gravel Co. v. Marshall, C.C.A. Wash., 98 F.2d 1—Diomedes v. Lowe, C.C.A.N.Y., 87 F.2d 296, certiorari denied Moran Bros. Contracting Co. v. Diomedes, 57 S.Ct. 783, 301 U.S. 682, 81 L.Ed. 1342—Associated Indemnity Corporation v. Marshall, C.C.A.Or., 71 F.2d 235. McWilliams Dredging Co. v. Henderson, D.C.Ala., 86 F.Supp. 361.

Fla.—Intercontinent Aircraft Corp. v. Pickton, 16 So.2d 292, 154 Fla. 8—Cone Bros. Contracting Co. v. Allbrook, 16 So.2d 165, 153 Fla. 872—Winn-Lovett Grocery Co. v. Stevens, 198 So. 835, 145 Fla. 209—Cone Bros. Contracting Co. v. Massey, 198 So. 805, 145 Fla. 179—Maryland Casualty Co. v. Sutherland, 169 So. 679, 125 Fla. 282.

Minn.—Oestreich v. Lakeside Cemetery Ass'n, 38 N.W.2d 193, 229 Minn. 209—Kiley v. Sward-Kemp Drug Co., 9 N.W.2d 237, 214 Minn. 543—Bergstrom v. Brehmer, 8 N.W.2d 328, 214 Minn. 326—Gustafson v. Ziesmer & Vorlander, 6 N.W.2d 452, 213 Minn. 253.

Miss.—Houston Contracting Co. v. Reed, 95 So.2d 231.

Neb.—Gilmore v. Department of Roads and Irrigation, 20 N.W.2d 918, 146 Neb. 647—Weitz v. Johnson, 9 N.W.2d 788, 143 Neb. 452—Ludwickson v. Central States Electric Co., 281 N.W. 603, 135 Neb. 371.

N.J.—Bobertz v. Hillside Tp., 14 A.2d 495, 18 N.J.Misc. 399, affirmed 15 A.2d 796, 125 N.J.Law 321, affirmed 19 A.2d 801, 126 N.J.Law 416.

N.M.—Ferris v. Thomas Drilling Co., 309 P.2d 225, 62 N.M. 283—Smith v. Spence & Son Drilling Co., 801 P.2d 723, 61 N.M. 431—Wright v. Schultz, 231 P.2d 937, 55 N.M. 261—Parr v. New Mexico State Highway Dept., 215 P.2d 602, 54 N.M. 126—Gonzales v. Sharp & Fellows Contracting Co., 179 P.2d 762, 51 N.M. 121—Eisea v. Broome Furniture Co., 143 P.2d 572, 47 N.M. 356—La Rue v. Johnson, 141 P.2d 321, 47 N.M. 260—Sallee v. Calhoun, 131 P.2d 276, 46 N.M. 463—Points v. Wills, 97 P.2d 374, 44 N.M. 31.

Or.—Bowser v. State Indus. Acc. Commission, 185 P.2d 391, 132 Or.

42—Hutchins v. State Industrial Accident Commission, 97 P.2d 944, 163 Or. 419—Hinkle v. State Industrial Accident Commission, 97 P.2d 725, 163 Or. 895.

Wyo.—In re Iles, 113 P.2d 516, 57 Wyo. 76.

71 C.J. p 1401 note 90.

Affirmance changed to reversal on rehearing

Where disposition of case on appeal from judgment awarding compensation for employee's death is changed on rehearing from affirmance to reversal and remand for new trial, allowance by supreme court's former opinion of attorney's fees to plaintiff for services in such court should be vacated without prejudice to claimant's rights to allowance therefor if she subsequently prevails.

N.M.—Gonzales v. Sharp & Fellows Contracting Co., 153 P.2d 676, 48 N.M. 528.

"Determination of cause on appeal" is not "trial" within statute authorizing court trying cause to increase compensation of attorneys for injured workman collecting through court proceedings compensation exceeding amount previously tendered by employer.

N.M.—New Mexico State Highway Department v. Bible, 34 P.2d 295, 38 N.M. 372.

Unsuccessful appeal by commission or board

(1) Statute entitling claimant to attorneys' fees on commission's unsuccessful appeal from adverse decision of circuit court is based on ethical principle that defeated appellant should pay attorney's fee of his successful antagonist; but fee should not be made so burdensome that commission will be deterred from resorting to courts on claims which it believes are without merit. Or.—King v. State Indus. Acc. Commission, 318 P.2d 272.

(2) Where cause presented difficulties, but claimant did not ask for more, court was justified in embracing minimum amounts specified in advisory schedules promulgated by Bar in fixing amount to be awarded for attorneys' fees on commission's unsuccessful appeal from adverse decision of circuit court.

Or.—King v. State Indus. Acc. Commission, supra.

(8) Even though attorneys for claimant had performed effective service for their client and had secured for her amount of compensation which might be large, and issues involved were difficult, supreme court would not, on commission's unsuccessful appeal, be justified in allowing, for services rendered in supreme court by claimant's attorney, fees larger than those fixed in advisory schedules of minimum fees and charges promulgated by State Bar.

Or.—Mikolich v. State Indus. Acc. Commission, 318 P.2d 274.

Right not limited to securing of increased award

Where claimant for workmen's compensation for permanent partial disability appealed from award, and on appeal court found judgment erroneous in one particular against contention of defendants and in another against contention of claimant, court could allow claimant additional attorney's fee for services rendered on appeal.

N.M.—Mann v. Board of County Com'rs of Bernalillo County, 274 P.2d 145, 58 N.M. 628.

Effect of contract

Court cannot make new contract for parties, or add to terms of contract which they have made; and where there was included in record an agreement signed by workman and his attorneys whereby they agreed that a fee of twenty-five per cent would be paid to attorneys for services in case, contingent on amount of recovery, reviewing court, affirming compensation award, would not grant workman's attorneys' motion for allowance of additional attorneys' fee for services rendered on appeal.

Miss.—Alexander Smith, Inc. v. Genette, 98 So.2d 455.

56. La.—Heard v. Receivers of Parker Gravel Co., App., 194 So. 142.

N.M.—Wells v. Gulf Refining Co., 79 P.2d 321, 42 N.M. 378.

Tex.—Indemnity Ins. Co. of North America v. Sparra, Civ.App., 57 S.W.2d 892, 1120.

57. Mass.—Watson's Case, 78 N.E. 2d 225.

Such provisions are constitutional⁵⁸ and are valid and enforceable.⁵⁹ Where the statute so provides, the board or commission must, on proper application by claimant or his attorney, fix, after hearing where requested, a reasonable attorney's fee and incorporate it into the final award.⁶⁰

Under some of the compensation acts the fee of the attorney is limited to such sum as the court or commission approves of.⁶¹ In such case the employee may contract for the services of an attorney,⁶² but any such contract is subject to approval and to the power of the board or court to award a reasonable fee,⁶³ and any contract for payment of

2d 333, 322 Mass. 581—Whittaker's Case, 66 N.E.2d 785, 319 Mass. 582. Mich.—Rench v. Kalamazoo Stove & Furnace Co., 287 N.W. 884, 290 Mich. 476.

Tex.—Texas Employers Ins. Ass'n v. Howell, Civ.App., 107 S.W.2d 391, error dismissed.

71 C.J. p 1401 note 92.

58. Wis.—Cranston v. Industrial Commission, 16 N.W.2d 865, 246 Wis. 287.

71 C.J. p 1401 note 93.

59. Minn.—Sarja v. Pittsburg Steel Ore Co., 191 N.W. 742, 154 Minn. 217, certiorari denied 43 S.Ct. 702, 262 U.S. 754, 67 L.Ed. 1216, and error dismissed 44 S.Ct. 180, 263 U.S. 685, 68 L.Ed. 505.

71 C.J. p 1401 note 94.

Legislative intent in enactment of statute giving compensation commission power to approve attorney's fees was to prevent attorneys from exacting excessive or unreasonable fees, not to place amount to be allowed at such a low and unreasonable level as would foreclose claimant from obtaining legal services of competent counsel.

Colo.—Cline v. Warrenberg, 126 P.2d 1030, 109 Colo. 497.

Contingent fees

Provision of workmen's compensation act that contingent fees of attorneys for services shall be subject to approval of superior court operates as an exception to section providing that no claim for compensation under act shall be assignable or subject to attachment or liable in any way for any debt.

R.I.—Carty v. American Mut. Liability Ins. Co., 40 A.2d 597, 70 R.I. 472.

60. Ariz.—McCluskey v. Industrial Commission, 296 P.2d 443, 80 Ariz. 255—Kelsey v. Industrial Commission, 286 P.2d 195, 79 Ariz. 191.

Request held necessary

Ariz.—McCluskey v. Industrial Commission, 296 P.2d 443, 80 Ariz. 255.

Effect of waiver of rehearing

Ariz.—McCluskey v. Industrial Commission, supra.

Mandamus to compel fixing of fee

Ariz.—McCluskey v. Industrial Commission, supra—Kelsey v. Industrial Commission, 286 P.2d 195, 79 Ariz. 191.

Contract between attorney and claimant was not binding on com-

mission, although commission may fix fee in accordance with contract. Ariz.—Timmons v. Industrial Commission, 316 P.2d 935, 83 Ariz. 74—McCluskey v. Industrial Commission, 296 P.2d 443, 80 Ariz. 255.

61. Ga.—Wilson v. Maryland Cas. Co., 30 S.E.2d 420, 71 Ga.App. 184. Ind.—Buckler v. Hilt, 200 N.E. 219, 209 Ind. 541, 103 A.L.R. 901. 71 C.J. p 1401 note 95.

In Nebraska

(1) Notice to a claimant in a compensation proceeding is not a condition precedent to approval of attorney's fees by the judge presiding at trial, since that is a nonjudicial act which may be done anywhere within judge's district.

Neb.—Solomon v. A. W. Farney, Inc., 286 N.W. 254, 136 Neb. 338. 71 C.J. p 1401 note 95 [a] (2).

(2) Where district court and supreme court allowed attorney's fees to claimant in compensation case, fees allowed could not inure to benefit of claimant's counsel in addition to those provided for in agreement with client, and total fee received was not to be in excess of whichever was greater, agreed fee or fees allowed by courts.

Neb.—Miller v. Schlereth, 42 N.W. 2d 865, 152 Neb. 805.

(3) Statute providing for approval in writing in compensation cases by judge presiding at trial, of claims and agreements for legal services or disbursements made by attorneys in support of such suit, and for their enforceability after such approval, does not contemplate or require use of formal pleadings or that technical requirements of code pleading be complied with.

Neb.—Solomon v. A. W. Farney, Inc., supra.

(4) In cases arising under compensation act, attorney's fees, when allowed, are to be taxed as costs, and as in addition to the amount of recovery, and constitute no part of judgment recovered, and hence are within rules that a motion for an order to clerk to tax costs does not require opening or modification of judgment, and court has jurisdiction to act on motion at a subsequent term of court from that at which judgment was rendered.

Neb.—Solomon v. A. W. Farney, Inc., supra.

(5) Other particulars of rule in Nebraska see 71 C.J. p 1401 note 95 [a].

62. Ariz.—McCluskey v. Industrial Commission, 296 P.2d 443, 80 Ariz. 255.

Or.—Hutchins v. State Industrial Accident Commission, 97 P.2d 944, 163 Or. 419.

R.I.—Carty v. American Mut. Liability Ins. Co., 40 A.2d 597, 70 R.I. 472.

Tex.—Texas Employers' Ins. Ass'n v. Lane, Civ.App., 124 S.W.2d 893, error dismissed, judgment correct—Fidelity Union Casualty Co. v. Dapperman, Civ.App., 53 S.W.2d 845.

Utah.—Thatcher v. Industrial Commission, 207 P.2d 178, 115 Utah 568.

W.Va.—Billingslea v. Tartell, 35 S.E.2d 89, 127 W.Va. 750.

Effect of statute authorizing contract Provision in compensation act granting injured employee right to contract for services of attorney and authorizing court to fix and allow judgment for reasonable attorney fee vests in attorney present beneficial interest in claim which may not be divested by client without judicial ascertainment.

Tex.—Texas Employers' Ins. Ass'n v. Lane, Civ.App., 124 S.W.2d 893, error dismissed, judgment correct.

63. U.S.—White & Yarborough v. Dailey, C.A.Tex., 228 F.2d 836.

Ga.—Fletcher v. Aetna Cas. & Sur. Co., 96 S.E.2d 650, 95 Ga.App. 23—Wilson v. Maryland Casualty Co., 30 S.E.2d 420, 71 Ga.App. 184.

Neb.—In re Yeiser, 192 N.W. 953, 110 Neb. 65, affirmed 45 S.Ct. 399, 267 U.S. 540, 69 L.Ed. 775.

N.J.—Monaco v. Albert Maund, Inc., 91 A.2d 389, 21 N.J.Super. 443.

Ohio.—Terrell v. Wardlaw, App. 59 N.E.2d 59, motion denied 59 N.E. 2d 64.

Tex.—Texas Emp. Ins. Ass'n v. Hatton, 255 S.W.2d 848, 152 Tex. 199.

Texas Emp. Ins. Ass'n v. Lee, Civ.App., 254 S.W.2d 902, reversed on other grounds 255 S.W.2d 569, 152 Tex. 227—Texas Employers' Ins. Ass'n v. Lane, Civ.App., 124 S.W.2d 893, error dismissed, judgment correct—Fidelity Union Casualty Co. v. Dapperman, Civ.App., 53 S.W.2d 845.

Utah.—Ellis v. Industrial Commission, 64 P.2d 363, 91 Utah 432.

attorney's fees contrary to the provisions of the statute is void.⁶⁴ Other compensation acts protect a claimant against excessive attorney's fees by requiring their approval by the board or court in case of disagreement between the parties,⁶⁵ but if there is no disagreement between the parties the board is

without jurisdiction to fix the fees of a successful claimant's attorney.⁶⁶

The provisions of the compensation act as to the tribunal empowered to fix the fee and the method to be used must be followed,⁶⁷ and an amount in

Purpose of provision

(1) A provision of workmen's compensation law giving industrial commission right to supervise and pass on reasonableness of fees charged employers or claimants by attorneys contemplated employment of counsel and payment for services rendered by counsel and was intended to protect claimant as well as employer against excessive fee charges.

Ohio.—Carson v. Beall, 9 N.E.2d 729, 55 Ohio App. 245.

(2) Statutory provision that no charge, claim, or agreement for legal services or disbursements for attorney's fees in industrial accident cases is enforceable, valid, or binding in excess of a reasonable amount, and that commission may determine what constitutes reasonable amount, has purpose of protecting claimants before commission from exaction of excessive fees, and it constitutes professional misconduct for an attorney to secure or attempt to secure fees in excess of those allowed by commission.

Cal.—Coviello v. State Bar, 259 P.2d 7, 41 C.2d 273.

Contingent fee contract

(1) Under provision in compensation act requiring court approval of contingent fee contract between injured employee and his attorney with power to fix fee, where called on to do so court must judicially determine what fee employee should pay, as this impliedly denies to employee right to contract as to amount of fee.

Tex.—Postal Mut. Indemnity Co. v. Ellis, 169 S.W.2d 482, 140 Tex. 570.

(2) Compliance with provisions of compensation act making amount of attorney's contingent fee for services rendered in connection with workmen's compensation proceeding subject to approval by superior court, is a condition precedent to attorney's right to recover, in an action under Attorney's Lien Act, amount of his contingent fee for services rendered in workmen's compensation proceeding.

R.I.—Carty v. American Mut. Liability Ins. Co., 40 A.2d 597, 70 R.I. 472.

(3) Although contingent contracts between a compensation claimant and his attorney for fees are not favored and are unenforceable when they contravene the clear provisions of the compensation act, where they

are reasonable and in full conformity with the provisions of the act, they are not against public policy; and even though a contingent contract between a compensation claimant and his attorney for fees is, because of its terms, found to be unenforceable, attorney, if his work has made possible granting of an award by industrial commission, without necessity of appeal to courts, is entitled to receive out of funds awarded, an amount equal to reasonable value of his services.

Ohio.—Szabo v. Warady, App., 44 N.E.2d 270.

(4) Contingent contract, whereby attorney was to receive from compensation claimant for legal services one-half of any award made by industrial commission, but in event no award was made attorney was to receive nothing, was invalid as against public policy declared in constitution.

Ohio.—Adkins v. Staker, 198 N.E. 575, 130 Ohio St. 198.

Presence of attorney

Under provision in compensation act authorizing court to fix reasonable attorney fee, presence of attorney who holds contract of employment, as party litigant, is not required, and court may fix fee and enter judgment on injured employee's pleadings, reserving beneficial title and interest to attorney, with right of enforcement in his own name, regardless of action of employee.

Tex.—Texas Employers' Ins. Ass'n v. Lane, 124 S.W.2d 893, error dismissed, judgment correct.

64. Ind.—Rickert v. Schreiber, 66 N.E.2d 769, 116 Ind.App. 621.

Ohio.—Adkins v. Staker, 198 N.E. 575, 130 Ohio St. 198.

Contract held valid

A contract providing for reasonable fees for attorney's services before industrial commission in a sum not to exceed twenty per cent of compensation awarded, and for such sums as common pleas court might allow under statute in event of appeal to such court, was valid under statutes.

Ohio.—Carson v. Beall, 9 N.E.2d 729, 55 Ohio App. 245.

65. Mich.—Vollenweith v. General Motors Bldg. Corporation, 225 N.W. 542, 247 Mich. 271, 71 C.J. p. 1402 note 98.

Approval only after agreement

(1) Statute confers authority on industrial accident commission and courts to approve attorney's fee in compensation case only after client and attorney have agreed on amount, and confers no authority as to fee in absence of such agreement, save that, if dispute arises between attorney and commission concerning approval of fee, court may adjust dispute after parties thereto have submitted statements.

Or.—Davis v. State Industrial Accident Commission of Oregon, 68 P.2d 118, 156 Or. 893.

(2) Court is without authority to pass on reasonableness of attorney's fee charged in compensation case except where an agreement has been had between claimant and attorney.

Or.—Cox v. State Industrial Accident Commission, 123 P.2d 800, 168 Or. 508, 159 A.L.R. 899.

Withdrawal of approval by claimant

Letter of compensation claimant approving claim for attorney's fee did not entitle attorney to approval of claim, where subsequent letter from claimant stated that she signed letter of approval through misunderstanding which she fully explained and asked that her approval be deemed withdrawn.

Or.—Davis v. State Industrial Accident Commission of Oregon, supra.

66. Mich.—Pearson v. Gillard, 204 N.W. 725, 231 Mich. 541.

71 C.J. p. 1402 note 99.

67. Colo.—Corpus Juris cited in Warrenberg v. Cline, 114 P.2d 302, 303, 108 Colo. 179.

N.J.—Haberberger v. Myer, 71 A.2d 717, 4 N.J. 116.

Hopler v. Hill City Coal & Lumber Co., 71 A.2d 722, 7 N.J. Super. 24, affirmed 76 A.2d 17, 5 N.J. 466.

Ohio.—Adkins v. Staker, 198 N.E. 575, 130 Ohio St. 198.

Tex.—Employers' Liability Assur. Corporation v. Sims, Civ.App., 67 S.W.2d 445, error refused.

71 C.J. p. 1402 note 1.

State Industrial Commission

(1) State industrial commission has exclusive original jurisdiction over fees to be allowed attorneys in proceedings before commission.

Okl.—Conrad v. State Industrial Commission, 73 P.2d 853, 181 Okl. 324.

(2) In proceeding for death benefit before state industrial commission, where record did not disclose

excess of a statutory limitation may not be allowed.⁶⁸ The jurisdiction of the commission or

administrator was represented by attorney but widow and children, proper parties because misjoinder was waived, were represented by attorneys, commission had exclusive original jurisdiction to fix attorneys' fees.

Okl.—Willis v. Capitol Well Servicing Co., 285 P.2d 388.

(3) Workmen's compensation act provision that claims for legal services in connection with any claim arising under act shall not be enforceable unless approved by industrial commission and, if so approved, shall become lien on compensation awarded but shall be paid therefrom only in manner fixed by commission applies only to claims for legal services rendered by claimant's attorney, and does not confer jurisdiction on commission to fix attorneys' fees for attorneys representing claimant's employer or his compensation carrier, but does confer jurisdiction on commission to fix and allow claims for attorneys' fees for attorneys representing claimant only.

Okl.—Butter Nut Baking Co. v. State Ins. Fund, 294 P.2d 842.

In Louisiana

(1) An employee recovering compensation for injuries sustained in course of employment was entitled to a decree in favor of his attorneys fixing amount of fee due attorneys under contract agreed on between employee and attorneys and as set out in employee's petition, fee not exceeding twenty per cent of amount of award or maximum fee of one thousand dollars.

La.—Fryou v. T. Aucoin & Sons, App., 5 So.2d 193.

(2) Other particulars of rule in Louisiana see 71 C.J. p 1402 note 1 [a].

In Ohio

(1) On appeal in compensation case, trial judge only and not court of appeals had authority to allow and fix attorney's fee.

Ohio.—Garner v. B. F. Goodrich Co., 26 N.E.2d 203, 136 Ohio St. 397.

(2) Attorneys representing claimants before industrial commission or common pleas court on appeal must be compensated on an allowance by commission or on order of trial court to which appeal is taken, and, if further compensation is to be awarded for such services, it must be authorized by legislature.

Ohio.—Terrell v. Wardlaw, App., 59 N.E.2d 59, motion denied 59 N.E.2d 64.

(3) Attorney's fees provided for in provision of workmen's compensation law providing that costs should include attorney's fees to be fixed by trial court has reference to costs

incurred in appeal to common pleas court, and not to services rendered before industrial commission in preliminary proceedings.

Ohio.—Carson v. Beall, 9 N.E.2d 729, 55 Ohio App. 245.

(4) Workmen's compensation law, providing that costs should include attorney's fees to be fixed by trial court in appeal from industrial commission to common pleas court, was not applicable to case involving right of attorneys to retain portion of compensation award as fee for services rendered in prosecuting workmen's compensation claim before industrial commission.

Ohio.—Thornton v. Graham, 6 Ohio Supp. 289.

(5) Section of compensation act applying to compensation for lawyers, which is taxed against industrial commission when a compensation claimant is successful in his appeal to court after being refused compensation on rehearing by commission, had no application with respect to fees charged by claimant's attorney for obtaining an additional award for claimant from industrial commission.

Ohio.—Szabo v. Warady, App., 44 N.E.2d 270.

(6) Claim of attorney of compensation claimant for funds advanced to claimant for living expenses and used by claimant during period for which award was later made could lawfully be paid out of funds received by claimant from industrial commission.

Ohio.—Szabo v. Warady, supra.

(7) Other particulars of rule in Ohio see 71 C.J. p 1402 note 1 [b].

68. U.S.—Goebel v. Railway Exp. Agency, D.C.La., 93 F.Supp. 56.

La.—Washington v. Independent Ice & Cold Storage Co., 30 So.2d 758, 211 La. 690—Hemphill v. Tremont Lumber Co., 25 So.2d 625, 209 La. 385.

Guillory v. Coal Operators Cas. Co., App., 95 So.2d 201—Stull v. Russo, App., 85 So.2d 112—Gloston v. Coal Operators Cas. Co., App., 85 So.2d 100—Anderson v. International Creosoting & Const. Co., App., 41 So.2d 688.

Miss.—Pigford Bros. Const. Co. v. Evans, 83 So.2d 622—W. G. Avery Body Co. v. Hall, 80 So.2d 53, 224 Miss. 51—Mississippi Federated Co-ops. v. Jefferson, 79 So.2d 723, 224 Miss. 150—Sunnyland Contracting Co. v. Davis, 75 So.2d 638, 221 Miss. 744.

N.J.—Haberberger v. Myer, 71 A.2d 717, 4 N.J. 116.

Hoplet v. Hill City Coal & Lumber Co., 71 A.2d 722, 7 N.J.Super. 24, affirmed 76 A.2d 17, 5 N.J. 466.

Parker v. John A. Roebbling's Sons Co., 52 A.2d 681, 135 N.J.Law 440, affirmed 57 A.2d 387, 136 N.J.Law 635.

71 C.J. p 1402 note 2.

Application of statute

(1) Limitation of twenty-five per cent set by workmen's compensation law for services of an attorney before compensation commission is not applicable to additional services rendered before superior courts; but in compensation proceedings to recover death benefits for widow and children of deceased employee, the fee for all services of attorneys of claimant, both for services rendered before commission, superior court, and supreme court should not exceed one third of sum recovered.

Miss.—Sunnyland Contracting Co. v. Davis, 75 So.2d 638, 221 Miss. 744.

(2) Where disability claim filed with industrial commission by attorneys for compensation claimant was dismissed because barred by limitations, and self-insured employer voluntarily paid claimant thereafter a certain amount for his injury, maximum attorney fee provision with respect to compensation claimant did not apply on ground that attorneys' fee did not arise from anything done before commission.

Ohio.—Calloway v. Hood, 51 N.E.2d 660, 72 Ohio App. 319.

Award held proper where no statutory limitation was shown to have been contravened.

N.J.—Sunkimat v. Senger Coal & Ice Corp., 58 A.2d 226, 137 N.J.Law 103—Bobertz v. Hillside Tp., 19 A.2d 801, 126 N.J.Law 416.

Computation of amount

(1) Under statute limiting fees of an attorney who renders his service for an employee to twenty per cent of amount of award, award of attorney's fees could be based on twenty per cent of not merely total weekly compensation payments allowed, but on total judgment for claimant exclusive of penalties and attorney's fees, including compensation, medical expenses, and interest thereon.

La.—Guillory v. Coal Operators Cas. Co., App., 95 So.2d 201.

(2) Under provision that a proportion not exceeding twenty per cent of judgment is permissible for attorney's fees, "judgment" is a single entity, comprised of various component elements out of which it is aggregated, among which are medical, hospital, and analogous expenditures.

N.J.—Bobertz v. Hillside Tp., 19 A.2d 801, 126 N.J.Law 416.

(3) Counsel fee awarded by appellate division for services rendered on direct appeal to appellate division in

board has been held not to extend to a determination of the reasonableness of the fee to be paid for services rendered in independent proceedings⁶⁹ even though such fee is made payable out of the award

workmen's compensation proceeding arising out of accident which happened outside state did not include any allowance to workman's attorney as fee based on amount of increased award ordered by appellate division.

N.J.—Monaco v. Albert Maund, Inc., 91 A.2d 339, 21 N.J.Super. 448.

Effect of appeal

If workmen's compensation award is increased on appeal to appellate division, division of workmen's compensation is authorized to increase original award of attorney's fees based on amount of workman's award, as finally determined, as long as fee is kept within statutory maximum.

N.J.—Monaco v. Albert Maund, Inc., supra.

Offer of settlement or payment before hearing

(1) Nineteen hundred fifty-two Compensation Law amendment changed law so that to reduce attorney's fee, compensation had to be offered and amount then due tendered in good faith or paid at a reasonable time, prior to any hearing; and its purpose was to afford greater protection to attorneys representing compensation claimants who may have invested substantial time and effort prior to making of an offer by a respondent and "tender in good faith" suggests some degree of objectivity in making of a proposal.

N.J.—Moore v. Magor Car Corp., 136 A.2d 81, 47 N.J.Super. 425—Seitz v. Singer Mfg. Co., 116 A.2d 641, 36 N.J.Super. 546.

(2) Obvious purpose of provision is to encourage employers and compensation carriers to make voluntary payments at reasonable time prior to trial.

N.J.—Shuler v. Eastern Foundry, 111 A.2d 802, 34 N.J.Super. 216.

(3) Under statute providing that where at any reasonable time prior to "any hearing," compensation has been offered, and amount then due is tendered in good faith, reasonable allowance for attorney's fees shall be based only on part of award in excess of amount of compensation previously received, phrase "any hearing" means any final hearing and does not refer to any preliminary or indeterminate meeting or pre-trial conference of the parties; and phrase "reasonable time" is to be reviewed in light of clearly established facts, and is a circumstantial and latitudinous concept.

N.J.—Tlusek v. Federal Leather Co., 128 A.2d 521, 43 N.J.Super. 269.

(4) Under compensation amendment requiring in order to reduce attorney's fee that compensation be offered and amount then due tendered in good faith or paid at a reasonable time prior to any hearing, date of filing of claim petition may not of itself be selected as beginning date of test period of "reasonable time."

N.J.—Moore v. Magor Car Corp., supra.

(5) Under provision, overture must be reasonable as to time, and tender must be in good faith.

N.J.—Davala v. American Bridge Co., 115 A.2d 581, 36 N.J.Super. 274.

(6) "Tender" may have varying shades of contextual significance, but, as used within statute should be interpreted as requiring some degree of objectivity in making of proposal, so as not to deprive attorney of compensation.

N.J.—Davala v. American Bridge Co., supra.

(7) Where employer had been making death benefit payments to one of employee's alleged widows until other alleged widow made claim against employer, and employer then sought a judicial determination as to which of claimants it was liable, employer had not made bona fide offer or tender and was properly taxed with its share of attorneys' fees allowed widows' counsel.

N.J.—Shuler v. Eastern Foundry, supra.

(8) Settlement offer made by handing injured employee check for first week's permanent disability payment four days prior to hearing was not made within reasonable time prior to hearing and did not preclude award of reasonable attorney fees rather than fee based only on excess of award over settlement offer.

N.J.—Seitz v. Singer Mfg. Co., 111 A.2d 523, 34 N.J.Super. 88, affirmed 116 A.2d 641, 36 N.J.Super. 546.

(9) Offer and tender of settlement of workmen's compensation claim made by check rather than cash would have been sufficient for purposes of diminishing award of attorney's fees under statute.

N.J.—Seitz v. Singer Mfg. Co., 116 A.2d 641, 36 N.J.Super. 546.

(10) Offer of settlement in compensation case after case had opened for trial was too late.

N.J.—Feinsold v. L. & F. Const. Co., 4 A.2d 692, 17 N.J.Misc. 65—Savitt v. L. & F. Const. Co., 4 A.2d 692,

17 N.J.Misc. 65, certiorari dismissed 8 A.2d 110, 123 N.J.Law 149, modified on other grounds 10 A.2d 728, 124 N.J.Law 173.

(11) Offer of settlement in compensation case, made after case had been marked ready and contested on list, was made too late.

N.J.—Everhart v. Newark Cleaning & Dyeing Co., 184 A. 200, 14 N.J. Misc. 270, modified on other grounds Everhardt v. Newark Cleaning & Dyeing Co., 189 A. 926, 117 N.J.Law 581, reversed on other grounds 194 A. 294, 119 N.J.Law 108, conformed to 200 A. 759, 120 N.J.Law 474.

(12) Where claimant's attorney on day that case was marked ready received notice that employer acknowledged liability and on that day attorney and claimant were not present and ready to proceed, attorney, under statute as it then existed, was not entitled to counsel fees out of compensation which was subsequently allowed after hearing which was only pro forma, notwithstanding offer may have been made by way of amendment.

N.J.—Hope v. R. Hoe & Co., 98 A.2d 140, 26 N.J.Super. 602.

(13) Where employer first filed answer to claim petition for compensation for employee's death denying liability, but prior to any hearing filed amended answer admitting liability and offering to pay full amount of compensation, employer's offer of settlement defeated right of claimant's attorney to any award of counsel fees, despite his rendition of services in preparation of case for hearing.

N.J.—Haberberger v. Myer, 71 A.2d 717, 4 N.J. 116.

(14) Under provision of workmen's compensation act that counsel fee allowed in workmen's compensation bureau shall not exceed twenty per cent of that part of judgment or award in excess of amount of compensation offered or paid prior to hearing, allowance in bureau of one hundred fifty dollars counsel fee was required to be revised where employee was found to be entitled to additional award for permanent incapacity in the aggregate sum of six hundred sixty-six dollars and fifty cents.

N.J.—Di Meglio v. Slonk Const. Co., 2 A.2d 470, 121 N.J.Law 366, affirmed 5 A.2d 691, 122 N.J.Law 379.

69. Cal.—Schilling v. Industrial Accident Commission of California, 190 P. 373, 47 C.A. 190.

of compensation made to applicant by the commission.⁷⁰

In jurisdictions which, under the compensation act, require the approval of attorney's fees by the commission, the jurisdiction of such commission as to the approval of attorney's fees is limited to attorney's fees which are required to be paid from, or sought to be enforced against, the proceeds of an award made to an injured workman.⁷¹ Where the payment thereof is not required to be made from the proceeds of the award, the commission has no jurisdiction over the amount of attorney's fees

which a claimant has contracted to pay to an attorney,⁷² but when an attorney attempts to enforce the collection of an attorney's fee from the proceeds of an award made by the commission to an injured workman, the commission has jurisdiction to determine the reasonableness of the claim for an attorney's fee.⁷³

In fixing the amount of the fees of attorneys appearing and conducting proceedings for compensation, the court or commission is not given a purely uncontrolled and arbitrary power to determine what shall be allowed the attorney,⁷⁴ but it is given a

70. Cal.—Schilling v. Industrial Accident Commission of California, supra.

71. Okl.—Carr v. State Industrial Commission, 11 P.2d 134, 157 Okl. 140.

72. Okl.—Carr v. State Industrial Commission, supra.

73. Okl.—Carr v. State Industrial Commission, supra.

74. Ariz.—McCluskey v. Industrial Commission, 296 P.2d 443, 80 Ariz. 255.

Colo.—Warrenberg v. Cline, 114 P.2d 302, 108 Colo. 179.

Ga.—Wilson v. Maryland Cas. Co., 30 S.E.2d 420, 71 Ga.App. 184.

71 C.J. p 1402 note 8.

Test of reasonableness

Industrial commission is not arbitrary or unreasonable in fixing attorney's fee in compensation proceeding unless it fixes fee which a reasonable mind, familiar with value of attorney's services, would say was less than reasonable.

Utah.—Thatcher v. Industrial Commission, 207 P.2d 178, 115 Utah 568.

Findings held arbitrary

Colo.—Cline v. Warrenberg, 126 P.2d 1080, 109 Colo. 497—Warrenberg v. Cline, 114 P.2d 302, 108 Colo. 179.

Fees held sufficient

La.—Crow v. Hosier, App., 66 So.2d 880—Brown v. Furr, App., 19 So.2d 283—Johnson v. G. M. Johnson Lumber Co., App., 200 So. 48.

Mass.—Whittaker's Case, 66 N.E.2d 785, 319 Mass. 582.

N.J.—Simpkins v. Martin Dye & Finishing Co., 36 A.2d 611, 22 N.J. Misc. 230.

Okl.—Houston v. Silver, 97 P.2d 752, 186 Okl. 326.

Or.—Cox v. State Industrial Accident Commission, 123 P.2d 800, 168 Or. 508, 159 A.L.R. 899.

71 C.J. p 1402 note 8 [c].

Fees considered reasonable, or not excessive

Fla.—Chiles v. E. M. Scott Const. Co., 91 So.2d 852—City of Miami v. Peltz, 60 So.2d 36—Sultan & Chera Corp. v. Dallas, 52 So.2d 825—

Perrin v. Tanner Grocery Co., 46 So.2d 886—Orange Homes Co. v. Burnette, 29 So.2d 449, 158 Fla. 625—Hart v. State Live Stock Sanitary Board, 13 So.2d 11, 152 Fla. 741—New Fort Pierce Hotel Co. v. Gorley, 188 So. 840, 137 Fla. 345—Ocala Mfg. Ice & Packing Co. v. Preskitt, 187 So. 168, 136 Fla. 796.

La.—Johnson v. Hillyer, Deutsch, Edwards Inc., App., 185 So. 652, rehearing denied 186 So. 365.

Miss.—Jackson Ready-Mix Concrete v. Young, 94 So.2d 607—King v. Westinghouse Elec. Corp., 98 So. 2d 183—Mandle v. Kelly, 92 So.2d 246—Russell v. Southeastern Utilities Service Co., 92 So.2d 877—Prince v. Nicholson, 91 So.2d 734—Prentiss Truck & Tractor Co. v. Spencer, 88 So.2d 99—Retail Credit Co. v. Coleman, 86 So.2d 666—Cumbest Mfg. Co. v. Pinkney, 84 So.2d 421—Southern Engineering & Elec. Co. v. Chester, 83 So.2d 811, 226 Miss. 136, judgment corrected 84 So.2d 535, 226 Miss. 136—Anderson-Tully Co. v. Wilson, 76 So. 2d 515, 221 Miss. 656—Railway Exp. Agency v. Hollingsworth, 75 So.2d 639, 221 Miss. 638—Vestal & Vernon Agency v. Pittman, 70 So. 2d 74, 219 Miss. 570—Hill v. United Timber & Lumber Co., 68 So.2d 420—Hardin's Bakeries, Inc. v. Ranager, 65 So.2d 461, 217 Miss. 463.

Neb.—Sears v. City of Omaha, 83 N. W.2d 857, 164 Neb. 869—Haler v. Gering Bean Co., 81 N.W.2d 152, 163 Neb. 748—Anderson v. Bituminous Cas. Co., 52 N.W.2d 814, 155 Neb. 590—Shamburg v. Shamburg, 45 N.W.2d 446, 153 Neb. 495—Miller v. Schlereth, 42 N.W.2d 865, 152 Neb. 805—Solheim v. Hastings Housing Co., 37 N.W.2d 212, 151 Neb. 264—Clark v. Village of Hemingford, 28 N.W.2d 15, 147 Neb. 1044—Faulhaber v. Roberts Dairy Co., 24 N.W.2d 571, 147 Neb. 631—Riggins v. Lincoln Tent & Awning Co., 11 N.W.2d 810, 143 Neb. 893—Klement v. H. P. Lau Co., 292 N. W. 381, 138 Neb. 144.

N.J.—Fitzsimmons v. Federal Shipbuilding & Dry Dock Co., 71 A.2d 441, 4 N.J. 110.

Neylon v. Ford Motor Co., 99 A. 2d 664, 27 N.J.Super. 511.

Parker v. John A. Roebbling's Sons Co., 52 A.2d 681, 135 N.J.Law 440, affirmed 57 A.2d 387, 136 N.J. Law 635—Fountain v. Booth & Flinn, 10 A.2d 275, 123 N.J.Law 422.

Robinson v. Jackson, 137 A. 918, 14 N.J.Misc. 866—Fernandez v. Ford Motor Co., 174 A. 223, 12 N.J.Misc. 653, appeal dismissed Ford Motor Co. v. Fernandez, 176 A. 152, 114 N.J.Law 202.

N.M.—Hathaway v. New Mexico State Police, 263 P.2d 690, 57 N.M. 747—Garcia v. J. C. Penney Co., 200 P.2d 372, 52 N.M. 410—Anderson v. Contract Trucking Co., 146 P.2d 873, 48 N.M. 158—Elsea v. Broome Furniture Co., 143 P.2d 572, 47 N.M. 356—Points v. Willis, 97 P. 2d 374, 44 N.M. 31.

N.D.—Tweten v. North Dakota Workmen's Compensation Bureau, 287 N. W. 304, 69 N.D. 369.

Ohio.—Thornton v. Graham, 6 Ohio Supp. 289.

Okl.—James v. State Indus. Commission, 308 P.2d 271—Eagle Picher Mining & Smelting Co. v. Lamkin, 117 P.2d 519, 189 Okl. 463—Helmerich & Payne v. State Industrial Commission, 102 P.2d 586, 187 Okl. 385.

Or.—Green v. State Indus. Acc. Commission, 252 P.2d 545, 197 Or. 160—Tice v. State Indus. Acc. Commission, State of Or., 195 P.2d 188, 183 Or. 593.

Utah.—Thatcher v. Industrial Commission, 207 P.2d 178, 115 Utah 568.

Wash.—Borenstein v. Department of Labor and Industries, 306 P.2d 228, 49 Wash.2d 674—Otter v. Department of Labor and Industries, 118 P.2d 418, 11 Wash.2d 51—Abraham v. Department of Labor and Industries of Washington, 34 P.2d 457, 178 Wash. 160, followed in Powell v. Department of Labor and Industries of Washington, 84 P. 2d 459, 178 Wash. 669, and Kloeppel v. Department of Labor and Industries of Washington, 84 P. 2d 459, 178 Wash. 669.

71 C.J. p 1402 note 8 [d].

large discretion to incorporate in the award a provision for the benefit of counsel, and to determine what that provision shall be.⁷⁵ In fixing the amount of their fees for appearing and conducting litigation before the commission, attorneys should be accorded the same fair consideration as they usually receive before any other tribunal considering the

amount of legal work done and the amount of money involved.⁷⁶ If the attorney has made a contract for his services, the board or commission must give him a fair hearing on the question of the reasonableness of the fee agreed to be paid before it can order a change therein.⁷⁷

Fees held excessive

Ga.—Castle v. Imperial Laundry & Dry Cleaning Co., 8 S.E.2d 547, 62 Ga.App. 184.

La.—Bordelon v. Ludeau's Lumber Yard, App., 177 So. 436.

Mass.—Green's Case, 111 N.E.2d 204, 330 Mass. 63—Dillon's Case, 85 N.E.2d 69, 344 Mass. 102—McBride v. Royal Laundry Service, Inc., 129 A.2d 738, 44 N.J.Super. 114.

Molnar v. American Smelting & Refining Co., 21 A.2d 213, 127 N.J. Law 118, affirmed 24 A.2d 892, 128 N.J. Law 11—Comparr v. James Reading, Inc., 3 A.2d 802, 121 N.J. Law 591.

Wash.—Peterson v. Department of Labor and Industries, 157 P.2d 298, 22 Wash.2d 647—Dessen v. Department of Labor and Industries of Washington, 66 P.2d 867, 190 Wash. 69—Wintermute v. Department of Labor and Industries of State of Washington, 48 P.2d 627, 183 Wash. 169.

71 C.J. p 1402 note 8 [f].

75. Ariz.—McCluskey v. Industrial Commission, 296 P.2d 443, 80 Ariz. 255.

N.M.—Hathaway v. New Mexico State Police, 263 P.2d 690, 57 N.M. 747—Wright v. Schultz, 231 P.2d 937, 55 N.M. 261.

Tex.—Texas Indemnity Ins. Co. v. Bush, Civ.App., 163 S.W.2d 224, error refused.

71 C.J. p 1403 note 9.

Discretion held not abused

Ind.—Guevara v. Inland Steel Co., 95 N.E.2d 714, 121 Ind.App. 390.

Mo.—Sanderson v. Producers Commission Ass'n, App., 241 S.W.2d 273.

N.J.—Kea v. Elizabeth Lumber Co., 98 A.2d 596, 26 N.J.Super. 599.

Pacifico v. Carpenter Steel Co., 46 A.2d 381, 134 N.J. Law 149, affirmed 50 A.2d 894, 135 N.J. Law 204.

Utah.—Ellis v. Industrial Commission, 64 P.2d 363, 91 Utah 432.

Reduction of amount awarded by referee

(1) Fact that board reversed referee's award of compensation for employee's death as to one of claimants thereof at same time that it reduced amount of fee allowed by referee to claimants' attorney did not, of itself, establish that such fee was based solely on amount of award in violation of board's rule.⁷⁸

N.Y.—Hunter v. Goodstein Bros., 156 N.Y.S.2d 699, 2 A.D.2d 387.

(2) Fixing of claimant's attorney's fees, in compensation proceeding, was matter within discretion of compensation board whose finding would not be disturbed by appellate division, even though board had substantially reduced amount allowed by referee, where record disclosed no unusual or particularly novel problems which would justify finding that board had abused discretion.

N.Y.—Lipiarz v. International Mill Co., 139 N.Y.S.2d 399, 285 App.Div. 1092.

Setting aside award

Federal district court could set aside deputy commissioner's order fixing attorneys' fee for services rendered claimant under Longshoremen's and Harbor Workers' Compensation Act, only if order was "not in accordance with law."

U.S.—Hillman v. O'Hearne, D.C.Md., 129 F.Supp. 217.

76. Colo.—Corpus Juris quoted in Cline v. Warrenberg, 126 P.2d 1030, 1031, 109 Colo. 497.

Okl.—Conrad v. State Industrial Commission, 73 P.2d 858, 181 Okl. 324—Willhoit v. Prairie Oil & Gas Co., 26 P.2d 406, 166 Okl. 108.

Standard of measurement

Fees of attorneys rendering services in cases before industrial commission are not measured by same standard as in legal proceedings before courts or bodies other than those administering workmen's compensation acts.

Utah.—Ellis v. Industrial Commission, 64 P.2d 363, 91 Utah 432.

Reasonable worth of services

(1) Proper criterion in determining whether attorney fees awarded successful compensation claimant by county court were excessive was whether fees exceeded fair and reasonable worth of services performed by counsel.

N.J.—Neylon v. Ford Motor Co., 99 A.2d 664, 27 N.J.Super. 511.

(2) Although attorneys may not hope to be compensated to full measure of value of their time and work in a compensation proceeding, they must not be limited by industrial commission to such meagerly fees that they cannot afford to accept compensation cases.

Utah.—Thatcher v. Industrial Com-

mission, 207 P.2d 178, 115 Utah 568.

(3) Attorneys' fees in workmen compensation cases should not be fixed with sole purpose in view of saving applicant from expense and should not be so low as to discourage competent attorneys from accepting employment in industrial accident matters.

Cal.—Bentley v. Industrial Acc. Commission, 171 P.2d 532, 75 C.A.2d 547.

Award held inadequate

Cal.—Bentley v. Industrial Acc. Commission, supra.

N.Y.—Haskell v. Hitchcock, 28 N.Y. S.2d 945, 262 App.Div. 309.

Okl.—Woodard v. Nipper, 285 P.2d 203.

77. Cal.—Schilling v. Industrial Acc. Commission of California, 190 P. 373, 47 C.A. 190.

Ga.—Wilson v. Maryland Cas. Co., 30 S.E.2d 420, 71 Ga.App. 184.

Okl.—James v. State Indus. Commission, 297 P.2d 1092—Conrad v. State Industrial Commission, 73 P.2d 858, 181 Okl. 324.

Appraisal of value of service

Attorneys appearing in compensation cases may not contract for fees in excess of those awarded by commission, but they are entitled to have commission carefully appraise value of services shown to have been rendered in fixing fee; and attorney is not to be regarded as consenting to fixing of a minimum fee by his failure to offer evidence as to value of his services particularly where record before referee and industrial accident commission shows on its face that services of attorney involved considerable responsibility and that they were of substantial value. Cal.—Bentley v. Industrial Acc. Commission, 171 P.2d 532, 75 C.A.2d 547.

Increase over agreed amount

(1) Industrial commission in compensation proceeding cannot fix attorney's fee above amount which attorney and client have agreed to. Utah.—Thatcher v. Industrial Commission, 207 P.2d 178, 115 Utah 568.

(2) An attorney's fee of seventy-five dollars allowed to claimant's attorney in workmen's compensation proceeding was increased to only one hundred dollars in view of limitation of value placed upon services of attorney, although without such limit-

In determining the amount of the fee to be awarded, various matters have been considered,⁷⁸ such as the number of witnesses sworn,⁷⁹ the length of time taken,⁸⁰ and the nature of the case, whether it was a troublesome, complicated issue or a simple matter easily and quickly determined.⁸¹ Under some statutes the amount may be based not only on the cash award to the employee but also on the amount expended by defendant for medical, surgical, and hospital services, since such services are part of the compensation.⁸²

The fee may not include a portion of the expenses of the litigation to be paid therefrom.⁸³ The duty placed on an insurer under some compensation acts to pay for legal services in connection with the ap-

pointment of a legal representative of a deceased employee not otherwise necessary is limited to necessary disbursements for appointment, the representative's necessary expenses, and compensation for time necessarily spent in carrying out a provision that, if payment is made to him, it shall be paid to the dependents.⁸⁴

A compensation act which provides that all fees of attorneys under the act shall be subject to the approval of the board, and that no fee shall be allowed exceeding the sums specified in the section, and also that the board may deny or reduce the fees if it appears that the employment was solicited, was intended, it has been held, to limit the fees that attorneys might have,⁸⁵ to give to the board the

tation, evidence would support a higher fee.

Colo.—Cline v. Warrenberg, 126 P.2d 1030, 109 Colo. 497.

Amendment of statute

Where a section of compensation act provided for a hearing relative to attorney fees in accordance with terms of another section, which section was amended so that it no longer applied to such hearings, court was entitled to resort to other pertinent parts of act and to applicable rules of compensation commission. Mich.—Wing v. Aten, 25 N.W.2d 561, 316 Mich. 365.

78. N.M.—Garcia v. J. C. Penney Co., 200 P.2d 372, 52 N.M. 410.

Okl.—James v. State Indus. Commission, 308 P.2d 271.

Schedule of services and fees

(1) If deputy commissioner is otherwise unable to agree with attorneys and claimant for amount to be allowed as attorneys' fees in proceeding under Longshoremen's and Harbor Workers' Compensation Act, he has right to ask for written statement or schedule of services and fees, although such statement is otherwise not customarily required. Where attorneys refused to submit requested statement or schedule of services and fees for services rendered for use of Deputy Commissioner in fixing attorneys' fees, and record before federal district court in proceeding to review order fixing such fees was meager, court could not say that deputy commissioner's order was contrary to law or that he had abused his discretion.

U.S.—Hillman v. O'Hearne, D.C.Md., 129 F.Supp. 217.

(2) Schedules of attorneys' fees for workmen's compensation cases as approved by board of governors of state bar are of material assistance to courts in passing on fees to be allowed in such cases.

Or.—Cox v. State Industrial Acci-

dent Commission, 123 P.2d 800, 168 Or. 508, 159 A.L.R. 899.

Nature of injury and amount of compensation as fixed by statute should be considered in determining reasonableness of attorneys' fee in compensation case.

Or.—Cox v. State Industrial Accident Commission, supra.

Attorney's opinion

Industrial commission was not bound to accept attorneys' opinion evidence to exclusion of other evidence in fixing amount of fee allowed attorney for employee awarded compensation for injuries sustained. Utah.—Ellis v. Industrial Commission, 64 P.2d 363, 91 Utah 432.

Employee's station

Attorney's fee for services rendered to injured employee in workmen's compensation proceeding should be measured according to such employee's station.

Utah.—Ellis v. Industrial Commission, supra.

Purpose of statute

In determining reasonableness of attorneys' fee in compensation case, court should consider purpose of workmen's compensation law, and fact that attorneys' fees were made subject to supervision by commission and courts in furtherance of that purpose.

Or.—Cox v. State Industrial Accident Commission, 123 P.2d 800, 168 Or. 508, 159 A.L.R. 899.

Subsequent recovery of additional compensation

Where after successful termination of workmen's compensation case, attorney applied to have fees fixed and justice of superior court found that attorney was entitled to a total fee of one third of accumulated compensation recovered in "pending case" and such fee was paid, attorney was not entitled to a fee of one third of lump sum settlement of future compensation subsequently pro-

cured through services of another attorney.

R.I.—Erbe v. A. D. Juilliard & Co., 114 A.2d 842.

79. Colo.—Corpus Juris quoted in Warrenberg v. Cline, 114 P.2d 302, 303, 108 Colo. 179.

Mich.—Vellenoweth v. General Motors Bldg. Corporation, 225 N.W. 522, 247 Mich. 274.

80. Colo.—Corpus Juris quoted in Warrenberg v. Cline, 114 P.2d 302, 303, 108 Colo. 179.

71 C.J. p 1403 note 13.

81. U.S.—Hillman v. O'Hearne, D.C. Md., 129 F.Supp. 217.

Cal.—Bentley v. Industrial Acc. Commission, 171 P.2d 532, 75 C.A.2d 547.

Colo.—Corpus Juris quoted in Warrenberg v. Cline, 114 P.2d 302, 303, 108 Colo. 179.

Mich.—Vellenoweth v. General Motors Bldg. Corporation, 225 N.W. 522, 247 Mich. 274.

82. Ark.—Ragon v. Great Am. Indem. Co., 273 S.W.2d 524, 224 Ark. 387.

83. Okl.—Willhoit v. Prairie Oil & Gas Co., 26 P.2d 406, 166 Okl. 103. 71 C.J. p 1403 note 15.

Witness fee of doctor

An order of the industrial commission fixing an employee's attorney's fee is void in so far as it directed attorney to pay out of such fee witness fee of a doctor testifying for employee.

Okl.—Magnolia Petroleum Co. v. Rader, 32 P.2d 281, 168 Okl. 174—Skelly Oil Co. v. Hopkins, 31 P.2d 105, 167 Okl. 642—Willhoit v. Prairie Oil & Gas Co., 26 P.2d 406, 166 Okl. 103.

84. Mass.—Mellon's Case, 121 N.E. 18, 231 Mass. 399.

85. Ky.—Rawlings v. Workmen's Compensation Board, 218 S.W. 985, 187 Ky. 308.

power to reduce the fee below the statutory limit,⁸⁶ even when it was agreed to by contract,⁸⁷ and to deny altogether the fee if it should appear the employment was solicited.⁸⁸ Under such a statute the board in the exercise of a sound discretion and after a careful consideration and understanding of the facts and circumstances may reduce the contract compensation agreed to be paid an attorney, although it does not exceed the statutory amount or there be any evidence that the employment was solicited,⁸⁹ and, if no contract was entered into between the attorney and the client, it has the power to fix the fee at a reasonable sum.⁹⁰

A contract between the injured employee or his dependents and the attorney as to the amount of the fee for services under the workmen's compensation act has, under some circumstances, been held to be of no force or effect.⁹¹ The acceptance by an attorney of a portion of his fee and the receipt for it as for his fee in full waives any right he may have had to a larger sum.⁹²

Effect of settlement. Where an attorney has,

by reason of the judgment or award, become entitled to a certain sum as his fee, such amount may not be reduced by a subsequent settlement by claimant and the employer or his insurer for an amount less than the judgment.⁹³

Acquisition of jurisdiction by commission. To invoke the jurisdiction of the commission to determine the amount of attorney's fees it is not necessary to file with it a claim for attorney's fees;⁹⁴ a verbal complaint by claimant to the commission is sufficient to invoke its jurisdiction.⁹⁵

Return of excess fee. In some jurisdictions the compensation commission or board or the court has power to compel an attorney to repay any fee in excess of the amount fixed as proper,⁹⁶ although not where the fee was received for services other than in the compensation case.⁹⁷ In other jurisdictions such power does not exist.⁹⁸

Remedy of attorney who feels himself aggrieved by the action of the board in allowing a smaller fee than he considers himself entitled to have is by appeal from the action of the board to the court;⁹⁹

86. Ky.—Rawlings v. Workmen's Compensation Board, *supra*.

87. Ky.—Rawlings v. Workmen's Compensation Board, *supra*.

88. Ky.—Rawlings v. Workmen's Compensation Board, *supra*.

Where employment not solicited

Under section governing allowance of attorney's fee, injured employee's attorney who had not solicited employment was entitled to reasonable compensation for time and effort expended by attorney in employee's behalf, notwithstanding attorney's failure to recover for employee an award greater than employee would have recovered without an attorney, or to recover fifteen per cent additional compensation for employer's failure to install or maintain safety appliances.

Ky.—Vanderpool v. Goose Creek Mining Co., 170 S.W.2d 32, 293 Ky. 719.

89. Ky.—Pope v. Fayette Jellico Coal Co., 192 S.W.2d 103, 301 Ky. 353—Rawlings v. Workmen's Compensation Board, 218 S.W. 985, 187 Ky. 308.

Reasonable fee not subject to reduction

Under section governing allowance of attorney's fee, compensation board may limit attorney's fee, notwithstanding attorney's contract with employee, to a reasonable amount, considering time and effort required in presenting and prosecuting employee's claim, together with result achieved, but board may not reduce such reasonable fee as so determined or deny fee altogether, except as pen-

alty on attorney for soliciting employment.

Ky.—Vanderpool v. Goose Creek Mining Co., 170 S.W.2d 32, 293 Ky. 719.

90. Ky.—Rawlings v. Workmen's Compensation Board, 218 S.W. 985, 187 Ky. 308.

91. Minn.—Blair v. Village of Coleraine, 231 N.W. 193, 180 Minn. 388, 69 A.L.R. 1315.

71 C.J. p 1403 note 24.

92. Kan.—Mickens v. Lawrence Paper Mfg. Co., 285 P. 624, 130 Kan. 149.

93. Tex.—Texas Employers' Ins. Ass'n v. Lane, Civ.App., 124 S.W. 2d 893, error dismissed, judgment correct—Consolidated Underwriters v. Trevino, Civ.App., 124 S.W.2d 861—Texas Employers' Ins. Ass'n v. Cloud, Civ.App., 120 S.W.2d 903, error dismissed—Texas Employers Ins. Ass'n v. Howell, Civ.App., 107 S.W.2d 391, error dismissed.

94. Okl.—Carr v. State Industrial Commission, 11 P.2d 134, 157 Okl. 140.

95. Okl.—Carr v. State Industrial Commission, *supra*.

96. Mass.—Whittaker's Case, 66 N.E.2d 785, 319 Mass. 582—Silva's Case, 25 N.E.2d 708, 305 Mass. 380. Ohio.—McCamey v. Payer, 22 N.E.2d 127, 135 Ohio St. 660.

Terrell v. Wardlaw, App., 59 N.E.2d 59, motion denied 59 N.E.2d 64.

71 C.J. p 1404 note 27.

97. Mass.—Whittaker's Case, 66 N.E.2d 785, 319 Mass. 582.

98. Mich.—May v. Charles Hoertz & Son, 170 N.W. 305, 204 Mich. 432.

99. Ga.—Thomas v. Travelers Ins. Co., 135 S.E. 922, 53 Ga.App. 404. Ky.—Pope v. Fayette Jellico Coal Co., 192 S.W.2d 103, 301 Ky. 353—Rawlings v. Workmen's Compensation Board, 218 S.W. 985, 187 Ky. 308.

Limitation on right to appeal

Statute providing that orders of industrial accident commission regulating payments and refunds for legal services in compensation cases may be appealed from in similar manner as awards for compensation is limited to appeal as to right to fee and its size, and to obligation to refund.

Md.—Switkes v. John McShain, Inc., 96 A.2d 617, 202 Md. 340.

Agreed judgment

Where, in workmen's compensation action, there was entered an agreed judgment which was for six thousand dollars and which awarded plaintiff's attorneys fee of one thousand dollars, instead of two thousand dollars as agreed to between plaintiff and attorneys, attorneys were not entitled to appeal from such judgment for purpose of having their fees increased to two thousand dollars in view of fact that benefits of such agreed judgment had been accepted.

U.S.—White & Yarbrough v. Dallas, C.A. Tex., 228 F.2d 836.

but under some statutes no right to appeal exists from a decision fixing attorney's fees,¹ or from an order denying a petition for review of such a decision.² Under other provisions an attorney is entitled to maintain an independent proceeding in the supreme court to obtain a review of an award fixing attorney's fees.³

On appeal. What constitutes a reasonable fee for the attorney's services on appeal must be determined by the facts of the case in which allowed,⁴ and its amount is a matter, in large degree, of discretion vested in the trial court.⁵ An award which is not briefed or argued will not be considered on appeal.⁶ It has been held that the commission's powers as to attorney's fees are law questions which may be considered on review only if passed on by the commission and included in the record before the appellate court.⁷

§ 821. — Payment; Commutation

Payment of attorney's fees, whether in installments

or by commutation to a lump sum, is generally regulated by provisions of the statute.

On approval of a claim for legal services, the manner of payment has been held a matter for the discretion of the board or court.⁸ Attorney's fees may be made payable in installments,⁹ and under some compensation acts, an award of compensation cannot direct the immediate payment in a lump sum of the fee of claimant's attorney to be credited as compensation where the award is made payable in installments;¹⁰ but, on a bulk sum settlement or commutation, payment of the attorney's fees can be ordered to be made in full,¹¹ or, where the payments are made periodically, they may be applied in whole or in part to such fees until extinguished.¹² In other jurisdictions, under a compensation act which authorizes the compensation commission to allow claims for legal services, and also to commute periodical payments to a lump sum, such commission may commute a portion of the periodical payments into a lump sum and order immediate payment of that sum as an attorney's fee for claimant's attorney,¹³ but not in cases excluded from commuta-

1. S.D.—Unzelman v. City of Sioux Falls, 272 N.W. 825, 65 S.D. 266.
Wis.—Cranston v. Industrial Commission, 16 N.W.2d 865, 246 Wis. 287.
71 C.J. p 1221 note 6 [a].

2. S.D.—Unzelman v. City of Sioux Falls, 272 N.W. 825, 65 S.D. 266.

3. Okl.—Conrad v. State Industrial Commission, 73 P.2d 858, 181 Okl. 324.

4. Neb.—Davis v. Lincoln County, 219 N.W. 899, 117 Neb. 148.

5. Neb.—Davis v. Lincoln County, supra.
71 C.J. p 1404 note 33.

6. N.J.—Federal Leather Co. v. De Luca, 176 A. 708, 13 N.J.Misc. 161.

7. Utah.—Ellis v. Industrial Commission, 64 P.2d 363, 91 Utah 432.

8. N.Y.—Meyer v. Meyer, 59 N.Y.S. 2d 499, 270 App.Div. 787, amended on other grounds 61 N.Y.S.2d 527, 270 App.Div. 862.

Duty exacted of courts by workmen's compensation act, that courts fix manner in which attorney's fee shall be paid, contemplates not promulgation of a universal rule applicable in all cases regardless of financial circumstances of beneficiary of fund, but exercise of discretion in each case.

Or.—Cox v. State Industrial Accident Commission, 121 P.2d 919, 168 Or. 508, 159 A.L.R. 899.

9. La.—Brown v. Furr, App., 19 So. 2d 283.

10. Ala.—Woodward Iron Co. v. Bradford, 90 So. 803, 206 Ala. 447.

N.J.—Serzan v. Naporowski, 131 A. 76, 2 N.J.Misc. 113.
71 C.J. p 1404 note 34.

11. Ala.—Woodward Iron Co. v. Bradford, 90 So. 803, 206 Ala. 447.

12. Ala.—Ex parte Woodward Iron Co., 99 So. 649, 211 Ala. 111—Woodward Iron Co. v. Bradford, 90 So. 803, 206 Ala. 447.
71 C.J. p 1404 note 36.

13. Ky.—Warner v. Lexington Roller Mills, 233 S.W.2d 938, 314 Ky. 1—Holt Bros. Mining Co. v. Fisher, 74 S.W.2d 469, 255 Ky. 418.

Mich.—Ranch v. Kalamazoo Stove & Furnace Co., 287 N.W. 884, 290 Mich. 476.

Miss.—American Sur. Co. of N. Y. v. Bovkin, 54 So.2d 398, 212 Miss. 310.

Mo.—Wims v. Hercules Contracting Co., 123 S.W.2d 225, 235 Mo.App. 1.

Okl.—Denver Producing & Refining Co. v. Whatley, 190 P.2d 154, 199 Okl. 637—Eagle Picher Mining & Smelting Co. v. Lamkin, 117 P.2d 519, 189 Okl. 463—J. E. Mabee, Inc. v. Ziemann, 32 P.2d 299, 168 Okl. 60.
71 C.J. p 1404 note 37.

Effect of order for lump-sum payment

Where compensation award directed payment of a portion thereof to attorney for claimant and award was affirmed by supreme court, and a subsequent order was entered directing lump sum payment to claimant of amount due under original award, fact that employer and insurer, by inadvertence, included in lump sum

payment to claimant amount they were required to pay attorney, did not excuse them from paying attorney.

Okl.—O. C. Whitaker, Inc., v. Dillingham, 152 P.2d 371, 194 Okl. 421.

In proceeding for a lump sum compensation award, requiring employee's attorney's fee to be paid out of weekly compensation payments was error.

Tex.—Texas State Highway Dept. v. Pritchett, Civ.App., 233 S.W.2d 796, reversed on other grounds, Sup., 287 S.W.2d 938.

In Oregon

(1) Industrial accident commission could raise question of lack of authority of circuit court to award an attorney's fee in a lump sum constituting percentage of additional amount of compensation awarded to claimant as a result of appeal to circuit court since commission had a direct interest in matter.

Or.—Verban v. State Industrial Accident Commission, 123 P.2d 988, 168 Or. 394.

(2) Where accrued payments of compensation were more than sufficient to discharge attorney's fee in full, and reasonableness of fee was not challenged, circuit court in exercise of sound discretion was justified on application of claimant and his attorney in directing payment to attorney in a lump sum.

Or.—Verban v. State Industrial Accident Commission, 123 P.2d 988, 168 Or. 394—Cox v. State Industrial Accident Commission, 121 P.2d 919, 168 Or. 508, 159 A.L.R. 899.

tion.¹⁴ The commutation must be made under, and in accordance with, statutory provisions applicable thereto.¹⁵ Under some statutes the lump sum allowance is based on a percentage of the total amount of the award of compensation.¹⁶ A lump sum payment may be made to cover fees of attor-

(3) Court cannot make such award when there is not sufficient accrued compensation to pay fee, since such action amounts in effect to payment of portion of compensation in a lump sum within statute authorizing commission only to make such payments. Or.—*Verban v. State Industrial Accident Commission*, *supra*.

(4) Discretion of trial court in awarding attorney's fee in compensation cases is limited to determination of extent of attorney's fee and manner in which it shall be paid out of additional compensation secured by attorney's efforts, and if sufficient compensation has accrued at time of judgment, court may order payment of fees therefrom, but in other cases attorney's fees to extent fixed by court becomes a lien on extra compensation secured and is payable therefrom in reasonable manner to be fixed by court.

Or.—*Verban v. State Industrial Accident Commission*, *supra*.

(5) Supreme court was not without jurisdiction to interfere with award of circuit court of an attorney's fee in a lump sum on ground that compensation claimant and attorneys agreed on payment of entire fee, in view of statute providing that no claim for legal services in connection with circuit court litigation should be valid unless approved by court.

Or.—*Verban v. State Industrial Accident Commission*, *supra*.

(6) Where through attorneys' efforts on appeal to circuit court from industrial accident commission award was increased, circuit court could not award an attorney's fee in a lump sum notwithstanding claimant and attorneys agreed on present payment of entire fee, but such fee was required to be paid in monthly installments when additional compensation was paid to claimant and such fee was to be a lien on such additional compensation.

Or.—*Verban v. State Industrial Accident Commission*, *supra*.

(7) In entering judgment for claimant on appeal from industrial accident commission's order denying compensation for employee's death, court was authorized to fix fee of claimant's attorneys in amount agreed on between them and claimant, but had no authority to direct payment of such amount in lump sum, in absence of provision for like payment of compensation awarded. Or.—*Dickson v. State Industrial Accident Commission*, 107 P.2d 104, 165 Or. 306.

(8) Under earlier statutes an order directing fees of attorney for compensation claimant injured on July 5, 1934, to be paid in single cash payment was held authorized.

Or.—*Carr v. State Industrial Accident Commission*, 57 P.2d 1278, 153 Or. 517.

14. Okl.—*Pioneer Drilling Co. v. Morphis*, 82 P.2d 1048, 183 Okl. 424; —*Barnsdall Refining Corporation v. Locker*, 77 P.2d 749, 182 Okl. 818; —*Southwestern States Telephone Co. v. State Industrial Commission*, 75 P.2d 468, 181 Okl. 533; —*Jim Young Drilling Co. v. Moyer*, 74 P.2d 113, 181 Okl. 347; —*Cornhuskers Theatres v. Foster*, 74 P.2d 109, 181 Okl. 341.

Award payable from special indemnity fund

(1) In workmen's compensation case, attorney's fees may be allowed and may be made payable from special indemnity fund but attorney's fees must be paid in periodical installments same as payment of compensation to claimant although fee may be paid from latter part of award.

Okl.—*Special Indem. Fund v. Hobbs*, 164 P.2d 980, 196 Okl. 318.

(2) In making an award against special indemnity fund, state industrial commission was authorized to order lump sum equivalent of eleven payments of twenty-five dollars per week payable in weekly installments from latter end of award as attorneys' fees in addition to periodical payments to be made to claimant.

Okl.—*Special Indem. Fund v. Bryant*, 239 P.2d 1014, 205 Okl. 630.

(3) Attorneys' fees awarded to claimant's attorneys and ordered paid from special indemnity fund in weekly installments of twenty-five dollars constituted compensation payments, and hence, in making award against special indemnity fund of twenty-five dollars per week to claimant, state industrial commission had no authority to order that payment of attorneys' fee commence immediately, since such payments together with compensation payments to claimant would exceed maximum compensation payments of twenty-five dollars per week allowed by statute.

Okl.—*Special Indem. Fund v. Bryant*, *supra*.

15. Miss.—*American Sur. Co. of N. Y. v. Boykin*, 54 So.2d 398, 212 Miss. 310.

16. Possible change of condition.
(1) Where attorney for claimant, who had been awarded compensa-

tion for permanent partial disability, was allowed fee equal to twenty-five per cent of total amount of compensation, such lump sum allowance for attorney's fee was properly based on assumption that disability would continue for full four hundred and fifty week period, even though it might subsequently develop that disability would not continue beyond twenty-five weeks.

Miss.—*Jim Nix Cafeteria v. Burton*, 84 So.2d 164, 226 Miss. 206.

(2) Decision of commission requiring attorney's fee to be paid to deceased employee's dependent out of last payments to become due was not objectionable on ground that carrier might be compelled to meet payments for entire period even though dependent died before expiration of period during which dependent was entitled to compensation, in view of workmen's compensation law providing that probability of death of person entitled to compensation before expiration of period shall be determined in accordance with American experience table of mortality.

Miss.—*American Sur. Co. of N. Y. v. Boykin*, 54 So.2d 398, 212 Miss. 310.

(3) Where deceased employee's widow was given an award of compensation for 365.2 weeks, with provision in award that compensable period should terminate on widow's death or remarriage, and widow's attorney was awarded a commuted attorney's fee in a lump sum, and thereafter widow died before compensable period had expired, and on appeal court of appeals affirmed the award, award became conclusive and industrial commission had no discretion to modify award by reducing amount of attorney's fee.

Mo.—*Dunaway v. J. C. Penney Co.*, 209 S.W.2d 567, 240 Mo.App. 61.

(4) In absence of any restriction in statute on commission's power to commute future installments of compensation so as to permit immediate payment of attorney's fees, fact that obligation for payment of future compensation was contingent because of possibility of death or remarriage of claimant to whom award was made, and of absence of any other dependents, did not preclude attorneys from having portion of award to which they were entitled under contract with claimant commuted and paid in a lump sum.

Mo.—*Wims v. Hercules Contracting Co.*, 123 S.W.2d 225, 235 Mo.App. 225.

(5) Where widow was awarded fixed weekly sum for three months

neys in the amount agreed on by contract between claimant and his attorneys where the agreed amount is fair, just, and reasonable.¹⁷

Attorney's fees are, under some provisions, to be paid out of the amount awarded as compensation.¹⁸ Only after the amount of the fee has been fixed by the commission may the fee be deducted from the award and paid directly to the attorney.¹⁹ It has been held that the award of attorney's fees should be to claimant and not to the attorney.²⁰

Where interest is allowed an offer of payment of the fee without interest is not sufficient.²¹ An error in the award proper has been held not to extend to, or affect the portion of, the award covering payment of attorney's fees.²² A claim for legal services, based on a contract, is not enforceable in an independent action where the statute provides that such a claim shall be unenforceable in the courts unless approved by the commission.²³

Discount. In making a lump sum award of a fee to the attorney, it has been held that a discount should be allowed.²⁴ The discount is not chargeable to either the employer or insurer.²⁵

weeks and twenty-six weekly payments were due and unpaid, industrial board could order payment of widow's attorney's fees in a lump sum equal to twenty-five per cent of total compensation reduced to its commutable value with such payment to be credited against last installment payments to widow at end of compensation period with interest at five per cent on all compensation not yet payable under terms of award, notwithstanding weekly payments to widow would cease on her remarriage or death.

Ga.—Employers Liability Assur. Corp. v. Pruitt, 9 S.E.2d 641, 190 Ga. 479, answers to certified questions conformed to 10 S.E.2d 275, 63 Ga.App. 149.

17. Miss.—East v. Pigford Bros. Const. Co., 70 So.2d 880, 219 Miss. 121.

18. Alaska.—Alaska Packers Ass'n v. Alaska Indus. Bd., 12 Alaska 465.

La.—Hall v. Pipe Line Service Corp., 98 So.2d 202, 233 La. 821.

Wyo.—In re Iles, 113 P.2d 516, 57 Wyo. 76.

19. Ariz.—McCluskey v. Industrial Commission, 296 P.2d 443, 80 Ariz. 255.

20. Ga.—Dunagan v. Marell Farms, Inc., 99 S.E.2d 286, 95 Ga.App. 857. N.M.—Dudley v. Ferguson Trucking Co., 297 P.2d 313, 61 N.M. 166—Feldhut v. Latham, 287 P.2d 615,

60 N.M. 87—La Rue v. Johnson, 141 P.2d 321, 47 N.M. 260.

21. Alaska.—Baccigliieri v. Ghezzi, 11 Alaska 93.

22. Mo.—Wims v. Hercules Contracting Co., 123 S.W.2d 225, 235 Mo.App. 1.

23. Okl.—Corbin v. Wilkinson, 52 P.2d 45, 175 Okl. 247.

24. Md.—Bethlehem Steel Co. v. Jackson, 87 A.2d 841, 199 Md. 642, reargument denied 88 A.2d 488, 199 Md. 642.

25. Md.—Bethlehem Steel Co. v. Jackson, 88 A.2d 488, 199 Md. 642.

26. Alaska.—Corpus Juris quoted in Baccigliieri v. Ghezzi, 11 Alaska 93, 97.

Mo.—Clark v. Midwest Bakeries & Macaroni Mfg. Co., 201 S.W.2d 423, 240 Mo.App. 18.

Tex.—Fidelity Union Casualty Co. v. Dapperman, Civ.App., 53 S.W.2d 845.

Effect of statute prohibiting lien

The provision of the workmen's compensation act that no agreement for legal services shall be an enforceable lien against amounts to be paid as compensation or valid and binding in any other respect, unless approved by a judge of the trial court, does not fix an arbitrary charge, but leaves the amount to be determined and fixed by the judge, and it will not be presumed that the judge will refuse to make a reason-

§ 822. — Lien

When so provided for by statute, and only in such case, a claim for attorney's fees may become a lien on the award of compensation.

Some compensation acts contain provisions prohibiting the assignment of claims for compensation under the workmen's compensation act and exempting them from claims of creditors and from levy, execution, attachment, or other remedy for the collection thereof. In such case the employee cannot assign to his attorney an interest in the cause of action.²⁶ The fund arising from an allowance by the industrial commission under the workmen's compensation law is exempt from the common-law lien of an attorney on a fund produced by his services,²⁷ nor does the fact that the payment agreed on by the employer was not approved by the compensation board or commission enable the lien to attach.²⁸ However, such acts frequently contain additional provisions which authorize an attorney's lien against the fund paid as compensation provided the attorney's fee is approved by the court or compensation board or commission. In such case claims for attorney's fees must be approved by the court or commission before they become a lien on the compensation awarded.²⁹

able allowance or approve a fair and just charge.

Neb.—Solomon v. A. W. Farney, Inc., 286 N.W. 254, 136 Neb. 338.

27. Alaska.—Corpus Juris quoted in Baccigliieri v. Ghezzi, 11 Alaska 93, 97.

Ohio.—Terry v. Claypool, 65 N.E.2d 839, 77 Ohio App. 87. 71 C.J. p 1404 note 39.

28. Ill.—Gross v. Lake Shore & M. S. Ry. Co., 209 Ill.App. 439.

29. Okl.—Willhoit v. Prairie Oil & Gas Co., 26 P.2d 406, 166 Okl. 108. Or.—Verban v. State Industrial Accident Commission, 123 P.2d 988, 168 Or. 394.

Approval condition precedent

The provision of the compensation act that no claim or agreement for legal services or disbursements in support of any demand made or suit brought under the act shall be an enforceable lien against amounts to be paid as compensation or be valid or binding in any respect, unless approved in writing by the presiding judge, or, in case of settlement without trial, by a judge of the district court, constitutes a condition precedent created by the state in the exercise of its police power to safeguard interests of a class for whose benefit the compensation act was enacted. Neb.—Solomon v. A. W. Farney, Inc., 286 N.W. 254, 136 Neb. 338.

A claim for attorney's fees cannot become a lien on the award, or be collected out of it except in the amount approved by the commission,³⁰ and until the claim for attorney's fees is so approved the attorney is without authority of law to hold the proceeds of the award without the consent of claimant.³¹ If, however, the fee of the attorney is approved by the commission, it is a lien on the proceeds of the award, and may be collected by the attorney from the proceeds thereof.³² It has been held that a statutory provision requiring that the fee of an attorney be reasonable and be approved by the court indicates an intention that the fee may be secured out of the amount collected as compensation.³³ A lien for attorney's fees which the commission may impress on an award of compensation is wholly incidental to the principal award.³⁴

Under a compensation act which requires as a condition of the attachment of an attorney's lien to the compensation of the workmen that the contract for professional services be in writing and be approved by the court or judge, it is not essential that the attorney's written contract for fees be approved

before the lien may attach.³⁵ This approval, however, it has been held, is not a time condition.³⁶ The attorney's lien perfected prior to settlement under a written contract approved subsequent to settlement will extend to his contract percentage of the sum paid the workman,³⁷ and it will not, where the settlement was not collusive or fraudulent as to the attorney, extend to the contract percentage of the sum the workman would have received if, instead of settling, he had prosecuted the compensation proceeding to a decision.³⁸ A lien given by statute may not be displaced by the board and precedence given to some other claim.³⁹ Unless otherwise provided by statute it has been held that fees of the attorney may not be made liens on payments made to a special fund.⁴⁰

The method of perfecting a lien has been held to be that prescribed by the general statute,⁴¹ and when perfected the lien will attach for whatever amount the court finally approves.⁴² The disapproval by the court of the amount of the fee provided in a contract for professional services is not a disapproval and setting aside of the contract so as to pre-

In action by attorney to recover amount of attorney's lien against employer's insurer, declaration which did not contain allegation that attorney had obtained any approval by superior court of his contingent fee for services as required by Workmen's Compensation Act was defective on demurrer.

R.I.—Carty v. American Mut. Liability Ins. Co., 40 A.2d 597, 70 R.I. 472.

30. Alaska.—Corpus Juris quoted in Bacciglieri v. Ghezzi, 11 Alaska 93, 97.

71 C.J. p 1404 note 42.

31. Alaska.—Corpus Juris quoted in Bacciglieri v. Ghezzi, 11 Alaska 93, 97.

Okl.—Stephenson v. Hammons, 308 P.2d 817—Conrad v. State Industrial Commission, 73 P.2d 858, 181 Okl. 324—Carr v. State Industrial Commission, 11 P.2d 134, 157 Okl. 140.

General statutes not applicable

An employee's attorney who did not give timely notice to compensation commission and who did not have the commission make an allowance for attorney's services as a lien was not entitled to any lien since the provisions of compensation act are exclusive and the general attorneys' lien statutes are inapplicable. Mo.—Clark v. Midwest Bakeries & Macaroni Mfg. Co., 201 S.W.2d 423, 240 Mo.App. 18.

32. Fla.—Winn-Lovett Grocery Co. v. Stevens, 198 So. 835, 145 Fla. 209.

Ga.—Dunagan v. Marell Farms, Inc., 99 S.E.2d 236, 95 Ga.App. 857.

N.Y.—Klag v. Drug & Chemical Club, Inc., 114 N.E.2d 434, 305 N.Y. 900, reargument denied 115 N.E.2d 826, 306 N.Y. 597—Meyer v. Meyer, 59 N.Y.S.2d 499, 270 App.Div. 787, amended on other grounds 61 N.Y. S.2d 527, 270 App.Div. 862.

Okl.—Helmerich & Payne v. State Industrial Commission, 102 P.2d 586, 187 Okl. 335—Conrad v. State Industrial Commission, 73 P.2d 858, 181 Okl. 324.

Or.—Verban v. State Industrial Accident Commission, 123 P.2d 988, 168 Or. 394—Hutchins v. State Industrial Accident Commission, 97 P.2d 944, 163 Or. 419.

71 C.J. p 1405 note 44.

Priority as against disability benefits carrier

Claimant was not entitled to have any part of her attorney's fees apportioned against amount awarded in reimbursement of payments made by disability benefits carrier.

N.Y.—Babkees v. Electrolux Corp., 163 N.Y.S.2d 809, 4 A.D.2d 710.

33. La.—Connell v. U. S. Sheet & Window Glass Co., 2 La.App. 93, 71 C.J. p 1405 note 45.

34. Cal.—Pacific Employers' Ins. Co. v. French, 298 P. 23, 212 C. 139. State Compensation Ins. Fund v. Industrial Acc. Commission, 202 P.2d 86, 89 C.A.2d 821.

35. Kan.—Graham v. Wichita Terminal Elevator Co., 222 P. 89, 115 Kan. 143.

Substantial compliance with provision of the compensation act requiring that agreement for legal services or disbursements supporting demand under the act shall not be a lien on compensation paid or valid in any other respect, unless approved by a judge of the district court, secures a determination of the validity of a claim or agreement for legal services or disbursements made binding on all parties to the litigation.

Neb.—Solomon v. A. W. Farney, Inc., 236 N.W. 254, 136 Neb. 338.

36. Kan.—Mickens v. Lawrence Paper Mfg. Co., 285 P. 624, 130 Kan. 149—Graham v. Wichita Terminal Elevator Co., 222 P. 89, 115 Kan. 143.

37. Kan.—Graham v. Wichita Terminal Elevator Co., supra.

38. Kan.—Graham v. Wichita Terminal Elevator Co., supra.

39. N.Y.—Klag v. Drug & Chemical Club, Inc., 114 N.E.2d 434, 305 N.Y. 900, reargument denied 115 N.E.2d 826, 306 N.Y. 597.

40. N.Y.—De Stefano v. Meerbaum, 72 N.Y.S.2d 840, 272 App.Div. 981.

41. Kan.—Mickens v. Lawrence Paper Mfg. Co., 285 P. 624, 130 Kan. 149—Graham v. Wichita Terminal Elevator Co., 222 P. 89, 115 Kan. 143.

42. Kan.—Mickens v. Lawrence Paper Mfg. Co., 285 P. 624, 130 Kan. 149—Graham v. Wichita Terminal Elevator Co., 222 P. 89, 115 Kan. 143.

vent a compliance with the requirement that the contract as to the fee be in writing as a condition to a lien therefor, but is merely a modification of the amount of the fee and an approval of the contract with such modification.⁴³ In some jurisdictions an attorney's lien on compensation awarded under the compensation act exists, if at all, only because of the general statute on the subject of attorneys' liens.⁴⁴

The compensation board has been held without jurisdiction to enforce an attorney's lien.⁴⁵

Lien of lay representative. Under a compensation act which provides that a party litigant before the commission may be represented to one not admitted to practice law and authorizes the commission to fix and determine and allow as a lien against the award a reasonable attorney's fee for legal services, it is proper for the commission to declare the amount directed to be paid a lay representative of claimant for his services a lien on the compensation awarded.⁴⁶

Notice of lien. Where a lien is allowed, in the ab-

sence of a statute providing otherwise, it need not be recorded,⁴⁷ and the only notice necessary is that the employer and his insurance carrier have notice of the attorney's relation to the proceeding.⁴⁸ After service of notice of lien, the employer must, at his peril, take into account the attorney's contract when settling with the injured workman and in paying awards and judgments.⁴⁹

§ 823. Costs

- a. In general
- b. Fees of expert witnesses

a. In General

Costs and witness fees are allowable in workmen's compensation proceedings only when and to the extent authorized by statute.

Costs and witness fees are not to be allowed in workmen's compensation proceedings in the absence of a positive or permissive statute.⁵⁰ However, the acts ordinarily make specific provisions as to the propriety of allowing costs,⁵¹ which may be allowed only under the terms and conditions of the statute.⁵² Under some compensation acts court

43. Kan.—Mickens v. Lawrence Paper Mfg. Co., 285 P. 624, 130 Kan. 149.

44. Iowa.—Kratz v. Holland Inn, 173 N.W. 292, 186 Iowa 963.

45. Ga.—Dunagan v. Marell Farms, Inc., 99 S.E.2d 236, 95 Ga.App. 857.

46. Cal.—Eagle Indemnity Co. v. Industrial Accident Commission of California, 18 P.2d 341, 217 C. 244.

47. Ga.—Dunagan v. Marell Farms, Inc., 99 S.E.2d 236, 95 Ga.App. 857.

48. Ga.—Dunagan v. Marell Farms, Inc., *supra*.

49. Kan.—Graham v. Wichita Terminal Elevator Co., 222 P. 89, 116 Kan. 143.

50. Mont.—Lunardello v. Republic Coal Co., 53 P.2d 87, 101 Mont. 94. N.M.—Reck v. Robert E. McKee General Contractors, Inc., 287 P.2d 61, 59 N.M. 492.

71 C.J. p 1405 note 56.

General statute not applicable

(1) Under statute providing for costs to prevailing party in all civil actions, successful employee was not entitled to costs of proceedings under workmen's compensation act, since statute does not apply to such proceedings.

Mass.—Minns' Case, 190 N.E. 843, 286 Mass. 459—Royal's Case, 190 N.E. 841, 286 Mass. 374.

(2) The statute expressly limited to costs arising out of court actions did not authorize allowance by industrial commission of traveling expenses to compensation claimant,

since the statute has no application to special proceedings before any boards, bureaus or commissions, unless expressly authorized by statute. Colo.—Maryland Cas. Co. v. Industrial Commission, 178 P.2d 426, 116 Colo. 58.

Provisions as to attorneys' fees

Provisions of workmen's compensation act as to fees of attorneys representing claimants before industrial accident board and contracts for attorneys' fees for representing claimants in courts are inapplicable to fees of guardians ad litem for minor claimants and costs.

Tex.—Federal Underwriters Exchange v. Brigham, Civ.App., 184 S.W.2d 849.

51. Minn.—State v. St. Louis County Dist. Ct., 153 N.W. 838, 129 Minn. 423.

Pa.—Zboch v. National Erie Corp., Com.Pl., 25 Erie Co. 187. 71 C.J. p 1405 note 57.

52. La.—Franklin v. J. P. Floria & Co., App., 158 So. 591.

Okl.—Pioneer Lead & Zinc Co. v. Kauffman, 63 P.2d 944, 178 Okl. 622.

Award to employee, not counsel

Decree awarding costs in proceeding by which compensation insurer sought enforcement of memorandum of agreement with employee should have awarded costs to the employee and not to his counsel.

Mass.—Green's Case, 111 N.E.2d 203, 380 Mass. 63.

"Either party"

The provision of the workmen's compensation act that witness' fees, expenses, and costs of any hearing may be imposed by the workmen's compensation board upon either party or may be divided between parties in such proportion as the board may direct, in using the expression "either party" manifestly designates the claimant or the employer or his insurance carrier, and does not include the commonwealth.

Pa.—Weyant v. General Refractories Co., 29 A.2d 100, 150 Pa.Super. 502.

Restriction on amount

Offer of settlement in compensation case after case had opened for trial was too late to entitle employer to restriction upon costs and attorney's fees authorized by statute, where compensation had been offered prior to rehearing.

N.J.—Feinsod v. L. & F. Const. Co., 4 A.2d 692, 17 N.J.Misc. 65—Savitt v. L. & F. Const. Co., 4 A.2d 692, 17 N.J.Misc. 65, certiorari dismissed 8 A.2d 110, 123 N.J.Law 149, modified on other grounds 10 A.2d 728, 124 N.J.Law 173.

Costs against state

In suit against state of Louisiana, through state board of education, department of public education, as specially authorized by legislature, for workmen's compensation, only court costs taxable against state were stenographer's costs of taking testimony.

La.—Gillmore v. State, App., 79 So.2d 192.

costs ordinarily follow the judgment in a workmen's compensation case,⁵³ and the successful party to the proceeding recovers of his adversary the costs incurred,⁵⁴ but the prevailing party has been held not entitled to costs as a matter of right.⁵⁵

Under other compensation acts each party may be required to pay his own costs,⁵⁶ as where both parties prevail in part;⁵⁷ and under still other acts costs can be awarded only in a case where the employer does not institute proceedings for review of the decision of the board and refuses to pay the compensation awarded.⁵⁸

A party ordinarily will not be held liable for un-

necessary costs caused by the opposing party.⁵⁹ However, the necessary expenses incurred by insurer in successfully defending a common-law action wrongfully brought by the employee against the employer to recover for the injuries suffered cannot be credited by the compensation board on the amount awarded the employee as compensation under the act.⁶⁰ Statutes authorizing the court before which a workmen's compensation proceeding is brought, prosecuted, or defended without reasonable ground to assess the whole cost against the offending party do not supersede general provisions for the taxation of costs.⁶¹

Costs against city as employer

The taxing of all costs of suit against city in its capacity as an employer in a compensation case was error in light of statute restricting costs taxable against state or any municipality or political subdivision to the costs of court reporter for taking the testimony.

La.—Henderson v. City of Shreveport, App., 26 So.2d 766.

Trial tax not costs

Ala.—State v. Montevallo Coal Mining Co., 197 So. 82, 29 Ala.App. 318, certiorari denied 197 So. 87, 240 Ala. 73.

53. U.S.—Woods v. Loffland Bros. Co., D.C.La., 29 F.Supp. 990.

N.Y.—O'Brien v. Hotel Statler, 158 N.Y.S.2d 801, 3 A.D.2d 689.

Pa.—Crosby v. Robertshaw-Fulton Controls Co., Com.Pl., 36 West.L.J. 243.

71 C.J. p 1406 note 58.

Necessity of judgment

In workman's compensation case, there must be a money judgment for claimant in workmen's compensation bureau to justify its allowance of counsel fee and costs to claimant, and dismissal of employer's rule to open judgment for claimant is not a "judgment," but an "order," which does not justify such allowance.

N.J.—Yeager v. Brown Bros., 37 A.2d 287, 131 N.J.Law 463, affirmed 40 A.2d 571, 132 N.J.Law 361.

Reduction of award

The reduction of an award of compensation for death of plaintiffs' son from \$11.99 per week to \$11.98 was so small that under rule of "de minimis non curat lex" it would have no effect on payment of costs.

La.—Buettnier v. Polar Bar Ice Cream Co., App., 17 So.2d 486.

Action prosecuted in forma pauperis

(1) Where permitted to prosecute a claim in forma pauperis, claimant ordinarily will not be taxed for costs. La.—Hicks v. Royal Indent. Co., 86 So.2d 1233, 1239 La. 536—Hicks v.

Memphis Natural Gas Co., 137 So. 276, 192 La. 157.

Hammer v. Lazarone, App., 37 So.2d 765—Wade v. Calcasieu Paper Co., App., 82 So.2d 117, cause remanded on other grounds 86 So. 2d 540, 229 La. 702—Bigham v. Swift & Co., App., 81 So.2d 28, reversed on other grounds 86 So.2d 59, 229 La. 341—Green v. A. C. Campbell Const. Co., App., 78 So. 2d 54—Hicks v. Continental Cas. Co., App., 75 So.2d 522—Reiner v. Maryland Cas. Co., App., 185 So. 93—Seaux v. G. B. Zigler Co., App., 183 So. 564—Rogers v. Mengel Co., App., 176 So. 322, reversed on other grounds 180 So. 499, 139 La. 723.

(2) Defendant in suit under compensation act which is brought in forma pauperis has right to show at any time during progress of litigation between it and plaintiff that plaintiff is able to pay costs or give bond therefor, but until such showing is made plaintiff has right to prosecute his suit under original order permitting him to file and prosecute suit in forma pauperis.

La.—Dilley v. Phillips Petroleum Co., App., 24 So.2d 209.

54. Ind.—Rickert v. Schreiber, 66 N.E.2d 769, 116 Ind.App. 621.

La.—Patterson v. Cargo Services, Inc., App., 95 So.2d 49—Mancil v. J. B. Bealrd Corp., App., 7 So.2d 385—Strickland v. Walker-Johnson Lumber Co., App., 188 So. 516.

Mass.—McSweeney's Case, 63 N.E.2d 353, 318 Mass. 620.

N.J.—Zehrer v. H. H. Robertson Co., 4 A.2d 854, 17 N.J.Misc. 53.

S.C.—Dameron v. Spartan Mills, 44 S.E.2d 465, 211 S.C. 217—Cole v. State Highway Department, 2 S.E. 2d 490, 190 S.C. 142.

S.D.—Millage v. Canton Twp., 38 N.W.2d 755, 73 S.D. 26.

Tex.—Texas Employers' Ins. Ass'n v. Brock's Gem.App., 36 S.W.2d 704.

Costs on interpleader

Where employee's widow to whom an award had been made prevailed upon initial issue of award, and in-

terpleader action instituted by employer was intimately related with that issue, widow was entitled to allowance of counsel fees and costs for services rendered upon interpleader action in the several courts. N.J.—Minter v. Bendix Aviation Corp., 130 A.2d 809, 24 N.J. 128.

Award held proper

Mass.—Brek's Case, 138 N.E.2d 748.

55. R.I.—Ferguson v. George A. Fuller Co., 82 A.2d 856, 78 R.I. 412—Gomes v. John J. Orr & Son, 79 A.2d 618, 78 R.I. 96—Egan v. Walsh-Kaiser Co., 56 A.2d 854, 73 R.I. 399.

Discretion of court

R.I.—Gomes v. John J. Orr & Son, 79 A.2d 618, 78 R.I. 96—Egan v. Walsh-Kaiser Co., 56 A.2d 854, 73 R.I. 399.

56. Conn.—Bayon v. Beckley, 93 A. 139, 39 Conn. 154.

57. Mich.—Thomas v. Continental Motors Corp., 23 N.W.2d 191, 315 Mich. 27.

58. Ill.—Board of Education of High School Dist. No. 502 of Bureau County v. Industrial Commission, 140 N.E. 39, 303 Ill. 445.

71 C.J. p 1406 note 61.

59. La.—Lampkin v. Kent Piling Co., App., 34 So.2d 636.

71 C.J. p 1406 note 62.

60. Ky.—Beattyville Co. v. Sizemore, 261 S.W. 620, 203 Ky. 7.

71 C.J. p 1406 note 63.

61. Idaho.—Brady v. Place, 243 P. 654, 41 Idaho 747.

Employee not entitled to costs

Under statute providing that whole cost shall be assessed against party who brought or defended proceedings under workmen's compensation act without reasonable ground, successful employee was not entitled to costs of such proceedings defended by insurer on close questions relating to aggravation of pre-existing latent disease causing total disability of employee, and admission of expert opinion testimony.

If the equities require it, the costs may be divided between the parties;⁶² and where, in an action for compensation, the right thereto is admitted, except for the bar of the statutory limitation, the costs are, under some compensation acts, properly adjudged against the successful employer.⁶³ Where the compensation act provides for the payment of fees in the first instance by the employer who may deduct one half of such payment from any compensation found due the employee, such fees are properly taxed in full against the employer instead of being apportioned one half to each party.⁶⁴ Where a minor claimant is brought in at the suggestion of defendant, the court may allow fees to the guardian ad litem appointed to represent him within the limitation fixed for attorney's fees.⁶⁵ The state insurance fund is liable for costs in a proceeding for

compensation the same as any private insurance company.⁶⁶

In suit to determine proper beneficiaries the cost of litigation should be charged against the beneficiaries where the compensation insurer at all times conceded liability to such persons as the court should determine were the proper beneficiaries.⁶⁷

b. Fees of Expert Witnesses

The various compensation acts generally make provision for the taxing as costs of the fees of expert witnesses.

Under some compensation acts the fees of expert witnesses are taxed as a part of the costs of suit,⁶⁸ the amount thereof being left to the discretion of the court.⁶⁹ The fees of each expert witness should

Mass.—Minns' Case, 190 N.E. 843, 386 Mass. 459.

62. La.—Mays v. Allison & Langston Supply Co., 5 La.App. 686.

Mass.—Lyssaght's Case, 120 N.E.2d 396, 331 Mass. 451.

S.D.—Millage v. Canton Twp., 38 N.W.2d 755, 73 S.D. 26.

63. Tenn.—Oman v. Delius, 35 S.W.2d 570, 162 Tenn. 192.

64. Iowa.—Fischer v. W. F. Priebe & Co., 160 N.W. 48, 178 Iowa 512.

65. Ala.—Woodward Iron Co. v. Bradford, 90 So. 803, 206 Ala. 447.

66. Idaho.—Brady v. Place, 243 P. 654, 41 Idaho 747.

67. Tenn.—Winfield v. Cargill, Inc., 264 S.W.2d 584, 196 Tenn. 133.

68. U.S.—Goebel v. Railway Exp. Agency, D.C.La., 93 F.Supp. 56.

La.—Hebert v. Hartford Acc. & Indem. Co., App., 88 So.2d 243—Arbo v. Maryland Cas. Co., App., 29 So.2d 380—Brown v. Furr, App., 19 So.2d 283—Kirby v. Terminal Paper Bag Co., App., 6 So.2d 562.

Wash.—Cady v. Department of Labor and Industries, 162 P.2d 813, 23 Wash.2d 851.

71 C.J. p 1406 note 70.

No provision therefor

There is no provision in the workmen's compensation act as amended to authorize, as part of the cost, payment of a fee for an expert medical witness.

R.I.—Trotta v. General Elec. Co., Wiring Device Division, 134 A.2d 177—Lambert v. First Nat. Stores, Inc., 131 A.2d 811.

Nonresident witness

Physician, not shown to reside in state, is not entitled to allowance for appearance and testimony as witness for claimant in workman's compensation proceeding.

N.J.—Grogan v. Granger, 2 A.2d 884, 16 N.J.Misc. 523.

Number of experts

Court's ruling, allowing each party to workmen's compensation suit expert witness fees for only two medical experts, was erroneous, parties being entitled to allowance of such fees for each medical expert testifying.

La.—Harris v. Southern Carbon Co., App., 162 So. 430.

Services considered

Services rendered by physician, who was expert witness for compensation claimant, in assisting and advising with claimant's attorney while other physician's deposition was being taken in defendants' behalf could not be considered in taxing physician's fees against defendants as costs.

La.—Stieffel v. Valentine Sugars, App., 185 So. 101.

The trial judge is entitled to fix fees of expert witnesses summoned by the claimant in compensation proceedings.

La.—Johnson v. Hillier, Deutsch, Edwards, Inc., App., 185 So. 652, rehearing denied 186 So. 365.

69. La.—Davis v. Reynolds, App., 96 So.2d 368—Thompson v. Leach & McClain, App., 11 So.2d 109, rehearing denied 11 So.2d 925—Richardson v. Southern Kraft Corp., App., 5 So.2d 24.

71 C.J. p 1407 note 71.

Disallowances held proper

(1) Disallowance of a claim for amount allegedly charged by photographer for taking pictures of plaintiff's injured shoulder and refusal to grant expert fee to photographer on ground that such charges were not a legitimate item of costs was proper.

La.—Morgan v. American Bitumuls Co., App., 39 So.2d 139, affirmed 47 So.2d 739, 217 La. 968.

(2) Compensation for studying done by physician to qualify him-

self as an expert able to substantiate his findings in court when called to testify on behalf of workmen's compensation claimant regarding his findings on examination of claimant was not chargeable to employer and his insurance carrier as part of expert witness' fee.

La.—Laird v. Flournoy, App., 11 So.2d 84.

Fees held reasonable or adequate

U.S.—Woods v. Loffland Bros. Co., D.C.La., 29 F.Supp. 990.

La.—Eldridge v. Federal Compress & Warehouse Co., App., 24 So.2d 492—Valentine v. Southern Advance Bag & Paper Co., App., 20 So.2d 814—Lee v. International Paper Co., App., 16 So.2d 679—Laird v. Flournoy, App., 11 So.2d 84—Kirby v. Terminal Paper Bag Co., App., 6 So.2d 562—English v. Kellogg Lumber Co., App., 200 So. 167—Diggins v. Salley & Ellis, App., 199 So. 442—Law v. Kansas City Bridge Co., App., 199 So. 155—Champagne v. Unity Industrial Life Ins. Co., App., 161 So. 52, rehearing denied 161 So. 783.

N.J.—Owens v. Bennett Air Service, 45 A.2d 320, 133 N.J.Law 540, affirmed 51 A.2d 111, 135 N.J.Law 467—Mazzarella v. Compo-Site, Inc., 26 A.2d 276, 20 N.J.Misc. 182, affirmed 45 A.2d 488, 133 N.J.Law 590, affirmed 48 A.2d 917, 134 N.J.Law 616—Bobertz v. Hillside Tp., 14 A.2d 495, 18 N.J.Misc. 399, affirmed 15 A.2d 796, 125 N.J.Law 321, affirmed 19 A.2d 801, 126 N.J.Law 416.

Fees held inadequate

La.—Rosenquist v. New Amsterdam Cas. Co., App., 78 So.2d 225—Stieffel v. Valentine Sugars, App., 185 So. 101.

Fees held excessive

La.—Carrington v. Consolidated Underwriters, App., 80 So.2d 427, judgment amended on other

be fixed, instead of providing a total fee for all expert witnesses testifying.⁷⁰ The fact that most of the testimony of the expert was ruled out on objections does not mitigate against his right to a fee as an expert.⁷¹ In a proper case the fees of expert witnesses may be apportioned.⁷²

A statute authorizing the payment of the fees of medical and other witnesses on appeal from an order of the board does not authorize the payment as costs of fees of expert medical witnesses beyond the ordinary fees authorized by statute for witnesses generally.⁷³ Fees for expert witnesses will not be allowed where it does not appear that it was necessary to call them.⁷⁴ A physician testifying to facts which were within his own personal knowledge as claimant's attending physician is not entitled to a fee as an expert witness.⁷⁵

Under a compensation act which provides that the fees of expert witnesses shall be reasonable and are not to be allowed unless fixed in the judgment, the proper time to tax as costs such fees is while the case is being tried on its merits and not after final judgment.⁷⁶ It is too late, after the case has been appealed, for the employer to object to a reasonable bill of costs to cover the fees of expert witnesses.⁷⁷ The status of doctors testifying as ex-

pert witnesses for the employee is not affected in so far as their right to fees as experts by the fact that the trial court did not appoint them, but instead they were summoned by the employee.⁷⁸ A provision in the compensation act that the fees of medical witnesses shall be reasonable and are not to be allowed unless fixed in the judgment relates to court procedure and applies to actions tried after its passage although the cause of action arose prior thereto.⁷⁹

An attorney representing the claimant has been held not entitled to recover from him a fee advanced to an expert witness testifying for the claimant without having submitted such claim to the employer or insurance carrier for payment.⁸⁰

§ 824. — On Appeal

Costs on appeal are taxable only when authorized by statute.

In a compensation case there is no authority on appeal to tax the costs against a party in the absence of some statutory provision conferring such authority,⁸¹ and a statute authorizing costs before the commission or board will not authorize such costs on appeal.⁸² However, some statutory provision is generally made therefor.⁸³ A provision authorizing costs only in a case where the employer

- grounds 89 So.2d 399, 230 La. 939 —Jones v. International Paper Co., App., 11 So.2d 555—Rhône v. Southern Kraft Corp., App., 189 So. 325—Crouch v. George H. Leidenheimer Baking Co., App., 184 So. 605—Bell v. Employers' Liability Assur. Corporation, App., 152 So. 766, rehearing refused 153 So. 334.
70. La.—Hibbard v. Blane, App., 183 So. 39.
71. La.—Diggins v. Salley & Ellis, App., 199 So. 442.
72. N.J.—Pacifico v. Carpenter Steel Co., 46 A.2d 381, 134 N.J. Law 149, affirmed 50 A.2d 894, 135 N.J. Law 204.
73. Wash.—Nelson v. Industrial Insurance Department, 176 P. 15, 104 Wash. 204.
74. La.—Ricks v. Crowell & Spencer Lumber Co., App., 189 So. 466.
75. La.—Rosenquist v. New Amsterdam Cas. Co., App., 78 So.2d 225 —Morgan v. American Bitumuls Co., App., 39 So.2d 139, affirmed 47 So.2d 739, 217 La. 968.
76. La.—Jefferson v. Lauri N. Truck Lines, 187 So. 44, 192 La. 29.
- Carrington v. Consolidated Underwriters, App., 80 So.2d 427, judgment amended on other grounds 89 So.2d 399, 230 La. 939 —Valentine v. Southern Advance Bag & Paper Co., App., 20 So.2d 814—Jackson v. W. Horace Wil-

- liams Co., App., 12 So.2d 22—Johnson v. Hillyer, Deutsch, Edwards Inc., App., 185 So. 652, rehearing denied 186 So. 365.
- 71 C.J. p 1407 note 73.
- Rule to show cause**
- (1) In compensation suit, trial court did not err in fixing fees of medical witnesses without a rule to show cause having been first filed and tried.
- La.—Hester v. Tremont Lumber Co., App., 15 So.2d 94.
- (2) In an earlier decision it was held that, in compensation proceeding, court could not fix the amount of expert witnesses' fees except upon rule to show cause.
- La.—Long v. Louisiana Highway Commission, App., 2 So.2d 683.
77. La.—Walker v. White Woods Product Co., 4 La.App. 403.
78. La.—Wright v. Fuller Const. Co., App., 145 So. 300.
79. La.—Le Seur v. Rumbaugh, 6 La.App. 587.
80. Okl.—Corbin v. Wilkinson, 52 P. 2d 45, 175 Okl. 247.
81. Ill.—J. E. Crowder Seed Co. v. Industrial Commission, 179 N.E. 518, 347 Ill. 86.
- 71 C.J. p 1407 note 77.
- Docket fee**
- (1) Act providing that no filing fees shall be charged by clerk of

any court for any service required by act relating to compensation claims was held to amend and modify prior act providing that, at time of filing of transcript, original suit, or proceeding in supreme court, there shall be paid to clerk twenty dollars as docket fee, in so far as such act applied to compensation cases.

Neb.—Scott v. Dohrse, 266 N.W. 709, 130 Neb. 847.

(2) Provision of compensation act that no filing fees shall be charged by the clerk of any court for any service required by the act does not relieve parties in a compensation proceeding from payment of all costs, nor does it relieve appellants from the requirements of statute regarding cost bond or cash deposit on appeal, but merely relieves parties from payment of filing fees.

Neb.—Hoffman v. State, 8 N.W.2d 200, 142 Neb. 821.

82. Vt.—Kelly v. Hoosac Lumber Co., 118 A. 520, 96 Vt. 153.

83. Vt.—Kelly v. Hoosac Lumber Co., supra.

71 C.J. p 1407 note 79.

Items allowed

Employee, who did not bring workmen's compensation proceeding to the supreme judicial court, was entitled to allowance of reasonable costs of attorney's fees, briefs, and other necessary expenses for the ap-

does not institute proceedings for review and refuses to pay the compensation awarded does not include any costs sustained by the employee in having the award reviewed in the circuit court or in the supreme court.⁸⁴

Ordinarily costs may be taxed in favor of the prevailing party and against the unsuccessful one.⁸⁵ However, the appellate court can exercise its discretion in the matter.⁸⁶ It may award costs against one partially successful on the appeal;⁸⁷ it may

peal, but he was not entitled to costs in superior court.

Mass.—*Peters' Case*, 118 N.E.2d 75, 331 Mass. 138.

Statute not applicable

N.C.—*Liles v. Faulkner Neon & Elec. Co.*, 94 S.E.2d 790, 244 N.C. 653.

84. Ill.—*Board of Education of High School Dist. No. 502 of Bureau County v. Industrial Commission*, 140 N.E. 39, 308 Ill. 445.

85. Idaho.—*Stoddard v. Mason's Blue Link Stores*, 45 P.2d 597, 55 Idaho 609.

La.—*Griffith v. Wyatt Lumber Co.*, App., 193 So. 257, followed in *Johnson v. Wyatt Lumber Co.*, 193 So. 258—*Thornton v. Haynesville Lumber Co.*, App., 155 So. 784, amended on other grounds 157 So. 279.

Mass.—*Luczek's Case*, 141 N.E.2d 526—*Franklin's Case*, 129 N.E.2d 906, 333 Mass. 236—*Lysaght's Case*, 120 N.E.2d 396, 331 Mass. 451—*Woloshchuck's Case*, 88 N.E.2d 640, 325 Mass. 10—*McSweeney's Case*, 63 N.E.2d 353, 318 Mass. 620.

Mich.—*De Witt v. Grand Rapids Fuel Co.*, 77 N.W.2d 759, 346 Mich. 209—*Bowles v. James Lumber Co.*, 75 N.W.2d 822, 345 Mich. 292—*Morgan v. Lloyds Builders, Inc.*, 73 N.W.2d 880, 344 Mich. 524—*Alexander v. Covell Mfg. Co.*, 57 N.W.2d 224, 336 Mich. 140—*May v. A. H. Powell Lumber Co.*, 56 N.W.2d 242, 335 Mich. 420—*McDonald v. Kelly Coal Co.*, 55 N.W.2d 851, 335 Mich. 325—*Pieczynski v. Brunswick, Balke, Collender Co.*, 55 N.W.2d 841, 335 Mich. 303—*Roman v. Delta Broadcasting Co.*, 55 N.W.2d 147, 334 Mich. 669—*Wieland v. Dow Chemical Co.*, 54 N.W.2d 708, 334 Mich. 427—*Arnold v. Ogle Const. Co.*, 53 N.W.2d 655, 333 Mich. 652—*Nightlinger v. Giant Super Market*, 53 N.W.2d 602, 334 Mich. 90—*Sorensen v. Grand Rapids Metalcraft, Division of F. L. Jacobs Co.*, 53 N.W.2d 590, 333 Mich. 709—*Danford v. Contract Purchase Corp.*, 53 N.W.2d 377, 333 Mich. 559—*Rantis v. Michigan Motor Exp.*, 52 N.W.2d 602, 333 Mich. 73—*Harris v. Checker Cab Mfg. Corp.*, 52 N.W.2d 599, 333 Mich. 66—*Tarnew v. Railway Exp. Agency*, 50 N.W.2d 318, 331 Mich. 558—*Hammons v. Franzblau*, 50 N.W.2d 161, 331 Mich. 572—*Lyons v. Bond Motor Co.*, 48 N.W.2d 154, 330 Mich. 684—*Tibbs v. Kalamazoo Brass Foundry Co.*, 47 N.W.2d 702, 330 Mich. 484—*Brandner v. Myers*

Funeral Home, 47 N.W.2d 658, 330 Mich. 392—*Phillips v. Fitzhugh Motor Co.*, 46 N.W.2d 922, 330 Mich. 183—*Alexander v. Ford Motor Co.*, 46 N.W.2d 369, 329 Mich. 535—*Kelly v. Dixie Fuel & Supply Co.*, 45 N.W.2d 356, 329 Mich. 466—*Underwood v. National Motor Castings Division, Campbell, Wyant & Cannon Foundry Co.*, 45 N.W.2d 286, 329 Mich. 273.

Minn.—*Graf v. Montgomery Ward & Co.*, 49 N.W.2d 797, 234 Minn. 485. Neb.—*Elliott v. Gooch Feed Mill Co.*, 23 N.W.2d 262, 147 Neb. 309.

N.J.—*Bobertz v. Hillside Tp.*, 14 A.2d 495, 18 N.J.Misc. 399, affirmed 15 A.2d 796, 125 N.J.Law 321, affirmed 19 A.2d 801, 126 N.J.Law 416—*Marotta v. Fabi*, 180 A. 545, 13 N.J.Misc. 690.

N.Y.—*Moses v. Mrs. Dixon's Products Co.*, 97 N.Y.S.2d 66, 277 App. Div. 820.

Tenn.—*Oden v. Foster & Creighton Co.*, 298 S.W.2d 711.

Tex.—*ICT Ins. Co. v. Gunn*, Civ. App., 294 S.W.2d 435, error refused no reversible error—*Royal Indem. Co. v. Jones*, Civ.App., 201 S.W.2d 129, error refused no reversible error—*Texas Employers Ins. Ass'n v. Schwarz*, Civ.App., 107 S.W.2d 666, error dismissed.

Wyo.—*In re Dragoni*, 79 P.2d 465, 53 Wyo. 143.

71 C.J. p 1407 note 81.

Effect of tender of compensation

An employee who was entitled to compensation under judgment of commission of appeals would be required to pay costs incurred in commission of appeals, where insurance carrier who sued out writ of error to commission of appeals, tendered the amount of compensation to which employee was entitled in the court of civil appeals and in the commission of appeals.

Tex.—*Safety Cas. Co. v. Long*, 152 S.W.2d 1102, 137 Tex. 209.

Appeal by self-insured employer

Where city of New York as a self-insured employer appealed from an award of compensation and the award was affirmed, costs were awarded to the workmen's compensation board and to the claimant to be divided equally between them and with disbursements to each.

N.Y.—*Hogans v. City of New York*, Dept. of Health, 101 N.Y.S.2d 910, 278 App.Div. 620.

On precautionary appeal

Where compensation claimants who were entitled to recover from

either one or the other group of defendants, took a precautionary appeal from judgment in favor of the claimants as against one group of defendants in order to protect the rights of the claimants in the event that the supreme court should conclude that group of defendants found liable under the workmen's compensation act were in fact not liable, and judgment was affirmed, and appeal of claimants was dismissed, claimants would be taxed with the costs of their brief.

N.C.—*Roth v. McCord & Dellinger*, 62 S.E.2d 64, 232 N.C. 678.

Action brought in forma pauperis

(1) Where action for workmen's compensation was brought in forma pauperis, under order relieving plaintiff of payment of costs and the giving of bond, plaintiff would not be charged with costs on his unsuccessful appeal.

La.—*Driggers v. Coal Operators Cas. Co.*, App., 73 So.2d 602—*Cormier v. Hart-Mun Furnace Co.*, App., 9 So. 2d 814.

(2) Where employee was unsuccessful on appeal, costs should be taxed under pauper's oath by which employee prosecuted his appeal.

Tenn.—*Coker v. Armco Drainage & Metal Products Co.*, 236 S.W.2d 980, 192 Tenn. 10.

86. Miss.—*T. C. Fuller Plywood Co. v. Moffett*, 95 So.2d 475.

N.Y.—*Wilson v. C. Dorfinger & Sons*, 113 N.E. 454, 218 N.Y. 734.

87. La.—*Von Herr v. American Employers' Ins. Co.*, App., 187 So. 85. Mich.—*Hardiman v. General Motors Corp.*, 50 N.W.2d 872, 332 Mich. 170.

Tenn.—*Willoughby v. Warstler & Egly Bakery, Inc.*, 298 S.W.2d 727.

Tex.—*Consolidated Underwriters v. Pruitt*, Civ.App., 180 S.W.2d 461, error refused—*Lloyds Guarantee Assurance v. Ryno*, Civ.App., 177 S.W.2d 307, error refused—*United Employers Casualty Co. v. Barker*, Civ.App., 148 S.W.2d 260.

71 C.J. p 1407 note 83.

Where successful party substantially interested

Where compensation insurer was successful for the most part on its appeal but the insurer was substantially interested in the proper construction of the compensation statute rather than the employee, the insurer was required to pay the cost on appeal.

Tenn.—*Bituminous Cas. Corp. v. Smith*, 238 S.W.2d 913.

apportion the costs;⁸⁸ it may deny costs to either party on appeal,⁸⁹ particularly where both parties are successful in part;⁹⁰ where a judgment for defendant is reversed and remanded for retrial, the costs may be ordered to abide the event,⁹¹ or assessed against the employer and his insurer, where the award was made for a combination of injuries treated as a single injury, but remand is necessary to determine the extent of compensation for partial permanent loss of use of a member;⁹² or where an appeal by the employer and his insurer was not necessary to obtain correction of a judgment granting compensation, the costs of the appeal will be taxed against the employer and his insurer.⁹³

A statute providing that, if insurer appeals to a reviewing board from an award of compensation and the board by its decision orders insurer to make or to continue payments to the injured employee,

the cost to the injured employee of such review shall be determined by the board and shall be paid by insurer, applies to appeals by insurer alone and has nothing to do with appeals by the employee.⁹⁴ It relates solely to the cost to the employee of the review.⁹⁵ In its largest extent it can comprehend only disbursements reasonably made and actually required,⁹⁶ and although the reviewing board does not constitute a court, but only an administrative tribunal, yet the word "cost," as used in such statute, bears a close analogy to the "costs" as used in ordinary proceedings in the courts,⁹⁷ and the statute affords something in the nature of court costs as reimbursement for actual expenses incurred by the employee and not as a penalty on insurer for seeking review of the decision awarding compensation to the employee.⁹⁸

Under such a statute, insurer is liable to pay costs

88. Ala.—*Western Union Telegraph Co. v. George*, 194 So. 183, 239 Ala. 80.

Tex.—*Texas Emp. Ins. Ass'n v. Hodnett*, Civ.App., 216 S.W.2d 301, refused no reversible error—*Southern Underwriters v. Waddell*, Civ. App., 144 S.W.2d 637—*Federal Underwriters Exchange v. Simpson*, Civ.App., 137 S.W.2d 132.

Partial success

Where, on cross appeals to circuit court from commission award, claimant prevailed on contention that he was entitled to penalty but did not prevail on his contention that entire award was to be adjudged due and payable, it was proper for circuit judge, under general costs statute, to apportion costs between parties equally.

Miss.—*T. C. Fuller Plywood Co. v. Moffett*, 95 So.2d 475.

89. Mich.—*Adkins v. Rives Plating Corp.*, 61 N.W.2d 117, 338 Mich. 265—*Velie v. Ingham County Road Commission*, 290 N.W. 812, 292 Mich. 320.

Minn.—*Whaling v. Itasca County*, 260 N.W. 299, 194 Minn. 302.

71 C.J. p 1407 note 84.

Where no brief filed

(1) Even though award of workmen's compensation commission was affirmed, injured employee who did not file a brief was not awarded costs.

Mich.—*Ide v. Scott Drilling, Inc.*, 67 N.W.2d 133, 341 Mich. 164.

(2) Where compensation award was affirmed on appeal by employer and employer's insurer, and claimant had filed no brief, no costs would be awarded.

Mich.—*Bovee v. Robert Gage Coal Co.*, 50 N.W.2d 878, 332 Mich. 259.

Where public question involved

(1) Where compensation award to

filing clerk in office of secretary of state, who sustained injuries when she slipped and fell on wet waxed floor of elevator in capitol building, was reversed on appeal, no costs would be awarded since a public question was involved.

Mich.—*Campbell v. Secretary of State*, 56 N.W.2d 84, 335 Mich. 237.

(2) A workmen's compensation case concerning determination of amount payable for occupational disease suffered by employee whose total disability occurred in eighteenth calendar month after effective date of the occupational disease statute, and whose death occurred in thirty-third calendar month after passage of the statute, involved a public question and no costs were allowed by supreme court.

Mich.—*Rueter v. Rinshed Mason Co.*, 6 N.W.2d 887, 303 Mich. 550.

(3) Where appeal from award of the department of labor and industry under the occupational disease statute involved a construction of the statute, court reversing the award would not grant costs.

Mich.—*Ruffertshafer v. Robert Gage Coal Co.*, 289 N.W. 151, 291 Mich. 254.

Use of state property

Workmen's compensation proceeding involving question whether public service commissioner's death, which occurred while commissioner was driving state vehicle from Lansing, where commission office was located, to Niles, where commissioner lived, arose out of and in course of employment involved use of state property so that costs would not be allowed.

Mich.—*White v. State*, 61 N.W.2d 31, 335 Mich. 282.

90. Mich.—*Samels v. Goodyear Tire & Rubber Co.*, 35 N.W.2d 265, 323

Mich. 251—*Webber v. Steiger Lumber Co.*, 34 N.W.2d 516, 322 Mich. 675—*Talbert v. Owen-Ames-Kimbel Co.*, 9 N.W.2d 572, 305 Mich. 345—*Moninger v. Germania Bldg. & Loan Ass'n*, 9 N.W.2d 550, 305 Mich. 303.

N.J.—*McGhee v. Raritan Copper Works*, 44 A.2d 383, 133 N.J.Law 378—*Kardos v. American Smelting & Refining Co.*, 39 A.2d 509, 132 N.J. Law 579, affirmed 42 A.2d 271, 133 N.J.Law 39.

71 C.J. p 1407 note 85.

91. N.J.—*West Jersey Trust Co. v. Philadelphia, etc., R. Co.*, 95 A. 753, 88 N.J.Law 102, reversed on other grounds 101 A. 1055, 90 N.J.Law 730.

92. Tenn.—*Southern Mfg. Co. v. Wade*, 219 S.W.2d 901, 188 Tenn. 398.

93. U.S.—*Globe Const. Co. v. Brewer*, C.A.La., 197 F.2d 707.

Tex.—*General Ins. Corp. v. Handy*, Civ.App., 267 S.W.2d 622, refused no reversible error.

94. Mass.—*Ahmed's Case*, 179 N.E. 684, 278 Mass. 180, 79 A.L.R. 669, followed in *Butler's Case*, 179 N.E. 690, 278 Mass. 218.

95. Mass.—*Ahmed's Case*, 179 N.E. 684, 278 Mass. 180, 79 A.L.R. 669, followed in *Butler's Case*, 179 N.E. 690, 278 Mass. 218.

96. Mass.—*Ahmed's Case*, 179 N.E. 684, 278 Mass. 180, 79 A.L.R. 669, followed in *Butler's Case*, 179 N.E. 690, 278 Mass. 218.

97. Mass.—*Ahmed's Case*, 179 N.E. 684, 278 Mass. 180, 79 A.L.R. 669, followed in *Butler's Case*, 179 N.E. 690, 278 Mass. 218.

98. Mass.—*Ahmed's Case*, 179 N.E. 684, 278 Mass. 180, 79 A.L.R. 669, followed in *Butler's Case*, 179 N.E. 690, 278 Mass. 218.

in the event that it prosecutes its claim for review and the employee is allowed to recover some compensation even though reduced in amount as a result of the review.⁹⁹ Of course, if on appeal to the court by insurer it should be decided finally that the employee was not entitled to recover compensation, a determination of costs to be paid by insurer made by the reviewing board would fall.¹ In general it is obligatory on the reviewing board to act with reference to the costs if on review the employee is to receive any compensation.²

A compensation claimant who loses an appeal will not be taxed for unnecessary costs incurred in transmitting the record to the appellate court.³ A provision of the workmen's compensation law that, where the commission or a court determines that a proceeding under such law has not been brought on reasonable grounds, such court or commission shall assess the whole cost of the proceeding on the party who has so brought it is mandatory,⁴ and requires the court of appeals to award costs against the party to an appeal under the act whenever such court determines that the proceeding has not been brought on reasonable grounds.⁵ Such a statute, however, does not supersede all other provisions for the award of costs so as to prevent the taxation of ordinary costs in cases where there is no element of unreasonableness.⁶

In some jurisdictions, in the exercise of the court's discretion, costs will not be awarded against an unsuccessful claimant personally, but will be

charged against the state industrial commission which virtually represents such claimant through the attorney general.⁷ On appeal an affidavit of inability to pay costs by a claimant of compensation need not include parties erroneously joined in the action.⁸

Objections on appeal to costs and expenses incurred in the prosecution of a claim for compensation may be too late.⁹

Liability of attorney. An attorney entitled to receive for his fee a percentage of the compensation awarded is not liable for any portion of the costs on an appeal from the award.¹⁰

Liability of intervener. An intervener who, on the trial, recovered against both parties is liable for the costs on appeal when the judgment is reversed.¹¹

Cost of transcript. Under some compensation acts transcripts in appeals must be furnished to the employer or employee without cost,¹² and under a statute prohibiting the taxation of costs in favor of either party on an appeal in a workmen's compensation case the expense of printing the testimony cannot be taxed against claimant on appeal.¹³ On an employer's appeal, where he has prepared and filed a transcript as required by statute, a successful claimant is not entitled to costs of the transcript.¹⁴ Where no transcript is made, but in lieu thereof the original record of the board is filed in the circuit court and transmitted with the record on appeal, the clerk of the circuit court is not entitled to a

99. Mass.—Ahmed's Case, 179 N.E. 684, 278 Mass. 180, 79 A.L.R. 669, followed in Butler's Case, 179 N.E. 690, 278 Mass. 218.

1. Mass.—Ahmed's Case, 179 N.E. 684, 278 Mass. 180, 79 A.L.R. 669, followed in Butler's Case, 179 N.E. 690, 278 Mass. 218.

2. Mass.—Ahmed's Case, 179 N.E. 684, 278 Mass. 180, 79 A.L.R. 669, followed in Butler's Case, 179 N.E. 690, 278 Mass. 218.

3. Ga.—U. S. Fidelity & Guaranty Co. v. Hairston, 139 S.E. 685, 37 Ga. App. 234.

4. N.Y.—Wilson v. C. Dorfing & Sons, 113 N.E. 454, 218 N.Y. 734. Vt.—Kelly v. Hoosac Lumber Co., 113 A. 520, 96 Vt. 153. 71 C.J. p 1408 note 96.

5. N.Y.—Wilson v. C. Dorfing & Sons, 113 N.E. 454, 218 N.Y. 734. 71 C.J. p 1408 note 97.

Appeal held not prosecuted without reasonable grounds

Mass.—Ferron's Case, 88 N.E.2d 637, 325 Mass. 6—Caccamo's Case, 55 N.E.2d 614, 816 Mass. 358—Elbridge's Case, 38 N.E.2d 566, 310

Mass. 830—Sanborn's Case, 21 N.E. 2d 248, 303 Mass. 225—Akins' Case, 20 N.E.2d 453, 302 Mass. 562—Rich's Case, 17 N.E.2d 903, 301 Mass. 546—Maguskas' Case, 9 N.E. 2d 380, 298 Mass. 80—Sylvia's Case, 9 N.E.2d 412, 298 Mass. 27—Farren's Case, 195 N.E. 738, 290 Mass. 452—Royal's Case, 190 N.E. 841, 286 Mass. 374.

71 C.J. p 1408 note 97 [a].

Existence of reasonable ground

In compensation proceeding, where in claimant recovered judgment against state insurance fund for death of employee who shot and killed himself after his mind was affected by injuries suffered in course of his employment, counsel for state in interest of his client exercised sound professional judgment in prosecuting appeal, in view of novel question presented, and appellee could not have costs, including a reasonable attorney's fee and damages, taxed against appellant.

Ohio.—Burnett v. Industrial Commission, 98 N.E.2d 41, 87 Ohio App. 441.

6. N.Y.—In re Petrie, 113 N.E. 455, 218 N.Y. 730.

7. N.Y.—Wilson v. C. Dorfing & Sons, 113 N.E. 454, 218 N.Y. 734.

8. Tex.—Fidelity Union Casualty Co. v. Depperman, Civ.App., 53 S. W.2d 845. 71 C.J. p 1408 note 1.

9. La.—Singleton v. Wyatt Lumber Co., 6 La.App. 627. 71 C.J. p 1237 note 31.

10. Tex.—Texas Employers Ins. Ass'n v. Johnson, Civ.App., 101 S. W.2d 400. 71 C.J. p 1408 note 2.

11. Tex.—Norwich Union Indemnity Co. v. Wilson, Civ.App., 17 S.W.2d 68. 71 C.J. p 1408 note 3.

12. Wyo.—In re Winborne, 244 P. 135, 34 Wyo. 349. 71 C.J. p 1409 note 4.

13. Conn.—Taylor v. St. Paul's Universalist Church, 147 A. 671, 109 Conn. 737.

14. N.J.—Trenton Malleable Iron Co. v. Paley, 181 A. 149, 115 N.J. Law 579.

fee for transmitting the transcript, since none has been made.¹⁵

Printing costs may be allowed to the extent that they are reasonable.¹⁶

Damages or penalties on appeal. In jurisdictions authorizing the imposition of damages or a penalty on a party appealing or suing out a writ of error in case such appeal or writ of error is frivolous or sued out for the purpose of delay,¹⁷ such damages or penalty will not be assessed where the appeal was not frivolous or taken for delay,¹⁸ and damages cannot be allowed for frivolous appeal where defendant does not stay the execution of the judgment by giving a suspensive appeal bond.¹⁹ The appeal will not be considered frivolous where eminent physicians disagreed in their diagnosis as to the probable duration of the disability.²⁰

Any right to damages is governed wholly by the statute.²¹ Damages for delay will not be imposed where the employer and his insurer have, on appeal, succeeded in having the judgment awarding compensation corrected.²² Where there has been no definite or fixed sum awarded, damages and interest will not be allowed on affirmance.²³ Under a statute so providing, where the employer appeals from an award of the full board, the proper statutory penalty may be awarded on affirmance of the award.²⁴

Necessity of appeal. Where, on successful appeal from the order of the commission, claimant is entitled to costs, he cannot recover costs where by negotiation he secures a cancellation of an order of the board terminating his compensation and a reinstatement of his compensation.²⁵

§ 825. Expenses

Expenses in compensation proceedings are allowable only when and to the extent authorized by statute.

Except as authorized by statute, no allowance for expenses may be made in compensation cases.²⁶ The commission on awarding compensation may, in some jurisdictions, assess against the employer and his insurer the costs incurred by claimant in taking depositions.²⁷ However, it has been held that an attorney may not proceed to incur expenses in attending the taking of a deposition and later obtain an order for allowance of the expenses.²⁸ In jurisdictions in which the compensation act requires the judge of the district court to investigate claims for compensation in such manner as he may deem necessary the judge may have the aid of assistants who are entitled to receive, as expenses of investigation, compensation for their services.²⁹ The necessity of employing such assistants is largely in the discretion of the judge,³⁰ and the amount to be paid them should not exceed the reasonable value

15. Ky.—*Highland Co. v. Goben*, 175 S.W.2d 124, 295 Ky. 803.

16. Iowa.—*Bocian v. Armour & Co.*, 56 N.W.2d 900, 244 Iowa 304.

Payment from special fund

In workmen's compensation proceeding, record disclosed that there was no abuse of discretion in denying motion for certification under statute providing that if employee appeals to supreme judicial court from decree of superior court the superior court may in its discretion certify that appeal raises a substantial question of law in which event the expense of printing the records, papers, and briefs shall be paid from the special fund.

Mass.—*Lavoie's Case*, 135 N.E.2d 750, 334 Mass. 403.

17. Tex.—*Federal Underwriters Exchange v. Smith*, Civ.App., 145 S.W.2d 897.

18. La.—*Daigle v. Great Am. Indem. Co.*, App., 70 So.2d 697—*O'Connor v. American Automobile Ins. Co.*, App., 32 So.2d 624—*Richardson v. American Emp. Ins. Co.*, App., 31 So.2d 527, rehearing refused 32 So.2d 108—*Henry v. Higgins Industries, App.*, 24 So.2d 402—*Jackson v. Kellogg Lumber Co.*, App., 14 So.2d 311—*Franz v. Sun Indemnity*

Co. of New York, App., 7 So.2d 686—*Boykin v. We Hope Gas & Oil Co.*, App., 2 So.2d 528.

Mo.—*Wigger v. Consumers Co-op. Ass'n*, App., 301 S.W.2d 56.

Mont.—*O'Neill v. Industrial Accident Fund*, 81 P.2d 688, 107 Mont. 176.

N.M.—*Wright v. Schultz*, 231 P.2d 937, 55 N.M. 261.

N.Y.—*Marina v. Demetriades*, 88 N.Y.S.2d 704, 275 App.Div. 879.

Tex.—*Texas Emp. Ins. Ass'n v. Moore*, Civ.App., 284 S.W.2d 175, error refused no reversible error—

Alamo Cas. Co. v. Vasquez, Civ. App., 261 S.W.2d 376—*Traders & General Ins. Co. v. Durette*, Civ. App., 258 S.W.2d 346—*Traders & General Ins. Co. v. Batson*, Civ. App., 253 S.W.2d 488, refused no reversible error.

19. La.—*Simmonds v. Austin Oil Co.*, 2 La.App. 535—*Eisel v. Caddo Transfer & Warehouse Co.*, 2 La. App. 533.

71 C.J. p 1409 note 7.

20. La.—*Million v. W. K. Henderson Iron Works & Supply Co.*, 2 La. App. 539.

21. Miss.—*M. T. Reed Const. Co. v. Martin*, 63 So.2d 528, 215 Miss. 472.

22. U.S.—*Globe Const. Co. v. Brewer*, C.A.La., 197 F.2d 707.

23. Miss.—*M. T. Reed Const. Co. v. Martin*, 63 So.2d 528, 215 Miss. 472—*J. & B. Mfg. Co. v. Cochran*, 62 So.2d 378, 216 Miss. 336—*Mills v. Jones' Estate*, 57 So.2d 496, 213 Miss. 680.

24. Ind.—*Craddock Furniture Corp. v. Nation*, 54 N.E.2d 295, 115 Ind. App. 62, rehearing denied 55 N.E.2d 121, 115 Ind.App. 62—*L. W. Dailley Const. Co. v. Carpenter*, 53 N.E.2d 190, 114 Ind.App. 522.

25. Wash.—*Cloquet v. Department of Labor & Industries of Washington*, 268 P. 602, 148 Wash. 229.

26. Colo.—*Maryland Cas. Co. v. Industrial Commission*, 178 P.2d 426, 116 Colo. 58.

Mont.—*Lunardello v. Republic Coal Co.*, 53 P.2d 87, 101 Mont. 94.

Pa.—*Zboch v. National Erie Corp.*, Com.Pl., 25 Erie Co. 187.

Wyo.—*Ludlow v. Wortham Machinery Co.*, 257 P.2d 358, 71 Wyo. 331.

27. Okl.—*Sapulpa Refining Co. v. Boggs*, 287 P. 713, 143 Okl. 84.

28. Ky.—*Adkins v. International Harvester Co.*, 286 S.W.2d 528.

29. Wyo.—*In re Harnsberger*, 3 P.2d 80, 43 Wyo. 226.

30. Wyo.—*In re Harnsberger*, supra.

71 C.J. p 1409 note 13.

of the services performed.³¹ However, the appointment of an official investigator to whom every workmen's compensation claim is automatically referred and who is paid fixed fees is not authorized.³²

Reasonable expenses may be allowed a successful party on appeal where the statute so provides,³³

but expenses may be disallowed where the claim therefor is not supported by proof³⁴ or where the award appealed from was not inadequate as claimed.³⁵

Allowance of expenses to an attorney in addition to his fee has been denied.³⁶

XX. PAYMENT OF COMPENSATION AND ENFORCEMENT OF AWARD

A. PAYMENT

§ 826. In General

Compensation should be paid in the time and manner prescribed by the workmen's compensation act.

Compensation should be paid in the time and manner prescribed by the workmen's compensation act.³⁷ In the absence of controversy, compensation should be paid immediately,³⁸ without waiting for an award by the compensation board,³⁹ and where compensation has been paid an award should not be made for such period.⁴⁰ Under some statutes, payments must be made within a stated time after the injury or claim unless a notice denying liability for compensation is filed.⁴¹

Payments called for by a compensation award are immediately due and payable.⁴² Payments by the employer for drugs and medicines for the employee constitute payments of compensation within the statute.⁴³ A provision requiring the employee to give a receipt for the payment of compensation does not limit the employer to such a receipt to prove his payment of compensation.⁴⁴

Liability for injuries to state employees. A provision of the workmen's compensation act for the payment of compensation awards for injuries to state employees out of the state contingent fund is not impliedly repealed by a special act requiring the

31. Wyo.—In re Harnsberger, supra.
71 C.J. p 1409 note 14.

32. Wyo.—In re Harnsberger, supra.

33. Mass.—Luczek's Case, 141 N.E. 2d 526—Dillon's Case, 85 N.E.2d 69, 344 Mass. 102.

34. La.—Morgan v. American Bitumuls Co., App., 39 So.2d 139, affirmed 47 So.2d 739, 217 La. 968.

35. Me.—Chapman v. Hector J. Cyr Co., 198 A. 736, 135 Me. 416.

36. Miss.—Cumbest Mfg. Co. v. Pinkney, 84 So.2d 421, 225 Miss. 318.

37. Ill.—Kijowski v. Times Pub. Corp., 18 N.E.2d 754, 298 Ill.App. 236, affirmed 23 N.E.2d 703, 372 Ill. 311.

Minn.—Bourdeaux v. Gilbert Motor Co., 20 N.W.2d 393, 220 Minn. 538.

Premature payment

An employer has no right, by voluntarily anticipating his payments to his employee, to shorten the period of his liability.

Pa.—Creighton v. Continental Roll & Steel Foundry Co., 38 A.2d 337, 155 Pa.Super. 165.

38. N.J.—Wallenstein v. Hartford Accident & Indemnity Co., 34 A.2d 402, 21 N.J.Misc. 373.

N.Y.—Smith v. City of Rochester, 335 N.Y.S.2d 323, 285 App.Div. 446, appeal denied 137 N.Y.S.2d 631, 285 App.Div. 344.

Self-insured city which did not contest compensation claim by its employee was under obligation to pay compensation immediately, by whatever legal means of appropriation might have been required by its own law or general statutes. Statute providing that where compensation is awarded to an employee of a self-insured city, treasurer on presentation of award shall forthwith begin payment of it does not excuse a self-insured municipality from obligation to pay compensation at once in absence of a controversy.
N.Y.—Smith v. City of Rochester, supra.

39. N.Y.—Smith v. City of Rochester, supra.
Tex.—Booth v. Texas Employers' Ins. Ass'n, 123 S.W.2d 322, 132 Tex. 237.

40. Tex.—Texas Emp. Ins. Ass'n v. Mahlow, Civ.App., 304 S.W.2d 161.

41. Miss.—Southern Engineering & Elec. Co. v. Chester, 33 So.2d 311, 226 Miss. 136, modified on other grounds 34 So.2d 535, 226 Miss. 136.

42. D.C.—Harris v. Britton, 213 F. 2d 45, 95 U.S.App.D.C. 32.

Delays in making payments are not to be countenanced.

La.—Carrington v. Consolidated Underwriters, App., 80 So.2d 427, judgment amended on other grounds 89 So.2d 399, 230 La. 939.

Excuse for delay

(1) Failure of employer or its compensation carrier, within fourteen days after date of employee's demand, to pay sum awarded doctor by workmen's compensation commissioner would not be excused by failure of doctor to present for payment compensation carrier's draft in a lesser amount, in view of fact that employer or compensation carrier failed to pay difference between the amount awarded and amount of the draft within the two-week period.
Kan.—Owen v. Ready Made Buildings, Inc., 313 P.2d 267, 181 Kan. 659.

(2) Fact that, at time of hearing before workmen's compensation commissioner, employer agreed to assume all of employee's medical bills would not afford legal excuse for failure of employer or its compensation carrier to make payment of unpaid compensation within time required by workmen's compensation act provision requiring payment within two weeks after employee's written demand on penalty that otherwise employer would be liable to pay the entire award.
Kan.—Owen v. Ready Made Buildings, Inc., supra.

43. N.Y.—Cook v. New York Cent. R., 60 N.Y.S.2d 342, 270 App.Div. 869, affirmed 63 N.E.2d 372, 296 N.Y. 576.

44. U.S.—Atkinson-Jones Const. Co. v. Henderson, D.C.La., 35 F.Supp. 146.

treasurer to collect and deposit the income and revenue from designated state properties and make disbursements therefrom for carrying out its purposes.⁴⁵ In a jurisdiction in which the state accident fund is not required to issue insurance policies to state departments insured by it because its liability for compensation for injuries to employees of departments of the government is not based on contract but is fixed by statute, a statute providing that medical expenses shall be paid by the state institution in which the employee is serving at the time of his injury and that the premium or assessment required to be paid to the state accident fund by the various state departments shall not cover medical and hospital services is not repealed by implication by a statute which provides what insurance policies covering employers who elect to become subject to the workmen's compensation law shall contain.⁴⁶

Liability for injuries to school teachers. Under a workmen's compensation act which includes all school districts within its provisions and requires them to compensate their employees in case of injury, but confers the option on them to contribute to the state insurance fund and insure the payment of compensation from that fund, or to pay the same direct to the injured employee, where a school district is not insured in the state insurance fund it must pay compensation awarded an injured school teacher from the funds raised by taxation for the support and maintenance of the schools.⁴⁷

§ 827. Liability of Several Employers of Employee

Liability for the payment of a compensation award where the claimant had several employers is discussed supra § 46.

Examine Pocket Parts for later cases.

§ 828. Liability of Successive Employers and Insurance Carriers

Liability for payment of a compensation award as between successive employers and insurance carriers is discussed supra §§ 46, 376.

Examine Pocket Parts for later cases.

§ 829. To Whom Payment Made

The compensation commission has continuous jurisdiction of the payment of an award, and may require that payments be made to one other than the person originally designated to receive them.

The commission charged with the administration of the compensation statute has continuous jurisdiction of the payments and can at any time when necessary or convenient require the employer or insurance carrier to make payments to another than the one who was originally designated to receive them,⁴⁸ as by the substitution of a dependent possessing a superior right in the place of the person to whom the payments were first ordered to be made.⁴⁹ The board or commission should require the award to be applied for the benefit of those for whom it is intended,⁵⁰ and should likewise protect those who are required to pay from assuming unnecessary risks.⁵¹ Where a compensation judgment is paid to the clerk of the court in which it is rendered, the clerk in the absence of statutory inhibition may pay it out to the attorney of the claimant.⁵² Where compensation awards are made separately to a husband and a wife, the wife's share should be paid directly to the wife and not to the husband as community property.⁵³ The employer or insurance carrier is not concerned with, and cannot object to, whom the payments are directed to be made, provided always that they are protected in making the payments.⁵⁴

In case the claimant dies, compensation due him may be paid to his executor or administrator.⁵⁵ A

45. Me.—Harris' Case, 126 A. 166, 124 Me. 68.

71 C.J. p 1410 note 37.

46. Mich.—O'Meara v. Michigan Department of Agriculture, 195 N.W. 418, 224 Mich. 666.

47. Utah.—Woodcock v. Board of Education of Salt Lake City, 187 P. 181, 55 Utah 458, 10 A.L.R. 181.

48. Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 234 P. 697, 65 Utah 100.

Municipal employee

Where captain in fire department of city of under one million population was totally and permanently disabled in performance of duties, and captain consented to arrangement whereby he was paid full

amount of salary by city but city claimed and received from workmen's compensation commission the captain's weekly compensation award as reimbursement, captain having accepted the bargain could have no claim in reference to such arrangement.

N.Y.—Birmingham v. Mirrington, 123 N.Y.S.2d 72, 204 Misc. 321.

49. Ky.—Johnson v. Hardy-Burlingham Mining Co., 268 S.W. 685, 205 Ky. 752.

71 C.J. p 1412 note 57.

50. Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 234 P. 697, 65 Utah 100.

51. Utah.—Utah Fuel Co. v. Industrial Commission of Utah, supra.

52. Ala.—Hayes v. Waldrop, 108 So. 333, 214 Ala. 534.

71 C.J. p 1412 note 63.

53. Tex.—Federal Underwriters Exchange v. Bullard, Civ.App., 128 S.W.2d 126.

Waiver

The right, if any, of husband to award of compensation in favor of wife for death of son on theory that award was community fund to which he was entitled as head of family could be waived.

Tex.—Federal Underwriters Exchange v. Bullard, supra.

54. Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 234 P. 697, 65 Utah 100.

55. N.J.—Kozlowski v. Industrial

statute giving the employer the privilege of paying compensation for death either to the personal representative of the deceased employee or to his beneficiaries may be availed of only by an employer who voluntarily pays the compensation,⁵⁶ and an award in a contested proceeding may properly be made to the administrator.⁵⁷

Special provision may be made for the payment to a state official of a compensation award which cannot be paid to the nonresident entitled to it because of war conditions.⁵⁸

Liens and claims against award. A compensation award may be subjected to claims for support by the wife or children of the person to whom the award is made.⁵⁹ Provision is sometimes made for a lien against the compensation award for payments or advances for the reasonable living expenses of the claimant or his dependents.⁶⁰ Under some statutes, the unemployment compensation fund is entitled to a lien against a workmen's compensation award covering disability during a period for which unemployment benefits were paid to the claimant,⁶¹

but unless such procedure is authorized by law the unemployment compensation fund is not to be reimbursed out of the workmen's compensation award.⁶²

Head of family. Under some compensation acts it is proper for the commission to make the award of a death benefit to the head of a dependent family to be used for the common support of all dependents,⁶³ and where the head of such a family dies during the period compensation is being paid the award may be modified so as to make the remaining payments payable to the surviving dependents.⁶⁴ Where the children of a deceased employee by a divorced wife were wholly dependent on him, and his second wife was also wholly dependent, it is competent for her to consent to a binding decree ordering payment of compensation to be divided between her and the children, although she was found entitled to the total compensation.⁶⁵

Infant. Payment of compensation to a minor ordinarily should be made to the minor's guardian,⁶⁶ but, particularly where the award is small, the board,

Corp., 102 A.2d 404, 29 N.J.Super. 272.

56. Ill.—Peabody Coal Co. v. Industrial Commission, 132 N.E. 438, 299 Ill. 142—G. H. Hammond Co. v. Industrial Commission, 123 N.E. 384, 288 Ill. 262.

57. Ill.—Peabody Coal Co. v. Industrial Commission, 132 N.E. 438, 299 Ill. 142—G. H. Hammond Co. v. Industrial Commission, 123 N.E. 384, 288 Ill. 262.

58. N.Y.—Bock v. Sheffield Farms Co., 71 N.Y.S.2d 605, 272 App.Div. 387—Bock v. Sheffield Farms Co., 60 N.Y.S.2d 305, 270 App.Div. 868.

59. Ariz.—Industrial Commission v. Oden, 204 P.2d 849, 68 Ariz. 234. N.Y.—Hilmantel v. Hilmantel, 282 N.Y.S. 918, 157 Misc. 649.

Nonresident divorced father

Where compensation award was rendered in favor of nonresident divorced father who was in arrears in payment of support money for minor children in custody of mother, industrial commission could be ordered to pay amount of arrears and future installments for support directly to mother out of award.

Ariz.—Industrial Commission v. Oden, 204 P.2d 849, 68 Ariz. 234.

60. Cal.—Glass Containers, Inc. v. Industrial Acc. Commission, 264 P. 2d 148, 121 C.A.2d 656—Safway Steel Scaffold Co. v. Industrial Accident Commission, 130 P.2d 484, 55 C.A.2d 388.

61. Cal.—Garcia v. Industrial Acc. Commission, 263 P.2d 8, 41 C.2d 599—California-Western States Life

Ins. Co. v. Industrial Acc. Commission, 244 P.2d 912, 39 C.2d 104—Bryant v. Industrial Acc. Commission, 231 P.2d 32, 37 C.2d 215.

Settlement of claim

Amount payable under agreement compromising claim for workmen's compensation entered into between employee and employer's workmen's compensation insurance carrier and approved by industrial accident commission is considered workmen's compensation against which lien for unemployment disability benefits may be allowed.

Cal.—Garcia v. Industrial Acc. Commission, 263 P.2d 8, 41 C.2d 599—Aetna Life Ins. Co. v. Industrial Acc. Commission, 241 P.2d 530, 38 C.2d 599.

Award paid prior to attack on denial of lien

Where carrier of employer's unemployment disability insurance under a voluntary plan commenced paying workmen unemployment compensation disability benefits on same date that employee filed application with industrial accident commission for adjustment of claim, and such disability carrier requested commission to allow lien against any award of workmen's compensation, and commission denied allowance of lien and awarded compensation, fact that state compensation insurance fund paid out award before disability carrier attacked denial of lien by filing of petition for rehearing did not cause disability carrier to lose its right to lien against state fund. Cal.—California-Western States Life

Ins. Co. v. Industrial Acc. Commission, 244 P.2d 912, 39 C.2d 104.

62. Mass.—Gallant's Case, 109 N.E. 2d 829, 329 Mass. 607.

63. Cal.—Great Western Power Co. of California v. Industrial Accident Commission of California, 218 P. 1009, 191 C. 724. 71 C.J. p 1412 note 64.

64. Mich.—Byle v. Grand Rapids Blowpipe & Dust Arrester Co., 175 N.W. 416, 208 Mich. 638.

65. R.I.—Loiselle v. Pawtucket Ice Co., 118 A. 872, 44 R.I. 474.

66. La.—Glostons v. Industrial Lumber Co., App., 159 So. 618. N.C.—Lineberry v. Town of Mebane, 13 S.E.2d 429, 219 N.C. 257, 142 A. L.R. 1088.

71 C.J. p 1412 note 68.

Wages

Statute providing that a "disability payment which shall be payable for one week in advance as wages" shall be paid to employee temporarily disabled by injury was held not to mean that such payments or any award of industrial accident commission shall constitute "wages," as used in statute authorizing payment of wages of a minor to such, minor, in absence of contrary direction from guardian or parent.

Cal.—Pollock v. Industrial Accident Commission, 54 P.2d 695, 5 C.2d 205.

Payment to minor does not discharge obligation

Payment of compensation award, directly to minor employee was held

commission, or court need not require it to be paid to a legally appointed and qualified guardian of such minor dependent or dependents,⁶⁷ and may order payment to the surviving widow in behalf of the minor children,⁶⁸ or appoint a person as trustee to whom the payments are to be made,⁶⁹ and the statute may provide for direct payment to a minor claimant.⁷⁰

If a mother to whom an award is paid neglects the minors, they may ask for an order directing their share of the compensation to be paid to a guardian for their use and benefit.⁷¹ Where the infant has

been committed to an institution, the award may be paid to the public authorities to be applied to the infant's support and maintenance.⁷² A child acquires no rights in an award made to the mother, determined to be the sole dependent of the deceased employee, where the widow's rights in the award terminate by her remarriage.⁷³

Insane or aged person. A compensation award to an incompetent should be paid to the committee or guardian of the incompetent or to a trustee for him.⁷⁴ The committee or guardian of an insane person to whom payment of an award is being made

ineffectual to discharge employer's indebtedness created by award, in view of provision of probate code requiring payments in sums exceeding two hundred and fifty dollars to be made to guardian, and other provisions indicating policy to prevent minors from directly handling their own money.

Cal.—Pollock v. Industrial Accident Commission, *supra*.

Compensation is a "property right" generally to be used in support of dependent claimants, and someone authorized by law to collect and expend it is contemplated.

U.S.—Maryland Casualty Co. v. Lawson, C.C.A.Fla., 110 F.2d 269.

Return of investment

Industrial accident commission had authority to condition its order declaring payment of compensation award directly to minor employee ineffectual to discharge employer's indebtedness upon minor's return of building and loan certificates purchased by him with award money.

Cal.—Pollock v. Industrial Accident Commission, 54 P.2d 695, 5 C.2d 205.

67. Ind.—Riggs v. Lehigh Portland Cement Co., 131 N.E. 231, 76 Ind. App. 308.

71 C.J. p 1412 note 67.

Prior payments to guardian

Where supreme court determined that dependent son over age eighteen and dependent son under age eighteen were entitled to share in death benefits, sums already paid by insurance carrier to guardian of sons should be held by such guardian for benefit of both sons in the proportions that it should be determined that they were entitled to share in the death benefits.

Wis.—Krueger v. Industrial Commission, 295 N.W. 33, 237 Wis. 153.

Amount of award

Where compensation claimant was seventeen years of age when he received injury, claim for compensation was properly filed by claimant's father, and award and resultant payments for temporary total dis-

ability in an amount of less than three hundred dollars to father was authorized under compensation act, although father was not appointed claimant's guardian, but proceedings whereby award and payment were made to father in excess of amount of three hundred dollars for specific loss and disfigurement were voidable at election of claimant upon his becoming of age, and claimant was thereafter entitled to hearing before Industrial Commission as to damages for specific loss and disfigurement without a new claim being filed.

S.C.—Gilliard v. Victor-Monaghan Co., 44 S.E.2d 109, 211 S.C. 68.

68. Idaho.—Hiebert v. Howell, 85 P. 2d 699, 59 Idaho 591, 120 A.L.R. 338.

La.—Litton v. Natchitoches Oil Mill, App., 8 So.2d 751, affirmed 9 So.2d 445, 201 La. 37.

71 C.J. p 1412 note 69.

Qualification as tutrix

Widow of employee who was killed in course of employment was not required under the compensation act to qualify as tutrix of her minor children in order legally to demand and to receive compensation for the benefit of the children, but the fact that she did qualify as tutrix did not alter her right individually to demand and receive what the act allowed for the children.

La.—Litton v. Natchitoches Oil Mill, *supra*.

Matter of convenience

Under compensation act, the right of a widow to petition for and to receive compensation due a dependent child is one of convenience and is not absolute.

Pa.—Sweeney v. Reading Co., 23 A. 2d 66, 146 Pa.Super. 539.

Mother of deceased

Where minor sisters of deceased employee lived with mother, compensation awarded for benefit of sisters was properly paid to mother in mother's suit for her own use and that of the sisters, and it was unnecessary to have a guardian appointed to receive compensation awarded to sisters.

Tenn.—W. C. Sharp Drug Stores v. Hansard, 144 S.W.2d 777, 176 Tenn. 595.

Widow and mother of children

Where widow filed application for compensation for workman's death, individually and as next friend and mother of dependent children, and allocation of the compensation payments was not sought, appointment of guardian to receive children's share in award was not necessary.

Ill.—Beckemeyer Coal Co. v. Industrial Commission, 18 N.E.2d 132, 370 Ill. 113.

69. Cal.—Lee v. Superior Court of California in and for City and County of San Francisco, 214 P. 972, 191 C. 46.

Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 234 P. 697, 65 Utah 100.

70. Tex.—Keller v. Texas Employers' Ins. Ass'n, Civ.App., 279 S.W. 1113.

71. Idaho.—Hiebert v. Howell, 85 P. 2d 699, 59 Idaho 591, 120 A.L.R. 338.

72. N.Y.—In re Rubawic, 15 N.Y.S. 2d 686, 253 App.Div. 841.

73. Ill.—Trigg v. Industrial Commission, 5 N.E.2d 394, 364 Ill. 581, 108 A.L.R. 153.

74. N.Y.—Gilchrist v. American News Co., 290 N.Y.S. 278.

Payment to director of hospital

An award as death benefits to dependent incompetent adult daughter of deceased employee, with direction that it be paid to the director of state hospital for benefit of the incompetent was warranted by mental hygiene law and award would be affirmed on the assumption that the director of the hospital would use the award to provide luxuries and comforts for the incompetent and not for or on account of her cost and maintenance in the hospital.

N.Y.—La Burt v. Ankara Perfumes, 81 N.Y.S.2d 795, 274 App.Div. 366, appeal denied 84 N.Y.S.2d 927, 374 App.Div. 949.

may be required to make a disclosure to the board or commission of the disposition made of the moneys received under the award.⁷⁵ The commission may order an award for an aged applicant to be paid to a trustee for him.⁷⁶

§ 830. Apportionment of Payment

Apportionment of payment may be ordered in a proper case.

In a proceeding to compel the surety on a self-insurer's bond to pay compensation awards against the self-insurer, it is proper, where the sum of the awards exceeds the amount of the bond, to order payments to the compensation claimants to be made by the surety in pro rata proportion.⁷⁷ Where an award is divided between the widow and minor dependents of a deceased employee, the decree should not prorate the share of the minor dependents at the time they reach an age when they will no longer be entitled to it.⁷⁸

§ 831. Deductions and Offsets

Payments made on account of the injury may be credited in payment of the award.

It is the duty of the board or commission to ascertain any payments made by the employer or insurer for the injury and to give credit on the award for such payments.⁷⁹ Overpayments made by mistake may be charged against subsequent payments.⁸⁰ Where an employer claims that payments were made under an agreement for reimbursement, under a provision that the employer might at his option advance any sums under conditions provided in the

act and should be entitled to reimbursement by his insurance carrier out of an unpaid installment or installments of compensation due, no reimbursement can be due until an award is made.⁸¹

§ 832. Compromise

The board may be authorized to approve the compromise of a payment in default.

The state industrial board has no power, in the exercise of an authority to compromise a payment in default, to grant a larger award to a claimant than he was otherwise entitled to receive under the statute, and place that extra burden upon one who was not a party to the compromise agreement.⁸² So, where awards of compensation have been made against two partners as uninsured employers, and the compensation board approved a compromise settlement of the liability of one of the partners by his payment of a lump sum to claimant in full of his liability, the board holding that the liability of the other partner was not to be affected by the settlement, a later award against such partner of the full amount of the joint award, plus subsequent awards, without credit for any part of the settlement, is error.⁸³

§ 833. Accord and Satisfaction

Payment of a final award may constitute an accord and satisfaction.

It is only where an award for compensation has become final and payment of the award has been made that such award and payment constitute accord and satisfaction.⁸⁴ The receipt and retention

75. W.Va.—McDowell County Nat. Bank v. Compensation Com'r, 168 S.E. 372, 113 W.Va. 372.

76. Utah.—Tintic Milling Co. v. Industrial Commission of Utah, 207 P. 1114, 60 Utah 261.

71 C.J. p 1413 note 78.

77. Cal.—Hartford Accident & Indemnity Co. v. Industrial Accident Commission, 13 P.2d 699, 216 C. 40.

Apportionment of death benefits see supra § 324.

78. La.—Selser v. Bragmans Bluff Lumber Co., App., 146 So. 690.

79. Ill.—Board of Education of High School Dist. No. 502 of Bureau County v. Industrial Commission, 140 N.E. 39, 308 Ill. 445.

71 C.J. p 1413 note 78.

Deductions and offsets considered in fixing amount of award, see supra §§ 830, 831.

80. La.—Cranmer v. Fidelity & Casualty Co. of New York, App. 18 So.2d 220, 12 Mich. Samsel v. Goodyear Tire &

Rubber Co., 35 N.W.2d 265, 323 Mich. 251.

Subject to approval of court

Under statute providing for deduction of any overpayments under workmen's compensation law "subject to the approval of the court," the quoted phrase means that any agreement of the parties is subject to inquisitorial power of the court in a proper proceeding, but does not make court's approval a condition precedent to a valid adjustment. La.—Cranmer v. Fidelity & Casualty Co. of New York, App., 18 So.2d 220.

Idea against unpaid compensation

(1) Where compensation claimant had recovered sum of money on original award of industrial accident commission predicated upon finding that employer was guilty of serious and willful misconduct, which finding was subsequently annulled, employer was entitled to "lien" against unpaid portion of normal award for the recovery of sum so obtained by claimant.

Cal.—Safway Steel Scaffold Co. v. Industrial Accident Commission, 130 P.2d 484, 55 C.A.2d 388.

(2) Where state compensation insurance fund had not made any expenditure under original award of industrial accident commission for death of employee predicated upon a finding that employer was guilty of serious and willful misconduct, which finding was subsequently annulled, fund had not been injured and was not entitled to a "lien" against unpaid compensation under normal award for reimbursement of amount paid by employer.

Cal.—Safway Steel Scaffold Co. v. Industrial Accident Commission, 130 P.2d 485, 55 C.A.2d 390.

81. N.Y.—Bell v. Fraser, 206 N.Y.S. 530, 210 App.Div. 560.

71 C.J. p 1413 note 82.

82. N.Y.—Rahman v. Bethel, 258 N.Y.S. 286, 236 App.Div. 182.

83. N.Y.—Rahman v. Bethel, supra.

84. Tex.—Texas Employers' Ins.

by the claimant of a check in the amount of the award do not constitute payment of the award unless it is so agreed.⁸⁵ A part payment of a compensation judgment for which claimant gives a receipt in full satisfaction of the judgment does not satisfy the judgment.⁸⁶

§ 834. Alternative Award of Employment or Compensation

The rights of the parties where the award calls for compensation or an offer of employment are discussed supra § 320.

Examine Pocket Parts for later cases.

Ass'n v. Adcock, 83 S.W.2d 310, 125 Tex. 484.
71 C.J. p 1413 note 85.

85. Mo.—*Komosa v. Monsanto Chemical Co.*, App., 305 S.W.2d 506.

86. Ill.—*Wright v. Federal Wrecking Co.*, 73 N.E.2d 16, 331 Ill.App. 231.

87. N.J.—*Sassarro v. Wright Aeronautical Corp.*, 46 A.2d 52, 24 N.J. Misc. 57.

Wash.—*Brakus v. Department of Labor and Industries*, 292 F.2d 865, 48 Wash.2d 218.

71 C.J. p 1414 note 89.

Recovery back of compensation by insurer from employee where insurer did not intervene in action by employee against tort-feasor see infra § 993.

Reduction of award on review

Where compensation award is decreased on review of case for change in conditions or mistake in determination of facts, insurer will not receive back any compensation previously paid but may have prior excess payments credited upon present award, future awards, or any unpaid prior award.

U.S.—*Bethlehem Shipbuilding Corp. v. Cardillo*, C.C.A.Mass., 102 F.2d 289, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

Compensation bureau without jurisdiction

A deputy commissioner of the compensation bureau was not authorized to order repayment of amount erroneously paid by employer for benefit of a son of a niece of deceased employee's wife as a dependent, but employer was required to resort to some other court following commissioner's reversal of judgment which erroneously directed the payments.

N.J.—*Ayers v. Public Service Co.—ordinated Transport*, 196 A. 468, 16 N.J.Misc. 60.

Voluntary payment

An employer and workmen's com-

pensation insurance carrier were not entitled to recover sum voluntarily paid by them to injured employee in settlement of claim for serious bodily disfigurement, for which supreme court subsequently found that he was not entitled to compensation on appeal from judgment affirming industrial commission's order affirming single commissioner's award of larger sum therefor.

S.C.—*Manning v. Gossett Mills*, 6 S.E.2d 256, 192 S.C. 262.

88. W.Va.—*State ex rel. Trent v. Pritt*, 59 S.E.2d 890, 134 W.Va. 516.

Where employee was engaged in interstate transportation at time of injury, all state compensation proceedings were void and employee could not keep payments made under state statute.

Mo.—*Gieseke v. Litchfield & Madison Ry. Co.*, 127 S.W.2d 700, 344 Mo. 872, certiorari denied *Litchfield & M. R. Co. v. Gieseke*, 60 S.Ct. 104, 308 U.S. 583, 84 L.Ed. 488.

89. W.Va.—*Mathews v. Dale*, 190 S.E. 383, 118 W.Va. 303.

Employee who misrepresented his age in securing employment and in obtaining compensation perpetrated a fraud against compensation fund which justified suit by compensation commissioner to recover amount paid, and suit to recover money paid on award instituted within five years from date when employee first disclosed his true age was not barred by limitations, the concealment being a continuance of the original fraud.

W.Va.—*Mathews v. Dale*, supra.

90. La.—*Robin v. Brandin*, App., 45 So.2d 423—*Chance v. T. J. Moss Tie Co.*, App., 31 So.2d 19.

Mich.—*Samels v. Goodyear Tire & Rubber Co.*, 35 N.W.2d 265, 323 Mich. 251.

Remarriage by widow
Common pleas court had jurisdic-

§ 835. Recovery Back

Compensation paid under an award cannot be recovered unless the award was void or obtained by fraud, but excessive payments may under some circumstances be recovered.

Where, under the workmen's compensation act, compensation is lawfully paid to one entitled thereto by the terms of the award, the recipient cannot be required to pay it back,⁸⁷ but recovery is allowed where the compensation award was void⁸⁸ or was secured through fraudulent misrepresentation.⁸⁹

Excess payments made by mistake may be recovered,⁹⁰ and recovery may be had of payments made in excess of the amount subsequently awarded.⁹¹ Where an employer pays his employee full

tion of action to recover on theory of unjust enrichment amount paid deceased employee's widow, after her remarriage, in excess of amount to which she was entitled under compensation agreement since employer had no remedy available within framework of workmen's compensation act.

Pa.—*Glen Alden Corp. v. Tomchick*, 130 A.2d 719, 183 Pa.Super. 306.

Burden is on employer and insurance carrier to establish claim in reconviction.

La.—*Chance v. T. J. Moss Tie Co.*, App., 31 So.2d 19.

Death prior to approval of settlement

Where claimant and employer entered agreement for lump-sum non-schedule adjustment for compensation to accrue in the future, but employer, unaware of claimant's death, sent check, after death and before workmen's compensation board purported to approve adjustment, board's approval was without jurisdiction and a nullity, and employer was entitled to recover proceeds of check.

N.Y.—*Zielinski v. General Motors Corp.*, 153 N.Y.S.2d 642, 1 N.Y.2d 424, 135 N.E.2d 808.

Change of domicile

Where alien resident was adjudicated incompetent and committee of his person and property obtained order allowing repatriation to native land, workmen's compensation board correctly directed reimbursement to carrier of one-half of award.

N.Y.—*Serrano, by Afonso v. M. A. Gammino Const. Co.*, 118 N.Y.S.2d 55, 281 App.Div. 736.

91. Mich.—*Danford v. Contract Furniture Corp.*, 53 N.W.2d 377, 333 Mich. 552—*Samels v. Goodyear Tire & Rubber Co.*, 35 N.W.2d 265, 323 Mich. 251.

Advancement
Where the workmen's compensation commission granted to widow

wages or an amount in excess of that ultimately determined to be the amount of compensation the employee is entitled to, the employer may be entitled to credit for his payments, but cannot recover the overpayments, since they are deemed a gratuity.⁹²

Where compensation is commuted, but the one entitled thereto dies before receiving the full amount placed in trust for his benefit, the employer cannot recover the remaining balance.⁹³ On the other

hand, where an employer, required to make periodic payments to a widow until her remarriage, made a commuted payment under the compulsion of an invalid order, and the widow remarried, the employer was entitled to recover part of the payment.⁹⁴

A general employer who pays compensation to a "loaned employee" may recover from the special employer.⁹⁵

B. ENFORCEMENT

§ 836. In General

Under some, but not other, statutes the compensation commission is authorized to enforce its awards.

Under some compensation acts the commission has no power to enforce its own awards,⁹⁶ and the only way an agreement of the parties or a decision of the board as to compensation can be enforced is by a proceeding in a particular court.⁹⁷ Under the prac-

tice in some jurisdictions an order or award of the compensation authorities is enforceable by contempt proceedings.⁹⁸

Under other workmen's compensation acts the board, commission, or department authorized to make compensation awards has the further authority and power to enforce said awards by appropriate orders to be made thereafter as it may find

lump-sum advance payment to enable her to purchase certain equipment for operation of her home and farm and to cover specified items of personal expense, and widow terminated right to further compensation by remarriage, commission was authorized to order refund of amount paid to her in anticipation of future payments which it had been assumed she would be entitled to receive before remarriage.

Mich.—Danford v. Contract Purchase Corp., 53 N.W.2d 377, 333 Mich. 559.

Hospital expenses

A workmen's compensation insurer, moving insured's injured employee from charity hospital, where he would have obtained free service, to private hospital was not entitled to recover from his amount of medical, hospital, and surgical bills, paid to private hospital by insurer in employee's behalf, after discovering that employer and insurer were not liable to employee under act.

La.—Robin v. Brandin, App., 45 So. 2d 423.

Timely request for reimbursement

N.Y.—Dodge v. New York Tribune Co., 157 N.Y.S.2d 1019, 3 A.D.2d 614.

92. Fla.—Daoud v. Matz, 73 So.2d 51.

State the employer

Rule that, where employer pays an injured employee his entire salary or an amount in excess of that due him as compensation during a period of total disability, such overpayment is a gratuity which employer cannot recover, applies as well where the state is the employer

and where suit for compensation is authorized by statute.

La.—Martin v. State, App., 25 So.2d 251.

93. Minn.—Employers' Mut. Liability Ins. Co. v. Empire Nat. Bank & Trust Co., 256 N.W. 663, 192 Minn. 398, 95 A.L.R. 250.

94. N.Y.—Brophy v. Prudential Ins. Co. of America, 271 N.Y.S. 819, 241 App.Div. 306.

95. Wis.—Braun v. Jewett, 85 N.W. 2d 364, 1 Wis.2d 531.

Waiver

Individual plaintiff's general employer's workmen's compensation insurer did not, by joining in plaintiff's complaint against alleged third party tort-feasor, make such binding election of remedies as would bar it from asserting, after trial court's ruling that individual plaintiff was a "loaned employee" of defendant, right to recover from defendant compensation paid to plaintiff on behalf of general employer.

Wis.—Braun v. Jewett, supra.

96. Me.—Middleton's Case, 3 A.2d 434, 136 Me. 108.

Mo.—McCoy v. Simpson, 125 S.W.2d 833, 344 Mo. 215.

Okl.—Fowler v. Brooks, 146 P.2d 304, 193 Okl. 580.

Tex.—Booth v. Texas Employers' Ins. Ass'n, 123 S.W.2d 322, 132 Tex. 237.

71 C.J.P. 1414 note 90.

The public has an interest in due enforcement and observance of the provisions of the workmen's compensation law, respecting compliance with compensation awards and it is the duty of the court to protect such interest of the public, even

without regard to the wishes of the parties.

Neb.—Anderson v. Cowger, 65 N.W. 2d 51, 158 Neb. 772.

97. D.C.—Harris v. Briscoe, 212 F. 2d 619, 94 U.S.App.D.C. 92.

Ky.—Corpus Juris quoted in Conda Coal Co. v. Caldwell, 103 S.W.2d 303, 304, 267 Ky. 774.

Mass.—McCracken's Case, 146 N.E. 904, 251 Mass. 347.

Mich.—Sampson v. Michigan Copper & Brass Co., 265 N.W. 472, 274 Mich. 592.

Okl.—Fowler v. Brooks, 146 P.2d 304, 193 Okl. 580.

Award to United States

Award of one thousand dollars which employer is required to pay to United States treasurer when longshoreman dies leaving no dependents is enforceable like any other compensation award or order, by deputy commissioner or United States treasurer.

U.S.—Pacific Employers' Ins. Co. v. Pillsbury, D.C.Cal., 14 F.Supp. 156.

98. R.I.—Fanning & Doorley Const. Co. v. Carvahlo, 112 A.2d 878—Zielonka v. U. S. Rubber Co., 74 A.2d 246, 77 R.I. 167.

Unjust enrichment

Petition under workmen's compensation act to have employer adjudged in contempt for willful failure or neglect to obey provisions of superior court decree awarding employee compensation for partial incapacity was not equivalent to invocation of equitable jurisdiction to enforce unjust enrichment of employer.

R.I.—Plouffe v. Taft-Peirce Mfg. Co., 97 A.2d 439, 80 R.I. 397.

necessary in order to provide injured employees the relief to which they are entitled by the terms of their awards,⁹⁹ and an order enforcing a compensation award of the commission is neither a rescission, an alteration, nor an amendment of such award so as to be in violation of a statute prohibiting the rescission, alteration, or amendment of an award after the lapse of a specified time.¹ The jurisdiction to enforce an order awarding compensation to continue indefinitely, and until the termination of a specified need therefor, includes the jurisdiction to decide if it should be enforced,² that is, if the need specified still exists;³ and the jurisdiction so to decide necessarily implies the jurisdiction to deny if the need does not exist.⁴ The commission has the power, pending the final determination of a controversy before it, to enforce interlocutory findings, orders, and awards made by it in the same manner as a final award.⁵

One seeking to enforce a compensation award cannot repudiate the limitations or restrictions with which the benefits of the award are burdened.⁶

Lien. The statutes generally provide that a compensation award shall constitute a lien;⁷ but such an award is a lien only when and to the extent pro-

vided by statute.⁸ Under some acts provision is made for the docketing of an award for a workman's compensation in a designated court and for giving it the force and effect of a judgment, or for the filing of the decision of the court, when the application is to the court, and giving it a like effect.⁹ Under other statutes an award is a lien against the assets of the employer or insurer without making it a matter of public record through filing, recording, or docketing.¹⁰ Some statutes give to a claim for compensation the same lien as is given to a claim for wages.¹¹

Right to certified copy of award. Under a compensation act providing for the filing of a certified copy of the award of the commission, claimant for compensation is ordinarily entitled to a certified copy thereof,¹² except that, under some acts where it is deemed desirable to stay the enforcement of an award, the commission may refuse to issue a certified copy thereof.¹³

§ 837. Payment from Special Funds.

Under the various workmen's compensation acts, special funds have been established for the payment of certain claims, such as claims which cannot be collected from the employer or insurer, claims for compensation based on

99. Cal.—U. S. Fidelity & Guaranty Co. v. Department of Industrial Relations, Division of Industrial Accidents and Safety, 277 P. 492, 207 C. 144.

Validity of payments

Industrial accident commission was held to have jurisdiction to determine validity of payments made upon its award, notwithstanding judgment had not yet been entered on award.

Cal.—Pollock v. Industrial Accident Commission, 54 P.2d 695, 5 C.2d 205.

1. Cal.—United States Fidelity & Guaranty Co. v. Department of Industrial Relations, Division of Industrial Accidents and Safety, 277 P. 492, 207 C. 144.

Llewellyn Iron Works v. Industrial Accident Commission of California, 18 P.2d 975, 129 C.A. 449.

2. Cal.—Llewellyn Iron Works v. Industrial Accident Commission of California, *supra*.

3. Cal.—Llewellyn Iron Works v. Industrial Accident Commission of California, *supra*.

4. Cal.—Llewellyn Iron Works v. Industrial Accident Commission of California, *supra*.

71 C.J. p 1414 note 98.

5. Wis.—Knobbe v. Davis, 242 N. W. 501, 208 Wis. 185.

6. Kan.—Brewington v. W. U. Tel. Co., 183 P.2d 872, 168 Kan. 534.

7. Alaska.—Rivers v. Wiggins, 15 Alaska 292.

8. Alaska.—Rivers v. Wiggins, *supra*.

Property not owned by employer

(1) Amendment of workmen's compensation act, creating a lien on all property in connection with construction, preservation, maintenance, or operation of which the work of injured or deceased employee was being performed, by striking therefrom provision that such lien should extend to all right, title, interest, claim, or lien of any person in or to such property, unless specified notice had been posted, was intended to eliminate from lien provisions of compensation act any such lien on property of persons other than employer.

Alaska.—Rivers v. Wiggins, *supra*.

(2) Property used in business covered by compensation act is subject to a lien, even as against the owner, where the property is leased and the business is conducted by the lessee.

Or.—Bill White's Market v. Dixie Creek Gold Mining Co., 80 P.2d 712, 159 Or. 406.

9. Ariz.—Danner v. Industrial Commission, 95 P.2d 53, 54 Ariz. 275.

Okl.—Rucks-Brandt Const. Corp. v. Silver, 151 P.2d 399, 194 Okl. 324.—Fowler v. Brooks, 146 P.2d 304, 193 Okl. 580.—Pauline Oil & Gas

Co. v. Fischer, 130 P.2d 305, 191 Okl. 346, rehearing denied 60 S.Ct. 706, 309 U.S. 697, 84 L.Ed. 1037.

10. U.S.—Halpert v. Industrial Com'r of State of N. Y., C.C.A.N.Y., 147 F.2d 375.

N.Y.—Albert Pipe Supply Co. v. Callanan, 288 N.Y.S. 307, 159 Misc. 547.

11. Tenn.—Pennington v. Webb-Hamcock Coal Co., 184 S.W.2d 47, 182 Tenn. 33.—Francis v. Williams Coal Mining Co., 156 S.W.2d 434, 178 Tenn. 203.

Secret liens are not favored, and a person invoking lien for workmen's compensation must bring himself strictly within statutory provisions. Tenn.—Francis v. Williams Coal Mining Co., *supra*.

Delay in bringing suit

Where suit by compensation claimant was filed more than ninety days after injury, lien was waived. Tenn.—Brady v. Reed, 212 S.W.2d 378, 186 Tenn. 556.—Francis v. Williams Coal Mining Co., 156 S.W.2d 434, 178 Tenn. 203.

12. Cal.—Findley v. Industrial Accident Commission of California, 241 P. 312, 75 C.A. 178.

71 C.J. p 1414 note 5.

13. Cal.—Findley v. Industrial Accident Commission of California, *supra*.

71 C.J. p 1414 note 7.

an impairment which pre-existed the employment, and state claims.

Special funds for a variety of purposes have been established under workmen's compensation acts.¹⁴ Payments of compensation from a special fund may be made only in accordance with statutory authority.¹⁵ Provision is generally made for the payment of an award from a special fund where the award

cannot be enforced against the employer or his insurer, as where they are insolvent or outside the jurisdiction.¹⁶

In order to cope with the situation created by inflation, provision has been made under some compensation acts for an additional payment from a special fund to persons receiving compensation for total disability¹⁷ and to widows with dependent

14. Wash.—Harbor Plywood Corp. v. Department of Labor and Industries of State of Wash., 295 P. 2d 310, 48 Wash.2d 553.

Catastrophe fund

(1) The catastrophe fund was created by the legislature for the purpose of minimizing the individual financial loss to an employer from an accident which results in multiple fatalities or designated injuries.

W.Va.—State ex rel. Mountain Fuel Co. v. Trent, 77 S.E.2d 608, 138 W. Va. 737.

(2) An accident in which one employee was killed and another employee was totally and permanently disabled as result of injury which was not one of injuries specifically enumerated in workmen's compensation act was not a "catastrophe" and employer was not entitled to have charges heretofore made against employer's account credited accordingly.

W.Va.—State ex rel. Mountain Fuel Co. v. Trent, supra.

(3) Industrial commission rule, that should one accident result in death of three or more employees that portion of the aggregate award in excess of fifteen thousand dollars shall be charged as a catastrophe loss against the state surplus fund, is not applicable where the employer is self-insured, since self-insured employers must pay the compensation due their injured employees, and the state insurance fund, which is the only fund created, can be disbursed only to such employees of employers as have paid into the fund.

Ohio.—State ex rel. Turner v. Industrial Commission of Ohio, 62 N.E. 2d 336, 145 Ohio St. 608.

Attorney's fees

(1) The purpose of code sections, providing that fee fixed by superior court for workmen's compensation claimant's attorney's services before superior court on appeal from order of board of industrial insurance appeals shall be payable out of administrative fund of department of labor and industries, if order is reversed, or modified and accident fund is affected by litigation, and prohibiting such attorney from charging more than reasonable fee set by department and board, is to provide for fixing of

claimant's attorney's fees and prevent charging of unreasonable fees, not to assess fees against department, except where board errs and accident fund is affected, so that such fees will not be awarded against department, where board's decision is upheld by court.

Wash.—Harbor Plywood Corp. v. Department of Labor and Industries of State of Wash., 295 P.2d 310, 48 Wash.2d 553.

(2) An injured workman, successfully resisting in superior court review of industrial insurance appeals board's order sustaining award of compensation to him and securing affirmation of order on certiorari by department of labor and industries, is not entitled to attorney's fee payable from administrative fund of department, since such fee is payable therefrom under statute only where board's order is reversed or modified.

Loss not otherwise provided for

A claim for compensation for silicosis in the first stage does not involve a "catastrophe hazard" or a "second injury hazard," or a "loss not otherwise specifically provided for" in the workmen's compensation law within meaning of provision of the workmen's compensation law that surplus fund shall be sufficiently large to cover "catastrophe hazard," "second injury hazard," and "all losses not otherwise specifically provided for" in the workmen's compensation law.

W.Va.—Rogers v. State Compensation Com'r, 84 S.E.2d 218, 140 W. Va. 376.

15. Okl.—Special Indem. Fund v. Bryant, 239 P.2d 1014, 205 Okl. 630.

16. Cal.—Subsequent Injuries Fund v. Industrial Acc. Commission, 310 P.2d 7, 48 C.2d 365.

Ohio.—State v. Industrial Commission of Ohio, 161 N.E. 32, 118 Ohio St. 340.

71 C.J. § 1415 note 11.

Penalty

The employee cannot, however, recover a penalty provided for against employers.

Ohio.—State v. Industrial Commission of Ohio, supra.

Judgment against employer

Industrial commission need not pay an award made by commission to dependent of killed employee of employer who has not complied with compensation law, unless attorney general has obtained a judgment against such employer on such award.

Ohio.—State ex rel. Long v. Industrial Commission, 70 N.E.2d 895, 147 Ohio St. 237.

17. Minn.—Thoresen v. Schmahl, 24 N.W.2d 273, 222 Minn. 304.

Insolvency of insurer and carrier

Provision of amendment to workmen's compensation act that injured workman, before being entitled to additional compensation from special compensation fund for total permanent disability, must have received full amount of maximum compensation awarded by industrial commission therefor was satisfied where such maximum awards to certain employees were past due before they petitioned for benefits from such fund, even though employer's and insurance carrier's insolvency rendered payments of whole amounts thereof impossible.

Minn.—Thoresen v. Schmahl, supra.

"Compensation"

Under 1941 amendment of compensation act providing that employees then receiving or who might thereafter become entitled to receive "compensation" for permanent total disability should be paid from special fund, word "compensation" is used in identical sense it is used in defining compensation for wages lost on account of accident for which ten thousand dollars compensation is paid; receipt of medical, surgical and nursing benefits by disabled employee, who, prior to 1941 amendment of compensation act, had received full amount of compensation payment allowed by the act, did not make him eligible for participation in special fund made available by 1941 amendment of the act providing special fund to an employee "now receiving, or who may hereafter become entitled to receive compensation for permanent total disability." Minn.—Loew v. Hagerie Bros., 24 N.W.2d 273, 222 Minn. 253.

children receiving compensation for death.¹⁸

Fund for payment of compensation for disability due to pre-existing impairment. In order to further the employment of handicapped workers,¹⁹ a spe-

cial fund, variously referred to as a subsequent injury fund or a one per cent fund, has been established in many jurisdictions to assist in the payment of compensation awarded to handicapped workers.²⁰

18. Minn.—Reichert v. Victory Granite Co., 82 N.W.2d 497, 249 Minn. 407—Skjefstad v. Red Wing Potteries, Inc., 60 N.W.2d 1, 240 Minn. 38.

Maximum compensation

Statute providing for additional compensation from special fund to widow with dependent child receiving compensation for death of husband and father after "maximum collectible compensation" has been paid uses quoted phrase as meaning maximum compensation provided by statute for death of husband and father and not the maximum which under facts of a particular case is collectible as compensation.

Minn.—Skjefstad v. Red Wing Potteries, Inc., *supra*.

19. U.S.—Lawson v. Suwanee Fruit & S. S. Co., C.C.A.Fla., 166 F.2d 13, affirmed 69 S.Ct. 503, 336 U.S. 198, 93 L.Ed. 611.

Cal.—State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818—Dahlbeck v. Industrial Acc. Commission of Cal., 287 P.2d 353, 135 C.A.2d 394—Pacific Gas & Elec. Co. v. Industrial Acc. Commission, 272 P.2d 818, 126 C.A.2d 554.

Ill.—Arvree v. Industrial Commission, 114 N.E.2d 698, 415 Ill. 522.

Mass.—McLean's Case, 93 N.E.2d 233, 326 Mass. 72.

N.J.—Application of Glennon, 12 A.2d 360, 18 N.J.Misc. 196.

N.Y.—Persky v. Stanley Persky Poultry Market, Inc., 151 N.Y.S.2d 737, 2 A.D.2d 612—Wason v. Moyer & Pratt, 84 N.Y.S.2d 371, 274 App. Div. 813.

Okl.—Petroleum Maintenance Co. v. Herron, 206 P.2d 182, 201 Okl. 393—Special Indem. Fund of Okl. v. Wade, 189 P.2d 609, 199 Okl. 547—Cameron & Henderson v. Franks, 184 P.2d 965, 199 Okl. 143.

Other statements of purpose

(1) Section of the compensation act dealing with disposition and use of the one per cent fund was intended to insure an employee full compensation where a compensable disability succeeds but has no causative connection with the results of a prior disability, the combination of the two leaving the employee permanently and totally disabled, and was intended to relieve employer of undue burden of a prior disability, with which or its results, the disability arising in his employ has no causative connection.

N.J.—Balash v. Harper, 70 A.2d 747, 8 N.J. 497.

(2) The purpose of provision of longshoremen's compensation act making employer liable for disability caused by subsequent injury which in combination with previous disability causes permanent total disability, but providing that remainder of compensation for permanent total disability should be paid from special fund established for that purpose was to aid employees who become partially and permanently disabled through causes unconnected with industrial accident.

U.S.—Lawson v. Suwanee Fruit & S. S. Co., C.C.A.Fla., 166 F.2d 13, affirmed 69 S.Ct. 503, 336 U.S. 198, 93 L.Ed. 611.

(3) The legislative purpose in the one per cent fund statute providing for additional payment of compensation to totally disabled employees was to rehabilitate injured employees and not the providing for pensions, the fund being insufficient for such purpose.

N.J.—Tortoriello v. Toohey, 3 A.2d 805, 121 N.J.Law 604, affirmed 8 A.2d 291, 123 N.J.Law 202.

War veterans

Purpose of statute providing for payment of part of compensation for permanent partial disability resulting from combined effect of industrial injury and previous disability from subsequent injuries fund is to encourage the employment of physically handicapped persons, particularly veterans, and to make a logical and equitable adjustment of the liability under workmen's compensation law. Cal.—State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818.

Nonresidents

Act creating special indemnity fund applies to all physically impaired employees sustaining subsequent compensable injuries while performing work in state and is not limited in its benefits to residents of state.

Okl.—Special Indem. Fund v. Hill, 186 P.2d 72, 199 Okl. 329.

Supplement to statute

Special indemnity fund act is not, strictly speaking, amendatory of the workmen's compensation law, but is supplementary thereto.

Okl.—Special Indem. Fund of Okl. v. Wade, 189 P.2d 609, 199 Okl. 547.

20. Minn.—Peterson v. Halvorson, 273 N.W. 812, 200 Minn. 253.

N.J.—Wallencourt v. Toohey, 15 A.2d 604, 125 N.J.Law 365—Walker v. Albright, 196 A. 373, 119 N.J.Law 285.

Okl.—Cameron & Henderson v. Franks, 184 P.2d 965, 199 Okl. 143.

Pa.—Eagle v. Reading Co., 24 A.2d 683, 148 Pa.Super. 218.

Tex.—State v. Bothe, Civ.App., 231 S.W.2d 453.

71 C.J. p 822 note 92.

Remedial act

Special indemnity fund act is remedial in character, and liberal construction of the act should be indulged, if necessary, to give effect to the purpose intended by the legislature.

Okl.—Special Indem. Fund of Okl. v. Wade, 189 P.2d 609, 199 Okl. 547.

Strict construction

Labor code must be strictly construed to effect its beneficent purposes; and this rule extends to construction of provisions relating to subsequent injuries fund.

Cal.—Subsequent Injuries Fund, State of Cal. v. Industrial Acc. Commission, 311 P.2d 42, 151 C.A.2d 147.

Enforceable right

A workman who is within the purview of the one per cent fund for the payment of compensation for disability for which an employer is not liable has a legal right to participation therein which the court will enforce.

N.J.—Voessler v. Palm Fetchteler & Co., 1 A.2d 32, 120 N.J.Law 553, affirmed 3 A.2d 753, 122 N.J.Law 434.

Control by commission

Whether the industrial commission has exercised a sound discretion as to the allowance or denial of disability benefits from the special compensation fund must be ascertained wholly in the light of the facts of each case.

Minn.—Senske v. Fairmont & Waseca Canning Co., 45 N.W.2d 640, 232 Minn. 350.

The action of a deputy commissioner of compensation in recommending to commissioner of labor that an employee be accorded benefits of so-called one per cent fund was not a "final judgment" which was binding upon commissioner.

N.J.—Phillips v. A.R Wright, 16 A.2d 200, 126 N.J.Law 14.

Venue

The venue of injured employee's suit to set aside industrial accident board's award of less than amount of compensation claimed by plaintiff under the second injury fund amendment to workmen's compensation act was properly laid in county where plaintiff's second injury occurred.

Under the statutes establishing such funds, it is provided in substance that where a previously disabled employee suffers a subsequent compensable injury in the course of his employment, and he is entitled to compensation in a measure greater than the injury caused by the last accident, considered alone, as discussed supra § 298, the liability for compensa-

tion is apportioned between the employer or insurer and the special fund established by the statute,²¹ the employer or insurer being liable only for the disability due to the subsequent injury, as discussed supra § 298, and the special fund being liable for the balance of the compensation.²² Under some statutes, the procedure is for the award to run

Tex.—*State v. Bothe*, Civ.App., 231 S.W.2d 453—Industrial Acc. Bd. v. *Miears*, Civ.App., 227 S.W.2d 571, affirmed in part and reversed in part on other grounds *Miears v. Industrial Acc. Bd.*, 232 S.W.2d 671, 149 Tex. 270.

Time to file claim against fund

(1) In general.
Cal.—Subsequent Injuries Fund v. Industrial Acc. Commission, 244 P. 2d 889, 39 C.2d 83.

(2) The right to participation in the benefits of the one per cent fund statute is subject to the same limitations contained in the act providing for the time in which compensation or increased compensation may be sought.

N.J.—*Tortoriello v. Toohy*, 3 A.2d 805, 121 N.J.Law 604, affirmed 8 A.2d 291, 123 N.J.Law 202—*Ruffin v. Albright*, 3 A.2d 135, 121 N.J.Law 424, affirmed 12 A.2d 676, 124 N.J.Law 449.

(3) Applications of totally disabled employees for payment of additional compensation under the one per cent fund statute must be filed within two years after the date of the last payment of workmen's compensation.

N.J.—*Tortoriello v. Toohy*, supra.

(4) Under statute entitling claimant to compensation for total and permanent disability when caused by compensable accident following prior noncompensable accident, and establishing a fund for that purpose, where claimant was awarded compensation in 1934, at which time he was not shown to have been totally disabled as result of accident and from other cause, claimant could not obtain benefits from the fund in 1937, at which time he was totally and permanently disabled.

N.J.—*Ruffin v. Albright*, supra.

21. U.S.—*Lawson v. Suwanee Fruit & S. S. Co.*, Fla., 69 S.Ct. 503, 336 U.S. 198, 93 L.Ed. 611.

Cal.—Subsequent Injuries Fund of Cal. v. Industrial Acc. Commission, 317 P.2d 8.

State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818—*Dahlbeck v. Industrial Acc. Commission of Cal.*, 287 P.2d 353, 135 C.A.2d 394.

Minn.—*Peters v. Archer-Daniels-Midland Co.*, 26 N.W.2d 29, 223 Minn. 163.

Neb.—*Franzen v. Blakley*, 52 N.W.2d 833, 155 Neb. 621.

N.J.—*Vandenberg v. John De Kuyper & Son*, 69 A.2d 531, 5 N.J.Super. 440.

Voessler v. Palm Fetchteler & Co., 1 A.2d 32, 120 N.J.Law 558, affirmed 5 A.2d 753, 122 N.J.Law 434.

Okl.—Special Indem. Fund of the State v. *Nipper*, 186 P.2d 331, 199 Okl. 346—Special Indem. Fund Administered by State Ins. Fund v. *Christy*, 184 P.2d 730, 199 Okl. 184—*Cameron & Henderson v. Franks*, 184 P.2d 965, 199 Okl. 143—Special Indem. Fund v. *Hobbs*, 164 P.2d 980, 196 Okl. 318—Special Indem. Fund v. *Wood*, 157 P.2d 905, 195 Okl. 357.

Tex.—*State v. Bothe*, Civ.App., 231 S.W.2d 453.

Utah.—*Marker v. Industrial Commission*, 37 P.2d 785, 84 Utah 537, 98 A.L.R. 722.

W.Va.—*Wheeling Metal & Manufacturing Co. v. Workmen's Compensation Com'r*, 2 S.E.2d 252, 121 W.Va. 155—*McDaniel v. Workmen's Compensation Appeal Board*, 191 S.E. 362, 118 W.Va. 596.

Uninsured employer

(1) Uninsured employer is liable for the full compensation.

Okl.—*Starr Coal Co. v. Evans*, 184 P.2d 638, 199 Okl. 342.

(2) A group accident policy covering employees of transportation company and affording employees much less protection than that afforded by workmen's compensation policy was not "guaranty insurance" or "compensation insurance" within the workmen's compensation act, and where physically impaired employee sustained an accidental injury, the commission was without authority to make award against the special indemnity fund, but entire compensation award should have been assessed against the transportation company.

Okl.—Special Indem. Fund v. *Bramlett*, 206 P.2d 972, 201 Okl. 415.

Fund for payment

Whether moneys required to make up balance of permanent total disability award, which employer is not required to pay in full because disability resulted in part from a noncompensable injury, are to be withdrawn from working compensation fund or surplus fund, is mat-

ter for decision of compensation commissioner.

W.Va.—*Wheeling Metal & Manufacturing Co. v. Workmen's Compensation Com'r*, 2 S.E.2d 252, 121 W.Va. 155.

Right of review

(1) A "party interested" having right to review industrial commission's award determining compensation payable by employer and by special indemnity fund to physically impaired person suffering permanent partial disability and thereafter sustaining accidental injury must have a present, direct, pecuniary interest in the subject matter and suffer fancied or real wrong in the particular case.

Okl.—*Cameron & Henderson v. Franks*, 184 P.2d 965, 199 Okl. 143.

(2) The last employer of physically impaired person suffering permanent partial disability and thereafter sustaining accidental injury has present, direct, pecuniary interest in award in view of provisions in workmen's compensation law requiring employer to pay compensation for disability caused by last injury and special indemnity fund to pay compensation for disability attributable to former injury, and hence is "party interested" having right to review award.

Okl.—*Cameron & Henderson v. Franks*, supra.

(3) Where compensation claimant contended that industrial commission improperly computed award, and that he was entitled to a greater award, claimant had such interest as entitled him to challenge award as against special indemnity fund.

Okl.—*Miller v. Harmon Const. Co.*, 237 P.2d 439, 205 Okl. 280.

Fund is not entitled to separate hearing, that is, one separate and apart from that of the employer and insurer.

Okl.—Special Indem. Fund v. *Davis*, 264 P.2d 320.

22. U.S.—*Lawson v. Suwanee Fruit & S. S. Co.*, Fla., 69 S.Ct. 503, 336 U.S. 198, 93 L.Ed. 611.

Cal.—*State v. Industrial Acc. Commission*, 306 P.2d 64, 147 C.A.2d 818—*Dahlbeck v. Industrial Acc. Commission of Cal.*, 287 P.2d 353, 135 C.A.2d 394.

Idaho.—*Anderson v. Potlatch Forests*, 291 P.2d 559, 77 Idaho 263.

Minn.—Peters v. Archer-Daniels-Midland Co., 26 N.W.2d 29, 228 Minn. 168.

Neb.—Franzen v. Blakley, 52 N.W.2d 833, 155 Neb. 621.

N.J.—Vandenberg v. John De Kuyper & Son, 69 A.2d 581, 5 N.J.Super. 440.

Voessler v. Palm Fatchteler & Co., 1 A.2d 32, 120 N.J.Law 553, affirmed 3 A.2d 753, 122 N.J.Law 434—Walker v. Albright, 196 A. 378, 119 N.J.Law 285.

Application of Glennon, 12 A.2d 360, 18 N.J.Misc. 196.

Okl.—Ravallin Min. Co. v. Viers, 200 P.2d 433, 201 Okl. 12—Special Indem. Fund of State v. Corbin, 199 P.2d 1020, 201 Okl. 5—Special Indem. Fund v. Neal, 122 P.2d 660, 200 Okl. 242—Special Indem. Fund v. Duff, 191 P.2d 584, 200 Okl. 57—Special Indem. Fund of the State v. Nipper, 186 P.2d 331, 199 Okl. 346—Special Indem. Fund v. Hill, 186 P.2d 72, 199 Okl. 329—Cameron & Henderson v. Franks, 184 P.2d 965, 199 Okl. 143—Special Indem. Fund of Okl. v. Pool, 180 P.2d 165, 198 Okl. 496—Special Indem. Fund of Okl. v. George, 179 P.2d 919, 198 Okl. 457.

Utah.—Marker v. Industrial Commission, 37 P.2d 785, 84 Utah 587, 98 A.L.R. 722.

71 C.J. p 822 note 93.

Parties

(1) Where an employee asserts a claim against the fund, the state is a necessary and proper party.

Cal.—State (Subsequent Injuries Fund) v. Industrial Acc. Commission, 373 P.2d 342, 126 C.A.2d 740.

(2) The state treasurer was not a necessary party to workmen's compensation proceeding against industrial special indemnity fund and treasurer was not required to be given notice of injury.

Idaho.—Anderson v. Potlatch Forests, 291 P.2d 859, 77 Idaho 263.

Time for claim

(1) Limitations as to the time of giving notice of the injury and instituting proceedings for an award do not apply as to a claim against the second injury fund where such requirements have been met as against the employer.

Idaho.—Anderson v. Potlatch Forests, supra.

(2) Section of the labor code providing that nothing in the chapter shall bar right of any injured employee to institute proceedings for collection of compensation within five years after date of injury on ground that original injury has caused new and further disability and that jurisdiction of industrial accident commission shall be continuing jurisdiction at all times within five years from date of injury applies to proceedings for special

additional compensation from the subsequent injuries fund.

Cal.—Subsequent Injuries Fund v. Industrial Acc. Commission, 244 P. 2d 889, 39 C.2d 88.

(3) Fact that employee may file claim against subsequent injuries fund within five years after date of injury and have it heard and determined after expiration of that period, did not entitle fund to same privilege.

Cal.—State v. Industrial Acc. Commission, App., 318 P.2d 194.

Commutation of payments

Where the liability of the special compensation fund for total disability benefits is established, the compensation benefits periodically payable from such fund may in a proper case be commuted to one or more lump-sum payments.

Minn.—Senske v. Fairmont & Waseca Canning Co., 45 N.W.2d 640, 232 Minn. 350.

Employer's payments made first

(1) The payments to be made by special indemnity fund under an award against it begin when the payments have ceased under award made against employer.

Okl.—Special Indem. Fund v. Bryant, 239 P.2d 1014, 205 Okl. 630.

(2) Where settlement on a joint petition had been approved by state industrial commission and payment thereof made by employer in a lump sum, commission had authority to order that payment on award against the special indemnity fund commence immediately thereafter.

Okl.—Special Indem. Fund v. Bryant, supra.

Settlement with employer

If an award is once made on a properly approved settlement, such an award may be considered as establishing that the employee's right to compensation for which the employer alone is responsible has been exhausted, and to provide the necessary prerequisite to a consideration of whether the employee is entitled to receive further benefits from the special fund by reason of combined disability which is both permanent and total.

Minn.—Senske v. Fairmont & Waseca Canning Co., 45 N.W.2d 640, 232 Minn. 350.

Attorney's fees

(1) The statute providing for payments from the one per cent fund to persons totally disabled as result of experiencing a subsequent permanent injury when claimant has previously been partially disabled from some other cause does not authorize an award of costs and attorney's fee to claimant, notwithstanding statute is consolidated with workmen's compensation legislation which does provide for allowance of costs and attorneys' fees to claimants.

N.J.—El v. Toohey, 14 A.2d 531, 125 N.J.Law 150, affirmed 17 A.2d 165, 125 N.J.Law 510.

(2) In making an award against special indemnity fund, state industrial commission was authorized to order payments of attorneys' fees in addition to the periodic payments to be made to claimant.

Okl.—Special Indem. Fund v. Bryant, 239 P.2d 1014, 205 Okl. 630—Special Indem. Fund v. Hobbs, 164 P.2d 980, 196 Okl. 313.

(3) Attorneys' fees awarded to claimant's attorneys and ordered paid from special indemnity fund in weekly installments of twenty-five dollars constituted compensation payments, and hence, in making award against special indemnity fund of twenty-five dollars per week to claimant, state industrial commission had no authority to order that payment of attorneys' fee commence immediately, since such payments together with compensation payments to claimant would exceed maximum compensation payments of twenty-five dollars per week allowed by statute.

Okl.—Special Indem. Fund v. Bryant, supra.

Deduction for prior disability

(1) In computing amount of award against special indemnity fund in favor of employee, who was a physically impaired person due to prior injuries, state industrial commission should have first computed total of employee's disability resulting from all of injuries, then computed degree of disability which constituted employee a physically impaired person by reason of prior injuries on percentage of body as a whole and subtracted the same, together with award for last injury, from total award and then assessed remainder against special indemnity fund.

Okl.—Special Indem. Fund v. Jordan, 232 P.2d 220—Special Indem. Fund v. Goad, 281 P.2d 179—Special Indem. Fund v. Osborne, 272 P.2d 392—Special Indem. Fund of State v. Dickinson, 253 P.2d 161, 208 Okl. 39—Special Indem. Fund of State v. Woodrow, 245 P.2d 445, 206 Okl. 580—Miller v. Harmon Const. Co., 237 P.2d 439, 205 Okl. 280—Howard v. Special Indem. Fund, 227 P.2d 641, 204 Okl. 207—Special Indem. Fund of Okl. v. Hewes, 214 P.2d 240, 202 Okl. 356—Special Indem. Fund v. Jennings, 205 P.2d 873, 201 Okl. 330—Special Indem. Fund v. Ward, 185 P.2d 186, 199 Okl. 196.

(2) Where claimant was a physically impaired person by reason of two prior injuries which were combinable, industrial commission should, have required evidence to establish degree of disability occasioned by such injuries and to find thereon as to percentage of disability and to deduct percentage so found, from the

against the employer or carrier, and the carrier or the fund.²³

employer is entitled to partial reimbursement from In order to apportion liability, it is necessary to

total disability before making an award against the special indemnity fund.

Okl.—Special Indem. Fund v. Jennings, supra.

(3) Special Indemnity Fund is not entitled to a deduction from award to workman and against fund when degree of disability caused by a combination of disabilities to workman is materially greater than that which would have resulted from last injury alone when combined injuries result in a permanent total disability.

Okl.—Ravelin Min. Co. v. Viers, 200 P.2d 433, 201 Okl. 12.

(4) Where state industrial commission found that claimant was a physically impaired person within meaning of section of compensation act dealing with compensation for additional disability and payment from special Indemnity Fund, to extent of twenty-five per cent permanent partial disability to his right hand and twenty per cent permanent partial disability to his left hand, and that he suffered a subsequent injury to extent of thirty per cent of his left leg, award which ignored degree of disability contributed by injury to left hand was unauthorized. Okl.—Special Indem. Fund v. Neal, 192 P.2d 660, 200 Okl. 242.

(5) Where claimant is permanently and totally disabled, no deduction is to be made from the award against the fund because of claimant's prior impairment.

Okl.—Special Indem. Fund v. Long, 281 P.2d 933—Special Indem. Fund v. Neal, supra.

(6) Prior to the amendment of the statute no deduction from the award against the fund was made because of the earlier injury.

Okl.—Special Indem. Fund v. Bodine, 199 P.2d 199, 200 Okl. 653—Special Indem. Fund v. Hill, 186 P.2d 72, 199 Okl. 329—Special Indem. Fund v. Farmer, 156 P.2d 815, 195 Okl. 262.

(7) Where employer's insurance carrier paid workman, on joint petition settlement, two hundred dollars bonus over sum fixed by industrial commission as amount to which claimant was entitled by reason of new injury, it was not necessary that such bonus be deducted from award against special indemnity fund for increased disability resulting by reason of fact that claimant was a previously impaired person.

Okl.—Special Indem. Fund v. Horne, 254 P.2d 988, 208 Okl. 218.

(8) In proceeding for workmen's compensation for injury to foot where claimant claimed to be physi-

cally impaired person by reason of prior injury to hand, evidence sustained industrial commission's finding that disability to hand should be computed on basis of five hundred dollars, although state on behalf of special indemnity fund claimed that records of proceeding in another state, which were admitted in evidence, showed award of larger amount for hand injury.

Okl.—Special Indem. Fund v. Osborne, 272 P.2d 392.

(9) In determining amount of compensation to which injured employee is entitled from second injury fund, created by amendment to workmen's compensation act, for total permanent disability, amounts of payments made or benefits provided by such act for his prior injuries cannot be charged against him.

Tex.—State v. Bothe, Civ.App., 231 S.W.2d 453.

(10) An employee becoming totally disabled by loss of leg after loss of other leg in previous accident was entitled to payment from second injury fund of difference between maximum compensation for total permanent disability and combination of payments for second injury, without deduction of amount received in settlement of his claim for previous loss of one leg.

Tex.—State v. Bothe, supra.

(11) Under amendment providing where employee is totally and permanently incapacitated after second injury that in addition to compensation for second injury and after combination of payments therefor employee should be paid out of second injury fund compensation that would be due for total and permanent incapacity, word "therefor" refers to payments for second injury and word combination indicates total compensation payable for second injury, including all installments actually paid and those payable in the future, should be deducted, and there is no basis in language of amendment for holding that deduction should be made for amount which would have been payable for a first injury if such injury were compensable.

Tex.—Miers v. Industrial Acc. Bd., 232 S.W.2d 671, 149 Tex. 270.

Reservation of fund's liability

In proceeding against employer because of recent injury, wherein special indemnity fund is made a party by reason of claimant being physically impaired person, state industrial commission, in its discretion, may make award against employer in favor of claimant for the recent injury and reserve question of award against the fund, where order for

such reservation can be made without substantial prejudice to parties involved.

Okl.—Berna v. Maloney-Crawford Tank Co., 281 P.2d 736.

Award against employer

When an award on stipulation is once made, and constitutes a properly approved settlement in full on employer's liability, award establishes that employee's right to compensation for which employer alone is responsible has been exhausted, and provides necessary prerequisite to consideration of whether employee is entitled to receive further benefits from special compensation fund by reason of combined disability which is both permanent and total.

Minn.—Rikala v. Rundquist Const. Co., 77 N.W.2d 551, 247 Minn. 401.

Loss of sight in one eye after earlier loss of sight of other eye.

U.S.—Lawson v. Suwanee Fruit & S. S. Co., C.C.A.Fla., 166 F.2d 13, affirmed 69 S.Ct. 503, 336 U.S. 192, 93 L.Ed. 611.

71 C.J. p 822 note 93 [a].

Death of claimant

Labor code section providing that workman's death shall not affect his employer's liability for compensation in so far as its liability has accrued and become payable at date of death, has no application to awards against subsequent injuries fund.

Cal.—Subsequent Injuries Fund, State of Cal. v. Industrial Acc. Commission, 311 P.2d 42, 151 C.A. 2d 147.

Evidence held sufficient

To support award against fund. Idaho—Crawford v. Nielson, 307 P.2d 229, 78 Idaho 526.

Okl.—Special Indem. Fund v. Reeder, 290 P.2d 419—Special Indem. Fund v. Long, 281 P.2d 933—Special Indem. Fund v. Osborne, 272 P.2d 392—Special Indem. Fund v. Davis, 264 P.2d 318.

Evidence held insufficient

To support award against fund. Ark.—Arkansas Workmen's Compensation Commission v. Sandy, 233 S.W.2d 332, 217 Ark. 821.

Okl.—Special Indem. Fund v. Ring, 189 P.2d 939, 199 Okl. 685.

23. N.Y.—Dubrow v. 40 West 33rd St. Realty Corp., 167 N.Y.S.2d 98, 4 A.D.2d 896—Lambright v. St. Luke's Hospital, 153 N.Y.S.2d 213, 3 A.D.2d 613—Elling v. Ontario County Sheriff's Dept., 146 N.Y.S.2d 182, 286 App.Div. 628, affirmed 195 N.E.2d 591, 1 N.Y.2d 789, 153 N.Y.S.2d 55—Carter v. Town of Comstock, 141 N.Y.S.2d 904, 286 App.Div. 899—De Maroney v. Bennett Junior College, 125 N.Y.S.2d 512, 282 App.Div. 538—Kline v. Ameri-

determine what disability would have resulted from the last injury had there been no prior disability or impairment,²⁴ and to avoid the difficulties of proof in apportioning liability between the employer and

the fund some statutes have adopted an arbitrary rule that in such cases compensation for a stated period is to be paid by the employer, and compensation thereafter is to be paid by the fund.²⁵

can Locomotive Co., 116 N.Y.S.2d 770, 280 App.Div. 1003—Wason v. Moyer & Pratt, 84 N.Y.S.2d 371, 274 App.Div. 313.

County as employer is entitled to the benefits of reimbursement from the special fund to the same extent as private employers.

N.Y.—Elling v. Ontario County Sheriff's Dept., 146 N.Y.S.2d 182, 286 App.Div. 628, affirmed 135 N.E.2d 591, 1 N.Y.2d 789, 153 N.Y.S.2d 55.

Elected employee

No distinction will be made between an elected employee and a privately hired one solely on basis the former was elected by voters instead of employed by an individual or board of directors, in determining eligibility of county for reimbursement under workmen's compensation law authorizing reimbursement from special fund for compensation or death benefits in case disability or death would not have occurred except for pre-existing permanent physical disability.

N.Y.—Elling v. Ontario County Sheriff's Dept., 146 N.Y.S.2d 182, 286 App.Div. 628, affirmed 135 N.E.2d 591, 1 N.Y.2d 789, 153 N.Y.S.2d 55.

Silicosis cases

In view of expressed purposes of the workmen's compensation law to make silicosis cases compensable without limit and irrespective of previous disability, and to impose a substantial part of the burden on industry as a whole, workmen's compensation board should not have denied employer and state insurance fund reimbursement under the workmen's compensation law for total disability payments made to claimant for disability due to silicosis, merely because no formal, written notice of claim for reimbursement was filed as required by the workmen's compensation law.

N.Y.—Deubel v. Buffalo Pottery, 128 N.Y.S.2d 892, 283 App.Div. 542.

Time for claim for reimbursement

N.Y.—Hengel v. John Frederici & Sons, 161 N.Y.S.2d 461, 3 A.D.2d 885—Lambright v. St. Luke's Hospital, 153 N.Y.S.2d 213, 3 A.D.2d 618—Webb v. Norwich Knitting Co., 128 N.Y.S.2d 140, 283 App.Div. 754—De Manoney v. Bennett Junior College, 125 N.Y.S.2d 512, 282 App.Div. 538—Kline v. American Locomotive Co., 116 N.Y.S.2d 770, 280 App.Div. 1003—Cerniglia v. McDonald, 101 N.Y.S.2d 961, 278 App.Div. 550—D'Amario v. Martins, 88 N.Y.S.2d 628, 277 App.Div. 918.

24. Cal.—Pacific Gas & Elec. Co. v. Industrial Acc. Commission, 272 P.2d 818, 126 C.A.2d 554.

Minn.—Peters v. Archer-Daniels-Midland Co., 26 N.W.2d 29, 223 Minn. 168.

Okl.—Special Indem. Fund v. Prewitt, 205 P.2d 306, 201 Okl. 308—Special Indem. Fund of Okl. v. George, 179 P.2d 919, 198 Okl. 457.

Rating of prior disability of employee was not an issue in proceeding brought to recover compensation from a new employer for subsequent injury.

Cal.—Pacific Gas & Elec. Co. v. Industrial Acc. Commission, 272 P.2d 818, 126 C.A.2d 554.

25. N.Y.—Chardeen v. General Elec. Co., 137 N.Y.S.2d 410, 285 App.Div. 914—Grimes v. Village of Albion, 111 N.Y.S.2d 319, 279 App.Div. 488—Shanley v. 60th Lane Corp., 62 N.Y.S.2d 788, 270 App.Div. 690.

Computation of time; medical benefits

(1) Workmen's compensation act, permitting reimbursement from special disability fund for all compensation and medical benefits subsequent to those payable for first one hundred and four weeks of disability, did not express a legislative intention that a claimant must have received both medical benefits and compensation for one hundred and four weeks if carrier was to be reimbursed for further payments of either, and insurance carrier was entitled to reimbursement for medical benefits paid after one hundred and four weeks even though claimant was paid compensation for only twenty-eight and five sixths weeks of disability.

N.Y.—Mastrodonato v. Pfaudler Co., 123 N.E.2d 83, 307 N.Y. 592.

(2) Provision of workmen's compensation law for reimbursement of insurance carrier from special disability fund for all compensation and medical benefits subsequent to those payable for first one hundred and four weeks of injured employee's disability authorizes reimbursement of carrier for medical benefits paid after one hundred and four weeks of medical impairment and compensation paid after such period of financial impairment, so that workmen's compensation board erred in directing reimbursement of carrier from such fund for all compensation payable after one hundred and four weeks from first day of employee's disability, where carrier actually paid only six weeks compensation.

N.Y.—Hastings v. Hugh T. Beckwith, Inc., 163 N.Y.S.2d 754, 4 A.D.2d 714.

(3) The term "medical benefits" in provision of workmen's compensation law for reimbursement of insurance carrier from special disability fund for all compensation and medical benefits subsequent to those payable for first one hundred and four weeks of injured employee's disability means expenses, whenever and however infrequently incurred, for medical disability or impairment existing for such period, while "compensation benefits" mean weekly payments.

N.Y.—Hastings v. Hugh T. Beckwith, Inc., *supra*.

Death benefits; funeral expenses

"Death benefits" under provision of the workmen's compensation law that employer or insurance carrier shall, in the first instance, pay funeral expenses and death benefits in case of death of disabled person, but that employer or insurance carrier shall be reimbursed from the special disability fund for all "death benefits" payable in excess of one hundred and four weeks, do not include funeral expenses, and employer and insurance carrier are not entitled to reimbursement for funeral expenses.

N.Y.—Krause v. Ronell Decorators, Inc., 142 N.Y.S.2d 55, 286 App.Div. 899, affirmed 133 N.E.2d 710, 1 N.Y.2d 676, 150 N.Y.S.2d 202.

Compensation paid for first accident not counted

(1) Where employee sustained back injury for which he was compensated and thereafter returned to work at a lighter job at lower wages, and there suffered a second back injury, resulting in partial disability attributable equally to the two accidents, employer was entitled to reimbursement from special disability fund only for awards exceeding one hundred and four weeks after second accident, but not to reimbursement after first one hundred and four weeks of disability for both accidents.

N.Y.—Gessi v. Kennedy Valve Mfg. Co., 146 N.Y.S.2d 851, 1 A.D.2d 712.

(2) Workmen's compensation board properly held that employer was not entitled to reimbursement from special disability fund for disability compensation paid employee in excess of one hundred and four weeks, unless employer's liability as result of second of two accidental injuries sustained by employee in 1916 and 1918, respectively, exceeded

The statutes vary a good deal in their coverage, and the special fund is liable for compensation only where both the prior condition of the employee and his condition subsequent to an industrial injury meet the requirements of the statute.²⁶ Such statutes do not give the employer relief as to every accident that may be suffered by a handicapped employee.²⁷ In order for the fund to be liable, the second accident must be compensable;²⁸ the fund is not liable where the subsequent accident does not arise out of, and in the course of, employment and is compensable only on the theory that it is the result of

or a complication of an earlier industrial injury.²⁹ Where the death or disability results solely from the earlier accident and is not contributed to by a subsequent accident, the fund is not liable.³⁰ Similarly, where the death³¹ or disability³² results solely from the last accident and is not substantially contributed to by the earlier impairment, the fund is not liable. Where the disability is the result of two accidents, the award is to be apportioned between the two accidents, and the special fund is liable only for its appropriate share of the portion of the award charged against the later accident.³³ It has been

dred and four weeks, though his combined disability period as results of both accidents totaled one hundred sixty-three and eight-tenths weeks. N.Y.—*Seaman v. Endicott Johnson Corp.*, 115 N.Y.S.2d 540, 280 App. Div. 904.

(3) Where two accidental injuries contributed to permanent partial disability, employer's compensation insurance carrier was entitled to reimbursement from special disability fund only for portion of compensation after one hundred four weeks awarded on account of second injury. N.Y.—*Conklin v. Arden Farms Dairy Co.*, 156 N.Y.S.2d 765, 2 A.D.2d 910.

26. Mass.—*McLean's Case*, 93 N.E.2d 233, 326 Mass. 72.

Minn.—*Rikala v. Rundquist Const. Co.*, 77 N.W.2d 551, 247 Minn. 401—*Senske v. Fairmont & Waseca Canning Co.*, 45 N.W.2d 640, 232 Minn. 350.

Neb.—*Franzen v. Blakley*, 53 N.W.2d 833, 155 Neb. 621.

N.J.—*Application of Glennon*, 12 A.2d 360, 18 N.J.Misc. 196.

N.Y.—*Sherman v. Holland Furnace Co.*, 156 N.Y.S.2d 407, 2 A.D.2d 911—*Goldat v. General Outdoor Advertising Co.*, 70 N.Y.S.2d 366, 272 App. Div. 850.

Right to appeal

Special disability fund created by workmen's compensation law had right to appeal from workmen's compensation board's decision and award. N.Y.—*Hastings v. Hugh T. Beckwith, Inc.*, 163 N.Y.S.2d 754, 4 A.D.2d 714.

Oklahoma rule

(1) To authorize award of compensation against special indemnity fund, claimant must show that he was a physically impaired person, that he suffered another compensable injury resulting in additional permanent disability combinable with disability because of previous impairment, and that combination of both disabilities is materially greater than that which would have resulted from subsequent injury alone.

Okl.—*Howard v. Special Indem. Fund*, 227 P.2d 641, 204 Okl. 207—

Special Indem. Fund of Okl. v. Hewes, 214 P.2d 240, 202 Okl. 356—*Special Indem. Fund v. Arnold*, 200 P.2d 907, 210 Okl. 51—*Special Indem. Fund of State of Okl. v. Hunt*, 190 P.2d 795, 800 Okl. 1—*Special Indem. Fund v. James*, 189 P.2d 171, 199 Okl. 624—*Special Indem. Fund v. Ward*, 185 P.2d 186, 199 Okl. 196—*Special Indem. Fund Administered by State Ins. Fund v. Christy*, 184 P.2d 780, 199 Okl. 184—*Special Indem. Fund v. Hobbs*, 164 P.2d 980, 196 Okl. 318—*Special Indem. Fund of Okl. v. Gambrell*, 164 P.2d 240, 196 Okl. 203.

(2) The prerequisite conditions on which applicability of special indemnity fund act rests are jurisdictional, and in the absence of proof of their existence, industrial commission cannot enter any benefit award under the act.

Okl.—*Clyde's Auto Salvage & Coal Operators Cas. Co. v. Hughes*, 231 P.2d 356, 204 Okl. 467—*Special Indem. Fund v. Patterson*, 217 P.2d 536, 202 Okl. 637—*Special Indem. Fund v. Quinalty*, 203 P.2d 713, 201 Okl. 204—*Special Indem. Fund of State of Okl. v. Hunt*, 190 P.2d 795, 200 Okl. 1.

(3) Findings as to all requisite facts are necessary to support an award against the fund.

Okl.—*Special Indem. Fund of State v. Woodrow*, 245 P.2d 445, 206 Okl. 580—*Special Indem. Fund v. Prewitt*, 205 P.2d 306, 201 Okl. 308.

27. N.Y.—*Rice v. Williams & Co.*, 142 N.Y.S.2d 109, 286 App.Div. 299.

28. N.Y.—*Craven v. Andrews*, 128 N.Y.S.2d 143, 233 App.Div. 345—*Webb v. Norwich Knitting Co.*, 128 N.Y.S.2d 140, 283 App.Div. 754.

29. N.Y.—*Webb v. Norwich Knitting Co.*, *supra*.

30. N.Y.—*Thilman v. Katz*, 151 N.Y.S.2d 812, 2 A.D.2d 613.

31. N.Y.—*Rice v. Williams & Co.*, 142 N.Y.S.2d 109, 286 App.Div. 299—*Roberts v. Star Woolen Co.*, 131 N.Y.S.2d 548, 283 App.Div. 1122.

Suicide

Evidence that employee who had lost all vision of right eye during infancy and who had previously suffered a forty per cent permanent loss of use of left eye as result of accident while working for another employer sustained additional injuries to left eye as result of accident during course of his employment causing him to suffer a sixty per cent loss of use of that member, and that employee thereafter, while suffering from depressive psychosis, committed suicide supported finding that employee's death was due solely to accidental injuries and that award of death benefits should not be made against special fund for reopened cases under workmen's compensation law.

N.Y.—*Pushkarowitz v. A. & M. Kramer*, 38 N.Y.S.2d 835, 275 App.Div. 875, affirmed 90 N.E.2d 494, 300 N.Y. 637.

32. N.Y.—*Green v. William Henger Co.*, 143 N.Y.S.2d 746, 1 A.D.2d 856—*Reed v. C. R. Edmonds & Sons*, 126 N.Y.S.2d 68, 232 App.Div. 1083—*Ehinger v. Hotel St. Regis*, 104 N.Y.S.2d 225, 278 App.Div. 866. Okl.—*Petroleum Maintenance Co. v. Herron*, 206 P.2d 182, 201 Okl. 393—*Special Indem. Fund of Okl. v. Bennett*, 187 P.2d 991, 199 Okl. 505.

Loss of eyes; defective vision

Prior organic or functional perfection or visual normality is not a conditional prerequisite to liability for statutory compensation for the total and permanent loss of the faculty of sight, and in such circumstances the statute providing compensation payments from the one per cent fund for subsequent permanent injuries has no application, since there is a compensable total disability as result of the loss of both eyes as a result of one accident.

N.J.—*Vaccaro v. Walter Kidde & Co.*, 48 A.2d 393, 134 N.J.Law 491.

33. N.Y.—*McGowan v. McCosco*, 163 N.Y.S.2d 550, 4 A.D.2d 726—*Conklin v. Arden Farms Dairy Co.*, 156 N.Y.S.2d 765, 2 A.D.2d 910—*Sherman v. Holland Furnace Co.*, 156 N.Y.S.2d 407, 2 A.D.2d 911.

indicated that the subsequent injury fund is not liable where the last accident aggravates, activates, or accelerates the pre-existing condition.³⁴

Ordinarily the fund is not liable unless the subsequent condition is permanent³⁵ and the subsequent disability is materially and substantially greater than would have resulted from the last accident alone,³⁶ or the subsequent injury or death is one which would not have occurred except for the prior im-

pairment.³⁷ Under some statutes it is sufficient if the subsequent disability is greater than the disability that would have resulted from the last accident alone;³⁸ but under other statutes the fund is liable only where the claimant is totally and permanently disabled after the subsequent injury.³⁹

A permanent partial disability which was in existence at the time of the subsequent injury is a condition precedent to recovery from the special fund.⁴⁰

34. Minn.—Rikala v. Rundquist Const. Co., 77 N.W.2d 551, 247 Minn. 401.

N.J.—Balash v. Harper, 70 A.2d 747, 3 N.J. 437.

Davenport v. Alvord Hotel, 91 A.2d 361, 21 N.J.Super. 493.

Application of Glennon, 12 A.2d 360, 18 N.J.Misc. 196.

35. N.Y.—Breen v. Fairview Foundry, Inc., 126 N.Y.S.2d 245, 282 App. Div. 1082—Miller v. U. S. Television Mfg. Co., 122 N.Y.S.2d 427, 282 App.Div. 782.

Temporary injuries

Where the injuries from the later accident are of a temporary nature, the fund is not liable.

N.Y.—Scoma v. Wright Associates Bldg. Corp., 139 N.Y.S.2d 379, 285 App.Div. 1096.

36. N.Y.—Lampman v. Leonard Hospital, 144 N.Y.S.2d 853, 286 App.Div. 1048.

Okl.—Howard v. Special Indem. Fund, 227 P.2d 641, 204 Okl. 207—Special Indem. Fund v. Prewitt, 205 P.2d 306, 201 Okl. 308—Special Indem. Fund v. Neal, 192 P.2d 660, 200 Okl. 242—Special Indem. Fund of State of Okl. v. Wright, 191 P.2d 194, 200 Okl. 55—Special Indem. Fund v. Drye, 188 P.2d 359, 199 Okl. 553—Eagle-Picher Min. & Smelting Co. v. Van Gundy, 188 P.2d 210, 199 Okl. 522—Special Indem. Fund of Okl. v. Gambrell, 164 P.2d 240, 196 Okl. 203.

Disabilities which may be combined

(1) The Special Indemnity Fund Act is applicable if previous impairment be combinable under the workmen's compensation law with the later injury resulting from the compensable accident, treating the pre-existing injury as though it occurred at time of later injury and combined effects or disability of the pre-existing condition and the later accidental compensable injury is materially greater than the disability resulting from the later injury standing alone. Okl.—Special Indem. Fund of Okl. v. Wade, 189 P.2d 609, 199 Okl. 547.

(2) A schedule injury and a non-schedule injury may not be combined and considered as a disability to the body as a whole so as to subject the fund to liability for the disability in excess of that caused by the last in-

jury except where the injuries result in total disability.

Okl.—Henry Schafer, Inc., v. Mitchell, 198 P.2d 397, 200 Okl. 510—Special Indem. Fund of State v. Lee, 193 P.2d 305, 200 Okl. 327.

(3) Permanent partial disability to foot could not be combined with a previous disability to back so as to fix liability on the special indemnity fund, where the only medical testimony was that claimant had only sixty per cent permanent disability to the body as a whole as result of the combined injuries.

Okl.—Special Indem. Fund of State v. Kilgore, 219 P.2d 1001, 203 Okl. 241.

(4) Prior injury causing total loss of claimant's eye and subsequent injury to claimant's feet may be combined in making award against special indemnity fund, if by reason of such combination claimant has a disability materially greater in degree than that caused by injury to his feet alone.

Okl.—Special Indem. Fund v. Horne, 254 P.2d 988, 208 Okl. 218.

(5) Previous physical impairment by reason of injury to right thumb did not give state industrial commission jurisdiction to award additional disability payable from special indemnity fund to workman receiving compensable injury to left index finger, where evidence showed that neither injury entered the hand.

Okl.—Special Indem. Fund v. Davidson, 162 P.2d 1016, 196 Okl. 118.

(6) Where evidence showed disability resulting from combination of pre-existing total loss of vision of one eye and permanent partial loss of use of foot by later compensable accident was materially greater in degree than that which resulted from the foot injury, an award for compensation against special indemnity fund was proper.

Okl.—Special Indem. Fund v. Urban, 204 P.2d 537, 201 Okl. 226.

(7) Schedule injuries generally see supra § 306 et seq.

(8) Multiple and successive injuries generally see supra § 308.

Evidence held sufficient

To show that disability was greater because of prior impairment.

N.Y.—Lampman v. Leonard Hospital, 144 N.Y.S.2d 853, 286 App.Div. 1048.

Okl.—Special Indem. Fund v. Osborne, 272 P.2d 392—Special Indem. Fund v. Horne, 254 P.2d 988, 208 Okl. 218—Special Indem. Fund v. Urban, supra—Special Indem. Fund v. James, 189 P.2d 171, 199 Okl. 624—Special Indem. Fund Administered by State Ins. Fund v. Christy, 184 P.2d 780, 199 Okl. 184—Special Indem. Fund of Okl. v. Gambrell, 164 P.2d 240, 196 Okl. 203.

Evidence held insufficient

To show that disability was greater because of prior impairment.

N.Y.—Green v. William Hengerer Co., 148 N.Y.S.2d 746, 1 A.D.2d 856.

Okl.—Merrick v. Blackman, 207 P.2d 942, 201 Okl. 553—Special Indem. Fund v. Neal, 192 P.2d 660, 200 Okl. 242—Special Indem. Fund v. Drye, 188 P.2d 359, 199 Okl. 553—Eagle-Picher Min. & Smelting Co. v. Van Gundy, 188 P.2d 210, 199 Okl. 522.

37. N.Y.—Elling v. Ontario County Sheriff's Dept., 146 N.Y.S.2d 182, 286 App.Div. 628, affirmed 135 N.E.2d 591, 1 N.Y.2d 789, 153 N.Y.S.2d 55—Rice v. Williams & Co., 142 N.Y.S.2d 109, 286 App.Div. 299.

38. N.Y.—Wason v. Moyer & Pratt, 84 N.Y.S.2d 371, 274 App.Div. 813.

Okl.—Clyde's Auto Salvage & Coal Operators Cas. Co. v. Hughes, 231 P.2d 356, 204 Okl. 467.

There need not be a reduction in wage-earning capacity; it is sufficient if there is a medical disability. N.Y.—Mastrodonato v. Pfaudler Co., 123 N.E.2d 83, 307 N.Y. 592.

39. Neb.—Franzen v. Blakley, 52 N.W.2d 833, 155 Neb. 621.

N.J.—Balash v. Harper, 70 A.2d 747, 3 N.J. 437.

40. Cal.—State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818.

N.Y.—Souers v. Town of Blenheim, 106 N.Y.S.2d 885, 278 App.Div. 1030.

"Disabled" means a combination of partial or total physical incapacity and of inability to work.

Cal.—State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818.

The burden of proof as to the previous disability or impairment rests on the claimant.

Minn.—Rikala v. Rundquist Const. Co., 77 N.W.2d 551, 247 Minn. 401.

The previous condition must be permanently and partially disabling, and capable of being fixed in definite percentage of disability.⁴¹ Under some statutes the prior impairment or disability must have affected earning power,⁴² and liability is not apportioned and the second injury fund is not liable where the employee was not so disabled prior to the accident that he was unable to perform his usual duties.⁴³ It would seem that where the employee was totally and permanently disabled at the time of the later accident no liability can be imposed on the fund,⁴⁴ but it has been held that an

employee rated one hundred per cent disabled prior to the second injury was entitled to an award measured by his entire disability, and to recover from the special fund for that proportion of his disability which was not due to the second injury.⁴⁵

In view of the fact that the purpose of the establishment of second injury funds is to further the employment of handicapped workers, it has been held that there is no apportionment and the fund is not liable where the pre-existing impairment was not obvious or known to the employer,⁴⁶ or where

Evidence held sufficient

To show prior permanent disability.

N.Y.—Dugan v. Muller Dairies, Inc., 125 N.Y.S.2d 530, 282 App.Div. 590.

Evidence held insufficient

To show prior permanent physical impairment.

Cal.—State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818.

N.Y.—Bellospirito v. Smith, 137 N.Y.S.2d 601, 285 App.Div. 912.

41. N.J.—Gorman v. Miner-Edgar Chemical Corporation, 198 A. 404, 406, 16 N.J.Misc. 170.

"Previous permanent and partial disability must be, as to its existence and extent, substantially as certain and as capable of ascertainment as previously incurred permanent partial disability through the loss of one hand."

N.J.—Gorman v. Miner-Edgar Chemical Corporation, *supra*.

"A weakness, whether pathological or traumatic in origin, which does not become manifest until an accident occurs, is not ordinarily considered as a disability, being too indefinite and speculative for practical purposes."

N.J.—Gorman v. Miner-Edgar Chemical Corporation, *supra*.

Paget's disease

Where Paget's disease, with which employee was afflicted, was dormant until he accidentally broke his right hip bone and was thereafter precipitated into state of activity by accident rendering his leg useless, employee's condition was result of accident and not of prior condition, and employer was therefore liable for additional compensation beyond four hundred week period and no portion thereof was chargeable to one per cent fund.

N.J.—Gorman v. Miner-Edgar Chemical Corporation, *supra*.

42. Minn.—Rikala v. Rundquist Const. Co., 77 N.W.2d 551, 247 Minn. 401.

N.J.—Davenport v. Alyord Hotel, 91 A.2d 361, 31 N.J.Super. 493.

43. N.Y.—Powell v. Miller, 122 N.Y.

S.2d 495, 282 App.Div. 790—Klein v. Ambrosino, 101 N.Y.S.2d 945, 278 App.Div. 620—Rodstein v. Columbia Mach. Works, 92 N.Y.S.2d 688, 276 App.Div. 790—Rak v. New York Car Wheel Co., 70 N.Y.S.2d 386, 272 App.Div. 855.

Evidence held sufficient

To show that disability did not affect ability to perform work or earning capacity.

N.Y.—Farnell v. Buffalo and Port Erie Public Bridge Authority, 135 N.Y.S.2d 809, 284 App.Div. 1070.

44. Okl.—Clyde's Auto Salvage & Coal Operators Cas. Co. v. Hughes, 231 P.2d 856, 204 Okl. 467—Special Indem. Fund v. Prewitt, 205 P.2d 306, 201 Okl. 308.

Evidence held sufficient

To support finding that claimant was not totally and permanently disabled prior to later accident.

Okl.—Special Indem. Fund v. Long, 281 P.2d 933.

45. Cal.—Smith v. Industrial Acc. Commission, 282 P.2d 64, 44 C.2d 864.

Dahlbeck v. Industrial Acc. Commission of Cal., 287 P.2d 353, 135 C.A.2d 394.

46. Cal.—Subsequent Injuries Fund, State of Cal. v. Industrial Acc. Commission, 311 P.2d 26, 150 C.A.2d 716—State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818—Urquiza v. Industrial Acc. Commission of Cal., 300 P.2d 871, 144 C.A.2d 322.

N.Y.—Sheldon v. Doughty's Laundry Service, 167 N.Y.S.2d 56, 4 A.D.2d 909—Tuttle v. Hotel Earle, 156 N.Y.S.2d 526, 2 A.D.2d 906, amended on other grounds 158 N.Y.S.2d 780, 3 A.D.2d 609—Elling v. Ontario County Sheriff's Dept., 146 N.Y.S.2d 182, 286 App.Div. 628, affirmed 135 N.E.2d 591, 1 N.Y.2d 789, 153 N.Y.S.2d 55—Handaly v. Alfred Blayer & Co., 144 N.Y.S.2d 831, 286 App.Div. 1050, reargument and appeal denied 142 N.Y.S.2d 234, 1 A.D.2d 792—Young v. Waterbury, 142 N.Y.S.2d 148, 286 App.Div. 990—Rice v. Williams & Co., 142 N.Y.S.2d 109, 286 App.Div. 299—Shaugh-

nessy v. Troy Engineering Co., 137 N.Y.S.2d 407, 285 App.Div. 912—Baron v. Nobar Realty Corp., 120 N.Y.S.2d 146, 281 App.Div. 295—Accardy v. Parker-Kalon Corp., 108 N.Y.S.2d 23, 279 App.Div. 678—Zyla v. A. D. Juilliard & Co., 102 N.Y.S.2d 255, 277 App.Div. 604—Mueller v. Rutgers Club, 101 N.Y.S.2d 953, 278 App.Div. 619.

"Impairment" does not mean an unknown condition, but refers to a condition that causes loss of function of the body in whole or in part. Cal.—State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818—State Subsequent Injuries Fund v. Industrial Acc. Commission of Cal., 288 P.2d 31, 135 C.A.2d 544.

Proof that employer had knowledge of pre-existing disabling condition is a prerequisite to recovery of benefits from subsequent injuries fund for permanent partial disability due to combined effect of industrial injury and previous disability or impairment.

Cal.—State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818.

Elected employee

If actual knowledge of an elected county employee's pre-existing disability be deemed impossible solely because of the number of voters electing him, such knowledge should be imputed to county by law in determining county's eligibility for reimbursement from special disability fund.

N.Y.—Elling v. Ontario County Sheriff's Dept., 146 N.Y.S.2d 182, 286 App.Div. 628, affirmed 135 N.E.2d 591, 1 N.Y.2d 789, 153 N.Y.S.2d 55.

Extent of knowledge

(1) Where employer knew that claimant could not do his regular work following first accident, but there was no proof of knowledge of employer that, prior to second accident, first injury had resulted in a permanent condition, carrier was not entitled to reimbursement from special disability fund after one hundred and four weeks of disability following award of compensation upon second accident.

the claimant was not hired or retained in employ- | ment as a partially disabled person.⁴⁷ Thus the

N.Y.—Weller v. Imperial Paper & Color Corp., 142 N.Y.S.2d 255, 286 App.Div. 896.

(2) Where employer knew of employee's operation for removal of an intervertebral disc, but employer believed that employee had fully recovered at time of occurrence of subsequent accident, it could not be said that employer retained employee in his employ at that time with knowledge of an existing, permanent impairment, and employee's claim did not come within provisions of the second injury law, and employer was not entitled to reimbursement from the special fund under the second injury law.

N.Y.—Lusero v. Tronolone, 146 N.Y.S.2d 881, 1 A.D.2d 713.

(3) With respect to employer's right to reimbursement from special disability fund under second injury law, there is no requirement that employer have had medical evidence or knowledge to a point of medical certainty as to permanence of workman's first injury, and it is sufficient, in a case in which such injury was actually permanent, that employer have formed his own conclusion or belief that injury was permanent.

N.Y.—Dubrow v. 40 West 33rd St. Realty Corp., 167 N.Y.S.2d 98, 4 A.D.2d 896—Sheldon v. Doughty's Laundry Service, 167 N.Y.S.2d 56, 4 A.D.2d 909.

Knowledge of employer's wife

Proof of knowledge by employer's wife of slight physical disability or weakness of gardener did not necessarily require a finding by workmen's compensation board that employer had knowledge of permanent physical impairment of gardener, so as to charge special disability fund.

N.Y.—Bellospirito v. Smith, 137 N.Y.S.2d 601, 285 App.Div. 912.

Knowledge acquired after accident

Knowledge of employer with respect to existing physical impairment of employee acquired subsequent to accident resulting in death furnishes no basis for reimbursement from the special disability fund.

N.Y.—Accardy v. Parker-Kalon Corp., 108 N.Y.S.2d 23, 279 App.Div. 678.

Mental condition

Where laborer was committed to state hospital in 1944 because suffering from permanent dementia praecox, paranoid type, but was granted a leave of absence several months later, and in 1947 he returned to work for employer and continued to work steadily until injury, which cost him the sight of an eye, and all medical men who examined him after injury, agreed that his mental condition was not a disabling factor in the field of normal labor, he was

if employer knew of his condition, within section of the labor code dealing with additional compensation from the subsequent injuries fund in case of combined permanent partial disabilities.

Cal.—Urquiza v. Industrial Acc. Commission of Cal., 300 P.2d 871, 144 C.A.2d 322.

Slight swelling or enlargement of ankles and knees of sixty-four-year old deputy county clerk, which did not result in pain, limitation of action, or weakness, and did not affect her performance on the job, did not constitute permanent partial "disability" or "impairment" within statute providing for payment of part of compensation for disability due to combined effect of industrial injury and previous disability or impairment from subsequent injuries fund.
Cal.—State v. Industrial Acc. Commission, 306 P.2d 64, 147 C.A.2d 818.

Knowledge due to family relationship

(1) That corporate officers of employer, who were sons of employee, knew of permanent physical impairment of employee before latter's employment because of family relationship could not defeat corporation's claim for reimbursement against special disability fund for payment of workmen's compensation benefits made after employee's injury and death under conditions meeting statutory test of disability before hiring.
N.Y.—Baron v. Nobar Realty Corp., 120 N.Y.S.2d 146, 281 App.Div. 295.

(2) Where claimant was president of employer corporation and other officers were members of his family and all were aware that he had been suffering from diabetes and such condition aggravated the effects of his injury necessitating a partial amputation, award against the special disability fund was authorized as against contention that requirement of an informed decision by present or prospective employer was impossible of fulfillment under the circumstances and that the statute was not intended to benefit such a corporation.

N.Y.—Persky v. Stanley Persky Poultry Market, Inc., 151 N.Y.S.2d 737, 2 A.D.2d 612.

Gastric ulcer

N.Y.—Shaughnessy v. Troy Engineering Co., 137 N.Y.S.2d 407, 285 App.Div. 913.

Evidence held sufficient

To show employer's knowledge.
N.Y.—Nissels v. Carson's Dept. Store, 160 N.Y.S.2d 407, 3 A.D.2d 774—Elling v. Ontario County Sheriff's Dept., 146 N.Y.S.2d 182, 286 App.Div. 628, affirmed 135 N.E.2d 591, 1 N.Y.2d 789, 153 N.Y.S.2d 55—Ghirardi v. Mack Mfg. Corp., 124

N.Y.S.2d 780, 282 App.Div. 905—Baron v. Nobar Realty Corp., 120 N.Y.S.2d 146, 281 App.Div. 295—Fields v. Rebowsky, 118 N.Y.S.2d 671, 281 App.Div. 787.

Evidence held insufficient

To show employer's knowledge.
N.Y.—Hanson v. Juliano, 158 N.Y.S.2d 52, 3 A.D.2d 610—Robinson v. Mergenthaler Linotype Co., 158 N.Y.S.2d 10, 3 A.D.2d 611—Weinberger v. A. Zeibert & Sons, Inc., 156 N.Y.S.2d 770, 2 A.D.2d 908—Tuttle v. Hotel Earle, 156 N.Y.S.2d 526, 2 A.D.2d 906 amended on other grounds 158 N.Y.S.2d 780, 3 A.D.2d 609—Walker v. Triborough Bridge & Tunnel Authority, 146 N.Y.S.2d 837, 1 A.D.2d 719—Handaly v. Alfred Blayer & Co., 144 N.Y.S.2d 831, 286 App.Div. 1050, reargument and appeal denied 149 N.Y.S.2d 234, 1 A.D.2d 792—Zyla v. A. D. Juilliard & Co., 102 N.Y.S.2d 255, 277 App.Div. 604.

Finding conclusive on review

In proceeding by employer and insurance carrier for reimbursement from special disability fund, finding that carrier failed to produce any proof that claimant was hired or continued in his employment as a disabled person prior to the accident was conclusive on reviewing court.
N.Y.—Ledwith v. Olympic Restaurant, 152 N.Y.S.2d 571, 2 A.D.2d 720.

47. N.Y.—Hanson v. Juliano, 158 N.Y.S.2d 52, 3 A.D.2d 610—Ferdinand v. Midtown Bar & Restaurant, 121 N.Y.S.2d 345, 281 App.Div. 1062—Kaplan v. Model Iron & Aluminum Corp., 108 N.Y.S.2d 44, 279 App.Div. 694—Thomas v. Pine Auto Service, 87 N.Y.S.2d 233, 275 App.Div. 737.

Retention in employment after notice

(1) A continuance in employment, even at a change to lighter work, of one who to employer's knowledge has merely slowed down physically due only to advanced age is not within purview of "second injury law," and therefore, where employer gave seventy-two-year-old employee lighter work because of advanced age and employee sustained sacroiliac strain, which was aggravated by a pre-existing condition of osteoarthritis and arteriosclerosis, and employer did not know of such pre-existing condition, employer was not entitled to reimbursement from special disability fund for compensation paid.

N.Y.—Stophluben v. G. E. Van Vorst Co., 116 N.Y.S.2d 855, 280 App.Div. 1004.

(2) Where compensation claimant was actually suffering from a permanent condition of long standing due to a previous disease, and was continued in his employment after the

fund is not liable for the portion of the subsequent disability due to a pre-existing heart condition which was unknown to the employer.⁴⁸

Ordinarily the liability of the fund is not limited to cases where the prior disability was due to the loss or the loss of the use of specific members,⁴⁹ but under some statutes the special fund is liable only where an employee suffered the loss or loss of use of an organ or member or loses another organ or member in an industrial accident.⁵⁰ The prior impairment need not be one which prevents the employee from doing his work in a normal and accept-

able manner; the test is whether the impairment will adversely affect the claimant in obtaining or retaining employment.⁵¹

It is not a requisite to the imposition of liability on the fund that the prior injury be compensable or be sustained in the course of employment.⁵² While it has been held that the prior disability need not have been the result of an accident or injury,⁵³ and that the fund may be liable where the disability is a product of an industrial accident and a pre-existing disease,⁵⁴ a statute covering a person who has previously suffered a personal injury does not

employer had been expressly advised of the condition, employer was entitled to reimbursement, in accordance to statute, from special disability fund, when claimant suffered a cerebro-vascular hemorrhage while unloading cases of milk in course of his employment.

N.Y.—Dugan v. Muller Dairies, Inc., 125 N.Y.S.2d 530, 282 App.Div. 590.

(3) Under provision of compensation law giving employer or his insurance carrier a right to reimbursement from special disability fund for payment of compensation after first one hundred and four weeks to employee, who, while suffering from a permanent physical disability, suffers a subsequent disability by accident in course of employment, the express advice of a physician to an employer that condition is permanent is not necessary before reimbursement can be had, but is enough if the condition is actually permanent and the employer knows of the existence of the condition and is in a position to form some judgment as to whether it is temporary or permanent.

N.Y.—Dugan v. Muller Dairies, Inc., supra.

(4) In absence of proof in record that employee's dormant osteomyelitis condition, of which employer had notice in 1939, was liable to be aggravated by another accident, evidence would sustain board's finding that employer's retention of claimant in his employment had not brought claim within purview of subsection relieving employer from liability except for disability which would have resulted from injury if there had been no previous injury, and therefore special disability fund was properly discharged.

N.Y.—Harkins v. New York Dock Co., 113 N.Y.S.2d 600, 280 App.Div. 843, affirmed 112 N.E.2d 426, 305 N.Y. 652.

Prior disability suffered in course of same employment

(1) It has been held that the fund is liable only where the disability existed at the time the employment

began, and not where it was suffered in the course of the employment.

N.Y.—Rose v. Block & Guggenheimer, 97 N.Y.S.2d 357, 277 App.Div. 813.

(2) Where the claimant was not a disabled person at the time of his employment and suffered two successive accidents in the course of his employment by the same employer, and both accidents contributed to cause his disability, the employer was liable in full and the special fund was not liable at all.

N.Y.—Breuer v. 517 West 212th St. Corp., 78 N.Y.S.2d 726, 273 App.Div. 1043.

Special consideration in assignment of work

With respect to employer's right to reimbursement from special disability fund under the second injury law, there is no requirement that special consideration have been given to disabled person in assigning work to him.

N.Y.—Dubrow v. 40 West 33rd St. Realty Corp., 167 N.Y.S.2d 98, 4 A.D.2d 896.

43. Cal.—State Subsequent Injuries Fund v. Industrial Acc. Commission of Cal., 288 P.2d 31, 135 C.A.2d 544.

N.Y.—Caggiano v. Cella, 121 N.Y.S.2d 326, 281 App.Div. 1050, reargument and appeal denied 122 N.Y.S.2d 921, 282 App.Div. 730—Lacatena v. Sweeney Bottling Works, 112 N.Y. S.2d 157, 279 App.Div. 1104.

49. U.S.—Vandever v. Voris, D.C. Tex., 147 F.Supp. 447.

50. Ill.—Arview v. Industrial Commission, 114 N.E.2d 698, 415 Ill. 522. Kan.—Justice v. Continental Can Co., 257 P.2d 564, 174 Kan. 539.

The loss of more than one member in a compensable accident by an employee who had previously lost a member, or its use, or the sight of an eye, cannot deprive employee or his employer of benefits of special fund.

Ill.—Arview v. Industrial Commission, 114 N.E.2d 698, 415 Ill. 522.

"Physical loss"

Employee who sustained injury to right hand and arm resulting in permanent partial disability and who had sustained prior injury causing loss of use of left hand and who was unable physically to use right hand and arm and left hand suffered "physical loss" within provision of workmen's compensation law relating to industrial special indemnity fund and to permanent total disability after permanent partial disability, notwithstanding right hand and arm had not been amputated.

Idaho.—Anderson v. Potlatch Forests, 291 P.2d 859, 77 Idaho 263.

Partial loss of use

Where compensation commissioner and district court did not find that the claimant had lost the right eye or the use of it prior to date of industrial injury but found only that claimant had sustained a partial loss of the use thereof and a finding was justified that claimant was totally and permanently disabled after injury to his left eye, compensation award for total disability was not required to be made against the second injury fund but was properly made against the employer and its insurance carrier.

Kan.—Polston v. Ready Made Homes, 232 P.2d 446, 171 Kan. 336.

51. N.Y.—Nagorka v. Goldstein, 167 N.Y.S.2d 118, 4 A.D.2d 904.

52. U.S.—Lawson v. Suwanee Fruit & S. S. Co., Fla., 69 S.Ct. 503, 336 U.S. 198, 98 L.Ed. 611.

Scott v. Alaska Indus. Bd., D.C. Alaska, 91 F.Supp. 201.

N.J.—Balash v. Harper, 70 A.2d 747, 3 N.J. 437.

Application of Glennon, 12 A.2d 360, 18 N.J.Misc. 196.

Under earlier statute, it was required that the prior disability be compensable.

N.J.—Addotta v. Blunt, 176 A. 105, 114 N.J.Law, 85.

53. Tenn.—Giles County v. Rainey, 258 S.W.2d 774, 195 Tenn. 239.

54. Cal.—Subsequent Injuries Fund of State of Cal. v. Industrial Acc.

embrace one suffering from a congenital defect,⁵⁵ and under other statutes the second injury fund is not liable in the case of a pre-existing disease, except where such disease was the result of a compensable injury or was contracted while in the armed forces.⁵⁶ Degenerative diseases are not within a subsequent injury statute covering previous disabilities.⁵⁷

Commission, 283 P.2d 1039, 44 C.2d 604.

Minn.—Orbke v. Morrison Garment Co., 84 N.W.2d 682.

Necessity of disability

Second injury fund provision of workmen's compensation act applies only to a disease which results in some disability prior to compensable injury.

U.S.—Scott v. Alaska Indus. Bd., D. C. Alaska, 91 F.Supp. 201.

Silicosis

Second injury fund provision of workmen's compensation act did not apply to employee who sought compensation for total permanent disability due to silicosis which employee had contracted in prior employment but which was unmanifested.

U.S.—Scott v. Alaska Indus. Bd., supra.

55. Mass.—McLean's Case, 93 N.E. 2d 233, 326 Mass. 72.

56. Ky.—Combs v. Gaffney, 282 S.W. 2d 817.

57. Minn.—Rikala v. Rundquist Const. Co., 77 N.W.2d 551, 247 Minn. 401—Senske v. Fairmont & Waseca Canning Co., 45 N.W.2d 640, 232 Minn. 350.

Arthritis

(1) Rheumatoid arthritis which had caused prior loss of employment was a "previous disability" within statute providing for recovery from special compensation fund where permanent total disability results from a combination of an industrial injury and a previous disability.

Minn.—Orbke v. Morrison Garment Co., 84 N.W.2d 682.

(2) Hypertrophic arthritis is not a "previous disability" within statute providing for recovery from special compensation fund where permanent total disability results from combination of an industrial injury and a previous disability.

Minn.—Rikala v. Rundquist Const. Co., 77 N.W.2d 551, 247 Minn. 401.

(3) The test in determining whether award should be made from special fund where total permanent disability results from combined effect of industrial accident and pre-existing disability due to rheumatoid arthritis is not whether the progression of arthritis had stopped before accident and would never flare up

again but rather whether there was enough disability before accident which combined with the disability caused by the accident produced a permanent total disability.

Minn.—Orbke v. Morrison Garment Co., supra.

Parkinson's disease

Where Parkinson's disease, which totally disabled employee prior to his return to work after accident causing permanent partial disability, may have been caused by prior attack of influenza, but was not caused by accident, employee was not entitled to recover from special compensation fund difference between compensation for permanent partial and permanent total disability.

Minn.—Ginsburg v. Byers, 17 N.W.2d 354, 219 Minn. 230.

58. Okl.—Special Indemnity Fund of State of Okl. v. Ivan, 284 P.2d 419—Special Indem. Fund v. Edmonds, 222 P.2d 742, 203 Okl. 419—Poteet v. Special Indem. Fund, 206 P.2d 1143, 201 Okl. 440—Special Indem. Fund v. Quinalty, 203 P.2d 713, 201 Okl. 204.

Evidence held insufficient

To show that claimant was physically impaired at time of accident.

Okl.—Special Indem. Fund v. England, 223 P.2d 629, 204 Okl. 126.

59. Okl.—Special Indem. Fund v. Dimpel, 207 P.2d 776, 201 Okl. 526—Special Indem. Fund of State v. Stone, 207 P.2d 263, 201 Okl. 465—Cameron & Henderson v. Franks, 184 P.2d 965, 199 Okl. 143.

Settlement approved by commission

Claimant sustaining a subsequent injury was a "physically impaired person" within the meaning of the statute providing for compensation for additional disability, by virtue of a settlement for prior injury based upon form 14, filed, and approved by industrial commission, and such determination was final adjudication and binding in proceeding for compensation against special indemnity fund for additional disability sustained by claimant from the subsequent injury while working for different employer.

Okl.—Special Indem. Fund v. Arnold, 200 P.2d 907, 201 Okl. 51.

60. Okl.—Special Indem. Fund of State v. Stone, 207 P.2d 263, 201 Okl. 465—Special Indem. Fund v. Darr, 203 P.2d 881, 201 Okl. 212.

Under one statute, the employee must have been a physically impaired person at the time of the subsequent injury,⁵⁸ and the impairment may consist of any disability previously adjudged and determined by the compensation commission,⁵⁹ the loss of the sight of an eye or the loss or partial loss of a member,⁶⁰ or such loss of use or partial loss of

Loss of sight

(1) An employee who has sustained permanent total industrial blindness in one eye is a physically impaired person within special indemnity fund act.

Okl.—Special Indem. Fund v. Fellows, 261 P.2d 899—Special Indem. Fund v. Smith, 242 P.2d 159, 206 Okl. 185.

(2) Where reliance, in claim against special indemnity fund, that one is physically impaired person is based solely on previous loss of vision complete industrial loss of vision in an eye must be shown.

Okl.—Special Indem. Fund v. Patterson, 217 P.2d 536, 202 Okl. 637—Poteet v. Special Indem. Fund, 206 P.2d 1143, 201 Okl. 440.

(3) Evidence that claimant had sustained permanent partial loss of vision of both eyes by reason of a previous injury was insufficient to justify award against special indemnity fund on ground that at time of second injury claimant was a physically impaired person as defined by statute.

Okl.—Special Indem. Fund v. Edmonds, 222 P.2d 742, 203 Okl. 419.

(4) Where claimant had previously suffered an accidental injury by which he lost all of the sight of his right eye, and that loss was permanent, claimant was a previously impaired person as defined by special indemnity fund act, and claimant was not required to prove that loss of sight of his right eye was obvious and apparent from observation or examination by ordinary layman.

Okl.—Special Indem. Fund v. Darr, 203 P.2d 881, 201 Okl. 212.

(5) Evidence that claimant sustained twenty per cent permanent partial obvious loss of vision of one eye by reason of old injury was insufficient to establish that claimant was a physically impaired person as defined by special indemnity fund act, so as to establish liability against fund.

Okl.—Poteet v. Special Indem. Fund, supra.

(6) Evidence sustained finding that claimant was industrially blind in one eye and hence was a physically impaired person within meaning of special indemnity fund act.

Okl.—Special Indem. Fund of State v. Woodrow, 245 P.2d 445, 206 Okl. 185.

use of a member as is obvious from observation or examination by an ordinary layman.⁶¹

Control over disbursements from a subsequent injury fund is normally vested in the compensation authorities.⁶² The state official intrusted with the custody of the subsequent injury fund has no

discretionary power with respect to its disbursement.⁶³

Fund for reopened cases. In New York a special fund has been set up for the payment of stale claims.⁶⁴ Liability against the fund for reopened cases arises only under the precise conditions set

580—Special Indem. Fund v. Smith, 242 P.2d 159, 206 Okl. 185.

Loss of hearing

(1) The word "member," as used in special indemnity fund act relating to a physically impaired person, does not include the ear.

Okl.—Special Indem. Fund of State v. Stone, 207 P.2d 263, 201 Okl. 465.

(2) Workman, who had lost the hearing in one ear in a previous accident, was not a physically impaired person, within meaning of special indemnity fund act, so as to be entitled to compensation from the fund on the loss of hearing of other ear as the result of another accident arising out of, and in the course of, his employment.

Okl.—Special Indem. Fund of State v. Stone, supra.

Loss of fingers

Employee who had lost two fingers was a "physically impaired person" within the special indemnity fund act, and, when thumb of the same hand was amputated because of subsequent injury resulting in additional permanent disability so that degree of disability caused by combination of both disabilities was materially greater than that which would have resulted from subsequent injury, remainder of disability after termination of employer's payment of per cent of disability which would have resulted from the subsequent injury alone was payable out of the special indemnity fund.

Okl.—Special Indem. Fund v. Duff, 191 P.2d 534, 200 Okl. 57.

61. Okl.—Special Indem. Fund of State v. Stone, 207 P.2d 263, 201 Okl. 465—Special Indem. Fund of Okl. v. Wade, 189 P.2d 609, 199 Okl. 547—Special Indem. Fund v. Cornish, 185 P.2d 467, 199 Okl. 257—Special Indem. Fund of State v. Keel, 164 P.2d 996, 196 Okl. 315.

Walk with a limp due to injury which caused right leg to be an inch shorter than left leg made claimant a physically impaired person for purpose of fixing liability upon special indemnity fund for subsequent eye injury.

Okl.—Special Indem. Fund v. Dimpel, 207 P.2d 776, 201 Okl. 526.

Hip or back injury

(1) A pre-existing injury to a hip or back does not bring claimant within the statute.

Okl.—Special Indem. Fund of Okl. v. Wade, 189 P.2d 609, 199 Okl. 547.

(2) A hip injury that results directly in partial permanent disability to a leg is an injury to the leg and may be combined with a subsequent injury under the special indemnity fund act.

Okl.—Special Indem. Fund of Okl. v. Wade, supra.

Loss of use of finger

An employed person who has formerly lost the use of an index finger by reason of same becoming stiffened is a physically impaired person whose impairment is obvious and apparent from examination by an ordinary layman within workmen's compensation act relating to an award against the special indemnity fund.

Okl.—Special Indem. Fund of Okl. v. Gambrell, 164 P.2d 240, 196 Okl. 203.

Commission's determination must be supported by competent evidence

Okl.—Special Indem. Fund v. Osborne, 272 P.2d 392.

Evidence held sufficient

Okl.—Special Indem. Fund v. Osborne, supra—Special Indem. Fund of Okl. v. Gambrell, 164 P.2d 240, 196 Okl. 203.

62. Minn.—Senske v. Fairmont & Waseca Canning Co., 45 N.W.2d 640, 232 Minn. 350.

Power to compromise claims

Control over the allowance of disability benefits from the publicly administered special compensation funds is wholly vested in the industrial commission, and no other official or department, in behalf of the state or in behalf of anyone else, has such ownership in or supervision over the fund as to empower them to compromise disability benefits or to make recommendations which are a material factor in the exercise of the industrial commission's discretion.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

Claim against state

The special compensation fund is a fund which belongs to industry and is a public fund only in the sense that the public welfare is highly involved with its proper administration, and the injured workman's right to total disability benefits from the fund is not based upon

any direct financial obligation of the state.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

Attorney general

(1) An employee's claim for total disability benefits from the special compensation fund is not in the nature of a claim against the state which may be compromised and settled by the attorney general, and the attorney general's recommendation of such a compromise is not a material factor in ascertaining whether the industrial commission has abused its discretion in declining to approve such settlement.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

(2) The attorney general may properly appear in workmen's compensation cases in behalf of the custodian of the special compensation fund in so far as that official's purely ministerial function is concerned.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

(3) In the performance of his official duties, the opinions and recommendations given by attorney general to industrial commission are entitled to the greatest respect, but such opinions and recommendations cannot control or become a material factor in the exercise of the commission's discretion as to allowance or denial of disability benefits from the special compensation fund.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

63. Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

Duty to resist illegal disbursements

While the state treasurer's ministerial role gives him no discretionary control over payment of disability benefits from special compensation fund, the treasurer does have, by virtue of the inherent nature of his custodianship of the funds, a right and a duty, for the preservation of the fund, to resist disbursements and invasions which have no basis in law.

Minn.—Senske v. Fairmont & Waseca Canning Co., supra.

64. N.Y.—Kaplan v. Wirth & Birnbaum, 92 N.E.2d 919, 801 N.Y. 121.

Longo v. M & F Auto Wreckers, 166 N.E.2d 940, 4 A.D.2d 902—Koepe v. Buffalo Brake Beam-Acme Steel & Malleable Iron Works, 156 N.Y.S.2d 829, 2 A.D.2d 946, motion

forth in the statute.⁶⁵ Under this statute, where the compensation board has jurisdiction to make an award despite the staleness of the claim, as discussed infra § 856, the award is to be paid from the special fund where seven years have elapsed since the injury or death⁶⁶ and where (1) the claim for

denied *Kopec v. Buffalo Brake Beam-Acme Steel and Malleable Iron Works*, 158 N.Y.S.2d 782—*Greenwald v. Electro Metallurgical Co.*, 134 N.Y.S.2d 451, 284 App.Div. 706—*Riddle v. General Ice Cream Corp.*, 29 N.Y.S.2d 225, 262 App.Div. 353—*De Santis v. Folcaro*, 18 N.Y.S.2d 259, 259 App.Div. 768—*Kirilloff v. A. G. W. Wet Wash Laundry*, 12 N.Y.S.2d 109, 257 App.Div. 37, reargument denied 15 N.Y.S.2d 815, 258 App.Div. 818, appeal dismissed 27 N.E.2d 11, 282 N.Y. 466—*Tipton v. Lang's Bakery*, 296 N.Y.S. 228, 250 App.Div. 696, affirmed 11 N.E.2d 759, 275 N.Y. 572.

Purpose of fund

(1) Purpose of fund for reopened cases, which is maintained by assessment upon employers and carriers, is to establish a method by which risk of claims recurring beyond statutory period shall be borne by all.

N.Y.—*Casey v. Hinkle Iron Works*, 87 N.E.2d 419, 299 N.Y. 382.

(2) Purpose of establishment of special fund for reopened cases is to insure in a proper case the benefits of workmen's compensation law to injured workman regardless of prior denials and time limitations and also to cushion the burden to employer and carrier by relieving them from a continuing liability.

N.Y.—*Watkins v. Cornwall Press*, 63 N.Y.S.2d 23, 270 App.Div. 615.

(3) The purpose of the special fund provided for in workmen's compensation law is to relieve in part the burden upon employer or insurance carrier resulting from claims where there has been a recurrence after a lapse of years of a malady resulting from the injury received by a workman in the course of employment.

N.Y.—*McDonnell v. City of New York*, 3 N.Y.S.2d 685, 253 App.Div. 559.

Claimant's interest

A claimant, when not prejudiced thereby, has no concern with question of whether, because of lapse of time, his compensation is payable by employer or special fund for reopened cases.

N.Y.—*Sturesky v. Straussman*, 78 N.Y.S.2d 633, 273 App.Div. 1036.

Limitation on retroactive liability

(1) Statute providing that award of workmen's compensation payable by special fund on reopened claim shall not be retroactive for period of disability longer than two years immediately preceding date of filing application, establishes a time limitation on retroactive liability of special

fund for temporary total disability, and limitation was not applicable to award based on permanent partial disability of left foot for which a schedule award was made.

N.Y.—*Bellini v. Great Am. Indem. Co.*, 87 N.E.2d 426, 299 N.Y. 399, motion granted 91 N.E.2d 329, 300 N.Y. 679.

(2) Where evidence sustained finding that compensation case was last reopened on July 30, 1937, and award was not made until August 11, 1947, award payable from fund for reopened cases could not properly be made retroactive beyond July 30, 1935, two years before last reopening under 1940 amendment to workmen's compensation law limiting retroactive awards to a period of two years.

N.Y.—*Russo v. Wielandt*, 82 N.Y.S.2d 469, 274 App.Div. 275.

Deficiency compensation

Under the statute the fund is not liable for deficiency compensation, that is, a claim based on the contention that claimant's recovery against a third party is less than the amount he is entitled to under the compensation statute.

N.Y.—*McCarthy v. H. J. Heinz Co.*, 156 N.Y.S.2d 931, 2 A.D.2d 908.

Change of law

The release accorded by statute to employer after lapse of three years from date of lump-sum payment, and transfer of subsequent liability to special fund, is not a privilege which can be recalled; the statute is not a statute of limitations which can be extended after running of three-year period, but confers property right on employer which cannot be taken away except on act of employer or due compensation made.

N.Y.—*Tipton v. Lang's Bakery*, 296 N.Y.S. 228, 250 App.Div. 696, affirmed 11 N.E.2d 759, 275 N.Y. 572.

Reimbursement where claim paid by employer

N.Y.—*Sutari v. City of New York*, 5 N.Y.S.2d 563, 254 App.Div. 923—*McDonnell v. City of New York*, 3 N.Y.S.2d 685, 253 App.Div. 559.

65. N.Y.—*Pascucci v. William Kennedy Const. Co.*, 58 N.Y.S.2d 667, 270 App.Div. 83, appeal denied 59 N.Y.S.2d 905, 270 App.Div. 781.

Award against employer

(1) The reopening of a compensation case to consider benefits payable by the special fund does not constitute a reopening for the purpose of enlarging original carrier's liability.

N.Y.—*Mazzei v. Frontier Bronze Corp.*, 142 N.Y.S.2d 42, 285 App.Div. 1194.

(2) Where compensation was awarded under stale claims statute, with directions that it be paid by self-insurer, and parties to appeal stipulated that sole question should be whether award should be paid out of special fund or by self-insurer, that claimant had made no application for compensation under such statute did not preclude industrial board from directing that award be paid by self-insurer.

N.Y.—*Ryan v. American Bridge Co.*, 278 N.Y.S. 612, 243 App.Div. 496, affirmed 198 N.E. 375, 268 N.Y. 502.

66. N.Y.—*Walker v. Triborough Bridge & Tunnel Authority*, 146 N.Y.S.2d 837, 1 A.D.2d 719—*Ludgen v. Jamestown Asphalt Paving Materials Corp.*, 11 N.Y.S.2d 886, 257 App.Div. 881—*Sehm v. Sibley, Lindsay & Curr Co.*, 275 N.Y.S. 582, 242 App.Div. 271.

Liability depends solely on passage of time

N.Y.—*Casey v. Hinkle Iron Works*, 87 N.E.2d 419, 299 N.Y. 382.

Schechter v. State Ins. Fund, 126 N.Y.S.2d 257, 283 App.Div. 19—*Watkins v. Cornwall Press*, 63 N.Y.S.2d 23, 270 App.Div. 615.

Postponement of operation

Where compensation claimant suffered hernia in course of employment but postponed correctional operation for thirteen months, such postponement at claimant's election did not convert the accident into an "occupational disease" and postpone the date of "accident", for purposes of limitations in statute imposing liability on fund for reopened cases, to date of disability due to the operation.

N.Y.—*Buehler v. Service Mach. Works*, 134 N.Y.S.2d 413, 284 App. Div. 923.

Where exactly seven years from date of accident workmen's compensation board received application to reopen claim, special fund was properly discharged from liability in connection with such accident.

N.Y.—*Frank v. Rypinski*, 151 N.Y.S.2d 974, 2 A.D.2d 616.

In silicosis and other dust disease cases, the date of the "injury" is the date the claimant became totally disabled.

N.Y.—*Kopec v. Buffalo Brake Beam-Acme Steel and Malleable Iron Works*, 156 N.Y.S.2d 829, 2 A.D.2d 946, motion denied *Kopec v. Buffalo Brake Beam-Acme Steel and Malleable Iron Works*, 158 N.Y.S.2d 782.

Medical bills

(1) Award to compensation claimant for medical expenses, made

compensation has been previously disallowed or otherwise disposed of without an award of compensation⁶⁷ or (2) where three years have elapsed since the last payment of compensation.⁶⁸ Where death resulting from the injury occurs after either of the foregoing time limitations, the award is to be paid by the fund.⁶⁹

The time is to be computed to the date of the application to reopen.⁷⁰ Where the statute is tolled,

as in the case of a minor or incompetent for whom no guardian or committee has been appointed, the award is not to be paid from the special fund.⁷¹ However, it has been held that the statute is not one of limitation and that the time period is not tolled by minority in so far as the liability of the fund for reopened cases is concerned.⁷² The statutory time is tolled during the period of appeal from the prior award,⁷³ and during the period of the

than seven years after injury and more than three years after payment of compensation was completed, could not be made against employer and insurance carrier, but was payable out of special statutory funds. N.Y.—Wyski v. Brewer Dry Dock Co., 295 N.Y.S. 900, 251 App.Div. 769.

(2) A retroactive award under provision of workmen's compensation law for liability of special fund for reopened cases may include medical bills despite fact that no prior authority has been obtained for the incurring of the expense. N.Y.—Greenwald v. Electro Metallurgical Co., 134 N.Y.S.2d 451, 284 App. Div. 706.

(3) Retroactive award against special fund for reopened cases may include medical expenses incurred during the two-year period immediately preceding filing of application to reopen case, but such award may include only such expenses as could have been charged against employer in the first instance without specific authorization, and special fund may not be held liable for medical expenses for which employer could not have been held liable if claim had been made against employer within statutory time limits.

N.Y.—Marrameo v. Manhattan Coat Co., 153 N.Y.S.2d 848, 2 A.D.2d 102.

(4) Special fund for reopened cases was not liable for medical expenses incurred by claimant for a herniorrhaphy performed more than a month prior to application to reopen case filed more than seven years after industrial accident in nature of a right inguinal hernia and more than three years after last payment of compensation, where no emergency existed and such expenses were incurred without authorization from chairman of workmen's compensation board.

N.Y.—Marrameo v. Manhattan Coat Co., *supra*.

67. N.Y.—Kaplan & Wirth v. Birnbaum, 92 N.E.2d 919, 301 N.Y. 118. Watkins v. Cornwall Press, 63 N.Y.S.2d 23, 270 App.Div. 615.

68. N.Y.—Casey v. Hinkle Iron Works, 87 N.E.2d 419, 299 N.Y. 382.

Courteau v. Buffalo Flour Mills, 146 N.Y.S.2d 885, 1 A.D.2d 714—Mazza v. Frontier Bronze Corp., 141 N.Y.S.2d 72, 285 App.Div. 1194—Nash v. State Ins. Fund, 112 N.Y.S.2d 377, 279 App.Div. 1030—Finkle v. Cushing Stone Co., 104 N.Y.S.2d 692, 278 App.Div. 250, appeal denied 105 N.Y.S.2d 1006, 278 App.Div. 985—Esterow v. Schimel, Son & Lustig, 83 N.Y.S.2d 735, 274 App.Div. 325—Antoniazzi v. City of New York, 75 N.Y.S.2d 917, 273 App.Div. 835—Becker v. Marcy State Hospital, 38 N.Y.S.2d 219, 264 App.Div. 643—Semar v. City of New York, 33 N.Y.S.2d 686, 263 App.Div. 1040, appeal denied 35 N.Y.S.2d 280, 264 App.Div. 744—Riddle v. General Ice Cream Corp., 29 N.Y.S.2d 225, 262 App.Div. 353—Gabriel v. Brooklyn-Manhattan Transit Corp., 4 N.Y.S.2d 84, 254 App.Div. 789—Speranza v. Loft, Inc., 1 N.Y.S.2d 746, 253 App.Div. 177.

Orthopedic shoes

On request by injured workmen over seven years after accident and three years since last payment of compensation, for replacement of special orthopedic shoes, necessitated by injury, award directing that shoes be furnished should have been made against special fund for reopened cases rather than against employer and insurance carrier.

N.Y.—Casey v. Hinkle Iron Works, 87 N.E.2d 419, 299 N.Y. 382.

69. N.Y.—Kopec v. Buffalo Brake Beam-Acme Steel & Malleable Iron Works, 156 N.Y.S.2d 829, 2 A.D.2d 946, motion denied Kopec v. Buffalo Brake Beam-Acme Steel and Malleable Iron Works, 158 N.Y.S. 2d 782.

Time is measured from date of death, not from date of accident or disability.

N.Y.—Dickerson v. Essex County, 157 N.Y.S.2d 94, 2 A.D.2d 516—Burscia v. St. Joseph Lead Co., 131 N.Y.S. 2d 644, 283 App.Div. 1124, appeal denied 134 N.Y.S.2d 277, 284 App. Div. 858.

70. N.Y.—Forrest v. Church of St. Anthony of Padua, 153 N.Y.S.2d 902, 2 A.D.2d 727—Stearns v. American Laundry Machinery Co., 111 N.Y.S.2d 161, 279 App.Div. 481—

Broe v. Flushing Hospital, 100 N.Y. S.2d 705, 277 App.Div. 1070, appeal denied 102 N.Y.S.2d 648, 278 App. Div. 593—Marinaccio v. City of New York, 19 N.Y.S.2d 958, 259 App.Div. 947—Kircher v. Kircher, 291 N.Y.S. 281, 249 App.Div. 662—Patsaros v. John Eichler Brewing Co., 282 N.Y.S. 183, 245 App.Div. 878.

Abandoned application to reopen

Where claimant was awarded compensation for temporary disability on July 7, 1921, and on March 14, 1922, in response to his request for reopening of case, claimant was directed to file a report but he did nothing more about the matter until Oct. 7, 1938, when he submitted another application, the long lapse of time was conclusive evidence that application for reopening had been abandoned so as to preclude charging liability against employer and insurance carrier and so as to require payment of award from special fund. N.Y.—Kane v. Utica Knitting Co., 19 N.Y.S.2d 961, 259 App.Div. 947.

71. N.Y.—Fytel v. Carborundum Co., 76 N.Y.S.2d 26, 273 App.Div. 832, appeal and reargument denied 78 N.Y.S.2d 384, 273 App.Div. 924.

72. N.Y.—Longo v. M & F Auto Wreckers, 166 N.Y.S.2d 900, 4 A.D. 2d 902.

73. N.Y.—Sturesky v. Straussman, 78 N.Y.S.2d 633, 273 App.Div. 1036—Riddle v. General Ice Cream Corp., 29 N.Y.S.2d 225, 262 App. Div. 353.

Neither employer nor insurer party to appeal

Where neither employer of injured compensation claimant nor employer's insurance carrier were parties to appeal by third person erroneously found to be employer, or were concerned with appeal, statutory period within which insurance carrier of employer could be held liable for award of workmen's compensation on reopened claim would not be diminished to prejudice of carrier and for benefit of special fund by time the appeal of person erroneously found to be employer was pending.

N.Y.—Bellini v. Great Am. Indem. Co., 87 N.E.2d 426, 299 N.Y. 399, motion granted 91 N.E.2d 329, 300 N.Y. 679.

claimant's military service,⁷⁴ and while claimant is within the jurisdiction of a country at war with the United States.⁷⁵

The special fund is not liable unless the case was previously closed, and is reopened by a new application.⁷⁶ Where the original claim for compensation is still open, the fund is not liable.⁷⁷ Where no prior application for compensation was made, the fund is not liable.⁷⁸

Payment of compensation within three years pri-

or to the application for reopening prevents the imposition of liability on the fund,⁷⁹ although compensation was paid voluntarily and not under the direction of an award.⁸⁰ It has been held that for a payment by the employer to constitute a payment of compensation within the statute the payment must have been made voluntarily and with some knowledge of its effect.⁸¹ Payment of compensation after the filing of the application to reopen the case does not avoid the liability of the fund.⁸²

74. N.Y.—Sturesky v. Straussman, 78 N.Y.S.2d 633, 273 App.Div. 1036.

Right to claim that statute is tolled

(1) The right to claim that the statute is tolled by military service is personal to the claimant and may not be invoked to relieve or protect others.

N.Y.—Greenwald v. Electro Metallurgical Co., 134 N.Y.S.2d 451, 284 App.Div. 706—Schechter v. State Ins. Fund, 126 N.Y.S.2d 257, 283 App.Div. 19.

(2) Special fund for reopened cases was not entitled to benefit of statute tolling time limitation for bringing of suits by or against any person in military service in determining whether statutory time limit for holding employer liable for an award to former member of armed services in a reopened claim had elapsed.

N.Y.—Bellini v. Great Am. Indem. Co., 87 N.E.2d 426, 299 N.Y. 399, motion granted 91 N.E.2d 329, 300 N.Y. 679.

Greenwald v. Electro Metallurgical Co., supra—Schechter v. State Ins. Fund, supra—Walker v. Symington Gould Corp., 122 N.Y.S.2d 565, 282 App.Div. 785.

(3) Where liability is limited if the claim is upheld against the special fund but not if it is charged against the employer, the fact that claimant was in the military service may be invoked so as to toll the statute and impose liability on the employer rather than the fund.

N.Y.—Sturesky v. Straussman, 78 N.Y.S.2d 633, 273 App.Div. 1036.

(4) Under workmen's compensation law provision authorizing a retroactive award against special fund for reopened cases for bill incurred within two years prior to date of filing of application for reopening, incurrance of medical bills by employee one month prior to filing application did not constitute such "prejudice" as would entitle special fund to benefit of case law authorizing invocation of military law provision, for deduction of time spent in military service, to prevent shifting of liability from employer to special fund for reopened cases.

N.Y.—Greenwald v. Electro Metallurgical Co., supra.

75. N.Y.—Borelli v. Rochester Transit Corp., 136 N.Y.S.2d 315, 285 App.Div. 230.

76. N.Y.—Casey v. Hinkle Iron Works, 87 N.E.2d 419, 299 N.Y. 382. Lanfield v. Cady, 290 N.Y.S. 234, 248 App.Div. 926.

77. N.Y.—Branciforte v. H. Kohnstamm & Co., 70 N.Y.S.2d 364, 272 App.Div. 855, appeal denied 72 N.Y.S.2d 419, 272 App.Div. 966, appeal dismissed 75 N.E.2d 266, 297 N.Y. 594—Gordon v. Pennsylvania R. Co., 55 N.Y.S.2d 42, 269 App.Div. 794—Naylor v. Carey, 293 N.Y.S. 775, 250 App.Div. 792.

Claim in abeyance

For the purpose of application of statute relating to liability of fund for reopened cases, neither administrative distinction between a closed case and one in abeyance that the latter may be restored to active calendar by request of parties while an application to reopen the former is addressed to discretion of workmen's compensation board nor labels on files of board are determinative; and case is "closed" within meaning of statute when it has been referred to abeyance file because no further proceedings are foreseen.

N.Y.—Casey v. Hinkle Iron Works, 87 N.E.2d 419, 299 N.Y. 382.

Continuance

(1) Where more than seven years had elapsed since date of claimant's injury, but there had been numerous hearings before the workmen's compensation board, and case was marked continued at close of such hearings and had never been closed, employer and insurance carrier were not relieved from liability by provision of the compensation law that, after a lapse of seven years from date of injury and after claim has been disallowed or otherwise disposed of without award, an award, if made, shall be against the special fund for reopened cases.

N.Y.—Baker v. Crispell Bros., 87 N.Y.S.2d 193, 275 App.Div. 735.

(2) Where compensation claimant, although represented by an attorney, was himself absent and unable to

attend proceedings for further award from special fund for partial disability, because of his service in army transport services, and claimant's attorney requested an award on basis of proof previously given, but employer and insurance carrier objected on ground that they wished to contest the matter further when claimant was present, and referee stated that case would be closed until claimant requested a hearing, workmen's compensation board properly held that there was no actual closing of case, but rather merely a direction that it be withheld from calendar until claimant was available.

N.Y.—Diskin v. 99 Wall St. Corp., 112 N.Y.S.2d 127, 279 App.Div. 1103.

78. N.Y.—McCann v. Walsh Const. Co., 123 N.Y.S.2d 509, 282 App.Div. 444, affirmed 119 N.E.2d 596, 306 N.Y. 904.

79. N.Y.—Kirilloff v. A. G. W. Wet Wash Laundry, 56 N.E.2d 559, 293 N.Y. 222.

Sayres v. August Feine & Sons Co., 123 N.Y.S.2d 898, 283 App.Div. 547—Neuman v. North River Garnet Co., 4 N.Y.S.2d 204, 254 App. Div. 793, affirmed 18 N.E.2d 321, 279 N.Y. 702.

Payment from special silicosis fund

Payments made from special disability fund to silicosis victim constituted "payment of compensation" so as to relieve special fund for reopened cases from liability on death claim filed within three years after the last of such payments.

N.Y.—Saracino v. Davey & McConnell, Inc., 134 N.Y.S.2d 433, 284 App. Div. 913.

80. N.Y.—Lopa v. Brillo Mfg. Co., 65 N.Y.S.2d 673, 271 App.Div. 846, appeal denied 67 N.Y.S.2d 685, 271 App.Div. 939.

81. N.Y.—Davidson v. Central Greyhound Lines, 110 N.Y.S.2d 748, 279 App.Div. 946.

82. N.Y.—Fuglia v. Sing Sing Prison, 161 N.Y.S.2d 250, 3 A.D.2d 871—Davidson v. Central Greyhound Lines, 110 N.Y.S.2d 748, 279 App. Div. 946.

While the statute has been amended to provide that neither medical treatment nor the supply of equipment shall constitute the payment of compensation,⁸³ it was previously held that the giving of medical treatment⁸⁴ or equipment⁸⁵ constituted the payment of compensation, so as to impose liability on the employer rather than the fund.

The test of whether or not wages paid the claimant constitute the payment of compensation is whether the employer paid for something which he did not get in the way of service.⁸⁶ Wages paid the employee while he is disabled and not working may be regarded as payment of compensation.⁸⁷ Payment of full wages for partial work with the knowledge of and in consideration of a compensable disability constitutes the payment of compensation

within the statute.⁸⁸ The payment of sick benefits as required by the employer's contract with the union is not a payment of compensation within the statute.⁸⁹ Where a claimant is paid his full salary although given lighter work, such payment may be regarded as payment of compensation within the provision.⁹⁰ Similarly, payment of what is designated as a pension may be regarded as payment of compensation within the rule.⁹¹

Under the provision imposing liability on the fund for a reopened case where more than three years have elapsed since the last payment of compensation, the date of the last payment is the date when it was actually made, not the date when it should have been made,⁹² but in the case of a lump-sum or commuted payment, the date of the last payment of

83. N.Y.—Casey v. Hinkle Iron Works, 87 N.E.2d 419, 299 N.Y. 382.

84. N.Y.—Warmack v. Marlin Rockwell Corp., 77 N.Y.S.2d 823, 273 App.Div. 932—Sassano v. City of New York, 70 N.Y.S.2d 39, 272 App.Div. 849—Danaruma v. City of New York, 41 N.Y.S.2d 364, 266 App.Div. 810—Harris v. White, 37 N.Y.S.2d 175, 264 App.Div. 969—Semar v. City of New York, 33 N.Y.S.2d 686, 263 App.Div. 1040, appeal denied 35 N.Y.S.2d 280, 264 App.Div. 744—Nylander v. George L. Hilt Co., 13 N.Y.S.2d 299, 259 App.Div. 766, appeal denied 20 N.Y.S.2d 413, 259 App.Div. 933. Appeal denied, 27 N.E.2d 819, 283 N.Y. 779.

Payment of hospital bill on June 1, 1944, incurred as a result of condition which medical testimony connected with earlier accident, amounted to "payment of compensation" and relieved special fund for reopened cases from liability for further compensation because of injury first received in 1936.

N.Y.—Leland v. Sandersons, Inc., 74 N.Y.S.2d 551, 272 App.Div. 1093.

Provision for medical treatment

Where more than seven years had elapsed after date of injury and more than three years after last payment of compensation was made or medical treatment was furnished additional medical treatment and compensation were not chargeable against the employer on ground that the direction that medical treatment was to be furnished when necessary continued the case indefinitely, but the liability, if any, was chargeable against the fund for reopened cases, if claimant's disability was attributable to the injury.

N.Y.—Becker v. Marcy State Hospital, 33 N.Y.S.2d 219, 264 App.Div. 643.

85. N.Y.—Niker v. McCormick, 73 N.Y.S.2d 793, 273 App.Div. 1037—Romano v. City of New York, 33

N.Y.S.2d 453, 263 App.Div. 1030—Patti v. Knickerbocker Fireproofing Co., 6 N.Y.S.2d 754, 255 App.Div. 732. Appeal denied 7 N.Y.S.2d 1016, 255 App.Div. 901, affirmed 20 N.E.2d 559, 280 N.Y. 609.

Elastic stockings

Where employee was awarded compensation in September 1939 and case was closed, but employer and insurance carrier supplied employee with elastic stockings and replaced them every three months until 1945, on reopening of case in 1946, award was properly made against employer and insurance carrier rather than against special fund for reopened cases.

N.Y.—Niker v. McCormick, 73 N.Y.S.2d 793, 273 App.Div. 1037.

86. N.Y.—Mallardi v. Palumbo Cigar Co., 134 N.Y.S.2d 314, 284 App.Div. 916—Baker v. Standard Rolling Mills, 131 N.Y.S.2d 739, 284 App.Div. 433.

Evidence held insufficient

To show that wages paid constituted payment of compensation.

N.Y.—Buehler v. Service Mach. Works, 134 N.Y.S.2d 413, 284 App.Div. 923—Mallardi v. Palumbo Cigar Co., 134 N.Y.S.2d 314, 284 App.Div. 916—Baker v. Standard Rolling Mills, 131 N.Y.S.2d 739, 284 App.Div. 433.

87. N.Y.—Tum v. Elmira Coca-Cola Bottling Works, 96 N.Y.S.2d 736, 277 App.Div. 800, 814—Pronath v. Bethlehem Steel Co., 31 N.Y.S.2d 798, 275 App.Div. 1011, reargument and appeal denied 33 N.Y.S.2d 531, 276 App.Div. 798—Paul v. National Sav. Bank, 31 N.Y.S.2d 815, 274 App.Div. 865, affirmed 34 N.E.2d 150, 293 N.Y. 347.

Customary payment

Fact that employer paid employee, who remained home because of recurrence of back injury, a week's full salary in accordance with employer's

established custom of paying one week's full salary to all employees absent because of disability, did not justify finding of workmen's compensation board that such payment constituted a payment of compensation by the employer within meaning of section of the workmen's compensation law excusing the special fund for reopened cases from responsibility where compensation payment has been made by employer within three years of reopening of claim.

N.Y.—Murray v. Packard, 156 N.Y.S.2d 409, 2 A.D.2d 907.

88. N.Y.—White v. Marine Trust Co., 119 N.Y.S.2d 650, 281 App.Div. 912.

89. N.Y.—Davidson v. Central Greyhound Lines, 110 N.Y.S.2d 748, 279 App.Div. 946.

90. N.Y.—Sassano v. City of New York, 70 N.Y.S.2d 39, 272 App.Div. 843.

Showing held insufficient

N.Y.—Puglia v. Sing Sing Prison, 161 N.Y.S.2d 250, 3 A.D.2d 871.

91. N.Y.—Hyser v. City of New York, 79 N.Y.S.2d 378, 273 App.Div. 1043—Pollock v. Melville Shoe Corp., 65 N.Y.S.2d 829, 271 App.Div. 846.

Retirement allowance

Payment of annuity portion of retirement allowance by city to an employee who has previously been given a compensation award is not payment of "compensation" within meaning of provision of compensation law that, when an application for additional compensation is made after lapse of seven years from date of injury and three years from date of last payment of compensation, award shall be made against special fund.

N.Y.—Hyser v. City of New York, 79 N.Y.S.2d 378, 273 App.Div. 1043.

92. N.Y.—Kirilloff v. A. G. W. Wet Wash Laundry, 56 N.E.2d 559, 293 N.Y. 222.

compensation is deemed to be the date on which the last payment would have been made had there been installment payments.⁹³ The fact that the full amount of the prior award has not been paid does not prevent the fund from being liable for the award on reopening where the last payment on account of the earlier award was made more than three years prior to the reopening of the case.⁹⁴

Where the statutory time has run since the last payment of compensation and the employee suffers another compensable injury which aggravates the earlier injury, the compensation board may apportion liability between the current employer and the special fund.⁹⁵

§ 838. Enforcement against Estate of Deceased Employer

A compensation award is enforceable against the employer's estate like any other claim.

Esterow v. Schimel, Son & Lustig, 83 N.Y.S.2d 735, 274 App.Div. 325.

93. N.Y.—*Courteau v. Buffalo Flour Mills*, 146 N.Y.S.2d 885, 1 A.D.2d 714—*Sayres v. August Feine & Sons Co.*, 128 N.Y.S.2d 898, 283 App.Div. 547—*Pascucci v. William Kennedy Const. Co.*, 58 N.Y.S.2d 667, 270 App.Div. 88, appeal denied 59 N.Y.S.2d 905, 270 App.Div. 781.

Award paid to aggregate trust fund
A commuted award paid into the aggregate trust fund is essentially the same as a lump-sum payment and the date of the last payment by carrier is the same date on which the fund made the last payment, with respect to question whether a new award should be made against the fund for reopened cases on ground that more than three years have elapsed since last payment of compensation.

N.Y.—*Pascucci v. William Kennedy Const. Co.*, *supra*.

94. N.Y.—*Esterow v. Schimel, Son & Lustig*, 83 N.Y.S.2d 735, 274 App.Div. 325.

Payment made to correct mistake

Payment made by self-insured employer to claimant for sole purpose of correcting mistake made by workmen's compensation board in computing amount due under award constituted a "payment of compensation" within meaning of statute providing for award against special fund for reopened cases on application made after lapse of seven years from date of injury and three years from date of last payment of compensation, and hence special fund would not be liable for any award made on

application to reopen claim made less than three years after such payment. N.Y.—*Adams v. Aluminum Co. of America*, 126 N.Y.S.2d 671, 282 App.Div. 1088.

95. N.Y.—*Richardson v. Marinette Paper Co.*, 77 N.Y.S.2d 919, 273 App.Div. 932.

96. N.J.—*Narozniak v. Perdek*, 162 A. 118, 10 N.J.Misc. 1000.

97. N.J.—*Narozniak v. Perdek*, *supra*.
71 C.J. p 1415 note 15.

98. N.Y.—*In re Consolidated Indemnity & Insurance Co.*, 8 N.Y.S.2d 217, 255 App.Div. 501.

Bachmann v. Clemente Contracting Co., 86 N.Y.S.2d 899, modified on other grounds *Bachmann v. Dirrane*, 88 N.Y.S.2d 285, 275 App.Div. 753.

Tenn.—*Pennington v. Webb-Hammock Coal Co.*, 184 S.W.2d 47, 182 Tenn. 88.

71 C.J. p 1415 notes 16, 18.

"Without limit of amount"

Longshoremen's and Harbor Workers' Compensation Act manifests intent to protect injured workmen by a preference "without limit of amount."

U.S.—*In re Charles Nelson Co.*, D.C. Cal., 29 F.Supp. 56.

Settlement with employer

Where award to widow under compensation law was commuted into a lump-sum award when insurance carrier went into liquidation, carrier's obligation was fixed as of date of liquidation, and widow was entitled to dividends on award until her full claim was paid, even though after date of liquidation she received a

At the death of the employer an employee's claim for compensation under the workmen's compensation act should be presented to the employer's estate for audit and recognition as in any other case of a claim,⁹⁶ and where it is not presented until after the time for the presentation of claims has expired it is barred except as against a surplus remaining after settlement, or unless some estate not accounted for is discovered.⁹⁷

§ 839. Enforcement on Insolvency of Employer or Insurer

A claim for workmen's compensation may be entitled to a preference when the employer or his insurer is insolvent.

By some compensation acts, in case of the insolvency of the employer, the right to compensation and to the payments of compensation awarded is given a preference,⁹⁸ as, for example, that accorded to unpaid wage claims generally⁹⁹ or judgments rendered for claims for taxes.¹ A provision of

settlement from employer as principal debtor, and other compensation creditors had no right in law or in equity to derive benefits for themselves from payments made by employer until widow's entire claim was paid in full.

N.Y.—*In re Consolidated Indemnity & Insurance Co.*, 8 N.Y.S.2d 217, 255 App.Div. 501.

State not guarantor

Workmen's compensation act provides penalties to employer and insurer for violation of certain provisions of act, but state is not a guarantor of protection which act contemplates, and if an employer has not taken out compensation insurance and if he proves not to be financially responsible, law provides no civil recourse to employee other than his right of action against employer.

Kan.—*Matlock v. Hollis*, 109 P.2d 119, 153 Kan. 227, 132 A.L.R. 1316.

99. Tenn.—*Brady v. Reed*, 212 S.W. 2d 378, 186 Tenn. 556—*Pennington v. Webb-Hammock Coal Co.*, 184 S.W.2d 47, 182 Tenn. 88.

71 C.J. p 1415 note 19.

1. U.S.—*Kennison v. Kanzler*, C.C.A. Ohio, 4 F.2d 815.

71 C.J. p 1415 note 20.

Tax claims; tax liens

Fact that judgment of industrial commission against employer was lien on all employer's realty in county in which judgment was docketed did not require that statute giving judgment of industrial commission against employer same preference against assets of employer as claims for taxes be construed to give judgments same priority as tax claims.

the bankruptcy act according workmen a priority for wages does not include a claim for workmen's compensation benefits,² but a claim for workmen's compensation may be accorded priority in bankruptcy proceedings under a provision of the bankruptcy law giving priority where it is provided by state law.³ Where it is provided that the award shall be paid to a special state fund where there is an industrial death, but no one entitled to claim compensation, such fund is entitled to the preference afforded state claims in enforcing such a claim.⁴

Assets transferred in fraud of creditors are subject to a claim for workmen's compensation.⁵

Receivership. Where a claimant obtains a compensation award against an insolvent employer he is entitled to present his claim to the receiver appointed for such employer,⁶ and, if the receiver refuses his claim, he can intervene by leave of the court appointing the receiver, and there procure an adjudication on its validity.⁷ By some compensation acts compensation awards are entitled to priority,⁸ subject to the claims of the United States⁹ and the expenses of the receivership proceeding.¹⁰ When a receiver is conducting the business of the original employer during insolvency, he is bound to continue payments of compensation.¹¹

§ 840. Priorities

A compensation award may have the same priority

status with respect to the employer's assets as a claim for wages.

A compensation award is frequently accorded the same priority status with respect to the employer's assets as is a claim for wages.¹² Where a claim for workmen's compensation is accorded the same status as a claim for wages,¹³ such a claim does not have priority over a mortgage on the employer's property;¹⁴ and this rule has been applied as to a subsequent mortgage, taken in good faith for value without knowledge of the injury to the mortgagor's employee.¹⁵ A judgment in favor of the state fund and against the employer for insurance premiums is not entitled to priority over a prior mortgage on the employer's property.¹⁶

§ 841. Commutation of Award

Under statutes so providing, an award of compensation may be commuted, and the value thereof paid into a state fund. Commutation must be made in the manner provided by the statute.

After an award of compensation has been made it cannot be substantially changed without notice to the parties interested and an opportunity given them to be heard,¹⁷ and after such notice and opportunity to be heard, before a different method of payment can be fixed, the award previously made must either be vacated or modified.¹⁸ Except as the statute contains mandatory provisions for commutation of

to keep statute from being meaningless, since statute gave commission's judgments same preference that tax claims would have against personal property.

Utah.—Local Realty Co. v. Steele, 62 P.2d 558, 90 Utah 468.

2. U.S.—In re Raiken, D.C.N.J., 33 F.Supp. 88.

Effect of state statute

State statute providing that right of workman to compensation shall have same preference against assets of employer as allowed to claim for unpaid wages for labor could not operate to entitle compensation claimant to priority in bankruptcy on theory that his claim was for wages, since state statute could not amend applicable federal statute.

U.S.—In re Raiken, D.C.N.J., 33 F.Supp. 88.

3. U.S.—In re Raiken, supra.

4. N.Y.—In re Lloyds Ins. Co. of America, 22 N.E.2d 330, 281 N.Y. 176.

5. Okl.—Rucks-Brandt Const. Corp. v. Silver, 151 P.2d 899, 194 Okl. 324.

6. U.S.—Bowen v. Hockley, C.C.A. Md., 71 F.2d 781, 94 A.L.R. 856.

Ohio.—State v. Hershner, 161 N.E. 334, 118 Ohio St. 555.

7. Ohio.—State v. Hershner, supra.

8. U.S.—West Virginia Rail Co. v. Jewett Bigelow & Brooks Coal Co., D.C.Ky., 26 F.2d 503.

9. U.S.—West Virginia Rail Co. v. Jewett Bigelow & Brooks Coal Co., supra.

10. W.Va.—West Virginia Rail Co. v. Jewett Bigelow & Brooks Coal Co., supra.

11. U.S.—Bowen v. Hockley, C.C.A. Md., 71 F.2d 781, 94 A.L.R. 856. 71 C.J. p 1416 note 27.

12. Ky.—Adkins v. Carol Mining Co., 136 S.W.2d 32, 281 Ky. 328. 71 C.J. p 1415 note 16.

Priority over lessor

Provision of workmen's compensation act that all rights of compensation granted thereby shall have same preference or priority for whole thereof against employer's assets as law allows for laborers' unpaid wages gives insolvent mineral lessee's injured employee priority of lien against lessee's assets for whole amount of compensation awarded him, not merely part accruing within six months before time for distribution of such assets among lessee's creditors, over lessor's lien for rent-

als and royalties due under coal mining lease.

Ky.—Adkins v. Carol Mining Co., supra.

Compensation awards have priority over compensation claims

Ky.—Adkins v. Carol Mining Co., supra.

13. N.J.—Decorative Utilities Corp. v. National Motors Trucking Corp., 196 A. 381, 123 N.J.Eq. 48.

Tenn.—Francis v. Williams Coal Mining Co., 156 S.W.2d 434, 178 Tenn. 203.

14. La.—Franklin Life Ins. Co. v. Hill, App., 61 So.2d 602.

Tenn.—Pennington v. Webb-Ham-mock Coal Co., 184 S.W.2d 47, 182 Tenn. 33—Francis v. Williams Coal Mining Co., 156 S.W.2d 434, 178 Tenn. 203.

15. Tenn.—McKee v. Dever Bros., 284 S.W.2d 305, 39 Tenn.App. 411.

16. Utah.—Local Realty Co. v. Steele, 62 P.2d 558, 90 Utah 468.

17. N.Y.—Sperduto v. New York City Interborough R. Co., 123 N.E. 207, 228 N.Y. 73.

Brophy v. Prudential Ins. Co. of America, 271 N.Y.S. 819, 241 App. Div. 306.

18. N.Y.—Sperduto v. New York

awards in specified classes of cases,¹⁹ a provision which authorizes the commission to permit or require a self-insurer to pay into the state fund an amount equal to the present value of an award together with an additional sum for payment of the expenses of administering the fund²⁰ does not compel the industrial board to commute awards.²¹ It may in its discretion commute them.²²

It is not the purpose of such provision to destroy the general scheme of the compensation act of establishing periodical payments and to permit the commission in every instance to commute periodical payments into a lump sum payment.²³ Rather it is the purpose to provide for particular and exceptional cases.²⁴ The exception must be in the interest of justice,²⁵ and should not depend on the whim or caprice of claimant or the employer,²⁶ or on an arbitrary ruling of the commission.²⁷ Each case should be considered by itself.²⁸ The commission is not justified in making a sweeping rule ap-

plying to all cases, or to all cases of a certain class.²⁹ It cannot require such a payment without first giving notice to the parties interested and holding a hearing,³⁰ and, after such notice and hearing, either vacating or modifying the award previously made,³¹ which cannot be done by a general resolution.³²

An agreement by the self-insurer as a condition to self-insurance to pay such an award when required does not require him to observe arbitrary and illegal orders of the commission to make such a payment,³³ nor is such an agreement enlarged by a subsequent change in the statute increasing the class of persons for whom awards may be commuted.³⁴ The computation of the amount of a commuted award must be made in accordance with the provisions of the act.³⁵ If the board or commission commutes at all, it has no discretion except to commute on the basis of the tables designated in the statute as the tables by which computations are

City Interborough R. Co., 123 N.E. 207, 226 N.Y. 73.

19. N.Y.—Doyle v. Town of North Hempstead, 97 N.Y.S.2d 115, 277 App.Div. 816—Richter v. Town of Islip-Fire Dept., 92 N.Y.S.2d 844, 276 App.Div. 42, 806—Friedman v. Simon, 45 N.Y.S.2d 89, 267 App.Div. 17, affirmed 56 N.E.2d 732, 293 N.Y. 720.

Injuries warranting commutation

An award for permanent total disability by reason of injuries which resulted in one hundred per cent permanent loss of vision of one eye and eighty per cent permanent loss of vision of other was properly commuted with direction that commuted award be paid into aggregate trust fund, as against contention that statute required loss of a member and not merely loss of use of a member as basis for such commutation. N.Y.—Shaw v. Danforth, 17 N.Y.S.2d 92, 258 App.Div. 1028, reargument denied 18 N.Y.S.2d 748, 259 App.Div. 758, appeal denied 26 N.E.2d 838, 282 N.Y. 810.

20. N.Y.—Pettinelli v. Degnon Contracting Co., 217 N.Y.S. 679, 218 App.Div. 7, 71 C.J. p 1416 note 37.

21. N.Y.—Pettinelli v. Degnon Contracting Co., supra.

22. N.Y.—Pettinelli v. Degnon Contracting Co., supra.

23. N.Y.—Adams v. New York, O. & W. Ry. Co., 161 N.Y.S. 919, 175 App. Div. 714, affirmed 114 N.E. 1046, 220 N.Y. 579.

24. N.Y.—Adams v. New York, O. & W. Ry. Co., supra.

25. N.Y.—Adams v. New York, O. & W. Ry. Co., supra.

26. N.Y.—Adams v. New York, O. & W. Ry. Co., supra.

27. N.Y.—Brophy v. Prudential Ins. Co. of America, 271 N.Y.S. 819, 241 App.Div. 306, 71 C.J. p 1417 note 44.

28. N.Y.—Adams v. New York, O. & W. Ry. Co., 161 N.Y.S. 919, 175 App. Div. 714, affirmed 114 N.E. 1046, 220 N.Y. 579.

29. N.Y.—Adams v. New York, O. & W. Ry. Co., supra.

30. N.Y.—Sperduto v. New York City Interborough Ry. Co., 173 N.Y.S. 834, 186 App.Div. 145, appeal dismissed 123 N.E. 207, 226 N.Y. 73.

31. N.Y.—Sperduto v. New York City Interborough Ry. Co., 123 N.E. 207, 226 N.Y. 73.

32. N.Y.—Sperduto v. New York City Interborough R. Co., 123 N.E. 207, 226 N.Y. 73.

33. N.Y.—Sperduto v. New York City Interborough Ry. Co., 173 N.Y.S. 834, 186 App.Div. 145, appeal dismissed 123 N.E. 207, 226 N.Y. 73.

34. N.Y.—State Industrial Commission v. Yonkers R. Co., 173 N.Y.S. 858, 186 App.Div. 192, 71 C.J. p 1417 note 51.

35. Interest

(1) Where commuted amount of compensation award of death benefits is ordered to be immediately paid into special fund and installments of compensation are not due until future date, amount of interest which would accrue between date of payment and due date of compensation installments should be deducted in computing commuted amount.

N.Y.—Voelker v. Jos. Rosenberg's Sons, 296 N.Y.S. 380, 251 App.Div.

50, affirmed 11 N.E.2d 755, 275 N.Y. 565.

(2) Reviewing court assumed, on appeal from compensation award commuting death benefits and ordering immediate payment of award into special fund, that allowance was made in computation for interest until future date when installments payable by employer would become due, although it did not clearly appear from actuarial statement contained in record that such allowance was made, where elements mentioned by actuary were date when claimant received lump sum settlement, due date of installments, age of claimant, and amount of installments.

N.Y.—Voelker v. Jos. Rosenberg's Sons, supra.

Medical and surgical expenses

Provisions of workmen's compensation law that on payment into aggregate trust fund of an amount equal to present value of all unpaid compensation under award for total permanent disability resulting from certain losses employer or insurance carrier shall be discharged from further liability refer to "periodical payments," which do not include awards for medical and surgical expenses.

N.Y.—Friedman v. Simon, 45 N.Y.S.2d 89, 267 App.Div. 17, affirmed 56 N.E.2d 732, 293 N.Y. 720.

Proof of error

An employer and insurance carrier who assert error in computation of commuted award have burden of establishing affirmative of issue.

N.Y.—Voelker v. Jos. Rosenberg's Sons, 296 N.Y.S. 380, 251 App.Div. 50, affirmed 11 N.E.2d 755, 275 N.Y. 565.

to be made,³⁶ and where a commutation of an award computed on the basis of the tables designated in the statute would be unjust and oppressive in its result, it constitutes an abuse of discretion to do so.³⁷

Award to dependent parents of a deceased employee may be commuted to a lump sum, to be paid to them from the state fund into which the award has been paid by the insurance carrier.³⁸

Under a statute so providing, the commission may require commutation of awards to widows.³⁹ Where the award is made in accordance with the provisions of the law, its status is fixed at the time it was made;⁴⁰ and where granted to the widow of a deceased employee it is unaffected by her subsequent remarriage.⁴¹ A commuted award to a widow and children is a vested right which could not be rescinded or revised after the death of the widow.⁴² There can be no commutation of future payments of an award in favor of persons for whom the statute provides no appropriate table of averages for the ascertainment of probable dependency.⁴³

§ 842. Maturing Periodical Payments on Default

Under many statutes, it is provided in substance that where there is a default in complying with an award calling for periodic or installment payments, all of the payments shall become immediately due and payable.

Under many statutes, it is provided in substance that where there is a default in complying with an award calling for periodic or installment payments, all of the payments shall become immediately due and payable.⁴⁴ Under some statutes, the practice is for claimant to obtain an order finding that the employer or insurer is in default, and thereupon all future installments by operation of law become immediately due and payable.⁴⁵

The purpose of a provision authorizing suit for all unpaid compensation awarded on a failure to pay any part of the award is to secure prompt payment of the award,⁴⁶ and applies where the award calls for payments for an indefinite period of time.⁴⁷ A demand for payment of the installments past due

36. N.Y.—Pettinelli v. Degnon Contracting Co., 217 N.Y.S. 679, 218 App.Div. 7.

71 C.J. p 1417 note 52.

37. N.Y.—Pettinelli v. Degnon Contracting Co., supra.
71 C.J. p 1417 note 53.

38. N.Y.—Pocoroba v. State Insurance Fund, 3 N.Y.S.2d 83, 253 App. Div. 407.

Change of award

N.Y.—Von Borstel v. Central Hudson Gas & Elec. Co., 142 N.Y.S.2d 105, 286 App.Div. 175, reargument and appeal denied 144 N.Y.S.2d 721, 286 App.Div. 977.

Objection to payment

State industrial board has power to order that value of compensation awarded deceased employee's dependent parents be paid them in lump sum by state insurance fund from aggregate trust fund, into which paid by insurance carrier, irrespective of objection to such procedure by insurance fund.

N.Y.—Pocoroba v. State Insurance Fund, 3 N.Y.S.2d 83, 253 App.Div. 407.

39. N.Y.—State Industrial Commission v. Yonkers R. Co., 173 N.Y.S. 558, 186 App.Div. 192.
71 C.J. p 1417 note 54 [c].

Third-party recovery

Where compensation claimant, widow of employee, settled claim against person other than employer for only part of amount of compensation to which she was entitled, industrial board had authority to commute award for remainder of such amount and to order payment of award into special fund.

N.Y.—Voelker v. Jos. Rosenberg's Sons, 296 N.Y.S. 386, 251 App.Div. 50, affirmed 11 N.E.2d 755, 275 N.Y. 565.

40. N.Y.—Marconi v. Marshall, 134 N.Y.S.2d 486, 284 App.Div. 728—Gibson v. Policastro, 6 N.Y.S.2d 818, 255 App.Div. 731.

41. N.Y.—Marconi v. Marshall, 134 N.Y.S.2d 486, 284 App.Div. 728—Gibson v. Policastro, 6 N.Y.S.2d 818, 255 App.Div. 731—Thorgensen v. Movietonews, Inc., 6 N.Y.S.2d 753, 255 App.Div. 728, reargument denied Thorgensen v. Movietonews, Inc., 7 N.Y.S.2d 1013, 255 App.Div. 901, appeal denied, 18 N.E.2d 700, 279 N.Y. 812.

42. N.Y.—Marconi v. Marshall, 134 N.Y.S.2d 486, 284 App.Div. 728—Gonzales v. Allerton Operating Corp., 291 N.Y.S. 327, 249 App.Div. 664.

43. N.Y.—Russell v. 231 Lexington Ave. Corporation, 258 N.Y.S. 392, 236 App.Div. 177.
71 C.J. p 1417 note 54.

44. Fla.—Cohen v. Sloan, 197 So. 342, 143 Fla. 609.

Kan.—Miller v. Massman Const. Co., 237 P.2d 373, 171 Kan. 713.
Okl.—Excise Board of Grady County v. Griggs, 138 P.2d 829, 192 Okl. 636.

71 C.J. p 1418 note 66.

Award for payment of medical expenses

Kan.—Owen v. Ready Made Buildings, Inc., 303 P.2d 267, 181 Kan. 659—Owen v. Ready Made Buildings, Inc., 303 P.2d 168, 180 Kan. 286.

Liberal construction

Workmen's compensation act provision causing entire unpaid balance of entire workmen's compensation award to become due in a lump sum on expiration of two-week period following employee's written demand for compensation theretofore due and unpaid is not to be strictly construed on ground that it is penal in nature, but is remedial in character and intended to supplant existing remedies, and therefore must be liberally construed in favor of claimant with view of effecting purpose of act.

Kan.—Owen v. Ready Made Buildings, Inc., 313 P.2d 267, 181 Kan. 659.

45. Okl.—Rucks-Brandt Const. Corp. v. Silver, 151 P.2d 399, 194 Okl. 324—Excise Board of Grady County v. Griggs, 138 P.2d 829, 192 Okl. 636.

46. Kan.—Owen v. Ready Made Buildings, Inc., 303 P.2d 168, 180 Kan. 286.

Dependents

Phrase, "said employee or other person entitled to said compensation may maintain an action," as used in workmen's compensation statute authorizing action for all unpaid compensation awarded on a failure to pay any part of award of compensation, means that action may be maintained by employee or his dependents who are entitled to compensation.

Kan.—Owen v. Ready Made Buildings, Inc., 303 P.2d 168, 180 Kan. 286.

47. Kan.—Owen v. Ready Made Buildings, Inc., 303 P.2d 168, 180 Kan. 286.

may be a condition precedent to the institution of suit to mature all of the payments.⁴⁸ The action may not be defended on the ground of error in the award.⁴⁹ The issuance of execution to collect the overdue installments is not a waiver of the right to sue to mature all of the payments.⁵⁰

In Louisiana the act provides that in the event the employer shall become insolvent or fail to pay six successive installments as they become due, the installments not yet payable under said judgment shall immediately become due and the judgment shall become executory for the whole amount, except where the employee or his dependent is adequately protected by insurance and receives payments thereunder.⁵¹ This statute provides something in the nature of a penalty or forfeiture⁵² and should be strictly construed.⁵³ The proviso that if the employee or his dependent is adequately protected by insurance and receives payments thereunder this right to have the judgment declared executory for the whole amount shall not accrue, has reference only to the case where the employer becomes insolvent and not to the case of a failure to pay six successive installments as they become due.⁵⁴ The provision for maturing future installments does not apply prior to judgment,⁵⁵ but is applicable to a preliminary or interlocutory compensation decree.⁵⁶ Its purpose is to visit a penalty on the employer who willfully refuses to pay.⁵⁷

The refusal to pay must be willful,⁵⁸ and the bal-

ance of the payments will not be matured when the judgment on the authority of which payment was refused is reversed.⁵⁹ Under the statute an employee not adequately protected by insurance is entitled to a decree maturing all future payments where the employer repudiates the obligation by refusing to pay on demand, although the employee had waived his right to regular weekly payments and payments at the employer's office.⁶⁰ The statute does not apply to a judgment for compensation to be paid in weekly installments during the period of disability where in fact the disability has come to an end.⁶¹

In Texas, when payment of an award is not made within or at the end of the twenty days for giving notice of appeal, the employee or his beneficiary, in the absence of a bona fide appeal or justifiable cause, has a cause of action to mature all future installments on the award.⁶² The proceeding is designed to aid in the enforcement of compensation awards,⁶³ and is analogous to a suit on a judgment of a court of competent jurisdiction.⁶⁴ The employee need not demand payment prior to bringing suit.⁶⁵ It is mandatory on insurer to make the periodical payments in accordance with the award,⁶⁶ prompt payment is required,⁶⁷ and no days of grace beyond the twenty-day period are allowed.⁶⁸ Failure to comply with this obligation, to pay the amount due at once and to make the periodical payments promptly as they mature, constitutes

48. Kan.—Owen v. Ready Made Buildings, Inc., 303 P.2d 168, 180 Kan. 286—Miller v. Massman Const. Co., 237 P.2d 373, 171 Kan. 713—Ellis v. Kroger Grocery & Baking Co., 152 P.2d 860, 159 Kan. 213, 155 A.L.R. 546.

A letter clearly indicating that employee wanted employer to pay past-due compensation installments, although more of a request than a demand, was a sufficient compliance with statute providing for recovery of a lump sum judgment on employer's failure to pay past-due installments on written "demand."

Kan.—Ellis v. Kroger Grocery & Baking Co., 152 P.2d 860, 159 Kan. 213, 155 A.L.R. 546.

49. Kan.—Ellis v. Kroger Grocery & Baking Co., supra.

50. Kan.—Miller v. Massman Const. Co., 237 P.2d 373, 171 Kan. 713.

51. La.—Cranmer v. Fidelity & Casualty Co. of New York, App., 18 So.2d 220.

52. La.—Mason v. Costanza, 117 So.2d 166 La. 323.

53. La.—Dixon v. King, 150 So. 385, 176 La. 1.

54. La.—Dixon v. King, supra.

55. La.—Cranmer v. Fidelity & Casualty Co. of New York, App., 18 So.2d 220—Jackson v. Young, 6 La. App. 854.

56. La.—Hill v. Southern Advance Bag & Paper Co., App., 147 So. 753.

57. La.—Mason v. Costanza, 117 So.2d 166 La. 323.

Hill v. Southern Advance Bag & Paper Co., App., 147 So. 753.

58. La.—Mason v. Costanza, 117 So.2d 166 La. 323.

71 C.J. p 1418 note 63.

59. La.—Crawford v. T. Smith & Son, 162 So. 814, 183 La. 103.

Devolutive appeal

Employee held not entitled to lump sum payment of balance due under compensation award payable in installments because of employer's failure to pay installments due pending employee's appeal in forma pauperis without giving bond from modification of award suspending payments thereon, since appeal without bond was devolutive only, and did not suspend judgment.

La.—Crawford v. T. Smith & Son, 162 So. 814, 183 La. 103.

60. La.—Eisel v. Caddo Transfer & Warehouse Co., 123 So. 496, 38 La. App. 408.

61. La.—Dixon v. King, 150 So. 385, 176 La. 1.

62. Tex.—Southern Underwriters v. Lewis, Civ.App., 150 S.W.2d 162.

71 C.J. p 1418 note 67.

63. Tex.—Texas Employers' Ins. Ass'n v. Neal, Civ.App., 11 S.W.2d 847, error denied 14 S.W.2d 793, 118 Tex. 236.

71 C.J. p 1418 note 68.

64. Tex.—Texas Employers' Ins. Ass'n v. Neal, Civ.App., 11 S.W.2d 847, error denied 14 S.W.2d 793, 118 Tex. 236.

65. Tex.—Texas Employers' Ins. Ass'n v. Harrington, Civ.App., 61 S.W.2d 167.

66. Tex.—Texas Employers' Ins. Ass'n v. Harrington, supra.

67. Tex.—Minor v. London Guarantee & Accident Co., Com.App., 280 S.W. 163.

Texas Employers' Ins. Ass'n v. Harrington, Civ.App., 61 S.W.2d 167.

68. Tex.—Texas Employers' Ins. Ass'n v. Harrington, supra.

prima facie a failure and refusal to abide by the award so as to entitle the employee to bring suit.⁶⁹

Where the default was justified, the payments will not be matured.⁷⁰ Mere neglect is not a showing of justifiable cause.⁷¹ Justifiable excuse for failure or refusal to comply with an award of the board is shown by an order of the board timely obtained, ending or diminishing the payments,⁷² and also, where claimant refuses to accept the compensation.⁷³ Where notice is duly given, and suit filed to set aside the award, a claimant's suit to mature the award is improper and should be stricken on exception;⁷⁴ and such a suit is properly dismissed where the petitioners could have asserted the same rights by cross petition on the insurance carrier's

appeal from the award of the industrial board.⁷⁵

The suit is not precluded by the fact that the award is not for any definite amount or period of time or for total or permanent disability.⁷⁶ The effect of such a suit is to deprive the industrial accident board of further jurisdiction in the matter until the determination of the issues therein involved.⁷⁷ Claimant cannot sue to mature an award which the board had materially changed before suit was filed.⁷⁸

In such proceeding there can be no trial de novo so as in any way to vary or destroy the award.⁷⁹ The proceeding is collateral to the award.⁸⁰ No attack can be made on the award⁸¹ except to show

69. Tex.—Texas Employers' Ins. Ass'n v. Harrington, supra.
71 C.J. p 1419 note 74.

70. U.S.—Western Casualty Co. v. Hunt, C.C.A.Tex., 69 F.2d 129, certiorari dismissed Hunt v. Western Casualty Co., 55 S.Ct. 207, 293 U.S. 530, 79 L.Ed. 639.

Termination of cause

To excuse a workmen's compensation insurer for its failure to comply with award of industrial accident board on ground of "justifiable cause," existence of such cause must have continued to date injured employee filed suit to collect alleged matured award.

Tex.—Southern Underwriters v. Lewis, Civ.App., 150 S.W.2d 162.

Cause not shown

Fact that attorney for employee, who dismissed suit to set aside compensation award against a corporation which was a different and distinct party from insurance carrier, did not notify carrier of dismissal, did not raise issue of justifiable cause for carrier's refusal to comply with award subsequent to dismissal, where there was no agreement requiring attorney to notify carrier, attorneys for carrier defended dismissed suit, and carrier's refusal to comply with award after dismissal was based solely on dismissal.

Tex.—Southern Underwriters v. Lewis, supra.

71. Tex.—Minor v. London Guarantee & Accident Co., Com.App., 280 S.W. 163.

Texas Employers' Ins. Ass'n v. Harrington, Civ.App., 61 S.W.2d 167.

72. Tex.—Marrero v. American Gen. Ins. Co., Civ.App., 255 S.W.2d 373, error refused, Sup., 257 S.W.2d 954.
71 C.J. p 1419 note 76.

73. Tex.—Franco v. Texas Employers' Ins. Ass'n, Civ.App., 29 S.W.2d 902.

71 C.J. p 1419 note 77.

Testimony that tender would have been rejected

Testimony of attorney for employee, who filed suit to set aside compensation award against a corporation which was a different and distinct party from insurance carrier, that if weekly installments awarded by industrial accident board had been tendered he would not have accepted them during pendency of suit, was sufficient to raise issue of justifiable cause for carrier's failure to comply with award during pendency of suit.

Tex.—Southern Underwriters v. Lewis, Civ.App., 150 S.W.2d 162.

74. Tex.—Federal Underwriters Exchange v. Read, 158 S.W.2d 767, 138 Tex. 271.

71 C.J. p 1419 note 78.

Delay in issue of citation

Compensation insurance carrier's failure to secure issuance of citation for three and one half months after filing of petition to set aside compensation award held not failure to "institute and prosecute" suit within twenty day statutory period of limitations so as to entitle claimant to judgment maturing award, words "institute and prosecute" and "bring suit" within statute being synonymous.

Tex.—Traders & General Ins. Co. v. Spillers, Civ.App., 88 S.W.2d 738, error refused.

75. Tex.—Ocean Accident & Guaranty Corporation v. May, Com.App., 15 S.W.2d 594.

Traders & General Ins. Co. v. Spillers, Civ.App., 88 S.W.2d 738, error refused.

76. Tex.—Middlebrook v. Texas Indemnity Ins. Co., Civ.App., 112 S.W.2d 311, error dismissed Texas Indemnity Ins. Co. v. Middlebrook, 114 S.W.2d 226, 131 Tex. 163.

71 C.J. p 1419 note 80.

Words "final order, ruling or decision" in statute authorizing suit to

mature an award in compensation proceeding when board shall make a final order, ruling, or decision means same as "final ruling and decision" in provision for an appeal from a final ruling and decision, and an award which is final as far as taking an appeal therefrom is concerned, is sufficiently final to be the basis of a suit to mature it.

Tex.—Middlebrook v. Texas Indemnity Ins. Co., Civ.App., 112 S.W.2d 311, error dismissed Texas Indemnity Ins. Co. v. Middlebrook, 114 S.W.2d 226, 131 Tex. 163.

Award set aside

Where industrial accident board before expiration of time for appeal from award, and before filing of any suit to set award aside, set aside award on its own motion, such award never became a final order or award such as would sustain action to mature it.

Tex.—Marrero v. American Gen. Ins. Co., Civ.App., 255 S.W.2d 373, error refused, Sup., 257 S.W.2d 954—Bly v. Employers' Liability Assur. Corp., Civ.App., 181 S.W.2d 878, error refused.

77. Tex.—Vestal v. Texas Employers' Ins. Ass'n, Com.App., 285 S.W. 1041.

Indemnity Ins. Co. of North America v. Sparra, Civ.App., 57 S.W.2d 892, 1120.

78. Tex.—Hoyle v. Federal Lloyds of America, Civ.App., 295 S.W. 202.

79. U.S.—Wilson v. Associated Indemnity Corporation, C.C.A.Tex., 74 F.2d 896, certiorari denied Associated Indemnity Corporation v. Wilson, 56 S.Ct. 90, 296 U.S. 580, 80 L.Ed. 410.

71 C.J. p 1419 note 83.

80. Tex.—Texas Employers' Ins. Ass'n v. Neal, Civ.App., 11 S.W.2d 847, error denied 14 S.W.2d 793, 118 Tex. 236.

81. Tex.—Texas Employers' Ins. Ass'n v. Neal, supra.

that the same was void for want of jurisdiction.⁸² Neither party may impeach any recital in the award⁸³ and the court is without power to review, set aside, or revise the award of the board, or otherwise take cognizance of the original controversy between the parties.⁸⁴ The court does, however, have power to render a judgment pursuant to agreement of the parties even though it may differ from the award.⁸⁵

The measure of relief to be given in the proceeding is fixed by the terms of the statute.⁸⁶ A successful plaintiff is entitled to a judgment maturing the entire claim so as to collect the full amount thereof, that is, the aggregate of the weekly or monthly payments, together with twelve per cent penalties and a reasonable attorney's fee for the prosecution and collection of the claim.⁸⁷ A discount on future installments matured by the judgment is not required.⁸⁸

The action may be filed in the county of claimant's or beneficiary's residence as well as in the county where the accident occurred,⁸⁹ and it is not essential to the statement of a cause of action that the petition contain the jurisdictional allegations as to venue.⁹⁰

§ 843. Action by State against Noncomplying Employer

Under some statutes, the award is enforced against a noncomplying employer by the state.

Under some statutes a suit is to be brought by the attorney general in the name of the state for the benefit of the state insurance fund against noncomplying employers on their failure to pay an award⁹¹ and employees of employers who have failed to comply with the workmen's compensation law, are protected and compensated by payment out of the surplus insurance fund.⁹² Where the employer pays the award, the action cannot be maintained by the state.⁹³

When the statute so provides the payment of a judgment against the employer entitles claimant to compensation,⁹⁴ but the recovery of a judgment against the employer is not necessary before claimant of the award becomes entitled to payment out of the surplus fund.⁹⁵ The nonpayment of the judgment or a certificate that the award cannot be collected may equally entitle claimant to compensation.⁹⁶ In the event the attorney general fails to certify that the award cannot be collected within the legal time limit, his failure does not deprive the injured workman of his just right to compensation.⁹⁷

82. Tex.—Texas Employers' Ins. Ass'n v. Neal, supra.

83. Tex.—Texas Employers' Ins. Ass'n v. Neal, supra.
71 C.J. p 1419 note 87.

84. Tex.—Texas Employers' Ins. Ass'n v. Neal, supra.
71 C.J. p 1419 note 88.

85. Tex.—Texas Employers' Ins. Ass'n v. Ezell, Com.App., 14 S.W.2d 1018, rehearing denied 16 S.W.2d 523.
71 C.J. p 1419 note 89.

86. Tex.—Vestal v. Texas Employers' Ins. Ass'n, Com.App., 285 S.W. 1041.

87. Tex.—Vestal v. Texas Employers' Ins. Ass'n, supra.

88. Tex.—Texas Employers' Ins. Ass'n v. Harrington, Civ.App., 61 S.W.2d 167.

89. U.S.—Wilson v. Associated Indemnity Corporation, C.C.A.Tex., 74 F.2d 896, certiorari denied Associated Indemnity Corporation v. Wilson, 56 S.Ct. 90, 296 U.S. 530, 30 L.Ed. 410.
71 C.J. p 1420 note 84.

90. Tex.—Indemnity Ins. Co. of North America v. Sparra, Civ.App., 57 S.W.2d 892, 1120.
71 C.J. p 1420 note 95.

91. Ohio.—State ex rel. Bricker v. Ruff, 5 Ohio Supp. 418.

Purpose of statute

Statute permitting injured employee, whose employer does not carry required workmen's compensation insurance, to obtain award from workmen's compensation bureau and permitting bureau to bring action against employer to enforce payment of award was intended to impose liability on uninsured employers for injuries to their employees and to protect workmen's compensation fund.

N.D.—State for Benefit of North Dakota Workmen's Compensation Bureau v. Broadway Inv. Co., 85 N.W.2d 251.

Assistance by claimant's counsel

In state's action under compensation act in behalf of employee's widow against employer who failed to comply with act, permitting widow's attorney to assist attorney general in trying case, interview witnesses, and go in and out of courtroom, held not abuse of discretion, especially where matter was not seasonably brought to judge's attention.

Ohio.—Schomer v. State ex rel. Bettman, 190 N.E. 638, 47 Ohio App. 84.

"Cost of the claim to the industrial accident fund" within statute providing for industrial accident commis-

sion's recovery of claim for such cost from employer, not filing notice of engaging in hazardous occupation before injury to workman filing claim for compensation, is not amount transferred by state treasurer from such fund to segregated accident fund for payment of compensation installments; such transfer amounting to nothing more than setting up of reserve to meet contingent liability.

Or.—Bell v. State Industrial Accident Commission, 74 P.2d 55, 157 Or. 653.

92. Ohio.—State v. Industrial Commission of Ohio, 171 N.E. 405, 122 Ohio St. 328.
71 C.J. p 1420 note 97.

93. Ohio.—State ex rel. Bricker v. Ruff, 5 Ohio Supp. 418.

94. Ohio.—State v. Industrial Commission of Ohio, 170 N.E. 644, 122 Ohio St. 65.

95. Ohio.—State v. Industrial Commission of Ohio, supra.

96. Ohio.—State v. Industrial Commission of Ohio, supra.

97. Ohio.—State v. Industrial Commission of Ohio, supra.
71 C.J. p 1420 note 97.

The duty of determining who was the employer not complying with the workmen's compensation act rests on the state,⁹⁸ and if the state fails to collect premiums from, or fails to fix liability on, the real employer, such failure does not deprive the injured employee from obtaining his award from the surplus fund.⁹⁹

Under the rule in one jurisdiction, in the action by the attorney general, the employer is entitled to a trial by jury¹ and to challenge the correctness of the award in all respects save the amount of compensation.² The burden of proof as to all issues remains on the state throughout the case,³ but the introduction of the proceedings before the compensation board establishes a prima facie case and creates a rebuttable presumption of the facts therein found.⁴ As in ordinary civil cases, disputed questions of fact are to be submitted to the jury.⁵ Where a motion is made for a directed verdict at the conclusion of the state's case in its action against an employer to collect a compensation

award, the testimony and all reasonable inferences therefrom must be given the most reasonable and favorable interpretation to the state.⁶

Under another view, while it must be proved that the employer and the employee were covered by the statute, and that an award has been made and paid,⁷ the merits of the award need not be proved and are not open to examination.⁸

§ 844. Action on Award

In some jurisdictions, an action may be maintained on a compensation award.

An employer not complying with a workman's compensation award may under some statutes be sued on the award in a proper court.⁹ Such an action has been held to be in derogation of the common law,¹⁰ and a special proceeding,¹¹ the statutory provisions being mandatory and exclusive,¹² and the rights and remedies to be enforced being statutory.¹³ Jurisdictional matters must be alleged and proved;¹⁴ there can be no presumption of ju-

98. Ohio.—State v. Industrial Commission of Ohio, 166 N.E. 806, 121 Ohio St. 17.
71 C.J. p 1420 note 8.

99. Ohio.—State v. Industrial Commission, 168 N.E. 840, 121 Ohio St. 338.—State v. Industrial Commission of Ohio, 166 N.E. 806, 121 Ohio St. 17.
71 C.J. p 1420 note 4.

1. Ohio.—Fassig v. State, 118 N.E. 104, 95 Ohio St. 232.
71 C.J. p 1422 note 35.

2. Ohio.—State ex rel. Herbert v. Hoff, 42 N.E.2d 990, 140 Ohio St. 236.

State ex rel. O'Neill v. Troy Sunshade Co., 131 N.E.2d 837, 99 Ohio App. 115.—State v. James R. Clow & Sons Co., 173 N.E. 14, 36 Ohio App. 156.
71 C.J. p 1420 note 6.

Violation of safety requirements

Where industrial commission finds that employee's injury resulted from his employer's violation of specific safety requirement, and accordingly makes additional award against employer, commission has sole and exclusive right to determine whether failure to comply with such requirement caused injury of which employee complains, but question whether requirement is specific is one of law and not of fact alone, and if it is denied that there is specific requirement, this issue may properly be determined on appeal in action instituted by attorney general to recover additional award of commission.

Ohio.—State ex rel. O'Neill v. Troy Sunshade Co., 131 N.E.2d 837, 99 Ohio App. 115.

3. Ohio.—State v. Russo, 98 N.E.2d 830, 155 Ohio St. 841.—State ex rel. Herbert v. Hoff, 42 N.E.2d 990, 140 Ohio St. 236.

State v. Liff, 87 N.E.2d 917, 86 Ohio App. 396.

4. Ohio.—State ex rel. Herbert v. Hoff, 42 N.E.2d 990, 140 Ohio St. 236.—Pittsburgh Coal Co. v. Industrial Commission, 140 N.E. 684, 108 Ohio St. 185.—Fassig v. State ex rel. Turner, 116 N.E. 104, 95 Ohio St. 232.

5. Ohio.—State v. Liff, 87 N.E.2d 917, 86 Ohio App. 396.—State ex rel. Herbert v. Whims, 38 N.E.2d 596, 68 Ohio App. 39, appeal dismissed 38 N.E.2d 600, 139 Ohio St. 137.—Schomer v. State ex rel. Bettman, 190 N.E. 638, 47 Ohio App. 84.

6. Ohio.—State v. James R. Clow & Sons Co., 173 N.E. 14, 36 Ohio App. 156.

7. Or.—State Industrial Accident Commission v. Goode, 106 P.2d 296, 165 Or. 237.

8. Or.—State Industrial Accident Commission v. Goode, supra.

9. U.S.—Fresquez v. Farnsworth & Chambers Co., C.A.N.M., 238 F.2d 709.

Ky.—Stearns Coal & Lumber Co. v. Whalen, 98 S.W.2d 499, 266 Ky. 227.
Mo.—Spradling v. Wackman Welded Ware Co., 265 S.W.2d 290, 239 Mo. App. 1195.

N.J.—Goldmann v. Johanna Farms, Inc., 98 A.2d 142, 28 N.J. Super. 580.
71 C.J. p 1420 note 7.

Award is not a judgment, but may be enforced by suit as a statutory specialty.

Md.—Dyson v. Pen Mar Co., 73 A.2d 4, 195 Md. 107.

Provision for execution

Under statute providing that if no appeal from a compensation award is taken it shall be final and may be enforced in same manner as a judgment of superior court, and authorizing superior court to issue execution on any uncontested or final award of a commissioner in same manner as in cases of judgments rendered in that court, issuance of execution is not an exclusive method of enforcement, but resort may be had to the ordinary action on a judgment.
Conn.—McIntyre v. Standard Oil Co. of New York, 12 A.2d 544, 126 Conn. 491.

Minor procedural defects

Fact that employee's petition for order to show cause, in summary proceeding to enforce claim for workmen's compensation against insurer, was signed by attorney rather than by employee and that affidavit was served on insurer improperly, would not defeat recovery where insurer's substantial rights were not injured by such deviations.

N.J.—Goldmann v. Lumber Mut. Cas. Ins. Co. of N. Y., 104 A.2d 334, 30 N.J. Super. 281.

10. Tex.—Mingus v. Wadley, 235 S.W. 1064, 115 Tex. 551.

11. Tex.—Mingus v. Wadley, supra.

12. Tex.—Mingus v. Wadley, supra.

13. Tex.—Mingus v. Wadley, supra.

14. Alaska.—Hansen v. American Legion Post No. 11, 13 Alaska 432.
71 C.J. p 1420 note 14.

isdiction.¹⁵

Before suit can be instituted there must be a final award,¹⁶ which must be active and vital,¹⁷ and not suspended as by an appeal or suit to set it aside.¹⁸ The right to sue matures on the failure or refusal of the employer to pay the compensation awarded when due.¹⁹ The proceeding must be instituted within the time limited.²⁰ The running of limitations on the time to institute suit is suspended during the period of an injunction proceeding directed at the enforcement of the award.²¹

Claimant is entitled to recover the amount allowed in the award.²² His recovery, however, must be according to the terms of the award,²³ and where the award allows weekly sums he is not entitled to judgment for the total amount of all the weekly payments in a lump sum, but only for the aggregate weekly stipend to the date of trial,²⁴ and as to the remaining weeks for which he is entitled to recover, judgment should be rendered for such amounts payable weekly.²⁵ Only one cause of action is stated in an action on a compensation award although the award itself is made up of different items of award.²⁶ The failure of a statute making provision for the filing of an award in a designated court and the entering of judgment thereon to provide for an "award unappealed from" in cases in which the accident occurred outside the state does not pre-

vent its enforcement;²⁷ it may be enforced in an ordinary action at law.²⁸

Parties. Both the employer and his insurer are proper parties to a proceeding to enforce the award.²⁹

Venue. Venue provisions with respect to actions on awards for workmen's compensation are mandatory and jurisdictional³⁰ and no court, although otherwise competent, has jurisdiction except one within the territorial limits designated by the statute.³¹ An action to enforce a compensation award may be brought in the county where claimant resides and not in the county where the accident occurred.³²

Defenses. In some jurisdictions in an action by the compensation commission to recover the amount of the award made by it the only question to be considered by the trial court in the absence of fraud is whether or not the commission had jurisdiction in the premises.³³ However, the jurisdiction of the compensation board to make the award is open to consideration,³⁴ as is the question of limitations.³⁵ Where the action is on an award against a noncomplying employer, he may assert as a defense to the action any fact tending to show that the alleged injuries were not subject to the act and hence not within the compensation bureau's jurisdiction.³⁶

Verification of complaint

Alaska.—Hansen v. American Legion Post No. 11, *supra*.

15. Tex.—Mingus v. Wadley, 285 S. W. 1084, 115 Tex. 551.

16. Tex.—Mingus v. Wadley, *supra*. 71 C.J. p 1421 note 14.

Temporary award

Where there is an award for temporary disability and a provision that payments shall cease when disability ends, and there is dispute as to whether or not disability has ended, court did not err in refusing to enforce award, and in referring matter back to compensation commissioner. N.H.—Cassidy v. Fellows & Sons Inc., 102 A.2d 499, 98 N.H. 441.

17. Tex.—Mingus v. Wadley, 285 S. W. 1084, 115 Tex. 551.

18. Tex.—Mingus v. Wadley, *supra*.

19. N.M.—State ex rel. Mountain States Mut. Cas. Co. v. Swope, 278 P.2d 750, 58 N.M. 553.

Threat to discontinue payments

N.M.—State ex rel. Mountain States Mut. Cas. Co. v. Swope, *supra*.

20. D.C.—Cassell v. Taylor, 243 F.2d 259, 160 U.S.App.D.C. 153.

Mich.—Ardelean v. Ford Motor Co., 261 N.W. 267, 272 Mich. 117.

21. Okl.—Bucke-Brandt Const. Corp. v. Silver, 151 P.2d 399, 104 Okl. 324.

22. Ga.—Savannah Lumber Co. v. Burch, 142 S.E. 83, 165 Ga. 706.

Pa.—Schach v. Hazle Brook Coal Co., 38 A.2d 423, 155 Pa.Super. 242.

71 C.J. p 1421 note 17.

23. Tex.—U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parsons, Civ.App., 226 S.W. 418.

71 C.J. p 1421 note 18.

24. Tex.—Southwestern Surety Ins. Co. v. Curtis, Civ.App., 200 S.W. 1162.

71 C.J. p 1421 note 19.

25. Tex.—U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parsons, Civ.App., 226 S.W. 418.

71 C.J. p 1421 note 20.

26. Okl.—Robinson v. State, 244 P. 44, 116 Okl. 131.

27. Mo.—State ex rel. Brewen-Clark Syrup Co. v. Missouri Workmen's Compensation Commission, 8 S.W. 2d 897, 320 Mo. 898.

71 C.J. p 1421 note 23.

28. Mo.—State ex rel. Brewen-Clark Syrup Co. v. Missouri Workmen's Compensation Commission, 8 S.W. 2d 897, 320 Mo. 898.

29. N.J.—Romano v. Di Donato, 25 A.2d 883, 128 N.J.Law 325.

30. Tex.—Mingus v. Wadley, 285 S. W. 1084, 115 Tex. 551.

31. Tex.—Mingus v. Wadley, *supra*.

32. N.J.—Weir v. New Amsterdam Casualty Co., 24 A.2d 562, 128 N. J.Law 214, affirmed 28 A.2d 126, 129 N.J.Law 102.

33. Okl.—Board of Com'rs of Okmulgee County v. State, 201 P. 998, 83 Okl. 48.

Matters open for consideration in action by state against noncomplying employer see *supra* § 843.

Contempt proceedings

In proceedings on petition under workmen's compensation act to have employer adjudged in contempt for willful failure or neglect to obey provisions of decree awarding employee compensation for partial incapacity, it was no part of duty of court, and it was without authority to revise and correct an alleged error in decree which petition sought to enforce.

R.I.—Plouffe v. Taft-Peirce Mfg. Co., 97 A.2d 439, 80 R.I. 397.

34. Ark.—Sessing v. Great Western Coal Co., 120 S.W.2d 361, 196 Ark. 889.

35. Mich.—Hurst v. Ford Motor Co., 267 N.W. 573, 276 Mich. 105.

Weaver v. Antrim Iron Co., 266 N. W. 445, 274 Mich. 498.

N.J.—Dalton v. R. B. Davis Co., 128 A. 785, 15 N.J.Law 187.

36. N.D.—State v. Wadland, *supra*.

Where it is sought to enforce the award against insurer, the question of whether or not the award is within the coverage of the policy is open for consideration,³⁷ unless insurer was a party to the proceedings which culminated in the award.³⁸ Pleas of accord and satisfaction and *res judicata* in a suit to enforce an award of the industrial accident board are properly sustained, when the record discloses full payment of the amount awarded in a lump sum.³⁹

Demurrer. Where the complaint states a good cause of action a demurrer thereto will be overruled.⁴⁰ As is the case generally, a demurrer to a pleading admits the facts stated therein,⁴¹ and where claimant contends that the factual issues raised by defendant's pleading are for the determination of the compensation commission, such contention cannot be presented by way of a demurrer.⁴²

Evidence. In an action on a workmen's compensation award, evidence as to defendant's liability under the act is irrelevant.⁴³

Questions of law and fact. In an action to recover compensation awarded by the commission under the compensation act, the determination of facts alleged to deprive the commission of jurisdiction in the matter is for the jury,⁴⁴ as is also the determination of the question of whether the injury to the employee was sustained outside the scope of his employment⁴⁵ or was caused by a willful intention of the employee to injure himself or another.⁴⁶ Where, under the workmen's compensation act, the board makes findings, conclusions, and an award based thereon, and finds that the employer did not have its employees insured although the undisputed facts show that a policy had been issued and not canceled in accordance with its terms, the question of whether the employer has insurance is one of law.⁴⁷

Merger of award in judgment. An award under the workmen's compensation act when filed in a court and judgment entered thereon loses its actionable character as a claim or award as it becomes merged in the judgment.⁴⁸ Thereafter there can be no action based on the award⁴⁹ nor can the award be paid, as it no longer exists.⁵⁰ Satisfaction can only be had by payment of the judgment⁵¹ and an action to recover the amount of the award must be on the judgment and not on the award.⁵²

Action by employer against insurer. In an action by the employer against insurer to enforce an award by the industrial accident board to the employer as reimbursement for payments made by the employer for hospital, medical, and nurses expenses for the injured employee, the court may grant judgment for the amount of the award together with a penalty and attorney's fees.⁵³ Where the board, in its award of compensation to claimant, provides for the payment out of the compensation awarded of expenses incurred by the employer, the employer has no cause of action for such expenses where an appeal from the award to claimant is pending, even though the employer was not joined in the appeal.⁵⁴ The employer may review, by *certiorari*, a judgment enforcing an award against him, but relieving insurer of liability.⁵⁵

§ 845. Judgment on Award

In some jurisdictions, provision is made for the entry of a judgment on a compensation award.

In some jurisdictions provision is made by the workmen's compensation act therein for a transmission of an award of the board for compensation and all papers in connection therewith to a designated court which is required to render a judgment in accordance therewith.⁵⁶ Ordinarily, such pro-

W. 680, 51 N.D. 710, 39 A.L.R. 1169.

71 C.J. p 1421 note 29.

37. N.J.—*Raab v. American Cas. Co.*, 72 A.2d 848, 4 N.J. 308.

Belanowitz v. Travelers Ins. Co., 15 A.2d 745, 125 N.J.Law 301.

38. N.J.—*Goldmann v. Lumber Mut. Cas. Ins. Co. of N. Y.*, 104 A.2d 324, 30 N.J.Super. 281.

39. Tex.—*Keller v. Texas Employers' Ass'n*, Civ.App., 279 S.W. 1113.

40. Kan.—*Babcock v. Dose*, 293 P. 2d 1007, 179 Kan. 298, 71 C.J. p 1421 note 31.

41. Ky.—*Black Mountain Corp. v. Mullins*, 194 S.W.2d 528, 303 Ky. 294.

42. Ky.—*Black Mountain Corp. v. Mullins*, supra.

43. Ill.—See *Ryan v. Chicago Foundry Co.*, 200 Ill.App. 45.

44. Md.—*Taylor v. Robert Ramsay Co.*, 114 A. 830, 139 Md. 113, 71 C.J. p 1422 note 37.

45. N.D.—*State v. Hought*, 219 N.W. 213, 56 N.D. 663, 58 A.L.R. 186, 71 C.J. p 1422 note 38.

46. N.D.—*State v. Hought*, supra, 71 C.J. p 1422 note 39.

47. Idaho.—*Hauter v. Cœur D'Alene Antimony Mining Co.*, 228 P. 259, 39 Idaho 621.

48. Cal.—*Richey v. Ziegler*, 264 P. 293, 89 C.A. 85.

49. Cal.—*Richey v. Ziegler*, supra.

50. Cal.—*Richey v. Ziegler*, supra.

51. Cal.—*Richey v. Ziegler*, supra.

52. Cal.—*Richey v. Ziegler*, supra.

53. Tex.—*Security Union Casualty Co. v. Peer Oil Corporation*, Civ. App., 1 S.W.2d 1109.

Right to attorney's fees in proceeding by claimant to secure workmen's compensation see supra § 817.

54. Tex.—*Security Union Casualty Co. v. Peer Oil Corporation*, Civ. App., 1 S.W.2d 1112.

71 C.J. p 1422 note 47.

55. N.J.—*Romano v. Di Donato*, 25 A.2d 883, 128 N.J.Law 325.

56. Ky.—*Stearns Coal & Lumber Co. v. Duncan*, 213 S.W.2d 436, 271 Ky. 300.

visions apply to awards of the commission which have been previously affirmed on appeal, final awards of the commission which have not been appealed from, and agreements between the parties which have been approved by the commission.⁵⁷ In some jurisdictions if the compensation is insured no judgment can be rendered or execution issued thereon except upon application to the court and for good cause shown.⁵⁸ A proceeding for judgment under these provisions resembles a motion under the statute on a forthcoming or delivery bond.⁵⁹ It is not a separate suit, but merely a continuation of the proceeding instituted before the commission,⁶⁰ and constitutes merely a method adopted for the enforcement of such awards, in lieu of machinery of enforcement which might have been provided for and given to the commission itself, to exercise through executive officers appointed for that purpose,⁶¹ that is, by execution of fieri facias or any other appropriate process for enforcing a judgment.⁶² There is neither necessity nor reason for such a proceeding unless the employer or

his insurer fail to pay the amounts awarded claimants.⁶³ A judgment on an award of the compensation board is a judgment for compensation, not a judgment for damages.⁶⁴

Statutes authorizing such procedure have been held mandatory,⁶⁵ and it has been said that the court has no discretion in the matter,⁶⁶ that in entering judgment on the award it exercises a ministerial function,⁶⁷ and, if it refuses to render the judgment required, can be compelled to do so by mandamus.⁶⁸ However there is authority which holds that the rendition of a judgment on an award is not a perfunctory duty or an empty formality, but is a judicial act.⁶⁹ Thus, although on the filing of a certified copy of the award, the court should cause it to be spread of record⁷⁰ and then enter a judgment thereon,⁷¹ the entry of judgment must necessarily be predicated on jurisdiction of the subject matter and the parties,⁷² which jurisdiction is not presumed.⁷³ The record must show on its face that the case is one in which the court has authority to

Me.—Middleton's Case, 3 A.2d 434, 136 Me. 108.

Minn.—Connors v. United Metal Products Co., 296 N.W. 21, 209 Minn. 300.

Pa.—Beckley v. Speck, Com.Pl., 27 West.L.J. 127.

Vacation or term time

Statute providing that judge of each circuit court other than those of continuous session may make or direct in vacation or term time any judgment in any proceeding, except where trial by jury is called for or ordered, covers any action of which circuit court has jurisdiction, including a special proceeding under the compensation act for judgment enforcing an award.

Ky.—Stearns Coal & Lumber Co. v. Roberts, 168 S.W.2d 573, 293 Ky. 75.

Stay

(1) Superior court has no jurisdiction to stay entry of judgment on industrial accident commission award.

Cal.—Greitz v. Sivachenko, 313 P.2d 922, 152 C.A.2d 849.

(2) Under statute providing that petition for reconsideration of industrial accident award stays award for ten days, one who failed to seek a stay order from commission until action on petition could not complain of entry of judgment on day following expiration of ten-day statutory stay notwithstanding fact that petition for reconsideration was not denied until thirteen days thereafter.

Cal.—Greitz v. Sivachenko, *supra*.

57. Idaho.—Ybaibarriaga v. Farmer, 228 P. 227, 39 Idaho 361.

71 C.J. p 1422 note 49.

Award must be final

Procedure of statute permitting claimant to file in circuit court a certified copy of award of workmen's compensation board and move court to render judgment in accordance with award is permissible only where award of board has become final.

Ky.—Owensboro Wagon Co. v. Adams, 217 S.W.2d 637, 309 Ky. 302.

58. Ga.—Camp v. U. S. Fidelity & Guaranty Co., 157 S.E. 209, 42 Ga. App. 653.

59. Va.—Richmond Cedar Works v. Harper, 106 S.E. 516, 129 Va. 481.

60. Ga.—Durham Iron Co. v. Durham, 7 S.E.2d 804, 62 Ga. App. 361.
—Camp v. U. S. Fidelity & Guaranty Co., 157 S.E. 209, 42 Ga. App. 653.

61. Cal.—Vickich v. Superior Court of Los Angeles County, 288 P. 127, 105 C.A. 587.

62. Va.—Richmond Cedar Works v. Harper, 106 S.E. 516, 129 Va. 481.

63. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637—Richmond Cedar Works v. Harper, 106 S.E. 516, 129 Va. 481.

64. Ind.—Kühr v. Willan, 169 N.E. 475, 90 Ind. App. 567.

65. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637—Richmond Cedar Works v. Harper, 106 S.E. 516, 129 Va. 481.

66. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637—Richmond Cedar

Works v. Harper, 106 S.E. 516, 129 Va. 481.

67. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637—Richmond Cedar Works v. Harper, 106 S.E. 516, 129 Va. 481.

Clerk acts as agent of board

Proceeding for entry of judgment on industrial accident commission award is plenary, on filing certified copy of award, clerk must enter judgment and clerk, in entering judgment, and sheriff, in levying execution, act as instrumentalities of commission and not of court which has no jurisdiction to stay or modify any proceedings under award, and employer is entitled to no notice of intention to seek judgment.

Cal.—Greitz v. Sivachenko, 313 P.2d 922, 152 C.A.2d 849.

68. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637—Richmond Cedar Works v. Harper, 106 S.E. 516, 129 Va. 481.

69. Ill.—Fico v. Industrial Commission, 136 N.E. 605, 353 Ill. 74.
Mass.—In re Employers' Liability Assur. Corporation, 103 N.E. 697, 215 Mass. 497, L.R.A.1916A 306.

70. Ind.—Kühr v. Willan, 169 N.E. 475, 90 Ind. App. 567.

71. Ind.—State v. Scott Circuit Court, 181 N.E. 523, 203 Ind. 572, 71 C.J. p 1423 note 62.

72. Ala.—Fico v. Industrial Commission, 136 N.E. 605, 353 Ala. 74, 71 C.J. p 1423 note 63.

73. Ala.—Fico v. Industrial Commission, *supra*.

act.⁷⁴ However, if the award is void for any reason not appearing on its face the question can and must be raised when claimant undertakes to enforce the judgment.⁷⁵ A mistake in venue by the commission will not prevent entry of judgment on the award.⁷⁶ Although the act may require only the presentation to the superior court of certified copies of an order or decision of the industrial accident board, it is not improper that a petition be filed setting forth briefly the nature of the questions to be decided.⁷⁷

Notice. In the absence of statutory provision directing otherwise, notice is not required of the filing and docketing of the award in the particular court.⁷⁸ On the other hand, it has been held that for a judgment enforcing an award of compensation to be immune from attack, the employer must be notified of the application for judgment and be given an opportunity to defend.⁷⁹

Time for entering judgment. It is not required that judgment on the award be entered within the time limit provided for the right to review the action of the commission in making the award.⁸⁰

Judgment roll. The certified copy of the findings and award and a copy of the judgment constitute the judgment roll.⁸¹

What constitutes judgment. The rendition of a judgment by the court in accordance with the award,

or its refusal to enter such confirmation because no jurisdiction appears to sustain the award, is, in either event, a judgment.⁸²

Matters open for consideration on application. No general jurisdiction is given the court to determine any question of fact or law necessary to support the award as rendered by the board or commission in the first instance;⁸³ at the time application is made to enter judgment on the record the rights of claimant have been established.⁸⁴ The court must render judgment in accordance with the award;⁸⁵ it has no power to change the award,⁸⁶ it cannot review, or reverse or modify the award,⁸⁷ or construe the statute.⁸⁸ In rendering judgment thereon the court can construe the award.⁸⁹ An employee seeking judgment on an award may attack a receipt reciting that he had received the total amount of the award.⁹⁰

Parties. Claimant is entitled to judgment against the employer, even though insurer is solvent.⁹¹ The court must determine whether applicant to have judgment entered on the award is a proper party.⁹² Under some acts the person in whose favor judgment on the award is entered may be different from the one named in the award.⁹³ The court does not, however, have authority or power to enter judgment against one not named in the award.⁹⁴ On motion for judgment on the award, the legal status of the adverse party cannot be questioned.⁹⁵

74. Ala.—Fico v. Industrial Commission, supra.

Ill.—McMurray v. Peabody Coal Co., 118 N.E. 29, 281 Ill. 218.

71 C.J. p 1423 note 65.

75. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637.

71 C.J. p 1423 note 66.

76. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637.

71 C.J. p 1423 note 67.

77. Mass.—In re American Mut. Liability Ins. Co., 102 N.E. 693, 215 Mass. 480, Ann.Cas.1914D 372.

78. N.J.—Heldrich v. American Incubator Mfg. Co., 141 A. 770, 6 N.J. Misc. 526, 104 N.J.Law 492.

79. Ky.—W. M. Ritter Lumber Co. v. Begley, 156 S.W.2d 501, 288 Ky. 481.

80. Wis.—Rosandich v. Chicago, N. S. & M. R. Co., 201 N.W. 391, 185 Wis. 184.

81. Cal.—Vickich v. Superior Court of Los Angeles County, 288 P. 127, 105 C.A. 527.

82. Ill.—Fico v. Industrial Commission, 186 N.E. 695, 358 Ill. 74.

83. Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639.

84. Ky.—Angel v. Brown, 230 S.W. 2d 623, 313 Ky. 135.

85. Mo.—Moot question. Fact that employee was assured of collecting his workmen's compensation award by virtue of judgment against insurance carrier did not render moot question whether employee was entitled to have judgment go against all who were liable on award, as additional security.

86. Ky.—Angel v. Brown, supra.

87. Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639.

88. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637.

89. Ky.—Angel v. Brown, 230 S.W. 2d 623, 313 Ky. 135.

90. Mo.—Moot question. Fact that employee was assured of collecting his workmen's compensation award by virtue of judgment against insurance carrier did not render moot question whether employee was entitled to have judgment go against all who were liable on award, as additional security.

91. Ky.—Angel v. Brown, 230 S.W. 2d 623, 313 Ky. 135.

92. Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639.

93. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637.

94. Va.—Parrigen v. Long, supra.

95. Va.—Parrigen v. Long, supra.

96. Ky.—Angel v. Brown, supra.

97. Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639.

98. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637.

99. Va.—Parrigen v. Long, supra.

100. Va.—Parrigen v. Long, supra.

101. Ky.—Angel v. Brown, 230 S.W. 2d 623, 313 Ky. 135.

102. Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639.

103. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637.

104. Va.—Parrigen v. Long, supra.

105. Ky.—Angel v. Brown, 230 S.W. 2d 623, 313 Ky. 135.

106. Mo.—Moot question. Fact that employee was assured of collecting his workmen's compensation award by virtue of judgment against insurance carrier did not render moot question whether employee was entitled to have judgment go against all who were liable on award, as additional security.

107. Ky.—Angel v. Brown, supra.

108. Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639.

109. Va.—Parrigen v. Long, 134 S.E. 562, 145 Va. 637.

Requisites and sufficiency. The court in rendering judgment on an award of the board must accept the final award of the board as its finding.⁹⁶ The judgment of the court must be entered in accordance with the award,⁹⁷ which means that it should recite⁹⁸ and follow⁹⁹ the award, and should render such a decree as the law requires on the facts in the record as found by the board.¹ The court must admit testimony showing payments made on the award,² and should enter judgment in accordance with the award and the facts existing as to defaults in payment.³ It is not contemplated that a series of judgments be entered on an award, although a series of executions may be required to enforce payment of the judgment.⁴ It is unnecessary, where the statute confers such authority, for the court in its judgment expressly to retain jurisdiction to enforce the judgment and in accordance with the statute.⁵

Review of, and opening, vacating, or correcting judgment. A judgment rendered on an award has the same effect as though rendered in a suit duly heard and determined by the court.⁶ It is not subject to collateral attack⁷ unless the record affirmatively shows want of jurisdiction, and every fact not negated by the record is presumed in support of the judgment.⁸ Under the practice in some

jurisdictions, no appeal lies from a judgment on an award where no appeal lies from the award.⁹ A party, however, is not prevented from protesting or correcting the judgment.¹⁰

A motion to vacate a judgment entered on an award is addressed to the sound legal discretion of the court.¹¹ The court may, after the term has passed, set aside a judgment entered in conformity with the form provided by a repealed statute and enter the judgment in conformity with the provisions of the statute in force.¹² The court may open up a judgment at the employer's request where the matter was defended by the employer's insurer, who has become insolvent.¹³

§ 846. Executions

Ordinarily, a compensation award cannot be enforced by execution until judgment is entered thereon.

Ordinarily, an award for compensation under the workmen's compensation act, or an agreement for compensation thereunder, is not enforceable by execution or other process until judgment is entered thereon in the proper court.¹⁴ However, after the award has been filed in the proper court and given the force and effect of a judgment therein, it is enforceable by execution,¹⁵ and supplementary pro-

nership even though he was not a partner in this particular operation, and therefore trial court erred in denying employee's motion for judgment against appellee partner. Ky.—Angel v. Brown, 230 S.W.2d 623, 313 Ky. 135.

96. Ind.—Kuhre v. Willan, 169 N.E. 475, 90 Ind.App. 567.

In legal effect an award of compensation by the board is same as a finding or verdict.

Ind.—State v. Scott Circuit Court, 181 N.E. 523, 203 Ind. 572.

97. Cal.—Vickich v. Superior Court of Los Angeles County, 288 P. 127, 105 C.A. 587.

71 C.J. p 1424 note 90.

98. Mich.—Brown v. George A. Fuller Co., 159 N.W. 376, 193 Mich. 214.

99. Ind.—Kuhre v. Willan, 169 N.E. 475, 90 Ind.App. 567.

Mich.—Brown v. George A. Fuller Co., 159 N.W. 376, 193 Mich. 214.

1. Mass.—In re Employers' Liability Assur. Corporation, 102 N.E. 697, 215 Mass. 497, L.R.A.1918A 306. 71 C.J. p 1424 note 93.

2. Ill.—Board of Education of High School Dist. No. 502 of Bureau County v. Industrial Commission, 140 N.E. 39, 308 Ill. 445. 71 C.J. p 1424 note 94.

3. Idaho.—State Ins. Fund v. Hunt, 17 P.2d 854, 52 Idaho 639. 71 C.J. p 1425 note 95.

4. Mich.—Gallup v. Western Board & Paper Co., 233 N.W. 184, 252 Mich. 68—Brown v. George A. Fuller Co., 159 N.W. 376, 193 Mich. 214.

5. Ill.—Armour & Co. v. Industrial Board of Illinois, 113 N.E. 133, 273 Ill. 590.

71 C.J. p 1425 note 97.

6. Ga.—Camp v. U. S. Fidelity & Guaranty Co., 157 S.E. 209, 42 Ga. App. 653.

7. Ind.—Smith v. Deep Vein Coal Co., 155 N.E. 615, 87 Ind.App. 248. 71 C.J. p 1423 note 70.

8. Okl.—Hawkins v. Bryan, 261 P. 167, 128 Okl. 27.

71 C.J. p 1423 note 71.

9. Idaho.—Haines v. State Ins. Fund, 145 P.2d 833, 65 Idaho 450—Cain v. C. C. Anderson Co. of Caldwell, 145 P.2d 483, 65 Idaho 443.

Appeal from refusal to set judgment aside

Workmen's compensation act provision making judgment of district court with respect to enforcement of workmen's compensation award final and prohibiting appeal therefrom cannot be evaded by indirect method of appealing from order denying motion to set aside nonappealable judgment.

Idaho.—Haines v. State Ins. Fund, 145 P.2d 833, 65 Idaho 450.

If question of jurisdiction of court to enter judgment enforcing work-

men's compensation award is involved, application may be made for writ of review.

Idaho.—Haines v. State Ins. Fund, 145 P.2d 833, 65 Idaho 450.

10. Idaho.—Haines v. State Ins. Fund, supra—State Ins. Fund v. Hunt, 17 P.2d 854, 52 Idaho 639.

11. Ill.—Liberty Foundries Co. v. Industrial Commission, 124 N.E. 559, 289 Ill. 601.

71 C.J. p 1425 note 98.

12. Ill.—Suburban Ice Co. v. Industrial Board, 113 N.E. 979, 274 Ill. 630.

13. Minn.—Meehan v. Mitchell Battery Co., 254 N.W. 584, 191 Minn. 411.

14. N.C.—Corpus Juris cited in Champion v. Vance County Board of Health, 19 S.E.2d 239, 241, 221 N.C. 96.

71 C.J. p 1425 notes 1, 2.

An attachment execution is not an appropriate form of execution in workmen's compensation cases.

Pa.—Shay v. Aetna Life Ins. Co., 200 A. 302, 132 Pa.Super. 53, followed in Shay v. North Side Bank & Trust Co. of Lebanon, 200 A. 303, 132 Pa.Super. 55.

15. Ariz.—Holliday v. Salinas, 97 A. 23, 231, 54 Ariz. 496, 126 Cal.App. 2d 71 C.J. p 1425 note 4.

ceedings in aid of execution may be resorted to as in other cases.¹⁶ A judgment for compensation entered by the proper court on appeal from an award of the board or commission or in an action to enforce an award may be enforced by execution.¹⁷ The execution on a judgment entered on an award of a compensation commission, although in the form of an execution on a judgment of the court, is in reality an execution on the award of the commission.¹⁸ A judgment in an action on award for compensation which provides for future weekly payments of the weekly installments of the award not due at the time of the trial may provide that, if such payments are not paid, then due execution therefor shall issue.¹⁹ On failure to comply with the original order for compensation, the court may order that the entire amount of compensation shall become due immediately, and that, on proof of such failure, execution may issue for the entire amount of the award.²⁰

Under some compensation acts, however, where the decision of an arbitrator in a workmen's compensation proceeding is a final decision, equivalent to a judgment, it may be enforced by the issuance of an execution.²¹ A provision for the issuance of ex-

ecution on an award may be limited to cases where the employer has failed to comply with the financial security provisions of the statute.²² Under some statutes, the security provided by the statute for the payment of the claims is exclusive and execution does not lie for the collection of such a claim.²³ Where a claim against partners individually has been dismissed and the award entered against the partnership, the individual assets of the partners may be reached to satisfy the award after an execution against the partnership property has been returned unsatisfied.²⁴

Notice. In the absence of statutory provision directing otherwise, notice is not required of the issuance of execution on the judgment.²⁵

Time for issuance. The execution must be issued within the statutory period therefor.²⁶ Within the meaning of a statute limiting the time after final judgment within which an execution may be levied, an award in compensation proceedings becomes a final judgment only at the end of the compensation period;²⁷ or when so modified as to fix a definite sum of money as due from the debtor and presently payable,²⁸ as though the award be com-

16. N.J.—Heldrich v. American Incubator Mfg. Co., 141 A. 770, 6 N.J. Misc. 525, 104 N.J.Law 492.

17. U.S.—Fresquez v. Farnsworth & Chambers Co., C.A.N.M., 238 F.2d 709.

Ala.—Goodyear Tire & Rubber Co. of Ala. v. Downey, 96 So.2d 278, 286 Ala. 344.

Ga.—Durham Iron Co. v. Durham, 7 S.E.2d 804, 62 Ga.App. 381.

N.J.—Moore v. El. B. Badger & Son, 27 A.2d 1, 128 N.J.Law 478.

Pa.—Shay v. Aetna Life Ins. Co., 200 A. 302, 132 Pa.Super. 53, followed in Shay v. North Side Bank & Trust Co. of Lebanon, 200 A. 308, 132 Pa.Super. 65.
71 C.J. p 1425 note 6.

Award against commonwealth

Statute relating to execution for payment of compensation until the full amount of judgment with costs shall actually have been paid has no reference to award against commonwealth, since judgments against commonwealth are not enforceable by execution.

Pa.—Weyant v. General Refractories Co., 29 A.2d 100, 150 Pa.Super. 502.

Appeal

Where employer did not file supersedeas bond when appealing from judgment of district court in action under workmen's compensation law, appeal did not stay judgment, and nothing prevented levying of execution at any time after rendition of judgment.

Kan.—Miller v. Massman Const. Co., 237 P.2d 373, 171 Kan. 173.

18. Cal.—Vickich v. Superior Court of Los Angeles County, 298 P. 127, 165 C.A. 587.
71 C.J. p 1425 note 8.

19. Tex.—General Accident Fire & Life Assur. Corp. v. Evans, Civ. App., 201 S.W. 705.

20. N.J.—Heldrich v. American Incubator Mfg. Co., 141 A. 770, 6 N.J. Misc. 525, 104 N.J.Law 492.

21. Kan.—Palmer v. Fincke, 253 P. 583, 122 Kan. 825.
71 C.J. p 1425 note 7.

22. N.H.—Cassidy v. Fellows & Sons, Inc., 102 A.2d 499, 98 N.H. 441.

23. Mont.—State ex rel. Murray Hospital v. District Court of Second Judicial Dist., 57 P.2d 813, 102 Mont. 350.

24. Okl.—Fowler v. Brooks, 146 P. 2d 304, 193 Okl. 580.

Court action

Where award of industrial commission for disability compensation against partnership cannot be enforced because of insufficient partnership property, employee may proceed with court action against individual property of partners served with notice of injury for which claim for compensation was made or who appeared and defended therein even though not served.

Okl.—Fowler v. Brooks, 146 P.2d 304, 193 Okl. 580.

25. N.J.—Heldrich v. American Incubator Mfg. Co., 141 A. 770, 6 N.J. Misc. 525, 104 N.J.Law 492.

26. Tenn.—Butterbaugh v. Loew's, Inc., 77 S.W.2d 644, 168 Tenn. 284, 96 A.L.R. 973.

No application until award filed

Statute limiting time within which execution shall issue has no application to workmen's compensation award until performance of act of filing certified copy of award in office of court clerk, after which award has same force and effect as a judgment.

Okl.—Hickman v. Gumerson, 125 P.2d 765, 190 Okl. 514.

Time tolled by litigation

Employee's petition for execution and enforcement of previous compensation decree was not barred by limitations of one year after default of compensation due, where employer had previously filed petition for readjustment of compensation which was pending when default occurred.
Tenn.—Butterbaugh v. Loew's, Inc., 77 S.W.2d 644, 168 Tenn. 284, 96 A.L.R. 973.

27. Conn.—O'Keefe v. Elmer Automobile Co. of Winsted, 152 A. 280, 112 Conn. 370.

28. Conn.—O'Keefe v. Elmer Automobile Co. of Winsted, supra.

muted to a specific sum so payable.²⁹ Under such provision claimant may have execution any time within the compensation period to recover such of the payments as have matured and thereafter within the period allowed after final judgment for an execution to issue.³⁰

Effect of execution on right of action. The execution of a judgment for a part of the compensation originally claimed is not an acquiescence in the judgment rejecting the balance of the sum sued for.³¹

Stay of execution. A stay of execution may be granted for good cause,³² as for example, to require claimant to credit the judgment with amounts already received.³³ Under some compensation acts the commission or any member thereof may stay the execution of any judgment entered on an award of the commission on good cause appearing therefor and on such terms and conditions as may be imposed, a certified copy of such order to be filed with the clerk entering judgment.³⁴ Under such a provision, when a stay has been ordered by the commission or by one of its members, no judge of the court in which the judgment was rendered has authority to interfere with the operation of the order so made,³⁵ and, in the absence of a stay order by the commission or one of its members, the court is without jurisdiction to suspend or delay the execu-

tion of a judgment entered in the records of such court following on, and in accordance with, an award of the commission.³⁶ The court in threatening to proceed to the hearing and determination of a motion to recall and quash an execution on such a judgment exceeds its jurisdiction, in that it assumes authority to suspend the operation or execution of the judgment or of the award;³⁷ the authority to make such order is vested in the commission or some one of its members,³⁸ and in no other tribunal.³⁹

Who may apply for stay of execution. The commission cannot take cognizance of an application for an order staying execution on a judgment entered on its award brought by one who had not joined in any proceedings before it nor had questioned the validity of its award prior to final adjudication and affirmance by the upper courts.⁴⁰

§ 847. Interest

Under some authorities, compensation payments bear interest from the date they should be paid; under others, interest does not start running until there is an award, and under still other authorities, interest does not start running until a judgment is entered.

Where the compensation act covers the subject of interest it controls.⁴¹ It has been held that under compensation acts which provide for the payment of interest, the power to award interest is statutory⁴² and may only be exercised in the in-

29. Conn.—O'Keefe v. Elmer Automobile Co. of Winsted, *supra*.

30. Conn.—O'Keefe v. Elmer Automobile Co. of Winsted, *supra*. 71 C.J. p 1426 note 21.

31. La.—Cory v. Askew, 125 So. 455, 169 La. 479, followed in Glover v. Washington-Youres Hotel Co., 125 So. 455, 12 La.App. 110.

32. Kan.—Gadberry v. Hutchinson Egg Case Filler Co., 177 P. 834, 104 Kan. 72.

33. Kan.—Gadberry v. Hutchinson Egg Case Filler Co., *supra*. 71 C.J. p 1426 note 25.

34. Cal.—Vickich v. Superior Court of Los Angeles County, 288 P. 127, 105 C.A. 587.

35. Cal.—Vickich v. Superior Court of Los Angeles County, *supra*.

36. Cal.—Vickich v. Superior Court of Los Angeles County, *supra*.

37. Cal.—Vickich v. Superior Court of Los Angeles County, *supra*.

38. Cal.—Vickich v. Superior Court of Los Angeles County, *supra*.

39. Cal.—Vickich v. Superior Court of Los Angeles County, *supra*. 71 C.J. p 1426 note 31.

40. Cal.—Gamble v. Superior Court

in and for Alameda County, 179 P. 717, 39 C.A. 681.

41. U.S.—Twohy Bros. Co. v. Kennedy, C.C.A.Ariz., 205 F. 462, error dismissed 44 S.Ct. 638, 265 U.S. 575, 68 L.Ed. 1187.

Mo.—Komosa v. Monsanto Chemical Co., App., 305 S.W.2d 506.

N.Y.—Boek v. Sheffield Farms Co., 71 N.Y.S.2d 605, 272 App.Div. 387.

Okl.—Boettcher Oil & Gas Co. v. Lamb, 276 P.2d 243.

Payment without interest accepted

Award against special indemnity fund was collected by operation of law, and contractual relation did not exist between claimant and special indemnity fund, and therefore, claimant's acceptance of award could not estop him to accept benefit of interest, which was allowed on such award by subsequent order of state industrial commission.

Okl.—Special Indem. Fund v. Horne, 276 P.2d 240.

Award for medical services

Word "compensation," as employed in workmen's compensation act and Occupational Disease Act, includes medical services, so as to entitle injured employee to interest on amount awarded him for medical expenses from day of presentation of his claim therefor.

Pa.—Shank v. Consolidation Coal Co., 54 A.2d 289, 161 Pa.Super. 304.

Compound interest

There is no statutory authority for "compound" interest in a compensation case.

Pa.—Kessler v. North Side Packing Co., 188 A. 404, 122 Pa.Super. 565.

Change in rule

Where rule requiring motions for award of five per cent damages on appeal or for correction of any judgment to be filed within sixty days from entry of final judgment was adopted in December, 1952, but rule was not distributed to members of bar until February, 1953, motion to correct final judgment entered March 9, 1953, in workmen's compensation proceeding, so as to allow interest of six per cent per annum on each payment of compensation from its due date and five per cent statutory damages on all payments due at time cause was affirmed would be allowed, although motion was not filed until June 1, 1953.

Miss.—Watkins v. Taylor, 65 So.2d 461, 216 Miss. 822.

42. Cal.—Pacific Indemnity Co. v. Industrial Accident Commission of California, 261 P. 987, 202 C. 521,

stances specified.⁴³ Thus, under a compensation act authorizing the allowance of interest where payments of compensation have been unreasonably delayed, an order allowing interest where there was no unreasonable delay in payment of workmen's compensation is unauthorized.⁴⁴ Under some statutes, the imposition of interest on delayed payments rests in the discretion of the compensation board.⁴⁵

While it has been held that where the compensation act does not provide for interest, none can be allowed,⁴⁶ it is generally held that in the absence of a provision governing the matter in the compensa-

tion statute, general rules and statutes dealing with interest apply as to the allowance of interest in compensation cases.⁴⁷ Where the compensation act has no provision with respect to interest at the time the claim for compensation accrues, the general interest statute applies notwithstanding the subsequent amendment of the compensation act to contain a provision as to interest.⁴⁸

Under some compensation acts and general statutes, interest is allowed on each compensation payment from the date when it is due⁴⁹ even though

43. Idaho.—Cain v. C. C. Anderson Co. of Caldwell, 169 P.2d 505, 67 Idaho 1.
71 C.J. p 1427 note 39.

Future and past due installments

Under statute requiring employer to pay seven per cent interest on amount of district court's or Supreme Court's judgment for injured employee on appeal from industrial accident board's award of same or smaller amount of compensation, interest is computable and payable on all compensation installment payments in arrears, but not on any such payments not then due or in arrears when actually made.
Idaho.—Cain v. C. C. Anderson Co. of Caldwell, supra.

44. Cal.—London Guarantee & Accident Co. v. Industrial Accident Commission, 268 P. 670, 92 C.A. 298.
71 C.J. p 1427 note 41.

45. N.J.—Atamanik v. Real Estate Management, 91 A.2d 268, 21 N.J. Super. 357.
Greenhaus v. Essbee Amusement Corporation, 180 A. 625, 18 N.J. Misc. 646—Asbell v. Campbell Morrell & Co., 174 A. 344, 12 N.J. Misc. 707.

46. Mich.—Fowler v. Muskegon County, 65 N.W.2d 801, 340 Mich. 523.

Fact that no interest has ever been claimed or awarded on workmen's compensation award is not, in itself, determinative of issue as to whether one who obtains award for past-due payments of compensation is entitled to interest on such payments.
Mich.—Fowler v. Muskegon County, supra.

47. Fla.—Parker v. Brinson Const. Co., 78 So.2d 873.
Minn.—Bourdeaux v. Gilbert Motor Co., 20 N.W.2d 333, 228 Minn. 538.
Miss.—Houston Contracting Co. v. Reed, 95 So.2d 231.
RI.—Zielinski v. U. S. Rubber Co., 74 A.2d 299, 71 R.I. 367.
75 C.J. p 1427 note 36.

Statute making general rules applicable

Miss.—M. T. Reed Const. Co. v. Martin, 63 So.2d 528, 215 Miss. 472.

Time claim filed

Under Texas Workmen's Compensation Act, compensation insurer which had paid to employee's putative wife compensation under act was not liable for interest on payments owing to employee's legal surviving wife and children from date of payment to putative wife but from date when claims were filed by surviving legal wife and children, since insurer was not obligated to pay anything until claim was filed with industrial accident board.

U.S.—Travelers Ins. Co. v. Price, C. C.A.Tex., 111 F.2d 776, certiorari denied 61 S.Ct. 43, 311 U.S. 676, 85 L.Ed. 435.

No prayer for interest

(1) An allowance to compensation claimant of interest on past due installments of compensation was improper, in absence of pleading therefor.

Tex.—Pacific Emp. Ins. Co. v. Barnett, Civ.App., 230 S.W.2d 331, refused no reversible error—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed.

71 C.J. p 1427 note 36 [s].

(2) Interest on past due installments in workmen's compensation case is not interest by that name, but must be affirmatively alleged and sought as a part of damages and benefits claimed in order to be recoverable.

Tex.—American Sur. Co. of N. Y. v. Ritchie, Civ.App., 191 S.W.2d 137, reversed on other grounds Ritchie v. American Surety Co. of N. Y., 198 S.W.2d 85, 145 Tex. 422.

Death benefits

In calculating amount of judgment for compensation claimant for death of her husband who was paid compensation during his lifetime for injuries which resulted in the death, claimant was not entitled to interest from date of injury but only from date of death.

Tex.—Maryland Casualty Co. v. Lee, Civ.App., 165 S.W.2d 135, error refused.

Settlement

Where lump sum settlement for permanent total disability awarded did not include the full amount to which claimant was entitled, claimant was not entitled to interest on deferred payment.

Wash.—Horton v. Department of Labor and Industries, 90 P.2d 1009, 199 Wash. 212.

Suspension of benefits

A deceased employee's widow, reinstated on workmen's compensation rolls, from which she had been suspended by compensation commissioner's order, and allowed past-due monthly installments of compensation payments, is not entitled to interest on such payments accruing after her demand on commissioner for reinstatement, in absence of provision in workmen's compensation act for payment of interest.

W.Va.—Lancaster v. State Compensation Com'r, 23 S.E.2d 601, 125 W. Va. 190.

48. U.S.—Sunny Point Packing Co. v. Faigh, C.C.A.Alaska, 63 F.2d 921.

Pa.—Corpus Juris quoted in Kessler v. North Side Packing Co., 186 A. 404, 410, 122 Pa.Super. 565.

49. Fla.—Andrews v. Strecker Body Builders, Inc., 92 So.2d 521.

Ky.—Maryland Casualty Co. v. Reeves, 70 S.W.2d 992, 254 Ky. 83.

La.—Hebert v. Hartford Acc. & Indem. Co., App., 83 So.2d 243—Evans v. Louisiana State Bd. of Ed., App., 85 So.2d 689—Crow v. Hostler, App., 66 So.2d 380—Troquille v. Lacaze's Estate, App., 59 So.2d 505, amended on other grounds 63 So. 2d 139, 222 La. 611—Spillman v. L. O. Shocker, Co., App., 42 So.2d 136—Lampkin v. Kent Piling Co., App., 34 So.2d 79, rehearing denied 34 So.2d 636—Howell v. Clemmons Bros. Lumber Co., App., 32 So.2d 60—Hoover v. Dendinger, Inc., App., 29 So.2d 384—Arbo v. Maryland Cas. Co., App., 29 So.2d 380—

such date is prior to the date of the award.⁵⁰ A statutory provision that each installment of compensation shall bear interest from the date when due applies without action by the compensation authorities or the courts.⁵¹ A claim for compensation is treated like one in contract rather than one in tort as far as interest is concerned.⁵²

Under another view, interest does not begin to run until the date of the award.⁵³ Still another view is that an award does not draw interest until

a judgment is entered thereon.⁵⁴ A compensation award has been held not to be a money judgment within a statute as to interest on money judgments.⁵⁵ Until an award of compensation is given the effect of a judgment by the filing of a certified copy thereof with the clerk of a designated court and the entry of judgment thereon, the award does not draw interest as a judgment,⁵⁶ and a provision in the award for interest to be paid on the amounts awarded as on a judgment is unauthorized.⁵⁷

Pointe Coupee Electric Membership Corp. v. Pettey, App., 8 So.2d 764—Fryou v. T. Aucoin & Sons, App., 5 So.2d 193—Goins v. Shreveport Yellow Cabs, App., 200 So. 481—Ferguson v. Kellogg Lumber Co., App., 200 So. 36—Strickland v. Walker-Johnson Lumber Co., App., 188 So. 516—Johnson v. Hilmyer, Deutsch, Edwards, Inc., App., 185 So. 652, rehearing denied 186 So. 365.

Minn.—Beach v. American Steel & Wire Division of U. S. Steel Corp., 78 N.W.2d 371, 248 Minn. 11.

Miss.—Russell v. Southeastern Utilities Service Co., 92 So.2d 877—Anderson-Tully Co. v. Wilson, 76 So.2d 515, 221 Miss. 656—Sunnyland Contracting Co. v. Davis, 75 So.2d 923, 221 Miss. 744—La Dew v. La Borde, 63 So.2d 825, 216 Miss. 598—M. T. Reed Const. Co. v. Martin, 63 So.2d 528, 216 Miss. 472.

Mo.—Komosa v. Monsanto Chemical Co., App., 305 S.W.2d 506.

Pa.—Schach v. Hazle Brook Coal Co., 38 A.2d 423, 155 Pa.Super. 242—Pooler v. Grasselli Chemical Co., 29 A.2d 212, 150 Pa.Super. 595—Ciotti v. Jarecki Mfg. Co., 193 A. 323, 128 Pa.Super. 238—Horwath v. Edward G. Budd Mfg. Co., 191 A. 675, 127 Pa.Super. 154—Lemke v. Hazle Brook Coal Co., 191 A. 196, 126 Pa.Super. 155—Gardner v. Pressed Steel Car Co., 186 A. 410, 122 Pa.Super. 592—Kessler v. North Side Packing Co., 186 A. 404, 122 Pa.Super. 565—Graham v. Hillman Coal & Coke Co., 186 A. 400, 122 Pa.Super. 579—Petrulo v. M. O'Herron Co., 186 A. 397, 122 Pa.Super. 163.

Douglas v. Bowman & Co., Com. Pl., 51 Dauph. Co. 37.
71 C.J. p 1427 note 43.

Interest

(1) Where no appeal was taken from referee's decision that employer should have continued compensation payments, employee was entitled to interest on payments as a matter of right, and interest was no defense to right to interest.

Minn.—Bourdeaux v. Gilbert Motor Co., 20 N.W.2d 393, 220 Minn. 538.

(2) Claimant, who permitted his claim for workmen's compensation to be barred for two years, was

not entitled to interest on award when finally made, for such period. Pa.—Angelo v. Keystone State Const. Co., 3 A.2d 946, 134 Pa.Super. 255.

Definite or liquidated sum

Installment of workman's compensation which is definite or liquidated sum of money due on certain date bears interest from that date if it is not timely paid by employer.

Pa.—Kessler v. North Side Packing Co., 186 A. 404, 122 Pa.Super. 566.

Increase in award

Where claimant employee had originally been found to be twenty per cent permanently partially disabled and on review and reopening matter it was determined that because of aggravated conditions not taken into account on original proceeding employee was twenty-five per cent permanently partially disabled, in granting twenty additional weeks compensation employee was entitled to interest thereon only from date when commissioner found her to be entitled to increased compensation.

Iowa.—Bousfield v. Sisters of Mercy, 86 N.W.2d 109.

Judicial demand

(1) An award of compensation for total permanent disability resulting from injuries to employee in course of employment should be for period not exceeding four hundred weeks, less credit for weekly payments made, and interest awarded should be from delinquency date of each weekly installment, not from judicial demand.

La.—Deshotels v. Highway Ins. Underwriters, App., 40 So.2d 750.

(2) In view of fact that grandchildren are not conclusively presumed to be dependents under workmen's compensation act, and in view of fact that mother of grandchildren did not qualify as natural tutrix of grandchildren until a few days prior to filing of suit for compensation benefits for death of grandfather, interest allowed on judgment should run from date of judicial demand.

La.—Dorce v. Calcasieu Paper Co., App., 35 So.2d 559.

Where compensation settlement with legal widow had no legal effect,

because widow was not living with, or dependent on, deceased employee, settlement did not protect employer against payment of legal interest on each weekly compensation payment to minor entitled to compensation as a member of deceased employee's household, and such interest was due from time on which each weekly payment was due.

La.—Williams v. Jahncke Service, App., 55 So.2d 668.

Mo.—Komosa v. Monsanto Chemical Co., App., 305 S.W.2d 506.

Pa.—Graham v. Hillman Coal & Coke Co., 186 A. 400, 122 Pa.Super. 579—Petrulo v. M. O'Herron Co., 186 A. 397, 122 Pa.Super. 163.

Mo.—Walker v. Pickwick Hotel, App., 211 S.W.2d 55.

Fla.—Parker v. Brinson Const. Co., 78 So.2d 873.

Minn.—Bourdeaux v. Gilbert Motor Co., 20 N.W.2d 393, 220 Minn. 538.

N.H.—Pearson v. Wallace, 42 A. 2d 738, 93 N.H. 381.

Installments due prior to award

Interest on unpaid installments of workmen's compensation begins to run only from date of award and not from due date of each installment previous to date of award.

Idaho.—Holt v. Spencer Lumber Co., 199 P.2d 268, 68 Idaho 478.

Ala.—Baggett Transp. Co. v. Holderfield, 68 So.2d 21, 260 Ala. 56.

Kan.—Hall v. Kornfeld-Harper Well Servicing Co., 151 P.2d 688, 159 Kan. 70.

R.I.—Campbell v. Walsh-Kaiser Co., 81 A.2d 684, 78 R.I. 290.

Kan.—Woods v. Jacob Dold Packing Co., 43 P.2d 786, 141 Kan. 748.

Workmen's compensation award is not a judgment, and any authorization for interest on such award must be found in workmen's compensation law itself.

Okl.—Special Indem. Fund v. Horne, 276 P.2d 240.

Cal.—Pacific Indemnity Co. v. Industrial Accident Commission, 106 California, 261 P.2d 282, 283 Cal. 2d 282.

Cal.—Ocean Accident & Guarantee Corporation v. Industrial Accident Commission, 106 California, 261 P.2d 282, 283 Cal. 2d 282.

Where judgment is entered on an award, interest runs from the date of the judgment or the date the judgment directs payment.⁵⁸ Where the judgment is not for a sum of money, but merely an adjudication that claimant is entitled to compensation, the judgment does not carry interest.⁵⁹ Where the judgment in favor of claimant runs against the state compensation agency, interest has been denied on the ground that the judgment is one against the state.⁶⁰

The employer is not liable for interest during the period prior to the time he is in default.⁶¹ It has been held that the employer may not be required to pay interest on installments of compensation withheld pending an appeal,⁶² at least where the appeal is by claimant;⁶³ but the more usual view is that compensation payments deferred by reason of an

appeal bear interest.⁶⁴

Where the compensation commission directs payment of a commuted sum, and provides that it be deposited with a trustee and paid to the beneficiary in installments, the beneficiary is entitled to whatever interest the fund earns and not to a fixed rate.⁶⁵

*A bona fide tender stops the running of interest.*⁶⁶

§ 848. Penalty

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dent Commission, 266 P. 556, 90 C. A. 725.

58. Ind.—Hatfield v. Higgins, 31 N. E.2d 650, 108 Ind.App. 681.

N.J.—Simon v. New Jersey Asphalt & Paving Co., 8 A.2d 256, 123 N.J. Law 232.

Tenn.—A. G. S. R. Co. v. Wright, 133 S.W.2d 457, 175 Tenn. 138.

Lack of knowledge by employer

An injured employee's claim for interest on total amount of unpaid weekly installments of compensation awarded under workmen's compensation act from time of docketing judgment on award cannot be defeated by employer on ground that he had no knowledge of award or steps taken to enforce judgment until sheriff levied execution on monies due employer from county, as employer was obliged to take cognizance of such steps.

N.J.—Simon v. New Jersey Asphalt & Paving Co., 8 A.2d 256, 123 N.J. Law 232.

Damages for delay

Where judgment entered on an award of industrial board ordered payment of definite amounts at fixed times, on failure to make such payments when due, interest on deferred installments might be allowed by way of damages for delay.

Ind.—Hatfield v. Higgins, 31 N.E.2d 650, 108 Ind.App. 681.

Issuance of execution

An injured employee, awarded compensation payable in weekly installments under workmen's compensation act, is entitled to interest on each unpaid installment after docketing of judgment on award from time each payment became due, although he did not issue execution each week or procure order that entire amount awarded should become due immediately because of employer's noncompliance with origi-

nal order, as such failures merely injured to employer's benefit.

N.J.—Simon v. New Jersey Asphalt & Paving Co., 8 A.2d 256, 123 N.J. Law 232.

Award for medical expenses

In compensation proceeding, amounts recovered for doctor's services, and hospital and medical expenses bore interest at six per cent from the date final judgment was rendered until paid.

Tex.—Texas Emp. Ins. Ass'n v. Hierholzer, Civ.App., 207 S.W.2d 178, refused no reversible error.

Counsel fee, medical witnesses' fees and stenographer's charges, included in award of compensation to injured employee under workmen's compensation act, are penalties in nature of costs and hence part of judgment on award, so as to entitle employee to recover interest thereon.

N.J.—Simon v. New Jersey Asphalt & Paving Co., 8 A.2d 256, 123 N.J. Law 232.

59. Miss.—Sunnyland Contracting Co. v. Davis, 75 So.2d 923, 221 Miss. 744—Mills v. Jones' Estate, 57 So.2d 496, 218 Miss. 680.

60. Wash.—Spier v. Department of Labor and Industries, 29 P.2d 679, 176 Wash. 374.

61. Minn.—Lappinen v. Union Ore Co., 29 N.W.2d 8, 324 Minn. 395.

62. Kan.—Woods v. Jacob Dold Packing Co., 43 P.2d 786, 141 Kan. 748.

63. Mo.—Komosa v. Monsanto Chemical Co., App., 305 S.W.2d 506.

64. U.S.—Globe Const. Co. v. Brewer, C.A.La., 197 F.2d 707.

N.Y.—Bock v. Sheffield Farms Co., 71 N.Y.S.2d 606, 278 App.Div. 337; Okl.—Special Indem. Fund v. Horne, 276 P.2d 240.

Pa.—Petrulo v. M. O'Herron Co., 186 A. 397, 122 Pa.Super. 163—McGee v. Youghiogheny & Ohio Coal Co., 132 A. 773, 121 Pa.Super. 85—Mulligan v. E. Keeler Co., 170 A. 311, 112 Pa.Super. 261.

71 C.J. p 1423 note 44.

65. Cal.—Norwich Union Indemnity Co. v. Industrial Acc. Commission of California, 34 P.2d 1062, 140 C. A. 36.

Mich.—Grycan v. Ford Motor Co., 289 N.W. 146, 291 Mich. 241.

66. Ky.—Pfoff v. Osborne, 269 S.W. 2d 710.

La.—Maple v. American Sugar Refining Co., App., 39 So.2d 609.

71 C.J. p 1427 note 36 [e], [f].

67. Miss.—James F. O'Neil, Inc. v. Livings, 98 So.2d 148—Houston Contracting Co. v. Reed, 95 So.2d 281.

Mo.—Powers v. Universal Atlas Cement Co., App., 261 S.W.2d 512.

Failure to file reports or evidence

(1) A provision that compensation awards against an employer shall be increased by a certain percentage where employer has failed to file certain reports and furnish certain evidence is penal and will be strictly construed.

Ga.—Dunn v. American Mut. Liability Ins. Co., 13 S.E.2d 902, 64 Ga. App. 509.

(2) Such provision does not authorize an increase in the compensation award because of a refusal or willful neglect to pay an award.

Ga.—Duan v. American Mut. Liability Ins. Co., supra.

(3) Commission did not abuse its discretion in failing to assess penalties for failure of employer to file report of claimant's injury or in failing to allow certain medical benefits.

Miss.—Mississippi Products, Inc. v. Gordy, 30 So.2d 793, 224 Miss. 694.

posed under some statutes where the employer or insurer liable for compensation interposes a defense which is merely frivolous or for purposes of delay.⁶⁸ Provision is sometimes made for the addition of a percentage to an award affirmed on appeal.⁶⁹ Un-

der another statute, a penalty is provided where the employer makes a lump sum settlement without the approval of the court or at a discount greater than permitted by the statute.⁷⁰

Failure to carry insurance

Under statute requiring employer to pay fifty per cent additional compensation as a penalty for failure to carry insurance, liability is not determined by good faith or willful neglect, and only question is whether employer has insurance and if he has none, liability for additional compensation necessarily follows.

Colo.—Anderson v. Dutch Maid Bakeries, 102 P.2d 740, 106 Colo. 201.

Employment of minor

Where sixteen-year-old claimant was employed by tenant to help harvest beets to be delivered to landlord canning factory, no employment certificate was necessary for claimant, and landlord canning factory would therefore not be liable for double compensation for failure to obtain certificate even though claimant was an employee of factory.

N.Y.—Pestlin v. Haxton Canning Co., 80 N.Y.S.2d 869, 274 App.Div. 144, affirmed 87 N.E.2d 522, 299 N.Y. 477.

Noncompliance with safety rules

An employer's guarding of front of paper converting machine, where processed paper emerged from feed rolls, was not compliance with industrial commission's order that horizontal feed rolls be enclosed by cover over front, so that employee, injured when he reached into machine to thread broken paper through unguarded front rolls, was properly awarded fifteen per cent penalty by commission.

Wis.—Marinette Paper Co. v. Industrial Commission, 27 N.W.2d 722, 251 Wis. 60.

Failure to comply with temporary award

(1) Section of workmen's compensation act providing that amount of temporary or partial award, if not complied with, may be doubled in final award, is permissive and not mandatory and vests a discretion in industrial commission, with exercise of which reviewing court should not interfere unless it clearly appears that action of commission was arbitrary and constituted abuse of discretion.

Mo.—Powers v. Universal Atlas Cement Co., App., 261 S.W.2d 512.

(2) Under statute providing that if a compensation award is not complied with, amount thereof may be doubled in final award, commission's authority to inflict such penalty is not limited to situation in which employer's defense is found to be frivolous or vexatious, but if em-

ployer elects to refuse compliance with temporary award, he is assuming a calculated risk of being subjected to penalty in event final award is in accordance with temporary award.

Mo.—Cebak v. John Nooter Boiler Works Co., App., 258 S.W.2d 262.

(3) Where employer admittedly paid no part of compensation allowed in temporary awards to employee, compensation for periods involved would be doubled in final award in accordance with statute.

Mo.—Cebak v. John Nooter Boiler Works Co., supra.

Attorney's fees

Penalty provisions of insurance code apply to all forms of insurance, including workmen's compensation insurance, and are applicable notwithstanding workmen's compensation act provisions as to matter of attorney's fee.

La.—Cain v. Employers Cas. Co., App., 96 So.2d 527.

Hearing

Under rules of practice before industrial commission, demand for formal hearing may be made by either employee or employer; and employee complying substantially with commission's rules was entitled to hearing and determination before referee on his petition for imposition of penalty.

Minn.—Springborg v. Willson & Co., 73 N.W.2d 433, 245 Minn. 489.

Statute making general rules applicable

Language of 1950 Amendment of Workmen's Compensation Act, placing awards of compensation made by judgment of circuit court in same category as other judgments of circuit court, and providing that, on affirmance thereof, such judgments shall bear same interest and penalties as do other judgments of circuit court, is plain and unambiguous and cannot be interpreted as placing such judgments awarding compensation in a more favored or different class than other judgments of circuit court.

Miss.—M. T. Reed Const. Co. v. Martin, 63 So.2d 528, 215 Miss. 472.

Costs

In workmen's compensation proceeding in which claimant was entitled to compensation assessment of costs against state compensation insurance fund and industrial commission and requirement that state compensation fund pay such cost was not error.

Colo.—State Compensation Ins. Fund v. Howington, 298 P.2d 963, 133 Colo. 583.

68. Minn.—Lappinen v. Union Ore Co., 29 N.W.2d 8, 324 Minn. 395.

69. Ind.—Pinnell Lumber Co. v. Smith, 25 N.E.2d 643, 107 Ind.App. 686—Swift & Co. v. Neal, 25 N.E.2d 451, 26 N.E.2d 564, 108 Ind.App. 313—J. P. O. Sandwich Shop v. Papadopoulos, 13 N.E.2d 869, 105 Ind.App. 165.

Miss.—Bradshaw v. Rudder, 85 So.2d 778—Anderson-Tully Co. v. Wilson, 76 So.2d 515, 221 Miss. 656—Sunnyland Contracting Co. v. Davis, 75 So.2d 923, 221 Miss. 744—Railway Exp. Agency v. Hollingsworth, 75 So.2d 639, 221 Miss. 688.

Certiorari

Judgment of circuit court was affirmed by supreme court, inclusion in judgment of affirmance of amount of ten per cent damages was not error on ground that statute providing for such award applied only to cases which came before supreme court by appeal.

Ala.—Goodyear Tire & Rubber Co. of Ala. v. Downey, 96 So.2d 278, 266 Ala. 344.

Reinstatement of award

Under statute providing that where judgment or decree is affirmed, court shall allow damages of five per cent and costs against appellant, no such damages could be awarded where reviewing court reversed denial of compensation of trial court and reinstated commission order.

Miss.—Russell v. Southeastern Utilities Service Co., 92 So.2d 877.

Award for funeral expenses

Where statute on which attorney-referee based his award in death benefits case did not definitely fix amount of funeral expenses, his award of funeral expenses, which was affirmed by full commission, was not a judgment for a "sum of money" and, on judicial affirmance of award, beneficiaries were not entitled to recover statutory damages and interests on funeral expense award.

Miss.—Sunnyland Contracting Co. v. Davis, 75 So.2d 923, 221 Miss. 744.

70. La.—Neyland v. Maryland Cas. Co., App., 28 So.2d 351—Cummings v. T. H. Mastin & Co., App., 17 So.2d 40—Craig v. Compressed Industrial Gases, App., 7 So.2d 197—Reid v. J. P. Florio & Co., App., 172 So. 572.

Good faith

(1) Good faith of employer and its insurer in entering into a com-

In considering a petition to impose the penalty the commission may refer to its own records in the case without their introduction in evidence,⁷¹ but it is not error to introduce them in evidence.⁷² Pleadings for the recovery of such penalty will be strictly construed, and no intendment or inference will be indulged to supply omissions or to cure deficiencies.⁷³

In a number of jurisdictions the compensation acts provide for penalties in case of vexatious or unreasonable delay in the payment of the compensation awarded;⁷⁴ the proceedings therefor being maintained before the compensation commission⁷⁵ or a court.⁷⁶ Ordinarily, the penalty cannot be obtained unless an award has been made,⁷⁷ and then only after the award has become final either by confirmation on review or the lapse of time for review without such being sought;⁷⁸ but under some

statutes, a penalty may be imposed for delay in paying an award even though proceedings for its review are pending where the enforcement of the award has not been stayed.⁷⁹

An installment of compensation cannot become delinquent until it becomes due, which cannot be until there is some reasonable certainty as to the amount and number of payments to be made.⁸⁰ Thus, the compensation for an injury to an employee does not become due, in the sense that it carries the statutory penalties for nonpayment, until the obligation of the employer is definitely ascertained or settled in the exercise of proper diligence on his part, where there is a reasonable controversy as to his liability.⁸¹ Where, however, the controversy is over only a portion of the compensation, the employer or insurer, in order to be relieved of the

promise lump sum settlement of compensation which was invalid because of providing for discount at an unauthorized rate would not relieve employer and insurer from penalty provided by workmen's compensation act, in view of evidence showing that no error of fact or of law contributed to confection of compromise.

La.—Craig v. Compressed Industrial Gases, App., 7 So.2d 197.

(2) Where compromise settlement of compensation claim was entered into in good faith and all parties were in error as to claimant's true condition of total permanent disability, claimant thinking that he had fully recovered from the compensable injury, trial court properly refused to allow penalties against employer.

La.—Scott v. Caddo Parish School Board, App., 12 So.2d 823.

(3) Good faith agreement to settle compensation claim for lump sum computed on basis of sixty-five per cent of weekly wage for one hundred weeks in reliance on physician's opinion was an attempt at compromise and not a "lump-sum settlement" at unauthorized rate of discount so as to entitle claimant to statutory penalty.

La.—Smith v. Maier, App., 16 So.2d 682.

71. Ill.—Board of Education of City of Chicago v. Industrial Commission, 184 N.E. 202, 351 Ill. 128.

72. Ill.—Board of Education of City of Chicago v. Industrial Commission, supra.

73. Tex.—Maryland Cas. Co. v. Lewis, 252 S.W.2d 155, 151 Tex. 440, 88 F.2d 912.

74. U.S.—Hart v. Perkins, 179 N.E. 261, 258 N.Y. 66, 179 N.E. 259, 258 N.Y. 61, 71 C.J. p 1428 note 50.

Ill.—Dyer v. Industrial Commission, 4 N.E.2d 82, 364 Ill. 161.

Ind.—Guarantee Ins. Co. v. Phillips, 97 N.E.2d 364, 121 Ind.App. 324.

Mo.—Melvin v. Harrison Engineering & Construction Co., 107 S.W.2d 836, 232 Mo.App. 382.

Neb.—Redfern v. Safeway Stores, 16 N.W.2d 196, 145 Neb. 288.

N.Y.—Corcoran v. American Woodworking Machinery Co. (Yates-American Mach. Co.), 23 N.Y.S.2d 321, 260 App.Div. 965, appeal denied 32 N.E.2d 834, 285 N.Y. 858—Williams v. Roth, 292 N.Y.S. 745, 249 App.Div. 387, motion denied 294 N.Y.S. 214, 250 App.Div. 798—Williams v. Roth, 282 N.Y.S. 180, 245 App.Div. 874.

71 C.J. p 1428 note 27.

Statute enacted after injury

Where self-insured city's failure to pay uncontroverted compensation claim continued for about two months after amendment providing for penalties to enforce compliance, imposition of penalty was justified.

N.Y.—Smith v. City of Rochester, 135 N.Y.S.2d 323, 285 App.Div. 46, appeal denied 137 N.Y.S.2d 631, 285 App.Div. 844.

A municipal corporation is not exempt from statutory penalty for delay in paying a compensation award.

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75. Ill.—Board of Education of City of Chicago v. Industrial Commission, supra.

76. Tex.—Dixon v. U. S. Fidelity & Guaranty Co., Civ.App., 293 S.W. 291.

77. N.Y.—Hart v. Perkins, 179 N.E. 261, 258 N.Y. 66—Hart v. Perkins, 179 N.E. 259, 258 N.Y. 61, 71 C.J. p 1428 note 50.

Where employee is not entitled to compensation, no penalty may be imposed.

Ga.—Castle v. Imperial Laundry & Dry Cleaning Co., 8 S.E.2d 547, 62 Ga.App. 184.

Award rescinded

Failure to impose statutory penalty for default in payments of installments of compensation held not error where award was rescinded.

N.Y.—Seigmann v. Midwestern Const. Co., 290 N.Y.S. 245, 248 App.Div. 841.

78. Ill.—Board of Education of City of Chicago v. Industrial Commission, 184 N.E. 202, 351 Ill. 128.

71 C.J. p 1428 note 51.

79. U.S.—Zeller v. Associated Indemnity Corp., C.C.A.Or., 92 F.2d 453—Arrow Stevedore Co. v. Pillsbury, C.C.A.Cal., 88 F.2d 446—Candado Stevedoring Corp. v. Lowe, C. C.A.N.Y., 85 F.2d 119, certiorari denied 57 S.Ct. 115, 299 U.S. 538, 81 L.Ed. 433.

Supersedeas bond

Where judgment of district court, which set aside deputy commissioner's order terminating longshoreman's compensation and reinstated prior order awarding compensation, was affirmed by circuit court of appeals, insurance carrier was thereafter properly ordered to pay, from date of district court judgment, statutory penalty on overdue compensation, and supersedeas bond approved by district court did not avoid imposition of such penalty.

U.S.—Travelers Ins. Co. v. Branham, D.C.Pa., 65 F.Supp. 512.

80. Neb.—Udike Grain Co. v. Swanson, 178 N.W. 618, 164 Neb. 661.

81. Neb.—McGuire v. Phelan-Shirley Co., 197 N.W. 516, 111 Neb. 669, 71 C.J. p 1428 note 52.

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71 C.J. p 1428 note 51.

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71 C.J. p 1428 note 52.

penalty as to the portion obviously due, must pay or tender to the employee that amount.⁸²

What constitutes vexatious or unreasonable delay in paying the award is a question of fact,⁸³ to be determined under the circumstances of the particular case;⁸⁴ and, where all legal proceedings have been exhausted and a considerable time has been permitted to elapse thereafter during which the award is not paid, such delay is ordinarily considered unreasonable.⁸⁵ However, under some statutes, the penalty accrues on the failure to pay the award within a stated time after it becomes due.⁸⁶

Under some acts payment of the penalty will not be enforced where there was justifiable cause for

the delay or refusal to pay.⁸⁷ Delay during the pendency of a judicial proceeding brought and prosecuted in good faith for the purpose of obtaining a vacation or modification of an award of compensation,⁸⁸ or delay caused by uncertainty in the award which necessitated a conference with the commission's referee,⁸⁹ will not authorize the imposition of the penalty. However, when the appeal taken is not based on such a reasonable controversy as would justify an appeal, the penalty should be imposed.⁹⁰

Under some statutes, an insurer failing to pay a claim within the statutory time after proof of loss is subject to a penalty where such failure is arbitrary, capricious, or without probable cause.⁹¹

82. Neb.—*Western Newspaper Union v. Dee*, 187 N.W. 919, 108 Neb. 303.

71 C.J. p 1428 note 54.

83. Ill.—*Board of Education of City of Chicago v. Industrial Commission*, 184 N.E. 202, 351 Ill. 128.

84. Ill.—*Board of Education of City of Chicago v. Industrial Commission*, supra.

71 C.J. p 1428 note 56.

85. Ill.—*Board of Education of City of Chicago v. Industrial Commission*, supra.

71 C.J. p 1429 note 62.

86. U.S.—*Twine v. Locke*, C.C.A.Ky., 68 F.2d 712.

Clyde-Mallory Lines v. Cardillo, D.C.Mass., 22 F.Supp. 40—*Arrow Stevedore Co. v. Pillsbury*, D.C.Cal., 12 F.Supp. 920, affirmed, C.C.A., 88 F.2d 446.

Fla.—*Andrews v. Strecker Body Builders, Inc.*, 82 So.2d 521—*Rutherford v. Seven-Up Bottling Co.*, 83 So.2d 269.

Miss.—*T. C. Fuller Plywood Co. v. Moffett*, 95 So.2d 475—*Guess v. Southeastern Utilities Service Co.*, 85 So.2d 173, 226 Miss. 637—*Southern Engineering & Elec. Co. v. Chester*, 84 So.2d 535, 226 Miss. 136—*Cumbest Mfg. Co. v. Pinkney*, 83 So.2d 74, 225 Miss. 318, judgment corrected 84 So.2d 421, 225 Miss. 318.

N.Y.—*Teeter v. John W. Cowper Co.*, 100 N.Y.S.2d 984, 277 App.Div. 1082—*Leas v. Grumman Aircraft Engineering Corp.*, 97 N.Y.S.2d 77, 277 App.Div. 818.

at once.

Under statute providing that party not satisfied with award of industrial accident board may appeal by notice within twenty days after award, and by filing suit to set aside award within twenty days after notice, and that on failure to file such suit, award should be binding, and if it is against insurance company, it shall, at once comply, and section

providing for twelve per cent of the award as damages in event insurance company has failed to comply with award and claimant has brought suit on award and same is sustained, insurance company had not violated its statutory obligation to pay at once when but nine and one-half hours, most of which were consumed by darkness and nonbusiness hours, had passed from expiration of time for appeal, at time suit on award was commenced.

Tex.—*Maryland Cas. Co. v. Lewis*, 252 S.W.2d 155, 151 Tex. 480.

When award becomes final

Workmen's compensation act provision specifying when award becomes final pertains only to matters of review of order and does not determine when award becomes due, and, therefore, compensation carrier, which did not pay award within fourteen days after deputy commissioner's entry of award which compensation carrier did not seek to have reviewed, would be liable to claimant for additional compensation in amount of twenty percent of award. Fla.—*Rutherford v. Seven-Up Bottling Co.*, 83 So.2d 269.

Payment held timely

Under provision of workmen's compensation law requiring payment of award within ten days after service of notice thereof, and provision of Civil Practice Act that if service of a notice is made by mail three days shall be added to time specified, where notice of award was mailed Aug. 16, 1940, payment on Aug. 29, 1940, was timely and it was error to impose penalty.

N.Y.—*Bolton v. City of New York*, 37 N.Y.S.2d 148, 264 App.Div. 964.

87. U.S.—*Western Casualty Co. v. Hunt*, C.C.A.Tex., 69 F.2d 129, certiorari dismissed *Hunt v. Western Casualty Co.*, 55 S.Ct. 207, 293 U.S. 539, 79 L.Ed. 688.

Tex.—*Texas Emp. Ins. Ass'n v. Fish*, Civ.App., 276 S.W.2d 907, refused

no reversible error—*Pacific Indem. Co. v. Woodall*, Civ.App., 253 S.W.2d 490, error refused.

71 C.J. p 1429 note 63.

88. U.S.—*Travelers Ins. Co. v. Burleson*, C.A.Tex., 238 F.2d 620.

Neb.—*Hauff v. Kimball*, 77 N.W.2d 683, 163 Neb. 55—*Shamburg v. Shamburg*, 45 N.W.2d 446, 153 Neb. 495—*Faulhaber v. Roberts Dairy Co.*, 24 N.W.2d 571, 147 Neb. 631—*Redfern v. Safeway Stores*, 16 N.W.2d 196, 145 Neb. 288—*Kucera v. Village of Prague*, 3 N.W.2d 201, 141 Neb. 180—*Dobesh v. Associated Asphalt Contractors*, 292 N.W. 59, 138 Neb. 117—*Steward v. Deuel County*, 239 N.W. 877, 137 Neb. 516—*Hiestand v. Ristau*, 284 N.W. 756, 135 Neb. 881—*Carlson v. Condon-Klewit Co.*, 283 N.W. 220, 135 Neb. 537—*Wilson v. Brown-McDonald Co.*, 278 N.W. 254, 134 Neb. 211, 116 A.L.R. 702.

Tex.—*Texas Emp. Ins. Ass'n v. Logsdon*, Civ.App., 278 S.W.2d 393, refused no reversible error—*Texas Emp. Ins. Ass'n v. Layton*, Civ. App., 278 S.W.2d 453.

71 C.J. p 1429 note 59.

89. Colo.—*Industrial Commission of Colorado v. Continental Inv. Co.*, 277 P. 303, 85 Colo. 475.

90. Neb.—*Abel Const. Co. v. Goodman*, 181 N.W. 713, 105 Neb. 700.

71 C.J. p 1429 note 61.

91. La.—*Hall v. Pipe Line Service Corp.*, 98 So.2d 202, 233 La. 321—*Carrington v. Consolidated Underwriters*, 89 So.2d 399, 230 La. 939—*Kline v. Dawson*, 89 So.2d 385, 230 La. 901.

Cummings v. Albert, App., 86 So. 2d 727—*Glostion v. Coal Operators Cas. Co.*, App., 85 So.2d 100—*Moore v. Travelers Ins. Co.*, App., 79 So. 2d 507—*Martin v. Great Ath. Indem. Co.*, App., 75 So.2d 415—*Frugé v. Pacific Emp. Ins. Co.*, App., 71 So.2d 425, affirmed 76 So. 2d 719, 226 La. 570—*Dodge v. Ash Indem. Co.*, App., 70 So.2d 923.

While such statute is strictly construed,⁹² the imposition of a penalty is mandatory where the case falls within its provisions.⁹³ Only the insurer and not the employer is subject to the penalty;⁹⁴ an insured employer is not subject to the statutory penalty.⁹⁵

—Richard v. Traders & General Ins. Co., App., 62 So.2d 533.

Contra

Wright v. National Sur. Corp., App., 52 So.2d 597.

Estoppel

A workmen's compensation insurer, recognizing injured employee's right to compensation for total permanent disability by paying him compensation therefor for over a year, cannot deny that he furnished satisfactory proof of loss, as required by statute to recover penalty for insurer's arbitrary or capricious failure to make further compensation payments within sixty days after receipt of such proof.

La.—Daigle v. Great Am. Indem. Co., App., 70 So.2d 697.

Proof of loss

(1) Term "proof of loss" in provision of workmen's compensation act, subjecting compensation insurer to penalty for arbitrary or capricious failure to pay compensation due within sixty days after receipt of satisfactory proof of loss from injured employee, means satisfactory proof of employee's right to come under such act and of accident, injury, and resulting disability or loss of ability to perform same work as, or work similar to, that in which he was engaged at time of accident, and any monetary loss, that is, loss or decrease in wages, is incidental and result of such loss of ability.

La.—Daigle v. Great Am. Indem. Co., supra.

(2) An injured employee, furnishing workmen's compensation insurer satisfactory proof of loss, after which insurer paid him weekly compensation for total permanent disability for over a year, was not required to furnish another proof of loss after insurer's discontinuance of such payments and wait sixty days before filing suit for further compensation in order to recover statutory penalty for insurer's arbitrary and capricious refusal to continue payments.

La.—Daigle v. Great Am. Indem. Co., supra.

Payments by another employer

Continued wage payments to a workmen's compensation claimant, after her injury, by another employer, would not excuse insurer of claimant's employer at time of her injury from withholding payment of weekly compensation or absolve it from liability for penalties and attorney's fees imposed for arbitrary and capricious failure to pay compensation due a disabled employee.

La.—Guillory v. Coal Operators Cas. Co., App., 95 So.2d 201.

Payments delinquent at time of judgment

Penalties provided by statute for insurer's arbitrary and capricious failure to pay claims can be assessed only against payments delinquent at time of judgment, and cannot be based upon an entire workmen's compensation award.

La.—Guillory v. Coal Operators Cas. Co., supra.

Refusal held arbitrary and capricious

La.—Cain v. Employers Cas. Co., App., 96 So.2d 527—Holland v. Marquette Cas. Co., App., 95 So.2d 878—Cummings v. Albert, App., 86 So.2d, 727—Glostton v. Coal Operators Cas. Co., App., 85 So.2d 100—Daigle v. Great Am. Indem. Co., App., 70 So.2d 697—Wallace v. Aetna Cas. & Sur. Co., App., 68 So.2d 685—Richard v. Traders & General Ins. Co., App., 62 So.2d 533.

Refusal held not arbitrary or capricious

La.—Carrington v. Consolidated Underwriters, 89 So.2d 399, 230 La. 939—Landry v. Fuselier, 88 So.2d 218, 230 La. 271.

Helms v. Employers Mut. Liability Ins. Co. of Wis., App., 95 So.2d 46—McMorris v. Home Indem. Co., App., 94 So.2d 471—Flanagan v. Welch, App., 93 So.2d 36—Hebert v. Hartford Acc. & Indem. Co., App., 88 So.2d 243—Williams v. Southern Advance Bag & Paper Co., App., 87 So.2d 165—O'Connor v. American Mut. Liability Ins. Co., App., 87 So.2d 16—Cummings v. Albert, App., 86 So.2d 727—Welch v. Newport Industries, Inc., App., 86 So.2d 704—Tate v. Gullett Gin Co. & Liberty Mut. Ins. Co., App., 86 So.2d 698—Cahee v. U. S. Casualty Co., App., 86 So.2d 631—Lyons v. Swift & Co., App., 86 So.2d 613—Lacy v. Employers Mut. Liability Ins. Co. of Wis., App., 86 So.2d 605—Bickham v. Lester J. Danner, Inc., App., 86 So.2d 564—Hall v. Pipe Line Service Corp., App., 85 So.2d 706—Clements v. Liberty Mut. Ins. Co., App., 85 So.2d 675—Todd v. Sunnyland Contracting Co., App., 85 So.2d 537—Wynn v. Fidelity & Cas. Co. of N. Y., App., 85 So.2d 815—Champagne v. Houston Fire & Cas. Ins. Co., App., 85 So.2d 106—Smith v. W. Horace Williams Co., App., 84 So.2d 223—Teekell v. Travelers Ins. Co., App., 83 So.2d 586—Michel v. Maryland Cas. Co., App., 81 So.2d 86—Moore

v. Travelers Ins. Co., App., 79 So.2d 507—Monk v. Coal Operators Cas. Co., App., 76 So.2d 82—Martin v. Great Am. Indem. Co., App., 75 So.2d 415—Chamberlin v. Maryland Cas. Co., App., 75 So.2d 866—Watson v. Floyd Elec. Co., App., 75 So.2d 361—Madison v. Hornsby, App., 69 So.2d 616—Reeve v. Clement-Braswell Mach. & Fabricating Works, App., 66 So.2d 387.

92. La.—Cahee v. U. S. Casualty Co., App., 86 So.2d 631.

Waiver of statutory time

In suit under workmen's compensation act for total permanent disability compensation due plaintiff after defendant compensation insurer's discontinuance of compensation payments for such disability, insurer, admitting in its answer plaintiff's allegation of his amicable demand for payment of further compensation and insurer's refusal thereof and denying any liability for such compensation, waived statutory requirement of sixty days delay before filing suit as condition precedent to recovery of statutory penalty of twelve per cent of compensation payments sixty days overdue.

La.—Daigle v. Great Am. Indem. Co., App., 70 So.2d 697.

93. La.—Daigle v. Great Am. Indem. Co., supra.

Waiver of penalty

By accepting without protest carrier's resumption of compensation payments after filing of his suit, employee waived right to penalty on then overdue payments.

La.—Fruge v. Pacific Emp. Ins. Co., App., 71 So.2d 625, affirmed 76 So.2d 719, 226 La. 530.

Failure to pay undisputed part of claim

Where there was no bona fide dispute between injured workman and compensation carrier as to workman's partial disability, even though workman claimed total and permanent disability, carrier's discontinuance of all compensation was arbitrary, capricious and without probable cause, and subjected carrier to statutory penalties.

La.—Fruge v. Pacific Emp. Ins. Co., 76 So.2d 719, 226 La. 530.

94. La.—Ortego v. Southern Industries Co., App., 88 So.2d 73—Todd v. Sunnyland Contracting Co., App., 85 So.2d 537.

95. La.—Clifton v. Arnold, App., 87 So.2d 886.

XXI. INCREASE, DIMINUTION, TERMINATION, OR REINSTATEMENT OF COMPENSATION

A. AWARDS GENERALLY

1. ADJUSTMENT OR TERMINATION OF COMPENSATION

§ 849. In General

Provisions for the adjustment, termination, or suspension of compensation by the tribunal concerned, acting on application of a party in interest, may operate to create a right in addition to, and not dependent on, the right of appeal; and in so far as such provisions operate to give a workman a right to receive further compensation, the right conferred is substantial. Generally speaking, power to review a compensation award or judgment cannot be conferred by agreement, waiver, or conduct.

The rules governing modification, amendment, correction, opening and vacating awards and judgments in compensation proceedings have already been discussed in general terms supra §§ 649-653. The discussion herein deals with the modification, amendment, opening or vacating awards or judgments with the view to increasing, diminishing, terminating or suspending compensation.

The compensation acts commonly contain provisions, as discussed infra § 850, for the adjustment, termination, or suspension of compensation, either by the tribunal concerned acting on its own motion or on application of a party in interest. Such provisions presuppose an agreement or award,⁹⁶ or, at least, a benefit furnished under the compensation act by a voluntary act of the employer.⁹⁷ They may operate to create in a party a right in addition to, and not dependent on, the right of appeal.⁹⁸ In so far as such provisions operate to give a workman a right to receive further compensation, the right conferred is substantial,⁹⁹ of the same dignity as his right to receive compensation in the first instance,¹ and one of which he cannot be deprived.²

The power to review a compensation award or judgment is wholly statutory, as discussed infra § 850, and cannot be conferred by agreement, waiver, or conduct.³ However, it has been held that the right, if any, to object to the exercise of the power of the commission in reopening a case, taking further testimony, involving questions of law not previously considered, in a hearing de novo, and in making a second award, involves merely questions of remedy or procedure and may be waived;⁴ and that an employer is bound by an agreement stopping compensation and providing that if future disability develops or if the employee is unable to continue at his work because of disability due to the accident, compensation shall again be paid without its being necessary to show a change of condition for the worse lessening earning capacity.⁵

§ 850. Statutory Regulation

- a. In general
- b. Retrospective or prospective operation of statutes

a. In General

The compensation acts commonly contain provisions, subject to limitations, for the adjustment, termination, or suspension of compensation, under which the compensation authorities or a court may review a prior award or judgment in a proper case and increase, decrease, terminate, or suspend compensation; but such review power is wholly statutory and the exercise of such power must be within statutory terms, liberally construed.

The compensation acts commonly contain provisions, subject to limitations, for the adjustment,

96. Cal.—Pacific Indem. Co. v. Industrial Acc. Commission, 193 P. 2d 117, 85 C.A.2d 490.

Ill.—Weymer v. Industrial Commission, 83 N.E.2d 841, 404 Ill. 271.
Order denying compensation as subject to review see infra § 851 e.
Right and power to modify or set aside agreements and settlements see infra §§ 896-900.

97. Cal.—Pacific Indem. Co. v. Industrial Acc. Commission, 193 P.2d 117, 85 C.A.2d 490.

98. Ky.—Lincoln Coal Co. v. Watts, 120 S.W.2d 1026, 275 Ky. 130.

Judicial review as not being condition precedent to proceedings for review and adjustment of award see infra § 857.

99. N.J.—Kolesnik v. Irvington Varnish & Insulator Co., 197 A. 727, 120 N.J.Law 8.

Contractual

Right to petition for further compensation was a contractual right which existed because employer had elected to be subject to workmen's compensation act.

Mich.—Tarnow v. Railway Exp. Agency, 50 N.W.2d 318, 331 Mich. 558.

1. Ariz.—Hogle v. Arizona Concrete Co., 33 P.2d 589, 44 Ariz. 1.

2. N.H.—Zeady v. Arms Textile Mfg. Co., 76 A.2d 512, 96 N.H. 328.

Provision purporting to bar is void
Provision of an original judgment

on compensation claimant's petition, which purported to bar recovery for after-occurring increase of disability, was void as an attempt to deprive claimant of a substantial right conferred by statute.

N.J.—Kolesnik v. Irvington Varnish & Insulator Co., 197 A. 727, 120 N. J.Law 8.

3. Okl.—City of Tulsa v. State Industrial Commission, 113 P.2d 987, 189 Okl. 73.

4. Colo.—Industrial Commission of Colorado v. State Insurance Compensation Fund, 203 P. 215, 71 Colo. 106.

71 C.J. p 1431 note 86.

5. Mich.—Kalonsky v. Goebel Brewing Co., 276 N.W. 706, 282 Mich. 638.

termination, or suspension of compensation,⁶ under which the compensation board or commission, or other designated compensation officials,⁷ or, in the case of an award by a court, the court entering the original award,⁸ may review a prior award or judgment in a proper case and increase, decrease, terminate, or suspend compensation. The power of the compensation authorities⁹ or courts¹⁰ thus to adjust, terminate, or suspend compensation is wholly statutory, and their exercise of such power must

be within statutory terms.¹¹

While, as will be seen infra § 854, the grounds on which such power may be exercised are not always limited to changes in the condition of the workman, generally speaking, the purpose of statutes conferring such power is to provide a means of increasing, decreasing, or terminating compensation in accordance with the changed condition of the workman as justice requires,¹² or of correcting mistakes

6. Mich.—Romanchuk v. Ford Motor Co., 288 N.W. 303, 290 Mich. 673.

Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

N.D.—Wallace v. North Dakota Workmen's Compensation Bureau, 284 N.W. 420, 69 N.D. 165.

Okl.—Board of Com'rs of Oklahoma County v. State Industrial Commission, 85 P.2d 396, 184 Okl. 133.

State has right to enlarge right of workman to compensation whether disability developed before or after first allowance of his claim.

Or.—Colvin v. State Indus. Acc. Commission, 253 P.2d 910, 197 Or. 401.

7. Ga.—Fralish v. Royal Indemnity Co., 186 S.E. 567, 53 Ga.App. 557.

Kan.—Brewington v. W. U. Tel. Co., 183 P.2d 872, 163 Kan. 534.

Mass.—Gramolini's Case, 101 N.E.2d 750, 328 Mass. 86.

N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 13 N.W.2d 610, 73 N.D. 245, opinion supplemented on other grounds 23 N.W.2d 26, 74 N.D. 520—Wallace v. North Dakota Workmen's Compensation Bureau, 284 N.W. 420, 69 N.D. 165.

Pa.—Swartz v. Mitchell, 42 Pa.Dist. & Co. 120, 23 Erie Co. 120.

Award by court

A statute which in terms authorizes commission to review "any award" authorizes commission to review an award made by a court.

Kan.—Calonder v. F. H. Fresto Const. Co., 126 P.2d 209, 155 Kan. 497.

Referee designated by board may have power

Pa.—Swartz v. Mitchell, 42 Pa.Dist. & Co. 120, 23 Erie Co. 120.

8. Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

Claimant a nonresident

Judge before whom compensation proceedings had been tried had jurisdiction of suit by employer and its insurer for discontinuance of compensation payments on ground that claimant was no longer disabled, although claimant was at time a nonresident of state, where district judge appointed a curator ad hoc to represent claimant.

La.—Averill v. Wholesale Grocery Co. v. Elmore, App., 31 So.2d 434.

9. Conn.—Morisi v. Ansonia Mfg. Co., 142 A. 393, 108 Conn. 31.

N.J.—Cleland v. Verona Radio, 33 A. 2d 712, 130 N.J.Law 588.

N.Y.—Ryan v. American Bridge Co., 278 N.Y.S. 612, 243 App.Div. 496, affirmed 193 N.E. 875, 268 N.Y. 502.

W.Va.—Blevins v. State Compensation Commission, 33 S.E.2d 408, 127 W.Va. 481.

Powers of administrative officers and boards generally see supra § 384.

With respect to power to make a retroactive modification of an award, powers of compensation commissioners are wholly creation of statute and inquiry must be as to intent of the legislature in the provisions it has made as to revision of awards.

Conn.—Morisi v. Ansonia Mfg. Co., 142 A. 393, 108 Conn. 31.

10. Ky.—Stewart v. Model Coal Co., 288 S.W. 696, 216 Ky. 742.

71 C.J. p 1430 note 76.

Courts are powerless to aid workman seeking increase after entry of judgment for compensation where compensation act makes no provision for increase in case of increased disability, except through procedure authorized by statutes or general law.

N.M.—Hudson v. Herschbach Drilling Co., 128 P.2d 1044, 46 N.M. 330.

Jurisdiction to reclassify only appellate

An injured employee awarded compensation cannot bring an original action in the superior court to require compensation officials to reclassify his injury, since jurisdiction of the superior court as to such controversies is appellate only and not original.

Wash.—Maddox v. Industrial Insurance Commission, 204 P. 1057, 119 Wash. 21.

71 C.J. p 1430 note 75.

11. Ga.—Travelers Ins. Co. v. Haney, 88 S.E.2d 492, 92 Ga.App. 319.

Ind.—Lukich v. West Clinton Coal Co., 10 N.E.2d 302, 104 Ind.App. 73.

Ky.—Lincoln Coal Co. v. Watts, 120 S.W.2d 1026, 275 Ky. 130.

Mich.—Szczygiel v. Cadillac Motor Car Co., 293 N.W. 645, 294 Mich. 271.

Hurst v. Ford Motor Co., 287 N.W. 573, 276 Mich. 405—Wright

v. Mitchell Bros. Co., 267 N.W. 571, 275 Mich. 591.

Pa.—Swartz v. Mitchell, 42 Pa.Dist. & Co. 120, 23 Erie Co. 120.

Tenn.—Fidelity & Casualty Co. of New York v. Long, 180 S.W.2d 889, 181 Tenn. 190.

Wash.—Anderson v. Department of Labor and Industries, 242 P.2d 514, 40 Wash.2d 210.

71 C.J. p 1429 note 66, p 1430 note 69.

Second award for permanent disability

(1) Where commission has jurisdiction of subject matter to make award for temporary disability, it has power to make a second award for permanent disability.

Colo.—Industrial Commission of Colorado v. State Insurance Compensation Fund, 203 P. 215, 71 Colo. 106.

Commissioner could in his discretion withhold determination of whether claimant's partial disability was temporary or permanent and, on subsequent review of case, find it was permanent and award further compensation.

U.S.—Luckenbach S. S. Co. v. Norton, C.C.A.Pa., 106 F.2d 137.

Partial incapacity after total incapacity

Where further compensation for partial incapacity for work after expiration of period for which a claimant has been awarded and paid compensation for presumed total incapacity is expressly authorized, such additional compensation may be awarded if warranted by the facts.

Me.—Crabtree's Case, 121 A. 673, 123 Me. 554.

12. Kan.—Brewington v. W. U. Tel. Co., 183 P.2d 872, 163 Kan. 534.

La.—Jefferson v. Laure N. Truck Line, App., 181 So. 821, affirmed Jefferson v. Lauri N. Truck Lines, 187 So. 44, 192 La. 29.

Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172.

Similar statement

Object of statute dealing with adjustment and modification of awards is to deal fairly and justly with employer and employee alike in decreasing or increasing any previous award which because of subsequent change in condition of em-

and inaccuracies ordinarily inherent in, and incident to, the prognosis involved in entering an award.¹³ The power conferred under such provisions has been said to be similar to the general power of a court to open a judgment during the term at which it was rendered,¹⁴ but is to be distinguished from the power of a tribunal entering an award to rehear the case within a certain period of time and on certain grounds.¹⁵

Statutes conferring such power are to be liberally construed to accomplish the purpose of the legis-

lature in enacting them,¹⁶ in accordance with general rules of statutory construction.¹⁷ So construed, they will not be applied beyond their scope.¹⁸ Depending on the terms of the statute, the power may be exercised by the proper tribunal or official acting on its or his own motion,¹⁹ or on application of one of the parties in interest.²⁰ A provision of the act that, if no petition for review is filed, the referee's award of compensation shall be the final award of the commission does not bar the commission from reviewing the award of its own motion.²¹

employee or facts not previously considered by commissioner is too large or too small and to prevent any employer from contributing less to the workmen's compensation fund, and any employee from receiving more from it, than is just and equitable in particular case.

W.Va.—Blosser v. State Compensation Com'r, 51 S.E.2d 71, 132 W. Va. 112.

13. N.J.—J. W. Ferguson Co. v. Seaman, 197 A. 245, 119 N.J. Law 575.

14. S.C.—Corpus Juris quoted in Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 22, 201 S.C. 349.

Va.—Old Dominion Land Co. v. Messick, 141 S.E. 132, 149 Va. 330.

15. Mont.—Shugg v. Anaconda Copper Mining Co., 46 P.2d 435, 100 Mont. 159.

Rehearing and new trial in proceedings to secure compensation see supra §§ 660-668.

16. W.Va.—Blosser v. State Compensation Com'r, 51 S.E.2d 71, 132 W. Va. 112.

71 C.J. p 1431 note 89.

Liberal construction of compensation acts generally see supra § 20.

Constitutional and statutory provision for liberal construction of act Cal.—Bartlett Hayward Co. v. Industrial Accident Commission, 265 P. 195, 203 C. 522.

71 C.J. p 1431 note 91.

To end of providing adequate compensation

Statute authorizing commission within a specified period to review any award on specified grounds and on a sufficient showing, subject to limitations, to make an award ending, diminishing, maintaining, or increasing compensation previously awarded, is a remedial act for purpose of providing adequate compensation for those injured and must be liberally construed to that end. Colo.—Morrison v. Clayton Coal Co., 131 P.2d 1011, 116 Colo. 501.

17. Mont.—Meznarich v. Republic Coal Co., 53 P.2d 82, 101 Mont. 78. Pa.—Beake v. Vesta Coal Co., Com. Pl., 83 Pittsb. Leg. J. 568, reversed

on other grounds 28 A.2d 81, 149 Pa. Super. 388.

Omission of time limitation

Effect of statute which omitted time limitation provision relating to any further award of compensation in compensation cases arising because of injuries occurring prior to certain date, was to repeal that provision.

W.Va.—Taylor v. State Compensation Com'r, 86 S.E.2d 114, 140 W. Va. 572.

18. Ind.—Denasoff v. Foundation Co., 155 N.E. 521, 86 Ind. App. 272.

La.—Jefferson v. Laure N. Truck Line, App., 131 So. 321, affirmed Jefferson v. Lauri N. Truck Lines, 137 So. 44, 132 La. 29.

Filing original claim

(1) Statute vesting in commission authority to review award of commission within prescribed time from date of last payment of compensation, pursuant to award, has no relation to filing of original claim for compensation or time within which such claims are to be filed and relates exclusively to time within which employee may file petition for review of award theretofore made.

N.C.—Biddix v. Rex Mills, Inc., 75 S. E.2d 777, 237 N.C. 660.

(2) A provision that jurisdiction of board shall be continuing, and that from time to time it may, on its own motion or on application of either party, because of change of condition, make such modification or change in the award as it may deem just within the compass of the act, has no application where an employee makes an original application for compensation for permanent impairment, after having entered an agreement, approved by board, for compensation for temporary total disability, since there was no change of condition involved.

Ind.—Denasoff v. Foundation Co., 155 N.E. 521, 86 Ind. App. 272.

71 C.J. p 1431 note 93.

19. N.D.—Wallace v. North Dakota Workmen's Compensation Bureau, 234 N.W. 426, 69 N.D. 165.

Okl.—Dunning - James - Patterson v. Rickert, 164 P.2d 626, 196 Okl. 237

—Dennehy Const. Co. v. Kidd, 137 P.2d 535, 192 Okl. 463.

71 C.J. p 1430 note 70.

20. Mont.—Shugg v. Anaconda Copper Mining Co., 46 P.2d 435, 100 Mont. 159.

N.D.—Wallace v. North Dakota Workmen's Compensation Bureau, 234 N.W. 426, 69 N.D. 165.

Okl.—Dunning - James - Patterson v. Rickert, 164 P.2d 620, 196 Okl. 237

—Dennehy Const. Co. v. Kidd, 137 P.2d 535, 192 Okl. 463.

Pa.—Swartz v. Mitchell, 42 Pa. Dist. & Co. 120, 23 Erie Co. 120.

71 C.J. p 1430 note 70.

Persons entitled to apply and parties to application see infra § 858.

Claim not objectionable as splitting cause of action

Where claimant was awarded compensation for injuries suffered in accident arising out of, and in course of, employment, subsequent application to review payments was not open to objection that claimant had split cause of action, since under workmen's compensation act claimant had no cause of action against employer in sense of common law or any amendment thereto, to split.

Mich.—Hebert v. Ford Motor Co., 231 N.W. 374, 285 Mich. 607.

When jurisdictional facts are recited in petition, commission has right to reopen case, and if jurisdictional facts are established at hearing commission has jurisdiction to alter or amend award.

Ariz.—Nevitt v. Industrial Commission, 217 P.2d 1039, 70 Ariz. 172.

Provision that where an employer applies for modification of award, and such application discloses cause for further adjustment, commissioner shall make such modifications, is sufficient authority for further consideration by commissioner after claimant's death of claim for compensation for silicosis in second stage.

W.Va.—Whited v. State Compensation Com'r, 49 S.E.2d 388, 131 W. Va. 646.

21. Colo.—Employers' Mut. Ins. Co. v. Industrial Commission, 265 P. 234, 83 Colo. 355.

Continuing jurisdiction. Under many compensation acts, either by express terms or construction, the tribunal or official making an award has continuing jurisdiction over it,²² subject to statutory limitations and exceptions,²³ at least, as long as the disability continues,²⁴ and may, in a proper case, modify or change it²⁵ as changing conditions warrant.²⁶ Such statutory power continues irrespective of the reservation of jurisdiction in an award,²⁷ and the compensation authorities are without power to divest themselves of this continuing jurisdiction to modify an award in a proper case, except as authorized by statute.²⁸ The exercise of such statutory power, in the absence of an express restriction, is not conditional on payment by the employer of compensation in accordance with the original award.²⁹ In conferring a continuing

jurisdiction on the board, the statute does not purport to give it any authority to undo what has been finally determined;³⁰ it merely authorizes a review of the award in accordance with facts later found to exist;³¹ it does not authorize the board on the death of a dependent to abate a balance due under the award, if any, and revert it to the state insurance fund.³² Although the compensation act does not specifically confer on the commission a continuing power over its awards, such power may be implied from a provision that the commission shall not be bound, except as indicated, by formal rules of procedure but shall proceed in such manner as in its judgment is best to ascertain the substantial rights of the parties and to carry out the spirit of the act.³³ Where the full extent of claimant's injuries cannot be ascertained, the commission not

22. Ariz.—Nevitt v. Industrial Commission, 217 P.2d 1039, 70 Ariz. 172.

Mont.—Lunardello v. Republic Coal Co., 53 P.2d 87, 101 Mont. 94—Meznarich v. Republic Coal Co., 53 P.2d 82, 101 Mont. 78.

N.J.—Bilyou v. George M. Brewster & Son, Inc., 93 A.2d 425, 23 N.J. Super. 476.

N.M.—Corpus Juris cited in Norvell v. Barnsdall Oil Co., 70 P.2d 150, 151, 41 N.M. 421.

N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 13 N.W.2d 610, 73 N.D. 245, opinion supplemented on other grounds 23 N.W.2d 26, 74 N.D. 520—Bergstrand v. North Dakota Workmen's Compensation Bureau, 287 N.W. 631, 69 N.D. 447.

Minn.—Tuomi v. General Logging Co., 265 N.W. 837, 196 Minn. 617.

Okl.—Commerce Mining & Royalty Co. v. Fields, 99 P.2d 124, 186 Okl. 540—Ross Oil Co. v. Crouse, 96 P.2d 1030, 186 Okl. 169—Pauly Jail Bldg. Co. v. Akin, 86 P.2d 796, 184 Okl. 249—Marland Oil Co. v. Sans, 51 P.2d 751, 175 Okl. 131.

Utah.—Johnson v. Industrial Commission of Utah, 73 P.2d 1308, 93 Utah 493.

W.Va.—Blevins v. State Compensation Com'r, 33 S.E.2d 408, 127 W. Va. 481.

71 C.J. p 1430 note 78.

Where board assumed jurisdiction by allowing physician's claim for medical services furnished employee, and disability later developed board's jurisdiction on claim continued.

Mont.—Gugler v. Industrial Acc. Fund, 157 P.2d 89, 117 Mont. 38.

23. Minn.—Tuomi v. General Logging Co., 265 N.W. 837, 196 Minn. 617.

Me.—Dewey v. Union Electric Light & Power Co., App., 83 S.W.2d 203.

Mont.—Meznarich v. Republic Coal Co., 53 P.2d 82, 101 Mont. 78.

Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

W.Va.—Blevins v. State Compensation Com'r, 33 S.E.2d 408, 127 W. Va. 481.

24. Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

25. Mont.—Lunardello v. Republic Coal Co., 53 P.2d 87, 101 Mont. 94. Okl.—Marland Oil Co. v. Sans, 51 P.2d 751, 175 Okl. 131.

Utah.—Johnson v. Industrial Commission of Utah, 73 P.2d 1308, 93 Utah 493.

71 C.J. p 1430 note 78.

After an award for temporary disability, commission may, under its continuing jurisdiction, enter an award for permanent disability without showing a change of condition.

Okl.—Behling v. Fox Rig & Lumber Co., 105 P.2d 532, 187 Okl. 682—Commerce Mining & Royalty Co. v. Fields, 99 P.2d 124, 186 Okl. 540—Pauly Jail Bldg. Co. v. Akin, 86 P.2d 796, 184 Okl. 249.

26. N.J.—Bilyou v. George M. Brewster & Son, Inc., 93 A.2d 425, 23 N.J. Super. 476.

N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 13 N.W.2d 610, 73 N.D. 245, opinion supplemented on other grounds 23 N.W.2d 26, 74 N.D. 520—Bergstrand v. North Dakota Workmen's Compensation Bureau, 287 N.W. 631, 69 N.D. 447.

Ohio.—State ex rel. Randall v. Industrial Commission of Ohio, App., 47 N.E.2d 245—State ex rel. White v. Industrial Commission of Ohio, App., 40 N.E.2d 453.

Okl.—O. C. Whitaker, Inc., v. Dillingham, 134 P.2d 588, 192 Okl. 150.

71 C.J. p 1430 note 78.

27. Cal.—Arbogast v. Richardson, 6 P.2d 98, 119 C.A. 316.

Ind.—Swift & Co. v. Neal, 18 N.E.2d 491, 106 Ind.App. 139.

28. N.J.—Kolesnik v. Irvington Varnish & Insulator Co., 197 A. 727, 120 N.J. Law 3.

Okl.—Sparkman v. Cosden Pipe Line Co., 77 P.2d 21, 182 Okl. 184—Independent Oil & Gas Co. v. Clark, 52 P.2d 789, 175 Okl. 257—Gardner Pet. Co. v. Poe, 26 P.2d 743, 166 Okl. 169.

Entry of award against one employer only

Where claim had been filed against two employers and commission acquired jurisdiction of both, jurisdiction to make an award for permanent disability against both employers was not divested by fact that prior award for temporary disability and disfigurement had been entered against one employer only.

Okl.—Ross Oil Co. v. Crouse, 96 P.2d 1030, 186 Okl. 169.

29. Ind.—Gvozdic v. Inland Steel Co., 154 N.E. 804, 86 Ind.App. 122.

30. N.D.—Hanson v. North Dakota Workmen's Compensation Bureau, 248 N.W. 680, 63 N.D. 479.

Okl.—Payne Drilling Co. v. Shoemaker, 97 P.2d 881, 186 Okl. 345. Conclusiveness of original award or judgment generally see *infra* § 853.

31. N.D.—Hanson v. North Dakota Workmen's Compensation Bureau, 248 N.W. 680, 63 N.D. 479.

32. Ohio.—State v. Industrial Commission, 111 N.E. 299, 92 Ohio St. 434, L.R.A.1916D 944, Ann.Cas. 1917D 1162.

33. Ariz.—Zagar v. Industrial Commission, 14 P.2d 472, 40 Ariz. 479. 71 C.J. p 1431 note 84.

only has the right, but it is its legal duty, to retain jurisdiction of the case for further action.³⁴

b. Retrospective or Prospective Operation of Statutes

Whether or not a statute dealing with the revision of awards operates retrospectively or prospectively only is ordinarily to be determined in accordance with general rules of statutory construction and constitutional principles.

Whether or not a statute dealing with the revision of awards operates retrospectively or prospectively only is ordinarily to be determined in accordance with general rules of statutory construction³⁵ and constitutional principles.³⁶ Thus, such statute is ordinarily to be construed as having a prospective operation only unless its terms show clearly a legislative intention that its terms should operate retro-

spectively³⁷ or it relates merely to remedies or procedure.³⁸ So, a statute not in terms retroactive, providing that a finding that incapacity had ceased should not be considered final and that after such finding further hearings might be had and further compensation awarded will be construed as having prospective operation only.³⁹ A provision limiting the period within which an award or agreement as to compensation may be modified will not be construed to apply retroactively to prior awards or agreements unless such intention on the part of the legislature is clearly expressed.⁴⁰ However, a provision limiting the power to review an award by limiting the period for modification, if expressly applicable to an existing right, not depriving the employee of it but merely regulating the time for its assertion,⁴¹ or to a claim filed before adoption,⁴² is valid and enforceable.

34. Colo.—Employers' Mut. Ins. Co. v. Industrial Commission of Colorado, 176 P. 314, 65 Colo. 283.

35. Mich.—Tarnow v. Railway Exp. Agency, 50 N.W.2d 318, 331 Mich. 558.

W.Va.—Taylor v. State Compensation Com'r, 86 S.E.2d 114, 140 W. Va. 572.

Retrospective operation of statutes generally see Statutes §§ 412-440.

36. Constitutionality of retrospective laws generally see Constitutional Law §§ 415-419.

Authorizing reopening of cases finally determined

Where decision of board that employee's right to compensation was final under existing law, a subsequently enacted statute providing that decision terminating right to compensation should not be considered final and that a further hearing might be had and a further award made, in so far as applicable retroactively, was unconstitutional as depriving insurer of property rights.

Mass.—Ziccardi's Case, 192 N.E. 29, 287 Mass. 588, certiorari denied Ziccardi v. Travelers Ins. Co., 55 S.Ct. 515, 294 U.S. 716, 79 L.Ed. 1249, rehearing denied 55 S.Ct. 550, 294 U.S. 783, 79 L.Ed. 1262.

37. D.C.—New Amsterdam Casualty Co. v. Cardillo, 108 F.2d 492, 71 App.D.C. 172.

Idaho.—Kelley v. Prouty, 30 P.2d 769, 54 Idaho 225.

W.Va.—Taylor v. State Compensation Com'r, 86 S.E.2d 114, 140 W. Va. 572.

Right to proceed for further compensation is controlled solely by provisions of act in effect when accident happened; and statute enacted after accident and limiting period for which further compensation could be

awarded, the purpose being to limit amount of recovery in certain cases, would not be applied.

Mich.—Tarnow v. Railway Exp. Agency, 50 N.W.2d 318, 331 Mich. 558.

Statute enacted after claim reopened inapplicable

Where case was reopened March 29, 1945, after a lump sum settlement had been approved by board and case had been closed in 1941, statute relating to nonschedule adjustment had no application in view of fact it was not enacted until after date of reopening and in view of reclassification of disability.

N.Y.—Williamson v. J. W. Cowper Co., 85 N.Y.S.2d 715, 274 App.Div. 1078.

38. Ill.—Superior Coal Co. v. Industrial Commission, 151 N.E. 890, 321 Ill. 240.

N.J.—J. W. Ferguson Co. v. Seaman, 197 A. 245, 119 N.J.Law 575.

Extending time for modification or review

(1) An amendment extending period allowed for modification of an award and permitting modification within one year of last payment of compensation applies only to remedy and neither creates new rights nor destroys old and is applicable to claims pending at time it became effective.

D.C.—New Amsterdam Casualty Co. v. Cardillo, 108 F.2d 492, 71 App. D.C. 172.

(2) So, an amendment of compensation act extending time for review of a formal award on the ground of increased incapacity or diminished disability has been viewed as essentially procedural in character and applicable to awards made after its enactment, although based on accidents occurring prior thereto, since

amendment was intended to effectuate basic statutory policy of compensation, not beyond prescribed maximum, for entire disability ensuing from compensable accidental injury by extending time for presentation of petition increase or decrease in case of formal awards, to correspond substantially with kindred provisions relating to informal awards, and did not authorize enforcement of a new cause of action, but merely a new proceeding based on a new factual situation.

N.J.—J. W. Ferguson Co. v. Seaman, 197 A. 245, 119 N.J.Law 575.

39. Mass.—Ziccardi's Case, 192 N.E. 29, 287 Mass. 588, certiorari denied Ziccardi v. Travelers Ins. Co., 55 S.Ct. 515, 294 U.S. 716, 79 L.Ed. 1249, rehearing denied 55 S.Ct. 550, 294 U.S. 783, 79 L.Ed. 1262.

40. Idaho.—Kelley v. Prouty, 30 P.2d 769, 54 Idaho 225.

Time for application and limitations generally see *infra* § 856.

Where change in condition occurred before effective date of statute limiting time to reopen compensation proceeding on application based on change in workman's condition, commission was not divested of jurisdiction to reopen notwithstanding application was filed after effective date of statute limiting time to reopen.

Okl.—Oklahoma Portland Cement Co. v. Smith, 78 P.2d 446, 181 Okl. 313—Magnolia Petroleum Co. v. Watkins, 57 P.2d 622, 177 Okl. 80.

41. Md.—Ireland v. Shipley, 166 A. 593, 165 Md. 90.
71 C.J. p 1431, note 97.

42. Ohio.—State v. Industrial Commission of Ohio, 181 N.E. 476, 138 Ohio St. 241.

§ 851. Awards, Orders, or Findings Which May Be Altered or Set Aside

- a. In general
- b. Finality
- c. Period of compensation
- d. Permanent disability
- e. Order denying compensation
- f. Order terminating or suspending compensation
- g. Previously reviewed or modified award
- h. Judgments
- i. Award to dependents
- j. Lump sum

a. In General

Generally speaking, any award or order relating to an award, within the designated limitations, if any, may be modified, but under some statutes it has been held that the award must be one made after hearing by the compensation officials on contested issues.

Generally speaking, any award or order relating to an award, within the designated limitations, if any, may be modified;⁴³ the statutory power to rescind or alter awards, orders, or findings has been

held to extend to, among other awards, orders, or findings, awards made by referees and affirmed by the board;⁴⁴ awards made by the board itself;⁴⁵ an additional award made for the employer's violation of specific safety requirements;⁴⁶ an order denying increased compensation because of misconduct of the employer;⁴⁷ and a finding that applicant has suffered no loss of time for which compensation is payable or any specific loss of use of a member.⁴⁸ Under some statutes it has been held that the provisions for review of awards extend to formal agreements, original or supplemental, for the payment of compensation, approved by the compensation authorities.⁴⁹ However, under other statutes it has been held that an award subject to review must be one made after hearing by the compensation officials on contested issues,⁵⁰ and that the provisions for review are inapplicable to an award based on a voluntary agreement entered into by the parties and approved by the compensation officials on mere inspection thereof.⁵¹ So, it has been held that a determination which is in essence a mere agreement of compromise approved by the compensation authorities without a decision on the merits is not a "formal award" within the meaning

43. U.S.—Rothschild & Co. v. Marshall, D.C.Wash., 56 F.2d 415.
La.—Harris v. Southern Carbon Co., 181 So. 469, 189 La. 992, conformed to, App., 182 So. 370.
71 C.J. p 1431 note 2.

What constitutes award

(1) An "award," within statute authorizing review has been held to mean a decision, determination, or judgment for money, hospitalization, crutches, or other compensation in favor of employee, provided for in workmen's compensation act.

Okl.—Murch Bros. Const. Co. v. Gupp, 57 P.2d 852, 177 Okl. 102—
Oientine v. Calloway, 295 P. 608, 147 Okl. 197.

(2) So, an award for medical expenses has been held to be an award within the purview of statute.

Okl.—Murch Bros. Const. Co. v. Gupp, 57 P.2d 852, 177 Okl. 102.

(3) However, it has also been held that an award for payment of necessary medical care is not an "award of compensation" within meaning of a statute authorizing review of awards of compensation.

Or.—Lindeman v. State Indus. Acc. Commission, 192 P.2d 732, 183 Or. 245.

Award for total temporary disability is open for a later showing that total temporary disability has ended.
Vt.—Norman v. American Woolen Co., 84 A.2d 125, 117 Vt. 28.

Disability extending into future

(1) Under some statutes a review of a compensation award may be had when and only when award determines that disability continues into future.

Kan.—Meredith v. Shawver Graham, Inc., 233 P.2d 750, 171 Kan. 518—
Calonder v. F. H. Freeto, Const. Co., 126 P.2d 209, 155 Kan. 497.

(2) Under such statutes a review may not be had when an award determines that all disability has ended prior to award.

Kan.—Meredith v. Shawver Graham, Inc., supra.

44. Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 181 Pa.Super. 172.

No award until action by board

Where referee rendered decision for compensation claimant, employer appealed to compensation board, and employee obtained employment at wages in excess of those received prior to accident, employer's remedy was not a petition for termination of award for change of circumstances, since there was no award until board took final action; referee being merely agent.

Pa.—Mazzaccaro v. Jermyn-Green Coal Co., 36 A.2d 828, 154 Pa.Super. 618.

45. Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 181 Pa.Super. 172.

46. Ohio.—State v. Ohio Stove Co.,

93 N.E.2d 291, 154 Ohio St. 27—
State v. Industrial Commission, 168 N.E. 541, 121 Ohio St. 312.
Increased compensation for injuries involving misconduct of employer see supra §§ 332-335.

47. Cal.—Western Pipe & Steel Co. v. Industrial Accident Commission of California, 14 P.2d 530, 126 C.A. 235.

48. Ill.—Donk Bros. Coal & Coke Co. v. Industrial Commission, 156 N.E. 844, 325 Ill. 193.

Order denying compensation see infra subdivision c of this section.

49. Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 181 Pa.Super. 172.

50. Mo.—La Tour v. Green Foundry Co., 93 S.W.2d 297, 230 Mo.App. 1063—Dewey v. Union Electric Light & Power Co., App., 93 S.W. 2d 203—Miller v. William C. Johnson & Sons Machinery Co., App., 93 S.W.2d 144—Burnham v. Keystone Service Co., App., 77 S.W.2d 848.

51. Mo.—La Tour v. Green Foundry Co., 93 S.W.2d 297, 230 Mo.App. 1063—Dewey v. Union Electric Light & Power Co., App., 93 S.W. 2d 203—Miller v. William C. Johnson & Sons Machinery Co., App., 93 S.W.2d 144.

Award not a voluntary settlement
Mo.—Bruce v. Missouri-Kansas-Texas R. Co., 73 S.W.2d 425, 229 Mo. App. 124.

of a statutory provision authorizing the review of a formal award.⁵²

Award satisfied by payment. Under some statutes payment in full of an award does not bar review thereof.⁵³ However, under a statute authorizing the review of "any payment to be made," an award which has been satisfied by payment cannot thereafter be reviewed.⁵⁴

b. Finality

A final award or judgment may be reviewed and the compensation officials may review an award, although it has been affirmed or passed on by the courts, or an action is pending to enforce the award, but they may not review an award while an appeal is pending.

Statutory provisions authorizing the adjustment or termination of compensation previously awarded presuppose a final award or judgment establishing a compensable injury,⁵⁵ and thereunder an award, order, finding, or judgment is subject to modification or rescission, subject to statutory limitations, although the employee or other party to the proceeding has, by lapse of time or otherwise, lost the right

to appeal from the original determination, or the absolute right to a rehearing, and it has become final.⁵⁶ However, such provisions are inapplicable where there has been no final award or judgment.⁵⁷ Thus, where the commission makes an order which is interlocutory in its nature and not final, it retains full power to proceed to a hearing, investigation, and determination of a claim for an alleged disability without regard to limitations on the power of review commonly contained in such provisions, such as a requirement that a change of condition be shown.⁵⁸

The power of review conferred by such provisions may be exercised by a board or commission, although the award has been affirmed or passed on by the courts,⁵⁹ or an action is pending in the courts to enforce the award.⁶⁰ The compensation authorities may not, however, review an award while an appeal therefrom is pending,⁶¹ and under a statute in effect so providing they may not review an award after a writ of certiorari has been issued by the supreme court.⁶²

52. N.J.—*Streng's Piece Dye Works v. Galasso*, 191 A. 874, 118 N.J.Law 257.

53. Colo.—*Employers Mut. Ins. Co. v. Jacoe*, 81 P.2d 389, 102 Colo. 515—*Employers' Mutual Ins. Co. v. Industrial Commission of Colorado*, 265 P. 99, 83 Colo. 315—*Employers' Mut. Ins. Co. v. Industrial Commission of Colorado*, 242 P. 988, 78 Colo. 501.

54. S.D.—*Chittenden v. Jarvis*, 297 N.W. 787, 68 S.D. 5.

Requirement that application be made before final payment see *infra* § 856.

55. Award for after-occurring incapacity

Valid exercise of authority to award compensation for an after-occurring incapacity under statute permitting review presupposes a final judgment establishing a compensable injury.

N.J.—*Streng's Piece Dye Works v. Galasso*, 191 A. 874, 118 N.J.Law 257.

56. U.S.—*American Mut. Liability Ins. Co. of Boston v. Lowe*, C.C.A. N.J., 85 F.2d 625.

N.J.—*Fischman v. Joseph Fish & Co.*, 198 A. 398, 16 N.J.Misc. 165—*Napoleon v. Jersey City Coal & Ice Co.*, 181 A. 880, 14 N.J.Misc. 54.

S.C.—*Corpus Juris* quoted in *Cromer v. Newberry Cotton Mills*, 28 S.E.2d 19, 22, 201 S.C. 349.

71 C.J. p. 1432 note 8.

That an order purports to be final will not preclude board from reviewing it since such provision of order is of no force and effect being

in contravention of statute vesting board with continuing jurisdiction. Mont.—*Meznarich v. Republic Coal Co.*, 53 P.2d 82, 101 Mont. 78.

Okl.—*Independent Oil & Gas Co. v. Clark*, 52 P.2d 789, 175 Okl. 257.

57. N.J.—*Corasio v. Imhoff Berg Silk Dyeing Co.*, 195 A. 620, 16 N.J.Misc. 13.

58. Okl.—*National Zinc Co. v. Vandgrift*, 94 P.2d 919, 185 Okl. 547—*Board of County Commissioners of Oklahoma County v. State Industrial Commission*, 61 P.2d 730, 177 Okl. 645.

Case as remaining open for final adjudication where determination by compensation officials is not final see *infra* § 853.

Award not final

Award, evidenced by a determination and rule for judgment following request of parties that award be made on basis that employee was twenty per cent totally and permanently disabled, was not a "final judgment," and employee could recover further compensation merely on proof that quantum of disability was greater than twenty per cent of total without showing that his condition had become worse since original hearing.

N.J.—*Corasio v. Imhoff Berg Silk Dyeing Co.*, 195 A. 620, 16 N.J.Misc. 13.

59. Colo.—*Coursey v. Industrial Commission*, 267 P. 202, 83 Colo. 490.

N.D.—*Bergstrand v. North Dakota*

Workmen's Compensation Bureau, 287 N.W. 631, 69 N.D. 447. 71 C.J. p. 1432 note 9.

Grounds passed on by court may not, however, be reviewed.

Ky.—*Lincoln Coal Co. v. Watts*, 120 S.W.2d 1026, 275 Ky. 130.

60. Action independent of matters involved

An employer could file motion to reopen award on ground of employee's changed condition, notwithstanding pendency of employee's court action to enforce award, as such action was entirely independent of matters involved in compensation claim.

Ky.—*Oldham v. Officers' Club of Fort Knox*, 244 S.W.2d 478.

61. Until disposition of appeal change of condition cannot be shown

Where claimant appealed from order awarding him permanent partial disability, there could be no showing of a change in his condition until disposition of his appeal, but, on final determination of question of his condition, on timely and proper application award could be modified.

Wash.—*Reid v. Department of Labor and Industries*, 96 P.2d 492, 1 Wash.2d 430.

62. Where no writ of certiorari had issued to review award, and award had not been reduced to judgment compensation officials retained jurisdiction to review.

Mich.—*Tatum v. General Motors Co.*, 266 N.W. 837, 206 Mich. 141.

c. Period of Compensation

Under some statutes an award for less than a certain period of compensation is not subject to modification, but, apart from such statutes, an order for the payment of compensation at a certain rate per week for total disability until further order has been held to permit a petition to stop or alter payments.

Under certain provisions for the readjustment of awards, including a provision that no readjustment may be made if the award is for less than a certain period, the tribunal, otherwise authorized to make such readjustment, has no power to modify an award for compensation for less than such period.⁶³ The tribunal has the power to modify an award for more than such period,⁶⁴ although part of the period had elapsed when the award was made.⁶⁵

An order for the payment of compensation at a certain rate per week for total disability until further order, but not to exceed a certain sum, has been held to permit a petition to stop or alter payments if such be required.⁶⁶

d. Permanent Disability

Awards for permanent partial or total disability have been held subject to modification, but under some statutes

the provisions for review do not apply to an award of compensation for specific scheduled injuries.

Where, under a provision relative to review, a tribunal is authorized to modify an award on the ground of change of condition or increase or decrease of disability, subject to statutory limitations, it may in a proper case modify an award for permanent partial⁶⁷ or total⁶⁸ disability. Under some statutes the provisions for review do not apply to an award of compensation for specific scheduled injuries,⁶⁹ and after an award for a specific loss of a member there can be no additional award for disability solely resulting from, or related to, the permanent injury.⁷⁰

e. Order Denying Compensation

Where statutory authority therefor exists, an order denying compensation may be altered or set aside, but some statutory provisions for review have been construed as not authorizing the review of an order denying compensation.

Where statutory authority therefor exists, an order denying compensation may be altered or set aside.⁷¹ Whether or not such authority exists is to be determined in accordance with general rules of statutory construction,⁷² and some statutory pro-

63. La.—Lacy v. Employers Mut. Liability Ins. Co. of Wis., 98 So.2d 162, 233 La. 712.
Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.
71 C.J. p 1432 note 12.

64. Neb.—Peek v. Ayres Auto Supply, 71 N.W.2d 204, 160 Neb. 658—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363—Great Western Sugar Co. v. Hewitt, 257 N.W. 61, 127 Neb. 790—Hanley v. Union Stockyards Co., 158 N.W. 939, 100 Neb. 232.
Tenn.—Ledford v. Johnson City Foundry, 88 S.W.2d 804, 169 Tenn. 430.

65. Minn.—State v. Nye, 161 N.W. 224, 136 Minn. 50.
71 C.J. p 1432 note 14.

66. Mich.—Allen v. National Twist Drill & Tool Co., 37 N.W.2d 664, 324 Mich. 660.

67. Colo.—Byouk v. Industrial Commission of Colo., 105 P.2d 1087, 106 Colo. 430.

Okl.—O. C. Whitaker, Inc., v. Dillingham, 134 P.2d 588, 192 Okl. 150—Behling v. Fox Rig & Lumber Co., 105 P.2d 532, 187 Okl. 632—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 89 P.2d 938, 185 Okl. 68—Summit Drilling Co. v. Graham, 6 P.2d 693, 154 Okl. 64.

Regardless of whether award states such fact, award for permanent partial disability is subject to

change on timely showing of change in condition.

Okl.—Commander Mills v. Stanstill, 69 P.2d 60, 180 Okl. 202.

Not limited to general disability

Fact that injured employee, who had sought compensation for general disability, was awarded compensation for total permanent loss of use of his foot only, did not preclude him from having judgment modified where his disability and incapacity had increased, since statute authorizing modification of judgment was not limited to general disability cases.

La.—Harris v. Southern Carbon Co., 181 So. 469, 189 La. 992, conformed to, App., 182 So. 370.

68. Ill.—City of Evanston v. Industrial Commission, 10 N.E.2d 644, 367 Ill. 155.

Or.—Dimitroff v. State Indus. Acc. Commission, 306 P.2d 398, 209 Or. 316.

Order having effect of judgment

Notwithstanding an unappealed final order of commission for permanent total disability is of effect of a judgment, it is subject to statute giving commission power, on ground of a change in condition, to make an award ending, diminishing or increasing compensation previously awarded.

Mo.—Scannell v. Fulton Iron Works Co., 289 S.W.2d 122, 365 Mo. 889.

Necessary medication

Workman who had been awarded compensation for permanent total disability and was yet receiving extension payments was entitled, under statute providing for modification of agreements, to petition for award for necessary medications.

N.J.—Fierro v. Public Service Coordinated Transport, 129 A.2d 470, 44 N.J.Super. 73.

69. Kan.—Meredith v. Shawver Graham, Inc., 233 P.2d 750, 171 Kan. 513.

70. Pa.—Michetti v. State Workmen's Ins. Fund, 17 A.2d 712, 143 Pa.Super. 458.

71. Ariz.—Engle v. Industrial Commission, 269 P.2d 604, 77 Ariz. 202.
Fla.—McDonough v. Versailles Hotel, 57 So.2d 16.

Mich.—Dunec v. Ford Motor Co., 284 N.W. 901, 288 Mich. 342—Schneider v. Cadillac Motor Car Co., 278 N.W. 418, 280 Mich. 127.

Okl.—Texas Co. v. Atkinson, 62 P.2d 1204, 178 Okl. 480.
71 C.J. p 1433 note 20.

An order denying further compensation may be reviewed and compensation ordered under a provision authorizing such review on a change of condition.

Okl.—Skelly Oil Co. v. Goodwin, 13 P.2d 135, 158 Okl. 288.

72. Ga.—New Amsterdam Casualty Co. v. McFarley, 12 S.E.2d 355, 191 Ga. 334, conformed to 13 S.E.2d 588, 64 Ga.App. 465.

visions for review have been construed as implying a previous award of compensation,⁷³ and as not authorizing the review of an order denying compensation,⁷⁴ no matter what the reason for the denial of compensation.⁷⁵ So, a provision for review of an award on change of condition has been held inapplicable where no compensation has been awarded and it has been found that the workman's injury was not compensable.⁷⁶ However, notwithstanding the absence of statutory authority for the review of an order denying compensation, where compensation is denied as to part of the claimed injuries but is allowed as to others, a provision authorizing the review of an award granting compensation based on a change in condition permits review as to all claimed injuries.⁷⁷

f. Order Terminating or Suspending Compensation

If authorized under its continuing jurisdiction over

awards, the board or commission may modify its order terminating or suspending compensation.

If authorized under its continuing jurisdiction over its awards, the board or commission may modify its order terminating⁷⁸ or suspending⁷⁹ the payment of compensation.

g. Previously Reviewed or Modified Award

Within statutory limitations, an award which has been previously reviewed or modified may be reviewed, but after a case has been reviewed by a court the compensation authorities may not reopen it on the ground passed on by the court.

Within the statutory limitations, under a provision authorizing the review of an award in the exercise of a continuing jurisdiction, the review and modification of an award, which has been previously reviewed and modified, is authorized.⁸⁰ After a case has been reviewed by a court the compensation authorities may not reopen it on the ground passed on by the court.⁸¹ A final order dismissing an ap-

73. Ind.—Lukich v. West Clinton Coal Co., 10 N.E.2d 302, 104 Ind. App. 78.

S.C.—Corpus Juris cited in Cromer v. Newberry Cotton Mills, 23 S.E. 2d 19, 22, 201 S.C. 349.

71 C.J. p 1432 note 18.

74. Ga.—New Amsterdam Casualty Co. v. McFarley, 12 S.E.2d 355, 191 Ga. 384, conformed to 13 S.E.2d 588, 64 Ga.App. 465.

Rhindress v. Atlantic Steel Co., 32 S.E.2d 554, 71 Ga.App. 898.

Ind.—Lukich v. West Clinton Coal Co., 10 N.E.2d 302, 104 Ind. App. 78.

S.C.—Corpus Juris cited in Cromer v. Newberry Cotton Mills, 23 S.E. 2d 19, 22, 201 S.C. 349.

71 C.J. p 1432 note 18.

Omission of word "disallowance" from section providing for modification was not an oversight, so that, in case of a disallowance, there can be no modification.

Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172.

Award of medical expenses as authorizing review

(1) Where compensation for disability is denied but an award of medical expenses is made, this constitutes an award of compensation such as to give commission continuing jurisdiction to reopen case on change of condition.

Okl.—Murch Bros. Const. Co. v. Cupp, 57 P.2d 852, 177 Okl. 102.

(2) So, where board made a finding that claimant suffered permanent accidental injury arising out of, and in course of, his employment, for which medical expenses were payable, but had not reached maximum improvement and awarded medical expenses while denying compensa-

tion for wage loss because claimant had not lost sufficient time from work to qualify at that time, and did not dismiss case, claim for compensation was reviewable on a change of condition, since award of medical expenses is award of compensation.

Ga.—Chevrolet Division, General Motors Corp. v. Dempsey, 93 S.E. 2d 703, 212 Ga. 560.

75. Ga.—U. S. Fidelity & Guaranty Co. v. Garner, 45 S.E.2d 109, 76 Ga. App. 87.

Denial on ground of disability for less than minimum period

(1) After expiration of time for appeal, employee cannot apply for review of award denying compensation, on ground of change in condition, although denial of compensation was solely on ground that disability existed for less than seven days, since new award allowing compensation could not be considered as an "increase" of compensation previously awarded within terms of statute describing what can be done on review for change of condition.

Ga.—New Amsterdam Casualty Co. v. McFarley, 12 S.E.2d 355, 191 Ga. 384, conformed to 13 S.E.2d 588, 64 Ga.App. 465.

(2) However, it has been held that an award denying compensation on sole ground that disability had existed less than seven days, but awarding medical expenses and specifically retaining jurisdiction pending further permanent disability of claimant, may be reopened on change of condition.

Ga.—General Motors Corp., Chevrolet Division v. Dempsey, 91 S.E.2d 850, 93 Ga.App. 423.

76. Okl.—F. K. Ketler Co. v. Hanks, 234 P.2d 623, 205 Okl. 200—Nash v. Douglas Aircraft Co., 214 P.2d 919, 202 Okl. 459.

Where court determined that there was no causal connection between industrial accident and disability for which compensation was sought by employee, and there was no agreement with employer with respect to compensation, commission was without power to grant a further hearing to determine whether alleged disability had recurred and increased.

Ill.—Weymer v. Industrial Commission, 88 N.E.2d 841, 404 Ill. 271.

77. Ga.—U. S. Fidelity & Guaranty Co. v. Garner, 45 S.E.2d 109, 76 Ga. App. 87.

78. Ind.—Briggs Indiana Corp. v. Davis, 23 N.E.2d 285, 107 Ind.App. 177.

Mass.—In re Carmody's Case, 130 N. E.2d 567, 333 Mass. 249.

71 C.J. p 1433 note 22.

79. Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172.

71 C.J. p 1433 note 22 [b].

Reinstatement of compensation see infra §§ 891-895.

80. Ga.—Travelers Ins. Co. v. Haney, 88 S.E.2d 492, 92 Ga.App. 319—Rhindress v. Atlantic Steel Co., 32 S.E.2d 554, 71 Ga.App. 898.

N.D.—Bergstrand v. North Dakota Workmen's Compensation Bureau, 287 N.W. 631, 69 N.D. 447.

W.Va.—Raleigh-Wyoming Mining Co. v. Workmen's Compensation Appeal Board, 185 S.E. 554, 117 W.Va. 367.

71 C.J. p 1433 note 23.

81. Ky.—Lincoln Coal Co. v. Watts, 120 S.W.2d 1026, 275 Ky. 136.

plication for modification of an award precludes a subsequent identical application for modification of the award.⁸²

h. Judgments

In the absence of a statute otherwise providing, the final judgment of a court in an action for compensation is not subject to modification, but under some statutes an award, even though reduced to judgment or based on the judgment of a court, may be subject to modification by the compensation authorities.

In the absence of a statute otherwise providing, the final judgment of a court in action for compensation is not subject to modification.⁸³ So, where the compensation act makes no distinction between a judgment under the act and one in any other action for the recovery of money, and the provision authorizing a subsequent increase or decrease in the amount allowed, by its terms, applies only to proceedings based on agreement or arbitration, the provision cannot be extended to authorize the modification of judgments rendered in actions authorized under the act in the absence of agreement or arbitration.⁸⁴ Under a statute in effect so providing when an award has been reduced to judgment it is not subject to review by the compensation officials.⁸⁵ However, under a provision that a judgment under the compensation act may be reviewed at the instance of either party, on certain grounds the court is authorized to do so in a proper case;⁸⁶ and under some statutes an award based on the judgment of a court may be subject to the continuing jurisdiction of the compensation officials and, in a proper case, may be modified by them.⁸⁷ Where the compensation act authorizes the entry of a judgment

on an award and the continuing jurisdiction of the board to modify such award, such judgments are not like those in ordinary civil actions to the extent that they are not subject to modification, but, if an award is modified by the board, the court, on a proper application, has the power to modify the judgment to correspond with the award as modified by the board.⁸⁸

i. Award to Dependents

Under a statute in effect so providing an award to a dependent may be modified in a proper case.

Under a provision that any award of compensation shall be subject to modification, whenever it shall appear to the compensation commissioner that the measure of dependence, because of which the compensation is paid, has changed, the commissioner has the power to modify an award to a dependent where the measure of dependence has changed.⁸⁹

j. Lump Sum

Where a tribunal has continuing jurisdiction over its awards, in the absence of a statutory limitation, it has power, in a proper case, to rescind or modify a lump sum award.

Where a tribunal, under the compensation act, has a continuing jurisdiction over its awards, in the absence of a statutory limitation, it has power, in a proper case, to rescind or modify a lump sum award.⁹⁰ A provision authorizing the review of any order for weekly payments includes an order for compensation in weekly payments fixing the amount due at the time of the award.⁹¹

82. Ohio.—May v. Industrial Commission of Ohio, 198 N.E. 50, 50 Ohio App. 286.

83. Ala.—Alabama By-Products Co. v. Landgraft, 27 So.2d 215, 248 Ala. 253.—Ford v. Crystal Laundry Co., 189 So. 730, 238 Ala. 187.

Kan.—Roberts v. Charles Wolff Packing Co., 160 P. 221, 98 Kan. 750.

Provision for modification limited to settlements approved by court
Ala.—Sloss-Sheffield Steel & Iron Co. v. Nations, 8 So.2d 833, 243 Ala. 107.—Davis v. Birmingham Trussville Iron Co., 135 So. 455, 223 Ala. 259.

84. Kan.—Roberts v. Charles Wolff Packing Co., 160 P. 221, 98 Kan. 750.

85. When award has not been reduced to judgment and writ of certiorari has not been issued by supreme court, it remains subject to

continuing jurisdiction of compensation officials.

Minn.—Tuomi v. General Logging Co., 265 N.W. 837, 196 Minn. 617.

86. La.—Harris v. Southern Carbon Co., 181 So. 469, 189 La. 992, confirmed to, App., 182 So. 370.

Avoyelles Wholesale Grocery Co. v. Elmore, App., 31 So.2d 434.—Franklin v. Roger, 2 La.App. 764.

87. Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414.—Roma v. Industrial Commission, 119 N.E. 461, 97 Ohio St. 247.

88. Ind.—Lambert v. Powers, 181 N.E. 420, 76 Ind.App. 77.
71 C.J. p 1433 note 25.

89. Conn.—Sudol v. Town of Manchester, 48 A.2d 739, 137 Conn. 484.
73 C.J. p 1433 note 27.

90. Mo.—Bruce v. Missouri-Kansas-Texas R. Co., 73 S.W.2d 425, 229 Mo.App. 124.

N.Y.—Montgomery v. Seneca Iron & Steel Co., 257 N.Y.S. 556, 236 App. Div. 19, motion denied 258 N.Y.S. 1007, 236 App.Div. 768.

Statutes barring rescission or modification after final payment see infra § 856.

Notwithstanding statute making lump sum payments final, original order and judgment awarding employee compensation for temporary partial disability and striking cause from docket on payment of award held not to bar subsequent modification of award on ground of total and permanent disability where order in violation of statute disclosed that settlement had been made before matter was presented to court, and was entered as an agreed order by counsel for parties.
Tenn.—Ledford v. Johnson City Foundry & Machine Co., 88 S.W.2d 804, 169 Tenn. 430.

Mich.—Shaffer v. D'Arcy Spring Co., 173 N.W. 201, 206 Mich. 483.

§ 852. Scope and Extent of Power

- a. In general
- b. Retroactive orders
- c. Reclassification

a. In General

The scope and extent of the power to exercise a continuing jurisdiction over awards and decisions with respect to compensation depend on the statutory and constitutional provisions applicable and may to a degree depend on the rules adopted by the compensation authorities; but the continuing jurisdiction is generally limited, although some statutes rest a broad revisory power in the compensation officials.

The scope and extent of the power to review or exercise a continuing jurisdiction over awards and decisions with respect to compensation depend on the statutory⁹² and constitutional⁹³ provisions applicable, and may to a degree depend on the rules adopted by the compensation authorities.⁹⁴ Generally speaking, the jurisdiction conferred is limited,⁹⁵ and may be exercised only when the one seeking a change makes a showing bringing the case within the applicable statutory provisions.⁹⁶ Thus, under some statutes, it may be exercised only when there is a change in a claimant's physical condi-

92. *Ariz.*—Petition of Hale, 277 P. 2d 1014, 78 *Ariz.* 202—Transcontinental Bus System v. Industrial Commission, 225 P.2d 701, 71 *Ariz.* 209—Jupin v. Industrial Commission, 224 P.2d 199, 71 *Ariz.* 131—McManus v. Lindberg, 54 P.2d 997, 47 *Ariz.* 214—Howe v. Douglas, 31 P.2d 891, 43 *Ariz.* 371.
Cal.—Pacific Indem. Co. v. Industrial Acc. Commission, 193 P.2d 117, 85 C.A.2d 490.
Ga.—Travelers Ins. Co. v. Haney, 88 S.E.2d 492, 92 *Ga.App.* 319—Ware v. Swift & Co., 2 S.E.2d 128, 59 *Ga.App.* 836.
Ind.—Harmon v. Harmon, 62 N.E.2d 880, 116 *Ind.App.* 140—Lukich v. West Clinton Coal Co., 10 N.E.2d 302, 104 *Ind.App.* 73—Sumpter v. Colvin, 190 N.E. 66, 98 *Ind.App.* 453.
Kan.—Everett v. Kansas Power Co., 165 P.2d 595, 160 *Kan.* 712—Calonder v. F. H. Freeto Const. Co., 126 P.2d 209, 155 *Kan.* 497—Bailey v. Skelly Oil Co., 110 P.2d 746, 153 *Kan.* 378.
Md.—Stevenson v. Hill, 185 A. 551, 170 *Md.* 676.
Minn.—Tuomi v. General Logging Co., 265 N.W. 837, 196 *Minn.* 617.
Mo.—Dewey v. Union Electric Light & Power Co., App., 83 S.W.2d 203—Miller v. William C. Johnson & Sons Machinery Co., App., 83 S.W. 2d 144.
Mont.—Shugg v. Anaconda Copper Mining Co., 46 P.2d 435, 100 *Mont.* 159.
Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 *Neb.* 363—Ludwickson v. Central States Electric Co., 6 N.W.2d 65, 142 *Neb.* 308.
N.J.—Hopler v. Hill City Coal & Lumber Co., 76 A.2d 17, 5 *N.J.* 466.
Blyou v. George M. Brewster & Sons, Inc., 93 A.2d 425, 23 *N.J.Super.* 476—Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division, 78 A.2d 403, 11 *N.J.Super.* 383—Dugas v. Walworth Mfg. Co., 62 A.2d 480, 1 *N.J.Super.* 77.
Cleland v. Verona Radio, 33 A. 2d 712, 130 *N.J.Law* 588.
Hudson v. Herschbach Drilling Co., 128 P.2d 1044, 46 *N.M.* 330.

N.Y.—Ryan v. American Bridge Co., 278 N.Y.S. 612, 243 App.Div. 496, affirmed 198 N.E. 375, 268 *N.Y.* 502.
Ohio.—State ex rel. White v. Industrial Commission of Ohio, App., 40 N.E.2d 453.
Okl.—City of Tulsa v. State Industrial Commission, 113 P.2d 987, 189 *Okl.* 73—Payne Drilling Co. v. Shoemaker, 97 P.2d 881, 186 *Okl.* 345—Ward-Beekman, Inc., v. Odom, 67 P.2d 798, 180 *Okl.* 4—Stanolind Pipe Line Co. v. Giddens, 58 P.2d 146, 177 *Okl.* 193.
Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 *Pa.Super.* 172.
Byrk v. Susquehanna Collieries Co., Com.Pl., 7 *Sch.Reg.* 26.
S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 *S.C.* 349.
S.D.—Chittenden v. Jarvis, 297 N.W. 787, 68 *S.D.* 5.
Tenn.—Fidelity & Casualty Co. of New York v. Long, 180 S.W.2d 889, 181 *Tenn.* 190.
Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281, error refused.
Wash.—Reid v. Department of Labor and Industries, 96 P.2d 492, 1 *Wash.* 2d 430.
Wis.—Sheehan v. Industrial Commission, 76 N.W.2d 343, 272 *Wis.* 595.
71 C.J. p 1433 note 32.

Authority expressly granted or reasonably implied

Authority of compensation authorities is confined to that granted in express terms and such as is reasonably to be implied.

N.J.—Cleland v. Verona Radio, 33 A. 2d 712, 130 *N.J.Law* 588.

Statutory method of ending compensation

Method by which compensation may be ended is specially fixed by statute, and such statutory method of ending compensation is exclusive, and it does not lie within power of compensation authorities to engraft on statute another method of permanently ending compensation.

Mich.—Grycan v. Ford Motor Co., 289 N.W. 146, 291 *Mich.* 241.

Action on insufficient application of claimant

Where board has power to reopen compensation proceeding on its own motion and did desire to reopen, its action would be taken to be a reopening of board's own motion, and, therefore, it was of no consequence that board might actually have reopened matter in response to claimant's insufficient letter or his tardy claims.

U.S.—Alaska Indus. Bd. v. Chugach Elec. Ass'n, C.A.Alaska, 245 F.2d 855, reversed on other grounds 78 S.Ct. 735, 356 U.S. 320, 2 L.Ed.2d 795.

Compensation authorities and courts bound by requirements

Where legislature in plain language prescribes what shall be required as a prerequisite to allowance of an increase of compensation, compensation commissioner and compensation appeal board, no less than courts, are bound thereby.

W.Va.—Blevins v. State Compensation Commission, 33 S.E.2d 408, 127 *W.Va.* 481.

93. Ruling amounting to denial of due process

Commission exceeded its jurisdiction in submitting and determining self-insured employer's petition to terminate its liability on an award without permitting employer to obtain a medical examination to ascertain present physical condition of claimant who was in another state and to cross-examine him in that respect, and in effect commission's ruling amounted to a denial of "due process of law" by refusing to permit employer to cross-examine a witness on a material issue.

Cal.—Walker Mining Co. v. Industrial Accident Commission, 95 P.2d 188, 35 C.A.2d 257.

94. *Ariz.*—Jupin v. Industrial Commission, 224 P.2d 199, 71 *Ariz.* 131.

95. *Ariz.*—Petition of Hale, 277 P.2d 1014, 78 *Ariz.* 202.

96. *Neb.*—Ludwickson v. Central States Electric Co., 6 N.W.2d 65, 142 *Neb.* 308.

Necessity and sufficiency of evidence see *infra* § 354.

tion since the prior award,⁹⁷ or the power may be limited to a review of the disability, in so far as it may have subsequently increased,⁹⁸ diminished⁹⁹ or terminated.¹

Some statutes rest a broad revisory power in the compensation officials,² and give them a broad discretion in determining whether an award shall be reopened,³ and, in the absence of a showing of abuse of discretion, their action is not subject to control by the courts.⁴ A provision that the jurisdiction of the commission over each case shall be continuing and that the commission may, from time to time, make such changes in its former findings or orders as, in its opinion, may be just confers, within the limitations of the act, a broad and comprehensive power,⁵ and it has been held that the power thus conferred is not limited to cases in which there have been changes in disability conditions.⁶ However, it has also been held that such provision is subject to the limitation that the commission may not resume jurisdiction of a case regularly determined without some change or new development in the injury complained of and not known to the parties when the former award was made,⁷ and that the exercise of power under such provision must be predicated on new and changed

conditions occurring after an original award.⁸

In determining whether a compensation case should be reopened the compensation officials may look to the record made at a former hearing or hearings had before it with respect to the same accident or injury.⁹

Under a provision authorizing, on the review of an award, another award increasing the compensation previously awarded, the commission is authorized to increase an award which it has made tentatively.¹⁰ The "increase" of an award may include extending the time it is to run as well as augmenting the installments.¹¹

Termination. Where the compensation act vests a continuing jurisdiction in the board or commission over its awards, it generally has the power, in the proper exercise of its authority, to terminate the payment of compensation.¹² Where the board is forbidden to make an award in excess of a certain amount and, although limiting the period of compensation to that fixed by statute, fails to fix the amount of compensation at the statutory limitation, the award is incomplete and the board has the power to terminate the payments of compensation so as not to exceed such statutory limitation.¹³

97. Ariz.—Petition of Hale, 277 P.2d 1014, 78 Ariz. 202—Harris v. Industrial Commission, 251 P.2d 890, 75 Ariz. 71.

98. N.J.—Hopler v. Hill City Coal & Lumber Co., 76 A.2d 17, 5 N.J. 466.

New, additional, or previously undiscovered disability

Only when there is a change in a claimant's physical condition since original award, such as new, additional, or previously undiscovered disability, does commission have jurisdiction to reconsider case.

Ariz.—Harris v. Industrial Commission, 251 P.2d 890, 75 Ariz. 71—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540, 62 Ariz. 464.

99. N.J.—Hopler v. Hill City Coal & Lumber Co., 76 A.2d 17, 5 N.J. 466.

R.I.—Plouffe v. Taft-Peirce Mfg. Co., 97 A.2d 439, 80 R.I. 397.

1. R.I.—Plouffe v. Taft-Peirce Mfg. Co., supra.

2. N.J.—Cleveland v. Verona Radio, 33 A.2d 712, 130 N.J.Law 588.

Ohio.—Nichols v. Ohio Collieries Co., 62 N.E.2d 636, 75 Ohio App. 474.

Okl.—Stanolind Pipe Line Co. v. Giddens, 58 P.2d 146, 177 Okl. 193.

3. Colo.—Industrial Commission v. Kokel, 116 P.2d 915, 108 Colo. 353. Ky.—Clear Fork Coal Co. v. Gayler,

286 S.W.2d 519—W. E. Caldwell Co. v. Borders, 193 S.W.2d 453, 801 Ky. 843.

4. Colo.—Industrial Commission v. Kokel, 116 P.2d 915, 108 Colo. 353.

5. Md.—Stevenson v. Hill, 185 A. 551, 170 Md. 676.

71 C.J. p 1434 note 33.

Parties have no right to require that case be reopened under statute referred to in text.

Md.—Stevenson v. Hill, supra.

Complete consideration and disposition

A statute such as that referred to in text is adequate to extend commission's jurisdiction for a complete consideration and disposition of all questions raised by filing of an application for modification of an award.

Ohio.—Nichols v. Ohio Collieries Co., 62 N.E.2d 636, 75 Ohio App. 474.

6. Md.—Stevenson v. Hill, 185 A. 551, 170 Md. 676.

Separate statutory provision authorizing a change on application of any party in interest, or on commission's own motion, if aggravation, diminution, or termination of disability takes place, or is discovered after rate of compensation has been established, or compensation has been terminated does not limit power of commission under provision referred to in text.

Md.—Stevenson v. Hill, supra.

7. Utah.—Standard Coal Co. v. Industrial Commission, 65 P.2d 640, 91 Utah 549.

8. Ohio.—State v. Ohio Stove Co., 93 N.E.2d 291, 154 Ohio St. 27—State ex rel. Griffey v. Industrial Commission, 180 N.E. 376, 125 Ohio St. 27.

New evidence of further disability

Authority conferred by statute referred to may be exercised for purpose of considering new evidence of further disability resulting from a claimant's injury.

Ohio.—State ex rel. S. S. Kresge Co. v. Industrial Commission, 104 N.E. 2d 450, 157 Ohio St. 62.

9. Ky.—Clear Fork Coal Co. v. Gayler, 286 S.W.2d 519—W. E. Caldwell Co. v. Borders, 193 S.W.2d 453, 801 Ky. 843.

10. Colo.—London Guarantee & Accident Co. v. Industrial Commission of Colorado, 210 P. 70, 72 Colo. 177.

71 C.J. p 1434 note 34.

11. Me.—Graney's Case, 118 A. 369, 121 Me. 500.

12. Mass.—Mozetski's Case, 13 N.E. 2d 10, 299 Mass. 370—Shershun's Case, 190 N.E. 595, 286 Mass. 379. 71 C.J. p 1434 note 37.

13. Ind.—Brewer v. Culp, 161 N.E. 713, 37 Ind.App. 429. 71 C.J. p 1434 note 38.

Degree of impairment of wage-earning capacity. Where compensation for permanent partial disability is calculated on the wage-earning capacity of the workman, the degree of impairment of the wage-earning capacity, where such reconsideration is authorized by statute, may be reconsidered by the commission, on its own motion or the application of any party in interest, if the finding is erroneous or the degree of wage-earning capacity has changed.¹⁴

Change from permanent to temporary disability payment. Under a provision that, where an injury causes both temporary and permanent disability, the injured employee shall not be entitled to both a temporary and permanent disability payment, but only to the greater of the two, the power to allow a temporary disability payment in lieu of a permanent disability payment is a power which, from the nature of the object to be accomplished, must be a continuing power and within the scope of the continuing jurisdiction of the board or commission under the act.¹⁵

Additional award for employer's violation of safety requirements. The power to modify an award does not authorize the granting of an additional award because of the employer's violation of specific safety requirements, since such award is separate and distinct from the original award of com-

pensation and cannot be regarded as a modification thereof.¹⁶

Loss of jurisdiction by acceptance of final payment. Under some statutes the commission's jurisdiction to hear and determine a petition for review and modification of a compensation award may be lost by the subsequent tender and acceptance of the final payment due under the original award before a day has been fixed for hearing the petition for review.¹⁷

Medical examination of employee. Rules governing the scope and extent of the power of compensation authorities to direct a medical examination of the employee, as discussed supra § 484, in connection with original proceedings to secure compensation, have been applied in subsequent proceedings to review or modify the original award.¹⁸

b. Retroactive Orders

Generally speaking, an award may not be modified or terminated retroactively, but where statutory authority therefor exists, subject to limitations contained therein, a change may be made retroactive.

Generally speaking, an award may not be modified or terminated retroactively.¹⁹ However, where statutory authority therefor exists, subject to limitations contained therein, a change may be made retroactive,²⁰ and, at least under some circumstances, such change has been approved without reference

14. Okl.—Van Orman v. Robinson, 300 P. 412, 150 Okl. 156—Blake v. Smock, 296 P. 750, 147 Okl. 281.

15. Cal.—National Engineering Corporation v. Industrial Accident Commission of California, 225 P. 2, 193 C. 422.

71 C.J. p 1435 note 43.

16. Ohio.—State v. Ohio Stove Co., 93 N.E.2d 291, 154 Ohio St. 27—State ex rel. Carr v. Industrial Commission, 198 N.E. 480, 130 Ohio St. 185.

Provisions authorizing modification of award as authorizing modification of an additional award because of employer's violation of safety requirements see supra § 851.

17. Kan.—Everett v. Kansas Power Co., 165 P.2d 595, 160 Kan. 712—Bailey v. Skelly Oil Co., 110 P.2d 746, 153 Kan. 378.

Time for application and limitations see infra § 856.

Advance payment

Where during entire period covered by compensation award claimant has been paid semimonthly and had accepted checks covering compensation partially due and partially payable in future, issuance of check for final payment a few days in advance of last day for which

compensation was due, and which check claimant accepted before date set for hearing on petition for review and modification of award thereby depriving commission of jurisdiction to hear petition for review, did not constitute an attempt to shorten period of liability by voluntarily advancing payments.

Kan.—Everett v. Kansas Power Co., 165 P.2d 595, 160 Kan. 712.

18. Appointment of disinterested physician discretionary

Where physician for employer and insurance carrier made two examinations of compensation claimant, one just before hearing on application for review on ground of change in condition, director's appointment of disinterested physician to examine claimant was discretionary, and his refusal to appoint disinterested physician was not an abuse of discretion, although claimant was unable because of poverty to secure physician for himself and there was positive testimony that his condition was worse.

Ga.—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App. 789.

19. Ariz.—Hamlin v. Industrial Commission, 267 P.2d 736, 77 Ariz. 100.

Pa.—Carson v. Pittsburgh Coal Co., 200 A. 299, 132 Pa.Super. 66—Foster v. Mellon Stuart Co., 173 A. 773, 114 Pa.Super. 311.

Retrospective or prospective operation of statutes dealing with revision of awards see supra § 850 b.

20. Miss.—Rolling v. Hatten & Davis Lumber Co., 85 So.2d 486, 226 Miss. 732.

N.Y.—Breese v. Benedict, 94 N.Y.S.2d 243, 276 App.Div. 934.

Provision construed

Section of compensation act, providing that new compensation order issued by commission after review of compensation case shall not affect compensation previously paid and that, if any part of compensation due is unpaid, award decreasing compensation rate may be made effective from date of employee's injury and any prior payment in excess of decreased rate shall be deducted from unpaid compensation, means that overpayment arises only when award decreasing rate is made effective from date of injury or at date before payments were made at rate set in order modified.

Fla.—Smitty's Coffee Shop v. Industrial Commission, 86 So.2d 788, 153 Fla.

to statutory authority.²¹ Under a provision authorizing the modification of an award on the ground of a change in conditions, subject to the express limitation that no such review shall affect such award with respect to any moneys already paid when an award is modified "on the ground of a change in conditions," it cannot affect any moneys already paid,²² and if, under such provision, the award is increased, the increase has only prospective effect,²³ and cannot be made retroactive;²⁴ but if the award is modified because the original award was improper in its inception, because based on a mistake as to the nature of the injuries,²⁵ such limitation does not apply to the general power vested in the board to make such changes in its awards as in its opinion may be just. The expression "any moneys already paid" of such limitation is to be construed literally as including only money actually paid;²⁶ accordingly, the limitation does not apply to the case of uncashed drafts.²⁷ The commission is not authorized, on an application based on the ground of change of condition, to order compensation paid for permanent partial disability to be applied as compensation for temporary total disability.²⁸

c. Reclassification

Where statutory authority therefor exists, subject to statutory limitations, the compensation authorities may reclassify a disability.

Under the general power vested in the board to make such changes in its awards, from time to time, as in its opinion may be just, subject to the limitation that the board may reclassify a disability within one year from the date of accident, the expression "reclassify a disability" refers to the general classification as indicated by the statute, namely, permanent total disability, temporary total disability,

permanent partial disability, and temporary partial disability, and not to the schedule period of classification within a class;²⁹ accordingly, a change of the period of compensation within a class may be made after a year from the date of the accident,³⁰ but the injuries may not be reclassified by a change from one of the four general classes, thus indicated, to another except within the year.³¹ Under a statute so providing the board may at any time, without regard to the date of an accident, reclassify a disability on proof that there has been a change of condition or that the previous classification was erroneous;³² but such statute does not confer power on the board to direct the employer to pay a stale claim contrary to the limitations imposed by the compensation act.³³

§ 853. Conclusiveness of Original Award or Judgment

- a. In general
- b. Effect of statutes

a. In General

Generally speaking, except as abrogated, modified, or limited by provisions of the compensation acts, the res judicata rule applies in compensation proceedings, and a final award or judgment in a compensation case is, subject to the right of appeal, conclusive as to all matters adjudicated, but is not res judicata of issues neither asserted nor required to be asserted. Where the essential elements of waiver or estoppel are found to exist, a person may be barred from denying the validity or effect of a compensation award.

Generally speaking, except as abrogated, modified, or limited by provisions of the compensation acts, the res judicata rule applies in compensation proceedings.³⁴ Except as provided otherwise by stat-

21. Mich.—Samels v. Goodyear Tire & Rubber Co., 35 N.W.2d 265, 323 Mich. 251.

In proceedings for reduction of compensation and recovery of over-payments which employer was obliged to make before his petition could be heard, where it appeared that claimant had clearly been paid more than he was entitled to under law, employer was entitled to recover excess paid.

Mich.—Samels v. Goodyear Tire & Rubber Co., supra.

22. Ind.—Harmon v. Harmon, 62 N.E.2d 880, 116 Ind.App. 140.

N.Y.—In re Salotar v. F. Neuglass & Co., 126 N.E. 922, 228 N.Y. 508.

Modification as to future payments proper.

Ind.—Harmon v. Harmon, 62 N.E.2d 880, 116 Ind.App. 140.

23. Ky.—Harrison v. Tierney Min-

ing Co., 124 S.W.2d 757, 276 Ky. 637—Rex Coal Company v. Campbell, 281 S.W. 1039, 213 Ky. 636.

Increased award from date of motion to reopen case held proper.

Ky.—Hayden v. Elkhorn Coal Corp., 238 S.W.2d 138.

24. Ky.—Hayden v. Elkhorn Coal Corp., supra—Lincoln Coal Co. v. Watts, 120 S.W.2d 1026, 275 Ky. 130.

25. N.Y.—Schaefer v. Buffalo Steel Car Co., 166 N.E. 183, 250 N.Y. 507.

71 C.J. p 1435 note 46.

26. N.Y.—Criso v. Edgewater Sawmills Co., 191 N.Y.S. 316, 198 App. Div. 458.

27. N.Y.—Criso v. Edgewater Sawmills Co., supra.

71 C.J. p 1435 note 48.

28. Okl.—Summit Drilling Co. v.

Graham, 6 P.2d 693, 154 Okl. 64—K. D. Oil Co. v. Datel, 292 P. 564, 145 Okl. 264.

29. N.Y.—Schaefer v. Buffalo Steel Car Co., 166 N.E. 183, 250 N.Y. 507.

30. N.Y.—Schaefer v. Buffalo Steel Car Co., supra.

31. N.Y.—Schaefer v. Buffalo Steel Car Co., supra.

32. N.Y.—Brees v. Benedict, 94 N.Y.S.2d 243, 276 App.Div. 934.

33. N.Y.—Ryan v. American Bridge Co., 278 N.Y.S. 612, 243 App.Div. 496, affirmed 198 N.E. 375, 268 N.Y. 502.

34. Ariz.—Nevitt v. Industrial Commission, 217 P.2d 1039, 70 Ariz. 172—Beutler v. Industrial Commission, 190 P.2d 918, 67 Ariz. 73.

Mich.—Witek v. Ford Motor Co., 290 N.W. 318, 292 Mich. 285.

71 C.J. p 1435 note 55 [a].

ute, a final award or judgment in a compensation case is like a final judgment in any other case,³⁵ and, subject to the right of appeal, is conclusive as to all matters adjudicated³⁶ or is conclusive as to

35. Tenn.—Hay v. Woosley, 135 S. W.2d 933, 175 Tenn. 475—Crane Enamelware Co. v. Dotson, 20 S. W.2d 1045, 159 Tenn. 561.
General Shale Products Corp. v. Reese for Use and Benefit of U. S. Fidelity & Guaranty Co., 245 S.W.2d 783, 35 Tenn.App. 423.

Award is in nature of final judgment Ky.—Department of Highways v. Harrell, 163 S.W.2d 287, 291 Ky. 90.

36. U.S.—Industrial Commission of Wis. v. McCartin, Wis., 67 S.Ct. 886, 330 U.S. 622, 91 L.Ed. 1140, 169 A.L.R. 1179.

Ala.—Sloss Sheffield Steel & Iron Co. v. Nations, 8 So.2d 833, 243 Ala. 107—Ford v. Crystal Laundry Co., 189 So. 730, 238 Ala. 187—Ex parte Johnston, 165 So. 108, 231 Ala. 458.
Ariz.—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540, 62 Ariz. 464—Muehlebach v. Dorris-Heyman Furniture Co., 33 P.2d 339, 43 Ariz. 526—Wise v. Six Companies, 28 P.2d 1007, 43 Ariz. 24.
Idaho.—Eldridge v. Idaho State Penitentiary, 30 P.2d 781, 54 Idaho 213—Reagan v. Baxter Foundry & Machine Works, 27 P.2d 62, 53 Idaho 722.

Ill.—Fulton v. Knight, 104 N.E.2d 554, 346 Ill.App. 122.

Kan.—Larrick v. Hercules Powder Co., 188 P.2d 639, 184 Kan. 328.

La.—Harris v. Southern Carbon Co., App., 182 So. 370.

Mass.—Hummer's Case, 59 N.E.2d 295, 317 Mass. 617.

Mich.—Nevels v. Walbridge Aldinger Co., 270 N.W. 272, 278 Mich. 214.

Mo.—Scannell v. Fulton Iron Works Co., App., 280 S.W.2d 484, appeal transferred, see 289 S.W.2d 122, 365 Mo. 889—Corpus Juris cited in Ferguson v. Ozark Distributing Co., 117 S.W.2d 399, 403, 233 Mo.App. 68.

Mont.—Shugg v. Anaconda Copper Mining Co., 46 P.2d 435, 100 Mont. 159.

N.J.—Bowers v. American Bridge Co., 127 A.2d 580, 43 N.J.Super. 48, affirmed 132 A.2d 28, 24 N.J. 390—Hagerman v. Lewis Lumber Co., 98 A.2d 432, 24 N.J.Super. 120, affirmed 99 A.2d 513, 13 N.J. 315.

Drake v. C. V. Hill & Co., 187 A. 637, 113 N.J.Law 290—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301—Federal Leather Co. v. De Renzis, 174 A. 163, 113 N.J.Law 235.

N.M.—Corpus Juris quoted in Norvell v. Barnsdall Oil Co., 70 P.2d 185, 181 N.M. 421.

Ohio.—State ex rel. Randall v. Industrial Commission of Ohio, App., 44 N.E.2d 225—Meininger v. Indus-

trial Commission, App., 32 N.E.2d 438.

Okl.—Skelly Oil Co. v. Goodwin, 32 P.2d 67, 168 Okl. 141.

Or.—Dodd v. State Indus. Acc. Commission, 310 P.2d 324, rehearing denied 311 P.2d 458 and 315 P.2d 138—Hoffmeister v. State Indus. Acc. Commission, 156 P.2d 834, 176 Or. 216.

R.I.—Esposito v. Walsh-Kaiser Co., 58 A.2d 402, 74 R.I. 31.

Tenn.—Nelson v. Cambria Coal Co., 158 S.W.2d 717, 178 Tenn. 389, 165 A.L.R. 1, rehearing denied 160 S.W.2d 412, 178 Tenn. 389, 165 A.L.R. 1.

Wash.—Karlson v. Department of Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310—Soko v. Department of Labor and Industries, 42 P.2d 42, 181 Wash. 153, modified on other grounds 45 P.2d 30, 181 Wash. 153—Abraham v. Department of Labor and Industries of Washington, 34 P.2d 457, 178 Wash. 160, followed in Powell v. Department of Labor and Industries of Washington, 34 P.2d 459, 178 Wash. 699, and Kloeppel v. Department of Labor and Industries of Washington, 34 P.2d 459, 178 Wash. 699.

Wis.—Sheehan v. Industrial Commission, 76 N.W.2d 343, 272 Wis. 595

—Gergen v. Industrial Commission, 23 N.W.2d 473, 249 Wis. 140.

Wyo.—Corpus Juris cited in Mustan v. Diamond Coal & Coke Co., 62 P.2d 287, 289, 50 Wyo. 462.

71 C.J. p 1435 note 55.

Conclusiveness and effect of award or judgment in compensation proceedings generally see supra §§ 655-659.

Who bound

(1) An award is as binding on compensation officials as on parties. Ariz.—Schultz v. Industrial Commission, 37 P.2d 372, 44 Ariz. 357.

(2) Even though one of parties before trial commissioner took no appeal from his order to commission en banc, all parties to proceeding before commissioner were made parties before commission en banc on appeal of one of parties, and order of commission was binding on all parties.

Okl.—Sullivan-Anderson Well Servicing Co. v. Sullivan, 312 P.2d 943.

(3) Where neither principal nor its carrier were parties to workmen's compensation proceeding brought by claimant against immediate employer, trial court was without authority to determine rights as between principal and its carrier and immediate employer and its carrier, and any such determination of rights would not be res judicata.

Kan.—Attebery v. Griffin Const. Co., 312 P.2d 593, 181 Kan. 450.

Questions of law or fact

(1) Except as provided otherwise by statute, original award or judgment is conclusive as to all questions of law determined.

Mo.—Ferguson v. Ozark Distributing Co., 117 S.W.2d 399, 233 Mo.App. 68.

N.J.—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301. 71 C.J. p 1436 note 60.

(2) It is likewise conclusive of all questions of fact determined.

U.S.—Alaska Indus. Bd. v. Chugach Elec. Ass'n, C.A.Alaska, 245 F.2d 855, reversed on other grounds 78 S.Ct. 735, 356 U.S. 320, 2 L.Ed.2d 795.

Ariz.—Lee v. Industrial Commission, 224 P.2d 1085, 71 Ariz. 171.

N.J.—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301.

(3) Under a statute providing for reopening of an award if "it shall afterwards develop" that claimant was or is entitled to a higher rate of compensation, quoted words are not limited to changes of physical condition but include cases in which errors of law are disclosed and permit redetermination of questions of law affecting rate of compensation. U.S.—Alaska Indus. Bd. v. Chugach Elec. Ass'n, C.A.Alaska, 245 F.2d 855, reversed on other grounds 78 S.Ct. 735, 356 U.S. 320, 2 L.Ed.2d 795.

Compensation for certain period unless disability sooner ends

Where employee brought adversary proceedings for workmen's compensation and recovered a judgment for compensation for certain period, unless claimant's total disability should sooner terminate, award was conclusive between parties and employer could not subsequently have re-examined extent of disability.

Ala.—Sloss Sheffield Steel & Iron Co. v. Nations, 8 So.2d 833, 243 Ala. 107—Ex parte Johnston, 165 So. 108, 231 Ala. 458.

Formal deficiencies in findings made in support of an order are waived where no appeal is taken within time allowed.

Pa.—Michetti v. State Workmen's Ins. Fund, 17 A.2d 712, 143 Pa. Super. 458.

Award for wrist res judicata as to arm

Award for permanent partial disability for injury to compensation claimant's right wrist was res judicata as to entire arm, where in compensation proceeding

all matters which may be adjudicable,³⁷ and all issues before the tribunal at the time of entry of its decision,³⁸ although there is authority to the effect that an award or judgment does not conclude matters not decided, even though an issue as to such matters was raised,³⁹ or such matters might have been or should have been decided.⁴⁰ However, it is not *res judicata* of issues neither asserted nor required to be asserted,⁴¹ or which could not properly be asserted.⁴² To have the conclusive character of a final judgment a compensation award must rest on an independent determination of the issues on the merits after hearing in the customary mode.⁴³ Thus, while denial of a motion to reopen an award after a hearing on the merits bars a subsequent motion to reopen based on the same grounds,⁴⁴ denial of such motion on an adjudication

of technical insufficiency without an examination of the merits will not bar a subsequent motion based on the same grounds.⁴⁵ Likewise, where an order is based on an *ex parte* application and is not a decision on the merits, questions properly involved may be considered left open for future determination.⁴⁶ A final adjudication that a claimant is not entitled to compensation for total disability is not *res judicata* of the entire controversy between the parties arising from a compensable injury,⁴⁷ and does not preclude claimant from subsequently raising the question of whether he is entitled to compensation for partial disability.⁴⁸

Where a determination by the compensation officials is not final, the case remains open for final adjudication.⁴⁹ At least under some statutes, an

any provision for making of a fractional award, that is, an award for an "upper arm" and a "lower arm." Okl.—Behling v. Fox Rig & Lumber Co., 105 P.2d 532, 187 Okl. 682.

Retention of a compensation case on docket by original judgment "for such further and necessary orders as may be mete and proper in the premises" cannot in face of a statute declaring that decision of judge hearing case shall be conclusive and binding on parties, subject to right of appeal, and limiting subsequent proceedings to those for moneys determined to be due, authorize a re-examination of facts and fixation of a different basis of liability. Ala.—*Ex parte Johnston*, 165 So. 108, 231 Ala. 458.

37. La.—*Harris v. Southern Carbon Co.*, App., 182 So. 370.
Tex.—*Commercial Standard Ins. Co. v. Brock*, Civ.App., 167 S.W.2d 281, error refused.

Wis.—*Gergen v. Industrial Commission*, 23 N.W.2d 473, 249 Wis. 140.

Even that which could have been presented but which was not is precluded.

Utah.—*Silver King Coalition Mines Co. v. Industrial Commission of Utah*, 89 P.2d 608, 92 Utah 511.

38. Wash.—*Collins v. Department of Labor and Industries*, 259 P.2d 643, 42 Wash.2d 903.

39. **Loss of hearing issue presented but not decided**

Where an employee sustains an injury which results in loss of an eye and loss of hearing, and state industrial commission makes an award based on loss of eye, but makes no finding as to whether or not there was a loss of hearing, and makes no award based on a loss of hearing, although issue as to loss of hearing was presented, it has jurisdiction to make a finding of loss of hearing and an award based on it.

Okl.—*E. G. Fike Co. v. Vice*, 13 P.2d 143, 158 Okl. 243.

40. Wash.—*Munday v. Department of Labor & Industries*, 213 P.2d 481, 35 Wash.2d 374.

41. Mass.—*Hummer's Case*, 59 N.E. 2d 295, 317 Mass. 617.

N.J.—*Janvari v. Peter Schweitzer Co.*, 91 A.2d 113, 21 N.J.Super. 248.

Issue of medical or surgical treatment

(1) Issue of medical or surgical treatment is not necessarily involved in a compensation matter, and while issue may be submitted by employee in his petition for compensation, it need not be, and where it has not been asserted, an award of compensation is not *res judicata* of issue.

N.J.—*Van Tuyl v. Federal Shipbuilding & Dry Dock Co.*, 108 A.2d 483, 32 N.J.Super. 406—*Janvari v. Peter Schweitzer Co.*, 91 A.2d 113, 21 N.J.Super. 248—*Janvari v. Peter Schweitzer Co.*, 80 A.2d 367, 13 N.J. Super. 286.

(2) Where a determination on employee's original claim for temporary disability that claim was barred by limitation was inevitable, fact that referee in his report, or commission in its pleading before court on review, asserted that no medical treatment was furnished was not determinative of that question so as to preclude a subsequent determination that medical treatment had been furnished as a foundation for continuing jurisdiction of commission to make an award for a new and further disability.

Cal.—*Pacific Indem. Co. v. Industrial Acc. Commission*, 193 P.2d 117, 85 C.A.2d 490.

42. Ky.—*Clear Fork Coal Co. v. Gaylor*, 286 S.W.2d 519—*Byrne & Speed Coal Corp. v. Dodson*, 94 S. W.2d 24, 263 Ky. 848.

43. N.J.—*Streng's Piece Dye Works v. Galasso*, 191 A. 874, 118 N.J.Law 257.

44. Ky.—*Happy Coal Co. v. Hartbarger*, 65 S.W.2d 977, 251 Ky. 773—*Kentucky Wagon Mfg. Co. v. Esters*, 297 S.W. 811, 221 Ky. 63.

45. Ky.—*Clear Fork Coal Co. v. Gaylor*, 286 S.W.2d 519—*Byrne & Speed Coal Corp. v. Dodson*, 94 S. W.2d 24, 263 Ky. 848.

46. Mass.—*Frizzell's Case*, 130 N.E. 95, 237 Mass. 460.
71 C.J. p 1438 note 82.

47. R.I.—*Esposito v. Walsh-Kaiser Co.*, 56 A.2d 402, 74 R.I. 31.

48. R.I.—*Esposito v. Walsh-Kaiser Co.*, *supra*.

49. U.S.—*Luckenbach S. S. Co. v. Norton*, C.C.A.Pa., 106 F.2d 137.

Ind.—*Swift & Co. v. Neal*, 18 N.E.2d 491, 106 Ind.App. 139.

Md.—*Porter v. Bethlehem-Fairfield Shipyard*, 53 A.2d 668, 188 Md. 668.

Mo.—*Caldwell v. Melbourne Hotel Co.*, App., 116 S.W.2d 232, opinion quashed on other grounds State ex rel. Melbourne Hotel Co. v. Hostetter, 126 S.W.2d 1189, 344 Mo. 472.

N.J.—*Corasio v. Imhoff Berg Silk Dyeing Co.*, Dept. Labor, 195 A. 620, 16 N.J.Misc. 13.

Utah.—*Silver King Coalition Mines Co. v. Industrial Commission of Utah*, 89 P.2d 608, 92 Utah 511.

Wash.—*State ex rel. Stone v. Olinger*, 108 P.2d 630, 6 Wash.2d 643.

Previous orders not final in their nature may be modified by compensation officials as changes occur in condition of injured employee.

Mass.—*Mozetaki's Case*, 13 N.E.2d 10, 299 Mass. 370—*Shershun's Case*, 190 N.E. 596, 286 Mass. 379.

Memorandum not signed, filed, or sent to parties

Unsigned memorandum relating to compensation claim which was not filed as required by statute and copies

award for temporary disability is not regarded as final and leaves the case open for a subsequent award for permanent disability.⁵⁰

Award based on agreement. An agreement purporting to settle a compensation claim when approved by the compensation authorities may become in legal effect an award which is *res judicata* of the matters adjudicated and agreed on.⁵¹ An award based not on independent findings of fact, but on adoption and approval of an agreement entered into by the parties has been held to be final and conclusive only up to the date of its entry.⁵²

In subsequent proceedings for death benefits. Final determinations made in proceedings by a workman to secure compensation are *res judicata* in subsequent proceedings brought by his widow or dependents to recover death benefits under the compensation act.⁵³ Thus, if it has been determined in the workman's proceeding that the accident is com-

pensable, that fact is *res judicata* in subsequent proceedings for death benefits.⁵⁴

Admission. A failure to appeal from an award coupled with payment thereunder may operate as an admission of the disability found.⁵⁵

Waiver and estoppel. Where the essential elements of waiver⁵⁶ or estoppel⁵⁷ are found to exist, a person may be barred to deny the validity or effect of a compensation award. When payment of compensation is made under an award, it has been held that the parties are bound thereby, at least in so far as any change may be made by virtue of a statute authorizing modification, reinstatement, suspension, or termination of an award on a showing that the disability of the employee has increased, decreased, recurred, or terminated.⁵⁸

b. Effect of Statutes

The conclusiveness or effect as *res judicata* of the original or prior award or judgment in compensation pro-

of which were not sent to parties, held not "final order" which would preclude subsequent award to claimant.

U.S.—American Mut. Liability Ins. Co. of Boston v. Lowe, C.C.A.N.J., 85 F.2d 625.

Order of payments until final determination

Order requiring employer to pay employee compensation at specified weekly rate and to continue such payments until final determination or until otherwise ordered by commission held not "final order" so as to preclude a commission from exercising further jurisdiction, since it indicated commission intended to retain jurisdiction of cause, and contemplated further hearing to determine extent of disability.

Okl.—Orth Kleifeker & Wallace v. Scott, 49 P.2d 112, 173 Okl. 448.

Board's approval of agreement between parties for less than adequate compensation does not have character of final judgment and is not conclusive, evident purpose of statutory requirement of board's approbation of an agreement for compensation being to secure full compliance with statute.

N.J.—Streng's Piece Dye Works v. Galasso, 191 A. 874, 118 N.J.Law 257.

Recommendation

Where commission has made no award or finding but simply a recommendation, it must be taken as tentative and as leaving case still open for final adjudication.

Utah—Silver King Coalition Mines Co. v. Industrial Commission of Utah, 69 P.2d 608, 92 Utah 511.

50, Okl.—T. C. Ottinger Co. v. Hall, 73 P.2d 463, 181 Okl. 284.

Award continuing cause

Where commission awarded an injured employee compensation for temporary total disability and continued cause to a future date to determine any permanent partial disability that might exist, but made no order that employee's temporary disability had ceased, it is not precluded on a subsequent hearing, on motion of injured employee for further compensation for total permanent disability, from entering an order requiring further payment for temporary total disability.

Okl.—Earl W. Baker & Co. v. Holcomb, 16 P.2d 64, 160 Okl. 129.

"The payment of the temporary disability award, and the release thereon, was no bar to the subsequent proceeding for compensation for the permanent disability caused by the injury."

Cal.—Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission of California, 168 P. 1050, 1052, 176 C. 488.

Where statute authorizes award for partial incapacity, after expiration of specified period of total disability, award may be granted in a proper case, although there has been a prior determination on an application for total incapacity.

Me.—Lemelin's Case, 124 A. 204, 123 Me. 478.

51. U.S.—Industrial Commission of Wis. v. McCartin, Wis., 67 S.Ct. 886, 839 U.S. 622, 91 L.Ed. 1140, 169 A.L.R. 1179.

52. Pa.—Camizzi v. E. T. Fraim Lock Co., 29 A.2d 425, 151 Pa.Super. 3—Kilgore v. State Workmen's Insurance Fund, 198 A. 294, 127 Pa. Super. 213.

53. N.J.—Hagerman v. Lewis Lumber Co., 93 A.2d 632, 24 N.J.Super. 120, affirmed 99 A.2d 513, 13 N.J. 315.

54. N.J.—Hagerman v. Lewis Lumber Co., supra.

55. Admission of total disability

An employer's failure to appeal from original award of compensation for total disability resulting from leg injury, and his making of payments thereunder for more than a year, amounted to an "admission" that employee had been totally disabled by leg injury for period of approximately two years.

Pa.—Thomas v. Susquehanna Collieries Co., 25 A.2d 98, 148 Pa.Super. 161.

56. Employer and carrier held not to have waived right to deny causal relation between accident and hemiplegia because original award for fracture of leg was paid without question, where it did not appear that employee made any assertion that hemiplegia was result of accident until long after payment of award for fracture.

N.Y.—Springer v. Van Dorn, 288 N.Y.S. 312, 247 App.Div. 436, amendment of decision denied 290 N.Y.S. 547, 248 App.Div. 797.

57. Ariz.—Muehlebach v. Dorris-Heyman Furniture Co., 38 P.2d 339, 43 Ariz. 526.

Injured employee having collected and used compensation award is estopped to deny validity or binding effect thereof.

Ariz.—Muehlebach v. Dorris-Heyman Furniture Co., supra.

58. Pa.—Foster v. Mellon Steam Coal Co., 173 A. 773, 114 Pa.Super. 213.

ceedings may be limited or otherwise affected by provisions for review contained in the compensation acts; but statutes authorizing the review or modification of an award or judgment on a change of condition, the recurrence of the incapacity, or its aggravation, increase, or termination do not affect the conclusiveness of the award or judgment in question as to matters of law or fact residing in the adjudication, although the prior award or judgment is not res judicata as to matters open to review under such statutes.

The conclusiveness or effect as res judicata of the original or prior award or judgment in compensation proceedings may be limited or otherwise affected by provisions for review contained in the compensation acts,⁵⁹ such as those authorizing the compensation officials to rescind, alter, or amend an award for good cause shown,⁶⁰ error or mistake,⁶¹ or whenever in the opinion of the compensation officials a change may be justified.⁶² Thus, under a statute authorizing review on the ground of a mistake in a determination of fact, an award based

on such mistake is not res judicata.⁶³ So, under a statute authorizing the compensation officials to review an award on the ground of error, mistake, or change of condition, their determinations as to the extent and duration of the disability and the amount or compensation properly to be awarded are subject to future change in the event the estimate on which the award was originally based proves to be incorrect.⁶⁴ However, such statutes do not necessarily deprive the original or prior award or judgment of all effect as res judicata.⁶⁵ A statute authorizing the compensation officials to review an award for good cause shown does not authorize such officials to re-examine a question of law determined by a court on an appeal from their prior award.⁶⁶

Statutes authorizing review or modification of an award or judgment on a change of condition, the recurrence of the incapacity, or its aggravation, increase, diminution, or termination do not affect the

59. Conn.—Saddlemire v. American Bridge Co., 110 A. 63, 94 Conn. 618. 71 C.J. p 1435 note 54 [b].

60. Cal.—Bartlett Hayard Co. v. Industrial Accident Commission, 265 P. 195, 203 C. 522.

71 C.J. p 1435 note 54 [a].
Good cause as ground for modification see infra § 854.

61. U.S.—McCarthy Stevedoring Corp. v. Norton, D.C.Pa., 40 F.Supp. 960.

Error or mistake as ground for modification see infra § 854.

62. Md.—Stevenson v. Hill, 185 A. 551, 170 Md. 676.

Right to compensation for later results of injury

(1) Under a statute giving commission power to make such modifications or changes with respect to former findings or decisions as in its opinion may be justified, an award does not render res judicata question of whether claimant might not be entitled to further compensation for results of injury later developing.

Ohio.—Cramer v. Industrial Commission, 57 N.E.2d 233, 144 Ohio St. 135.—State ex rel. Weinberger v. Industrial Commission, 38 N.E.2d 395, 139 Ohio St. 92.

(2) Under such statute an award for disability, not permanent and total, for a period expiring at a certain time, whether before or after rendition of judgment, is not res judicata in subsequent proceeding for compensation for permanent and total disability existing after expiration of that period.

Ohio.—Cramer v. Industrial Commission, supra.

(3) Under such statute even a decision of a court on appeal is not

"res judicata" of question whether claimant might not be entitled to further compensation for results of injury later developing.

Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414.

Schedule award is not a final adjudication between parties where board has a continuing jurisdiction in every case and may at any time make such changes with respect to former findings or orders as in its opinion may be just.

N.Y.—Carolan v. R. Hoe & Co., 233 N.Y.S. 338, 225 App.Div. 393.

63. U.S.—McCarthy Stevedoring Corp. v. Norton, D.C.Pa., 40 F.Supp. 960.

Mistake in determination of fact as ground for review see infra § 855.

64. Colo.—Morrison v. Clayton Coal Co., 181 P.2d 1011, 116 Colo. 501.

Exception as to monies paid

An exception contained in statute referred to in text to effect that review cannot affect monies already paid, precludes commission, after determining by a prior award that monies paid are property of claimant, from finding or review that monies were not property of claimant and must be returned to insurer.

Colo.—Morrison v. Clayton Coal Co., 181 P.2d 1011, 116 Colo. 501.

65. La.—O'Donnell v. Fortuna Oil Co., 120 So. 789, 10 La.App. 599.

71 C.J. p 1436 note 60 [b] (2).

Mistake of law

A provision for review of an award because of change of condition, mistake, or fraud has no application to a mistake of law.

Tex.—Jones v. Casualty Reciprocal Exch., Civ.App., 275 S.W. 279.

71 C.J. p 1436 note 60 [b] (1).

Finding as to liability res judicata

(1) Under a statute authorizing compensation commission to review an award on ground or error, mistake or change of condition it has been held that finding of commission as to liability for compensation is res judicata.

Colo.—Morrison v. Clayton Coal Co., 181 P.2d 1011, 116 Colo. 501.

(2) A provision that a judgment for periodical payments may be reviewed and amount allowed by court reduced or raised in accordance with evidence introduced at time of such review does not authorize a relitigation of question whether plaintiff's injuries were incurred under such circumstances as to make defendant liable.

Kan.—Falcone v. Hamilton Coal & Mercantile Co., 250 P. 1068, 122 Kan. 187.

66. Cal.—United Dredging Co. v. Industrial Accident Commission, 284 P. 922, 208 C. 705.

71 C.J. p 1436 note 57.

Statute authorizing modification in accordance with facts found

A statute providing that compensation officials may review an award, and in accordance with the facts found on such review, may end, diminish, or increase compensation previously awarded, does not authorize compensation officials to correct errors of law inherent in judgment of a court on an appeal from their prior award.

N.D.—Hanson v. North Dakota Workmen's Compensation Bureau, 248 N.W. 680, 63 N.D. 479.

71 C.J. p 1436 note 59 [a].

conclusiveness of the award or judgment in question as to matters of law or fact residing in the adjudication.⁶⁷ In proceedings brought under such statutes the original or prior award or judgment is conclusive of all questions determined,⁶⁸ whether

of law⁶⁹ or of fact,⁷⁰ or which might have been presented and determined,⁷¹ and all essentials leading to the award or judgment,⁷² including those involving jurisdiction,⁷³ the right to compensation,⁷⁴

67. Ga.—Chicago Bridge & Iron Co. v. Cole, 28 S.E.2d 900, 70 Ga.App. 599.

Mo.—Scannell v. Fulton Iron Works Co., App., 280 S.W.2d 484, appeal transferred, see 289 S.W.2d 122, 365 Mo. 889.

N.J.—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301. S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349.

Not means of correcting errors

(1) Statutes such as those referred to in text do not afford means of correcting errors made in original or prior award or judgment.

Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281, error refused.

(2) Thus, a petition under a statute relating to review of compensation awards for change of condition may not be used to obtain a reversal. Ill.—Weymer v. Industrial Commission, 88 N.E.2d 841, 404 Ill. 271.

(3) Even though whole evidence in a proceeding to review an award under such statutes should show that original award was wrong, original award cannot be reviewed or set aside.

Ill.—De Bartolo v. Industrial Commission, 30 N.E.2d 677, 375 Ill. 103.

68. Mass.—Mozetski's Case, 13 N.E. 2d 10, 299 Mass. 376.

Okl.—Texas Co. v. Atkinson, 62 P.2d 1204, 178 Okl. 480.

An order refusing to open claim, from which claimant did not appeal, was "res judicata" of any right of claimant to have award reviewed on conditions existing up to that time. Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281, error refused.

69. N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301. Crecco v. Daley Excavating Co., 38 A.2d 696, 22 N.J.Misc. 310.

70. Ga.—Maryland Cas. Co. v. Pittman, 35 S.E.2d 319, 72 Ga.App. 838. Mont.—Paulich v. Republic Coal Co., 102 P.2d 4, 110 Mont. 174.

N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301.

Crecco v. Daley Excavating Co., 38 A.2d 696, 22 N.J.Misc. 310, 111 N.J. 1436 note 62.

71. Utah.—Silver King Coalition Mines Co. v. Industrial Commission of Utah, 69 P.2d 608, 610, 92 Utah 511.

"When the commission makes or denies an award upon a hearing, that finding will stand as a matter adjudicated as to the facts as they then existed whether or not they may have all been presented."

Utah.—Silver King Coalition Mines Co. v. Industrial Commission of Utah, supra.

72. Ga.—City of Atlanta v. Padgett, 22 S.E.2d 197, 68 Ga.App. 96.

Mich.—Lewward v. Public Welfare Board of Flint, 299 N.W. 104, 298 Mich. 351.

71 C.J. p 1435 note 55 [a] (1).

Essential ultimate facts

In proceedings under provision conferring continuing jurisdiction on board to modify payment previously awarded because of change in condition, essential ultimate facts necessary to be established and which were adjudicated in original award could not be reviewed.

Ind.—Lukich v. West Clinton Coal Co., 10 N.E.2d 802, 104 Ind.App. 78.

73. N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301. Crecco v. Daley Excavating Co., 38 A.2d 696, 22 N.J.Misc. 310.

71 C.J. p 1436 note 61.

In North Carolina

In a proceeding by a workman to set aside a compensation award on ground that he was an independent contractor and not an employee and that therefore commission was without jurisdiction to make an award, wherein defendants claimed that commission could not determine workman's challenge to its jurisdiction because compensation act authorized review only on ground of change of condition, it was held that statute authorizing review on ground of change of condition applies only where commission has jurisdiction and does not preclude an attack on an award because of commission's lack of jurisdiction of subject matter. N.C.—Hart v. Thomasville Motors, Inc., 92 S.E.2d 678, 244 N.C. 84.

In Oklahoma

(1) An adjudication of a jurisdictional issue precludes inquiry into jurisdictional question in subsequent proceedings for compensation on ground of change of condition.

Okl.—Consolidated Motor Freight

Terminal v. Vineyard, 143 P.2d 610, 193 Okl. 388—Hughes Motor Co. v. Thomas, 299 P. 176, 149 Okl. 16.

(2) Where evidence in original compensation proceeding is sufficient to establish fact on which commission's jurisdiction depends, commission by taking jurisdiction will be deemed to have determined jurisdictional fact, precluding inquiry into jurisdictional question in subsequent proceedings for compensation on ground of change of condition.

Okl.—Beck v. Davis, 54 P.2d 371, 175 Okl. 623—Pinkston Hardware Co. v. Hart, 46 P.2d 501, 172 Okl. 566—Sterling Milk Products Co. v. Underwood, 29 P.2d 937, 167 Okl. 361.

(3) This rule is especially applicable as against an employer attacking an order on jurisdictional grounds where employer on his own motion requested commission to conduct a hearing and make order being attacked, participated in hearing, and complied with order.

Okl.—Beck v. Davis, 54 P.2d 371, 175 Okl. 623.

(4) However, where commission merely approved a compensation settlement, in absence of a statement of facts and without hearing evidence or making findings, commission's jurisdiction to reopen case because of employee's changed condition may be questioned.

Okl.—City of Tulsa v. State Industrial Commission, 113 P.2d 987, 189 Okl. 73—City of Duncan v. Ray, 23 P.2d 694, 164 Okl. 205—Hardy Sanitarium v. De Hart, 22 P.2d 379, 164 Okl. 29—Spivey & McGill v. Nixon, 21 P.2d 1049, 163 Okl. 278—Roraugh-Brown Dry Goods Co. v. Mathews, 20 P.2d 141, 162 Okl. 283.

74. Iowa.—Stice v. Consolidated Indiana Coal Co., 291 N.W. 452, 228 Iowa 1031.

N.J.—Brahney v. Essex County, 41 A. 2d 890, 132 N.J.Law 584, affirmed 45 A.2d 700, 134 N.J.Law 129—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301.

Crecco v. Daley Excavating Co., 38 A.2d 696, 22 N.J.Misc. 310.

Liability of insurer, when once finally determined, cannot be further considered.

Mass.—Bumma's Case, 295 Mass. 317, 295, 317 Mass. 317.

the basis on which the award should rest,⁷⁵ whether timely notice of injury was given,⁷⁶ whether or not the employee was engaged in covered employment,⁷⁷ whether or not the injury arose out of,⁷⁸

or in the course of,⁷⁹ employment. It is also conclusive as to the fact of injury,⁸⁰ or disability,⁸¹ its cause,⁸² nature and extent;⁸³ and the reviewing tribunal acting under such statutory authority

75. Ind.—Bartley v. Burger, 149 N. E. 456, 83 Ind.App. 616.

71 C.J. p 1436 note 62.

76. Ga.—City of Hapeville v. Preston, 16 S.E.2d 774, 65 Ga.App. 835.

77. Idaho.—Blackburn v. Olson, 207 P.2d 1160, 69 Idaho 428.

78. Ga.—Manufacturers Cas. Co. v. Huskins, 90 S.E.2d 604, 93 Ga.App. 10—Rhindress v. Atlantic Steel Co., 32 S.E.2d 554, 71 Ga.App. 898.

Okl.—Warren & Bradshaw Drilling Co. v. Boyd, 271 P.2d 324—F. K. Kettler Co. v. Hanks, 234 P.2d 623, 205 Okl. 200—Nash v. Douglas Aircraft Co., 214 P.2d 919, 202 Okl. 459.

71 C.J. p 1436 note 66.

79. Ga.—Manufacturers Cas. Co. v. Huskins, 90 S.E.2d 604, 93 Ga.App. 10—Rhindress v. Atlantic Steel Co., 32 S.E.2d 554, 71 Ga.App. 898.

Okl.—Warren & Bradshaw Drilling Co. v. Boyd, 271 P.2d 324—F. K. Kettler Co. v. Hanks, 234 P.2d 623, 205 Okl. 200—Nash v. Douglas Aircraft Co., 214 P.2d 919, 202 Okl. 459.

71 C.J. p 1436 note 67.

80. Ill.—Cobine v. Industrial Commission, 183 N.E. 220, 350 Ill. 384—Slogo Coal Co. v. Industrial Commission, 138 N.E. 171, 307 Ill. 41.

Adjudication as to whether there was an accidental injury is res judicata on subsequent review.

Ga.—Rhindress v. Atlantic Steel Co., 32 S.E.2d 554, 71 Ga.App. 898.

Separate injuries

Where compensation award against first employer is made to employee for injuries, and for increase in such injuries during employment by a second employer, and award becomes final, and second award in same amount is made against second employer for a second injury and that award becomes final, two awards are res judicata on issue whether there were separate injuries in subsequent suit to set aside order refusing to terminate compensation.

U.S.—Pillsbury v. Liberty Mut. Ins. Co., C.A.Cal., 182 F.2d 743.

81. Ill.—Cobine v. Industrial Commission, 183 N.E. 220, 350 Ill. 384. 71 C.J. p 1437 note 69.

82. Ga.—Fidelity & Casualty Co. v. Brooks, 28 S.E.2d 343, 70 Ga.App. 355—Hartford Accident & Indemnity Co. v. Camp, 26 S.E.2d 679, 69 Ga.App. 758.

Mich.—Beylich v. J. A. Utley Co., 11 N.W.2d 267, 306 Mich. 625.

Okl.—Ditmore v. Charles M. Suttle Const. Co., 261 P.2d 590.

Pa.—Seko v. Hub Knitting Co., 16 A. 2d 138, 142 Pa.Super. 309.

Huha v. H. C. Frick Coke Co., Com.Pl., 4 Fay.L.J. 171, appeal dismissed 27 A.2d 739, 119 Pa.Super. 108.

No causal connection between accident and disability

(1) Judgment setting aside award of compensation on ground that there was no causal connection between industrial accident and disability for which compensation was sought, was res judicata in subsequent proceeding brought by employee to review award on ground his disability had recurred and increased.

Ill.—Weymer v. Industrial Commission, 88 N.E.2d 841, 404 Ill. 271.

(2) Finding that then existing neurosis bore no causal relation to compensable accident was "res judicata." N.J.—Drexel v. Jurgensen, 22 A.2d 816, 19 N.J.Misc. 643.

Order fixing no aggravation to a pre-existing disease by reason of an injury, if not appealed from, becomes res judicata, but, if order finds an aggravation to a preexisting disease by reason of an injury, any change in disability, occurring after order, may be provided for either by way of increasing or decreasing number of degrees of permanent partial disability.

Wash.—Romano v. Department of Labor and Industries, 146 P.2d 186, 20 Wash.2d 108.

83. Ariz.—Grim v. Industrial Commission, 214 P.2d 892, 70 Ariz. 1—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540, 62 Ariz. 464—Schultz v. Industrial Commission, 37 P.2d 372, 44 Ariz. 357—Wise v. Six Companies, 28 P.2d 1007, 43 Ariz. 24.

Ga.—Fralish v. Royal Indemnity Co., 186 S.E. 567, 53 Ga.App. 557.

Idaho.—Barry v. Peterson Motor Co., 46 P.2d 77, 55 Idaho 702.

Ind.—Frazier v. Knox Consol. Coal Corp., 46 N.E.2d 275, 112 Ind.App. 649.

Iowa.—Stice v. Consolidated Indiana Coal Co., 291 N.W. 452, 228 Iowa 1031.

Mich.—Webber v. Steiger Lumber Co., 34 N.W.2d 516, 322 Mich. 675—Boyich v. J. A. Utley Co., 11 N.W. 2d 267, 306 Mich. 625—De Bernardi v. Oliver Iron Mining Co., 259 N.W. 893, 271 Mich. 212—Magnuson v. Oliver Iron Mining Co., 259 N.W. 317, 270 Mich. 482—McKay v. Jackson & Tindle, 256 N.W. 480, 268 Mich. 452.

N.J.—Sanderson v. Crucible Steel Corp., 66 A.2d 188, 3 N.J.Super. 209.

Breheny v. Essex County, 41 A. 2d 890, 132 N.J.Law 584, affirmed 45 A.2d 700, 134 N.J.Law 129—Licker v. J. G. Martin Box Co., 21 A.2d 595, 127 N.J.Law 136—Cirillo v. United Engineers & Constructors, 3 A.2d 596, 121 N.J.Law 511—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301.

Blaziak v. Eastwood-Nealley Corp., 57 A.2d 553, 26 N.J.Misc. 116—Crecco v. Daley Excavating Co., 38 A.2d 696, 22 N.J.Misc. 310—Leiserowitz v. Prima Donna Silk Mills, 187 A. 359, 14 N.J.Misc. 792.

Okl.—Safeway Stores v. Brumley, 128 P.2d 1006, 191 Okl. 270—Davon Oil Co. v. State Industrial Commission, 61 P.2d 579, 177 Okl. 612.

Or.—Hoffmeister v. State Indus. Acc. Commission, 156 P.2d 834, 176 Or. 216.

Pa.—Zerby v. Reading Co., 189 A. 681, 125 Pa.Super. 397—Evans v. Philadelphia & Reading Coal & Iron Co., 176 A. 791, 116 Pa.Super. 284.

Wash.—White v. Department of Labor and Industries, 293 P.2d 764, 48 Wash.2d 413.

W.Va.—Reed v. Compensation Com'r, 18 S.E.2d 793, 124 W.Va. 37.

71 C.J. p 1437 note 70.

Condition at time

An award is res judicata as to condition of injured employee at time it is made or entered.

Ind.—Frazier v. Knox Consol. Coal Corp., 46 N.E.2d 275, 112 Ind.App. 649.

Mich.—Murray v. Ford Motor Co., 296 N.W. 284, 296 Mich. 348—Pentrack v. Motor Products Corp., 287 N.W. 858, 276 Mich. 357.

Okl.—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 89 P.2d 933, 185 Okl. 68.

Pa.—Foster v. Mellon Stuart Co., 173 A. 773, 114 Pa.Super. 311.

S.D.—Stowsand v. Jack Rabbit Lines, 58 N.W.2d 298, 75 S.D. 11.

Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281, error refused.

71 C.J. p 1437 note 70 [a].

Finding that injury did not cause permanent disability cannot be reviewed in proceeding to review compensation award granted on ground of change of disability.

Ill.—De Bartolo v. Industrial Commission, 30 N.E.2d 677, 375 Ill. 103.

is limited to a consideration of such facts only as have arisen since the making of the original award.⁸⁴

The prior award or judgment is not, however, res judicata as to matters open to review under such

statutory provisions, that is, depending on the terms of the particular provisions involved, a change of condition, recurrence of the incapacity, its aggravation, increase, diminution, or termination, since the prior award or judgment;⁸⁵ but such matters are

84. Ga.—Fralish v. Royal Indemnity Co., 186 S.E. 567, 53 Ga.App. 557.
Idaho.—Barry v. Peterson Motor Co., 46 P.2d 77, 55 Idaho 702.
Mich.—Magnuson v. Oliver Iron Mining Co., 259 N.W. 317, 270 Mich. 482—McKay v. Jackson & Tindle, 256 N.W. 480, 268 Mich. 452.
Mont.—Shugg v. Anaconda Copper Mining Co., 46 P.2d 435, 100 Mont. 159.
N.J.—Sanderson v. Crucible Steel Corp., 66 A.2d 188, 3 N.J.Super. 209.
Tucker v. Frank J. Beltramo, Inc., 186 A. 321, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301. 71 C.J. p 1437 note 71.
85. Ariz.—Schultz v. Industrial Commission, 37 P.2d 372, 44 Ariz. 357.
Ga.—General Motors Corp., Chevrolet Division v. Dempsey, 91 S.E.2d 350, 93 Ga.App. 423—Maryland Cas. Co. v. Pitman, 35 S.E.2d 319, 72 Ga. App. 838—Rhindress v. Atlantic Steel Co., 32 S.E.2d 554, 71 Ga.App. 298—City of Atlanta v. Padgett, 22 S.E.2d 197, 68 Ga.App. 96—Employers' Liability Assur. Corp. v. Johnson, 3 S.E.2d 542, 67 Ga.App. 416.
Idaho.—Koegler v. C. F. Davidson Co., 209 P.2d 728, 69 Idaho 416—Barry v. Peterson Motor Co., 46 P.2d 77, 55 Idaho 702.
Ill.—De Bartolo v. Industrial Commission, 30 N.E.2d 677, 375 Ill. 103.
La.—Harris v. Southern Carbon Co., 181 So. 469, 189 La. 992, conformed to, App., 182 So. 370.
Md.—Jackson v. Bethlehem-Sparrows Point Shipyard, 56 A.2d 702, 189 Md. 583.
Mass.—Mozetski's Case, 13 N.E.2d 10, 299 Mass. 370.
Mich.—Van Dorpel v. Haven-Busch Co., 85 N.W.2d 97, 350 Mich. 135—Webber v. Steiger Lumber Co., 34 N.W.2d 516, 322 Mich. 675—Mikulski v. Hudson Motor Car Co., 9 N.W.2d 20, 305 Mich. 97—Ledward v. Public Welfare Board of Flint, 299 N.W. 104, 298 Mich. 351—Murray v. Ford Motor Co., 296 N.W. 284, 296 Mich. 348—Houg v. Ford Motor Co., 285 N.W. 27, 288 Mich. 478—Schneyder v. Cadillac Motor Car Co., 273 N.W. 418, 280 Mich. 127.
N.J.—Jeanvari v. Peter Schweitzer Co., 33 A.2d 367, 13 N.J.Super. 286—Sanderson v. Crucible Steel Corp., 66 A.2d 188, 3 N.J.Super. 209.
N.J.—Licker v. J. G. Martin Box Co., 21 A.2d 595, 127 N.J.Law 136—

Cirillo v. United Engineers & Constructors, 3 A.2d 596, 121 N.J.Law 511—De Santis v. Turner Const. Co., 1 A.2d 202, 120 N.J.Law 590.

United Engineers and Constructors v. Anderson, 187 A. 363, 14 N.J.Misc. 799—Funari v. Standard Sanitary Mfg. Co., 177 A. 431, 13 N.J.Misc. 226, affirmed 181 A. 44, 115 N.J.Law 506.

Okl.—Knapp v. State Industrial Commission, 154 P.2d 964, 195 Okl. 56—Dennehy Const. Co. v. Kidd, 137 P.2d 535, 192 Okl. 463—Nelson v. Carter Oil Co., 130 P.2d 289, 191 Okl. 388—Amerada Petroleum Corporation v. White, 64 P.2d 660, 179 Okl. 82—Skelly Oil Co. v. Goodwin, 32 P.2d 67, 168 Okl. 141.

S.C.—Atkins v. Charleston Shipbuilding & Drydock Co., 33 S.E.2d 46, 206 S.C. 63—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349.

S.D.—Stowsand v. Jack Rabbit Lines, 58 N.W.2d 298, 75 S.D. 11.

Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281, error refused.

Wash.—White v. Department of Labor and Industries, 293 P.2d 764, 48 Wash.2d 413—Collins v. Department of Labor & Industries, 259 P.2d 643, 42 Wash.2d 903—Munday v. Department of Labor and Industries, 213 P.2d 481, 35 Wash.2d 374—Lindsey v. Department of Labor & Industries, 213 P.2d 316, 35 Wash.2d 370—Romano v. Department of Labor and Industries, 146 P.2d 186, 20 Wash.2d 108.

W.Va.—Peak v. State Compensation Commissioner, 91 S.E.2d 625, 141 W.Va. 453.

Wyo.—Corpus Juris cited in Mustanen v. Diamond Coal & Coke Co., 62 P.2d 287, 290, 50 Wyo. 462.

71 C.J. p 1437 note 72.

In so far as adjudication predicts future course of injury it is not final and binding when something new appears to show a different condition. Okl.—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 89 P.2d 933, 185 Okl. 68.

Award is not final as to changed condition of claimant as result of original injury.

Idaho.—Nitkey v. Bunker Hill & Sullivan Min. & Concentrating Co., 251 P.2d 216, 73 Idaho 294.

A finding that claimant had reached maximum improvement in awarding plaintiff compensation for a designated number of weeks was only an adjudication as to probable dura-

tion of claimant's disability and would not preclude employer's and insurance carrier's rights to have future determination made as to whether there had been a change in claimant's condition with respect to ability to labor.

Ga.—Borden Co. v. Fuerlinger 98 S.E.2d 410, 95 Ga.App. 556.

Finding that claimant had no permanent disability has no application to future development.

Okl.—Safeway Stores v. Brumley, 128 P.2d 1006, 191 Okl. 270.

Absolute judgment for total permanent disability

Right to contest question of total and permanent disability is statutory, and exists even though judgment awarding compensation for total and permanent disability is absolute in form.

N.M.—La Rue v. Johnson, 141 P.2d 321, 47 N.M. 260.

Issue of total permanent disability previously raised

Physical condition of employee remains open for consideration at any time within time prescribed by law for determination of question whether there has been change in his condition; and fact that board disagreed, at original hearing, with employee's contention that he was then totally and permanently disabled is immaterial.

Ga.—Manufacturers Cas. Co. v. Huskins, 90 S.E.2d 604, 93 Ga.App. 10.

Changes in earning capacity and earnings

(1) Finding as to earning capacity of injured employee, made in order to fix rate of compensation, may be considered only as a determination of earning capacity as of date of determination, since physical condition and earning capacity of employee may thereafter change.

Okl.—Dennehy Const. Co. v. Kidd, 137 P.2d 535, 192 Okl. 463.

(2) Where former decision suspended employee's right to compensation because she was being paid wages in excess of what she was earning at time of her injury without finding that she had recovered therefrom or that her incapacity had entirely ceased, such fact did not prevent employee from petitioning to review former decision for increase in compensation after such excessive earnings ceased.

R.I.—Pepe v. American Silk Spinning Co., 38 A.2d 474, 70 R.I. 309.

Cause of increased disability

(1) Whether an increase of disability

the only matters which may be considered in proceedings for review brought under such statutory provisions.⁸⁶ Thus, in subsequent proceedings it cannot be shown that at the time of an award for partial disability claimant was in fact totally disabled.⁸⁷ When review is sought on the ground of change of condition since the prior award, unless such change is shown the prior award or judgment is *res judicata*,⁸⁸ but if such change is shown, it is open to modification,⁸⁹ despite the affirmance of the original award on appeal.⁹⁰ Thus, an award or adjudication of partial disability does not preclude a subsequent award for increased⁹¹ or total⁹² disability based on a change of condition since the prior award. The compensation officials are without power to make an award that would bar either employee, employer, or insurer from the right to have the award reviewed on the ground of a subsequent change in the condition of the employee.⁹³

Statute governing effect of finding discontinuing compensation. Under a statute so providing when in any case there appears of record a finding that the employee is entitled to compensation, no subsequent finding discontinuing compensation on the ground that the employee's incapacity has ceased

may be considered final as a matter of fact or *res judicata* as a matter of law; and the employee may have further hearings as to whether his incapacity is the result of the injuries for which he received compensation.⁹⁴

§ 854. Necessity and Sufficiency of Grounds

- a. In general
- b. Good cause
- c. Change of condition
- d. Injuries not included or considered in original award
- e. Aggravation of injury
- f. Development of disease
- g. Failure of employee to recover
- h. Injury or disability becoming permanent
- i. Increase of disability or further disability
- j. Termination or decrease of disability
- k. Recurrence of disability
- l. Diminution or increase of earnings
- m. Refusal to submit to surgical or medical treatment
- n. Refusal to accept employment

ity was due to injury for which compensation has been recovered, or was due to a prior injury, or some other cause is a proper subject of review.

N.J.—*Calabria v. Liberty Mut. Ins. Co.*, 71 A.2d 550, 4 N.J. 64.

Vandenberg v. John De Kuyper & Son, 89 A.2d 581, 5 N.J.Super. 440.

Pa.—*Grosjean v. Murrell*, 132 A.2d 357, 183 Pa.Super. 580.

(2) A finding that operations necessitated by compensable injury precipitated an attack of heart disease "from which symptoms he is not as yet free," and ordering continuance of compensation payments for total disability, from which decision neither party appealed, was not a final determination as to permanent injury resulting from heart condition where question of permanency was not considered, and it was, therefore, duty of compensation officials in subsequent proceeding to ascertain actual condition of claimant's heart at that time and determine whether it was connected with injury.

Mass.—*Hummer's Case*, 59 N.E.2d 295, 317 Mass. 617.

(3) Where employee recovered against insurer of employer with whom employer carried policy at time disability arose judgment was not *res judicata* against insurer to extent of making it responsible for increases in disability due not to natural progress of existing disability

ity, but to results of subsequent exposure of employee to chrome poisoning.

N.J.—*Calabria v. Liberty Mut. Ins. Co.*, 71 A.2d 550, 4 N.J. 64.

Order approving settlement purporting to cover future disability

An order approving a lump sum settlement between an employee and an employer, reciting that amount paid is equal to value of probable future payments and should be a complete settlement of any disability that employee may now have or in future may have is not, even when acted on, conclusive of employee's right to additional compensation alleged because of change in condition.

Ga.—*Travelers Ins. Co. v. Haney*, 88 S.E.2d 492, 92 Ga.App. 319.

Idaho.—*Barry v. Peterson Motor Co.*, 46 P.2d 77, 55 Idaho 702.

N.J.—*Sanderson v. Crucible Steel Corp.*, 66 A.2d 188, 3 N.J.Super. 209.

71 C.J. p 1437 note 73.

Change beyond contemplation

On review of an award, inquiry then is limited as to whether disability resulting from injury may have increased or diminished beyond what award contemplated.

S.D.—*Stowson v. Jack Rabbit Lines*, 58 N.W.2d 293, 75 S.D. 111.

Mich.—*Schindler v. Ford Motor Co.*, 293 N.W. 713, 294 Mich. 449.

89. Ky.—*Department of Highways v. Harrell*, 163 S.W.2d 287, 291 Ky. 90.

Okl.—*Texas Co. v. Atkinson*, 62 P.2d 1204, 178 Okl. 480.

71 C.J. p 1437 note 75.

89. Ga.—*South v. Indemnity Ins. Co. of North America*, 146 S.E. 45, 39 Ga.App. 47.

71 C.J. p 1437 note 76.

90. Okl.—*Amerada Petroleum Corporation v. Williams*, 272 P. 328, 134 Okl. 177.

71 C.J. p 1437 note 77.

91. Mich.—*Murray v. Ford Motor Co.*, 296 N.W. 284, 296 Mich. 348.

92. Mich.—*Zelinkas v. Ford Motor Co.*, 293 N.W. 732, 294 Mich. 494.

71 C.J. p 1437 note 76 [a] (2).

93. Mo.—*Herndon v. S. A. Robertson Const. Co., App.*, 59 S.W.2d 75.

94. Mass.—*In re Carmody's Case*, 130 N.E.2d 587, 333 Mass. 249.

Finding of no causal relation

Where claimant suffered knee injury, and compensation was awarded, reserving claimant's rights, for knee injury but denied as to period when claimant suffered only from a rash, claimant was not barred, by decision that rash was not causally connected with injury, from recovering compensation for rash on subsequently discovered evidence that rash had causal connection with knee injury in view of statute referred to in text.

Mass.—*In re Carmody's Case*, *supra*.

- o. Confinement in public institution
- p. Departure from jurisdiction, state, or country
- q. Death or marriage of beneficiary
- r. Error or mistake
- s. Fraud
- t. Prior award for incorrect or inadequate amount

a. In General

The increase, diminution, termination, or suspension of compensation previously awarded may be only for the grounds expressly or necessarily implied in the provisions of the act applicable.

The increase, diminution, termination, or suspension of compensation previously awarded, as commonly authorized by the compensation act, may be for the grounds expressed or necessarily implied in the provisions of the act applicable, and only for such grounds.⁹⁵ Where the provisions of the act by which the amount of compensation is to be determined are applicable to all ages, no reduction because of old age is authorized.⁹⁶

Facts not previously considered. Where statutory authority therefor exists, an award of addi-

tional compensation may be made on a showing of some new fact not theretofore considered which would entitle claimant to greater benefits than he has already received.⁹⁷

b. Good Cause

Under statutes in effect so providing, an award or decision may be modified for good cause, and what constitutes good cause depends largely on the circumstances of each case.

Under a provision vesting the commission with a continuing jurisdiction to modify its orders, decisions, and awards, on good cause appearing therefor, whatever constitutes "good cause" is a necessary and sufficient ground for such modification;⁹⁸ a change in the physical condition of the workman is not the only ground.⁹⁹ What constitutes "good cause" depends largely on the circumstances of each case.¹ The existence of some circumstance which warrants the conclusion that the challenged award is inequitable is a necessary element to the exercise of continued jurisdiction to modify orders, decisions, and awards for good cause;² and a change cannot be predicated on a mere change of opinion by the commission as to the correctness of

95. U.S.—*Texas Employers' Ins. Ass'n v. Sheppard*, D.C.Tex., 42 F.Supp. 669—*Eastern S. S. Lines v. Monahan*, D.C.Me., 26 F.Supp. 944, affirmed, C.C.A., 110 F.2d 840.

Ariz.—*Inspiration Consol. Copper Co. v. Smith*, 280 P.2d 273, 78 Ariz. 355—*Radaca v. U. S. Smelting, Refining & Min. Co.*, 158 P.2d 540, 62 Ariz. 464—*Bates v. Linde*, 65 P.2d 655, 49 Ariz. 192.

Colo.—*Independence Coffee & Spice Co. v. Taylor*, 48 P.2d 798, 97 Colo. 242.

Ga.—*Rourke v. U. S. Fidelity & Guaranty Co.*, 1 S.E.2d 728, 187 Ga. 686.

Ideal Mut. Ins. Co. v. Ray, 96 S.E.2d 377, 94 Ga.App. 785.

Okl.—*Young v. Daugherty*, 224 P.2d 962, 203 Okl. 598.

Pa.—*Gleyze v. Hale Coal Co.*, 26 A.2d 141, 149 Pa.Super. 18—*Priorello v. State Workmen's Ins. Fund*, 2 A.2d 864, 133 Pa.Super. 373.

Wingard v. Keiser, Com.Pl., 45 Dauph. Co. 109.

R.I.—*Mancini v. Superior Court*, 82 A.2d 390, 78 R.I. 373.

Utah.—*Standard Coal Co. v. Industrial Commission*, 65 P.2d 640, 91 Utah 549.

Wash.—*Hagen v. Department of Labor and Industries*, 76 P.2d 592, 193 Wash. 555.

W.Va.—*Igo v. State Compensation Com'r*, 36 S.E.2d 690, 128 W.Va. 402—*Blavins v. State Compensation Com'r*, 33 S.E.2d 408, 127 W.Va. 481—*Turner v. State Compensation Com'r*, 17 S.E.2d 617, 123 W.Va. 673.

Com'r, 17 S.E.2d 617, 123 W.Va. 673.

Wis.—*State ex rel. Walter v. Industrial Commission of Wisconsin*, 287 N.W. 692, 233 Wis. 48.

71 C.J. p 1438 note 87.

Fact that injured employee needed further medical and surgical attention was not ground for reopening compensation award.

Ariz.—*Muehlebach v. Dorris-Heyman Furniture Co.*, 33 P.2d 339, 43 Ariz. 526.

Fact that claimant had become totally blind through causes in no way connected with his employment is not a ground for discontinuing an award for partial disability.

N.Y.—*Kuznicki v. Burns Bros.*, 282 N.Y.S. 157, 245 App.Div. 874.

96. Mich.—*Letourneau v. Davidson*, 188 N.W. 462, 464, 218 Mich. 334.

71 C.J. p 1438 note 88.

97. W.Va.—*Igo v. State Compensation Com'r*, 36 S.E.2d 690, 128 W.Va. 402—*Blavins v. State Compensation Com'r*, 33 S.E.2d 408, 127 W.Va. 481—*Reed v. Compensation Com'r*, 18 S.E.2d 798, 124 W.Va. 37—*Turner v. State Compensation Com'r*, 17 S.E.2d 617, 123 W.Va. 673.

98. Cal.—*Bartlett Hayward Co. v. Industrial Accident Commission*, 265 P. 195, 203 C. 522.

Mont.—*Paulich v. Republic Coal Co.*, 102 P.2d 4, 110 Mont. 174—*Menzel v. Republic Coal Co.*, 53 P.2d 87, 101 Mont. 94.

99. Cal.—*Bartlett Hayward Co. v. Industrial Accident Commission*, 265 P. 195, 203 C. 522.

1. Cal.—*Bartlett Hayward Co. v. Industrial Accident Commission*, supra.

71 C.J. p 1438 note 91.

Sufficient "good cause"

In compensation proceeding, testimony of doctor in report to commission that past history of employee had no bearing on present injured condition held sufficient "good cause" for order rescinding earlier award and establishing finding that all disability sustained was due to injury complained of.

Cal.—*Department of Public Works v. Industrial Acc. Commission*, 37 P. 2d 196, 1 C.A.2d 534.

Insufficient showing

Allegedly newly discovered evidence that employee's disability after designated date was caused or exacerbated by injury arising out of employment held insufficient to show "good cause" within statute for reopening case and granting employee increased award, especially where employee could with reasonable diligence have discovered and produced much of such evidence at hearing.

Cal.—*Merritt-Chapman & Scott Corp. v. Industrial Acc. Commission*, 457 P.2d 501, 4 C.2d 814.

2. Cal.—*Merritt-Chapman & Scott Corp. v. Industrial Acc. Commission*, supra.

its original decision.³ Although a provision vesting the commission with a continuing jurisdiction and power to modify its former findings and orders as in its opinion may be justified does not expressly state that good cause must be shown for such modification, it is a necessary ground.⁴

c. Change of Condition

Where statutory authority therefor exists, a change of condition or conditions is a sufficient ground for increasing, decreasing, terminating, or suspending payments of compensation, but the change must be actual,

material, and substantial and as a general rule must be a change in the physical condition of the employee affecting his earning capacity and must be due to the original injury.

In the absence of a statute otherwise providing, a change in condition of the injured workman is not a ground for altering an award of compensation.⁵ However, where statutory authority therefor exists, a change of condition or conditions is a sufficient ground for increasing, decreasing, terminating, or suspending payments of compensation,⁶ and, if the

3. Cal.—Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm., supra.

Santa Maria Gas Co. v. Industrial Acc. Commission, 117 P.2d 43, 46 C.A.2d 775, rehearing denied 117 P.2d 951, 46 C.A.2d 775.

4. Utah.—Aetna Life Ins. Co. v. Industrial Commission of Utah, 274 P. 139, 73 Utah 366.

W.Va.—Blosser v. State Compensation Com'r, 51 S.E.2d 71, 132 W.Va. 112.

5. Ala.—Alabama By-Products Co. v. Landgraff, 27 So.2d 215, 248 Ala. 253—Ford v. Crystal Laundry Co., 189 So. 730, 238 Ala. 187.

6. U.S.—Alaska Indus. Bd. v. Chugach Elec. Ass'n, C.A.Alaska, 245 F.2d 855, reversed on other grounds 78 S.Ct. 735, 356 U.S. 320, 2 L.Ed.2d 795—Tudman v. American Ship Bldg. Co., C.A.Ill., 170 F.2d 842. Texas Employers' Ins. Ass'n v. Sheppard, D.C.Tex., 42 F.Supp. 669.

Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92—Kelsey v. Industrial Commission, 286 P.2d 195, 79 Ariz. 191—Engle v. Industrial Commission, 269 P.2d 604, 77 Ariz. 202—Steward v. Industrial Commission, 211 P.2d 217, 69 Ariz. 159.

Colo.—Byouk v. Industrial Commission of Colo., 105 P.2d 1087, 106 Colo. 430.

Ga.—Chevrolet Division, General Motors Corp. v. Dempsey, 93 S.E.2d 703, 212 Ga. 560—Rourke v. U. S. Fidelity & Guaranty Co., 1 S.E.2d 728, 187 Ga. 636.

American Emp. Ins. Co. v. Hardeman, 85 S.E.2d 805, 91 Ga.App. 462—U. S. Fidelity & Guaranty Co. v. Garner, 45 S.E.2d 109, 76 Ga.App. 87—Rhindress v. Atlantic Steel Co., 32 S.E.2d 554, 71 Ga.App. 898—American Mut. Liability Ins. Co. v. Jenkins, 12 S.E.2d 80, 63 Ga.App. 777—Corpus Juris cited in New Amsterdam Cas. Co. v. McFarley, 10 S.E.2d 249, 251, 63 Ga.App. 122, reversed on other grounds 12 S.E.2d 355, 191 Ga. 334, mandate conforming to 13 S.E.2d 588, 64 Ga.App. 465—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App.

739—Ware v. Swift & Co., 2 S.E.2d 123, 59 Ga.App. 836.

Ky.—Three Point Coal Corp. v. Moser, 195 S.W.2d 305, 302 Ky. 584—Bell Coal Co. v. Jackson, 192 S.W.2d 947, 301 Ky. 673—Black Star Coal Co. v. Powers, 68 S.W.2d 30, 252 Ky. 736.

Mass.—Vass' Case, 65 N.E.2d 549, 319 Mass. 297.

Mich.—White v. Michigan Consol. Gas. Co., 69 N.W.2d 160, 342 Mich. 160—Ledward v. Public Welfare Board of Flint, 299 N.W. 104, 298 Mich. 351—Wicko v. Ford Motor Co., 290 N.W. 818, 292 Mich. 335—Jelusich v. Wisconsin Land & Lumber Co., 255 N.W. 920, 267 Mich. 313.

Mo.—Scannell v. Fulton Iron Works Co., 289 S.W.2d 122, 365 Mo. 889. Conn v. Chestnut Street Realty Co., 133 S.W.2d 1056, 235 Mo.App. 309.

Mont.—Kelly v. West Coast Const. Co., 78 P.2d 1078, 106 Mont. 463—State ex rel. Murray Hospital v. District Court of Second Judicial Dist., 57 P.2d 813, 102 Mont. 350—Shugg v. Anaconda Copper Mining Co., 46 P.2d 435, 100 Mont. 169.

Neb.—Metropolitan Dining Room v. Jensen, 254 N.W. 405, 126 Neb. 765. N.H.—Zeady v. Arms Textile Mfg. Co., 76 A.2d 512, 96 N.H. 328.

N.C.—Paris v. Carolina Builders Corp., 92 S.E.2d 405, 244 N.C. 35—Harris v. Asheville Contracting Co., 83 S.E.2d 802, 240 N.C. 715.

Okl.—Phillips Petroleum Co. v. Clark, 224 P.2d 597, 203 Okl. 561—Phillips Petroleum Co. v. Anguish, 209 P.2d 639, 201 Okl. 691—Dunning-James-Patterson v. Rickert, 164 P.2d 620, 196 Okl. 237—Dennehy Const. Co. v. Kidd, 137 P.2d 535, 192 Okl. 463—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 89 P.2d 933, 185 Okl. 68—Graner Const. Co. v. Brandt, 68 P.2d 788, 180 Okl. 221—Magnolia Petroleum Co. v. Nalley, 56 P.2d 769, 176 Okl. 491.

Or.—Dimitroff v. State Indus. Acc. Commission, 306 P.2d 398, 209 Or. 316.

Pa.—Strait v. Gulf Oil Co., 14 A.2d 168, 140 Pa.Super. 464—Carrara v.

Hallston Coal Co., 8 A.2d 484, 137 Pa.Super. 151—Priorello v. State Workmen's Ins. Fund, 2 A.2d 864, 133 Pa.Super. 373—Shay v. Aetna Life Ins. Co., 200 A. 302, 132 Pa. Super. 53, followed in Shay v. North Side Bank & Trust Co. of Lebanon, 200 A. 308, 132 Pa.Super. 65—Kilgore v. State Workmen's Ins. Fund, 193 A. 294, 127 Pa.Super. 213.

S.C.—Atkins v. Charleston Shipbuilding & Drydock Co., 33 S.E.2d 46, 206 S.C. 63.

S.D.—Stowsand v. Jack Rabbit Lines, 58 N.W.2d 298, 75 S.D. 11.

Utah.—Spencer v. Industrial Commission, 290 P.2d 692, 4 Utah 2d 185—Barber Asphalt Corp. v. Industrial Commission, 135 P.2d 266, 103 Utah 371—Silver King Coalition Mines Co. v. Industrial Commission of Utah, 69 P.2d 608, 92 Utah 511.

71 C.J. p 1430 note 70, p 1438 note 94. Specific changes warranting change of award:

Aggravation of injury see infra subdivision e of this section.

Development of disease see infra subdivision f of this section.

Failure of employee to recover see infra subdivision g of this section.

Injury or disability becoming permanent see infra subdivision h of this section.

Increase of disability or further disability see infra subdivision i of this section.

Termination or decrease of disability see infra subdivision j of this section.

Recurrence of disability see infra subdivision k of this section.

Diminution or increase of earnings see infra subdivision l of this section.

Refusal to submit to medical or surgical treatment see infra subdivision m of this section.

Refusal to accept employment see infra subdivision n of this section.

Confinement in public institution see infra subdivision o of this section.

Departure from jurisdiction, state or country see infra subdivision p of this section.

only ground applicable, a necessary⁷ ground for the modification of an award. Generally speaking, such change in condition refers to conditions different from those existent when the award was

made;⁸ and a continued incapacity of the same kind and character and for the same injury is not a change of condition;⁹ nor is a continued incapacity that has always been better or worse than it was

Specific changes warranting change of award—Cont'd

Death or marriage of beneficiary see *infra* subdivision q of this section.

New development showing prior award to be excessive or inadequate see *infra* subdivision t of this section.

No limit on number of applications

Ga.—Travelers Ins. Co. v. Haney, 88 S.E.2d 492, 92 Ga.App. 319.

Statute applies only where commission has jurisdiction

N.C.—Hart v. Thomasville Motors, Inc., 93 S.E.2d 673, 244 N.C. 84.

7. U.S.—Chugach Elec. Ass'n v. Alaska Indus. Bd., D.C.Alaska, 122 F.Supp. 210, reversed on other grounds 78 S.Ct. 735, 356 U.S. 320, 2 L.Ed.2d 795.

Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92.

Ga.—Arnold v. Indemnity Ins. Co., 95 S.E.2d 29, 94 Ga.App. 498—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App. 789—Fralish v. Royal Indem. Co., 186 S.E. 567, 53 Ga.App. 557—Swift & Co. v. Ware, 186 S.E. 452, 53 Ga.App. 500.

Idaho.—Fackenthal v. Eggers Pole & Supply Co., 108 P.2d 300, 62 Idaho 46.

Mich.—Nevels v. Walbridge Aldinger Co., 270 N.W. 272, 278 Mich. 214—Smith v. Pontiac Motor Car Co., 270 N.W. 172, 277 Mich. 652—Rummels v. Allied Engineers, 258 N.W. 230, 270 Mich. 153—McKay v. Jackson & Tindle, 256 N.W. 480, 268 Mich. 452.

N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290.

N.C.—Murray v. Nebel Knitting Co., 199 S.E. 609, 214 N.C. 437.

Okl.—Rippee v. Rippee, 279 P.2d 944—Couch v. Weaver, 277 P.2d 143—Young v. Daugherty, 224 P.2d 962, 203 Okl. 598—Rose v. Champlin Refining Co., 86 P.2d 317, 184 Okl. 203—Texas Co. v. Atkinson, 62 P.2d 1204, 178 Okl. 480—Brown Bros. v. Parks, 56 P.2d 883, 176 Okl. 615—Deep Rock Oil Corporation v. Evans, 28 P.2d 7, 167 Okl. 66.

Pa.—Shea v. Abbotts Dairies, 11 A.2d 526, 139 Pa.Super. 106.

S.D.—Chittenden v. Jarvis, 297 N.W. 787, 68 S.D. 5.

Utah.—Standard Coal Co. v. Industrial Commission, 65 P.2d 640, 91 Utah 549.

Wash.—Reid v. Department of Labor and Industries, 96 P.2d 492, 1 Wash.2d 430.

W.Va.—Reed v. Compensation Com'r, 148 S.E.2d 793, 124 W.Va. 37.

21 C.J. p 1212, note 29, p 1439, note 95.

Additional award for injuries not included or considered in original award without showing change of condition see *infra* subdivision d of this section.

After an award for permanent disability, commission's continuing jurisdiction may be confined to cases where a change in condition occurs. Okl.—White v. Shell Co., 143 P.2d 825, 193 Okl. 374—Behling v. Fox Rig & Lumber Co., 105 P.2d 532, 187 Okl. 682—Rose v. Champlin Refining Co., 86 P.2d 317, 184 Okl. 203.

Where an award has been entered for temporary total disability, there is no need to establish a change in condition in order to reopen matter. Okl.—Behling v. Fox Rig & Lumber Co., 105 P.2d 532, 187 Okl. 682—Pauly Jail Bldg. Co. v. Akin, 86 P.2d 796, 184 Okl. 249—Croxtton & Bucklin v. Buchanan, 39 P.2d 91, 170 Okl. 170.

8. U.S.—Chugach Elec. Ass'n v. Alaska Indus. Bd., D.C.Alaska, 122 F.Supp. 210, reversed on other grounds 78 S.Ct. 735, 356 U.S. 320, 2 L.Ed.2d 795.

Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92—Steward v. Industrial Commission, 211 P.2d 217, 69 Ariz. 159.

Ga.—Fortson v. American Sur. Co., 89 S.E.2d 671, 92 Ga.App. 625—American Emp. Ins. Co. v. Hardeman, 85 S.E.2d 805, 91 Ga.App. 462—Travelers Ins. Co. v. Hammond, 83 S.E.2d 576, 90 Ga.App. 595—Riegel Textile Corp. v. Vinyard, 77 S.E.2d 760, 88 Ga.App. 753—Georgia Marine Salvage Co. v. Merritt, 60 S.E.2d 419, 82 Ga.App. 111—Hartford Acc. & Indem. Co. v. Carroll, 43 S.E.2d 722, 75 Ga.App. 437—Corpus Juris cited in New Amsterdam Casualty Co. v. McFarley, 10 S.E.2d 249, 251, 68 Ga.App. 122, reversed on other grounds 12 S.E.2d 355, 191 Ga. 334, mandate conformed to 13 S.E.2d 588, 64 Ga. App. 465—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App. 789—Fralish v. Royal Indem. Co., 186 S.E. 567, 53 Ga.App. 557—Swift & Co. v. Ware, 186 S.E. 452, 53 Ga. App. 500.

Iowa.—Rose v. John Deere Ottumwa Works, 76 N.W.2d 756, 247 Iowa 900—Stice v. Consolidated Indiana Coal Co., 291 N.W. 452, 228 Iowa 1031.

Mo.—Ferguson v. Ozark Distributing Co., 117 S.W.2d 399, 233 Mo.App. 68.

Neb.—Riedel v. Smith Baking Co., 33 N.W.2d 287, 160 Neb. 28—Ludwickson v. Central States Elec. Co., 6 N.W.2d 65, 142 Neb. 808.

N.J.—Giacchi v. Richmond Bros. Co., 78 A.2d 109, 11 N.J.Super. 76, opinion adhered to 79 A.2d 488, 12 N.J.Super. 308.

Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290.

Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414.

State ex rel. Shaffer v. Industrial Commission, App., 56 N.E.2d 698.

Okl.—Phillips Petroleum Co. v. Clark, 224 P.2d 597, 203 Okl. 561—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 90 P.2d 398, 185 Okl. 72—Texas Co. v. Atkinson, 62 P.2d 1204, 178 Okl. 480—Barnsdall Oil Co. v. State Industrial Commission, 62 P.2d 1031, 178 Okl. 289—Derr v. Weaver, 57 P.2d 1153, 177 Okl. 100—Brown Bros. v. Parks, 56 P.2d 883, 176 Okl. 615—Magnolia Petroleum Co. v. Nalley, 56 P.2d 769, 176 Okl. 491—Boardman & Co. v. Clark, 26 P.2d 906, 166 Okl. 194.

Or.—Corpus Juris cited in Hoffmeister v. State Industrial Accident Commission, 156 P.2d 834, 836, 176 Or. 216.

Pa.—Gleyze v. Hale Coal Co., 26 A.2d 141, 149 Pa.Super. 18—Carrara v. Hallston Coal Co., 8 A.2d 484, 137 Pa.Super. 151—Shay v. Aetna Life Ins. Co., 200 A. 302, 132 Pa. Super. 53, followed in Shay v. North Side Bank & Trust Co. of Lebanon, 200 A. 308, 132 Pa.Super. 65—Kilgore v. State Workmen's Ins. Fund, 193 A. 294, 127 Pa.Super. 213.

S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349.

S.D.—Stowsand v. Jack Rabbit Lines, 58 N.W.2d 298, 75 S.D. 11—Chittenden v. Jarvis, 297 N.W. 787, 68 S.D. 5.

Tex.—Commercial Standard Ins. Co. v. Shank, Civ.App., 140 S.W.2d 273, error dismissed, judgment correct.

Va.—Corpus Juris cited in J. A. Jones Const. Co. v. Martin, 94 S.E.2d 202, 206, 193 Va. 370—Blair v. Buchanan Coal Corp., 198 S.E. 491, 171 Va. 102.

W.Va.—Reed v. Compensation Com'r, 18 S.E.2d 793, 124 W.Va. 37.

71 C.J. p 1439 note 96.

Previous award essential

Statute providing for review of any award by commission on ground of a changed condition, has no application except where it appears that a previous award has been made by industrial commission.

N.C.—Penland v. Bird Coal Co., 87 S.E.2d 432, 246 N.C. 26.

9. Conn.—Wallace v. Lux Clock Co., 180 A. 466, 120 Conn. 200.

found to be.¹⁰ In other words, although there is authority to the effect that a new hearing may be had on the ground of a change of condition where there are conditions which were not known and which could have revealed themselves only afterward,¹¹ as a general rule the change must be actual,¹² and not a mere change of opinion with re-

spect to a pre-existing condition.¹³

The change must be material and substantial.¹⁴ Although there is some authority to the contrary,¹⁵ as a general rule, it must be a change in the physical condition of the employee¹⁶ affecting his earning capacity,¹⁷ or his ability to labor and perform

Ga.—Georgia Marine Salvage Co. v. Merritt, 60 S.E.2d 419, 82 Ga.App. 111—Hartford Acc. & Indem. Co. v. Carroll, 43 S.E.2d 722, 75 Ga.App. 437.

Mo.—Winschel v. Stix, Baer & Fuller Dry Goods Co., App., 77 S.W.2d 488.

Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281, error refused.

Va.—Corpus Juris cited in J. A. Jones Const. Co. v. Martin, 94 S.E.2d 202, 198 Va. 370.

71 C.J. p 1439 note 97.

Change not changing incapacity

A change in condition which does not increase or decrease incapacity is not such change as will justify an alteration of an award, so that where compensation claimant was temporarily totally disabled as result of a second-degree hernia, change in condition from a second-degree to third-degree hernia, which did not change temporary total disability, did not authorize a change in compensation order.

Ga.—Chicago Bridge & Iron Co. v. Cole, 28 S.E.2d 900, 70 Ga.App. 599.

10. Ga.—Corpus Juris cited in Fralish v. Royal Indemnity Co., 188 S.E. 567, 571, 53 Ga.App. 557.

Idaho.—Corpus Juris cited in Boshers v. Payne, 70 P.2d 391, 394, 58 Idaho 109.

Mo.—State ex rel. Sei v. Haid, 61 S.W.2d 950, 332 Mo. 1061.

Okl.—White v. Shell Oil Co., 143 P.2d 325, 193 Okl. 374.

Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281, error refused.

11. Utah.—Silver King Coalition Mines Co. v. Industrial Commission of Utah, 69 P.2d 608, 610, 92 Utah 511.

"A" change of condition may occur when there is an actual change or where the condition is different than what it was thought to be and only could have been revealed by subsequent events."

Utah.—Silver King Coalition Mines Co. v. Industrial Commission of Utah, supra.

12. Okl.—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 90 P.2d 938, 185 Okl. 72—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 88 P.2d 933, 185 Okl. 68.

Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281, error refused.

Va.—J. A. Jones Const. Co. v. Martin, 94 S.E.2d 202, 198 Va. 370.

13. Okl.—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 90 P.2d 938, 185 Okl. 72—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 89 P.2d 933, 185 Okl. 68.

Va.—J. A. Jones Const. Co. v. Martin, 94 S.E.2d 202, 198 Va. 370.

Error as to disease causing disability

Finding that compensation claimant was disabled by infectious arthritis, which during earlier stages could not be distinguished from rheumatic fever to which claimant's disability was erroneously attributed on prior hearing, held not to justify compensation award on ground of "changed conditions of facts" arising after previous award.

Conn.—Kearns v. City of Torrington, 177 A. 725, 119 Conn. 522.

Additional evidence of facts previously presented to, and passed on, by commission is not authorized by provision giving commission jurisdiction to modify on change of conditions.

Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414.

71 C.J. p 1212 note 29 [b].

14. Mo.—Bruce v. Missouri-Kansas-Texas R. Co., 73 S.W.2d 425, 229 Mo.App. 124.

N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290.

Okl.—Osborne v. State Industrial Commission, 112 P.2d 384, 188 Okl. 616—Rose v. Champlin Refining Co., 86 P.2d 317, 184 Okl. 203.

Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281, error refused.

71 C.J. p 1439 note 99.

15. In Indiana

(1) It has been held that phrase "change in conditions" does not necessarily mean that there must be a change in physical condition.

Ind.—Swift & Co. v. Neal, 18 N.E.2d 491, 106 Ind.App. 139.

(2) However, there is also authority interpreting phrase to mean a change in physical condition of employee.

Ind.—Jackson Hill Coal & Coke Co.

v. Gregson, 150 N.E. 398, 84 Ind. App. 170.

(3) So, it has been said that "unfortunately in the past this [phrase] has been interpreted to mean a change in the physical condition of the injured one but certainly this was not what the general assembly had in mind."

Ind.—Homan v. Belleville Lumber & Supply Co., 8 N.E.2d 127, 131, 104 Ind.App. 98.

16. U.S.—Pillsbury v. Alaska Packers Ass'n, C.C.A.Cal., 85 F.2d 758, reversed on other grounds 57 S.Ct. 682, 301 U.S. 174, 81 L.Ed. 988—Burley Welding Works v. Lawson, C.C.A.Fla., 141 F.2d 964.

Bay Ridge Operating Co. v. Lowe, D.C.N.Y., 14 F.Supp. 280—Atlantic Coast Shipping Co. v. Golubiewski, D.C.Md., 9 F.Supp. 315.

Ariz.—Steward v. Industrial Commission, 211 P.2d 217, 69 Ariz. 159.

Ga.—Fortson v. American Sur. Co., 89 S.E.2d 671, 92 Ga.App. 625—Travelers Ins. Co. v. Hammond, 83 S.E.2d 576, 90 Ga.App. 595—Georgia Marine Salvage Co. v. Merritt, 60 S.E.2d 419, 82 Ga.App. 111—New Amsterdam Casualty Co. v. McFarley, 10 S.E.2d 249, 63 Ga.App. 122, reversed on other grounds 12 S.E.2d 355, 191 Ga. 834, mandate conformed to 13 S.E.2d 588, 64 Ga.App. 465.

Neb.—Riedel v. Smith Baking Co., 83 N.W.2d 287, 150 Neb. 28—Ludwickson v. Central States Elec. Co., 6 N.W.2d 65, 142 Neb. 308.

Okl.—Phillips Petroleum Co. v. Clark, 224 P.2d 597, 203 Okl. 561.

Or.—Hoffmeister v. State Indus. Acc. Commission, 156 P.2d 834, 176 Or. 216.

S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 249.

Tex.—Commercial Standard Ins. Co. v. Shank, Civ.App., 140 S.W.2d 273, error dismissed, judgment correct.

Va.—Corpus Juris cited in J. A. Jones Construction Co. v. Martin, 94 S.E.2d 202, 207, 198 Va. 370.

71 C.J. p 1440 note 5.

Change of domicile as change of conditions see infra subdivision p of this section.

17. Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92—Steward v. Industrial Commission, 211 P.2d 217, 69 Ariz. 159.

Mich.—White v. Michigan Consol. Gas Co., 169 N.W.2d 186, 342 Mich.

work,¹⁸ except in cases of loss of use of a specific member;¹⁹ and it must be due to the original injury,²⁰ even though manifesting itself in injuries not expressly enumerated in the original award²¹ or theretofore compensated.²² Accordingly, a change in economic conditions has been held insufficient to authorize a modification of an award,²³ although the employee, as a result of his physical condition, is unable to obtain employment.²⁴ Imprisonment of the workman²⁵ or his commitment to a mental institution²⁶ are not factors which may be relied on in determining whether there has been a change in conditions. A provision for the al-

teration of an award on the ground of a change of condition does not authorize a review for the correction of an error or mistake in the original award,²⁷ such as a mistake in fixing the amount thereof.²⁸

d. Injuries Not Included or Considered in Original Award

Where statutory authority therefor exists, the compensation officials may make an additional award for injuries, caused by the same accident but overlooked, unmentioned, or unknown in making the original award or other order, without showing a change of condition.

Where statutory authority therefor exists, the

160—Goines v. Kelsey Hayes Wheel Co., 292 N.W. 686, 294 Mich. 156.

Va.—Corpus Juris cited in J. A. Jones Construction Co. v. Martin, 94 S.E.2d 202, 207, 198 Va. 370. 71 C.J. p 1440 note 5.

In Oklahoma

(1) Rule stated in text has been followed.

Okl.—Incas Lead & Zinc Co. v. Morgan, 17 P.2d 370, 161 Okl. 33.

(2) However, it has been declared that provision authorizing commission to review an award at any time on ground of a change in conditions should be liberally construed in interest of employee, and authorizes commission to take into consideration all of conditions pathological, physical, and industrial which may, in any way, have a direct bearing on rights of injured employee.

Okl.—U. S. Fidelity & Guaranty Co. v. State Industrial Commission, 244 P. 432, 115 Okl. 273. 71 C.J. p 1439 note 4.

(3) In accordance with latter view where commission found that claimant was injured while in opponents' employ in course of employment, but refused to make award because claimant had lost no time and was still receiving same wages as before injury, and claimant was subsequently discharged and injury was shown to still exist, so as to incapacitate claimant, commission could consider claimant's discharge in determining whether award should be made on review of former hearing. Okl.—March Bros. Const. Co. v. Cupp, 57 P.2d 852, 177 Okl. 102—U. S. Fidelity & Guaranty Co. v. State Industrial Commission, supra.

18. Okl.—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 90 P.2d 398, 135 Okl. 72—Wilcox Oil & Gas Co. v. Sattelmair, 85 P.2d 696, 178 Okl. 418—Texas Co. v. Atkinson, 62 P.2d 1265, 174 Okl. 480—Barnsdall Oil Co. v. State Industrial Commission,

62 P.2d 1031, 178 Okl. 289—Brown Bros. v. Parks, 56 P.2d 833, 176 Okl. 615—Shell Petroleum Corporation v. Patton, 29 P.2d 86, 167 Okl. 246—Deep Rock Oil Corporation v. Evans, 28 P.2d 7, 167 Okl. 66.

19. Okl.—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 90 P.2d 398, 135 Okl. 72.

20. U.S.—Atlantic Coast Shipping Co. v. Golubiewski, D.C.Md., 9 F. Supp. 315.

Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92.

Ga.—New Amsterdam Casualty Co. v. McFarley, 10 S.E.2d 249, 63 Ga. App. 122, reversed on other grounds 12 S.E.2d 355, 191 Ga. 334, mandate conformed to 13 S.E.2d 583, 64 Ga.App. 465—Perrien v. Southern Co-op. Foundry Co., 3 S.E.2d 240, 60 Ga.App. 195.

Mich.—Schneyder v. General Motors Corp., (Cadillac Motor Car Division), 286 N.W. 153, 289 Mich. 63. Neb.—Riedel v. Smith Baking Co., 83 N.W.2d 287, 150 Neb. 23.

Ohio.—State ex rel. Shaffer v. Industrial Commission, App., 56 N.E. 2d 698.

Okl.—Phillips Petroleum Co. v. Clark, 224 P.2d 597, 203 Okl. 561—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 90 P.2d 398, 135 Okl. 72—Magnolia Petroleum Co. v. Nalley, 56 P.2d 769, 176 Okl. 491—Sinclair Prairie Oil Co. v. State Industrial Commission, 54 P.2d 348, 176 Okl. 84.

S.C.—Cromer v. Newberry Cotton Mills, 28 S.E.2d 19, 201 S.C. 349.

Utah.—Spencer v. Industrial Commission, 290 P.2d 692, 4 Utah 2d 185.

71 C.J. p 1439 note 1.

21. Okl.—Skelly Oil Co. v. Standley, 297 P. 235, 148 Okl. 77.

22. Okl.—Combination Drilling Co. v. Wiggs, 29 P.2d 901, 163 Okl. 88—Skelly Oil Co. v. Standley, 297 P. 235, 148 Okl. 77.

23. U.S.—Burley Welding Works v. Lawson, C.C.A.Fla., 141 F.2d 984.

Bethlehem Shipbuilding Corp. v. Cardillo, D.C.Mass., 23 F.Supp. 400, affirmed, C.C.A., 102 F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

Or.—Hoffmeister v. State Indus. Acc. Commission, 156 P.2d 834, 176 Or. 216.

Va.—J. A. Jones Const. Co. v. Martin, 94 S.E.2d 202, 198 Va. 370.

71 C.J. p 1440 note 6.

24. Ga.—Travelers' Ins. Co. v. Hurt, 167 S.E. 175, 176 Ga. 153, answers conformed to 167 S.E. 323, 46 Ga. App. 229.

71 C.J. p 1440 note 7.

25. U.S.—Atlantic Coast Shipping Co. v. Golubiewski, D.C.Md., 9 F. Supp. 315.

Excessive drinking

Imprisonment of injured workman for offense due to excessive indulgence in intoxicating liquor is not a factor on which commissioner could rely in determining whether there had been such a change in conditions as would entitle workman to modification of compensation award. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, D.C.Mass., 23 F.Supp. 400, affirmed, C.C.A., 102 F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

26. Right not terminated

Commitment of employee to insane hospital held not to terminate right of employee to compensation for existing disability which had resulted from injury sustained in course of his employment.

U.S.—Bay Ridge Operating Co. v. Lowe, D.C.N.Y., 14 F.Supp. 280.

27. Okl.—White v. Shell Oil Co., 143 P.2d 825, 193 Okl. 374—Deep Rock Oil Corporation v. Evans, 28 P.2d 7, 167 Okl. 66.

28. Okl.—Sinclair Refining Co., v. Duncan, 297 P.2d 568.

S.D.—Stowand v. Jack Rabbit Hill, 58 N.W.2d 293, 75 S.D. 15—Cited in v. Jarvis, 297 P.2d 901, 163 Okl. 88—S.D. 5. 71 C.J. p 1440 note 8.

compensation officials may make an additional award for injuries, caused by the same accident but overlooked, unmentioned, or unknown in making the original award or other order,²⁹ without a showing of a change of condition.³⁰ However, where claimant at the time an award is made, knows of injuries other than those for which he is being compensated, and exercises his judgment as to the seriousness of such other injuries and makes no claim therefor, an additional award therefor is not authorized, especially after the statute of limitations has run.³¹ A statute, limiting the compensation for a particular injury, does not preclude the award of additional compensation for other injuries received at the time, for which the employee has not been compensated.³² Under some statutes impairment

and disability are regarded as distinct claims or causes of action and an award for disability alone does not preclude a subsequent award for impairment.³³ A statute, vesting the compensation officials with a continuing jurisdiction, will not authorize the reexamination of a question, determined at the original hearing, involving the relation of a specific injury to the accident.³⁴

e. Aggravation of Injury

An aggravated condition which has not been considered in making the original award will, under some provisions, authorize an additional award in a proper case.

An aggravated condition which had not been considered in making the original award for the injury will, under some provisions, authorize an additional

29. Iowa.—Oldham v. Seofield & Welch, 266 N.W. 480, 222 Iowa 764. Me.—Lynch v. Jutras, 1 A.2d 221, 136 Me. 18.

N.J.—Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division, 78 A.2d 403, 11 N.J.Super. 338.

N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 23 N.W.2d 26, 74 N.D. 520.

Ohio.—Kaiser v. Industrial Commission of Ohio, 26 N.E.2d 449, 136 Ohio St. 440.

Okl.—Behling v. Fox Rig & Lumber Co., 105 P.2d 532, 187 Okl. 632—Phillips Petroleum Co. v. Lane, 86 P.2d 632, 184 Okl. 219—Fox v. Brown, 55 P.2d 129, 176 Okl. 201—Skelly Oil Co. v. Gage, 29 P.2d 616, 167 Okl. 329—Stanolind (formerly Sinclair) Crude Oil Purchasing Co. v. Randall, 27 P.2d 339, 166 Okl. 261.

71 C.J. p 1440 note 9.

Aggravated condition not considered in making original award as authorizing additional award see infra subdivision e of this section.

It is presumed that injuries not mentioned have not been determined.

Okl.—Dierks Lumber & Coal Co. v. Hagan, 114 P.2d 919, 189 Okl. 210—Phillips Petroleum Co. v. Lane, 86 P.2d 632, 184 Okl. 219—Meador & Whitaker Co. v. Davis, 60 P.2d 753, 177 Okl. 887.

Limited to unknown and unconsidered disability

On a reopening of a compensation award, commission is limited to new and additional disability, which was unknown and not considered at time of original award.

Ariz.—Harambasic v. Barrett & Hilp & Macco Corp., 119 P.2d 932, 58 Ariz. 319.

Traumatic psychoneuroses

(1) Where compensation claimant's traumatic psychoneurosis was not involved in prior proceedings, award based on finding that claim-

ant suffered from traumatic psychoneurosis as result of original compensable injury but was unaware of his condition at time of former order stopping compensation was authorized.

Mich.—Laichalk v. Chicago Pneumatic Tool Co., 13 N.W.2d 826, 308 Mich. 298.

(2) So, where injury mentioned in notice and application for adjustment of claim filed by employer was "loss of sight of the eye," no reference being made to other injury or disability, and on hearing inquiry was directed exclusively to question of specific loss of that eye, an award relating solely to loss of eye was not res judicata of right to compensation for total disability from traumatic neurosis allegedly resulting from accident to the eye, notwithstanding employee had lost sight of other eye prior to entering employment.

Mich.—Kubiak v. Briggs Mfg. Co., 282 N.W. 427, 286 Mich. 329.

Further amputation not loss from same injury

Where amputation of most of foot below ankle was successful and healed but did not give workman best possible stump for use of artificial appliance, and second amputation between knee and foot was made after compensation for loss of foot only had been paid pursuant to agreement, workman was not entitled to additional compensation on theory of later loss from same injury.

Iowa.—Schell v. Central Engineering Co., 4 N.W.2d 399, 232 Iowa 421, 143 A.L.R. 576.

30. Okl.—Dierks Lumber & Coal Co. v. Hagan, 114 P.2d 919, 189 Okl. 210—Phillips Petroleum Co. v. Lane, 86 P.2d 632, 184 Okl. 219—Meador & Whitaker Co. v. Davis, 60 P.2d 753, 177 Okl. 387—Fox v. Brown, 55 P.2d 129, 176 Okl. 201—Skelly

Oil Co. v. Gage, 29 P.2d 616, 167 Okl. 329.

31. Okl.—Finance Oil Co. v. James, 109 P.2d 818, 188 Okl. 372.

Claim barred by limitations

Where employee fell from boiler in 1922 and filed claim and notice of injury in 1922 specifying as only injury that to his wrist, such claim was insufficient to confer jurisdiction on commission to make award to claimant on motion filed in 1938 for injuries to employee's head and spine of which he was cognizant at all times after accident occurred but of which he gave no notice to employer and for which he did not claim compensation prior to filing of motion to reopen case in 1935, and claim was barred by statute of limitations.

Okl.—Finance Oil Co. v. James, supra.

32. Or.—Plowman v. State Industrial Accident Commission, 23 P. 2d 910, 144 Or. 138.

Statute limiting compensation for hernia

A statute providing that in case of an injury resulting in hernia, compensation for a certain number of weeks shall be payable, provided, that if hernia results in permanent total disability, an award for such disability may be made, does not preclude an additional award for an injury separate and apart from a hernia suffered, but if only injury suffered is result of hernia it is not compensable unless it is total and permanent.

Okl.—Eagle-Picher Mining & Smelting Co. v. Daniels, 172 P.2d 971, 197 Okl. 507.

33. Ind.—Briggs Indiana Corp. v. Davis, 23 N.E.2d 285, 107 Ind.App. 177.

34. Ohio.—State v. Industrial Commission of Ohio, 183 N.E. 780, 126 Ohio St. 32.

award.³⁵ A provision authorizing an additional award in case of aggravation of the disability has been held to apply to cases in which the disability proves to be greater than was supposed when the award was made,³⁶ but not to cases where the workman's condition has been aggravated as a result of a further accident, whether compensable or not,³⁷ or pre-existing conditions not related to the original injury.³⁸ Under such provisions it has been held that there can be no award for aggravation of a permanent partial disability unless it appears that the condition of the injured workman had previously been determined to have reached a fixed state, that a rate of compensation was established, that the claim was closed on that basis and that an increase of disability has occurred after such closing.³⁹ Although a workman has been denied compensation for an injury because he still has the use of the organ in question, should the impairment increase, the compensation officials under a continu-

ing jurisdiction to amend their decisions have the power to reconsider their order.⁴⁰ A workman using reasonable care in the selection of physicians and submitting to treatment, such as a surgical operation, which is unsuccessful, may recover compensation for increased permanent disability resulting from such treatment.⁴¹

f. Development of Disease

The compensation officials are not authorized to award additional compensation because of the development or recurrence of a nonoccupational disease not connected with the injury for which compensation has been awarded; but if the disease had been merely dormant and became active because of the injury, additional compensation may be authorized.

The compensation officials are not authorized to award additional compensation because of the development⁴² or recurrence⁴³ of a nonoccupational disease not connected with the injury for which compensation has been awarded; but if the disease

35. Ariz.—*Stephens v. Miami Copper Co.*, 130 P.2d 507, 59 Ariz. 528.

Colo.—*Consolidated Coal & Coke Co. v. Todoroff*, 47 P.2d 404, 97 Colo. 125.

Iowa.—*Corpus Juris* cited in *Rose v. John Deere Ottuwa Works*, 76 N.W. 2d 756, 759, 247 Iowa 900.

Or.—*Keefer v. State Industrial Acc. Commission*, 135 P.2d 806, 171 Or. 405.

Pa.—*Thomas v. Susquehanna Collieries Co.*, 25 A.2d 98, 148 Pa.Super. 161.

Wash.—*Collins v. Department of Labor and Industries*, 259 P.2d 643, 42 Wash.2d 903—*Lindsey v. Department of Labor & Industries*, 213 P.2d 316, 35 Wash.2d 370—*Tonkovich v. Department of Labor & Industries of State*, 195 P.2d 638, 31 Wash.2d 220—*Karlson v. Department of Labor and Industries of Wash.*, 178 P.2d 1001, 26 Wash.2d 310—*Litke v. Department of Labor and Industries*, 98 P.2d 981, 2 Wash.2d 536—*Hagen v. Department of Labor and Industries*, 76 P.2d 592, 193 Wash. 555.

W.Va.—*Igo v. State Compensation Com'r*, 36 S.E.2d 690, 128 W.Va. 402—*Blevins v. State Compensation Com'r*, 33 S.E.2d 408, 127 W.Va. 481—*Felty v. Compensation Com'r*, 19 S.E.2d 90, 124 W.Va. 75—*Reed v. Compensation Com'r*, 18 S.E.2d 793, 124 W.Va. 37—*Turner v. State Compensation Com'r*, 17 S.E.2d 617, 123 W.Va. 613—*Cheeks v. State Compensation Com'r*, 176 S.E. 421, 115 W.Va. 368.

71 C.J. p 1440 note 12.

Injuries not included or considered in original award generally see supra subdivision d of this section.

It is essence of claim for aggravation that claimant's condition is

different from and worse than it was at time of prior closing of his claim. Wash.—*Collins v. Department of Labor and Industries*, 259 P.2d 643, 42 Wash.2d 903.

Prior permanent partial disability or time loss not essential

(1) In order to warrant recovery for aggravation it has been declared that it is not necessary that there shall have been any previous permanent partial disability or time loss. Wash.—*Collins v. Department of Labor and Industries*, supra.

(2) However this may be, mere closing of a claim with only time loss and no finding of a disability does not bar recovery for aggravation of disability on theory that there was no disability to become aggravated, since there must have been a disability to warrant payment of time loss, and a disability even though deemed to have been terminated at time of closing of claim, may thereafter become aggravated.

Wash.—*Lindsey v. Department of Labor & Industries*, 213 P.2d 316, 35 Wash.2d 370.

Subsequent to award and prior to application

To recover in proceeding before board to reopen claim on ground of aggravation of injury for which award had been made, some aggravation must have occurred subsequent to date of award and prior to claimant's application to reopen claim.

Wash.—*Kleven v. Department of Labor & Industries of State*, 243 P.2d 488, 40 Wash.2d 415.

Aggravation from return to work

Where employee suffers compensable injury and returns to work and as result thereof first injury is aggravated so that employee is greater

disabled than before, entire disability may be compensated.

Iowa.—*Oldham v. Scofield & Welch*, 266 N.W. 480, 222 Iowa 764, modified on other grounds and rehearing overruled 269 N.W. 925, 222 Iowa 764.

36. Or.—*Keefer v. State Industrial Acc. Commission*, 135 P.2d 806, 171 Or. 405.

37. Or.—*Keefer v. State Industrial Acc. Commission*, supra.

38. Wash.—*Tonkovich v. Department of Labor & Industries of State*, 195 P.2d 638, 31 Wash.2d 220—*Ferguson v. Department of Labor and Industries of Washington*, 90 P.2d 280, 197 Wash. 524.

39. Wash.—*Karlson v. Department of Labor and Industries of Wash.*, 173 P.2d 1001, 26 Wash.2d 310—*Larson v. Dept. of Labor and Industries*, 166 P.2d 159, 24 Wash.2d 461—*State ex rel. Stone v. Olinger*, 108 P.2d 630, 6 Wash.2d 643.

40. N.Y.—*Boscarino v. Carfagno & Dragonette*, 115 N.E. 710, 220 N.Y. 323, Ann.Cas.1918A 530.

41. N.J.—*Janvari v. Peter Schweitzer Co.*, 80 A.2d 367, 13 N.J.Super. 286.

42. Mich.—*Lynch v. Briggs Mfg. Co.*, 45 N.W.2d 20, 329 Mich. 168.

Wash.—*Ferguson v. Department of Labor and Industries of Washington*, 90 P.2d 280, 197 Wash. 524—*Hadley v. Department of Labor and Industries*, 25 P.2d 1031, 174 Wash. 582.

43. Mich.—*Dunavant v. General Motors Corp., Cadillac Motor Car Division*, 38 N.W.2d 912, 328 Mich. 482.

had been merely dormant and became active because of the injury, additional compensation may be authorized.⁴⁴ However, under some statutes there can be no recovery of additional compensation for a nonoccupational disease resulting from the injury after an award determining the full extent of the employee's disability, even though the existence of the disease was then unknown.⁴⁵

g. Failure of Employee to Recover

Where statutory authority therefor exists, as under provisions authorizing such changes as in the opinion of the compensation officials may be justified, the compensation officials may make an additional award when an injured employee does not recover as expected, but a workman after having been granted an award for permanent total disability may not be granted an additional award based on a lesser degree of disability on failure of the injury to heal as expected.

Where statutory authority therefor exists,⁴⁶ as under provisions authorizing such changes as in the opinion of the compensation officials may be justified,⁴⁷ the compensation officials may make an additional award when an injured employee does not recover as expected. The officials are authorized to

continue payments awarded, despite subsequent injuries delaying recovery, where the employee is still suffering from the original injury.⁴⁸ However, on failure of an injury to heal as expected, a workman after having been granted an award for permanent total disability may not be granted an additional award based on a lesser degree of disability, such as temporary total disability.⁴⁹ On an application for additional compensation, where the failure to recover is due to the employee's lack of care, the refusal of further compensation is authorized.⁵⁰

h. Injury or Disability Becoming Permanent

As a general rule, and subject to statutory limitations, on an injury or disability becoming permanent, the compensation officials may, after an award for temporary disability reopen the case and make an award for permanent disability.

As a general rule, and subject to statutory limitations,⁵¹ on an injury or disability becoming permanent, the compensation officials may, after an award for temporary disability, reopen the case and make an award for permanent disability.⁵² In order to

44. Wash.—Hadley v. Department of Labor and Industries, 25 P.2d 1031, 174 Wash. 532.

45. Wis.—State ex rel. Watter v. Industrial Commission of Wisconsin, 287 N.W. 692, 233 Wis. 48.

46. La.—Dykes v. Ruddle, 128 So. 686, 14 La.App. 106.

47. Utah.—Continental Casualty Co. v. Industrial Commission of Utah, 260 P. 279, 70 Utah 354.

71 C.J. p 1441 note 16.

As "new development"

(1) Under a statute such as that referred to in text general rule, discussed infra subdivision t of this section, has evolved authorizing reopening of a case if there has been some new development which shows former award to be inadequate or excessive.

(2) Failure of an injury to heal as expected has been held to constitute a "new development" within meaning of this rule.

Utah.—Barber Asphalt Corp. v. Industrial Commission, 135 P.2d 286, 103 Utah 371.

48. Mich.—Cook v. Charles Hoertz & Son, 164 N.W. 464, 198 Mich. 129.

49. U.S.—Chugach Elec. Ass'n v. Alaska Indus. Bd., D.C.Alaska, 122 F.Supp. 210.

50. Ky.—Faulkner v. Morehead & N. E. Co., 298 S.W. 392, 221 Ky. 198.

51. Ohio.—State ex rel. Bohan v. Industrial Commission, 70 N.E.2d 888, 147 Ohio St. 249.

52. Ohio.—State ex rel. Bohan v. Industrial Commission, 70 N.E.2d 888, 147 Ohio St. 249.

tion for ankylosis which makes any of fingers, thumbs, or parts thereof "more than useless," quoted words are not surplusage, and to be "more than useless," ankylosed fingers must be harmful or detrimental to use of other parts of hand, so that where claimant had been paid compensation for temporary total disability and for impairment of earning capacity resulting from a fracture of wrist, he was not entitled to further compensation for permanent partial disability because fracture was followed by an atrophy of forearm and hand together with a complete ankylosis of wrist and a partially ankylosed claw hand.

Ohio.—State ex rel. Bohan v. Industrial Commission, supra.

Hernia

(1) Under a statute providing that in the case of an injury resulting in hernia, compensation for eight weeks, and cost of operation shall be payable, provided that if hernia results in permanent total disability compensation may so determine said fact and award claimant compensation for a total permanent disability, after an award for an operation and eight weeks compensation, commission is without power to make an award for permanent partial disability.

Okl.—Pioneer Mills Co. v. Webster, 54 P.2d 642, 184 Okl. 49. Empire Oil & Refining Co. v. Myers, 60 P.2d 780, 177 Okl. 401.

(2) It can make a further award only if hernia results in permanent total disability.

Okl.—Empire Oil & Refining Co. v. Myers, supra.

52. Colo.—Consolidated Coal & Coke Co. v. Todoroff, 47 P.2d 404, 97 Colo. 125.

D.C.—New Amsterdam Cas. Co. v. Cardillo, 108 F.2d 492, 71 App.D.C. 172.

Idaho.—Barry v. Peterson Motor Co., 46 P.2d 77, 55 Idaho 702.

Ind.—International Detrola Corp. v. Hoffman, 70 N.E.2d 844, 224 Ind. 613—Pettiford v. United Department Stores, 196 N.E. 842, 100 Ind. App. 471.

Iowa.—Rose v. John Deere Ottumwa Works, 76 N.W.2d 756, 247 Iowa 900.

Mont.—Mezmarich v. Republic Coal Co., 53 P.2d 82, 101 Mont. 78.

N.J.—Torbyn v. South River Sand Co., 69 A.2d 588, 6 N.J.Super. 1.

Okl.—Nelson v. Carter Oil Co., 157 P.2d 163, 195 Okl. 317—Fournier Stucco & Plastering Co. v. Greer, 104 P.2d 423, 187 Okl. 589—Stanolind (formerly Sinclair) Crude Oil Purchasing Co. v. Randall, 27 P.2d 339, 166 Okl. 261.

Or.—Wilson v. State Indus. Acc. Commission, 219 P.2d 138, 189 Or. 114.

Utah.—Spencer v. Industrial Commission, 91 P.2d 439, 97 Utah 140.

71 C.J. p 1441 note 20.

Awards for temporary total disability and for impaired earning capacity are no bar to award, in a proper case, for subsequent permanent partial disability.

Ohio.—State ex rel. Bohan v. Industrial Commission, 70 N.E.2d 888, 147 Ohio St. 249, adhered to 70 N.E. 2d 888, 147 Ohio St. 249.

reach this result, depending on the terms of the particular statute relied on to authorize the additional award, the original award having been based on the theory that the disability was only temporary, some authorities have regarded the permanent disability as a new and further disability,⁵³ others, as an increase of disability,⁵⁴ and still others, as a change of condition.⁵⁵ Again, depending on the terms of the particular statutes applicable, it has been held that a change of condition is not required to authorize the compensation officials to make an award for permanent disability where the only prior award was for temporary disability and there has been no determination of the question of permanent disability,⁵⁶ and that an award for permanent total disability is authorized after an award for

temporary total disability and for permanent partial disability, although no change in condition is shown.⁵⁷ To authorize the subsequent award, the permanent disability must be the result of the original injury.⁵⁸

i. Increase of Disability or Further Disability

Where statutory authority therefor exists, in cases where the incapacity of the workman has increased, or his condition is substantially worse, or he has suffered a further disability since the last prior award or order, the compensation authorities may award new or additional compensation provided the increased incapacity, worse condition, or further disability is caused, activated, or superinduced by the original injury.

Where statutory authority therefor exists, in cases where the incapacity of the workman has increased,⁵⁹ that is, has amplified, enlarged, expanded,

53. Cal.—Broadway-Locust Co. v. Industrial Acc. Commission, 206 P. 2d 856, 92 C.A.2d 287—Furness Pacific v. Industrial Acc. Commission, 168 P.2d 761, 74 C.A.2d 324—Standard Oil Co. of California v. Industrial Acc. Commission, 31 P.2d 457, 137 C.A. 455—City of Pasadena v. Industrial Acc. Commission, 29 P. 2d 447, 136 C.A. 649.

71 C.J. p 1441 note 19 [a].

54. Kan.—Corvi v. J. R. Crowe Coal & Mining Co., 237 P. 1056, 119 Kan. 244.

Mont.—Meznarich v. Republic Coal Co., 53 P.2d 82, 101 Mont. 78.

N.J.—Torbyn v. South River Sand Co., 69 A.2d 588, 6 N.J.Super. 1.

55. Idaho.—Hustead v. H. E. Brown Timber Co., 17 P.2d 927, 52 Idaho 590.

Ind.—International Detrola Corp. v. Hoffman, 70 N.E.2d 844, 224 Ind. 613.

71 C.J. p 1441 note 21.

If permanent partial impairment is a later and resultant development and does not begin with injury, it amounts to a "change of condition" within statute providing that board may on change of condition modify or change award.

Ind.—Pettiford v. United Department Stores, 196 N.E. 342, 100 Ind.App. 471.

Hernia becoming inoperable

Where employee who sustained hernia was awarded compensation for temporary partial disability, and deterioration in employee's general health, making surgical treatment of hernia impossible, resulted in permanent partial disability, there was a "change of condition" within compensation act, so as to authorize modification of award.

Ind.—New Amsterdam Cas. Co. v. Corbitt, 208 P.2d 492, 171 App.D.C. 172.

56. Okl.—Fournier Stucco & Plastering Co. v. Greer, 104 P.2d 423, 187

Okl. 589—Rose v. Champlin Refining Co., 86 P.2d 317, 184 Okl. 203—T. C. Ottinger Co. v. Hall, 73 P.2d 463, 181 Okl. 284—Oklahoma Pipe Line Co. v. Harvey, 40 P.2d 24, 170 Okl. 323—Croxtton & Bucklin v. Buchanan, 39 P.2d 91, 170 Okl. 170—Magnolia Petroleum Co. v. Proctor, 38 P.2d 7, 169 Okl. 513—Magnolia Petroleum Co. v. Phillips, 35 P.2d 448, 169 Okl. 1—Rock Island Improvement Co. v. Sammons, 29 P.2d 945, 167 Okl. 398—Magnolia Pipe Line Co. v. Smith, 29 P.2d 569, 167 Okl. 316.

71 C.J. p 1441 note 22.

Where order erroneously stated compensation to be for permanent partial disability, although it had approved compensation for temporary total disability, order was construed as awarding compensation for temporary total disability only, authorizing award of compensation for permanent partial disability resulting from original injury without proof of change in condition.

Okl.—Magnolia Pipe Line Co. v. Smith, supra.

57. Okl.—Bartlett-Collins Glass Co. v. Washabaugh, 26 P.2d 420, 166 Okl. 90.

71 C.J. p 1441 note 19.

58. Okl.—Fournier Stucco & Plastering Co. v. Greer, 104 P.2d 423, 187 Okl. 589.

71 C.J. p 1441 note 23.

Where employee was three times awarded compensation for back injuries sustained as result of injuries while employed by three different employers, but at no time was any permanent injury found by commission, and subsequently employee became disabled by back condition and sought compensation for period while not employed by any one, commission was without authority to award compensation and charge one third of compensation to employers who had employed employee at time of pre-

vious injuries, in absence of any evidence that previous injuries contributed to a partial permanent injury or disability not apparent at time of prior injuries.

Wis.—South Side Roofing & Material Co. v. Industrial Commission, 31 N. W.2d 577, 252 Wis. 403.

Extent of disability due to injury and congenital defect to be determined

Claim for sprained back, which was closed before claimant who suffered from congenital malformation of spine making him subject to sprains when he engaged in heavy manual labor had recovered from accident and before permanent partial disability had become fixed, held required to be reopened so that extent of disability due to previous weakness of back and extent of disability due to injury could be determined.

Wash.—Elliott v. Department of Labor and Industries of Washington, 62 P.2d 1343, 188 Wash. 703.

59. Ariz.—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540, 62 Ariz. 464—Harambasic v. Barrett & Hilp & Macco Corp., 119 P. 2d 932, 58 Ariz. 319.

Ga.—London Guarantee & Acc. Co. v. Pittman, 25 S.E.2d 60, 69 Ga.App. 146—Corpus Juris cited in New Amsterdam Cas. Co. v. McFarley, 10 S.E.2d 249, 251, 63 Ga.App. 122, reversed on other grounds 12 S.E. 2d 355, 191 Ga. 334, mandate confirmed to 13 S.E.2d 588, 64 Ga.App. 465.

Ill.—Madsen v. Industrial Commission, 50 N.E.2d 707, 383 Ill. 590.

Iowa.—Corpus Juris cited in Rose v. John Deere Ottumwa Works, 76 N.W.2d 756, 759, 247 Iowa 900—Oldham v. Scofield & Welch, 205 N.W. 480, 222 Iowa 764, modified on other grounds and rehearing overruled 309 N.W. 323, 232 Iowa 222—Mish. —Elong v. Ford Motor Co., 27 N.W. 27, 238 Mish. 478.

extended, or intensified,⁶⁰ or the condition of the workman is materially and substantially worse,⁶¹ or he has suffered a further disability,⁶² since the

C. O. Barton Co., 264 N.W. 333, 274 Mich. 175.

Mont.—Meznarich v. Republic Coal Co., 53 P.2d 82, 101 Mont. 78.

Neb.—Peek v. Ayers Auto Supply, 71 N.W.2d 204, 160 Neb. 658—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363—Riedel v. Smith Baking Co., 33 N.W.2d 287, 150 Neb. 28.

N.J.—Florek v. Board of Ed., City of Newark, N.J.Co., 87 A.2d 381, 18 N.J.Super. 425—Janvari v. Peter Schweitzer Co., N.J.Co., 80 A.2d 367, 13 N.J.Super. 286—Hartman v. Federal Shipbuilding & Dry Dock Co., Co., 78 A.2d 846, 11 N.J.Super. 611—Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division, 78 A.2d 403, 11 N.J.Super. 338—Hopler v. Hill City Coal & Lumber Co., 71 A.2d 722, 7 N.J.Super. 24, affirmed 76 A.2d 17, 5 N.J. 466—Torbyn v. South River Sand Co., 69 A.2d 538, 6 N.J.Super. 1—Vandenberg v. John De Kuyper & Son, 69 A.2d 581, 5 N.J.Super. 440—Calicchio v. Standard Brands, 64 A.2d 236, 1 N.J. Super. 276.

Breheny v. Essex County, 41 A.2d 390, 132 N.J.Law 584, affirmed 45 A.2d 700, 134 N.J.Law 129—Fischman v. Joseph Fish Hat Co., 5 A.2d 785, 122 N.J.Law 428—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301—Funari v. Standard Sanitary Mfg. Co., 181 A. 44, 115 N.J.Law 506.

Candito v. Fairmont Const. & Nicholson Engineering Co., 21 A.2d 622, 19 N.J.Misc. 503—Rightmyer v. Borough of Totowa, 197 A. 650, 16 N.J.Misc. 161, affirmed 8 A.2d 772, 17 N.J.Misc. 300—Zuga v. Ford Motor Co., 194 A. 67, 15 N.J.Misc. 610, vacated on other grounds 197 A. 375, 16 N.J.Misc. 76—De Santis v. Turner Const. Co., 194 A. 57, 15 N.J. Misc. 613.

N.Y.—Di Benedetto v. John F. McKinney Corp., 298 N.Y.S. 810, 252 App.Div. 712, reargument and motion denied 300 N.Y.S. 717, 252 App. Div. 900.

Pa.—Newancavitch v. Pittsburgh Terminal Coal Corp., 200 A. 137, 131 Pa.Super. 391.

S.C.—Corpus Juris cited in Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 22, 201 S.C. 349.

71 C.J. p 1441 note 25.

Notwithstanding statute making award final and conclusive, award may be reviewed on ground that disability has subsequently increased.
N.J.—Colbert v. Consolidated Laundry, 107 A.2d 521, 31 N.J.Super. 588.

Where increased disability is not shown, there can be no additional award.

Mich.—Barnett v. Kelsey Hayes Wheel Co., 43 N.W.2d 55, 328 Mich. 37.

Insufficient or erroneous amount

(1) A statute providing for modification of an award because of increased incapacity does not permit modification of an award on ground that claimant was not granted sufficient compensation by terms of prior award.

N.J.—Drexel v. Jurgensen, 22 A.2d 816, 19 N.J.Misc. 643.

(2) In other words, a proceeding for increase in disability cannot be instituted for purpose of correcting or revising a previous compensation award.

N.J.—Ducci v. Kapo Dyeing & Print Works, 23 A.2d 786, 20 N.J.Misc. 47.

(3) That is to say, such statute does not authorize a modification because of judicial error, if any, in determining amount of award from which no appeal has been taken.

Neb.—Huff v. Omaha Cold Storage Co., 287 N.W. 764, 136 Neb. 907.

In New Mexico

Compensation act makes no provision for increase of payments in case of increase of disability, and courts are powerless to aid workman in such cases except through some procedure authorized by general statutes or law.

N.M.—Hudson v. Hershback Drilling Co., 128 P.2d 1044, 46 N.M. 330.

60. Neb.—Riedel v. Smith Baking Co., 33 N.W.2d 287, 150 Neb. 28.

Whenever there has been a natural development of an industrial injury, compensation authorities may, in their sound discretion, reopen a case.
Colo.—Employers Mut. Ins. Co. v. Jacoe, 81 P.2d 389, 102 Colo. 515.

Where a disability continues longer than last predicted, that is, longer than anticipated in the last award, while in a sense disability has remained constant, it will be regarded as having increased within meaning of a statute authorizing an additional award where disability has increased.

Kan.—Corvi v. J. R. Crowe Coal & Mining Co., 237 P. 1056, 119 Kan. 244.

Mont.—Meznarch v. Republic Coal Co., 53 P.2d 82, 101 Mont. 78.

61. Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92—Kelsey v. Industrial Commission, 286 P.2d 195, 79 Ariz. 191—Stephens v. Miami Copper Co., 130 P.2d 507, 59 Ariz. 528—Caekos v. Stanley Fruit Co., 98 P.2d 471, 55 Ariz. 72—Bates v. Linde, 65 P.2d 655, 49 Ariz. 192.
Ga.—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App. 789.

Mich.—Sweet v. Eddy Paper Corp., 6 N.W.2d 883, 303 Mich. 492—Schney-

der v. Cadillac Motor Car Co., 273 N.W. 418, 280 Mich. 127—Smith v. Pontiac Motor Car Co., 270 N.W. 172, 277 Mich. 652.

Neb.—Riedel v. Smith Baking Co., 33 N.W.2d 287, 150 Neb. 28.

Okl.—Spartan Aircraft Co. v. Stockton, 279 P.2d 333—Phillips Petroleum Co. v. Clark, 224 P.2d 597, 203 Okl. 561—Standish Pipe Line Co. v. Kirkland, 107 P.2d 1024, 188 Okl. 248—Rose v. Champlin Refining Co., 86 P.2d 317, 184 Okl. 203—Magnolia Petroleum Co. v. Nalley, 56 P.2d 769, 176 Okl. 491.

Pa.—Thomas v. Susquehanna Collieries Co., 25 A.2d 93, 143 Pa.Super. 161.

W.Va.—Phillips v. State Compensation Com'r, 174 S.E. 561, 114 W.Va. 648.

Change resulting in additional disability

Okl.—Sappington-Hickman, Inc. v. State Indus. Commission, 262 P.2d 707.

Purpose of provision giving commission continuing jurisdiction is, among other things, to enable commission to increase compensation where change in condition is for worse.

S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349.

Retroactive award proper

A retroactive award based on a finding that injured employee's physical condition had changed for worse, resulting in total disability, is proper.

Mich.—Sweet v. Eddy Paper Corp., 6 N.W.2d 883, 303 Mich. 492.

62. Ariz.—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540, 62 Ariz. 464.

Cal.—Broadway-Locust Co. v. Industrial Acc. Commission, 206 P.2d 856, 92 C.A.2d 287—Furness Pac. v. Industrial Acc. Commission, 163 P.2d 761, 74 C.A.2d 324.

Iowa.—Oldham v. Scofield & Welch, 266 N.W. 480, 222 Iowa 764, modified on other grounds and rehearing overruled 269 N.W. 925, 222 Iowa 764.

La.—Mitchell v. T. L. James & Co., App., 176 So. 245.

Mich.—Bomarito v. Fisher Body Corporation, 262 N.W. 329, 273 Mich. 1.
Minn.—Bomersine v. Armour & Co., 30 N.W.2d 526, 225 Minn. 157.

Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414.

Or.—Wilson v. State Indus. Acc. Commission, 219 P.2d 138, 189 Or. 114.

Pa.—Michetti v. State Workmen's Ins. Fund, 17 A.2d 712, 143 Pa.Super. 453.

After return to work

Ga.—Employers' Liability Assur.

last prior award or order,⁶³ due to matters which were unknown and not considered at the time of the last award or order,⁶⁴ the compensation authorities may reopen the case and award new or additional compensation, provided the increased inca-

capacity, worse condition, or further disability is caused,⁶⁵ directly or indirectly,⁶⁶ activated or superinduced,⁶⁷ by the original injury, and is not due to some other cause,⁶⁸ such as premature old age of

Corp. v. Johnson, 8 S.E.2d 542, 62 Ga.App. 416.

63. Ariz.—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540, 62 Ariz. 464—Stephens v. Miami Copper Co., 180 P.2d 507, 59 Ariz. 528.

Neb.—Peek v. Ayres Auto Supply, 71 N.W.2d 204, 160 Neb. 658—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

N.J.—Bleeker v. Kuyper, 17 A.2d 787, 19 N.J.Misc. 112.

Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414.

Okl.—Sinclair Refining Co. v. Duncan, 297 P.2d 563—Spartan Aircraft Co. v. Stockton, 279 P.2d 333—Sappington-Hickman, Inc. v. State Indus. Commission, 262 P.2d 707—Standish Pipe Line Co. v. Kirkland, 107 P.2d 1024, 188 Okl. 248—Stanolind Pipe Line Co. v. Brewer, 95 P.2d 625, 185 Okl. 578—Rose v. Champlin Refining Co., 86 P.2d 317, 184 Okl. 203.

64. Ariz.—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540, 62 Ariz. 464—Harambasic v. Barrett & Hilp & Macco Corp., 119 P.2d 932, 58 Ariz. 319—Caekos v. Stanley Fruit Co., 98 P.2d 471, 55 Ariz. 72—Bates v. Linde, 65 P.2d 655, 49 Ariz. 192.

No permanent injury assumed

Where a workman, who has been injured, his employer, and state commission assume that no permanent disability has been suffered by employee, he is not precluded from thereafter obtaining relief where it develops that permanent disability has resulted from injury sustained.

Okl.—Mid-Continent Petroleum Corp. v. Abshire, 190 P.2d 790, 200 Okl. 24.

Neurosis at first appearing to be trifling

Where claimant had been awarded partial permanent disability and subsequently claimed compensation for increase in disability based on neurosis, fact that nervous condition that followed closely compensable accident may have, at first, appeared to be trifling, did not estop petitioner to assert, within statutory period of review, that neurosis increased in incapacitating effect since earlier determination.

N.J.—Florek v. Board of Ed., City of Newark, 87 A.2d 331, 18 N.J.Super. 425.

65. Ariz.—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540,

62 Ariz. 464—Caekos v. Stanley Fruit Co., 98 P.2d 471, 55 Ariz. 72. Colo.—Employers Mut. Ins. Co. v. Jacoe, 81 P.2d 389, 102 Colo. 515—Young v. Industrial Commission of Colorado, 253 P. 326, 81 Colo. 106.

Ga.—Corpus Juris cited in New Amsterdam Cas. Co. v. McFarley, 10 S.E.2d 249, 252, 63 Ga.App. 122, reversed on other grounds 12 S.E.2d 355, 191 Ga. 334, mandate conforming to 13 S.E.2d 588, 64 Ga.App. 465—Employers' Liability Assur. Corp. v. Johnson, 8 S.E.2d 542, 62 Ga.App. 416.

Iowa.—Oldham v. Scofield & Welch, 266 N.W. 480, 222 Iowa 764, modified on other grounds and rehearing overruled 269 N.W. 925, 222 Iowa 764.

La.—Mitchell v. T. L. James & Co., App., 176 So. 245.

Mich.—Bomarito v. Fisher Body Corporation, 262 N.W. 329, 273 Mich. 1. Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

N.J.—Hartman v. Federal Shipbuilding & Dry Dock Co., 78 A.2d 846, 11 N.J.Super. 611—Torbyn v. South River Sand Co., 69 A.2d 588, 6 N.J. Super. 1.

Crecco v. Daley Excavating Co., 38 A.2d 696, 22 N.J.Misc. 310.

Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414.

Okl.—Spartan Aircraft Co. v. Stockton, 279 P.2d 333—Sappington-Hickman, Inc. v. State Indus. Commission, 262 P.2d 707—Standish Pipe Line Co. v. Kirkland, 107 P.2d 1024, 188 Okl. 248—Stanolind Pipe Line Co. v. Brewer, 95 P.2d 625, 185 Okl. 578.

Pa.—Grosjean v. Murrell, 132 A.2d 357, 183 Pa.Super. 530—Thomas v. Susquehanna Collieries Co., 25 A. 2d 98, 148 Pa.Super. 161.

Disability from mental disorder growing out of accident

Where compensation is sought for disability arising from a mental disorder developing after award or order and growing out of accident, no award will be made where chain of causation is broken, as where mental disturbance is collateral to injury, does not arise directly from it, but is due to worry, anxiety, or brooding over accident or its effect or compensation for it, or the like, but where accident has a direct effect on nervous system, all results thereof, both physical and mental, go to make up disability and determine compensation.

Mich.—Schneyder v. Cadillac Motor Car Co., 273 N.W. 418, 280 Mich. 127.

66. La.—Mitchell v. T. L. James & Co., App., 176 So. 245.

Disability from operation; pre-existing defects

An injured workman's underlying and pre-existing physical defects and disabilities at time of surgical operation, necessitated by his worsened physical condition after award of temporary and permanent partial disability compensation, could not be raised to defeat award of additional compensation to him for increased disability resulting from operation.

N.J.—Janvari v. Peter Schweitzer Co., 80 A.2d 367, 13 N.J.Super. 286.

Failure of employer to promptly provide operation

Where an award is made for compensation and an operation for hernia and employer fails to promptly provide for operation, additional disability arising therefrom may be awarded.

Okl.—Young v. Daugherty, 224 P.2d 962, 203 Okl. 598.

Paralysis caused by self-administered treatment

A workman who suffered a compensable injury and who to relieve pain caused by injury, at suggestion of layman, drank Jamaica ginger which resulted in a species of paralysis could recover compensation for such paralysis, final result having a causal origin in original accident.

Ohio.—Phillips v. Industrial Commission, 61 N.E.2d 233, 75 Ohio App. 131.

67. La.—Mitchell v. T. L. James & Co., App., 176 So. 245.

N.J.—Breheny v. Essex County, Sup., 41 A.2d 890, 132 N.J.Law 584, affirmed 45 A.2d 700, 134 N.J.Law 129.

68. Colo.—Employers Mut. Ins. Co. v. Jacoe, 81 P.2d 389, 102 Colo. 515. Mich.—Kolbas v. American Boston Min. Co., 286 N.W. 91, 288 Mich. 596.

Fall at home

An employee's disability as result of hip fracture, caused by fall from ladder on which he was picking figs from tree in his own back yard, was not result of injury reasonably attributable to cause set in motion by previous injury to his knee in course of employment, so that employer was not liable for compensation for employee's increased incapacity.

N.J.—Crecco v. Daley Excavating Co., 38 A.2d 696, 22 N.J.Misc. 310.

the person applying for increased compensation benefits.⁶⁹

The case may be reopened and new or additional compensation awarded after an award for partial,⁷⁰ permanent⁷¹ or temporary⁷² disability, or for a specific injury,⁷³ or where compensation has been denied.⁷⁴ Additional compensation may be award-

ed for increased disability of the same type,⁷⁵ or for subsequently ascertained disability of another type than that on which the prior award was based.⁷⁶ So, a workman may be awarded compensation for temporary total disability after an award to him for permanent partial disability⁷⁷ or temporary partial disability⁷⁸ for the same injury,

Mental disturbance collateral to injury

Where present mental disturbance of injured employee was collateral to injury and did not arise directly from it but was due to worry, anxiety, or brooding over accident and his failure to obtain compensation for it, mental disturbance of employee could not be considered in awarding compensation.

Mich.—Schneyder v. General Motors Corp., Cadillac Motor Car Division, 286 N.W. 158, 289 Mich. 63.

Later accident due to intervening cause

Compensation cannot be increased merely because later accident due to efficient intervening cause, and not arising out of, or in course of, employment, would not have happened if employee had retained his former physical powers.

Colo.—Post Printing & Publishing Co. v. Erickson, 30 P.2d 327, 94 Colo. 382.

69. Colo.—Young v. Industrial Commission of Colorado, 253 P. 226, 81 Colo. 106.

70. Fla.—Smitty's Coffee Shop v. Florida Indus. Commission, 86 So. 2d 268.

Mich.—Kiviniemi v. Quincy Mining Co., 282 N.W. 866, 286 Mich. 680—Adams v. C. O. Barton Co., 264 N. W. 333, 274 Mich. 175.

N.J.—Rightmyer v. Borough of Totowa, 197 A. 650, 16 N.J.Misc. 161, affirmed 8 A.2d 772, 17 N.J.Misc. 300—De Santis v. Turner Const. Co., 194 A. 57, 15 N.J.Misc. 613.

Okl.—Stanolind Pipe Line Co. v. Brewer, 95 P.2d 625, 185 Okl. 578—Apple v. Kelley, 94 P.2d 900, 185 Okl. 546.

Pa.—Newancavitch v. Pittsburgh Terminal Coal Corp., 200 A. 137, 131 Pa.Super. 391.

71 C.J. p 1441 note 26.

71. Cal.—Westvaco Chlorine Products Corp. v. Industrial Acc. Commission, 288 P.2d 300, 136 C.A.2d 60.

Fla.—Smitty's Coffee Shop v. Florida Indus. Commission, 86 So.2d 268.

Okl.—Apple v. Kelley, 94 P.2d 900, 185 Okl. 546.

Order in effect set aside

Even though "new and further disability" statute was inapplicable where there was previous order of permanent disability, it nevertheless applied where commission had, in ef-

fect, set aside original order fixing percentage of permanent disability by subsequent finding that nature and extent of disability, temporary or permanent, could not be currently determined.

Cal.—Westvaco Chlorine Products Corp. v. Industrial Acc. Commission, 288 P.2d 300, 136 C.A.2d 60.

72. Cal.—Westvaco Chlorine Products Corp. v. Industrial Acc. Commission, supra—Furness Pac. v. Industrial Acc. Commission, 168 P. 2d 761, 74 C.A.2d 824.

Idaho.—Hustead v. H. E. Brown Timber Co., 17 P.2d 927, 52 Idaho 590.

N.Y.—Laser v. Gilmore Cafeteria, 28 N.Y.S.2d 180, 261 App.Div. 737, appeal denied 29 N.Y.S.2d 911, 262 App.Div. 922, affirmed 42 N.E.2d 606, 288 N.Y. 600.

Okl.—Magnolia Petroleum Co. v. Nalley, 56 P.2d 769, 176 Okl. 491.

73. Mich.—Kubiak v. Briggs Mfg. Co., 282 N.W. 427, 286 Mich. 329—Bommarito v. Fisher Body Corporation, 262 N.W. 329, 273 Mich. 1.

N.Y.—Zaso v. International Paper Co., 88 N.Y.S.2d 740, 275 App.Div. 881—Di Benedetto v. John F. McKinney Corp., 298 N.Y.S. 810, 252 App.Div. 712, reargument and motion denied 300 N.Y.S. 717, 252 App.Div. 900.

Okl.—Ford Motor Co. v. McDonald, 90 P.2d 404, 185 Okl. 130—Elk City Cotton Oil Co. v. State Industrial Commission, 88 P.2d 615, 184 Okl. 503—Tulsa Gas Producing Co. v. Kelly, 300 P. 1000, 150 Okl. 257.

Only payment, not number of weeks, may be adjusted

Period of time for which compensation is payable for scheduled injuries is arbitrarily fixed and once fixed is final, and only payment and not number of weeks of payment can be adjusted under provision for increase of awards on proper application and showing of increased disability of worker.

N.M.—Mann v. Board of County Com'rs of Bernalillo County, 274 P. 2d 145, 58 N.M. 626.

74. Ariz.—Engle v. Industrial Commission, 269 P.2d 604, 77 Ariz. 202.

Ky.—Southern Mining Co. v. Wilson, 280 S.W. 961, 213 Ky. 245.

Mich.—Dunec v. Ford Motor Co., 284 N.W. 901, 288 Mich. 342.

75. N.J.—Rightmyer v. Borough of Totowa, 197 A. 650, 16 N.J.Misc. 161, affirmed 8 A.2d 772, 17 N.J. Misc. 300.

Expected improvement of leg not realized

Where claimant was awarded compensation for only seventy-five per cent loss of use of broken leg on theory that improvement would occur in future, but it afterwards appeared that improvement was impossible, claimant held entitled to additional award for twenty-five per cent loss of use of leg on ground of change in condition, since there was change in condition from that in which injury was total with possibility of reduction in disability to that in which injury was total with no possibility of reduction in disability.

Ga.—Miller v. Indem. Ins. Co. of North America, 130 S.E. 868, 55 Ga.App. 644.

76. N.Y.—Di Benedetto v. John F. McKinney Corp., 298 N.Y.S. 810, 252 App.Div. 712, reargument and motion denied 300 N.Y.S. 717, 252 App.Div. 900.

Or.—Wilson v. State Indus. Acc. Commission, 219 P.2d 138, 189 Or. 114.

Disability which is separate, apart, and distinct from that incident to a permanent injury of a particular class may warrant compensation for additional partial disability.

Pa.—Michetti v. State Workmen's Ins. Fund, 17 A.2d 712, 143 Pa. Super. 458.

77. Fla.—Smitty's Coffee Shop v. Florida Indus. Commission, 86 So. 2d 268.

Where an award for permanent partial disability can be said to contemplate periods of total temporary disability, in absence of a showing of increased disability, a workman is not entitled to additional compensation for such periods of total temporary disability.

U.S.—Keehn v. Alaska Indus. Bd., C. A.Alaska, 230 F.2d 712.

78. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, C.C.A.Mass., 102 F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

Requirement that there be a change in condition was sufficiently complied with where new award was based on finding of temporary total disability and prior award was based on finding of temporary partial disability.

U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, supra.

or he may be awarded compensation for temporary partial disability after an award for temporary total disability,⁷⁹ and after an award for a specific loss he may be awarded additional compensation for a general disability resulting from the same injury.⁸⁰ Further, in a proper case, an award for permanent total disability may be made after an award for permanent partial disability,⁸¹ and after an award for temporary disability, he may be given an award for permanent disability, as discussed supra subdivision h of this section.

The right to additional compensation is, however, subject to statutory limitations;⁸² and where a claimant has been given an award for temporary total disability for the maximum period of time authorized by statute, and this award is followed by an award for permanent partial disability, he cannot,

in the absence of statutory authorization, subsequently be awarded additional compensation for further temporary total disability.⁸³ There can be no additional compensation for disabilities included in the prior award.⁸⁴ So, where the prior award is for permanent total disability, additional compensation for permanent partial disability may not be recovered.⁸⁵ Where an award has been made for a scheduled permanent injury and it is claimed that some other part of the body is affected, in order to recover additional compensation therefor under some statutory provisions it must definitely and positively appear that it is so affected, as a direct result of the permanent injury, and the disability must be separate and distinct from that which normally follows the permanent injury and must endure beyond the time for which compensa-

79. N.Y.—*Laser v. Gilmore Cafeteria*, 28 N.Y.S.2d 180, 261 App.Div. 737, appeal denied 29 N.Y.S.2d 911, 262 App.Div. 922, affirmed 42 N.E.2d 606, 288 N.Y. 600.

80. Mich.—*Kubiak v. Briggs Mfg. Co.*, 282 N.W. 427, 286 Mich. 329—*Dubey v. Brunswick Lumber Co.*, 262 N.W. 284, 272 Mich. 445.

81. N.J.—*Breheny v. Essex County*, Supp. 41 A.2d 890, 132 N.J.Law 584, affirmed 45 A.2d 700, 134 N.J.Law 129.

Okl.—*Brooks & Dahlgren v. Pettigrew*, 159 P.2d 743, 195 Okl. 550—*Warden-Pullen Coal Co. v. Cain*, 109 P.2d 487, 188 Okl. 357.

82. Ga.—*Travelers Ins. Co. v. Anderson*, 194 S.E. 193, 185 Ga. 105, conformed to 195 S.E. 879, 57 Ga. App. 496.

Neb.—*Peek v. Ayres Auto Supply*, 59 N.W.2d 564, 157 Neb. 363.

Tenn.—*American Snuff Co. v. Helms*, 301 S.W.2d 348.

Utah.—*Spencer v. Industrial Commission*, 91 P.2d 439, 97 Utah 140.

W.Va.—*Stout v. State Compensation Com'r*, 41 S.E.2d 687, 129 W.Va. 557.

Additional compensation for disfigurement not authorized

Where injured workman had been compensated in full for loss of an eye without enucleation and he had suffered no disfigurement to his head or face except that occasioned by loss of his eye, he could not be additionally compensated for disfigurement, since provision for compensation for disfigurement contemplates separate and additional disfigurement besides that caused by loss of eye itself.

Ariz.—*Wofford v. Industrial Commission*, 231 P.2d 448, 72 Ariz. 106.

Limitation applicable to consecutive, not concurrent, conditions

Under statutes limiting compensation for temporary total disability to \$5,000 and compensation for temporary partial disability to \$4,000, and authorizing reclassification of disability on proof of change of condition, where claimant received \$4,070 for temporary total disability after which he was reclassified and received \$1,855 for temporary partial disability, claimant was entitled to additional compensation for temporary partial disability, notwithstanding total award for temporary total disability and temporary partial disability exceeded \$5,000, since provisions for temporary total and temporary partial disability apply to consecutive and not concurrent conditions.

N.Y.—*Laser v. Gilmore Cafeteria*, 28 N.Y.S.2d 180, 261 App.Div. 737, appeal denied 29 N.Y.S.2d 911, 262 App.Div. 922, affirmed 42 N.E.2d 606, 288 N.Y. 600.

83. W.Va.—*State ex rel. Conley v. Pennybacker*, 48 S.E.2d 9, 131 W.Va. 442—*Miller v. State Compensation Commissioner*, 45 S.E.2d 249, 130 W.Va. 771—*Stout v. State Compensation Com'r*, 41 S.E.2d 687, 129 W.Va. 557—*Morrell v. State Compensation Com'r*, 22 S.E.2d 454, 124 W.Va. 758.

A statutory provision for rehabilitative surgery has been held not to authorize an additional award for temporary total disability following award for temporary total disability for maximum time fixed by statute and award for permanent partial disability.

W.Va.—*Morrell v. State Compensation Com'r*, supra.

84. Miss.—*Baggett v. "M" System Trailer Co.*, 36 So.2d 874.

85. Miss.—*Baggett v. "M" System Trailer Co.*, supra.

Permanent total disability is ultimate in disability and cannot change for worse so as to authorize an additional award of compensation.

Okl.—*Indian Territory Illuminating Oil Co. v. State Industrial Commission*, 89 P.2d 933, 185 Okl. 68—*Brown Bros. v. Parks*, 56 P.2d 883, 176 Okl. 615.

Statement or finding of no earning capacity

Where an award was made for permanent partial disability on appropriate findings, it was not converted into an award for "permanent total disability" merely because there was set out in award an ambiguous or erroneous statement or finding that at time of award there was no earning capacity so as to preclude commission from thereafter making any further award.

Okl.—*O. C. Whitaker, Inc., v. Dillingham*, 134 P.2d 588, 192 Okl. 150.

Claim of permanent total disability

(1) Fact that employee had claimed that he was totally and permanently disabled prior to award for permanent partial disability, did not preclude commission from granting further award, if it believed that an actual change in condition had resulted.

Okl.—*Stanolind Pipe Line Co. v. Brewer*, 95 P.2d 625, 185 Okl. 578—*Indian Territory Illuminating Oil Co. v. State Industrial Commission*, 89 P.2d 933, 185 Okl. 68.

(2) However, such claim is a matter of proper consideration by compensation authorities as to bona fides of claim for additional compensation because of an alleged change of condition.

Okl.—*Stanolind Pipe Line Co. v. Brewer*, supra.

tion for the permanent injury is allowable or has been allowed.⁸⁶

A workman may be entitled to additional compensation because of increased incapacity, even though it is not reflected in lower earnings⁸⁷ or a decrease in earning capacity.⁸⁸ In the case of injury of a specific member, he may be entitled to increased compensation because of increased disability of such member, even though it does not result in increased disability to work or perform labor.⁸⁹ However, as a general rule, an award may not be modified because of increased disability unless the disability causes a decrease in the ability of the workman to labor or perform work,⁹⁰ and an increase in pain and discomfort, by itself, is not enough.⁹¹ Where a workman is able to work at the time an award is made and subsequently becomes unable to work, there is such change of condition as will permit reopening of the award.⁹²

However, where there is no change in the physical condition of the workman, the failure to obtain work is not a basis, it has been held, for additional compensation;⁹³ nor, where an award is based on the permanent partial impairment of a member and there has been no increase in the degree of such impairment, is an additional award justified on a decrease of the employee's earning power.⁹⁴

j. Termination or Decrease of Disability

Where the incapacity of a workman has diminished or ceased, the compensation officials, within the terms of the continuing jurisdiction vested in them, may decrease or terminate compensation, and under particular statutory provisions and subject to the limitations contained therein, they may in a proper case diminish or terminate the original award where the employee returns to work or is able to return to work.

Where the incapacity of the workman, on which an award was based, has diminished⁹⁵ or ceased,⁹⁶ on a substantial change in the employee's condi-

86. Pa.—*Lenti v. Luci*, 119 A. 132, 275 Pa. 217, 24 A.L.R. 1462.

Porto v. Philadelphia & Reading Coal & Iron Co., 10 A.2d 29, 137 Pa.Super. 590.

87. N.J.—*Hopler v. Hill City Coal & Lumber Co.*, 71 A.2d 722, 7 N.J. Super. 24, affirmed 76 A.2d 17, 5 N.J. 466.

88. Okl.—*Warden-Pullen Coal Co. v. Cain*, 109 P.2d 487, 188 Okl. 357.

Test is not whether he could earn less after his first award, but whether there was an increase of disability due to accidental injuries.

Ariz.—*Radaca v. U. S. Smelting, Refining & Min. Co.*, 158 P.2d 540, 62 Ariz. 464.

89. Okl.—*Stanolind Pipe Line Co. v. Brewer*, 95 P.2d 625, 185 Okl. 578—*Ford Motor Co. v. McDonald*, 90 P.2d 404, 185 Okl. 130—*Elk City Cotton Oil Co. v. State Industrial Commission*, 88 P.2d 615, 184 Okl. 503.

90. Okl.—*Payne Drilling Co. v. Shoemaker*, 97 P.2d 881, 186 Okl. 345—*Stanolind Pipe Line Co. v. Brewer*, 95 P.2d 625, 185 Okl. 578—*Ford Motor Co. v. McDonald*, 90 P.2d 404, 185 Okl. 130—*Indian Territory Illuminating Oil Co. v. State Industrial Commission*, 89 P.2d 933, 185 Okl. 68—*Elk City Cotton Oil Co. v. State Industrial Commission*, 88 P.2d 615, 184 Okl. 503.

91. Okl.—*Payne Drilling Co. v. Shoemaker*, 97 P.2d 881, 186 Okl. 345.

92. N.Y.—*Palmeri v. E. I. duPont De Nemours & Co.*, 160 N.Y.S.2d 62, 3 A.D.2d 782.

93. Wash.—*Mullen v. Department of Labor and Industries of Washington*, 288 P. 926, 157 Wash. 329.

71 C.J. p 1442 note 34.

94. Ind.—*Smith v. Brown*, 144 N.E. 849, 81 Ind.App. 667.

71 C.J. p 1442 note 35.

95. Ga.—*Continental Cas. Co. v. Haynie*, 186 S.E. 683, 182 Ga. 608. *New Amsterdam Cas. Co. v. Brown*, 60 S.E.2d 245, 81 Ga.App. 790.

Idaho.—*Casger v. Fuger*, 310 P.2d 812.

Ky.—*U. S. Coal & Coke Co. v. Lloyd*, 203 S.W.2d 47, 305 Ky. 106.

La.—*Cox v. Southwest Region Conference Ass'n of Seventh Day Adventists*, App., 91 So.2d 103—*Gunter v. Strachan Shipping Co.*, App., 85 So.2d 543—*Strother v. Standard Acc. Ins. Co.*, App., 63 So. 2d 484.

Mass.—*Vass' Case*, 65 N.E.2d 549, 319 Mass. 297.

Mich.—*Dyer v. McQuistion*, 263 N.W. 73, 273 Mich. 327.

Neb.—*Peek v. Ayres Auto Supply*, 59 N.W.2d 564, 157 Neb. 363.

N.J.—*Colbert v. Consolidated Laundry*, 107 A.2d 521, 31 N.J.Super. 588.

Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301.

Pa.—*Evans v. Philadelphia & Reading Coal & Iron Co.*, 176 A. 791, 116 Pa.Super. 284.

Swartz v. Mitchell, 42 Pa.Dist. & Co. 120, 28 Erie Co. 120.

S.C.—*Cromer v. Newberry Cotton Mills*, 23 S.E.2d 19, 201 S.C. 349. 71 C.J. p 1442 note 36.

Notwithstanding statute making award final and conclusive, award may be reviewed on ground that disability has subsequently diminished.

N.J.—*Colbert v. Consolidated Laun-*

dry, 107 A.2d 521, 31 N.J.Super. 588.

Only payment, not number of weeks, may be adjusted

Period of time for which compensation is payable for scheduled injuries is arbitrarily fixed, and once fixed is final, and only payment and not number of weeks of payment can be adjusted under provision for diminution of awards on proper application and showing of recovery or diminution of disability.

N.M.—*Mann v. Board of County Com'rs of Bernalillo County*, 274 P.2d 145, 58 N.M. 626.

Modification because of error not authorized

A statute providing for modification of a compensation award or judgment of record, grounded on a decrease of capacity, does not authorize a modification because of judicial error, if any, in determining amount of award from which no appeal has been taken.

Neb.—*Huff v. Omaha Cold Storage Co.*, 287 N.W. 764, 136 Neb. 907.

96. Ill.—*Madsen v. Industrial Commission*, 50 N.E.2d 707, 383 Ill. 590.

Kan.—*Larrick v. Hercules Powder Co.*, 188 P.2d 639, 164 Kan. 328—*Brewington v. W. U. Tel. Co.*, 183 P.2d 872, 163 Kan. 534—*Dobson v. Apex Coal Co.*, 91 P.2d 5, 150 Kan. 80.

Ky.—*U. S. Coal & Coke Co. v. Lloyd*, 203 S.W.2d 47, 305 Ky. 106.

La.—*Cox v. Southwest Region Conference Ass'n of Seventh Day Adventist*, App., 91 So.2d 103—*Strother v. Standard Acc. Ins. Co.*, App., 63 So.2d 484.

Mass.—*Vass' Case*, 65 N.E.2d 549, 319 Mass. 297.

Mich.—*Szczucki v. Cadillac Motor Car Co.*, 293 N.W. 645, 294 Mich. 271—

tion,⁹⁷ the compensation officials, within the terms of the continuing jurisdiction vested in them by the act, are authorized to reopen the case to determine the degree of disability, if any, and to decrease or terminate the compensation accordingly. So, where the injury has been ameliorated by a surgical operation, the employer or insurer may on application secure a reduction, or, in a proper case, a cessation of compensation.⁹⁸ The modification of the original award is authorized, where the disability has ceased, although affirmed on appeal.⁹⁹ Until the disability is terminated, the officials have no authority to terminate payments before the period of compensation provided for the particular disability in the act has elapsed.¹ Where the condition of claimant has changed and he is entitled to less compensation than that originally awarded, the compensation officials are not authorized to terminate the compensation on the ground that the employee has received more than if the new finding had been made originally,² but should order the compensation decreased for the continuing disability.³

Such termination is authorized, although the inability to work continues, where it is not a proximate result of the injury because of which compensation was originally awarded.⁴ So, if total disability resulting from an accident ceases, the fact that there is no cessation of total disability because the employee, during its continuance, has been totally disabled from an independent supervening cause will not preclude termination of compensation payments on the ground of change of condition.⁵ However, where an employee is totally and permanently disabled as a result of an accident, the fact that he would have become totally and permanently disabled in any event as a result of pre-existing disease will not justify termination of compensation on the ground of a change of condition.⁶

Return to work or ability to return. The compensation officials, under particular provisions applicable and subject to limitations contained therein, are authorized, in a proper case, to diminish or terminate the original award where the employee returns to work⁷ or are authorized to diminish or

Kiviniemi v. Quincy Min. Co., 282 N.W. 866, 286 Mich. 680—Dyer v. McQuiston, 263 N.W. 73, 278 Mich. 327.

N.H.—Cassidy v. Fellows & Sons, Inc., 102 A.2d 499, 98 N.H. 441.

N.J.—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301.

N.Y.—Blanchard v. U. S. O. Camp Shows, Inc., 166 N.Y.S.2d 863, 4 A.D.2d 894.

Okl.—Knapp v. State Industrial Commission, 154 P.2d 964, 195 Okl. 56.

Pa.—Chubb v. Allegheny Country Club, 24 A.2d 550, 147 Pa.Super. 146—Earley v. Philadelphia & Reading Coal & Iron Co., 19 A.2d 615, 144 Pa.Super. 301.

S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349. 71 C.J. p 1442 note 37.

Even though claimant may still suffer pain, compensation should cease when incapacity ends.

Kan.—Dobson v. Apex Coal Co., 91 P.2d 5, 150 Kan. 80.

If total disability is adjudicated as permanent and a later recovery occurs, employer and his insurer would be entitled to an action for termination of compensation payment.

La.—Bean v. Higgins, Inc., 88 So.2d 30, 230 La. 211.

If workman has not fully recovered, compensation officials have no right to order payments stopped. Mich.—Szczeniowski v. Cadillac Motor Car Co., 293 N.W. 645, 294 Mich. 271.

97. Okl.—Skelton Lead & Zinc Co. v.

State Industrial Commission, 229 P. 255, 100 Okl. 188. 71 C.J. p 1442 note 38.

In event of change for better in physical condition of employee who had been awarded total disability benefits, board should re-examine matter and modify award as conditions warrant.

Idaho.—Casper v. Fuger, 310 P.2d 812.

98. N.J.—McNally v. Hudson, etc., R. Co., 95 A. 122, 87 N.J.Law 455, affirmed 96 A. 293, 88 N.J.Law 729.

N.D.—Dahl v. Workmen's Compensation Bureau of North Dakota, 248 N.W. 273, 63 N.D. 327.

99. Kan.—Consolidated Cement Co. v. Baker, 284 P. 415, 129 Kan. 845.

71 C.J. p 1442 note 41.

1. Okl.—Whitehead Coal Mining Co. v. State Industrial Commission, 204 P. 905, 85 Okl. 80.

2. Ga.—South v. Indemnity Ins. Co. of North America, 146 S.E. 45, 39 Ga.App. 47.

71 C.J. p 1442 note 43.

3. Ga.—South v. Indemnity Ins. Co. of North America, supra.

4. Conn.—Kowalski v. New York, N. H. & H. R. Co., 164 A. 653, 116 Conn. 229, 86 A.L.R. 957.

5. U.S.—Bernatowicz v. Nacirema Operating Co., D.C.Pa., 48 F.Supp. 4.

6. U.S.—Bernatowicz v. Nacirema Operating Co., supra.

7. Kan.—McAllister v. McDowell, 146 P.2d 411, 158 Kan. 234. 71 C.J. p 1442 note 47.

Under express statute

(1) Under a statute so providing an award of compensation for total disability is subject to modification if employee returns to work.

Ill.—J. I. Case Co. v. Industrial Commission, 37 N.E.2d 821, 378 Ill. 132—City of Evanston v. Industrial Commission, 10 N.E.2d 644, 367 Ill. 155.

71 C.J. p 1442 note 47 c (1), (3).

(2) Under such statute where employee is earning more than when he was injured, payments of compensation should be terminated.

Ill.—Snowdent McSweeney Co. v. Industrial Commission, 155 N.E. 277, 324 Ill. 423.

Change of condition

A return to work may reflect such change in condition as will authorize modification of an award on ground of change of condition.

Ky.—Leckie Collieries Co. v. Brannham, 122 S.W.2d 776, 275 Ky. 743. 71 C.J. p 1442 note 47 [a].

Not totally disabled despite pain

A workman was not "totally disabled" because of a previous fracture of his ankle, where he had returned to work and was earning same or higher wages than at time of injury, notwithstanding his ankle pained him.

Kan.—Dobson v. Apex Coal Co., 91 P. 2d 5, 150 Kan. 80.

Review of award for permanent total disability

Where statutory authority therefor exists, an award for permanent and

terminate the award where the employee is able to return to work.⁸ However, the right of a workman to receive compensation on a rating of permanent partial disability⁹ or permanent total disability¹⁰ is not necessarily defeated by his return to work. The difference in the character of the work prior to the occurrence of the disability as compared to that subsequently performed,¹¹ and differences in the terms of the applicable statutes,¹² must be considered in determining whether a return to work affects the right to continued compensation. Thus, under some statutes the test is whether the workman is still disabled from performing the duties of his original employment, and the fact that he is able to engage in other employment or has secured other employment is of no consequence.¹³ Under other statutes, compensation may be terminated if a workman's earning power, in any kind of work for which he is fitted, is not impaired,¹⁴ and it is immaterial

whether or not he is able to do exactly the same kind of work as he did before the injury.¹⁵ However, even under a statute authorizing termination or reduction of compensation when the employee is able to return to any employment, an employee cannot be said to have regained his ability to return to employment unless he is able to perform the duties of whatever employment may be under consideration in the manner that such duties are customarily performed by the average person engaged in such employment.¹⁶ Under the doctrine adopted by some authorities a reduction of compensation payments is not warranted on a mere showing that the workman has the physical capacity to do some kind of work different from the general kind of work which he was engaged in at the time of injury, but it must also be shown that the workman, either by his own effort or that of his employer, can actually get such work.¹⁷

total disability may be reviewed on workman's return to work.
Ky.—Leckie Collieries Co. v. Branhams, 122 S.W.2d 776, 275 Ky. 748.

3. Ill.—City of Evanston v. Industrial Commission, 10 N.E.2d 644, 367 Ill. 155.

La.—Mertz v. Von Schlemmer, App., 13 So.2d 133.

Mich.—Szczeniowski v. Cadillac Motor Car Co., 293 N.W. 645, 294 Mich. 271.

Workman receiving award for "complete disability"

Under a provision of an occupational diseases act that where an employee who receives an award for "complete disability" and subsequently returns to, or is able to resume, work and who earns, or is able to earn, as much as before last day of last exposure, payments under award shall cease, legislature did not employ quoted words as synonymous with a perpetual and irremediable incapacity for work.

Ill.—J. I. Case Co. v. Industrial Commission, 27 N.E.2d 821, 378 Ill. 132.

Where ability to return to work is not shown, refusal to modify decree awarding injured employee compensation for total disability on ground that employee was no longer totally disabled, but was only partially disabled, held not error.

R.I.—Providence Transit Concrete Co. v. Mulvey, 172 A. 616, 54 R.I. 281.

Pain and discomfort

An employee is not deemed to have recovered from a totally disabling injury if he would thereafter be required to perform his duties in pain and discomfort.

La.—Weeks v. Consolidated Underwriters, App., 73 So.2d 479.

Fact that employers may prefer an uninjured workman is not a proper criterion for determining whether disability has ceased.

La.—Anderson v. May, App., 6 So. 2d 174.

9. Ky.—Three Point Coal Corp. v. Moser, 195 S.W.2d 305, 302 Ky. 534.

Return to work at wages equal to or greater than those earned prior to injury is not of itself a ground for reopening and reducing an award for permanent partial disability.

Ky.—Three Point Coal Corp. v. Moser, supra—Bell Coal Co. v. Jackson, 192 S.W.2d 947, 301 Ky. 673.

10. W.Va.—Blosser v. State Compensation Com'r, 51 S.E.2d 71, 132 W.Va. 112.

11. W.Va.—Blosser v. State Compensation Com'r, supra.

12. Mich.—Warner v. Michigan Electric Ry. Co., 226 N.W. 887, 248 Mich. 60.

Mo.—Kinyon v. Kinyon, 71 S.W.2d 78, 230 Mo.App. 623.

13. Mich.—Warner v. Michigan Electric Ry. Co., 226 N.W. 887, 248 Mich. 60.

71 C.J. p 1443 note 43.

In determining whether sixty-one-year-old workman was entitled to continuance of compensation after correction by surgical operation of hernia resulting from compensable accident, question was not what work average man age sixty-one could or should reasonably do, but whether workman was incapacitated after such correction from doing heavy manual labor at which he had always been employed.

R.I.—Walsh-Kaiser Co. v. Koocharian, 51 A.2d 832, 72 R.I. 390.

In Louisiana

(1) It has been held that a workman does not forfeit his compensation by accepting employment in dissimilar work.

La.—Weeks v. Consolidated Underwriters, App., 73 So.2d 479.

(2) Test to be applied is whether workman could perform in usual and normal manner same kind of work he did before, or was equipped by training and experience to do, without pain or discomfort.

La.—Anderson v. May, App., 6 So.2d 174.

14. Pa.—Earley v. Philadelphia & Reading Coal & Iron Co., 19 A.2d 615, 144 Pa.Super. 301—Pelosi v. Overbrook Tile Co., 10 A.2d 118, 138 Pa.Super. 30.

15. Pa.—Earley v. Philadelphia & Reading Coal & Iron Co., 19 A.2d 615, 144 Pa.Super. 301—Pelosi v. Overbrook Tile Co., 10 A.2d 118, 138 Pa.Super. 30.

16. Mo.—Kinyon v. Kinyon, 71 S.W. 2d 78, 230 Mo.App. 623.

Reduction erroneous

Where truck driver, sustaining left hemiplegia, was originally awarded compensation for permanent total disability, change to award for permanent partial disability on rehearing held erroneous, although employee had obtained employment in police department, where physical condition remained unchanged and he had obtained employment largely through mayor's influence and could do work only when assisted by others.

Mo.—Kinyon v. Kinyon, supra.

17. R.I.—Olneyville Wool Combing Co. v. Di Donato, 13 A.2d 817, 65 R.I. 154.

k. Recurrence of Disability

The compensation officials, under the continuing jurisdiction vested in them by the act and subject to the limitations contained therein, have the power to increase the compensation previously awarded on a recurrence of the employee's disability, but not where the recurrence is the direct and proximate consequence of the employee's own act.

The compensation officials, under the continuing jurisdiction vested in them by the act, and subject to the limitations contained therein,¹⁸ have the power to increase the compensation previously awarded on a recurrence of the employee's disability.¹⁹ However, an increase of the compensation previously awarded is not authorized where the recurrence of the disability is the direct and proximate conse-

quence of the employee's own act.²⁰

l. Diminution or Increase of Earnings

Generally speaking, and in the absence of a statute otherwise providing, an award of compensation is not subject to modification as the wages of the employee vary, or the wage scale generally varies, but in a proper case where statutory authority therefor exists, an award may be modified, increased, or decreased as the circumstances warrant, on a showing that the earning capacity of the workman has increased or decreased since the prior award.

Generally speaking, and in the absence of a statute otherwise providing, an award of compensation is not subject to modification as the wages of the employee vary,²¹ or the wage scale generally

18. N.J.—*Sassarro v. Wright Aeronautical Corp.*, 46 A.2d 52, 24 N.J. Misc. 57.

Maximum benefits paid

Where employee totally disabled due to silicosis was awarded entire amount of compensation permissible under statute as of date of disability, and disability did not change but continued to be total, further compensation benefits were not payable under statute providing for resumption of payment on recurrence of disease.

Ariz.—*Michin v. Arundel Corp.*, 193 P.2d 445, 67 Ariz. 173.

In Pennsylvania

(1) It has been held that recurrence, in order to be compensable, must have occurred within one year after date as of which original disability ceased.

Pa.—*Downs v. Linton's Lunch*, 6 A.2d 515, 334 Pa. 415.

(2) However, above ruling has been said to be merely dictum, not necessary to decision, and that only limitation is that petition be filed within one year after last payment of compensation.

Pa.—*Kauffman v. United Engineering & Foundry Co.*, 33 A.2d 85, 153 Pa.Super. 67.

19. Ill.—*Madsen v. Industrial Commission*, 50 N.E.2d 707, 383 Ill. 590. Mass.—*Falcione's Case*, 28 N.E.2d 308, 305 Mass. 433.

N.J.—*Weber v. Brandt*, 3 A.2d 804, 121 N.J.Law 600.

N.Y.—*Lautzenheiser v. Foster-Hatch Medical Group*, 297 N.Y.S. 512, 251 App.Div. 913.

Pa.—*Downs v. Linton's Lunch*, 6 A.2d 515, 334 Pa. 415.

Kauffman v. United Engineering & Foundry Co., 24 West. 101, affirmed 33 A.2d 85, 153 Pa.Super. 67.

71 C.J. p 1430 note 71, p 1443 note 50.

Temporary disability

(1) Compensation for intermittent periods or recurrent intervals of

temporary disability may be recovered.

N.J.—*Colbert v. Consolidated Laundry*, 107 A.2d 521, 31 N.J.Super. 588.

Okl.—*Pittsburgh Plate Glass Co. v. Davison*, 122 P.2d 388, 190 Okl. 228.

(2) Recurrent temporary disability must be result of original accidental injury.

Okl.—*Pittsburgh Plate Glass Co. v. Davison*, supra.

(3) Power of compensation officials to make an award for recurrent temporary disability has been held to be discretionary and their action in refusing an award will not be disturbed in absence of a showing of abuse of discretion.

N.J.—*Sassarro v. Wright Aeronautical Corp.*, 46 A.2d 52, 24 N.J.Misc. 57.

Hernia

(1) On recurrence of a hernia after a corrective operation an additional award of compensation may be made.

Ind.—*Wolfcale v. Grush*, 57 N.E.2d 438, 115 Ind.App. 155.

Okl.—*Safeway Stores v. Brumley*, 128 P.2d 1006, 191 Okl. 270.

(2) Employer may be held liable even though employee at time of recurrence of hernia is no longer in his employ.

Ind.—*Wolfcale v. Grush*, 57 N.E.2d 438, 115 Ind.App. 155.

(3) Where recurrence of hernia after a corrective operation results in permanent total disability, commission may award compensation therefor.

Okl.—*Safeway Stores v. Brumley*, 128 P.2d 1006, 191 Okl. 270.

(4) Where, on application for reopening of claim, there appeared an aggravation of claimant's condition since his prior examination and hernias had reappeared which could not be cured by radical operation because of claimant's physical condition, which facts were not considered at time of prior award, appli-

cation to reopen claim was improperly denied.

W.Va.—*Johnson v. State Compensation Com'r*, 35 S.E.2d 677, 128 W.Va. 37.

20. Okl.—*Sinclair Prairie Oil Co. v. State Industrial Commission*, 54 P.2d 348, 176 Okl. 84.

Allergic condition

Where, as result of an injury, an allergic or susceptible condition follows as a permanent partial disability, and subsequently through deliberate act of injured person a recurrence of former injury is brought about, such latter condition may not properly be attributed to original injury, but is, on contrary, to be deemed a result of such deliberate act, notwithstanding fact that save for original injury and resulting susceptibility it would not have occurred.

Okl.—*Sinclair Prairie Oil Co. v. State Industrial Commission*, supra.

21. U.S.—*Burley Welding Works v. Lawson*, C.C.A.Fla., 141 F.2d 964.

Or.—*Hoffmeister v. State Indus. Acc. Commission*, 156 P.2d 834, 176 Or. 216.

Pa.—*Byrne v. Progress Plate Making Co.*, 43 A.2d 566, 158 Pa.Super. 51—*Chubb v. Allegheny Country Club*, 24 A.2d 550, 147 Pa.Super. 146.

Stanson v. Ross Federal Service, Com.Pl., 88 Pittsb.Leg.J. 157.

71 C.J. p 1443 note 53.

There is no distinction between scheduled and unscheduled injuries as far as application of rule stated in text is concerned.

Tenn.—*Fidelity & Casualty Co. of New York v. Long*, 180 S.W.2d 889, 181 Tenn. 190.

Termination of employment because of reduction in force, with consequent loss of earnings, does not constitute a change of condition warranting a review of such award.

Va.—*J. A. Jones Const. Co. v. Martin*, 94 S.E.2d 202, 198 Va. 370.

Right to compensation for permanent total disability is not necessari-

varies.²² So, where there has been no material decrease in a workman's incapacity since an award, the mere fact that he has secured employment at wages higher than he received before injury does not entitle the employer or his insurer to a reduction of the award.²³ However, under some statutes, in a proper case, an increase in an employee's actual wages may afford a basis for a reduction,²⁴ termination,²⁵ or suspension²⁶ of the compensation previously awarded. So, after a schedule award,

where statutory authority therefor exists, in a proper case, a further award may be made for reduced earnings.²⁷

Change in earning capacity. The earning capacity of the employee is to be distinguished from the actual wages earned.²⁸ In a proper case where statutory authority therefor exists, an award may be modified, increased, or decreased as the circumstances warrant, on a showing that the earning capacity of the workman has increased²⁹ or de-

ly defeated by workman's receipt of wages.

W.Va.—*Blosser v. State Compensation Com'r*, 51 S.E.2d 71, 132 W. Va. 112.

22. Mich.—*Sweet v. Eddy Paper Corp.*, 6 N.W.2d 883, 303 Mich. 492 —*Roxbury v. Weidman Lumber Co.*, 256 N.W. 560, 268 Mich. 596.

23. Tenn.—*Fidelity & Casualty Co. of New York v. Long*, 180 S.W.2d 889, 181 Tenn. 190.

24. Mich.—*Samels v. Goodyear Tire & Rubber Co.*, 35 N.W.2d 265, 323 Mich. 251.

R.I.—*Rau Fastener Co. v. Carr*, 60 A.2d 499, 7 R.I. 284.

"Change of condition"

Where injured workman who had been earning \$23 per week was allowed \$5.04 per week as thirty per cent partial permanent disability, but thereafter obtained work at salary of \$26.80 per week, there was a "change of condition" since award, within terms of statute requiring reduction of weekly allowance to sixty per cent of difference between former and latter weekly wage.

N.C.—*Smith v. Swift & Co.*, 194 S. E. 106, 212 N.C. 608.

Basis of determining change

Where it was determined by parties in accordance with compensation act that average weekly wages of employee, whose pay was 98 cents an hour for ordinary working hours and time and one half for overtime work, were \$45.18, including pay for overtime work, and, when employee returned to work, he was given lighter work because partially incapacitated, but he was paid at rate of 98 cents an hour, and because of elimination of overtime work his average weekly wage was only \$39.20, trial justice erred as a matter of law in deciding that there was no change in weekly wages, and erred in granting employer's petition to terminate compensation payments of \$20.00 per week and should have awarded compensation of \$3.59 a week.

R.I.—*Rau Fastener Co. v. Carr*, 60 A. 2d 499, 7 R.I. 284.

25. **Earnings in excess of those at time of injury**

(1) Under a statute so providing

where an employee's average weekly earnings after injury exceed his average weekly earnings at time of injury, compensation may be discontinued.

Mass.—*Malignazzi's Case*, 90 N.E.2d 11, 325 Mass. 306.

(2) So, where painter, who suffered fracture when he fell from ladder, was employed soon after total disability compensation award as factory building inspector and was earning higher wages than at time of accident, working continuously ever since, under a provision in effect so providing, it was mandatory on court to cancel previous award and end compensation on employer's application to modify such award.

Kan.—*McAllister v. McDowell*, 146 P.2d 411, 158 Kan. 234.

26. Pa.—*Holtz v. McGraw & Bindley*, 54 A.2d 905, 161 Pa.Super. 371 —*Scipani v. Pressed Steel Car Co.*, 28 A.2d 502, 150 Pa.Super. 410.

Noel v. H. H. Ward Co., Com.Pl., 32 Del.Co. 152.

Necessary implication of statute

A provision fixing compensation for partial disability at certain per cent of difference between wages of employee when injured and employee's earning power thereafter, by necessary implication, intended a suspension of payments during periods when physical disability is not reflected in loss of earnings.

Pa.—*Kelemon v. Reiber*, 53 A.2d 903, 161 Pa.Super. 169.

Amount of disability not fixed

Under provision basing payments for partial disability on difference between former wages and subsequent earning power, and providing that "earning power" should not be less than subsequent earnings, receipt thereafter of equivalent wages removes claimant from compensation rolls while receiving such wages, but does not fix amount of disability or loss of earning power, and does not affect burden of proof.

Pa.—*Holtz v. McGraw & Bindley*, 54 A.2d 905, 161 Pa.Super. 371.

Wages not actually earned

An employer and insurance carrier were not entitled to suspension of compensation award on ground that

employer continued to pay injured employee same salary as he had earned before accident, in view of finding supported by competent evidence that employee since accident had not actually earned wages he was receiving through generosity of his employer.

Pa.—*Chubb v. Allegheny Country Club*, 24 A.2d 550, 147 Pa.Super. 146.

27. N.Y.—*Arbanos v. E. I. Du Pont De Nemours & Co.*, 88 N.Y.S.2d 839, 275 App.Div. 881.

Claimant suffering only from pain

An award of compensation for reduced earnings due to partial disability of injured employee could be made where employee was suffering only from pain caused by injury to bodily member after a schedule award had been made.

N.Y.—*Arbanos v. E. I. Du Pont De Nemours & Co.*, supra.

28. U.S.—*Burley Welding Works v. Lawson*, C.C.A.Fla., 141 F.2d 964, 71 C.J. p 1443 note 54.

29. Ariz.—*Steward v. Industrial Commission*, 211 P.2d 217, 69 Ariz. 159.

Determination of earning capacity

(1) Wages equal to or exceeding earnings before disability are not conclusive against loss of earning power.

Pa.—*Iyrne v. Progress Plate Making Co.*, 43 A.2d 566, 158 Pa.Super. 51.

(2) Employee's earning capacity after injury and on application to reduce or stop compensation is not determinable by mere temporary employment at high wages until after an order stopping compensation may be obtained, or measurable by what employee actually earned in non-descript employment which is not steady, but is measured by injured employee's capacity to earn wages in same or another employment.

Mich.—*Satawa v. L. A. Young Spring & Wire Corp.*, 8 N.W.2d 60, 304 Mich. 264 —*Smith v. Pontiac Motor Car Co.*, 270 N.W. 172, 277 Mich. 652.

(3) So, it has been held that wages paid to an injured welder for light work during an unusual wartime demand for welders did not conclusive-

creased³⁰ since the prior award, without a showing of a change in the physical condition of the workman.³¹ However, under some statutes changes in earning power or industrial worth do not afford a basis for modifying an award;³² and the employer and his insurance carrier are not entitled to a reduction of compensation because the workman has, during the period of rehabilitation contemplated by the act, increased his earning power through study and training.³³ Under a statute so providing, in the case of compensation for permanent total disability, payments therefor cease after a statutory period unless the employee submits to such physical or educational rehabilitation as may be ordered by a rehabilitation commission and can show that because of such disability it is impossible for him to obtain earnings equal to those earned at

the time of the accident, in which case further payments shall be made during the period of such disability, the amount thereof to be the previous weekly compensation payment diminished by that portion thereof that the earnings he is then able to earn bears to the wages received at the time of the accident.³⁴

Expectancy of increased wages of minor. Under a statute providing that if the employee was a minor when injured, and that under normal conditions his wages would be expected to increase, that fact may be considered in arriving at his average weekly wages, the compensation officials may under their continuing jurisdiction to modify an award increase an award on the basis of the expectancy of increased wages of the employee.³⁵

ly establish welder's wage-earning capacity.

U.S.—Burley Welding Works v. Lawson, C.C.A.Fla., 141 F.2d 964.

"Partial incapacity" terminates when employee again becomes capable of earning same wage he earned before injury, whether at same or at a different occupation, and without regard to such personal inconveniences as may result to him solely from his injury, and are not caused or aggravated by his new employment.

Ga.—Lumbermens Mut. Cas. Co. v. Cook, 25 S.E.2d 67, 69 Ga.App. 131.

30. Ariz.—Engle v. Industrial Commission, 269 P.2d 604, 77 Ariz. 202—Lee v. Industrial Commission, 224 P.2d 1085, 71 Ariz. 171—Steward v. Industrial Commission, 211 P.2d 217, 69 Ariz. 159.

Ark.—Sallee Bros. v. Thompson, 187 S.W.2d 956, 208 Ark. 727.

Decrease in wages received by compensation claimant after award for partial disability is not conclusive on question of loss of earning power, and true test of extent of partial disability is earning power rather than earnings or wages.

Pa.—Sneed v. State Workmen's Ins. Fund, 180 A. 90, 118 Pa.Super. 298.

Workman held not to have shown sufficient change in earning capacity to be entitled to additional compensation.

Mich.—Gustafson v. Manning, Maxwell & Moore, 266 N.W. 301, 275 Mich. 146—MacDonald v. Great Lakes Steel Corp., 265 N.W. 776, 274 Mich. 701.

Loss of earning capacity and actual decrease of income considered

Where increased pain and difficulty of working result in loss of earning capacity with consequent actual decrease of earned income, they may be taken into consideration in determin-

ing whether an award should be increased based on a change of condition.

Ga.—Riegel Textile Corp. v. Vinyard, 77 S.E.2d 760, 88 Ga.App. 753.

31. Ariz.—Steward v. Industrial Commission, 211 P.2d 217, 69 Ariz. 159.

32. Neb.—Ludwickson v. Central States Elec. Co., 6 N.W.2d 65, 142 Neb. 308.

Award for total incapacity

(1) "Incapacity," into which court may inquire in proceeding to modify award of compensation for total incapacity on ground of increase or decrease of injured employee's incapacity, is incapacity due solely to violence to physical structure of employee's body as result of accident and relates to his physical condition, not his earning power and industrial worth.

Neb.—Ludwickson v. Central States Elec. Co., supra.

(2) Where claimant suffered injuries necessitating amputation of about one-half of all fingers, and award for permanent total disability provided for readjustment in event of vocational rehabilitation, commission was not justified ten years later in changing award to one of permanent partial disability, although claimant had allegedly earned a substantial living for last two years.

Or.—Hoffmeister v. State Indus. Acc. Commission, 156 P.2d 834, 176 Or. 216.

Permanent partial impairment

Increase or decrease in injured employee's earning power would afford no basis for modifying award for permanent partial impairment on theory of changed condition, since such award was intended to cover all disability arising therefrom, whether total or partial.

Ind.—Frazier v. Knox Consol. Coal Corp., 46 N.E.2d 275, 112 Ind.App. 649—Sumpter v. Colvin, 190 N.E. 66, 98 Ind.App. 453—Smith v. Brown, 144 N.E. 849, 81 Ind.App. 667.

33. Neb.—Ludwickson v. Central States Elec. Co., 6 N.W.2d 65, 142 Neb. 308.

34. N.J.—Verderosa v. Colonial Life Ins. Co., 18 A.2d 59, 19 N.J.Misc. 135—De Santis v. Turner Const. Co., 194 A. 57, 15 N.J.Misc. 613.

35. N.Y.—Herman v. Lee, 115 N.Y.S. 2d 734, 280 App.Div. 562.

Award of death benefits

N.Y.—Herman v. Lee, supra.

Wages in different occupation

Under statute providing that if employee was of such age and experience when injured that under natural conditions his wages would be expected to increase, that fact may be considered in determining his weekly wages for compensation purposes, injured employee who was paid total incapacity compensation based on average weekly wage but thereafter was able to earn more in a different occupation although he had suffered loss of one eye was not entitled to award of further compensation on basis of increased weekly wages, on theory that if he was able to earn more under unnatural conditions, that is, with loss of vision of one eye, he would have been able to earn more under natural conditions, since "wages" as used in statute must be taken to refer to wages earned in particular employment out of which injury arose, and not those in other occupations, so that fact that he was able to earn more in another occupation could not be given any weight on his application for increased compensation.

Mass.—Burse's Case, 92 N.E.2d 533, 825 Mass. 702.

m. Refusal to Submit to Surgical or Medical Treatment

Refusal of an employee to undergo a reasonable surgical operation or accept treatment may be urged by application to review or terminate compensation; but a statute authorizing the reduction or suspension of monthly payments because of such refusal has been held not to prevent recovery of an additional lump sum award based on increased permanent disability.

Refusal of the employee to undergo a reasonable surgical operation may be urged by an application to review or terminate compensation;³⁶ and so of refusal to accept treatment;³⁷ but the denial of a reduction of compensation on the ground that the existing disability is caused or aggravated by an unreasonable refusal to accept proper medical treatment is authorized where there has not been a sufficient tender of such treatment;³⁸ where an injured employee interrogated before the arbitrator offered to undergo the operation at the employer's expense, and the offer was ignored, the employer cannot, on review, ask diminution of the award for total disability on the ground that the employee may eventually be cured.³⁹ Provisions authorizing the reduction or suspension of monthly payments on the workman's refusal to submit to such medical or surgical treatment as is reasonably essential to his recovery do not, however, prevent recovery of an additional lump sum award based on increased permanent disability.⁴⁰

Examination. Where statutory authority therefor exists, the compensation officials may suspend compensation on the workman's refusal, without reasonable cause or excuse, to submit to a medical examination.⁴¹

n. Refusal to Accept Employment

On an injured employee's refusal of work, provided it is suitable and has actually been procured, the compensation officials are generally authorized to reduce or terminate further compensation, but provisions for termination of compensation if the employee refuses to accept suitable employment have been held not to apply to an award for permanent partial impairment compensated under a schedule.

On an injured employee's refusal of work, provided it is suitable⁴² and has been actually procured,⁴³ the compensation officials, under the provision investing them with a continuing jurisdiction, are generally authorized to reduce or terminate further compensation.⁴⁴ Where the compensation acts permit the employer to terminate or reduce compensation on claimant's refusal to accept suitable employment offered by the employer, where an employee is disabled and is offered other suitable work by his employer, he must accept it⁴⁵ and make a reasonable effort to perform it,⁴⁶ and he cannot insist on being put back in the same employment in which he was injured⁴⁷ or at exactly the same wage,⁴⁸ but the employment offered must be similar to that which he previously had⁴⁹ and suitable

36. N.M.—Fowler v. W. G. Const. Co., 188 P.2d 160, 51 N.M. 441. 71 C.J. p 1443 note 56.

Bar not lifted by worsened condition

Where compensation of employee sustaining injury to fingers was stopped by commission and stoppage was affirmed by court on employee's refusal to submit to a curative and rehabilitating operation, that employee's hand had become worse did not lift bar resulting from his refusal to submit to curative operation. Mich.—Kolbas v. American Boston Min. Co., 286 N.W. 91, 288 Mich. 596.

Refusal justified

Where employee in compliance with board's order submitted himself for an operation but after due observation and tests two of three physicians designated refused to perform operation on ground that it would be both dangerous and useless, even though there was no change in employee's physical condition but only a change of medical opinion, board had jurisdiction to revoke judgment ordering operation, hold that employee was justified in refusing to submit to an operation proffered by employer to be performed by third physician alone, and order em-

ployer to continue compensation payments for total disability.

Ga.—City of Atlanta v. Padgett, 22 S.E.2d 197, 88 Ga.App. 96.

37. Ariz.—McFadden v. Six Companies, 49 P.2d 1001, 46 Ariz. 195.

N.Y.—Blanchard v. U. S. O. Camp Shows, Inc., 166 N.Y.S.2d 863, 4 A.D.2d 894.

71 C.J. p 1443 note 57.

38. Cal.—Gildersleeve v. Industrial Accident Commission, 295 P. 1033, reheard 1 P.2d 1, 212 C. 763.

39. Ill.—Warsaw Coal Co. v. Industrial Commission, 138 N.E. 172, 307 Ill. 66.

40. Wash.—Litke v. Department of Labor and Industries, 98 P.2d 981, 2 Wash.2d 536.

41. N.Y.—Blanchard v. U. S. O. Camp Shows, Inc., 166 N.Y.S.2d 863, 4 A.D.2d 894.

Pa.—Rennard v. Rouseville Coopera-ge Co., 15 A.2d 48, 141 Pa.Super. 286.

42. Mich.—Moshinski v. Kay Salt Co., 172 N.W. 441, 206 Mich. 83.

71 C.J. p 1443 note 60.

Work which he can safely do

Ordinarily, injured employee has duty of being cooperative, within reason, and of attempting to perform

offered work which employee, in qualified medical witnesses' opinion, can safely do, so that his actual working capacity may be ascertained, if possible, and employee risks loss of all benefits by failing, without good cause, to perform such duty. R.I.—Fulford Mfg. Co. v. Lupoli, 67 A.2d 846, 75 R.I. 488.

43. Ind.—Bruce v. Stutz Motor Car Co. of America, 148 N.E. 161, 83 Ind.App. 257.

71 C.J. p 1443 note 61.

44. Cal.—Bakaloff v. Industrial Accident Commission, 287 P. 544, 105 C.A. 295.

71 C.J. p 1444 note 63.

45. Conn.—Reilley v. Carroll, 147 A. 818, 110 Conn. 282.

71 C.J. p 1444 note 65.

46. N.Y.—Czaus v. Lalance Grosjean Mfg. Co., 246 N.Y.S. 50, 230 App. Div. 586.

71 C.J. p 1444 note 66.

47. U.S.—Spratt v. Crowell, D.C.Ala., 4 F.Supp. 368.

48. La.—Boudreaux v. Rossen, 139 So. 706, 19 La.App. 138.

49. U.S.—Spratt v. Crowell, D.C.Ala., 4 F.Supp. 368.

to his capacity,⁵⁰ and he cannot be required to take an employment not covered by the compensation act.⁵¹ A provision for termination of compensation if the employee refuses to accept suitable employment applies only where there has been an award for disability, partial or total,⁵² and not to an award for permanent partial impairment compensated under a schedule.⁵³ Under such a provision, the board or commission cannot order claimant to work, but can only determine whether his refusal to accept the offered employment warrants reduction or termination of compensation,⁵⁴ and if, in the opinion of the board or commission, his refusal is justified, he is entitled to compensation,⁵⁵ and it must appear that suitable employment was found for him and that he unjustifiably refused to accept it, before compensation is suspended or terminated.⁵⁶

Suspension pending good faith attempt to work. In a proper case, the compensation officials may suspend a claimant's right to further compensation until claimant demonstrates that he has in good faith endeavored to work.⁵⁷

o. Confinement in Public Institution

A provision prohibiting the payment of compensation where an employee without dependents who is permanently and totally disabled is an inmate of a public institution has been held to authorize termination of compensation payable to an employee who is permanently and totally disabled but who suffered only a partial disability in his employment.

A provision prohibiting the payment of compensation where an employee without dependents who

is permanently and totally disabled is an inmate of a public institution authorizes the termination of compensation payable to an employee who is permanently and totally disabled but who suffered only a partial disability in his employment.⁵⁸

p. Departure from Jurisdiction, State, or Country

Where authorized by statute, on departure of the claimant from the jurisdiction, state, or country, the compensation officials may reduce or terminate compensation payments.

Where under certain provisions of the act, such as a requirement that a compensation claimant leaving the state must notify compensation officials and obtain permission to do so or lose his compensation during his absence,⁵⁹ or that an alien who becomes a nonresident shall lose a certain percentage of,⁶⁰ or all,⁶¹ compensation, or under other provisions, such as a requirement that the beneficiary report for a physical examination or suffer the suspension or loss of compensation,⁶² compensation officials are authorized to terminate or reduce payments where the beneficiary leaves the country or state, or they may do so in a proper case. However, in the absence of a statute otherwise providing, removal of claimant from the jurisdiction of the court making the award or from the state is not a ground for review or modification of a compensation award.⁶³

q. Death or Marriage of Beneficiary

Where statutory authority therefor exists, an award of compensation may be modified or terminated, in a proper case, on the death or marriage of the beneficiary.

50. Ga.—Lumbermens Mut. Cas. Co. v. Cook, 25 S.E.2d 67, 69 Ga.App. 131—Empire Glass & Decoration Co. v. Bussey, 126 S.E. 912, 33 Ga. App. 464.

51. U.S.—Spratt v. Crowell, D.C.Ala., 4 F.Supp. 368.

71 C.J. p 1444 note 71.

52. Ind.—Inman v. Carl Furst Co., 174 N.E. 96, 92 Ind.App. 17, followed in Hipskind v. Wabash Canning Co., 175 N.E. 896, 94 Ind.App. 72.

53. Ind.—Inman v. Carl Furst Co., 174 N.E. 96, 92 Ind.App. 17, followed in Hipskind v. Wabash Canning Co., 175 N.E. 896, 94 Ind.App. 72.

N.Y.—Knight v. Ferguson, 190 N.Y.S. 659, 198 App.Div. 756.

71 C.J. p 1444 note 73.

54. Ind.—Silvey v. Panhandle Coal Co. No. 5, 154 N.E. 778, 86 Ind.App. 111.

55. Del.—Shockley v. King, 117 A. 280, 31 Del. 606.

56. Ga.—Austin Bros. Bridge Co. v. Whitmire, 121 S.E. 345, 31 Ga.App. 560.

57. Conn.—Wiecinski v. Robert A. Keasby Co., 131 A.2d 227, 20 Conn. Sup. 234.

Desirability of return to work indicated

Where it appeared that claimant, who had not attempted to find employment, as directed by prior award for total incapacity, still suffered from some degree of incapacity, but medical testimony indicated desirability of his returning to work, commissioner properly suspended claimant's right to further compensation for partial disability until claimant should demonstrate that he had in good faith endeavored to work.

Conn.—Wiecinski v. Robert A. Keasby Co., supra.

58. Minn.—Naslund v. Federal Cement Tile Co., 232 N.W. 342, 181 Minn. 301.

59. Utah.—Bell Sample Shoe Co. v. Industrial Commission of Utah, 259 P. 193, 70 Utah 167, 55 A.L.R. 730.

Sufficient compliance

Where employer, before making compromise settlement with compensation claimant, advised commission

of claimant's desire to leave state and was told that there would be no objection, and employer thereafter arranged trip and hired a nurse to accompany claimant, and claimant, at time he left, was under influence of an opiate and had been taken to train on a stretcher, there was sufficient compliance with requirements that commission be notified and give its consent to such leaving as a prerequisite to an award of compensation during period while claimant is out of state.

Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 159 P.2d 877, 108 Utah 346, 162 A.L.R. 1457.

60. Pa.—Lubanski v. Delaware, L. & W. R. Co., 81 Pa.Super. 538.

61. Hawaii.—Morita v. Hawaiian Fertilizer Co., 27 Hawaii 431.

71 C.J. p 1445 note 81.

62. Mich.—Sauch v. Studebaker Corporation, 205 N.W. 120, 232 Mich. 147, 41 A.L.R. 863.

71 C.J. p 1445 note 83.

63. La.—Kirby v. Terminal Paper Bag Co., App., 16 So.2d 597.

Where statutory authority therefor exists, an award of compensation may be modified or terminated, in a proper case, on the death⁶⁴ or marriage⁶⁵ of the beneficiary. This may be done, in the event of marriage, although the marriage is not valid for all purposes and is at most only one at common law.⁶⁶ However, the marriage of a dependent, where such dependency is not expressly terminated by the marriage under the act, does not authorize the termination of compensation as on a change of condition under the continuing jurisdiction of the officials.⁶⁷

i. Error or Mistake

Under some statutory provisions a compensation award may be reviewed on the ground of error or mistake, or, more specifically, if there has been a mistake in a determination of fact; but where the exercise of the power of review is conditional on a change in the claimant's condition, mistake is not a ground for reviewing an award.

Under some statutory provisions a compensation award may be reviewed on the ground of error or mistake,⁶⁸ or, more specifically, if there has been a mistake in a determination of fact.⁶⁹ Under a provision investing compensation officials with a continuing jurisdiction over their awards and the power to alter them whenever in their opinion it may be just,⁷⁰ or with the same power over their awards that a court of equity has over its decrees,⁷¹ an award may be modified on the ground of mistake as to a material fact; likewise, under a pro-

vision investing compensation officials with a continuing jurisdiction over their awards and the power to alter them on "good cause," an award may be modified on the ground of a mistake of law;⁷² but, where the exercise of the power to review and alter a previous award is conditional on a change in claimant's condition, mistake is not a ground for reviewing an award.⁷³

s. Fraud

Where statutory authority therefor exists, an award may be reviewed on the ground that it was procured by fraud.

Where statutory authority therefor exists, an award of compensation may be reviewed by the compensation officials on the ground that it was procured by fraud.⁷⁴

t. Prior Award for Incorrect or Inadequate Amount

In the absence of a statute otherwise providing, a compensation award may not be modified on the ground that the compensation awarded is inadequate, but under a statute providing that the compensation officials may make such changes in former awards as in their opinion may be just, an award for an incorrect or inadequate amount may be reopened.

In the absence of a statute providing otherwise, a compensation award may not be modified on the ground that the compensation awarded is inadequate.⁷⁵ However, under a statute providing that

64. N.J.—Kievsky v. United Neon Supply Corp., 30 A.2d 40, 21 N.J. Misc. 43.

65. N.J.—Kievsky v. United Neon Supply Corp., supra.

Pa.—Hall v. Carnegie Institute of Technology, 87 A.2d 87, 170 Pa. Super. 459.

Lukash v. American Car & Foundry Co., 9 Pa. Dist. & Co. 34.

66. Ky.—Elkhorn Coal Corporation v. Tackett, 49 S.W.2d 571, 243 Ky. 694.

67. Ind.—Jackson Hill Coal & Coke Co. v. Gregson, 150 N.E. 398, 84 Ind.App. 170.

68. Colo.—Morrison v. Clayton Coal Co., 181 P.2d 1011, 116 Colo. 501.

Ga.—Ware v. Swift & Co., 2 S.E.2d 128, 59 Ga.App. 836.

Ky.—Three Point Coal Corp. v. Moser, 195 S.W.2d 305, 302 Ky. 584—Bell Coal Co. v. Jackson, 192 S.W.2d 947, 301 Ky. 673—Black Star Coal Co. v. Powers, 68 S.W.2d 30, 252 Ky. 736.

Prior award for incorrect or inadequate amount see infra subdivision t of this section.

Mistake as to extent or nature of disability is ground for review of an award under a statute so providing.

N.H.—Zeady v. Arms Textile Mfg. Co., 76 A.2d 512, 96 N.H. 328.

Adjudication of loss of use of foot mistakenly made

If, subsequent to adjudications of permanent loss of use of compensation claimant's foot, it developed that those adjudications were wrong because use of foot was not permanently lost, payments made to claimant were mistakenly made and it would become duty of referee to re-examine case from beginning and determine when claimant's total disability became partial and extent of partial disability and to ascertain whether claimant had been paid in full for his disability.

Pa.—Porto v. Philadelphia & Reading Coal & Iron Co., 10 A.2d 29, 137 Pa. Super. 590.

69. U.S.—Tudman v. American Ship Bldg. Co., C.A.III, 170 F.2d 842.

Texas Employers' Ins. Ass'n v. Sheppard, D.C. Tex., 42 F. Supp. 669—McCarthy Stevedoring Corp. v. Norton, D.C. Pa., 40 F. Supp. 960—Valeri v. Lowe, D.C. N.Y., 26 F. Supp. 761.

Finding more favorable witness Act does not contemplate that a

compensation proceeding may be reopened whenever any party finds a witness who can testify more favorably for him than his other witnesses have done, but permits a reopening only if there has been a change in conditions or a mistake in a determination of fact.

U.S.—Texas Employers' Ins. Ass'n v. Sheppard, D.C. Tex., 42 F. Supp. 669.

70. N.Y.—Kriegbaum v. Buffalo Wire Works Co., 169 N.Y.S. 307, 132 App. Div. 448, affirmed 121 N.E. 875, 224 N.Y. 621.

71 C.J. p 1445 note 89.

71. Conn.—Fair v. Hartford Rubber Works, 111 A. 193, 95 Conn. 350.

71 C.J. p 1445 note 90.

72. Cal.—Bartlett Hayward Co. v. Industrial Accident Commission, 265 P. 195, 203 C. 522.

71 C.J. p 1445 note 91.

73. Ind.—Indianapolis Pump & Tire Co. v. Surface, 155 N.E. 835, 86 Ind. App. 55.

71 C.J. p 1446 note 93.

74. Ky.—Black Star Coal Co. v. Powers, 68 S.W.2d 30, 252 Ky. 736.

75. Ariz.—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540, 62 Ariz. 464.

the compensation officials may, from time to time, make such modification or change with respect to former awards, as in their opinion may be just, an award for an incorrect or inadequate amount may be reopened.⁷⁶ More specifically, under such statute the case may be reopened if there has been some new development which shows the former award to be inadequate or excessive.⁷⁷ Under a statute providing that if after an award "it shall afterwards develop" that claimant is or was entitled to a higher rate of compensation, he shall receive such higher rate, the quoted words include disclosure of errors of law in connection with the award, and are not limited to changes in physical condition.⁷⁸

§ 855. Nature and Form of Proceedings

In general, while a proceeding to modify an award is not a new proceeding, but is one based on the juris-

diction of the tribunal acquired in the original proceeding, it is different and distinct from proceedings for rehearing or appeal. The procedure set forth in the statutes must be followed.

As a general rule, a proceeding to modify an award is not a new proceeding,⁷⁹ but is one based on the jurisdiction of the board⁸⁰ or court⁸¹ acquired in the original proceeding. It is a continuation⁸² or a reopening⁸³ of the original proceeding. The party seeking a modification does not proceed by an original application for an award.⁸⁴

Rehearings or appeals distinguished. On the other hand, a statutory proceeding to modify, suspend, or terminate an award because of a change of disability, or disability or dependency, is different and distinct from the statutory proceeding for the rehearing of the claim or for appeal from the award apart from changed conditions, if any,⁸⁵ since, while a petition or application to open or

Petition for increase by reason of increased disability is not remedy where award of compensation for partial disability is too low.

N.J.—Cirillo v. United Engineers & Constructors, 185 A. 912, 14 N.J. Misc. 459, reversed on other grounds 198 A. 768, 120 N.J. Law 225, reversed on other grounds 3 A.2d 596, 121 N.J. Law 511.

76. N.Y.—Fish v. Rutland R. Co., 178 N.Y.S. 439, 189 App.Div. 352—Kriegbaum v. Buffalo Wire Works, 169 N.Y.S. 307, 182 App.Div. 448.

Without reference to statute mentioned in text increasing of an award after employee's death was held proper where employee was totally disabled from time of accident to time of his death and payment of partial disability prior to employee's death was inadequate.

N.Y.—McCarty v. U. S. Trucking Corp., 6 N.Y.S.2d 939, 255 App.Div. 741, reargument denied 7 N.Y.S.2d 1018, 255 App.Div. 902, affirmed Cronin v. U. S. Trucking Corp., 23 N.E.2d 538, 281 N.Y. 704.

77. Utah.—Barber Asphalt Corp. v. Industrial Commission, 135 P.2d 266, 103 Utah 371.

78. U.S.—Alaska Indus. Bd. v. Chugach Elec. Ass'n, C.A.Alaska., 245 F.2d 855, reversed on other grounds 78 S.Ct. 735, 356 U.S. 320, 2 L.Ed.2d 795.

Period of increased compensation

Under statute referred to in text, use of word "was" in phrase "is or was entitled to a higher rate of compensation" indicates that period during which a claimant may be entitled to increased compensation includes time between injury and earlier award and negatives idea that increased compensation must be laid to a change in physical conditions since prior award.

U.S.—Alaska Indus. Bd. v. Chugach Elec. Ass'n, supra.

79. Mich.—Tarnow v. Railway Exp. Agency, 50 N.W.2d 318, 331 Mich. 558.

Neb.—**Corpus Juris cited in** Peek v. Ayres Auto Supply, 59 N.W.2d 564, 571, 157 Neb. 363.

N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 23 N.W.2d 26, 74 N.D. 520.

Pa.—Martray v. Munson-McCairns, Com.Pl., 5 Fay.L.J. 120.

71 C.J. p 1446 note 95.

Nature and form of:

Original proceedings for compensation see supra §§ 414-825.

Proceeding to modify agreements for compensation see infra §§ 901-910.

80. Mich.—Tarnow v. Railway Exp. Agency, 50 N.W.2d 318, 331 Mich. 558.

Minn.—Nyberg v. Little Falls Black Granite Co., 256 N.W. 732, 192 Minn. 404.

N.J.—Janvari v. Peter Schweitzer Co., 80 A.2d 367, 13 N.J. Super. 286.

71 C.J. p 1446 note 96.

Continuing jurisdiction see supra § 849.

81. Same court, same proceeding

An application to modify an award in workmen's compensation should be made to the court and in the proceeding in which the award was made.

Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

82. Neb.—Peek v. Ayres Auto Supply, supra.

71 C.J. p 1446 note 97.

83. Minn.—Glassman v. Radtke, 225 N.W. 889, 177 Minn. 555.

N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 23 N.W.2d 26, 74 N.D. 520.

84. Me.—Newell's Case, 118 A. 373, 121 Me. 504.

Reopening of prior application

Where employee had been awarded compensation for injuries sustained in an accident, his subsequent claim for compensation for another injury based on the same accident was required to be remedied by asking the bureau to reopen the prior application and not by new application. N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 23 N.W.2d 26, 74 N.D. 520.

85. Or.—White v. State Industrial Acc. Commission, 96 P.2d 772, 163 Or. 476, rehearing denied 98 P.2d 955, 163 Or. 476.

Proceedings for rehearing see supra § 662.

Petitions distinguished

Employee's petition for compensation for disability continuing after termination of award allowed by Supreme Court in prior opinion was held not "petition for review" within act, especially where employee did not seek to have reviewed any matters determined by supreme court under previous petition.

R.I.—Bernier v. Narragansett Elec. Co., 186 A. 479, 56 R.I. 438.

Mutually exclusive remedies

The remedies provided for by statute authorizing workmen's compensation board to modify, reinstate, suspend, or terminate an award upon petition and proof of change of disability or dependency within one year from date of last payment of compensation, or to review and modify an agreement if it be proved materially incorrect, and statute authorizing board to grant a rehearing within one year from date of an award, are mutually exclusive.

Pa.—Gleyze v. Hale Coal Co., 26 A. 2d 141, 149 Pa. Super. 18.

review a compensation award because of changed conditions is of necessity predicated on the original judgment or award,⁸⁶ the proceeding initiated thereby is essentially a new proceeding based on a new factual situation.⁸⁷ Thus, while the remedy of a claimant who is dissatisfied with an award, and whose condition has not changed, is by an appeal, and not by a petition for a recovery for increased disability,⁸⁸ an employee whose condition has changed is not, by the taking of such an appeal, deprived of the right to proceed by petition for compensation for augmented incapacity.⁸⁹

Where a claimant who is not satisfied with an award for an injury suffered subsequently has another accident and suffers an aggravation of the original injury, he must pursue two remedies.⁹⁰ His remedy, in so far as he is dissatisfied with the original award and seeks greater compensation for the original injury, unchanged, is by petition for rehearing, and appeal;⁹¹ and his remedy for the

injury as aggravated by the later accident must be by a new and separate claim based solely on the later injury.⁹²

Procedure generally. Where the manner in which awards may be modified is specified in the act, the procedure set forth must be followed,⁹³ and no change in an award may be made except in the manner so provided.⁹⁴ Since such proceedings are informal,⁹⁵ procedural niceties need not be strictly adhered to,⁹⁶ although substantive requirements must be fulfilled.⁹⁷ The general practice of the courts need not be followed in such proceedings before a board.⁹⁸

Effect of application; several applications. An application for an award based on changed conditions does not constitute an abandonment of the original application⁹⁹ since the later application does not supersede the original application for compensation.¹ A claimant may make more than one application for the modification of a compensation

86. U.S.—Hardware Mut. Cas. Co. v. Lieberman, D.C.N.J., 39 F.Supp. 243.

N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed, 192 A. 62, 118 N.J.Law 301.

87. U.S.—Hardware Mut. Cas. Co. v. Lieberman, D.C.N.J., 39 F.Supp. 243.

Conn.—Wysocki v. Bradley & Hubbard Co., 154 A. 431, 113 Conn. 170.

N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed, 192 A. 62, 118 N.J.Law 301.

88. N.J.—Ducci v. Kapo Dyeing & Print Works, 23 A.2d 786, 20 N.J. Misc. 47.

89. N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290.

Proceedings in two courts

Applications to decrease or terminate compensation because of a change of condition after the original award may be made to the district court, notwithstanding an appeal from such award is pending in the supreme court.

N.M.—Norvell v. Barnsdall Oil Co., 70 P.2d 150, 41 N.M. 421.

90. Or.—Keefer v. State Industrial Acc. Commission, 135 P.2d 806, 171 Or. 405.

91. Or.—Keefer v. State Industrial Acc. Commission, *supra*.

92. Or.—Keefer v. State Industrial Acc. Commission, *supra*.

93. Conn.—Sudol v. Town of Manchester, 78 A.2d 739, 137 Conn. 484.
Ky.—Aetna Cas. & Sur. Co. v. Snyder, 291 S.W.2d 14.

Mass.—Shershun's Case, 190 N.E. 595, 286 Mass. 379.

71 C.J. p 1446 note 3.

Review of payments

The method fixed by statute by which compensation awarded in pursuance of an order and award may be stopped is on review of payments, when such compensation so awarded may be ended, diminished or increased in accordance with the facts.

Mich.—Grycan v. Ford Motor Co., 289 N.W. 146, 291 Mich. 241.

Application for permission to stop payments

The workmen's compensation act and rule of the industrial commission contemplate that if insurance carrier desires to stop further payment of compensation under a temporary award, application should be made to the commission for permission to do so, whereupon, if there is a disagreement as to right to discontinue, matter will be placed on the calendar for hearing after which if it is determined that carrier is entitled to discontinue payments of total temporary disability, the question of permanent disability or disfigurement is ripe for determination.

S.C.—Halks v. Rust Engineering Co., 36 S.E.2d 852, 208 S.C. 39.

94. Cal.—Larsen v. State Industrial Accident Commission, 13 P.2d 850, 125 C.A. 13.

Conn.—Saddlemire v. American Bridge Co., 110 A. 63, 94 Conn. 618.

Change from partial to total disability

Where claimant was being paid compensation for partial disability under an award, only method by which award could be changed so as to increase compensation to that for

total disability and for additional time was by statute stating that industrial commission might review award and increase compensation on ground of a change in condition of claimant.

N.C.—Murray v. Nebel Knitting Co., 199 S.E. 609, 214 N.C. 437.

95. Ill.—Snowden & McSweeney Co. v. Industrial Commission, 155 N.E. 277, 324 Ill. 423.

96. Conn.—Kowalski v. New York, N. H. & H. R. Co., 153 A. 914, 114 Conn. 393.

Wash.—Goenen v. Department of Labor and Industries, 47 P.2d 991, 132 Wash. 469.

Requirement of petition as not jurisdictional

Question whether proceedings to ascertain a change in compensation claimant's disability subsequent to making of original award should be on formal petition or on rule to show cause is not jurisdictional, but merely procedural.

N.J.—Blaziak v. Eastwood-Nealley Corp., 57 A.2d 558, 26 N.J.Misc. 116.

97. Conn.—Kowalski v. New York, N. H. & H. R. Co., 153 A. 914, 114 Conn. 393.

98. Cal.—Massachusetts Bonding & Ins. Co. v. Industrial Acc. Commission, 168 P. 1050, 176 C. 488.

99. Ind.—Union Drawn Steel Co. v. Thompson, 165 N.E. 258, 89 Ind. App. 380.

Abandonment of claim generally see *supra* § 453.

Change of conditions as ground for modifying award see *supra* § 854.

1. Ind.—Union Drawn Steel Co. v. Thompson, *supra*.

award on the ground of changed conditions,² although, as appears *infra* § 874, he may not have more than one hearing for the identical claimed new condition.

No proceeding necessary. Under a statute to that effect, where the insurer is required to pay the employee, in the case of partial injury, weekly compensation equal to the difference between the average weekly wage before the injury and the average weekly wage thereafter, compensation can be discontinued, when the employee earns more than he was earning before the injury, without the assent of the employee or the approval of the compensation department.³

No waiver of provisions. The provisions for a review for increased incapacity are an integral part of the workmen's compensation acts, and any attempt by the parties to waive their operation is invalid and against public policy.⁴

§ 856. Time for Application and Limitations

a. Time for application in general

2. Ohio.—State ex rel. Shaffer v. Industrial Commission, App., 56 N.E. 2d 698.

3. Mass.—Malignazzi's Case, 90 N.E. 2d 11, 325 Mass. 306.

4. N.J.—Solazco v. Carol, 185 A. 510, 14 N.J.Misc. 435.

Stipulation held not "waiver"

A stipulation under which claimant agreed that department of labor and industries might segregate and deny liability for pre-existing arthritis and infection suffered by the claimant, made in light of reports rendered by medical examiners concerning claimant's condition, was merely a recognition by claimant that in reality his condition was not due to the injury, and was not void as constituting a waiver of future right to compensation for aggravation of an arthritic condition.

Wash.—Le Bire v. Department of Labor and Industries, 128 P.2d 308, 14 Wash.2d 407.

5. Idaho.—Eldridge v. Idaho State Penitentiary, 30 P.2d 781, 54 Idaho 213.

Claim held barred by laches

Miner, who resumed work one month after suffering skull fracture in 1925 and continued until 1931, when he suffered another injury, and made successful claim for temporary disability resulting from first accident, and was afforded opportunity by referee to present claim for permanent disability therefrom, which he failed to do until eight years after first accident, was guilty of laches

barring claim for permanent disability from first accident.

Colo.—U. S. Fidelity & Guaranty Co. v. Industrial Commission, 46 P.2d 752, 97 Colo. 102.

6. Colo.—Employers Mut. Ins. Co. v. Jacoe, 81 P.2d 389, 102 Colo. 515. Idaho.—Eldridge v. Idaho State Penitentiary, 30 P.2d 781, 54 Idaho 213. Mich.—Palchak v. Murray Corp. of America, 28 N.W.2d 295, 318 Mich. 482.

71 C.J. p 1448 note 19.

7. Ky.—Hodgkin v. Webb, 221 S.W. 2d 684, 310 Ky. 745—Clover Fork Coal Co. v. Scoggins, 91 S.W.2d 543, 263 Ky. 424—McIntosh v. John P. Gorman Coal Co., 69 S.W.2d 7, 263 Ky. 160.

Mich.—Tarnow v. Railway Exp. Agency, 50 N.W.2d 313, 331 Mich. 558.

Mo.—Ferguson v. Ozark Distributing Co., 93 S.W.2d 291, 230 Mo.App. 529 —Dewey v. Union Electric Light & Power Co., App., 83 S.W.2d 203 —Miller v. William C. Johnson & Sons Machinery Co., App., 83 S.W. 2d 144.

N.M.—Corpus Juris cited in Norvell v. Barnsdall Oil Co., 70 P.2d 150, 152, 41 N.M. 421.

71 C.J. p 1448 note 20.

Loss of jurisdiction after period

Mo.—Miller v. William C. Johnson & Sons Machinery Co., App., 83 S.W. 2d 144.

Effect of delay on good faith of claim

Employee's delay in filing petition for further compensation may go to

b. Statutes expressly prescribing limitations

a. Time for Application in General

In general, except for statutes expressly prescribing limitations, proceedings to increase, decrease, or terminate compensation may be brought any time within the period for which compensation is allowable for the particular injury, while the commission still has jurisdiction of the matter, general limitation provisions and provisions as to original compensation claims being inapplicable; under some statutes an application may not be made until the elapse of a specified time after the award.

In general, except in so far as there may be applicable statutory provisions expressly specifying some other time within which a proceeding to increase, decrease, or terminate compensation under a prior award must be instituted, as discussed *infra* subdivision b of this section, such a proceeding may, subject to the application of the doctrine of laches,⁵ be instituted at any time⁶ within the period for which compensation is allowable⁷ for the particular injury sustained,⁸ that is, the period for which compensation would have been allowable had the present condition of the claimant existed at the time of the original award,⁹ or until the claimant has received

good faith and integrity of claim and properly may be considered by department of labor and industry in passing on claim in connection with other evidence, but once department takes jurisdiction of injury it retains it to end of compensable period to award such compensation as statute and facts warrant.

Mich.—Giampa v. Chrysler Corporation, 262 N.W. 259, 272 Mich. 327.

8. Pa.—Sneed v. State Workmen's Ins. Fund, 180 A. 90, 118 Pa.Super. 298.

Tex.—Employers' Liability Assur. Corp. v. Best, Civ.App., 101 S.W.2d 391, error dismissed.

71 C.J. p 1448 note 21.

Several injuries

Where award was made to injured employee based on two separate classes of injury, which consisted of one resulting in temporary total incapacity for 38 weeks and other in 24.85 per cent partial permanent loss of hearing of both ears fixed at 24.85 weeks and compensation was awarded for each injury for such period for purposes of the review statute, original award for both injuries should not be separated but should be regarded as a unit award for 62.85 weeks, especially when injuries resulted from single accident.

Kan.—Meredith v. Shawver Graham, Inc., 233 P.2d 750, 171 Kan. 513.

9. Okl.—Wasson v. Tulsa Dairy Supplies, 315 P.2d 773—Oklahoma Ry. Co. v. Alsop, 240 P.2d 760, 205 Okl. 690—State Highway Commission v. State Industrial Commission,¹⁰ 140

the maximum number of weekly payments mentioned in the compensation statute, whether for partial disability or total disability.¹⁰

In other words, the proceeding must be instituted while the commission still has jurisdiction of the subject matter,¹¹ and before the matters involved have been judicially determined and become res judicata,¹² that is, before all the payments provided in the original award have been made and the judgment has been fully discharged,¹³ the jurisdiction of the court being extended by the provision for modification of a compensation judgment only if it is invoked before such time.¹⁴

Proceedings for further compensation have been allowed to be commenced even after the expiration of the compensable period, if the petitioner had not been paid compensation for either total or partial disability up to the end of that period.¹⁵ An application for the modification of an award made after payments under the original award have been completed is timely if otherwise made within the required time.¹⁶

Time before which application may not be made. Under some of the acts no application for a modification may be made before the elapse of a specified time after the original judgment or award¹⁷ unless

P.2d 109, 193 Okl. 593—Behling v. Fox Rig & Lumber Co., 105 P.2d 532, 187 Okl. 682—Skelly Oil Co. v. Harrell, 103 P.2d 88, 187 Okl. 412—Baker v. Indian Min. & Royalty Co., 99 P.2d 1038, 186 Okl. 644.

"Condition of claimant" construed

The phrase "condition of claimant" is used in the section of the compensation act providing that industrial commission's jurisdiction to reopen any cause on an application based on change in condition "shall extend for the maximum period of time measured by the number of weeks for which compensation could have been awarded by the Commission had the condition of claimant existed at the time original award was made thereon," refers to the nature and extent of his disability, attributable to the original injury, on the date of the filing of the motion to reopen. Okl.—Roberson v. Dierks, 116 P.2d 704, 189 Okl. 283.

Allowable period for total permanent disability

Where application by compensation claimant for reopening of compensation proceeding was filed after expiration of three hundred and thirty-five weeks for which compensation had been awarded for partial, permanent disability, but application came within period for which compensation might then have been allowed or justified for total, permanent disability, and at the time the maximum period for which compensation was allowable was ten years after date of injury or a maximum sum of seven thousand five hundred dollars was allowable, application was within statutory period. Ky.—Hodgkin v. Webb, 221 S.W.2d 664, 310 Ky. 745.

Proceeding held too late

Where in October, 1928, employee sustained injuries to feet, industrial commission was without jurisdiction to reopen cause on application filed in May, 1934, based on change of condition, where, had condition of employee existed at time original award was made in July, 1929, the

number of weeks for which compensation would have been awarded starting at date of that order would have been two hundred seventeen and one-half weeks.

Okl.—Earl W. Baker & Co. v. Morris, 54 P.2d 353, 176 Okl. 68.

Proceeding held not barred

Okl.—Graner Const. Co. v. Brandt, 68 P.2d 788, 180 Okl. 221—Wilcox Oil & Gas Co. v. Satterfield, 63 P.2d 696, 178 Okl. 418.

10. Mich.—Broadnax v. Ford Motor Co., 13 N.W.2d 829, 308 Mich. 305—Willard v. Glebe Housewrecking Co., 292 N.W. 558, 294 Mich. 42—Magnuson v. Oliver Iron Mining Co., 259 N.W. 317, 270 Mich. 482.

Total disability during payments for partial disability

Where employer and employee had complied with awards for disability and, under the last award, payments for partial disability were made and accepted until expiration of five hundred-week period, the department was without authority to award additional compensation for total disability during a part of the five hundred-week period upon employee's petition filed after such period had expired and a showing that total disability existed during a part of the time for which payments for partial disability had been received.

Mich.—Kiviniemi v. Quincy Min. Co., 282 N.W. 866, 286 Mich. 680.

Award made after such period

A statute limiting the number of weeks for which compensation may be paid in the case of a total disability does not bar an application for the modification of an award made more than such number of weeks after the injury was sustained. Mich.—Lakso v. Munro Iron Mining Co., 220 N.W. 728, 243 Mich. 261.

11. Ga.—U. S. Casualty Co. v. Smith, 133 S.E. 851, 162 Ga. 130.

Ohio.—State ex rel. Cundiff v. Industrial Commission, 193 N.E. 345, 128 Ohio St. 636.

Tenn.—Corpus Juris cited in Nelson v. Cambria Coal Co., 158 S.W.2d

717, 720, 178 Tenn. 389, 165 A.L.R. 1, reheard 160 S.W.2d 412, 178 Tenn. 389, 165 A.L.R. 1.

12. Ga.—U. S. Casualty Co. v. Smith, 133 S.E. 851, 162 Ga. 130.

Tenn.—Corpus Juris cited in Nelson v. Cambria Coal Co., 158 S.W.2d 717, 720, 178 Tenn. 389, 165 A.L.R. 1, reheard 160 S.W.2d 412, 178 Tenn. 389, 165 A.L.R. 1.

After time for appeal

Where award after full hearing denying compensation was unappealed from, industrial commission could not entertain another application for compensation for same injury, based on change in condition filed after time for appeal.

Ga.—Aetna Life Insurance Co. v. Davis, 157 S.E. 449, 172 Ga. 258.

Perry v. American Mut. Liability Ins. Co., 15 S.E.2d 471, 65 Ga.App. 130.

13. Tenn.—Nelson v. Cambria Coal Co., 160 S.W.2d 412, 178 Tenn. 389, 165 A.L.R. 1.

14. Tenn.—Nelson v. Cambria Coal Co., supra.

15. Mich.—Tarnow v. Railway Exp. Agency, 50 N.W.2d 318, 331 Mich. 558.

Eleven years

Where injured employee was paid compensation for injury in 1938 the jurisdiction of the compensation commission was not divested by employee's resumption of lighter work and the abatement of compensation during such employment but continued so that the commission had jurisdiction to review petition for further compensation filed in 1949.

Mich.—Tarnow v. Railway Exp. Agency, supra.

16. Conn.—Henderson v. Mazzotta, 157 A. 67, 113 Conn. 747.

71 C.J. p 1449 note 29.

17. La.—Brown v. International Paper Co., App., 58 So.2d 557—McClung v. Delta Shipbuilding Co., App., 34 So.2d 70.

Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

71 C.J. p 1450 note 31.

there are special circumstances.¹⁸ However, in the absence of provision to that effect, the commission has the power to reopen a compensation cause, and award additional compensation, even though the term of the prior award, that is, the period for which compensation had previously been awarded, has not expired.¹⁹ A petition for review of an award for a change of condition may be dismissed if it is prematurely brought.²⁰

Applicability of limitations on original claims. In general, the application to increase, decrease, or terminate compensation under a prior award, not being an original proceeding, as discussed supra § 855, is not affected by the provisions of the act fixing the time within which original proceedings for compensation or death must be instituted,²¹ and such proceeding need not be instituted within the time required of original claims.²²

Applicability of general limitation period. A

limitation provision in the code applicable to modification of judgments generally does not apply to a proceeding to modify an award under the compensation act.²³ Certainly, such an action or proceeding is not barred by the statutes of limitation applicable to actions generally.²⁴ However, it has been held, by analogy to the general statute of limitation, that claimant will not be allowed to recover for a period prior to the filing of the petition longer than the period specified by the general statute,²⁵ so that claimant may recover for as much of the unexpired compensable period as falls within statutory period prior to the filing of the petition.²⁶

Claims for other injuries. The petition for increased disability may include injuries resulting from the same accident which had not been alleged in the original claim petition, even though the statute of limitations period for original claims had expired,²⁷ at least if the matters for which the ad-

18. La.—Lindsey v. Twin City Motor Co., App., 181 So. 598.

Exceptional cases

In exceptional cases, the court of appeal may reserve to defendant in compensation suit right to reopen proceedings immediately, rather than waiting for statutory period of six months from finality of judgment of court of appeal; and where original injury was trivial, and prolongation of disability was partially due to disuse of injured hand by employee and, with reasonable effort toward rehabilitation, disability should disappear or be greatly minimized within relatively short period, which in fact should have expired at time of trial, plaintiff would be awarded compensation for temporary total compensation disability for certain period, and both parties would have right to reopen proceedings at once to prove duration or extent of continuing disability beyond date allowed.

La.—Fontenot v. Myers, App., 93 So. 2d 245.

19. Okl.—Stanolind Pipe Line Co. v. Giddens, 58 P.2d 146, 177 Okl. 193—Kadane Const. Co. v. Lee, 55 P.2d 1081, 176 Okl. 356.

20. Petition held not subject to dismissal

Petition for review of an award filed by an employee while in the army although he had no present claim for compensation, but filed to protect any possible claim he might have after discharge, was not subject to dismissal as premature where such action neither deprived the employer of any substantial rights, prevented it from making its defense, nor caused it to suffer any injustice. R.I.—Mondillo v. Ward Baking Co., 57 A.2d 447, 73 R.I. 478.

21. Ariz.—Foutz v. Phelps Dodge Corp., 236 P.2d 42, 72 Ariz. 350.

Ga.—Automatic Sprinkler Corp. of America v. Rucker, 78 S.E.2d 609, 87 Ga.App. 375—Campbell Coal Co. v. Render, 173 S.E. 245, 48 Ga.App. 547.

Ind.—Ben Welf Truck Lines v. Bailey, 22 N.E.2d 887, 107 Ind.App. 52. N.M.—Norvell v. Barnsdall Oil Co., 70 P.2d 150, 41 N.M. 421.

Ohio.—Kaiser v. Industrial Commission of Ohio, 26 N.E.2d 449, 136 Ohio St. 440.

71 C.J. p 1447 note 13.

Further disability as extending time for instituting original proceeding "or compensation see supra § 440. Time for:

Application and limitations as to proceedings to modify agreements see infra § 904.

Filing claims see supra §§ 468-482. Giving notice of injury see supra § 449.

Instituting proceedings generally see supra §§ 436-444.

22. Mo.—Wheeler v. Missouri Pac. R. Co., 42 S.W.2d 579, 328 Mo. 888. 71 C.J. p 1447 note 14.

23. N.M.—Norvell v. Barnsdall Oil Co., 70 P.2d 150, 41 N.M. 421. 71 C.J. p 1447 note 17.

24. Mich.—Tarnow v. Railway Exp. Agency, 50 N.W.2d 818, 331 Mich. 558—Hurst v. Ford Motor Co., 267 N.W. 573, 276 Mich. 405—Wilson v. Tittle Bros. Packing Co., 257 N.W. 873, 269 Mich. 501—Rowe v. Consumers' Power Co., 255 N.W. 749, 268 Mich. 162.

Tex.—Texas Employers Ins. Ass'n v. Guidry, 99 S.W.2d 900, 128 Tex. 433.

25. Mich.—Sweet v. Eddy Paper Corp., 6 N.W.2d 883, 303 Mich. 492.

26. Mich.—Sweet v. Eddy Paper Corp., supra.

Award limited to six years prior to petition

Employee was entitled to compensation from the beginning of six-year period before filing of claim to the end of the five hundred-week compensable period.

Mich.—Scalzo v. Family Creamery Co., 14 N.W.2d 505, 308 Mich. 587—Sweet v. Eddy Paper Corp., 6 N.W. 2d 883, 303 Mich. 492.

27. N.J.—Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division, 78 A.2d 403, 11 N.J.Super. 338.

Contra Ponck v. American Steel Foundries, 22 A.2d 814, 19 N.J.Misc. 640.

Neurological disability

Workmen's compensation claimant who had been given partial permanent orthopedic disability was not barred from later claiming for neurological disability by her failure to include claim therefor in first claim, regardless of whether she proceeded on theory that neurosis developed since first award or that it existed at time of first award but had since increased.

N.J.—Florak v. Board of Ed., City of Newark, 87 A.2d 381, 18 N.J.Super. 425.

Same trauma, new effect

Where workmen's compensation claimant was awarded partial permanent disability and subsequently made claim for increase in disability based on a different injury, the allegation of disability in second petition would not be new and distinct cause of action barred by two-year statutory limitation period but merely a new and distinct effect or injury flowing from the same trauma.

ditional compensation was awarded were unknown at the time the original award was made.²⁸ However, in other jurisdictions a claim for another injury sustained at the outset is an original claim, although not considered in or covered by a prior award, and is barred if not filed within the time required for the filing of an original claim.²⁹ In still other jurisdictions the rule is that an injury which existed and was known at the time of the original proceeding is within the limitations period for the original claim, since it is not a new or changed condition;³⁰ and, where a claimant, at the time an award is made for accidental injuries, knows of injuries other than those for which he is being compensated, and exercises his judgment as to the seriousness of such other injuries, and neglects to give notice thereof or assert a claim therefor within the statutory period, he cannot thereafter recover for such undisclosed injuries.³¹ Certainly, a claim for an injury not related to the injury for which an award has been made must be made within the time required for original claims;³² and in the case of a loss or loss of use of an organ or member in a second accident, after a similar loss in a prior acci-

dent, the claim therefor must be made within the statutory period for original claims generally, notwithstanding provision is made for special payments in such circumstances.³³

b. Statutes Expressly Prescribing Limitations

- (1) General considerations
- (2) Limitation provisions
- (3) Tolling of statute

(1) General Considerations

Statutes expressly prescribing limitations on the institution of proceedings to modify an award are frequently limitations on the jurisdiction of the board or commission. Authorities differ on whether the statutes may operate retroactively.

Where statutes expressly provide for the making of applications for an increase, decrease, termination, or reinstatement of compensation under a prior award within a time specified, such limitation is generally a limitation on the jurisdiction of the compensation board or commission, and there must be a compliance with the statutes in this respect or the application cannot be entertained,³⁴ except in so far

N.J.—*Florek v. Board of Ed., City of Newark*, *supra*.

28. N.D.—*Schmidt v. North Dakota Workmen's Compensation Bureau*, 13 N.W.2d 610, 73 N.D. 245, opinion supplemented 23 N.W.2d 26, 74 N.D. 520.

Neck injury developing after sprained ankle

Report of fall resulting in sprained ankle which was made within year from date of fall and for which compensation was awarded was held to permit additional application for compensation after lapse of one year from date of fall, for injury to neck growing out of same accident, disabling effect of which was unknown to claimant within statutory one year period for presentment of claims.

Wash.—*Crabb v. Department of Labor and Industries*, 58 P.2d 1025, 186 Wash. 505, 105 A.L.R. 964.

29. Mich.—*Stackhouse v. General Motors Corp., Ternstedt Mfg. Division*, 287 N.W. 452, 290 Mich. 249.

Rule applicable to specific or permanent injury or impairment
Mich.—*Stackhouse v. General Motors Corp., Ternstedt Mfg. Division*, *supra*.

30. Ohio.—*New Pittsburgh Coal Co. v. Stillwagner*, 191 N.E. 709, 47 Ohio App. 189.

Claim held barred

Where claimant in October, 1927, received last payment of award for injury to right arm occurring in July, 1925, and no mention was made of

condition of claimant's left hand until July, 1933, industrial commission did not abuse its discretion in thereafter denying claimant's application for modification of award sought on ground that, at time of injury to right arm, her left hand was of no industrial value and that therefore she had been permanently and totally disabled since date of injury to right arm.

Ohio.—*State ex rel. White v. Industrial Commission of Ohio*, App., 40 N.E.2d 453.

Claim held not barred

An injured employee, who, after being awarded compensation and more than two years after the original injury, filed an application for modification of the award in order to secure compensation for subsequently developing disability directly caused by injury sustained in the original accident but not described in the original application was not barred of his right to continue to participate in the state insurance fund by the section of the compensation act prescribing that claims for compensation for injuries are barred unless application is made to the industrial commission within two years after the injury.

Ohio.—*Kaiser v. Industrial Commission of Ohio*, 26 N.E.2d 449, 138 Ohio St. 440.

31. Okl.—*Tomberlin v. General Am. Transp. Corp.*, 295 P.2d 811—*Finance Oil Co. v. James*, 109 P.2d 813, 188 Okl. 372—*Barnes v. Indian*

Territory Illuminating Oil Co., 41 P.2d 633, 170 Okl. 520.

32. Okl.—*Cagle v. Federal Mining & Smelting Co.*, 240 P. 617, 112 Okl. 247.

71 C.J. p 1447 note 15.

Claims for separate and distinct injuries see *supra* § 463.

33. Loss of vision of both eyes

Employee who had suffered total loss of vision of left eye was held not entitled to recover special additional compensation for permanent total disability through total loss of vision of right eye, where employee filed no claim for compensation under second accident until more than two years thereafter, since such special payments are "compensation" in addition to schedule compensation for second disability, and claim therefor must be filed within statutory time.

N.Y.—*Martin v. Rudolph Wurlitzer Co.*, 293 N.Y.S. 105, 249 App.Div. 321.

34. Cal.—*Broadway-Locust Co. v. Industrial Acc. Commission*, 206 P. 2d 856, 92 C.A.2d 287.

Fla.—*Davis v. Combination Awning & Shutter Co.*, 62 So.2d 742.

Ga.—*Orvin v. National Sur. Corp.*, 74 S.E.2d 489, 87 Ga.App. 551, reversed on other grounds *National Sur. Corp. v. Orvin*, 76 S.E.2d 705, 209 Ga. 378, opinion conformed to 78 S.E.2d 91, 88 Ga.App. 785, vacated 78 S.E.2d 91, 88 Ga.App. 785—*Kirkland v. Employers Liability Assur. Corp.*, 25 S.E.2d 723, 69 Ga. App. 433.

as cases may fall within express exceptions set out in the statutes.³⁵ However, some provisions have been construed as constituting not a jurisdictional limitation, but rather a limitation of the right of in-

terested parties to receive the benefits of the act,³⁶ or they have been construed to apply to the right of the claimant to make such an application,³⁷ so that the provisions do not limit the right of the admin-

Idaho.—*Egus v. Triumph Min. Co.*, 232 P.2d 136, 71 Idaho 354—*Wanke v. Ziebarth Const. Co.*, 202 P.2d 384, 69 Idaho 64.

Ind.—*Hedrick v. Schenley Distillers, Inc.*, 133 N.E.2d 884, 125 Ind.App. 685.

Kan.—*Meredith v. Shawver Graham, Inc.*, 233 P.2d 750, 171 Kan. 513.

La.—*Pourclau v. Board of Com'rs of Port of New Orleans, App.*, 12 So. 2d 36.

Md.—*Dashiell v. Holland Maide Candy Shops*, 188 A. 29, 171 Md. 72.

Mass.—*Strycharz' Case*, 197 N.E. 9, 291 Mass. 212.

Mo.—*Ferguson v. Ozark Distributing Co.*, 117 S.W.2d 399, 233 Mo.App. 68.

N.Y.—*Sager v. General Elec. Co.*, 55 N.Y.S.2d 138, 269 App.Div. 801.

N.C.—*Paris v. Carolina Builders Corp.*, 92 S.E.2d 405, 244 N.C. 35.

Ohio.—*State ex rel. Allied Wheel Products, Inc. v. Industrial Commission*, 139 N.E.2d 41, 166 Ohio St. 47—*State ex rel. Fruehauf Trailer Co. v. Coffinberry*, 95 N.E.2d 381, 154 Ohio St. 241—*State v. Ohio Stove Co.*, 93 N.E.2d 291, 154 Ohio St. 27—*State ex rel. Fields v. Industrial Commission of Ohio*, 8 N.E. 2d 563, 132 Ohio St. 449.

Okl.—*Oklahoma Ry. Co. v. Alsop*, 240 P.2d 760, 205 Okl. 690—*Roberson v. Dierks*, 116 P.2d 704, 189 Okl. 233—*Behling v. Fox Rig & Lumber Co.*, 105 P.2d 532, 187 Okl. 682—*Earl W. Baker & Co. v. Morris*, 54 P.2d 353, 176 Okl. 68.

Pa.—*Bordick v. John Conlon Coal Co.*, 19 A.2d 536, 144 Pa.Super. 522—*Ernst v. Sassaman*, 178 A. 317, 117 Pa.Super. 353.

R.I.—*Julian v. Jules Desurmont*, 183 A. 850.

S.C.—*Wallace v. Campbell Limestone Co.*, 17 S.E.2d 309, 198 S.C. 196.

Tex.—*American Indemnity Co. v. Boatner, Civ.App.*, 86 S.W.2d 239, error dismissed.

W.Va.—*Turner v. State Compensation Com'r*, 17 S.E.2d 617, 123 W.Va. 673. 71 C.J. p 1448 note 24, p 1449 note 25.

Requirement as mandatory

Fla.—*Manrose v. Miami Shipbuilding Corp.*, 23 So.2d 733, 156 Fla. 402, 771.

Pa.—*Horton v. West Penn Power Co.*, 180 A. 56, 119 Pa.Super. 465.

Claims or applications held timely

Where both claimant's original and amended application for workmen's compensation were filed within three years after injury, and amended application was treated by employer, compensation carrier and chairman of Alaska Industrial board as request for an increased rate of compensation over that then in effect, claimant

made timely claim for increased compensation even though claim was not filed subsequent to decision establishing the lower rate of compensation. *U.S.—Alaska Indus. Bd. v. Chugach Elec. Ass'n, C.A.Alaska*, 245 F.2d 855, reversed on other grounds 78 S.Ct. 735, 356 U.S. 320, 2 L.Ed.2d 795.

35. N.Y.—*Antoniazzi v. City of New York*, 75 N.Y.S.2d 917, 273 App.Div. 835.

Cases held not within exceptions

(1) Under statute authorizing the workmen's compensation board to entertain applications to reopen claims more than seven years after accident, except where claim had been disallowed after a trial on merits, or other disposition of claim without an award after party had been given due notice of hearings, where in one case issue of employee's causal relationship was presented, contested, and decided adversely to claimant, and in another case claimant had been given due notice for four scheduled hearings and he failed to appear at any or press claim, workmen's compensation board had no jurisdiction to entertain application to reopen these claims, made thirteen and eleven years after date of injuries.

N.Y.—Kaplan v. Wirth & Birnbaum, 92 N.E.2d 919, 301 N.Y. 121—*Houston v. William L. Martha Co.*, 92 N.E.2d 919, 301 N.Y. 121.

(2) Where workmen's compensation case had been closed without an award for nonappearance of claimant, the workmen's compensation board had no jurisdiction to grant a reopening, and could not make an award against special fund for reopened cases ten years after original accident because of claimed continuing disability.

N.Y.—Bouchhaart v. Interstate Motor Freight System, 144 N.Y.S.2d 866, 286 App.Div. 1044.

(3) Where claimant, who was injured in 1929, was paid compensation to 1934, at which time compensation board approved lump-sum settlement and case was closed, and case was reopened in 1943, and board found that claimant had suffered further accidental injuries while working for other employers, and that latter were responsible for fifty per cent of claimant's total disability, award of compensation for the other fifty per cent, which was assessed against special fund for reopened cases, more than eighteen years after date of injury and more than eight years from date of last compensation payment was improper.

N.Y.—Likepittles v. Donner Steel Co., 106 N.Y.S.2d 146, 273 App.Div. 443.

Cases held within exceptions

(1) Under statutes prohibiting reopening of workmen's compensation case against special fund after lapse of seven years from date of injury or death if claim has been disallowed after trial on merits, but permitting liability of fund if claim has been previously disallowed or otherwise disposed of without award in any other manner, where employee filed claim almost eight years after injury and claim was dismissed by referee on ground that it was barred by statute of limitations, such dismissal was not "disallowance after trial on merits" and award could be made for injury.

N.Y.—Ennis v. Kennedy Valve Mfg. Co., 125 N.Y.S.2d 535, 282 App.Div. 971.

(2) Where claimant was injured in January 1934 and an award was made for three and one half weeks disability ending June 18, 1934, case was closed on September 5, 1935 and case was reopened February 27, 1942, statute regarding continuing jurisdiction of workmen's compensation board and imposing limitation was not applicable since award was made at earlier hearing, and, therefore, award payable from special fund for reopened cases was proper.

N.Y.—Antoniazzi v. City of New York, 75 N.Y.S.2d 917, 273 App.Div. 835.

(3) Reopening of compensation case after death of deceased employee's father, nine years after award was made to father and notice of award had been marked closed, and allowing compensation to employee's mother at rate previously paid to father, was not abuse of discretion.

N.Y.—McNeill v. New York Power & Light Corp., 292 N.Y.S. 604, 249 App.Div. 835.

(4) Payment from special fund for reopened cases generally see *supra* § 837.

Case closing held interlocutory, not final

Where accident happened in 1939, but case was reopened in 1945, and its closure on Jan. 15, 1947, by a referee was only an interlocutory determination subject to review by the compensation board, case was not definitely closed on that date so as to preclude award.

N.Y.—Barnes v. New York World's Fair 1939, 97 N.Y.S.2d 355, 277 App. Div. 819.

36. Iowa.—*Secrest v. Galloway Co.*, 30 N.W.2d 793, 239 Iowa 168.

37. Wash.—*Perry v. Department of Labor and Industries*, 292 P.2d 866,

istrative officials to reopen claims on their own motion even after the expiration of the stated period.³⁸

Applicability of statutes; retroactivity. While it has been held that the statutes of limitation as to the right to modify an award are substantive in nature and not retroactive,³⁹ so that the period of limitation applicable to a particular application to modify a compensation award depends on the provisions of the statute in effect at the time the original compensation claim accrued,⁴⁰ or during the continuance of the right under such statutes,⁴¹ it has also been held that such limitation is procedural in character, so that it may be retroactive in its operation,⁴² or that, even though it is not procedural, it may op-

erate as to an existing disability at the time of its enactment.⁴³

Liberal construction for claimant. It has been held that the provisions relating to limitations of time during which further awards can be made should be given a liberal construction in favor of the claimant.⁴⁴

Circumvention of statutes by board or commission. Where by the statute the board is given continuing jurisdiction to modify its awards without any time restrictions for the making of applications therefor, the board is without power to deprive itself of such jurisdictions by providing in any award that application for a modification thereof must be

48 Wash.2d 205—*Smith v. Department of Labor and Industries*, 113 P.2d 57, 8 Wash.2d 587—*Hoff v. Department of Labor and Industries of Washington*, 88 P.2d 419, 198 Wash. 257—*Nagel v. Department of Labor and Industries*, 66 P.2d 318, 189 Wash. 631—*Botica v. Department of Labor and Industries*, 52 P.2d 332, 184 Wash. 573—*Cox v. Department of Labor and Industries*, 32 P.2d 570, 177 Wash. 529.

38. Wash.—*Smith v. Department of Labor and Industries*, 113 P.2d 57, 8 Wash.2d 587.

39. Mich.—*Tarnow v. Railway Exp. Agency*, 50 N.W.2d 318, 331 Mich. 558.

40. Mich.—*Tarnow v. Railway Exp. Agency*, supra.
71 C.J. p 1446 note 11 [a].

Rules under different statutes compared

Compensation claims accruing under 1935 compensation act should be made as therein provided and applications to modify may be made within two years from date of injury and if claim accrues after effective date of 1941 act, then applications to modify should be made at any time prior to one year after date of last payment.

Fla.—*Daytona Beach Boat Works v. Spencer*, 15 So.2d 256, 153 Fla. 540.

Injuries suffered before and after enactment of statute

Employee who suffered two injuries, one before and other after enactment of statute limiting applications for additional compensation in permanent disability cases to one year after last payment under previous award, could file, after limitation as to second injury, application for additional compensation based on increased disability resulting from original injury.

W.Va.—*James v. Workmen's Compensation Appeal Board*, 185 S.E. 909, 117 W.Va. 493.

41. Claim already barred not reopened

Statute extending time for application for modification of compensation award from within one year to within three years after final award was not retroactive so as to permit reopening of claim barred by one-year limitation and to permit claimant to apply for further compensation.

Md.—*Holton v. Standard Sanitary Mfg. Co.*, 189 A. 194.

Statute applicable only to subsequent reports

The statute requiring compensation claim based on change in condition to be filed within two years after industrial board is notified of final payment of the claim is applicable only where final reports of payments were made after its passage.

Ga.—*Maryland Cas. Co. v. Posey*, 199 S.E.2d 543, 58 Ga.App. 723.

42. N.Y.—*Sager v. General Elec. Co.*, 55 N.Y.S.2d 138, 269 App.Div. 801.

Wash.—*Donati v. Department of Labor and Industries*, 211 P.2d 503, 35 Wash.2d 151—*Cox v. Department of Labor and Industries*, 32 P.2d 570, 177 Wash. 529.

Period shortened by amendment

A petition filed after 1939, to set aside a final compensation receipt executed in 1938, was not governed by 1937 provision in workmen's compensation act allowing six hundred weeks from date of injury to file such petition, but was governed by 1939 amendment to provision limiting time for filing such petition to two years after execution of final receipt, and hence petition was filed too late, notwithstanding receipt was given before effective date of 1939 amendment.

Pa.—*Ketzel v. Hammermill Paper Co.*, 48 A.2d 89, 159 Pa.Super. 462—*Hartman v. Pennsylvania Salt Mfg. Co.*, 38 A.2d 431, 155 Pa.Super. 86—*Bertges v. Armour & Co. of Delaware*, 27 A.2d 422, 149 Pa.Super. 123.

Statute held not one of nonclaim

The statute imposing a three-year

limitation on claim of injured workman for aggravation of injuries is not a statute of nonclaim so as to destroy workman's right when the time period elapses, but is only remedial, and hence amendment thereof providing a five-year limitation on such claims does not deny due process.

Wash.—*Lane v. Department of Labor and Industries*, 151 P.2d 440, 21 Wash.2d 420.

Claims barred under former statute

Claims of injured workmen, for compensation for aggravation of injuries for which they had previously received awards, could properly be brought under the act providing a five-year limitation for such claims after establishment of right to compensation and amending previous act providing for three-year limitations for such claims, where claims were timely brought under later act, notwithstanding claims were barred by the three-year limitation period when the later act became effective which operated retroactively.

Wash.—*Lane v. Department of Labor and Industries*, supra.

Sufficiency of time since enactment

Where act, which required workmen's compensation claimants to file claim for aggravation within five years after termination of compensation, became effective June 6, 1951, and was approved by governor on March 13, 1951, claimant whose claim had been closed June 28, 1946, had reasonable time in which to file claim in view of fact that time should be computed from day when new law was passed and not from time when it took effect.

Wash.—*Pape v. Department of Labor & Industries*, 264 P.2d 241, 43 Wash. 2d 736.

43. Or.—*Colvin v. State Indus. Acc. Commission*, 253 P.2d 910, 197 Or. 401.

44. W.Va.—*Wilkins v. State Compensation Com'r*, 198 S.E. 869, 120 W.Va. 424.

made within a specified time.⁴⁵ Conversely, a board, bureau, or commission cannot undertake to forestall or circumvent the statutory provisions limiting the time within which an award may be reviewed for a change in conditions,⁴⁶ as by undertaking to retain or reserve jurisdiction for a specified time pending future developments.⁴⁷

Original proceeding not determined. Where the original proceeding has never been finally determined, the proceeding to increase or modify the award therein, because of a change of condition, is not barred by the statutory period of limitation on such proceeding.⁴⁸ On the other hand, where a claimant had not commenced the original proceeding within the proper time therefor, and no compensation had been paid or agreed to, he cannot make an application for new and further disability, under the time limitations applicable to such an application.⁴⁹

Waiver. The bar of the statute requiring an application for an increase, diminution, or termina-

tion of compensation to be made within a specified period may be waived,⁵⁰ and the right to object to a late filing of the application may be lost by waiver where the necessary elements of waiver are present.⁵¹ In some of the jurisdictions requiring the proceedings to be instituted within a specified time, a failure to plead limitations as a defense,⁵² or to present the defense to the commission before the submission of the cause,⁵³ constitutes a waiver thereof. However, it has also been held that the question whether the proceeding was too late is present throughout the entire proceeding, so that the court may pass on it, even though it is not specifically raised in the pleadings.⁵⁴

Amendment of application. In any event, where an application for additional compensation, or otherwise to modify an award, is timely filed, an amendment thereof may be allowed after the expiration of the period of limitation, where the amendment makes no substantive change in the action as timely instituted.⁵⁵

45. Utah.—McLaren v. Industrial Commission, 18 P.2d 640, 81 Utah 380.

Wyo.—Corpus Juris cited in Mustanen v. Diamond Coal & Coke Co., 62 P.2d 287, 290, 50 Wyo. 462.

Continuing jurisdiction of board see supra § 849.

46. Holding petition in abeyance

Workmen's compensation bureau was not justified in holding in abeyance a petition filed by disabled employee for purpose of forestalling statutory two years limitation of time for filing of petition for further benefits after employer's last payment of weekly compensation for temporary and total permanent disability, since bureau has no power to delete statutory limitation of time for compensation petition.

N.J.—Diehl v. New Jersey Power & Light Co., 66 A.2d 563, 4 N.J.Super. 175.

47. S.C.—Keeter v. Clifton Mfg. Co., 82 S.E.2d 520, 225 S.C. 389.

48. File improperly closed by insurance carrier

Where claim had never reached final hearing and neither permanent disability nor disfigurement had ever been considered, but insurance carrier, without seeking permission of industrial commission and without notice to claimant, closed its file after last payment of compensation for temporary total disability, proceedings to secure further compensation instituted more than a year after the last payment were not barred.

S.C.—Halks v. Rust Engineering Co., 86 S.E.2d 852, 208 S.C. 39.

49. Cal.—American Motorists Ins. Co. v. Industrial Acc. Commission, 48 P.2d 721, 9 C.A.2d 66—Kauffman v. Industrial Accident Commission, 174 P. 690, 37 C.A. 500.

50. Ga.—Hartford Acc. & Indem. Co. v. Garland, 59 S.E.2d 560, 81 Ga. App. 687.

51. Letters held not to constitute waiver stipulation

Letters from employers' compensation insurance carrier to deceased employee's widow, stating merely that carrier was forwarding to deputy compensation commissioner request for permission to suspend further payments of death benefits awarded widow until dissolution of her prior marriage to another than such employee could be established, was too vague to constitute intentional relinquishment of known right, as required to waive statutory one-year limitation of time for filing of widow's application to reopen case on showing of annulment of prior marriage.

U.S.—Tatum v. Cardillo, C.A.N.Y., 208 F.2d 955.

52. Cal.—Western Pipe & Steel Co. v. Industrial Accident Commission of California, 14 P.2d 530, 126 C.A. 225.

71 C.J. p 1450 note 38. Necessity for pleading see infra § 859.

53. Cal.—Pullman Co. v. Industrial Acc. Commission, 170 P.2d 10, 28 C.2d 379.

54. Pa.—Zerby v. Reading Co., 189 A. 681, 125 Pa.Super. 397.

55. Ohio.—State ex rel. Allied Wheel Products, Inc. v. Industrial Commission, 139 N.E.2d 41, 166 Ohio St. 47.

Inclusion of citation of regulation

In workmen's compensation proceeding for additional compensation for violation of a specific safety requirement, where application for an additional award was filed within time limited by statute but erroneously referred to specific regulations which did not become effective until after happening of accident, there was no abuse of discretion in allowing amendment of application after expiration of two-year limitation period so as to include citation to effective specific safety requirement which was almost identical in wording with later previously cited regulation.

Ohio.—State ex rel. Allied Wheel Products, Inc. v. Industrial Commission, supra.

Relation back of amendment

Where claimant seeking to have workmen's compensation case reopened was given time to obtain proper medical report to present with his application, and he presented such report and made it a part of his application to reopen, obtaining and filing of report amounted to no more than an amendment of his application; and the amendment, having in no manner changed claim, or relief requested, related back to date of filing of application.

Okla.—Wasson v. Tulsa Dairy Supplies, 315 P.2d 773.

(2) Limitation Provisions

Statutes expressly providing a period of limitation within which a proceeding for an increase, decrease, or termination of compensation under a prior award may be instituted, vary widely as to period of limitation, when the period begins to run, and in other respects.

Under statutes expressly providing a period of limitation within which a proceeding for an increase, decrease, or termination of compensation under a prior award may be instituted, the period of

limitation and the time when it begins to run varies with the terms of the applicable statute.⁵⁶ Thus, depending on the particular statute, a proceeding to increase compensation because of changed conditions or other grounds must be instituted within a specified time after the last payment of compensation,⁵⁷ generally one year,⁵⁸ two years,⁵⁹ or three years;⁶⁰ or within a specified period from the date the board is notified of the final payment of the claim;⁶¹ or within a specified period from the date

56. Fla.—Daytona Beach Boat Works v. Spencer, 15 So.2d 256, 153 Fla. 540.

71 C.J. p 1449 note 26.

57. S.C.—Wallace v. Campbell Limestone Co., 17 S.E.2d 309, 198 S.C. 196.

58. N.C.—Paris v. Carolina Builders Corp., 92 S.E.2d 405, 244 N.C. 35—Knight v. Ford Body Co., 197 S.E. 563, 214 N.C. 7.

S.C.—Wallace v. Campbell Limestone Co., 17 S.E.2d 309, 198 S.C. 196.

Va.—J. A. Jones Const. Co. v. Martin, 94 S.E.2d 202, 198 Va. 370.

Under Longshoremen's and Harbor Workers' Act

(1) The rule stated in the text obtains.

U.S.—Ocean Acc. & Guarantee Corp. v. Lawson, C.C.A.Fla., 135 F.2d 865.

Assum v. McManigal, D.C.Ohio, 98 F.Supp. 31.

(2) Where claims examiner's memorandum of conference with deceased employee's widow six days before deputy compensation commissioner's rejection of her application to reopen her proceeding for compensation following rescission of award of compensation to her showed conclusively that she was then informed of her right to take action for further consideration of her claim within year from date of rejection order and she retained counsel within two months thereafter, no undue hardship was imposed on her by operation of statutory one-year limitation of time to file application.

U.S.—Tatum v. Cardillo, C.A.N.Y., 208 F.2d 955.

In Florida

(1) The rule stated in the text obtains.

Fla.—Superior Home Builders v. Moss, 70 So.2d 570—Manrose v. Miami Shipbuilding Corp., 23 So.2d 733, 156 Fla. 402, 771—Daytona Beach Boat Works v. Spencer, 15 So.2d 256, 153 Fla. 540.

(2) The rule that workmen's compensation act should be given broad and liberal construction in favor of compensation claimant does not require that provision authorizing industrial commission to review its

order rejecting claim at any time within year thereafter on showing of change in condition or mistake in determination of fact be interpreted differently from general rules respecting running of statutes of limitations.

Fla.—Davis v. Combination Awning & Shutter Co., 62 So.2d 742.

(3) Where full industrial commission had never finally determined that compensation carrier had discharged its obligation to claimant in full prior to time that claimant petitioned for additional compensation and medical benefits, the matter remained open for such an adjudication, notwithstanding more than one year had intervened between date of receipt of last compensation payment and date upon which claimant filed petition for additional compensation.

Fla.—Superior Home Builders v. Moss, *supra*.

(4) Under a prior statute the rule was that an application to modify could be made within two years from the date of injury.

Fla.—Daytona Beach Boat Works v. Spencer, 15 So.2d 256, 153 Fla. 540.

In Louisiana

(1) The rule stated in the text obtains.

La.—Pourciau v. Board of Com'rs of Port of New Orleans, App., 12 So.2d 36.

(2) It has been held that a compensation judgment after payment and after its term expires cannot be modified because of the employee's changed condition.

La.—Faircloth v. Stearns-Roger Mfg. Co., App., 147 So. 368.

59. In Indiana

(1) The rule stated in the text obtains.

Ind.—Hedrick v. Schenley Distillers, Inc., 133 N.E.2d 884, 125 Ind.App. 685.

(2) It was formerly held that modification shall not be made after expiration of one year from termination of period fixed in original award.

Ind.—Ben Wolf Truck Lines v. Bailey, 22 N.E.2d 887, 107 Ind.App.

52—Swift & Co. v. Neal, 18 N.E.2d 491, 106 Ind.App. 139—Sewell v. Terre Haute Brewing Co., 200 N.E. 734, 102 Ind.App. 373.

71 C.J. p 1449 note 26 [c].

(3) Under statute providing that no application for modification of an original award shall be filed after expiration of one year from termination of such compensation period where Industrial Board entered a conditional order by which employer was given opportunity to furnish claimant with surgical operation and board expressly retained continuing jurisdiction and employer did not offer claimant such operation, board had jurisdiction on claimant's motion, more than one year after original award, to order employer to provide surgical operation or pay compensation.

Ind.—Swift & Co. v. Neal, 25 N.E.2d 451, 26 N.E.2d 564, 103 Ind.App. 313.

In New Jersey

(1) The rule stated in the text obtains.

N.J.—Colbert v. Consolidated Laundry, 107 A.2d 521, 31 N.J.Super. 588.

(2) It was formerly held in some cases that the provision of the act fixing the time within which original proceedings for compensation must be instituted applied.

N.J.—Herbert v. Newark Hardware & Plumbing Supply Co., 151 A. 502, 107 N.J.Law 24 affirmed 160 A. 492, 109 N.J.Law 266.

71 C.J. p 1446 note 11.

60. Iowa.—Secrest v. Galloway Co., 30 N.W.2d 793, 239 Iowa 168.

61. Ga.—National Sur. Corp. v. Orvin, 78 S.E.2d 705, 209 Ga. 878, conformed to 78 S.E.2d 91, 88 Ga. App. 785.

Automatic Sprinkler Corp. of America v. Rucker, 73 S.E.2d 609, 87 Ga.App. 375.

Miss.—Hale v. General Box Mfg. Co., 87 So.2d 679.

Prior to 1937 the law was otherwise.

Ga.—Travelers Ins. Co. v. Anderson, 194 S.E. 193, 185 Ga. 105, conformed to 195 S.E. 873, 57 Ga.App. 496.

of the decision of the commission;⁶² or within a specified period from the date of injury;⁶³ or until the award is fully paid.⁶⁴

Under some statutes the proceeding must be instituted within one year from the date of the last

payment of compensation, or two years from the date of accident, whichever is greater;⁶⁵ or, in a review proceeding on the commission's own motion, within two years from the date the last payment becomes due and payable, or six years of the date of the accident, whichever is longer;⁶⁶ or with-

Date of notification, not of payment itself, as controlling

(1) Under statute authorizing Board of Workmen's Compensation to review any award or settlement made between parties and filed with Board within two years from date that Board is notified of final payment of claim, notification of final payment, and not payment itself, is date from which two-year statute of limitations commences to run.

Ga.—Orvin v. National Sur. Corp., 74 S.E.2d 489, 87 Ga.App. 551, reversed on other grounds National Sur. Corp. v. Orvin, 76 S.E.2d 705, 209 Ga. 878, opinion conformed to 78 S.E.2d 91, 88 Ga.App. 785, vacated 78 S.E.2d 91, 88 Ga.App. 785—Fidelity & Cas. Co. v. Brooks, 28 S.E.2d 343, 70 Ga.App. 355.

(2) Where Industrial Board, under an award made in September, 1940, directed suspension as of November, 1939, of all payments under previous award, the two years within which board had jurisdiction to consider claimant's application for additional compensation on ground of changed condition must be computed from date suspension order was made, and not from date payments were suspended.

Ga.—Fidelity & Cas. Co. v. Brooks, supra.

Oral notice held sufficient "notification"

Ga.—National Sur. Corp. v. Orvin, 76 S.E.2d 705, 209 Ga. 878, opinion conformed to 78 S.E.2d 91, 88 Ga.App. 785.

Notice by insurance carrier

The provision for "notice" to Industrial Board of the final payment of compensation, was sufficiently complied with by insurance carrier giving such notice to board.

Ga.—Kirkland v. Employers Liability Assur. Corp., 25 S.E.2d 723, 69 Ga.App. 433.

Notice to adversary held unnecessary

Under statute authorizing Industrial Board to review any award or settlement made between parties and filed with board within two years from date that board is notified of final payment of the claim, "notice" to the board of final payment of the claim satisfied requirements of statute without giving notice thereof to claimant; and even if statute required that notice of final payment of claim be given to claimant when given to the board, claimant would

have no ground to complain because of insurance carrier's failure to give him such notice, where it appeared that claimant had knowledge of all transactions with respect to final payment of the claim.

Ga.—Kirkland v. Employers Liability Assur. Corp., supra.

Notice of employee's refusal to sign receipt

Where Workmen's Compensation Board ordered sums agreed upon between employer and employee paid during disability and provided for modification of award in case of loss of use of member, and employer notified board of employee's refusal to sign final settlement receipt on returning to work, employee could within two years of notice apply to board for review on ground of change in condition.

Ga.—Hartford Acc. & Indem. Co. v. Brennan, 68 S.E.2d 170, 85 Ga.App. 163.

62. Date of award of arbitrators as immaterial

Petition to review award of Industrial Commission, on ground that claimant's disability had diminished or ended, filed over 18 months after award of arbitrators, but less than 18 months after decision of commission sustaining award of arbitrators, was not filed too late, since award of compensation is not made except by decision of commission.

Ill.—City of Chicago v. Industrial Commission, 2 N.E.2d 87, 363 Ill. 298.

63. Idaho.—Egus v. Triumph Min. Co., 232 P.2d 136, 71 Idaho 354—Wanke v. Ziebarth Const. Co., 202 P.2d 384, 69 Idaho 64.

In California

(1) The statutory period is five years from the date of the injury.

Cal.—Sutton v. Industrial Acc. Commission of Cal., 298 P.2d 857, 46 C.2d 791, certiorari denied Creighton Stationery Co. v. Industrial Acc. Commission of State of Cal., 77 S.Ct. 220, 352 U.S. 925, 1 L.Ed. 160.

Westvaco Chlorine Products Corp. v. Industrial Acc. Commission, 288 P.2d 300, 136 C.A.2d 60.

(2) Formerly the period was 245 weeks.

Cal.—Douglas Aircraft Co. v. Industrial Acc. Commission, 193 P.2d 468, 31 C.2d 853—Armstrong v. Industrial Acc. Commission, 28 P.2d 672, 219 C. 673.

Broadway-Locust Co. v. Industrial Acc. Commission, 206 P.2d 856, 92 C.A.2d 287.

Statute held inapplicable

Injured employee's claim for additional compensation after cessation of payments, made after filing of previous claim without further proceedings, was held not barred by statute as based on changed conditions.

Idaho.—Eldridge v. Idaho State Penitentiary, 30 P.2d 781, 54 Idaho 213.

64. Wyo.—Mustanen v. Diamond Coal & Coke Co., 62 P.2d 287, 50 Wyo. 462.

65. Voluntary character of payments as immaterial

Statute providing that claim for additional workmen's compensation shall be barred unless filed with workmen's compensation commission one year from date of last payment of compensation or two years from date of accident, whichever is greater, is not limited to the filing of the claim when voluntary payments of compensation have been made as distinguished from payments made as a result of an award or order of the commission after hearing, but is clearly applicable to claim for additional compensation in cases where compensation for disability has been paid on account of injury.

Ark.—Reynolds Metals Co. v. Brumley, 290 S.W.2d 211, 226 Ark. 388.

Conflict or ambiguity between statutes

If statute providing for modification of award by workmen's compensation commission within six months after termination of compensation period fixed in original compensation order is statute of limitations, there is sufficient ambiguity between such statute and other statute providing that claim for additional compensation shall be barred unless filed with commission within one year from date of last payment of compensation or two years from date of accident and in view of such doubt the latter statute would be controlling.

Ark.—Reynolds Metals Co. v. Brumley, supra.

66. Colo.—Safeway Stores v. Newman, 230 P.2d 168, 123 Colo. 362.

Payment not considered or ordered

Under statute permitting commission on ground of change in employee's condition within six years of date of accident where no compensation had been paid, or within

in a stated period from the last payment made, or from the date of the injury in cases in which no compensation was ever awarded;⁶⁷ within a specified time from the date of the first final award of compensation to the claimant,⁶⁸ or, if there has been no such award, within the specified time of the order allowing the claim.⁶⁹ Under a statute to that effect, the proceeding must be brought within a specified period from the time the employee knows, or is charged with knowledge, that his condition has materially changed and that there has been a substantial increase in his disability.⁷⁰

Under some statutes, expressly excepting cases of eye injuries from the rule,⁷¹ an award can be reviewed or modified only during the time the award has to run, if for a definite period,⁷² and only if a petition therefor is filed with the board within a

stated period after the date of the most recent payment of compensation made prior to the filing of the petition.⁷³ Under other statutes a distinction is drawn between awards designated as final awards and other awards, the limitation applicable to the final awards being determined from the date of the award,⁷⁴ while as to other awards the period begins to run from the date of the payment of the last award, so that the time will not begin to run so long as it remains unpaid;⁷⁵ and a distinction is made between awards generally and awards in occupational disease cases.⁷⁶ Under some provisions the applicable period of limitations may depend on whether the permanent impairment, for which compensation is sought subsequent to the original award, existed at the time of such award or resulted later as a change in conditions.⁷⁷

two years from the date the last payment becomes due and payable, to review a compensation award and award further compensation, a payment of compensation cannot be "due and payable" within the statute when it never has been considered or ordered by the commission; and limitation period did not begin to run on date on which last payment for permanent disability would have been made if there had been continuous monthly payments during the period of time covered by the final award, but began to run on the date on which the commission ordered retroactively the payment of compensation weekly until the full amount had been paid.

Colo.—*Dr. Pepper Bottling Co. v. Industrial Commission*, 301 P.2d 710, 134 Colo. 238.

Under former statute prescribing no limitation period the defense of laches was not available.

Colo.—*Employers Mut. Ins. Co. v. Jacoe*, 81 P.2d 389, 102 Colo. 515.

67. Ohio.—*State ex rel. Timken Roller Bearing Co. v. Industrial Commission*, 24 N.E.2d 448, 136 Ohio St. 148.

Occupational disease claims within provision

Ohio.—*State ex rel. Timken Roller Bearing Co. v. Industrial Commission*, supra.

68. Or.—*Gerber v. State Industrial Acc. Commission*, 101 P.2d 416, 164 Or. 353.

"First award of compensation" which marks beginning of limitation for filing such application means first payment to claimant after filing of original application for compensation.

Or.—*Miller v. State Industrial Accident Commission of Oregon*, 39 P.2d 366, 149 Or. 49.

Allowing payment of medical services is not an "award of compensation" within statute requiring an application for increased compensation for aggravation of disability to be filed within stated time from date of first final award of compensation. Or.—*Colvin v. State Indus. Acc. Commission*, 253 P.2d 910, 197 Or. 401—*Gerber v. State Industrial Acc. Commission*, 101 P.2d 416, 164 Or. 353.

69. Or.—*Colvin v. State Indus. Acc. Commission*, 253 P.2d 910, 197 Or. 401.

Purpose of provision

Clear purpose of amendatory statute providing that application for increased compensation for aggravation of injuries must be filed within two years from date of first final award of compensation, or, if there has been no such award, within two years of order allowing claim, was to provide relief in cases in which there had been aggravation of injury resulting in disability but there had been no previous compensation for time lost.

Or.—*Colvin v. State Indus. Acc. Commission*, supra.

70. Neb.—*Peek v. Ayres Auto Supply*, 59 N.W.2d 564, 157 Neb. 363—*Scott v. State*, 289 N.W. 367, 137 Neb. 348.

71. Pa.—*Eberst v. Sears, Roebuck & Co.*, 3 A.2d 25, 133 Pa.Super. 427, reversed on other grounds 6 A.2d 577, 334 Pa. 505.

72. Pa.—*Bordick v. John Conlon Coal Co.*, 19 A.2d 536, 144 Pa.Super. 522—*Stohan v. Rockhill Coal Co.*, 14 A.2d 229, 140 Pa.Super. 146—*Zerby v. Reading Co.*, 189 A. 681, 125 Pa.Super. 397—*Blase v. Philadelphia & Reading Coal & Iron Co.*, 175 A. 883, 115 Pa.Super. 381.

Richards v. E. T. Frain Lock Co., Com.Pl., 49 Lanc.Rev. 241,

affirmed 45 A.2d 382, 153 Pa.Super. 414.

73. Pa.—*Borneman v. H. C. Frick Coke Co.*, 186 A. 223, 122 Pa.Super. 391.

74. Award held final within provision

Awards determining claim for compensation and after payment of which final settlement receipt was required were "final awards" within statute requiring application for modification of final award to be made within one year, as against contention that there were no final awards to be closed within one year because statute extending time to three years defines final award as award so designated by Commission. Md.—*Dashiell v. Holland Maide Candy Shops*, 188 A. 29, 171 Md. 72.

75. Md.—*Porter v. Bethlehem-Fairfield Shipyard*, 53 A.2d 668, 188 Md. 668.

76. Award held not final within provision

Where initial compensation award made to claimant for temporary partial disability resulting from occupational disease was not designated as final, one-year limitation on applications to compensation board for modification or change in final award and three-year limitation to awards not designated as final did not apply to application made within three-year period.

Md.—*Kelly-Springfield Tire Co. v. Roland*, 79 A.2d 153, 197 Md. 354.

77. Ind.—*Pettiford v. United Department Stores*, 196 N.E. 342, 190 Ind.App. 471.

Statement of distinction

If a permanent partial impairment for which claim is made is direct result of accident, the claim may be filed within two years after accident as an original action, but if

Reclassification. Where the act in providing for a reclassification of a disability by the board specifies a time within which such reclassification may be had,⁷⁸ such reclassification must be made within the required time or else it is unauthorized; and⁷⁹ to be affected by the limitation provision the award must involve a reclassification of disability⁸⁰ theretofore classified.⁸¹ The waiver of an objection to delayed reclassification does not preclude an attack on a subsequent award based on a new determination covering a later period.⁸²

Special provisions as to permanent disability claims. In some jurisdictions the limitation period on a claim for permanent disability does not begin to run until a determination has been made by the commission of the existence or nonexistence of permanent disability,⁸³ on the ground that the statutory limitation applies only to the reopening of a cause for a change of condition, and hence is not

applicable to an award for permanent partial disability where the only award theretofore made was for temporary total disability, since it is not necessary to prove a change of condition to sustain a subsequent award for permanent partial disability;⁸⁴ and an award for permanent disability can be entered at any time, without limit, if there has been no former award therefor.⁸⁵ Thus, an order requiring payments to be made for a temporary disability does not start the running of limitations as to a subsequent claim of permanent disability;⁸⁶ nor do payments made pursuant to such order,⁸⁷ or payments voluntarily made prior to the entry of the original compensation award.⁸⁸

Under some statutes setting up a period of limitation computed from the date of the last payment, a distinction is drawn between temporary disability and permanent disability, a different period of time being established for each.⁸⁹

the impairment is the result of a temporary disability it must be filed within one year after final payment for temporary disability, as a change of conditions.

Ind.—International Detrola Corp. v. Hoffman, 70 N.E.2d 844, 224 Ind. 613.

Fashion Thimble Shoe Co. v. Withrow, 40 N.E.2d 359, 110 Ind. App. 668—Sewell v. Terre Haute Brewing Co., 200 N.E. 734, 102 Ind. App. 373—Pettiford v. United Department Stores, 196 N.E. 342, 100 Ind.App. 471.

78. N.Y.—Kolodick v. General Electric Co., 184 N.E. 54, 260 N.Y. 461, 71 C.J. p 1450 note 41.

79. N.Y.—Sokolowski v. Bank of America, 184 N.E. 492, 261 N.Y. 57, 71 C.J. p 1450 note 42.

80. N.Y.—Vincent v. Allerton House Co., 177 N.E. 25, 256 N.Y. 522, 71 C.J. p 1450 note 43.

81. N.Y.—Santo v. Symington Mach. Co., 261 N.Y.S. 706, 237 App.Div. 242, reargument denied 262 N.Y.S. 955, 238 App.Div. 880, 71 C.J. p 1450 note 44.

82. N.Y.—Kolodick v. General Electric Co., 256 N.Y.S. 831, 235 App. Div. 111, reversed on other grounds 184 N.E. 54, 260 N.Y. 461.

83. Okl.—Mid-Continent Petroleum Corp. v. Abshire, 190 P.2d 790, 200 Okl. 24—Upshaw v. Champlin Refining Co., 146 P.2d 1008, 194 Okl. 32—State Highway Commission v. State Industrial Commission, 146 P.2d 109, 193 Okl. 593—New State Ice Co. v. Sanford, 30 P.2d 708, 167 Okl. 435.

84. Okl.—Pure Oil Co. v. State Industrial Commission, 72 P.2d 779, 181 Okl. 176—New State Ice Co. v. Sanford, 30 P.2d 708, 167 Okl. 435.

85. Okl.—Edwards Inv. Co. v. Crook, 180 P.2d 189, 198 Okl. 489—Fournier Stucco & Plastering Co. v. Greer, 104 P.2d 423, 187 Okl. 589—Durant Cotton Oil Co. v. State Industrial Commission, 55 P.2d 750, 176 Okl. 257.

Award thirteen years later

Where there was no contention in original compensation proceeding that employee's injury resulted in permanent partial disability, and industrial commission had nothing before it on which to base a determination that employee was or was not to any extent permanently disabled, and employee was given an award only for permanent disfigurement, commission had jurisdiction, about thirteen years later, to make an award for permanent disability.

Okl.—Mid-Continent Petroleum Corp. v. Abshire, 190 P.2d 790, 200 Okl. 24.

86. Okl.—Mid-Continent Petroleum Corp. v. Abshire, supra—Upshaw v. Champlin Refining Co., 146 P.2d 1008, 194 Okl. 32—State Highway Commission v. State Industrial Commission, 146 P.2d 109, 193 Okl. 593.

87. Okl.—Upshaw v. Champlin Refining Co., 146 P.2d 1008, 194 Okl. 32—State Highway Commission v. State Industrial Commission, 146 P.2d 109, 193 Okl. 593.

88. Okl.—Upshaw v. Champlin Refining Co., 146 P.2d 1008, 194 Okl. 32.

89. W.Va.—Blosser v. State Compensation Com'r, 51 S.E.2d 71, 132 W. Va. 112.

Purpose of provision

Provision of workmen's compensation act relating to authority of state compensation commissioner to in-

crease an award on application of claimant was designed to limit the state compensation commissioner's jurisdiction with respect to time in which applications for reopening of case and granting of further compensation could be made.

W.Va.—Turner v. State Compensation Com'r, 17 S.E.2d 617, 123 W. Va. 673.

Applicable to employer and employee alike

W.Va.—Blosser v. State Compensation Com'r, 51 S.E.2d 71, 132 W. Va. 112.

Relationship between temporary and permanent disabilities

Statute respecting continuing jurisdiction of state compensation commissioner means that three-year period applies only to a temporary disability case which continues on that basis, and not to a case in which there is an award of permanent disability after temporary disability has been awarded and payments have ceased, and that one-year period applies only to a case in which permanent disability is awarded and paid, whether or not there has been prior award and payment for temporary disability.

W.Va.—Blosser v. State Compensation Com'r, supra.

Application to permanent disability cases

Fact that more than three years had elapsed since payments had been made by employer to injured employee for temporary disability, did not deprive state compensation commission of jurisdiction to consider employer's application to reopen case and modify award of permanent total disability to employee.

W.Va.—Blosser v. State Compensation Com'r, supra.

Limitation only on proceeding by employee. Under some statutes to that effect, the limitation prescribed by the statute applies to proceedings by the employee for modification of a formal award, on the ground of increased incapacity,⁹⁰ and does not apply to proceedings by an employer or insurer for the diminution of disability.⁹¹

What constitutes "last payment." What constitutes the "last payment" or "final payment," under provisions whereby the period of limitation is computed with relation to the date of the last or final payment, may vary with the circumstances of the particular case.⁹² The furnishing of medicines or equipment, or medical or hospital services, may con-

Application to temporary disability cases

(1) Petition to reopen compensation claim for temporary total disability must be presented within one year from final payment of original award.

W.Va.—York v. State Compensation Com'r, 35 S.E.2d 353, 128 W.Va. 16.

(2) An award of temporary compensation may be extended before expiration of the compensable period if kept within statutory limit of one hundred and fifty-six weeks, but after expiration of compensable period, temporary award could not be made for a later separate period.

W.Va.—Dillon v. State Compensation Com'r, 39 S.E.2d 837, 129 W.Va. 223.

90. N.J.—Torbyn v. South River Sand Co., 69 A.2d 588, 6 N.J.Super. 1.

Pasquale v. Clyde Piece Dye Works, 1 A.2d 45, 120 N.J.Law 557.

Smith v. Klemm, 186 A. 784, 14 N.J.Misc. 665.

Time for application and limitations for modification of agreement or settlement see *infra* § 904.

Under earlier provisions the rule was otherwise.

N.J.—Granata v. D. W. McGee Const. Co., 176 A. 104, 114 N.J.Law 89.

Olosh v. General Leather Co., 170 A. 241, 12 N.J.Misc. 165.

71 C.J. p 1446 note 11.

What constitutes "formal award"

"Final judgment" awarding compensation to injured employee, where issue was litigated and determined on its merits without involving elements of agreement, was held "formal award" within statute, and hence reviewable within two years from date when employee last received payment of compensation on ground that his incapacity had subsequently increased.

N.J.—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301.

Extended reparative compensation not within limitation

The two-year limitation provision of the statute permitting review of a formal award in a workmen's compensation proceeding on ground that incapacity of injured employee has subsequently increased does not apply to applications for extended reparative compensation, but the statute providing for such compensation imposes a continuing obligation on

the employer commensurate with continuing nature of employee's injury.

N.J.—Clark v. American Can Co., 73 A.2d 342, 4 N.J. 527.

91. Proceeding by employer at any time

Employer, who was required to pay employee compensation for total and permanent disability resulting from amputation of arm at shoulder, could, at any time, initiate proceedings to review award on ground that disability had diminished.

N.J.—Rodriguez v. Michael A. Scaturchio, Inc., 126 A.2d 378, 42 N.J. Super. 341.

92. Fla.—Evans v. City of Miami, 60 So.2d 20.

71 C.J. p 1446 note 11 [d].

Payment in full of compensation award constituted the "final payment of the claim," within statute authorizing industrial board to review any award or settlement made between parties and filed with board within two years from date that board is notified of final payment of the claim. Ga.—Kirkland v. Employers Liability Assur. Corp., 25 S.E.2d 723, 69 Ga. App. 433.

Tender as constituting "payment"

Under statute which does not permit deputy commissioner to reopen a compensation case unless application is made within one year after date of last "payment" of compensation, the word "payment" must be construed as being met by a tender made of money which is legal tender; and where amount awarded injured employee was tendered in legal tender to employee, who refused the tender, the date of the last tender was a final "payment" so that deputy commissioner was without power to modify the order where application was not made until more than one year after the final tender.

U.S.—Imperato v. Lowe, D.C.N.Y., 32 F.Supp. 563, affirmed, C.C.A., 123 F. 2d 1001.

Payment by draft or check

(1) Under provision of longshoremen's compensation act authorizing deputy commissioner to review case on change in condition, deputy commissioner could not reopen and review case where no application therefor was made within one year after draft for last payment was received by claimant, though draft was not

collected until over a month after it was received.

U.S.—Bajerczak v. B. H. Sobelman & Co., D.C.Pa., 89 F.Supp. 78.

(2) Where compensation check payable to order of claimant was received and deposited by him in his bank on or before a certain day and check on following day was presented and honored by drawee bank, which debited employer's account, check constituted "payment" on day of receipt within meaning of statute requiring claim for additional compensation to be filed within two years after last "payment" of compensation by an employer.

N.J.—Hayes v. Federal Shipbuilding & Dry Dock Co., 68 A.2d 766, 5 N.J. Super. 212.

(3) Where request for review of award on ground of change in claimant's condition was not received by industrial commission until more than twelve months after draft issued by insurance carrier payable to claimant in lump-sum payment of award had been delivered to and accepted by claimant, such request for review came too late and was barred, though it was received by commission within twelve months from date of payment of draft by bank on which it was drawn.

N.C.—Paris v. Carolina Builders Corp., 92 S.E.2d 405, 244 N.C. 35.

Wages while performing lighter work

Where employee, after receiving disability compensation to May, 1926, returned to lighter work at former wages and continued in such work until 1929, employee could not compel commission to grant rehearing of application filed 1937, for an adjustment of claim for compensation on theory that amounts received while performing lighter work should be treated as "disability compensation" and that hence his application for adjustment was filed within the statutory ten-year period.

Ohio.—State ex rel. Milton v. Industrial Commission of Ohio, 20 N.E. 2d 926, 135 Ohio St. 307.

Last payment by employer; change of employers

Where city furnished medical treatment and paid claimant, injured while employed at hospital owned and operated by city, her full salary, which included workmen's compensation for all periods of disability, while city owned hospital, claim against city for further compensa-

stitute a payment of compensation or a waiver which suspends the running of the time;⁹³ but the payment of a physician for services rendered to the injured employee is not the payment of compensation within the statute;⁹⁴ nor is the reimbursement of traveling expenses of claimant, in taking a physical examination to determine whether there was any compensable condition, such payment.⁹⁵

In the case of the payment by the employer of a lump sum in lieu of the payments to be made weekly, while some authorities compute the time of last payment from the date of the payment of the lump sum,⁹⁶ others hold that the advance payment of a lump sum does not constitute such final payment,⁹⁷ and that the statutory period does not begin to run until the time when the last payment would have been made if paid weekly.⁹⁸

Statutes barring ancient claims arising before specific date. Statutes designed to terminate ancient claims, such as a provision prohibiting any further award in cases arising from injuries occurring prior to a stated date, unless application therefor is filed before another specific date, are favored by the courts,⁹⁹ and create an absolute bar against applications not made before the stated date.¹

(3) Tolling of Statute

Provisions of general statutes of limitation relating to the tolling of such statutes ordinarily are inapplicable to proceedings to modify an award. The making of an application to modify generally tolls the statute; and subsequent steps, by the applicant or by the board or commission, may be taken even after the expiration of the statutory period of limitation.

Provisions of general statutes of limitation relating to the tolling of such statutes ordinarily are inapplicable to proceedings to modify an award.² Thus the running of the statutory period is not tolled by the insanity of the employee;³ nor does the refusal to permit claimant's attorney to examine hospital records and X-rays before an application to reopen was made extend the time within which the application to reopen can be made.⁴ Where a statute of limitations begins to run from the date of injury, the fact that the injured person is incompetent and that a guardian was appointed for him will not suspend the running or change the date of the starting of the period;⁵ and the time is not to be computed from the date that the guardian qualified.⁶

Pendency of appeal or other proceeding. In general, the running of the statute of limitations is not tolled by the pendency of an appeal from the order

tion filed more than two years after last compensation payment by city was barred by limitations, since sale of hospital to county before expiration of limitation period resulted in a change of employer, even though claimant continued to work at hospital and under workmen's compensation act the term "employment" includes employment by state and all political subdivisions.

Fla.—*Evans v. City of Miami*, 60 So. 2d 20.

93. Ark.—*Reynolds Metals Co. v. Brumley*, 290 S.W.2d 211, 226 Ark. 388.

Ind.—*Hedrick v. Schenley Distillers, Inc.*, 133 N.E.2d 884, 125 Ind.App. 685.

Statute so providing

By statute, industrial commission may not review any award and terminate, diminish, or increase the compensation previously awarded, after twelve months from date of last payment of compensation pursuant to an award, or, if no award has been made, after twelve months from date of last payment for medical or other treatment.

N.C.—*Paris v. Carolina Builders Corp.*, 92 S.E.2d 405, 244 N.C. 35.

Claim held timely filed and not barred

Where employee received last payment of workmen's compensation award on Dec. 8, 1952, and signed final receipt on that date for benefits

awarded, and on Oct. 26, 1953, employee was authorized treatment for same injury from employer, claim for additional compensation filed on May 4, 1954, was timely filed and not barred under limitation statute providing that claim for additional compensation should be filed within one year from date of last payment of compensation.

Ark.—*Reynolds Metals Co. v. Brumley*, 290 S.W.2d 211, 226 Ark. 388.

Furnishing of truss

N.Y.—*Schneider v. Durst Mfg. Co.*, 38 N.Y.S.2d 983, 265 App.Div. 1022.

94. N.J.—*Oldfield v. New Jersey Realty Co.*, 61 A.2d 767, 1 N.J. 63.

95. Ohio.—*Covert v. Industrial Commission of Ohio*, 40 N.E.2d 672, 139 Ohio St. 401.

96. Fla.—*Daytona Beach Boat Works v. Spencer*, 15 So.2d 256, 153 Fla. 540.

N.C.—*Paris v. Carolina Builders Corp.*, 92 S.E.2d 405, 244 N.C. 35.

97. N.J.—*King v. Western Electric Co.*, 5 A.2d 490, 122 N.J.Law 442, affirmed 11 A.2d 32, 124 N.J.Law 129.

Pending application for redemption

Where the application must be made before final payment under the original award, the voluntary payment of a lump sum into court pending an application for redemption does not constitute such a final payment as will bar an application for

the modification of the original award thereafter made.

Kan.—*Chickowsky v. Central Coal & Coke Co.*, 260 P. 620, 124 Kan. 471. 71 C.J. p 1450 note 30.

98. N.J.—*King v. Western Electric Co.*, 5 A.2d 490, 122 N.J.Law 442, affirmed 11 A.2d 32, 124 N.J.Law 129—*Anderson v. Public Service Electric & Gas Co.*, 177 A. 865, 114 N.J.Law 515.

Solazco v. Carol, 185 A. 510, 14 N.J.Misc. 435.

71 C.J. p 1446 note 11 [d] (2).

99. W.Va.—*Consentina v. State Compensation Com'r*, 31 S.E.2d 499, 127 W.Va. 67.

1. W.Va.—*Taylor v. State Compensation Com'r*, 86 S.E.2d 114, 140 W.Va. 572—*Consentina v. State Compensation Com'r*, 31 S.E.2d 499, 127 W.Va. 67—*Greer v. Workmen's Compensation Com'r*, 15 S.E.2d 175, 123 W.Va. 270.

2. Mich.—*Broadnax v. Ford Motor Co.*, 13 N.W.2d 829, 308 Mich. 305.

3. Mich.—*Broadnax v. Ford Motor Co.*, supra.

4. U.S.—*Imperato v. Lowe*, D.C.N.Y., 32 F.Supp. 563, affirmed, C.C.A., 123 F.2d 1001.

5. Cal.—*Abbott v. Industrial Acc. Commission*, 55 P.2d 927, 12 C.A. 2d 478.

6. Cal.—*Abbott v. Industrial Acc. Commission*, supra.

or award,⁷ and the remedy is extinguished if appellant fails to dismiss the appeal and proceed to petition the commission for modification of the award or order on one of the statutory grounds within the limitation period.⁸ However, it has also been held that, where an action to review the award was instituted, the period of limitation on the reopening of the cause begins to run from the date the appeal is determined⁹ and the mandate of the reviewing court is filed with the commission.¹⁰

Statute tolled by application; subsequent steps after period. It is sufficient if the application is made within the specified period, even though other steps are taken after such period,¹¹ at least in so

far as claimant is not barred under the doctrine of laches,¹² and even though the actual hearings were not held and the modified award was not made until the period had expired,¹³ the jurisdiction of the board or commission being extended by the application, and continuing until the application has been fully considered and acted on,¹⁴ or, under statutes expressly so providing, continuing for a specified period in which the commissioner must pass on the merits.¹⁵ However, the making of a proper application within the specified period is a jurisdictional prerequisite to the power of the board to modify the award after the expiration of the period,¹⁶ although, within limits, an informal application may be suf-

7. Fla.—Davis v. Combination Awning & Shutter Co., 62 So.2d 742.

8. Fla.—Davis v. Combination Awning & Shutter Co., supra.

9. Wash.—Hunter v. Department of Labor and Industries, 63 P.2d 224, 190 Wash. 380.

10. Okl.—Skelly Oil Co. v. Harrell, 134 P.2d 136, 192 Okl. 101.

11. W.Va.—Wilkins v. State Compensation Com'r, 198 S.E. 869, 120 W.Va. 424.

Petition for hearing on application filed later

Under statute providing that on application on grounds of changed conditions made within four years after date of accident causing injury industrial accident board may review award for purposes of modification, petition for hearing on application which had been filed within four-year period was not original application for review of award and board could properly set matter for hearing on such petition even though it had not been filed within four-year period.

Idaho.—Egus v. Triumph Min. Co., 232 P.2d 136, 71 Idaho 354.

12. Proceeding not barred by laches

Where employee, injured in January, 1933, refused to accept award of temporary disability, filed petition for permanent disability in January, 1934, and filed supplemental petition in May, 1934, but employee's mind became seriously affected within a short period after temporary disability award in July, 1933, and he was committed to insane asylum in March, 1935, and died there in April, 1944, and employer took no action to dismiss May 1934 supplemental petition, or to make payment of temporary disability award until December 1937, employer contributed to delay that ensued from filing of supplemental petition, and supplemental petition on which hearings were commenced January 1943, was not barred by employee's laches.

N.J.—Torbyn v. South River Sand Co., 69 A.2d 588, 6 N.J.Super. 1.

13. U.S.—American Mut. Liability Ins. Co. of Boston v. Lowe, C.C.A. N.J., 85 F.2d 625.

Cal.—Furness Pac. v. Industrial Acc. Commission, 168 P.2d 761, 74 C.A. 2d 324.

Or.—Miller v. State Industrial Accident Commission of Oregon, 39 P. 2d 366, 149 Or. 49.

Running of period stopped by filing of claim

Where claim of injured longshoreman for further compensation was filed with deputy commissioner who advised employer of such fact within one year after last payment under previous order, running of one year period of limitation was stopped, and deputy commissioner had jurisdiction to review case and make a further award, even though actual hearings were not held and award was not made until more than one year after last payment.

U.S.—Candado Stevedoring Corp. v. Willard, C.A.2, 185 F.2d 232.

14. Cal.—Subsequent Injuries Fund of State of Cal. v. Industrial Acc. Commission, 312 P.2d 78, 151 C.A. 2d 606.

Ohio.—Nichols v. Ohio Collieries Co., 62 N.E.2d 636, 75 Ohio App. 474.

15. Right not lost by commissioner's failure to act in time

Where the compensation commissioner failed to finally pass on and determine the merits of a claim for additional compensation within ninety days from the filing of an application in writing for a readjustment of the claim, the commissioner could not thereafter assert that his failure to act as required by statute destroyed his jurisdiction, especially in view of the fact that he permitted the filing of additional evidence and delayed a decision on the case, as finally submitted, for almost six months.

W.Va.—Wilkins v. State Compensation Com'r, 198 S.E. 869, 120 W. Va. 424.

16. Ohio.—Nichols v. Ohio Collieries Co., 62 N.E.2d 636, 75 Ohio App. 474.

Effect of stipulation as to application

Since the requirement is jurisdictional, while the parties could not by stipulation provide a substitute for the necessity for filing the application, a stipulation to the effect that such application had been filed might be sufficient proof of the filing thereof; but where original application to extend the jurisdiction of the industrial commission to modify a compensation award beyond the ten-year period contradicted the admission in parties' stipulation that an application had been filed within the ten-year period, trial court had right to consider all evidence in order to ascertain the truth and was not bound by the stipulation.

Ohio.—Nichols v. Ohio Collieries Co., supra.

Commissioner not estopped to assert failure to file claim

Under statute providing for readjustment of compensation claim, claimant seeking readjustment must file application in writing during the statutory period or make an affirmative showing that following the oral request and within the period the commissioner pursued such a course of conduct that he is estopped to deny that a proper application had in fact been filed; and, where claimant failed to file application for readjustment of compensation claim within one year period prescribed by statute, compensation commissioner's letter to the effect that claimant had been amply compensated for loss of eye and that defect of vision of other eye was in no way connected with the injury did not indicate such a course of conduct as to "estop" the commissioner from denying that a proper claim had in fact been filed.

W.Va.—Robinson v. State Compensation Com'r, 11 S.E.2d 111, 122 W.Va. 530.

sufficient to toll the statute and keep the claim open,¹⁷ even though the formal application is not filed until after the expiration of the period.¹⁸

Under the provisions of some statutes there is a distinction between the time limitation on the power of the commission to rescind, alter, or amend an award generally and the limitation of the right of an injured employee to institute proceedings for compensation for new and further disability,¹⁹ in that under the latter limitation a proceeding is timely if it is instituted in time, that is, if the applica-

tion for compensation for new and further disability is filed in time, even though the commission takes no action on it until after the period of limitation,²⁰ while in other proceedings, under the general limitation, the commission is without jurisdiction to act on a petition after the expiration of the limitation period, even though it was filed within the period.²¹ Thus, there is a distinction between an employee's proceeding for new and further disability and any proceeding by the employer or insurer, since the employer's or insurer's proceeding is governed by the limitation on the powers of the commission gen-

17. Va.—*J. A. Jones Const. Co. v. Martin*, 94 S.E.2d 202, 198 Va. 370.

Letter held sufficient

A letter written by compensation claimant's counsel to state compensation commissioner, asking that letter be treated as formal petition of claimant for an increased award on his claim, in order to keep the claim open, and stating that counsel expected to be out of his office and on his return would file additional medical evidence, was sufficient to toll limitations.

W.Va.—*Wilkins v. State Compensation Com'r*, 198 S.E. 869, 120 W.Va. 424.

Correspondence held insufficient

(1) Letters written by counsel for employee's widow within year after last payment of compensation to her for employee's death under an award which was rescinded on ground that her marriage to employee was invalidated by her prior existing marriage to another did not constitute timely application to reopen case on showing of annulment of such prior marriage, where letters contained only mere general inquiries as to status of case. U.S.—*Tatum v. Cardillo*, C.A.N.Y., 208 F.2d 955.

(2) Compensation claimant's informal correspondence with department and Governor was held insufficient to constitute application for rehearing on ground of aggravation and thereby give department's answers status of judicial adjudication, especially where record did not show that correspondence was called to attention of trial court, or that limitation statute was there presented as defense.

Wash.—*Goenen v. Department of Labor and Industries*, 47 P.2d 991, 182 Wash. 469.

(3) Under compensation statute allowing injured workman five years from effective date of statute, Dec. 3, 1942, to file claim for aggravation of injury, letter written and dated Dec. 2, 1947, by claimant's attorneys to labor department listing eighteen claimants giving no information as to basis of claims for aggravation and

stating that attorneys had been retained to reopen claims, was not sufficient application to reopen claim.

Wash.—*Donati v. Department of Labor and Industries*, 211 P.2d 503, 35 Wash.2d 151.

18. Va.—*J. A. Jones Const. Co. v. Martin*, 94 S.E.2d 202, 198 Va. 370.

19. Cal.—*Sutton v. Industrial Acc. Commission of Cal.*, 298 P.2d 857, 46 C.2d 791, certiorari denied *Creighton Stationery Co. v. Industrial Acc. Commission of State of Cal.*, 77 S.Ct. 220, 352 U.S. 925, 1 L.Ed. 160.

Westvaco Chlorine Products Corp. v. Industrial Acc. Commission, 288 P.2d 300, 136 C.A.2d 60—*Broadway-Locust Co. v. Industrial Acc. Commission*, 206 P.2d 856, 92 C.A.2d 287.

20. Cal.—*Sutton v. Industrial Acc. Commission of Cal.*, 298 P.2d 857, 46 C.2d 791, certiorari denied *Creighton Stationery Co. v. Industrial Acc. Commission of State of Cal.*, 77 S.Ct. 220, 352 U.S. 925, 1 L.Ed.2d 160—*Gobel v. Industrial Acc. Commission*, 33 P.2d 413, 1 C.2d 100.

Furness Pac. v. Industrial Acc. Commission, 168 P.2d 761, 74 C.A.2d 324.

Failure of commission to decide particular issue

Where award of compensation for total temporary disability left injured employee without any decision upon issue of permanent disability presented by employee's petition filed within the statutory period after which an award cannot be altered, amended, or rescinded, industrial commission on request for further hearing could award permanent disability more than the prescribed period following the injury.

Cal.—*Douglas Aircraft Co. v. Industrial Acc. Commission*, 193 P.2d 468, 31 C.2d 853.

Extension not effected by timely independent petition

Where workmen's compensation claimant filed petition for further medical treatment, and counsel stipulated that only issue was need for

further medical treatment, and no review of denial was sought, filing of such petition did not have effect of giving commission jurisdiction to determine a petition, filed after expiration of five-year period, for increased disability rating, although petition for further medical treatment had recited that claimant suffered from increased disability and pain and though petition for increased disability rating sought hearing on issue of increased permanent disability rating "as previously raised in applicant's last petition."

Cal.—*Sprague v. Industrial Acc. Commission*, 296 P.2d 548, 46 C.2d 414.

Reservation of jurisdiction held proper

Industrial accident commission's order in workmen's compensation case, finding that workman's condition was not stationary and stating that jurisdiction to make findings as to nature and extent of disability was being reserved, was to be construed in connection with petition which claimed new and further disability and on which the order was based, and since order also had effect of taking from prior award the final character of such award, order was reservation of jurisdiction to act on the petition and was not ineffective attempt to extend time within which commission could alter or amend the prior award.

Cal.—*Westvaco Chlorine Products Corp. v. Industrial Acc. Commission*, 288 P.2d 300, 136 C.A.2d 60.

Order on application as completely new order

Order for new and further disability in a workmen's compensation case is not an order amending a previous order on subject of permanent disability, but is a completely new order, as respects limitation of time within which award of compensation may be rescinded, altered or amended.

Cal.—*Westvaco Chlorine Products Corp. v. Industrial Acc. Commission*, supra.

21. Cal.—*Westvaco Chlorine Products Corp. v. Industrial Acc. Commission*, supra.

erally.²² In any event, there can be no change made where the application is made after the expiration of the statutory period.²³

§ 857. Conditions Precedent; Notice

The party seeking modification of an award must perform all conditions precedent, which may include payment of compensation due at the time of the proceeding and notice of the application and opportunity to be heard.

The party seeking the modification of an award must perform all conditions precedent to such a proceeding.²⁴ While it is a condition precedent to the right to make an application for new and further disability that there must have been earlier proceedings, commenced with the proper filing of claimant's original claim,²⁵ it is not necessary, in order that a proceeding may be instituted for an increase in compensation by reason of an increase in disability, that there first be a review of the original award and due approval by the courts.²⁶

Payment of compensation. In the absence of a provision to that effect in the act, the employer is not required to pay compensation in accordance with the original award up until the time of his filing an application for a modification of such award as a condition precedent to the maintenance of the proceeding.²⁷ Certainly the employer's failure to pay compensation awarded for a temporary total disability during such time as the employee is gainfully employed for a wage in excess of the compensation awarded is no justification for a dismissal of the

application for a modification of the award on the ground of default in payment of compensation under the original award.²⁸

On the other hand, in some jurisdictions, the employer and the insurer are not entitled to a change in a compensation award on the ground of the changed condition of the employee, where at the time of the application the compensation then due under the original award was not fully paid;²⁹ and, under a statute expressly so providing, no proceedings may be commenced to stop or reduce compensation unless the compensation provided in the award is paid or tendered to within a specified time before the proceeding is commenced,³⁰ although the requirement has been held not to be jurisdictional.³¹ In any event, it has been held that the commission cannot, as a condition precedent to the hearing of the application to end the compensation award, require the payment of compensation for the period between the time of the filing of the application and the hearing thereon.³²

Notice; opportunity to be heard. It is usually held that the provision of the act requiring a notice of the accident or injury to be given to the employer before an original proceeding for compensation may be instituted, discussed supra §§ 445-457, has no application in the case of a subsequent proceeding to increase the compensation allowed under the original award,³³ the notice given in the original instance being sufficient.³⁴

22. Petition filed on last day of period

Industrial accident commission could not, after expiration of the limitation period on filing petition to rescind and amend compensation awards, act on the petition of the insurance carrier which was filed on the last day of the limitation period. Cal.—Sutton v. Industrial Acc. Commission of Cal., 298 P.2d 857, 46 C.2d 791, certiorari denied Creighton Stationery Co. v. Industrial Acc. Commission of State of Cal., 77 S.Ct. 220, 352 U.S. 925, 1 L.Ed.2d 160.

23. Cal.—Broadway-Locust Co. v. Industrial Acc. Commission, 206 P.2d 856, 92 C.A.2d 287.

24. Cal.—American Motorists Ins. Co. v. Industrial Acc. Commission, 48 P.2d 721, 9 C.A.2d 66.

Conditions precedent to modify or set aside agreements and settlements as to compensation see *infra* § 905.

Failure to petition board to order medical examination

Where employer, on refusal of employee, who was receiving compensation, to submit to medical examination, failed to petition the workmen's

compensation board to make an order directing employee to submit to medical examination, referee did not abuse his discretion in refusing motion to suspend compensation payments for the reason that employee refused to submit to examination requested by employer.

Pa.—Rennard v. Rouseville Coopera-ge Co., 15 A.2d 48, 141 Pa.Super. 286.

Offer of selective employment held not condition

Employer was not required, as condition precedent to determination that injured employee's condition had changed from total incapacity to work to partial incapacity, to offer selective employment to, or to find selective employment for, the injured employee.

Va.—J. A. Foust Coal Co. v. Messer, 80 S.E.2d 533, 195 Va. 762.

25. Cal.—American Motorists Ins. Co. v. Industrial Acc. Commission, 48 P.2d 721, 9 C.A.2d 66—Kauffman v. Industrial Accident Commission, 174 P. 690, 37 C.A. 500.

26. Ill.—Western Foundry Co. v. Industrial Commission, 132 N.E. 218, 298 Ill. 593.

27. Ind.—Jamestown Lumber Co. v. Trotter, 187 N.E. 840, 97 Ind.App. 684.

71 C.J. p 1451 note 55.

28. Ind.—Gvozdic v. Inland Steel Co., 154 N.E. 804, 86 Ind.App. 132.

29. Pa.—Strait v. Gulf Oil Co., 14 A.2d 168, 140 Pa.Super. 464.

Va.—Gray v. Underwood Bros., 182 S.E. 547, 164 Va. 344.

30. Mich.—Dezomits v. Consolidated Paper Co., 24 N.W.2d 123, 315 Mich. 273—Passelli v. J. A. Utley Co., 282 N.W. 849, 286 Mich. 638—Hughson v. City of Kalamazoo, 260 N.W. 111, 271 Mich. 36.

31. Mich.—Kolbas v. American Boston Min. Co., 267 N.W. 751, 275 Mich. 616.

32. Okl.—Marland v. Forrester, 28 P.2d 542, 167 Okl. 140.

33. Mich.—Palchak v. Murray Corp. of America, 28 N.W.2d 295, 318 Mich. 482.

71 C.J. p 1451 note 49.

34. Okl.—Tankersley Const. Co. v. Ohls, 4 P.2d 68, 152 Okl. 203.

Waiver of service of process in original case

Where partnership waived service-

On the other hand, statutory requirements as to notice to an employer of an application for an additional award of compensation have been held to be jurisdictional.³⁵ Moreover, an opportunity to be heard must be given to the parties interested before an award may be modified;³⁶ and a modification of an award without such opportunity being given is void.³⁷ Notice that an award would be amended unless good cause to the contrary was shown within a specified time affords such opportunity,³⁸ such notice not being required to state a definite time for a hearing on such matter.³⁹

Whether an injured employee must give his employer notice of his intention to seek treatment of his injuries may depend on the circumstances of the particular case.⁴⁰

Waiver of notice. Where notice to the employer of the recurrence of the disability is necessary before a proceeding therein may be brought, a failure of the employer to raise such question and a submission to the jurisdiction of the board is a waiver of such requirement.⁴¹

Notice of reclassification. Where so required by

the act, notice of a change in the classification of the disability must be given to the employee.⁴²

§ 858. Persons Entitled to Apply and Parties to Application

An application for an increase, decrease, or termination of an award of compensation must be made by a party to it or someone in privity with a party; and all interested parties may properly be made parties to the proceeding, and may have the right to be made parties.

An application for an increase, decrease, or termination of an award of compensation must be made by a party to it,⁴³ or someone in privity with such party,⁴⁴ or by some beneficiary entitled to benefits under the particular character of the award.⁴⁵ Ordinarily it may be made by either the employer or the employee.⁴⁶ A mother, whose compensation has been terminated on remarriage, as discussed supra § 147, has a right, as trustee for her minor children, to have the award completed by an award to the children of the unawarded balance.⁴⁷

Mental incompetency. In the case of an injured employee who is mentally incompetent, the application on his behalf may be made by a guardian ad

and entered its appearance in district court when appeal was taken from award of compensation court in original compensation proceedings, and members of partnership filed answer in proceedings in district court, district court acquired jurisdiction over partnership and its members, and such jurisdiction continued so that partnership and its members were parties defendant in proceedings for modification of award to provide for additional benefits because of increased incapacity, even if such defendants were not properly served with process in modification proceedings.

Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

35. Ohio.—State ex rel. Fruehauf Trailer Co. v. Coffinberry, 95 N.E.2d 381, 154 Ohio St. 241.

36. S.C.—Halks v. Rust Engineering Co., 36 S.E.2d 852, 208 S.C. 39. 71 C.J. p 1451 note 51.

Notice of hearing see *infra* § 863.

Forfeiture of right to compensation

Department of labor and industry has no jurisdiction to order forfeiture of right to compensation without a hearing.

Mich.—Zawacki v. Detroit Harvester Co., 17 N.W.2d 234, 310 Mich. 415.

37. Cal.—Larsen v. State Industrial Accident Commission, 13 P.2d 850, 125 C.A. 13.

38. Cal.—Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission of California, 168 P. 1050, 176 C. 488.

39. Cal.—Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission of California, *supra*.

40. Notice held not required

An injured workman was not required by workmen's compensation act to give his employer notice of his intent to seek surgical treatment for back injury, which became worse after workmen's compensation division awarded him temporary and partial permanent disability compensation, though deputy director found at original hearing that operative surgery was not indicated at that time, where employer's plant manager refused operation requested by workman when he quit work after such award and he did not claim expenses of operation and medical or hospital bills.

N.J.—Janvari v. Peter Schweitzer Co., 80 A.2d 367, 13 N.J.Super. 286.

41. Ill.—Meyer v. Industrial Commission, 122 N.E. 51, 286 Ill. 642.

42. Wash.—Delpach v. Gill, 216 P. 21, 125 Wash. 699.

71 C.J. p 1451 note 60.

Scope and extent of power to reclassify see *supra* § 852.

Time for reclassification see *supra* § 856.

43. Ky.—McIntosh v. John P. Gorman Coal Co., 69 S.W.2d 7, 253 Ky. 160—Johnson v. J. P. Taylor Co., 278 S.W. 169, 211 Ky. 821.

Parties to proceedings for compensation generally see *supra* §§ 428-435.

44. Ky.—McIntosh v. John P. Gorman Coal Co., 69 S.W.2d 7, 253 Ky. 160.

Employer's insurance carrier

If permanently disabled employee should improve and his condition change, there would be an opportunity for employer's insurance carrier to have award granting compensation for total permanent disability corrected to conform to the prevailing state of the disability.

La.—Hingle v. Maryland Cas. Co., App., 30 So.2d 281.

45. Ky.—Johnson v. J. P. Taylor Co., 278 S.W. 169, 211 Ky. 821.

46. Okl.—Chas. H. Moureau Co. v. Domenge, 153 P.2d 628, 194 Okl. 563.

Employer has right to have commission determine whether there was such improvement in claimant's condition as to justify modification or reduction of award.

Okl.—Chas. H. Moureau Co. v. Domenge, *supra*.

Burden on employer

Ordinarily burden is on employer claiming that temporary disability has ended to seek review by suitable petition to commissioner or court, as case may be.

N.H.—Cassidy v. Fellows & Sons, Inc., 102 A.2d 499, 98 N.H. 441.

47. Ind.—Cullen v. Pan Handle Coal Co., 141 N.E. 647, 81 Ind.App. 913.

litem or a conservator;⁴⁸ and the wife of an injured employee may make the application on behalf of her husband who by reason of his injury is mentally incapable of doing so on his own account.⁴⁹ However, where an injured employee who was mentally incompetent is shown to have been cured he can proceed in his own name.⁵⁰

Death of employee. The personal representative of a deceased claimant cannot petition for compensation based on the increased disability of the claimant during his lifetime;⁵¹ and a dependent, after the death of the employee, is not entitled to make such an application as regards an award made to the employee while living.⁵² However, where an employee died after instituting the proceeding for a review of the claim because of a changed condition, it may be proper to permit his widow and sole dependent to be substituted as the real party in interest for the prosecution of the claim;⁵³ and the widow has been held to be entitled to collect the

compensation for loss of time because of the aggravation of the disability which had not been collected by the injured employee prior to his death.⁵⁴

Prior acceptance or acquiescence. The fact that an injured employee accepted a weekly award, or a total of weekly awards, for a certain kind of disability does not bar him from applying for additional compensation based on a somewhat different disability;⁵⁵ nor does the fact that the employer voluntarily paid compensation for a period of time preclude him from contesting a claim for additional compensation.⁵⁶

Parties to proceeding. Interested persons may have a right to be made parties⁵⁷ and may properly be joined as parties⁵⁸ to a proceeding to increase, decrease, or terminate an award of compensation, provided the steps to bring them in are timely made;⁵⁹ and under some circumstances the board should take action on its own motion to bring in all parties interested.⁶⁰ It is proper for the petitioner

48. Appointment as procedural, not jurisdictional

Ill.—Fulton v. Knight, 104 N.E.2d 554, 346 Ill.App. 122.

49. Okl.—Whitehead Coal Mining Co. v. State Industrial Commission, 207 P. 305, 86 Okl. 149.

71 C.J. p 1452 note 66.

50. No presumption of continued insanity

Where assistant superintendent of sanitarium, in a letter, certified that compensation claimant was discharged from the sanitarium in a normal mental condition prior to hearing for an award of additional compensation because of change in condition, claimant could proceed in his own name, since there was no presumption that he was still insane. Ga.—City of Hapeville v. Preston, 16 S.E.2d 774, 65 Ga.App. 835.

51. Workmen's compensation division lacks jurisdiction to entertain a petition by a personal representative of deceased claimant for compensation based upon deceased's increased disability.

N.J.—Hagerman v. Lewis Lumber Co., 93 A.2d 632, 24 N.J.Super. 120, affirmed 99 A.2d 513, 13 N.J. 315.

52. Ky.—Johnson v. J. P. Taylor Co., 278 S.W. 169, 211 Ky. 821.

71 C.J. p 1452 note 65.

53. Ind.—Weber Milk Co. v. Dunn, 29 N.E.2d 797, 108 Ind.App. 463.

54. Wash.—Wintermute v. Department of Labor and Industries of State of Washington, 48 P.2d 627, 183 Wash. 169.

55. Particular kinds of disability

Employee's acceptance of weekly award, or total of weekly awards, for temporary total disability and

permanent partial disability, could not bar his application for additional compensation based on continuing disability.

Mont.—Paulich v. Republic Coal Co., 102 P.2d 4, 110 Mont. 174.

56. Applicability of statutes

An employer which voluntarily paid compensation for eight months was not precluded from contesting claim to total and permanent disability under section of statute requiring employer controverting right to compensation to file notice with deputy commissioner within fourteen days, in view of section providing for hearing when payments have been stopped, since that section applies where employer originally pays benefits without contest and later discovers that information upon which payments were made was erroneous.

U.S.—Simmons v. Marshall, C.C.A. Wash., 94 F.2d 850.

57. Bankruptcy of employer

Workmen's compensation insurance carrier had right to be made party to, and given hearing on any questions affecting its liability that it chose to raise in, employee's proceeding to recover increased compensation for total permanent disability after bankruptcy of corporate employer, which paid amount previously awarded.

N.J.—Belanowitz v. Travelers Ins. Co., 15 A.2d 745, 125 N.J.Law 301.

58. Wash.—Georgia-Pacific Plywood Co. v. Department of Labor and Industries, 290 P.2d 718, 47 Wash. 2d 893.

Stockholder of employer held not proper party

Where corporation's employee ob-

tained award by arbitrator under workmen's compensation law for temporary disability, which award had been paid to clerk of district court, stockholder which several years later purchased corporation's assets could not be made defendant in employee's action commenced more than eight years after accident to review award by finding injury to be permanent, stockholder not being "employer." Kan.—Welden v. American Steel & Wire Co., 53 P.2d 1195, 143 Kan. 125.

59. Application for joinder of parties held not timely

In proceeding to reopen decision and award of workmen's compensation board, where insurer made application, after increased award, to join subsequent carriers covering claimant's employment, decision of board that such application was not timely was not error.

N.Y.—Kraus v. Marcus Decorating Co., 134 N.Y.S.2d 411, 284 App.Div. 914, modified on other grounds 136 N.Y.S.2d 377, 284 App.Div. 994.

60. Parties interested in issue of causation

Where, on application by workman to reopen compensation claim on ground of aggravation, record or evidence before board of industrial insurance appeals demonstrated that workman's right to benefits under the workmen's compensation act did not depend on which of two or more employments was the cause of the workman's condition, the board should have taken action on its own motion to bring in all parties interested in the issue of causation.

Wash.—Georgia-Pacific Plywood Co. v. Department of Labor and Indus-

to proceed directly against the employer's insurer.⁶¹

§ 859. Pleading

Except where the board has the power to take such action on its own motion, a petition or application is essential to the modification of an award, but the application need not be in any special form, provided it gives the necessary information. General rules apply as to other pleadings and issues, proof, and variance.

Except in so far as the doctrine of estoppel or waiver may apply, as discussed below, under some statutes a formal petition or application is an essential prerequisite to the modification of an award for an increase, decrease, or termination of incapacity, or a change in the measure of dependence,⁶² the statutory requirements being, under some acts, jurisdictional,⁶³ and the modified award can only be from the date of the application.⁶⁴ Under other statutes, the board has the power to take such action

on its own motion, as well as on the application of an interested party,⁶⁵ and the jurisdiction of the board does not depend upon an application or petition,⁶⁶ no pleading whatever being necessary to invoke the jurisdiction of the board.⁶⁷

Under a statute providing that, on its own motion or on the application of any party in interest, the board may, subject to specified limitations, review any award, decision, or order, any instrument which puts the board on notice that there has been a change in claimant's condition may be a sufficient basis for it to review an award,⁶⁸ as, for example, an attending physician's report that there was a change in claimant's condition.⁶⁹ Under statutes providing for an application or petition, it is generally held that it need not be in any special form or contain any special language,⁷⁰ as long as it

tries, 290 P.2d 718, 47 Wash.2d 893.

61. N.J.—Breheny v. Essex County, 54 A.2d 664, 136 N.J.Law 87, affirmed 57 A.2d 26, 136 N.J.Law 524.

62. Conn.—Sudol v. Town of Manchester, 78 A.2d 739, 137 Conn. 484. Mich.—Kiviniemi v. Quincy Min. Co., 282 N.W. 866, 286 Mich. 680. 71 C.J. p 1452 note 70.

Application in original proceedings for compensation see supra §§ 488-497.

Applications to modify agreements and settlements see infra § 906.

More informal complaints, oral or in letters, are not sufficient.

Ariz.—Harambasic v. Barrett & Hilp & Macco Corp., 119 P.2d 932, 58 Ariz. 319—Wise v. Six Companies, 28 P.2d 1007, 43 Ariz. 24.

63. Ohio.—State ex rel. Fruehauf Trailer Co. v. Coffinberry, 95 N.E. 2d 381, 154 Ohio St. 241.

64. Ariz.—Harambasic v. Barrett & Hilp & Macco Corp., 119 P.2d 932, 58 Ariz. 319.

65. Ky.—Three Point Coal Corp. v. Moser, 195 S.W.2d 305, 302 Ky. 584 —Bell Coal Co. v. Jackson, 192 S.W.2d 947, 301 Ky. 673.

N.Y.—Norton v. New York State Dept. of Public Works (Division of Highways), 135 N.E.2d 726, 1 N.Y. 2d 844, 153 N.Y.S.2d 223.

N.C.—Paris v. Carolina Builders Corp., 92 S.E.2d 405, 244 N.C. 35.

66. N.Y.—Norton v. New York State Dept. of Public Works (Division of Highways), 135 N.E.2d 726, 1 N.Y. 2d 844, 153 N.Y.S.2d 223.

Okl.—Graner Const. Co. v. Brandt, 68 P.2d 788, 180 Okl. 221—Sheldon Oil Co. v. Thompson, 56 P.2d 1171, 176 Okl. 511.

71 C.J. p 1452 note 71.

67. N.Y.—Norton v. New York State Dept. of Public Works (Division of Highways), 135 N.E.2d 726, 1 N.Y. 2d 844, 153 N.Y.S.2d 223.

Okl.—Prairie Oil & Gas Co. v. King, 235 P. 522, 109 Okl. 213.

68. N.Y.—Norton v. New York State Dept. of Public Works (Division of Highways), 135 N.E.2d 726, 1 N.Y. 2d 844, 153 N.Y.S.2d 223.

69. N.Y.—Norton v. New York State Dept. of Public Works (Division of Highways), supra.

70. Ariz.—Harambasic v. Barrett & Hilp & Macco Corp., 119 P.2d 932, 58 Ariz. 319.

Mich.—Nevels v. Walbridge Aldinger Co., 270 N.W. 272, 278 Mich. 214.

Mo.—Bruce v. Missouri-Kansas-Texas R. Co., 73 S.W.2d 425, 229 Mo. App. 124.

Okl.—Wasson v. Tulsa Dairy Supplies, 315 P.2d 773.

Pa.—Mazzaccaro v. Jermyn-Green Coal Co., 36 A.2d 828, 154 Pa.Super. 618.

71 C.J. p 1452 note 73.

Sufficiency of application for purpose of tolling of statute of limitation see supra § 856 b (3).

More request for increase

All that a claim for modification of workmen's compensation award need contain is a request for an increased rate of compensation over that in effect.

U.S.—Alaska Indus. Bd. v. Chugach Elec. Ass'n, C.A.Alaska, 245 F.2d 855, reversed on other grounds 78 S.Ct. 735, 356 U.S. 320, 2 L.Ed.2d 795.

Particular instruments held sufficient

(1) Where claimant filed a printed form, entitled "Application for Adjustment of Claim" and in the blank spaces in form claimant stated that employer had paid him a certain sum but had denied all further liability whatever and that claimant could no

longer perform any labor and was totally disabled from labor solely as a direct and proximate result of his injury, the workmen's compensation board properly treated form as motion to reconsider the award.

Ky.—Elkhorn Coal Co. v. Bates, 236 S.W.2d 946, 314 Ky. 837.

(2) Duly verified motion to reopen compensation case could be treated as affidavit sufficient to present statement of facts presumptively correct where it was not controverted.

Ky.—Blue Diamond Coal Co. v. Meade, 289 S.W.2d 503.

Title of petition immaterial

(1) The character of an application to modify a compensation award is to be determined from its contents and the nature of the relief sought and is not conclusively determined by the caption on the instruments.

Ohio.—Nichols v. Ohio Collieries Co., 62 N.E.2d 636, 75 Ohio App. 474.

Pa.—Gleyze v. Hale Coal Co., 26 A. 2d 141, 149 Pa.Super. 18—Conley v. Allegheny County, 200 A. 287, 131 Pa.Super. 236.

(2) That compensation claimant's petition seeking amendment of prior awards was misnamed did not affect commission's jurisdiction or prejudice employer, where evidence was directed to the nature, extent, and duration of disability and employer had opportunity to contest proposed finding of permanent partial disability.

Cal.—Pullman Co. v. Industrial Acc. Commission, 170 P.2d 10, 28 C.2d 879.

(3) Fact that claimant who sought further compensation under the Longshoremen's and Harbor Workers' Compensation Act, called the paper he filed a claim for com-

contains facts from which it may reasonably be inferred that it is an application to reopen.⁷¹ While it has been held that the complaint in an action to recover further compensation must be construed in the same manner as complaints in other actions,⁷² it is more commonly held that the application or petition should not be construed according to the

rules of common-law pleading,⁷³ but rather should be liberally construed.⁷⁴

In general, an application or petition should state or give necessary information,⁷⁵ as, for example, the nature of the claim being made⁷⁶ and the grounds therefor,⁷⁷ although, where pleadings are

pensation instead of an application for review, was immaterial.

U.S.—Candado Stevedoring Corp. v. Willard, C.A.2, 185 F.2d 232.

Applications for review or rehearing

(1) Application to commission for review of findings and order of examiner, computing compensation on basis of stipulation as to extent of injuries, constituted an application for additional compensation.

Wis.—Boehmke v. Industrial Commission, 34 N.W.2d 774, 253 Wis. 610.

(2) Where an award of compensation was not final but temporary or partial, with the workmen's compensation commission retaining jurisdiction to make future adjustments, the claim remained pending, and claimant's application, although mistakenly labeled as for rehearing and review for a change in condition, should have been treated as one for additional compensation to be determined after hearing.

Mo.—Weiss v. Anheuser-Busch, Inc., 117 S.W.2d 632, 234 Mo.App. 710.

71. N.Y.—Mazza v. Frontier Bronze Corp., 141 N.Y.S.2d 72, 285 App. Div. 1194—Stearns v. American Laundry Machinery Co., 111 N.Y.S. 2d 161, 279 App.Div. 431.

72. Or.—Dimitroff v. State Indus. Acc. Commission, 306 P.2d 393, 209 Or. 316.

73. Minn.—Glassman v. Radtke, 225 N.W. 889, 177 Minn. 555. 71 C.J. p 1452 note 74.

74. Conn.—Henderson v. Mazzotta, 157 A. 67, 113 Conn. 747.

75. Pa.—Mazzaccaro v. Jermyn-Green Coal Co., 36 A.2d 823, 154 Pa.Super. 618.

71 C.J. p 1452 note 76.

Applications held sufficient

(1) Application for modification of workmen's compensation award to provide for additional benefits was sufficient.

Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

(2) Where injured employee timely applies in writing for further adjustment of his claim, and application discloses fact not theretofore considered by the state compensation commissioner and sufficient, if true, to entitle claimant to further benefit, claimant is entitled to have claim reopened and matters alleged in the application determined.

W.Va.—Bostic v. State Compensation Com'r, 96 S.E.2d 481.

(3) Employer's letter addressed to secretary of workmen's compensation commission advising commissioner that claimant had died prior to commissioner's award to claimant for silicosis in second stage, and that employer had a check for one thousand six hundred dollars and desired to return it and appeal from commissioner's order making the award, if necessary, could have been treated as a suggestion to commissioner of claimant's death, on which a proper application for modification of award could have been based.

W.Va.—Whited v. State Compensation Com'r, 49 S.E.2d 838, 131 W. Va. 646.

(4) Where workman's application was headed by the phrase "to reopen case, claim No. 574182" and fixed time when and described manner in which workman was injured and physician's letter accompanying application stated that, as the result of the injury which occurred on date fixed by application, the workman's condition had gradually become more aggravated and at present workman was unable to continue with his occupation, the application and the letter constituted an "application for additional compensation by reason of aggravation" so that order of commission granting additional compensation was made pursuant to the application rather than on commission's own motion.

Or.—Hinkle v. State Industrial Acc. Commission, 97 P.2d 725, 163 Or. 395.

Second petition to stop compensation

Award stopping compensation because claimant's disability had ceased was held proper as against contention that since petition which was filed more than ten months after former petition to stop compensation contained same allegations, it was in fact a petition for a rehearing, which department of labor and industry was unauthorized to grant.

Mich.—Adams v. C. O. Barton Co., 264 N.W. 333, 274 Mich. 175.

Application held insufficient

Claimant, petitioning for increased compensation, is not entitled to have commissioner set time and place for hearing of evidence, in absence of reasonable showing of condition not

considered when former award was made.

W.Va.—Phillips v. State Compensation Com'r, 174 S.E. 561, 114 W.Va. 648.

Correspondence held insufficient

(1) In general.

Or.—Grunnett v. State Industrial Accident Commission, 215 P. 831, 108 Or. 178.

71 C.J. p 1452 note 76 [b].

(2) Correspondence between a claimant and industrial commission, relative to claim for additional award, which did not set forth facts predicated claim of violation of specific safety requirement, was insufficient to constitute an application for an additional award.

Ohio.—State ex rel. Fruehauf Trailer Co. v. Coffinberry, 95 N.E.2d 331, 154 Ohio St. 241.

(3) A letter from compensation claimant's attorney to industrial accident commission, inquiring whether claim had been filed, and requesting commission to send proper form in case claim had not been filed, so that attorney could file claim immediately, did not constitute an "application" for additional compensation on account of aggravation of disability, especially in view of statutory requirement that such an application set forth facts to show an aggravation of disability and degree thereof, and hence the commission in denying additional compensation acted on its own motion, and the commission's order was not appealable.

Or.—Jacoby v. State Industrial Acc. Commission, 106 P.2d 294, 165 Or. 230.

76. Me.—Gauthier v. Penobscot Chemical Fiber Co., 113 A. 28, 120 Me. 73.

77. Or.—Stacey v. State Industrial Accident Commission, 26 P.2d 1092, 145 Or. 195.

71 C.J. p 1453 note 78.

Employers' allegation held sufficient

In suit by employer and insurer for permission to discontinue compensation payments to claimant under a judgment awarding weekly compensation, on ground that disability had ceased, allegation that disability had totally "ceased" was equivalent to an allegation that claimant's incapacity had "diminished" within meaning of the compen-

not essential, an application need not be considered insufficient for failure to allege sufficient facts.⁷⁸ A belated demand by an employee for compensation for a sympathetic affliction not otherwise related to the original injury does not constitute an application to modify or increase the compensation being paid for the original injury.⁷⁹

Being in the nature of a pleading,⁸⁰ the petition should be consistent with the findings of the board in making the award.⁸¹ If it appears at the hearing that the petition does not conform to the evidence,⁸² the petition should be amended before the award is entered.⁸³ Amendments to the application or petition may be made in a proper case,⁸⁴ and the amended petition relates back to the time

of filing of the prior petition and supersedes it.⁸⁵

A defect in a petition will not justify the reversal of an award where the employer was not prejudiced or misled by the defect.⁸⁶ Objections to application should be considered by the board before proceeding with the case on the merits.⁸⁷

Estoppel or waiver as to insufficiency of application. Where the commission has treated an informal complaint as an application for readjustment of compensation and has made the additional award on that basis, the commission may be estopped to question the sufficiency of such application;⁸⁸ and the failure of a party to object timely to a petition which is too general may operate as a waiver or

sation act, and stated a cause of action.

La.—Avoyelles Wholesale Grocery Co. v. Elmore, App., 81 So.2d 434.

Petition held insufficient

Where it was not apparent on the face of the petition that employee had suffered any increase of incapacity since determination of original proceeding in which he had been awarded a judgment for permanent partial disability of a leg, employee was not entitled to an increase in compensation under statute.

Tenn.—Hay v. Woosley, 135 S.W.2d 933, 175 Tenn. 475.

New and additional disability; change of condition

(1) Where employee did not allege in application for readjustment and reopening of workmen's compensation claim that his disability claimed was new, additional, and previously undiscovered, but alleged that it had existed from date of his release, employee could not have his case reopened, and commission had no authority to grant relief upon it.

Ariz.—London v. Industrial Commission, 223 P.2d 929, 71 Ariz. 111—Graves v. Industrial Commission, 223 P.2d 817, 71 Ariz. 74.

(2) Affidavit in support of motion to reopen compensation award which contained no statement that there had been change in claimant's condition ascribable to the injury received was insufficient to warrant reopening of award.

Ky.—Jude v. Cabbage, 251 S.W.2d 584.

Petition stating wrong ground for modification

Petition for modification of workmen's compensation award for death of claimant's husband on the ground that decedent's average weekly wage was erroneously computed could not be treated as a petition under section providing for modification of agreement or award on change in disability of injured person.

Pa.—Busch v. Jones & Laughlin Steel Corp., 27 A.2d 656, 150 Pa.Super. 48.

Change of condition as to noncompensable injury

Where compensation claimant, applying to industrial commission for reopening of case on ground of change of condition after commission denied claim for compensation for back injury, attached to application a physician's report referring only to back injury as causing such change and offered depositions of two other physicians referring only to such injury as cause of further disability, and trial commissioner stated that hearing was to determine change of condition due to back injury, which he found was not result of original accident, application was properly denied, although it did not specifically mention back injury.

Okl.—Nash v. Douglas Aircraft Co., 214 P.2d 919, 202 Okl. 459.

78. Okl.—Shawnee Morning News v. Thomas, 255 P. 937, 125 Okl. 155—Prairie Oil & Gas Co. v. King, 235 P. 522, 109 Okl. 213.

Failure to allege change in condition

In proceeding before state industrial commission to recover additional compensation for temporary total disability, evidence adduced without objection showing a change in condition will sustain award, although change in condition is not alleged in petition.

Okl.—National Zink Co. v. State Industrial Commission, 107 P.2d 1005, 188 Okl. 206.

79. Kan.—Schweiger v. Sheridan Coal Co., 297 P. 688, 182 Kan. 798. 71 C.J. p 1453 note 87.

80. Ill.—Snowdon & McSweeney Co. v. Industrial Commission, 155 N.E. 277, 324 Ill. 423.

81. Ill.—Snowdon & McSweeney Co. v. Industrial Commission, supra.

82. Ill.—Snowdon & McSweeney Co. v. Industrial Commission, supra.

Evidence in proceedings to modify award see *infra* §§ 1423-1426.

83. Ill.—Snowdon & McSweeney Co. v. Industrial Commission, supra.

84. Okl.—Slick v. Wallace, 26 P. 2d 418, 166 Okl. 92.

71 C.J. p 1453 note 82.

Amendments held proper

Where award of workmen's compensation for a "sprained" back was allowed and discontinued, and application for modification, stating that injury was the tearing apart of vertebrae of back, was denied, and petition alleging that claimant sustained a sacroiliac sprain, contusions of back, and arthritis of the spine, permitting amendment of petition to state that injuries superimposed on previous condition of arthritis aggravated and accelerated condition of arthritis was not an abuse of discretion, since the several descriptions of the effect of the injury did not change the time and place of injury or part of body injured, and were not inconsistent with each other.

Ohio.—Baugh v. Industrial Commission, 25 N.E.2d 463, 63 Ohio App. 142.

85. N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290.

86. Me.—Gauthier v. Penobscot Chemical Fiber Co., 113 A. 28, 120 Me. 73.

71 C.J. p 1453 note 81.

87. Utah.—McLaren v. Industrial Commission, 18 P.2d 640, 81 Utah 380.

88. Letter accepted as application

Where industrial commission, after award for hernia injury, treated claimant's letter as application for readjustment of compensation and made additional award on that basis, commission was estopped to question sufficiency of letter as such application or its jurisdiction to make award.

Ariz.—McManus v. Lindberg, 54 P. 2d 997, 47 Ariz. 214.

estoppel,⁸⁹ provided the essential elements for the application of the doctrine of estoppel are present.⁹⁰

Special forms in special circumstances. A special form of application for reopening of a compensation claim may be required, under statutes expressly so providing, in special circumstances, as where specified times have elapsed since the date of the injury or death or since the date of the last payment of compensation.⁹¹

Medical reports. Where the statute so requires, the claimant must include with his application a certificate of the physician who attended him;⁹² but in the absence of such a provision a medical report is not required to be attached to the application.⁹³ Under a rule to that effect, a petition to stop compensation to an employee, and its accompanying affidavit, should contain facts as to the employee's physical condition;⁹⁴ but such requirement has been held not to be jurisdictional.⁹⁵

Second petition to reopen award. Where a second petition for the reopening of a claim was filed after an order denying a prior petition therefor, and without an appeal having been taken from such order, the second petition presents only a claim for compensation based on the aggravation of claimant's condition subsequent to the date of the order denying the first petition.⁹⁶

Demurrers. Rules concerning demurrers as to pleadings generally have been applied to demurrers to petitions to increase, decrease, or terminate a compensation award.⁹⁷

No prior award. Where there has been no award, an employee's petition for additional compensation may, in some circumstances, be viewed as an original petition.⁹⁸

Answer. In general, matters going to the defense of an application must be pleaded to be available.⁹⁹

89. Failure to object or ask continuance

Petition for review of compensation award filed in general terms, but on printed form furnished by department of labor, signed by the petitioner and asking for a review of his incapacity was not subject to dismissal as improperly drawn, where employer went to trial without asking for a continuance on grounds of surprise or that petitioner make a fuller statement of the dispute between the parties. R.I.—Mondille v. Ward Baking Co., 57 A.2d 447, 73 R.I. 473.

90. No ground for invocation of estoppel

That employer treated a second petition as for compensation for increased disability did not preclude employer from questioning its sufficiency where there was no ground upon which doctrine of estoppel in pais could be invoked against the employer. N.J.—Toohey v. Gorman, 12 A.2d 873, 125 N.J.Law 41.

91. Statutory times held not to have elapsed

Where statute required that application for reopening of compensation claim of injured employee must be made on special form after lapse of seven years from date of injury or death and lapse of three years from date of last payment and that if award was made it should be granted from special fund, compensation board was entitled to treat physician's report made within three years of last payment which set forth all pertinent facts necessary to application to reopen claim as such application.

N.Y.—Finkle v. Cushing Stone Co., 104 N.Y.S.2d 692, 278 App.Div. 250,

appeal denied 105 N.Y.S.2d 1006, 278 App.Div. 985.

92. Late filing of certificate held sufficient

Failure of workman's compensation claimant, after award, to submit physician's certificate with application for readjustment of compensation, as required by statute, did not deprive claimant of right to have application heard, where, after the award and shortly before the filing of the application, claimant's physician filed two reports of claimant's condition. Ariz.—Rhoades v. Lee Moor Contracting Co., 132 P.2d 432, 60 Ariz. 161.

93. Okl.—Wasson v. Tulsa Dairy Supplies, 315 P.2d 773.

94. Mich.—Paselli v. Utley, 276 N.W. 444, 282 Mich. 287.

Rule held reasonable

Rule of department of labor and industry requiring petition to stop compensation to set forth facts as to employee's physical condition and extent of disability, if any, is a reasonable requirement. Mich.—Paselli v. Utley, supra.

95. Mich.—Seppi v. Ford Motor Co., 279 N.W. 881, 284 Mich. 410.

Pa.—Brink v. Consolidation Coal Co., 35 Pa. Dist. & Co. 551, 9 Som. Leg. J. 269.

Petition and affidavit held sufficient

(1) Where employer's petition urged stoppage of compensation not only because of asserted recovery of employee but because of employee's rehabilitation through resumption of employment, affidavit accompanying petition, even though it lacked a statement setting forth in detail employee's physical condition as required by the rule of the commis-

sion, was sufficient to confer jurisdiction upon the department to stop compensation.

Mich.—Seppi v. Ford Motor Co., 279 N.W. 881, 284 Mich. 410.

(2) However, it was also held that a petition by attorney for insurance carrier that he had been advised by employer that employee resumed his former duties as of certain date at wage equal to or greater than that received at time of accident was insufficient, and should not have been entertained by department. Mich.—Paselli v. Utley, 276 N.W. 444, 282 Mich. 287.

96. Wash.—Stevich v. Department of Labor and Industries, 47 P.2d 32, 132 Wash. 401.

97. Admission by demurrer

Demurrer to petition for additional workmen's compensation benefits because of increased incapacity admitted alleged fact that demurrant was employer's compensation insurance carrier.

Neb.—Peek v. Ayres Auto Supply, 59 N.W.2d 564, 157 Neb. 363.

98. Previous petition dismissed on merits

Employee's petition for additional compensation under compensation act was viewed as original petition, notwithstanding previous petition was dismissed after hearing on merits.

N.J.—Smith v. Klemm, 186 A. 784, 14 N.J. Misc. 665.

99. Cal.—Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission of California, 168 P. 1050, 176 C. 483.

Ind.—Adams v. I. E. Smith Const. Co., 171 N.E. 882, 91 Ind. App. 529.

Answer and notice of defense to

Hence, a party desiring to avail himself of the defense of limitations must plead such defense.¹ Where the accident commission gave notice that an award would be amended in the absence of good cause shown, and insurer appeared and objected on a particular ground, its failure to object on other grounds waived them.² That a statute interposes a general denial to the application where no answer is filed does not operate to prevent a waiver from arising as to matters not raised.³ However, an employer is not estopped to claim the benefit of the final order of the commission, denying additional compensation for an increased disability, by failure to plead it in bar to a subsequent petition complaining of the same disability, the entire record of the case, including all former orders or awards, being

necessarily before the commission.⁴ Amendments to an answer may be made in a proper case.⁵

Issues, proof, and variance. In accordance with general rules, the issues on the proceeding to increase, decrease, or terminate a compensation award depend on the pleadings.⁶ Such matters as are necessary to entitle applicant to the relief sought must be shown or proved;⁷ but matters not in issue need not be proved.⁸ The evidence should conform to the pleadings;⁹ and evidence which is not excluded by any rule or principle of law may be introduced if it tends to support an issue made by the pleadings.¹⁰ Thus, in a proceeding for further compensation, the employer or insurer may prove that the employee's condition was not related to the original injury.¹¹

original claims for compensation see supra §§ 498-503.

1. Cal.—*Western Pipe & Steel Co. v. Industrial Accident Commission of California*, 14 P.2d 530, 126 C.A. 225.

Time for instituting proceedings see supra § 856.

2. Cal.—*Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission of California*, 168 P. 1050, 176 C. 488.

3. Ind.—*Adams v. I. E. Smith Const. Co.*, 171 N.E. 882, 91 Ind.App. 529. 71 C.J. p 1453 note 95.

4. Cal.—*Benton v. Industrial Accident Commission of California*, 240 P. 1021, 74 C.A. 411.

5. **Proposal held not to constitute amendment**

In proceeding for further compensation for total disability from traumatic neurosis caused by injuries, wherein it was agreed that employee had received head and foot injuries, employer's conditional proposal that if there was competent evidence of other injuries employer wished to amend its answer to include statute of limitations did not operate as an amendment.

- Mich.—*Rajkovich v. Oliver Iron Min. Co.*, 290 N.W. 365, 292 Mich. 162.

6. Pa.—*Foster v. Mellon Stuart Co.*, 173 A. 773, 114 Pa.Super. 311.

Issues, proof, and variance in original proceedings for compensation see supra §§ 504-508.

Change in condition as main issue

On application to review award because of change in physical condition, main fact in issue is whether physical condition, as established by evidence at previous hearing, has changed since that time.

- Ind.—*Morgan v. Wooley*, 6 N.E.2d 717, 103 Ind.App. 242.

Issues as to both sides

(1) Where employer filed petition to terminate compensation award for

partial disability, employee, by answering that he was then totally disabled, put in issue claim of employer to terminate and also employee's demand for change from compensation for partial disability to that for total disability.

- Pa.—*Foster v. Mellon Stuart Co.*, 173 A. 773, 114 Pa.Super. 311.

(2) Where employer's petition to review prior award alleging a change in condition in that employee had completely recovered was considered at same time as employee's petition for review alleging that temporary total disability has ceased, leaving employee with a permanent partial impairment, industrial board had jurisdiction to award compensation for temporary total disability based upon a recurrence of hernia from which employee originally suffered.

- Ind.—*Wolfcale v. Grush*, 57 N.E.2d 438, 115 Ind.App. 155.

Matter determined on prior application

Leg amputation was before industrial commission when it dismissed application for modification of compensation award, with respect to question whether right to compensation for amputation was finally determined on failure to file application for rehearing, where commission's record disclosed that before such time claimant filed affidavit that he had leg amputated and presented claim that his right foot had been amputated, and attending physician prepared supplemental report in which amputation was mentioned five times.

- Ohio.—*State ex rel. Szalay v. Industrial Commission of Ohio*, 199 N.E. 76, 130 Ohio St. 269.

Matters held not in issue

Where claimant's application for rehearing made no mention of any claimed aggravation to claimant's right hip or leg and there had never

been a prior determination by department of any disability to right hip or leg resulting from original injury and hearing before joint board was limited strictly to matter of aggravation, regardless of fact that evidence took a wide range, joint board properly refused to consider any claimed aggravation to right hip and leg, notwithstanding there was testimony relevant thereto.

- Wash.—*Karlson v. Department of Labor and Industries of Wash.*, 173 P.2d 1001, 26 Wash.2d 310.

7. Mich.—*Woodcock v. Dodge Bros.*, 181 N.W. 976, 213 Mich. 233, 17 A.L.R. 203.

71 C.J. p 1453 note 98.

8. Ky.—*Southern Mining Co. v. Wilson*, 230 S.W. 961, 213 Ky. 245.

9. Variance held immaterial

In compensation case, pleading of injuries as of date August 26, and proof as of date September 26, was held immaterial variance, since time was not essence of employee's cause of action and insurer was not shown to have been surprised.

- Tex.—*Indemnity Ins. Co. of North America v. Weeks*, Civ.App., 75 S. W.2d 925.

10. Application held sufficient to admit proof

Employee's application, alleging that an award had been made because of accidental injury, that employer and employee had disagreed as to continuance of payments, and that injury had resulted in a permanent partial impairment, was sufficient to admit proof of an impairment that resulted from the accident.

- Ind.—*International Detrola Corp. v. Hoffman*, 70 N.E.2d 844, 224 Ind. 613.

11. Mass.—*Mulkern's Case*, 174 N. E. 226, 274 Mass. 69.

§ 860. Evidence

- a. Burden of proof
- b. Presumptions
- c. Admissibility
- d. Weight and sufficiency

a. Burden of Proof

In general, the burden of proof, or of proving a change in the conditions on which an award of compensation rests, is on the party seeking to change an existing compensation order or award.

Except in so far as the rule may be affected by

evidence introduced or by the admission of a party,¹² the burden of proof, or of proving a change in the conditions on which an award of compensation rests, is on the party seeking to change an existing compensation order or award.¹³

Burden on employee. An injured employee seeking increased or continued compensation has the burden of proving his case and the necessary elements thereof,¹⁴ as by showing that his condition has changed since the last award,¹⁵ which has

12. Particular facts held not admission

Recognition by state insurance fund that hernia was compensable, providing for operation and payment of compensation until employee was deemed to have recovered, was held not admission that employee's subsequent condition was due to operation so as to require fund to prove cessation of compensable disability.

Idaho.—Carlson v. F. H. De Atley & Co., 46 P.2d 1089, 55 Idaho 713.

13. Ga.—Fortson v. American Sur. Co., 89 S.E.2d 671, 92 Ga.App. 625.

Idaho.—Egus v. Triumph Min. Co., 232 P.2d 186, 71 Idaho 354—Skelly v. Sunshine Mining Co., 109 P.2d 622, 62 Idaho 192—Fackenthall v. Eggers Pole & Supply Co., 108 P.2d 300, 62 Idaho 46—Boshers v. Payne, 70 P.2d 391, 58 Idaho 109.

Kan.—Jones v. W. U. Tel. Co., 192 P.2d 141, 165 Kan. 1.

Ky.—Cornwell v. Commonwealth, 200 S.W.2d 286, 304 Ky. 182—W. E. Caldwell Co. v. Borders, 193 S.W.2d 453, 301 Ky. 843.

Neb.—Ludwickson v. Central States Elec. Co., 6 N.W.2d 65, 142 Neb. 308.

N.J.—Jersey City Printing Co. v. Klochansky, 74 A.2d 432, 9 N.J. Super. 361, affirmed 73 A.2d 742, 8 N.J. Super. 186.

Rotino v. J. P. Scanlon, Inc., 15 A.2d 336, 752, 125 N.J. Law 227, affirmed 19 A.2d 777, 126 N.J. Law 419.

Ducci v. Kapo Dyeing & Print Works, 23 A.2d 786, 20 N.J. Misc. 47—Drexel v. Jurgensen, 22 A.2d 816, 19 N.J. Misc. 643—Kersner v. New Jersey Good Humor Ice Cream Co., 16 A.2d 453, 18 N.J. Misc. 688.

Okla.—Sinclair Refining Co. v. Duncan, 297 P.2d 563.

Pa.—Thomas v. Susquehanna Collieries Co., 25 A.2d 98, 148 Pa. Super. 161.

Huha v. H. C. Frick Coke Co., Com.Pl., 4 Fay.L.J. 171, appeal dismissed 27 A.2d 739, 149 Pa. Super. 108.

Wash.—Karlsen v. Department of

Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310.

71 C.J. p 1454 note 2.

14. Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 93—London v. Industrial Commission, 223 P.2d 929, 71 Ariz. 111—Cole v. Town of Miami, 83 P.2d 997, 52 Ariz. 488.

Idaho.—Howard v. Washington Water Power Co., 144 P.2d 210, 65 Idaho 339.

Ky.—W. E. Caldwell Co. v. Borders, 193 S.W.2d 453, 301 Ky. 843.

La.—Dees v. Louisiana Oil Refining Corporation, App., 162 So. 597.

Mass.—Hummer's Case, 59 N.E.2d 295, 317 Mass. 617.

Minn.—Bomersine v. Armour & Co., 30 N.W.2d 526, 225 Minn. 157.

Okla.—Osborne v. State Industrial Commission, 112 P.2d 384, 188 Okl. 616.

Pa.—Porto v. Philadelphia & Reading Coal & Iron Co., 10 A.2d 29, 137 Pa. Super. 590—Zuro v. McClintic Marshall Co., 195 A. 160, 129 Pa. Super. 143.

Burden of proving particular elements

(1) Workmen's compensation claimant seeking to show that statute of limitations had not run on application to reopen his case on ground of mental incompetency was required to show actual existence of mental incompetency during period in which he claimed statute was suspended and during which he had no committee.

N.Y.—Macracken v. R. & B. Lunch Co., 119 N.Y.S.2d 827, 281 App. Div. 215, reargument denied 120 N.Y.S.2d 254, 281 App. Div. 912.

(2) Where application to review award because of change of conditions was filed more than two years after original accident, claimant was required to prove, and industrial board was required to find, time when permanent partial impairment occurred.

Ind.—International Detrola Corp. v. Hoffman, 70 N.E.2d 844, 224 Ind. 613.

(3) In proceedings by claimant to recover additional compensation under compensation act on ground that

employer violated safe-place statute and safety orders of industrial commission, claimant had burden to establish that safe-place statute or safety orders, or one of them, were violated by employer.

Wis.—Hipke v. Badger Paper Mills, 52 N.W.2d 401, 261 Wis. 226.

Disability despite return to work

Where an employee who has lost a specific member of his body returns to work, and does work assigned to him, before end of period during which employee is paid compensation for specific loss, and employee wishes to claim that in spite of being back at work and earning wages, he is permanently and totally disabled, burden is on employee to show basis of such claim.

La.—Pourciau v. Board of Com'rs of Port of New Orleans, App., 12 So. 2d 36.

15. Ariz.—Graves v. Industrial Commission, 223 P.2d 817, 71 Ariz. 74.

Idaho.—Fackenthall v. Eggers Pole & Supply Co., 108 P.2d 300, 62 Idaho 46.

Ind.—Berkey v. Chase Bag Co., 187 N.E. 679, 98 Ind. App. 175.

Ky.—W. E. Caldwell Co. v. Borders, 193 S.W.2d 453, 301 Ky. 843.

Mich.—Catina v. Hudson Motor Car Co., 262 N.W. 266, 272 Mich. 377.

N.J.—Florek v. Board of Ed., City of Newark, 87 A.2d 331, 18 N.J. Super. 425.

Fasquale v. Clyde Piece Dye Works, 1 A.2d 45, 120 N.J. Law 557—Cirillo v. United Engineers & Constructors, 198 A. 768, 120 N.J. Law 225, reversed on other grounds 3 A.2d 596, 121 N.J. Law 511—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J. Law 72, affirmed 192 A. 62, 118 N.J. Law 301.

Brehehy v. Essex County, 33 A.2d 294, 21 N.J. Misc. 253, certiorari dismissed 41 A.2d 890, 132 N.J. Law 584, affirmed 45 A.2d 700, 134 N.J. Law 129—Drexel v. Jurgensen, 22 A.2d 816, 19 N.J. Misc. 643—Lieberman v. Warman, 20 A.2d 605, 19 N.J. Misc. 417—Circelli v. Falco, 5 A.2d 61, 17 N.J. Misc. 94—Fishman v. Joseph Fish & Co.,

lessened his ability to labor and perform work,¹⁶ that he has suffered new, additional, and previously undiscovered disability,¹⁷ that the increased disability was directly and proximately caused by the original injury,¹⁸ that it affects his earning capacity,¹⁹ and that his present compensation is

- 198 A. 398, 16 N.J.Misc. 165—De Marco v. F. H. McGraw Co., 172 A. 798, 12 N.J.Misc. 496.
- Okl.—Sinclair Refining Co. v. Duncan, 297 P.2d 563—Sigler v. Tillery and Jones, 292 P.2d 423—H. & H. Supply Co. v. Bryant, 231 P.2d 685, 204 Okl. 515—Lumbermen's Supply Co. v. Mackey, 205 P.2d 870, 201 Okl. 296—Osborne v. State Industrial Commission, 112 P.2d 384, 188 Okl. 616—Payne Drilling Co. v. Shoemake, 97 P.2d 881, 186 Okl. 345—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 90 P.2d 398, 185 Okl. 72—Rose v. Champlin Refining Co., 86 P.2d 317, 184 Okl. 203.
- Or.—Hisey v. State Industrial Acc. Commission, 99 P.2d 475, 163 Or. 696.
- Pa.—Holtz v. McGraw & Bindley, 54 A.2d 905, 161 Pa.Super. 371—Kilgore v. State Workmen's Ins. Fund, 193 A. 294, 127 Pa.Super. 213.
- Tex.—Independence Indemnity Co. v. White, Com.App., 27 S.W.2d 529. General Am. Cas. Co. v. Ross, Civ.App., 275 S.W.2d 570, refused no reversible error.
- Wash.—Lyle v. Department of Labor and Industries, 304 P.2d 668, 49 Wash.2d 540—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71—Moses v. Department of Labor and Industries, 268 P.2d 665, 44 Wash.2d 511—Kleven v. Department of Labor & Industries of State, 243 P.2d 488, 40 Wash.2d 415—Hastings v. Department of Labor and Industries, 163 P.2d 142, 24 Wash.2d 1—Cooper v. Department of Labor and Industries, 147 P.2d 528, 20 Wash.2d 429—Smith v. Department of Labor and Industries of Washington, 38 P.2d 1016, 180 Wash. 84.
- W.Va.—State ex rel. Conley v. Pennybacker, 48 S.E.2d 9, 131 W.Va. 442.
- 71 C.J. p 1454 note 3.
- Change from partial to total disability**
- Pa.—Sorby v. Three Rivers Motors, 114 A.2d 347, 178 Pa.Super. 187—Reager v. Day & Zimmerman, 94 A.2d 81, 173 Pa.Super. 102—Hughes v. H. Kellogg & Sons, 13 A.2d 98, 189 Pa.Super. 580.
- Increase or recurrence of disability**
- A compensation claimant who petitioned for increased payments because of an alleged recurrence and increase of disability had burden to prove that disability had in fact recurred or increased.
- Ill.—Czerny v. Industrial Commission, 16 N.E.2d 739, 369 Ill. 275.
- 101 C.J.S.—17

No prior adjudication as to disability

Where no adjudication had been made in original workmen's compensation award as to extent of injured employee's disability, proof of change or deterioration in employee's condition since original award was not essential to subsequent award granting employee additional compensation.

Ga.—General Motors Corp. v. Craig, 85 S.E.2d 441, 91 Ga.App. 239.

Separate and distinct disability

Where it was determined by two referees and affirmed by compensation board that claimant's injury had resolved itself into permanent loss of use of foot, claimant would be required, in order to obtain additional compensation, to show that by reason of an injury to some organ or portion of his body, other than his foot, he was suffering a disability separate from disability normally flowing from loss of use of his foot.

Pa.—Porto v. Philadelphia & Reading Coal & Iron Co., 10 A.2d 29, 137 Pa.Super. 590.

Extent of impairment from subsequent injury

A claimant seeking compensation for aggravation of prior injury must show extent of impairment resulting from subsequent injury.

Or.—Keefer v. State Industrial Accident Commission, 135 P.2d 806, 171 Or. 405.

Wash.—Clayton v. Department of Labor and Industries, 296 P.2d 676, 48 Wash.2d 754—Moses v. Department of Labor and Industries, 268 P.2d 665, 44 Wash.2d 511.

16. Neb.—Peek v. Ayers Auto Supply, 71 N.W.2d 204, 160 Neb. 658.

Okl.—Payne Drilling Co. v. Shoemake, 97 P.2d 881, 186 Okl. 345—Rose v. Champlin Refining Co., 86 P.2d 317, 184 Okl. 203.

Wash.—Moses v. Department of Labor and Industries, 268 P.2d 665, 44 Wash.2d 511.

17. Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92—London v. Industrial Commission, 223 P.2d 929, 71 Ariz. 111.

18. Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92—Craig v. De Berge, 193 P.2d 442, 67 Ariz. 168.

Iowa.—Corpus Juris cited in Rose v. John Deere Ottumwa Works, 76 N.W.2d 756, 760, 247 Iowa 900—Oldham v. Scofield & Welch, 266 N.W. 480, 222 Iowa 764, modified on other grounds and rehearing overruled 269 N.W. 925, 222 Iowa 764.

Ky.—Jude v. Cabbage, 251 S.W.2d

584—W. E. Caldwell Co. v. Borders, 193 S.W.2d 453, 301 Ky. 843.

Mass.—Burns' Case, 9 N.E.2d 719, 298 Mass. 78.

N.J.—Giacchi v. Richmond Bros. Co., 78 A.2d 109, 11 N.J.Super. 76, opinion adhered to 79 A.2d 488, 12 N.J. Super. 308.

Okl.—Sinclair Refining Co. v. Duncan, 297 P.2d 563—Sigler v. Tillery and Jones, 292 P.2d 423—H. & H. Supply Co. v. Bryant, 231 P.2d 685, 204 Okl. 515—Lumbermen's Supply Co. v. Mackey, 205 P.2d 870, 201 Okl. 296—Osborne v. State Industrial Commission, 112 P.2d 384, 188 Okl. 616—Payne Drilling Co. v. Shoemake, 97 P.2d 881, 186 Okl. 345—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 90 P.2d 398, 185 Okl. 72—Blackburn Const. Co. v. Kennedy, 83 P.2d 881, 184 Okl. 549—Rose v. Champlin Refining Co., 86 P.2d 317, 184 Okl. 203.

Wash.—Tonkovich v. Department of Labor & Industries of State, 195 P.2d 638, 31 Wash.2d 220—La Lone v. Department of Labor and Industries, 100 P.2d 26, 3 Wash.2d 191—Nagel v. Department of Labor and Industries, 66 P.2d 318, 189 Wash. 631—Stevich v. Department of Labor and Industries, 47 P.2d 32, 132 Wash. 401.

71 C.J. p 1454 note 4.

19. Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92.

Mich.—Wieland v. Dow Chemical Co., 54 N.W.2d 708, 334 Mich. 427.

Rule not affected by statutory provision

Under provision of compensation act basing payments for partial disability on difference between former wages and subsequent earning power, and providing that "earning power" should not be less than subsequent earnings, receipt thereafter of equivalent wages does not affect burden of proof.

Pa.—Holtz v. McGraw & Bindley, 54 A.2d 905, 161 Pa.Super. 371.

Agreement for resumption of payments

To entitle injured employee to resumption of compensation payments, stopped by agreement providing for resumption thereof if future disability from injuries developed or he became unable to continue work because of disability due to accident, burden was on him to prove disability lessening his earning capacity because of accident, and proof of physical condition not impairing such capacity was insufficient.

Mich.—Kalonsky v. Goebel Brewing Co., 276 N.W. 706, 282 Mich. 638.

inadequate.²⁰

In the event of the death of an employee who had been receiving compensation for a compensable injury, the burden on dependent claimant is only to prove a causal relation between the adjudicated compensable injury and the death.²¹

Burden on employer. On the other hand, an employer or insurer seeking to reopen an award or otherwise to secure a diminution or discontinuance of compensation has the burden of proving his case,²² as by showing a change or improvement in the employee's condition,²³ as that the incapacity of the employee has diminished²⁴ or ceased,²⁵ or that, if his disability continues, such continuance is due to disconnected causes and not to the original injury,²⁶ although it has been held that if the employer establishes that disability was not caused by the original injury he need not go further and affirmatively show that it was due to some other

cause.²⁷ Before an employer can avail himself of the plea of the statute of limitations providing that the board shall not modify an award after the expiration of one year from termination of the compensation period fixed in the original award, he is burdened with showing when the disability ended.²⁸

The employer or insurer also has the burden of showing that the employee is now able to resume work of the same kind or of the same general character as the work in which he was engaged at the time he received the injuries for which he was awarded compensation in the first instance;²⁹ or is able to perform such work as is ordinarily available in the community in which he resides, and can thereby earn sufficient wages to justify a finding of partial incapacity;³⁰ or that employment tendered by the employer, which claimant refused to accept, was such as claimant could perform.³¹

20. Mo.—*Tabacchi v. Garavelli*, App., 52 S.W.2d 567, 568.

21. N.J.—*Hagerman v. Lewis Lumber Co.*, 93 A.2d 632, 24 N.J.Super. 120, affirmed 99 A.2d 513, 13 N.J. 315.

22. Cal.—*Brown v. Industrial Acc. Commission of Cal.*, 111 P.2d 931, 44 C.A.2d 6.

Ind.—*Earhart v. Cyclone Fence Co.*, 4 N.E.2d 571, 102 Ind.App. 634.

Mich.—*Pretzer v. State Psychopathic Hospital*, 282 N.W. 213, 286 Mich. 454.

Okl.—*Reams v. Malcolm*, 122 P.2d 145, 190 Okl. 213—*Thomas Conlin Co. v. Guckian*, 50 P.2d 299, 174 Okl. 463.

Pa.—*Manno v. Tri-State Engineering Co.*, 48 A.2d 122, 159 Pa.Super. 267. 71 C.J. p 1454 note 7.

Burden of proof as to particular matters

(1) Employee resisting petition by employer to review existing award of compensation does not have burden of proving loss of earning capacity, but employer as petitioner must prove extent of employee's incapacity.

R.I.—*Wareham v. U. S. Rubber Co.*, 54 A.2d 372, 73 R.I. 207.

(2) An employer's failure to appeal from original award of compensation for total disability resulting from leg injury, and his making of payments thereunder for more than a year, amounted to an "admission" that employee had been totally disabled by leg injury for period of approximately two years, and employer, thereafter disassociating leg injury from pre-existing lung condition and assigning twenty-five per cent of disability to leg injury and seventy-five per cent to lung condition and

reducing compensation accordingly, assumed a heavy burden of proof.

Pa.—*Thomas v. Susquehanna Collieries Co.*, 25 A.2d 98, 148 Pa.Super. 161.

23. Ga.—*Maryland Cas. Co. v. Pitman*, 35 S.E.2d 319, 72 Ga.App. 838. Ky.—*Department of Highways v. Harrell*, 163 S.W.2d 287, 291 Ky. 90.

Mich.—*Pretzer v. State Psychopathic Hospital*, 282 N.W. 213, 286 Mich. 454.

Pa.—*Monarko v. Culmerville Coal Co.*, 47 A.2d 295, 159 Pa.Super. 126. *Herbert v. Glen Alden Coal Co.*, 47 Pa.Dist. & Co. 48, 37 Luz.Leg. Reg. 51.

Va.—*J. A. Foust Coal Co. v. Messer*, 80 S.E.2d 533, 195 Va. 762.

W.Va.—*Blosser v. State Compensation Com'r*, 51 S.E.2d 71, 132 W.Va. 112.

71 C.J. p 1454 note 8.

24. La.—*Johnson v. Calcasieu Sulphate Paper Co.*, App., 142 So. 861.

Neb.—*Ludwickson v. Central States Elec. Co.*, 6 N.W.2d 65, 142 Neb. 308.

N.J.—*Blaziak v. Eastwood-Nealley Corp.*, 57 A.2d 558, 26 N.J.Misc. 116.

Pa.—*Holtz v. McGraw & Bindley*, 54 A.2d 905, 161 Pa.Super. 371.

Matichak v. Motley Coal Co., Com.Pl., 55 Lack.Jur. 49—*Cahn v. Savitz*, Com.Pl., 45 Lack.Jur. 47.

25. Ind.—*Earhart v. Cyclone Fence Co.*, 4 N.E.2d 571, 102 Ind.App. 634.

Okl.—*Van Ness Const. Co. v. Walther*, 95 P.2d 858, 185 Okl. 657—*Davon Oil Co. v. State Industrial Commission*, 61 P.2d 579, 177 Okl. 812—*Thomas Conlin Co. v. Guckian*, 50 P.2d 299, 174 Okl. 463—*Marland v. Forrester*, 28 P.2d 542, 167 Okl. 140.

Pa.—*Boyle v. Boyle*, 100 A.2d 385, 174 Pa.Super. 188—*Rosa v. Paint Creek Collieries*, 85 A.2d 670, 170 Pa.Super. 540.

Callahan v. Philadelphia & Reading Coal & Iron Co., Com.Pl., 28 Northumb.Leg.J. 61—*Korn v. Carnegie Coal Corp.*, Com.Pl., 25 Wash. Co. 41.

71 C.J. p 1455 note 10.

Burden not on claimant

Industrial accident commission's decree in compensation proceeding suspending payments, although no finding was made that incapacity had ended, and demanding an attempted demonstration of claimant's incapacity, was erroneous for improperly placing a burden on claimant to make an attempted demonstration of her earning capacity.

Me.—*Shoemaker's Case*, 51 A.2d 484, 142 Me. 321.

26. N.J.—*Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division*, 78 A.2d 403, 11 N.J.Super. 338—*Calicchio v. Standard Brands*, 64 A.2d 236, 1 N.J.Super. 276—*Ducasse v. Walworth Mfg. Co.*, 62 A.2d 480, 1 N.J.Super. 77.

Lieberman v. Warman, 20 A.2d 604, 19 N.J.Misc. 417.

71 C.J. p 1455 note 11.

27. Ky.—*Lewis v. Fordson Coal Co.*, 60 S.W.2d 585, 249 Ky. 253.

28. Ind.—*American Chain Co. v. Salters*, 140 N.E. 435, 80 Ind.App. 410.

29. Ind.—*Earhart v. Cyclone Fence Co.*, 4 N.E.2d 571, 102 Ind.App. 634.

30. Me.—*Gagnon's Case*, 65 A.2d 6, 144 Me. 131.

Pa.—*Kutney v. William Penn Colliery Co.*, Com.Pl., 8 Sch.Reg. 84.

31. Mich.—*Kolenko v. U. S. Rubber*

Availability of "light work." Where an employer or insurer seeks reduction of compensation and it appears that the employee has so far recovered as to be able to perform light work, it has been held that the employer or insurer is not under the burden of showing that light work is available to the employee,³² but that the burden rests on the employee to show that such work is unavailable.³³ However, it has also been held that the burden is on the employer to prove that light work, such as would have therapeutic value in enabling the injured employee to rehabilitate himself, was available to him.³⁴

b. Presumptions

Various presumptions and inferences of fact obtain in proceedings to increase, decrease, or terminate a compensation award, such as a presumption that the physical condition of the employee at a former time continues.

Various presumptions and inferences of fact have been held to obtain in a proceeding to increase, decrease, or terminate a compensation award.³⁵ Thus, the physical condition of an employee shown to have existed in a former workmen's compensation proceeding or at a former time, is presumed to continue so until rebutted,³⁶ although it is also presumed not to continue beyond the period for which compensation was paid him by the employer;³⁷ and where the original disability was found to be compensable, the subsequent partial disability is entitled to a presumption of continuing causally related disability in a subsequent proceeding.³⁸ Where an employer or

insurance carrier seeks to discontinue compensation on the ground that continued disability is due merely to a preëxisting disease, there is a presumption that continued disability is due to the accidental injury.³⁹

Under a statute providing that any disability beginning more than a stated period from the date of the accident shall be conclusively presumed not to be due to such accident, the presumption is so far conclusive as to deprive the commission of the power to infer a causal connection no matter what evidence may be adduced to show it,⁴⁰ although the statutory presumption is inapplicable to a disability beginning before expiration of the specified period and recurring thereafter.⁴¹ In the absence of a showing to the contrary, it is presumed that the injured employee would have taken advantage of selective work which he could have performed in his injured condition, if such work had been available.⁴² In an employee's proceeding to secure additional compensation, it will be presumed from the original adjudication that there was a compliance with the jurisdictional requirements of timely giving of notice of injury⁴³ and due filing of claim for compensation.⁴⁴

c. Admissibility

In general, evidence which is relevant and material to prove or disprove an issue, and competent under general rules, is admissible in proceedings to increase, decrease, or terminate a compensation award.

Products, 280 N.W. 148, 285 Mich. 159.

32. Mass.—In re Ginley, 138 N.E. 719, 244 Mass. 346.

71 C.J. p 1455 note 13.

33. Ma.—Connolly's Case, 119 A. 664, 122 Me. 289.

34. Pa.—Rosa v. Paint Creek Collieries, 85 A.2d 670, 170 Pa.Super. 540.

Eckley v. Rae, Com.Pl., 31 Luz. Leg.Reg. 421, affirmed 128 Pa.Super. 577, 194 A. 575—Centofanti v. Industrial Collieries Corp., Com.Pl., 22 Wash.Co. 55.

Contra Yednock v. Hazle Brook Coal Co., 167 A. 236, 109 Pa.Super. 182.

35. Payment of check

Date of check of workmen's compensation commissioner making last payment of a permanent disability award creates a rebuttable presumption that such payment was on that day received by claimant.

W.Va.—York v. State Compensation Com'r, 35 S.E.2d 353, 128 W.Va. 16.

36. N.J.—Walker v. Albright, 196 A. 378, 119 N.J.Law 285.

Okl.—Thomas Conlin Co. v. Guckian, 50 P.2d 299, 174 Okl. 463.

Pa.—Suarez v. DeAngelis Coal Co., Com.Pl., 40 Lack.Jur. 101.

Presumption held not rebutted

(1) In general.

Ariz.—Hurley v. Industrial Commission, 318 P.2d 357, 83 Ariz. 178.

(2) A statement by commissioner of labor in his brief that he had made an examination of claimant, whose disability had been previously adjudged by workmen's compensation bureau as total, and that claimant's disability was not total, was insufficient to destroy presumption that total disability continued.

N.J.—Walker v. Albright, 196 A. 378, 119 N.J.Law 285.

Restoration of compensation at loss of employment

Under statute providing that compensation payable to workman, when added to his earning capacity after injury, should not exceed average weekly earnings at time of injury, when employee seeks to have compensation restored because he has lost employment he should not be required to make showing of actual change of physical condition which would discourage attempts at re-

habilitation by imposing an unfair hazard thereon.

Mich.—Markey v. S. S. Peter & Paul's Parish, 274 N.W. 797, 281 Mich. 292.

37. La.—Mitchell v. T. L. James & Co., App., 176 So. 245—Dees v. Louisiana Oil Refining Corporation, App., 162 So. 597.

Pa.—Powell v. Susquehanna Collieries Co., 32 Luz.Leg.Reg. 161.

38. N.Y.—Brewka v. Mollet, 112 N. Y.S.2d 122, 279 App.Div. 1104.

39. Okl.—Channing v. Payton, 4 P. 2d 1, 152 Okl. 153.

40. Colo.—Industrial Commission of Colorado v. Weaver, 254 P. 444, 81 Colo. 191.

41. Colo.—Industrial Commission of Colorado v. Weaver, supra.

42. Va.—J. A. Foust Coal Co. v. Messer, 80 S.E.2d 533, 195 Va. 762.

43. Tex.—Wiggins v. Standard Accident Ins. Co., Civ.App., 61 S.W.2d 579.

44. Tex.—Wiggins v. Standard Accident Ins. Co., supra.

While, where express statutory provisions to that effect exist, the administrative compensation agency is not bound by common-law or statutory rules of evidence,⁴⁵ and may receive such evidence as in its judgment would best ascertain the rights of the parties,⁴⁶ it is generally held, in accordance with rules governing the admissibility of evidence in civil actions generally, that in a proceeding to increase, decrease, or terminate a compensation award, any evidence which is relevant and material to prove or disprove a particular issue, and competent under the general rules of evidence, is admissible;⁴⁷ and, conversely, that evidence which is irrelevant or immaterial,⁴⁸ or which from its nature is incompetent

under the general rules,⁴⁹ is inadmissible.

Since evidence to show increase or decrease in disability must be predicated on the condition and causes determined at the original hearing, evidence thereof is admissible;⁵⁰ but evidence is not admissible to prove or disprove an issue which has been finally decided by the original award or order.⁵¹

Employee's application to increase compensation. The general rules discussed above have been applied, in proceedings on an employee's application for an increase in the amount of compensation,⁵² to evidence offered to prove a change in the employee's condition,⁵³ or to prove the continuance or perma-

45. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, C.C.A.Mass., 102 F.2d 298, certiorari denied 59 S.Ct. 1042, 307 U.S. 646, 83 L.Ed. 1525.

46. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, supra.

Competency not limited to newly discovered evidence
U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, supra.

47. Ariz.—Schultz v. Industrial Commission, 37 P.2d 372, 44 Ariz. 357.

N.J.—Drexel v. Jurgensen, 22 A.2d 816, 19 N.J.Misc. 643.

Ohio.—Dean v. Industrial Commission, 81 N.E.2d 813, 86 Ohio App. 105—Phillips v. Industrial Commission, 61 N.E.2d 233, 75 Ohio App. 131.

Stipulation of facts

On compensation hearing on ground of change in condition, stipulation of facts as to claimant's condition, theretofore entered into and filed with industrial commission, may be considered as evidence of facts stipulated.

Okl.—Kansas Explorations v. Wright, 49 P.2d 65, 173 Okl. 411.

48. Ga.—Hartford Accident & Indemnity Co. v. Camp, 26 S.E.2d 679, 69 Ga.App. 753.

49. Ga.—Royal Indem. Co. v. Babb, 16 S.E.2d 907, 66 Ga.App. 51.

Wash.—Kresoya v. Department of Labor and Industries, 240 P.2d 257, 40 Wash.2d 40.

Unsworn ex parte statement

(1) Where special indemnity fund was not a party to prior joint petition settlement hearing in which unsworn statement of doctor, introduced by agreement, showed that claimant sustained permanent partial disability as result of last injury, and ex parte statement was not offered in evidence in later proceeding for additional compensation against fund, and fund did not agree that such statement could be considered against it, commission was without authority to consider such statement

as basis for entering award against fund.

Okl.—Special Indem. Fund v. Knight, 200 P.2d 766, 201 Okl. 24.

(2) In workmen's compensation proceedings, a written statement which was made by claimant's doctor as part of original claim for aggravation but which was inconsistent with doctor's testimony was not evidence on which claimant could rely to establish his case and was at most a prior unsworn statement which could serve no purpose except that of impeachment.

Wash.—Prince v. Department of Labor and Industries of Wash., 286 P.2d 707, 47 Wash.2d 98.

50. N.J.—Ducci v. Kapo Dyeing & Print Works, 28 A.2d 786, 20 N.J. Misc. 47—Drexel v. Jurgensen, 22 A.2d 816, 19 N.J.Misc. 643—Lieberman v. Warman, 20 A.2d 604, 19 N.J.Misc. 417.

Particular evidence held admissible

Where compensation award based on receipt and report or stipulation is made by industrial commission, and it is impossible to determine what character of disability was included in award, commission, on subsequent hearing, may consider competent evidence to determine character or extent of disability determined by prior award.

Okl.—Croxtton & Bucklin v. Buchanan, 39 P.2d 91, 170 Okl. 170.

51. Ariz.—Nevitt v. Industrial Commission, 217 P.2d 1039, 70 Ariz. 172.

Particular evidence held inadmissible

(1) On review of compensation award based on alleged change in employee's condition, evidence that condition causing disability was not caused by accident is incompetent and inadmissible.

Ga.—Hartford Accident & Indemnity Co. v. Camp, 26 S.E.2d 679, 69 Ga. App. 753.

(2) Compensation claimant's disability due to heart disease having

been found by industrial accident board not to have a causal connection with injury to claimant's hand could not be considered in determining whether condition of his hand rendered claimant totally and permanently disabled for purpose of awarding further compensation on that ground.

Mass.—Hummer's Case, 59 N.E.2d 295, 317 Mass. 617.

52. Wyo.—In re Iles, 110 P.2d 826, 56 Wyo. 443.

Record in proceeding to perpetuate testimony

Where deceased employee in addition to widow to whom compensation was awarded was survived by partially dependent minor children who might at some future time become entitled to an award, compensation commissioner would have jurisdiction, on proper notice, to hold a hearing in nature of a proceeding to perpetuate testimony, and a transcript of such testimony, made a part of the file of case, may be properly considered in proceedings for a supplemental award.

Conn.—Morrill v. Hartford Painting & Decorating Co., 43 A.2d 74, 132 Conn. 163.

Evidence held inadmissible

Proof that employee, seeking modification of compensation award, so as to be allowed compensation for permanent total disability, engaged, with some associates in some oil exploration, which did not require any physical work on part of employee, could not be taken into consideration in determining employee's incapacity.

Wyo.—In re Iles, 110 P.2d 826, 56 Wyo. 443.

53. Ga.—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App. 789.

Evidence held admissible

(1) In general.

Colo.—Wierman v. Tunnell, 120 P.2d 638, 108 Colo. 544.

N.J.—Da Bin v. P. S. Thorsen & Co., 79 A.2d 918, 12 N.J.Super. 575.

Okl.—Phillips Petroleum Co. v. Anguish, 209 P.2d 689, 201 Okl. 691.

S.C.—Crenshaw v. Pendleton Mfg. Co., 54 S.E.2d 61, 215 S.C. 66.

Wash.—Anderson v. Department of Labor and Industries, 159 P.2d 397, 23 Wash.2d 76.

(2) On employer's application to stop payment of compensation because of change in employee's condition industrial board's refusal to admit testimony of physicians to show that employee's alleged incapacity was not due to his employment and that employee was not totally incapacitated, on ground that physicians had not seen employee at time of first hearing or before time of examination, was error, since employee's condition at hearing on "change in condition" is a "question of fact" to be determined not by what his condition might have been at or prior to original award, but by what it was after application for hearing on change in condition.

Ga.—Wilson v. Swift & Co., 23 S.E. 2d 261, 68 Ga.App. 701.

(3) A physician, who had examined and treated an injured employee prior and subsequent to last previous order of award made by state industrial commission in compensation proceeding, was a competent witness at a hearing held to determine whether there had been a change in condition of such employee.

Okl.—J. E. Smith & Sons v. Bay, 99 P.2d 152, 186 Okl. 544.

(4) Testimony as to extent of permanent partial disability of compensation claimant's hand by two physicians, of whom only one examined claimant before as well as after industrial commission's first award of compensation for lesser extent of such disability, was admissible in corroboration of such physician's testimony as to progressive nature of injury and extent of disability in proceeding for award of additional compensation on ground of change of condition.

Okl.—Lumbermen's Supply Co. v. Mackey, 205 P.2d 870, 201 Okl. 296.

(5) In proceeding for increase in compensation award on ground of increased disability where examining physicians who testified on original hearing were deceased and medical experts had no personal knowledge of claimant's condition at prior hearing, medical experts were permitted to use findings of deceased medical witnesses at prior hearing as a basis for comparison and formulating opinion as to character and extent of change in disability of claimant.

N.J.—Lieberman v. Warman, 20 A. 2d 604, 19 N.J.Misc. 417.

(6) Testimony as to medical examination occurring after terminal date may be material and probative in proceedings on workman's aggravation claim.

Wash.—La Plant v. Department of Labor and Industries, 301 P.2d 542, 49 Wash.2d 343.

Evidence held inadmissible

(1) In general.
Ga.—Hartford Accident & Indemnity Co. v. Camp, 26 S.E.2d 679, 69 Ga. App. 758.

N.J.—Licker v. J. G. Martin Box Co., 21 A.2d 595, 127 N.J.Law 136.

(2) Fact that workman annually represented in applications for motor vehicle driver's license that he was free from physical and mental disability was not material to his claim for additional workmen's compensation for total psycho-neurotic disability, nor did representation made on application for unemployment compensation in year following alleged accident, that he was able to work, impair his proof of illness and disability.

N.J.—Simon v. R. H. H. Steel Laundry, Inc., 95 A.2d 446, 25 N.J.Super. 50, affirmed 98 A.2d 604, 26 N.J. Super. 598.

(3) Where employee, who had been awarded compensation for permanent injuries consisting of loss of right index finger, permanent loss of use of right thumb, and serious and permanent disfigurement of face, filed petition for an additional award for partial disability, physician's testimony with respect to injury to and extent of disability in claimant's right arm and hand had no bearing on question whether employee was entitled to additional compensation for partial disability.

Pa.—Bordick v. John Conlon Coal Co., 19 A.2d 536, 144 Pa.Super. 522.

(4) In proceedings on workman's aggravation claim, medical testimony which made no reference to workman's condition or possible aggravation of his condition between terminal dates had no probative value and should not have been admitted.

Wash.—La Plant v. Department of Labor and Industries, 301 P.2d 542, 49 Wash.2d 343.

(5) Workman, seeking additional compensation for aggravation of disability, was properly refused request to read as part of his case in chief testimony of doctors who were witnesses of department of labor and industries and who had testified for department in previous hearings before joint board.

Wash.—Larson v. Dept. of Labor and Industries, 166 P.2d 159, 24 Wash.2d 461.

(6) In proceeding on application to reopen industrial insurance claim to recover compensation for aggravation, no evidence of aggravation prior to last order of supervisor from which no appeal is taken is admissible, but date of such order is one terminal date.

Wash.—Karniss v. Department of Labor and Industries, 239 P.2d 555, 39 Wash.2d 898.

Subjective symptoms

(1) Where existence of aggravated condition attributable to original injury is to be shown by medical opinion, physician may use history obtained from injured person in connection with objective findings he as expert may make by examinations, tests, X-ray pictures, and other appropriate data.

Wash.—Kresoya v. Department of Labor and Industries, 240 P.2d 257, 40 Wash.2d 40.

(2) Aggravation of condition of injured workman attributable to original injury cannot be established by medical opinion which is based on subjective symptoms alone, although opinion may be partially based on subjective symptoms related by injured workman.

Wash.—Kresoya v. Department of Labor and Industries, supra.

(3) While exclusion of history and work record stated to physician by injured person and physician's opinion based thereon was proper, where medical expert's testimony indicated that injury and work history obtained from injured person was sufficiently corroborated by matters objective, expert's opinion based thereon was admissible.

Wash.—Kresoya v. Department of Labor and Industries, supra.

(4) In proceeding to reopen workman's compensation claim, physician's opinion testimony, based on claimant's ex parte history of subjective symptoms during twelve year period between original injury and his second visit to physician, not for treatment, but to qualify physician as witness, was inadmissible as hearsay.

Wash.—Petersen v. Department of Labor and Industries, 217 P.2d 607, 36 Wash.2d 266.

(5) Testimony of compensation claimant detailing his injuries, his pain, his discomfort, and disabling effect of such injuries, was not objectionable as being purely of a subjective character.

Wash.—Omeitt v. Department of Labor and Industries, 152 P.2d 973, 21 Wash.2d 684.

(6) Testimony of physician, who examined compensation claimant, concerning such examination, interpreting X-ray pictures taken of claimant, expressing opinion that claimant could not do any heavy work, and expressing an opinion as to amount of permanent partial disability, was not objectionable as being based solely on what claimant had told physician.

Wash.—Omeitt v. Department of Labor and Industries, supra.

nency of the disability,⁵⁴ and to evidence to prove the cause of such change or continued disability.⁵⁵

On an application for additional compensation, claimant should be permitted to introduce evidence as to the circumstances under which a final receipt was given,⁵⁶ and as to when total disability actually terminated,⁵⁷ in order to fix the time when applicable limitations began to run.

Employer's or insurer's application to decrease or terminate compensation. Similarly, the general rules have been applied, in proceedings on the application of an employer or insurer to decrease or

terminate a compensation award, to evidence as to the employee's recovery.⁵⁸

d. Weight and Sufficiency

General rules as to the requisites and sufficiency of evidence apply in proceedings to increase, decrease, or terminate compensation.

Rules governing the degree of proof required, and the weight and sufficiency of evidence, to establish matters in civil actions generally, have been applied, in proceedings to increase, decrease, or terminate compensation, to the proof requisite to the reopening or review of the prior award,⁵⁹ and

54. Mont.—Koski v. Murray Hospital, 56 P.2d 179, 102 Mont. 109.

Evidence held admissible

On application of compensation claimant, who had previously received maximum statutory compensation for total incapacity and specific compensation for injury to right hand, for further compensation because disability was total and permanent, single member, in determining whether claimant's heart condition was traceable to original injury, should consider finding made in previous proceeding that surgical operations necessitated by injury had precipitated heart attack, together with conflicting evidence as to whether effect of injury on heart still continued.

Mass.—Hummer's Case, 59 N.E.2d 295, 317 Mass. 617.

Evidence held inadmissible

A claimant, testifying with respect to a change in condition of injured member for purpose of showing an increase in permanent partial industrial handicap, cannot competently give opinion that condition of injury is permanent, but he may state facts relating to such condition and from such facts, together with other evidence, industrial board may determine question of permanency.

Ga.—Royal Indem. Co. v. Babb, 16 S. E.2d 907, 66 Ga.App. 51.

55. Ky.—University of Kentucky v. Combs, 88 S.W.2d 981, 261 Ky. 333.

La.—Otwell v. Travelers Ins. Co., App., 22 So.2d 70.

N.J.—Huber v. New England Tree Expert Co., 61 A.2d 59, 137 N.J. Law 549, affirmed 65 A.2d 514, 2 N. J. 53.

Evidence held admissible

(1) In proceeding on application for reopening of claim to obtain further benefits after two prior awards had become final, testimony of medical witness, who had not examined claimants subsequent to last award, was competent on question whether claimant's change in physical condition was attributable to injuries which formed basis for claim sought to be reopened.

Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92.

Okl.—H & H Supply Co. v. Bryant, 281 P.2d 685, 204 Okl. 515.

(2) In proceeding by employee's guardian to recover additional compensation after employee became insane, testimony of physician that head injuries received by employee in course of employment were a positive factor of his insanity was admissible.

Ohio.—Dean v. Industrial Commission, 81 N.E.2d 813, 86 Ohio App. 105.

(3) In workmen's compensation proceeding, on claim by employee that compensable ankle injury had caused heart ailment which further disabled him, court erred in excluding testimony of physician that he believed there was a causal relationship between plaintiff's ankle and heart ailment although such evidence did not tend to establish all elements of direct or proximate causal relationship.

Ohio.—Fox v. Industrial Commission of Ohio, 125 N.E.2d 1, 162 Ohio St. 569.

(4) In compensation suit, testimony of four physicians who examined employee that operation and treatment for fractured right femur, as well as success of operation, could hardly be improved on and that there was nothing to cause a limp by reason of fracture and plate placed against bone was competent.

Tenn.—Lee v. Aluminum Co., 198 S. W.2d 639, 184 Tenn. 287.

Degrees of disability from particular causes

Where workmen's compensation award had determined that claimant was totally disabled, but that part of disability had been caused by compensable accident and rest by infirmity not connected with accident, claimant was thereafter entitled to apply for hearing to determine whether there had been change in his condition since initial award had been entered and, on such hearing, would be permitted to show, by competent evidence, that degree of dis-

ability arising from injury had increased and that degree due to other infirmity had decreased, even though original award had been fully satisfied.

Ga.—American Emp. Ins. Co. v. Hardeman, 85 S.E.2d 805, 91 Ga.App. 462.

56. Ind.—Adams v. I. E. Smith Const. Co., 171 N.E. 882, 91 Ind. App. 529.

57. Ind.—Adams v. I. E. Smith Const. Co. supra.

58. Mich.—Pretzer v. State Psychopathic Hospital, 282 N.W. 213, 286 Mich. 454.

59. U.S.—Hudnell v. O'Hearne, D.C. Md., 99 F.Supp. 954.

Ga.—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App. 789.

Wash.—La Lone v. Department of Labor and Industries, 100 P.2d 26, 3 Wash.2d 191.

71 C.J. p 1455 note 26.

Opinion evidence

In workmen's compensation proceeding, where medical advisory board reported that there were no objective findings to reopen case, and doctor, who had performed a spinal fusion operation on claimant after original award, stated, prior to operation, that claimant's permanent disability rating was twenty-five per cent for body as whole due to upper back injury and thirty-five per cent of left ankle due to malunited fracture present there but, after operation, stated that he had not made explorations to confirm his diagnosis; testimony contained in doctor's letter and medical advisory board's report had to be placed in same category of opinion evidence.

Ariz.—Harris v. Industrial Commission, 251 P.2d 890, 75 Ariz. 71.

Evidence held not conclusive

A deputy commissioner of labor department bureau of employees' compensation is not obliged to accept experts' opinions as correct, or credibility of even uncontradicted evidence, in proceeding for further disability compensation under longshoremen's compensation act.

setting it aside⁶⁰ or reclassification of the injury,⁶¹ ing the sufficiency of evidence to support an award or granting a new, altered, or modified award.⁶² granting further or additional compensation,⁶³ and

The general rules have been applied in determin- ing they have also been applied in determining the suf-

U.S.—Hudnell v. O'Hearne, D.C.Md., 99 F.Supp. 954.

Evidence held sufficient

(1) To warrant reopening of claim for an award of compensation.

Wash.—Bilski v. Department of Labor and Industries, 113 P.2d 62, 8 Wash.2d 594.

(2) To justify refusal to reopen or review case.

Colo.—Kokel v. Industrial Commission, 139 P.2d 259, 111 Colo. 188.

Ga.—Maryland Cas. Co. v. Pitman, 35 S.E.2d 319, 72 Ga.App. 838.

Okl.—Montgomery v. State Industrial Commission, 61 P.2d 209, 177 Okl. 525.

Evidence held sufficient to authorize hearing

(1) Where uncontroverted affidavits of employer alleged that after award of compensation to employee for permanent total disability he had been employed for several months in performance of heavy manual labor as a member of a road maintenance crew, and had been accorded no special privilege because of his physical condition, employer was entitled to have case reopened and to have a hearing by state compensation commissioner on employer's application for modification of award. W.Va.—Blosser v. State Compensation Com'r, 51 S.E.2d 71, 132 W.Va. 112.

(2) Physician's report that claimant was suffering muscular spasms in region of lower back and traumatic arthritis, being totally disabled for manual labor in his then condition, although insufficient in itself to justify reopening claim after expiration of temporary award, entitled claimant to a hearing before compensation commissioner for purpose of presenting further proof concerning reopening of finding of no permanent disability.

W.Va.—Dillon v. State Compensation Com'r, 39 S.E.2d 837, 129 W.Va. 223.

Evidence held insufficient

(1) To require reopening of an award.

Colo.—Beckley v. Industrial Commission, 146 P.2d 990, 112 Colo. 135.

Fla.—Sonny Boy's Fruit Co. v. Compton, 46 So.2d 17.

Ind.—Berkey v. Chase Bag Co., 187 N.E. 679, 93 Ind.App. 175.

W.Va.—Mason v. Workmen's Compensation Appeal Board, 4 S.E.2d 793, 121 W.Va. 444.

(2) To establish that state industrial commission "waived" rule that an award, on which no application for rehearing was made, and which was not brought before supreme

court by certiorari within statutory time, was conclusive as to issues determined.

Ariz.—Harambasic v. Barrett & Hilp & Macco Corp., 119 P.2d 932, 58 Ariz. 319.

60. N.J.—Lemongelli v. Carlson Co., 38 A.2d 578, 132 N.J.Law 71, affirmed 45 A.2d 325, 133 N.J.Law 559.

Okl.—Southern Fuel Co. v. State Industrial Commission, 284 P. 35, 141 Okl. 127.

More than scintilla of evidence required

Unless there is more than a scintilla of evidence of increased disability, mere difference of opinion of experts or competent observers as to percentage of disability arising from original injury would not be sufficient to justify a different determination by another commissioner on petition for review-reopening.

Iowa.—Bousfield v. Sisters of Mercy, 86 N.W.2d 109.

Evidence held sufficient

(1) To justify rescinding lump sum award which had been made "in full for all present and future claims arising out of accidental injury" and order directing payment of compensation until application should be made for further consideration of degree of physical impairment and earning capacity of claimant.

N.Y.—King v. John W. Cowper Co., 285 N.Y.S. 57, 246 App.Div. 877.

(2) To sustain board's refusal to set aside an award on ground that stipulation of facts on which award was based was entered into under mutual mistake of fact that claimant's injury had reached a quiescent stage.

Ind.—Brush v. American Coffee House, 44 N.E.2d 202, 112 Ind.App. 206.

Evidence held insufficient

To justify circuit court in setting aside compensation commission's finding denying additional compensation.

Mo.—Glenn v. Joseph Kesl & Sons, App., 74 S.W.2d 253.

61. Wash.—Luke v. Department of Labor and Industries of Washington, 265 P. 176, 147 Wash. 149.

62. Ariz.—Caekos v. Stanley Fruit Co., 98 P.2d 471, 55 Ariz. 72—Cole v. Town of Miami, 83 P.2d 997, 52 Ariz. 488.

Neb.—Riedel v. Smith Baking Co., 33 N.W.2d 287, 150 Neb. 28—Kucera v. Village of Prague, 3 N.W.2d 201, 141 Neb. 180—Huff v. Omaha Cold Storage Co., 287 N.W. 764, 136 Neb.

907—Metropolitan Dining Room v. Jensen, 254 N.W. 405, 126 Neb. 765.

Pa.—Barckhoff v. Westmoreland Coal Co., Com.Pl., 28 West. 185, affirmed 53 A.2d 872, 161 Pa.Super. 146.

71 C.J. p 1456 note 29.

Absence of proof of change

Where industrial board had previously determined that claimant was permanently partially disabled, board was authorized to grant modified award without further proof as to claimant's inability to work, where award directed payment until change in condition was shown and employer had presented no evidence of change. N.Y.—Schultz v. Buffalo Union Furnace Co., 292 N.Y.S. 321, 249 App. Div. 866.

Evidence held insufficient

(1) To warrant modification of award of compensation for scheduled injury.

Kan.—Cornell v. Cities Service Gas Co., 27 P.2d 228, 138 Kan. 607.

(2) To authorize correction of previous award on ground of mistake, fraud, or changed condition.

Ky.—Wells v. Fox Ridge Min. Co., 243 S.W.2d 676.

63. Mich.—Wieland v. Dow Chemical Co., 54 N.W.2d 708, 334 Mich. 427—Tarnow v. Railway Exp. Agency, 50 N.W.2d 318, 331 Mich. 558—Ellis v. City of Detroit, Department of Street Railways, 4 N.W.2d 662, 302 Mich. 296.

Okl.—General Acc. Fire & Life Assur. Corp. v. Mowry, 262 P.2d 421—Brooks & Dahlgren v. Pettigrew, 159 P.2d 743, 195 Okl. 550—Oklahoma Portland Cement Co. v. Smith, 73 P.2d 446, 181 Okl. 313—Wetherbee Electric Co. v. Collier, 71 P.2d 312, 180 Okl. 473.

71 C.J. p 1456 note 30.

Evidence to produce moral certainty

In action to recover further compensation after claimant was awarded compensation for permanent partial disability, claimant was required to produce satisfactory evidence on contested issue which would ordinarily produce moral certainty or conviction in an unprejudiced mind. Or.—Dimitroff v. State Indus. Acc. Commission, 306 P.2d 398, 209 Or. 316.

Evidence held insufficient as matter of law

In proceeding for additional compensation, where claimant introduced no medical evidence of causal relation at any of hearings or following reopening of his claim but relied solely on testimony of attending physician whose report was contradicted by sworn testimony of two

ficiency of evidence to support an award denying | further or additional compensation,⁶⁴ or granting or

doctors, claimant as a matter of law failed to establish his claim.

N.Y.—*Algeri v. Brady & Ghee*, 7 N.Y.S.2d 812, 255 App.Div. 907, appeal denied 19 N.E.2d 684, 280 N.Y. 850.

Evidence held sufficient

To support award of further or additional compensation.

Cal.—*City of Pasadena v. Industrial Acc. Commission*, 29 P.2d 447, 136 C.A. 649.

Colo.—*Cain v. Industrial Commission of Colo.*, 315 P.2d 823.

D.C.—*Etina Life Ins. Co. v. Hoage*, 76 F.2d 435, 64 App.D.C. 185.

Ga.—*London Guarantee & Acc. Co. v. Pittman*, 25 S.E.2d 60, 69 Ga.App. 146.

Idaho.—*McGarrigle v. Grangeville Elec. Light & Power Co.*, 97 P.2d 402, 60 Idaho 690.

Iowa.—*Rose v. John Deere Ottumwa Works*, 76 N.W.2d 756, 247 Iowa 900.

Kan.—*Coleman v. Standard Rendering Co.*, 155 P.2d 320, 159 Kan. 398.

La.—*Silver v. Ryan Stevedoring Co.*, App., 166 So. 517.

Mich.—*Webber v. Steiger Lumber Co.*, 34 N.W.2d 516, 322 Mich. 675 —*Atherton v. Fawcett*, 293 N.W. 708, 294 Mich. 436.

Mo.—*Winschel v. Stix, Baer & Fuller Dry Goods Co., App.*, 77 S.W.2d 488.

N.J.—*Torbyn v. South River Sand Co.*, 69 A.2d 588, 6 N.J.Super. 1.

Kolesnik v. Irvington Varnish & Insulator Co., 197 A. 727, 120 N.J. Law 8.

Lieberman v. Warman, 20 A.2d 604, 19 N.J.Misc. 417—*Fischman v. Joseph Fish & Co.*, 198 A. 898, 16 N.J.Misc. 165.

N.Y.—*Newman v. American Locomotive Co.*, 6 N.Y.S.2d 762, 255 App. Div. 733—*Collier v. P. J. Meade Eng. & Constr.*, 290 N.Y.S. 373, 248 App.Div. 931.

Okl.—*Brooks & Dahlgren v. Pettigrew*, 159 P.2d 743, 195 Okl. 550—*National Zink Co. v. State Industrial Commission*, 107 P.2d 1005, 188 Okl. 206—*Van Ness Const. Co. v. Waltcher*, 95 P.2d 858, 185 Okl. 657—*Graner Const. Co. v. Brandt*, 68 P.2d 788, 180 Okl. 221—*Kansas Explorations v. Wright*, 49 P.2d 65, 173 Okl. 411.

Pa.—*Boyle v. Boyle*, 100 A.2d 385, 174 Pa.Super. 188.

Medallis v. Glen Alden Coal Co., Com.Pl., 33 Luz.Leg.Reg. 193.

S.C.—*Crenshaw v. Pendleton Mfg. Co.*, 54 S.E.2d 61, 215 S.C. 66.

Utah.—*Silver King Coalition Mines Co. v. Industrial Commission of Utah*, 69 P.2d 608, 92 Utah 511.

Wash.—*Kull v. Department of Labor and Industries*, 152 P.2d 961, 21 Wash.2d 672.

71 C.J. p 1456 note 30 [a].

Evidence held insufficient

To support award granting further or additional compensation.

Ariz.—*Phelps Dodge Corp. v. Ulmer*, 177 P.2d 225, 65 Ariz. 180.

Fla.—*McDonough v. Versailles Hotel*, 57 So.2d 16.

Idaho.—*Howard v. Washington Water Power Co.*, 144 P.2d 210, 65 Idaho 339.

Mich.—*White v. Michigan Consol. Gas Co.*, 69 N.W.2d 160, 342 Mich. 160—*Blust v. National Brewing Co.*, 280 N.W. 126, 285 Mich. 103—*Rice v. J. F. Braun & Son*, 261 N.W. 84, 271 Mich. 532—*Becker v. City of Detroit*, 255 N.W. 426, 267 Mich. 511.

N.J.—*Hopler v. Hill City Coal & Lumber Co.*, 71 A.2d 722, 7 N.J.Super. 24, affirmed 76 A.2d 17, 5 N.J. 466.

De Pasquale v. Contalvi, 18 A.2d 840, 126 N.J.Law 136.

Travers v. Gaynor, 49 A.2d 309, 24 N.J.Misc. 341—*Bleeker v. Kuyper*, 17 A.2d 787, 19 N.J.Misc. 112—*De Marco v. F. H. McGraw Co.*, 181 A. 639, 13 N.J.Misc. 856.

N.Y.—*Andrews v. Einsfeld*, 116 N.Y. S.2d 814, 280 App.Div. 1028.

Okl.—*Barnsdall Oil Co. v. State Industrial Commission*, 62 P.2d 1031, 178 Okl. 289—*Shell Petroleum Corporation v. Patton*, 29 P.2d 86, 167 Okl. 246.

Pa.—*Bordick v. John Conlon Coal Co.*, 19 A.2d 536, 144 Pa.Super. 522.

Wash.—*Cooper v. Department of Labor and Industries*, 147 P.2d 522, 20 Wash.2d 429.

71 C.J. p 1456 note 30 [b].

64. Effect of rule of liberal construction of evidence

In workmen's compensation proceedings, rule requiring liberal construction of evidence in favor of injured party does not require commission to disregard general rules for judging credibility of witnesses and weight and sufficiency of their testimony, and in denying an award for additional compensation, and in accepting testimony of seven doctors instead of one, commission did not violate rule.

Ariz.—*Stephens v. Miami Copper Co.*, 130 P.2d 507, 59 Ariz. 523.

Evidence held sufficient

(1) To support denial of further or additional compensation.

U.S.—*Tudman v. American Ship Bldg. Co., C.A.III.*, 170 F.2d 842—*Lockard v. Parker, C.C.A.Md.*, 164 F.2d 804.

Hudnell v. O'Hearne, D.C.Md., 99 F.Supp. 854.

Ariz.—*London v. Industrial Commission*, 223 P.2d 929, 71 Ariz. 111—*Craig v. De Berge*, 193 P.2d 442, 67 Ariz. 163—*Reinartz v. Industrial Commission*, 187 P.2d 324, 66 Ariz.

270—*Caekos v. Stanley Fruit Co.*, 98 P.2d 471, 55 Ariz. 72—*Edens v. L. E. Dixon Const. Co.* 27 P.2d 1107, 42 Ariz. 519.

Colo.—*Schwab v. Industrial Commission of Colorado*, 85 P.2d 723, 103 Colo. 244.

Conn.—*Osterlund v. State*, 30 A.2d 893, 129 Conn. 591—*Civitallo v. Connecticut Sav. Bank*, 25 A.2d 47, 128 Conn. 621.

Ga.—*Carroll v. Hartford Acc. & Indem. Co.*, 38 S.E.2d 185, 73 Ga.App. 799—*Walker v. U. S. Fidelity & Guaranty Co.*, 13 S.E.2d 526, 64 Ga.App. 459—*American Mut. Liability Ins. Co. v. Jenkins*, 12 S.E.2d 80, 63 Ga.App. 777—*American Mut. Liability Ins. Co. v. Bond*, 8 S.E.2d 715, 62 Ga.App. 562.

Idaho.—*Mell v. Larson*, 36 P.2d 250, 54 Idaho 754.

Ind.—*Curry v. Roach Indiana Corp.*, 23 N.E.2d 598, 107 Ind.App. 405.

La.—*Johnson v. W. Horace Williams Co., App.*, 8 So.2d 720.

Mich.—*Huemiller v. Yellow Truck & Coach Mfg. Co.*, 292 N.W. 857, 293 Mich. 431.

Mo.—*Kopolow v. Zavodnick, App.*, 177 S.W.2d 647.

Neb.—*Peek v. Ayers Auto Supply*, 71 N.W.2d 204, 160 Neb. 658—*Cunningham v. Armour & Co.*, 276 N.W. 393, 133 Neb. 598.

N.J.—*Cancello v. Federal Shipbuilding & Dry Dock Co.*, 61 A.2d 46, 137 N.J.Law 646—*Rotino v. J. P. Scanlon, Inc.*, 15 A.2d 336, 752, 125 N.J.Law 227, affirmed 19 A.2d 777, 126 N.J.Law 419.

Blaziak v. Eastwood-Nealley Corp., 57 A.2d 558, 26 N.J.Misc. 116—*Ducci v. Kapo Dyeing & Print Works*, 23 A.2d 786, 20 N.J.Misc. 47.

Okl.—*Sigler v. Tillery and Jones*, 292 P.2d 423—*Kemp v. Comar Oil Co.*, 94 P.2d 882, 185 Okl. 527.

Pa.—*Frederick v. Berwind-White Coal Mining Co.*, 176 A. 60, 115 Pa. Super. 581.

Va.—*Blair v. Buchanan Coal Corp.*, 198 S.E. 491, 171 Va. 102.

W.Va.—*Blevins v. State Compensation Com'r*, 33 S.E.2d 408, 127 W. Va. 481.

17 C.J. p 1456 note 31 [a].

(2) In proceeding by workmen's compensation recipient for continuation of compensation, conclusion of medical advisory board, based on psychiatric examination which established, by objective evidence recognized in that science, that cause of claimant's disabilities was conscious motivation, was reasonable evidence on which to base award refusing further compensation.

Ariz.—*Stanley v. Industrial Commission*, 251 P.2d 638, 75 Ariz. 31.

denying a decrease⁶⁵ or discontinuance⁶⁶ of compensation, or showing an employee's right to compensation beyond a date already past,⁶⁷ or to support an award for the death of the employee resulting from

the prior injury.⁶⁸

So, also, the rules have been applied to evidence as to the fact of a change in the employee's condition since a prior award,⁶⁹ such as an increased dis-

Evidence held insufficient

To support denial of further or additional compensation.

Ga.—Ware v. Swift & Co., 2 S.E.2d 128, 59 Ga.App. 836.

Minn.—Kirtland v. State of Minnesota, Department of Health, Division of Hotel Inspection, 297 N.W. 23, 209 Minn. 537.

65. Cal.—Contractors' Indemnity Exch. of California v. State Industrial Accident Commission, 237 P. 404, 72 C.A. 350.

Evidence held sufficient

To justify a decrease in amount of compensation.

Minn.—Baker v. MacGillis Gibbs Co., 25 N.W.2d 219, 222 Minn. 460.

Evidence held insufficient

To justify a decrease in amount of compensation.

Ill.—J. I. Case Co. v. Industrial Commission, 37 N.E.2d 821, 378 Ill. 132.

Mont.—Lunardello v. Republic Coal Co., 53 P.2d 87, 101 Mont. 94.

N.J.—Jersey City Printing Co. v. Klochansky, 74 A.2d 432, 9 N.J.Super. 361, affirmed 73 A.2d 742, 8 N.J.Super. 186.

66. La.—Otwell v. Travelers Ins. Co., App., 22 So.2d 70.

W.Va.—Ashworth v. State Compensation Commissioner, 183 S.E. 912, 117 W.Va. 73.

71 C.J. p 1456 note 33.

Evidence held sufficient

To support order granting discontinuance.

Okl.—Deep Rock Oil Corporation v. Evans, 28 P.2d 7, 167 Okl. 66.

R.I.—Hemphill v. Provencher, 59 A. 2d 540, 74 R.I. 173—Walsh-Kaiser Co. v. Yeager, 50 A.2d 776, 72 R.I. 278.

Wis.—Sheehan v. Industrial Commission, 76 N.W.2d 343, 272 Wis. 595.

Evidence held insufficient

(1) To authorize order terminating compensation.

U.S.—Bernatowicz v. Nacirema Operating Co., C.C.A.Pa., 142 F.2d 385.

Cal.—Brown v. Industrial Acc. Commission of California, 111 P.2d 931, 44 C.A.2d 6.

W.Va.—Ashworth v. State Compensation Commissioner, 183 S.E. 912, 117 W.Va. 73.

(2) To support decision of workmen's compensation board denying application to discontinue payments. N.Y.—Blanchard v. U. S. O. Camp Shows, Inc., 166 N.Y.S.2d 863, 4 A.D.2d 894.

Okl.—Reams v. Malcolm, 122 P.2d 145, 190 Okl. 213.

Pa.—Korn v. Carnegie Coal Corp., Com.Pl., 25 Wash.Co. 41.

67. Mo.—Schaefer v. Lowell-Kreker Grocery Co., App., 49 S.W.2d 209.

Pa.—Szabo v. State Workmen's Ins. Fund, 167 A. 508, 110 Pa.Super. 8.

68. Evidence held sufficient

(1) To sustain decision awarding compensation for death of employee on ground that it grew out of injury previously suffered.

Iowa.—Eveland v. Newell Const. & Machinery Co., 17 N.W.2d 524, 236 Iowa 204.

(2) To establish that injured employee, who died pending appeal, was not disabled between date to which compensation had been awarded and date of death, and therefore widow could not recover compensation benefits during that period even though death was result of injury.

La.—Warning v. Royal Indem. Co., App., 75 So.2d 242.

69. Va.—J. A. Jones Const. Co. v. Martin, 94 S.E.2d 202, 198 Va. 370.

Probative evidence as basis

In proceeding for review of compensation award for change in conditions or mistake in determination of fact, a finding of "change of conditions" can be made on any probative evidence of which deputy commissioner might avail himself in determining an original award of compensation.

Mass.—Bethlehem Shipbuilding Corp. v. Cardillo, C.C.A.Mass., 102 F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

No new evidence

An employee who had been denied an award of compensation on finding that he had suffered no disability as result of an accidental injury arising in course of employment, and such award became final, was not entitled to an award on application to review award because of a change in conditions, where all evidence at first hearing was before board on subsequent hearing, without any further introduction by either party.

Ind.—Lukich v. West Clinton Coal Co., 10 N.E.2d 302, 104 Ind.App. 73.

Time when change occurred

In workmen's compensation case, if there is competent evidence reasonably tending to support a finding of change in employee's condition after effective date of last prior award, state industrial commission is authorized to find from such

evidence date at which change in condition occurred.

Okl.—Warden-Pullen Coal Co. v. Cain, 109 P.2d 487, 188 Okl. 357.

Effect of recency of original hearing

Fact that only about a year elapsed between time of hearing on petition for compensation, and time of hearing on petition for additional compensation, went only to weight of claimant's testimony that there was a change of condition.

Mich.—Webber v. Steiger Lumber Co., 34 N.W.2d 516, 322 Mich. 675.

Evidence held sufficient to show change

U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, D.C.Mass., 23 F.Supp. 400, affirmed, C.C.A., 102 F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

Idaho.—Koegler v. C. F. Davidson Co., 209 P.2d 728, 69 Idaho 416.

Ky.—Clear Fork Coal Co. v. Gaylor, 286 S.W.2d 519—Hodgkin v. Webb, 221 S.W.2d 664, 310 Ky. 745.

Mo.—Adkins v. Bramhall, App., 233 S.W.2d 36.

Ohio.—Nichols v. Ohio Collieries Co., 62 N.E.2d 636, 75 Ohio App. 474.

Okl.—Spartan Aircraft Co. v. Stockton, 279 P.2d 333.

S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 343.

71 C.J. p 1456 note 35 [a].

Evidence held insufficient to show change

Ga.—Travelers Ins. Co. v. Hammond, 83 S.E.2d 576, 90 Ga.App. 595—Hartford Acc. & Indem. Co. v. Carroll, 43 S.E.2d 722, 75 Ga. App. 437.

Idaho.—Fackenthal v. Eggers Pole & Supply Co., 108 P.2d 300, 62 Idaho 46.

Mich.—Boyich v. J. A. Utley Co., 11 N.W.2d 267, 306 Mich. 625—Catina v. Hudson Motor Car Co., 262 N.W. 266, 272 Mich. 377.

Okl.—Marland Oil Co. v. Sans, 35 P. 2d 895, 169 Okl. 41.

Pa.—Zerby v. Reading Co., 189 A. 681, 125 Pa.Super. 397.

71 C.J. p 1456 note 35 [b].

Evidence held sufficient to show no change

U.S.—Dunn v. Belair, D.C.R.I., 184 F.Supp. 802—Mixon v. Willard, D. C.N.Y., 120 F.Supp. 232.

Ga.—Daniel v. Ford Motor Co., 76 S.E.2d 66, 88 Ga.App. 58—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App. 789—Milam v. Ford Motor Co., 7 S.E.2d 37, 61 Ga.App. 614.

figurement,⁷⁰ or an increase or aggravation⁷¹ or recurrence⁷² of the disability.

The requisites and sufficiency of evidence have also been determined with respect to evidence show-

ing the existence of partial disability,⁷³ or an increase in the extent of partial disability, or in the disability rating,⁷⁴ or that increased or recurrent injury resulted in permanent, or total and permanent disability,⁷⁵ or showing the fact of original injury

Idaho.—Bower v. Smith, 118 P.2d 737, 63 Idaho 128.

Mich.—Blust v. National Brewing Co., 280 N.W. 126, 285 Mich. 103.

Mo.—Brammer v. Binkley Min. Co. of Mo., App., 244 S.W.2d 584.

Ohio.—State ex rel. Randall v. Industrial Commission of Ohio, App., 47 N.E.2d 245.

Pa.—Porto v. Philadelphia & Reading Coal & Iron Co., 10 A.2d 29, 137 Pa.Super. 590—Magliocco v. U. S. Aluminum Co., 200 A. 117, 131 Pa.Super. 341.

Va.—J. A. Jones Const. Co. v. Martin, 94 S.E.2d 202, 198 Va. 370.

70. Okl.—Skelly Oil Co. v. Skinner, 19 P.2d 548, 162 Okl. 150.

71 C.J. p 1456 note 36.

71. Neb.—Huff v. Omaha Cold Storage Co., 287 N.W. 764, 136 Neb. 907.

N.J.—Hopler v. Hill City Coal & Lumber Co., 76 A.2d 17, 5 N.J. 466. Travers v. Gaynor, 49 A.2d 309, 24 N.J.Misc. 341.

Or.—Keefer v. State Industrial Accident Commission, 135 P.2d 806, 171 Or. 405.

Wash.—White v. Department of Labor and Industries, 293 P.2d 764, 48 Wash.2d 413—Kirkpatrick v. Department of Labor and Industries, 290 P.2d 979, 48 Wash.2d 51—Kleven v. Department of Labor & Industries of State, 243 P.2d 488, 40 Wash.2d 415—Strmich v. Department of Labor and Industries, 198 P.2d 181, 31 Wash.2d 598.

71 C.J. p 1456 note 37.

Evidence held sufficient

(1) To sustain finding that employee's condition had changed for worse since original hearing.

Ga.—Manufacturers Cas. Co. v. Huskins, 90 S.E.2d 604, 93 Ga.App. 10.

Mich.—Stevens v. Consumers' Power Co., 254 N.W. 215, 266 Mich. 591.

N.J.—Breheny v. Essex County, 41 A.2d 890, 132 N.J.Law 584, affirmed 45 A.2d 700, 134 N.J.Law 129.

Okl.—H & H Supply Co. v. Bryant, 231 P.2d 685, 204 Okl. 515—Phillips Petroleum Co. v. Clark, 224 P.2d 597, 203 Okl. 561—Prairie Oil & Gas Co. v. Fitzke, 27 P.2d 836, 167 Okl. 44.

Wash.—Larson v. Department of Labor & Industries of State, 223 P.2d 207, 37 Wash.2d 263—Smith v. Department of Labor and Industries of Washington, 38 P.2d 1016, 180 Wash. 84.

(2) To sustain finding that claimant did not sustain increased dis-

ability from injury in course of employment after original determination of workmen's compensation bureau.

N.J.—Pasquale v. Clyde Piece Dye Works, 1 A.2d 45, 120 N.J.Law 557.

Borzi v. Steers, 186 A. 723, 14 N. J.Misc. 553.

Wash.—Georgia-Pacific Plywood Co. v. Department of Labor and Industries, 290 P.2d 718, 47 Wash.2d 893.

Evidence held insufficient

To show an increase in disability since original compensation award.

Neb.—Riedel v. Smith Baking Co., 33 N.W.2d 287, 150 Neb. 28—Huff v. Omaha Cold Storage Co., 287 N. W. 764, 136 Neb. 907.

N.J.—Florek v. Board of Ed., City of Newark, 87 A.2d 381, 18 N.J.Super. 425—Giacchi v. Richmond Bros. Co., 78 A.2d 109, 11 N.J.Super. 76, opinion adhered to 79 A.2d 488, 12 N.J.Super. 308—Thompson v. American Smelting & Refining Co., 73 A.2d 605, 8 N.J.Super. 111.

De Pasquale v. Contalvi, 18 A.2d 840, 126 N.J.Law 136—Cirillo v. United Engineers & Constructors, 3 A.2d 596, 121 N.J.Law 511.

Drexel v. Jurgensen, 22 A.2d 816, 19 N.J.Misc. 643.

Okl.—Sinclair Refining Co. v. Duncan, 297 P.2d 563.

Pa.—Sneed v. State Workmen's Ins. Fund, 180 A. 90, 118 Pa.Super. 298.

Wingard v. Keiser, Com.Pl., 45 Dauph.Co. 109.

Wash.—Prince v. Department of Labor and Industries of Wash., 286 P.2d 707, 47 Wash.2d 98—Olson v. Department of Labor and Industries, 260 P.2d 313, 43 Wash.2d 85—Gillmer v. Department of Labor & Industries, 255 P.2d 899, 42 Wash.2d 387—Goehring v. Department of Labor & Industries, 246 P.2d 462, 40 Wash.2d 701—Karlson v. Department of Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310.

72. Ill.—Franklin County Mining Co. v. Industrial Commission, 153 N.E. 635, 323 Ill. 98.

71 C.J. p 1456 note 38.

Pa.—Sneed v. State Workmen's Ins. Fund, 180 A. 90, 118 Pa.Super. 298.

Wingard v. Keiser, Com.Pl., 45 Dauph.Co. 109.

Wash.—Prince v. Department of Labor and Industries of Wash., 286 P.2d 707, 47 Wash.2d 98—Olson v. Department of Labor and Industries, 260 P.2d 313, 43 Wash.2d 85—Gillmer v. Department of Labor & Industries, 255 P.2d 899, 42 Wash.2d 387—Goehring v. Department of Labor & Industries, 246 P.2d 462, 40 Wash.2d 701—Karlson v. Department of Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310.

72. Ill.—Franklin County Mining Co. v. Industrial Commission, 153 N.E. 635, 323 Ill. 98.

71 C.J. p 1456 note 38.

Pa.—Sneed v. State Workmen's Ins. Fund, 180 A. 90, 118 Pa.Super. 298.

Wingard v. Keiser, Com.Pl., 45 Dauph.Co. 109.

Wash.—Prince v. Department of Labor and Industries of Wash., 286 P.2d 707, 47 Wash.2d 98—Olson v. Department of Labor and Industries, 260 P.2d 313, 43 Wash.2d 85—Gillmer v. Department of Labor & Industries, 255 P.2d 899, 42 Wash.2d 387—Goehring v. Department of Labor & Industries, 246 P.2d 462, 40 Wash.2d 701—Karlson v. Department of Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310.

72. Ill.—Franklin County Mining Co. v. Industrial Commission, 153 N.E. 635, 323 Ill. 98.

71 C.J. p 1456 note 38.

Pa.—Sneed v. State Workmen's Ins. Fund, 180 A. 90, 118 Pa.Super. 298.

Wingard v. Keiser, Com.Pl., 45 Dauph.Co. 109.

Wash.—Prince v. Department of Labor and Industries of Wash., 286 P.2d 707, 47 Wash.2d 98—Olson v. Department of Labor and Industries, 260 P.2d 313, 43 Wash.2d 85—Gillmer v. Department of Labor & Industries, 255 P.2d 899, 42 Wash.2d 387—Goehring v. Department of Labor & Industries, 246 P.2d 462, 40 Wash.2d 701—Karlson v. Department of Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310.

72. Ill.—Franklin County Mining Co. v. Industrial Commission, 153 N.E. 635, 323 Ill. 98.

71 C.J. p 1456 note 38.

Pa.—Sneed v. State Workmen's Ins. Fund, 180 A. 90, 118 Pa.Super. 298.

Wingard v. Keiser, Com.Pl., 45 Dauph.Co. 109.

Wash.—Prince v. Department of Labor and Industries of Wash., 286 P.2d 707, 47 Wash.2d 98—Olson v. Department of Labor and Industries, 260 P.2d 313, 43 Wash.2d 85—Gillmer v. Department of Labor & Industries, 255 P.2d 899, 42 Wash.2d 387—Goehring v. Department of Labor & Industries, 246 P.2d 462, 40 Wash.2d 701—Karlson v. Department of Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310.

73. Mich.—Trask v. Modern Pattern & Machine Co., 193 N.W. 830, 222 Mich. 692.

Pa.—Spence v. Lash & Bailey, 22 A. 2d 35, 146 Pa.Super. 177.

74. Evidence held sufficient

(1) To support an award based on an increase in extent, rating, or percentage of disability.

Cal.—Santa Maria Gas Co. v. Industrial Acc. Commission, 117 P.2d 43, 46 C.A.2d 775, rehearing denied 117 P.2d 951, 46 C.A.2d 775.

Ga.—Royal Indem. Co. v. Babb, 16 S.E.2d 907, 66 Ga.App. 51.

Iowa.—Bousfield v. Sisters of Mercy, 86 N.W.2d 109.

N.J.—Hawthorne v. Van Keuren & Son, 23 A.2d 291, 127 N.J.Law 501—Kuczynski v. Humphrey, 192 A. 371, 118 N.J.Law 321.

Dougherty v. Anthony P. Miller, Inc., 183 A. 904, 14 N.J.Misc. 229.

Wash.—Collins v. Department of Labor and Industries, 310 P.2d 232, 50 Wash.2d 194—Clayton v. Department of Labor and Industries, 296 P.2d 676, 48 Wash.2d 754—Romano v. Department of Labor and Industries, 146 P.2d 186, 20 Wash.2d 108—Matson v. Department of Labor and Industries, 88 P.2d 825, 198 Wash. 507.

(2) To support finding that compensation claimant was not entitled to any additional percentage of unspecified permanent partial disability because of alleged aggravation.

Wash.—Clayton v. Department of Labor and Industries of State, 217 P.2d 783, 36 Wash.2d 325.

75. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

Va.—Virginia Oak Flooring Co. v. Chrisley, 80 S.E.2d 537, 195 Va. 850.

Wash.—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71.

75. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

Va.—Virginia Oak Flooring Co. v. Chrisley, 80 S.E.2d 537, 195 Va. 850.

Wash.—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71.

75. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

Va.—Virginia Oak Flooring Co. v. Chrisley, 80 S.E.2d 537, 195 Va. 850.

Wash.—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71.

75. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

Va.—Virginia Oak Flooring Co. v. Chrisley, 80 S.E.2d 537, 195 Va. 850.

Wash.—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71.

75. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

Va.—Virginia Oak Flooring Co. v. Chrisley, 80 S.E.2d 537, 195 Va. 850.

Wash.—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71.

75. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

Va.—Virginia Oak Flooring Co. v. Chrisley, 80 S.E.2d 537, 195 Va. 850.

Wash.—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71.

75. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

Va.—Virginia Oak Flooring Co. v. Chrisley, 80 S.E.2d 537, 195 Va. 850.

Wash.—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71.

75. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

Va.—Virginia Oak Flooring Co. v. Chrisley, 80 S.E.2d 537, 195 Va. 850.

Wash.—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71.

additional to that compensated;⁷⁶ and to the sufficiency of evidence to show continuance of incapacity or disability,⁷⁷ as of total temporary disability,⁷⁸ or inability to work.⁷⁹

The rules have also been applied to evidence to show an improvement of condition,⁸⁰ or decrease in the extent of disability,⁸¹ as in the case of a partial recovery,⁸² or ability to work;⁸³ or that disa-

fied conclusion that permanent, total disability had been sustained.

La.—*Pourciau v. Board of Com'rs of Port of New Orleans*, App., 12 So. 2d 36.

Evidence held sufficient

Mo.—*Adkins v. Bramhall*, App., 233 S.W.2d 36—*Rue v. Eagle-Picher Lead Co.*, 70 S.W.2d 124, 228 Mo. App. 114.

N.J.—*Simon v. R. H. H. Steel Laundry, Inc.*, 95 A.2d 446, 25 N.J.Super. 50, affirmed 98 A.2d 604, 26 N.J.Super. 598.

Fischman v. Joseph Fish Hat Co., 5 A.2d 785, 122 N.J.Law 428.

Levering v. Fox, 171 A. 152, 12 N.J.Misc. 356.

Okl.—*Shell Oil Co. v. Thomas*, 274 P.2d 1011—*Dunning-James-Patterson v. Rickert*, 164 P.2d 620, 196 Okl. 237—*Brooks & Dahlgren v. Pettigrew*, 159 P.2d 743, 195 Okl. 550—*Dennehy Const. Co. v. Kidd*, 137 P.2d 535, 192 Okl. 463—*Indian Territory Illuminating Oil Co. v. State Industrial Commission*, 90 P.2d 398, 185 Okl. 72—*Blackburn Const. Co. v. Kennedy*, 88 P.2d 831, 184 Okl. 549.

Or.—*Hisey v. State Industrial Accident Commission*, 99 P.2d 475, 163 Or. 696.

Pa.—*Toth v. Pittsburgh Terminal Coal Corporation*, 167 A. 438, 109 Pa.Super. 163.

Tex.—*Commercial Standard Ins. Co. v. Brock*, Civ.App., 167 S.W.2d 281, error refused.

W.Va.—*Miller v. State Compensation Commissioner*, 45 S.E.2d 249, 130 W.Va. 771.

Wyo.—*In re Hes*, 110 P.2d 826, 56 Wyo. 443.

Evidence held insufficient

Ark.—*Bookout v. Reynolds Min. Co.*, 209 S.W.2d 881, 213 Ark. 198.

Okl.—*Bonham v. Southern Rock Asphalt Co.*, 77 P.2d 697, 182 Okl. 306.

76. La.—*Moak v. Louisiana Central Lumber Co.*, 125 So. 488, 12 La. App. 242.

Wash.—*Hyde v. Department of Labor and Industries*, 278 P.2d 390, 46 Wash.2d 81.

Substantial proof required

Under statute authorizing industrial commissioner to increase amount of workmen's compensation if condition of employee warrants increase, employee is entitled to relief on substantial proof of aggravated condition of old injury not taken into account in former findings.

Iowa.—*Rose v. John Deere Ottumwa Works*, 76 N.W.2d 756, 247 Iowa 900.

Evidence held sufficient

Colo.—*Moffat Coal Co. v. Podbelsk*, 42 P.2d 1001, 96 Colo. 355.

77. Mich.—*Anderson v. Escanaba & L. S. R. Co.*, 209 N.W. 40, 234 Mich. 643.

71 C.J. p 1457 note 50.

Evidence held sufficient

Fla.—*Brewer v. Pan American Airways*, 24 So.2d 521, 156 Fla. 812.

N.Y.—*Cronin v. Union Bag & Paper Corp.*, 135 N.Y.S.2d 877, 284 App. Div. 1079—*Rogers v. American Cyanamid Co.*, 134 N.Y.S.2d 476, 284 App.Div. 916.

Pa.—*Reager v. Day & Zimmerman*, 94 A.2d 81, 173 Pa.Super. 102—*Fegan v. The Maccabees*, 2 A.2d 511, 183 Pa.Super. 338.

R.I.—*Gilbane Bldg. Co. v. Feeney*, 135 A.2d 262.

Tenn.—*Butterbaugh v. Loew's, Inc.*, 77 S.W.2d 644, 96 A.L.R. 973, 163 Tenn. 284.

Evidence held insufficient

Pa.—*Powell v. Susquehanna Collieries Co.*, Com.Pl., 32 Luz.Leg. Reg. 161.

Evidence held to show noncontinuance of disability

U.S.—*Valeri v. Lowe*, D.C.N.Y., 26 F.Supp. 761.

La.—*Green v. A. C. Campbell Const. Co.*, App., 78 So.2d 54.

78. Okl.—*Stanolind Pipe Line Co. v. Brewer*, 25 P.2d 1100, 166 Okl. 29.

Evidence held sufficient

Ga.—*General Motors Corp. v. Craig*, 85 S.E.2d 441, 91 Ga.App. 239.

Evidence held insufficient

Mich.—*Wieland v. Dow Chemical Co.*, 54 N.W.2d 708, 334 Mich. 427.

80. Ky.—*Blue Diamond Coal Co. v. Phillips*, 198 S.W.2d 799, 303 Ky. 693.

Evidence held sufficient

Ga.—*Bituminous Cas. Corp. v. Wilbanks*, 23 S.E.2d 519, 68 Ga.App. 631.

Pa.—*Spence v. Lash & Bailey*, 22 A. 2d 35, 146 Pa.Super. 177.

71 C.J. p 1457 note 52 [a].

Evidence held insufficient

To justify order modifying award of compensation to injured employee for permanent total disability on ground of substantial improvement in his condition.

Idaho.—*Boshers v. Payne*, 70 P.2d 391, 58 Idaho 109.

Ky.—*Department of Highways v. Harrell*, 163 S.W.2d 287, 291 Ky. 90.

71 C.J. p 1457 note 52 [b].

81. Ill.—*Scranton & Big Muddy Coal & Mining Co. v. Industrial*

Commission, 146 N.E. 442, 315 Ill. 428.

71 C.J. p 1457 note 53.

Evidence held sufficient

(1) To show a decrease in extent, rating, or percentage of disability.

Idaho.—*Jones v. Boise Produce & Commission Co.*, 177 P.2d 157, 67 Idaho 287.

Ky.—*Blue Diamond Coal Co. v. Phillips*, 198 S.W.2d 799, 303 Ky. 693.

Pa.—*Byrne v. Progress Plate Making Co.*, 43 A.2d 566, 158 Pa.Super. 51—*Pelosi v. Overbrook Tile Co.*, 10 A.2d 118, 138 Pa.Super. 30.

(2) To sustain conclusion that there was no decrease in injured employee's incapacity due solely to injury on which judgment was based.

Neb.—*Ludwickson v. Central States Elec. Co.*, 6 N.W.2d 65, 142 Neb. 308.

Evidence held insufficient

To show a decrease in extent of disability.

N.J.—*Jersey City Printing Co. v. Klochansky*, 73 A.2d 742, 8 N.J. Super. 186.

Kersner v. New Jersey Good Humor Ice Cream Co., 16 A.2d 452, 18 N.J.Misc. 688.

82. Kan.—*Davis v. Phillips Petroleum Co.*, 19 P.2d 733, 137 Kan. 39.

Evidence held sufficient

N.Y.—*Katz v. Carborundum Co.*, 37 N.Y.S.2d 174, 264 App.Div. 963.

83. Ill.—*Perry Coal Co. v. Industrial Commission*, 175 N.E. 801, 343 Ill. 525.

Evidence of theoretical employability

In proceeding for compensation for total and permanent disability after prior award for partial "permanent total disability" testimony that claimant was theoretically employable was not entitled to much weight, where there was nothing to indicate that claimant was familiar with type of work which experts suggested he might be able to perform.

N.J.—*Candito v. Fairmont Const. & Nicholson Engineering Co.*, 21 A.2d 622, 19 N.J.Misc. 503.

Evidence held sufficient

(1) To support finding that claimant was no longer incapacitated for work.

R.I.—*Hemphill v. Provencher*, 59 A. 2d 540, 74 R.I. 173.

(2) To establish that laborer could have returned to work at any time had he been willing to do so.

La.—*Hall v. Pipe Line Service Corp.*, App., 85 So.2d 706.

bility has ceased or terminated,⁸⁴ as in the case of disability of a partial,⁸⁵ total,⁸⁶ total temporary,⁸⁷ or total permanent⁸⁸ character; or that recovery was only partial;⁸⁹ or to show the permanent⁹⁰ or progressive⁹¹ character of injuries; or to show a

change in the employee's earning capacity,⁹² or fraud of the employer,⁹³ or to show various other matters involved in or relating to proceedings to increase, decrease, or terminate a compensation award.⁹⁴

(3) To sustain finding that claimant was capable of steadily performing certain types of light work.
Pa.—Sorby v. Three Rivers Motors, 114 A.2d 347, 178 Pa.Super. 187.
R.I.—Fulford Mfg. Co. v. Lupoli, 67 A.2d 846, 75 R.I. 488.

(4) To show claimant's industrial disability, although wages earned by him after accident causing his injuries were approximately on same level as those received by him previously.
Colo.—Wiernman v. Tunnell, 120 P.2d 638, 108 Colo. 544.

Evidence held insufficient

To show conclusively that claimant was performing as strenuous physical labor at time of hearing as that in which he was engaged before accident causing his injuries.
Colo.—Wiernman v. Tunnell, supra.

84. Cal.—Rodriguez v. Industrial Accident Commission of State of California, 257 P. 879, 84 C.A. 308.
Okla.—Thomas Conlin Co. v. Guckian, 50 P.2d 299, 174 Okl. 463.

Evidence held sufficient

To support finding as to termination of compensation claimant's disability.

U.S.—Portland Stevedoring Co. v. Wegener, C.C.A.Or., 162 F.2d 830.
Ga.—Short v. Glendale Mills, Inc., 97 S.E.2d 541, 95 Ga.App. 238.

Kan.—McAllister v. McDowell, 146 P.2d 411, 158 Kan. 284.

La.—Blanchard v. Employers' Liability Assur. Corp., App., 95 So.2d 194—Wade v. Calcasieu Paper Co., App., 82 So.2d 117, cause remanded on other grounds 86 So.2d 540, 229 La. 702—Buford v. International Paper Co., App., 35 So.2d 791—Anderson v. May, App., 6 So.2d 174.

Mo.—Kaiser v. H. C. Merry, Inc., App., 79 S.W.2d 474.

Neb.—Metropolitan Dining Room v. Jensen, 254 N.W. 405, 126 Neb. 765.

Pa.—Gallihue v. Auto Car Co., 135 A.2d 817, 184 Pa.Super. 598—Gallihue v. Autocar Co., 82 A.2d 73, 169 Pa.Super. 303.
71 C.J. p 1457 note 56 [a].

Evidence held insufficient

To support finding of termination of claimant's disability.

U.S.—Marshall v. Johnson, C.C.A.Or., 127 F.2d 544.

Ark.—Hollifield v. Bird & Son, Inc., 301 S.W.2d 27.

Pa.—Pelosi v. Overbrook Tile Co., 10 A.2d 118, 138 Pa.Super. 30.

71 C.J. p 1457 note 56 [b].

85. Ill.—Ridge Coal Mining Co. v. Industrial Commission, 145 N.E. 643, 314 Ill. 509.
71 C.J. p 1457 note 57.

86. Ind.—Venable v. Fairmount Glass Works, 145 N.E. 581, 83 Ind. App. 77.

La.—Aultman v. Louisiana Central Lumber Co., 128 So. 683, 14 La.App. 179.

87. Cal.—Los Angeles County v. Industrial Accident Commission of California, 261 P. 295, 202 C. 437.

88. La.—Clark v. Forest Lumber Co., App., 142 So. 187.

89. Ill.—Slogo Coal Co. v. Industrial Commission, 138 N.E. 171, 307 Ill. 41.

Mich.—Johnson v. Folwell-Ahlskog Co., 235 N.W. 165, 253 Mich. 271.

90. Iowa.—Rose v. John Deere Ottumwa Works, 76 N.W.2d 756, 247 Iowa 900.

Mo.—Vollet v. Federal Brilliant Sign Co., App., 49 S.W.2d 201.

Evidence held sufficient

(1) To show that temporary disability had become permanent.

Cal.—Standard Oil Co. of California v. Industrial Acc. Commission, 31 P.2d 457, 137 C.A. 455.

Colo.—Wiernman v. Tunnell, 120 P.2d 638, 108 Colo. 544.

(2) To show that disability had not become permanent.

U.S.—Varney v. O'Hearne, D.C.Md., 141 F.Supp. 421.

91. Wash.—Schmelling v. Department of Labor and Industries, 10 P.2d 229, 167 Wash. 692.

Evidence held sufficient

To justify a modification of a compensation award because of a change in employee's condition, where testimony of medical witnesses showed a progressive mental disease, tantamount to a changed condition, fairly and naturally traceable to accident, although not apparent when original award was made.
Va.—A. Wilson & Co. v. Matthews, 195 S.E. 490, 170 Va. 164.

92. Mont.—Brajeich v. Republic Coal Co., 23 P.2d 337, 94 Mont. 568.

Evidence held sufficient

(1) To support board's finding that earning ability had not lessened since preceding hearing.

Mich.—Thomas v. Ford Motor Co., 265 N.W. 754, 274 Mich. 564.

(2) To support industrial commission's determination that employee's wage loss was total by rea-

son of the partial physical incapacity and that employee was entitled to maximum benefits.

Va.—J. A. Foust Coal Co. v. Messer, 80 S.E.2d 533, 195 Va. 762.

Evidence held insufficient

Evidence sustained finding of department that work assigned by employer to injured employee to whom compensation award had previously been made was of a favored or make-shift nature and did not establish wage-earning capacity of employee for purpose of determining compensation to which he was subsequently entitled.

Mich.—Murray v. Ford Motor Co., 296 N.W. 284, 296 Mich. 348.

93. S.D.—Vodopich v. Trojan Mining Co., 180 N.W. 965, 43 S.D. 540.

94. Iowa.—Bousfield v. Sisters of Mercy, 86 N.W.2d 109.

Malingering

(1) Courts are loath to conclude that workmen's compensation claimant is malingerer, and evidence should clearly show "faking" almost certainly to justify such conclusion.
La.—Mitchell v. T. L. James & Co., App., 176 So. 245—Green v. National Manufacture & Stores Corporation, App., 159 So. 412.

(2) Evidence was held to sustain finding that laborer was a malingerer and was feigning total disability in order to recover further compensation.

La.—Nevills v. Valentine Sugars, 177 So. 586, 188 La. 493.

(3) Evidence was insufficient to support finding that employee did not make honest effort to return to employer's shop and do light work offered her by employer.

R.I.—Fulford Mfg. Co. v. Lupoli, 67 A.2d 846, 75 R.I. 488.

Peak of improvement

Evidence was held to warrant finding that forward progress of claimant's condition of disability had reached its peak of improvement if workmen's compensation board had been authorized to adjudicate such issue.

Ga.—Borden Co. v. Fuerlinger, 98 S.E.2d 410, 95 Ga.App. 556.

Amount of payments made

In workmen's compensation case in which employee was awarded permanent partial disability after a period of total temporary disability, evidence was sufficient to establish that employer and insurance carrier had paid employee during period of total temporary disability an amount

Evidence of comparative conditions required. Since a claim of increase or decrease in disability is grounded in the comparative condition and ability of the workman, that is, his present condition and ability as compared with that at the time of the original compensation award, the claim must be supported by proofs which permit comparison, and cannot be grounded solely on the estimate of the injured person's present degree of disability.⁹⁵

Evidence as to subjective symptoms. In general, evidence of the injured employee's subjective symptoms, standing alone, or evidence based solely thereon, is not entitled to much weight on the question of the employee's physical condition.⁹⁶

Timeliness of application for additional benefits. The sufficiency of evidence to establish matters relating to whether or not an application for additional benefits was barred under the statute of limitations has been adjudicated.⁹⁷

in excess of amount employee was entitled to recover.

Okl.—Don Clawson Drilling Co. v. Finch, 277 P.2d 127.

95. N.J.—Hopler v. Hill City Coal & Lumber Co., 76 A.2d 17, 5 N.J. 466. Florek v. Board of Ed., City of Newark, 87 A.2d 381, 18 N.J.Super. 425—Da Bin v. P. S. Thorsen & Co., 79 A.2d 918, 12 N.J.Super. 575—Giacchi v. Richmond Bros. Co., 78 A.2d 109, 11 N.J.Super. 76, opinion adhered to 79 A.2d 488, 12 N.J.Super. 308.

Rotino v. J. P. Scanlon, Inc., 15 A.2d 336, 752, 125 N.J.Law 227, affirmed 19 A.2d 777, 126 N.J.Law 419—Cirillo v. United Engineers & Constructors, 3 A.2d 596, 121 N.J.Law 511.

Watts v. City of Newark, 54 A.2d 622, 25 N.J.Misc. 402—Lieberman v. Warman, 20 A.2d 604, 19 N.J.Misc. 417—Kersner v. New Jersey Good Humor Ice Cream Co., 16 A.2d 453, 18 N.J.Misc. 688.

Evidence held insufficient

(1) In workmen's compensation proceeding by claimant to reopen his claim and obtain a permanent total disability pension because of alleged aggravation of original injuries, medical testimony, which did not show increased aggravation to claimant's injuries between terminal date of aggravation period, and which merely covered claimant's physical condition as of date of hearing before board of industrial appeals, was insufficient to support judgment allowing a permanent total disability pension.

Wash.—Moses v. Department of Labor and Industries, 268 P.2d 665, 44 Wash.2d 511.

(2) Where, after department of labor and industries made injury award from which no appeal was taken, claimant applied to reopen claim on ground of subsequent aggravation of injury, doctor's testimony before joint board recommending amount of award at higher rating than claimant had ever received had no probative value where it was not directed to period subsequent to award, and did not purport to compare claimant's condition before and after any aggravation but was

instead comparison of testimony of different witnesses without regard to time involved.

Wash.—Kleven v. Department of Labor & Industries of State, 243 P.2d 488, 40 Wash.2d 415.

(3) In proceeding to reopen claim because of alleged aggravation of injury occurring subsequent to award made by department of labor and industries, testimony of two doctors who disagreed on degree of claimant's disability did not authorize inference that claimant's condition had improved or worsened to extent of their difference during interval of time between their testimony.

Wash.—Kleven v. Department of Labor & Industries of State, supra.

(4) Where doctor, testifying as to aggravation of injured workman's disability, did not purport to have any personal knowledge of injury involved or of workman's condition at time his claim was closed, but testified as to history of case given him by workman which failed to state what his condition was at time claim was closed, trial court was justified in finding that such testimony failed to establish the alleged aggravation.

Wash.—Larson v. Dept. of Labor and Industries, 166 P.2d 159, 24 Wash.2d 461.

96. U.S.—Hudnell v. O'Hearne, D.C. Md., 99 F.Supp. 954.

Not conclusive

In proceeding for further disability compensation under longshoremen's compensation act, deputy compensation commissioner was not obliged to accept as credible claimant's statement as to his physical condition, based only on subjective symptoms, if unwilling to accept statement as correct on whole record before commissioner, including his personal observation of claimant.

U.S.—Hudnell v. O'Hearne, supra.

Claim not sustained

(1) A claim, based on subjective symptoms alone, for aggravation of employee's injuries, is not sustained.

Wash.—Petersen v. Department of Labor and Industries, 217 P.2d

607, 36 Wash.2d 266—Karlson v. Department of Labor and Industries of Wash., 173 P.2d 1001, 26 Wash.2d 310—Cooper v. Department of Labor and Industries, 147 P.2d 522, 20 Wash.2d 429.

(2) An affidavit by physician who had not treated compensation claimant whose subjective symptoms as related to physician were incorporated in affidavit which failed to state that objective conditions found by physician resulted or could have resulted from prior accident more than a year previously was insufficient to sustain burden of proof resting on claimant who sought to reopen compensation award or to create a prima facie case for him.

Ky.—W. E. Caldwell Co. v. Borders, 193 S.W.2d 453, 301 Ky. 843.

To prove existence of objective symptoms, essential to establish incorrectness of supervisor's order fixing workmen's compensation claimant's disability, claimant must produce medical evidence that objective symptoms either had been discovered by a medical expert who mentally noted or physically recorded such symptoms on or prior to closing date or within a reasonable time thereafter, or that objective symptoms had left their own record in or on claimant's body on or prior to closing date.

Wash.—Hyde v. Department of Labor and Industries, 278 P.2d 390, 46 Wash.2d 31.

97. Evidence held sufficient

(1) To sustain finding that there was a new and further disability extending time for filing claim for compensation.

Cal.—Consolidated Steel Corp. v. Industrial Acc. Commission of California, 57 P.2d 919, 6 C.2d 388. R.I.—Larkin v. George A. Fuller Co., 71 A.2d 690, 76 R.I. 395.

(2) To sustain finding that employer furnished medical treatment such as to constitute an advance payment of compensation within three years prior to date of employee's application to reopen case.

N.Y.—Maczek v. James McKinney & Son, 85 N.Y.S.2d 885, 274 App.Div. 1081.

(3) To support determination of commission that compensation insur-

Causal connection between injury and disability.

The general rules have been applied in determining the requisites and sufficiency of evidence to establish the fact of causal connection between continued, increased, or recurrent disability, or death, and the

original injury;⁹⁸ or to show that the subsequent condition was not the result of, or attributable to, the prior injury;⁹⁹ or to show, or to refute, that the increased, continuing, or recurrent disability was caused by several contributory causes or was the

er was estopped to raise defense of statute of limitations during a certain period and that claimant had not unreasonably delayed in filing application for benefits after such estoppel had ceased to exist.

Cal.—Industrial Indem. Co. v. Industrial Acc. Commission, 252 P.2d 649, 115 C.A.2d 684.

(4) To establish that petition was made practically as soon as existence of permanent incapacity was reasonably clear.

Mo.—Rue v. Eagle-Picher Lead Co., 70 S.W.2d 124, 228 Mo.App. 114.

(5) To support finding that more than eighteen years had elapsed since date of accident and more than eight years from date of last payment of compensation, and to justify action of industrial board in rescinding action of an individual member in reopening claimant's case.

N.Y.—Norcisco v. American Book Bindery, 50 N.Y.S.2d 271, 268 App. Div. 837.

Evidence held insufficient

(1) To overcome rebuttable presumption of delivery of check on day on which it was dated, so as to establish that petition to reopen was filed within a year of date of delivery of check.

W.Va.—York v. State Compensation Com'r, 35 S.E.2d 353, 128 W.Va. 16.

(2) To show that claimant was not notified as required by statute, that he had thirty days in which to appeal from compensation commissioner's previous order rejecting claim.

W.Va.—Consentina v. State Compensation Com'r, 31 S.E.2d 499, 127 W.Va. 67.

98. Ariz.—Cole v. Town of Miami, 83 P.2d 997, 52 Ariz. 488.

Idaho.—Howard v. Washington Water Power Co., 144 P.2d 210, 65 Idaho 339.

Iowa.—Rose v. John Deere Ottumwa Works, 76 N.W.2d 756, 247 Iowa 900.

Ky.—University of Kentucky v. Combs, 88 S.W.2d 981, 261 Ky. 833.

La.—Mitchell v. T. L. James & Co., App., 176 So. 245.

Wash.—Brown v. Department of Labor and Industries, 161 P.2d 533, 23 Wash.2d 572—La Lone v. Department of Labor and Industries, 100 P.2d 26, 3 Wash.2d 191.

71 C.J. p 1457 note 64.

More probable hypothesis

(1) In proceeding by employee under workmen's compensation act for

additional compensation, employee was only required to establish that his theory was a probable or more probable hypothesis with respect to possibility of other hypotheses.

N.J.—Ducasse v. Walworth Mfg. Co., 62 A.2d 486, 1 N.J.Super. 77.

(2) Application of doctrine of "more probable hypothesis" to proceedings for compensation generally see *supra* § 555.

Evidence held sufficient

Ariz.—Russell v. Bald Eagle Mining Co., 33 P.2d 616, 44 Ariz. 105.

Colo.—Wierman v. Tunnell, 120 P.2d 638, 108 Colo. 544.

Iowa.—Oldham v. Scofield & Welch, 266 N.W. 480, 222 Iowa 764, modified on other grounds and rehearing overruled 269 N.W. 925, 222 Iowa 764.

Mass.—Wentworth's Case, 188 N.E. 237, 284 Mass. 479.

Mich.—Arnold v. Ogle Const. Co., 53 N.W.2d 655, 333 Mich. 652—Dundon v. Grand Trunk Western R. Co., 253 N.W. 194, 266 Mich. 4.

N.J.—Hagerman v. Lewis Lumber Co., 98 A.2d 632, 24 N.J.Super. 120, affirmed 99 A.2d 513, 13 N.J. 315—Calicchio v. Standard Brands, 64 A.2d 236, 1 N.J.Super. 276.

N.Y.—Brewka v. Mollet, 112 N.Y.S. 2d 122, 279 App.Div. 1104—Battaglia v. Robert W. Kelly Pub. Corp., 62 N.Y.S.2d 43, 270 App.Div. 968, appeal denied 64 N.Y.S.2d 913, 271 App.Div. 757.

Okl.—Shell Oil Co. v. Thomas, 274 P. 2d 1011.

R.I.—Mondillo v. Ward Baking Co., 57 A.2d 447, 73 R.I. 473.

71 C.J. p 1457 note 64 [a].

Evidence held insufficient

Mich.—Stevens v. Consumers' Power Co., 254 N.W. 215, 266 Mich. 591.

N.J.—Giacchi v. Richmond Bros. Co., 78 A.2d 109, 11 N.J.Super. 76, opinion adhered to 79 A.2d 488, 12 N.J. Super. 308.

Zuga v. Ford Motor Co., 197 A. 875, 16 N.J.Misc. 76—Weber v. Brandt, 195 A. 297, 15 N.J.Misc. 729.

N.Y.—Macracken v. R. & B. Lunch Co., 119 N.Y.S.2d 827, 281 App.Div. 215, reargument denied 120 N.Y.S. 2d 254, 281 App.Div. 912.

Ohio.—Fox v. Industrial Commission of Ohio, 125 N.E.2d 1, 162 Ohio St. 569.

R.I.—Bishop v. Centredale Textile Co., 115 A.2d 353.

S.D.—Stowsand v. Jack Rabbit Lines, 58 N.W.2d 298, 75 S.D. 11.

Wash.—White v. Department of Labor and Industries, 248 P.2d 566, 41 Wash.2d 276—Tonkovich v. Department of Labor & Industries of State, 195 P.2d 633, 31 Wash.2d 220.

71 C.J. p 1457 note 64 [b].

99. Evidence held sufficient

(1) In general.

U.S.—Walker v. Marshall, C.C.A. Wash., 111 F.2d 794.

Ariz.—Jastrzebski v. Wasielewski, 308 P.2d 937, 82 Ariz. 92.

Ga.—Rivers v. Travelers Ins. Co., 92 S.E.2d 818, 93 Ga.App. 779.

Ky.—Whitlow v. Mengel Co., 228 S.W.2d 21, 312 Ky. 483.

Me.—Albert v. Lockwood Co., 45 A.2d 660, 142 Me. 33.

Mass.—Hummer's Case, 59 N.E.2d 295, 317 Mass. 617.

Minn.—Liakos v. Yellow Taxi Co. of Minneapolis, 29 N.W.2d 481, 225 Minn. 34—Ginsburg v. Byers, 17 N.W.2d 854, 219 Minn. 230.

Mo.—Buckley v. Elmira Coal Co., App., 104 S.W.2d 725.

N.Y.—Bankowski v. American Locomotive Co., 126 N.Y.S.2d 54, 282 App.Div. 1084.

Okl.—Ditmore v. Charles M. Suttle Const. Co., 261 P.2d 590.

R.I.—Crepeau v. Wanskuck Co.—Steere Mill, 107 A.2d 313, 82 R.I. 276.

Wash.—La Lone v. Department of Labor and Industries, 100 P.2d 26, 3 Wash.2d 191—Ferguson v. Department of Labor and Industries, 90 P.2d 280, 197 Wash. 524.

(2) To justify finding that change in condition of injured employee since award of compensation to him was due entirely to disease, so as to preclude award of additional compensation.

Idaho.—Mall v. Larson, 36 P.2d 250, 54 Idaho 754.

Ky.—University of Kentucky v. Combs, 88 S.W.2d 981, 261 Ky. 833.

La.—Jackson v. Southern Stevedoring Co., App., 65 So.2d 674.

Pa.—Zelenko v. Carnegie Coal Co., 200 A. 608, 132 Pa.Super. 135.

Evidence held insufficient

Mich.—Pretzer v. State Psychopathic Hospital, 282 N.W. 213, 286 Mich. 454.

N.J.—Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division, 78 A. 2d 403, 11 N.J.Super. 338—Calicchio v. Standard Brands, 64 A.2d 236, 1 N.J.Super. 276.

Lieberman v. Warman, 20 A.2d 604, 19 N.J.Misc. 417.

result of cumulative events over a period of time and several employments.¹

Fault of employee; obedience to medical advice. The weight and sufficiency of evidence has been determined with respect to evidence as to fault of the employee accounting for continued, increased, or recurrent disability and warranting denial of further or additional compensation,² as in the em-

ployee's refusal to take medical advice or submit to surgery,³ or whether the employee acted properly in taking certain medical advice or submitting to surgery.⁴

Application of rules to particular injuries. The above rules have been applied to evidence as to various injuries or disabilities,⁵ such as injury or disability to an employee's back or spine,⁶ injury or

1. Evidence held sufficient

(1) To support finding that claimant's total disability as result of psychoneurosis was contributed to by two separate compensable accidents while working for different employers and order apportioning additional compensation awarded between two employers, as against second employer's contention that claimant's first injury was sole cause of his disability.

Idaho.—Walker v. Hogue, 185 P.2d 708, 67 Idaho 484.

(2) To support finding that acceleration of disease, which had been subject of previous compensation award, was due to exposure occurring while one insurer was on risk and that no part of accelerated results of disease was due to earlier exposure which occurred while another insurer was on risk.

N.Y.—Kraus v. Marcus Decorating Co., 134 N.Y.S.2d 411, 284 App.Div. 914, modified on other grounds 136 N.Y.S.2d 377, 284 App.Div. 994.

(3) To sustain finding that employee's previous exposures to shop dust and printing plant conditions while in employ of other employers had not had cumulative effect on his pre-existing allergy, and that no part of his disability for exposure while in employ of last employer was attributable to previous employers.

N.Y.—Laine v. Commanday Roth, Inc., 135 N.Y.S.2d 879, 284 App.Div. 1070.

2. La.—Daste v. Gwin, 128 So. 41, 13 La.App. 378.
71 C.J. p 1457 note 67.

3. S.D.—Detling v. Tessier, 244 N. W. 538, 60 S.D. 405, adhered to 249 N.W. 686, 61 S.D. 403.

Evidence held sufficient

(1) To warrant suspension of further payments of compensation unless employee should submit to surgical treatment which was not dangerous to life or limb.

Mich.—Kolbas v. American Boston Mining Co., 287 N.W. 751, 275 Mich. 616.

N.M.—Fowler v. W. G. Const. Co., 188 P.2d 180, 51 N.M. 441.

(2) To authorize suspension of further payments of compensation unless employee should submit to surgical treatment, even though operation was of a major character.

Colo.—Overton v. City and County of Denver, 102 P.2d 474, 108 Colo. 114.

(3) To warrant holding that operation should not be required as a condition to continued compensation payments.

Ga.—City of Atlanta v. Padgett, 22 S.E.2d 197, 68 Ga.App. 96.

(4) To warrant finding that refusal to undergo operation or other treatment was not unreasonable.

Mass.—Burns' Case, 9 N.E.2d 719, 298 Mass. 78.

N.Y.—Raynello v. Scott Bros., 23 N. Y.S.2d 275, 260 App.Div. 977, reargument denied 24 N.Y.S.2d 663, 261 App.Div. 848.

4. Evidence held sufficient

(1) To justify finding that employee in undergoing surgery reasonably followed professional advice which he received, so that employer was not relieved of liability for increased disability even though increased disability was caused by surgery.

N.J.—Janvari v. Peter Schweitzer Co., 91 A.2d 113, 21 N.J.Super. 248.

(2) To sustain award for disability resulting from acute urinal retention, on ground that condition was result of operation performed several years before with consent of insurance carrier after injury.

N.Y.—Magen v. Great Atlantic & Pac. Tea Co., 119 N.Y.S.2d 602, 281 App. Div. 931.

(3) To support decision permitting claimant to proceed with amputation of his left lower leg if he desired to do so and directing case to be continued to referee's calendar for further consideration.

N.Y.—Cornelius v. Rochester Products Division, General Motors Corp., 74 N.Y.S.2d 773, 272 App.Div. 1090.

5. Mo.—Snaveley v. Delmar Hotel Co., App., 84 S.W.2d 188.

Pa.—Bordick v. John Conlon Coal Co., 19 A.2d 536, 144 Pa.Super. 522.

6. Mo.—Kiser v. J. W. O'Connell Painting Co., App., 60 S.W.2d 636.
71 C.J. p 1456 note 39.

Evidence held sufficient

(1) To warrant or sustain further or additional compensation for continuation or increase of disability from a back injury.

Cal.—Maryland Cas. Co. v. Industrial

Acc. Commission, 148 P.2d 95, 64 C.A.2d 162.

Colo.—Safeway Stores v. Newman, 230 P.2d 168, 123 Colo. 362.

Ga.—General Motors Corp. v. Craig, 85 S.E.2d 441, 91 Ga.App. 239.

Idaho.—Young v. Herrington, 99 P.2d 441, 61 Idaho 183.

Iowa.—Bousfield v. Sisters of Mercy, 86 N.W.2d 109.

La.—Wallace v. Spohrer-Pollard Contractors, App., 76 So.2d 312—Weeks v. Consolidated Underwriters, App., 73 So.2d 479—Brinson v. Arkansas Natural Gas Corporation, App., 152 So. 381.

Miss.—International Paper Co. v. Handford, 78 So.2d 895, 223 Miss. 747.

N.J.—Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division, 78 A. 2d 403, 11 N.J.Super. 338.

Schmidt v. Atlantic Refining Co., 38 A.2d 889, 132 N.J.Law 196, affirmed 42 A.2d 201, 133 N.J.Law 39.

N.Y.—Caltieri v. Great Atlantic & Pac. Tea Co., 120 N.Y.S.2d 606, 281 App.Div. 999—Tutokey v. Carborundum Co., 136 N.Y.S.2d 16, 284 App.Div. 1076, reargument and appeal denied 139 N.Y.S.2d 264, 285 App.Div. 987.

Okl.—Sappington-Hickman, Inc. v. State Indus. Commission, 262 P.2d 707—General Acc. Fire & Life Assur. Corp. v. Mowry, 262 P.2d 421—Phillips Petroleum Co. v. Anguish, 209 P.2d 689, 201 Okl. 691.

Wash.—Collins v. Department of Labor and Industries, 259 P.2d 643, 42 Wash.2d 903—Knowles v. Department of Labor and Industries, 184 P.2d 591, 28 Wash.2d 970.

(2) To sustain denial or reduction of further or additional compensation.

U.S.—Kechn v. Alaska Indus. Bd., C. A.Alaska, 230 F.2d 712—Simmons v. Marshall, C.C.A.Wash., 94 F.2d 850.

Ariz.—McFarland v. Industrial Commission, 285 P.2d 745, 79 Ariz. 165—Martin v. Industrial Commission, 213 P.2d 362, 69 Ariz. 285—Scott v. L. E. Dixon Co., 27 P.2d 1109, 42 Ariz. 525.

Ga.—Perrien v. Southern Co-op. Foundry Co., 3 S.E.2d 240, 60 Ga. App. 195.

Ill.—De Bartolo v. Industrial Commission, 80 N.E.2d 677, 375 Ill. 103.

La.—Phelps v. Royal Indem. Co., App., 77 So.2d 225—Dees v. Louisi-

disability to an employee's arms,⁷ fingers,⁸ or hands,⁹ | feet¹⁰ or legs,¹¹ or injury or disability to an em-

ana Oil Refining Corporation, App., 162 So. 597—Aloisio v. Seims-Helmers, Inc., App., 161 So. 334.

Minn.—Erickson v. Globe Wrecking Co., 280 N.W. 866, 203 Minn. 261.

N.Y.—Holzman v. Gottfried Baking Co., 20 N.Y.S.2d 2, 259 App.Div. 946, appeal dismissed 29 N.E.2d 394, 284 N.Y. 574—Wenzel v. J. W.

Kiesling & Son, 11 N.Y.S.2d 877, 257 App.Div. 879, appeal denied 22 N.E.2d 763, 281 N.Y. 887—Benn v. Washburn Wire Co., 6 N.Y.S.2d 926, 255 App.Div. 742.

R.I.—Meierovitz v. George A. Fuller Co., 67 A.2d 45, 75 R.I. 378.

S.D.—Stowssand v. Jack Rabbit Lines, 58 N.W.2d 298, 75 S.D. 11.

Tenn.—Davis v. General Elec. Supply Corp., 264 S.W.2d 563, 196 Tenn. 86—Mathis v. J. L. Forrest & Sons, 216 S.W.2d 967, 188 Tenn. 128.

Wash.—Eyer v. Department of Labor and Industries, 96 P.2d 1115, 1 Wash.2d 553.

Evidence held insufficient
(1) To support grant of further or additional compensation.

Colo.—Santerli v. Rocky Mountain Fuel Co., 153 P.2d 927, 113 Colo. 441.

W.Va.—Dillon v. State Compensation Com'r, 39 S.E.2d 827, 129 W.Va. 223.

(2) To sustain denial of further or additional compensation.

Ariz.—Bradshaw v. Industrial Commission, 276 P.2d 542, 78 Ariz. 124—Urvalejo v. Industrial Commission, 230 P.2d 516, 72 Ariz. 43—Tashner v. Industrial Commission, 157 P.2d 608, 62 Ariz. 333.

7. Evidence held sufficient
(1) To sustain award for additional or further compensation payments because of continued, increased, or recurrent disability in connection with injury to arm or arms.

Colo.—Hayden Bros. Coal Corporation v. Industrial Commission, 29 P.2d 637, 94 Colo. 211—Reynolds v. Fraker Coal Co., 28 P.2d 338, 94 Colo. 84.

Mich.—Carlson v. E. H. Sheldon & Co., 251 N.W. 369, 265 Mich. 190.

Okl.—Shell Petroleum Corporation v. Slate, 28 P.2d 990, 167 Okl. 157.

(2) To warrant denial of such additional or further compensation.

Fla.—Roberts v. Wofford Beach Hotel, 87 So.2d 670.

Ky.—Northeast Coal Co. v. Wells, 154 S.W.2d 740, 287 Ky. 654.

N.Y.—Roper v. H. C. Bohack Co., 22 N.Y.S.2d 356, 260 App.Div. 819, appeal denied 26 N.Y.S.2d 854, 261 App.Div. 1018.

Evidence held insufficient
(1) To justify or support award for additional or further compensation.

Ky.—George T. Staggs Co. v. O'Nan, 151 S.W.2d 51, 286 Ky. 527.

Pa.—Casper v. State Workmen's Ins. Fund, 200 A. 186, 132 Pa.Super. 96.

(2) To support denial of additional or further compensation.

R.I.—Pepe v. American Silk Spinning Co., 38 A.2d 474, 70 R.I. 309.

S. Okl.—Noble Drilling Co. v. Link, 17 P.2d 971, 161 Okl. 238.

Evidence held sufficient
(1) To justify award for additional or further compensation because of continued, increased, or recurrent disability in connection with injury to fingers.

Ariz.—Wise v. Six Companies, 28 P.2d 1007, 43 Ariz. 24.

Mass.—Burns' Case, 9 N.E.2d 719, 298 Mass. 78.

Mich.—Lentz v. Mumy Well Service, 64 N.W.2d 673, 340 Mich. 1.

Okl.—Stanolind (formerly Sinclair) Crude Oil Purchasing Co. v. Randall, 27 P.2d 339, 166 Okl. 261.

Pa.—Michetti v. State Workmen's Ins. Fund, 17 A.2d 712, 143 Pa.Super. 458.

(2) To support denial of further or additional compensation payments.

La.—Johnson v. Lone Star Cement Corp., App., 51 So.2d 658—Powers v. Allied Chemical & Dye Corp., App., 45 So.2d 214, rehearing refused 46 So.2d 332.

Mich.—Kolbas v. American Boston Mining Co., 267 N.W. 751, 275 Mich. 616.

Evidence held insufficient
To show that employee who had received injuries necessitating amputation, in part, of three fingers of left hand had been totally incapacitated.

Mass.—Strycharz' Case, 197 N.E. 9, 291 Mass. 212.

9. Pa.—Matlack v. Motley Coal Co., Com.Pl., 55 Lack.Jur. 49.

Evidence held sufficient
(1) To justify an award for additional or further compensation because of continued, increased, or recurrent disability in connection with injury to hand or hands.

Mich.—Wicko v. Ford Motor Co., 290 N.W. 818, 292 Mich. 335—Pentrack v. Motor Products Corp., 267 N.W. 858, 276 Mich. 357—Catino v. Morgan & Wright, 261 N.W. 281, 272 Mich. 154.

N.J.—Tucker v. Frank J. Beltramo, Inc., 186 A. 821, 117 N.J.Law 72, affirmed 192 A. 62, 118 N.J.Law 301.

Fernandez v. Ford Motor Co., 174 A. 223, 12 N.J.Misc. 653, appeal dismissed Ford Motor Co. v. Fernandez, 176 A. 152, 114 N.J.Law 202.

Okl.—Lumbermen's Supply Co. v. Mackey, 205 P.2d 870, 201 Okl. 296—Southwestern Cotton Oil Co. v. Hall, 46 P.2d 455, 172 Okl. 644.

Pa.—Camizzi v. E. T. Fraim Lock Co., 29 A.2d 425, 151 Pa.Super. 3.

(2) To support denial of further or additional compensation.

La.—Mitchell v. T. L. James & Co., App., 176 So. 245.

Mich.—Waterous v. Fisher Body Corp., 290 N.W. 814, 292 Mich. 324.

N.J.—Ponek v. American Steel Foundries, 22 A.2d 814, 19 N.J. Misc. 640.

Evidence held insufficient
To justify award for additional disability.

Okl.—Special Indem. Fund v. Knight, 200 P.2d 766, 201 Okl. 27.

10. Ind.—Berkey v. Chase Bag Co., 187 N.E. 679, 98 Ind.App. 175.

Evidence held sufficient
(1) To support award of further or additional compensation for continued or increased disability from injury to foot or feet.

Minn.—Berg v. Sadler, 50 N.W.2d 266, 235 Minn. 214.

Mo.—McWhorter v. White Baking Co., App., 81 S.W.2d 992.

Okl.—Magnolia Petroleum Co. v. Watkins, 57 P.2d 622, 177 Okl. 30.

Pa.—Eckley v. Rae, 194 A. 575, 128 Pa.Super. 577.

R.I.—Mondillo v. Ward Baking Co., 57 A.2d 447, 73 R.I. 473.

(2) To warrant denial of additional or further compensation payments for injury to foot.

N.M.—Fowler v. W. G. Const. Co., 188 P.2d 160, 51 N.M. 441.

Wash.—Hoff v. Department of Labor and Industries of Washington, 88 P.2d 419, 198 Wash. 257.

(3) To support finding of industrial board that disability of compensation claimant resulting from injury to foot had not increased, recurred, or resulted in increased permanent partial impairment since original award.

Ind.—Berkey v. Chase Bag Co., 187 N.E. 679, 98 Ind.App. 175.

Evidence held insufficient
(1) To justify award for continued or increased disability in connection with injury to foot or feet.

Ariz.—Harambasic v. Barrett & Hilp & Macco Corp., 119 P.2d 932, 58 Ariz. 319.

Mich.—Barnot v. Ford Motor Co., 275 N.W. 758, 282 Mich. 37.

11. Okl.—Kano Oil Co. v. Robertson, 11 P.2d 759, 157 Okl. 192.

Or.—Keefer v. State Industrial Acc. Commission, 135 P.2d 806, 171 Or. 405.

Pa.—McGurty v. Ruskin Dining Room, 34 A.2d 374, 153 Pa.Super. 535.

71 C.J. p 1456 note 42.

Evidence held sufficient
(1) To support reopening of case and granting of further or additional compensation because of continued.

plyee's head,¹² and heart.¹³

The requisites and sufficiency of evidence have

also been determined with respect to evidence as to disability by reason of hernia or rupture,¹⁴ loss or

increased, or recurrent disability resulting from a leg injury.

Colo.—Employers Mut. Ins. Co. v. Jacoe, 81 P.2d 389, 102 Colo. 515.

Ga.—London Guarantee & Accident Co. v. Boynton, 188 S.E. 265, 54 Ga.App. 419.

Idaho.—Nitkey v. Bunker Hill & Sullivan Min. & Concentrating Co., 251 P.2d 216, 73 Idaho 294.

Mass.—Case of Virta, 192 N.E. 98, 287 Mass. 602.

N.J.—Drexel v. Jurgensen, 22 A.2d 816, 19 N.J.Misc. 643.

Okl.—Standish Pipe Line Co. v. Kirkland, 107 P.2d 1024, 188 Okl. 248—Gibbs v. Lawrence, 27 P.2d 355, 166 Okl. 256.

Pa.—Manno v. Tri-State Engineering Co., 48 A.2d 122, 159 Pa.Super. 267—Kauffman v. United Engineering & Foundry Co., 33 A.2d 85, 153 Pa. Super. 67.

Utah.—Standard Coal Co. v. Industrial Commission, 65 P.2d 640, 91 Utah 549.

(2) To support finding that employee had suffered a greater disability with respect to loss of use of his leg than had been determined in fixing original compensation award. U.S.—McCarthy Stevedoring Corp. v. Norton, D.C.Pa., 40 F.Supp. 960.

(3) To warrant discontinuance of compensation and denial of further or additional compensation. Mont.—Wierl v. Anaconda Copper Min. Co., 156 P.2d 838, 116 Mont. 524.

Pa.—Massich v. Keystone Coal & Coke Co., 10 A.2d 98, 137 Pa.Super. 541—Porto v. Philadelphia & Reading Coal & Iron Co., 10 A.2d 29, 137 Pa.Super. 590.

Tenn.—Lee v. Aluminum Co., 198 S.W. 2d 639, 184 Tenn. 287.

(4) To show that employee, claiming further compensation for disability resulting from fractures of leg bones, had fully recovered. La.—Beamon v. Dalgarn Const. Co., App., 151 So. 265.

(5) To warrant denial of employer's application for reduction or discontinuance of compensation payments for leg injury.

Pa.—Thomas v. Susquehanna Collieries Co., 25 A.2d 98, 148 Pa.Super. 161—Toth v. Pittsburgh Terminal Coal Corporation, 167 A. 438, 109 Pa.Super. 163.

(6) To show that subsequent leg disability, or effects thereof, were result of original injury. Md.—Great A. & P. Tea Co. v. Hill, 95 A.2d 84, 201 Md. 630.

Mass.—Virta's Case, 192 N.E. 98, 287 Mass. 602.

(7) To show that further disability was not result of original injury to leg or hip.

N.Y.—Slosson v. Chazy Tel. Co., 57 N.Y.S.2d 549, 269 App.Div. 916.

(8) As to other matters relating to leg injuries.

Colo.—Martin v. Industrial Commission, 74 P.2d 1243, 101 Colo. 540.

Evidence held insufficient

(1) To warrant reopening case and granting further or additional relief for injury of leg.

Ariz.—London v. Industrial Commission, 223 P.2d 929, 71 Ariz. 111—Grim v. Industrial Commission, 214 P.2d 892, 70 Ariz. 1.

Pa.—McGurty v. Ruskin Dining Room, 34 A.2d 374, 153 Pa.Super. 535.

S.C.—Buckman v. International Agr. Corp., 13 S.E.2d 133, 196 S.C. 153.

W.Va.—Consentina v. State Compensation Com'r, 31 S.E.2d 499, 127 W.Va. 67.

(2) To warrant discontinuance of compensation payments for disability resulting from leg injury.

Pa.—Rosa v. Paint Creek Collieries, 85 A.2d 670, 170 Pa.Super. 540.

(3) To warrant suspension or refusal of compensation on ground that his condition was due to, or aggravated by, his refusal to follow medical advice to lay aside his crutch and cane.

Ky.—Harlan Fuel Co. v. Jordan, 112 S.W.2d 982, 271 Ky. 562.

12. Okl.—Parks v. Brown Bros., 26 P.2d 925, 166 Okl. 204—Skelly Oil Co. v. Thomas, 295 P. 213, 147 Okl. 86.

Evidence held sufficient

(1) To sustain grant of further or additional compensation because of increased, continued, or recurrent disability in connection with a head injury.

U.S.—Atlantic & Gulf Stevedores, Inc. v. Michalski, D.C.Md., 144 F.Supp. 475.

Colo.—Continental Cas. Co. v. Industrial Commission, 238 P.2d 196, 124 Colo. 295.

Mich.—Mikulski v. Hudson Motor Car Co., 9 N.W.2d 30, 305 Mich. 97.

Wash.—Dry v. Department of Labor and Industries, 39 P.2d 609, 180 Wash. 92.

(2) To sustain a denial of further or additional compensation for disability in connection with a head injury.

Ky.—Hedges v. F. & C. R. Co., 264 S.W.2d 655.

Pa.—Massich v. Keystone Coal & Coke Co., 10 A.2d 98, 137 Pa.Super. 541.

Evidence held insufficient

To warrant award of further compensation for alleged increased disability.

N.J.—Circelli v. Falco, 5 A.2d 61, 17 N.J.Misc. 94.

Wash.—Johnson v. Department of Labor and Industries, 273 P.2d 510, 45 Wash.2d 71.

13. **Evidence held insufficient**

To establish injured employee's right to additional compensation for increased incapacity as result of continued progressive weakening of his heart after award of compensation for permanent partial incapacity caused by weakening heart as result of accident.

N.J.—Breheny v. Essex County, 45 A. 2d 700, 134 N.J.Law 129.

14. **Evidence held sufficient**

(1) To sustain award of further or additional compensation because of increased, continued, or recurrent disability from a hernia or rupture.

Ga.—Riegel Textile Corp. v. Vinyard, 77 S.E.2d 760, 88 Ga.App. 753.

Ind.—Wolfcale v. Grush, 77 N.E.2d 438, 115 Ind.App. 155.

Minn.—Benjamin v. Kiefer, 213 N.W. 32, 170 Minn. 382.

N.Y.—Raynello v. Scott Bros., 23 N.Y.S.2d 275, 260 App.Div. 977, reargument denied 24 N.Y.S.2d 663, 261 App.Div. 848.

R.I.—Walsh-Kaiser Co. v. Kooharian, 51 A.2d 832, 72 R.I. 390.

(2) To warrant reduction or denial of further or additional compensation for disability from hernia or rupture.

Idaho.—Carlson v. F. H. De Atley & Co., 46 P.2d 1089, 55 Idaho 713.

La.—Alexander v. T. L. James & Co., App., 16 So.2d 550—Etie v. Olivier, App., 168 So. 713.

Me.—Middleton's Case, 3 A.2d 434, 136 Me. 108.

N.Y.—Bitsakis v. Wine, 90 N.Y.S.2d 30, 275 App.Div. 973, reargument and appeal denied 91 N.Y.S.2d 517, 275 App.Div. 1004, appeal denied 108 N.Y.S.2d 998, appeal dismissed 104 N.E.2d 361, 303 N.Y. 802, certiorari denied 73 S.Ct. 54, 344 U.S. 841, 97 L.Ed. 655, and application denied 110 N.Y.S.2d 923—Goldberg v. City of New York, 15 N.Y.S.2d 620, 258 App.Div. 830.

Pa.—Stoisits v. Lehigh & N. E. R. Co., 17 A.2d 694, 143 Pa.Super. 219.

Evidence held insufficient

To authorize award of further or additional compensation because of increased, continued, or recurrent disability from hernia or rupture.

impairment of vision,¹⁵ or traumatic psychosis or neurosis.¹⁶

§ 861. Dismissal before Hearing

While a petition for review on the ground of changed condition should not ordinarily be dismissed before hearing evidence, it may be under certain circumstances.

Ordinarily, a petition for review by the board on the ground of change of condition should not be dismissed before hearing the evidence;¹⁷ and constant change of front by applicant employee does not justify such dismissal.¹⁸ An employer's application is properly dismissed, however, at the employee's death when the latter's dependents apply for an adjustment of his compensation.¹⁹

In any event, an order of dismissal will not operate to dismiss a petition filed by claimant's most recent counsel where such order is directed to claimant's former counsel who represented him on an earlier petition.²⁰

§ 862. Hearing or Trial

Where a claimant shows a change in condition a hearing on a timely application for a supplemental award should be granted; and, when possible, the proceeding should be heard by the same commissioner who acted in the original hearing.

Where a claimant shows a change in condition arising subsequent to a previous award and not then considered in fixing the amount of the compensation, a hearing on a timely application for a supplemental award should be granted.²¹ Even if a claimant's motion for a modified or corrected award, on alleged changed conditions, does not present facts sufficient to invoke the jurisdiction of the board or commission, an order refusing jurisdiction is not justified where to sustain the order would be in effect to sustain a general demurrer to the claimant's petition, which, under the local practice, may not be done.²² The industrial commission may not be required to hold a hearing in each case in which payments of compensation have been stopped or suspended, but it is given a wide discre-

Ga.—Chicago Bridge & Iron Co. v. Cola, 28 S.E.2d 900, 70 Ga.App. 599.
Ky.—Three Point Coal Corp. v. Moser, 195 S.W.2d 305, 302 Ky. 584.
Mich.—Boyich v. J. A. Utley Co., 11 N.W.2d 267, 306 Mich. 625.
Neb.—Riedel v. Smith Baking Co., 33 N.W.2d 287, 150 Neb. 28.
Pa.—Zelenko v. Carnegie Coal Co., 200 A. 608, 132 Pa.Super. 135.

15. Ind.—Morgan v. Wooley, 6 N.E. 2d 717, 103 Ind.App. 242.
Pa.—Chordash v. McCloskey & Co., Com.Pl., 50 Dauph.Co. 43.
71 C.J. p 1457 note 45.

Evidence held sufficient

(1) To sustain grant of further or additional compensation because of continued, increased, or recurrent disability with respect to eyes or loss or impairment of vision.
Ga.—Maryland Cas. Co. v. Posey, 199 S.E. 543, 58 Ga.App. 723.
Ind.—Delano v. Frisinger Const. Co., 198 N.E. 123, 101 Ind.App. 68.
Okl.—Oklahoma Power & Water Co. v. State Industrial Commission, 95 P.2d 643, 185 Okl. 607—Superior Oil Co. v. Swimmer, 80 P.2d 734, 177 Okl. 396—Derr v. Weaver, 57 P. 2d 1153, 177 Okl. 100.
Pa.—Cahn v. Savitz, Com.Pl., 45 Lack. Jur. 47.
Wash.—Smith v. Department of Labor and Industries, 30 P.2d 656, 176 Wash. 569.

(2) To justify an award for total permanent disability because of total or almost total loss of vision in both eyes.
Mich.—Houg v. Ford Motor Co., 285 N.W. 27, 288 Mich. 478.
N.J.—Pugh v. Winslow Const. Co., 34 A.2d 281, 131 N.J.Law 23.

N.Y.—Bernsohn v. George Ferguson Co., 117 N.Y.S.2d 831, 281 App.Div. 722.

(3) To sustain denial of further or additional compensation.

Ariz.—Perkins v. Industrial Commission, 293 P.2d 674, 80 Ariz. 119.
Ga.—Roberson v. Lumbermen's Mut. Cas. Co., 89 S.E.2d 270, 92 Ga.App. 572.

Evidence held insufficient

To justify denial of further, additional, or continued compensation for eye injury.
Pa.—Higgins v. Edward G. Budd Mfg. Co., 194 A. 682, 128 Pa.Super. 595.

16. Idaho.—Jenkins v. Boise Payette Lumber Co., 287 P. 202, 49 Idaho 24.

Evidence held sufficient

(1) To establish an increase in disability as result of consequent neurosis.
N.J.—Polulich v. J. G. Schmidt Tool Die & Stamping Co., 134 A.2d 29, 46 N.J.Super. 135.
Wash.—Peterson v. Department of Labor and Industries, 33 P.2d 650, 178 Wash. 15.

(2) To establish that workman was totally and permanently disabled thereby.

N.J.—Simon v. R. H. H. Steel Laundry, Inc., 98 A.2d 604, 26 N.J.Super. 593.

Candito v. Fairmont Const. & Nicholson Engineering Co., 21 A.2d 622, 19 N.J.Misc. 503.

(3) To sustain finding that claimant was not disabled by any post-traumatic neurosis.

La.—Phelps v. Royal Indem. Co., App., 77 So.2d 225.

Evidence held insufficient

(1) To establish employee's claim of total and permanent disability predicated on such traumatic neurosis.

La.—Turner v. W. Horace Williams Co., App., 80 So.2d 162.

(2) To establish that present mental disturbance of employee was collateral to his injury and did not arise directly from it, but was due to worry, anxiety, and brooding over accident and his failure to obtain compensation for it.

Mich.—Schneyder v. General Motors Corp., Cadillac Motor Car Division, 286 N.W. 158, 289 Mich. 63.

17. Ill.—Simpson Const. Co. v. Industrial Board of Illinois, 114 N.E. 138, 275 Ill. 366.

18. N.J.—Bucci v. Kirkpatrick Const. Co., 166 A. 203, 11 N.J.Misc. 377.

19. Ind.—Graver Tank & Mfg. Corporation v. Noble, 186 N.E. 390, 97 Ind.App. 307.

20. N.J.—Torbyn v. South River Sand Co., 69 A.2d 588, 6 N.J.Super. 1.

21. Ariz.—Hogle v. Arizona Concrete Co., 33 P.2d 589, 44 Ariz. 1.
Ga.—Travelers Ins. Co. v. Haney, 88 S.E.2d 492, 92 Ga.App. 319.

Wash.—Goenen v. Department of Labor and Industries, 47 P.2d 991, 132 Wash. 469.

W.Va.—Young v. State Compensation Com'r, 167 S.E. 592, 113 W.Va. 230.

22. Tex.—Miller v. Lloyds Alliance, Civ.App., 259 S.W.2d 777, refused no reversible error.

tion as to the procedure it will follow and the action it will take properly to protect the parties' rights.²³ One claiming compensation for a temporary disability, while in a hospital after an operation resulting in a diminution of his permanent disability, for which he had been paid full compensation, is not entitled to a formal hearing.²⁴

Where any delay in hearing on a claim for further compensation could have been avoided by the employer if he had asked for a more prompt hearing, the employer is not in a position to complain on jurisdictional or other grounds because of the delay.²⁵ A dependent awarded compensation for the death of the employee is under no obligation to demand a hearing, provided for by statute, before the entry of the commissioner's order stopping compensation on the ground of the misconduct of the dependent.²⁶ Under a statute providing for hearing within a certain time after the date of the accident, the board cannot indefinitely postpone the hearing on an application for a modification of the award.²⁷

Who may hear. Although the question does not seem to be jurisdictional,²⁸ when possible, proceedings to review an award for change of condition should be heard by the same commissioner who acted in the original hearing;²⁹ but, if he deems

himself disqualified, he may designate another commissioner to conduct the further hearing.³⁰ A hearing on an application for a modification of a compensation award before a majority of the board is not error.³¹

Instructions. In a proceeding for an increase or diminution of compensation, the instructions should set forth the law correctly³² and be complete.³³ Although the inclusion in instructions, on the function and duty of the board, of the statement that the board consists of representatives of labor, industry, and the public is not prejudicial, it has been recommended that such instruction be dispensed with in the future.³⁴ Where a failure by a claimant to go to the jury on an issue does not infect allegations and evidence with an irremovable taint, the taint, if any, may be removed by instructions to the jury to disregard such allegations and evidence.³⁵

§ 863. — Notice

The interested parties are entitled to notice of further consideration of a compensation claim.

The interested parties are entitled to notice of further consideration of a compensation claim³⁶ and payment under an award cannot be reduced³⁷ or discontinued³⁸ without first giving notice to

23. Fla.—Miami Beach First Nat. Bank v. Dunn, 85 So.2d 558.

24. N.J.—Sassarro v. Wright Aeronautical Corp., 52 A.2d 151, 135 N.J. Law 368.

25. U.S.—Candado Stevedoring Corp. v. Willard, C.A.2, 185 F.2d 232.

26. W.Va.—Lancaster v. State Compensation Com'r, 23 S.E.2d 601, 125 W.Va. 190.

27. Idaho.—Egus v. Triumph Min. Co., 232 P.2d 136, 71 Idaho 354.

Order held proper

Where application for modification of workmen's compensation award on ground of changed conditions was filed one day prior to expiration of four-year statutory period from accident, order setting matter for hearing two years after application, in absence of objection or motion to vacate and for continuance, was proper.

Idaho.—Egus v. Triumph Min. Co., supra.

28. N.J.—Blazlak v. Eastwood-Nealley Corp., 57 A.2d 553, 26 N.J. Misc. 116.

29. Conn.—Saddlemire v. American Bridge Co., 110 A. 63, 94 Conn. 618.

30. Conn.—Saddlemire v. American Bridge Co., supra.

31. Idaho.—Egus v. Triumph Min. Co., 232 P.2d 136, 71 Idaho 354.

32. Wash.—La Plant v. Department

of Labor and Industries, 301 P.2d 542, 49 Wash.2d 343.

33. Wash.—Parks v. Department of Labor and Industries, 286 P.2d 104, 46 Wash.2d 895.

34. Wash.—Parks v. Department of Labor and Industries, supra.

35. Tex.—Insurance Co. of Tex. v. Davis, Civ.App., 276 S.W.2d 327, error refused no reversible error.

36. Cal.—Walker Mining Co. v. Industrial Acc. Commission, 95 P.2d 188, 35 C.A.2d 257.

Pa.—Martray v. Munson-McCairns, Com.Pl., 5 Fay.L.J. 120.

W.Va.—Lancaster v. State Compensation Com'r, 23 S.E.2d 601, 125 W.Va. 190—Yacomolish v. State Compensation Commissioner, 157 S.E. 45, 110 W.Va. 79.

Statutory provision not satisfied

State compensation commissioner's letter, advising deceased employee's widow that formal order, stopping payments of compensation awarded her under workmen's compensation act, would be entered on ground of her immoral conduct, in absence of protest and contrary showing by her within thirty days from date of letter, did not satisfy statutory provisions for written notice to deceased employee's dependents of commissioner's modification or change of his previous orders; and the statute does not require dependent to pro-

duce proof within thirty days after notification of commissioner's intention to enter adverse order.

W.Va.—Lancaster v. State Compensation Com'r, 23 S.E.2d 601, 125 W.Va. 190.

Disabled employee's attorney

(1) The mailing of notice of industrial accident commission's intention to amend for permanent disability rating its award of compensation for temporary total disability to disabled employee personally, instead of his attorney of record, was not mere procedural irregularity, but vitiated commission's proceedings and rendered its decision so amending award subject to annulment.

Cal.—Lyydikaenen v. Industrial Acc. Commission, 97 P.2d 993, 36 C.A.2d 298.

(2) Service of notice of time and place of hearing on application for modification of compensation award on attorney who had filed application and who had been attorney of record of applicant in original proceedings was service upon applicant.

Idaho.—Egus v. Triumph Min. Co., 232 P.2d 136, 71 Idaho 354.

37. W.Va.—Yacomolish v. State Compensation Com'r, 157 S.E. 45, 110 W.Va. 79.

38. W.Va.—Johnson v. State Compensation Com'r, 168 S.E. 803, 113 W.Va. 540.

claimant of the intention to reopen the claim. So an additional award cannot be made against an insurance carrier without notice to it and an opportunity to be heard;³⁹ and submission of the cause without notice to the employer and without affording him an opportunity to adduce his evidence, after entry of an order for continuing it for further hearing, is prejudicial error.⁴⁰ Notice to the company doctor by an employee who has sustained an injury constitutes notice to the employer within the statute.⁴¹

Form and sufficiency. The notice of hearing on modification of an award for change of condition has been considered an order,⁴² and should approximate an order of court in its definiteness⁴³ and its form,⁴⁴ and in every case should specifically bring the claim under some one or more of the statutory causes authorizing a modification of an award.⁴⁵ The fact that the notice was not in proper form, however, will not avail the parties on appeal when each of them had such notice as to give him full opportunity to present the issue of modification, and that issue was fully heard and adjudicated without prejudice to any rights which cannot be protected upon the appeal.⁴⁶ Even though a notice that an amendment awarding additional compensation will be made unless good cause to the contrary was shown is error as placing the burden of proof upon the insurance company instead of upon the employee, it will not avoid the award since it is a mere error as to the proper method of procedure.⁴⁷

Waiver. A motion to dismiss the application amounts to a general appearance, and waives any defects in the service of notice of the application,⁴⁸ and an active participation in a rehearing constitutes a waiver of a failure to give notice.⁴⁹ A disabled employee, however, has been held not to waive a defect in the notice by appearing and filing a petition for a rehearing, in the absence of anything in the petition to suggest that he voluntarily relinquished the right to object to the failure to give him a legal notice.⁵⁰

§ 864. — Scope and Extent of Inquiry

On a hearing of the application to review an award on the ground of change of condition, the authority of the commission usually is limited to a readjustment of the amount of compensation, and to this end the commission is authorized to inquire into the nature and degree of the change in the condition of the claimant.

On a hearing of the application to review an award on the ground of change of condition, the authority of the commission is limited to a readjustment of the amount of compensation,⁵¹ and to this end the commission may consider all of the conditions which may in any way have a direct bearing on the rights of the injured employee.⁵² The case is not reopened on the old application,⁵³ and it is not competent to inquire as to the cause of disability⁵⁴ or whether the employee has received compensable injuries.⁵⁵ In the absence of fraud,⁵⁶ the only questions to be considered are as to whether there has been any change shown, subsequent to the previous hearing, in the condition of claimant,⁵⁷ that

39. Cal.—Larsen v. State Industrial Accident Commission, 13 P.2d 850, 125 C.A. 13.

40. Cal.—Union Lumber Co. v. Industrial Accident Commission of California, 12 P.2d 1047, 124 C.A. 584.

41. Pa.—Zelenko v. Carnegie Coal Co., 200 A. 608, 132 Pa.Super. 135.

42. Conn.—Saddlemire v. American Bridge Co., 110 A. 63, 94 Conn. 618.

43. Conn.—Saddlemire v. American Bridge Co., supra.

44. Conn.—Saddlemire v. American Bridge Co., supra.

45. Conn.—Saddlemire v. American Bridge Co., supra.

46. Conn.—Saddlemire v. American Bridge Co., supra.

47. Cal.—Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission of California, 163 P. 1050, 176 C. 483.

48. Ind.—Venable v. Fairmount Glass Works, 145 N.E. 531, 83 Ind. App. 77.

49. Mo.—Rue v. Eagle-Picher Lead Co., 70 S.W.2d 124, 228 Mo.App. 114.

50. Cal.—Lyydikainen v. Industrial Acc. Commission, 97 P.2d 993, 36 C. A.2d 298.

51. Okl.—Skelly Oil Co. v. Harrell, 134 P.2d 136, 192 Okl. 101.

52. Okl.—Noel v. Kozak, 298 P. 298, 148 Okl. 210.

Not confined to assigned ground only
Where uncontroverted petition to reopen compensation case wherein claimant had not been awarded compensation for total disability was predicated on theory of fraud or mistake and contained sufficient facts to raise presumption that claimant had been totally disabled, fact that board's order reopening case assigned only "change of condition" as ground did not confine hearing to question as to whether there had been any change in conditions after date of original settlement agreement.

Ky.—Blue Diamond Coal Co. v. Meade, 289 S.W.2d 503.

53. Or.—Clerich v. State Industrial Acc. Commission, 23 P.2d 534, 143 Or. 627.

54. U.S.—W. R. Grace & Co. v. Marshall, D.C.Wash., 56 F.2d 441.

71 C.J. p 1458 note 88.

55. Ill.—Cobine v. Industrial Commission, 133 N.E. 220, 350 Ill. 384.

56. Idaho.—Barry v. Peterson Motor Co., 46 P.2d 77, 55 Idaho 702.

57. Ariz.—Edens v. L. E. Dixon Const. Co., 27 P.2d 1107, 42 Ariz. 519.

Ga.—Rhindress v. Atlantic Steel Co., 32 S.E.2d 554, 71 Ga.App. 898—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App. 789.

Idaho.—Barry v. Peterson Motor Co., 46 P.2d 77, 55 Idaho, 702—Mell v. Larson, 36 P.2d 250, 54 Idaho, 754.

Mich.—Smith v. Pontiac Motor Car Co., 270 N.W. 172, 277 Mich. 652.

Wash.—Nagel v. Department of Labor and Industries, 66 P.2d 318, 189 Wash. 631.

71 C.J. p 1458 note 90.

True condition

District court on application for additional compensation for permanent partial disability could inquire into workman's true condition, in light of history of case and additional medical evidence, where orig-

is, whether or not the disability has subsequently occurred, increased, diminished, or ended,⁵⁸ and the cause and extent of the change, if any;⁵⁹ and, under some statutes, the hearing applies only to matters going to the basis of applicant's right, and not to amounts or duration of awards.⁶⁰ It has been held that the board or commission is not called on to apply the provisions of a statute relating to the determination of the basis of compensation,⁶¹ and the board is not required to go into a general accounting relative to the payment of money to the employee, not provided for in the award.⁶²

In proceedings brought under a statute providing for a decrease in compensation if an employee compensated for complete disability returns to work or is able to do so and earns or is able to earn as much as or part of what he earned before, the question is not whether the disability has decreased,⁶³ but whether the earning capacity has increased.⁶⁴

§ 865. — Production and Reception of Evidence

On a hearing of an application to review an award on the ground of change in condition, evidence is admis-

sible to show whether or not the disability has recurred or changed as claimed by the applicant.

On a hearing of an application to review an award on the ground of change of condition, a showing which is synonymous with the production of competent testimony is necessary,⁶⁵ and there can be no additional award of compensation where the facts are the same as those considered on the former award.⁶⁶ Evidence is admissible to show whether or not the disability has recurred or changed as claimed by applicant.⁶⁷ He is not permitted to prove his condition from the time of the injury to the time of the hearing,⁶⁸ but only the changes since the former hearing.⁶⁹ Medical experts who testified as to the employee's condition at a prior hearing, if available, have been held to be the only experts competent to testify as to the employee's condition at the time of the later hearing as compared with his condition at the time of the original proceeding.⁷⁰

Evidence of claimant's condition at the time of the original award as shown by such award or by evidence introduced on the first hearing is proper⁷¹ and necessary,⁷² although new evidence of his condition when the first award was made would not

inal award for temporary total disability was made operative until claimant should be able to return to gainful occupation.

Wyo.—In re Pero, 52 P.2d 690, 49 Wyo. 131.

Undiscovered disabilities

Where employee does not offer to return benefits of compensation award, industrial commission, on application for increase or adjustment of compensation, is limited to inquiry whether new and previously undiscovered disabilities or ailments have developed which could not have been considered originally.

Ariz.—Edens v. L. E. Dixon Const. Co., 27 P.2d 1107, 42 Ariz. 519.

58. Ill.—Madsen v. Industrial Commission, 50 N.E.2d 707, 383 Ill. 590—De Bartolo v. Industrial Commission, 30 N.E.2d 677, 375 Ill. 103—Cobine v. Industrial Commission, 183 N.E. 220, 350 Ill. 384.

Me.—Rowe v. Keyes Fibre Co., 129 A.2d 210, 152 Me. 317.

Okl.—Van Ness Const. Co. v. Walther, 95 P.2d 858, 185 Okl. 657—Oak Drilling Co. v. Gibbons, 83 P.2d 816, 183 Okl. 586.

Entire range of disability

Where jurisdiction of commission to make a determination of extent of disability has been properly invoked, commission can properly inquire into entire range of disability. Okl.—Ditmore v. Charles M. Suttle Const. Co., 261 P.2d 590—Malcolm

v. State Industrial Commission, 143 P.2d 823, 193 Okl. 367.

Increase

On an employee's application to compensation bureau for compensation for increased disability, only question for consideration is whether employee has suffered an increase of disability since prior disability award.

N.J.—Sanderson v. Crucible Steel Corp., 66 A.2d 188, 3 N.J.Super. 209.

59. Okl.—Skelly Oil Co. v. Harrell, 134 P.2d 136, 192 Okl. 101—Hanna Lumber Co. v. Penrose, 7 P.2d 164, 154 Okl. 210.

60. W.Va.—State ex rel. Conley v. Pennybacker, 48 S.E.2d 9, 131 W. Va. 442—State v. State Compensation Com'r, 153 S.E. 509, 109 W.Va. 218.

61. Okl.—Oak Drilling Co. v. Gibbons, 83 P.2d 816, 183 Okl. 586.

62. Ga.—City of Hapeville v. Preston, 20 S.E.2d 202, 67 Ga.App. 350.

63. Ill.—Superior Coal Co. v. Industrial Commission, 151 N.E. 890, 321 Ill. 240.

64. Ill.—Superior Coal Co. v. Industrial Commission, supra.

Mich.—Smith v. Pontiac Motor Car Co., 270 N.W. 172, 277 Mich. 652.

65. Ky.—Blue Diamond Coal Co. v. Meade, 289 S.W.2d 503.

66. W.Va.—Igo v. State Compensation Com'r, 36 S.E.2d 690, 128 W.Va. 402.

67. Ill.—Casparis Stone Co. v. Industrial Board of Illinois, 115 N.E. 822, 278 Ill. 77.

Party outside state

Where petition for additional compensation under compensation act was scheduled for hearing, but, before hearing, claimant moved to another state, absolute refusal of board to allow claimant to present his testimony and witnesses in that state was abuse of discretion; and claimant was entitled to have his rights adjudicated without appearing personally before the compensation authorities within the state.

Pa.—Selinsky v. New Shawmut Min. Co., 115 A.2d 916, 178 Pa.Super. 240.

68. Ill.—Casparis Stone Co. v. Industrial Board of Illinois, 115 N.E. 822, 278 Ill. 77.

69. Ill.—Belleville Brick & Tile Co. v. Industrial Commission, 137 N.E. 401, 305 Ill. 577—Casparis Stone Co. v. Industrial Board of Illinois, 115 N.E. 822, 278 Ill. 77.

70. N.J.—Fischman v. Joseph Fish & Co., 198 A. 398, 16 N.J.Misc. 165.

71. Ind.—Indianapolis Bleaching Co. v. Morgan, 129 N.E. 644, 75 Ind. App. 672.

Utah—Spencer v. Industrial Commission, 290 P.2d 692, 4 Utah 2d 185.

72. Ind.—Indianapolis Bleaching Co. v. Morgan, 129 N.E. 644, 75 Ind. App. 672.

be proper.⁷³ Where evidence from the previous hearing is considered, it should not be done in any manner which will result in any procedural disadvantage to the party affected,⁷⁴ who must be given an opportunity to examine or cross-examine any witness who may have testified,⁷⁵ and to offer evidence supporting his views.⁷⁶ The consideration of a medical examiner's ex parte report without affording an opportunity for cross-examination and for offering testimony to the contrary is not error in the absence of a request therefor.⁷⁷

When a proceeding is reopened, the board or commission is not limited to a reconsideration of evidence already before it.⁷⁸ In reaching the determination as to whether or not a change in condition has occurred, the court or board may consider the entire record,⁷⁹ and it is the duty of the board or commission to consider the evidence on the original hearing and any additional evidence offered on the question of a change in condition.⁸⁰ In some jurisdictions applicant must produce in evidence the record of the former hearing,⁸¹ but in others the testimony on the first application may be considered as evidence without any agreement of the parties and without it being received as evidence in the second hearing,⁸² since such evidence is not ipso facto part of the record on the proceedings as to subsequently increased or decreased disability.⁸³ Where the commission increases the percentage of the claimant's disability on the basis of evidence produced at a final hearing held before a referee who had not conducted former hearings, the examination of evidence

adduced at former hearings is not necessary in the determination of the question of increasing the percentage of disability.⁸⁴

Since a deputy commissioner appointed by the commission to take testimony has no authority to dismiss the case, as discussed *infra* § 873, when he has attempted to do so, the commission may treat the application as still pending⁸⁵ and consider the testimony taken by him, with that subsequently introduced, in determining the final disposition of the case.⁸⁶

In determining whether there has been a change in condition of the claimant so as to authorize an award increasing, diminishing, or ending the payment of compensation, the board has a right to consider the physical appearance of the claimant at the hearing,⁸⁷ and to have him examined by a physician to determine whether there has been a change in his condition;⁸⁸ and where a claimant submits himself and the injured part of his body to the observation of the deputy commissioner, the commissioner has a right to consider such proof⁸⁹ and to formulate and announce his conclusions with respect thereto.⁹⁰

An opportunity to present rebuttal evidence must be given to a party,⁹¹ and he should be permitted to cross-examine witnesses introduced at the hearing.⁹² Where no objection is made to evidence as being incompetent, it may be considered by the commission as credible.⁹³ Objections to the testimony are insufficient when so indefinite that they do not fairly

73. Ind.—Indianapolis Bleaching Co. v. Morgan, *supra*.

74. Utah.—Spencer v. Industrial Commission, 290 P.2d 692, 4 Utah 2d 185.

75. Utah.—Spencer v. Industrial Commission, *supra*.

76. Utah.—Spencer v. Industrial Commission, *supra*.

77. W.Va.—Phillips v. State Compensation Com'r, 174 S.E. 561, 114 W.Va. 648.

78. U.S.—Clyde-Mallory Lines v. Cardillo, D.C.Mass., 22 F.Supp. 40—Gravel Products Corp. v. McManigal, D.C.N.Y., 14 F.Supp. 414.

79. Ga.—General Motors Corp., Chevrolet Division v. Dempsey, 91 S.E.2d 850, 93 Ga.App. 423.

Ky.—Clear Fork Coal Co. v. Gaylor, 286 S.W.2d 519—W. E. Caldwell Co. v. Borders, 193 S.W.2d 453, 301 Ky. 843.

80. Cal.—Bethlehem Steel Co. v. Industrial Accident Commission, 108 P.2d 698, 42 C.A.2d 192.

Ill.—De Bartolo v. Industrial Commission, 30 N.E.2d 677, 375 Ill. 103. Ind.—Lukich v. West Clinton Coal Co., 10 N.E.2d 362, 164 Ind.App. 73. 71 C.J. p 1459 note 7.

81. Ill.—Caspas Stone Co. v. Industrial Board of Illinois, 115 N.E. 822, 278 Ill. 77—Bloomington, D. & C. R. Co. v. Industrial Board, 114 N.E. 511, 276 Ill. 120.

Pa.—Sorby v. Three Rivers Motors, Co., 102 Pittsb.Leg.J. 242, affirmed 114 A.2d 347, 178 Pa. 187.

82. U.S.—Independent Pier Co. v. Norton, C.C.A.Pa., 54 F.2d 734. 71 C.J. p 1459 note 9.

83. N.J.—Watts v. City of Newark, 54 A.2d 622, 25 N.J.Misc. 402.

84. Cal.—Santa Maria Gas Co. v. Industrial Acc. Commission, 117 P. 2d 951, 46 C.A.2d 775.

85. Ga.—Robertson v. Aetna Life Ins. Co., 141 S.E. 504, 37 Ga.App. 703.

86. Ga.—Robertson v. Aetna Life Ins. Co., *supra*.

87. Ga.—Bituminous Cas. Corp. v.

Willbanks, 23 S.E.2d 519, 68 Ga.App. 631.

88. Okl.—Chas. H. Moureau Co. v. Domange, 153 P.2d 628, 194 Okl. 563.

89. N.J.—Licker v. J. G. Martin Box Co., 21 A.2d 595, 127 N.J.Law 136.

90. N.J.—Licker v. J. G. Martin Box Co., *supra*.

91. Wash.—Suriaa v. Department of Labor and Industries of State, 210 P.2d 403, 34 Wash.2d 839.

92. Waiver

Where counsel objected to the offer in evidence of a physician's report on the basis that he did not have an opportunity to cross-examine the physician, and at a later hearing counsel again objected to the admission of the report on the same ground, there was no waiver of the right to cross-examine, and depriving the counsel of that right was erroneous.

U.S.—McCarthy Stevedoring Corp. v. Norton, D.C.Pa., 40 F.Supp. 957.

93. Conn.—Osterlund v. State, 66 A. 2d 363, 135 Conn. 498.

apprise the court of the testimony objected to, or the reasons for the objections.⁹⁴

§ 866. — Questions of Law or Fact

On the hearing of an application for review of an award on the ground of change in condition, the question whether the disability has recurred or increased or ceased is one of fact, as is the credibility and weight of the testimony.

On the hearing of an application for review of an award on the ground of change of condition, the question whether the disability has recurred or increased or ceased is one of fact,⁹⁵ and so are the questions as to whether the recurring or continued disability resulted from the compensable accident or some other cause,⁹⁶ and as to whether applicant's income is earned or given him in charity,⁹⁷ or what is his earning capacity.⁹⁸ The period within which the commission can reopen a cause which is to be

calculated on the basis of disability then existing may become a question of fact for the determination of the commission.⁹⁹ Likewise, whether a former award of compensation was for temporary or permanent disability is a question of fact.¹ Where a physician testifies that the injuries received by an employee were a positive factor of his insanity, the question whether the insanity resulted from the injury is an issue of fact.² The credibility³ and weight⁴ of the testimony in the case are for the commission to decide.

Mixed questions of law and fact. Where there is no dispute as to an employee's condition and extent of his injuries, or that such injury aggravated his pre-existing disease, but the only conflict in the expert opinion concerns the extent to which the accident contributed to his later disability, a mixed question of law and fact is raised.⁵

94. Wash.—Kull v. Department of Labor and Industries, 152 P.2d 961, 21 Wash.2d 672.

95. U.S.—Valeri v. Lowe, D.C.N.Y., 26 F.Supp. 761.

Kan.—Williams v. Lozier-Broderick & Gordon, 154 P.2d 126, 159 Kan. 266.

Mich.—Ammond v. Muskegon Motor Specialties Co., 251 N.W. 327, 265 Mich. 211.

Okl.—Mullman v. Hirschler, 87 P.2d 162, 184 Okl. 318—Sheldon Oil Co. v. Thompson, 56 P.2d 1171, 176 Okl. 511.

Pa.—Pelosi v. Overbrook Tile Co., 10 A.2d 118, 138 Pa.Super. 30—Sneed v. State Workmen's Ins. Fund, 180 A. 90, 118 Pa.Super. 298.

Tex.—Employers' Liability Assur. Corp. v. Best, Civ.App., 101 S.W.2d 891, error dismissed. 71 C.J. p 1459 note 18.

Evidence held sufficient to take case to jury

(1) In general.

Wash.—White v. Department of Labor and Industries, 293 P.2d 764, 48 Wash.2d 413—Swak v. Department of Labor & Industries, 240 P.2d 560, 40 Wash.2d 51.

(2) In proceeding for additional compensation award for aggravation of workman's disability, opinion evidence of physician that workman developed neurasthenia since his claim was closed was sufficient to take case on issue of aggravation to jury, where opinion evidence was not based wholly on subjective symptoms.

Wash.—Anderson v. Department of Labor and Industries, 159 P.2d 397, 23 Wash.2d 76.

(3) Testimony of physician, in support of claim for additional compensation award for aggravation of claimant's disability, was competent

and was sufficient to take case to jury, notwithstanding physician's statement that he accepted as true claimant's recitation of subjective symptoms, where physician did not rely solely on claimant's statements respecting his claims, but made a physical examination and took an X-ray picture.

Wash.—Hastings v. Department of Labor and Industries, 163 P.2d 142, 24 Wash.2d 1.

Evidence held insufficient to take case to jury.

(1) In general.

Wash.—Lyle v. Department of Labor and Industries, 304 P.2d 668, 49 Wash.2d 540.

(2) In proceeding for additional compensation award for aggravation of workman's disability, opinion of physician based wholly on statements made by workman, disclosing only subjective symptoms of aggravation of disability, was insufficient to take issue of aggravation to jury.

Wash.—Anderson v. Department of Labor and Industries, 159 P.2d 397, 23 Wash.2d 76.

96. Mass.—Wentworth's Case, 188 N. E. 237, 284 Mass. 479.

Wash.—Clayton v. Department of Labor and Industries, 296 P.2d 676, 48 Wash.2d 754.

71 C.J. p 1459 note 14.

Evidence held insufficient to take case to jury, in absence of any substantial evidence tending to establish proximate causal relationship between injury and alleged disability.

Ohio.—Fox v. Industrial Commission, Com.Pl., 114 N.E.2d 451, affirmed in part and reversed in part on other grounds 125 N.E.2d 1, 162 Ohio St. 569, and affirmed 132 N.E. 2d 475, 99 Ohio App. 245.

97. Mass.—Sensk's Case, 141 N.E. 377, 247 Mass. 232. 71 C.J. p 1459 note 15.

98. Mich.—Satawa v. L. A. Young Springs & Wire Corp., 8 N.W.2d 60, 304 Mich. 264—Smith v. Pontiac Motor Car Co., 270 N.W. 172, 277 Mich. 652.

Evidence sufficient to present question of fact

In proceeding for compensation for partial disability and reduced earnings between date claimant returned to work after compensation for injury ceased, and date when claimant again left work and further compensation was paid, evidence on issue whether claimant during such period worked only part time because of partial disability was sufficient to present question of fact upon which workmen's compensation board could find reduced earnings due to injury. N.Y.—Brewka v. Mollet, 112 N.Y.S.2d 122, 279 App.Div. 1104.

99. Okl.—Baker v. Indian Min. & Royalty Co., 99 P.2d 1038, 186 Okl. 644.

1. Okl.—Independent Oil & Gas Co. v. Mooney, 103 P.2d 557, 187 Okl. 472.

2. Ohio.—Dean v. Industrial Commission, 81 N.E.2d 813, 86 Ohio App. 105.

3. Mich.—Hovey v. General Construction Co., 207 N.W. 852, 233 Mich. 531.

4. Ind.—Indiana Limestone Co. v. Ridge, 167 N.E. 617, 89 Ind.App. 689.

Wash.—White v. Department of Labor and Industries, 293 P.2d 764, 48 Wash.2d 413.

5. Idaho.—Young v. Herrington, 99 P.2d 441, 61 Idaho 183.

§ 867. — Findings

- a. In general
- b. Matters which must be found
- c. Conformity to issues and evidence
- d. Construction and effect

a. In General

In a proceeding for increase, diminution, termination, or reinstatement of compensation, findings of fact in support of the decision of the commission are necessary, and a failure to make findings of fact may be fatal to the order of the commission.

In a proceeding for increase, diminution, termination, or reinstatement of compensation, findings of fact in support of the decision of the commission are necessary,⁶ and should be sufficiently specific,⁷ so as to ascertain the extent of claimant's disability,⁸ and the failure to make findings of fact may be fatal to the order of the commission.⁹ Findings of fact and rulings of law should comply with statutory requirements.¹⁰

A *verdict* in a proceeding for reopening of a compensation claim because of an alleged aggravation has the same force and effect as in actions at law.¹¹

b. Matters Which Must Be Found

In order to support an award of compensation on the

ground of a change in condition the award should state the findings as to the changed condition, and when it took place; but a finding that the cause should be reopened and further compensation allowed has been considered a finding of every fact necessary to support the award.

In order to support an award of compensation on the ground of a change in condition the award should state the findings as to the changed condition,¹² that the original injury has caused a new and further disability,¹³ when the changed condition took place,¹⁴ and whether the changed condition is referable to the original injury.¹⁵ Where it is necessary to establish the earning capacity of the employee, the award of the commission is improper where there is no finding as to the actual earning ability of the employee.¹⁶ On the other hand, a finding that the cause should be reopened and further compensation allowed has been considered a finding of every fact necessary to support the award,¹⁷ and that the necessity for a finding whether the actual condition of the claimant is a direct result of the first injury, or the result of independent causes occurring after returning to work, is essential only when a jurisdictional question is involved.¹⁸

6. Fla.—*Straehla v. Bendix-We-Lauder-Rite*, 81 So.2d 657. Findings of fact and conclusions of law by board, commission, or court in proceedings to secure compensation see *supra* §§ 627-637.

Liberal construction

Findings of deputy industrial commissioner, in compensation case increasing compensation, should be construed even more liberally than findings of a court, in view of provision that commissioner and his deputy shall not be bound by technical or formal rules of procedure.

Iowa.—*Rose v. John Deere Ottumwa Works*, 76 N.W.2d 756, 247 Iowa 900.

Findings held sufficient

Deputy industrial commissioner's decision, on a review of a prior award, that claimant failed to prove that, since earlier adjudication of case, there had been such change in his condition as to entitle him to additional compensation, was sufficient to comply with requirement of compensation act that commissioner state his findings of fact and conclusions of law.

Iowa.—*Stice v. Consolidated Indiana Coal Co.*, 291 N.W. 453, 228 Iowa 1081.

Error in finding

On motion by claimant for increase in compensation, based on evidence bearing on finding of average weekly

wage prevailing at time of injury in city where injury occurred, and for change of doctors, commissioner erred in finding, of his own initiative, that maximum improvement of claimant's injured foot had been reached, and in making an award terminating weekly payments being made for partial incapacity and in granting claimant in lieu thereof specific compensation on basis of apparent partial loss of foot's function, over objection of claimant on ground that he was not prepared to meet such issue.

Conn.—*Osterlund v. State*, 30 A.2d 393, 129 Conn. 591.

7. Pa.—*Michetti v. State Workmen's Ins. Fund*, 17 A.2d 712, 143 Pa.Super. 458—*Bencho v. Glen Alden Coal Co.*, 184 A. 563, 121 Pa.Super. 533.

8. Pa.—*Maishock v. State Workmen's Ins. Fund*, 195 A. 143, 129 Pa.Super. 118.

Grigarski v. Glen Alden Coal Co., Com.Pl., 31 Luz.Leg.Reg. 357.

9. Fla.—*Straehla v. Bendix-We-Lauder-Rite*, 81 So.2d 657.

10. Ky.—*Lewis v. Fordson Coal Co.*, 60 S.W.2d 585, 249 Ky. 258.

11. Wash.—*Clayton v. Department of Labor and Industries of State*, 217 P.2d 783, 36 Wash.2d 325.

12. Colo.—*National Lumber & Creosoting Co. v. Kelly*, 63 P.2d 457, 99 Colo. 442.

Findings held insufficient

Colo.—*North Park Coal Co. v. Industrial Commission of Colorado*, 10 P.2d 326, 90 Colo. 500—*Hayden Bros. Coal Corporation v. Industrial Commission of Colorado*, 10 P.2d 325, 90 Colo. 503.

13. Cal.—*Pacific Employers Ins. Co. v. Industrial Acc. Commission*, 55 P.2d 1253, 12 C.A.2d 523.

14. Ind.—*International Detrola Corp. v. Hoffman*, 70 N.E.2d 844, 224 Ind. 613.

Okl.—*Blackburn Const. Co. v. Kennedy*, 83 P.2d 381, 184 Okl. 549.

71 C.J. p 1459 note 18.

After date of temporary compensation

The commission may, under all the facts and circumstances, determine that the changed condition occurred after the date to which temporary compensation was paid.

Okl.—*National Zink Co. v. State Industrial Commission*, 107 P.2d 1005, 188 Okl. 206.

15. R.I.—*Bishop v. Centredale Textile Co.*, 115 A.2d 353.

16. Me.—*St. Pierre's Case*, 48 A.2d 635, 142 Me. 145.

N.C.—*Hill v. Du Bose*, 67 S.E.2d 371, 234 N.C. 446.

17. Okl.—*Wentz v. Brookshire*, 300 P. 652, 150 Okl. 92.

18. Ind.—*Poke v. Peerless Foundry Co.*, 119 N.E.2d 905, 124 Ind.App.

In order to support an award of additional compensation for total disability, where the original award was for partial disability, there must be a finding of total permanent disability.¹⁹ Under a statute classifying permanent injuries as total or partial, the findings should designate the proper class of permanent injury, and, if the latter, there should be a finding as to the percentage of disability,²⁰ and a finding that the employee was suffering from "permanent disability" is insufficient to support an award.²¹ Where the second application seeks an award on an entirely new matter, and not for a change in the old condition, a finding as to change of condition is not necessary.²²

c. Conformity to Issues and Evidence

The findings should be supported by the pleadings and evidence.

On an application for review of an award for change of condition, the commission should make findings in accordance with the facts adduced,²³ and a finding of change of condition and an award based thereon cannot be sustained in the absence of an allegation of such change²⁴ or evidence supporting such an allegation.²⁵ The findings may be sufficient even though all of the evidence on which the findings are based is not recited.²⁶ If the evidence shows that the injury was more extensive

than had originally appeared, the finding by the commission that the claimant's condition had become worse does not invalidate the additional award.²⁷ Where the evidence discloses a change of condition, findings that there was no change due to the compensable injury and that the change was due to disease and not because of the injury are proper²⁸ and responsive to the issues,²⁹ and are not objectionable as conclusions of law.³⁰

d. Construction and Effect

A general finding is in effect a finding of each and every special matter necessary to support the finding.

A general finding of the commission is in effect a finding of each and every special matter necessary to support the finding.³¹ Accordingly, a finding in the second hearing that the employee had a permanent partial disability, when compared with a finding in the previous hearing of a temporary total disability, is, in effect, a finding of a change in condition.³² Also, where a disability award has been made, a subsequent finding of permanent partial impairment is necessarily equivalent to a specific finding that total disability has ceased.³³ Likewise, where there has been an adjudication that the compensation claimant has recovered from his injury and compensation is stopped, a subsequent finding of disability supported by evidence is in itself

544—Switow Theatrical Co. v. Humphrey, 44 N.E.2d 213, 112 Ind. App. 221—Ben Wolf Truck Lines v. Bailey, 22 N.E.2d 887, 107 Ind.App. 52.

19. Okl.—Crowe Coal Co. v. Swindell, 235 P. 614, 109 Okl. 275.
Utah.—Spencer v. Industrial Commission, 91 P.2d 439, 97 Utah 140.

20. Ariz.—Zager v. Industrial Commission, 14 P.2d 472, 40 Ariz. 479.

21. Ariz.—Zager v. Industrial Commission, *supra*.

22. Ind.—Briggs Indiana Corp. v. Davis, 23 N.E.2d 285, 107 Ind.App. 177—Eureka Coal Co. v. Melcho, 154 N.E. 774, 85 Ind.App. 552.

Okl.—Skelly Oil Co. v. Gage, 45 P.2d 766, 172 Okl. 493.

23. Minn.—Berg v. Sadler, 50 N.W. 2d 266, 235 Minn. 214.
71 C.J. p 1460 note 24.

24. Okl.—Magnolia Petroleum Co. v. Nalley, 17 P.2d 390, 161 Okl. 198.

25. Colo.—Dr. Pepper Bottling Co. v. Industrial Commission, 301 P.2d 710, 134 Colo. 238.

Okl.—Magnolia Petroleum Co. v. Nalley, 17 P.2d 390, 161 Okl. 198.

R.I.—Walsh-Kaiser Co. v. Della Morte, 69 A.2d 689, 76 R.I. 325.

Not reversal of former finding

In proceeding by claimant, who had been determined to have ceased to suffer compensable back injury but had been awarded compensation for temporary total disability on condition that there could be later review, for further compensation on ground of recurrence of complete and total incapacity, commissioner's finding, to effect that claimant was suffering from faulty back structure did not constitute a reversal of former finding that claimant had sustained a compensable injury and evidence justified conclusion that there was no change in condition.

S.D.—Stowsand v. Jack Rabbit Lines, 58 N.W.2d 298, 75 S.D. 11.

26. Colo.—National Lumber & Creosoting Co. v. Kelly, 75 P.2d 144, 101 Colo. 535.

Iowa.—Rose v. John Deere Ottumwa Works, 76 N.W.2d 756, 247 Iowa 900.

27. Colo.—Moffat Coal Co. v. Podbelsk, 42 P.2d 1001, 96 Colo. 355.

28. Ind.—People's Trust Co. v. Warner Gear Co., 141 N.E. 231, 80 Ind. App. 401.

29. Ind.—People's Trust Co. v. Warner Gear Co., *supra*.

30. Ind.—People's Trust Co. v. Warner Gear Co., *supra*.

31. Okl.—Pauly Jail Bldg. Co. v. Akin, 86 P.2d 796, 184 Okl. 249—Amerada Petroleum Corporation v. White, 64 P.2d 660, 179 Okl. 82.

Limitations

Absence of finding as to contention that awards were barred by limitations was not a ground for a complaint, since finding that claimant was entitled to further compensation impliedly negated contention.

Cal.—Consolidated Steel Corp. v. Industrial Accident Commission, 57 P.2d 919, 6 C.2d 368.

Los Angeles County v. Industrial Acc. Commission, 57 P.2d 1341, 14 C.A.2d 134.

32. Okl.—Pauly Jail Bldg. Co. v. Akin, 86 P.2d 796, 184 Okl. 249—Amerada Petroleum Corporation v. White, 64 P.2d 660, 172 Okl. 82—Magnolia Pipe Line Co. v. Smith, 29 P.2d 569, 167 Okl. 316—White Oak Refining Co. v. Whitehead, 22 P.2d 910, 164 Okl. 57.

33. Ind.—Inman v. Carl Furst Co., 174 N.E. 96, 92 Ind.App. 17, followed in *Hipskind v. Wabash Canning Co.*, 175 N.E. 896, 94 Ind.App. 72.

a finding of a change in condition.³⁴ Where it had been found that the employee was entitled to compensation for only partial disability, a finding at a subsequent hearing that the employee is entitled to compensation for total disability is an adjudication that the employee's condition has changed for the worse and that his earning capacity has been lessened.³⁵

A failure to find that there had been a change in condition is equivalent to a finding that there was no change.³⁶ There is no need to state that there is a change in condition³⁷ or a mistake in the determination of facts³⁸ where the new compensation order makes such disclosure. Where an employee is seeking additional compensation because of a change for the worse, a finding that the evidence shows his condition is materially better is a finding of ultimate fact, and not a conclusion of law.³⁹

Under the facts and circumstances of the particular case, it has been held that a finding that, because of the original injury to one eye, the other has sympathetically become partially disabled is a finding of a change in condition,⁴⁰ that a finding that the employee's injury caused a temporary total disability continuing from a date subsequent to the previous award indefinitely amounts to a finding that the disability had recurred,⁴¹ and that a finding of recurrence and increase of disability refers to a recurrence since the last hearing.⁴² Where it was originally found that claimant was wholly disabled as the result of an accident, a finding in subsequent proceedings by the employer that claimant still remained totally disabled is a sufficient finding that the disability resulting from the accident had not terminated.⁴³

A finding of temporary total disability is not in-

consistent with a prior finding of temporary partial disability, and objectionable as an attempt to correct an error.⁴⁴ A finding that work offered the employee was within his capacity and would advance his recovery is not a final determination that all incapacity had ceased and that the employee was fully competent to do the work offered;⁴⁵ and in view of a subsequent finding of his good-faith attempt, and that he could not go on with work solely because of incapacity, insurer cannot successfully contend that the employee was able to continue the occupation offered.⁴⁶

The findings of fact contained in an order made by the commission, which order has been vacated in its entirety by the court on review thereof, are not binding on the parties in a subsequent proceeding to recover an additional compensation for a change in condition.⁴⁷ A finding that the employee was partially incapacitated does not bar a later finding that injuries, which manifested themselves at the time of the accident and increased in their incapacitating effect at a subsequent date, were compensable.⁴⁸ The view has been taken that a finding of the earning capacity of an employee at the time of the employer's application to stop compensation is conclusive on all the parties in the absence of fraud.⁴⁹

§ 868. Stay of Proceedings

A temporary stay of further proceedings on motion of the employer may be proper procedure where the employer has a good defense to a suit for further compensation, even though applications for further compensation based on a change in condition should be acted on as summarily as possible.

Although applications for further compensation based on a change in condition should be acted on as summarily as possible,⁵⁰ a temporary stay of

34. Mich.—Murray v. Ford Motor Co., 296 N.W. 284, 296 Mich. 348.

35. Mich.—Zelinkas v. Ford Motor Co., 293 N.W. 732, 294 Mich. 494.

36. Ind.—Poe v. Caswell-Runyan Co., 171 N.E. 223, 91 Ind.App. 304. 71 C.J. p 1460 note 30.

37. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, C.C.A.Mass., 102 F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525. Okl.—Thomas Conlin Co. v. Guckian, 50 P.2d 299, 174 Okl. 463.

38. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, C.C.A.Mass., 102 F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

Held not jurisdictional

U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, supra.

39. Ariz.—Doby v. Miami Trust Co., 14 P.2d 476, 40 Ariz. 490.

40. Okl.—Loffland Bros. Co. v. Velvin, 3 P.2d 855, 152 Okl. 83.

41. Cal.—National Engineering Corporation v. Industrial Accident Commission of California, 225 P. 2, 193 C. 422.

42. Ill.—Valier Coal Co. v. Industrial Commission, 149 N.E. 805, 319 Ill. 99.

43. Pa.—Raisner v. Bangor Hosiery Co., 161 A. 620, 105 Pa.Super. 377.

44. Cal.—Southern California Edison Co. v. Industrial Accident Commission of California, 248 P. 933, 78 C.A. 584.

45. Mass.—Weir's Case, 147 N.E. 561, 252 Mass. 236.

46. Mass.—Weir's Case, supra.

47. Okl.—Williams Bros. v. State Industrial Commission, 50 P.2d 331, 174 Okl. 284.

48. N.J.—Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division, 78 A.2d 403, 11 N.J.Super. 338.

49. Mich.—Smith v. Pontiac Motor Car Co., 270 N.W. 172, 277 Mich. 652.

50. La.—Coleman v. Butler, 116 So. 328, 166 La. 138.

A purpose of the workmen's compensation act is to afford injured employee prompt relief and not permit relief to be withheld, while employer delays payment by filing of a petition or petitions to reduce compensation.

Mich.—Samels v. Goodyear Tire & Rubber Co., 35 N.W.2d 265, 323 Mich. 251.

further proceedings on motion of the employer and on his agreement that payments would meanwhile continue is proper and commendable procedure where the employer had a good defense to a suit for further compensation because of the employee's refusal to report as required by statute for medical examination and treatment offered by the employer, and the employee was without means of support other than the compensation he was receiving, and an adverse judgment would deprive him of such means;⁵¹ and this is so notwithstanding a ruling indefinitely postponed collection of the employee's attorney's fees.⁵² A statute providing that the filing of a petition to terminate or modify an award shall operate as a supersedeas as to the further payments of compensation under the award does not require the trial court to stay and open the liquidated judgment on the award entered before the petition was filed.⁵³

§ 869. Determination or Award

The record in the proceeding should be completed by a formal entry of judgment, which should be entered in accordance with the requirement of the governing statute.

Although the record in a proceeding for additional compensation or to reduce or terminate compensation should be completed by a formal entry of judgment,⁵⁴ there is authority to the effect that the industrial commission is not required to make a formal adjudication in each case in which payments of compensation have been stopped or suspended.⁵⁵ The purpose of a final award is to do adequate justice regardless of the terms of a partial award.⁵⁶

51. La.—*Coleman v. Butler*, 116 So. 828, 166 La. 138.

52. La.—*Coleman v. Butler*, supra.

53. Pa.—*Zimmer v. Closky*, 186 A. 403, 122 Pa.Super. 142.

Drobac v. Jones & Laughlin Steel Corp., Com.Pl., 94 Pittsb.Leg. J. 228.

54. Pa.—*Stoisits v. Lehigh & N. E. R. Co.*, 17 A.2d 694, 143 Pa.Super. 219.

55. Fla.—*Miami Beach First Nat. Bank v. Dunn*, 85 So.2d 556.

56. Mo.—*Winschel v. Stix, Baer & Fuller Dry Goods Co.*, App., 77 S. W.2d 488.

New award

An award of compensation by commissioner pursuant to provisions of compensation act providing for review and modification of a former award, constitutes a new award.

Kan.—Brewington v. W. U. Tel. Co., 183 P.2d 872, 163 Kan. 534—*Stevens v. Kelly-Carter Coal Co.*, 37 P.2d 48, 140 Kan. 441.

57. R.I.—*Rau Fastener Co. v. Carr*, 60 A.2d 499, 74 R.I. 284.

58. A reclassification of the employee's disability must be in compliance with a statute governing reclassifications.

N.Y.—Spinks v. American Mfg. Co., 278 N.Y.S. 66, 243 App.Div. 828.

Basis of action

If a letter to the commission constitutes an application for additional compensation because of aggravation of disability, and is filed within the statutory period, the commission cannot prejudice claimant's rights by an order reciting that the commission acted on its own motion.

Or.—Jacoby v. State Industrial Acc. Commission, 106 P.2d 294, 165 Or. 280.

Opportunity to accept treatment

Where judge announces after claimant's testimony that award will be reduced because of his unreasonable refusal to submit to medical treatment, and record fairly discloses that claimant was given opportunity to undergo such treatment pending entry of order, delay does not post-

If a matter was not raised at the hearing, it is proper to exclude it from the order.⁵⁷ A judgment or award must be entered in compliance with the terms of the governing statute.⁵⁸ The commission has discretion, in considering an award of additional compensation on a permanent basis, to defer its action for a reasonable time to ascertain whether claimant has reached his maximum degree of permanent improvement.⁵⁹

Construction of orders together. Where an order of the commission merely corrects a finding made on a preceding date respecting an application to modify a compensation award and does not involve the consideration of any new matter, and the two orders are directed to the same application, they are required to be construed as one order.⁶⁰

Effect of invalidity. If an order suspending compensation for disability was void, the employee is entitled to compensation until the time when the facts warranting a change in award are found to exist.⁶¹

§ 870. — Conformity to Petition or Application

The award in a proceeding for the review of a previous award because of a change of condition must be consistent with the application or petition.

The award in a proceeding for review of a previous award because of a change of condition must be consistent with the petition or application,⁶² and an award for increased disability is not authorized where no claim is made therefor.⁶³ An informal

pone time for such election until after expiration of right thereto, and hence does not invalidate order as denying claimant opportunity to accept treatment tendered.

N.M.—Fowler v. W. G. Const. Co., 188 P.2d 160, 51 N.M. 441.

59. W.Va.—*State ex rel. Conley v. Pennybacker*, 48 S.E.2d 9, 131 W. Va. 442.

60. Ohio.—*Nichols v. Ohio Collieries Co.*, 62 N.E.2d 636, 75 Ohio App. 474.

61. Ariz.—*Hamlin v. Industrial Commission*, 267 P.2d 736, 77 Ariz. 100.

62. Ill.—*M. Becker Cleaning Co. v. Industrial Commission*, 153 N.E. 647, 322 Ill. 603.

Mich.—Dezomits v. Consolidated Paper Co., 24 N.W.2d 122, 315 Mich. 273.

63. Ill.—*M. Becker Cleaning Co. v. Industrial Commission*, 153 N.E. 647, 322 Ill. 603.

W.Va.—Robinson v. State Compensation Com'r, 11 S.E.2d 111, 122 W. Va. 530.

complaint, not carried into any specific written application, may not be the basis of an order denying the claim on jurisdictional grounds.⁶⁴ Under statutes specifically so providing, a rearrangement of compensation because of changed circumstances cannot antedate the application made therefor.⁶⁵

Statements of a counsel coupled with the admissions in the answer have been held to be sufficient to justify the awarded amount of compensation.⁶⁶

§ 871. — Conformity to Evidence and Findings

The award on application for review based on change of condition should conform to the findings and evidence.

The award on application for review based on change of condition should conform to the findings⁶⁷ and evidence,⁶⁸ and an order is improper when not supported by proper findings⁶⁹ or evidence.⁷⁰ A denial of further compensation because of the employee's ability to work has been held not inconsistent with a finding that the injury had not entirely healed,⁷¹ and the fact that the judgment fixed a definite date of recurrence of the injury, and the evidence did not show a definite date but merely that there was a recurrence after the previous award, is not fatal.⁷²

Where neither applicant nor his attorney appears at a hearing for modification of a compensation award, an order of dismissal is in the nature of a default judgment entered by reason of the failure to appear and prosecute the application, and no evi-

dence is necessary to support the order of dismissal.⁷³

A *nunc pro tunc* order directing that a previous order concerning additional compensation be vacated has been held not to be void, notwithstanding the absence of a record of the evidence.⁷⁴

§ 872. — Form and Contents

The award on an application for review based on a change of condition need not set forth the facts found by the commission, if, in fact, the record affirmatively shows that there has been such a change; but an award for recurrence of disability should state the time when the compensation payments are to begin.

The award on application for review based on change of condition need not set forth the facts found by the commission,⁷⁵ if, in fact, the record affirmatively shows by competent evidence that there has been a change;⁷⁶ but an award for recurrence of disability should state the time when the compensation payments are to begin.⁷⁷ A decree which does not comply with the statutory provisions requiring that the decree contain the ultimate findings of fact is defective.⁷⁸ A statutory requirement of a statement of conclusions of the fact at issue and the rulings of law thereon is satisfied by an order reciting that the case can only be reviewed on a change of conditions, which has not been shown.⁷⁹ The decision must, it has been said, be positive and unqualified,⁸⁰ but there is authority to the effect that a temporary or partial award subject to further order is within the power of the commission.⁸¹

64. Ohio.—State ex rel. Palmieri v. Industrial Commission, App., 67 N. E.2d 363.

65. Or.—State v. State Industrial Accident Commission, 237 P. 680, 115 Or. 484.

66. La.—Sams v. Great Nat. Oil Corp., App., 5 So.2d 849.

67. Colo.—Sherratt v. Rocky Mountain Fuel Co., 30 P.2d 270, 94 Colo. 269.

Mich.—Romanchuk v. Ford Motor Co., 288 N.W. 303, 290 Mich. 673.

Okl.—Oklahoma Gas & Electric Co. v. Kiblinger, 28 P.2d 9, 167 Okl. 48.

R.I.—Gilbane Bldg. Co. v. Feeney, 135 A.2d 262.

71 C.J. p 1461 note 48.

Award held not supported

In proceeding to review and modify award of workmen's compensation, where trial court found that claimant had been totally disabled for period of time which had ended before filing of application for review, such finding did not support com-

pensation award extending into future.

Kan.—Williams v. Lozier-Broderick & Gordon, 154 P.2d 126, 159 Kan. 266.

68. Okl.—Ditmore v. Charles M. Suttle Const. Co., 261 P.2d 590.

69. Colo.—Sherratt v. Rocky Mountain Fuel Co., 30 P.2d 270, 94 Colo. 269.

N.C.—Hill v. Du Bose, 67 S.E.2d 371, 234 N.C. 446.

70. Colo.—Allan v. Gadbois, 66 P.2d 331, 100 Colo. 141.

71. Conn.—Mostacciolo v. American Iron Works, 155 A. 636, 113 Conn. 532.

71 C.J. p 1461 note 49.

72. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

73. Idaho.—Egus v. Triumph Min. Co., 232 P.2d 136, 71 Idaho 354.

74. Okl.—McQuiston v. Tyler, 97 P.2d 552, 186 Okl. 315.

75. Okl.—Farris-Cantrell v. State Industrial Commission, 82 P.2d 984,

183 Okl. 456—Amerada Petroleum Corp. v. White, 64 P.2d 660, 179 Okl. 82—Skelly Oil Co. v. Gage, 45 P.2d 766, 172 Okl. 493—Magnolia Pipe Line Co. v. Smith, 29 P.2d 569, 167 Okl. 316.

71 C.J. p 1461 note 51.

76. Okl.—Farris-Cantrell v. State Industrial Commission, 82 P.2d 984, 183 Okl. 456—Amerada Petroleum Corp. v. White, 64 P.2d 660, 179 Okl. 82—Magnolia Pipe Line Co. v. Smith, 29 P.2d 569, 167 Okl. 316.

77. Ill.—Valier Coal Co. v. Industrial Commission, 149 N.E. 805, 319 Ill. 99.

78. R.I.—Walsh-Kaiser Co. v. Della Morte, 69 A.2d 689, 76 R.I. 325.

79. Okl.—Glasgow v. State Industrial Commission, 250 P. 133, 120 Okl. 37.

80. Mich.—Harris v. Castile Mining Co., 193 N.W. 855, 222 Mich. 709.

71 C.J. p 1461 note 54.

81. Mo.—State ex rel. New Amsterdam Casualty Co. v. Richardson, App., 61 S.W.2d 409.

After a temporary disability has ended, an injured employee is entitled to a clear and concise ruling on the question of whether or not he has any permanent disability as the result of the accidental injury.⁸² Where it is found that total disability has ceased, but that the employee was still partially disabled, the extent and loss of his earning power and the amount of compensation due him because of such partial disability should be determined.⁸³ When the commission reduces or stops compensation for the sole reason that the employee is engaged in a wage-earning employment and without reference to his physical condition, the reason for the award should be specifically stated in order that an undue and unjust burden is not cast on the employee when his employment ceases.⁸⁴ An order of the department of labor is effective, although not signed by the supervisor.⁸⁵

Under the provisions of a compensation law that the compensation should be paid during the full term of disability not to exceed a specified number of weeks, a limitation of maximum weekly compensation payments to a designated number of weeks under the maximum in the award of an additional compensation is erroneous in the absence of a showing of the method by which the award was reached.⁸⁶

§ 873. — Relief Granted

- a. In general
- b. Increase or reinstatement of compensation
- c. Diminution or termination of compensation

a. In General

On review of an award on the ground of change in conditions, if there is competent evidence to justify it in so doing the commission may change its findings, orders, or award in accordance with the facts established at the hearing.

On review of an award on the ground of change in conditions, if there is competent evidence to justify it in so doing, the commission may change its findings, orders, or award in accordance with the facts established at the hearing;⁸⁷ but where it is found that there is no change of condition the previous award must be left in force.⁸⁸ However, even though there is a diminished incapacity, if the wage loss remains total, the award for the total incapacity should be left undisturbed.⁸⁹

The standard by which to determine the award for aggravation, diminution, or termination of disability is the difference between original award and the amount to which the employee would be entitled because of his condition subsequent thereto.⁹⁰ An award covering all of the injuries and deducting therefrom payments already made under the former award is practical and just⁹¹ and not invalid as affecting the former award "as regards any money already paid."⁹² Where the board finds that the employee died from causes other than the accidental injury, the benefits recoverable by his dependents, on an application filed after the death of the employee pending proceedings on application for review of the original award on the ground of a change in condition, are limited to those to which the employee would have been entitled had he lived.⁹³ In a proceeding for increased compensation on the ground of increased disability, claim-

82. Okl.—Dunning-James-Patterson v. Rickert, 164 P.2d 620, 196 Okl. 237.

83. Okl.—Duncan Welding Co. v. Brewer, 9 P.2d 702, 156 Okl. 42. 71 C.J. p 1461 note 53.

84. Mich.—Markey v. S. S. Peter & Paul's Parish, 274 N.W. 797, 281 Mich. 292.

85. Wash.—Liddle v. Department of Labor and Industries, 255 P. 385, 143 Wash. 380.

86. Mont.—Lunardello v. Republic Coal Co., 53 P.2d 87, 101 Mont. 94.

87. Ga.—Hartford Acc. & Indem. Co. v. Brennan, 63 S.E.2d 170, 85 Ga. App. 163.

Idaho.—Nitkey v. Bunker Hill & Sullivan Min. & Concentrating Co., 261 P.2d 216, 73 Idaho 294.

Ky.—Blue Diamond Coal Co. v.

Meade, 289 S.W.2d 503—Thompson v. Harlan Wallins Coal Corp., 256 S.W.2d 10—Consolidation Coal Co.'s Receivers v. Patrick, 72 S.W. 2d 51, 254 Ky. 671.

La.—Watson v. Floyd Elec. Co., App., 75 So.2d 361.

Mich.—Casey v. Escanaba & L. S. R. Co., 287 N.W. 538, 290 Mich. 601—Passelli v. J. A. Utley Co., 282 N.W. 849, 286 Mich. 638.

Ohio.—State v. Ohio Stove Co., 93 N.E.2d 291, 154 Ohio St. 27.

Okl.—Loffland Bros. Co. v. Velvin, 3 P.2d 355, 152 Okl. 83.

A child's pension is distinct from, and not a part of, parent's pension as such, and hence the department of labor and industries cannot correct mistakes in pension paid to disabled parent at expense of child's pension.

Wash.—Anderson v. Department of Labor and Industries, 242 P.2d 514, 40 Wash.2d 210.

88. Ind.—Poe v. Caswell-Runyan Co., 171 N.E. 223, 91 Ind.App. 304.

Mich.—Gulec v. Chrysler Corp., 290 N.W. 364, 292 Mich. 159, reheard 293 N.W. 890, 292 Mich. 711.

Wash.—State ex rel. Stone v. Olinger, 108 P.2d 630, 6 Wash.2d 643.

89. Va.—J. A. Foust Coal Co. v. Messer, 80 S.E.2d 533, 195 Va. 762.

90. Wash.—Reid v. Department of Labor and Industries, 96 P.2d 492, 1 Wash.2d 430.

91. Conn.—Saddlemire v. American Bridge Co., 110 A. 63, 94 Conn. 618.

92. N.Y.—Tolloid v. A. W. Hopeman & Sons Co., 205 N.Y.S. 349, 209 App.Div. 719, affirmed 148 N.E. 700, 240 N.Y. 550.

93. Ind.—Ben Wolf Truck Lines v. Bailey, 22 N.E.2d 837, 107 Ind.App. 52.

ant has been held chargeable with the cost of treatment not authorized by his employer.⁹⁴

Dismissal. A deputy commissioner appointed by the commission to take testimony has no authority to dismiss the case,⁹⁵ and dismissal of a petition for further compensation "without prejudice" has been held to be beyond the powers of the commission or of a deputy commissioner conducting an arbitration hearing.⁹⁶ The commission is authorized under some statutes to order the suspension of compensation payments, if there exists a disability which reduces the claimant's ability to work, as long as the claimant refuses an employment suitable to his capacity, offered to or procured for him, but the commission is not authorized to dismiss the claim on that account.⁹⁷

Closing case. Under some statutes, the board reviewing an award for change of condition has power to order that its new award shall close the case.⁹⁸

Original award for maximum amount. Where an employee has been awarded the maximum amount for total disability, an additional award cannot be made, but the payments can only be ended or diminished.⁹⁹

Retroactive operation. Ordinarily under the various compensation acts an award ending, diminishing, or increasing the compensation previously awarded may not be made retroactive.¹ Thus it cannot be made effective as of the date of the origi-

nal award² or the time of final settlement of the former award,³ but it can become effective only as of the date of the new application⁴ or the time the new award is entered,⁵ and claimant cannot be required to account for moneys already paid him under the previous award.⁶ This rule is inapplicable, however, to a case where there was only a partial disability and no review of any previous award,⁷ and the board may make an award retroactive to the date of the original claim where the award made does not affect or change any previous payment.⁸ Likewise, according to some authority, the permitting of a retroactive effect to a supplemental award for an additional period of temporary disability is not illegal as resulting in two concurrent compensations for the same injury where the compensation for permanent disability is computed on the basis of the claimant's life expectancy as of the date of the termination of temporary disability.⁹

b. Increase or Reinstatement of Compensation

When additional compensation is awarded for a change in the employee's condition, the compensation can date only from the discovery of the changed condition, and the subsequent award, in some instances, is limited by the amount of the change in condition since the prior award.

When additional compensation is awarded for a change or new development in the injury, the compensation can date only from the discovery of the changed condition or new development in the injury,¹⁰ and an award for a period of time antedat-

94. N.J.—Lieberman v. Warman, 20 A.2d 604, 19 N.J.Misc. 417.

95. Ga.—Robertson v. Aetna Life Ins. Co., 141 S.E. 504, 37 Ga.App. 703.

96. Mich.—Levanen v. Seneca Copper Corporation, 199 N.W. 652, 227 Mich. 592.

97. Ark.—Paragould Laundry & Dry Cleaning Co. v. Rogers, 197 S.W.2d 567, 210 Ark. 764.

98. Mich.—Shaffer v. D'Arcy Spring Co., 165 N.W. 825, 199 Mich. 537.

99. Mich.—Magnuson v. Oliver Iron Mining Co., 259 N.W. 317, 270 Mich. 422.

1. Ga.—Travelers Ins. Co. v. Haney, 88 S.E.2d 492, 92 Ga.App. 319—City of Hapeville v. Preston, 20 S.E.2d 202, 67 Ga.App. 350.

Ky.—Harrison v. Tierney Mining Co., 124 S.W.2d 757, 276 Ky. 637.

Mich.—Murray v. Ford Motor Co., 296 N.W. 284, 296 Mich. 348. 71 C.J. p 1461 note 60.

2. Ga.—Home Accident Ins. Co. v. McNair, 161 S.E. 131, 173 Ga. 566,

answers conformed to 162 S.E. 635, 44 Ga.App. 659.

71 C.J. p 1461 note 61.

3. Va.—Bristol Door & Lumber Co. v. Hinkle, 161 S.E. 902, 157 Va. 474.

4. Me.—Lynch v. Jutras, 1 A.2d 221, 136 Me. 18.

71 C.J. p 1461 note 63.

5. Colo.—Lefkaras v. Moffat Coal Co., 158 P.2d 336, 113 Colo. 416—Roeder v. Industrial Commission, 52 P.2d 668, 98 Colo. 95.

Ga.—Metropolitan Casualty Ins. Co. v. Duckworth, 173 S.E. 177, 48 Ga.App. 595—South v. Indemnity Ins. Co. of North America, 146 S.E. 45, 39 Ga.App. 47.

N.J.—J. W. Ferguson Co. v. Seaman, 197 A. 245, 119 N.J.Law 575.

6. Ga.—London Guarantee & Acc. Co. v. Pittman, 25 S.E.2d 60, 69 Ga. App. 146—City of Hapeville v. Preston, 20 S.E.2d 202, 67 Ga.App. 350—London Guarantee & Acc. Co. v. Ritchey, 186 S.E. 863, 53 Ga.App. 628—Metropolitan Casualty Ins. Co. v. Duckworth, 173 S.E. 177, 48 Ga.App. 595.

71 C.J. p 1461 note 65.

7. Ga.—American Mut. Liability Ins. Co. v. Braden, 157 S.E. 904, 48 Ga. App. 74.

8. Ky.—Williams v. Gordon, 231 S.W.2d 89, 313 Ky. 377—Glogora Coal Co. v. Boyd, 169 S.W.2d 816, 293 Ky. 610.

9. Colo.—Merrison v. Clayton Coal Co., 181 P.2d 1011, 116 Colo. 501.

10. Mich.—Boyich v. J. A. Utley Co., 11 N.W.2d 267, 306 Mich. 625—Gulec v. Chrysler Corp., 293 N.W. 890, 292 Mich. 711—Anderson v. Clark Equipment Co., 270 N.W. 761, 278 Mich. 492.

Mo.—Winschel v. Stix, Baer & Fuller Dry Goods Co., App., 77 S.W.2d 488.

Okl.—Indian Territory Illuminating Oil Co. v. State Industrial Commission, 89 P.2d 933, 185 Okl. 68—Payne Drilling Co. v. Shoemaker, 79 P.2d 806, 183 Okl. 10.

Pa.—Kilgore v. State Workmen's Ins. Fund, 193 A. 294, 127 Pa.Super. 213.

Utah.—Aetna Life Ins. Co. v. Industrial Commission, 252 P. 567, 69 Utah 102.

ing the discovery is erroneous.¹¹ Under a statute providing that no increase or rearrangement shall be operative for any period prior to application therefor, the time of formal application is the proper date for commencement of the new award¹² and it is error to award compensation for disability occurring long prior to the application for increased compensation.¹³ Under some statutes a supervisor when making an award on a reopened claim on the ground of aggravation may allow the compensation for all aggravation to the date of his order, and not merely to the date of the application to reopen,¹⁴ and, in view of the appellate nature of proceedings before the board of industrial insurance, an award can be entered only for the aggravation occurring up until the date of the supervisor's order and not to the date of the board's order.¹⁵ Under some statutes it is proper to have the increased payments date from the time of the subsequent award.¹⁶

The subsequent award is limited in amount by the amount of the change in condition since the prior award;¹⁷ and the compensable period has been held to be determined by deducting the time

during which compensation was paid under the original award, but not that for which no compensation was paid.¹⁸ It has been held that an award based on change in condition since a former award was made should be based on the change in earning capacity.¹⁹ The commission in increasing the compensation previously awarded is bound by the maximum or minimum of time during which compensation may be paid as provided by the act.²⁰ Where a compensation award is made because of a change in condition, the employer and insurance carrier are given credit for the weeks for which they have paid the employee and not for the amount of money which they have paid him under the previous award,²¹ and an award is not erroneous because refusing the employer credit for moneys paid under the previous award, although the moneys so paid amounted to more than the claimant was entitled to receive under that award.²²

Where an aggravation of the original injury resulted in a permanent disability, under some statutes the prior payment for a permanent partial disability cannot be deducted from the award,²³ notwithstanding the employee's failure to allege the ag-

Meaning of statute

Statutory provision that modification of agreement or award of compensation shall be made as of date upon which it is shown that injured employee's disability increased does not mean that modification is to be effective only from date when proof is produced of increase of disability but from date of increase of disability as shown by proofs produced.

Pa.—Kilgore v. State Workmen's Ins. Fund, 193 A. 294, 127 Pa.Super. 213.

11. Pa.—Shepherd v. Pittsburgh Provision & Packing Co., 3 A.2d 432, 137 Pa.Super. 146.

Utah.—Zitna Life Ins. Co. v. Industrial Commission, 252 P. 567, 69 Utah 102.

12. Ariz.—Jupin v. Industrial Commission, 224 P.2d 199, 71 Ariz. 131—Russell v. Bald Eagle Mining Co., 33 P.2d 616, 44 Ariz. 105—Zagar v. Industrial Commission, 14 P.2d 472, 40 Ariz. 479.

13. Ariz.—Jupin v. Industrial Commission, 224 P.2d 199, 71 Ariz. 131—Wise v. Six Companies, 28 P.2d 1007, 43 Ariz. 24.

Or.—Chebot v. State Industrial Accident Commission, 212 P. 792, 106 Or. 660.

Wash.—Hall v. Department of Labor and Industries, 48 P.2d 923, 133 Wash. 486.

14. Wash.—Karniss v. Department of Labor and Industries, 239 P.2d 555, 39 Wash.2d 898.

15. Wash.—Turner v. Department of Labor and Industries, 251 P.2d 833, 41 Wash.2d 739—Karniss v. Department of Labor and Industries, 239 P.2d 555, 39 Wash.2d 898.

16. N.J.—Hopler v. Hill City Coal & Lumber Co., 71 A.2d 722, 7 N.J. Super. 24, affirmed 76 A.2d 17, 5 N.J. 466.

W.Va.—Burgess v. State Compensation Com'r, 5 S.E.2d 804, 121 W.Va. 571.

Excess wages

Where, prior to and up to date when compensation is increased, a claimant has been actually employed and has received wages in excess of amount he would have received as compensation during such period had compensation been awarded at beginning thereof, compensation commissioner or compensation appeal board may, in discretion of either, in order finding character and percentage of disability and making an increase, provide that payments thereof shall begin at date thereof.

W.Va.—Burgess v. State Compensation Com'r, supra.

17. Md.—Smith v. Revere Copper & Brass, 76 A.2d 147, 196 Md. 160.

Okl.—Humble Oil & Refining Company v. Noble, 16 P.2d 1072, 161 Okl. 35—O. M. Bilharz Mining Co. v. Clark, 4 P.2d 729, 153 Okl. 31.

18. Ky.—Williams v. Gordon, 231 S.W.2d 89, 313 Ky. 377—Wallins Creek Collieries Co. v. Jones, 283 S.W. 1067, 214 Ky. 775.

19. Okl.—Kansas Explorations v. Wright, 49 P.2d 65, 173 Okl. 411.

20. Mo.—Winschel v. Stix, Baer & Fuller Dry Goods Co., App. 77 S.W.2d 488.

Mont.—Meznarich v. Republic Coal Co., 53 P.2d 82, 101 Mont. 78.

Okl.—Brooks & Dahlgren v. Pettigrew, 159 P.2d 743, 195 Okl. 550.

Award held improper

Award limiting employee's additional compensation to ninety-seven weeks and five days was improper, where employee was temporarily totally disabled and would be either permanently partially disabled or permanently totally disabled.

Okl.—Globe Indemnity Co. v. Christian, 27 P.2d 830, 167 Okl. 78.

21. Ga.—City of Hapeville v. Preston, 20 S.E.2d 202, 67 Ga.App. 350—Helms v. Continental Casualty Co., 177 S.E. 915, 50 Ga.App. 267.

22. Ga.—London Guarantee & Accident Co. v. Pittman, 25 S.E.2d 60, 69 Ga.App. 146—Metropolitan Casualty Ins. Co. v. Duckworth, 173 S.E. 177, 48 Ga.App. 595.

23. Wash.—State ex rel. Stone v. Olinger, 108 P.2d 630, 6 Wash.2d 643—Hagen v. Department of Labor and Industries, 76 P.2d 592, 193 Wash. 555—Seagraves v. Department of Labor and Industries of Washington, 54 P.2d 1010, 185 Wash. 333—Dry v. Department of Labor and Industries, 39 P.2d 609, 180 Wash. 92—Arnold v. Department of Labor and Industries, 11 P.2d 825, 168 Wash. 300.

gravation, where the department, of its own motion, opened the claim on the ground of aggravation;²⁴ but under other statutes, where an award is made for a total permanent disability after a prior award for a permanent partial disability, all payments made on the original award must be considered in determining the amount of the total disability award.²⁵

Where an injured employee suffered a partial permanent disability after the termination of his total temporary disability, the board may make an award for such disability without allowing in addition an award for a partial temporary disability.²⁶ In granting an award for permanent partial disability due to multiple injuries the board must rescind a schedule award previously paid and allow credit for earning capacity from the date of the accident.²⁷ An award for total and permanent disability has been considered to be based on the permanent total disability subdivision of the section of the compensation act dealing with the schedule of compensation, no matter whether the award is made for the first total disability or a total disability which arises on a change in condition after the award has been made for a permanent partial disability.²⁸

Change attributable to several injuries. Where an employee following a supposed recovery from a compensated injury sustains another compensable injury while employed by a new employer, and receives compensation therefor, and thereafter a change of condition arises under which the cause may be reopened, it is proper for the commission to inquire whether the disability found to exist under such changed condition is attributable to the one or the other, or both or neither, of the two accidental injuries.²⁹ Where such disability is found to be attributable in part to each of such injuries, an award should be apportioned against the two employers in the proportion that the disability attributable to each of the two injuries bears to the whole

disability found to exist.³⁰ Where the disability is due to the second injury, the claimant is entitled to compensation from the second employer.³¹

c. Diminution or Termination of Compensation

On a proper showing compensation payments may be diminished or terminated.

An employer is entitled to have an award for total disability decreased where the evidence shows that the employee was not totally disabled at the time of the second hearing notwithstanding his testimony that his condition was about the same as when the original award was made.³² So, where the employee's earning power has increased, compensation should be reduced³³ and the employer or insurer allowed to deduct from future payments the amount of overpayments made since institution of the proceedings for modification.³⁴ The view has been taken that the board in passing on a petition to stop compensation, where there has been no change in condition, must consider the average weekly wage of the employee at the time of his injury and his wage-earning capacity at the time of the determination of the board,³⁵ and fix the compensation at an amount limited by the difference between the employee's earning capacity at the time the petition was filed and his actual weekly wages at the time of the injury.³⁶

On application to terminate, compensation should be terminated as of the date on which the disability ceased and not as of the date of the filing of the application.³⁷

Where award has been partly commuted on application of a dependent desiring to leave the country, in subsequent proceedings to reduce the award in accordance with a statute providing for compensation to nonresidents in two thirds of the amount provided in the case of residents the employer is not entitled to a refund of any of the share which had been commuted.³⁸

²⁴ Wash.—Seagraves v. Department of Labor and Industries of Washington, 54 P.2d 1010, 185 Wash. 333.

²⁵ Okl.—Brooks & Dahlgren v. Pettigrew, 159 P.2d 743, 195 Okl. 550.

²⁶ Idaho.—Blackburn v. Olson, 207 P.2d 1160, 69 Idaho 428.

²⁷ N.Y.—Freeland v. Endicott Forging & Mfg. Co., 245 N.Y.S. 556, 231 App.Div. 772.

²⁸ Okl.—Warden-Pullen Coal Co. v. Cain, 109 P.2d 487, 188 Okl. 357.

²⁹ Okl.—C. E. Reynolds Drilling Co. v. Phillips, 22 P.2d 111, 163 Okl. 170 —Denver Producing & Refining Co. v. Phillips, 21 P.2d 42, 163 Okl. 106.

³⁰ Okl.—C. E. Reynolds Drilling Co. v. Phillips, 22 P.2d 111, 163 Okl. 170 —Denver Producing & Refining Co. v. Phillips, 21 P.2d 42, 163 Okl. 106.

³¹ N.Y.—Nicolla v. F. B. Leopold Co., 276 N.Y.S. 669, 243 App.Div. 663.

³² Ill.—Summit Coal & Mining Co. v. Industrial Commission, 139 N.E. 1, 308 Ill. 121.

³³ La.—Stewart v. Fitzgerald Plumbing & Heating Co., 4 La.App. 511.

³⁴ U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, C.C.A.Mass., 102

F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

La.—Stewart v. Fitzgerald Plumbing & Heating Co., 4 La.App. 511.

Pa.—Stugenski v. Glen Alden Coal Co., Com.Pl., 33 Luz.Leg.Reg. 149.

³⁵ Mich.—Smith v. Pontiac Motor Car Co., 270 N.W. 172, 277 Mich. 652.

³⁶ Mich.—Smith v. Pontiac Motor Car Co., supra.

³⁷ Pa.—Doolsky v. Kingston Coal Co., 198 A. 461, 130 Pa.Super. 549. 71 C.J. p 1462 note 89.

³⁸ Pa.—Lubanski v. Delaware, L. & W. R. Co., 81 Pa.Super. 538.

§ 874. — Conclusiveness and Effect

An order or decree not appealed from, or one affirmed on appeal granting or denying a petition for a modified compensation, constitutes a final determination of the right to compensation on the date of the order, and is res judicata as to the issues determined, but does not preclude further proceedings based on a change of conditions since the date of the award.

An order or decree not appealed from, or one affirmed on appeal granting or denying a petition for a modified compensation, constitutes a final de-

termination of the right to compensation on the date of the order.³⁹ Such order is, in the absence of fraud,⁴⁰ res judicata⁴¹ as to the issues determined by the award,⁴² such as the extent of injuries then existing⁴³ and the proper amount of award therefor at that time,⁴⁴ and is equally binding on all the parties.⁴⁵ It does not preclude further proceedings based on a change of conditions since the date of such award,⁴⁶ since the compensation commission cannot adjudge that there will be no further disa-

39. U.S.—Tudman v. American Ship Bldg. Co., C.A.III., 170 F.2d 842.

Ariz.—Brown v. Industrial Commission, 59 P.2d 323, 48 Ariz. 161.

Colo.—Sherratt v. Rocky Mountain Fuel Co., 30 P.2d 270, 94 Colo. 269. Ga.—Aetna Life Insurance Co. v. Davis, 157 S.E. 449, 172 Ga. 258.

Martin v. U. S. Fidelity & Guaranty Co., 197 S.E. 660, 58 Ga.App. 59.

Mich.—Rice v. J. F. Braun & Son, 261 N.W. 84, 271 Mich. 532.

Mo.—Corpus Juris cited in Ferguson v. Ozark Distributing Co., App., 117 S.W.2d 401, 403.

Ohio.—State ex rel. Gabbard v. Industrial Commission, 34 N.E.2d 933, 133 Ohio St. 333.

Or.—Yurick v. State Indus. Acc. Commission, 291 P.2d 721, 206 Or. 108.

Wis.—Boehmke v. Industrial Commission, 34 N.W.2d 774, 253 Wis. 610.

71 C.J. p 1463 note 91.

Conclusiveness of adjudication of public officers and boards see Judgments § 690.

Meaning of adjudication

The denial of an award for further compensation, unappealed from, is an adjudication that claimant was not incapacitated as of the date of the hearing, or, if incapacitated, that the disability was not the result of the original injury received.

Mich.—Webber v. Steiger Lumber Co., 34 N.W.2d 516, 322 Mich. 675—Rice v. J. F. Braun & Son, 261 N.W. 84, 271 Mich. 532.

Final receipt

Pa.—Rosenberry v. Gillan Bros., 197 A. 523, 130 Pa.Super. 469.

Abandonment of appeal

Order of commission denying application to discontinue payments for compensation on the ground that there has been a change in conditions for the better was not prevented from becoming final by the taking of an appeal from such order and subsequent abandonment of appeal.

Okl.—Brooks & Dahlgren v. Pettigrew, 159 P.2d 743, 195 Okl. 550.

In Massachusetts

(1) The former rule that a definite decision of the reviewing board, or of a single member unreviewed, that the employee had fully recovered and that compensation cease, amounted to

an adjudication that the employee had no further right and the proceedings could not be revived, was abrogated by statute providing that such a finding should not be considered final as a matter of fact or res judicata as a matter of law. Mass.—Mozetaki's Case, 13 N.E.2d 10, 299 Mass. 370.

(2) Earlier decisions applied the text rule.

Mass.—Ziccardi's Case, 192 N.E. 29, 287 Mass. 588, certiorari denied Ziccardi v. Travelers Ins. Co., 55 S.Ct. 515, 294 U.S. 716, 79 L.Ed. 1249, rehearing denied 55 S.Ct. 550, 294 U.S. 755, 79 L.Ed. 1262—Brode's Case, 146 N.E. 731, 251 Mass. 414.

40. Mich.—Szczucki v. Cadillac Motor Car Co., 293 N.W. 645, 294 Mich. 271.

41. Ariz.—Harambasic v. Barrett & Hilp & Macco Corp., 119 P.2d 932, 58 Ariz. 319.

Ky.—Happy Coal Co. v. Hartbarger, 65 S.W.2d 977, 251 Ky. 779.

Mich.—Murray v. Ford Motor Co., 296 N.W. 284, 296 Mich. 348—Nevels v. Walbridge Aldinger Co., 270 N.W. 272, 273 Mich. 214.

N.J.—Breheny v. Essex County, 57 A. 2d 26, 136 N.J.Law 524.

Wash.—Kleven v. Department of Labor & Industries of State, 243 P.2d 488, 40 Wash.2d 415—Karniss v. Department of Labor and Industries, 239 P.2d 555, 39 Wash.2d 898—Donati v. Department of Labor and Industries, 211 P.2d 503, 35 Wash.2d 151.

Future petitions directed to modification

Where department of labor and industry, on petition to review payment under existing award, makes new award continuing, changing, or stopping payments, new award would be res judicata, since future petitions to review must be directed to modification and not to original award. Mich.—Nevels v. Walbridge Aldinger Co., 270 N.W. 272, 273 Mich. 214.

42. Ariz.—Harambasic v. Barrett & Hilp & Macco Corp., 119 P.2d 932, 58 Ariz. 319.

Wash.—Karniss v. Department of Labor and Industries, 239 P.2d 555, 39 Wash.2d 898.

43. Ariz.—Stephens v. Miami Copper Co., 130 P.2d 507, 59 Ariz. 528.

Ohio.—State ex rel. White v. Industrial Commission of Ohio, App., 40 N.E.2d 453—Schrader v. Cincinnati & Suburban Bell Tel. Co., 11 N.E.2d 253, 56 Ohio App. 501.

Wash.—Kleven v. Department of Labor & Industries of State, 243 P.2d 488, 40 Wash.2d 415.

44. Ariz.—Stephens v. Miami Copper Co., 130 P.2d 507, 59 Ariz. 528.

Ohio.—Schrader v. Cincinnati & Suburban Bell Tel. Co., 11 N.E.2d 253, 56 Ohio App. 501.

45. Mich.—Gulec v. Chrysler Corp., 293 N.W. 890, 292 Mich. 711.

N.J.—Breheny v. Essex County, 54 A.2d 664, 136 N.J.Law 87, affirmed 57 A.2d 26, 136 N.J.Law 524.

R.I.—Mancini v. Superior Court, 32 A.2d 390, 78 R.I. 373—Vincent v. John Bowen Co., 32 A.2d 628, 69 R.I. 241.

46. Mich.—Ammond v. Muskegon Motor Specialties Co., 251 N.W. 327, 265 Mich. 211.

N.J.—King v. Western Elec. Co., 5 A.2d 490, 122 N.J.Law 442, affirmed 11 A.2d 32, 124 N.J.Law 129.

Ohio.—State ex rel. Shaffer v. Industrial Commission, App., 56 N.E.2d 698—Chilcoat v. Industrial Commission, 29 N.E.2d 54, 64 Ohio App. 537.

Or.—State ex rel. Griffin v. State Industrial Acc. Commission, 28 P.2d 237, 145 Or. 443.

Pa.—Walsh v. Keystone State Const. Co., 175 A. 719, 115 Pa.Super. 437.

Wash.—Kleven v. Department of Labor & Industries of State, 243 P.2d 488, 40 Wash.2d 415—Karniss v. Department of Labor and Industries, 239 P.2d 555, 39 Wash.2d 898—Donati v. Department of Labor and Industries, 211 P.2d 503, 35 Wash.2d 151—Goenen v. Department of Labor and Industries, 47 P.2d 991, 132 Wash. 469.

71 C.J. p 1463 note 92.

Percentage of increase in aggravation
Although claimant obtained judgment on determination that his condition had become aggravated after his claim had been closed, such judgment was not res judicata on issue of percentage of increase in aggravation in subsequent action by

bility.⁴⁷ Consequently, a proceeding for additional compensation on the ground of a continuing disability is not considered as a collateral attack on a judgment denying additional compensation.⁴⁸

A denial of a prior petition to review payments is not *res judicata* of a later one,⁴⁹ nor is it an approval of a settlement, unless so provided in the order of the department.⁵⁰ Persons not made parties to the application for change of award are not bound by the changes made,⁵¹ such as persons claiming for death benefits under some acts,⁵² and minors not made parties to such an application are not estopped to claim additional compensation by the fact that they received compensation under the award made therein.⁵³ An order is not *res judicata* on a subsequent claim for a dependent's pension, where the employee's claim was never finally adjudicated, but he was granted a rehearing which was still pending at the time of his death.⁵⁴

Effect. The legal effect of the order suspending compensation until such time as claimant proves a

loss of earning power is a finding that the employer is liable for compensation for partial disability in an amount to be ascertained at some future time.⁵⁵ An award stopping compensation which had been granted to claimant constitutes an adjudication that claimant has fully recovered from his injury.⁵⁶

§ 875. Rehearing

The right to rehear proceedings on an application for review of an award based on change of condition is conferred by some statutes, and the matter may rest in the discretion of the compensation commission.

The right to rehear proceedings on an application for review of an award based on change of condition may be conferred by statute,⁵⁷ and the compensation commission may be vested with discretion with respect to granting a rehearing.⁵⁸ Under some statutes where a denial of a claim is on jurisdictional grounds, an application for a rehearing may be allowed,⁵⁹ and the commission has jurisdiction on the rehearing to make an order

claimant for permanent total disability pension.

Wash.—*Moses v. Department of Labor and Industries*, 268 P.2d 665, 44 Wash.2d 511.

47. Okl.—*Dunning-James-Patterson v. Rickert*, 164 P.2d 620, 196 Okl. 237.

48. Mont.—*Paulich v. Republic Coal Co.*, 102 P.2d 4, 110 Mont. 174.

49. Mich.—*Grant v. Chevrolet Motor Co.*, 250 N.W. 293, 264 Mich. 510—*Shaffer v. D'Arcy Spring Co.*, 165 N.W. 825, 199 Mich. 537.

50. Mich.—*Grant v. Chevrolet Motor Co.*, 250 N.W. 293, 264 Mich. 510.

51. Ind.—*Cullen v. Pan Handle Coal Co.*, 141 N.E. 647, 81 Ind.App. 913.

N.J.—*Belanowitz v. Travelers Ins. Co.*, 15 A.2d 745, 125 N.J.Law 301.

52. Idaho.—*Branson v. Firemen's Retirement Fund of State of Idaho*, 312 P.2d 1037.

53. Ind.—*Cullen v. Pan Handle Coal Co.*, 141 N.E. 647, 81 Ind.App. 913.

54. Wash.—*Russell v. Department of Labor and Industries of Washington*, 78 P.2d 960, 194 Wash. 565.

55. Pa.—*Michetti v. State Workmen's Ins. Fund*, 17 A.2d 712, 143 Pa.Super. 458.

56. Mich.—*Murray v. Ford Motor Co.*, 296 N.W. 284, 296 Mich. 348.

57. Ariz.—*Rhoades v. Lee Moor Contracting Co.*, 132 P.2d 432, 60 Ariz. 161—*Hogle v. Arizona Concrete Co.*, 33 P.2d 589, 44 Ariz. 1.

Pa.—*Gleyze v. Hale Coal Co.*, 26 A.2d 141, 149 Pa.Super. 18—*Seko v. Hub Knitting Co.*, 16 A.2d 138, 142 Pa. Super. 309—*Petrovan v. Rockhill*

Coal & Iron Co., 196 A. 516, 130 Pa. Super. 58.

Martray v. Munson-McCairns, Com.Pl., 5 Fay.L.J. 120.
71 C.J. p 1463 note 97.

Petition construed

Where employer's petition for termination of workmen's compensation was granted on Oct. 4, 1937, and no appeal was taken from referee's order, but on March 9, 1938, claimant filed rehearing petition, such petition should have been construed as one for rehearing under statute relating thereto rather than one for reinstatement under another statute.

Pa.—*Jordan v. Merchants Meat Co.*, 10 A.2d 72, 138 Pa.Super. 133.

Decision by deputy commissioner

Where commissioner delegates to his deputy powers of his office to determine a review of a prior award, as authorized by compensation act, deputy's decision is not subject to reexamination and redetermination through rehearing by commissioner.

Iowa.—*Stice v. Consolidated Indiana Coal Co.*, 291 N.W. 452, 228 Iowa 1081.

Consideration of second petition

Department of labor and industry, after a denial of a petition for further compensation, had right to consider a second petition and reopen its inquiry into claimant's condition, and such action did not amount to a rehearing.

Mich.—*Mikulski v. Hudson Motor Car Co.*, 9 N.W.2d 20, 305 Mich. 97.

58. Minn.—*Gustafson v. Ziesmer & Vorlander, Inc.*, 6 N.W.2d 452, 213 Minn. 253.

71 C.J. p 1463 note 98.

Discretion held not abused

(1) In general.

U.S.—*Simmons v. Marshall, C.C.A.* Wash., 94 F.2d 850.

Ga.—*Hartford Acc. & Indem. Co. v. Garland*, 59 S.E.2d 560, 81 Ga.App. 667.

Pa.—*Schach v. Hazle Brook Coal Co.*, 198 A. 464, 130 Pa.Super. 430.

71 C.J. p 1463 note 98 [a].

(2) Where proposed testimony of one witness was chiefly cumulative and there was no showing as to what other witnesses would testify to or why they had not been called originally or their affidavits procured.

Minn.—*Ginsburg v. Byers*, 17 N.W.2d 354, 219 Minn. 230.

59. Ohio.—*State ex rel. S. S. Kresge Co. v. Industrial Commission*, 104 N.E.2d 450, 157 Ohio St. 62—*State ex rel. Gerard v. Industrial Commission of Ohio*, 192 N.E. 730, 128 Ohio St. 558—*State ex rel. Depalo v. Industrial Commission of Ohio*, 191 N.E. 691, 128 Ohio St. 410—*State ex rel. Randolph v. Industrial Commission of Ohio*, 190 N.E. 217, 128 Ohio St. 27.

State ex rel. Palmieri v. Industrial Commission, App., 67 N.E.2d 363—*Boord v. Industrial Commission, App.*, 61 N.E.2d 617—*State ex rel. Shaffer v. Industrial Commission, App.*, 56 N.E.2d 698—*State ex rel. White v. Industrial Commission of Ohio, App.*, 40 N.E.2d 453.

Weatherbee v. Union Gas & Elec. Co., 4 Ohio Supp. 35.

71 C.J. p 1463 note 97 [a].

Extent of injury as matter solely for commission

Order of commission, on claimant's application for additional compensa-

vacating a prior order and ordering that the application for rehearing and all proceedings thereunder be dismissed.⁶⁰ One is not entitled to a rehearing on the ground that new evidence will be offered where there was an opportunity to offer it on a previous hearing;⁶¹ and where evidence is not newly discovered, the bureau of compensation has no jurisdiction, in the absence of fraud, to vacate its judgment more than the statutory time after the entry thereof.⁶²

Rules of the commission as to time of filing the application for rehearing must be observed,⁶³ and an application filed after the expiration of such time is ineffective,⁶⁴ since a claimant cannot revest his right for further hearing by a subsequent application covering the same question;⁶⁵ but these rules may be waived by the commission.⁶⁶ A failure to file an application within the designated time does not deprive the commission of jurisdiction,⁶⁷ nor is the commission divested of continuing jurisdiction by a denial of an application for a rehearing,⁶⁸ and a failure to file a timely application does not preclude the commission from making valid subsequent orders with reference to the claim.⁶⁹ Hence

the commission, having found that it made a mistake resulting in injustice, may consider an application for a rehearing, and grant further compensation, although the application was not filed within the required time.⁷⁰ Where a petition for rehearing is to be filed within a certain time after the order, a filing of such a petition is precluded where the commission fails to make any order on a claim for increased compensation,⁷¹ but a provision of the statute giving the effect of a denial of the claim by the commission to its failure to pass thereon within the time prescribed by statute permits a claimant, where there is such a failure by the commission, to file his application for rehearing within the statutory period.⁷²

Where no particular form of application for rehearing is jurisdictional, letters by claimant's counsel to the commission presenting his claim and asking what could be done for him are sufficient to institute the proceedings for rehearing.⁷³

In order to recover on a subsequent petition for further compensation, claimant must prove a change in the condition since the former hearing,⁷⁴ and a

tion, that claimant had made a complete recovery from injury, went only to extent of injury, which finding was a matter resting solely with commission and was sufficient to deny claimant a right to a rehearing, notwithstanding added finding that claimant was being compensated for permanent total disability under a prior claim, which added finding recognized that claimant was being compensated to greatest extent contemplated by compensation act and that second injury could not increase total disability.

Ohio.—State ex rel. Holcomb v. Industrial Commission, 60 N.E.2d 814, 75 Ohio App. 349.

Jurisdictional grounds not shown

Where order of commission dismissing application for modification of award pointed out that over a period of several years claimant had made no mention of alleged condition of left hand, there was no rejection of claimant's application on "jurisdictional grounds" within statutory provision authorizing a rehearing within thirty days after denial of compensation because of lack of jurisdiction.

Ohio.—State ex rel. White v. Industrial Commission of Ohio, App., 40 N.E.2d 453.

Finding of commission on application for additional compensation that claimant had been fully compensated was not finding that commission had no further jurisdiction within statute providing for rehearing and appeal.

Ohio.—Metal Specialty Co. v. Gregory, 191 N.E. 701, 128 Ohio St. 452.

60. Ohio.—Boord v. Industrial Commission, App., 61 N.E. 617.

61. Pa.—Sorby v. Three Rivers Motors, 114 A.2d 347, 178 Pa.Super. 187.

62. N.J.—Breheny v. Essex County, 54 A.2d 664, 136 N.J.Law 87, affirmed 57 A.2d 26, 136 N.J.Law 524.

63. Ohio.—Industrial Commission of Ohio v. Willenborg, 163 N.E. 212, 29 Ohio App. 162.

Pa.—Petrovan v. Rockhill Coal & Iron Co., 196 A. 516, 130 Pa. Super. 58.

Wash.—Hagen v. Department of Labor and Industries, 76 P.2d 592, 193 Wash. 555.

64. Ohio.—Industrial Commission of Ohio v. Willenborg, 163 N.E. 212, 29 Ohio App. 162.

65. Ohio.—State ex rel. Szalay v. Industrial Commission of Ohio, 199 N.E. 76, 130 Ohio St. 269—State ex rel. Randolph v. Industrial Commission of Ohio, 190 N.E. 217, 128 Ohio St. 27.

State ex rel. Reis v. Industrial Commission, App., 47 N.E.2d 230.

Same cause of injury

Where compensation claimant failed to take necessary steps seeking a rehearing within thirty days after notice of dismissal of application for modification of an award of compensation for temporary total disability for an injury to both eyes, a

second application relating to same cause of injury would not revest claimant's rights for further hearing, notwithstanding first application related to impairment of left eye, whereas second application referred to an impairment of right eye.

Ohio.—State ex rel. Reis v. Industrial Commission, supra.

66. Ohio.—Lane v. Industrial Commission of Ohio, 156 N.E. 508, 24 Ohio App. 196.

71 C.J. p 1463 note 2.

67. Ohio.—State ex rel. New Idea v. Blake, 61 N.E.2d 195, 145 Ohio St. 209.

68. Ohio.—Metal Specialty Co. v. Gregory, 191 N.E. 701, 128 Ohio St. 452.

69. Ohio.—State ex rel. New Idea v. Blake, 61 N.E.2d 195, 145 Ohio St. 209.

70. Ohio.—State ex rel. New Idea v. Blake, supra.

71. Or.—White v. State Industrial Accident Commission, 96 P.2d 772, 163 Or. 476, rehearing denied 98 P.2d 955, 163 Or. 476.

72. Or.—White v. State Industrial Accident Commission, supra.

73. Ohio.—Industrial Commission of Ohio v. Willenborg, 163 N.E. 212, 29 Ohio App. 162.

74. Mich.—Rice v. J. F. Braun & Son, 261 N.W. 84, 271 Mich. 532.

Rehearing justified

In proceeding for further compensation after employer refused further

consequent lessening of his earning ability.⁷⁵ Claimant has been held to have the right to examine all of the files and the records in his case on which the bureau based its decision to terminate the award, when necessary to prepare for the hearing on his application.⁷⁶ Where a deputy commissioner, in passing on an application for modification of a compensation award, has before him important evidence which was not before another commissioner who had previously refused to modify the award, the second commissioner has jurisdiction to modify the earlier award on the ground of a mistake in a determination of fact.⁷⁷

A refusal to reopen the case solely because a former application on the same ground was denied is erroneous, where the former decision was not on the merits, since one is entitled to a hearing on the merits.⁷⁸ A denial of an employee's petition for a rehearing, signed by some of the members of the board, is not invalid even though such members purport to sit as the board, where jurisdiction to grant a rehearing is vested in a single member of the board and not in the board as such.⁷⁹ A determination by a reviewing board, without hearing evidence that an employee's petition for a rehearing should be dismissed as without merit and frivolous, is improper where the lack of merit does not appear on the face of the petition.⁸⁰

payments, subsequent showing of newly discovered evidence obtained during operation on claimant's spine at clinic that injury caused disability justified vacation of referee's decision and reference to him of proceeding for rehearing and determination.

Minn.—Jovanovich v. St. Paul Corrugating Co., 276 N.W. 741, 201 Minn. 412.

75. Mich.—Rice v. J. F. Braun & Son, 261 N.W. 84, 271 Mich. 532.

76. N.D.—Wallace v. North Dakota Workmen's Compensation Bureau, 284 N.W. 420, 69 N.D. 165.

77. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, D.C.Mass., 23 F. Supp. 400, affirmed C.C.A., 102 F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

78. Ky.—Byrne & Speed Coal Corp. v. Dodson, 94 S.W.2d 24, 263 Ky. 848.

79. Mass.—Mozetaki's Case, 13 N.E. 2d 10, 299 Mass. 376.

80. Mass.—Mozetaki's Case, supra. "Board" equivalent to reviewing board

Under provision of compensation act which, while permitting a rehearing of a decision discontinu-

ing compensation because disability had ceased, precluded a subsequent petition if the "board" determined that petition for rehearing was without merit and frivolous, the quoted term referred to a reviewing board. Mass.—Mozetaki's Case, supra.

81. U.S.—Wellgeng v. Marshall, D.C. Wash., 32 F.2d 922.

82. U.S.—Wellgeng v. Marshall, supra.

83. Ohio.—Industrial Commission v. Davidson, 126 N.E. 876, 101 Ohio St. 71.

Or.—Gerber v. State Industrial Accident Commission, 101 P.2d 416, 164 Or. 353.

Wash.—Surina v. Department of Labor and Industries of State, 210 P. 2d 403, 84 Wash.2d 839.

84. Kan.—Stevens v. Kelly-Carter Coal Co., 37 P.2d 48, 140 Kan. 441. Md.—Porter v. Bethlehem-Fairfield Shipyard, 53 A.2d 668, 188 Md. 668.

N.J.—Licker v. J. G. Martin Box Co., 21 A.2d 595, 127 N.J.Law 186—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290.

Ohio.—Logsdon v. Industrial Commission, App., 67 N.E.2d 823, affirmed 57 N.E.2d 75, 143 Ohio St. 508.

§ 876. Suspension of Order

Where a statute so provides, a compensation order may be suspended or set aside through injunction proceedings brought in the courts by any party in interest.

Under a statute providing that a compensation order may be suspended or set aside through injunction proceedings brought in the courts by any party in interest against the commissioner making the order, the employer and insurer are not necessary parties to an action to suspend an order reducing compensation,⁸¹ and where the court, out of an abundance of precaution, directed them to appear and show cause why the relief should not be granted, a motion by them to dismiss because the action was not commenced as against them within the statutory time limit is not well taken, where the proceedings were timely instituted against the commissioner.⁸²

§ 877. Review

The right to appeal from an adverse determination in proceedings to increase, diminish, terminate, or reinstate compensation is purely statutory.

The right to appeal in cases of this character depends on the terms of the governing statute;⁸³ and the various statutes frequently contain a provision for appeals from adverse decisions,⁸⁴ and the right

Wash.—Roellich v. Department of Labor and Industries, 148 P.2d 957, 20 Wash.2d 674.

W.Va.—Mason v. Workmen's Compensation Appeal Board, 4 S.E.2d 791, 121 W.Va. 444.

Error of law

Failure of full commission to diminish compensation award because of change of condition since award, in that workman had obtained work at approximately same salary, is an error of law reviewable by the superior court.

N.C.—Smith v. Swift & Co., 194 S.E. 106, 212 N.C. 608.

Error proceeding

An appeal on questions of law from judgment of common pleas court in workmen's compensation case relating to termination of compensation would be determined as an error proceeding.

Ohio.—McMillen v. Industrial Commission of Ohio, App., 37 N.E.2d 632.

Effect of appeal

Compensation act provision that claim of an appeal shall suspend operation of decree appealed from refers to a decree based on petition to review as well as one based on original petition.

R.I.—Dunn v. Broomfield, 58 A.2d 254, 74 R.I. 27.

to appeal may be a matter of right.⁸⁵ A proceeding for additional compensation is a distinct proceeding from which an independent appeal may be taken.⁸⁶ The mere perfecting of an appeal to the court from a modified award of the commissioner does not operate to reinstate a former award.⁸⁷ The denial of the right to compensation for aggravation of disability occurring or discovered after the rate of compensation has been established or compensation terminated is appealable.⁸⁸

The proceeding may be subject to the general rules of law relating to appeals,⁸⁹ and the errors complained of will not be noticed unless brought to the attention of the appellate court through the proper procedure.⁹⁰ The review is limited to the issues tendered in the application for review,⁹¹ and on review the inquiry is limited as to whether disability resulting from the injury may have increased or diminished beyond what the award contemplated.⁹² The theory of the case as tried in the lower tribunal will be adhered to on appeal.⁹³

The pendency of an appeal does not deprive the board of jurisdiction to entertain another application for an additional compensation because of a changed condition arising since the hearing on which the award appealed from was based.⁹⁴ Where an appeal has been refused, appellant is not allowed to use another mode of appeal for making the same contentions and raising the same issues,⁹⁵ and claimant cannot have pending at the same time, in the same compensation proceeding, an appeal from the order of the board, involving a question of the sufficiency of the award, and an appeal from an order regarding a question of aggravation of his condition.⁹⁶ Where an alleged error is invited by appellant, he cannot be permitted, on appeal, to urge that point.⁹⁷

Further review. An order overruling a so-called demurrer, which in fact was a motion to dismiss an application by an employee to vacate a judgment finding that he had fully recovered from his injuries, cannot be reviewed by certiorari before the deter-

Previous demand for hearing

Appeal lies to workmen's compensation appeal board from compensation commissioner's ruling without previous demand on commissioner for hearing, in view of provisions of act.

W.Va.—Georges Creek Coal Co. v. Workmen's Compensation Appeal Board, 188 S.E. 866, 117 W.Va. 89.

85. Okl.—Lewis v. Sinclair Prairie Oil Co., 114 P.2d 462, 189 Okl. 150.

86. Or.—Claim of Graves, 223 P. 248, 112 Or. 143.

87. Kan.—Brewington v. W. U. Tel. Co., 183 P.2d 872, 163 Kan. 534.

Recovery of balance of compensation not allowed

Where commissioner, after hearing for review and modification of former compensation award of district court, found that claimant's disability had ceased, and made an award terminating the compensation, and the claimant appealed to the district court, claimant could not, while such appeal was pending, recover the balance of the compensation due under the former award, on theory that compensation remained due and payable in accordance with the former award until the district court reviewed the record on appeal from the modified award.

Kan.—Brewington v. W. U. Tel. Co., *supra*.

88. Or.—Grunnett v. State Industrial Accident Commission, 215 P. 881, 108 Or. 178.

89. Ind.—Earhart v. Cyclone Fence Co., 4 N.E.2d 571, 102 Ind.App. 634.

Or.—Claim of Graves, 223 P. 248, 112 Or. 143.

90. Ind.—Harmon v. Harmon, 62 N. E.2d 880, 116 Ind.App. 140.

Ky.—Palko v. Fordson Coal Co., 169 S.W.2d 602, 293 Ky. 511.

Mo.—Snaveley v. Delmar Hotel Co., App., 84 S.W.2d 188.

N.J.—Fernandez v. Ford Motor Co., 174 A. 223, 12 N.J.Misc. 653, appeal dismissed Ford Motor Co. v. Fernandez, 176 A. 152, 114 N.J. Law 202.

Wash.—La Plant v. Department of Labor and Industries, 301 P.2d 542, 49 Wash.2d 843.

Insufficient brief

Where compensation claimant after filing his brief on appeal requested and was granted the right to cite additional authorities, and he did cite two cases and inserted in the brief, "Case can be reopened on change of condition during award only," brief was insufficient under court rule to raise claimant's contention that award should be reversed because under the circumstances claimant was allegedly deprived of his right to apply for review on ground of a change in condition during pendency of compensation payments.

Mo.—Johnson v. Fogertey Bldg. Co., App., 194 S.W.2d 924.

Jurisdictional question not waived

The court of appeals, in determining that order of the compensation board reopening compensation proceeding was not a final and appealable order, was dealing with a jurisdictional question which was not waived by the failure to raise the question in the brief whether or not the order was final and appealable.

Ky.—North American Refractories Co. v. Day, 145 S.W.2d 75, 234 Ky. 458.

Statement of questions involved

Court will not pass on questions which were not included on appeal in statement of questions involved.

Mich.—Seppi v. Ford Motor Co., 279 N.W. 881, 284 Mich. 410.

91. Ind.—Mooney-Mueller-Ward Co. v. Doyle, 144 N.E. 473, 81 Ind. App. 563.

N.J.—Pasquale v. Clyde Piece Dye Works, 1 A.2d 45, 120 N.J.Law 557.

Amendments

Board was empowered to permit amendments on appeal from deputy's decision on petition to stop compensation.

Mich.—Kolbas v. American Boston Mining Co., 267 N.W. 751, 275 Mich. 616.

92. S.D.—Stowsand v. Jack Rabbit Lines, 58 N.W.2d 298, 75 S.D. 11.

Trial as original action

Ind.—Switow Theatrical Co. v. Humphrey, 44 N.E.2d 213, 112 Ind.App. 221.

94. Ga.—Ingram v. Liberty Mut. Ins. Co., 11 S.E.2d 499, 63 Ga.App. 493.

95. Cal.—Howard v. Industrial Acc. Commission, 116 P.2d 113, 46 C.A. 2d 492.

96. Wash.—Reid v. Department of Labor and Industries, 96 P.2d 492, 1 Wash.2d 480.

97. U.S.—Walker v. Marshall, C.C.A. Wash., 111 F.2d 794.

mination of the application.⁹⁸ Where the court has found that an employee was totally incapacitated and that it was reasonable to require him to submit to a curative operation, and the employee sought certiorari to quash an order pursuant to which compensation was terminated because of the employee's failure to submit to the operation, certiorari will be granted to hear on the merits the question of whether the employee, later offering to submit to the operation, may have it performed and have the necessary expenses relating thereto paid by the employer.⁹⁹ Furthermore, the employee is not precluded from attacking the order by certiorari as against the contention that the employee has an adequate remedy through a petition to the administrative authorities.¹

Costs. Where there is uncertainty as to whether or not an employee has a cause of action for an additional compensation, it has been held that the employer should bear the cost of a judicial determination that the employee is not entitled to such compensation.²

§ 878. — Jurisdiction

Appellant must conform to the statute in order to give the appellate court jurisdiction, which can be ac-

quired only in the statutory manner and after the compensation board has passed on the question to be decided.

Appellant must conform to the statute in order to give the appellate court jurisdiction,³ which can be acquired only in the manner pointed out by the statute⁴ and after the board has passed on the question to be decided.⁵ Under express statutory provision, a court which has jurisdiction over neither the place where the accident occurred nor the person of the appealing party is without authority to decide the appeal.⁶ What particular tribunal has jurisdiction of the appeal is determined by the statute.⁷ Where the statute provides that an appeal by the beneficiary shall be to the court of the county in which claimant resides, there must be a compliance with such statute.⁸

§ 879. — Decisions and Orders Reviewable

A final decision on an application for a modification of compensation is a prerequisite to the right to appeal, and an appeal will not lie from a decision which is not final.

A final decision on an application for a modification of compensation is a prerequisite to the right to appeal,⁹ but where the appeal is in fact taken from the final action of the commission, the com-

98. Minn.—*State v. Rice County* Dist. Ct., 155 N.W. 1057, 132 Minn. 100.

99. R.I.—*Mancini v. Superior Court*, 75 A.2d 300, 77 R.I. 262.

1. R.I.—*Mancini v. Superior Court*, 82 A.2d 390, 78 R.I. 373.

2. Tenn.—*American Snuff Co. v. Helms*, 301 S.W.2d 348.

3. Idaho.—*Wanke v. Ziebarth Const. Co.*, 202 P.2d 384, 69 Idaho 64.

Mo.—*Dewey v. Union Electric Light & Power Co., App.*, 83 S.W.2d 203.

Ohio.—*New Pittsburgh Coal Co. v. Stillwagner*, 191 N.E. 709, 47 Ohio App. 189.

Or.—*White v. State Industrial Acc. Commission*, 96 P.2d 772, 163 Or. 476, rehearing denied 98 P.2d 955, 163 Or. 476—*Claim of Graves*, 223 P. 248, 112 Or. 143.

4. Tex.—*Jones v. Casualty Reciprocal Exch., Civ.App.*, 275 S.W. 279.

Wash.—*Perry v. Department of Labor and Industries*, 292 P.2d 366, 48 Wash.2d 205.

5. Okl.—*Dunning-James-Patterson v. Rickert*, 164 P.2d 620, 196 Okl. 237.

Tex.—*Jones v. Casualty Reciprocal Exch., Civ.App.*, 275 S.W. 279.

Wash.—*Dry v. Department of Labor and Industries*, 89 P.2d 609, 180 Wash. 92—*Noll v. Department of Labor and Industries*, 86 P.2d 809, 179 Wash. 213.

6. Ind.—*Miller v. Bethlehem Steel Co.*, 154 A. 555, 164 Md. 657.

7. R.I.—*Catanese v. A. D. Julliard & Co.*, 125 A.2d 123.
71 C.J. p 1464 note 16.

The board of industrial insurance appeal and the superior court exercise only appellate jurisdiction over supervisor's order in workmen's compensation case.
Wash.—*Turner v. Department of Labor and Industries*, 251 P.2d 883, 41 Wash.2d 739.

8. Or.—*Claim of Graves*, 223 P. 248, 112 Or. 143.

9. Ky.—*North American Refractories Co. v. Day*, 145 S.W.2d 75, 284 Ky. 458.

Ohio.—*Sergi v. Industrial Commission of Ohio*, 27 N.E.2d 149, 136 Ohio St. 546.

Nichols v. Ohio Collieries Co., 62 N.E.2d 636, 75 Ohio App. 474—*May v. Industrial Commission of Ohio*, 198 N.E. 50, 50 Ohio App. 286.

Okl.—*McAlester Fuel Co. v. Kelley*, 180 P.2d 829, 198 Okl. 559.

Or.—*Hutchins v. State Industrial Acc. Commission*, 97 P.2d 944, 163 Or. 419, overruled on other grounds *Gerber v. State Industrial Accident Commission*, 101 P.2d 416, 164 Or. 353—*Degidio v. State Industrial Accident Commission*, 207 P. 176, 105 Or. 642.

Pa.—*Critchlow v. George H. Sokel Co., Com.Pl.*, 91 Pittsb.Leg.J. 337.

Wash.—*Farris v. Department of Labor and Industries*, 80 P.2d 824, 195 Wash. 281.

Held final

(1) A judgment setting aside award of additional compensation on ground that application for review had not been filed in time was a final judgment from which an appeal would lie.

Kan.—*Souden v. Rine Drilling Co.*, 92 P.2d 74, 150 Kan. 239.

(2) Where industrial commission on rehearing denied a petition for continued compensation on ground that any disability was not due to claimant's original injury, neither lapse of time nor intervention of compensation would have any bearing on finality and conclusiveness of commission's finding on question of right to appeal.

Ohio.—*McManus v. Industrial Commission of Ohio*, 31 N.E.2d 465, 66 Ohio App. 14.

Decision held not interlocutory

A decision of board that additional compensation was chargeable against employer, and not against special fund for reopened cases, was not interlocutory but was appealable where decision established liability for further treatment, provided a factual connection with prior injury

mission may not complain of informalities in such final action.¹⁰ Where the statute provides that appeal may be taken from the decision or findings of the commission, a mere letter which, although characterized as a decision, is merely a narrative of past occurrences does not constitute a decision within the meaning of the statute.¹¹

Whether a decision is reviewable depends on the construction of the particular statute involved.¹² A determination on a petition to review and modify an award previously made is an appealable order,¹³ since whether the application for additional compensation was refused in a proper exercise of discretion raises a question of law.¹⁴ A decree fixing compensation is appealable,¹⁵ as is an order denying a reopening of a compensation proceeding¹⁶ because of an erroneous belief that the commission was with-

out jurisdiction to review the claim on its own motion,¹⁷ or where it is a denial of a right to a hearing by the commission on a question not previously presented and decided.¹⁸ Likewise, if the refusal of further compensation is based on jurisdictional grounds, under some statutes the decision is appealable.¹⁹

Under some statutes, the right of appeal is granted from any order of the commission which terminates, diminishes, or increases its former award if such former award was not made by the commission on its own motion pursuant to its continuing jurisdiction.²⁰ Orders made on the commission's own motion pursuant to its continuing jurisdiction, however, are not appealable.²¹ While an application is pending, the commission may not ignore or fail to dispose of it and claim to be acting on its

was found, and decision came generally within appeal section of compensation law.

N.Y.—Becker v. Marcy State Hospital, 38 N.Y.S.2d 219, 264 App.Div. 643.

Held not final

(1) Order, granting injured employee's application for reopening of compensation claim only on question of aggravation of injury since denial of previous application.

Wash.—Smith v. Department of Labor and Industries, 55 P.2d 603, 185 Wash. 443.

(2) Order remanding employee's claim to supervisor for action in accordance with judgment of superior court setting aside board's order denying application for correction of monthly payments by way of pension and for an attendant, and directing department to pass on claim.

Wash.—Farris v. Department of Labor and Industries, 80 P.2d 824, 195 Wash. 281.

10. Or.—Meaney v. State Industrial Accident Commission, 232 P. 789, 118 Or. 371.

11. Or.—Degidio v. State Industrial Accident Commission, 207 P. 176, 105 Or. 642—Iwanicki v. State Industrial Acc. Commission of Oregon, 205 P. 990, 104 Or. 650, 29 A.L.R. 682.

12. Or.—Chebot v. State Industrial Accident Commission, 212 P. 792, 106 Or. 660.

71 C.J. p 1464 note 22.

13. Kan.—Dobson v. Apex Coal Co., 91 P.2d 5, 150 Kan. 80—Brown v. Shellabarger Mill & Elevator Co., 50 P.2d 919, 142 Kan. 476.

Ky.—North American Refractories Co. v. Day, 145 S.W.2d 75, 284 Ky. 458.

N.J.—Licker v. J. G. Martin Box Co., 21 A.2d 595, 127 N.J.Law 136.

Tex.—Miller v. Lloyds Alliance, Civ. App., 259 S.W.2d 777, refused no reversible error.

14. Pa.—Selinsky v. New Shawmut Min. Co., 115 A.2d 916, 178 Pa. Super. 240.

15. R.I.—Ottone v. Franklin Process Co., 71 A.2d 780, 76 R.I. 431.

Decree construed

Last unappealed order or decree which has been entered after a hearing on a petition for review of any prior order or decree fixing compensation is, regardless of its form or contents, a new fixing of compensation within statute providing for review of such decree, to which any petition for review thereafter filed should be directed.

R.I.—Ottone v. Franklin Process Co., supra.

16. Ky.—North American Refractories Co. v. Day, 145 S.W.2d 75, 284 Ky. 458.

Md.—Kelly-Springfield Tire Co. v. Roland, 79 A.2d 153, 197 Md. 354—Stevenson v. Hill, 185 A. 551, 170 Md. 676.

N.J.—Ruoff v. Blasl, 191 A. 877, 118 N.J.Law 314.

17. Colo.—Gregorich v. Industrial Commission, 188 P.2d 886, 117 Colo. 423.

18. Md.—Stevenson v. Hill, 185 A. 551, 170 Md. 676.

19. Ohio.—State ex rel. Depalo v. Industrial Commission of Ohio, 191 N.E. 691, 128 Ohio St. 410.

McIntyre v. B. F. Goodrich Co., App., 137 N.E.2d 567—Brooks v. Industrial Commission, 49 N.E.2d 580, 71 Ohio App. 295—McManus v. Industrial Commission of Ohio, 31 N.E.2d 465, 66 Ohio App. 14—Mummert v. Cincinnati & Suburban Bell Tel. Co., 11 N.E.2d 258, 56 Ohio App. 511.

Klein v. B. F. Goodrich Co., Com. Pl., 104 N.E.2d 90—Weatherbee v. Union Gas & Elec. Co., 4 Ohio Supp. 35.

20. Or.—Verban v. State Industrial Acc. Commission, 123 P.2d 988, 168 Or. 394—Garner v. State Industrial Acc. Commission, 92 P.2d 193, 162 Or. 256.

Not within continuing jurisdiction

Where pursuant to claimant's letter which did not constitute a petition for rehearing, commission increased final award at a time within which claimant might have filed petition for rehearing, increased award was not in exercise of commission's continuing jurisdiction within statute rendering nonappealable orders made on commission's own motion pursuant to its continuing jurisdiction, and hence order increasing award was appealable.

Or.—Verban v. State Industrial Acc. Commission, 123 P.2d 988, 168 Or. 394.

21. Or.—Verban v. State Industrial Accident Commission, supra—Jacoby v. State Industrial Accident Commission, 106 P.2d 294, 165 Or. 230—Garner v. State Industrial Acc. Commission, 92 P.2d 193, 162 Or. 256.

Commission's order challenged

Where workman had filed application for additional compensation by reason of aggravation of injuries but commission's order stated that order was made on commission's own motion, statement in workman's petition for rehearing that "based upon such application the said commission entered an order" challenged commission's statement that order was entered on its own motion, with respect to workman's right to appeal.

Or.—Hinkle v. State Industrial Acc. Commission, 97 P.2d 725, 163 Or. 395.

own motion in awarding additional or increased compensation with the result of preventing the workman from appealing from any subsequent ruling modifying the commission's order so entered.²² Where the commission's order was made pursuant to the workman's application for additional compensation and not on the commission's own motion, a subsequent order terminating the previous order is an appealable order, notwithstanding the subsequent order was made on the commission's own motion.²³

In the absence of a statute providing otherwise, a determination that the injuries have been fully compensated by allowance previously made is not reviewable,²⁴ and no appeal lies from a determination refusing to allow compensation for a physical condition undisclosed at the time of previous hearings and now discovered;²⁵ and an order of the board reopening a compensation proceeding is not appealable as a final order.²⁶ A decision by the commission has been held not appealable if the

refusal of further compensation is based on a determination of the question of the extent of disability²⁷ or the amount of award.²⁸ No appeal lies from the refusal of the commission to act on an application for aggravation of a compensable injury not filed within the required time;²⁹ and, with respect to a question which the commission has once determined, none of the parties has a right to appeal from a refusal to comply with a demand that the case be reopened.³⁰

§ 880. — Presentation and Reservation Below of Grounds for Review

Questions not raised and properly reserved for review below will not be noticed on appeal.

In accordance with the general rule on review of civil cases generally, questions not raised and properly reserved for review below will not be noticed on appeal,³¹ unless such questions not raised nor

22. Or.—Hinkle v. State Industrial Accident Commission, *supra*—Miller v. State Industrial Acc. Commission of Oregon, 39 P.2d 366, 149 Or. 49.

23. Or.—Hinkle v. State Industrial Accident Commission, 97 P.2d 725, 163 Or. 395.

24. N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 23 N.W.2d 26, 74 N.D. 520—Lillefeld v. North Dakota Workmen's Compensation Bureau, 244 N.W. 36, 62 N.D. 388.

Statutory construction

Provision in Uniform Practice Act that any party to any proceeding heard by an administrative agency, except in cases where decision of administrative agency is declared final by any other statute, may appeal from such decision, does not nullify section of revised code providing that workmen's compensation bureau should have full power and authority to hear and determine all questions within its jurisdiction so as to make bureau's decision with reference to increase or decrease of compensation reviewable on appeal.

N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 23 N.W.2d 26, 74 N.D. 520.

25. N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, *supra*.

26. Ky.—North American Refractories Co. v. Day, 145 S.W.2d 75, 284 Ky. 458.

27. Ohio.—Midland Steel Products Co. v. Allen, 198 N.E. 581, 130 Ohio St. 218—State ex rel. Depalo v. Industrial Commission of Ohio, 191 N.E. 691, 128 Ohio St. 410.

Brooks v. Industrial Commission, 49 N.E.2d 580, 71 Ohio App. 295—Derewicki v. Youghiogheny & Ohio Coal Co., 32 N.E.2d 44, 66 Ohio A.p. 111—Mummert v. Cincinnati & Suburban Bell Tel. Co., 11 N.E.2d 258, 56 Ohio App. 511.

Order dismissing a second application of employee for modification of compensation award was not appealable, even though second application were properly brought after dismissal of first application, and even though present order were otherwise appealable, where no application had been made for a rehearing as required by statute.

Ohio.—May v. Industrial Commission of Ohio, 198 N.E. 50, 50 Ohio App. 286.

28. Ohio.—State ex rel. Depalo v. Industrial Commission of Ohio, 191 N.E. 691, 128 Ohio St. 410.

29. Or.—White v. State Industrial Acc. Commission, 98 P.2d 955, 163 Or. 476—Allen v. State Industrial Accident Commission of Oregon, 8 P.2d 1088, 140 Or. 449.

30. Md.—Stevenson v. Hill, 185 A. 551, 170 Md. 676.

31. Conn.—Osterlund v. State, 30 A. 2d 393, 129 Conn. 591.

Fla.—Roberts v. Wofford Beach Hotel, 67 So.2d 670.

Idaho.—Egus v. Triumph Min. Co., 232 P.2d 136, 71 Idaho 354.

Mich.—Dezomits v. Consolidated Paper Co., 24 N.W.2d 122, 315 Mich. 273—Kolbas v. American Boston Min. Co., 267 N.W. 751, 275 Mich. 616.

N.J.—Breheny v. Essex County, 41 A. 2d 890, 132 N.J.Law 584, affirmed 45 A.2d 700, 134 N.J.Law 129—Kolesnik v. Irvington Varnish &

Insulator Co., 197 A. 727, 120 N.J. Law 8.

N.D.—Schmidt v. North Dakota Workmen's Compensation Bureau, 23 N.W.2d 610, 73 N.D. 245, opinion supplemented 23 N.W.2d 26, 74 N.D. 520.

R.I.—Larkin v. George A. Fuller Co., 71 A.2d 690, 76 R.I. 395—Marconi v. Bartlett Scrap Iron Co., 19 A.2d 766, 66 R.I. 409.

Tex.—Mullens v. Texas Indemnity Ins. Co., Civ.App., 158 S.W.2d 861, error refused.

Wash.—La Plant v. Department of Labor and Industries, 301 P.2d 542, 49 Wash.2d 343—Stansbury v. Department of Labor and Industries, 217 P.2d 785, 36 Wash.2d 330—Wiles v. Department of Labor and Industries of State, 209 P.2d 462, 34 Wash.2d 714—Omeitt v. Department of Labor and Industries, 152 P.2d 973, 21 Wash.2d 684—Kull v. Department of Labor and Industries, 152 P.2d 961, 21 Wash.2d 672.

Wyo.—In re Fero, 52 P.2d 690, 49 Wyo. 131.

71 C.J. p 1464 note 25.

Presentation and reservation in lower court of grounds of review in general see Appeal and Error § 228 et seq.

Failure to submit requested instruction

In proceeding for increased compensation for permanent partial disability because of loss of sight of one eye by aggravation, industrial accident commission, failing to submit to circuit court requested instruction to jury as to meaning of "aggravation," cannot complain of failure of court to give instruction defining such term on commission's

properly preserved for review relate to jurisdiction.³² Likewise, an issue is reviewable where such issue, although not mentioned in the petition to stop compensation, was included in the claim of appeal from the deputy to the board which passed thereon without objection.³³ A pleading, the definiteness or sufficiency of which was not tested by motion or demurrer, may be sufficient on appeal to sustain a finding, even though defective.³⁴

§ 881. — Time for Taking and Perfecting Proceeding for Review

Proceedings for review must be taken and perfected within the prescribed statutory time.

The time within which a proceeding to review the action of the lower tribunal must be prayed, taken, and perfected is regulated by statute, and the proceeding must be taken and perfected within the

prescribed statutory time,³⁵ and the rule is applicable to cross appeals.³⁶ The time for filing the appeal dates from the time of the denial of the application for a modification of the original award.³⁷ Where an extension of time to appeal is permissible, it has been held that the application for the extension must be made within the time originally fixed for the appeal;³⁸ and the grant or denial of an extension is, in a very large measure, a matter of discretion.³⁹

§ 882. — Record

The reviewing court usually will not consider matters which are not in the record before it.

The reviewing court is ordinarily required to consider the entire record.⁴⁰ Although the reviewing court may not consider matters which do not appear from the record,⁴¹ in a proper case it may consider

appeal from judgment awarding compensation claimed.

Or.—Wilson v. State Indus. Acc. Commission, 219 P.2d 138, 139 Or. 114.

Questions held adequately raised

Minn.—Hawkinson v. Mirau, 264 N. W. 438, 196 Minn. 120, rehearing denied 265 N.W. 346, 196 Minn. 120. Wash.—Franks v. Department of Labor & Industries, 215 P.2d 416, 35 Wash.2d 763.

32. U.S.—Candado Stevedoring Corp. v. Willard, D.C.N.Y., 91 F.Supp. 77, affirmed, C.A., 185 F.2d 232.

33. Mich.—Kolbas v. American Boston Min. Co., 267 N.W. 751, 275 Mich. 616.

34. Or.—Stacey v. Sate Industrial Accident Commission, 26 P.2d 1092, 145 Or. 195.

35. U.S.—Tudman v. American Ship Bldg. Co., C.A.III., 170 F.2d 842—Mille v. McManigal, C.C.A.N.Y., 69 F.2d 644.

Ariz.—Ellison v. Industrial Commission, 257 P.2d 391, 75 Ariz. 374—Brown v. Industrial Commission, 59 P.2d 323, 48 Ariz. 161.

Iowa.—Stice v. Consolidated Indiana Coal Co., 291 N.W. 452, 228 Iowa 1031.

Kan.—Souden v. Rine Drilling Co., 92 P.2d 74, 150 Kan. 239.

Md.—Union Min. Co. v. Del Signora, 59 A.2d 771, 191 Md. 55—Stevenson v. Hill, 185 A. 551, 170 Md. 676.

Ohio.—Manes v. Industrial Commission of Ohio, 22 N.E.2d 135, 60 Ohio App. 619.

Okl.—Whittington v. Tidal Oil Co., 279 P.2d 926.

Or.—Dodd v. State Indus. Acc. Commission, 315 P.2d 138—Gerber v. State Industrial Acc. Commission, 101 P.2d 416, 164 Or. 353.

Wash.—Kuhle v. Department of Labor and Industries, 130 P.2d 1047,

15 Wash.2d 427—Smith v. Department of Labor and Industries, 95 P.2d 1031, 1 Wash.2d 305. 71 C.J. p 1464 note 28.

Interpretation

Where an award was entered in 1934, stopping compensation, and subsequently an award of additional compensation was made and employer in application for review of award presented as a ground for review contention that claim was barred under res judicata doctrine, because of 1934 award statement of ground for review would be interpreted as properly presenting issue that 1934 award prevented making of allowance for compensation for period prior to that time, although statement might be interpreted to mean that claim of employer was that award was conclusive on claimant's right to any further award.

Mich.—Murray v. Ford Motor Co., 296 N.W. 284, 296 Mich. 348.

Statute not applicable

Statutes providing that in a workmen's compensation proceeding, an appeal from an award must be taken to supreme court within thirty days after copy of award has been sent to parties, had no application in proceeding by widow for death benefits from firemen's retirement fund, in view of fact that fireman's failure to appeal from an adverse decision on his application for additional compensation could not render res judicata his widow's claim for death benefits coming into existence upon decedent's death.

Idaho.—Branson v. Firemen's Retirement Fund of State of Idaho, 312 P.2d 1037.

Proceedings held taken in time

(1) In general.

Kan.—Brown v. Shellabarger Mill & Elevator Co., 50 P.2d 919, 142 Kan. 476.

W.Va.—Wright v. Workmen's Compensation Appeal Board, 185 S.E. 559, 117 W.Va. 401.

71 C.J. p 1464 note 28 [a].

(2) A judgment of superior court sustaining an appeal from board, and reversing judgment of board dismissing claim for compensation on ground of change in condition, was reviewable by court of appeals on direct bill of exceptions, and writ of error was not subject to dismissal on ground that bill of exceptions was sued out prematurely.

Ga.—New Amsterdam Casualty Co. v. McFarley, 13 S.E.2d 583, 64 Ga. App. 465.

36. Kan.—Davis v. Phillips Petroleum Co., 19 P.2d 733, 133 Kan. 30.

37. Ohio.—Industrial Commission of Ohio v. Monroe, 161 N.E. 31, 27 Ohio App. 169.

38. Pa.—Wilson v. National Freight & Delivery Co., 165 A. 259, 103 Pa. Super. 472—Walatka v. Levin, 100 Pa.Super. 489.

39. Mich.—Sedlow v. Peoples Wayne County Bank, 264 N.W. 388, 274 Mich. 325.

40. Wash.—Nagel v. Department of Labor and Industries, 66 P.2d 313, 189 Wash. 631.

Record held not to authorize reopening

Ky.—Palko v. Fordson Coal Co., 169 S.W.2d 602, 293 Ky. 511.

Record held not to establish that board had mistakenly construed medical testimony.

Ky.—Palko v. Fordson Coal Co., *supra*.

Record held not to sustain contention Or.—Jacoby v. State Industrial Acc. Commission, 106 P.2d 294, 165 Or. 230.

41. Wash.—Swak v. Department of

the record of a previous appeal as a part of the record.⁴² If the commission makes conclusions on its own observation, it has been held that its observation must be recorded so that the appellate court can tell whether there was evidence by ocular preference on which the commission could make a finding.⁴³ In the absence from the record of the evidence on the hearing for the first award an award of increased compensation because of changed conditions since such award cannot be reviewed.⁴⁴

Where the time for filing the stenographic report or agreed statement of facts is prescribed by statute, there must be a compliance with such statute;⁴⁵ otherwise a statement of facts will be stricken.⁴⁶ Where a statement of facts is stricken for untimely filing, the departmental record will not be stricken as a part thereof, since it is a part of the record on appeal.⁴⁷ A court may consider questions of law pertaining to terminal dates involved in an application to reopen the claim on the ground of aggravation without a statement of facts.⁴⁸

Where the record discloses that claimant failed to give timely notice of appeal from a supervisor's order to the compensation board, the burden is on him to challenge the existence of the apparent imperfection of his proceedings.⁴⁹

§ 883. — Dismissal

An appeal will not be dismissed on the ground that the time for taking an appeal from a prior judgment has expired.

In a proper case, an appeal may be dismissed by the court.⁵⁰ An appeal will not be dismissed on

the ground that the time for taking an appeal from a prior judgment has expired.⁵¹

§ 884. — Evidence and Matters Considered

On review of an award on a petition seeking additional compensation, the court may consider the evidence, claim, and finding at the original hearing, and the evidence at the hearing in the proceedings seeking the additional compensation.

It has been held that, on review of an award on a petition seeking additional compensation, the court may consider the evidence, claim, and finding at the original hearing,⁵² and the evidence at the hearing in the proceedings seeking the additional compensation.⁵³ It has also been held that the entire transcript certified by the commission may be admitted although the transcript contains reports incompetent under rules of evidence at common law.⁵⁴ Where there are no findings of fact, the court may consider a résumé of the evidence attached by stipulation of the parties to the return in certiorari in order to ascertain if the facts necessarily inferred from the award as presumptively found have any evidential support.⁵⁵

On the other hand, it has been held that the court should not consider a rule of the commission not pleaded or appearing in the record,⁵⁶ nor can the employee relitigate questions arising out of the facts, circumstances, and conditions surrounding the injury, existing and known at the time of decision on the original application, from which he did not appeal.⁵⁷

Labor & Industries, 240 P.2d 560, 40 Wash.2d 51.

42. Mo.—Herndon v. S. A. Robertson Const. Co., App., 59 S.W.2d 75.

43. Utah.—Silver King Coalition Mines Co. v. Industrial Commission of Utah, 69 P.2d 608, 92 Utah 511.

44. Ind.—Indianapolis Bleaching Co. v. Morgan, 129 N.E. 644, 75 Ind. App. 672.

45. Ill.—Morris & Co. v. Industrial Commission, 137 N.E. 465, 305 Ill. 447.

46. Wash.—Hunter v. Department of Labor and Industries, 68 P.2d 224, 190 Wash. 380.

47. Wash.—Hunter v. Department of Labor and Industries, 68 P.2d 224, 190 Wash. 380.

Limited scope of review

In compensation proceeding, where statement of facts was stricken for untimely filing, and departmental record was presented, assignment of error based on finding of fact would not be considered, since appellate

court could not say on what evidence trial court based its findings or that findings were based solely on departmental record, but was required to assume that trial court acted on sufficient evidence, and could only consider whether findings and conclusions supported judgment.

Wash.—Hunter v. Department of Labor and Industries, supra.

48. Wash.—Karniss v. Department of Labor and Industries, 239 P.2d 555, 39 Wash.2d 898.

49. Wash.—Smith v. Department of Labor and Industries, 95 P.2d 1031, 1 Wash.2d 305.

50. Pa.—Stanson v. Ross Federal Service, Com.Pl., 88 Pittsb.L.J. 157.

Order entered pursuant to mandate

Proceeding to vacate order of industrial commission was dismissed where order was entered pursuant to mandate of supreme court in a prior proceeding for review.

Okl.—Parks v. State Industrial Commission, 77 P.2d 1112, 182 Okl. 413.

51. Ky.—Faulkner v. Morehead & N. F. R. Co., 298 S.W. 392, 221 Ky. 198.

52. Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

53. Idaho.—Carlson v. F. H. De Atley & Co., 46 P.2d 1089, 55 Idaho 713.

Ill.—Biker v. Industrial Commission, 160 N.E. 180, 328 Ill. 641.

Kan.—Jones v. W. U. Tel. Co., 192 P.2d 141, 165 Kan. 1.

Pa.—Kalina v. Motor Freight Exp., Com.Pl., 42 Berks Co. 187—Matichak v. Motley Coal Co., Com.Pl., 55 Lack.Jur. 49.

54. Ohio.—Industrial Commission of Ohio v. Link, 170 N.E. 594, 34 Ohio App. 174, modified on other grounds 171 N.E. 99, 122 Ohio St. 181.

55. Mich.—Foley v. Detroit United R. Co., 157 N.W. 45, 190 Mich. 507.

56. Colo.—Industrial Commission of Colorado v. Roper, 12 P.2d 349, 91 Colo. 125.

57. Mo.—Brammer v. Binkley Min. Co. of Mo., App., 244 S.W.2d 584.

Or.—Grunnett v. State Industrial Accident Commission, 215 P. 881, 108 Or. 178.

The court may properly consider matters which were before the compensation board for determination when it made its award;⁵⁸ and the appellate court is not restricted to a consideration of the matters raised by the employee's application to rehear his claim where the compensation board broadened the scope of the rehearing and awarded compensation for an injury which was not within the claim made in the application for rehearing.⁵⁹

§ 885. — Presumptions

There is a presumption in favor of the regularity and correctness of the proceedings and determinations made below, and the burden is cast on the party who asserts the contrary.

In the absence of any evidence to the contrary, the court, on review, will presume that the findings of fact made by the commission were supported by competent evidence⁶⁰ and that the issues were decided correctly.⁶¹ The usual presumptions of the regularity of the proceedings below,⁶² and that public officers performed their duty,⁶³ will be indulged. The decision will be considered, *prima facie*, to be correct,⁶⁴ and the burden of proof rests on the party attacking the decision.⁶⁵

An order that claimant is not entitled to further compensation is presumed, in the absence of a showing to the contrary, to be based on the fact that claimant has been adequately compensated⁶⁶ rather than on the fact that there is a lack of jurisdictional facts.⁶⁷ It has also been presumed that

such an order is an action final in its nature,⁶⁸ going to some basis of claimant's right.⁶⁹ Where the commission on its own motion entered an additional award, it must be assumed, on review, that the commission believed that a mistake had been made.⁷⁰

Where no finding was made that the injury was the result of an accident, it must be assumed that the occurrence did not involve an accident or fortuitous circumstance.⁷¹ Where the commission fails either to deny or to award compensation for a certain injury, it will be presumed that the commission did not consider such injury.⁷² Where plaintiff's request for increased compensation had not been disposed of as provided by law, it must be presumed that the action of the commission allowing further compensation was taken with respect to his request.⁷³

In the absence of testimony to the contrary, plaintiff's testimony is to be accepted as true,⁷⁴ and the evidence and the reasonable inferences to be drawn therefrom will be stated in the light most favorable to applicant.⁷⁵

On further review there is a presumption in favor of the correctness of a decision of the lower court which in effect affirmed the action of the compensation authorities.⁷⁶

§ 886. — Matters of Discretion

Matters within the discretion of the lower tribunal are not reviewable unless there has been a clear abuse of discretion.

58. Wash.—Matson v. Department of Labor and Industries, 88 P.2d 825, 198 Wash. 507.

59. Wash.—Pulver v. Department of Labor and Industries, 56 P.2d 701, 185 Wash. 664.

60. Okl.—Baker v. Indian Min. & Royalty Co., 99 P.2d 1038, 186 Okl. 644.

Pa.—Michetti v. State Workmen's Ins. Fund, 17 A.2d 712, 143 Pa. Super. 458.

61. Wash.—Karniss v. Department of Labor and Industries, 339 P.2d 555, 39 Wash.2d 898.

62. Okl.—McQuiston v. Tyler, 97 P.2d 552, 186 Okl. 315.

63. W.Va.—Consentina v. State Compensation Com'r, 31 S.E.2d 499, 127 W.Va. 67.

64. Wash.—Hastings v. Department of Labor and Industries, 163 P.2d 142, 24 Wash.2d 1—Nilsen v. Department of Labor and Industries, 77 P.2d 598, 194 Wash. 97.

Testimony before examiner

Decision of department of labor and industries in compensation case does not have same presumptive ef-

fect when testimony is before examiner as where it is taken before one or more members of board, notwithstanding statute providing that department's decision must be considered as *prima facie* correct.

Wash.—Dry v. Department of Labor and Industries, 39 P.2d 609, 180 Wash. 92.

65. Wash.—Larson v. Department of Labor and Industries, 166 P.2d 159, 24 Wash.2d 461—Hastings v. Department of Labor and Industries, 163 P.2d 142, 24 Wash.2d 1—Brown v. Department of Labor and Industries, 161 P.2d 533, 23 Wash.2d 572—Nilsen v. Department of Labor and Industries, 77 P.2d 598, 194 Wash. 97.

Abuse of discretion

One who seeks to attack decision of commission declining to reduce or suspend compensation must show that commission abused its discretion.

Colo.—National Lumber & Creosoting Co. v. Kelly, 75 P.2d 144, 101 Colo. 535.

66. Ohio.—Dykes v. Industrial Commission of Ohio, 17 Ohio App. 384.

67. Ohio.—Dykes v. Industrial Commission of Ohio, *supra*.

68. Ohio.—Perkins v. Industrial Commission of Ohio, 140 N.E. 134, 106 Ohio St. 233.

69. Ohio.—Perkins v. Industrial Commission of Ohio, *supra*.

70. Colo.—Employers Mut. Ins. Co. v. Jacoe, 81 P.2d 389, 103 Colo. 515—Clayton Coal Co. v. Zak, 29 P.2d 374, 94 Colo. 171.

71. Mich.—Arnold v. Ogle Const. Co., 53 N.W.2d 655, 333 Mich. 652.

72. Okl.—Dierks Lumber & Coal Co. v. Hagan, 114 P.2d 919, 189 Okl. 210.

73. Or.—Miller v. State Industrial Acc. Commission of Oregon, 39 P.2d 366, 149 Or. 49.

74. La.—Bailey v. Gifford Sand & Gravel Co., App., 140 So. 240, annulled on other grounds 145 So. 712.

75. Cal.—Industrial Indem. Co. v. Industrial Acc. Commission, 252 P.2d 649, 115 C.A.2d 684.

76. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, C.C.A.Mass., 192

In accordance with the rule on the review of civil cases generally, matters within the discretion of the lower tribunal are not reviewable⁷⁷ unless there has been a clear abuse of discretion.⁷⁸ While it is generally held that the board or commission is vested with certain discretion under a statute permitting it to reopen a case or rescind, alter, or amend its orders,⁷⁹ including the power to authorize cessation of payments retroactively,⁸⁰ there is authority that a modification or change with respect to former findings and orders is not purely discretionary and beyond the right of appeal.⁸¹ It has even been held that the duty to award increased compensation is not discretionary⁸² and contains no

element of discretion not associated with the duty to award compensation in the first instance.⁸³

§ 887. — Questions of Fact and Sufficiency of Evidence

The finding of the board or commission on a question of fact is conclusive, and such findings will be sustained on review if supported by the evidence.

In the same manner as a trial judge's findings⁸⁴ or a jury's verdict,⁸⁵ the finding of the board or commission on a question of fact is conclusive,⁸⁶ in the absence of fraud.⁸⁷ Otherwise expressed, the findings of the board or commission will be sustained on review if supported by the evidence,⁸⁸

F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

77. Colo.—Industrial Commission v. Kokel, 116 P.2d 915, 108 Colo. 353. 71 C.J. p 1465 note 48.

78. Colo.—Beckley v. Industrial Commission, 146 P.2d 990, 112 Colo. 135—Kokel v. Industrial Commission, 139 P.2d 259, 111 Colo. 188.

Ohio.—State ex rel. White v. Industrial Commission of Ohio, App., 40 N.E.2d 453.

71 C.J. p 1465 note 49.

Discretion held not abused

Colo.—Industrial Commission v. Kokel, 116 P.2d 915, 108 Colo. 353.

79. Colo.—Industrial Commission v. Kokel, supra.

Ky.—South East Coal Co. v. Spangler, 243 S.W.2d 56—W. E. Caldwell Co. v. Borders, 193 S.W.2d 453, 301 Ky. 843.

71 C.J. p 1465 note 50.

80. Conn.—Morisi v. Ansonia Mfg. Co., 142 A. 393, 108 Conn. 31.

81. Or.—Clerich v. State Industrial Accident Commission, 23 P.2d 534, 143 Or. 827—Iwanicki v. State Industrial Acc. Commission of Oregon, 205 P. 990, 104 Or. 650, 29 A.L.R. 682.

82. Or.—Chebot v. State Industrial Accident Commission, 212 P. 792, 106 Or. 660.

83. Or.—Chebot v. State Industrial Accident Commission, supra.

84. Ind.—Wolfcale v. Grush, 57 N.E.2d 438, 115 Ind.App. 155.

Review of findings of court in general see Appeal and Error § 1656 et seq.

85. Ind.—Wolfcale v. Grush, supra. Wash.—Omeitt v. Department of Labor and Industries, 152 P.2d 973, 21 Wash.2d 684.

Review of verdicts in general see Appeal and Error § 1647 et seq.

86. Ariz.—Grim v. Industrial Commission, 214 P.2d 892, 70 Ariz. 1.

Ga.—Ingram v. Liberty Mut. Ins. Co., 10 S.E.2d 99, 62 Ga.App. 789.

Idaho.—Walker v. Hogue, 185 P.2d 708, 67 Idaho 484.

Ind.—International Detrola Corp. v. Hoffman, 70 N.E.2d 844, 224 Ind. 613.

Mass.—McGowan's Case, 193 N.E. 28, 288 Mass. 441.

Mich.—Samels v. Goodyear Tire & Rubber Co., 35 N.W.2d 265, 323 Mich. 251—Laichalk v. Chicago Pneumatic Tool Co., 13 N.W.2d 826, 308 Mich. 298—Sweet v. Eddy Paper Corp., 6 N.W.2d 883, 303 Mich. 492.

N.J.—Simon v. R. H. H. Steel Laundry, Inc., 95 A.2d 446, 25 N.J.Super. 50, affirmed 98 A.2d 804, 26 N.J.Super. 598.

Pugh v. Winslow Const. Co., 34 A.2d 281, 131 N.J.Law 23.

N.Y.—Becker v. Marcy State Hospital, 38 N.Y.S.2d 219, 264 App.Div. 643.

Pa.—Michetti v. State Workmen's Ins. Fund, 17 A.2d 712, 143 Pa. Super. 458.

Zimmer v. Closky, Com.Pl., 85 Pittsb.Leg.J. 688.

R.I.—Bernier v. Narragansett Elec. Co., 186 A. 479, 56 R.I. 438.

Tex.—Mullens v. Texas Indemnity Ins. Co., Civ.App., 153 S.W.2d 861, error refused.

71 C.J. p 1466 note 57.

87. R.I.—Rau Fastener Co. v. Carr, 60 A.2d 499, 74 R.I. 284—Walsh-Kaiser Co. v. Yeager, 50 A.2d 776, 72 R.I. 298—Bernier v. Narragansett Elec. Co., 186 A. 479, 56 R.I. 438.

88. U.S.—Portland Stevedoring Co. v. Wegener, C.C.A.Or., 162 F.2d 830.

Bernatowicz v. Nacirema Operating Co., D.C.Pa., 48 F.Supp. 4—Valeri v. Lowe, D.C.N.Y., 26 F.Supp. 761.

Ariz.—Foutz v. Phelps Dodge Corp., 236 P.2d 42, 72 Ariz. 350—Wise v. Six Companies, 28 P.2d 1007, 43 Ariz. 24.

Colo.—Martin v. Industrial Commission, 74 P.2d 1243, 101 Colo. 540.

Fla.—Sonny Boy's Fruit Co. v. Comp-ton, 46 So.2d 17.

Ga.—London Guarantee & Acc. Co. v. Pittman, 25 S.E.2d 60, 69 Ga.App. 146—Bituminous Cas. Corp. v. Wilbanks, 23 S.E.2d 519, 68 Ga.App. 631—City of Hapeville v. Preston, 16 S.E.2d 774, 65 Ga.App. 835—Evans v. New Amsterdam Cas. Co., 9 S.E.2d 706, 62 Ga.App. 666.

Idaho.—Bower v. Smith, 118 P.2d 737, 63 Idaho 128.

Ind.—Morton v. Felix, 10 N.E.2d 431, 104 Ind.App. 666.

Iowa.—Oldham v. Scofield & Welch, 269 N.W. 925, 222 Iowa 764.

La.—Dees v. Louisiana Oil Refining Corporation, App., 162 So. 597—Green v. National Manufacture & Stores Corporation, App., 159 So. 412.

Mich.—Drake v. Fuller Mfg. Co., 297 N.W. 228, 297 Mich. 168—Wicko v. Ford Motor Co., 290 N.W. 818, 292 Mich. 335—Walker v. U. S. Aluminum Co., 273 N.W. 569, 280 Mich. 281.

N.J.—Ginter v. Westinghouse Elec. & Mfg. Corp., Lamp Division, 78 A.2d 403, 11 N.J.Super. 338.

Rotino v. J. P. Scanlon, Inc., 19 A.2d 777, 126 N.J.Law 419.

Pa.—Callahan v. Philadelphia & Reading Coal & Iron Co., Com.Pl., 28 Northumb.Leg.J. 61.

R.I.—Gilbane Bldg. Co. v. Feeney, 135 A.2d 262—Catanese v. A. D. Juilliard & Co., 125 A.2d 123—Fulford Mfg. Co. v. Lupoli, 67 A.2d 846, 75 R.I. 488—Rau Fastener Co. v. Carr, 60 A.2d 499, 74 R.I. 284—Walsh-Kaiser Co. v. Yeager, 50 A.2d 776, 72 R.I. 298—Bernier v. Narragansett Elec. Co., 186 A. 479, 56 R.I. 438.

Utah.—Caillet v. Industrial Commission of Utah, 58 P.2d 760, 60 Utah 8.

Wash.—Collins v. Department of Labor and Industries, 310 P.2d 232, 50 Wash.2d 194—Anderson v. Department of Labor and Industries, 159 P.2d 397, 23 Wash.2d 76—Schraum v. Department of Labor and Industries, 85 P.2d 262, 197 Wash. 336—Nilsen v. Department of Labor and Industries, 77 P.2d 593, 194 Wash.

or by ample evidence,⁸⁹ or by competent evidence,⁹⁰ or by competent evidence sufficient to support an order or award,⁹¹ or by substantial evidence,⁹² or by substantial competent evidence.⁹³ Likewise, the findings will be sustained on review if supported by

any evidence,⁹⁴ or by any competent evidence,⁹⁵ or by any reasonable testimony,⁹⁶ or, if based on a legitimate conclusion from facts proved, by competent evidence.⁹⁷ The question of the weight⁹⁸ and

97—Soko v. Department of Labor and Industries, 42 P.2d 42, 181 Wash. 153, modified on other grounds 45 P.2d 30, 181 Wash. 153. 71 C.J. p 1466 note 58.

Some evidence

Mich.—Harris v. Castile Mining Co., 193 N.W. 855, 222 Mich. 709—Solomon v. Detroit United Ry., 192 N.W. 568, 221 Mich. 599.

Not palpably contrary to decision

Decision of commission denying compensation for recurred or increased disability would not be disturbed where evidence was not palpably contrary to decision.

Ill.—Czerny v. Industrial Commission, 16 N.E.2d 739, 369 Ill. 275.

89. Ky.—Standard Accident Ins. Co. v. Hinson, 64 S.W.2d 574, 251 Ky. 287.

N.Y.—Tschaspe v. Albee Godfrey-Whale Creek Co., 37 N.Y.S.2d 171, 264 App.Div. 961.

N.C.—Knight v. Ford Body Co., 197 S.E. 568, 214 N.C. 7.

90. Ariz.—Beutler v. Industrial Commission, 190 P.2d 918, 67 Ariz. 72.

Colo.—C. S. Card Iron Works Co. v. Radovich, 30 P.2d 1108, 94 Colo. 426.

Mo.—Adkins v. Bramhall, App., 238 S.W.2d 86.

Okl.—General Acc. Fire & Life Assur. Corp. v. Mowry, 262 P.2d 421—Brooks & Dahlgren v. Pettigrew, 159 P.2d 743, 195 Okl. 550—Pittsburgh Plate Glass Co. v. Davison, 122 P.2d 888, 190 Okl. 228—Independent Oil & Gas Co. v. Mooney, 103 P.2d 557, 187 Okl. 472—Mullman v. Hirschler, 87 P.2d 162, 184 Okl. 318—Oak Drilling Co. v. Gibbons, 83 P.2d 816, 183 Okl. 586—Wilcox Oil & Gas Co. v. Satterfield, 63 P.2d 696, 178 Okl. 418—Southwestern Cotton Oil Co. v. Hall, 46 P.2d 455, 172 Okl. 644—Gibbs v. Lawrence, 27 P.2d 355, 166 Okl. 256.

Pa.—Sorby v. Three Rivers Motors, 114 A.2d 347, 178 Pa.Super. 187.

Koller v. State Workmen's Ins. Fund, Com.Pl., 46 Berks Co. 45—Petterhoff v. Susquehanna Collieries Co., Com.Pl., 50 Dauph.Co. 341—Callahan v. Philadelphia & Reading Coal & Iron Co., Com.Pl., 28 Northumb.Leg.J. 61—Stanson v. Ross Federal Service, Com.Pl., 88 Pittsb.Leg.J. 157—Minbar v. Duquesne Coal & Coke Co., Com.Pl., 28 Wash.Co. 123—Eisenhart v. Union Gas Coal Co., Com.Pl., 22 Wash.Co. 175.

Wash.—Husa v. Department of Labor and Industries of State of Wash-

ington, 146 P.2d 191, 20 Wash.2d 114.

71 C.J. p 1466 note 61.

Some competent evidence

Ga.—Robertson v. Aetna Life Ins. Co., 141 S.E. 504, 37 Ga.App. 703.

71 C.J. p 1466 note 62.

91. Ga.—Royal Indem. Co. v. Babb, 16 S.E.2d 907, 66 Ga.App. 51—Evans v. New Amsterdam Cas. Co., 9 S.E. 2d 706, 62 Ga.App. 666.

71 C.J. p 1466 note 63.

92. U.S.—Hudnell v. O'Hearne, D.C. Md., 99 F.Supp. 954.

Cal.—Brown v. Industrial Acc. Commission of Cal., 111 P.2d 931, 44 C.A.2d 6—Newman v. Industrial Acc. Commission of California, 30 P.2d 571, 137 C.A. 477.

Kan.—Jones v. W. U. Tel. Co., 192 P.2d 141, 165 Kan. 1.

Pa.—Spence v. Lash & Bailey, 22 A.2d 35, 146 Pa.Super. 177.

Wash.—Brown v. Department of Labor and Industries, 161 P.2d 533, 23 Wash.2d 572—Omeitt v. Department of Labor and Industries, 152 P.2d 973, 21 Wash.2d 684—Roellich v. Department of Labor and Industries, 148 P.2d 957, 20 Wash.2d 674—Husa v. Department of Labor and Industries of State of Washington, 146 P.2d 191, 20 Wash.2d 114—Calkins v. Department of Labor and Industries, 117 P.2d 640, 10 Wash.2d 565—Darling v. Department of Labor and Industries, 108 P.2d 1034, 6 Wash.2d 651.

Wyo.—Harvey v. Stanolind Oil & Gas Co., 84 P.2d 755, 53 Wyo. 495, rehearing denied 86 P.2d 735, 53 Wyo. 495.

71 C.J. p 1466 note 64.

"Substantial evidence" which will sustain a verdict in a compensation case is that character of evidence which would convince an unprejudiced thinking mind of truth of fact to which evidence is directed.

Wash.—Omeitt v. Department of Labor and Industries, 152 P.2d 973, 21 Wash.2d 684.

Amended application

Where there is any substantial evidence, unobjected to when introduced, to sustain finding and award, evidence is sufficient, and, on appeal, application, if it could have been amended in proceedings before board to conform to evidence, will be deemed amended accordingly.

Ind.—Wolfcale v. Grush, 57 N.E.2d 438, 115 Ind.App. 155.

93. Kan.—Jones v. W. U. Tel. Co., 192 P.2d 141, 165 Kan. 1—Brown

v. Shellabarger Mill & Elevator Co., 50 P.2d 919, 142 Kan. 476.

Pa.—Sorby v. Three Rivers Motors, 114 A.2d 347, 178 Pa.Super. 187—Reager v. Day & Zimmerman, 94 A.2d 81, 173 Pa.Super. 102.

Utah.—Littsos v. Industrial Commission of Utah, 194 P. 338, 57 Utah 259.

Wash.—Stevich v. Department of Labor and Industries, 47 P.2d 32, 182 Wash. 401.

94. Cal.—Brown v. Industrial Acc. Commission of Cal., 111 P.2d 931, 44 C.A.2d 6.

Mich.—Webber v. Steiger Lumber Co., 34 N.W.2d 516, 322 Mich. 675.

Okl.—Farris-Cantrell v. State Industrial Commission, 82 P.2d 984, 183 Okl. 456.

Wis.—Hipke v. Badger Paper Mills, 52 N.W.2d 401, 261 Wis. 226.

71 C.J. p 1466 note 66.

95. Ga.—Bituminous Cas. Corp. v. Wilbanks, 23 S.E.2d 519, 68 Ga.App. 631.

Mich.—Blust v. National Brewing Co., 280 N.W. 126, 235 Mich. 103.

Okl.—Phillips Petroleum Co. v. Anguish, 209 P.2d 689, 201 Okl. 691—Special Indem. Fund v. Knight, 200 P.2d 766, 201 Okl. 24—Pittsburgh Plate Glass Co. v. Davison, 122 P.2d 388, 190 Okl. 228—Blackburn Const. Co. v. Kennedy, 88 P.2d 881, 184 Okl. 549—Graner Const. Co. v. Brandt, 68 P.2d 788, 180 Okl. 221. Pa.—Zuro v. McClintic Marshall Co., 195 A. 160, 129 Pa.Super. 143—Maishock v. State Workmen's Ins. Fund, 195 A. 143, 129 Pa.Super. 118. S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349. 71 C.J. p 1466 note 67.

96. Ariz.—Doby v. Miami Trust Co., 14 P.2d 476, 40 Ariz. 490.

97. Ill.—Carson-Payson Co. v. Industrial Commission, 121 N.E. 264, 285 Ill. 635.

98. Cal.—Department of Public Works v. Industrial Acc. Commission, 37 P.2d 196, 1 C.A.2d 584.

Colo.—Wiernman v. Tunnell, 120 P.2d 638, 108 Colo. 544.

Fla.—Sonny Boy's Fruit Co. v. Comp-ton, 46 So.2d 17.

N.J.—Watts v. City of Newark, 54 A.2d 622, 25 N.J.Misc. 402.

Okl.—Safeway Stores v. Brumley, 128 P.2d 1006, 191 Okl. 270.

Pa.—Thomas v. Susquehanna Collieries Co., 25 A.2d 98, 148 Pa.Super. 161.

R.I.—Giblane Bldg. Co. v. Feeney, 135 A.2d 262—Catanese v. A. D. Julliard & Co., 125 A.2d 123.

credibility⁹⁹ of the evidence and whether the burden of proof is sustained¹ is solely for the compensation board or commission, and, accordingly, the court will not weigh conflicting evidence.²

The court, however, is not bound by the reasoning of the commission or commissioner.³ If the conclusions of the commission or commissioner are unsupported by any competent⁴ or substantial⁵ evidence, or are based on conjecture or surmise,⁶ they are reviewable, where they go to essential facts on which the petition is based.⁷ Where there is an implied finding of fact, the court may search the testimony to ascertain if the necessary inferred facts

presumptively found have evidential support.⁸ A finding by the board as to the cause of the employee's incapacity does not preclude the court on review from examining into the cause of a later incapacity as to which the employee's rights were reserved.⁹

In passing on a question as to the sufficiency of evidence, the court must consider evidence in the light most favorable to claimant.¹⁰

The matter of limitations of time for reconsideration and modification of a compensation award is a question of law reviewable by the courts,¹¹ and a question whether just cause has been shown for

S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349, 71 C.J. p 1466 note 71.

Personal appearance

Supreme court would not disturb findings of board in proceedings for modification of compensation award on ground of change in claimant's physical conditions, where witnesses had personally appeared and testified before board and evidence was of such nature as might lead different minds to different conclusions. Idaho.—Fackenthall v. Eggers Pole & Supply Co., 108 P.2d 300, 62 Idaho 46.

99. Okl.—Safeway Stores v. Brumley, 128 P.2d 1006, 191 Okl. 270.

Pa.—Thomas v. Susquehanna Collieries Co., 25 A.2d 98, 148 Pa.Super. 161.

R.I.—Gibbane Bldg. Co. v. Feeney, 135 A.2d 262—Catanese v. A. D. Juilliard & Co., 125 A.2d 123.

1. Me.—Shaw's Case, 140 A. 370, 126 Me. 572.

Pa.—Frederick v. Berwind-White Coal Mining Co., 176 A. 69, 115 Pa. Super. 581.

2. Ariz.—Foutz v. Phelps Dodge Corp., 236 P.2d 42, 72 Ariz. 350—Radaca v. U. S. Smelting, Refining & Min. Co., 158 P.2d 540, 62 Ariz. 464—Stephens v. Miami Copper Co., 130 P.2d 507, 59 Ariz. 528.

Ark.—Mechanics Lumber Co. v. Roark, 224 S.W.2d 806, 216 Ark. 242. Colo.—Arvas v. McNeil Coal Corp., 203 P.2d 966, 119 Colo. 289—Wierman v. Tunnell, 120 P.2d 638, 108 Colo. 544—Industrial Commission v. Downing, 113 P.2d 869, 108 Colo. 76.

Conn.—Manacek v. George McLachlan Hat Co., 186 A. 487, 121 Conn. 541.

Ind.—Curry v. Roach Indiana Corp., 23 N.E.2d 598, 107 Ind.App. 405.

Kan.—Everett v. Kansas Power Co., 165 P.2d 595, 160 Kan. 712.

N.Y.—Coon v. Jermain, 56 N.Y.S. 2d 213, 269 App.Div. 871.

Okl.—Safeway Stores v. Brumley, 128 P.2d 1006, 191 Okl. 270—Farris-Cantrell v. State Industrial

Commission, 82 P.2d 984, 183 Okl. 456.

Pa.—Gallihue v. Auto Car Co., 185 A. 2d 817, 184 Pa.Super. 598.

R.I.—Marconi v. Bartlett Scrap Iron Co., 19 A.2d 766, 66 R.I. 409.

71 C.J. p 1466 note 73.

No substantial conflict

Where psychiatrist testified that claimant was suffering from traumatic neurosis, orthopedic surgeon stated that he did not know, neurological surgeon testified that claimant might be, there was no substantial conflict in testimony, and court was not bound by commission's finding that claimant was not suffering from traumatic neurosis.

Colo.—Arvas v. McNeil Coal Corp., 203 P.2d 966, 119 Colo. 289.

Not erroneous as matter of law

In proceeding to recover additional compensation for claimant's aggravated condition resulting from original injury, commissioner's award denying conditional compensation could not be held erroneous as a matter of law, where evidence was in dispute as to claimant's condition, and also as to whether examining physician's report had been examined by entire board.

Ariz.—Stephens v. Miami Copper Co., 130 P.2d 507, 59 Ariz. 528.

In Washington

(1) Text rule has been applied.

Wash.—McMullin v. Department of Labor and Industry of Washington, 207 P. 956, 120 Wash. 525.

(2) It has been held, however, that where medical testimony as to whether employee was suffering from progressive course of arthritis or from aggravation occasioned by injury was sharply conflicting, supreme court must determine weight of testimony in light of all attendant circumstances.

Wash.—Ferguson v. Department of Labor and Industries of Washington, 85 P.2d 1072, 197 Wash. 524, reheard 90 P.2d 280, 197 Wash. 524.

3. Me.—Shaw's Case, 140 A. 370, 126 Me. 572.

4. Okl.—Wetherbee Elec. Co. v. Collier, 71 P.2d 312, 180 Okl. 473.

R.I.—Fulford Mfg. Co. v. Lupoli, 67 A.2d 846, 75 R.I. 488.

71 C.J. p 1466 note 74.

5. U.S.—Bernatowicz v. Nacirema Operating Co., C.C.A.Pa., 142 F.2d 385.

N.J.—Hopler v. Hill City Coal & Lumber Co., 76 A.2d 17, 5 N.J. 466.

Utah.—Spencer v. Industrial Commission, 290 P.2d 692, 4 Utah 2d 185.

6. Ill.—Carson-Payson Co. v. Industrial Commission, 121 N.E. 264, 285 Ill. 635.

7. Me.—Shaw's Case, 140 A. 370, 126 Me. 572.

8. Mich.—Foley v. Detroit United Ry., 157 N.W. 45, 190 Mich. 507.

9. Mass.—Panagotopoulos' Case, 177 N.E. 809, 276 Mass. 600.

10. Iowa.—Bousfield v. Sisters of Mercy, 86 N.W.2d 109.

Evidence accepted at its face value

On appeal from judgment granting claimant additional compensation on ground of aggravation of disability, supreme court must accept evidence offered by claimant at its face value.

Wash.—Anderson v. Department of Labor and Industries, 159 P.2d 397, 23 Wash.2d 76.

Evidence most favorable to appellee

On appeal in a workmen's compensation case on question of law as to whether there was substantial evidence to support a finding of total future disability, reviewing court could consider only evidence most favorable to appellee.

Kan.—Jones v. W. U. Tel. Co., 192 P.2d 141, 165 Kan. 1.

11. Ky.—Hodgkin v. Webb, 221 S.W.2d 664, 310 Ky. 745.

opening up the case is a mixed question of law and fact.¹²

§ 888. — Harmless Error

The court will disregard error which does not affect the substantial rights of the party complaining.

The general rule that on review of civil actions the court must disregard error which does not affect the substantial rights of the party complaining applies on review of proceedings to increase, diminish, or terminate compensation;¹³ but only error of a prejudicial nature may result in reversal.¹⁴ Accordingly, appellant may not complain of an error which is favorable to himself,¹⁵ and an error is not prejudicial to claimant where the judgment is in his favor.¹⁶

The general rule that there will be no reversal because of harmless error has been applied to error in refusing to allow the taking of the depositions,¹⁷ the admission¹⁸ or exclusion¹⁹ of evidence, the giving of instructions,²⁰ and the use of discretion.²¹ An alleged error to the effect that the board acted on its own motion to correct its own error, whereas the case was reopened on claimant's motion, is not ground for reversal where the employer was duly notified of all the proceedings and took part there-

in.²² A voluntary appearance before the commission without a counsel is harmless if there is no prejudice.²³

§ 889. — Trial De Novo

Where authorized by statute, there may be a trial de novo in the court of questions of fact.

While a trial de novo is not proper where the only question involved is the discretion of the commission as to the amount of the award²⁴ or where the findings are not jurisdictional,²⁵ there are some questions of fact on which, under some statutes, such a trial is authorized,²⁶ such as facts concerning injury, its extent, and the measure of relief to be awarded to claimant.²⁷ Where the board erroneously denied a hearing on a petition for additional compensation on the ground that it was without jurisdiction, the court on appeal may be authorized to conduct a hearing, examine witnesses, and enter a judgment,²⁸ particularly where there is no substantial dispute as to the facts.²⁹

Under some statutes on a trial de novo the court may receive testimony in addition to that received before the compensation board or commission;³⁰ but under other statutes the case must be tried and submitted on the record of the proceedings before

12. Ky.—Hodgkin v. Webb, *supra*.

13. Ga.—Evans v. New Amsterdam Cas. Co., 9 S.E.2d 706, 62 Ga.App. 666.

Ind.—Calumet Paving Co. v. Butkus, 47 N.E.2d 829, 113 Ind.App. 232—Corr v. Trustees of Indiana University, 34 N.E.2d 136, 109 Ind. App. 237—Swift & Co. v. Neal, 18 N.E.2d 491, 106 Ind.App. 139.

Mont.—Paulich v. Republic Coal Co., 102 P.2d 4, 110 Mont. 174.

Or.—Yurick v. State Indus. Acc. Commission, 291 P.2d 721, 206 Or. 108.

Tex.—Mullens v. Texas Indem. Ins. Co., Civ.App., 158 S.W.2d 861, error refused.

Wash.—Karniss v. Department of Labor and Industries, 239 P.2d 555, 39 Wash.2d 898—Dry v. Department of Labor and Industries, 39 P.2d 609, 180 Wash. 92.

71 C.J. p 1467 note 80.

Harmless error in general see Appeal and Error § 1676 et seq.

14. La.—Green v. National Manufacture & Stores Corporation, App., 159 So. 412.

Ohio.—Ball v. Industrial Commission of Ohio, 2 N.E.2d 269, 52 Ohio App. 1.

15. Ill.—Carson-Payson Co. v. Industrial Commission, 121 N.E. 264, 285 Ill. 635.

Or.—Keefer v. State Industrial Accident Commission, 135 P.2d 806, 171 Or. 405.

16. Ohio.—Phillips v. Industrial Commission, 61 N.E.2d 233, 75 Ohio App. 131.

17. Neb.—Peek v. Ayers Auto Supply, 71 N.W.2d 204, 160 Neb. 658.

18. Okl.—Phillips Petroleum Co. v. Clark, 224 P.2d 597, 203 Okl. 561.

19. Ohio.—Fox v. Industrial Commission of Ohio, 125 N.E.2d 1, 162 Ohio St. 569.

Wash.—Wintermute v. Department of Labor and Industries of State of Washington, 48 P.2d 627, 183 Wash. 169—Dry v. Department of Labor and Industries, 39 P.2d 609, 180 Wash. 92.

20. Wash.—Hastings v. Department of Labor and Industries, 163 P.2d 142, 24 Wash.2d 1—Calkins v. Department of Labor and Industries, 117 P.2d 640, 10 Wash.2d 565.

Error held prejudicial

Or.—Dimitroff v. State Indus. Acc. Commission, 306 P.2d 398, 209 Or. 316.

Wash.—La Plant v. Department of Labor and Industries, 301 P.2d 542, 49 Wash.2d 343—Parks v. Department of Labor and Industries, 286 P.2d 104, 46 Wash.2d 895—Franks v. Department of Labor & Industries, 215 P.2d 416, 35 Wash.2d 763

—Hastings v. Department of Labor and Industries, 163 P.2d 142, 24 Wash.2d 1.

21. Wash.—Larson v. Dept. of Labor and Industries, 166 P.2d 159, 24 Wash.2d 461.

22. Ky.—Lincoln Coal Co. v. Watts, 120 S.W.2d 1026, 275 Ky. 130.

23. Utah.—Spencer v. Industrial Commission, 91 P.2d 439, 97 Utah 140.

24. Wash.—Chalmers v. Industrial Ins. Commission, 162 P. 576, 94 Wash. 490.

25. U.S.—Bethlehem Shipbuilding Corp. v. Cardillo, C.C.A.Mass., 102 F.2d 299, certiorari denied 59 S.Ct. 1042, 307 U.S. 645, 83 L.Ed. 1525.

26. R.I.—Salerno v. George A. Fuller Co., 42 A.2d 28, 71 R.I. 41.

Wash.—Smith v. Department of Labor and Industries of Washington, 38 P.2d 1016, 180 Wash. 84.

71 C.J. p 1467 note 83.

27. Wash.—Smith v. Department of Labor and Industries of Washington, *supra*.

28. Mont.—Paulich v. Republic Coal Co., 102 P.2d 4, 110 Mont. 174.

29. Mont.—Paulich v. Republic Coal Co., *supra*.

30. Or.—Hinkle v. State Industrial Acc. Commission, 97 P.2d 725, 163 Or. 395.

the industrial commission, and there is no opportunity for the appearance of witnesses.³¹ On a trial de novo, general rules apply to the weight and sufficiency of the evidence,³² instructions,³³ exceptions,³⁴ the submission of questions to the jury,³⁵ verdict³⁶ and findings,³⁷ and judgment.³⁸

Under some statutes, the burden is on claimant to overcome the prima facie case made by an order closing the claim.³⁹ He must prove that the amount of compensation is inadequate,⁴⁰ and that there has been an aggravation of his injuries.⁴¹ Under the pleadings of the case, the burden may be on the employee to prove that a prior award was set aside on a showing of changed conditions, mistake, or fraud.⁴² Findings by the court which are not with-

in the issue are unnecessary and immaterial.⁴³

New trial. In the absence of statutory authorization therefor, the view has been taken that the court may not grant a new trial on the ground of newly discovered evidence.⁴⁴

§ 890. — Determination and Disposition

In a proper case, the decision of the lower tribunal may be affirmed, modified, set aside, reversed, or remanded for further proceedings.

Where the court determines that the court below was not in error in entering a decree authorizing suspension of payments, it follows that an appeal from a decree directing that payments be continued must be sustained.⁴⁵ In a proper case, the decision of the lower tribunal may be affirmed,⁴⁶ modi-

31. Ohio.—State ex rel. Thompson v. Industrial Commission, 25 N.E. 2d 456, 136 Ohio St. 290.

32. Wash.—Roellich v. Department of Labor and Industries, 148 P.2d 957, 20 Wash.2d 674.

Evidence held sufficient to take case to jury

Or.—Dimitroff v. State Indus. Acc. Commission, 306 P.2d 398, 209 Or. 316—Falkenstrom v. Department of Labor & Industries, 232 P.2d 917, 38 Wash.2d 75—Munday v. Department of Labor & Industries, 213 P.2d 481, 35 Wash.2d 374—Solberg v. Department of Labor and Industries, 169 P.2d 701, 25 Wash.2d 156—Husa v. Department of Labor and Industries of State of Washington, 146 P.2d 191, 20 Wash.2d 114.

33. Or.—Dimitroff v. State Indus. Acc. Commission, 306 P.2d 398, 209 Or. 316.

Wash.—Franks v. Department of Labor & Industries, 215 P.2d 416, 35 Wash.2d 768.

Instruction held erroneous

Wash.—Franks v. Department of Labor & Industries, *supra*.

34. Wash.—Franks v. Department of Labor & Industries, *supra*.

35. Or.—Dimitroff v. State Indus. Acc. Commission, 306 P.2d 398, 209 Or. 316—Keefe v. State Industrial Acc. Commission, 135 P.2d 806, 171 Or. 405.

Wash.—Solberg v. Department of Labor and Industries, 169 P.2d 701, 25 Wash.2d 156—Bilski v. Department of Labor and Industries, 113 P.2d 62, 8 Wash.2d 594.

Held jury question

Wash.—Bilski v. Department of Labor and Industries, *supra*.

Submission of question held erroneous

Ohio.—Logsdon v. Industrial Commission, App., 67 N.E.2d 823, af-

firmed 57 N.E.2d 75, 143 Ohio St. 508.

Or.—Wilson v. State Indus. Acc. Commission, 219 P.2d 138, 189 Or. 114.

Verdict considered advisory

On appeal from order of joint board of department of labor and industries denying a claim of aggravation subsequent to closing order, court could submit case to a jury, but must consider verdict as only advisory, and determine for itself whether department had properly found facts.

Wash.—Schraum v. Department of Labor and Industries, 85 P.2d 262, 197 Wash. 336.

Reading evidence to jury

On appeal from order of department in compensation case, in which another attempt was being made to open closed claim on ground of aggravation, there was no error in permitting evidence to be read from record to jury, where that was necessary to acquaint jury with background of case.

Wash.—Calkins v. Department of Labor and Industries, 117 P.2d 640, 10 Wash.2d 565.

36. Wash.—Roellich v. Department of Labor and Industries, 148 P.2d 957, 20 Wash.2d 674.

37. Wash.—Husa v. Department of Labor and Industries of State of Washington, 146 P.2d 191, 20 Wash. 2d 114—Litke v. Department of Labor and Industries, 98 P.2d 981, 2 Wash.2d 536.

38. Wash.—La Lone v. Department of Labor and Industries, 100 P.2d 26, 3 Wash.2d 191.

39. Wash.—Matela v. Department of Labor and Industries, 24 P.2d 429, 174 Wash. 144.
71 C.J. p 1467 note 84.

Burden not met

Wash.—Petersen v. Department of

Labor and Industries, 217 P.2d 607, 36 Wash.2d 266.

40. Wash.—Kleven v. Department of Labor & Industries of State, 243 P. 2d 488, 40 Wash.2d 415—Karniss v. Department of Labor and Industries, 239 P.2d 555, 39 Wash.2d 898.

41. Wash.—Gillmer v. Department of Labor and Industries, 255 P.2d 899, 42 Wash.2d 387—Husa v. Department of Labor and Industries of State of Washington, 146 P.2d 191, 20 Wash.2d 114—Smith v. Department of Labor and Industries, 38 P.2d 1016, 180 Wash. 84.

Burden sustained

Wash.—Litke v. Department of Labor and Industries, 98 P.2d 981, 2 Wash.2d 536.

42. Tex.—Independence Indemnity Co. v. White, Civ.App., 10 S.W.2d 263, reversed on other grounds, Com.App., 27 S.W.2d 529.

43. Wash.—Babic v. Department of Labor and Industries, 287 P. 32, 156 Wash. 537.

44. Wash.—La Lone v. Department of Labor and Industries, 100 P.2d 26, 3 Wash.2d 191.

45. R.I.—Dunn v. Broomfield, 58 A. 2d 254, 74 R.I. 27—Turner Const. Co. v. Simone, 153 A. 364, 51 R.I. 210.

46. Ga.—Bituminous Cas. Corp. v. Wilbanks, 12 S.E.2d 479, 64 Ga.App. 232—McFarley v. New Amsterdam Cas. Co., 11 S.E.2d 76, 63 Ga.App. 344.

La.—Weeks v. Consolidated Underwriters, App., 73 So.2d 479.

Mass.—Gramolini's Case, 101 N.E.2d 750, 328 Mass. 86.

Mich.—Sotomayor v. Ford Motor Co., 1 N.W.2d 472, 300 Mich. 107—Hood v. Wyandotte Oil & Fat Co., 261 N.W. 295, 272 Mich. 190.

N.J.—Hopler v. Hill City Coal & Lumber Co., 76 A.2d 17, 5 N.J. 466.

Weber v. Brandt, 3 A.2d 804, 121 N.J.Law 600.

fied,⁴⁷ set aside,⁴⁸ vacated,⁴⁹ or reversed.⁵⁰ Also, the proceedings may be dismissed,⁵¹ the appeal dismissed,⁵² a judgment directed without remanding the case,⁵³ the record remitted to the board to make findings,⁵⁴ the finding corrected,⁵⁵ the case remanded for further proceedings⁵⁶ with directions,⁵⁷ such as for the introduction of further evi-

dence,⁵⁸ or a new trial may be granted.⁵⁹

Under some statutes, on appeal from an action of the commissioner refusing to reopen a case formerly determined by him, the appeal board has power only to determine whether the case should be reopened, and cannot order the commissioner to

J. W. Ferguson Co. v. Seaman, 191 A. 739, 15 N.J.Misc. 393, affirmed 197 A. 245, 119 N.J.Law 575. N.Y.—**Wolfe v. City of New York**, 45 N.Y.S.2d 536, 267 App.Div. 794. Ohio.—**McManus v. Industrial Commission of Ohio**, 31 N.E.2d 465, 66 Ohio App. 14. Pa.—**Noel v. H. H. Ward Co., Com. Pl.**, 32 Del.Co. 152—**Kauffman v. United Engineering & Foundry Co., Com.Pl.**, 24 West.L.J. 101, affirmed 33 A.2d 85, 153 Pa.Super. 67. Wash.—**Kleven v. Department of Labor & Industries of State**, 243 P.2d 488, 40 Wash.2d 415. Wis.—**Sheehan v. Industrial Commission**, 76 N.W.2d 343, 272 Wis. 595.

Allowance of credit

Supreme court in proceeding on appeal from decree entered in proceedings to review former decree authorizing cessation of workmen's compensation payments did not have power to allow credit for compensation paid employee pending appeal from former decree.

R.I.—**Catanese v. A. D. Juilliard & Co.**, 125 A.2d 123.

Exercise of discretion not to be ordered

Superior court could not order director of department of labor and industries to exercise his discretion as to whether on his own motion he would readjust compensation previously allowed to injured workman.

Wash.—**Botica v. Department of Labor and Industries**, 52 P.2d 332, 184 Wash. 573.

47. Okl.—**Williams Bros. v. State Industrial Commission**, 50 P.2d 331, 174 Okl. 284.

S.C.—**Cromer v. Newberry Cotton Mills**, 23 S.E.2d 19, 201 S.C. 349.

48. U.S.—**Marshall v. Johnson, C.C. A.Or.**, 127 F.2d 544.

Ky.—**Sawyers v. Lena Rue Coal Co.**, 289 S.W. 1107, 217 Ky. 500.

Mich.—**Nacey v. Utley**, 294 N.W. 675, 295 Mich. 266.

Mo.—**Adkins v. Bramhall, App.**, 238 S.W.2d 36.

Mont.—**Koski v. Murray Hospital**, 56 P.2d 179, 102 Mont. 109.

Rights of dependent

Where compensation claimant died pending appeal to department for review of award by deputy granting further compensation on ground of change of condition and disability, rights of a dependent or personal representative of claimant were not be-

fore department or reviewing court, and award would not be permitted to stand with respect to period prior to claimant's death, for purpose of collection by representative.

Mich.—**Nacey v. Utley**, 294 N.W. 675, 295 Mich. 266.

49. Minn.—**Hawkinson v. Mirau**, 264 N.W. 438, 196 Minn. 120, rehearing denied 265 N.W. 346, 196 Minn. 120.

Okl.—**Ward-Beekman, Inc., v. Odum**, 67 P.2d 798, 180 Okl. 4—**Texas Co. v. Atkinson**, 62 P.2d 1204, 178 Okl. 480.

50. Ga.—**New Amsterdam Casualty Co. v. McFarley**, 18 S.E.2d 588, 64 Ga.App. 465.

Mich.—**Ammond v. Muskegon Motor Specialties Co.**, 251 N.W. 327, 265 Mich. 211.

Mo.—**La Tour v. Green Foundry Co.**, 93 S.W.2d 297, 230 Mo.App. 1063.

Pa.—**Benko v. Vesta Coal Co.**, 28 A.2d 31, 149 Pa.Super. 388.

Naparava v. Glen Alden Coal Co., Com.Pl., 32 Luz.Leg.Reg. 437.

W.Va.—**Miller v. State Compensation Commissioner**, 45 S.E.2d 249, 130 W.Va. 771.

51. Wash.—**Brown v. Department of Labor and Industries**, 161 P.2d 533, 23 Wash.2d 572.

52. La.—**Swift & Co. Fertilizer Works v. Harris, App.**, 163 So. 757.

Pa.—**Morris v. Glen Alden Coal Co., Com.Pl.**, 33 Luz.Leg.Reg. 174—**Oswalt v. Consolidation Coal Co., Com. Pl.**, 96 Pittsb.Leg.J. 145.

53. Idaho.—**Jenkins v. Boise Payette Lumber Co.**, 287 P. 202, 49 Idaho 24.

71 C.J. p 1467 note 91.

54. U.S.—**Marshall v. Johnson, C.C. A.Or.**, 127 F.2d 544.

Pa.—**Powell v. Susquehanna Collieries Co., Com.Pl.**, 32 Luz.Leg. Reg. 161.

71 C.J. p 1467 note 89.

55. N.J.—**Brahany v. Essex County**, 45 A.2d 700, 134 N.J.Law 129.

71 C.J. p 1467 note 90.

Permissive power

Superior court, appellate division, is empowered to review facts and make independent findings thereon in a compensation case, but such power is permissive, and a litigant may not, as a matter of right, require that court to exercise it.

N.J.—**Giacchi v. Richmond Bros. Co.**, 79 A.2d 488, 12 N.J.Super. 308.

56. Conn.—**Osterlund v. State**, 66 A.2d 363, 135 Conn. 498.

Ind.—**Ben Wolf Truck Lines v. Bailey**, 22 N.E.2d 887, 107 Ind.App. 52.

Minn.—**Berg v. Sadler**, 50 N.W.2d 266, 235 Minn. 214.

N.J.—**Giacchi v. Richmond Bros. Co.**, 79 A.2d 488, 12 N.J.Super. 308.

Hawthorne v. Van Keuren & Son, 23 A.2d 291, 127 N.J.Law 501. Ohio.—**State ex rel. Shelley v. Industrial Commission of Ohio**, 14 N.E.2d 412, 133 Ohio St. 438.

Schrader v. Cincinnati & Suburban Bell Co., 11 N.E.2d 253, 56 Ohio App. 501.

Pa.—**Rosa v. Paint Creek Collieries**, 85 A.2d 670, 170 Pa.Super. 540—**Monarko v. Culmerville Coal Co.**, 47 A.2d 295, 159 Pa.Super. 126.

Pogazelski v. Philadelphia & Reading Coal & Iron Co., Com.Pl., 17 Northumb.Leg.J. 37—**Weis v. Frick-Reid Supply Corp., Com.Pl.**, 38 Pittsb.Leg.J. 290.

Power of remand not curtailed

Nothing in compensation act or Certiorari Act curtails powers of remand of superior court, appellate division, in a compensation case.

N.J.—**Giacchi v. Richmond Bros. Co.**, 79 A.2d 488, 12 N.J.Super. 308.

57. Ky.—**Oldham v. Officers' Club of Fort Knox**, 244 S.W.2d 478.

Mo.—**McWhorter v. White Baking Co., App.**, 81 S.W.2d 992.

Wash.—**De Stoop v. Department of Labor and Industries**, 95 P.2d 1026, 1 Wash.2d 340.

W.Va.—**Miller v. State Compensation Commissioner**, 45 S.E.2d 249, 130 W.Va. 771.

As justice requires

Whether remand of compensation case to division of workmen's compensation should be with or without direction for a new hearing is made to depend on what justice requires in particular case.

N.J.—**Giacchi v. Richmond Bros. Co.**, 79 A.2d 488, 12 N.J.Super. 308.

58. La.—**Barnes v. American Mut. Liability Ins. Co., App.**, 62 So.2d 843.

N.J.—**De Marco v. F. H. McGraw Co.**, 172 A. 798, 12 N.J.Misc. 496.

Wash.—**Surina v. Department of Labor and Industries of State**, 210 P.2d 403, 34 Wash.2d 839.

59. Or.—**Clerich v. State Industrial Acc.-Commission**, 23 P.2d 534, 143 Or. 627.

71 C.J. p 1467 note 92.

give claimant a rating of disability then fixed by the board.⁶⁰

In accordance with the general rule on review of civil cases, a decision on a former appeal is the law

of the case.⁶¹ A voluntary dismissal, however, is not res judicata of a subsequent appeal.⁶² The board's affirmance of a referee's termination of compensation is conclusive where no appeal is taken therefrom.⁶³

2. REINSTATEMENT

§ 891. Power to Reinstate

After an order denying further compensation, the commission has jurisdiction to reopen the case and award additional compensation on proof of a change in condition, or where neither the employee nor the commission was aware of injuries causing continuation of disability.

After an order denying further compensation, the commission has jurisdiction to reopen the case⁶⁴ and award additional compensation⁶⁵ on proof of a change of condition,⁶⁶ or where neither the employee nor the commission was aware of injuries causing continuation of disability.⁶⁷ The fact that a claimant allowed an award terminating his compensation to go against him, owing to his inaction, does not prevent the board from reinstating his compensation on proof that his disability has continued or recurred.⁶⁸ Claimant has the burden of proving a recurrence of disability warranting reinstatement of an award;⁶⁹ but where an employee's com-

pensation payments were discontinued because he was able to procure employment, and not because there had been a change in his condition, on his loss of the employment and subsequent application for reinstatement of compensation payments he does not have the burden of proving a change in his physical condition.⁷⁰

The commission, finding that temporary total disability has ceased, has no authority to make a further finding precluding the employee from recovering for disability thereafter resulting from the injury.⁷¹ On the other hand, if claimant does not commence proceedings to review the order discontinuing compensation⁷² within the proper time,⁷³ or there is no showing of a change of condition,⁷⁴ the case cannot be reopened. Under some statutes, where there has been a disallowance of a claim, there can be no reinstatement.⁷⁵

60. W.Va.—Feltz v. Compensation Com'r, 19 S.E.2d 90, 124 W.Va. 75—Reed v. Compensation Com'r, 18 S.E.2d 793, 124 W.Va. 37.

61. U.S.—Travelers Ins. Co. v. Branham, D.C.Pa., 65 F.Supp. 512.

Mo.—Ferguson v. Ozark Distributing Co., 117 S.W.2d 399, 233 Mo.App. 68.

Wash.—De Stoop v. Department of Labor and Industries, 95 P.2d 1026, 1 Wash.2d 340—Carlson v. Department of Labor and Industries, 94 P.2d 191, 200 Wash. 533.

71 C.J. p 1467 note 94.

Former decision as law of case in general see Appeal and Error § 1821.

62. Wash.—Kelly v. Department of Labor and Industries, 20 P.2d 1105, 172 Wash. 525.

63. Pa.—Roeschen v. Dietrich, 163 A. 63, 107 Pa.Super. 298.

71 C.J. p 1467 note 96.

64. Okl.—Amerada Petroleum Corporation v. Whitley, 10 P.2d 683, 156 Okl. 248.

Return of moneys

Where order of compensation bureau, that money paid by city under award for compensation of aged and illiterate employee be paid over to department of labor officials for distribution, was not complied with, but claimant's attorney retained bulk of money paid, city's action in procur-

ing return of such moneys was necessary, and was not ground for reinstating award against city which had been set aside.

N.J.—Davis v. City of Newark, 17 A. 2d 805, 19 N.J.Misc. 85.

Statute construed

Under workmen's compensation act, section authorizing board to reinstate at any time an award, and section permitting board to grant a rehearing on any petition on which board has made an award or disallowance, are mutually exclusive, in view of proviso of latter section that nothing contained therein should limit or restrict right of the board as conferred by former section, so that former section applies only where an award is still in existence or has been suspended or terminated, and latter section applies to disallowances as well as awards.

Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172.

65. Okl.—Amerada Petroleum Corporation v. Whitley, 10 P.2d 683, 156 Okl. 248.

66. Okl.—Amerada Petroleum Corporation v. Whitley, supra.

Pa.—Swartz v. Mitchell, 42 Pa.Dist. & Co. 120, 23 Erie Co. 120.

Evidence held sufficient

Okl.—A. A. Davis & Co. v. Young, 7 P.2d 459, 154 Okl. 144.

Pa.—Morgan v. Sanderson & Porter,

21 A.2d 475, 146 Pa.Super. 37—Seko v. Hub Knitting Co., 16 A.2d 138, 142 Pa.Super. 309.

67. Ma.—Devoe's Case, 163 A. 789, 131 Ma. 452.

71 C.J. p 1467 note 1.

68. Pa.—Stinger v. Rinold Bros., 80 Pa.Super. 420.

69. Pa.—Frederick v. Berwind-White Coal Mining Co., 176 A. 60, 115 Pa. Super. 581—Roeschen v. Dietrich, 163 A. 63, 107 Pa.Super. 298.

70. Mich.—Babcock v. General Motors Corp., Oldsmobile Division, 64 N.W.2d 917, 340 Mich. 58.

71. Okl.—Gardner Petroleum Co. v. Poe, 26 P.2d 743, 166 Okl. 169.

72. Mich.—Kilgour v. Remington-Rand, Inc., 234 N.W. 131, 252 Mich. 657.

Okl.—Hanna Lumber Co. v. Penrose, 7 P.2d 164, 154 Okl. 210.

73. Ga.—U. S. Casualty Co. v. Smith, 157 S.E. 351, 42 Ga.App. 774.

74. Okl.—Hanna Lumber Co. v. Penrose, 7 P.2d 164, 154 Okl. 210.

71 C.J. p 1468 note 6.

75. Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172.

Statutory omission not oversight

Omission of word "disallowance" from section of act providing for reinstatement, at any time, of an award, was not an oversight.

§ 892. Conclusiveness of Former Decision Terminating Compensation

As a general rule, the jurisdiction of a petition for reinstatement based on a recurrence of disability due to an accident is not ousted by a previous decision in which a recurrence was not an issue, but only where the identical question is raised.

As a general rule, the jurisdiction of a petition for reinstatement based on a recurrence of disability due to an accident is not ousted by a previous decision in which a recurrence was not an issue;⁷⁶ but where the petition for reinstatement raises the identical question determined in the adjudication had on a petition for review, the decree on the petition for review deprives the referee of jurisdiction.⁷⁷ So, an unappealed decree of the commission terminating compensation is *res judicata* as to fact findings on which it is based, on the employee's subsequent petition for further compensation,⁷⁸ but a decision which is not a final determination has been held not to prevent a later hearing and grant of compensation,⁷⁹ and a finding that the employee is not entitled to further compensation by reason of changed conditions has been held not to prevent the allowance of increased compensation at a later date because of changed conditions.⁸⁰ A determination that total disability had ceased will not prevent recovery of further compensation on recurrence of total disability,⁸¹ as the cessation of total disability might have been only temporary or apparent.⁸²

§ 893. Time for Application

An application for reinstatement should be timely made.

Under some statutes, a petition for reinstatement because of recurrent disability must be filed within a certain time after the last payment of compensation.⁸³ An injured employee is not required on recurrence of total disability after apparent cessation thereof to apply for reinstatement within a year after total disability has *prima facie* ceased, where the statute does not so provide.⁸⁴ A motion in the commission to review an order of the commission discontinuing an award on the ground of changed conditions is unauthorized and does not affect the time for beginning proceedings in court.⁸⁵

§ 894. Relief Granted

One who applies for the reopening of a closed claim is not entitled to compensation for the period prior to filing the application.

A claimant who applies for the reopening of a closed claim for aggravation of disability is not entitled to compensation for the period prior to filing the application.⁸⁶ A referee's order dismissing a petition to reinstate compensation on the ground that the proper procedure was to file a petition for a rehearing with the compensation board is erroneous where there has been no action by the board on which a rehearing could be had.⁸⁷

Pa.—Leeper v. Logan Iron & Steel Co., *supra*.

76. Pa.—Seko v. Hub Knitting Co., 16 A.2d 138, 142 Pa.Super. 309—Churchill v. Eberle Tanning Co., 16 Pa.Dist. & Co. 602.

Ground for complaint

Fact that employee, whose disability changed from partial to total after expiration of period for which he was awarded and paid disability compensation, filed no petition for rehearing as to compensation for partial disability during interim and total disability thereafter, was no ground for complaint by employer in proceeding for reinstatement of compensation on ground that employee's disability had recurred.

Pa.—Kaufman v. United Engineering Co., 33 A.2d 85, 153 Pa.Super. 67.

77. Pa.—Churchill v. Eberle Tanning & Foundry Co., 33 A.2d 85, 153 Pa.Super. 67.

Huha v. H. C. Frick Coke Co., Com.Pl., 4 Fay.L.J. 171, appeal dismissed 27 A.2d 739, 149 Pa.Super. 108.

78. Pa.—Flowers v. Liggett & Myers Tobacco Co., 20 A.2d 856, 145 Pa.Super. 230.

71 C.J. p 1468 note 9.

79. Mass.—Hanson's Case, 162 N.E. 341, 264 Mass. 300.

Pa.—Petrovan v. Rockhill Coal & Iron Co., 196 A. 516, 130 Pa.Super. 58.

80. Okl.—Noel v. Kozak, 298 P. 298, 148 Okl. 210.

81. Ind.—Fort Branch Coal Mining Co. v. Farley, 130 N.E. 132, 131 N.E. 228, 76 Ind.App. 37.

82. Ind.—Fort Branch Coal Mining Co. v. Farley, *supra*.

83. Pa.—Will v. Stinemen Coal & Coke Co., 37 A.2d 104, 170 Pa.Super. 446—Kaufman v. United Engineering & Foundry Co., 33 A.2d 85, 153 Pa.Super. 67—Gleyze v. Hale Coal Co., 26 A.2d 141, 149 Pa.Super. 18—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172—Straub v. Edward G. Budd Mfg. Co., 175 A. 704, 115 Pa.Super. 395.

Date on which notice of compensation award was mailed to parties did not govern one-year limitation period for filing petition for reinstatement of award.

Pa.—Straub v. Edward G. Budd Mfg. Co., *supra*.

Claim held barred

Pa.—Shea v. Abbotts Dairies, 11 A. 2d 526, 139 Pa.Super. 106.

Claim held not barred

Where employee received compensation benefits for injury and thereafter supplemental agreement was executed which set forth that employee had returned to work at rate of pay greater than at time of injury and that weekly indemnity benefits would be suspended until such time as disability should recur resulting in loss of earning power, one year statute of limitations did not bar employee from obtaining reinstatement of compensation even though more than one year after last payment of benefits had elapsed when injury recurred causing total disability.

Pa.—Dougher v. Lummus Co., 136 A.2d 132, 184 Pa.Super. 615.

84. Ind.—Fort Branch Coal Mining Co. v. Farley, 130 N.E. 132, 131 N.E. 228, 76 Ind.App. 37.

85. Okl.—Vietti v. Crow Coal Co., 246 P. 412, 114 Okl. 296.

86. Wash.—Fuller v. State Department of Labor and Industries, 13 P.2d 903, 169 Wash. 362.

87. Pa.—McGuire v. Dougherty & Jennings, 180 A. 168, 119 Pa.Super. 485.

§ 895. Review

A petition for review must be timely.

It has been held that, on claimant's appeal from an order refusing reinstatement after termination of an allowance, the commission should formally

traverse the facts alleged by claimant, and thus raise a clearly defined issue.⁸⁸ The court will not review the board's original award on appeal from a judgment confirming an order reinstating it, in the absence of a timely petition for review.⁸⁹

B. AGREEMENTS AND SETTLEMENTS

§ 896. Right and Power to Modify or Set Aside

As a general rule, a compensation agreement or settlement may be reviewed because of a subsequent change in the condition of the employee, and the compensation provided for by agreement may be increased, decreased, terminated, or suspended.

In most jurisdictions,⁹⁰ if a compensation agree-

ment or settlement has been entered into between the parties and thereafter there is a change in the condition of the employee, on proper application or petition, the agreement or settlement may be reviewed, and compensation may be increased or diminished,⁹¹ or the payment of compensation may be suspended or terminated.⁹² This is particularly true

88. Or.—*Meaney v. State Industrial Accident Commission*, 232 P. 789, 113 Or. 371.

89. Ky.—*Sanders v. Eddings*, 22 S. W.2d 623, 232 Ky. 243.

90. In Texas

An injured employee who had entered into a compromise settlement which had been approved in manner required could not thereafter have settlement set aside and recover additional compensation because of a change in condition.

Tex.—*Lumbermen's Reciprocal Ass'n v. Day*, Com.App., 17 S.W.2d 1043. *Estes v. Hartford Accident & Indemnity Co.*, Civ.App., 46 S.W.2d 413.

91. Ariz.—*Russell v. Bald Eagle Mining Co.*, 33 P.2d 616, 44 Ariz. 105.

Conn.—*Sugrue v. Champion*, 24 A.2d 890, 123 Conn. 574.

Ga.—*Travelers Ins. Co. v. Haney*, 88 S.E.2d 492, 92 Ga.App. 319—*Sin-yard v. Stokes*, 61 S.E.2d 504, 82 Ga.App. 454—*Georgia Marine Salvage Co. v. Merritt*, 60 S.E.2d 419, 82 Ga.App. 111—*Wiley v. Bituminous Cas. Co.*, 47 S.E.2d 652, 76 Ga. App. 862—*Sears, Roebuck & Co. v. Griggs*, 173 S.E. 194, 48 Ga.App. 585.

Ky.—*Cornwell v. Com.*, 200 S.W.2d 286, 304 Ky. 182—*Lincoln Coal Co. v. Watts*, 120 S.W.2d 1026, 275 Ky. 130.

Mich.—*Gates v. Central Foundry Division, General Motors Corp.*, 84 N. W.2d 482, 349 Mich. 286—*Poisson v. Department of Labor and Industries*, 274 N.W. 336, 280 Mich. 583.

N.H.—*Prassas v. J. F. McElwain Co.*, 123 A.2d 157, 100 N.H. 209—*King v. Kniznick*, 98 A.2d 356, 98 N.H. 247. N.J.—*Ferraro v. Zurcher*, 79 A.2d 473, 12 N.J.Super. 231.

King v. Western Elec. Co., 5 A. 2d 490, 122 N.J.Law 442, affirmed 11 A.2d 32, 124 N.J.Law 129—*Ecken v. O'Brien*, 178 A. 373, 115

N.J.Law 33, affirmed 183 A. 273, 116 N.J.Law 94.

N.Y.—*La Felice v. Stone & Wilkie*, 33 N.Y.S.2d 942, 263 App.Div. 511.

Okl.—*Williams Bros. v. State Industrial Commission*, 50 P.2d 331, 174 Okl. 284.

Pa.—*Downs v. Linton's Lunch*, 6 A. 2d 515, 334 Pa. 415.

Maher v. New Castle Grocery Co., 10 A.2d 837, 138 Pa.Super. 310—*Leeper v. Logan Iron & Steel Co.*, 198 A. 489, 131 Pa.Super. 172—*Gardner v. Pressed Steel Car Co.*, 186 A. 410, 122 Pa.Super. 592.

Lesh v. Jones & Laughlin Steel Corp., Com.Pl., 8 Fay.L.J. 94—*Baron v. Cox Bros. & Co.*, Com.Pl., 34 Luz.L.Reg. 9, affirmed 13 A.2d 94, 140 Pa.Super. 1—*Daush v. State Workmen's Insurance Fund*, Com. Pl., 86 Pittsb.Leg.J. 111.

R.I.—*Bobola v. Royal Elec. Co.*, 123 A.2d 250.

S.D.—*Salmon v. Denhart Elevators*, 30 N.W.2d 644, 72 S.D. 110, opinion adhered to 33 N.W.2d 167, 72 S.D. 263—*Middleton v. City of Watertown*, 16 N.W.2d 39, 70 S.D. 153.

Utah.—*Utah Fuel Co. v. Industrial Commission of Utah*, 159 P.2d 877, 108 Utah 346, 162 A.L.R.2d 1457—*Barber Asphalt Corp. v. Industrial Commission*, 135 P.2d 266, 103 Utah 371.

71 C.J. p 1469 note 23.

Statute for benefit of employee and employer

Statute relating to review of compensation agreements or awards is for benefit of employee and employer and applies where employee's disability has recurred or increased within eighteen months from time of agreement or award or where disability has ceased, and a recurrence, increase, diminution, or termination of an employee's disability is only question open on a petition for review.

Ill.—*Madsen v. Industrial Commission*, 50 N.E.2d 707, 383 Ill. 590.

Change in incapacity and disability

Under statute providing for modification of agreement for compensation and award where incapacity of employee has increased, or where disability of employee has diminished, words "incapacity" and "disability" are used synonymously.

N.J.—*Colbert v. Consolidated Laundry*, 107 A.2d 521, 31 N.J.Super. 588.

Modification in interest of justice

Where a statute permits a modification of an approved agreement in the interest of justice, an agreement giving employee less than maximum to which he is entitled under statute for his particular injuries may be increased on that ground. N.Y.—*Polucci v. Emerson Norris Co.*, 187 N.Y.S. 52, 195 App.Div. 805. 71 C.J. p 1470 note 36.

Necessity of proof of fraud

Change of condition is sufficient ground for review without necessity that there be proof of fraud.

Okl.—*Shawnee Morning News v. Thomas*, 256 P. 937, 125 Okl. 155. 71 C.J. p 1470 note 31.

92. Ky.—*Cornwell v. Com.*, 200 S.W. 2d 286, 304 Ky. 182.

Pa.—*Ede v. Ruhe Motor Corp.*, 136 A. 2d 151, 184 Pa.Super. 603—*Augustine v. Evert Lumber Co.*, 3 A.2d 284, 134 Pa.Super. 167.

Hickes v. Dravo Corp., Com.Pl., 90 Pittsb.Leg.J. 496.

Nothing but suspension warranted

Where a disability agreement has been made which contemplated payments for a period of five hundred weeks, and within this period, because of a change in physical condition of employee, employer is relieved from making payments by action of the compensation board, relief employer receives is merely suspension of payments awaiting further developments.

Pa.—*Gairt v. Curry Coal Mining Co.*, 116 A. 332, 272 Pa. 494.

where the agreement itself expressly provides for a review on the ground of a change in condition;⁹³ or where it is shown that the agreement for compensation was entered into by the employee with the distinct understanding that the entire case might be opened for review in the event there was a change in his condition.⁹⁴ The express reservation of a right of review will not confer that right unless it exists by statute.⁹⁵

Under some compensation acts, it is within the discretion of a compensation board or commission whether an award of compensation which is based on a stipulation between the parties will be set aside because of a change in the condition of the employee, and a determination by a board or commission on a petition to set aside such an award because of change in the employee's condition will not be disturbed in the absence of any showing of abuse

of discretion.⁹⁶

If a review of a compensation agreement or settlement is sought on the ground of change in the condition of the employee, a change in condition must be shown,⁹⁷ and the change in condition must be such that lessens the earning capacity of the employee.⁹⁸ The change in the physical condition of the employee must be causally connected with the original compensable accident,⁹⁹ and there can be no review for incapacity caused by a new, separate, and different injury.¹

Under some compensation acts, compensation in addition to that provided for by agreement may be awarded where a change occurs in the condition of the employee which manifests itself in injuries which were not expressly enumerated in the original agreement or award which was based on the

Miraglia v. Publicker Commercial Alcohol Co., 174 A. 16, 113 Pa. Super. 487.

Purpose of provision for termination or suspension

Provision of compensation act conferring on board authority to terminate agreement, or authority to suspend agreement, was intended to give employer remedy of obtaining termination of agreement on proof that disability of injured employee has finally ceased, or a suspension when disability has temporarily ended.

Pa.—*Stanella v. Scranton Coal Co.*, 186 A. 211, 122 Pa. Super. 506.

Temporary suspension

Suspension of payments of compensation permitted by department of labor under provisions of workmen's compensation act were intended to be temporary and to operate only during period that petition for review of such agreement was pending before department of labor, and such suspension was not intended to remain effective thereafter if appeal to superior court was taken from decision of director of labor on petition to review.

R.I.—*Fanning & Doorley Const. Co. v. Carvahlo*, 112 A.2d 878—*Martin's Furniture Co. v. Perry*, 86 A.2d 555, 79 R.I. 204.

Overpayment

Where employer actually paid more than employee was fairly entitled to by way of compensation, suspension of payments of compensation under preliminary agreement from filing of petition for review was not error.

R.I.—*Anaconda Wire & Cable Co. v. Silke*, 58 A.2d 395, 74 R.I. 15.

Suspension during imprisonment

Where an injured employee was confined in penitentiary during peri-

od he was to receive compensation payments under an agreement, an order suspending such payments during period of confinement was improper, but because employee did not perfect an appeal from such order it became res judicata against his right to further compensation.

Pa.—*Stevenson v. Westmoreland Coal Co.*, 26 A.2d 199, 344 Pa. 561.

93. Tenn.—*Phillips v. Memphis Furniture Mfg. Co.*, 79 S.W.2d 576, 168 Tenn. 481.

71 C.J. p 1469 note 25.

94. S.C.—*Cole v. State Highway Department*, 2 S.E.2d 490, 190 S.C. 142.

95. Me.—*Milton's Case*, 120 A. 533, 122 Me. 437.

71 C.J. p 1469 note 26.

96. Minn.—*Wallace v. Leitzen*, 68 N.W.2d 372, 243 Minn. 481—*Batchelder v. Northwestern Hanna Fuel Co.*, 30 N.W.2d 530, 225 Minn. 250.

97. Conn.—*Makris v. Chase Brass & Copper Co.*, 71 A.2d 77, 136 Conn. 340.

Ga.—*Fortson v. American Sur. Co.*, 89 S.E.2d 671, 92 Ga. App. 625.

Mich.—*Hemstreet v. Robert Gage Coal Co., Monitor Sugar Co. Division*, 14 N.W.2d 501, 308 Mich. 574.

Pa.—*Bencho v. Glen Alden Coal Co.*, 184 A. 563, 121 Pa. Super. 533.

Wahs v. Wolf, 43 Pa. Dist. & Co. 644, affirmed 42 A.2d 166, 157 Pa. Super. 181.

Tenderness following amputation

Where compensation was paid under an approved agreement for amputation of fingers, and subsequently further compensation was sought because of tenderness at points where fingers were amputated, no further compensation would be awarded since tenderness at such points was direct, natural, and necessary result of amputation.

Mich.—*Stackhouse v. General Motors*

Corp., *Ternstedt Mfg. Division*, 287 N.W. 452, 290 Mich. 249.

98. Mich.—*Kalonsky v. Goebel Brewing Co.*, 276 N.W. 706, 282 Mich. 638.

99. Ill.—*Weymer v. Industrial Commission*, 88 N.E.2d 841, 404 Ill. 271. Minn.—*Wallace v. Leitzen*, 68 N.W.2d 372, 243 Minn. 481.

N.Y.—*Shafaransky v. Cosmos Footwear Corp.*, 96 N.Y.S.2d 706, 277 App. Div. 803.

R.I.—*Macedo v. Atlantic Rayon Corp.*, 103 A.2d 64, 81 R.I. 339.

71 C.J. p 1469 note 28.

Subsequent trouble not connected with injury

An employee's claim for further compensation because of a change in physical condition could not be sustained where it was found that employee had fully recovered from his accidental injury, and that his later trouble was not connected with accidental injury.

Kan.—*Smith v. Sonken-Galamba Corp.*, 88 P.2d 1114, 149 Kan. 693.

1. N.Y.—*Shafaransky v. Cosmos Footwear Corp.*, 96 N.Y.S.2d 706, 277 App. Div. 803.

R.I.—*Macedo v. Atlantic Rayon Corp.*, 103 A.2d 64, 81 R.I. 339.

Additional compensation for separate disability

Where an employee had received full compensation for loss of use of a leg, he would be entitled to additional compensation only by establishing that there were other specifically identified parts of his body which were affected as a direct result of injury which resulted in loss of use of leg and that other parts of body affected resulted in a disability separate, apart, and distinct from disability which followed loss of use of leg.

agreement.² Under other compensation acts, a change in the employee's condition which will justify a review of the agreement is a change which results from the injuries mentioned or described in the agreement;³ and an award of additional compensation may not be made for a new and different injury from the one described in the agreement.⁴ Where an employee sustained several injuries from one compensable accident, and the agreement for compensation referred to only one injury, there can be no review of the agreement because of a change in the employee's condition which resulted from the injury which was not mentioned in the agreement.⁵ Thus, if an agreement for compensation refers only to hernia as the cause of disability, a proceeding to review will not be justified for a change in the condition of the employee which results from a condition of the employee's leg, even though the condition of the leg was the result of the hernia.⁶

Where an agreement is entered into for compensation for physical injuries, and thereafter the disability of the employee continues because of a neurotic condition which was caused by the physical injuries, the neurotic condition may constitute the necessary change in condition which is required for an award of additional compensation,⁷ and the neurotic condition will not constitute a new and different injury.⁸ Further compensation may be awarded for the neurotic condition,⁹ even though it

might have been within the power of the employee to have avoided the development of the neurotic condition.¹⁰

It has been held that if an agreement for compensation must be approved by a board or commission, the agreement may be abrogated only by action taken by the board or commission.¹¹ However, an agreement may be modified because of an increase or decrease of disability without an adjudication on the part of the compensation board or commission as to the extent of disability, and merely by a subsequent agreement properly approved.¹²

If the employee's disability ends prior to the expiration of the time fixed by an approved agreement for the payment of compensation, the employer has the right to have payments thereunder ended on proper application to the compensation tribunal.¹³ Ordinarily, an agreement for compensation may be terminated only by following the statutory procedure,¹⁴ or by a supplemental agreement which is properly approved,¹⁵ and, regardless of the language used in the agreement, it may not be terminated by an unapproved agreement.¹⁶ As a general rule, an employer or insurer may not terminate an agreement by unilateral action,¹⁷ and an employer's refusal to make further payments under a compensation agreement does not terminate the agreement.¹⁸ An employer who discontinues payments under an agreement without first obtaining

Pa.—Flood v. Logan Iron & Steel Co., 5 A.2d 621, 136 Pa.Super. 101.

2. Mass.—MacKinnon's Case, 190 N. E. 117, 286 Mass. 37.
71 C.J. p 1469 note 29.

3. R.I.—Day v. Almac's Inc., 88 A. 2d 925, 79 R.I. 357—Peters v. Monowatt Elec. Corp., 79 A.2d 922, 78 R.I. 134, reargument denied 81 A.2d 424, 78 R.I. 134.

Only terms of agreement in issue

On a petition to review an agreement for compensation only terms of agreement are in issue and it cannot be attacked or otherwise amended except as provided by statute.

R.I.—Capobianco v. United Wire & Supply Corp., 82 A.2d 170, 78 R.I. 309.

Concealment of one injury

Where an employee sustained an accidental injury to a testicle and also to his back, and entered into a stipulation for compensation for injury to testicle without disclosing back injury, and stipulation was basis of an award, in view of concealment of back injury it would not constitute an abuse of discretion on part of compensation commission to refuse to vacate award where it was

shown that employee's condition had changed as a result of back injury but had not changed as a result of testicle injury.

Minn.—Wallace v. Leitzen, 68 N.W. 2d 372, 243 Minn. 481.

4. R.I.—A. D. Juilliard & Co. v. De Conti, 102 A.2d 116, 81 R.I. 260—Colored Worsted Mill v. Persechino, 98 A.2d 859, 81 R.I. 30—Greenville Finishing Co. v. Pezza, 98 A. 2d 825, 81 R.I. 20—Stillwater Worsted Mills v. Mehegan, 98 A.2d 267, 80 R.I. 449—Peters v. Monowatt Elec. Corp., 79 A.2d 922, 78 R.I. 134, reargument denied 81 A.2d 424, 78 R.I. 134.

5. Mich.—Stackhouse v. General Motors Corp., Ternstedt Mfg. Division, 287 N.W. 452, 290 Mich. 249.

6. R.I.—Peters v. Monowatt Elec. Corp., 79 A.2d 922, 78 R.I. 134, reargument denied 81 A.2d 424, 78 R. I. 134.

7. Idaho.—Skelly v. Sunshine Min. Co., 109 P.2d 622, 62 Idaho 192.

8. R.I.—Greenville Finishing Co. v. Pezza, 98 A.2d 825, 81 R.I. 20—Stillwater Worsted Mills v. Mehegan, 98 A.2d 267, 80 R.I. 449.

9. Mich.—Rajkovich v. Oliver Iron

Min. Co., 290 N.W. 365, 292 Mich. 162.

10. Idaho.—Skelly v. Sunshine Min. Co., 109 P.2d 622, 62 Idaho 192.

11. N.J.—Wallenstein v. Hartford Acc. & Indem. Co., 34 A.2d 402, 21 N.J.Misc. 378.

12. N.J.—Ferraro v. Zurcher, 79 A. 2d 473, 12 N.J.Super. 231.

13. Ind.—Grant Coal Mining Co. v. Coleman, Ind., 179 N.E. 778, 204 Ind. 122.

71 C.J. p 1470 note 37.

14. R.I.—Frenier v. United Wire & Supply Corp., 119 A.2d 724—Gobeille v. Ray's Inc., 14 A.2d 241, 65 R.I. 207—Carpenter v. Globe Indem. Co., 14 A.2d 235, 65 R.I. 194, 129 A.L.R. 410.

15. R.I.—Gobeille v. Ray's Inc., 14 A.2d 241, 65 R.I. 207—Carpenter v. Globe Indem. Co., 14 A.2d 235, 65 R.I. 194, 129 A.L.R. 410.

16. R.I.—Carpenter v. Glove Indem. Co., supra.

17. R.I.—Frenier v. United Wire & Supply Corp., R.I., 119 A.2d 724.

18. Pa.—Pikutas v. Glen Alden Coal Co., 194 A. 765, 129 Pa.Super. 57—Furman v. Standard Pressed Steel Co., 169 A. 243, 111 Pa.Super. 44.

authorization to do so takes the risk of being able to justify such discontinuance by proving that the employee's disability had ceased at or before the time payments were stopped.¹⁹

An agreement for the payment of compensation may be suspended when it is shown that the employee is earning and receiving wages equivalent to those earned prior to the injury,²⁰ and it is not necessary to show that the employee's disability has temporarily ceased;²¹ but the fact that the employee is receiving equivalent wages is not sufficient to justify the termination of an agreement for compensation.²² An employer may obtain a review because of a change in the condition of the employee without having to show that the employee in fact has earned wages since the injury was sustained.²³ However, a temporary or intermittent cessation of total disability under an agreement to pay compensation during the period of total disability is not such a cessation as will justify the termination of an agreement.²⁴

On the employer's petition to terminate a compensation agreement on the ground that the employee has recovered sufficiently to engage in light work, the employee must, to prevent a termination, show that no source of permanent employment is open to one under the disadvantages which he suffers;²⁵ the criterion is not that the employee cannot perform the work he engaged in before the accident.²⁶

Where the evidence tends strongly to show that the employee has recovered, his refusal to submit his person to an expert X-ray examination will require the suspension of his right to compensation;²⁷ and when an agreement has been suspended by the compensation tribunal the employer is entirely free from liability to pay any compensation, unless there

is a recurrence of disability within the period fixed for reinstatement.²⁸

Where the statute so provides, a compensation case may be reopened after a final settlement receipt has been approved only if there is a change for the worse in the condition of the employee,²⁹ and a rule of the compensation authorities which would permit the reopening of a case for reasons other than a change for the worse in the condition of the employee will be invalid and of no effect.³⁰

The fact that there has been a determination on an application for review of an agreement for compensation, whether that determination is that the employee's condition has or has not changed, does not preclude a subsequent application for review, where the subsequent application alleges that since the prior application was determined there has been a change in condition.³¹ Where one provision of a compensation act authorizes a review of an agreement entered into under mistake of fact, and a different provision permits review where there has been a recurrence or increase in disability, the latter provision should control where an employee has entered into an agreement under the mistaken belief that disability has permanently ceased and subsequently further disability develops.³²

Settlement of death claim. A provision authorizing a review and increase or diminution of compensation provided for by agreement is inapplicable where an agreement is entered into for compensation death benefits.³³ Where the widow and children are surviving dependents, the employer cannot have a compensation agreement terminated because the widow has received money in a settlement of her claim against a third person causing the death,³⁴ since the rights of the children, unless changed by

19. Pa.—Pikutas v. Glen Alden Coal Co., 194 A. 765, 129 Pa.Super. 57.
Brink v. Consolidation Coal Co., 85 Pa.Dist. & Co. 551, 9 Som.Leg.J. 269.
Negro v. Glen Alden Coal Co., Com.Pl., 32 Luz.L.Reg. 192.

20. Pa.—Holtz v. McGraw & Bindley, 54 A.2d 905, 161 Pa.Super. 371.
—Kalemon v. Reiber, 53 A.2d 903, 161 Pa.Super. 169.—Scipani v. Pressed Steel Car Co., 28 A.2d 502, 150 Pa.Super. 410.

21. Pa.—Scipani v. Pressed Steel Car Co., *supra*.

Under prior statute

Prior to amendment of compensation act in 1939, only ground for suspending an agreement for compensation, or an award based on an agreement, was that employee's disability had temporarily ceased.

Pa.—Chubb v. Allegheny Country Club, 24 A.2d 550, 147 Pa.Super. 146.

22. Pa.—Downs v. Linton's Lunch, 6 A.2d 515, 334 Pa. 415.

23. Mass.—Vass' Case, 65 N.E.2d 549, 319 Mass. 297.

24. Ind.—Swift & Co. v. Bobich, 163 N.E. 232, 88 Ind.App. 64.

25. Pa.—Yednock v. Hazle Brook Coal Co., 167 A. 236, 109 Pa.Super. 182.

26. Pa.—Yednock v. Hazle Brook Coal Co., *supra*.

27. Mich.—Rose v. Desmond Charcoal & Chemical Co., 172 N.W. 415, 206 Mich. 294.

28. Pa.—Stanella v. Scranton Coal Co., 186 A. 211, 122 Pa.Super. 506.

29. Mich.—Butler v. Millman, 259 N.W. 877, 271 Mich. 113.

30. Mich.—Butler v. Millman, 259 N.W. 877, 271 Mich. 113.

31. Ga.—Lumbermen's Mut. Cas. Co. v. Cook, 24 S.E.2d 309, 195 Ga. 397, answer to certified question conformed to 25 S.E.2d 67, 69 Ga. App. 131.

N.J.—Pugh v. Winslow Const. Co., 34 A.2d 281, 131 N.J.Law 23.

32. Pa.—Augustine v. Evert Lumber Co., 3 A.2d 284, 134 Pa.Super. 167.—Eberst v. Sears, Roebuck & Co., 3 A.2d 25, 133 Pa.Super. 427, reversed on other grounds 6 A.2d 577, 334 Pa. 505.

33. Iowa.—Shaker v. Quealy, 4 N.W.2d 250, 232 Iowa 429.

34. Pa.—Satterfield v. Wahlquist, 111 A. 253, 267 Pa. 378.

death, having been fixed by such agreement, are unaffected by the action of their mother.⁸⁵

§ 897. — Conclusiveness of Original Claim or Award

On review of a compensation agreement or settlement, or an award based on such agreement or settlement, the agreement or settlement is *res judicata*, final, and binding, and constitutes a final determination of such facts as are material to the existence of liability.

Since an approved agreement or settlement for the payment of compensation is equivalent to a final award, judgment, or decree, as stated *supra* § 407, on review, such agreement or settlement, or an award based on such agreement or settlement and unappealed from, is *res judicata* and final,⁸⁶ and, in the absence of fraud, accident, or mistake, is binding on the parties.⁸⁷ There may be no inquiry into the validity of the agreement,⁸⁸ in the absence of an allegation of fraud or coercion,⁸⁹ and the authority of the board or commission to make an award on the agreement cannot be questioned on such a review.⁴⁰ On a petition by the employer for review on the ground that the particular injury described in the agreement no longer incapacitated the

employee, it is not open to the employee to have considered a claim that there was an erroneous diagnosis of the original injury.⁴¹

Such agreement or settlement, or an award based on such agreement or settlement, constitutes a final determination of such facts as are material to the existence of liability,⁴² the fact of employment,⁴³ the fact of injury arising out of, and in the course of, employment,⁴⁴ and the fact of notice.⁴⁵ Such agreement or settlement, or an award based thereon, is conclusive as to the compensability of the accident or injury,⁴⁶ as long as the facts on which the awarding of compensation was predicated continue to be the facts in the case.⁴⁷ Likewise, where an award is made on stipulated facts, at a subsequent hearing on the grounds of changed conditions evidence of the stipulated facts need not be heard.⁴⁸

Such agreement or settlement, or an award based thereon, may not be a final determination of the extent of the injuries,⁴⁹ and may not be *res judicata* as to the employee's condition at a time subsequent to the time the agreement or settlement was made or approved.⁵⁰ Thus, an employee who in his original petition alleged a fifty per cent disability but com-

35. Pa.—Satterfield v. Wahlquist, *supra*.
Right of dependent to institute review for change of condition see *infra* § 1472.

36. Ga.—Heath v. Standard Acc. Ins. Co., 95 S.E.2d 726, 94 Ga.App. 548.

Mich.—Sweet v. Eddy Paper Corp., 6 N.W.2d 883, 303 Mich. 492.

37. Ga.—Heath v. Standard Acc. Ins. Co., 95 S.E.2d 726, 94 Ga.App. 548.

Idaho.—Zapantis v. Central Idaho Min. & Mill. Co., 136 P.2d 154, 64 Idaho 498—Fruett v. Cranston Chevrolet Co., 121 P.2d 559, 68 Idaho 478—Skelly v. Sunshine Mining Co., 109 P.2d 622, 62 Idaho 192—Zapantis v. Central Idaho Min. & Mill. Co., 106 P.2d 118, 61 Idaho 660.

Mich.—Roe v. Daily Record, 262 N.W. 380, 273 Mich. 5—Wilson v. Titte Bros. Packing Co., 257 N.W. 873, 269 Mich. 501.

38. Ga.—Heath v. Standard Acc. Ins. Co., 95 S.E.2d 726, 94 Ga.App. 548.

R.I.—Airedale Worsted Mills v. Cote, 66 A.2d 802, 75 R.I. 361.

39. R.I.—Airedale Worsted Mills v. Cote, *supra*.

40. Ga.—Heath v. Standard Acc. Ins. Co., 95 S.E.2d 726, 94 Ga.App. 548.

41. R.I.—Kestenman Bros. Mfg. Co. v. Greene, 102 A.2d 452, 81 R.I. 291.

42. Mass.—Vass' Case, 65 N.E.2d 549, 319 Mass. 297—Amon's Case, 52 N.E.2d 582, 315 Mass. 210—MacKinnon's Case, 190 N.E. 117, 286 Mass. 37.

Matter as to which agreement final
Agreement entered into between employer, insurer, and employee determining that relation of employer and employee existed, that employee was injured in course of his employment, that annual wage was nine hundred dollars, fixing weekly compensation at nine dollars and fifty-one cents, and that employee was entitled to receive compensation during period of total incapacity, filed with, and approved by, industrial commissioner was a final determination as to all matters embraced in agreement with force and effect of an award and not subject to review three years after filing.

S.D.—Salmon v. Denhart Elevators, 30 N.W.2d 644, 72 S.D. 110, opinion adhered to 33 N.W.2d 167, 72 S.D. 263.

43. Mass.—Vass' Case, 65 N.E.2d 549, 319 Mass. 297—Amon's Case, 52 N.E.2d 582, 315 Mass. 210—MacKinnon's Case, 190 N.E. 117, 286 Mass. 37.

44. Mass.—Vass' Case, 65 N.E.2d 549, 319 Mass. 297—Amon's Case, 52 N.E.2d 582, 315 Mass. 210—MacKinnon's Case, 190 N.E. 117, 286 Mass. 37.

45. Mass.—MacKinnon's Case, *supra*.

46. Mass.—Case of Virta, 192 N.E. 98, 287 Mass. 602.
71 C.J. p 1470 note 46.

47. Me.—Healey's Case, 126 A. 21, 124 Me. 54.

48. Okl.—Tulsa Lead & Zinc Co. v. Utton, 21 P.2d 748, 163 Okl. 192.

49. Iowa.—Sheker v. Quealy, 4 N.W. 2d 250, 232 Iowa 429.

Mass.—Vass' Case, 65 N.E.2d 549, 319 Mass. 297—Amon's Case, 52 N.E.2d 582, 315 Mass. 210—MacKinnon's Case, 190 N.E. 117, 286 Mass. 37.

Approval not final determination of extent of injuries

N.J.—Ferraro v. Zurcher, 79 A.2d 473, 12 N.J.Super. 231.

50. Ga.—Hartford Acc. & Indem. Co. v. Carroll, 43 S.E.2d 722, 75 Ga.App. 437.

Under law effective at time of claimant's injury, even adjudication by court in appeal case would not render *res judicata* question of whether claimant might not be entitled to further compensation for results of injury developing under continuing jurisdiction of commission, and, such being case, it would appear equally clear that a compromise settlement of case on appeal to court would have no greater force than would judgment of such court in same case.

Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414.

promised with his employer on the basis of a twenty-five per cent disability is not, on a review to increase his compensation for increased disability, concluded by his original allegation to the extent that he can only receive compensation on the excess over fifty per cent.⁵¹ Such agreement or settlement, or an award based thereon, may, however, be conclusive and binding as to the extent of the employee's disability at the time the agreement or settlement was made or approved;⁵² and this is so even though the whole evidence produced at the hearing to determine whether there has been a change in the employee's condition shows that the original award was wrong.⁵³ A properly approved agreement or settlement is not a final determination of the payments to be made;⁵⁴ except as to payments for the period covered;⁵⁵ but such agreement or settlement may be *res judicata* that the amount allowed was complete compensation for the injuries then known,⁵⁶ and an unappealed award based on such an agreement fixes the amount to which the employee is entitled, and the amount remains fixed until increased or decreased at a subsequent hearing on a change in the employee's condition.⁵⁷

On a petition to review an agreement for compensation because of a change in the condition of the employee, there may be a limitation as to the extent

to which the doctrine of *res judicata* will be applied,⁵⁸ and it may be applied only to such issues as were actually raised and decided in the prior action;⁵⁹ and where it was not originally contended that the injury which was the subject of the compensation agreement had any psychical effects, the agreement as to such issue would not be *res judicata*.⁶⁰

§ 898. — What Agreements or Settlements Are Reviewable

- a. In general
- b. Lump sum or commutation agreements

a. In General

Whether a compensation agreement or settlement is subject to review because of a change in the condition of the employee usually will depend on the provisions of the compensation act and whether the agreement or settlement was approved in the required manner, and it may depend on the terms of the agreement or settlement itself.

Where the parties have entered into an agreement or settlement which determines the compensation that is to be paid, whether there may be a review of such an agreement or settlement because of a subsequent change in the condition of the employee may depend on the provisions of the compensation act;⁶¹ and, may also depend on whether the

51. N.J.—*Thomas v. Liondale Bleach, Dye & Print Works*, 154 A. 542, 9 N.J.Misc. 365, affirmed 159 A. 313, 10 N.J.Misc. 255, affirmed 164 A. 11, 110 N.J.Law 27.

52. Ga.—*Lumbermen's Mut. Cas. Co. v. Cook*, 24 S.E.2d 309, 195 Ga. 397, answer to certified question conformed to 25 S.E.2d 67, 69 Ga.App. 131.

Ga.—*Travelers Ins. Co. v. Hammond*, 83 S.E.2d 576, 90 Ga.App. 595—*Maryland Cas. Corp. v. Mitchell*, 62 S.E.2d 415, 83 Ga.App. 99.

Idaho.—*Zapantis v. Central Idaho Min. & Mill. Co.*, 106 P.2d 113, 61 Idaho 660.

Ill.—*Franklyn County Mining Co. v. Industrial Commission*, 153 N.E. 635, 323 Ill. 98.

Ohio.—*State ex rel. Fortner v. Industrial Commission of Ohio*, 183 N.E. 8, 127 Ohio St. 289.

Binding to date of entry

An agreement of compensation fairly entered into and approved by referee in form of award, for partial disability for statutory period, was binding on parties to date of entry, so that claimant, who was entitled to revision of award to one for total and permanent disability, was entitled to compensation for increased disability only from date of entry. Pa.—*Kilgore v. State Workmen's*

Ins. Fund, 193 A. 294, 127 Pa.Super. 213.

53. Ill.—*De Bartolo v. Industrial Commission*, 30 N.E.2d 677, 375 Ill. 103.

Concealment of evidence

A concealment of evidence with respect to employee's mental and physical condition, provided it was not done with malicious intention, even though it resulted in an erroneous approval by the board of a settlement agreement, would not warrant disturbance of settlement agreement.

Idaho.—*Zapantis v. Central Idaho Min. & Mill. Co.*, 136 P.2d 154, 64 Idaho 493.

54. Mass.—*Vass' Case*, 65 N.E.2d 549, 319 Mass. 297—*Amon's Case*, 52 N.E.2d 582, 315 Mass. 210—*MacKinnon's Case*, 190 N.E. 117, 286 Mass. 37.

N.J.—*Toohy v. Gorman*, 12 A.2d 873, 125 N.J.Law 41.

Referee's finding as to earning power

On an application for additional compensation where an agreement for compensation had been terminated and an award made on findings by referee, finding as to prospective earnings of employee was not *res judicata* of employee's earning power.

Pa.—*Bush v. Lehigh Brick Co.*, 109 A.2d 206, 176 Pa.Super. 634.

55. Mass.—*Vass' Case*, 65 N.E.2d 549, 319 Mass. 297—*Amon's Case*, 52 N.E.2d 582, 315 Mass. 210.

56. Ariz.—*Russell v. Bald Eagle Mining Co.*, 33 P.2d 616, 44 Ariz. 105.

Compensation in amount provided for

Having by its approval of agreement adjudicated that employee was entitled to compensation in amount stated in agreement, board was without authority of law to again adjudicate those questions.

Ga.—*Lumbermen's Mut. Cas. Co. v. Cook*, 24 S.E.2d 309, 195 Ga. 397, answer to certified question conformed to 25 S.E.2d 67, 69 Ga.App. 131.

57. Ga.—*Moore v. American Liability Ins. Co.*, 19 S.E.2d 763, 67 Ga. App. 259.

58. R.I.—*Di Vona v. Haverhill Shoe Novelty Co.*, 127 A.2d 503.

59. R.I.—*Di Vona v. Haverhill Shoe Novelty Co.*, *supra*.

60. R.I.—*Di Vona v. Haverhill Shoe Novelty Co.*, *supra*.

61. Mo.—*Mosier v. St. Joseph Lead Co.*, App., 205 S.W.2d 227.

agreement or settlement has been approved by the compensation board or commission in the manner required by the compensation act.⁶² Under some compensation acts, an agreement or settlement which has not been approved by the proper tribunal in the required manner is not reviewable because of a change in the condition of the employee;⁶³ and where a statute declares that the approval of an agreement by the compensation board will render it final and binding, a conditional approval by the board is not final and binding so as to deprive the board of further jurisdiction, no question of change of condition being involved.⁶⁴

Compensation act provisions authorizing modification, termination, suspension, or reinstatement of compensation agreements or settlements because of a change in the condition of the employee apply only if a valid agreement or settlement has been entered into by the parties,⁶⁵ although such provisions may apply to compensation agreements which have been terminated or suspended as well as agreements which are existing.⁶⁶ Such provisions may apply to both original and supplemental agreements,⁶⁷ but do not apply where there has been a disallowance of a claim for compensation.⁶⁸ It may also be necessary that the agreement be one in which the employer admits that the disability of the employee arose out of an industrial accident.⁶⁹

An agreement for compensation may be effective as a complete settlement of a claim for compensation and as a bar to modification for a subsequent change in the employee's condition if the agreement expressly covers future, as well as past and present, disability arising out of the injury which is the basis of the claim;⁷⁰ but an agreement which does not cover future disability may be modified on application for review.⁷¹ On the other hand, a review on the ground of change in the condition of the employee may be permitted even though the agreement or settlement provides that there shall be no review,⁷² and clearly indicates that there is intended a full and final closeout of the claim for compensation.⁷³

Where no provision is made for review of a voluntary settlement, provision is made for a review of an award, a voluntary agreement for compensation which does not constitute an award is not subject to review because of a change in the condition of the employee,⁷⁴ and the fact that such agreements, to be effective, must be approved by the compensation board or commission, does not make them subject to review.⁷⁵ On the other hand, under a provision conferring continuing jurisdiction on the board or commission over claims for compensation, an agreement for compensation may be subject to review for change in the employee's condition;⁷⁶ but where the act also provides for the

N.J.—Federal Leather Co. v. De Rensis, 174 A. 163, 113 N.J.Law 235.

Rightmyer v. Totowa Borough, 8 A.2d 772, 17 N.J.Misc. 300.

62. Mich.—Scalzo v. Family Creamery Co., 14 N.W.2d 505, 308 Mich. 537.

General order approving all prior settlements

Where department of labor issued a general order approving all settlement receipts filed prior to a named date in which no proceedings had been had within one year before such date, such general order was sufficient approval to permit an application for additional compensation because of a change in employee's physical condition.

Mich.—Grycan v. Ford Motor Co., 289 N.W. 148, 291 Mich. 241—Poisson v. Department of Labor and Industry, 274 N.W. 336, 280 Mich. 533—Neveis v. Walbridge Aldinger Co., 270 N.W. 272, 273 Mich. 214—Stetu v. Ford Motor Co., 269 N.W. 236, 277 Mich. 463—Weaver v. Antrim Iron Co., 265 N.W. 445, 274 Mich. 493—Giampa v. Chrysler Corporation, 262 N.W. 259, 272 Mich. 327.

63. Ala.—Sloss Sheffield Steel &

Iron Co. v. Nations, 8 So.2d 333, 243 Ala. 107.

71 C.J. p 1471 note 53.

Approval of agreements generally see supra § 406.

64. Mich.—Seem v. Consolidated Fuel & Lumber Co., 209 N.W. 133, 234 Mich. 637.

65. Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172.

66. Pa.—Flowers v. Liggett & Myers Tobacco Co., 20 A.2d 856, 145 Pa.Super. 230—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172—Melody v. Bornot, Inc., 170 A. 408, 112 Pa.Super. 174—Zupicick v. Philadelphia & Reading Coal & Iron Co., 164 A. 731, 108 Pa.Super. 165.

67. Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172.

68. Pa.—Leeper v. Logan Iron & Steel Co., supra.

69. Ill.—Weymer v. Industrial Commission, 88 N.E.2d 841, 404 Ill. 271.

70. Ohio.—Clendenen v. Industrial Commission, 45 N.E.2d 108, 140 Ohio St. 414—State ex rel. Weinberger v. Industrial Commission, 38 N.E.2d 399, 139 Ohio St. 92.

71. Ohio.—State ex rel. Weinberger v. Industrial Commission, supra.

72. N.J.—Solazco v. Carol, 185 A. 510, 14 N.J.Misc. 435.

73. N.J.—Streng's Piece Dye Works v. Galasso, 191 A. 874, 118 N.J.Law 257. Solazco v. Carol, 185 A. 510, 14 N.J.Misc. 435.

74. Mo.—Mosier v. St. Joseph Lead Co., App., 205 S.W.2d 227—Bliss v. Lungstras Dyeing & Cleaning Co., App., 130 S.W.2d 198—La Tour v. Green Foundry Co., 93 S.W.2d 297, 230 Mo.App. 1063—Dewey v. Union Electric Light & Power Co., App., 83 S.W.2d 203.

75. Mo.—Burnham v. Keystone Service Co., App., 77 S.W.2d 848.

Approval by single member

Fact that an agreement for compensation was approved by a single member of commission rather than by full commission would not render agreement inoperative and thereby permit a review because of changed condition of employee.

Mo.—Morgan v. Jewell Const. Co., 91 S.W.2d 638, 230 Mo.App. 425.

76. Okl.—Skelly Oil Co. v. Harrell, 103 P.2d 88, 187 Okl. 412—Indian Territory Illuminating Oil Co. v.

entry of a final award, the effect of which is to deprive the board or commission of further jurisdiction over any claim for the same injury or any results arising from it, an agreement for compensation on which a final award has been entered is not subject to review because of a change in the employee's condition which is due to the injury which was the subject of the agreement.⁷⁷

Under a provision that all awards of compensation and all settlements by agreement, where the amount to be paid does not exceed the compensation for six months disability, shall be final and not subject to readjustment, a settlement pursuant to an award for ten weeks' compensation will preclude additional compensation on the grounds of decreased capacity.⁷⁸

"Open end" agreements, that is, agreements not fixing the date of the end of the compensation period, are held not to be reviewable in some jurisdictions;⁷⁹ but in other jurisdictions where an agreement fixes the rate of payments but not the length of time of their continuance, the employee's physical condition is left open for further inquiry, and, if facts justifying it are found, the payments may be ordered continued.⁸⁰ Where a compensation act provides for temporary or partial awards with the further provision that such awards shall remain open until a final award can be made, the parties may enter into an agreement for a temporary or partial award which will be subject to modification from time to time.⁸¹

An agreement that there shall be no compensation is not an "agreement for compensation" under a statute declaring such a statute to be reviewable where there is a change in the employee's condition.⁸² Likewise, an employer's payment of a physician's bill for attendance during the first two weeks of an injury is not such an agreement.⁸³ It has been held that there is an "agreement", under a statute reciting that an agreement or award, un-

der the act providing for compensation in installments, may, within a certain period, be reviewed by the board on the ground of recurred, increased, or diminished disability, where there is a voluntary payment by the employer of compensation, within the statutory period, and an acceptance thereof by the employee.⁸⁴

Under the provisions of some compensation acts the amount of compensation that will be paid for the disability or death of an employee may be increased if the injury was due to misconduct of the employer, as discussed supra §§ 332, 333, and, where the statute makes the employer rather than the insurer primarily liable for this increased amount, and further prohibits the shifting of this primary liability to insurer,⁸⁵ an agreement entered into between insurer and the injured employee for a compromise settlement, and providing for the release and discharge from all liability of the employer, does not preclude the employee thereafter from proceeding against the employer to recover the additional amount that should be awarded because the injuries sustained by the employee were due to the misconduct of the employer.⁸⁶

b. Lump Sum or Commutation Agreements

Whether lump sum settlements of compensation or commutations of payments into lump sums may be reviewed because of a change in the condition of the employee generally depends on the compensation act provisions, and also on whether the settlements are intended to be final and in full satisfaction of future, as well as existing, disability.

Lump sum settlements of compensation are almost always reviewable because of invalidating circumstances, such as fraud or mistake, existing at the time the settlement was made, as discussed supra § 410, and, under some compensation acts now or formerly existing, such settlements may be reviewable because of a subsequent change in the condition of the employee,⁸⁷ and may be reviewed even though the settlement itself recites that payment

State Industrial Commission, 90 P. 2d 398, 185 Okl. 72.

77. Okl.—Reinhart & Donovan v. Dean, 16 P.2d 85, 160 Okl. 116.

78. Tenn.—McCaslin v. Heath, 8 S. W.2d 362, 157 Tenn. 380.

79. Me.—Hamel's Case, 138 A. 866, 126 Me. 401.

71 C.J. p 1471 note 56.

80. Mich.—Wilcox v. Clarage Foundry & Mfg. Co., 165 N.W. 925, 199 Mich. 79.

81. Mo.—Jones v. F. W. Woolworth Co., 122 S.W.2d 41, 234 Mo.App. 1189—Weiss v. Anheuser-Busch, Inc., 117 S.W.2d 682, 234 Mo.App. 710.

82. N.J.—Benjamin & Johnes v. Brabban, 103 A. 688, 90 N.J.Law 355, affirmed 105 A. 717, 92 N.J. Law 508.

83. N.J.—Benjamin & Johnes v. Brabban, supra.

84. Ill.—Carson-Payson Co. v. Industrial Commission, 121 N.E. 264, 285 Ill. 635—Simpson Const. Co. v. Industrial Board of Illinois, 114 N. E. 138, 275 Ill. 366.

85. Wis.—R. J. Wilson Co. v. Industrial Commission, 263 N.W. 204, 219 Wis. 463.

86. Wis.—R. J. Wilson Co. v. Industrial Commission, supra.

87. Ind.—In re Holland, 126 N.E. 236, 72 Ind.App. 538.

Nonschedule adjustment or settlement

Where an award of compensation was rescinded by board for lack of proof of causal relation and case reheard, and on rehearing a so-called nonschedule adjustment or settlement was consummated with referee approval, such adjustment, not recognized by any statutory provision, was not binding on employee with respect to reopening of his claim.

N.Y.—Maschebet v. Success Baking Co., 100 N.Y.S.2d 614, 277 App.Div. 1069.

constitutes a complete settlement for present and future disability.⁸⁸ Under other compensation acts, now or formerly existing, such settlements are not subject to review because of a change in the condition of the employee.⁸⁹ This is particularly true where the lump sum settlement is intended to be final and in full satisfaction of all claims, and where the settlement has been approved in the manner required by the compensation act.⁹⁰ However, an unauthorized lump sum settlement may be set aside because of a subsequently appearing disability,⁹¹ and a change in the condition of the employee may authorize a review of a lump sum settlement which was not approved in the manner required by law,⁹² even though the agreement specifically waives the right of review.⁹³

Furthermore, although it may be within the power of a compensation board to approve a lump sum settlement and make it final and binding and not subject to review under any condition,⁹⁴ if the lump sum settlement which is approved provides that it is subject to limitations and conditions set out in the compensation act, it will be subject to review because of a change in the condition of the employee, even though the settlement agreement specifically covers all types of disability, past, present, and future, resulting from the accidental injury.⁹⁵ An agreement which is merely a settlement into one lump sum of the remaining weeks of compensation yet due without reference to any other award which might be made for change of condition, may be reviewed for change of condition.⁹⁶

Where one provision of a compensation act

authorizes a review of compensation settlements if the amount exceeds the compensation for six months disability, and another provision prohibits review of lump sum settlements, an award of compensation for more than six months disability which ordinarily would be reviewable under the first provision, is not reviewable because of the second provision where there was an agreement for lump sum payment.⁹⁷

A commutation of deferred payments into a lump sum may be reviewed because of a change in the condition of the employee,⁹⁸ and a commutation of periodical payments of compensation, which is not regarded as a compromise or settlement of compensation or a determination of amount by agreement of parties, but merely a mathematical computation of the present value of a series of future payments, may be reopened and reviewed because of a change in the condition of the employee, or because the periodical payments as commuted into a lump sum payment were not in the interest of justice.⁹⁹

§ 899. — Effect of Satisfaction, Receipt, or Release

After a compensation agreement has been satisfied by payment, whether there may be a review because of a subsequent change in the condition of the employee is generally determined by the provisions of the governing compensation act.

After an agreement for compensation has been satisfied by payment, whether there may be a review because of a change in the condition of the employee frequently depends on the particular provisions of the compensation act which are applicable.¹

88. Ga.—Globe Indemnity Co. v. Lankford, 184 S.E. 357, 35 Ga.App. 599.

89. Tenn.—Hay v. Woosley, 135 S. W.2d 933, 175 Tenn. 475. 71 C.J. p 1472 note 64.

90. Ariz.—Doyle v. Old Dominion Co., 84 P.2d 401, 44 Ariz. 123. Idaho.—Limprecht v. Bybee, 281 P. 2d 1047, 76 Idaho 293.

Ill.—Michelson v. Industrial Commission, 31 N.E.2d 940, 375 Ill. 462.

Mich.—Meyers v. Iron County, 298 N. W. 308, 297 Mich. 629—Catina v. Hudson Motor Car Co., 262 N.W. 266, 272 Mich. 377.

Mont.—Moffett v. Industrial Acc. Bd., 301 P.2d 340.

N.H.—King v. Kniznick, 98 A.2d 356, 98 N.H. 247.

N.C.—Morgan v. Town of Norwood, 191 S.E. 345, 211 N.C. 600.

S.C.—Atkins v. Charleston Shipbuilding & Drydock Co., 33 S.E.2d 46, 206 S.C. 63. 71 C.J. p 1471 note 61.

91. Minn.—Johnson v. Pillsbury Flour Mills, 245 N.W. 619, 187 Minn. 362.

92. Ill.—Board of Education of City of Chicago v. Industrial Commission, 15 N.E.2d 283, 368 Ill. 564.

93. Ill.—Board of Education of City of Chicago v. Industrial Commission, supra.

94. S.C.—Atkins v. Charleston Shipbuilding & Drydock Co., 33 S.E.2d 46, 206 S.C. 63.

95. S.C.—Atkins v. Charleston Shipbuilding & Drydock Co., supra.

96. Mo.—Oard v. Hope Engineering Co., App., 64 S.W.2d 707.

97. Tenn.—Hay v. Woosley, 135 S. W.2d 933, 175 Tenn. 475.

98. Mich.—Catina v. Hudson Motor Car Co., 262 N.W. 266, 272 Mich. 377.

Utah.—Barber Asphalt Corp. v. Industrial Commission, 135 P.2d 266, 103 Utah 371. 71 C.J. p 1471 note 63.

99. N.Y.—Cretella v. New York Dock Co., 45 N.E.2d 429, 289 N.Y. 254.

La Felice v. Stone & Wilkie, 33 N.Y.S.2d 942, 263 App.Div. 511. 71 C.J. p 1471 note 59.

Commutation of payments; lump sum payments see supra §§ 337-352.

Validity of agreements and compromise settlements generally see supra § 402.

1. In New Jersey

(1) As a result of 1931 amendment of compensation act it became immaterial to right of review for change in condition of employee whether compensation had been paid under an agreement which was approved by an award entered after formal hearing, or whether compensation was paid under an agreement approved by commission without a formal hearing.

N.J.—Solazco v. Carol, 185 A. 510, 14 N.J.Misc. 435.

(2) In cases decided under law as it existed prior to 1931 amendment,

The generally accepted rule is that where compensation has been paid and the award approved and the case closed, it may still be reopened on the grounds of a change in the employee's condition,² where the question of the permanency of the injuries was not considered in the settlement;³ and a final receipt⁴ or a release⁵ will not preclude a review on such grounds; not even, it has been held, where the receipt recites that the disability has ceased.⁶

On the other hand, under some compensation acts an award of compensation which is based on an agreement and which has been satisfied by payment, may not thereafter be reopened and reviewed because of a change in condition,⁷ particularly where there has been an approval of a final receipt,⁸ and where the compensation was paid under an agreement which did not call for continuing payments.⁹ If a settlement agreement may be reviewed because of a change in the condition of the employee, it may be reviewed where the receipt expressly states that

it is subject to review as provided by law;¹⁰ but if a settlement agreement may not be reviewed on the ground of a change in the condition of the employee, a statement in the receipt that it is subject to review as provided by law may not subject the agreement to review where it is shown that there has been a change in the condition of the employee.¹¹ Thus, the provision in a settlement receipt that it is subject to review as provided by law may be meaningless except as a suggestion that there may be resort to equitable relief.¹² Where the judgment is limited to a fixed period, a satisfaction instrument based on such judgment will not bar a future right of action for a continuance of compensation.¹³

If compensation is sought for further disability after payment has been made under an agreement for compensation and after a receipt has been executed, the receipt may be set aside,¹⁴ but, under a statute so providing, it may be discretionary with

whether there could be review because of change in condition depended on whether payment was pursuant to an agreement approved by board after formal hearing, or was pursuant to an agreement approved without formal hearing.

N.J.—Federal Leather Co. v. Derensis, 174 A. 163, 113 N.J.Law 235.

71 C.J. p 1472 note 71.

2. Colo.—Moffat Coal Co. v. Giankos, 152 P.2d 681, 112 Colo. 585—William E. Russell Coal Co. v. Zinge, 147 P.2d 365, 112 Colo. 171. Ga.—Fulton Bag & Cotton Mills v. Dean, 61 S.E.2d 584, 82 Ga.App. 494.

Pa.—Kissel v. Harbison-Walker Refractories Co., 41 A.2d 434, 157 Pa. Super. 37—Parks v. Susquehanna Collieries Co., 27 A.2d 481, 149 Pa. Super. 585—Huerbin v. D. L. Clark Co., 14 A.2d 175, 140 Pa. Super. 406—Shetina v. Pittsburgh Terminal Coal Corporation, 173 A. 727, 114 Pa. Super. 108.

S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349—Corpus Juris quoted in Cole v. State Highway Department, 2 S.E. 2d 490, 190 S.C. 142.

71 C.J. p 1472 note 72.

3. Okl.—Burlison & Pack v. Shotwell, 14 P.2d 233, 159 Okl. 27.

S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349—Corpus Juris quoted in Cole v. State Highway Department, 2 S.E. 2d 490, 190 S.C. 142.

4. Ind.—Syler & Syler v. Luse, 5 N.E.2d 130, 103 Ind.App. 47.

Md.—Porter v. Bethlehem-Fairfield Shipyard, 53 A.2d 668, 188 Md. 668. Pa.—Ralston v. Baldwin Locomotive Works, 41 A.2d 361, 156 Pa. Super.

573—Smith v. Union Collieries Co., 38 A.2d 407, 155 Pa. Super. 389—Elite v. Rockhill Coal Co., 30 A.2d 212, 151 Pa. Super. 284—Coder v. Pittsburgh Des Moines Steel Co., 16 A.2d 662, 142 Pa. Super. 407—Augustine v. Evert Lumber Co., 3 A.2d 284, 134 Pa. Super. 167—Eberst v. Sears, Roebuck & Co., 3 A.2d 25, 133 Pa. Super. 427, reversed on other grounds 6 A.2d 577, 334 Pa. 505—Horwath v. Edward G. Budd Mfg. Co., 191 A. 675, 127 Pa. Super. 154—Shetina v. Pittsburgh Terminal Coal Corporation, 173 A. 727, 114 Pa. Super. 108.

Krejdosky v. Westinghouse Elec. & Mfg. Co., 95 Pittsb. Leg.J. 15.

R.I.—Starnino v. George A. Fuller Co., 48 A.2d 361, 72 R.I. 91.

S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349—Corpus Juris quoted in Cole v. State Highway Department, 2 S.E. 2d 490, 190 S.C. 142.

71 C.J. p 1472 note 74.

5. S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349—Corpus Juris quoted in Cole v. State Highway Department, 2 S.E. 2d 490, 190 S.C. 142.

Utah—Barber Asphalt Corp. v. Industrial Commission, 135 P.2d 266, 103 Utah 371.

71 C.J. p 1472 note 75.

6. S.C.—Cromer v. Newberry Cotton Mills, 23 S.E.2d 19, 201 S.C. 349—Corpus Juris quoted in Cole v. State Highway Department, 2 S.E. 2d 490, 190 S.C. 142.

71 C.J. p 1472 note 76.

7. Ill.—Madsen v. Industrial Commission, 50 N.E.2d 707, 333 Ill. 590.

Mo.—Burnham v. Keystone Service Co., App., 77 S.W.2d 848.

S.D.—Nilsson v. Krueger, 297 N.W. 790, 68 S.D. 11—Chittenden v. Jarvis, 297 N.W. 787, 68 S.D. 5.

71 C.J. p 1472 note 67.

8. Mo.—State ex rel. Saunders v. Missouri Workmen's Compensation Commission, 63 S.W.2d 67, 333 Mo. 691.

Satterly v. Mueller, App., 119 S. W.2d 449.

Receipt on blank furnished by commission.

Where compensation act required employers to report all payments of compensation on blanks furnished by commission, and only such blanks could be used, a report by employer on a final report and settlement form which contained a provision that receipt was subject to review would not authorize a review which was not provided for by statute.

Ill.—Madsen v. Industrial Commission, 50 N.E.2d 707, 333 Ill. 590.

9. Mo.—Burnham v. Keystone Service Co., App., 77 S.W.2d 848.

71 C.J. p 1472 note 69.

10. S.C.—Cole v. State Highway Department, 2 S.E.2d 490, 190 S.C. 142.

11. Mo.—Satterly v. Mueller, App., 119 S.W.2d 449.

12. N.H.—Robbins v. Nims, 7 A.2d 261, 90 N.H. 555.

13. N.J.—Zizza v. W. H. Compton Shear Co., 164 A. 397, 11 N.J.Misc. 81.

71 C.J. p 1472 note 70.

14. Pa.—Repper v. Eichelberger & Co., 181 A. 379, 120 Pa. Super. 19. Levins v. Philadelphia Hospital, 35 Pa. Dist. & Co. 479.

a compensation board or commission whether to set aside a settlement evidenced by a final receipt.¹⁵

§ 900. — Effect of Nature of Disability

If a compensation agreement or settlement is subject to review because of a change in the condition of the employee, modification may be allowed if disability has increased or decreased.

Ordinarily, if a compensation agreement or settlement is subject to review because of a change in the condition of the employee, modification may be allowed by the compensation tribunal if the incapacity of the employee has increased or decreased,¹⁶ and in the absence of a change in the condition of the employee modification may be denied.¹⁷ Thus, if an agreement is for compensation for a specified per cent of disability, there may be no review and an award of compensation for a greater per cent of disability, in the absence of any increase in the disability of the employee.¹⁸ If an agreement for compensation finally determines the amount of compensation to which the employee is entitled, the subsequent increase, decrease, or even absence of disability will not authorize a review of the agreement;¹⁹ and, accordingly, where pursuant to agreement an injured employee has received full compensation for a specific injury, further compensation may not be awarded for that injury;²⁰ and if full

compensation has been paid under an agreement, the fact that a surgical operation would materially reduce the disability of the employee does not justify an order requiring that the employee be tendered such remedial operation.²¹ Furthermore, if an agreement is for compensation for the destruction, or permanent loss of the use, of a member of the body, as, an arm, leg, or eye, thereafter no review may be had for further compensation if there was in fact the destruction, or permanent loss of the use, of the member,²² and the extent of disability, incapacity to labor, or loss of earning power, consequent on such destruction or loss of use of the member is immaterial;²³ but if in fact the employee did not suffer the destruction or loss of use of a member of the body, there may be a review of the agreement and an award of further compensation where a change in the condition of the employee is shown.²⁴

Where the stipulation and receipt and order all recite that the cause is subject to the continuing jurisdiction of the commission on a change of condition, the additional award for permanent partial disability may be made without a showing of a change of condition.²⁵ Where an approved agreement provides for weekly payments during total disability, an employee's subsequent petition for further compensation for an alleged disablement since the date

Shaw v. H. C. Frick Coke Co., Com.Pl., 4 Fay.L.J. 242—Morgan v. Pean Anthracite Collieries Co., Com.Pl., 43 Lack.Jur. 163—Phillips v. Coxie Bros. Co., Com.Pl., 32 Luz. L.Reg. 457, affirmed 5 A.2d 445, 135 Pa.Super. 185—Hoffman v. McClaune Mining Co., Com.Pl., 19 Wash.Co. 105.

15. In Minnesota

(1) Text rule is followed. Minn.—Lappinen v. Union Ore Co., 29 N.W.2d 8, 224 Minn. 395.

(2) Under earlier statutes a settlement in a compensation case which was approved by industrial commission and under which payment had been made, became final at expiration of time permitted for review, precluding commission from thereafter reopening case.

Minn.—Frederickson v. Burns Lumber Co., 261 N.W. 479, 195 Minn. 660.

16. Ga.—Royal Indem. Co. v. Banister, 62 S.E.2d 765, 82 Ga.App. 845.

Ky.—Schaab v. Irwin, 183 S.W.2d 814, 298 Ky. 626.

N.J.—Nagy v. Ford Motor Co., 72 A.2d 802, 8 N.J.Super. 387, reversed 78 A.2d 709, 6 N.J. 341.

Bush v. Rudolph, 187 A. 786, 14 N.J.Misc. 869.

Okl.—Farris-Cantrell v. State Indus-

trial Commission, 82 P.2d 984, 183 Okl. 456.

Pa.—Berkhamer v. Heinsling, 28 A.2d 807, 150 Pa.Super. 461—Kilgore v. State Workmen's Ins. Fund, 193 A. 294, 127 Pa.Super. 213.

R.I.—Martin v. Silvertown Garage, 173 A. 352, 54 R.I. 388.

S.D.—Middleton v. City of Watertown, 16 N.W.2d 39, 70 S.D. 158.

71 C.J. p 1473 note 78.

Employer's petition for review

An employer's petition for review of a preliminary agreement for compensation on ground that employee's incapacity has ceased cannot be sustained where it is not shown that incapacity has ceased.

R.I.—Narragansett Hotel, Inc. v. Mallozzi, 103 A.2d 355, 81 R.I. 389.

17. Idaho.—Anderson v. Potlatch Forests, 291 P.2d 859, 77 Idaho 263.

18. Ga.—Moore v. American Liability Ins. Co., 19 S.E.2d 763, 67 Ga. App. 259.

N.J.—Nagy v. Ford Motor Co., 72 A.2d 802, 8 N.J.Super. 387, reversed on other grounds 78 A.2d 709, 6 N.J. 341.

19. Pa.—Vanaskie v. Stevens Coal Co., 2 A.2d 531, 133 Pa.Super. 457—McGarvey v. Conemaugh Lumber Co., 174 A. 609, 114 Pa.Super. 368.

20. Pa.—Will v. Stinemen Coal & Coke Co., 87 A.2d 104, 170 Pa.Super. 446.

Compensation for loss of use

Where an employee had received full compensation for injury, and subsequently it was necessary to amputate injured part, further compensation would not be allowed because of amputation.

Pa.—Will v. Stinemen Coal & Coke Co., 87 A.2d 104, 170 Pa.Super. 446.

21. Pa.—Vanaskie v. Stevens Coal Co., 2 A.2d 531, 133 Pa.Super. 457.

22. Pa.—Berkhamer v. Heinsling, 28 A.2d 807, 150 Pa.Super. 461—Lewis v. Bethlehem Mines Corp., 13 A.2d 107, 140 Pa.Super. 128—Flood v. Logan Iron & Steel Co., 5 A.2d 621, 136 Pa.Super. 101—Croll v. Miller, 2 A.2d 527, 133 Pa.Super. 448.

23. Pa.—Berkhamer v. Heinsling, 28 A.2d 807, 150 Pa.Super. 461—Lewis v. Bethlehem Mines Corp., 13 A.2d 107, 140 Pa.Super. 128—Flood v. Logan Iron & Steel Co., 5 A.2d 621, 136 Pa.Super. 101—Croll v. Miller, 2 A.2d 527, 133 Pa.Super. 448.

24. Pa.—Zellner v. Haddock Mining Co., 10 A.2d 918, 139 Pa.Super. 16.

25. Okl.—West Tulsa Pipe & Supply Co. v. Ivory, 23 P.2d 148, 164 Okl. 112.

of his injury will be denied.²⁶ It has been held that, notwithstanding an approved agreement reciting that compensation was to be paid at a certain rate during present disability and additional compensation would be paid for subsequent incapacity due to the same injury, the employee, if there was a refusal to pay, may ask for a determination of permanent impairment.²⁷

Usually the change must have occurred after the agreement was made²⁸ or approved,²⁹ and a statute providing that an agreement for compensation may be modified at any time by a formal award when the disability of the employee has increased or diminished relates only to an increase or diminishment of disability occurring subsequent to the judgment awarding compensation on the agreement,³⁰ and such a statute does not authorize a correction or revision of errors residing in the adjudication.³¹

An agreement for compensation for partial disability usually does not operate as a bar to a subsequent award of compensation for total disability,³² providing total disability can be shown;³³ but an agreement for compensation for total disability is generally not subject to review for further compensation,³⁴ and this is true notwithstanding the employee is suffering from more physical pain and infirmity than before.³⁵ An agreement for compensation for total disability may, however, be reviewed where the condition of the employee has improved, and the agreement will not prevent a subsequent award for partial disability if it is found to exist.³⁶

Whether further compensation may be awarded may depend on whether the settlement was for temporary or permanent disability,³⁷ and it may be for the compensation board or commission to determine whether the settlement was for temporary

or permanent disability where the record in the cause is in such condition that it does not disclose this fact.³⁸ A change in an employee's condition from industrial handicap to partial incapacity to work will authorize an award of further compensation, although the employee had received compensation in a lump sum settlement for his industrial handicap.³⁹

The fact that an employee, at the time of the payment of compensation for total temporary disability, may have known that he had permanent partial disability, did not impose on him the duty to make known such fact, or, because of his silence, estop him to thereafter ask for compensation for permanent partial disability.⁴⁰

Where a statute permits reclassification of a disability on proof that the previous classification was erroneous and not in the interest of justice, a compensation settlement may be reviewed without the necessity of showing a change in the condition of the employee.⁴¹

§ 901. Persons Entitled to Relief

Ordinarily, any party in interest may obtain a review of an agreement for compensation because of a change in the condition of the employee.

Ordinarily, compensation act provisions do not restrict the right to review compensation agreements to only one of the parties thereto,⁴² and under many of the statutes any party in interest is entitled to have a voluntary award reopened for a change in condition.⁴³ In some jurisdictions it has been held that the compensation commission may institute such proceedings of its own motion.⁴⁴ Under a statute giving dependents the same rights that the deceased employee would have had had he lived, a widow may be entitled to a determination of the permanent impairment of her husband's limbs although he had

26. Mich.—Groleau v. Ford Motor Co., 240 N.W. 76, 256 Mich. 408.

27. Me.—Eastabrook v. Steward-Read Co., 151 A. 141, 129 Me. 178.

28. Ga.—Moore v. American Liability Ins. Co., 19 S.E.2d 763, 67 Ga. App. 259.

29. Mich.—Ledward v. Public Welfare Board of Flint, 299 N.W. 104, 298 Mich. 351.

30. N.J.—Drake v. C. V. Hill & Co., 187 A. 637, 117 N.J.Law 290.

31. N.J.—Drake v. C. V. Hill & Co., supra.

32. Ga.—Campbell Coal Co. v. Render, 173 S.E. 245, 48 Ga.App. 547.

Mich.—Ledward v. Public Welfare Board of Flint, 299 N.W. 104, 298 Mich. 351.

33. La.—Washington v. Holmes & Barnes, 9 So.2d 35, 200 La. 787.

34. Mich.—Catina v. Hudson Motor Car Co., 262 N.W. 266, 272 Mich. 377—Gulec v. Chrysler Corporation, 262 N.W. 364, 272 Mich. 327.

35. Mich.—Catina v. Hudson Motor Car Co., 262 N.W. 266, 272 Mich. 377.

36. R.I.—Lorraine Mfg. Co. v. Apolony, 50 A.2d 616, 72 R.I. 258.

37. Okl.—Independent Oil & Gas Co. v. Mooney, 103 P.2d 557, 187 Okl. 472.

38. Okl.—Independent Oil & Gas Co. v. Mooney, supra.

39. Ga.—Hardware Mut. Cas. Co. v. Wilson, 34 S.E.2d 634, 72 Ga.App. 574.

40. Okl.—McCawley v. Crane, 85 P. 2d 423, 184 Okl. 64.

41. N.Y.—Cretella v. New York Dock Co., 45 N.E.2d 429, 289 N.Y. 254, motion denied 47 N.E.2d 444, 289 N.Y. 848.

42. R.I.—Balon v. General Cable Corp., 68 A.2d 44, 76 R.I. 206.

Employee

R.I.—Starnino v. George A. Fuller Co., 48 A.2d 361, 72 R.I. 91.

Either employer or employee

Conn.—Sugrue v. Champion, 24 A. 2d 890, 128 Conn. 574.

43. Ky.—Katterjohn v. Adams, 249 S.W.2d 952.

71 C.J. p 1473 note 82.

44. Okl.—St. Joseph Mining Co. v. Pettitt, 216 P. 657, 90 Okl. 242.

been paid for total disability until his death under an open end agreement.⁴⁵ However, if an injured employee dies after a motion to open his compensation case has been granted but before the hearing, his widow and dependent children will not be substituted as parties in such proceeding if no benefit would result from such substitution.⁴⁶

§ 902. Jurisdiction

Jurisdiction over a proceeding to review an agreement for compensation because of a change in the condition of the employee is usually in the compensation board or commission.

As a general rule, jurisdiction of a proceeding to review an agreement for compensation because of a change in the condition of the employee is in the compensation board or commission,⁴⁷ such jurisdiction being derived from, or based on, the jurisdiction that was acquired through the original proceeding,⁴⁸ and the continuing jurisdiction which compensation boards and commissions have over all claims for compensation.⁴⁹ Such continuing jurisdiction is retained although an agreement has been entered into for the settlement of a compensation claim,⁵⁰ and it has been held to be the duty of the board or commission to retain such jurisdiction where it appears that future adjustments will be necessary.⁵¹

Even though no original claim for compensation is filed, it has been held that the compensation board or commission will, nevertheless, have jurisdiction of a proceeding to review an agreement for compensation because of a change in the condition of the employee,⁵² the agreement for compensation which is filed being regarded as a substitute for an original claim.⁵³ The filing of the agreement for compensation may be considered as conferring continuing jurisdiction on the board or commission for the determination of all questions of future liability due to the original injury and based on subsequent

changes in the condition of the employee.⁵⁴

If an agreement for compensation is not intended to extinguish the employer's liability, an award founded on such agreement is subject to all the incidents of awards in general, and one incident is that the board or commission thereafter retains jurisdiction over the award for whatever review or modification its character may warrant under the provisions of the compensation act.⁵⁵ Furthermore, having acquired jurisdiction over a case by agreement, the board or commission may retain jurisdiction indefinitely,⁵⁶ but such jurisdiction is definitely limited to ending, increasing, or diminishing the compensation awarded or agreed on within the maximum and minimum amount specified, within the period fixed, when application for review is made by one of the interested parties;⁵⁷ and where a compensation board or commission, by approving of an agreement for compensation, determines that the employee lost the sight of an eye on a specified date, it thereafter has no jurisdiction to entertain a petition for further compensation based on the claim that the loss of sight of the eye did not occur until a later date.⁵⁸

A statute providing that the commission shall have the same power to open and modify an award as any court has to open and modify its judgment gives the commission jurisdiction in a proper case to open and modify a voluntary award and hear the case de novo.⁵⁹ Where the statute provides that the commissioner shall retain jurisdiction for any proper action during the whole compensation period, the commissioner will have jurisdiction to determine whether the balance due under a voluntary agreement for compensation for the loss of the sight of one eye survived to claimant's estate on his death.⁶⁰

Where a proceeding is brought to review an agreement for compensation because of a change in the condition of the employee, the fact that an

45. Me.—Eastabrook v. Steward-Read Co., 151 A. 141, 129 Me. 178.

46. Ky.—Royal Coal Co. v. Arrowood, 147 S.W.2d 386, 285 Ky. 225.

47. Ga.—U. S. Casualty Co. v. Smith, 133 S.E. 851, 162 Ga. 130.
Ky.—Katterjohn v. Adams, 249 S.W. 2d 952—Cornwell v. Commonwealth, 200 S.W.2d 286, 304 Ky. 182.

48. Vt.—Bosquet v. Howe Scale Co., 120 A. 171, 96 Vt. 364.

49. Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 159 P. 2d 877, 108 Utah 246, 162 A.L.R. 1457—Barber Asphalt Corporation

v. Industrial Commission, 135 P.2d 266, 103 Utah 371.

50. Mo.—Weiss v. Anheuser-Busch, Inc., 117 S.W.2d 682, 234 Mo.App. 710.

51. Mo.—Weiss v. Anheuser-Busch, Inc., 117 S.W.2d 682, 234 Mo. 710.

52. Okl.—Skelly Oil Co. v. Harrell, 103 P.2d 88, 187 Okl. 412.

53. Mo.—Bruce v. Missouri-Kansas-Texas R. Co., 73 S.W.2d 425, 229 Mo.App. 124.
Okl.—Skelly Oil Co. v. Harrell, 103 P.2d 88, 187 Okl. 412.

54. S.D.—Middleton v. City of Wattertown, 16 N.W.2d 39, 70 S.D. 158.

55. Mo.—Mosier v. St. Joseph Lead Co., App., 205 S.W.2d 227.

56. Mich.—Millaley v. City of Grand Rapids, 203 N.W. 651, 231 Mich. 10—Curtis v. Slater Construction Co., 160 N.W. 659, 194 Mich. 259.

57. Mich.—Millaley v. City of Grand Rapids, 203 N.W. 651, 231 Mich. 10.

58. Mich.—Righi v. Robert Gage Coal Co., 256 N.W. 617, 269 Mich. 46.

59. Conn.—Grabowski v. Miskell, 115 A. 691, 97 Conn. 76.

60. Conn.—Forkas v. International Silver Co., 123 A. 831, 100 Conn. 417.

occupational disease is alleged as a factor in causing the change of condition does not remove the cause from the classification of workmen's compensation cases.⁶¹

A provision in a compensation act to the effect that the act is not to be construed strictly has been held to apply to a provision conferring jurisdiction to review agreements for compensation where there has been a change in the condition of the employee;⁶² and, such a provision, construed liberally, does not restrict the power of the board to review such agreements only while compensation is being paid and while there is pending an order with respect to which compensation might be ended, diminished, or increased.⁶³ The filing of an agreement for the discontinuance of compensation and the termination of compensation in accordance with such an agreement does not deprive the board or commission forever of jurisdiction to entertain a claim for further compensation arising out of the same occurrence.⁶⁴

If a compensation board or commission correctly rules that it is without jurisdiction to entertain a petition to set aside a compromise settlement and grant further relief, it is immaterial that an incorrect reason for so ruling is given.⁶⁵

Right to question jurisdiction. Where the commission merely approved a settlement in the absence of a statement of facts or without hearing evidence or making findings, the commission's jurisdiction to reopen the case because of changed conditions may be questioned by any party in interest if the commission was without authority to award compensation in the first instance.⁶⁶ However, when a compensation board or commission has acquired jurisdiction in a cause by reason of action initiated by the employer or insurer, and thereafter an agreement for compensation is made and carried out, and subsequently the employee petitions for further compensation on the ground that there has been a change in his condition, neither the employer nor insurer can question the jurisdiction of the board or commission to conduct such review.⁶⁷

§ 903. Nature and Form of Proceedings

The proceeding whereby an agreement for compensation may be reviewed because of a change in the condition of the employee, ordinarily, is by a petition or application to review the agreement rather than by an original application for compensation.

Proceedings before an industrial board or commission for adjustment of compensation are wholly statutory,⁶⁸ and the application by statutory provisions to the facts of the particular case will determine the character of the proceeding as one for payment of compensation pursuant to agreement,⁶⁹ or an independent proceeding to determine the extent of existing incapacity⁷⁰ or a petition for review of an agreement.⁷¹ Where modification of an agreement because of a change in the condition of the employee is sought, it should be by a proceeding to review rather than by an original proceeding for compensation.⁷² A petition seeking additional compensation for permanent disability following a previous agreement may not be regarded as one for review.⁷³

After an agreement for compensation has been entered into and approved, the proper method to have determined whether there has been such a change in the condition of the injured employee as will warrant a modification or termination of the agreement may be by a petition to review,⁷⁴ filed in the first instance with the compensation board or commission, or the equivalent thereto.⁷⁵ When there is a disagreement between an employer and employee as to the continuance of payments under an agreement, a summary hearing as provided by statute may be had.⁷⁶

When full payment of compensation under an approved agreement has been made, and thereafter the employee seeks further compensation, if the compensation act provides two methods by which such further compensation may be obtained it may be immaterial which method is pursued provided proper grounds for action under one or the other is

61. Ind.—Scroggs v. Delco-Remy Division of General Motors, 21 N.E. 2d 449, 106 Ind.App. 647.

62. Ky.—Louisville Milling Co. v. Turner, 273 S.W. 83, 209 Ky. 515.

63. Ky.—Louisville Milling Co. v. Turner, *supra*.

64. Mass.—Amon's Case, 52 N.E.2d 582, 315 Mass. 210.

65. Mo.—Mosier v. St. Joseph Lead Co., App., 205 S.W.2d 227.

66. Okl.—City of Duncan v. Ray, 23 P.2d 694, 164 Okl. 205.

71 C.J. p 1473 note 92.

67. Utah.—Utah Apex Min. Co. v. Industrial Commission of Utah, 209 P.2d 571, 116 Utah 305.

68. Ill.—Centralia Coal Co. v. Industrial Commission, 130 N.E. 727, 297 Ill. 451.

69. Iowa.—Kramer v. Tone Bros., 199 N.W. 985, 198 Iowa 1140.

70. Me.—Wallace's Case, 124 A. 241, 123 Me. 517—Milton's Case, 120 A. 538, 122 Me. 437.

71. Ill.—Centralia Coal Co. v. Industrial Commission, 130 N.E. 727, 297 Ill. 451.

Iowa.—Henderson v. Iles, 82 N.W. 2d 731.

72. Me.—Newell's Case, 118 A. 373, 121 Me. 504.

73. Me.—Collins' Case, 121 A. 554, 123 Me. 74.

74. Mich.—Grycan v. Ford Motor Co., 289 N.W. 146, 291 Mich. 241.

R.I.—Gobeille v. Ray's, Inc., 14 A.2d 241, 65 R.I. 207.

75. R.I.—Gobeille v. Ray's, Inc., *supra*.

76. Mo.—Mosier v. St. Joseph Lead Co., App., 205 S.W.2d 227.

proved,⁷⁷ but the employee must bring himself within one or the other of the methods provided.⁷⁸

If an approved agreement for compensation does not constitute a formal award, a petition filed for modification of such agreement and for compensation for increased disability may not be regarded as a petition to modify an award,⁷⁹ but should be considered as an application for an original determination on the merits of the employee's statutory claim for compensation, a determination to which the statute entitles the employee.⁸⁰

§ 904. Time for Application and Limitations

A proceeding to review a compensation agreement or settlement on the ground that there has been a change in the condition of the employee must be brought within such time as is provided for by statute.

An application for increase, diminution, termination, or reinstatement of compensation provided for by agreement, or by an award based on an agree-

ment, may be barred where not made within the time limited by statute,⁸¹ and provisions prescribing the time within which a review of an award of compensation may be sought are applicable where an agreement for compensation has attained the status of an award;⁸² but provisions limiting the right to proceed for compensation to a specified time after the accident, injury, or death are ordinarily held inapplicable to proceedings for the review of agreements or of awards based on agreements,⁸³ particularly where the agreement expressly reserved to the employee the right to apply for further compensation in case of an increase in disability.⁸⁴

General statutes of limitation,⁸⁵ such as statutes specifying the time for the commencement of personal injury actions,⁸⁶ or statutes limiting the time within which an action on a contract not otherwise provided for may be brought,⁸⁷ have been held in-

77. Pa.—Huerbin v. D. L. Clark Co., 14 A.2d 175, 140 Pa.Super. 406—Murphy v. Hudson Coal Co., 5 A.2d 428, 135 Pa.Super. 241.

78. Pa.—Gleyze v. Hale Coal Co., 26 A.2d 141, 149 Pa.Super. 18.

79. N.J.—Donofrio v. Haag Bros., 77 A.2d 42, 10 N.J.Super. 258.

80. N.J.—Donofrio v. Haag Bros., supra.

81. Ga.—Priest v. Exposition Cotton Mills, 71 S.E.2d 743, 86 Ga.App. 301—Royal Indem. Co. v. Bannister, 62 S.E.2d 765, 82 Ga.App. 845—Strickland v. Metropolitan Cas. Ins. Co., 139 S.E. 424, 54 Ga.App. 866. Ind.—Corr v. Trustees of Indiana University, 34 N.E.2d 136, 109 Ind. App. 237.

Miss.—H. C. Moody & Sons v. De-
deaux, 79 So.2d 225, 223 Miss. 832.
Mo.—La Tour v. Green Foundry Co.,
93 S.W.2d 297, 230 Mo.App. 1063.

N.H.—Prassas v. J. F. McElwain Co.,
123 A.2d 157, 100 N.H. 209.

N.C.—Smith v. Mecklenburg County
Chapter Am. Red Cross, 95 S.E.2d
559, 245 N.C. 116.

Pa.—Roberts v. John Wanamaker,
Philadelphia, 30 A.2d 189, 151 Pa.
Super. 297—Berkstresser v. State
Workmen's Ins. Fund, 14 A.2d 225,
140 Pa.Super. 237—Boyle v. Mill
Creek Coal Co., 10 A.2d 834, 138 Pa.
Super. 347—Focht v. General Bak-
ing Co., 9 A.2d 185, 137 Pa.Super.
318—Carrara v. Hallston Coal Co.,
8 A.2d 484, 137 Pa.Super. 151—
Demmel v. Dilworth Co., 7 A.2d 50,
136 Pa.Super. 37—Rednock v.
Westmoreland Coal Co., 200 A. 114,
132 Pa.Super. 89—Reichner v. P.
Blakiston Son & Co., 175 A. 372,
115 Pa.Super. 415—Bogdon v. Sus-
quehanna Collieries Co., 170 A. 405,
111 Pa.Super. 491—Godfroid v.

Rockhill Coal & Iron Co., 169 A.
577, 111 Pa.Super. 296.

Morgan v. Penn Anthracite Col-
lieries Co., Com.Pl., 43 Lack.Jur.
163—Martinovich v. Lehigh Valley
Coal Co., Com.Pl., 40 Luz.Leg.Reg.
43.

S.C.—Corpus Juris quoted in Wallace
v. Campbell Limestone Co., 17 S.E.
2d 309, 311, 198 S.C. 196.

Tenn.—Trobaugh v. Harper, 234 S.W.
2d 829, 191 Tenn. 409—Watson v.
Proctor & Gamble Defense Corp.,
221 S.W.2d 528, 188 Tenn. 494—
Gaines v. Du Pont Rayon Co., 79 S.
W.2d 40, 168 Tenn. 361.

Wis.—Putnam v. Industrial Com-
mission, 262 N.W. 594, 219 Wis.
217.

71 C.J. p 1474 note 1.

Application held within statutory pe-
riod

Mo.—Bruce v. Missouri-Kansas-Tex-
as R. Co., 73 S.W.2d 425, 229 Mo.
App. 124.

Pa.—Downs v. Linton's Lunch, 6 A.
2d 515, 334 Pa. 415.

Kissel v. Harbison-Walker Re-
fractories Co., 41 A.2d 434, 157 Pa.
Super. 37—Hill v. Booth & Fling
Co., 23 A.2d 85, 146 Pa.Super. 575—
Augustine v. Evert Lumber Co., 3
A.2d 284, 134 Pa.Super. 167—Eberst
v. Sears, Roebuck & Co., 3 A.2d 25,
133 Pa.Super. 427, reversed on oth-
er grounds 6 A.2d 577, 334 Pa. 505
—McGuire v. Dougherty & Jen-
nings, 180 A. 168, 119 Pa.Super.
485.

Henderson v. McNulty Bros. Co.,
Com.Pl., 86 Pittsb.Leg.J. 5.

82. S.C.—Atkins v. Charleston Ship-
building & Drydock Co., 33 S.E.2d
46, 206 S.C. 68.

Time within which review of award
of compensation may be sought
see supra § 856.

Award entered on settlement

Statutory amendment authorizing
review of formal award within two
years from last payment if incapac-
ity has increased is applicable to
compromise close-out settlement ap-
proved by deputy commissioner, who
entered award thereon, which was
paid in lump sum.

N.J.—Solazco v. Carol, 185 A. 510, 14
N.J.Misc. 435.

83. Mich.—Chelli v. American Bos-
ton Mining Co., 285 N.W. 14, 288
Mich. 441.

Minn.—Lappinen v. Union Ore Co., 29
N.W.2d 8, 224 Minn. 395.

S.D.—Middleton v. City of Water-
town, 16 N.W.2d 39, 70 S.D. 158.

71 C.J. p 1474 note 2.

84. Tenn.—Phillips v. Memphis Fur-
niture Mfg. Co., 79 S.W.2d 576, 168
Tenn. 481.

85. Okl.—Simon v. Amerada Petro-
leum Co., 249 P.2d 120, 207 Okl. 255.

Limitations not applicable

Where compensation commission
retained jurisdiction after employee
was awarded compensation based on
agreement of parties, neither gen-
eral statute of limitations nor limi-
tation contained in compensation act
would bar employee's application for
further compensation.

Mich.—Catino v. Morgan & Wright,
261 N.W. 281, 272 Mich. 154.

86. Mich.—Seem v. Consolidated
Fuel & Lumber Co., 209 N.W. 193,
234 Mich. 637.

87. Tenn.—Phillips v. Memphis Fur-
niture Mfg. Co., 79 S.W.2d 576, 168
Tenn. 481.

applicable to proceedings for review of compensation agreements, or awards based on such agreements. Since an agreement for compensation may be regarded as a substitute for an original claim of compensation for the purpose of conferring on the board or commission jurisdiction of a proceeding to review the agreement because of a change in the condition of the employee, as stated *supra* § 902, if an agreement for compensation is filed within the time provided, a claim of additional compensation will not be denied on the ground that an original claim of compensation was not filed within the statutory period.⁸⁸

A provision in a compensation act limiting the time in which a proceeding may be brought to obtain a review of an agreement for compensation on the ground of a change in the condition of the injured employee has been held not to be a technical statute of limitations which, in conformity with common-law practice, must be affirmatively pleaded as a defense,⁸⁹ but rather a statute of repose which completely extinguishes the right, and not merely the remedy, and may be invoked even though it is not pleaded.⁹⁰ It has also been held that a provision limiting the time within which review may be had of an agreement for compensation constitutes a limitation on the right and not on the remedy, and that the right afforded is conditioned on its exercise within the limitation period, so that its non-exercise within that period operates to extinguish

the right altogether, and, consequently, the making of a claim for review within the statutory period is jurisdictional, and may not be waived by the parties, but is always open to assertion at any stage of the proceedings,⁹¹ and where a further award of compensation is made after the expiration of the time for review of the agreement, if the compensation tribunal was without jurisdiction to enter such award, the court to which the case came is correspondingly without jurisdiction.⁹² On the other hand, it has been held that a requirement that a decision of the compensation board be filed with the court within a specified number of days does not constitute a condition to the acquirement of jurisdiction by the court, and the court has jurisdiction to decree additional compensation in revision of a decision of the compensation board, although the decision of the board was not filed within the period specified.⁹³

The time within which a proceeding must be commenced to obtain a review of an agreement for compensation because of a change in the condition of the employee may depend on the particular provision under which the proceeding for review is brought,⁹⁴ and it may also depend on the nature of the injury which the employee suffered.⁹⁵

In the case of a lump sum settlement it has been held that a suit for revision will not be entertained after expiration of the term covered by the settlement;⁹⁶ but where the parties conduct negotiations

88. *Mo.—Bruce v. Missouri-Kansas-Texas R. Co.*, 73 S.W.2d 425, 229 Mo.App. 124.

89. *Pa.—Jericho v. Liggett Spring & Axle Co.*, 106 A.2d 846, 176 Pa.Super. 128—*Harrington v. Mayflower*, 96 A.2d 180, 173 Pa.Super. 130.

90. *Pa.—Jericho v. Liggett Spring & Axle Co.*, 106 A.2d 846, 176 Pa.Super. 128—*Harrington v. Mayflower*, 96 A.2d 180, 173 Pa.Super. 130.

91. *Mo.—Dewey v. Union Electric Light & Power Co., App.*, 83 S.W. 2d 203.

92. *Mo.—Dewey v. Union Electric Light & Power Co.*, *supra*.

93. *Mass.—Case of Virta*, 192 N.E. 98, 287 Mass. 602.

94. *N.J.—Ecken v. O'Brien*, 178 A. 873, 115 N.J.Law 33, affirmed 183 A. 273, 116 N.J.Law 94.

Pa.—Glen Alden Corp. v. Tomchick, 130 A.2d 719, 183 Pa.Super. 306—*Lasick v. Consumers Min. Co.*, 128 A.2d 144, 182 Pa.Super. 414—*Parks v. Susquehanna Collieries Co.*, 27 A.2d 481, 149 Pa.Super. 535—*Hill v. Booth & Filian Co.*, 23 A.2d 85, 146 Pa.Super. 575—*Stevenson v. Westmoreland Coal Co.*, 21 A.2d

468, 146 Pa.Super. 32, affirmed 26 A.2d 199, 344 Pa. 561—*Federoff v. Union Collieries Co.*, 15 A.2d 385, 141 Pa.Super. 308—*Berkstresser v. State Workmen's Ins. Fund*, 14 A. 2d 225, 140 Pa.Super. 237—*Focht v. General Baking Co.*, 9 A.2d 185, 137 Pa.Super. 318—*Flood v. Logan Iron & Steel Co.*, 5 A.2d 621, 136 Pa.Super. 101—*Augustine v. Evert Lumber Co.*, 3 A.2d 284, 134 Pa.Super. 167—*Casper v. State Workmen's Ins. Fund*, 200 A. 186, 132 Pa.Super. 96—*Newancavitch v. Pittsburgh Terminal Coal Corp.*, 200 A. 137, 131 Pa.Super. 891—*Gardner v. Pressed Steel Car Co.*, 186 A. 410, 122 Pa.Super. 592—*Tinsman v. Jones & Laughlin Steel Corporation*, 180 A. 175, 118 Pa.Super. 516—*McGuire v. Dougherty & Jennings*, 180 A. 168, 119 Pa.Super. 485—*Irwin v. Byllesby Engineering & Management Corporation*, 179 A. 780, 119 Pa.Super. 449—*Hunter v. Viscose Co.*, 178 A. 314, 117 Pa.Super. 323—*Reichner v. P. Blakiston's Son & Co.*, 175 A. 872, 115 Pa.Super. 415—*McGarvey v. Conemaugh Lumber Co.*, 174 A. 609, 114 Pa.Super. 368—*Miraglia v. Publicker Commercial Alcohol Co.*, 174 A. 16,

113 Pa.Super. 487—*Shetina v. Pittsburgh Terminal Coal Corporation*, 173 A. 727, 114 Pa.Super. 108.
Shaw v. H. C. Frick Coke Co., Com.Pl., 4 Fay.L.J. 242.

95. Specific exemption of eye injuries

Pa.—Parks v. Susquehanna Collieries Co., 27 A.2d 481, 149 Pa.Super. 535—*Eberst v. Sears, Roebuck & Co.*, 3 A.2d 25, 133 Pa.Super. 427, reversed on other grounds 6 A.2d 577, 334 Pa. 505.

Richards v. E. T. Fraim Lock Co., Com.Pl., 49 Lanc.L.Rev. 241, affirmed 45 A.2d 382, 158 Pa.Super. 414.

96. *La.—Faircloth v. Stearns-Roger Mfg. Co., App.*, 147 So. 368.

Mich.—Willard v. Globe Housewrecking Co., 22 N.W. 558, 294 Mich. 42.

Discharge of special fund for reopened cases

Where employee had suffered no decrease in earning capacity after award of lump sum settlement, under statute providing that date of last payment under a lump sum settlement shall be considered date to which amount paid would extend if award had been made on date lump

which are merely an attempt to compromise, with no lump sum settlement being effected, the prescription period provided by statute for review of lump sum settlements does not apply.⁹⁷

Under a statute providing that an application for modification of an award shall not be filed after a stated period from termination of the compensation period fixed in the original award, made by agreement or on hearing, where termination of compensation is not fixed by the agreement, the date of termination for purposes of limitations may be fixed by the board,⁹⁸ and the limitation begins to run on termination of the compensation period as fixed by the award or by the board,⁹⁹ and not from the date of the award.¹ Where the period of disability has not been fixed the statute does not run.² The fact that the employee signs a receipt reciting that his disability has ceased does not conclusively show such fact or that the compensation period had terminated so as to make limitations applicable.³ Under such statutes an agreement approved by the board has the effect of an award as far as limitations are concerned.⁴

Under some compensation act provisions, a review of an agreement for compensation because of a change in the employee's condition may be had at any time, and provisions of this nature are sometimes construed as imposing no limitation on the time in which an award pursuant to agreement may be reviewed,⁵ or are construed as permitting review at any time within the period of disability,⁶ or at any time while the board or commission retains jurisdiction;⁷ and the length of time the board or commission retains jurisdiction may depend on

the terms of the agreement, or of the award that is based on the agreement.⁸ Other provisions of this nature are construed as not affording the employee unlimited time within which to apply for review,⁹ and may merely mean that a petition or application for review may be filed at any time before a claim for compensation is finally disposed of,¹⁰ restricting the time within which a petition to review may be filed to the period the agreement has to run.¹¹ Where a limitation is imposed as to the time when review may be sought after the termination of an agreement for compensation, such limitation applies only where there has been a proper termination of the agreement,¹² and the fact that the employer refuses to make payments under an agreement does not terminate the agreement for the purpose of starting the limitation period to run.¹³

Under statutes providing that an agreement or award may be modified at any time by a subsequent agreement, or reviewed on the application of either party, the words "at any time" have been construed as applicable only to modification by agreement of the parties and not to the review provided for,¹⁴ and the latter should be made within the period otherwise limited by statute.¹⁵ Furthermore, where a compensation act contains a provision of this nature and also a provision limiting the time within which a proceeding may be brought to obtain a review of an agreement for compensation on the ground of change in the condition of the injured employee, the limitation provision may be the provision that will control.¹⁶

Provisions limiting the time within which applications may be made for review of agreements for

sum payment was approved at maximum compensation rate warranted by employee's earning capacity, on reopening of case three-year limitation on liability of employer and compensation insurer running from date of last payment had not commenced to run and special fund for reopened cases was properly discharged from liability.

N.Y.—*Rainer v. Modern Mfg. Co.*, 88 N.Y.S.2d 923, 265 App.Div. 1023, appeal denied 41 N.Y.S.2d 381, 266 App.Div. 693.

97. La.—*Smith v. Maier*, App., 16 So.2d 682.

98. Ind.—*Dunsizer v. A. J. Wolf Const. Co.*, 23 N.E.2d 685, 107 Ind. App. 408—*Miles v. Indiana Service Corporation*, 185 N.E. 460, 97 Ind. App. 400.

99. Ind.—*Grant Coal Mining Co. v. Coleman*, 187 N.E. 692, 98 Ind.App. 560—*Miles v. Indiana Service Corporation*, 185 N.E. 460, 97 Ind.App. 400.

1. Ind.—*Lambert v. Powers*, 131 N.E. 420, 76 Ind.App. 77.

2. Ind.—*Grant Coal Mining Co. v. Coleman*, 187 N.E. 692, 98 Ind.App. 560.

3. Ind.—*Bertram v. Bicknell Coal & Mining Co.*, 148 N.E. 177, 83 Ind. App. 242—*McDaniel v. Circle A Products Corporation*, 147 N.E. 56, 83 Ind.App. 292.

4. Ind.—*Corr v. Trustees of Indiana University*, 34 N.E.2d 186, 109 Ind. App. 237—*Grant Coal Mining Co. v. Coleman*, 187 N.E. 692, 98 Ind. App. 560.

5. Va.—*Old Dominion Land Co. v. Messick*, 141 S.E. 132, 149 Va. 330.

6. Pa.—*Ancello v. Elk Tanning Co.*, 88 Pa.Super. 353.

7. Ga.—*London Guarantee & Accident Co. v. Boynton*, 188 S.E. 265, 54 Ga.App. 419.

8. Ga.—*London Guarantee & Accident Co. v. Boynton*, supra.

9. Ga.—*U. S. Casualty Co. v. Smith*, 133 S.E. 851, 853, 162 Ga. 130.

Vt.—*Bosquet v. Howe Scale Co.*, 120 A. 171, 96 Vt. 364.

10. Vt.—*Bosquet v. Howe Scale Co.*, supra.

11. Pa.—*Lomancik v. Youghiogheny & Ohio Coal Co.*, 180 A. 731, 119 Pa. Super. 263—*Zupcick v. Philadelphia & Reading Coal & Iron Co.*, 164 A. 731, 108 Pa.Super. 165.

12. Pa.—*Furman v. Standard Pressed Steel Co.*, 169 A. 243, 111 Pa.Super. 44.

13. Pa.—*Furman v. Standard Pressed Steel Co.*, supra.

14. N.J.—*Luszc v. Seaboard By-Products Co.*, 127 A. 212, 101 N.J. Law 170.

15. N.J.—*Luszc v. Seaboard By-Products Co.*, supra.

16. Pa.—*Jericho v. Liggett Spring & Axle Co.*, 106 A.2d 846, 176 Pa.Su-

compensation because of a change in the condition of the employee require that there be some action which will start the limitation period to run, and if such action as is required is not taken, the compensation provided for by the agreement may be increased, decreased, or terminated at any time.¹⁷ Thus, if approval of the compensation agreement is required to start the limitation period to run, in the absence of the required approval the application for review may be made at any time.¹⁸ If a compensation case has not been dismissed, vacated, or in any other manner brought to a conclusion, with the petition for compensation in full force and effect notwithstanding the agreement, additional compensation may not be denied because of the lapse of time;¹⁹ and, similarly, if at the time of filing a petition for review there is a properly approved subsisting preliminary agreement for compensation which has not been altered or terminated by a decree of court or by any subsequent agreement of the parties, the limitation period will not have commenced to run.²⁰ If the period in which to obtain a review starts to run from the date of the last or final payment, an application for review of an award on an agreement may be barred where it is not within the period so provided,²¹ and the application is timely when it is within such period.²² In determining the date of the last or final payment, the date when medical aid was furnished the employee may be regarded as the date of the last or final payment,²³ although it has also been held that the payment of medical bills by the employer or insurer does not constitute a payment of compensation to determine the date of the starting of the period of limitations.²⁴

Where a compensation act provides that review may be had within a specified time after notice to the board of final payment under the agreement,

notice of final payment must be given to start the limitation period to run,²⁵ and notice of final payment may be given by the employer or by insurer, and notice from such source will be sufficient to start the limitation period to run.²⁶ Where a compensation act provides that a proceeding to obtain compensation in addition to that provided for by an agreement must be brought within a specified time after the last payment under the agreement, it is not necessary that there should be a formal hearing closing the case in order for the period to commence to run.²⁷

An employer or insurer seeking to have an agreement for compensation modified or terminated may file the petition to effect this purpose at any time within the period allowed by law,²⁸ and the petitioner may wait until such time within the statutory period as he is prepared to prove the facts necessary to obtain the modification or termination of the agreement;²⁹ and the petitioner is not precluded from maintaining such a proceeding because he waits to file the petition until near the end of the statutory period.³⁰ Similarly, in a case where a compromise has been made and the employee has a specified period of time in which to sue to annul the compromise and recover the compensation that is due to him, he may wait until near the end of the specified period to institute the action to annul.³¹

Where a provision of a compensation act is to the effect that in the case of temporary disability compensation shall not continue for more than six years, and another provision is to the effect that the powers and jurisdiction of the compensation commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings, or orders

per. 128—Harrington v. Mayflower, 96 A.2d 180, 173 Pa.Super. 130.

17. Okl.—Simon v. Amerada Petroleum Co., 249 P.2d 120, 207 Okl. 255.

R.I.—Balon v. General Cable Corp., 68 A.2d 44, 76 R.I. 206.

18. Mo.—Weiss v. Anheuser-Busch, Inc., 117 S.W.2d 682, 234 Mo.App. 710.

Okl.—Simon v. Amerada Petroleum Co., 249 P.2d 120, 207 Okl. 255.

19. N.J.—Schepp v. Todd (Hoboken) Dry Dock Co., Co., 62 A.2d 159.
Kacprowicz v. Federal Shipbuilding & Dry Dock Co., 55 A.2d 18, 25 N.J.Misc. 426.

20. R.I.—Santilli v. Original Bradford Soap Works, Inc., 131 A.2d 235, reheard 135 A.2d 834—Balon v.

General Cable Corp., 68 A.2d 44, 76 R.I. 206.

21. Mo.—State ex rel. Saunders v. Missouri Workmen's Compensation Commission, 63 S.W.2d 67, 333 Mo. 691.

Bliss v. Lungstras Dyeing & Cleaning Co., App., 130 S.W.2d 193
—Ferguson v. Ozark Distributing Co., 93 S.W.2d 291, 230 Mo.App. 529.

22. Mo.—Myers v. Cap Sheaf Bread Co., 192 S.W.2d 503, 354 Mo. 943.
N.J.—Ecken v. O'Brien, 183 A. 273, 116 N.J.Law 94.

23. Mo.—Myers v. Cap Sheaf Bread Co., 192 S.W.2d 503, 354 Mo. 943.

24. N.C.—Tucker v. Lowdermilk, 63 S.E.2d 109, 233 N.C. 185.

25. Ga.—Kirkland v. Employers Lia-

bility Assur. Corp., 25 S.E.2d 723, 69 Ga.App. 433.

Miss.—H. C. Moody & Sons v. Dedaux, 79 So.2d 225, 223 Miss. 832.

26. Ga.—Kirkland v. Employers Liability Assur. Corp., 25 S.E.2d 723, 69 Ga.App. 433.

27. Miss.—H. C. Moody & Sons v. Dedaux, 79 So.2d 225, 223 Miss. 832.

28. Pa.—Flood v. Logan Iron & Steel Co., 5 A.2d 621, 136 Pa.Super. 101.

29. Pa.—Flood v. Logan Iron & Steel Co., supra.

30. Pa.—Flood v. Logan Iron & Steel Co., supra.

31. La.—Langston v. Hanbury, App., 11 So.2d 415.

with respect thereto, as in its opinion may be justified, the two provisions are not in conflict with respect to the time within which there may be an award of compensation in addition to that paid under a settlement agreement.³² The first provision merely fixes the period during which payment is to extend, and does not determine or fix the time for application to be made for an award of additional compensation because of a change in the condition of the employee.³³

Where a provision is added to a compensation act limiting the time within which application for review of an agreement for compensation must be made, such a limitation relates to procedure, and may be made applicable to pending cases, and it is not necessary that it should be confined in its application to accidents which occur after the passage and approval of the provision.³⁴

Statutes extending period of limitations on reclassification of disability have been held to permit reclassification of disability within the extended period where the case had been closed on a lump sum settlement prior to the enactment of the statutory extension and the limitation period theretofore in effect had already expired.³⁵

Tolling of statutory period. When a review of an agreement for compensation is sought because of a change in the condition of the employee, the application for review must be made within the time provided by statute, unless there has been a tolling of the statute,³⁶ and the running of the statute may be tolled by the conduct or declarations of the party invoking the protection of the statute.³⁷ The conduct of the employer may constitute such a quasi estoppel as to preclude the setting up of the bar of

limitations,³⁸ but in order that the conduct of the employer toll the running of the limitation period there must be statements or representations which deceived or misled the employee.³⁹ The confinement of the employee in a penal institution has been held not to extend his right to review beyond the statutory period.⁴⁰ Where the injured employee is a minor at the time an agreement for compensation is made, the commencement of the period for instituting proceedings to obtain compensation in addition to that provided for by the agreement, may be extended to the date the employee attains majority.⁴¹

The general rule, as discussed in Limitations of Actions § 247, to the effect that a statute of limitations will not run against a right in litigation has been held to apply to a provision limiting the time within which review of an agreement for compensation may be sought.⁴² In accordance with this rule, the filing of a claim for review and for compensation in addition to that provided for by an agreement will toll the running of a statute of limitations;⁴³ and time limitations may not run during the period a petition for termination of an agreement for compensation and the answer thereto are pending before a compensation tribunal,⁴⁴ nor will limitations begin to run prior to a determination of an appeal from the award.⁴⁵

Laches. While an application for increase, diminution, termination, or reinstatement of compensation provided for by agreement, or by an award based on an agreement, may be barred where not made promptly,⁴⁶ the doctrine of laches is not always applicable to such applications,⁴⁷ and if the doctrine of laches is not applicable, a petition for

32. Utah.—Utah Apex Min. Co. v. Industrial Commission of Utah, 209 P.2d 571, 116 Utah 305.

33. Utah.—Utah Apex Min. Co. v. Industrial Commission of Utah, supra.

34. Pa.—Rednock v. Westmoreland Coal Co., 200 A. 114, 132 Pa.Super. 89—De Joseph v. Standard Steel Car Co., 99 Pa.Super. 497.

35. N.Y.—Montgomery v. Seneca Iron & Steel Co., 257 N.Y.S. 556, 236 App.Div. 19, motion denied 258 N.Y. S. 1007, 236 App.Div. 763.

36. Pa.—Boyle v. Mill Creek Coal Co., 10 A.2d 884, 138 Pa.Super. 347.

37. Pa.—Horton v. West Penn Power Co., 180 A. 56, 119 Pa.Super. 465.

38. Pa.—Horton v. West Penn Power Co., supra.

39. Pa.—Boyle v. Mill Creek Coal Co., 10 A.2d 884, 138 Pa.Super. 347.

40. Pa.—Stevenson v. Westmore-

land Coal Co., 21 A.2d 468, 146 Pa. Super. 32, affirmed 26 A.2d 199, 344 Pa. 561.

41. Miss.—H. C. Moody & Sons v. Dedeaux, 79 So.2d 225, 223 Miss. 832.

42. Tenn.—Phillips v. Memphis Furniture Mfg. Co., 79 S.W.2d 576, 168 Tenn. 481.

43. Mich.—Scalzo v. Family Creamery Co., 14 N.W.2d 505, 308 Mich. 587.

Tenn.—Phillips v. Memphis Furniture Mfg. Co., 79 S.W.2d 276, 168 Tenn. 481.

44. Pa.—Downs v. Linton's Lunch, 6 A.2d 515, 334 Pa. 415.

45. Pa.—Higgins v. Commonwealth Coal & Coke Co., 161 A. 745, 106 Pa. Super. 1.

46. S.C.—Corpus Juris quoted in Wallace v. Campbell Limestone Co., 17 S.E.2d 309, 311, 198 S.C. 196. 71 C.J. p 1473 note 99.

47. Okl.—Simon v. Amerada Petroleum Co., 249 P.2d 120, 207 Okl. 255.

Doctrine of laches explained

In a proceeding where injured employee sought to have reviewed agreement for compensation because his condition had changed, and where respondent urged defense of laches, it was held that in this connection laches involves more than mere delay, mere lapse of time, and to deserve that category delay must be for a length of time which, unexplained and unexcused, is altogether unreasonable under circumstances, and has been prejudicial to party asserting it or renders it very doubtful that truth can be ascertained and justice administered.

N.J.—Simon v. R. H. H. Steel Laundry, Inc., 95 A.2d 446, 25 N.J.Super. 50, affirmed 98 A.2d 604, 26 N.J.Super. 598.

compensation in addition to that provided for by an agreement may be filed and considered, even though long after the last payment under the agreement.⁴⁸

§ 905. Conditions Precedent

A review of a compensation agreement or settlement for change in condition of the employee may be maintained only if there has been compliance with such conditions precedent as may exist, and it is essential that there be an agreement that may be reviewed.

It is a prerequisite to a review of an agreement for compensation because the disability of the employee has subsequently recurred, increased, diminished, or ended, that there be an agreement for compensation which may be reviewed.⁴⁹ Under some compensation acts, if a valid compromise settlement of a claim for compensation has been entered into, the compensation board or commission has no jurisdiction to entertain a claim for further compensation until such settlement has been set aside;⁵⁰ and it may be a prerequisite to the reopening of a case which has been closed by a compromise settlement under which payments have been made, that there be a tender of the money paid under the compromise settlement,⁵¹ unless it is shown that such a tender would be refused.⁵² However, where final payment of compensation has been made under an agreement and a final receipt given, and thereafter it is sought to have the agreement reinstated because of a recurrence of the disability, the fact that a final receipt has been signed may be of no significance,⁵³ and it is not necessary to first move to set it aside.⁵⁴ Furthermore, where an employee has entered into an agreement suspending further payments of compensation, and thereafter claims additional compensation because he did not recover from the injury as expected, the employee has a remedy at law to obtain such additional

compensation, and the remedy at law is available without resorting to a bill to set aside the agreement suspending compensation payments.⁵⁵

If an employer or insurer seeks to have an agreement for compensation terminated because the disability of the employee has ceased, it may be a condition precedent to an application for such relief that payment in accordance with the terms of the agreement has been made,⁵⁶ on the theory that a party in default of an approved agreement for compensation has not the right to invoke or receive affirmative relief by a petition to review while such default continues;⁵⁷ but continued payment of compensation pursuant to settlement and award up to the time of the employer's application for review thereof because of changed conditions is not necessarily a condition precedent to the making of such application,⁵⁸ although where an employer or insurance carrier is in default for a considerable period of time before applying for review it may be barred of such right.⁵⁹

Where the commission has approved a lump sum agreement not constituting a final settlement of the employer's entire liability, but constituting merely a commutation of the remaining weeks of the award, it is not a condition precedent in proceedings for additional compensation that there first be an appeal from the lump sum award secured by the lump sum agreement,⁶⁰ or a request or application to set aside such award;⁶¹ and where a settlement is made on a lump sum basis, it is not necessary that such settlement be set aside in order for the employee to recover such further compensation as may be due him.⁶²

Notice. Ordinarily, a provision barring the right to compensation if notice to the employer is not given within a specified period of time has no ap-

48. Okl.—Simon v. Amerada Petroleum Co., 249 P.2d 120, 207 Okl. 255.

49. Ill.—Weymer v. Industrial Commission, 88 N.E.2d 841, 404 Ill. 271. Pa.—Byrk v. Susquehanna Collieries Co., Com.Pl., 7 Sch.Reg. 26.

50. Tex.—Kennedy v. Texas Employers Ins. Ass'n, Civ.App., 121 S.W.2d 434, affirmed Texas Employers Ins. Ass'n v. Kennedy, 143 S.W.2d 583, 135 Tex. 486.

51. U.S.—Hohn v. Alaska Indus. Bd., D.C.Alaska, 150 F.Supp. 519.

52. U.S.—Hohn v. Alaska Indus. Bd., supra.

53. Pa.—Gower v. Mackes, 132 A.2d 880, 184 Pa.Super. 41—Mouhat v. Board of Public Ed. of Pittsburgh,

48 A.2d 20, 159 Pa.Super. 423—Smith v. Union Collieries Co., 38 A.2d 407, 155 Pa.Super. 389—Parks v. Susquehanna Collieries Co., 27 A.2d 481, 149 Pa.Super. 535—Koreen v. Union Collieries Co., 14 A.2d 845, 141 Pa.Super. 70.

54. Pa.—Gower v. Mackes, 132 A.2d 880, 184 Pa.Super. 41—Mouhat v. Board of Public Ed. of Pittsburgh, 48 A.2d 20, 159 Pa.Super. 423—Smith v. Union Collieries Co., 38 A.2d 407, 155 Pa.Super. 389—Parks v. Susquehanna Collieries Co., 27 A.2d 481, 149 Pa.Super. 535.

55. Mich.—Smith v. Markille, 292 N.W. 695, 294 Mich. 178.

56. R.I.—Carpenter v. Globe Indem. Co., 14 A.2d 235, 65 R.I. 194, 129 A.L.R. 410.

Payment to date disability ceased
Pa.—Burchewsky v. Max Bailis & Sons, 36 Pa.Dist. & Co. 378.

57. R.I.—Brown & Sharpe Mfg. Co. v. Giacoppa, 32 A.2d 419, 69 R.I. 378.

58. Ind.—Indiana Electric Corporation v. Medley, 152 N.E. 285, 85 Ind.App. 32.

71 C.J. p 1475 note 23.

59. Ind.—Lambert v. Powers, 131 N.E. 420, 76 Ind.App. 77.

60. Mo.—Oard v. Hope Engineering Co., App., 64 S.W.2d 707.

61. Mo.—Oard v. Hope Engineering Co., supra.

62. La.—Washington v. Holmes & Barnes, App., 4 So.2d 51, amended on other grounds and rehearing denied 5 So.2d 195, affirmed 9 So.2d 35, 200 La. 787.

plication to a proceeding to review an agreement for compensation because of a change in the condition of the employee;⁶³ and the original notice of injury precedent to a subsequent settlement and award for specified injuries has been held sufficient notice to warrant a later award for different injuries thereafter developing from the same accident.⁶⁴ If a compensation board or commission entertains an employee's supplemental claim for compensation for disability recurring after the execution of a compensation settlement receipt, a presumption arises that any irregularity in the giving of the original notice has been waived.⁶⁵ Under statutes providing for review on notice to the parties interested, where an agreement for compensation constituting an award has been made, such award may not subsequently be changed in the employee's favor without notice to the employer.⁶⁶

§ 906. Application

Applications and petitions to review compensation agreements and settlements on the ground of a change in the condition of the employee, ordinarily, are governed by the general rules of pleading, although technical rules of pleading are not usually applied.

An application or petition to review an agreement for compensation to obtain an increase, diminution, termination, or reinstatement of compensation because of a change in the condition of the employee, ordinarily, is governed by the rules of pleading which are applied in workmen's compensation cases;⁶⁷ but the technical rules of pleading do not apply in such proceedings,⁶⁸ and, accordingly, such applications or petitions should be liberally

construed.⁶⁹ The rule of liberal construction will not be carried so far as to permit granting of relief where the petition wholly fails to apprise the other party that such relief was sought,⁷⁰ and, thus, an application or petition for review may be ineffective to secure the requested relief if it does not contain the essential averments.⁷¹ On the other hand, a petition or application is sufficient if it affords the adverse party ample notice of the claim against which that party has to defend.⁷²

The fact that an application or petition for review is improperly designated does not change the substance of the application or petition, or destroy any of the rights or obligations that are provided for by the compensation act,⁷³ since formal inaccuracy in the designation of a petition does not constitute cause for the denial of the proper relief;⁷⁴ and such relief as is proper may be granted without regard to the particular provision of the compensation act which is cited in the application or petition.⁷⁵

If an agreement for compensation is unapproved and a change occurs in the condition of the employee, the remedy to obtain additional compensation is by an original petition for compensation rather than by a petition for review, which would be the proper remedy had the agreement been approved.⁷⁶ A petition to terminate or modify an agreement may operate as a supersedeas permitting the discontinuance of payments as of the date of filing the petition, but for a petition to have such effect it must be in accordance with the statutory requirements.⁷⁷ In the construction of applica-

63. U.S.—Carper v. Texas Compensation Ins. Co., C.C.A.Tex., 88 F.2d 572.

Tenn.—Phillips v. Memphis Furniture Mfg. Co., 79 S.W.2d 576, 168 Tenn. 481.

64. Okl.—Tankersley Const. Co. v. Ohls, 4 P.2d 68, 153 Okl. 203.

65. U.S.—Carper v. Texas Compensation Ins. Co., C.C.A.Tex., 88 F.2d 572.

66. Ky.—Sawyers v. Lena Rue Coal Co., 239 S.W. 1107, 217 Ky. 500.

Notice held sufficient

Mich.—Curtis v. Slater Const. Co., 160 N.W. 659, 194 Mich. 259.

67. Pa.—Kochinsky v. Independent Pier Co., 41 A.2d 409, 157 Pa.Super. 15.

68. Pa.—Yanasavage v. Lehigh Nav. Coal Co., 171 A. 404, 112 Pa.Super. 479.

69. Ga.—Georgia Marine Salvage Co. v. Merritt, 60 S.E.2d 419, 82 Ga.App. 111.

71 C.J. p 1475 note 27.

70. Ill.—M. Becker Cleaning Co. v. Industrial Commission, 153 N.E. 647, 322 Ill. 603.

Lack of averment, proof, and finding

Where only ground for suspension of agreement is that disability has temporarily ceased, absence of any averment, proof, or finding that employee's disability has temporarily ceased precludes suspension of agreement.

Pa.—Angelo v. Keystone State Const. Co., 3 A.2d 946, 135 Pa.Super. 255.

71. La.—Reiner v. Maryland Cas. Co., App., 185 So. 93.

Pa.—Brusco v. Philadelphia Rapid Transit Co., 24 A.2d 710, 148 Pa. Super. 97.

72. R.I.—Kestenman Bros. Mfg. Co. v. Greene, 102 A.2d 452, 81 R.I. 291.

73. R.I.—Balon v. General Cable Corp., 68 A.2d 44, 76 R.I. 206.

74. R.I.—Esposito v. Walsh-Kaiser, Co., 58 A.2d 402, 74 R.I. 31.

75. Pa.—Gill v. Fives, 88 A.2d 109, 170 Pa.Super. 564—Mallory v.

Pittsburgh Coal Co., 58 A.2d 804, 162 Pa.Super. 541—Kochinsky v. Independent Pier Co., 41 A.2d 409, 157 Pa.Super. 15—Tubbs v. O. T. Oil Co., 174 A. 836, 114 Pa.Super. 375—Yanasavage v. Lehigh Nav. Coal Co., 171 A. 404, 112 Pa.Super. 479.

Petition presented under proper provision

Pa.—Melody v. Bornot, Inc., 170 A. 408, 112 Pa.Super. 174.

Enforcement rather than modification

Where employer had refused to make payments under agreement, and employee petitioned for review and increase of compensation, board could properly order that agreement be fulfilled and carried out.

Pa.—Furman v. Standard Pressed Steel Co., 169 A. 243, 111 Pa.Super. 44.

76. Me.—Gauthier v. Penobscot Chemical Fiber Co., 113 A. 28, 120 Me. 73.

77. Pa.—Brusco v. Philadelphia Rap-

tions to reopen compensation awards, specific allegations outweigh conflicting general allegations relative to the same subject matter.⁷³

§ 907. Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

In a proceeding to review an agreement for compensation because of a change in the condition of the employee, the burden of proving change in condition rests on the party asserting that a change has occurred.

The burden of proof rests on the one claiming a change in condition following settlement and award to establish the fact of such change,⁷⁹ and the burden of establishing that a compensation board or commission has approved an agreement or settlement rests on the party relying on the agreement or settlement.⁸⁰ The burden is on an employee seeking increase or reinstatement of compensation following settlement and award to prove that he is entitled to reopen the case,⁸¹ and to show the facts

essential to the relief sought by way of modification of a prior approved agreement,⁸² or setting it aside,⁸³ or the grant of further or additional compensation.⁸⁴ In this connection the burden rests on claimant, where such facts are in issue, to show that the injury arose out of, and in the course of, his employment,⁸⁵ and that the condition for which he seeks increased compensation is the result of the original injury;⁸⁶ and where he seeks further compensation following discontinuance of payments under an agreement, claimant has the burden of proving his incapacity since such discontinuance and as a result of injury connected with his employment.⁸⁷

After payment has been made under an agreement for compensation and a final receipt has been given, in a proceeding to set aside the final receipt because of a change in the condition of the employee, as where there has been a recurrence of the disability, the burden of proof is on the employee to establish the grounds for setting aside the final receipt;⁸⁸ but after a final receipt has been set aside and the agreement for compensation rein-

id Transit Co., 24 A.2d 710, 148 Pa. Super. 97.

73. Tex.—Wiggins v. Standard Accident Ins. Co., Civ.App., 61 S.W.2d 579.

79. Ga.—Fortson v. American Sur. Co., 89 S.E.2d 671, 92 Ga.App. 625. Ky.—Standard Accident Ins. Co. v. Hinson, 64 S.W.2d 574, 251 Ky. 287.

Pa.—Hendricks v. Patterson, 67 A.2d 652, 164 Pa.Super. 584—Rennard v. Rouseville Cooperage Co., 15 A.2d 48, 141 Pa.Super. 286.

Cybert v. Bendix Corp., 57 Pa. Dist. & Co. 443.

Search v. West End Coal Co., Com.Pl., 31 Luz.Leg.Reg. 475—Purpich v. Westmoreland Coal Co., Com.Pl., 38 West.L.J. 47.

R.I.—Pearl v. Builders Iron Foundry, 55 A.2d 282, 73 R.I. 304.

Procedure assuming or shifting burden

Where there is a serious dispute on question of causal connection between compensation claimant's injury and an existing disability, an employer should petition for a termination of agreement for compensation, thus assuming burden of proof, which is rightfully employer's burden, that disability from accident has ended, and a final receipt should not be taken merely as a device to shift that burden to employee.

Pa.—Schrein v. Fleischmann's Vienna Model Bakery, 24 A.2d 661, 148 Pa.Super. 155.

In Michigan

(1) Rule was recognized that where a settlement receipt had been

approved, claimant had burden of proof of showing that receipt was not in accordance with facts.

Mich.—Grycan v. Ford Motor Co., 289 N.W. 146, 291 Mich. 241—Roundtree v. Ford Motor Co., 277 N.W. 860, 283 Mich. 141—Richards v. Rogers Boiler & Burner Co., 234 N.W. 428, 252 Mich. 52.

(2) In order to bring cases in which no settlement receipt had been approved within application of above rule, department of labor and industries issued General Order No. 30 providing that in cases where settlement receipts had been filed prior to a stated date, and in which there had been no further proceedings, such receipts were approved as though approved individually.

Mich.—Grycan v. Ford Motor Co., supra—Weaver v. Antrim Iron Co., 265 N.W. 445, 274 Mich. 493—Giampa v. Chrysler Corp., 262 N.W. 259, 272 Mich. 327.

(3) Effect of General Order No. 30 was not to give blanket approval to all settlement receipts to which it applied, but to establish a procedural rule whereby burden of proof was placed on a party attacking a settlement receipt approved by General Order No. 30.

Mich.—Grycan v. Ford Motor Co., supra—Poisson v. Department of Labor & Industries, 274 N.W. 336, 280 Mich. 583—Weaver v. Antrim Iron Co., supra.

30. U.S.—Carper v. Texas Compens-

sation Ins. Co., C.C.A.Tex., 88 F.2d 572.

81. Mich.—Weidner v. Northway Motor Mfg. Co., 172 N.W. 574, 205 Mich. 583.

82. Ind.—Smith v. Brown, 144 N.E. 849, 81 Ind.App. 667.

Pa.—Brown v. Union Collieries Co., 33 A.2d 786, 153 Pa.Super. 293.

83. Pa.—Shuler v. Midvalley Coal Co., 146 A. 146, 296 Pa. 503.

Kursa v. H. C. Frick Coke Co., Com.Pl., 4 Fay.L.J. 130.

84. Pa.—Blackwell v. Dahlstrom Metallic Door Co., 169 A. 394, 111 Pa.Super. 93.

R.I.—De Conti v. A. D. Juilliard & Co., 132 A.2d 74.

71 C.J. p 1475 note 34.

85. Okl.—West Tulsa Pipe & Supply Co. v. Ivory, 28 F.2d 148, 164 Okl. 112.

86. Neb.—Gooch Milling & Elevator Co. v. Warner, 257 N.W. 224, 127 Neb. 796.

Va.—Old Dominion Land Co. v. Messick, 141 S.E. 132, 149 Va. 380.

87. Mass.—Donovan's Case, 137 N.E. 34, 243 Mass. 88.

88. Pa.—Eberst v. Sears Roebuck & Co., 6 A.2d 577, 334 Pa. 505—Shuler v. Midvalley Coal Co., 146 A. 146, 296 Pa. 503.

Gill v. Fives, 88 A.2d 109, 170 Pa. Super. 564—Artac v. Union Collieries Co., 13 A.2d 909, 140 Pa.Super. 499.

stated, the burden then rests on the employer to prove that the employee's disability has temporarily ceased and that he no longer suffers a loss of earning power.⁸⁹

An agreement for compensation is prima facie evidence of a compensable accident,⁹⁰ and the burden of proof rests on an employer or insurance carrier to show that it is entitled to diminution or termination of compensation.⁹¹ On petition to re-

view an agreement for compensation where it is established that the employee's incapacity is partial, the burden of establishing the extent of partial disability is on the employer;⁹² and in order to establish that the disability of an injured employee has diminished or ended, the burden is on the employer or insurer to show that there is suitable work available which the employee is capable of performing,⁹³ although it may be necessary, if the

89. Pa.—Artac v. Union Collieries Co., supra.

90. Pa.—Svestka v. Union Collieries Co., 27 A.2d 675, 149 Pa.Super. 468—Maishock v. State Workmen's Ins. Fund, 195 A. 143, 129 Pa.Super. 118—Carson v. Real Estate-Land Title & Trust Co., 165 A. 677, 109 Pa. Super. 37.

Amdel v. Doyle, Com.Pl., 4 Chester Co. 14.

91. Pa.—Knight v. Millard, 38 A.2d 264, 350 Pa. 17.

Muenz v. Kelo Beach Imp. Ass'n, 124 A.2d 153, 181 Pa.Super. 105—Clingan v. Fairchance Lumber Co., 71 A.2d 839, 166 Pa.Super. 331—Bartman v. Jones & Laughlin Steel Corp., 60 A.2d 565, 163 Pa.Super. 31—Dunkle v. Baltimore & O. R. Co., 57 A.2d 714, 162 Pa.Super. 340—Leaver v. Midvale Co., 57 A.2d 698, 162 Pa.Super. 393—Barckhoff v. Westmoreland Coal Co., 53 A.2d 872, 161 Pa.Super. 146—Snyder v. Hoffman, 48 A.2d 78, 159 Pa.Super. 392—Visnic v. Westmoreland Coal Co., 38 A.2d 539, 155 Pa.Super. 199—Rehm v. Union Collieries Co., 33 A.2d 637, 152 Pa.Super. 461—Hite v. Rockhill Coal Co., 30 A.2d 213, 151 Pa.Super. 284—Berkhamer v. Heinsling, 28 A.2d 807, 150 Pa. Super. 461—Nagel v. McDonald Min. Co., 28 A.2d 805, 150 Pa.Super. 527—Radez v. Westmoreland Coal Co., 27 A.2d 698, 149 Pa.Super. 642—Wells v. Lowber Gas Coal Co., 27 A.2d 677, 149 Pa.Super. 485—Ludwig v. Union Collieries Co., 24 A.2d 581, 147 Pa.Super. 247—Tomshuck v. Wallin Concrete Corp., 23 A.2d 74, 146 Pa.Super. 390—Matichowski v. Pittsburgh Terminal Coal Corp., 22 A.2d 114, 146 Pa.Super. 201—Flood v. Logan Iron & Steel Co., 20 A.2d 792, 145 Pa.Super. 206—Artac v. Union Collieries Co., 13 A.2d 909, 140 Pa.Super. 499—Lewis v. Bethlehem Mines Corp., 13 A.2d 107, 140 Pa.Super. 128—Flood v. Logan Iron & Steel Co., 5 A.2d 621, 136 Pa.Super. 101—Stanella v. Scranton Coal Co., 186 A. 211, 122 Pa.Super. 506.

Sako v. Eastern Gas & Fuel Associates, Sonman Mine Coal Division, Com.Pl., 17 Cambria 49—Amdel v. Doyle, Com.Pl., 4 Chester Co. 14—Miller v. Arundel Corp., Com. Pl., 46 Lack.Jur. 61—Masurkevich

v. Philadelphia & Reading Coal & Iron Co., Com.Pl., 21 Northumb. Leg.J. 85—Hickes v. Dravo Corp., Com.Pl., 90 Pittsb.Leg.J. 496—Luto v. Lytle Coal Co., Com.Pl., 6 Sch. Reg. 44—Keiser v. Philadelphia & Reading Coal & Iron Co., Com.Pl., 5 Sch.Reg. 266, affirmed 4 A.2d 188, 134 Pa.Super. 104—Squarcia v. Industrial Collieries Corp., Com.Pl., 29 Wash.Co. 29.

R.I.—Imperial Knife Co. v. Gonsalves, 133 A.2d 721—Moss Const. Co. v. Boiani, 125 A.2d 147—Scialo Bros. v. Marini, 115 A.2d 359—American Textile Co. v. De Angelo, 100 A.2d 216, 81 R.I. 163—Manville Jenckes Corp. v. Lubinski, 68 A.2d 107, 76 R.I. 36—Brown & Sharpe Mfg. Co. v. Vincent, 55 A.2d 729, 73 R.I. 309—Walsh-Kaiser Co. v. D'Ambra, 53 A.2d 479, 73 R.I. 37. 71 C.J. p 1476 note 39.

Proceeding for compensation

Where insurance company stopped making payments under agreement to pay claimant compensation for permanent total disability, and claimant filed claim petition for compensation, burden of proof on petition was not on insurance company and employer to prove a decrease of disability but on claimant to sustain by preponderant evidence claim asserted therein that permanent disability was total.

N.J.—Ferraro v. Zurcher, 79 A.2d 473, 12 N.J.Super. 231.

Burden of proof not unreasonable

In proceeding by employer and insurance carrier for modification of workmen's compensation agreement on ground of decrease of employee's disability, wherein compensation board affirmed referee's finding that employee was totally disabled, and further stated that employer and insurance carrier failed to sustain their burden to establish change in disability because their experts had expressed opinion that disability had been reduced but did not venture to state that employee was unable to do any work, an unwarranted, arbitrary, and unreasonable burden of proof was not placed on insurance carrier and employer.

Pa.—Kutney v. William Penn Colliery Co., 25 A.2d 92, 143 Pa.Super. 114.

92. R.I.—Moss Const. Co. v. Boiani, 125 A.2d 147—Walsh-Kaiser Co. v. D'Ambra, 53 A.2d 479, 73 R.I. 37.

93. Pa.—Barckhoff v. Westmoreland Coal Co., 53 A.2d 872, 161 Pa.Super. 146—Maishock v. State Workmen's Ins. Fund, 195 A. 143, 129 Pa. Super. 118—Hale v. Susquehanna Collieries Co., 191 A. 225, 126 Pa. Super. 342.

R.I.—Walsh-Kaiser Co. v. D'Ambra, 53 A.2d 479, 73 R.I. 37—Olneyville Wool Combing Co. v. Di Donato, 13 A.2d 817, 65 R.I. 154.

First burden on employer

In proceedings on employer's petition for review of preliminary agreement, providing for payment of compensation for total incapacity, on ground that incapacity of employee had ended or diminished, it was error for trial judge, who had found employee sufficiently recovered to resume light work, to require employee to go ahead with duty of producing evidence as to his good faith and cooperation in attempt to attain light work without first requiring petitioning employer to establish that it had cooperated sufficiently at least prima facie to discharge its burden in that regard.

R.I.—Moss Const. Co. v. Boiani, 125 A.2d 147.

Work in nature of odd jobs

In workmen's compensation proceeding to review preliminary agreement on ground employee's total incapacity had ended or diminished, evidence sustained trial justice's finding that employee was unable to do any kind of light work in general but could do only work in nature of odd jobs not generally obtainable and that employer had not pointed out or suggested any light work which employee could perform or by his own efforts might reasonably obtain, and trial justice's conclusion that employer had failed to sustain burden of proof as required.

R.I.—Scialo Bros. v. Marini, 115 A. 2d 359.

Availability of work

An employer seeking modification of workmen's compensation agreement on ground of decrease of employee's liability is not required to show in every case that work which employee is able to do is available and has been offered to him.

employer or insurer expects to establish that disability has terminated rather than merely diminished, to produce evidence to show that the employee is capable of performing the work that was being done at the time of the injury.⁹⁴

The evidence required to set aside a final receipt must be definite, precise, specific, credible, and reasonably satisfactory,⁹⁵ and must be of a more definite and specific nature than that on which initial compensation is based;⁹⁶ the purpose of this rule being to prevent the maintenance of false claims, and to give some degree of assurance to the employer that his liability has ended or will not be re-established unless it is on evidence which clearly warrants it.⁹⁷

Presumptions. Where a compensation act so provides, there is a presumption that at the time a final receipt is signed claimant's disability had ceased,⁹⁸ but the presumption may be overcome on the presentation of competent testimony.⁹⁹ Where an employee's petition contains allegations showing that he was in possession of normal faculties up to and through the day of a compensation settlement, it will be presumed that he had capacity to execute the settlement.¹

b. Admissibility

In a proceeding to review an agreement for compensation because of a change in the condition of the employee, the rules as to the admissibility of evidence in compensation proceedings generally are applicable.

The general rules as to the admissibility of evidence in workmen's compensation proceedings, which are discussed supra §§ 525-546, are generally held to be applicable in proceedings to review an agreement for compensation because of a change in the condition of the employee,² and, in such proceedings, under the generally recognized rules, evidence which is material on an issue is usually admissible,³ while irrelevant evidence is not admissible.⁴ Accordingly, where an application for review and modification of an agreement for compensation is based solely on an alleged change in the condition of the employee, and with no suggestion of fraud being made, evidence as to fraud is not admissible.⁵ Similarly, on review of an approved agreement for compensation where a change in the condition of the employee is alleged as the ground for review, evidence that the condition causing disability was not the result of accident may be incompetent and inadmissible, and an award decreasing compensation cannot be based thereon.⁶ Evidence which might otherwise be inadmissible may be introduced by agreement of the parties.⁷ The agreement for compensation may be admissible against the employer and insurer as a declaration against interest.⁸

The testimony of medical experts is generally admissible in such proceedings,⁹ and a physician does not usurp the function of the court in testifying that an employee is able to resume his ordinary

Pa.—Kutney v. William Penn Colliery Co., 25 A.2d 92, 148 Pa.Super. 114.

94. R.I.—Walter Marshall Spinning Corp. v. Merola, 78 A.2d 355, 78 R.I. 20.

95. Pa.—Shuler v. Midvalley Coal Co., 146 A. 146, 296 Pa. 503. Gill v. Fives, 88 A.2d 109, 170 Pa.Super. 564.

96. Pa.—Shuler v. Midvalley Coal Co., 146 A. 146, 296 Pa. 503. Gill v. Fives, 88 A.2d 109, 170 Pa.Super. 564.—Huerbin v. D. L. Clark Co., 14 A.2d 175, 140 Pa.Super. 406.

97. Pa.—Eberst v. Sears Roebuck & Co., 6 A.2d 577, 334 Pa. 505.

98. Pa.—Benko v. Vesta Coal Co., 28 A.2d 31, 149 Pa.Super. 388.

99. Pa.—Benko v. Vesta Coal Co., supra.

1. Tex.—Wiggins v. Standard Accident Ins. Co., Civ.App., 61 S.W.2d 579.

2. Qualification of medical experts

Fact that certain physicians who testified in a proceeding to review an agreement for compensation were specialists in particular field of medicine under consideration, and that

other physicians who testified were not specialists, would not affect admissibility of their testimony.

R.I.—Morton C. Tuttle Co. v. Carbone, 125 A.2d 133.

Evidence bearing on credibility

In employer's action to review preliminary agreement for compensation for total incapacity, cross-examination of employee concerning time of his return to work for employer after receiving lump sum payment for a previous injury was proper as bearing on credibility of employee in view of his inconsistent statements in superior court and before director of labor.

R.I.—Narragansett Hotel, Inc. v. Mallozzi, 103 A.2d 355, 81 R.I. 389.

Evidence held admissible

In proceeding to review compensation agreement, evidence that petitioner had performed his usual heavy work satisfactorily and for an appreciable time without complaint and without asking for lighter work, medical attention, or compensation, and had voluntarily left job solely to get better wages, was admissible on question of disability and loss of earning power.

R.I.—Pearl v. Builders Iron Foundry, 55 A.2d 282, 73 R.I. 304.

3. Ga.—Wiley v. Bituminous Cas. Co., 47 S.E.2d 652, 76 Ga.App. 862.

4. R.I.—Haverhill Shoe Novelty Co. v. Di Vona, 107 A.2d 305, 83 R.I. 254, reargument denied 108 A.2d 253, 82 R.I. 254.

5. Idaho.—McCall v. Potlatch Forests, 182 P.2d 156, 67 Idaho 415.

6. Ga.—Hartford Acc. & Indem. Co. v. Camp, 26 S.E.2d 679, 69 Ga.App. 753.

7. R.I.—Narragansett Hotel, Inc. v. Mallozzi, 103 A.2d 355, 81 R.I. 389.

8. N.J.—Ferraro v. Zurcher, 79 A.2d 473, 12 N.J.Super. 231.

9. R.I.—Atlas Tool & Findings Co. v. Duffy, 98 A.2d 849, 81 R.I. 61.—Ostby & Barton Co. v. Curcio, 63 A.2d 784, 75 R.I. 82.

Examination one year prior to testifying

"It is our judgment that we should not hold as a matter of law that an opinion given by a medical witness and based on an examination of an injured person made about one year prior to the date the witness testi-

occupation.¹⁰ The report of a physician examining an injured employee on behalf of the employer or insurer may be admissible in a proceeding to review an agreement for compensation, although a copy of the report was not sent to the employee or his attorney in strict compliance with the requirements of the statute, if the failure to follow the statutory prescribed procedure does not prejudice the rights of the injured employee.¹¹

Where an award of compensation is based on a receipt and report or stipulation is made by the compensation board or commission, and, it being impossible to determine from the order, receipt, report, or stipulation what character of disability was determined or included in the award, the board or commission, on a subsequent hearing, may consider competent evidence to determine the character or extent of disability determined by the prior award.¹²

fied must *ipso facto* be of no legal or probative value."

R.I.—American Textile Co. v. De Angelo, 100 A.2d 218, 217, 81 R.I. 163.

10. R.I.—Ostby & Barton Co. v. Curcio, 63 A.2d 784, 75 R.I. 82.

11. R.I.—Morton C. Tuttle Co. v. Carbone, 125 A.2d 133.

12. Okl.—McCawley v. Crane, 85 P. 2d 423, 184 Okl. 64—Croxtton & Bucklin v. Buchanan, 39 F.2d 91, 170 Okl. 170.

13. Pa.—Flood v. Logan Iron & Steel Co., 20 A.2d 792, 145 Pa.Super. 206. Cybert v. Bendix Corp., 57 Pa. Dist. & Co. 443.

Kalina v. Motor Freight Exp., Com.Pl., 42 Berks Co. 187—Miller v. Arundel Corp., Com.Pl., 46 Lack. Jur. 61.

R.I.—Macedo v. Atlantic Rayon Corp., 103 A.2d 64, 81 R.I. 339—Kesterman Bros. Mfg. Co. v. Greene, 102 A.2d 452, 81 R.I. 291—Walter Marshall Spinning Corp. v. Merola, 78 A.2d 355, 78 R.I. 20.

Requirement of competent evidence

Where an employee enters into an agreement with his employer and insurance carrier based on a percentage of permanent partial disability, he is not entitled to an additional award on ground of a change in condition for worse unless there is competent evidence authorizing a finding that his condition has changed for worse since original agreement and award. Ga.—Phinney v. Ocean Acc. & Guaranty Corp., 58 S.E.2d 921, 81 Ga. App. 394.

Evidence introduced by agreement held sufficient

Employee's contention that there was no legal evidence to support finding of trial court that employer offered her light factory work on

ground that letter in support of such finding was addressed to employee's attorney, but not to her was without merit, where letter was put in evidence by agreement at hearing of workmen's compensation case in which employer sought reduction of total disability compensation. R.I.—Gorham Mfg. Co. v. Viselli, 52 A.2d 517, 72 R.I. 427.

Determination as to weight and credibility

In proceeding by employer and insurance carrier for modification of workmen's compensation agreement on ground of decrease of employee's disability, it was exclusive province of compensation authorities to pass on weight and credibility of testimony of medical experts, and authorities could accept testimony of employee's experts and reject testimony of employer's experts.

Pa.—Kutney v. William Penn Colliery Co., 25 A.2d 92, 148 Pa.Super. 114.

Qualification of medical experts

Fact that certain physicians who testified in a proceeding to review an agreement for compensation were specialists in particular field of medicine under consideration, and that other physicians were not specialists, would go only to weight of their testimony.

R.I.—Morton C. Tuttle Co. v. Carbone, 125 A.2d 133.

14. Mo.—Brown v. Corn Products Refining Co., App., 55 S.W.2d 706.

No final determination

In a proceeding to obtain additional compensation, evidence was held sufficient to establish that a prior determination of compensation bureau was not a final adjudication precluding employee's claim for increased disability compensation.

c. Weight and Sufficiency

In proceedings to review agreements for compensation because of a change in the condition of the employee, the general rules governing weight and sufficiency of evidence are applicable.

The general rules governing weight and sufficiency of evidence apply in proceedings to review an agreement for compensation, or an award based on such agreement, for the purpose of obtaining an increase, diminution, termination, suspension, or reinstatement of compensation.¹³ Accordingly, these rules have been applied in respect of the evidence requisite to show the making of a valid settlement not subject to review for change of condition,¹⁴ or to support an award for resumption¹⁵ or reinstatement¹⁶ of compensation, or to show the existence of grounds for reopening, review or change of settlements and awards based thereon, as to show a change in conditions,¹⁷ such as an in-

N.J.—Anderson v. Public Service Electric & Gas Co., 177 A. 865, 114 N.J.Law 515.

15. Ind.—Mooney-Mueller-Ward Co. v. Doyle, 144 N.E. 473, 81 Ind.App. 563.

16. Mich.—Patrick v. Consolidated Coal Co., 259 N.W. 906, 271 Mich. 396.

Pa.—Koreen v. Union Collieries Co., 40 A.2d 925, 156 Pa.Super. 448—Hite v. Rockhill Coal Co., 80 A.2d 212, 151 Pa.Super. 284—Hill v. Booth & Flinn Co., 23 A.2d 85, 146 Pa.Super. 575—Zygmunt v. Copperweld Steel Co., 193 A. 350, 128 Pa. Super. 109.

17. Ga.—Fortson v. American Sur. Co., 89 S.E.2d 671, 92 Ga.App. 625—Royal Indem. Co. v. Bannister, 62 S.E.2d 765, 82 Ga.App. 845—Maryland Cas. Corp. v. Mitchell, 62 S.E.2d 415, 83 Ga.App. 99.

Idaho.—Skelly v. Sunshine Min. Co., 109 P.2d 622, 62 Idaho 192.

Mich.—Runnels v. Allied Engineers, 258 N.W. 230, 270 Mich. 153—Burley v. Central Paper Co., 192 N.W. 538, 221 Mich. 595.

Okl.—Moran-Buckner Co. v. French, 94 P.2d 883, 185 Okl. 550.

Pa.—Hendricks v. Patterson, 67 A.2d 652, 164 Pa.Super. 584—Patulonis v. Locust Mountain Coal Co., 51 A.2d 352, 160 Pa.Super. 401—Hayden v. Stony Springs Coal Co., 43 A.2d 384, 157 Pa.Super. 423—Brown v. Union Collieries Co., 33 A.2d 786, 153 Pa.Super. 293—Wells v. Lower Gas Coal Co., 27 A.2d 677, 149 Pa.Super. 485—Vetrulli v. Wallin Concrete Corp., 18 A.2d 535, 144 Pa. Super. 78.

R.I.—Di Vona v. Haverhill Shoe Novelty Co., 127 A.2d 503—M. Longo & Sons, Inc. v. Ianotti, 103 A.2d 560, 81 R.I. 496—Rhode Island Tpbacco

crease,¹⁸ recurrence,¹⁹ termination,²⁰ or continuance²¹ of disability or incapacity, or the termination of incapacity from the injury described in the agreement,²² or the causal connection between continued increased, or recurrent incapacity and the original accident or injury,²³ or to show no causal connection

between the original injury which was the subject of the agreement and the subsequent cause of disability.²⁴

In proceedings to review agreements for compensation, evidence has been held sufficient,²⁵ or insufficient

Co. v. Weintraub, 102 A.2d 456, 81 R.I. 272—Atlas Tool & Findings Co. v. Duffy, 98 A.2d 849, 81 R.I. 61—Gorham Mfg. Co. v. Viselli, 52 A.2d 517, 72 R.I. 427—Lorraine Mfg. Co. v. Appolony, 50 A.2d 616, 72 R.I. 258.

Change from total incapacity to partial incapacity

R.I.—Imperial Knife Co. v. Gonsalves, 138 A.2d 721—Barbieri v. De-Moranville, 106 A.2d 506, 82 R.I. 120.

No change in physical condition

In a proceeding to obtain further compensation, evidence was held sufficient to show no change in physical condition of employee.

Mich.—Goines v. Kelsey Hayes Wheel Co., 292 N.W. 686, 294 Mich. 156.

18. Ky.—Department of Highways v. Tarter, 276 S.W.2d 667.

Mich.—Chelli v. American Boston Min. Co., 285 N.W. 14, 288 Mich. 441—Van Atta v. Henry, 282 N.W. 185, 286 Mich. 379.

Pa.—Mouhat v. Board of Public Ed. of Pittsburgh, 48 A.2d 20, 159 Pa. Super. 428—Croll v. Miller, 2 A.2d 527, 133 Pa. Super. 448—Johnson v. Purnell, 200 A. 151, 181 Pa. Super. 230—Moule v. Barrymore Seamless Wilton Corp., 189 A. 523, 124 Pa. Super. 529—Gardner v. Pressed Steel Car Co., 186 A. 410, 122 Pa. Super. 592.

71 C.J. p 1476 note 47.

19. Ill.—Board of Education of City of Chicago v. Industrial Commission, 15 N.E.2d 288, 368 Ill. 564.

Pa.—Smith v. Union Collieries Co., 38 A.2d 407, 155 Pa. Super. 389—Brown v. Union Collieries Co., 33 A.2d 786, 153 Pa. Super. 293—Koreen v. Union Collieries Co., 14 A.2d 845, 141 Pa. Super. 70—Huerbin v. D. L. Clark Co., 14 A.2d 175, 140 Pa. Super. 406—Roberts v. Hillman Coal & Coke Co., 200 A. 128, 131 Pa. Super. 570—Irwin v. Byllesby Engineering & Management Corporation, 179 A. 780, 119 Pa. Super. 449.

Knittle v. Hazle Brook Coal Co., Com.Pl., 8 Sch.Reg. 108.

R.I.—Bobola v. Royal Elec. Co., 123 A.2d 250—Burns v. Rhode Island Tool Co., 85 A.2d 925, 79 R.I. 169.

71 C.J. p 1476 note 48.

20. Pa.—Zbleg v. Rochester & Pittsburgh Coal Co., 104 A.2d 158, 175 Pa. Super. 308—Houlihan v. Joseph J. Scheiter & Co., 70 A.2d 481, 166 Pa. Super. 85—Capriotti v. Philadelphia Inquirer Co., 40 A.2d 890,

156 Pa. Super. 509—Metalko v. Ford Collieries Co., 22 A.2d 222, 146 Pa. Super. 206.

Chordash v. McCloskey & Co., Com.Pl., 50 Dauph.Co. 43.

R.I.—Morton C. Tuttle Co. v. Carbone, 125 A.2d 133—Fiore v. Wanskuck Co., 116 A.2d 186—Woonsocket Worsted Co. v. Ravenelle, 114 A.2d 844—Hope Bldg. Co. v. Douglas, 105 A.2d 199, 82 R.I. 1—Kestenman Bros. Mfg. Co. v. Greene, 102 A.2d 452, 81 R.I. 291—Sayles Finishing Plants, Glen-Lyon Print Works Division v. Pandozzi, 101 A.2d 874, 81 R.I. 264—E. Turgeon Const. Co. v. Barbato, 101 A.2d 481, 81 R.I. 230—Menzies v. King, 95 A.2d 853, 80 R.I. 247—Sidney Blumenthal & Co. v. Jucknik, 81 A.2d 135, 78 R.I. 246—Manville Jenckes Corp. v. Lubinski, 68 A.2d 107, 76 R.I. 36—Airedale Worsted Mills v. Cote, 66 A.2d 802, 75 R.I. 361—Central Engineering & Const. Co. v. Rassano, 64 A.2d 197, 75 R.I. 108—Ostby & Barton Co. v. Curcio, 63 A.2d 784, 75 R.I. 82—Brown & Sharpe Mfg. Co. v. Vincent, 55 A.2d 729, 73 R.I. 309—Atlantic Rayon Corp. v. Macedo, 53 A.2d 756, 73 R.I. 157.

No termination of agreement

Evidence showing total disability of employee was sufficient to justify denial of termination of compensation agreement.

Pa.—Matchouski v. Pittsburgh Terminal Coal Corp., 22 A.2d 114, 146 Pa. Super. 201—Lewis v. Bethlehem Mines Corp., 13 A.2d 107, 140 Pa. Super. 128—Hale v. Susquehanna Collieries Co., 191 A. 225, 126 Pa. Super. 342—Fuzzio v. Susquehanna Collieries Co., 191 A. 222, 126 Pa. Super. 488.

Carleton v. Jeddo-Highland Coal Co., Com.Pl., 38 Luz.Leg.Reg. 241.

21. Pa.—Dunkle v. Baltimore & O. R. Co., 57 A.2d 714, 162 Pa. Super. 340—Leaver v. Midvale Co., 57 A.2d 698, 162 Pa. Super. 393—Knight v. Millard, 85 A.2d 764, 154 Pa. Super. 383, affirmed 38 A.2d 284, 350 Pa. 17—Berkhamer v. Heinsling, 28 A.2d 807, 150 Pa. Super. 461—Wess v. Diebold Lumber Co., 14 A.2d 589, 141 Pa. Super. 76—Malshock v. State Workmen's Ins. Fund, 195 A. 143, 129 Pa. Super. 118—Jones v. Hazle Brook Coal Co., 179 A. 783, 119 Pa. Super. 409.

Kocrodoci v. Glen Alden Coal Co., Com.Pl., 38 Luz.Leg.Reg. 147.

R.I.—Brown & Sharpe Mfg. Co. v. Campo, 113 A.2d 377—Providence

Window Cleaning Co. v. Robidoux, 112 A.2d 523—Balon v. General Cable Corp., 68 A.2d 44, 76 R.I. 206—Walsh-Kaiser Co. v. Champness, 53 A.2d 483, 73 R.I. 44—General Scrap Iron v. La Porte, 26 A.2d 618, 68 R.I. 98.

71 C.J. p 1476 note 50.

22. R.I.—Wanskuck Co. v. Puleo, 82 A.2d 872, 78 R.I. 447.

23. Minn.—Leland v. St. Olaf Lutheran Church, 4 N.W.2d 769, 213 Minn. 34.

Pa.—Rehm v. Union Collieries Co., 33 A.2d 637, 152 Pa. Super. 461.

71 C.J. p 1476 note 51.

24. Pa.—Turian v. William Clark-Rea Coal Co., 38 A.2d 639, 153 Pa. Super. 105.

R.I.—Macedo v. Atlantic Rayon Corp., 103 A.2d 64, 81 R.I. 339—Friscella Worsted Mills v. Vizzacco, 96 A.2d 835, 80 R.I. 342—Rigo v. Walsh-Kaiser Co., 55 A.2d 858, 73 R.I. 319.

25. Particular finds held supported by evidence

(1) Fact that compensation claimant failed to prove that he suffered any incapacity for work because of accident subsequent to last settlement agreement.

R.I.—Ferguson v. George A. Fuller Co., 58 A.2d 810, 74 R.I. 93, reargument denied 60 A.2d 723, 74 R.I. 93.

(2) Fact that return to work by employee who had contracted occupational dermatitis would intensify her embarrassment from a consciousness of apparent disfigurement or blemishes.

R.I.—Cornell-Dublier Elec. Corp. v. Manocchia, 89 A.2d 923, 79 R.I. 466.

(3) Fact that employee was in sufficiently good physical condition to sustain surgical operation.

R.I.—Esmond Mills, Inc. v. Mollo, 73 A.2d 865, 78 R.I. 27.

(4) Fact that claimant, before accident, had arthritic condition which accident aggravated and accelerated.

Pa.—Kulick v. Susquehanna Collieries Co., 169 A. 398, 111 Pa. Super. 35.

(5) Fact that injured employee was able to do kind of work she was doing when injured.

R.I.—Carl-Art, Inc. v. Cardullo, 89 A.2d 188, 78 R.I. 171.

Proceeding to compel resumption of compensation payments

(1) Evidence sustained finding that employee had tried in good faith to perform janitor work and to accept

ficient²⁶ to support findings made by the compensation board or commission, and evidence has been held sufficient to show that, because of the agreement for compensation, the employee was denied compensation in accordance with compensation law;²⁷ and evidence has also been held sufficient to show that the compensation provided by the agreement was wholly inadequate to compensate for nonschedule injuries.²⁸ In such a proceeding, evidence has been held sufficient to support a finding of maximum partial compensation for the injury sustained,²⁹ or to show that subsequent disability was the result of the compensable accident,³⁰ or to show no disability, in addition to that which was the basis of the agreement, sufficient to entitle the employee to additional compensation,³¹ or to show the ability of the employee to resume ordinary and usual work,³² or to show loss of earning capacity.³³

In an employer's proceeding to review an agreement for compensation for total incapacity, where evidence showed that the employee was only partially incapacitated, the failure to show what a person such as the employee could earn in a partially incapacitated condition warrants the continuance

of compensation for total incapacity.³⁴ In a proceeding to secure additional compensation after an award on a stipulated agreement, evidence may be sufficient to show as a matter of law that such award was not a compromise final settlement of all liability, but that the claim was left open to future adjustment.³⁵

In a proceeding for modification of an agreement for compensation because of an alleged change in the condition of the employee, where there is a conflict in the testimony, as between a medical expert and the employee, the board or commission is not required to accept the testimony of the medical expert,³⁶ and the testimony of the employee may be sufficient to support the finding of the board or commission.³⁷ However, in such a proceeding medical testimony may be sufficient to support a finding of the board or commission,³⁸ and, where the circumstances are such that the testimony of laymen would not be sufficient to establish the point in issue, medical testimony may be essential to support a finding of the board or commission.³⁹

In other proceedings particular evidence has been held insufficient to warrant modification,⁴⁰ termina-

ate in experiment to ascertain extent of his incapacity and to rehabilitate himself in conformity with decision of director of labor.

R.I.—Fresselli v. Washburn Wire Co., 64 A.2d 686, 75 R.I. 144.

(2) Evidence sustained finding that discharge of employee after he had been reemployed as jamitor was not based on employee's unwillingness to cooperate in attempt at rehabilitation but was based rather on employee's unwillingness to perform his original heavy work or to shovel and lift substantial weights, and warranted conclusion that discharge was in effect a withdrawal by employer of offer to give employee light work.

R.I.—Fresselli v. Washburn Wire Co., supra.

26. Particular findings held not supported by evidence

(1) Classification of an injured employee as a nondescript.

Pa.—Forsythe v. Harrison Tp. Bd. of Ed., 43 A.2d 366, 157 Pa.Super. 433.

(2) Finding fixing dollar value of employee's earning capacity.

R.I.—Atlas Tool & Findings Co. v. Duffy, 98 A.2d 849, 81 R.I. 61.

27. U.S.—Hohn v. Alaska Indus. Bd., D.C.Alaska, 150 F.Supp. 519.

28. N.Y.—La Felice v. Stone & Wilkie, 33 N.Y.S.2d 942, 263 App.Div. 511.

29. R.I.—Enos v. Abrasive Mach. Tool Co., 125 A.2d 111.

30. Pa.—Blackwell v. Dahlstrom Metallic Door Co., 169 A. 394, 111 Pa.Super. 93.

Subsequent accident caused by prior accident

R.I.—Ferguson v. George A. Fuller Co., 58 A.2d 810, 74 R.I. 98, reargument denied 60 A.2d 723, 74 R.I. 98.

31. Pa.—Rednock v. Westmoreland Coal Co., 200 A. 114, 132 Pa.Super. 39.

32. R.I.—Moss Const. Co. v. Bolani, 125 A.2d 147—E. Turgeon Const. Co. v. Barbato, 101 A.2d 481, 81 R.I. 230—Mincoff v. Marcaruso, 72 A. 2d 225, 76 R.I. 469.

Inability to resume prior work

R.I.—Olneyville Wool Combing Co. v. Di Donato, 18 A.2d 817, 65 R.I. 154.

33. R.I.—Enos v. Abrasive Mach. Tool Co., 125 A.2d 111.

Cause of decrease in earning capacity

Evidence in proceeding to review preliminary agreement in workmen's compensation case supported finding that decrease in plaintiff's earning capacity after his return to work was a result of disciplinary action by employer because of bad work, rather than as a result of physical condition growing out of injury.

R.I.—Laptev v. Moore Fabrics, Inc., 123 A.2d 398.

Evidence sufficient to show partial disability

Pa.—Wells v. Lowber Gas Coal Co.,

27 A.2d 677, 149 Pa.Super. 485—Svestka v. Union Collieries Co., 27 A.2d 675, 149 Pa.Super. 468.

34. R.I.—Rhode Island Tobacco Co. v. Weintraub, 102 A.2d 456, 81 R.I. 272.

35. Mo.—Weiss v. Anheuser-Busch, Inc., 117 S.W.2d 682, 234 Mo.App. 710.

36. Pa.—Knight v. Millard, 35 A.2d 764, 154 Pa.Super. 383, affirmed 38 A.2d 264, 350 Pa. 17.

Medical testimony held insufficient

In a proceeding for review of an agreement for compensation because of a change in condition of employee, testimony by a physician that in his opinion employee suffered a certain percentage of disability greater than that provided for by agreement was not sufficient to support an award of additional compensation.

Ga.—Phinese v. Ocean Acc. & Guaranty Corp., 58 S.E.2d 921, 81 Ga. App. 394.

37. Pa.—Knight v. Millard, 35 A.2d 764, 154 Pa.Super. 383, affirmed 38 A.2d 264, 350 Pa. 17.

38. Pa.—Baughman v. Hockensmith Wheel & Mine Car Co., 44 A.2d 764, 153 Pa.Super. 314—Visnic v. Westmoreland Coal Co., 38 A.2d 539, 155 Pa.Super. 199.

Knittle v. Hazle Brook Coal Co., Com.Pl., 8 Sch.Reg. 108.

39. Pa.—Baughman v. Hockensmith Wheel & Mine Car Co., 44 A.2d 764, 153 Pa.Super. 314.

40. Pa.—Clingan v. Fairchance Lum-

tion,⁴¹ or reinstatement⁴² of the agreement, or the setting aside of a lump sum settlement,⁴³ or insufficient to show a change in the physical condition of the employee,⁴⁴ or to show that permanent and total disability resulted from the compensable injury.⁴⁵ Similarly, particular evidence has been held insufficient to show recurrence of,⁴⁶ or increase in,⁴⁷ disability, or no recurrence of disability,⁴⁸ or that the employee's disability had ceased,⁴⁹ or had ceased at the time alleged,⁵⁰ or that the employee's disability was not caused by the original accident,⁵¹ or a causal connection between the compensable injuries which were the subject of the agreement and the subsequent cause of the employee's disability,⁵² or a decrease in the employee's earning capacity,⁵³ or that a prior physical condition rather than the accident was the cause of the employee's disability,⁵⁴ or that because of the disability the employee was capable of performing only light work.⁵⁵

Sufficiency of evidence as to limitations. In a

proceeding to review an agreement for compensation because of a change in the condition of the employee, particular evidence has been held sufficient to establish the applicability of a statute of limitations,⁵⁶ or insufficient to show that a claim for additional compensation was barred by limitations,⁵⁷ or insufficient to show such fraud as would extend the period provided by statute.⁵⁸

§ 908. Hearing or Trial

There should be a determination of all issues properly raised in the proceeding, and the determination should be such as is warranted by the circumstances of the case.

In a proceeding to review, reopen, set aside, or terminate an agreement for compensation because of a change in the condition of the employee, the tribunal exercising jurisdiction should determine all issues which are properly raised in the proceeding,⁵⁹ but there may be no determination of mat-

ber Co., 71 A.2d 839, 166 Pa.Super. 331—Barchhoff v. Westmoreland Coal Co., 53 A.2d 872, 161 Pa.Super. 146—Karlberg v. Weber, 30 A.2d 208, 151 Pa.Super. 173—Hopshock v. Hackmeister, 14 A.2d 374, 140 Pa.Super. 384—Zuro v. McClintic Marshall Co., 195 A. 180, 129 Pa.Super. 143.

Denial of application for modification

Evidence held sufficient to warrant denial of application for modification of agreement for payment of compensation.

Pa.—Flood v. Logan Iron & Steel Co., 20 A.2d 792, 145 Pa.Super. 206.

41. Pa.—Clingan v. Fairchance Lumber Co., 71 A.2d 839, 166 Pa.Super. 331—Osborn v. Franklin Hospital, 43 A.2d 579, 157 Pa.Super. 307.

42. Pa.—McLaughlin v. P. H. Butler Co., 186 A. 190, 122 Pa.Super. 189.

43. La.—Washington v. Holmes & Barnes, App., 4 So.2d 51, amended on other grounds and rehearing denied 5 So.2d 195, affirmed 9 So.2d 35, 200 La. 787.

Compromise judgment

Plaintiff's unsubstantiated claim of continuing pain was insufficient to authorize setting aside of compromise judgment and award of additional compensation in view of preponderance of medical testimony that only injury from which plaintiff could be suffering was one which occurred two years before accident for which compensation was sought, and in view of impeaching evidence that prior to compromise judgment, plaintiff accepted compensation for total disability while performing his regular work and drawing regular wages.

La.—Brown v. Trio Bldg. Co., App., 19 So.2d 461.

44. Ga.—Fletcher v. Aetna Cas. & Sur. Co., 96 S.E.2d 650, 95 Ga.App. 23—Travelers Ins. Co. v. Hammond, 83 S.E.2d 576, 90 Ga.App. 595—Phinese v. Ocean Acc. & Guaranty Corp., 58 S.E.2d 921, 81 Ga.App. 394.

N.J.—Donofrio v. Haag Bros., 77 A.2d 42, 10 N.J.Super. 258.

Circelli v. Falco, 18 A.2d 731, 19 N.J.Misc. 213.

Pa.—Muenz v. Kelso Beach Imp. Ass'n, 124 A.2d 153, 181 Pa.Super. 105.

R.I.—Interlaken Mills (Harris) v. Poling, 102 A.2d 710, 81 R.I. 309—Quillen v. O. D. Purington Co., 94 A.2d 247, 80 R.I. 165.

45. Pa.—Davis v. Asquini, 173 A. 672, 114 Pa.Super. 60.

46. Pa.—Eberst v. Sears Roebuck & Co., 6 A.2d 577, 334 Pa. 505.

Evidence insufficient to show date of recurrence

Pa.—Roberts v. Hillman Coal & Coke Co., 200 A. 128, 131 Pa.Super. 570.

47. Neb.—Gooch Milling & Elevator Co. v. Warner, 257 N.W. 224, 127 Neb. 796.

Pa.—Eberst v. Sears Roebuck & Co., 6 A.2d 577, 334 Pa. 505.

48. Pa.—Gill v. Fives, 88 A.2d 109, 170 Pa.Super. 564.

49. Pa.—Knight v. Millard, 38 A.2d 264, 350 Pa. 17.

Lewis v. Bethlehem Mines Corp., 13 A.2d 107, 140 Pa.Super. 128.

R.I.—Naragansett Hotel, Inc. v. Mallozzi, 103 A.2d 355, 81 R.I. 389—Walter Marshall Spinning Corp. v. Merola, 78 A.2d 355, 78 R.I. 20.

50. Pa.—Smith v. Creveling, 170 A. 344, 112 Pa.Super. 204.

51. R.I.—Rhode Island Rayon Co. v. Bertrand, 102 A.2d 520, 81 R.I. 314.

52. Ky.—Powell v. Winchester Garment Co., 226 S.W.2d 341, 312 Ky. 38.

53. R.I.—Trotta v. Brown & Sharpe Mfg. Co., 134 A.2d 173.

54. Pa.—Rehm v. Union Collieries Co., 33 A.2d 637, 152 Pa.Super. 461.

55. Pa.—Forsythe v. Harrison Tp. Bd. of Ed., 43 A.2d 366, 157 Pa.Super. 433.

56. Two-year statute rather than one-year held applicable

Ind.—Bicknell Coal Co. v. Slater, 50 N.E.2d 881, 114 Ind.App. 141.

57. Ind.—Fashion Thimble Shoe Co. v. Withrow, 40 N.E.2d 359, 110 Ind. App. 668.

58. Ga.—Priest v. Exposition Cotton Mills, 71 S.E.2d 743, 86 Ga.App. 301.

59. Mich.—Hayward v. Kalamazoo Stove Co., 288 N.W. 433, 290 Mich. 610—Weaver v. Antrim Iron Co., 285 N.W. 445, 274 Mich. 493.

Pa.—Muenz v. Kelso Beach Imp. Ass'n, 124 A.2d 153, 181 Pa.Super. 105—Varo v. C. G. Hussey & Co., 27 A.2d 690, 149 Pa.Super. 518.

Croll v. Forrest Laundry, 44 Pa. Dist. & Co. 548.

Gerwell v. Auto Radiator Hospital, Com.Pl., 36 Luz.Leg.Reg. 88.

R.I.—Hanley v. Westminster Motors, 90 A.2d 762, 80 R.I. 22.

71 C.J. p 1476 note 52.

Postponement of determination improper

Where industrial accident board found that claimant's disability had been increasing since making of compensation agreement, claimant was entitled to an award in keeping with his changed physical condition and

ters which are not within the scope of the proceeding.⁶⁰ It may be determined whether claimant is entitled to further or additional compensation,⁶¹ as, whether there has been a recurrence of disability attributable to accident,⁶² or whether the injury which was the subject of the agreement continued to incapacitate the employee totally or partially,⁶³ and it has been stated that in such proceeding the inquiry is limited to a determination on the single issue of whether the disability has recurred, increased, diminished, or ended subsequent to the original finding.⁶⁴ In a proceeding of this nature the employer may be precluded from questioning the applicability of the compensation act, whether the injured claimant was actually an employee, whether the injuries sustained arose out of, and in the scope of, an employee's duties, and whether the injured employee gave notice of injury and made claim for compensation within the time prescribed by the act.⁶⁵

In a proceeding to reinstate or modify a com-

pensation agreement on the ground of a change in disability, the inquiry goes directly to the question of whether disability has increased,⁶⁶ and it should be determined whether there is any existing disability.⁶⁷ If existing disability is found, the extent of such disability should be determined,⁶⁸ and if subsequent to the agreement there has been a change in the extent of disability, the date on which such change occurred should be determined.⁶⁹ On the hearing of a petition for review of a compensation agreement on the ground of termination of disability, the board or commission should consider evidence with respect to the status or condition of the employee subsequent to the agreement and prior to the filing of the petition.⁷⁰

A provision that the filing of a petition for the termination of an agreement for compensation operates as a supersedeas of the terms of the agreement to the extent subsequently justified by the evidence contemplates a prompt ascertainment of the earning power of an injured employee;⁷¹ and

board improperly refrained from determining amount of permanent physical impairment and improperly continued hearing until such time as claimant's condition became fixed and determinable.

Idaho.—McCall v. Potlatch Forests, 182 P.2d 156, 67 Idaho 415.

Matters for determination

Under power to review payments after disapproval of settlement, department of labor and industry must determine physical condition, earnings, and earning capacity of claimant, and payments made by employer, and make such determination of amount due employee as facts warrant, for which amount employee would be entitled to certificate for judgment.

Mich.—Poisson v. Department of Labor and Industry, 274 N.W. 336, 280 Mich. 583.

Peremptory instruction

On trial of suit brought by employee to set aside compensation board's award denying application to review order approving compromise compensation agreement, it is error to give peremptory instruction for defendant where evidence is sufficient to raise an issue as to fact of change in condition of employee. Tex.—Day v. Lumbermen's Reciprocal Ass'n, Civ.App., 8 S.W.2d 709, affirmed, Com.App., 17 S.W.2d 1043.

80. R.I.—Haverhill Shoe Novelty Co. v. Di Vona, 107 A.2d 305, 82 R.I. 254, reargument denied 108 A.2d 253, 82 R.I. 254—Macedo v. Atlantic Rayon Corp., 103 A.2d 64, 81 R.I. 839—Frischilla Worsteds Mills v. Vizzacco, 96 A.2d 835, 80 R.I. 342—Airedale Worsteds Mills v.

Cote, 66 A.2d 802, 75 R.I. 361—Anaconda Wire & Cable Co. v. Silke, 58 A.2d 395, 74 R.I. 15—Vick v. Aubin, 58 A.2d 109, 73 R.I. 508—Carpenter v. Globe Indem. Co., 14 A.2d 235, 65 R.I. 194, 129 A.L.R. 410.

61. Mich.—Weidner v. Northway Motor Mfg. Co., 172 N.W. 574, 205 Mich. 583.

71 C.J. p 1476 note 54.

62. Pa.—Downs v. Linton's Lunch, 6 A.2d 515, 334 Pa. 415.

63. R.I.—Rhode Island Tobacco Co. v. Weintraub, 102 A.2d 456, 81 R.I. 272.

64. Ill.—Madsen v. Industrial Commission, 50 N.E.2d 707, 383 Ill. 590—De Bartolo v. Industrial Commission, 30 N.E.2d 677, 375 Ill. 108.

65. Ill.—Madsen v. Industrial Commission, 50 N.E.2d 707, 383 Ill. 590.

66. Pa.—Parks v. Susquehanna Collieries Co., 27 A.2d 481, 149 Pa.Super. 635.

67. Pa.—Heck v. Bayuk Cigars, Inc., 17 Pa.Dist. & Co. 318.

No issue as to existence or extent of disability

Where employer petitioned for termination of compensation agreement with respect to eye injury on ground that claimant's disability had ceased and that his earning power had not been impaired, and claimant answered that he had lost industrial use of eye, all questions relating to existence of disability or its extent were eliminated.

Pa.—Colchiagale v. Union Collieries Co., 200 A. 119, 132 Pa.Super. 83.

68. Pa.—Downs v. Linton's Lunch, 6 A.2d 515, 334 Pa. 415.

Rehm v. Union Collieries Co., 38 A.2d 637, 152 Pa.Super. 461—Zuro v. McClintic Marshall Co., 195 A. 160, 129 Pa.Super. 143.

Heck v. Bayuk Cigars, Inc., 17 Pa.Dist. & Co. 318.

Extent of loss of earning power

Pa.—Angelo v. Keystone State Const. Co., 3 A.2d 946, 134 Pa.Super. 255—Stanella v. Scranton Coal Co., 186 A. 211, 122 Pa.Super. 506.

69. Pa.—Stanella v. Scranton Coal Co., supra.

Buckler v. Reppy, Com.Pl., 32 Luz.Leg.Reg. 373.

Date disability increased

Statutory provision that modification of agreement or award of compensation shall be made as of date on which it is shown that injured employee's disability increased does not mean that modification is to be effective only from date when proof is produced of increase of disability but from date of increase of disability as shown by proofs produced.

Pa.—Kilgore v. State Workmen's Ins. Fund, 193 A. 294, 127 Pa.Super. 213.

Date with respect to limitations period

Pa.—Downs v. Linton's Lunch, 6 A.2d 515, 334 Pa. 415.

70. Me.—Zooma's Case, 121 A. 232, 123 Me. 36.

71. Pa.—Angelo v. Keystone State Const. Co., 3 A.2d 946, 134 Pa.Super. 255—Stanella v. Scranton Coal Co., 186 A. 211, 122 Pa.Super. 506.

where on a petition to terminate an agreement for compensation it is established that the employee's disability has not ceased although it has decreased from total disability to partial disability, an order holding the entire matter in abeyance and compelling the employee to forego all compensation until he has furnished a practical demonstration of his earning power by engaging in some kind of employment is not such an order as is authorized by the compensation act.⁷²

Where a proceeding is brought to set aside an injured employee's final receipt on the ground that disability continues, if the receipt is not set aside the matter is at an end.⁷³ If, however, an order is made setting aside the final receipt, the effect of such order is automatically to restore the parties to the position they would have been in had the receipt never been signed;⁷⁴ and the order operates to revive the compensation agreement which was in effect at the time the receipt was given,⁷⁵ and presents the issue as to the degree of partial disability which exists as reflected in earning power.⁷⁶

In a proceeding to review, reopen, set aside, modify, terminate, or reinstate an agreement for compensation because of a change in the condition of the employee, or because of a change in the earning capacity of the employee, the award, decree, order, or other determination that is made should be such as is warranted by the circumstances of

the case.⁷⁷ While the determination that will be made will depend to an extent on the averments, proof, and findings,⁷⁸ a liberal attitude will be taken in considering the substance of the relief prayed for rather than its form,⁷⁹ and a form of relief other than that requested may be granted.⁸⁰ Where a proceeding has been brought by an injured employee for modification of an agreement for compensation on the ground there has been a change in the employee's condition, in making a finding adverse to the employee the compensation board or commission is not limited to dismissing the employee's petition and thus reinstating the agreement;⁸¹ and even though the employer does not petition for reduction in compensation, the board, commission, or referee may review the compensation agreement and make such modification in it as is warranted, and may make an award for partial disability.⁸²

The determination that is made may be that compensation payments shall be suspended,⁸³ or that under certain circumstances compensation payments shall be terminated or suspended, or the amount decreased,⁸⁴ or the determination may be that periodic payments be continued until there is some further change in the condition of the employee.⁸⁵ However, if the suspension of an agreement under which compensation had been paid for total disability would be authorized only on averment, proof, and

72. Pa.—Angelo v. Keystone State Const. Co., 3 A.2d 946, 134 Pa.Super. 255—Stanella v. Scranton Coal Co., 186 A. 211, 122 Pa.Super. 506.

73. Pa.—Artac v. Union Collieries Co., 27 A.2d 782, 149 Pa.Super. 449.

74. Pa.—Artac v. Union Collieries Co., supra.
Rupnik v. Irving Worsted Co., Com.Pl., 86 Del.Co. 411.

75. Pa.—Hite v. Rockhill Coal Co., 30 A.2d 212, 151 Pa.Super. 284—Artac v. Union Collieries Co., 27 A.2d 782, 149 Pa.Super. 449.

76. Pa.—Hite v. Rockhill Coal Co., 30 A.2d 212, 151 Pa.Super. 284.

Practice followed

After a final receipt has been set aside, theoretically a new petition by employer is required before board or commission may modify or terminate agreement; but in practice compensation authorities regard employer's answer to petition to set aside final receipt as a denial of alleged grounds for setting aside receipt, and where evidence indicates a disability less than that provided for in revived agreement, as a petition to modify or terminate agreement, and, on that hypothesis, it is proper for board or commission to consider ev-

idence of extent of disability and its effect on earning power, and to modify or terminate revived agreement accordingly.

Pa.—Artac v. Union Collieries Co., 27 A.2d 782, 149 Pa.Super. 449.

77. R.I.—Brown & Sharpe Mfg. Co. v. Campo, 113 A.2d 877—Interlaken Mills (Harris) v. Poling, 102 A.2d 710, 81 R.I. 309—Collyer Insulated Wire Co. v. Hockenson, 46 A.2d 545, 71 R.I. 415.

Effect of change in earnings

Change in injured employee's earnings has nothing to do with his right to compensation but only with amount thereof that must be paid by employer or insurance carrier, and therefore fact that change in employee's earnings was not related to any change in employee's disability or his physical condition had no bearing on employee's right to recover benefits to which he became entitled because of change in his earning capacity.

Pa.—Bush v. Lehigh Brick Co., 109 A.2d 206, 176 Pa.Super. 634.

Receipt of further evidence

In a hearing on an employer's proceeding to terminate a compensation agreement, board on resubmission was authorized to receive such

further evidence as parties might desire to offer.

Pa.—Poellot v. Baltimore & O. R. Co., 167 A. 497, 109 Pa.Super. 471.

78. Pa.—Angelo v. Keystone State Const. Co., 3 A.2d 946, 134 Pa.Super. 255.

79. Pa.—Kochinsky v. Independent Pier Co., 41 A.2d 409, 157 Pa.Super. 15.

80. Correction of prior award
Ind.—Stanton v. Pitman-Moore Co., 33 N.E.2d 832, 109 Ind.App. 341.

Termination granted where modification requested

Pa.—Kochinsky v. Independent Pier Co., 41 A.2d 409, 157 Pa.Super. 15.

81. Pa.—Vetrulli v. Wallin Concrete Corp., 18 A.2d 535, 144 Pa.Super. 78.

82. Pa.—Vetrulli v. Wallin Concrete Corp., supra.

83. Pa.—Johnston v. Butler Rys. Co., 27 A.2d 785, 149 Pa.Super. 404.
R.I.—Kestenman Bros. Mfg. Co. v. Greene, 102 A.2d 452, 81 R.I. 291.

84. R.I.—Fresselli v. Washburn Wire Co., 64 A.2d 686, 75 R.I. 144.

85. Ga.—Royal Indem. Co. v. Banister, 62 S.E.2d 765, 82 Ga.App. 845.

finding that such disability had temporarily ceased, the absence of such averment, proof and finding prevents suspension of the agreement.⁸⁶ If the payments an employee is receiving under an agreement are suspended because of the fact that the employee is receiving the same wages as prior to the accident, the suspension does not terminate the agreement;⁸⁷ and it may come into operation again if the suspension is lifted by reason of the employee receiving less wages than he received prior to the accident.⁸⁸

The determination may be that payments of compensation shall be suspended or terminated on the happening of a specified condition, such as, if the employee refuses to submit to a surgical operation,⁸⁹ or if the employee refuses to accept work offered by the employer,⁹⁰ or the determination may be that compensation payments are to be suspended for as long a period as a specified condition exists.⁹¹ Determinations of this nature should not, however, be too broad,⁹² and should not give the employer an unwarranted degree of discretion.⁹³

The determination that is made on petition or application to review may be final or interlocutory,⁹⁴ and interlocutory only as to the extent of partial incapacity.⁹⁵ An award of further compensation may constitute an effectual determination that there was no approval of a settlement receipt.⁹⁶

An employer's petition for termination of an

agreement for compensation on the ground that disability has ceased, if dismissed, fixes the status of parties as of the date of the dismissal, in the absence of appeal therefrom;⁹⁷ but the dismissal of a prior petition does not necessarily preclude a subsequent petition for termination,⁹⁸ and the dismissal of such petition does not preclude the employee from making application for further compensation,⁹⁹ although the dismissal of the employer's petition to terminate the agreement may, if not appealed from, deny the employee the right to obtain further compensation due prior to the date the employer's petition was filed.¹

In a proceeding on an employer's petition to review an agreement for compensation, the denial of the employee's motion for extra medical expense on jurisdictional grounds does not preclude the employee from claiming such expenses on his petition to review the compensation agreement.²

Where it is determined that additional compensation should be awarded, the amount that will be awarded should be such as is authorized by the compensation act,³ and, in determining the amount that should be paid as additional compensation because of the change in the condition of the employee, a deduction or allowance may be proper because of the amount paid under the agreement.⁴ In the absence of a binding final settlement by way of commutation, it has been held that a lump sum payment

86. Pa.—Angelo v. Keystone State Const. Co., 3 A.2d 946, 134 Pa.Super. 255.

87. Pa.—Holtz v. McGraw & Bindley, 54 A.2d 905, 161 Pa.Super. 371.

88. Pa.—Holtz v. McGraw & Bindley, supra.

89. R.I.—Esmond Mills, Inc. v. Mollo, 78 A.2d 365, 78 R.I. 27.

90. R.I.—Carl-Art, Inc. v. Cardullo, 80 A.2d 188, 78 R.I. 171.

91. Pa.—Holtz v. McGraw & Bindley, 54 A.2d 905, 161 Pa.Super. 371.

92. Pa.—Holtz v. McGraw & Bindley, supra.

93. R.I.—Carl-Art, Inc. v. Cardullo, 80 A.2d 188, 78 R.I. 171.

94. R.I.—Moss Const. Co. v. Botani, 125 A.2d 147—Brown & Sharpe Mfg. Co. v. Campo, 113 A.2d 377.

95. R.I.—Moss Const. Co. v. Botani, 125 A.2d 147.

96. Mich.—Chelli v. American Boston Mining Co., 285 N.W. 14, 288 Mich. 441.

97. Pa.—Osborn v. Franklin Hospital, 43 A.2d 579, 157 Pa.Super. 307.

98. Pa.—Osborn v. Franklin Hospital, supra.

99. Pa.—Augustine v. Evert Lumber Co., 3 A.2d 284, 134 Pa.Super. 167.

1. Pa.—Augustine v. Evert Lumber Co., supra.

2. R.I.—Balon v. General Cable Corp., 68 A.2d 44, 76 R.I. 206.

3. Idaho.—Endicott v. Potlatch Forests, 208 P.2d 803, 69 Idaho 450.

Pa.—Bush v. Lehigh Brick Co., 109 A.2d 206, 176 Pa.Super. 634.

Increase in amount rather than rate
Where compensation in addition to that provided for by settlement was authorized, compensation act did not restrict additional award to increase in rate, but permitted increase in amount.

U.S.—Hohn v. Alaska Indus. Bd., D. C.Alaska, 150 F.Supp. 519.

Place where rate of pay computed

Where employee, who was resident of Kansas, returned to Kansas following termination of his employment in Alaska, during course of which he sustained injuries and entered into settlement, any additional compensation allowable to employee for disability continuing after return to Kansas should be based on amount of pay employee would have received at same type of em-

ployment in state of Kansas and not on Alaska rate of pay.

U.S.—Hohn v. Alaska Indus. Bd., supra.

4. Ga.—Hardware Mut. Cas. Co. v. Wilson, 34 S.E.2d 634, 72 Ga.App. 574—City of Hapeville v. Preston, 20 S.E.2d 202, 67 Ga.App. 350.

Idaho.—Endicott v. Potlatch Forests, 208 P.2d 803, 69 Idaho 450.

Ky.—Anderson v. Whitaker, 247 S. W.2d 980.

Wash.—Sorenson v. Department of Labor and Industries, 121 P.2d 978, 12 Wash.2d 355.

Adjustment of payment

Where after making settlement agreement employee makes application for additional compensation because of change of conditions, he is not entitled to receive further payments until amount received in settlement, applied to temporary total disability or a fixed and increased permanent partial disability, which may thereafter be fixed, has been absorbed out of portion of settlement representing permanent partial disability theretofore allowed.

S.C.—Atkins v. Charleston Shipbuilding & Drydock Co., 33 S.E.2d 46, 206 S.C. 63.

made prior to an award for increased compensation on change of condition to total disability should be applied to cover payments from its effective date at the weekly rate for total disability until exhausted.⁵

If a statute so provides, an award of additional compensation because of a change in the condition of the employee may not operate retroactively to the date of the injury, but would have only a prospective effect from the date of the order for additional compensation.⁶ Furthermore, if an allowance is proper for interest, the interest that will be allowed may be only on payments due after the date of the filing of the motion or petition to reopen.⁷ Where it is determined on an employer's application to terminate compensation provided for by agreement that the employee's disability is partial, and full compensation for partial disability is paid, and subsequently a petition is filed by the employee for further compensation, although it may be found that disability increased during the period compensation for partial disability was paid, the employee will not be permitted to recover additional compensation for such period,⁸ or for any period during which the determination that the employee's disability was partial was in effect.⁹

In a proceeding to review an agreement for compensation, an award of additional compensation which is to continue until a further order is made, should expressly provide that payments shall not continue beyond the period prescribed by the compensation act.¹⁰ Where a provision of a compensation act requires that payment under an agreement must be made up to the date of filing of a petition to terminate, in the absence of payment as required no termination may be granted because of a change in the condition of the employee.¹¹ Where a compensation act provides that when an employer is in default in payments under an agreement therefor, claimant may file a copy of the agreement

with the prothonotary of the court and obtain the entry of judgment, such provision has been held to be applicable to a reinstated agreement for compensation.¹²

A proceeding for review of an agreement for compensation is not rendered null and void and of no effect because the commissioner conducting the hearing fails to enter a decree within the period specified by the compensation act,¹³ and a proceeding of this nature is not invalid simply because the employee is not represented by counsel.¹⁴

Where a decree is entered by the trial court granting an employer's petition to terminate an agreement for compensation and suspending payments under the agreement, the filing of an appeal from such decree will, under a statute so providing, supersede the decree and permit the employee to prosecute a contempt proceeding against the employer for failing to make payments under the agreement;¹⁵ but when on appeal the decree is affirmed, the obligation of the employer to make further payments after the date the appeal is decided ends, although the employee may recover payments for the period from the filing of the appeal until the determination of the appeal.¹⁶

Questions of law and fact. Ordinarily, it is the province of the compensation board or commission, rather than that of the court, to pass on and decide questions of fact presented on a petition or application to review or reinstate an agreement for compensation.¹⁷ Usually it is a question of fact for the trier of such questions whether there has been a change in the condition of the employee,¹⁸ whether an agreement for compensation for total disability should be modified because the employee was no longer totally disabled,¹⁹ and an award or order made in such a proceeding may be subject to reversal in the absence of the findings required by law.²⁰ Where a claim for compensation is made

5. Ky.—Black Mountain Corporation v. Swift, 43 S.W.2d 1008, 241 Ky. 333.

6. Ky.—Hayden v. Elkhorn Coal Corp., 238 S.W.2d 138—Schaab v. Irwin, 183 S.W.2d 814, 298 Ky. 626—Lincoln Coal Co. v. Watts, 120 S.W.2d 1026, 275 Ky. 130.

7. Ky.—Anderson v. Whitaker, 247 S.W.2d 980—Williams v. Gordon, 231 S.W.2d 89, 313 Ky. 377.

Pa.—Feeney v. Needham's Motor Service, 61 Pa. Dist. & Co. 671.

8. Pa.—Augustine v. Evert Lumber Co., 3 A.2d 284, 134 Pa. Super. 167.

9. Pa.—Augustine v. Evert Lumber Co., supra.

10. Mich.—Chelli v. American Bos-

ton Mining Co., 285 N.W. 14, 288 Mich. 441.

11. Pa.—Brusco v. Philadelphia Rapid Transit Co., 24 A.2d 710, 148 Pa. Super. 97.

12. Pa.—Zygmunt v. Copperweld Steel Co., 193 A. 350, 128 Pa. Super. 109.

13. R.I.—Morton C. Tuttle Co. v. Carbone, 125 A.2d 133.

14. R.I.—Berkshire Fine Spinning Associates v. Label, 60 A.2d 371, 74 R.I. 6.

15. R.I.—American Textile Co. v. De Angelo, 115 A.2d 349.

16. R.I.—American Textile Co. v. De Angelo, supra.

17. Pa.—McLaughlin v. P. H. Butler Co., 186 A. 190, 122 Pa. Super. 139.

18. Me.—Coyne's Case, 140 A. 185, 126 Me. 611.
71 C.J. p 1476 note 58.

19. Pa.—Knight v. Millard, 38 A.2d 264, 350 Pa. 17.

20. Pa.—Brusco v. Philadelphia Rapid Transit Co., 24 A.2d 710, 148 Pa. Super. 97—Rennard v. Rouseville Cooperage Co., 15 A.2d 48, 141 Pa. Super. 286—Conley v. Allegheny County, 200 A. 287, 131 Pa. Super. 236.

Findings held superfluous
In proceeding to set aside supple-

within the time prescribed by statute, and compensation is paid under an unapproved settlement agreement, and subsequently there is further disability which the employee alleges is a recurrence of the original disability, substantial evidence tending to connect the subsequent disability with the original injury may present a proper jury question.²¹

Findings. In proceedings involving review of compensation agreements and awards based thereon, the general rules as to findings apply,²² and findings should be made in accordance with the requirements of the compensation law.²³ Findings should be made on matters, and only on matters, which are properly in issue in the proceeding,²⁴ and, under some statutes, a decision by a compensation commissioner may not constitute an unqualified finding, but only a provisional order.²⁵ A finding may be valid although it is irregular in form,²⁶ although a finding may be so defective that it is insufficient to form the basis of an award for additional compensation.²⁷

If a finding made in a proceeding to review an agreement for compensation is ambiguous, it will be construed in the light of circumstances so as to give reasonable effect both to the finding and to the general disposition of the case.²⁸ A finding as to disability during a certain period of time is not necessarily *res judicata* as to disability during a different period of time.²⁹ Ordinarily, only ultimate findings of fact may be set out in the decree that is entered in a proceeding for review of an agreement for compensation.³⁰

mental agreement for payment of compensation under workmen's compensation act for partial disability and reinstate original total disability compensation agreement, referee's findings that supplemental agreement was founded on mistakes of law and fact were superfluous, in view of provision of amendatory statute, in force when petition was filed, that existing compensation agreements may be set aside on proof that they are incorrect in any material respect.
Pa.—Hill v. Booth & Flinn Co., 28 A. 2d 85, 146 Pa.Super. 575.
21. U.S.—Carper v. Texas Compensation Ins. Co., C.C.A.Tex., 88 F. 2d 572.
22. Pa.—Knight v. Millard, 35 A.2d 764, 154 Pa.Super. 383, affirmed 38 A.2d 264, 350 Pa. 17.
71 C.J. p 1476 note 60.
23. Pa.—Flood v. Logan Iron & Steel Co., 5 A.2d 621, 136 Pa.Super. 101—Conley v. Allegheny County, 200 A. 287, 131 Pa.Super. 236—Smith v. Creveling, 170 A. 344, 112 Pa.Super. 204.

Herbert v. Glen Alden Coal Co., 47 Pa.Dist. & Co. 488, 37 Luz.Leg. Reg. 51.
R.I.—Atlas Tool & Findings Co. v. Duffy, 98 A.2d 849, 81 R.I. 61—Rigo v. Walsh-Kaiser Co., 55 A.2d 858, 73 R.I. 319—General Scrap Iron v. La Porte, 26 A.2d 618, 68 R.I. 98.

Characterization of evidence

Where trial judge characterized evidence as strongly preponderant of a neurotic condition, it did not constitute such a finding as was required by compensation act, particularly where there was nothing to this effect as a finding contained in decree.
R.I.—Stillwater Worsted Mills v. Mehegan, 98 A.2d 267, 80 R.I. 449.
24. R.I.—Bobola v. Royal Elec. Co., 123 A.2d 250.
25. R.I.—Fresselli v. Washburn Wire Co., 64 A.2d 686, 75 R.I. 144.
26. Ky.—Siegal v. Diehl Pump & Supply Co., 234 S.W.2d 732, 314 Ky. 218.

§ 909. Rehearing

After there has been a hearing on an application to modify, terminate, or reinstate an agreement for compensation, there may, in a proper case, be a rehearing of the application.

If a party to a proceeding to modify an agreement for compensation because of a change in the condition of the employee fails to sustain the burden of proof, the party should be accorded an opportunity to supply the deficiencies in proof by granting a rehearing;³¹ but the refusal to grant a rehearing may not constitute reversible error if the party has the right to bring another proceeding to obtain modification of the agreement.³² After the compensation authorities have made a final determination as to a petition for further compensation, they have no power to grant a rehearing as to such determination,³³ and an agreement for compensation which has been finally terminated may not be reinstated by an unauthorized rehearing,³⁴ although a subsequent change in condition may warrant a new hearing.³⁵

An application for rehearing is one remedy that may be available to correct an erroneous order dismissing a petition for reinstatement of an agreement for compensation;³⁶ and when an order is made terminating an agreement for compensation on the ground that the employee has returned to work at the same rate of pay he formerly was receiving, the failure of the employee to seek a rehearing will be tantamount to an acquiescence by the employee in the termination of the compensation agreement.³⁷

27. Okl.—Special Indem. Fund v. Knight, 200 P.2d 766, 201 Okl. 24.
28. R.I.—Hanley v. Westminster Motors, 30 A.2d 762, 80 R.I. 22—Fresselli v. Washburn Wire Co., 64 A.2d 686, 75 R.I. 144.
29. R.I.—Balon v. General Cable Corp., 68 A.2d 44, 76 R.I. 206.
30. R.I.—Bobola v. Royal Elec. Co., 123 A.2d 250.
31. Pa.—Kutney v. William Penn Colliery Co., 25 A.2d 92, 143 Pa.Super. 114.
32. Pa.—Kutney v. William Penn Colliery Co., *supra*.
33. Mich.—Jaquith v. W. M. Ackerman Electric Co., 242 N.W. 854, 258 Mich. 362.
34. Pa.—Melody v. Bornot, Inc., 170 A. 408, 112 Pa.Super. 174.
35. Mich.—Jaquith v. W. M. Ackerman Electric Co., 242 N.W. 854, 258 Mich. 362.
36. Pa.—Downs v. Linton's Lunch, 6 A.2d 515, 334 Pa. 415.
37. Pa.—Downs v. Linton's Lunch, *supra*.

unless the employee appeals from the order, as discussed *infra* § 910. A rehearing may be granted for material error in the findings.³⁸

An application for a rehearing of an order terminating an agreement for compensation must be made within the time provided by statute,³⁹ and an application for a rehearing of such an order, if dismissed without prejudice to the bringing of another application, does not serve to extend the time within which a further application may be made.⁴⁰

It is not necessary that an instrument be designated a request for a rehearing in order that it be considered as such.⁴¹

§ 910. Review

In a proceeding to review an agreement for compensation because of a change in the condition of the employee, a final order is generally subject to appellate review, providing the required steps are taken, and the review is usually one of law with no re-examination of the facts except to determine whether the findings of fact are supported by legal evidence.

In a proceeding brought to review an agreement for compensation because of a change in the condition of the employee, an order which is final in character is subject to review on appeal,⁴² pro-

vided the right of appeal exists.⁴³ Such an order may be considered to be an award, and appealable as such.⁴⁴

In a proceeding of this nature, if an appealable order is entered from which no appeal is prosecuted, the order becomes a conclusive determination,⁴⁵ and the failure to appeal or otherwise obtain review may constitute a waiver of the right to review,⁴⁶ and be tantamount to an acquiescence in the order,⁴⁷ unless a rehearing is sought, as discussed *supra* § 909. After an agreement for compensation has been terminated by a proper order from which no timely appeal is prosecuted, there is no agreement to be reviewed on petition to review.⁴⁸ Ordinarily, if an appealable order is entered and no appeal is prosecuted, the order will not be subject to review on appeal from a subsequent judgment.⁴⁹

In a proceeding brought to modify, terminate, or reinstate an agreement for compensation because of a change in the condition of the employee, when an appealable order has been entered and the required procedure followed to obtain an appellate review, the review is usually solely one of law;⁵⁰ and,

38. Conn.—Grabowski v. Miskell, 115 A. 691, 97 Conn. 76. 71 C.J. p 1477 note 64.

39. Pa.—Calabria v. State Workmen's Ins. Fund, 3 A.2d 322, 333 Pa. 40.

40. Pa.—Calabria v. State Workmen's Ins. Fund, *supra*.

41. Pa.—Savolaine v. Matthew Leivo & Sons, 260 A. 243, 131 Pa.Super. 508.

42. Ga.—Zant v. U. S. Fidelity & Guaranty Co., 148 S.E. 764, 40 Ga. App. 38.

Order awarding insufficient compensation

Pa.—Bush v. Lehigh Brick Co., 109 A.2d 206, 176 Pa.Super. 634.

Order of postponement

Where industrial accident board found that claimant's disability had increased since time of compensation agreement, an order of continuance postponing award until his condition was fixed, definite, and determinable was appealable as a final order.

Idaho.—McCall v. Potlatch Forests, 182 P.2d 156, 67 Idaho 415.

Order or decree fixing compensation

Last unappealed order or decree which has been entered after a hearing on a petition for review of any prior agreement, order, or decree fixing compensation is, regardless of its form or contents, a new fixing of compensation to which any petition

for review thereafter filed should be directed.

R.I.—Ottone v. Franklin Process Co., 71 A.2d 780, 76 R.I. 431.

Erroneous reason for award

Where an agreement was entered into for compensation and a proceeding brought for additional compensation and it was allowed on ground of fraud, additional award would be permitted to stand even though evidence would not support the ground of fraud where evidence showed a change in condition of employee sufficient to warrant award of additional compensation.

Ky.—Department of Highways v. Tarter, 276 S.W.2d 687.

Appealable order

Fact that industrial commission had once taken jurisdiction of claim and made an award is not conclusive on question of jurisdiction, so as to make an order denying further award appealable.

Ohio.—Ball v. Industrial Commission of Ohio, 2 N.E.2d 269, 52 Ohio App. 1.

43. No appeal permitted from decrees

Where an agreement for compensation had been presented to court and a decree entered thereon under which compensation was to be continued, no appeal would lie under statutory provision expressly prohibiting appeals from decrees entered on compensation agreements.

Mass.—Dileo's Case, 4 N.E.2d 299, 295 Mass. 568.

44. Iowa.—Soukup v. Shores Co., 268 N.W. 593, 222 Iowa 272.

Pa.—McClelland v. Baltimore & O. R. Co., 8 A.2d 498, 137 Pa.Super. 158—Foster v. Mellon Stuart Co., 173 A. 773, 114 Pa.Super. 311.

45. Pa.—McGuire v. Dougherty & Jennings, 180 A. 163, 119 Pa.Super. 485.

46. La.—Washington v. Holmes & Barnes, 9 So.2d 35, 200 La. 787. Utah.—Aetna Life Ins. Co. v. Industrial Commission of Utah, 274 P. 139, 73 Utah 366.

47. Pa.—Downs v. Linton's Lunch, 6 A.2d 515, 334 Pa. 415.

48. Pa.—Calabria v. State Workmen's Ins. Fund, 3 A.2d 322, 333 Pa. 40.

49. Pa.—Artac v. Union Collieries Co., 27 A.2d 782, 149 Pa.Super. 449.

Appeal from subsequent order

An employee not appealing from order of joint board of department of labor and industries, denying his application to reopen earlier compensation claim, could not, on his appeal from order rejecting claim for later injury, be awarded additional compensation which he was entitled to receive on lump sum settlement of earlier claim.

Wash.—Sorenson v. Department of Labor and Industries, 121 P.2d 973, 12 Wash.2d 355.

50. R.I.—Flore v. Wanskuck Co., 116 A.2d 186.

as a general rule, questions of fact are determined by the compensation tribunal, and not by the court on review.⁵¹ After a determination of the facts by the proper compensation tribunal there may be no further inquiry into the facts by any other tribunal, except for fraud.⁵² If the appeal is prosecuted from an order of a referee to the compensation board or commission, that tribunal may have the power to substitute its own findings of fact for those made by the referee,⁵³ but when the appeal is prosecuted from an order or decision of the compensation board or commission to the courts, the courts may not have the same power of substitution.⁵⁴

On appellate review it is not for the reviewing court to pass on the weight of the evidence or the credibility of witnesses,⁵⁵ and the reviewing court

may not weigh the evidence and decide for itself whether the decree is supported by a fair preponderance of the evidence.⁵⁶ Generally, the only question presented on appellate review is whether there was competent and substantial evidence to justify the findings of fact which were made by the compensation tribunal,⁵⁷ and whether there was substantial competent evidence to support findings of fact is a question of law for the reviewing court.⁵⁸ Thus, the appellate court will examine the transcript only to determine if there is any legal evidence to support the decree appealed from,⁵⁹ since the absence of legal evidence to support the decree constitutes an error of law.⁶⁰

Findings of fact which are supported by legally sufficient evidence are conclusive and binding,⁶¹ and will not be reviewed, set aside, or disturbed by

51. Me.—Milton's Case, 120 A. 533, 122 Me. 437.

Mich.—Chelli v. American Boston Mining Co., 285 N.W. 14, 288 Mich. 441.

Okl.—Independent Oil & Gas Co. v. Mooney, 103 P.2d 557, 187 Okl. 472. Pa.—Purpich v. Westmoreland Coal Co., Com.Pl., 33 West.L.J. 47.

In New Jersey

In a proceeding for compensation after insurer ceased making payments under an agreement therefor, appellate division of superior court would give determinative weight in first instance to factual findings of county court, but appellate division of superior court was empowered, in its discretion, to make independent findings of fact when interests of justice so required. N.J.—Ferraro v. Zurcher, 79 A.2d 473, 12 N.J.Super. 231.

52. In Rhode Island

(1) Under 1954 amendment to compensation act text rule applies precluding any inquiry by any tribunal into facts established by full compensation commission, except for fraud.

R.I.—Brown & Sharpe Manufacturing Co. v. Lavoie, 116 A.2d 181.

(2) Prior to 1954 amendment to compensation law, an appeal from a decision of director of labor in a proceeding to review an agreement for compensation resulted in a trial de novo in superior court.

R.I.—Berkshire Fine Spinning Associates v. Label, 60 A.2d 871, 74 R.I. 6—Walsh-Kaiser Co. v. Branch, 47 A.2d 860, 72 R.I. 16—Salerno v. George A. Fuller Co., 42 A.2d 28, 71 R.I. 41.

(3) Appeal from decision or order of director of labor had effect of vacating and superseding decision or order made by director of labor.

R.I.—Gilbane Bldg. Co. v. De Ruosi, 59 A.2d 846, 74 R.I. 200—Dunn v.

Broomfield, 58 A.2d 254, 74 R.I. 27—Salerno v. George A. Fuller Co., 42 A.2d 28, 71 R.I. 41.

(4) Similarly, prior to 1954 amendment, appeal from decree of superior court suspending further payments under compensation agreement suspended decree until decision by supreme court, and even though that court affirmed superior court decree, employee was still entitled to such payments as should have been made during period from entry of superior court decree to affirmation of such decree by supreme court.

R.I.—American Textile Co. v. De Angelo, 115 A.2d 349.

53. Pa.—Flood v. Logan Iron & Steel Co., 5 A.2d 621, 136 Pa.Super. 101.

54. Pa.—Knight v. Millard, 35 A.2d 764, 154 Pa.Super. 383, affirmed 38 A.2d 264, 350 Pa. 17.

55. Pa.—Dunkle v. Baltimore & O. R. Co., 57 A.2d 714, 162 Pa.Super. 340—Knight v. Millard, 35 A.2d 764, 154 Pa.Super. 383, affirmed 38 A.2d 264, 350 Pa. 17—Allen v. Dravo Corporation, 27 A.2d 491, 149 Pa.Super. 188—Kutney v. William Penn Colliery Co., 25 A.2d 92, 143 Pa.Super. 114—Flood v. Logan Iron & Steel Co., 20 A.2d 792, 145 Pa.Super. 206—Korean v. Union Collieries Co., 14 A.2d 845, 141 Pa. Super. 70.

Rodeffer v. Wrought Iron Range Co., Com.Pl., 4 Fay.L.J. 268.

56. In Rhode Island

(1) Under 1954 amendment of compensation act text rule applies and supreme court may not weigh evidence and decide whether a decree of full compensation commission is supported by fair preponderance of evidence.

R.I.—Morton C. Tuttle Co. v. Carbone, 125 A.2d 133—Brown &

Sharpe Manufacturing Co. v. Lavoie, 116 A.2d 181.

(2) Prior to 1954 amendment, on appeal from a decree of superior court issued after trial de novo, supreme court would not weigh evidence but would review only to determine whether findings of fact made by superior court were supported by any legal evidence.

R.I.—E. Turgeon Const. Co. v. Barbato, 101 A.2d 481, 81 R.I. 230—American Textile Co. v. De Angelo, 100 A.2d 216, 81 R.I. 163—Menzies v. King, 95 A.2d 853, 80 R.I. 247—Central Engineering & Const. Co. v. Rassano, 64 A.2d 197, 75 R.I. 108.

57. Pa.—Hendricks v. Patterson, 67 A.2d 652, 164 Pa.Super. 584—Rehm v. Union Collieries Co., 33 A.2d 637, 152 Pa.Super. 461—Benko v. Vesta Coal Co., 28 A.2d 31, 149 Pa.Super. 388—Metalko v. Ford Collieries Co., 22 A.2d 222, 146 Pa.Super. 206—Matchouski v. Pittsburgh Terminal Coal Corp., 22 A.2d 114, 146 Pa.Super. 201—Jones v. Hazle Brook Coal Co., 179 A. 783, 119 Pa. Super. 409.

Henderson v. McNulty Bros. Co., Com.Pl., 86 Pittsb.Leg.J. 5—Purpich v. Westmoreland Coal Co., Com.Pl., 33 West.L.J. 47.

58. Pa.—Visnic v. Westmoreland Coal Co., 38 A.2d 539, 155 Pa.Super. 199—Berkhamer v. Heinsling, 28 A.2d 807, 150 Pa.Super. 461—Hamer v. West Virginia Pulp & Paper Co., 18 A.2d 452, 144 Pa.Super. 144.

59. R.I.—Fiore v. Wanskuck Co., 116 A.2d 186.

60. R.I.—Fiore v. Wanskuck Co., supra—William H. Haskell Mfg. Co. v. Smith, 48 A.2d 406, 72 R.I. 161.

61. Ga.—Travelers Ins. Co. v. Ham-

the reviewing court on appeal,⁶² in the absence of fraud,⁶³ and an order based on findings of fact which are supported by competent and substantial evidence will not be disturbed by the reviewing court.⁶⁴ On the other hand, a finding is unauthorized where there is insufficient evidence to support it,⁶⁵ and is erroneous as a matter of law,⁶⁶ and an award or order based on such finding will be reversed or set aside.⁶⁷

In a proceeding to modify, terminate, or reinstate an agreement for compensation, where the triers of the facts refuse to find facts in favor of the party having the burden of proof, the question on review is not whether competent evidence would sustain such a finding if made, but whether there was a capricious disregard of competent evidence in the refusal so to find;⁶⁸ and on appeal from an order of a compensation board or commission where it has been held that the party who had the burden of proof did not meet that burden, the question is whether the findings of fact of the board or commission are consistent with each other and with its conclusion of law and its order, and can be sustained without capricious disregard of the competent

evidence.⁶⁹ Thus, the failure of the referee or compensation board or commission to consider uncontradicted evidence, and to make findings in accordance therewith may constitute reversible error.⁷⁰

A finding of a compensation tribunal on a mixed question of law and fact may be reviewed on appeal,⁷¹ and whether the law has been correctly applied to the facts as found is solely a question of law to be determined on appeal.⁷² Where it is contended that a change should be made in the order of the referee and compensation board or commission, the burden on appeal to show that such change should be made is on the party so contending.⁷³

Where an award of compensation in addition to that provided for by agreement could be construed as based on a change in the condition of the employee and thus be a valid award, or could be construed as not based on a change in the condition of the employee and thus be an invalid award, on appeal the reviewing court would adopt the construction which would validate the award.⁷⁴

A question not raised in the proceeding before the board or commission will not be considered

mond, 83 S.E.2d 576, 90 Ga.App. 595.

Pa.—Kursa v. H. C. Frick Coke Co., Com.Pl., 4 Fay.L.J. 130.

S.C.—Atkins v. Charleston Shipbuilding & Drydock Co., 33 S.E.2d 46, 206 S.C. 63.

In Rhode Island

(1) Prior to 1954 amendment to compensation act where an appeal was prosecuted from a decision or order of director of labor and a trial de novo was held in superior court, findings of fact made by superior court, if supported by legal evidence, would be binding on supreme court, in absence of fraud.

R.I.—Scialo Bros. v. Marini, 115 A. 2d 359—Haverhill Shoe Novelty Co. v. Di Vona, 107 A.2d 305, reargument denied 108 A.2d 253—Macedo v. Atlantic Rayon Corp., 103 A.2d 64, 81 R.I. 339—E. Turgeon Const. Co. v. Barbato, 101 A. 2d 481, 81 R.I. 230—American Textile Co. v. De Angelo, 100 A.2d 216, 81 R.I. 163—Colored Worsted Mill v. Persechino, 98 A.2d 859, 81 R.I. 30—Atlas Tool & Findings Co. v. Duffy, 98 A.2d 849, 81 R.I. 61—Mincoff v. Marcaruso, 72 A.2d 225, 76 R.I. 469—Central Engineering & Const. Co. v. Rassano, 64 A.2d 197, 75 R.I. 108—Brown & Sharpe Mfg. Co. v. Vincent, 55 A.2d 729, 73 R.I. 309—Pearl v. Builders Iron Foundry, 55 A.2d 282, 73 R.I. 304—William H. Haskell Mfg. Co. v. Smith, 48 A.2d 406, 72 R.I. 161—Walsh-Kaiser Co. v. Branch, 47 A. 2d 360, 72 R.I. 16—Collyer Insulat-

ed Wire Co. v. Hockenson, 46 A.2d 545, 71 R.I. 415.

(2) Effect of 1954 amendment was to eliminate appeals to superior court and trials de novo in that court, and to make findings of fact made or approved by full compensation commission binding on supreme court on review by that court.

R.I.—Brown & Sharpe Manufacturing Co. v. Lavoie, 116 A.2d 181.

62. Ky.—Siegel v. Diehl Pump & Supply Co., 234 S.W.2d 732, 314 Ky. 216.

Okl.—Independent Oil & Gas Co. v. Mooney, 103 P.2d 557, 187 Okl. 472.

Pa.—Zbieg v. Rochester & Pittsburgh Coal Co., 104 A.2d 158, 175 Pa.Super. 308—Dunkle v. Baltimore & O. R. Co., 57 A.2d 714, 162 Pa.Super. 340—Forsythe v. Harrison Tp. Bd. of Ed., 43 A.2d 366, 157 Pa.Super. 433—Knight v. Millard, 35 A.2d 764, 154 Pa.Super. 383, affirmed 38 A.2d 264, 350 Pa. 17—Kutney v. William Penn Colliery Co., 25 A.2d 92, 148 Pa.Super. 114—Shetina v. Pittsburgh Terminal Coal Corporation, 179 A. 776, 119 Pa.Super. 425.

Wahs v. Wolf, 43 Pa.Dist. & Co. 644, affirmed 42 A.2d 166, 157 Pa. Super. 181.

Farley v. Johnstown Coal & Coke Co., Com.Pl., 17 Cambria 185—Keller v. Central Iron & Steel Co., Com.Pl., 48 Dauph.Co. 419—Kursa v. H. C. Frick Coke Co., Com.Pl., 4 Fay.L.J. 130—Palmer v. Glen Alden Coal Co., Com.Pl., 35 Luz.Leg. Reg. 129—Kuhar v. Hillman Coal

& Coke Co., Com.Pl., 22 Wash.Co. 152.

71 C.J. p 1477 note 68.

63. Ga.—Travelers Ins. Co. v. Hammond, 83 S.E.2d 576, 90 Ga.App. 595.

64. Pa.—Bartman v. Jones & Laughlin Steel Corp., 60 A.2d 565, 163 Pa.Super. 31—Nagel v. McDonald Mining Co., 28 A.2d 805, 150 Pa. Super. 527.

71 C.J. p 1477 note 69.

65. Ga.—Sinyard v. Stokes, 61 S.E. 2d 504, 82 Ga.App. 454.

66. R.I.—M. Longo & Sons, Inc. v. Ianotti, 103 A.2d 560, 81 R.I. 406.

67. Ga.—Sinyard v. Stokes, 61 S.E. 2d 504, 82 Ga.App. 454.

68. Pa.—Bartman v. Jones & Laughlin Steel Corp., 60 A.2d 565, 163 Pa.Super. 31—Barchhoff v. Westmoreland Coal Co., 53 A.2d 872, 161 Pa.Super. 146.

69. Pa.—Barchhoff v. Westmoreland Coal Co., supra.

70. Pa.—Tomlinson v. Hazle Brook Coal Co., 176 A. 853, 116 Pa.Super. 128.

71. R.I.—Morton C. Tuttle Co. v. Carbone, 125 A.2d 133.

72. Pa.—Visnic v. Westmoreland Coal Co., 38 A.2d 539, 155 Pa.Super. 199.

73. Pa.—Karlberg v. Weber, 30 A.2d 208, 151 Pa.Super. 173.

74. Ga.—Maryland Cas. Corp. v. Mitchell, 62 S.E.2d 415, 83 Ga.App. 99.

for the first time by the reviewing court,⁷⁵ and the reviewing court need not consider a question not urged or argued.⁷⁶ The failure to plead an affirmative defense and join issue thereon may preclude raising such defense on review.⁷⁷ Furthermore, on appeal from a decree entered in a proceeding to review an agreement for compensation, the appellate court has no authority or power to add to the agreement which was made by the parties and approved as required by law,⁷⁸ and the agreement is final to the extent of the facts therein agreed on,⁷⁹ and the tribunal below may likewise be bound by the agreement as made and approved.⁸⁰ On appeal by an employer from an order of an industrial board denying its petition to set aside an approved compensation agreement on the grounds of mistake and noncompliance with statute, and ordering a resumption of compensation payments, it has been held that the employer's attempt to procure a decision on the board's power to order resumption of payments is premature when raised on such appeal.⁸¹

An appeal usually must be taken within the time prescribed,⁸² and an appeal will be denied when taken too late.⁸³ An extension of time in which to perfect an appeal may be granted if good cause for the extension of time exists.⁸⁴ A refusal to extend the time within which an appeal may be perfected may constitute an abuse of discretion, particularly where a justiciable question is shown to exist.⁸⁵

In order to raise and preserve for review a question as to the admissibility of evidence, one objection may be sufficient without the necessity of

thereafter repeating the objection to each question which is designed to elicit similar testimony.⁸⁶ A party to a proceeding to review an agreement for compensation, having consented to the admission in evidence of a physician's report, cannot thereafter on review have the report ruled out of evidence because it allegedly is in conflict with a rule governing the admissibility of evidence.⁸⁷

If a proceeding for review of an agreement for compensation is heard originally by a single member of the compensation tribunal, it may not be required under the provisions of the compensation act that there be a further hearing by the full compensation tribunal before an appeal may be prosecuted to the courts.⁸⁸ Where a petition for reinstatement of an agreement for compensation is decided adversely to the employee, and from this decision an appeal is taken but prior to action being taken on the appeal by the court the appeal is discontinued without prejudice, such action does not preclude the employee from presenting another petition for reinstatement.⁸⁹

On certiorari to review the order of a board or commission denying claimant's application for relief from an agreement and for additional compensation, the only question involved is whether the inferior tribunal had jurisdiction to perform the act complained of,⁹⁰ and if the commission's order is valid on any ground, it is not subject to attack by certiorari.⁹¹

Disposition. An order which is subject to review may be reversed if erroneous,⁹² and may be reversed with directions to the tribunal below.⁹³

75. Ga.—Fletcher v. Aetna Cas. & Sur. Co., 96 S.E.2d 650, 95 Ga.App. 23.

Pa.—Hendricks v. Patterson, 67 A.2d 652, 164 Pa.Super. 584—Koreen v. Union Collieries Co., 14 A.2d 845, 141 Pa.Super. 70.

Sufficiency of petition

R.I.—Kestelman Bros. Mfg. Co. v. Greene, 102 A.2d 452, 81 R.I. 291.

Amendment of petition on appeal

On appeal from a decree entered in a proceeding to review an agreement for compensation, appellate court will not permit an amendment of petition where effect of amendment would be to change petition to review into an original petition for compensation.

R.I.—Meierovitz v. George A. Fuller Co., 67 A.2d 45, 75 R.I. 378.

76. Iowa.—Shaker v. Quealy, 4 N.W. 2d 250, 282 Iowa 429.

77. Mich.—Rajkovich v. Oliver Iron Min. Co., 290 N.W. 365, 292 Mich. 162.

78. R.I.—Airedale Worsted Mills v. Cote, 66 A.2d 802, 75 R.I. 361.

79. R.I.—Airedale Worsted Mills v. Cote, *supra*.

80. R.I.—Rhode Island Rayon Co. v. Bertrand, 102 A.2d 520, 81 R.I. 314.

81. Ind.—Home Packing & Ice Co. v. Cahill, 123 N.E. 415, 71 Ind.App. 245.

Illness of claimant not ground for extension of time

Pa.—Calabria v. State Workmen's Ins. Fund, 3 A.2d 322, 333 Pa. 40.

83. Pa.—Wilson v. National Freight & Delivery Co., 165 A. 259, 108 Pa. Super. 472.

71 C.J. p 1477 note 74.

84. Mich.—Meyers v. Iron County, 298 N.W. 308, 297 Mich. 629.

85. R.I.—Priscilla Worsted Mills v. Vizzacco, 86 A.2d 655, 79 R.I. 217.

86. R.I.—Morton C. Tuttle Co. v. Carbone, 125 A.2d 133.

87. R.I.—Ostby & Barton Co. v. Curcio, 63 A.2d 784, 75 R.I. 82.

88. Iowa.—Henderson v. Iles, 82 N. W.2d 731—Stice v. Consolidated Indiana Coal Co., 291 N.W. 452, 228 Iowa 1031.

89. Pa.—Hunter v. Viscose Co., 178 A. 314, 117 Pa.Super. 323.

90. Cal.—Silva v. Industrial Accident Commission of California, 229 P. 870, 68 C.A. 510.

91. Cal.—Silva v. Industrial Accident Commission of California, *supra*.

92. Pa.—Downs v. Linton's Lunch, 6 A.2d 515, 334 Pa. 415.

Ralston v. Baldwin Locomotive Works, 41 A.2d 361, 156 Pa.Super. 573.

Amdel v. Doyle, Com.Pl., 4 Chester Co. 14.

93. Pa.—Downs v. Linton's Lunch, 6 A.2d 515, 334 Pa. 415.

Zygmunt v. Copperweld Steel Co., 193 A. 350, 128 Pa.Super. 109.

If an appeal is prosecuted from an order or determination of the compensation board or commission, the court may return the record to the board or commission for such further action as may be required,⁹⁴ as for further or more specific findings of fact,⁹⁵ and, if a judgment has been entered, on review the judgment may be modified and affirmed.⁹⁶ A finding of fact contained in a decree entered in a proceeding to review an agreement for compensation may be stricken from the decree where the finding is not within the scope of the review.⁹⁷

Ordinarily, an order or decision of a compensation board or commission will not be reversed by the courts where the matter in issue is one peculiarly for the compensation authorities to determine,⁹⁸ and an order or decision will not be reversed if no error is shown.⁹⁹ Although it may be required by statute that findings of fact be set forth in the decree that is entered in a proceeding to review an agreement for compensation, where neither party on appeal objected to the form of a decree, and argued the case as though the decree contained the required findings of fact, under such circumstances the reviewing court would not remand the cause for the entry of a proper decree, but would treat the decree as though it had been properly amended.¹

§ 911. Reinstatement of Agreement

If payment of compensation has been under an agreement, and the agreement has terminated, or been sus-

pending, a change in the condition of the employee may be ground for a reinstatement of the agreement.

It is stated supra § 896, that after an agreement for the payment of compensation has been made and approved, a change in the physical condition of the employee may warrant the suspension of the compensation payments; but a further change in the physical condition of the employee after the suspension of the payments may be sufficient to warrant the reinstatement of the agreement, and to require the resumption of the payments.² A compensation board may grant a petition for reinstatement of a compensation agreement after it has previously denied petitions for review and modification of its order suspending payments of compensation.³

A review and reinstatement of an agreement for compensation cannot be had under a compensation act provision relating to review, modification, or the setting aside of an agreement for compensation because of fraud, coercion, improper conduct, or fraud,⁴ and an erroneous opinion as to future changes in the condition of an employee does not constitute such a mistake of fact as to justify the setting aside of an agreement for compensation, as stated supra § 410; but a present disability as a consequence of later developments or physical degeneration resulting from the injury may be presented as a cause for reviewing and reinstating the agreement,⁵ provided the review and reinstatement is applied for within the time limited by statute, as discussed supra § 904.

Confusion in proceedings

Where employer's petition to terminate disability payments to employee under open agreement did not comply with statutory requirements and entire proceedings became so confused that burden of proof, which never shifted from employer and was never met by it, was transferred to employee, order of termination was vacated and record returned to workmen's compensation board to afford employer opportunity to comply with statutory provisions and to file a new petition.

Pa.—Brusco v. Philadelphia Rapid Transit Co., 24 A.2d 710, 148 Pa. Super. 97.

94. Pa.—Flood v. Logan Iron & Steel Co., 5 A.2d 621, 136 Pa. Super. 101.
Palmer v. Glen Alden Coal Co., Com.Pl., 35 Luz. Leg. Reg. 129—Henderson v. McNulty Bros. Co., Com. Pl., 86 Pittsb. Leg. J. 5.

Taking of additional evidence not required

In a proceeding to set aside a final receipt of compensation paid under an agreement, where reviewing court reverses decision of compensation board and returns record with in-

structions to make a further determination, board may make such determination without having to take additional evidence.

Pa.—Shetina v. Pittsburgh Terminal Coal Corporation, 179 A. 776, 119 Pa. Super. 425.

95. Pa.—Flood v. Logan Iron & Steel Co., 5 A.2d 621, 136 Pa. Super. 101—Miraglia v. Publicker Commercial Alcohol Co., 174 A. 16, 113 Pa. Super. 487.

Wahs v. Wolf, 43 Pa. Dist. & Co. 644, affirmed 42 A.2d 166, 157 Pa. Super. 181.

Dismissal instead of remitting record Statute providing that if lower court shall sustain appellant's exceptions to findings of fact and reverse action of board founded thereon, court shall remit record to board for further hearing and determination, had no application where court found from record that there was no finding of fact as contended.

Pa.—Tubbs v. O. T. Oil Co., 174 A. 836, 114 Pa. Super. 375.

96. Pa.—Kutney v. William Penn Colliery Co., 25 A.2d 92, 148 Pa. Super. 114.

97. R.I.—Priscilla Worsted Mills v. Vizzacco, 96 A.2d 835, 80 R.I. 342.

98. Pa.—Bankovich v. Westmoreland Coal Co., 144 A. 103, 294 Pa. 167.

99. R.I.—Atlas Tool & Findings Co. v. Duffy, 98 A.2d 849, 81 R.I. 61.

1. R.I.—Rigo v. Walsh-Kaiser Co., 55 A.2d 858, 73 R.I. 319.

2. Pa.—Gairt v. Curry Coal Mining Co., 116 A. 382, 272 Pa. 494.

Selinsky v. New Shawmut Min. Co., 115 A.2d 916, 178 Pa. Super. 240—Miraglia v. Publicker Commercial Alcohol Co., 174 A. 16, 113 Pa. Super. 487.

Byrk v. Susquehanna Collieries Co., Com.Pl., 7 Sch. Reg. 26.

3. Pa.—Gairt v. Curry Coal Mining Co., 116 A. 382, 272 Pa. 494.

4. Pa.—Godfroid v. Rockhill Coal & Iron Co., 169 A. 577, 111 Pa. Super. 296.

5. Pa.—Federoff v. Union Collieries Co., 15 A.2d 385, 141 Pa. Super. 308—Berkstresser v. State Workmen's Ins. Fund, 14 A.2d 225, 149 Pa. Super. 237.

In order that an agreement for compensation be subject to reinstatement it is usually necessary that it have been approved by the board or commission,⁶ and any approved formal agreement for compensation, whether original or supplemental, may be reinstated,⁷ and the agreement may be in existence, or it may have been suspended or terminated.⁸ A petition for reinstatement of a compensation agreement is barred if not filed within the period provided by statute.⁹ Where an employee has been awarded compensation, payments have been made for a period of time, and an agreement is then entered into suspending further payments, such agreement does not constitute a bar to a recovery of further compensation if it is found that the employee is permanently disabled,¹⁰ and a remedy may be available to obtain such further compensation with-

out the necessity of first having set aside the agreement suspending payments.¹¹

§ 912. Waiver of Payments under Agreement

An employee does not voluntarily relinquish the right to further payments of compensation under an agreement by failing to reply to an inquiry of the compensation authorities with respect to his satisfaction with payments made.

An employee's failure to reply to an inquiry of the compensation commission with respect to whether he is satisfied with payments already made under an approved agreement, or desires a hearing as to termination thereof, is not equivalent to a voluntary relinquishment of the right to further payments.¹²

XXII. OFFENSES AND PENALTIES

§ 913. Offenses and Responsibility Therefor

Compensation acts providing for the imposition of penalties for violation of various provisions of the act, as, for failure to file required reports, or for failure to provide compensation insurance, are usually strictly construed in favor of the accused person.

A person who violates, or who intends to violate, a provision of a workmen's compensation act may thereby be subject to a criminal penalty, and if provision is made for such a penalty, it may be the only penalty that will be imposed.¹³ On the other hand, under a statute providing that an employer's failure to secure the payment of compensation shall constitute a misdemeanor and have the effect of enabling the injured employee or his representatives to maintain an action for damages, the punishment for such misdemeanor is not limited

to enabling the employee or representatives to sue for damages;¹⁴ but in addition the offending employer may be punished by fine or imprisonment as provided in general penal laws relating to punishment for misdemeanors when not fixed by statute.¹⁵ If an injury to an employee is caused by an employer's violation of a safety order, such violation may result in a penalty being imposed as well as an increase in the amount of compensation that will be paid;¹⁶ but the fact that a violation of a safety order may result in a penalty as well as increased compensation does not mean that the two things are identical, and the fact that a violation of a safety order may result in a penalty as well as increased compensation shows a statutory distinction between the two results.¹⁷

6. Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172.

7. Pa.—Leeper v. Logan Iron & Steel Co., supra—Zupicick v. Philadelphia & Reading Coal & Iron Co., 164 A. 781, 108 Pa.Super. 165.

8. Pa.—Leeper v. Logan Iron & Steel Co., 198 A. 489, 131 Pa.Super. 172—Zupicick v. Philadelphia & Reading Coal & Iron Co., 164 A. 781, 108 Pa.Super. 165.

Suspension of agreement

Referee's order terminating workmen's compensation agreement and reserving to claimant right to ask for modification of agreement was at least suspension of agreement, subject to claimant's right to petition for reinstatement and modification. Pa.—Melody v. Bornot, Inc., 170 A. 408, 112 Pa.Super. 174.

9. Pa.—Godfroid v. Rockhill Coal &

Iron Co., 169 A. 577, 111 Pa.Super. 296.

Provision applicable only to schedule injuries

A provision for reinstatement of agreements for compensation requiring that reinstatement could be made only during time agreement has to run if agreement was for a definite period applied only to an agreement for compensation for schedule injuries.

Pa.—Mouhat v. Board of Public Ed. of Pittsburgh, 48 A.2d 20, 159 Pa. Super. 423.

10. Mich.—Smith v. Markillie, 292 N. W. 695, 294 Mich. 178.

11. Mich.—Smith v. Markillie, supra.

12. Me.—Healey's Case, 126 A. 21, 124 Me. 54.

71 C.J. p 1477 note 76.

13. Ill.—Meyer v. Buckman, 129 N. E.2d 603, 7 Ill.App.2d 885.

No provision for civil action

Section of workmen's compensation law providing that every employer, his director, officer, or agent, who discharges or in any way discriminates against an employee for exercising any of his rights under act, shall be guilty of a misdemeanor and shall be subject to certain punishment, does not give an employee a cause of action for damages against employer who violates section.

Mo.—Christy v. Petrus, 295 S.W.2d 122, 365 Mo. 1187.

14. N.Y.—People v. Donnelly, 134 N.E. 332, 232 N.Y. 423, 21 A.L.R. 1425.

15. N.Y.—People v. Donnelly, supra.

16. Wis.—R. J. Wilson Co. v. Industrial Commission, 263 N.W. 204, 219 Wis. 463.

17. Wis.—R. J. Wilson Co. v. Industrial Commission, supra.

Compensation acts frequently require that an injury or accident to an employee be reported by the employer, as stated *infra* § 915, and the failure of an employer to make a report within the time prescribed may result in the imposition of such penalty as is provided by law.¹⁸ A provision that a claimant must be penalized one day's compensation for each day's failure to report an accident to the employer must be enforced.¹⁹

Ordinarily, provisions providing penalties against employers will be strictly construed,²⁰ and, in strictly construing a compensation act, it has been held that a provision providing for a penalty for failure to obtain insurance does not apply to a municipality.²¹ Where a penalty may be imposed for an employer's failure to insure his liability under the act or to furnish proof of ability to pay compensation, a penalty may be imposed even though it is not found that the employer wilfully neglected to comply with the requirement.²² A statute making it an offense for an employer to fail to pay compensation to an employee in accordance with the terms of an award does not make it an offense for an employer to fail to pay death benefits to an employee's dependents.²³

If a member of a partnership cannot be an employee thereof for the purposes of workmen's compensation, a penal provision may not be enforced for failure to provide insurance for partners;²⁴ and, although a court will not lend its aid to a plan designed to evade provisions of a compensation act for the violation of which a penalty is prescribed,²⁵ such as a scheme whereby an employer attempts to evade requirements of insurance by creating a partnership,²⁶ such a plan may be executed to the de-

gree that a partnership is in fact established, and if this is done no penalty may be imposed for failure to provide insurance, even though the plan was admittedly conceived and executed for the purpose of evading insurance requirements.²⁷ In determining whether a workman was an independent contractor or an employee for the purpose of ascertaining whether a criminal penalty should be imposed for failure to provide compensation insurance, the same tests will be applied as are used in determining such status for other purposes.²⁸

The failure of an employer to keep his employees insured in accordance with compensation act requirements may be a continuing offense, similar to a husband's neglect to support his wife;²⁹ and the duty to secure the payment of compensation arises as soon as a person becomes an employer and continues while that status exists, and if a person fails to perform that duty, either when he first becomes an employer, or at any time thereafter while such status continues, he may be guilty of a misdemeanor, entirely regardless of the occurrence of injury to any employee or the making of an award therefor.³⁰

Where a public employee sustains an injury for which a lump sum payment is made under workmen's compensation law, and the employee retires and seeks the benefits provided by a retirement law, a provision in that law that an employee is not entitled to retirement benefits until the amount which would be paid exceeds the amount of a lump sum settlement of a compensation claim does not constitute a violation of a statutory provision prohibiting an employer from exacting from an employee any part of the cost of workmen's compensation.³¹

18. Conn.—Hoard v. Sears, Roebuck & Co., 188 A. 269, 122 Conn. 185.
Miss.—Stanley v. McLendon, 70 So. 2d 323, 220 Miss. 192.

19. Colo.—Jahot v. Industrial Commission, 80 P.2d 871, 94 Colo. 424.

20. Ga.—Petty v. Mayor, etc., of College Park, 11 S.E.2d 246, 63 Ga.App. 455.

N.Y.—People on Inf. of Levy v. Somerville, 4 N.Y.S.2d 793, 167 Misc. 89.

Penal provision held inapplicable

Where an employee's activity which was not covered by compensation was only on a single occasion, and was not employment in a business carried on for pecuniary gain, employer was not subject to a penalty for failing to provide compensation insurance.

N.Y.—People v. Imbesi, 254 N.Y.S. 803, 235 App.Div. 636.

Construed in favor of offender

Any ambiguity in language of rules of incorporated accident prevention group of window cleaning firms as to penalties for failure to report to state insurance fund names of window cleaner employees working each day should be resolved in favor of offender, particularly where fine imposed is incompatible with gravity of offense.

N.Y.—Nordam Window & House Cleaning Co. v. Connolly, 44 N.Y.S. 2d 246, 180 Misc. 792.

21. Ga.—Petty v. Mayor, etc., of College Park, 11 S.E.2d 246, 63 Ga.App. 455.

22. Ga.—Jones v. Cochran, 167 S.E. 751, 46 Ga.App. 360.

23. Md.—Grimm v. State, 129 A.2d 128, 212 Md. 243.

24. N.Y.—People, on Complaint of Cohen v. Levine, 288 N.Y.S. 476, 160 Misc. 181.

25. N.Y.—People, on Complaint of Fein, v. Beatty, 14 N.Y.S.2d 260, 171 Misc. 1004.

26. N.Y.—People, on Complaint of Fein v. Beatty, *supra*.

27. N.Y.—People, on Complaint of Cohen, v. Levine, 288 N.Y.S. 476, 160 Misc. 181—People, on Complaint of Fogarty, v. Kaplan, 288 N.Y.S. 474, 160 Misc. 179.

28. N.Y.—People v. Manzo, 26 N.Y. S.2d 566.

Independent contractors generally see *supra* §§ 90–106.

29. N.Y.—People, on Complaint of Fein, v. Beatty, 14 N.Y.S.2d 260, 171 Misc. 1004.

30. Cal.—People v. Barker, 77 P.2d 321, 29 C.A.2d Supp. 766.

31. Cal.—Stafford v. Los Angeles County Emp. Retirement Bd., 270 P.2d 12, 42 C.2d 795.

Filing statement as to persons employed. Under statutes requiring an employer entitled to the benefits of the act, and who has not elected to reject such benefits, to file with the commission annually on or before a specified date, a duplicate verified statement showing the number of his employees who would be entitled to the benefits of the act, the total wages paid such employees during the previous fiscal year, and any other information required as to wages, and making failure to file the statement a misdemeanor, and providing that the statute shall not apply to any employer regularly employing less than a stated number of employees, in counting the number of employees boys are included,³² and an employer is within the requirements of the act if the number of employees in all departments totals the number specified by statute although the number in any single department may be less.³³

An employer cannot violate an order of a commission prior to the effective date thereof,³⁴ and a penalty based on such an alleged violation is unenforceable.³⁵ An employer may not be penalized under one section of a workmen's compensation act for an offense committed under a different and distinct section carrying its own penalties for violation.³⁶ Where a compensation act has been amended and reenacted with a provision in the act that nothing in the act should affect or impair any right of action which shall have accrued before the act shall take effect, such provision, being applicable only to civil right of action, does not operate to permit a criminal prosecution under the prior provisions.³⁷

Who may sue for penalty. Under general statutes requiring actions to be brought by the real party in interest, and subsequently enacted provisions of a workmen's compensation law expressly authorizing a board or commission to sue for penalties, it has been held that a suit may be brought against an employer, for penalties for failure to make required reports of injuries, by either the board³⁸ or

the state as the real party in interest.³⁹

Venue. Under statutes making it a misdemeanor for an employer to refuse or neglect to "make" a report of injuries sustained by an employee and to "mail" it to the industrial board, the offense of such neglect or failure is completed in the county of the employer's place of business,⁴⁰ so that the venue of an action to collect a fine for such offense lies in the county wherein the employer's place of business is situated;⁴¹ although under a statutory provision punishing a failure to "file" with the board evidence of a compliance with certain provisions of the act, the neglect is punishable in the county wherein the filing should have been done, which is the county wherein the board has its offices.⁴²

Hearing. The assessment of a penalty for violation of a compensation act provision, if done without first affording the penalized person an opportunity to be heard, is erroneous.⁴³

§ 914. Enforcement

If an employer is convicted of violating provisions of a workmen's compensation act, the sentence imposed should be commensurate with the gravity of the offense.

The prosecution of an employer for violation of provisions of compensation law may be by information,⁴⁴ and, on conviction of an employer, the sentence imposed should be commensurate with the gravity of the offense.⁴⁵ Where an employer is convicted and a fine imposed under a statute which, in addition to creating the offense, provides for the remission of such fine as may be imposed if defendant complies with certain requirements, the fine may be suspended under a general statute, even though defendant has not complied with the requirements that would authorize the remission of the fine.⁴⁶

In prosecutions of this character, general rules with respect to presumptions and burden of proof,⁴⁷

32. Puerto Rico.—People v. Martinez, 26 Puerto Rico 226.

33. Puerto Rico.—People v. Martinez, supra.

34. Ohio.—Clemmer & Johnson Co. v. Industrial Commission, 147 N.E. 518, 112 Ohio St. 421.

35. Ohio.—Clemmer & Johnson Co. v. Industrial Commission, supra. 71 C.J. p 1477 note 79.

36. Ga.—Turner v. Albany Coca-Cola Bottling Co., 123 S.E. 910, 32 Ga. App. 518.

71 C.J. p 1478 note 80.

37. Pa.—Commonwealth v. Gross, 21 A.2d 238, 145 Pa.Super. 92.

38. Ind.—In re Burk, 118 N.E. 540, 66 Ind.App. 435.

39. Ind.—In re Burk, supra.

40. Ind.—In re Burk, supra.

41. Ind.—In re Burk, supra.

42. Ind.—In re Industrial Board of Indiana, 117 N.E. 546, 65 Ind.App. 550.

43. Ga.—Employers' Liability Assur. Corp. v. Pruitt, 10 S.E.2d 275, 63 Ga.App. 149.

44. Information held sufficient N.Y.—People v. Rudnick, 19 N.E.2d 658, 280 N.Y. 5.

Puerto Rico.—People v. Martinez, 26 Puerto Rico 226.

45. N.Y.—Nordam Window & House

Cleaning Co. v. Connelly, 44 N.Y.S. 2d 246, 180 Misc. 792—People, on Complaint of Fein, v. Beatty, 14 N.Y.S.2d 260, 171 Misc. 1004.

Sentence of three months in workhouse was held excessive under controlling facts.

N.Y.—People v. Eisner, 15 N.Y.S.2d 973, 258 App.Div. 810.

46. Md.—State v. Fisher, 104 A.2d 403, 204 Md. 307.

47. Burden of proof

In prosecution of employer for failure to secure compensation, burden of proof that compensation was secured is on employer.

Cal.—People v. Barker, 77 P.2d 321, 29 C.A.2d Supp. 766.

admissibility of evidence,⁴⁸ and weight and sufficiency of evidence⁴⁹ apply.

A lien filed to secure payment of a penalty assessed has the legal effect of a *lis pendens*.⁵⁰

In a proceeding brought for the collection of a penalty, an order assessing the penalty is an ap-

pealable order,⁵¹ and jurisdiction on appeal may properly lie with an appellate compensation tribunal.⁵² If the appellate compensation tribunal reverses an order assessing a penalty, and thereafter no appeal is prosecuted to the courts, the order of reversal is *res judicata* in any subsequent proceeding.⁵³

XXIII. EMPLOYER'S REPORT OF ACCIDENT AND NOTICE OF DEATH TO BENEFICIARIES

§ 915. Report of Accidents

Compensation acts frequently require the employer to report an injury or accident to an employee, but it is not always necessary that trivial accidents or injuries be reported.

Workmen's compensation act provisions, or rules and regulations of compensation boards or commissions, may require that a report be made by an employer when an accident occurs which results in the injury or death of an employee,⁵⁴ and it has been held that such provisions should be liberally construed.⁵⁵ Where certain provisions of the compensation act require employers to keep a record of all "injuries" sustained by their employees in the course of their employment and to make certain reports of such injuries, while other provisions denominate the reports to be those of "accidents," the latter term is used in the sense of something undesigned, unforeseen, or unexpected.⁵⁶ The failure of an employer to make a report with the

time prescribed may result in the imposition of such penalty as is provided by law, as discussed supra § 913, and may result in the employer being precluded from setting up a statute of limitations as a bar to a proceeding for compensation, supra § 441, or as a bar to a claim for compensation, supra § 475.

Compensation acts, or regulations made pursuant thereto, usually do not require the reporting of every injury or accident,⁵⁷ and an accident may be so trivial that the employer is justified in believing that it need not be reported.⁵⁸ Under some compensation acts it is necessary to report only such accidents as result in compensable injuries,⁵⁹ or such accidents as arise out of, and in the course of, employment and result in loss of life or injury.⁶⁰ A requirement that employers shall, within a stated period of time, report all on-the-job deaths of employees is mandatory,⁶¹ and a report on an em-

48. Evidence held inadmissible

In prosecution for failure to secure compensation, award of compensation board or commission was inadmissible.

Cal.—*People v. Barker*, supra.

49. Agreement not conclusive

Mere production of agreement signed by laborers describing their relationship as partners or declarations of interested parties as to their relationship are not conclusive in determination whether relationship of partnership existed; but courts may look behind legal terminology to discover and expose real relationship between parties with respect to question of failure to secure payment of workmen's compensation.

N.Y.—*People*, on Complaint of Cohen, v. Levine, 288 N.Y.S. 476, 160 Misc. 181.

Evidence held sufficient to justify imposition of penalties.

Ga.—*Overton-Green Drive-It-Yourself System v. Cook*, 16 S.E.2d 50, 65 Ga.App. 274.

La.—*Greschner v. Claiborne Towers, Inc.*, App., 73 So.2d 82.

Evidence held sufficient to establish guilt

N.Y.—*People*, on Complaint of Cohen,

v. Levine, 288 N.Y.S. 476, 160 Misc. 181.

Evidence held insufficient to establish guilt

N.Y.—*People*, on Complaint of Fein, v. Beatty, 14 N.Y.S.2d 260, 171 Misc. 1004.

50. Wash.—*Stell v. State*, 250 P.2d 118, 41 Wash.2d 479.

Reversal of penalty order

Where an order for a penalty was entered, a lien filed against property, property sold, and thereafter order for penalty reversed, title to property would be quieted against lien. Wash.—*Stell v. State*, supra.

51. Wash.—*Stell v. State*, supra.

52. Wash.—*Stell v. State*, supra.

53. Wash.—*Stell v. State*, supra.

54. Mich.—*Thompson v. Lake Superior Lumber Corp.*, 28 N.W.2d 891, 318 Mich. 510.

Miss.—*Stanley v. McLendon*, 70 So. 2d 323, 220 Miss. 192.

71 C.J. p 1478 notes 93, 94.

Reports by physicians see supra § 484.

55. N.J.—*Massie v. Court of Common Pleas in and for Monmouth County*, 151 A. 205, 8 N.J.Misc. 600,

affirmed 156 A. 377, 108 N.J.Law 199.

71 C.J. p 1479 note 98.

56. Tex.—*Texas Employers' Ins. Ass'n v. Parr*, Com.App., 30 S.W.2d 305.

71 C.J. p 1479 note 99.

57. Ariz.—*Sears, Roebuck & Co. v. Industrial Commission*, 213 P.2d 672, 69 Ariz. 320.

Mich.—*Amamoto v. J. Kozloff Fish Co.*, 27 N.W.2d 118, 317 Mich. 641.

71 C.J. p 1479 note 97 [a].

58. Ariz.—*English v. Industrial Commission*, 237 P.2d 815, 73 Ariz. 86.

S.C.—*Kirby v. Holliday Laundry & Dry Cleaners*, 96 S.E.2d 61, 230 S.C. 412.

59. Mo.—*Price v. Kansas City Public Service Co.*, App., 42 S.W.2d 51, 55, affirmed 50 S.W.2d 1947, 330 Mo. 706.

71 C.J. p 1479 note 97.

60. Ariz.—*Sears, Roebuck & Co. v. Industrial Commission*, 213 P.2d 672, 69 Ariz. 320.

61. Miss.—*Southern Engineering & Elec. Co. v. Chester*, 83 So.2d 811, 226 Miss. 136, judgment corrected 84 So.2d 535, 226 Miss. 136.

ployee's death on the job must be reported even though the employer may believe that the death is not compensable.⁶²

A compensation act may require that a report of a noncompensable accident shall be made when an employee is injured so slightly that he loses little or no time from work, and also require that a report of a compensable accident shall be made when an employee sustains an injury which causes the loss of a specified period of time from work.⁶³ Under such a provision a report of a compensable accident is required as a matter of law when an injury causes an employee to be absent from work for the specified period of time.⁶⁴ However, an accident which does not result in any immediate disability need not be reported as compensable merely because there is a possibility that the employee will be prevented in the future from performing the work in which he was engaged at the time the accident occurred.⁶⁵ An employer who knows that an employee's injury is disabling in character must file a proper report.⁶⁶ An injury may be compensable and be reported as such although it does not cause the employee to lose time from work,⁶⁷ and an employer who reports an injury as noncompensable although he has full knowledge that the injury is in fact compensable has not complied with the requirements of the act;⁶⁸ but if an employer does not have knowledge that an accident is compensable, a report of the accident as noncompensable will constitute compliance with the requirement of a report.⁶⁹ In order that an employer be under the duty of reporting an accident, injury, or occupational disease, it is necessary that the employer have

notice or knowledge that the accident or injury has occurred, or that the occupational disease exists.⁷⁰

Where a statute requires that reports be on forms furnished by the board or commission, the forms should provide for such definite statements of fact as are necessary to obtain the required information,⁷¹ and a report which is not on a prescribed form may be ineffective as a report.⁷² Where the method of transmitting the report to the compensation bureau for filing is prescribed by the compensation act, compliance with the designated method is compliance with the act.⁷³

Under a compensation act providing for reports of noncompensable injuries and compensable injuries, a report of a noncompensable injury should describe the injury with such particularity of location and effect as to indicate the nature of the injury, and identify it;⁷⁴ but it is not necessary that the employer ascertain and set up all the effects of the injury, or to anticipate future developments.⁷⁵ An employer reporting to the compensation authorities and denying liability need not notify the employee to this effect.⁷⁶

A person who is an employer within the meaning of workmen's compensation law may be considered to be an employer for the purpose of making such report as is required by the compensation act.⁷⁷ The fact that an employer has rejected the act does not excuse him, under some statutes, from making the required reports of injuries to employees.⁷⁸

An employer's report of an accident or injury may constitute prima facie evidence that the accident and injury were as reported,⁷⁹ and a report of

⁶² Miss.—Southern Engineering & Elec. Co. v. Chester, *supra*.

⁶³ Mich.—Tinney v. City of Grand Rapids, 264 N.W. 402, 274 Mich. 364.

⁶⁴ Mich.—Osmer v. Montgomery Ward & Co., 283 N.W. 578, 287 Mich. 267.

⁶⁵ Mich.—Johnston v. Commerce Pattern Foundry Mach. Co., 40 N.W.2d 158, 326 Mich. 300—Tinney v. City of Grand Rapids, 264 N.W. 402, 274 Mich. 364.

⁶⁶ Mich.—Shaw v. General Motors Corp., Chevrolet Gear & Axle Division, 31 N.W.2d 75, 320 Mich. 333.

⁶⁷ Mich.—Pardee v. Great Atlantic & Pacific Tea Co., 270 N.W. 263, 278 Mich. 191—Pritchard v. Ford Motor Co., 267 N.W. 622, 276 Mich. 246.

⁶⁸ Mich.—Pardee v. Great Atlantic & Pacific Tea Co., 270 N.W. 263, 278 Mich. 191—Pritchard v. Ford

Motor Co., 267 N.W. 622, 276 Mich. 246.

⁶⁹ Mich.—La Duke v. Consumers Power Co., 1 N.W.2d 16, 299 Mich. 625—Pardee v. Great Atlantic & Pacific Tea Co., 270 N.W. 263, 278 Mich. 191.

⁷⁰ Mich.—Osmer v. Montgomery Ward & Co., 283 N.W. 578, 287 Mich. 267.

N.J.—Massie v. Court of Common Pleas in and for Monmouth County, 151 A. 205, 8 N.J.Misc. 600.

N.Y.—Roman v. Leviton Mfg. Co., 137 N.Y.S.2d 597, 285 App.Div. 913.

Actual knowledge equivalent to notice

Mich.—Shaw v. General Motors Corp., Chevrolet Gear & Axle Division, 31 N.W.2d 75, 320 Mich. 333.

⁷¹ Colo.—State Compensation Ins. Fund v. Howington, 293 P.2d 963, 133 Colo. 583.

⁷² N.J.—Frasier v. L. Bamberger &

Co., 160 A. 630, 10 N.J.Misc. 781, affirmed 166 A. 101, 110 N.J.Law 447.

⁷¹ C.J. p 1479 note 1.

⁷³ N.J.—Loeloff v. Kelly Press Division of American Type Foundry Co., 163 A. 1, 10 N.J.Misc. 1156, affirmed 166 A. 203, 110 N.J.Law 507.

⁷¹ C.J. p 1479 note 2.

⁷⁴ Mich.—Pardee v. Great Atlantic & Pacific Tea Co., 270 N.W. 263, 278 Mich. 191.

⁷⁵ Mich.—Pardee v. Great Atlantic & Pacific Tea Co., *supra*.

⁷⁶ S.C.—Burnhart v. Dunean Mills, 51 S.E.2d 377, 214 S.C. 113.

⁷⁷ Mich.—De Witt v. Grand Rapids Fuel Co., 77 N.W.2d 759, 346 Mich. 209.

⁷⁸ Ind.—In re Burk, 118 N.E. 540, 66 Ind.App. 435.

⁷¹ C.J. p 1479 note 3.

⁷⁹ Idaho.—Teater v. Dairymen's

an accident and injury may constitute an admission of liability.⁸⁰ A report may not constitute an admission of liability,⁸¹ and may negative any admission of liability.⁸² Furthermore, an employer in reporting an accident and injury may waive any question as to the nature of an injury and give an unqualified answer.⁸³

§ 916. Notice of Death to Beneficiaries

If an employee has furnished his employer or the representative of the employer with a statement of persons who will be beneficiaries if the employee dies, and thereafter the employee does die in the course of em-

ployment, the employer may be required to give the beneficiaries notice that the employee has died.

Where a compensation act provides for employees furnishing their employers with a statement of the persons who would be beneficiaries under compensation law in the event of the death of the employee, and further provides that when such a statement has been given the employer shall, in the event of the death of the employee, notify beneficiaries of the death, a statement by an employee given to one acting as employment agent for several employers is sufficient to require one of such employers to give notice to such employee's beneficiaries.⁸⁴

XXIV. EFFECT OF ACT ON OTHER STATUTORY OR COMMON-LAW RIGHTS OF ACTION AND DEFENSES

A. IN GENERAL

§ 917. General Statement

Except as the statute otherwise provides, the general rule is that wherever the compensation laws are applicable, the rights and remedies provided thereby are exclusive.

The extent to which a workmen's compensation act deprives the employer or the employee of his causes of action or defenses depends primarily on

the language of the act itself,⁸⁵ which, by act of the parties accepting the act, becomes a part of the contract of service.⁸⁶ An existing common-law right of action is not taken away except by direct enactment or necessary implication;⁸⁷ but the general rule is that wherever the compensation laws are applicable, the rights and remedies granted or provided thereby are exclusive,⁸⁸ with such excep-

Co-op. Creamery of Boise Valley, 190 P.2d 687, 68 Idaho 152.

80. Mich.—Nicholas v. St. Johns Table Co., 5 N.W.2d 442, 302 Mich. 503.

Admissibility of report as admission see supra § 531.

Question mark

Where an employer in his report answered question as to probable length of disability with a question mark, it was held that this would constitute an admission of existence of disability on date report was made, and an admission that there was a continuance of disability.

N.Y.—Brink v. Comstock Canning Corp., 104 N.Y.S.2d 242, 278 App. Div. 867.

81. Mo.—Becherer v. Curtiss-Wright Corp., App., 194 S.W.2d 740.

82. Mich.—Nicholas v. St. Johns Table Co., 5 N.W.2d 442, 302 Mich. 503.

83. Mich.—Schinderle v. Ford Motor Co., 25 N.W.2d 568, 316 Mich. 387.

84. U.S.—Alaska Treadwell Gold Mining Co. v. Crinis, Alaska, 255 F. 810, 167 C.C.A. 138. 71 C.J. p 1479 note 7.

85. Va.—Corpus Juris cited in Griffith v. Raven Red Ash Coal Co., 20 S.E.2d 530, 534, 179 Va. 790.

71 C.J. p 1479 note 8.

"The act . . . superseded and replaced many previously existing theories of personal injury damages arising out of common law and statutory actions."

Ala.—Alabama By-Products Co. v. Landgraff, 27 So.2d 209, 212, 32 Ala.App. 343, affirmed 27 So.2d 215, 248 Ala. 253.

Only employer-employee cases affected

(1) Statute relating to rights of action for injury or death are affected by workmen's compensation act, to extent only, if at all, to which they apply to cases arising between employer and employee.

Ala.—Chapman v. Railway Fuel Co., 101 So. 879, 212 Ala. 106.

(2) Rights of action and defenses as between employer and employee see infra §§ 918-963.

Cause of action arising before amendment

Where cause of action for injuries sustained by employee during course of his employment for an employer, who was not a subscriber under compensation law, arose prior to effective date of amendment to compensation law, it was governed by pre-existing law.

Mass.—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165.

86. Mich.—Thomas v. Parker Rust

Proof Co., 279 N.W. 504, 284 Mich. 260.

Minn.—Huhn v. Foley Bros., 22 N.W. 2d 3, 221 Minn. 279.

71 C.J. p 1479 note 9.

87. Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 513.

71 C.J. p 1479 note 10.

Cases not specially covered

Washington compensation act is not opposed to common-law theory of recompense for injury, and a common-law action may be maintained and its remedy enforced in all cases not specially covered by Industrial Insurance Act.

U.S.—Muir v. Kessinger, D.C.Wash., 35 F.Supp. 116, cause remanded on other grounds, C.C.A., 121 F.2d 456.

88. U.S.—Capetola v. Barclay White Co., C.C.A.Pa., 139 F.2d 556, 153 A. L.R. 1046, certiorari denied 64 S.Ct. 939, 321 U.S. 799, 88 L.Ed. 1087—Heard v. Texas Compensation Ins. Co., C.C.A.Tex., 87 F.2d 30.

Doty v. Travelers Ins. Co., D.C. Tex., 31 F.Supp. 186.

Ala.—Smith v. Southern Ry. Co., 187 So. 195, 237 Ala. 372.

Kan.—Bright v. Bragg, 264 P.2d 494, 175 Kan. 404—Lessley v. Kansas

Power & Light Co., 231 P.2d 239, 171 Kan. 197—Crawford v. Atchison, T. & S. F. Ry. Co., 199 P.2d

796, 166 Kan. 163—Duncan v. Perry Packing Co., 174 P.2d 78, 162 Kan.

79—Hoffman v. Cudahy Packing

tions as the statute may provide,⁸⁹ the award of | compensation operating as full recovery, thereby

Co., 167 P.2d 613, 161 Kan. 345—Gray v. Hercules Powder Co., 165 P.2d 447, 160 Kan. 767—Bailey v. Mosby Hotel Co., 160 P.2d 701, 160 Kan. 258—Woods v. Jacob Dold Packing Co., 41 P.2d 748, 141 Kan. 363, modified on other grounds 43 P.2d 786, 141 Kan. 748.

La.—Sisk v. L. W. Eaton Co., App., 89 So.2d 425—Brooks v. American Mut. Liability Ins. Co., App., 7 So. 2d 658—Fryou v. T. Aucouin & Sons, App., 5 So.2d 193—Atchison v. May, App., 5 So.2d 182, affirmed 10 So. 2d 785, 201 La. 1003—Dourrieu v. Board of Com'rs of Port of New Orleans, App., 158 So. 581.

Mass.—Conlon v. City of Lawrence, 13 N.E.2d 425, 299 Mass. 528.

Minn.—Hartman v. Cold Spring Granite Co., 77 N.W.2d 651, 247 Minn. 515—Foley v. Western Alloyed Steel Casting Co., 18 N.W.2d 541, 219 Minn. 571.

Mo.—Hughes v. Maryland Casualty Co., 76 S.W.2d 1101, 229 Mo.App. 472.

N.M.—Guthrie v. Threlkeld Co., 192 P.2d 307, 52 N.M. 93.

Okl.—Pine v. Davis, 145 P.2d 378, 193 Okl. 517—May v. Covington, 95 P. 2d 233, 135 Okl. 576.

Or.—Kowcun v. Bybee, 186 P.2d 790, 182 Or. 271.

S.C.—Marchbanks v. Duke Power Co., 2 S.E.2d 325, 190 S.C. 336.

Tex.—Traders & General Ins. Co. v. Lincecum, Civ.App., 126 S.W.2d 692 —Traders & General Ins. Co. v. Huntsman, Civ.App., 125 S.W.2d 431, error dismissed, judgment correct.

Wash.—Jewett v. Kerwood, 263 P.2d 830, 43 Wash.2d 691.

W.Va.—Makarenko v. Scott, 55 S.E. 2d 88, 132 W.Va. 430.

71 C.J. p 1479 note 11.

"Workmen's compensation statutes are sui generis and create rights, remedies and procedure which are exclusive."

N.M.—Swallows v. City of Albuquerque, 298 P.2d 945, 947, 61 N.M. 265.

"The remedy under . . . [the compensation] act is complete, with a procedure distinctly its own, and that procedure was intended to be and is substantial, complete, and exclusive."

Kan.—Williams v. Cities Service Gas Co., 99 P.2d 822, 827, 151 Kan. 497 —Employers' Liability Assur. Corp. v. Matlock, 98 P.2d 456, 457, 151 Kan. 293, 127 A.L.R. 461.

Word "exclusive" means what it implies.

N.Y.—Fellows v. Seymour, 13 N.Y.S. 2d 803, 171 Misc. 833, reversed on other grounds 19 N.Y.S.2d 960, 259 App.Div. 966.

Criterion of rights and liabilities

Within its field of operation com-

pensation law is criterion of rights and liabilities of all parties affected thereby and within terms of that law.

Ala.—Carraway Methodist Hospital v. Pitts, 57 So.2d 96, 256 Ala. 665—Harris v. Louisville & N. R. Co., 186 So. 771, 237 Ala. 366.

Substitutes for existing rights and remedies

Compensation act, including provisions for compensation in cases of occupational disease, creates exclusive rights and remedies so far as it provides substitutes for those existing at time of its enactment.

Minn.—Foley v. Western Alloyed Steel Casting Co., 18 N.W.2d 541, 219 Minn. 571.

Act is conclusive within scope of its coverage.

N.Y.—Monti v. Gimbel Bros., 82 N.Y. S.2d 781, 192 Misc. 811, affirmed 89 N.Y.S.2d 238, 275 App.Div. 845, appeal denied, 91 N.Y.S.2d 758, 275 App.Div. 1005.

Common liability of employer with third party

(1) Compensation act extinguished liability of employer to employee for negligence of employer, and consequently there can be no common liability of such employer with third party for their joint negligence.

Ky.—Employers Mut. Liability Ins. Co. of Wis. v. Griffin Const. Co., 280 S.W.2d 179.

(2) Person whose negligence is concurrent with employer's as liable to employee see infra § 985.

(3) Ordinarily, joint tortfeasors acts are inapplicable between an employer who is within compensation act and a third party whose negligence, together with that of employer, allegedly resulted in death of employee.

N.J.—Yearicks v. City of Wildwood, 92 A.2d 873, 23 N.J.Super. 379.

Effect on proceedings in another state

(1) Illinois compensation act abolished right of action against employer under Illinois common law or Illinois Personal Injuries Act, in situations to which compensation act applies, and to that extent such act provides an exclusive remedy, but act was not designed to preclude any recovery by proceedings brought in another state for injuries received there in course of Illinois employment.

U.S.—Industrial Commission of Wis. v. McCartin, Wis., 67 S.Ct. 886, 330 U.S. 622, 91 L.Ed. 1140, 169 A.L.R. 1179.

(2) Supreme court should not readily interpret Illinois compensation act so as to cut off employee's right to sue under other legislation passed

for his benefit, and only some unmistakable language by state legislature or judiciary would warrant accepting by court of such construction, especially where rights affected were those arising under legislation of another state and where full faith and credit clause was brought into play. U.S.—Industrial Commission of Wis. v. McCartin, supra.

89. Ind.—Chicago, M., St. P. & P. R. Co. v. Cox, 7 N.E.2d 1008, 103 Ind. App. 364.

Or.—Kowcun v. Bybee, 186 P.2d 790, 182 Or. 271.

71 C.J. p 1480 note 12.

"An injured workman entitled to compensation under . . . [the compensation act] has no right of action against anyone for his injuries except as that right is expressly preserved or created by that act, for it was the intention of the Workmen's Compensation Act to withdraw such causes of action from private controversy."

Wash.—Jewett v. Kerwood, 263 P.2d 830, 43 Wash.2d 691.

Rights of action preserved or created

Under compensation act, all civil causes of action for personal injuries sustained in an industrial accident arising out of extrahazardous employment are abolished except in those cases where act expressly preserves or creates a right of action, and in such cases rights of action are purely statutory, and not common-law, rights.

Wash.—Boeing Aircraft Co. v. Department of Labor and Industries, 156 P.2d 640, 22 Wash.2d 423.

Hazardous or extra-hazardous work

(1) Industrial Insurance Act of Washington has application only to common-law system governing remedy of workmen against employers for injuries received in hazardous work. U.S.—Muir v. Kessinger, D.C.Wash., 35 F.Supp. 116, cause remanded on other grounds, C.C.A., 121 F.2d 456.

(2) One engaged in extra-hazardous employment has only such right of action as is specifically afforded by compensation act, and such right of action is not a common-law right of action, but is a purely statutory right of action.

Wash.—Koreski v. Seattle Hardware Co., 135 P.2d 860, 17 Wash.2d 421.

(3) There does not exist, by reason of legislative declaration of public policy, a right of action for an injury sustained in an industrial accident arising out of an extra-hazardous employment, except in those cases where compensation act expressly preserves or creates a right of action, and all jurisdiction of courts of state of such causes of action has been abolished.

extinguishing any further claim of the injured person for his injuries,⁹⁰ even though actually inadequate and substantially less than a claimant would be likely to receive by the verdict of a jury.⁹¹

So, a compensation act has been held not cumulative⁹² or supplementary⁹³ in character, but is substitutional,⁹⁴ displaces the common-law liability for negligence,⁹⁵ as far as the act provides a remedy,⁹⁶ and is a complete and exclusive code of laws on its subject,⁹⁷ governing all questions of substantive rights under its terms;⁹⁸ it is complete and exclusive not only as to relief for injuries within its purview, but as to procedures to be followed.⁹⁹

If a person has an action against a defendant under the compensation act, he cannot also have his action against the defendant under the common law;¹ any rights which a plaintiff might have had at common law have been supplanted and superseded by the act, if applicable.²

Only the facts and circumstances of the injury can determine whether it is compensable and, therefore, whether the employee's remedy is exclusively under the compensation law.³ A provision of the compensation law that the statutory liability for injury or death shall be exclusive and in place of any other liability "on account of such injury or death" does not mean that the right to compensation

Wash.—Koreski v. Seattle Hardware Co., supra.

Fraud

Compensation act which, specifically provides for all rights and remedies thereunder, is exclusive of any other remedies and proceedings not therein set forth except in equity for fraud.

Mich.—Passelli v. J. A. Utley Co., 282 N.W. 849, 286 Mich. 638.

90. U.S.—Schlavick v. Manhattan Brewing Co., D.C.Ill., 103 F.Supp. 744.

"The provisions of the Compensation Law are exclusive of all other liability as to those subject to it." Neb.—Jones v. Rossbach Coal Co., 264 N.W. 877, 879, 130 Neb. 302.

"When the Workmen's Compensation law . . . entitles an injured workman to compensation, the latter is the measure of his recovery. The Commission's award is intended to be full and complete. It covers all consequences of his injury, such as aggravation."

Or.—Kowcun v. Bybee, 186 P.2d 790, 801, 182 Or. 271.

Waiver

(1) An employee who voluntarily comes under act in effect agrees that, if he is injured by accident contemplated by act, he will waive all of his rights to sue at common law or otherwise and rely solely on recovery provided for him under act.

Ga.—Blue Bell Globe Mfg. Co. v. Baird, 18 S.E.2d 105, 64 Ga.App. 347.

(2) Election and waiver as between employee and employer see *infra* §§ 936-938.

91. W.Va.—Makarenko v. Scott, 55 S.E.2d 88, 132 W.Va. 430.

92. Kan.—Gray v. Hercules Powder Co., 165 P.2d 447, 160 Kan. 767.

Ky.—Morrison v. Carbide & Carbon Chemicals Corp., 129 S.W.2d 547, 278 Ky. 746.

Mo.—Blaine v. Huttig Sash & Door

Co., 105 S.W.2d 946, 232 Mo.App. 870.

Relation to common law generally see *supra* § 6.

93. U.S.—New Amsterdam Cas. Co. v. Boaz-Kiel Const. Co., C.C.A.Mo., 115 F.2d 950.

Kan.—Gray v. Hercules Powder Co., 165 P.2d 447, 160 Kan. 767.

Ky.—Morrison v. Carbide & Carbon Chemicals Corp., 129 S.W.2d 547, 278 Ky. 746.

Mo.—Blaine v. Huttig Sash & Door Co., 105 S.W.2d 946, 232 Mo.App. 870.

94. U.S.—General Motors Corp. v. Holler, C.C.A.Mo., 150 F.2d 297—Atlas Powder Co. v. Hanson, C.C.A.Mo., 136 F.2d 444—New Amsterdam Cas. Co. v. Boaz-Kiel Const. Co., C.C.A.Mo., 115 F.2d 950.

Mich.—Hebert v. Ford Motor Co., 281 N.W. 374, 285 Mich. 607.

Minn.—Foley v. Western Alloyed Steel Casting Co., 18 N.W.2d 541, 219 Minn. 571.

Mo.—Fitzgerald v. Fisher Body St. Louis Co., Kansas City Division, 130 S.W.2d 975, 234 Mo.App. 269, opinion quashed in part on other grounds State ex rel. Fisher Body St. Louis Co. v. Shain, 137 S.W.2d 546, 245 Mo. 962.

Tex.—Jones v. Jeffreys, Civ.App., 244 S.W.2d 924, error refused.

"The Legislature framed the Compensation Act to take the place of all common-law remedies."

Mich.—Thomas v. Parker Rust Proof Co., 279 N.W. 504, 507, 284 Mich. 260.

"[As to parties properly within its terms, the act] abolishes old legal rights and obligations and creates a new relation with its peculiar statutory incidents."

Mass.—In re Opinion of the Justices, 34 N.E.2d 527, 545, 309 Mass. 571—Ahmed's Case, 179 N.E. 684, 686, 278 Mass. 180, 79 A.L.R. 669.

Act is wholly substitutional in character.

Mo.—McDaniel v. Kerr, 258 S.W.2d

629, 364 Mo. 1—McKay v. Delico Meat Products Co., 174 S.W.2d 149, 351 Mo. 876.

Wholly substitutional to common law Mo.—Blaine v. Huttig Sash & Door Co., 105 S.W.2d 946, 232 Mo.App. 870.

95. Mich.—Hebert v. Ford Motor Co., 281 N.W. 374, 285 Mich. 607.

96. Conn.—Farrell v. L. G. De Felice & Son, 42 A.2d 697, 132 Conn. 81.

97. Cal.—Hawthorn v. City of Beverly Hills, 245 P.2d 352, 111 C.A.2d 723.

98. U.S.—New Amsterdam Cas. Co. v. Boaz-Kiel Const. Co., C.C.A.Mo., 115 F.2d 950.

Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061.

99. Kan.—Ancor Cas. Co. v. Wise, 241 P.2d 484, 172 Kan. 539—Gray v. Hercules Powder Co., 165 P.2d 447, 160 Kan. 767—Taylor v. Taylor, 137 P.2d 147, 156 Kan. 763.

Under Argentine law, an injured seaman claiming damages because of unseaworthiness of vessel or negligence of owner must exhaust remedy provided by workmen's compensation act before resorting to courts.

U.S.—The Fletero v. Arias, C.A.Va., 206 F.2d 267, certiorari denied 74 S.Ct. 220, 346 U.S. 897, 98 L.Ed. 898.

1. Kan.—Lessley v. Kansas Power & Light Co., 231 P.2d 239, 171 Kan. 197—Hoffman v. Cudahy Packing Co., 167 P.2d 613, 161 Kan. 345—Bailey v. Mosby Hotel Co., 160 P.2d 701, 160 Kan. 258.

Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061—Pfitzinger v. Shell Pipe Line Corporation, 46 S.W.2d 955, 226 Mo. App. 861.

2. Mo.—McKay v. Delico Meat Products Co., 174 S.W.2d 149, 351 Mo. 876.

3. S.C.—Thompson v. J. A. Jones Const. Co., 19 S.E.2d 226, 199 S.C. 304.

in the event of certain injuries shall be exclusive and in place of liability for other injuries.⁴

A person who is not an employee at all is not limited to remedies under the compensation act, but may enforce other appropriate remedies against the person liable.⁵ So, an independent contractor is not an employee within the act, and may sue for damages.⁶ A volunteer who substitutes for a regular employee at the latter's request, although not an employee entitled to compensation within the meaning of the compensation act in the absence of the employer's consent, express or implied, may found his right of recovery for injuries received on the general principles of negligence, and, where an award under the act is made on that basis, it will not be disturbed;⁷ and, so, an applicant for employment

who thought he had been employed notwithstanding his testimony showed that no contract of employment had been completed may recover damages for injuries resulting from defendant's negligence while on his premises.⁸

Liability of highway department for tort. A statute making the state subject to the workmen's compensation law does not change the method of bringing actions against the state highway department for a tort⁹ or otherwise affect its liability therefor.¹⁰

Conflict with Declaratory Judgments Act. Since the workmen's compensation laws are specific, and the Declaratory Judgments Act is general, the former must prevail in the event of a conflict.¹¹

B. BETWEEN EMPLOYEE AND EMPLOYER

1. EXCLUSIVENESS OF REMEDIES AFFORDED BY ACTS

§ 918. In General

- a. General rules
- b. Federal acts
- c. Municipal pensions or compensation
- d. Failure to furnish, or negligence in furnishing, medical treatment

a. General Rules

The general rule is that, as between employer and employee, the rights and remedies provided in the compensation acts are exclusive, within the area of their operation; so, unless a statute provides otherwise, an employee whose claim is within the act cannot maintain an action against his employer for damages.

Unless the statute otherwise provides,¹² the gen-

4. N.Y.—Barrencotto v. Cocker Saw Co., 194 N.E. 61, 266 N.Y. 139.

5. Cal.—Edwards v. Hollywood Canteen, 187 P.2d 729, 27 C.2d 802.

Brosius v. Orpheum Theater Co., 60 P.2d 156, 16 C.A.2d 61.

Pa.—Teets v. Crescent Portland Cement Co., 186 A. 373, 123 Pa.Super. 85.

Wis.—Nemeth v. Farmers Co-op. Elevator Co., 31 N.W.2d 569, 252 Wis. 290.

Employees not within act see *infra* § 922.

Held not emergency employee

N.Y.—Paul v. Mosberg Realty Corp., 37 N.Y.S.2d 766.

Fighting fire

Bystander who was directed by government fire fighters to assist in fighting fire on government property did not become a government employee by assisting fighting fire, whose only remedy was under Federal Employees Compensation Act, but could maintain action for personal injuries under Federal Tort Claims Act.

U.S.—Messig v. U. S., D.C.Minn., 129 F.Supp. 571.

6. U.S.—Smith v. Price Bros. Co., C.C.A.Ohio, 131 F.2d 750, certiorari denied Price Bros. Co. v. Smith, 63 S.Ct. 560, 318 U.S. 762, 87 L.Ed. 1134.

Ill.—Westlund v. Kewanee Public

Service Co., 186 N.E.2d 263, 11 Ill. App.2d 10.

N.C.—Odum v. National Oil Co., 196 S.E. 823, 213 N.C. 478.

Tex.—Bridwell v. Bernard, Civ.App., 159 S.W.2d 981, error refused.

W.Va.—Rawson v. Jones-Winifrede Coal Co., 130 S.E. 492, 100 W.Va. 263, 43 A.L.R. 330.

Independent contractors generally see *supra* §§ 90-106.

A "contractor" whose remedy against possessor of land for injuries sustained while inspecting work on premises is not limited to relief under compensation act is one who, as an independent business, undertakes to do special jobs of work without submitting himself to control as to petty details.

Okl.—Long Const. Co. v. Fournier, 123 P.2d 689, 190 Okl. 361.

Operation of defendant's usual business

Plaintiff's remedy was not under compensation act, rather than by action for damages, if he was independent contractor not employed in matter which was an operation of usual business which defendant carried on.

Mo.—Feldewerth v. Great Eastern Oil Co., App., 149 S.W.2d 410.

7. Okl.—Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 148 Okl. 107. Volunteers generally see *supra* § 75.

8. La.—Noble v. Southland Lumber Co., 4 La.App. 281.

9. Ga.—State Highway Dept. v. Parker, 43 S.E.2d 172, 75 Ga.App. 237.

10. Ga.—State Highway Dept. v. Parker, *supra*.

11. La.—Gary v. Marquette Cas. Co., App., 72 So.2d 619.

12. La.—Crain v. State, App., 23 So. 2d 386.

N.J.—Goetaski v. California Packing Corp., 88 A.2d 685, 19 N.J.Super. 460.

Ohio.—Pisanello v. Polinori, 22 N.E. 2d 92, 60 Ohio App. 422.

Or.—Manke v. Nehalem Logging Co., 315 P.2d 539.

Wyo.—Corpus Juris quoted in Horvath v. Sheridan-Wyoming Coal Co., 131 P.2d 315, 325, 58 Wyo. 211. 71 C.J. p 1480 note 14.

Employer regarded as third person see *infra* § 985.

Failure to provide insurance or secure compensation see *infra* § 933.

Indemnifying employee

Statute requiring employer to indemnify employee for all time necessarily expended or lost by employee in direct consequence of discharge of his duties or obedience to employer's directions does not impose an independent liability for injuries to employee where such injuries are compensable under compensation act.

eral rule is that, as between the employer and the employee, the rights and remedies provided by the workmen's compensation acts are exclusive, within the area of their operation or application, or when the conditions of compensation exist;¹³ the remedy provided by the act is exclusive of all other statu-

Cal.—*Roberts v. U. S. O. Camp Shows*, 205 P.2d 1116, 91 C.A.2d 884.

Employee not engaged in hazardous work

Where an employer carries compensation insurance and employee's wages are included in those on which premium is computed, and he is not actually engaged in hazardous work, he can elect to pursue remedies provided by compensation act or his common-law remedy for injuries received in course of his employment. Okl.—*McAlester Corp. v. Wheeler*, 239 P.2d 409, 205 Okl. 446.

13. U.S.—*Hall v. Continental Drilling Co.*, C.A.La., 245 F.2d 717—*Kelley v. Summers*, C.A.Kan., 210 F.2d 666—*Huffstetler v. Lion Oil Co.*, C.A.Ark., 268 F.2d 549—Isthmian S. S. Co. of Del. v. *Olivieri*, C.A.La., 202 F.2d 492—*Watkins v. National Elec. Products Corp.*, C.C.A.Pa., 165 F.2d 980—*Peski v. Todd & Brown*, C.C.A.Ind., 158 F.2d 59—*Dennis v. Mabes*, C.C.A.Tex., 139 F.2d 941, certiorari denied 64 S.Ct. 1261, 322 U.S. 750, 88 L.Ed. 1581—*Gomillion v. Union Bridge & Const. Co. of Kansas City, Mo.*, C.C.A.Tex., 100 F.2d 937, certiorari denied 59 S.Ct. 1031, 307 U.S. 834, 83 L.Ed. 1516—*Boal v. Electric Storage Battery Co.*, C.C.A.Pa., 98 F.2d 815—*Jones v. George F. Getty Oil Co.*, C.C.A.N.M., 92 F.2d 255, certiorari denied *Associated Indem. Corp. v. George F. Getty Oil Co.*, 58 S.Ct. 644, 303 U.S. 644, 82 L.Ed. 1106—*Todahl v. Sudden & Christenson*, C.C.A.Cal., 5 F.2d 462.

King v. Chrysler Corp., D.C.Mich., 150 F.Supp. 440—*Trammell v. Appalachian Elec. Co-op.*, D.C.Tenn., 135 F.Supp. 512—*Bean v. Piedmont Interstate Fair Ass'n*, D.C.S.C., 124 F.Supp. 385, reversed on other grounds, C.A., 222 F.2d 227—*Shultz v. Lion Oil Co.*, D.C.Ark., 106 F.Supp. 119, appeal dismissed, C.A., 202 F.2d 752—*Kittleson v. American Dist. Tel. Co.*, D.C.Iowa., 81 F.Supp. 25—*Morgan v. Ray L. Smith & Son*, D.C.Kan., 79 F.Supp. 371, construing Iowa act—*Morrissey v. North River Barge Line*, D.C.N.Y., 73 F.Supp. 662—*Oliva v. Goleta Lemon Ass'n*, D.C.Cal., 61 F.Supp. 241—*Staton v. Reynolds Metals Co.*, D.C.Ky., 58 F.Supp. 657—*Ligiecki v. E. I. Dupont De Nemours & Co.*, D.C.N.Y., 46 F.Supp. 266—*Frankel v. Bethlehem-Fairfield Shipyard*, D.C.Md., 46 F.Supp. 242, affirmed C.C.A., 132 F.2d 634, certiorari denied 63 S.Ct. 1030, 319 U.S. 746, 87 L.Ed. 1702—*Cason v. American Brake Shoe & Foundry*

Co., D.C.Colo., 32 F.Supp. 680—*Gay v. E. H. Moore, Inc.*, D.C.Okl., 26 F.Supp. 749.

Ark.—*Wallace v. Wells*, 255 S.W.2d 970, 221 Ark. 750—*Kimpel v. Garland Anthony Lumber Co.*, 227 S.W.2d 932, 216 Ark. 788—*Odum v. Arkansas Pipe & Scrap Material Co.*, 187 S.W.2d 320, 203 Ark. 678—*Young v. G. L. Tarlton, Contractor, Inc.*, 162 S.W.2d 477, 204 Ark. 233—*Magnolia Petroleum Co. v. Turner*, 65 S.W.2d 1, 188 Ark. 177.

Cal.—*Duprey v. Shane*, 249 P.2d 8, 39 C.2d 781—*Baugh v. Rogers*, 148 P.2d 633, 24 C.2d 200, 152 A.L.R. 1043—*Freire v. Matson Nav. Co.*, 113 P.2d 809, 19 C.2d 8.

Scott v. Pacific Coast Borax Co., 294 P.2d 1039, 140 C.A.2d 173—*Seymour v. Setzer Forest Products*, 268 P.2d 1084, 124 C.A.2d 608—*Glacalone v. Industrial Acc. Commission*, 262 P.2d 79, 120 C.A.2d 727—*Knowles v. Roberts-at-the-Beach Co.*, 251 P.2d 389, 115 C.A.2d 196—*Peterson v. Moran*, 245 P.2d 540, 111 C.A.2d 766—*Law v. Dartt*, 240 P.2d 1013, 109 C.A.2d 508—*Walker v. City and County of San Francisco*, 219 P.2d 487, 97 C.A.2d 901—*Moise v. Owens*, 218 P.2d 22, 96 C.A.2d 617—*Roberts v. U. S. O. Camp Shows*, 205 P.2d 1116, 91 C.A.2d 884—*Jiminez v. Liberty Farms Co.*, 177 P.2d 785, 78 C.A.2d 458—*Liberty Mut. Ins. Co. v. Superior Court in and for Los Angeles County*, 145 P.2d 344, 62 C.A.2d 601—*Buttner v. American Bell Tel. Co.*, 107 P.2d 439, 41 C.A.2d 531—*Nelson v. Associated Indem. Corp.*, 66 P.2d 184, 19 C.A.2d 564.

Conn.—*Crisanti v. Creme Brewing Co.*, 72 A.2d 655, 136 Conn. 529—*Zimmerman v. MacDermid, Inc.*, 34 A.2d 698, 130 Conn. 385—*Buytкус v. Second Nat. Bank*, 16 A.2d 579, 127 Conn. 316—*Johnson v. Wiese*, 5 A.2d 19, 125 Conn. 238.

Fla.—*Yovan v. Burdine's*, 81 So.2d 555.

Ga.—*Scott v. Savannah Elec. & Power Corp.*, 66 S.E.2d 179, 84 Ga.App. 553—*McLaughlin v. Thompson, Boland & Lee*, 34 S.E.2d 562, 72 Ga.App. 564—*Minchew v. Huston*, 19 S.E.2d 422, 66 Ga.App. 856—*Patterson v. Curtis Pub. Co.*, 198 S.E. 102, 53 Ga.App. 211—*Stebbins v. Georgia Veneer & Package Co.*, 179 S.E. 649, 51 Ga.App. 56—*Joiner v. Sinclair Refining Co.*, 172 S.E. 754, 48 Ga.App. 365—*Maloney v. Kirby*, 172 S.E. 683, 48 Ga.App. 252.

Idaho.—*Lockard v. St. Maries Lumber Co.*, 285 P.2d 473, 76 Idaho 506—*French v. J. A. Terteling & Sons, Inc.*, 274 P.2d 990, 75 Idaho 480.

Ill.—*Greene v. Walgreen Co.*, 45 N.E.2d 690, 317 Ill.App. 148.

Ind.—*Seaton v. U. S. Rubber Co.*, 61 N.E.2d 177, 223 Ind. 404.

Stainbrook v. Johnson County Farm Bureau, Coop. Ass'n, 122 N.E.2d 884, 125 Ind.App. 487—*Allen v. Public Service Co. of Ind.*, 104 N.E.2d 756, 122 Ind.App. 421—*Markham v. Hettrick Mfg. Co.*, 79 N.E.2d 548, 118 Ind.App. 348—*Dawson v. Acme Evans*, 75 N.E.2d 553, 118 Ind.App. 49.

Iowa.—*Doyle v. Duggan*, 295 N.W. 128, 229 Iowa 724—*Elk River Coal & Lumber Co. v. Funk*, 271 N.W. 204, 222 Iowa 1222, 110 A.L.R. 1415.

Kan.—*Bright v. Bragg*, 264 P.2d 494, 175 Kan. 404—*Winkelman v. Boeing Airplane Co.*, 203 P.2d 171, 166 Kan. 503—*Duncan v. Perry Packing Co.*, 174 P.2d 78, 162 Kan. 79—*Bell v. Hall Lithographing Co.*, 121 P.2d 281, 154 Kan. 660—*Jennings v. Kansas Power & Light Co.*, 105 P.2d 882, 152 Kan. 469.

La.—*Thibodaux v. Sun Oil Co.*, 49 So.2d 852, 218 La. 453, followed in *Baker v. Sun Oil Co.*, 49 So.2d 854, 218 La. 461, and *Baker v. Chance Well Service Inc.*, 49 So.2d 855, 218 La. 462.

Dixon v. Herrin Transp. Co., App., 81 So.2d 159—*Gilmore v. State*, App., 79 So.2d 192—*Smith v. Bankston*, App., 75 So.2d 880—*Benoit v. Hunt Tool Co.*, App., 45 So.2d 512, followed in *Holloway v. Hunt Tool Co.*, 45 So.2d 526, *Anchor Cas. Co. v. Hunt Tool Co.*, 45 So.2d 526 and *Benoit v. Hunt Tool Co.*, 45 So.2d 526, and reversed on other grounds 53 So.2d 137, 219 La. 380—*Blackburn v. Chenet*, App., 42 So.2d 288—*Moss v. St. Paul-Mercury Indem. Co.*, App., 35 So.2d 867—*Jones v. Williams*, 33 So.2d 580, App., annulled on other grounds 39 So.2d 746, 215 La. 1—*Allgood v. Loeb*, App., 22 So.2d 568, reversed on other grounds 27 So.2d 380, 210 La. 594—*Fryou v. T. Aucoin & Sons*, App., 5 So.2d 193—*Atchison v. May*, App., 5 So.2d 182, affirmed 10 So.2d 785, 201 La. 1003—*Spanja v. Thibodaux Boiler Works*, App., 2 So.2d 668—*Thomas v. Shippers' Compress & Warehouse Co.*, App., 158 So. 859.

Md.—*Cox v. Sandler's, Inc.*, 120 A.2d 674, 209 Md. 193—*Hart v. Sealtest, Inc.*, 46 A.2d 293, 136 Md. 183—*Baltimore Transit Co. v. State*, to Use of *Schriefer*, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460—*Lease v. Upper Potomac River Commission*, 20 A.2d 498, 179 Md. 543—*Kramer v. Globe Brewing Co.*, 2 A.2d 634, 175 Md. 461.

Mass.—Zapponi v. Central Const. Co., 134 N.E.2d 447, 344 Mass. 146—Adiletto v. Brockton Cut Sole Corp., 75 N.E.2d 926, 322 Mass. 110.
 Mich.—Totten v. Detroit Aluminum & Brass Corp., 73 N.W.2d 882, 344 Mich. 414.
 Minn.—Frank v. Anderson Bros., 51 N.W.2d 805, 236 Minn. 81—Fox v. Swartz, 36 N.W.2d 703, 228 Minn. 233—Breimhorst v. Beckman, 35 N.W.2d 719, 227 Minn. 409—Berger v. Church of St. Patrick, 3 N.W.2d 590, 212 Minn. 345.
 Miss.—Riddell v. Cagle's Estate, 85 So.2d 926.
 Mo.—Tinsley v. Massman Const. Co., 270 S.W.2d 835, construing Arkansas law—McKay v. Delico Meat Products Co., 174 S.W.2d 149, 351 Mo. 876—Tindall v. Marshall's U. S. Auto Supply Co., 159 S.W.2d 302, 348 Mo. 1189—Gardner v. Stout, 119 S.W.2d 790, 342 Mo. 1206.
 Duncan v. Thompson, 146 S.W.2d 112, App., reversed on other grounds 62 S.Ct. 422, 315 U.S. 1, 86 L.Ed. 575—Blaine v. Huttig Sash & Door Co., 105 S.W.2d 946, 232 Mo.App. 870.
 Neb.—Miller v. Schlereth, 36 N.W.2d 497, 151 Neb. 33.
 Nev.—Pershing Quicksilver Co. v. Thiers, 152 P.2d 432, 62 Nev. 382.
 N.H.—Wilkinson v. Achber, 131 A.2d 51, 101 N.H. 7.
 N.J.—Estelle v. Board of Ed. of Borough of Red Bank, 102 A.2d 44, 14 N.J. 256.
 Biglioli v. Durotest Corp., 129 A.2d 727, 44 N.J.Super. 93—Imre v. Riegel Paper Corp., 128 A.2d 498, 43 N.J.Super. 289, reversed on other grounds 132 A.2d 505, 24 N.J. 438.
 Burns v. Vilardo, 60 A.2d 94, 26 N.J.Misc. 277—Hull v. Hercules Powder Co., 26 A.2d 164, 20 N.J. Misc. 163.
 N.Y.—Maloney v. State, 144 N.E.2d 364, 3 N.Y.2d 356, 165 N.Y.S.2d 465—Cifolo v. General Elec. Co., 112 N.E.2d 197, 305 N.Y. 209, certiorari denied, Cifolo v. General Electric Co., 74 S.Ct. 124, 346 U.S. 874, 98 L.Ed. 382—Williams v. Hartshorn, 69 N.E.2d 557, 295 N.Y. 49—Scherini v. Titanium Alloy Co., 37 N.E.2d 237, 286 N.Y. 581.
 Rauch v. Jones, 168 N.Y.S.2d 69, 4 A.D.2d 572—Penn v. Standard Acc. Ins. Co., 164 N.Y.S.2d 618, 4 A.D.2d 796—Johnson v. General Elec. Co., 152 N.Y.S.2d 25, 2 A.D. 632, reargument and appeal denied 154 N.Y.S. 2d 1018, 2 A.D.2d 823—Roberts v. Gagnon, 149 N.Y.S.2d 743, 1 A.D.2d 297—Doca v. Federal Stevedoring Co., 130 N.Y.S.2d 172, 284 App.Div. 46, affirmed 123 N.E.2d 632, 308 N.Y. 44, reargument denied 125 N.E.2d 102, 308 N.Y. 744—Young v. International Paper Co., 122 N.Y.S.2d 89, 282 App.Div. 750—Jewtraw v. Hartford Accident & Indemnity Co., 112 N.Y.S.2d 727, 280 App.Div. 150—Jones v. State, 57 N.Y.S.2d 582, 269

App.Div. 920, appeal denied 59 N.Y. S.2d 334, 269 App.Div. 1006—Caulfield v. Elmhurst Contracting Co., 53 N.Y.S.2d 25, 268 App.Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803—Volk v. City of New York, 19 N.Y.S.2d 53, 259 App.Div. 247, reversed on other grounds 30 N.E.2d 596, 284 N.Y. 279—De Coigne v. Ludlum Steel Co., 297 N.Y.S. 636, 251 App.Div. 662—Seely v. Phoenix Transit Co., 272 N.Y.S. 127, 241 App.Div. 183.
 Skakandy v. State, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 836—Haven v. Hartshorn, 55 N.Y.S.2d 698, 184 Misc. 310—Otis v. State, 27 N.Y.S. 2d 527, 176 Misc. 389—McCue v. J. F. Shea Co., 24 N.Y.S.2d 307, 175 Misc. 557, affirmed 24 N.Y.S.2d 130, 260 App.Div. 946.
 Twitty v. Donlon, 133 N.Y.S.2d 331—Wasserman v. Josephson, 61 N.Y.S.2d 204, affirmed 84 N.Y.S.2d 895, 274 App.Div. 919—Loftus v. Columbian Ribbon & Carbon Mfg. Co., 61 N.Y.S.2d 102—Schier v. James J. McCreery & Co., 13 N.Y.S. 2d 546.
 N.C.—Champion v. Vance County Board of Health, 19 S.E.2d 239, 221 N.C. 96.
 Ohio.—Bevis v. Armco Steel Corp., App. 93 N.E.2d 33, appeal dismissed 91 N.E.2d 479, 153 Ohio St. 366, certiorari denied 71 S.Ct. 37, 340 U.S. 810, 95 L.Ed. 595, rehearing denied 71 S.Ct. 192, 340 U.S. 885, 95 L.Ed. 642—Shoemaker v. Electric Auto-Lite Co., 41 N.E.2d 433, 69 Ohio App. 169.
 Okl.—Governair Corp. v. District Court of Oklahoma County, 293 P. 2d 918—Wilson & Co. of Oklahoma v. Musgrave, 68 P.2d 846, 180 Okl. 246—Malone v. United Zinc & Smelting Corp., 54 P.2d 360, 175 Okl. 643.
 Or.—Ellis v. Fallert, 307 P.2d 283, 209 Or. 406—Bigby v. Pelican Bay Lumber Co., 147 P.2d 199, 178 Or. 682.
 Pa.—Socha v. Metz, 123 A.2d 837, 385 Pa. 832—Hyzy v. Pittsburgh Coal Co., 121 A.2d 85, 384 Pa. 316—McIntyre v. Strausser, 76 A.2d 220, 365 Pa. 507—Venezia v. Philadelphia Electric Co., 177 A. 25, 317 Pa. 557.
 Culver v. Baldwin Locomotive Works, Com.Pl., 34 Del.Co., 423—Miller v. Brobst, Com.Pl., 42 Lack. Jur. 133—Jabour v. Max, Com.Pl., 30 North.Co. 396—Snyder v. I. Unterberg & Co., Com.Pl., 57 York.Leg. Rec. 92.
 S.C.—Cummings v. McCoy, 7 S.E.2d 222, 192 S.C. 469.
 Tenn.—Hammett v. Vogue, Inc., 165 S.W.2d 577, 179 Tenn. 284.
 Copeland v. Cherry, 95 S.W.2d 1275, 20 Tenn.App. 122.
 Tex.—Bell v. Humble Oil & Refining Co., 181 S.W.2d 569, 142 Tex. 645.

Huckabay v. Hughes Tool Co., Civ.App., 122 S.W.2d 233, error dismissed—Serano v. Garza, Civ.App., 119 S.W.2d 413—Indemnity Ins. Co. of North America v. Hare, Civ.App., 107 S.W.2d 739, error refused.
 Utah.—Koch v. Telluride Power Co., 209 P.2d 241, 116 Utah 237—Ortega v. Salt Lake Wet Wash Laundry, 156 P.2d 885, 108 Utah 1.
 Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 518—Sykes v. Stone & Webster Engineering Corp., 41 S.E.2d 469, 186 Va. 116—Feitig v. Chalkley, 38 S.E.2d 73, 185 Va. 96.
 Wash.—Pearson v. Aluminum Co. of America, 161 P.2d 169, 23 Wash.2d 403.
 Wis.—Guse v. A. O. Smith Corp., 51 N.W.2d 24, 260 Wis. 403—Saxhaug v. Forsyth Leather Co., 31 N.W.2d 589, 252 Wis. 376.
 "The act clearly bespeaks a purpose and intention to make the method and procedure prescribed exclusive."
 Ky.—Morrison v. Carbide & Carbon Chemicals Corp., 129 S.W.2d 547, 549, 278 Ky. 746.
 "The Workmen's Compensation Act and the constitutional amendment supporting the same affords a complete and exclusive manner and procedure of adjusting all controversies as between an injured employee and his . . . employer or insurance carrier."
 Cal.—Credit Bureau of San Diego v. Johnson, 142 P.2d 963, 965, 61 C.A. 2d Supp. 334.
Universal rule
 Neb.—Jones v. Rossbach Coal Co., 264 N.W. 877, 130 Neb. 302.
Workmen's Occupational Diseases Act
 Ind.—In re Jefferies, 14 N.E.2d 751, 105 Ind.App. 349.
 Intent of legislature in adopting compensation act was to provide that right to recover compensation benefits shall be exclusive remedy.
 Mich.—Fowler v. Muskegon County, 65 N.W.2d 801, 340 Mich. 522.
 Declared public policy of compensation act precludes any other recovery or measure of compensation in cases governed by its terms.
 N.J.—New Amsterdam Cas. Co. v. Popovich, 113 A.2d 666, 18 N.J. 213—Gotkin v. Weinberg, 66 A.2d 433, 2 N.J. 305.
Right solely in compensation law
 Employee under act has no right which he may assert against employer because of injury sustained or disabling disease contracted in course of employment, unless such right is given in compensation law.
 Mo.—Fitzgerald v. Fisher Body St. Louis Co., Kansas City Division, 130 S.W.2d 975, 234 Mo.App. 269, opinion quashed in part on other grounds State ex rel. Fisher Body St. Louis Co. v. Shain, 137 S.W.2d 546, 345 Mo. 962.

tory or common-law remedies,¹⁴ and of any other liability on the part of the employer.¹⁵ This is the

Immediate and remote employers subject to compensation act have no responsibility to their employees, injured in course of employment, except such as is imposed on them as employers by terms of act.

U.S.—New Amsterdam Cas. Co. v. Boaz-Kiel Const. Co., C.C.A.Mo., 115 F.2d 950.

Remedy of a borrowed servant against borrowing master for injuries is under compensation act.

Mo.—Ellagood v. Brashear Freight Lines, 162 S.W.2d 628, 236 Mo.App. 971.

Wis.—Braun v. Jewett, 85 N.W.2d 364, 1 Wis.2d 531.

Employers' Liability Act

(1) Action under Employers' Liability Act is barred.

Ala.—Jackson v. United Cigar Stores Co., 153 So. 422, 228 Ala. 220.

N.Y.—Taswell v. General Matt Co., 30 N.Y.S.2d 145.

(2) Generally, Employers' Liability Act was superseded by compensation act, and any injuries sustained by an employee are presumed to come under compensation act.

Ala.—Pound v. Gaulding, 187 So. 468, 237 Ala. 387.

(3) Where employee was injured while working on federal government building located on land ceded to federal government prior to passage of compensation act and at time when Employers' Liability Act was in force, employee was entitled to recover under Employers' Liability Act instead of compensation act, since compensation act was without effect in ceded territory.

Ala.—Pound v. Gaulding, 187 So. 468, 237 Ala. 387.

14. U.S.—Jenkins v. American Enka Corp., C.C.A.N.C., 95 F.2d 755.

Cal.—Alaska Packers Ass'n v. Industrial Accident Commission of California, 253 P. 926, 200 C. 579, affirmed 48 S.Ct. 346, 276 U.S. 467, 72 L.Ed. 656.

Sasser v. Miles & Sons Trucking Service, 259 P.2d 488, 119 C.A.2d 239.

Ill.—Hayes v. Marshall Field & Co., 115 N.E.2d 99, 351 Ill.App. 329.

Iowa.—Elk River Coal & Lumber Co. v. Funk, 271 N.W. 204, 222 Iowa 1222, 110 A.L.R. 1415.

La.—Fryou v. T. Aucoin & Sons, App., 5 So.2d 193.

Mass.—De Stefano v. Alpha Lunch Co. of Boston, 30 N.E.2d 827, 308 Mass. 38.

Minn.—Hartman v. Cold Spring Granite Co., 77 N.W.2d 651, 247 Minn. 515.

N.C.—Champion v. Vance County Board of Health, 19 S.E.2d 232, 221 N.C. 96—McCune v. Rhodes-Rhys Mfg. Co., 8 S.E.2d 219, 217 N.C. 351

—Tscheiller v. National Weaving Co., 199 S.E. 623, 214 N.C. 449.

Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 513.

W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805, 130 W.Va. 480, 172 A.L.R. 1389.

Sole recourse for negligent injury is under compensation act.

U.S.—U. S. Steel Corp. v. Emerson-Comstock Co., D.C.Ill., 141 F.Supp. 143.

Shield against civil liability

An award of workmen's compensation shields employer from civil liability in action at law.

Idaho.—Devlin v. Ennis, 292 P.2d 469, 77 Idaho 342.

Possible election between employer and third party

Where employer is liable under compensation act, act must furnish exclusive remedy as to him, regardless of fact that, if a third party were also liable, employee might have option to elect whether to proceed against him or third party.

U.S.—Peski v. Todd & Brown, C.C.A. Ind., 158 F.2d 59.

Effect of provision as to penalties

Provision of compensation act that nothing therein shall be construed to relieve any employer or employee from any penalty for failure to perform any statutory duty applies solely to penalties and does not provide any greater remedy to employee by limiting or qualifying provision that remedy given by act excludes all other remedies.

Ga.—Reid v. Lummus Cotton Gin Co., 197 S.E. 904, 58 Ga.App. 184.

Expenses of compensation litigation

An employee failing to present claim for expenses of compensation litigation, resulting in a favorable award which was paid by insurance carrier, could not maintain a common-law action against employer for such expenses, notwithstanding employer was stubbornly litigious.

Ga.—Patterson v. Curtis Pub. Co., 198 S.E. 102, 58 Ga.App. 211.

Employer's breach of agreement

Employee held not entitled to recover from employer for breach of agreement to provide for compensation or employment because of employee's forbearance to assert his right to compensation within time within which he was permitted by law to present his claim for injuries before industrial commission.

Ill.—Wright v. Peabody Coal Co., 8 N.E.2d 68, 290 Ill.App. 110.

Absence of contract

In injuries suffered by employee which occurred in course of employment, sole recovery, in absence of contract, would be under compensation act.

N.J.—Lake v. Rosenberg, 34 A.2d 224, 131 N.J.Law 19.

Occupational Disease Act

(1) Generally.

Pa.—Moffett v. Harbison-Walker Refractories Co., 14 A.2d 111, 339 Pa. 112.

Salada v. Drakenfeld & Co., 39 Pa. Dist. & Co. 334, 20 Wash.Co. 154.

Ceccarelli v. Jones & Laughlin Steel Corp., Com.Pl., 90 Pittsb.Leg. J. 304.

(2) Exclusive remedy provision of occupational disease act, which is closely allied to workmen's compensation act, is ambiguous and, from wording, susceptible of being interpreted in two different manners, thereby requiring court, in construing provision, to ascertain legislative intent.

Utah.—Masich v. U. S. Smelting, Refining & Min. Co., 191 P.2d 612, 113 Utah 101, appeal dismissed 69 S.Ct. 138, 335 U.S. 868, 93 L.Ed. 411, rehearing denied 69 S.Ct. 405, 335 U.S. 905, 93 L.Ed. 439.

Federal acts; interstate commerce

(1) If injured railroad employee was engaged in intrastate commerce and not interstate commerce at time of his injury, his sole remedy was under compensation act of state, and he could not recover under Federal Employers' Liability Act or Federal Safety Appliance Act.

Cal.—McCoy v. Southern Pac. Co., 83 P.2d 970, 29 C.A.2d 16, certiorari denied 59 S.Ct. 827, 307 U.S. 626, 83 L.Ed. 1510.

Ill.—Lavigne v. Chicago, M., St. P. & P. R. Co., 4 N.E.2d 785, 287 Ill.App. 253, 288, certiorari denied 58 S.Ct. 32, 302 U.S. 688, 82 L.Ed. 532.

(2) Remedies provided by Federal Employers' Liability Act and workmen's compensation act of state are not cumulative, and an injured employee who is entitled to recover under one of acts may not recover under other.

Cal.—McCoy v. Southern Pac. Co., supra.

(3) Operation of state compensation acts in intrastate or interstate commerce generally see Commerce § 78e(4) (c).

15. U.S.—Johnson v. U. S., D.C.N.C., 132 F.Supp. 613.

Minn.—Fox v. Swartz, 36 N.W.2d 708, 228 Minn. 233.

N.Y.—Doca v. Federal Stevedoring Co., 130 N.Y.S.2d 172, 284 App.Div. 46, affirmed 123 N.E.2d 632, 308 N.Y. 44, reargument denied 125 N.E.2d 102, 308 N.Y. 744.

Ohio.—McDonald v. Industrial Commission, App., 67 N.E.2d 806—Bankers' Indem. Ins. Co. v. Cleveland Hardware & Forging Co., 62 N.E.2d 180, 77 Ohio App. 121, ap-

general rule where the act by its terms is compulsory,¹⁶ or where it is elective and the employer and the employee have elected to come within its

terms,¹⁷ or where election is presumed in the absence of notice of rejection.¹⁸ The fact that the compensation to which an employee is entitled con-

peal dismissed 62 N.E.2d 251, 145 Ohio St. 615.
Or.—Ellis v. Fallert, 307 P.2d 283, 209 Or. 406—Bigby v. Pelican Bay Lumber Co., 147 P.2d 199, 173 Or. 682.
Pa.—Socha v. Metz, 123 A.2d 837, 385 Pa. 632.
S.C.—Adams v. Davison-Paxon Co., 96 S.E.2d 566, 230 S.C. 532.
W.Va.—Makarenko v. Scott, 55 S.E.2d 88, 132 W.Va. 430.
"After imposing this new and comprehensive liability upon the employer, the statute accords to him, in return therefor, relief from any and all liability 'on account of such injury or death.'"
N.Y.—Williams v. Hartshorn, 69 N.E. 2d 557, 558, 296 N.Y. 49.
16. Mont.—Sullivan v. City of Butte, 157 P.2d 479, 117 Mont. 215—Aleksich v. Industrial Accident Fund, 151 P.2d 1016, 116 Mont. 127.
Wyo.—Corpus Juris quoted in Horvath v. Sheridan-Wyoming Coal Co., 131 P.2d 315, 325, 58 Wyo. 211. 71 C.J. p 1480 note 15.
17. U.S.—Watkins v. National Elec. Products Corp., C.C.A.Pa., 165 F.2d 980.
Ala.—Gentry v. Swann Chemical Co., 174 So. 530, 234 Ala. 313.
Conn.—Buytkus v. Second Nat. Bank, 16 A.2d 579, 127 Conn. 316—Hoard v. Sears, Roebuck & Co., 188 A. 269, 122 Conn. 185.
Ky.—Davis v. Solomon, 276 S.W.2d 674—Standard Oil Co. v. Cheek, 128 S.W.2d 950, 278 Ky. 508.
Mont.—Sullivan v. City of Butte, 157 P.2d 479, 117 Mont. 215.
N.J.—Burns v. Villardo, 60 A.2d 94, 26 N.J.Misc. 277.
N.C.—Champion v. Vance County Board of Health, 19 S.E.2d 239, 221 N.C. 96—Tscheiller v. National Weaving Co., 199 S.E. 623, 214 N.C. 449.
71 C.J. p 1480 note 16.
"It is the general rule that unless the act is by its terms optional, remedies provided by the act are exclusive when the act is applicable, at least so far as rights against the employer are concerned. One must not generalize too widely from this rule because many of the statutes provide expressly that the remedy is exclusive."
U.S.—Mandel v. U. S., C.A.Pa., 191 F.2d 164, 166, affirmed 72 S.Ct. 849, 343 U.S. 427, 96 L.Ed. 675, rehearing denied 73 S.Ct. 47, 344 U.S. 848, 97 L.Ed. 675.
New rights or remedies
Compensation act creates entirely new rights or remedies in favor of employee or his dependents, provided employee elects to accept them.

Mo.—Equity Mut. Ins. Co. v. Kroger Grocery & Baking Co., 175 S.W.2d 153, 238 Mo.App. 4.
Rights and remedies supplanted
All rights and remedies of employee electing to come under compensation act are supplanted except those not provided for by act.
Mo.—Equity Mut. Ins. Co. v. Kroger Grocery & Baking Co., supra.
Implied election by parents for minor
La.—Smith v. Bankston, App., 75 So. 2d 880—Ballard v. Stroube Drug Co., App., 19 So.2d 593.
Violation of Federal Safety Appliance Act
Railroad employee injured by defective locomotive cab apron as result of violation of Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq., held required to proceed under state compensation law, where train on which he was injured was engaged in intrastate commerce and both employer and employee had contracted to work under state compensation law, which was elective.
Tenn.—Louisville & N. R. Co. v. Nichols, 80 S.W.2d 656, 168 Tenn. 672, 98 A.L.R. 508.
Employer brought in as defendant
(1) In personal injury action by employee and her husband against third party, who had employer brought in by scire facias as additional defendant on allegation that employer was alone liable, employee could not obtain verdict against employer, in view of compensation act, within which both had, in effect, elected to come.
Pa.—Murray v. Lavinsky, 182 A. 808, 120 Pa.Super. 392.
(2) Action by employee or representative against third person generally see infra §§ 983-1045.
Employer not operating under act
Where employer is not operating under compensation act, injured employee has option to institute common-law action for damages or agree with employer on liability.
Ky.—King v. Bringardner Lumber Co., 65 S.W.2d 673, 251 Ky. 553.
Signing employees' register after injury
Acceptance of compensation act by signing employees' register after receiving an injury cannot be given a retroactive effect to avoid common-law tort liabilities, and same rule applies to an employer, although under certain conditions he may be estopped to deny responsibility.
Ky.—McNeese Const. Co. v. Harris, 273 S.W.2d 856.
18. U.S.—Macarages v. Raymond

Concrete Pile Co., C.A.Fla., 220 F. 2d 891.
Bean v. Piedmont Interstate Fair Ass'n, D.C.S.C., 124 F.Supp. 385, reversed on other grounds, C.A., 222 F.2d 227—Morgan v. Ray L. Smith & Son, D.C.Kan., 79 F.Supp. 971, construing Iowa act.
Ga.—Scott v. Savannah Elec. & Power Corp., 66 S.E.2d 179, 84 Ga.App. 553—Echols v. Chattooga Mercantile Co., 38 S.E.2d 675, 74 Ga.App. 18—McLaughlin v. Thompson, Bolland & Lee, 34 S.E.2d 562, 72 Ga. App. 564—Blue Bell Globe Mfg. Co. v. Baird, 13 S.E.2d 105, 64 Ga.App. 347—Blue Bell Globe Mfg. Co. v. Baird, 6 S.E.2d 83, 61 Ga.App. 298.
Ind.—Seaton v. U. S. Rubber Co., 61 N.E.2d 177, 223 Ind. 404.
Stainbrook v. Johnson County Farm Bureau, Co-op. Ass'n, 122 N. E.2d 884, 125 Ind.App. 487—Allen v. Public Service Co. of Ind., 104 N.E.2d 756, 122 Ind.App. 421—Markham v. Hettrick Mfg. Co., 79 N.E. 2d 548, 118 Ind.App. 348—Harshman v. Union City Body Co., 13 N. E.2d 353, 105 Ind.App. 36.
Iowa.—Doyle v. Dugan, 295 N.W. 128, 229 Iowa 724—Elk River Coal & Lumber Co. v. Funk, 271 N.W. 204, 222 Iowa 1222, 110 A.L.R. 1415.
Mich.—Thomas v. Parker Rust Proof Co., 279 N.W. 504, 284 Mich. 260.
Mo.—Tindall v. Marshall's U. S. Auto Supply Co., 159 S.W.2d 302, 348 Mo. 1189.
N.C.—McCune v. Rhodes-Rhyne Mfg. Co., 8 S.E.2d 219, 217 N.C. 351.
Pa.—Hyzy v. Pittsburgh Coal Co., 121 A.2d 85, 384 Pa. 316.
Walford v. Chambersburg Oil & Gas Co., 86 Pa.Dist. & Co. 496, 3 Lebanon 342.
Snyder v. I. Unterberg & Co., Com.Pl., 57 York.Leg.Rec. 92.
71 C.J. p 1481 note 17.
No choice as to suing or accepting compensation
Where an injury is compensable under industrial insurance act and injured workman accepts provisions of act, as by failing to file notice of rejection, he cannot choose as to whether he will sue at common law or accept compensation under act, and his exclusive remedy is under act.
Nev.—Pershing Quicksilver Co. v. Thiers, 152 P.2d 432, 62 Nev. 382.
Minor employee
(1) Exclusive remedy of a minor employee for injuries is under compensation act, in absence of notice to contrary.
Ariz.—Villapando v. Industrial Commission, 216 P.2d 397, 70 Ariz. 55.
(2) Common law with respect to a minor's capacity to contract and his

sists only of medical and hospitalization benefits does not prevent the application of the principle.¹⁹

So, unless a statute provides otherwise,²⁰ an action governed by the law of master and servant

cannot be maintained against an employer operating under the compensation act;²¹ and an employee whose claim is within the act cannot maintain an action at law, or at common law, in tort against his employer for damages,²² the common-law lia-

ability to break his contract has been changed by compensation act making act exclusive remedy of minor employee not giving notice to contrary prior to injury.

Ariz.—*S. H. Kress & Co. v. Superior Court of Maricopa County*, 182 P. 2d 931, 66 Ariz. 67.

19. Minn.—*Frank v. Anderson Bros.*, 51 N.W.2d 805, 236 Minn. 81.

20. La.—*Crain v. State*, App., 23 So.2d 336.

Ohio.—*Pisanello v. Polinori*, 22 N.E. 2d 92, 60 Ohio App. 422.

Act authorizing suit against state

An act authorizing person injured by highway department's employee to file suit against state on his claim for damage permitted maintenance of tort action against state, notwithstanding fact that injured person was also an employee of department and that compensation act provides an exclusive remedy, legislature being empowered to change nature of remedy.

La.—*Crain v. State*, App., 23 So.2d 336.

Prospective application of statute

Provision of Employers' Liability and Workmen's Compensation Act that right of action of an injured employee for damages caused by injury, at common law or under any statute in force on named date, should not be affected by act, refers not only to injuries sustained before passage of act, but also to injuries sustained thereafter, and hence act does not destroy common law of master and servant.

N.H.—*Dubuc v. Amoskeag Industries*, 15 A.2d 867, 91 N.H. 173.

Liability of owner of motor vehicle

It was not legislative intent to vitiate compensation law provision, making remedy thereunder exclusive in case of injury by a fellow worker, when it enacted Vehicle and Traffic Law section making owner of motor vehicle liable for negligence of any person operating same on public highway with express or implied permission of owner.

N.Y.—*Rauch v. Jones*, 168 N.Y.S.2d 69, 4 A.D.2d 572.

Infant

(1) Under provision of compensation act that nothing therein shall deprive an infant of right or rights now existing to recover damages in a common-law or other appropriate action or proceeding for injuries received by reason of the negligence of his master, a minor injured in an accident arising out of, and in course

of, employment had right to elect to seek remedy at law or under compensation act, but he could not do both.

N.J.—*Goetaski v. California Packing Corp.*, 88 A.2d 685, 19 N.J.Super. 460.

(2) Right of infant to sue at law after election to take compensation under statute see *infra* § 937.

21. Mich.—*Thomas v. Parker Rust Proof Co.*, 279 N.W. 504, 284 Mich. 260—*Cell v. Yale & Towne Mfg. Co.*, 275 N.W. 250, 281 Mich. 564.

Substitute for previous actions

(1) Compensation act was intended, in general, as in nature of a substitute, between master and servant, who elect to come within its provisions, for actions of tort for personal injuries at common law and under other statutes.

Ala.—*Gentry v. Swann Chemical Co.*, 174 So. 530, 234 Ala. 313.

(2) Compensation act was designed as a substitute for previous rights of action of employees against employers and to cover whole ground of liabilities of employer.

Ill.—*Moushon v. National Garages, Inc.*, 137 N.E.2d 842, 9 Ill.2d 407—*Matthiessen & Hegeler Zinc Co. v. Industrial Board*, 120 N.E. 249, 284 Ill. 378.

Employer acting jointly with third party

An insured employer is not liable for an industrial injury to his employees under general tort principles, but only by virtue of workmen's compensation provisions, and is subject to proceedings before industrial accident commission, but not to suit in court for injury; and this is so even though employer acted jointly with third party.

Cal.—*Lamoreux v. San Diego & A. El. Ry. Co.*, 311 P.2d 1, 48 C.2d 617.

22. U.S.—*Hall v. Continental Drilling Co.*, C.A.La., 245 F.2d 717—*Whittington v. Moore McCormack Lines*, C.A.N.Y., 196 F.2d 295, certiorari denied 73 S.Ct. 106, 344 U.S. 865, 97 L.Ed. 671, rehearing denied 73 S.Ct. 211, 344 U.S. 894, 97 L.Ed. 691—*Latsko v. National Carload-ing Corp.*, C.A.Ohio, 192 F.2d 905—*Kaylor v. Magill*, C.A.Tenn., 181 F. 2d 179—*American Dist. Tel. Co. v. Kittleson*, C.A.Iowa, 179 F.2d 946—*Watkins v. National Elec. Products Corp.*, C.C.A.Pa., 165 F.2d 980—*Rickman v. E. I. Du Pont de Nemours & Co.*, C.C.A.Okl., 157 F.2d 837—*U. S. Fidelity & Guaranty Co. v. R. H. Macy & Co.*, C.C.A.N.Y.,

156 F.2d 204—*General Motors Corp. v. Holler*, C.C.A.Mo., 150 F.2d 297—*Dennis v. Mabey*, C.C.A.Tex., 139 F.2d 941, certiorari denied 64 S.Ct. 1261, 322 U.S. 750, 88 L.Ed. 1581—*Atlas Powder Co. v. Hanson*, C.C.A. Mo., 136 F.2d 444—*Chandler v. Katz Drug Co.*, C.C.A.Mo., 130 F.2d 1007—*Severson v. Hanford Tri-State Airlines*, C.C.A.Minn., 105 F.2d 622, certiorari denied 60 S.Ct. 514, 309 U.S. 660, 84 L.Ed. 1008, rehearing denied 60 S.Ct. 607, 309 U.S. 696, 84 L.Ed. 1036—*Jenkins v. American Enka Corp.*, C.C.A.N.C., 95 F.2d 755.

Johnson v. U. S., D.C.N.C., 133 F.Supp. 613—*Bean v. Piedmont Interstate Fair Ass'n*, D.C.S.C., 124 F.Supp. 385, reversed on other grounds, C.A., 222 F.2d 227—*Staton v. Reynolds Metals Co.*, D.C.Ky., 58 F.Supp. 657.

Ark.—*Wallace v. Wells*, 255 S.W.2d 970, 221 Ark. 750.

Cal.—*Baugh v. Rogers*, 148 P.2d 633, 24 C.2d 200, 152 A.L.R. 1043—*Freire v. Matson Nav. Co.*, 118 P. 2d 809, 19 C.2d 8.

Knowles v. Roberts-at-the-Beach Co., 251 P.2d 389, 115 C.A.2d 196—*Moise v. Owens*, 216 P.2d 22, 96 C.A.2d 617—*Roberts v. U. S. O. Camp Shows*, 205 P.2d 1116, 91 C.A.2d 884—*Jiminez v. Liberty Farms Co.*, 177 P.2d 735, 78 C.A. 2d 458.

Conn.—*Zimmerman v. MacDermid, Inc.*, 34 A.2d 698, 130 Conn. 385—*Johnson v. Wiese*, 5 A.2d 19, 125 Conn. 238.

D.C.—*Jonathan Woodner Co. v. Mather*, 210 F.2d 868, 93 U.S.App.D.C. 234, certiorari denied *Mather v. Jonathan Woodner Co.*, 75 S.Ct. 39, 348 U.S. 824, 99 L.Ed. 650.

Ga.—*Echols v. Chattooga Mercantile Co.*, 38 S.E.2d 675, 74 Ga.App. 13—*McLaughlin v. Thompson, Boland & Lee*, 34 S.E.2d 562, 72 Ga.App. 564—*Bartram v. City of Atlanta*, 30 S.E.2d 780, 71 Ga.App. 313—*Blue Bell Globe Mfg. Co. v. Baird*, 13 S.E.2d 105, 64 Ga.App. 347—*Blue Bell Globe Mfg. Co. v. Baird*, 6 S.E.2d 83, 61 Ga.App. 298.

Idaho.—*White v. Ponzozzo*, 291 P.2d 843, 77 Idaho 276—*French v. J. A. Terteling & Sons, Inc.*, 274 P.2d 990, 75 Idaho 480—*Gifford v. Nottingham*, 193 P.2d 831, 68 Idaho 330.

Ill.—*Moushon v. National Garages, Inc.*, 137 N.E.2d 842, 9 Ill.2d 407.
Nordland v. Poor Sisters of St. Francis Seraph of Perpetual Devotion, 123 N.E.2d 121, 4 Ill.App.2d 48—*Will (Mueller) v.* 1527-31

- Wicker Park Ave. Bldg. Corp., 58 N.E.2d 296, 324 Ill.App. 264—Greene v. Walgreen Co., 45 N.E.2d 690, 317 Ill.App. 148.
- Ind.—Seaton v. U. S. Rubber Co., 61 N.E.2d 177, 223 Ind. 404.
- Chicago, M., St. P. & P. R. Co. v. Cox, 7 N.E.2d 1008, 103 Ind.App. 364.
- Kan.—Bright v. Bragg, 264 P.2d 494, 175 Kan. 404—Winkelman v. Boeing Airplane Co., 203 P.2d 171, 166 Kan. 503—Crawford v. Atchison, T. & S. F. Ry. Co., 199 P.2d 796, 166 Kan. 163—Duncan v. Perry Packing Co., 174 P.2d 78, 162 Kan. 79.
- Ky.—Standard Oil Co. v. Cheek, 128 S.W.2d 950, 278 Ky. 508.
- La.—Gilmore v. State, App., 79 So.2d 192—Monnerjahn v. Times Picayune Pub. Co., App., 67 So.2d 756—Blackburn v. Chenet, App., 42 So.2d 233—Thibodaux v. Sun Oil Co., App., 40 So.2d 761, followed in 40 So.2d 767, and Baker v. Sun Oil Co., 40 So.2d 767, and Baker v. J. C. Chance Well Service, 40 So.2d 767, and affirmed Thibodaux v. Sun Oil Co., 49 So.2d 852, 218 La. 453, followed in Baker v. Sun Oil Co., 49 So.2d 854, 218 La. 461, and Baker v. J. C. Chance Wall Service, 49 So.2d 855, 218 La. 462—Moss v. St. Paul-Mercury Indem. Co., App., 35 So.2d 867—Jones v. Williams, App., 33 So.2d 580, annulled on other grounds 39 So.2d 746, 215 La. 1—Spanja v. Thibodaux Boiler Works, App., 2 So.2d 668.
- Md.—Maryland Cas. Co. v. Sause, 57 A.2d 801, 190 Md. 135—Hart v. Sealtest, Inc., 46 A.2d 293, 186 Md. 183—Kramer v. Globe Brewing Co., 2 A.2d 634, 175 Md. 461.
- Mass.—Stamo v. Wiener, 101 N.E.2d 379, 328 Mass. 651—Fell v. New Bedford Gas & Edison Light Co., 90 N.E.2d 555, 325 Mass. 239—Adiletto v. Brockton Cut Sole Corp., 75 N.E.2d 926, 322 Mass. 110—Alberts v. Brockelman Bros., 45 N.E.2d 392, 312 Mass. 486—Noble v. Greenbaum, 42 N.E.2d 823, 311 Mass. 722—De Stefano v. Alpha Lunch Co. of Boston, 30 N.E.2d 827, 308 Mass. 38—Cozzo v. Atlantic Refining Co., 12 N.E.2d 744, 299 Mass. 260.
- Mich.—Totten v. Detroit Aluminum & Brass Corp., 73 N.W.2d 882, 344 Mich. 414—Lucier v. Pansy Hosiery Co., 282 N.W. 254, 286 Mich. 585—Piskornik v. Hudson Motor Car Co., 280 N.W. 125, 285 Mich. 100—Dalley v. River Raisin Paper Co., 257 N.W. 857, 269 Mich. 443—Cell v. Yale & Towne Mfg. Co., 275 N.W. 250, 281 Mich. 564.
- Minn.—Monson v. Arcand, 70 N.W.2d 364, 244 Minn. 440—Fox v. Swartz, 36 N.W.2d 708, 228 Minn. 233—Sandy v. Walter Butler Shipbuilders, 21 N.W.2d 612, 221 Minn. 215—Lewis v. Connolly Contracting Co., 264 N.W. 581, 196 Minn. 108.
- Mo.—Tinsley v. Massman Const. Co., 270 S.W.2d 835, construing Arkansas law—Tindall v. Marshall's U. S. Auto Supply Co., 159 S.W.2d 302, 348 Mo. 1189—Gardner v. Stout, 119 S.W.2d 790, 342 Mo. 1206.
- Mitchell v. J. A. Tobin Const. Co., 159 S.W.2d 709, 236 Mo.App. 910—Duncan v. Thompson, App., 146 S.W.2d 112, reversed on other grounds 62 S.Ct. 422, 315 U.S. 1, 86 L.Ed. 575.
- Nev.—Pershing Quicksilver Co. v. Thiers, 152 P.2d 432, 62 Nev. 382.
- N.J.—Biglioli v. Durotest Corp., 129 A.2d 727, 44 N.J.Super. 93—Stepnowski v. Specific Pharmaceuticals, 87 A.2d 546, 18 N.J.Super. 495.
- Hull v. Hercules Powder Co., 26 A.2d 164, 20 N.J.Misc. 168.
- N.Y.—Cifolo v. General Elec. Co., 112 N.E.2d 197, 305 N.Y. 209, certiorari denied Cifolo v. General Electric Co., 74 S.Ct. 124, 346 U.S. 874, 98 L.Ed. 382.
- Roberts v. Gagnon, 149 N.Y.S.2d 743, 1 A.D.2d 297—Mazarredo v. Levine, 80 N.Y.S.2d 237, 274 App. Div. 122.
- Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941—Jones v. State, 50 N.Y.S.2d 877, 183 Misc. 239, affirmed 57 N.Y.S.2d 582, 269 App.Div. 920, appeal denied 59 N.Y.S.2d 384, 269 App.Div. 1006.
- Trask v. Beatty, 153 N.Y.S.2d 938, affirmed 161 N.Y.S.2d 830—Camacho v. Innersprings, Inc., 142 N.Y.S.2d 886—Twitty v. Donlon, 133 N.Y.S.2d 381—Wasserman v. Josephson, 61 N.Y.S.2d 204, affirmed 84 N.Y.S.2d 895, 274 App. Div. 919—Loftus v. Columbian Ribbon & Carbon Mfg. Co., 61 N.Y. S.2d 102—Taswell v. General Matt Co., 30 N.Y.S.2d 145—Schier v. James J. McCreery & Co., 13 N.Y.S. 2d 546.
- N.C.—McCune v. Rhodes-Rhyne Mfg. Co., 8 S.E.2d 219, 217 N.C. 351—Tscheiller v. National Weaving Co., 199 S.E. 623, 214 N.C. 449—Johnson v. Hughes, 177 S.E. 632, 207 N.C. 544.
- Ohio.—Greenwalt v. Goodyear Tire & Rubber Co., 128 N.E.2d 116, 164 Ohio St. 1—Sebek v. Cleveland Graphite Bronze Co., 76 N.E.2d 892, 148 Ohio St. 693—State ex rel. Engle v. Industrial Commission, 52 N.E.2d 743, 142 Ohio St. 425.
- McDonald v. Industrial Commission, App., 67 N.E.2d 806—Shoemaker v. Electric Auto-Lite Co., 41 N.E.2d 433, 69 Ohio App. 169.
- Okl.—Governair Corp. v. District Court of Oklahoma County, 293 P. 2d 918—Horwitz Iron & Metal Co. v. Myler, 252 P.2d 475, 207 Okl. 691—Deep Rock Oil Corp. v. Howell, 204 P.2d 282, 200 Okl. 675—Jordon v. Champlin Refining Co., 198 P.2d 408, 200 Okl. 604—Wilson & Co. of Oklahoma v. Musgrave, 68 P.2d 846, 180 Okl. 246.
- Or.—Ellis v. Fallert, 307 P.2d 283, 209 Or. 406—Bigby v. Pelican Bay Lumber Co., 147 P.2d 199, 173 Or. 682.
- Pa.—Greenya v. Gordon, 133 A.2d 595, 389 Pa. 499—Socha v. Metz, 123 A. 2d 837, 385 Pa. 632—Hyzy v. Pittsburgh Coal Co., 121 A.2d 85, 384 Pa. 316—Butrin v. Manion Steel Barrel Co., 63 A.2d 345, 361 Pa. 166.
- Wolford v. Chambersburg Oil and Gas Co., 86 Pa.Dist. & Co. 496, 3 Lebanon 342.
- Culver v. Baldwin Locomotive Works, Com.Pl., 84 Del.Co. 423—Fenner v. Littleton, Com.Pl., 28 Del.Co. 340—Miller v. Brobst, Com. Pl., 42 Lack.Jur. 138—Jabour v. Max, Com.Pl., 30 North.Co. 396—Collins v. White, Com.Pl., 68 York Leg.Rec. 110—Snyder v. I. Unterberg & Co., Com.Pl., 57 York Leg. Rec. 92.
- S.C.—Adams v. Davison-Paxon Co., 96 S.E.2d 566, 230 S.C. 532—Thompson v. J. A. Jones Const. Co., 19 S.E.2d 226, 199 S.C. 304.
- Tenn.—Copeland v. Cherry, 95 S.W. 2d 1275, 20 Tenn.App. 122.
- Tex.—Bell v. Humble Oil & Refining Co., 181 S.W.2d 569, 142 Tex. 645.
- Robertson v. C. A. Bryant Co., Civ.App., 127 S.W.2d 549, error dismissed judgment correct—Huckabay v. Hughes Tool Co., Civ.App., 122 S.W.2d 232, error dismissed—Serano v. Garza, Civ.App., 119 S.W. 2d 413—Montgomery v. United Salt Corp., Civ.App., 112 S.W.2d 494, error dismissed—Harrison v. Harrison, Civ.App., 100 S.W.2d 780.
- Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 518—Nolde Bros. v. Chalkley, 35 S.E.2d 827, 184 Va. 553, adhered to Feitig v. Chalkley, 38 S.E.2d 73, 185 Va. 96.
- Wash.—State ex rel. Bates v. Board of Indus. Ins. Appeals of State of Wash., 316 P.2d 467—Latimer v. Western Machinery Exchange, 241 P.2d 923, 40 Wash.2d 155, reheard 259 P.2d 623, 42 Wash.2d 756.
- W.Va.—Brewer v. Appalachian Constructors, 65 S.E.2d 87, 135 W.Va. 739—Makarenko v. Scott, 55 S.E. 2d 88, 132 W.Va. 430—State ex rel. Cashman v. Sims, 43 S.E.2d 805, 130 W.Va. 430, 172 A.L.R. 1389.
- Exemplary damages for gross negligence see infra § 927.
- "The policy of the act is to deprive him of all right of action in tort against his employer for damages for an injury within the scope of the Workmen's Compensation Act."
- Mass.—Alecks' Case, 17 N.E.2d 173, 174, 301 Mass. 403.
- Actual damages**
- U.S.—Gomillion v. Union Bridge & Const. Co. of Kansas City, Mo., C.C. A.Tex., 100 F.2d 937, certiorari de-

bility, or right of action, being taken away or abro- | gated,²³ and the compensation act serving as an af-

nied 59 S.Ct. 1031, 307 U.S. 634, 83 L.Ed. 1516.

Purposes of act would be defeated if independent actions to recover damages for injuries or death caused by a compensable act were permitted. Ky.—Davis v. Solomon, 276 S.W.2d 674.

Borrowed or emergency employee

La.—Dixon v. Herrin Transp. Co., App., 81 So.2d 159.

Tex.—Process Engineering Co. of Fort Worth v. Rosson, Civ.App., 287 S.W.2d 511.

Special employee or employer

U.S.—Jones v. George F. Getty Oil Co., C.C.A.N.M., 92 F.2d 255, certiorari denied Associated Indem. Corp. v. George F. Getty Oil Co., 58 S.Ct. 644, 303 U.S. 644, 82 L.Ed. 1106.

Cal.—Wessell v. Barrett, 144 P.2d 656, 62 C.A.2d 374.

Kan.—Bell v. Hall Lithographing Co., 121 P.2d 281, 154 Kan. 660.

Mo.—Ellegood v. Brashear Freight Lines, 162 S.W.2d 628, 236 Mo.App. 971.

N.Y.—Gardner v. 1111 Corp., 141 N.Y. S.2d 552, 286 App.Div. 110, affirmed 152 N.Y.S.2d 303, 1 N.Y.2d 758, 135 N.E.2d 55.

Wis.—Braun v. Jewett, 85 N.W.2d 364, 1 Wis.2d 531.

General or special employee

Ga.—Scott v. Savannah Elec. & Power Corp., 66 S.E.2d 179, 84 Ga.App. 553.

Immediate or remote employer

U.S.—Atlas Powder Co. v. Hanson, C.C.A.Mo., 136 F.2d 444.

Contractual or statutory employer

(1) Under Arkansas law, liability of any employer, contractual or statutory, for compensation is exclusive, and no common-law right for damages exists where employer provides compensation coverage.

U.S.—Huffstettler v. Lion Oil Co., C. A.Ark., 208 F.2d 549.

(2) Railroad company held statutory employer within compensation act.

Idaho.—Russell v. City of Idaho Falls, 305 P.2d 740, 78 Idaho 466.

Two employers

(1) Where an employee is entitled to compensation benefits from two employers, he is barred from maintaining a common-law negligence action against either of them.

N.J.—Scott v. Public Service Interstate Transp. Co., 70 A.2d 832, 6 N.J.Super. 226.

(2) An employee may have more than one employer within compensation law, and cannot maintain an action for negligence against either employer if employer carries insurance.

U.S.—U. S. Fidelity & Guaranty Co. v.

R. H. Macy & Co., C.C.A.N.Y., 156 F.2d 204.

Mutually exclusive remedies

A statutory proceeding for workmen's compensation and common-law liability for negligence of employer are mutually exclusive remedies, and former affords social insurance irrespective of fault for consequences of an industrial accident arising out of, and in course of, employment, while latter is a common-law mode of redressing personal injuries attributable to fault not within compensation act.

N.J.—Imre v. Riegel Paper Corp., 132 A.2d 505, 24 N.J. 438.

Occupational disease

Pa.—Moffett v. Harbison-Walker Refractories Co., 14 A.2d 111, 339 Pa. 112.

Salada v. Drakenfeld & Co., 39 Pa. Dist. & Co. 334, 20 Wash.Co. 154.

23. U.S.—Rickman v. E. I. Du Pont de Nemours & Co., C.C.A.Okl., 157 F.2d 837—Tyler v. Ocean Accident & Guarantee Corp., C.C.A.Tex., 80 F.2d 720—Todahl v. Sudden & Christenson, C.C.A.Cal., 5 F.2d 462.

Johnson v. U. S., D.C.N.C., 133 F. Supp. 613—Gay v. E. H. Moore, Inc., D.C.Okl., 26 F.Supp. 749.

Conn.—Crisanti v. Cremo Brewing Co., 72 A.2d 655, 136 Conn. 529—Buytkus v. Second Nat. Bank, 16 A.2d 579, 127 Conn. 316—Hoard v. Sears, Roebuck & Co., 188 A. 269, 122 Conn. 185.

Ga.—McLaughlin v. Thompson, Bolland & Lee, 84 S.E.2d 562, 72 Ga. App. 564.

Idaho.—Gifford v. Nottingham, 193 P.2d 831, 68 Idaho 330.

Ill.—Hayes v. Marshall Field & Co., 115 N.E.2d 99, 351 Ill.App. 329—Wilson Garment Mfg. Co., for Use of Hardware Mut. Casualty Co. v. Edmonds, 88 N.E.2d 534, 312 Ill. App. 317—Wright v. Peabody Coal Co., 8 N.E.2d 68, 290 Ill.App. 110.

Md.—Cox v. Sandler's, Inc., 46 A.2d 293, 186 Md. 183—Baltimore Transit Co. v. State, to Use of Schrieffer, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460.

Mo.—Tinsley v. Massman Const. Co., 270 S.W.2d 835, construing Arkansas law—McDaniel v. Kerr, 258 S.W.2d 629, 364 Mo. 1—McKay v. Delco Meat Products Co., 174 S.W.2d 149, 351 Mo. 876.

N.Y.—Taswell v. General Matt Co., 30 N.Y.S.2d 145.

Ohio.—State ex rel. Engle v. Industrial Commission, 52 N.E.2d 743, 142 Ohio St. 425.

Shoemaker v. Electric Auto-Lite Co., 41 N.E.2d 433, 69 Ohio App. 169.

Okl.—Governair Corp. v. District Court of Oklahoma County, 293 P.2d 918—Malone v. United Zinc & Smelting Corp., 54 A.2d 360, 175

Okl. 643—Wilson & Co. of Oklahoma v. Musgrave, 68 P.2d 846, 180 Okl. 246.

Pa.—Socha v. Metz, 123 A.2d 837, 385 Pa. 632.

Tenn.—Hammett v. Vogue, Inc., 165 S.W.2d 577, 179 Tenn. 284.

Tex.—Jones v. Jeffreys, Civ.App., 244 S.W.2d 924, error refused—Faulkner v. Kleinman, Civ.App., 158 S.W.2d 891, error refused—Indemnity Ins. Co. of North America v. Hare, Civ.App., 107 S.W.2d 739, error refused.

Utah.—Masich v. U. S. Smelting, Refining & Min. Co., 191 P.2d 612, 113 Utah 101, appeal dismissed 69 S.Ct. 138, 335 U.S. 866, 93 L.Ed. 411, rehearing denied 69 S.Ct. 405, 335 U.S. 705, 93 L.Ed. 439.

Va.—Sykes v. Stone & Webster Engineering Corp., 41 S.E.2d 469, 186 Va. 116.

W.Va.—Makarenko v. Scott, 55 S.E.2d 88, 132 W.Va. 430—Mains v. J. H. Harris Co., 197 S.E. 10, 119 W.Va. 730, 117 A.L.R. 511.

"Our compensation law . . . practically abolished the common law relating to the subject of tortious liability as between the employer and the employee."

Ky.—Morrison v. Carbide & Carbon Chemicals Corp., 129 S.W.2d 547, 549, 278 Ky. 746.

"The very act itself deprives the workman of his common law right and provides these indemnities in lieu thereof."

Idaho.—Close v. General Const. Co., 106 P.2d 1007, 1009, 61 Idaho 689.

Express provision of statute

Compensation statute providing that employer shall not be liable to any action for damages because of personal injuries sustained by employee arising out of, and in course of, his employment eliminates common-law liability of employer to employee.

Conn.—Stulginaki v. Cizauskas, 5 A.2d 10, 125 Conn. 293.

Injury caused by employer's negligence

Ga.—Williams Bros. Lumber Co. v. Meisel, 68 S.E.2d 884, 85 Ga.App. 72.

No right of election

Compensation act provision making exclusive rights and remedies granted to an employee who is subject to act, because of personal injury by accident, does not permit injured employee to elect to either proceed under compensation act or to bring common-law action.

Ind.—Seaton v. U. S. Rubber Co., 61 N.E.2d 177, 223 Ind. 404.

Effect of absence of disability

Common-law remedy is unavailable to employee suffering injury or disease mentioned in compensation law, even though he sustained no disability.

firmative,²⁴ or complete,²⁵ defense to such an action. In such circumstances the courts have no jurisdiction to hear an action for damages,²⁶ and

ity; so, employee contracting chrome poisoning, listed as occupational disease in compensation law, held not entitled to prosecute common-law action against employer for damages, although not yet disabled.

N.Y.—*Repka v. Fedders Mfg. Co.*, 267 N.Y.S. 709, 239 App.Div. 271, affirmed 191 N.E. 553, 264 N.Y. 538.

Gross negligence

(1) An employee's common-law right of action for gross negligence is abrogated by compensation act.

Tex.—*Faulkner v. Kleinman*, Civ. App., 158 S.W.2d 891, error refused.

(2) Gross negligence as not within scope of acts see *infra* § 927.

Occupational disease act

(1) Generally.

Pa.—*Agostin v. Pittsburgh Steel Foundry Corp.*, 43 A.2d 604, 157 Pa. Super. 322, affirmed 47 A.2d 680, 354 Pa. 543.

Ceccarelli v. Jones & Laughlin Steel Corp., Com.Pl., 90 Pittsb.Leg. J. 304.

(2) Legislature, by including silicosis in Occupational Disease Act, which is closely allied to workmen's compensation act, has occupied complete field of silicosis, so that under exclusive remedy provision, an employee suffering from silicosis is barred from common-law remedy against employer.

Utah.—*Masich v. U. S. Smelting, Refining & Min. Co.*, 191 P.2d 612, 113 Utah 101, appeal dismissed 69 S.Ct. 138, 335 U.S. 866, 93 L.Ed. 411, rehearing denied 69 S.Ct. 405, 335 U.S. 905, 93 L.Ed. 439.

Estoppel of insurance carrier

Estoppel provided for by statute providing that insurance carrier shall be estopped to assert, as defense to claim for compensation, that employee was not engaged in extra-hazardous employment does not run against an employee so as to limit his recourse to common-law remedies.

Md.—*Congressional Country Club v. Baltimore & O. R. Co.*, 71 A.2d 696, 194 Md. 533.

24. Ohio.—*Fitzgerald v. Chemical Service Corp.*, 84 N.E.2d 754, 84 Ohio App. 423.

Employer held not estopped to defend

(1) In action for injuries to nurse in city hospital, city was not estopped to claim application of compensation law on ground that, when nurse filed claim with comptroller within statutory time, she was not then told to apply for compensation, and when she was examined and served her summons and complaint within two-year limit, city failed to move to dismiss.

N.Y.—*Volk v. City of New York*, 19 N.Y.S.2d 53, 259 App.Div. 247, re-

versed on other grounds 30 N.E.2d 596, 284 N.Y. 279.

(2) Employee's action against employer for injuries on theory of common-law negligence, fact that employer acquiesced in, profited by, and did not appeal from commission's decision that injury sued on was not covered by compensation law held not to estop employer to defend on opposite ground, that common-law action would not lie because injury was covered by compensation law, since otherwise workman could deliberately invite adverse award in order to recover greater amount for common-law negligence.

Mo.—*Blaine v. Huttig Sash & Door Co.*, 105 S.W.2d 946, 232 Mo.App. 870.

25. Md.—*Congressional Country Club v. Baltimore & O. R. Co.*, 71 A.2d 696, 194 Md. 533.

26. U.S.—*Taylor v. Hubbell*, C.A. Ariz., 138 F.2d 106, certiorari denied 72 S.Ct. 32, 342 U.S. 818, 96 L.Ed. 618.

Bean v. Piedmont Interstate Fair Ass'n, 124 F.Supp. 385, reversed on other grounds, C.A., 222 F.2d 227—*Smith v. General Motors Corp.*, D.C. Mo., 63 F.Supp. 101—*Wann v. National Lead Co.*, D.C.Mo., 27 F.Supp. 217.

Cal.—*Scott v. Industrial Acc. Commission*, 293 P.2d 18, 146 C.2d 76.

Buttner v. American Bell Tel. Co., 107 P.2d 439, 41 C.A.2d 581.

Ga.—*Bartram v. City of Atlanta*, 30 S.E.2d 780, 71 Ga.App. 313.

Ind.—*Harshman v. Union City Body Co.*, 13 N.E.2d 353, 105 Ind.App. 36.

Mich.—*Vlaene v. Mikel*, 84 N.W.2d 765, 349 Mich. 533—*Osborne v. Van Dyke*, 18 N.W.2d 374, 311 Mich. 86.

N.Y.—*Roberts v. Gagnon*, 149 N.Y.S. 2d 743, 1 A.D.2d 297.

Ohio.—*State ex rel. Engle v. Industrial Commission*, 52 N.E.2d 743, 142 Ohio St. 425.

Okl.—*Governair Corp. v. District Court of Oklahoma County*, 293 P. 2d 918—*Ford v. Holt*, 131 P.2d 67, 191 Okl. 534.

Pa.—*Nichols v. Poole*, Com.Pl., 33 West.L.J. 127.

Wash.—*State ex rel. Bates v. Board of Indus. Ins. Appeals of State of Wash.*, 316 P.2d 467.

No jurisdiction of subject matter

U.S.—*Rickman v. E. I. Du Pont de Nemours & Co.*, C.C.A.Okl., 157 F.2d 837.

Ill.—*Nordland v. Poor Sisters of St. Francis Seraph of Perpetual Devotion*, 123 N.E.2d 121, 4 Ill.App.2d 48.

N.Y.—*Taswell v. General Matt Co.*, 30 N.Y.S.2d 145.

N.C.—*McCune v. Rhodes-Rhyne Mfg. Co.*, 8 S.E.2d 219, 217 N.C. 351.

Court of Claims

N.Y.—*Jones v. State*, 50 N.Y.S.2d 877, 183 Misc. 239, affirmed 57 N.Y.S.2d 582, 269 App.Div. 920, appeal denied 59 N.Y.S.2d 384, 269 App.Div. 1006.

Claim pending before board

District court did not acquire jurisdiction of common-law action for damages after plaintiff had invoked jurisdiction of industrial accident board by filing claim for compensation for injury under provisions of compensation act, and after board had assumed jurisdiction by setting down claim for hearing, and while claim was pending before board and undetermined.

Tex.—*Coffey v. Management Co. of Texas*, Civ.App., 121 S.W.2d 377, error refused.

Action by guardian

Superior court is without jurisdiction to hear guardian's common-law action against employer for injuries sustained by thirteen-year-old employee if employee's exclusive remedy is under compensation act, since right to appeal is by statute only.

Ariz.—*S. H. Kress & Co. v. Superior Court of Maricopa County*, 132 P.2d 931, 66 Ariz. 67.

Action removed to federal court

Remedy given by compensation law to employee injured in course of her employment by corporation qualified as self-insurer under such law was exclusive, so that Arkansas courts, and hence federal district court, to which employee's action against employer for damages was removed from Arkansas court, had no jurisdiction of action.

U.S.—*Shultz v. Lion Oil Co.*, D.C.Ark., 106 F.Supp. 119, appeal dismissed, C.A., 202 F.2d 752.

Error of compensation division in ruling that it had no jurisdiction to grant relief to claimant could not give him a remedy in law court, where clearly such remedy had been taken from him by statute.

N.J.—*Estelle v. Board of Ed. of Borough of Red Bank*, 102 A.2d 44, 14 N.J. 256.

Occupational disease act

U.S.—*Watkins v. National Elec. Products Corp.*, C.C.A.Pa., 165 F.2d 980.

Mental pain and suffering

An employee could not maintain a common-law action against city for injuries received growing out of, and in course of, employment, which injuries caused mental pain and suffering, notwithstanding injury was occasioned by negligence of city's agents, since board of workmen's compensation had exclusive jurisdiction, as against claim that board was without jurisdiction because compen-

the employee has no capacity to sue.²⁷

So, also, an action for fraud²⁸ or deceit²⁹ will not lie; likewise, an injury which is compensable under the compensation act will not support an ac-

tion against the employer at law in contract.³⁰

The remedies provided by the compensation act are exclusive only where the employer-employee relationship exists,³¹ whether it does exist is deter-

sation act does not provide for mental pain and suffering.

Ga.—Bartram v. City of Atlanta, 30 S.E.2d 780, 71 Ga.App. 313.

Effect of avoiding award

Employee, succeeding in avoiding final award of state industrial commission, made on joint petition, on ground of fraud, could not maintain common-law action for injuries, since powers of commission, interrupted by a voidable order, reattached and continued until a valid order was issued closing case.

Okl.—Malone v. United Zinc & Smelting Corp., 54 P.2d 360, 175 Okl. 643.

In North Dakota, claims are against compensation bureau, an arm of state itself, and jurisdiction of courts over personal injuries sustained by employees is abolished except as provided for in compensation act.

U.S.—Nelson v. Westland Oil Co., D. C.N.D., 96 F.Supp. 656.

27. Ill.—Nordland v. Poor Sisters of St. Francis Seraph of Perpetual Devotion, 123 N.E.2d 121, 4 Ill.App.2d 48.

N.Y.—Roberts v. Gagnon, 149 N.Y.S. 2d 743, 1 A.D.2d 297.

28. Tex.—Indemnity Ins. Co. of North America v. Hare, Civ.App., 107 S.W.2d 739, error refused.

Inducing compromise settlement agreement

Workman was not entitled to recover for fraud inducing him to make compromise settlement agreement of compensation claim, since right to compensation and method of relief from such fraud are exclusively statutory.

Tex.—Indemnity Ins. Co. of North America v. Hare, supra.

Employer's failure to file employee's application

Where employer allegedly represented that it would file injured employee's application for compensation, but withheld application and paid employee twenty-two dollars and fifty cents a week for two years so as to lead employee to believe that his claim was being paid in accordance with compensation law, and then stopped payment after limitation period of two years had expired, employee could not maintain common-law action of deceit against employer who had complied with compensation law.

Ohio.—Greenwalt v. Goodyear Tire & Rubber Co., 128 N.E.2d 116, 164 Ohio St. 1.

29. Cal.—Buttner v. American Bell

Tel. Co., 107 P.2d 439, 41 C.A.2d 581.

30. Mass.—De Stefano v. Alpha Lunch Co. of Boston, 30 N.E.2d 827, 308 Mass. 38.

31. U.S.—Lanza v. Carroll, C.A.Ark., 216 F.2d 808, reversed on other grounds 75 S.Ct. 804, 349 U.S. 408, 99 L.Ed. 1183.

Ga.—Joiner v. Sinclair Refining Co., 172 S.E. 754, 48 Ga.App. 365.

Ill.—Kijowski v. Times Pub. Corp., 18 N.E.2d 754, 298 Ill.App. 236, affirmed 23 N.E.2d 703, 372 Ill. 311.

Mont.—Sullivan v. City of Butte, 157 P.2d 479, 117 Mont. 215.

Utah.—Masich v. U. S. Smelting, Refining & Min. Co., 191 P.2d 612, 113 Utah 101, appeal dismissed 69 S.Ct. 138, 335 U.S. 866, 93 L.Ed. 411, rehearing denied 69 S.Ct. 405, 335 U.S. 705, 93 L.Ed. 439.

Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 518.

Doubt as to relationship; suit in alternative

Although statutory provision making employee's rights under compensation law exclusive is strictly enforced where employee or his dependents seek to circumvent its stringency by suing in tort, employee may sue for compensation and in alternative for damages under general statute, where there is doubt as to whether relationship of employer and employee exists.

La.—Jackson v. Southern Kraft Corp., App., 183 So. 135.

Admission of relationship

Where relationship of employer and employee is admitted, both are bound by compensation law, and employee's disability resulting from injury received in course of employment must be compensated, if at all, strictly in keeping therewith.

La.—Jackson v. Southern Kraft Corp., supra.

Severance of relation

(1) If relation of employer and employee was severed before fight occurred between employee and foreman, compensation law would not govern what occurred thereafter; whether an employee voluntarily quits his employment or is discharged by his employer, employee is entitled to reasonable time to leave premises of employer before it can be said that relation of employer and employee is so completely severed as to render compensation law inapplicable.

Mo.—Gardner v. Stout, 119 S.W.2d 790, 342 Mo. 1206.

(2) Relation held not severed before assault by foreman on employee, and, hence, employee could not maintain common-law action for damages against his employers.

Mo.—Gardner v. Stout, supra.

(3) Assault generally see *infra* § 926.

Employee's duties as part of employer's business

(1) Decisive factors in determining whether injured employee's duties are part of employer's business, so as to make compensation exclusive remedy for injuries sustained by employees of independent contractors, are nature of employee's work and nature of employer's business, and unless work is of such special or separate character as would not ordinarily or appropriately be performed by employer's own employees in prosecution of his business or as essential part thereof, it is part of employer's trade, business, or occupation.

U.S.—Isthmian S. S. Co. of Del. v. Olivieri, C.A.La., 202 F.2d 492.

(2) Taking of precautions to guard ship cargo is indispensable and usual part of trade, business, or occupation of every steamship line, and, therefore, watchman who was employed by corporation which had contracted to provide such protection, and who was injured when crates fell on him, was limited in his recovery by compensation statute.

U.S.—Isthmian S. S. Co. of Del. v. Olivieri, supra.

Employer as owner of premises

Regardless of his status as owner of premises where injury occurs, employer remains employer in his relations with his employees as to all matters arising from, and connected with, their employment, and may not be treated as dual legal personality in order to impose liability in addition to that assumed under compensation law.

N.Y.—Klein v. Pepe, 99 N.Y.S.2d 794.

Partner as employer

Fact that automobile driver was but one member of partnership which employed passenger would not prevent driver's absolution from any liability for injuries to passenger other than that under compensation law.

N.Y.—Klein v. Pepe, supra.

A compromise agreement entered into by painter and building company's insurer, which settled compensation case and was approved by industrial accident board, was not an

mined as of the time of the injury, and not of the commencement of the action.³² It is the employer who, by virtue of the compensation statute, is exempt from the ordinary action or suit for negligence.³³

The rule that the compensation act is to be liberally construed in favor of its applicability is not altered by the fact that a plaintiff believes he can establish negligence and brings a civil suit for damages;³⁴ the act is to be liberally construed, so as to include all services that can reasonably be said to be within it, not only when the injured person seeks its protection, but when he attempts to have himself excluded from the coverage of the act.³⁵

A state compensation act, even though in terms exclusive, does not affect an employee's remedy in damages under a federal law which to that extent supersedes the state enactment;³⁶ and, where exclusiveness of remedy is conditioned on the existence of certain facts, the bringing of an action for damages is not barred in the first instance, but the nonexistence of facts on which exclusiveness of remedy is predicated must be set up as a defense, and proved.³⁷

The failure of physicians, employed full-time by the employer, to inform an employee of his rights under the compensation act has been held not such

a breach of legal or statutory duty as to make the employer liable in damages for the loss of compensation benefits through failure to make a timely claim.³⁸

Stay of proceedings. Where a petition for a settlement under the compensation act, and an action at law for damages, both for the same cause of action, are pending, the proper practice is to stay the trial of the action for damages until a final determination on the petition.³⁹

Disposition of action wrongfully brought. Where, under the statute, an application under the compensation act waives the right to institute proceedings in any court, an action begun after such an application should be dismissed.⁴⁰ Although an action at law by an injured employee is erroneously brought, both parties being within the provisions of a compensation act, the court, in case it has jurisdiction of proceedings to obtain compensation, should not dismiss the action, but should retain it for the remedy to which plaintiff may prove his right;⁴¹ but, where in such case the action is over the objection permitted to proceed to trial and judgment, the judgment must be reversed and the court on appeal cannot treat the verdict as an award of compensation or direct a judgment for any amount on the record.⁴²

adjudication that painter was an employee at time he sustained injuries, and he was not estopped subsequently to maintain action against building company for injuries sustained, on theory that he was an independent contractor at time of injury. *Tex.—Lowry v. Anderson-Berney Bldg. Co.*, 161 S.W.2d 459, 139 Tex. 29.

32. *Cal.—Buttner v. American Bell Tel. Co.*, 107 P.2d 439, 41 C.A.2d 581.

33. *U.S.—Kirk v. U. S.*, C.A.Idaho, 232 F.2d 763.

Purview of act

Cases are not within purview of compensation act providing that an employer, paying premiums or compensation provided by law, shall not be liable in damages at common law for injury to an employee unless it is made to appear that injured person was an employee of employer, or an employee of an independent contractor who carried no insurance, in which case act would apply if injuries were received under circumstances which would have made principal liable had employee been in his immediate employment.

U.S.—Smith v. Price Bros. Co., C.C. A.Ohio, 131 F.2d 750, certiorari denied *Price Bros. Co. v. Smith*, 68

S.Ct. 560, 318 U.S. 762, 87 L.Ed. 1184.

34. *Cal.—Freire v. Matson Nav. Co.*, 118 P.2d 809, 19 C.2d 8.

Peterson v. Moran, 245 P.2d 540, 111 C.A.2d 766—*Moise v. Owens*, 216 P.2d 22, 96 C.A.2d 617.

Liberal construction of acts generally see *supra* § 20.

35. *U.S.—Isthmian S. S. Co. of Del. v. Olivieri*, C.A.La., 202 F.2d 492.

"If there is to be reasonable consistency in decisions involving the act courts cannot construe it liberally in favor of compensation where the workman seeks compensation and strictly against compensation when he seeks damages."

Kan.—Bright v. Bragg, 264 P.2d 494, 501, 175 Kan. 404.

"If the act is to be liberally construed so as to protect all possible persons when they seek its protection, surely it would not do to say that the provisions of the statute should be restricted when persons, in order to recover in tort, are attempting to have themselves excluded from the coverage of the statute."

La.—Thibodaux v. Sun Oil Co., App., 40 So.2d 761, 766, followed in 40 So.2d 767, and *Baker v. Sun Oil Co.*, 40 So.2d 767, and *Baker v. J. C.*

Chance Well Service, 40 So.2d 767, affirmed *Thibodaux v. Sun Oil Co.*, 49 So.2d 852, 218 La. 453, followed in *Baker v. Sun Oil Co.*, 49 So.2d 854, 218 La. 461, and *Baker v. J. C. Chance Well Service*, 49 So.2d 855, 218 La. 462—*Spanja v. Thibodaux Boiler Works*, App., 2 So.2d 668, 672.

36. *U.S.—Delaware, L. & W. R. Co. v. Peck*, N.Y., 255 F. 261, 166 C.C. A. 431.

N.Y.—Ward v. Erie R. Co., 129 N.E. 886, 230 N.Y. 230.

Conflict between state and federal laws see *supra* § 26.

37. *Tex.—Kampmann v. Cross*, Civ. App., 194 S.W. 437.

38. *Wash.—Pate v. General Elec. Co.*, 260 P.2d 901, 43 Wash.2d 185, opinion adhered to on rehearing, 269 P.2d 589, 44 Wash.2d 919.

39. *R.I.—Simas v. Dugan*, 116 A. 755.

40. *Ohio.—Zilch v. Bomgardner*, 110 N.E. 459, 91 Ohio St. 205.

41. *Kan.—Shade v. Ash Grove Lime, etc., Co.*, 139 P. 1193, 92 Kan. 146, affirmed 144 P. 249, 93 Kan. 257.

42. *Kan.—McRoberts v. National Zinc Co.*, 144 P. 247, 93 Kan. 364, 71 C.J. p 1482 note 43.

b. Federal Acts

The Longshoremen's and Harbor Workers' Compensation Act and the Federal Employees' Compensation Act have been held exclusive within the fields of their operation, so as to bar actions against their employers by employees whose claims come within either act.

Under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., providing that the liability of an employer to his employee thereunder shall be exclusive, but that the

act shall not apply to the injury or death of a master or member of the crew of any vessel, the exclusiveness of the employer's liability, where the act applies, has been judicially declared;⁴³ the obvious purpose of the provision is to make the statutory liability of an employer to contribute to his employee's compensation the exclusive liability of such employer to his employee, or to anyone claiming under or through such employee, because of his injury or death arising out of that employment.⁴⁴

43. U.S.—South Chicago Coal & Dock Co. v. Bassett, Ill., 60 S.Ct. 544, 309 U.S. 251, 84 L.Ed. 732.

Continental Cas. Co. v. Thorden Line, C.A.Va., 186 F.2d 992—De Martino v. Bethlehem Steel Co., C.C.A.Mass., 164 F.2d 177—Bowen v. Shamrock Towing Co., C.C.A.N.Y., 139 F.2d 674—Warner Co. v. Norton, C.C.A.Pa., 137 F.2d 57, affirmed Norton v. Warner Co., 64 S.Ct. 747, 321 U.S. 565, 88 L.Ed. 931—Carumbo v. Cape Cod S. S. Co., C.C.A.Mass., 123 F.2d 991.

Mikkelsen v. The Granville, D.C.N.Y., 101 F.Supp. 566, affirmed, C.A., 191 F.2d 853, rehearing denied 192 F.2d 809—Rich v. U. S., D.C.N.Y., 81 F.Supp. 587, reversed on other grounds, C.A., 177 F.2d 688—Cioffi v. New Zealand Shipping Co., D.C.N.Y., 80 F.Supp. 98—Braner v. Brooklyn Eastern District Terminal, D.C.N.Y., 46 F.Supp. 302—Paolillo v. Rederi A/B Disa, D.C.N.Y., 38 F.Supp. 833—Cantey v. McLain Line, D.C.N.Y., 32 F.Supp. 1023, affirmed, C.C.A., 114 F.2d 1017, reversed on other grounds 61 S.Ct. 829, 313 U.S. 667, 85 L.Ed. 1111, rehearing denied 61 S.Ct. 939, 313 U.S. 598, 85 L.Ed. 1551—Kraft v. A. H. Bull S. S. Co., D.C.N.Y., 28 F.Supp. 437—Hawn v. American S. S. Co., D.C.N.Y., 27 F.Supp. 410, affirmed, C.C.A., 107 F.2d 999—Larson v. Todd Shipyards Corp., D.C.N.Y., 16 F.Supp. 967. Cal.—Smrekar v. Bay & River Nav. Co., 160 P.2d 85, 69 C.A.2d 654, certiorari denied 66 S.Ct. 333, 326 U.S. 782, 90 L.Ed. 473.

D.C.—Brown v. Curtin & Johnson, Inc., D.C., 117 F.Supp. 830, affirmed, C.A., 221 F.2d 106, 95 U.S.App.D.C. 234.

N.J.—Byrd v. New York Central System, 70 A.2d 97, 6 N.J.Super. 568—Gussie v. Pennsylvania R. Co., 64 A.2d 244, 1 N.J.Super. 293, certiorari denied 70 S.Ct. 145, 338 U.S. 869, 94 L.Ed. 533.

N.Y.—Barbara v. Stephen Ransom, Inc., 79 N.Y.S.2d 438, 191 Misc. 957.

Application of Longshoremen's and Harbor Workers' Compensation Act generally see supra § 89.

Effect of failure to secure payment of compensation see infra § 932.

State or federal laws as governing see supra § 26.

"The remedy provided by the Act is exclusive of any other recourse." U.S.—Massman Const. Co. v. Bassett, D.C.Pa., 30 F.Supp. 813, 815, reversed on other grounds, C.C.A., Bassett v. Massman Const. Co., 120 F.2d 230, certiorari denied 62 S.Ct. 92, 314 U.S. 648, 86 L.Ed. 520.

Limitation of coverage

(1) Longshoremen's Compensation Act, by restricting compensation to injuries occurring on navigable waters, and by excluding from its own terms and from Jones Act any remedies against employer for injuries inflicted on shore, left stevedores injured on shore to pursue remedies afforded by local laws which permit recovery against employer for injuries inflicted by land torts on his employees who are not members of crew of a vessel.

U.S.—Swanson v. Marra Bros., Pa., 66 S.Ct. 869, 328 U.S. 1, 90 L.Ed. 1045.

(2) Matters not within scope of acts see infra §§ 918-930.

Merchant Marine Act superseded

Longshoremen's Act supersedes Merchant Marine Act, 46 U.S.C.A. § 688, authorizing recovery for injury to, or death of, seamen, with respect to longshoremen who are injured on navigable waters of United States. U.S.—Panama Agencies Co. v. Franco, C.C.A.Canal Zone, 111 F.2d 263.

Effect of Defense Bases Act

Exclusive nature of remedy afforded employees entitled to benefits of Longshoremen's Compensation Act was not changed by Defense Bases Act, 42 U.S.C.A. § 1651 et seq., extending benefits of Longshoremen's Compensation Act to defense base workers.

Minn.—Huhn v. Foley Bros., 22 N.W. 2d 3, 221 Minn. 279.

N.M.—State ex rel. Haddock Engineers v. Swope, 251 P.2d 266, 56 N.M. 782.

Coverage not affected by amendment of other act

Amendment to Federal Employers' Liability Act with respect to test to be applied in determining whether an employee is in interstate commerce does not affect coverage of

Longshoremen's and Harbor Workers' Act.

U.S.—Job v. Erie R. Co., D.C.N.Y., 79 F.Supp. 698.

Effect of contract

(1) Where employer expressly agreed with employee to carry compensation insurance pursuant to Longshoremen's Compensation Act, as amended by Defense Bases Act, such acts became part of contract, and exclusive statutory remedy afforded thereunder for injured employees could not be defeated or extended by resort to a different and independent contract provision designed for another purpose and having no relation to workmen's compensation insurance.

Minn.—Huhn v. Foley Bros., 22 N.W. 2d 3, 221 Minn. 279.

(2) A stevedoring company, liable under contract to government for injury to stevedoring employee unloading a government ship because of company's fault in creating an unseaworthy place to work, is not relieved of liability under contract because of provision of Longshoremen's Compensation Act for exclusiveness of liability of employer for employee's injury, since act limits liability of employer to those entitled to damages from injury to, or death of, employee without any contract relationship to employer other than employment.

U.S.—U. S. v. Arrow Stevedoring Co., C.A.Cal., 175 F.2d 329, certiorari denied 70 S.Ct. 307, 338 U.S. 904, 94 L.Ed. 557.

44. U.S.—Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., N.Y., 76 S.Ct. 232, 350 U.S. 124, 100 L.Ed. 133.

Liability at law or in admiralty

This section was designed to make employer's liability exclusive of any other liability either at law or in admiralty to injured employee or anyone suing in employee's right.

D.C.—Hitaffer v. Argonne Co., 188 F.2d 811, 87 U.S.App.D.C. 57, 23 A.L.R.2d 1366, certiorari denied Argonne Co. v. Hitaffer, 71 S.Ct. 80, 340 U.S. 852, 95 L.Ed. 624.

Expense of trip for medical treatment

(1) Where contract of employment

The act imposes an absolute, but limited, liability on the part of the employer to pay compensation and related benefits, which are exclusive and in place of all other liability of the employer.⁴⁵

Particular persons have been held to be within

the coverage of the act, and, therefore, barred by the act from maintaining actions against their employers for injuries,⁴⁶ as where they were held not to be members of crews,⁴⁷ while others have been held to be members of crews, and therefore not to

expressly obligated employers to carry compensation insurance pursuant to Longshoremen's Compensation Act, as amended by Defense Bases Acts, employee injured in Alaska, being entitled to travel expense necessary to obtain medical treatment as part of compensation award, could not sue employers for expense of return trip to St. Paul under another provision of contract requiring employers to provide free return transportation if employee remained on job nine months on theory that, although he did not remain nine months, return was not voluntary, but necessary to obtain medical treatment.

Minn.—Huhn v. Foley Bros., 22 N.W. 2d 8, 221 Minn. 279.

(2) Municipal court of St. Paul had no jurisdiction over subject matter of action against employers by employee injured in Alaska to recover expense of trip to St. Paul for medical treatment, where employee was entitled to benefits of Longshoremen's Compensation Act, since his remedy under Compensation Act was exclusive.

Minn.—Huhn v. Foley Bros., supra.

45. U.S.—Fontana v. Pennsylvania R. Co., D.C.N.Y., 106 F.Supp. 461, affirmed, C.A., Fontana v. Grace Line Inc. R. Co., 205 F.2d 151, certiorari denied Fontana v. Huron Stevedoring Corp., 74 S.Ct. 137, 346 U.S. 886, 98 L.Ed. 390.

Minn.—Huhn v. Foley Bros., 22 N.W. 2d 8, 221 Minn. 279.

Enlargement of longshoreman's rights

Prior to Longshoremen's Compensation Act, longshoreman had a possible right of action against vessel on which he was injured, against his immediate employer, or against any one else claimed to be responsible for injuring him, and change in law was not intended to reduce his rights, but to enlarge them.

U.S.—Rederi v. Jarka Corp., D.C.Me., 26 F.Supp. 304, appeal dismissed, C.C.A., Jarka Corp. v. Rederi, 110 F.2d 234.

46. U.S.—Chappell v. C. D. Johnson Lumber Corp., C.A.Or., 216 F.2d 873 —Lo Bue v. U. S., C.A.N.Y., 178 F.2d 528.

Christiansen v. U. S., D.C.Mass., 94 F.Supp. 324, affirmed, C.A., 192 F.2d 199—Portel v. U. S., D.C.N.Y., 85 F.Supp. 458—Cioffi v. New Zealand Shipping Co., D.C.N.Y., 80 F.Supp. 98—Armento v. U. S., D.C.N.Y., 74 F.Supp. 198—Ellis v. Gulf

Oil Corp., D.C.N.J., 48 F.Supp. 771—Larson v. Todd Shipyards Corp., D.C.N.Y., 16 F.Supp. 967.

Quilty v. United Fruit Co., D.C.N.Y., 6 F.R.D. 216.

D.C.—Fernandez v. Gantz, D.C., 113 F.Supp. 763.

N.M.—State ex rel. Haddock Engineers v. Swope, 251 P.2d 266, 56 N.M. 782.

Harbor worker

U.S.—De Martino v. Bethlehem Steel Co., C.C.A.Mass., 164 F.2d 177.

Longshoreman

U.S.—Cataldo v. A/S Glittre, D.C.N.Y., 41 F.Supp. 555—Paohillo v. Rederi A/B Disa, D.C.N.Y., 38 F.Supp. 833.

Stevedore

U.S.—Frusteri v. U. S., D.C.N.Y., 76 F.Supp. 667—The Tampico, D.C.N.Y., 45 F.Supp. 174.

Action under Federal Employers' Liability Act

(1) Generally.

U.S.—Scrinko v. Reading Co., D.C.N.J., 117 F.Supp. 603—Rist v. Pittsburgh & Conneaut Dock Co., D.C. Ohio, 104 F.Supp. 29.

N.J.—Byrd v. New York Central System, 70 A.2d 97, 6 N.J.Super. 568.

(2) Railroad brakeman injured while doing a brakeman's work on freight car situated on car float moored on navigable waters of United States.

U.S.—Pennsylvania R. Co. v. O'Rourke, N.Y., 73 S.Ct. 302, 344 U.S. 334, 97 L.Ed. 367, rehearing denied 73 S.Ct. 638, 345 U.S. 913, 97 L.Ed. 1347.

(3) Employee of street railroad company in District of Columbia.

D.C.—Keffer v. Capital Transit Co., 183 F.2d 808, 87 U.S.App.D.C. 13.

(4) Where plaintiff was employed by railroad company and his services were directly connected with interstate transportation, and injury occurred as he was pulling a loaded cart down a gangplank from a dock to a large freighter afloat on a navigable river, he was covered by Federal Employers' Liability Act, but, since he also qualified under Longshoremen's Act, remedy under latter act was exclusive.

U.S.—Job v. Erie R. Co., D.C.N.Y., 79 F.Supp. 698.

(5) Amendment of 1939 to Federal Employers' Liability Act, enlarging scope of act to include all employees whose duties are in furtherance of interstate commerce or in any way directly, clearly, and sub-

stantially affect interstate commerce, does not exclude railroad employees injured on navigable waters from Longshoremen's Compensation Act. N.J.—Gussie v. Pennsylvania R. Co., 64 A.2d 244, 1 N.J.Super. 293, certiorari denied 70 S.Ct. 145, 338 U.S. 869, 94 L.Ed. 533.

Action under Jones Act

U.S.—Hagens v. United Fruit Co., C.C.A.N.Y., 135 F.2d 842—Hawn v. American S. S. Co., C.C.A.N.Y., 107 F.2d 999.

Conzo v. Moore McCormack Lines, Inc., D.C.N.Y., 114 F.Supp. 956—Kraft v. A. H. Bull S. S. Co., D.C.N.Y., 28 F.Supp. 437.

Cal.—Smrekar v. Bay & River Nav. Co., 160 P.2d 85, 69 C.A.2d 654, certiorari denied 66 S.Ct. 338, 326 U.S. 782, 90 L.Ed. 473.

Action under Public Vessels Act

U.S.—Whyatt v. U. S., D.C.N.Y., 92 F.Supp. 543.

Action under Safety Appliance Acts

U.S.—Pennsylvania R. Co. v. O'Rourke, 73 S.Ct. 302, 344 U.S. 334, 97 L.Ed. 367, rehearing denied 73 S.Ct. 638, 345 U.S. 913, 97 L.Ed. 1347.

Action under Suits in Admiralty Act

U.S.—Whyatt v. U. S., D.C.N.Y., 92 F.Supp. 543.

Compensability under state act; twilight zone

(1) Fact that employee, injured on barge on navigable water, was entitled to compensation under New Jersey compensation act did not bring him within an exception to Longshoremen's and Harbor Workers' Act.

U.S.—Scrinko v. Reading Co., D.C.N.Y., 117 F.Supp. 603.

(2) Where person allegedly injured while assisting in loading a barge in navigable water was not covered under state compensation law, he was required to seek remedy for injuries under Longshoremen's and Harbor Workers' Act and could not maintain negligence action in federal court against employer regardless of whether, at time of injuries, he was within federal jurisdiction or within twilight zone between state and federal jurisdiction.

U.S.—Chappell v. C. D. Johnson Lumber Corp., D.C.Or., 112 F.Supp. 625.

47. U.S.—Grimes v. Raymond Concrete Pile Co., C.A.Mass., 245 F.2d 437—Hagens v. United Fruit Co., C.C.A.N.Y., 135 F.2d 842—Hawn v. American S. S. Co., C.C.A.N.Y., 107 F.2d 999.

be barred by the act from maintaining such actions, as discussed *infra* § 922.

The Federal Employees' Compensation Act, 5 U.S.C.A. § 751 et seq, makes recovery thereunder for injured employees of the United States exclusive,⁴⁸ and in place of any and all legal liability of the United States or its instrumentalities,⁴⁹ so as to bar suit under the Federal Tort Claims Act, 28 U.S.C.A. § 2671 et seq;⁵⁰ and suit under the latter

act has also been held barred where the injured employee is entitled to compensation under another federal act.⁵¹

While there is authority to the contrary effect,⁵² the Federal Employees' Compensation Act, under a ruling of the United States supreme court, is the exclusive remedy for civilian seamen on public vessels,⁵³ and such a seaman cannot maintain an action under the Public Vessels Act, 46 U.S.C.A. §§

Ellis v. Gulf Oil Co., D.C.N.J., 48 F.Supp. 771—Mamat v. United Fruit Co., D.C.N.Y., 39 F.Supp. 103—Kraft v. A. H. Bull S. S. Co., D.C. N.Y., 28 F.Supp. 437.
Cal.—Smrekar v. Bay & River Nav. Co., 160 P.2d 85, 69 C.A.2d 654, certiorari denied 66 S.Ct. 338, 326 U.S. 782, 90 L.Ed. 473.
D.C.—Beddoe v. Smoot Sand & Gravel Corp., 128 F.2d 608, 76 U.S.App. D.C. 39.

Painter employed on dock
U.S.—De Martino v. Bethlehem Steel Co., C.C.A.Mass., 164 F.2d 177.

Railroad brakeman
U.S.—Zientek v. Reading Co., C.A.Pa., 220 F.2d 183, certiorari denied 76 S.Ct. 55, 350 U.S. 846, 100 L.Ed. 754, rehearing denied 76 S.Ct. 345, 350 U.S. 960, 100 L.Ed. 834.

48. U.S.—Underwood v. U. S., C.A. Colo., 207 F.2d 862—Posey v. Tennessee Val. Authority, C.C.A.Ala., 93 F.2d 726.

Messig v. U. S., D.C.Minn., 129 F. Supp. 571—Stiffier v. U. S., D.C. Pa., 122 F.Supp. 304—De Vos v. U. S., D.C.N.Y., 121 F.Supp. 514—Biagi v. U. S., D.C.Cal., 115 F.Supp. 697—Thomason v. Works Projects Administration, D.C.Idaho, 47 F.Supp. 51, affirmed, C.C.A., 138 F.2d 342.
Contra Parr v. U. S., C.A.Kan., 172 F. 2d 462.

Henson v. U. S., D.C.Mo., 88 F. Supp. 148.

"Such a comprehensive plan for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive."

U.S.—Johansen v. U. S., N.Y., 72 S. Ct. 849, 857, 343 U.S. 427, 96 L.Ed. 1051, rehearing denied 73 S.Ct. 5, 344 U.S. 848, 97 L.Ed. 660—Mandel v. U. S., N.Y., 72 S.Ct. 849, 343 U. S. 427, 96 L.Ed. 1051, rehearing denied 73 S.Ct. 47, 344 U.S. 848, 97 L.Ed. 660.

"The Federal Employees' Compensation Act . . . [is] a general statement of a congressional policy favoring a remedy through compensation rather than by action in tort for federal employees."

D.C.—Lewis v. U. S., 190 F.2d 22, 23, 89 U.S.App.D.C. 21, certiorari denied 72 S.Ct. 110, 342 U.S. 869, 96 L.Ed. 653, rehearing denied 72 S.Ct. 230, 342 U.S. 899, 96 L.Ed. 678.

Common-law remedy

(1) United States Employees' Compensation Act does not deprive employee of any remedy he may have at common law, although employee is bound by his election as against United States government if he receives compensation under such act. Tex.—National Housing Agency v. Orton, Civ.App., 202 S.W.2d 243, error refused no reversible error.

(2) Election generally see *infra* § 936.

(3) Fact that employee of federal public housing authority had right to compensation under United States Employees' Compensation Act did not prevent him from bringing common-law action for negligent injury.

Tex.—National Housing Agency v. Orton, *supra*.

49. U.S.—Underwood v. U. S., C.A. Colo., 207 F.2d 862.

Messig v. U. S., D.C.Minn., 129 F.Supp. 571.

Suit against government is not provided for by act.

U.S.—White v. Tennessee Valley Authority, D.C.Tenn., 58 F.Supp. 776—Thomason v. Works Projects Administration, D.C.Idaho, 47 F.Supp. 51, affirmed, C.C.A., 138 F.2d 342.

T. V. A. employee

(1) Congress has power to limit remedy of injured employees of an instrumentality of United States, as Tennessee Valley authority, to that afforded by United States Employees' Compensation Act.

U.S.—Posey v. Tennessee Valley Authority, C.C.A.Ala., 93 F.2d 726.

(2) Remedy of injured employee of Tennessee Valley authority is not action in district court under United States Employees Compensation Act, but proper proceedings before United States employees' compensation commission, and he cannot bring such action, in any event, without first exhausting his administrative remedies. U.S.—White v. Tennessee Val. Authority, D.C.Tenn., 58 F.Supp. 776.

(3) Exclusive remedy of injured employees of Tennessee Valley authority is under United States Employees' Compensation Act, and state laws, including common law, do not

apply, notwithstanding statutory subjection of Tennessee Valley authority to suit.

U.S.—Posey v. Tennessee Val. Authority, *supra*.

50. U.S.—Sasse v. U. S., C.A.Ind., 201 F.2d 871.

Stiffier v. U. S., D.C.Pa., 122 F. Supp. 304—De Vos v. U. S., D.C. N.Y., 121 F.Supp. 514—Biagi v. U. S., D.C.Cal., 115 F.Supp. 697.

Contra Henson v. U. S., D.C.Mo., 88 F.Supp. 148.

Holding to other effect

(1) Since enactment of Federal Tort Claims Act, an injured employee has an election to proceed under compensation act or against government in tort.

U.S.—Parr v. U. S., C.A.Kan., 172 F. 2d 462.

Brown & Root, Inc., v. U. S., D. C.Tex., 92 F.Supp. 257, affirmed, C. A., 198 F.2d 138.

(2) Election generally see *infra* §§ 936–938.

51. D.C.—Lewis v. U. S., 190 F.2d 22, 89 U.S.App.D.C. 21, certiorari denied 72 S.Ct. 110, 342 U.S. 869, 96 L.Ed. 653, rehearing denied 72 S.Ct. 230, 342 U.S. 899, 96 L.Ed. 673.

Act governing United States Park Police

D.C.—Lewis v. U. S., *supra*.

52. U.S.—Johnson v. U. S., C.A.Va., 186 F.2d 120.

McKenney v. U. S., D.C.Cal., 99 F.Supp. 121.

53. U.S.—Johansen v. U. S., N.Y., 72 S.Ct. 849, 343 U.S. 427, 96 L.Ed. 1051, rehearing denied 73 S.Ct. 5, 344 U.S. 848, 97 L.Ed. 660—Mandel v. U. S., N.Y., 72 S.Ct. 849, 343 U. S. 427, 96 L.Ed. 1051, rehearing denied 73 S.Ct. 47, 344 U.S. 848, 97 L.Ed. 660.

U. S. v. Firth, C.A.Cal., 207 F.2d 665.

Hartzog v. U. S., D.C.Cal., 139 F.Supp. 47—Mayo v. U. S., D.C. Cal., 139 F.Supp. 46—Svenarski v. U. S., D.C.Cal., 124 F.Supp. 200—Rookard v. U. S., D.C.N.Y., 124 F. Supp. 194—Benet v. The General M. L. Hersey, D.C.N.Y., 113 F.Supp. 826.

Seamen generally see *supra* § 86.

781 et seq.⁵⁴ This rule of exclusive remedy has also been applied to a seaman-employee of the United States on a merchant vessel owned and operated by an instrumentality of the United States,⁵⁵ so that such an employee cannot maintain a suit under the Suits in Admiralty Act, 46 U.S.C.A. § 741 et seq.;⁵⁶ but under other authority a civilian member of the crew of a merchant vessel of the United States has been held not precluded by the Federal Employees' Compensation Act from suing for his injuries under the Suits in Admiralty Act,⁵⁷ and the act was held not to bar a tort action by a shore-side civilian employee under the Public Vessels Act.⁵⁸

The fact that an air force base exchange carries compensation insurance for its employees, as authorized by statute, does not exclude an employee from suing the United States under the Tort Claims Act, 28 U.S.C.A. § 2671 et seq.⁵⁹

Award of state commission as res judicata. A state industrial commission's final award, which has ripened into an enforceable award under the state compensation act on the theory that the employee, at the time of the injury, was engaged in interstate commerce and thus subject to the state compensation law, is *res judicata*, precluding him from thereafter suing his employer under the Federal Employers' Liability Act on the theory that he was engaged

in interstate commerce.⁶⁰

c. Municipal Pensions or Compensation

The right of a municipal employee to workmen's compensation or a pension, or to both, has been variously determined in accordance with the language of the compensation act and of the charter or other statute governing the municipality.

A state compensation law binds cities as employers within its terms with respect to city officers and employees injured in the city's service,⁶¹ superseding similar provisions in the city charter,⁶² unless the act in express terms excludes city employees from its benefits when, and as long as, provision for them is made in the city charter,⁶³ or unless the charter has been framed by the city independently of the legislature under a provision of the state constitution and is interpreted to entitle the injured employee to a pension independently of his right to compensation,⁶⁴ or unless the charter in terms supplements the act, entitling the employee or his dependents to a pension after compensation under the act ceases.⁶⁵ In the latter case, payment of compensation under the act,⁶⁶ or waiver by the employee of his right thereto,⁶⁷ is a condition precedent to a pension under the charter.

Under governing statutes or charter provisions, the award or acceptance of compensation may not bar the right to a pension,⁶⁸ but the contrary rul-

Midshipman cadet at maritime academy

U.S.—Sbarbaro v. U. S., D.C.Pa., 112 F.Supp. 93.

Dredge which was owned and operated by United States Army and which was deepening river under supervision of army engineer corps pursuant to congressional appropriation for river and harbor improvement was public vessel performing public service and was not employed as merchant vessel.

U.S.—Rodriguez v. U. S., D.C.Pa., 204 F.2d 508.

54. U.S.—Johansen v. U. S., N.Y., 72 S.Ct. 849, 343 U.S. 427, 96 L.Ed. 1061, rehearing denied 73 S.Ct. 5, 344 U.S. 848, 97 L.Ed. 660—Mandel v. U. S., N.Y., 72 S.Ct. 849, 343 U.S. 427, 96 L.Ed. 1061, rehearing denied 73 S.Ct. 47, 344 U.S. 848, 97 L.Ed. 660.

Rodriguez v. U. S., C.A.Pa., 204 F.2d 508.

Hartzog v. U. S., D.C.Cal., 139 F.Supp. 47—Mayo v. U. S., D.C.Cal., 139 F.Supp. 46—Svenarski v. U. S., D.C.Cal., 124 F.Supp. 200—Benet v. The General M. L. Hersey, D.C.N.Y., 113 F.Supp. 826—Sbarbaro v. U. S., D.C.Pa., 112 F.Supp. 93.

55. U.S.—Sullivan v. U. S., D.C.N.Y., 130 F.Supp. 53.

56. U.S.—Sullivan v. U. S., supra.

57. U.S.—Inland Waterways Corp. v. Doyle, C.A.Mo., 204 F.2d 874.

Choice of remedies

U.S.—Cowan v. Inland Waterways Corp., D.C.Ill., 121 F.Supp. 683.

58. U.S.—Gibbs v. U. S., D.C.Cal., 94 F.Supp. 586.

59. U.S.—Daniels v. Chanute Air Force Base Exchange, D.C.Ill., 127 F.Supp. 920.

60. U.S.—Landreth v. Wabash R. Co., C.C.A.Ill., 153 F.2d 98, certiorari denied 66 S.Ct. 1345, 328 U.S. 855, 90 L.Ed. 1627.

Failure to find as to nature of employment

Where evidence was heard by state commission, alleged error in failing to find that parties were engaged in intrastate commerce or interstate commerce could have been corrected by an appeal to supreme court of state, and such error could not be raised in subsequent action by employee against employer under Federal Employers' Liability Act.

U.S.—Landreth v. Wabash R. Co., supra.

61. Tenn.—Cornett v. City of Chattanooga, 56 S.W.2d 742, 165 Tenn. 563.

62. Mich.—Purdy v. Sault Ste. Marie, 155 N.W. 597, 188 Mich. 573, Ann.Cas.1917D 881.

63. Wash.—State v. Carroll, 162 P. 593, 94 Wash. 531.

64. Minn.—Markley v. City of St. Paul, 173 N.W. 215, 142 Minn. 356.

65. Mich.—Doyle v. City of Saginaw, 243 N.W. 27, 258 Mich. 467.

66. Mich.—Doyle v. City of Saginaw, supra.

67. Mich.—Bross v. City of Detroit, 247 N.W. 714, 262 Mich. 447.

68. Cal.—Johnson v. Board of Police and Fire Pension Com'rs of City of Long Beach, 170 P.2d 48, 74 C.A.2d 919—Tyra v. Board of Police and Fire Pension Com'rs of City of Long Beach, 162 P.2d 35, 71 C.A.2d 50.

Fireman

(1) A member of city fire department who became totally and permanently disabled in course of his employment was entitled to receive benefits of compensation act and of Firemen's Pension Act, and it was immaterial under which act he first accepted benefits, as against contention that such recovery allowed him double protection and double compensation for same injury.

ing has also been made,⁶⁹ and under a provision of the compensation act that injured policemen or firemen, or their dependents, are not entitled to both the benefits provided by the act and "like benefits" provided by municipal charter, the quoted phrase does not mean benefits coextensive in every detail, or identical, but benefits similar in salient features.⁷⁰

Where the act excludes city employees who have pension rights under the charter from compensation under the act,⁷¹ or where the charter supplements the act, giving the employee an election between compensation under the act and pension under the charter,⁷² the employee is not entitled to elect between compensation or pension, on the one hand, and a right to sue for damages, on the other. A statute requiring a city employee to elect between workmen's compensation and a pension does not deprive the legislature of its power, after an election to take compensation has been made, to recognize long and faithful service by a pension in contravention of the policy of the statute.⁷³

Credit of compensation payments against pension.

A city is not entitled to credit against the pension due an employee any payments made to him under the workmen's compensation act;⁷⁴ the employee is entitled to his entire pension without set-off or deduction.⁷⁵

d. Failure to Furnish, or Negligence in Furnishing, Medical Treatment

Authorities differ as to whether an injured employee having a remedy under the compensation act may sue his employer, or the latter's insurer, for negligence in connection with the medical or surgical treatment of the employee.

Where an employer, in addition to subscribing to the workmen's compensation act, makes a separate contract with employees to furnish medical treatment for illness or injuries in consideration of deductions from wages, the remedies under act and contract are cumulative, and the employer's liability on the contract is not affected by the act;⁷⁶ but, where an employee's only right to be furnished medical treatment by his employer is his right to recover therefor in a proceeding before the compensation commission, he may not sue to recover damages for the employer's breach of statutory duty to furnish the treatment, as discussed *infra* § 936.

Particular evidence has been held to establish the fact that the employer did not refuse to provide medical treatment, so as to be estopped to invoke the defense, to an action for injuries, that the employee was within the compensation act.⁷⁷ The only effect of an employer's failure to provide medical treatment for the injured employee, and his denial of liability therefor, is to authorize the employee to employ a physician of his own choosing and recover the expense of medical treatment in the proceeding before the compensation commission.⁷⁸

Neb.—City of Lincoln v. Steffensmeyer, 279 N.W. 272, 134 Neb. 613, 119 A.L.R. 914.

(2) With respect to whether firemen's pension was compensation within compensation act, section providing that election under act shall be a surrender by parties of their right to any other method, form, or amount of compensation must be construed with other sections of act. Neb.—City of Lincoln v. Steffensmeyer, *supra*.

69. N.J.—DeLorenzo v. Board of Com'rs of City of Newark, 45 A. 2d 686, 134 N.J.Law 7.

Right to pension held waived

Any right to a pension which city employee may have had in 1930 was waived by his continuing in employ of city, by accepting compensation benefits for more than ten years for injuries sustained during employment with city, and by failure to take proceedings to review action of city in denying his application for a pension.

N.J.—DeLorenzo v. Board of Com'rs of City of Newark, *supra*.

Employee held not retired

A city employee receiving compensation benefits for disability which

arose out of, and in course of, employment with city continued to be an employee of city and was not entitled to receive also a pension as a retired employee.

N.J.—DeLorenzo v. Board of Com'rs of City of Newark, *supra*.

County's knowledge of pension imputed to insurer

County was chargeable with full knowledge of county pension granted former employee after he had been awarded compensation for permanent partial incapacity, and such knowledge must be imputed to county's insurance carrier actively defending subsequent proceeding for additional compensation for increased incapacity.

N.J.—Breheny v. Essex County, 54 A. 2d 664, 136 N.J.Law 87, affirmed 57 A.2d 26, 136 N.J.Law 524.

70. Mich.—MacKay v. City of Port Huron, 284 N.W. 671, 233 Mich. 129.

Effect of unrelated charter provisions

Provision is not limited by clause declaring that it does not affect charter benefit provisions bearing no relation to provisions of act.

Mich.—MacKay v. City of Port Huron, *supra*.

71. Wash.—State v. Carroll, 162 P. 593, 94 Wash. 531.

Election between compensation and damages generally see *infra* §§ 936-938.

72. Mich.—Bross v. City of Detroit, 247 N.W. 714, 262 Mich. 447.

73. Mass.—Olivier v. City of Fall River, 28 N.E.2d 223, 306 Mass. 376.

Reinstatement to make retirement possible

Mass.—Olivier v. City of Fall River, *supra*.

74. Cal.—Holt v. Board of Police and Fire Pension Com'rs of City of Long Beach, 196 P.2d 94, 86 C. A.2d 714—Vero v. Sacramento City Employees' Retirement System, 107 P.2d 82, 41 C.A.2d 482.

75. Cal.—Holt v. Board of Police and Fire Com'rs of City of Long Beach, 196 P.2d 94, 86 C.A.2d 714.

76. W.Va.—Ashby v. Davis Coal & Coke Co., 121 S.E. 174, 95 W.Va. 372, 83 A.L.R. 1201.

77. Mo.—Klasing v. Fred Schmitt Contracting Co., 73 S.W.2d 1011, 335 Mo. 721.

78. Mo.—Klasing v. Fred Schmitt Contracting Co., *supra*.

An injured employee cannot maintain an action against his employer's compensation insurer on the theory that it is guilty of negligence or breach of contract in causing a delay in the hospitalization of the employee through failure to guarantee hospital expenses.⁷⁹

The great weight of authority has been held to be to the effect that an employee may not recover from his employer, or the latter's insurance carrier, damages for aggravation of his injury resulting from the negligence of a physician in examination or treatment performed as prescribed by the workmen's compensation act;⁸⁰ such malpractice is regarded as constituting a natural consequence of the primary injury,⁸¹ and the compensation act affords the exclusive remedy for the compensable aggravation of an injury by a physician, as far as the liability of the employer or his insurer is concerned.⁸²

So, where an employee suffering from a compensable injury is entitled to proceed before the industrial commission for aggravated disability caused by negligent performance of an operation undergone at the request of the insurance carrier, he is not entitled to maintain an action against the carrier for physicians' negligence.⁸³ In the absence of constitutional restriction, a compensation law permitting⁸⁴ or requiring⁸⁵ the employer to furnish proper medical treatment, or providing for readjustment of compensation in case of aggrava-

tion of disability,⁸⁶ or providing that no action shall be brought against any employer subject to the act by any employee to recover damages for malpractice or improper treatment received by such employee from any physician or hospital,⁸⁷ confines the injured employee to his remedy under the statute, precluding action against the employer for physician's malpractice. Under such circumstances the employer is not liable in damages on the ground that disability resulting from malpractice is nonaccidental where under statute only accidental injury is compensable.⁸⁸ A compensation act has also been held to bar an action by an injured employee against his employer based on the alleged failure of the latter to provide competent medical service and his alleged affirmative wrong in furnishing an incompetent nurse whose treatment aggravated the injury.⁸⁹

Under other authority, an action against an employer based on a physician's negligence in treating the injured employee is not barred by a previous proceeding in court sustaining the action of the industrial commission;⁹⁰ and an employee, injured in the course of his employment, is not limited, as against his employer, to his remedy under the compensation law, where he alleges negligent diagnosis by the employer's physician and the employer's failure to provide proper facilities and competent physicians.⁹¹ Where the aggravation of injuries is the result of the insurance carrier's wrongful act and is not compensable under the act, the employee may

79. N.Y.—Penn v. Standard Acc. Ins. Co., 164 N.Y.S.2d 618, 4 A.D.2d 796.

80. U.S.—Schulz v. Standard Acc. Ins. Co. of Detroit, D.C.Wash., 125 F.Supp. 411, construing Idaho statute.

Rights of employee against physician or surgeon guilty of malpractice see *infra* § 1043.

81. Mo.—Schumacher v. Leslie, 232 S.W.2d 913, 360 Mo. 1238.
Hughes v. Maryland Casualty Co., 76 S.W.2d 1101, 229 Mo.App. 476.

82. Mo.—Schumacher v. Leslie, 232 S.W.2d 913, 360 Mo. 1238.

Insurer as not "third person"

(1) Under act, insurer is made primarily liable, and is not a "third person."

Mo.—Schumacher v. Leslie, *supra*.
Hughes v. Maryland Casualty Co., 76 S.W.2d 1101, 229 Mo.App. 476.

(2) Primary liability of insurer generally see *supra* § 376.

83. Cal.—Nelson v. Associated Indem. Corp., 86 P.2d 184, 19 C.A. 2d 564.

84. Ala.—Nall v. Alabama Utilities Co., 138 So. 411, 224 Ala. 33.

85. U.S.—Compton v. Carter Oil Co., C.C.A.Okla., 283 F. 22.

86. Wash.—Ross v. Erickson Constr. Co., 155 P. 153, 89 Wash. 634, L.R. A.1916F 319.

87. Ky.—Morrison v. Carbide & Carbon Chemicals Corporation, 129 S. W.2d 547, 278 Ky. 746.
71 C.J. p 1481 note 36.

Wrongs not constituting malpractice or extended disability

(1) Under such provision, employee, compensated for injury, held entitled to bring action against employer who was alleged to have confined employee in hospital against his will and compelled him to submit to examinations, since such wrongs were not malpractice or improper treatment of compensable injuries and did not constitute extended disability.

Ky.—Powers v. Middlesboro Hospital, 79 S.W.2d 391, 258 Ky. 20.

(2) Such provision does not preclude action by employee against employer to recover damages for inju-

ries caused by negligent treatment of his injured eye by person in charge of employer's first aid station, on ground of employer's negligence in selecting and employing unskilled and incompetent person to care for injured employees; action is not based on malpractice in any sense of term.

Mont.—Vesel v. Jardine Min. Co., 100 P.2d 75, 110 Mont. 82, 127 A.L.R. 1093.

88. Colo.—Hennig v. Crested Butte Anthracite Mining Co., 21 P.2d 1115, 92 Colo. 459.

89. N.Y.—Young v. International Paper Co., 122 N.Y.S.2d 39, 282 App.Div. 750.

90. Cal.—Steiner v. Goodyear Tire & Rubber Co. of California, 300 P. 980, 115 C.A. 182.

91. N.Y.—Robison v. State, 32 N.Y. S.2d 388, 263 App.Div. 240.

Reason for rule

Alleged negligence, in so far as provision for diagnosis and treatment was concerned, did not arise out of employment.

N.Y.—Robison v. State, *supra*.

recover damages therefor in an independent action against the carrier.⁹² Where a compensation act does not require an employer to render medical aid and attention to an injured employee, an employer voluntarily and gratuitously assuming to render such aid is held to the same measure of duty as any other person in the same situation;⁹³ so, the act does not deprive an employee of the right to sue his employer for damages caused by negligent treatment of an injury, incurred in the course of the employment, by an unskilled and incompetent person to whom he is sent by the employer for examination and treatment.⁹⁴

Where the statute provides that, if an employee submits to an operation he shall, in addition to the surgical benefits therein provided for, be entitled to compensation for his actual disability following such operation, the employee is entitled to have the award opened and additional compensation allowed under this provision.⁹⁵

Pain and suffering. Where the compensation law authorizes the industrial commission to award compensation to an injured employee in an amount sufficient to compensate him for the result of the injury, although it was aggravated by the negligence or carelessness of the physician selected by the employer, the court has no authority in law to render a judgment for pain and suffering resulting therefrom.⁹⁶

§ 919. Matters Not within Scope of Acts

Rights and remedies of employers or employees, other than those provided by the compensation acts, are not barred as to matters not within the scope of the acts.

A compensation act excludes other remedies only when the conditions existing in a particular case have brought it within the terms of the act;⁹⁷ where the act is inapplicable, the common-law and statutory remedies of the employee remain intact or are not barred.⁹⁸

92. Okl.—*Ætna Life Ins. Co. v. Watts*, 296 P. 977, 148 Okl. 28.

93. Mont.—*Vesel v. Jardine Min. Co.*, 100 P.2d 75, 110 Mont. 82, 127 A.L.R. 1093.

94. Mont.—*Vesel v. Jardine Min. Co.*, *supra*.

Injury not arising out of, or in course of, employment

An injury to employee's eye as result of negligent treatment thereof at first-aid station, operated by corporate employer some distance from its premises, by person in charge of such station, did not arise out of, and in course of his employment, within compensation act, which therefore did not bar such employee's recovery of damages from employer in common-law action, although injury necessitating treatment occurred in course of employment.

Mont.—*Vesel v. Jardine Min. Co.*, *supra*.

95. Ky.—*Black Mountain Corporation v. Middleton*, 49 S.W.2d 318, 243 Ky. 527.

96. Okl.—*Markley v. White*, 32 P.2d 716, 168 Okl. 244.

97. U.S.—*Boal v. Electric Storage Battery Co.*, C.C.A.Pa., 98 F.2d 815.

Minn.—*Foley v. Western Alloyed Steel Casting Co.*, 18 N.W.2d 541, 219 Minn. 571.

Or.—*Bigby v. Pelican Bay Lumber Co.*, 147 P.2d 199, 173 Or. 682.

Pa.—*Simon v. Allegheny-Pittsburgh Coal Co.*, 34 Pa.Dist. & Co. 648, 87 Pittsb.Leg.J. 41.

S.C.—*Corpus juris quoted in Stewart v. McLellan's Stores Co.*, 9 S.E.2d 85, 37, 194 S.C. 50.

Va.—*Corpus Juris cited in Griffith v.*

Raven Red Ash Coal Co., 20 S.E. 2d 530, 534, 179 Va. 790.

71 C.J. p 1482 note 52.

"The Workmen's Compensation Act is exclusive in so far as it covers the field of industrial accidents, but no further. To the extent that the field is not touched by statute, we think that the legislature intended that the employee's common-law remedies against an employer are to be preserved unimpaired."

Va.—*Griffith v. Raven Red Ash Coal Co.*, 20 S.E.2d 530, 534, 179 Va. 790.

"The statute is a substitute for the common law on the subject which it covers and so far as it goes. But it does not affect rights and wrongs not within its purview or which by implication or express negation are excluded."

Minn.—*Rosenfield v. Matthews*, 275 N.W. 698, 699, 201 Minn. 113—

Donnelly v. Minneapolis Mfg. Co., 201 N.W. 305, 306, 161 Minn. 240.

Claim subject to elective provisions

Damage claimed by an employee against employer arising out of a New Jersey employment is within exclusive original jurisdiction of New Jersey commissioner of labor, under compensation act, only if claim is in fact, as well as in law, such a claim for compensation as is subject to elective provisions of act. U.S.—*Ivanick v. Wright Aeronautical Corp.*, D.C.N.J., 68 F.Supp. 270.

98. U.S.—*Canon v. U. S.*, D.C.Cal., 111 F.Supp. 162.

Ill.—*Mueller v. Elm Park Hotel Co.*, 63 N.E.2d 365, 391 Ill. 391.

Minn.—*Foley v. Western Alloyed Steel Casting Co.*, 18 N.W.2d 541, 219 Minn. 571.

N.J.—*Estelle v. Board of Ed. of Borough of Red Bank*, 97 A.2d 1, 26

N.J.Super. 9, modified on other grounds 102 A.2d 44, 14 N.J. 256.

"The court will not extend operation of the defensive provisions of the Workmen's Compensation Act to bar actions to recover for liabilities which, although they may be in some indirect way connected with an employer-employee relationship, do not arise out of, or depend upon it, and are not expressly included within the terms of the statute."

Cal.—*Duprey v. Shane*, 249 P.2d 8, 16, 39 C.2d 781.

Wrong or contractual obligation

Where an employee's cause of action against his employer is predicated on some wrong or contractual obligation, compensation and satisfaction for which is not furnished by compensation act, employee may maintain a common-law action against his employer.

Ohio.—*Bevis v. Armco Steel Corp.*, App., 93 N.E.2d 33, appeal dismissed 91 N.E.2d 479, 153 Ohio St. 366, certiorari denied 71 S.Ct. 37, 340 U.S. 810, 95 L.Ed. 595, rehearing denied 71 S.Ct. 192, 340 U.S. 885, 95 L.Ed. 682.

Slander

Fact that matters complained of by employees in slander action against department store arose out of, and in course of, their employment could not justify transfer to compensation commission, since compensation statute does not include slander or damage to character as a basis for compensation to employees.

Ark.—*Braman v. Walthall*, 225 S.W. 2d 342, 215 Ark. 582.

False representations

Injured employee's remedy, if any, for employer's insurance carrier's

The mere fact that employer and employee are subject to the act does not deprive them of their common-law remedies if conditions in the case place it outside the scope of the act,⁹⁹ as, for example, where the injury suffered was not caused by an accident, as discussed infra § 923, or did not result in disability.¹ So, it may be provided by statute that in all cases where the conditions of compensation do not concur, the liability of the employer is the same as though the provisions with respect to compensation had not been enacted.²

§ 920. — Employments Not within Act

Remedies other than those provided by the compensation act are available to an employee injured in an employment outside the scope of the act.

false representations, inducing election to accept payment of damages by one other than employer, is not within compass of compensation law. Mich.—Tews v. C. F. Hanks Coal Co., 255 N.W. 227, 267 Mich. 466.

99. Ill.—Foreman Bros. Banking Co. v. Kelly-Atkinson Const. Co., 213 Ill.App. 356.

S.C.—Corpus Juris quoted in Stewart v. McLellan's Stores Co., 9 S.E.2d 35, 37, 194 S.C. 50.

Medical expenses of volunteer fireman

A volunteer fireman who has been injured in course of his duties as such, and who has been reimbursed under provisions of compensation act for medical expenses incurred during first thirty days after injury, is entitled to maintain an action in assumpsit against borough, under another statute, for similar expenses incurred after expiration of thirty-day period.

Pa.—Stanger v. Borough of West View, 33 Pa.Dist. & Co. 247, 86 Pittsb.Leg.J. 418, 30 Mun.L.R. 1.

1. S.C.—Corpus Juris quoted in Stewart v. McLellan's Stores Co., 9 S.E.2d 35, 37, 194 S.C. 50. 71 C.J. p 1483 note 55.

2. Cal.—Liberty Mut. Ins. Co. v. Superior Court in and for Los Angeles County, 145 P.2d 344, 62 C.A. 2d 601.

3. N.H.—Davis v. W. T. Grant Co., 2 A.2d 448, 89 N.H. 520.

W.Va.—Pritt v. West Virginia Northern R. Co., 51 S.E.2d 105, 32 W.Va. 184, 6 A.L.R.2d 562, certiorari denied West Virginia Northern R. Co. v. Pritt, 69 S.Ct. 891, 336 U.S. 961, 93 L.Ed. 1113.

Employments within act see supra §§ 27-36.

Intrastate or interstate employment

(1) Compensation laws are intended to cover intrastate employment.

only, and either employment in intrastate activity must be shown to be clearly separable from interstate employment and therefore within compensation law, or that employee was employed in interstate commerce, in which event he would not be entitled to benefits from state fund, but must look to common law or to Federal Employers' Liability Act for relief, in event of injury.

W.Va.—Pritt v. West Virginia Northern R. Co., 51 S.E.2d 105, 32 W.Va. 184, 6 A.L.R.2d 562, certiorari denied West Virginia Northern R. Co. v. Pritt, 69 S.Ct. 891, 336 U.S. 961, 93 L.Ed. 1113.

(2) Operation of state compensation acts in intrastate or interstate commerce generally see Commerce § 78 e (4) (c).

4. Wash.—Parker v. Pantages Theater Co., 254 P. 1083, 143 Wash. 176.

Determination of hazardous character

In a common-law action for damages by an employee against employer for injuries sustained in course of employment, court is not bound by description of employment, but looks further to particular nature of work which employee was doing to determine whether his work was in fact extrahazardous or incidental to operation of an extrahazardous enterprise within compensation act.

Md.—Cox v. Sandler's Inc., 120 A.2d 674, 209 Md. 193.

Securing compensation for non-hazardous occupation

An employer claiming that he has secured compensation to employees not engaged in hazardous occupation and that injured employee's sole remedy is under compensation law must prove that he has become subject to provisions of such act; to defeat administratrix' recovery of damages for farm laborer's death

Where the compensation act, by its terms, applies only to employments of a particular kind or for a restricted purpose, common-law or statutory remedies are available to an employee injured in an employment outside the scope of the act,³ as, for example, in an employment not classified as hazardous,⁴ or in a trade, business, or occupation not carried on by the employer for pecuniary gain,⁵ or in a business other than loading or unloading in connection with carriage by land and water.⁶ Likewise, a suit for damages may be brought where the employment is casual and not in the usual course of the employer's business.⁷

Where the compensation act provides that it shall not apply to railroad employees engaged in "train

from his employer on ground that her exclusive remedy is under compensation law, defendant must show that notices that he had obtained policy securing payment of compensation thereunder to his employees were posted in his place of business. N.Y.—De Antonis v. Catalano, 9 N.Y. S.2d 438, 256 App.Div. 10.

Occupation of caddy at a golf club is not a hazardous employment within purview of compensation law so as to make recourse to compensation law caddy's exclusive remedy for injuries sustained in course of such employment.

N.Y.—Murphy v. Elmwood Country Club, 50 N.Y.S.2d 331.

5. N.Y.—Merriam v. Brooks, 196 N.Y.S. 257, 203 App.Div. 52.

Flood control dam

(1) Under compensation act provision excluding coverage of agricultural pursuits and employment not carried on by employer for sake of pecuniary gain, a private person constructing a flood control dam merely for good of public generally, and not for profit, is excluded from definition of an "employer," and is not exempt from an employee's common-law action for damages.

U.S.—Kirk v. U. S., C.A.Idaho, 232 F.2d 763.

(2) So, United States, which was interested in constructing a flood control dam on government property and which had let contract for this purpose, was not an employer of a contractor's injured employee, and was not exempted from suit, under Tort Claims Act, by Idaho statute exempting employers from common-law actions.

U.S.—Kirk v. U. S., supra.

6. Ill.—Bastle v. Chicago, R. I. & P. Ry. Co., 205 Ill.App. 293.

7. Colo.—Heckman v. Warren, 238 P.2d 854, 124 Colo. 497.

Pa.—Jabour v. Max, Com.Pl., 30 North.Co. 396.

service," the quoted phrase was not intended by the legislature to include involved relationships of railroad employees, or to apply to the general business of the railroad, but to be limited to employees engaged in the movement of trains.⁸

Where the employment is partly within and partly without the scope of the compensation act, and the act, or an amendment thereof, further provides that "to the extent that the payroll of such workman may and shall be clearly separable and distinguishable," the part of the employment within the act shall be separated from the part without, the employee is entitled to his common-law remedies if his injuries were received while engaged in the part of the employment outside the act.⁹

§ 921. — Employers Not within Act

An employer excluded from, or not included in, the compensation act is liable at common law for damages resulting from his own wrong.

8. Ind.—Chicago, M., St. P. & P. R. Co. v. Cox, 7 N.E.2d 1008, 103 Ind.App. 364.

Employee held not engaged in train service, so that he could not bring action under Employers' Liability Act for injuries sustained.

Ind.—Chicago, M., St. P. & P. R. Co. v. Cox, supra.

Engagement in interstate commerce not determinative

Whether railroad employee is engaged in interstate commerce within Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. is not determinative of whether he is engaged in train service within statutory exception to application of compensation act.

Ind.—Chicago, M., St. P. & P. R. Co. v. Cox, supra.

9. Wash.—McEachran v. Rothschild & Co., 241 P. 969, 135 Wash. 260. 71 C.J. p 1483 note 62.

10. S.C.—Cribbs v. Southern Coatings & Chemical Co., 62 S.E.2d 505, 218 S.C. 273.

71 C.J. p 1483 note 64.

Employers within act see supra §§ 37-58.

Failure to comply with act see infra § 932.

Employer of fewer than specified number of employees

Mich.—Vlaene v. Mikel, 34 N.W.2d 765, 349 Mich. 533.

A city was not relieved from its common-law liability for injuries of its employee by reason of insurance policy, which it carried, in form similar to that ordinarily issued to subscribers under compensation act, but based on assumption that city could not become a subscriber, and containing an indorsement by which insurer agreed to voluntarily pay compensation regardless of whether

or not employee would have a legal claim under compensation act against city.

Tex.—Great American Indemnity Co. v. Blakey, Civ.App., 107 S.W.2d 1002, error dismissed.

11. Ill.—Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission, 122 N.E. 366, 287 Ill. 113.

12. Cal.—Devens v. Goldberg, 199 P. 2d 943, 33 C.2d 173.

Minn.—Ryan v. Twin City Wholesale Grocer Co., 297 N.W. 705, 210 Minn. 21.

Pa.—Snyder v. I. Unterberg & Co., Com.Pl., 57 York Leg.Rec. 92.

Employees within act see supra §§ 59-119.

Persons not employees see supra § 917.

Effect of acceptance of act

The acceptance of the compensation act by an employer does not relieve him of liability in actions at common law by employees not covered by the act.

N.H.—Davis v. W. T. Grant Co., 2 A. 2d 448, 89 N.H. 520.

Employee of independent contractor or subcontractor

(1) An employee of independent contractor or subcontractor performing work which is merely incidental to, and no part of or process in, the trade or business conducted by principal is not covered by compensation insurance of principal and can recover damages from principal in common-law action for injuries caused by negligence of principal or his employees.

Mass.—Dubois v. Soule Mill, 82 N.E. 2d 886, 323 Mass. 472.

(2) Where manufacturer employed independent contractor to do excava-

An employer who is excluded from, or not included within, the compensation act is liable at common law for damages resulting from his own wrong,¹⁰ as in the case of employers of minors in violation of the child labor law of the state, as discussed infra § 930. Exclusion from the enumeration of employers subject to the act contained in one section thereof does not so operate where another section provides for the right of employers generally to accept the act and defendant has accepted by operating thereunder.¹¹

§ 922. — Employees and Persons Injured Not within Act

An employee not subject to, or not covered by, the compensation act retains the right to sue his employer for negligence.

Employees and servants who are not subject to, or are not covered by, the compensation act,¹² as

tion work required in construction for manufacturer of plant facility to be used in manufacturer's business, excavation work was not a "part of employer's regular business" and independent contractor was not a "contractor," within compensation act, so as to make manufacturer liable as a statutory employer for injuries sustained by contractor's employee, while engaged in work on manufacturer's premises for contractor; hence employee was not barred from bringing a common-law action against manufacturer for his injuries.

Pa.—Allen v. Babcock & Wilcox Tube Co., 52 A.2d 314, 356 Pa. 414.

(3) Suit against statutory employer or third person liable for injury see infra § 935 d.

Waitress

Okl.—McAlester Corp. v. Wheeler, 239 P.2d 409, 205 Okl. 446.

Master or member of crew

(1) Employees held members of crew, so as to be entitled to sue employers under Jones Act, 46 U.S.C.A. § 688, and not relegated to recovery under Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq.

U.S.—Wilkes v. Mississippi River Sand & Gravel Co., C.A.Tenn., 202 F.2d 883, certiorari denied Mississippi River Sand & Gravel Co. v. Wilkes, 74 S.Ct. 28, 346 U.S. 817, 98 L.Ed. 344.

Early v. American Dredging Co., D.C.Pa., 101 F.Supp. 893.

(2) Operator in charge of a tug who, at the time he was injured, was actively engaged as master in navigating the tug and was primarily on board to aid in navigation was a "master" excluded from the cover-

where they are entitled to elect to be bound by its provisions and have not done so,¹³ or because they have been expressly excepted from its operation,¹⁴ as in the case of domestic servants¹⁵ and farm laborers,¹⁶ still retain the right to sue the employer in a common-law or statutory action for personal injuries occasioned by his negligence. However, one excepted from the act may bring himself within the act by a joint election of employer and employees under another section of the act providing

therefor, and thereby cut off his right to sue at law.¹⁷

§ 923. — Injuries Not within Act

An employee's remedy against his employer for an injury not within the compensation act is not affected by the act.

Where an injury does not fall within the workmen's compensation act, the common-law remedy of an employee against his employer, or the remedy under some other statute, is not affected by it.¹⁸

age of the compensation act, and was entitled to maintain an action under the Jones Act for injuries.

Cal.—Sanguinetti v. Moore Dry Dock Co., 228 P.2d 557, 36 C.2d 812.

(3) Sole employee permanently attached to barge, primarily for purpose of maintaining it in seaworthy condition, keeping it from sinking or being injured, and performing all necessary duties incident to navigation, was a "master or member of crew" of a vessel excluded from coverage under Longshoremen's Compensation Act, and a "seaman" entitled to maintain action under Jones Act and general maritime law for injuries sustained in course of employment, although he did not sleep aboard barge and supervised loading and discharging of cargo for the purpose of seeing that it was correct and properly stowed so that it would not shift.

N.Y.—Bryer v. Erie R. Co., 145 N.Y.S.2d 847, 1 Misc.2d 422.

(4) Other employee held member of crew and therefore not required to proceed under the compensation act.

U.S.—Malloy v. Great Lakes Dredge & Dock Co., D.C.Ill., 43 F.Supp. 885.

Brakeman injured on navigable waters

Where plaintiff was employed by railroad as a brakeman and ninety per cent of his work was on land and the other ten per cent aboard a car float in navigable waters, he was entitled to the benefits of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. notwithstanding his injuries were sustained on navigable waters, and he was not required to proceed under the Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq. 33 U.S.C.A. § 901 et seq.

U.S.—Zientek v. Reading Co., D.C.Pa., 93 F.Supp. 875.

13. Neb.—Herrmann v. Franklin Ice Cream Co., 208 N.W. 141, 114 Neb. 468.

14. U.S.—Panama R. Co. v. Minnix, C.C.A.Can. Zone, 282 F. 47.

71 C.J. p 1483 note 69.

15. Utah.—Murray v. Strike, 287 P. 922, 76 Utah 118.

16. Ga.—Hamilton Turpentine Co. v. Johnson, 92 S.E.2d 235, 93 Ga.App. 544.

Minn.—Palmer v. Wiltse, 57 N.W.2d 812, 239 Minn. 130.

71 C.J. p 1483 note 71.

Payment under policy

If employee lost use of her hand for industrial purposes and, although engaged in agriculture, was entitled to damages in addition to those already paid by insurance carrier under "voluntary" policy which insurance carrier issued to employers covering injuries to employees notwithstanding they were engaged in domestic service or agriculture, employee was required to seek recovery under the policy, and could not file claim under compensation act.

Pa.—Rosenberry v. Gillan Bros., 197 A. 523, 130 Pa.Super. 469.

17. N.Y.—Caldana v. Buezenburg, 200 N.Y.S. 468, 206 App.Div. 183.

18. U.S.—Kane v. Federal Match Corporation, D.C.Pa., 5 F.Supp. 507.

Ala.—Gentry v. Swann Chemical Co., 174 So. 530, 234 Ala. 813.

Ga.—Corpus Juris cited in Covington v. Berkeley Granite Corp., 184 S.E. 371, 872, 182 Ga. 235, answer conformed to 185 S.E. 386, 53 Ga. App. 269.

Ky.—Powers v. Middlesboro Hospital, 79 S.W.2d 391, 258 Ky. 20.

Mass.—Levin v. Twin Tanners, 60 N.E.2d 6, 318 Mass. 13.

Minn.—Corpus Juris quoted in Rosenfield v. Matthews, 275 N.W. 698, 699, 201 Minn. 113.

N.M.—Olguin v. Thygesen, 143 P.2d 585, 47 N.M. 377.

N.Y.—De Coigne v. Ludlum Steel Co., 297 N.Y.S. 636, 251 App.Div. 662.

Schwartz v. Queensboro Farm Products, 78 N.Y.S.2d 863, 191 Misc. 778.

Quinn v. S. A. Healy Co., 140 N.Y.S.2d 925—Schler v. James McCreery & Co., 10 N.Y.S.2d 724, reversed on other grounds 13 N.Y.S.2d 546.

Ohio.—Morris v. City of Cleveland, App., 64 N.E.2d 134, appeal dismissed 64 N.E.2d 422, 146 Ohio St. 186.

Pa.—Evinchuk v. Pyne-Taylor Co., 51 Pa.Dist. & Co. 163, 45 Lack.Jur. 49.

Va.—Griffith v. Raven Red Ash Coal Co., 20 S.E.2d 530, 179 Va. 790.

Injuries within act see supra §§ 152-265.

"The Workmen's Compensation Law fails to make provision for all injuries. There are a number that are not compensable. Where an employee suffers an injury that is not covered by the act, he may have his action at law for damages."

Tenn.—Hammett v. Vogue, Inc., 165 S.W.2d 577, 580, 179 Tenn. 284.

"Where the injury or the circumstances of its occurrence do not come within the embrace of terms of the act, the compensation legislation does not constitute a bar to a common-law suit for compensatory damages."

N.J.—Imre v. Riegal Paper Corp., 128 A.2d 498, 501, 43 N.J.Super. 289, reversed on other grounds 132 A.2d 505, 24 N.J. 438.

Enforcement of rights under general law of torts

Where employee's claim against employer is not within compensation law, employee may enforce his rights under the general law of torts.

La.—Clark v. Southern Kraft Corp., App., 200 So. 489.

Exclusive remedy of an employee for injuries sustained when he is not covered by compensation act is an action at law to recover damages for negligence or breach of statutory duty.

Minn.—Hardware Mut. Cas. Co. v. Ozmun, 14 N.W.2d 351, 217 Minn. 280.

Services not compensable under act

If an employee is injured in performance of services which are not compensable under the compensation act, he may maintain an action for the tort independently of the act.

Cal.—Jackson v. Pacific Gas & Elec. Co., 212 P.2d 591, 95 C.A.2d 204.

Effect of failure to reserve common-law rights

Under compensation act, employee has duty to give notice in writing to employer that he reserves his right of action at common law in accordance with statute, but if injury is not of a compensable class, under statute, and employee can show a breach of duty, he may re-

This is true in the case of injuries sustained by an employee while not in the performance of his duties,¹⁹ or not acting within the scope of his employment,²⁰ or in the case of injuries not arising out of, or in the course of, his employment,²¹ or not incidental thereto,²² or not connected therewith,²³ or not arising out of a risk or condition incident to the employment,²⁴ or a risk greater than that to

which the general public was subjected,²⁵ or not arising out of a hazard of the employment,²⁶ or not within the reasonable contemplation of the employment.²⁷

Where the act includes only injuries resulting from accident, the rule also applies in case of injuries not caused by an accident,²⁸ or injuries in-

cover from employer at common law, notwithstanding his omission to reserve his common-law rights.

Mass.—Pell v. New Bedford Gas & Edison Light Co., 90 N.E.2d 555, 325 Mass. 239—Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565.

Safe place to work; safe equipment

Employee who suffered a lung abscess requiring removal of lung, by reason of his inhaling large quantities of dust created by removal of plaster, under circumstances excluding applicability of compensation act, was not limited to recovery against employer under the occupational disease statutes, but could maintain action for violation of duty to exercise ordinary care to furnish him reasonably safe place in which to work and reasonably safe equipment and appliances.

Mo.—McDaniel v. Kerr, 258 S.W.2d 629, 364 Mo. 1.

Fireman injured while passenger on streetcar

Cal.—Sullivan v. City and County of San Francisco, 214 P.2d 82, 95 C.A. 2d 745.

19. U.S.—Canon v. U. S., D.C. Cal., 111 F.Supp. 162.

Cal.—Weddle v. Loges, 125 P.2d 914, 52 C.A.2d 115.

N.M.—Olguin v. Thygesen, 143 P.2d 585, 47 N.M. 377.

Changing clothes to enter mine

Trespass is the proper remedy for recovery of damages by an employee injured by the collapse of a bench in a wash shanty while changing his clothes to go into a mine to begin his daily work, because, being a mere licensee and not acting in the furtherance of his employer's interests at the time, he is not an employee within the meaning of the compensation act, and therefore not entitled to its benefits.

Pa.—Evinchuk v. Pyne-Taylor Co., 51 Pa. Dist. & Co. 163, 45 Lack. Jur. 49.

Employee getting pay checks

Cal.—Robbins v. Yellow Cab Co., 193 P.2d 956, 85 C.A.2d 811.

20. La.—Moss v. St. Paul-Mercury Indem. Co., App., 35 So.2d 867.

Mass.—Levin v. Twin Tanners, 60 N. E.2d 6, 318 Mass. 13.

Ohio.—Morris v. City of Cleveland, App., 84 N.E.2d 134, appeal dis-

missed 64 N.E.2d 422, 146 Ohio St. 186.

Employee given ride as accommodation

N.Y.—Callahan v. State, 107 N.Y.S. 2d 319, 201 Misc. 378.

21. U.S.—Johnson v. Bederman, C.C. A.III., 149 F.2d 515.

Cal.—Robbins v. Yellow Cab Co., 193 P.2d 956, 85 C.A.2d 811.

La.—Moss v. St. Paul-Mercury Indem. Co., App., 35 So.2d 867—Thomas v. Shippers' Compress & Warehouse Co., App., 158 So. 859.

Mass.—Levin v. Twin Tanners, 60 N. E.2d 6, 318 Mass. 13.

Minn.—Yeager v. Chapman, 45 N.W. 2d 776, 233 Minn. 1, 22 A.L.R.2d 1260.

N.Y.—Volk v. City of New York, 30 N.E.2d 596, 284 N.Y. 279.

Paris v. Langston, 138 N.Y.S.2d 178, 285 App.Div. 483.

Callahan v. State, 107 N.Y.S.2d 319, 201 Misc. 378—Jones v. Herbert Equities, 60 N.Y.S.2d 88, 186 Misc. 163, affirmed 62 N.Y.S.2d 612, 270 App.Div. 922.

Ohio.—Morris v. City of Cleveland, App., 64 N.E.2d 134, appeal dismissed 64 N.E.2d 422, 146 Ohio St. 186—Tipple v. High Street Hotel Co., 41 N.E.2d 879, 70 Ohio App. 397.

Okl.—Lyday v. Holloway, 293 P.2d 348.

Va.—Griffith v. Raven Red Ash Coal Co., 20 S.E.2d 530, 179 Va. 790.

Wash.—Waddams v. Wright, 152 P. 2d 611, 21 Wash.2d 603.

Injuries arising out of, or in course of, employment generally see supra §§ 208-257.

Particular facts of case

In determining whether employee's injury was received in course of his employment under compensation law so as to preclude maintenance of common-law action for such injury, each case must be determined by particular facts.

U.S.—Johnson v. Bederman, C.C.A. Ill., 149 F.2d 515.

Occupational or industrial disease

(1) An employee who was injured by contracting an occupational or industrial disease which injury arose gradually from the character of the work in which he was engaged was not injured by an accident arising out of and in course of his employment, within the meaning of the

compensation act, as to preclude his common-law action against the employer for injuries sustained.

Ga.—Peerless Woolen Mills v. Pharr, 40 S.E.2d 106, 74 Ga.App. 459.

(2) Diseases not within act see infra § 924.

22. Cal.—Robbins v. Yellow Cab Co., 193 P.2d 956, 85 C.A.2d 811.

La.—Thomas v. Shippers' Compress & Warehouse Co., App., 158 So. 859.

Wash.—Waddams v. Wright, 152 P. 2d 611, 21 Wash.2d 603.

23. Wash.—Waddams v. Wright, supra.

Causal connection

La.—Thomas v. Shippers' Compress & Warehouse Co., App., 158 So. 859.

Proximate cause

Cal.—Robbins v. Yellow Cab Co., 193 P.2d 956, 85 C.A.2d 811.

24. U.S.—Johnson v. Bederman, C. C.A.III., 149 F.2d 515.

Cal.—Carter v. Superior Court In and For Los Angeles County, 298 P.2d 598, 142 C.A.2d 350.

25. La.—Thomas v. Shippers' Compress & Warehouse Co., App., 158 So. 859.

Ohio.—Morris v. City of Cleveland, App., 64 N.E.2d 134, appeal dismissed 64 N.E.2d 422, 146 Ohio St. 186.

26. U.S.—Barnes v. Chrysler Corp., D.C.Ill., 65 F.Supp. 806.

Employee beaten by plant guards

U.S.—Barnes v. Chrysler Corp., supra.

27. Cal.—Garcia v. Yedor, 154 P.2d 1, 67 C.A.2d 367.

Accident caused by fellow employee on employer's premises

Fact that employee's accident was caused by a fellow employee upon employer's premises is not controlling on question of whether remedy under compensation law is exclusive, test being whether the particular act involving accident was reasonably contemplated by employment.

Cal.—Garcia v. Yedor, supra.

28. U.S.—Kane v. Federal Match Corporation, D.C.Pa., 5 F.Supp. 507.

Ga.—Berkeley Granite Corp. v. Covington, 190 S.E. 8, 183 Ga. 801—Covington v. Berkeley Granite Corp., 184 S.E. 871, 182 Ga. 235, answer conformed to 185 S.E. 886, 53 Ga.App. 269.

fllicted intentionally or willfully, as discussed *infra* § 926.

Where there is an injury within the act and associated injuries without the act, only a recovery under the act can be had,²⁹ as in case of temporary or permanent disability plus disfigurement not amounting to disability,³⁰ or not materially affecting employability;³¹ and, where both employer and employee are operating under the act, thereby barring any action for damages, an injury for which recovery might have been had at common law may be compensated for under the statute, even though the injury is one outside the act.³² Where, however, the parties are operating under the compensation act, and the employee's accidental injury arises out of, and in the course of, his employment, the fact that the particular injury is not made compensable by the act does not give the employee a right of

action against the employer at common law.³³

A compensation act does not affect an employee's right of action for independent injuries after an injury for which he is entitled to compensation under the act, although the award will include all matters arising out of the original injury.³⁴

§ 924. — Diseases Not within Act

An employee's remedy against his employer with respect to a disease not within the compensation act is not affected by the act.

Where the common-law action for disease is not covered by the workmen's compensation act, it is still retained by the employee;³⁵ and if the compensation statute does not furnish a remedy for occupational disease the court will presume that the legislature intended to preserve the common-law remedy.³⁶ So, a compensation act that provides

Mo.—McDaniel v. Kerr, 258 S.W.2d 629, 364 Mo. 1.

Rush v. Swift & Co., App., 268 S.W.2d 589.

N.Y.—Naud v. King Sewing Mach. Co., 164 N.Y.S. 200, 178 App.Div. 31, affirmed 119 N.E. 1061, 223 N.Y. 567.

Schwartz v. Queensboro Farm Products, 78 N.Y.S.2d 863, 191 Misc. 778.

S.C.—Corpus Juris quoted in Stewart v. McLellan's Stores Co., 9 S.E.2d 35, 37, 194 S.C. 50. Disease see *infra* § 924.

Mercurial poisoning is not an accident so as to be compensable under the industrial insurance act, but is an occupational disease, for which the common law provides a remedy. Nev.—Pershing Quicksilver Co. v. Thiers, 152 P.2d 432, 62 Nev. 382.

29. N.Y.—Morris v. Muldoon, 180 N.Y.S. 319, 190 App.Div. 689. 71 C.J. p 1484 note 81.

30. Minn.—Hyett v. Northwestern Hospital for Women and Children, 180 N.W. 552, 147 Minn. 413.

State and federal jurisdiction.

Where employee, while in Iowa, suffered accidental injuries arising out of, and in the course of, his employment and was receiving compensation under Iowa compensation act for temporary total disability, he could not maintain a common-law action in Kansas federal court, based on diversity of citizenship and required jurisdictional amount, to recover damages for disfigurement on the ground that such injury was not covered by Iowa statutes.

U.S.—Morgan v. Ray L. Smith & Son, D.C.Kan., 79 F.Supp. 971.

31. Minn.—Frank v. Anderson Bros., 51 N.W.2d 805, 236 Minn. 81, overruling Lloyd v. Minnesota Valley Canning Co., 28 N.W.2d 697, 224

Minn. 805—Breimhorst v. Beckman, 35 N.W.2d 719, 227 Minn. 409.

32. S.D.—Freese v. John Morrell & Co., 237 N.W. 886, 58 S.D. 634.

33. Ga.—Blue Bell Globe Mfg. Co. v. Baird, 13 S.E.2d 105, 64 Ga.App. 347.

34. Wash.—Ross v. Erickson Constr. Co., 155 P. 153, 89 Wash. 634, L.R.A.1916F 319.

35. Ohio.—Shoemaker v. Electric Auto-Lite Co., 41 N.E.2d 433, 69 Ohio App. 169.

Compensation for disease generally see *supra* §§ 163-169.

Occupational diseases act

Ill.—McGehee v. Geo. S. Mephram & Co., 279 Ill.App. 115.

Silicosis

An employee suffering from silicosis was entitled to maintain an action against employer for damages for negligence which proximately caused it, where silicosis was not then compensable.

Ohio.—Triff v. National Bronze & Aluminum Foundry Co., 20 N.E.2d 232, 135 Ohio St. 191, 121 A.L.R. 1131.

Amendment not retroactive

(1) The occupational disease amendment to the compensation act is not retroactive, in view of provision, existing before amendment and retained thereafter, that nothing in the entire chapter of the act should be construed to deprive employees of rights under laws pertaining to occupational diseases.

Mo.—Cleveland v. Laclède-Christy Clay Products Co., App., 113 S.W.2d 1065.

(2) If facts, when developed, showed that employee's alleged occupational disease occurred prior to date upon which both employee and employer accepted occupational dis-

ease amendment to compensation act, court had jurisdiction of action against employer for damages, and fact that damages would continue in the future would not divest the court of its jurisdiction to submit to jury question of damages, present and prospective.

Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061.

(3) Retroactive operation of statutes generally see *supra* § 21.

36. N.J.—Biglioli v. Durotest Corp., 129 A.2d 727, 44 N.J.Super. 93. Compensability of occupational diseases generally see *supra* § 169.

No contrary legislative intent

That legislature failed to include within industrial insurance act compensation for industrial diseases, because of opposition of industrialists of state, is not indicative of legislative intent to exclude a recovery by one suffering from such a disease by taking away common-law action for damages for injuries inflicted because of negligence of employer.

Nev.—Pershing Quicksilver Co. v. Thiers, 152 P.2d 432, 62 Nev. 382.

Effect of constitutional provision

The constitutional provision authorizing establishment of compensation fund and providing that compensation should be in lieu of all other rights to compensation or damages for death, injuries, or occupational disease did not deprive employee of right of action growing out of noncompensable occupational disease.

Ohio.—Triff v. National Bronze & Aluminum Foundry Co., 20 N.E.2d 232, 135 Ohio St. 191, 121 A.L.R. 1131, overruling Zajachuck v. Willard Storage Battery Co., 140 N.E. 405, 106 Ohio St. 538, and Mabley & Carew Co. v. Lee, 193 N.E. 745, 129 Ohio St. 69, 100 A.L.R. 511.

compensation only for injuries resulting from accident, or which excludes occupational disease from the operation of the act, does not bar an action for damages for occupational disease resulting from employer's negligence or breach of statutory duty,³⁷ nor does an act giving compensation for some occupational diseases bar the common-law remedy for other occupational diseases not listed.³⁸

Effect of statute

The statute providing that employers complying with compensation law should not be liable for injury or death of any employee did not deprive employee of right of action for employer's negligence directly resulting in a noncompensable occupational disease.

Ohio.—*Triff v. National Bronze & Aluminum Foundry Co.*, 20 N.E. 2d 232, 135 Ohio St. 191, 121 A.L.R. 1131, overruling *Zajachuck v. Willard Storage Battery Co.*, 140 N.E. 405, 106 Ohio St. 538, and *Mabley & Carew Co. v. Lee*, 193 N.E. 745, 129 Ohio St. 69, 100 A.L.R. 511.

37. U.S.—*Boal v. Electric Storage Battery Co.*, C.C.A.Pa., 98 F.2d 815. *Cason v. American Brake Shoe & Foundry Co.*, D.C.Colo., 32 F.Supp. 680—*Kane v. Federal Match Corporation*, D.C.Pa., 5 F.Supp. 507. Ga.—*Berkeley Granite Corp. v. Covington*, 190 S.E. 8, 183 Ga. 801—*Covington v. Berkeley Granite Corp.*, 184 S.E. 871, 182 Ga. 235, answer conformed to 185 S.E. 386, 53 Ga.App. 269.

Peerless Woolen Mills v. Pharr, 40 S.E.2d 106, 74 Ga.App. 459—*Martin v. Tubize-Chatillon Corp.*, 17 S.E.2d 915, 66 Ga.App. 481.

Mo.—*Rush v. Swift & Co.*, App., 268 S.W.2d 589—*Langeneckert v. St. Louis Sulphur & Chemical Co.*, App., 65 S.W.2d 648.

Okl.—*Dixon v. Gaso Pump & Burner Mfg. Co.*, 80 P.2d 678, 183 Okl. 249.

Pa.—*Brown v. Pittsburgh Clay Pot Co.*, Com.Pl., 86 Pittsb.Leg.J. 542.

Nev.—*Pershing Quicksilver Co. v. Thiers*, 152 P.2d 432, 62 Nev. 332. 71 C.J. p 1484 note 86.

"All the numerous provisions of the Workmen's Compensation Act apply only to cases arising from accidents, and occupational diseases do not so arise."

Pa.—*Billo v. Allegheny Steel Co.*, 195 A. 110, 113, 328 Pa. 97.

An employee's tuberculosis which was revived from a dormant condition because of dust and fumes of acids and chemicals inhaled by employee while working in employer's chemical plant was not the result of a compensable accident so as to preclude employee from maintaining a common-law action therefor.

N.J.—*Dalley v. Mutual Chemical Co. of America*, 19 A.2d 778, 126 N.J. Law 426.

In Indiana

(1) Employer could not bring employee within provisions of occupa-

tional diseases act which deprive him of any cause of action he may have had before its passage and exclude him from provisions which give him a remedy for wrong he has suffered; provision in occupational diseases act against liability of employer for compensation other than for compensation therein provided has no application to an employee excluded from operation of act.

Ind.—*Dalton Foundries v. Jefferies*, 51 N.E.2d 13, 114 Ind.App. 271, followed in *Dalton Foundries v. Dean*, 51 N.E.2d 397, 114 Ind.App. 289.

(2) Silicosis, the last exposure to which has been less than sixty days after June 7, 1937, is a noncompensable occupational disease under occupational diseases act, and employee suffering therefrom has right to an action at law for negligence of employer proximately causing such disease.

Ind.—*Dalton Foundries v. Jefferies*, 51 N.E.2d 13, 114 Ind.App. 271, followed in *Dalton Foundries v. Dean*, 51 N.E.2d 397, 114 Ind.App. 289.

(3) Where occupational disease was proximate cause of death of printer, deceased's widow was entitled to maintain action under employers' liability act as against contention that her remedy was confined to compensation act.

Ind.—*General Printing Corporation v. Umback*, 195 N.E. 281, 100 Ind. App. 285.

38. N.J.—*Downing v. Oxweld Acetylene Co.*, 169 A. 709, 112 N.J.Law 25, affirmed, 174 A. 900, 113 N.J. Law 399.

N.Y.—*Schwartz v. Queensboro Farm Products*, 78 N.Y.S.2d 863, 191 Misc. 778.

Ohio.—*Shoemaker v. Electric Auto-Lite Co.*, 41 N.E.2d 433, 69 Ohio App. 169.

71 C.J. p 1484 note 87.

Termination of employment before enactment of statute

Employee's action for injuries allegedly sustained through employer's violation of statute requiring adequate provision for removal of dust and other impurities from workrooms held not barred by provisions of compensation law relating to diseases suffered by employee, where employment had ended prior to enactment of provisions extending law to such diseases.

U.S.—*Michalek v. U. S. Gypsum Co.*, D.C.N.Y., 16 F.Supp. 708.

Diseases in occupations not described in act

Under occupational diseases law,

employee is left to common-law remedies for occupational diseases in occupations not described in the act.

Ill.—*Hillside Fluor Spar Mines v. Hartford Acc. & Indem. Co.*, 21 N.E.2d 912, 301 Ill.App. 597.

Disease as accidental personal injury
Compensation law does not apply to other diseases than occupational diseases enumerated therein unless disease is accidental personal injury within statute.

N.Y.—*Barrencotto v. Cocker Saw Co.*, 194 N.E. 61, 266 N.Y. 139.

Skin cancer

Where skin cancer resulting from overexposure to X-ray was not compensable under compensation act covering other occupational diseases, city hospital X-ray technician suffering from such condition could maintain suit at law against city for failure to provide safe place to work.

N.J.—*Kress v. City of Newark*, 86 A. 2d 185, 8 N.J. 562.

Silicosis

(1) Employee may bring action at law against employer for damages resulting from occupational disease, such as silicosis, for which compensation law imposes no liability on employer to provide compensation.

N.Y.—*Barrencotto v. Cocker Saw Co.*, 194 N.E. 61, 266 N.Y. 139.

(2) Prior to time when compensation law made provision with respect to silicosis contracted in the course of employment, that law was not a bar to an action for damages by an employee who had contracted the disease due to employer's fault.

N.Y.—*Cope v. General Elec. Co.*, 101 N.Y.S.2d 46, affirmed 111 N.Y.S. 2d 16, 279 App.Div. 886, affirmed *Cifolo v. General Elec. Co.*, 112 N.E.2d 197, 305 N.Y. 209, certiorari denied 79 S.Ct. 124, 346 U.S. 874, 98 L.Ed. 382.

(3) Amendment making silicosis a compensable disease does not bar a common-law right of action which became vested before effective date of the amendment.

N.Y.—*Schwartz v. Queensboro Farm Products*, 78 N.Y.S.2d 863, 191 Misc. 778.

(4) The New York workmen's compensation law does not bar the common-law remedy for injury from silicosis where the last injurious exposure occurred prior to Sept. 1, 1935.

U.S.—*Mapes v. Massey-Harris Co.*, D.C.N.Y., 19 F.Supp. 667.

(5) In action against employer by employee for damages for silicosis,

However, it has been held that, since an employee had no right of action at common law against an employer for injury or death due to an occupational disease,³⁹ the failure of a compensation act to constitute an occupational disease a compensable injury does not take away any right of action.⁴⁰ A disability developing in little more than a week where the employee is without knowledge of the character of the element or force by which he is disabled is not an occupational disease outside the scope of the compensation act entitling him to recover damages outside the act.⁴¹

A disease, or impaired physical condition, which is not occupational in character and is therefore not within occupational disease provisions of the compensation statute may be the subject of an action for damages.⁴² With respect to a disease which is not occupational in character, it has been held that before the employee may be relegated to the compensation act for his exclusive remedy, if any, it must appear that the disease resulted from an accidental injury arising out of, and in the course of, his employment.⁴³

court would grant employee's motion to strike defense that compensation law was exclusive remedy, where employee's employment terminated prior to May, 1935, since employments terminating before such date are not within purview of provision of compensation act dealing with silicosis.

N.Y.—Gribsch v. B. T. Babbitt, Inc., 298 N.Y.S. 848, 164 Misc. 7, affirmed 2 N.Y.S.2d 848, 254 App.Div. 601.

(6) Employee who did not suffer any disability interfering with performance of his duties because of silicosis allegedly contracted through employer's neglect to provide proper safeguards, and who was discharged one month after enactment of statute authorizing compensation for occupational diseases resulting in disability or death, was not covered by compensation law, and hence was not precluded from maintaining common-law action for injuries to person based on negligence of employer.

N.Y.—Mutolo v. Utica General Jobbing Foundry, 292 N.Y.S. 14, 161 Misc. 327.

(7) Even though compensation for partial disability due to silicosis or other dust diseases was excluded by 1936 amendment to compensation act, employees could not recover in an action at law for partial disability caused by silicosis contracted after Sept. 1, 1935.

N.Y.—Cope v. General Elec. Co., 101 N.Y.S.2d 46, affirmed 111 N.Y.S.2d 16, 279 App.Div. 886, affirmed Cifolo v. General Elec. Co., 112 N.E.2d 197, 305 N.Y. 209, certiorari denied 74 S.Ct. 124, 846 U.S. 874, 98 L.Ed. 382.

(8) Compensation law providing that compensation is payable for total disability due to silicosis, but not for partial disability due to that disease, deprives employee of common-law right of damages for partial disability due to silicosis arising in the course of employment as a result of negligence of the employer, in absence of allegation that employer has failed to secure the payment of compensation.

N.Y.—Soraci v. Colonial Sand & Stone Co., 79 N.Y.S.2d 698, 191 Misc. 1056, affirmed, 94 N.Y.S.2d 820, 276 App.Div. 895, appeal denied 97 N.Y.S.2d 541, 277 App.Div. 769—Del Busto v. E. I. Dupont de Nemours & Co., 5 N.Y.S.2d 174, 167 Misc. 920, motion denied 20 N.Y.S.2d 1019, affirmed 21 N.Y.S.2d 417, 259 App.Div. 1070, appeal denied 23 N.Y.S.2d 194, 260 App.Div. 842. Granchelli v. Ridge Const. Co., 52 N.Y.S.2d 344.

(9) Failure to secure payment of compensation generally see *infra* § 933.

39. Mich.—Thomas v. Parker Rust Proof Co., 279 N.W. 504, 284 Mich. 260.

§ 925. — Failure to Comply with Lawful Requirements

Where the facts bring the case within the compensation act, the fact that the employer may have violated statutory requirements may not prevent an action against him by the employee from being barred by the act.

The alleged violation of municipal or statutory regulations, even though their violation constitutes a criminal offense, cannot be made the basis of an action for damages against an employer who has complied with the compensation act where such regulations are inapplicable to the facts of the case.⁴⁴ Under a constitutional provision permitting compensation legislation taking away all rights of action or defenses from employees and employers, but providing that no right of action should be taken away from any employee when injury arose from failure of the employer to comply with any lawful requirement for protection of the lives, health, and safety of employees, a compensation law which makes safety requirements of so uncertain and indefinite a nature as to furnish no standard to guide the employer as to his duties cannot be made the basis of an action brought by the employee to re-

40. Mich.—Thomas v. Parker Rust Proof Co., *supra*.

Failure to provide preventative means and measures

A common-law action could not be maintained against an employer operating under the compensation act for death of an employee allegedly resulting from the employer's negligence in failing to provide preventative means and measures which would have saved the employee from death resulting from silicosis.

Mich.—Thomas v. Parker Rust Proof Co., *supra*.

41. U.S.—Sullivan Mining Co. v. Aschenbach, C.C.A.Idaho, 33 F.2d 1, certiorari denied 50 S.Ct. 35, 280 U.S. 586, 74 L.Ed. 635.

42. N.Y.—Converse v. State, 55 N.Y. S.2d 922, 185 Misc. 162.

43. Mo.—Row v. Cape Girardeau Foundry Co., App., 141 S.W.2d 113.

Cumulative effect

Where disease was alleged to have resulted progressively from cumulative effect of conditions to which employee was subjected at all times during employment, and whole of employment under such conditions weakened his health so as to have made him susceptible to disease which he finally contracted, there was no accidental injury within meaning of compensation law.

Mo.—Row v. Cape Girardeau Foundry Co., *supra*.

44. Minn.—Gibbons v. Gooding, 196 N.W. 256, 153 Minn. 225.

cover damages,⁴⁵ even though the prescribed standard had been accepted and acted on for a long period of years;⁴⁶ but also it has been stated by the same authority in more recent decisions that any requirement stated in general terms will be regarded as definite, if the knowledge of details necessary to make it definite and certain may fairly be imputed to the employer, and as authorizing a suit against him for damages by an injured employee,⁴⁷ but not by an employee suffering from an occupational disease.⁴⁸

The general obligation of care and caution resting on employers and employees to protect life⁴⁹ and the common-law duty of an employer to warn an employee of obvious dangers in the operation of dangerous machinery⁵⁰ are not lawful requirements, within the meaning of the statute, the violation of which will give a right of action for damages against an employer complying with the act; nor do the general safety orders of the commission presumptively fix a reasonable and proper standard;⁵¹ nor will an action for damages lie against an employer for alleged violation of a statute providing merely for coöperation of the commission with the employer in fixing standards of safety, there being no statutory obligation on the employer to take the initiative to establish such standards.⁵²

Where the facts clearly bring the case within the provisions of the compensation act, the fact that

there may have been a violation by the employer of the factory act⁵³ or the state labor law⁵⁴ does not prevent the application of the compensation act, or prevent an action from being barred thereby; and where an employee's injuries are caused by an accident arising out of, and in the course of, his employment, the fact that the employer violated the dangerous occupation act does not take the employee's claim out of the compensation act.⁵⁵

Illegal business. Where the nature of the employer's business is illegal, an employee may choose to sue in the courts for any injury sustained, and is not bound by the compensation law.⁵⁶

§ 926. — Willful or Deliberate Act or Negligence

- a. In general
- b. Assault

a. In General

Under some compensation acts, an employee injured by his employer's willful or deliberate act or negligence may sue for damages, the remedy under the act not being exclusive.

Under some of the compensation acts, the proceedings for compensation are not exclusive where the injury is due to the deliberate intention of the employer,⁵⁷ or is the result of his willful act⁵⁸ or

45. Ohio.—*Chestosky v. Wolf Run Coal Co.*, 140 N.E. 126, 106 Ohio St. 122.

71 C.J. p 1484 note 91.

46. Ohio.—*D. T. Owen Co. v. Kalasinski*, 15 Ohio App. 211.

71 C.J. p 1484 note 92.

47. Ohio.—*Winzeler v. Knox*, 143 N.E. 24, 109 Ohio St. 503—*Ohio Automatic Sprinkler Co. v. Fender*, 141 N.E. 269, 108 Ohio St. 149.

48. Ohio.—*Zajachuck v. Willard Storage Battery Co.*, 140 N.E. 405, 106 Ohio St. 538.

49. Ohio.—*American Woodenware Mfg. Co. v. Schorling*, 117 N.E. 368, 96 Ohio St. 305, Ann.Cas.1918D 318.

50. Ohio.—*Winzeler v. Knox*, 143 N.E. 24, 109 Ohio St. 503.

51. Cal.—*Schmidt v. Pursell*, 190 P. 846, 47 C.A. 440.

52. Iowa.—*Stricklen v. Pearson Const. Co.*, 169 N.W. 628, 185 Iowa 95.

53. Ind.—*Markham v. Hettrick Mfg. Co.*, 79 N.E.2d 548, 118 Ind.App. 448.

Pa.—*Moffett v. Harbison-Walker Refractories Co.*, 14 A.2d 111, 339 Pa. 112.

54. N.Y.—*Cifolo v. General Elec.*

Co., 112 N.E.2d 197, 305 N.Y. 209, certiorari denied *Cifolo v. General Electric Co.*, 74 S.Ct. 124, 346 U.S. 874, 98 L.Ed. 382.

55. U.S.—*Selby v. Sykes*, C.A.III, 189 F.2d 770.

56. N.Y.—*Wasserman v. Josephson*, 61 N.Y.S.2d 204, affirmed 84 N.Y.S. 2d 895, 274 App.Div. 919.

57. Cal.—*Carter v. Superior Court in and for Los Angeles County*, 298 P.2d 598, 142 C.A.2d 350.

Ky.—*Morrison v. Carbide & Carbon Chemicals Corp.*, 129 S.W.2d 547, 278 Ky. 746.

N.Y.—*De Coigne v. Ludlum Steel Co.*, 297 N.Y.S. 636, 251 App.Div. 662.

Mazarredo v. Levine, 76 N.Y.S.2d 324, 190 Misc. 953, reversed on other grounds 80 N.Y.S.2d 237, 274 App.Div. 122.

71 C.J. p 1485 note 1.

"The Workmen's Compensation Law deals not with intentional wrongs but only with accidental injuries."

N.Y.—*Lavin v. Goldberg Bldg. Material Corp.*, 87 N.Y.S.2d 90, 93, 274 App.Div. 690, appeal denied 89 N.Y.S.2d 523, 275 App.Div. 865.

"It is well settled that an intentional tort or an intended wrong is not the 'wrong' which the Legisla-

ture intended would bar a common-law cause of action against either an employer or employee."

N.Y.—*Artonio v. Hirsch*, 157 N.Y.S. 2d 398, 400, 4 Misc.2d 42.

Statute preserving common-law right of action

Statute giving employee injured with deliberate intent cause of action for excess of damages over amount received or receivable as workmen's compensation merely preserves unto employee his common-law right of action to sue for such injury.

W.Va.—*Brewer v. Appalachian Constructors*, 65 S.E.2d 87, 135 W.Va. 739.

58. Cal.—*Conway v. Globin*, 233 P. 2d 612, 105 C.A.2d 495.

N.Y.—*De Coigne v. Ludlum Steel Co.*, 297 N.Y.S. 636, 251 App.Div. 662.

Artonio v. Hirsch, 157 N.Y.S.2d 398, 4 Misc.2d 42, affirmed in part, reversed in part on other grounds, 163 N.Y.S.2d 489, 3 A.D.2d 939.

Camacho v. Innersprings, Inc., 142 N.Y.S.2d 886.

71 C.J. p 1485 note 2.

Leading case

Minn.—*Boek v. Wong Hing*, 231 N.W. 233, 180 Minn. 470, 72 A.L.R. 108.

that of his agent,⁵⁹ the expression "willful act" being employed in the sense of willful negligence.⁶⁰ Under such statute, an employee injured by his employer's willful⁶¹ or deliberate⁶² act may sue for damages, even exemplary, or punitive, damages in cases where allowed and where justified by the facts.⁶³

A willful violation of duty by the employer signifies a conscious violation;⁶⁴ but mere negligence, in the absence of violation of statutory requirement, or a commission's orders is not willfulness within the meaning of the rule;⁶⁵ nor is gross negligence a willful act done with the direct object of injuring another.⁶⁶

The meaning of the phrase "deliberate intention," in this connection, is that the employer must have determined to injure an employee⁶⁷ and used some means appropriate to that end;⁶⁸ and there must be a specific intent.⁶⁹ Violation of law, even though deliberately committed, does not constitute deliberate intention to injure within the meaning of the statute.⁷⁰

Where the statute restricts the liability of the employer in such cases to injury arising from the willful act of the employer's agent, the injured employee is not entitled to sue for damages for injury arising from the willful act of a fellow servant, an agent being one in authority over the servants.⁷¹

59. N.Y.—Garcia v. Gusmack Restaurant Corp., 150 N.Y.S.2d 232.

Injuries not accidental

Injuries to employee as result of eating polluted or poisoned pie, left in employer's cafeteria by manager thereof for such employee, were not accidental injuries arising out of and in course of employment, within compensation law, so that he was not precluded from maintaining common-law action against employer for damages.

N.Y.—De Coigne v. Ludlum Steel Co., 297 N.Y.S. 636, 251 App.Div. 662.

60. U.S.—McWeeny v. Standard Boiler, etc., Co., D.C.Ohio, 210 F. 507, affirmed Standard Boiler & Plate Iron Co. v. McWeeny, 218 F. 361, 134 C.C.A. 169.

71 C.J. p 1485 note 3.

61. Ohio.—Gildersleeve v. Newton Steel Co., 142 N.E. 678, 109 Ohio St. 341.

71 C.J. p 1485 note 4.

Reduction of damages by amount of compensation

Under provision of compensation act that, if injury or death resulted to workman from deliberate intention of employer, workman should have privilege to take under act and also have action against employer, employee could pursue remedy under act and then sue at common law, with amount of damages recoverable reduced by amount which employee was entitled to receive under act.

Or.—Weis v. Allen, 35 P.2d 478, 147 Or. 670.

62. Ky.—Morrison v. Carbide & Carbon Chemicals Corp., 129 S.W. 2d 547, 278 Ky. 746.

71 C.J. p 1485 note 5.

63. Cal.—Carter v. Superior Court in and for Los Angeles County, 298 P.2d 598, 142 C.A.2d 350—Conway v. Globin, 233 P.2d 612, 105 C.A.2d 495.

Tex.—Castleberry v. Frost-Johnson Lumber Co., Com.App., 283 S.W. 141.

Exemplary damages allowed only where death results

Tex.—Jones v. Jeffreys, Civ.App., 244 S.W.2d 924, error refused.

64. Ill.—May v. Belleville Enameling & Stamping Co., 247 Ill.App. 275.

65. Cal.—Helme v. Great Western Milling Co., 185 P. 510, 43 C.A. 416.

Failure to discover burglar alarm

Mere negligence in failing to discover burglar alarm in form of spring gun was not tantamount to a malicious or deliberate intent on part of employer to assault employee, and where employer had no knowledge of existence of such device employee could not maintain common-law action for disfigurement against employer, since "malicious" and "willfully" involve ill will of a degree that is equivalent of a deliberate intent to injure others, and there is no such thing as a negligent assault.

Minn.—Brehmhorst v. Beckman, 35 N.W.2d 719, 227 Minn. 409.

66. Ohio.—Gildersleeve v. Newton Steel Co., 142 N.E. 678, 109 Ohio St. 341.

67. Ky.—Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25.

Or.—Jenkins v. Carman Mfg. Co., 155 P. 703, 79 Or. 448.

Intent not inferred from negligence

(1) The element of "malicious or deliberate intent" required on the part of an employer with respect to an assault of his employee, in order to give the employee the option of either suing for damages at common law or proceeding under the compensation act, is a conscious and deliberate intent directed to the purpose of inflicting an injury, and such intent may not be inferred from mere negligence, although it is gross.

Minn.—Brehmhorst v. Beckman, 35 N.W.2d 719, 227 Minn. 409.

(2) Negligence, however wanton, is not tantamount to deliberate intention to inflict injury which is essential to charge employer with

damages in excess of sums paid to employee under compensation law.

W.Va.—Brewer v. Appalachian Constructors, 65 S.E.2d 87, 135 W.Va. 739.

Carelessness insufficient

Statute authorizing employee's recovery, in addition to compensation act for injury resulting from employer's "deliberate intention" to produce injury was held not to authorize recovery for injuries sustained on breaking of line used, with knowledge of its defectiveness, for hauling logs, since there must be specific intent to injure employee and use of some means appropriate thereto, not merely carelessness, however gross, to warrant recovery under statute.

Wash.—Biggs v. Donovan-Corkery Logging Co., 54 P.2d 235, 185 Wash. 284.

68. Ky.—Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25.

Or.—Jenkins v. Carman Mfg. Co., 155 P. 703, 79 Or. 448.

Wash.—Biggs v. Donovan-Corkery Logging Co., 54 P.2d 235, 185 Wash. 284.

69. Ky.—Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25.

Or.—Jenkins v. Carman Mfg. Co., 155 P. 703, 79 Or. 448.

Wash.—Biggs v. Donovan-Corkery Logging Co., 54 P.2d 235, 185 Wash. 284.

W.Va.—Allen v. Raleigh-Wyoming Mining Co., 186 S.E. 612, 117 W.Va. 631.

70. Or.—Heikkila v. Ewen Transfer Co., 297 P. 373, 135 Or. 631.

Wash.—Delthony v. Standard Furniture Co., 205 P. 379, 119 Wash. 298.

Violation of:

Child labor laws see infra § 930.
Safety regulations see infra § 929.

71. Ohio.—Gildersleeve v. Newton Steel Co., 142 N.E. 678, 109 Ohio St. 341.

b. Assault

Authorities differ as to whether an employee assaulted by his employer or by a fellow servant may sue his employer for damages or is relegated to his remedy under the compensation act.

Assault by an employer on his employee has been held not to arise out of, or not to occur in the course of, the employment, within the compensation act, so that an action for damages will lie;⁷² other authority, in holding that a suit for assault may be brought at common law, holds that the compensation law does not apply in such a situation.⁷³ The employee may have an election between seeking recovery under the compensation act or suing for full damages at common law.⁷⁴

Likewise, it is held, a willful or intentional assault by an employee on a fellow employee cannot be classified as accidental, even though the consequent injury may not have been deliberately designed, and an action against the employer will

lie;⁷⁵ and an employee willfully assaulted by an agent or servant of the employer acting within the scope of his authority may sue at common law, and is not relegated solely to workmen's compensation.⁷⁶ This principle has been held applicable where the employer is a corporation and there is no issue as to whether the agent, in committing the assault, acted within the scope of his authority;⁷⁷ so, where an assault is committed by the manager of a corporation, he may be considered the alter ego of the corporation employer.⁷⁸

Under other authority, while an individual employer cannot plead the bar of workmen's compensation for an assault which he has willfully committed on an employee,⁷⁹ the situation is quite different with respect to a corporation,⁸⁰ and in an employee's action against a corporate employer and fellow employees for assault the compensation statute is a defense which may be applicable, with respect to the corporation, depending on the proof.⁸¹

72. U.S.—*Davis v. Bennett*, D.C.Mo., 114 F.Supp. 790.

Cal.—*Carter v. Superior Court in and for Los Angeles County*, 298 P.2d 598, 142 C.A.2d 350—*Conway v. Globin*, 233 P.2d 612, 105 C.A.2d 495.

Idaho.—*Devlin v. Ennis*, 292 P.2d 469, 77 Idaho 342.

Assaults as, or as not, arising out of, or in course of, employment generally see supra §§ 226, 227.

73. N.J.—*Rumbolo v. Erb*, 20 A.2d 54, 19 N.J.Misc. 311.

Contra

Pa.—*Miller v. Brobst*, Com.Pl., 42 Lack.Jur. 138.

"It would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meagre allowance provided by the Workmen's Compensation Law. Under such circumstances the one assaulted may avail himself of a common law action against his assailant where full monetary satisfaction may be obtained."

N.Y.—*Lavin v. Goldberg Bldg. Material Corp.*, 87 N.Y.S.2d 90, 93 appeal denied 89 N.Y.S.2d 523, 275 App.Div. 865, 274 App.Div. 690.

Assault not "accidental"

(1) An affirmative tortious act committed by an employer upon an employee is not "accidental," within meaning of compensation law, so as to bar employee from maintaining a common-law action against employer for assault.

N.Y.—*Le Pochat v. Pendleton*, 63 N.Y.S.2d 313, 187 Misc. 296, affirmed 68 N.Y.S.2d 594, 271 App.Div. 964.

(2) An intentional and malicious assault and battery by an employer on an employee is not an accident,

within terms of compensation act, so as to preclude recovery from employer at common law, where no physical disability has been suffered.

S.C.—*Stewart v. McLellan's Stores Co.*, 9 S.E.2d 35, 194 S.C. 50.

74. Cal.—*Carter v. Superior Court in and for Los Angeles County*, 298 P.2d 598, 142 C.A.2d 350.

Minn.—*Boek v. Wong Hing*, 231 Minn. 233, 180 Minn. 470, 72 A.L.R. 103.

Election generally see infra §§ 936–938.

75. N.Y.—*Quinn v. S. A. Healy Co.*, 140 N.Y.S.2d 925.

76. N.Y.—*Lavin v. Goldberg Bldg. Material Corp.*, 87 N.Y.S.2d 90, 274 App.Div. 690, appeal denied 89 N.Y.S.2d 523, 275 App.Div. 865.

Mazarredo v. Levine, 76 N.Y.S.2d 324, 190 Misc. 953, reversed on other grounds 80 N.Y.S.2d 237, 274 App.Div. 122.

Garcia v. Gusmack Restaurant Corp., 150 N.Y.S.2d 232.

Conspiracy to assault

Employee alleging intentional, willful, and malicious assault by assistant manager of employer hired by employer to assault employee, and that the assault was made in the course of such special employment and pursuant to conspiracy between the assistant manager and employer's manager, was not subject to plea in abatement that injury was within compensation act.

Tex.—*Richardson v. The Fair, Inc.*, Civ.App., 124 S.W.2d 885, error dismissed, judgment correct.

77. N.Y.—*Garcia v. Gusmack Restaurant Corp.*, 150 N.Y.S.2d 232.

Employee's right of election

(1) Where officer and general manager of corporate employer intentionally committed an unprovoked assault and battery upon employee during course of his employment, under circumstances which would entitle employee to actual and exemplary damages at common law, employee was entitled to elect either to claim compensation under compensation act or to treat willful assault as a severance of employer-employee relationship and seek full damages at common law.

Ark.—*Heakett v. Fisher Laundry & Cleaners Co.*, 230 S.W.2d 28, 217 Ark. 350.

(2) Election generally see infra §§ 936–938.

78. S.C.—*Stewart v. McLellan's Stores Co.*, 9 S.E.2d 35, 194 S.C. 50.

The rule of respondeat superior does not prevail to the extent of making the matter within the exclusive province of the compensation act, although matter might fall within the act where assault is committed by fellow employee or an outsider.

S.C.—*Stewart v. McLellan's Stores Co.*, supra.

79. N.Y.—*Camacho v. Innersprings, Inc.*, 142 N.Y.S.2d 886.

80. N.Y.—*Camacho v. Innersprings, Inc.*, 142 N.Y.S.2d 886, distinguished in *Garcia v. Gusmack Restaurant Corp.*, 150 N.Y.S.2d 232.

81. N.Y.—*Mazzarredo v. Levine*, 80 N.Y.S.2d 237, 274 App.Div. 122.

Camacho v. Innersprings, Inc., 142 N.Y.S.2d 886—*Loftus v. Columbian Ribbon & Carbon Mfg. Co.*, 81 N.Y.S.2d 102.

A compensation act has also been held to bar an action by an employee against his employer for an assault committed by the latter's manager,⁸² foreman,⁸³ or dock boss,⁸⁴ or by a nurse in a hospital maintained by the employer.⁸⁵

§ 927. — Gross Negligence

Whether an employee may recover damages, or punitive damages, for injury caused by his employer's gross negligence, or is relegated to his remedy under the compensation act, is determined by the language of the act.

The remedy afforded an employee under the compensation act may be exclusive where injury results from gross negligence of the employer or a fellow employee.⁸⁶ However, under statute, gross negligence of the employer may be made an exception to the statutory provision that proceedings before the commission shall be the exclusive remedy,⁸⁷ although an amendatory statute omitting the words of exception in an earlier act changes the rule.⁸⁸ Violation of a statute or an order of the commission,⁸⁹ especially where general in terms,⁹⁰ does not of itself constitute gross negligence bringing the employee's rights within the scope of the exception.

The common-law right of action for gross negligence is preserved by the Texas act only when the employee's injury results in death.⁹¹

Additional or punitive damages may not be recovered, in a common-law action, on the ground of the employer's gross negligence, where the compensation law provides an exclusive remedy against the

employer for injuries sustained by an employee as a result of an accident or disease arising out of the employment.⁹²

It has been held that under the Texas compensation act an injured employee may bring suit for gross negligence and recover exemplary damages therefor if he can;⁹³ but under other authority the right to recover exemplary damages because of the gross negligence of the employer is limited to claims for the death of the employee,⁹⁴ and the act excludes actions by the employee to recover exemplary damages for gross negligence.⁹⁵

§ 928. — Failure to Install or Maintain Safety Appliances

Whether an employer's failure to install or maintain safety appliances takes the case out of the rule as to exclusive remedy by way of the compensation act depends on the language of the act.

The general rule has been said to be that, in the absence of specific statutory provision, the failure of the employer to comply with laws or regulations as to the installation of safety appliances or proper safeguards, especially in the case of dangerous machinery, does not affect the rule as to exclusive remedy by way of the compensation laws.⁹⁶ However, under some statutes, the failure of the employer to install or maintain safety appliances required by statute is made an exception to the exclusive remedy rule, and an action to recover damages for injuries arising therefrom may be maintained by the injured workman,⁹⁷ if, where the stat-

Employer's knowledge of servant's viciousness

In employee's action against fellow servant and corporate employer for assault by servant, allegations that employer knew of fellow servant's viciousness, but gave him authority over other employees and made available for his use, in connection with his duties, a tear gas gun known to defendants to be dangerous and deadly weapon, did not save such common-law action from destruction by compensation law, under which plaintiff was required to seek relief.

N.Y.—Loftus v. Columbian Ribbon & Carbon Mfg. Co., *supra*.

82. Ga.—McLaughlin v. Thompson, Boland & Lee, 34 S.E.2d 562, 72 Ga. App. 564.

Minn.—Fox v. Swartz, 36 N.W.2d 708, 228 Minn. 233.

Injuries as result of accident

Ga.—Echols v. Chattooga Mercantile Co., 38 S.E.2d 675, 74 Ga.App. 18.

83. La.—Smith v. Bankston, App., 75 So.2d 880.

Mo.—Gardner v. Stout, 119 S.W.2d 790, 342 Mo. 1206.

N.C.—McCune v. Rhodes-Rhyne Mfg. Co., 8 S.E.2d 219, 217 N.C. 351.

S.C.—Thompson v. J. A. Jones Const. Co., 19 S.E.2d 226, 199 S.C. 304.

84. U.S.—Whittington v. Moore McCormack Lines, C.A.N.Y., 196 F. 2d 295, certiorari denied 78 S.Ct. 106, 344 U.S. 865, 97 L.Ed. 671, rehearing denied 78 S.Ct. 211, 344 U.S. 894, 97 L.Ed. 691.

Assault held "accidental" within meaning of compensation act.

U.S.—Whittington v. Moore McCormack Lines, *supra*.

85. U.S.—Rickman v. E. I. Du Pont de Nemours & Co., C.C.A.Okl., 157 F.2d 837.

86. Ark.—Heskett v. Fisher Laundry & Cleaners Co., 230 S.W.2d 28, 217 Ark. 350.

87. Cal.—San Francisco Stevedoring Co. v. Pillsbury, 149 P. 586, 170 C. 321.

88. Cal.—Lockhart v. Southern Pac. Co., 267 P. 591, 91 C.A. 770.

89. Cal.—Schmidt v. Pursell, 190 P. 846, 47 C.A. 440.

90. Cal.—Helme v. Great Western Milling Co., 185 P. 510, 43 C.A. 418.

91. Tex.—Faulkner v. Kleinman, Civ.App., 158 S.W.2d 891, error refused.

92. Wis.—Beck v. Hamann, 56 N.W. 2d 837, 263 Wis. 131.

93. U.S.—Gomillion v. Union Bridge & Construction Co. of Kansas City, Mo., C.C.A.Tex., 100 F.2d 937, certiorari denied 59 S.Ct. 1031, 307 U.S. 634, 83 L.Ed. 1516.

94. Tex.—Castleberry v. Frost-Johnson Lumber Co., Com.App., 283 S. W. 141.

Odom v. Indemnity Ins. Co. of North America, Civ.App., 111 S.W. 2d 1143, error dismissed.

95. Tex.—Castleberry v. Frost-Johnson Lumber Co., Com.App., 283 S. W. 141.

71 C.J. p 1485 note 16.

96. Kan.—Corpus Juris cited in Duncan v. Perry Packing Co., 174 P.2d 78, 84, 162 Kan. 79.

97. N.Y.—Artonio v. Hirsch, 157 N. Y.S.2d 393, 4 Misc.2d 42, affirmed in part, reversed in part on other

ute so requires, the omission is intentional,⁹⁸ and is the omission of an elective officer, where the employer is a corporation.⁹⁹

The rule that the compensation act does not exclude actions for damages resulting from violation of a safety appliance law applies also where injury is caused by violation of a federal safety appliance law which by its terms extends its protection to employees whether engaged in interstate or local transit;¹ but the fact that the employer violated such federal law, thereby becoming liable to a penalty, has been held not to deprive him of the right to the protection of the state compensation law.² The rule does not apply where the compensation act in terms excludes common-law remedies for "all accidents occurring within this Commonwealth" and no exception is made for injury resulting from neglect of a statutory duty.³

§ 929. — Violation of Safety Regulations

Under some statutes an injured employee may sue for damages for injuries arising from a violation of safety regulations.

Under some statutes a violation of safety regulations by an employer is made an exception to the

exclusive remedy rule, and an action to recover damages for injuries arising therefrom may be maintained by the injured employee⁴ if, where the statute so requires, the omission is intentional⁵ and is the omission of an elective officer where the employer is a corporation.⁶

§ 930. — Violation of Child Labor Laws

If the employment of a minor in violation of child labor law does not exclude the minor from the coverage provided by workmen's compensation law, the right of recovery for the minor's injury or death may be limited to that provided under the compensation law, and there may be no right of recovery in an action under the common law.

Under many workmen's compensation act provisions, a minor whose employment is in violation of law may be within the scope of the coverage provided by the act, as stated supra § 113 c; and where the employment of a minor is in violation of child labor laws, if the illegality of the employment does not exclude the minor from the coverage of the workmen's compensation acts, the minor may be limited to the recovery provided by the terms of the compensation act, and may not be entitled to maintain an action at law against the employer.⁷ Simi-

grounds 163 N.Y.S.2d 489, 3 A.D.2d 939.

71 C.J. p 1485 note 17.

Failure to ventilate mine

Minn.—Applequist v. Oliver Iron Mining Co., 296 N.W. 13, 209 Minn. 280.

98. Ill.—Forrest v. Roper Furniture Co., 108 N.E. 328, 267 Ill. 331.

71 C.J. p 1485 note 18.

99. Ill.—Brimie v. Belden Mfg. Co., 122 N.E. 75, 287 Ill. 11—Von Boeckmann v. Corn Products Refining Co., 113 N.E. 902, 274 Ill. 605.

1. N.Y.—Ward v. Erie R. Co., 129 N. E. 886, 230 N.Y. 230.

2. Tenn.—Louisville & N. R. Co. v. Nichols, 80 S.W.2d 656, 163 Tenn. 672, 98 A.L.R. 508.

3. Pa.—Welsch v. Pittsburgh Terminal Coal Corporation, 154 A. 716, 303 Pa. 405.

4. Wash.—Depre v. Pacific Coast Forge Co., 276 P. 89, 151 Wash. 480.

71 C.J. p 1486 note 23.

Violation of law as constituting deliberate intention to injure see supra § 926.

Removal of fumes and vapors

Where claim against state was based on theory that state operated place of claimant's employment so as to violate Labor Law and rules of industrial board relating to removal of fumes and vapors, as a result of which claimant sustained

severe injuries, the compensation law regarding occupational diseases did not provide claimant sole remedy.

N.Y.—Converse v. State, 41 N.Y.S.2d 245, 181 Misc. 113.

5. Ill.—Von Boeckmann v. Corn Products Refining Co., 113 N.E. 902, 274 Ill. 605.

Burnes v. Swift & Co., 186 Ill. App. 460.

6. Ill.—Von Boeckmann v. Corn Products Refining Co., 113 N.E. 902, 274 Ill. 605.

Burnes v. Swift & Co., 186 Ill. App. 460.

7. Ariz.—Villapando v. Industrial Commission, 216 P.2d 397, 70 Ariz. 55—S. H. Kress & Co. v. Superior Court of Maricopa County, 182 P. 2d 931, 66 Ariz. 67.

Ark.—Cummins v. J. J. Newberry Co., 203 S.W.2d 187, 211 Ark. 854—Odom v. Arkansas Pipe & Scrap Material Co., 187 S.W.2d 320, 208 Ark. 678.

Ga.—Maloney v. Kirby, 172 S.E. 683, 48 Ga.App. 252.

Idaho.—Lockard v. St. Maries Lumber Co., 285 P.2d 473, 76 Idaho 506. Ind.—Dawson v. Acme Evans, 75 N. E.2d 553, 118 Ind.App. 49.

N.Y.—Ulrich v. Terminal Operating Corp., 67 N.Y.S.2d 590, 271 App. Div. 930.

Murphy v. Elmwood Country Club, 51 N.Y.S.2d 260, 133 Misc. 332.

Or.—Manke v. Nehalem Logging Co., 315 P.2d 539.

Pa.—Lengyel v. Bohrer, 94 A.2d 753, 372 Pa. 531—Fritsch v. Pennsylvania Golf Club, 50 A.2d 207, 355 Pa. 384.

Zeitz v. Zurich General Acc. & Liability Ins. Co., 67 A.2d 742, 165 Pa.Super. 295.

Green v. Anwyl, Com.Pl., 86 Pittsb.Leg.J. 543.

Tex.—Haskins v. Cherry, Civ.App., 202 S.W.2d 691, error refused.

Va.—Nolde Bros. v. Chalkley, 35 S. E.2d 827, 184 Va. 553, adhered to 38 S.E.2d 73, 185 Va. 96.

Wis.—Foth v. Macomber & Whyte Rope Co., 154 N.W. 369, 161 Wis. 549.

71 C.J. p 1486 note 27.

Legal employment at time of injury

Where minor engaged in employment prohibited by law to one of his age was injured after reaching age at which employment was permitted by law, minor's only right of recovery was under compensation act and no common-law right of recovery existed.

N.M.—Benson v. Expert Equipment Corp., 164 P.2d 380, 49 N.M. 356.

Illegally employed minor held employee

Where a minor was employed in violation of the Illinois child labor law, and at the time of injury the employer had two policies of insurance, one for workmen's compensa-

larly, where an illegally employed minor is entitled to recover for injuries only under the provisions of the compensation act, and is not entitled to maintain an action at law for the injuries, the minor's beneficiaries and personal representatives are likewise relegated to the remedy provided by the compensation law, and are not entitled to maintain an action at law;⁸ and it has been held that restricting the right to recover for injuries or death sustained by a minor whose employment was in violation of child labor law to the recovery that is authorized by compensation law does not impair the child labor law.⁹ Other compensation acts permit, but do not require, an illegally employed minor to resort to the compensation laws, as stated supra § 113 c, and under such compensation acts a minor who is employed in violation of child labor laws has the option to proceed under the compensation law or sue at common law.¹⁰

Under some workmen's compensation act provisions, an eligible employer who has not accepted the act so as to enable his employees to receive compensation is deprived of the right to set up certain

defenses in a common-law action brought by an injured employee, as discussed infra §§ 939-943. Such a provision of a compensation act, freeing employees prosecuting actions at common law for injuries received in the course of their employment from defenses which, prior to the act, would have been available to the employer, is applicable to a minor employee whose employment was violative of a child labor law requiring a certificate or permit for the minor to be entitled to engage in the employment.¹¹

In a number of cases decided under workmen's compensation act provisions now or formerly existing, it has been held that an illegally employed minor is not within the scope of the coverage of the act, as stated supra § 113 b. Where this rule has been followed it has been held that the employment of a minor in violation of child labor law places the minor outside the terms of the workmen's compensation act, and permits or compels the minor or his personal representative to seek recovery for the minor's injury or death in a proceeding other than that authorized by the act,¹² and this rule has been

tion and the other for public liability, and the public liability policy specifically excluded employees of the insured, in an action for a declaratory judgment it was held that the minor was an employee under the Illinois compensation law, and was within the exclusion clause of the public liability policy.

U.S.—Scarpelli v. Travelers Indem. Co. of Hartford, C.A.III., 248 F.2d 791.

In Florida

(1) Workmen's compensation act provides exclusive remedy against an employer for injuries sustained by a minor employee whose employment was in violation of child labor laws, and no distinction on basis of age or nature of employment is warranted.

Fla.—Winn-Lovett Tampa v. Murphree, 73 So.2d 287.

(2) In an earlier case which was expressly overruled by decision in Winn-Lovett Tampa v. Murphree, supra, it was held that where a minor was employed in violation of child labor laws, and was of an age where he could not have been legally employed under child labor laws, workmen's compensation act did not provide exclusive remedy that was available to minor or to personal representatives of minor.

Fla.—Smith v. Arnold, 60 So.2d 281.

8. Ariz.—S. H. Kress & Co. v. Superior Court of Maricopa County, 182 P.2d 931, 66 Ariz. 67.

Conn.—Greenberg v. Guiliano, 38 A.2d 436, 131 Conn. 157—Wells v. Radville, 153 A. 154, 112 Conn. 459.

N.Y.—Ulrich v. Terminal Operating Corp., 67 N.Y.S.2d 590, 271 App.Div. 930.

Pa.—Lengyel v. Bohrer, 94 A.2d 753, 372 Pa. 531.—Santucci v. Frank, 51 A.2d 696, 356 Pa. 54.

Zeitz v. Zurich General Acc. & Liability Ins. Co., 67 A.2d 742, 165 Pa.Super. 295.

9. Or.—Manke v. Nehalem Logging Co., 315 P.2d 539.

10. Iowa.—Lodge v. Drake, 51 N.W.2d 418, 243 Iowa 628, followed in 51 N.W.2d 420, 243 Iowa 638.

Saving provision not retroactive

Where at the time of the injury the minor employee, although employed in violation of the child labor law, was sixteen years old and thus entitled to recover only under the provisions of the compensation act which contained a saving provision to the effect that the act should not deprive infants under sixteen years of their common-law remedy, the fact that at the time the case was heard the legislature had amended the saving provision so that the act did not deprive infants under the age of eighteen years of their common-law remedy did not permit the minor employee to seek recovery in a common-law action, since the amendment of the saving provision was not retroactive.

N.J.—Wilson v. Newark Smelting & Refining Co., 56 A.2d 619, 26 N.J. Misc. 51.

Election by minor employee

(1) Where the employer elected to take compensation coverage al-

though not required to do so, and under a statutory provision such election enabled an injured minor, who was employed illegally, to elect whether to take the compensation coverage and thus be barred from maintaining another remedy provided by law, it was held contrary to public policy to deem the minor capable of exercising such an election. N.Y.—Warney v. Board of Education of School Dist. No. 5 of Town of Irondequoit, 49 N.E.2d 466, 290 N.Y. 329.

(2) "Since the decision in the Warney case, supra, the statute has been amended to abrogate the employee's right of election in non-hazardous employments where the employer has obtained coverage." N.Y.—Murphy v. Elmwood Country Club, 51 N.Y.S.2d 260, 264, 183 Misc. 332.

In North Dakota

The 1949 amendment of the workmen's compensation act deleted the provision giving an illegally employed minor either the right to compensation or to maintain an action for damages, and placed an illegally employed minor in the same class as any other employee for the purposes of the workmen's compensation act. N.D.—State for Benefit of Workmen's Compensation Fund v. E. W. Wylie Co., 58 N.W.2d 76, 79 N.D. 471.

11. Me.—Bartley v. Couture, 55 A.2d 438, 143 Me. 69.

12. Kan.—Hadley v. Security Elevator Co., 264 P.2d 1076, 175 Kan. 395—Lee v. Kansas City Public

applied where the minor has secured his employment by falsely or mistakenly stating his age.¹³ Under this rule, if the minor's employment was not violative of the child labor law the right of recovery would be only under the compensation act, and there would be no right of recovery under the common law.¹⁴

Under some statutes qualifying the general rule, the employment must have been in willful and known violation of the child labor law to deprive the employer of the protection afforded by the compensation act, and to permit the maintenance of a common-law action to recover for the injury or death;¹⁵ and a failure to guard machinery as required by the child labor law does not of itself establish the fact that the employment was a known and willful violation of that law,¹⁶ although, under the terms of the child labor law, the bringing of an action for damages may be authorized on the basis of failure to guard machinery as well as on the unlawful employment.¹⁷ The rule that violation of the child labor law of a state subjects the employer to liability in damages for injuries received by the minor does not apply when the illegality of the employment arises solely from violation of a municipal ordinance;¹⁸ and the rule does not apply to permit the representative of a deceased minor employee to recover in a common-law or statutory action where the employment of the minor was legal under

the laws of the state although in contravention of federal law.¹⁹

Under Longshoremen's and Harbor Workers' Act. It is stated supra § 113 c that a minor employee is not excluded from the coverage provided by the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. § 901 et seq, because the minor's employment was in violation of a child labor law, and where a minor employer is within the coverage provided by the Longshoremen's Act, the fact that the minor's employment was violative of a child labor law will not authorize a recovery in a common-law suit for injuries sustained by the minor.²⁰

§ 931. On Rejection of Act

Where an employer or an employee has rejected the compensation act, remedies other than those provided by the act are available.

The remedy of an employee who has rejected the compensation act lies in damages recoverable from his employer under statute or the common law.²¹ The right of an injured employee to sue his employer may be required to be exercised before the injury by rejecting the compensation act at the time of the employment.²²

An employer who has rejected the compensation act, pursuant to its provisions, thereby stands on his common-law liability or his liability under statutes other than the compensation act.²³ Such an

Service Co., 22 P.2d 942, 137 Kan. 759.

71 C.J. p 1486 note 28.

Under repealed or amended provisions
Ind.—Ping v. Indianapolis Soap Co., 184 N.E. 903, 206 Ind. 287.

Iowa.—Sechlich v. Harris-Emery Co., 169 N.W. 325, 184 Iowa 1025.

Mich.—Grand Rapids Trust Co. v. Petersen Beverage Co., 189 N.W. 186, 219 Mich. 208.

N.J.—Mauthe v. B. & G. Service Station, 139 A. 245, 5 N.J.Misc. 981.

Pa.—Lincoln v. National Tube Co., 112 A. 73, 268 Pa. 504.

Mitchell v. Mione Mfg. Co., 171 A. 114, 112 Pa.Super. 394.

Lasky v. Pittsburgh Press Co., Com.Pl., 94 Pittsb.Leg.J. 107.

Utah.—Henrie v. Rocky Mountain Packing Corp., 202 P.2d 727, 113 Utah 444—Lucas v. Industrial Commission, 156 P.2d 896, 108 Utah 25

—Ortega v. Salt Lake Wet Wash Laundry, 156 P.2d 885, 108 Utah 1.

Wis.—Stetz v. F. Mayer Boot, etc., Co., 156 N.W. 971, 163 Wis. 151, Ann.Cas.1918B 675.

13. Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.

71 C.J. p 1486 note 32.

14. Okl.—Associated Indem. Co. v. Frierson, 170 P.2d 225, 197 Okl. 304.

101 C.J.S.—25

W.Va.—Raynes v. Nitro Pencil Co., 52 S.E.2d 248, 132 W.Va. 417.

15. Ky.—Riddell's Adm'r v. Berry, 298 S.W.2d 1—Caldwell v. Jarvis, 185 S.W.2d 552, 299 Ky. 439.

71 C.J. p 1486 note 35.

16. Ky.—D. E. Hewitt Lumber Co. v. Brumfield, 245 S.W. 858, 196 Ky. 723—Frye's Guardian v. Gamble Bros., 221 S.W. 870, 188 Ky. 283.

17. Ky.—Frye's Guardian v. Gamble Bros., supra.

18. Tenn.—Walsh v. Myer Hotel Co., 30 S.W.2d 225, 161 Tenn. 355.

71 C.J. p 1486 note 38.

19. Kan.—Neville v. Wichita Eagle, Inc., 294 P.2d 248, 179 Kan. 197.

Employer's liability measured by state law

"We hold that the test of a minor's capacity to enter into an employment contract is that fixed by the laws of this state; that the employment was a lawful one under our workmen's compensation act, and that the liabilities of the employer for injury resulting in the workman's death are measured by that act."

Kan.—Neville v. Wichita Eagle, Inc., supra.

20. U.S.—Mallen v. Hirsch, C.A.Md., 171 F.2d 127.

D.C.—Mallen v. H. B. Hirsch & Sons, 159 F.2d 461, 82 U.S.App.D.C. 1, certiorari denied 67 S.Ct. 1534, 331 U.S. 845, 91 L.Ed. 1855, rehearing denied 68 S.Ct. 34, 332 U.S. 784, 92 L.Ed. 367.

21. Ariz.—Industrial Commission v. Orizaba Mining Co., 145 P.2d 850, 61 Ariz. 152.

Mo.—Mitchell v. J. A. Tobin Const. Co., 159 S.W.2d 709, 236 Mo.App. 910.

Purpose of statute
(1) Purpose of provision of occupational diseases act giving a cause of action for damages to an employee who has elected not to operate under compensation provision, even though his employer has, is to lead an employee to accept compensation to prevent his action from being met by defenses of assumption of risk and negligence of a fellow servant.

Ind.—Dalton Foundries v. Jefferies, 51 N.E.2d 13, 114 Ind.App. 271, followed in Dalton Foundries v. Dean, 51 N.E.2d 397, 114 Ind.App. 289.

(2) Abrogation of defenses see infra §§ 939-943.

22. Ariz.—Pressley v. Industrial Commission, 236 P.2d 1011, 73 Ariz. 22.

23. U.S.—Baker v. Great Atlantic &

D.C.—Mallen v. H. B. Hirsch & Sons, 159 F.2d 461, 82 U.S.App.D.C. 1, certiorari denied 67 S.Ct. 1534, 331 U.S. 845, 91 L.Ed. 1855, rehearing denied 68 S.Ct. 34, 332 U.S. 784, 92 L.Ed. 367.

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23. U.S.—Baker v. Great Atlantic &

employer may be sued by an injured employee even though the latter has himself accepted the act, in a common-law action for damages,²⁴ or under an unrequited factory act,²⁵ or under a section of the code providing an alternative remedy in such cases;²⁶ and where, under the law, revocation by the department of the employer's acceptance has the effect of taking both employer and employee out of the act both are relegated to their rights at common

law.²⁷

Express or implied acceptance of act. It has been held that unless the terms of the compensation act are accepted, either expressly or impliedly, by the master and the servant, the common law remains applicable.²⁸ Where there is no agreement, express or implied, under which an employee and his employer contract to be bound by the compensa-

Pacific Tea Co., C.A.Fla., 212 F.2d 130.

Abrogation or restoration of defenses

(1) Where employer had affirmatively elected not to operate under the compensation act, action by an employee against employer for injuries was governed by common law, except in so far as common-law defenses of contributory negligence, fellow servant, and assumption of risk were abrogated.

U.S.—Great Atlantic & Pacific Tea Co. v. Robards, C.C.A.N.C., 161 F. 2d 929.

(2) Purpose of provision of occupational diseases act setting up cause of action for damages against an employer who has not elected to pay compensation is to induce employers to elect to come under compensation provision by restoring to them defenses of assumption of risk and negligence of a fellow servant in an action for damages brought by an employee who has elected not to be bound by compensation provisions.

Ind.—Dalton Foundries v. Jefferies, 51 N.E.2d 13, 114 Ind.App. 271, followed in Dalton Foundries v. Dean, 51 N.E.2d 397, 114 Ind.App. 289.

(3) Abrogation of defenses see *infra* §§ 939-943.

Injury arising out of, or in course of, employment

(1) An employer who has rejected the Nevada industrial insurance act is liable for injury to a servant sustained through negligence of the employer and arising out of, and in the usual course of, employment.

U.S.—Gonzalez v. Pacific Fruit Exp. Co., D.C.Nev., 99 F.Supp. 1012.

(2) Any employee of employer subject to, but not assenting to, compensation act, may recover, in common-law action, from such employer for injuries sustained in course of employment.

Me.—Bartley v. Couture, 55 A.2d 438, 143 Me. 69.

(3) Where employers of injured employee had exempted themselves from operation of compensation act, employee could institute common-law action to recover damages for injury on the ground of negligence, although injury was sustained in course of employment.

N.C.—Muldrow v. Weinstein, 68 S.E. 2d 249, 234 N.C. 587.

Default in filing pay rolls and paying premiums

Employer's default in filing of his pay rolls and payment of his premiums resulted in a statutory rejection of the industrial insurance act at the time of accident complained of by employee.

Nev.—Provenzano v. Long, 183 P.2d 639, 64 Nev. 412.

Employee not limited to claim against insurer

Where employer elected not to be bound by compensation law, an injured employee was not limited to making claim for compensation against insurer from which the employer obtained a standard workmen's compensation and employer's liability policy, and employee had right to sue employer for damages at law.

U.S.—Union Oil Co. of California v. Hunt, C.C.A.Or., 111 F.2d 269.

Withdrawal after qualification

(1) The responsibility to injured employee of employer which had qualified under compensation act and had then withdrawn from it prior to injury was the common-law responsibility less the common-law defenses.

Tenn.—Pearson Hardwood Flooring Co. v. Phillips, 120 S.W.2d 973, 22 Tenn.App. 206.

(2) An employer could not defeat employee's right to recover for injuries sustained on ground that employee's action was under compensation act because of failure to prove that employer had complied with law in withdrawing from act under which employer had once qualified, where employer's president had stated to employee before trial, and had also testified, that it had withdrawn from the act.

Tenn.—Pearson Hardwood Flooring Co. v. Phillips, *supra*.

Disease

(1) If disease resulted progressively from the cumulative effect of conditions to which employee was subjected, as distinguished from an accident, and if result of disease is peculiar to employment and employer has not accepted benefits of compensation act on occupational disease, employee has a common-law

action against employer based upon negligence.

U.S.—Henson v. U. S., D.C.Mo., 88 F. Supp. 148.

(2) A court has jurisdiction over an action against an employer to recover for damages arising from an occupational disease only on the theory that defendant has rejected the provisions of the occupational disease act; it has no jurisdiction over an action to recover for such damages on the theory that, although at the time disability arose defendant had rejected the provisions of the act, it was under a contractual obligation to accept them by reason of a collective bargaining agreement with the union of which plaintiff was a member.

Pa.—Tumeleavich v. Motley Coal Co., 61 Pa.Dist. & Co. 668.

(3) Diseases not within acts see *supra* § 924.

24. Iowa.—Gay v. Hocking Coal Co., 169 N.W. 360, 184 Iowa 949.

Pa.—Robinson v. Atlantic Elevator Co., 148 A. 847, 298 Pa. 549.

Principal contractor; subcontractor

(1) The rule applies to a principal contractor who is the statutory employer of the subcontractor's employees on the job; if the statutory employer rejects the act, his common-law liability to the workmen on the job remains; nor will the fact that the subcontractor, who is the actual employer, has accepted the act, and the injured employee has received compensation thereunder, relieve the statutory employer, who has rejected the act, from his common-law liability.

Pa.—Gallivan v. Wark Co., 136 A. 223, 288 Pa. 443.

(2) Suit against statutory employer as third person liable for injury see *infra* § 985 d.

25. Kan.—Truman v. Kansas City, M. & O. R. Co., 161 P. 587, 98 Kan. 761.—Smith v. Western States Portland Cement Co., 146 P. 1026, 94 Kan. 501.

26. Iowa.—Balen v. Colfax Consol. Coal Co., 168 N.W. 246, 183 Iowa 1198.

27. Mich.—Lester v. Auto Haulaway Co., 244 N.W. 213, 260 Mich. 16.

28. S.C.—Gooze v. Speaks, 9 S.E.2d 439, 194 S.C. 206.

tion law, concerning occupational diseases, the employee may be entitled to exercise his common-law right of suit in trespass and trial by jury.²⁹

Time for rejection of act by minor. The statutory period within which a minor must file a rejection of benefits under the compensation acts, so as to be entitled to maintain a suit at law for injuries, begins to run against him from the date of the injury, and not from the date of the appointment of a guardian.³⁰

§ 932. Failure to Comply with Act

An employee may sue his employer for negligence where the latter, although subject to the compensation act, has failed to comply with its requirements.

Recovery at common law is open to an employee injured by the negligence of his employer who, although subject to the compensation act, has not qualified thereunder by complying with its require-

ments.³¹ This has been held to be so even where the employee is injured before the commission has been appointed and before the employer has had opportunity to comply;³² but compliance by the employer as soon as he has opportunity to comply, even though after the accident and done to escape common-law liability therefor, bars the employee's right to the common-law remedy.³³

§ 933. Failure to Provide Insurance or Secure Compensation

Failure of an employer, subject to the compensation act, to provide insurance or secure the payment of compensation may subject him to an action by the employee for damages.

The failure of an employer who is subject to the compensation act to provide insurance or secure the payment of compensation may subject him to liability in an action at law to recover damages, brought by the employee,³⁴ or, under some statutes,

29. Pa.—Simon v. Allegheny-Pittsburgh Coal Co., 34 Pa.Dist. & Co. 643, 87 Pittsb.Leg.J. 41.

30. Ill.—Cadwell v. National Tea Co., 98 N.E.2d 516, 343 Ill.App. 206. Right of infant to sue at law after election to take compensation under statute see *infra* § 937.

Violation of child labor law

(1) Guardian of minor who had been illegally employed in violation of the child labor law could not, more than six months after minor's injuries were sustained, maintain action for those injuries, although action was filed within six months after guardian was appointed and filed a rejection of minor's right to benefits under the act.

Ill.—Cadwell v. National Tea Co., *supra*.

(2) Violation of child labor laws generally see *supra* § 930.

31. Md.—Kramer v. Globe Brewing Co., 2 A.2d 634, 175 Md. 461.

Ohio.—Fitzgerald v. Chemical Service Corp., 84 N.E.2d 754, 84 Ohio App. 423—Geller v. Epstein, 34 N.E.2d 66, 66 Ohio App. 354—Pisanello v. Polinori, 22 N.E.2d 92, 60 Ohio App. 422.

R.I.—Rossi v. Ronci, 195 A. 401, 59 R.I. 307—Faltinalli v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438.

Tenn.—Layne v. Campbell, 219 S.W. 2d 917, 31 Tenn.App. 651.

Utah.—Corpus Juris cited in Peterson v. Sorensen, 65 P.2d 12, 22, 31 Utah 507.

71 C.J. p 1487 note 45.

Employers not within act see *supra* § 921.

Injury arising out of, and in course of, employment

An employer, who came within pro-

visions of compensation act, but did not take necessary steps to bring himself and his employees within terms thereof, was subject to common-law action for injury to employee arising out of, and in course of, employment.

R.I.—Rossi v. Ronci, 7 A.2d 773, 63 R.I. 250.

Option of employee or representative

(1) Under compensation act, the right to sue the employer at common law is inherent in the employee only in those cases in which the employer has failed to comply with the act, in which case the employee, or his representative in cases of death, has the option of either claiming compensation under the act or maintaining an action at common law for damages on account of the injury.

Md.—Kramer v. Globe Brewing Co., 2 A.2d 634, 175 Md. 461.

(2) General purpose of compensation act is to protect employees coming within it by authorizing employees of noncomplying employers to bring suits against them for damages or apply to compensation bureau for compensation awards.

N.D.—State for Benefit of Workmen's Compensation Fund v. E. W. Wylie Co., 58 N.W.2d 76, 79 N.D. 471.

(3) If Ohio employer fails to comply with compensation law, an injured employee has an election to have industrial commission fix compensation, and, in default thereof, have attorney general collect it by suit from employer, or he may sue for damages.

Ohio.—Cameron v. Ringling Bros.—Barnum & Bailey Combined Shows, 5 Ohio Supp. 235.

Effect of compliance by other employer

Employee of operator of sawmill, suing operator as well as owner of timber, was entitled to maintain common-law action against operator for negligence, where operator had not complied with compensation act, even though owner or some other employer may have complied therewith. Tenn.—Copeland v. Cherry, 95 S.W.2d 1275, 20 Tenn.App. 117.

Furnishing reports; contributing to fund

(1) The provision of the compensation act making an employer liable to suit in certain cases, as a punitive measure, on failure to furnish certain reports to the department of labor and industry refers only to the particular reports specified in the statute, and, as a penal clause, must be strictly construed.

Wash.—Lubich v. Pacific Highway Transport, 202 P.2d 270, 32 Wash. 2d 457.

(2) Under Washington compensation act, if employer had not made reports or contributed to accident fund, deceased employee's beneficiary could elect to sue for death by wrongful act of employer.

U.S.—Calvin v. West Coast Power Co., D.C.Or., 44 F.Supp. 783.

Compliance held sufficient

Wash.—Pearson v. Aluminum Co. of America, 161 P.2d 169, 23 Wash.2d 403.

32. Mo.—Warren v. American Car & Foundry Co., 38 S.W.2d 718, 327 Mo. 755.

33. Mo.—Walker v. Sheffield Steel Corporation, 27 S.W.2d 44, 224 Mo. App. 849.

34. U.S.—Chappell v. D. C. Johnson Lumber Co., C.A.Or., 216 F.2d 873.

by the commission acting therein for the benefit of the injured employee;³⁵ and the employee's right to bring the action at law because of the employer's failure to comply with insurance provisions will not be affected by an order of the commission, subsequently made, exempting the employer from com-

Muir v. Kessinger, D.C.Wash., 35 F.Supp. 116, cause remanded, C.C.A., 121 F.2d 456—Larson v. Todd Shipyards Corp., D.C.N.Y., 16 F.Supp. 967.

Ark.—Odom v. Arkansas Pipe & Scrap Material Co., 187 S.W.2d 320, 208 Ark. 678—Young v. G. L. Tarlton, Contractor, Inc., 162 S.W.2d 477, 204 Ark. 283.

Cal.—Chakmakjian v. Lowe, 201 P.2d 801, 33 C.2d 308—Devens v. Goldberg, 199 P.2d 943, 33 C.2d 173—Rideaux v. Torggrimson, 86 P.2d 826, 12 C.2d 633.

Lee v. Cranford, 237 P.2d 986, 107 C.A.2d 677—Chakmakjian v. Lowe, 225 P.2d 307, 101 C.A.2d 329—Blinkinsop v. Weber, 193 P.2d 96, 85 C.A.2d 276—Liberty Mut. Ins. Co. v. Superior Court in and for Los Angeles County, 145 P.2d 344, 62 C.A.2d 601.

Fla.—Jones v. Brink, 39 So.2d 791. Md.—Lease v. Upper Potomac River Commission, 20 A.2d 498, 179 Md. 543.

Mass.—Thorneal v. Cape Pond Ice Co., 74 N.E.2d 5, 321 Mass. 528.

Mich.—Nantico v. Matuszak, 34 N.W.2d 506, 322 Mich. 644.

Miss.—Corpus Juris cited in McCoy v. Cornish, 71 So.2d 304, 307, 220 Miss. 577.

N.M.—Addison v. Tessier, 305 P.2d 1067, 62 N.M. 120.

N.Y.—Paulsen v. Kahn, 288 N.Y.S. 622, 248 App.Div. 744.

Soraci v. Colonial Sand & Stone Co., 79 N.Y.S.2d 698, 191 Misc. 1066, affirmed 94 N.Y.S.2d 820, 276 App.Div. 895, appeal denied 97 N.Y.S.2d 541, 277 App.Div. 769.

Ohio.—Cameron v. Ringling Bros.—Barnum & Bailey Combined Shows, 5 Ohio Supp. 235.

Okl.—Londagin v. McDuff, 251 P.2d 496, 207 Okl. 594.

S.D.—Utah Idaho Sugar Co. v. Temmey, 5 N.W.2d 486, 68 S.D. 628.

Utah.—Corpus Juris cited in Peterson v. Sorensen, 65 P.2d 12, 22, 91 Utah 507.

Wash.—O'Brien v. Northern Pac. Ry. Co., 72 P.2d 602, 192 Wash. 55. 71 C.J. p 1487 note 48.

Failure to pay compensation as not failure to secure see *infra* § 935.

Statutory action

Wash.—Long v. Thompson, 81 P.2d 908, 177 Wash. 296.

Suit at common law or under Employers' Liability Act

Ariz.—Haralson v. Rhea, 259 P.2d 246, 76 Ariz. 74.

Absolute right of employee to sue for damages

Okl.—Dixie Cab Co. v. Sanders, 284 P.2d 421.

Word "secure," within compensation act provision that, if employer has failed to secure payment of compensation for injured employee, employee may maintain action for damages, has been held to mean that employer would obtain or procure compensation for employee. Okl.—Akin v. Shelton, 53 P.2d 661, 175 Okl. 536.

Failure of employer held shown

Miss.—McCoy v. Cornish, 71 So.2d 304, 220 Miss. 577.

Tex.—Hartford Acc. & Indem. Co. v. Christensen, 228 S.W.2d 135, 149 Tex. 79.

Failure of employer held not shown

(1) Generally.

U.S.—Williams v. Minnesota Min. & Mfg. Co., D.C.Cal., 14 F.R.D. 1.

N.Y.—Murphy v. Elmwood County Club, 51 N.Y.S.2d 260, 183 Misc. 332.

Wash.—Pearson v. Aluminum Co. of America, 161 P.2d 169, 23 Wash.2d 403.

W.Va.—Canterbury v. Valley Bell Dairy Co., 95 S.E.2d 73.

(2) Defendant's employees, injured while acting within course of their employment and subject to compensation laws, were fully protected by defendant's application for coverage and payment of an advance premium to industrial commission, and an error in accounting could not be basis of an action on behalf of an employee against defendant as a noncomplying employer.

Ohio.—Brown v. L. A. Wells Const. Co., App., 67 N.E.2d 110, affirmed 56 N.E.2d 451, 143 Ohio St. 580.

(3) Where employer procured compensation policy prior to date of injury to employee, but "coverage card" had not been received by commission until after injury, and insurance carrier had on file copy of its standard policy of compensation, compensation act was complied with, and employee was precluded from bringing action in district court, but was required to bring claim before state industrial commission; statute requiring employer to post notice that he has secured compensation insurance held directory.

Okl.—Akin v. Shelton, 53 P.2d 661, 175 Okl. 536.

(4) Where compensation insurer expressly agreed to pay entire amount of compensation due, and actually paid compensation to widow of employee, insurer thereby acknowledged liability and hence widow could recover statutory compensation only, and not actual damages, irrespective of whether employer paid premium.

U.S.—Gomillion v. Union Bridge & Construction Co. of Kansas City, Mo., C.C.A.Tex., 100 F.2d 937, certiorari denied 59 S.Ct. 1081, 307 U.S. 634, 83 L.Ed. 1516.

(5) Where insurer agreed to pay, and did pay, compensation for workman's death, his widow could not recover actual damages for death, as against contention that "participation and assessment indorsement" superseded the policy and made the employer in effect a self-insurer rather than a subscriber under compensation law.

U.S.—Gomillion v. Union Bridge & Construction Co. of Kansas City, Mo., *supra*.

Determination of question by court

Where a determination of whether an employer was covered by state industrial insurance, denied by industrial commission for reason that employer was in default in filing of pay rolls and payment of premiums, required not only a finding of facts under conflicting evidence, but also determination of numerous questions of both law and equity in connection therewith, district court had jurisdiction to make determination, as against contention that commission had exclusive jurisdiction.

Nev.—Provenzano v. Long, 183 P.2d 639, 64 Nev. 412.

General contractor; subcontractor

(1) If general contractor fails to secure payment of compensation, an action at law may be maintained against him for injury of employee. Fla.—Brickley v. Gulf Coast Const. Co., 14 So.2d 265, 153 Fla. 216.

(2) Remedy of employee of subcontractor who had failed to provide workmen's compensation was limited as against prime contractor by provisions of state compensation law, and federal district court lacked jurisdiction to entertain negligence action by such employee against prime contractor.

U.S.—Huffstettler v. Lion Oil Co., C.A.Ark., 208 F.2d 549.

Employee's knowledge of employer's failure

That plaintiff employee knew that employer employed more than three employees and did not have compensation insurance would not necessarily preclude recovery by employee for injuries sustained as result of employer's negligence.

Tex.—Mender v. Bryant, Civ.App., 225 S.W.2d 877, error refused.

35. Mo.—Osagera v. Schaff, 240 S.W.2d, 293 Mo. 333.

pliance on a showing of solvency and ability to pay.³⁶ The good faith of the employer in attempting to secure compensation insurance is not the test in determining whether he may be sued by his employee for damages;³⁷ and an employer is not relieved of such suit by the erroneous interpretation of the compensation statute by the attorney general and the department of labor and industries, who believed the employer not to be within the statute.³⁸

In some jurisdictions, where the employer fails to insure, the action at law is the only remedy;³⁹ in others, compensation under the statute is the only remedy, the right to bring an action of law having been abrogated;⁴⁰ in still others, the injured

employee has an election, or option, and may sue for damages or bring proceedings to secure compensation under the act,⁴¹ the reasoning in some cases basing the employer's liability under the act on his failure to reject, and his common-law liability on his failure to insure.⁴² In at least one jurisdiction the employee, under such circumstances, may proceed both under the compensation statute and by action for damages, at the same time;⁴³ he is not required to apply for compensation under the statute before beginning his action at law.⁴⁴

Statutory provisions as to the effect of the failure of an employer to provide compensation insurance coverage apply only to employers who are subject

36. Minn.—Nash v. Minneapolis & St. L. Ry. Co., 175 N.W. 610, 144 Minn. 322.

37. Miss.—McCoy v. Cornish, 71 So. 2d 304, 220 Miss. 577.

Purchasing life insurance for employee

Employer's act in purchasing five thousand dollar policy on employee's life would not release employer from liability to employee's widow and dependents for such benefits as they would be entitled to under the compensation act following employee's death in course of his employment. Miss.—Riddell v. Cagle's Estate, 85 So.2d 926, 227 Miss. 305.

38. Wash.—Long v. Thompson, 31 P. 2d 908, 177 Wash. 296.

39. S.D.—Utah Idaho Sugar Co. v. Temmey, 5 N.W.2d 486, 68 S.D. 623—Collins v. Chicago, M. & St. P. Ry. Co., 207 N.W. 460, 49 S.D. 411.

40. Wash.—Gowey v. Seattle Lighting Co., 184 P. 339, 108 Wash. 479.

Longshoremen's and Harbor Workers' Act

Failure of an employer to secure payment of compensation, as required by Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 905, would not give injured workman who was otherwise limited to remedy under such act the privilege of filing a common-law action against employer for negligence or an action under state employers' liability act.

U.S.—Chappell v. C. D. Johnson Lumber Corp., D.C.Or., 112 F.Supp. 625.

41. U.S.—Chappell v. D. C. Johnson Lumber Co., C.A.Or., 216 F.2d 873—Severson v. Hanford Tri-State Airlines, C.C.A.Minn., 105 F.2d 622, construing Iowa statute.

D.C.—Garcia v. De Leon, Mun.App., 59 A.2d 637.

Ind.—Conway v. Park, 31 N.E.2d 79, 108 Ind.App. 562.

Miss.—Riddell v. Cagle's Estate, 85 So.2d 926, 227 Miss. 305—McCoy v. Cornish, 71 So.2d 304, 220 Miss. 577.

Mo.—Neff v. Balotto Coal Co., 234 S.W.2d 578, 361 Mo. 304.

N.Y.—Soraci v. Colonial Sand & Stone Co., 79 N.Y.S.2d 698, 191 Misc. 1056, affirmed 94 N.Y.S.2d 820, 276 App.Div. 895, appeal denied 97 N.Y.S.2d 541, 277 App.Div. 769.

Twitty v. Donlon, 133 N.Y.S.2d 381.

Ohio.—Cameron v. Ringling Bros.—Barnum & Bailey Combined Shows, 5 Ohio Supp. 235.

Utah.—Peterson v. Sorensen, 65 P.2d 12, 91 Utah 507.

71 C.J. p 1487 notes 53, 54.

Election generally see infra §§ 936—938.

Employee of major employer

Mo.—Daniels v. Luechtefeld, App., 155 S.W.2d 807.

Right to sue for wrongful death not reinstated

Statutory amendment providing that if employer fails to secure payment of compensation, employee or his legal representative may have the choice between claiming compensation under the compensation law or suing at law for damages did not operate to repeal the compensation law and reinstate right to maintain an action for the wrongful death of an employee, as it existed prior to original enactment of the statute.

Miss.—Allen v. R. G. Le Tourneau, Inc., 71 So.2d 447, 220 Miss. 520.

The employer's failure to report the accident, as required by statute, does not give the claimant an option to claim compensation or bring an action for damages, where such option is given by statute only in case of the employer's failure to prove his financial ability or to procure insurance.

Conn.—Hoard v. Sears, Roebuck & Co., 138 A. 269, 122 Conn. 185.

42. Iowa.—Van Gorkom v. O'Connell, 206 N.W. 637, 201 Iowa 52.

43. Cal.—Chakmakjian v. Lowe, 225 P.2d 307, 101 C.A.2d 329—Blinkinsop v. Weber, 193 P.2d 98, 85 C.A. 2d 276—Goodman Bros. v. Superior Court of City and County of San Francisco, 124 P.2d 644, 51 C.A. 2d 297—Marshall v. Foote, 252 P. 1075, 81 C.A. 98.

"Under section 3706 of the Labor Code, the injured employee may bring an action for damages in any case where his employer failed to carry compensation insurance, and this right may be exercised independently of any proceeding before the Industrial Accident Commission." Cal.—Chakmakjian v. Lowe, 201 P.2d 801, 802, 33 C.2d 308.

Effect of payment of compensation

(1) Payment in full of award of industrial accident commission to employee did not deprive superior court of jurisdiction of action for damages against employers who failed to carry compensation insurance. Cal.—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 773.

(2) The phrase, in compensation act, that if any employer "shall fail to secure the payment of compensation," any injured employee may bring an action against employer for damages, refers to the time before the contingency arises that requires payment of compensation and not the actual payment.

Cal.—Coffin v. Bloodworth, 82 P.2d 953, 28 C.A.2d 522.

Payment of medical bills and wages

Employer who failed to comply with requirements of compensation act by securing compensation insurance or consent to self-insure was subject to suit for damages for injuries sustained by employee, although employer had paid employee's medical bills and wages during disability.

Cal.—Coffin v. Bloodworth, supra.

44. Cal.—Marshall v. Foote, 252 P. 1075, 81 C.A. 98.

to the compensation act;⁴⁵ likewise, the option of an injured employee to claim compensation or maintain an action for damages, where his employer has failed to carry compensation insurance or to qualify as a self-insurer, is limited to employees covered by the compensation act, and has no application to employees not covered thereby.⁴⁶ Where the claimant asserts only his rights under the compensation law, and no others, a provision as to the effect of the employer's failure to contribute to the industrial accident fund is not pertinent, and its operation need not be determined.⁴⁷

Where the employer fails to comply with the insurance requirements, the employee retains the common-law action, if any, which he had prior to the enactment of the compensation act,⁴⁸ or has all the rights of action which he would have had if the compensation act had not been passed,⁴⁹ and no new cause of action is created.⁵⁰

An employee has no right to proceed with an action at law on the basis of the alleged failure of the employer to provide insurance if, after receiving notice of delinquency, the employer pays within the time allowed by statute in such cases,⁵¹ or if he has filed an application to be a self-insurer and the commission has failed to act thereon,⁵² the employer being entitled to the protection of the act, as of the date of his application;⁵³ nor can the action at law be maintained in the absence of evidence that the employer had failed to make his remittances to the insurance fund,⁵⁴ especially where the expressed willingness of the commission to pay com-

pensation to the employee justifies an inference that all remittances due had been paid.⁵⁵

On the other hand, where an employee is injured before his employer has qualified as a self-insurer under the compensation law, his right to sue at common law accrues, and is not affected by the employer's later qualification;⁵⁶ nor will the right of dependents to compensation under the statute be defeated by the employer's delinquency in payment of premiums at the time of the accident where payment is made subsequently.⁵⁷

Failure to name employee in policy. The fact that an injured employee is not named in his employer's compensation policy does not enable him to maintain an action against his employer based on common-law negligence.⁵⁸

§ 934. Failure to Give Notice

Whether an employer's failure to give notice that he has subscribed to the compensation act leaves his injured employee free to sue for damages depends on the language of the statute.

Under sections of the compensation act requiring an employer subscribing thereto to give written notice, or to post notice, to employees that he has subscribed, and, in some instances, requiring an employee, otherwise within the act, to notify the employer that he rejects the act, if he wishes to retain his rights to sue at common law, failure of the employer to notify a workman that he has subscribed to the act may leave the workman, who is injured, free to pursue his remedy at common law.⁵⁹

45. *Ariz.—Swatzell v. Industrial Commission*, 277 P.2d 244, 78 *Ariz.* 149.

Employers not within act see *supra* § 921.

Insufficient number of employees

Mass.—Costa v. Krivitsky, 123 N.E. 2d 515, 332 *Mass.* 98.

Utah.—Buhler v. Maddison, 140 P.2d 983, 105 *Utah* 89.

46. *Minn.—Hardware Mut. Cas. Co. v. Ozmun*, 14 N.W.2d 351, 217 *Minn.* 280.

Employees not within act see *supra* § 922.

47. *Wyo.—Fox Park Timber Co. v. Baker*, 84 P.2d 736, 58 *Wyo.* 467, 120 A.L.R. 1020.

48. *Okl.—Board of Com'rs of Harmon County v. Keen*, 153 P.2d 483, 194 *Okl.* 593.

49. *Mass.—Thorneal v. Cape Pond Ice Co.*, 74 N.E.2d 5, 321 *Mass.* 528.

50. *Okl.—Board of Com'rs of Harmon County v. Keen*, 153 P.2d 483, 194 *Okl.* 593.

County held not liable in tort despite failure to insure.

Okl.—Board of Com'rs of Harmon County v. Keen, *supra*—*Whiteneck v. Board of County Commissioners*, 213 P. 865, 89 *Okl.* 52.

Employees of county boards of education not paying into compensation fund held to have no right of action for injuries sustained in course of employment because of employers' negligence.

W.Va.—Webster v. Board of Education of Raleigh County, 180 S.E. 438, 116 *W.Va.* 395.

51. *U.S.—Barrett v. Grays Harbor Commercial Co.*, D.C.Wash., 209 F. 95.

52. *U.S.—Ginnocchio v. Hydraulic Press Brick Co.*, D.C.Ohio, 266 F. 564.

Mo.—Walker v. Sheffield Steel Corporation, 27 S.W.2d 44, 224 *Mo. App.* 849.

53. *U.S.—Ginnocchio v. Hydraulic Press Brick Co.*, D.C.Ohio, 266 F. 564.

54. *Or.—Lamm v. Silver Falls Tim-*

ber Co., 277 P. 91, 286 P. 527, 291 P. 375, 133 *Or.* 468, appeal dismissed 51 S.Ct. 214, 282 U.S. 812, 75 L.Ed. 727.

55. *Or.—Lamm v. Silver Falls Timber Co.*, *supra*.

56. *U.S.—Brazil v. Chicago, B. & Q. R. R.*, D.C.Mass., 65 F.Supp. 20.

57. *Ohio.—Industrial Commission of Ohio v. Madden*, 152 N.E. 662, 115 *Ohio St.* 230.

58. *Miss.—Nowell v. Harris*, 68 So. 2d 464, 219 *Miss.* 363.

59. *U.S.—Anderson v. Rosebear, C.A. N.D.*, 245 F.2d 673.

Ariz.—Jeune v. Del E. Webb Const. Co., 265 P.2d 1076, 76 *Ariz.* 413. 71 C.J. p 1488 note 64.

Employer presumptively excluded from act

Where employer which was presumptively excluded from provisions of compensation act, because it regularly employed less than fifteen employees, elected to come within provisions of act, but did not notify an employee or post the notice of such election required by the act, such em-

This is true even though the employee has failed to notify the employer of his rejection of the act, the statutory requirement as to notice by the employee applying only where the employee would otherwise be brought within the act.⁶⁰

However, particular provisions requiring the posting of notice have been held not to give an employee the right to maintain an action at law, on failure to post, in view of other provisions of the statute,⁶¹ as where it is specifically provided, by amendment to the compensation law, that a failure to post such notices shall not in any way affect the exclusiveness of the remedy provided for in the compensation law.⁶² Also, where the statute in terms limits its effect to extension of time allowed the employee for notifying the employer of the accident, failure of the employer to give notice of his subscription to the act does not deprive him of its protection.⁶³

*The employee may waive his right to notice by the employer.*⁶⁴

§ 935. Failure to Pay Compensation

Failure to pay compensation does not authorize the

bringing of an action at law where the compensation act is applicable and it does not provide for an action on such nonpayment.

Failure of the employer and his insurer to pay compensation to an injured employee does not authorize the bringing of an action at law, where the conditions making the compensation act applicable are shown to exist and there is no provision therein permitting an action at law when compensation is not paid;⁶⁵ nor is failure to pay compensation a failure to secure compensation which, as discussed supra § 933, may justify the bringing of an action at law.⁶⁶ An employer, by procuring a stay of compensation proceedings pending proceedings in admiralty to limit liability, does not thereby repudiate his obligation under the act so as to authorize a recovery of damages at common law.⁶⁷

Where an employer and an employee enter into an agreement for the payment of compensation for injuries sustained by the employee, and the employer abandons the agreement without waiting for, or seeking, any determination of the employee's disability as contemplated by the agreement, the employee is not barred from bringing an action against the employer for such injuries.⁶⁸

employee was not required to make a compensation act proceeding his exclusive remedy for a civil assault and battery allegedly committed upon him by employer's agent.
S.C.—Herring v. Lawrence Warehouse Co., 72 S.E.2d 453, 222 S.C. 226.

Estoppel of employer

Where employer is sued at common law by employee who alleges that employer had not accepted provisions of compensation act, and employer, by answer, specifically admits such allegations, employer is estopped thereafter to assert that case should be dismissed because employee had not shown that employer had not given notice required by the act.

Ga.—Campbell v. Dixie Gravel Co., 191 S.E. 274, 55 Ga.App. 747.

60. Tex.—Batson-Milholme Co. v. Faulk, Civ.App., 209 S.W. 837.

61. Fla.—Hughes v. B. F. Goodrich Co., 11 So.2d 813, 152 Fla. 170.

62. N.Y.—Arnold v. Wright, 80 N.Y. S.2d 808.

Nonhazardous employee

Under such provision, a nonhazardous employee of an employer who has secured compensation is in the same position as a hazardous employee with respect to exclusiveness of compensation benefits and question whether employer has complied with section relating to posting of notice of employer's election to obtain coverage is immaterial on is-

sue of whether compensation coverage extends to an injured nonhazardous employee.

N.Y.—Murphy v. Elmwood Country Club, 51 N.Y.S.2d 260, 183 Misc. 332.

Decisions prior to amendment

(1) Prior to enactment of amendment, it was held that employer could not escape liability for failure to furnish employee with a safe place to work on ground that he had compensation coverage, where he failed to prove that notice respecting compensation had been posted as required by statute.

N.Y.—Salzberg v. Grossman Nassau Hotel Corp., 16 N.Y.S.2d 811, 258 App.Div. 926.

(2) Where school board had not complied with compensation law requiring posting of notices in form prescribed by industrial commissioner, stating that board had secured payment of compensation, infant pupil employed in school's cafeteria could not be deemed to have elected, pursuant to law, to become subject thereto, and hence was not barred from maintaining an action under the Labor Law for injuries due to school board's negligence and sustained before enactment of amendment.

N.Y.—Warney v. Board of Ed. of School Dist. No. 5, of Town of Irondequoit, 49 N.E.2d 466, 290 N.Y. 329.

63. La.—Colorado v. Johnson Iron Works, 83 So. 381, 146 La. 68—

Boyer v. Crescent Paper Box Factory, 78 So. 596, 143 La. 368.

64. Tex.—Poe v. Continental Oil & Cotton Co., Civ.App., 211 S.W. 488, reversed on other grounds, Com. App., 231 S.W. 717.

65. Cal.—Pecor v. Norton-Lilly Co., 295 P. 582, 111 C.A. 241.

Actual payment as not test

Employer's liability to pay compensation where death results from injury as provided in compensation act, and his immunity under the savings clauses, do not depend upon whether he actually pays compensation, but on whether, measured by terms of act, he is liable to pay compensation to those who are entitled thereto under the act.

Kan.—Neville v. Wichita Eagle, Inc., 294 P.2d 248, 179 Kan. 197.

66. Cal.—Pecor v. Norton-Lilly Co., 295 P. 582, 111 C.A. 241.

67. U.S.—In re Spencer Kellogg & Sons, C.C.A.N.Y., 52 F.2d 129, reversed on other grounds, The Linseed King, 53 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903.

68. Okl.—Montgomery Ward & Co. v. Beller, 276 P.2d 932.

Attempt to secure release from employee

Where agreement provided for termination of termination of temporary total disability and extent of permanent disability, if any, and for review of such determination, employer who attempted to obtain re-

2. ELECTION AND WAIVER

§ 936. In General

An employee's election to take compensation generally bars an action by him against his employer for damages. Particular acts by an employee have, in varying circumstances, been held, or held not, to constitute an election, for this purpose.

lease from employee and terminate its contract obligations toward him breached the contract by such attempted summary termination without seeking the review provided.

Okl.—Montgomery Ward & Co. v. Bel-ler, *supra*.

69. N.H.—Schofield v. E. R. Bates & Company, 3 A.2d 818, 90 N.H. 31.

70. U.S.—Rackus v. Moore-McCormack Lines, D.C.Pa., 85 F.Supp. 185.

Mo.—Neff v. Baiotto Coal Co., 234 S. W.2d 578, 361 Mo. 304.

N.H.—Carignan v. Amoskeag Hamper Co., 61 A.2d 799, 95 N.H. 262—Schofield v. E. R. Bates & Company, 3 A.2d 818, 90 N.H. 31.

N.Y.—Legault v. Brown, 127 N.Y.S. 2d 601, 283 App.Div. 303.

Ohio.—Geller v. Epstein, 34 N.E.2d 66, 86 Ohio App. 354.

71 C.J. p 1488 note 72.

Election:

By assaulted employee see *supra* § 926 b.

To pursue third person as waiver of right to claim compensation see *supra* §§ 393-398.

Where employer fails to provide insurance or secure compensation see *supra* § 933.

Pursuit of other remedies against employer as waiver right to claim compensation see *supra* § 392.

Special employee

Where special employee, injured during course of employment for special employer, elected to proceed against his general employer and received compensation for injuries sustained, he was precluded from thereafter bringing a common-law action against his special employer based on latter's negligence.

Ga.—Scott v. Savannah Elec. & Power Co., 66 S.E.2d 179, 84 Ga.App. 553.

N.Y.—Mitchell v. Adam Hat Stores, 110 N.Y.S.2d 423, 279 App.Div. 877, reargument denied 111 N.Y.S.2d 769, 279 App.Div. 931, affirmed 109 N.E.2d 710, 304 N.Y. 836.

Estoppel of employee not accepting act

An agreement between employer who has accepted provisions of compensation act, and employee who has not accepted them, for employee's receipt of compensation under act for injuries sustained, is binding on him only on grounds of estoppel.

U.S.—Sears, Roebuck & Co. v.

Broughton, C.A.Ky., 195 F.2d 95, certiorari denied 72 S.Ct. 1047, 343 U.S. 953, 96 L.Ed. 1354.

71. U.S.—McKenney v. U. S., D.C. Cal., 99 F.Supp. 121.

Ala.—Harris v. Louisville & N. R. Co., 186 So. 771, 237 Ala. 366.

Mass.—McDonald v. Employers' Liability Assur. Corporation, 192 N.E. 608, 288 Mass. 170.

Okl.—*Corpus Juris* cited in *Dixie Cab Co. v. Sanders*, 284 P.2d 421, 424.

71 C.J. p 1488 note 73.

"Plaintiff's filing of such claim constituted a release of all claims at law arising from the injury. Whether plaintiff's injury and resultant disability were compensable under the act or not, his claim therefor was within the jurisdiction of the compensation commission, and, having proceeded before it under the act, he may not thereafter maintain an action at law . . . Plaintiff proceeded before the compensation commission on the theory that his injury arose out of and in the course of his employment, but, now, in an action at law, proceeds on the theory that it did not so arise. Having adopted one theory before the compensation commission, he may not thereafter bring other proceedings based upon an inconsistent, opposite theory or claim."

Mich.—Morris v. Ford Motor Co., 31 N.W.2d 89, 90, 320 Mich. 372, appeal dismissed 69 S.Ct. 51, 335 U.S. 803, 93 L.Ed. 360.

Filing of claim

(1) The rule stated in the text has been applied to the filing of a claim for compensation.

U.S.—Brown & Root v. U. S., D.C. Tex., 92 F.Supp. 257, affirmed, C. A., 198 F.2d 138—Frader v. U. S., D.C.N.Y., 91 F.Supp. 657.

Mich.—Twork v. Munising Paper Co., 266 N.W. 311, 275 Mich. 174.

Mo.—Neff v. Baiotto Coal Co., 234 S. W.2d 578, 361 Mo. 304.

N.Y.—Johnson v. General Elec. Co., 152 N.Y.S.2d 25, 2 A.D.2d 632, reargument and appeal denied 154 N. Y.S.2d 1018, 2 A.D.2d 823.

Tex.—Jones v. Jeffreys, Civ.App., 244 S.W.2d 924, error refused.

(2) The rule applies despite employer's failure to show compliance with compensation law as to posting notice of obtaining security for payment of compensation.

The general rule is that, unless such election is avoided for some equitable cause,⁶⁹ an action by an employee against his employer to recover damages is barred by his election to take compensation under the statute,⁷⁰ as evidenced by bringing proceedings to secure compensation,⁷¹ even though the

N.Y.—Polinsky v. Louis Saffer Co., 37 N.Y.S.2d 248, 265 App.Div. 821.

(3) The filing of a claim after suit at law brought operates as a release of rights at law where the statute so provides.

Mich.—Brabon v. Gladwin Light & Power Co., 167 N.W. 1024, 201 Mich. 697.

N.Y.—Santo v. A. Santini Storage Co., 254 N.Y.S. 592, 142 Misc. 383.

(4) Under other authority, filing of claim for compensation is no bar to institution of action for damages for same injuries.

Ill.—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied *Twin City Barge & Gravel Co. v. Whalen*, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

(5) An action is not barred by the filing of a claim with the compensation commission where done in a tentative way, and subsequently to filing of the suit at common law.

Tex.—Rice v. Garrett, Civ.App., 194 S.W. 667.

(6) It has also been held that where an employee did not have two co-existing remedial rights by way of workmen's compensation and personal injury action against employer, but had an exclusive compensation remedy if accident arose out of, and in course of, her employment, the mere filing of compensation claim was not such an election of remedies or such an estoppel as would preclude him from maintaining action.

Nev.—McColl v. Scherer, 315 P.2d 807.

Settlement with approval of commission

Where employee upon whom employer had intentionally inflicted injury filed claim with industrial accident commission and a settlement was made with approval of commission, he was bound by his election of remedies and was precluded from prosecuting in court any civil action for damages for assault and battery.

Cal.—Carter v. Superior Court In and For Los Angeles County, 298 P.2d 598, 142 C.A.2d 350.

Waiver of right of action at common law

Tex.—Robertson v. C. A. Bryant Co., Civ.App., 127 S.W.2d 549, error dismissed, judgment correct.

right to compensation is disputed,⁷² or by accepting | compensation⁷³ or by the prior acceptance of other

72. Ill.—Allen v. American Milling Co., 209 Ill.App. 73.

73. U.S.—Heagney v. Brooklyn Eastern Dist. Terminal, C.A.N.Y., 190 F.2d 976, certiorari denied 72 S.Ct. 367, 342 U.S. 920, 96 L.Ed. 688, rehearing denied 72 S.Ct. 633, 343 U.S. 911, 96 L.Ed. 1327.

Remington v. General Motors Corp., D.C.Mich., 127 F.Supp. 672, cause remanded, C.A., 229 F.2d 738, affirmed 237 F.2d 919—Stiffler v. U. S., D.C.Pa., 122 F.Supp. 304—Militano v. U. S., D.C.N.Y., 55 F.Supp. 904.

Cal.—Law v. Dartt, 240 P.2d 1013, 109 C.A.2d 508.

Mo.—Neff v. Balotto Coal Co., 234 S.W.2d 578, 361 Mo. 804.

N.H.—Carignan v. Amoskeag Hammer Co., 61 A.2d 799, 95 N.H. 262.

N.Y.—Johnson v. General Elec. Co., 152 N.Y.S.2d 25, 2 A.D. 632, reargument and appeal denied 154 N.Y.S.2d 1018, 2 A.D.2d 823.

Pa.—Fenner v. Littleton, Com.Pl., 28 Del.Co. 340.

Tex.—Jones v. Jeffreys, Civ.App., 244 S.W.2d 924, error refused—National Housing Agency v. Orton, Civ.App., 202 S.W.2d 243, error refused no reversible error—Huckabay v. Hughes Tool Co., Civ.App., 122 S.W.2d 233, error dismissed.

71 C.J. p 1488 note 76.

"Assuming that he had two remedies, one by virtue of the statute and one under the common law, it must be held that the two are inconsistent one with the other. He may not pursue both to a conclusion. By demanding, receiving and retaining the benefits of his first remedy, he is estopped to simultaneously pursue the second. He made his election." N.Y.—Legault v. Brown, 127 N.Y.S.2d 601, 604, 283 App.Div. 303.

Actual acceptance required

U.S.—McKenney v. U. S., D.C.Cal., 99 F.Supp. 121—Mandel v. U. S., D.C. Pa., 74 F.Supp. 754.

Acceptance without coercion, misrepresentation, or fraud

U.S.—Wright v. U. S., D.C.Cal., 95 F.Supp. 77.

Acceptance of equivalent of compensation from employer's insurance carrier.

U.S.—Ouzts v. A. P. Ward & Son, Inc., D.C.Fla., 146 F.Supp. 733.

Purpose of provision of compensation act that acceptance by employee of payments from employer's insurer shall constitute a release of all claims or demands at law, if any, arising from injury, is to prevent an employee who has proceeded under the act from enforcing any rights at common law or under employers' liability statutes against employer. Mass.—In re West, 46 N.E.2d 760, 313 Mass. 146.

Preliminary question, in employee's personal injury action at law after alleged acceptance of compensation, is whether employee had made valid election to accept compensation.

N.H.—McBride v. Amoskeag Mfg. Co., 185 A. 652, 88 N.H. 187.

Accord or satisfaction

(1) Where injured seaman accepted state workmen's compensation he could not recover in admiralty for maintenance, since compensation was substitute for maintenance and there was an accord and satisfaction.

U.S.—Owens v. Hammond Lumber Co., D.C.Cal., 8 F.Supp. 392.

(2) Where employee received award of the compensation board and medical payments, and tendered back the award, but retained the medical payments, and brought a separate action for negligence of the employer, even if the board had no jurisdiction the final award and acceptance of it would be deemed a satisfaction of any cause against the employer.

N.Y.—Meaney v. Keating, 102 N.Y.S.2d 514, 200 Misc. 308, affirmed 113 N.Y.S.2d 240, 279 App.Div. 1030, affirmed 112 N.E.2d 783, 305 N.Y. 660.

Proper remedy for relief of employee who signed receipt for final compensation settlement was under statute providing for review of award or order by compensation board, and not common-law action for damages.

Ky.—Kentucky Road Oiling Co. v. Sharp, 78 S.W.2d 38, 257 Ky. 378.

Action under Federal Employers' Liability Act

(1) The acceptance by an injured employee of compensation under a state workmen's compensation law is not a release of a cause of action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., nor does it estop the employee to sue under the federal act, if the injury is governed by it.

Ill.—Wetterer v. Atchison, T. & S. F. Ry. Co., 277 Ill.App. 275, certiorari denied Atchison, T. & S. F. Ry. Co. v. Wetterer, 55 S.Ct. 835, 295 U.S. 754, 79 L.Ed. 1698.

(2) Federal acts generally see supra § 918 b.

Action against government

(1) In libel by stevedore against government for injuries sustained on government-operated ship, fact that stevedore had filed a claim with federal employees' compensation commission and accepted compensation was a valid defense, since by accepting compensation he elected his remedy and surrendered any right of action he might have had

against the government under the Suits in Admiralty Act, if the ship was a merchant vessel, or the Public Vessels Act if the ship was a public vessel.

U.S.—Militano v. U. S., C.C.A.N.Y., 156 F.2d 599, certiorari dismissed State Marine Corp. v. Militano, 67 S.Ct. 193, 329 U.S. 682, 91 L.Ed. 600.

(2) Defense that stevedore had accepted compensation was not defective on ground that no award was made by the commission, where commission dealt with stevedore's application in usual manner and marked the file "final" which meant that claim was closed subject only to being reopened if additional claim for recurrent disability should be filed. U.S.—Militano v. U. S., C.C.A.N.Y., 156 F.2d 599, certiorari dismissed State Marine Corp. v. Militano, 67 S.Ct. 193, 329 U.S. 682, 91 L.Ed. 600.

(3) Defense was not defective on theory that stevedore's rights were protected by War Shipping Act extending rights to seaman employed through the War Shipping Administration, where he was not a member of crew of government vessel and was not employed through the War Shipping Administration, but was a longshoreman on stevedore pay roll of the army base in Brooklyn.

U.S.—Militano v. U. S., C.C.A.N.Y., 156 F.2d 599, certiorari dismissed State Marine Corp. v. Militano, 67 S.Ct. 193, 329 U.S. 682, 91 L.Ed. 600.

(4) Where civilian employees of the United States, injured in explosion while engaged in repairing vessel of United States, accepted compensation payments under the federal employees compensation act, they were thereby barred from maintaining tort actions under the Public Vessels Act, although no final awards had been made to them by compensation commission, and although commission had not advised them that they might have a right of action against the United States in tort for damages.

U.S.—Gibbs v. U. S., D.C.Cal., 94 F.Supp. 586.

(5) A civil service employee engaged as a seaman on a public vessel of the United States, having filed a claim under the federal employees' compensation act, and having received and accepted compensation, elected his remedy and surrendered any right of action he may have had against the United States under any other act, including the Public Vessels Act, although there allegedly had been no "final award" by the commission.

benefits by the employee,⁷⁴ such as medical services⁷⁵ or hospitalization,⁷⁶ under the act, and, it has been held, even though the commission had no jurisdiction under the act to make the award.⁷⁷

The action is also barred by the employee's failure to reserve common-law rights where, under the statute, reservation is necessary to save them,⁷⁸ by continuing in employment after notice that the employer has accepted the act,⁷⁹ or by an agreement to waive common-law remedies.⁸⁰ An action will not lie notwithstanding the employee's ignorance of the provisions of the compensation act, if there is no fraud or attempt to take advantage of the em-

ployee by the employer.⁸¹

An action to recover damages for pain and suffering or disfigurement,⁸² or for failure to furnish reasonably competent medical and surgical services,⁸³ or exemplary damages for gross and reckless negligence,⁸⁴ will not lie on the ground that they were not included in the compensation award.

An election or estoppel from instituting suit for damages is held to arise from application for, and acceptance of, compensation only where they are with the full understanding or knowledge of the applicant;⁸⁵ likewise, an employee appearing in com-

U.S.—Frader v. U. S., D.C.N.Y., 91 F.Supp. 657.

(6) This is true with respect to an employee who is sui juris.

U.S.—Johnson v. U. S., D.C.Va., 89 F.Supp. 65, reversed on other grounds, C.A., 186 F.2d 120.

(7) Infant see *infra* § 937.

(8) Where federal employee was injured while at work prior to effective date of Federal Tort Claims Act, presentation of claims for monthly payment and acceptance of monthly payments under Employees' Compensation Act for almost twelve months after Federal Tort Claims Act became effective constituted an election which precluded him from maintaining suit under Federal Tort Claims Act, notwithstanding he was not paid lump sum award under Employees' Compensation Act.

U.S.—Parr v. U. S., C.A.Kan., 172 F.2d 462.

(9) Federal acts generally see *supra* § 918 b.

74. U.S.—Militano v. U. S., D.C.N.Y., 55 F.Supp. 904.

Mo.—Neff v. Balotto Coal Co., 234 S.W.2d 578, 361 Mo. 304.

75. Ind.—Talge Mahogany Co. v. Burrows, 130 N.E. 865, 191 Ind. 167.

Mo.—Neff v. Balotto Coal Co., 234 S.W.2d 578, 361 Mo. 304.

76. Mo.—Neff v. Balotto Coal Co., *supra*.

Refusal of monetary compensation.

However, the receipt of hospital benefits by a seaman and his refusal to accept the actual monetary compensation offered to him under the compensation act have been held not to bar his action against the United States for negligence.

U.S.—McKenney v. U. S., D.C.Cal., 99 F.Supp. 121.

Tort occurring after acceptance

Where, at time of alleged malpractice in an operation on plaintiff in an army hospital the Federal Tort Claims Act, 28 U.S.C.A. § 2671 et seq., was not in effect and the tort for which the damages claimed did

not occur until after plaintiff had accepted hospitalization in the army hospital, the mere fact that he accepted hospitalization did not mean that he elected to receive the benefits of the Federal Employees' Compensation Act, 5 U.S.C.A. § 751 et seq.

U.S.—Canon v. U. S., C.A.Cal., 188 F.2d 444.

77. N.Y.—Brassel v. Electric Welding Co. of America, 145 N.E. 745, 239 N.Y. 78.

78. Mass.—Stamo v. Weiner, 101 N.E.2d 379, 328 Mass. 651—Adiletto v. Brockton Cut Sole Corp., 75 N.E.2d 926, 322 Mass. 110—Alberts v. Brockelman Bros., 45 N.E.2d 392, 312 Mass. 486—Noble v. Greenbaum, 42 N.E.2d 823, 311 Mass. 722—De Stefano v. Alpha Lunch Co. of Boston, 30 N.E.2d 827, 308 Mass. 38—Cozzo v. Atlantic Refining Co., 12 N.E.2d 744, 299 Mass. 260.

Tex.—Garrett v. Reno Oil Co., Civ. App., 271 S.W.2d 764, refused no reversible error.

71 C.J. p 1488 note 79.

79. Tex.—Gordon v. Travelers' Ins. Co., Civ.App., 287 S.W. 911—Consolidated Kansas City Smelting & Refining Co. v. Dean, Civ.App., 189 S.W. 747.

80. Kan.—Fuller v. Wright, 189 P. 142, 106 Kan. 676.

81. Ind.—Talge Mahogany Co. v. Burrows, 130 N.E. 865, 191 Ind. 167.

Mass.—Barry v. Bay State St. R. Co., 110 N.E. 1031, 222 Mass. 366.

82. N.Y.—Connors v. Semet-Solvay Co., 159 N.Y.S. 431, 94 Misc. 405.

83. Ala.—Singleton v. Hope Engineering Co., 137 So. 441, 223 Ala. 538.

Ill.—Spelman v. Pirie, 233 Ill.App. 6.

84. Iowa.—Stricklen v. Pearson Const. Co., 169 N.W. 628, 185 Iowa 95.

85. U.S.—Smith v. Price Bros. Co., C.C.A.Ohio, 131 F.2d 750, certiorari denied Price Bros. Co. v. Smith,

63 S.Ct. 560, 318 U.S. 762, 87 L.Ed. 1134.

In re Famous Players Lasky Corporation, D.C.Cal., 30 F.2d 402. N.M.—Addison v. Tessier, 305 P.2d 1067, 62 N.M. 120.

Election held not shown.

Okl.—McAlester Corp. v. Wheeler, 239 P.2d 409, 205 Okl. 446.

Knowledge of available remedies

An injured workman is accorded a "reasonable election" of remedy, within purview of constitutional limitation against denying action for negligence without granting "reasonable election," only when he has knowledge of alternative remedies available and knowledge that law precludes him from pursuing but one of such remedies, and in absence of such knowledge, to seek one remedy does not constitute election to waive another.

U.S.—Taylor v. Hubbell, C.A.Ariz., 188 F.2d 106, certiorari denied 72 S.Ct. 32, 342 U.S. 818, 96 L.Ed. 618.

Void application

If independent contractor who was not entitled to compensation, at time application on his behalf for compensation was filed, was under influence of narcotics and mentally incapable of transacting business, application was void, not merely voidable, and filing of the application did not preclude him from maintaining an independent action for injuries against the general contractor, without repaying, or offering to repay, to the industrial commission the sums received by him from it.

U.S.—Smith v. Price Bros. Co., C.C.A.Ohio, 131 F.2d 750, certiorari denied Price Bros. Co. v. Smith, 63 S.Ct. 560, 318 U.S. 762, 87 L.Ed. 1134.

Signing document before recovery from injuries held not a binding election of remedies.

U.S.—Cowan v. Inland Waterways Corp., D.C.Ill., 121 F.Supp. 683.

Knowledge of contents of agreement; fraud

(1) Employee who could read was

pensation proceedings without an attorney has been held not to have had a sufficient understanding of the subject, or sufficient knowledge, to support a waiver of his right to assert his claim in a lawsuit.⁸⁶ Under other authority, an employee's unilateral mistake of fact as to the effect of his acceptance of compensation on his common-law remedy does not relieve him of the consequences of his election.⁸⁷

An action for damages is not barred by compensation proceedings under the statute based on fraud in procuring the employee's signature to the application for compensation,⁸⁸ or by proceedings before the compensation commission, or acceptance of compensation, where the employment is not within the act;⁸⁹ or by the mere filing of statutory notice of the injury,⁹⁰ or appearance before the board for the purpose of attacking its jurisdiction,⁹¹ by a futile attempt to obtain an adjudication before the board,⁹² or where the employer has elected not to operate

under the act,⁹³ or by compensation proceedings at a time when the employee's remedy is uncertain because of the unsettled condition of the law as to the exclusiveness of the remedy under the compensation act.⁹⁴

Under some authorities, an action for damages is not barred by the institution of compensation proceedings, or the acceptance of compensation, where the injuries are not within the compensation act;⁹⁵ under other authorities, the acceptance of the compensation act by the employee bars his action for injuries even where his injuries are not compensable under the act.⁹⁶

An action is not barred where the award in the compensation case is on appeal and it does not appear that any payments on account of it have been made.⁹⁷ An unsigned statement by the compensation commissioner, and a penciled notation on a

estopped to assert that he did not know contents of agreement for payment of full compensation which he signed, or that checks paid to him, and accepted and receipted for by him were compensation payments under compensation law, so that, in absence of fraud, he could not maintain common-law action for damages.

Ky.—Kentucky Road Oiling Co. v. Sharp, 78 S.W.2d 38, 257 Ky. 378.

(2) Statement of officer of employer that employer would take care of employee by paying part of his regular wages did not constitute fraud sufficient to avoid employer's plea of estoppel based on employee's agreement for payment to him of compensation under compensation act; and reliance of employee on such statement was held not evidence of fraud which would bar employer's plea of estoppel.

Ky.—Kentucky Road Oiling Co. v. Sharp, *supra*.

Misrepresentation or misconception held not shown

N.H.—Coll v. Suncook Mills, 62 A.2d 717, 95 N.H. 301—Carignan v. Amoskeag Hamper Co., 61 A.2d 799, 95 N.H. 262.

Tender back of payment not required

Injured employee, electing to sue under state employers' liability act, need not tender back payment received on signing election to take compensation law, which instrument he understood to be something entirely different.

U.S.—Miles v. Lavender, 10 F.2d 450.

86. U.S.—Heagney v. Brooklyn Eastern Dist. Terminal, D.C.N.Y., 91 F.Supp. 775, affirmed, C.A., 190 F.2d 976, certiorari denied 72 S.Ct. 367, 342 U.S. 920, 96 L.Ed. 688, re-

hearing denied 72 S.Ct. 633, 343 U.S. 911, 96 L.Ed. 1827.

87. N.H.—Carignan v. Amoskeag Hamper Co., 61 A.2d 799, 95 N.H. 262.

No obligation on employer to instruct employee

Employer of injured employee was not obliged to instruct employee that employee need not accept a draft tendered for compensation and that another remedy was available if employee refused to accept draft. N.H.—Carignan v. Amoskeag Hamper Co., *supra*.

88. Ohio.—Byrne v. Vanderbilt, App., 187 N.E. 731—Affeld v. Paige Dairy Co., 11 Ohio App. 122.

89. U.S.—Waters v. Guile, Mich., 234 F. 532, 148 C.C.A. 298. 71 C.J. p 1489 note 87.

Employment in interstate commerce
W.Va.—Pritt v. West Virginia Northern R. Co., 51 S.E.2d 105, 132 W.Va. 184, 6 A.L.R.2d 562, certiorari denied West Virginia Northern R. Co. v. Pritt, 69 S.Ct. 891, 336 U.S. 961, 93 L.Ed. 1113.

90. Okl.—Dixie Cab Co. v. Sanders, 284 P.2d 421. 71 C.J. p 1489 note 89.

91. Ky.—Louisville Woolen Mills v. Kindgen, 231 S.W. 202, 191 Ky. 568. Minn.—Elder v. Chicago, R. I. & P. Ry. Co., 204 N.W. 557, 163 Minn. 457, affirmed 46 S.Ct. 420, 270 U.S. 611, 70 L.Ed. 757.

92. Tex.—Poe v. Continental Oil & Cotton Co., Com.App., 231 S.W. 717.

93. S.D.—Utah Idaho Sugar Co. v.

Temmey, 5 N.W.2d 486, 68 S.D. 623.

Rejection of act generally see *supra* § 931.

94. U.S.—Inland Waterways Corp. v. Doyle, C.A.Mo., 204 F.2d 874.

95. La.—Thomas v. Shippers' Compress & Warehouse Co., App., 158 So. 859.

N.Y.—Weydig v. Cole Elec. Products, 25 N.Y.S.2d 863.

71 C.J. p 1489 note 88.

Denial of compensation see *infra* this section.

"The waiver by an employee of his common law rights by virtue of . . . [the compensation statute] does not extend to his right to recover at common law for a noncompensable injury. His right to recover for such an injury is not affected by the Compensation Law." Mass.—Levin v. Twin Tanners, 60 N.E.2d 6, 9, 318 Mass. 13.

Estoppel to question compensability

Where injured employee had been put on notice that compensation board intended to find that his accident was compensable, and board had before it evidence showing that accident was compensable, employee could not, after having made no objection to the making of awards and having accepted payments for more than a year, question the fact that accident was compensable.

N.Y.—Doca v. Federal Stevedoring Co., 123 N.E.2d 632, 308 N.Y. 44.

96. N.C.—Murphy v. American Enka Corp., 195 S.E. 536, 213 N.C. 218—Lee v. American Enka Corp., 193 S.E. 809, 212 N.C. 455.

97. U.S.—Marceau v. Great Lakes Transit Corp., C.C.A.N.Y., 146 F.2d 416, certiorari denied 65 S.Ct. 1013, 324 U.S. 872, 89 L.Ed. 1426.

hearing minute sheet, have been held not to constitute a general finding or award or show that the commission exercised jurisdiction of the claim, so as to bar a common-law action against the employer.⁹⁸

An action for damages is not barred by receipt of money from the compensation commission as salary and not as compensation,⁹⁹ or where, at the time the money was received, the employee was assured that no waiver of his rights was involved,¹ by a finding in a collateral proceeding that payments had been made and accepted under the act,² by accepting payments from the employer's compensation insurer under circumstances not showing an election to accept benefits under the compensation law,³ or by a release of other remedies signed on receipt of money where its effect as an election was not understood at the time by the injured employee, and he was induced to sign in fraud of his rights.⁴ An action at law is not barred by an election to take compensation at an earlier time and under an earlier law where the employment has been intermittent, and no election to take compensation under the existing law is shown,⁵ or by the fact that the employee had applied for insurance as an independent contractor under the act.⁶

Where the compensation act prescribes a form of waiver, action for damages is not barred by a waiver not meeting the statutory requirements.⁷ So, as used in a statute providing that a "claim of compensation" shall be deemed a waiver of the right

to proceed at law, the quoted phrase means a claim filed in a tribunal having jurisdiction to hear and determine it,⁸ and not a mere request or demand upon the employer invoking no process of law for its determination or enforcement;⁹ and a claim for compensation is not deemed a waiver of such right unless it is filed in a tribunal having such jurisdiction and is prosecuted to final judgment.¹⁰

Employee's doubt as to compensability or tribunal.

An employee who is in doubt as to whether his injury was sustained in the course of his employment can protect himself against the running of the statute of limitations, and be certain that his claim will be heard in the proper tribunal, by filing both a civil action in court and an application before the compensation commission for compensation.¹¹ An injured employee who is in doubt as to whether his cause of action is one for compensation or for damages, and therefore is in doubt as to which tribunal has jurisdiction, as between the industrial accident commission or a court, may submit the question to either tribunal.¹²

Failure to comply with act. Under an act providing that, where an employer has failed to comply therewith, an injured employee may apply for compensation or sue for damages, an employee who applies for, and receives, a compensation award has made his election of remedies, and is precluded thereby from maintaining an action against his employer even though the latter has failed to comply with the provisions of the act.¹³

98. U.S.—General Motors Corp. v. Holler, C.C.A.Mo., 165 F.2d 271.

99. N.Y.—Lassell v. Mellon, 220 N. Y.S. 235, 219 App.Div. 539.

1. La.—Gray v. New Orleans Dry Dock & Shipbuilding Co., 84 So. 109, 146 La. 326, error dismissed 41 S.Ct. 216, 254 U.S. 617, 65 L.Ed. 441.

2. N.H.—Sullivan Machinery Co. v. Stowell, 114 A. 873, 80 N.H. 158.

3. Ark.—Haynes Drilling Corp. v. Smith, 143 S.W.2d 27, 200 Ark. 1098.

4. U.S.—Miles v. Lavender, C.C.A. Cal., 10 F.2d 450.

N.H.—Eleftherion v. Great Falls Mfg. Co., 146 A. 172, 84 N.H. 32.

Fraud and undue influence held not shown

N.H.—Carignan v. Amoskeag Hammer Co., 61 A.2d 799, 95 N.H. 262.

5. Wis.—Waldum v. Lake Superior Terminal & Transfer Ry. Co., 170 N.W. 729, 169 Wis. 137.

6. Mont.—Nelson v. Stuke, 300 P. 287, 89 Mont. 277, 78 A.L.R. 433.

7. N.Y.—Fitzgerald v. Harbor

Lighterage Co., 155 N.E. 74, 76, 244 N.Y. 132.

71 C.J. p 1489 note 1.

8. Tenn.—Hudgins v. Nashville Bridge Co., 113 S.W.2d 733, 172 Tenn. 580—Shipley v. Wellwood Silk Throwing Mills, 47 S.W.2d 561, 164 Tenn. 281.

9. Tenn.—Shipley v. Wellwood Silk Throwing Mills, supra.

10. Tenn.—Hudgins v. Nashville Bridge Co., 113 S.W.2d 733, 172 Tenn. 580.

Plea interposed in action

Where employee instituted an action at law for lead poisoning and, after plea of employer that the compensation act applied, employee instituted a proceeding thereunder but did not prosecute it to final judgment, the institution of the compensation proceeding did not bar employee's right to proceed in the action.

Tenn.—Hudgins v. Nashville Bridge Co., supra.

11. Cal.—Freire v. Matson Nav. Co., 118 P.2d 809, 19 C.2d 8.

Giocalone v. Industrial Acc. Commission, 262 P.2d 78, 120 C.A. 2d 727.

12. Cal.—Carter v. Superior Court In and For Los Angeles County, 298 P.2d 598, 142 C.A.2d 350.

Decision as to jurisdiction

If tribunal to which he submits question holds that it does not have jurisdiction, he is free to proceed before other tribunal, but if it rules that it does have jurisdiction, then it, and it only, can proceed.

Cal.—Carter v. Superior Court In and For Los Angeles County, supra.

Jurisdiction remaining undetermined

There is nothing to preclude filing of claim before second tribunal while question of jurisdiction yet remains undetermined in tribunal whose jurisdiction is first invoked and which alone has right to proceed.

Cal.—Carter v. Superior Court In and For Los Angeles County, supra.

13. Ohio.—Geller v. Epstein, 34 N.E. 2d 66, 66 Ohio App. 354.

Failure to comply with act generally see supra § 932.

Failure to carry compensation insurance. The filing of a claim for compensation does not constitute an election of remedies, so as to preclude an action against the employer, where the claim is filed in the justified, although mistaken, belief that the employer was covered by compensation insurance,¹⁴ or where the compensation proceeding is closed, and there are no further proceedings thereon, after disclosure of the fact that the employer carried no compensation insurance.¹⁵ A noninsured employer who at all times knows that he does not carry compensation insurance and has not relieved himself of so doing as provided by the act is not in a position to invoke the doctrine of estoppel by acceptance of benefits, as a bar to the employee's cause of action for injuries.¹⁶ Under other authority, where an injured employee recovers a judgment in an action against an uninsured employer, and the industrial accident commission later awards him a larger amount than he had recovered in the law action, the employer must satisfy the judgment, notwithstanding he has fully paid the employee the amount of the award by the commission.¹⁷

Self-insurer. The acceptance of payments from an employer who is a self-insurer may bar an employee from suing the employer for damages,¹⁸ whether or not the employer has obtained a release from the employee.¹⁹

Denial of compensation; mistake as to remedy. An employee's right to sue his employer for dam-

ages for an injury has been denied on the ground of election to take compensation under the act even though compensation is denied.²⁰ An employee failing to prosecute a timely appeal from an order of the commission denying compensation has been held to waive the right of action against his employer at common law.²¹

Under other authority, where compensation is denied because the employment is not within the act, the proceedings do not constitute an election of remedies precluding a suit against the employer, at common law, for negligence,²² since there can be no election between remedies unless alternative remedies are available;²³ and the fact that the employee mistook his remedy gives rise to no estoppel against him to maintain the action.²⁴ It has also been held, without reference to election of remedies, that an applicant's proceeding under the compensation act with an unfavorable result does not affect his right to sue the alleged employer at common law for damages,²⁵ and that reversal of an order affirming an award of compensation does not impair whatever right the applicant has in such action.²⁶ An independent contractor is not precluded from maintaining an action for damages by the fact that he mistakenly attempts to collect workmen's compensation.²⁷

Waiver by employer. In an employee's action against his employer for injuries, the employer may

14. Okl.—Dixie Cab Co. v. Sanders, 284 P.2d 421.

Failure to provide insurance generally see supra § 933.

15. N.Y.—Schaub v. Springer, 70 N. Y.S.2d 398, 272 App.Div. 782.

16. N.M.—Addison v. Tessier, 305 P. 2d 1067, 62 N.M. 120.

17. Cal.—Chakmakjian v. Lowe, 235 P.2d 307, 101 C.A.2d 329.

18. U.S.—Dearhouse v. Bethlehem Steel Co., D.C. Ohio, 118 F.Supp. 936. Or.—Pease v. Roseburg Lumber Co., 294 P.2d 346, 206 Or. 658.

19. U.S.—Dearhouse v. Bethlehem Steel Co., D.C. Ohio, 118 F.Supp. 936.

20. Mich.—Demkiw v. Briggs Mfg. Co., 79 N.W.2d 876, 347 Mich. 492. Morris v. Ford Motor Co., 31 N.W. 2d 89, 320 Mich. 372, appeal dismissed 69 S.Ct. 51, 335 U.S. 803, 93 L.Ed. 360—Twork v. Munising Paper Co., 266 N.W. 311, 275 Mich. 174—Varga v. Detroit Edison Co., 216 N.W. 374, 240 Mich. 593.

N.C.—Murphy v. American Enka Corp., 195 S.E. 536, 213 N.C. 213—Francis v. Carolina Wood Turning Co., 181 S.E. 628, 208 N.C. 517.

21. Tex.—Montgomery v. United Salt Corp., Civ.App., 112 S.W.2d 494, error dismissed.

22. N.H.—Davis v. W. T. Grant Co., 2 A.2d 448, 89 N.H. 520.

Statute not barring action

Where employee's petition for compensation had been dismissed on ground that employment was not one within scope of compensation act, he was not prohibited from bringing common-law action under statute providing that, if employee avails himself of benefit of compensation act by beginning proceeding for compensation, he shall be barred from recovery in an action at common law, but limiting application of statute to specified employments.

N.H.—Davis v. W. T. Grant Co., supra.

23. N.H.—Davis v. W. T. Grant Co., supra.

24. N.H.—Davis v. W. T. Grant Co., supra.

Injury not covered by act

An employee suffering an injury not covered by compensation act cannot be deprived of right to pursue his

lawful remedy because of a mistaken view of the proper remedy.

Tenn.—Hammett v. Vogue, Inc., 165 S.W.2d 577, 179 Tenn. 284.

25. N.Y.—Weydig v. Cole Elec. Products, 25 N.Y.S.2d 863.

S.C.—Jolly v. Atlantic Greyhound Corp., 35 S.E.2d 42, 207 S.C. 1.

Occupational disease

Fact that employee filed complaint with industrial commission under compensation law and cause was dismissed because of lack of jurisdiction for reason that evidence showed an occupational disease rather than an accidental injury did not estop him from maintaining common-law action or action under applicable statute for occupational disease, based on negligence.

Okl.—Dixon v. Gaso Pump & Burner Mfg. Co., 80 P.2d 678, 183 Okl. 249.

26. S.C.—Jolly v. Atlantic Greyhound Corp., 35 S.E.2d 42, 207 S.C. 1.

27. Tex.—Bridwell v. Bernard, Civ. App., 159 S.W.2d 981, error refused. Independent contractor as not precluded from suing generally see supra § 917.

waive the provisions of the act if he sees fit to do so.²⁸

§ 937. Right of Infant to Sue at Law after Election to Take Compensation under Statute

Under varying statutory provisions, authorities differ as to whether an infant employee may sue his employer for injuries notwithstanding his election to take compensation.

23. S.C.—Googe v. Speaks, 9 S.E.2d 439, 194 S.C. 206.

Exclusiveness of remedy on rejection of act see supra § 931.

Reason for rule

The acceptance of the compensation act depends on consent, express or implied.

S.C.—Googe v. Speaks, supra.

29. N.H.—Roberts v. Hillsborough Mills, 161 A. 29, 85 N.H. 517—Moore v. Hoyt, 116 A. 29, 80 N.H. 168.

Action by parent for injury to child see infra § 979.

Election held not shown

(1) A minor employee's agreement with employer to accept compensation under state compensation act for injuries theretofore sustained by him was not election to operate under act, but merely contractual obligation, not binding on him because of his minority, although approved by compensation board.

U.S.—Sears, Roebuck & Co. v. Broughton, C.A.Ky., 195 F.2d 95, certiorari denied 72 S.Ct. 1047, 343 U.S. 953, 96 L.Ed. 1354.

(2) A girl of about fifteen years would not be deemed to have made an election, so as to preclude her from maintaining a civil action against her employer for her injuries merely because she had signed an application with the industrial commission for, and did receive an award of, compensation, where she was ignorant of her right to maintain the civil action and was persuaded to sign the application without legal advice while still suffering from the injuries on promise of money, education, and other things.

Ohio.—Pisanello v. Polinori, 22 N.E. 2d 92, 60 Ohio App. 422.

(3) In such circumstances, the industrial commission could vacate the award previously granted.

Ohio.—Pisanello v. Polinori, supra.

(4) A daughter under eighteen did not elect to come under compensation act, and hence her father could maintain tort action for injuries received while employed, notwithstanding mother knew of employment prior to injury, where father did not know of employment until after injury, and he had legal responsibility for mak-

ing election because daughter lived in his household and he was readily available.

La.—Melton v. Fraering Brokerage Co., App., 31 So.2d 884.

No estoppel under voidable agreement

(1) A minor employee, filing no election to operate under state compensation act, was not estopped to deny that he accepted provisions of act by agreeing with his employer to accept compensation thereunder for injuries theretofore sustained.

U.S.—Sears, Roebuck & Co. v. Broughton, C.A.Ky., 195 F.2d 95, certiorari denied 72 S.Ct. 1047, 343 U.S. 953, 96 L.Ed. 1354.

(2) Such agreement was merely voidable and subject to disaffirmance by him on reaching majority, although compensation board approved agreement and final settlement of employee's compensation claim.

U.S.—Sears, Roebuck & Co. v. Broughton, supra.

30. N.H.—Schofield v. E. R. Bates & Co., 10 A.2d 227, 90 N.H. 422. 71 C.J. p 1489 note 3.

Action as avoidance of election

Under compensation act providing that injured workman is barred from recovery in common-law action for negligence by accepting any compensation, action for negligence, brought by minor against employer on reaching majority, was sufficient avoidance of any alleged election while a minor, made by accepting payments under release or final settlement receipt.

N.H.—Johnson v. National Biscuit Co., 69 A.2d 703, 96 N.H. 44.

Discontinuance of compensation proceedings

(1) Acceptance of compensation payments and medical benefits by injured minor and filing of claim petition with workmen's compensation bureau did not estop him from proceeding in law, where he voluntarily withdrew and discontinued the proceedings before hearing, and there had been no adjudication in favor of minor under compensation act.

N.J.—Goetaski v. California Packing Corp., 88 A.2d 685, 19 N.J.Super. 460.

Under some authorities, an infant employee, injured under circumstances making his employer liable in damages, may sue the employer at law, notwithstanding his election to take compensation under the act,²⁹ or his acceptance of compensation thereunder,³⁰ or his failure to restore compensation received before bringing suit for damages,³¹ especially where his employment was in violation of law,³² or his application for compensation had failed for that reason.³³ The infant's action at law is not

(2) Right of injured minor to claim damages and his right to claim compensation were not inconsistent but were alternative and concurrent remedies.

N.J.—Goetaski v. California Packing Corp., supra.

Seaman; federal acts

(1) Fact that injured seaman received compensation under the Federal Employees' Compensation Act, 5 U.S.C.A. § 751 et seq. during his minority, did not bar him from recovering damages from the United States under the Public Vessels Act, 46 U.S.C.A. § 781 et seq.

U.S.—Johnson v. U. S., C.A.Va., 186 F.2d 120.

(2) The definition of the term "employee" contained in the Federal Employees' Compensation Act as including all civil officers and employees of all branches of the government of the United States, should be taken to extend to minors the benefits of the act, but not to deprive them of the protection with which the law surrounds persons below legal age.

U.S.—Johnson v. U. S., supra.

(3) Federal acts generally see supra § 918 b.

31. N.H.—Roberts v. Hillsborough Mills, 161 A. 29, 85 N.H. 517.

Tenn.—Manning v. American Clothing Co., 247 S.W. 103, 147 Tenn. 274.

Discretion of court

Where release or final settlement receipt was given to employer during minority of injured employee, who received payments thereunder, fact that minor, on reaching majority, brought common-law action in his own right against employer for negligence was a circumstance to be considered by the court, in its discretion, in deciding whether repayment was a condition precedent to bringing the action.

N.H.—Johnson v. National Biscuit Co., 69 A.2d 703, 96 N.H. 44.

32. Mich.—Grand Rapids Trust Co. v. Petersen Beverage Co., 189 N.W. 186, 219 Mich. 208.

71 C.J. p 1489 note 5. Violation of child labor laws generally see supra § 930.

33. Ind.—Raggi v. H. G. Christman Co., 151 N.E. 833, 92 Ind.App. 337.

barred by judgment entered by the compensation commission denying him compensation, where such judgment is not authorized by statute.³⁴

The rule permitting suit applies where compensation applied for is refused because the infant is engaged in an occupation not covered by the compensation act;³⁵ and it applies even though the infant's mother and attorney acted for him in the compensation proceedings, where in law they had no authority to represent him.³⁶

Under other authority, suit has been held barred, after election to take compensation, if the infant has conformed to statutory requirements giving him status as an employee *sui juris*,³⁷ or where the parents of the infant employee impliedly consented to his employment and thereby elected for him to be governed by the compensation law.³⁸ Also, acceptance of the benefits of the compensation act after the employee attains his majority, such acceptance not being induced by fraud, constitutes a binding election to the exclusion of his remedy at common law.³⁹ Under statutes providing for election of his remedy by an infant employee and for payment to him of compensation for his injuries

under the compensation act, a proceeding by an infant employee under the compensation act,⁴⁰ or the acceptance of compensation by him,⁴¹ bars an action for damages; and this may be true even though the infant was employed in violation of law.⁴²

An infant's right to sue at law is not barred by an appearance of a guardian in his behalf before the compensation commission for a ruling which, under the statute, is made a condition precedent to the action at law.⁴³

§ 938. Right to Sue Statutory Employer at Law after Election to Take Compensation from Real Employer

Election to take compensation from the subcontractor, the real employer, bars proceedings against the statutory employer for compensation or for damages in an action at law, unless he has rejected the act.

An election to take compensation from the subcontractor, who is the real employer, bars proceedings against the statutory employer either for compensation under the statute⁴⁴ or to recover damages in an action at law;⁴⁵ but it does not bar a claim for damages against a statutory employer who has rejected the act.⁴⁶

3. ABROGATION OF DEFENSES

§ 939. In General

As a general rule, the workmen's compensation acts provide for the abrogation of the conventional or customary common-law defenses in actions against employers

for injuries to employees, where the employers have the option to operate under the act and elect not to do so, or where they are required to operate under the act, or elect to do so, and fail to comply with the requirements of the act or are in default.

Md.—William B. Tilghman Co. v. Conway, 133 A. 593, 150 Md. 525.

34. Ind.—Raggi v. H. G. Christman Co., 161 N.E. 833, 92 Ind.App. 337.

35. Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.

36. Ky.—Wynn Coal Co. v. Lindsey, 18 S.W.2d 864, 230 Ky. 53.

37. Ky.—Elkhorn Coal Corporation v. Diets, 9 S.W.2d 1100, 225 Ky. 753.

Statute held inapplicable

(1) A minor employee who never filed election provided for by state compensation act to operate thereunder was not made *sui juris* for purposes of such act by provision thereof that minor over sixteen years old shall be considered *sui juris* for such purposes.

U.S.—Sears, Roebuck & Co. v. Broughton, C.A.Ky., 195 F.2d 95, certiorari denied 72 S.Ct. 1047, 343 U.S. 953, 96 L.Ed. 1354.

(2) The provision is inapplicable to minor employee filing no election to operate under act either before or after sustaining injury in course of his employment, since it means only that minor employee may accept act

by filing required statement and thereafter enter into compensation agreement in accordance with provisions of act.

U.S.—Sears, Roebuck & Co. v. Broughton, *supra*.

(3) Such provision means only that infant is considered *sui juris* for purposes of carrying out provisions of, coming within, or operating under, act, and not that infant not electing to come under act may contract away, after accident, his rights to damages for injuries resulting from employer's negligence.

U.S.—Sears, Roebuck & Co. v. Broughton, *supra*.

38. La.—Smith v. Bankston, App., 75 So.2d 880—Ballard v. Stroube Drug Co., App., 19 So.2d 593.

39. N.H.—Schofield v. E. R. Bates & Co., 10 A.2d 227, 90 N.H. 422.

40. N.J.—Watson v. Stagg, 158 A. 820, 108 N.J.Law 444.

Pa.—Delaney v. Philadelphia & Reading Coal & Iron Co., 116 A. 537, 272 Pa. 578.

41. Pa.—Santucci v. Frank, 51 A.2d 696, 356 Pa. 54—Delaney v. Philadelphia & Reading Coal & Iron Co., 116 A. 537, 272 Pa. 578.

Mitchell v. Mione Mfg. Co., 171 A. 114, 112 Pa.Super. 394.

42. Pa.—Delaney v. Philadelphia & Reading Coal & Iron Co., 116 A. 537, 272 Pa. 578.

71 C.J. p 1489 note 12.

Violation of child labor laws generally see *supra* § 930.

43. Ky.—Louisville Woolen Mills v. Kindgen, 231 S.W. 202, 191 Ky. 568.

44. Pa.—Byrne v. Henry A. Hitner's Sons Co., 138 A. 826, 290 Pa. 225, 58 A.L.R. 865.

45. Conn.—Bogoratt v. Pratt & Whitney Aircraft Co., 157 A. 860, 114 Conn. 126.

Suit against statutory employer as third person liable for injury see *infra* § 985 d.

46. Pa.—Gallivan v. Wark Co., 136 A. 223, 288 Pa. 443.

Rejection of act generally see *supra* § 931.

Under varying workmen's compensation acts, employers who have the option to operate thereunder and elect not to do so and those required to operate thereunder, or who elect to do so, and fail to comply with their requirements or are in default are deprived of the conventional or customary common-law defenses in actions against them for damages for injuries to employees,⁴⁷ as are also employers who are subject to, and at one time had qualified under, the act, but later withdrew therefrom.⁴⁸ The abrogation of the common-law defenses is dependent on a showing by the employee that he was injured in the course of his employment.⁴⁹ If the person injured was an independent contractor and not an employee, the defendant employer is not precluded from his common-law defenses.⁵⁰

An act will be given effect as depriving a non-accepting employer of the common-law defenses as against an employee's action for injury, although the employee has not elected to accept the act,

where the employee has no right of election in advance of a determination by the employer to be governed by the act.⁵¹ A workman who, by agreement with the employer, does not accept the elective compensation provisions of the act is none the less relieved of the rigor of the common-law rule concerning master and servant in the event of his injury or death by accident arising out of, and in the course of, his employment.⁵²

On the other hand, the compensation acts may not abrogate the common-law defenses in actions for injuries to employees against employers who have accepted the act and are operating thereunder,⁵³ at least where the employee has properly rejected the act.⁵⁴ Also, ordinarily employers to whom such compensation acts are not made to apply, or who are exempt therefrom, or not subject thereto are not thereby deprived of such common-law defenses,⁵⁵ nor are employers who cannot for any legal

47. U.S.—*Bath Mills v. Odom*, C.C. A.S.C., 168 F.2d 38, certiorari denied 69 S.Ct. 39, 335 U.S. 818, 93 L. Ed. 373.

Bean v. Piedmont Interstate Fair Ass'n, D.C.S.C., 124 F.Supp. 385, reversed on other grounds, C.A., 222 F.2d 227.

Cal.—*Hard v. Hollywood Turf Club*, 246 P.2d 716, 112 C.A.2d 263.

Kan.—*Palmer v. Julian*, 170 P.2d 813, 161 Kan. 619.

Mass.—*Price v. Railway Exp. Agency*, 78 N.E.2d 13, 322 Mass. 476—*Maciejewski v. Graton & Knight*, 70 N.E.2d 796, 321 Mass. 165.

Mich.—*Erickson v. Leach*, 281 N.W. 324, 285 Mich. 554—*Thomas v. Parker Rust Proof Co.*, 279 N.W. 504, 284 Mich. 260.

W.Va.—*Walls v. McKinney*, 81 S.E.2d 901, 139 W.Va. 866.

Abrogation of defense of:

Assumption of risk and contractual assumption of risk see *infra* § 941.

Contributory negligence see *infra* § 940.

Lack of negligence of employer see *infra* § 944.

Negligence of fellow servant see *infra* § 942.

Common-law defenses not applicable in proceedings for compensation under compensation acts see *supra* §§ 10, 160.

Effect of amendment

Amendments of 1943 and 1945 to workmen's compensation act did not alter legal position of employer of three or less when sued by injured employee, and if such employer had failed to insure he would be deprived of common-law defenses.

Mass.—*Roberts v. Reynolds*, 123 N.E. 2d 226, 332 Mass. 95.

Operation under out-of-state law

Where the record is silent on the matter, the appellate court will assume that out-of-state employer was not operating under compensation law of his state, where plaintiff was employed in navigation and interstate commerce, and hence not within state compensation acts.

Mich.—*Powers v. Murray*, 254 N.W. 559, 266 Mich. 688.

Doctrine of *volenti non fit injuria* does not apply and is not available as defense to employer, if negligence of employer or its servants or agents is shown.

Tex.—*Sears, Roebuck & Co. v. Robinson*, Civ.App., 272 S.W.2d 549, affirmed 280 S.W.2d 238, 154 Tex. 336.

Single job

Fact that painting job on which painter was injured was only job of operator of paint store who had elected not to come under compensation act did not exempt him from provision of act denying certain defenses to employers who had elected not to come within its provisions.

Kan.—*Palmer v. Julian*, 170 P.2d 813, 161 Kan. 619.

48. Tenn.—*Pearson Hardwood Flooring Co. v. Phillips*, 120 S.W.2d 973, 22 Tenn.App. 206.

49. Tex.—*Foster v. Carle*, Civ.App., 160 S.W.2d 999, error refused.

50. W.Va.—*Walls v. McKinney*, 81 S.E.2d 901, 139 W.Va. 866.

51. Ill.—*Dietz v. Big Muddy Coal, etc., Co.*, 105 N.E. 289, 263 Ill. 480—*Crooks v. Tazewell Coal Co.*, 105 N.E. 132, 263 Ill. 343, Ann.Cas.1915C 304 and note.

52. N.J.—*Bollinger v. Wagaraw Bldg. Supply Co.*, 6 A.2d 396, 122 N.J.Law 512.

53. Wis.—*Karny v. Northwestern Malleable Iron Co.*, 151 N.W. 786, 160 Wis. 316.

71 C.J. p 1491 note 34.

Policy of law is to preserve the common-law defenses to an employer who elects to come under the act, concerning an employee who does not, as a constitutional method of coercing both parties to accept the benefits and burdens of the act.

Wis.—*Karny v. Northwestern Malleable Iron Co.*, *supra*.

Common-law principles govern where employee elects to bring action for damages.

N.H.—*Rosedoff v. Consolidated Rendering Co.*, 47 A.2d 574, 94 N.H. 114.

Waiver

Where an employer has elected to come under the act, and his employee, suing for a personal injury, has not so elected, the employer does not waive common-law defenses by objecting to the employee, not so electing, having the benefit of the act.

Wis.—*Karny v. Northwestern Malleable Iron Co.*, 151 N.W. 786, 160 Wis. 316.

54. Mo.—*Mitchell v. J. A. Tobin Const. Co.*, 159 S.W.2d 709, 236 Mo. App. 910.

55. U.S.—*Bean v. Piedmont Interstate Fair Ass'n*, D.C.S.C., 124 F. Supp. 385, reversed on other grounds, C.A., 222 F.2d 227.

Mass.—*Price v. Railway Exp. Agency*, 78 N.E.2d 13, 322 Mass. 476.

Tex.—*City of Tyler v. Texas Employers' Ins. Ass'n*, Com.App., 288 S.W. 409, rehearing denied 294 S.W. 195.

Knowledge of danger

Where employers were not subject to provisions of workmen's compen-

reason subscribe thereunder,⁵⁶ or employers who were not under the act by operation of law, who filed an election to accept the provisions of the act, and who later filed an election not to accept its benefits,⁵⁷ or where the employment was casual and the employee not protected by the compensation act.⁵⁸

Under some of the compensation acts, the statutory abrogation of common-law defenses in actions for injuries to employees applies only where the employer was under the act by operation of law and elected not to accept its benefits,⁵⁹ although under other acts it applies whether or not the employer comes under the act.⁶⁰ An employer not subject to the act but accepting its provisions gains no immunities thereby, and he is not precluded from his common-law defenses by provisions of the act.⁶¹

The purpose of provisions in workmen's compensation acts abrogating the common-law defenses in actions against employers for injuries to employees is to induce employers who have the option to operate thereunder to do so,⁶² and to place an additional burden on employers required to operate under such acts who fail to provide for the payment of compensation as the act requires.⁶³

Estoppel to rely on act as defense to action on contract. An employer who agrees to give an injured employee lifetime employment in consideration of the employee's releasing him from all lia-

bility on account of injuries is estopped to rely on the workmen's compensation act as a defense to the employee's action on the contract.⁶⁴

Limitations period for liabilities under act. A limitations period prescribed by a compensation act for liabilities created by the act may not be pleaded in bar of an action for damages against an employer not complying with the act for injuries to an employee.⁶⁵

§ 940. Contributory Negligence

Under varying workmen's compensation acts, employers who have the option to operate under the act and reject it or elect not to do so and employers required to operate under the act or who elect to do so and who are in default thereunder or fail to comply with its requirements are deprived of the defense of contributory negligence in actions for damages for injuries to employees; but employers who accept the act and are not in default thereunder and employers to whom the act is not applicable are not deprived of the defense in such actions.

Under varying workmen's compensation acts, employers of a class subject to the operation of the act who have not elected to come within the act, or who have rejected it, or have elected not to pay compensation thereunder are not entitled to assert the contributory negligence of the employee as a defense against liability in actions for damages for injuries to employees,⁶⁶ unless, under some acts, the negligence of the employee is willful, as dis-

sation act, knowledge of the danger may not be considered in determining the propriety of an order of nonsuit in actions against them under employers' liability act for injuries to employees.
Or.—Ludwig v. Zidell, 118 P.2d 1073, 167 Or. 488.

Occupational disease

Prior to the enactment of the occupational disease act, an employee who suffered an occupational disease could not obtain compensation under the workmen's compensation act, and in an action based on the negligence of the employer the common-law defenses were available to the employer.

Utah.—Masich v. U. S. Smelting, Refining & Min. Co., 191 P.2d 612, 118 Utah 101, appeal dismissed 69 S.Ct. 138, 335 U.S. 866, 93 L.Ed. 411, rehearing denied 69 S.Ct. 405, 335 U.S. 905, 93 L.Ed. 439.

56. Tex.—City of Tyler v. Texas Employers' Ins. Ass'n, Com.App., 288 S.W. 409, rehearing denied 294 S.W. 195.

57. Kan.—Vick v. Morton, 238 P.2d 467, 172 Kan. 87.

58. Tenn.—Thoni v. Hayborn, 260 S.W.2d 376, 37 Tenn.App. 56.

59. Kan.—Vick v. Morton, 238 P.2d 467, 172 Kan. 87.

60. U.S.—Valencia v. Stearns Roger Mfg. Co., D.C.N.M., 124 F.Supp. 670.

61. N.H.—Davis v. W. T. Grant Co., 185 A. 889, 88 N.H. 204.

62. Mass.—Price v. Railway Exp. Agency, 78 N.E.2d 13, 322 Mass. 476.

Policy of state was to draw all employers into compensation system by putting those who remained outside it under legal disadvantages in actions of tort brought by injured employees.

Mass.—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165.

Stringent rule of liability

The abrogation of common-law defenses by an elective compensation act was intended to subject a noninsuring employer to very stringent rules of liability.

U.S.—Redmond v. American Ry. Express Co., C.C.A.Mass., 17 F.2d 753.

63. Mass.—Price v. Railway Exp. Agency, 78 N.E.2d 13, 322 Mass. 476.

64. Ind.—Toni v. Kingan & Co., 15 N.E.2d 80; 214 Ind. 611.

65. Utah.—Peterson v. Sorensen, 65 P.2d 12, 91 Utah 507.

66. U.S.—Baker v. Great Atlantic & Pacific Tea Co., C.A.Fla., 212 F.2d 130—Peyatte v. International Harvester Co., C.A.W.Va., 208 F.2d 261—Kansas City Stockyards Co. of Maine v. Anderson, C.A.Mo., 199 F.2d 91, 36 A.L.R.2d 1—Railway Exp. Agency v. Cox, C.A.Tex., 179 F.2d 593—Bath Mills v. Odom, C.C.A.S.C., 168 F.2d 38, certiorari denied 69 S.Ct. 39, 335 U.S. 818, 93 L.Ed. 373—Great Atlantic & Pacific Tea Co. v. Robards, C.C.A.N.C., 161 F.2d 929—Hossack v. Metzger, C.C.A.S.D., 156 F.2d 501—Union Oil Co. of California v. Hunt, C.C.A.Or., 111 F.2d 269—Shoaf v. Fitzpatrick, C.C.A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518.

Bean v. Piedmont Interstate Fair Ass'n, D.C.S.C., 124 F.Supp. 385, reversed on other grounds, C.A., 222 F.2d 227.

Fla.—Jacksonville Paper Co. v. Thurman, 16 So.2d 289, 153 Fla. 906.

Ind.—Pinnell-Dulin Lumber Co. v. Day, 13 N.E.2d 351, 195 Ind.App. 62.

Kan.—Vick v. Morton, 238 P.2d 467, 172 Kan. 87.

Ky.—Fitch v. Mayer, 258 S.W.2d 923—Beck Elec. Repair Co. v. Brown

cussed infra § 945, or is the result of intoxication on his part.⁶⁷ The defense has also been abrogated in such actions where operation under the act by the employer is compulsory and he has failed to provide compensation thereunder;⁶⁸ where the employer is in default under the act because of his

failure to make reports or contribute to the accident fund,⁶⁹ or is in such default of payments under the compensation act as, under its terms, will deprive him of its benefit,⁷⁰ or is not insured under the act, or otherwise fails to secure the payment of workmen's compensation,⁷¹ or, under some acts,

ing, 214 S.W.2d 1007, 308 Ky. 503—Croley v. Huddleston, 192 S.W.2d 717, 301 Ky. 580—Elcomb Coal Co. v. Brock, 189 S.W.2d 397, 300 Ky. 399—Carbon Min. Co. v. Ward's Adm'r, 178 S.W.2d 955, 297 Ky. 47—Harlan Central Coal Co. v. Gemmeno's Adm'r, 178 S.W.2d 217, 296 Ky. 828—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18—Cloversplint Coal Co. v. Blair, 151 S.W.2d 1052, 287 Ky. 158—Morrison v. Carbide & Carbon Chemicals Corp., 129 S.W.2d 547, 278 Ky. 746—Robinson v. Lytle, 124 S.W.2d 78, 276 Ky. 397—Phillips v. Keltner's Adm'r, 124 S.W.2d 71, 276 Ky. 254—Clover Splint Coal Co. v. Lorenz, 110 S.W.2d 457, 270 Ky. 676—Perkins-Harlan Coal Co. v. Creech's Adm'r, 103 S.W.2d 943, 268 Ky. 174—Wilders' Adm'r v. Southern Min. Co., 96 S.W.2d 436, 265 Ky. 219—Southern Min. Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655—Gatloff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 263 Ky. 309—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168—Brooks v. Arnett, 69 S.W.2d 1029, 253 Ky. 491—Horse Creek Mining Co. v. Frazier's Adm'r, 5 S.W.2d 1064, 224 Ky. 211.

Me.—Bartley v. Couture, 55 A.2d 438, 143 Me. 69—Poirier v. Venus Shoe Mfg. Co., 3 A.2d 116, 136 Me. 100—Hoskins v. Bangor & A. R. Co., 195 A. 363, 135 Me. 285.

Mass.—Roberts v. Reynolds, 123 N. E.2d 226, 332 Mass. 95—Maciejewski v. Graton & Knight Co., 70 N. E.2d 796, 321 Mass. 165—Roberts v. Frank's, Inc., 49 N.E.2d 427, 314 Mass. 42—Klein v. Kersey, 29 N. E.2d 703, 307 Mass. 51—Tardiff v. Lynn Sand & Stone Co., 193 N.E. 55, 288 Mass. 472—Neiss v. Burwen, 191 N.E. 654, 287 Mass. 82—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520—Lukas v. Reece, 162 N.E. 344, 264 Mass. 312.

Mich.—Sherman v. Barthwell, 17 N. W.2d 727, 310 Mich. 494—Brown v. Standard Oil Co., 14 N.W.2d 797, 309 Mich. 101—Williams v. Sealand, 286 N.W. 101, 288 Mich. 617—Roselip v. Great Atlantic & Pacific Tea Co., 262 N.W. 408, 272 Mich. 560.

Miss.—Riddell v. Cagle's Estate, 85 So.2d 926.

Mo.—Spicer v. Hannah, 247 S.W.2d 864, 241 Mo.App. 1215—Daniels v. Luechtefeld, App., 155 S.W.2d 307.

N.M.—Addison v. Tessier, 305 P.2d 1067, 62 N.M. 120.

N.C.—Muldrow v. Weinstein, 68 S.E.

2d 249, 234 N.C. 587—Lee v. Roberson, 16 S.E.2d 459, 220 N.C. 61.

Ohio.—Ringling Bros.-Barnum & Bailey Combined Shows, 5 Ohio Supp. 235.

Okl.—Marrs v. Richardson, 87 P.2d 131, 184 Okl. 342.

Or.—Baldassarre v. West Oregon Lumber Co., 239 P.2d 839, 193 Or. 556—Whitehead v. Montgomery Ward & Co., 239 P.2d 226, 194 Or. 106—Ludwig v. Zidell, 118 P.2d 1073, 167 Or. 488.

Pa.—McGuire v. Hamler Coal Min. Co., 49 A.2d 396, 355 Pa. 160.

Wascavage v. Susquehanna Collieries Co., Com.Pl., 15 Northumb. Leg.J. 162, affirmed 23 A.2d 509, 343 Pa. 529.

R.I.—Soucy v. Alix, 90 A.2d 722, 79 R.I. 499—Rossi v. Ronci, 7 A.2d 773, 63 R.I. 250—Rossi v. Ronci, 195 A. 401, 59 R.I. 307—Faltinalli v. Great Atlantic & Pac. Tea Co., 182 A. 605, 55 R.I. 438, 488.

S.C.—McGee v. Clearwater Mfg. Co., 53 S.E.2d 393, 214 S.C. 495—Caughman v. Columbia Y. M. C. A., 47 S.E.2d 788, 212 S.C. 337—Nuckolls v. Great Atlantic & Pac. Tea Co., 5 S.E.2d 862, 192 S.C. 156.

S.D.—Voet v. Lampert Lumber Co., 15 N.W.2d 579, 70 S.D. 142—Stevenson v. Douros, 235 N.W. 707, 58 S.D. 268.

Tenn.—Duncan v. Dickie Rector Lumber Co., 212 S.W.2d 908, 31 Tenn.App. 155—McGinniss v. Brown, 204 S.W.2d 334, 30 Tenn. App. 178.

Tex.—Evans v. Phipps, 259 S.W.2d 723, 152 Tex. 487—Najera v. Great Atlantic & Pacific Tea Co., 207 S.W.2d 365, 146 Tex. 367—W. U. Tel. Co. v. Coker, 204 S.W.2d 977, 146 Tex. 190—United East & West Oil Co. v. Dyer, 162 S.W.2d 680, 139 Tex. 318.

Railway Exp. Agency v. Bollier, Civ.App., 253 S.W.2d 669, refused no reversible error—Langston v. Degelia, Civ.App., 186 S.W.2d 738—Dial v. Wilke, Civ.App., 127 S.W. 2d 379, error refused—Hernandez v. Malakoff Fuel Co., Civ.App., 109 S.W.2d 356, error dismissed—Gulf States Utilities Co. v. Moore, Civ. App., 73 S.W.2d 941, reversed on other grounds, 106 S.W.2d 256, 129 Tex. 604.

Wash.—Long v. Thompson, 31 P.2d 908, 177 Wash. 296.

W.Va.—Dahmer v. State Fair of W. Va., 91 S.E.2d 453—Walls v. McKinney, 81 S.E.2d 901, 139 W.Va.

866—Smith v. Morrison, 199 S.E. 689, 120 W.Va. 481—Powell v. Mitchell, 196 S.E. 153, 120 W.Va. 9—Thorn v. Addison Bros. & Smith, 194 S.E. 771, 119 W.Va. 479.

71 C.J. p 1492 note 37.

Abrogation of defense of contributory negligence in actions against employers for injuries to employees generally see Master and Servant § 425.

Plaintiff's negligence not an issue in case

Ala.—Belcher v. Chapman, 7 So.2d 859, 242 Ala. 653.

In course of employment

Abrogation of defense is dependent on a showing by employee that he was injured in course of his employment.

Tex.—Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused.

Acts or omissions held not to defeat recovery

(1) Generally.

Ky.—Harlan Ridgeway Min. Co. v. Jackson, 129 S.W.2d 585, 278 Ky. 767—High Splint Coal Co. v. Ramsey's Adm'r, 112 S.W.2d 1007, 271 Ky. 532.

71 C.J. p 1492 note 37 [a].

(2) Failure of employee who had reported defective brakes on coal car to again inspect them on reporting back to work.

Ky.—Burk Hollow Coal Co. v. Bills, 190 S.W.2d 338, 300 Ky. 735.

67. Iowa.—Hunter v. Colfax Cons. Coal Co., 157 N.W. 145, 175 Iowa 245, L.R.A.1917D 15, Ann.Cas.1917E 803.

68. Mass.—Price v. Railway Exp. Agency, 73 N.E.2d 13, 322 Mass. 476.

69. U.S.—Calvin v. West Coast Power Co., D.C.Or., 44 F.Supp. 783.

70. W.Va.—Roberts v. United Fuel Gas Co., 99 S.E. 549, 84 W.Va. 368—De Francesco v. Piney Min. Co., 86 S.E. 777, 76 W.Va. 756.

71. U.S.—Calvino v. Farley, D.C.N. Y., 26 F.Supp. 431.

Ariz.—Haralson v. Rhea, 259 P.2d 246, 76 Ariz. 74.

Cal.—Devens v. Goldberg, 199 P.2d 943, 33 C.2d 173—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 773.

Goss v. Fanoe, 251 P.2d 337, 114 C.A.2d 819—Lee v. Cranford, 237 P.2d 986, 107 C.A.2d 677—Blinkinsop v. Weber, 193 P.2d 96, 85 C.

where he does not contribute to the state insurance fund;⁷² or, in more general terms, where the employer fails to comply with the act,⁷³ as by failing to give the required notice to the employee.⁷⁴ Under some acts the defense is not available to an employer whether or not he comes under the act,⁷⁵ but under other acts the statute abrogating the defense applies only to actions for damages where the employer was under the act by operation of law and elected not to accept the benefits of the act.⁷⁶ The negligence of one illegally employed has been held not a bar to a recovery of damages.⁷⁷

On the other hand, an employer who has accepted, or is operating under, a workmen's compensation act may rely on the defense of contributory negligence,⁷⁸ at least where the employee has properly rejected the act,⁷⁹ or has not elected to come under the act,⁸⁰ or has had no opportunity for election,⁸¹ as may, in general terms, an employer who has complied with the requirements of the act.⁸² Also, provisions in compensation acts abrogating the defense of contributory negligence in actions against em-

ployers for injuries to employees do not prevent employers to whom the act is not applicable or who do not come within its provisions from relying on the defense in actions against them for injuries to employees.⁸³ In such actions, employers may rely on the defense who are not subject to the compensation act because not engaged in business for pecuniary gain⁸⁴ or because they do not employ the prescribed number of employees;⁸⁵ and under some acts the defense may be relied on by an employer, not under the act by operation of law, who filed an election to accept the provisions of the act, and later filed an election not to accept its benefits.⁸⁶ An out-of-state employer engaged in interstate or foreign commerce has been held entitled to the defense of contributory negligence in an action by an employee who had not elected to operate under the state compensation law for injuries sustained while engaged in a separable intra-state activity.⁸⁷

Employers are not deprived of the defense, where they are sued for injuries by employees to whom the act is made not applicable, such as domestic

- A.2d 276—*Balzeca v. Lorentzen*, 127 P.2d 1018, 53 C.A.2d 370.
 Mass.—*Beekes v. Cutler*, 77 N.E.2d 402, 322 Mass. 392—*Godon v. McClure*, 75 N.E.2d 656, 322 Mass. 1—*Taylor v. Newcomb Baking Co.*, 59 N.E.2d 293, 317 Mass. 609—*Enga v. Sparks*, 51 N.E.2d 984, 315 Mass. 120—*Doherty v. Paul's for Tires*, 49 N.E.2d 430, 314 Mass. 83—*Spear v. Chelsea Bldg. Wrecking Co.*, 32 N.E.2d 241, 308 Mass. 416—*Mucha v. Northeastern Crushed Stone Co.*, 30 N.E.2d 870, 307 Mass. 592—*Novash v. Crompton & Knowles Loom Works*, 23 N.E.2d 89, 304 Mass. 244—*Rivers v. Krasowski*, 22 N.E.2d 114, 303 Mass. 409—*Pittsley v. Allen*, 7 N.E.2d 442, 297 Mass. 83.
 Mich.—*Nantico v. Matuszak*, 34 N.W. 2d 506, 322 Mich. 644.
 Okl.—*Ice v. Gardner*, 83 P.2d 378, 183 Okl. 496.
 S.D.—*Daniels v. Moser*, 71 N.W.2d 739.
 Tex.—*Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238, 154 Tex. 336.
 Jackson v. Marshall, Civ.App., 243 S.W.2d 205—*Eastern Iron & Metal Co. v. McMorrough*, Civ.App., 135 S.W.2d 750—*Griffith v. Kernaghan*, Civ.App., 121 S.W.2d 617.

Employer willfully uninsured

- Cal.—*Greitz v. Sivachenko*, 299 P.2d 374, 143 C.A.2d 146.

Gross contributory negligence was not a defense.

- Ariz.—*Haralson v. Rhea*, 259 P.2d 246, 76 Ariz. 74.

Expired policy

Where compensation policy had ex-

pired at time of accident and employer did not file proof of renewal of insurance until after accident, defense of contributory negligence was not available to employer.

- Tenn.—*Schroader v. Rural Educational Ass'n*, 228 S.W.2d 491, 33 Tenn.App. 36.

72. Ohio.—*Vayto v. River Terminal & Railway Co.*, 18 Ohio N.P., N.S., 305—*Schwarz v. Columbus Citizens Telephone Co.*, 16 Ohio N.P., N.S., 129.

73. U.S.—*Shoaf v. Fitzpatrick*, C.C. A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518.

- Ariz.—*Robles v. Preciado*, 79 P.2d 504, 52 Ariz. 113.

- Ind.—*Conway v. Park*, 31 N.E.2d 79, 108 Ind.App. 562.

- Tex.—*Joy v. Craig*, Civ.App., 94 S.W. 2d 524, error dismissed.

- 71 C.J. p 1493 note 42.

74. Tex.—*Kampmann v. Cross*, Civ. App., 194 S.W. 437.

75. U.S.—*Valencia v. Stearns Roger Mfg. Co.*, D.C.N.M., 124 F.Supp. 670.

76. Kan.—*Vick v. Morton*, 238 P.2d 467, 172 Kan. 87.

77. Ill.—*Kowalczyk v. Swift & Co.*, 148 N.E. 59, 317 Ill. 312.

- N.J.—*Chipman v. Cramer*, 197 A. 901, 16 N.J.Misc. 178.

78. N.H.—*Bjork v. U. S. Bobbin & Shuttle Co.*, 111 A. 284, 79 N.H. 402.

79. Mo.—*Mitchell v. J. A. Tobin*

- Const. Co., 159 S.W.2d 709, 236 Mo. App. 910.

80. Wis.—*Kieler v. Fred Miller Brewing Co.*, 161 N.W. 739, 165 Wis. 237.

- 71 C.J. p 1494 note 46.

81. Mich.—*Bernard v. Michigan United Traction Co.*, 165 N.W. 846, 198 Mich. 497.

82. Ohio.—*Foundry Appliance Co. v. Ratliff*, 148 N.E. 237, 113 Ohio St. 1.

- 71 C.J. p 1494 note 48.

83. U.S.—*Bean v. Piedmont Interstate Fair Ass'n*, D.C.S.C., 124 F. Supp. 385, reversed on other grounds, C.A., 222 F.2d 227.

- Ky.—*Jessie's Adm'x v. Gulf Refining Co.*, 121 S.W.2d 909, 275 Ky. 533.

Municipality acting in its governmental capacity has been held not within the provisions of the compensation act and hence not deprived of the right to plead the defense of contributory negligence.

- Ky.—*City of Bellevue v. Hall*, 174 S.W.2d 24, 295 Ky. 57.

84. N.Y.—*Dillon v. St. Patrick's Cathedral*, 137 N.E. 311, 234 N.Y. 225.

85. Tex.—*Dial v. Wilke*, Civ.App., 127 S.W.2d 379, error refused.

- 71 C.J. p 1494 note 50.

86. Kan.—*Vick v. Morton*, 238 P.2d 467, 172 Kan. 87.

87. Mich.—*Powers v. Murray*, 254 N.W. 559, 266 Mich. 688.

servants⁸⁸ or farm or ranch laborers;⁸⁹ and it has been stated generally that under certain circumstances an employer sued for damages for injury to an employee not covered by the act may rely on contributory negligence to bar recovery.⁹⁰ An employer who has not elected to come under the act has been held not deprived of this defense where the employee is injured while engaged in casual employment.⁹¹

Under an act making the remedy therein provided exclusive except that, where the injury was caused by the employer's gross negligence or willful misconduct, the employee may claim compensation or maintain an action at law for damages, the latter action would be defeated by the fact that the injury was due to his contributory negligence;⁹² and it has been loosely held with respect to another act that if the employer's rights of defense with respect to contributory negligence are not controlled by a cited section thereof such negligence is an absolute defense.⁹³

Under some acts some care on the part of the employee is demanded,⁹⁴ and where he took no care to avoid an obvious risk the employer is not liable in an action for damages for the resulting injury.⁹⁵

Sole cause of injury. Even though the defense of contributory negligence is abrogated, the fact that a wrongful or negligent act of the employee was the

sole proximate cause of his injury or death has been held to constitute a good defense to an action for damages for his injury or death;⁹⁶ and such a defense may be shown by the employer,⁹⁷ since the establishment of such a defense thereby negatives that the injury was caused by the employer's negligence.⁹⁸ In order, however, for the employee's negligence to prevent a recovery, his must have been the only negligence proximately causing the injury and the employer must have been guilty of none.⁹⁹ Where no negligence of the employer is shown, a showing of negligence by the employee does not fall in the category of contributory negligence, but rather it is a showing of primary negligence on the part of the employee.¹ It is a defense to an action for injury to an employee that the employee, without any imminent danger or necessity therefor, left a place of safety and by his negligent conduct caused his own injury, his own intervening negligence thus constituting the sole proximate cause of his injury.²

Mitigation or diminution of damages; comparative negligence. Under some statutes the employer may plead and prove contributory negligence in mitigation or reduction of damages,³ or the damages may be diminished in proportion to the amount of negligence attributable to the employee.⁴ Under other compensation acts, however, contributory negligence does not cut down or mitigate the damages recoverable,⁵ at least where the employer had

88. N.M.—Thompson v. Dale, 283 P. 2d 623, 59 N.M. 290.

Under former statute

Mass.—Bell v. Sawyer, 47 N.E.2d 1, 313 Mass. 250.

89. N.M.—Thompson v. Dale, 283 P. 2d 623, 59 N.M. 290.

90. Cal.—Devens v. Goldberg, 199 P. 2d 943, 33 C.2d 173.

91. Mont.—Miller v. Granite County Power Co., 213 P. 604, 66 Mont. 368.

Tenn.—Thoni v. Hayborn, 260 S.W. 2d 376, 37 Tenn.App. 56.

Casual employment generally see supra § 69.

92. Cal.—Brown v. Lemon Cove Ditch Co., 171 P. 705, 36 C.A. 94, 71 C.J. p 1494 note 52.

93. Tex.—Hodges v. Swastika Oil Co., Civ.App., 185 S.W. 369.

94. N.H.—Lafontaine v. St. John, 30 A.2d 476, 92 N.H. 319.

95. N.H.—Lafontaine v. St. John, supra.

Negligence of employer need not be decided where employee was guilty of contributory negligence.
N.H.—Lafontaine v. St. John, supra.

96. U.S.—Baker v. Great Atlantic &

Pacific Tea Co., C.A.Fla., 212 F.2d 130—Peyatte v. International Harvester Co., C.A.W.Va., 208 F.2d 261.

Ky.—Skinner v. Smith, 255 S.W.2d 621—Howard v. Southern Harlan Coal Co., 152 S.W.2d 613, 287 Ky. 228—Baker v. High Splint Coal Co., 81 S.W.2d 577, 258 Ky. 786.

Tex.—Najera v. Great Atlantic & Pacific Tea Co., 207 S.W.2d 365, 146 Tex. 367—Gulf States Utilities Co. v. Moore, 106 S.W.2d 256, 129 Tex. 604.

Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused—Hernandez v. Malakoff Fuel Co., Civ.App., 109 S.W.2d 356, error dismissed.
W.Va.—Ferguson v. Pinson, 50 S.E. 2d 476, 131 W.Va. 691.

97. Ky.—Skinner v. Smith, 255 S.W. 2d 621—Harlan Central Coal Co. v. Gemmen's Adm'r, 178 S.W.2d 217, 296 Ky. 828—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18—Cloversplint Coal Co. v. Blair, 151 S.W. 2d 1052, 287 Ky. 153.

When not sole cause

Where employer is guilty of any acts of negligence, employee's negligence, constituting only a concurring or contributory cause, would not be the sole cause of injury or death and would not bar recovery.

Ky.—Carbon Min. Co. v. Ward's Adm'r, 178 S.W.2d 955, 297 Ky. 47.

98. Tex.—Great Atlantic & Pacific Tea Co. v. Najera, Civ.App., 208 S.W.2d 577, reversed on other grounds 207 S.W.2d 365, 146 Tex. 367—Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused.

99. Ky.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 263 Ky. 309.

1. Ky.—Skinner v. Smith, 255 S.W. 2d 621—Smith's Adm'r v. Honaker, 197 S.W.2d 780, 303 Ky. 348—Harlan Central Coal Co. v. Gemmen's Adm'r, 178 S.W.2d 217, 296 Ky. 828—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18.

2. U.S.—Peyatte v. International Harvester Co., C.A.W.Va., 208 F.2d 261.

3. Or.—Baldassarre v. West Oregon Lumber Co., 239 P.2d 839, 193 Or. 556—Parrott v. Hanson, 175 P.2d 169, 180 Or. 620.
71 C.J. p 1494 note 54.

4. Iowa.—Potier v. Winifred Coal Co., 184 N.W. 739, 192 Iowa 1280.
71 C.J. p 1494 note 55.

5. U.S.—Redmond v. American Ry. Express Co., C.C.A.Mass., 17 F.2d 753.

rejected the provisions of the workmen's compensation act,⁶ and under one of the acts an employer failing to contribute to the state insurance fund cannot rely on the doctrine of comparative negligence in mitigation of damages.⁷ Still another act has been held not to recognize the doctrine of comparative negligence,⁸ although it has been stated that in certain circumstances an employer sued for damages for injury by an employee not covered by the act may rely on contributory negligence to diminish the amount of damages to be awarded.⁹

Proximate cause. Where the employer is guilty of negligence, he cannot defeat a recovery by claiming that the contributory negligence of plaintiff was the proximate cause of the injury.¹⁰ A provision of a compensation act depriving an employer who violates a statute for the safety of employees of the defense of contributory negligence in an action for injuries to the employee applies only where the violation contributed to the employee's injury.¹¹

Action for property damage. A provision of a

compensation act making the defense of contributory negligence unavailable in actions to recover damages for personal injuries or death has no application to an action solely for damage to personal property.¹²

§ 941. Assumption of Risk

As a general rule, provisions in workmen's compensation acts abrogate the defense of assumption of risk in actions for injuries to employees against employers who have not come within the operation of an act which they have the option to come under or who have elected, or are required, to come under the act and are in default thereunder; but it is not abrogated with respect to employers who are operating under the act and are not in default or who are exempt from the application of the act.

In actions against employers for injuries to employees, the defense of assumption of risk by the employee is not, under the ordinary provisions of the compensation acts, open to an employer who has not come within the operation of the act, or is not exempted or precluded from its operation, or has elected not to pay compensation thereunder,¹³ or

Ind.—Central Indiana Ry. Co. v. Mitchell, 199 N.E. 439, 102 Ind. App. 121.

6. Fla.—Jacksonville Paper Co. v. Thurman, 16 So.2d 289, 153 Fla. 906.

Hazardous occupation statute held not applicable

Fla.—Jacksonville Paper Co. v. Thurman, *supra*.

7. Ohio.—Zumkehr v. Diamond Portland Cement Co., 14 Ohio N.P., N.S., 166.

71 C.J. p 1494 note 57.

8. Cal.—Brown v. Lemon Cove Ditch Co., 171 P. 705, 36 C.A. 94.

9. Cal.—Devens v. Goldberg, 199 P. 2d 943, 33 C.2d 173.

10. Mich.—Lydman v. De Haas, 151 N.W. 718, 185 Mich. 128.

71 C.J. p 1494 note 59.

11. Cal.—Williams v. Southern Pac. Co., 160 P. 660, 173 C. 525.

Employment during illegal hours

Violation by employer of statute prohibiting employment of person under specified age during certain hours of the night will not deprive him of the defense of contributory negligence where the injury to the employee did not occur during the prohibited hours and the violation did not contribute to the injury.

Cal.—Williams v. Southern Pac. Co., *supra*.

12. Tex.—J. W. Zempster Const. Co. v. Rodgers, Civ.App., 45 S.W.2d 763.

13. U.S.—Baker v. Great Atlantic & Pacific Tea Co., C.A.Fla., 212 F.2d 130—Peyatte v. International Harvester Co., C.A.W.Va., 208 F.2d 261

—Kansas City Stockyards Co. of Me. v. Anderson, C.A.Mo., 199 F.2d 91, 36 A.L.R.2d 1—Railway Exp. Agency v. Cox, C.A.Tex., 179 F.2d 593—Bath Mills v. Odom, C.C.A.S.C., 168 F.2d 38, certiorari denied 69 S.Ct. 39, 335 U.S. 818, 93 L.Ed. 373—Great Atlantic & Pacific Tea Co. v. Robards, C.C.A.N.C., 161 F.2d 929—Hossack v. Metzger, C.C.A.S.D., 156 F.2d 501—Union Oil Co. of California v. Hunt, C.C.A.Or., 111 F.2d 269—Shoaf v. Fitzpatrick, C.C.A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518—Newbern v. Great Atlantic & Pacific Tea Co., C.C.A.N.C., 68 F.2d 523, 91 A.L.R. 781.

Bean v. Piedmont Interstate Fair Ass'n, D.C.S.C., 124 F.Supp. 385, reversed on other grounds, C.A., 222 F.2d 227.

Ala.—Belcher v. Chapman, 7 So.2d 859, 242 Ala. 653.

Ind.—Pinnell-Dulin Lumber Co. v. Day, 13 N.E.2d 351, 105 Ind.App. 62.

Kan.—Palmer v. Julian, 170 P.2d 813, 161 Kan. 619.

Ky.—Fitch v. Mayer, 258 S.W.2d 923—Croley v. Huddleston, 192 S.W.2d 717, 301 Ky. 580—Burk Hollow Coal Co. v. Bills, 190 S.W.2d 338, 300 Ky. 735—Elcomb Coal Co. v. Brock, 189 S.W.2d 397, 300 Ky. 399—Harlan Central Coal Co. v. Gemmeno's Adm'r, 178 S.W.2d 217, 296 Ky. 828—Cloversplint Coal Co. v. Blair, 151 S.W.2d 1052, 287 Ky. 158—Morrison v. Carbide & Carbon Chemicals Corp., 129 S.W.2d 547, 278 Ky. 746—Robinson v. Lytle, 124 S.W.2d 78, 276 Ky. 397—Phil-

lips v. Keltner's Adm'r, 124 S.W.2d 71, 276 Ky. 254—Elcomb Coal Co. v. Coffman, 113 S.W.2d 847, 272 Ky. 93—High Splint Coal Co. v. Ramey's Adm'r, 112 S.W.2d 1007, 271 Ky. 532—Clover Splint Coal Co. v. Lorenz, 110 S.W.2d 467, 270 Ky. 676—Perkins-Harlan Coal Co. v. Creech's Adm'r, 103 S.W.2d 943, 268 Ky. 174—Wildner's Adm'r v. Southern Min. Co., 96 S.W.2d 436, 265 Ky. 219—Southern Min. Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 263 Ky. 309—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168—Brooks v. Arnett, 69 S.W.2d 1029, 253 Ky. 491—Horse Creek Mining Co. v. Frazier's Adm'r, 5 S.W.2d 1064, 224 Ky. 211.

Me.—Bartley v. Couture, 55 A.2d 438, 143 Me. 69—Poirier v. Venus Shoe Mfg. Co., 3 A.2d 116, 136 Me. 100—Hoskins v. Bangor & A. R. Co., 195 A. 363, 135 Me. 285.

Mass.—Roberts v. Reynolds, 123 N.E.2d 226, 332 Mass. 95—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165—Roberts v. Frank's Inc., 49 N.E.2d 427, 314 Mass. 42—Klein v. Keressey, 29 N.E.2d 703, 307 Mass. 51—Tardiff v. Lynn Sand & Stone Co., 193 N.E. 55, 288 Mass. 472—Neiss v. Burwen, 191 N.E. 654, 287 Mass. 82—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520—Lyons v. Sommer, 174 N.E. 927, 274 Mass. 284.

Mich.—Sherman v. Barthwell, 17 N.W.2d 727, 310 Mich. 494—Brown v. Standard Oil Co., 14 N.W.2d 797, 309 Mich. 101—Roselip v. Great At-

who is required to operate under the act and has failed to provide compensation thereunder;¹⁴ and this is also true where the employer is in default,¹⁵ or is not insured under the act or fails to secure the

payment of compensation in any of the ways allowed,¹⁶ or, under some acts, where the employer is not a contributor to the state insurance fund,¹⁷ or, in more general terms, where the employer fails to

lantic & Pacific Tea Co., 262 N.W. 408, 272 Mich. 560.
Miss.—Riddell v. Cagle's Estate, 85 So.2d 926.
Mo.—Spicer v. Hannah, 247 S.W.2d 864, 241 Mo.App. 1215—Daniels v. Luechtefeld, App., 155 S.W.2d 307.
N.M.—Addison v. Tessier, 305 P.2d 1067, 62 N.M. 120.
N.C.—Muldrow v. Weinstein, 68 S.E. 2d 249, 234 N.C. 587.
Ohio.—Cameron v. Ringling Bros.—Barnum & Bailey Combined Shows, 5 Ohio Supp. 235.
Okl.—Marrs v. Richardson, 87 P.2d 181, 184 Okl. 342.
Or.—Whitehead v. Montgomery Ward & Co., 239 P.2d 226, 194 Or. 106—Ludwig v. Zidell, 118 P.2d 1073, 167 Or. 488.
Pa.—Wascavage v. Susquehanna Collieries Co., 23 A.2d 509, 343 Pa. 529.
R.I.—Soucy v. Alix, 90 A.2d 722, 79 R.I. 499—Rossi v. Ronci, 7 A.2d 773, 63 R.I. 250—Rossi v. Ronci, 195 A. 401, 59 R.I. 307—Faltinalli v. Great Atlantic & Pac. Tea Co., 182 A. 605, 55 R.I. 438, 488.
S.C.—Caugham v. Columbia Y. M. C. A., 47 S.E.2d 788, 212 S.C. 337—Nuckolls v. Great Atlantic & Pac. Tea Co., 5 S.E.2d 862, 192 S.C. 156.
S.D.—Voet v. Lampert Lumber Co., 15 N.W.2d 579, 70 S.D. 142—Maher v. Wagner, 252 N.W. 647, 62 S.D. 227—Stevenson v. Douros, 235 N.W. 707, 58 S.D. 268.
Tenn.—Duncan v. Dickie Rector Lumber Co., 212 S.W.2d 908, 31 Tenn.App. 155.
Tex.—Najera v. Great Atlantic & Pacific Tea Co., 207 S.W.2d 365, 146 Tex. 367—W. U. Tel. Co. v. Coker, 204 S.W.2d 977, 146 Tex. 190—United East & West Oil Co. v. Dyer, 162 S.W.2d 680, 139 Tex. 318.
Langston v. Degella, Civ.App., 186 S.W.2d 738—Callahan v. Hester, Civ.App., 181 S.W.2d 294, error refused—Dial v. Wilke, Civ.App., 127 S.W.2d 379, error refused—Gulf States Utilities Co. v. Moore, Civ.App., 73 S.W.2d 941, reversed on other grounds, 106 S.W.2d 256, 129 Tex. 604.
Wash.—Long v. Thompson, 31 P.2d 908, 177 Wash. 296.
W.Va.—Dahmer v. State Fair of W. Va., 91 S.E.2d 453—State ex rel. Cashman v. Sims, 43 S.E.2d 805, 130 W.Va. 430, 172 A.L.R. 1389—Smith v. Morrison, 199 S.E. 689, 120 W.Va. 481—Powell v. Mitchell, 196 S.E. 153, 120 W.Va. 9—Thorn v. Addison Bros. & Smith, 194 S.E. 771, 119 W.Va. 479.
71 C.J. p 1495 note 62.

Abrogation of defense of assumption of risk in action under:
Federal Employers' Liability Act see Master and Servant § 359.
State employers' liability acts see Master and Servant § 360.
Action based on violation of statute and rule
Defense, in employee's action for damages for silicosis, that employee assumed risk was properly stricken as to cause of action which was based solely on employer's violation of labor law and rules of industrial board.
N.Y.—Gribsch v. B. T. Babbitt, Inc., 2 N.Y.S.2d 848, 254 App.Div. 601.
Employer-employee relationship
Determination that plaintiff was not an "employee" under workmen's compensation law would not mean that he was not within statute abolishing defense of assumption of risk in actions for employee's injuries based on employer's negligence.
Cal.—Edwards v. Hollywood Canteen, 167 P.2d 729, 27 C.2d 802.
Injury in course of employment
Abrogation of defense is dependent on showing by employee that he was injured in course of his employment.
Tex.—Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused.
Negligence of fellow servant
Injuries sustained through negligence of a fellow servant are not injuries due to risks inherent in a given employment.
Tex.—Railway Exp. Agency v. Gray, Civ.App., 211 S.W.2d 1013, error refused no reversible error.
Risks to which barred defense relate
(1) The defense of "assumption of risk" which is not available to employer does not relate to such ordinary and inherent risks of employment as the employer could not avoid in the observance of its duty of care, but to those enhanced, unnecessary risks due to employer's negligence, which negligence and enhancement of risk were known to the employee.
S.D.—Voet v. Lampert Lumber Co., 15 N.W.2d 579, 70 S.D. 142.
(2) The risks which employee does not assume are those which come from master's negligence, of which employee has notice, and which, prior to enactment of workmen's compensation law, because of employee's knowledge thereof and his remaining in the employment after such knowledge, he was held to have assumed, notwithstanding they were produced by employer's negligence.
W.Va.—Walls v. McKinney, 81 S.E.2d 901, 139 W.Va. 866.

(3) Other risks within abrogated defense see 71 C.J. p 1495 note 62 [b], [c].
14. Mass.—Price v. Railway Exp. Agency, 78 N.E.2d 13, 322 Mass. 476.
15. U.S.—Calvin v. West Coast Power Co., D.C.Or., 44 F.Supp. 783.
W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805, 130 W.Va. 430, 172 A.L.R. 1389.
71 C.J. p 1496 note 63.
16. U.S.—Calvino v. Farley, D.C.N.Y., 26 F.Supp. 431.
Ariz.—Haralson v. Rhea, 259 P.2d 246, 76 Ariz. 74.
Cal.—Devens v. Goldberg, 199 P.2d 943, 33 C.2d 173—Hicks v. Ocean Shore R. R., 117 P.2d 850, 13 C.2d 773.
Lee v. Cranford, 237 P.2d 986, 107 C.A.2d 677—Blinkinsop v. Weber, 193 P.2d 96, 85 C.A.2d 276—Balzeca v. Lorentzen, 127 P.2d 1018, 53 C.A.2d 370.
Mass.—Beekes v. Cutler, 77 N.E.2d 402, 322 Mass. 392—Gordon v. McClure, 75 N.E.2d 656, 322 Mass. 1—Enga v. Sparks, 51 N.E.2d 984, 315 Mass. 120—Doherty v. Paul's for Tires, 49 N.E.2d 430, 314 Mass. 83—Spear v. Chelsea Bldg. Wrecking Co., 32 N.E.2d 241, 308 Mass. 416—Mucha v. Northeastern Crushed Stone Co., 30 N.E.2d 870, 307 Mass. 592—Novash v. Crompton & Knowles Loom Works, 23 N.E.2d 89, 304 Mass. 244—Rivers v. Krasowski, 22 N.E.2d 114, 303 Mass. 409—Eckstein v. Scoff, 13 N.E.2d 436, 299 Mass. 573—Pittsley v. Allen, 7 N.E.2d 442, 297 Mass. 83.
Mich.—Nantico v. Matuszak, 34 N.W. 2d 506, 322 Mich. 644.
Okl.—Ice v. Gardner, 83 P.2d 378, 183 Okl. 496.
S.D.—Daniels v. Moser, 71 N.W.2d 739.
Tex.—Sears, Roebuck & Co. v. Robinson, 280 S.W.2d 238, 154 Tex. 336.
Jackson v. Marshall, Civ.App., 243 S.W.2d 205—Eastern Iron & Metal Co. v. McMorrough, Civ.App., 135 S.W.2d 750—Griffith v. Kernaghan, Civ.App., 121 S.W.2d 617.
Employer willfully uninsured
Cal.—Greitz v. Sivachenko, 299 P.2d 374, 143 C.A.2d 146.
Expired policy
Tenn.—Schroeder v. Rural Educational Ass'n, 228 S.W.2d 491, 33 Tenn.App. 36.
17. Ohio.—Vayto v. River Terminal & Railway Co., 18 Ohio N.P., N.S. 305.

comply with the act.¹⁸ Under some acts the defense is not available to an employer whether or not he comes under the act,¹⁹ but under other acts the statute abrogating the defense applies only to actions for damages where the employer was under the act by operation of law and elected not to accept its benefits.²⁰ The defense has been held not available where the employment was illegal.²¹

On the other hand, an employer who has accepted the provisions of the act may rely on the defense of assumption of risk by the employee,²² at least where the employee has properly rejected the act,²³ or has not accepted the act,²⁴ or has had no opportunity for election,²⁵ and also where the employer was not subject to the act.²⁶ In such a case, the employee, to recover, must establish that the injury arose from a risk which he did not assume.²⁷ The defense of assumption of risk, however, has been held not available in an action against an employer who had accepted the workmen's compensation act for injury to an employee caused by a defective system of using machinery or an improper system of work adopted by the employer.²⁸ Likewise, an employer of a class not subject to, or exempt from, the act, so far as actions to recover damages are concerned, may rely on such defense, even if he is not a subscriber,²⁹ or where he has not taken affirmative action to elect to come under the act.³⁰

An employer not subject to the act because not engaged in a business for pecuniary gain³¹ or because he does not employ the prescribed number of employees,³² or a municipality acting in its governmental capacity,³³ or employers of persons in particular occupations, such as domestic servants³⁴ or farm or ranch laborers,³⁵ may rely on such defense, as may, it has been held, a nonassenting employer whose employee is injured while engaged in casual employment.³⁶

Under some acts the defense may be relied on by an employer who was not under the act by operation of law, and who filed an election to accept the provisions of the act, and later filed an election not to accept its benefits,³⁷ and under others the denial of the defense is imposed only on those employers who fail to accept the mandatory requirements of the act.³⁸

The restrictions relative to the abrogation of the defense of assumption of risk in actions against employers for injuries to employees cannot be so extended as to deprive the employer of other evidentiary benefits evolving from the same source furnishing a basis for the defense.³⁹

Contractual assumption of risk. Under some compensation acts, in a consideration of the risks involved in the abrogation of the defense of assump-

18. U.S.—Shoaf v. Fitzpatrick, C.C. A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518.

Ariz.—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.
Ind.—Conway v. Park, 31 N.E.2d 79, 108 Ind.App. 562.
71 C.J. p 1496 note 65.

19. U.S.—Valencia v. Stearns Roger Mfg. Co., D.C.N.M., 124 F.Supp. 670.

20. Kan.—Vick v. Morton, 238 P.2d 467, 172 Kan. 87.

21. N.J.—Chipman v. Cramer, 197 A. 901, 16 N.J.Misc. 178.

22. N.H.—Rosedoff v. Consolidated Rendering Co., 47 A.2d 574, 99 N.H. 114.
71 C.J. p 1496 note 66.

23. Mo.—Mitchell v. J. A. Tobin Const. Co., 159 S.W.2d 709, 236 Mo. App. 910.

24. Wis.—Kieler v. Fred Miller Brewing Co., 161 N.W. 739, 165 Wis. 237.
71 C.J. p 1496 note 67.

25. Mich.—Bernard v. Michigan United Traction Co., 165 N.W. 846, 198 Mich. 497.

26. N.H.—Davis v. W. T. Grant Co., 185 A. 889, 88 N.H. 204.

27. N.H.—Zajac v. Amoskeag Mfg. Co., 124 A. 792, 81 N.H. 257.
71 C.J. p 1496 note 69.

28. N.H.—Demers v. Becker, 23 A.2d 375, 91 N.H. 519.

29. Ky.—Jessie's Adm'x v. Gulf Refining Co., 121 S.W.2d 909, 275 Ky. 533.

Mass.—Price v. Railway Exp. Agency, 78 N.E.2d 13, 322 Mass. 476—Zarski v. Creamer, 59 N.E.2d 704, 317 Mass. 744.

N.M.—Thompson v. Dale, 283 P.2d 623, 59 N.M. 290.
71 C.J. p 1496 note 70.

30. U.S.—Bean v. Piedmont Interstate Fair Ass'n, D.C.S.C., 124 F. Supp. 385, reversed on other grounds, C.A., 222 F.2d 227.

31. N.Y.—Dillon v. St. Patrick's Cathedral, 137 N.E. 311, 234 N.Y. 225.

32. Tex.—Dial v. Wilke, Civ.App., 127 S.W.2d 379, error refused.
71 C.J. p 1496 note 72.

33. Ky.—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57.

34. Mass.—Bell v. Sawyer, 47 N.E.2d 1, 313 Mass. 250.
N.M.—Thompson v. Dale, 283 P.2d 623, 59 N.M. 290.

35. N.M.—Thompson v. Dale, supra.

36. Mont.—Miller v. Granite County Power Co., 213 P. 604, 66 Mont. 368. N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.

Tenn.—Thoni v. Hayborn, 260 S.W.2d 376, 37 Tenn.App. 56.

Casual employment generally see supra § 69.

37. Kan.—Vick v. Morton, 238 P.2d 467, 172 Kan. 87.

38. Ky.—Coburn v. North Am. Refractories Co., 174 S.W.2d 757, 295 Ky. 566.

Silicosis

A noncomplying employer was not precluded from pleading assumed risk as a defense to action for death of grinder from pulmonary tuberculosis caused by silicosis.

Ky.—Coburn v. North Am. Refractories Co., supra.

39. Tenn.—Duncan v. Dickie Rector Lumber Co., 212 S.W.2d 908, 31 Tenn.App. 155.

Superior knowledge by the employee of the particular circumstances existing at the time of the injury and his control over the instrumentality causing it may serve to negative the liability of the employer; consideration of the evidence pertaining thereto relates not to the acts of the employee as a bar to his action, but to the bearing they may have on

tion of risk, a distinction is made between voluntary and contractual assumption of risk.⁴⁰ The principle that an employer owes no duty to one entering his employment to alter the obvious condition of his premises or to change the manifest methods of conducting his business, even though safer ones might be devised and that there is therefore no negligence in the employer continuing them,⁴¹ sometimes called "contractual assumption of risk,"⁴² relates to the issue of the employer's negligence,⁴³ and is a limitation on the duty of the employer and a measure by which to determine his negligence,⁴⁴ while the defense of voluntary assumption of risk relates to a risk of injury that comes into existence subsequent to the making of the contract of employment.⁴⁵

It was formerly held under one of the acts, although not under others,⁴⁶ that an employer who failed to come within the act could rely on contractual assumption of risk as a defense, as contrasted with voluntary assumption of risk;⁴⁷ but under subsequent amendments employers who have the option to come under the compensation act and fail to do so are deprived of the defenses of voluntary and contractual assumption of risk,⁴⁸ as also

are employers for whom operation under the act is compulsory and who fail to provide compensation thereunder.⁴⁹

Sole cause of injury. The defense of assumption of risk has been held available to an employer eligible to operate under the compensation act but who has not accepted it, where it is the sole cause of the injury or death of the employee.⁵⁰

Simple tool doctrine. Provisions in compensation acts abrogating the defense of assumption of risk in actions against employers for injuries to employees have been held not to abolish the simple tool doctrine and hence not to preclude an employer's reliance on such doctrine as a defense to an action against him for injuries to an employee,⁵¹ but other authority has held that the simple tool doctrine is founded on assumption of risk and does not operate where the defense of assumption of risk is not available as a defense.⁵²

Action for property damage. A provision of a compensation act making the defense of assumed risk unavailable in actions to recover damages for personal injuries or death has no application to an action solely for damages to personal property.⁵³

the determination of proximate cause.

Tenn.—Duncan v. Dickie Rector Lumber Co., *supra*.

40. Mass.—Ashton v. Boston, etc., R. Co., 109 N.E. 820, 222 Mass. 65, L.R.A.1916B 1281.

71 C.J. p 1497 note 75.

41. Mass.—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165—Enga v. Sparks, 51 N.E. 2d 984, 315 Mass. 120—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520.

71 C.J. p 1497 note 76 [a].

Continuance of obvious conditions

Employer was held not liable for injuries sustained when a tire falling from a pile struck employee, where the risk of danger from somewhat higher piles was ordinarily incidental to the continuance of obvious conditions.

Mass.—Doherty v. Paul's for Tires, 49 N.E.2d 430, 314 Mass. 83.

Contractual assumption of risk held not shown

(1) Generally.

Mass.—Roberts v. Frank's, Inc., 49 N.E.2d 427, 314 Mass. 42—Rivers v. Krasowski, 22 N.E.2d 114, 303 Mass. 409—Neiss v. Burwen, 191 N.E. 654, 287 Mass. 82—Lyons v. Sommer, 174 N.E. 927, 274 Mass. 234.

(3) Risk that employer would negligently permit floor to become and remain slippery.

Nev.—Cahow v. Michelas, 149 P.2d 233, 62 Nev. 295.

42. Mass.—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520.

43. Mass.—Neiss v. Burwen, 191 N.E. 654, 287 Mass. 82.

44. Mass.—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520.

45. Mass.—Rivers v. Krasowski, 22 N.E.2d 114, 303 Mass. 409—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520.

46. U.S.—Bay State St. Ry. Co. v. Rust, R.I., 253 F. 43, 165 C.C.A. 641. 71 C.J. p 1497 note 77.

47. Prior to November 15, 1943

Mass.—Beekes v. Cutler, 77 N.E.2d 402, 322 Mass. 392—Godon v. McClure, 75 N.E.2d 656, 322 Mass. 1—Winchester v. Solomon, 75 N.E.2d 653, 322 Mass. 7—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135—Taylor v. Newcomb Baking Co., 59 N.E. 2d 293, 317 Mass. 609—Enga v. Sparks, 51 N.E.2d 984, 315 Mass. 120—Bigos v. United Rayon Mill, 16 N.E.2d 44, 301 Mass. 76—Neiss v. Burwen, 191 N.E. 654, 287 Mass. 82—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520.

71 C.J. p 1497 note 76.

48. Mass.—Roberts v. Reynolds, 123 N.E.2d 226, 332 Mass. 95.

49. Mass.—Price v. Railway Exp. Agency, 78 N.E.2d 13, 322 Mass. 476.

50. Ky.—Cloversplint Coal Co. v. Blair, 151 S.W.2d 1052, 287 Ky. 158.

Assurance by employer of safe place to work

Death of employee who continued to work on being assured by foreman of the safety of the place could not be said to be solely due to assumption of risk by decedent, where the danger was not so apparent that no ordinarily prudent person would disregard it.

Ky.—Cloversplint Coal Co. v. Blair, *supra*.

51. U.S.—Newbern v. Great Atlantic & Pacific Tea Co., C.C.A.N.C., 68 F. 2d 523, 91 A.L.R. 781.

S.D.—Maher v. Wagner, 252 N.W. 647, 62 S.D. 227.

Simple tool doctrine not changed by a statute abolishing the doctrine of assumption of risk in case of the master's negligence generally see Master and Servant § 390 d (3).

52. Ky.—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91.

53. Tex.—J. W. Zempter Const. Co. v. Rodgers, Civ.App., 45 S.W.2d 763.

§ 942. Negligence of Fellow Servant

As a general rule, provisions in workmen's compensation acts abrogate the defense that the injury was due to the negligence of a fellow servant in actions for injuries to employees against employers who have not come within the operation of an act they have the option to come under, or who have elected, or are required, to come under the act and are in default thereunder, but it is not abrogated with respect to employers who are operating under the act and are not in default or who are exempt from its application.

As a general rule, under varying provisions in workmen's compensation acts the defense that the injury was due to the negligence of a fellow serv-

ant is abrogated in actions against employers for injuries to employees, where the employer is of a class subject to the operation of the act and has not elected to come within it, or has elected not to pay compensation thereunder,⁵⁴ or where operation under the act is compulsory and the employer failed to provide compensation thereunder,⁵⁵ even, it has been held, where such negligence was the sole cause of injury.⁵⁶ Likewise, the defense is abrogated where the employer is in default,⁵⁷ or is not insured under the act, or has failed to secure the payment of compensation for employees covered by the act,⁵⁸

54. U.S.—*Baker v. Great Atlantic & Pacific Tea Co.*, C.A.Fla., 212 F.2d 130—*Kansas City Stockyards Co. of Maine v. Anderson*, C.A.Mo., 199 F.2d 91, 36 A.L.R.2d 1—*Railway Exp. Agency v. Cox*, C.A.Tex., 179 F.2d 593—*Bath Mills v. Odum*, C. C.A.S.C., 168 F.2d 38, certiorari denied 69 S.Ct. 39, 335 U.S. 818, 93 L. Ed. 373—*Great Atlantic & Pacific Tea Co. v. Robards*, C.C.A.N.C., 161 F.2d 929—*Hessack v. Metzger*, C.C. A.S.D., 156 F.2d 501—*Union Oil Co. of California v. Hunt*, C.C.A.Or., 111 F.2d 269—*Shoaf v. Fitzpatrick*, C.C.A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 630, 84 L.Ed. 518.

Bean v. Piedmont Interstate Fair Ass'n, D.C.S.C., 124 F.Supp. 385, reversed on other grounds, C.A., 222 F.2d 227.

Ga.—*Hamilton Turpentine Co. v. Johnson*, 92 S.E.2d 235, 93 Ga.App. 544.

Ind.—*Pinnell-Dulin Lumber Co. v. Day*, 13 N.E.2d 351, 105 Ind.App. 62.

Ky.—*Fitch v. Mayer*, 258 S.W.2d 923—*Croley v. Huddleston*, 192 S.W.2d 717, 301 Ky. 580—*Burk Hollow Coal Co. v. Bills*, 190 S.W.2d 338, 300 Ky. 735—*Elcomb Coal Co. v. Brock*, 189 S.W.2d 397, 300 Ky. 399—*Harlan Central Coal Co. v. Gemmeno's Adm'r*, 178 S.W.2d 217, 296 Ky. 828—*Ward v. Marshall*, 168 S.W.2d 348, 293 Ky. 18—*Grubb v. Coleman Fuel Co.*, 114 S.W.2d 477, 272 Ky. 847—*High Splint Coal Co. v. Ramsey's Adm'r*, 112 S.W.2d 1007, 271 Ky. 532—*Clover Splint Coal Co. v. Lorenz*, 110 S.W.2d 457, 270 Ky. 676—*Wildner's Adm'r v. Southern Min. Co.*, 96 S.W.2d 436, 285 Ky. 219—*Southern Min. Co. v. Saylor*, 95 S.W.2d 236, 264 Ky. 655—*Helton v. Gunn Coal Mining Co.*, 79 S.W.2d 695, 258 Ky. 168—*Brooks v. Arnett*, 69 S.W.2d 1029, 253 Ky. 491—*Horse Creek Mining Co. v. Frazier's Adm'r*, 5 S.W.2d 1064, 224 Ky. 211.

Me.—*Bartley v. Couture*, 55 A.2d 438, 143 Me. 69—*Poirier v. Venus Shoe Mfg. Co.*, 3 A.2d 116, 136 Me. 100—*Hoskins v. Bangor & A. R. Co.*, 195 A. 383, 135 Me. 285.

Mass.—*Roberts v. Reynolds*, 123 N.E. 2d 226, 332 Mass. 95—*Price v. Railway Exp. Agency*, 78 N.E.2d 13, 322 Mass. 476—*Maciejewski v. Graton & Knight Co.*, 70 N.E.2d 796, 321 Mass. 165—*Watkins v. New York, N. H. & H. R. Co.*, 195 N.E. 888, 290 Mass. 448—*Tardiff v. Lynn Sand & Stone Co.*, 193 N.E. 55, 288 Mass. 472—*Neiss v. Burwen*, 191 N.E. 654, 287 Mass. 82—*Cronan v. Armitage*, 190 N.E. 12, 285 Mass. 520.

Mich.—*Brown v. Standard Oil Co.*, 14 N.W.2d 797, 309 Mich. 101—*Williams v. Sealander*, 286 N.W. 101, 288 Mich. 617.

Miss.—*Riddell v. Cagle's Estate*, 85 So.2d 926.

Mo.—*Daniels v. Luechtefeld*, App., 155 S.W.2d 307.

N.M.—*Addison v. Tessier*, 305 P.2d 1067, 62 N.M. 120.

N.C.—*Muldrow v. Weinstein*, 68 S.E. 2d 249, 234 N.C. 537.

Ohio.—*Ringling Bros.-Barnum & Bailey Combined Shows*, 5 Ohio Supp. 235.

Pa.—*McGuire v. Hamler Coal Min. Co.*, 49 A.2d 396, 355 Pa. 160—*Was-cavage v. Susquehanna Collieries Co.*, 23 A.2d 509, 343 Pa. 529.

R.I.—*Soucy v. Alix*, 90 A.2d 722, 79 R.I. 499—*Rossi v. Ronci*, 7 A.2d 773, 63 R.I. 250—*Rossi v. Ronci*, 195 A. 401, 59 R.I. 307—*Faltinalli v. Great Atlantic & Pac. Tea Co.*, 182 A. 605, 55 R.I. 438, 468.

S.C.—*Caughman v. Columbia Y. M. C. A.*, 47 S.E.2d 788, 212 S.C. 337—*Nuckolls v. Great Atlantic & Pac. Tea Co.*, 5 S.E.2d 862, 192 S.C. 156.

S.D.—*Voet v. Lampert Lumber Co.*, 15 N.W.2d 579, 70 S.D. 142—*Stevenson v. Douros*, 235 N.W. 707, 58 S. D. 268.

Tenn.—*Duncan v. Dickie Rector Lumber Co.*, 212 S.W.2d 908, 31 Tenn.App. 155.

Tex.—*Najera v. Great Atlantic & Pacific Tea Co.*, 207 S.W.2d 365, 146 Tex. 367—*W. U. Tel. Co. v. Coker*, 204 S.W.2d 977, 146 Tex. 190—*United East & West Oil Co. v. Dyer*, 162 S.W.2d 680, 139 Tex. 318.

Dial v. Wilke, Civ.App., 127 S.W. 2d 379, error refused—*Gulf States*

Utilities Co. v. Moore, Civ.App., 73 S.W.2d 941, reversed on other grounds, 106 S.W.2d 256, 129 Tex. 604.

Wash.—*Long v. Thompson*, 31 P.2d 908, 177 Wash. 296.

W.Va.—*Dahmer v. State Fair of W. Va.*, 91 S.E.2d 453—*Smith v. Morrison*, 199 S.E. 689, 120 W.Va. 481—*Powell v. Mitchell*, 196 S.E. 153, 120 W.Va. 9—*Thorn v. Addison Bros. & Smith*, 194 S.E. 771, 119 W.Va. 479. 71 C.J. p 1497 note 81.

Abrogation of fellow-servant doctrine in actions against employers for injuries to employees generally see *Master and Servant* §§ 334-355.

55. Mass.—*Price v. Railway Exp. Agency*, 78 N.E.2d 13, 322 Mass. 476.

56. U.S.—*Redmond v. American Ry. Express Co.*, C.C.A.Mass., 17 F.2d 753.

57. U.S.—*Calvin v. West Coast Power Co.*, D.C.Or., 44 F.Supp. 783. 71 C.J. p 1498 note 84.

58. U.S.—*Calvino v. Farley*, D.C.N. Y., 26 F.Supp. 431.

Cal.—*Devens v. Goldberg*, 199 P.2d 943, 33 C.2d 173—*Hicks v. Ocean Shore R. R.*, 117 P.2d 850, 18 C.2d 773.

Fla.—*Jones v. Brink*, 39 So.2d 791.

Mass.—*Enga v. Sparks*, 51 N.E.2d 984, 315 Mass. 120—*Spear v. Chelsea Bldg. Wrecking Co.*, 32 N.E.2d 241, 308 Mass. 416—*Mucha v. Northeastern Crushed Stone Co.*, 30 N.E.2d 870, 307 Mass. 592—*Novash v. Crompton & Knowles Loom Works*, 23 N.E.2d 89, 304 Mass. 244—*Rivers v. Krasowski*, 22 N.E. 2d 114, 303 Mass. 409—*Green v. Cohen*, 11 N.E.2d 492, 298 Mass. 439—*Pittsley v. Allen*, 7 N.E.2d 442, 297 Mass. 83.

Mich.—*Nantico v. Matuszak*, 34 N.W. 2d 506, 322 Mich. 644.

Okl.—*Ice v. Gardner*, 83 P.2d 378, 183 Okl. 496.

Tex.—*Sears, Roebuck & Co. v. Robinson*, Civ.App., 272 S.W.2d 549, affirmed 280 S.W.2d 238, 154 Tex. 236—*Jackson v. Marshall*, Civ.App., 243 S.W.2d 205—*Eastern Iron & Metal Co. v. McMorrough*, Civ.App.,

or, under some acts, where the employer does not contribute to the state insurance fund,⁵⁹ or, in more general terms, where the employer does not comply with the act.⁶⁰

Under some acts the defense is not available to an employer whether or not he comes under the act,⁶¹ although under other acts the statute abrogating the defense applies only to actions for damages where the employer was under the act by operation of law and elected not to accept its benefits.⁶² The abrogation of the defense is dependent on a showing by the employee that he was injured in the course of his employment⁶³ or in the usual course of the employer's business.⁶⁴ The defense may not be abrogated with respect to a nonassenting employer whose employee is injured while engaged in casual employment.⁶⁵ The defense has been held not available where the employment was illegal.⁶⁶

On the other hand, an employer who has accepted the provisions of the act may rely on the defense of the negligence of a fellow servant,⁶⁷ at least where the employee has properly rejected the act,⁶⁸ or has

not accepted the act,⁶⁹ or has had no opportunity for election,⁷⁰ and also where the employer is not subject to the act,⁷¹ as may, in general terms, an employer who has complied with the requirements of the act.⁷² Likewise the defense is not abrogated with respect to employers to whom the compensation act is not applicable, or who are exempt therefrom,⁷³ such as employers who do not come within the operation of the act because they do not employ the specified number of employees,⁷⁴ and employers of persons in particular occupations, such as domestic servants⁷⁵ or farm or ranch laborers.⁷⁶ Under some acts the defense may be relied on by an employer who was not under the act by operation of law, and who filed an election to accept the provisions of the act, and later filed an election not to accept its benefits.⁷⁷

In situations in which the defense is abrogated the employer is responsible for the negligence of the employee's fellow servant.⁷⁸ The defense has been held not available in actions for damages for injury or death from silicosis.⁷⁹

Action for property damage. A provision of a

135 S.W.2d 750—Griffith v. Kernaghan, Civ.App., 121 S.W.2d 617.

Expired policy
Tenn.—Schroeder v. Rural Educational Ass'n, 228 S.W.2d 491, 33 Tenn.App. 36.

Employer willfully uninsured

In action by employee against employer, who was willfully uninsured, for personal injuries sustained in course of employment, contributory negligence, assumption of risk, or injury caused by negligence of fellow servant was not a defense.

Cal.—Greitz v. Sivachenko, 299 P.2d 374, 143 C.A.2d 146.

59. Ohio.—Vayto v. River Terminal & Railway Co., 18 Ohio N.P., N.S., 305.

60. U.S.—Shoaf v. Fitzpatrick, C.C. A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518.

Ind.—Conway v. Park, 31 N.E.2d 79, 108 Ind.App. 562.

71 C.J. p 1498 note 86.

61. U.S.—Valencia v. Stearns Roger Mfg. Co., D.C.N.M., 124 F.Supp. 670.

62. Kan.—Vick v. Morton, 238 P.2d 467, 172 Kan. 87.

63. Tex.—Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused.

W.Va.—Prowse v. Owen's Bottle Co., 120 S.E. 300, 95 W.Va. 81.

64. Mont.—Nelson v. Stukeley, 300 P. 287, 89 Mont. 277, 78 A.L.R. 483.

65. Mont.—Miller v. Granite County Power Co., 213 P. 604, 66 Mont. 368.
N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law, 569.

Tenn.—Thoni v. Hayborn, 260 S.W.2d 376, 37 Tenn.App. 56.

Casual employment generally see supra § 69.

66. N.J.—Chipman v. Cramer, 197 A. 901, 16 N.J.Misc. 178.

67. Ohio.—Gildersleeve v. Newton Steel Co., 142 N.E. 678, 109 Ohio St. 341.

71 C.J. p 1498 note 87.

68. Mo.—Mitchell v. J. A. Tobin Const. Co., 159 S.W.2d 709, 236 Mo. App. 910.

69. Wis.—Kieler v. Fred Miller Brewing Co., 161 N.W. 739, 165 Wis. 237.

71 C.J. p 1498 note 88.

70. Mich.—Bernard v. Michigan United Traction Co., 165 N.W. 846, 198 Mich. 497.

71. N.H.—Davis v. W. T. Grant Co., 185 A. 889, 88 N.H. 204.

72. N.H.—Jutras v. Amoskeag Mfg. Co., 147 A. 753, 84 N.H. 171.

73. U.S.—Bean v. Piedmont Interstate Fair Ass'n, D.C.S.C., 124 F. Supp. 385, reversed on other grounds, C.A., 222 F.2d 227.

Ga.—Hamilton Turpentine Co. v. Johnson, 92 S.E.2d 235, 93 Ga.App. 544.

Mass.—Price v. Railway Exp. Agency, 78 N.E.2d 13, 322 Mass. 476.

74. Tex.—Aldridge v. General Mills, Civ.App., 188 S.W.2d 407.

71 C.J. p 1498 note 91.

75. Mass.—Bell v. Sawyer, 47 N.E. 2d 1, 313 Mass. 250.

N.M.—Thompson v. Dale, 283 P.2d 623, 59 N.M. 290.

76. N.M.—Thompson v. Dale, supra.
Farm laborers

Subsequent to 1939 amendment, employees of original producer of crude gum or oleoresin who help to gather gum from trees are "farm laborers" within exemption of workmen's compensation act, and hence fellow-servant rule is available as defense to such original producer in action against him by such employee for personal injuries sustained because of alleged negligence of fellow employee.

Ga.—Hamilton Turpentine Co. v. Johnson, 92 S.E.2d 235, 93 Ga.App. 544.

77. Kan.—Vick v. Morton, 238 P.2d 467, 172 Kan. 87.

78. Me.—Hoskins v. Bangor & A. R. Co., 195 A. 363, 135 Me. 285.

Mich.—Williams v. Sealander, 286 N. W. 101, 288 Mich. 617.

Proof required

In action for injuries allegedly resulting from negligence of fellow employee it is necessary for the plaintiff to establish that fellow servant acting within the scope of his employment was negligent and that such negligence proximately resulted in injury.

Tex.—Najera v. Great Atlantic & Pacific Tea Co., 207 S.W.2d 365, 146 Tex. 367.

79. N.Y.—Griebsch v. B. T. Babbitt, Inc., 2 N.Y.S.2d 848, 254 App.Div. 601.

compensation act making the defense of negligence of a fellow servant unavailable in actions to recover damages for personal injuries or death has no application to an action solely for damages to personal property.⁸⁰

§ 943. Negligence of Person Whose Duty Is Prescribed by Statute

Under some compensation acts an employer who is

not operating thereunder cannot assert the negligence of a person whose duty is prescribed by statute in defense of an action for injury to an employee.

Under some compensation acts an employer who has not come within its operation cannot assert as against the employee's action that the negligence in question was that of one whose duties are prescribed by statute.⁸¹

4. OTHER MATTERS AFFECTING RIGHT OR EXTENT OF RECOVERY

§ 944. Negligence of Employer as Essential to Recovery

Actions for damages for injuries to employees of employers who are not operating under, or have failed to comply with, the workmen's compensation act are essentially actions for negligence; and, except as they have been modified by the act, they are governed by the rules usually applicable to such actions, and negligence on the part of the employer as a proximate part of the injury is essential to a recovery.

In general, an action for damages for injuries to an employee of an employer who is not operating under, or has failed to comply with, the workmen's compensation act is essentially an action for negligence and is governed by the usual rules of

law which apply to such actions, except in so far as the act has specifically modified them.⁸² In such an action, actionable fault or breach of duty on the part of the employer is essential to recovery,⁸³ and the mere happening of an accident and resulting injury to the employee are insufficient to establish a breach of the employer's duty.⁸⁴ Hence, except where the act provides otherwise,⁸⁵ negligence on the part of the employer as the proximate cause of the injury is an essential to a recovery by an employee in an action at law, notwithstanding the employer has not come within the provisions of the act, or is in default thereunder.⁸⁶

80. Tex.—J. W. Zempter Const. Co. v. Rodgers, Civ.App., 45 S.W.2d 763.

81. W.Va.—Dahmer v. State Fair of W. Va., 91 S.E.2d 453, 141 W.Va. 517.

71 C.J. p 1498 note 94.

82. Ariz.—Hammels v. Britten, 85 P. 2d 992, 53 Ariz. 112.

83. Cal.—Roberts v. U. S. O. Camp Shows, 205 P.2d 1116, 91 C.A.2d 884. D.C.—Garcia v. De Leon, Mun.App., 59 A.2d 637.

S.D.—Maher v. Wagner, 252 N.W. 647, 62 S.D. 227—Stevenson v. Douros, 235 N.W. 707, 58 S.D. 268.

Care for safety of employees

Action under compensation act by injured employee whose employer has failed to secure the payment of compensation, and action authorized by statute against employer by injured employee who is not covered by the compensation act, are both based on obligation of employer to exercise due care with regard to safety of employees, and the same facts relating to negligence will support a recovery in each, and the parties and the relationship are identical, though the remedies are different.

Cal.—Devens v. Goldberg, 199 P.2d 943, 33 C.2d 173.

84. Mich.—Muchler v. Johnson, 273 N.W. 784, 280 Mich. 527.

85. N.D.—Moen v. Melin, 231 N.W. 283, 59 N.D. 582.

71 C.J. p 1490 note 17.

86. U.S.—Baker v. Great Atlantic & Pacific Tea Co., C.A.Fla., 212 F.2d 130—Peyatte v. International Harvester Co., C.A.W.Va., 208 F.2d 261—Railway Exp. Agency v. Cox, C. A.Tex., 179 F.2d 593—Newbern v. Great Atlantic & Pacific Tea Co., C.C.A.N.C., 68 F.2d 523, 91 A.L.R. 781.

Parker v. Great Atlantic & Pacific Tea Co., D.C.Ind., 146 F.Supp. 871.

Ariz.—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.

Ind.—Conway v. Park, 31 N.E.2d 79, 108 Ind.App. 562.

Ky.—Fitch v. Mayer, 258 S.W.2d 925—Burk Hollow Coal Co. v. Bills, 190 S.W.2d 338, 300 Ky. 735—Gatliff Coal Co. v. Broyles' Adm'r, 180 S.W.2d 406, 297 Ky. 516—Harlan Central Coal Co. v. Gemmen's Adm'r, 178 S.W.2d 217, 296 Ky. 828—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18—Howard v. Southern Harlan Coal Co., 152 S.W.2d 613, 287 Ky. 228—Southern Min. Co. v. Lawson, 131 S.W.2d 831, 279 Ky. 659—Phillips v. Keltner's Adm'r, 124 S.W.2d 71, 276 Ky. 254—Jessie's Adm'r v. Gulf Refining Co., 121 S.W.2d 909, 275 Ky. 533—High Splint Coal Co. v. Ramey's Adm'r, 112 S.W.2d 1007, 271 Ky. 532—Clover Splint Coal Co. v. Lorenz, 110 S.W.2d 467, 270 Ky. 676—Southern Min. Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655—Baker v. High Splint

Coal Co., 81 S.W.2d 577, 258 Ky. 786—Cravens v. Poston, 71 S.W.2d 1044, 254 Ky. 542—Horse Creek Mining Co. v. Frazier's Adm'r, 5 S.W.2d 1064, 224 Ky. 211.

Me.—Palmer v. Inhabitants of Town of Sumner, 177 A. 711, 133 Me. 337, 97 A.L.R. 1292.

Mich.—Sherman v. Barthwell, 17 N. W.2d 727, 310 Mich. 494—Brown v. Standard Oil Co., 14 N.W.2d 797, 309 Mich. 101—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L. R. 537—Erickson v. Leach, 281 N. W. 324, 285 Mich. 554—Muchler v. Johnson, 273 N.W. 794, 280 Mich. 527—Roselip v. Great Atlantic & Pacific Tea Co., 262 N.W. 408, 272 Mich. 560.

Mo.—Nance v. Atchison, T. & S. F. Ry. Co., 232 S.W.2d 547, 360 Mo. 980.

Nev.—Cahow v. Michelas, 149 P.2d 233, 62 Nev. 295.

N.C.—Muldrow v. Weinstein, 68 S.E. 2d 249, 234 N.C. 587—Kates v. Harrison, 198 S.E. 573, 214 N.C. 151.

Okl.—Ice v. Gardner, 83 P.2d 378, 183 Okl. 496.

S.C.—Corpus Juris cited in Nuckolls v. Great Atlantic & Pac. Tea Co., 5 S.E.2d 862, 864, 192 S.C. 156.

Tenn.—Duncan v. Dickie Rector Lumber Co., 212 S.W.2d 908, 31 Tenn.App. 155—McGinniss v. Brown, 204 S.W.2d 334, 30 Tenn. App. 178.

Tex.—Sears, Roebuck & Co. v. Robinson, 280 S.W.2d 238, 154 Tex. 336—

Provisions in compensation acts abrogating certain defenses in actions against employers for injuries to employees, as discussed *supra* §§ 939-943, abolish only those defenses and do not create a new right of action where there was none at common law.⁸⁷ They do not, in addition to taking away the specified defenses, establish a statutory right of recovery based only on the fact that the employee sustained injuries by accident arising out of and in the course of his employment,⁸⁸ or relieve the employee of the necessity of establishing a breach of duty by the employer.⁸⁹ Such provisions ordinarily leave only the question whether the employer was negligent and whether that negligence was the proximate cause of the injury,⁹⁰ or the only de-

fense open to the employer is his absence of negligence⁹¹ or that the injury was caused by the sole negligence of the employee.⁹² Thus the employer's negligence as the proximate cause of the employee's injury is all that the employee need establish in order to recover.⁹³

Safe instrumentalities and place of work. An employer who is subject to, or eligible to operate under, a workmen's compensation act and does not operate thereunder, or comply therewith, has the duty, independently of statute, to furnish a reasonably safe place in which to work and reasonably safe tools and instrumentalities with which to work, and he is liable in an action for damages for injuries to employees proximately caused by his violation of

W. U. Tel. Co. v. Coker, 204 S.W.2d 977, 146 Tex. 190.

Dial v. Wilke, Civ.App., 127 S.W.2d 379, error refused.

W.Va.—Ferguson v. Pinson, 50 S.E.2d 476, 131 W.Va. 691—Powell v. Mitchell, 196 S.E. 153, 120 W.Va. 9—Thorn v. Addison Bros. & Smith, 194 S.E. 771, 119 W.Va. 479.

71 C.J. p 1490 note 18, p 1491 note 19. Right of accepting employee to recover under compensation act see *supra* § 125.

Primary inquiry must be directed toward the ascertainment of whether employer was guilty of a breach of duty owed employee, since in absence of negligence of employer, no liability for such injuries can be imposed. Ky.—Home Lumber Co. v. Turley, 139 S.W.2d 435, 282 Ky. 633.

Primary negligence essential

If an employer is not guilty of any primary negligence proximately causing an injury, he is not liable, even if he has failed to comply with the workmen's compensation statutes.

W.Va.—Walls v. McKinney, 81 S.E.2d 901, 139 W.Va. 866.

Malpractice

Injured employee's recovery against employer's insurance carrier on theory that its physicians were guilty of malpractice in treating injured hand is entirely dependent on ability to prove negligence.

N.Y.—Parchefsky v. Kroll Bros., 275 N.Y.S. 322, 242 App.Div. 346, reversed on other grounds 196 N.E. 308, 267 N.Y. 410, 98 A.L.R. 1387.

87. Me.—Palmer v. Inhabitants of Town of Sumner, 177 A. 711, 133 Me. 337, 97 A.L.R. 1292.

88. Me.—Palmer v. Inhabitants of Town of Sumner, *supra*.
S.C.—Nuckolls v. Great Atlantic & Pac. Tea Co., 5 S.E.2d 862, 192 S.C. 156.

Employer's duty not enlarged

The workmen's compensation act does not enlarge the duty of an em-

ployer who is not a subscriber; it takes away some of the employer's defenses, but it does not transform conduct theretofore lawful on the part of the employer into negligence. Me.—Palmer v. Inhabitants of Town of Sumner, 177 A. 711, 133 Me. 337, 97 A.L.R. 1292.

Mass.—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165—Spear v. Chelsea Bldg. Wrecking Co., 32 N.E.2d 241, 308 Mass. 416.

71 C.J. p 1490 note 18 [a].

89. U.S.—Great Atlantic & Pacific Tea Co. v. Robards, C.C.A.N.C., 161 F.2d 929.

Assumption of risk

The elimination of the defense of assumption of risk does not take away the defense of absence of negligence on the part of the employer. Iowa.—Hunter v. Colfax Cons. Coal Co., 151 N.W. 1037, 157 N.W. 145, 175 Iowa 245, L.R.A.1917D 15, Ann. Cas.1917E 803.

71 C.J. p 1496 note 74.

90. U.S.—Bath Mills v. Odom, C.C.A. S.C., 168 F.2d 38, certiorari denied 69 S.Ct. 39, 335 U.S. 818, 93 L.Ed. 373.

Mass.—Roberts v. Frank's Inc., 49 N.E.2d 427, 314 Mass. 42—Spear v. Chelsea Bldg. Wrecking Co., 32 N.E.2d 241, 308 Mass. 416—Mucha v. Northeastern Crushed Stone Co., 30 N.E.2d 870, 307 Mass. 592.

Extent of inquiry

Inquiry is confined to acts or omissions of employer.

Ky.—Harlan Ridgeway Min. Co. v. Jackson, 129 S.W.2d 585, 278 Ky. 767.

Sole issue

Issues are confined to negligence and proximate cause.

Ky.—Elcomb Coal Co. v. Coffman, 113 S.W.2d 847, 272 Ky. 93.

On motion for directed verdict

Only question raised by motion for directed verdict of employer not

insured under workmen's compensation act is whether there was evidence of employer's negligence contributing to cause injury to employee.

Mass.—Reldy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135.

71 C.J. p 1490 note 18 [e].

Only defenses

Only defenses available in suit for personal injuries by employee are that employer, its agents, servants or employees, were not guilty of negligence which proximately caused employee's injuries, or that employee himself was guilty of some act which was sole proximate cause of his injuries.

Tex.—Sears, Roebuck & Co. v. Robinson, Civ.App., 272 S.W.2d 549, affirmed 280 S.W.2d 238, 154 Tex. 336.

91. Mass.—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165—Rivers v. Krasowski, 22 N.E.2d 114, 303 Mass. 409—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520.

71 C.J. p 1491 note 22.

92. Ariz.—Haralson v. Rhea, 259 P.2d 248, 76 Ariz. 74—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.

93. Mass.—Starr v. Chafitz, 57 N.E.2d 567, 317 Mass. 227—Doherty v. Paul's for Tires, 49 N.E.2d 430, 314 Mass. 83—Roberts v. Frank's Inc., 49 N.E.2d 427, 314 Mass. 42.

R.I.—Faltinalli v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438, 438.

71 C.J. p 1491 note 23.

In any particular

If the employer's negligence as the proximate cause of the injury is established in any particular it is sufficient to establish liability.

Mont.—Chancellor v. Lines Motor Supply Co., 69 P.2d 764, 104 Mont. 603.

such duty,⁹⁴ notwithstanding the employee knew of the danger and, with that knowledge, entered into the course of his work,⁹⁵ even though the risk incident to the work is partially the cause of the injury.⁹⁶

The fact, however, that the employer does not operate under the act, or is in default thereunder, does not enlarge his duty with respect to furnishing his employees with safe tools and machines and a place in which to work, and to warn them of dangers not open and obvious;⁹⁷ and he is not an insurer of the safety of his employees or of the safety of their working place or instrumentalities.⁹⁸ Also the abrogation of the common-law defenses does not make the employer an insurer of the safety of his employees.⁹⁹

Neglect of statutory duties. The employee is entitled to enforce any liability arising from the failure to discharge any statutory duty imposed on the employer,¹ such as that requiring the furnishing of a safe place to work,² or the safeguarding of ma-

chinery;³ and this is true although the employee has accepted,⁴ or the employer has elected to come under, and the employee has not accepted,⁵ the compensation act.

Notice of injury. A statutory requirement that notice of injury be given to the owner of premises within a specified time after the injury as prerequisite to a right of action for damages has been held not impliedly repealed by the workmen's compensation act.⁶

Presumptions and burden of proof. A consideration of the question of actionable fault or negligence of the employer in an action against him for injury to an employee is complicated by the fact that varying rules exist in the different jurisdictions with respect to the burden of proof and whether or not such negligence is considered an essential element of the cause of action or a matter of defense. Under some acts, although the employer may show the absence of negligence on his part,⁷ the burden is on the plaintiff-employee to prove that the negligence or actionable fault of his employer or of one for

94. Mass.—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520.

Mich.—Muchler v. Johnson, 273 N.W. 794, 280 Mich. 527.

Duty of master to furnish his servant with suitable and safe instrumentalities wherewith, and places wherein, to do his work generally see Master and Servant §§ 201-212.

Negligence per se

Where negligence relied on is the failure of employer to furnish a safe place to work, the employer's negligence consists per se in the failure to furnish a safe place, and the employee's assumption of risk or contributory negligence does not bar recovery.

Ky.—Clover Splint Coal Co. v. Lorenz, 110 S.W.2d 457, 270 Ky. 676—Read v. Carter, 98 S.W.2d 464, 266 Ky. 346.

Elements considered in determining safe place

Employee's age, experience, and skill were proper elements for consideration in determining whether employer had failed to furnish employee with a reasonably safe place to work, and reasonably safe appliances and equipment with which to work.

U.S.—Baker v. Great Atlantic & Pacific Tea Co., C.A.Fla., 212 F.2d 130.

Failure to warn

Where employer knew or should have known that strong soap used in its restaurant had previously caused skin irritation to other employees, it was not necessary, in order to render employer liable for failure

to warn inexperienced employee of dangers of using such soap, that a majority of possible employees should be susceptible thereto, but it was enough if a sufficient number were susceptible so that a jury could reasonably say that employer should have known and guarded against the danger.

Mass.—Taylor v. Newcomb Baking Co., 59 N.E.2d 293, 317 Mass. 609.

95. Ky.—Read v. Carter, 98 S.W.2d 464, 266 Ky. 346.

W.Va.—Smith v. Morrison, 199 S.E. 689, 120 W.Va. 481.

96. Tex.—Railway Exp. Agency v. Bollier, Civ.App., 253 S.W.2d 669, refused no reversible error.

97. Mass.—Bigos v. United Rayon Mill, 16 N.E.2d 44, 301 Mass. 76.

98. D.C.—Garcia v. De Leon, Mun. App., 59 A.2d 637.

Ky.—Skinner v. Smith, 255 S.W.2d 621—Burk Hollow Coal Co. v. Bills, 190 S.W.2d 338, 300 Ky. 735—Gatliff Coal Co. v. Broyles' Adm'r, 180 S.W.2d 406, 297 Ky. 516—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18—Howard v. Southern Harlan Coal Co., 152 S.W.2d 613, 287 Ky. 228—Southern Min. Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655.

Mo.—Nance v. Atchison, T. & S. F. Ry. Co., 232 S.W.2d 547, 360 Mo. 980.

N.C.—Muldrow v. Weinstein, 68 S.E. 2d 249, 234 N.C. 587.

R.I.—Falkinall v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 433, 438.

Tenn.—Duncan v. Dickie Rector Lumber Co., 212 S.W.2d 908, 31 Tenn. App. 155.

Master not insurer of safety of instrumentalities or places for work furnished his servant generally see Master and Servant § 202.

99. U.S.—Great Atlantic & Pacific Tea Co. v. Robards, C.C.A.N.C., 161 F.2d 929.

1. Wis.—Puza v. C. Hennecke Co., 149 N.W. 223, 158 Wis. 482.

71 C.J. p 1491 note 26.

Statutory duties of employer toward servant see Master and Servant § 173.

2. Wis.—Kieler v. Fred Miller Brewing Co., 161 N.W. 739, 165 Wis. 237.

71 C.J. p 1491 note 27.

Safe place to work see Master and Servant §§ 201-259.

3. Wis.—Krueck v. Phoenix Chair Co., 147 N.W. 41, 157 Wis. 266, Ann. Cas.1916B 291.

71 C.J. p 1491 note 28.

Guarding machinery see Master and Servant § 232.

4. Kan.—Smith v. Western States Portland Cement Co., 146 P. 1026, 94 Kan. 501.

5. Wis.—Kieler v. Fred Miller Brewing Co., 161 N.W. 739, 165 Wis. 237.

6. Mass.—Whalen v. Railway Exp. Agency, 73 N.E.2d 740, 321 Mass. 382.

7. Ky.—Skinner v. Smith, 255 S.W. 2d 621—Harlan Central Coal Co. v. Gemmen's Adm'r, 178 S.W.2d 217, 296 Ky. 828—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18.

whose negligence the employer is legally responsible was the proximate cause of his injury.⁸ Under other acts absence of actionable fault or negligence on the part of the employer is considered a defense which he may show,⁹ and the burden of proving such absence of negligence or fault is imposed on him,¹⁰ except that in an action by an employee not covered by the act against an employer for damages for

injury, based on want of ordinary or reasonable care, the burden of proof of negligence is on the employee.¹¹ Under some of these acts, proof of the injury constitutes prima facie evidence of negligence on the part of the employer,¹² and under others it is presumed that the employer was negligent¹³ and that such negligence proximately caused the employee's injury,¹⁴ and he is held to have the

8. U.S.—Peyatte v. International Harvester Co., C.A.W.Va., 208 F.2d 261—Hossack v. Metzger, C.C.A. S.D., 156 F.2d 501—Boal v. Electric Storage Battery Co., C.C.A.Pa., 98 F.2d 815.

Ky.—Fitch v. Mayer, 258 S.W.2d 923 —Burk Hollow Coal Co. v. Bills, 190 S.W.2d 338, 800 Ky. 735—Gatliff Coal Co. v. Broyles' Adm'r, 180 S.W.2d 406, 297 Ky. 516—Harlan Central Coal Co. v. Gemmen's Adm'r, 178 S.W.2d 217, 296 Ky. 828—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18—Southern Min. Co. v. Lawson, 131 S.W.2d 831, 279 Ky. 659—Jessie's Adm'r v. Gulf Refining Co., 121 S.W.2d 909, 275 Ky. 533—High Splint Coal Co. v. Ramey's Adm'r, 112 S.W.2d 1007, 271 Ky. 532—Clover Splint Coal Co. v. Lorenz, 110 S.W.2d 457, 270 Ky. 676—Jones v. Chambers' Adm'r, 106 S.W.2d 72, 269 Ky. 98—Southern Min. Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655—Hollon v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168.

Mich.—Sherman v. Barthwell, 17 N.W.2d 727, 310 Mich. 494—Brown v. Standard Oil Co., 14 N.W.2d 797, 309 Mich. 101—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537—Williams v. Sealander, 286 N.W. 101, 288 Mich. 617—Erickson v. Leach, 281 N.W. 324, 285 Mich. 554—Rosellip v. Great Atlantic & Pacific Tea Co., 262 N.W. 408, 272 Mich. 560.

Mont.—Chancellor v. Hines Motor Supply Co., 69 P.2d 764, 104 Mont. 603.

Ohio.—Shoemaker v. Electric Auto-Lite Co., 41 N.E.2d 433, 69 Ohio App. 169.

Okl.—Ice v. Gardner, 83 P.2d 378, 183 Okl. 496.

S.C.—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 192 S.C. 156.

S.D.—Voet v. Lampert Lumber Co., 15 N.W.2d 579, 70 S.D. 142—Maher v. Wagner, 252 N.W. 647, 62 S.D. 227.

Tex.—Sears, Roebuck & Co. v. Robinson, 280 S.W.2d 238, 154 Tex. 336 —W. U. Tel. Co. v. Coker, 204 S.W.2d 977, 146 Tex. 190.

Eastern Iron & Metal Co. v. McMorrough, Civ.App., 135 S.W.2d 750—Dial v. Wilke, Civ.App., 127 S.W.2d 379, error refused—Griffith

v. Kernaghan, Civ.App., 121 S.W.2d 617.

W.Va.—Thorn v. Addison Bros. & Smith, 194 S.E. 771, 119 W.Va. 479.

Necessity for plaintiff employee to allege employer's negligence see infra § 948.

Affirmative duty

Employee has affirmative duty of showing negligence equally as great as in any other tort action.

D.C.—Garcia v. De Leon, Mun.App., 59 A.2d 637.

Nature of proof immaterial

Burden of proof is not affected by the fact that the facts and circumstances surrounding accident and resulting injury are only proof of negligence injured employee is able to offer.

Tex.—McClish v. R. C. Young Feed & Seed Co., Civ.App., 225 S.W.2d 910, error refused.

9. U.S.—Baker v. Great Atlantic & Pacific Tea Co., C.A.Fla., 212 F.2d 130.

10. Ariz.—Haralson v. Rhea, 259 P.2d 246, 76 Ariz. 74—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.

71 C.J. p 1491 note 20.

Necessity to plead defense of absence of negligence see infra § 950.

Inference of employer's negligence from testimony of employee was held not destroyed by his admission that he did not ask for help prior to his injury.

U.S.—Great Atlantic & Pacific Tea Co. v. Robards, C.C.A.N.C., 161 F.2d 929.

11. Cal.—Devens v. Goldberg, 199 P.2d 943, 33 C.2d 173.

12. Ariz.—Haralson v. Rhea, 259 P.2d 246, 76 Ariz. 74—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.

13. Cal.—Devens v. Goldberg, 199 P.2d 943, 33 C.2d 173—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 773.

Gritz v. Sivachenko, 299 P.2d 374, 143 C.A.2d 146—Lee v. Cranford, 237 P.2d 986, 107 C.A.2d 677—Blinkinsop v. Weber, 193 P.2d 96, 85 C.A.2d 276.

Nev.—Cahow v. Michelas, 149 P.2d 233, 62 Nev. 295—Reeder v. Pincolini, 94 P.2d 1097, 59 Nev. 396.

Utah.—Buhler v. Maddison, 166 P.2d 205, 109 Utah 245, modified on

other grounds 176 P.2d 118, 109 Utah 267, 168 A.L.R. 177, construing Nevada law.

71 C.J. p 1491 note 20 [a].

Purpose of presumption

The statutory presumption that an employer, who is not within the compensation act, is guilty of negligence proximately causing any injury suffered by an employee arising out of, and in the course of, employment, functions as an inducement to employers not to reject the compensation act, and if an employer desires to avoid effect of presumption he has only to insure his liability or be relieved from so doing pursuant to statute.

Iowa.—Casey v. Hansen, 26 N.W.2d 50, 238 Iowa 62.

Presumption as evidence

Statutory presumption that an injury to an employee was a direct result and grew out of the negligence of the employer, which arises from failure of employer to secure payment of workmen's compensation, in itself amounts to evidence, which raises a conflict, and may outweigh positive evidence adduced to rebut it. Cal.—Goss v. Fancoe, 251 P.2d 337, 114 C.A.2d 819—Grady v. Canfield, 49 P.2d 902, 9 C.A.2d 341.

Negligence of fellow servant

In employee's action for injuries against employer who declined to come within compensation act, evidence that employee's injury was caused by negligence of fellow employee supported presumption of employer's negligence, arising from statute, since under statute employer was responsible for negligence of coemployee.

Nev.—Reeder v. Pincolini, 94 P.2d 1097, 59 Nev. 396.

14. Cal.—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 773.

Gritz v. Sivachenko, 299 P.2d 374, 143 C.A.2d 146—Lee v. Cranford, 237 P.2d 986, 107 C.A.2d 677—Moushek Chakmakjian v. Lowe, 201 P.2d 801, 33 C.A.2d 308—Blinkinsop v. Weber, 193 P.2d 96, 85 C.A.2d 276—Grady v. Canfield, 49 P.2d 902, 9 C.A.2d 341.

Utah.—Buhler v. Maddison, 166 P.2d 205, 109 Utah 245, modified on other grounds 176 P.2d 118, 109 Utah 267, 168 A.L.R. 177, construing Nevada law.

burden of proof to rebut the presumption.¹⁵

This presumption is a rule of substantive law.¹⁶ It is mandatory and takes the place of other evidence, and the court or jury cannot refuse to infer the fact or draw the conclusion until it is overcome by evidence to the contrary more convincing and persuasive.¹⁷ It is a rebuttable presumption of law that obtains until overthrown by proof.¹⁸ It is not an evidentiary presumption that drops out of the picture on the employer producing evidence to rebut it, but it is evidence and may be considered as such along with any other evidence offered by the parties.¹⁹ The statutory presumption of negligence applies only to an action by an employee and does not include an independent contractor who must allege and prove negligence;²⁰ in the case of an independent contractor who is not an employee the presumption that, in the absence of evidence to the contrary, one has used due care applies to defendant as well as to plaintiff.²¹

Some compensation acts deprive employers required to operate thereunder who do not do so of the defense that the employee's injury did not result from negligence or other fault of the employer,

where the injury arose out of, and in the course of, the employment,²² but employers who have the option to accept the act,²³ or who are exempt from its application,²⁴ are not deprived of such defense. Hence in actions against them for injuries to employees, negligence must be established as a prerequisite to recovery,²⁵ and plaintiff is required to prove the negligence of an employer who had an option to elect whether or not he would come under the act.²⁶

§ 945. Willful Act or Misconduct of Employee

Where the workmen's compensation act so provides, an employer may defend an action against him for injury to an employee on the ground that the injury was caused by the willful act or misconduct of the employee.

Under some workmen's compensation acts, provisions abrogating the defense of contributory negligence in actions against employers for injuries to employees, as discussed supra § 940, except therefrom willful negligence or misconduct on the part of the employee, so that the employer may defend on the ground that the employee willfully caused his own injury.²⁷ Contributory recklessness and

15. Cal.—Blinkinsop v. Weber, 193 P.2d 96, 85 C.A.2d 276—Grady v. Canfield, 49 P.2d 902, 9 C.A.2d 341. Nev.—Cahow v. Michelas, 149 P.2d 233, 62 Nev. 295.

Utah.—Buhler v. Maddison, 166 P.2d 205, 109 Utah 245, modified on other grounds 176 P.2d 118, 109 Utah 267, 168 A.L.R. 177, construing Nevada law.

16. Utah.—Buhler v. Maddison, 176 P.2d 118, 109 Utah 267, 168 A.L.R. 177, construing Nevada law.

17. Utah.—Buhler v. Maddison, supra.

18. Utah.—Buhler v. Maddison, supra.

71 C.J. p 1491 note 20 [a].

Presumption is not absolute, but places burden on employer of rebutting such presumption.

Nev.—Reeder v. Pincolini, 94 P.2d 1097, 59 Nev. 336.

Rebuttable evidence

(1) Presumption cannot be overlooked or denied, until overcome by evidence so strong that in face of and against force of presumption it convinces and satisfies the mind that defendant was free from negligence. Utah.—Buhler v. Maddison, 176 P.2d 118, 109 Utah 267, 168 A.L.R. 177, construing Nevada law.

(2) Finding of contributory negligence might warrant jury in rebutting presumption of negligence and result in verdict for defendant.

Utah.—Buhler v. Maddison, supra.

19. Utah.—Buhler v. Maddison, supra.

20. Iowa.—In re Amond's Estate, 210 N.W. 923, 203 Iowa 306.

21. Mo.—Kersey v. Conrad, App., 30 S.W.2d 167.

22. Mass.—Costa v. Krivitsky, 123 N.E.2d 515, 332 Mass. 98—Roberts v. Reynolds, 123 N.E.2d 226, 332 Mass. 95.

Purpose of statute eliminating the defense that employee's injury did not result from negligence or other fault of the employer who is not a subscriber under the workmen's compensation act was to place such employee as nearly as possible in same position as employee of an employer who is a subscriber.

Mass.—Zarba v. Lane, 76 N.E.2d 318, 322 Mass. 132.

New cause of action

Provision that noninsuring employer be deprived of defense that employee's injury was not a direct result of any negligence of employer must be interpreted as creating cause of action in employee sustaining injury in course of his employment, that is, a direct result of such employment although not a direct result of any negligence of employer.

Mass.—In re Opinion of the Justices, 34 N.E.2d 527, 309 Mass. 571.

23. Mass.—Roberts v. Reynolds, 123 N.E.2d 226, 332 Mass. 95—Price v. Railway Exp. Agency, 73 N.E.2d 13, 322 Mass. 476.

24. Mass.—Price v. Railway Exp. Agency, supra.

25. Mass.—Costa v. Krivitsky, 123 N.E.2d 515, 332 Mass. 98—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165.

26. Mass.—Roberts v. Reynolds, 123 N.E.2d 226, 332 Mass. 95—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165—Enga v. Sparks, 51 N.E.2d 984, 315 Mass. 120—Green v. Cohen, 11 N.E.2d 492, 298 Mass. 439.

27. Mich.—Nantico v. Matuszak, 34 N.W.2d 506, 322 Mich. 644—Muchler v. Johnson, 273 N.W. 794, 280 Mich. 527.

71 C.J. p 1493 note 38, p 1498 note 95.

What constitutes

(1) "Willful negligence" of employee, precluding his recovery against employer for injury sustained in course of employment, means self-determined, voluntary, intentional negligence.

Mont.—Chancellor v. Hines Motor Supply Co., 69 P.2d 764, 104 Mont. 603.

(2) Provision abrogating the defense of contributory negligence, unless it shall appear that such negligence was willful and with intent to cause the injury, requires the presence of both willful negligence and an intent to cause injury before employee can be barred, and the breaking of a safety rule does not make the injury purposely self-inflicted.

wantonness, however, have been held not to constitute a defense.²⁸ The defense that the employee was negligent cannot be asserted in violation of the statutory prohibition of the defense of contributory negligence by calling his negligence recklessness or wantonness.²⁹

Under a compensation act authorizing an employer to show fraud or misrepresentation by a minor employee as a defense in an action for injury to such employee, it has been held that an employer may set up misrepresentation as to age as a defense to such an action, and that if such defense is proved it makes the defense of contributory negligence available.³⁰

§ 946. Limitation of Recovery or Measure of Damages

The damages obtained in an action against an employer for injuries to an employee should fairly compensate the employee and be in accordance with the rules applicable in actions for negligence at common law.

In general, the damages obtained in an action against an employer for injuries to an employee should fairly compensate the employee and be in accordance with the rules applicable in actions for negligence at common law.³¹ In such an action the employee is not confined to the rate of compensation fixed by the compensation act and may recover an amount in excess of the amount authorized thereunder, as discussed in Damages § 197. The ability of the employee to earn rather than the record of his past earnings is the proper factor on which to compute the impairment of his future earning power.³²

In the absence of a statute authorizing it, an em-

ployer cannot set up in mitigation of damages in a tort action by an injured employee indemnity from a collateral source, such as benefits under a workmen's compensation act, even where he has contributed to the fund.³³

A compensation act authorizing an employee injured from the deliberate intention of the employer to recover damages in an action therefor in a sum over and above that to which he is entitled as an award under the act does not limit recovery by the employee in the action to damages in the nature of punitive damages, but he may recover therein both general and punitive damages.³⁴

Under some workmen's compensation acts, compensation payments made to an injured employee who had not elected to come under the act should be credited on the judgment obtained in a tort action for the injury.³⁵ Under an act, however, which provides that where the judgment obtained in an action against an employer for damages for injury to an employee is in excess of the workmen's compensation awarded for such injury the compensation awarded shall be credited on the judgment, if the judgment obtained is less than the compensation awarded it will not be credited on the judgment in satisfaction thereof, even though the award has been fully paid.³⁶

Conditional release. A release of an employer from liability for injuries to an employee on condition that the employer compensate the employee for the injuries he has sustained as provided in the workmen's compensation act may not be relied on in defense of an action by the employee against the employer in the absence of a showing of complete performance of the condition.³⁷

Utah.—Buhler v. Maddison, 166 P.2d 205, 109 Utah 245, modified on other grounds 176 P.2d 118, 109 Utah 267, 168 A.L.R. 177.

28. S.C.—McGee v. Clearwater Mfg. Co., 53 S.E.2d 393, 214 S.C. 495.

29. U.S.—Bath Mills v. Odom, C.C.A. S.C., 168 F.2d 38, certiorari denied 69 S.Ct. 39, 335 U.S. 818, 93 L.Ed. 373.

30. Ohio.—Hartley v. The Victor Rubber Co., 23 Ohio N.P., N.S., 593.

31. Cal.—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 773. 71 C.J. p 1498 note 98.

Damages held not excessive

Cal.—Hicks v. Ocean Shore R. R., supra.

Reduction of verdict held proper
Cal.—Hicks v. Ocean Shore R. R., supra.

32. Cal.—Hicks v. Ocean Shore R. R., supra.

33. U.S.—Chicago Great Western Ry. Co. v. Peeler, C.C.A. Minn., 140 F.2d 865.

34. Or.—Weis v. Allen, 35 P.2d 478, 147 Or. 670.

35. La.—Melton v. Fraering Brokerage Co., App., 31 So.2d 884.

After verdict

Where employee brought common-law action for injuries and employer pleaded the employee's election to accept workmen's compensation, if

motion for consolidation is granted in discretion of trial court and there is no issue of fact as to amount paid in compensation, triers of fact would not be required to deduct the amount of compensation from any verdict which might be returned for plaintiff, but defendant might offset it against such a verdict.

N.H.—Schofield v. E. R. Bates & Co., 3 A.2d 818, 90 N.H. 31.

36. Cal.—Sullivan v. Tait, 101 P.2d 145, 38 C.A.2d 135.

Statute held free from ambiguity and the courts required to enforce its provisions as written.

Cal.—Sullivan v. Tait, supra.

37. Or.—Fond v. Jantzen Knitting Mills, 190 P.2d 141, 183 Or. 256.

5. PROCEDURE

§ 947. In General

The applicability of the workmen's compensation statute to an action is not to be determined on the pleadings in the absence of legal certainty.

The compensation act of the state, as part of the law of the land, must be read into every statement of claim;³⁸ but, as to whether a question which arises under it is to be met as a question of pleading or on the trial, in the absence of a legal certainty, on the pleadings, that the act does apply, the question should not be ruled on as a question of pleading.³⁹ The issue of whether the employee has elected to take compensation, barring his right to recover in an action at common law, cannot be determined in the compensation proceeding where the jurisdiction in such proceeding is limited to questions under the compensation feature of the act.⁴⁰ Where there is conflict as to whether plaintiff has elected to proceed under the compensation act so that the common-law remedy is barred, the question should not be determined on motion.⁴¹ In the absence of anything in the pleading or evidence to show that the employee has any remedy under the compensation act of any state, no such defense is available to the employer.⁴²

An employee claiming the right to sue his employer at common law is not required first to obtain a ruling from the compensation authorities that the employer is not protected by the compensation act.⁴³ Under some statutes, where the employer fails to

carry insurance as required by the statute, an injured employee may sue his employer without first applying to the compensation authorities to fix the amount of compensation.⁴⁴ Once it clearly appears that the matter is within the exclusive jurisdiction of the compensation authorities, the court should not proceed further.⁴⁵ A common-law action by an employee against an employer for personal injuries is independent of proceedings before the compensation authorities⁴⁶ even though the question of compensation insurance is contested.⁴⁷ The federal court has jurisdiction to determine whether an employee is a member of the crew entitled to maintain a civil suit or is not a member of the crew whose exclusive remedy is under the compensation act.⁴⁸

The compensation board is not a necessary party to a personal injury action by an employee against his employer;⁴⁹ but, under some circumstances, the board may intervene in such action.⁵⁰ An employer who has complied with its contract obligation to furnish his employee with insurance against injury in the course of employment is entitled to be dismissed from the action against the insurer.⁵¹

An employer may be denied the right to bring in as a party the one primarily liable for the injury.⁵²

Employer's death. An employee's cause of action against an uninsured employer survives the employer's death.⁵³

38. U.S.—Stamp v. Union Stevedoring Corporation, D.C.Pa., 11 F.2d 172.

39. U.S.—Stamp v. Union Stevedoring Corporation, *supra*.
Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061.

Occupational disease

A judgment which showed on its face that court dismissed action by employee against employer for injuries without any evidence before it of when alleged occupational disease occurred with reference to date upon which employer and employee accepted the occupational disease amendment to the workmen's compensation act was void, particularly where showing that court not only sustained plea to the jurisdiction as filed, but "on its own motion" found that it had no jurisdiction.
Mo.—State ex rel. National Lead Co. v. Smith, *supra*.

40. N.H.—Sullivan Machinery Co. v. Stowell, 114 A. 873, 89 N.H. 153.

41. N.Y.—Dale v. Derdiger, 146 N.Y. S.2d 819, 1 A.D.2d 736.

42. N.Y.—Simpson v. Atlantic Coast Shipping Co., 132 N.Y.S. 331, 191 App.Div. 844, affirmed 134 N.E. 560, 232 N.Y. 533.

43. U.S.—Bean v. Piedmont Interstate Fair Ass'n, C.A.S.C., 222 F.2d 227.

44. U.S.—Esteves v. Lykes Bros. S. S. Co., C.C.A.Tex., 74 F.2d 364, certiorari denied Lykes Bros. S. S. Co. v. Esteves, 55 S.Ct. 830, 295 U.S. 751, 79 L.Ed. 1695.

45. Okl.—Mid-Continent Pipe Line Co. v. Wilkerson, 193 P.2d 536, 200 Okl. 335.

46. Cal.—Rosslow v. Janssen, 33 P. 2d 705, 139 C.A. 81.

47. Cal.—Rosslow v. Janssen, *supra*.

48. U.S.—Schantz v. American Dredging Co., C.C.A.Pa., 138 F.2d 534.

49. Ohio.—Kopp v. Torto, App., 36 N.E.2d 900.

50. N.D.—Schnoor v. Meinecke, 40 N.W.2d 803, 77 N.D. 96.

51. U.S.—Lund v. Johnson, Drake & Piper, D.C.Minn., 64 F.Supp. 456.

52. Tex.—United Fidelity Life Ins. Co. v. Holliday, Civ.App., 226 S.W. 2d 139, error refused no reversible error.

Confusion

Where employee brought action against employer for injuries sustained when foot caught in telephone cord in booth installed and owned by employer, and employer had contract with telephone company obligating company to maintain phones in proper condition when notified in writing, but employer did not claim that company had been notified of need for repairs, and phone company could claim defenses of contributory negligence and assumed risk to which employer was not entitled, confusion would result, and court properly denied motion to join telephone company as a party defendant.

Tex.—United Fidelity Life Ins. Co. v. Holliday, *supra*.

53. Cal.—Devens v. Goldberg, 199 P.2d 943, 33 C.2d 173—Rideaux v. Torgrimson, 86 P.2d 826, 13 C.2d 632.

Notice of injury required by the compensation law need not be given to an uninsured employer.⁵⁴ Under the procedure in some jurisdictions, a claim for compensation may be joined with one for common-law relief.⁵⁵

§ 948. Pleading

The complaint or petition in an action by an employer against his employee for personal injuries is considered *infra* § 949. The answer in such action is considered *infra* § 950, and the reply *infra* § 951. Amendments to the pleadings and supplemental pleadings are discussed *infra* § 952.

Examine *Pocket Parts* for later cases.

§ 949. — Declaration, Petition, or Complaint

While the complaint in an action for personal injuries

need not allege affirmatively that the action is not barred by a statutory provision making compensation proceedings the exclusive remedy, a complaint which on its face shows that it is barred by such statute is insufficient.

While a complaint which shows on its face that the cause of action is within a provision of the compensation law making compensation proceedings the exclusive remedy is insufficient,⁵⁶ ordinarily it is held that the complaint in an action for personal injuries need not allege affirmatively that the claim is not within the statute providing compensation proceedings as the exclusive remedy.⁵⁷ Where an employee is presumptively within the terms of a compensation act depriving him of any other remedy for his injury, on bringing an action for damages against his employer he must allege facts bringing the case without the act⁵⁸ and within an exception, if any.⁵⁹ If no facts are pleaded bringing the employee within the act, it is not necessary

54. Mass.—*Greem v. Cohen*, 11 N.E. 2d 492, 298 Mass. 439.

55. Me.—*Bubar v. Bernardo*, 27 A.2d 593, 139 Me. 82.

56. U.S.—*Jones v. George F. Getty Oil Co.*, C.C.A.N.M., 92 F.2d 255, certiorari denied *Associated Indem. Corp. v. George F. Getty Oil Co.*, 58 S.Ct. 644, 303 U.S. 644, 82 L.Ed. 1106.

Seifort v. Keansburg Steamboat Co., D.C.N.Y., 19 F.Supp. 965.

Cal.—*Jackson v. Pacific Gas & Elec. Co.*, 212 P.2d 591, 95 C.A.2d 204.

Ga.—*Minchew v. Huston*, 19 S.E.2d 422, 66 Ga.App. 856.

Idaho.—*French v. J. A. Terteling & Sons, Inc.*, 274 P.2d 990, 75 Idaho 480.

Ind.—*Seaton v. U. S. Rubber Co.*, 61 N.E.2d 177, 223 Ind. 404.

Strickler v. Sloan, 141 N.E.2d 863.

—*Pearson v. Rogers Galvanizing Co.*, 59 N.E.2d 364, 115 Ind.App. 426.

—*Runion v. Indiana Glass Co.*, 16 N.E.2d 961, 105 Ind.App. 650.

—*Harshman v. Union City Body Co.*, 13 N.E.2d 353, 105 Ind.App. 36.

La.—*Shumake v. Home Indem. Co.*, App., 68 So.2d 789.

Mass.—*Pall v. New Bedford Gas & Edison Light Co.*, 90 N.E.2d 555, 325 Mass. 239.

N.J.—*Staubach v. Cities Service Oil Co.*, 19 A.2d 882, 126 N.J.Law 479.

N.Y.—*Wasserman v. Josephson*, 61 N.Y.S.2d 204, affirmed 84 N.Y.S.2d 895, 274 App.Div. 919.

Pa.—*Hyzy v. Pittsburgh Coal Co.*, Com.Pl., 103 Pittsb.Leg.J. 141.

S.C.—*Cummings v. McCoy*, 7 S.E.2d 222, 192 S.C. 469.

57. Cal.—*Popejoy v. Hannon*, 231 P. 2d 484, 37 C.2d 159.

Liberty Mut. Ins. Co. v. Superior Court in and for Los Angeles County, 145 P.2d 344, 62 C.A.2d 601.

Ga.—*Mobley v. Durham Iron Co.*, 64 S.E.2d 469, 83 Ga.App. 690.

Ill.—*Whalen v. Twin City Barge & Gravel Co.*, 280 Ill.App. 596, certiorari denied *Twin City Barge & Gravel Co. v. Whalen*, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1006.

Mo.—*Kearley v. St. Louis Car Co.*, App., 111 S.W.2d 976, certiorari quashed *State ex rel. St. Louis Car Co. v. Hostetter*, 131 S.W.2d 558, 345 Mo. 102.

N.Y.—*Schwartz v. Queensboro Farm Products*, 78 N.Y.S.2d 863, 191 Misc. 778.

Occupational Diseases Act

In action at law by employee against employer to recover for non-compensable disease resulting from employer's alleged negligence in failure to provide a safe place to work, it is not essential to a good complaint to mention occupational diseases act. Ind.—*Dalton Foundries v. Jefferies*, 51 N.E.2d 13, 114 Ind.App. 271, followed in *Dalton Foundries v. Dean*, 51 N.E.2d 397, 114 Ind.App. 289.

Violation of employers' liability act

The allegations in a complaint, which stated a cause of action, if any, under the compensation act, of a violation of the employers' liability act, did not remove the cause from the classification of compensation cases.

Ind.—*Harshman v. Union City Body Co.*, 13 N.E.2d 353, 105 Ind.App. 36.

58. U.S.—*Corpus Juris* quoted in *Jones v. George F. Getty Oil Co.*, C.C.A.N.M., 92 F.2d 255, 265, certiorari denied *Associated Indem. Corp. v. George F. Getty Oil Co.*, 58 S.Ct. 644, 303 U.S. 644, 82 L.Ed. 1106.

Ala.—*De Arman v. Ingalls Iron Works Co.*, 61 So.2d 764, 258 Ala. 205.

Cal.—*Singleton v. Bonnesen*, 280 P.2d 481, 131 C.A.2d 327.

La.—*Boyd v. American Mut. Liability Ins. Co.*, App., 11 So.2d 102.

N.J.—*Staubach v. Cities Service Oil Co.*, 19 A.2d 882, 126 N.J.Law 479. *Ziegler v. Henry Maurer & Son*, 194 A. 612, 15 N.J.Misc. 654.

N.Y.—*Caruso v. Ridge Const. Corp.*, 300 N.Y.S. 795, 252 App.Div. 918.

Varicchio v. Schmitt, 57 N.Y.S.2d 93, 185 Misc. 355, affirmed 59 N.Y.S. 2d 408, 269 App.Div. 1020, affirmed 68 N.E.2d 31, 295 N.Y. 920.

Dienert v. Handy-Andy Specialty Co., 16 N.Y.S.2d 160.

Pa.—*Culver v. Baldwin Locomotive Works, Com.Pl.*, 34 Del.Co. 423.

71 C.J. p 1499 note 5.

Illegal employment of minor

Pa.—*Lengyel v. Bohrer*, 94 A.2d 753, 372 Pa. 531.

59. Cal.—*Butler v. Wyman*, 18 P.2d 354, 128 C.A. 736.

Kan.—*Hoffman v. Hill*, 267 P.2d 526, 175 Kan. 826.

N.Y.—*Champlin v. Chemical Corn Exchange Bank*, 158 N.Y.S.2d 138.

R.I.—*Huling v. Finn*, 24 A.2d 620, 67 R.I. 369.

Utah.—*Ortega v. Salt Lake Wet Wash Laundry*, 156 P.2d 885, 108 Utah 1.

W.Va.—*Brewer v. Appalachian Constructors*, 65 S.E.2d 87, 135 W.Va. 739.—*Maynard v. Island Creek Coal Co.*, 175 S.E. 70, 115 W.Va. 249.

71 C.J. p 1499 note 6.

Intentional injury

(1) In action by employee to recover from employer excess of damages over amounts received under workmen's compensation law, allegation that employer had, with deliberate intent to kill or injure plaintiff, failed to require removal of illegally stored explosives and that employer

for him to plead any facts bringing the case without the act.⁶⁰

Where the employee relies on a compensation act as depriving the employer of particular defenses, he should allege the facts bringing the case within the act.⁶¹ A complaint alleging that plaintiff was not entitled to relief under the compensation law of another state has been held insufficient in the absence of an allegation that relief was sought of, and refused by, the compensation authorities of such other state.⁶² A petition is not subject to attack by a general demurrer because it contains an erroneous allegation of law.⁶³

Election not to come within act. Where the compensation act does not raise any presumption that the employment is subject to the act, the employee in an action for personal injuries need not allege that the employer has elected not to come within the act;⁶⁴ likewise, where the compensation act in question is a foreign law, the employee need not allege that he has elected not to come within the act;⁶⁵ but where, under the act, an election by the employer and employee to come within the act is presumed, an allegation that the employer⁶⁶ or the

employee⁶⁷ has elected not to come within the act is necessary. Where the employee avers that the employer has elected not to come within the operation of the act, it is not necessary that the declaration contain any averment as to the acceptance or rejection of the act by the employee where he has no right of election in case the employer rejects the act.⁶⁸ A petition alleging that the employer has elected not to come within the compensation act, if otherwise proper, is sufficient where the allegation takes the place of an allegation otherwise necessary in an action at common law.⁶⁹

Where the employee has a right to proceed at law unless he has waived his right by filing a claim for compensation under the act, an allegation of filing the statutory notice of claim is not an allegation of filing the claim itself.⁷⁰ The act of a minor in commencing suit against his employer for personal injuries is a sufficient election to proceed by common-law action rather than by compensation proceedings, and the complaint need not contain an allegation as to the election.⁷¹

Failure to comply with act. In an action by an employee on a case presumptively within the com-

had, with deliberate intent to injure or kill plaintiff, permitted plaintiff to go into building for purpose of salvaging tools while building was afloat, were not sufficient to allow plaintiff to maintain action.

W.Va.—*Brewer v. Appalachian Constructors*, 65 S.E.2d 87, 135 W.Va. 739.

(2) In action by employee, operator of metal press, against employer to recover damages, in lieu of workmen's compensation, for personal injuries sustained while operating press, allegations that machine was defective and dangerous and that employer was notified of unsafe condition of machine by previous operators and that, despite such warnings, the employer allowed employee to work on machine without knowledge of defect or without safety devices were not sufficient to state cause of action on theory of employer's deliberate intent to injure employee.

Ky.—*Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25.

Illegal business

Allegation that the manner in which employer conducted business violated law was not sufficient to bring case within the exception to the rule that employee's remedy against employer for injuries arising in the course of employment under the compensation law is exclusive, which exception arises when nature of employer's business is illegal.

N.Y.—*Wasserman v. Josephson*, 61 N.

Y.S.2d 204, affirmed 84 N.Y.S.2d 895, 274 App.Div. 919.

Violation of law

Complaint, for injuries allegedly sustained as result of his employer's locking, or tampering with, safety devices on power press operated by plaintiff, insufficiently alleged such deliberate and wanton acts by employer as would make inapplicable immunity afforded by workmen's compensation law, notwithstanding allegations that employer had violated the labor law and the penal law.

N.Y.—*Artorio v. Hirsch*, 168 N.Y.S.2d 489, 3 A.D.2d 939.

60. Mo.—*Warren v. American Car & Foundry Co.*, 38 S.W.2d 713, 327 Mo. 755.

71 C.J. p 1499 note 7.

61. Me.—*Nadeau v. Caribou Water, Light & Power Co.*, 108 A. 190, 193, 118 Me. 325.

Tex.—*Hodges v. Swastika Oil Co.*, Civ.App., 185 S.W. 369.

71 C.J. p 1499 note 4.

62. N.Y.—*Healey v. Arabian Am. Oil Co.*, 80 N.Y.S.2d 418.

63. Ga.—*Reid v. Lummus Cotton Gin Co.*, 197 S.E. 904, 58 Ga.App. 184.

64. Me.—*Nadeau v. Caribou Water, Light & Power Co.*, 108 A. 190, 118 Me. 325.

71 C.J. p 1499 note 8.

65. Mo.—*Span v. Jackson, Walker*

Coal & Mining Co., 16 S.W.2d 190, 322 Mo. 158.

71 C.J. p 1499 note 9.

66. Ind.—*Seaton v. U. S. Rubber Co.*, 61 N.E.2d 177, 223 Ind. 404.

Pa.—*Zacharzewski v. Landis, Com. Pl.*, 15 Northumb.Leg.J. 122.

71 C.J. p 1500 note 10, p 1501 note 36 [a].

67. Alaska.—*Aho v. Chichagoff Mining Co.*, 6 Alaska 528.

Ind.—*Seaton v. U. S. Rubber Co.*, 61 N.E.2d 177, 223 Ind. 404.

71 C.J. p 1501 note 36 [a].

Fraud

Allegation that field hand assigned to work in sugar house was not informed of the extra hazards connected with such employment due to dangerous condition of stack of sugar bags which were known to employer did not allege such fraud as would vitiate employee's presumed agreement to be governed by compensation act, so as to render employer liable in tort for employee's death.

La.—*Brooks v. American Mut. Liability Ins. Co., App.*, 7 So.2d 658.

68. Ill.—*Favro v. Superior Coal Co.*, 188 Ill.App. 203.

69. Iowa.—*Balen v. Colfax Consol. Coal Co.*, 168 N.W. 246, 133 Iowa 1198.

70. Tenn.—*Shipley v. Wellwood Silk Throwing Mills*, 47 S.W.2d 561, 164 Tenn. 281.

71. N.D.—*Schnoor v. Meinecke*, 33 N.W.2d 66, 75 N.D. 768.

pensation act, under which, however, on failure of the employer to comply with its provisions, the employee may sue at law, the employee must allege the noncompliance;⁷² but where the complaint does not allege facts bringing plaintiff within the act he need not allege the failure of the employer to secure payment of compensation as provided by the act;⁷³ and, where plaintiff has brought himself within an exception to the act, his allegation that the employer has failed to insure his liability or deposit any security is immaterial and properly stricken.⁷⁴ Where an employee relies on a compensation act as depriving the employer of particular defenses because of a failure to comply with the conditions to obtain its benefit, he must allege the failure;⁷⁵ on the other hand, under a provision making it optional to sue where the employer has failed to secure the payment of compensation as prescribed, it has been held that the burden is not on the employee to allege the failure.⁷⁶ Where the right of election does not rest alone with the employer, an allegation that the employer has not participated in the state insurance fund does not fix the responsibility on the employer for the legal status of the parties sufficiently to show that he is not entitled to his defenses at common law.⁷⁷

It is not necessary for the complaint to allege that the employer did not carry workmen's compensation insurance where the employer is liable in either

event.⁷⁸ A complaint sufficient to state a cause of action against an uninsured employer has been held sufficient to state a case against an employer not covered by the compensation statute.⁷⁹

Negligence. As discussed supra § 944, negligence or fault on the part of the employer is essential to his liability for personal injuries to an employee, and negligence or fault on the part of the employer must be pleaded by the employee⁸⁰ unless the act creates a presumption of negligence which excuses the necessity of pleading it.⁸¹ Where the employee does not come within the act creating a presumption of negligence on the part of the employer, he must plead as in any other action for negligence to which the act is not applicable.⁸² It has been held that even though the statute provides that proof of injury shall be prima facie evidence of the employer's negligence, or raises a presumption of negligence on the employer's part, plaintiff must allege negligence⁸³ and what the negligence was that caused the injury.⁸⁴

It has been held that the employee need not allege his own due care or absence of contributory negligence.⁸⁵ Where the compensation act deprives the employer of certain defenses, if the allegations of the employee show that the employer is within the terms of the act, it is not necessary for the employee to allege that he is not subject to such defense;⁸⁶ and his pleading is good although his al-

72. Md.—Lease v. Upper Potomac River Commission, 20 A.2d 498, 179 Md. 543.

N.Y.—Lazar v. Steinberg, 54 N.Y.S.2d 859, 269 App.Div. 760—Gardner v. Shepard Niles Crane & Hoist Corp., 52 N.Y.S.2d 313, 268 App.Div. 561, affirmed 68 N.E.2d 609, 296 N.Y. 539—Volk v. City of New York, 19 N.Y.S.2d 53, 259 App.Div. 247, reversed on other grounds 30 N.E.2d 596, 284 N.Y. 279.

71 C.J. p 1500 note 15.

73. N.Y.—Michel v. American Cinema Corporation, 182 N.Y.S. 588.

74. Iowa.—Slycord v. Horn, 162 N.W. 249, 179 Iowa 936.

75. W.Va.—Louis v. Smith-McCormick Const. Co., 92 S.E. 249, 80 W. Va. 159.

71 C.J. p 1500 note 18.

76. Md.—Solvaca v. Ryan & Reilly Co., 98 A. 675, 129 Md. 235.

77. U.S.—Hogan v. Baltimore & O. R. Co., C.C.A. Ohio, 15 F.2d 739.

78. N.Y.—Antonio v. Hirsch, 157 N.Y.S.2d 898, 4 Misc.2d 42, affirmed in part, reversed on other grounds in part, A.D., 163 N.Y.S.2d 489.

79. Cal.—Devens v. Goldberg, 199 P.2d 943, 33 C.2d 173.

Defendant not misled to his prejudice

Where instructions indicated that case was not tried on theory that employer was liable under compensation act, but that it was tried as a statutory action against an employer not subject to the act, and injured employee was not given benefit of statutory presumption of negligence which would have been applicable if the action had been tried under compensation act, and jury was given an instruction on law of contributory negligence which was proper only if action was within statute as one against an employer not subject to the compensation act, employer was not misled by allegations of complaint respecting employer's duties under compensation act.

Cal.—Devens v. Goldberg, supra.

80. Ga.—Austin v. Cary, 11 S.E.2d 102, 63 Ga.App. 383.

Ind.—Conway v. Park, 81 N.E.2d 79, 108 Ind.App. 562.

Ky.—Burk Hollow Coal Co. v. Bills, 190 S.W.2d 338, 300 Ky. 735—Moore v. Wright, 126 S.W.2d 121, 277 Ky. 242—Clover Splint Coal Co. v. Lorenz, 110 S.W.2d 457, 270 Ky. 676.

N.Y.—Morgan v. Robacker, 151 N.Y.S.2d 836, 2 A.D.2d 637.

Tex.—Great Am. Indem. Co. v. Blakey, Civ.App., 107 S.W.2d 1002, error dismissed—Cate v. Orific Gasoline Production Co., Civ.App., 78 S.W.2d 635, error refused.

Utah.—Peterson v. Sorensen, 65 P.2d 12, 91 Utah 507.

71 C.J. p 1500 note 24, p 1490 note 18 [d].

Negligence held sufficiently alleged
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.

Ky.—Combs v. W. P. Sullivan & Co., 114 S.W.2d 754, 272 Ky. 522.

81. Iowa.—Mitchell v. Swanwood Coal Co., 166 N.W. 391, 182 Iowa 1001.

82. Iowa.—Slycord v. Horn, 162 N.W. 249, 179 Iowa 936.

83. Cal.—Graybiel v. Consolidated Ass'n, 60 P.2d 184, 16 C.A.2d 20.

84. Ariz.—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.

85. Ky.—Moore v. Wright, 126 S.W.2d 121, 277 Ky. 242.

86. Me.—Nadeau v. Caribou Water, Light & Power Co., 108 A. 190, 118 Me. 325.

71 C.J. p 1500 note 25.

legations show that otherwise he would be subject to such defense.⁸⁷

§ 950. — Plea, Answer, or Affidavit of Defense

The contention that compensation proceedings are plaintiff's exclusive remedy is an affirmative defense which may and should be pleaded by the defendant in an action for personal injuries.

The contention that the action does not lie because plaintiff's exclusive remedy is in proceedings under the workmen's compensation act is an affirmative defense⁸⁸ which may and should be pleaded by the defendant.⁸⁹ A defendant is entitled to plead that plaintiff's cause of action falls within a compensation act, notwithstanding plaintiff alleges that the relationship of passenger and carrier existed between himself and defendant at the time of the injury.⁹⁰

On the one hand, it has been held that the employer, in an action at law by the employee for a personal injury, may by plea set up the want of jurisdiction in the court by reason of the fact that the case falls within the provisions of a compensation act;⁹¹ on the other hand, it has been held that it is not proper for the employer to file a plea to the jurisdiction of the court, where the court has juris-

diction of all actions of trespass on the case, but the defense that the case falls within the provision of a compensation act may properly be raised by a plea of the general issue.⁹²

The rule commonly is that where an employer relies on a compensation act in defense, or on a defense which the compensation act has taken away from those not electing to come within it, the burden of pleading the election to come within,⁹³ that he is a subscriber under,⁹⁴ or that he has complied with,⁹⁵ the act is on the employer. Where the employee is presumed not to be bound if the employer elects not to come within the act, an employer relying on the defense that the employee was subject to the act, must allege it.⁹⁶ The claim that the plaintiff has elected to proceed under the compensation act must be pleaded to be available as a defense.⁹⁷

Assumed risk, contributory negligence, and negligence of a fellow employee are usually defensive issues which must be pleaded by the defendant.⁹⁸ Where defendant is required to plead contributory negligence as a defense, it has been held that an employer must plead that he is not within a compensation act depriving certain employers of that defense.⁹⁹ Where the compensation act creates a pre-

87. W.Va.—*Louis v. Smith-McCormick Const. Co.*, 92 S.E. 249, 80 W. Va. 159—*Watts v. Ohio Valley Electric Ry. Co.*, 88 S.E. 659, 78 W. Va. 144.

88. Cal.—*Dalglish v. Holt*, 237 P.2d 553, 108 C.A.2d 561.

Ill.—*Dempster v. New York Cent. R. Co.*, 118 N.E.2d 56, 2 Ill.App.2d 47. Mo.—*Simmons v. Kansas City Jockey Club*, 66 S.W.2d 119, 334 Mo. 99.

Kearley v. St. Louis Car Co., App., 111 S.W.2d 976, certiorari quashed *State ex rel. St. Louis Car Co. v. Hostetter*, 131 S.W.2d 558, 345 Mo. 102.

S.C.—*Googe v. Speaks*, 9 S.E.2d 439, 194 S.C. 206.

Tenn.—*Hammett v. Vogue, Inc.*, 165 S.W.2d 577, 179 Tenn. 284.

Occupational diseases act

In action at law by employee against employer to recover for non-compensable disease resulting from employer's alleged negligence in failure to provide a safe place to work, it is not essential to a good complaint to mention occupational diseases act, and the pleading of its terms does not constitute a good answer.

Ind.—*Dalton Foundries v. Jafferries*, 51 N.E.2d 18, 114 Ind.App. 271, followed in *Dalton Foundries v. Dean*, 51 N.E.2d 397, 114 Ind.App. 289.

89. U.S.—*Lopez v. U. S.*, D.C.N.Y., 59 F.Supp. 831—*Kolienko v. Certain-*

Teed Products Corp., D.C.N.Y., 20 F.Supp. 920.

Mo.—*Downey v. Kansas City Gas Co.*, 92 S.W.2d 580, 338 Mo. 803.

N.Y.—*Camacho v. Innersprings, Inc.*, 142 N.Y.S.2d 886.

S.C.—*Googe v. Speaks*, 9 S.E.2d 439, 194 S.C. 206.

Tenn.—*Hammett v. Vogue, Inc.*, 165 S.W.2d 577, 179 Tenn. 284.

90. Or.—*Susznik v. Alger Logging Co.*, 147 P. 922, 76 Or. 189, Ann.Cas. 1917C 700.

91. Wis.—*Vannan v. New Dells Lumber Co.*, 154 N.W. 640, 161 Wis. 370, L.R.A.1916A 273, Ann.Cas. 1918B 293.

92. Ill.—*Beveridge v. Illinois Fuel Co.*, 119 N.E. 46, 283 Ill. 31.

S.C.—*Corpus Juris* cited in *Googe v. Speaks*, 9 S.E.2d 439, 444, 194 S.C. 206.

Tenn.—*Corpus Juris* cited in *Copeland v. Cherry*, 95 S.W.2d 1275, 1280, 20 Tenn.App. 122.

71 C.J. p 1500 note 29.

93. Cal.—*Mickel v. Althouse*, 176 P. 51, 33 C.A. 321.

S.C.—*Corpus Juris* quoted in *Googe v. Speaks*, 9 S.E.2d 439, 445, 194 S.C. 206.

71 C.J. p 1501 note 37.

94. S.C.—*Corpus Juris* quoted in *Googe v. Speaks*, 9 S.E.2d 439, 445, 194 S.C. 206.

71 C.J. p 1501 note 31.

95. Md.—*Cox v. Sandler's Inc.*, 120 A.2d 674, 209 Md. 193.

Mass.—*Pell v. New Bedford Gas & Edison Light Co.*, 90 N.E.2d 555, 325 Mass. 239.

S.C.—*Corpus Juris* quoted in *Googe v. Speaks*, 9 S.E.2d 439, 445, 194 S.C. 206.

71 C.J. p 1501 note 32.

96. Ill.—*Kinnan v. Chas. B. Hurst Co.*, 134 N.E. 72, 301 Ill. 597.

S.C.—*Corpus Juris* quoted in *Googe v. Speaks*, 9 S.E.2d 439, 445, 194 S.C. 206.

97. N.D.—*Schnoor v. Meinecke*, 33 N. W.2d 66, 75 N.D. 768.

Acceptance of compensation

In libel by stevedore against government under Jones Act for injuries sustained while stowing cargo on a government operated ship, defense that stevedore had accepted compensation under the Federal Employees' Compensation Act was not defective for failure to allege acceptance of compensation under an order of the commission.

U.S.—*Militano v. U. S.*, D.C.N.Y., 55 F.Supp. 904.

98. Tex.—*Smith v. Great Atlantic & Pacific Tea Co.*, Civ.App., 100 S.W. 2d 1041.

99. Tex.—*Dunaway v. Austin St. Ry. Co.*, Civ.App., 195 S.W. 1157, error refused.

sumption of negligence on the part of the employer, he has the burden of pleading as a defense, or in mitigation of damages, whatever he must prove to overcome the presumption or to mitigate the damages.¹

Where a suit is founded on an exception under the compensation act,² or is not founded on the act,³ a plea founded on the act, or its general application, is insufficient. An answer which does not sufficiently allege that the employment is within the compensation act is insufficient.⁴ Although the statute abrogates the defense of contributory negligence, defendant may properly plead that plaintiff's negligence was the sole cause of his injury.⁵ A defense which fails to allege all of the facts necessary to show that plaintiff is entitled to compensation solely under the compensation law is insufficient and may be stricken.⁶

An allegation of the declaration or complaint that the defendant is an employer subject to the provisions of the compensation act,⁷ or an employer who has elected not to come within the act,⁸ is admitted, if not properly denied.

Surplusage. An averment by the employer that he is governed by a compensation act may be rejected as surplusage where it amounts to an averment of a legal impossibility.⁹

Inconsistent pleas. Pleas that plaintiff is within the operation of a compensation act and that he was negligent are not inconsistent.¹⁰

§ 951. — Reply

Where the compensation act is set up as a defense, its inapplicability may be set up by a reply.

If the compensation act is set up as a defense, it may be countered by a reply,¹¹ denying, for example, that the parties have elected to be bound by the act,¹² or alleging that the case is within an exception.¹³ Where the defense is one which an employer who has not elected to come within the act is deprived of, an employee, relying on the act and failing to plead it otherwise, must allege the application of the act in his reply.¹⁴ Where the defense is that plaintiff accepted compensation, and the reply alleges that such settlement was fraudulent, the reply may be treated as a bill in equity to set aside the settlement.¹⁵

§ 952. — Amendments and Supplemental Pleadings

In a proper case, the pleadings may be amended.

Unless barred by the lapse of time,¹⁶ an amendment of the pleading of an injured employee to show liability of the employer under the compensation act,¹⁷ or to show that the employer was not bound by the act,¹⁸ may be proper. Where the original

1. Iowa.—Hunter v. Colfax Consol. Coal Co., 154 N.W. 1037, 157 N.W. 145, 175 Iowa 245, L.R.A.1917D 15, Ann.Cas.1917E 803.

71 C.J. p 1491 note 21.

2. Ala.—Garrett v. Gadsden Cooperative Co., 96 So. 188, 209 Ala. 223.

71 C.J. p 1501 note 40.

3. La.—Nash v. Longville Lumber Co., 88 So. 226, 148 La. 943.

71 C.J. p 1501 note 41.

4. N.Y.—Michel v. American Cinema Corporation, 182 N.Y.S. 588.

71 C.J. p 1501 note 42.

5. Tex.—Hernandez v. Malakoff Fuel Co., Civ.App., 109 S.W.2d 356, error dismissed.

6. Contract

Defense to wrongful death action by widow of employee who was killed while working for defendant in foreign country which alleged that by his contract of employment employee had agreed that his right to compensation would be determined under New York workmen's compensation law failed to allege all facts necessary to show that widow was entitled to compensation solely under workmen's compensation law, and hence did not constitute a complete defense.

N.Y.—Conway v. Hamilton Overseas Contracting Corp., 120 N.Y.S.2d 672, affirmed 131 N.Y.S.2d 443, 283 App. Div. 1011, reargument and appeal denied 134 N.Y.S.2d 585, 284 App. Div. 846.

7. Tex.—Southwestern Portland Cement Co. v. Moreno, Com.App., 215 S.W. 444.

71 C.J. p 1501 note 43.

8. Ill.—Shomidle v. Brewerton, 234 Ill.App. 173.

71 C.J. p 1501 note 44.

9. Ill.—Dietz v. Big Muddy Coal, etc., Co., 105 N.E. 289, 263 Ill. 480.

10. Conn.—Hoard v. Sears, Roebuck & Co., 188 A. 269, 122 Conn. 185.

Or.—Susznik v. Alger Logging Co., 147 P. 922, 76 Or. 189, Ann.Cas. 1917C 700.

11. Ill.—Curran v. Wells Bros. Co., 205 Ill.App. 307, affirmed 117 N.E. 984, 281 Ill. 615.

71 C.J. p 1502 note 48.

Fraud

Where plaintiff sued defendant for damages at law and defendant pleaded in bar that plaintiff had elected his statutory remedy under the compensation act, plaintiff's so-called "replication" asserting that he executed written election because of de-

fendant's fraud was not a "defense," but by it plaintiff sought affirmative relief by way of cancellation, which could only be obtained in equity.

N.H.—Dion v. Cheshire Mills, 32 A.2d 605, 92 N.H. 414, rehearing denied 37 A.2d 708, 92 N.H. 414.

12. Ill.—Von Boeckmann v. Corn Products Refining Co., 113 N.E. 902, 274 Ill. 605.

Mass.—Fell v. New Bedford Gas & Edison Light Co., 90 N.E.2d 555, 325 Mass. 239.

13. Ill.—Von Boeckmann v. Corn Products Refining Co., 113 N.E. 902, 274 Ill. 605.

14. Ky.—Patton v. Stegall, 295 S.W. 979, 220 Ky. 674.

15. N.H.—Schofield v. E. R. Bates & Co., 3 A.2d 818, 90 N.H. 31.

16. Ill.—Davis v. St. Paul Coal Co., 211 Ill.App. 626, affirmed 121 N.E. 181, 286 Ill. 64.

17. Kan.—Kasper v. Kansas City, L. & W. Ry. Co., 223 P. 1106, 115 Kan. 610.

71 C.J. p 1502 note 53.

18. U.S.—Sandonato v. Carborundum Co., D.C.N.Y., 19 F.Supp. 655.

Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370.

petition in an action by an employee stated facts sufficient to show a cause of action under the compensation act, an amendment merely asking relief thereunder in the alternative is proper.¹⁹ The answer may be amended to show workmen's compensation proceedings as a defense to the action.²⁰

Refusal to permit an amendment is not error where such amendment is not necessary and where its refusal does not prejudice the applicant,²¹ as where it is sought to amend the complaint to add a cause of action based on a statute which is not applicable.²² Refusal to permit an amendment of the complaint to correct an allegation that plaintiff was an employee of the defendant has been held error.²³

§ 953. — Demurrer or Exception

A complaint is subject to a demurrer where it appears on its face that plaintiff's exclusive remedy is by way of compensation proceedings.

Where it appears from the face of the complaint or petition for damages for personal injuries that plaintiff's sole remedy is by way of compensation proceedings, the petition or complaint is subject to a demurrer or motion to dismiss;²⁴ but a complaint is not subject to dismissal or to a general demurrer where it does not appear from the complaint as a matter of law that the claim is exclusively one for compensation proceedings.²⁵ Where the practice is authorized by statute, the employer, without answering the averments of fact in the statement of claim,

may set up by his affidavit of defense the claim that the compensation act provides the sole remedy.²⁶ Although an injured employee may have a right to compensation under a compensation act, his pleading is not subject to demurrer²⁷ or exception of no cause of action²⁸ for failure to allege that he has not received compensation under the statute.

A demurrer to an answer setting up the workmen's compensation act is properly overruled where the complaint shows that the claim falls within the operation of the act.²⁹

In accordance with general rules, allegations of fact,³⁰ but not of law,³¹ are treated as admitted on a demurrer.

§ 954. — Issues, Proof, and Variance

General rules as to issues, proof, and variance apply in actions for personal injuries by an employee against his employer.

General rules as to issues, proof, and variance apply in an action by an employee against his employer for personal injuries.³² Inasmuch as every fact material to the employee's cause of action, if put in issue, must be proved, an allegation that the employee was exercising due care,³³ or that the employer elected not to come within,³⁴ or failed to comply with,³⁵ the compensation act, if put in issue, must be proved by plaintiff; but plaintiff need not prove what is not put in issue by a proper denial³⁶ or that which is mere surplusage with respect to his action.³⁷

19. U.S.—Blount v. Kansas City Southern Ry. Co., D.C.La., 5 F.2d 967.

20. N.Y.—Dale v. Dardiger, 146 N.Y. S.2d 819, 1 A.D.2d 736.

21. Mass.—Enga v. Sparks, 51 N.E. 2d 984, 315 Mass. 120.

22. Mass.—Pell v. New Bedford Gas & Edison Light Co., 90 N.E.2d 555, 325 Mass. 239.

23. Cal.—Jackson v. Pacific Gas & Elec. Co., 212 P.2d 591, 95 C.A.2d 204.

24. Ga.—Bartram v. City of Atlanta, 30 S.E.2d 780, 71 Ga.App. 313—Maloney v. Kirby, 172 S.E. 683, 48 Ga.App. 252.

Mo.—Kearley v. St. Louis Car Co., App., 111 S.W.2d 976, certiorari quashed State ex rel. St. Louis Car Co. v. Hostetter, 131 S.W.2d 558, 345 Mo. 102.

N.C.—McCune v. Rhodes-Rhyne Mfg. Co., 8 S.E.2d 219, 217 N.C. 351.

Pa.—Zagozan v. Testa Bros., Inc., Com.Pl., 35 West.L.J. 189, 71 C.J. p 1502 notes 56, 57.

25. U.S.—Baham v. Eagle Indem. Co., D.C.La., 78 F.Supp. 665—Mapes v. Massey-Harris Co., D.C.N.Y., 19 F.

Supp. 667—Sandonato v. Carborundum Co., D.C.N.Y., 19 F.Supp. 655.

Cal.—Garcia v. Yedor, 154 P.2d 1, 67 C.A.2d 367.

Ga.—Berkeley Granite Corp. v. Covington, 190 S.E. 8, 183 Ga. 801. Reid v. Lummus Cotton Gin Co., 197 S.E. 904, 58 Ga.App. 184.

Kan.—Robinson v. Muller, 309 P.2d 651, 181 Kan. 150.

La.—Clark v. Southern Kraft Corp., App., 200 So. 489.

N.C.—Allen v. American Cotton Mills, 175 S.E. 98, 206 N.C. 704.

Okl.—Southwestern Bell Tel. Co. v. Ward, 193 P.2d 569, 200 Okl. 315—Long Const. Co. v. Fournier, 128 P. 2d 689, 190 Okl. 361.

Pa.—Scanlon v. Cauley, 64 A.2d 763, 361 Pa. 413.

S.D.—Johnson v. Concrete Materials Co., 15 N.W.2d 4, 70 S.D. 95.

Vt.—Brace v. Rashaw, 45 A.2d 207, 114 Vt. 368.

26. Pa.—Fetters v. Robinson, 15 Pa. Dist. & Co. 403.

27. Nev.—Day v. Cloke, 215 P. 386, 47 Nev. 75.

28. U.S.—Hogan v. Buja, D.C.La., 262 F. 224.

29. N.Y.—Wagner v. American Bridge Co., 158 N.Y.S. 1043, 172 App.Div. 876.

71 C.J. p 1502 note 61.

30. Cal.—Seymour v. Setzer Forest Products, 268 P.2d 1084, 124 C.A.2d 608.

Ind.—Strickler v. Sloan, App., 141 N. E.2d 863.

31. Ind.—Strickler v. Sloan, supra.

32. Mo.—McKay v. Delico Meat Products Co., 174 S.W.2d 149, 351 Mo. 876.

33. Me.—Nicholas v. Folsom, 110 A. 68, 119 Me. 176.

71 C.J. p 1502 note 68.

34. Ill.—Barnes v. Illinois Fuel Co., 119 N.E. 48, 283 Ill. 173.

71 C.J. p 1502 note 69.

35. Ind.—Talge Mahogany Co. v. Burrows, 130 N.E. 865, 191 Ind. 167.

36. Ill.—Haynes v. Saline County Coal Co., 206 Ill.App. 264.

37. Mich.—Noble v. Detroit Taxicab & Transfer Co., 192 N.W. 709, 222 Mich. 414.

71 C.J. p 1502 note 72.

A plea of the general issue by the employer puts in issue every fact necessary to sustain the employee's action, including an allegation by the employee that he was exercising due care,³⁸ and an allegation that the employer had elected not to come within the compensation act.³⁹ A general denial by the employer likewise puts in issue every material allegation of the employee's complaint, including an allegation that the employer failed to comply with the act.⁴⁰ An averment by the employee which is neither admitted nor proved is unavailing;⁴¹ and a defense which the employer might set up under the plea of the general issue, but does not, is waived.⁴²

Plaintiff must plead and prove negligence or fault on the part of the employer proximately causing his injury.⁴³ Ordinarily it is for defendant to plead and prove that plaintiff's exclusive remedy is by way of compensation proceedings;⁴⁴ but it has been held that, where the complaint alleges an employer-employee relationship, plaintiff must allege and prove that the action is not within the provision of the statute making compensation proceedings the exclusive remedy.⁴⁵

In an action at common law for injuries received by a workman, where the evidence makes out a case, not at common law but under the compensation act, if the charge of variance is properly raised by the employer it is fatal to the action.⁴⁶ An allegation by the employee that the employer elected not to come within the compensation act is not

varied by proof which is consistent with such non-election⁴⁷ or is inconsistent as to an immaterial part of the allegation which may be rejected as mere surplusage;⁴⁸ but where the employee did not allege that the employer elected not to come within a compensation act proof of the non-election would be at variance with the pleading.⁴⁹

It has been held that it is for plaintiff to allege and prove that his employer did not carry compensation insurance.⁵⁰ Pleading and proof that the employer did not carry workmen's compensation insurance has been held improper where the employer does not plead contributory negligence, negligence of a fellow servant, or assumption of risk.⁵¹

The fact that the complaint fails to allege an agreement to pay for the services does not render it insufficient to support evidence of an employee-employer relationship.⁵²

§ 955. Evidence

Presumptions and burden of proof are discussed infra § 956. The admissibility of evidence is considered infra § 957, and its weight and sufficiency infra § 958.

Examine Pocket Parts for later cases.

§ 956. — Presumptions and Burden of Proof

An employee suing his employer at common law for personal injuries has the burden of proof as to the ele-

38. Me.—Nicholas v. Folsom, 110 A. 68, 119 Me. 176.

39. Ill.—Barnes v. Illinois Fuel Co., 119 N.E. 48, 283 Ill. 173.

40. Ind.—Talge Mahogany Co. v. Burrows, 130 N.E. 865, 191 Ind. 167.

71 C.J. p 1502 note 66.

41. Or.—Lamm v. Silver Falls Timber Co., 277 P. 91, 286 P. 527, 291 P. 375, 133 Or. 463, appeal dismissed 51 S.Ct. 214, 282 U.S. 812, 75 L.Ed. 727.

42. Ill.—Wolff v. Foote Bros. Gear & Mach. Co., 207 Ill.App. 311.

43. U.S.—Union Oil Co. of California v. Hunt, C.C.A.Or., 111 F.2d 269.

Ky.—Fitch v. Mayer, 258 S.W.2d 923 —Harlan Central Coal Co. v. Gemmen's Adm'r, 178 S.W.2d 217, 296 Ky. 828—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18—Lay's Adm'r v. Harlan Producers Coal Corp., 90 S.W.2d 716, 262 Ky. 612.

S.D.—Voet v. Lampert Lumber Co., 15 N.W.2d 579, 70 S.D. 142.

Tenn.—Great Am. Indem. Co. v. Blakey, Civ.App., 107 S.W.2d 1002, er-

ror dismissed—Smith v. Great Atlantic & Pacific Tea Co., Civ.App., 100 S.W.2d 1041, error dismissed—Cate v. Orlic Gasoline Production Co., Civ.App., 78 S.W.2d 635, error refused.

Utah.—Peterson v. Sorensen, 65 P.2d 12, 91 Utah 507.

44. U.S.—Muir v. Kessinger, D.C. Wash., 35 F.Supp. 116, cause remanded on other grounds, C.C.A., 121 F.2d 456.

Cal.—Popejoy v. Hannon, 231 P.2d 484, 37 C.2d 159.

Ill.—Mueller v. Elm Park Hotel Co., 63 N.E.2d 365, 391 Ill. 391.

Mo.—Ellegood v. Brashear Freight Lines, 162 S.W.2d 628, 236 Mo.App. 971—Kearley v. St. Louis Car Co., App., 111 S.W.2d 976, certiorari quashed State ex rel. St. Louis Car Co. v. Hostetter, 131 S.W.2d 558, 345 Mo. 102.

N.Y.—Murphy v. Elmwood Country Club, 50 N.Y.S.2d 331.

Tenn.—Pikeville Fuel Co. v. Marsh, 232 S.W.2d 789, 34 Tenn.App. 82.

45. U.S.—Sinclair Refining Co. v. Howell, C.A.Ala., 222 F.2d 637.

Pa.—Zagozan v. Testa Bros., Inc., Com.Pl., 35 West.L.J. 189.

Railroad employee
Machinist's helper in railroad roundhouse suing for injuries under employers' liability act must allege and prove himself exempted from workmen's compensation act.

Ind.—Chicago, M. St. P. & P. R. Co. v. Cox, 7 N.E.2d 1008, 103 Ind. App. 364.

46. Ill.—O'Brien v. Chicago City Ry. Co., 220 Ill.App. 107.

47. Ill.—Garrett v. Anglo-American Provision Co., 205 Ill.App. 411.

48. Ill.—Cyrulik v. Ritchey Coal Co., 215 Ill.App. 254.

49. Ill.—Wachuta v. Chicago Rys. Co., 222 Ill.App. 329.

50. Cal.—Wessell v. Barrett, 144 P. 2d 556, 62 C.A.2d 374.

51. Tex.—Dial v. Wilke, Civ.App., 127 S.W.2d 379, error refused—Sonken-Galamba Corp. v. Hillman, Civ.App., 111 S.W.2d 853, error dismissed.

52. Cal.—Rideaux v. Torgrimson, 86 P.2d 826, 12 C.2d 633.

ments of his case, such as that his injury was the proximate result of the employer's negligence or fault.

In accordance with general rules governing actions by employees against their employers to recover damages for injuries, where, notwithstanding the existence of a compensation statute, an employee chooses to bring an action at law against his employer for damages, he has the burden of proving his case by a preponderance of evidence.⁵³ Where plaintiff seeks to escape the application of a provision of the compensation law making compensation proceedings the exclusive remedy, he must show that he is within an exception to the statute.⁵⁴

Where a compensation act provides that an injured employee, instead of applying for compensation, may at his option sue at law, where certain specified elements coexist, the employee must prove that the elements specified actually coexist in the particular case.⁵⁵ Where the employee's right to sue at law depends upon his having first made an application for compensation, a plaintiff showing

that he has first applied for compensation under the act must prove the facts bringing him within the exceptions authorizing a suit at law.⁵⁶ Where the employer is presumed to accept the act, the employee bringing an action at law for damages on the theory that the employer has rejected the act must prove that the employer has rejected the act,⁵⁷ or has failed to comply with the provisions thereof,⁵⁸ as by failing to keep in force compensation insurance.⁵⁹

Where the employer has accepted the provisions of the compensation act, the burden is on the employee to show that the doctrine of voluntary assumption of risk⁶⁰ or contributory negligence⁶¹ is inapplicable to the case.

Where the employer relies on particular matters of defense, in order to defeat the action the employer has the burden of establishing those matters.⁶² Ordinarily the burden is on defendant to prove the defense that compensation proceedings are plaintiff's exclusive remedy.⁶³ Where the employer relies on the defense that the employee has elected to accept

53. Mass.—*Greem v. Cohen*, 11 N.E. 2d 492, 298 Mass. 439.

N.H.—*Dube v. Robinson*, 30 A.2d 482, 92 N.H. 312.

Okl.—*Ice v. Gardner*, 88 P.2d 378, 183 Okl. 496.

Wis.—*Hills Dry Goods Co. v. Industrial Commission*, 258 N.W. 336, 217 Wis. 76.

54. Ill.—*Will (Mueller) v. 1527-31 Wicker Park Ave. Bldg. Corp.*, 58 N.E.2d 296, 324 Ill.App. 264.

Mo.—*Metsinger v. H. A. Dalley, Inc.*, 216 S.W.2d 480, 358 Mo. 689, 71 C.J. p 1503 note 88.

55. Cal.—*Helme v. Great Western Milling Co.*, 185 P. 510, 43 C.A. 416.

71 C.J. p 1503 note 89.

Willfulness; gross neglect

In action for employee's death caused by burns from explosion, plaintiff had to show willfulness or gross neglect.

U.S.—*Bonner v. Texas Co., C.C.A. Tex.*, 89 F.2d 291.

56. Or.—*Jenkins v. Carman Mfg. Co.*, 155 P. 708, 79 Or. 448, 71 C.J. p 1503 note 90.

57. Ill.—*Barnes v. Illinois Fuel Co.*, 119 N.E. 48, 283 Ill. 178, 71 C.J. p 1504 note 91.

58. Mo.—*Osager v. Schaff*, 240 S.W. 124, 126, 293 Mo. 338.

N.Y.—*Barons v. Brambach Piano Co.*, 167 N.Y.S. 933, 101 Misc. 669.

59. N.Y.—*Kuhn v. P. J. Carlin Const. Co.*, 8 N.E.2d 300, 274 N.Y. 118, reargument denied and remittitur amended 14 N.E.2d 204, 277 N.Y. 651.

W.Va.—*Corpus Juris cited in Ferguson v. Pinson*, 50 S.E.2d 476, 478, 131 W.Va. 691.

71 C.J. p 1504 note 93.

60. N.H.—*Fasekis v. J. J. Newbury Co.*, 44 A.2d 817, 93 N.H. 468.

71 C.J. p 1504 note 94.

Burden of nonassumption of risk

Where employer had accepted the provisions of the employers' liability and workmen's compensation acts but injured employee elected to bring an action for damages against employer, burden of nonassumption of risk rested upon the employee.

N.H.—*Rosedoff v. Consolidated Rendering Co.*, 47 A.2d 574, 94 N.H. 114.

61. Me.—*Nadeau v. Caribou Water, Light & Power Co.*, 108 A. 190, 118 Me. 325.

62. Ala.—*Pound v. Gaulding*, 187 So. 468, 287 Ala. 387.

71 C.J. p 1504 note 97.

Contributory negligence

N.H.—*Demers v. Becker*, 23 A.2d 375, 91 N.H. 519.

63. U.S.—*Ivancik v. Wright Aeronautical Corp.*, D.C.N.J., 68 F.Supp. 270.

Cal.—*Popejoy v. Hannon*, 231 P.2d 484, 37 C.2d 159.

Meloy v. Texas Co., 263 P.2d 897, 121 C.A.2d 691.

Conn.—*Johnson v. Robertson Bleachery & Dye Works*, 74 A.2d 196, 136 Conn. 693.

Ill.—*Mueller v. Elm Park Hotel Co.*, 63 N.E.2d 365, 391 Ill. 391.

Thieme v. Harris, 105 N.E.2d 778, 346 Ill.App. 575.

Mo.—*McDaniel v. Kerr*, 258 S.W.2d

629, 364 Mo. 1—*McKay v. Delico Meat Products Co.*, 174 S.W.2d 149, 351 Mo. 876.

N.J.—*Dailey v. Mutual Chemical Co. of America*, 16 A.2d 557, 125 N.J. Law 465, affirmed 19 A.2d 778, 126 N.J. Law 426.

N.Y.—*Warney v. Board of Education of School Dist. No. 5 of Town of Irondequoit*, 49 N.E.2d 466, 290 N.Y. 329.

Arnold v. Wright, 79 N.Y.S.2d 720.

Ohio.—*Fitzgerald v. Chemical Service Corp.*, 84 N.E.2d 754, 84 Ohio App. 423.

Okl.—*Oklahoma Steel Castings Co. v. Banks*, 74 P.2d 1168, 181 Okl. 503.

Tex.—*Clark v. Livingston Shipbuilding Co., Civ.App.*, 226 S.W.2d 212, error refused no reversible error.

Order of proof

In negligence action against an employer and a supplier of defective oil for personal injuries, burden was not on defendants to establish that employee's action was under workmen's compensation act, and not under common law, until after employee had made out a prima facie case of liability for common-law negligence.

Tenn.—*Watson v. Borg-Warner Corp.*, 228 S.W.2d 1011, 190 Tenn. 209.

Compensation law of another state

Where employer relied on workmen's compensation act of Missouri to relieve him from common-law liability to employee for injuries sustained in Ohio allegedly as result of employer's negligence, employer had burden of establishing that plaintiff

compensation, rather than to proceed at law, the burden is on the employer to prove such election.⁶⁴ An employer relying on the defense of contributory negligence has been held to have the burden of proving that the case is not within the statute depriving him of such defense.⁶⁵

Where it is presumed that the employer authorized the execution and presentation of certain writings in which it was stated that the employer rejected the compensation act, the burden of proving that the writings were not authorized is on the employer.⁶⁶ An employer who has rejected the compensation act may have, in an action by the employee at law, the burden of rebutting a prima facie case made by the employee.⁶⁷ Where there is a presumption that an employer's rejection of a compensation act, prior to the time of an accident, continues down to the time of the accident in the absence of evidence to the contrary, it is held that the burden of proving that the rejection of the act was waived is on the employer.⁶⁸

General presumptions and inferences of fact apply in actions by employees against employers for

personal injuries.⁶⁹ Where the injuries on which the action is based arise out of peculiar conditions of the employment, it may be presumed that those conditions existed with the permission of the employer so as to constitute the injury one "arising out of and in the course of" employment, and accordingly an injury compensable under the act rather than an injury for which damages may be sought in an action at law.⁷⁰ The presumption that another person working on the premises of the employer is another employee goes out of the case where positive evidence that he is not an employee is presented.⁷¹

It has been held that there is no presumption that the workmen's compensation statute applies;⁷² but it has also been held that it is presumed that such statute applies where there is an employer-employee relationship⁷³ and the trade or business is within the statute.⁷⁴

An election by the parties to accept the compensation act has been presumed,⁷⁵ but there is author-

was a resident of Missouri and was insured under Missouri workmen's compensation act.

Ohio.—Fitzgerald v. Chemical Service Corp., 84 N.E.2d 754, 84 Ohio App. 423.

Posting of notices

In action by employee against employer for personal injuries, employer, in order to defeat employee's right to recover, on ground that employee's exclusive remedy is under workmen's compensation law, must show that notices required by the law were posted.

N.Y.—Warney v. Board of Education of School Dist. No. 5 of Town of Irondequoit, 49 N.E.2d 466, 290 N.Y. 329.

Vespa v. Herald Co., 49 N.Y.S.2d 343, 267 App.Div. 1035.

Burden met by plaintiff's admission
U.S.—De Martino v. Bethlehem Steel Co., C.C.A.Mass., 164 F.2d 177.

64. Ind.—Talge Mahogany Co. v. Burrows, 130 N.E. 865, 191 Ind. 167.

65. Tex.—Evans v. Phipps, 259 S.W. 2d 723, 152 Tex. 437.

66. Kan.—Rickel v. Atchison, T. & S. F. Ry. Co., 179 P. 550, 104 Kan. 453.

67. Iowa.—Mitchell v. Swanwood Coal Co., 166 N.W. 391, 182 Iowa 1001—Hunter v. Colfax Cons. Coal Co., 157 N.W. 145, 175 Iowa 245, L.R.A.1917D 15, Ann.Cas.1917E 803.

68. Ind.—Jones v. Princeton Coal Co., 139 N.E. 202, 203, 140 N.E. 438, 85 Ind.App. 463.

69. U.S.—Pulley v. Peter Klewit Son's Co., C.A.Ill., 223 F.2d 191.

70. N.Y.—Barone v. Brambach Piano Co., 167 N.Y.S. 933, 101 Misc. 669. 71 C.J. p 1503 note 82.

71. Tex.—Aldridge v. General Mills, Civ.App., 188 S.W.2d 407.

72. U.S.—Young v. Schmitt, D.C.Mo., 25 F.Supp. 905.

In Georgia

(1) Where pleadings or issues make it appear affirmatively that employer and employee would ordinarily come under workmen's compensation law, there is a presumption that they come under its exclusive remedies; but where it appears that employer and employee are or are not an employer and employee as defined in workmen's compensation law, and nothing else appears to indicate that action is one coming under its provisions, there is no presumption which plaintiff must negative in order to maintain an action not covered by the law.

Ga.—Flint Elec. Membership Corp. v. Posey, 51 S.E.2d 869, 73 Ga.App. 597.

(2) Mere existence of employer-employee relationship raises no presumption that the parties are subject to the workmen's compensation act. Ga.—Reid v. Lummus Cotton Gin Co., 197 S.E. 904, 58 Ga.App. 184.

73. Ala.—Pound v. Gaulding, 187 So. 468, 237 Ala. 387.

N.M.—Christensen v. Dysart, 76 P.2d 1, 42 N.M. 107.

W.Va.—Ferguson v. Pinson, 50 S.E. 2d 476, 131 W.Va. 691.

Independent contractor

Where the industrial commission found that plaintiff was an independent contractor, no appeal was taken, and, in an action for injuries, there was no evidence that the parties stood in the relationship of master and servant or employer and employee, the provision of the workmen's compensation act that every employer and employee shall be presumed to have accepted the provisions of that act had no application. N.C.—Odum v. National Oil Co., 196 S.E. 323, 213 N.C. 478.

74. Okl.—Dixie Cab Co. v. Sanders, 284 P.2d 421.

75. Ill.—Connibol v. Mt. Olive & Staunton Coal Co., 211 Ill.App. 32. Iowa.—Doyle v. Dugan, 295 N.W. 128, 229 Iowa 724.

N.C.—Tscheiller v. National Weaving Co., 199 S.E. 623, 214 N.C. 449.

Election by employee

(1) It may be presumed under certain evidence that the employee has accepted the act.

Ky.—Kentucky Road Oiling Co. v. Sharp, 50 S.W.2d 535, 244 Ky. 157. 71 C.J. p 1503 note 85.

(2) The failure of Iowa employer to carry compensation insurance as required by compensation act gave injured employee an election to proceed under the act or to collect damages at common law, but in absence of filing of notice of election within required time, an election by the employee to proceed under the act would be presumed by law.

U.S.—Severson v. Hanford Tri-State Airlines, C.C.A.Minn., 105 F.2d 622,

ity that such an election will not be presumed.⁷⁶ The employer's acceptance of a compensation act is not to be presumed from the employer's failure to file with the compensation commission, prior to the accident, notice that the employer would not be bound by the act, where it appears that the compensation commission did not come into existence until after the time of the accident.⁷⁷ Where there is evidence that certain documents were accepted by a state officer as indicating the election of the employer not to come within the act, it may be presumed that the execution and the presentation of such documents were authorized by the employer,⁷⁸ and, where there is evidence to the effect that the employer had, prior to the time that the accident occurred, excepted itself from the operation of the act, it may be presumed that the exception continued to the time that the injury was sustained.⁷⁹

It may be presumed that the employer has complied with the provisions of the compensation law.⁸⁰ Provisions of an existing compensation statute requiring the employer "to secure the payment of compensation" have been held to give rise to the presumption that the employer has complied with this statutory duty.⁸¹

Negligence. Presumptions and burden of proof as to the employer's negligence are discussed *supra* § 944.

certiorari denied 60 S.Ct. 514, 309 U.S. 660, 84 L.Ed. 1008, rehearing denied 60 S.Ct. 607, 309 U.S. 696, 84 L.Ed. 1036.

Exception

Workmen's compensation law provision creating presumption of acceptance of law by every employee, "unless otherwise specifically excepted" does not comprehend an exception by virtue of hazardous occupation act but refers merely to any specific exception in workmen's compensation act itself.

U.S.—Macarages v. Raymond Concrete Pile Co., C.A.Fla., 220 F.2d 891.

76. La.—Ballard v. Stroube Drug Co., App., 10 So.2d 532.

77. Mo.—Warren v. American Car & Foundry Co., 38 S.W.2d 718, 327 Mo. 755.

78. Kan.—Rickel v. Atchison, T. & S. F. Ry. Co., 179 P. 550, 104 Kan. 458.

79. Ind.—Jones v. Princeton Coal Co., 139 N.E. 202, 140 N.E. 438, 85 Ind.App. 468.

80. Tenn.—Pikeville Fuel Co. v. Marsh, 232 S.W.2d 789, 34 Tenn. App. 82—Copeland v. Cherry, 95 S.W.2d 1275, 20 Tenn.App. 122.

81. N.Y.—Barone v. Brambach Piano Co., 167 N.Y.S. 933, 101 Misc. 669.

82. Ind.—Pinnell-Dullin Lumber Co. v. Day, 13 N.E.2d 351, 105 Ind. App. 62.

N.Y.—Warney v. Board of Ed. of School Dist. No. 5 of Town of Irondequoit, 49 N.E.2d 466, 290 N.Y. 329.

71 C.J. p 1504 note 3.

Age

In action for injuries against defendant covered by the workmen's compensation act where plaintiff sought to avoid the act on ground that he was under sixteen years of age at the time of the accident, testimony of plaintiff as to his own age and as to his previous statements on the same subject was admissible.

N.D.—Schnoor v. Meinecke, 40 N.W. 2d 803, 77 N.D. 96.

Number of employees

In employee's personal injury action against employer which allegedly carried no compensation insurance, statements elicited from employee's witnesses that they had worked for employer at and prior to time of injury, admittedly showing that employer had requisite number of employees to render it eligible to carry such insurance, were admissible.

Tex.—Sonken-Galamba Corp. v. Hill-

§ 957. — Admissibility

Competent evidence, relevant to a material issue, is admissible in a civil suit for damages for personal injuries by an employee against an employer in a jurisdiction where there is a workmen's compensation statute.

In accordance with the rules governing the admissibility of evidence in civil actions generally, competent evidence, relevant to a material issue, is admissible in a common-law action by an employee for personal injuries against an employer in a jurisdiction where there is a workmen's compensation statute,⁸² and evidence which is not competent, relevant, and material is not admissible.⁸³ Evidence which is inadmissible for some purposes may be admissible for other purposes.⁸⁴

Evidence which is competent and material on the issue of negligence may be admissible on behalf of the employer,⁸⁵ and competent evidence, tending to show that the particular case is governed by provisions of the compensation act, entitling the employee to compensation rather than to recover damages at law, is admissible.⁸⁶ Accident reports of an employer may not, however, be admissible in evidence as admissions of, and against, the employer,⁸⁷ and evidence relating to the employer's rejection of the compensation act may not be admissible for the purpose of indicating the scope and meaning of the act itself.⁸⁸

man, Civ.App., 111 S.W.2d 853, error dismissed.

83. Cal.—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 778.

Ind.—Toni v. Kingan & Co., 15 N.E. 2d 80, 214 Ind. 611.

Mo.—Metzinger v. H. A. Dailey, Inc., 216 S.W.2d 480, 358 Mo. 689.

84. Mich.—Downs v. Fowler, 167 N. W. 855, 201 Mich. 659.

85. Okl.—Eagle Creek Oil Co. v. Gregston, 226 P. 339, 99 Okl. 181.

86. N.J.—Watson v. Stagg, 158 A. 820, 108 N.J.Law 444.

Union contract

In personal injury action by union musician employed at restaurant where defendant restaurant claimed that plaintiff was its employee and was limited to claim under workmen's compensation act, a contract purporting to be a contract of employment negotiated and executed by or for a union representing employees was admissible irrespective of whether it had been signed by plaintiff.

D.C.—Earle Restaurant v. O'Meara, 160 F.2d 275, 82 U.S.App.D.C. 49.

87. Mass.—Gerry v. Worcester Consol. St. Ry. Co., 143 N.E. 694, 248 Mass. 559.

88. Or.—Hoffman v. Broadway

Evidence that the employer's failure to carry insurance was not deliberate is properly rejected as immaterial.⁸⁹ When the employer fails to insure against liability to pay compensation to its employees under the act, evidence as to the efforts made by the employer to take out insurance is inadmissible,⁹⁰ as is evidence that the employer has been previously acquitted when proceeded against under the penal provisions of the compensation act.⁹¹ Where contributory negligence is not a defense, evidence to show such negligence is not ad-

missible.⁹²

§ 958. — Weight and Sufficiency

General rules as to weight and sufficiency of evidence apply in actions by employees for personal injuries.

General rules are applicable to questions of the weight and sufficiency of evidence where an employee sues at law to recover damages for injuries rather than proceeding for compensation under the statute.⁹³ The degree of proof required to show that defendant has rejected the compensation

Hazelwood, 10 P.2d 349, 11 P.2d 814, 139 Or. 519, 83 A.L.R. 1008.

89. Cal.—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 773.

90. Cal.—Soria v. Cowell Portland Cement Co., 277 P. 1061, 99 C.A. 108.

91. Cal.—Soria v. Cowell Portland Cement Co., *supra*.

92. Cal.—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 773.

93. U.S.—General Motors Corp. v. Holler, C.C.A.Mo., 150 F.2d 297—Schantz v. American Dredging Co., C.C.A.Pa., 138 F.2d 534.

Ala.—Carraway Methodist Hospital v. Pitts, 57 So.2d 96, 256 Ala. 665—Pound v. Gaulding, 187 So. 468, 237 Ala. 387.

Iowa.—Doyle v. Dugan, 295 N.W. 128, 229 Iowa 724.

Ky.—R. B. Tyler Co. v. Cantrell, 137 S.W.2d 401, 281 Ky. 718.

Mass.—Grant v. Carlisle, 101 N.E.2d 376, 328 Mass. 25—Taylor v. Newcomb Baking Co., 59 N.E.2d 293, 317 Mass. 609—Starr v. Chafitz, 57 N.E.2d 567, 317 Mass. 227.

N.H.—Johnson v. National Biscuit Co., 69 A.2d 703, 96 N.H. 44.

N.Y.—Vespa v. Herald Co., 49 N.Y.S. 2d 343, 267 App.Div. 1035.

Pa.—Tests v. Crescent Portland Cement Co., 186 A. 373, 123 Pa.Super. 85.

Tenn.—Cain v. Sisk, 72 S.W.2d 1061, 18 Tenn.App. 84.

Utah.—Buhler v. Maddison, 140 P.2d 933, 105 Utah 89.

W.Va.—Allen v. Raleigh-Wyoming Mining Co., 186 S.E. 612, 117 W.Va. 631.

71 C.J. p 1505 note 12.

Evidence held sufficient

(1) To support recovery.

Ariz.—Haralson v. Rhea, 259 P.2d 246, 76 Ariz. 74.

Ky.—Burk Hollow Coal Co. v. Bills, 190 S.W.2d 388, 300 Ky. 735—Harlan Ridgeway Min. Co. v. Jackson, 129 S.W.2d 585, 278 Ky. 767.

Nev.—Reeder v. Pincolini, 94 P.2d 1097, 59 Nev. 896.

(2) To show that employee's exclusive remedy was under compensation statute.

U.S.—Schantz v. American Dredging Co., C.C.A.Pa., 138 F.2d 534.

Cal.—Smrekar v. Bay & River Nav. Co., 160 P.2d 85, 69 C.A.2d 654, certiorari denied 66 S.Ct. 333, 326 U.S. 782, 90 L.Ed. 473.

Mo.—Tindall v. Marshall's U. S. Auto Supply Co., 159 S.W.2d 302, 348 Mo. 1189.

Ellegood v. Brashear Freight Lines, 162 S.W.2d 628, 238 Mo.App. 971.

N.Y.—Doca v. Federal Stevedoring Co., 123 N.E.2d 632, 308 N.Y. 44.

Abruzzo v. Grandview Dairy, 24 N.Y.S.2d 879, 261 App.Div. 830, appeal denied 27 N.Y.S.2d 459, 261 App.Div. 1078.

N.D.—Schnoor v. Meinecke, 40 N.W. 2d 803, 77 N.D. 96.

Pa.—Roman v. Legori, Com.Pl., 34 Wash.Co. 55.

(3) To show employer's negligence. Cal.—Goss v. Fanoce, 251 P.2d 337, 114 C.A.2d 819.

Nev.—Cahow v. Michelas, 149 P.2d 233, 62 Nev. 295.

Tenn.—Schroader v. Rural Educational Ass'n, 228 S.W.2d 491, 33 Tenn.App. 36.

(4) To show employer's willful violation of law.

Ky.—Hooven & Allison Co. v. Cor' Adm'r, 104 S.W.2d 969, 268 Ky. 266.

(5) To show that compensation act applied.

Cal.—Baugh v. Rogers, 148 P.2d 633, 24 C.2d 200, 152 A.L.R. 1043.

Tenn.—D. M. Rose & Co. v. Snyder, 206 S.W.2d 897, 185 Tenn. 499.

Utah.—Buhler v. Maddison, 176 P.2d 113, 109 Utah 267, 168 A.L.R. 177.

(6) To show that compensation statute did not apply.

Ala.—Blair v. Greene, 22 So.2d 834, 247 Ala. 104.

Minn.—Nicholas v. Hennepin Wheel Goods Co., 58 N.W.2d 572, 239 Minn. 269.

Tenn.—Pikeville Fuel Co. v. Marsh, 232 S.W.2d 789, 34 Tenn.App. 82.

(7) To show that plaintiff was not an employee.

Ill.—Westlund v. Kewanee Public Service Co., 138 N.E.2d 263, 11 Ill. App.2d 10.

La.—Allgood v. Loeb, 27 So.2d 380, 210 La. 594.

Mass.—Grant v. Carlisle, 101 N.E.2d 376, 328 Mass. 25.

Mo.—Triplett v. Beeler, 268 S.W.2d 814.

Pa.—Brock v. Bowser, 102 A.2d 121, 376 Pa. 209.

Va.—Tidewater Stevedoring Corp. v. McCormick, 52 S.E.2d 61, 139 Va. 158.

Evidence held insufficient

(1) To authorize recovery.

U.S.—Baker v. Great Atlantic & Pacific Tea Co., C.A.Fla., 212 F.2d 130.

Cal.—Still v. Pearson, 215 P.2d 87, 96 C.A.2d 315.

Ky.—Skinner v. Smith, 255 S.W.2d 621.

Mass.—Maciejewski v. Graton & Knight Co., 70 N.E.2d 796, 321 Mass. 165—Starr v. Chafitz, 57 N.E. 2d 567, 317 Mass. 227.

Tex.—Aldridge v. General Mills, Civ. App., 138 S.W.2d 407.

Utah.—Buhler v. Maddison, 140 P.2d 933, 105 Utah 39.

(2) To show that employee's exclusive remedy was under compensation statute.

U.S.—Sun Oil Co. v. Pierce, C.A.Tex., 224 F.2d 580—Bean v. Piedmont Interstate Fair Ass'n, C.A.S.C., 222 F. 2d 227—Long v. Valley Steel Products Co., C.A.Okl., 207 F.2d 505—Gahagan Const. Corp. v. Armao, C. C.A.Mass., 165 F.2d 301, certiorari denied 68 S.Ct. 905, 333 U.S. 876, 92 L.Ed. 1152.

Rosebear v. Anderson, D.C.N.D., 143 F.Supp. 721.

Ala.—U. S. Steel Corp. v. Mathews, 73 So.2d 239, 261 Ala. 120.

Ga.—Smith v. Colonial Stores, 33 S.E. 2d 360, 72 Ga.App. 186.

Mo.—Szofran v. Century Elec. Co., App., 255 S.W.2d 443.

N.Y.—Parisi v. Langston, 138 N.Y.S. 2d 178, 235 App.Div. 483.

Callahan v. State, 107 N.Y.S.2d 319, 201 Misc. 378.

Ohio.—Fitzgerald v. Chemical Service Corp., 84 N.E.2d 754, 84 Ohio App. 423.

Okl.—Meriden Creamery Co. v. McCullough, 195 P.2d 765, 200 Okl. 440.

(3) To show employer's failure to carry insurance.

act has been held to be the same as would be required by defendant to defeat liability for compensation in proceedings therefor.⁹⁴

An award of the compensation commission, relied on as a bar to a suit for damages, should be established by the production and inspection of the record, not by parol.⁹⁵

§ 959. Trial

General rules as to trial apply.

General rules as to trial apply in actions for personal injuries by an employee against his employer in jurisdictions where there is a workmen's compensation statute.⁹⁶ Where the pleadings interject an equitable issue, the order of procedure rests in the discretion of the trial court.⁹⁷

§ 960. — Questions of Law and Fact

Questions of law are for the court and questions of fact are for the jury in actions for personal injuries by an employee against his employer in a jurisdiction where there is a workmen's compensation statute.

In accordance with the rules applicable in civil

actions generally, the court, in an action by an employee against the employer for damages sustained in the course of the employment, should overrule a motion for a nonsuit,⁹⁸ or a motion to direct a verdict in favor of the employer⁹⁹ and submit the case to the jury, where the evidence, considered in a light most favorable to the employee, tends to support his action. If, however, the employee has failed to adduce any proof in support of one of the essential allegations of the complaint the motion should be granted.¹

The meaning of a term used in the statute is a question of law for the court.² The extent and validity of an election not to accept the provisions of a foreign workmen's compensation law are for the court and not for the jury,³ and where the statute states the requirements of the notices of acceptance to be posted in the employer's place of business it is for the court to determine whether the notices filed comply therewith.⁴

Where the evidence as to an issue is not conflicting and is reasonably susceptible of but one inference, the question is one of law for the court.⁵

Cal.—Wessell v. Barrett, 144 P.2d 656, 62 C.A.2d 374.

(4) To support finding that fellow employee was not negligent.

Ky.—Grubb v. Coleman Fuel Co., 114 S.W.2d 477, 272 Ky. 847.

(5) To require finding that employee was in course of his employment.

Minn.—Pettit v. Swift & Co., 281 N.W. 44, 203 Minn. 270.

(6) To show that compensation statute was applicable.

N.H.—Dube v. Robinson, 30 A.2d 482, 92 N.H. 312.

(7) To show election to proceed under compensation statute.

U.S.—Taylor v. Hubbell, C.A.Ariz., 188 F.2d 106, certiorari denied 72 S.Ct. 32, 342 U.S. 818, 96 L.Ed. 618.

94. Ill.—Barnes v. Illinois Fuel Co., 119 N.E. 48, 283 Ill. 173.

95. U.S.—General Motors Corp. v. Holler, C.C.A.Mo., 150 F.2d 297.

Jurisdiction of commission

In employee's action against employer for injuries allegedly due to occupational disease, where the evidence established that there had been a hearing on employee's claim for injuries before the workmen's compensation commission, jurisdiction of the commission over the proceeding instituted by employee should have been decided on the record and findings of the commission, rather than on the evidence presented in the action.

U.S.—General Motors Corp. v. Holler, *supra*.

96. Okl.—Southwestern Bell Tel. Co. v. Ward, 193 P.2d 560, 200 Okl. 315.

Admission

(1) In common-law action for negligence, remark of defendant's counsel in his opening statement that there was not any accident, if constituting an admission that there was no accident within the meaning of the compensation act, did not authorize plaintiff's maintenance of the common-law action where the admission was not accepted or acted upon and plaintiff proceeded to prove that there was an accident within the compensation act, so that he made no case at common law.

Mo.—McKay v. Delico Meat Products Co., 174 S.W.2d 149, 351 Mo. 876.

(2) Where at opening of the trial the defendant's counsel admitted that the defendant employed more than three employees and was not a subscriber to workmen's compensation law and requested that he be allowed to strike from his answer any allegations which would require proof by plaintiff that defendant was not such a subscriber, the better practice was to keep from the jury all reference to such matter.

U.S.—Railway Exp. Agency v. Cox, C.A.Tex., 179 F.2d 593.

97. N.H.—Dion v. Cheshire Mills, 87 A.2d 708, 92 N.H. 414.

98. N.H.—Ouellette v. J. H. Mendall Engineering & Construction Co., 105 A. 414, 79 N.H. 112.

99. Ill.—First Nat. Bank v. Wedron Shila Co., 184 N.E. 897, 351 Ill. 560.

Minn.—Anderson v. Hegna, 2 N.W.2d 820, 212 Minn. 147.

1. D.C.—Garcia v. De Leon, Mun. App., 59 A.2d 637.

Ill.—Connibol v. Mt. Olive & Staunton Coal Co., 211 Ill.App. 32.

Ky.—Fitch v. Mayer, 258 S.W.2d 923. Tex.—Dial v. Wilke, Civ.App., 127 S.W.2d 379, error refused.

2. U.S.—Watkins v. National Elec. Products Corp., C.C.A.Pa., 165 F.2d 980.

Utah.—Henrie v. Rocky Mountain Packing Corp., 202 P.2d 727, 113 Utah 444.

3. Mo.—Span v. Jackson, Walker Coal & Mining Co., 16 S.W.2d 190, 322 Mo. 158.

4. R.I.—De Pasquale v. Mason Mfg. Co., 97 A. 816, 39 R.I. 114.

5. Ark.—Haynes Drilling Corp. v. Smith, 143 S.W.2d 27, 200 Ark. 1098.

Cal.—Baugh v. Rogers, 148 P.2d 633, 24 C.2d 200, 152 A.L.R. 1043.

Esquer v. Teresi, 232 P.2d 895, 105 C.A.2d 89.

Mo.—McKay v. Delico Meat Products Co., 174 S.W.2d 149, 351 Mo. 876.

Kearley v. St. Louis Car Co., App., 111 S.W.2d 976, certiorari quashed State ex rel. St. Louis Car Co. v. Hostetter, 181 S.W.2d 558, 345 Mo. 102.

Pa.—Butrin v. Manion Steel Barred Co., 63 A.2d 345, 361 Pa. 166—Harris v. Selavitch, 9 A.2d 375, 326 Pa. 294.

Sell v. Fahs, Com.Pl., 55 Montg. Co. 197.

Thus, where the evidence is conclusive, the court may properly charge that a particular case falls within the terms of a compensation act.⁶

Questions of fact are for the jury.⁷ Where the evidence is conflicting or such that men's minds might reasonably differ as to the inference to be drawn therefrom, it is for the jury to determine the applicability of the Workmen's Compensation Act,⁸ whether the employee's exclusive remedy is in com-

pensation proceedings,⁹ waiver or election by the employee,¹⁰ whether or not an employer-employee relationship existed,¹¹ whether the injury arose out of, and in the course of, employment,¹² the nature of the employment, whether casual or permanent,¹³ the sufficiency of the posting of the employer's election to comply with the workmen's compensation act,¹⁴ the negligence of the employee,¹⁵ or the negligence of the employer and its causal connection with the employee's injury.¹⁶

Tex.—United East & West Oil Co. v. Dyer, Civ.App., 144 S.W.2d 989, affirmed 162 S.W.2d 680, 159 Tex. 318.
Utah.—Buhler v. Maddison, 176 P.2d 118, 109 Utah 267, 168 A.L.R. 177.

Jurisdictional fact

Whether defendant had required number of employees to make workmen's compensation act a bar to personal injury action was a jurisdictional fact to be found by court.

N.C.—Powers v. Robeson County Memorial Hospital, 87 S.E.2d 510, 242 N.C. 290.

6. N.C.—McNair v. Ward, 82 S.E.2d 85, 240 N.C. 330.
71 C.J. p 1505 note 21.

7. Fla.—Rogers v. Barrett, 46 So.2d 490.

Mass.—Taylor v. Newcomb Baking Co., 59 N.E.2d 293, 317 Mass. 609.

Mich.—Brown v. Standard Oil Co., 14 N.W.2d 797, 309 Mich. 101.

N.J.—Dawson v. El. J. Brooks & Co., 45 A.2d 892, 134 N.J.Law 94.

Tex.—Dial v. Wilke, Civ.App., 127 S.W.2d 379, error refused.

Credibility and weight of plaintiff's testimony were questions for jury.
Me.—Bubar v. Bernardo, 27 A.2d 593, 139 Me. 82.

Assumption of risk

In action to recover for impairment of health caused by alleged breathing of carbon monoxide gas in course of plaintiff's employment as cook in small kitchen at lunch counter operated as part of general store, whether plaintiff assumed risk of injury from carbon monoxide gas was for jury.

W.Va.—Adams v. G. C. Murphy Co., 174 S.E. 794, 115 W.Va. 122.

8. U.S.—Sinclair Refining Co. v. Howell, C.A. Ala., 222 F.2d 637.

Collette v. Zenith Dredge Co., D. C. Minn., 11 F.R.D. 594.

Conn.—Johnson v. Robertson Bleachery & Dye Works, 74 A.2d 196, 136 Conn. 698.

Ill.—Thieme v. Harris, 105 N.E.2d 778, 346 Ill.App. 575.

Mass.—Klein v. Keresey, 29 N.E.2d 703, 307 Mass. 51.

Mo.—Kearley v. St. Louis Car Co., App., 111 S.W.2d 976, certiorari quashed State ex rel. St. Louis Car Co. v. Hostetter, 131 S.W.2d 558, 345 Mo. 102.

N.H.—Dube v. Robinson, 30 A.2d 482, 92 N.H. 312.

N.J.—Dawson v. El. J. Brooks & Co., 45 A.2d 892, 134 N.J.Law 94.

N.M.—Addison v. Tessier, 305 P.2d 1067, 62 N.M. 120.

Ohio.—Fitzgerald v. Chemical Service Corp., 84 N.E.2d 754, 84 Ohio App. 423.

Tex.—Dial v. Wilke, Civ.App., 127 S.W.2d 379, error refused.

71 C.J. p 1505 note 22.

9. U.S.—Isthmian S. S. Co. of Del. v. Olivieri, C.A. La., 202 F.2d 492.

Cal.—Meloy v. Texas Co., 263 P.2d 897, 121 C.A.2d 691—Dalglish v. Holt, 237 P.2d 553, 108 C.A.2d 561.

Conn.—Battistelli v. Connohio, Inc., 88 A.2d 372, 138 Conn. 646.

N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.

Pa.—Walters v. Kaufmann Department Stores, 5 A.2d 559, 334 Pa. 233.

71 C.J. p 1505 note 23.

10. N.H.—Dion v. Cheshire Mills, 37 A.2d 708, 92 N.H. 414.

N.M.—Addison v. Tessier, 305 P.2d 1067, 62 N.M. 120.

71 C.J. p 1505 note 23.

Estoppel

In action by partner against general contractor for injuries sustained on building, parts of which the partnership had agreed to clean, whether partner was estopped to maintain the action because he had received compensation under Ohio compensation act was for jury, under evidence that partner did not know, nor by exercise of ordinary care could have known, all the facts and circumstances attending his acts which resulted in the compensation allowance.

U.S.—Smith v. Price Bros. Co., C.C.A. Ohio, 131 F.2d 750, certiorari denied Price Bros. Co. v. Smith, 63 S.Ct. 560, 318 U.S. 762, 87 L.Ed. 1134.

11. U.S.—Smith v. Price Bros. Co., C.C.A. Ohio, 131 F.2d 750, certiorari denied Price Bros. Co. v. Smith, 63 S.Ct. 560, 318 U.S. 762, 87 L.Ed. 1134.

Ala.—Birmingham Ice & Cold Storage Co. v. McFarling, 200 So. 110, 240 Ala. 479.

Cal.—Esquer v. Teresi, 232 P.2d 895, 105 C.A.2d 89.

Fla.—Rogers v. Barrett, 46 So.2d 490.

Mo.—Simmons v. Kansas City Jockey Club, 66 S.W.2d 119, 334 Mo. 99.

N.Y.—Wawrzonek v. Central Hudson Gas & Elec. Corp., 12 N.E.2d 525, 276 N.Y. 412.

Mirabile v. Bartlett-Hayward Co., 291 N.Y.S. 285, 249 App.Div. 667.

Okl.—Southwestern Bell Tel. Co. v. Ward, 193 P.2d 569, 200 Okl. 315.

Pa.—Walters v. Kaufmann Department Stores, 5 A.2d 559, 334 Pa. 233.

Walters v. Kaufmann Department Stores, 20 A.2d 865, 145 Pa. Super. 56.

Tex.—Bridwell v. Bernard, Civ.App., 159 S.W.2d 981, error refused—Faulkner v. Kleinman, Civ.App., 158 S.W.2d 891, error refused.

12. Ind.—General Printing Corporation v. Umbach, 195 N.E. 281, 100 Ind.App. 285.

Mass.—Dubois v. Soule Mill, 82 N.E. 2d 886, 323 Mass. 472—Zarba v. Lane, 76 N.E.2d 318, 322 Mass. 132.

N.J.—Nicolasi v. Sparagna, 50 A.2d 867, 135 N.J.Law 131.

Ohio.—Fike v. Goodyear Tire & Rubber Co., 10 N.E.2d 242, 58 Ohio App. 197.

Or.—Ramseth v. Maycock, 304 P.2d 415, 209 Or. 66.

Wash.—Mutti v. Boeing Aircraft Co., 172 P.2d 249, 25 Wash.2d 871.

13. Iowa.—Duncan v. Iowa Ry. & Light Co., 187 N.W. 486, 194 Iowa 469, modified on other grounds 189 N.W. 793.

N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.

14. W.Va.—McVey v. Chesapeake & Potomac Telephone Co. of West Virginia, 145 S.E. 578, 106 W.Va. 331.

15. Cal.—McGuire v. Miller & Lux, 174 P. 898, 173 C. 644.

Mich.—Freeman v. East Jordan & S. R. Co., 158 N.W. 204, 191 Mich. 529.

16. Ky.—Duvon Coal Co. v. Fike, 88 S.W.2d 201, 238 Ky. 376.

Tex.—Sears, Roebuck & Co. v. Robinson, Civ.App., 272 S.W.2d 549, affirmed 280 S.W.2d 238, 154 Tex. 336.

It is usually a question for the jury whether presumptions in favor of the employee have been controverted and overcome.¹⁷

§ 961. — Instructions

General rules as to instructions apply in actions by an employee against his employer for personal injuries in jurisdictions where there is a workmen's compensation statute.

General rules as to instructions in civil actions apply as to instructions in actions for personal injuries by employees against employers in jurisdictions where there is a workmen's compensation statute.¹⁸ The instructions must be considered as a whole,¹⁹ and must not be misleading or confusing.²⁰ Matter covered by other instructions need not be repeated.²¹ The instructions should cover adequately all of the issues in the case,²² but should be confined to the issues raised by the pleadings.²³ The instructions should not set out common-law defenses prohibited defendant by the compensation act;²⁴ but, where the situation is such that the common-law defenses are available to defendant, proper instructions thereon should be given.²⁵

The instructions must state the law correctly and adequately.²⁶

It is proper to instruct the jury relative to pertinent portions of the workmen's compensation law²⁷ and as to the evidence which may be considered in determining a particular issue.²⁸ Where the employee's attempt to recover in an action at law, if unsuccessful, will not defeat his right to compensation under the compensation act, the employer is entitled to an instruction to that effect.²⁹ If instructions on particular phases of the issues are desired, they should be requested.³⁰ A requested instruction which does not state the law correctly is properly refused.³¹

§ 962. — Verdict, Findings and Conclusions

General rules as to verdicts and findings apply in an employee's action for personal injuries.

General rules apply as to verdicts and findings.³² In an action tried to the court without a jury, findings of fact and conclusions of law must conform to, and be supported by, the pleadings.³³ Where an employer has rejected the act, a general finding for defendant makes special findings on assumption of risk and contributory negligence unnecessary.³⁴ Inconsistent findings will not support a judgment.³⁵

17. Cal.—*Peters v. California Building-Loan Ass'n*, 2 P.2d 439, 116 C.A. 143.

Iowa.—*Martin v. Chase*, 189 N.W. 958, 194 Iowa 407.

18. U.S.—*Baker v. Great Atlantic & Pacific Tea Co.*, C.A.Fla., 212 F.2d 130.

Ill.—*Kijowski v. Times Pub. Corp.*, 23 N.E.2d 703, 372 Ill. 311.

Westlund v. Kewanee Public Service Co., 136 N.E.2d 263, 11 Ill. App.2d 10.

Ky.—*Riddell's Adm'r v. Berry*, 298 S.W.2d 1—*Southern Mining Co. v. Childers*, 142 S.W.2d 995, 283 Ky. 687, 131 A.L.R. 315.

Mass.—*Grant v. Carlisle*, 101 N.E.2d 376, 328 Mass. 25.

Mo.—*Tinsley v. Massman Const. Co.*, 270 S.W.2d 835.

Okla.—*Southwestern Bell Tel. Co. v. Ward*, 193 P.2d 569, 200 Okl. 315.

Or.—*Ramseth v. Maycock*, 304 P.2d 415, 209 Or. 66.

19. Conn.—*Battistelli v. Connohio, Inc.*, 88 A.2d 372, 138 Conn. 646.

71 C.J. p 1506 note 33.

20. Conn.—*Jenkins v. Reichert*, 5 A.2d 6, 125 Conn. 258.

Mont.—*Chancellor v. Hines Motor Supply Co.*, 69 P.2d 764, 104 Mont. 603.

Or.—*Pond v. Jantzen Knitting Mills*, 190 P.2d 141, 188 Or. 256.

71 C.J. p 1506 note 32.

21. Ill.—*Devine v. Delano*, 111 N.E. 742, 272 Ill. 166, Ann.Cas.1918A 689

—*Crooks v. Tazewell Coal Co.*, 105 N.E. 132, 263 Ill. 343, Ann.Cas.1915C 304.

22. Cal.—*Hicks v. Ocean Shore R. R.*, 117 P.2d 850, 18 C.2d 773.

Conn.—*Jenkins v. Reichert*, 5 A.2d 6, 125 Conn. 258.

23. Ala.—*St. Louis-San Francisco Ry. Co. v. Carros*, 93 So. 445, 207 Ala. 535.

Ohio.—*Brown v. L. A. Wells Const. Co., App.*, 67 N.E.2d 110, affirmed 56 N.E.2d 451, 143 Ohio St. 580.

24. Ill.—*New Staunton Coal Co. v. Fromm*, 121 N.E. 594, 286 Ill. 254.

71 C.J. p 1506 note 39.

25. Ky.—*Consolidated Realty Co. v. Jones*, 294 S.W. 172, 219 Ky. 647.

26. Ky.—*Croley v. Huddleston*, 192 S.W.2d 717, 301 Ky. 580—*Ward v. Marshall*, 168 S.W.2d 348, 293 Ky. 13—*High Splint Coal Co. v. Ramey's Adm'r*, 112 S.W.2d 1007, 271 Ky. 532.

N.D.—*Schnoor v. Meinecke*, 40 N.W. 2d 803, 77 N.D. 96.

71 C.J. p 1506 note 38.

27. N.D.—*Moen v. Melin*, 231 N.W. 283, 59 N.D. 582.

71 C.J. p 1506 note 36.

28. U.S.—*O'Brien v. Las Vegas & T. R. Co., Nev.*, 242 F. 850, 155 C.C.A. 438.

29. Ind.—*Talge Mahogany Co. v. Burrows*, 130 N.E. 865, 191 Ind. 187.

30. Tex.—*Kampmann v. Cross*, Civ. App., 194 S.W. 437.

31. Ala.—*Birmingham Ice & Cold Storage Co. v. McFarling*, 200 So. 110, 240 Ala. 479.

Ark.—*Missouri Pac. R. Co. v. Sanders*, 117 S.W.2d 720, 196 Ark. 269.

Idaho.—*Russell v. City of Idaho Falls*, 305 P.2d 740, 78 Idaho 466.

Ind.—*Dalton Foundries v. Jefferies*, 51 N.E.2d 13, 114 Ind.App. 271, followed in *Dalton Foundries v. Dean*, 51 N.E.2d 397, 114 Ind.App. 289.

N.M.—*Addison v. Tessier*, 305 P.2d 1067, 62 N.M. 120.

Or.—*Whitehead v. Montgomery Ward & Co.*, 239 P.2d 226, 194 Or. 106.

Tenn.—*Thoni v. Hayborn*, 260 S.W.2d 376, 37 Tenn.App. 56.

W.Va.—*Riley v. West Virginia Northern R. Co.*, 51 S.E.2d 119, 132 W.Va. 208, certiorari denied *West Virginia Northern R. Co. v. Riley*, 69 S.Ct. 891, 336 U.S. 961, 93 L.Ed. 1113.

32. Cal.—*Goss v. Fanoe*, 251 P.2d 337, 114 C.A.2d 819.

Ill.—*Starczynski v. Miltenberg*, 55 N.E.2d 299, 323 Ill.App. 283.

Pa.—*Walters v. Kaufmann Department Stores*, 20 A.2d 865, 145 Pa. Super. 56.

33. Ky.—*Bannon v. Watson*, 268 S.W. 573, 207 Ky. 23.

34. Ind.—*Central Indiana Ry. Co. v. Davis*, 132 N.E. 611, 78 Ind.App. 341.

35. Tex.—*Griffith v. Kernaghan*, Civ. App., 121 S.W.2d 617.

Where plaintiff fails to establish his case, and defendant does not introduce any evidence, a judgment of nonsuit rather than one of dismissal has been held proper.³⁶

§ 963. Review

General rules apply on review of personal injury actions by employees against employers in jurisdictions where there is a workmen's compensation statute.

General rules apply on review of actions by employees against employers for personal injuries in jurisdictions where there is a workmen's compensation statute.³⁷ The remedy of a party adversely affected by errors committed in the trial of an action by an employee to recover damages for a personal injury from an employer may be by appeal.³⁸ An order determining the defense that plaintiff's sole remedy is under the compensation statute is

appealable.³⁹ An order overruling a demurrer to a reply which alleged that defendant was deprived of the defenses of assumption of risk and contributory negligence by the workmen's compensation act has been held to be appealable.⁴⁰

Questions not properly raised and reserved in the court below cannot be considered for the first time on review.⁴¹ A contention not made in the lower court may not be raised for the first time on appeal.⁴² However, the court may of its own motion consider a jurisdictional question.⁴³ An adjudication by the compensation board which is not pleaded or proved will not be considered.⁴⁴ Appellant cannot complain of a ruling favorable to him⁴⁵ or which he requested or invited.⁴⁶

Ordinarily questions of fact will not be reviewed and a finding of fact will not be disturbed on review where it is supported by the evidence.⁴⁷ While

36. Ga.—Campbell v. Dixie Gravel Co., 191 S.E. 274, 55 Ga.App. 747.

37. Cal.—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 773.

Ill.—Beveridge v. Illinois Fuel Co., 119 N.E. 46, 283 Ill. 81.

La.—Comeaux v. South Coast Corp., App., 178 So. 513.

N.C.—McCune v. Rhodes-Rhyme Mfg. Co., 8 S.E.2d 219, 217 N.C. 351.

Tex.—United East & West Oil Co. v. Dyer, Civ.App., 144 S.W.2d 989, affirmed 162 S.W.2d 680, 139 Tex. 318.

38. Or.—Steinfeld v. State Industrial Accident Commission, 16 P.2d 639, 141 Or. 296.

39. Or.—Manke v. Nehalem Logging Co., 301 P.2d 192.

General statute as to appeals

Appealability of order, in wrongful death action, disposing of defense asserted by attorney general in behalf of state industrial accident commission, to effect that plaintiff's sole remedy was under workmen's compensation law, is not governed by general statute authorizing appeals, and, accordingly, fact that wrongful death action was still pending would not preclude allowance of appeal by commission from adverse ruling. Or.—Manke v. Nehalem Logging Co., supra.

40. Kan.—Vick v. Morton, 238 P.2d 467, 172 Kan. 87.

41. Nev.—Provenzano v. Long, 183 P.2d 639, 64 Nev. 412.

N.J.—Dailey v. Mutual Chemical Co. of America, 16 A.2d 557, 125 N.J. Law 465, affirmed 19 A.2d 778, 126 N.J. Law 426.

Va.—Aistrop v. Blue Diamond Coal Co., 24 S.E.2d 546, 181 Va. 287. 71 C.J. p 1507 note 53.

Double recovery

Where independent proceedings before industrial accident commission

on claim of employee of uninsured employer for compensation terminated subsequent to entry of judgment for employee in action against employer for same injury, merits of employer's objection to successive awards for employee in damage action and in compensation proceedings as being a double recovery would not be reviewed on employer's appeal contesting validity of judgment in damage action.

Cal.—Chakmakjian v. Lowe, 201 P.2d 801, 33 C.2d 308.

42. U.S.—De Martino v. Bethlehem Steel Co., C.C.A.Mass., 164 F.2d 177.

Ark.—Layne-Arkansas Co. v. Henderson, 255 S.W.2d 423, 221 Ark. 691.

Mo.—Kearley v. St. Louis Car Co., App., 111 S.W.2d 976, certiorari quashed State ex rel. St. Louis Car Co. v. Hostetter, 131 S.W.2d 558, 345 Mo. 102.

Constitutionality of statute

Where question of constitutionality of statute making every person in the service of another under any contract of hire, including minors, subject to workmen's compensation act was neither presented to the trial court nor passed upon by it, issue of constitutionality of statute would not be considered on appeal.

Mich.—Jesiak v. Banfield, 282 N.W. 429, 286 Mich. 440.

43. Utah.—Henrie v. Rocky Mountain Packing Corp., 202 P.2d 727, 113 Utah 444.

44. Cal.—Rideaux v. Torgrimson, 86 P.2d 826, 12 C.2d 683.

45. Ariz.—Haralson v. Rhea, 259 P. 2d 246, 76 Ariz. 74.

46. Ill.—Westlund v. Kewanee Public Service Co., 126 N.E.2d 263, 11 Ill.App.2d 10.

Tex.—Clark v. Livingston Shipbuild-

ing Co., Civ.App., 226 S.W.2d 212, error refused no reversible error.

47. U.S.—Anderson v. Rosebear, C.A. N.D., 245 F.2d 673—Sheffield Steel Corp. v. Vance, C.A.Mo., 236 F.2d 938—Bowen v. Shamrock Towing Co., C.C.A.N.Y., 139 F.2d 674.

Cal.—Chakmakjian v. Lowe, 201 P. 2d 801, 33 C.2d 308—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 C.2d 773.

Soria v. Cowell Portland Cement Co., 277 P. 1061, 99 C.A. 108.

N.H.—Schofield v. E. R. Bates & Co., 10 A.2d 227, 90 N.H. 422.

71 C.J. p 1507 note 49.

"Seaman" or "harbor worker"

(1) When injured employee sues under Jones Act, question whether he is to be classified as a "seaman," or as a "harbor worker" covered by longshoremen's compensation act, presents issues of fact for determination by jury or the court.

U.S.—Bowen v. Shamrock Towing Co., C.C.A.N.Y., 139 F.2d 674—Schantz v. American Dredging Co., C.C.A.Pa., 138 F.2d 534.

Cal.—Smrekar v. Bay & River Nav. Co., 160 P.2d 85, 69 C.A.2d 654, certiorari denied 68 S.Ct. 338, 326 U.S. 782, 90 L.Ed. 473.

(2) Where reasonable minds might reasonably differ as to whether employee injured on navigable waters and in scope of his employment was a member of the crew so as to be excluded from operation of the longshoremen's compensation act or was a maritime worker within the ambit of that act was a question of fact for the trier of the facts.

U.S.—Smrekar v. Bay & River Nav. Co., supra.

(3) Conclusion of judge, jury, or commissioner that injured employee is not a master or member of a crew

the appellate court will not weigh the evidence,⁴⁸ it will consider whether there is substantial evidence in support of the judgment.⁴⁹ Where the facts are undisputed, the reviewing court may determine as a matter of law whether plaintiff was an employee or an independent contractor.⁵⁰ A judgment which implies a finding of fact must stand on appeal unless the evidence in support of the finding is insufficient to sustain it.⁵¹ A finding that defendant was a subscriber under a compensation act cannot be reviewed where the evidence on which it is based is not reported,⁵² nor may the sufficiency of a document admitted in evidence below be reviewed as to formal matters where the exhibit is not shown in the abstract.⁵³

The judgment will be reversed for prejudicial error.⁵⁴ An erroneous instruction requires reversal where it is impossible to tell whether it affected a verdict reached on sharply conflicting evidence.⁵⁵

In accordance with general rules, the judgment will not be reversed for harmless error⁵⁶ with respect to the admission or exclusion of evidence,⁵⁷ the argument of counsel,⁵⁸ or instructions.⁵⁹ Error, if any, in striking a defense based on a workmen's compensation act is harmless where the evidence is such that such defense must necessarily fail,⁶⁰ and any error committed in admitting evidence to prove a fact, which the party against whom the evidence is offered admits to be true, is harmless and the error is not subject to review.⁶¹

The admission of evidence which was not required in support of any allegation of the party who introduced the evidence, although erroneous, may be harmless.⁶² In an injured servant's action against his employer who had not accepted the workmen's compensation act, any error in the unnecessary allegations by plaintiff that defendant employed large numbers of employees, and that it was not a subscriber to the act, is harmless.⁶³ Where a declaration contains a count on a common-law cause of action and a count alleging that defendant had elected not to be governed by a compensation act, defendant is not prejudiced by the action of the trial court in permitting both counts to be submitted to the jury and in allowing the defenses of assumption of risk and contributory negligence to be submitted as to the first count and excluded as to the second.⁶⁴ Where the employee, if he had any right to maintain an action at law at all, was immune to the common-law defenses of contributory negligence, assumed risks and the fellow servant rule, the employer was not harmed by the court's refusal to instruct that it was a "common law action."⁶⁵ Under a compensation act providing that, where an employer does not insure its employees, in an action to recover damages for injuries sustained by such employees it shall not be a defense that the employee has assumed the risk of the injury, an instruction to the effect that plaintiff assumed certain risks was harmless as to defendant,⁶⁶ and where the case was tried below on the erroneous theory, but with

within provision of longshoremen's act excepting from its operation member of a crew of any vessel is not binding upon reviewing court if the basic facts competently found by judge, jury, or commissioner rightly call for a different conclusion.
U.S.—*Schantz v. American Dredging Co.*, *supra*.

Negligence

Cal.—*Chakmakjian v. Lowe*, 201 P. 2d 801, 33 C.2d 808.

Employer-employee relationship

Cal.—*Jackson v. Pacific Gas & Elec. Co.*, 212 P.2d 591, 95 C.A.2d 204.

48. Cal.—*Hicks v. Ocean Shore R. R.*, 117 P.2d 850, 18 C.2d 773.

49. Cal.—*Hicks v. Ocean Shore R. R.*, *supra*.

50. Mo.—*McKay v. Delico Meat Products Co.*, 174 S.W.2d 149, 351 Mo. 876.

51. Tex.—*C. C. Slaughter Cattle Co. v. Pastrana*, Civ.App., 217 S.W. 749, dismissed for want of jurisdiction.

52. Mass.—*Young v. Durican*, 106 N. E. 1, 218 Mass. 346.

53. Ill.—*Bacon v. Emerson-Brantingham Co.*, 213 Ill.App. 96.

54. Ohio.—*Brown v. L. A. Wells Const. Co.*, App., 67 N.E.2d 110, affirmed 56 N.E.2d 451, 143 Ohio St. 580.

Okl.—*Southwestern Bell Tel. Co. v. Ward*, 193 P.2d 569, 200 Okl. 315.

Or.—*Nixon v. Hawley Pulp & Paper Co.*, 41 P.2d 807, 149 Or. 526.

Tex.—*Sears, Roebuck & Co. v. Robinson*, Civ.App., 272 S.W.2d 549, affirmed 280 S.W.2d 238, 154 Tex. 336.

55. Cal.—*Mantonva v. Bratlie*, 199 P.2d 677, 33 C.2d 120.

56. Ohio.—*Fitzgerald v. Chemical Service Corp.*, 84 N.E.2d 754, 84 Ohio App. 423.

Tex.—*Clark v. Livingston Shipbuilding Co.*, Civ.App., 226 S.W.2d 212, error refused no reversible error.

57. Cal.—*Hicks v. Ocean Shore R. R.*, 117 P.2d 850, 18 C.2d 773.

N.J.—*Scott v. Public Service Interstate Transp. Co.*, 70 A.2d 882, 6 N.J.Super. 226.

Tex.—*Clark v. Livingston Shipbuilding Co.*, Civ.App., 226 S.W.2d 212, error refused no reversible error.

58. N.D.—*Schnoor v. Meinecke*, 40 N.W.2d 803, 77 N.D. 96.

59. Cal.—*Hicks v. Ocean Shore R. R.*, 117 P.2d 850, 18 C.2d 773.
Conn.—*Jenkins v. Reichert*, 5 A.2d 6, 125 Conn. 258.

Ill.—*Westlund v. Kewanee Public Service Co.*, 136 N.E.2d 263, 11 Ill. App.2d 10.

Ky.—*Croley v. Huddleston*, 192 S.W. 2d 717, 301 Ky. 580.

60. Or.—*Susznik v. Alger Logging Co.*, 147 P. 922, 76 Or. 189, Ann. Cas.1917C 700.

61. Ill.—*Dietz v. Big Muddy Coal, etc., Co.*, 105 N.E. 289, 263 Ill. 480.

62. Ill.—*Daly v. New Staunton Coal Co.*, 117 N.E. 413, 280 Ill. 175.

63. Tex.—*Consumers' Lignite Co. v. Grant*, Civ.App., 181 S.W. 202.

64. Ill.—*Devine v. Delano*, 111 N.E. 742, 272 Ill. 166, Ann.Cas.1918A 689.

65. Ind.—*Talge Mahogany Co. v. Burrows*, 130 N.E. 865, 191 Ind. 167.

66. U.S.—*Western Union Telegraph Co. v. Williamson*, C.C.A.Mass., 15 F.2d 972.

the assent of defendant, that he had the burden of proving that a statutory provision dispensing with the common-law defenses including that of contributory negligence was inapplicable, refusal of the court to instruct that plaintiff had the burden of proving his own due care was held to be harmless and not subject to review.⁶⁷

In affirming a ruling on a demurrer, the court

may remand the matter with directions that leave to amend be granted.⁶⁸ Where the case is tried by the parties on the theory that certain facts exist, their existence will be assumed on appeal, even though they are put in issue by the pleadings.⁶⁹ The court will not rule on questions the determination of which is not necessary to a proper disposition of the appeal.⁷⁰

C. ACTION BY THIRD PERSON AGAINST EMPLOYER

1. ACTION FOR DEATH BY WRONGFUL ACT

§ 964. In General

- a. General considerations
- b. Death of minor employee
- c. Employer, employee, or employment not within act

a. General Considerations

Statutory provisions making the remedies provided

by the compensation act exclusive may preclude an action against the employer for the death of an employee.

Subject to certain limitations and qualifications, as considered in this section and infra §§ 965-967, under some acts an action for damages for the death of an employee will not lie against the employer where he and the deceased employee were subject to,⁷¹ as, for example, where they had elected to come

67. Me.—Nadeau v. Caribou Water, Light & Power Co., 108 A. 190, 118 Me. 325.

68. Md.—Lease v. Upper Potomac River Commission, 20 A.2d 498, 179 Md. 543.

69. Cal.—Goss v. Fanoie, 251 P.2d 337, 114 C.A.2d 819.

70. N.J.—Staubach v. Citiles Service Oil Co., 19 A.2d 882, 126 N.J.Law 479.

71. U.S.—Hall v. Continental Drilling Co., C.A.La., 245 F.2d 717—Turner v. Wilson Line of Mass., Inc., C.A.Mass., 242 F.2d 414—Patterson v. Sears Roebuck & Co., C.A.La., 196 F.2d 947—Lynch v. U. S., C.C.A.N.Y., 163 F.2d 97—Peski v. Todd & Brown, C.C.A.Ind., 158 F.2d 59—Jenkins v. Pullman Co., C.C.A.Cal., 96 F.2d 405, affirmed 59 S.Ct. 347, 305 U.S. 534, 83 L.Ed. 334.

Curran v. Mackay Radio & Tel. Co., D.C.N.Y., 123 F.Supp. 88—Fogel v. U. S., D.C.N.Y., 102 F.Supp. 727—Braner v. Brooklyn Eastern District Terminal, D.C.N.Y., 46 F.Supp. 302—Doty v. Travelers Ins. Co., D.C.Tex., 31 F.Supp. 186.

Ala.—De Arman v. Ingalls Iron Works Co., 61 So.2d 764, 258 Ala. 205—Carraway Methodist Hospital v. Pitts, 57 So.2d 96, 256 Ala. 665.

Ga.—Wall v. J. W. Starr & Sons Lumber Co., 23 S.E.2d 452, 68 Ga. App. 552.

Idaho.—Gifford v. Nottingham, 193 P.2d 831, 68 Idaho 330.

Kan.—Spade v. Van Sickle, 265 P.2d 860, 175 Kan. 557—Duncan v. Perry Packing Co., 174 P.2d 78, 162 Kan. 79.

La.—Dandridge v. Fidelity & Casualty Co. of New York, Employers Liability Assur. Corp., Intervener, App., 192 So. 887.

Mass.—Cozzo v. Atlantic Refining Co., 12 N.E.2d 744, 299 Mass. 260.

Minn.—Fjeld v. Marshall County Co-op. Oil Ass'n, 35 N.W.2d 448, 227 Minn. 274.

N.H.—Wilkinson v. Achber, 131 A.2d 51, 101 N.H. 7.

N.J.—Cowart v. Borough of Freehold, 21 A.2d 738, 127 N.J.Law 215.

N.Y.—Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941.

Glaser v. Highland Hospital of Rochester, 131 N.Y.S.2d 728—Conway v. Hamilton Overseas Contracting Corp., 120 N.Y.S.2d 672, affirmed 131 N.Y.S.2d 443, 283 App. Div. 1011, reargument and appeal denied 134 N.Y.S.2d 585, 284 App. Div. 846.

N.C.—Miller v. Roberts, 193 S.E. 286, 212 N.C. 126.

Pa.—Hyzy v. Pittsburgh Coal Co., 121 A.2d 85, 384 Pa. 316—Fritz v. York Motor Exp. Co., 58 A.2d 12, 358 Pa. 398—Commonwealth Trust Co. of Pittsburgh v. Carnegie-Illinois Steel Co., 44 A.2d 594, 353 Pa. 150.

Roger v. General Ribbon Mills, Com.Pl., 27 North.Co. 156.

Wash.—Anthony v. National Fruit Canning Co., 56 P.2d 688, 185 Wash. 637.

71 C.J. p 1507 note 65.

Action against person contracting with employee's immediate employer see infra § 985.

Actions for medical, nursing, and hospital services see supra § 275.

Deduction of death benefit awarded under workmen's compensation law from widow's benefit under municipal pension system see Municipal Corporations § 727 h.

Rights to death benefits in addition to those provided by compensation act see infra § 982.

Dual employment

Where employee was in employ of two companies, next of kin's exclusive remedy for employee's death resulting from negligence of another employee of one company was by claim under compensation act.

N.J.—Scott v. Public Service Interstate Transp. Co., 70 A.2d 882, 6 N.J.Super. 226.

Employee of state or subdivision of state

(1) Workmen's compensation was exclusive remedy of claimant for wrongful death of seaman who was fatally injured in an accident on state derrick barge used in repair of state canal system.

N.Y.—Maloney v. State, 165 N.Y.S.2d 465, 144 N.E.2d 364, 3 N.Y.2d 356.

(2) Administratrix of estate of city employee, killed in course of his duties as alleged result of another city employee's negligence, is limited to recovery of compensation for his death under workmen's compensation law and has no right to maintain action against city to recover damages for his wrongful death.

N.Y.—De Giuseppe v. City of New York, 79 N.Y.S.2d 163, 273 App.Div. 1010, appeal denied 79 N.Y.S.2d 910, 274 App.Div. 790.

(3) Volunteer fireman, who, while responding to town's call, died from

under⁷² a compensation act which excludes remedies other than those given by the act, at least where the employer has fully complied with the act.⁷³ The remedies provided by the act may exclude an action for the death of the employee, even though the employer may not be required to pay compensation for the death under the act because it occurred more than a specified period after the injury.⁷⁴

Where a death act limits the right of action to those cases in which the person injured would have had a right of action for damages if death had not ensued, the personal representatives of a deceased employee cannot sue thereunder where, if he had lived, the employee would have been compelled to resort to the compensation act.⁷⁵ So, where the remedy under the act is intended as a substitute for common-law and other statutory remedies and permits the employee to retain only rights given by the common law by notice claiming such rights, the view has been taken that a right of action for death may not so be retained since such right is exclusively the

creature of statute.⁷⁶

Further, where a compensation act is compulsory and provides that the system of compensation established shall be exclusive of all other remedies, it takes away any existing right to maintain an action for wrongful death,⁷⁷ in the absence of the employer's failure to secure the payment of compensation as required by the act.⁷⁸

Federal Employees' Compensation Act. The view has been taken that the Federal Employees' Compensation Act does not provide an exclusive remedy so as to prevent an action by the personal representative of a deceased railroad employee against the director general of railroads for the death of such employee which occurred while the railroad in question was being operated under federal control.⁷⁹ It has been held, however, that the Federal Employees' Compensation Act excludes any other remedy against the United States under federal tort liability statutes.⁸⁰

asphyxiation in a sewer manhole, which was located within fire district, while attempting to assist two men who had become asphyxiated, was employee of district and not of town, and, therefore, workmen's compensation act barred death action by fireman's widow against district.

N.Y.—Bauman v. Town of Irondequoit, 122 N.Y.S.2d 47, 204 Misc. 494, affirmed 125 N.Y.S.2d 250, 282 App.Div. 916, appeal dismissed 123 N.E.2d 574, 307 N.Y. 926.

(4) Other employees.

N.Y.—Schwartz v. State, 297 N.Y.S. 815, 251 App.Div. 634, affirmed 13 N.E.2d 476, 277 N.Y. 567.

Poulakis v. Village of Freeport, 162 N.Y.S.2d 737, 7 Misc.2d 1005. N.J.—Moore v. City of Paterson, 13 A.2d 299, 18 N.J.Misc. 201.

General or special employee

An action for negligence causing death of a workman in general or special employ of an employer is barred.

N.Y.—Wawrzonek v. Central Hudson Gas & Electric Corp., 12 N.E.2d 525, 276 N.Y. 412.

Next of kin

(1) A provision barring other remedies of an employee's next of kin includes his heirs.

Idaho.—Gifford v. Nottingham, 193 P.2d 831, 68 Idaho 330.

(2) A surviving spouse who is employee's only heir at law is included in such a provision.

Ind.—McDonald v. Miner, 32 N.E.2d 885, 218 Ind. 373.

Suit based on negligent treatment by employer's physician

Employee who was injured in course of employment, and who

thereafter was negligently treated by doctor of same employer, and whose injury was compensable under workmen's compensation law, could recover only under that law, and suit against employer to recover for death of employee so injured would be dismissed.

U.S.—Remington v. General Motors Corp., D.C.Mich., 127 F.Supp. 672, cause remanded, C.A., 229 F.2d 738, affirmed 237 F.2d 919.

72. Ky.—Johnson v. Frankfort & C. R. R., 197 S.W.2d 432, 303 Ky. 256. 71 C.J. p 1507 note 66.

Right of action under constitutional provision

Exclusiveness of remedy given by workmen's compensation act has been recognized notwithstanding a right of action for death is conferred by constitution.

Ky.—Davis v. Solomon, 276 S.W.2d 674.

71 C.J. p 1507 note 66 [a].

73. U.S.—Gladden v. Stockard S. S. Co., C.A.Pa., 184 F.2d 510.

Fla.—Brickley v. Gulf Coast Const. Co., 14 So.2d 265, 153 Fla. 216.

Ohio.—Greenwalt v. Goodyear Tire & Rubber Co., 128 N.E.2d 116, 164 Ohio St. 1.

Bankers Indem. Ins. Co. v. Cleveland Hardware & Forging Co., 62 N.E.2d 180, 77 Ohio App. 121, appeal dismissed 62 N.E.2d 251, 145 Ohio St. 615.

Or.—Bigby v. Pelican Bay Lumber Co., 147 P.2d 199, 178 Or. 682.

Tenn.—McDonald v. Dunn Const. Co., 185 S.W.2d 517, 182 Tenn. 213.

W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805, 130 W.Va. 430, 172 A.L.R. 1389.

74. Ky.—Davis v. Solomon, 276 S.W.2d 674.

75. N.J.—Hull v. Hercules Powder Co., 26 A.2d 164, 20 N.J.Misc. 168. N.Y.—Parsons v. Robinson, 53 N.Y.S.2d 400.

R.I.—National India Rubber Co. v. Kilroe, 178 A. 86, 54 R.I. 333.

71 C.J. p 1508 note 67.

76. Mass.—McDonnell v. Berkshire St. Ry. Co., 137 N.E. 268, 243 Mass. 94.

77. U.S.—De Martino v. Bethlehem Steel Co., C.C.A.Mass., 164 F.2d 177.

Shelton v. Seas Shipping Co., D. C.Pa., 75 F.Supp. 195.

Mass.—Silva v. Gorton Pew Fisheries Co., 22 N.E.2d 31, 303 Mass. 531.

71 C.J. p 1508 note 69.

Dependent or nondependent person

A provision of compensation act that compensation for death of an employee provided by act shall be in lieu of any other liability whatsoever to any person excludes liability of employer to any person by reason of death of an employee whether such person is dependent or nondependent.

Cal.—Lelong v. Postal Telegraph-Cable Co., 153 P.2d 204, 66 C.A.2d 849.

71 C.J. p 1508 note 69 [a].

78. U.S.—Moore v. Christensen S. S. Co., C.C.A.Ga., 53 F.2d 299.

71 C.J. p 1508 note 70.

79. Mo.—Midwest Nat. Bank & Trust Co. v. Davis, 233 S.W. 406, 288 Mo. 563.

80. U.S.—Thol v. U. S., C.A.Mont., 218 F.2d 12—Underwood v. U. S., C.A.Colo., 207 F.2d 862—U. S. v.

Remedy sought in courts of another jurisdiction. Where the provision of the compensation act of a state in which the employee's injury occurs, that makes the remedy exclusive, does not create a new cause of action for wrongful death, the remedy under the act has been regarded as cumulative and not exclusive where the remedy is sought in another jurisdiction.⁸¹ A compensation act of the state where the contract of employment was made which otherwise applies to the employer and the employee may preclude an action for the death of the employee under the law of another jurisdiction.⁸² In respect of a claim for damages to which a state act does not apply, the right to pursue a remedy in an admiralty court of the United States has been recognized where the matter is otherwise within the jurisdiction of that court.⁸³

In Oklahoma. Under an amendment to the constitutional provision that the right of action to recover damages for injuries resulting in death shall never be abrogated providing that the legislature may provide compensation for death under the workmen's compensation law, such compensation to be exclusive, and under provisions of the compensation act pursuant thereto providing for death benefits payable to the dependents of a deceased employee, the personal representative of an employee who left no dependents has no right of action for pain and suffering of the employee.⁸⁴ Under the constitutional provision as it stood prior to amend-

ment, the compensation act provided that no right of action for the recovery of damages for injuries resulting in death was intended to be denied or affected,⁸⁵ and it was held that the employee's personal representative was entitled to maintain an action for death on the theory that it resulted from the employer's wrongful act or omission, even though the employee had recovered workmen's compensation;⁸⁶ it was further held that recovery might be had for pain and suffering of the deceased employee when no award of compensation had been made to him before his death,⁸⁷ but not where such an award had been made before his death.⁸⁸

b. Death of Minor Employee

An action against the employer for the death of a minor may not be maintained, even though the employment was illegal, where the compensation act provides the exclusive remedy.

A general statute giving a right of action to a parent for the death of a minor child has been construed in the light of subsequent legislation embodied in the workmen's compensation act making exclusive the remedy under the act for death,⁸⁹ and does not give a right of action where the employee is one who is not excluded from the operation of the compensation act.⁹⁰ Some compensation acts making the remedies therein given exclusive preclude an action for damages for the death of a minor, even though the minor was illegally employed,⁹¹ where the minor was authorized to elect

Firth, C.A.Cal., 207 F.2d 665—U. S. v. Vatuone, C.A.Cal., 200 F.2d 199—U. S. v. Meyer, C.A.Tex., 200 F.2d 110—Mandel v. U. S., C.A. Pa., 191 F.2d 164, affirmed 72 S.Ct. 849, 343 U.S. 427, 96 L.Ed. 1051, rehearing denied 73 S.Ct. 47, 344 U.S. 848, 97 L.Ed. 660.

Patterson v. U. S., D.C.N.Y., 129 F.Supp. 794.

81. U.S.—Elliott v. De Soto Crude Oil Purchasing Corp., D.C.La., 20 F.Supp. 743.

71 C.J. p 1509 note 79.

82. U.S.—Willingham v. Eastern Airlines, C.A.N.Y., 199 F.2d 623.

Spelar v. American Overseas Airlines, D.C.N.Y., 80 F.Supp. 344.

Particular statutes

(1) Where contract of employment was made in Georgia and stated that it was made in contemplation of, and pursuant to, Georgia Workmen's Compensation Act, which contained provision that rights and remedies under such act shall exclude all other rights and remedies because of compensable injury or death, and where there was no indication that public policy of New York precluded application of such statute, Georgia statute barred ac-

tion in New York for wrongful death of employee killed in scope of employment.

U.S.—Willingham v. Eastern Airlines, C.A.N.Y., 199 F.2d 623.

(2) Where flight engineer on passenger airplane en route from New York to Ireland, who was killed when airplane crashed during take-off in Newfoundland, was resident of New York, and his employer was a Delaware corporation with its principal place of business in New York, engineer's death was within coverage of New York Workmen's Compensation Law, precluding wrongful death action under Newfoundland statute, notwithstanding that employer was engaged solely in interstate or foreign commerce, in view of fact that congress had made no provision for compensating employees of airplane carriers engaged in interstate or foreign commerce for personal injuries.

U.S.—Spelar v. American Overseas Airlines, D.C.N.Y., 80 F.Supp. 344.

83. U.S.—The Linseed King, N.Y., 52 S.Ct. 450, 285 U.S. 502, 76 L. Ed. 903.

71 C.J. p 1509 note 80.

84. Okl.—Herndon v. Dolton Barnard Hardware Co., 264 P.2d 723.

85. Okl.—Landry v. Acme Flour Mills Co., 211 P.2d 512, 202 Okl. 170.

71 C.J. p 1509 note 71.

86. Okl.—Weatherman v. Victor Gasoline Co., 130 P.2d 527, 191 Okl. 423.

87. Okl.—Landry v. Acme Flour Mills Co., 211 P.2d 512, 202 Okl. 170 —Consumers' Gas Co. v. O'Bannon, 221 P. 423, 94 Okl. 107.

88. Okl.—Landry v. Acme Flour Mills Co., 211 P.2d 512, 202 Okl. 170.

89. Cal.—McLain v. Llewellyn Iron Works, 204 P. 869, 58 C.A. 58.

Action by or for benefit of person not entitled to compensation see infra § 965.

90. Cal.—Lelong v. Postal Telegraph-Cable Co., 153 P.2d 204, 66 C.A.2d 849.

Fla.—Howze v. Lykes Bros., 64 So. 2d 277.

71 C.J. p 1509 note 75.

91. Cal.—Lelong v. Postal Telegraph-Cable Co., 153 P.2d 204, 66 C.A.2d 849.

and did elect to accept the provisions of the act,⁹² or failed to elect not to be bound by the compensation plan adopted by the employer.⁹³

Where, however, the right to elect in respect of a minor employee is, under the act, in the parent, the right of a parent to sue has been recognized where the parent had no knowledge of the employment of such employee before his death.⁹⁴ Where it is presumed that the employer and employee are bound by the act in the absence of an election to the contrary, which election shall be made by the parent or tutor of a minor, it has been held that an action by the parent is precluded in the absence of an election, even though the employment was illegal and without the knowledge or consent of the parents.⁹⁵

In at least one jurisdiction it has been held that an action for the death of an illegally employed minor by a parent is not precluded by the workmen's compensation act.⁹⁶

c. Employer, Employee, or Employment Not within Act

Where the employer, the employee, or the employment is not covered by the compensation act, an action against the employer for the death of the employee may be maintained.

Where an employee is one of a class of employees excepted from the compensation act,⁹⁷ or where an employer is not within the classes of employers who

are subject to the act,⁹⁸ an action for the death of an employee is not precluded. However, even though the deceased person was not within the class of employees covered by the compensation act, if he was an employee there may be no recovery on the theory that he was an invitee of the employer.⁹⁹

Where a state compensation act is not applicable because the employee was employed in interstate commerce, his representative must look to the common law or to an appropriate statute for relief,¹ and may properly maintain an action for death.² Likewise, a statute which is applicable only to maritime workers does not preclude an action for the death of one whose employment had no connection with an undertaking to carry on trade, commerce or transportation on public waters.³ A compensation act which specifically excepts from its operation persons whose employment is casual in character, and not in the regular course of business of the employer, does not preclude an action for the death of a person within the exception.⁴

§ 965. Action by, or for Benefit of, Person Not Entitled to Compensation

Although there is authority to the contrary, generally, an action for damages may not be maintained for the death of an employee where the compensation act provides the exclusive remedy, even though there are no persons entitled to the benefits provided for dependents by the act.

Conn.—Greenberg v. Guiliano, 38 A. 2d 486, 131 Conn. 157.

N.Y.—Monteleone v. Center Storage Warehouses, 68 N.Y.S.2d 369.

Or.—Manke v. Nehalem Logging Co., 315 P.2d 539.

Right of illegally employed minor employee or his personal representative to sue see supra § 930.

92. Mich.—Thomas v. Morton, 235 N.W. 846, 253 Mich. 613, certiorari denied 52 S.Ct. 8, 284 U.S. 619, 76 L.Ed. 528, and reheard 242 N.W. 235, 258 Mich. 231.

71 C.J. p 1509 note 76.

93. Mont.—Tarrant v. Helena Bldg. & Realty Co., 156 P.2d 168, 116 Mont. 319.

94. U.S.—Freno v. Connell Anthracite Mining Co., C.C.A.Pa., 295 F. 667.

95. U.S.—Goings v. Hardware Mut. Cas. Co., C.A.La., 201 F.2d 837.

96. Utah.—Lucas v. Industrial Commission, 156 P.2d 896, 108 Utah 25.

Right of minor held personal

Right to claim workman's compensation, including statutory double compensation for injuries to minor illegally employed, is personal to minor, and survivors' remedy, for minor's death is by action at law.

Utah.—Lucas v. Industrial Commission, supra.

97. U.S.—Turner v. Wilson Line of Mass., Inc., C.A.Mass., 242 F.2d 414—Wilkes v. Mississippi River Sand & Gravel Co., C.A.Tenn., 202 F.2d 383, certiorari denied Mississippi River Sand & Gravel Co. v. Wilkes, 74 S.Ct. 29, 346 U.S. 817, 98 L.Ed. 344.

Members of a crew

In suits under Jones Act for death of decedents killed while employed on barge, in which district court denied relief because decedents were not members of a crew, district court by placing a restrictive meaning on words "member of a crew," as applied to facts, incorrectly interpreted facts as though claims had origin under Longshoremen's Act and, by presumption, held claims to come within provisions of that act.

U.S.—Wilkes v. Mississippi River Sand & Gravel Co., C.A.Tenn., 202 F.2d 383, certiorari denied Mississippi River Sand & Gravel Co. v. Wilkes, 74 S.Ct. 29, 346 U.S. 817, 98 L.Ed. 344.

98. Ala.—Hardy v. City of Dothan, 176 So. 449, 234 Ala. 664.

Nonprofit electric membership corporation

Ga.—Flint Elec. Membership Corp. v.

Posey, 51 S.E.2d 869, 78 Ga.App. 597.

99. Ohio.—Brown v. L. A. Wells Const. Co., App., 67 N.E.2d 110, affirmed 56 N.E.2d 451, 143 Ohio St. 580.

1. W.Va.—Pritt v. West Virginia Northern R. Co., 51 S.E.2d 105, 132 W.Va. 184, 6 A.L.R.2d 562, certiorari denied West Virginia Northern R. Co. v. Pritt, 69 S.Ct. 891, 336 U.S. 961, 93 L.Ed. 1113.

2. Colo.—Cohen v. Schaetzl, 103 P. 2d 1060, 106 Colo. 266.

W.Va.—Riley v. West Virginia Northern R. Co., 51 S.E.2d 119, 132 W.Va. 208, certiorari denied West Virginia Northern R. Co. v. Riley, 69 S.Ct. 891, 336 U.S. 961, 93 L.Ed. 1113.

3. U.S.—Posavec v. Merritt-Chapman & Scott Corp., D.C.N.Y., 106 F. Supp. 170.

4. Passerby assisting employees

Workmen's compensation act did not bar bringing of a tort action for death of passerby, who was electrocuted while assisting employees of an electric company, at their request, to remove an injured workman from electric wires.

Pa.—Vescio v. Pennsylvania Elec. Co., 9 A.2d 546, 336 Pa. 502.

Where the compensation statute provides that its remedies shall exclude other remedies except such rights and remedies as are not provided for by the compensation statute, and the parents of a deceased minor child who are not his dependents have no right to the death benefit provided for by the compensation statute, they may sue under the wrongful death statute.⁵ Many acts, however, substitute a complete new system for the former remedy by action for damages for the death of an employee⁶ and prevent the bringing of an action for the benefit of certain next of kin of a deceased employee, who were prior to the act entitled to the benefit of such action, even though they are not entitled to compensation under the act;⁷ a similar rule has been recognized as to next of kin not entitled to compensation where the deceased employee and the employer had elected to come under the act.⁸ Even though there are no dependents entitled to the benefits provided by the compensation act in lieu of damages for the death of the employee, an action for death may be excluded.⁹

§ 966. Employer's Nonacceptance of, or Noncompliance with, Act

An employer who is subject to the act but does not accept it may be liable in an action for the death of an employee.

Under some acts, if an employer subject to the act does not accept the act, he may be liable in an action for the death of an employee resulting from wrongful act or negligence,¹⁰ and, as discussed infra § 969, the act sometimes permits the legal representative of the deceased employee to elect either to take compensation or to maintain an action for dam-

ages if the employer fails to secure the payment of compensation.

Death occurring in place subject to jurisdiction of United States. A provision of the workmen's compensation act authorizing an action for damages and rendering unavailable therein the common-law defenses if the employer does not pay premiums into the state industrial fund does not authorize such an action for the death of an employee where the death occurred at a place which, although within the state, has been subject to the exclusive jurisdiction of the United States since a time prior to the enactment of the workmen's compensation act, where the right of action on the default of the employer is conferred as a part of the scheme of state insurance and not otherwise, and the compensation act abolishes actions at law for negligence of the employer and substitutes another system therefor.¹¹

Government control of employer's business may not be a bar to an action for the death of an employee which is maintainable because the employer was not a subscriber to the state compensation fund.¹²

§ 967. Death from Cause or Occurrence Not within Act or Specifically Excepted

An action may be maintained for the death of an employee which resulted from a cause or occurrence not within the compensation act.

A provision rendering the remedy under the act exclusive does not apply where the death of the employee is not compensable because it is not the result of a cause or occurrence to which the act applies,¹³ and in such case an action will lie if the

5. Mo.—*Miller v. Hotel Savoy Co.*, 68 S.W.2d 929, 228 Mo.App. 463.

6. N.Y.—*Shanahan v. Monarch Engineering Co.*, 114 N.E. 795, 219 N.Y. 469.

7. N.Y.—*Shanahan v. Monarch Engineering Co.*, *supra*.

8. N.J.—*Gregutis v. Wacklark Wire Works*, 92 A. 354, 86 N.J.Law 610. 71 C.J. p 1509 note 84.

9. U.S.—*Patterson v. Sears-Robuck & Co.*, C.A.Ala., 196 F.2d 947. Ala.—*De Arman v. Ingalls Iron Works Co.*, 61 So.2d 764, 258 Ala. 205.

Fla.—*Chamberlain v. Florida Power Corp.*, 198 So. 486, 144 Fla. 719.

Kan.—*Neville v. Wichita Eagle, Inc.*, 294 P.2d 248, 179 Kan. 197.

La.—*Atchison v. May*, 10 So.2d 785, 201 La. 1003.

N.Y.—*Poulakis v. Village of Freeport*, 162 N.Y.S.2d 737, 7 Misc.2d 1005.

Or.—*Bigby v. Pelican Bay Lumber Co.*, 147 P.2d 199, 173 Or. 682.

Utah.—*Henrie v. Rocky Mountain Packing Corp.*, 196 P.2d 487, 113 Utah 415, rehearing denied 202 P.2d 727, 113 Utah 444.

71 C.J. p 1508 note 69 [a] (3).

10. W.Va.—*State ex rel. Cashman v. Sims*, 43 S.E.2d 805, 130 W.Va. 430, 172 A.L.R. 1389.

71 C.J. p 1509 note 86.

11. U.S.—*Murray v. Joe Gerrick & Co.*, Wash., 54 S.Ct. 432, 78 L.Ed. 821.

71 C.J. p 1510 note 88.

12. W.Va.—*Stanton v. Ruthbell Coal Co.*, 34 S.E.2d 257, 127 W.Va. 685, certiorari denied 66 S.Ct. 53, 326 U.S. 740, 90 L.Ed. 442.

13. Kan.—*Echord v. Rush*, 261 P. 820, 124 Kan. 521.

N.H.—*Wilkinson v. Achber*, 131 A.2d 51, 101 N.H. 7.

Va.—*Griffith v. Raven Red Ash Coal Co.*, 20 S.E.2d 530, 179 Va. 790.

Cause of death not within employment

(1) Where deceased was killed before his employment had commenced as result of negligence of driver of automobile acting as agent of employer in transporting deceased to place where employment was to commence, so that workmen's compensation law did not apply.

N.Y.—*Dunseath v. Starrett Bros. & Eken*, 42 N.E.2d 474, 288 N.Y. 174, reargument denied 43 N.E.2d 355, 288 N.Y. 734.

(2) Student nurse who entered hospital as a patient for treatment and died allegedly as a result of administrative negligence of hospital.

N.Y.—*Glaser v. Highland Hospital of Rochester*, 131 N.Y.S.2d 728.

(3) Where contract of employment contemplated that employer would furnish one round trip transportation from Louisiana to Mississippi for work on oil well, but bad weath-

elements of a right of action for death exist.¹⁴ Thus, where the death resulted from an occupational disease,¹⁵ as where it resulted from silicosis,¹⁶ and such death is not compensable under the workmen's compensation act, an action for death may be maintained. So, the right to maintain an action for death resulting from a maritime tort has apparently been recognized in view of the nonapplicability of a state compensation act.¹⁷

Accident outside jurisdiction. Where a compensation statute is not applicable to an accident occurring outside the jurisdiction, its provision excluding actions for damages against employers subject to the act does not apply to an action for death resulting from such an accident.¹⁸

§ 968. Death Resulting from Willful Act or Omission or Gross Negligence

Under some statutes there may be a recovery of damages for the death of an employee resulting from the employer's willful act or gross negligence.

Some acts provide that nothing therein shall prohibit the recovery of exemplary damages for the death of an employee occasioned by homicide from the willful act or omission or gross negligence of the employer¹⁹ and contemplate the prosecution of the action in the first instance in the court having jurisdiction of such an action generally and not before the industrial accident board.²⁰

Deliberate intention to produce death. An employer has been held not to be protected from liability other than payment of compensation under

er caused suspension of operation and employees were being transported home until weather cleared, and employee was killed in an accident during course of such trip.

U.S.—Banks v. Travelers Ins. Co., D.C.La., 161 F.2d 305.

14. Kan.—Echord v. Rush, 261 P. 820, 124 Kan. 521.

15. Ohio.—Weil v. Taxicabs of Cincinnati, 39 N.E.2d 148, 139 Ohio St. 198, appeal dismissed 35 N.E.2d 445, 138 Ohio St. 414.

Utah.—Young v. Salt Lake City, 90 P.2d 174, 97 Utah 128.
71 C.J. p 1510 note 91 [a].

Disease not caused by accident

Action for death resulting from lead poisoning was maintainable under Employers' Liability Act on ground of employer's negligent maintenance of defective working conditions as against contention that industrial board would have duty to inquire whether deceased died from injury caused by accident arising out of, and in course of, employment, or whether death was caused by disease resulting from negligence.

Ind.—General Printing Corporation v. Umback, 195 N.E. 281, 100 Ind. App. 285.

16. Ohio.—Triff v. National Bronze & Aluminum Foundry Co., 20 N.E. 2d 232, 135 Ohio St. 191, 121 A.L.R. 1181.

Minn.—Foley v. Western Alloyed Steel Casting Co., 18 N.W.2d 541, 219 Minn. 571.

17. N.Y.—Liverani v. John T. Clark & Son, 176 N.Y.S. 725, reversed on other grounds 181 N.E. 881, 231 N. Y. 178.

18. U.S.—Duskin v. Pennsylvania-Central Airlines Corp., C.C.A.Tenn.,

167 F.2d 727, certiorari denied 69 S.Ct. 56, 335 U.S. 329, 93 L.Ed. 382.

Effect of agreement

Where District of Columbia airline company and pilot domiciled in Tennessee and temporarily residing in New York and making flights from New York City, with stop in Pennsylvania to Birmingham, Alabama, agreed that rights of parties should be governed by Pennsylvania Workmen's Compensation Act, but act provided that it should not apply to accidents outside state except those occurring to Pennsylvania employees engaged in business of state and except accidents to Pennsylvania employees whose duties required them to go temporarily beyond state limits for not more than ninety days, such act did not cover fatal accident to pilot in Alabama and was no bar to an action for wrongful death.

U.S.—Duskin v. Pennsylvania-Central Airlines Corp., supra.

19. Tex.—Bennett v. Howard, 170 S.W.2d 709, 141 Tex. 101.

Jones v. Jeffreys, Civ.App., 244 S.W.2d 924, error refused.
71 C.J. p 1510 note 94.

Compensatory damages not recoverable

(1) Where employer's insurer had satisfied judgment under Texas Workmen's Compensation Act, no recovery could be had against insurer for damages under Texas constitution for death allegedly resulting from aggravation by medical treatment of injury.

U.S.—Martin v. Consolidated Cas. Ins. Co., C.C.A.Tex., 138 F.2d 896.

(2) In action for employee's death caused by burns from explosion, recovery was limited to exemplary damages only, where actual damages had been settled for in prior workmen's compensation proceeding.

U.S.—Bonner v. Texas Co., C.C.A. Tex., 89 F.2d 291.

What constitutes "gross negligence"

(1) Under Texas law, "gross negligence," which will authorize recovery of exemplary damages for death of another, is that entire want of care which would raise belief that act or omission complained of was result of a conscious indifference to rights or welfare of person or persons to be affected by it.

U.S.—McAlester v. Sinclair Refining Co., C.C.A.Tex., 146 F.2d 36.

(2) Employer's failure to use an explosion-proof switch in pump-house where gasoline vapors were present did not show such gross negligence as would authorize recovery of punitive damages above compensation paid for death of employee, in view of evidence that switch used was standard equipment in good repair and that points were immersed in oil to prevent sparks.

U.S.—McAlester v. Sinclair Refining Co., supra.

Rights of employer

Where, at time of workman's death, compensation policy had been filed and approved, and insurer and employer had notified Texas industrial accident board that employer had become a subscriber, but workman had not given notice of reservation of common-law rights, employer was entitled to all rights and defenses of a subscriber under Texas law, in common-law action in federal court for workman's death.

U.S.—Gomillion v. Union Bridge & Const. Co. of Kansas City, Mo., C. C.A.Tex., 100 F.2d 937, certiorari denied 59 S.Ct. 1031, 307 U.S. 634, 83 L.Ed. 1516.

20. Tex.—Morton Salt Co. v. Wells, Civ.App., 35 S.W.2d 454.

71 C.J. p 1510 note 95.

workmen's compensation act where death of an employee results from deliberate intention of employer to produce injury or death.²¹

§ 969. Option, Election, Waiver, or Estoppel

An election between the remedy provided by the compensation act for recovery of compensation and a remedy by action against the employer may be permitted or required; and the election of one remedy may preclude the use of the other.

Under some statutes benefits may be received and an action may be brought against a delinquent employer.²² The widow of an employee who sues the employer under both the Federal Employers' Liability Act and under a state compensation act which provides for recovery of compensation by court proceedings is not required to elect between the remedies provided by the two acts.²³

Some acts give the personal representative or dependents of a deceased employee an option either to proceed under the act for compensation or to bring an action for damages for wrongful death,²⁴ or permit an election in this respect when²⁵ and only when²⁶ the employer has failed to comply with the act as to securing the payment of compensation. A mere failure to pay compensation which is due does not estop the employer and his insurer to contend in an action for the death of the employee that the sole remedy against the employer is under the compensation law.²⁷

Where under the terms of the act the filing by dependents with the employer of any claim constitutes a release of all claims or demands at law, filing a claim with the industrial accident board and service on the employer prevent an action by the administrator,²⁸ and, even in the absence of express provision, the legal representative of a deceased em-

ployee may by proceeding to obtain an award under the workmen's compensation act and accepting a decision in his favor in such proceeding be estopped to maintain an action for damages against the employer.²⁹

Where the act provides that a legal representative who makes application for an award or accepts compensation waives his right to exercise his option to institute proceedings in any court for damages, a legal representative who seeks compensation under the act is estopped to bring an action for damages if the industrial commission finds in favor of the legal representative,³⁰ or such representative accepts compensation under the act;³¹ but the rule is otherwise if the commission rejects the claim on the sole ground that at the time of the injury deceased was not in the employ of defendant employer or killed in the course of employment.³² Where, however, an appeal from the denial of compensation by the commission for want of jurisdiction is pending, the personal representative may not maintain an action for damages.³³

A provision which gives an injured employee the option to claim compensation or to maintain an action at law for damages under certain circumstances where the injury was caused by the employer's gross negligence or willful misconduct does not give such option to one seeking recovery for the death of an employee which, it is alleged, was caused by the gross negligence of the employer.³⁴ The mere filing of a claim under a compensation act has been held not to prevent a widow of a deceased employee from dismissing her claim or refusing the benefits awarded in order that a remedy by suit under another statute may be pursued.³⁵ It has been held that where a personal representative, acted in making his election to accept compensation on misin-

21. Ky.—Morrison v. Carbide & Carbon Chemicals Corp., 129 S.W. 2d 547, 278 Ky. 746.

22. Or.—Manke v. Nehalem Logging Co., 315 P.2d 589.

23. U.S.—Quin v. Kansas City Southern Ry. Co., D.C.La., 8 F. Supp. 78.

24. Okl.—Davis v. Hagen, 233 P. 671, 106 Okl. 167, 71 C.J. p 1510 note 86.

25. Iowa.—Casey v. Hansen, 26 N. W.2d 50, 238 Iowa 62, 71 C.J. p 1510 note 97.

Status of employer as though he rejected act

Where employer had not insured his liability to pay compensation for injuries to workmen and had not been relieved from doing so, and employer had more than five persons

in hazardous employment, and administratrix of a fatally injured employee elected to sue for damages at common law, employer's status was same as though he had rejected compensation act.

Iowa.—Casey v. Hansen, supra.

26. D.C.—Garcia v. De Leon, Mun. App., 59 A.2d 637.

N.Y.—Culhane v. Economical Garage, Inc., 186 N.Y.S. 454, 195 App.Div. 108.

27. U.S.—Banks v. Travelers Ins. Co., D.C.La., 66 F.Supp. 801, reversed on other grounds, C.C.A., 161 F.2d 305.

28. Mich.—Gray v. Brown & Sehler Co., 166 N.W. 930, 200 Mich. 177.

29. N.J.—Yearicks v. City of Wildwood, 92 A.2d 873, 23 N.J.Super. 379.

71 C.J. p 1510 note 1.

30. Ohio.—Conrad v. Youghiogheny & Ohio Coal Co., 140 N.E. 482, 107 Ohio St. 387, 36 A.L.R. 1288, 71 C.J. p 1511 note 2.

31. Ohio.—Conrad v. Youghiogheny & Ohio Coal Co., supra.

32. Ohio.—Conrad v. Youghiogheny & Ohio Coal Co., supra.

33. Ohio.—Slattery v. Wallingford, 4 Ohio Supp. 311.

34. Cal.—McLain v. Llewellyn Iron Works, 204 P. 869, 56 C.A. 58, 71 C.J. p 1511 note 5.

35. U.S.—Wilkes v. Mississippi River Sand & Gravel Co., C.A.Tenn., 202 F.2d 383, certiorari denied Mississippi River Sand & Gravel Co. v. Wilkes, 74 S.Ct. 29, 346 U.S. 817, 98 L.Ed. 844.

formation given by an agent of the employer, he may be permitted to rescind his election and substitute an action at law for the compensation proceedings.³⁶

Under some acts, the parent of a minor employee, who elects to pursue a remedy under the workmen's compensation act, may thereby lose the right to recover damages for the death of such employee,³⁷ and where, as discussed supra § 125, under the act a conclusive presumption has arisen that a minor employee has accepted the provisions of the act and the remedy given by the act is exclusive, the administrator of such employee cannot, after the death of the employee, exercise an election to renounce the benefits of the act and bring an action at law to recover damages.³⁸

Waiver or exercise of option by particular persons, and whose rights affected. Where the statute provides that in case of the death of the employee failure of the employer to secure compensation shall permit the "legal representative" of the employee to elect to claim compensation or to maintain an action for damages, the dependent, and not the administrator or executor, is entitled to elect.³⁹ The view has been taken that a waiver provided for by statute by electing to take compensation or to bring an action for damages for death of an employee is not binding on a beneficiary who is not sui juris,⁴⁰ as, for example, a minor,⁴¹ and the mother of the minor may not, by accepting compensation under the act, waive the right of the minor to the benefit of an action for death caused by wrongful act or neglect where under the constitution such action may not be abrogated and the amount of recovery may not be made subject to any statutory limitation.⁴²

The right of dependent father of a deceased employee to sue where the employer has failed to comply with the provisions of the act has been recognized notwithstanding certain language recognizing liability to the personal representative.⁴³ The view has been expressed that the personal represent-

ative of a deceased employee appointed in one state who was not entitled to compensation under the workmen's compensation act of another state could not disaffirm the contract of deceased to be bound by such act and take other proceedings for recovery where other persons were the beneficiaries in respect of compensation under such act.⁴⁴ The acceptance of workmen's compensation by the employee during his lifetime may constitute an acceptance of the act so as to prevent an action by his personal representative for his death which resulted from the injury for which compensation was paid.⁴⁵

Time for exercising option. Where a provision of the act giving persons entitled to compensation for the death of an employee the option to elect to claim compensation or to recover damages if the employer fails to comply with certain provisions requires that the option to elect to bring an action for damages shall be exercised by notice to the employer within a specified time after the injury, failure to give such notice within the specified time prevents the maintenance of the action.⁴⁶

In Arizona, where a constitutional provision requiring the enactment of a workmen's compensation act gives the employee the option to settle for compensation or to retain the right to sue for damages, an act passed pursuant to such constitutional provision does not preclude the personal representative of a deceased employee from bringing an action for damages under the general death statute, even though the case is one in which an employee might elect to take compensation under the act;⁴⁷ but where the act provides that the employee shall be conclusively presumed to have elected to take compensation under the act if he has not given the required notice in writing, the personal representative of a deceased employee may not maintain an action at law for damages under the employers' liability act where such conclusive presumption has arisen,⁴⁸ since the rights of the dependents of such deceased employee who has not given the required

36. N.H.—Ahern v. Eldredge Brewing Co., 192 A. 569, 89 N.H. 48.

37. Mich.—Sotonyi v. Detroit City Gas Co., 232 N.W. 201, 251 Mich. 393.

38. Conn.—Wells v. Radville, 153 A. 154, 112 Conn. 459.

39. N.Y.—Dearborn v. Peugeot Auto Import Co., 155 N.Y.S. 769, 170 App.Div. 93.

71 C.J. p 1511 note 9.

40. Utah.—Garfield Smelting Co. v. Industrial Commission of Utah, 178 P. 57; 53 Utah 133.

41. Utah.—Garfield Smelting Co. v. Industrial Commission of Utah, supra.

42. Utah.—Garfield Smelting Co. v. Industrial Commission of Utah, supra.

43. N.D.—Olson v. Hemsley, 187 N. W. 147, 48 N.D. 779.

44. U.S.—In re Spencer Kellogg & Sons, C.C.A.N.Y., 52 F.2d 129, reversed on other grounds The Linseed King, 52 S.Ct. 450, 285 U.S. 302, 76 L.Ed. 903.

45. Ky.—Davis v. Solomon, 276 S. W.2d 674.

46. Conn.—Wells v. Radville, 153 A. 154, 112 Conn. 459.

47. Ariz.—Inspiration Consol. Copper Co. v. Conwell, 190 P. 88, 21 Ariz. 480—Behringer v. Inspiration Consolidated Copper Co., 149 P. 1065, 17 Ariz. 232.

48. Ariz.—Corral v. Ocean Accident & Guarantee Corporation, 23 P.2d 934, 42 Ariz. 213.

notice are fixed and must be administered by the industrial commission.⁴⁹

§ 970. Necessity for Tort Chargeable to Employer

Generally, an employer is not liable in an action for the death of an employee, unless the employer has been negligent or otherwise guilty of an actionable tort.

The necessity for a showing that defendant employer was guilty of an actionable tort in order to render him liable in an action for damages for the death of an employee, if the act was otherwise maintainable because of the employer's having elected not to be bound by the compensation act, has been recognized,⁵⁰ and, if in such case defendant employer was not negligent and the accident which caused the death of the employee was due solely to an act of the employee, there can be no recovery.⁵¹ Where, as discussed supra § 968, compensation act permits the maintenance of an action for exemplary damages for the death of an employee, caused by the gross negligence of the employer, the negligence contemplated by the act must be shown.⁵² Under a provision of the compensation act that employers who fail to pay premiums as required by the act shall not be entitled to the benefit of the act during the period of such noncompliance but shall be liable to the personal representatives of employees where death results from the injuries, it has been held that an employer who is in default may be liable, even though in the absence of such provision there would be no liability.⁵³

§ 971. Contributory Negligence

Under particular statutory provisions, an employer

sued for damages for the death of an employee may, or may not, be permitted to assert the employee's contributory negligence as a defense.

Under some acts defendant employer may not rely on the contributory negligence of the deceased employee to defeat recovery in an action which is maintainable because of the nonacceptance of,⁵⁴ or the noncompliance with,⁵⁵ the act by the employer. Where the action is for exemplary damages for death resulting from gross negligence of the employer, the defense of contributory negligence is available.⁵⁶

Under other acts, however, the nonaccepting employer may, it seems, rely on the defense of contributory negligence,⁵⁷ and, in an action based on the gross negligence of defendant, the view has been taken that the contributory negligence of the deceased employee constitutes a defense.⁵⁸

§ 972. Assumption of Risk

Under some statutory provisions an employer may not rely on assumption of risk by an employee to defeat an action for the death of the employee; under other provisions the defense is available.

Under some acts defendant employer may not rely on assumption of risk by the deceased employee to defeat recovery in an action which is maintainable because of the nonacceptance of the act by the employer,⁵⁹ or his default in making payments, to the compensation fund;⁶⁰ but the defense is available in an action for exemplary damages based on the gross negligence of the employer.⁶¹ Under some acts, however, in the event that the personal representative has exercised his election to bring an action, his right to recover may be defeated by the

49. Ariz.—Corral v. Ocean Accident & Guarantee Corporation, supra. 71 C.J. p 1512 note 21.

50. W.Va.—Ferguson v. Pinson, 50 S.E.2d 476, 131 W.Va. 691. 71 C.J. p 1512 note 23.

51. Ky.—Smith's Adm'r v. Honaker, 197 S.W.2d 780, 303 Ky. 348—Harlan Central Coal Co. v. Gemmeno's Adm'r, 178 S.W.2d 217, 296 Ky. 828—Highsplint Coal Co. v. Palmer's Adm'r, 20 S.W.2d 1020, 231 Ky. 24.

W.Va.—Ferguson v. Pinson, 50 S.E.2d 476, 131 W.Va. 691.

52. Tex.—Magnolia Petroleum Co. v. Ford, Civ.App., 14 S.W.2d 97, error denied 17 S.W.2d 36, 118 Tex. 461.

53. N.D.—Fahler v. City of Minot, 194 N.W. 695, 49 N.D. 960. 71 C.J. p 1512 note 27.

54. Fla.—Tampa Elec. Co. v. Hardy, 190 So. 478, 139 Fla. 142.

Ky.—Harlan Central Coal Co. v. Gemmeno's Adm'r, 178 S.W.2d 217, 296 Ky. 828.

W.Va.—Stanton v. Ruthbell Coal Co., 34 S.E.2d 257, 127 W.Va. 685, certiorari denied 66 S.Ct. 53, 326 U.S. 740, 90 L.Ed. 442.

71 C.J. p 1512 note 29.

55. Tex.—Lerer v. Raines, Civ.App., 27 S.W.2d 621.

71 C.J. p 1512 note 30.

56. In Texas

(1) Workmen's compensation act did not abolish defense of contributory negligence in action for exemplary damages for death due to gross negligence of employer.

Tex.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128.

Magnolia Petroleum Co. v. Dunn, Civ.App., 72 S.W.2d 387, error dismissed.

(2) For earlier authorities apparently to contrary see 71 C.J. p 1512 note 31.

57. N.H.—Hussey v. Boston & M. R. R., 133 A. 9, 82 N.H. 236. 71 C.J. p 1512 note 32.

58. Cal.—Brown v. Lemon Cove Ditch Co., 171 P. 705, 36 C.A. 94.

59. Ky.—Harlan Central Coal Co. v. Gemmeno's Adm'r, 178 S.W.2d 217, 296 Ky. 828.

W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805, 130 W.Va. 430, 172 A.L.R. 1389.

71 C.J. p 1512 note 35.

60. W.Va.—State ex rel. Cashman v. Sims, supra.

61. In Texas

(1) Rule as stated in text applies. Tex.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128.

Magnolia Petroleum Co. v. Dunn, Civ.App., 72 S.W.2d 387, error dismissed.

(2) For earlier authorities apparently to contrary see 71 C.J. p 1513 note 36.

fact that the deceased employee assumed the risk.⁶² In a jurisdiction in which the distinction is recognized between voluntary and contractual assumption of risk, the view has been taken that a provision eliminating assumption of risk as a ground for defeating recovery refers to voluntary, and not contractual, assumption of risk.⁶³

§ 973. Negligence of Fellow Servant

Under the various statutory provisions an employer may or may not rely on the negligence of a fellow servant to defeat recovery in an action for the death of an employee.

Under some acts where an action lies for the death of an employee, defendant employer may not rely on the negligence of a fellow servant of the deceased employee to defeat recovery,⁶⁴ as, for example, where the action is maintainable because of the nonacceptance of,⁶⁵ or noncompliance with,⁶⁶ the act by the employer. The defense may be available, however, in an action for exemplary damages based on gross negligence of the employer.⁶⁷

§ 974. Effect of Award, Judgment, or Finding in Compensation Proceeding

An award, judgment, or finding, in a compensation proceeding or the acceptance of compensation thereunder may or may not affect an action against the employer for the death of the employee.

A judgment in a proceeding for compensation for the death of an employee denying compensation on the ground that the death did not result from a cause which was within the operation of the act is not a bar to a subsequent action for such death,⁶⁸ and, in an action by the widow of a deceased employee for his death under a provision of the act permitting such action where the employer has failed to insure, the finding of the industrial commission in a prior compensation proceeding that the evidence

was insufficient to establish that the deceased employee received an injury arising out of, and in the course of, any employment with the alleged employer or that the death was caused by injury does not constitute a defense.⁶⁹

So, a determination in a compensation proceeding by the compensation board or commission denying an award on the ground that the accident or injury did not arise in the course of employment is not a bar to a subsequent action for the death of the employee⁷⁰ or of an alleged employee⁷¹ against the employer or the alleged employer. Where, however, the disallowance of a claim for compensation involves a determination that the death was not a result of negligence by the employer, a subsequent action for death which is dependent on negligence of the employer may not be maintained.⁷²

Where a widow claimed compensation under the Longshoremen's Act, but moved to dismiss her claim, the judgment of the commissioner after denial of the motion that the claim was compensable and the award of compensation which the widow refused to accept does not preclude the maintenance of an action for damages by the employee's personal representative.⁷³ A decision of the workmen's compensation board making an award against the employer and in favor of a state fund holding that the employee left no dependents, that no claim was made for his funeral expenses, and that his death arose out of, and in the course of, his employment, does not bar an action by the employee's personal representative against the employer for the death of the employee,⁷⁴ and does not prevent the litigation in such an action of an issue whether the death arose out of, and in the course of, the employment.⁷⁵

An award of compensation has been held to bar an action against the employer.⁷⁶ A final and un-

62. N.H.—Smith v. Mason-Perkins Paper Co., 117 A. 11, 80 N.H. 299.

63. Mass.—Ashton v. Boston, etc., R. Co., 109 N.E. 820, 222 Mass. 65, L.R.A.1916B 1281.
71 C.J. p 1513 note 39.

64. Tex.—El Paso Electric Co. v. Sawyer, Com.App., 298 S.W. 267.

65. Ky.—Harlan Central Coal Co. v. Gemmeno's Adm'r, 178 S.W.2d 217, 296 Ky. 828.
71 C.J. p 1513 note 42.

66. Tex.—Lerer v. Raines, Civ.App., 27 S.W.2d 621.
71 C.J. p 1513 note 43.

67. Tex.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128.

68. Kan.—Echord v. Rush, 261 P. 820, 124 Kan. 521.
71 C.J. p 1513 note 44.

69. Cal.—Peters v. California Building-Loan Ass'n, 2 P.2d 439, 116 C. A. 143.

70. Md.—Kendall Lumber Co. v. State, 103 A. 141, 132 Md. 93.
Va.—Griffith v. Raven Red Ash Coal Co., 20 S.E.2d 530, 179 Va. 790.

Inconsistent position

Fact that contention in action for death of employee that death was not compensable was inconsistent with contention in prior proceeding for compensation did not estop plaintiff in action for death.

Va.—Griffith v. Raven Red Ash Coal Co., supra.

71. Ky.—Partin's Adm'r v. Black Mountain Corporation, 36 S.W.2d 1, 237 Ky. 556.
71 C.J. p 1513 note 47.

72. Md.—State, to Use of Wilson, v. North East Fire Brick Co., 24 A.2d 287, 180 Md. 367.

73. U.S.—Wilkes v. Mississippi River Sand & Gravel Co., C.A. Tenn., 202 F.2d 383, certiorari denied Mississippi River Sand & Gravel Co. v. Wilkes, 74 S.Ct. 29, 346 U.S. 817, 98 L.Ed. 344.

74. N.Y.—Department of Taxation and Finance v. City of New York, 71 N.Y.S.2d 572, 272 App.Div. 407.

75. N.Y.—Department of Taxation and Finance v. City of New York, supra.

76. U.S.—Gladden v. Stockard S. Co., C.A.Pa., 184 F.2d 510.

modified judgment by the court of a state in a compensation proceeding, awarding compensation for the death of an employee on a determination that the deceased employee was engaged in intrastate commerce and, therefore, subject to the compensation act of such state, is conclusive in an action under the Federal Employers' Liability Act for such death where the judgment in the compensation proceeding is rendered first and there is, in legal contemplation, an identity of parties,⁷⁷ whether or not the determination as to the character of the commerce is correct,⁷⁸ and prevents the maintenance of the action under such liability act.⁷⁹

A similar rule as to conclusiveness has been recognized where the determination as to employment in intrastate commerce, and the award of compensation, were made by the industrial accident board and a judgment of court on such award was entered, in so far as the rights of the widow of the deceased employee are affected, where she prosecuted the compensation proceeding and also, as personal representative of the deceased employee, prosecuted the action under the Federal Employers' Liability Act for her own benefit and that of another.⁸⁰ It has been held, however, that, where the employee was engaged in interstate commerce, an award to the widow under the state compensation act is void and does not bar an action by the personal representative under the federal statute;⁸¹ and the view has been expressed that the award in the compensation proceeding is not a bar to the whole cause of action under the Federal Employers' Liability Act where there are persons claiming as beneficiaries in such action who were not entitled to share in the award of compensation.⁸²

An award of compensation in a proceeding under

a state compensation act, sought and accepted by a dependent of a deceased employee with full knowledge of his rights, has been held to bar the subsequent prosecution of a death claim in an admiralty court by the dependent as personal representative, for the benefit of the dependent.⁸³

Payment of award or compensation. Under some workmen's compensation acts, no action may be brought against the employer for the death of the employee where the employer has paid a compensation award⁸⁴ for the death of the employee.⁸⁵ Where the statute governing actions for death gives a right of action only when the person injured could have maintained an action for injuries if he had survived, as considered supra § 1533, no action may be maintained under the statute if the employee accepted compensation under the compensation act,⁸⁶ or if payments of compensation for the death of the employee have been accepted.⁸⁷

Under a constitutional provision that the right to recover damages for death shall never be abrogated except in cases where compensation is provided for by law, the payment of part of the burial expenses and a specified amount to the state treasury as required by the compensation act when there are no dependents is compensation.⁸⁸ Where an action for exemplary damages for death of an employee resulting from the employer's gross negligence, as considered supra § 968, is permissible, the fact that the employer has paid compensation so that actual damages may not be recovered in the action for exemplary damages does not prevent the maintenance of the suit.⁸⁹

§ 975. Procedure

Actions against an employer for death of an employee

77. U.S.—Chicago, R. I. & P. Ry. Co. v. Schendel, Minn., 46 S.Ct. 420, 270 U.S. 611, 70 L.Ed. 757.

71 C.J. p 1513 note 48.

78. U.S.—Chicago, R. I. & P. Ry. Co. v. Schendel, supra.

79. U.S.—Chicago, R. I. & P. Ry. Co. v. Schendel, supra.

80. Cal.—Williams v. Southern Pac. Co., 202 P. 356, 54 C.A. 571, certiorari denied 42 S.Ct. 315, 258 U.S. 622, 66 L.Ed. 796.

71 C.J. p 1514 note 51.

81. W.Va.—Riley v. West Virginia Northern R. Co., 51 S.E.2d 119, 132 W.Va. 208, certiorari denied West Virginia Northern R. Co. v. Riley, 69 S.Ct. 891, 336 U.S. 961, 93 L.Ed. 1113.

82. Cal.—Williams v. Southern Pac. Co., 202 P. 356, 54 C.A. 571, cer-

tiorari denied 42 S.Ct. 315, 258 U.S. 622, 66 L.Ed. 796.

71 C.J. p 1514 note 52.

83. U.S.—In re Famous Players Lasky Corporation, D.C.Cal., 30 F.2d 402.

71 C.J. p 1514 note 53.

84. U.S.—Elliott v. Armour & Co., D.C.S.C., 30 F.Supp. 367.

85. U.S.—Brady v. Roosevelt S. S. Co., N.Y., 63 S.Ct. 425, 317 U.S. 575, 87 L.Ed. 471, certiorari denied Roosevelt S. S. Co. v. Brady, 63 S.Ct. 1320, 319 U.S. 763, 87 L.Ed. 1714, rehearing denied 63 S.Ct. 659, 318 U.S. 799, 87 L.Ed. 1163.

Curran v. Mackay Radio & Tel. Co., D.C.N.Y., 123 F.Supp. 83.

Ark.—Odum v. Arkansas Pipe & Scrap Material Co., 187 S.W.2d 320, 208 Ark. 678.

N.Y.—Levine v. City of New York, 167 N.Y.S.2d 980, 8 Misc.2d 410.

N.C.—Bright v. N. B. & C. Motor Lines, 193 S.E. 391, 212 N.C. 384.

86. U.S.—Schlavick v. Manhattan Brewing Co., D.C.Ill., 103 F.Supp. 744.

87. U.S.—Gerardo v. U. S., D.C.Cal., 101 F.Supp. 383—Ocasio v. U. S., D.C.Puerto Rico, 99 F.Supp. 601. D.C.—Brown v. Curtin & Johnson, Inc., 221 F.2d 106, 95 U.S.App.D.C. 234.

Ciarrocchi v. James Kane Co., D.C., 116 F.Supp. 848—O'Neil v. Shelton Bros. Trucking Co., D.C., 116 F.Supp. 654.

88. Utah.—Henrie v. Rocky Mountain Packing Corp., 196 P.2d 487, 118 Utah 415.

89. Tex.—People's Ice Co. v. Nowling, Civ.App., 16 S.W.2d 976—Robertson v. Magnolia Petroleum Co., Civ.App., 255 S.W. 223.

must be timely brought. Where the death is covered by a workmen's compensation act, such an action may be dismissed.

An action for death of an employee must be brought within the time specified by statute.⁹⁰

Dismissal of a suit against an employer or insurer for the death of an employee whose death is covered by the provisions of the workmen's compensation act is proper.⁹¹

§ 976. — Pleading

- a. Declaration, petition, or complaint
- b. Plea or answer
- c. Issues, proof, and variance

a. Declaration, Petition, or Complaint

General rules as to the declaration, petition, or complaint apply in actions for the wrongful death of an employee, but it is sometimes required that the nonapplicability of the compensation act be pleaded.

General rules as to the declaration, petition, or complaint in an action for wrongful death, as considered in Death §§ 67-74, apply in an action for the death of an employee prosecuted notwithstanding the existence of a compensation act.⁹² The necessity for alleging the negligence of defendant employer⁹³ as the proximate cause of the death⁹⁴

in an action maintainable because of defendant employer's election not to come under the act has been recognized.

While, as shown *infra* subdivision b of this section, the view has been taken that, under certain circumstances at least, the existence of a compensation act and the election of the deceased employee before his death to accept compensation are to be pleaded as matters of defense, usually, where the remedy provided by the workmen's compensation act is exclusive if the act applies, plaintiff, in order to state a cause of action for the death of an employee, must allege facts which show that the act does not apply if the act is otherwise applicable to the other facts alleged,⁹⁵ that is, he must negative the presumption that the act applies.⁹⁶ So, where the act makes the remedy thereunder exclusive except that the legal representative of a deceased employee may elect either to claim compensation or to maintain an action for damages if the employer fails to secure the payment of compensation, plaintiff must allege such failure where the other facts alleged show that the act is applicable.⁹⁷

Where the foregoing rules are applicable, a complaint which does not comply with them is demur-

90. Ohio.—*Tomasi v. Crucible Steel Castings Co.*, 17 Ohio Supp. 185—*Bryson v. American Tool Works Co.*, 5 Ohio Supp. 292.

Action held commenced in time
Ohio.—*Weil v. Taxicabs of Cincinnati*, 39 N.E.2d 148, 139 Ohio St. 198.

91. Ark.—*Scobey v. Southern Lumber Co.*, 238 S.W.2d 640, 218 Ark. 671.

Suit against insurer

Petition, in action on a workmen's compensation insurance contract to recover for accidental death of husband arising out of, and in course of, employment, was properly dismissed by superior court on demurrer, since remedy for enforcement of rights, if any, under contract was proceeding before department of industrial relations.

Ga.—*Grice v. U. S. Fidelity & Guaranty Co.*, 200 S.E. 700, 187 Ga. 259.

92. Ala.—*Jenkins v. Mann*, 127 So. 230, 220 Ala. 661.
71 C.J. p 1514 note 55.

93. Ill.—*Bacon v. Emerson-Brantingham Co.*, 213 Ill.App. 96.

94. Ky.—*Smith's Adm'x v. Honaker*, 197 S.W.2d 780, 303 Ky. 348.

95. U.S.—*Gladden v. Stockyard S. Co.*, C.A.Pa., 184 F.2d 510.
Cal.—*Singleton v. Bonnesen*, 280 P. 2d 481, 131 C.A.2d 327.

Ill.—*Parker v. Alton R. Co.*, 14 N.E.2d 665, 295 Ill.App. 60.

Pa.—*Capozzoli v. Stone & Webster Engineering Corp.*, 42 A.2d 524, 352 Pa. 183.

Zagozan v. Testa Bros., Inc., Com.Pl., 35 West.L.J. 189.
71 C.J. p 1514 note 58.

Allegations held not to take case out of compensation act

In action for employee's death as result of gas explosion on defendant employer's premises, count of declaration, alleging that defendant, by willful, deliberate, or culpable acts in ordering employee to operate certain electrical equipment when defendant knew or should have known that gas explosion could result therefrom, caused explosion, did not take cause out of workmen's compensation act, but alleged injuries arising out of, and in course of, decedent's employment within such act.

N.H.—*Wilkinson v. Achber*, 131 A.2d 51, 101 N.H. 7.

Complaint held sufficient to prevent judgment on pleadings.

N.Y.—*Lavin v. Goldberg Bldg. Material Corp.*, 87 N.Y.S.2d 90, 274 App.Div. 690, appeal denied 89 N.Y.S.2d 523, 275 App.Div. 865.

Interstate commerce

(1) If employer is engaged in interstate commerce so as to be regulated by federal statute rather than by state compensation act, matter must be pleaded by plaintiff.

Ky.—*Johnson v. Frankfort & C. R.*, 197 S.W.2d 432, 303 Ky. 256.

(2) In action by administratrix against railroad company for death of employee, a motion to dismiss, which was supported by affidavit that employee and his employer were subject to compensation act and that railroad company was subject to compensation act, was properly sustained, where complaint failed affirmatively to allege that railroad company was engaged in interstate commerce, so as to be excepted from operation of workmen's compensation act.

Ill.—*Parker v. Alton R. Co.*, 14 N.E.2d 665, 295 Ill.App. 60.

Prima facie showing of noncompliance

In action for employee's death against employer, subscriber to workmen's compensation fund, allegation that employer failed to post statutory notices constitutes prima facie showing of employer's noncompliance with statute; absence of actual notice need not be alleged.

W.Va.—*Maynard v. Island Creek Coal Co.*, 175 S.E. 70, 115 W.Va. 249.

96. N.J.—*Cowart v. Borough of Freehold*, 21 A.2d 738, 127 N.J.Law 215.

71 C.J. p 1515 note 59.

97. W.Va.—*Ferguson v. Pinson*, 50 S.E.2d 476, 131 W.Va. 691.

71 C.J. p 1515 note 61.

table⁹⁸ as not stating a cause of action.⁹⁹ There is, however, authority for the view that a complaint by an administrator is not demurrable where it does not appear on the face of the complaint that the act applies to defendant employer.¹ The view has been expressed that the contention that an action by the personal representative of a deceased employee is barred by his election to take compensation under the act is a matter of defense which is not presented by a demurrer to the complaint for failure to state a cause of action.² Where it does not appear from the pleadings or issues made that the employer and employee are covered by the act,³ and a fortiori, where it is shown by the pleadings that the employer is presumptively a person not included in the employers covered by the act,⁴ no presumption that the act applies arises, and plaintiff is not required affirmatively to plead wherein the act is not applicable.⁵

Where the employer may be liable in an action for the death of the employee resulting from employer's negligence if employer failed to comply with the compensation act, or resulting from employer's deliberate intention to produce death, a complaint seeking recovery on either theory is sufficient if it alleges all the essentials of one of the theories.⁶ Where by an election not to be bound by the act defendant employer is precluded from relying on the contributory negligence of, or the assumption of risk by, the deceased employee, as considered supra

§§ 971, 972, it is not necessary that the complaint should contain an averment as to whether the employee had knowledge of the unsafe condition of the place of work.⁷

Under statutory provisions authorizing recovery of exemplary damages for the death of an employee caused by the willful act or gross negligence of the employer, plaintiff must plead actual loss or injury.⁸

Death of minor employee. Where the compensation act makes the remedy exclusive in cases to which the act applies, the parent of a minor employee, in order to state a cause of action for the death of such employee, must allege facts which show that the act does not apply if the act is otherwise applicable to the facts alleged,⁹ that is, there must be allegations negating a presumption, arising from the facts alleged, that the act applies,¹⁰ and the complaint is demurrable as not stating a cause of action where the facts alleged show that the case is one within the provisions of the act.¹¹ Where, under the statute giving a right of action for wrongful death, no cause of action is vested in the mother of a minor child, if she is married, except on a showing that her husband has abandoned his family, such fact of abandonment must be alleged in an action by the mother of a minor employee for such employee's death in order to state a cause of action.¹²

:98. Ala.—De Arman v. Ingalls Iron Works Co., 61 So.2d 764, 253 Ala. 205.

Pa.—Hyzy v. Pittsburgh Coal Co., 121 A.2d 85, 384 Pa. 816.

Applicability of act may be raised by demurrer, it being unnecessary to plead matter so as to permit plaintiff to plead that employee left no dependents, since no nondependent may predicate suit on such an allegation.

Ala.—De Arman v. Ingalls Iron Works Co., 61 So.2d 764, 253 Ala. 205.

71 C.J. p 1515 note 62.

:99. N.Y.—Culhane v. Economical Garage, 186 N.Y.S. 454, 195 App. Div. 108—Nulle v. Hardman, Peck & Co., 178 N.Y.S. 236, 185 App.Div. 351.

1. N.C.—Cooke v. Gillis, 12 S.E.2d 250, 218 N.C. 726.

71 C.J. p 1515 note 64.

Complaint held not demurrable

(1) Where a complaint in action against employer for wrongful death of employee alleged facts which would bring case within provisions of workmen's compensation act, except for allegation that at time of

employee's death employer was not operating under workmen's compensation act, such complaint did not show on its face, as a matter of law, that superior court had no jurisdiction.

N.C.—Cooke v. Gillis, supra.

(2) Other complaints see 71 C.J. p 1515 note 64 [a].

Complaint held not vulnerable to motion to dismiss

Complaint, disclosing that employee was merely invited to attend employers' annual Sunday good will outing and did not work on outing and was not under employers' control, did not establish that employee's death, resulting from burns received when a fishing boat was set on fire, was compensable under workmen's compensation law, so as to defeat right to maintain common-law death action against employers where relation of master and servant did not exist between parties at time and with respect to transaction resulting in death.

N.C.—Barber v. Minges, 25 S.E.2d 337, 223 N.C. 213.

2. N.Y.—Culhane v. Economical

Garage, 186 N.Y.S. 454, 195 App. Div. 108.

71 C.J. p 1515 note 65.

3. Ga.—Flint Elec. Membership Corp. v. Posey, 51 S.E.2d 869, 78 Ga.App. 597.

4. Ga.—Flint Elec. Membership Corp. v. Posey, supra.

5. Ga.—Flint Elec. Membership Corp. v. Posey, supra.

6. W.Va.—Maynard v. Island Creek Coal Co., 175 S.E. 70, 115 W.Va. 249—Collins v. Dravo Contracting Co., 171 S.E. 757, 114 W.Va. 229.

7. Ind.—U. S. Railroad Administration v. Monahan, 137 N.E. 778, 138 N.E. 785, 79 Ind.App. 673.

8. Tex.—King v. Keystone-Fleming Transport Co., Civ.App., 299 S.W. 2d 747.

9. Cal.—McLain v. Llewellyn Iron Works, 204 P. 869, 56 C.A. 60.

10. La.—Labourdette v. Doullut & Williams Shipbuilding Co., 100 So. 547, 156 La. 412.

11. Cal.—Treat v. Los Angeles Gas & Electric Corporation, 256 P. 447, 82 C.A. 610.

12. Cal.—McLain v. Llewellyn Iron Works, 204 P. 869, 56 C.A. 60.

Amendment setting up death statute of another state. On a motion to amend a complaint in an action by the personal representative of a deceased employee so as to set up the death statute of another state where the death occurred, the court has declined to consider defendant's objection to the amendment based on the existence of a compensation act in such other state, on the ground that the existence of such statute was a matter of defense.¹³

b. Plea or Answer

General rules as to pleas or answers apply in actions for death of an employee. Matters of affirmative defense with respect to the application of the compensation act must be pleaded.

Subject to applicable qualifications and limitations, general rules as to pleas and answers, as considered in Death § 76, in actions for wrongful death apply in actions for the death of a deceased employee prosecuted notwithstanding the existence of a compensation act.¹⁴ It has been held that the theory that the remedy of a plaintiff suing for the death of an employee is exclusively under the workmen's compensation act is an affirmative defense to be pleaded by the employer.¹⁵ Where the declaration presents two theories of liability, a plea which meets only one of them is not a complete defense.¹⁶ Where the employer may be liable notwithstanding the compensation act if the employee had no knowledge that employer had complied with the act and the declaration alleges a failure to post required notices of compliance, actual knowledge of the employee must be pleaded by way of defense.¹⁷ An election by an employee before his death to accept compensation is a matter of defense to be raised by plea or answer in an action by his representative

under a death act, where the employee has a right of election which is personal to him.¹⁸ In an action by the personal representative of a deceased employee under the death statute of another state where the death occurred, the view has been taken that the existence of a compensation act of such other state is to be pleaded as a matter of defense.¹⁹ Some acts have required that, in order that an allegation that defendant employer has rejected the act may be made an issue, it is necessary to enter a verified plea denying such allegation.²⁰ Where a statute authorizes an action for exemplary damages for the death of an employee resulting from the intentional act or gross negligence of the employer, but provides that no award, ruling, or finding of the industrial accident board shall be pleaded, the employer may, out of the hearing of the jury, plead a recovery under the compensation act to show that he is not liable to pay the amount of damages for the actual injury.²¹

c. Issues, Proof, and Variance

In an action for the death of an employee brought against the employer in spite of the existence of a workmen's compensation act, general rules as to issues, proof, and variance apply.

Subject to qualifications and limitations, general rules as to issues, proof, and variance in an action for wrongful death, as considered in Death § 79, apply in an action for the death of an employee prosecuted notwithstanding the existence of a compensation act.²² Where the facts alleged indicate that deceased and defendant were master and servant engaged in operations of the class covered by the compensation act, and the jurisdiction of the court is challenged on the ground that the remedy

13. Minn.—Nash v. Minneapolis & St. L. R. Co., 169 N.W. 540, 141 Minn. 148.

14. W.Va.—Collins v. Dravo Contracting Co., 171 S.E. 757, 114 W. Va. 229.

15. Mo.—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065.

16. W.Va.—Collins v. Dravo Contracting Co., 171 S.E. 757, 114 W. Va. 229.

Motion to strike

In action for death of painter as result of fall while painting house allegedly owned or controlled by defendants, affirmative defense that plaintiff had filed claim for workmen's compensation benefits for death of painter and had thereby elected her remedy was properly permitted to stand until time of trial, in view of fact that claim for workmen's compensation was pending.

N.Y.—Overton v. Gerard, 156 N.Y.S. 2d 759, 2 A.D.2d 410.

Particular theories

Where declaration in one count seeks recovery for servant's death on theory of master's common-law negligence, and on theory of master's deliberate intent to produce death, plea of compliance with compensation act is not defense to second theory.

W.Va.—Collins v. Dravo Contracting Co., 171 S.E. 757, 114 W.Va. 229.

17. W.Va.—Maynard v. Island Creek Coal Co., 175 S.E. 70, 115 W.Va. 249.

18. Ariz.—Behringer v. Inspiration Cons. Copper Co., 149 P. 1065, 17 Ariz. 232.
71 C.J. p 1516 note 76.

19. Minn.—Nash v. Minneapolis & St. L. R. Co., 169 N.W. 540, 141 Minn. 148.

20. Ill.—Evaniski v. Mt. Olive & Staunton Coal Co., 223 Ill.App. 33.
71 C.J. p 1516 note 78 [a].

21. Tex.—King v. Keystone-Fleming Transport Co., Civ.App., 299 S. W.2d 747.

22. N.H.—Wilkinson v. Achber, 131 A.2d 51, 101 N.H. 7.
71 C.J. p 1516 note 80.

Particular issue held presented

In action for death of defendant's employee as result of gas explosion on defendant's premises, counts of declaration, alleging defendant's breach of duty to warn decedent of dangers arising from presence of escaped gas on premises and defendant's permission of such gas to escape into premises presented issues as to whether injury arose out of, and in course of, decedent's employment within workmen's compensation act.

N.H.—Wilkinson v. Achber, *supra*.

is under the compensation act, evidence that the employer is not excepted from the act is competent.²³

Where there is a presumption that the employer and the deceased employee were both within the compensation act, and the right to maintain an action for damages depended on an agreement or election not to come within the act, there can be no recovery in the absence of proof of such election.²⁴ So, the necessity for proof of the employer's negligence in an action maintainable because of his election not to be bound by the act has been recognized.²⁵

§ 977. — Evidence

- a. Presumptions
- b. Burden of proof
- c. Admissibility
- d. Weight and sufficiency

a. Presumptions

Except as qualified and limited by the effect of the workmen's compensation acts, general rules as to presumptions in actions for wrongful death apply in actions for the death of an employee prosecuted against an employer notwithstanding the existence of a compensation act.

Subject to certain qualifications and limitations, general rules as to presumptions in an action for wrongful death, as discussed in Death § 80, apply in an action for the death of an employee prosecuted notwithstanding the existence of a compensation act.²⁶ It has been held that in every case where the personal representative of an employee sues the employer for the death of the employee, a presumption arises that the workmen's compensation statute is applicable,²⁷ and that the presumption prevails until the contrary is shown,²⁸ as by proof that the employer has not complied with the statute,²⁹ or that the employee is prohibited by law from engaging in the employment.³⁰ Likewise, a specific statutory presumption that employers and employees not excepted by the terms of the act have accepted

the act applies in an action for the death of an employee³¹ where it appears that the employer gave no notice that he would not be bound by the act,³² and nothing to contradict the presumption has been shown.³³

Where the employer failed to insure, a presumption may arise under the express terms of some acts that the injury was the direct result and grew out of the employer's negligence;³⁴ the presumption is not conclusive,³⁵ and disappears when contradicted or controverted by the evidence of plaintiff dependent in an action for the death of an employee if the circumstances are such as to afford no indication that the testimony is the product of mistake or inadvertence and the fact so proved is wholly irreconcilable with the presumption.³⁶ This rule does not, however, apply where the presumption is contradicted by evidence of the party against whom it is invoked.³⁷

b. Burden of Proof

Except as affected by the existence of workmen's compensation acts, general rules with respect to the burden of proof in actions for death apply in actions for the death of an employee brought against an employer notwithstanding the acts.

General rules with respect to the burden of proof in actions for death generally, as considered in Death § 80, apply, with some qualifications, in actions for the death of an employee brought against an employer despite the existence of a compensation law.³⁸ According to some authorities, plaintiff has the burden of proving that the workmen's compensation act is not applicable,³⁹ at least where it is alleged that defendant has accepted the act or is subject to its provisions.⁴⁰ Where the action for damages is prosecuted on the theory that defendant employer has elected not to come within the act, according to some cases plaintiff has the burden of proving such election in the absence of any statutory provision to the contrary;⁴¹ but it has been held

23. N.C.—*Miller v. Roberts*, 193 S. E. 286, 212 N.C. 126.

24. N.J.—*McNutt v. Adams Express Co.*, 111 A. 13, 94 N.J.Law 487. 71 C.J. p 1516 note 81.

25. Ill.—*Bacon v. Emerson-Brantingham Co.*, 213 Ill.App. 96.

26. W.Va.—*Ferguson v. Pinson*, 50 S.E.2d 476, 131 W.Va. 691.

27. W.Va.—*Ferguson v. Pinson*, supra.

28. W.Va.—*Ferguson v. Pinson*, supra.

29. W.Va.—*Ferguson v. Pinson*, supra.

30. W.Va.—*Ferguson v. Pinson*, supra.

31. N.C.—*Miller v. Roberts*, 193 S. E. 286, 212 N.C. 126.

Presumption that all employers entitled to come within act have done so see supra § 121.

32. N.C.—*Miller v. Roberts*, supra.

33. N.C.—*Miller v. Roberts*, supra.

34. Iowa.—*Casey v. Hansen*, 26 N. W.2d 50, 238 Iowa 62.

35. Cal.—*Peters v. California Building-Loan Ass'n*, 2 P.2d 439, 116 C. A. 443.

36. Cal.—*Peters v. California Building-Loan Ass'n*, supra.

37. Cal.—*Peters v. California Building-Loan Ass'n*, supra.

38. Mo.—*Cleveland v. Laclede-Christy Clay Products Co.*, App., 113 S.W.2d 1065.

39. U.S.—*Gladden v. Stockyard S. S. Co.*, C.A.Pa., 184 F.2d 510. Pa.—*Zagozan v. Testa Bros., Inc.*, Com.Pl., 85 West.L.J. 189.

40. Ky.—*Johnson v. Frankfort & C. R. R.*, 197 S.W.2d 432, 303 Ky. 256. W.Va.—*Ferguson v. Pinson*, 50 S.E. 2d 476, 131 W.Va. 691.

41. Ill.—*Bishop v. Chicago, M. & St. P. Ry. Co.*, 217 Ill.App. 96. 71 C.J. p 1517 note 83.

under some acts that defendant employer has the burden of producing evidence that he has accepted the act in order to avoid the application of the provisions of the Employers' Liability Act modifying common-law liability of an employer who does not accept provisions for compensation.⁴²

Matters relating to the applicability of the compensation act which are affirmative defenses, as considered supra § 976 b, must be proved by defendant.⁴³ Where the presumption has arisen that an employer failing to insure was guilty of negligence proximately causing the fatal injury, the burden is on the employer to rebut the presumption by negating every fact which would justify a finding of negligence.⁴⁴

Where an employer who has not accepted provisions for compensation may rely on the contributory negligence of the deceased employee to defeat recovery, defendant has the burden of showing contributory negligence.⁴⁵ Where defendant employer seeks to avoid liability on the theory that the deceased employee was guilty of willful negligence, plaintiff does not have the burden of showing that deceased was free from willful negligence.⁴⁶ So, also, even though the employee's failure to notify the employer or the employer's representative of a defect or negligence of which the employee had knowledge, within a reasonable time, may defeat a recovery against an employer who has not accepted the compensation act, plaintiff is not required to prove absence of such knowledge⁴⁷ or the giving of such notice.⁴⁸

Under some acts where plaintiff has exercised an election to proceed at common law for the death of an employee, he cannot recover unless he shows that the deceased employee neither knew, nor was

at fault for not knowing, of the dangers involved in the operation in connection with which death resulted.⁴⁹ In a suit for exemplary damages for the death of an employee from the willful act or gross negligence of the employer, plaintiff must prove actual loss or injury,⁵⁰ and the employer's willfulness or gross neglect.⁵¹

c. Admissibility

Subject to some qualifications, general rules as to the admissibility of evidence apply.

General rules as to the admissibility of evidence in an action for wrongful death apply in an action for the death of an employee prosecuted notwithstanding the existence of a compensation act.⁵² Under a specific statutory provision that in a suit to recover exemplary damages for the death of an employee resulting from a willful act or gross negligence, an award, ruling, or finding of the industrial accident board in proceedings for compensation shall not be offered in evidence, the fact of recovery may not be offered to establish actual loss or injury,⁵³ but the records showing such recovery may be offered by the employer out of the presence of the jury,⁵⁴ and they may be admitted in evidence to show that defendant should not be compelled to pay damages for the actual injury in addition to the exemplary damages which may be recovered in the suit.⁵⁵

d. Weight and Sufficiency

General rules with respect to the weight and sufficiency of evidence in actions for death apply.

General rules as to the weight and sufficiency of evidence in an action for wrongful death, as considered in Death §§ 86, 87, apply in an action for the death of an employee prosecuted notwithstanding

42. N.H.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326. 71 C.J. p 1517 note 89.

43. Mo.—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065.

Insurance or self-insurance

Where employer sought to avoid liability in wrongful death action on ground that exclusive remedy was under workmen's compensation act, burden of proof to establish that employer was insured or self-insured under act was on employer.

Minn.—Andrews v. Bartholomew, 64 N.W.2d 7, 242 Minn. 46.

Occupational disease

In suit for death of employee from occupational disease, employer had burden of proving that notice of acceptance of occupational disease amendment to compensation act was

posted so as to make such amendment applicable to employee's death. Mo.—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065.

44. Iowa—Casey v. Hansen, 26 N.W.2d 50, 238 Iowa 62.

45. N.H.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326.

46. Mich.—Jonescu v. Orlich, 189 N.W. 919, 220 Mich. 89.

47. U.S.—Boston & M. R. R. v. Baker, Mass., 236 F. 896, 150 C.C.A. 158.

71 C.J. p 1517 note 93.

48. U.S.—Boston & M. R. R. v. Baker, supra.

49. N.H.—Smith v. Mason-Perkins Paper Co., 117 A. 11, 80 N.H. 299.

50. Tex.—King v. Keystone-Flem-

ing Transport, Inc., Civ.App., 299 S.W.2d 747.

Necessity of proving actual damages to recovery of exemplary damages in actions for death in general see Death § 97.

51. U.S.—Bonner v. Texas Co., C.C.A. Tex., 89 F.2d 291.

52. Ky.—Pioneer Coal Co. v. Polly, 271 S.W. 592, 208 Ky. 548.

71 C.J. p 1517 note 98.

Admissibility of evidence in actions for death generally see Death §§ 81-85.

53. Tex.—King v. Keystone-Fleming Transport, Inc., Civ.App., 299 S.W.2d 747.

54. Tex.—King v. Keystone-Fleming Transport, Inc., supra.

55. Tex.—King v. Keystone-Fleming Transport, Inc., supra.

ing the existence of a compensation act.⁵⁶ A preponderance of the evidence is necessary to rebut a presumption that the death of the employee was proximately caused by the negligence of an employer who failed to insure.⁵⁷ A provision of the compensation act that the identification of the signature of the employee on the register of the employer shall constitute conclusive proof of his election to operate under the act does not render the testimony of a subscribing witness that the deceased employee signed the compensation register conclusive of such signing in an action for the death of such employee prosecuted on the theory that he had not accepted the provisions of the compensation act.⁵⁸

§ 978. — Trial, Judgment, and Review

General rules with respect to trial, judgment, and review apply in actions for the death of an employee brought against the employer notwithstanding the existence of a workmen's compensation act.

General rules with respect to trial, judgment, and review, particularly those considered in Death §§ 88-94, apply in an action for the death of an employee prosecuted notwithstanding the existence of

a compensation act.⁵⁹ Where the complaint alleges an intentional injury, and such injuries are not compensable under the compensation act, defendant is not entitled to summary judgment on the ground that the exclusive remedy is that provided by the compensation act.⁶⁰

Questions of law and fact; taking case from jury. Questions of fact, where on conflicting evidence there could reasonably be a finding for either party, are for the jury;⁶¹ but a question need not be submitted to the jury where the evidence is insufficient to present an issue of fact,⁶² and when the evidence admits of only one conclusion an issue is one of law to be decided by the court.⁶³ Where defendant employer who has not accepted provisions for compensation has the burden of proving the contributory negligence of the deceased employee if he may rely on such negligence to defeat recovery, defendant is not entitled to a directed verdict unless the proof is conclusive that the accident would not have happened except through the employee's negligence.⁶⁴

Instructions. Where under the act the contributory negligence of the deceased employee may not

56. Va.—Blue Diamond Coal Co. v. Aistrop, 31 S.E.2d 297, 183 Va. 23.

Evidence held sufficient

(1) To show that plaintiff was entitled to recover.

S.D.—Voet v. Lampert Lumber Co., 15 N.W.2d 579, 70 S.D. 142.

(2) To show employer-employee relationship.

S.D.—Voet v. Lampert Lumber Co., supra.

(3) To support finding that death was proximately caused by negligence of defendant.

Va.—Blue Diamond Coal Co. v. Aistrop, 31 S.E.2d 297, 183 Va. 23.

(4) To show right to compensation precluding recovery in action. Minn.—Fjeld v. Marshall County Co-op. Oil Ass'n, 35 N.W.2d 448, 227 Minn. 274.

(5) To show other matters see 71 C.J. p 1517 note 1 [a].

Evidence held insufficient

(1) To show that exclusive remedy was under occupational disease provision of compensation act.

Mo.—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065.

N.H.—Hussey v. Boston & M. R. R., 133 A. 9, 82 N.H. 236—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326.

(2) To show other matters see 71 C.J. p 1517 note 1 [b].

57. Iowa.—Casey v. Hansen, 26 N.W.2d 50, 238 Iowa 62.

58. Ky.—Pioneer Coal Co. v. Polly, 271 S.W. 592, 208 Ky. 548. 71 C.J. p 1517 note 2.

59. N.H.—Wilkinson v. Achber, 131 A.2d 51, 101 N.H. 7.

N.Y.—Lavin v. Goldberg Bldg. Material Corp., 87 N.Y.S.2d 90, 274 App.Div. 690, appeal denied 89 N.Y.S.2d 523, 275 App.Div. 865.

Va.—Griffith v. Raven Red Ash Coal Co., 20 S.E.2d 530, 179 Va. 790.

60. N.Y.—Lavin v. Goldberg Bldg. Material Corp., 87 N.Y.S.2d 90, 274 App.Div. 690, appeal denied 89 N.Y.S.2d 523, 275 App.Div. 865.

61. N.H.—Wilkinson v. Achber, 131 A.2d 51, 101 N.H. 7.

71 C.J. p 1518 note 4.

Direction of verdict held improper

Minn.—Andrews v. Bartholomew, 64 N.W.2d 7, 242 Minn. 46.

Demurrer to evidence held properly refused

Mo.—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065.

Questions held for jury

(1) Whether defendant employed more than five men so as to be within provisions of workmen's compensation act.

N.C.—Young v. Mayland Mica Co., 198 S.E. 285, 212 N.C. 243.

(2) Whether minor had been employed by contractor, so that ex-

clusive remedy was under compensation law.

Ala.—Couch v. Hutcherson, 8 So.2d 580, 243 Ala. 47, 141 A.L.R. 697.

(3) Whether coal miner died as result of gradual inhalation of gas over a considerable period, or whether his death was caused by sudden inhalation of quantity of gas at particular time so as to authorize a common-law action for death rather than a proceeding under workmen's compensation act.

Va.—Blue Diamond Coal Co. v. Aistrop, 31 S.E.2d 297, 183 Va. 23.

(4) Whether employer, who had not insured successfully rebutted statutory presumption that fatal injury to employee arising out of, and in course of, employment was caused by employer's negligence.

Iowa.—Casey v. Hansen, 26 N.W.2d 50, 238 Iowa 62.

(5) Other questions see 71 C.J. p 1517 note 99 [a] (2), p 1518 note 4 [a], [b].

62. Tex.—Howard v. Bennett, 170 S.W.2d 709, 141 Tex. 101.

Langston v. Tex-O-Kan Flour Mills Co., Civ.App., 211 S.W.2d 1020, error refused no reversible error.

63. N.H.—Wilkinson v. Achber, 131 A.2d 51, 101 N.H. 7.

64. N.H.—Hussey v. Boston & M. R. R., 133 A. 9, 82 N.H. 236.

be relied on by defendant employer to defeat recovery, but it is necessary to show the negligence of defendant, an instruction that it is no defense that deceased came to his death by any negligence on his part is improper because of the omission before "negligence" of the qualifying word "contributory."⁶⁵ Where the contributory negligence of, or the voluntary assumption of risk by, the deceased employee may not be relied on to defeat re-

covery, an instruction requested by defendant employer, based on the theory that contributory negligence or assumption of risk may so be relied on, is properly refused.⁶⁶ Instructions as to other matters must conform to general rules.⁶⁷

Appeal and error. General rules as to review apply in an action for the death of an employee prosecuted notwithstanding the existence of a compensation act.⁶⁸

2. OTHER ACTIONS

§ 979. Action by Parent for Injury to Child

An action by the parent of a child against the employer of the child for loss to the parent resulting from injury to the child may, or may not, be precluded by the provisions of particular compensation acts.

According to some cases, in the absence of a direct enactment in the statute or a necessary implication from its terms, a compensation act will not deprive the parent of a minor employee of his independent right of action for loss from an injury to the minor,⁶⁹ which includes damages for the loss of services of the minor⁷⁰ and for ex-

penses incurred by reason of the injury.⁷¹ There is, however, authority for the view that where the compensation act provides a complete and exclusive remedy for all injured employees and those who may claim as beneficiaries, a parent may not recover in a common-law action,⁷² or under another statutory provision expressly permitting a parent to recover for loss of services of a minor child,⁷³ where the act is otherwise applicable; and in such case under some statutes a parent, in order to save his common-law right of action, must elect,⁷⁴

65. Ill.—Bacon v. Emerson-Brantingham Co., 213 Ill.App. 96.

66. Ky.—West Kentucky Coal Co. v. Hazel's Adm'x, 129 S.W.2d 1000, 279 Ky. 5.
71 C.J. p 1518 note 14.

67. Mo.—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065.

Instructions held proper or erroneously refused

U.S.—Skelly Oil Co. v. Amacker, C.C. A.Tex., 140 F.2d 21, certiorari denied 64 S.Ct. 1278, 322 U.S. 760, 88 L.Ed. 1588, rehearing denied 65 S.Ct. 29, 323 U.S. 810, 89 L.Ed. 646.

Mo.—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065.

Instructions held erroneous or properly refused

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Mo.—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065.

68. Harmless or prejudicial error

(1) In action for death of employee because of whose failure to sign workmen's compensation register, claim for compensation under compensation act had been dismissed, references by plaintiff's counsel to workmen's compensation on examination of jurors were not prejudicial to defendant although improper.

Ky.—Premier Motors v. Smith's Adm'x, 178 S.W.2d 205, 296 Ky. 642.

(2) Other errors see 71 C.J. p 1518 note 16 [c].

Matters or questions considered in reviewing court

(1) With respect to right of employee's widow to sue under Employers' Liability Act, as against contention that her remedy was confined to compensation act, jury's finding that occupational disease was proximate cause of death of printer who died from lead poisoning was binding on reviewing court.

Ind.—General Printing Corporation v. Umback, 195 N.E. 281, 100 Ind.App. 285.

(2) Fact that death of coal mine employee was caused by his own negligence and would bar recovery in administratrix' death action at law against employer was a "matter of defense" on merits and was not before reviewing court on appeal involving question whether denial of compensation award by industrial commission was res judicata of action.

Va.—Griffith v. Raven Red Ash Coal Co., 20 S.E.2d 530, 179 Va. 790.

(3) Where trial of wrongful death action by administrator of deceased employee against employer was conducted by both parties without regard for workmen's compensation law or application of its provisions, and proceeded as a common-law action with exception of unsupported allegation in declaration that employer had

not complied with statute and was not entitled to its protection, question of applicability thereof, not being jurisdictional in character, would not be considered or reviewed on writ of error.

W.Va.—Ferguson v. Pinson, 50 S.E.2d 476, 131 W.Va. 691.

(4) Other matters see 71 C.J. p 1518 note 16 [a], [b].

69. Okl.—Roxanna Petroleum Co. v. Cope, 269 P. 1034, 122 Okl. 152, 60 A.L.R. 837.

71 C.J. p 1518 note 18.

Parent's action for death of child see supra § 964.

70. Mass.—Slavinsky v. National Bottling Torah Co., 166 N.E. 821, 267 Mass. 319.

71 C.J. p 1519 note 19.

71. Mass.—Slavinsky v. National Bottling Torah Co., supra.

71 C.J. p 1519 note 20.

72. N.H.—Courage v. Carleton, 77 A. 2d 111, 96 N.H. 348.

Pa.—Zagozan v. Testa Bros., Inc., Com.Pl., 35 West.Co. 189.

Wis.—Deluhery v. Sisters of St. Mary, 12 N.W.2d 49, 244 Wis. 264.

71 C.J. p 1519 note 21.

73. Iowa.—Hilsinger v. Zimmerman Steel Co., 187 N.W. 493, 193 Iowa 708.

74. N.J.—Hartman v. Unexcelled Mfg. Co., 108 A. 357, 93 N.J.Law 418—Buonfiglio v. R. Neumann & Co., 107 A. 285, 93 N.J.Law 174.

or arrange to have the minor child elect,⁷⁵ not to be bound by the act, and, if the parent fails to make or to cause such election, he accepts the provisions of the act and thereby surrenders his rights to any other method and form of compensation.⁷⁶

Where the remedy under the compensation act is exclusive, a parent may not maintain an action for the use and benefit of a minor employee, under another statutory provision, for an injury within the act.⁷⁷ Some acts measure the limit of liability of an employer as to the amount which is reasonable and necessary for the proper maintenance, support, and care of an injured employee and abrogate any other right which a parent of an adult employee may have to recover from the employer additional amounts paid by him for medical, hospital, and nursing care of such child.⁷⁸ Even in jurisdictions in which the right of a parent to recover is recognized the parent of a minor employee cannot, in a common-law action, recover for loss resulting from the negligence of a fellow servant.⁷⁹

Illegal employment. Under some statutes, a parent may not sue for injuries to his child who is otherwise subject to the workmen's compensation act, even though the employment was illegal;⁸⁰ but under other statutes, the parent may sue if the

child was illegally employed, even though the child is permitted to recover compensation.⁸¹ Where the compensation act preserves the right of action for damages by an illegally employed minor only if the minor is under a specified age, the parent of a minor older than the specified age and otherwise within the compensation act may not sue at law for loss of services or expenses.⁸² The parent of a minor employee may not maintain an action against the employer for loss of services on the theory that because the minor was unlawfully permitted to work where liquor was sold no employer-employee relationship existed.⁸³

§ 980. Action by Spouse of Injured Employee

It is generally held that the spouse of an injured employee may not maintain action against the employer for loss or damage incident to an injury for which the employer must pay compensation. Certain other rights of action of the spouse, however, are not barred.

Some workmen's compensation acts, in the absence of an effective election not to be bound by the act or of a default by the employer rendering the act inapplicable, take away a husband's common-law right of action for loss of consortium⁸⁴ or for loss of services.⁸⁵ Likewise, many compensation

75. Minn.—*Novack v. Montgomery Ward & Co.*, 198 N.W. 294, 158 Minn. 505.

76. N.J.—*Buonfiglio v. R. Neumann & Co.*, 107 A. 285, 93 N.J.Law 174. 71 C.J. p 1519 note 25.

77. La.—*Ross v. Cochran & Franklin Co.*, 122 So. 141, 10 La.App. 719.

78. Pa.—*Staggers v. Dunn-Mar Oil & Gas Co.*, 167 A. 785, 312 Pa. 269. 71 C.J. p 1519 note 27.

79. Mass.—*Zarba v. Lane*, 76 N.E.2d 318, 322 Mass. 132.—*Slavinaky v. National Bottling Torah Co.*, 166 N.E. 821, 267 Mass. 319.

Reason for rule

Provision eliminating defense that injury to employee did not result from negligence or other fault of employer is limited to cases where damages are result of direct injury to person of plaintiff, and does not include those which were sustained by plaintiff in consequence of direct injury to person of another.

Mass.—*Zarba v. Lane*, 76 N.E.2d 318, 322 Mass. 132.

80. Fla.—*Winn-Lovett Tampa v. Murphree*, 73 So.2d 287.

Pa.—*Lengyel v. Bohrer*, 94 A.2d 753, 372 Pa. 531.

Zeitz v. Zurich General Acc. & Liability Ins. Co., 67 A.2d 742, 165 Pa.Super. 295.

Effect of agreement

Parents of illegally employed mi-

nor could not maintain an action in trespass for injury sustained by minor in course of his employment where minor entered into compensation agreements with employer with consent and approval of minor's parents and their counsel, and of workmen's compensation board, and where all moneys had been paid pursuant to terms of agreements.

Pa.—*Santucci v. Frank*, 51 A.2d 696, 356 Pa. 54.

Where compensation received by guardian

Where minor employee's guardian received compensation from employer for minor's injury, employer was relieved of all liability, even though minor was working in violation of law and employer did not have ten or more employees; hence, employer was not liable to minor's parents for loss of minor's services.

Ga.—*Griggs v. Zimmerman*, 177 S.E. 86, 50 Ga.App. 24.

81. Iowa.—*Lodge v. Drake*, 51 N.W. 2d 420, 243 Iowa 633.

82. N.J.—*Wilson v. Newark Smelting & Refining Co.*, 56 A.2d 619, 26 N.J.Misc. 51.

83. N.Y.—*Ulrich v. Terminal Operating Corp.*, 67 N.Y.S.2d 590, 271 App.Div. 930.

84. W.Va.—*McVey v. Chesapeake & Potomac Telephone Co.*, 138 S.E. 97, 103 W.Va. 519.

71 C.J. p 1520 note 29.

Federal Employees' Compensation Act barred recovery from United States under Tort Claims Act by husband of employee suing for loss of consortium resulting from her death. U.S.—*Underwood v. U. S.*, C.A.Colo., 207 F.2d 862.

Where wife received compensation husband may not maintain action for loss of consortium.

Ind.—*Stainbrook v. Johnson County Farm Bureau Co-op. Ass'n*, 122 N.E. 2d 884, 125 Ind.App. 487.

N.J.—*Danek v. Hommer*, 87 A.2d 5, 9 N.J. 56.

Wis.—*Guse v. A. O. Smith Corp.*, 51 N.W.2d 24, 260 Wis. 403.

85. U.S.—*King v. Chrysler Corp.*, D.C.Mich., 150 F.Supp. 440. 71 C.J. p 1520 note 30.

Receipt of compensation

A husband's common-law right to damages for the loss of service of his wife resulting from employer's negligence is lost where she has received workman's compensation.

Ind.—*Stainbrook v. Johnson County Farm Bureau, Co-op. Ass'n*, 122 N.E. 2d 884, 125 Ind.App. 487.

Mo.—*Holder v. Elms Hotel Co.*, 92 S. W.2d 620, 338 Mo. 857, 104 A.L.R. 339.

Sharp v. Producers' Produce Co., 47 S.W.2d 242, 226 Mo.App. 189.

acts preclude an action by the wife of an employee from recovering damages for loss of consortium or services from injury or disease compensable under the act.⁸⁶

The right of a wife to recover for fright and mental shock resulting from the condition of her husband has been recognized notwithstanding the employer of the husband is a subscriber to the compensation insurance fund where the employer has not complied with his obligation under his contract with the insurance association to act in caring for an injured employee.⁸⁷ A wife who seeks to recover damages from the employer of her husband for the husband's alleged addiction to liquor unlawfully furnished to him by the employer, under the provision of a federal statute which purports to give to certain classes of persons a right of action when they have been injured by addiction to the liquor habit of one from whom they have the right of support, through unlawful acts of others, need not seek compensation under the workmen's compensation law but may bring an action in a court in which common-law procedure prevails.⁸⁸ Since the right of a deceased employee's

widow to recover damages for mutilation of employee's body from employer's insurer cannot be enforced under the compensation act, a suit for such damages is not precluded by the compensation act.⁸⁹

Where a husband of an employee may maintain an action against an employer who failed to comply with the compensation act for damages for injury to the wife⁹⁰ or for loss of services when the employer has failed to comply with the act,⁹¹ the employer may be deprived of certain defenses.⁹²

Pleading. A common-law declaration by a husband for damages for loss of consortium, growing out of personal injuries sustained by plaintiff's infant wife by reason of the alleged negligence of defendant as employer of the wife, has been held to be demurrable where such declaration shows that defendant was an employer within the meaning of the workmen's compensation law, in the absence of an allegation either that defendant had elected not to come within the act or that defendant is deprived of the benefit of the act by reason of some default on his part.⁹³

86. U.S.—*Josewski v. Midland Constructors, Inc.*, D.C.S.D., 117 F. Supp. 681.

Ohio.—*Bevis v. Armco Steel Corp.*, 102 N.E.2d 444, 156 Ohio St. 295.

Wash.—*Ash v. S. S. Mullen, Inc.*, 261 P.2d 118, 43 Wash.2d 345.

Under Longshoremen's and Harbor Workers' Compensation Act

(1) Wife of an employee who has received compensation benefits under act may not maintain an action against employer for loss of consortium.

D.C.—*Smither & Co. v. Coles*, 242 F.2d 220, 100 U.S.App.D.C. 68, certiorari denied 77 S.Ct. 1299, 354 U.S. 914, 1 L.Ed.2d 1429.

Ga.—*Anderson v. Savannah Mach. & Foundry Co.*, 100 S.E.2d 621, 96 Ga. App. 621.

(2) In action by wife of injured longshoreman against employer for loss of consortium, petition which alleged that husband was subject to compensation act was insufficient since it must be inferred that husband either received or was eligible to receive benefits provided by act.

Ga.—*Anderson v. Savannah Mach. & Foundry Co.*, *supra*.

(3) In an earlier case it was held that such an action might be maintained.

D.C.—*Hittaffer v. Argonne Co.*, 183 F.2d 811, 87 U.S.App.D.C. 57, 23 A.L.R.2d 1366, certiorari denied *Argonne Co. v. Hittaffer*, 71 S.Ct. 80, 340 U.S. 552, 95 L.Ed. 624.

Where husband has been awarded compensation wife may not recover from employer.

Minn.—*Hartman v. Cold Spring Granite Co.*, 77 N.W.2d 651, 247 Minn. 515.

Or.—*Ellis v. Fallert*, 307 P.2d 283, 209 Or. 406.

Tenn.—*Napier v. Martin*, 250 S.W.2d 35, 194 Tenn. 105.

Tex.—*Garrett v. Reno Oil Co.*, Civ. App., 271 S.W.2d 764, refused no reversible error.

Term "families" in workmen's compensation provision setting out purpose of act to provide relief for workmen and their families and dependents in certain situations includes workmen's wives.

Wash.—*Ash v. S. S. Mullen, Inc.*, 261 P.2d 118, 43 Wash.2d 345.

87. Tex.—*Price v. Yellow Pine Paper Mill Co.*, Civ.App., 240 S.W. 583.

88. Cal.—*Shell Oil Co. v. Superior Court in and for Los Angeles County*, 2 P.2d 801, 213 C. 596.

89. Mo.—*Patrick v. Employers Mut. Liability Ins. Co.*, 118 S.W.2d 116, 233 Mo.App. 251.

90. Tex.—*Shumake v. Great Atlantic & Pac. Tea Co.*, Civ.App., 255 S.W.2d 949, refused no reversible error.

91. Tenn.—*Schroader v. Rural Educational Ass'n*, 228 S.W.2d 491, 33 Tenn.App. 36.

Evidence

In action against employer who was not operating under compensa-

tion act by husband of employee for loss of services, evidence held sufficient to sustain finding that employer was negligent.

Tenn.—*Schroader v. Rural Educational Ass'n*, *supra*.

92. Tenn.—*Schroader v. Rural Educational Ass'n*, *supra*.

Particular defenses

(1) Where employer prior to accident in which employee was injured, had been operating under compensation law and had filed its proof of insurance as an employer with proper state official, but policy of insurance expired and a notice of expiration was sent to employer, but employer failed to file any proof of renewal of insurance until after accident, defenses of contributory negligence, negligence of a fellow servant, and assumption of risk were not available to employer in action against employer by employee's husband for expenses and loss of services.

Tenn.—*Schroader v. Rural Educational Ass'n*, *supra*.

(2) Where employer was subject to workmen's compensation act but was not a subscriber to that act, there were no issues as to contributory negligence, assumed risk, and fellow servant rule in action by husband of employee to recover damages from employer for injuries to employee.

Tex.—*Shumake v. Great Atlantic & Pac. Tea Co.*, Civ.App., 255 S.W.2d 949, refused no reversible error.

93. W.Va.—*McVey v. Chesapeake &*

§ 981. Action by Child of Employee

Actions for injuries independent of the injury to an employee which is compensable under the compensation act may be maintained against an employer by the child of an employee.

A minor child who seeks to recover damages from the employer of his father for the father's alleged addiction to liquor unlawfully furnished to him by the employer, under the provision of a federal statute which purports to give to certain classes of persons a right of action when they have been injured by addiction to the liquor habit of one from whom they have the right of support, through unlawful acts of others, need not seek compensation under the workmen's compensation law but may bring an action in a court in which common-law procedure prevails.⁹⁴ Since the workmen's compensation act provides no remedy for the mutilation or failure properly to preserve the dead body of an employee, the children of a deceased employee may maintain an action against an employer for such mutilation or failure to preserve.⁹⁵

§ 982. Miscellaneous Actions

- a. In general
- b. To secure contribution
- c. To secure indemnity
- d. Right of third person compromising action by employee or his representative
- e. Right of third person paying compensation

a. In General

Generally, the provisions of a workmen's compensation act which make the remedies under the act exclusive apply to third persons suing in the employee's right, but not to those suing in their own right. Rights to death benefits other than those provided by the compensation act may or may not be affected.

Provisions of workmen's compensation acts which

make the payment of compensation the exclusive remedy, except for other remedies expressly provided, may apply to any person suing in the employee's right;⁹⁶ but not to a person suing in his own right,⁹⁷ at least where the right arises from the breach of an independent duty of the employer to the person suing.⁹⁸ The compensation act may also be exclusive with respect to any remedies granted to the personal representative, dependent, or next of kin of the employee at common law or otherwise;⁹⁹ to the rights of action of all persons because of the injury to an employee, when he and the employer come under the act;¹ to any civil liability of a complying employer for injury or death of an employee in his service;² and, in the event of the death of the employee, to all personal liability of a complying employer to beneficiaries named in the act, or to beneficiaries named in the employers' liability law, or to anyone else.³ The provision of the Federal Employers' Liability Act excluding other remedies applies to an employee's legal representative, spouse, or anyone else entitled to recover damages from the United States under any federal tort liability statute.⁴

Even though the liability of an employer for injuries to, or death of, his employees is limited to that provided by the workmen's compensation act, the employer is not protected from suit for injuries to a third person merely because the third person's injuries resulted from the employer's negligence toward his employees.⁵

Rights to death benefits. A person entitled to a death benefit under an employer's private plan providing for such benefits, as discussed in Master and Servant §§ 167-170, may sue to recover such benefit even though, as a matter of precaution, he filed a workmen's compensation claim, which he later withdrew, and which the compensation referee or-

Potomac Telephone Co., 138 S.E. 97, 103 W.Va. 519.

94. Cal.—Shell Oil Co. v. Superior Court in and for Los Angeles County, 2 P.2d 801, 213 C. 596.

95. N.Y.—Diebler v. American Radiator & Standard Sanitary Corp., 92 N.Y.S.2d 356, 196 Misc. 618.

96. U.S.—The Tampico, D.C.N.Y., 45 F.Supp. 174.

D.C.—Hitaffer v. Argonne Co., 183 F.2d 811, 87 U.S.App.D.C. 57, 23 A.L.R.2d 1366, certiorari denied Argonne Co. v. Hitaffer, 71 S.Ct. 80, 340 U.S. 852, 95 L.Ed. 624.

97. D.C.—Hitaffer v. Argonne Co., 183 F.2d 811, 87 U.S.App.D.C. 57, 23 A.L.R.2d 1366, certiorari denied

Argonne Co. v. Hitaffer, 71 S.Ct. 80, 340 U.S. 852, 95 L.Ed. 624.

98. D.C.—Coates v. Potomac Elec. Power Co., D.C., 95 F.Supp. 779.

99. Ind.—Stainbrook v. Johnson County Farm Bureau, Co-op. Ass'n, 122 N.E.2d 884, 125 Ind.App. 487.

1. Minn.—Hartman v. Cold Spring Granite Co., 77 N.W.2d 651, 247 Minn. 515.

2. W.Va.—Makarenko v. Scott, 55 S.E.2d 88, 132 W.Va. 430.

3. Or.—Bigby v. Pelican Bay Lumber Co., 147 P.2d 199, 173 Or. 682.

4. U.S.—Underwood v. U. S., C.A. Colo., 207 F.2d 862.

5. N.J.—Cafone v. Spiniello Const. Co., 127 A.2d 441, 42 N.J.Super. 590.

Persons attempting rescue

Fact that dependents of employees, who had been fatally asphyxiated by negligence of employer in requiring use of gasoline pump in confined area of water main, were limited to remedy against employer under workmen's compensation statute, would not derogate from right of members of fire rescue squad, to sue employer for injuries sustained when they became asphyxiated as result of attempt to rescue employees although negligence of employer towards his own employees provided base on which rested cause of action of attempted rescuers against employer. N.J.—Cafone v. Spiniello Const. Co., supra.

dered dismissed.⁶ The widow of a police officer who has been awarded workmen's compensation for his death is not barred from the right to bring action to compel payment of a pension under the provisions of a city charter providing that a person applying for a pension waives provisions of the compensation act.⁷ Where, under a plan providing for benefits for work relief employees, as considered generally in Social Security and Public Welfare § 12, death benefits are authorized, a widow of an employee who accepted such benefits in her individual capacity may, nevertheless, sue the employing city for the death of the employee in her capacity as personal representative.⁸

b. To Secure Contribution

Although there is some authority to the contrary, a third person sued for damages for injuries to, or death of, an employee is not entitled to contribution from the employer where the remedy under the compensation act is exclusive.

It is generally held that a third person sued for damages for the injury or death of an employee is

not entitled to contribution from the employer where the compensation act makes its remedy against the employer exclusive.⁹ In some jurisdictions and under some statutes, however, the right to contribution is recognized.¹⁰ It has been held that a third person could not recover contribution from the employer unless the latter was guilty of gross negligence, even though such a recovery is not barred by the compensation act.¹¹

c. To Secure Indemnity

A third person sued for injuries to, or death of, an employee may or may not be entitled to indemnity from an employer who is liable to pay compensation under the compensation act.

A compensation act which makes the liability prescribed exclusive and in place of all other liability of the employer at common law or otherwise to the employee or any other person has been held to preclude recovery of indemnity from the employer by a third person sued for injuries to an employee.¹² Under many workmen's compensation acts, a third person sued for damages for injury

6. Pa.—Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476.

7. Cal.—Larson v. Board of Police and Fire Pension Com'rs of City of Long Beach, 162 P.2d 33, 71 C.A.2d 60.

Deduction of death benefit awarded under compensation act from widow's benefit under municipal pension system see Municipal Corporations § 727 h.

8. N.Y.—Flora v. City of New York, 10 N.Y.S.2d 195, 256 App.Div. 293.

9. U.S.—Hill Lines, Inc. v. Pittsburg Plate Glass Co., C.A.N.M., 222 F.2d 854.

Trammell v. Appalachian Elec. Co-op., D.C.Tenn., 135 F.Supp. 512—McCormick v. U. S., D.C.Tex., 134 F.Supp. 243—Johnson v. U. S., D.C.N.C., 133 F.Supp. 613—Ward v. Denver & R. G. W. R. Co., D.C. Colo., 119 F.Supp. 112.

D.C.—Christie v. Powder Power Tool Corp., D.C., 124 F.Supp. 693—Coates v. Potomac Elec. Power Co., D.C., 95 F.Supp. 779.

N.M.—Beal v. Southern Union Gas Co., 304 P.2d 566, 62 N.M. 566.

N.C.—Hunsucker v. High Point Bending & Chair Co., 75 S.E.2d 768, 237 N.C. 559—Lovette v. Lloyd, 73 S.E. 2d 886, 236 N.C. 663.

Wis.—Wisconsin Power & Light Co. v. Dean, 81 N.W.2d 486, 275 Wis. 236—Criswell v. Seaman Body Corp., 290 N.W. 177, 233 Wis. 606.

Necessity of common liability see contribution § 3.

Right of third person defendant to bring in employer as party defendant see infra § 1021.

Employer's insurer was not liable since, even though doctrine of primary and secondary negligence was available to third person, insurer was not a tort-feasor. N.C.—Lovette v. Lloyd, 73 S.E.2d 886, 236 N.C. 663.

10. Pa.—Maio v. Fahs, 14 A.2d 105, 339 Pa. 180.

Smith v. Sanctis, 81 Pa.Dist. & Co. 281, 31 Wash.Co. 6.

French v. Benischeck, Com.Pl., 61 Montg.Co. 1.

Amount of contribution limited to amount employer would be required to pay to employee.

Pa.—Maio v. Fahs, 14 A.2d 105, 339 Pa. 180.

Smith v. Sanctis, 81 Pa.Dist. & Co. 281, 31 Wash.Co. 6.

Under Longshoremen's and Harbor Workers' Compensation Act

(1) It has been held that third person is not entitled to contribution from employer.

U.S.—Crawford v. Pope & Talbot, Inc., C.A.Pa., 206 F.2d 784—Read v. U. S., C.A.Pa., 201 F.2d 758—Lo Bue v. U. S., C.A.N.Y., 188 F.2d 800—American Mut. Liability Ins. Co. v. Matthews, C.A.N.Y., 182 F.2d 322.

Lundberg v. Prudential S. S. Corp., D.C.N.Y., 102 F.Supp. 115—Miranda v. City of Galveston, Tex., D.C.Tex., 98 F.Supp. 245.

D.C.—Liberty Mut. Ins. Co. v. Vallingdham, D.C., 94 F.Supp. 17.

Md.—Standard Wholesale Phosphate & Acid Works, Inc. v. Ruckert Terminals Corp., 65 A.2d 304, 193 Md. 20.

N.Y.—Cardinal v. State, 109 N.Y.S.2d

313, 279 App.Div. 326, modified on other grounds 107 N.E.2d 569, 304 N.Y. 400, certiorari denied State of New York v. Cardinal, 73 S.Ct. 729, 345 U.S. 918, 97 L.Ed. 1351, motion denied 108 N.E.2d 400, 304 N.Y. 732 and 109 N.E.2d 885, 304 N.Y. 875.

Tex.—Hill v. City of Galveston, Civ. App., 241 S.W.2d 229, reversed on other grounds, City of Galveston v. Hill, 246 S.W.2d 860, 151 Tex. 139.

(2) A third person sued by employee may recover contribution from employer where third person and employer are joint tort-feasors.

U.S.—Portel v. U. S., D.C.N.Y., 85 F. Supp. 458—The Samovar, D.C.Cal., 72 F.Supp. 574—The Tampico, D.C. N.Y., 45 F.Supp. 174.

(3) Where employees of stevedoring company who were injured when loading grain from city owned elevator into ship elected not to take compensation under Longshoremen's and Harbor Workers' Compensation Act but sued city in tort for damages, and insurer of stevedoring company had paid compensation in accordance with act, insurer's right of recoupment against city arose by virtue of insurer's contract with employer, and being contractual in nature could not be subjected to any tort liability which employer might be under as joint tort-feasor with city.

Tex.—Hill v. City of Galveston, Civ. App., 241 S.W.2d 229, reversed on other grounds City of Galveston v. Hill, 246 S.W.2d 860, 151 Tex. 139.

11. Tex.—Westfall v. Lorenzo Gin Co., Civ.App., 287 S.W.2d 551.

12. U.S.—Calvary v. Peak Drilling Co., D.C.Okl., 118 F.Supp. 335.

to, or death of, an employee has been held not entitled to indemnity from the employer where he would have no right thereto under the general rules of indemnity,¹³ as, where there is no contractual obligation of the employer to indemnify the third person.¹⁴ Where the only relation between the third person, whom employee or his personal representative has sued, and the employer is that of joint tort-feasors, the third person is not entitled to indemnity from the employer.¹⁵

Moreover, some of these acts preclude recovery in indemnity even where the third person is passively or secondarily negligent, and the employer is primarily or actively negligent,¹⁶ or where the injury was due solely to the negligence of the employee.¹⁷ Under other statutes, however, the third person may

be entitled to indemnity where his liability is secondary and that of the employer is primary,¹⁸ or where his negligence was passive, and that of the employer was active.¹⁹

Under some statutes, a third person sued for injuries to, or death of, an employee may be entitled to indemnity from the employer where the injuries resulted from a breach of an independent duty of the employer to the third person²⁰ arising from the contract between the employer and the third person;²¹ or where the employer is bound by express contract to indemnify the third person.²²

Where the liability of the third person is based on a statute which imposes liability on the owner or lessor of a motor vehicle for injuries resulting

13. U.S.—Hill Lines, Inc. v. Pittsburgh Plate Glass Co., C.A.N.M., 222 F.2d 854.

Trammell v. Appalachian Elec. Co-op., D.C.Tenn., 135 F.Supp. 512—Brown & Root, Inc. v. U. S., D.C. Tex., 92 F.Supp. 257, affirmed, C.A., 198 F.2d 138.

D.C.—Christie v. Powder Power Tool Corp., D.C., 124 F.Supp. 693.

N.Y.—Gorham v. Arons, 121 N.Y.S.2d 669, 282 App.Div. 147, reargument denied 122 N.Y.S.2d 892, 282 App. Div. 760, affirmed 118 N.E.2d 600, 306 N.Y. 782—Edwards v. Sophkirsch Holding Corp., 112 N.Y.S.2d 219, 280 App.Div. 168, affirmed 109 N.E.2d 717, 304 N.Y. 850.

Groth v. Masnakoff, 122 N.Y.S.2d 110, 204 Misc. 268.

N.C.—Essick v. City of Lexington, 60 S.E.2d 106, 232 N.C. 200.

Right of third person defendant to bring in employer as party defendant see *infra* § 1021.

14. U.S.—Peak Drilling Co. v. Halliburton Oil Well Cementing Co., C.A. Okl., 215 F.2d 368—Slattery v. Marra Bros., C.A.2, 186 F.2d 134, certiorari denied Marra Bros. v. Slattery, 71 S.Ct. 736, 341 U.S. 915, 95 L.Ed. 1351.

McCormick v. U. S., D.C.Tex., 134 F.Supp. 243—Johnson v. U. S., D.C. N.C., 133 F.Supp. 613.

N.M.—Beal by Boatwright v. Southern Union Gas Co., 304 P.2d 566, 62 N.M. 88.

N.Y.—Cardinal v. State, 109 N.Y.S.2d 818, 279 App.Div. 226, modified on other grounds 107 N.E.2d 569, 304 N.Y. 400, certiorari denied State of New York v. Cardinal, 73 S.Ct. 729, 345 U.S. 918, 97 L.Ed. 1351, motion denied 108 N.E.2d 400, 304 N.Y. 732, and 109 N.E.2d 885, 304 N.Y. 875.

Under Longshoremen's and Harbor Workers' Compensation Act

U.S.—Mikkelsen v. The Granville, D. C.N.Y., 101 F.Supp. 566, affirmed C.A., 191 F.2d 853, rehearing denied

192 F.2d 809—American Mut. Liability Ins. Co. v. Matthews, C.A. N.Y., 182 F.2d 322.

Miranda v. City of Galveston, Tex., D.C.Tex., 98 F.Supp. 245.

Md.—Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corp., 65 A.2d 304, 193 Md. 20.

15. U.S.—Slattery v. Marra Bros., C.A.2, 186 F.2d 134, certiorari denied Marra Bros. v. Slattery, 71 S.Ct. 736, 341 U.S. 915, 95 L.Ed. 1351. Sientki v. Haffner, D.C.N.Y., 145 F.Supp. 435.

N.J.—Public Service Elec. & Gas Co. v. Waldroup, 119 A.2d 172, 38 N.J. Super. 419.

N.Y.—Havens v. Hartshorn, 55 N.Y.S.2d 698, 184 Misc. 310.

16. U.S.—Brown v. American-Hawaiian S. S. Co., C.A.Pa., 211 F.2d 16—Crawford v. Pope & Talbot, Inc., C.A.Pa., 206 F.2d 784.

N.C.—Hunsucker v. High Point Bending & Chair Co., 75 S.E.2d 768, 237 N.C. 559—Lovette v. Lloyd, 73 S.E.2d 886, 236 N.C. 663.

Employer's insurer was not liable where, even though doctrine of primary and secondary negligence were available to third person, insurer was not a tort-feasor.

N.C.—Lovette v. Lloyd, *supra*.

17. U.S.—Ward v. Denver & R. G. W. R. Co., D.C.Colo., 119 F.Supp. 112.

18. U.S.—American Dist. Tel. Co. v. Kittleson, D.C.Iowa, 179 F.2d 946.

19. N.Y.—Tabor v. Stewart, 100 N.Y.S.2d 697, 277 App.Div. 1075.

Alloco v. Gulf Oil Corp., 59 N.Y.S.2d 515.

20. U.S.—Burris v. American Chicle Co., C.C.A.N.Y., 120 F.2d 218.

N.Y.—Westchester Lighting Co. v. Westchester County Small Estates Corp., 15 N.E.2d 567, 278 N.Y. 175.

21. D.C.—Pearson to Use of Phoenix Indem. Co. v. National Trust for

Historic Preservation, D.C., 145 F. Supp. 378.

Under Longshoremen's and Harbor Workers' Compensation Act

(1) A third person sued by employee may be entitled to indemnity from employer where injury results from breach by employer of a duty to third person which is necessarily included in the obligation assumed by employer in his contract with third person.

U.S.—Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., N.Y., 76 S.Ct. 232, 350 U.S. 124, 100 L.Ed. 133.

Amerocean S. S. Co. v. Copp, C.A. Wash., 245 F.2d 291—Rich v. U. S., C.A.N.Y., 177 F.2d 688.

Valerio v. American President Lines, D.C.N.Y., 112 F.Supp. 202—Lundberg v. Prudential S. S. Corp., D.C.N.Y., 102 F.Supp. 115—Lyons v. American-Hawaiian S. S. Co., D.C. Pa., 89 F.Supp. 334.

N.Y.—Barbara v. Stephen Ransom, Inc., 79 N.Y.S.2d 438, 101 Misc. 957.

(2) Where injury results from breach of a contractual duty, express or implied, of employer to third person, third person is entitled to indemnity.

U.S.—Brown v. American-Hawaiian S. S. Co., C.A.Pa., 211 F.2d 16—Crawford v. Pope & Talbot, Inc., C.A.Pa., 206 F.2d 784.

N.Y.—McFall v. Compagnie Maritime Belge (Lloyd Royal) S. A., 107 N.E.2d 463, 304 N.Y. 314.

22. U.S.—Johnson v. U. S., D.C.N.C., 133 F.Supp. 613—Rappa v. Pittston Stevedoring Corp., D.C.N.Y., 48 F. Supp. 911.

N.Y.—Alloco v. Gulf Oil Corp., 59 N.Y.S.2d 515.

Under Longshoremen's and Harbor Workers' Compensation Act

U.S.—Finley v. U. S., D.C.N.J., 130 F. Supp. 788—Severn v. U. S., D.C. N.Y., 69 F.Supp. 21—Green v. War Shipping Administration, D.C.N.Y., 66 F.Supp. 393.

from its operation by another, as considered generally in Motor Vehicles § 442, the third person's right to indemnity from one who is responsible for negligence causing the injury, as considered generally in Indemnity § 21, is not excluded even though the person responsible is the employer of the person injured, so that the exclusive remedy against the employer for the injury would be under the workmen's compensation act.²³

d. Right of Third Person Compromising Action by Employee or His Representative

A third person settling an action by the employee may or may not be entitled to recover from the employer under particular compensation acts.

In an action against an employer by a third person who has compromised an action for personal injuries against such person by the employer's employee, on an alleged agreement of the employer to indemnify such person, the person may not recover on the theory that he is subrogated to the rights of the employee against the employer in view of the provision of the compensation act which gives an employer who pays compensation the right of subrogation to the rights of the employee against a negligent third person.²⁴ It has been held that when an employer contributed to the workmen's compensa-

tion insurance fund and compensation was paid for the death of an employee, the employer is not liable for contribution to a third person who settled a wrongful death action by the dependents of the employee.²⁵ A third person who settles a suit for damages against him by an employee may have a right to sue the employer for contribution where he was not liable to pay compensation to the employee under the compensation act because the employee was not engaged in the kind of employment covered by the act.²⁶ It has been held that a third person who settled an action against him for injuries to an employee of the United States may be entitled to contribution from the United States.²⁷ Where the personal representative of an employee of a contractor's subcontractor sued the principal who settled the action and sued the contractor for the amount thus expended, the contractor may have a right of action in turn against the subcontractor, even though the subcontractor had paid compensation.²⁸

e. Right of Third Person Paying Compensation

A third person who is liable to pay and pays compensation to an employee may be entitled to reimbursement from the employer.

Where a statutory provision makes a principal

23. Cal.—Baugh v. Rogers, 148 P.2d 633, 24 C.2d 200, 152 A.L.R. 1043.

Minn.—Lunderberg v. Bierman, 63 N.W.2d 355, 241 Minn. 349, 43 A.L.R. 2d 865.

N.Y.—Gorham v. Arons, 121 N.Y.S.2d 669, 282 App.Div. 147, reargument denied 122 N.Y.S.2d 892, 282 App. Div. 760, affirmed 118 N.E.2d 600, 306 N.Y. 782.

Amount of recovery

If employee, injured through employer's negligent operation of automobile with owner's permission, recovers judgment against owner under automobile statute and owner has credited on judgment any amount paid by employer or his insurance carrier as compensation for injuries, then owner's recovery from employer will be reduced pro tanto.

Cal.—Baugh v. Rogers, 148 P.2d 633, 24 C.2d 200, 152 A.L.R. 1043.

Lessor's insurer

Statutory liability of lessor of motor truck for injuries sustained by lessee's employee riding in truck driven by fellow employee engaged in lessee's business was based on negligence of driver so that lessee was liable to lessor for its driver's negligence independently of any duty that lessee owed its injured employee, and therefore lessor's insurer, as subrogee to lessor's rights could recover amount paid by insurer in defending

employee's action and satisfying judgment, notwithstanding lessee's liability to employee for workmen's compensation.

Conn.—Farm Bureau Mut. Auto. Ins. Co. v. Kohn Bros. Tobacco Co., 107 A.2d 406, 141 Conn. 539.

24. La.—McClintic-Marshall Co. v. O'Leary, 84 So. 503, 147 La. 85, 71 C.J. p 1520 note 35.

25. Ohio.—Bankers Indem. Ins. Co. v. Cleveland Hardware & Forging Co., 62 N.E.2d 180, 77 Ohio App. 121, appeal dismissed 62 N.E.2d 251, 145 Ohio St. 615.

26. Md.—Congressional Country Club v. Baltimore & O. R. Co., 71 A.2d 696, 194 Md. 533.

Statutory estoppel held ineffective against third person

Estoppel provided for by statute providing that insurance carrier shall be estopped to assert as defense to claim for compensation that employee was not engaged in extra-hazardous employment does not run against a third party asserting a derivative right of contribution against an allegedly negligent employer.

Md.—Congressional Country Club v. Baltimore & O. R. Co., supra.

27. U.S.—Brown & Root v. U. S., D.C.Tex., 92 F.Supp. 257, affirmed C.A., 198 F.2d 138.

Effect of claim for, or payment of, compensation

(1) Mere filing of a claim for compensation because of death of a government employee, followed by an abandonment thereof without claim having been perfected and without payment either of compensation or expense by bureau of employees' compensation, would not constitute an election by heirs of employee constituting a defense to an action for contribution against United States by joint tort-feasor responsible for death and settling claim of heirs.

U.S.—Brown & Root v. U. S., supra.

(2) Where case of occupant of government truck injured in accident due to combined negligence of driver and contractor was considered as compensable by all parties, and at time of settlement with contractor he made no objection to deduction from his portion of amounts paid for or on his behalf, or to credit on future payments of compensation to which he might become entitled, occupant elected to receive compensation from government, and to such extent it would constitute a defense to action by contractor against government for contribution to amounts paid by contractor in settlement of occupant's claim.

U.S.—Brown & Root v. U. S., supra.

28. U.S.—Whitmarsh v. Durastone Co., D.C.R.I., 122 F.Supp. 806.

liable to pay compensation to an employee of a contractor, the principal paying compensation,²⁹ or his insurer,³⁰ may be entitled to reimbursement from the immediate employer if the latter would have been liable to the employee independently of the statutory provision; but the rule does not apply where the immediate employer is not subject to the compensation act.³¹ It has been held that a contractor who paid compensation to an employee under the compensation act may not sue his principal on the theory that the injured person was the employee of the principal where the act makes the payment of

compensation the exclusive remedy against the employer.³²

Dual employment. Where an employee of two employers, both of whom carried compensation insurance, was paid compensation by insurer of one employer, insurer had no right of action against the other employer as subrogee of the employee.³³

A state fund which paid compensation to an employee has been held entitled to recover from the employer who failed to pay compensation where the employer's insurance carrier was insolvent.³⁴

D. ACTION BY EMPLOYEE OR REPRESENTATIVE AGAINST THIRD PERSON

1. PERSONS OCCASIONING PRIMARY INJURY

a. Rights and Liabilities Generally

§ 983. In General

Under the workmen's compensation acts, an employee or his personal representative is not in all circumstances precluded from maintaining a common-law action as against third persons causing the injury; but some

statutes qualify the right to maintain the action, and designate the manner in which the liability of the third person should be enforced.

Usually the workmen's compensation acts do not prevent an employee³⁵ or the personal representa-

29. La.—Jones v. Louisiana Oil Refining Corporation, 8 La.App. 85.

30. La.—Richards v. Consolidated Underwriters, App., 90 So.2d 577.

Evidence

In workmen's compensation suit, wherein insurer of owner of timber sought indemnity from owner of the mill used to cut and manufacture timber into ties for compensation paid because of injuries sustained by employee of mill owner, evidence established that owner of the mill was an independent contractor and not an employee of owner of timber, even though mill owner was indebted to owner of timber and performed manual labor in connection with operation of the mill.

La.—Richards v. Consolidated Underwriters, supra.

31. Kan.—Southern Surety Co. v. Parsons, 295 P. 727, 132 Kan. 355.
Ohio.—Cleveland, Columbus & Cincinnati Highway v. Bookmyer, 37 N.E.2d 393, 67 Ohio App. 476.

32. U.S.—Continental Cas. Co. v. Thorden Line, C.A.Va., 186 F.2d 992.

33. U.S.—U. S. Fidelity & Guaranty Co. v. R. H. Macy & Co., C.C.A.N.Y., 156 F.2d 204.

Right of employer or insurer to remedy of employee against third person see *infra* § 992 et seq.

34. Ill.—Smith v. Clavey Ravinia Nurseries, 69 N.E.2d 921, 329 Ill. App. 648.

35. U.S.—Kirk v. U. S., C.A.Idaho, 232 F.2d 763—Bagnal v. Springfield Sand & Tile Co., C.C.A.Mass., 144 F.

2d 65, certiorari denied 65 S.Ct. 72, 323 U.S. 735, 89 L.Ed. 589.

Hayhurst v. Henry, D.C.Tex., 102 F.Supp. 306—McGann v. Moss, D.C.Va., 50 F.Supp. 578.

Ariz.—State ex rel. Industrial Commission v. Reese, 250 P.2d 1001, 74 Ariz. 425—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412.

Cal.—Pacific Emp. Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 299 P.2d 928, 143 C.A.2d 646.

Colo.—Hartford Acc. & Indem. Co. v. Clifton, 190 P.2d 909, 117 Colo. 547—Drake v. Hodges, 161 P.2d 388, 114 Colo. 10—Wilson v. Smith, 130 P.2d 1053, 110 Colo. 68—Riss & Co. v. Anderson, 114 P.2d 278, 108 Colo. 78.

Fla.—Hartquist v. Tamiami Trail Tours, 190 So. 533, 139 Fla. 328.

Ga.—Minchew v. Huston, 19 S.E.2d 422, 66 Ga.App. 856.

Idaho.—Gifford v. Nottingham, 193 P. 2d 831, 68 Idaho 330.

Ill.—Wintersteen v. National Cooperation & Woodenware Co., 197 N.E. 578, 361 Ill. 95, applying Pennsylvania law.

Kan.—Bittle v. Shell Petroleum Corp., 75 P.2d 829, 147 Kan. 227.

Ky.—Kentucky-Tennessee Light & Power Co. v. Priest's Adm'r, 127 S.W.2d 616, 277 Ky. 700—Powers v. Middlesboro Hospital, 79 S.W.2d 391, 258 Ky. 20.

La.—Smith v. McDonough, App., 29 So.2d 818.

Minn.—Gleason v. Geary, 8 N.W.2d 808, 214 Minn. 499.

Mo.—Corpus Juris cited in Schumacher v. Leslie, 232 S.W.2d 913, 918, 360 Mo. 1238.

Reynolds v. Grain Belt Mills Co., 78 S.W.2d 124, 229 Mo.App. 380.

N.J.—Wilson v. Faull, 133 A.2d 695, 45 N.J.Super. 555, reversed on other grounds 141 A.2d 768, 27 N.J. 105.

Savitt v. L. & F. Const. Co., 8 A.2d 110, 123 N.J.Law 149, modified on other grounds 10 A.2d 728, 124 N.J.Law 173.

N.Y.—Caulfield v. Elmhurst Contracting Co., 53 N.Y.S.2d 25, 268 App.Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803—Richards v. Town of Stillwater, 279 N.Y.S. 866, 244 App. Div. 868.

Skakandy v. State, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S. 2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886—McCue v. J. F. Shea Co., 24 N.Y.S.2d 307, 175 Misc. 557, affirmed 24 N.Y.S.2d 130, 260 App.Div. 946.

Brunn v. Tip Realty Corp., 112 N.Y.S.2d 183—Williams v. Hartshorn, 57 N.Y.S.2d 895, affirmed 61 N.Y.S. 2d 127, 270 App.Div. 875, reversed on other grounds 69 N.E.2d 557, 296 N.Y. 49.

N.C.—Ward v. Bowles, 45 S.E.2d 354, 228 N.C. 273—Mack v. Marshall Field & Co., 6 S.E.2d 889, 217 N.C. 55.

Ohio.—George v. City of Youngstown, 41 N.E.2d 567, 139 Ohio St. 591.

Hartford Acc. & Indem. Co. v. Procter & Gamble Co., 109 N.E.2d 287, 91 Ohio App. 573.

Okl.—Sartin v. Moran-Buckner Co., 114 P.2d 938, 189 Okl. 178—Okla-

tive or dependents of a deceased employee,³⁶ under all circumstances, from maintaining an action against a third person causing the injury or death. A provision that the liability prescribed by the compensation act shall be exclusive is construed to apply only to actions against the employer, and does not prevent an injured employee from maintaining

a common-law action as against third persons causing the injury³⁷ or the personal representative or dependents of a deceased employee from maintaining an action for wrongful death against a third person.³⁸ Even a provision which by its express terms purports to make the remedy by taking compensation exclusive where the injury or death is

homa City v. Caple, 105 P.2d 209, 187 Okl. 600.

Tenn.—*Hammett v. Vogue, Inc.*, 165 S.W.2d 577, 179 Tenn. 284.

Va.—*Kramer v. Kramer*, 100 S.E.2d 37, 199 Va. 409—*Fauver v. Bell*, 65 S.E.2d 575, 192 Va. 518—*Feltig v. Chalkley*, 38 S.E.2d 73, 185 Va. 96.

71 C.J. p 1520 note 37.

Exclusive or concurrent right as between employer or insurers and employee or dependents to sue and recover see *infra* § 1003.

Other statements of rule

(1) Labor code does not alter the correlative rights and liabilities of persons who do not occupy the reciprocal statuses of employer and employee, or relieve one not the employer from any liability imposed by statute or common law.

Cal.—*Baugh v. Rogers*, 148 P.2d 633, 24 C.2d 200, 152 A.L.R. 1043.

(2) Workmen's compensation act does not abrogate, modify, or affect in any way, injured employee's common-law right to exact payment of damages from negligent third party or tort-feasor.

Okl.—*Parkhill Truck Co. v. Wilson*, 125 P.2d 203, 190 Okl. 473.

(3) Workmen's compensation law substitutes benefits which are not subject to uncertainties of litigation and defenses incident to, and which arise from, master and servant relationship for common-law right of action, but it leaves unaffected the liabilities of third persons.

N.Y.—*Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp.*, 53 N.Y.S.2d 835, 184 Misc. 941.

(4) Employer's liability under workmen's compensation act to injured employee does not bar employee's recovery of damages from tort-feasor liable for injuries, since employer's liability does not rest in tort, but is predicated on relationship of employer and employee, and compensation payable under act does not constitute satisfaction for all damages sustained by employee.

Mo.—*Schumacher v. Leslie*, 232 S.W. 2d 913, 360 Mo. 1238.

Benefits of act

A party liable at common law for tortious injury to another's employee is entirely without scope of all benefits of workmen's compensation act.

Fla.—*Hartquist v. Tamiami Trail Tours*, 190 So. 533, 139 Fla. 328.

Separate duties

The duty of an employer to pay compensation under statute is entirely separate from the duty of a third person to pay damages to a servant for personal injuries caused by third-party tort-feasor.

N.H.—*McCullough v. John B. Varick Co.*, 10 A.2d 245, 90 N.H. 409.

Unrelated action

Action against negligent third party is independent of, and unrelated to, workmen's compensation proceedings.

N.Y.—*Broome County v. Binghamton Taxicab Co.*, 75 N.Y.S.2d 423, 190 Misc. 925—*Jackson v. City of New York*, 45 N.Y.S.2d 505, 182 Misc. 686.

Statute held not controlling

(1) Where neither employee nor employer had accepted Michigan workmen's compensation act, its provisions were not controlling and would not, of themselves, bar recovery by employee against third-party wrongdoer where employee had accepted compensation under some other act.

U.S.—*Alexander v. Creel*, D.C.Mich., 54 F.Supp. 652.

(2) Action against insured third-party tort-feasor for injuries sustained by compensated employee was not barred by want of notice under statutory provision that any employee waives any right of action against an insured employer unless at time of hiring he gave his employer written notice that he claimed such right of action, unless plaintiff became an employee of defendant.

Mass.—*Abbott v. Link-Belt Co.*, 88 N.E.2d 551, 324 Mass. 678.

36. U.S.—*Standard Oil Co. v. Lyons*, C.C.A.Iowa, 130 F.2d 965.

Tammell v. Appalachian Elec. Co-op., D.C.Tenn., 135 F.Supp. 512.

Idaho.—*Gifford v. Nottingham*, 193 P. 2d 831, 68 Idaho 330.

Md.—*Employers Liability Assur. Corp.*, for its Own Use and to Use of *Jones v. Baltimore & O. R. Co.*, 195 A. 541, 173 Md. 238.

N.Y.—*Adreance v. Lorentzen*, 58 N.Y.S.2d 257, 269 App.Div. 987, reargument denied 59 N.Y.S.2d 412, 269 App.Div. 1049.

Skakandy v. State, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 836.

Okl.—*Updike Advertising System v.*

State Indus. Commission, 232 P.2d 759.

Pa.—*Pennsylvania Turnpike Commission, to Use of Albright, v. U. S. Fidelity & Guaranty Co.*, 23 A.2d 416, 343 Pa. 543.

Tenn.—*Stanford v. Halloway*, 157 S.W.2d 864, 25 Tenn.App. 379.

71 C.J. p 1521 note 38.

Nature of rights

In action against a third-party tort-feasor for death of an employee whose employer is insured under the workmen's compensation act, the rights of the employee's dependents as next of kin under the wrongful death act are not necessarily identical with their rights as dependents under the workmen's compensation act, in that, under the former act, any amount recovered is for pecuniary loss, and after payment of funeral bill is to be distributed as personality to the next of kin as in case of intestacy without regard to dependency, while the award under the compensation act is based on dependency and not on pecuniary loss.

Minn.—*Nyquist v. Batchner*, 51 N.W.2d 566, 235 Minn. 491.

Joint tort-feasors

Where right of action for wrongful death arises from personal breach of master's common-law duty to servant, whether or not nondelegable, or breach of nondelegable common-law duty by master's vice principal or alter ego, and case is not within workmen's compensation act, deceased servant's personal representative may proceed against master and joint tort-feasors, whose negligence or wrongful acts concurred with master's negligence in producing death, under homicide act.

Ala.—*Hardy v. City of Dothan*, 176 So. 449, 234 Ala. 664.

37. Ga.—*Echols v. Chattooga Mercantile Co.*, 38 S.E.2d 675, 74 Ga. App. 18.

Ill.—*Huntoon v. Pritchard*, 20 N.E.2d 53, 371 Ill. 36.

Va.—*Fauver v. Bell*, 65 S.E.2d 575, 192 Va. 518.

71 C.J. p 1521 note 39.

38. Fla.—*Vanlandingham v. Florida Power & Light Co.*, 18 So.2d 678, 154 Fla. 628.

Ill.—*Miller v. Yellow Cab Co.*, 31 N.E. 2d 406, 308 Ill.App. 217.

N.Y.—*Metildi v. State*, 80 N.Y.S.2d 168, 177 Misc. 179.

71 C.J. p 1521 note 40.

caused by a third person has been so construed, in the light of another provision recognizing a right of action against a third person, as not to prevent such an action by an injured employee³⁹ or by the dependents of a deceased employee.⁴⁰

Under the construction given some acts which permit the personal representative to bring an action for damages for the death of an employee against the person other than the employer, whose negligence caused the death, notwithstanding the death is also compensable, the cause of action is for the benefit of the heirs or next of kin as defined by the general statute applicable to death actions,⁴¹ and not of dependents as defined by the compensation act.⁴² Some provisions, however, while they

do not repeal the so-called homicide act in respect of an action against a third person for the death of an employee who was subject to the workmen's compensation act,⁴³ do limit the homicide act by providing for its enforcement for the benefit of the dependents of the deceased employee⁴⁴ and withdraw from the personal representative the right to pursue the remedy for the employee's death.⁴⁵

Some acts recognize the common-law liability of a third person for negligence that causes an injury to an employee engaged in the work of his employment⁴⁶ and the right of an employee to bring an action for such injury against such third person;⁴⁷ other acts expressly permit such action, subject to certain qualifications.⁴⁸ Some acts desig-

39. Utah.—Industrial Commission of Utah v. Wasatch Grading Co., 14 P.2d 988, 80 Utah 223.

40. Utah.—Robinson v. Union Pac. R. Co., 261 P. 9, 70 Utah 441. 71 C.J. p 1521 note 42.

41. Ill.—In re Shields' Estate, 51 N.E.2d 816, 320 Ill.App. 522.

N.Y.—Bachman v. Fred Seitz, Inc., 4 N.Y.S.2d 653, 254 App.Div. 159, appeal denied, 17 N.E.2d 111, 278 N.Y. 737—Battalico v. Knickerbocker Fireproofing Co., 294 N.Y.S. 481, 250 App.Div. 258.

Distribution of amount recovered see *infra* § 1042.

Children

Where deceased employee left two children who were not dependents under the workmen's compensation act, their rights as beneficiaries under the death statute were not affected by the workmen's compensation act. Mass.—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631.

42. In New York

(1) Cause of action for workman's injuries resulting in death, prosecuted by administratrix against a third party, is for benefit not of dependents as defined under workmen's compensation law, but of next of kin as defined by decedent estate law. N.Y.—Battalico v. Knickerbocker Fireproofing Co., 294 N.Y.S. 481, 250 App.Div. 258. 71 C.J. p 1522 note 51.

(2) The remedy against an employer for industrial accidents leaves untouched any right of action which next of kin of a deceased employee might have against third persons for wrongfully causing employee's death, but share of any such recovery, belonging to a dependent entitled to compensation under the decedent estate law, must be applied in the reduction of burden on the insurance carrier.

N.Y.—Bachman v. Fred Seitz, Inc., 4 N.Y.S.2d 653, 254 App.Div. 159, ap-

peal denied, 17 N.E.2d 111, 278 N.Y. 737.

(3) It has been broadly stated, however, that the right of legal representative of deceased employee to sue tort-feasor under workmen's compensation statute is for benefit of dependents of deceased employee, as provided in decedent estate law.

N.Y.—Application of Grasso's Estate, 148 N.Y.S.2d 850, 1 Misc.2d 704.

43. Ala.—Georgia Casualty Co. v. Haygood, 97 So. 87, 210 Ala. 56.

Fla.—Vanlandingham v. Florida Power & Light Co., 18 So.2d 678, 154 Fla. 628.

44. Ala.—Georgia Casualty Co. v. Haygood, 97 So. 87, 210 Ala. 56. 71 C.J. p 1522 n. 53.

Assertion of rights

Where deceased employee's dependents were required to rely upon the workmen's compensation act to establish their right to maintain an action against a third party for employee's death, dependents, in asserting their right, were bound by the terms of the act.

Ala.—Smith v. Southern Ry. Co., 137 So. 195, 237 Ala. 372.

45. Ala.—Georgia Casualty Co. v. Haygood, 97 So. 87, 210 Ala. 56.

46. Idaho.—White v. Ponzio, 291 P. 2d 843, 77 Idaho 276.

Minn.—Gleason v. Sing, 297 N.W. 720, 210 Minn. 253.

Neb.—Danner v. Walters, 48 N.W.2d 685, 154 Neb. 506—Rehn v. Bingaman, 38 N.W.2d 856, 151 Neb. 196, appeal dismissed 70 S.Ct. 79, 338 U.S. 806, 94 L.Ed. 488, rehearing denied 70 S.Ct. 157, 338 U.S. 832, 94 L.Ed. 541, motion overruled 40 N.W. 2d 673, 152 Neb. 171—Luckey v. Union Pac. R. Co., 219 N.W. 802, 117 Neb. 85.

71 C.J. p 1521 note 43.

47. Cal.—Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 831.

N.J.—U. S. Cas. Co. v. Hercules Powder Co., 72 A.2d 190, 4 N.J. 157.

Or.—Cary v. Burris, 127 P.2d 126, 169 Or. 24.

71 C.J. p 1521 note 44.

Repeal

Section of compensation act reserving right of injured workman to sue third-party tort-feasor was not repealed by implication by subsequent enactment declaring remedy under compensation act to be exclusive, since such declaration applied only between workman, employer, and compensation insurer and had no reference to liability otherwise existing. N.M.—Rader v. Rhodes, 153 P.2d 516, 48 N.M. 511.

Strict construction

Statute clarifying declaration of compensation claimant's right to sue at common law a third-party cotort-feasor, being in derogation of the common law, must be strictly construed.

N.J.—Belfatto v. Massachusetts Bonding & Ins. Co., 121 A.2d 431, 39 N.J.Super. 507.

Personal representative

Under workmen's compensation act providing for enforcement and apportionment of liability of third person between employer and "employee," word "employee" wherever used is intended to include personal representative of a deceased employee.

Conn.—Stavola v. Palmer, 73 A.2d 831, 136 Conn. 670.

Control of action

Statute clarifying declaration of compensation claimant's right to sue at common law a third-party cotort-feasor does not confer on the insurance carrier or employer any control over the common-law action.

N.J.—Belfatto v. Massachusetts Bonding & Ins. Co., 121 A.2d 431, 39 N.J.Super. 507.

48. U.S.—Pierce v. U. S., D.C.Tenn., 142 F.Supp. 721, affirmed, C.A., U. S. v. Pierce, 235 F.2d 466—Trammell

nate the manner in which the liability of a third person for an injury to, or the death of, an employee, theretofore existing, should be enforced.⁴⁹

Generally, however, the workmen's compensation act does not create the legal liability of a third person for an injury to an insured employee,⁵⁰ or im-

v. Appalachian Elec. Co-op., D.C. Tenn., 135 F.Supp. 512.

Ill.—O'Brien v. Rautenbush, 139 N.E. 2d 222, 10 Ill.App.2d 167.

La.—Ernst v. New Orleans Public Belt R. R., App., 55 So.2d 657—Todd-Johnson Dry Docks v. City of New Orleans, App., 55 So.2d 650.

Md.—Perdue v. Brittingham, 47 A.2d 491, 186 Md. 393.

N.Y.—Caulfield v. Elmhurst Contracting Co., 53 N.Y.S.2d 25, 268 App. Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803—Bachman v. Fred Seitz, Inc., 4 N.Y.S.2d 653, 254 App.Div. 159, appeal denied 17 N.E.2d 111, 278 N.Y. 737.

Skakandy v. State, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886—Schwartz v. Forty-Second St., M. & St. N. A. Ry. Co., 22 N.Y.S.2d 752, 175 Misc. 49.

N.C.—Essick v. City of Lexington, 60 S.E.2d 106, 232 N.C. 200—Jones v. Otis Elevator Co., 56 S.E.2d 684, 231 N.C. 285.

Or.—Kowcun v. Bybee, 186 P.2d 790, 182 Or. 271.

Va.—Sykes v. Stone & Webster Engineering Corp., 41 S.E.2d 469, 186 Va. 116.

Liberal construction

Provision of workmen's compensation act relating to recovery against third persons whose negligence resulted in injury to employee whose employer is subject to the act is to be liberally construed.

Ill.—Johnson v. Turner, 49 N.E.3d 297, 319 Ill.App. 265.

Strict construction

Provision in workmen's compensation law relating to third-party actions by injured employees should be strictly construed in the light of past history and precedent.

N.Y.—McCue v. J. F. Shea Co., 24 N.Y.S.2d 307, 175 Misc. 557, affirmed 24 N.Y.S.2d 130, 260 App.Div. 946.

Intent

(1) Workmen's compensation act regulating third-party procedure is intended to regulate all third-party claims and not only those specifically mentioned, notwithstanding act refers to actions for "negligence or wrong of another not in the same employ;" purpose is to prevent a double recovery by injured workman and permit reimbursement to the employer or insurance carrier for compensation paid out.

N.Y.—Berenberg v. Park Memorial Chapel, 142 N.Y.S.2d 845, 286 App. Div. 167.

(2) Section of the compensation law relating to right of an employee

injured by a third person, or, in case of death, his dependents, to proceed against the third person has for its purpose to assure to the employee or his dependents at least the benefits to which they would have been entitled under the compensation law.

N.Y.—Bachman v. Fred Seitz, Inc., 4 N.Y.S.2d 653, 254 App.Div. 159, appeal denied, 17 N.E.2d 111, 278 N.Y. 737.

(3) Amendment in 1933 to statute limiting an injured workman's right to sue negligent third parties under certain circumstances was intended to expand, rather than limit, the right to sue.

Or.—Johnson v. Timber Structures, Inc., 231 P.2d 723, 203 Or. 670.

Option as to proof

An injured employee's right to maintain action against negligent third party under workmen's compensation act is limited only by provision giving employee the option of proving amount of indemnity payments made or to be made in lieu of proof of loss of earning capacity and the like for special damages.

Cal.—Pacific Indem. Co. v. California Elec. Works, 84 P.2d 313, 29 C.A.2d 260, followed in Jacques v. Standard Oil Co. of Cal., 84 P.2d 322, 29 C.A.2d 745.

Rights of dependents

(1) Statute authorizes dependent to sue tort-feasor responsible for employee's death or accept compensation, regardless whether such dependent is given cause of action by Lord Campbell's Act.

Md.—Storrs v. Mech, 170 A. 743, 166 Md. 124.

(2) In enforcing liability of third person to dependent of deceased employee, question of primary importance is whether claimant was dependent of deceased employee, since, if he is not a dependent and not a member of the class as defined, he can recover nothing regardless of any pecuniary loss he may have suffered as a result of the death.

Md.—Employers Liability Assur. Corp., for Its Own Use and to Use of Jones v. Baltimore & O. R. Co., 195 A. 541, 173 Md. 238.

(3) Under the statute relating to the taking of compensation by an injured employee and the pursuit of the employee's remedy by his dependents against the third party tort-feasor, the term "dependents" is a word of art referring to a defined group of persons who may claim the compensation award.

N.Y.—Lappin v. National Container Corp., 37 N.Y.S.2d 800, 179 Misc. 109.

Applicability of act

Where deceased employee's administratrix brought death action against seller of material to employer and assumed burden of proving that contract of employment was entered into in Iowa, and asserted rights under Iowa workmen's compensation act, it was incumbent on administratrix to bring herself within the act.

U.S.—Raiche v. Standard Oil Co., C. C.A.Iowa, 137 F.2d 446.

49. U.S.—Guerrido v. Alcoa S. S. Co., C.A.Puerto Rico, 234 F.2d 349. Md.—Clough & Molloy v. Shilling, 131 A. 343, 149 Md. 189.

Wrongful death statute

Under provision of compensation law granting dependents of deceased employee election as to whether to accept compensation from employer or sue third party tort-feasor for damages, the action for damages contemplated by compensation law is to be pursued under procedural machinery provided in wrongful death statute.

Ind.—Northern Indiana Power Co. v. West, 32 N.E.2d 713, 218 Ind. 321.

Procedural priorities

Statute providing that employee, or his dependents in case of his death, might proceed against third-party tort-feasor if employer or insurer did not commence an action within two months from an award does not create right of action, but merely creates or preserves right of subrogation for benefit of employer and employee as their interests might appear, and the procedural priorities established are for the protection of those interests alone.

Md.—Johnson v. Miles, 53 A.2d 30, 188 Md. 455.

50. U.S.—Hobart v. O'Brien, C.A. Mass., 243 F.2d 735.

Cal.—Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 881.

La.—Todd-Johnson Dry Docks v. City of New Orleans, App., 55 So. 2d 650.

Mich.—Woods v. Ford Motor Co., 70 N.W.2d 739, 342 Mich. 513. 71 C.J. p 1521 note 47.

Other statements of rule

(1) Right of action for negligence against third person with whom party has no contractual relation as employer and employee is not given by workmen's compensation act but is a common-law right previously existent and preserved by such act.

Neb.—Rehn v. Bingaman, 36 N.W. 2d 856, 151 Neb. 196, appeal dismissed 70 S.Ct. 79, 238 U.S. 806, 94 L.Ed. 488, rehearing denied 70 S.

pose liability of such nature for the wrongful death of an employee;⁵¹ and where the employee has no cause of action against the third person as a tort-feasor, any reservation of rights made on claiming compensation is ineffectual.⁵²

Certain acts are so broad in their terms in respect of the exclusiveness of the remedy under the act as to abrogate a right of action as against a third person except as within a proviso saving such rights of action in certain circumstances,⁵³ as where the injury occurs away from the plant of the employer, as discussed *infra* § 986; and a subsequent amendment of such an act which permits an election to bring an action without reference to the place of the injury has been regarded as giving merely a statutory right of action.⁵⁴ Generally the law as of the time of the accident governs in determining whether the employee's remedy under

the compensation act for injury resulting from the negligence of a third person is exclusive,⁵⁵ and statutory provisions pertaining to liability of a third-party tort-feasor to the employee do not become effective retroactively.⁵⁶

Federal Employees' Compensation Act. It has been held or recognized that the Federal Employees' Compensation Act does not render exclusive the remedy given by such act so as to prevent an action by the employee⁵⁷ or by the personal representative of a deceased employee,⁵⁸ and that an action for wrongful death of such employee under a state statute will lie.⁵⁹

Federal Longshoremen's and Harbor Workers' Compensation Act. While such statute intends the remedy of compensation to be exclusive as against the employer, it does not affect an employee's rights against third persons.⁶⁰ According to some author-

Ct. 157, 338 U.S. 882, 94 L.Ed. 541, motion overruled 40 N.W.2d 678, 152 Neb. 171.

(2) Workmen's compensation law provision authorizing an injured workman to recover for injuries from a negligent third party does not create a new cause of action, and neither enlarges nor impairs a remedy which existed at common law. *Wis.—Severin v. Luchinske*, 73 N.W. 2d 477, 271 Wis. 378.

51. D.C.—*Webster v. Clodfelter*, 130 F.2d 484, 76 U.S.App.D.C. 171, 143 A.L.R. 280, certiorari denied 63 S. Ct. 261, 317 U.S. 689, 87 L.Ed. 552.

Ind.—*Hall v. Pennsylvania Greyhound Lines*, 96 N.E.2d 348, 121 Ind.App. 219.

Mass.—*Reidy v. Old Colony Gas Co.*, 53 N.E.2d 707, 315 Mass. 631.

Minn.—*Nyquist v. Batchner*, 51 N.W. 2d 566, 235 Minn. 491.

71 C.J. p 1521 notes 48, 49.

52. La.—*Board of Com'rs of Port of New Orleans v. City of New Orleans By and Through Public Belt R. Commission*, 65 So.2d 313, 223 La. 199.

53. Mont.—*Clark v. Olson*, 31 P.2d 283, 96 Mont. 417.

71 C.J. p 1522 note 55.

54. U.S.—*Calvin v. West Coast Power Co., D.C.Or.*, 44 F.Supp. 783, applying Washington law.

71 C.J. p 1522 note 57.

55. Mont.—*Chisholm v. Vocational School for Girls*, 64 P.2d 838, 103 Mont. 503.

56. Del.—*Miller v. Ellis*, 122 A.2d 314.

Ind.—*New York Cent. R. Co. v. Milhiser*, 108 N.E.2d 57, 231 Ind. 180.

Language used in prior act

In amendment of workmen's compensation act authorizing injured employee or his dependents to claim

compensation and proceed at law to recover damages where injury or death for which compensation is payable "shall have been sustained" under circumstances creating in some person other than workmen's compensation fund a liability to pay damages, use of quoted phrase does not give amendment retrospective effect in view of use of the same phrase with like context in original act.

N.D.—*Gimble v. Montana-Dakota Utilities Co.*, 44 N.W.2d 198, 77 N. D. 581.

57. Cal.—*Owen v. Rheem Mfg. Co.*, 187 P.2d 785, 83 C.A.2d 42.

Okl.—*Oklahoma City v. Caple*, 105 P.2d 209, 187 Okl. 600.

71 C.J. p 1522 note 58.

Absence of assignment

Unless an injured federal employee has assigned to the government his right of action against a tort-feasor, the tort-feasor must be held to answer to the employee for injuries actually and proximately flowing from his wrongful act, since there is no privity between the government and the tort-feasor and without the assignment the government is entitled to no part of the amount recovered until a recovery is had, even though the federal compensation act contains a provision enabling the government to compel its employee to prosecute an action in his own name.

Ohio.—*Hubbuck v. City of Springfield*, 2 Ohio Supp. 86.

58. S.D.—*Chiles v. Rohl*, 201 N.W. 154, 47 S.D. 580.

59. S.D.—*Chiles v. Rohl*, *supra*.

60. U.S.—*Seas Shipping Co. v. Sierracki*, Pa., 66 S.Ct. 872, 328 U.S. 85, 90 L.Ed. 1099, rehearing denied 66 S.Ct. 1116.

McMahan v. The Panamolga, D. C.Md., 127 F.Supp. 659—*Roeben v. U. S.*, D.C.N.J., 113 F.Supp. 732—*Portel v. U. S.*, D.C.N.Y., 85 F. Supp. 458—*Moragnel v. Moore-McCormack Lines*, D.C.Md., 75 F. Supp. 969—*Terminal Shipping Co. v. Branham*, D.C.Md., 47 F.Supp. 561, affirmed, C.C.A., *Branham v. Terminal Shipping Co.*, 136 F.2d 655—*The Wearpool*, D.C.Tex., 28 F.Supp. 886, affirmed, C.C.A., 112 F.2d 245.

Md.—*Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp.*, 65 A.2d 304, 193 Md. 20.

N.Y.—*Barbara v. Stephen Ransom, Inc.*, 79 N.Y.S.2d 438, 191 Misc. 957.

Different elements

The elements of a third-party claim under the Longshoremen's Compensation Act are different from those of compensation, in that the latter is absolute liability, whereas the possible liability of a third party is grounded on proof of its negligence.

U.S.—*Johnson v. Sword Line, Inc.*, D.C.Pa., 153 F.Supp. 691.

Absolution

Provision of Longshoremen's Compensation Act absolving an employer from any liability to his employee provided employer has complied with the act does not, in and of itself, absolve a third party tort-feasor from liability to the employee.

U.S.—*Cupo v. Isthmian S. S. Co.*, D. C.N.Y., 56 F.Supp. 45.

Enlargement of rights

Prior to the Longshoremen's Compensation Act, longshoreman had a possible right of action against vessel on which he was injured, against

ity, however, such statute supersedes, and precludes recovery under, a state statute authorizing recovery for wrongful death in respect of the death of an employee, which in general is compensable under such act,⁶¹ even in respect of a cause of action for the benefit of next of kin of a deceased employee, who are not entitled to compensation under the act.⁶² Payment by the employer of a certain amount into a special fund for the death of an employee leaving no surviving dependents entitled to compensation under the statute operates as an assignment to the employer of the cause of action against a third person for the death of the employee and precludes the personal representative of the employee from maintaining a wrongful death action under state statute against such third person.⁶³

Employee's contract with employer not to sue third person. The enforceability of a contract between an employer and an employee which preserves the liability of the employer under the compensation act, but which forbids the employee to sue a third person whom the employer has agreed to indemnify against liability for injury to, or death of, an employee of such employer under certain circumstances, has been recognized.⁶⁴ It has also been held, however, that a contract of this nature is void under a provision of the compensation act casting liability on any third person who negligently causes an employee's death,⁶⁵ and that such a contract does not preclude the employee's distributees from bringing suit against the third person involved for injuries resulting in death.⁶⁶

Duty of employer to disclose facts. The view has been taken that a relation of trust and confidence exists between an employee and his employer requiring the employer to make a full disclosure of the circumstances surrounding the injury suffered by the employee to show who was liable as between the employer and a third person.⁶⁷

Abatement and survival. The general rule that a cause of action for personal injuries abates on

the death of the tort-feasor in the absence of a statute providing to the contrary applies to a cause of action by an employee against a person other than the employer, notwithstanding a provision of the compensation act which gives the employer the right to maintain an action to recover the compensation which the employer has paid or has become obligated to pay, against the personal representative of the tort-feasor who caused the injury.⁶⁸ A provision of the compensation act that in all cases of injuries resulting in death, where such injury was sustained in the course of employment, the cause of action shall survive does not refer to the right of action of the widow of a deceased employee to sue for the value of the life of such employee.⁶⁹ Where, however, the compensation act in express terms provides that the making of a lawful claim for compensation shall operate as an assignment of any tort action which the personal representative has against a person other than the employer for death, it has been laid down that, in view of the general rule that any cause of action that is assignable survives, where the widow of a deceased employee received compensation under the act and subsequently died, the cause of action for death survived for the benefit of the employer to the extent of his interest, and to the estate of the widow to the extent of her interest.⁷⁰

§ 984. Elements of Cause or Right of Action by Employee or Dependents; Defenses

The right of action of an injured employee against a third person rests on an actionable tort of such person; but if defendant's negligence is the proximate cause of the injury he is liable regardless of the negligence of the employer of the injured employee or of fellow employees, and an agreement by which the employer of the injured employee was to indemnify defendant in respect of claims for injuries does not necessarily constitute a defense in an action by the injured employee.

The right of action of an employee against a person⁷¹ or the right of action of an employee

his immediate employer, or against any one else claimed to be responsible for injuring him, and the change in the law was not intended to reduce his rights but to enlarge them. U.S.—*Rederii v. Jarka Corp.*, D.C. Me., 28 F.Supp. 304, appeal dismissed, C.C.A., *Jarka Corp. v. Rederii*, 110 F.2d 234.

61. U.S.—*Moore v. Christensen S. S. Co.*, C.C.A.Ga., 53 F.2d 299.

62. U.S.—*Christensen v. U. S.*, C. A.N.Y., 194 F.2d 978. 71 C.J. p 1523 note 62.

63. N.Y.—*Adreance v. Lorentzen*, 60 N.Y.S.2d 834.

64. U.S.—*Western Union Telegraph Co. v. Tompa*, C.C.A.N.Y., 51 F.2d 1032.

65. N.Y.—*W. U. Tel. Co. v. Cochran*, 99 N.E.2d 882, 302 N.Y. 545, reargument denied 102 N.E.2d 586, 303 N.Y. 665.

66. N.Y.—*W. U. Tel. Co. v. Cochran*, 102 N.Y.S.2d 65, 277 App.Div. 625, affirmed 99 N.E.2d 882, 302 N.Y. 545, reargument denied 102 N.E.2d 586, 303 N.Y. 665.

67. Cal.—*Kimball v. General Electric Co.*, App., 23 P.2d 295, 1075, affirmed 30 P.2d 39, 220 C. 203. 71 C.J. p 1523 note 64.

68. Cal.—*De La Torre v. Johnson*, 254 P. 1105, 200 C. 754. 71 C.J. p 1523 note 66.

69. U.S.—*Orange Ice, Light & Water Co. v. Texas Compensation Ins. Co.*, C.C.A.Tex., 278 F. 8.

70. Wis.—*City of Milwaukee v. Boynton Cab Co.*, 231 N.W. 597, 229 N.W. 28, 201 Wis. 581.

71. U.S.—*E. I. Du Pont De Nemours & Co. v. Frechette*, C.C.A.Minn., 161 F.2d 318.

Mo.—*Hanson v. Norton*, 103 S.W.2d 1, 340 Mo. 1012.

against a vessel⁷² as a third person rests on an actionable tort of such person or vessel, in the absence of which no recovery against the third person may be had; and this is the rule even where the act provides that, under certain circumstances, if the employee or the dependents of an employee shall bring an action for the recovery of damages against a person who is subject to the act, other than the employer, the amount thereof, the manner in which, and the persons to whom, the same are payable shall be as provided in that part of the act which deals with the award of compensation.⁷³ It is not necessary, however, to show actual negligence of defendant third person himself in order to permit a recovery for the death of an employee; it is sufficient to show that the negligence of an employee of defendant, occurring while such employee was acting in the course of his employment, was the cause of the death.⁷⁴

Ordinarily the liability of the employer or his insurer for workmen's compensation is no defense against the liability of a third party whose negligence caused the injury, either as to the right of recovery or the quantum of recovery,⁷⁵ and it is

no defense to an action against a third-party tortfeasor that the employer and its insurance carrier are by statute given an interest in the recovery,⁷⁶ or that the employer has breached a contract to furnish public liability insurance, protecting defendant from claims of the type involved.⁷⁷ Also, a third person responsible for injuries to an employee may not defeat or diminish the recovery by showing negotiations between the compensation insurer and the injured employee as to the disposition of the proceeds of such recovery⁷⁸ or a promise by counsel for the insurer to recommend that suit be not instituted.⁷⁹

Notwithstanding the employer, by electing not to provide and pay compensation under the compensation act, has been deprived of certain defenses in an action by an employee, as discussed supra §§ 939-943, a manager for such employer may be entitled to the common-law defenses of assumed risk⁸⁰ and the tort of a fellow servant⁸¹ in an action by the employee in which the employer and the manager are made defendants. Where the compensation act deprives the employee or the personal representative of the employee of the right to maintain an action

N.Y.—Havens v. Hartshorn, 55 N.Y. S.2d 698, 184 Misc. 310.
71 C.J. p 1523 note 73.

Liability and defenses where rights of employer or insurer involved see infra § 1010.

Necessity of employee's:

Giving notice to employer of bringing of action see infra § 1000.

Making formal election to bring action see infra § 991.

Passive negligence

Statute giving injured employee, or his dependents in case of death, option as to whether to claim compensation or have action for damages against tort-feasor covers mere passive negligence as well as affirmative wrongful acts of a third person.

Utah.—Johanson v. Cudahy Packing Co., 152 P.2d 98, 107 Utah 114.

Defective scaffold

Under workmen's compensation act, a painter employed by subcontractor could not recover from general contractor for injuries sustained when defective scaffold furnished by subcontractor, and for which general contractor was not responsible, collapsed.

Cal.—Hard v. Hollywood Turf Club, 246 P.2d 716, 112 C.A.2d 263.

72 U.S.—The Aden Maru, D.C.Tex., 51 F.2d 599.

71 C.J. p 1523 note 74.

Vessel as third person see infra § 985.

In absence of negligence on part of ship's officers, agents or employees, liability for injuries sustained by longshoreman poisoned by carbon disulfide in grain being loaded on board ship and who is entitled to compensation under Longshoremen's and Harbor Workers' Compensation Act should not be shifted to the shipowner.

U.S.—McMahan v. The Panamolga, D.C.Md., 127 F.Supp. 659.

73. Minn.—Rasmussen v. George Benz & Sons, 212 N.W. 20, 210 N.W. 75, 168 Minn. 319.

Primary benefit

In an action brought against a third-party tort-feasor for death of an employee of an employer insured under the workmen's compensation act, the action, whether prosecuted or controlled by the employee or by his dependents or by the employer, is for the primary benefit of the employee of his dependents, and the employer's personal interest therein is purely one of indemnification to the limited extent of his compensation liability.

Minn.—Nyquist v. Batcher, 51 N.W. 2d 566, 235 Minn. 491.

74. Tex.—Harbour v. Graham Mfg. Co., Civ.App., 47 S.W.2d 700.

75. Ala.—Coleman v. Hamilton Storage Co., 180 So. 553, 235 Ala. 553.

Conn.—Farm Bureau Mut. Auto. Ins. Co. v. Kohn Bros. Tobacco Co., 107 A.2d 406, 141 Conn. 529.

Return of payments

Where employer reassigned to injured stevedore the claim against any third-party tort-feasor in consideration of return to employer of compensation payments, which had been received by stevedore, the third-party tort-feasor could not rely, as a defense to a libel by the stevedore, on provisions of Longshoremen's Compensation Act, making acceptance of compensation thereunder operate as an assignment to employer of all rights of the person entitled to compensation to recover damages against third-party tort-feasor.

U.S.—The Owen, D.C.Pa., 43 F.Supp. 897.

76. Okl.—Griffin Grocery Co. v. Logan, 309 P.2d 1074—Horwitz Iron & Metal Co. v. Myler, 252 P.2d 475, 207 Okl. 691.

Pa.—Moltz, to Use of Royal Indemnity Co. v. Sherwood Bros., 176 A. 842, 116 Pa.Super. 231.

77. S.C.—Fuller v. Southern Elec. Service Co., 20 S.E.2d 707, 200 S. C. 246.

78. Mass.—Dreher v. Bedford Realty, Inc., 140 N.E.2d 180.

79. N.C.—Penny v. Stone, 45 S.E. 2d 362, 228 N.C. 295.

80. Ill.—Wendzinski v. Madison Coal Corp., 118 N.E. 435, 282 Ill. 32.

81. Ill.—Wendzinski v. Madison Coal Corp., supra.

for damages based on an injury or death for which compensation is payable against a person who is subject to the act, a plea setting up facts bringing the case within such statutory provision constitutes a complete defense.⁸² Where an injured employee accepted compensation under the Longshoremen's and Harbor Workers' Compensation Act, thus surrendering his claim against the third-party tortfeasor, and the employer's insurance carrier subsequently reassigned the claim against the third party to the employee, such person as the assignee took the assignment subject to any defense against the assigned claim which then existed against the insurance carrier.⁸³

Under some provisions, an action could be prosecuted for an injury caused by an act or omission of a person or corporation other than the employer only where the cause of injury had no direct connection with the employee's regular employment and did not arise out of or necessarily follow as an incident thereof.⁸⁴

Negligence of employer or fellow employees. In an action by an employee⁸⁵ or by the personal representative of a deceased employee for the death of such employee⁸⁶ against a person other than the employer, if defendant's negligence was the proximate

cause of the injury, then defendant is liable, regardless of the negligence of the employer of the deceased employee or of fellow employees;⁸⁷ and the view has been expressed that the fact that the employer or a fellow employee is a joint tortfeasor is not a defense, either wholly or in diminution of damages, in an action by the employee or his dependents.⁸⁸ Under some statutes, however, the common-law action is preserved for a workman only where the injury was not proximately caused by the employer or his employees and created a legal liability for injury on the part of some person other than the employer;⁸⁹ and there can be no recovery by a parent for the death of a minor employee where the proximate cause of such death is the negligence of the employer and not that of defendant.⁹⁰ The employee of an independent contracting stevedore operating under the Federal Longshoremen's and Harbor Workers' Compensation Act may not hold a vessel liable as a third person where the proximate cause of the injury was the negligence of the employer.⁹¹

Negligence of employee; imputed negligence. In an action by the employee,⁹² by the dependents of a deceased employee,⁹³ or by the parent of a minor employee,⁹⁴ contributory negligence of the employee

82. Ill.—Elaborated Ready Roofing Co. v. Chicago, etc., R. Co., 222 Ill. App. 181.

83. U.S.—Loraine v. Coastwise Lines, D.C.Cal., 86 F.Supp. 336.

84. Mont.—Hoffman v. Johnston, 181 P.2d 792, 120 Mont. 231.

85. N.Y.—Caulfield v. Elmhurst Contracting Co., 53 N.Y.S.2d 25, 268 App.Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803.

Pa.—Kerper v. Counties Gas & Electric Co., 29 Pa.Dist. 1049.

Tex.—Johnson v. Willoughby, Civ. App., 183 S.W.2d 201, error refused.

Negligence of subcontractor

Under compensation act, negligence of subcontractor does not defeat owner's liability to employee of subcontractor as a frequenter for injuries occurring on owner's premises and caused by owner's failure to comply with the safe-place statute.

Wis.—Criswell v. Seaman Body Corp., 290 N.W. 177, 233 Wis. 606.

86. Wis.—Clark v. Chicago, M., St. P. & P. R. Co., 252 N.W. 685, 214 Wis. 295.

71 C.J. p 1524 note 82.

87. U.S.—Calvino v. Farley, D.C.N.Y., 26 F.Supp. 431.

N.Y.—Caulfield v. Elmhurst Contracting Co., 53 N.Y.S.2d 25, 268

App.Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803.

Wis.—Wisconsin Power & Light Co. v. Dean, 81 N.W.2d 486, 275 Wis. 236.

88. Cal.—Lamoureux v. San Diego & A. E. Ry. Co., 311 P.2d 1, 48 C. 617. Ga.—Williams Bros. Lumber Co. v. Meisel, 68 S.E.2d 384, 85 Ga.App. 72.

Ill.—Hulke v. International Mfg. Co., 142 N.E.2d 717, 14 Ill.App.2d 5. 71 C.J. p 1524 note 83.

Negligence of fellow employee

(1) In wrongful death action against negligent third party, if it be found that deceased was free from contributory negligence and that defendant's negligence was a proximate cause of the accident, defendant is liable even though the negligence of a fellow employee of deceased was a concurring proximate cause.

N.Y.—Caulfield v. Elmhurst Contracting Co., 53 N.Y.S.2d 25, 268 App.Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803.

Favale v. Jackson, 163 N.Y.S.2d 438, 8 Misc.2d 143.

(2) Provisions that right to workmen's compensation shall be the exclusive remedy to an employee or his dependents, when such employee is injured or killed by the negligence or wrong of another in the same em-

ploy, has no application to an action brought by an injured employee or his dependents against negligent third party.

N.Y.—Caulfield v. Elmhurst Contracting Co., 53 N.Y.S.2d 25, 268 App.Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803.

(3) In action against deputy sheriff by heirs of sheriff, who was killed in accident involving county-owned automobile driven by deputy sheriff while sheriff and deputy sheriff were acting within scope of their employment as employees of county, negligence, if any, of deputy sheriff could not be imputed to sheriff.

Cal.—Singleton v. Bonnesen, 280 P.2d 481, 131 C.A.2d 327.

89. Ill.—O'Brien v. Rautenbush, 139 N.E.2d 222, 10 Ill.App.2d 167.

90. Cal.—Stackpole v. Pacific Gas & Electric Co., 186 P. 354, 181 C. 700.

91. U.S.—The Aden Maru, D.C.Tex., 51 F.2d 599.

71 C.J. p 1524 note 85.

92. La.—Duke v. Dixie Bldg. Material Co., App., 23 So.2d 823.

71 C.J. p 1524 note 86.

93. Cal.—Milosevich v. Pacific Electric Ry. Co., 230 P. 15, 68 C.A. 662.

Md.—State, for Use of Parks, v. Insley, 29 A.2d 904, 181 Md. 347.

94. Pa.—Stern v. Philadelphia Transit Co., 17 Pa.Dist. & Co. 865.

71 C.J. p 1524 note 88.

which is chargeable to plaintiff constitutes a defense. Where, however, the contributory negligence of plaintiff's fellow employee is not imputed to him, it does not constitute a defense to the action against a third person whose primary negligence caused the injury.⁹⁵

Agreement for indemnity. An agreement by which the employer of the employee who was injured or killed was to indemnify defendant in respect of claims for injuries does not necessarily constitute a defense in an action by the injured employee⁹⁶ or by a dependent of a deceased employee.⁹⁷ In other words, an employee's right to recover against a person other than the employer is not affected by the fact that the third person has entered into a contractual legal relationship with the employer,⁹⁸ and that the employer might eventually be liable to the third person for the damages recovered by the employee.⁹⁹ A provision of the statute that the injured employee's recovery against a third party causing injuries shall be reduced by the amount of contribution or indemnity which the third party has the right to enforce against the employer on payment of any recovery against such third party does not entitle the third party to set up a claim which it has against the employer for contribution or indemnity under a contract made before the injury as a defense to an action for the employee's death.¹

Determination by compensation commission. The determination of the state industrial accident commission that a deceased employee was not in the course of his employment at the time of the accident which caused his death and its dismissal of a petition and claim for compensation do not constitute a defense to an action for the death of such employee brought for the benefit of his widow.²

Necessity for claiming compensation. Under an act which permits an employee to maintain an action against a third person wrongdoer notwithstanding the employee has claimed compensation, the employee is not required to claim compensation before bringing the action.³

Settlement of action; waiver or assignment of claim. The common-law action sanctioned by statute conferring on a compensation claimant the right to sue at common law a third-party tort-feasor is an independent substantive thing, and the right to settle such an action by the employee is integrally a part of the right to bring it.⁴ A statutory provision requiring approval by the court or commissioner of labor of any settlement of an action by an injured employee who was previously awarded workmen's compensation, against a third person responsible for such injury, does not require such approval of an action by administrators of an employee against such third person to recover damages arising out of the employee's death.⁵ An assignment by the injured employee of his claim against a negligent third party, acquired by such third party, may constitute a good defense where the assignment is supported by a good consideration;⁶ and where the employee has settled his claim against the third party and executed a total release, without the formal approval of his employer, such settlement constitutes a defense to a tort action brought by the employee against the third party notwithstanding a provision of statute making a release void when executed without the written consent of both the employer and employee.⁷

Proof of a workmen's compensation claimant's "waiver" of his rights and remedies against another than his employer must be clear and unequivocal;⁸ and until the intention to waive a compensation claimant's rights and remedies against another than his employer is announced by all who must participate therein a "waiver" by any one of them is inchoate and revocable.⁹

§ 985. What Persons Liable as Third Persons

- a. In general
- b. Employer acting in different capacities or carrying on different businesses

95. Wis.—Wisconsin Power & Light Co. v. Dean, 81 N.W.2d 486, 275 Wis. 236.

96. Conn.—Huntadi v. Stratfield Hotel, 119 A.2d 321, 143 Conn. 77.
Md.—Baltimore Transit Co. v. State, to Use of Schriefer, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460.
71 C.J. p 1524 note 89.

97. Md.—State v. New York, P. & N. R. Co., 118 A. 795, 141 Md. 305.
Wis.—Umnus v. Wisconsin Public Service Corp., 51 N.W.2d 42, 260 Wis. 433.

98. Cal.—Baugh v. Rogers, 148 P. 2d 633, 24 C.2d 200, 152 A.L.R. 1043.

99. Cal.—Baugh v. Rogers, *supra*.

1. S.C.—Fuller v. Southern Elec. Service Co., 20 S.E.2d 707, 200 S.C. 246.

2. Md.—Kendall Lumber Co. v. State, 103 A. 141, 132 Md. 93.

3. Mo.—Brown v. Payne, 264 S.W. 2d 341.

71 C.J. p 1525 note 93.

4. N.J.—Belfatto v. Massachusetts

Bonding & Ins. Co., 121 A.2d 431, 39 N.J.Super. 507.

5. N.H.—Dowd v. Moore, 109 A.2d 838, 99 N.H. 313.

6. Tex.—Independent Eastern Torpedo Co. v. Herrington, 95 S.W.2d 377, 128 Tex. 17, 1108.

7. Cal.—Cilibrasi v. Reiter, 229 P. 2d 394, 103 C.A.2d 397.

8. N.Y.—Reinhart v. Gerosa Crane Service Co., 31 N.Y.S.2d 162, 263 App.Div. 28.

9. N.Y.—Reinhart v. Gerosa Crane Service Co., *supra*.

- c. Third person subject to compensation act
- d. Person contracting with employer of injured person; principal employer
- e. Employee or agent of employer of injured workman
- f. Vessel

a. In General

Third persons who may be liable to an injured employee in a common law action include persons who do not bear the relationship of employer toward the injured employee, or who are not constituted employers by the statute.

As used in provisions of the compensation acts permitting an action of the type here involved, words designating the persons against whom the action may be maintained are given their usual¹⁰ or plain and natural¹¹ meaning, and as so used the phrase "third person,"¹² "third party,"¹³ "other person,"¹⁴ or "other party"¹⁵ usually includes persons who do not bear the relationship of employer toward the injured employee, or who are not constituted employers by the act.¹⁶ A "third person" against whom action is authorized is a person on whom no liability could be entailed under the act,¹⁷

and does not include the employer's insurer.¹⁸ An employee rendering assistance to a third person in an emergency does not become the emergency employee of the third person so as to restrict the employee to workmen's compensation for injuries received by him where the employee had an interest for his employer in relieving the emergency situation.¹⁹

A provision making a principal contractor liable to pay compensation for injuries to a subcontractor's employee to the same extent as the subcontractor has no application to third parties but is limited to principal or intermediate contractors or subcontractors.²⁰ A person in the service of an employer may be transferred with his consent to the service of another for some special purpose, and during his employment with the other he may be a stranger to his original employer so that he may maintain an action at common law for negligence against his original employer.²¹ Where plaintiff sought to recover for injuries sustained in an automobile accident from the owner of the automobile, plaintiff's right of recovery is a statutory one under a statute making the automobile owner liable for negligence of the person operating the automobile with the per-

10. N.J.—Churchill v. Stephens, 102 A. 657, 91 N.J.Law 195.

11. Mich.—Webster v. Stewart, 177 N.W. 230, 210 Mich. 13.

12. N.J.—Churchill v. Stephens, 102 A. 657, 91 N.J.Law 195.

13. A.—Zimmer v. Casey, 146 A. 130, 296 Pa. 529.

A special master employing a special servant who is a general servant of the general master is not such a third person against whom a common-law action will lie under provisions of workmen's compensation law.

Ga.—Scott v. Savannah Elec. & Power Corp., 66 S.E.2d 179, 84 Ga.App. 553.

13. N.Y.—Sweet v. Board of Ed. of Union Free School Dist. No. 9, of Town of Lenox, 48 N.E.2d 266, 290 N.Y. 73.

N.C.—Mack v. Marshall Field & Co., 6 S.E.2d 889, 217 N.C. 55.

Wis.—McGonigle v. Gryphan, 229 N.W. 81, 201 Wis. 269.

14. U.S.—Schulz v. Standard Acc. Ins. Co. of Detroit, D.C.Wash., 125 F.Supp. 411, applying Idaho law.

15. U.S.—McGann v. Moss, D.C.Va., 50 F.Supp. 573.

Wis.—McGonigle v. Gryphan, 229 N.W. 81, 201 Wis. 269.

16. Mo.—Corpus Juris cited in Schumacher v. Leslie, 232 S.W.2d 913, 918, 360 Mo. 1238.

Neb.—Rehn v. Bingham, 36 N.W.2d 856, 151 Neb. 196, appeal dismissed 70 S.Ct. 79, 338 U.S. 806, 94 L.Ed. 488, rehearing denied 70 S.Ct. 157, 338 U.S. 882, 94 L.Ed. 541, motion overruled 40 N.W.2d 673, 152 Neb. 171.

N.Y.—Wawrzonek v. Central Hudson Gas & Elec. Corp., 12 N.E.2d 525, 276 N.Y. 412.

Pa.—Zimmer v. Casey, 146 A. 130, 296 Pa. 529.

Stranger to business

An employee covered by the workmen's compensation act of Virginia has no right of action against another party for injuries received while engaged in the business of his employer unless that other party is a stranger to the business.

U.S.—Doane v. E. I. DuPont de Nemours & Co., C.A.Va., 209 F.2d 921.

Va.—Feitig v. Chalkley, 38 S.E.2d 73, 185 Va. 96.

Auto liability insurer

City employee who had been injured by co-employee's operation of city truck in course of employment, and who had received compensation from city's workmen's compensation carrier, could maintain action against city's automobile liability insurer, upon compensation carrier's assignment of interest in claim, notwithstanding liability policy purported to exclude liability as to any

obligation for which insured might be held liable under workmen's compensation law.

Wis.—Severin v. Luchinske, 73 N.W. 2d 477, 271 Wis. 378.

Injured workman held not "special employee" of third person

U.S.—Boettger v. Babcock & Wilcox Co., C.A., 242 F.2d 455.

Cal.—Peterson v. Twentieth Century Fox Films, 173 P.2d 851, 76 C.A.2d 587.

Va.—Kramer v. Kramer, 100 S.E.2d 37, 199 Va. 409.

17. Mo.—Schumacher v. Leslie, 232 S.W.2d 913, 360 Mo. 1238—Hanson v. Norton, 103 S.W.2d 1, 340 Mo. 1012.

Hughes v. Maryland Casualty Co., 76 S.W.2d 1101, 229 Mo.App. 472.

18. U.S.—Schulz v. Standard Acc. Ins. Co. of Detroit, D.C.Wash., 125 F.Supp. 411, applying Idaho law. Mo.—Hughes v. Maryland Casualty Co., 76 S.W.2d 1101, 229 Mo.App. 472.

19. Ark.—Layne-Arkansas Co. v. Henderson, 255 S.W.2d 423, 221 Ark. 691.

20. U.S.—Pierce v. U. S., D.C.Tenn., 142 F.Supp. 721, affirmed C.A., U. S. v. Pierce, 235 F.2d 466.

21. Mo.—Stroud v. Zuzich, 271 S.W. 2d 549.

mission of the owner, and the owner may not defend the action on the ground that plaintiff and the driver were in the employ of a common employer and that at the time of collision were in the scope of their employment so that workmen's compensation was the exclusive remedy.²²

Partner. According to some authority, the workmen's compensation law absolves a partnership as an employer from all other liability for the injury or death of an employee arising out of, and in the course of, employment, and a common-law action for negligence for such injury or death may not be maintained against a member of the partnership individually as owner of the premises where the partnership business was carried on and the employee injured.²³ It has been held, however, that for purposes of the workmen's compensation law a partnership is a legal entity separate from the individual members of the partnership, and where an employee is injured as the result of negligence of a partner he may elect to sue such partner individually as a third party.²⁴

Common employer. Under some statutes all employers who are engaged in various capacities in a common employment under a "common employer" are immune from common-law liability with re-

spect to injuries to the employees engaged in the common employment, since the employees are protected by the compensation insurance of the common employer and the various employers may not be regarded as "persons other than the insured" who are liable to suit;²⁵ but such immunity is granted only where the injury to the employee is compensable,²⁶ and the statute is inapplicable where there is no common employment.²⁷

Owner and lessor of property. Under an act which recognizes the common-law liability of a third person whose negligence causes an injury to an employee, the view has been taken that the owner and lessor of a building, whose only connection with the making of improvements on the building under a contract between the lessee and a contractor is the granting of permission to make such improvements, is not to be treated as an employer of the employees of the contractor and may, therefore, be liable as a third person whose negligence causes the injury.²⁸

Corporation owning stock of employer corporation. The right of an employee of a corporation, the majority of whose stock is owned by another corporation, to maintain an action against such other corporation under a provision of the compensation act permitting an action where the injury is sus-

22. In New York

(1) The text rule has been followed.

N.Y.—*Minerva v. Certified Trucking, Inc.*, 166 N.Y.S.2d 701, 8 Misc.2d 971—*Milone v. Bono*, 162 N.Y.S.2d 1002, 8 Misc.2d 326—*Goldwasser v. Ranieri*, 151 N.Y.S.2d 170, 2 Misc.2d 606.

(2) It has been held, however, that where the negligent operator of a motor vehicle was a co-employee of plaintiff, engaged in the course of his employment, plaintiff's exclusive remedy with respect to the negligence causing him injury is the right to compensation under the workmen's compensation law, and he may not maintain an action against the owner of the vehicle whose sole liability is a derivative liability, as owner, for negligence of the operator of the vehicle.

N.Y.—*Schwartz v. Forty-Second St. M. & St. N. A. Ry. Co.*, 22 N.Y.S.2d 752, 175 Misc. 49.

(3) It has also been held that where employee of garage, where automobile belonging to defendant was stored, was injured when fellow employee backed automobile into employee, employee could not maintain action against automobile owner, but was confined to exclusive remedy of workmen's compensation.

N.Y.—*Kahne v. Lipkind*, 145 N.Y.S.2d 884.

23. N.Y.—*Williams v. Hartshorn*, 69 N.E.2d 557, 296 N.Y. 49.

Minsky v. Battelman, 120 N.Y.S.2d 86, 281 App.Div. 910.

Basis of rule

Even though a partnership is itself an employer under the workmen's compensation act, nevertheless, in view of fact that under the law the partners are liable individually for workmen's compensation, an employee of the partnership will be deemed to have surrendered any common-law cause of action in tort which he holds against the partners individually because of a compensable injury.

N.J.—*Parker v. Zanghi*, 131 A.2d 802, 45 N.J.Super. 167.

24. Minn.—*Monson v. Arcand*, 70 N.W.2d 364, 244 Minn. 440—*Gleason v. Sing*, 297 N.W. 720, 210 Minn. 253.

25. Mass.—*Pimental v. John E. Cox Co.*, 13 N.E.2d 441, 299 Mass. 579.

Nature of employment

Option given injured employee to claim compensation from insurer or to claim damages from person other than insured does not allow employee to sue person engaged in common employment as contractor, subcontractor, or employee.

Mass.—*Bencivengo v. Walter C. Benson Co.*, 64 N.E.2d 918, 319 Mass. 110—*Meehan v. Gordon*, 29 N.E.2d

759, 307 Mass. 59—*Carlson v. Dowgielewicz*, 24 N.E.2d 533, 304 Mass. 560—*Clark v. M. W. Leahy Co.*, 16 N.E.2d 57, 300 Mass. 565—*Pimental v. John E. Cox Co.*, 13 N.E.2d 441, 299 Mass. 579.

26. Mass.—*Clark v. M. W. Leahy Co.*, 16 N.E.2d 57, 300 Mass. 565.

27. Mass.—*Stratis v. McLellan Stores Co.*, 43 N.E.2d 282, 311 Mass. 525, 142 A.L.R. 1393—*Benoit v. Hathaway*, 38 N.E.2d 329, 310 Mass. 362.

Carrier

Where contractor engaged in laying pipe for town to be furnished by contractor purchased pipe to be delivered by seller and seller contracted with carrier for delivery of pipe to the job, contractor and carrier were not engaged in "common employment" so as to preclude contractor's insurer after paying compensation to employee of contractor injured while unloading the pipe from enforcing common-law liability of carrier and its employee for negligence causing injury.

Mass.—*Bencivengo v. Walter C. Benson Co.*, 64 N.E.2d 918, 319 Mass. 110.

28. Neb.—*Tralle v. Hartman Furniture & Carpet Co.*, 217 N.W. 952, 116 Neb. 418.

Owner contracting with employer of injured employee see *infra* subdivision d of this section.

tained under circumstances creating legal liability in some person other than the employer has been recognized where there is nothing to show a merger of such corporations.²⁹

Person whose negligence is concurrent with employer. There is authority for the view that the fact that an employer who is within the compensation act is a joint tort-feasor with a third person who causes the injury does not prevent an action against such third person by the employee or the personal representative or dependents of the employee,³⁰ and that the provision of the compensation act that the rights and remedies granted to the employee by the act shall exclude other rights and remedies does not prevent an action against a third person where the injury was caused by the joint and concurrent negligence of such third person and the employer.³¹

b. Employer Acting in Different Capacities or Carrying on Different Businesses

An employer may not be regarded as a third person subject to a common-law action by the employee for an injury incurred while engaged in the work for which he is employed because of the fact that the injury occurs on premises, owned and controlled by the employer, where a business other than that in connection with which the injured employee is employed is carried on.

The fact that the injury occurs on premises, owned and controlled by the employers, where a business other than that in connection with which the injured employee is employed is carried on does not of itself warrant the treatment of the employer as a third person subject to a common-law action by the employee where the injury occurs when the employee is directly engaged in the work for which he is employed.³² So an employer, regardless of his status as owner of the premises where the injury occurred, remains an employer in his relations with his employees as to all matters arising from and connected with their employment and he may not be treated as a dual personality with respect to the right to sue him for negligence.³³ It has been

held, however, that the fact that the same management and officers conducted the affairs of two different companies does not preclude the employee of one company from maintaining a negligence action against the other company.³⁴

Claim against municipality. The view has been taken that a municipality may not be regarded as a person "other than the employer" so as to permit an action against it by an employee in one of its departments notwithstanding the injury was caused by the negligence of employees of another department.³⁵

Claim against United States. The right of a person employed by the United States acting in one capacity to a remedy against the United States by an action for damages for an injury sustained by an operation conducted by the United States in another capacity has been recognized notwithstanding the injury is compensable under the Federal Employees' Compensation Act,³⁶ but in such case the necessity for an election by the employee either to seek damages or to take compensation has also been recognized, as discussed *infra* § 987. The view has been taken, however, that the remedy for compensation under the War Risk Insurance Act for an injury to, or the death of, a soldier or sailor of the United States army or navy is an exclusive remedy and that an action for such injury or death would not lie against the director general of railroads, based on his alleged negligence during the period of operation of railroads under wartime control by the United States.³⁷

c. Third Person Subject to Compensation Act

While under some acts the fact that the employer, the employee, and a third person who caused the injury were all subject to the compensation act does not prevent the maintenance of an action against such third person by the employee, other provisions expressly exempt the third person from suit, or limit the amount of recovery to the amount of compensation prescribed in the act, where the third person is an employer within the compensation act, and other statutory conditions exist.

29. Conn.—Wheeler v. New York, N. H. & H. R. Co., 153 A. 159, 112 Conn. 510.

30. Ga.—Gay v. Greene, 84 S.E.2d 847, 91 Ga.App. 78.

Mo.—Liddle v. Collins Const. Co., 283 S.W.2d 474.

71 C.J. p 1531 note 87.

31. Tenn.—Bristol Telephone Co. v. Weaver, 243 S.W. 299, 146 Tenn. 511.

32. N.Y.—Winter v. Peter Doelger Brewing Co., 162 N.Y.S. 469, 175

App.Div. 796, affirmed 123 N.E. 895, 226 N.Y. 581.

71 C.J. p 1525 note 5.

Vessel and owner of vessel see *infra* subdivision f of this section.

33. N.Y.—Williams v. Hartshorn, 69 N.E.2d 557, 296 N.Y. 49.

34. N.Y.—Foley v. New York City Omnibus Corp., 112 N.Y.S.2d 217.

35. Mich.—Bross v. City of Detroit, 247 N.W. 714, 262 Mich. 447.

An employee of a city fire department injured by a collision between fire apparatus and a streetcar operated by the city, while going to a

fire, could not sue the city at law on the theory that the city was "some person other than the employer."

Cal.—Walker v. City and County of San Francisco, 219 P.2d 487, 97 C. A.2d 901.

Mich.—Bross v. City of Detroit, 247 N.W. 714, 262 Mich. 447.

36. U.S.—Hines v. Dahn, C.C.A.Iowa, 267 F. 105, affirmed 42 S.Ct. 320, 258 U.S. 421, 66 L.Ed. 696.

71 C.J. p 1525 note 7.

37. Ala.—Moon v. Hines, 87 So. 603, 205 Ala. 355, 13 A.L.R. 1020.

71 C.J. p 1525 note 2.

Under some acts the fact that the employer, the employee, and a third person who caused the injury were all subject to the compensation act does not prevent the maintenance of an action against such third person by the employee³⁸ or by the personal representative of a deceased employee³⁹ unless, it seems under some acts, the third person is one who is under the act liable to pay compensation to the injured person.⁴⁰

Some statutes, however, limit the amount of recovery to the amount of compensation prescribed in the act in an action by the employee or his personal representative in certain cases in which the employee, his employer, and the third person were all subject to the act. Under such provisions, a common-law action for damages in an unlimited amount may not be prosecuted against a third party where the employer and the third party were both employers under the act and were engaged in due course of business in the furtherance of a "common enterprise" or the accomplishment of a "related purpose."⁴¹ Such a provision limits the negligence liability of third persons to the standard of payment provided by the compensation act only in the case of third persons who are employers insured un-

der the statute,⁴² and whose employees and the employees of an employer who would be required to pay compensation for negligent injuries caused by the third person are working together in the performance of the same project in a manner which exposes them to the same or similar hazards on the premises where the injury occurs and at the time thereof.⁴³ Third persons who are not employers within the coverage of the act may not claim any such limitation of liability for negligence.⁴⁴

Under some statutes there is expressly exempted from the provisions of the act permitting an employee to bring an action against a person not in the same employ the right to bring an action against any employer or any workman as a third person if at the time of the accident such employer or such workman is in the course of any extrahazardous employment under the act. Under such a provision, a third-party employer is immune from suit by a workman when both are covered by the compensation act, in good standing, and when the injury resulted direct from extrahazardous employment in which each was engaged at the time of the accident.⁴⁵ Two requirements have been imposed as conditions for immunity, that is, the employer

38. N.D.—State for Benefit of Workmen's Compensation Fund v. El. W. Wylie Co., 58 N.W.2d 76, 79 N.D. 471.

71 C.J. p 1526 note 11.

Prerequisite to action

Compensation act provision permitting injured employee to proceed at law against third party for damages applies only if both employer and third party are under and subject to the compensation law.

Ala.—Employers Ins. Co. v. Harrison, 33 So.2d 264, 250 Ala. 116.

39. Ohio.—Ohio Public Service Co. v. Sharkey, 160 N.E. 687, 117 Ohio St. 586.

71 C.J. p 1526 note 12.

40. Wis.—Cermak v. Milwaukee Air Power Pump Co., 211 N.W. 354, 192 Wis. 44.

41. U.S.—E. I. Du Pont De Nemours & Co. v. Frechette, C.C.A.Minn., 161 F.2d 318.

42. Minn.—Monson v. Arcand, 58 N. W.2d 753, 239 Minn. 336.

43. Minn.—Monson v. Arcand, supra.

Employers held not within statute

(1) Supplier of ready-mixed concrete was not engaged in a "common enterprise" or "related purpose" with building contractor or its subcontractor within provision of workmen's compensation act precluding unlimited recovery in tort action against one engaged in common en-

terprise or related purpose with injured employee's employer.

Minn.—Swanson v. J. L. Shiely Co., 48 N.W.2d 848, 234 Minn. 548.

(2) Common carrier delivering merchandise to manufacturer was not engaged with manufacturer on same project, even though they joined, through their employees, in unloading merchandise from delivery truck, and therefore manufacturer's employee, who had received workmen's compensation, was not by reason thereof prevented from maintaining common-law tort action, not limited as to damages, against common carrier.

Minn.—Urbanski v. Merchants Motor Freight, 57 N.W.2d 686, 239 Minn. 63.

(3) Common carrier delivering merchandise to consignee was not engaged with consignee on same project, even though their employees joined in unloading merchandise from truck, and therefore carrier's driver, who had received workmen's compensation for injuries sustained while unloading truck, was not, by reason thereof prevented from maintaining common-law tort action not limited as to damages, against consignee and its employee.

Minn.—Schneider v. Texas Co., 69 N.W.2d 329, 244 Minn. 181.

44. U.S.—E. I. DuPont De Nemours & Co. v. Frechette, C.C.A.Minn., 161 F.2d 318.

45. U.S.—Williamson v. Weyerhaeuser Timber Co., C.A.Or., 221 F.2d 5, applying Washington law —Pennsylvania Salt Mfg. Co. of Wash. v. Haynes, C.A.Wash., 184 F.2d 355.

Calvin v. West Coast Power Co., D.C.Or., 44 F.Supp. 783, applying Washington law.

Wash.—Hand v. Greyhound Corp., 299 P.2d 554, 49 Wash.2d 171—Pink v. Rayonier, Inc., 242 P.2d 174, 40 Wash.2d 188, reversed on other grounds 259 P.2d 629, 42 Wash.2d 768—D'Amico v. Congusta, 167 P.2d 157, 24 Wash.2d 674—Boeing Aircraft Co. v. Department of Labor and Industries, 156 P.2d 640, 22 Wash.2d 423—Koreski v. Seattle Hardware Co., 135 P.2d 860, 17 Wash.2d 421.

71 C.J. p 1527 note 26.

Purpose held proper

Amendment to workmen's compensation act providing that no action may be brought against any employer or workman as a third person, if at time of accident such employer or workman was in course of any extrahazardous employment, did not possess a purpose inconsistent with fundamental purposes of the act.

Wash.—Hand v. Greyhound Corp., 299 P.2d 554, 49 Wash.2d 171.

Property damage

Under provision of workmen's compensation statute relating to third-party actions that no action may be brought against any employ-

must be a contributor to the workmen's compensation fund and, at the time of the accident, the employee must be in the course of some extrahazardous employment or business then being carried on by the employer; and where such requirements are not met the employer may be held liable to a third-party action.⁴⁶

So a third person is not entitled to immunity from suit, under such a statute, where he is a non-resident engaged solely in interstate commerce and

hence is not covered by the compensation act.⁴⁷ Likewise, where the employee is not at the moment of injury engaged in extrahazardous work, an action may be brought against a third-party employer, rather than a claim for compensation.⁴⁸ However, an employer who had complied with the workmen's compensation act may not be penalized by noncompliance with the act by the corporate employer of the workman who was injured because of the alleged negligence of the employer who had complied with the act.⁴⁹ The statute does not bar a

er or any workman under statute as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment, immunity extends only to actions for personal injuries and not to property damage.

Wash.—Hammack v. Monroe St. Lumber Co., 303 P.2d 1095, 49 Wash.2d 581.

Meaning of "employment"

Under provision of workmen's compensation act that no actions may be brought against any employer as a third person if at time of accident employer was in course of extrahazardous employment, use of word "employment" was not intended to restrict proviso to actions resulting directly from relationship of employer and employee, since word "employment" in compensation act is synonymous with industry, occupation, work, and business and is used interchangeably with those terms.

Wash.—Weiffenbach v. City of Seattle, 76 P.2d 589, 193 Wash. 528.

Rule applicable to claims of elective adoption workmen

Wash.—Freeman v. Rinkel, 312 P.2d 822, 50 Wash.2d 504.

Statute inapplicable where plaintiff not a workman

Wash.—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.

46. U.S.—Williamson v. Weyerhaeuser Timber Co., C.A.Or., 221 F.2d 5, applying Washington law—Pennsylvania Salt Mfg. Co. of Wash. v. Haynes, C.A.Wash., 184 F.2d 355.

Calvin v. West Coast Power Co., D.C.Or., 44 F.Supp. 783, applying Washington law.

Wash.—Peters v. Snohomish County, 279 P.2d 1085, 46 Wash.2d 192—Jewett v. Kerwood, 263 P.2d 830, 43 Wash.2d 691—Gephart v. Stout, 118 P.2d 801, 11 Wash.2d 184—Reeder v. Crewes, 90 P.2d 267, 199 Wash. 40—Pryor v. Safeway Stores, 83 P.2d 241, 196 Wash. 382, opinion adhered to 85 P.2d 1045, 195 Wash. 382—O'Brien v. North-

ern Pac. Ry. Co., 72 P.2d 602, 192 Wash. 55.

Default

(1) A person whose employer or who himself is in default under Washington compensation act and who because of default cannot recover benefits thereof may maintain action against tort-feasor.

U.S.—Calvin v. West Coast Power Co., D.C.Or., 44 F.Supp. 783, applying Washington law.

(2) Where employer engaged in extrahazardous work defaulted in payment of premiums and in submitting required payroll estimates or reports under workmen's compensation act, injured workman not in his employ could maintain common-law action against him, since provision of workmen's compensation act prohibiting workman's action against third-party employers engaged in extrahazardous work was subject to provision depriving defaulting employers of benefit of the act.

Wash.—Reeder v. Crewes, 90 P.2d 267, 199 Wash. 40.

(3) Employer, who was making payments into industrial accident fund on his employees, who was not in default in payment of premiums or in submitting required payroll estimates, and who was engaged in extrahazardous employment, at time his negligent act caused injury to workman, not in his employment, but entitled to benefits under workmen's compensation law, was not subject to suit by such workman, and fact that employer failed to carry himself on his payroll reports to department of labor and industry, and failed to qualify himself to receive benefits as workman in event of injury to himself, was immaterial.

Wash.—Jewett v. Kerwood, 263 P.2d 830, 43 Wash.2d 691.

(4) Under provision of the workmen's compensation act respecting filing of reports by employers with department of labor and industries, considerable discretion is vested in the director as what should be included and be omitted from the reports and the reports are required to furnish the department with the

data for the accomplishment of the collection and payment functions and are not for the protection of the employees so as to give an employee engaged in extrahazardous employment a common-law cause of action against a third-party tort-feasor failing to file required reports.

Wash.—Lubich v. Pacific Highway Transport, 202 P.2d 270, 32 Wash. 2d 457.

Negligence connected with employment

Requirement that employer must have been engaged in extrahazardous employment at time of accident to render him immune from suit by workman not in his employ requires that employer's negligent act or omission must arise out of or be in some way connected with an extrahazardous employment or business then being carried on by employer.

Wash.—Gephart v. Stout, 118 P.2d 801, 11 Wash.2d 184.

Employment held extrahazardous

Wash.—Weiffenbach v. City of Seattle, 76 P.2d 589, 193 Wash. 528.

47. Wash.—McClung v. Pratt, 270 P.2d 1063, 44 Wash.2d 779.

48. Wash.—Muck v. Snohomish County Public Utility Dist. No. 1, 247 P.2d 233, 41 Wash.2d 81—D'Amico v. Conguista, 167 P.2d 157, 24 Wash.2d 674.

49. Wash.—Koreski v. Seattle Hardware Co., 135 P.2d 860, 17 Wash.2d 421.

Person not carried on pay roll

Where electric motor service corporation, which was within extrahazardous employment classification, contracted to repair machinery of hardware company, whose operation of power-driven machinery brought it within extrahazardous employment classification, and manager of the service corporation was injured while supervising or personally assisting in the repair work, the manager was a "workman" within the workmen's compensation act and could not maintain personal injury action against the hardware company even though the service corporation failed to carry him on its pay roll and make report to department

common-law action by a self-employed individual for negligence causing him injury unless he has qualified himself for benefits as and under the same circumstances and subject to the same obligations as a workman.⁵⁰

In Illinois. Under statutory provisions formerly in effect, where the employer, the employee, and a third person whose negligence caused the injury were all bound by the act and the injury was compensable under the act, in general the employee⁵¹ or the personal representative of a deceased employee⁵² could not maintain an action against such third person; the right was transferred to the employer who paid the compensation fixed by the act, and the amount of his recovery was limited by the amount of compensation payable under the act for the injury or death of the employee, as discussed *infra* § 1039. On the other hand, the common-law right of action of an employee⁵³ or the right of action of the personal representative of a deceased employee⁵⁴ for an injury to, or the death of, the employee against a person other than the employer, who caused the injury or death, was not affected by

the compensation act where such other person was not bound by the provisions of the act. Such provisions were held invalid,⁵⁵ and not to preclude maintenance of a common-law action against a third person whether such person became bound by the compensation act through election or through compulsion.⁵⁶

Under the statute which was formerly in effect, the fact that the person who caused the injury was, as to his own employees, within the provisions of the act did not, of itself entitle such person to the protection of such provisions,⁵⁷ and the mere fact that the injured employee, his employer, and the third person were within the operation of the act did not prevent the maintenance of an action for damages against such third person.⁵⁸ Thus the right to bring the action, otherwise maintainable, existed where the act which caused the injury did not arise out of any employment within the act in which the third person was engaged,⁵⁹ or where the injury occurred in the conduct of a part of the business of the third person which was not within the act;⁶⁰ nor did the provisions in question pre-

of labor and industries that the manager was carried on pay roll.

Wash.—Koreski v. Seattle Hardware Co., *supra*.

50. Wash.—Pink v. Rayonier, Inc., 259 P.2d 629, 42 Wash.2d 768—Latimer v. Western Machinery Exchange, 259 P.2d 633, 42 Wash.2d 756.

Independent contractor

Where junk company employed decedent and his copartners as independent contractors to remove equipment from abandoned railroad over whose right of way power company maintained uninsulated transmission line, decedent, who was electrocuted by the line, was not a "workman" within Washington compensation act, and hence decedent's beneficiary could maintain action under Washington wrongful death statute.

U.S.—Calvin v. West Coast Power Co., D.C.Or., 44 F.Supp. 783.

51. Ill.—Petrzelli v. Propper, 99 N.E.2d 140, 409 Ill. 365—Thornton v. Herman, 43 N.E.2d 934, 380 Ill. 341.

Victor v. Dehmlow, 84 N.E.2d 342, reversed on other grounds 90 N.E.2d 724, 405 Ill. 249—Biggs v. Farnsworth, 84 N.E.2d 330, 336 Ill. App. 417—Sweat v. Aircraft & Diesel Equipment Corp., 81 N.E.2d 8, 335 Ill.App. 177—Osada v. Patent Scaffolding Co., 76 N.E.2d 62, 332 Ill.App. 656—Cohen v. Cummings, 71 N.E.2d 198, 330 Ill.App. 431—Wildy v. Woodruff, 64 N.E.2d 745, 327 Ill.App. 608—Walsh v. Central Cold Storage Co., 58 N.E.2d 325, 324 Ill.App. 402—Rehula

v. Bessert, 54 N.E.2d 71, 322 Ill. App. 146—Taylor v. Boston Store, 52 N.E.2d 1022, 321 Ill.App. 301—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265—Springer v. Illinois Transit Lines, 48 N.E.2d 206, 318 Ill.App. 403—Wilson Garment Mfg. Co., for Use of Hardware Mut. Cas. Co. v. Edmonds, 38 N.E.2d 534, 312 Ill.App. 317—Havana Nat. Bank, for Use of Hartford Acc. & Indem. Co. v. Tazewell Club, 19 N.E.2d 228, 298 Ill.App. 393—Schnell v. National Air Transport, 18 N.E.2d 191, 296 Ill. App. 641—Hoff v. Lindstrom, 3 N.E.2d 149, 284 Ill.App. 651—Moy Wang v. Whelan, 2 N.E.2d 337, 284 Ill.App. 653—Kelas v. William Ganschow Co., 228 Ill.App. 189.

Mo.—Hungate v. Hudson, 169 S.W.2d 682, construing Illinois statute. 71 C.J. p 1526 note 15.

Action against fellow servant

Where the employer and the injured servant and a fellow servant who caused the injury were all subject to the act, an action by the injured servant against such fellow servant would not lie where the accident arose out of and in the course of the employment.

Ill.—Biggs v. Farnsworth, 84 N.E.2d 330, 336 Ill.App. 417—Cunningham v. Metzger, 258 Ill.App. 150.

52. Ill.—Thornton v. Herman, 43 N.E.2d 934, 380 Ill. 341.

Parker v. Alton R. Co., 14 N.E.2d 665, 295 Ill.App. 60.

71 C.J. p 1526 note 16.

Statute held applicable to third person bound by act as employee

Ill.—Thornton v. Herman, 43 N.E.2d 934, 380 Ill. 341.

53. Ill.—City of Chicago v. Pizel, 42 N.E.2d 850, 315 Ill.App. 216.

Mo.—Hungate v. Hudson, 169 S.W.2d 682, construing Illinois statute. 71 C.J. p 1525 note 1.

54. Ill.—Keeran v. Peoria, Bloomington & Champaign Traction Co., 115 N.E. 636, 277 Ill. 413. 71 C.J. p 1525 note 2.

55. Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealer's Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651.

56. Ill.—Hannigan v. Chicago Motor Coach Co., 109 N.E.2d 381, 348 Ill.App. 473.

57. U.S.—Hynes v. Indian Trails, C. A.Ill., 181 F.2d 668, certiorari denied 71 S.Ct. 58, 340 U.S. 824, 95 L.Ed. 605.

Ill.—Dinwiddie v. Siefkin, 20 N.E.2d 130, 299 Ill.App. 316—Clipperly v. Carmack, 258 Ill.App. 593.

58. Ill.—Kelly-Atkinson Const. Co. v. Foreman Bros. Banking Co., 218 Ill.App. 345. 71 C.J. p 1526 note 20.

59. Ill.—Clipperly v. Carmack, 258 Ill.App. 593. 71 C.J. p 1526 note 21.

60. U.S.—Hynes v. Indian Trails, C. A.Ill., 181 F.2d 668, certiorari denied 71 S.Ct. 58, 340 U.S. 824, 95 L.Ed. 605.

71 C.J. p 1526 note 22.

vent the maintenance of an action where the injury or death was not one for which compensation was payable under the act.⁶¹

Notwithstanding the provisions of the statute, an action would lie against a railroad company for an injury to, or death of, an employee of another where the injury occurred when such company was engaged in interstate commerce, even though the injured employee and his employer were both subject to the act,⁶² and the railroad company was subject to such act in respect of its intrastate business.⁶³ The employer and employee could not, after the happening of an injury, place themselves under the compensation act, as to such injury, so as to affect the rights⁶⁴ or liabilities⁶⁵ of a third person with respect to the matters here considered.

d. Person Contracting with Employer of Injured Person; Principal Employer

(1) In general

61. Ill.—Christian v. Chicago & I. M. Ry. Co., 105 N.E.2d 741, 413 Ill. 171.

71 C.J. p 1526 note 23.

Injury not in course of employment
Ill.—Victor v. Dehmlow, 90 N.E.2d 724, 405 Ill. 249.

Anderson v. Meyer, 87 N.E.2d 787, 338 Ill.App. 414—Lyons v. Michigan Blvd. Bldg. Co., 73 N.E.2d 776, 331 Ill.App. 482—Walsh v. Central Cold Storage Co., 58 N.E.2d 325, 324 Ill.App. 402—Rehula v. Bessert, 54 N.E.2d 71, 322 Ill.App. 146.

62. Ill.—Goldsmith v. Payne, 133 N. E. 52, 300 Ill. 119.

71 C.J. p 1531 note 84.

63. Ill.—Goldsmith v. Payne, supra.
71 C.J. p 1531 note 85.

64. Ill.—Righthouse v. Peoria Ry. Co., 208 Ill.App. 564.

65. Ill.—Righthouse v. Peoria Ry. Co., supra.

66. La.—Benoit v. Hunt Tool Co., 53 So.2d 137, 219 La. 380.

Albrecht v. Gaethe, App., 97 So. 2d 88.

Mass.—Hooper v. Noakes, 113 N.E.2d 829, 330 Mass. 366—Alberts v. Brockelman Bros., 45 N.E.2d 392, 312 Mass. 486—Stratis v. McLellan Stores Co., 42 N.E.2d 282, 311 Mass. 525, 142 A.L.R. 1393—Benoit v. Hathaway, 38 N.E.2d 329, 310 Mass. 362.

Mo.—Perrin v. American Theatrical Co., 178 S.W.2d 332, 352 Mo. 484.

Brody v. Cudahy Packing Co., 127 S.W.2d 7, 233 Mo.App. 973.

Ohio.—George v. City of Youngstown, 41 N.E.2d 567, 139 Ohio St. 591.

Pa.—Quick v. Allegheny Const. Equipment Co., 65 A.2d 238, 361 Pa. 377.

Tex.—Stephens v. Mendenhall, Civ. App., 287 S.W.2d 259, error refused no reversible error.

Wis.—Braun v. Jewett, 85 N.W.2d 364, 1 Wis.2d 531—Siblik v. Motor Transport Co., 55 N.W.2d 3, 262 Wis. 242.

71 C.J. p 1527 note 32.

Where third person is independent contractor in respect of work to be performed on certain property, some acts permit an employee of the owner of the property to maintain an action for damages against such contractor for injuries caused by him.
Conn.—Farrell v. L. G. De Felice & Son, 42 A.2d 697, 132 Conn. 81.
La.—Benoit v. Hunt Tool Co., 53 So. 2d 137, 219 La. 380.

Neb.—Rehn v. Bingham, 36 N.W.2d 856, 151 Neb. 196, appeal dismissed 70 S.Ct. 79, 338 U.S. 806, 94 L.Ed. 488, rehearing denied 70 S.Ct. 157, 338 U.S. 882, 94 L.Ed. 541, motion overruled 40 N.W.2d 678, 152 Neb. 171.

Tex.—Stephens v. Mendenhall, Civ. App., 287 S.W.2d 259, error refused no reversible error.

71 C.J. p 1527 note 32 [b].

Third person furnishing instrumentalities and operators to employer

The right to maintain the action has been recognized where the third person had furnished to the employer certain instrumentalities and operators and injuries resulted from the use of such instrumentalities or acts of the operators.

U.S.—Funk v. Hawthorne, C.C.A.Pa., 133 F.2d 686.

(2) General, principal, or original contractor

(3) Subcontractor

(1) In General

An employee may bring an action for damages for injury against another than his employer, where such other causes the injury, notwithstanding such other and the employer had entered into contract relations; but, under some acts, where a person enters into a contract with the immediate employer of the injured employee and is liable for compensation to such employee, the employee may not maintain an action against such person.

The rule permitting an action for damages for an injury to, or the death of, an employee against another than his employer where such other causes the injury has been recognized or applied notwithstanding such other and the employer had entered into contract relations.⁶⁶ So the right to treat a person causing the injury, who has entered into a contract with the immediate employer of the injured employee, as a third person against whom an action

Ga.—Albert v. Hudson, 176 S.E. 659, 49 Ga.App. 636.

71 C.J. p 1527 note 32 [c].

Employer performing services for third person

(1) The rule has been recognized where the third person had contracted with the employer of the injured or deceased employee for the performance of certain work or services by such employer.

Fla.—Jones v. Florida Power Corp., 72 So.2d 285.

Ill.—Kijowski v. Times Pub. Corp., 23 N.E.2d 703, 372 Ill. 311.

Mont.—Sullivan v. City of Butte, 157 P.2d 479, 117 Mont. 215.

N.Y.—Grimes v. Shell Union Oil Corp., 29 N.Y.S.2d 578, 262 App. Div. 344, motion denied 39 N.E.2d 285, 287 N.Y. 661, affirmed 40 N.E.2d 1022, 287 N.Y. 805.

Bauman v. Town of Irondequoit, 122 N.Y.S.2d 47, 204 Misc. 494, affirmed 125 N.Y.S.2d 250, 282 App. Div. 916, appeal dismissed 123 N.E.2d 574, 307 N.Y. 926.

Okl.—Oklahoma Steel Castings Co. v. Banks, 74 P.2d 1168, 181 Okl. 503.

Pa.—Walters v. Kaufmann Department Stores, 20 A.2d 865, 145 Pa. Super. 56.

71 C.J. p 1527 note 32 [e].

(2) The rule applies where the employer is an independent contractor.

U.S.—Konstantino v. Curtiss-Wright Corp., D.C.N.Y., 52 F.Supp. 684.

Kan.—Bittle v. Shell Petroleum Corp., 75 P.2d 829, 147 Kan. 227.

Mo.—Shafer v. Southwestern Bell Tel. Co., 295 S.W.2d 109.

for damages may be maintained has been recognized where the conditions which by the terms of the act render such person liable for compensation,⁶⁷ as, for example, the failure of the immediate or actual employer to make provision for the payment of compensation,⁶⁸ do not exist, and there is authority for the view that a provision of the act which renders a person liable for compensation to the employees of a contractor with whom such person has contracted without exacting from the contrac-

tor a certificate of compliance with the act does not prevent the employee of the contractor from bringing an action for damages against such person even though the latter has not exacted the certificate.⁶⁹

Under some acts, however, where a person enters into a contract with the immediate employer of the injured employee and is liable for compensation to such employee, the employee may not maintain an action against such person.⁷⁰ Where it is so pro-

Ohio.—*Robinson v. Republic Steel Corp.*, App., 78 N.E.2d 381.
71 C.J. p 1527 note 32 [e] (3).

(3) Libel for death of longshoreman employed by stevedore acting as independent contractor, and not as agent or employee of vessel owner, held maintainable against vessel owner as "some person other than the employer" within statute.
U.S.—*Colvin v. Kokusai Kisen Ka-bushiki Kaisha*, C.C.A.Tex., 72 F. 2d 44.

(4) Where trucking company is employed by seller to deliver merchandise to buyer, buyer is a third person not in the same employ as employee of trucking company against whom such employee may maintain action for injuries sustained, allegedly as a result of buyer's negligence, while engaged in unloading merchandise in buyer's yard.
Okla.—*Londagin v. McDuff*, 251 P.2d 496, 207 Okl. 594.

Lessor of truck

If death of assistant driver was caused by negligence of owner, who was operator of truck, which he has leased to interstate carrier, at time of accident, his administratrix had good cause of action against owner, even though, as to lessee, only remedy would be proceeding by his dependents for compensation under workmen's compensation statute.
N.C.—*McGill v. Bison Fast Freight, Inc.*, 96 S.E.2d 438, 245 N.C. 469.

Payment of premiums

Fact that owner of ship had paid premiums for employer's workmen's compensation insurance did not preclude employer's insurer from recovering, on behalf of itself and injured employee, damages because of negligence of shipowner which caused injuries to employee.

U.S.—*U. S. Fidelity & Guaranty Co. v. U. S.*, C.C.A.N.Y., 152 F.2d 46.

Contract of sale

Where seller contracted with buyer to sell machinery to buyer and to place it in operation, and seller's workman was injured while installing the machinery, the agreement was a contract to sell and seller was not a "subcontractor" within workmen's compensation act making remedy of workmen's compensation act

exclusive for employees of subcontractors, and workman was entitled to bring civil action against buyer for his injuries.

U.S.—*Ryan v. Bethlehem Sparrows Point Shipyard, Inc.*, C.A.Md., 209 F.2d 53.

67. U.S.—*Sears, Roebuck & Co. v. Wallace*, C.A.Va., 172 F.2d 802.

Mass.—*Whitehouse v. Cities Service Oil Co.*, 52 N.E.2d 414, 315 Mass. 108.

Mo.—*Dixon v. General Grocery Co.*, 293 S.W.2d 415.

71 C.J. p 1528 note 33.

Who are employers within act in general see supra §§ 42-58.

Seller

Where trucking company's driver was injured, allegedly due to seller's negligence, while voluntarily helping load the truck, seller was not driver's "principal employer" who would be liable to trucker for workmen's compensation if trucking company, as the "immediate employer," had not paid the compensation, and therefore the trucker was not barred by the workmen's compensation act from maintaining an action against the seller for the injuries received.
Okla.—*Horwitz Iron & Metal Co. v. Myler*, 252 P.2d 475, 207 Okl. 691.

68. U.S.—*Buffa v. General Motors Corp.*, D.C.Mich., 141 F.Supp. 803.
71 C.J. p 1528 note 34.

69. Ind.—*Artificial Ice & Cold Storage Co. v. Waltz*, 146 N.E. 826, 86 Ind.App. 534.
71 C.J. p 1528 note 35.

70. U.S.—*Hall v. Continental Drilling Co.*, C.A.La., 245 F.2d 717—*Blue Ridge Rural Elec. Co-op., Inc. v. Byrd*, C.A.S.C., 238 F.2d 346, certiorari granted 77 S.Ct. 557, 352 U. S. 999, 1 L.Ed.2d 544—*Tucker v. Texas Co.*, C.A.Tex., 203 F.2d 918.
Woody v. Union Equity Co-op. Exchange, D.C.Okla., 146 F.Supp. 217—*Kieffer v. Walsh Const. Co.*, D.C.Pa., 140 F.Supp. 318—*Harper v. Stroud*, D.C.Ark., 108 F.Supp. 436, applying Oklahoma law.

Ark.—*Trotter v. Ozarks Rural Elec. Co-op. Corp.*, 294 S.W.2d 498, applying Oklahoma law.

Conn.—*Farrell v. L. G. De Felice & Son*, 42 A.2d 697, 132 Conn. 81.

Kan.—*Bright v. Bragg*, 264 P.2d 494, 175 Kan. 404—*Lessley v. Kansas Power & Light Co.*, 231 P.2d 239, 171 Kan. 197—*Jennings v. Kansas Power & Light Co.*, 105 P.2d 882, 152 Kan. 469.

La.—*Benoit v. Hunt Tool Co.*, 53 So. 2d 137, 219 La. 380—*Thibodaux v. Sun Oil Co.*, 49 So.2d 852, 218 La. 453.

Stansbury v. Magnolia Petroleum Co., App., 91 So.2d 917—*Dandridge v. Fidelity & Casualty Co. of New York*, Employers Liability Assur. Corp., Intervener, App., 192 So. 887.

Mass.—*Alberts v. Brockelman Bros.*, 45 N.E.2d 392, 312 Mass. 486—*Meehan v. Gordon*, 29 N.E.2d 759, 307 Mass. 59.

Okla.—*Deep Rock Oil Corp. v. Howell*, 204 P.2d 282, 200 Okl. 675—*Jordon v. Champlin Refining Co.*, 198 P.2d 408, 200 Okl. 604—*Mid-Continent Pipe Line Co. v. Wilkerson*, 193 P.2d 586, 200 Okl. 335.

Tenn.—*Corpus Juris cited in Adams v. Hercules Powder Co.*, 175 S.W.2d 319, 321, 180 Tenn. 340, 151 A.L.R. 1352.

Tex.—*Lindsey v. Texas & N. O. R. Co.*, Civ.App., 87 S.W.2d 864.
71 C.J. p 1528 note 36.

Statutory employee

(1) Under provision of compensation act relating to liability of principal to employees of an independent contractor, the principal is considered the employer of contractor's employees so that right to compensation is their exclusive remedy and principal is not liable to contractor's employees in tort.

La.—*Benoit v. Hunt Tool Co.*, 53 So. 2d 137, 219 La. 380.

(2) If contractor was employed to service equipment of principal, and in an emergency employee of principal assumed control and directed contractor's employees, contractor's employees would become employees of principal and under Louisiana workmen's compensation act, workmen's compensation would be exclusive remedy for injuries.

U.S.—*Fontenot v. Stanolind Oil & Gas Co.*, Liberty Mut. Ins. Co., Intervener, D.C.La., 144 F.Supp. 818, affirmed 243 F.2d 574.

vided, the owner is not liable as a third party for negligence causing injury to an employee of a person employed by the owner to do work for the owner, if the work is part of the owner's trade, business, or occupation.⁷¹ Under such provisions, the nature of the work engaged in by the injured employee and his immediate employer is the decisive factor in determining liability of the third party,⁷²

and an employee of an independent contractor who is injured by negligence of the principal while performing work that is only ancillary and incidental to the principal's business may bring an action against the principal for damages.⁷³ In determining which of two employers is master of an employee at the time the employee's negligence caused injury to another employee so as to determine

(3) Where foreman of labor gang employed by independent contractor in unloading of box car was injured when door of car fell, connecting carrier, which was under duty of unloading the box car but which had engaged the independent contractor to do so, was in effect the foreman's "employer" so that payment of workmen's compensation by the independent contractor's insurance carrier relieved the connecting carrier of all further responsibility.

La.—Franklin v. Illinois Cent. R. Co., App., 13 So.2d 125.

(4) If independent contractor's employee, who was electrocuted while working in exchange building of telephone company, was a statutory employee of telephone company within meaning of the workmen's compensation act, then no recovery could be had in action against telephone company for wrongful death of the employee.

Mo.—Shafer v. Southwestern Bell Tel. Co., 295 S.W.2d 109.

(5) Where employee of trucking contractor hired to move ore from the mine to processing mill was either an employee or an independent contractor, which under the circumstances made him a statutory employee of the mine owner, or he was an employee of the mine owner by reason of the express written authority of the contractor as the owner's employee to employ him, the employee was barred from maintaining a common-law action for injuries against the mine owner.

Mo.—Montgomery v. Mine La Motte Corp., 304 S.W.2d 885.

(6) Independent contractor's employee killed while working on electric power company's land and engaged in replacement of power company's electrical conductors was employee of power company within Idaho workmen's compensation statute defining a statutory employer and common-law action for negligence by his widow and child was precluded.

U.S.—Beedy v. Washington Water Power Co., C.A.Idaho, 233 F.2d 123.

71. U.S.—Blue Ridge Rural Elec. Co-op., Inc. v. Byrd, C.A.S.C., 238 F.2d 346, reversed on other grounds Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 78 S.Ct. 893—Doane v. E. I. DuPont De Nemours

& Co., C.A.Va., 209 F.2d 921—Berry v. Atlantic Greyhound Lines, C. C.A.S.C., 114 F.2d 255.

Kan.—Sheahan v. Kansas Power & Light Co., 241 P.2d 515, 172 Kan. 399.

S.C.—Marchbanks v. Duke Power Co., 2 S.E.2d 825, 190 S.C. 336.

Va.—Kramer v. Kramer, 100 S.E.2d 37, 199 Va. 409.

Intent of statute

(1) The workmen's compensation statutes manifest intent to bring within the compensation act all persons engaged in any work that is part of the trade, business, or occupation of original party who undertakes as owner, or contracts as contractor, to perform that work, and to make liable to every employee engaged in that work, every such owner or contractor and subcontractor above such employee, but to except, and preserve common-law remedy against, any employer reached in the ascending scale of whose trade, business, or occupation, the work is not a part.

Va.—Sykes v. Stone & Webster Engineering Corp., 41 S.E.2d 469, 186 Va. 116.

(2) Purpose of statute requiring insurer of employer of independent contractor to pay compensation to independent contractor's employees performing work which is part of employer's business is to prevent employer from avoiding application of workmen's compensation act by letting out the work to independent contractor, and such employees, being covered by insurance of employer, have no right of action against employer to recover for injuries arising out of, and in course of, their employment in such work.

Mass.—Dubois v. Soule Mill, 32 N. E.2d 886, 323 Mass. 472.

Where relationship of principal employer and contractor did not exist between building owner and firm examining the premises, the building owner was not liable to pay compensation for the injury or death of employee of firm and an action based on negligence could not be maintained against building owner.

Conn.—Buytkus v. Second Nat. Bank, 16 A.2d 579, 127 Conn. 816.

72. U.S.—Sears, Roebuck & Co. v. Wallace, C.A.Va., 172 F.2d 802.

The customary practice of a person or corporation in carrying on its business has a material bearing on whether a particular activity is a "part of or process in" the "trade or business" or "merely ancillary and incidental" thereto within the meaning of the compensation act so as to permit recovery at common law for death of employee of contractor.

Mass.—Caton v. Winslow Bros. & Smith Co., 34 N.E.2d 633, 309 Mass. 150—Cozzo v. Atlantic Refining Co., 12 N.E.2d 744, 299 Mass. 260.

Performance of commercial functions of owner

Work which ordinarily would be performed by owner's own employees in the prosecution of owner's business, or as an essential part in maintenance of business, is part of owner's "trade, business, or occupation" within Virginia workmen's compensation act making owner liable as a third party for negligence of owner causing injury to employee of person employed by owner to do work for owner, unless work is part owner's trade, business, or occupation, but quoted phrase does not include work not directly entering into performance of the commercial function of owner but only affording the facilities for conduct of owner's commercial function.

U.S.—Sears, Roebuck & Co. v. Wallace, C.A.Va., 172 F.2d 802.

Construction of new building

Although the construction of a new building for use in manufacturing or merchandising goods may not ordinarily be a "part of or process in" the "trade or business" of a person or corporation engaged in such manufacturing or merchandising within the meaning of the compensation act so as to preclude recovery at common law for death of employee of contractor, it does not follow that such a person or corporation may not adopt the general practice of constructing new buildings for use as outlets for the distribution of its products so that the construction thereof becomes an integral part of its business and not "merely ancillary or incidental" thereto.

Mass.—Cozzo v. Atlantic Refining Co., 12 N.E.2d 744, 299 Mass. 260.

73. Mass.—Cannon v. Crowley, 61 N.E.2d 662, 318 Mass. 373.

whether the remedy is by tort action or under the workmen's compensation act, the test is the right of control with respect to the work done and the manner of performing it.⁷⁴

Principal employer's injury to employee of subcontractor. Under some acts, where a principal employer procures work to be done by a contractor, or through him by a subcontractor, and such work is a part or process in the trade or business of such principal contractor and is performed in, on, or about premises under the control of such principal contractor, such principal employer becomes absolutely liable for the payment of compensation to the employees involved if such principal employer has accepted the act, and an employee of a subcontractor may not, it seems, maintain an action for damages against such principal employer for an injury for which such employer is otherwise liable.⁷⁵

Where, however, the work involved is not a part or process in the trade or business of the principal employer, performed on his premises, the right of an employee of a subcontractor to maintain an action against such employer has been recognized.⁷⁶

Under a statute making a "principal or intermediate contractor or subcontractor" liable for compensation to an employee injured while in the employ of any of his subcontractors and engaged on the subject matter of the contract, the quoted words do not include an owner for whom buildings were being erected by contractors and subcontractors.⁷⁷ Where a subcontractor provided compensation coverage for his employees, an employee may not sue as a third party the owner of property who had contracted for the work, under a provision imposing such direct liability if the contractor fails to provide compensation coverage.⁷⁸

74. U.S.—*Funk v. Hawthorne*, C.C. A.Pa., 138 F.2d 686.

75. U.S.—*Boettger v. Babcock & Wilcox Co.*, D.C.Pa., 142 F.Supp. 777, reversed on other grounds 242 F.2d 455.

Conn.—*Bogoratt v. Pratt & Whitney Aircraft Co.*, 157 A. 860, 114 Conn. 126.

Kan.—*Primm v. Kansas Power and Light Co.*, 249 P.2d 647, 173 Kan. 443.

Intent of statute

The Virginia workmen's compensation act making owner liable as a third party for negligence of owner causing injury to employee of person employed by owner to do work for owner, unless work is part of owner's trade, business, or occupation, is intended to protect employees of financially irresponsible subcontractors, and to prevent employers from relieving themselves of liability for compensation by doing through independent contractors what they would otherwise do through direct employees, and was not intended to relieve employers from liability for their own negligence which causes injury to employees of independent contractors engaged in work for employers outside scope of employers' occupation. U.S.—*Sears, Roebuck & Co. v. Wallace*, C.A.Va., 172 F.2d 802.

Equipment for operation

Argument that principal is not relieved from liability under common law for injuries to independent contractor's employee on ground that his remedy is under workmen's compensation act simply because such contractor's work may be required to equip principal's trade or business for operation is inapplicable

where work involved is part of principal's trade or business.

Kan.—*Lessley v. Kansas, Power & Light Co.*, 231 P.2d 239, 171 Kan. 197.

76. U.S.—*Boettger v. Babcock & Wilcox Co.*, C.A.Pa., 242 F.2d 455. Conn.—*Johnson v. Robertson Bleachery & Dye Works*, 74 A.2d 196, 136 Conn. 698.—*King v. Palmer*, 30 A. 2d 549, 129 Conn. 636.

Mass.—*Caton v. Winslow Bros. & Smith Co.*, 34 N.E.2d 633, 309 Mass. 150.

Mo.—*Settle v. Baldwin*, 196 S.W.2d 299, 355 Mo. 336.

Pa.—*D'Alessandro v. Barfield*, 35 A. 2d 412, 348 Pa. 328.

71 C.J. p 1528 note 39.

Work not a part of trade or business

(1) The making of extensive alterations on storage warehouse was not a part of the "trade, business, or occupation" of a seller of merchandise leasing the warehouse for storage purposes within the Virginia workmen's compensation act, so as to create compensation liability to an employee of the subcontractor sustaining injuries while making alterations and preclude a common-law action by him against the seller for injuries sustained.

U.S.—*Sears, Roebuck & Co. v. Wallace*, C.A.Va., 172 F.2d 802.

(2) Employee of contractor engaged in major job of replacing entire heating steam pressure system in railroad engine house was not engaged in "part or process of the trade or business" of railroad within meaning of statute providing for compensation liability of principal employer procuring work to be done for him through a contractor which work is a part of process in the trade or business of principal em-

ployer, so as to be barred from maintaining tort action against railroad company for injuries arising in course of such work.

Conn.—*King v. Palmer*, 30 A.2d 549, 129 Conn. 636.

(3) Employee of trucking concern who came on defendant's premises to obtain goods that were to be delivered was not engaged in "part or process of the trade or business" of defendant within meaning of compensation act provision for compensation liability of principal employer so as to be barred from maintaining tort action against defendant for injuries arising in course of such work, notwithstanding defendant on occasion had its own employees make deliveries to shipping terminals.

Conn.—*Greenwald v. Wire Rope Corp. of America*, 40 A.2d 748, 131 Conn. 465.

Premises

Where public road on which independent contractor was erecting poles for power company did not constitute premises under company's control within provision making compensation act applicable to a contractor's employees, company could not avoid liability for death of contractor's employee resulting from negligence of employee of power company on ground that the injury was within the compensation act. Conn.—*Bates v. Connecticut Power Co.*, 33 A.2d 342, 130 Conn. 256.

77. Tenn.—*International Harvester Co. v. Sartain*, 222 S.W.2d 854, 32 Tenn.App. 425.

78. U.S.—*Ballard v. Southern Cotton Oil Co.*, D.C.S.C., 145 F.Supp. 832.

(2) General, Principal, or Original Contractor

While a general contractor has been regarded as a "third person" liable to suit for injuries to an employee of a subcontractor, under some statutes, where the general contractor is liable for workmen's compensation to an employee of a subcontractor, the employee cannot maintain an action for damages against the general contractor.

With respect to injuries to an employee of a subcontractor, a general contractor has been regarded as a "third person" within the meaning of a provision of the act which permits an action at law against a "third person" causing the injury or death of the employee.⁷⁹ Under some acts, however, where a principal or general contractor⁸⁰ or his in-

79. U.S.—Lanza v. Carroll, Ark., 75 S.Ct. 804, 349 U.S. 408, 99 L.Ed. 1183.

Tipton v. Barge, C.A.N.C., 243 F. 2d 531.

Liberty Mut. Ins. Co. v. Goode Const. Co., D.C.Va., 97 F.Supp. 316. N.J.—Wilson v. Faull, 141 A.2d 768, 27 N.J. 105.

N.C.—Cathey v. Southeastern Const. Co., 11 S.E.2d 571, 218 N.C. 525—Sayles v. Loftis, 9 S.E.2d 393, 217 N.C. 674—Mack v. Marshall Field & Co., 6 S.E.2d 889, 217 N.C. 55. 71 C.J. p 1529 note 53.

Corpus Juris cited in support of statement that the lack of harmony among the courts on the liability of a general contractor as a third person derives mainly from the differences in the provisions of the statutes involved.

Va.—Sykes v. Stone & Webster Engineering Corp., 41 S.E.2d 468, 473.

Constitutional prohibition

Under Arkansas constitution prohibiting the general assembly from passing any law limiting the common-law liability for injury or death except in cases "arising between employer and employee," the general assembly could not relieve a general contractor of his common-law liability except with respect to persons in his employ.

U.S.—Anderson v. Sanderson & Porter, C.C.A.Ark., 146 F.2d 58.

Abandonment of subcontract

Subcontractor's employee held to have remained in subcontractor's employ and not to have become general contractor's employee authorizing his recovery against general contractor for negligence, notwithstanding subcontractor abandoned subcontract and general contractor continued the work and paid subcontractor's men, where wages paid and premiums paid on compensation policy in subcontractor's name were charged to subcontractor and employee had no notice or knowledge of change of his employment.

N.Y.—Paulsen v. Kahn, 288 N.Y.S. 622, 248 App.Div. 744.

80. U.S.—Lanza v. Carroll, C.A.Ark., 216 F.2d 808, reversed on other grounds 75 S.Ct. 804, applying Missouri law—New Amsterdam Cas. Co. v. Boaz-Kiel Const. Co., C.C.A.Mo., 115 F.2d 950.

Aetna Cas. & Sur. Co. v. Manufacturers Cas. Ins. Co., D.C.La.,

140 F.Supp. 579—Burris v. J. Ray McDermott & Co., D.C.La., 116 F. Supp. 907—Carroll v. Lanza, D.C. Ark., 118 F.Supp. 491, affirmed in part and reversed in part on other grounds C.A., Lanza v. Carroll, 216 F.2d 808, reversed on other grounds 75 S.Ct. 804, 349 U.S. 408, 99 L.Ed. 1183, applying Missouri law—Huffstetler v. Lion Oil Co., D.C.Ark., 110 F.Supp. 222, affirmed 208 F.2d 549—Staton v. Reynolds Metals Co., D.C.Ky., 58 F.Supp. 657.

Ark.—Baldwin Co. v. Maner, 278 S. W.2d 28, 224 Ark. 593.

Fla.—Brickley v. Gulf Coast Const. Co., 14 So.2d 265, 153 Fla. 216.

Idaho.—Brown v. Arrington Const. Co., 262 P.2d 789, 74 Idaho 338—Gifford v. Nottingham, 193 P.2d 831, 68 Idaho 330.

La.—Sisk v. L. W. Eaton Co., App., 89 So.2d 425.

Md.—Kegley v. Vulcan Rail & Const. Co., 101 A.2d 822, 203 Md. 476.

Mass.—Cozzo v. Atlantic Refining Co., 12 N.E.2d 744, 299 Mass. 260.

Miss.—Mosley v. Jones, 80 So.2d 819, 224 Miss. 725.

Mo.—Bunner v. Patti, 121 S.W.2d 153, 343 Mo. 274.

Nev.—Simon Service Inc. v. Mitchell, 307 P.2d 110.

Pa.—Black v. Booth & Flinn Co., 65 Dauph. 199.

Tenn.—Corpus Juris cited in Adams v. Hercules Powder Co., 175 S.W.2d 319, 321, 180 Tenn. 340, 151 A.L.R. 1352.

71 C.J. p 1528 note 41.

Statutory employer.

(1) Where, under the act, the principal contractor accepts certain provisions of the act and thereby becomes the statutory employer of the employees of the subcontractor and as such liable for compensation, an employee of the subcontractor may not maintain an action at law for damages against the principal contractor.

U.S.—Capetola v. Barclay White Co., C.C.A.Pa., 139 F.2d 556, 153 A.L.R. 1046, certiorari denied 64 S.Ct. 939, 321 U.S. 799, 88 L.Ed. 1087.

Kieffer v. Walsh Const. Co., D.C. Pa., 140 F.Supp. 318—Rivera v. Turner Const. Co., D.C.Pa., 135 F. Supp. 553.

N.J.—Wilson v. Faull, 141 A.2d 768, 27 N.J. 105, applying Pennsylvania law.

Pa.—Brown v. International Scrap Iron & Metal Co., Com.Pl., 41 Del. Co. 163—Lapes v. Pennsylvania Engineering Co., Com.Pl., 29 West. L.J. 197.

71 C.J. p 1528 note 41 [a].

(2) Agreement by subcontractor to provide for compensation insurance does not remove statutory employer from protection of compensation act, even though it may operate to relieve such employer from payment of compensation by placing that responsibility on subcontractor.

Pa.—Capozzoli v. Stone & Webster Engineering Corp., 42 A.2d 524, 352 Pa. 183.

(3) Where New Jersey defendant contracted in Pennsylvania with association for repair work and subcontracted part of the work in New Jersey and plaintiff, a New Jersey resident, and employee of the subcontractor, was injured by fall from scaffold erected by defendant, plaintiff was a statutory employee of defendant within the intent of the Pennsylvania compensation act.

N.J.—Wilson v. Faull, 133 A.2d 695, 45 N.J.Super. 555, reversed on other grounds 141 A.2d 768, 27 N.J. 105.

(4) Where wrecking company undertook by contract to wreck certain dwellings, and remove them, and engaged a trucking company to help haul away portions of the dwellings, truck driver-employee of trucking company was a "statutory employee" of wrecking company, within meaning of workmen's compensation act, and therefore could not maintain common-law action against wrecking company for his injuries.

N.J.—Parker v. Zanghi, 131 A.2d 802, 45 N.J.Super. 167, applying Pennsylvania law.

Meeting of obligation

In action by alleged employee of subcontractor against owner of premises and power company for injuries sustained from an electric wire, general contractor as third-party defendant had good defense to extent that it had met its obligation in full toward employee under compensation law.

U.S.—Gallagher v. General Mach. Co., D.C.Pa., 9 F.R.D. 824.

Employees engaged in common enterprise

(1) Amended section of workmen's compensation act, providing that all of general contractor's and subcontractor's employees, engaged on con-

suror⁸¹ is liable for compensation under the act to an employee of a subcontractor, such employee cannot maintain an action for damages against the general contractor.

Thus, where the act renders the general or principal contractor absolutely liable for compensation for an injury to, or the death of, an employee of a subcontractor, an action for damages for such injury⁸² or death⁸³ against the general or principal contractor who has caused the injury and has complied with, or accepted, the act may not be maintained; and this is the rule notwithstanding another provision of the act which permits the maintenance of an action for damages against a person other than the employer⁸⁴ or against a person not in the same employ,⁸⁵ where the injury is caused by such person, in the absence of a showing which takes the case out of the operation of the act.⁸⁶

It has been stated broadly, however, that the provision of an act that any contractor shall, in the event of the subcontractor's failing to carry workmen's compensation insurance as required by the act, become liable for compensation does not impair any of the common-law rights of an employee of the subcontractor⁸⁷ or relieve the general contractor from liability for damages caused by his own negligence,⁸⁸ on the theory that the purpose of such provision is to protect the employee of the subcontractor.⁸⁹ It has been held that even where the subcontractor failed to procure compensation insurance, thus imposing a secondary liability on the general contractor, the latter may not claim immunity from a common-law action for negligence.⁹⁰

Where by the terms of the act the principal or general contractor is not liable for compensation for an injury to, or the death of, an employee of a subcontractor under the particular circumstances in-

tract work, shall be deemed employed in same business or establishment, and that contractor shall secure payment of compensation to all such employees, abrogates common law to extent of making all employees engaged in common enterprise fellow servants entitled to equal benefits under such act without resorting to common-law action, and brings within its provisions all claims for compensation for injuries arising out of and in course of employment by common employer. Fla.—Frantz v. McBee Co., 77 So.2d 796—Younger v. Giller Contracting Co., 196 So. 690, 143 Fla. 335.

(2) Protection of a general contractor's compensation insurance extends to all workmen on the job whether or not employed immediately by the general contractor or employer, at least if they are not otherwise protected by insurance, and such general contractor or employer and all persons or corporations engaged on the job as employees or independent contractors are also insured and are granted immunity against actions at law brought by or in the right of other employees so engaged.

Mass.—Pimental v. John E. Cox Co., 13 N.E.2d 441, 299 Mass. 579.

81. Mass.—White v. George A. Fuller Co., 114 N.E. 829, 226 Mass. 1. 71 C.J. p 1528 note 42.

82. U.S.—Kaufman v. Bowman, C.A. Conn., 193 F.2d 606. Staton v. Reynolds Metals Co., D.C.Ky., 58 F.Supp. 657.

Kan.—Whitaker v. Douglas, 292 P.2d 688, 179 Kan. 64—Hoffman v. Cudahy Packing Co., 167 P.2d 613, 161 Kan. 345.

Tenn.—Adams v. Hercules Powder

Co., 175 S.W.2d 319, 180 Tenn. 340, 151 A.L.R. 1352.

71 C.J. p 1529 note 43.

Existence of liability as decisive

(1) Under provisions of workmen's compensation act declaring in effect that an employer, within meaning of act, must secure payment of compensation to its employees, and that a contractor who sublets work shall be deemed the employer of the subcontractor for purpose of securing payment of compensation, it is not the providing of the compensation that gives immunity from suit by employee of a subcontractor on theory that contractor is a third-party tortfeasor, but it is the existence of the liability, vel non, to secure compensation which gives the employer immunity.

Fla.—Jones v. Florida Power Corp., 72 So.2d 285.

(2) Where payment of compensation is secured by general contractor, either directly or through subcontractor, a recovery for injury arising out of and in course of contract work is exclusively under compensation act.

Fla.—Brickley v. Gulf Coast Const. Co., 14 So.2d 265, 153 Fla. 216.

Subcontractors not complying with act

Under Michigan law, a general contractor is only held to the limited employer's liabilities under the act, and may not be sued in a personal injury action, if he lets his work to subcontractors who do not comply with, or who are not covered by, the act, since in such case he is liable for compensation.

U.S.—Miller v. J. A. Utley Const. Co., D.C.Mich., 154 F.Supp. 138.

83. Idaho.—Gifford v. Nottingham, 193 P.2d 831, 68 Idaho 330,

Ky.—Jennings v. Vincent's Adm'x, 145 S.W.2d 537, 284 Ky. 614.

Md.—State, to Use of Reynolds v. City of Baltimore, 86 A.2d 618, 199 Md. 289.

71 C.J. p 1529 note 44.

Securing of payment

Where payment of compensation is secured by general contractor, either directly or through subcontractor, a recovery for death arising out of and in course of contract work is exclusively under compensation act.

Fla.—Brickley v. Gulf Coast Const. Co., 14 So.2d 265, 153 Fla. 216.

84. Kan.—Hoffman v. Cudahy Packing Co., 167 P.2d 613, 161 Kan. 345. La.—Coal Operators Cas. Co. v. Fidelity & Cas. Co. of N. Y., 66 So.2d 852, 223 La. 794.

Md.—State, to Use of Reynolds v. City of Baltimore, 86 A.2d 618, 199 Md. 289.

71 C.J. p 1529 note 45.

85. Okl.—Fox v. Dunning, 255 P. 582, 108 Okl. 292.

86. Md.—State v. Benjamin F. Bennett Bldg. Co., 140 A. 52, 154 Md. 159.

87. N.J.—Corbett v. Starrett Bros., 143 A. 352, 105 N.J.Law 228.

88. N.Y.—Sweezy v. Arc Elec. Const. Co., 67 N.E.2d 869, 295 N.Y. 306, 166 A.L.R. 809. Sher v. Roth-Schenker Corp., 72 N.Y.S.2d 684.

71 C.J. p 1529 note 49.

89. N.J.—Corbett v. Starrett Bros., 143 A. 352, 105 N.J.Law 228.

90. N.Y.—Sweezy v. Arc Elec. Const. Co., 67 N.E.2d 869, 295 N.Y. 306, 166 A.L.R. 809.

71 C.J. p 1529 note 51 [a].

volved,⁹¹ as, for example, where the subcontractor pays, or secures payment of, compensation to the employee,⁹² the right to maintain an action against the principal or general contractor for his negligence or wrong has been recognized; but under some statutes a common-law action for damages against the general contractor may not be maintained where the subcontractor has secured the payment of compensation.⁹³ Likewise an employee of a subcontractor may maintain an action against the general contractor for an injury caused by the negligence of the general contractor where the general contractor has not secured the payment of compensation to such employee.⁹⁴

Under some acts where the principal contractor has rejected the provisions of the act for elective compensation, an employee of a subcontractor may maintain an action against the principal contractor for an injury caused by the latter,⁹⁵ notwithstanding the subcontractor has accepted the act and tak-

en out insurance.⁹⁶

(3) Subcontractor

Some acts allow an action to be brought against a subcontractor for an injury to the employee of the general contractor caused by negligence chargeable to such subcontractor, or for injury to the employee of another subcontractor; but according to other authority, a subcontractor is not an "other party" than the employer so as to permit the bringing of a tort action against him by the employee of the principal contractor.

Some acts do not prevent an action against a subcontractor for an injury to the employee of the general contractor caused by negligence chargeable to such subcontractor,⁹⁷ at least where the so-called subcontractor is in fact an independent contractor in so far as the control of the work is concerned,⁹⁸ and a subcontractor whose negligence is the cause of an injury to an employee of the general or principal contractor has been regarded as a "third person"⁹⁹ or a person other than the employer¹ within the meaning of a provision of the act permit-

91. U.S.—*Anderson v. Sanderson & Porter*, C.C.A.Ark., 146 F.2d 58.
McGann v. Moss, D.C.Va., 50 F. Supp. 573.

Pa.—*Sarne v. Baltimore & O. R. Co.*, 87 A.2d 264, 370 Pa. 82.
71 C.J. p 1529 note 51.

Injury not arising out of, and in course of, employment

U.S.—*E. I. Du Pont De Nemours Co. v. Hall*, C.A.S.C., 237 F.2d 145.

Absence of contractual relationship

As used in statute making a "principal or intermediate contractor or subcontractor" liable for compensation to employee injured while in employ of any of his subcontractors and engaged upon subject matter of contract, quoted words did not include a contractor having no contractual relationship with injured employee or his immediate or remote employer so as to bar suit by injured employee against such owner and contractor to recover damages for injuries.
Tenn.—*International Harvester Co. v. Sartain*, 222 S.W.2d 854, 32 Tenn. App. 425.

92. U.S.—*Lanza v. Carroll*, C.A.Ark., 216 F.2d 808, reversed on other grounds 75 S.Ct. 804, 349 U.S. 408, 99 L.Ed. 1183.

Miller v. J. A. Utley Const. Co., D.C.Mich., 154 F.Supp. 138.

Ark.—*Baldwin Co. v. Maner*, 273 S.W. 2d 28, 224 Ark. 348.
71 C.J. p 1529 note 52.

93. Fla.—*Brickley v. Gulf Coast Const. Co.*, 14 So.2d 265, 153 Fla. 216.

Secondary Liability

Even when a subcontractor under the Pennsylvania compensation law agrees to assume the compensation

liability, the contractor is secondarily liable and his common-law immunity against suit by employee continues.
N.J.—*Wilson v. Faull*, 133 A.2d 695, 45 N.J.Super. 555, reversed on other grounds 141 A.2d 768, 27 N.J. 105.

94. Fla.—*Brickley v. Gulf Coast Const. Co.*, 14 So.2d 265, 153 Fla. 216.
71 C.J. p 1530 note 54.

95. Pa.—*Robinson v. Atlantic Elevator Co.*, 148 A. 847, 298 Pa. 549—*Gallivan v. Wark Co.*, 136 A. 223, 288 Pa. 443.

96. Pa.—*Gallivan v. Wark Co.*, supra.

97. U.S.—*Bagnet v. Springfield Sand & Tile Co.*, C.C.A.Mass., 144 F.2d 65, certiorari denied 65 S.Ct. 72, 323 U.S. 735, 89 L.Ed. 589.
Ga.—*Blair v. Smith*, 41 S.E.2d 133, 201 Ga. 747.

Idaho.—*Brown v. Arrington Const. Co.*, 262 P.2d 789, 74 Idaho 338.

Kan.—*Davison v. Martin K. Eby Const. Co.*, 218 P.2d 219, 169 Kan. 256.

Okl.—*Parkhill Truck Co. v. Wilson*, 125 P.2d 203, 190 Okl. 473.

Tenn.—*Olsen v. Sharpe*, 235 S.W.2d 11, 191 Tenn. 503.

71 C.J. p 1530 note 58.

Employee not covered by act

Statute providing that, where a general contractor is covered by the Massachusetts workmen's compensation act and a covered employee is injured by the negligence of a subcontractor engaged in common employment, then the general contractor's insurer may not maintain in the name of injured employee an action against subcontractor, does not bar

an employee not covered by the Massachusetts act from an action of tort against subcontractor engaged in common employment.

U.S.—*Bagnet v. Springfield Sand & Tile Co.*, D.C.Mass., 64 F.Supp. 768.

An independent contractor is not an "employee" against whom workmen's compensation act does not authorize action for injuries caused by his negligence to general contractor's employee, even though independent contractor is in general contractor's general employment, since "employee," in such situation, means one under his immediate employer's direct supervision and control.

Okl.—*Parkhill Truck Co. v. Wilson*, 125 P.2d 203, 190 Okl. 473.

98. U.S.—*Standard Accident Ins. Co. v. Pennsylvania Car Co.*, C.C.A.Tex., 49 F.2d 73.

Ga.—*Blair v. Smith*, 41 S.E.2d 133, 201 Ga. 747.

99. Neb.—*Sloan v. Harrington*, 223 N.W. 663, 117 Neb. 809, appeal dismissed and certiorari denied 50 S. Ct. 65, 280 U.S. 516, 74 L.Ed. 586.

Common employment

Construction company which was allegedly a subcontractor on project on which county was the principal, was a third person against whom a suit would lie by an employee of the county for injuries occasioned by negligence of the subcontractor's employee, even though the employees were engaged in common employment.

Idaho.—*Brown v. Arrington Const. Co.*, 262 P.2d 789, 74 Idaho 338.

1. Ky.—*Dillman v. John Diebold & Sons Stone Co.*, 44 S.W.2d 581, 241 Ky. 631.

ting an action for damages against such person for an injury caused by him.

The right to maintain such action is not defeated by another provision of the act which renders the principal contractor liable for compensation to an employee of a subcontractor,² but it has also been held that, under a provision imposing on the general contractor the obligation of securing equal benefits to the contractor's and subcontractor's employees engaged in the common enterprise, the subcontractor, as well as the general contractor, is immune from common-law liability to employees injured in work on the common enterprise.³ According to other authority, a subcontractor is not an "other party" than the employer so as to permit the bringing of a tort action against him by an employee of the principal contractor;⁴ and, under provisions of statute authorizing actions against third parties who are not in the same employment as the claimant, the representative of an employee has no cause of action against a subcontractor who had employed the employee, but who had permitted compensation insurance to terminate so that under the compensation act the employee was an employee of the principal contractor.⁵

Subcontractor causing injury to employee of another subcontractor. The right of an employee of

a subcontractor to maintain an action against another subcontractor, under the same general contractor, has been recognized notwithstanding the employee's right to claim compensation under the act.⁶ According to other authority, where injuries suffered by the employee of a subcontractor involve the negligence of employees of another subcontractor under the same general contractor, the remedy under the workmen's compensation act is exclusive since such employees, whether employed by the subcontractor or general contractor, are deemed to be statutory fellow servants;⁷ but such result follows only where it appears that the general contractor has secured payment of workmen's compensation either directly or indirectly through the subcontractor,⁸ and where the contractor and employee involved are engaged in work covered by a common contract.⁹

While an independent contractor or subcontractor engaged on a common job for a common employer insured under the statute is not a "person other than the insured" under the compensation statute permitting an action at law to be brought against such a party,¹⁰ immunity from suit at common law does not apply where there is no common employer of the two independent contractors whose employees are involved in an accident or injury.¹¹

2. Ky.—Dillman v. John Diebold & Sons Stone Co., *supra*.

3. Fla.—Younger v. Giller Contracting Co., 196 So. 690, 143 Fla. 335.

4. Va.—Rea v. Ford, 96 S.E.2d 92, 198 Va. 712.

5. Colo.—Hartford Acc. & Indem. Co. v. Clifton, 190 P.2d 909, 117 Colo. 517.

6. N.Y.—Portman v. Hanman Bldg. Corporation, 226 N.Y.S. 395, 131 Misc. 168.

Tenn.—McVeigh v. Brewer, 189 S.W. 2d 812, 182 Tenn. 683.

"Same employ"

Employees of separate independent contractors under the same general contractor who were engaged in performing distinct tasks for which they were hired, although they were cooperating to accomplish a joint result, were not persons in the "same employ" within workmen's compensation act authorizing workman injured by negligence or wrong of another not in the "same employ" to pursue common-law remedy against such person.

Okl.—Rota-Cone Oil Field Operating Co. v. Chamness, 168 P.2d 1007, 197 Okl. 103.

7. Fla.—Miami Roofing & Sheet Metal Co. v. Kindt, 48 So.2d 840.

Other statement of rule

The protection of a general con-

tractor's compensation insurance extends to all workmen on the job whether or not employed immediately by the general contractor or employer, at least if they are not otherwise protected by insurance, and such general contractor or employer and all persons or corporations engaged on the job as employees, independent contractors or subcontractors, irrespective of whether such independent contractors or subcontractors are also insured, are granted immunity against actions at law brought by or in the right of other employees so engaged.

Mass.—Pimental v. John E. Cox Co., 13 N.E.2d 441, 299 Mass. 579—Dresser v. New Hampshire Structural Steel Co., 4 N.E.2d 1012, 296 Mass. 97.

8. Fla.—Miami Roofing & Sheet Metal Co. v. Kindt, 48 So.2d 840.

9. Mass.—Pimental v. John E. Cox Co., 13 N.E.2d 441, 299 Mass. 579.

10. Mass.—Pimental v. John E. Cox Co., *supra*.

11. Mass.—Pimental v. John E. Cox Co., *supra*.

A group of independent contractors insured under the compensation act is not an adequate substitute for a "common employer insured under the act" whose existence under compen-

sation statute, gives the work as a whole, the character of a "common job or employment" within the scope of which, actions at law for damages for injuries cannot be brought between persons engaged thereon as employees or independent contractors or subcontractors, even though insurance in combination, covers all employees on the work which is being done for an owner of property.

Mass.—Pimental v. John E. Cox Co., *supra*.

The erection of a freight terminal was not a "part or process in" the "trade or business" of freight forwarding company's work but was "ancillary and incidental" to such work within compensation statute providing that employees of noninsured subcontractors should be covered by contractor's compensation insurance if the subcontractor's work was a part of process in the trade or business of the contractor and was not ancillary and incidental to such work, so that freight forwarding company was not, under compensation statute, a "common employer" of independent contractors who erected terminal, with respect to right of injured employee of one of the contractors to recover for insurer which compensated injured employee, from other contractor whose employee's negligence caused the injury.

e. Employee or Agent of Employer of Injured Workman

Under some acts the common-law tort liability of an employee to his coemployee is not abrogated notwithstanding the employer's liability for compensation; but by the terms of other statutes an employee of one who is operating under the act has no right of action against any agent, servant, or employee of such employer.

Some of the acts do not abrogate the common-law liability of an employee to his coemployee¹² or an employee's liability for the death of a coemployee,¹³ notwithstanding the employer is liable for compensation;¹⁴ and provisions of the act constituting the remedies or relief thereunder exclusive do not prevent an action by the employee against a coemployee¹⁵ or an action by the injured employee against an agent of the employer.¹⁶ So a provision subrogating the employer to the rights of the employee against a third person does not prevent such action by the injured employee.¹⁷

Furthermore, such coemployee has been regarded

as a "third person" or "third party" against whom the act recognizes the right of the injured employee to maintain an action,¹⁸ and a foreman under whom the injured employee works has been regarded as a "third person" within the meaning of the provision of the act expressly permitting an action against a third person who is himself liable.¹⁹ So an agent of the employer²⁰ and an officer of a corporate employer²¹ is "a person other than the employer" within the meaning of some statutes which permit the maintenance of an action against such person, and the chief of a municipal fire department has been regarded as a "party other than the employer" in respect of an assistant chief who was injured.²²

By the terms of some statutes, however, an employee of one who is operating under the act has no right of action against any agent, servant, or employee of such employer.²³ Under a provision permitting, under certain circumstances, an injured

Mass.—Pimental v. John E. Cox Co., supra.

12. Mo.—Gardner v. Stout, 119 S.W. 2d 790, 342 Mo. 1206.

N.J.—Stacy v. Greenberg, 88 A.2d 619, 9 N.J. 390.

Evans v. Rohrbach, 118 A.2d 838, 35 N.J. Super. 260.

Pa.—Lacaria v. Hetzel, 96 A.2d 182, 378 Pa. 309.

Wolford v. Chambersburg Oil and Gas Co., 86 Pa. Dist. & Co. 496, 3 Lebanon 342.

Tex.—Grandstaff v. Mercer, Civ. App., 214 S.W.2d 133, refused on reversible error applying Louisiana law.

W. Va.—Makarenko v. Scott, 55 S.E.2d 88, 132 W. Va. 430—Tawney v. Kirkhart, 44 S.E.2d 634, 130 W. Va. 550.

Wis.—Severin v. Luchinske, 73 N.W. 2d 477, 271 Wis. 378.

71 C.J. p 1530 note 65.

13. Conn.—Wells v. Lavitt, 160 A. 617, 115 Conn. 117.

Wis.—McGonigle v. Gryphar, 229 N. W. 81, 201 Wis. 269.

Residents of other state

Although workmen's compensation had been paid under New York law which barred recovery for death caused by acts of a fellow employee, an action could be maintained in Ohio for wrongful death in Ohio of New York employee, against a fellow employee who was also resident of New York, notwithstanding the full faith and credit clause.

Ohio.—Ellis v. Garwood, App., 143 N. E.2d 715.

14. Conn.—Wells v. Lavitt, 160 A. 617, 115 Conn. 117.

15. Cal.—Singleton v. Bonnesen, 280 P.2d 481, 131 C.A.2d 327.

Pa.—Wolford v. Chambersburg Oil

and Gas Co., 86 Pa. Dist. & Co. 496, 3 Lebanon 342.
71 C.J. p 1530 note 68.

16. U.S.—Pryor v. Strawn, C.C.A. Neb., 73 F.2d 595.

Cal.—Thompson v. Lacey, 267 P.2d 1, 42 C.2d 443.

Singleton v. Bonnesen, 280 P.2d 481, 131 C.A.2d 327—Wallace v. Pacific Electric Ry. Co., 288 P. 834, 105 C.A. 664.

Ga.—Echols v. Chattooga Mercantile Co., 38 S.E.2d 675, 74 Ga. App. 18.

17. N.J.—Churchill v. Stephens, 102 A. 657, 91 N.J. Law 195.

18. U.S.—Martin v. Theockary, C.A. Fla., 220 F.2d 900—Hudson v. Moonier, C.C.A. Mo., 94 F.2d 132, reversed on other grounds 58 S.Ct. 954, 304 U.S. 397, 82 L.Ed. 1422, mandate conformed to 102 F.2d 96, certiorari denied 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and Pritch v. Moonier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.

Fla.—Frantz v. McBee Co., 77 So.2d 796.

La.—Vidrine v. Solleau, App., 38 So. 2d 77—Kimbrow v. Holladay, App., 154 So. 389.

Neb.—Rehn v. Bingham, 36 N.W.2d 856, 151 Neb. 196, appeal dismissed 70 S.Ct. 79, 338 U.S. 806, 94 L.Ed. 488, rehearing denied 70 S.Ct. 157, 338 U.S. 832, 94 L.Ed. 541, motion overruled 40 N.W.2d 673, 152 Neb. 171.

71 C.J. p 1530 note 71.

19. N.J.—Churchill v. Stephens, 102 A. 657, 91 N.J. Law 195.

20. Cal.—Wallace v. Pacific Electric Ry. Co., 288 P. 834, 105 C.A. 664.

General manager

Employer's general manager was not such an identical party with the

employer as to prevent maintenance of an action against him individually for a willful assault on an employee whose only remedy against the employer was under the workmen's compensation act.

Ga.—Gay v. Greene, 84 S.E.2d 847, 91 Ga. App. 78—Echols v. Chattooga Mercantile Co., 38 S.E.2d 675, 74 Ga. App. 18.

21. Mich.—Webster v. Stewart, 177 N.W. 280, 210 Mich. 13.

President and majority stockholder

Occupant of truck owned by corporation would not be precluded from suing president and majority stockholder of corporation individually for injuries sustained in accident allegedly caused by negligence of driver, a corporation employee, by fact that he was an employee of the corporation and receiving workmen's compensation for his injuries, if the driver at time of accident was in fact the personal agent or employee of the president and majority stockholder.

Mo.—Leidy v. Taliaferro, 260 S.W.2d 504.

22. Minn.—Behr v. Soth, 212 N.W. 461, 170 Minn. 278.

23. U.S.—Doane v. E. I. DuPont de Nemours & Co., C.A. Va., 209 F.2d 921—Ohlhaber v. Narron, C.A.N.C., 195 F.2d 676.

Idaho.—White v. Ponzozzo, 291 P.2d 848, 77 Idaho 276.

Ill.—O'Brien v. Rautenbush, 139 N.E. 2d 222, 10 Ill.2d 167.

Hayes v. Marshall Field & Co., 115 N.E.2d 99, 351 Ill. App. 329—Kenney v. Mozin, 54 N.E.2d 861, 323 Ill. App. 20.

Apparently contra Botthof v. Fenske, 280 Ill. App. 362.

Mass.—Wechsler v. Liner, 102 N.E.2d

employee to bring an action against another not in the same employ, such an action may be maintained when,²⁴ and only when,²⁵ such other is not in the same employ. Where the act denies the

92, 328 Mass. 152—Thomas v. Fritz, 63 N.E.2d 357, 318 Mass. 622—Murphy v. Miettinen, 59 N.E.2d 252, 317 Mass. 633—Caira v. Caira, 6 N.E.2d 431, 296 Mass. 448.
N.C.—Warner v. Leder, 69 S.E.2d 6, 234 N.C. 727.
Ohio.—Gallick v. Ott, App., 51 N.E.2d 404—Rosenberger v. L'Archer, App., 31 N.E.2d 700.
Or.—Kowcun v. Bybee, 186 P.2d 790, 182 Or. 271.
Tenn.—Majors v. Moneyemaker, 270 S.W.2d 328, 196 Tenn. 698.
Tex.—Haynes v. Taylor, Com.App., 35 S.W.2d 104, rehearing denied Com. App., Haynes v. Taylor, 38 S.W.2d 1101.
Grandstaff v. Mercer, Civ.App., 214 S.W.2d 133, refused no reversible error—Faulkner v. Kleinman, Civ.App., 158 S.W.2d 891, error refused.
Va.—Phillips v. Brinkley, 72 S.E.2d 339, 194 Va. 62—Coker v. Gunter, 63 S.E.2d 15, 191 Va. 747—Feitig v. Chalkley, 38 S.E.2d 73, 185 Va. 96—Nolde Bros. v. Chalkley, 35 S.E.2d 327, 184 Va. 553, adhered to Feitig v. Chalkley, 38 S.E.2d 73, 185 Va. 96.
W.Va.—Crawford v. Parsona, 92 S.E.2d 913.
71 C.J. p 1530 note 76.

Exclusive remedy

Where employee was injured in collision with co-employee and employee's injuries were compensable under workmen's compensation law, compensation was the exclusive remedy available and employee had no election of remedies as between compensation and personal injury action. Idaho.—White v. Ponzozzo, 291 P.2d 343, 77 Idaho 276.

Person conducting business

(1) The phrase "those conducting his business" as used in provision of workmen's compensation law that employer who accepts compensation provisions shall secure payment of compensation to his employees and that while such security remains in force he or those conducting his business shall only be liable to any employee who elects to come under law for injury or death by accident to extent specified in law, includes any person who, as an employee of a covered employer, was performing any work incident to employer's business, regardless of whether employed in a menial, supervisory, or managerial capacity.
S.C.—Nolan v. Daley, 78 S.E.2d 449, 222 S.C. 407.

(2) Phrase "those conducting his business" as used in provision of South Carolina workmen's compensation act relating to extent of liability of employer or those conducting his

business included crane-operator who injured fellow employee.
U.S.—Burns v. Carolina Power & Light Co., C.A.S.C., 193 F.2d 525, certiorari denied 73 S.Ct. 103, 344 U.S. 863, 97 L.Ed. 669.

(3) An officer or agent of a corporation, who is acting within scope of his authority for and on behalf of corporation, and whose acts are such as to render corporation liable therefor, is among those conducting business of corporation, within purview of immunity clause of compensation act, and entitled to immunity it gives.
N.C.—Warner v. Leder, 69 S.E.2d 6, 234 N.C. 727—Essick v. City of Lexington, 60 S.E.2d 106, 232 N.C. 200.

Master of vessel

The provision in Longshoremen's and Harbor Workers' Compensation Act providing for ineligibility of master of vessel for compensation was not intended to, and does not, affect unrelated matters such as privity of principal and agent in their relation to the fellow employees and immunity from liability for injuries. Wash.—Ginnis v. Southerland, 313 P.2d 675, 50 Wash.2d 557.

Extrahazardous "employment"

Under provision of workmen's compensation act that no actions may be brought against any workman as a third person if at time of accident workman was in course of extrahazardous employment, use of word "employment" was not intended to restrict proviso to actions resulting directly from relationship of employer and employee, since word "employment" in compensation act is synonymous with industry, occupation, work, and business and is used interchangeably with those terms.
Wash.—Weiffenbach v. City of Seattle, 76 P.2d 589, 193 Wash. 528.

24. Okl.—Dolese Bros. v. Tollett, 19 P.2d 570, 162 Okl. 158.
71 C.J. p 1530 note 77.

25. U.S.—Ohlhaber v. Narron, C.A.N.C., 195 F.2d 676.
Or.—Kowcun v. Bybee, 186 P.2d 790, 182 Or. 271.
71 C.J. p 1531 note 78.

Person other than employer

Compensation act provision giving injured employee or his personal representative right to recover damages for such injury, loss of service, or death from any "person other than employer" means any other person or party who is a stranger to employment but whose negligence contributed to injury and does not authorize injured employee to maintain action at law against officer, agent, or em-

ployee conducting business of employer whose negligence caused injury.
N.C.—Warner v. Leder, 69 S.E.2d 6, 234 N.C. 727, overruling Tschellier v. National Weaving Co., 199 S.E. 623, 214 N.C. 449.

Persons held not in same employ

Or.—Walter v. Turtle, 29 P.2d 517, 146 Or. 1.

In New York

(1) By express provision of the statute, the right to compensation is the exclusive remedy of an employee when he is injured by the wrong of another in the same employ, and the accident happened within the scope of the injured employee's employment.

N.J.—Stacy v. Greenberg, 88 A.2d 619, 9 N.J. 390, applying law of New York.

N.Y.—Traynor v. Plattsburgh Coop. G. L. F. Service, 151 N.Y.S.2d 854, 2 A.D.2d 617, appeal denied 154 N.Y. S.2d 432, 2 A.D.2d 795—Roberts v. Gagnon, 149 N.Y.S.2d 743, 1 A.D.2d 297—Cunningham v. Mark Rafalsky & Co., 121 N.Y.S.2d 207, 281 App.Div. 609, affirmed 117 N.E.2d 903, 306 N.Y. 712—Kincer v. Kincer, 113 N.Y.S.2d 325, 280 App.Div. 850, appeal denied 115 N.Y.S.2d 664, 280 App.Div. 909—Ritornato v. Schuth, 105 N.Y.S.2d 630, 278 App.Div. 996—Olmsted v. Teal, 90 N.Y.S.2d 25, 275 App.Div. 387—Mazarredo v. Levine, 80 N.Y.S.2d 237, 274 App. Div. 122—Behan v. Maleady, 292 N.Y.S. 540, 249 App.Div. 912.

Favale v. Jackson, 163 N.Y.S.2d 438, 8 Misc.2d 143—Klein v. Coletta, 150 N.Y.S.2d 662, 3 Misc.2d 26—Pantolo v. Lane, 56 N.Y.S.2d 227, 185 Misc. 221—Puccio v. Carr, 31 N.Y.S.2d 805, 177 Misc. 706, affirmed 33 N.Y.S.2d 684, 263 App.Div. 1042—Schwartz v. Forty-Second St. M. & St. N. A. Ry. Co., 22 N.Y.S.2d 752, 175 Misc. 49—Fellows v. Seymour, 13 N.Y.S.2d 803, 171 Misc. 833, reversed on other grounds 19 N.Y.S.2d 960, 259 App.Div. 966.
Contra Hall v. Hill, 285 N.Y.S. 815, 158 Misc. 341.

Mittman v. Meyerson, 19 N.Y.S.2d 575.

(2) Employee may not waive right to compensation, in order to bring personal injury action against fellow employee merely because he was an infant.

N.Y.—Traynor v. Plattsburgh Coop. G. L. F. Service, 151 N.Y.S.2d 854, 2 A.D.2d 617, appeal denied 154 N.Y. S.2d 432, 2 A.D.2d 795.

(3) In determining meaning of term in the same "employ" as used in section of the workmen's compensation law barring employee's right of action for injuries resulting from negligence of another in the same

right to bring an action except as provided in the act, an action by an injured employee against a superintendent under whom such employee worked has been dismissed on the ground that it was not shown that the case was within one of the exceptions.²⁶

A provision barring an action by an injured employee against his fellow employee for damages resulting from the latter's negligence applies only when the negligence of a fellow employee was the sole proximate cause of the injury or death;²⁷ and if the negligence of a third-party defendant was a proximate cause of the accident, defendant is liable even though the negligence of a fellow employee of deceased was a concurrent proximate cause, as discussed supra § 984. In order to render applicable a provision of the workmen's compensation law barring an employee's action for an injury resulting from negligence of another in the same "employ," the employee must have sustained an injury in the course of his employment and the coemployee causing the injury must have been in the course of his employment by the same employer.²⁸ If the injured employee was not in the course of employment at the time of the accident, so that it would not be compensable under the statute, he may

recover against a fellow employee whose negligence caused the accident.²⁹

The workmen's compensation law does not afford a defense based on the exclusive remedy of compensation provided for one injured by the negligence or wrong of another in the same employ, to the perpetrator of an assault arising out of a quarrel between coemployees relating to matters connected with the employment, although the claimant's injuries might be compensable as an industrial accident so far as the employer is concerned.³⁰ The statute does not furnish a defense to one guilty of intentional tort as distinguished from mere carelessness.³¹ It has been held that a defense that plaintiff and defendant are coemployees may not be raised where the liability of defendant, constituting the basis of the action, is statutory and not dependent on any wrongdoing or negligence under the workmen's compensation law.³²

f. Vessel

Under provisions of statute permitting an action against a third person liable for the injury, a vessel owned by one other than an independent contracting stevedore by whom the injured employee was employed may be treated as a "third person," and the employee may proceed against such vessel where the vessel would otherwise be liable.

"employ" and providing a right of action against another not in the same "employ," purpose and effect of the law as a whole must be considered; word "employ" as so used has merely ordinary and usual meaning as synonymous with "employment."

N.Y.—*D'Agostino v. Wagenaar*, 48 N.Y.S.2d 410, 183 Misc. 184, affirmed 51 N.Y.S.2d 756, 268 App.Div. 912, appeal denied 52 N.Y.S.2d 784, 268 App.Div. 986.

(4) Defendant held not coemployee of plaintiff so as to restrict remedy to workmen's compensation.

N.Y.—*Puccio v. Carr*, 33 N.Y.S.2d 684, 268 App.Div. 1042.

(5) Under earlier statutory provisions some decisions held that an injured employee could bring an action at law against a coemployee.
N.Y.—*Galotti v. Deansboro Supply Co.*, 289 N.Y.S. 535, 248 App.Div. 20, 71 C.J. p 1531 note 79 [a].

26. Wash.—*Perry v. Beverage*, 214 P. 146, 121 Wash. 652, 71 C.J. p 1531 note 80.

27. N.Y.—*Caulfield v. Elmhurst Contracting Co.*, 53 N.Y.S.2d 25, 268 App.Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803.

Favale v. Jackson, 163 N.Y.S.2d 438, 8 Misc.2d 143.

28. N.Y.—*Bilonos v. Sparano*, 142 N.Y.S.2d 8, 286 App.Div. 914.

Pantolo v. Lane, 56 N.Y.S.2d 227, 185 Misc. 221—*D'Agostino v. Wagenaar*, 48 N.Y.S.2d 410, 183 Misc. 184, affirmed 51 N.Y.S.2d 756, 268 App.Div. 912, appeal denied 52 N.Y.S.2d 784, 268 App.Div. 986.

Use of employee's car

(1) Where motorist was giving a fellow employee a ride in motorist's own car, not as a duty but as a favor, such ride was not an incident of the employment and motorist and guest were not "in the same employ" within meaning of provision of workmen's compensation law denying recovery for injury due to negligence of another "in the same employ."

N.Y.—*Philips v. D'Angelo*, 37 N.Y.S. 2d 108.

(2) Where employee, who was riding in automobile owned and driven by superior coemployee, was killed through negligence of coemployee in operating automobile while both were engaged in making trip in service of employer, action for such negligence could be maintained against driver, notwithstanding decedent's dependents had received compensation under workmen's compensation law.

Ohio.—*Morrow v. Hume*, 3 N.E.2d 39, 131 Ohio St. 319.

Tampering with safety devices

If officers, directors, and stockholders of corporate employer had acted outside scope of their authority in

tampering with safety devices on power press operated by workman, the workmen's compensation law would not be a bar to a common-law action against them for injuries sustained by workman.

N.Y.—*Antonio v. Hirsch*, 163 N.Y.S.2d 489, 3 A.D.2d 939.

29. Mass.—*Donovan v. Johnson*, 16 N.E.2d 62, 301 Mass. 12.

N.Y.—*Parisi v. Langston*, 138 N.Y.S. 2d 178, 285 App.Div. 483.

Miano v. Schneider, 148 N.Y.S. 2d 340, 1 Misc.2d 1039, affirmed 162 N.Y.S.2d 544, 3 A.D.2d 900, affirmed 171 N.Y.S.2d 857, 4 N.Y.2d 782, 148 N.E.2d 907.

Sills v. Wert, 139 N.Y.S.2d 132.

Departure from course of employment held not shown

Idaho.—*White v. Ponozzo*, 291 P.2d 843, 77 Idaho 276.

Mass.—*Murphy v. Miettinen*, 59 N.E. 2d 252, 317 Mass. 633.

30. N.Y.—*Mazarredo v. Levine*, 80 N.Y.S.2d 237, 274 App.Div. 122.

31. N.Y.—*Berenberg v. Park Memorial Chapel*, 142 N.Y.S.2d 845, 286 App.Div. 167—*Mazarredo v. Levine*, 80 N.Y.S.2d 237, 274 App.Div. 122.
Mazarredo v. Levine, 76 N.Y.S.2d 326, 190 Misc. 951, affirmed 80 N.Y.S.2d 237, 274 App.Div. 122.

32. N.Y.—*Puccio v. Carr*, 33 N.Y.S.2d 684, 268 App.Div. 1042.

Under the provision of the federal Longshoremen's and Harbor Workers' Compensation Act permitting an action against a third person liable for the injury, a vessel owned by one other than an independent contracting stevedore by whom the injured employee was employed may be treated as a "third person," and the employee may proceed against such vessel where such vessel would otherwise be liable,³³ notwithstanding the provision of the act making the liability of the employer for compensation under the act exclusive.³⁴ However, a vessel owned by the employer of a stevedore who is injured while at work on such vessel is not a "third person" within the meaning of such provision,³⁵ and in such case the provision for exclusive liability prevents a proceeding against the vessel.³⁶

§ 986. Liability of Third Person Dependent on Place of Injury

Where so provided by statute, a negligent third party responsible for injuries to a workman may not be sued at common law where such party, or his workman causing the injury was, at the time thereof, on premises over which he had joint supervision and control with the employer of the injured workman, where the third party and the workman's employer were engaged in furtherance of a common enterprise or in the accomplishment of the same or related purposes, and where the third party was, at the time, an employer subject to the compensation act.

Under some statutes an injured workman may not sue a negligent third party at common law where such party or his workman causing the injury was, at the time of the injury, on premises over which

he had joint supervision and control with the employer of the injured workman, where the third party and the workman's employer were engaged in furtherance of a common enterprise or in the accomplishment of the same or related purposes, and where the third party was, at the time, an employer subject to the compensation act.³⁷ The term "joint supervision and control" within such a statute means more than a mere right of supervision as to results, and means an active participation in the work at hand;³⁸ and the term "premises" as used in the statute should not be confined within a small perimeter, but should be extended to the entire area wherein the work resulting in injury was in progress.³⁹ In order to become "engaged in the furtherance of a common enterprise," within the statute, it is not essential that the workmen formally enter into an agreement to that effect; it is only necessary that they occupy the same premises and perform component parts of a general undertaking.⁴⁰ The statute is applicable to an action at law to recover damages for assault and battery.⁴¹

In a few states there were formerly in effect provisions permitting an injured employee or the dependents of a deceased employee to maintain an action against a person not in the same employ for an injury or death which occurred away from the plant of the employer, but denying the right to maintain such action where the injury occurred at such plant.⁴² Such a provision was required to be given the same liberal construction in favor of

33. U.S.—Guerrido v. Alcoa S. S. Co., C.A.Puerto Rico, 234 F.2d 349.

Eagle Indem. Co., to Use of Beall v. U. S. Lines Co., D.C.Md., 86 F. Supp. 949.

71 C.J. p 1531 note 89.

34. U.S.—The Pacific Pine, D.C. Wash., 31 F.2d 152.

35. U.S.—Smith v. The Mormacdale, C.A.Pa., 198 F.2d 849, certiorari denied 73 S.Ct. 648, 345 U.S. 908, 97 L.Ed. 1344—Samuels v. Munson S. S. Line, C.C.A.Fla., 63 F.2d 861.

36. U.S.—Smith v. The Mormacdale, C.A.Pa., 198 F.2d 849, certiorari denied 73 S.Ct. 648, 345 U.S. 908, 97 L.Ed. 1344—Samuels v. Munson S. S. Line, C.C.A.Fla., 63 F.2d 861.

37. Or.—Johnson v. Timber Structures, Inc., 231 P.2d 723, 203 Or. 670 —Kosmecki v. Portland Stevedoring Co., 223 P.2d 1035, 190 Or. 85—Atkinson v. Fairview Dairy Farms, 222 P.2d 732, 190 Or. 2—Brown v. Underwood Lumber Co., 141 P.2d 527, 172 Or. 261—Inwall v. Transpacific Lumber Co., 108 P.2d 522, 165 Or. 560.

Furtherance of common enterprise held not shown

Or.—Hensler v. City of Portland, 318 P.2d 313.

38. Or.—Johnson v. Timber Structures, Inc., 231 P.2d 723, 203 Or. 670.

Provision held inapplicable

Where defendant sold sawdust to workman's employer and delivered it by truck within employer's plant, where it was inspected and accepted by workman who, after unloading, placed it in process, defendant was not engaged in the same enterprise or project as employer and had not joint supervision and control with employer over premises, and workman could, despite statute limiting right of workman to sue negligent third parties under certain circumstances, sue defendant for injuries allegedly sustained through negligence of defendant's truck driver.

Or.—Johnson v. Timber Structures, Inc., *supra*.

39. Or.—Kosmecki v. Portland Steve-

doring Co., 223 P.2d 1035, 190 Or. 85.

Highway

Where plaintiff's employer and defendants were separately engaged in business of hauling logs over the Oregon coast highway and all parties concerned were subject to workmen's compensation law, the highway did not constitute "premises" within compensation law precluding a third party action when parties are engaged in common enterprise and have control of premises where injury occurred so as to preclude plaintiff from maintaining action against defendants for injuries resulting from defendants' negligence on the highway.

Or.—French v. Christner, 143 P.2d 674, 173 Or. 158.

40. Or.—Inwall v. Transpacific Lumber Co., 108 P.2d 522, 165 Or. 560.

41. Or.—Atkinson v. Fairview Dairy Farms, 222 P.2d 732, 190 Or. 2.

42. Or.—Walter v. Turtle, 29 P.2d 517, 146 Or. 1.

71 C.J. p 1532 notes 93-95.

the employee as was given to any other part of the compensation act.⁴³

While the question as to what constitutes "the plant of the employer" within the meaning of such a provision was governed by the terms of the act where it defined what such "plant" shall include,⁴⁴ in some of the cases certain general rules were laid down in construing the provision in question, and the view was taken that the boundaries of the "plant" must be inflexible and limited.⁴⁵ So the right of control over the place where the injury occurred was held important,⁴⁶ and it was asserted that the "plant" did not include more than that part of the employer's fixed property of which he had exclusive control,⁴⁷ but that it did include a place which was a part of the fixed property of the employer, where, in so far as the operations involved were concerned, the employer had exclusive control and could provide means for the protection of his employees,⁴⁸ regardless of whether the place was actually on the real estate of another than the employer.⁴⁹

In respect of a public street or highway, the "plant" of an employer did not include that portion in which the traveling public had at least

equal rights with the employer and over which the employer had no oversight and no means of protecting his employees from the negligent or wrongful acts of third persons,⁵⁰ and did not include that portion which was reserved and kept open for the use of the public,⁵¹ but the mere fact that the place in question was within the limits of a dedicated street did not prevent such place from being a part of the "plant" of an employer so as to exclude an action against a third person where the employer had exclusive control of such place in so far as the operations involved were concerned and could provide means for the protection of his employees.⁵²

The "plant" of a municipal corporation which was an employer included a particular portion of the street or highway where in respect thereof it had control, could, for purposes of repair, exclude the public therefrom, and could take the steps necessary to insure the safety of its employees while engaged thereon.⁵³ As affecting the right to bring an action against a third person, the court refused to construe the act as requiring a determination that the "plant" of the employer accompanied the employee wherever he would go to perform services for his employer.⁵⁴

b. Election of Remedies

§ 987. In General

Unless provided otherwise by statutory or constitutional provision, an employee injured under such circumstances as to afford him a right to compensation as against his employer, and also to impose a liability in damages on a third person, is not required to elect whether he will seek compensation or damages, and the fact that he has received compensation under the act, or settled a claim therefor, does not prevent the maintenance of an action against the third-party tort-feasor.

By the provisions of some compensation acts, presently or formerly in force, an employee injured under such circumstances as to afford him a right to compensation as against his employer, and also to impose a liability in damages on a third person, has a right to elect whether he will seek compensation or damages;⁵⁵ he cannot recover both

43. Wash.—Scott v. Pacific Warehouse Co., 255 P. 138, 143 Wash. 245.

71 C.J. p 1532 note 96.

44. Mont.—Black v. Northern Pac. Ry. Co., 214 P. 82, 66 Mont. 538. 71 C.J. p 1532 note 97.

45. Wash.—Burns v. Jones, 216 P. 2, 125 Wash. 337.

46. Wash.—Scott v. Pacific Warehouse Co., 255 P. 138, 143 Wash. 245. 71 C.J. p 1532 note 1.

47. Wash.—Mathewson v. Olmstead, 218 P. 226, 126 Wash. 269—Carlson v. Mock, 173 P. 637, 102 Wash. 557, reheard 176 P. 2, 104 Wash. 691.

48. Wash.—Boroughs v. Davis, 210 P. 196, 121 Wash. 557. 71 C.J. p 1532 note 3.

49. Wash.—Boroughs v. Davis, supra. 71 C.J. p 1532 note 4.

50. Wash.—Carlson v. Mock, 173 P. 637, 102 Wash. 557, reheard 176 P. 637, 104 Wash. 691. 71 C.J. p 1532 note 5.

51. Wash.—Burns v. Johns, 216 P. 2, 125 Wash. 337. 71 C.J. p 1532 note 6.

52. Wash.—Boroughs v. Davis, 210 P. 196, 121 Wash. 557.

53. Wash.—Zenor v. Spokane & I. E. R. Co., 186 P. 849, 109 Wash. 471. 71 C.J. p 1532 note 8.

54. U.S.—Martin v. Matson Nav. Co., D.C.Wash., 244 F. 976. 71 C.J. p 1532 note 9.

55. U.S.—Fontana v. Grace Line, C. A.N.Y., 205 F.2d 151, certiorari denied Fontana v. Huron Stevedoring

Corp., 74 S.Ct. 137, 346 U.S. 886, 98 L.Ed. 390.

Czaplicki v. The Hoegh Silvercloud, D.C.N.Y., 133 F.Supp. 358—Eagle Indem. Co. to Use of Beall v. U. S. Lines Co., D.C.Md., 86 F. Supp. 949.

Ariz.—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412—Pressley v. Industrial Commission, 236 P.2d 1011, 73 Ariz. 22.

D.C.—Chapman v. Griffith-Consumers Co., 107 F.2d 263, 71 App.D.C. 64.

Fla.—Lovejoy Co. v. Ackis, 16 So.2d 297, 153 Fla. 876.

Md.—Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp., 65 A.2d 304, 193 Md. 20.

Mo.—Giambelluca v. Thompson, General Acc. Fire & Life Assur. Corp., Intervenor, 283 S.W.2d 531, applying Texas law.

damages and compensation,⁵⁶ cannot elect to take compensation and also to bring an action against a third person,⁵⁷ and cannot proceed concurrently at common law for damages and under the compensation act for compensation.⁵⁸ It has been stated broadly that when a binding election is made it is final.⁵⁹

Even, however, where an election is provided for, the employer or insurer may, under some acts,

prosecute an action against the person liable for the injury notwithstanding the person entitled has elected to take compensation, as discussed supra § 992, and such person may be entitled to a beneficial interest in the amount recovered in excess of the amount of compensation, as discussed infra § 1040; and under such an act, according to some cases, the fact that the employee or the dependents of a deceased employee have proceeded to obtain

N.Y.—*Skakandy v. State*, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S. 2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886.

Vt.—*Laird v. State of Vermont Highway Dept.*, 20 A.2d 555, 112 Vt. 67.
Wash.—*Jewett v. Kerwood*, 263 P.2d 830, 43 Wash.2d 691—*Gephart v. Stout*, 118 P.2d 801, 11 Wash.2d 184. 71 C.J. p 1533 note 11.

Election to pursue third person as waiver of right to claim compensation see supra §§ 393-398.

Effect of employer's or insurer's failure or refusal to sue see infra § 1004.

Liberal construction

Massachusetts workmen's compensation act provision requiring claimant to elect between right to compensation and right to enforce third person's legal liability for the compensable injury and giving compensation carrier right to enforce third person's legal liability should be liberally construed to accomplish the purpose for which it was enacted.

U.S.—*Hobart v. O'Brien*, C.A.Mass., 243 F.2d 735.

Causes to which applicable

Section of workmen's compensation law entitling workmen entitled to compensation through injuries caused by wrong of one not in same employ to elect whether to take compensation or pursue remedy against such other has reference only to causes arising at law which are not abrogated by the workmen's compensation law.

Okl.—*Mid-Continent Pipe Line Co. v. Wilkerson*, 193 P.2d 586, 200 Okl. 335.

56. U.S.—*Fontana v. Grace Line, Inc.*, C.A.N.Y., 205 F.2d 151, certiorari denied *Fontana v. Huron Stevedoring Corp.*, 74 S.Ct. 137, 346 U.S. 886, 98 L.Ed. 390—*Currant v. Eastern S. S. Lines*, C.A.Mass., 170 F.2d 148—*Toomey v. Waterman S. S. Corp.*, C.C.A.N.Y., 123 F.2d 713.
Davis v. U. S. Lines Co., D.C.Pa., 153 F.Supp. 912, affirmed, C.A., 253 F.2d 262—*Czaplicki v. The Hoegh Silvercloud*, D.C.N.Y., 133 F.Supp. 358.

Ariz.—*State ex rel. Industrial Commission v. Pressley*, 250 P.2d 992, 74 Ariz. 412—*Pressley v. Industrial*

Commission, 236 P.2d 1011, 73 Ariz. 22.

D.C.—*Moore v. Hechinger*, 127 F.2d 746, 75 U.S.App.D.C. 391.

Mass.—*Petition of Nealon*, 134 N.E.2d 886, 334 Mass. 213.
71 C.J. p 1534 note 12.

Reimbursement

Under statute requiring injured workman to elect whether to pursue tort remedy against third persons liable or to take compensation under act and providing, in such instance, that his cause is to be assigned for benefit of accident fund, where, after workman had received compensation for loss of time and medical expenses, he commenced and settled injury action against third party, purported election to take compensation was ineffective and he was required to reimburse department of labor and industries for all compensation received and not merely for payment received out of accident fund.

Wash.—*State v. Owen*, 311 P.2d 415, 50 Wash.2d 361.

Injury connected with employment

Injury sustained by foreman of company which was employed by railroad to operate certain of its coal docks, in stepping through hole in floor of pumphouse owned by railroad but controlled by company under its contract, was result of a cause "directly connected with his regular employment," within meaning of provision of Montana workmen's compensation act permitting recovery for injuries against a third-party tort-feasor in addition to receiving compensation if cause of injury has no "direct connection with the regular employment," so as to preclude foreman from recovering from railroad after acceptance of benefits from company under the compensation act.

U.S.—*Sullivan v. Northern Pac. Ry. Co.*, D.C.Minn., 24 F.Supp. 822, affirmed, C.C.A., 104 F.2d 517.

57. U.S.—*Freader v. Cities Service Transp. Co.*, D.C.N.Y., 14 F.Supp. 456.

Ariz.—*Pressley v. Industrial Commission*, 236 P.2d 1011, 73 Ariz. 22.

N.Y.—*Bellanger v. Economy Engineering Co.*, 282 N.Y.S. 325, 245 App. Div. 889.

71 C.J. p 1534 note 13.

Control of action

Once an employee has made a valid binding election to accept compensation under the Longshoremen's and Harbor Workers' Compensation Act he has no further control over the cause of action against the third person whose negligence caused the injury.

U.S.—*Johnsen v. American-Hawaiian S. S. Co.*, C.C.A.Cal., 98 F.2d 847.

Failure of employer to bring action

An employee could not maintain action against tort-feasor negligently injuring him where he had accepted compensation paid by employer, notwithstanding employer's failure to bring action against the tort-feasor.

U.S.—*Currant v. Eastern S. S. Lines*, D.C.Mass., 77 F.Supp. 9, affirmed, C.A., 170 F.2d 148.

Injury arising out of employment

Injured employee cannot maintain action against third-party tort-feasor for damages after receiving compensation under Montana workmen's compensation act, if cause of injury was directly connected with and arose out of, or necessarily followed as incident of, regular employment.

U.S.—*Sullivan v. Northern Pac. Ry. Co.*, C.C.A.Minn., 104 F.2d 517.

58. Mass.—*Labuff v. Worcester Consol. St. Ry. Co.*, 120 N.E. 381, 231 Mass. 170.

59. N.Y.—*Lunn v. Andrews*, 274 N.Y. S. 432, 152 Misc. 568, affirmed 277 N.Y.S. 750, 243 App.Div. 654, affirmed 198 N.E. 393, 268 N.Y. 538.

71 C.J. p 1534 note 15.

Revocation

Where longshoreman was injured on vessel of defendant and elected to take compensation from the stevedoring company which was paid to him, and subsequently he brought suit against the defendant as third-party tort-feasor, and he failed to secure an assignment of the cause of action from the stevedoring company or its insurer, and there was no showing that the insurer purported to bargain away any rights of the longshoreman, who failed to file the election to sue the third-party, longshoreman was not entitled to revoke such election because he believed it would be profitable for him to do so.

U.S.—*Johnson v. Sword Line, Inc.*, D. C.Pa., 153 F.Supp. 691.

compensation is not a defense to an action for damages.⁶⁰ So the election of an employee to take compensation will not bar his suit against third parties, where there is no other procedure by which he may procure his statutory share in the proceeds, if any, of his rights of action against third parties.⁶¹

In the absence of a statutory or constitutional requirement, an employee is not required to make an election,⁶² and it is generally the rule that the fact that he has received compensation under the act, or settled a claim therefor, does not prevent the maintenance of an action against a third person who caused the injury.⁶³ Some provisions in terms

60. Kan.—Early v. Burt, 7 P.2d 95, 134 Kan. 445, 12 P.2d 1117, 135 Kan. 717.

Mo.—Scott v. Missouri Pac. R. Co., 62 S.W.2d 834, 333 Mo. 374, applying Kansas law.

Waiver or loss of right by employer or insurer and failure or refusal to sue as entitling employee to bring action see *infra* § 1004.

61. U.S.—Czaplicki v. The Hoegh Silvercloud, N.Y., 76 S.Ct. 946, 351 U.S. 525, 100 L.Ed. 1387.

62. Idaho.—White v. Ponozzo, 291 P.2d 843, 77 Idaho 276.

Ill.—Huntton v. Pritchard, 20 N.E.2d 53, 371 Ill. 36.

Mass.—Benoit v. Hathaway, 38 N.E.2d 329, 310 Mass. 362.

N.Y.—Reinhart v. Gerosa Crane Service Co., 31 N.Y.S.2d 162, 263 App. Div. 23.

Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 518.

71 C.J. p 1534 note 19.

63. U.S.—Kirk v. U. S., C.A.Idaho, 232 F.2d 763—Kelley v. Summers, C.A.Kan., 210 F.2d 665, applying Texas law—Parr v. U. S., C.A.Kan., 172 F.2d 462—Standard Accident Ins. Co. v. Turgeon, C.C.A.R.I., 140 F.2d 94—Crab Orchard Imp. Co. v. Chesapeake & O. Ry. Co., C.C.A.W. Va., 115 F.2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

Cart v. Coal Creek Min. & Mfg. Co., D.C.Tenn., 153 F.Supp. 330—Dearhouse v. Bethlehem Steel Co., D.C.Ohio, 118 F.Supp. 936—Cyr v. F. S. Payne Co., D.C.Conn., 112 F. Supp. 526, affirmed, C.A., 208 F.2d 356—Crab Orchard Imp. Co. v. Chesapeake & O. Ry. Co., D.C.W. Va., 33 F.Supp. 580, affirmed, C.C.A., 115 F.2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

Cal.—Lamoreux v. San Diego & A. E. Ry. Co., 311 P.2d 1, 48 C.2d 617.

Huber v. Henry J. Kaiser Co., 162 P.2d 693, 71 C.A.2d 278.

Ga.—Sheffield Co. v. Phillips, 24 S.E.2d 834, 69 Ga.App. 41.

Idaho.—Department of Finance of State v. Union Pac. R. Co., 104 P.2d 1110, 61 Idaho 484.

Ill.—Walsh v. Central Cold Storage Co., 58 N.E.2d 325, 324 Ill.App. 402—Miller v. Yellow Cab Co., 31 N.E.2d 406, 308 Ill.App. 217, applying Texas law.

Iowa.—McGraw v. Seigel, 263 N.W. 553, 221 Iowa 127.

Kan.—Waterbury v. Riss & Co., 219 P.2d 673, 169 Kan. 271—Clifford v. Eacrett, 183 P.2d 861, 163 Kan. 471.

La.—Jackson v. Thomas, App., 75 So. 2d 249—Gerstmayr v. Kolb, App., 158 So. 647.

Minn.—Gleason v. Sing, 297 N.W. 720, 210 Minn. 253—Guile v. Greenberg, 257 N.W. 649, 192 Minn. 548.

Mo.—Schumacher v. Leslie, 232 S.W.2d 913, 360 Mo. 1238—Bunner v. Patti, 121 S.W.2d 153, 343 Mo. 274—Markley v. Kansas City Southern Ry. Co., 90 S.W.2d 409, 338 Mo. 436.

N.H.—Butler v. King, 106 A.2d 385, 99 N.H. 150—McCullough v. John B. Varick Co., 10 A.2d 245, 90 N.H. 409.

N.J.—Dettman v. Goldsmith, 78 A.2d 626, 11 N.J.Super. 571.

N.Y.—Taylor v. New York Cent. R. Co., 62 N.E.2d 777, 294 N.Y. 397, motion denied 63 N.E.2d 711, 294 N.Y. 977, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Reinhart v. Gerosa Crane Service Co., 31 N.Y.S.2d 162, 263 App.Div. 23.

McCue v. J. F. Shea Co., 24 N.Y. S.2d 307, 175 Misc. 557, affirmed 24 N.Y.S.2d 130, 260 App.Div. 946—Drake v. New York State Elec. & Gas Corp., 294 N.Y.S. 227, 162 Misc. 167.

Public Service Mut. Ins. Co. v. Saks Fifth Ave., 155 N.Y.S.2d 173—Cunningham v. State, 32 N.Y.S.2d 275, modified on other grounds 34 N.Y.S.2d 903, 264 App.Div. 811.

N.C.—Lovette v. Lloyd, 73 S.E.2d 886, 236 N.C. 663—Ward v. Bowles, 45 S.E.2d 354, 228 N.C. 273.

Okl.—Griffin Grocery Co. v. Logan, 309 P.2d 1074—Parkhill Truck Co. v. Wilson, 125 P.2d 203, 190 Okl. 473—Oklahoma City v. Caple, 105 P.2d 209, 187 Okl. 600.

S.C.—Jolly v. Atlantic Greyhound Corp., 35 S.E.2d 42, 207 S.C. 1.

Tex.—Morgan v. Woodruff, Civ.App., 208 S.W.2d 628.

Wis.—Richtman, American Mut. Liability Ins. Co., Intervener, v. Honkamp, 13 N.W.2d 597, 245 Wis. 68—Neitzke v. Kraft-Phenix Dairies, 253 N.W. 579, 214 Wis. 441.

71 C.J. p 1534 note 20.

Consistent remedies

Liability of an employer and surety for compensation is separate and distinct from that of the third-party tort-feasor for damages, and employee's remedies of claiming compensation or obtaining damages

against third person by action of law are not inconsistent.

Idaho.—Lake v. State, 227 P.2d 361, 71 Idaho 107.

Satisfaction

The amount of compensation received by injured employee under Ohio workmen's compensation law may not be considered as pro tanto satisfaction of recovery to which he is entitled in action at law against third-party tort-feasor.

U.S.—Dearhouse v. Bethlehem Steel Co., D.C.Ohio, 118 F.Supp. 936.

Compromise settlement

(1) An injured employee's release of his self-insured employer from all claims of employee under Ohio workmen's compensation law in consideration of employer's payment of agreed sum in compromise settlement, approved by industrial commission, of employee's disputed claims for total and permanent partial disability and facial disfigurement, did not discharge third-party tort-feasor from liability for employee's injuries, in absence of proof that such payment was in full satisfaction for injuries.

U.S.—Dearhouse v. Bethlehem Steel Co., *supra*.

(2) If workman was acting in course of his employment when he was killed, release of all causes of action against employer would do no more than give employer what he would be entitled to by operation of law upon finding that injury was compensable as industrial injury; and third party would not be released by fact that compromise agreement, in addition to releasing compensation claim, also released employer from all causes of action arising from injury.

Cal.—Lamoreux v. San Diego & A. E. Ry. Co., 311 P.2d 1, 48 C.2d 617.

A release of all claims for compensation does not bar an action by the injured workman for damages against a third-party tort-feasor.

N.H.—McCullough v. John B. Varick Co., 10 A.2d 245, 90 N.H. 409.

N.J.—Jacowicz v. Delaware, etc., R. Co., 92 A. 946, 87 N.J.Law 273, Ann. Cas.1916B 1922 and note.

Aggravation of injury

The obligation of a tort-feasor to pay damages to party he injures is not vitiated by injured party's recovery of compensation under workmen's compensation act, and that is true even if tort-feasor was only

have dispensed with any requirement of election and recognize the right of an employee to maintain such an action, subject to certain qualifications, notwithstanding his receipt of compensation.⁶⁴ Under some acts, which in general permit the maintenance of an action notwithstanding the

responsible for aggravation of original injury and even though injured party has recovered compensation for all injuries.

N.J.—Dettman v. Goldsmith, 78 A. 2d 626, 11 N.J.Super. 571.

64. U.S.—Kelley v. Girdler Corp., C. A.Ind., 207 F.2d 703—Foster v. Buckner, C.A.Mich., 203 F.2d 527, certiorari denied 74 S.Ct. 30, 346 U.S. 818, 98 L.Ed. 345.

Miller v. J. A. Utley Const. Co., D.C.Mich., 154 F.Supp. 138—Remington v. General Motors Corp., D. C.Mich., 127 F.Supp. 672, cause remanded on other grounds C.A., 229 F.2d 738, and affirmed 237 F.2d 919—Rappa v. Pittston Stevedoring Co., D.C.N.Y., 49 F.Supp. 240.

Ga.—Gay v. Greene, 84 S.E.2d 847, 91 Ga.App. 78.

Kan.—Barker v. Zeckser, 296 P.2d 1085, 179 Kan. 596—Davison v. Martin K. Eby Const. Co., 218 P. 2d 219, 169 Kan. 256—Clifford v. Bacrett, 183 P.2d 861, 163 Kan. 471.

Me.—Mitchell v. Peaslee, 63 A.2d 302, 143 Me. 372.

N.J.—Dettman v. Goldsmith, 78 A. 2d 626, 11 N.J.Super. 571.

N.C.—Whitehead & Anderson v. Branch, 17 S.E.2d 637, 220 N.C. 507.

Or.—Manke v. Nehalem Logging Co., 315 P.2d 539.

Utah.—Rogalski v. Phillips Petroleum Co., 282 P.2d 304, 3 Utah 2d 203.

71 C.J. p 1535 note 21.

Exclusive or concurrent right as between employer or insurers and employee or dependents to sue and recover see *infra* § 1003.

Purpose of statute

(1) Amendment of workmen's compensation act so as to abolish requirement that injured employee make an election to take compensation or pursue his action at law against third-party tort-feasor was adopted in order to correct evils and injustices which had become apparent from actual operation and administration of the act as a result of inconsistent positions in which insurance companies were placed under prior act as both compensation and liability insurers.

Fla.—Fidelity & Cas. Co. of N. Y. v. Bedingfield, 60 So.2d 489.

(2) Where original workmen's compensation law permitted injured employee to proceed either against third-party tort-feasor or against employer but not against both, amendment, which permitted employee to recover compensation benefits and thereafter to proceed

against third-party tort-feasors, did not create the right of action of employee injured by tort-feasor but merely deprived tort-feasor of a defense that might have been available to him under provisions of the law previously enforced.

Mich.—Woods v. Ford Motor Co., 70 N.W.2d 739, 342 Mich. 518.

(3) Under statute providing that injured employee's right of action against third person shall not be affected by payment of compensation by employer, legislature intended that the wrongdoer should not benefit by payment of compensation made to injured employee by employer, and that he should not be permitted to benefit from payments made by persons who were not joint tort-feasors, whether motive impelling the payment be affection, philanthropy, or contract.

Conn.—Stuljinski v. Cizauskas, 5 A. 2d 10, 125 Conn. 293.

Construction

Section of workmen's compensation act as amended in 1951 so as to permit injured employee to claim compensation benefits and at the same time institute suit against third-party tort-feasor is plain and unambiguous and should be construed within its four corners.

Fla.—Fidelity & Cas. Co. of N. Y. v. Bedingfield, 60 So.2d 489.

Prospective or retroactive operation

(1) Where original workmen's compensation law permitted injured employee to proceed either against third-party tort-feasor or against employer but not against both, amendment, which permitted employee to recover compensation benefits and thereafter to proceed against third-party tort-feasors, did not in any way impair vested rights and was intended by the legislature to have a retroactive effect.

Mich.—Muskegon Hardware & Supply Co. for Use and Benefit of Hardware Mut. Cas. Co. v. Green, 72 N.W.2d 52, 348 Mich. 340—Wood v. Ford Motor Co., 70 N.W. 2d 739, 342 Mich. 518—Horn v. Davis, 65 N.W.2d 793, 340 Mich. 460—Rookledge v. Garwood, 65 N.W. 2d 785, 340 Mich. 444.

(2) Amendment to workmen's compensation statute permitting injured employee to enforce compensation payments and also to sue third-party tort-feasor creates no new cause of action but merely limits the procedural defense of election of remedies, and, therefore, such amendment, even though enacted after negligence action against third-party tort-feasor was commenced

but while such action was pending, governed the action.

U.S.—Foster v. Buckner, C.A.Mich., 203 F.2d 527, certiorari denied 74 S.Ct. 30, 346 U.S. 818, 98 L.Ed. 345.

Mich.—Munson v. Vane-Stecker Co., 79 N.W.2d 855, 347 Mich. 377.

(3) Where, under statute in force at time employee was injured, an employee's election to take compensation, his cause of action against third party became property of insurer, but by 1937 amendment the employee was not required to elect but might take compensation and also sue the third party, the amendment affected only matters of procedure and consequently was applicable to employee's previously existing cause of action against third party, and hence fact that employee accepted awards of workmen's compensation from insurer could not be asserted as a defense in employee's action against third party.

N.Y.—Hession v. Sari Corp., 28 N.E. 2d 712, 283 N.Y. 262.

Curtis v. U. S. Trucking Corp., 2 N.Y.S.2d 248.

(4) The July 1, 1949, amendment to North Dakota workmen's compensation act providing that common-law liability of third party for injury or death of workman for which compensation has been claimed and paid is no longer to be enforced by workmen's compensation bureau but by workman or his dependents in his or their own right does not have a retroactive or retrospective effect and does not give workmen or their dependents accepting compensation prior to July 1 the right to maintain in their own names after July 1 actions against third party for personal injuries and wrongful death.

U.S.—Nelson v. Westland Oil Co., D. C.N.D., 96 F.Supp. 656.

N.D.—Gimble v. Montana-Dakota Utilities Co., 44 N.W.2d 198, 77 N. D. 581.

(5) Where workmen's compensation act prior to July 1, 1949, amendment provided that common-law liability of third party for injury or death of workman if compensation had been claimed and awarded could be enforced only by North Dakota workmen's compensation bureau for replenishment of compensation fund and for benefit and assistance of injured workmen, defendant whose negligence allegedly caused July 21, 1947, fire resulting in deaths and injuries for which workmen's compensation had been awarded did not prior to July 1, 1949, acquire vested

payment of compensation, the view has been taken that an employee who has applied for and accepted compensation may not maintain an action for damages against a foreman in the same employ who caused the injury, where the injury was received while the employee and the foreman were acting in the regular course of their employment and was not caused willfully, wantonly, or maliciously.⁶⁵ Some acts which do not require an election give the employer or insurer rights against, or the right to reimbursement out of the amount recovered from, a third person, as discussed *infra* § 1041.

Option under act and common-law election compared and distinguished. The exercise of the option given by a compensation act to claim compensation under the act or to proceed at law against a third person has been distinguished from an election of remedies under doctrines of the common law⁶⁶ in that the option granted by the act provides for an election under statutory provisions which specify the conditions and terms of the election,⁶⁷ but the analogy is such that the rules of pleading and proof applicable to election of remedies under common-law doctrines apply to the exercise of the option under the act.⁶⁸

Right and obligation to elect in case of death by wrongful act. It is sometimes provided in express terms for an election by the dependents of a deceased employee between taking compensation and seeking damages from a third person,⁶⁹ and under the construction given other acts a provision for

making an election or exercising an option applies in the case of an injury causing the death of an employee, although such provision in terms refers only to an injured employee.⁷⁰ A provision of the act which in terms makes the recovery of compensation exclusive even where the injury is caused by one not in the same employment has been construed in the light of another provision which recognizes the right of action against a third person not in the same employment so as to permit an election by the dependents of a deceased employee.⁷¹

Where the beneficiaries or dependents have accepted the benefits of the compensation act, an action against a third person may not be maintained by such beneficiaries or dependents where the provision for election includes such beneficiaries or dependents either expressly⁷² or by the construction given such provision.⁷³ Under some acts the right of election exists only when the injury resulting in death, caused by one not in the same employ, occurs away from the plant of the employer, as discussed *infra* § 988 e.

In the absence of any constitutional or statutory provision for an election the view has been taken that an election to take compensation or to bring an action for wrongful death is not required,⁷⁴ and the fact that the beneficiaries or dependents of a deceased employee have accepted compensation under the act does not prevent the maintenance of an action against a third person for causing the death of such employee.⁷⁵

right to have liability enforced by workmen's compensation bureau or not at all.

U.S.—*Nelson v. Westland Oil Co., C. A.N.D.*, 181 F.2d 371.

Legislative control

Whether employee injured by third person may receive double compensation through payment under workmen's compensation act and through action for damages is matter of legislative control.

Mont.—*Chisholm v. Vocational School for Girls*, 64 P.2d 838, 103 Mont. 508.

Changing compensation award

In authorizing employee to make a claim for compensation and also to bring action against third party for injuries, it was not intention of legislature that the action was to operate so as to compel changing compensation award which provided for weekly payments.

Wis.—*Richtman (American Mut. Liability Ins. Co.) v. Honkamp*, 13 N.W.2d 597, 245 Wis. 68.

65. Ohio.—*Landrum v. Middaugh*, 160 N.E. 691, 117 Ohio St. 608.

Liability of coemployee in general see *supra* § 985 e.

66. Mass.—*Miller v. Richards*, 26 N. E.2d 380, 305 Mass. 424.

71 C.J. p 1535 note 24.

67. Mass.—*Tocci's Case*, 168 N.E. 744, 269 Mass. 221, 67 A.L.R. 236.

68. Vt.—*Owens v. Lane Const. Co.*, 168 A. 549, 105 Vt. 421.

71 C.J. p 1535 note 26.

69. Ala.—*Western Union Tel. Co. v. George*, 194 So. 183, 239 Ala. 80—*Smith v. Southern Ry. Co.*, 187 So. 195, 237 Ala. 372.

S.C.—*Dawson v. Southern Ry. Co.*, 11 S.E.2d 453, 196 S.C. 34.

70. Del.—*Silvia v. Scotten*, 122 A. 513, 32 Del. 295.

71 C.J. p 1536 note 29.

71. Utah.—*Robinson v. Union Pac. R. Co.*, 261 P. 9, 70 Utah 441.

71 C.J. p 1536 note 30.

72. Utah.—*Johanson v. Cudahy Packing Co.*, 115 P.2d 794, 100 Utah 399, rehearing denied 120 P.2d 281, 101 Utah 219.

71 C.J. p 1536 note 31.

73. Mich.—*City of Grand Rapids v.*

Crocker, 189 N.W. 221, 219 Mich. 178.

71 C.J. p 1536 note 32.

74. Ohio.—*Ohio Public Service Co. v. Sharkey*, 160 N.E. 687, 117 Ohio St. 586.

71 C.J. p 1536 note 34.

75. U.S.—*American Fidelity & Cas. Co. v. Drexler, C.A.La.*, 220 F.2d 930—*Betts v. Southern Ry. Co., C.C.A.N.C.*, 71 F.2d 787.

Ill.—*Leif v. Fleming*, 52 N.E.2d 606, 321 Ill.App. 297.

Mont.—*Hardware Mut. Cas. Co. v. Butler*, 143 P.2d 563, 116 Mont. 73—*Koppang v. Sevier*, 53 P.2d 455, 101 Mont. 234.

N.H.—*Merchants Mut. Cas. Co. v. Tuttle*, 101 A.2d 262, 98 N.H. 349.

N.Y.—*W. U. Tel. Co. v. Cochran*, 102 N.Y.S.2d 65, 277 App.Div. 625, affirmed 99 N.E.2d 832, 302 N.Y. 545, reargument denied 102 N.E.2d 586, 303 N.Y. 665.

N.C.—*Penny v. Stone*, 45 S.E.2d 362, 228 N.C. 295.

Ohio.—*St. Paul Mercury Indem. Co. v. Kopp*, App., 121 N.E.2d 23.

Tex.—*Morgan v. Woodruff, Civ.App.*, 208 S.W.2d 628.

Failure of employer to comply with act. Under some acts the duty to elect does not exist where the employer has failed to comply with the act.⁷⁶

Maritime tort. Attempted election to take compensation for the death of an employee which is the result of a maritime tort and not compensable under the state act under which the election was attempted does not, it has been held, prevent the personal representative of the deceased employee from bringing an action for damages for such death.⁷⁷

Claims against United States. The right of a person employed by the United States acting in one capacity, either to claim compensation under the Federal Employees' Compensation Act or to pursue a remedy for damages against the United States where the injury was sustained by an operation conducted by the United States in another capacity has been recognized,⁷⁸ but where such employee accepts compensation under the compensation act he may not pursue the remedy for damages.⁷⁹ Where compensation was accepted under the War Risk Insurance Act for an injury to, or the death of, a soldier or enlisted man of the United States Army, the personal representative of such soldier or enlisted man could not recover in an action for damages against the director general of railroads, based on the latter's alleged negligence in the operation of a railroad under federal control.⁸⁰

Compensation accepted under law of another state. The fact that an employee has accepted com-

pensation under the act of a particular state, which does not require an election, does not prevent his maintaining an action against a third person in another state where the employee is not within the compensation act of such other state, even if the act of such other state prevents an employee who is subject to the act and who has accepted compensation from suing a third person;⁸¹ and the acceptance of compensation for the death of an employee, under the act of another state, does not, it has been held, bar an action by the personal representative for such death, at least where such act does not require an election.⁸² So a widow of an employee killed in one state as the result of negligence of a fellow employee is not precluded from suing the tort-feasor in such state by reason of a statute requiring an election between acceptance and retention of compensation benefits and suit against the fellow employee, by reason of her receipt of a compensation award under the statute of another state to which the employer and employee had agreed to be bound.⁸³

There is authority for the view that the acceptance of compensation for the death of an employee under the compensation act of one state which renders such acceptance an election may not prejudice the rights of defendant in an action by the personal representative in another state where the accident and death occurred,⁸⁴ but that if such acceptance inured to the advantage of defendant he may avail himself of such advantage.⁸⁵ Where, under the law of another state in which compensation was paid, a principal employer or general contractor, his

Wis.—*Saxhaug v. Forsyth Leather Co.*, 31 N.W.2d 589, 252 Wis. 376.
71 C.J. p 1536 note 35.

76. N.D.—*State v. Hughes Oil Co.*, 226 N.W. 586, 58 N.D. 581.

77. N.Y.—*Reinhart v. Gerosa Crane Service Co.*, 31 N.Y.S.2d 162, 263 App.Div. 28.
71 C.J. p 1536 note 38.

78. U.S.—*Hines v. Dahn*, C.C.A. Iowa, 267 F. 105, affirmed *Dahn v. Davis*, 42 S.Ct. 320, 258 U.S. 421, 66 L.Ed. 696.

79. U.S.—*Dahn v. Davis*, Iowa, 42 S.Ct. 320, 258 U.S. 421, 66 L.Ed. 696.

71 C.J. p 1537 note 40.

80. U.S.—*Sandoval v. Davis*, D.C. Ohio, 278 F. 988.

81. U.S.—*Bagnet v. Springfield Sand & Tile Co.*, D.C.Mass., 64 F.Supp. 768.

71 C.J. p 1537 note 43.

Acceptance of award

Virginia workmen's compensation law provision for action against third party, and providing that acceptance of award shall be bar to

proceeding further with alternate remedy, applies only where award under Virginia act is accepted, and did not apply where award under North Carolina statute was accepted. U.S.—*Betts v. Southern Ry. Co.*, C.C. A.N.C., 71 F.2d 787.

Settlement of damages

Provisions of Indiana workmen's compensation act are binding on Indiana employers and their employees only, and acceptance of workmen's compensation for injury under the law of a state other than Indiana does not constitute a settlement of damages sustained by reason of tort committed in Indiana by person other than the employer.

Ind.—*New York Cent. R. Co. v. Milhiser*, 106 N.E.2d 453, 231 Ind. 180, rehearing denied 108 N.E.2d 57, 231 Ind. 180.

Dismissal of carrier from case

Where count of complaint, wherein workmen's compensation insurance carrier prayed recovery of amount paid by it to complainant employee as compensation under Texas workmen's compensation act for in-

juries sustained in Illinois, was stricken on plaintiff's motion and carrier was subsequently dismissed from case with its consent and without objection by defendant corporation, which denied in its original answer that carrier had right of subrogation, complainant had right to maintain action in Illinois to recover damages for such injuries on ground of defendant's negligence, as against contentions that he could not do so after recovering compensation under such act and that insurance carrier was subrogated to complainant's right to maintain action. Ill.—*Miller v. Yellow Cab Co.*, 31 N.E.2d 406, 308 Ill.App. 217.

82. Wash.—*Reutenik v. Gibson Packing Co.*, 231 P. 773, 132 Wash. 108, 37 A.L.R. 830.
71 C.J. p 1537 note 44.

83. U.S.—*Sheerin v. Steele*, C.A. Mich., 240 F.2d 797.

84. N.H.—*Saloshin v. Houle*, 155 A.47, 85 N.H. 126.

85. N.H.—*Saloshin v. Houle*, supra.

subcontractor, and their respective insurers are equally responsible to an employee of the subcontractor for compensation for injuries, such employee is barred from any recovery in an action in another state predicated on common-law liability of the general contractor for negligence.⁸⁶

Effect on liability of third person and who benefited by provisions. Provisions for an election or for the exercise of an option, where the act also gives to the employer or insurer rights against the person liable for an injury to, or death of, an employee, are not, according to some cases, designed to benefit such person,⁸⁷ but are intended for the benefit of the employer,⁸⁸ or do not discharge the liability.⁸⁹

§ 988. Right or Duty to Elect under Particular Provisions

- a. In general
- b. Option to proceed for compensation or damages but not for both
- c. Provision forbidding collection, recovery, or receipt of both compensation and damages
- d. Acceptance of award or procurement of judgment barring alternate proceeding
- e. Limitation as to place of injury
- f. Limitation as to furtherance of common enterprise or accomplishment of same or related purposes

a. In General

A provision that the injured employee may at his option either claim compensation under the act or obtain damages from, or proceed at law against, the person liable for damages may deny to the injured employee the benefit of both remedies, but under some such provisions the fact that the injured employee has claimed and accepted compensation does not prevent an action by him against such third person.

According to some cases, a provision that the injured employee may at his option either claim compensation under the act or obtain damages from, or proceed at law against, the person liable other than the employer for damages provides for an election,⁹⁰ denies to the injured employee the benefit of both remedies,⁹¹ and prevents an action by him against the third person where the injured employee has elected to take compensation,⁹² at least where such action is for the sole benefit of the employee.⁹³ Such provision has been construed to apply where the claim is for the death of an employee notwithstanding such provision in terms refers only to an injured employee,⁹⁴ and when dependents have duly exercised the option to take compensation they cannot thereafter proceed against a third person.⁹⁵

In some jurisdictions, however, the view has been taken that, since such provision is not intended for the benefit of a third person who caused the injury,⁹⁶ the fact that the injured employee has claimed and accepted compensation does not prevent an action by him against such third person.⁹⁷ So under a provision of the act that the injured em-

86. N.Y.—Black v. Stone & Webster Engineering Corp., 49 N.Y.S.2d 666, 181 Misc. 854.

87. N.Y.—Royal Indemnity Co. v. J. G. White Engineering Corporation, 198 N.Y.S. 264, 120 Misc. 332, affirmed 202 N.Y.S. 950, 208 App.Div. 759.

Discontinuance of action

Massachusetts Workmen's Compensation Act provision that claimant, in electing to receive compensation benefits, must discontinue prior to trial any action at law for the compensable injury was not intended to aid third party in escaping liability for such injury but was inserted to preserve compensation carrier's right of action against third party. U.S.—Hobart v. O'Brien, C.A.Mass., 243 F.2d 735.

88. Tenn.—Walters v. Eagle Indemnity Co., 61 S.W.2d 666, 166 Tenn. 386.

89. U.S.—Hobart v. O'Brien, C.A.Mass., 243 F.2d 735.

Fla.—Red Top Cab & Baggage Co., for Use and Benefit of Fontaine v. Dornier, 31 So.2d 409, 159 Fla. 366, 71 C.J. p 1537 note 49.

Illegally employed minor

The common-law right of a sixteen year old boy to bring action by his father and next friend against owner of truck for injuries sustained by boy while making delivery on bicycle when he was crowded into parked automobile by truck could not be taken from him by his failure to file notice required of illegally employed minor, within six months after injury, that he did not care to take advantage of workmen's compensation act.

Ill.—Oran v. Kraft-Phenix Cheese Corp., 58 N.E.2d 731, 324 Ill.App. 463.

90. N.D.—Tandsetter v. Oscarson, 217 N.W. 660, 56 N.D. 392, 71 C.J. p 1537 note 50.

91. Vt.—Laird v. State of Vermont Highway Dept., 20 A.2d 555, 112 Vt. 67—Belfore v. Vermont State Highway Department, 137 A. 797, 108 Vt. 396.

71 C.J. p 1537 note 51.

92. N.D.—Tandsetter v. Oscarson, 217 N.W. 660, 56 N.D. 392, 71 C.J. p 1537 note 52.

93. Vt.—Davis v. Central Vermont

Ry. Co., 113 A. 539, 95 Vt. 180.

94. U.S.—Canadian Pac. Ry. Co. v. Morin, C.C.A.Vt., 54 F.2d 246, 71 C.J. p 1537 note 54.

95. U.S.—Workmen's Compensation Exchange v. Chicago, M., St. P. & P. R. Co., D.C.Idaho, 45 F.2d 886.

96. La.—Lowe v. Morgan's Louisiana & T. R. & S. S. Co., 90 So. 429, 150 La. 29.

97. Idaho.—Hancock v. Halliday, 171 P.2d 333, 67 Idaho 119, 71 C.J. p 1538 note 57.

No waiver of right

A person having a cause of action against a third-party tort-feasor for damages for wrongful death or injury does not waive such right by exercising another right based on a claim for workman's compensation. Colo.—Drake v. Hodges, 161 P.2d 338, 114 Colo. 10.

The making of a compensation agreement whereby employee accepts a stated sum in payment of an injury sustained by accident arising out of, and in the course of, his employment, including permanent partial disability, does not bar the

employee may claim compensation or bring an action against the person other than the employer, who is liable, construed in connection with a provision that if the employee elects to take compensation the employer or the compensation board will be subrogated to the rights of the employer, the view has been taken that an election to take compensation under the act does not necessarily prevent the employee from subsequently bringing an action against a third person⁹⁸ or prevent dependents from suing for damages against the third party whose negligence allegedly caused the death of the employee.⁹⁹

b. Option to Proceed for Compensation or Damages but Not for Both

Where the statute gives the option to an employee to proceed for compensation or for damages from a third person, but not for both, an election is provided for, and, if the person entitled to compensation duly elects to take compensation under the act, he may not also maintain an action against the third person who caused the injury, for the sole benefit of the employee.

Under an act giving the option to an employee either to claim compensation from insurer or employer or to seek damages from a third person, but

providing that the employee or dependents may not proceed against both, it is usually held or recognized that an election is provided for,¹ and that, where the person entitled to compensation duly elects to take compensation under the act, he may not also maintain an action against the third person who caused the injury,² for the sole benefit of the employee.³

Such provision has so been construed as to apply to a claim for the death of the employee notwithstanding in terms it refers only to an injured employee⁴ and, as so construed, prevents an action by dependents or a personal representative who have duly elected or exercised the option to take compensation,⁵ for their own benefit.⁶ An employee who has made a binding and final election to accept workmen's compensation from his employer for his injuries may not maintain an action against a third-party tort-feasor on any theory that he was not entitled to compensation rights,⁷ and it is immaterial that the compensation proceedings are subsequently abandoned or prove unsuccessful.⁸

Under some statutes of this nature, however, the insurer may bring an action in the name of the em-

recovery of damages for injuries sustained by reason of negligence of a third party, between whom and injured employee the relationship of employer and employee does not exist.

Idaho.—Hancock v. Halliday, 171 P. 2d 333, 67 Idaho 119.

98. Colo.—Donley v. Denver & Salt Lake R. Co., 141 P.2d 399, 111 Colo. 358.

99. Idaho.—Lebak v. Nelson, 107 P. 2d 1054, 62 Idaho 96.

1. U.S.—Melella v. Savage, D.C.Del., 59 F.Supp. 258.

Ala.—Western Union Tel. Co. v. George, 194 So. 183, 239 Ala. 80—Smith v. Southern Ry. Co., 187 So. 195, 237 Ala. 372.

Mass.—Furlong v. Cronan, 26 N.E.2d 382, 305 Mass. 464.

Tex.—Fort Worth Lloyds v. Haygood, 246 S.W.2d 865, 151 Tex. 149. 71 C.J. p 1538 note 61.

Intent

Statute requiring employee to exercise option between proceeding against third person to recover damages and proceeding against insurer for compensation, and providing that insurer may enforce third person's liability "if compensation be paid," manifested intent to compel employee or his administrator to make a final and binding election, and to preserve the cause of action at law for benefit of insurer if employee should choose compensation. Mass.—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631—

Furlong v. Cronan, 26 N.E.2d 382, 305 Mass. 464.

Liberal construction.

Statute requiring employee to elect between right to compensation and right to enforce third person's legal liability, and giving compensation insurer right to enforce third person's legal liability, should be construed liberally to accomplish the purposes for which it was enacted. Mass.—Furlong v. Cronan, supra.

No double recovery

One of principles underlying workmen's compensation law is that there shall be no double recovery for injury, once by way of compensation and once by way of damages.

Mass.—McDonald v. Employers' Liability Assur. Corporation, 192 N. E. 608, 288 Mass. 170.

2. Ala.—Employers Ins. Co. v. Harrison, 33 So.2d 264, 250 Ala. 116—Smith v. Southern Ry. Co., 187 So. 195, 237 Ala. 372.

Del.—Rogers v. Delaware Power & Light Co., 95 A.2d 842, Terry 115. Mass.—Miller v. Richards, 26 N.E. 2d 380, 305 Mass. 424. 71 C.J. p 1538 note 62.

Waiver

When injured employee accepts compensation under act, he waives all right of action against third person. Mass.—Bruso's Case, 4 N.E.2d 808, 295 Mass. 531.

Partial claim

Injured employee cannot, by claiming only part of workmen's

compensation to which he is entitled, reserve right to proceed at law for damages against third person.

Mass.—McDonald v. Employers' Liability Assur. Corporation, 192 N. E. 608, 288 Mass. 170.

Prior to change in statute the text rule applied in Michigan.

U.S.—Dinardo v. Consumers Power Co., C.A.Mich., 181 F.2d 104.

Mich.—Tews v. C. F. Hanks Coal Co., 255 N.W. 227, 267 Mich. 466—Valisano v. Chicago & N. W. Ry. Co., 225 N.W. 607, 247 Mich. 301.

3. Mass.—Pimental v. John E. Cox Co., 13 N.E.2d 441, 299 Mass. 579—Barrv v. Bay State St. R. Co., 110 N.E. 1031, 222 Mass. 366.

4. U.S.—Melella v. Savage, D.C.Del., 59 F.Supp. 258.

Ill.—Biddy v. Blue Bird Air Service, 30 N.E.2d 14, 374 Ill. 506, applying Michigan law.

71 C.J. p 1538 note 64.

5. U.S.—Melella v. Savage, D.C.Del., 59 F.Supp. 258.

71 C.J. p 1538 note 65.

6. Mass.—Hall v. Henry Thayer & Co., 113 N.E. 644, 225 Mass. 151.

7. One who had made binding and final election to accept workmen's compensation from his employer for his injuries could not maintain injury action against another on any theory that he was not entitled to compensation rights.

Mass.—Petition of Nealon, 134 N.E. 2d 886, 334 Mass. 213.

8. Mass.—Miller v. Richards, 26 N. E.2d 380, 305 Mass. 424.

employee or personal representative against the person liable for damages notwithstanding an election to take compensation, as discussed *infra* § 1017, and the person who has elected to take compensation may have a beneficial interest in the amount recovered, *infra* § 1040. So notwithstanding such a provision and a provision for subrogation of the insurer, in view of other provisions recognizing and preserving a substantial right of the employee for the recovery of damages even though he first proceeds for compensation under the act,⁹ the view has been taken that the injured employee may, after obtaining an award, and receiving payment, of compensation, bring an action against a third person,¹⁰ especially where the insurance carrier fails or refuses to bring the action, as discussed *infra* § 1004, or requests the employee to sue,¹¹ and a like rule applies in respect of an action for the death of an employee where such carrier fails or refuses to bring the action, as considered *infra* § 1004.

c. Provision Forbidding Collection, Recovery, or Receipt of Both Compensation and Damages

Where so provided by the statute, an injured employee may either claim compensation or proceed against a third person for damages, or may proceed against both but may not collect from both, and he must elect whether to collect compensation or damages.

Under some provisions, an injured employee may

either claim compensation or proceed against a third person for damages, or may proceed against both but may not collect from both.¹² Under such a statute an employee,¹³ or, if the provision is applicable in case of death of the employee, his personal representative,¹⁴ who has not accepted compensation may bring an action against the third person for all damages caused by such person's wrongful act; and the employee may have his claim for compensation awarded and also prosecute his action for damages to judgment.¹⁵ The employee must, however, elect whether to collect compensation or damages,¹⁶ although a tort-feasor is not entitled to assert the receipt of workmen's compensation under the laws of another state as a defense to an action for damages brought by the injured employee.¹⁷

According to some cases an employee who has received compensation under the act loses his right to bring an action in his own behalf to recover damages from a third person,¹⁸ at least where the employee collects compensation without reserving his right of action for damages,¹⁹ and it has been held that an employee who accepts compensation under the act may not recover an additional amount in an action against a third person.²⁰ Under some acts of this general type, however, the acceptance of compensation does not necessarily bar an action against a third person.²¹ Thus in some jurisdictions

9. Tex.—Hanson v. Ponder, Com. App., 300 S.W. 35.
Wm. Cameron & Co. v. Ganble, Civ.App., 216 S.W. 459.

10. Tex.—Hart v. Traders & General Ins. Co., 189 S.W.2d 493, 144 Tex. 146.
71 C.J. p 1538 note 71.

11. Tex.—Galveston, H. & S. A. Ry. Co. v. Mallott, Civ.App., 6 S.W.2d 432.

12. Tenn.—Wilson v. City of Chattanooga, 165 S.W.2d 373, 179 Tenn. 234.

The purpose of that section of the compensation act providing that an employee injured because of the negligence of a third person may, at his option, either claim compensation or proceed at law against the third person to recover damages, but that he shall not be entitled to collect them both, is to prevent an injured employee from receiving double compensation for his injury.

Tenn.—Wilson v. City of Chattanooga, *supra*.

13. Ind.—Armstrong Cork Co. v. Maar, 111 N.E.2d 82, 124 Ind.App. 105, rehearing denied 112 N.E.2d 240, 124 Ind.App. 105—Marion County Const. Co. v. Kimberlin, 184 N.E. 574, 96 Ind.App. 145.

14. Tenn.—Bristol Telephone Co. v. Weaver, 243 S.W. 299, 146 Tenn. 511.
71 C.J. p 1539 note 76.

Dependent of a deceased employee may proceed against both employer and wrongdoer and may obtain a judgment against wrongdoer as well as award against employer, but cannot collect from both.

Ind.—Hall v. Pennsylvania Greyhound Lines, 96 N.E.2d 348, 121 Ind.App. 219—Robbins v. National Veneer & Lumber Co., 88 N.E.2d 773, 120 Ind.App. 213.

15. U.S.—Old Dominion Stages v. Cates, C.C.A.Tenn., 65 F.2d 258, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592.

Ind.—Ritman v. Wass, 125 N.E.2d 33, 125 Ind.App. 348—Armstrong Cork Co. v. Maar, 111 N.E.2d 82, 124 Ind.App. 105, rehearing denied 112 N.E.2d 240, 124 Ind.App. 105—Weiss v. Wakefield, 38 N.E.2d 303, 111 Ind.App. 106—Artificial Ice & Cold Storage Co. v. Ryan, 193 N.E. 710, 99 Ind.App. 606.
71 C.J. p 1539 note 77.

16. Tenn.—Wilson v. City of Chattanooga, 165 S.W.2d 373, 179 Tenn. 234.

71 C.J. p 1539 note 78.

17. Ind.—New York Cent. R. Co. v.

Milhiser, 108 N.E.2d 57, 231 Ind. 180.

18. Tenn.—City of Nashville v. Latham, 28 S.W.2d 46, 160 Tenn. 581—Mitchell v. Usilton, 242 S.W. 648, 146 Tenn. 419.

19. Tenn.—Wilson v. City of Chattanooga, 165 S.W.2d 373, 179 Tenn. 234—Keen v. Allison, 60 S.W.2d 158, 166 Tenn. 218.

20. U.S.—McNaughton v. New York Cent. R. Co., C.A.Ind., 220 F.2d 835.

Ind.—Pittsburgh, C. & St. L. R. Co. v. Parker, 132 N.E. 372, 134 N.E. 890, 191 Ind. 686, 19 A.L.R. 751.

21. Alaska.—Andersen v. Pacific S. Co., 8 Alaska 291.
71 C.J. p 1539 note 82.

Reservation of rights

Receipt of advancements from employer's compensation insurer under agreement by which injured employee reserved his right of action for such injuries against third party and agreed to reimburse insurer to extent of recovery against third party did not bar suit by injured employee against third parties for such injuries.

Tenn.—International Harvester Co. v. Sartain, 222 S.W.2d 854, 32 Tenn. App. 425.

the provision that the employee shall not collect both from the employer and from the third person has been construed to mean that to the extent that the employee collects from one he may not collect from the other,²² and therefore that the collection of compensation does not bar an action to recover damages,²³ but the recovery of full damages by the employee is not allowed, as discussed *infra* § 1040.

Notwithstanding a provision of the general type here considered in terms refers only to an injured employee, it has been so construed as to apply where the claim is for the death of an employee,²⁴ and, as so construed, may prevent an action by a personal representative where compensation has been collected, at least where the action is brought under a statute which is primarily a survival statute.²⁵ Provisions of the general type here involved, considered in connection with provisions giving the employer the right to collect from a third person indemnity or compensation paid or payable, have been regarded as an integral part of the scheme for compensation,²⁶ and as intended for the benefit of the employer, and do not protect a negligent third person from liability for his negligent acts.²⁷

d. Acceptance of Award or Procurement of Judgment Barring Alternate Proceeding

Under statutes which permit an action against a third person before an award is made but provide that the acceptance of an award or compensation under the act shall be a bar to proceeding further with the other remedy, the employee or his personal representative cannot recover both compensation and damages for his sole benefit.

Under an act permitting an action against a third person before an award is made and providing that the acceptance of an award or compensation under

the act or the procurement of a judgment in the action shall be a bar to proceeding further with the alternate remedy, while, according to some cases, an injured employee may proceed concurrently against the employer and against a third person,²⁸ the employee or his personal representative cannot recover both compensation and damages for his sole benefit,²⁹ and an employee who accepts compensation under the act may not also recover in his own behalf damages from a third person,³⁰ but the acceptance of an award by the employee constitutes a bar to an action by him only to the extent that he cannot maintain the action in his own name and for his own benefit.³¹

e. Limitation as to Place of Injury

Under some statutes, presently or formerly in force, the right of an employee to elect to take compensation under the act or to seek a remedy against a third-party tort-feasor is limited to cases in which the injury occurs away from the plant of the employer, and where the injury does not occur away from the plant the person entitled to compensation is confined to seeking compensation.

Under some acts which have since been repealed in some jurisdictions, the right of an employee, or of dependents of a deceased employee, to elect to take compensation under the act or to seek a remedy against a third person who causes the injury is limited to cases in which the injury occurs away from the plant of the employer,³² and was due to the negligence or wrong of another not in the same employ;³³ and where the injury does not occur away from the plant the person entitled to compensation is confined to seeking compensation.³⁴ Where the injury occurs away from the plant and is due to the negligence of one not in the same employ, the person entitled to compensation may³⁵ and must³⁶

22. Ky.—Book v. City of Henderson, 197 S.W. 449, 176 Ky. 785.

23. Ky.—Napier v. John P. Gorman Coal Co., 45 S.W.2d 1064, 242 Ky. 127.
71 C.J. p 1540 note 84.

24. Alaska.—Andersen v. Pacific S. S. Co., 8 Alaska 291.
71 C.J. p 1540 note 86.

25. Tenn.—McCreary v. Nashville, C. & St. L. Ry., 34 S.W.2d 210, 161 Tenn. 691.

26. Tenn.—Walters v. Eagle Indemnity Co., 61 S.W.2d 666, 166 Tenn. 386.

27. Ind.—Armstrong Cork Co. v. Maar, 111 N.E.2d 82, 124 Ind.App. 105, rehearing denied 112 N.E.2d 240, 125 Ind.App. 105—Weis v. Wakefield, 38 N.E.2d 303, 111 Ind. App. 106.

Other statement of rule

A negligent third party is liable

for the full amount of damages caused by his negligence and has no concern with any agreements or payments between employer and employee, or with provision of workmen's compensation law with respect to employee's election of remedies, as long as third party is safe from double liability.

Ind.—Forcum-James, Inc. v. Johnson, 59 N.E.2d 730, 115 Ind.App. 655.

28. N.C.—Phifer v. Berry, 163 S.E. 119, 202 N.C. 388.

29. N.C.—Phifer v. Berry, *supra*.

30. Va.—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, reheard 167 S.E. 424, 159 Va. 855.

71 C.J. p 1540 note 98.

31. Va.—Corrigan v. Stormont, 170 S.E. 16, 160 Va. 727.

71 C.J. p 1540 note 94.

32. Or.—King v. Union Oil Co. of California, 24 P.2d 345, 144 Or. 655, rehearing denied 25 P.2d 1055, 144 Or. 655.

71 C.J. p 1540 notes 96, 97.

Liability of third person dependent on place of injury see *supra* § 986.

33. Or.—King v. Union Oil Co. of California, *supra*.

34. U.S.—Matheny v. Edwards Ice Machine & Supply Co., C.C.A.Or., 39 F.2d 70, certiorari denied 50 S. Ct. 464, 281 U.S. 765, 74 L.Ed. 1173.
71 C.J. p 1540 note 99.

35. Wash.—Anderson v. Bauer, 264 P. 410, 146 Wash. 594.

71 C.J. p 1541 note 1.

36. Wash.—Stertz v. Industrial Insurance Commission of Washington, 158 P. 256, 91 Wash. 538.

make an election, and he cannot both claim compensation and also bring an action against a third person³⁷ or, at least, cannot both obtain compensation and recover damages.³⁸ An employee is not, however, required to make an election by such provisions where at the time of the injury he was not on the premises or plant of his employer and was not in the course of his employment.³⁹

f. Limitation as to Furtherance of Common Enterprise or Accomplishment of Same or Related Purposes

Under some statutes which contain provisions requiring an election where both the employer and the third person are subject to the act, such provisions are applicable only where the employer liable for compensation and the other person legally liable for damages are en-

gaged in the due course of business in furtherance of a common enterprise or in the accomplishment of the same or related purposes in operation on the premises where the injury was received at the time of such injury.

Some acts which contain provisions requiring an election where both the employer and the third person are subject to the act are by express terms applicable only where the employer liable for compensation and the other person legally liable for damages are engaged in the due course of business in furtherance of a common enterprise or in the accomplishment of the same or related purposes in operation on the premises where the injury was received at the time of such injury;⁴⁰ where the employer and the third person are not so engaged, an election is not required,⁴¹ and the fact that the em-

37. U.S.—Holmes v. Henry Jennings & Co., D.C.Or., 7 F.2d 231.

Or.—McDonough v. National Hospital Ass'n, 294 P. 351, 134 Or. 451.

38. Wash.—Anderson v. Bauer, 264 P. 410, 146 Wash. 594.

71 C.J. p 1541 note 4.

39. Wash.—Hoffman v. Hansen, 263 P. 53, 118 Wash. 73.

40. U.S.—Pittsburgh Plate Glass Co. v. Carey, C.C.A.Minn., 98 F.2d 533.

Minn.—Schneider v. Texas Co., 69 N.W.2d 329, 244 Minn. 131—Wagner v. City of Duluth, 300 N.W. 820, 211 Minn. 252—Seidel v. Nicollet Ave. Properties Corp., 279 N.W. 570, 202 Minn. 569—Egan v. E. A. Brown Co., 258 N.W. 161, 193 Minn. 165.

Legislative purpose of amendment to workmen's compensation act preventing injured employee from recovering both compensation under the act and damages from third-party tort-feasor, where the parties are engaged in a common enterprise or the same or related purposes in operation on premises where injury occurred, is to restore injured employee's common-law right of action against third-party tort-feasor, except where several employers are engaged on the same project and their employees are exposed to the same or similar hazards created by such mutual engagements.

Minn.—Crawford v. Woodrich Const. Co., 57 N.W.2d 648, 239 Minn. 12—Volding v. Harnish, 51 N.W.2d 658, 236 Minn. 71—Gleason v. Geary, 8 N.W.2d 808, 214 Minn. 499.

Fair and liberal construction

(1) Amendment to workmen's compensation act permitting injured employee to recover from third-party tort-feasor subject to act unless employer and tort-feasor are engaged in a common enterprise or the same or related purposes in operation on premises where injury oc-

curred was intended for the benefit of employees and should be liberally construed with such purpose and intent in mind.

Minn.—Swanson v. J. L. Shiely Co., 48 N.W.2d 848, 234 Minn. 548.

(2) Provision, being "remedial," should receive such fair and liberal construction as to make it a workable statute, thereby giving force and effect to legislative purpose.

Minn.—Gleason v. Geary, 8 N.W.2d 808, 214 Minn. 499.

Statutory conditions

(1) Section of workmen's compensation act depriving compensated employee of tort action against third party will prevent recovery only if: First, both injured worker's employer and third party were insured or self-insured under Workmen's Compensation Act; second, employer and third party were engaged in due course of business on same project; third, their employees were working together in performance of such project in manner which exposed them to same or similar hazards on premises where injury was received and at time thereof.

Minn.—Urbanski v. Merchants Motor Freight, 57 N.W.2d 686, 239 Minn. 68.

(2) Under compensation provision limiting an injured employee or his dependents to a choice between receiving "compensation" from employer or proceeding at law against third party causing injury, and provision that all employers shall be subject to provisions of workmen's compensation law, and every such employer shall be liable for compensation, word "compensation" refers to payment made by an employer subject to the Minnesota workmen's compensation act, and has no application to the United States or its agencies; so dependents of a deceased worker were not precluded by receipt of payment of compensation under the United States Compensa-

tion Act from bringing an action against the city whose negligence allegedly caused employee's death.

Minn.—Wagner v. City of Duluth, 300 N.W. 820, 211 Minn. 252.

Related businesses

Under Minnesota workmen's compensation act imposing liability on an employer other than an injured employee's employer, for the employee's injuries, where the injury complained of was received in the due course of business and in the accomplishment of the same or related purposes in operation on the premises where the injury was received, at the time thereof, businesses are "related" when the parties are mutually or reciprocally interested in a commercial way or where the business of one has a necessary relation toward or in conjunction with the other.

U.S.—Pittsburgh Plate Glass Co. v. Carey, C.C.A.Minn., 98 F.2d 533.

41. Minn.—Manteuffel v. Theo. Hamm Brewing Co., 56 N.W.2d 310, 238 Minn. 140—Johnson v. City of Duluth, 13 N.W.2d 192, 216 Minn. 192—Gleason v. Geary, 8 N.W.2d 808, 214 Minn. 499—Murphy v. Barlow Realty Co., 289 N.W. 567, 206 Minn. 537—Horgen v. Franklin Co-operative Creamery Ass'n, 262 N.W. 149, 195 Minn. 159.

71 C.J. p 1541 note 7.

The supplying of a commodity or a service to a customer upon the latter's premises does not amount to engaging in the "same or a related purpose" by the parties within the meaning of provision of the workmen's compensation act preventing an injured employee from recovering both compensation under act and damages from third-party tort-feasor where the parties are engaged in the same or related purposes in operation on the premises where the injury was received.

Minn.—Gentle v. Northern States

ployee has been awarded, and is receiving from his employer, compensation does not prevent the maintenance of an action against the third person.⁴² Where, however, the employer, the employee, and the third person are subject to the compensation act and the employer and the third person are so engaged, an employee,⁴³ or dependents of a deceased employee,⁴⁴ who make a binding election to take compensation cannot maintain an action against the third person.

§ 989. Election by Particular Person in Case of Death by Wrongful Act

In the case of death of an employee by wrongful act of a third person, the widow of the deceased employee as administratrix is the proper person to elect between the compensation act and the seeking of recovery under a death act.

An election between the compensation act and the seeking of recovery under a death act is, under some acts, properly made by the widow of the deceased employee as administratrix.⁴⁵ Under a provision for election by the dependents of a deceased employee, the power of a widow to make an election so as to affect her own rights and those of a dependent child has been recognized⁴⁶ even though the widow has not been appointed administratrix,⁴⁷ and where she has duly made an election to take

compensation she cannot thereafter as administratrix maintain an action against a third person under the death statute.⁴⁸

Even in the absence of a specific provision for an election in the case of the death of the employee, it has been held or recognized that the widow may elect to take compensation and thereby prevent the maintenance of an action for her own benefit,⁴⁹ or for the benefit of dependent children who are beneficiaries under the compensation act,⁵⁰ and even an action for the benefit of adult children who are not beneficiaries under the act.⁵¹ So, even where there is no provision for alternative remedies, the fact that a surviving widow on her own behalf and as guardian of a minor child accepts and retains compensation awarded in a proceeding under some compensation act prevents her as administratrix from maintaining an action against a third person.⁵²

The view has been taken, however, that the mother of a deceased employee does not, by accepting compensation, release the alleged wrongdoer from liability in an action for the benefit of the heirs and creditors of such employee,⁵³ that payment of compensation to a widow of the deceased workman does not preclude the bringing of a tort action against the tort-feasor by the children of the deceased,⁵⁴ and that the widow of a deceased em-

Power Co., 6 N.W.2d 361, 213 Minn. 281.

Suit against principal contractor

(1) Under such provision, subcontractor's employee, who sustained injuries when temporary scaffold on which he was working was struck by truck of general contractor, could maintain personal injury action against general contractor notwithstanding general contractor was subject to the act and the subcontractor's employee had received workman's compensation from subcontractor's insurer.

U.S.—E. I. Du Pont De Nemours & Co. v. Frachette, C.C.A.Minn., 161 F.2d 818.

(2) Where employee of subcontractor was not working with or exposed to the same hazards as employees of building contractor he could maintain tort action against building contractor for injuries caused by his negligence.

Minn.—Swanson v. J. L. Shiely Co., 48 N.W.2d 848, 234 Minn. 548.

(3) Neither employer, merely carrying on systematic inspection to insure that it was obtaining quality of services for which it had obligated itself to pay under a construction contract, nor inspector hired by it were engaged in same project as contractor who performed work, so as to prevent inspectors who had

been compensated by employer, from maintaining a common-law tort action against the contractor.

Minn.—Crawford v. Woodrich Const. Co., 57 N.W.2d 648, 239 Minn. 12.

42. U.S.—Phillips Petroleum Co. v. Miller, C.C.A.Minn., 84 F.2d 148.

Minn.—Lang v. William Bros. Boiler & Mfg. Co., Manufacturers & Merchants Indem. Co., Intervenor, 85 N.W.2d 412—Gentle v. Northern States Power Co., 6 N.W.2d 361, 213 Minn. 281—Smith v. Ostrov, 292 N.W. 745, 208 Minn. 77—Tevoigt v. Polson, 285 N.W. 893, 205 Minn. 252—Taylor v. Northern States Power Co., 264 N.W. 139, 196 Minn. 22—Anderson v. Interstate Power Co., 263 N.W. 612, 195 Minn. 528.

71 C.J. p 1541 note 8.

43. Minn.—Volding v. Harnish, 51 N.W.2d 658, 236 Minn. 71—Egan v. E. A. Brown Co., 258 N.W. 161, 193 Minn. 165.

71 C.J. p 1541 note 9.

44. Minn.—Prebeck v. Village of Hibbing, 240 N.W. 890, 185 Minn. 303.

45. Mass.—Turnquist v. Hannon, 107 N.E. 443, 219 Mass. 560.

71 C.J. p 1541 note 11.

Appointment of guardian

Under North Dakota law, the appointment of a guardian for a de-

pendent minor is not essential to the making of a binding election by surviving widow to accept benefits of workmen's compensation law rather than to proceed against a third-party tort-feasor.

U.S.—Nelson v. Westland Oil Co., D.C.N.D., 96 F.Supp. 656.

46. N.Y.—Hanke v. New York Consol. R. Co., 168 N.Y.S. 234, 181 App.Div. 53.

71 C.J. p 1542 note 12.

47. N.Y.—Hanke v. New York Consol. R. Co., supra.

48. N.Y.—Hanke v. New York Consol. R. Co., supra.

49. Tenn.—McCreary v. Nashville, C. & St. L. Ry., 34 S.W.2d 210, 161 Tenn. 691.

50. Tenn.—McCreary v. Nashville, C. & St. L. Ry., supra.

51. Tenn.—McCreary v. Nashville, C. & St. L. Ry., supra.

52. U.S.—Weber v. Chicago & N. W. Ry. Co., D.C.Wyo., 278 F. 258.

71 C.J. p 1542 note 18.

53. Mich.—Vereeke v. City of Grand Rapids, 168 N.W. 1019, 203 Mich. 85.

54. Utah—Reid v. Owens, 93 P.2d 830, 98 Utah 50, 126 A.L.R. 55.

ployee may not by accepting compensation under the act of one state defeat the interest of other beneficiaries of a recovery for death in an action in another state under the laws of such other state.⁵⁵ Dependents of a deceased employee who are without a beneficial interest in the cause of action for death against the tort-feasor are not put to an election.⁵⁶

§ 990. What Constitutes and Validity

- a. In general
- b. Agreement with employer or insurer; settlement and release
- c. Prosecuting compensation proceeding
- d. Award of compensation
- e. Accepting or collecting payment or advances
- f. Furnishing or accepting hospital, medical, or nursing expenses
- g. Knowledge of alternative remedies; fraud or mistake
- h. Proceeding to impeach or avoid election

a. In General

In the absence of a statute or regulation defining what shall constitute an "election," any decisive act of a party with knowledge of his rights and of the facts indicating his intention to pursue one remedy rather than the other determines his election.

The view has been expressed that, in the absence of any statutory provision, or rule of the state industrial commission defining what shall constitute an "election," any decisive act of a party with knowledge of his rights and of the facts indicating his intention to pursue one remedy rather than the other determines his election.⁵⁷ So there is author-

ity for the view that whether or not an employee has made an election to take compensation or to enforce a right against a third person is largely a matter of intention in each case,⁵⁸ and each case must be determined on its peculiar facts.⁵⁹

The act should so be construed as to give the employee a choice free from restraint,⁶⁰ and, until he has done something which evidences his intention to pursue one course or the other, the choice remains open to him.⁶¹ The right of election conferred by statute contemplates an opportunity for deliberation, followed by some affirmative action.⁶² These rules must, of course, be read in connection with the construction given the particular provision involved as to the right and duty to elect, discussed *supra* § 988, and as to the particular facts which constitute an election, *infra* subdivisions e-g of this section.

Under some statutes an election may or should be made by filing notice with the commission of intention to sue the third-party tort-feasor,⁶³ but notice to the commission constitutes a binding election only where no acceptance of compensation pursuant to an award has yet occurred;⁶⁴ and the filing of an election to receive compensation is not binding where, with the approval of the commission and prior to the time any compensation is received, the employee files another notice of election to sue negligent third parties.⁶⁵ Where no form of notice of election to recover damages against a third-party tort-feasor has been fixed by the statute or by administrative regulation, an alleged defective notice does not deprive the employee of the right to maintain an action against the third-party tort-feasor.⁶⁶

55. N.H.—*Saloshin v. Houle*, 155 A. 47, 85 N.H. 126.

56. N.Y.—*Zirpola v. T. & E. Casselman, Inc.*, 143 N.E. 222, 237 N.Y. 367.

71 C.J. p 1542 note 21.

57. Okl.—*Marland Refining Co. v. McClung*, 226 P. 312, 102 Okl. 56—*Barton v. Oklahoma, K. & M. Ry. Co.*, 220 P. 929, 96 Okl. 113.

58. Wis.—*Harloff v. Merwin*, 177 N. W. 913, 172 Wis. 30.

71 C.J. p 1542 note 23.

59. Md.—*Perdue v. Brittingham*, 47 A.2d 491, 186 Md. 393.

Wis.—*Harloff v. Merwin*, 177 N.W. 913, 172 Wis. 30.

Written election

A wage history, signed by employee and filed with insurance carrier's admission of liability, was not "written election" barring, under compensation act and rule of indus-

trial commission, employee's recovery from third party in tort action in view of commission rule requiring filing of wage history.

Colo.—*King v. O. P. Baur Confectionery Co.*, 68 P.2d 909, 100 Colo. 528.

60. Wis.—*Harloff v. Merwin*, 177 N. W. 913, 172 Wis. 30.

61. Wis.—*Harloff v. Merwin*, *supra*.

Definitive action

Under amended section of Delaware workmen's compensation act permitting an employee, injured by person other than employer, and who elects to receive compensation, to sue such third person within two hundred sixty days of date of accident, the election of remedies is not considered until there has been some definitive action as to compensation benefits, and where there had been

no sufficient action under statutes to bring the amendment into play, the right of employee's widow under Delaware wrongful death act remained unimpaired.

U.S.—*Kowalewski v. Pennsylvania R. Co.*, D.C.Del., 141 F.Supp. 565.

62. Colo.—*King v. O. P. Baur Confectionery Co.*, 68 P.2d 909, 100 Colo. 528.

63. D.C.—*Jordan v. District of Columbia*, D.C., 116 F.Supp. 559.

64. U.S.—*Toomey v. Waterman S. Corp.*, C.C.A.N.Y., 123 F.2d 713. N.Y.—*Leibow v. Arthur G. Blair, Inc.*, 54 N.Y.S.2d 894, 183 Misc. 918.

65. N.Y.—*Leibow v. Arthur G. Blair, Inc.*, *supra*.

66. U.S.—*Brusich v. Grace Line, D. C.N.Y.*, 56 F.Supp. 48.

Evidence; questions of law and fact. A third-party tort-feasor sued by an employee for negligence causing injury has the burden of proving plaintiff's election to take workmen's compensation, thus barring the action at law;⁶⁷ but an employee must sustain his claim of lack of knowledge to make a binding election by reasonable evidence.⁶⁸ Relevant evidence with respect to the issue of election is admissible.⁶⁹ Particular evidence has been held sufficient⁷⁰ or has been held insufficient⁷¹ to show an election to take compensation, precluding action at law. Ordinarily it is a question for the trial court in an action at law against a third-party tort-feasor to determine whether the employee instituting suit had made an election to receive compensation instead;⁷² but the determination whether the employee collected compensation has been held a question of fact for the jury.⁷³

b. Agreement with Employer or Insurer; Settlement and Release

A settlement of a claim for compensation and the acceptance of payments of compensation thereunder will evidence an election.

It has been laid down broadly that a settlement of a claim for compensation and the acceptance of payments of compensation thereunder will evidence an election.⁷⁴ So the view has been taken that an agreement for compensation between the employee and the employer's insurer, approved by the duly authorized board or department under provisions of

the act, constitutes an election which will prevent the employee's maintaining an action for damages against a third person.⁷⁵ The making of an agreement for compensation by the administrator of a deceased employee with the employer, which is not approved by the industrial accident board, does not of itself, however, constitute such an election as will prevent an action against a third person.⁷⁶

Under some statutes the fact that the injured workman and his employer may have had agreements between themselves concerning compensation does not affect the liability imposed by law on a third-party tort-feasor as long as there has been no actual payment and satisfaction of the compensation claim,⁷⁷ and, if there was any mistake as to the terms of an agreement for compensation filed with the state industrial board and approved by the board, the workman and the employer are entitled to have the award of the board, based on such agreement, set aside, without affecting the right of the workman to proceed against the third-party tort-feasor.⁷⁸

c. Prosecuting Compensation Proceeding

Under some statutes the mere making of a claim for compensation is not decisive as an election of remedy, but it is the actual award which is binding, and until an award is made, the claimant may forego compensation under the act and pursue his remedy against a negligent third person.

Under some acts it is not the making of a claim

67. U.S.—Foster v. Buckner, C.A. Mich., 203 F.2d 527, certiorari denied 74 S.Ct. 30, 346 U.S. 818, 98 L.Ed. 345.

Acceptance of benefits

Defendant in negligence action which charged that plaintiff had elected to receive benefits under workmen's compensation law had burden of showing acceptance by plaintiff of benefits of compensation. Ind.—Armstrong Cork Co. v. Maar, 111 N.E.2d 82, 124 Ind.App. 105, rehearing denied 112 N.E.2d 240, 124 Ind.App. 105.

68. Ariz.—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412.

69. Mass.—Petition of Nealon, 134 N.E.2d 886, 334 Mass. 213.

70. Mich.—Schulmeyer v. Central Motor Freight Co., 35 N.W.2d 225, 323 Mich. 142.

Minn.—Volding v. Harnish, 51 N.W. 2d 658, 236 Minn. 71.

71. U.S.—Foster v. Buckner, C.A. Mich., 203 F.2d 527, certiorari denied 74 S.Ct. 30, 346 U.S. 818, 98 L.Ed. 345.

Ind.—Armstrong Cork Co. v. Maar, 111 N.E.2d 82, 124 Ind.App. 105,

rehearing denied 112 N.E.2d 240, 124 Ind.App. 105.

72. Ariz.—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412.

Mass.—Petition of Nealon, 134 N.E. 2d 886, 334 Mass. 213.

73. Ind.—Samuel E. Pentecost Const. Co. v. O'Donnell, 39 N.E.2d 812, 112 Ind.App. 47.

74. Tenn.—Stanford v. Holloway, 157 S.W.2d 864, 25 Tenn.App. 379, 71 C.J. p 1542 note 29.

Noncompensable injury

An employee injured by act of third person, who signed written agreement with liability insurer of employer for payment of compensation under compensation act, was barred from instituting tort action against third person causing injury, irrespective of fact that injury might not be compensable under compensation act.

Mass.—Miller v. Richards, 26 N.E. 2d 380, 305 Mass. 424.

75. Mich.—Nagy v. Michigan Copper & Brass Co., 207 N.W. 850, 233 Mich. 552—Smith v. Port Huron Gas & Electric Co., 187 N.W. 292, 217 Mich. 519.

76. Mich.—Brabon v. Gladwin Light & Power Co., 167 N.W. 1024, 201 Mich. 697—Dettloff v. Hammond, Standish & Co., 161 N.W. 949, 195 Mich. 117.

77. Ind.—Armstrong Cork Co. v. Maar, 124 Ind.App. 105, 111 N.E. 2d 82, rehearing denied 112 N.E.2d 240, 124 Ind.App. 105—Forcum-James, Inc. v. Johnson, 59 N.E.2d 730, 115 Ind.App. 655—Samuel E. Pentecost Const. Co. v. O'Donnell, 39 N.E.2d 812, 112 Ind.App. 47—Weis v. Wakefield, 38 N.E.2d 303, 111 Ind.App. 106.

78. Ind.—Weis v. Wakefield, supra.

Repayment by employee

That employee and employer once had an agreement under which compensation was being paid to employee for injuries from negligence of third party did not relieve third party from liability where the agreement had been rescinded and the money repaid by employee, and neither employer nor his insurance carrier had a claim against third party.

Ind.—Forcum-James, Inc. v. Johnson, 59 N.E.2d 730, 115 Ind.App. 655.

for compensation under the act but the actual award which is decisive and binding,⁷⁹ and, even though an employee has made a claim, he may, until an award is made, forego compensation under the act and pursue his remedy against a negligent third person.⁸⁰ Furthermore, there must be a formal assertion of the claim⁸¹ and the mere appearance of the injured employee at a hearing before the industrial commission, pursuant to a direction of the commission, does not constitute a claim for compensation and an election where no claim was otherwise made,⁸² even though the commission gratuitously makes a temporary award which is not accepted or recognized by the employee.⁸³ Where, however, after making application for compensation, the injured employee is permitted to withdraw his claim in order to sue a third person, a subsequent application or request by the employee to the commission to assume jurisdiction and make an award may constitute an election to take compensation.⁸⁴

The mere signing of a claim for compensation does not necessarily constitute an election so as to prevent the maintenance of an action against a

third person.⁸⁵ Where the person entitled to compensation merely gives to the employer and files with the designated commissioner the notice of injury and claim for compensation prescribed by other provisions of the act, in the absence of an award of compensation there is not such an exercise of the option to claim compensation by the person entitled to compensation as will, under some acts, preclude such person from maintaining an action against a third person.⁸⁶ An employee's initial pursuit of a statutory remedy of suit to set aside the ruling of the industrial board denying his claim for compensation for injuries sustained is not, strictly speaking, an election precluding subsequent action against negligent third parties for damages.⁸⁷

Option to proceed against either but not against both. Under an act giving the injured employee an option to proceed against the employer for compensation or to proceed against a third person for damages, but not against both, "to proceed" against the employer is to employ the procedure, the method, pointed out by the act.⁸⁸ According to some cases, bringing and prosecuting to a determination on the merits a proceeding for compensation con-

79. N.Y.—*Godfrey v. Brooklyn Edison Co.*, 187 N.Y.S. 263, 115 Misc. 21.

Curtis v. U. S. Trucking Corp., 2 N.Y.S.2d 248.

An employee failing to recover compensation under workmen's compensation law for injuries sustained may subsequently pursue common-law action against negligent third parties for damages.

Tex.—*Robertson v. C. A. Bryant Co.*, Civ.App., 127 S.W.2d 549, error dismissed, judgment correct.

80. Ind.—*McKinnon v. Parrill*, 38 N. E.2d 1008, 111 Ind.App. 843.

N.Y.—*Galotti v. Deansboro Supply Co.*, 289 N.Y.S. 535, 248 App.Div. 20.

N.Y.—*Godfrey v. Brooklyn Edison Co.*, 187 N.Y.S. 263, 115 Misc. 21.

Curtis v. U. S. Trucking Corp., 2 N.Y.S.2d 248.

Pending suit

Fact that employee who was injured on employer's premises while going to cafeteria had suit under workmen's compensation law pending in state court did not bar her from bringing action against employer's landlord for her injuries. U.S.—*Kaylor v. Magill*, C.A.Tenn., 181 F.2d 179.

Withdrawal of claim

(1) Where employee filed and withdrew claim for workmen's compensation against employer, and no compensation was paid, agreed upon, or awarded, and no future claim could be filed because barred by one-

year statute of limitations, employee did not elect to "claim compensation" so as to bar subsequent suit against alleged third-party tortfeasor for damages because of injuries.

Del.—*McGonigal v. Ward Baking Co.*, 67 A.2d 61, 6 Terry 55.

(2) Where industrial commission found that claimant suffered injuries arising out of, and in course of, employment and accepted responsibility for accident benefits and compensation and paid medical benefits and then claimant filed election of remedies to proceed against third party and asked that medical benefits be continued but that his claim for compensation be held in abeyance pending decision of that action, request for delay in award of compensation was proper and not such an application for award as would bar his right of election to sue the third party.

Ariz.—*Pressley v. Industrial Commission*, 236 P.2d 1011, 73 Ariz. 22.

81. N.Y.—*Dyer v. Central Sav. Bank*, 242 N.Y.S. 74, 137 Misc. 509.

A wage history, signed by employee and filed with insurance carrier's admission of liability, was not "claim for compensation" barring, under compensation act and rule of industrial commission, employee's recovery from third party in tort action in view of commission rule requiring filing of wage history. Colo.—*King v. O. P. Baur Confectionery Co.*, 68 P.2d 909, 100 Colo. 528.

Failure to attend hearing

Where guest, injured when automobile in which he was riding ran into tree, did not attend hearing of workmen's compensation board, although he received notice of hearing, the fact that guest received an award, which was not a final award, from workmen's compensation board for injuries suffered in accident did not bar guest's common-law action for damages against driver of automobile.

N.Y.—*Sills v. Wert*, 139 N.Y.S.2d 132.

82. N.Y.—*Dyer v. Central Sav. Bank*, 242 N.Y.S. 74, 137 Misc. 509.

83. N.Y.—*Dyer v. Central Sav. Bank*, supra.

84. Okl.—*Stephens v. Keystone Boiler & Welding Co.*, 286 P. 309, 142 Okl. 237.

85. Wash.—*Harvey v. Chas. R. McCormick Lumber Co. of Delaware*, 271 P. 65, 149 Wash. 368.

71 C.J. p 1543 note 39.

86. U.S.—*Canadian Pac. R. Co. v. Morin*, C.C.A.Vt., 54 F.2d 246.

87. Tex.—*Robertson v. C. A. Bryant Co.*, Civ.App., 127 S.W.2d 549, error dismissed, judgment correct.

88. Mich.—*Fox v. Detroit United Ry.*, 187 N.W. 321, 218 Mich. 5—*Brabon v. Gladwin Light & Power Co.*, 167 N.W. 1024, 201 Mich. 697.

stitutes an election which will prevent the maintenance of an action by the employee against a third person,⁸⁹ even though there is a decision adverse to the employee⁹⁰ or the judgment for compensation against the employer is not collectible.⁹¹ It has been held, on the other hand, that where a compensation claim was filed before the industrial board but no proceedings were had on the claim and there had been no hearing or award, there was no election of alternative remedies preventing the valid institution of a suit by the injured employee against the third-party tort-feasor.⁹²

d. Award of Compensation

Ordinarily, where there is provision for an election and the employee's proceeding has progressed to an award, there is such an election as will prevent an action against a third person.

Under some acts it is not the making of a claim for compensation under the act but the actual award which is decisive and binding, as discussed supra subdivision c of this section, and, where no award has been made, a binding election precluding an action against a third person is not effected by the receipt of payments from the employer or the insurance carrier, infra subdivision e of this section. While ordinarily, where there is provision for an election and the employee's proceeding has progressed to an award, there is such an election as will prevent an action against a third person,⁹³ un-

der some acts the view has been expressed that the mere filing of a claim for compensation followed by an award of full compensation under the act does not necessarily constitute an election.⁹⁴

Where the act permits an injured employee to recover damages from a third person before an award under the act is made and provides that the acceptance of an award shall be a bar to proceeding further with the alternate remedy, an agreement for compensation between the employee and the employer, duly filed with the industrial commission but not approved by it, is not an award so as to prevent an action against a third person.⁹⁵

e. Accepting or Collecting Payment or Advances

Ordinarily the receipt and acceptance of compensation constitutes such an election as will prevent an action by the injured employee against a third person, at least where full compensation has been received, or the acceptance of compensation is pursuant to an award.

Where the compensation act provides for an election, usually the receipt and acceptance of compensation constitutes such an election as will prevent an action by the injured employee against a third person,⁹⁶ at least where full compensation has been received,⁹⁷ or the acceptance of compensation is pursuant to an award.⁹⁸ There is authority for the view that there is an election to take compensation

89. Minn.—Olson v. Thiele, 225 N. W. 391, 177 Minn. 410.
71 C.J. p 1543 note 42.

Guardian

Where compensation claim was filed with state industrial commission by injured workman, who was thereafter adjudged incompetent, subsequent prosecution of claim by workman's guardian constituted sufficient "election" on part of incompetent to take compensation under the compensation act, rather than to pursue his remedy against third person whose negligence caused the injury.

Okl.—State Ins. Fund v. Smith, 88 P. 2d 895, 184 Okl. 552.

90. Mich.—Valisano v. Chicago & N. W. Ry. Co., 225 N.W. 607, 247 Mich. 301.

71 C.J. p 1543 note 43.

91. Minn.—Olson v. Thiede, 225 N. W. 391, 177 Minn. 410.

92. U.S.—Kowalewski v. Pennsylvania R. Co., D.C.Del., 147 F.Supp. 429.

93. U.S.—Canadian Pac. Ry. Co. v. Morin, C.C.A.Vt., 54 F.2d 246.
S.C.—Davis v. Fleming, 18 S.E.2d 434, 196 S.C. 343.

Approval of admission of Liability
The action of an industrial com-

mission statistician in approving insurance carrier's admission of liability did not constitute "awarding of compensation" effecting assignment of employee's cause of action to insurance carrier under compensation act, so as to bar employee's recovery from third person in tort action.

Colo.—King v. O. P. Baur Confectionery Co., 88 P.2d 909, 100 Colo. 528.

Assignment

Awarding of compensation to injured employee who elected to take compensation for injuries caused by third party operates as assignment of cause of action against third party to insurance carrier, notwithstanding employee did not execute instrument of assignment.

N.Y.—Lunn v. Andrews, 274 N.Y.S. 432, 152 Misc. 568, affirmed 277 N. Y.S. 750, 243 App.Div. 654, affirmed 198 N.E. 393, 268 N.Y. 538.

94. Or.—Hicks v. Peninsula Lumber Co., 220 P. 133, 109 Or. 305.

95. N.C.—Alford v. Seaboard Air Line Ry. Co., 164 S.E. 125, 126, 202 N.C. 719.

71 C.J. p 1544 note 49.

96. U.S.—Dinardo v. Consumers Power Co., C.A.Mich., 181 F.2d 104.

Kan.—Copeland v. Martin Metal Mfg. Co., 42 P.2d 982, 141 Kan. 725.

N.Y.—Lunn v. Andrews, 274 N.Y.S. 432, 152 Misc. 568, affirmed 277 N. Y.S. 750, 243 App.Div. 654, affirmed 198 N.E. 393, 268 N.Y. 538.

71 C.J. p 1544 note 50.

"Proceeding" against employer

Action of employee injured by third party, operating under workmen's compensation act, in seeking and accepting benefits prescribed in the act from employer, or his insurance carrier, is such a "proceeding" against the employer as to constitute a binding election which precludes the employee from maintaining action against the third party.

Ala.—Harris v. Louisville & N. R. Co., 186 So. 771, 237 Ala. 366.

97. Or.—King v. Union Oil Co. of California, 24 P.2d 345, 144 Or. 655, reheard 25 P.2d 1055, 144 Or. 655.

98. U.S.—Sabol v. Merritt-Chapman & Scott Corp., D.C.N.Y., 137 F. Supp. 635, affirmed C.A., 241 F.2d 765—Czaplicki v. The Hoegh Silvercloud, D.C.N.Y., 138 F.Supp. 358—Roeben v. U. S., D.C.N.J., 113 F.Supp. 732—Currant v. Eastern S. S. Lines, D.C.Mass., 77 F.Supp. 9, affirmed, C.A., 170 F.2d 148.

so as to prevent the recovery of damages where an application for compensation is made and after the subsequent bringing of an action for damages payments of compensation are received and retained, and the state is released from liability, by the employee with full knowledge of the facts on his

part.⁹⁹

Under some acts, however, where no award has been made, the receipt of payments from the employer or the insurance carrier does not constitute a binding election precluding an action against a third person.¹ So where, in accordance with the

D.C.—Moore v. Hechinger, D.C., 39 F.Supp. 427, affirmed 127 F.2d 746, 75 U.S.App.D.C. 391.

Wash.—Anderson v. Allison, 122 P.2d 484, 12 Wash.2d 487, 139 A.L.R. 1003.

71 C.J. p 1544 note 52.

Strict construction

Provision of Longshoremen's Compensation Act that acceptance of compensation under an award in a compensation order filed by deputy commissioner should operate as an assignment to employer of all rights against third persons should be strictly construed against the employer.

U.S.—Sessa v. Weeks Stevedoring Co., D.C.N.Y., 56 F.Supp. 50.

Purpose

The provision of the Longshoremen's Compensation Act transferring to the employer the right of its injured employee against a third-party tort-feasor upon the employee's acceptance of compensation under the act is designed for the protection of the employer and not the third-party wrongdoer except to the extent that the latter is thereby protected against suit by both the employee and his employer.

U.S.—The Owen, D.C.Pa., 43 F.Supp. 897.

Complete defense

Where the employer of an injured employee, who has accepted compensation under the Longshoremen's Compensation Act, objects to action by employee against third-party tort-feasor, or does not affirmatively assent thereto on the record, the third party may assert as a complete defense to action by employee the transfer of employee's claim to the employer by operation of provisions of act.

U.S.—The Owen, supra.

Payment held not voluntary

Where award under Longshoremen's and Harbor Workers' Compensation Act was in amount of five hundred sixty-five dollars subject to liens of eighty-five dollars and employee received five hundred twelve dollars from insurance carrier, the variation in amount did not render the payment "voluntary" so as to preclude assignment of employee's cause of action to the state insurance fund and hence employee's action was required to be dismissed.

U.S.—Sabol v. Merritt Chapman &

Scott Corp., D.C.N.Y., 137 F.Supp. 635, affirmed, C.A., 241 F.2d 765.

A master's report that deputy commissioner noted in his records disposition he had made of injured longshoreman's claim for compensation was equivalent to an "order" and satisfied Longshoremen's Compensation Act amendment providing that acceptance of compensation under an award in a compensation order filed by deputy commissioner shall operate as an assignment to employer of all right of person entitled to compensation to recover damages against a third person, precluding longshoreman from suing third parties for his injuries.

U.S.—Toomey v. Waterman S. S. Corp., C.C.A.N.Y., 123 F.2d 718.

Partial satisfaction of award

Where there was disagreement as to whether compensation was payable under federal or state law, and insurer liable under federal law commenced action to have award under that law set aside, but, pending disposition thereof, entered into agreement with insurer liable under state law whereby federal law insurer paid to workman the lesser sum to which he would be entitled if state law were applicable, such payment would have to be held to have been made in partial satisfaction of award under federal law, and to have resulted in statutory assignment of workman's right to recover from alleged third-party tort-feasors precluding action by employee against third party.

U.S.—Sabol v. Merritt Chapman & Scott Corp., C.A.N.Y., 241 F.2d 765.

99. Wash.—Anderson v. Bauer, 264 P. 410, 146 Wash. 594.

1. Colo.—Corpus Juris cited in King v. O. P. Baur Confectionery Co., 68 P.2d 909, 912, 100 Colo. 528. 71 C.J. p 1544 note 55.

Longshoremen's Compensation Act

(1) Under the terms of the statute as amended, the mere acceptance of compensation payments without an award does not preclude an injured employee from thereafter electing to sue a third-party tort-feasor.

U.S.—Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., N.Y., 76 S.Ct. 232, 350 U.S. 124, 100 L.Ed. 133—American Stevedores v. Porello, N.Y., 67 S.Ct. 847, 330 U.S. 446, 91 L.Ed. 1011—U. S. v. Lauro, N.Y., 67 S.Ct. 847, 330 U.S. 446, 91 L.Ed.

1011, conformed to, C.A., Lauro v. U. S., 162 F.2d 32, motion granted in part and denied in part 163 F. 2d 642.

Fontana v. Grace Line, Inc., C.A. N.Y., 205 F.2d 151, certiorari denied Fontana v. Huron Stevedoring Corp., 74 S.Ct. 137, 346 U.S. 886, 98 L.Ed. 390—Meyers v. Pittsburgh S. S. Co., C.C.A.Ohio, 165 F.2d 642.

Liberty Mut. Ins. Co. v. U. S., D.C.N.Y., 145 F.Supp. 887—Roeben v. U. S., D.C.N.J., 113 F.Supp. 732—Whyatt v. U. S., D.C.N.Y., 92 F.Supp. 543—Romano v. U. S., D.C.N.Y., 90 F.Supp. 15—Tevington v. International Milling Co., D.C.N.Y., 62 F.Supp. 462—Tartaglio v. Cunard White Star, D.C.N.Y., 56 F. Supp. 55—Cupo v. Isthmian S. S. Co., D.C.N.Y., 56 F.Supp. 45—Iaria v. Silver Line, Limited, D.C.N.Y., 56 F.Supp. 42.

D.C.—Jordan v. District of Columbia, D.C., 116 F.Supp. 559.

N.Y.—Ruggiero v. Norwegian Shipping & Trade Mission, 59 N.Y.S.2d 757, 270 App.Div. 813—Ricciardi v. American Export Lines, 52 N.Y. S.2d 269, 268 App.Div. 606, affirmed 62 N.E.2d 241, 294 N.Y. 812, followed in Jakuboski v. Matson Nav. Co., 56 N.Y.S.2d 927, 269 App. Div. 849, appeal denied 57 N.Y.S.2d 847, 269 App.Div. 941 and appeal dismissed 64 N.E.2d 656, 295 N.Y. 633.

Contra Cocasso v. Erie R. Co., 44 N.Y.S.2d 373.

(2) Under the Longshoremen's Compensation Act, as amended in 1938, there must be some official action by the deputy commissioner establishing an award of compensation in order to make a longshoreman's acceptance of compensation an assignment of the employee's cause of action against a third party although the award may be informal.

U.S.—Grasso v. Lorentzen, C.C.A.N.Y., 149 F.2d 127, certiorari denied 66 S.Ct. 57, 326 U.S. 743, 90 L.Ed. 444, rehearing denied 66 S.Ct. 1019, 328 U.S. 878, 90 L.Ed. 1646.

(3) A compensation award by a claims examiner, instead of by the deputy commissioner did not meet requirement of Longshoremen's Compensation Act that acceptance of compensation under an award filed by deputy commissioner should operate as an assignment to employer of all rights against third persons.

act, an injured employee has filed the required notice of an election to proceed against a person other than the employer it has been held that the acceptance of advances made under an agreement between the employee and insurer does not defeat his right to recover in the proceedings against the person other than the employer.²

Where under the act the employee may proceed against the employer for compensation or against a third person for damages but not against both, in the absence of any agreement between the person entitled to compensation and the employer approved by the designated board as required by the act or of a submission of a demand against the employer to lawful determination, the mere receipt of payments from the employer made in view of the admitted right to claim compensation,³ or the acceptance of a pension which under the act could be taken in lieu of compensation,⁴ does not necessarily constitute an election which will prevent the bringing of an action against a person other than the employer. Under a similar statute, however, the view has been taken that an employee who, after commencing an action against a third person, accepts compensation from his employer thereby abandons his action against such third person and waives his rights thereunder,⁵ and the settlement of a claim

for compensation and the acceptance of payments of compensation thereunder will evidence an election, as discussed supra subdivision b of this section.

Advances or payments received from the employer under an agreement or understanding that repayment will be made⁶ in the event of a recovery from the third person⁷ may not constitute an election which will defeat the employee's action against the third person.

Provision denying right to collect both compensation and damages. As used in a provision giving an injured employee an option to proceed either for compensation or for damages or against both the employer and a person other than the employer, but denying the right to "collect" from both, the word "collect" implies the act of payment and collection of money and imports an act of payment without reference to the legal grounds on which payment may be demanded.⁸ Where the employee receives money or the equivalent from his employer, he cannot maintain an action against a third person primarily responsible for the injury.⁹

The employee does not, however, lose his right to sue a third person until the employee collects compensation from his employer,¹⁰ and the fact that the

U.S.—*Sessa v. Weeks Stevedoring Co.*, D.C.N.Y., 56 F.Supp. 50.

(4) So the right of stevedore to sue United States as third-party tort-feasor was not barred by stevedore's acceptance of compensation under Longshoremen's and Harbor Workers' Compensation Act, with a close-out settlement, after conference with a claims examiner.

U.S.—*Roeben v. U. S.*, D.C.N.J., 113 F.Supp. 732.

(5) The fact that a memorandum of an informal conference with regard to longshoreman's right to additional compensation was produced from files of compensation commission did not change the memorandum into an "award in a compensation order filed by the deputy commissioner" within provision of Longshoremen's Compensation Act that acceptance of compensation under an award filed by deputy commissioner should operate as an assignment of rights against third persons.

U.S.—*Grasso v. Lorentzen*, D.C.N.Y., 56 F.Supp. 51, affirmed C.C.A., 149 F.2d 127, certiorari denied 66 S.Ct. 57, 326 U.S. 743, 90 L.Ed. 444, rehearing denied 66 S.Ct. 1019, 328 U.S. 378, 90 L.Ed. 1646.

(6) Prior to a change in the statute effected by an amendment, acceptance of a payment of compensation, without more, constituted an

election precluding suit by the injured employee against the third-party tort-feasor.

U.S.—*Toomey v. Waterman S. S. Corp.*, C.C.A.N.Y., 123 F.2d 718—*The Nako Maru*, C.C.A.Pa., 101 F.2d 716, certiorari denied *Speck v. Lavino Shipping Co.*, 59 S.Ct. 1039, 307 U.S. 641, 83 L.Ed. 1522.

71 C.J. p 1544 note 50.

(7) This was the rule notwithstanding absence of any conscious election on part of employee to accept compensation rather than seek recovery of damages against third party and lack of knowledge that acceptance of compensation would operate as such assignment.

U.S.—*The Owen*, D.C.Pa., 43 F.Supp. 897.

2. U.S.—*The Nicoline Maersk*, D.C. Mass., 53 F.2d 103.

71 C.J. p 1544 note 56.

3. Mich.—*Quick v. Western Michigan Transp. Co.*, 293 N.W. 696, 294 Mich. 402.

71 C.J. p 1544 note 57.

4. Mich.—*Ford v. Kuehne*, 219 N.W. 680, 242 Mich. 428.

71 C.J. p 1544 note 58.

5. Mass.—*Hunt v. Zako*, 137 N.E. 728, 243 Mass. 565.

71 C.J. p 1544 note 59.

6. Ind.—*Marion County Construction Co. v. Kimberlin*, 184 N.E. 574, 96 Ind.App. 145.

7. Or.—*McKay v. Pacific Building Materials Co.*, 68 P.2d 127, 156 Or. 578.

8. Tenn.—*Walters v. Eagle Indemnity Co.*, 61 S.W.2d 666, 166 Tenn. 386.

9. Tenn.—*Nashville v. Latham*, 28 S.W.2d 46, 160 Tenn. 581.

10. Ind.—*Ritman v. Wass*, 125 N.E. 2d 33, 125 Ind.App. 348.

Tenn.—*Mitchell v. Usilton*, 242 S.W. 648, 146 Tenn. 419.

Agreement without payment

Under provision of compensation act pertaining to liability of third-party tort-feasor, employee and his employer may enter into agreement concerning compensation and have same approved by industrial board without affecting employee's right to sue for and collect damages from the third-party wrongdoer, and mere fact of agreement does not indicate an election by employee of his remedy and does not affect liability of third-party wrongdoer, as long as there has been no actual payment and satisfaction of claim.

Ind.—*Armstrong Cork Co. v. Maar*, 111 N.E.2d 82, 124 Ind.App. 105, rehearing denied 112 N.E.2d 240, 124 Ind.App. 105.

employer files a petition to have the compensation fixed and has the amount fixed, as permitted by the act, does not of itself affect the right of the employee to proceed against the third person.¹¹ So the right of the employee to recover from a third person has been recognized where the payments by the employer are received as a gift¹² or loan.¹³ Under some provisions eliminating the necessity for an injured employee to make an election as to whether to pursue a third party or take under the compensation act, no such separate action may be maintained against an employee of the employer if the benefits of compensation are retained.¹⁴

Partial compensation. Under some acts the receipt of partial compensation does not necessarily constitute an election preventing a subsequent action against a third person,¹⁵ at least where payments made have been repaid and the industrial accident commission disclaims any interest in the employee's claim.¹⁶ The view has been taken that the mere receipt of payments from the industrial accident commission to cover temporary loss of time and wages only does not constitute an election to take compensation.¹⁷

f. Furnishing or Accepting Hospital, Medical, or Nursing Expenses

An election to take compensation, precluding a common-law action against the third person responsible for an employee's injuries, is not established by the mere acceptance by the employee of medical, surgical, or hospital aid furnished by the employer or insurer.

The mere acceptance of medical, surgical, or hospital aid by the employee may not constitute an election to take compensation, precluding a common-law action against the tort-feasor responsible for the employee's injuries,¹⁸ at least where there has been no claim¹⁹ or proceeding²⁰ for compensation under the act, or where the employee is not entitled to compensation.²¹

g. Knowledge of Alternative Remedies; Fraud or Mistake

Generally an election as between workmen's compensation and the remedy against a third-party tort-feasor must be made with knowledge of the alternative remedies and that the acceptance of one waives the right to the other; and an election to take compensation may be impeached for fraud or for want of knowledge of facts showing the liability of a third person.

It is generally held that an election as between workmen's compensation and the remedy against a third-party tort-feasor must be made with knowledge

11. Tenn.—*Mitchell v. Usilton*, 242 S.W. 648, 146 Tenn. 419.

12. Ind.—*Weis v. Wakefield*, 38 N.E. 2d 303, 111 Ind.App. 106—*Artificial Ice & Cold Storage Co. v. Ryan*, 193 N.E. 710, 99 Ind.App. 606.

71 C.J. p 1545 note 68.

13. Ind.—*Artificial Ice & Cold Storage Co. v. Ryan*, supra—*Marion County Construction Co. v. Kimberlin*, 184 N.E. 574, 96 Ind.App. 145.

14. U.S.—*Sheerin v. Steele*, C.A. Mich., 240 F.2d 797.

Remington v. General Motors Corp., D.C.Mich., 127 F.Supp. 672, cause remanded on other grounds, C.C.A., 229 F.2d 738, affirmed C.A., 287 F.2d 919.

15. Or.—*Coomer v. Supple Inv. Co.*, 274 P. 302, 128 Or. 224.

71 C.J. p 1545 note 70.

16. Or.—*Hicks v. Peninsula Lumber Co.*, 220 P. 133, 109 Or. 305.

17. U.S.—*Kantleberg v. G. M. Standifer Const. Co.*, D.C.Or., 7 F.2d 922, 71 C.J. p 1545 note 72.

18. U.S.—*Foster v. Buckner*, C.A. Mich., 203 F.2d 527, certiorari denied 74 S.Ct. 30, 346 U.S. 818, 98 L.Ed. 345.

Colo.—*Corpus Juris cited in King v. O. P. Baur Confectionery Co.*, 68 P.2d 909, 913, 100 Colo. 528.

Ind.—*Armstrong Cork Co. v. Maas*, 111 N.E.2d 82, 124 Ind.App. 105, re-

hearing denied 112 N.E.2d 240, 124 Ind.App. 105—*Weis v. Wakefield*, 38 N.E.2d 303, 111 Ind.App. 106.

N.Y.—*Roeper v. Albany Port Dist.*, 43 N.Y.S.2d 848, 266 App.Div. 936.

71 C.J. p 1545 note 73.

No "award of compensation"

Employee who had accepted hospitalization, medical services, and wages under benefit plan which court assumed constituted self-insurance under the workmen's compensation act was not thereby deprived of right to sue third-party tort-feasor, notwithstanding provision in statute that awarding of compensation shall operate as an assignment of cause of action to industrial commission, since acceptance of benefits does not constitute an "award of compensation."

Colo.—*Riss & Co. v. Anderson*, 114 P. 2d 278, 108 Colo. 78.

Accident benefits

A statute which provides that an employee who makes an application for an award waives his right to pursue a third party refers to an application for an award for compensation and not to an application for an award for accident benefits such as surgical and hospital treatment.

Ariz.—*Pressley v. Industrial Commission*, 236 P.2d 1011, 73 Ariz. 22.

Lien of carrier

That insurance carrier had paid

medical expenses of injured employee was not a sufficient defense in employee's action against third-party tort-feasor where carrier had elected to claim a lien on any recovery to be had by employee in such action.

N.Y.—*Calhoun v. West End Brewing Co.*, 43 N.Y.S.2d 830, 182 Misc. 423, affirmed 56 N.Y.S.2d 105, 269 App. Div. 395.

Employee held not subject to estoppel

Ariz.—*Pressley v. Industrial Commission*, 236 P.2d 1011, 73 Ariz. 22.

19. N.Y.—*Dyer v. Central Sav. Bank*, 242 N.Y.S. 74, 137 Misc. 509.

Payment to nurse

Proof of payment directly to nurse by employer's insurance carrier for nursing contractor's employee without employee's knowledge of payment did not show such election of remedy by employee as to preclude negligence action against subcontractor.

U.S.—*Foster v. Buckner*, C.A. Mich., 203 F.2d 527, certiorari denied 74 S.Ct. 30, 346 U.S. 818, 98 L.Ed. 345.

20. Mich.—*Fox v. Detroit United Ry.*, 187 N.W. 321, 218 Mich. 5, 71 C.J. p 1545 note 75.

21. Tenn.—*City of Nashville v. Latham*, 28 S.W.2d 46, 160 Tenn. 581.

71 C.J. p 1545 note 76.

of the alternative remedies and that the acceptance of one waives the right to the other;²² and a purported election of remedies is not binding if made without such knowledge, whether the ignorance be with respect to the law or with respect to the facts.²³ An election will not be presumed if the employee has acted in ignorance of his right and obligation to make an election, where no other person's rights have been prejudicially affected,²⁴ and there is authority for the view that there is no binding election which will prevent an action against a third person where the injured employee, in proceeding under the act and accepting compensation, does not understand the nature and effect of his acts²⁵ or has no knowledge of his legal rights,²⁶ including his right to make an election.²⁷ So the mere receipt of moneys from the compensation board or commission does not necessarily constitute such an election to take compensation as will prevent an action against a third person where the moneys were received when the employee had no knowledge of his right to a remedy against the third person.²⁸

While it has apparently been recognized that an

election to take compensation may be impeached for fraud²⁹ or for want of knowledge of facts showing the liability of a third person,³⁰ according to some cases, want of knowledge of the compensation act,³¹ of a provision of the act permitting the employee to proceed against a third person,³² or want of knowledge of the fact that the act requires an election,³³ is not ground for impeaching, or avoiding the effect of, such election.

h. Proceeding to Impeach or Avoid Election

An election once made may not be avoided in a collateral proceeding, but it is necessary to attack it by a direct proceeding in equity, in which proceeding all persons interested should be made parties.

According to some cases an election once made may not be avoided in a collateral proceeding.³⁴ This rule has been applied where, after an election to take compensation, the employee seeks to impeach such election in an action against a third person alleged to be liable for the injury for which compensation has been sought,³⁵ as, for example, for fraud³⁶ or insanity;³⁷ in order to impeach such election it is permissible³⁸ and necessary³⁹ to attack

22. Ala.—Employers Ins. Co. v. Harrison, 38 So.2d 264, 250 Ala. 116.

Ariz.—State ex rel. Industrial Commission v. Reese, 250 P.2d 1001, 74 Ariz. 425—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412.

Conscious election

Injured employee's election under the Longshoremen's Compensation Act to receive compensation, or to recover damages against negligent third party, must be a conscious election in that the employee must understand that he may not sue a third party if he elects to accept compensation under the act.

N.Y.—Leibow v. Arthur G. Blair, Inc., 54 N.Y.S.2d 894, 183 Misc. 918.

Payment under law of other state

Employee's receipt of compensation payments under Missouri workmen's compensation act would not preclude him from securing benefit of Arkansas act's third-party rule, permitting employee of subcontractor to prosecute suit against general contractor, when he had not, at time of receiving payments under Missouri act, known that he had right to receive payments under Arkansas act and had not in fact known that payments were in fact being made under Missouri act. U.S.—Lanza v. Carroll, Ark., 75 S.Ct. 804, 349 U.S. 408, 99 L.Ed. 1183.

23. Ariz.—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412.

Want of knowledge held not shown U.S.—Czaplicki v. The Hoegh Silvercloud, D.C.N.Y., 110 F.Supp. 933, af-

firmed, C.A., 223 F.2d 189, reversed on other grounds 76 S.Ct. 946, 351 U.S. 525, 100 L.Ed. 1887.

24. U.S.—Johnsen v. American-Hawaiian S. S. Co., C.C.A.Cal., 98 F.2d 847.

Or.—Hicks v. Peninsula Lumber Co., 220 P. 133, 109 Or. 305.

25. N.Y.—Ellich v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, 234 N.Y.S. 171, 226 App.Div. 32, affirmed 170 N.E. 135, 252 N.Y. 541.

71 C.J. p 1546 note 84.

26. Okl.—Barton v. Oklahoma, K. & M. Ry. Co., 220 P. 929, 96 Okl. 119.

27. N.Y.—Liston v. Hicks, 277 N.Y.S. 19, 248 App.Div. 159, affirmed 199 N.E. 528, 269 N.Y. 535.

71 C.J. p 1546 note 86.

28. Wash.—Harvey v. Chas. R. McCormick Lumber Co., 271 P. 65, 149 Wash. 368.

71 C.J. p 1546 note 87.

29. Mich.—Smith v. Port Huron Gas & Electric Co., 187 N.W. 292, 217 Mich. 519.

71 C.J. p 1545 note 78.

30. Mich.—Nagy v. Michigan Copper & Brass Co., 207 N.W. 850, 233 Mich. 552.

31. Mass.—Barry v. Bay State St. R. Co., 110 N.E. 1031, 222 Mass. 366.

71 C.J. p 1546 note 80.

32. Mich.—Nagy v. Michigan Copper & Brass Co., 207 N.W. 850, 233 Mich. 552.

71 C.J. p 1546 note 81.

33. Minn.—Ott v. St. Paul Union

Stockyards, 227 N.W. 47, 178 Minn. 313.

71 C.J. p 1546 note 82.

Acceptance of compensation

An employee who was allegedly injured because of the negligence of a third person was not entitled to recover damages from the third person after the injured employee had accepted compensation from his employer under the compensation act, notwithstanding injured employee contended at time he accepted the compensation that he was not aware of any choice of remedy that he might have had and that he did not intend to abandon his rights against the third person.

Tenn.—Wilson v. City of Chattanooga, 165 S.W.2d 373, 179 Tenn. 234.

34. Mich.—Smith v. Port Huron Gas & Electric Co., 187 N.W. 292, 217 Mich. 519.

35. Mich.—Valisano v. Chicago & N. W. Ry. Co., 225 N.W. 607, 247 Mich. 301.

36. Mich.—Smith v. Port Huron Gas & Electric Co., 187 N.W. 292, 217 Mich. 519.

71 C.J. p 1546 note 90.

37. Mich.—Valisano v. Chicago & N. W. Ry. Co., 225 N.W. 607, 247 Mich. 301.

38. Mich.—Smith v. Port Huron Gas & Electric Co., 187 N.W. 292, 217 Mich. 519.

39. Mich.—Valisano v. Chicago & N. W. Ry. Co., 225 N.W. 607, 247 Mich. 301.

it by a direct proceeding in equity, in which proceeding all persons interested should be made parties so that they will be bound by the decree.⁴⁰ In such proceeding the injured employee has the burden of establishing the fact on which his claim to impeach the election is based.⁴¹

Where an employee had allegedly rescinded his election to accept compensation under the Longshoremen's and Harbor Workers' Compensation Act by advising his employer of the rescission and offering to return benefits received, he was not required to go into equity to rescind his election before proceeding against the third-party tort-feasor for damages, since one having a right to rescind need not turn to the courts to have the rescission accomplished where it has already been accomplished by rescission in pais.⁴²

§ 991. Effect of Failure to Make Election; Election or Consent as Condition Precedent

Notwithstanding a provision of the act requiring evidence or filing of election to bring an action against a third person, the filing with the designated commission of the prescribed notice of election is not a condition precedent to the right of the employee to bring the action.

Since a provision of the act requiring evidence or filing of election to bring an action against a third person is regarded as one for the benefit of the person liable to pay compensation under the act,⁴³

or for the benefit and guidance of the employer and employee,⁴⁴ the filing with the designated commission of the prescribed notice of election to bring an action for damages is not a condition precedent to the right of the employee to bring the action;⁴⁵ nor is the consent of the commission a condition precedent to an action by the personal representative for the death of an employee.⁴⁶ Therefore, where the injured workman is required by the compensation act to elect whether to take compensation under the act or to pursue his remedy against a third person occasioning his injury, his failure formally to elect is not a defense to his action against the third person;⁴⁷ nor will the failure of the widow of a deceased employee, in this respect, prevent her maintenance of an action against a third person for the death of such employee.⁴⁸

Election in advance of suit. Where the act provides that the injured workman shall elect whether to take under the act or to seek a remedy against a person not in the same employ whose negligence was the cause of the injury and that such election shall be in advance of suit, the provision for election in advance of suit is for the benefit of the state in the administration of the accident fund,⁴⁹ and not for the benefit of the third person,⁵⁰ and the view has been taken that such third person cannot, in an action against him, successfully complain of the injured employee's failure to make an election in advance of suit.⁵¹

40. Mich.—Smith v. Port Huron Gas & Electric Co., 187 N.W. 292, 217 Mich. 519.

41. Ignorance of remedy against wrongdoer

Mich.—Nagy v. Michigan Copper & Brass Co., 207 N.W. 850, 233 Mich. 552.

42. U.S.—Johnsen v. American-Hawaiian S. S. Co., C.C.A.Cal., 98 F.2d 847.

43. Fla.—Red Top Cab & Baggage Co. for Use and Benefit of Fontaine v. Dorner, 32 So.2d 321, 159 Fla. 538—Hartquist v. Tamiami Trail Tours, 190 So. 533, 139 Fla. 328. 71 C.J. p 1546 note 96.

44. Fla.—Weathers, for Use and Benefit of Ocean Acc. & Guarantee Corp. v. Cauthen, 12 So.2d 294, 152 Fla. 420.

71 C.J. p 1547 note 97.

45. Fla.—Weathers, for Use and

Benefit of Ocean Accident & Guarantee Corp. v. Cauthen, supra.

N.Y.—Lester v. Otis Elevator Co., 155 N.Y.S. 524, 169 App.Div. 613.

Neri v. Erie R. Co., 101 N.Y.S.2d 133, 199 Misc. 374.

Derogation of common-law rights

Construction of section of workmen's compensation act, authorizing election to receive compensation thereunder or recover damages from another than injured person's employer by giving notice to employer and industrial commission, as requiring such notice before institution of suit against third party, in derogation of employee's common-law rights, must be avoided, if possible. Fla.—Hartquist v. Tamiami Trail Tours, 190 So. 533, 139 Fla. 328.

46. N.Y.—Rosebrock v. General Electric Co., 140 N.E. 571, 236 N.Y. 227.

47. Fla.—Red Top Cab & Baggage

Co., for Use and Benefit of Fontaine, v. Dorner, 32 So.2d 321, 159 Fla. 538—Hartquist v. Tamiami Trail Tours, 190 So. 533, 139 Fla. 328.

71 C.J. p 1547 note 1.

48. Kan.—Acock v. Kansas City Power & Light Co., 10 P.2d 877, 135 Kan. 389.

49. Colo.—Corpus Juris quoted in King v. O. P. Baur Confectionery Co., 68 P.2d 909, 911, 100 Colo. 528. Wash.—Arthun v. City of Seattle, 242 P. 16, 137 Wash. 228.

50. Colo.—Corpus Juris quoted in King v. O. P. Baur Confectionery Co., 68 P.2d 909, 911, 100 Colo. 528. Wash.—Arthun v. City of Seattle, 242 P. 16, 137 Wash. 228.

51. Okl.—Keener Oil & Gas Co. v. Bushong, 56 P.2d 819, 176 Okl. 565. Wash.—Arthun v. City of Seattle, 242 P. 16, 137 Wash. 228.

c. Right of Employer or Insurer to Remedy of Employee or to Reimbursement or Indemnity; Subrogation

§ 992. In General

- a. General rules
- b. Abatement and survival
- c. Necessity for, and limitation of rights by, statutory or contractual provision

a. General Rules

Under various statutory provisions, the rights of an employee receiving compensation for injuries, against a third person who caused them, are assigned to the employer, or the employer is subrogated thereto, or may seek reimbursement from the wrongdoer.

By the terms of some acts, an assignment, to the

employer or person liable to pay compensation, of the employee's right of action against the person causing the injury is effected by the making of a claim for compensation,⁵² an election to take compensation,⁵³ the award of compensation to the employee,⁵⁴ the payment of a compensation award,⁵⁵ the acceptance of an award of compensation,⁵⁶ or the failure of the employee to prosecute his own right of action within a specified time.⁵⁷

It may be provided that the employer who has paid compensation or has become liable therefor may recover from the person liable,⁵⁸ and that, if com-

52. Wis.—Pawlak v. Hayes, 156 N. W. 464, 162 Wis. 503, L.R.A.1917A 392.

71 C.J. p 1547 note 7.

Right of action of master for injury to servant in general see Master and Servant § 622.

Who may sue as between employer and insurer see infra § 1016.

Necessity of formal assignment see infra § 1002.

53. Ariz.—Moseley v. Lilly Ice Cream Co., 300 P. 958, 38 Ariz. 417. Fla.—Lovejoy Co. v. Ackis, 16 So.2d 297, 153 Fla. 876—Weathers, for Use and Benefit of Ocean Accident & Guarantee Corp. v. Cauthen, 12 So.2d 294, 152 Fla. 420.

Utah.—Corpus Juris cited in Baker v. Wycoff, 79 P.2d 77, 81, 95 Utah 199.

54. N.Y.—Lester v. Otis El. Co., 155 N.Y.S. 524, 169 App.Div. 613.

55. N.Y.—Reinhart v. Gerosa Crane Service Co., 31 N.Y.S.2d 162, 263 App.Div. 28.

City of New York v. Steers & Menke, 4 N.Y.S.2d 292, 167 Misc. 566, affirmed 4 N.Y.S.2d 992, 254 App.Div. 669.

56. N.C.—Essick v. City of Lexington, 60 S.E.2d 106, 232 N.C. 200.

Pa.—Paxos v. Jarka Corporation, 171 A. 468, 314 Pa. 148, applying Federal Longshoremen's Compensation Act.

71 C.J. p 1547 note 10.

Voluntary assignment

Md.—Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp., 65 A.2d 304, 193 Md. 20, applying Federal Longshoremen's Compensation Act.

Requirements of assignment

Employee's cause of action against third-party tort-feasor passes to employer by subrogation and assignment on employee's election to accept compensation, paid him by employer's insurer under Federal Long-

shoremen's Compensation Act, with intention to waive further damages. N.Y.—Cocasso v. Erie R. Co., 44 N.Y. S.2d 373.

57. Kan.—Terrell v. Ready Mixed Concrete Co. of Kansas City, Kan., 258 P.2d 275, 174 Kan. 633—Wise v. Morgan-Mack Motor Co., 246 P.2d 308, 173 Kan. 372.

Mo.—McLendon v. Kissick, 250 S.W. 2d 489, 363 Mo. 264, applying Kansas law.

N.Y.—Eisenberg v. Louis Adler Realty Co., 78 N.Y.S.2d 875, 273 App.Div. 641, affirmed 86 N.E.2d 102, 299 N.Y. 572.

Monti v. Gimbel Bros., 82 N.Y.S. 2d 781, 192 Misc. 811, affirmed 89 N.Y.S.2d 238, 275 App.Div. 845, appeal denied, 91 N.Y.S.2d 758, 275 App.Div. 1005.

Exclusive or concurrent right as between employer or insurers and employee or dependents to sue and recover see infra § 1003.

Compensation payer disabled from utilizing assignment

Where claimant fails to institute action against tort-feasor within time limited, cause of action passes to employer or insurer, notwithstanding compensation payer has in advance disabled itself by agreement or release from taking advantage of cause of action.

N.Y.—Taylor v. New York Cent. R. Co., 62 N.E.2d 777, 294 N.Y. 897, motion denied 63 N.E.2d 711, 294 N.Y. 977, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Statute not one of limitations

(1) Provision requiring workman taking compensation to bring action against third-party tort-feasor within specified time and transferring such cause of action to employer after lapse of such time, does not merely bar remedy and does more than create a statute of limitations.

N.Y.—Massi v. Alben Builders, 60 N.Y.S.2d 494, 270 App.Div. 482, affirmed 70 N.E.2d 746, 296 N.Y. 767.

(2) Intent of provision that if employee did not commence third-party action within specified time, cause of action is assigned by operation of law to his employer, was not to establish statute of limitations diminishing normal period for institution of employee's personal injury action, but rather to effectuate automatic assignment for protection of employer. N.Y.—Farrell v. American Beverage Corp., 119 N.Y.S.2d 720, 203 Misc. 330.

(3) Limitations generally see infra § 1014.

58. Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Quisenberry v. Rulison, 277 P.2d 57, 129 C.A.2d 268—Fernandez v. Consolidated Fisheries, Inc., 255 P. 2d 863, 117 C.A.2d 254—City of Los Angeles v. Howard, 182 P.2d 278, 80 C.A.2d 728—Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 881—Huber v. Henry J. Kaiser Co., 162 P.2d 693, 71 C.A. 2d 278—Eckman v. Arnold Taxi Co., 148 P.2d 677, 64 C.A.2d 229—National Automobile Ins. Co. v. Cunningham, 107 P.2d 643, 41 C.A.2d 828—Chase v. Southern Pac. Co., 43 P.2d 1108, 6 C.A.2d 273.

Conn.—Stavola v. Palmer, 73 A.2d 831, 136 Conn. 670.

Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealer's Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651—Petrzelli v. Proper, 99 N.E.2d 140, 409 Ill. 365.

Melohn v. Ganley, 100 N.E.2d 780, 344 Ill.App. 213—Classen v. Heil, 71 N.E.2d 537, 330 Ill.App. 433—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265—City of Chicago v. Fizel, 42 N.E.2d 850, 315 Ill.App. 216.

Ky.—T. W. Samuels Distillery Co. v. Houck, 176 S.W.2d 890, 296 Ky. 323.

La.—Todd-Johnson Dry Docks v. City of New Orleans, App., 55 So.

pensation is paid under the act, an employer may enforce for his own benefit, or for that of insurer, and that of the employee, the liability of a person other than the employer.⁵⁹ Other acts make specific provision that the employer shall be subrogated to the right of the employee against a third person.⁶⁰ Provision is sometimes made that the employer shall be repaid compensation paid to the employee from any judgment or settlement, in excess of the amount of compensation, which is secured against a third person.⁶¹

Some acts provide for a lien against any judgment of the employee against a person other than the employer for the amount of the employer's expenditures for compensation.⁶²

Construction of statute. In construing the pro-

visions of a compensation statute relating to subrogation, statutory definitions of terms used in the statute must be considered.⁶³ Some provisions for the transfer of a cause of action to an employer have been held to be remedial in nature;⁶⁴ these provisions should be liberally construed to effectuate their purposes.⁶⁵ However, the provisions relating to an assignment of the employee's right of action on the giving of notice by the employee to the employer of his acceptance of the compensation, being in derogation of the common law, should be strictly construed.⁶⁶

Who is "employer." The word "employer" as used in the statute subrogating the person paying compensation to the rights of the employee against another who is legally liable for damages means either the immediate employer⁶⁷ or one of a succes-

2d 650.—Smith v. McDonough, App., 29 So.2d 818.

N.J.—U. S. Cas. Co. v. Hercules Powder Co., 72 A.2d 190, 4 N.J. 157.

Prudential Ins. Co. of America v. Laval, 23 A.2d 908, 181 N.J.Eq. 23.

71 C.J. p 1547 notes 11, 13 [b]. Amount of recovery in action by employer see *infra* § 1039.

59. U.S.—Dinardo v. Consumers Power Co., C.A.Mich., 181 F.2d 104. John Deere Plow Co. v. Ortnier, D.C.Mich., 11 F.Supp. 375.

Mich.—Uiley, for Use and Benefit of Travelers Ins. Co., v. Taylor & Gaskin, 9 N.W.2d 842, 305 Mich. 561.

71 C.J. p 1547 note 12.

60. U.S.—Chapman v. Hoage, App. D.C., 56 S.Ct. 333, 296 U.S. 528, 80 L.Ed. 370.

Kelley v. Summers, C.A.Kan., 210 F.2d 665, applying Texas law. Trammell v. Appalachian Elec. Co-op., D.C.Tenn., 135 F.Supp. 512. Rehner v. Service Trucking Co., D.C.Del., 112 F.Supp. 24, applying Pennsylvania law—Hartford Acc. & Indem. Co. v. Pettibone, D.C.Ind., 56 F.Supp. 328.

Ala.—Metropolitan Casualty Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co., 3 So.2d 306, 241 Ala. 545.

Ga.—Hartford Accident & Indemnity Co. v. Fidelity & Cas. Co. of New York, 188 S.E. 517, 183 Ga. 388. Travelers Ins. Co. v. Georgia Power Co., 181 S.E. 111, 51 Ga. App. 579.

Ind.—Hall v. Pennsylvania Greyhound Lines, 96 N.E.2d 348, 121 Ind.App. 219—Standard Acc. Ins. Co. v. Pet Milk Co., 78 N.E.2d 672, 118 Ind.App. 477—Bebout v. F. L. Mendez & Co., 37 N.E.2d 690, 110 Ind.App. 28.

Iowa.—American Mut. Liability Ins.

Co. v. State Auto. Ins. Ass'n, 72 N.W.2d 88, 246 Iowa 1294—Iowa Nat. Mut. Ins. Co. v. Chicago, B. & Q. R. Co., 68 N.W.2d 920, 246 Iowa 971.

Md.—Johnson v. Miles, 53 A.2d 30, 188 Md. 455—Baltimore Transit Co. v. State, to Use of Schriefer, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460.

Minn.—Wagner v. City of Duluth, 300 N.W. 820, 211 Minn. 252.

Neb.—Danner v. Walters, 48 N.W.2d 635, 154 Neb. 506.

Pa.—Pennsylvania Turnpike Commission to Use of Albright v. U. S. Fidelity & Guaranty Co., Com.Pl., 51 Dauph.Co. 256, affirmed 23 A.2d 416, 343 Pa. 543—Dotterer v. Nothstein, Com.Pl., 20 Lehigh. 138—Fitzpatrick v. Finnegan, Com.Pl., 33 Luz.Leg.Reg. 255.

71 C.J. p 1547 note 13. Extent of subrogation see *infra* § 996.

Effect of unconstitutional amendment of statute

Attempted enactment of unconstitutional amendment to statute, subrogating party paying compensation to rights of employee against third-party tort-feasor who is legally liable, did not affect existing statute, but left it in full force and effect. Ga.—U. S. Cas. Co. v. Watkins, 88 S.E.2d 20, 211 Ga. 619, followed in Pass v. Massachusetts Bonding & Ins. Co., 88 S.E.2d 25, 211 Ga. 655, followed in Continental Cas. Co. v. Evans, 89 S.E.2d 591, 92 Ga. App. 598.

61. N.J.—Henry Steers, Inc. v. Turner Const. Co., 139 A. 42, 104 N.J. Law 189.

71 C.J. p 1548 note 15.

62. Cal.—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 C.A.2d 254—Huber v. Henry J. Kaiser Co., 162 P.2d 693, 71 C.A.2d 278.

Ill.—Hulke v. International Mfg. Co., 142 N.E.2d 717, 14 Ill.App.2d 5.

71 C.J. p 1548 note 16.

Deductions from compensation of amount of recovery or collection by employee from third person see *supra* § 396.

63. Iowa.—Iowa Nat. Mut. Ins. Co. v. Chicago, B. & Q. R. Co., 68 N.W. 2d 920, 246 Iowa 971.

64. Ind.—Hall v. Pennsylvania Greyhound Lines, 96 N.E.2d 348, 121 Ind.App. 219.

65. Ariz.—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412.

Ill.—Baker & Conrad v. Chicago Heights Const. Co., 4 N.E.2d 953, 364 Ill. 386.

Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265.

Ind.—Hall v. Pennsylvania Greyhound Lines, 96 N.E.2d 348, 121 Ind.App. 219.

Mass.—Furlong v. Cronan, 26 N.E.2d 382, 305 Mass. 464.

71 C.J. p 1549 note 34 [b] (3).

Liberal construction of compensation statutes generally see *supra* § 20.

In New Jersey

(1) Rule of text has been followed.

N.J.—Henry Steers, Inc. v. Turner Const. Co., 139 A. 42, 104 N.J. Law 189.

71 C.J. p 1548 note 15 [b] (4).

(2) Lower court decision held that statute, being in derogation of common law, must be strictly construed. N.J.—General Home Imp. Co. v. American Ladder Co., 56 A.2d 116, 26 N.J.Misc. 24.

66. Fla.—Weathers, for Use and Benefit of Ocean Accident & Guarantee Corp. v. Cauthen, 12 So.2d 294, 152 Fla. 420.

67. Ill.—Baker & Conrad v. Chicago

sion of employers engaged in an original undertaking, or some part thereof,⁶⁸ who has paid compensation for injuries to, or death of, the employee. A person who conducts his work through a superintendent of construction may be regarded as an "employer" entitled to subrogation under a provision therefor, notwithstanding another provision of the act which, under certain circumstances, relieves the person who contracts with such contractor from liability for compensation to employees of an independent contractor.⁶⁹ A property owner who has paid for injuries sustained by an employee of an uninsured independent contractor working on his property is an employer entitled to recoup the money so paid.⁷⁰

Where a person serving in the national guard is not an employee of the state within the compensation act, as considered supra § 116, the state, although paying an award under the state military code for such person's injuries, is not entitled to be subrogated to his rights against a third-person tortfeasor.⁷¹

Employee. A person who is a noncommissioned officer in the regular army of the United States is not a federal employee within a statutory provision for subrogation of the United States to an employee's right of action against a third person for personal injuries.⁷²

b. Abatement and Survival

Under statutory provisions, the right of action of an employer against a third-party wrongdoer has been held not abated by the death of the employee or employer. Whether the right abates on the death of the wrongdoer depends on the provisions of the governing statute.

A provision of a section of the compensation act that the death of the employee or any other person shall not abate any right of action established by the section has been construed as applicable to the right of action of the employer or insurer against the third-person wrongdoer.⁷³ Even in the absence

of a statute relating to abatement, a cause of action for personal injuries, begun by the employer before the death of the employee from other causes, does not abate by reason of such death before trial.⁷⁴ So, an action brought by insurer for pain and suffering and other damages sustained by an employee up to the time of his death is not abated, but is preserved by statute.⁷⁵ Where the act provides that the making of a claim for, or the awarding of, compensation shall operate as an assignment, the right of action of the employer or insurer acquired under such provision is not defeated by the death of the employer,⁷⁶ or, where the action is for the death of the employee, by the death of the widow of such employee.⁷⁷

The right of an employer to sue the administrator of a deceased tort-feasor's estate to recover compensation paid has been sustained under a probate statute authorizing such action against an administrator when deceased has injured the property of plaintiff.⁷⁸ However, the right of an employer to maintain an action under the subrogation provision of the act, against the personal representative of the wrongdoer for the amount of compensation paid,⁷⁹ or for damages arising out of injuries to the employer's personal estate by reason of the employee's death,⁸⁰ has been denied; and a right of action under a subrogation provision has been denied to an insurer, where, although the wrongful act occurred before the death of the wrongdoer, the injury to the employee occurred after it.⁸¹

c. Necessity for, and Limitation of Rights by, Statutory or Contractual Provision

Under most authorities, the right of an employee to recover against a wrongdoer for injury to an employee depends on statutory authority.

The rights of an employer who has paid, or has become liable to pay, compensation against a person other than the employer are usually statutory.⁸²

Heights Const. Co., 4 N.E.2d 953, 364 Ill. 386.

68. Ill.—Baker & Conrad v. Chicago Heights Const. Co., supra.

69. U.S.—Otis Elevator Co. v. Miller & Paine, Neb., 240 F. 376, 153 C.C.A. 802.

70. Ill.—National Alliance of Bohemian Catholics v. Industrial Commission, 4 N.E.2d 362, 364 Ill. 249.

71. Ill.—Hays v. Illinois Terminal Transp. Co., 2 N.E.2d 309, 363 Ill. 397.

72. Ky.—Sims Motor Transp. Lines, Inc. v. Foster, 293 S.W.2d 226.

73. Cal.—De La Torre v. Johnson, 254 P. 1105, 200 C. 754.

Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 881—National Automobile Ins. Co. v. Cunningham, 107 P.2d 643, 41 C.A.2d 828.

74. Fla.—Haverty Furniture Co. v. McKesson & Robbins, 19 So.2d 59, 154 Fla. 772.

75. U.S.—Orange Ice, Light & Water Co. v. Texas Compensation Ins. Co., C.C.A.Tex., 278 F. 8.

76. N.Y.—Manufacturers' Liability Ins. Co. v. Overseas Shipping Co., 225 N.Y.S. 70, 130 Misc. 710.

Survival of assignable cause of ac-

tion in general see Abatement and Revival § 182.

77. Wis.—City of Milwaukee v. Boynton Cab Co., 281 N.W. 597, 229 N.W. 28, 201 Wis. 581.

78. Cal.—City of Los Angeles v. Howard, 182 P.2d 278, 80 C.A.2d 728.

79. Kan.—Kelly v. Johnson, 75 P.2d 209, 147 Kan. 74.

80. Kan.—Kelly v. Johnson, supra.

81. Tex.—U. S. Casualty Co. v. Rice, Civ.App., 18 S.W.2d 760.

82. U.S.—Liberty Mut. Ins. Co. v. Borsari Tank Corp., C.A.N.Y., 248 F.2d 277.

However, the view has been expressed that a provision for subrogation of an employer, who pays compensation to an employee for injuries received in his employment, is merely declaratory of the common-rule of subrogation⁸³ and is available to the employer without an act of the legislature.⁸⁴

In the absence of a statutory provision for an assignment of the employee's rights,⁸⁵ or a provision that an employer shall be subrogated to the right of the employee or the dependents against a third person and may recover any amount which such employee or his dependents would have been entitled to recover,⁸⁶ the employer does not have the rights sometimes provided by statutory provisions. The right of an employer to be indemnified by,⁸⁷ or to seek reimbursement from,⁸⁸ a third person for an amount paid to an employee as compensation has been denied in the absence of any statutory provision therefor.

Where the act permits the employer to enforce the liability of a person other than the employer for himself or for the insurance carrier if compensation is claimed and awarded or paid, the remedy so pro-

vided is exclusive,⁸⁹ and the employer's rights and remedies are not subject to exceptions not contained in the compensation act.⁹⁰

It has also been held that workmen's compensation is not subject to the principle of subrogation in the absence of a statute or specific contractual provision.⁹¹

Although it has been held that an employer may not bring an action against a tort-feasor except as authorized by the act,⁹² the right to bring the action has been upheld even though the employer failed to file the required reports with the compensation board.⁹³

§ 993. Right of Insurer to Remedy against Third Person or to Reimbursement in General

- a. In general
- b. Necessity for, and limitation of rights by, statutory provision

a. In General

Depending on the terms of the governing statute,

Van Wie v. U. S., D.C.Iowa, 77 F.Supp. 22.

Cal.—Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 881.

N.H.—Holland v. Morley Button Company, 145 A. 142, 83 N.H. 482.

Okla.—New State Ice Co. v. Morris, 285 P.2d 855—Updike Advertising System v. State Indus. Commission, 282 P.2d 759.

S.C.—Taylor v. Mount Vernon-Woodberry Mills, 45 S.E.2d 809, 211 S.C. 414.

Va.—Stone v. George W. Helme, 37 S.E.2d 70, 184 Va. 1051.

71 C.J. p 1548 note 27.

Insurance carrier see *infra* § 993 b.

83. Ill.—Corpus Juris cited in Geneva Construction Co. v. Martin Transfer & Stor. Co., 122 N.E.2d 540, 546, 4 Ill.2d 273.

Minn.—Fidelity & Casualty Co. of New York v. St. Paul Gas Light Co., 188 N.W. 265, 152 Minn. 197.

84. Ill.—Geneva Const. Co. v. Martin Transfer & Storage Co., 122 N.E.2d 540, 4 Ill.2d 273.

Hyland v. 79 West Monroe Corp., 118 N.E.2d 636, 2 Ill.App.2d 83.

Ind.—Liberty Mut. Ins. Co. v. Stitzle, 41 N.E.2d 133, 220 Ind. 180.

Minn.—Fidelity & Casualty Co. of New York v. St. Paul Gas Light Co., 188 N.W. 265, 152 Minn. 197.

Mont.—Hardware Mut. Cas. Co. v. Butler, 148 P.2d 563, 116 Mont. 73.

85. U.S.—Crab Orchard Imp. Co. v.

Chesapeake & O. Ry. Co., D.C.W. Va., 33 F.Supp. 580, affirmed, C.C.A., 115 F.2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

86. U.S.—Liberty Mutual Ins. Co. v. Borsari Tank Corp., C.A.N.Y., 248 F.2d 277—Crab Orchard Improvement Co. v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 115 F.2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

Mo.—McKenzie v. Missouri Stables, Inc., 34 S.W.2d 136, 225 Mo.App. 64.

N.H.—McCullough v. John B. Varick Co., 10 A.2d 245, 90 N.H. 409.

Okla.—New State Ice Co. v. Morris, 285 P.2d 855—Updike Advertising System v. State Indus. Commission, 282 P.2d 759.

Pa.—Herberich, to Use of, v. Sheinman, 36 Pa.Dist. & Co. 542.

87. U.S.—Crab Orchard Imp. Co. v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 115 F.2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

N.H.—McCullough v. John B. Varick Co., 10 A.2d 245, 90 N.H. 409.

Wis.—City of Milwaukee v. Boynton Cab Co., 231 N.W. 597, 201 Wis. 581.

Reason for rule

Compensation act was not intended to place double liability on third-party tort-feasor by requiring him to indemnify employer for amount paid as compensation in addition to being liable for employee's death in wrongful death action.

U.S.—Crab Orchard Imp. Co. v. Chesapeake & O. Ry. Co., D.C.W.Va., 33 F.Supp. 580, affirmed C.C.A., 115 F.2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

88. U.S.—Crab Orchard Imp. Co. v. Chesapeake & O. Ry. Co., *supra*. 71 C.J. p 1549 note 30—17 C.J. p 1184 note 18.

89. U.S.—U. S. v. Klein, C.C.A.Iowa, 153 F.2d 55.

Common-law rights

United States has no common-law right growing out of master and servant relationship to recover from third-party tort-feasor for expenditures made on behalf of civilian conservation corps enrollees, since exclusive remedy of United States is provided by statute.

U.S.—U. S. v. Klein, *supra*.

90. U.S.—Kittleson v. American Dist. Tel. Co., D.C.Iowa, 81 F. Supp. 25.

91. U.S.—Crab Orchard Improvement Co. v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 115 F.2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

N.H.—McCullough v. John B. Varick Co., 10 A.2d 245, 90 N.H. 409.

92. U.S.—Milan v. Kausch, C.A. Mich., 194 F.2d 263.

Md.—Bethlehem Steel Co. v. Raymond Concrete Pile Co., 118 A. 279, 141 Md. 67.

93. Kan.—Roehrman v. D. S. & O. Rural Elec. Co-op. Ass'n, 283 P.2d 411, 178 Kan. 52.

an insurer paying compensation to an injured employee on behalf of the employer is assigned the employee's rights against the third-party wrongdoer, or is subrogated to the rights of the employee or the employer against the wrongdoer.

The acceptance of compensation, pursuant to an award, by an injured employee,⁹⁴ or the acceptance of compensation and the failure of the employee to take action against the wrongdoer within a specified time,⁹⁵ operates as an assignment to the employer's

insurance carrier, paying the compensation, of the employee's right of action against the person causing the injury.

By the terms of some acts, insurer is permitted to enforce for his own benefit the liability of the person liable other than the employer,⁹⁶ or is subrogated to the rights of the employee, or of the dependents of a deceased employee, against such person.⁹⁷

94. U.S.—U. S. Fidelity & Guaranty Co. v. U. S., C.C.A.N.Y., 152 F.2d 46.

Hartford Acc. & Indem. Co. v. U. S., D.C.N.Y., 130 F.Supp. 839—Lorraine v. Coastwise Lines, D.C. Cal., 86 F.Supp. 336.

Ariz.—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412.

Necessity of formal assignment see *infra* § 1002.

Who may sue as between employer and insurer see *infra* § 1016.

Effect of state law

Provision in defense bases act that Longshoremen's Compensation Act shall apply to injury or death of any employee employed in defense base, irrespective of where injury or death occurs, made inapplicable, to workman injured, while employed at military base in Puerto Rico, provision in Longshoremen's Act that compensation shall be payable thereunder only if recovery "may not validly be provided by state law," and hence compensation law of Puerto Rico did not prevent recovery by insurance carrier as subrogee from corporation whose negligence caused employee's injuries.

U.S.—Royal Indem. Co. v. Puerto Rico Cement Corp., C.C.A.Puerto Rico, 142 F.2d 237, certiorari denied 65 S.Ct. 89, 323 U.S. 756, 89 L.Ed. 605.

95. U.S.—Alexander v. Creel, D.C. Mich., 54 F.Supp. 652, applying New York law.

N.Y.—Lehman v. Hartke, 146 N.Y.S. 2d 444, 286 App.Div. 661—Eisenberg v. Louis Adler Realty Co., 78 N.Y.S.2d 875, 273 App.Div. 641, affirmed 86 N.E.2d 102, 299 N.Y. 572—Reinhart v. Gerosa Crane Service Co., 31 N.Y.S.2d 162, 263 App.Div. 28.

Butchers Mut. Casualty Co. of New York v. Emerald Cab Corp., 8 N.Y.S.2d 746, 169 Misc. 749, reversed on other grounds 19 N.Y.S. 2d 685, 174 Misc. 1.

Public Service Mut. Ins. Co. v. Saks Fifth Ave., 155 N.Y.S.2d 173—Corsi v. Jenkins, 68 N.Y.S.2d 98.

State insurance fund

N.Y.—Commissioners of State Ins. Fund v. City Chemical Corp., 48 N.E.2d 262, 290 N.Y. 64.

Skakandy v. State, 80 N.Y.S.2d 849, 274 App.Div. 153.

Commissioners of State Ins. Fund v. Gladstone, 61 N.Y.S.2d 792, 136 Misc. 91—Commissioners of State Ins. Fund v. Farrand Optical Co., 58 N.Y.S.2d 317, 185 Misc. 976, affirmed 60 N.Y.S.2d 277, 270 App. Div. 805, reversed on other grounds 68 N.E.2d 506, 295 N.Y. 493.

Effect of statutory amendment

Statute of 1951, amending subdivision providing that failure of injured employee, taking compensation under law, to commence action against third-party tort-feasor within six months after award, shall operate as assignment of his cause of action to employer's insurer, did not create new or additional remedy against third party, but merely affected ownership of cause of action.

N.Y.—Olker v. Salomone, 130 N.Y.S. 2d 229, 283 App.Div. 943, reargument and appeal denied 132 N.Y.S. 2d 338, 283 App.Div. 1103.

96. Mass.—Miller v. Richards, 26 N.E.2d 380, 305 Mass. 424—Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565—Pimental v. John E. Cox Co., 13 N.E.2d 441, 299 Mass. 579.

71 C.J. p 1549 note 33.

97. U.S.—Kelley v. Summers, C.A. Kan., 210 F.2d 665, applying Texas law—Baker v. Traders & General Ins. Co., C.A.Okl., 199 F.2d 289—Staples v. Central Surety & Insurance Corporation, C.C.A.Okl., 62 F. 2d 650.

Myers v. Westland Oil Co., D.C. N.D., 96 F.Supp. 667.

Ala.—Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co., 3 So.2d 306, 241 Ala. 545.

Ark.—Martin v. Lavender Radio & Supply, Inc., 305 S.W.2d 845.

Iowa.—American Mut. Liability Ins. Co. v. State Auto. Ins. Ass'n, 72 N.W.2d 88, 246 Iowa 1294.

Md.—Baltimore Transit Co. v. State, to Use of Schriever, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460.

N.C.—Hinson v. Davis, 17 S.E.2d 348, 220 N.C. 380.

Okl.—Muskogee Transfer & Storage Co. v. Southern Surety Co. of New York, 40 P.2d 1044, 170 Okl. 895.

Tex.—Fort Worth Lloyds v. Haygood, 246 S.W.2d 865, 151 Tex. 149—Otis Elevator Co. v. Allen, 187 S.W.2d 657, 143 Tex. 607—Traders & General Ins. Co. v. West Texas Utilities Co., 165 S.W.2d 713, 140 Tex. 57.

71 C.J. p 1549 note 34.

Contribution or subrogation as between insurers see *supra* § 376.

Nature of subrogation right

Provisions of Kentucky act became part of contract of employment entered into in Kentucky, so that insurer's right of subrogation was not only statutory but contractual.

U.S.—Sloan v. Appalachian Electric Power Co., D.C.W.Va., 27 F.Supp. 108, applying Kentucky law.

Effect of statutory amendment

The amendment of compensation act did not affect right acquired by compensation bureau under act before amendment to maintain as subrogee of claimant action against third-party tort-feasor.

N.D.—Gimble v. Montana-Dakota Utilities Co., 44 N.W.2d 198, 77 N.D. 581.

Effect of agreement

Where compensation insurer, although not itself actual party to workman's suit against third-party tort-feasor, entered into written contract with workman to effectuate purpose of subrogation provision of act, insurer became subrogee to extent of compensation paid by it, not only under express terms of act, but under written agreement.

Tex.—Snodgrass v. American Sur. Co. of New York, Civ.App., 156 S.W.2d 1004.

In New Jersey

(1) Employer's insurer is entitled to reimbursement out of damages recovered by injured employee from tort-feasor for compensation paid to employee.

N.J.—Scheno Trucking Co. v. Bickford, 174 A. 548, 116 N.J.Eq. 586.

(2) Insurance carrier's right of subrogation for injuries to employee by third party is restricted to method of reimbursement provided for by statute through right of injured employee or his dependents against third party in tort, and insurer has no direct cause of action against

Some provisions which give to an employer who has paid, or who has become liable for, compensation, rights against the person causing the injury, have been construed in connection with another provision that "employer," as used in the act, includes "insurer,"⁹⁸ or with another provision for the subrogation of insurer to the rights of the employer,⁹⁹ so as to permit an insurer to assert rights against the person causing the injury.

Construction of statute. The compensation statute giving a compensation insurer the right to enforce the legal liability of a third-person tort-feasor should be liberally construed to accomplish the purposes for which it was enacted.¹

Exoneration or indemnity. Where an immediate employer's liability to its employee for his injuries

is primary, and the liability of the principal employer is merely secondary, a compensation insurer of the immediate employer is not entitled to any relief against the principal employer on the basis of exoneration or indemnity.²

Action by insurer against employee. Where an employee who has accepted a compensation settlement from his employer's insurer obtains a larger recovery from the third-person tort-feasor, insurer, although it had not intervened in the employee's action against the tort-feasor, can recover the sum received by the employee as compensation.³ The right of action of insurer against the employee does not arise out of subrogation,⁴ but is based on a claim for money had and received by the employee for the use of insurer.⁵

such third party *ex contractu* for breach of implied warranty.
N.J.—U. S. Cas. Co. v. Hercules Powder Co., 72 A.2d 190, 4 N.J. 157.

(3) Remedy provided by compensation act for reimbursement of insurer against third-party tort-feasor who caused employee's injuries is not exclusive remedy of insurer for reimbursement.

N.J.—New Amsterdam Cas. Co. v. Popovich, 113 A.2d 666, 13 N.J. 213.

(4) Provision of truck lessee's compensation policy that insurer shall be subrogated in case of any payment under policy to extent of such payment to all rights of recovery thereafter vested by law in employer, meant that insurer would be entitled to subrogation only if employer, in turn, had right to reimbursement over and against owner of truck by virtue of contract of lease governing truck.

N.J.—New Amsterdam Cas. Co. v. Popovich, *supra*.

(5) Under prior law, insurer could not seek reimbursement from tort-feasor where statute gave such right only to employer.

N.J.—Degler v. Domejka, 165 A. 533, 112 N.J.Eq. 538.
71 C.J. p 1550 note 39 [a], 41 [a].

96. U.S.—Globe Indemnity Co. v. Liberty Mut. Ins. Co., C.C.A.Pa., 138 F.2d 180.

Rehrer v. Service Trucking Co., D.C.Del., 112 F.Supp. 24, applying Pennsylvania law—Hartford Acc. & Indem. Co. v. Pettibone, D.C.Ind., 56 F.Supp. 323.

Magee v. McNany, D.C.Pa., 10 F.R.D. 5—State of Md., to Use of Carson v. Acme Poultry Corp., D.C. Del., 9 F.R.D. 687, applying Pennsylvania law.

Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Pacific Emp. Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 299 P.2d 928, 143 C.A.2d 646—Quisenberry v. Rullison, 277 P.2d 57, 129 C.A.2d 268—Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 881—Eckman v. Arnold Taxi Co., 148 P.2d 677, 64 C.A.2d 229—National Automobile Ins. Co. v. Cunningham, 107 P.2d 643, 41 C.A.2d 828.

Pa.—Neal v. Buffalo, R. & P. Ry. Co., 153 A. 305, 103 Pa.Super. 213.

S.D.—Western Sur. Co. v. Addy, 42 N.W.2d 660, 73 S.D. 322.

Vt.—Towne v. Rizzico, 32 A.2d 129, 113 Vt. 205.

71 C.J. p 1549 notes 35, 36 [c].

Rights of insurer measured by rights of insured

Under compensation statute, where employer is in position of third party, insurer can be in no better position than third party to whose rights it was subrogated.

Cal.—Pacific Indemnity Co. v. California Electric Works, 84 P.2d 313, 29 C.A.2d 260, followed in Jacques v. Standard Oil Co. of California, 84 P.2d 322, 29 C.A.2d 745.

99. U.S.—Curry v. U. S., D.C.S.C. 129 F.Supp. 38—McMahan v. The Panamolga, D.C.Md., 127 F.Supp. 659.

Del.—Frank C. Sparks Co. v. Huber Baking Co., 96 A.2d 456, 9 Terry 9—Distefano v. Lamborn, 84 A.2d 413, 7 Terry 406.

Kan.—Wise v. Morgan-Mack Motor Co., 246 P.2d 308, 173 Kan. 372.

La.—Benenate v. Brooks, App., 95 So. 2d 757—Southern Surety Co. v. Morgan's L. & T. R. R. & S. S. Co., 6 La.App. 575.

71 C.J. p 1549 note 36.

Longshoremen's and Harbor Workers' Compensation Act

D.C.—Poteet v. Liberty Mut. Ins. Co., Mun.App., 107 A.2d 781.

Rights of insurer measured by rights of employer

(1) Generally.

Va.—Chesapeake & O. Ry. Co. v. Palmer, 140 S.E. 831, 149 Va. 560.

71 C.J. p 1549 note 36 [e].

(2) A subcontractor's insurance carrier had no greater rights under act than subcontractor had against principal contractor.

Va.—Sykes v. Stone & Webster Engineering Corp., 41 S.E.2d 469, 186 Va. 116.

1. U.S.—Hobart v. O'Brien, C.A. Mass., 243 F.2d 735.

Mass.—Furlong v. Cronan, 26 N.E.2d 382, 305 Mass. 464.

71 C.J. p 1549 note 34 [b] (3).

Liberal construction of compensation statutes generally see *supra* § 20.

2. Conn.—Fidelity & Cas. Ins. Co. v. Sears, Roebuck & Co., 199 A. 93, 124 Conn. 227, 117 A.L.R. 565.

3. Ky.—Aetna Cas. & Sur. Co. v. Snyder, 291 S.W.2d 14.

Amount recoverable see *infra* § 1039. Deductions from compensation of amount of recovery from third person see *supra* § 396.

Effect of employee's failure to notify employer of action against tort-feasor on insurer's action against employee see *infra* § 1000.

Matters which can be adjudicated in proceeding see *infra* § 1013.

Recovery back of compensation generally see *supra* § 835.

Recovery by insurer where it intervenes in action by employee against tort-feasor see *infra* § 1042.

4. Ky.—Aetna Cas. & Sur. Co. v. Snyder, *supra*.

5. Ky.—Aetna Cas. & Sur. Co. v. Snyder, *supra*.

b. Necessity for, and Limitation of Rights by, Statutory Provision

Authorities differ as to whether the right of an insurer to recover against a wrongdoer depends on statutory authority.

According to some cases, insurer is subrogated to the rights of the employer to the extent that it has discharged its duties, independently of any statutory provision therefor,⁶ on the theory that subrogation is a normal incident of indemnity insurance,⁷ or by reason of a conventional subrogation;⁸ and, where it has obtained an assignment from the employer, insurer may sue the wrongdoer even though in the absence of such assignment it could not sue.⁹

According to other cases, however, the rights against the third-person wrongdoer of an insurance carrier who has paid, or has become liable to pay, compensation are wholly the creature of statute¹⁰ and cannot exist independently thereof;¹¹ and, when the applicable provision is in terms confined to the employer, an insurer who pays compensation is not entitled to bring an action against the person causing the injury.¹²

When the right of subrogation is given to insurer

by statute, insurer's rights are limited to those given thereby;¹³ and when insurer seeks or accepts the benefits of subrogation as provided by the statute, it must also accept the rules, regulations, burdens, and conditions which go with the statutory right of subrogation.¹⁴

§ 994. Nature and Purpose of Particular Statutory Provision

- a. Provision for subrogation
- b. Provision for assignment
- c. Miscellaneous provisions

a. Provision for Subrogation

The nature and purpose of the subrogation provisions giving a right of action against tort-feasors to employers or their insurers have been variously stated. Such provisions are for the benefit of injured employees and their subrogees, and not for the benefit of the tort-feasor.

The primary purpose of provisions of the compensation statutes by which an employer is subrogated to the rights of the injured employee against a third-party tort-feasor is to give the employer, who has paid compensation, a means of recouping his loss,¹⁵

6. U.S.—*Dierks v. Alaska Air Transport*, D.C.Alaska, 109 F.Supp. 695—*First Nat. Bank in Greensburg v. M & G Convoy, Inc.*, D.C.Pa., 102 F.Supp. 494—*Haslam v. Trailways of New England*, D.C.Conn., 59 F.Supp. 441.

Ind.—*Liberty Mut. Ins. Co. v. Stitzle*, 41 N.E.2d 133, 220 Ind. 180.

Mont.—*Hardware Mut. Cas. Co. v. Butler*, 143 P.2d 563, 116 Mont. 73.

Okl.—*Stinchcomb v. Dodson*, 126 P.2d 257, 190 Okl. 643.

7. U.S.—*Staples v. Central Surety & Insurance Corporation*, C.C.A.Okl., 62 F.2d 650.

71 C.J. p 1550 note 37.

Longshoremen's and Harbor Workers' Compensation Act

U.S.—*U. S. Fidelity & Guaranty Co. v. U. S.*, C.C.A.N.Y., 152 F.2d 46.

8. La.—*Metropolitan Casualty Ins. Co. of New York v. Bowdon*, App., 164 So. 464.

9. U.S.—*The Aden Maru*, D.C.Tex., 51 F.2d 599.

71 C.J. p 1550 note 38.

10. U.S.—*Liberty Mut. Ins. Co. v. Borsari*, C.A.N.Y., 248 F.2d 277.

Ala.—*Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co.*, 3 So.2d 306, 241 Ala. 545.

Fla.—*Cushman Baking Co. v. Hoberman*, 74 So.2d 69—*Brinson v. Southeastern Utilities Service Co.*, 72 So.2d 37—*Fidelity & Cas. Co. of N. Y. v. Bedingfield*, 60 So.2d 489.

Mass.—*Reidy v. Old Colony Gas Co.*, 53 N.E.2d 707, 315 Mass. 631—*Jordan v. Orcutt*, 181 N.E. 661, 279 Mass. 413.

71 C.J. p 1550 note 39.

Right to recover award paid to state treasury

Wis.—*Standard Sur. & Cas. Co. of New York v. Spewachek*, 288 N.W. 758, 233 Wis. 158.

11. Ala.—*Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co.*, 3 So.2d 306, 241 Ala. 545.

In Georgia

(1) Rule of text has been followed.

Ga.—*Maryland Cas. Co. v. Stephens*, 47 S.E.2d 108, 76 Ga.App. 723.

(2) On other hand, provision of compensation policy that insurer should be subrogated, in event of any payments under policy, to extent of such payments to all rights of recovery theretofore vested in employer or in employee, meant payments which policy expressly obligated insurer to make in conformity with policy and would entitle insurer to subrogation only when payments made by insurer were in discharge of obligation imposed by policy; and referred to rights under law to recover from tort-feasor because of injury to employee.

Ga.—*Glens Falls Indem. Co. v. Liberty Mut. Ins. Co.*, 44 S.E.2d 543, 202 Ga. 752.

12. U.S.—*John Deere Plow Co. v. Ortner*, D.C.Mich., 11 F.Supp. 875.

In Illinois

(1) Rule of text has been followed.

Wis.—*Marshall-Jackson Co. v. Jeffery*, 166 N.W. 647, 167 Wis. 63, construing Illinois compensation act.

(2) Insurance carrier of excavating subcontractor paying award of compensation to employee of subcontractor engaged by excavating subcontractor to move excavated materials is entitled to subrogation to legal rights of employee against subcontractor engaged to move excavated materials.

Ill.—*Baker & Conrad v. Chicago Heights Const. Co.*, 4 N.E.2d 953, 364 Ill. 386.

13. Fla.—*Cushman Baking Co. v. Hoberman*, 74 So.2d 69—*Fidelity & Cas. Co. of N. Y. v. Bedingfield*, 60 So.2d 489.

71 C.J. p 1550 note 34 [b] (2).

14. Fla.—*Fidelity & Cas. Co. of N. Y. v. Bedingfield*, supra.

15. U.S.—*First Nat. Bank in Greensburg v. M & G Convoy, Inc.*, D.C. Pa., 102 F.Supp. 494, construing Illinois law.

Del.—*Frank C. Sparks Co. v. Huber Baking Co.*, 96 A.2d 456, 9 Terry 9.

Nature and form of action to enforce liability of person causing injury see infra § 1012.

and the safeguarding of the employee's hope of further recovery is of secondary interest.¹⁶ The purpose of a provision for the subrogation of a state insurance fund to the rights of the employee is to make the wrongdoer who caused the injury contribute to the payment of compensation to the employee whenever possible.¹⁷

In providing that an employer shall be "subrogated" to the right of the employee or the dependents of a deceased employee against a third person, it is presumed that the legislature used the word "subrogation" in its legal sense,¹⁸ that a statutory subrogation has the same characteristics that it would have if it were a creature of equity,¹⁹ that it is enforced solely for the purpose of accomplishing the ends of substantial justice,²⁰ that it does not depend on any contractual relation between the parties,²¹ and that the subrogation provided for is not an assignment.²²

The subrogation intended by such a provision has, however, been regarded as a conventional, as distinguished from a legal, subrogation,²³ and it has even been stated that under an act containing such provision the employer takes over the employee's cause of action by statutory assignment rather than by strict subrogation.²⁴ In other cases, while a dis-

inction between an assignment and subrogation has been recognized,²⁵ the view has been taken that "subrogation," within the meaning of such provision, means "substitution,"²⁶ and that the ultimate effect of subrogation under such provision and of an assignment would be much the same in substituting one person to another's rights.²⁷

The word "subrogated," as used in a provision that, where compensation is payable, the right of the employee or personal representative against a person other than the employer shall be "subrogated" to the employer, means "transferred,"²⁸ and by the operation of the act the right of action against the third person is transferred to the employer, as considered *infra* § 1002.

Under a provision that, if compensation is claimed and awarded under the act, an employer having paid the compensation on having become liable therefor shall be subrogated to the rights of the employee to recover against a person other than the employer, subrogation relates back to the time the injury was inflicted;²⁹ and, where compensation has been paid under the act, the claim against the third person is that of the employer or his insurer,³⁰ and the employer or insurer has the management of an action on the claim,³¹ and may dismiss the action or discharge the claim, as considered *infra* § 1005.

16. Del.—Frank C. Sparks Co. v. Huber Baking Co., *supra*.
Recovery of beneficial interest of employee see *infra* § 1040.

17. N.D.—Breitwieser v. State, 62 N.W.2d 900.

18. Pa.—Smith v. Yellow Cab Co., 135 A. 858, 288 Pa. 85.

Tenn.—U. S. Fidelity & Guaranty Co. v. Elam, 278 S.W.2d 698, 198 Tenn. 194.

19. Pa.—Smith v. Yellow Cab Co., 87 Pa.Super. 143, 149, affirmed 135 A. 858, 288 Pa. 85.

71 C.J. p 1550 note 44.

Theory as matter of pure equity

Theory of subrogation is matter of pure equity and is never allowed where it would be inequitable to do so.

Pa.—Meehan v. City of Philadelphia, 136 A.2d 178, 184 Pa.Super. 659.

20. Minn.—City of Red Wing v. Eichinger, 203 N.W. 622, 163 Minn. 54.

21. Minn.—City of Red Wing v. Eichinger, *supra*.

Award paid into state treasury

(1) Right of insurer to reimbursement from tort-feasor after payment of compensation award into state treasury in absence of persons entitled to compensation, is not dependent on subrogation clause of policy.

Wis.—Standard Sur. & Cas. Co. of New York v. Spewachek, 288 N.W. 758, 233 Wis. 158.

(2) Right of recovery of such payment generally see *infra* § 996.

22. Del.—Ierardi v. Farmers' Trust Co. of Newark, 151 A. 822, 34 Del. 246, construing Pennsylvania law.

23. Mo.—McKenzie v. Missouri Stables, 84 S.W.2d 136, 225 Mo.App. 64.

71 C.J. p 1551 note 48.

24. Mo.—General Box Co. v. Missouri Utilities Co., 55 S.W.2d 442, 331 Mo. 845.

71 C.J. p 1551 note 49.

25. Me.—Travelers' Ins. Co. v. Foss, 130 A. 210, 124 Me. 399.

71 C.J. p 1551 note 50.

26. Cal.—Eckman v. Arnold Taxi Co., 148 P.2d 677, 64 C.A.2d 229.

71 C.J. p 1551 note 51.

Substitution pro tanto

Word "subrogated" means that employer or insurance carrier may be substituted pro tanto so that it can indemnify itself to extent of compensation paid.

Utah.—Johanson v. Cudahy Packing Co., 152 P.2d 98, 107 Utah 114.

27. Me.—Travelers' Ins. Co. v. Foss, 130 A. 210, 124 Me. 399.

71 C.J. p 1551 note 52.

28. Ill.—Walsh v. Central Cold Storage Co., 58 N.E.2d 325, 324 Ill.App. 402—Havana Nat. Bank, for Use of Hartford Acc. & Indem. Co. v. Tazewell Club, 19 N.E.2d 228, 298 Ill.App. 393.

71 C.J. p 1551 note 53.

Reason for rule

With respect to employer's right to recover for injury of employee where all parties were under compensation act, legislature did not intend to subrogate employer to right of employee which was abolished by act.

Ill.—Schlitz Brewing Co. v. Chicago Rys. Co., 138 N.E. 658, 307 Ill. 322.

Havanna Nat. Bank, for Use of Hartford Acc. & Indem. Co. v. Tazewell Club, 19 N.E.2d 228, 298 Ill.App. 393.

29. Me.—Travelers' Ins. Co. v. Foss, 130 A. 210, 124 Me. 399.

Va.—Stone v. George W. Helme Co., 37 S.E.2d 70, 184 Va. 1051.

30. Me.—Travelers' Ins. Co. v. Foss, 130 A. 210, 124 Me. 399.

31. U.S.—Melella v. Savage, D.C. Del., 59 F.Supp. 258.

Me.—Travelers' Ins. Co. v. Foss, 130 A. 210, 124 Me. 399.

N.J.—Belfatto v. Massachusetts Bonding & Ins. Co., 121 A.2d 431, 39 N.J.Super. 507.

Persons protected. A provision for subrogation to the rights of an injured employee against a third person may be for the benefit of the employer,³² the employee and the employer,³³ the employer and insurer,³⁴ insurer and the employee,³⁵ or the employer, insurer, employee, and the employee's dependents.³⁶ Such provision is not intended for the benefit of the negligent third person³⁷ and does not relieve him from liability.³⁸

It is of no concern of the tort-feasor by whom recovery is had;³⁹ he is concerned only as to whom the amount of recovery is to be paid,⁴⁰ and to be protected against a double suit⁴¹ and double recovery.⁴² Likewise, he is entitled to be protected against double liability.⁴³

Prevention of double recovery. One purpose of a provision for the subrogation of the employer is to prevent a double recovery by the employee.⁴⁴

Splitting causes of action. The view has been expressed that a provision for subrogation does not involve a splitting of causes of action.⁴⁵

b. Provision for Assignment

The nature and purpose of a statutory provision for the assignment of an injured employee's rights against a tort-feasor to the person liable for the payment of compensation have been variously stated. The provision is not for the tort-feasor's benefit.

The purposes of a provision of a compensation act that an award shall operate as an assignment of an employee's right of action against a third-party tort-feasor to the person liable for compensation are to permit the latter to enforce the third person's liability,⁴⁶ and to reimburse himself.⁴⁷

The view has been expressed that the effect of an award of compensation is to subrogate insurer to the cause of action, if any, in favor of the employee against a third person under such a provision;⁴⁸

32. Idaho.—*Lake v. State*, 227 P.2d 361, 71 Idaho 107.

Ind.—*Hall v. Pennsylvania Greyhound Lines*, 96 N.E.2d 348, 121 Ind.App. 219—*Weis v. Wakefield*, 38 N.E.2d 303, 111 Ind.App. 106.
Neb.—*Danner v. Walters*, 48 N.W.2d 635, 154 Neb. 506.

Employee only

Del.—*Travelers Ins. Co. v. E. I. Du Pont De Nemours & Co.*, 9 A.2d 88, 1 Terry 285.

Idaho.—*Hancock v. Halliday*, 171 P.2d 333, 67 Idaho 119.

33. N.Y.—*City of New York v. Steers & Menke*, 4 N.Y.S.2d 292, 167 Misc. 566, affirmed 4 N.Y.S.2d 992, 254 App.Div. 669.

34. U.S.—*Johnson v. Sword Line, Inc.*, D.C.Pa., 146 F.Supp. 940, reversed on other grounds, C.A., 240 F.2d 954.

71 C.J. p 1551 note 59.

35. Tex.—*Lancaster v. Hunter*, Civ. App., 217 S.W. 765.

36. Md.—*Johnson v. Miles*, 53 A.2d 30, 188 Md. 455.

37. U.S.—*Jay v. Chicago Bridge & Iron Co.*, C.C.A.Utah, 150 F.2d 247.
Johnson v. Sword Line, Inc., D.C. Pa., 146 F.Supp. 940, reversed on other grounds, C.A., 240 F.2d 954.
Magee v. McNany, D.C.Pa., 10 F.R.D. 5.

Ga.—*Gay v. Greene*, 84 S.E.2d 847, 91 Ga.App. 78.

Kan.—*Moesser v. Shunk*, 226 P. 784, 116 Kan. 247.

Md.—*Johnson v. Miles*, 53 A.2d 30, 188 Md. 455.

Utah.—*Johanson v. Cudahy Packing Co.*, 152 P.2d 98, 107 Utah 114.

38. Ind.—*Weis v. Wakefield*, 38 N.E.2d 303, 111 Ind.App. 106.

Kan.—*Moesser v. Shunk*, 226 P. 784, 116 Kan. 247.

39. Ind.—*Hall v. Pennsylvania Greyhound Lines*, 96 N.E.2d 348, 121 Ind.App. 219.

40. Ind.—*Weis v. Wakefield*, 38 N.E.2d 303, 111 Ind.App. 106.
S.D.—*Western Sur. Co. v. Addy*, 42 N.W.2d 660, 73 S.D. 322.

41. U.S.—*Jay v. Chicago Bridge & Iron Co.*, C.C.A.Utah, 150 F.2d 247.
Magee v. McNany, D.C.Pa., 10 F.R.D. 5.

42. Ind.—*Weis v. Wakefield*, 38 N.E.2d 303, 111 Ind.App. 106.
S.D.—*Western Sur. Co. v. Addy*, 42 N.W.2d 660, 73 S.D. 322.

Interest of tort-feasor to have valid satisfaction of judgment

Cal.—*Pacific Indem. Co. v. California Elec. Works*, 84 P.2d 313, 29 C.A.2d 260, followed in *Jacques v. Standard Oil Co. of California*, 84 P.2d 322, 29 C.A.2d 745.

43. U.S.—*Johnson v. Sword Line, Inc.*, D.C.Pa., 146 F.Supp. 940, reversed on other grounds, C.A., 240 F.2d 954.

Ind.—*Hall v. Pennsylvania Greyhound Lines*, 96 N.E.2d 348, 121 Ind.App. 219.

44. U.S.—*Crab Orchard Imp. Co. v. Chesapeake & O. Ry. Co.*, C.C.A. W.Va., 115 F.2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

Iowa.—*Black v. Chicago Great Western R. Co.*, 174 N.W. 774, 187 Iowa 904.

45. Iowa.—*Black v. Chicago Great Western R. Co.*, supra.

46. N.Y.—*Caulfield v. Elmhurst Contracting Co.*, 53 N.Y.S.2d 25, 268 App.Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803.

Skakandy v. State, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S.2d 849, 274 App.Div. 153,

affirmed 84 N.E.2d 804, 298 N.Y. 886.

In case of statutory provision specifically making assignment requisite of obtaining compensation see *infra* § 1011.

47. N.Y.—*Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp.*, 53 N.Y.S.2d 835, 184 Misc. 941.

N.C.—*Thompson v. Virginia & Carolina Southern R. Co.*, 6 S.E.2d 38, 216 N.C. 554—*Brown v. R. Co.*, 169 S.E. 419, 204 N.C. 688.

48. U.S.—*Terminal Shipping Co. v. Branham*, D.C.Md., 47 F.Supp. 561, affirmed, C.C.A., *Branham v. Terminal Shipping Co.*, 136 F.2d 655.
Ariz.—*State ex rel. Industrial Commission v. Fressley*, 250 P.2d 992, 74 Ariz. 412.

N.J.—*Zurich General Acc. & Liability Ins. Co. v. Ackerman Bros.*, 11 A.2d 52, 124 N.J.Law 187, applying New York law.

N.Y.—*Commissioners of State Ins. Fund v. City Chemical Corp.*, 48 N.E.2d 262, 290 N.Y. 64.

71 C.J. p 1551 note 67.

Integral element of theory of compensation

Employer's right of subrogation to rights of person entitled to compensation under longshoremen's and harbor workers' compensation act as against third-party tort-feasor is integral element of theory under which compensation is awarded in first instance.

U.S.—*Culley v. Willard*, D.C.N.Y., 146 F.Supp. 421.

Outright assignment not made

Workmen's "assignment" to insurer of cause of action against another for damages does not work outright assignment of such cause

but under a provision that the acceptance of an award of compensation shall operate as an assignment of the right of the employee to receive damages, the right of the employer⁴⁹ or insurance carrier⁵⁰ does not, it has been said, rest on the principle of subrogation.

Where an assignment to the employer, pursuant to the act, has once become effective, title to the cause of action so vested may not be divested, without the employer's consent, either by the employee⁵¹ or by the industrial commission.⁵² Where, under a provision for assignment, the employer or insurer has acquired the right to proceed against the third-person wrongdoer, an action against such third person is prosecuted, not in behalf of the employee, or, in case of his death, of the persons designated as the beneficiaries in the statute providing for an action for wrongful death,⁵³ but in behalf of the employer or insurer.⁵⁴ The statutory assignment of a cause of action against a third-party wrongdoer carries with it the right to conduct litigation.⁵⁵

The ownership of a cause of action by an insurer who has paid compensation, under a statute of the type here considered, is by statutory assignment,⁵⁶ and not as a lienor.⁵⁷

Person protected or affected. A provision for the assignment of the employee's right of action applies only to the employee, employer, and insurance carrier;⁵⁸ it is intended for the protection of insurer,⁵⁹ the employee,⁶⁰ and the employer.⁶¹ Such provi-

sion is not designed to benefit the third-party tortfeasor,⁶² to affect his liability,⁶³ or to relieve him from liability.⁶⁴

Splitting causes of action. A provision for the assignment of a cause of action to the employer does not purport to split the cause of action.⁶⁵ Since an employee who is injured as the result of the activity of joint wrongdoers can sue them separately or jointly for all of his injuries, an assignment, to the compensation fund, of his remedy against one wrongdoer is not a prohibited splitting of a cause of action.⁶⁶

Where the widow of a deceased employee and her minor children were awarded compensation for his death, and assigned their rights against the tortfeasor to the state, the assignment is not invalidated on the theory of the splitting of the widow's sole cause of action brought by her as administratrix against the tortfeasor for the benefit of an adult child, under statutes other than the compensation act, since the widow or administratrix possesses distinct causes of action, one for tort damages held by the adult child and one for compensation of the widow and minor children.⁶⁷

c. Miscellaneous Provisions

The nature and purpose of various other provisions entitling one who has paid compensation to an injured employee to succeed to his rights against the wrongdoer have been variously stated.

The right of an employer who has paid, or has

of action, but amounts to no more than right of "subrogation" to extent of compensation paid by employer and insurer.

Okl.—Parkhill Truck Co. v. Wilson, 125 P.2d 203, 190 Okl. 473.

49. Va.—U. S. Fidelity & Guaranty Co. v. Blue Diamond Coal Co., 170 S.E. 728, 161 Va. 373.

50. Va.—U. S. Fidelity & Guaranty Co. v. Blue Diamond Coal Co., supra, 71 C.J. p 1552 note 69.

51. N.Y.—Sabatino v. Thomas Crimmins Const. Co., 168 N.Y.S. 495, 102 Misc. 172, affirmed 172 N.Y.S. 917, 186 App.Div. 891.

52. N.Y.—Sabatino v. Thomas Crimmins Const. Co., supra.

53. N.C.—Brown v. Southern Ry. Co., 162 S.E. 613, 202 N.C. 256.

54. N.C.—Brown v. Southern Ry. Co., supra.

Persons entitled to recovery in action by employer or insurer see *infra* §§ 1039, 1041.

55. N.Y.—Skakandy v. State, 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886.

56. U.S.—Komlos v. Compagnie Nationale Air France, D.C.N.Y., 18 F.R.D. 363.

57. U.S.—Komlos v. Compagnie Nationale Air France, supra.

58. Okl.—Horwitz Iron & Metal Co. v. Myler, 252 P.2d 475, 207 Okl. 691.

59. N.Y.—Commissioners of State Ins. Fund v. E. T. Clark Carting Co., 83 N.Y.S.2d 783, reversed on other grounds 86 N.Y.S.2d 313, 274 App.Div. 559.

60. N.Y.—Commissioners of State Ins. Fund v. E. T. Clark Carting Co., supra.

61. Okl.—Parkhill Truck Co. v. Wilson, 125 P.2d 203, 190 Okl. 473.

62. N.C.—Hinson v. Davis, 17 S.E.2d 348, 220 N.C. 380—Thompson v. Virginia & Carolina Southern R. Co., 6 S.E.2d 38, 216 N.C. 554—Brown v. Southern R. Co., 169 S.E. 419, 204 N.C. 668.

63. N.C.—Hinson v. Davis, 17 S.E.2d 348, 220 N.C. 380.

Okl.—Horwitz Iron & Metal Co. v.

Myler, 252 P.2d 475, 207 Okl. 691—Parkhill Truck Co. v. Wilson, 125 P.2d 203, 190 Okl. 473.

64. N.Y.—Commissioners of State Ins. Fund v. E. T. Clark Carting Co., 83 N.Y.S.2d 783, reversed on other grounds 86 N.Y.S.2d 313, 274 App.Div. 559.

N.C.—Hinson v. Davis, 17 S.E.2d 348, 220 N.C. 380.

65. N.Y.—McCue v. J. F. Shea Co., 24 N.Y.S.2d 307, 175 Misc. 557, affirmed 24 N.Y.S.2d 130, 260 App.Div. 946.

Longshoremen's and Harbor Workers' Compensation Act

U.S.—Doleman v. Levine, App.D.C., 55 S.Ct. 741, 295 U.S. 221, 79 L.Ed. 1402.

Terminal Shipping Co. v. Branham, D.C.Md., 47 F.Supp. 561, affirmed, C.C.A., Branham v. Terminal Shipping Co., 136 F.2d 655.

66. N.Y.—Commissioners of State Ins. Fund v. Farrand Optical Co., 68 N.E.2d 506, 295 N.Y. 493.

67. Wash.—State v. Vinther, 48 P.2d 915, 183 Wash. 350, adhered to 58 P.2d 357, 186 Wash. 691.

become liable to pay, compensation, under a provision expressly permitting him to bring an action for damages against a third person is based on the principle of subrogation;⁶⁸ but the right of an employer under a provision expressly permitting him to collect indemnity from a third person is not based on that principle.⁶⁹ Under both such provisions, the cause of action is in effect assigned to the employer.⁷⁰

Under a provision that, if compensation is paid, insurer may enforce for its own benefit the liability of a person other than the employer, the right of an insurer does not rest or depend on the principle of subrogation⁷¹ or on the theory of reimbursement;⁷² such act makes a transfer to insurer of the employee's right to enforce the legal liability of the third person, and thereafter insurer becomes, in substance, an assignee of the employee's cause of action.⁷³

The view has been expressed that, under a provision that if compensation is paid the employer may enforce the liability of a person other than the employer, there is effected a transfer or assignment of the employee's right of action, that is to say, a subrogation.⁷⁴ A provision that the court shall, on ap-

plication, allow, as a first lien against any judgment of the employee against a person other than the employer, the amount of the employer's expenditures for compensation is not self-executing in the employer's interest.⁷⁵

Prevention of double recovery. The purpose of provisions of the compensation act which permit the employer to bring an action against the person liable for an injury to the employee⁷⁶ or to impress on a judgment against such person recovered by the employee, a lien for the employer's expenditures for compensation,⁷⁷ is to prevent the employee from obtaining double payment or recovery for the same compensable injury.

Contribution act. It has been held that it is not the intention of the statute relating to contribution between joint tort-feasors to obligate a tort-feasor, in consequence of his concurrent negligence with that of the employer, to pay his pro rata share of an employee's compensation award, in view of the fact that there was no joint or several liability, in tort, of the employer and the tort-feasor to the employee, and no equivalence of monetary responsibility of each to be divided into pro rata shares.⁷⁸

68. N.J.—U. S. Cas. Co. v. Hercules Powder Co., 72 A.2d 190, 4 N.J. 157. Prudential Ins. Co. of America v. Laval, 28 A.2d 908, 131 N.J.Eq. 23.

In California

(1) Rule of text has been followed. Cal.—Eckman v. Arnold Taxi Co., 148 P.2d 677, 64 C.A.2d 229—Chase v. Southern Pac. Co., 48 P.2d 1108, 6 C.A.2d 273.

71 C.J. p 1552 note 74.

(2) There is authority to contrary effect in a case relating to amount recoverable.

Cal.—Merino v. Pacific Coast Borax Co., 12 P.2d 458, 124 C.A. 336.

In Louisiana

(1) Rule of text has been followed. La.—Johnson Dry Docks v. City of New Orleans, App., 55 So.2d 650—International Paper Co. v. Arkansas & L. M. Ry. Co., App., 35 So.2d 769.

(2) Other authority is to contrary effect.

La.—Board of Com'rs of Port of New Orleans v. City of New Orleans By and Through Public Belt R. Commission, 65 So.2d 313, 223 La. 199. Smith v. McDonough, App., 29 So. 2d 818.

69. Ind.—Wabash Water & Light Co. v. Home Telephone Co., 138 N.E. 692, 79 Ind.App. 895.

70. Cal.—Llewellyn Iron Works v. Smith, 24 P.2d 532, 133 C.A. 475. Ind.—Hall v. Pennsylvania Grey-

hound Lines, 96 N.E.2d 348, 121 Ind.App. 219.

71. In Massachusetts

(1) There is authority in support of text.

Mass.—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631—Jordan v. Orcutt, 181 N.E. 661, 279 Mass. 413—Fidelity & Casualty Co. of New York v. Huse & Carleton, 172 N.E. 590, 272 Mass. 448, 72 A.L.R. 1143.

71 C.J. p 1552 note 77 [a].

(2) Other authority is to contrary effect.

Mass.—Labuff v. Worcester Consol. St. Ry. Co., 120 N.E. 381, 231 Mass. 170—Barry v. Bay State St. R. Co., 110 N.E. 1031, 222 Mass. 366.

72. Mass.—Fidelity & Casualty Co. of New York v. Huse & Carleton, 172 N.E. 590, 272 Mass. 448, 72 A.L.R. 1143—Turnquist v. Hannon, 107 N.E. 443, 219 Mass. 560.

73. Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435—Turnquist v. Hannon, 107 N.E. 443, 219 Mass. 560.

74. U.S.—Dinardo v. Consumers Power Co., C.A.Mich., 181 F.2d 104. Mich.—Smith v. Port Huron Gas & Electric Co., 187 N.W. 292, 217 Mich. 519.

Purpose of statute was to provide method whereby employer could reimburse himself or his insurance car-

rier for benefits paid to employee where injury resulted from negligence of some other person.

Mich.—Utey, for Use and Benefit of Travelers Ins. Co., v. Taylor & Gaskin, 9 N.W.2d 842, 305 Mich. 561.

Subrogation exclusively

Right of employer to indemnity from tort-feasor arises exclusively from right of subrogation.

Mich.—Bay State Milling Co., for Use and Benefit of Hartford Acc. & Indem. Co. v. Izak, 17 N.W.2d 769, 310 Mich. 601—Michigan Employers' Casualty Co. v. Doucette, 188 N.W. 507, 218 Mich. 363.

75. Cal.—Jacobsen v. State Industrial Accident Commission, 299 P. 66, 212 C. 440.

76. Cal.—Jacobsen v. State Industrial Accident Commission, *supra*.

Construction of statute

Act is not to be construed as providing for double recovery of indemnity against tort-feasor.

Cal.—Eckman v. Arnold Taxi Co., 148 P.2d 677, 64 C.A.2d 229.

77. Cal.—Jacobsen v. State Industrial Accident Commission, 299 P. 66, 212 C. 440.

78. N.J.—Farren v. New Jersey Turnpike Authority, 106 A.2d 752, 31 N.J.Super. 356.

§ 995. Effect on Existing Right of Action and Creation of New Right

Under most statutory provisions authorizing the employer or insurer to succeed to an employee's rights against a tort-feasor, no new or independent cause of action is created.

Most statutory provisions transferring an employee's right of action against a tort-feasor to an employer or insurer do not extinguish a cause of action against a person other than the employer⁷⁹ and do not impose a new liability on the tort-feasor.⁸⁰ These provisions do not create a new cause of action⁸¹ or one which is additional,⁸² independent, or severable.⁸³ The statutory provisions keep the

cause of action alive for the benefit of the employer⁸⁴ or insurer,⁸⁵ and the right of recovery is transferred.⁸⁶

The cause of action of an employer has been held to be derivative.⁸⁷ Notwithstanding this fact, the right given to the employer is his right, and not that of the employee or personal representative.⁸⁸

So, also, a provision that, if compensation is claimed and awarded or paid under the act, the employer or insurance carrier may enforce for his benefit the liability of a person other than the employer does not take away common-law rights from anyone,⁸⁹ but declares how the right shall be regu-

79. Vt.—*Davis v. Central Vermont Ry. Co.*, 113 A. 539, 95 Vt. 180.

71 C.J. p 1552 note 85.

In case of statutory provision specifically making assignment requisite of obtaining compensation see *infra* § 1011.

Parties to actions see *infra* §§ 1015-1021.

80. Wis.—*London Guarantee & Acc. Co. v. Wisconsin Public Service Corp.*, 279 N.W. 76, 228 Wis. 441.

81. U.S.—*Hartford Acc. & Indem. Co. v. U. S.*, D.C.N.Y., 180 F.Supp. 839—*California Cas. Indem. Exchange v. U. S.*, D.C.Cal., 74 F.Supp. 401, followed in 74 F.Supp. 411.

Del.—*Travelers Ins. Co. v. El. I. Du Pont De Nemours & Co.*, 9 A.2d 88, 1 Terry 285.

Ind.—*Hall v. Pennsylvania Greyhound Lines*, 96 N.E.2d 348, 121 Ind. App. 219—*Standard Acc. Ins. Co. v. Pet Milk Co.*, 78 N.E.2d 672, 118 Ind.App. 477—*Bebout v. F. L. Mendez & Co.*, 37 N.E.2d 690, 110 Ind. App. 28.

Kan.—*Corpus Juris* cited in *Kelly v. Johnson*, 75 P.2d 209, 211, 147 Kan. 74.

Ky.—*National Biscuit Co. v. Employers Mut. Liability Ins. Co.*, 231 S.W.2d 52, 313 Ky. 305—*Employers Mut. Liability Ins. Co. v. Brown Wood Preserving Co.*, 182 S.W.2d 30, 298 Ky. 194—*Whitney v. Louisville & N. R. Co.*, 177 S.W.2d 139, 296 Ky. 381.

Md.—*Johnson v. Miles*, 53 A.2d 30, 188 Md. 455.

Mo.—*Goldschmidt v. Pevely Dairy Co.*, 111 S.W.2d 1, 341 Mo. 982.

Wis.—*Eleason v. Western Cas. & Sur. Co.*, 35 N.W.2d 301, 254 Wis. 134—*London Guarantee & Acc. Co. v. Wisconsin Public Service Corp.*, 279 N.W. 76, 228 Wis. 441.

71 C.J. p 1553 note 86.

Nature of action in general see *infra* § 1012.

New York decisions see *infra* this section.

In Illinois

(1) Employer's compensation payments to employee did not create a

separate and distinct cause of action in favor of employer, but, since employer's subrogation rights were more in nature of lien on employee's recovery only one cause of action, belonging to employee, accrued against third party.

Ill.—*Hulke v. International Mfg. Co.*, 142 N.E.2d 717, 14 Ill.App.2d 5.

(2) Following declaration of invalidity of a prior statute, since employer's rights were governed by common-law subrogation principles, it had distinct cause of action against third-party tort-feasor.

Ill.—*Hyland v. 79 West Monroe Corp.*, 118 N.E.2d 636, 2 Ill.App.2d 83.

(3) Under prior statute, decisions were conflicting on question of creation of new cause of action.

Ill.—*Schlitz Brewing Co. v. Chicago Rys. Co.*, 138 N.E. 658, 307 Ill. 322. 71 C.J. p 1553 note 86 [d].

82. In Louisiana

(1) Rule of text has been followed. La.—*Todd-Johnson Dry Docks v. City of New Orleans*, App., 55 So.2d 650.

(2) There is a decision to contrary effect. La.—*Smith v. McDonough*, App., 29 So.2d 818.

(3) Basis of decision to contrary has been declared to be untenable. La.—*Todd-Johnson Dry Docks v. City of New Orleans*, *supra*.

83. U.S.—*Hutto v. Benson*, D.C. Tenn., 110 F.Supp. 855, applying Texas law.

New York decisions see *infra* this section.

84. U.S.—*Lumbermens Mut. Cas. Co. v. Dodge City Cement Products Co.*, D.C.Kan., 88 F.Supp. 643—*Black, Sivalls & Bryson v. Sheahan*, D.C.Kan., 88 F.Supp. 639—*California Cas. Indem. Exchange v. U. S.*, D.C.Cal., 74 F.Supp. 401, followed in 74 F.Supp. 411.

Kan.—*Sundgren v. Topeka Transp. Co.*, 238 P.2d 444, 178 Kan. 83—*Elam v. Bruenger*, 198 P.2d 225, 165

Kan. 31—*Kelly v. Johnson*, 75 P.2d 209, 147 Kan. 74.

La.—*Todd-Johnson Dry Docks v. City of New Orleans*, App., 55 So. 2d 650.

Md.—*Johnson v. Miles*, 53 A.2d 30, 188 Md. 455.

Wis.—*Eleason v. Western Cas. & Sur. Co.*, 35 N.W.2d 301, 254 Wis. 134.

71 C.J. p 1553 note 87.

85. U.S.—*Hobart v. O'Brien*, C.A. Mass., 243 F.2d 735.

Dierks v. Alaska Air Transport, D.C.Alaska, 109 F.Supp. 695—*California Cas. Indem. Exchange v. U. S.*, D.C.Cal., 74 F.Supp. 401, followed in 74 F.Supp. 411.

Mass.—*Furlong v. Cronan*, 26 N.E.2d 382, 305 Mass. 464.

Tex.—*Texas Employers' Ins. Ass'n v. Texas & P. Ry. Co.*, Civ.App., 129 S.W.2d 746, error dismissed, judgment correct.

Vt.—*Travelers' Ins. Co. v. Evans*, 143 A. 290, 101 Vt. 250.

86. Ky.—*Employers Mut. Liability Ins. Co. v. Brown Wood Preserving Co.*, 182 S.W.2d 30, 298 Ky. 194—*Whitney v. Louisville & N. R. Co.*, 177 S.W.2d 139, 296 Ky. 381.

87. Conn.—*Stavola v. Palmer*, 73 A. 2d 831, 136 Conn. 670—*Mickel v. New England Coal & Coke Co.*, 47 A.2d 187, 132 Conn. 671.

88. In Connecticut

(1) Rule of text has been followed. Conn.—*Stavola v. Palmer*, 73 A.2d 831, 136 Conn. 670.

(2) Insurance carrier who paid compensation to employee had no independent cause of action against tort-feasor, notwithstanding Connecticut statute giving such right to extent of compensation paid, but cause of action was solely that of employee. N.Y.—*General Acc. Fire & Life Assur. Corp., Limited, of Perth, Scotland, v. Zerhe Const. Co.*, 199 N.E. 89, 269 N.Y. 227, applying Connecticut law.

89. Md.—*Western Maryland Ry. Co. v. Employers' Liability Assur. Corporation*, 161 A. 5, 163 Md. 97.

lated with respect to its use.⁹⁰

Some provisions, however, have been regarded as creating a new cause of action either because of their express terms⁹¹ or because of the construction given the provisions.⁹²

§ 996. What Causes of Actions or Claims Transferred, Enforceable, or Subject of Indemnification; Transfer of Entire Cause of Action

- a. In general
- b. Cause of action based on death of employee

a. In General

Any cause of action of an employee for a compensable injury is transferred or assigned to an employer paying compensation. Whether the transfer or assignment is entire or partial depends on the provisions of the governing statute.

In general, any cause of action of the employee

against a person other than the employer in favor of an employee for an injury caused by such other is the subject of subrogation,⁹³ or is transferred or assigned to the employer,⁹⁴ under provisions of the compensation acts transferring the employee's rights to him where the injury is compensable. It has been held that the subrogation of the employer⁹⁵ or insurer⁹⁶ is to the right of the injured employee or his dependents to bring an action for damages against the person causing the injury by negligence or wrongful act, and that an employer and his compensation insurer are subrogated only to tort claims existing in favor of the employee or his dependents,⁹⁷ and not to contract claims existing in their favor.⁹⁸

The view has been taken that the injury on which the cause of action against the third person is based must be such as will support a claim for compensation,⁹⁹ but insurer has been permitted to sue under a provision that awarding compensation shall oper-

90. Md.—*Western Maryland Ry. Co. v. Employers' Liability Assur. Corporation*, *supra*.

91. Recovery of award to state officer

Wis.—*Employers Mut. Liability Ins. Co. of Wis. v. Mueller*, 79 N.W.2d 246, 273 Wis. 616—*Standard Sur. & Cas. Co. of New York v. Spewachek*, 288 N.W. 758, 233 Wis. 158—*Western Casualty & Surety Co. v. Shafton*, 285 N.W. 408, 231 Wis. 1.

In New Jersey

Prior statute authorizing employer or insurer to "proceed legally" against third person causing injuries, where employee does not, attempt to create separate right of action distinct from action of employee.

N.J.—*U. S. Cas. Co. v. Hyrne*, 189 A. 645, 117 N.J.Law 547.

In New York

(1) Provision that payment to state treasurer of award where there is no person entitled to compensation in case of a deceased employee shall operate to give employer or insurance carrier cause of action for amount of payment which shall be in addition to any cause of action by legal representative of employee, created new cause of action separate and distinct from that created by general death statute.

N.Y.—*Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp.*, 53 N.Y.S.2d 835, 184 Misc. 841.

71 C.J. p 1553 note 91 [a].

(2) Assignment to insurer of cause of action for wrongful death effected by compensation law does not create a new and independent right of action, where employee leaves dependents.

U.S.—*Werkley v. Koninklijke Luchtvaart Maatschappij N. V.*, D.C.N.Y., 111 F.Supp. 300—*Indemnity Ins. Co. of North America v. Pan. Am. Airways*, D.C.N.Y., 57 F.Supp. 980.

N.Y.—*United States Fidelity & Guaranty Co. v. Graham & Norton Co.*, 171 N.E. 903, 254 N.Y. 50—*Exchange Mut. Indemnity Ins. Co. v. Central Hudson Gas & Electric Co.*, 152 N.E. 470, 243 N.Y. 75.

Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 841—*Commissioners of the State Insurance Fund v. Town of Howard*, 31 N.Y.S.2d 910, 177 Misc. 820, affirmed 34 N.Y.S.2d 823, 268 App.Div. 1088, appeal denied 35 N.Y.S.2d 737, 264 App.Div. 828.

(3) Cause of action given to employer by statute for medical expenses is not based on any assignment of cause of action which employee had. N.Y.—*U. S. Trucking Corp. v. New York & Pennsylvania Motor Express, Inc.*, 32 N.Y.S.2d 251, 177 Misc. 377.

(4) Provision for medical treatment for employee injured through fault of third party gives employer separate cause of action against third party for medical expenses paid by employer before injured employee elects to sue third party.

N.Y.—*Butchers Mut. Cas. Co. of New York v. Emerald Cab Corp.*, 8 N.Y.S.2d 746, 169 Misc. 749, reversed on other grounds 19 N.Y.S.2d 685, 174 Misc. 1.

92. Ark.—*Winfrey & Carlile v. Nickles*, 270 S.W.2d 923, 223 Ark. 894. Cal.—*City of Los Angeles v. Howard*, 182 P.2d 278, 80 C.A.2d 728—*Limited Mut. Compensation Ins. Co. v.*

Billings, 169 P.2d 673, 74 C.A.2d 881.

71 C.J. p 1553 note 92.

93. Excess medical and hospital services

Tenn.—*U. S. Fidelity & Guaranty Co. v. Elam*, 278 S.W.2d 693, 198 Tenn. 194.

94. Wis.—*Anderson v. Miller Scrap Iron Co.*, 182 N.W. 852, 187 N.W. 746, 176 Wis. 521.

71 C.J. p 1553 note 94.

Sufficiency of claim for compensation see *infra* § 997.

Amount and items of recovery and beneficial interests see *infra* §§ 1037-1042.

Medical expenses

N.Y.—*U. S. Trucking Corp. v. New York & Pennsylvania Motor Express*, 32 N.Y.S.2d 251, 177 Misc. 377.

Employers Liability Assur. Corp. v. Fisher, 13 N.Y.S.2d 902.

71 C.J. p 1553 note 95 [c].

95. Ala.—*Metropolitan Casualty Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co.*, 3 So.2d 306, 241 Ala. 545.

96. Ala.—*Metropolitan Casualty Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co.*, *supra*.

97. U.S.—*Liberty Mut. Ins. Co. v. Borsari Tank Corp.*, C.A.N.Y., 248 F.2d 277, applying Missouri law.

98. U.S.—*Liberty Mut. Ins. Co. v. Borsari Tank Corp.*, *supra*. Rights of subrogation against physician guilty of malpractice see *infra* § 1044.

99. Ill.—*Christian v. Chicago & I. M. Ry. Co.*, 105 N.E.2d 741, 412 Ill. 171. *Anderson v. Chicago, B. & Q. R. Co.*, 250 Ill.App. 92.

ate as an assignment where the injury was the result of a maritime tort.¹

Rights acquired under a foreign compensation act by statutory assignment may be enforced by an employer in the state of the forum.²

Cause of action based on contract between employer and third person. There is authority for the view that, under a provision that the award of compensation shall operate as an assignment to the person liable for compensation of the cause of action against a person not in the same employ, there is no subrogation of an insurer who has paid compensation to the employer's right of action against a negligent third person based on a contract between such third person and the employer.³

Entire or partial assignment or transfer. Under an act providing for the assignment to the person liable to pay compensation of a cause of action against a third person, it has been held or recognized that the entire cause of action is transferred.⁴ Under a provision that the receipt of compensation shall operate as an assignment to the employer or insurer to the extent of the liability of the employer to the employee, occasioned by the injury, there is

only a partial assignment;⁵ likewise, a provision for subrogation does not effect a transfer to the employer of the entire cause of action of the employee;⁶ and, according to some authorities, a partial transfer is effective to the extent of the compensation paid⁷ or payable.⁸ However, the employer has been held to be subrogated to all the rights of an employee or his dependents until he is reimbursed for the sums that he was required to pay.⁹

b. Cause of Action Based on Death of Employee

Under most, although not all, statutes, the right of an employer or insurer to succeed to an employee's cause of action against a tort-feasor applies to a cause of action for his death.

Under some compensation acts, the making of a lawful claim for compensation for the death of an employee,¹⁰ the payment of such claim,¹¹ the acceptance of an award of compensation,¹² or the failure of the dependents of the employee to bring an action against the wrongdoer after an acceptance of compensation,¹³ operates as an assignment of any cause of action that the personal representative of such employee may have against a third person. Under some statutes, the employer is subrogated to the rights of the dependents of a deceased employee

1. N.Y.—Lumber Mut. Casualty Ins. Co. of New York v. Edward A. Thompson, Inc., 244 N.Y.S. 20, 137 Misc. 379—Lumber Mut. Casualty Ins. Co. of New York v. Edward Thompson, Inc., 235 N.Y.S. 646, 134 Misc. 370.

2. Ill.—Alschuler v. Rockford Bolt & Steel Co., 48 N.E.2d 435, 318 Ill. App. 564—Stix, Baer & Fuller Company v. Woesthaus Motor Company, 1 N.E.2d 796, 284 Ill.App. 301.

N.H.—Saloshin v. Houle, 155 A. 47, 85 N.H. 126.

N.M.—Kandelin v. Lee Moor Contracting Co., 24 P.2d 781, 37 N.M. 479.

Effect on public policy of forum as to assignability of cause of action in tort see *infra* § 1002.

3. U.S.—Liberty Mut. Ins. Co. v. American Incinerator Co., D.C.N.Y., 51 F.2d 739.

4. N.Y.—Lumber Mut. Cas. Ins. Co. v. William Spencer & Son Corp., 41 N.Y.S.2d 319, 181 Misc. 416.

71 C.J. p 1554 note 1.
Amount of recovery by subrogee in general see *infra* §§ 1039, 1041.

Accident benefits included

Ariz.—Hubbell v. Industrial Commission, 250 P.2d 1000, 74 Ariz. 424—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412.

5. N.M.—Kandelin v. Lee Moor Con-

tracting Co., 24 P.2d 731, 37 N.M. 479.

71 C.J. p 1554 note 2.

6. Iowa.—Black v. Chicago Great Western R. Co., 174 N.W. 774, 187 Iowa 904.

7. U.S.—Kelley v. Summers, C.A. Kan., 210 F.2d 665, applying Texas law.

Ill.—Geneva Const. Co. v. Martin Transfer & Storage Co., 114 N.E.2d 906, 351 Ill.App. 289, affirmed 122 N.E.2d 540, 4 Ill.2d 273.

Ky.—T. W. Samuels Distillery Co. v. Houck, 176 S.W.2d 890, 296 Ky. 323.
Minn.—Wagner v. City of Duluth, 300 N.W. 820, 211 Minn. 252.

N.J.—Prudential Ins. Co. of America v. Laval, 23 A.2d 908, 131 N.J.Eq. 23.

Pa.—Faxon v. Jarka Corporation, 171 A. 468, 314 Pa. 143.

Word "compensation" defined

Word "compensation" as used in provision limiting right of subrogation to amount of compensation paid employee includes not only periodic disability benefits paid, but also medical expenses.

Minn.—Dockendorf v. Lakie, 61 N.W. 2d 752, 240 Minn. 441.

8. U.S.—Hartford Acc. & Indem. Co. v. Pettibone, D.C.Ind., 56 F.Supp. 328.

Ind.—Liberty Mut. Ins. Co. v. Stitzle, 41 N.E.2d 133, 220 Ind. 180.

9. U.S.—Rehrer v. Service Trucking

Co., D.C.Del., 112 F.Supp. 24, applying Pennsylvania law.

Pa.—Leach v. Meadow Gold Dairies, 91 A.2d 293, 171 Pa.Super. 594—Myers v. Philadelphia Daily News, 79 A.2d 787, 168 Pa.Super. 561.

Fitzpatrick v. Finnegan, Com.Pl., 33 Luz.Leg.Reg. 255.

Hospital and medical expenses

Pa.—Haley to Use of Martin v. Matthews, 158 A. 645, 104 Pa.Super. 313.

Funeral expenses paid directly to mortician

Pa.—Myers v. Philadelphia Daily News, 79 A.2d 787, 168 Pa.Super. 561.

10. Wis.—Verhelst Const. Co. v. Gales, 235 N.W. 556, 204 Wis. 96.

71 C.J. p 1554 note 5.

Rights of employer or insurer in absence of statutory provision for transfer of rights see *supra* §§ 992, 993.

Nature and extent of rights see *infra* § 1041.

11. Wis.—Eleason v. Western Cas. & Sur. Co., 35 N.W.2d 301, 254 Wis. 134.

12. Kan.—Kelly v. Johnson, 75 P.2d 209, 147 Kan. 74.

71 C.J. p 1554 note 6.

13. U.S.—Werkley v. Koninklijke Luchtvaart Maatschappij N. V., D. C.N.Y., 111 F.Supp. 299.

N.Y.—Skakandy v. State, 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 836.

against a third person who is liable,¹⁴ while under other statutes the employer is entitled to enforce the liability of the tort-feasor for his own benefit.¹⁵ Notwithstanding the act in express terms provides for the subrogation of the dependents of a deceased employee, however, the right of the employer or insurer to bring an action for death has been denied on the ground that the general statute authorizing an action for death designates the personal representative as the person to bring the action.¹⁶

Even in the absence of a reference to an action for death or to the rights of dependents or the representative of a deceased employee, provisions which permit an employer¹⁷ or an insurer¹⁸ to enforce the liability of a person other than the employer, who is liable, have been so construed as to include claims or rights based on the death of an employee; a similar rule has been applied to statutes which in terms subrogate the employer to the rights of an injured employee¹⁹ or provide that the acceptance of compensation shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against a third person.²⁰ Under a provision that an employer shall be subrogated to the rights of an "injured employee," the

right of an employer to claim subrogation in respect of the rights of dependents of a deceased employee has, however, been denied.²¹

Under some acts, in case of the death of an employee resulting from the wrong of a person not in the same employ, the assignment to the person liable to pay compensation is effective to the extent,²² and only to the extent,²³ of the beneficial interest of such dependents or beneficiaries as are entitled to compensation under the act.

The provision for assignment has been regarded as applicable to the widow's cause of action,²⁴ and where the provisions of the compensation act so limit the so-called homicide statute as to provide that the recovery for the death of an employee shall be for the benefit of dependents, as discussed supra § 983, the right of subrogation extends to such right of action for the benefit of dependents.²⁵

Where an insurer is subrogated by the terms of the compensation policy to the rights of the insured against a third person, it may recover against a lessor who has agreed to indemnify a lessee for any loss resulting from injury or death to the employee of the lessor, for the payments he has made by rea-

14. U.S.—Kelley v. Summers, C.A. Kan., 210 F.2d 685, applying Texas law.

Rehrer v. Service Trucking Co., D.C.Del., 112 F.Supp. 24, applying Pennsylvania law—First Nat. Bank in Greensburg v. M. & G. Convey, Inc., D.C.Pa., 102 F.Supp. 494, applying Illinois law—Melella v. Savage, D.C.Del., 59 F.Supp. 258.

Mo.—Goldschmidt v. Pevely Dairy Co., 111 S.W.2d 1, 341 Mo. 982.

Pa.—Pennsylvania Turnpike Commission to Use of Albright v. U. S. Fidelity & Guaranty Co., Com.Pl., 51 Dauph.Co. 256, affirmed 23 A.2d 416, 343 Pa. 543.

Tex.—Texas Emp. Ins. Ass'n v. Grimes, 269 S.W.2d 332, 153 Tex. 357.

71 C.J. p 1554 note 7.

15. Md.—Mech v. Storrs, 179 A. 525, 169 Md. 150—Storrs v. Mech, 170 A. 743, 166 Md. 124.

16. Neb.—Luckey v. Union Pac. R. Co., 219 N.W. 802, 117 Neb. 85.

N.C.—Whitehead & Anderson v. Branch, 17 S.E.2d 637, 220 N.C. 507. 71 C.J. p 1555 note 8.

17. Cal.—Eckman v. Arnold Taxi Co., 148 P.2d 677, 64 C.A.2d 229—National Automobile Ins. Co. v. Cunningham, 107 P.2d 643, 41 C.A.2d 828.

Conn.—Stavola v. Palmer, 78 A.2d 831, 136 Conn. 670.

N.Y.—Coleman v. Cating Rope Works, 286 N.Y.S. 315, 247 App.Div. 310, applying Connecticut law. 71 C.J. p 1555 note 9.

18. Cal.—Eckman v. Arnold Taxi Co., 148 P.2d 677, 64 C.A.2d 229—National Automobile Ins. Co. v. Cunningham, 107 P.2d 643, 41 C.A.2d 828.

71 C.J. p 1555 note 10.

19. Vt.—Travelers' Ins. Co. v. Evans, 143 A. 290, 101 Vt. 250.

In Iowa

(1) Rule of text has been followed. Iowa.—Corpus Juris quoted in Iowa Nat. Mut. Ins. Co. v. Chicago, B. & Q. R. Co., 68 N.W.2d 920, 925, 246 Iowa 971.

(2) Other authority is to contrary effect.

U.S.—Standard Oil Co. v. Lyons, C.C. A.Iowa, 130 F.2d 965.

20. U.S.—Etna Life - Ins. Co. v. Moses, App.D.C., 53 S.Ct. 231, 287 U.S. 530, 77 L.Ed. 477.

71 C.J. p 1555 note 12.

21. La.—City of Shreveport v. Southwestern Gas & Electric Co., 82 So. 785, 145 La. 680, 74 So. 559, 140 La. 1078.

71 C.J. p 1556 note 13.

22. U.S.—Doleman v. Levine, App. D.C., 55 S.Ct. 741, 295 U.S. 221, 79 L.Ed. 1402.

71 C.J. p 1556 note 14.

Extent of transfer of cause of action generally see supra subdivision a of this section.

Persons entitled to bring action see infra § 1002.

Rights of employer measured by rights of dependents see infra § 1009.

If dependents electing to assign are only next of kin entire beneficial interest in cause of action against wrongdoer will pass to insurance carrier.

N.Y.—De Clara v. Barber S. S. Lines, 132 N.E.2d 871, 309 N.Y. 620—Zirpola v. T. & E. Casseiman, Inc., 143 N.E. 222, 237 N.Y. 367.

23. N.Y.—De Clara v. Barber S. S. Lines, 132 N.E.2d 871, 309 N.Y. 620.

71 C.J. p 1556 note 15.

Rights assigned by compensated beneficiaries

Widow and minor children under sixteen years of age assigning claim for death of husband and father are without power to assign rights of minor child more than sixteen years of age who because of his age had no rights under compensation act. Wash.—State v. Vinther, 48 P.2d 915, 183 Wash. 350, adhered to 53 P.2d 357, 186 Wash. 691.

24. Wis.—City of Milwaukee v. Boynton Cab Co., 231 N.W. 597, 201 Wis. 581—Combined Locks, etc., Co. v. Kray, 203 N.W. 946, 187 Wis. 48.

Claim for compensation of one other than exclusive beneficiary of death action see infra § 997.

25. Ala.—Georgia Casualty Co. v. Haygood, 97 So. 87, 210 Ala. 56.

son of the death of the employee, and the right of recovery cannot be defeated on the ground that, since insurer made the payments, the lessee did not suffer any loss.²⁶ The assignment of a cause of action for the death of an employee to the insurance carrier effected by the terms of some acts does not include the employer's right of action against a negligent third person based on a contract between the third person and the employer.²⁷

Action based on award to official where no person entitled to compensation. Some acts give the employer or insurer, who is liable for an award payable to an official where there is no person entitled to compensation for the death of an employee, a right of action against the third-person wrongdoer to recover the amount of the award,²⁸ which cause of action is in addition to that of the employee's next of kin to recover for wrongful death.²⁹ However, such provision does not apply where the employee was killed in another state and no such cause of action exists under the law of the other state.³⁰ Moreover, an insurer, who, after making a settlement with a deceased employee's widow, paid a sum to a state official pursuant to a statute of that state, even though not required to do so, since there was a person entitled to compensation, has been held not entitled to recover in another state from the wrongdoer for the sum paid to the state official.³¹ Since the statute authorizing recovery of the amount paid to an official does not operate retroactively, no re-

covery can be had of an amount paid before the enactment of the statute.³²

Cause of action created by statute of foreign state. The view has been taken that a provision that the making of a lawful claim for compensation against an employer for compensation for the injury or death of an employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party does not effect an assignment of a cause of action for the death of an employee arising under the laws of another state, even though the widow of such employee has sought and obtained compensation under the act.³³ There is, however, authority for the view that the assignment effected by the operation of the compensation statute, as considered infra § 1002, applies to a cause of action based on the death of an employee arising under the laws of another state.³⁴ The compensation act of another state may not, it has been said, give insurer any right of action for the death of an employee, independent of that of the personal representative of the deceased employee, which may be enforced in the state of the forum.³⁵

Appointment of personal representative. Even though no personal representative of a deceased employee has been appointed, the right of an employer to relief against a third person has been recognized.³⁶

26. Pa.—Employers Mut. Liability Ins. Co. of Wis. v. Melcher, 107 A.2d 874, 378 Pa. 598.

27. U.S.—Liberty Mut. Ins. Co. v. American Incinerator Co., D.C.N.Y., 51 F.2d 739.
71 C.J. p 1556 note 19.

28. U.S.—Hartford Acc. & Indem. Co. v. U. S., D.C.N.Y., 130 F.Supp. 839.

N.Y.—Travelers Ins. Co. v. Stieglitz, 30 N.Y.S.2d 306.

Wis.—Employers Mut. Liability Ins. Co. of Wis. v. Mueller, 79 N.W.2d 246, 273 Wis. 616—Employers Mut. Liability Ins. Co. v. De Bruin, 73 N.W.2d 479, 271 Wis. 412—Standard Sur. & Cas. Co. of New York v. Spewachek, 288 N.W. 758, 233 Wis. 158.

71 C.J. p 1556 note 21.

Award in such case in general see supra § 366.

Liability of third person see infra § 1010.

Attack on validity of award see infra § 998.

Longshoremen's and Harbor Workers' Compensation Act

U.S.—Doleman v. Levine, App.D.C., 55 S.Ct. 741, 295 U.S. 221, 79 L.Ed. 1402.

D.C.—Chapman v. Griffith-Consumers Co., 107 F.2d 268, 71 App.D.C. 64.

Purpose of cause of action is to place burden of payments on person whose wrongful act necessitated contributions.

N.Y.—Royal Indem. Co. v. Atchison, T. & S. F. Ry. Co., 70 N.Y.S.2d 697, 272 App.Div. 246, affirmed 75 N.E.2d 631, 297 N.Y. 619.

29. N.Y.—Royal Indem. Co. v. Atchison, T. & S. F. Ry. Co., supra.

30. N.Y.—Royal Indem. Co. v. Atchison, T. & S. F. Ry. Co., supra.
Travelers' Ins. Co. v. Central R. Co. of New Jersey, 258 N.Y.S. 35, 143 Misc. 589.

31. Pa.—Employers' Liability Assur. Corporation v. Eaby, 170 A. 352, 111 Pa.Super. 589.

32. N.Y.—City of Buffalo v. New York Tel. Co., 1 N.Y.S.2d 842, 165 Misc. 904.

33. Wis.—Bernard v. Jennings, 244 N.W. 589, 209 Wis. 116.
71 C.J. p 1556 note 22.

34. U.S.—Betts v. Southern Ry. Co., C.C.A.N.C., 71 F.2d 787.

Werkley v. Koninklijke Luchtvaart Maatschappij N. V., Royal

Dutch Airlines Holland, D.C.N.Y., 110 F.Supp. 746.

Ill.—Alschuler v. Rockford Bolt & Steel Co., 48 N.E.2d 435, 318 Ill. App. 564—Stix, Baer & Fuller Company v. Woesthaus Motor Company, 1 N.E.2d 796, 284 Ill.App. 801.

Ohio.—American Mut. Liability Ins. Co. v. U. S. Elec. Tool Co., 9 N.E.2d 157, 55 Ohio App. 107.

71 C.J. p 1557 note 23.

What law governs

Assignment of right of recovery against third person under wrongful death statute of one state as result of acceptance by beneficiary of compensation from employer under compensation act of another state is governed by law under which compensation is accepted.

U.S.—Betts v. Southern Ry. Co., C.C.A.N.Y., 71 F.2d 787.

Werkley v. Koninklijke Luchtvaart Maatschappij N. V., D.C.N.Y., 111 F.Supp. 300.

35. N.H.—Saloshin v. Houle, 155 A. 47, 85 N.H. 126.

71 C.J. p 1548 note 19.

36. Ill.—Brennan Const. Co. v. Blair, 261 Ill.App. 9.

71 C.J. p 1557 note 24.

§ 997. Necessity, Sufficiency and Validity of Claim for Compensation

In order for an employer or insurer paying compensation to succeed to the rights of an employee or his dependents against a tort-feasor, a valid and sufficient claim for compensation is generally required to have been made.

Usually, in order that an employer or insurer may claim the benefit of a statutory provision transferring the employee's cause of action against a third person, it is required that the employee or his dependents shall have made a claim for,³⁷ or elected to receive,³⁸ compensation, and that the claim for compensation shall be one which may properly be allowed under the act.³⁹ Thus, under a statute providing that the making of a lawful claim for compensation shall operate as an assignment of a right of action against a third person, a valid claim against the employer is presupposed,⁴⁰ and if the claim is not a lawful one, making such claim does not operate as an assignment.⁴¹ So, it is necessary that the relation of master and servant or employer and employee shall exist between the injured or deceased employee and the person from whom compensation is claimed,⁴² and that the injury shall arise out of, or in the course of, the employment,⁴³ even though the employer has actually paid certain sums which are designated as compensation.⁴⁴ There is, however, apparently authority for the view that the fact that an injured employee who has received payments pursuant to an award was not en-

titled to it does not necessarily prevent the insurance carrier who paid the award from maintaining an action against a third person.⁴⁵

In an action by an employer to recover from a third person the amount of compensation paid to the employee, defendant cannot avoid recovery on the ground that the employer and employee were engaged in interstate commerce at the time of the accident, where the railroad car involved was not ready for transportation when the accident occurred.⁴⁶

Sufficiency of making claim. Within a provision that the making of any claim for compensation shall operate as an assignment, a letter to the state industrial commission from a person entitled to compensation stating that such person will apply for compensation does not constitute the making of a claim.⁴⁷ A claim by an employee may be lawful, however, so as to entitle insurer to subrogation even though it is made under an insurance policy which was defectively executed by the agent of insurer where such policy was subsequently ratified by insurer.⁴⁸

Necessity for written notice of injury. Where the act provides that the making of a lawful claim against the employer for compensation shall operate as an assignment to the employer of any cause of action which the personal representative of an employee may have against a third person for the death

37. N.Y.—Schwabacher v. International Salt Co., 70 N.Y.S.2d 370, 272 App.Div. 173, appeal denied 72 N.Y.S.2d 420, 272 App.Div. 965, affirmed 83 N.E.2d 140, 298 N.Y. 726.
Public Service Mut. Ins. Co. v. Saks Fifth Ave., 155 N.Y.S.2d 173.
38. Ala.—Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co., 3 So.2d 306, 241 Ala. 545.
Ariz.—Industrial Commission v. Nevelle, 119 P.2d 934, 58 Ariz. 325.
39. La.—Tregre v. Kratzer, App., 148 So. 271.
71 C.J. p 1557 note 26.
40. Wis.—Hornburg v. Morris, 157 N.W. 556, 163 Wis. 31.
41. Wis.—Swanson v. Lake Superior Terminal & Transfer Ry. Co., 219 N.W. 274, 195 Wis. 633.
42. Wis.—Hornburg v. Morris, 157 N.W. 556, 163 Wis. 31.
71 C.J. p 1557 note 29.
43. Ill.—Wilson Garment Mfg. Co., for Use of Hardware Mut. Cas. Co. v. Edmonds, 38 N.E.2d 534, 312 Ill. App. 317.
71 C.J. p 1557 note 30.
Injury arising out of or in course of

employment in general see supra §§ 208-257.

Position of employer in settling immaterial

Fact that employer, in settling with employee, took position that injuries did not arise out of course of employment, could not be taken as decisive in determining whether injuries actually arose out of course of employment, so as to entitle employer to recover from third party. Ill.—Wilson Garment Mfg. Co., for Use of Hardware Mut. Cas. Co. v. Edmonds, supra.

Injuries held to arise in course of employment

(1) Where elevator was only reasonable means provided for employee for coming to, and going from, work, injuries sustained by employee in elevator because of negligence of landlord were compensable as "arising out of and in course of employment" although employee's employer was not sole tenant of building and others had right to use elevator, and hence employer was entitled to recover from landlord. Ill.—Wilson Garment Mfg. Co., for Use of Hardware Mut. Cas. Co. v. Edmonds, supra.

(2) Fact that employee was taking lady in automobile which he was driving for road test, in course of which collision occurred, did not prevent trip from being "in course of his employment" so as to justify recovery against negligent third person by insurer.

N.Y.—Travelers Ins. Co. v. Stieglitz, 40 N.Y.S.2d 459.

44. Ga.—New Amsterdam Casualty Co. v. Griner, 166 S.E. 864, 176 Ga. 69, certified questions conformed to 167 S.E. 319, 46 Ga.App. 220.
71 C.J. p 1557 note 31.

45. N.Y.—Royal Indemnity Co. v. Platt & Washburn Refining Co., 163 N.Y.S. 197, 98 Misc. 631.
71 C.J. p 1557 note 32.

46. Ill.—East St. Louis Junction R. Co. v. Armour & Co., 247 Ill.App. 528.

47. Colo.—Arkansas Valley Ry., Light & Power Co. v. Ballinger, 178 P. 566, 65 Colo. 543.
71 C.J. p 1558 note 34.

48. Cal.—Royal Indemnity Co. v. Midland Counties Service Corporation, 183 P. 960, 42 C.A. 628.

of the employee, the fact that no written notice of the injury, as provided in the statute, was served on the employer does not prevent the assignment and subrogation where the employer had actual notice of the injury which, under the act, is equivalent to service of such written notice.⁴⁹

Rights as affected by person making claim. The view has been expressed that the making of a lawful claim for compensation works a subrogation of any right of action to recover for the death of an employee whether or not the person making the claim is the exclusive beneficiary for whom the action for such death would lie,⁵⁰ and where the act gives the right to recover compensation to the widow of a deceased employee and not to the minor children, the making of a claim by the widow is sufficient to transfer to the employer the right to recover for the death of such employee.⁵¹

§ 998. Necessity for, and Sufficiency of, Award of, Agreement for, or Payment of, Compensation

Whether an award of compensation to an employee or his dependents, or payment pursuant to such award, is necessary in order to allow an employer or insurer to succeed to the employee's rights against a tort-feasor depends on the language of the governing statute.

Under various statutory provisions transferring an employee's cause of action against a third person to the person paying compensation, it has been held or recognized that, in order that an employer or insurer may assert rights against a third person, there must be, as variously stated, an award of compensation,⁵² payment of compensation,⁵³ payment of, or the existence of the obligation or liability to pay, compensation,⁵⁴ an award and acceptance of

49. Cal.—*Western States Gas & Electric Co. v. Bayside Lumber Co.*, 187 P. 735, 182 C. 140. Notice of injury in general see supra §§ 445-457.

50. Cal.—*Massachusetts Bonding & Insurance Co. v. Los Angeles R. Corporation*, 190 P. 161, 182 C. 981. 71 C.J. p 1558 note 37. Assignment to person liable for compensation to extent of beneficial interest of persons entitled to compensation see supra § 996.

51. Cal.—*Western States Gas & Electric Co. v. Bayside Lumber Co.*, 187 P. 735, 182 C. 140.

52. Me.—*Creamer v. Lott*, 126 A. 488, 124 Me. 118.

71 C.J. p 1558 note 40. Receipt by employee of money as gift from employer as election see supra § 990.

Recovery from third person of amount of compensation payable but not paid see infra § 1041.

Statutory requirement held not retroactive

Where provision of act relating to acceptance of compensation operating as assignment to employer was amended to require award after all but one of payments of compensation had been made, provision as it stood prior to amendment governed case and did not apply in its amended form or operate retroactively. U.S.—*Toomey v. Waterman S. S. Corp.*, C.C.A.N.Y., 123 F.2d 718.

Award held sufficient

In longshoreman's action against third parties, wherein longshoreman contended that compensation award was "little more than a temporary or interlocutory order" which should not be considered kind of award which would operate as assignment, record indicated that what was called

an "award" was in effect just that.

U.S.—*Czaplicki v. The Hoegh Silvercloud*, 76 S.Ct. 946, 351 U.S. 525, 100 L.Ed. 1387.

53. Fla.—*Red Top Cab & Baggage Co., for Use and Benefit of Fontaine, v. Dornier*, 32 So.2d 321, 159 Fla. 538.

N.Y.—*Schwabacher v. International Salt Co.*, 70 N.Y.S.2d 370, 272 App. Div. 173, affirmed 83 N.E.2d 140, 298 N.Y. 726.

Utah.—*Johanson v. Cudahy Packing Co.*, 152 P.2d 98, 107 Utah 114.

Payment into governmental fund

D.C.—*Chapman v. Griffith-Consumers Co.*, 107 F.2d 263, 71 App.D.C. 64.

Wis.—*Standard Sur. & Cas. Co. of New York v. Spewachek*, 288 N.W. 758, 233 Wis. 158.

In Massachusetts

(1) Rule of text has been followed.

U.S.—*Hobart v. O'Brien*, C.A.Mass., 243 F.2d 735.

71 C.J. p 1558 note 41.

(2) Under statute authorizing insurer to enforce liability of third person "if compensation be paid," insurer has incidental right to preserve its power to enforce by bringing action before compensation is actually paid, at least where employee or administrator has elected to take compensation, and action is necessary in order to prevent loss of substantial rights. Mass.—*Furlong v. Cronan*, 26 N.E.2d 382, 305 Mass. 464.

(3) Transfer of cause of action to insurer should be deemed to take place, as effecting its right to sue, when employee's election to take compensation is made, subject to condition that insurer cannot actually recover until compensation is

paid; and court may exercise control over action commenced by insurer, by postponing trial, continuing case for judgment after trial, or other appropriate measures, so as to insure that there shall be no recovery until compensation has actually been paid.

Mass.—*Furlong v. Cronan*, supra.

Equitable subrogation

Insurer, who had not paid entire amount of compensation awarded, could not enforce equitable right of subrogation.

Ind.—*Liberty Mut. Ins. Co. v. Stitzle*, 41 N.E.2d 133, 220 Ind. 180.

54. Ala.—*Foster & Creighton Co. v. St. Paul Mercury Indem. Co.*, 88 So.2d 825, 264 Ala. 581—*Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co.*, 3 So.2d 306, 241 Ala. 545.

Tex.—*Texas Employers' Ins. Ass'n v. Texas & P. Ry. Co.*, Civ.App., 129 S.W.2d 746, error dismissed, judgment correct.

71 C.J. p 1558 note 42.

Payment of doctor's bill insufficient

N.Y.—*Public Service Mut. Ins. Co. v. Saks Fifth Ave.*, 155 N.Y.S.2d 173 —*Employers Liability Assur. Corp. v. Fisher*, 13 N.Y.S.2d 902.

Deposit of security for payment

Fact that award has not been paid in full at time action is commenced does not deprive insurer of right to maintain action since it must have given security for payment of award. Del.—*Frank C. Sparks Co. v. Huber Baking Co.*, 96 A.2d 456, 9 Terry 9.

In Virginia

(1) Compensation insurance carrier cannot exercise right of subrogation to employee's claim until carrier has paid compensation for which employer is liable under act or assumed employer's liability therefor.

compensation,⁵⁵ or an award or payment of compensation.⁵⁶

Where an award is required, the award, and not an election to claim compensation,⁵⁷ or the acceptance of compensation paid,⁵⁸ or the payment of compensation,⁵⁹ effects the transfer of the right of action contemplated by some acts. Under the federal Longshoremen's and Harbor Workers' Compensation Act, where the assignment of the cause of action is not effected because payment was not made under an award, the employer's right to subrogation is recognized apart from the question of assignment,⁶⁰ and the employer, by paying compensation without an award, foregoes only the right to control the employee's right of action against the wrongdoer;⁶¹ also, since the act makes the assignment effective on acceptance of compensation under an award, an assignment is effected even though the payment and acceptance of compensation precede the award.⁶² Where the right of subrogation depends on an award or payment of compensation, the right does not exist where neither a

claim for, nor payment of, compensation has been made.⁶³

Under a provision that, if the injured employee takes under the act, his cause of action against another not in the same employ shall be assigned to the state for the benefit of the accident fund, the mere filing of a claim for compensation, followed by an award of the full statutory compensation, does not necessarily effect an assignment of such cause of action,⁶⁴ and the cause of action of an insurer entitled to subrogation may be contingent on the injured employee's prosecuting his claim for compensation to a successful conclusion.⁶⁵

Some acts do not require the payment of compensation in order that the employer or insurer may assert rights against a third person,⁶⁶ and where, by the terms of the act, the right of the employer is based on payment of, or liability to pay, compensation, the employer, or insurer treated as employer under the act, may assert his rights against the person liable when he becomes directly liable to pay compensation.⁶⁷

Va.—Noblin v. Randolph Corp., 28 S. E.2d 209, 180 Va. 345.

(2) It has also been held that right of subrogation does not depend on equitable principles which require actual payment before right accrues.

Va.—Stone v. George W. Helme, 37 S.E.2d 70, 184 Va. 1051.

(3) When right of subrogation arises generally see *infra* § 1002.

55. Ind.—Liberty Mut. Ins. Co. v. Stitzle, 41 N.E.2d 133, 220 Ind. 180
—Northern Indiana Power Co. v. West, 32 N.E.2d 713, 218 Ind. 321.

Compensation held not accepted

Where widow of employee had borrowed money from employer pursuant to agreement that she would repay loan from compensation awarded for employee's death or from judgment that might be obtained in action against tort-feasor, loan could not be regarded as acceptance of compensation on part of widow and other dependents, in view of reservations contained in agreement.

Ind.—Northern Indiana Power Co. v. West, *supra*.

56. Md.—Bethlehem Steel Co. v. Raymond Concrete Pile Co., 118 A. 279, 141 Md. 67.

Mo.—Pätzinger v. Shell Pipe Line Corporation, 46 S.W.2d 955, 226 Mo.App. 861.

57. N.Y.—Godfrey v. Brooklyn Edison Co., 187 N.Y.S. 263, 115 Misc. 21, affirmed 188 N.Y.S. 923, 196 App.Div. 890—Sabatino v. Thomas Crimmins Construction Co., 168 N.Y.S. 495, 102 Misc. 172.

58. U.S.—American Stevedores v. Porello, N.Y., 67 S.Ct. 847, 330 U.S. 446, 91 L.Ed. 1011.

American Emp. Ins. Co., to Use of Walker v. Benjamin Foster Co., Inc., D.C.Pa., 86 F.Supp. 711—The Etna, D.C.Pa., 46 F.Supp. 156, affirmed, C.C.A., 138 F.2d 37.

In New York

(1) Rule of text has been followed.

N.Y.—Jakuboski v. Matson Nav. Co., 84 N.Y.S.2d 352, 264 App.Div. 735, modified on other grounds 56 N.Y.S.2d 927, 269 App.Div. 849, appeal denied 57 N.Y.S.2d 847, 269 App.Div. 941, and appeal dismissed 64 N.E.2d 656, 295 N.Y. 633.

Neri v. Erie R. Co., 101 N.Y.S.2d 133, 199 Misc. 374.

Public Service Mut. Ins. Co. v. Saks Fifth Ave., 155 N.Y.S.2d 173—Employers Liability Assur. Corp. v. Fisher, 13 N.Y.S.2d 902. 71 C.J. p 1559 note 45.

(2) Other authority is to contrary effect.

N.Y.—Hatch v. Cherry-Burrell Corp., 82 N.Y.S.2d 322, 274 App.Div. 234, appeal denied 83 N.Y.S.2d 219, 274 App.Div. 869.

59. Me.—Creamer v. Lott, 128 A. 488, 124 Me. 118.

71 C.J. p 1559 note 45.
Requirement of reimbursement where payment made without award see *infra* § 1041.

60. U.S.—The Etna, C.C.A.Pa., 138 F.2d 37.

61. U.S.—The Etna, *supra*.
American Emp. Ins. Co. to Use

of Walker v. Benjamin Foster Co., Inc., D.C.Pa., 86 F.Supp. 711.

Management of action where compensation paid see *supra* § 994 a. Parties to action see *infra* §§ 1015–1021.

62. D.C.—Poteet v. Liberty Mut. Ins. Co., Mun.App., 107 A.2d 781.

Meaning of statutory phraseology

Statute providing that acceptance of compensation "under an award in a compensation order filed by the deputy commissioner" shall operate as assignment does not mean that payment must be made after award is entered, but rather, words were added by amendment to give employee opportunity to consider whether to accept compensation or proceed against third party.

D.C.—Poteet v. Liberty Mut. Ins. Co., *supra*.

63. Mo.—Pitzinger v. Shell Pipe Line Corporation, 46 S.W.2d 955, 226 Mo.App. 861.

64. Or.—Senter v. Peninsula Lumber Co., 220 P. 139, 109 Or. 325. 71 C.J. p 1559 note 47.

65. Tex.—Brandon v. Texas Employers' Ins. Ass'n, Civ.App., 58 S.W.2d 894.

66. Cal.—National Auto. & Cas. Ins. Co. v. Ainge, 215 P.2d 13, 34 C.2d 806.

S.C.—Taylor v. Mount Vernon-Woodberry Mills, 45 S.E.2d 809, 211 S.C. 414.

71 C.J. p 1559 note 49.

67. Cal.—Moreno v. Los Angeles Transfer Co., 186 P. 800, 44 C.A. 551.

71 C.J. p 1559 note 50.

Under at least one act, the right of reimbursement is not necessarily postponed until the employer has paid, or by award has become obligated to pay, compensation.⁶⁸

Under an act which requires payment, the amount of payment is not material;⁶⁹ under another statute, if the consideration paid for an assignment of a cause of action is only that which was required to be paid under the compensation law, it is without force and effect.⁷⁰ It seems that payment of compensation made in compliance with the determination of a committee of arbitration has been regarded as sufficient where such determination was not reviewed,⁷¹ but the right of an insurer to reimbursement for payments which were purely voluntary has been denied.⁷²

While an employee's acceptance of compensation with full knowledge of the surrounding facts has been treated as effecting an assignment of the employee's rights, contemplated by the act,⁷³ the right of the employee and insurer to avoid, by agreement, the effect of the employee's acceptance of certain payments as operating as an assignment has been recognized.⁷⁴

Payment of salary as payment of compensation. Under at least one act, the payment by a municipal corporation of full salary to a municipal employee or officer during the period of disability has been regarded as the performance by such corporation of

its obligation to pay compensation, so as to entitle it to reimbursement out of any recovery from a third person, notwithstanding a municipal ordinance requires the payment of full salary during the period of disability and such salary is in excess of the amount which the municipal corporation is required to pay by the compensation act.⁷⁵

Payment of compensation by insurance carrier as affecting employer's rights. According to some cases, where, by the terms of the act, the right of an employer to subrogation,⁷⁶ to assert rights against a third person,⁷⁷ or to claim reimbursement⁷⁸ is confined to an employer who has paid compensation, or has become liable therefor, payment of compensation by the insurance carrier is not sufficient; but there is authority for the view that, where compensation is paid for the death of an employee, the employer is vested with sufficient title to maintain an action against the third person for such death notwithstanding the payments to dependents of compensation are being made by insurer.⁷⁹

Fixing amount. Under a provision that the employer may bring legal proceedings against a person other than the employer to recover the damages sustained, not exceeding the aggregate amount of compensation payable under the act, the employer may not bring an action against a third person until the amount to be paid the employee is fixed.⁸⁰ In order to satisfy this requirement, the amount may be fixed either by award or by agreement.⁸¹

68. Conn.—*Rosenbaum v. Hartford News Co.*, 103 A. 120, 92 Conn. 398, L.R.A.1918F 521.

71 C.J. p 1559 note 51.

69. Mass.—*Chaves v. Weeks*, 136 N. E. 73, 242 Mass. 156—*Turnquist v. Hannon*, 107 N.E. 443, 219 Mass. 560.

70. Tex.—*Independent Eastern Torpedo Co. v. Herrington*, 95 S.W.2d 377, 128 Tex. 17, 1108.

71. Mass.—*Fidelity & Casualty Co. of New York v. Huse & Carleton*, 150 N.E. 230, 254 Mass. 359. 71 C.J. p 1559 note 53.

72. N.Y.—*Hartford Accident & Indemnity Co. v. Proctor*, 201 N.Y.S. 420, 206 App.Div. 571, applying New Jersey law.

Tenn.—*Blumberg v. Abbott*, 21 S.W. 2d 396, 159 Tenn. 586.

Payments held not voluntary

(1) Insurer who was entitled to subrogation to recover from workman and tort-feasor for hospital and medical expenses paid in excess of statutory minimum was not a volunteer or intermeddler with respect to liabilities incurred before, but paid after, workman and tort-feasor entered settlement whereunder tort-

feasor agreed to indemnify workman for amounts he might be required to repay insurer.

Tenn.—*U. S. Fidelity & Guaranty Co. v. Elam*, 278 S.W.2d 693, 198 Tenn. 194.

(2) Payments were not voluntary even though employer did not require employee to invoke enforcement provisions of act before they were made.

U.S.—*The Etna, C.C.A.Pa.*, 138 F.2d 37.

73. U.S.—*Sciortino v. Dimon S. S. Corporation*, D.C.N.Y., 39 F.2d 210, affirmed, C.C.A., 44 F.2d 1019.

74. U.S.—*The Nicoline Maersk*, D.C. Mass., 53 F.2d 103. 71 C.J. p 1560 note 56.

75. Cal.—*Evans v. Los Angeles Ry. Corporation*, 14 P.2d 752, 216 C. 495.

71 C.J. p 1560 note 57. Amount of reimbursement or recovery see *infra* § 1041.

76. Del.—*Frank C. Sparks Co. v. Huber Baking Co.*, 96 A.2d 456, 9 Terry 9.

77. U.S.—*Haslam v. Trailways of*

New England, D.C.Conn., 59 F. Supp. 441.

71 C.J. p 1560 note 58.

78. N.J.—*New York, S. & W. R. Co. v. Huebschmann*, 162 A. 767, 111 N.J.Eq. 547.

71 C.J. p 1560 note 59.

79. Mich.—*Michigan Boiler & Sheet Iron Works, for Use and Benefit of American Mut. Liability Co., v. Dressler*, 282 N.W. 222, 236 Mich. 502.

Mo.—*Superior Minerals Co. v. Missouri Pac. R. Co.*, 45 S.W.2d 912, 227 Mo.App. 1044, certiorari quashed State ex rel. and to Use of Missouri Pac. R. Co. v. Haid, 59 S.W. 2d 690, 232 Mo. 616.

80. Ala.—*Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co.*, 3 So.2d 306, 241 Ala. 545.

Ill.—*Tribune Co. v. Emery Motor Livery Co.*, 232 Ill.App. 309.

81. Ill.—*Tribune Co. v. Emery Motor Livery Co.*, 232 Ill.App. 309. 71 C.J. p 1560 note 62.

Agreement approved by board

Ill.—*Wilson Garment Mfg. Co., for Use of Hardware Mut. Casualty*

Under a provision that, if compensation is awarded, the employer or his insurer shall have a right to recover from a person other than the employer not to exceed indemnity paid or payable to the injured employee, it is not necessary that a formal award should be made in order to authorize the employer or insurer to enforce the liability of such other person;⁸² a voluntary agreement that needs only to be filed in order to be enforced as an award is sufficient.⁸³

Effect of invalidity of award; attack by third persons. Under a provision that, if compensation is claimed and awarded or paid under the act, the employer or insurer may enforce for his benefit the liability of a person other than the employer, the view has been taken that it is the fact, and not the validity, of an award which subrogates an insurer to the rights of the injured employee or of the dependents of a deceased employee,⁸⁴ and which authorizes insurer to enforce the liability of the tort-feasor.⁸⁵ So, the validity of the award cannot be attacked by defendant tort-feasor in an action by insurer for injuries to,⁸⁶ or the death of,⁸⁷ the employee.

However, there is authority for the view that defendant third person may attack the validity of an award or judgment for compensation,⁸⁸ by asserting, in the action against it, every defense that could have been interposed by the employer or insurer

in the compensation proceedings,⁸⁹ and it has also been held that the validity of the award or judgment for compensation is not res judicata as to the tort-feasor.⁹⁰

§ 999. Notice to Bring Action

Unless it is waived, there must be compliance with a statutory requirement that the employer or insurer give the employee written notice to bring an action against a tort-feasor in order to succeed to his rights against the tort-feasor.

Under an act providing that, if the employee fails to bring an action against a third person within a specified time after a written notice so to do is given by the employer or his insurer, then the employer or his insurer shall succeed to the right of the employee to maintain such action, there is no transfer of the right to sue in the absence of any demand on the employee to bring an action.⁹¹ However, since such requirement is for the benefit of the employee,⁹² he may waive it,⁹³ and where there was no written demand on the employee to bring the action, but he does not disavow or repudiate an action commenced by the insurer, it will not be dismissed.⁹⁴

Retroactive effect of statute. A statutory provision requiring an employer or insurer to give the person receiving compensation notice to bring an action against the tort-feasor before the cause of action is considered as assigned to it is procedural in nature,⁹⁵ and, while it does not apply to divest an

Co. v. Edmonds, 38 N.E.2d 534, 312 Ill.App. 317.

82. Ky.—Berry v. Irwin, 6 S.W.2d 705, 224 Ky. 565.

83. Ky.—Berry v. Irwin, *supra*.

84. Md.—Maryland Casualty Co. v. Union Bridge Electric Mfg. Co., 125 A. 762, 145 Md. 644.

Collateral attack on award or judgment in general see *supra* § 659.

85. Md.—Maryland Casualty Co. v. Union Bridge Electric Mfg. Co., *supra*.

86. Election that statute apply to employee

Railroad company's liability depended on negligence, so that while compensation had been awarded, and state insurance fund had become liable for payment, railroad company's liability to insurer and employer for compensation paid could not be avoided on ground that driver was minor member of employer's family, and that employer had not, prior to accident, filed with board election in writing that provisions of law should apply to driver.

Idaho.—Department of Finance of State v. Union Pac. R. Co., 104 P. 2d 1110, 61 Idaho 484.

87. Wash.—State v. Starr, 52 P.2d 897, 185 Wash. 18.
71 C.J. p 1561 note 68.

88. Tenn.—Blumberg v. Abbott, 21 S.W.2d 396, 159 Tenn. 586.
71 C.J. p 1561 note 69.

89. Mich.—Currier Lumber Co. v. Van Every, 20 N.W.2d 241, 312 Mich. 375.

Award to state officer

(1) In action by insurer to recover from alleged wrongdoer, amount of award paid to a state officer where there was no person entitled to compensation for death of employee, right of defendant to test validity of award by any defense, which insurer could have interposed in proceeding for such award has been recognized. N.Y.—Commissioners of State Ins. Fund v. Consolidated Edison Co., 151 N.Y.S.2d 215, 2 Misc.2d 410—Commissioners of State Ins. Fund v. H. L. & F. McBride, Inc., 90 N.Y.S.2d 416, 195 Misc. 362.
71 C.J. p 1561 note 69 [b].

(2) Other defenses to such action see *infra* § 1010.

90. N.Y.—Commissioners of State Ins. Fund v. Consolidated Edison Co., 151 N.Y.S.2d 215, 2 Misc.2d 410.
71 C.J. p 1561 note 70.

Amount of compensation payable
Mich.—Currier Lumber Co. v. Van Every, 20 N.W.2d 241, 312 Mich. 375—Grand Rapids Lumber Co. v. Blair, 157 N.W. 29, 190 Mich. 513.
91. Iowa.—Southern Surety Co. of New York v. Chicago, R. I. & P. Ry. Co., 245 N.W. 864, 215 Iowa 525.

N.Y.—Tormey v. City of New York, 168 N.Y.S.2d 296, 6 Misc.2d 654—Plumitallo v. 1407 Broadway Realty Corp., 108 N.Y.S.2d 448, 201 Misc. 277, affirmed 111 N.Y.S.2d 720, 279 App.Div. 1019.
Schulze v. Park Ave. Estates, 143 N.Y.S.2d 677.

92. N.J.—Poetz v. Mix, 81 A.2d 741, 7 N.J. 436.

93. N.J.—Poetz v. Mix, *supra*.

Waiver held not effected by employee's filing notice of his intention to sue third party with compensation insurer.

N.Y.—Robinson v. River Esplanade Corp., 137 N.Y.S.2d 382.

94. N.J.—Poetz v. Mix, 81 A.2d 741, 7 N.J. 436.

95. In New York

(1) The rule of the text has been followed.

N.Y.—Lykudis v. Danial, 148 N.Y.S.

insurer of ownership of a cause of action which has been assigned to it;⁹⁶ it applies retroactively to claims, arising before its passage, which have not been assigned to an insurer, under some authorities,⁹⁷ although not under others.⁹⁸

§ 1000. Notice of Bringing Action

A requirement that an employer or an employee bringing an action against a third person shall notify the employee or the employer is for their protection, and the third party may not complain of noncompliance.

Under some acts, if either the employee or his dependents, or the employer, shall bring suit against a third person, the person bringing the action shall notify the other in writing of such fact.⁹⁹ Such a provision is intended for the protection of the employee and of the employer,¹ and the giving of such notice by the employee is neither an essential ingredient of his cause of action against the wrongdoer² nor a condition precedent to his bringing of the action;³ where neither employer nor employee complains of noncompliance with the statute, defendant may not complain.⁴

In the absence of a statute requiring it, such notice need not be given.⁵

Action by insurer against employee. Where a compensation insurer has actual knowledge of the facts, the failure of an employee, who accepted com-

pensation from the insurer, to notify the employer that he had filed a claim with the third-party tortfeasor for the injuries for which compensation had been paid is unimportant in an action by the insurer against the employee to recover the compensation paid.⁶

§ 1001. Notice to Tort-Feasor

A tort-feasor may, under statutory provision, be entitled to notice of an award of, or agreement to pay, compensation before an action may be brought against him by a subrogee of the employee's rights.

A provision of the compensation act that, in order to acquire a right against a third person for compensation paid, the employer shall file with the third person or corporation liable, at any time prior to payment, a statement of the compensation agreement or award as between the employer and employee contemplates a written notice,⁷ which must be filed;⁸ the notice should contain a statement of an agreement to pay compensation or of an award for compensation.⁹ The notice need not be signed by the employer,¹⁰ and may be filed by his agent.¹¹

The view has been expressed that the employer¹² or insurer,¹³ on filing the requisite notice with the third person, succeeds to the rights of the employee against such third person for amounts paid to the employee as compensation under the act.

2d 34, 1 Misc.2d 660—Rose v. Sun Oil Co., 125 N.Y.S.2d 388, 204 Misc. 428.

(2) However, another decision is to the effect that the provision is substantive in nature. N.Y.—Selerto v. Brooklyn Steel Warehouse Co., 118 N.Y.S.2d 505.

96. U.S.—Komlos v. Compagnie Nationale Air France, D.C.N.Y., 111 F. Supp. 393, reversed on other grounds 209 F.2d 436—Paschall v. Mooney, D.C.N.Y., 110 F.Supp. 749—Werkley v. Koninklijke Luchtvaart Maatschappij N. V., Royal Dutch Airlines Holland, D.C.N.Y., 110 F.Supp. 746.

N.Y.—Olker v. Salomone, 130 N.Y.S.2d 229, 283 App.Div. 948, reargument and appeal denied 132 N.Y.S.2d 388, 283 App.Div. 1103.

97. N.Y.—Lykudis v. Danial, 148 N.Y.S.2d 34, 1 Misc.2d 660—Rose v. Sun Oil Co., 125 N.Y.S.2d 388, 204 Misc. 428.

Robinson v. River Esplanade Corp., 137 N.Y.S.2d 382.

98. U.S.—McCall v. United Engineering & Foundry Co., D.C.N.Y., 148 F.Supp. 801.

N.Y.—Farrell v. American Beverage Corp., 119 N.Y.S.2d 720, 203 Misc. 330—Bedsole v. Consolidated Edi-

son Co. of N. Y., 118 N.Y.S.2d 192, 203 Misc. 194.

Selerto v. Brooklyn Steel Warehouse Co., 118 N.Y.S.2d 505.

99. La.—Fidelity Union Casualty Co. v. Carpenter, 125 So. 504, 12 La.App. 321. 71 C.J. p 1561 note 72.

Purpose of provision is to enable employer or insurer to make choice whether to join in action and employ own attorneys or to permit employee, through his attorneys, to proceed without employer or carrier intervening.

Cal.—Quisenberry v. Rulison, 277 P. 2d 57, 129 C.A.2d 268.

Compensation insurer included within term "employer"

Cal.—Quisenberry v. Rulison, supra.

1. Cal.—Driscoll v. California Street Cable R. Co., 250 P. 1062, 80 C.A. 208.

2. Cal.—Van Zandt v. Sweet, 204 P. 860, 56 C.A. 164. 71 C.J. p 1561 note 74.

3. Mich.—Woods v. Ford Motor Co., 70 N.W.2d 739, 342 Mich. 518. 71 C.J. p 1561 note 74.

4. Cal.—Driscoll v. California Street Cable R. Co., 250 P. 1062, 80 C.A. 208.

71 C.J. p 1561 note 75.

Failure of employee to give notice as ground for nonsuit or peremptory instruction for defendant see infra § 1032.

5. Pa.—Crider v. Hock, 71 Pa.Dist. & Co. 247, 2 Lebanon 270.

6. Ky.—Aetna Cas. & Sur. Co. v. Snyder, 291 S.W.2d 14.

Action by insurer to recover compensation from employee where employee recovers from tort-feasor see supra § 993 a.

7. N.J.—Brenner v. Mount, 143 A. 868, 7 N.J.Misc. 35. 71 C.J. p 1561 note 76.

8. Registered mail. Negligent third party's receipt of agreement by registered mail was sufficient filing thereof.

N.J.—Travelers Ins. Co. v. Gardner, 28 A.2d 507, 129 N.J.Law 159.

9. N.J.—Brenner v. Mount, 143 A. 868, 7 N.J.Misc. 35. 71 C.J. p 1561 note 77.

10. N.J.—Erie R. Co. v. Michelson, 162 A. 764, 111 N.J.Eq. 541.

11. N.J.—Erie R. Co. v. Michelson, supra. 71 C.J. p 1561 note 79.

12. N.J.—Warner-Quinlan Co. v. Byram, 150 A. 212, 106 N.J.Eq. 82.

13. N.J.—Travelers Ins. Co. v. Gardner, 28 A.2d 507, 129 N.J.Law 159.

The fact that a tort-feasor is not immediately notified of the occurrence of an accident is not sufficient to deny recovery for compensation paid.¹⁴

Notice of claim. Where a statute requires that notice of claim be filed with a town within a specified period after the cause of action arises, the failure of the claimant or the insurer to give such notice defeats the insurer's right to recover against the town for its negligence.¹⁵

Action by state against county. Under a provision for assignment to the state for the benefit of the accident fund if compensation is taken, where a county is the alleged wrongdoer, whether or not a claim filed with the county by the widow of a deceased employee, who ultimately elected to take compensation, has been regarded as immaterial in respect of the right of the state to maintain an action against the county.¹⁶

§ 1002. Transfer of Cause of Action or Claim Effected by Statute; Necessity for Formal Assignment

A provision in a compensation act relating to the

succession of an employer or insurer to an employee's right of action against a third person may itself effect a transfer of the right of action, when the statutory conditions are met, without any formal assignment.

Under statutory provisions relating to the transfer to, or vesting in, the employer or the compensation insurer of the employee's right of action against a tort-feasor, no formal assignment is regarded as necessary where the conditions contemplated by the provision exist.¹⁷ In such circumstances, the transfer may be effected by a provision for the subrogation of the employer¹⁸ or of the insurance carrier¹⁹ to the rights of the injured employee, a provision for the assignment to the employer or insurance carrier of the employee's right of action,²⁰ or a provision for the enforcement by the employer of the liability of a person other than the employer if compensation is paid.²¹ In the absence of a statutory requirement for the approval of the assignment by the compensation board, the transfer is effected without such approval.²²

Under a provision of the Federal Employees' Compensation Act to the effect that a commission may require an employee or his legal representative

14. La.—Travelers Ins. Co. v. Crescent Forwarding & Transp. Co., App., 176 So. 654, reinstated 178 So. 886.

15. N.Y.—Commissioners of the State Insurance Fund v. Town of Howard, 31 N.Y.S.2d 910, 177 Misc. 820, affirmed 34 N.Y.S.2d 823, 263 App.Div. 1068, appeal denied 35 N.Y.S.2d 737, 264 App.Div. 828.

16. Wash.—State v. Cowlitz County, 262 P. 977, 146 Wash. 305.

17. U.S.—Dinardo v. Consumers Power Co., C.A.Mich., 181 F.2d 104, 71 C.J. p 1562 note 87.

18. S.C.—Taylor v. Mount Vernon-Woodberry Mills, 45 S.E.2d 809, 211 S.C. 414.

Va.—Stone v. George W. Helme Co., 37 S.E.2d 70, 184 Va. 1051, 71 C.J. p 1562 note 83.

19. Va.—Stone v. George W. Helme Co., supra, 71 C.J. p 1562 note 84.

20. U.S.—Matovac v. U. S., D.C.N.Y., 91 F.Supp. 247.

Ariz.—Industrial Commission v. Nevelle, 119 P.2d 934, 58 Ariz. 325. Kan.—Erb v. Atchison, T. & S. F. Ry. Co., 299 P.2d 35, 180 Kan. 60—Terrell v. Ready Mixed Concrete Co. of Kansas City, Kan., 258 P.2d 275, 174 Kan. 633.

N.J.—Culnen v. Public Service Interstate Transp. Co., 57 A.2d 246, 136 N.J.Law 637, applying New York law.

N.Y.—Marmet v. Rankins, 167 N.Y.S.2d 194, 4 A.D.2d 486—Lehman v. Hartke, 146 N.Y.S.2d 444, 286 App.

Div. 661—Eisenberg v. Louis Adler Realty Co., 78 N.Y.S.2d 875, 273 App.Div. 641, affirmed 86 N.E.2d 102, 299 N.Y. 572—Christison v. Wallace, 38 N.Y.S.2d 441, 265 App. Div. 937, appeal denied 39 N.Y.S.2d 619, 265 App.Div. 1001.

Bedsole v. Consolidated Edison Co. of N. Y., 118 N.Y.S.2d 192, 203 Misc. 194—Meyers v. Royce Haulage Corp., 76 N.Y.S.2d 301, 190 Misc. 777—Young v. State, 74 N.Y.S.2d 811, 190 Misc. 711, reversed on other grounds 78 N.Y.S.2d 39, 273 App.Div. 986—City of New York v. Steers & Menke, 4 N.Y.S.2d 292, 167 Misc. 566, affirmed 4 N.Y.S.2d 992, 254 App.Div. 669.

Ruopoli v. Geraci & Castagna, Inc., 140 N.Y.S.2d 464—Reyes v. Federal Adhesives Corp., 96 N.Y.S.2d 510.

71 C.J. p 1562 note 85.

Absolute assignment

(1) Generally.

N.Y.—Commissioners of State Insurance Fund v. E. T. Clark Carting Co., 86 N.Y.S.2d 313, 274 App.Div. 559—Skakandy v. State, 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886.

Ohio.—Hartford Acc. & Indem. Co. v. Procter & Gamble Co., 109 N.E.2d 287, 91 Ohio App. 573, applying New York law.

(2) On election by employee or dependents to proceed against employer instead of third party, assignment of cause of action against third party to insurance fund making compensation payments is ab-

solute one, notwithstanding rights of infants are involved.

N.Y.—Skakandy v. State, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886.

(3) Where workman takes compensation and fails to commence action against asserted wrongdoer within period prescribed in statute, claim is automatically assigned to one liable for payment of such compensation and fact that original claimant may, in certain contingencies, have interest in excess recovery to extent of two thirds does not alter absolute quality of assignment made.

N.Y.—Liberty Mut. Ins. Co. v. Canadian Pac. R. Co., 95 N.Y.S.2d 390, 196 Misc. 852.

(4) Apportionment and distribution of amount recovered see infra § 1042.

21. U.S.—Dinardo v. Consumers Power Co., C.A.Mich., 181 F.2d 104. Mass.—Meehan's Case, 56 N.E.2d 23, 316 Mass. 522—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631—Miller v. Richards, 26 N.E.2d 380, 305 Mass. 424—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435.

Mich.—Smith v. Port Huron Gas & Electric Co., 187 N.W. 292, 217 Mich. 519.

22. Tex.—Independent Eastern Torpedo Co. v. Herrington, 95 S.W.2d 377, 128 Tex. 17, 1108.

to assign any right of action he may have against a third-person wrongdoer, acceptance of compensation by an employee does not effect an assignment of such right of action to an employer,²³ and the employer has no right to bring an action against the tort-feasor without a formal assignment from the employee.²⁴ However, the failure of an employee to assign to the person liable to pay compensation, which assignment is, under an act, a condition precedent to the employee's right to compensation, as considered *infra* § 1011, does not defeat the transfer of his rights to the person liable for compensation where the employee has received the compensation.²⁵

Under a statutory provision authorizing an employee to elect to receive compensation or recover damages against a tort-feasor by giving notice of his choice to the employer and the compensation commission, and providing that the giving of notice to receive compensation shall operate as an assignment of the cause of action to the employer, the employer cannot recover from the tort-feasor in the absence of the notice from the employee.²⁶

Where the act effects the transfer of the cause of action, questions as to whether a cause of action in tort²⁷ or for wrongful death²⁸ is assignable, and as to the consent of the debtor or tort-feasor,²⁹ are determined by the provisions of the act, and rules against the splitting of causes of action, if the act provides for a partial assignment, yield to such provisions.³⁰ Also, where the state of the forum allows the assignment of a cause of action for personal injuries, as considered in Assignments § 33, the public policy of that state is not contravened by

the recognition therein of an assignment under the compensation law of another state.³¹

§ 1003. Exclusive or Concurrent Right as between Employer or Insurers and Employee or Dependents to Sue and Recover

- a. In general
- b. Double recovery and effect of judgment

a. In General

Whether an employer or insurer has an exclusive right, or a right concurrent with that of the employee or his personal representative, to bring an action against a tort-feasor depends on the applicable compensation statute.

Some compensation acts expressly recognize the right either of the employee or of the employer to sue the tort-feasor where the employer has paid, or has become obligated to pay, compensation.³² So, the fact that an insurer had assisted a deceased employee's heirs in maintaining a death action against the tort-feasor and had therein successfully asserted a lien for a death claim which it had paid does not preclude it, on the theory that it had split its cause of action, from maintaining a subsequent action against the tort-feasor to recover the medical and burial expenses which it had paid.³³

According to some cases, under a provision which subrogates an insurer to the rights of the employee against a third-person wrongdoer, the right of the insurer to sue such person becomes absolute and unqualified if the employee duly elects to take compensation;³⁴ where the employee has received com-

23. Mass.—Benoit v. Hathaway, 38 N.E.2d 329, 310 Mass. 362.

N.Y.—Wood v. Ford Garage Co., 293 N.Y.S. 999, 162 Misc. 87, affirmed 300 N.Y.S. 1358, 252 App.Div. 921. Pa.—Dotterer v. Nothstein, Com.Pl., 20 Lehl.J. 188.

24. N.Y.—Wood v. Ford Garage Co., 293 N.Y.S. 999, 162 Misc. 87, affirmed 300 N.Y.S. 1358, 252 App.Div. 921.

25. Utah.—Salt Lake City v. Industrial Commission, 17 P.2d 239, 81 Utah 213.

26. Fla.—Weathers, for Use and Benefit of Ocean Acc. & Guarantee Corp. v. Cauthen, 12 So.2d 294, 152 Fla. 420.

27. Ill.—Baker & Conrad v. Chicago Heights Const. Co., 4 N.E.2d 953, 364 Ill. 386—Lincoln Park Coal & Brick Co. v. Wabash Railway Co., 170 N.E. 8, 338 Ill. 82.

Alschuler v. Rockford Bolt & Steel Co., 48 N.E.2d 435, 318 Ill. App. 564.

Kan.—Wise v. Morgan-Mack Motor Co., 246 P.2d 308, 173 Kan. 372.

N.J.—Zurich General Acc. & Liability Ins. Co. v. Ackerman Bros., 11 A.2d 52, 124 N.J.Law 187.

N.M.—Kandelin v. Lee Moor Contracting Co., 24 P.2d 731, 37 N.M. 479.

N.Y.—McCue v. J. F. Shea Co., 24 N.Y.S.2d 307, 175 Misc. 557, affirmed 24 N.Y.S.2d 180, 260 App.Div. 946 —City of New York v. Steers & Menke, 4 N.Y.S.2d 292, 167 Misc. 566, affirmed 4 N.Y.S.2d 992, 254 App.Div. 669.

28. U.S.—Doleman v. Levine, App.D. C., 55 S.Ct. 741, 295 U.S. 221, 79 L.Ed. 1402—Aetna Life Ins. Co. v. Moses, App.D.C., 53 S.Ct. 231, 287 U.S. 530, 77 L.Ed. 477, 88 A.L.R. 647.

Ill.—Baker & Conrad v. Chicago Heights Const. Co., 4 N.E.2d 953, 364 Ill. 386.

29. N.M.—Kandelin v. Lee Moor Contracting Co., 24 P.2d 731, 37 N.M. 479.

30. N.M.—Kandelin v. Lee Moor Contracting Co., supra. Assignment of cause against one joint wrongdoer as not violative of rule on splitting of cause of action see supra § 994 b.

31. U.S.—Alexander v. Creel, D.C. Mich., 54 F.Supp. 652.

32. La.—Board of Com'rs of Port of New Orleans v. City of New Orleans By and Through Public Belt R. Commission, 65 So.2d 313, 223 La. 199.

Smith v. McDonough, App., 29 So.2d 813.

71 C.J. p 1563 note 8.

33. Cal.—Pacific Emp. Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 299 P.2d 923, 143 C.A. 2d 646.

34. Tex.—Brandon v. Texas Employers' Ins. Ass'n, Civ.App., 58

pensation, he has no cause of action against the tort-feasor,³⁵ and the wrongdoer may be subjected to only one action for damages.³⁶

Where, under the act, the employee or dependents of a deceased employee have a beneficial interest in the amount recoverable from such person if such amount is more than sufficient to indemnify the employer or insurer, as discussed *infra* § 1040, usually the right of the employer³⁷ or insurer³⁸ who is entitled to subrogation under the act is not exclusive, and the employee³⁹ or, in case of his death, his dependents or personal representative⁴⁰ has a concurrent right to bring the action.

Under an amendment to a statute providing for the subrogation of the compensation fund to the rights of an employee receiving compensation, even though the claim arose prior to the date of the amendment, an employee or his dependents, who had a claim, on that date, or thereafter, against a third party, have the exclusive right to bring the action.⁴¹

Under some acts permitting the employer or other person liable for compensation to enforce the liability of a person other than the employer, the employee or his personal representative has no property right in the maintenance of an action by the insurer,⁴² and the right to bring an action against the

wrongdoer belongs exclusively to the person who pays the compensation⁴³ for a specified time after the award.⁴⁴ After the expiration of the specified period the injured employee, his representative, or dependents may sue such third person as discussed *infra* § 1004; but even then the employer or insurer may also sue whether or not the employee, his representatives, or dependents sue.⁴⁵ However, under such a statute an insurer is not authorized to bring a death action where the entire cause of action for death was not transferred to it by the payment of compensation to only some of the persons who had a beneficial interest in the cause of action for death.⁴⁶

Where, under the act, the election to take, or the award of, compensation operates to assign, to the person liable to pay compensation, the entire cause of action, as considered *supra* § 996, after an election or award, the employee has no right of action⁴⁷ and only the person liable to pay compensation is entitled to sue.⁴⁸ A like rule has been recognized notwithstanding the act gives the employee a certain beneficial interest in a recovery by the employer.⁴⁹ Under such a statute an employer paying compensation for an employee's death may maintain a suit against a tort-feasor if the dependents of the employee who accept compensation would be entitled to the entire recovery if they brought the death action;⁵⁰ if their interest is less than the whole, the

S.W.2d 894—Schnick v. Morris, Civ.App., 24 S.W.2d 491.

Parties to action in general see *infra* §§ 1015-1021.

35. Tex.—Fort Worth Lloyds v. Haygood, 246 S.W.2d 865, 151 Tex. 149.

36. U.S.—Hutto v. Benson, D.C. Tenn., 110 F.Supp. 355, applying Texas law.

37. U.S.—Jenkins v. Westinghouse Elec. Co., D.C.Mo., 18 F.R.D. 267.
Pa.—Pennsylvania Turnpike Commission, to Use of Albright v. U. S. Fidelity & Guaranty Co., Com.Pl., 51 Dauph.Co. 256, affirmed 23 A.2d 416, 343 Pa. 543.
71 C.J. p 1562 note 97.

38. U.S.—Jenkins v. Westinghouse Elec. Co., D.C.Mo., 18 F.R.D. 267.
Tex.—Schnick v. Morris, Civ.App., 24 S.W.2d 491.

39. U.S.—Jenkins v. Westinghouse Elec. Co., D.C.Mo., 18 F.R.D. 267.
71 C.J. p 1562 note 99.

40. Pa.—Pennsylvania Turnpike Commission, to Use of Albright, v. U. S. Fidelity & Guaranty Co., 23 A.2d 416, 343 Pa. 543.
71 C.J. p 1562 note 1.

41. U.S.—Nelson v. Westland Oil Co., C.A.N.D., 181 F.2d 371.

In Nebraska

(1) Under prior law, right of employer to bring action was exclusive until he neglected or refused to bring action.

Neb.—O'Donnell v. Baker Ice Mach. Co., 205 N.W. 561, 114 Neb. 9.
71 C.J. p 1563 note 3.

(2) Prior to such neglect or refusal employee could not sue.

Neb.—O'Donnell v. Baker Ice Mach. Co., *supra*.

42. Mass.—Furlong v. Cronan, 26 N.E.2d 382, 305 Mass. 464—Case of Calligaris, 198 N.E. 607, 292 Mass. 397.

43. Action for death

Under provision authorizing employer to maintain action against tort-feasor, legislature intended to take right to sue on death claim away from personal representative of deceased, whose dependents were no longer interested in it, and set up new procedure for its enforcement against wrongdoer.

Ind.—Hall v. Pennsylvania Greyhound Lines, 96 N.E.2d 348, 121 Ind.App. 219.

44. U.S.—The Maine, 28 F.Supp. 578, affirmed Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., D.C.Md., 107 F.2d 373.
71 C.J. p 1563 note 6.

45. Md.—Western Maryland Ry. Co. v. Employers' Liability Assur. Corp., 161 A. 5, 163 Md. 97—State v. Francis, 134 A. 26, 151 Md. 147.

46. Mass.—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631.
Transfer of cause of action for death to insurer where dependents are not entitled to compensation see *supra* § 996 b.

47. Ariz.—Moseley v. Lily Ice Cream Co., 300 P. 958, 38 Ariz. 417.
71 C.J. p 1563 note 11 [b] (1).

48. Or.—King v. Union Oil Co. of California, 24 P.2d 345, 144 Or. 655, reheard 25 P.2d 1055, 144 Or. 655.
71 C.J. p 1563 note 11 [b].

49. U.S.—U. S. Fidelity & Guaranty Co. v. U. S. C.C.A.N.Y., 152 F.2d 46—Hunt v. Bank Line, C.C.A.Md., 35 F.2d 136.

D.C.—Moore v. Hechinger, 127 F.2d 746, 75 U.S.App.D.C. 391.

50. U.S.—Doleman v. Levine, App.D. C., 55 S.Ct. 741, 295 U.S. 221, 79 L. Ed. 1402—Aetna Life Insurance Co. v. Moses, D.C., 53 S.Ct. 231, 287 U.S. 530, 77 L.Ed. 477, 88 A.L.R. 647.

Extent of assignment of cause of action see *supra* § 996 b.

employer is not authorized to maintain the action for wrongful death,⁵¹ but he may, if necessary, institute appropriate proceedings to compel an administrator to bring the suit and account for the proceeds which the employer is entitled to receive.⁵²

Where, however, under a provision that the receipt of compensation shall operate as an assignment to the employer or insurer to the extent of the liability of the employer to the employee, the assignment is regarded as a partial assignment, as discussed supra § 996, the right of the employee to sue has been recognized.⁵³

Under a statute providing that a person taking compensation may bring an action against the tortfeasor for the damages sustained only within a specified period of time, and that thereafter the cause of action is assigned to the person liable for the payment of compensation, the person taking compensation may not bring the action after the assignment, as discussed infra § 1014, the cause of action then becomes the property of the person liable for the payment of compensation,⁵⁴ and only that person may bring the action.⁵⁵ Under such a statute, actions cannot be instituted by both the employee or his representative, and the employer or insurer, at the same time.⁵⁶

Even though the employer and the insurer have made voluntary payments to the employee, in the absence of an award, where the employee has filed a notice of intention to sue the third party, the employer has no rights against the third party on account of the employee's injury until he has succeeded in his own purported cause of action.⁵⁷

Under some acts a distinction is made, as to the exclusiveness of the right, between claims against persons other than the employer, who are bound by the act, and claims against persons other than the employer, who are not bound by the act.⁵⁸

Joint wrongdoers. The mere commencement of an action by an injured employee against one joint wrongdoer does not bar an action by the compensation insurer against the others.⁵⁹

b. Double Recovery and Effect of Judgment

Generally the payment or recovery of a judgment for plaintiff in an action by an employee or his personal representative against a tort-feasor is a bar to an action by the employer or insurer.

Where there is but one cause of action against the third-person wrongdoer, which is for the common benefit of both the employer and the employee or the dependents of a deceased employee, a bar to a subsequent action on the same cause of action by

51. U.S.—Doleman v. Levine, App. D.C., 55 S.Ct. 741, 295 U.S. 221, 79 L.Ed. 1402.

52. U.S.—Doleman v. Levine, 55 S. Ct. 741, 295 U.S. 221, 79 L.Ed. 1402.

Beneficial interest of employer see infra § 1041.

53. N.M.—Kandelin v. Lee Moor Contracting Co., 24 P.2d 731, 37 N.M. 379.
71 C.J. p 1563 note 14.

54. U.S.—Alexander v. Creel, D.C. Mich., 54 F.Supp. 652, applying New York law.

N.Y.—Skakandy v. State, 80 N.Y.S. 2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886—Nelson v. Buffalo Niagara Elec. Corp., 36 N.Y.S.2d 205, 264 App.Div. 941, affirmed 55 N.E.2d 371, 292 N.Y. 600.

Schulze v. Park Ave. Estates, 143 N.Y.S.2d 677—Jacoby v. Chemical Bank & Trust Co., 65 N.Y.S.2d 821.

55. Kan.—Elam v. Bruenger, 193 P. 2d 225, 165 Kan. 31.

Prior to amendment of Michigan act by Pub.Acts 1952, No. 155, effective Sept. 18, it was held that only the employer may bring the action.

U.S.—Milan v. Kausch, C.A.Mich., 194 F.2d 263.

In New York

(1) The rule of the text has been followed.

N.Y.—Marmet v. Rankins, 167 N.Y.S. 2d 194, 4 A.D.2d 485—Skakandy v. State, 80 N.Y.S.2d 849, 274 App. Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886.

Commissioners of State Ins. Fund v. Farrand Optical Co., 58 N.Y.S.2d 317, 135 Misc. 976, affirmed 60 N.Y.S.2d 277, 270 App. Div. 805, reversed on other grounds 68 N.E.2d 506, 295 N.Y. 493—Lappin v. National Container Corp., 37 N.Y.S.2d 800, 179 Misc. 109.

(2) Before insurer can bring action against third person who has allegedly caused claimant's injury, insurer must show that claimant has failed to commence action against third person within time limited by compensation law.

N.Y.—Employers Liability Assur. Corp. v. Fisher, 13 N.Y.S.2d 902.

(3) The same result was reached under a prior statute depriving employee of rights against tort-feasor where he had elected to receive compensation.

N.Y.—O'Brien v. Lodi, 157 N.E. 925, 246 N.Y. 46.

71 C.J. p 1563 note 11 [a].

56. Kan.—Sundgren v. Topeka

Transp. Co., 283 P.2d 444, 178 Kan. 83—Wise v. Morgan-Mack Motor Co., 246 P.2d 308, 173 Kan. 372—Elam v. Bruenger, 193 P.2d 225, 165 Kan. 31.

Effect of barred proceeding by employee

Where employee's action is barred, by reason of its assignment to insurer, pendency of his action does not require that complaint by insurer be dismissed under theory that there is another action pending.

N.Y.—Liberty Mut. Ins. Co. v. Brown & Matthews, 98 N.Y.S.2d 804.

57. U.S.—Culley v. Willard, D.C.N. Y., 146 F.Supp. 421.

58. Minn.—McGuigan v. Allen, 206 N.W. 714, 165 Minn. 390.
71 C.J. p 1563 note 15 [b].

Prior to repeal of Illinois act by Ill.Rev.Stat.1951, chap. 48, § 138-172, the rule of the text was followed.

Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealer's Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651.

Melohn v. Ganley, 100 N.E.2d 780, 344 Ill.App. 316.

71 C.J. p 1563 note 15 [a].

59. N.Y.—Commissioners of State Ins. Fund v. Farrand Optical Co., 68 N.E.2d 506, 295 N.Y. 493.

the employer or insurer is presented by the payment⁶⁰ or recovery⁶¹ of a judgment for plaintiff in an action prosecuted in the name of the employee against the tort-feasor, or the payment⁶² or recovery⁶³ of a judgment for plaintiff in an action prosecuted in the name of the personal representative of a deceased employee for the death of the latter. Where the employee has recovered full damages in an action against the wrongdoer, the right of the employer to maintain an action against the latter for the amount of compensation paid has been denied notwithstanding the act gives the employer the right to indemnity from the third person and to subrogation.⁶⁴

Even where the act permits concurrent actions by the employer or insurer and by the employee or dependents, in no event can there be more than one recovery for the same tort.⁶⁵

There is authority for the view that, while, if an administrator of a deceased employee duly elects to bring an action against a third person whose negligence caused the death, such third person cannot again be subjected to an action by the employer or insurer,⁶⁶ a judgment for the deceased employee's administrator in an action against the wrongdoer, commenced after a compensation agreement was ap-

proved and payments were made thereunder, is not a bar to the employer's right to recover from the wrongdoer, at least where the employer was not a party to the action by the administrator.⁶⁷

The fact that an insurer had assisted a deceased employee's heirs in maintaining a death action against the tort-feasor and had therein successfully asserted a lien for a death claim which it had paid does not preclude it, on the theory that it is subjecting the tort-feasor to a double liability, from maintaining a subsequent action against the tort-feasor to recover the medical and burial expenses which it had paid.⁶⁸

§ 1004. Waiver or Loss of Right by Employer or Insurer and Failure or Refusal to Sue

The right of an employer or its insurer to proceed against a tort-feasor for an injury to an employee receiving compensation may be waived, or lost by estoppel, as by failure to sue or to sue within the required time.

The benefit of, or rights acquired under, provisions of the compensation acts relating to the transfer to an employer or its compensation insurer of an employee's right of action against a tort-feasor may be waived by the employer or insurer,⁶⁹ or lost

60. Ga.—Travelers Ins. Co. v. Georgia Power Co., 181 S.E. 111, 51 Ga. App. 579.

Pa.—Moltz, to Use of Royal Indemnity Co. v. Sherwood Bros., 176 A. 842, 116 Pa.Super. 231.

In New York

(1) The rule of the text has been followed.

N.Y.—Commissioners of State Ins. Fund v. Farrand Optical Co., 68 N.E.2d 506, 295 N.Y. 493.

(2) A decision involving the recovery and payment of judgment for medical, hospital, and funeral expenses is to the contrary effect.

N.Y.—American Mut. Liability Ins. Co. of Boston v. Nisbet, 282 N.Y. S. 371, 245 App.Div. 895.

61. U.S.—Magee v. McNany, D.C. Pa., 10 F.R.D. 5.

Ill.—Geneva Const. Co. v. Martin Transfer & Storage Co., 114 N.E. 2d 906, 351 Ill.App. 289, affirmed 122 N.E.2d 540, 4 Ill.2d 273.

N.C.—Corpus Juris cited in Lovette v. Lloyd, 73 S.E.2d 886, 891, 236 N. C. 663.

Okl.—Oklahoma City v. Caple, 105 P. 2d 209, 187 Okl. 600.

Or.—Cary v. Burris, 127 P.2d 126, 169 Or. 24.

71 C.J. p 1564 note 16.

Action against employee or third party

Tex.—Otis Elevator Co. v. Allen, Civ. App., 185 S.W.2d 117, affirmed in

part and reversed in part on other grounds 187 S.W.2d 657, 143 Tex. 607.

Prior to repeal of Illinois act by Ill.Rev.Stat.1951, chap. 48, § 138-172, where third party was not under statute, rule of text was followed.

Ill.—Gones v. Fisher, 122 N.E. 95, 286 Ill. 606.

Melohn v. Ganley, 100 N.E.2d 780, 344 Ill.App. 316.

62. N.C.—Whitehead & Anderson v. Branch, 17 S.E.2d 637, 220 N.C. 507.

63. Minn.—McGuigan v. Allen, 206 N.W. 714, 165 Minn. 390.

71 C.J. p 1564 note 17.

Employer making payment into governmental fund in absence of person entitled to compensation cannot sue after personal representative has recovered on cause of action against tort-feasor.

U.S.—Terminal Shipping Co. v. Branham, D.C.Md., 47 F.Supp. 561, affirmed Branham v. Terminal Shipping Co., 136 F.2d 655.

Judgment for less than compensation paid

Verdict and judgment in action by administrator fixed common-law liability of third-party tort-feasor for death of employee and limited indemnity to which employer's insurer was entitled, though it was required to pay much larger amount of compensation.

Ky.—National Biscuit Co. v. Employers Mut. Liability Ins. Co., 231 S.W.2d 52, 313 Ky. 305.

64. Iowa.—Southern Surety Co. v. Chicago, St. P., M. & O. Ry. Co., 174 N.W. 329, 187 Iowa 357.

65. La.—Todd-Johnson Dry Docks v. City of New Orleans, App., 55 So.2d 650—Breaux v. Roussell, App., 151 So. 267.

Md.—State v. Francis, 134 A. 26, 151 Md. 147.

66. Mich.—Dettloff v. Hammond, Standish & Co., 161 N.W. 949, 195 Mich. 117.

67. Mich.—City of Grand Rapids v. Crocker, 189 N.W. 221, 219 Mich. 178.

68. Cal.—Pacific Emp. Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 299 P.2d 928, 143 C.A.2d 646.

69. U.S.—Magee v. McNany, D.C. Pa., 10 F.R.D. 5, applying New York law.

Okl.—L. B. Jackson Drilling Co. v. Prichard, 308 P.2d 284.

71 C.J. p 1564 note 22.

Effect of failure to intervene in action by employee against wrongdoer see infra § 1021.

Authorization of representation by claimant's attorney

Where state insurance fund by letter authorized claimant's attorney to represent interest of state in at-

by estoppel,⁷⁰ and if, by an agreement between the employer and the employee, the right to bring an action against the tort-feasor is left with the employee, the tort-feasor may not complain.⁷¹ However, where a cause of action has been assigned by operation of law to an employer's compensation insurer, the employer cannot disturb the insurer's right of action by any act to which the insurer is not a party.⁷²

A provision permitting a compensation beneficiary or his representative to enforce in his own name the liability of a person other than the employer where the employer or insurer fails to sue within a specified time after written demand by the compensation beneficiary is to be liberally construed to effect the beneficial purpose intended and to prevent a failure of remedy;⁷³ on failure of the employer or insurer to bring action against the person other than the employer within the specified time after demand, the right of action passes to the employee,⁷⁴ and the employee,⁷⁵ or, in case of his death, his personal representative,⁷⁶ may prosecute the action in his own name, the employer retaining only an interest in the proceeds where the act provides for an accounting by the employee.⁷⁷

Failure of the employer to bring action within the specified time after demand by the employee is deemed an express waiver of the employer's right of action.⁷⁸ In such case, however, the employer's right of action continues until and unless he fails to pur-

sue his remedy for the specified time after demand.⁷⁹

Under some acts permitting the employer or other person liable for compensation to enforce the liability of a person other than the employer, the person who pays compensation has the exclusive right for a specified time after an award to bring an action against the tort-feasor, as discussed supra § 1003; after the expiration of the specified period the injured employee, his representative, or dependents may sue such third person.⁸⁰

Even in the absence of any provision for a demand by the employees or dependents, under some statutory provisions the right of the injured employee⁸¹ or of the dependents of a deceased employee⁸² to sue on the employer's or insurer's refusal or failure to sue has been recognized.

On the other hand, where, under the act, the right to sue a third person is transferred to the insurer on the payment of compensation, the view has been taken that the insurer is not under a duty to prosecute an action against a person other than the employer,⁸³ notwithstanding a provision giving the employee the right to a share in the amount of recovery from such person in excess of the compensation paid;⁸⁴ whether or not the insurer⁸⁵ or the employer, if the transfer is to the employer,⁸⁶ will sue is for the insurer or employer to determine, and an employee who accepts compensation may not complain that the claim against the third party was al-

tempting to procure reimbursement for amounts of compensation paid, fund waived its rights to bring action against third-party tort-feasor and would be bound by judgment for or against claimant suing third-party to extent of fund's interests.

Utah.—Rogalski v. Phillips Petroleum Co., 282 P.2d 304, 3 Utah 2d 203.

70. Pa.—Sullivan v. J. B. Fluke & Co., Inc., 14 Pa.Dist. & Co. 787.

71. Neb.—Thomas v. Otis Elevator Co., 172 N.W. 53, 103 Neb. 401. 71 C.J. p 1564 note 24.

72. N.C.—Hinson v. Davis, 17 S.E. 2d 348, 220 N.C. 380.

73. Me.—Foster v. Congress Square Hotel Co., 145 A. 400, 128 Me. 50, 67 A.L.R. 239.

74. Me.—Fournier v. Great Atlantic & Pacific Tea Co., 148 A. 147, 128 Me. 393, 68 A.L.R. 481.

Wis.—Martell v. Kutcher, 216 N.W. 522, 195 Wis. 19.

75. Tex.—Independent Eastern Torpedo Co. v. Herrington, 95 S.W.2d 377, 123 Tex. 17.

71 C.J. p 1564 note 27.

Right of employee to sue before ex-

piration of period where employer waives right see infra § 1014.

76. Wis.—Theby v. Wisconsin Power & Light Co., 222 N.W. 826, 197 Wis. 601, reheard 223 N.W. 791, 197 Wis. 601.

71 C.J. p 1564 note 28.

77. Wis.—Martell v. Kutcher, 216 N.W. 522, 195 Wis. 19.

Beneficial interest of employer or insurer in general see infra § 1041.

78. Me.—Fournier v. Great Atlantic & Pacific Tea Co., 148 A. 147, 128 Me. 393, 68 A.L.R. 481.

79. Me.—Fournier v. Great Atlantic & Pacific Tea Co., supra.

80. U.S.—Bagnet v. Springfield Sand & Tile Co., D.C.Mass., 64 F. Supp. 768.

Fla.—Holmes v. Carroll, 75 So.2d 203 —Brinson v. Southeastern Utilities Service Co., 72 So.2d 37.

71 C.J. p 1565 note 33.

81. U.S.—Jay v. Chicago Bridge & Iron Co., C.C.A.Utah, 150 F.2d 247. Magee v. McNany, D.C.Pa., 10 F.R.D. 5.

Idaho.—Lake v. State, 227 P.2d 361, 71 Idaho 107.

Tex.—Independent Eastern Torpedo

Co. v. Herrington, 95 S.W.2d 377, 128 Tex. 17—Houston Gas & Fuel Co. v. Perry, 91 S.W.2d 1052, 127 Tex. 102.

71 C.J. p 1565 note 35.

82. Tex.—Harbour v. Graham Mfg. Co., Civ.App., 47 S.W.2d 700.

71 C.J. p 1565 note 36.

Making employer party defendant see infra § 1019 b.

83. N.Y.—Monti v. Gimbel Bros., 82 N.Y.S.2d 781, 192 Misc. 811, affirmed 89 N.Y.S.2d 238, 275 App. Div. 845, appeal denied 91 N.Y.S. 2d 758, 275 App.Div. 1005.

71 C.J. p 1565 note 37.

84. Mass.—Whalen v. Athol Mfg. Co., 136 N.E. 600, 242 Mass. 547.

Beneficial interest of employee generally see infra § 1040.

85. Mass.—Meehan's Case, 56 N.E. 2d 23, 316 Mass. 522—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631—Whalen v. Athol Mfg. Co., 136 N.E. 600, 242 Mass. 547.

N.Y.—Skakandy v. State, 80 N.Y.S. 2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 386.

Corst v. Jenkins, 66 N.Y.S.2d 98.

86. U.S.—Hunt v. Bank Line, C.C.A. Md., 35 F.2d 136.

lowed to become barred by lapse of time.⁸⁷ An employee has no legal right to require an insurer, to whom the right to sue has been transferred, to bring an action against the third party⁸⁸ or to prosecute it diligently.⁸⁹ Under such a statute, the refusal of the insurer or employer to bring an action does not permit the maintenance of an action by the employee⁹⁰ for the benefit of himself and the insurer.⁹¹

Waiver on failure of employee to elect. Notwithstanding a provision that failure on the part of the injured employee to file with the employer within a specified time notice of the employee's intention to pursue the employee's remedy against the negligent third person shall operate as an election to take compensation and as an assignment of any cause of action in tort against any other person for the injury, the employer may waive its right to proceed against the third person where the employee has so failed to elect⁹² and permit the employee to sue,⁹³ and the third person has no ground to complain of such waiver.⁹⁴

Assignment by employer or insurer as waiver. According to some cases, an assignment by the employer or insurer to the employee operates as an express waiver of the right to bring the action,⁹⁵ even though the attempted reassignment to the employee is ineffective as an assignment.⁹⁶

Denial of liability for compensation and of interest in claim against third person. An employer may, by a denial of liability for compensation and of an interest in the claim against the third person, lose the right to bring an action against a third person who has caused the death of an employee.⁹⁷

Assisting employee or dependents to recover from third person. An employer who, having knowledge of negotiations on a claim between a deceased em-

ployee's dependents and the tort-feasor, advises one of the dependents in respect of a settlement of the claim of the dependents against the tort-feasor, waives whatever rights it may once have had against the tort-feasor.⁹⁸ A person who has paid compensation and who assists in compelling the third person to pay full damages in an action by the injured employee is estopped to demand indemnity from such third person.⁹⁹ However, the fact that the insurer had assisted an employee's heirs in maintaining a death action against a tort-feasor and had successfully asserted therein a lien for a death claim which it had paid does not preclude it from maintaining a subsequent action against the tort-feasor to recover the medical and funeral expenses which it had paid, on the theory that it had waived its right to recover that amount by not asserting it in the death action,¹ or on the theory that it had become estopped to pursue the action by procuring partial recoupment.²

Employer not complying with act. An employer who has failed to obtain insurance is not, under at least one act, subrogated to the right of action against a third person.³

Lien of employer or insurer. The right to a lien, under an act providing that the court shall, on application, allow as a first lien against any judgment of the employee against a person other than the employer, the amount of the employer's expenditures for compensation, may be waived by an employer⁴ or by an insurer otherwise entitled to assert the lien;⁵ and there is a waiver by an employer where, after receiving the required statutory notice of the commencement of an action against such other by the employee, he fails to assert, and timely to apply for, the allowance of his lien.⁶ So the right to assert the lien may be lost by estoppel by con-

87. Del.—Frank C. Sparks Co. v. Huber Baking Co., 96 A.2d 456, 9 Terry 9.

88. Mass.—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631—Murphy v. Liberty Mut. Ins. Co., 2 N.E.2d 490, 294 Mass. 505.

89. Mass.—Murphy v. Liberty Mut. Ins. Co., supra.

90. U.S.—Hunt v. Bank Line, C.C.A. Md., 35 F.2d 136.
71 C.J. p 1565 note 41.

91. Mass.—Whalen v. Athol Mfg. Co., 136 N.E. 600, 242 Mass. 547.

92. Kan.—Jolley v. United Power & Light Corporation, 289 P. 962, 131 Kan. 102.

93. Kan.—Jolley v. United Power & Light Corporation, supra.

94. Kan.—Jolley v. United Power & Light Corporation, supra.
71 C.J. p 1565 note 45.

95. Wis.—Martell v. Kutcher, 216 N.W. 522, 195 Wis. 19.
Assignment by employer in general see infra § 1006.

96. U.S.—Jay v. Chicago Bridge & Iron Co., C.C.A. Utah, 150 F.2d 247.

97. Or.—Rorvik v. North Pacific Lumber Co., 190 P. 331, 195 P. 163, 99 Or. 58.
71 C.J. p 1565 note 48.

98. U.S.—Bituminous Trucking & Equipment Co. for Use of Liberty Mut. Ins. Co. v. Delta Air Lines, C.A.7, 189 F.2d 307.
Settlement or release by employee or personal representative generally see infra § 1007.

99. R.I.—McArthur v. Dutee W. Flint Oil Co., 146 A. 484, 50 R.I. 226.

1. Cal.—Pacific Emp. Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 299 P.2d 928, 143 C.A. 2d 646.

2. Cal.—Pacific Emp. Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co., supra.

3. N.D.—State v. Hughes Oil Co., 226 N.W. 586, 58 N.D. 581.
71 C.J. p 1565 note 50.

4. Cal.—Jacobsen v. State Industrial Accident Commission, 299 P. 66, 212 C. 440.

5. Cal.—Morris v. Standard Oil Co., 247 P. 583, 77 C.A. 720.

6. Cal.—Zurich General Accident & Liability Ins. Co. v. State Indus-

duct in the case of an employer,⁷ or in the case of an insurer otherwise entitled to assert the lien.⁸

The assertion of a lien, on an employee's possible recovery, by a compensation insurer, is not inconsistent with its later assertion of ownership of the cause of action based on the employee's failure to commence an action against the tort-feasor.⁹

Deprivation of insurer's rights by a clause in a contract between a stevedoring company and a shipowner that, in insurance policies, the shipowner shall be named as an additional insured, or the insurer shall waive all right of subrogation against the shipowner, cannot be accomplished in the absence of a showing of such provision as part of the policy,¹⁰ or unless the contract was brought home to the insurance company.¹¹

§ 1005. Settlement or Release by Employer or Insurer

Subject to statutory requirements, an employer or insurer to whom an employee's rights against a tort-feasor have passed may generally release or settle the claim, or compromise a judgment recovered against the tort-feasor.

Where a compensated employee's cause of action against a tort-feasor has passed to an employer or its insurer, that party may release or settle the

claim,¹² without the consent of the employee or his dependents.¹³ Also, the right of the employer or its insurer to dismiss the action and discharge the claim has been recognized.¹⁴

It may be required that the compromise or settlement of a claim be approved by an authorized judge¹⁵ or by the compensation board.¹⁶ Under some acts, the insurer does not have the right to adjust or compromise the liability of a person other than the employer without notice to the injured employee or his beneficiaries and the approval of the industrial accident board.¹⁷

Where both the employer and the employee have a right of action against the third-party tort-feasor, as considered supra § 1003, a settlement by the employer cannot affect the right of the employee.¹⁸

An insurer to whom a cause of action is assigned can compromise a judgment recovered against the tort-feasor¹⁹ without the consent of the employee.²⁰ Where judicial approval of the compromise is not required, a compromise of a judgment recovered against a tort-feasor in a death action need not be approved by the surrogate, even though infants' rights are involved, because the duties and prerogatives of the assignee are defined by the compensation law and not by the decedent estate law or the surrogate's court act.²¹

- trial Accident Commission, 299 P. 70, 212 C. 451.
71 C.J. p 1566 note 54.
Notice of commencement of action in general see supra § 1000.
7. Cal.—*Jacobsen v. State Industrial Accident Commission*, 299 P. 66, 212 C. 440.
8. Cal.—*Morris v. Standard Oil Co.*, 247 P. 583, 77 C.A. 720.
9. In New York
(1) The rule of the text has been followed.
N.Y.—*Olker v. Salomone*, 130 N.Y.S. 2d 229, 283 App.Div. 948, reargument and appeal denied 132 N.Y.S. 2d 338, 283 App.Div. 1103.
Peritore v. Niagara Mohawk Power Corp., 157 N.Y.S.2d 723, 4 Misc.2d 202.
(2) There is, however, a decision to the contrary effect.
N.Y.—*Calhoun v. West End Brewing Co.*, 43 N.Y.S.2d 830, 182 Misc. 423, affirmed 56 N.Y.S.2d 105, 269 App.Div. 398.
10. U.S.—*Matovac v. U. S.*, D.C.N.Y., 91 F.Supp. 247.
11. U.S.—*Matovac v. U. S.*, supra.
12. U.S.—*Doleman v. Levine*, 55 S. Ct. 741, 295 U.S. 221, 79 L.Ed. 1402.
The *Etna*, C.C.A.Pa., 138 F.2d 37.

- Czaplicki v. The Hoegh Silvercloud*, D.C.N.Y., 133 F.Supp. 358.
71 C.J. p 1566 notes 58, 59.
Conduct of litigation by employer or insurer in general see supra § 994.
Amount for which settlement made by employer or insurer see infra § 1040.
13. N.Y.—*Marmet v. Rankins*, 167 N.Y.S.2d 194, 4 A.D.2d 485—*Skakandy v. State*, 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E. 2d 804, 298 N.Y. 886.
Commissioners of State Ins. Fund v. E. T. Clark Carting Co., 86 N.Y.S.2d 313.
14. Me.—*Travelers' Ins. Co. v. Foss*, 130 A. 210, 124 Me. 399.
71 C.J. p 1566 note 58.
15. Fla.—*Lovejoy Co. v. Ackis*, 16 So.2d 297, 153 Fla. 876.
Wis.—*Wisconsin Mutual Liability Co. v. Industrial Commission*, 209 N.W. 697, 190 Wis. 598.
71 C.J. p 1566 note 59 [a] (1).
16. Wis.—*Wisconsin Mutual Liability Co. v. Industrial Commission*, supra.
71 C.J. p 1566 note 59 [a] (2).
Right of employee to hearing
Employee who received compensation from insurer was not entitled to be heard as of right with respect to approval of settlement, by board, of insurer's action against third

- party, for sum which was insufficient to reimburse insurer.
Mass.—*Case of Calligaris*, 198 N.E. 607, 207 Mass. 397.
17. Tex.—*Independent-Eastern Torpedo Co. v. Herrington*, Civ.App., 59 S.W.2d 222, 1108.
71 C.J. p 1566 note 60.
18. La.—*Smith v. McDonough*, App., 29 So.2d 818.
19. N.Y.—*Marmet v. Rankins*, 167 N.Y.S.2d 194, 4 A.D.2d 485—*Skakandy v. State*, 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E. 2d 804, 298 N.Y. 886.
Amount for which compromise made by employer or insurer see infra § 1040.
20. N.Y.—*Marmet v. Rankins*, 167 N.Y.S.2d 194, 4 A.D.2d 485—*Skakandy v. State*, 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E. 2d 804, 298 N.Y. 886.
21. N.Y.—*Skakandy v. State*, supra.
Matter for disposition by board
The question whether insurer paying compensation to deceased employee's dependents, which sued third party, had authority to settle verdict for lesser sum without order from surrogate or consent of dependents was matter for disposition by board and was not within jurisdiction of court of claims.

*The effect of an illegal compromise, as where it was not approved by the compensation board, is to leave the claim unimpaired.*²²

§ 1006. Assignment by Employer or Insurer

Authorities differ as to whether an employer or insurer may assign an employee's cause of action against a tort-feasor.

Although the assignability of a cause of action against a tort-feasor by a subrogee of the injured employee or his dependents has been denied,²³ under other statutory provisions the right of an employer²⁴ or an insurer²⁵ to assign a right of action has been recognized.

In such case the assignment operates as an express waiver of the employer's right to bring the action, as considered supra § 1004, and the employer's assignee is the real party in interest and may sue thereon.²⁶ An attempted assignment by an insurer does not transfer anything where the insurer has not acquired any rights against the third per-

son.²⁷

§ 1007. Settlement or Release by Employee or Personal Representative

Generally, a settlement by an employee of his cause of action against a tort-feasor does not affect the rights of the employer or insurer to recover from the tort-feasor.

The right of an employee who receives compensation to settle an action, brought by him against a tort-feasor, without the consent or approval of his employer or the employer's compensation insurer, has been recognized;²⁸ but where an award of compensation operates as an assignment to an insurer, the right of the employee who has received compensation to settle the action against the wrongdoer has been denied.²⁹

According to some cases, a settlement between an employee and a third person, without the consent of the employer or its insurer, does not destroy,³⁰ or otherwise affect,³¹ its right of recovery against a

N.Y.—*Skakandy v. State*, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886.

22. Mass.—*Murphy v. Liberty Mut. Ins. Co.*, 2 N.E.2d 490, 294 Mass. 505.

23. Agreement between employee or dependent and insurer changing statutory amount of reimbursement to which insurer entitled see *infra* § 1041.

In New York

(1) The right of an employee to have the cause of action reassigned to him has been denied.

N.Y.—*Olker v. Salomone*, 130 N.Y.S.2d 229, 233 App.Div. 948.

Ruopoli v. Geraci & Castagna, Inc., 140 N.Y.S.2d 464.

(2) There is, however, a decision to the contrary effect concerning reassignment by compensation insurer.

U.S.—*Magee v. McNany*, D.C.Pa., 10 F.R.D. 5, applying New York law.

(3) Reassignment to employee of part of recovery see *infra* § 1041.

In Utah

(1) The rule of the text has been followed.

U.S.—*Jay v. Chicago Bridge & Iron Co.*, C.C.A.Utah, 150 F.2d 247.

Utah.—*Johanson v. Cudahy Packing Co.*, 152 P.2d 98, 107 Utah 114.

(2) Earlier decisions were to the contrary effect.

Utah.—*Johanson v. Cudahy Packing Co.*, 120 P.2d 281, 101 Utah 219.

24. Wis.—*Frankfort Gen. Ins. Co. of Frankfort-on-the-Main*, Ger-

many, *v. City of Milwaukee*, 159 N.W. 581, 164 Wis. 77.

71 C.J. p 1566 note 61.

Municipal corporation

Wis.—*Martell v. Kutcher*, 216 N.W. 522, 195 Wis. 19.

71 C.J. p 1566 note 63.

25. Tex.—*Foster v. Langston*, Civ. App., 170 S.W.2d 250.

71 C.J. p 1566 note 62.

26. U.S.—*Haslam v. Trailways of New England*, D.C.Conn., 59 F. Supp. 441.

71 C.J. p 1567 note 65.

27. Wis.—*Bernard v. Jennings*, 244 N.W. 589, 209 Wis. 116.

71 C.J. p 1567 note 67.

28. Minn.—*Lang v. William Bros. Boiler & Mfg. Co., Manufacturers & Merchants Indem. Co., Intervenor*, 85 N.W.2d 412.

Effect of settlement and the like on employee's right to compensation see *supra* § 395.

Settlement as acknowledgment of liability of third person see *infra* § 1010.

29. N.Y.—*O'Brien v. Lodi*, 157 N.E. 925, 246 N.Y. 46.

30. Ky.—*Napier v. John P. Gorman Coal Co.*, 45 S.W.2d 1064, 242 Ky. 127.

71 C.J. p 1567 note 70.

In California

(1) The rule of the text has been followed.

Cal.—*Papineau v. Industrial Accident Commission of State of California*, 187 P. 108, 45 C.A. 181.

(2) However, there is authority to the contrary effect where settlement was for entire amount of damages sustained by employee.

Cal.—*State Compensation Ins. Fund, v. Thackery*, 22 P.2d 250, 132 C.A. 10.

71 C.J. p 1568 note 77.

In Pennsylvania

(1) Third party, who has notice of employer's or insurer's subrogation right under compensation law, may not, by settlement with employee, deprive employer or insurer of such right.

Pa.—*Broderick v. Great Lakes Cas. Co.*, 33 A.2d 653, 152 Pa.Super. 449.

71 C.J. p 1567 note 70 [a] (1).

(2) It seems, however, that an employer who claims to be subrogated must show that the third person wrongdoer had knowledge of the employment and of the amounts of compensation paid, or was acquainted with such facts as would, if followed up, lead to such knowledge, otherwise the employer may lose his right to subrogation by laches where the wrongdoer in good faith settles with the employee.

Pa.—*Smith v. Yellow Cab Co.*, 135 A. 858, 288 Pa. 85.

Meade v. Pennsylvania R. R. Co., 99 Pittsb.Leg.J. 307.

31. La.—*Smith v. McDonough*, App. 29 So.2d 818.

Minn.—*Lang v. William Bros. Boiler & Mfg. Co., Manufacturers & Merchants Indem. Co., Intervenor*, 85 N.W.2d 412.

Mo.—*Everard v. Woman's Home Companion Reading Club*, 122 S.W.2d 51, 234 Mo.App. 760.

Neb.—*Hugh Murphy Const. Co. v. Serck*, 177 N.W. 747, 104 Neb. 398.

Tex.—*Traders & General Ins. Co. v.*

third person; and the employer's right to have questions of liability and recovery adjudicated remains where the settlement was for less than its liability to the employee under the compensation act.³²

Furthermore, an employer who has made compensation and medical payments, without an award, is entitled to maintain an action for reimbursement against a tort-feasor who, with notice of the employer's claim, has settled the employee's action against it,³³ and this rule is applicable to an insurer's right to recover, from a tort-feasor, for medical treatment furnished to an injured employee who did not claim compensation.³⁴

The rule as to the effect of a settlement applies where a settlement is made without the requisite statutory consent³⁵ of the employer³⁶ or the insurer.³⁷

Where the act provides that the making of a claim for compensation shall operate as an assignment, a settlement between the employee and the third person is a nullity in so far as the employer or insurer is concerned, where the employee has made a valid claim for compensation.³⁸

Under a statute requiring an employee to give the employer a notice of election to receive com-

pensation or to proceed to recover damages against the tort-feasor, his release of the liability of the tort-feasor without having given such notice does not affect the right of the employer or insurer to recover from the tort-feasor.³⁹

The effectiveness of a settlement between the employee and the third person has, however, been recognized⁴⁰ where the required consent was obtained.⁴¹

Employee's covenant not to sue. The view has been expressed that a covenant of an employee not to sue a third person does not deprive the employer⁴² or the insurer⁴³ of any right of subrogation.

Void or voidable settlement. While a settlement between an employee and a third person without notice to the employer may be voidable at the election of the employer,⁴⁴ it is not necessarily void,⁴⁵ and the employee may not successfully assert the invalidity of the settlement where the result of invalidity would be injurious to the interests of the employer.⁴⁶

Proceeds of settlement subject to employer's right to reimbursement. The employer's right to reimbursement may extend to the amount paid by the tort-feasor to the injured employee in voluntary

West Texas Utilities Co., 165 S.W. 2d 713, 140 Tex. 57.

Wis.—Doyle v. Teasdale, 57 N.W.2d 381, 263 Wis. 323.
71 C.J. p 1567 note 72.

In Georgia

(1) Where employee received compensation for injuries resulting from negligence of defendants, insurer was entitled to sue defendants to recover compensation, notwithstanding defendants had paid larger amount to employee in settlement of his claim against them.

Ga.—General Acc. & Fire & Life Assur. Corp. v. John P. King Mfg. Co., 3 S.E.2d 841, 60 Ga.App. 281.

(2) Employer of injured employee and compensation insurer were not entitled to subrogation of employee's rights against tort-feasor, where employee had received money from tort-feasor, not in payment of a legal liability resulting from an adjudication in a lawsuit, but in a settlement with tort-feasor.

Ga.—Lumbermens Mut. Casualty Co. v. Babb, 19 S.E.2d 550, 67 Ga.App. 161.

32. Ky.—Whitney v. Louisville & N. R. Co., 177 S.W.2d 139, 296 Ky. 381.

33. N.Y.—Jarka Corp. v. Fireman's Fund Indem. Co., 142 N.Y.S.2d 869, 286 App.Div. 148, appeal denied 145 N.Y.S.2d 313, 286 App.Div.

1003, appeal dismissed 131 N.E.2d 903.

34. N.Y.—Butchers' Mut. Casualty Co. of New York v. Emerald Cab Corp., 19 N.Y.S.2d 685, 174 Misc. 1.
Tenn.—U. S. Fidelity & Guaranty Co. v. Union Ry. Co., 137 S.W.2d 615, 132 Tenn. 412.
71 C.J. p 1567 note 72 [c] (1).

35. Dismissal of action held not compromise

If claimant was mentally and physically incapable of prosecuting her third-party action, and dismissal of action for failure to prosecute was without her fault, dismissal was not "compromise," which envisages, a voluntary act, within statute requiring consent to compromise.

N.Y.—Husing v. Medical Laboratories, 135 N.Y.S.2d 157, 285 App. Div. 13.

36. Conn.—U. S. Fidelity & Guaranty Co. v. New York, N. H. & H. R. Co., 125 A. 875, 101 Conn. 200.
71 C.J. p 1568 note 73.

37. Tenn.—U. S. Fidelity & Guaranty Co. v. Elam, 278 S.W.2d 693, 198 Tenn. 194.
71 C.J. p 1568 note 74.

38. Wis.—Wisconsin Mutual Liability Co. v. Industrial Commission, 209 N.W. 697, 190 Wis. 598.
71 C.J. p 1568 note 75.

39. Fla.—Sweat v. Allen, 200 So. 348, 145 Fla. 733.

40. Ill.—Chicago Surface Lines v. Foster, 241 Ill.App. 49.
71 C.J. p 1568 note 76.

Reason for rule

Since, where workman is injured by third person, there is but one cause of action against third person, when that is satisfied by execution of release by workman there is nothing to be assigned to employer or its insurer by operation of law.

N.M.—White v. New Mexico Highway Commission, 83 P.2d 457, 42 N.M. 626.

41. U.S.—U. S. v. Klein, C.C.A.Iowa, 153 F.2d 55.

42. Iowa.—Renner v. Model Laundry, Cleaning & Dyeing Co., 184 N. W. 611, 191 Iowa 1288.

43. Iowa.—Renner v. Model Laundry, Cleaning & Dyeing Co., supra.

44. Conn.—Rosenbaum v. Hartford News Co., 103 A. 120, 92 Conn. 398, L.R.A.1918F 521.

71 C.J. p 1568 note 80.

45. Cal.—San Bernardino County v. State Industrial Accident Commission, 20 P.2d 673, 217 C. 618.

46. Cal.—San Bernardino County v. State Industrial Accident Commission, supra.

71 C.J. p 1568 note 82.

settlement of the employee's claim before the tortfeasor's liability has been ascertained by judgment.⁴⁷

Enjoining settlement; other remedies. Although there is authority to the effect that an employer may have the making of a settlement enjoined,⁴⁸ where the legal liability of the tort-feasor has not yet been established, the insurer which paid compensation to the employee is not entitled to enjoin the making of a voluntary settlement between the employee and the tort-feasor⁴⁹ to have a receiver appointed⁵⁰ or to have any funds impounded.⁵¹

§ 1008. Who Treated as Third Person or Person Other Than Employer

Whether a person is to be treated as a third person, liable to an employer or insurer in an action brought by either after injury to an employee, depends on the statute under which the action is brought.

One who is not the immediate or direct employer, but who is, under the act, liable for compensation for an injury to, or the death of, an employee ordinarily is not liable as a third person in an action for damages by the employer or insurer.⁵²

Under a particular statute, an employer may maintain an action for injury to, or death of, an employee against a third party who is under the compensation act,⁵³ and only against such person,⁵⁴ or who might otherwise be under the act, but who has elected not to be bound by it;⁵⁵ but such ac-

tion may not be maintained against one who is exempt from the operation of the act.⁵⁶

A person who contracts with the employer of the injured employee for the performance of certain work by such employer has been regarded as a "person other than the employer" against whom the insurer could assert a claim,⁵⁷ and the right of the insurer to recover from an independent contractor who has contracted to perform certain work for the employer, whose employee was injured has been recognized.⁵⁸ A third person against whom an employer may bring an action need not be one participating in the original injury to the employee.⁵⁹

Fellow servant of injured employee and agent of employer. Under a provision of a statute subrogating an employer to the rights of an injured employee against a third person, who is liable for such injury, a third person is one with whom the employee does not have a master and servant relationship under the act.⁶⁰ Accordingly, an injured person's coemployee, fellow servant, or foreman is a third person within the act.⁶¹

Where the compensation statute provides that while an employer's compensation insurance remains in effect the employer or those conducting his business shall be liable to the employee only for compensation, the term "other party," in a provision that the making of a claim for compensation

47. Conn.—Rosenbaum v. Hartford News Co., 103 A. 120, 92 Conn. 398, L.R.A.1918F 521.

48. Md.—Western Maryland Ry. Co. v. Employers' Liability Assur. Corporation, 161 A. 5, 163 Md. 97, 71 C.J. p 1567 note 72 [a] (2).

49. Ga.—U. S. Casualty Co. v. Watkins, 88 S.E.2d 20, 211 Ga. 619, followed in Pass v. Massachusetts Bonding & Ins. Co., 88 S.E.2d 25, 211 Ga. 655, followed in Continental Cas. Co. v. Evans, 89 S.E.2d 591, 92 Ga.App. 598, and not following Hartford Acc. & Indem. Co. v. Fidelity & Cas. Co. of New York, 188 S.E. 517, 183 Ga. 383.

50. Ga.—U. S. Casualty Co. v. Watkins, 88 S.E.2d 20, 211 Ga. 619, followed in Pass v. Massachusetts Bonding & Ins. Co., 88 S.E.2d 25, 211 Ga. 655, followed in Continental Cas. Co. v. Evans, 89 S.E.2d 591, 92 Ga.App. 598, and not following Hartford Acc. & Indem. Co. v. Fidelity & Cas. Co. of New York, 188 S.E. 517, 183 Ga. 383.

51. Ga.—U. S. Casualty Co. v. Watkins, 88 S.E.2d 20, 211 Ga. 619, followed in Pass v. Massachusetts Bonding & Ins. Co., 88 S.E.2d 25, 211 Ga. 655, followed in Continental Cas. Co. v. Evans, 89 S.E.2d 591,

92 Ga.App. 598, and not following Hartford Acc. & Indem. Co. v. Fidelity & Cas. Co. of New York, 188 S.E. 517, 183 Ga. 383.

52. Okl.—New Amsterdam Casualty Co. v. Rinehart & Donovan Co., 255 P. 587, 124 Okl. 227.

71 C.J. p 1568 note 85.
Who liable for injury to, or death of, employee as third person in general see supra § 985.

Subcontractor; principal contractor
Subcontractor, or its insurer, which paid compensation for death of, or injury to, its immediate employee was not entitled to exoneration from principal contractor whose negligence allegedly caused death.

U.S.—Standard Roofing & Material Co. v. Chas. M. Dunning Const. Co., C.A.Okla., 224 F.2d 449.

Aetna Cas. & Sur. Co. v. Manufacturers Cas. Ins. Co., D.C.La., 140 F.Supp. 579.

La.—Coal Operator's Cas. Co. v. Fidelity & Casualty Co. of New York, 66 So.2d 852, 223 La. 794.

Va.—Sykes v. Stone & Webster Engineering Corp., 41 S.E.2d 469, 186 Va. 116.

71 C.J. p 1568 note 85 [a].

53. Ill.—Rogers v. Illinois Central R. Co., 210 Ill.App. 577.

71 C.J. p 1569 note 86.

Remedy not limited to one against immediate employer or subcontractor

Ill.—Baker & Conrad v. Chicago Heights Const. Co., 4 N.E.2d 958, 364 Ill. 386.

54. Ill.—Agar Packing & Provision Co. v. Becker, 22 N.E.2d 447, 301 Ill.App. 287.

71 C.J. p 1569 note 86.

55. Ill.—Agar Packing & Provision Co. v. Becker, supra.

56. Ill.—Agar Packing & Provision Co. v. Becker, supra.

57. Md.—State v. Chesapeake & Potomac Telephone Co. of Baltimore City, 160 A. 437, 162 Md. 572.

71 C.J. p 1569 note 87.

58. U.S.—Standard Accident Ins. Co. v. Pennsylvania Car Co., C.C.A.Tex., 49 F.2d 73.

Mich.—Utley, for Use and Benefit of Travelers Ins. Co. v. Taylor & Gaslin, 9 N.W.2d 842, 305 Mich. 561.

59. Mo.—Schumacher v. Leslie, 232 S.W.2d 913, 360 Mo. 1238.

60. Mo.—Schumacher v. Leslie, supra.

61. Mo.—Schumacher v. Leslie, supra.

assigns any right to recover damages which the employee may have against any other party for his injury to the employer, refers exclusively to strangers, and does not refer to people conducting the employer's business, such as coemployees or fellow servants of the injured employee.⁶²

Under a statute assigning the rights of an injured employee against a wrongdoer, who is not in the same employ, to the employer, if the wrongdoer was in the same employ, the employer is not entitled to recover in an action against him.⁶³ The term "in the same employ" must be read in its setting in the statute,⁶⁴ and, even though the legislature did not intend to give the right of action to the employer where the injury arose out of the exigencies of the undertaking upon which the employees were jointly engaged,⁶⁵ the employees cannot be said to have been in the same employ where the injury arose from an act of frivolity when the employees were on the way to work.⁶⁶

Liability insurer. A compensation insurer who has paid compensation is entitled to recover against the tort-feasor's liability insurer, notwithstanding a provision in the liability policy excluding liability thereunder as to any obligation for which the insured thereunder, or any company as his insurer, might be held liable under the compensation law, since the insured's liability arises from his wrongful act, the nature of which is not changed by its recognition in the compensation act.⁶⁷

In Massachusetts. Under statutory provisions requiring an insured general contractor, or an insured owner of the premises where work is done, to pay compensation for compensable injuries to employees of any contractor or subcontractor as though such contractor or subcontractor were the person insured

under the act, one engaged in that common employment as a contractor,⁶⁸ subcontractor,⁶⁹ or employee of the common employer⁷⁰ cannot be a person other than the insured, and consequently is not liable in an action by the one liable to pay compensation; the insurance of the general contractor or common employer throws its shadow over the whole work,⁷¹ and covers and protects all employees engaged in the common employment.⁷²

In the application of this rule, it is immaterial whether a subcontractor is also insured under the act;⁷³ the essential thing in the application of the rule is the existence of a common employer who is an insured person under the act, and who is doing, or having done, work by contract in or about premises specified in the act, which work is part of, or a process in, the trade or business of the insured person on whose premises the work is being done.⁷⁴

Where the general contractor is the common employer as to all parties involved in the action, and is insured, recovery may not be had against an employee of that common employer on the theory that, since the work was being done for the state, it was the common employer.⁷⁵

A statutory provision allowing an insurer to enforce the common-law liability of a person other than the insured for injuries to an employee comprehends a person, whether a contractor, subcontractor, or employee, who is not protected by the insurance of the common employer.⁷⁶

Where a worker is not an employee of a contractor by dint of a contract of hire, he does not come within the orbit of common employment;⁷⁷ accordingly, the contractor, being a person other than the

62. Va.—Feitig v. Chalkley, 38 S.E. 2d 73, 185 Va. 96.

63. N.Y.—City of New York v. Fusco, 9 N.Y.S.2d 911, 170 Misc. 564.

64. N.Y.—City of New York v. Fusco, supra.

65. N.Y.—City of New York v. Fusco, supra.

66. N.Y.—City of New York v. Fusco, supra.

67. Wis.—Employers Mut. Liability Ins. Co. v. De Bruin, 73 N.W.2d 479, 271 Wis. 412.

68. Mass.—Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565.
71 C.J. p 1568 note 85 [b] (1).

69. Mass.—Clark v. M. W. Leahy Co., supra.
71 C.J. p 1568 note 85 [b] (2).

70. Mass.—Carlson v. Dowgielewicz, 24 N.E.2d 538, 304 Mass. 560—

Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565—Bresnahan v. Barre, 190 N.E. 815, 286 Mass. 593.

71. Mass.—Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565.

72. Mass.—Clark v. M. W. Leahy Co., supra.

73. Mass.—Carlson v. Dowgielewicz, 24 N.E.2d 538, 304 Mass. 560—Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565.

74. Mass.—Meehan v. Gordon, 29 N.E.2d 759, 307 Mass. 59—Carlson v. Dowgielewicz, 24 N.E.2d 538, 304 Mass. 560—Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565.

General contractor held common employer

Mass.—Carlson v. Dowgielewicz, 24 N.E.2d 538, 304 Mass. 560.

75. Mass.—Carlson v. Dowgielewicz, supra.

76. Mass.—Bencivengo v. Walter C. Benson Co., 64 N.E.2d 918, 319 Mass. 110.

77. Mass.—Meehan v. Gordon, 29 N.E.2d 759, 307 Mass. 59.

Realty owner's employee held not contractor's employee

Where general contractor installing vault and door in company's premises requested that vault door be unlocked in order that door and frame could be set in proper manner, and company's employee was directed by company to open door and was injured when door and frame fell upon him, company's employee did not become "employee" of general contractor.

Mass.—Meehan v. Gordon, supra.

employer, is liable to an insurer for compensation payments made to the injured employee.⁷⁸

Also, where the work being done, in the course of which an employee of the owner of the premises is injured, is not a part of, or a process in, the business of the owner, but is ancillary to it, the contractor performing the work is a person other than the insured and is liable for the compensation paid.⁷⁹

§ 1009. Rights of Employer or Insurer Measured by Rights of Employee or Dependents

An employer or insurer to whom an employee's right of action against a third person passes stands in the position of the employee, and acquires only such rights against the third person as the employee had.

The employer or insurer stands in the position of the employee, or of the personal representative or dependents of a deceased employee, under provisions of compensation acts for the subrogation of,⁸⁰ assignment to,⁸¹ or enforcement of rights by,⁸² the employer or insurer, and also under a conventional subrogation.⁸³

An employer occupies no better position than the employee would have occupied if he had sued.⁸⁴ The employer or insurer, to whom the employee's

cause of action is transferred, acquires such rights,⁸⁵ and only such rights,⁸⁶ against a third person as the injured employee or the dependents or personal representative of a deceased employee would have against the third person.

Accordingly, where the right of the employee to receive compensation from his employer is the exclusive remedy against the employer, as considered supra § 918, after the compensation has been accepted by an employee's dependents, an insurer has no cause of action on which to proceed against the employer responsible for the death.⁸⁷ However, the fact that the personal representative cannot recover both compensation under the statute and damages from the tort-feasor does not affect the right of the person paying the compensation to maintain the action against the tort-feasor.⁸⁸

§ 1010. Liability of Third Person; Defenses

- a. In general
- b. Employee's fault, contributory negligence, or assumption of risk
- c. Negligence, wrong, or estoppel of employer

a. In General

(1) General rules

78. Mass.—Meehan v. Gordon, 29 N. E.2d 759, 307 Mass. 59.

79. Mass.—Meehan v. Gordon, supra.

80. U.S.—Liberty Mut. Ins. Co. v. Borsari Tank Corp., C.A.N.Y., 248 F.2d 277.

La.—Aetna Cas. & Sur. Co. v. Cazebon, App., 11 So.2d 118.

71 C.J. p 1569 note 92.

81. N.Y.—Commissioners of State Ins. Fund v. Humm, 48 N.Y.S.2d 875, affirmed 53 N.Y.S.2d 461, 269 App.Div. 657, motion dismissed 61 N.E.2d 782, 294 N.Y. 777.

Va.—U. S. Fidelity & Guaranty Co. v. Blue Diamond Coal Co., 170 S.E. 728, 181 Va. 373.

82. Mass.—Fidelity & Casualty Co. of New York v. Huse & Carleton, 172 N.E. 590, 272 Mass. 448, 72 A. L.R. 1143.

Mich.—Uitley, for Use and Benefit of Travelers Ins. Co. v. Taylor & Gas-kin, 9 N.W.2d 842, 305 Mich. 561.—Hekman Biscuit Co. v. Commercial Credit Co., 289 N.W. 113, 291 Mich. 156.

Wis.—Eleson v. Western Cas. & Sur. Co., 35 N.W.2d 301, 254 Wis. 134.—London Guarantee & Acc. Co. v. Wisconsin Public Service Corp., 279 N.W. 76, 228 Wis. 441.

83. La.—Metropolitan Casualty Ins.

Co. of New York v. Bowdon, App., 164 So. 464.

84. Md.—State, for Use of Parks v. Insley, 29 A.2d 904, 181 Md. 347.

85. U.S.—Liberty Mut. Ins. Co. v. Borsari Tank Corp., C.A.N.Y., 248 F.2d 277.—Jones v. George F. Getty Oil Co., C.C.A.N.M., 92 F.2d 255, certiorari denied Associated Indem. Corp. v. George F. Getty Oil Co., 58 S.Ct. 644, 303 U.S. 644, 82 L.Ed. 1106.

Conn.—Stavola v. Palmer, 73 A.2d 831, 136 Conn. 670.

Ga.—Travelers Ins. Co. v. Georgia Power Co., 181 S.E. 111, 51 Ga.App. 579.

Iowa.—Iowa Nat. Mut. Ins. Co. v. Chicago, B. & Q. R. Co., 68 N.W. 2d 920, 246 Iowa 971.

La.—Metropolitan Casualty Ins. Co. of New York v. Bowdon, 159 So. 394, 181 La. 295.

Mo.—Goldschmidt v. Pevely Dairy Co., 111 S.W.2d 1, 341 Mo. 982.

Tenn.—General Shale Products Corp. v. Reese for Use and Benefit of U. S. Fidelity & Guaranty Co., 245 S. W.2d 788, 35 Tenn.App. 423.

Wash.—State v. Starr, 52 P.2d 897, 185 Wash. 18.

71 C.J. p 1569 note 95.

Federal Longshoremen's and Harbor Workers' Compensation Act

Pa.—Paxos v. Jarka Corporation, 171 A. 468, 314 Pa. 148.

Rights and remedies

La.—International Paper Co. v. Arkansas & L. M. Ry. Co., App., 35 So.2d 769.

86. U.S.—Doleman v. Levine, App. D.C., 55 S.Ct. 741, 295 U.S. 221, 79 L.Ed. 1402.

Liberty Mut. Ins. Co. v. Borsari Tank Corp., C.A.N.Y., 248 F.2d 277. Mass.—Carlson v. Dowgielewicz, 24 N.E.2d 538, 304 Mass. 560.—Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565.

N.J.—U. S. Cas. Co. v. Hercules Powder Co., 72 A.2d 190, 4 N.J. 157.

Prudential Ins. Co. of America v. Laval, 23 A.2d 908, 131 N.J.Eq. 23. 71 C.J. p 1569 note 96.

Federal Longshoremen's and Harbor Workers' Compensation Act

U.S.—Hartford Acc. & Indem. Co. v. U. S., D.C.N.Y., 130 F.Supp. 839.—California Cas. Indem. Exchange v. U. S., D.C.Cal., 74 F.Supp. 401, followed in 74 F.Supp. 411.

87. U.S.—Continental Cas. Co. v. Thorden Line, C.A.Va., 186 F.2d 992.

88. S.C.—Fuller v. Southern Elec. Service Co., 20 S.E.2d 707, 200 S.C. 246.

- (2) In action for amount of award to state officer where no person entitled to compensation

(1) General Rules

A tort-feasor's liability for injuries to an employee, or for his death, in an action by the employer or insurer, depends on the tort-feasor's liability to the employee or his dependents; such liability must be established by an action at law or an admission of liability, and a settlement between the tort-feasor and the employee may be insufficient. In the employer's or insurer's action, the tort-feasor may interpose whatever defense he has against the employee.

In an action against the third-party tort-feasor by the person liable for the payment of compensation, the test of the third person's liability is his liability to the injured employee or to his dependents;⁸⁹ an employer, or his insurer, has no cause of action against a tort-feasor unless the employee or his personal representative has a cause of action against such party.⁹⁰

Under a statute subrogating an employer to the rights of a deceased employee's dependents,⁹¹ or a statute assigning such rights to an insurer,⁹² where a dependent of a deceased employee has no cause of action under a wrongful death statute against the person causing the death, the person who paid compensation cannot recover, from the person caus-

ing the death, for the compensation paid to that dependent; under a statute giving an employer the right to recover compensation paid to a dependent from a person who was legally liable to the employee for damages, where this right is not in the nature of subrogation, as considered supra § 994(c), the employer may recover even though the dependent has no right of recovery on the employee's cause of action.⁹³

In view of the test of liability of the tort-feasor in an action by an employer or insurer, if the employee,⁹⁴ or the personal representative or dependents of a deceased employee,⁹⁵ could not recover, the employer or insurer is not entitled to recover. Thus, in order that an employer⁹⁶ or his insurer⁹⁷ may be entitled to assert rights against a third person, the circumstances surrounding the injury to the employee must be such as to create liability of such third person, and it has been held, or recognized, that the third person is not liable in the absence of any actionable wrong on his part causing the injury to, or the death of, the employee.⁹⁸

Although the liability of the third party need not be judicially established before an insurer is entitled to assert its claim for subrogation,⁹⁹ the liability must be established either by an action at law¹ or an admission of liability on the part of the third

89. U.S.—*Corpus Juris* cited in *Liberty Mut. Ins. Co. v. Borsari Tank Corp.*, C.A.N.Y., 248 F.2d 277, 287.

E. F. Hauserman Co., for Use and Benefit of Aetna Cas. & Sur. Co. v. U. S., D.C.Mich., 103 F.Supp. 353.

La.—*London Guarantee, etc., Ins. Co. v. Vicksburg, etc., R. Co.*, 95 So. 771, 153 La. 287.

Liberty Mut. Ins. Co. v. Benton, App., 153 So. 479.

Mich.—*Utley, for Use and Benefit of Travelers Ins. Co., v. Taylor & Gaskin*, 9 N.W.2d 842, 305 Mich. 561.

71 C.J. p 1570 note 2.

Who treated as third persons or persons other than employer see supra § 1008.

Sole test

U.S.—*Liberty Mut. Ins. Co. v. Borsari Tank Corp.*, C.A.N.Y., 248 F. 2d 277.

90. U.S.—*Jones v. George F. Getty Oil Co.*, C.C.A.N.M., 92 F.2d 255, certiorari denied *Associated Indem. Corp. v. George F. Getty Oil Co.*, 58 S.Ct. 644, 303 U.S. 644, 82 L.Ed. 1106.

Conn.—*Stavola v. Palmer*, 73 A.2d 831, 136 Conn. 670.

N.J.—*U. S. Cas. Co. v. Hercules Powder Co.*, 72 A.2d 190, 4 N.J. 157.

N.Y.—*Commissioners of State Ins.*

Fund v. Humm, 48 N.Y.S.2d 875, affirmed 53 N.Y.S.2d 461, 269 App. Div. 657, motion dismissed 61 N.E. 2d 782, 294 N.Y. 777.

91. U.S.—*Delaware Coach Co. v. Savage*, D.C.Del., 68 F.Supp. 175. Del.—*Travelers Ins. Co. v. E. I. Du Pont De Nemours & Co.*, 9 A.2d 88, 1 Terry 285.

92. N.Y.—*Liberty Mut. Ins. Co. v. Mueller*, 278 N.Y.S. 140, 154 Misc. 718.

93. La.—*Board of Com'rs of Port of New Orleans v. City of New Orleans By and Through Public Belt R. Commission*, 65 So.2d 313, 223 La. 199.

94. Ill.—*Weintraub v. John B. Sexton & Co.*, 64 N.E.2d 235, 327 Ill. App. 348.

71 C.J. p 1570 note 3.

95. Mass.—*Fidelity & Casualty Co. of New York v. Huse & Carleton*, 172 N.E. 590, 273 Mass. 448, 72 A. L.R. 1143.

71 C.J. p 1570 note 4.

96. Ala.—*Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co.*, 3 So.2d 306, 241 Ala. 545.

Ill.—*Weintraub v. John B. Sexton & Co.*, 64 N.E.2d 235, 327 Ill.App. 348.

N.J.—*Corpus Juris* quoted at length in *Dugan Bros. of N. J. for Use*

and Benefit of Maryland Cas. Co. v. Robinson, 51 A.2d 218, 220, 139 N.J.Eq. 318.

71 C.J. p 1570 note 5.

97. Ala.—*Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co.*, 3 So.2d 306, 241 Ala. 545.

Del.—*Travelers Ins. Co. v. E. I. Du Pont De Nemours & Co.*, 9 A.2d 88, 1 Terry 285.

La.—*Aetna Cas. & Sur. Co. v. Cazebon*, App., 11 So.2d 118.

71 C.J. p 1570 note 6.

98. Ill.—*Weintraub v. John B. Sexton & Co.*, 64 N.E.2d 235, 327 Ill. App. 348.

71 C.J. p 1570 note 7.

Proximate cause

Minn.—*Carlson v. Minneapolis St. Ry. Co.*, 173 N.W. 405, 143 Minn. 129.

99. Tex.—*Traders & General Ins. Co. v. West Texas Utilities Co.*, 165 S.W.2d 713, 140 Tex. 57.

1. Ga.—*U. S. Casualty Co. v. Watkins*, 88 S.E.2d 20, 211 Ga. 619, followed in *Pass v. Massachusetts Bonding & Ins. Co.*, 88 S.E.2d 25, 211 Ga. 655, and *Continental Cas. Co. v. Evans*, 89 S.E.2d 591, 92 Ga. App. 598.

71 C.J. p 1570 note 8.

person.² A settlement between the employee and a third person of a claim against the latter does not necessarily constitute an acknowledgment or admission,³ or an adjudication,⁴ of the liability of such third person, and the view has been expressed that it is not even evidence of legal liability.⁵

In an action by or on behalf of the employer or insurer, the third person may interpose such defenses as he might interpose against the employee or against the personal representative of a deceased employee.⁶ The fact that an insurer has filed a lien in an action by the employee against a tort-feasor other than the defendants in the instant action, all of whom may be liable for the injury, is no defense to an action by the insurer to recover compensation paid.⁷

Also, where an employee's cause of action is assigned to the state for the benefit of the state insurance fund, the fund must be treated as any other insurance carrier,⁸ and its rights and obligations are treated as separate and apart from the state's general liabilities;⁹ accordingly, the fund is entitled to the full benefit of the statutory assignment of the cause of action to it, unimpaired by the result of any quarrel between the tort-feasor and the state arising out of the circumstances from which the employee's injuries resulted.¹⁰

A compensation insurer who has been subrogated

to the rights of an employer against a tort-feasor is not bound by any accord, settlement, and satisfaction between the employer and the tort-feasor, to which the insurer was not a party,¹¹ and it cannot be used as a defense to an action by the insurer against the tort-feasor.¹²

A subcontractor who has elected not to become subject to the compensation act cannot avoid liability to the contractor for the amount of an award for funeral expenses of a deceased employee of the subcontractor, on the ground that the effect of recovery by the contractor would be to subject the subcontractor to the provisions of the act even though he had not elected to become subject thereto, since, as a result of his voluntary acceptance of the contract, the burden of the statute is deemed to be voluntarily assumed as an incident to the contract.¹³

The liability need not be the sole liability of the third person in order to permit a recovery by the employer or person called on to pay compensation,¹⁴ and the liability includes liability for the acts of defendant's employees.¹⁵

Action for medical expenses. A prior judgment for a defendant tort-feasor, in the employee's action for personal injuries, is not *res judicata* in the employer's action for medical expenses incurred by it in the treatment of the employee, since the em-

2. Iowa.—Southern Surety Co. of New York v. Chicago, R. I. & P. Ry. Co., 245 N.W. 864, 215 Iowa 525.

71 C.J. p 1570 note 9.

Statute held to refer to subrogation. Provision that, for subrogation purposes, any payment, by or on behalf of third party involved in injury of employee, to such employee, shall be considered as having been so paid as damages resulting from and because injury was caused under circumstances creating legal liability against third party, refers to rights of subrogation.

Iowa.—American Mut. Liability Ins. Co. v. State Auto. Ins. Ass'n, 72 N.W.2d 88, 246 Iowa 1294.

3. Iowa.—Corpus Juris cited in American Mut. Liability Ins. Co. v. State Auto. Ins. Ass'n, 72 N.W.2d 88, 91, 246 Iowa 1294.

Pa.—Broderick v. Great Lakes Cas. Co., 33 A.2d 653, 152 Pa.Super. 449.

Tex.—Texas Employers' Ins. Ass'n v. Fort Worth & D. C. Ry. Co., Civ. App., 181 S.W.2d 828.

71 C.J. p 1570 note 10.

Effect on subrogee's rights of settlement of employee's action see supra § 1007.

4. Cal.—Folk v. Garcia & Maggini Co., 30 P.2d 615, 137 C.A. 406.

Conn.—U. S. Fidelity & Guaranty Co. v. New York, N. H. & H. R. Co., 125 A. 875, 101 Conn. 200.

5. Conn.—U. S. Fidelity & Guaranty Co. v. New York, N. H. & H. R. Co., supra.

Pa.—Broderick v. Great Lakes Cas. Co., 33 A.2d 653, 152 Pa.Super. 449.

6. U.S.—Dierks v. Alaska Air Transport, D.C.Alaska, 109 F.Supp. 695.

Mich.—City of Grand Rapids v. Crocker, 189 N.W. 221, 219 Mich. 178.

71 C.J. p 1571 notes 13, 14.

Right of third person to attack validity of award or judgment for compensation see supra § 998.

7. N.Y.—Commissioners of State Ins. Fund v. Farrand Optical Co., 58 N.Y.S.2d 317, 185 Misc. 976, affirmed 60 N.Y.S.2d 277, 270 App. Div. 805, reversed on other grounds 68 N.E.2d 566, 295 N.Y. 498.

8. N.Y.—Commissioners of State Ins. Fund v. Low, 138 N.Y.S.2d 437, 285 App.Div. 525, affirmed 148 N.E.2d 136, 3 N.Y.2d 590, 170 N.Y.S. 2d 795.

Reason for rule

Statutory assignment of employee's cause of action against another than employer to state for benefit of state insurance fund after ex-

piration of statutory time for commencement of action by employee carries to state merely in name whatever cause of action employee might have had against such third party solely for benefit of fund, which is real owner of any such subrogated action.

N.Y.—Commissioners of State Ins. Fund v. Low, supra.

9. N.Y.—Commissioners of State Ins. Fund v. Low, supra.

10. N.Y.—Commissioners of State Ins. Fund v. Low, supra.

11. N.C.—Hinson v. Davis, 17 S.E. 2d 348, 220 N.C. 380.

12. N.C.—Hinson v. Davis, supra.

13. Mich.—Michigan Boiler & Sheet Iron Works, for Use and Benefit of American Mut. Liability Co. v. Dressler, 282 N.W. 222, 286 Mich. 502.

14. Iowa.—Fidelity & Casualty Co. v. Cedar Valley Electric Co., 174 N.W. 709, 187 Iowa 1014.

15. Mich.—Eber v. Bauer, 238 N.W. 419, 252 Mich. 571.

71 C.J. p 1571 note 17.

Employee held to be in course of employment

Wash.—State v. Starr, 52 P.2d 897, 185 Wash. 18.

ployee was never entitled to recover the cost of the medical expenses.¹⁶

Employer's agreement to indemnify third person. The rights of an insurer are not necessarily defeated by the fact that the employer had agreed to indemnify the person who caused the injury to,¹⁷ or the death of,¹⁸ the employee.

The fact that the employer was insured against loss occasioned by the payment of compensation to an injured workman, as permitted by the compensation act, does not bar the employer's rights against a third person under the act;¹⁹ and an insurer is not barred from bringing suit against a contractor by a provision in the contract with its insured requiring the latter to carry compensation insurance.²⁰

Agreement imposing liability for insurance premiums on defendant third person. The fact that the employer and defendant had, prior to the death of an employee, entered into a contract pursuant to which defendant would ultimately pay the premiums for the insurance of employees does not relieve defendant from liability in an action by such employer or its insurer based on the employee's injury or death.²¹

Action by employer for reimbursement against employee. In an action by an employer against an employee, who has recovered against a tort-feasor, for reimbursement of compensation paid, the employee is not permitted to set up the defense that the jury in the suit against the tort-feasor had made a deduction in its verdict equal to the amount received by the employee as compensation.²²

(2) In Action for Amount of Award to State Officer Where No Person Entitled to Compensation

Where an insurer brings an action for the amount

paid to a state officer in the absence of anyone entitled to compensation, even though the tort-feasor had settled a prior action by the personal representative of the employee against him, he can interpose any defense to the action which he has or ever had; but this is not so where the prior action resulted in a judgment against the tort-feasor.

In the absence of any wrongdoing on the part of a third person, no recovery may be had in an action by an insurer to recover from the alleged wrongdoer, pursuant to a provision of the act, the amount of an award paid to a state officer under a provision for such award where there is no person entitled to compensation for the death of an employee;²³ and the view has been expressed, where the defendant settled a prior action against him by the personal representative of the deceased employee in an action for the latter's death for an amount in excess of the compensation payable, that defendant could avail himself of any defense which he has or ever had,²⁴ and that he may show, if he can, that there could have been no recovery in such prior action.²⁵ However, it has been held that, where there was a judgment for the personal representative in such prior action, such judgment is binding on defendant in respect of its liability in the action by insurer for the amount of the award where the issues and burden of proof, as to such liability, are the same in both actions.²⁶

b. Employee's Fault, Contributory Negligence, or Assumption of Risk

An employee's contributory negligence will defeat the action by his employer or its insurer against the tort-feasor; but this is not true of the employee's alleged assumption of risk.

The contributory negligence of the employee will defeat the right of recovery against the third-party tort-feasor by the employer²⁷ or will defeat the right

16. N.Y.—U. S. Trucking Corp. v. New York & Pennsylvania Motor Express, Inc., 32 N.Y.S.2d 251, 177 Misc. 377.

17. Va.—Chesapeake & O. Ry. Co. v. Palmer, 140 S.E. 831, 149 Va. 560. 71 C.J. p 1571 note 18.

18. Md.—State v. New York, P. & N. R. Co., 118 A. 795, 141 Md. 305. 71 C.J. p 1571 note 19.

19. U.S.—Otis Elevator Co. v. Miller & Paine, C.C.A.Neb., 240 F. 376, 153 C.C.A. 302. 71 C.J. p 1571 note 20.

20. U.S.—U. S. Fidelity & Guaranty Co. v. U. S., D.C.N.Y., 63 F.Supp. 421, modified on other grounds, C. C.A., 152 F.2d 46.

21. U.S.—U. S. Fidelity & Guaranty Co. v. U. S., C.A.N.Y., 152 F.2d 46. 71 C.J. p 1571 note 21.

22. Ga.—Williams Bros. Lumber Co. v. Meisel, 68 S.E.2d 384, 85 Ga.App. 72.

23. N.Y.—Royal Indem. Co. v. Atchison, T. & S. F. Ry. Co., 70 N.Y.S.2d 697, 272 App.Div. 246, affirmed 75 N.E.2d 631, 297 N.Y. 619.

Right of person making payment to maintain action see supra § 996.

24. N.Y.—Phoenix Indemnity Co. v. Staten Island Rapid Transit R. Co., 167 N.E. 194, 251 N.Y. 127, affirmed 50 S.Ct. 242, 281 U.S. 98, 74 L.Ed. 726.

Commissioners of State Ins. Fund v. Consolidated Edison Co., 151 N.Y.S.2d 215, 2 Misc.2d 410—Commissioners of State Ins. Fund v. H. L. & F. McBride, Inc., 90 N.Y.S.2d 416, 195 Misc. 362—Employers Mut. Liability Ins. Co. of Wis.

v. Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941.

25. N.Y.—Phoenix Indemnity Co. v. Staten Island Rapid Transit R. Co., 167 N.E. 194, 251 N.Y. 127, affirmed 50 S.Ct. 242, 281 U.S. 98, 74 L.Ed. 726.

26. N.Y.—Travelers Ins. Co. v. Stieglitz, 30 N.Y.S.2d 306. 71 C.J. p 1571 note 24.

Testing of validity of award to employee by tort-feasor in action against him see supra § 998.

27. Md.—State, for Use of Parks, v. Insley, 29 A.2d 904, 181 Md. 347.

Mich.—Lather, for Use and Benefit of Employers Mut. Cas. Co. v. Michigan Public Service Co., 52 N.W.2d 551, 332 Mich. 683—Currier Lumber Co. v. Van Every, 20 N.W.2d 241, 312 Mich. 375—Postal Tele-

of recovery against the third-party tort-feasor by the insurer.²⁸ General rules as to what constitutes contributory negligence, considered in Negligence §§ 116-173, apply in actions by an employer or insurer against a tort-feasor.²⁹

Assumption of risk. The view has been taken that a third person may not defeat liability to an employer³⁰ or insurer³¹ on the alleged ground that the employee had assumed the risk.

Fault of employee. An insurer cannot recover if the employee was at fault in being injured, even though the defendant was not justified in injuring him.³²

Action for medical expenses. The legislature, it has been held, did not intend to permit an employee by any act of his own to foreclose any additional rights the employer may have against the tort-feasor for medical expenses paid by reason of the employee's injuries.³³

Action for amount of award to state officer where

no person entitled to compensation. In an action by an insurer to recover from the alleged wrongdoer the amount of awards paid to a state officer, pursuant to the act where there is no person entitled to compensation, a judgment for plaintiff in a prior action by the personal representative of the deceased employee for the latter's death has been regarded as binding on defendant as to the contributory negligence of the deceased employee where the burden of proof as to the defense of contributory negligence is the same in both actions.³⁴

c. Negligence, Wrong, or Estoppel of Employer

Authorities differ as to whether an employer or insurer is barred from recovery against a tort-feasor, for injuries to an employee, by the employer's contributory negligence.

The right of an employer³⁵ or insurer³⁶ to assert rights against a third person has been recognized even where the injury or death of the employee is the result of the joint and concurrent negligence of the employer and the third person. Also, the view

graph Cable Co. v. Carpenter, 243 N.W. 19, 258 Mich. 370.

N.C.—Corpus Juris cited in Lovette v. Lloyd, 73 S.E.2d 886, 891, 236 N.C. 663.

71 C.J. p 1571 note 26.

22. U.S.—American Cas. Co. of Reading, Pa. v. South Carolina Gas Co., D.C.S.C., 124 F.Supp. 30—Fireman's Fund Indem. Co. v. U. S., D. C.Fla., 110 F.Supp. 937, applying federal longshoremen's compensation act, affirmed, C.A., 211 F.2d 733, certiorari denied 75 S.Ct. 79, 348 U.S. 855, 99 L.Ed. 673—E. F. Hauserman Co., for Use and Benefit of Aetna Cas. & Sur. Co. v. U. S., D.C.Mich., 103 F.Supp. 358.

La.—Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822.

Mich.—Lather, for Use and Benefit of Employers Mut. Cas. Co. v. Michigan Public Service Co., 52 N.W.2d 551, 332 Mich. 683.

Minn.—Hartford Acc. & Indem. Co. v. Schutt Realty Co., 297 N.W. 718, 210 Minn. 235.

N.Y.—Utica Mut. Ins. Co. v. Amsterdam Color Works, 131 N.Y.S.2d 782, 284 App.Div. 376, affirmed 125 N.E.2d 871, 308 N.Y. 816.

N.C.—Corpus Juris cited in Lovette v. Lloyd, 73 S.E.2d 886, 891, 236 N.C. 663.

71 C.J. p 1571 note 27.

29. N.Y.—Utica Mut. Ins. Co. v. Amsterdam Color Works, 131 N.Y.S.2d 782, 284 App.Div. 376, affirmed 125 N.E.2d 871, 308 N.Y. 816.

71 C.J. p 1572 note 29.

Last clear chance

U.S.—Runnels v. City of Douglas, Alaska, D.C.Alaska, 124 F.Supp. 657.

71 C.J. p 1572 note 29 [a].

Failure to anticipate another's negligence

Failure of employee to anticipate negligence of operator of truck was not negligence.

Md.—Foreman Co. v. Williams, to Use of Mayor and City Council of Baltimore, 188 A. 25, 171 Md. 55.

Imputed negligence of fellow employee

In action by employer against corporation and driver of its station wagon for injuries sustained by employees in collision between employer's truck, in which employees were riding, and station wagon, alleged negligence of employee, who was driving truck, was not to be imputed to other employees.

Wis.—Wisconsin Power & Light Co. v. Dean, 81 N.W.2d 486, 275 Wis. 236.

30. Mich.—Golden & Boter Transfer Co. v. Brown & Sehler Co., 177 N.W. 202, 209 Mich. 503.

71 C.J. p 1572 note 30.

31. N.Y.—Liberty Mut. Ins. Co. v. White, 233 N.Y.S. 619, 133 Misc. 847.

71 C.J. p 1572 note 31.

32. La.—Aetna Cas. & Sur. Co. v. Cazebon, App., 11 So.2d 118.

33. N.Y.—U. S. Trucking Corp. v. New York & Pennsylvania Motor Express, 32 N.Y.S.2d 251, 177 Misc. 377.

34. N.Y.—Liberty Mut. Life Ins. Co. v. George Colon & Co., Inc., 133 N.E. 506, 260 N.Y. 305.

71 C.J. p 1572 note 32.

35. U.S.—Kittleson v. American Dist. Tel. Co., D.C.Iowa, 81 F.Supp. 25.

Ga.—Williams Bros. Lumber Co. v.

Meisel, 68 S.E.2d 384, 85 Ga.App. 72.

Tex.—Johnson v. Willoughby, Civ. App., 183 S.W.2d 201, error refused. 71 C.J. p 1572 note 33.

In Michigan

(1) The rule of the text has been followed.

U.S.—E. F. Hauserman Co., for Use and Benefit of Aetna Cas. & Sur. Co. v. U. S., D.C.Mich., 103 F.Supp. 358.

Mich.—Utley, for Use and Benefit of Travelers Ins. Co. v. Taylor & Gas-kin, 9 N.W.2d 842, 305 Mich. 561.

(2) Contributory negligence of employee driving automobile, under rule of imputed negligence, barred recovery against third persons allegedly responsible for collision causing death of another employee who was riding in automobile.

Mich.—Hekman Biscuit Co. v. Commercial Credit Co., 289 N.W. 113, 291 Mich. 156.

36. U.S.—United Gas Corp. v. Gullory, C.A.La., 206 F.2d 49, rehearing denied 207 F.2d 308.

Cyr v. F. S. Payne Co., D.C.Conn., 112 F.Supp. 526, affirmed 208 F.2d 856.

Ga.—Williams Bros. Lumber Co. v. Meisel, 68 S.E.2d 384, 85 Ga.App. 72.

Iowa.—Fidelity & Casualty Co. v. Cedar Valley Electric Co., 174 N.W. 709, 187 Iowa 1014.

Tex.—Johnson v. Willoughby, Civ. App., 183 S.W.2d 201, error refused.

Contributory negligence of fellow employee

U.S.—Baker v. Traders & General Ins. Co., C.A.Okl., 199 F.2d 289.

has been expressed that the contributory negligence of the employer is not a defense to an action by him³⁷ or his insurer;³⁸ and this is so irrespective of which party commences and maintains the action, as long as the beneficiaries of the compensation award have any real interest in the proceeds of a judgment against the tort-feasor.³⁹

Under some acts, however, an employer who is a joint wrongdoer with the person whom it is sought to hold liable cannot recover compensation paid,⁴⁰ and the defense of the employer's contributory negligence is available to the defendant third person in an action by, or for the benefit of, the employee⁴¹ or insurer.⁴²

§ 1011. Assignment of Cause of Action as Condition Precedent to Award of Compensation

Under a provision that an employee, or his dependents, seeking compensation, shall assign any cause of ac-

tion against the tort-feasor to the person paying compensation, they are not entitled to compensation in the absence of such assignment.

Under a provision that no compensation shall be granted unless the injured employee or the dependents of a deceased employee shall assign any cause of action against a person responsible for, or causing, the injury to the person paying compensation, an injured employee⁴³ or the dependents of a deceased employee⁴⁴ are not entitled to compensation in the absence of an assignment. The fact that the cause of action is made assignable does not make a cause of action so assigned a liability created by statute;⁴⁵ the only effect of the assignment is to transfer to the assignee the right to maintain the action.⁴⁶

Sufficiency of assignment. The fact that there are inconsistencies in different parts of an assignment as to whom the assignment is intended to run does not necessarily render the assignment a nullity

37. U.S.—*Marciniak v. Pennsylvania R. Co.*, D.C.Del., 152 F.Supp. 89.

Mo.—*Corpus Juris* cited in *Liddle v. Collins Construction Company*, 283 S.W.2d 474, 478.
71 C.J. p 1572 note 35.

38. U.S.—*Marciniak v. Pennsylvania R. Co.*, D.C.Del., 152 F.Supp. 89.

In New York

(1) The rule of the text has been followed.

N.Y.—*Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp.*, 53 N.Y.S.2d 835, 184 Misc. 941.

(2) Where employee's death was contributed to by negligence of fellow employee, compensation insurer cannot recover amount thereof from third-party tort-feasor, since it has no independent cause of action, separable from employer, against third party, but carrier's rights are derivative and must be limited at source. N.Y.—*In re Wales' Estate*, 36 N.Y.S.2d 643, 178 Misc. 936.

(3) Where fault of employer and third party is joint and injury results to employee, no right of contribution exists when employer settles compensation claim and third party defendant is relieved of liability, not by reason of compensation law, but because there is no right of contribution as between joint tortfeasors.

N.Y.—*Cardinal v. State*, 102 N.Y.S.2d 895, 200 Misc. 574, modified on other grounds 109 N.Y.S.2d 818, 279 App.Div. 326, modified on other grounds 107 N.E.2d 569, 304 N.Y. 400, motion denied 108 N.E.2d 400, 304 N.Y. 732, and 109 N.E.2d 885, 304 N.Y. 875, certiorari denied *State of New York v. Cardinal*, 73

S.Ct. 729, 345 U.S. 918, 97 L.Ed. 1351.

39. Minn.—*Nyquist v. Batcher*, 51 N.W.2d 566, 235 Minn. 491.

40. Ill.—*Hulke v. International Mfg. Co.*, 142 N.E.2d 717, 14 Ill.App.2d 5—*Alaimo v. Du Pont*, 136 N.E.2d 542, 11 Ill.App.2d 238.

71 C.J. p 1573 note 36.

41. N.C.—*Corpus Juris* cited in *Hunsucker v. High Point Bending & Chair Co.*, 75 S.E.2d 768, 773, 237 N.C. 559—*Essick v. City of Lexington*, 65 S.E.2d 220, 233 N.C. 600—*Essick v. City of Lexington*, 60 S.E.2d 106, 232 N.C. 200.

71 C.J. p 1573 notes 37, 38.

Employer's "Independent negligence," barring pro tanto recovery of compensation paid, or payable, to injured employee by employer or insurance carrier from third party whose negligence concurred with that of employer to cause injury, denotes employer's negligence other than that imputable to him under respondeat superior doctrine because of injured employee's acts or omissions.

N.C.—*Lovette v. Lloyd*, 73 S.E.2d 886, 236 N.C. 663—*Poindexter v. Johnson Motor Lines, Inc.*, 69 S.E.2d 495, 235 N.C. 286.

42. U.S.—*American Cas. Co. of Reading, Pa. v. South Carolina Gas Co.*, D.C.S.C., 124 F.Supp. 30.

N.C.—*Lovette v. Lloyd*, 73 S.E.2d 886, 236 N.C. 663—*Poindexter v. Johnson Motor Lines, Inc.*, 69 S.E.2d 495, 235 N.C. 286—*Essick v. City of Lexington*, 65 S.E.2d 220, 233 N.C. 600—*Eledge v. Carolina Power & Light Co.*, 55 S.E.2d 179, 230 N.C. 584, rehearing denied 57 S.E.2d 306, 231 N.C. 787.

71 C.J. p 1573 note 39.

Negligence of other employee

U.S.—*Aetna Cas. & Sur. Co. v. Mfgs. Cas. Ins. Co.*, D.C.La., 140 F.Supp. 579.

Contractual Liability of employer

Where contract between stevedoring company and government provided that compensation and public liability insurance rates were included in rates specified, and that all liability for damage or injury to person or property resulting from performance of contract was assumed by stevedoring company, and it was responsible for negligence of its employees in connection with death of one stevedore and injuries to others from falling hatch, it was responsible for damages as result of such injuries, and its insurer was not entitled to recover compensation payments made.

U.S.—*Fireman's Fund Indem. Co. v. U. S.*, D.C.Fla., 110 F.Supp. 937, affirmed, C.A., 211 F.2d 773, certiorari denied 75 S.Ct. 79, 348 U.S. 855, 99 L.Ed. 673.

43. Utah.—*Industrial Commission of Utah v. Wasatch Grading Co.*, 14 P.2d 988, 80 Utah 223. Conditions precedent to proceedings for compensation see *supra* § 416.

44. Utah.—*Robinson v. Industrial Commission*, 269 P. 513, 72 Utah 203.

45. Utah.—*Salt Lake City v. Industrial Commission*, 17 P.2d 239, 81 Utah 213.

46. Utah.—*Salt Lake City v. Industrial Commission*, *supra*. Effect of assignment on existing right of action generally see *supra* § 995.

where it is apparent that the employee intended to assign the cause of action to the person who is liable for the payment of compensation.⁴⁷ The widow of a deceased employee who duly assigns her cause of action against a third person is not required also to procure the assignment of the cause of action of a minor child against such third person, in order to entitle the widow to compensation.⁴⁸

Waiver of right to assignment and excuse for delay. Since the provision as to assignment is intended for the benefit of the person liable for the payment of compensation,⁴⁹ he may waive the right to an assignment.⁵⁰ In the absence of a request that the employee's cause of action against a third person wrongdoer be assigned, the employer cannot complain because the cause of action was not assigned at an earlier date.⁵¹

d. Actions and Proceedings

§ 1012. Nature and Form of Action

Although an action by an employee against a third-person wrongdoer is one in tort and usually regarded as a common-law action, the rights of action acquired by employers or their insurers are statutory and as a general rule are based either in tort for personal injury or death, or on an obligation to reimburse or indemnify such employer or insurer, rather than on an implied contract.

An action by an employee against a person other than the employer is one in tort,⁵² and usually is regarded as a common-law action.⁵³ Although it has been held that the cause of action accruing to an employee and a compensation insurer is single and joint, not severable,⁵⁴ and that the policy of the law is against splitting a cause of action,⁵⁵ the insti-

tution of an independent action arising out of incidental matter respecting indemnity and rights of subrogation has been said to be contemplated by the compensation act.⁵⁶

Action by or on behalf of employer or insurer. Rights of actions acquired by or on behalf of an employer or insurer under statutory provisions of the general type here considered are usually regarded as merely the right of action of the injured employee or his dependents against the wrongdoer, transferred to the employer or insurer as discussed supra § 995. Usually the right is not one based on implied contract,⁵⁷ but is an action in tort,⁵⁸ for

47. Utah.—Salt Lake City v. Industrial Commission, *supra*.

48. Utah.—Brainard's Cottonwood Dairy v. Industrial Commission, 14 P.2d 212, 80 Utah 159, 71 C.J. p 1573 note 47.

49. Utah.—Salt Lake City v. Industrial Commission, 17 P.2d 239, 81 Utah 213.

Effect of failure to make assignment on rights of person making assignment see *supra* § 1002.

50. Utah.—Salt Lake City v. Industrial Commission, *supra*.
Estoppel to resist payment see *supra* § 401 a.

51. Utah.—Salt Lake City v. Industrial Commission, *supra*.

52. Conn.—Duffy v. J. W. Bishop Co., 122 A. 121, 99 Conn. 573.
Acceptance of compensation as defense see *supra* §§ 987, 988.

Necessity of employee's making formal election to bring action as condition precedent see *supra* § 991.

53. U.S.—Hudson v. Moonier, C.C.A. Mo., 94 F.2d 132, reversed on other grounds 58 S.Ct. 954, 304 U.S. 397, 82 L.Ed. 1422, mandate conformed to, C.C.A., 102 F.2d 96, certiorari denied 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520, and Fitch v. Moonier, 59 S.Ct. 1037, 307 U.S. 639, 83 L.Ed. 1520.

Hutto v. Benson, D.C.Tenn., 110 F.Supp. 355, reversed on other grounds, C.A., 212 F.2d 349, certiorari denied Benson v. Hutto, 75 S.Ct. 52, 348 U.S. 831, 99 L.Ed. 665, 71 C.J. p 1573 note 55.

54. Mo.—Giambelluca v. Thompson, General Acc. Fire & Life Assur. Corp., Intervenor, 283 S.W.2d 531.

55. *Separate suits held not maintainable*

Dependents of state highway construction contractor's employee, fatally injured when struck by subcontractor's truck, and such employer or its assignee, could not bring separate suits against subcontractor for employee's death and amount of claim under compensation act for compensation therefor.

Pa.—Pennsylvania Turnpike Commission, to Use of Albright, v. U. S. Fidelity & Guaranty Co., 23 A.2d 416, 343 Pa. 543.

56. Kan.—Attebery v. Griffin Const. Co., 312 P.2d 598, 181 Kan. 450.

57. Ind.—Employers' Liability Assur. Corporation v. Indianapolis & Cincinnati Traction Co., 144 N.E. 615, 195 Ind. 91.

71 C.J. p 1574 note 57.

Breach of warranty

(1) Where implied warranty of fitness arose when powder company sold fuse to iron company and fuse was allegedly improperly made and caused premature explosion when used by employees of iron company,

causing injury to such employees, and compensation insurer of iron company paid compensation claims and became subrogated, under policy, to rights of iron company against powder company, insurer could not maintain action against powder company ex contractu for breach of such implied warranty, including in damages the compensation payments made to injured employees.
N.J.—U. S. Cas. Co. v. Hercules Powder Co., 72 A.2d 190, 4 N.J. 157.

(2) A corporate employer, failing to bring itself within provisions of workmen's compensation act prescribing conditions and procedures on and by which employer may secure reimbursement of compensation paid injured employee from third person or corporation liable to employee for injury, could not recover amount of compensation awarded under such act to its employee, injured by fall when rung of ladder being used by him broke, from manufacturer and seller of ladder as damages for breach of warranty of fitness thereof for its intended purpose.

N.J.—General Home Imp. Co. v. American Ladder Co., 56 A.2d 116, 26 N.J.Misc. 24.

58. U.S.—U. S. Fidelity & Guaranty Co. v. U. S., C.C.A.N.Y., 152 F.2d 46.

Hartford Acc. & Indem. Co. v. U. S., D.C.N.Y., 130 F.Supp. 839—

personal injury or death,⁵⁹ or it may be considered as an action for the recovery of a penalty.⁶⁰

Under some acts, however, the action is not regarded as merely an action for personal injuries but as one based on an obligation imposed on defendant third person by the act to reimburse the employer or insurer for a property injury.⁶¹ In some jurisdictions an employer who has paid compensation to an injured employee has an action *ex delicto* against the person whose negligence caused the injury under the provision of the compensation act for the subrogation of an employer who has paid compensation to the rights of insurer against the person liable for the injury, and also an action against such person for indemnification, as upon an implied or quasi contract for reimbursement for

money which the employer was compelled to pay because of the default of such person.⁶²

Notwithstanding the applicable statute provides for subrogation of the employer or insurer, the right of action is not an equitable one,⁶³ and even where the provision for subrogation is construed not as effecting an assignment to the employer but as the equivalent of a subrogation in equity, as discussed *supra* § 994, the necessity for bringing an action at law against the third person,⁶⁴ in the name of the employee, as discussed *infra* § 1017, has been asserted. There is, however, authority for the view that, if the compensation act of one state gives the employer or insurer the right to reimbursement out of a recovery by the injured employee from a third person, a court of equity in another state in which the judgment against the third person is recovered

Dierks v. Alaska Air Transport, D. C. Alaska, 109 F.Supp. 695.

N.J.—U. S. Cas. Co. v. Hercules Powder Co., 72 A.2d 190, 4 N.J. 157.

Tenn.—J. F. Elkins Const. Co. v. Naill Bros., 76 S.W.2d 326, 168 Tenn. 165, 95 A.L.R. 1429.

71 C.J. p 1574 note 58.

Particular statutes construed

(1) Where insured employer, which has been reimbursed by workmen's compensation insurer for payment to employee injured by third person's negligence, assigns its claim to insurer, insurer can enforce employer's right of action, which right of action needs no privity of contract with third-party tort-feasor, since it is created by statute.

U.S.—Haslam v. Trailways of New England, D.C.Conn., 59 F.Supp. 441.

(2) Since employer's right of action for reimbursement of amount of compensation, paid injured employee under workmen's compensation act, from third person liable to employee for injury, is statutory, requirements of statute must be strictly met.

N.J.—General Home Imp. Co. v. American Ladder Co., 56 A.2d 116, 26 N.J.Misc. 24.

(3) Provision of workmen's compensation act as to enforcement of negligent party's liability for resulting injuries to another's employee contemplates that action by employer, his insurance carrier, or employee against such party shall be tried on its merits as action in tort.

N.C.—Lovette v. Lloyd, 73 S.E.2d 886, 236 N.C. 663.

59. U.S.—Standard Accident Ins. Co. v. Pennsylvania Car Co., C.C.A. Tex., 63 F.2d 444.

71 C.J. p 1574 note 59.

60. Money paid to state funds

Action by workmen's compensation insurance carrier, which, incident to death of employee resulting from employment connected injury, has paid money into certain funds, against tort-feasor who caused death, is one for recovery of penalty for benefit of all injured workmen who come within class designated by and within relevant provisions of workmen's compensation law.

N.Y.—Application of Grasso's Estate, 148 N.Y.S.2d 850, 1 Misc.2d 704.

61. U.S.—Milan v. Kausch, C.A. Mich., 194 F.2d 263.

State Compensation Ins. Fund v. Proctor & Schwartz, D.C.Pa., 102 F.Supp. 451, applying California law.

Cal.—Dodds v. Stellar, 133 P.2d 658, 30 C.2d 496.

71 C.J. p 1574 note 60.

"Compensation recoupment suit"

Suits in which a compensation insurer seeks to recoup itself for benefits paid an injured employee out of damages recovered from negligent third persons should be referred to as "compensation recoupment suits."

Tex.—Myers v. Thomas, 186 S.W.2d 811, 143 Tex. 502.

Right to indemnity and enforcement thereof

(1) Relationship between employer who was paying workmen's compensation to injured employee and third-party tort-feasor whose negligence caused injury is that of indemnitee and indemnitor in which a liability over is placed upon tort-feasor.

Mich.—Bay State Milling Co. for Use and Benefit of Hartford Acc. & Indem. Co. v. Izak, 17 N.W.2d 769, 310 Mich. 601.

(2) Liability of contractor or subcontractor, not subject to compensation act, to indemnify principal under indemnification provisions of the

act rests primarily on contract, whereas liability of third person negligently causing injury under subrogation provisions of the act is not based on contractual relationship, but right to indemnity may be enforced by action in *assumpsit* to recover amount paid.

Mich.—Currier Lumber Co. v. Van Every, 20 N.W.2d 241, 312 Mich. 375.

(3) The form of action which an employer is authorized to maintain under statute vesting him with a cause of action to recover sums paid as compensation as result of injury to, or death of, an employee of a contractor who has not accepted provisions of the compensation act, is *assumpsit* rather than tort.

Mich.—Michigan Boiler & Sheet Iron Works, for Use and Benefit of American Mut. Liability Co., v. Dressler, 232 N.W. 222, 236 Mich. 502.

62. La.—Foster & Glassell Co. v. Knight Bros., 93 So. 913, 152 La. 596.

71 C.J. p 1574 note 61.

63. Cal.—Massachusetts Bonding & Ins. Co. v. San Francisco-Oakland Terminal Rys., 178 P. 974, 39 C.A. 388.

Action at law

The right to which a subrogee succeeds is the right to bring an action at law against the party whose wrongful act caused the employee's injury.

Ala.—Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co., 3 So.2d 306, 241 Ala. 545.

64. Del.—Ierardi v. Farmers' Trust Co. of Newark, 151 A. 822, 34 Del. 246.

71 C.J. p 1575 note 64.

may impress a lien on the proceeds of the judgment for the benefit of insurer.⁶⁵

Bringing in third person in action for compensation. Notwithstanding a provision for subrogation of insurer and for the payment to the employee of the excess recovered from the third-person wrongdoer, the view has been taken that insurer may not, in a contested proceeding for compensation brought against it by the injured employee, implead a person who, it is alleged, caused the injury, for the purpose of enforcing insurer's right as subrogee against such person.⁶⁶

§ 1013. Jurisdiction

In the absence of a statute providing otherwise, the courts have exclusive jurisdiction to hear and determine an action by an employee or his representative against a third person.

A provision that, under certain circumstances, if the employee or the dependents of an employee bring an action for the recovery of damages against a person who is subject to the act, other than the employer, the amount thereof, manner in which, and the persons to whom the same are payable, shall be as provided in that part of the act which deals with the award of compensation, does not confer jurisdiction on the industrial commission to determine the amount and manner of payment of the proper award.⁶⁷

Jurisdiction to hear and determine controversies with respect to the rights of an injured employee against a third-person tort-feasor after having recovered compensation from his employer or his insurer, rests with the court rather than with the industrial board or commission.⁶⁸ In an action by an insurer against an employee, who has recovered

damages from a third-person tort-feasor, to recover the compensation it had paid such employee, however, the court cannot adjudicate a counterclaim by the employee for additional compensation.⁶⁹

Statutory lien of employer on judgment of employee. A provision that the court shall, on application, allow as a first lien against any judgment of the employee against a person other than the employer the amount of the employer's expenditures for compensation confers on the court in which such judgment is rendered the power and duty to fix the amount of the lien⁷⁰ and to allow it as a first lien on the judgment,⁷¹ and by necessary implication denies the existence of such powers and duties in the state industrial accident commission.⁷²

Venue. Under a statute providing that a suit for damages for personal injuries may be brought in the county in which the plaintiff resided at the time of the injury, an insurer, who becomes subrogated to the rights of an injured employee, is not a plaintiff within the meaning of the statute and thus cannot bring a compensation recoupment suit in its own county of residence when the injured employee and his legal representative both lived in another county at the time of the injury.⁷³

§ 1014. Time to Sue, Successive Actions, and Limitations

- a. In general
- b. Limitations of actions

a. In General

Under some statutes a cause of action against a third-person tort-feasor accrues to the employer or in-

65. N.Y.—Hartford Accident & Indemnity Co. v. Chartrand, 145 N. E. 274, 239 N.Y. 36.
71 C.J. p 1575 note 66.

66. Tex.—Fidelity Union Casualty Co. v. Riley, Civ.App., 26 S.W.2d 682.
71 C.J. p 1575 note 67.

67. Minn.—Rasmussen v. George Benz & Sons, 212 N.W. 20, 168 Minn. 319.
71 C.J. p 1575 note 68.

68. Ark.—Maxcy v. John F. Beasley Const. Co., 306 S.W.2d 849.
Idaho.—Hancock v. Halliday, 171 P. 2d 333, 67 Idaho 119.

Election of remedy

Industrial commission has no jurisdiction to decide whether an employee has made an election; that is a matter to be litigated in court between the necessary parties, and is a

preliminary question for the trial judge to determine.

Ariz.—State ex rel. Industrial Commission v. Reese, 250 P.2d 1001, 74 Ariz. 425.

Notice

In proceeding arising from action by employee against tort-feasor who had injured employee, it was for trial court to construe evidence upon issue whether compensation carrier had sufficient notice of the action so that it would be liable for fees of employee's attorneys.

Cal.—Quisenberry v. Rulison, 277 P. 2d 57, 129 C.A.2d 268.

69. Ky.—Aetna Cas. & Sur. Co. v. Snyder, 291 S.W.2d 14.
Nature and form of proceedings for increase, diminution, termination, or reinstatement of compensation in general see supra § 855.

70. Cal.—Jacobsen v. State Indus-

trial Accident Commission, 299 P. 66, 212 C. 440.

71. Cal.—Jacobsen v. State Industrial Accident Commission, supra.
72. Cal.—Jacobsen v. State Industrial Accident Commission, supra.
71 C.J. p 1575 note 71.

73. Tex.—Commercial Standard Ins. Co. v. Texas & N. O. R. Co., Civ. App., 198 S.W.2d 913.

Purpose of statute

Statute providing for suits against railroad corporation for damages arising from personal injuries to be brought either in county in which the injury occurred or in the county in which plaintiff resided at time of injury is a protective statute which guarantees defendant railroad company, in compensation recoupment suit, venue in its home county where the exceptions are not applicable.
Tex.—Commercial Standard Ins. Co. v. Texas & N. O. R. Co., supra.

surer on the making of payment pursuant to a compensation award.

Under a provision that, if compensation is paid under the act, the employer may enforce for his benefit or for that of the insurance carrier the liability of a person other than the employer, the view has been expressed that a cause of action accrues to the employer whenever he has made a payment in pursuance of the award,⁷⁴ and that the subsequent payments may be sued for and recovered as they become due and payable under the award.⁷⁵ It has been held, under a statute providing that if an employee shall elect to receive compensation the employer or insurer shall be subrogated to the right of the employee against a third-person tort-feasor, that only one action is contemplated,⁷⁶ and it is neither necessary⁷⁷ nor proper⁷⁸ for the employer to bring successive actions for installments of compensation as they become due and are paid; where the award is fixed and made payable in installments extending over a period of years, then damages may be recovered from the person liable⁷⁹ in an amount not exceeding the aggregate amount of compensation payable, without regard to whether or not payment of installments of compensation has actually been made.⁸⁰ In any event, under some provisions, it is not necessary to await the payment of the entire award before proceeding against the person who caused the injury.⁸¹

Assertion of lien. Under a provision that the

court shall, on application, allow as a first lien against any judgment of the employee against a person other than the employer the amount of the employer's expenditures for compensation, the employer should assert his lien before the verdict or judgment is entered,⁸² or, at least, before satisfaction of the judgment.⁸³

Failure of employer or insurer to sue. Under a provision permitting the employee to sue if employer or insurer does not sue within a specified time after demand, the employee need not await the expiration of the specified period before suing where there is an express waiver by the employer or insurer of the right to sue.⁸⁴

b. Limitations of Actions

- (1) In general
- (2) In New York

(1) In General

Where those who come within the provisions of workmen's compensation acts are also entitled to bring actions against third-person tort-feasors, such actions must be commenced within the period of limitation prescribed by statute, and usually the same period of limitation applies in actions by an employer or insurer as is applicable to actions by an employee or his representatives.

Where the employee or his representative may elect to sue a third-person tort-feasor, the action must be instituted within the time limited by statute,⁸⁵ and, where the statute so provides, the failure

74. Mich.—Albert A. Albrecht Co. v. Whitehead & Kales Iron Works, 166 N.W. 855, 200 Mich. 109.

75. Mich.—Albert A. Albrecht Co. v. Whitehead & Kales Iron Works, supra.

76. Ala.—Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co., 3 So.2d 306, 241 Ala. 545.

III.—Bauer v. Rusetos & Co., 138 N.E. 206, 306 Ill. 602.

77. Ill.—Bauer v. Rusetos & Co., supra. 71 C.J. p 1575 note 77.

78. Ala.—Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co., 3 So.2d 306, 241 Ala. 545.

III.—Bauer v. Rusetos & Co., 138 N.E. 206, 306 Ill. 602.

Action held not in contract

Where employer's insurance carrier as statutory subrogee of injured workman recovered a judgment against tort-feasor, carrier could not maintain a second action against tort-feasor to recover sums paid in addition to that recovered in the first action under the doctrine of "equitable subrogation" or "conventional subrogation," since the car-

rier's claim arose out of the employer's liability under the compensation act, and not out of any contract relation between the employee and the carrier.

Ala.—Metropolitan Cas. Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co., 3 So.2d 306, 241 Ala. 545.

79. Ill.—Bauer v. Rusetos & Co., 138 N.E. 206, 306 Ill. 602.

Action held premature

Where employee of plaintiff was injured through negligence of employees of defendant while injured party was in course of employment of plaintiff, and employee's claim against plaintiff was pending with commission, plaintiff could not maintain action against defendant for amount which plaintiff's employee might recover, but action was sustainable only after compensation of plaintiff's employee had been fixed. Ill.—Union News Co. v. Continental Elec. Const. Co., 99 N.E.2d 577, 343 Ill.App. 521.

80. Ill.—Bauer v. Rusetos & Co., 138 N.E. 206, 306 Ill. 602.

La.—Foster & Glassell Co. v. Knight Bros., 93 So. 913, 152 La. 596.

71 C.J. p 1575 note 75, p 1575 note 81.

81. Tex.—Otis Elevator Co. v. Allen, Civ.App., 185 S.W.2d 117, affirmed in part and reversed in part on other grounds 187 S.W.2d 657, 143 Tex. 607.

71 C.J. p 1575 note 82.

82. Cal.—Lidberg v. E. T. Leiter & Son, 2 P.2d 526, 116 C.A. 312.

83. Cal.—Jacobsen v. State Industrial Accident Commission, 299 P. 66, 212 C. 440.

84. Me.—Foster v. Congress Square Hotel Co., 145 A. 400, 128 Me. 50, 67 A.L.R. 239.

Action held not premature

An employee's action against third-person tort-feasors, after waiver of right to bring action by insurer which had commenced payment of compensation, was not dismissible as premature because compensation had not been paid in full. U.S.—Jay v. Chicago Bridge & Iron Co., C.C.A.Utah, 150 F.2d 247.

85. Ind.—Wright Bachman, Inc. v. Hodnett, 133 N.E.2d 713, 235 Ind. 307.

Six months

(1) Where statute so provides, action by employee or his representatives must be instituted within six

to bring an action within the time specified confers the right to bring such action on the employer or his insurer.⁸⁶

A two-year period of limitation within which an employee may commence an action against a third-person tort-feasor has been held to be in no way altered by a statute permitting an employer to bring

such action if the employee fails to do so within one year and nine months;⁸⁷ and the running of the period is not tolled either by an unconstitutional statute precluding the employee from bringing such an action,⁸⁸ or, since the action is at common law in tort, by a saving clause applicable only to actions arising under the compensation act.⁸⁹ A statute

months after cause of action accrues.

U.S.—*Kelley v. Girdler Corp.*, C.A. Ind., 207 F.2d 703.

Ind.—*Wright Bachman, Inc. v. Hodnett*, 133 N.E.2d 713, 235 Ind. 307.

(2) Workmen's Compensation Act section providing that whenever an injury for which compensation is payable under the act is suffered by employee under circumstances which place liability upon party other than employer, employee may commence legal proceedings against such person to recover damages within six months applies to actions ex contractu for breach of warranty as well as to actions of ex delicto for breach of warranty.

Ind.—*Wright Bachman, Inc. v. Hodnett*, supra.

One year

(1) Under some statutes if action is prosecuted by injured workman it must be instituted within one year from the date of the injury.

Kan.—*Erb v. Atchison, T. & S. F. Ry. Co.*, 299 P.2d 35, 180 Kan. 60—*Whitaker v. Douglas*, 292 P.2d 683, 179 Kan. 64—*Terrell v. Ready Mixed Concrete Co. of Kansas City*, Kan., 258 P.2d 275, 174 Kan. 633.

(2) Where the statute so provides, such an action must be commenced within one year from the date the cause of action accrues.

U.S.—*Hutto v. Benson*, C.A.Tenn., 212 F.2d 349, applying Texas law, certiorari denied *Benson v. Hutto*, 75 S.Ct. 52, 348 U.S. 831, 99 L.Ed. 665.

(3) Under a statute so providing, which has been applied retrospectively, an employer may commence an action against a third person within one year after the acceptance of the compensation awarded.

U.S.—*Standard Acc. Ins. Co. v. Miller*, C.A.Ind., 170 F.2d 495.

(4) Original suits held in fact instituted by injured workman, and not by employer in name of injured workman.

Mo.—*McLendon v. Kissick*, 250 S.W. 2d 489, 363 Mo. 264, applying Kansas law.

(5) The employees' compensation act does not alter the period of limitations in the wrongful death statute and where defendant caused death of employee of another under

such circumstances that, if death had not ensued, the employee would have been entitled to maintain action against defendant or to recover compensation under employees' compensation act, death action instituted under wrongful death act within one year after appointment of guardian for employee's infant son but more than one year after death was barred by limitation of the death act, notwithstanding employees' compensation act provision that one year limitation on right to compensation for death should not be applicable to infants until appointment of guardian.

D.C.—*Webster v. Clodfelter*, 130 F. 2d 434, 76 U.S.App.D.C. 171, 143 A. L.R. 280, certiorari denied 63 S. Ct. 261, 317 U.S. 639, 87 L.Ed. 552.

Eighteen months

Under provision authorizing wrongful death action against third-party tort-feasor, deceased workman's personal representative can institute an action within eighteen months, and in the succeeding six months employer may institute such action, but where the record disclosed that widow and not employer was maintaining wrongful death action against third-party tort-feasor, the maintenance thereof was precluded because of the eighteen-month limitation period applicable to widow and dependents of deceased workman.

Kan.—*Elam v. Bruenger*, 193 P.2d 225, 165 Kan. 31.

Two years

Under some statutes, such an action must be commenced within two years from the date of injury.

U.S.—*Govedarica v. Yellow Cab Co.*, C.A.Ill., 216 F.2d 499.

Ill.—*Peterson v. Montegna & Co.*, 136 N.E.2d 586, 11 Ill.App.2d 109.

Longshoremen's and Harbor Workers' Compensation Act

(1) Longshoreman who was injured during course of his employment was not precluded under provisions of Federal Longshoremen's Compensation Act from instituting an action against third person tort-feasor because of his failure to institute such action within one year from date of sustaining his injuries.

N.Y.—*Neri v. Erie R. Co.*, 101 N.Y.S. 2d 133, 199 Misc. 374.

(2) Where, however, the employee elects to sue a third person tort-feasor and to hold the employer liable for any deficiency, suit must be brought within one year.

U.S.—*Terminal Shipping Co. v. Branham*, D.C.Md., 47 F.Supp. 561, affirmed, C.C.A., *Branham v. Terminal Shipping Co.*, 136 F.2d 655.

86. Kan.—*Elam v. Bruenger*, 193 P. 2d 225, 165 Kan. 31.

Liability of third person unchanged

Provision of compensation act granting to employer right to bring action against third-person tort-feasor if employee does not bring action within one year, was not enacted to relieve, alter, or vary in any way the liability for tort of third-person wrongdoer and his liability remains the same for two years after injury no matter who brings action, employee or employer.

Kan.—*Sundgren v. Topeka Transp. Co.*, 283 P.2d 444, 173 Kan. 83.

Actions in other jurisdictions

An action by an employee injured in Kansas and subject to the Kansas compensation law to recover for injuries against an Ohio third-person tort-feasor not commenced within one year from the date of injury could not be maintained, in view of the Kansas statute assigning the cause of the action to the employee's employer and the Ohio statute providing that actions must be prosecuted in the name of the real party in interest.

Ohio.—*Griffin v. Gar Wood Industries*, 128 N.E.2d 751, 97 Ohio App. 129.

87. U.S.—*King v. Cairo Elks Home Ass'n*, D.C.Ill., 145 F.Supp. 681.

88. Ill.—*Peterson v. Montegna & Co.*, 136 N.E.2d 586, 11 Ill.App.2d 109.

89. U.S.—*Govedarica v. Yellow Cab Co.*, C.A.Ill., 216 F.2d 499.

Actions held barred

Statute providing that, if some provision of compensation act should be adjudged invalid, period intervening between date of injury and adjudication of invalidity should not be computed as part of time limited by law for commencement of common-law action is applicable only to an action which arises out of some of provisions of the act providing

giving an injured workman the right to proceed against a third-person tort-feasor after compensation has been awarded has been held inapplicable where no award has been recovered.⁹⁰

Usually, in an action by or on behalf of an employer or an insurer to enforce the liability of a person who has caused the injury or death of an em-

ployee, the statute of limitations is the same as that which would be applicable if the action were brought by the injured employee,⁹¹ or, in case of the death of the employee, by the dependents or the personal representative of the deceased.⁹² Although it has been held that the period of limitation commences to run from the date of the employee's death or injury;⁹³ in some cases, the stat-

for compensation for injuries to or death of employees.

U.S.—Govedarica v. Yellow Cab Co., supra.

Ill.—Peterson v. Montegna & Co., 136 N.E.2d 586, 11 Ill.App. 109.

90. Tex.—Garza v. Sumrall, Civ. App., 267 S.W.2d 912, error refused.

Action held barred

Where claimant failed to recover unemployment compensation either because claim was not filed within time required or because party sued was not his employer, statute giving injured workman or compensation carrier right to proceed against third-person tort-feasor after compensation has been awarded was not applicable to permit unsuccessful claimant to commence common-law action against others for the same injuries more than four years after injury.

Tex.—Garza v. Sumrall, supra.

91. U.S.—Dierks v. Alaska Air Transport, D.C.Alaska, 109 F.Supp. 695.

Ill.—Walsh v. Central Cold Storage Co., 58 N.E.2d 325, 324 Ill.App. 402.

Ky.—Employers Mut. Liability Ins. Co. v. Brown Wood Preserving Co., 182 S.W.2d 30, 298 Ky. 194.

Mich.—Bay State Milling Co., for Use and Benefit of Hartford Acc. & Indem. Co. v. Izak, 17 N.W.2d

but made no effort for more than a year to enforce them and later assigned claim to injured employee, such employee as assignee was barred by laches from maintaining any action under the general maritime law.

U.S.—Lorraine v. Coastwise Lines, D. C.Cal., 86 F.Supp. 336.

(3) Injured shipyard employees' election to seek compensation precluded recovery of additional sum as damages for personal injuries to employees if actions therefor were not timely filed by employers and their carrier to whom employees' right to recover damages against third-person tort-feasor was assigned by virtue of the act.

U.S.—California Cas. Indem. Exchange v. U. S., D.C.Cal., 74 F. Supp. 410—California Cas. Indem. Exchange v. U. S., D.C.Cal., 74 F. Supp. 401.

(4) Where contract between shipowner and contractor provided a limitation of six months for presentation of claims arising under the contract, the limitation was not applicable to claim for injury to contractor's employee injured because of negligence of shipowner.

U.S.—U. S. Fidelity & Guaranty Co. v. U. S., C.C.A.N.Y., 152 F.2d 46.

92. U.S.—Continental Cas. Co. v. Thornden Line, C.A. Va., 126 F.2d

Actions for breach of warranty

An employer's action against seller of certain solvent which, although warranted to be nonflammable, ignited and caused employee's death was for breach of warranty, rather than under compensation act, where employer prayed for amount paid as compensation and for amount necessary to pay for damage to employer's equipment and business, and hence one-year limitation on death actions, made applicable to employers' actions under compensation act, was inapplicable.

U.S.—Sterling Aluminum Products v. Shell Oil Co., D.C.Mo., 48 F. Supp. 540.

93. Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealers Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651.

Kan.—Terrell v. Ready Mixed Concrete Co. of Kansas City, Kan., 258 P.2d 275, 174 Kan. 633.

71 C.J. p 1576 note 90.

Action held barred

Where employer's compensation insurer brought action against third person to recover for wrongful death of workman in name of surviving wife of workman more than eighteen months after death, and it was admitted that insurer was the real party in interest, action was barred by limitations and insurer could not

utes have been construed to effect either a postponement of the accrual of the cause of action until a determination in the compensation proceeding or a suspension of the running of the statute of limitations until such determination.⁹⁴ Where the statute creates a new cause of action in the employer and the insurer, it has been held that the period of limitation applicable to an action based on a liability created by statute applies in an action by an employer or insurer,⁹⁵ or in an action by an employee based on the assignment to him by insurer of the cause of action,⁹⁶ although the right of action in the employee is subject to a shorter period of limitation.⁹⁷ Where an employer is given a statutory right to sue a third-person tort-feasor if the employee fails to do so within a specified time, it has been held that no question of limitation of the employer's right can arise where the employee has already recovered judgment.⁹⁸

Intervention. Where an insurer authorized to bring action has instituted an action prior to the expiration of the period of limitation, the propriety of the filing by an injured employee, who is not a necessary party to the action, of a complaint in intervention which presents no new issue, after the expiration of such period, has been recognized.⁹⁹ So, where an action against a person other than the employer, in the name of an employee, is actually

brought for the benefit of the employee and the insurer at the insurer's instance and request and the insurer is therefore a real party in interest, the insurer's right to intervene by petition is not barred although made after the period of limitation has expired where the original action was brought within such period.¹ A statute allowing pleadings to be amended after the period allowed for the commencement of proceedings has expired has been held not to permit an employer to intervene as a plaintiff in an action brought by an employee, and by amendment assert a cause of action against defendant after the period of limitations has expired, since the employer's cause of action is independent and separate.²

Dismissal or nonsuit in action by employee or dependents. Under some acts, where an employee who elects to bring an action against a third person permits a dismissal of the action for default, and the statute of limitations has run before the insurer has knowledge of the dismissal, the insurer loses his right to bring an action against the third person.³ Where, however, after the period of limitation has expired, an insurer who has paid compensation is properly admitted as party plaintiff to an action against a third person by one claiming as widow and sole heir of a deceased employee, the view has been taken that the fact that subsequently there is a

(3) The amendment, however, has been held not to bar an action commenced within two years from the date of the accident, but more than one year after acceptance of compensation awarded.
Ind.—Standard Acc. Ins. Co. v. Pet Milk Co., supra.

94. U.S.—Pacific Emp. Ins. Co. v. The Paul David Jones, D.C.Tex., 98 F.Supp. 668, affirmed, C.A., Pacific Emp. Ins. Co. v. Parry Nav. Co., 195 F.2d 372.

Tex.—Buss v. Robison, Civ.App., 255 S.W.2d 339, refused no reversible error—Texas Employers' Ins. Ass'n v. Texas & P. Ry. Co., Civ. App., 129 S.W.2d 746, error dismissed, judgment correct—Webster v. Isbell, Civ.App., 71 S.W.2d 342, reversed on other grounds 100 S.W.2d 350, 128 Tex. 626.

71 C.J. p 1576 note 91.

Laches

The compensation insurer of a town could not be denied recovery against automobile liability insurer for amount of compensation award paid by compensation insurer into state treasury for death of employee on ground that compensation insurer was guilty of laches where compensation insurer asked the commission to determine whether it was liable

and commenced action against automobile liability insurer within seventeen days after it was ordered to make payment into state treasury.
Wis.—Standard Sur. & Cas. Co. of New York v. Spewachek, 288 N.W. 758, 233 Wis. 158.

95. Cal.—Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 881.

Action held not barred

An action by employer's insurance carrier against third persons to recover amount paid as compensation and medical benefits to two injured employees, brought more than one year but less than three years after happening of accident in which employees were injured, was not barred by limitations.

Cal.—Limited Mut. Compensation Ins. Co. v. Billings, supra.

96. Cal.—Morris v. Standard Oil Co., 252 P. 605, 200 C. 210.

97. One year

Statute providing that claim of an employee for workman's compensation does not affect his right of action for damages against any third person who may have caused his injury creates no new right of action, but recognizes continuance of a long established right which is subject to one-year statute of limitations.

Cal.—Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 881.

98. Tenn.—Reece v. York, 288 S.W. 2d 448, 199 Tenn. 592.

99. Cal.—State Compensation Ins. Fund v. Allen, 285 P. 1053, 104 C. A. 400.

Iowa.—Corpus Juris quoted in Iowa National Mutual Ins. Co. v. Chicago, B. & Q. R. Co., 68 N.W.2d 920, 926, 246 Iowa 971.

1. U.S.—Hobart v. O'Brien, C.A. Mass., 243 F.2d 735.

Dierks v. Alaska Air Transport, D.C.Alaska, 109 F.Supp. 695.

Iowa.—Corpus Juris cited in Iowa National Mutual Ins. Co. v. Chicago, B. & Q. R. Co., 68 N.W.2d 920, 927, 246 Iowa 971.

Ky.—Berry v. Irwin, 6 S.W.2d 705, 224 Ky. 565.

Mo.—Giambelluca v. Thompson, General Acc. Fire & Life Assur. Corp., Intervenor, 283 S.W.2d 531 applying Texas law.

2. Ill.—Walsh v. Central Cold Storage Co., 58 N.E.2d 325, 324 Ill.App. 402.

3. N.Y.—McKee v. White, 218 N.Y. S. 215, 218 App.Div. 300, affirmed 155 N.E. 918, 244 N.Y. 610.

judgment of nonsuit as to the widow, from which she does not appeal, does not prevent the insurer's continued prosecution of the action.⁴

Amendment of pleading or record. Where the amended pleadings grow out of the same facts or occurrence as alleged in the original pleading, an employer's complaint is amendable to include the employee as a party plaintiff after the running of the statute of limitations;⁵ but where an amended declaration filed by the employer after the expiration of the period of limitation states a different cause of action from that stated in the original declaration, the action is barred.⁶ Where, after the period of limitation has expired, the insurer is properly admitted as a party plaintiff to an action by one claiming as widow and sole heir of deceased employee and there is subsequently a judgment of nonsuit as to the widow, the insurer may amend the complaint so as to bring in missing heirs, where there is nothing to indicate that the original plaintiff fraudulently omitted to bring in such heirs and the attorneys for both plaintiffs had no knowledge of such heirs until immediately before the amendment was sought.⁷ While an amendment of a notice of motion in an action in the name of the employee to show that the employer is suing in the name of the employee may be appropriate where the employer may maintain an action in the name of the employee, such amendment does not constitute the institution of a new action which will permit the interposition of the plea of the statute of limitations.⁸ In an action by the widow of a deceased employee, the

propriety of permitting the amendment of the record, after the statute has run, to show that the action is for the benefit of the widow and of the employer who is entitled to subrogation under the act has been recognized.⁹

Provision fixing time for filing compensation claim. Statutes providing that the right to compensation shall be barred unless a claim is filed within a specified time after the date of the employee's death or injury have been held inapplicable in actions against third persons.¹⁰

Provision permitting action by employee or dependents on failure of employer or insurer to sue. Statutes providing that if an employer or insurer who is entitled to enforce the liability of a person other than the employer shall not within a specified time start proceedings to enforce such liability, the injured employee or, in case of death, his dependents, may enforce the liability of such other person, have been held to,¹¹ and have been held not to,¹² restrict to such specified period the employer's or insurer's right to bring an action.

In Louisiana, where the view is taken that the employer has two causes of action, as discussed supra § 1012, the statute of limitations applicable if the employee had sued for the wrong applies where the employer seeks to enforce rights acquired under the subrogation provision of the act,¹³ but the statute applicable to the action for indemnity, independent of the act, is that which is applicable to actions on implied contracts.¹⁴

4. Cal.—Lopez v. Pacific Electric Ry. Co., 269 P. 685, 93 C.A. 196.

5. Ill.—Geneva Const. Co. v. Martin Transfer & Storage Co., 114 N.E. 2d 906, 351 Ill.App. 289, affirmed 122 N.E.2d 540, 4 Ill.2d 273.

6. D.C.—Chapman v. Griffith-Consumers Co., 107 F.2d 263, 71 App. D.C. 64.

71 C.J. p 1577 note 99.

7. Cal.—Lopez v. Pacific Electric Ry. Co., 269 P. 685, 93 C.A. 196.

8. Va.—Smith v. Virginia R. & Power Co., 131 S.E. 440, 144 Va. 169.

9. Pa.—Gentile v. Philadelphia & R. Ry. Co., 118 A. 223, 274 Pa. 335.

10. Fla.—Florida Industrial Commission v. Felda Lumber Co., 18 So.2d 362, 154 Fla. 507.

Action by insurer

Va.—U. S. Fidelity & Guaranty Co. v. Blue Diamond Coal Co., 170 S. E. 728, 161 Va. 373.

Action by commission

Section of compensation act pro-

viding that right to compensation shall be barred unless claim therefor is filed within one year after injury or death has no application to industrial commission's right to enforce payment of contribution upon death of employee leaving no widow or dependents, since the commission acts for the state.

Fla.—Florida Industrial Commission v. Felda Lumber Co., 18 So.2d 362, 154 Fla. 507.

11. Me.—Fournier v. Great Atlantic & Pacific Tea Co., 148 A. 147, 128 Me. 393.

Mass.—Employers Mut. Liability Ins. Co. of Wis. v. Ford Motor Co., 140 N.E.2d 634.

Wis.—Martell v. Kutcher, 216 N.W. 522, 195 Wis. 19.

Waiver or loss of right by employer or insurer and failure or refusal to sue see supra § 1004.

12. Md.—Western Maryland Ry. Co. v. Employers' Liability Assur. Corporation, 161 A. 5, 163 Md. 97—

State v. Francis, 134 A. 26, 151 Md. 147.

13. La.—Marquette Cas. Co. v. Brown, App., 97 So.2d 92—Massachusetts Bonding & Ins. Co. v. Nelson, 22 So.2d 363.

71 C.J. p 1578 note 8.

Action held barred

Where insurer, from date of injury to insured's employee, admitted employee's right to workman's compensation at specified weekly rate and, prior to insurer's action against employer of alleged tort-feasor, had made payments, insurer's right of action arose, and current of one-year prescription began, over three years prior to filing of the action, making the action amenable to a plea of one-year prescription.

La.—Massachusetts Bonding & Ins. Co. v. Nelson, supra.

14. La.—Foster & Glassell Co. v. Knight Bros., 93 So. 913, 152 La. 596.

Marquette Cas. Co. v. Brown, App., 97 So.2d 92.

(2) In New York

Where an injured employee or, in case of death, his dependents take compensation and desire to bring an action against a third-person tort-feasor, such action must be commenced within the time allowed by statute or the cause of action is assigned to the party liable for compensation who thereafter has the exclusive right to maintain such action.

In New York, although an injured employee normally may bring an action against a negligent third person at any time within the period allowed in negligence actions generally,¹⁵ under a statute so providing, where an employee or, in case of death, his dependents take compensation and desire to

bring such an action, it must be commenced not later than six months after the awarding of compensation,¹⁶ or not later than nine months after the enactment of a law creating, establishing, or affording a new or additional remedy,¹⁷ and in any event before the expiration of one year from the date such action accrues,¹⁸ or the cause of action is assigned to the party liable for compensation who thereafter has the exclusive right to maintain such action.

The action must be commenced against the third party, or against a codefendant united in interest therewith, within the time prescribed,¹⁹ and, if not

15. N.Y.—*Mezzanotte v. Maurer*, 79 N.Y.S.2d 442, 191 Misc. 981.

16. N.J.—*Culnen v. Public Service Interstate Transp. Co.*, 57 A.2d 246, 136 N.J.Law 637 applying New York law.

N.Y.—*Mezzanotte v. Maurer*, 79 N.Y.S.2d 442, 191 Misc. 981—*Cooper v. Amehler*, 35 N.Y.S.2d 917, 178 Misc. 844.

17. Amendment held retroactive U.S.—*Commissioners of State Ins. Fund v. U. S.*, D.C.N.Y., 72 F.Supp. 549.

Federal Tort Claims Act

Under amendment extending period within which to institute a third-party action to nine months after passage of a law creating new or additional remedies, nine months after effective date of Federal Tort Claims Act was the last date on which injured longshoreman could institute suit against United States as third-party tort-feasor for injuries for which longshoreman had been awarded and paid compensation; and a waiver by employer's insurance carrier of right of subrogation did not extend the time for commencement of action, particularly where waiver was executed almost three years after commencement of action by employee.

U.S.—*Matovac v. U. S.*, D.C.N.Y., 91 F.Supp. 247.

18. N.J.—*Culnen v. Public Service Interstate Transp. Co.*, 57 A.2d 246, 136 N.J.Law 637 applying New York law.

N.Y.—*Mezzanotte v. Maurer*, 79 N.Y.S.2d 442, 191 Misc. 981.

Construction

(1) The statute directing that a third-party action must be commenced within one year from date of injury, if injured employee takes or intends to take compensation is unambiguous and does not require construction.

N.Y.—*Crossman v. Consolidated Edison Co. of New York*, 48 N.Y.S.2d 701, reversed on other grounds 50 N.Y.S.2d 785, 268 App.Div. 875, affirmed 60 N.E.2d 199, 294 N.Y. 39.

(2) The provision in the workmen's compensation law that if an injured employee takes compensation and desires to bring an action against a third party whose negligence caused the injury, the action must be commenced not later than six months after awarding of compensation, and in any event before expiration of one year from date such cause of action accrues, is plain, and the words employed ordinary, and they must be given their usual meaning.

N.Y.—*Carter v. Brooklyn Ladder Co.*, 25 N.Y.S.2d 639, 175 Misc. 920, affirmed 37 N.Y.S.2d 578, 265 App. Div. 39.

(3) An injured workman, who has accepted compensation, does not have a choice of commencing action within six months of awarding of compensation "or" before expiration of one year from date action accrues. N.Y.—*Duffy v. Thames Trading Co.*, 66 N.Y.S.2d 579.

Nondependent beneficiary

Provisions of the act requiring action against tort-feasor to be instituted within six months after receiving the award, or within one year from the date action accrued, does not bar the action by the nondependent beneficiary where there is no identity in the constituency of the dependent and next-of-kin group, but where the dependent is the sole beneficiary of the deceased employee's estate, or is sole next of kin, the compensation act limitation provision would apply.

N.Y.—*Lappin v. National Container Corp.*, 37 N.Y.S.2d 800, 179 Misc. 109.

Actions held barred

N.Y.—*Taylor v. New York Cent. R. Co.*, 62 N.E.2d 777, 294 N.Y. 397, motion denied 63 N.E.2d 711, 294 N.Y. 977, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Balsley v. Severance, 26 N.Y.S.2d 190, 261 App.Div. 492.

Monti v. Gimbel Bros., 82 N.Y.S.2d 781, 192 Misc. 811, affirmed 89 N.Y.S.2d 238, 275 App.Div. 845,

appeal denied 91 N.Y.S.2d 753, 275 App.Div. 1005—*Meyers v. Royce Haulage Corp.*, 76 N.Y.S.2d 301, 180 Misc. 777.

19. N.Y.—*Crossman v. Consolidated Edison Co. of New York*, 48 N.Y.S.2d 701, reversed on other grounds 50 N.Y.S.2d 785, 268 App.Div. 875, affirmed 60 N.E.2d 199, 294 N.Y. 39.

Service or delivery of process as commencement

(1) Where federal jurisdiction of suit for wrongful death was predicated on diversity of citizenship, suit was deemed to have been commenced on date of service upon defendant for purpose of determining whether it was commenced within time allowed compensation claimant to pursue his remedy against third-party tort-feasor.

U.S.—*Werkley v. Koninklijke Luchtvaart Maatschappij N. V.*, D.C.N.Y., 111 F.Supp. 300.

(2) The limitation period prescribed by the workmen's compensation law on an action by an employee covered by the law against a third-party tort-feasor was not extended by delivery of process to the sheriff within the statutory period and its service after the expiration thereof, since the time limitation of the compensation law, and not that prescribed by the civil practice act was applicable.

N.Y.—*Peritore v. Niagara Mohawk Power Corp.*, 157 N.Y.S.2d 723, 4 Misc.2d 202—*Weingarten v. Cohen*, 84 N.Y.S.2d 614, 193 Misc. 566, reversed on other grounds 89 N.Y.S.2d 356, 275 App.Div. 253, affirmed 89 N.E.2d 251, 300 N.Y. 528.

Duffy v. Thames Trading Co., 66 N.Y.S.2d 579.

(3) Provision in statute authorizing service of summons upon nonresident motorist by serving secretary of state that such service should be complete in ten days after papers are filed, is a matter of grace to allow actual notice to be brought to a nonresident motorist before beginning of a twenty-day period al-

so commenced, the third party may assert as a defense that the employee no longer holds the cause of action.²⁰ The fact that the assignee may not

lowed defendant to answer, and does not operate to shorten six-month period within which employee taking compensation for injuries received in collision with such nonresident may bring action against the nonresident before his action becomes assigned by law to state for benefit of state insurance fund; and the action commenced when service of summons was made on the secretary of state as motorist's statutory attorney for service of summons.

N.Y.—Cooper v. Amehler, 35 N.Y.S. 2d 917, 178 Misc. 844.

Action against another held sufficient

(1) Commencement of third-party action against employer of third party was sufficient to defeat motion of third party to dismiss complaint even though third party had not been served within time required by the workmen's compensation law, since third party and his employer were so united in interest that commencement of action against employer was sufficient to toll statute against third party.

N.Y.—Plumitallo v. 1407 Broadway Realty Corp., 111 N.Y.S.2d 720, 279 App.Div. 1019.

(2) Service of summons within year on allegedly negligent third party was sufficient to prevent assignment of cause of action against such third party's employer, a codefendant, since defendants were united in interest within statutory provision that action is commenced when summons is served on codefendant united in interest.

N.Y.—Hatch v. Cherry-Burrell Corp., 82 N.Y.S.2d 322, 274 App.Div. 234, appeal denied 83 N.Y.S.2d 219, 274 App.Div. 869.

(3) Transferee of corporation's assets, which had agreed to pay corporation's debts, was "united in interest" with such corporation as defendant in third-party action by contractor's employee for injuries sustained on corporation's premises, within terms of rule that action is commenced by service on codefendant united in interest, and hence service of summons on transferee within statutory time was sufficient to prevent cause of action against corporation from being assigned to contractor by operation of law, and employee remained real party in interest.

N.Y.—Cappello v. Union Carbide & Carbon Corp., 103 N.Y.S.2d 157, 200 Misc. 924.

Action against another held insufficient

(1) Corporation could defend against third-party action by em-

ployee on ground that action was not commenced within six months after award of compensation, notwithstanding employee within the required six-month period had commenced a third-party action against another corporation which allegedly owned premises where accident occurred.

N.Y.—Reyes v. Federal Adhesives Corp., 96 N.Y.S.2d 510.

(2) Timely commencement of action against third-party tortfeasor for negligence resulting in injuries to employee of another did not entitle injured employee's administratrix after employee's death to commence similar action against other tortfeasors more than six months after injured employee had accepted compensation award.

N.Y.—Jacoby v. Chemical Bank & Trust Co., 69 N.Y.S.2d 371.

(3) Where compensation claimant was injured as result of several negligence of defendants, who were not joint contractors or otherwise united in interest, and claimant failed to sue one defendant within one year after injury, action against defendant not sued was barred by limitation.

N.Y.—Crossman v. Consolidated Edison Co. of New York, 48 N.Y.S.2d 701, reversed on other grounds 50 N.Y.S.2d 785, 268 App.Div. 875, affirmed 60 N.E.2d 199, 294 N.Y. 39.

Impleader

Injured employee choosing to take compensation who brought third-party action against owner of premises at which he was injured within time required by statute, could not after lapse of statutory period, implead cleaning contractor who was responsible for waxing hallway wherein employee fell, since any action that injured employee might have had against cleaning contractor, was automatically assigned by operation of law to employer or his insurance carrier upon lapse of the statutory period.

N.Y.—Eisenberg v. Louis Adler Realty Co., 86 N.E.2d 102, 299 N.Y. 572.

Amendment

Where compensation claimant's third-party action against one of two defendants whose several negligence caused injury was timely, bar of one-year limitation as to other defendant could not be lifted by bringing in other defendant by amendment after expiration of one year from date of injury.

N.Y.—Crossman v. Consolidated Edison Co. of New York, 48 N.Y.S.2d 701, reversed on other grounds 50

N.Y.S.2d 785, 268 App.Div. 875, affirmed 60 N.E.2d 199, 294 N.Y. 39.

Discontinuance

Action in federal court by injured employee against negligent third party and others brought within a year after injury complied with requirement that action must be brought within a year if employee has received compensation, notwithstanding discontinuance of the action as to such defendant.

N.Y.—Mezzanotte v. Maurer, 79 N.Y. S.2d 442, 191 Misc. 961.

20. U.S.—McCall v. United Engineering & Foundry Co., D.C.N.Y., 148 F.Supp. 801—Alexander v. Creel, D.C.Mich., 54 F.Supp. 652, applying New York law.

N.Y.—Hyland v. Herman H. Schwartz, Inc., 121 N.Y.S.2d 611, 281 App.Div. 1044—Hatch v. Cherry-Burrell Corp., 82 N.Y.S.2d 322, 274 App.Div. 234, appeal denied 83 N.Y.S.2d 219, 274 App.Div. 869—Skakandy v. State, 80 N.Y.S.2d 849, 274 App.Div. 153 affirmed 84 N.E.2d 804, 298 N.Y. 886—Christison v. Wallace, 38 N.Y.S.2d 441, 265 App.Div. 937, appeal denied 39 N.Y.S.2d 619, 265 App.Div. 1001, overruling McCue v. J. F. Shea Co., 24 N.Y.S.2d 307, 175 Misc. 557, affirmed 24 N.Y.S.2d 130, 260 App.Div. 946—Carter v. Brooklyn Ladder Co., 37 N.Y.S.2d 573, 265 App.Div. 39—Nelson v. Buffalo Niagara Elec. Corp., 36 N.Y.S.2d 205, 264 App.Div. 941, affirmed 55 N.E.2d 371, 292 N.Y. 600—Calagna v. Sheppard-Pollak, Inc., 35 N.Y.S.2d 934, 264 App.Div. 589, appeal dismissed 46 N.E.2d 355, 289 N.Y. 753.

Farrell v. American Beverage Corp., 119 N.Y.S.2d 720, 203 Misc. 330—Bedsole v. Consolidated Edison Co. of N. Y., 118 N.Y.S.2d 192, 203 Misc. 194—Wenger v. Pullman Co., 80 N.Y.S.2d 171, 191 Misc. 937, affirmed 86 N.Y.S.2d 200, 194 Misc. 330, affirmed 89 N.Y.S.2d 894, 275 App.Div. 834—Young v. State, 74 N.Y.S.2d 811, 190 Misc. 711, reversed on other grounds 78 N.Y.S.2d 39, 273 App.Div. 986—Hazzard v. Finch Pruyn & Co., 40 N.Y.S.2d 574, 180 Misc. 195—Lappin v. National Container Corp., 37 N.Y. S.2d 800, 179 Misc. 109.

Maccarrone v. Accurate Const. Corp., 138 N.Y.S.2d 103—Liberty Mut. Ins. Co. v. Brown & Matthews, 98 N.Y.S.2d 804—Parkinson v. Rink, 82 N.Y.S.2d 417—Corsi v. Jenkins, 66 N.Y.S.2d 98—Jacoby v. Chemical Bank & Trust Co., 65 N.Y.S.2d 821.

Exclusive or concurrent right to sue and recover see supra § 1003.

Transfer of cause of action effected by statute see supra § 1002.

bring an action against the third party,²¹ or may not vigorously seek a recovery beyond the amount necessary to recompense itself,²² does not justify the maintenance of an action by the employee after the expiration of the limitation period.

The statute, however, does not shorten the period

within which the party liable for the payment of compensation may maintain an action,²³ nor does it impose a short statute of limitations upon the right of the employee to bring an action against a third party unless compensation has been awarded and accepted for the injuries on which the action is based;²⁴ thus, an action by an employee

Action in another state held not barred

U.S.—Magee v. McNany, D.C.Pa., 10 F.R.D. 5.

Motion to dismiss

Defendant's motion to dismiss injured workman's action against third-party tort-feasor on ground that workman's cause of action had been assigned to employer's insurance carrier by workman's acceptance of compensation payments and failure to bring third-party action within six months thereafter or within one year from time cause of action accrued would be denied where third-party tort-feasor was in a position to know of expiration of six-month and one-year periods and failed to set defense up in its original answer, and at time motion to amend defense was made three-year statute of limitations applicable to negligence actions generally had expired.

N.Y.—Forsyth v. Manufacturers Trust Co., 104 N.Y.S.2d 571, affirmed 105 N.Y.S.2d 358, 278 App. Div. 848.

Motion to amend answer

(1) Motion for leave to amend answer, by interposing defense that plaintiff's cause of action has been automatically assigned to the compensation carrier, because of failure to timely commence the action should have been granted, where no prejudice to the carrier would result. N.Y.—Lehman v. Hartke, 146 N.Y.S. 2d 444, 286 App. Div. 661.

(2) Defendants, moving nearly six years after commencement of personal injury action for leave to amend answers by adding allegations that action was barred because of failure to commence it within six months after first workmen's compensation award to plaintiff, were chargeable with laches barring such amendments.

N.Y.—Morey v. City of Rochester, 85 N.Y.S.2d 32, 274 App. Div. 969.

(3) Where action was begun against original third parties within the statutory period required by provision relating to third-party actions by injured employees, an additional third party who was subsequently brought into the action was properly denied permission to amend answer by inserting therein an additional defense alleging that plaintiff had failed to bring action against

additional third party within such statutory period.

N.Y.—Oldford v. Moran Towing Corp., 60 N.Y.S.2d 52, 270 App. Div. 822.

(4) Since statutes enlarging time within which actions could be brought by employees covered by workmen's compensation law against tort-feasors should not be construed liberally so as to encompass pending cases, a motion to amend answer will be granted.

N.Y.—Olker v. Salomone, 180 N.Y.S. 2d 229, 283 App. Div. 948, reargument and appeal denied 132 N.Y.S. 2d 338, 283 App. Div. 1103.

21. N.Y.—Monti v. Gimbel Bros., 89 N.Y.S.2d 238, 275 App. Div. 845, appeal denied 91 N.Y.S.2d 758, 275 App. Div. 1005.

22. N.Y.—Hazzard v. Finch Pruyn & Co., 40 N.Y.S.2d 574, 180 Misc. 195.

23. U.S.—Hartford Acc. & Indem. Co. v. Eastern Air Lines, Inc., D. C.N.Y., 155 F.Supp. 263.

N.Y.—Farrell v. American Beverage Corp., 119 N.Y.S.2d 720, 203 Misc. 330—Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941—Commissioners of State Insurance Fund v. Town of Howard, 31 N.Y.S.2d 910, 177 Misc. 820, affirmed 34 N.Y.S.2d 823, 263 App. Div. 1068, appeal denied 35 N.Y.S. 2d 787, 264 App. Div. 828.

24. N.Y.—Gillette v. Allen, 36 N.Y. S.2d 306, 264 App. Div. 599, appeal denied 37 N.Y.S.2d 493, 264 App. Div. 987, appeal dismissed 46 N.E. 2d 355, 289 N.Y. 754.

Duffy v. Thames Trading Co., 66 N.Y.S.2d 579.

Purpose of limitation

(1) Purpose of compensation law provision requiring that action against third-party tort-feasor be commenced within six months of compensation award, and in any event within one year from time cause of action accrued, is to foreclose double recovery for same injury.

N.Y.—Baselice v. Fanoni, 57 N.Y.S. 2d 531, 185 Misc. 593.

(2) Limitation provision of workmen's compensation law was not intended to shorten the three-year limitation for actions arising out of negligence contained in the civil practice act, but was intended to de-

fine who, within that period, should be entitled to bring the negligence action against the negligent third party.

N.Y.—Grossman v. Consolidated Edison Co. of New York, 50 N.Y.S.2d 785, 268 App. Div. 875, affirmed 60 N.E.2d 199, 294 N.Y. 39.

Necessity of formal award

(1) The fixation of liability on part of employer by the industrial board, and the granting of some compensation after such fixation, is an "awarding of compensation" within statute.

N.Y.—Carter v. Brooklyn Ladder Co., 37 N.Y.S.2d 573, 265 App. Div. 39.

(2) The six-month period did not begin to run on mere receipt of advance compensation payments in anticipation of a subsequent award of compensation, but only on a formal award of compensation.

N.Y.—Moses v. Contower Realty Corp., 63 N.Y.S.2d 889.

(3) The provision that employee, injured by negligence of another not in same employ, may sue such other for damages within six months after award of compensation, refers to compensation award, not receipt of temporary compensation payments, and application, made by injured employee within six months after date of such award, for leave to file claim against state, is timely, even though not made within six months after receipt of last compensation payment.

N.Y.—Young v. State, 74 N.Y.S.2d 811, 190 Misc. 711, reversed on other grounds 78 N.Y.S.2d 39, 278 App. Div. 986.

Validity of award

Where compensation award was made as result of claim erroneously processed by painter against apartment house owner as employer, but subsequently a corrected award was made against separate corporation which was his true employer, employee's third-party negligence action against apartment house owner commenced within six months after the date of the corrected award was not barred.

N.Y.—Brunn v. Tip Realty Corp., 112 N.Y.S.2d 183.

Actions for injuries not included in award

(1) In employee's action against employer's physician for malpractice, physician was not entitled to

commenced more than a year after the cause of action accrued, but before the taking of compensation, is not barred.²⁵

Although it has been held that the period of limitation commences to run when the first award of compensation is made,²⁶ it has also been held that the statutory provisions relating to the period of limitation must be liberally construed and read in conjunction with other provisions of the statute which require the board to give notice of an award to the parties involved,²⁷ and that the running of the period begins with the giving of notice of an award rather than with the act of making an award.²⁸

Infants or incompetents. Even where there has been an award of compensation, the statutory limitations as to time have been held not to run against

a person who is mentally incompetent, or a minor, as long as no committee or guardian has been appointed.²⁹ Thus, with respect to an infant, the period of limitation has been held not to begin running until the appointment of a guardian³⁰ or until the infant reaches majority.³¹

§ 1015. Parties

An injured employee, or, in case of his death, the personal representative or dependents of the employee, who under the compensation act have a beneficial interest in the amount recovered from a third person wrongdoer, may bring an action to recover from the wrongdoer; but some acts do not contemplate an action by dependents of an employee who have obtained an award.

Notwithstanding the employer is entitled to subrogation under the workmen's compensation act, an injured employee,³² or, in case of the death of the

summary judgment because employee had accepted compensation payments from employer's insurance carrier, where there was question of fact as to whether payments were for damages for result of original injury only or whether they also included damages for alleged malpractice.

N.Y.—Weinman v. Schmidt, 66 N.Y. S.2d 45, 271 App.Div. 843.

(2) Defendant in action for alleged malpractice in treatment of injury covered by workmen's compensation law may not take advantage of time limitation under statute providing that failure to commence action within time limited operates as assignment of cause of action to person liable for compensation until it is shown that plaintiff has taken and accepted compensation for aggravation of his injuries resulting from the alleged malpractice.

N.Y.—McIntyre v. Stewart, 55 N.Y. S.2d 39, 184 Misc. 610, affirmed 55 N.Y.S.2d 128, 269 App.Div. 731.

(3) Although the statutory provision requiring that action against third-party tort-feasor be commenced within six months after award of compensation, or in any event within one year from date cause of action accrued, applies to suits for malpractice, where the compensation award did not embrace aggravation of injury allegedly caused by defendant's malpractice, limitation provisions of compensation law respecting action against third-party tort-feasor did not apply to malpractice action so as to require dismissal for failure to bring action within time limited.

N.Y.—Baselice v. Fanoni, 57 N.Y.S. 2d 531, 185 Misc. 593.

(4) Where mother and sole next of kin of decedent killed in airplane crash in a foreign country elected to

take compensation under New York law, her failure to commence suit against airline for decedent's death within six months after compensation award resulted in an automatic statutory assignment to compensation insurer of that part of her cause of action demanding indemnity for airline's negligence in causing death, but not of that part of her cause of action dealing with "moral damages," which were unknown in New York; and the insurer, having only a partial assignment, could not cause splitting of cause of action by suing on its assignment, but entire cause of action remained in hands of decedent's estate for benefit of mother.

U.S.—Komlos v. Compagnie Nationale Air France, C.C.A.N.Y., 209 F.2d 436, certiorari denied Compagnie Nationale Air France v. Komlos, 75 S.Ct. 31, 348 U.S. 820, 99 L.Ed. 646.

25. N.Y.—Grossman v. Consolidated Edison Co. of N. Y., 60 N.E.2d 199, 294 N.Y. 39.

26. U.S.—Werkley v. Koninklijke Luchtvaart Maatschappij N. V., D. C.N.Y., 111 F.Supp. 300.

N.Y.—Nelson v. Buffalo Niagara Elec. Corp., 55 N.E.2d 371, 292 N. Y. 600.

27. N.Y.—Weingarten v. Cohen, 89 N.E.2d 251, 300 N.Y. 528.

28. N.Y.—Schulze v. Park Ave. Estates, 143 N.Y.S.2d 677—Brunn v. Tip Realty Corp., 112 N.Y.S.2d 183.

Service by mail

The six-month period of limitation on action by injured workman against negligent third person dates from the giving of notice of compensation award, and the plaintiff is entitled to the benefit of the civil practice act section providing for three days' additional time because of service of notice by mail.

N.Y.—Weingarten v. Cohen, 89 N.E. 2d 251, 300 N.Y. 528.

29. N.Y.—Inakay v. Sun Laundry Corp., 42 N.Y.S.2d 344, 180 Misc. 550.

Commissioners of State Ins. Fund v. Thames Trading Co., 64 N.Y.S.2d 91.

Married infant

N.Y.—Inakay v. Sun Laundry Corp., 42 N.Y.S.2d 344, 180 Misc. 550.

Leave to file claim granted

In application for leave to file claim against state for injuries for which claimant had obtained a workmen's compensation award, triable questions of fact, precluding summary denial of the application, were presented by allegation of claimant's mental incompetency interrupting the running of statutory one-year period after which the cause of action would have passed to compensation insurance carrier.

N.Y.—Young v. State, 78 N.Y.S.2d 39, 273 App.Div. 986.

30. N.Y.—Duffy v. Thames Trading Co., 66 N.Y.S.2d 579.

Action by injured employee held barred

Where minor workman sustained a compensable injury as the alleged result of act of third-party tort-feasor and, measured from date when guardian was appointed for workman, more than one year passed before third-party tort-feasor was served with summons and complaint, workman's cause of action by operation of law, was transferred to state insurance fund, and workman could not recover.

N.Y.—Duffy v. Thames Trading Co., supra.

31. N.Y.—Duffy v. Thames Trading Co., supra.

32. U.S.—Tipton v. Barge, C.A.N.C., 243 F.2d 531.

employee, the personal representative or dependents of such employee,³³ who under the act, have, or may have, a beneficial interest in the amount recovered from the third person wrongdoer, may bring an action against the wrongdoer, and it has been held that the injured employee, as the real party in interest, may bring the action in his own name.³⁴ The rule is otherwise where, under the provision involved, compensation is received and the personal representative has no cause of action against the wrongdoer for the death of an employee.³⁵ Notwithstanding a provision for subrogation of the employer to the rights of dependents of a deceased employee, it has been held that the personal representative, and not the employer, is the

proper person to sue for the death of the employee;³⁶ and where the employer's insurer, which has paid compensation to an injured employee, waives its right to pursue its remedy under the statute against a third-person tort-feasor, the employee is entitled to maintain an action against the third person in his own name.³⁷

A statute providing that an employee, or his dependents in case of his death, may proceed against a third-person tort-feasor if the employer or insurer does not commence an action within a stated time from the award is for the benefit of the employer or insurer and the injured employee or his dependents, and it is not for the benefit of the tort-

III.—Wintersteen v. National Coöperage & Woodenware Co., 197 N.E. 578, 361 Ill. 95.
Mass.—Benoit v. Hathaway, 38 N.E. 2d 329, 310 Mass. 362.
Neb.—Oliver v. Nelson, 258 N.W. 69, 128 Neb. 160.
N.C.—Jones v. Otis Elevator Co., 56 S.E.2d 684, 231 N.C. 285.
Okla.—Parkhill Truck Co. v. Wilson, 125 P.2d 203, 190 Okl. 473.
71 C.J. p 1578 note 13.
Exclusive and concurrent right to sue in general see supra § 1003.
In action for wrongful death see Death §§ 57-64.

Compensation insurer also liability insurer

Where the compensation insurer is also a liability insurer for one of the third persons causing the employee's injuries, the employee is a proper party to bring an action against the third-person tort-feasors.
U.S.—Czaplicki v. The Hoegh Silvercloud, N.Y., 76 S.Ct. 946, 351 U.S. 525, 100 L.Ed. 1387.

Where employer has not commenced action

N.C.—Ikerd v. North Carolina R. Co., 183 S.E. 402, 209 N.C. 270.

33. Ind.—Hall v. Pennsylvania Grayhound Lines, 96 N.E.2d 348, 121 Ind.App. 219.

Mass.—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631.

Tenn.—Millican v. Home Stores, 270 S.W.2d 372, 197 Tenn. 93.

Utah.—Johnson v. Cudahy Packing Co., 152 P.2d 98, 107 Utah 114.
71 C.J. p 1578 note 14.

Additional class including sisters

Workmen's compensation law providing for suit by personal representative or dependents of employee against tort-feasor other than employer was held to have added to Lord Campbell's Act an additional class that may sue thereunder and that class includes sisters.

Md.—Mech v. Storrs, 179 A. 525, 169 Md. 150.

General demurrer

Whether suit to recover compensation paid by insurer of excavating subcontractor to employee of subcontractor engaged by excavating subcontractor to move excavated materials should have been brought in name of excavating subcontractor for use of its insurer or in name of legal representative of deceased employee for use of insurer could not be reached by general demurrer.

III.—Baker & Conrad v. Chicago Heights Const. Co., 4 N.E.2d 953, 364 Ill. 386.

Sole party in interest

Administratrix of estate of motorist who was killed in collision in Iowa with automobile operated by federal employee was sole party in interest so far as recovery for wrongful death under Federal Tort Claims Act was concerned, notwithstanding motorist and his employer were under Wisconsin workmen's compensation act at time of accident and that employer's insurance carrier had paid compensation for motorist's death, since insurance carrier had no right of recovery of compensation paid under either Wisconsin or Iowa workmen's compensation act.

U.S.—Van Wie v. U. S., D.C.Iowa, 77 F.Supp. 22.

No right in dependent mother

Workmen's compensation statute providing that employee's dependents may pursue his remedy by action at law or otherwise against third-person tort-feasor did not grant special concession irrespective of statute providing that action for death shall be brought by widow and where there is neither widow nor minor child by any person dependent on person killed, and where surviving widow dismissed action against alleged tort-feasor, dependent mother did not succeed to right to sue.

Fla.—McCoy v. Florida Power & Light Co., 87 So.2d 809.

Action may not be brought by employer or employer's insurance carrier.

N.C.—Taylor v. Hunt, 95 S.E.2d 589, 245 N.C. 212.

No dependents

The fact that deceased employee left no dependents did not preclude maintenance of action against negligent third person on theory that there was no person authorized to sue.

Fla.—Vanlandingham v. Florida Power & Light Co., 18 So.2d 678, 154 Fla. 628.

Under homicide statute, in all cases not falling within workmen's compensation act, the right to maintain a suit for damages for wrongful death of an adult is alone in the personal representative.

Ala.—Robinson v. Western Ry. of Alabama, 9 So.2d 885, 243 Ala. 278.
—Smith v. Southern Ry. Co., 187 So. 195, 237 Ala. 372.

34. Okla.—Parkhill Truck Co. v. Wilson, 125 P.2d 203, 190 Okl. 473.
71 C.J. p 1563 note 3, p 1578 note 15.

Statutory assignment

Under amendatory provisions of workmen's compensation law relating to assignment of employee's cause of action against third-person tort-feasor to the insurance carrier, in absence of any affirmative allegations vesting employee's cause of action against third-person tort-feasor in insurance carrier, employee was real party in interest and could maintain suit in his name.
N.Y.—Sacco v. Central R. Co. of N. J., 119 N.Y.S.2d 369.

35. Minn.—Prebeck v. Village of Hibbing, 240 N.W. 890, 185 Minn. 303.
71 C.J. p 1578 note 16.

36. Neb.—Luckey v. Union Pac. R. Co., 219 N.W. 802, 117 Neb. 85.
71 C.J. p 1578 note 20.

37. Me.—Daigle v. Pelletier, 31 A.2d 345, 139 Me. 382.

feasor.³⁸ A rule that compensation act provisions relating to third-person tort-feasors are not intended to relieve such a wrongdoer of liability will not be applied to prevent an alleged tort-feasor from ascertaining who is the real plaintiff in an action against wrongdoer.³⁹

Where the act provides that, if compensation is paid, the insurer may enforce in the name of the employee or in its own name and for its own benefit the liability of a person other than the employer, the view has been taken that, as in the ordinary case of an action at law brought in the name of an assignor of a cause of action, it is immaterial whether plaintiff employee is the real party in interest or is a nominal party suing for the benefit of another;⁴⁰ and a like rule has been recognized in respect of the status of the personal representative of a deceased employee.⁴¹ An agreement of plaintiff employee not to sue the employer in consideration of receiving an amount equal to that called for by the workmen's compensation act, and to repay the employer's insurer from the amount recovered from defendant, does not make the employer's insurer a real party in interest as to the action against defendant.⁴²

An employee is under no duty to prosecute an action against a negligent third person for the benefit of his employer's insurance carrier, at least where the employee has never claimed or been awarded compensation or medical expenses;⁴³ but where an employee, seeking damages for personal injuries from an alleged wrongdoer, is paid compensation by his employer's insurer, the employee is not the real party in interest within a statute requiring an action to be brought by such a party.⁴⁴ It has been stated, however, that the act does not vest absolutely in an injured employee a cause of action for medical expenses which are not paid by him, or for moneys already paid as compensation,

but it gives the employee the right to sue the third person for both of such claims, in a sort of a representative or trust capacity.⁴⁵ Until an injured employee assigns to his employer, either actually or equitably, his right of action against a tort-feasor, the injured employee is the real party in interest under some compensation acts.⁴⁶

Under some acts it has been implied that the action against a negligent third person is prosecuted in behalf of any person entitled to claim a share in the recovery, regardless of whether he is a party to the action.⁴⁷

Under the Federal Workmen's Compensation Act, the United States has no right of action in the absence of an assignment by the employee of his right of action, but the commission may require an employee to assign his right of action to the United States or to prosecute an action in his own name as a condition of receiving compensation.⁴⁸ It has been held that the legal representative of an employee of the United States is the proper party to sue for the death of the employee notwithstanding compensation has been paid under the Federal Workmen's Compensation Act where an assignment to the United States of the cause of action against the third person wrongdoer was neither made nor required by the compensation commission.⁴⁹ So it has been held that a soldier of the United States army who had received compensation under the War Risk Insurance Act was entitled to maintain an action in his own name, as a real party in interest, against a negligent third person.⁵⁰

What constitutes joinder. Granting to insurer a lien on the judgment recovered by the personal representative of a deceased employee, pursuant to a provision of a compensation act, does not amount to a joinder of insurer with the personal representative in recovering judgment;⁵¹ but an employer having paid workmen's compensation to an injured em-

38. Md.—Johnson v. Miles, 53 A.2d 30, 188 Md. 455.

Prior statute did not contemplate an action by dependents of an employee who had obtained an award even though the action was brought in the name of the employer and the dependents had a beneficial interest in the amount recovered.

Md.—Bethlehem Steel Co. v. Raymond Concrete Pile Co., 118 A. 279, 141 Md. 67.

39. Kan.—Elam v. Bruenger, 193 P. 2d 225, 165 Kan. 31.

40. Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435.

71 C.J. p 1578 note 18.

Action by assignor in general see Assignments § 122.

41. Mass.—Chaves v. Weeks, 136 N. E. 73, 242 Mass. 156.

42. Or.—McKay v. Pacific Building Materials Co., 68 P.2d 127, 156 Or. 578.

43. N.Y.—Schreiber v. American Employers' Ins. Co., 38 N.Y.S.2d 250, 265 App.Div. 167, affirmed 49 N.E.2d 627, 290 N.Y. 673.

44. N.Y.—Wilton v. Radish, 44 N.Y. S.2d 437, 266 App.Div. 974, appeal denied 45 N.Y.S.2d 950, 267 App. Div. 765.

45. N.Y.—Calhoun v. West End Brewing Co., 56 N.Y.S.2d 105, 269 App.Div. 398.

46. Ohio.—Hubbuck v. City of Springfield, 2 Ohio Supp. 86.

47. N.C.—Lovette v. Lloyd, 73 S.E. 2d 886, 236 N.C. 663.

48. U.S.—Dierssen v. Woolever, D.C. Conn., 3 F.R.D. 342.

49. S.D.—Chiles v. Rohl, 201 N.W. 154, 47 S.D. 580.

50. Mo.—Gould v. Chicago, B. & Q. R. Co., 290 S.W. 135, 315 Mo. 713.

51. Wash.—Reutenik v. Gibson Packing Co., 231 P. 773, 132 Wash. 108, 37 A.L.R. 880, applying California law.

71 C.J. p 1579 note 23.

ployee may exercise his right of subrogation to the employee's rights against a third person causing the injury by joining in an action with the injured employee and applying to have allowed, as a first lien against the entire amount of any judgment for damages recovered by the employee, the amount of the employer's expenditures for compensation.⁵²

§ 1016. — Action in Name of Employer or Insurer

Under some workmen's compensation acts, an em-

ployer or his insurer may enforce in his or its own name rights against a tort-feasor who causes an injury to an employee.

Under the express terms of some workmen's compensation acts an employer⁵³ or insurer⁵⁴ may enforce in his or its own name rights against a third person who causes the injury to an employee. Even in the absence of specific permission or authorization, the right of the employer⁵⁵ or insurer⁵⁶ to maintain an action in his or its own name against a third person causing the injury to, or death of,

52. Cal.—Chase v. Southern Pac. Co., 43 P.2d 1108, 6 C.A.2d 273.

53. U.S.—Johnson v. Sword Line, Inc., C.A.Pa., 240 F.2d 954.
Haslam v. Trailways of New England, D.C.Conn., 59 F.Supp. 441
—Melella v. Savage, D.C.Del., 59 F.Supp. 258.

Ala.—Harris v. Louisville & N. R. Co., 186 So. 771, 237 Ala. 366.

Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Quisenberry v. Rulison, 277 P. 2d 57, 129 C.A.2d 268—Chase v. Southern Pac. Co., 43 P.2d 1108, 6 C.A.2d 273.

Ill.—Melohn v. Ganley, 100 N.E.2d 780, 344 Ill.App. 316.

Ind.—Hall v. Pennsylvania Greyhound Lines, 96 N.E.2d 348, 121 Ind.App. 219.

Ky.—Roberts v. U. S. Fidelity & Guaranty Co., 273 S.W.2d 39.

Mich.—Michigan Boiler & Sheet Iron Works, for Use and Benefit of American Mut. Liability Co. v. Dressler, 282 N.W. 223, 286 Mich. 502.

71 C.J. p 1579 note 24.

Real party in interest

(1) Where an employer paid compensation to an employee allegedly injured by a third party not under the act, and sought to recover against the third party the amount of compensation paid to the employee for the benefit of the employer's compensation insurer, the employer was the real party in interest notwithstanding the phrase "for the use" of the insurer since such words did not affect rights which the employer had against the third party.

Ill.—Melohn v. Ganley, 100 N.E.2d 780, 344 Ill.App. 316.

(2) An action to recover a sum paid by contractor in satisfaction of an award for funeral expenses of deceased employee of subcontractor who had not accepted provisions of the compensation act was properly brought under the express provisions of the workmen's compensation act, and was unaffected by general provision of the judicature act requiring suits to be prosecuted in the name of the real party in interest, notwithstanding sum was paid by contractor's insurance carrier.

Mich.—Michigan Boiler & Sheet Iron Works, for Use and Benefit of American Mut. Liability Co. v. Dressler, 282 N.W. 223, 286 Mich. 502.

(3) Under section of workmen's compensation act governing suits to enforce liability of third-person tort-feasor, employer had sufficient interest to prosecute action as "real party in interest" three years after injury, and failure to bring suit in name of employee's widow or personal representative was not fatal.

Mich.—Muskegon Hardware & Supply Co. for Use and Benefit of Hardware Mut. Cas. Co. v. Green, 72 N.W.2d 52, 343 Mich. 340.

(4) Under compensation act, an injured employee electing to receive compensation does not retain right to participate as plaintiff in an action which by the act has been assigned to his employer to recover from third person causing injury and therefore motion to have injured employees dropped as parties plaintiff was granted, since they were not "real parties at interest" within meaning of federal rules.

D.C.—Moore v. Hechinger, D.C., 39 F.Supp. 427, affirmed 127 F.2d 746, 75 U.S.App.D.C. 391.

Employer stands in shoes of employee

Wis.—Wisconsin Power & Light Co. v. Dean, 81 N.W.2d 486, 275 Wis. 236.

54. U.S.—Staples v. Central Surety & Insurance Corporation, C.C.A. Okl., 62 F.2d 650.

Ala.—Harris v. Louisville & N. R. Co., 186 So. 771, 237 Ala. 366.

Sloss-Sheffield Steel & Iron Co. v. Metropolitan Cas. Ins. Co. of New York, 185 So. 395, 28 Ala.App. 366, certiorari denied 185 So. 399, 237 Ala. 43.

Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Quisenberry v. Rulison, 277 P.2d 57, 129 C.A.2d 268—National Automobile Ins. Co. v. Cunningham, 107 P.2d 643, 41 C.A.2d 328.

Ill.—Geneva Const. Co. v. Martin Transfer & Storage Co., 122 N.E.2d 540, 4 Ill.2d 273.

Ky.—Roberts v. U. S. Fidelity & Guaranty Co., 273 S.W.2d 39,

N.Y.—De Clara v. Barber S. S. Lines, 132 N.E.2d 871, 309 N.Y. 620.

Liberty Mut. Ins. Co. v. Canadian Pac. R. Co., 95 N.Y.S.2d 890, 196 Misc. 852.

Okl.—Stinchcomb v. Dodson, 126 P. 2d 257, 190 Okl. 643.

S.C.—Fuller v. Southern Elec. Service Co., 20 S.E.2d 707, 200 S.C. 246.

Tex.—Consolidated Underwriters v. Kirby Lumber Co., Com.App., 287 S.W. 703.

71 C.J. p 1579 note 25.

Federal compensation act

Insurance carrier, enforcing employee's cause of action after subrogation to rights of employer under federal compensation act, may enforce its right in its own name, at least where wrongful death is not involved, subject to duties and obligations imposed by federal statute.

N.Y.—Travelers' Ins. Co. v. Lee & Simmons, 271 N.Y.S. 239, 241 App. Div. 835.

Insurer has substantive right in cause of action.

U.S.—Koepp v. Northwest Freight Lines, D.C.Minn., 10 F.R.D. 524.

Insurer stands in shoes of employee

Wis.—Wisconsin Power & Light Co. v. Dean, 81 N.W.2d 486, 275 Wis. 236.

Insurer as assignee

If insured employer has assigned employee's claim for injury caused by negligence of third person to insurer which has reimbursed employer for such injury, suit may be brought in insurer's name as assignee under statute permitting assignee and equitable owner of chose in action, not negotiable, to sue thereon in own names, or assignor may sue in own name as at common law, or assignee, if he owns chose in action, may sue in name of assignor.

U.S.—Haslam v. Trailways of New England, D.C.Conn., 59 F.Supp. 441.

55. Mo.—McKenzie v. Missouri Stables, Inc., 34 S.W.2d 136, 225 Mo. App. 64.

Pa.—Fitzpatrick v. Finnegan, Com. Pl., 33 Luz.Leg.Reg. 255.

71 C.J. p 1579 note 26.

56. Ind.—Employers' Liability Assurance Corporation v. Indianapolis & C. Traction Co., 144 N.E. 615, 195 Ind. 91.

the employee has been recognized, but under some acts the right is subject to certain limitations.⁵⁷ Some acts expressly permit the employer or insurer to proceed either in his or its own or in the name of the employee, as discussed *infra* § 1017.

Where the act provides that, if compensation is claimed and awarded, any employer may enforce for the benefit of the insurer the liability of a third person, the fact that the action is in the name of the employer for the benefit of the insurer and of the injured employee, if not in strict compliance with the act, has been considered immaterial where the act expressly directs the application of the amount recoverable.⁵⁸ A statute authorizing an employer or his insurer to proceed legally against a third person causing injuries to the employee

who has received compensation but who has not brought suit within a stated time from the injuries, and which does not expressly confer a right on the employer or his insurer to institute suit in his or its own name, should not be construed to imply such right, since the statute is in derogation of the common law and must be strictly construed.⁵⁹

Plaintiff as trustee. Where under the act either the employer or the employee may sue and both the employer and the employee or the employee's dependents have a beneficial interest in the recovery, the employer who sues does so, in part at least, as the trustee of an express trust,⁶⁰ to see that the employee receives any surplus after his indemnification.⁶¹

57. Longshoremen's Compensation Act

(1) Under Longshoremen's Compensation Act providing that acceptance of compensation operates as assignment to employer of employee's cause of action against third-person tort-feasor, employer is thereby constituted trustee of express trust and hence is real party in interest exclusively vested with right of action, and although insurer paying compensation has beneficial interest in recovery, insurer cannot maintain action as subrogee against tort-feasor.

N.Y.—Globe Indemnity Co. v. Atlantic Lighterage Corporation, 278 N.Y.S. 212, 244 App.Div. 97, affirmed 2 N.E.2d 640, 271 N.Y. 234.

(2) If insurer could maintain action in its own right to recover from third person amount of its expenditures, there inevitably would result a division of cause of action between insurer seeking to be indemnified and employer in whom would remain vested a cause of action for excess payable to injured employee. A rule which would thus subject third person to two actions on a cause of action which is single and entire would be fruitful of unjust results. Moreover, it would be incompatible with the principle that the equity of subrogation does not arise in favor of a surety or indemnitor until the entire obligation has been discharged. If, on the other hand, insurer were permitted to sue not only for actual expenditures, but for any excess to which injured employee might be entitled, it would violate basic principle that insurer may not maintain action in his own right where there is an outstanding interest in another because right of subrogation entitles him only to indemnity.

N.Y.—Globe Indemnity Co. v. Atlantic Lighterage Corporation, *supra*.

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(3) Payment of death compensation under Longshoremen's Compensation Act does not entitle employer to sue the tort-feasor in his own name under the wrongful death act unless all entitled to benefits of death act received compensation, and where right of dependents to which employer is subrogated under compensation act is only to a share of proceeds of recovery, employer acquires only right of dependent to compel representative of decedent, by appropriate proceedings, to maintain suit and to have share in proceeds of recovery against the tort-feasor.

Ill.—North Pier Terminal Co. for Use of Liberty Mut. Ins. Co. v. Hoskins Coal & Dock Corp., 77 N.E.2d 546, 333 Ill.App. 440, affirmed 83 N.E.2d 748, 402 Ill. 192.

Under New York statute

(1) Where injured workman collected compensation from compensation insurer, so as to subrogate insurer to workman's rights against person responsible for injury, statutory right which workman would have had to file a claim against insolvent liability insurer of person liable for injury did not inure to benefit of compensation insurer, whether liability insurer was solvent or insolvent.

N.Y.—In re Concord Casualty & Surety Co., 297 N.Y.S. 583, 163 Misc. 596, affirmed 4 N.Y.S.2d 1004, 254 App.Div. 721.

(2) Commissioners of state insurance fund, being by statute managers and administrators of the fund, were proper parties plaintiff to maintain action for damages allegedly caused by negligence of defendants to employee of an employer whose liability to employees was insured by fund, where compensation was awarded employee and he did not commence an action against defendants within time limited by workmen's compensation law.

N.Y.—Commissioners of State Ins. Fund v. Gladstone, 61 N.Y.S.2d 792, 186 Misc. 91.

(3) The workmen's compensation statutes giving employer cause of action against third-person tort-feasor for medical expenses paid on behalf of injured employee, and giving employee right of action against third-person tort-feasor for such expenses, when read together, are not inconsistent but provide compensation benefits, including medical care, for employee whether or not he succeeds in action or even brings one.

N.Y.—Calhoun v. West End Brewing Co., 56 N.Y.S.2d 105, 269 App.Div. 398.

(4) Where employee had not claimed or been awarded compensation for injuries arising out of, and in course of, employment and in an action for such injuries against negligent third person had recovered nothing for medical expense because he had incurred no such expense, employer and employer's insurance carrier had a separate cause of action against the negligent third person.

N.Y.—Schreiber v. American Employers' Ins. Co., 38 N.Y.S.2d 250, 265 App.Div. 167, affirmed 49 N.E.2d 627, 290 N.Y. 673.

(5) Other New York decisions see 71 C.J. p 1579 note 28 [a].

58. Md.—Bethlehem Steel Co. v. Variety Iron & Steel Co., 115 A. 59, 139 Md. 313, 31 A.L.R. 1021. Apportionment, distribution, and priorities in general see *infra* § 1042.

59. N.J.—U. S. Cas. Co. v. Hyrne, 189 A. 645, 117 N.J.Law 547.

60. U.S.—Jenkins v. Westinghouse Elec. Co., D.C.Mo., 18 F.R.D. 267, 71 C.J. p 1580 note 31.

61. Mo.—Zasslow v. Service Blue Print Co., App., 288 S.W.2d 377.

As between employer and insurer. Where rights against the third person wrongdoer are by the express terms of the act conferred on the employer, he may bring an action in his own name against the wrongdoer notwithstanding the employer carries insurance.⁶² So, where the right of the insurer to maintain the action depends on its payment of, or assumption of liability to pay, compensation, an employer who has paid compensation may maintain the action in the absence of a showing that the insurer has paid, or assumed liability to pay, compensation.⁶³ Furthermore, where the act provides that if compensation is paid under the act, the employer may enforce for his benefit or for that of the insurer carrying the risk the liability of a person other than the employer, the right of the insurer to maintain an action in its own name against such third person has been denied.⁶⁴ Notwithstanding a provision for the subrogation of the

employer, however, the right of the employer to maintain the action has been denied, on the ground that he is not the real party in interest where compensation was paid by the insurer;⁶⁵ and an insurance carrier who has paid the compensation and has relieved the employer of any further liability therefor has been held to have the option to prosecute the cause of action in either its or the employer's name.⁶⁶

§ 1017. — Action in Name of Employee, Dependents, or Personal Representative on Behalf of Employer or Insurer

Under some workmen's compensation acts, the employer or insurer may proceed against a third-person tort-feasor either in his or its own name or in the name of the employee.

Some acts expressly permit the employer⁶⁷ or in-

62. Ill.—C. J. DeWit Co. v. Central Lime & Cement Co., 250 Ill.App. 161.

71 C.J. p 1580 note 32.

63. Cal.—Western States Gas & Electric Co. v. Bayside Lumber Co., 187 P. 735, 182 C. 140.

64. U.S.—Milan v. Kausch, C.A. Mich., 194 F.2d 263.

John Deere Plow Co. v. Ortner, D.C.Mich., 11 F.Supp. 375.

71 C.J. p 1580 note 34.

65. N.C.—Whitehead & Anderson v. Branch, 17 S.E.2d 637, 220 N.C. 507.

71 C.J. p 1580 note 35.

Employer has no interest in the action, since he has paid nothing and suffers no injury.

N.C.—Whitehead & Anderson v. Branch, *supra*.

66. D.C.—Moore v. Hechinger, 127 F.2d 746, 75 U.S.App.D.C. 391.

Ky.—Roberts v. U. S. Fidelity & Guaranty Co., 273 S.W.2d 39.

67. U.S.—Melella v. Savage, D.C.Del., 59 F.Supp. 258.

Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Quisenberry v. Rulison, 277 P.2d 57, 129 C.A.2d 268.

Kan.—Terrell v. Ready Mixed Concrete Co. of Kansas City, Kan., 258 P.2d 275, 174 Kan. 633—Long v. American Employers' Ins. Co., 83 P.2d 674, 148 Kan. 520.

Ky.—Roberts v. U. S. Fidelity & Guaranty Co., 273 S.W.2d 39—National Biscuit Co. v. Employers Mut. Liability Ins. Co., 231 S.W.2d 52, 313 Ky. 305.

Mo.—Zasslow v. Service Blue Print Co., App., 288 S.W.2d 377.

Pa.—Paxos v. Jarka Corporation, 171 A. 468, 314 Pa. 148.

Assignment

(1) Under federal compensation act provision that, if death is caused under circumstances creating legal liability on some person other than United States, the United States employees' compensation commission may require beneficiary to assign to United States any right of action he may have to enforce such liability, or may require beneficiary to prosecute action in his own name, where commission has not acted in the matter, beneficiary may prosecute the action, but any recovery is applied or credited to make the United States whole with respect to compensation paid or payable.

Minn.—Wagner v. City of Duluth, 300 N.W. 320, 211 Minn. 252.

(2) Under workmen's compensation act, failure of workman to bring action against third person liable for his injury, within time specified by act, operates as an assignment to workman's employer of any cause of action in tort which he may have against such third person, and employer may enforce it by proper action in any court of competent jurisdiction, in his own name or in name of workman for their benefit as their interests may appear.

Kan.—Terrell v. Ready Mixed Concrete Co. of Kansas City, Kan., 258 P.2d 275, 174 Kan. 633.

Limited subrogation at option of employee

Amendment of workmen's compensation act so as to permit injured employee to claim compensation benefits and at the same time institute suit against third-person tort-feasor in name of injured employee as plaintiff, or at employee's option, in the name of employee and for use and benefit of employer or insurance carrier gives injured employee the

right to control his own lawsuit against third-person and provides for limited subrogation on an equitable basis.

Fla.—Fidelity & Cas. Co. of N. Y. v. Beddingfield, 60 So.2d 489.

Compensation accepted by employee

Where an injured employee accepted compensation under the compensation act, he could not maintain an action against a third-person within six months from the date of injury in his own name in the absence of an allegation in the complaint disclosing that the action was instituted in the name of employee by either his employer or his employer's insurance carrier.

N.C.—Taylor v. Hunt, 95 S.E.2d 589, 245 N.C. 212.

In Illinois

(1) Where compensation had been awarded for death of employee, caused by negligence of third person who also was under compensation act, employer had no right of recovery against third person in name of employee's personal representative for amount of compensation paid.

Ill.—Havana Nat. Bank, for Use of Hartford Acc. & Indem. Co. v. Tazewell Club, 19 N.E.2d 228, 298 Ill.App. 393.

(2) Action by decedent's widow and daughter to recover under dram shop act because of decedent's death, for which workmen's compensation had been paid, was not an action by the employee or his personal representative, within statute providing for an employer's participation in a proceeding on a claim for damages by reason of injury or death for which compensation has been paid; "personal representative" means the administrator or executor, or other official representative, of a deceased

surer⁶⁸ to proceed either in his or its own name or in the name of the employee, or jointly,⁶⁹ against a third-person tort-feasor. Such an act does not create a new cause of action but merely authorizes the employer or his insurance carrier in his or its own name or in the name of the injured employee to institute or join in and prosecute the injured employee's cause of action for the benefit of all.⁷⁰ Even in the absence of an express provision permitting the prosecution of an action against a third person in the name of the injured employee,⁷¹ or of the personal representative or dependents of a de-

ceased employee,⁷² the right to prosecute the action in such name for the benefit of the employer or insurer has been recognized.

The view has been taken, however, that under a provision that the employer, having paid compensation or having become liable therefor, shall be subrogated to the rights of the injured employee or of his dependents to recover damages against a third person and may recover in his own name or that of "the injured employee" from such third person, the indemnity paid or payable to the injured

employee, or the conservator or guardian of an incompetent or minor employee.

Ill.—Dillon v. Nathan, 135 N.E.2d 136, 10 Ill.App.2d 289.

(3) Other particulars of rule in Illinois see 71 C.J. p 1580 note 36 [a].

68. Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Quisenberry v. Rulison, 277 P.2d 57, 129 C.A.2d 268.

Ky.—Roberts v. U. S. Fidelity & Guaranty Co., 273 S.W.2d 39—National Biscuit Co. v. Employers Mut. Liability Ins. Co., 231 S.W.2d 52, 313 Ky. 305.

Mass.—Miller v. Richards, 26 N.E.2d 380, 305 Mass. 424.

N.Y.—De Clara v. Barber S. S. Lines, 132 N.E.2d 871, 309 N.Y. 620.

Pa.—Gaetano v. Dorst, Com.Pl., 89 Pittsb.Leg.J. 371.

71 C.J. p 1580 note 37.

One of the purposes of the statute, whereby both compensation insurer and injured employee have an interest in any action brought against third-person tort-feasor, was to impose ultimate liability for an injury to the employee upon a person other than the insured legally at fault. Mass.—Dreher v. Bedford Realty, Inc., 140 N.E.2d 180.

Benefit of insurer

In administratrix' action to recover damages for employee's death from another than employer, where complaint alleged that action was brought for benefit of employer's workman's compensation insurer, which paid award of compensation under workmen's compensation act and which was joined and appeared as party plaintiff, action may be continued as brought for benefit of insurer primarily and also for benefit of employee's widow and children, who may participate in any recovery exceeding amount of award.

S.C.—Fuller v. Southern Elec. Service Co., 20 S.E.2d 707, 200 S.C. 246.

Failure to bring action

(1) Where workman failed to file tort action against third-person tort-feasor within one year from injury

and employer likewise failed to bring such action, employer's compensation insurer was entitled to do so in his own name or in the name of the workman for their benefit as their interests might appear prior to expiration of statute of limitations.

Kan.—Wise v. Morgan-Mack Motor Co., 246 P.2d 308, 173 Kan. 372.

(2) Widow having failed to institute action against third-person tort-feasor for death of husband, employer's compensation insurer having assumed liability for compensation awarded widow could maintain such action in widow's name, since provisions in workmen's compensation act authorizing employer to maintain such action in name of injured employee or dependents or personal representatives of deceased employee create an exception to general rule of code of civil procedure that every action must be prosecuted in name of real party in interest and are to be given full effect notwithstanding such code provision.

Kan.—Krol v. Coryell, 175 P.2d 423, 162 Kan. 198.

In name of employee

N.C.—Whitehead & Anderson v. Branch, 17 S.E.2d 637, 220 N.C. 507 —Hinson v. Davis, 17 S.E.2d 348, 220 N.C. 380.

69. Mo.—Zasslow v. Service Blue Print Co., App., 288 S.W.2d 377.

70. Ky.—Roberts v. U. S. Fidelity & Guaranty Co., 273 S.W.2d 39.

Two causes of action not created

Kan.—Wise v. Morgan-Mack Motor Co., 246 P.2d 308, 173 Kan. 372.

71. Utah.—Johnson v. Cudahy Packing Co., 152 P.2d 98, 107 Utah 114. 71 C.J. p 1581 note 38.

Nominal plaintiff

In determining whether injured employee, to whom compensation had been paid, was bringing personal injury action against negligent third person as a nominal plaintiff for benefit of compensation insurer, it was immaterial that no assignment of employee's rights to employer or to insurer appeared.

Vt.—Towne v. Rizzico, 32 A.2d 129, 113 Vt. 205.

In Pennsylvania

(1) Under a provision that the employer shall be subrogated to the right of the employee against a third person to the extent of the compensation payable an employer who pays compensation may institute an action in the employee's name if the employee does not sue.

Pa.—Scalise v. F. M. Venzie & Co., 152 A. 90, 301 Pa. 315.

(2) Right of subrogation of insurer of employer paying compensation to injured employee where employee has recovered judgment for injuries against third-person must be worked out through action brought in name of injured employee, either by joining employer's insurer as a party plaintiff or as a use plaintiff.

Pa.—Moltz, to Use of Royal Indemnity Co. v. Sherwood Bros., 176 A. 842, 116 Pa.Super. 231.

(3) Other particulars of rule in Pennsylvania see 71 C.J. p 1581 note 38 [d] (2), (3).

72. La.—Walton v. Louisiana Power & Light Co., App., 152 So. 760. 71 C.J. p 1581 note 39.

Election by widow

Where there has been an election by widow to accept compensation under compensation act, but widow is not the only person for whose benefit action for wrongful death may be maintained, such action must be prosecuted by administrator, and duties and obligations of defendant are the same as if there had been no election by the widow to receive compensation.

D.C.—Tate v. Nelson, D.C., 71 F.Supp. 465.

Nominal party

Under provisions of workmen's compensation statute subrogating employer or insurance carrier, in case either has paid compensation award, to claim of employee against third person, employer or insurance carrier need not be a nominal party to an action brought by employee, or employee's administratrix in case of death, against third person.

U.S.—Ballard v. Southern Cotton Oil Co., D.C.S.C., 145 F.Supp. 882.

employee the employer must sue in his own name in an action for the death of an employee,⁷³ and that a suit brought in the employee's name should indicate clearly that it is brought by the employer or his insurer.⁷⁴ Where the act permits the employee to sue if the employer or insurer fails to sue within a specified time after the award of compensation, as discussed supra § 1004, the necessity for entitling an action by the employee, for the use of the employer or insurer, has been denied.⁷⁵ Where a provision that the employer shall be subrogated to the right of the employee or the dependents against a third person liable to the employee or dependents, but only to the extent of the compensation payable, is not construed as effecting an assignment to the employer but as the equivalent of a subrogation in equity, as discussed supra § 994, the necessity for bringing an action in the name of the employee has been asserted, as discussed infra § 1019.

Plaintiff as trustee. Where under the act either the employee or the employer may sue and both the employee and the employer have a beneficial interest in the recovery, the employee who sues does so, in part at least, as the trustee of an express trust,⁷⁶ to see that the employer's right of subrogation is protected.⁷⁷

§ 1018. — Action in Name of State

An action in the name of a state against a third-person tort-feasor may be brought where the act provides for the transfer of the cause of action to the state for the benefit of the accident fund.

Where the act provides for the transfer to the state for the benefit of the accident fund the cause of action against a person not in the same employ, the propriety of prosecuting an action in the name of the state against a third person has been recog-

nized.⁷⁸ Notwithstanding a provision of the statute creating a right of action for death by wrongful act that the action shall be brought by and in the name of the state for the use of the persons entitled to damages, it has been held or recognized that it is not essential that an action for the benefit of the dependents of a deceased employee and of an insurer who has paid compensation and thereby has acquired the right to proceed against a third person should be brought in the name of the state,⁷⁹ but where the insurer is the state accident fund, it has been held that it is proper that the action against the third person should be brought in the name of the state.⁸⁰ In an action by a workman or his dependents against a third-person tort-feasor, it has been held that a court will not consider reasons why the workmen's compensation bureau has not brought the action in the bureau's own name.⁸¹

§ 1019. — Proper and Necessary Parties

- a. Employee, or personal representative or dependents of deceased employee
- b. Employer or insurer

a. Employee, or Personal Representative or Dependents of Deceased Employee

Under some workmen's compensation acts, although a person who has elected to take compensation may have a beneficial interest in the amount recovered from a third-person wrongdoer, such person is not a proper party to an action by the employer; under other acts the employee or the dependents of a deceased employee have been regarded as proper but not necessary parties where he or they have an interest in the recovery.

Under some acts, the view has been taken that, even though the person who has elected to take compensation may have a beneficial interest in the amount recovered from the third-person wrongdoer, such person is not a proper party to an action by the employer.⁸² Under other acts providing for

73. Del.—*Silvia v. Scotten*, 122 A. 513, 31 Del. 290.
71 C.J. p 1582 note 40.

74. Del.—*Rogers v. Delaware Power & Light Co.*, 95 A.2d 842, 9 Terry 115.

Action not with insurer's consent

Where complaint on its face showed that injured employee's action against general contractors was a tort action at common law, employee moved to strike from answer all allegations relating to an award under the compensation act, efforts to prove amount and manner of payment of award were defeated by judge's action sustaining objections to questions, and employee thereafter moved to amend complaint by alleging that action was brought for the benefit of compensation insurer and himself.

action was not a subrogation action brought with insurer's consent and for joint benefit of insurer and employee.

S.C.—*Davis v. Fleming*, 13 S.E.2d 434, 196 S.C. 343.

75. Md.—*Stark v. Gripp*, 133 A. 338, 150 Md. 655.

76. Mo.—*McKenzie v. Missouri Stables, Inc.*, 34 S.W.2d 136, 225 Mo. App. 64.

77. Mo.—*Zasslow v. Service Blue Print Co.*, App., 288 S.W.2d 377—*McKenzie v. Missouri Stables, Inc.*, 34 S.W.2d 136, 225 Mo.App. 64.

78. Wash.—*State v. Cowlitz County*, 262 P. 977, 146 Wash. 305.

Provision for assignment

(1) Where widow of employee killed by third person accepted compensation award and assigned cause of

action to state, state had authority under compensation act to prosecute assigned cause of action against third person.

Wash.—*State v. Starr*, 52 P.2d 897, 185 Wash. 18.

(2) Other decisions under provisions for assignment see 71 C.J. p 1582 note 46 [a].

79. Md.—*Clough & Molloy v. Shilling*, 131 A. 343, 149 Md. 189.

71 C.J. p 1582 note 47.

80. Md.—*State v. New York, P. & N. R. Co.*, 118 A. 795, 141 Md. 305.

71 C.J. p 1582 note 48.

81. U.S.—*Nelson v. Westland Oil Co.*, D.C.N.D., 96 F.Supp. 656.

82. U.S.—*Workmen's Compensation Exchange v. Chicago, M., St. P. & P. R. Co.*, D.C.Idaho, 45 F.2d 885. 71 C.J. p 1582 note 50.

the subrogation of,⁸³ or for both assignment to, and subrogation of,⁸⁴ an employer, the employee or dependents of a deceased employee have been regarded as proper but not necessary parties, where the employee or the dependents may have an interest in the recovery.⁸⁵ Under at least one act the injured employee, even though he has received compensation benefits, is the only necessary party plaintiff in a common-law suit against a third person and he is not required to bring such suit for himself and for the use and benefit of the insurer.⁸⁶ Under a provision that the employer shall be subrogated to the right of the employee or the dependents against the third person liable to the employee or the dependents, but only to the extent of the compensation payable, which is construed as not effecting an assignment to the employer but as the equivalent of a subrogation in equity, as dis-

cussed supra § 994, the necessity for bringing an action at law against the third person in the name of the employee has been asserted.⁸⁷

An injured employee who has been paid compensation has been held not to be a proper or necessary party plaintiff in an insurer's action against a third-person tort-feasor,⁸⁸ at least where the action is not commenced within the statutory time after the accident has occurred or compensation was paid.⁸⁹ In an action by an injured employee against a third-person tort-feasor, another person who may possibly be liable may properly be impleaded, since the injured employee has but a single claim for damages for the injuries which he sustained in the accident.⁹⁰

In Louisiana, in an action by an insurer against a third person to recover compensation paid and

83. Mo.—Anzer v. Humes-Deal Co., 58 S.W.2d 982, 332 Mo. 432.

71 C.J. p 1582 note 51.

84. Cal.—Bassot v. United Railroads of San Francisco, 177 P. 884, 39 C. A. 60.

71 C.J. p 1583 note 52.

85. Colo.—Wilson v. Smith, 130 P.2d 1053, 110 Colo. 68.

Ind.—Hall v. Pennsylvania Greyhound Lines, 96 N.E.2d 348, 121 Ind.App. 219.

Iowa.—Corpus Juris cited in Iowa National Mutual Ins. Co. v. Chicago, B. & Q. R. Co., 68 N.W.2d 920, 226, 246 Iowa 971.

71 C.J. p 1583 note 53.

Administratrix not necessary party

Administratrix of estate of deceased employee was not a necessary party plaintiff to action by workman's compensation insurer against third person to recover for wrongful death of insured's employee.

Iowa.—Iowa Nat. Mut. Ins. Co. v. Chicago, B. & Q. R. Co., 68 N.W.2d 920, 246 Iowa 971.

Compensation paid in another state

However, decedent's widow was a proper and necessary party to action for death occasioned by negligence in Colorado which was commenced within one year after accrual of cause of action, even though decedent was employed in Wyoming and widow was receiving compensation from Wyoming industrial accident fund.

Colo.—Drake v. Hodges, 161 P.2d 338, 114 Colo. 10.

86. Fla.—Fidelity & Cas. Co. of N. Y. v. Beddingfield, 60 So.2d 489.

87. Del.—Jerardi v. Farmers' Trust Co. of Newark, 151 A. 822, 34 Del. 246, applying Pennsylvania law.

88. N.Y.—Husted v. Hendrikson Bros., 127 N.Y.S.2d 696, 283 App. Div. 737.

Assignment

Injured employee was not proper party to suit by insurance carrier securing assignment from employer of claim against third person causing injury.

U.S.—The Kokusai Kisen Kabushiki Kaisha, D.C.Tex., 44 F.2d 659.

Insurer real party in interest

Where employee, sustaining injury through negligence of a third person, had been paid compensation by employer's insurer, the insurer and not employee was the real party in interest in whose name the action against third person was required to be brought.

N.Y.—Wilton v. Radish, 47 N.Y.S.2d 824, 267 App.Div. 970—Wilton v. Radish, 47 N.Y.S.2d 823, 267 App. Div. 970, appeal denied 48 N.Y.S.2d 804, two cases, 267 App.Div. 987.

Statutory assignment

Where, after injured employee had accepted compensation under New York law with result that there had been statutory assignment of cause of action against tort-feasor to employer's insurer, employee instituted common-law action in federal district court sitting in Michigan against tort-feasor, the employee was not the real party in interest within federal rule or state statutes and could not prosecute the action.

U.S.—Alexander v. Creel, D.C.Mich., 54 F.Supp. 652.

89. N.Y.—Olker v. Salomone, 130 N. Y.S.2d 229, 283 App.Div. 948, reargument and appeal denied 132 N.Y. S.2d 338, 283 App.Div. 1103.

Lumber Mut. Cas. Ins. Co. v. William Spencer & Son Corp., 41 N.Y.S.2d 319, 181 Misc. 416.

Claim held not assigned to insurer

Where claimant filed a notice of

intention to sue within the one-year period and also filed and served a notice of motion, with notice of claim attached, to obtain permission to file a claim after the ninety-day period, and motion was returnable before the year had expired and motion was eventually granted, although not until after the year had expired, the claimant commenced action prior to the expiration of one year from the accrual of the cause of action, and therefore claim was not assigned to a compensation carrier.

N.Y.—Bickford v. State, 103 N.Y.S.2d 316, 278 App.Div. 721.

Surviving adult, nondependent children

Where stevedore, allegedly fatally injured by failure of owner of pier to repair heavy steel door which fell on stevedore, left surviving adult, nondependent children as well as minor, dependent child and widow, in view of interest of adult children in suit, widow, as administratrix, and not employer's workmen's compensation insurance carrier, was proper party to maintain wrongful death action against pier company, even though more than six months had elapsed from time of award of workmen's compensation death benefits.

N.Y.—De Clara v. Barber S. S. Lines, 132 N.E.2d 871, 309 N.Y. 620.

90. N.Y.—McCue v. J. F. Shea Co., 24 N.Y.S.2d 307, 175 Misc. 557, affirmed 24 N.Y.S.2d 130, 260 App. Div. 946.

Insurer of tort-feasor

In a reimbursement suit by injured employee of subcontractor and his compensation insurer against general contractor who allegedly caused injury, indemnity insurer of general contractor was not a proper party to suit.

Tex.—Torres v. Dishman, Civ.App., 69 S.W.2d 501, error dismissed.

expenses of medical services rendered to an injured employee, based on a conventional assignment and subrogation made by the employer to the insurer, the employee who has compromised his right of action against the third person is not a necessary party.⁹¹

b. Employer or Insurer

An employer paying compensation is a necessary party under some acts to an action by an employee or the personal representative of a deceased employee against a third-person tort-feasor whose alleged negligence caused the injury or death of the employee; under other acts neither the employer nor the insurer who pays compensation is a necessary party to the action.

Notwithstanding the act permits an injured employee both to receive compensation and to proceed against a third person for damages, where the employer is entitled to indemnity or subrogation in respect of compensation paid, in an action by the employee the employer should, it has been asserted, be brought in in some way in order that he may obtain indemnification.⁹² Thus an employer pay-

ing compensation is a necessary party under some acts,⁹³ and he must be made a party.⁹⁴

Under a provision that the employer shall be subrogated to the right of the employee or dependents against a third person, the propriety of making the employer a party to an action against the third person has been recognized even though the compensation has been paid by insurer,⁹⁵ as has the right of the employee or dependents to make the employer or insurer who has, or may have, an interest in the recovery, a party defendant.⁹⁶ On the other hand, under some acts, when the insurer has made payments to the employee, the insurer, and not the employer, has a right of action as the party subrogated so that the employer is not a proper party plaintiff to an action against a third person.⁹⁷

Notwithstanding the compensation act gives the employer or insurer an interest in the recovery from, or claim against, a third person, the view has been taken that neither the employer⁹⁸ nor the insurer

91. La.—Globe Indemnity Co. v. Toye Bros. Auto & Taxicab Co., 129 So. 234, 14 La.App. 142.

92. Iowa.—Black v. Chicago Great Western R. Co., 174 N.W. 774, 187 Iowa 904.

Pa.—Simon v. Keystone Coal & Grape Ass'n, Com.Pl., 29 Erie Co. 234.

93. Alaska.—Anderson v. Pacific S. S. Co., 8 Alaska 291.
71 C.J. p 1583 note 60 [a].

No allegation of award or payment
In action against electric company for death of workman who was electrocuted by company's electric wire, workmen's employer and employer's compensation insurance carrier were not necessary parties, where it was not alleged that an award had been made or that the employer or insurer had paid or become obligated for any amount.

Ky.—Kentucky-Tennessee Light & Power Co. v. Priest's Adm'r, 127 S.W.2d 616, 277 Ky. 700.

94. Neb.—Oliver v. Nelson, 258 N.W. 69, 128 Neb. 160.

Legal liability

To entitle an employer to participate in a proceeding on a claim for damages by reason of an injury or death for which compensation has been paid, there must be legal liability for damages on part of third person, the complaint must state a good common-law cause of action and the proof must establish a good common-law or statutory right of recovery of damage for negligence or wrongful death, and the negligence of the third person must be the proximate cause of the injury or death.
Ill.—Dillon v. Nathan, 135 N.E.2d 186, 10 Ill.App.2d 289.

95. Mo.—Anzer v. Humes-Deal Co., 58 S.W.2d 962, 332 Mo. 432.
71 C.J. p 1583 note 61.

96. Cal.—Stackpole v. Pacific Gas & Electric Co., 186 P. 354, 181 C. 700.
71 C.J. p 1583 note 62.

An automobile operator might eventually be liable over to owner of automobile for amounts recovered by one injured by negligent driving, and hence was a proper and necessary defendant in action by injured person against owner, even though driver had a good defense against primary liability because injured person was his employee and subject to compensation statutes.

Cal.—Baugh v. Rogers, 148 P.2d 633, 24 C.2d 200, 152 A.L.R. 1043.

97. U.S.—Rehrer v. Service Trucking Co., D.C.Del., 112 F.Supp. 24, applying Pennsylvania law.

Indispensable party

In suit for declaratory relief on ground that plaintiff had become liable for and had paid workmen's compensation to an employee allegedly injured through defendant's negligence based on a common-law right of indemnity, absence of insurance company actually paying compensation as a party to the suit was no defense, since subsequent development during trial that compensation payments were actually made by the insurer could be considered a transfer of interest by the plaintiff under the statute during the pendency of the action specifically authorizing continuance thereof in the name of the assignor; but insurer was an indispensable party to the recovery phase

of the proceeding so that employer was not entitled to recover of the defendant where the employer had paid nothing but the payments had been made by the insurance carrier which was not a party to the suit.
Ky.—Johnson v. Ruby Lumber Co., 278 S.W.2d 71.

98. U.S.—Jones v. Goodman, D.C. Kan., 114 F.Supp. 110, applying Nebraska law—Calvino v. Farley, D. C.N.Y., 26 F.Supp. 431.

Md.—Baltimore Transit Co. v. State to Use of Schriever, 39 A.2d 853, 183 Md. 674, 156 A.L.R. 460.
Miss.—American Creosote Works of La. v. Harp, 60 So.2d 514, 215 Miss. 5.

Mo.—Smith v. Siedhoff, 209 S.W.2d 233.

Reynolds v. Grain Belt Mills Co., 78 S.W.2d 124, 229 Mo.App. 380, remanded 69 S.W.2d 947, 334 Mo. 712.

Pa.—Tribuno v. Donato, Com.Pl., 4 Chest.Co. 69.

S.C.—Fuller v. Southern Elec. Service Co., 20 S.E.2d 707, 200 S.C. 246.
71 C.J. p 1583 note 63.

Agreement of parties

In action against truck owners for injuries received by traveling salesman when truck sideswiped salesman's automobile, for which salesman had received compensation under the workmen's compensation act, the employer and the employer's insurer were not necessary parties to the action where agreement between employer, employer's insurer, and salesman authorized salesman to prosecute action in his own name, since, in view of agreement, judgment would constitute a complete

who pays compensation⁹⁹ is a necessary party to an action by the employee or the personal representative of a deceased employee against a third person whose negligence caused the injury or death of the employee. Where the right of an employer to relief against a third person is dependent on his being a self-insurer, an employer who is not a self-insurer is neither a necessary,¹ nor, it seems, a proper,² party to an action to enforce the liability of the person who, it is alleged, caused the injury. It has been asserted that, notwithstanding the employer and insurer are primarily the beneficiaries of the action against a third person, the employer or insurer is neither a necessary³ nor even a proper⁴

party.

Under provisions that the acceptance of compensation shall operate as an assignment to the employer of the right of the person entitled to compensation to proceed against the person causing the injury and that out of the amount recovered the employer shall pay to the employee or to the representative the excess over expenses, benefits furnished by the employer, and compensation paid and payable, the employer is the only necessary party plaintiff in an action against a third person for injury to, or the wrongful death of, an employee where the employer has paid compensation.⁵ Where an insurance carrier, as a third-party as-

bar to any further suit based on the same cause of action, which was the only question of importance concerning defendant.

Mo.—*Edwards v. Woods*, 119 S.W.2d 359, 342 Mo. 1097.

Joint tort-feasors' contribution act

In action by employee of corporation which had contracted to furnish material and labor necessary to construct electric transmission wires for defendant, for injuries received when he contacted live wire, plaintiff's employer was not a proper party defendant, even under joint tort-feasors' contribution act, where employer carried insurance pursuant to workmen's compensation law and had paid all compensation due to plaintiff under that act.

Ark.—*C. & L. Rural Elec. Co.-op. Corp. v. Kincaid*, 256 S.W.2d 337, 221 Ark. 450.

Not proper party

Kan.—*Davison v. Martin K. Eby Const. Co.*, 218 P.2d 219, 169 Kan. 256.

It was not necessary to add name of employer as a party plaintiff in caption, where right of subrogation to employer of deceased employee was involved, although plaintiff should have included name of employer in her statement as one of beneficiaries on its claim for subrogation.

Pa.—*Jenkins v. Pennsylvania Power Co.*, 41 Pa. Dist. & Co. 231, 89 Pittsb. Leg.J. 67.

99. U.S.—*Betts v. Southern Ry. Co.*, C.C.A.N.C., 71 F.2d 787.

Md.—*Baltimore Transit Co. v. State to Use of Schriefer*, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460.

Miss.—*American Creosote Works of La. v. Harp*, 60 So.2d 514, 215 Miss. 5.

Mo.—*Smith v. Siedhoff*, 209 S.W.2d 233.

Reynolds v. Grain Belt Mills Co., 78 S.W.2d 124, 229 Mo.App. 380, remanded 69 S.W.2d 947, 334 Mo. 712.

Pa.—*Tribuno v. Donato*, Com.Pl., 4 Chest.Co. 469.

Tex.—*Traders & General Ins. Co. v. West Texas Utilities Co.*, Civ.App., 156 S.W.2d 271, reversed on other grounds 165 S.W.2d 713, 140 Tex. 57.

71 C.J. p 1584 note 64.

No subrogation under statute

Action for death occasioned by negligence in Colorado was properly brought in name of decedent's widow, although decedent was employed in Wyoming under whose statute such cause of action would inure to decedent's personal representative, but under applicable Wyoming statute, which does not provide for subrogation, Wyoming industrial accident fund, from which widow received compensation for husband's death, was not a necessary party to action and could only look to proceeds of judgment in hands of widow for reimbursement for compensation paid.

Colo.—*Drake v. Hodges*, 161 P.2d 338, 114 Colo. 10, applying Wyoming law.

Not proper party

U.S.—*Milan v. Kausch*, C.A.Mich., 194 F.2d 263.

Kan.—*Davison v. Martin K. Eby Const. Co.*, 218 P.2d 219, 169 Kan. 256.

Not indispensable party

U.S.—*Hayhurst v. Henry*, D.C.Tex., 102 F.Supp. 306.

1. Md.—*Texas Co. v. Washington, B. & A. Electric R. Co.*, 127 A. 752, 147 Md. 167, 40 A.L.R. 495.
71 C.J. p 1584 note 65.

2. Md.—*Texas Co. v. Washington, B. & A. Electric R. Co.*, supra.
71 C.J. p 1584 note 66.

3. N.C.—*Essick v. City of Lexington*, 60 S.E.2d 106, 232 N.C. 200—*Jones v. Otis Elevator Co.*, 56 S.E. 2d 684, 231 N.C. 285.
71 C.J. p 1584 note 67.

4. N.C.—*Essick v. City of Lexington*, 60 S.E.2d 106, 232 N.C. 200—

Jones v. Otis Elevator Co., 56 S.E. 2d 684, 231 N.C. 285.

71 C.J. p 1584 note 68.

Liability of employer to be sued

In action for death of plaintiff's intestate, complaint alleging negligence of municipality in failing to keep its streets in repair causing death of intestate in sewer drain which he was excavating, and alleging that intestate was working with Emergency Relief Administration which was alleged to be an independent contractor failed to state cause of action where independent contractor was not made party to the action and it was not shown that independent contractor could be sued.

N.C.—*Barnhardt v. City of Concord*, 196 S.E. 310, 213 N.C. 864.

5. U.S.—*Ætna Life Ins. Co. v. Moses*, App.D.C., 53 S.Ct. 231, 287 U.S. 530, 77 L.Ed. 477.

Other persons

Provision in longshoremen's compensation act that acceptance of compensation shall operate as an assignment of right to recover damages against third person gives employer or insurance carrier right to maintain action for wrongful death against a third person where the person who elects to receive compensation is the sole person for whose benefit such action for wrongful death may be brought, but not where there are persons other than the person who elects to take compensation for whose benefit action for wrongful death may be maintained.

D.C.—*Tate v. Nelson*, D.C., 71 F.Supp. 465.

Insurer cannot bring action alone

Employer's insurer, paying compensation awarded injured employee under federal statute, cannot bring action alone against third person causing injury for damages, but may demand that employer do so and, if he refuses, bring such action and make employer party thereto.

N.Y.—*Globe Indem. Co. v. Atlantic Lighterage Corp.*, 2 N.E.2d 640, 271 N.Y. 234.

signee of an injured workman's claim, brings an action against an asserted wrongdoer to recover damages for injuries, the insurance carrier is a real party in interest and a motion by defendant to eliminate from the pleadings certain portions thereof which make reference to the original plaintiff will be granted.⁶

Absence of award. Where the subrogation of an insurer to the rights and duties of the employer depends on insurer's assumption of the employer's liability to pay compensation or the insurer's payment of compensation for which the employer is liable, the insurer is a proper party plaintiff to an action against a third person for injury to an employee even though an award of compensation has not been made when the action is commenced, if liability to pay compensation is created by the act and not by the award.⁷ On the other hand, under a provision that the acceptance of an award shall operate as an assignment to the employer of any right to recover damages which the employee may have against a third person and that insurer who pays, or assumes liability for, compensation shall be subrogated to the rights of the employer, the view has been expressed that it is improper to permit an insurer to become a party to an action against a third person before an award is made.⁸ Where, however, it appears on the face of the complaint by an employee against a third person that no award had been made by the industrial commission and that neither the employer nor his insurer

has admitted or accepted liability, the employer and insurer are neither necessary nor proper parties.⁹

Effect of failure of employer to become party. Fact that an employer has not become or been made a party to an action by the employee against the third-person wrongdoer does not prevent subrogation of the employer, given by some acts, out of the fund recovered.¹⁰

In Louisiana, in an action by an insurer against a third person to recover compensation paid, and expenses of medical services rendered to an injured employee, based on a conventional assignment and subrogation made by the employer to the insurer, the employer is not a necessary party in view of his assignment.¹¹

§ 1020. — Joinder

Under some workmen's compensation acts, it is proper to join as parties the employee or personal representative of a deceased employee with the employer or insurer in an action against a third-person tort-feasor, where those who are made parties have an interest in the recovery.

The propriety of joining as parties the employee, or the personal representative or dependents of a deceased employee, with the employer¹² or insurer¹³ has been recognized where those who are made parties have, or may have, an interest in the recovery, as has the right of the employee or dependents to make the employer or insurer a party defendant if he refuses to join.¹⁴ The view has been

6. N.Y.—Liberty Mut. Ins. Co. v. Canadian Pac. R. Co., 95 N.Y.S.2d 390, 196 Misc. 852.
7. Cal.—Moreno v. Los Angeles Transfer Co., 186 P. 800, 44 C.A. 551.
8. N.C.—Alford v. Seaboard Air Line Ry. Co., 164 S.E. 125, 202 N.C. 719.
9. N.C.—Jones v. Otis Elevator Co., 56 S.E.2d 684, 231 N.C. 285.
10. Pa.—Wilson v. Pittsburgh B. & I. Works, 85 Pa.Super. 537.
11. La.—Globe Indemnity Co. v. Toye Bros. Auto & Taxicab Co., 129 So. 234, 14 La.App. 142.
12. U.S.—First Nat. Bank in Greensburg v. M & G Convoy, Inc., D.C. Pa., 102 F.Supp. 494.
Cal.—Quisenberry v. Rulison, 277 P. 2d 57, 129 C.A.2d 268—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 C.A.2d 254.
Idaho.—O'Connell v. Ivankovich, 111 P.2d 888, 62 Idaho 328.
Mo.—Schumacher v. Leslie, 232 S. W.2d 913, 360 Mo. 1238—Bunner v. Patti, 121 S.W.2d 153, 243 Mo. 274.

N.J.—U. S. Cas. Co. v. Hyrne, 189 A. 645, 117 N.J.Law 547.
Pa.—Smith v. Altoona & Logan Valley Elec. Ry. Co., 41 Pa.Dist. & Co. 165.
Wis.—Braun v. Jewett, 85 N.W.2d 364, 1 Wis.2d 531.
71 C.J. p 1585 note 75.
13. U.S.—U. S. Fidelity & Guaranty Co. v. U. S., C.C.A.N.Y., 152 F.2d 46.
Paschall v. Mooney, D.C.N.Y., 110 F.Supp. 749—First Nat. Bank in Greensburg v. M & G Convoy, Inc., D.C.Pa., 102 F.Supp. 494—Hayhurst v. Henry, D.C.Tex., 102 F.Supp. 306.
Idaho.—O'Connell v. Ivankovich, 111 P.2d 888, 62 Idaho 328—Lebak v. Nelson, 107 P.2d 1054, 62 Idaho 96.
N.J.—U. S. Cas. Co. v. Hyrne, 189 A. 645, 117 N.J.Law 547.
Tex.—Yellow Cab & Baggage Co. of San Antonio v. Donnell, Civ.App., 159 S.W.2d 946.
Wis.—Braun v. Jewett, 85 N.W.2d 364, 1 Wis.2d 531.
71 C.J. p 1585 note 76.
Involuntary plaintiff
Where employee of independent

contractor brought third-party action against owner of premises upon which he was injured and for which workmen's compensation had already been paid, and compensation carrier filed waiver of right to participate in suit but specifically reserved right to share in proceeds as provided by Wisconsin statute, there was no error in joining such carrier as an involuntary plaintiff.
U.S.—Hrabak v. Madison Gas & Elec. Co., C.A.Wis., 240 F.2d 472.
Waiver
The failure of dependents of deceased employee who had elected to accept compensation for death of employee to make insurance carrier a party plaintiff in action against tort-feasor, or if carrier refused to join, to make it a party defendant, was at most a defect in parties plaintiff, which was waived unless raised.
Utah.—Johanson v. Cudahy Packing Co., 152 P.2d 98, 107 Utah 114.
14. Utah.—Johanson v. Cudahy Packing Co., supra.
Right of employee or dependents to make the employer or insurer who has an interest in the recovery a party defendant see supra § 1019 b.

taken, however, that, where the act provides for an election by the dependents of a deceased employee and for the subrogation of the employer to the rights of dependents to recover against a third person, if compensation is claimed and awarded, it constitutes a misjoinder if dependents are made parties plaintiff in an action by the employer if compensation has been claimed and awarded.¹⁵

Where an award of compensation operates in general to vest in the insurance carrier the entire cause of action, as discussed supra § 996, and an assignment has been effected, the view has been taken that the employee to whom an award has been made may not properly be joined with insurer as coplaintiff,¹⁶ even though insurer, after payment of the award of compensation, irrevocably declares itself a trustee for the benefit of the employee of any surplus that may be recovered;¹⁷ but the propriety of permitting a plaintiff employee to bring in the insurer as coplaintiff has been recognized where the insurer consents and defendant has set up as a defense the alleged election of plaintiff to take compensation.¹⁸ Also, where, on the employee's election to take workmen's compensation, the employee's cause of action against a wrongdoer is, under statute, assigned to the employer, the employer is not required, on the employee's death after action has been begun against the wrongdoer, to join the employee's personal representative as the real party in interest.¹⁹

Notwithstanding a provision of an act that an employer shall be subrogated to the right of an employee against a third-person tort-feasor, an in-

jured employee may maintain an action without joining as plaintiff the employer or the employer's insurer,²⁰ and a negligent third person is not entitled to join an insurer as an additional party plaintiff in the absence of a showing that fairness requires a joinder.²¹

Under a statute providing that either the employee or the employer may institute an action in his own name, an employer who starts an action against a third-person tort-feasor to recover for workmen's compensation paid and payable to a widow of employee is not required to join the personal representative of the deceased employee as a party.²² Under another statute making a lessor of a motor vehicle liable for damage caused by its operation while so leased, a lessor may not join as a party defendant a lessee who is the employer of the injured person and also the employer of the person whose negligence caused the injury, because the statutory liability of the lessor as such is separate and distinct from the liability of the lessee under the workmen's compensation statute.²³

Employer and insurer. Where the act provides for an election by the dependents of a deceased employee and for the subrogation of the employer to the rights of dependents to recover against a third person if compensation is claimed or awarded, the propriety of joining insurer as a party plaintiff with the employer has been recognized because of a general rule, sometimes recognized, granting to insurers the right of subrogation by operation of law to sue the one who has caused the damages or loss which insurer has paid or is paying.²⁴

Tort-feasor may not complain of joinder of employer as a defendant where it does not appear that his interests were adversely affected by joinder.

U.S.—*Johnsen v. American-Hawaiian S. S. Co.*, C.C.A.Cal., 98 F.2d 847.

Coplaintiff

Where injured employee sued tort-feasor, and made his employer's compensation insurer a party defendant, alleging that insurer claimed an interest in the cause of action because of compensation paid to injured employee, insurer became in effect a coplaintiff with injured employee, and it was immaterial that insurer was first made a defendant.

Tex.—*Hartford Acc. & Indem. Co. v. Weeks Drug Store*, Civ.App., 161 S.W.2d 153, error refused.

Dismissal

In action against third person for death of employee who was killed in explosion of hydrogen in cylinder in which third person had shipped ammonia to employer, and for whose death compensation award under

South Carolina statute had been paid by employer and insurance carrier, motion of employer, which had been joined as third-party defendant, to dismiss as to it on ground that it had fully discharged liability to administratrix by causing payment of award was denied.

U.S.—*Elliott v. Armour & Co.*, D.C.S.C., 30 F.Supp. 367.

15. U.S.—*Workmen's Compensation Exchange v. Chicago, M., St. P. & P. R. Co.*, D.C.Idaho, 45 F.2d 885.

16. Kan.—*Wise v. Morgan-Mack Motor Co.*, 246 P.2d 308, 173 Kan. 372.

N.Y.—*Lang v. Brooklyn City R. Co.*, 161 N.E. 178, 247 N.Y. 551.

17. N.Y.—*Lang v. Brooklyn City R. Co.*, supra.

18. N.Y.—*Roecklein v. American Sugar Refining Co.*, 226 N.Y.S. 375, 222 App.Div. 540.

19. Fla.—*Haverty Furniture Co. v. McKesson & Robbins*, 19 So.2d 59, 154 Fla. 772.

20. Mo.—*Edwards v. Woods*, 119 S.W.2d 359, 342 Mo. 1097.

21. U.S.—*Jenkins v. Westinghouse Elec. Co.*, D.C.Mo., 18 F.R.D. 267.

Trial court has discretion, when fairness requires, to require joinder.

U.S.—*Jenkins v. Westinghouse Elec. Co.*, supra.

22. Conn.—*Stavola v. Palmer*, 73 A.2d 831, 136 Conn. 670.

Complicated trial

Mere fact that trial might be complicated because employer had to prove not only liability of third person as a tort-feasor, but also amount of damages sustained by employee as a limit to amount which employer might recover did not require joinder of employee's personal representative as a party.

Conn.—*Stavola v. Palmer*, supra.

23. Conn.—*Farm Bureau Mut. Auto. Ins. Co. v. Kohn Bros. Tobacco Co.*, 107 A.2d 406, 141 Conn. 539.

24. U.S.—*Workmen's Compensation Exchange v. Chicago, M., St. P. & P. R. Co.*, D.C.Idaho, 45 F.2d 885.

§ 1021. — New Parties, Intervention, and Substitution

Where an employee elects to bring an action against an alleged third-person wrongdoer and there is no liability of the employer other than for workmen's compensation, the defendant may not bring in the employer as a party defendant; but it is usually held that an employer or his insurer may intervene in an action by the employee to enforce a right of subrogation or other right against the third person.

Where the compensation act gives the employer the right of subrogation, according to some cases, defendant in an action by the employee may make the employer a party to the record for the purpose of protection,²⁵ and may by timely and appropriate exception for nonjoinder require that the employer shall be made a party either as plaintiff or defend-

ant.²⁶ Under an act providing that awarding compensation shall operate as an assignment to the person liable for compensation, the right of plaintiff employee to bring in, on motion, insurer as co-plaintiff has been recognized,²⁷ at least where plaintiff asserts, contrary to the claim of defendant, that no valid award had been made.²⁸

Where an employee or the personal representative of a deceased employee elects to bring an action against an alleged third-person wrongdoer, pursuant to the compensation act, and there is no liability of the employer other than for compensation under the act, defendant may not, on motion, bring in the employer as a party defendant for the purpose of having the employer held liable as a joint tort-feasor,²⁹ and a like rule has been recognized

Insurer should be joined as party plaintiff

Ky.—Johnson v. Ruby Lumber Co., 278 S.W.2d 71.

25. Pa.—Weschler v. B. & L. E. Traction Co., 6 Pa.Dist. & Co. 556.

26. La.—Lowe v. Morgan's Louisiana & T. R. & S. S. Co., 90 So. 429, 150 La. 29.

Litigating issue of fault

Where sublessee of pier put steamship company in possession under agreement by company to indemnify sublessee from all damages arising from operation for which sublessee was not legally liable, and steamship company's employee was injured on pier and recovered compensation from company, but also sued sublessee, sublessee could make company a third-party defendant; and fact that employee sought both compensation and third-party remedy did not prevent litigating issue of fault as between sublessee and company. U.S.—Rappa v. Pittston Stevedoring Corp., D.C.N.Y., 48 F.Supp. 911.

27. N.Y.—Gokey v. McDermott, 84 N.Y.S.2d 465, 274 App.Div. 996.

Cause of action in insurer

Where injured employees, who had been awarded workmen's compensation commenced action against third-person tort-feasors after their cause of action, through lapse of time, had vested in employer's insurance carrier, but third-person tort-feasors through their own fault could not avail themselves of that defense under the existing pleadings, employer, who was impleaded in third-person action nearly three years after the accident, was not precluded from asserting that defense.

N.Y.—Marrone v. John A. Johnson & Sons, Inc., 131 N.Y.S.2d 853, 283 App.Div. 1114, appeal granted 134 N.Y.S.2d 272, 284 App.Div. 849.

28. N.Y.—Roeklein v. American Sugar Refining Co., 226 N.Y.S. 375, 222 App.Div. 540.

29. N.Y.—Thompson v. International Harvester Co. of America, 253 N.Y.S. 190, 141 Misc. 757.

N.C.—Lovette v. Lloyd, 73 S.E.2d 886, 236 N.C. 663.

Pa.—Dignan v. York-Buffalo Motor Exp., Inc., 31 Pa.Dist. & Co. 560, 13 Northumb.Leg.J. 327.

Federal statutes

(1) Ship, sued for an accident, by a harbor worker, cannot implead harbor worker's employer as joint tort-feasor, because of provision of Longshoremen's and Harbor Workers' Compensation Act that employer's liability for accidents to its employees shall be limited to the compensation provided by the Act. U.S.—Johnson v. U. S., D.C.Or., 79 F. Supp. 448—Calvino v. Pan-Atlantic S. S. Corp., D.C.N.Y., 29 F.Supp. 1022.

(2) Where United States had paid death benefits for death of federal employee, defendants, in employee's administrator's suit alleging negligence, were precluded, by Federal Employees Compensation Act, from filing third-party complaints against United States seeking contribution and indemnity under Federal Tort Claims Act.

D.C.—Christie v. Powder Power Tool Corp., D.C., 124 F.Supp. 693.

Joint tort-feasors statute

(1) Where employee and employer had elected to have their rights adjudged and fixed pursuant to terms of workmen's compensation act, employee could not lawfully maintain action in tort against his employer for injury, and hence the employer was not a person liable in tort within statute allowing contribution between joint tort-feasors.

N.J.—Farren v. New Jersey Turnpike Authority, 106 A.2d 752, 31 N.J. Super. 356.

(2) Where employee's dependents were awarded workmen's compensation and brought an action against

third person for employee's death, third person was not entitled under the Joint Tort-Feasors' Act to join employer as a party defendant, particularly where third person alleged that employer was solely responsible for employee's injury, notwithstanding under the act employer would be entitled to repayment of compensation award.

Md.—Baltimore Transit Co. v. State, to Use of Schriefer, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460.

Agreement between employer and tort-feasor

Where administratrix of employee availed herself of the workmen's compensation act for remedy against employer and there was an indemnification agreement between employer and the city on whose premises the fatal injury occurred, city, when sued at common law for the employee's death, was entitled to file a third-party complaint bringing in the employer and the insurer on the indemnity bond.

N.J.—Yearicks v. City of Wildwood, 92 A.2d 873, 23 N.J.Super. 379.

No common-law liability

In action for death of contractor's employee against subcontractor whose truck allegedly ran over employee, subcontractor was not authorized to make the contractor an additional party defendant, where the contractor had paid the award made by the industrial commission and had been expressly relieved of any common-law liability under the provisions of the Workmen's Compensation Act.

S.C.—Simon v. Strock, 39 S.E.2d 209, 209 S.C. 134, 163 A.L.R. 596.

Recovery of damages from fellow employee

Where defendant's bus was allegedly involved in collision with motor vehicle in which plaintiff was passenger, and operator of motor vehicle, as a defense to defendant's

in an action by the personal representative where compensation has been paid,³⁰ and in an action by the insurer in the name of the injured employee³¹ or in its own name.³² Consequently, a defendant cannot retain the employer as an additional defendant on the ground that it is solely liable to the employee or the personal representative or dependents of a deceased employee, since the employer's liability is only that prescribed by the workmen's compensation act.³³ On the other hand, if the employer is liable over to, or jointly liable with, the original defendant, the employer may be summoned by the original defendant as an additional defendant for the exclusive purpose of protecting the original defendant's right of contribution.³⁴ It has been stated, moreover, that the right of a tort-feasor to

implead the employer as a third-party defendant may not be defeated on the ground that the result would be to make the employer indirectly liable for injuries to the employee although the employer has complied with the workmen's compensation law.³⁵

Some provisions as to the enforcement of a negligent party's liability for resulting injuries to another's employee imply that the employer, his insurance carrier, or the employee bringing the original action against such party shall have the exclusive privilege to prosecute the action to a final determination, and a court will not interfere by making additional parties unless compelled by extraordinary circumstances to do so.³⁶

Intervention. While the right of the employer³⁷

third-party action, alleged that at time of accident he and plaintiff were fellow employees engaged in course of their employment and that Colorado workmen's compensation act precludes recovery of damages from fellow employee, if operator was fellow employee of plaintiff, defendant could not recover indemnification from operator, by reason of the act. U.S.—Hamblen v. Santa Fe Trail Transp. Co., D.C.Colo., 101 F.Supp. 799.

Refusal to implead employer held not error where plaintiff's employer waived right to participate in employee's action under safe-place statute against defendant.

Wis.—Johannsen v. Peter P. Woboril, Inc., 51 N.W.2d 53, 260 Wis. 341.

Writs of scire facias

(1) Where general contractor's workmen who had elected to accept compensation allowed under Pennsylvania workmen's compensation law brought personal injury actions against subcontractor and subcontractor issued writs of scire facias, under Pennsylvania law, to bring in the general contractor as additional defendant, motion to quash writ of scire facias was required to be determined according to mandate of the state legislature rather than in accordance with rules of legal logic. U.S.—Deslauriers Steel Mould Co. v. Gangway, C.C.A.Pa., 97 F.2d 78.

(2) In action against motorist for injuries employee sustained while riding in employer's truck, for which injuries employee was receiving compensation from employer, scire facias bringing employer on record as additional defendant was unauthorized, since employer could not be alone liable for cause of action declared on. Pa.—Jackson v. Gleason, 182 A. 498, 320 Pa. 545.

30. N.C.—Brown v. Southern Ry. Co., 162 S.E. 613, 202 N.C. 256.

31. Del.—Miller v. Ellis, 122 A.2d 314.

32. N.Y.—Lumber Mut. Casualty Ins. Co. of New York v. Roberts, 41 N.Y.S.2d 232, 266 App.Div. 749.

33. Pa.—Shaul v. A. S. Beck N. Y. Shoe Co., 85 A.2d 698, 369 Pa. 112.

34. Pa.—Socha v. Metz, 123 A.2d 837, 385 Pa. 632—Shaul v. A. S. Beck N. Y. Shoe Co., 85 A.2d 698, 369 Pa. 112—Maio v. Fahs, 14 A.2d 105, 339 Pa. 180.

Smith v. Sanctis, 81 Pa.Dist. & Co. 281, 31 Wash.Co. 6.

Right of third person sued for injuries or death to contribution or indemnity from employer generally see supra § 982 c.

Employer's insurer

In action by third party's employee against a motor vehicle owner's liability insurer for injuries sustained in a collision, employer's insurer, under compensation policy and policy insuring against liability for employer's torts, could be made a third party defendant, though the employee under Louisiana workmen's compensation law could not sue his own employer in tort to determine liability of employer's insurer should the employer be found jointly liable with motor vehicle owner and compelled by such joint tort-feasor to contribute to payment of damages. U.S.—Robinson v. National Auto. & Cas. Ins. Co., D.C.La., 75 F.Supp. 489.

Federal statutes

(1) Owner of vessel was entitled to implead employer, notwithstanding provision of Longshoremen's Compensation Act making liability of employer for compensation exclusive, where shipowner sought recovery against employer by way of contribution or indemnity only. U.S.—Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., N.Y., 76 S.Ct. 232, 350 U.S. 124, 100 L.Ed. 133.

Crawford v. Pope & Talbot, Inc., C.A.Pa., 206 F.2d 784.

Finley v. U. S., D.C.N.J., 130 F. Supp. 788—Calvino v. Pan-Atlantic S. S. Corporation, D.C.N.Y., 29 F. Supp. 1022.

Christon v. U. S., D.C.Pa., 8 F.R. D. 327.

(2) Right of employee, suing shipowner for injuries sustained aboard ship while doing work under employer's independent contract with defendant, to recover compensation from employer under Longshoremen's Compensation Act did not preclude defendant from filing proper third-party complaint impleading employer.

U.S.—Rich v. U. S., C.A.N.Y., 177 F. 2d 688.

Lukasiewicz v. Moore-McCormack Lines, D.C.N.Y., 104 F.Supp. 572.

35. N.Y.—Clements v. Rockefeller, 70 N.Y.S.2d 146, 189 Misc. 885.

Action against landlord

Tenant's obtaining a general liability insurance policy protecting landlord and tenant against any claim for injuries to person on demised premises did not authorize dismissal of landlord's cross complaint against tenant in action against landlord for death of tenant's employee who fell down elevator shaft, and provisions of workmen's compensation law would not prevent recovery by landlord on third-party complaint against tenant.

N.Y.—Clements v. Rockefeller, supra.

36. N.C.—Lovette v. Lloyd, 73 S.E. 2d 886, 236 N.C. 663.

37. Discretion

It was not an abuse of discretion to deny a motion by employer to intervene where both employee and tort-feasor objected.

Ill.—Hyland v. 79 West Monroe Corp., 118 N.E.2d 686, 2 Ill.App.2d 83.

Protection of lien

However, where employee brought

or his insurance carrier³⁸ to intervene in an action by an employee or the dependents of a deceased employee against a third person for injuries to, or death of, such employee has been denied, at least where no statutory provision is made for subrogation of insurer to the rights, if any, of the employer against a third person,³⁹ it is usually held or recognized that the employer⁴⁰ or insurer⁴¹ may intervene in an action by the employee, or by the personal representative or dependents of a deceased employee, to enforce the right of subrogation, or other right against a third person,⁴² which is given

by the compensation act. Moreover, it has been held if an employer does not intervene he loses all right to proceed against the tort-feasor and he may only claim reimbursement from the employee out of such damages as the employee may recover.⁴³ There is also authority for the view that, while an employer may sue in the name of the employee or the representative of a deceased employee, as discussed supra § 1017, the employer must be the active litigant and he cannot break into a proceeding as intervener where the original plaintiff has no cause of action.⁴⁴

action for personal injuries against third person after award had been made to employee under workmen's compensation act, employer could intervene for purpose of protecting his lien for amount employer was obligated to pay employee under act, but such intervention did not extend to employer the right to participate in the conduct or trial of the suit without consent of plaintiff.

III.—Sjoberg v. Joseph T. Ryerson & Son, Inc., 132 N.E.2d 56, 8 Ill.App. 2d 414.

Suit under Dram Shop Act

III.—Lovekin v. Loser, 139 N.E.2d 326, 12 Ill.App.2d 367—Dillon v. Nathan, 135 N.E.2d 136, 10 Ill.App. 2d 289.

38. Fla.—Fidelity & Cas. Co. of N. Y. v. Bedingsfield, 60 So.2d 489.

Dismissal

Where injured employee filed action at law against alleged actual tort-feasor, insurance carrier, which had paid employee compensation for injuries and medical expenses, had no legal right to assert its claim for reimbursement under statute by intervention in such action which would prevent employee from dismissing action without consent of insurance carrier; and fact that intervention of insurance carrier was allowed without objection and no exception taken to order of allowance would not prevent employee from dismissing suit without consent of insurance carrier.

Ga.—Travelers Ins. Co. v. Bumstead, 186 S.E. 742, 182 Ga. 692, answers to certified questions conformed to 187 S.E. 736, 54 Ga.App. 284.

Longshoremen's and Harbor Workers' Compensation Act

Where owner of vessel, being sued by administratrix for death of employee of cleaning company while working on respondent's vessel, impleaded decedent's employer, seeking recovery against employer by way of contribution or indemnity, employer's insurance carrier was not entitled to intervene as a party plaintiff, since its interest would be adverse to that of plaintiff as respects recovery of any amount in excess of

compensation due plaintiff under Longshoremen's and Harbor Workers' Compensation Act.

U.S.—Christon v. U. S., D.C.Pa., 8 F. R.D. 327.

39. Tex.—Texas & P. Ry. Co. v. Archer, Civ.App., 203 S.W. 796. 71 C.J. p 1586 note 92.

40. U.S.—United Gas Corp. v. Guillery, C.A.La., 207 F.2d 308—The Etna, C.C.A.Pa., 138 F.2d 37.

Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 C.A.2d 254.

La.—Board of Com'rs of Port of New Orleans v. City of New Orleans By and Through Public Belt R. Commission, 65 So.2d 313, 223 La. 199.

Todd-Johnson Dry Docks v. City of New Orleans, App., 55 So.2d 650.

Md.—Johnson v. Miles, 53 A.2d 30, 188 Md. 455.

71 C.J. p 1586 note 93.

41. Ariz.—State ex rel. Industrial Commission v. Reese, 250 P.2d 1001, 74 Ariz. 425—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412.

Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Ky.—Roberts v. U. S. Fidelity & Guaranty Co., 273 S.W.2d 39.

Md.—Johnson v. Miles, 53 A.2d 30, 188 Md. 455.

Minn.—Lang v. William Bros. Boiler & Mfg. Co., Manufacturers & Merchants Indem. Co., Intervenor, 85 N.W.2d 412.

Pa.—Smith v. Altoona & Logan Valley Elec. Ry. Co., 41 Pa.Dist. & Co. 165.

Tex.—Otis Elevator Co. v. Allen, Civ. App., 185 S.W.2d 117, affirmed in part and reversed in part on other grounds 187 S.W.2d 657, 143 Tex. 607.

71 C.J. p 1586 note 94.

Filing intervention complaint after expiration of statutory period of limitations see supra § 1014.

Failure to notify insurer of settlement

Tort-feasor's promise to notify compensation insurer in case of settlement with injured employee and

failure to do so was not such fraud as to authorize insurer to recover from tort-feasor amount of compensation paid employee, where tort-feasor paid consent judgment entered in favor of employee against tort-feasor and insurer failed to intervene in suit by employee against tort-feasor.

Ga.—Travelers Ins. Co. v. Georgia Power Co., 181 S.E. 111, 51 Ga. App. 579.

Compensation paid in excess of statute

Compensation insurer's petition for intervention in action between injured workman and tort-feasor alleged a good cause of action to recover compensation paid in excess of statutory requirement.

Tenn.—U. S. Fidelity & Guaranty Co. v. Elam, 278 S.W.2d 693, 198 Tenn. 194.

42. U.S.—Betts v. Southern Ry. Co., C.C.A.N.C., 71 F.2d 787.

Ala.—Coleman v. Hamilton Storage Co., 180 So. 553, 235 Ala. 553.

71 C.J. p 1586 note 95.

Right of employer or insurer to enforce claim for wrongful death in general see supra § 996.

What law governs

Whether insurance carrier paying compensation could proceed in action instituted against third person by deceased employee's personal representative or institute new action was question of procedure governed by law of state of forum.

U.S.—Betts v. Southern Ry. Co., C. C.A.N.C., 71 F.2d 787.

43. U.S.—United Gas Corp. v. Guillery, C.A.La., 207 F.2d 308.

La.—Board of Com'rs of Port of New Orleans v. City of New Orleans By and Through Public Belt R. Commission, 65 So.2d 313, 223 La. 199.

Todd-Johnson Dry Docks v. City of New Orleans, App., 55 So.2d 650.

44. U.S.—Melella v. Savage, D.C.Del., 59 F.Supp. 258.

Extending doctrine of intervention not warranted

Facts that there may be cases where hardship would arise if employer is unaware that suit has been

The right of the employer to intervene before verdict to enforce his right of subrogation has been recognized,⁴⁵ as has the right of the insurer to intervene for such purpose after the trial has commenced where the intervention does not delay the trial or work any injury to defendant.⁴⁶ Although it has been held that the right of the subrogee ceases if he fails to intervene before the suit is brought to judgment,⁴⁷ there is authority for the view that the employer is not bound to intervene in an action by the employee in order to preserve the right of subrogation.⁴⁸

An employee or his personal representative has been held entitled to intervene in an action against an alleged negligent third person by the employer or his insurer, even though compensation has been paid to the injured employee.⁴⁹

Substitution. The right of insurer who has paid compensation to be substituted as plaintiff in an action commenced in the name of the personal representative of a deceased employee has been recognized.⁵⁰ The insurer may not be substituted as plaintiff for the employee after the limitation period has run where, due to a statutory assignment of the cause of action to the insurer, the employee had no cause of action when he instituted the proceeding.⁵¹

§ 1022. Pleading

The general rules of pleading apply.

The pleadings in an action by an injured employee against a third-person tort-feasor, wherein the compensation insurer seeks to intervene, are governed by the general rules relating to the plead-

ings in civil actions.⁵² Where the employer is impleaded as a defendant for the purpose of protecting the tort-feasor's right of contribution, the employer-employee relationship may not be pleaded.⁵³ If insurer refuses to sue a third person causing the employee's injury and is made party defendant in an action for death, wherein plaintiff sues for insurer's benefit, insurer is not entitled to recover where no pleading is filed in its own name.⁵⁴ Where a person may receive compensation and at the same time maintain an action in tort against a third person, the fact that he did claim and receive compensation under the compensation act has no place in the pleadings in the common-law action.⁵⁵

§ 1023. — Declaration, Complaint, or Petition

- a. Action by, or on behalf of, employee, his dependents, or beneficiaries
- b. Action by, or on behalf of, employer or insurer

a. Action by, or on Behalf of, Employee, His Dependents, or Beneficiaries

General rules applicable to declarations, complaints, or petitions in tort actions apply in an action by an employee, or the dependents or personal representative of a deceased employee, prosecuted notwithstanding the existence of a workmen's compensation act.

General rules applicable to declarations, complaints, or petitions in tort actions apply in an action by an employee, or the dependents or personal representative of a deceased employee, prosecuted notwithstanding the existence of a workmen's compensation act.⁵⁶ In an action by dependents for

instituted by employee's widow, and that, in such case, to refuse to allow employer to intervene in widow's suit might leave him without remedy to enforce his subrogation right, do not warrant extending doctrine of intervention in favor of subrogated employer, since, once he commences his payments to widow under opposite workmen's compensation statute, employer should make independent effort to protect his right of subrogation by instituting suit in his own name or that of widow under statute which gives him that right.
U.S.—*Melella v. Savage*, *supra*.

45. Iowa.—*Cawley v. People's Gas & Electric Co.*, 187 N.W. 591, 193 Iowa 536.

46. Tex.—*Schnick v. Morris*, Civ. App., 24 S.W.2d 491.

47. Ala.—*Coleman v. Hamilton Storage Co.*, 180 So. 553, 235 Ala. 553.

48. Pa.—*Smith v. Yellow Cab Co.*, 135 A. 858, 288 Pa. 85.
71 C.J. p 1586 note 98.

49. Cal.—*State Compensation Insurance Fund v. Matulich*, 131 P.2d 21, 55 C.A.2d 528.

Ill.—*Echales v. Krasny*, 139 N.E. 767, 12 Ill.App.2d 530.

50. Mass.—*Fidelity & Casualty Co. of New York v. Huse & Carleton*, 150 N.E. 230, 254 Mass. 359.

51. N.Y.—*Marmet v. Rankins*, 167 N.Y.S.2d 194, 4 A.D.2d 485.

Possible interest

Workmen's compensation carrier was permitted to be substituted as plaintiff in action brought by injured employee even though the statute of limitations had run against a new action by the carrier, where employee had a possible partial and contingent interest in any sum recovered by carrier in excess of payments to employee and expenses of litigation.
N.Y.—*Lehman v. Hartke*, 146 N.Y.S.

2d 444, 286 App.Div. 661—*Wilton v. Radish*, 44 N.Y.S.2d 437, 266 App. Div. 974.

52. Tenn.—*U. S. Fidelity & Guaranty Co. v. Elam*, 278 S.W.2d 693, 198 Tenn. 194.

53. Pa.—*Socha v. Metz*, 123 A.2d 837, 385 Pa. 632—*McIntyre v. Strausser*, 76 A.2d 220, 365 Pa. 507.

54. Tex.—*Houston Gas & Fuel Co. v. Perry*, 91 S.W.2d 1052, 127 Tex. 102.

55. Kan.—*Davison v. Martin K. Eby Const. Co.*, 218 P.2d 219, 169 Kan. 256.

56. U.S.—*Rich v. U. S.*, C.A.N.Y., 177 F.2d 688.

Declaration, petition, or complaint in general see Pleading §§ 63-98. Amendments affecting application of statute of limitations see *supra* § 1014. Petition in intervention see *supra* § 1021.

the death of the employee, an averment that the employee and his employer were subject to the compensation act has been held essential,⁵⁷ and this is so even where defendant was not a party to the compensation proceedings.⁵⁸ It is not necessary to allege in the declaration that, pursuant to the statute, a notice of election to sue the third person was given.⁵⁹

Plaintiff's capacity to sue. Rules already stated as to the right of an employee to sue a third person, as discussed supra § 983 et seq, enter into a determination of the sufficiency of a showing in plaintiff's pleading as to his right to prosecute the action.⁶⁰ So, where the act gives the employee the right to bring the action where the employer or insurer, entitled to subrogation under the act, fails to sue within a specified time after demand, plaintiff employee need not allege waiver by the employer of the subrogated right to sue⁶¹ or the essentials, prescribed by the act, of the employee's right

to sue.⁶² A complaint, although not alleging that the employee elected to bring an action against the third person instead of seeking his remedy under the compensation act, has been held sufficient.⁶³ Dependents of a deceased employee, who elected to accept compensation for the employee's death prior to bringing the action against the third-person wrongdoer based on the theory of assignment by insurer to them of its cause of action, are not required to allege that the employer or insurer has paid compensation awarded, as a condition precedent to bringing a suit against the tort-feasor.⁶⁴

Where the employee may maintain the action notwithstanding the employer is a subrogee under the act, as considered supra § 1003, plaintiff employee need not allege the failure or refusal of the employer to bring the action.⁶⁵ A complaint, sufficiently alleging the subrogation of the compensation fund to the rights of the deceased employee's dependents to recover damages for the employee's

Service of copy of complaint

In action by employee against third person, employee was required to have copy of complaint served on his employer's compensation insurer and when this was done, if insurer failed to assert any claim, defendant would be relieved if he paid to employee any sum which might be recovered.

U.S.—Davis v. St. Louis-Southwestern Ry. Co., D.C.La., 99 F.Supp. 751.

57. Ala.—Murphy v. Louisville & N. R. Co., 61 So.2d 3, 258 Ala. 138.
Pa.—Jenkins v. Pennsylvania Power Co., 41 Pa.Dist. & Co. 231, 89 Pittsb. Leg.J. 67.

58. Ala.—Murphy v. Louisville & N. R. Co., 61 So.2d 3, 258 Ala. 138.

59. Fla.—Hartquist v. Tamiami Trail Tours, 190 So. 533, 139 Fla. 328.

60. Wis.—Swanson v. Lake Superior Terminal & Transfer Ry. Co., 219 N.W. 274, 195 Wis. 633.

71 C.J. p 1586 note 5.

Complaint held sufficient

(1) In general.

N.Y.—Lazar v. Steinberg, 54 N.Y.S. 2d 859, 269 App.Div. 760.

N.C.—Cathey v. Southeastern Const. Co., 11 S.E.2d 571, 218 N.C. 525.

Okl.—Londagin v. McDuff, 251 P.2d 496, 207 Okl. 594.

Pa.—Tribuno v. Donato, Com.Pl., 4 Chest.Co. 469.

Va.—Kramer v. Kramer, 100 S.E.2d 37, 199 Va. 409.

71 C.J. p 1586 note 5 [a].

(2) Third-party complaint.

D.C.—Coates v. Potomac Elec. Power Co., D.C., 96 F.Supp. 1019.

(3) A complaint against manufacturer of device, by commissioners of

state insurance fund as subrogees of one injured as result of defect in device.

N.Y.—Commissioners of State Ins. Fund v. Humm, 48 N.Y.S.2d 375, affirmed 53 N.Y.S.2d 461, 269 App. Div. 657, motion dismissed 61 N.E. 2d 732, 294 N.Y. 777.

(4) Even though statute authorizing an action against tort-feasor were construed as excluding wrongful death resulting from passive negligence of third persons a complaint seeking recovery for death of employee against tort-feasor which alleged that plaintiffs were heirs as well as dependents should be sustained under wrongful death statute.

Utah.—Johanson v. Cudahy Packing Co., 152 P.2d 98, 107 Utah 114.

Complaint held insufficient

(1) In general.

U.S.—Czaplicki v. The Hoegh Silvercloud, D.C.N.Y., 133 F.Supp. 358.

Conn.—Fidelity & Cas. Ins. Co. of New York v. Sears, Roebuck & Co., 199 A. 93, 124 Conn. 227, 117 A.L.R. 565.

Pa.—Smith v. Sanctis, 81 Pa.Dist. & Co. 281, 81 Wash.Co. 6—Perry v. M. Shapiro & Son Const. Co., 55 Pa.Dist. & Co. 180.

Meade v. Pennsylvania R. R. Co., Com.Pl., 99 Pittsb.Leg.J. 307.

Tex.—Webster v. Isbell, 100 S.W.2d 350, 128 Tex. 626.

(2) In employee's action against manufacturer of machine by which employee was injured, complaint was insufficient to state a cause of action for failure to show that employee was a bona fide farm laborer excluded from workmen's compensation act.

Ind.—Strickler v. Sloan, App., 141 N. E.2d 868.

Petition held demurrable

N.C.—Barnhardt v. City of Concord, 196 S.E. 310, 213 N.C. 364.

Petition held not demurrable

Kan.—Truhlicka v. Beech Aircraft Corp., 178 P.2d 252, 162 Kan. 535

—Bittle v. Shell Petroleum Corp., 75 P.2d 829, 147 Kan. 227.

Md.—Virginia Dare Stores v. Schuman, 1 A.2d 897, 175 Md. 287.

Separate and several cause of action

Where compensation claimant in action for injuries caused by third persons alleged that injuries were caused through negligence of defendants "and/or" either of them, cause of action was separate and several against each third person and not single and indivisible against both.

N.Y.—Crossman v. Consolidated Edison Co. of New York, 48 N.Y.S. 2d 701, reversed on other grounds 50 N.Y.S.2d 785, 268 App.Div. 875, affirmed 60 N.E.2d 199, 294 N.Y. 39.

61. Me.—Fournier v. Great Atlantic & Pacific Tea Co., 148 A. 147, 128 Me. 393, 68 A.L.R. 481.

62. Me.—Foster v. Congress Square Hotel Co., 145 A. 400, 128 Me. 50, 67 A.L.R. 239.

71 C.J. p 1586 note 8.

63. Or.—Walter v. Turtle, 29 P.2d 517, 146 Or. 1.

64. Utah.—Johanson v. Cudahy Packing Co., 152 P.2d 98, 107 Utah 114.

65. Mo.—Langston v. Selden-Breck Const. Co., 37 S.W.2d 474, 225 Mo. App. 531.

death from the third-person wrongdoer, states the facts authorizing the state to bring the action against such third person, although the complaint does not allege that any demand to sue was made on the persons entitled under the statute to bring the action before the personal representative may bring it.⁶⁶ Where plaintiff employee seeks to avoid the effect of an election to take compensation from his employer as defeating his right of action against the third-person wrongdoer, the issue must be raised by the pleading.⁶⁷

Negating employment by defendant or application of compensation act to employment. Allegations which definitely exclude the theory that the injured or deceased employee was an employee of defendant have been held sufficient to negative the fact of such employment⁶⁸ and to show that defendant is a "person other than the employer" within the meaning of the act.⁶⁹ Where plaintiff's pleading sets up no relationship of master and servant between plaintiff and defendant and no other facts which would make the workmen's compensation act applicable, it is not necessary to allege matters to take the case out of, or to negative the force of, the act.⁷⁰

Provisions of act benefiting defendant or relieving him from liability. According to some cases plaintiff employee need not negative the terms of a provision of the compensation act which permit a person other than the employee to have the benefit of the act⁷¹ or which create defenses, in a common-law action by the employee,⁷² or, it seems, in an action brought by a dependent of a deceased employee for the death of such employee.⁷³ A complaint is, however, demurrable where the allegations therein

show that defendant is, under the act, immune from an action against him by plaintiff employee,⁷⁴ but a demurrer will not lie where such allegations are lacking.⁷⁵

Notwithstanding an employee or the personal representative of a deceased employee has no cause of action for a compensable injury or death where the employee, his employer, and defendant were all subject to the compensation act, the view has been taken that in a common-law action by the employee⁷⁶ or in an action under the injuries act for the death of an employee in which there is nothing to show that deceased employee was under the compensation act,⁷⁷ it is not necessary to allege that defendant was not under the compensation act, and where in an action for the death of an employee, it clearly appears that defendant was not under the act, no reference to the act need be made;⁷⁸ likewise, in an action under the injuries act, it has been held that it is not necessary to allege that the deceased employee was not under the compensation act.⁷⁹ There is, however, authority for the view that, in view of such provision relieving a person subject to the act from liability to an employee, where the allegations raise a presumption that plaintiff's employer and defendant were subject to the act and that the injury complained of arose out of, and in the course of, plaintiff's employment, plaintiff should make allegations showing that plaintiff's employer⁸⁰ or defendant⁸¹ was not bound by the act.

Where the act prevents the maintenance of an action against a third person who is an employer in the course of any extrahazardous employment under the act, on demurrer to the complaint of

66. N.D.—State, for Benefit of Workmen's Compensation Fund v. Thompson, 11 N.W.2d 113, 73 N.D. 58.

67. Ariz.—State ex rel. Industrial Commission v. Pressley, 250 P.2d 992, 74 Ariz. 412—Moseley v. Lily Ice Cream Co., 300 P. 958, 38 Ariz. 417.

Election defeating right of action in general see supra § 987 et seq.

68. Ala.—U. S. Cast Iron Pipe & Foundry Co. v. Fuller, 102 So. 25, 212 Ala. 177.

71 C.J. p 1587 note 13.

69. Md.—State v. Chesapeake & Potomac Telephone Co. of Baltimore City, 160 A. 487, 162 Md. 572.

71 C.J. p 1587 note 14.

70. Mo.—Langston v. Selden-Breck Const. Co., 37 S.W.2d 474, 225 Mo. App. 531.

71 C.J. p 1587 note 15.

71. Ala.—Demopolis Telephone Co. v. Hood, 102 So. 35, 212 Ala. 216. 71 C.J. p 1587 note 17.

72. Ill.—Manion v. Chicago, R. I. & P. R. Co., 119 N.E.2d 498, 2 Ill.App. 2d 191.

71 C.J. p 1587 note 18.

Fellow servants

Allegations that plaintiff was working as employee of subcontractor when injured, as result of negligence of an employee of principal contractor, did not show that plaintiff and negligent employee were fellow servants, in which case plaintiff's remedy would be in accordance with state industrial accident law. U.S.—Bryant v. Phoenix Bridge Co., D.C.Me., 43 F.Supp. 162.

73. U.S.—Madden v. Northern Pac. R. Co., D.C.Wash., 242 F. 981.

71 C.J. p 1587 note 19.

74. Minn.—Olson v. Thiede, 225 N. W. 391, 177 Minn. 410.

71 C.J. p 1587 note 20.

75. Fla.—Miami Roofing & Sheet Metal Co. v. Kindt, 48 So.2d 840.

76. Ill.—O'Brien v. Chicago City Ry. Co., 137 N.E. 214, 305 Ill. 244, 27 A.L.R. 479.

71 C.J. p 1587 note 22.

Liability of third person subject to act in general see supra § 985.

77. Ill.—Elaborated Ready Roofing Co. v. Chicago & W. I. R. Co., 222 Ill.App. 181.

78. Ill.—Klonowski v. Crescent Paper Box Mfg. Co., 217 Ill.App. 150.

79. Ill.—Hartray v. A. T. Willett Co., 232 Ill.App. 193.

80. Ill.—Rogers v. Illinois Cent. R. Co., 210 Ill.App. 577.

71 C.J. p 1587 note 26.

81. Ill.—Stevens v. Illinois Central R. Co., 137 N.E. 859, 306 Ill. 370.

71 C.J. p 1588 note 27.

plaintiff employee, the court will not assume that defendant was an employer within the act unless the allegations of the complaint show that fact with certainty and precision.⁸²

Tort or wrong of defendant and duty to employee. In an action for the death of an employee, for the use of his dependents, the absence of allegations sufficient to show the existence of an actionable wrong on the part of defendant renders the declaration insufficient on demurrer.⁸³ In such action, where there are allegations in respect of a contract between defendant and the deceased employee's employer which are appropriate to show that the contract was the occasion for deceased's rightful presence on defendant's property at the time and place of the injury and to show that deceased was acting as an employee of independent contractors, it is not necessary that the terms and effect of the contract should be more particularly stated.⁸⁴

Damages. Where an employee sues the third-person wrongdoer in his own right *ex delicto*, it has been held that the amount of damages must be alleged.⁸⁵

b. Action by, or on Behalf of, Employer or Insurer

In an action by, or on behalf of, an employer or insurer for an injury to, or the death of, an employee, the plaintiff's pleadings must state facts sufficient to show a cause of action, and the necessity of alleging facts

which show that the plaintiff insurer has acquired the right to reimbursement out of a recovery from a third person has been recognized.

General rules applicable to declarations, complaints, or petitions in tort actions apply in an action by, or on behalf of, the employer or an insurer for an injury to, or the death of, an employee.⁸⁶ It has been held that an insurer may include in its complaint a claim for injuries sustained by the employee.⁸⁷ Likewise, the employer or insurer should allege that the third person was liable to the employee.⁸⁸ Where a complaint by an insurer sets forth the facts concerning the status of both the employee and insurer, and recites that the damages sought are in behalf of both, such complaint is sufficient, without naming the employee as a party plaintiff.⁸⁹ The fact that an employer's original complaint is based on a statute, subsequently held unconstitutional, is immaterial, if such complaint contains essential elements of a cause of action.⁹⁰

Where an employer seeks indemnification out of the proceeds of a recovery against a third-person wrongdoer for compensation paid the injured employee, a petition which does not allege that the injury was not proximately caused by the negligence of the employer or his employees has been held insufficient,⁹¹ although it has been held that an employer is not required affirmatively to allege the employee's freedom from negligence in order to state a cause of action.⁹² Under a provision re-

82. U.S.—*Lindh v. Booth Fisheries Co.*, D.C.Wash., 2 F.Supp. 19.

83. Md.—*State v. Chesapeake & Potomac Telephone Co. of Baltimore City*, 160 A. 437, 162 Md. 572.

84. Md.—*State v. Chesapeake & Potomac Telephone Co. of Baltimore City*, *supra*.

85. La.—*International Paper Co. v. Arkansas & L. M. Ry. Co.*, App., 35 So.2d 769.

86. U.S.—*Travelers Ins. Co. v. Northwest Airlines*, D.C.Wis., 94 F.Supp. 620.

71 C.J. p 1588 note 33.

Declaration, complaint, or petition held sufficient

(1) In general.

U.S.—*Elliott v. Armour & Co.*, D.C.S.C., 30 F.Supp. 367.

Minn.—*Anchor Casualty Co. v. Carrier Engineering Corporation*, 273 N.W. 647, 200 Minn. 111.

N.Y.—*Coleman v. Cating Rope Works*, 286 N.Y.S. 815, 247 App. Div. 310, appeal dismissed 6 N.E.2d 404, 273 N.Y. 461.

Employers Liability Assur. Corp. v. Fisher, 13 N.Y.S.2d 902.

(2) Complaint under compensation act section which provided for em-

ployer's action against tort-feasor and which was declared unconstitutional pending action was sufficient to enforce common-law right of subrogation where complaint set forth operative facts to sustain common-law recovery and apprised opponent of nature of claim and partially complied with applicable civil practice act section, in view of overruling motion of trial court to amend so as further to comply.

Ill.—*Geneva Const. Co. v. Martin Transfer & Storage Co.*, 122 N.E.2d 540, 4 Ill.2d 273.

(3) In subrogation suit by compensation insurer against alleged negligent third person commenced more than two years after dismissal by supreme court of application for writ of error, but less than two years after overruling of motion for rehearing in suit establishing insurer's liability, petition showing that insurer had insisted on motion for rehearing indicated that insurer had not previously assumed obligation to pay compensation and was sufficient to entitle insurer to maintain suit.

Tex.—*Texas Employers' Ins. Ass'n v. Texas & P. Ry. Co.*, Civ.App.,

129 S.W.2d 746, error dismissed, judgment correct.

Declaration, complaint, or petition held insufficient

Ill.—*Alschuler v. Rockford Bolt & Steel Co.*, 48 N.E.2d 435, 318 Ill. App. 564.

Motion to amend granted

U.S.—*Elliott v. Armour & Co.*, D.C.S.C., 30 F.Supp. 367.

87. Cal.—*State Compensation Ins. Fund v. Matulich*, 131 P.2d 21, 55 C.A.2d 528.

88. Pa.—*Broderick v. Great Lakes Cas. Co.*, 33 A.2d 653, 152 Pa.Super. 449.

89. N.J.—*Zurich General Acc. & Liability Ins. Co. v. Ackerman Bros.*, 11 A.2d 52, 124 N.J.Law 187.

90. Ill.—*Geneva Const. Co. v. Martin Transfer & Storage Co.*, 114 N.E.2d 906, 351 Ill.App. 289, affirmed 122 N.E.2d 540, 4 Ill.2d 273.

91. Ill.—*Manion v. Chicago, R. I. & P. R. Co.*, 119 N.E.2d 498, 2 Ill. App.2d 191.

92. La.—*International Paper Co. v. Arkansas & L. M. Ry. Co.*, App., 35 So.2d 769.

quiring an employer, instituting a suit against the third-person wrongdoer for reimbursement for compensation paid the employee, "forthwith" to notify the employee, the employer's petition is not defective because of the failure to allege that such notice was given.⁹³

Employer's or insurer's rights or interest. The necessity of alleging facts which show that plaintiff insurer has acquired the right to reimbursement out of a recovery from a third person has been recognized.⁹⁴ So, it has been held that an insurer is required to set out policy provisions, if any, authorizing subrogation to the rights of the employer;⁹⁵ but the omission of an allegation that plaintiff is an insurance carrier which is entitled to subrogation under the provision of the compensation act is immaterial where that fact is necessarily implied from allegations actually made.⁹⁶

Where an employer's right to recover damages from a third person for the death of an employee is not dependent on the appointment of a personal representative of the deceased employee, as discussed supra § 1010, the omission from the declaration of an allegation of the appointment of a personal representative does not render the declaration insufficient as not stating a cause of action.⁹⁷ An employer's complaint does not state a cause of action where it is impossible to ascertain who the dependents are to whom the employer claims to be subrogated.⁹⁸ Where an insurer who has paid compensation is entitled to relief against a third person both under a provision of the compensation act which subrogates insurer to all the rights and actions to which the employer is entitled under the act and also under a statute giving a right of action for every act which causes damage to another, insurer need not, in an action by him against a person who caused the injury to the employee, specifically state whether it sues as legal subrogee un-

der the compensation act or whether it claims under such other statute.⁹⁹

In an action by an employer under his right of subrogation given by the compensation act, an allegation in the declaration of nonwaiver of the employer's right of subrogation is not necessary.¹ Under an act providing that, if an injured employee elects to take compensation, awarding compensation shall operate as an assignment to the person liable for compensation of the cause of action against a person not in the same employ, in an action by insurer allegations setting up the election of the employee to take compensation and the fact that the election and award operated as an assignment of the cause of action are proper.²

While the view has been expressed that, under a provision for the subrogation of the employer to the right of the employee to the extent of the compensation payable, the statement of plaintiff employee in an action against a third person should show that plaintiff has sued for himself and his employer as their respective interests may appear,³ under a provision that, if compensation is paid, insurer may enforce in the name of the employee or in its own name and for its own benefit the liability of a person other than the employer, it is not necessary to allege in an action brought in the name of the employee that the action is brought in the name of the employee for the benefit of insurer,⁴ at least where a consent signed by insurer is attached to the complaint.⁵ Where under a provision for subrogation of the employer who has paid, or has become liable to pay, compensation, the employee's cause of action is not extinguished if the employee elects to take compensation but is kept alive for the benefit of the employer, an amendment of the declaration in an action by the employee, setting forth his election to take, and the receipt of, com-

93. La.—International Paper Co. v. Arkansas & L. M. Ry. Co., *supra*.

94. D.C.—Chapman v. Griffith-Consumers Co., 107 F.2d 263, 71 App. D.C. 64.

71 C.J. p 1588 note 34.

Granting of compensation

A complaint, which alleged that compensation claimant applied for compensation for injuries resulting from alleged negligence of third person and that hearings were had thereon, but which failed to allege a granting of compensation, was insufficient to plead a cause of action by insurance carrier against third person causing claimant's injuries. N.Y.—Employers' Liability Assur. Corp. v. Fisher, 13 N.Y.S.2d 992.

95. U.S.—Liberty Mut. Ins. Co. v. American Incinerator Co., D.C.N.Y., 51 F.2d 739.

96. Cal.—Royal Indemnity Co. v. Midland Counties Public Service Corporation, 183 P. 960, 42 C.A. 628.

71 C.J. p 1588 note 35.

97. Ill.—Brennan Const. Co. v. Blair, 261 Ill.App. 9.

98. Ill.—North Pier Terminal Co. for Use of Liberty Mut. Ins. Co. v. Hoskins Coal & Dock Corp., 77 N.E.2d 546, 333 Ill.App. 440, affirmed 83 N.E.2d 748, 402 Ill. 192.

99. La.—Fidelity Union Casualty Co. v. Carpenter, 125 So. 504, 12 La.App. 321.

1. Me.—Fournier v. Great Atlantic & Pacific Tea Co., 148 A. 147, 128 Me. 393, 68 A.L.R. 481.

2. N.Y.—Royal Indemnity Co. v. J. G. White Engineering Corporation, 198 N.Y.S. 264, 120 Misc. 332, affirmed 202 N.Y.S. 950, 208 App. Div. 759.

3. Pa.—Weschler v. B. & C. El. Traction Company, 6 Pa.Dist. & Co. 556.

4. Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435.

71 C.J. p 1589 note 42.

5. U.S.—Ballard v. Southern Cotton Oil Co., D.C.S.C., 145 F.Supp. 323.

pensation does not introduce a new cause of action⁶ and is permissible.⁷

Employee subject to compensation act. Where the presumption is that if an employer is operating under the act his employee is bound by its terms, as considered supra § 125, and, in an action by the employer against the person liable for the injury to the employee, to enforce a right given by statute where such person is within the compensation act, it is specifically alleged that both plaintiff and defendant are under the act, the omission of an allegation that the employee was under the act does not render the declaration defective.⁸

Negating employment. Where, under the compensation act, the liability enforceable is that of a "person other than the employer," allegations which definitely exclude the theory that the employee was an employee of defendant are sufficient to show that defendant is a "person other than the employer" within the meaning of the act.⁹

Election of defendant as to being bound by the act. It seems that where the employer has, under the act, a right to enforce the liability of a person who has elected not to be bound by the act, for an injury to the employee, it is necessary to allege in the declaration in an action by the employer to enforce such liability that defendant had elected not to be bound by the act;¹⁰ but in an action by an employer pursuant to a provision that, where compensation is payable, the employer may enforce the liability of a person who has elected to be bound by the act, it is not necessary to allege that defendant has elected to be bound by the compensation act if facts are alleged which, under the act, raise a presumption that defendant has elected to be bound by the act.¹¹

Actionable wrong or tort of defendant and duty to employee. In an action for the use of insurer based on the death of an employee, the absence from the declaration of allegations sufficient to show the violation by defendant of some duty which defendant owed to such employee renders the declaration

insufficient on demurrer.¹² The omission, however, of an allegation of the terms of the applicable provision defining the conditions under which defendant shall be liable does not render the declaration fatally defective where from the facts alleged the existence of such conditions must necessarily be inferred.¹³ A count of the complaint in an action by insurer for reimbursement, which states in greater detail the wrongful conduct of which plaintiff complains which was set forth in more general language in other counts, has been upheld on demurrer.¹⁴

In an action for the benefit of insurer, based on the death of an employee, where there are allegations in respect of a contract between defendant and the deceased employee's employer which are appropriate to show that the contract was the occasion for deceased's rightful presence on defendant's property at the time and place of the injury and to show that deceased was acting as an employee of independent contractors, it is not necessary that the terms and effect of the contract should be more particularly stated.¹⁵ In respect of defendant's act constituting the cause of the death of an employee, it is sufficiently alleged that the injury inflicted by defendant was the cause of the death if that fact is necessarily inferable from the facts alleged.¹⁶

Damages; payment of compensation. Where, under the compensation act, in an action in the name of the employee for the benefit of insurer, the liability of defendant, including liability in respect of the amount recoverable, is the same as in an action for the benefit of the employee, an allegation that insurer made certain payments to the injured employee, while permissible,¹⁷ is not necessary.¹⁸ Likewise, an insurer suing the third-person wrongdoer for wrongful death of the employee, is not required to state in his petition the amount of compensation paid the dependent of the deceased employee,¹⁹ and an employer's petition need not specifically allege the amount of damages the employee sustained as a result of the accident involv-

6. Vt.—Davis v. Central Vermont Ry. Co., 113 A. 539, 95 Vt. 180.

7. Vt.—Davis v. Central Vermont Ry. Co., supra.

8. Ill.—Tribune Co. v. Emery Motor Livery Co., 232 Ill.App. 309.

9. Md.—State v. Chesapeake & Potomac Telephone Co. of Baltimore City, 160 A. 437, 162 Md. 572. 71 C.J. p 1589 note 48.

10. Ill.—Vose v. Central Illinois Public Service Co., 122 N.E. 134, 286 Ill. 519.

11. Ill.—Vose v. Central Illinois Public Service Co., supra. 71 C.J. p 1589 note 50.

12. Md.—State v. Chesapeake & Potomac Telephone Co. of Baltimore City, 160 A. 437, 162 Md. 572. 71 C.J. p 1589 note 51.

13. Ill.—Ryan Co. v. Sanitary Dist. of Chicago, 236 Ill.App. 511. 71 C.J. p 1589 note 52.

14. Ala.—Day & Sachs v. Travelers' Ins. Co., 137 So. 409, 223 Ala. 558.

15. Md.—State v. Chesapeake & Po-

tomac Telephone Co. of Baltimore City, 160 A. 437, 162 Md. 572.

16. Ill.—Brennan Const. Co. v. Blair, 261 Ill.App. 9. 71 C.J. p 1590 note 55.

17. Me.—Donahue v. Thorndike & Hix, 109 A. 187, 119 Me. 20. 71 C.J. p 1590 note 57.

18. Me.—Donahue v. Thorndike & Hix, supra.

19. Iowa.—Iowa Nat. Mut. Ins. Co. v. Chicago, B. & Q. R. Co., 68 N.W. 2d 920, 246 Iowa 971.

ed.²⁰ Where the act provides that the awarding of compensation shall operate as an assignment to the person liable for compensation, the view has been expressed that allegations setting up the amount or details of the award as a basis or element of damages or as a separate cause of action are unnecessary²¹ and improper.²² There is a sufficient allegation that the amount of compensation was fixed and determined where it is alleged that an order was entered directing plaintiff employer to pay a specified amount in weekly installments and that thereafter plaintiff proceeded to pay these installments.²³

§ 1024. — Plea or Answer

- a. Action by, or on behalf of, employee, his dependents, or beneficiaries
- b. Action by, or on behalf of, employer or insurer

a. Action by, or on Behalf of, Employee, His Dependents, or Beneficiaries

In an action by, or on behalf of, an employee, a defendant who seeks the benefit of a provision of the compensation act must by his pleading bring himself with-

in such provision, and he must plead such defenses as are based on the act.

General rules as to pleas or answers in tort actions apply in actions by, or on behalf of, an employee, or dependents or the personal representative of a deceased employee, prosecuted notwithstanding the existence of a workmen's compensation act.²⁴ In such an action, in general, defendant who seeks the benefit of a provision of the compensation act must by his pleading bring himself within such provision,²⁵ and he must plead such defenses as are based on the act,²⁶ as, for example, acceptance of compensation by plaintiff employee from his employer,²⁷ subrogation of the employer,²⁸ assignment to the employer,²⁹ or to insurer,³⁰ under the act of another state,³¹ and defendant's liability under the act for compensation for the injury complained of in the action.³² A plea in bar based on the alleged receipt of compensation by plaintiff employee from his employer is bad where it fails to allege that the injury arose out of, and in the course of, plaintiff's employment.³³

Defendant's answer that the employee accepted and is receiving benefits under the compensation act,³⁴ or that plaintiff filed a claim for compensa-

20. La.—International Paper Co. v. Arkansas & L. M. Ry. Co., App. 35 So.2d 769.

21. N.Y.—Royal Indemnity Co. v. J. G. White Engineering Corporation, 198 N.Y.S. 264, 120 Misc. 332, affirmed 202 N.Y.S. 950, 208 App.Div. 759.

22. N.Y.—Royal Indemnity Co. v. J. G. White Engineering Corporation, *supra*.

23. Ill.—Brennan Const. Co. v. Blair, 261 Ill.App. 9.

24. Kan.—Lessley v. Kansas Power & Light Co., 231 P.2d 239, 171 Kan. 197.

Allegations held proper

Kan.—Lessley v. Kansas Power & Light Co., *supra*.

25. Ala.—Demopolis Telephone Co. v. Hood, 102 So. 35, 212 Ala. 216. 71 C.J. p 1590 note 65.

26. Ill.—O'Brien v. Chicago City Ry. Co., 137 N.E. 214, 305 Ill. 244, 27 A.L.R. 479. 71 C.J. p 1590 note 66.

27. R.I.—McHugh v. Williams & Payton, 110 A. 607, 48 R.I. 170. 71 C.J. p 1590 note 67.

Admission of employer-employee relationship

In suit for wrongful death against employer and another, plea by third person that plaintiff agreed with de-

fendant to accept compensation, setting forth copy of alleged agreement containing statements amounting to admissions of employer-employee relationship and applicability of compensation act, stated valid defense. Ga.—Smith v. Standard Oil Co. of Kentucky, 173 S.E. 879, 178 Ga. 651.

Allegations held insufficient

In personal injury action, amendment of answers by adding allegations that action was commenced over six months after first workmen's compensation award to plaintiff and hence barred under statute assigning cause after six-months period to compensation carrier, was insufficient to state defense because of failure to allege that plaintiff had taken compensation.

N.Y.—Morey v. City of Rochester, 85 N.Y.S.2d 32, 274 App.Div. 969.

28. Me.—Foster v. Congress Square Hotel Co., 145 A. 400, 128 Me. 50, 67 A.L.R. 239.

29. N.Y.—Massi v. Alben Builders, 60 N.Y.S.2d 494, 270 App.Div. 482, affirmed 70 N.E.2d 746, 296 N.Y. 767. 71 C.J. p 1591 note 69.

Defense to be pleaded affirmatively

Plea that injured employee has lost right to sue third-party tortfeasor for his injuries because of statutory transfer of cause of action to employer or insurance car-

rier by reason of employee's taking compensation and not suing third person within six months of award of compensation and within one year from date cause of action accrues, more closely resembles a plea that plaintiff is not real party in interest than a plea of bar of statute of limitations, but in any event such plea is one based on collateral facts showing action not to be maintainable and must be pleaded affirmatively.

N.Y.—Massi v. Alben Builders, 60 N.Y.S.2d 494, 270 App.Div. 482, affirmed 70 N.E.2d 746, 296 N.Y. 767.

Forsyth v. Manufacturers Trust Co., 104 N.Y.S.2d 571, affirmed 105 N.Y.S.2d 358, 278 App.Div. 843.

30. N.Y.—Peritore v. Niagara Mohawk Power Corp., 157 N.Y.S.2d 723, 4 Misc.2d 202. 71 C.J. p 1591 note 70.

31. N.M.—Kandelin v. Lee Moor Contracting Co., 24 P.2d 731, 37 N.M. 479. 71 C.J. p 1591 note 70.

32. N.Y.—Clark v. Monarch Engineering Co., 161 N.E. 436, 248 N.Y. 107. 71 C.J. p 1591 note 71.

33. Ga.—Hotel Equipment Co. v. Liddell, 124 S.E. 92, 32 Ga.App. 590. 71 C.J. p 1591 note 72.

34. N.Y.—Mezzanotte v. Maurer, 79 N.Y.S.2d 442, 191 Misc. 961.

tion,³⁵ or that the action is barred by limitations,³⁶ has been held insufficient in the absence of allegations that an award for compensation has been made. Under a statute providing that an acceptance of compensation under an award in a compensation order filed by a deputy commissioner should operate as an assignment to employer of all right to recover damages against a third-person wrongdoer, a defense is not stated in the absence of any allegation that the deputy commissioner has ever filed the compensation order,³⁷ or that compensation was accepted under an award;³⁸ although it has been held that there is no need to allege that payment was made pursuant to an award under the act.³⁹ Under the same statute, a defense alleging the provisions of the act pertaining to compensation and alleging that the employer paid to claimant compensation is not sufficient to show an election by claimant to receive compensation under the act, in the absence of allegations that compensation was received under an award.⁴⁰

Where an allegation that plaintiff was in the employ of a person other than defendant is denied by the answer, it is proper to permit the defense of assumption of risk⁴¹ and that the injuries were due to the negligence of a fellow servant.⁴² Likewise, the negligence of a fellow employee as a sole proximate cause of the injury to the employee may be shown under a general denial, and, if established, the complaint must be dismissed, regardless of the compensation law or the rights thereunder against the employer.⁴³ A motion by third-party plaintiff to amend an answer by including provisions of the compensation law barring an action by an injured employee against his fellow-employee for damages

resulting from the latter's negligence will be denied where there is no allegation that the third-party plaintiff was the employer or the coemployee of plaintiff.⁴⁴ Allegations that medical, surgical, and hospital services have been, or were being, furnished plaintiff by the United States, by which he was employed when injured, and that he was not, and will not be, required to pay therefor, states a proper partial defense, where plaintiff is not obligated to make a refund for such services.⁴⁵

Where under the act, the employee or the personal representative of a deceased employee may maintain an action against a person who is not bound by the act, even though compensation under the act has been claimed, a plea that the employee and his employer were both subject to the act and that defendant was not subject to the act does not state a defense,⁴⁶ nor does a plea that the employee has accepted compensation from his employer.⁴⁷ Where defendant seeks to avoid liability on the ground that the employee, his employer, and defendant were all bound by the act and that the employee was engaged in the course of his employment when the injury occurred, it is essential to a good plea that it should appear that the employer was engaged in an occupation which is within the compensation act,⁴⁸ and that facts should be alleged from which it may be inferred that the employee was actually engaged in the course of his employment when the injury occurred.⁴⁹ The plea is sufficient, however, where it alleges facts which show that the employee, his employer, and defendant were all bound by the act and that the injury occurred in the course of, and arose out of, the employment.⁵⁰

35. N.Y.—Grossman v. Consolidated Edison Co. of New York, 50 N.Y.S. 2d 785, 268 App.Div. 875, affirmed 60 N.E.2d 199, 294 N.Y. 39—Gillette v. Allen, 36 N.Y.S.2d 306, 264 App.Div. 599, appeal denied 37 N.Y.S.2d 493, 264 App.Div. 987, appeal dismissed 46 N.E.2d 355, 289 N.Y. 754.

36. N.Y.—Gillette v. Allen, *supra*.

37. U.S.—Brusich v. Grace Line, D. C.N.Y., 56 F.Supp. 48.

38. N.Y.—Jakuboski v. Matson Nav. Co., 34 N.Y.S.2d 352, 264 App.Div. 735, modified on other grounds 56 N.Y.S.2d 927, 269 App.Div. 849, appeal denied 57 N.Y.S.2d 847, 269 App.Div. 941, and appeal dismissed 64 N.E.2d 656, 295 N.Y. 633.

39. N.Y.—Cocasso v. Erie R. Co., 44 N.Y.S.2d 373.

40. N.Y.—Jakuboski v. Matson Nav. Co., 56 N.Y.S.2d 927, 269 App.Div.

849, appeal denied 57 N.Y.S.2d 847, 269 App.Div. 941, and appeal dismissed 64 N.E.2d 656, 295 N.Y. 633.

41. N.Y.—Ricciardi v. American Export Lines, 52 N.Y.S.2d 269, 268 App.Div. 606, affirmed 62 N.E.2d 241, 294 N.Y. 812.

Neri v. Erie R. Co., 101 N.Y.S. 2d 133, 199 Misc. 374.

42. N.Y.—Ricciardi v. American Export Lines, 52 N.Y.S.2d 269, 268 App.Div. 606, affirmed 62 N.E.2d 241, 294 N.Y. 812.

43. N.Y.—Caulfield v. Elmhurst Contracting Co., 53 N.Y.S.2d 25, 268 App.Div. 661, affirmed 62 N.E.2d 237, 294 N.Y. 803.

44. N.Y.—Favale v. Jackson, 163 N.Y.S.2d 438, 8 Misc.2d 143.

45. N.Y.—Drake v. New York State Elec. & Gas Corp., 294 N.Y.S. 227, 162 Misc. 167.

46. Ill.—Gones v. Fisher, 122 N.E. 95, 288 Ill. 606.

Moscarelli v. Sheldon, 247 Ill. App. 352.

Liability of person not bound by act see *supra* § 985.

Necessity of election in general see *supra* § 987 et seq.

47. Ill.—Gones v. Fisher, 122 N.E. 95, 288 Ill. 606.

48. Ill.—Keeran v. Peoria, Bloomington & Champaign Traction Co., 115 N.E. 636, 277 Ill. 413. 71 C.J. p 1591 note 78.

49. Ill.—Victor v. Dehmlow, 90 N.E. 2d 724, 405 Ill. 249.

White v. Stenson Brewing Co., 54 N.E.2d 79, 322 Ill.App. 181. 71 C.J. p 1591 note 79.

50. Ill.—Smith v. City of Hamilton, 231 Ill.App. 482. 71 C.J. p 1591 note 80.

In an action by the personal representative for the death of employee, an allegation of the answer that full compensation has been paid under the compensation act does not raise an inference that the amount received as compensation equals the maximum amount recoverable under the death statute.⁵¹ A defendant's plea that the administrator cannot maintain an action because the intestate and his employer at the time of the accident were subject to the compensation act is demurrable in the absence of an averment that the intestate is survived by dependents who were entitled to compensation.⁵²

Answer showing that defendant was independent contractor. Under some acts an answer which shows that defendant was an independent contractor under a contract with the employer of the employee for whose death the action is brought shows that the act does not apply to relieve defendant from liability in the action.⁵³

Amended answer not inconsistent with pleadings. In an action by the employee the propriety of permitting defendant to file an amended answer by alleging that plaintiff had elected to take compensation under the act and was thereby precluded from maintaining the action has been recognized, as against an objection that such amendment was inconsistent with, and changed the issues raised by, the prior pleadings.⁵⁴

Striking allegations. Where, in an action by the personal representative of a deceased employee, there are joined in the declaration a count for the death of the employee and a count for his conscious suffering, it has been held that plaintiff is entitled to have defendant's answer amended by striking as prejudicial an allegation that plaintiff was barred from recovery because he had received compensation.⁵⁵ Plaintiff's motion to strike defenses set up in amended answers of third parties that plaintiff received and accepted compensation under the compensation act, that plaintiff was nev-

er legally authorized by the commission to prosecute the action in his own name, and that he was not the real party in interest, will be granted where plaintiff has the right to prosecute the action either at request of the commission or on his own initiative.⁵⁶

b. Action by, or on Behalf of, Employer or Insurer

As a general rule, in an action by an employer for the death of an employee, the defendant may plead the contributory negligence of the employee as a defense.

General rules as to pleas or answers in tort actions apply in actions on behalf of an employer or insurer, and in accordance with the general rule applicable in most jurisdictions, in an action by an employer for the death of an employee, defendant may plead the contributory negligence of the employee⁵⁷ and assumption of risk⁵⁸ as a defense. The view has been taken that an allegation by defendant that the injury was wholly the result of the negligence of the employee is not sufficient to set up the defense of contributory negligence of the employee.⁵⁹

The third-person tort-feasor, when sued for damages for an injury to an employee which is compensable under the compensation act, is entitled to plead contributory negligence on the part of the employer as a bar to reimbursement pro tanto for the award paid.⁶⁰ The alleged negligence of the employee, however, cannot be made the basis of an independent plea in bar of the right of the employer to recover over against defendant as an original and primary wrongdoer.⁶¹ Any alleged negligence of the employer which is entirely independent of the negligence imputed to him under the doctrine of respondeat superior because of the negligent or wrongful conduct of the employee, who was injured or killed, may be pleaded in bar of plaintiff's right to recover, pro tanto, in behalf of the employer or his insurance carrier.⁶² On the

51. Minn.—McGuigan v. Allen, 206 N.W. 714, 165 Minn. 390.

52. Ala.—Robinson v. Western Ry. of Alabama, 9 So.2d 885, 243 Ala. 278.

53. Ky.—Dulaney v. Sebastian's Adm'r, 39 S.W.2d 1000, 239 Ky. 577.

54. La.—Lowe v. Morgan's Louisiana & T. R. & S. S. Co., 90 So. 429, 150 La. 29.

71 C.J. p 1591 note 82.

55. Mass.—Chaves v. Weeks, 136 N. E. 73, 242 Mass. 156.

71 C.J. p 1592 note 84.

56. N.Y.—Wood v. Ford Garage Co., 293 N.Y.S. 999, 162 Misc. 87, affirmed 300 N.Y.S. 1358, 252 App. Div. 921.

57. Cal.—Western States Gas & Electric Co. v. Bayside Lumber Co., 187 P. 735, 182 C. 140.

N.Y.—Commissioners of State Ins. Fund v. National City Bank of N. Y., 60 N.Y.S.2d 576, 187 Misc. 82.

58. N.Y.—Commissioners of State Ins. Fund v. National City Bank of N. Y., supra.

59. Cal.—Western States Gas &

Electric Co. v. Bayside Lumber Co., 187 P. 735, 182 C. 140. 71 C.J. p 1592 note 89.

60. N.C.—Lovette v. Lloyd, 73 S.E. 2d 886, 238 N.C. 663—Essick v. City of Lexington, 65 S.E.2d 220, 233 N.C. 600—Eledge v. Carolina Power & Light Co., 55 S.E.2d 179, 230 N.C. 584, rehearing denied 57 S.E.2d 306, 231 N.C. 737—Brown v. Southern R. Co., 169 S.E. 419, 204 N.C. 668.

61. N.C.—Poindexter v. Johnson Motor Lines, 69 S.E.2d 495, 235 N.C. 286.

62. N.C.—Lovette v. Lloyd, 73 S.E.

other hand, any alleged negligence of such employee who has received, or whose estate has received, compensation from the employer under the compensation act, must be pleaded, if at all, as a bar to the whole action without reference to any rights of the employer to share in the recovery.⁶³

In an action under the workmen's compensation act, by an insurer who had paid compensation, in the name of the personal representatives of a deceased employee against a third person for the employee's death and conscious suffering, allegations in the answer that the nominal plaintiff had elected to receive, and had been paid compensation, have been regarded as immaterial and irrelevant,⁶⁴ and may properly be stricken on motion,⁶⁵ and a motion to amend an answer in an action by insurer in the name of the employee by adding allegations that plaintiff had proceeded under the compensation act and had received compensation thereunder is properly denied.⁶⁶ Where the recovery by an insurer or employer against the third person is limited to the financial loss of the employer, as discussed supra § 1039, allegations as to the real party in interest, the amount of compensation paid, and others of similar import are material to the defense and are properly included in the answer.⁶⁷

Pleading statute of limitations. The necessity of defendant's pleading the statute of limitations to the intervening petition of an insurer in an action by an employee, in order to claim the benefit of the statute, has been recognized.⁶⁸ In an action by the state insurance fund, defenses alleging that the employee was an infant at the time of the accident, but not alleging that no guardian had been appointed for the employee, or that the employee commenced an action within a certain time after reaching majority, or that compensation was awarded after reaching majority but less than a certain time prior to the commencement of the instant action, are insufficient.⁶⁹

§ 1025. — Verification

In the absence of statutory requirement, a declara-

tion in an action by an employer against a third-person tort-feasor need not be verified.

In the absence of statutory requirement, a declaration in an action by an employer for the injury to, or the death of, an employee need not be verified,⁷⁰ and in such action, brought pursuant to a provision that the right of the employee or the personal representative to recover against a person other than the employer shall be subrogated to the employer, the view has been taken that a general statute requiring an allegation by oath or affidavit that the alleged subrogee is the actual bona fide subrogee does not apply,⁷¹ and it is not necessary for the employer to set forth on oath that he is a bona fide subrogee.⁷² It has been held, however, that an employer's motion to amend the complaint by verifying it could have been allowed where the ultimate facts were stipulated and accepted as true.⁷³

§ 1026. — Issues, Proof, and Variance

- a. Action by, or on behalf of, employee, his dependents, or beneficiaries
- b. Action by, or on behalf of, employer or insurer

a. Action by, or on Behalf of, Employee, His Dependents, or Beneficiaries

In an action by, or on behalf of, an employee the issues are usually confined to those raised by the pleadings, and proof may be made of matters in issue.

General rules as to issues, proof, and variance between pleading and proof in tort actions apply in an action by, or on behalf of, employee, his dependents, or beneficiaries for injury or death, prosecuted notwithstanding the existence of a workmen's compensation act; and in an action by employee who sues, as authorized by the act, after failure of the employer or compensation insurer to enforce subrogated rights under the act, the issues of fact involve the tortious liability of defendant.⁷⁴ The right of defendant to introduce evidence that there has been an election to proceed against the employer for compensation has been denied in the absence

2d 886, 236 N.C. 663—Poindexter v. Johnson Motor Lines, 69 S.E.2d 495, 235 N.C. 286.

63. N.C.—Poindexter v. Johnson Motor Lines, supra.

64. Mass.—Chaves v. Weeks, 136 N.E. 73, 242 Mass. 156.

65. Mass.—Chaves v. Weeks, supra. 71 C.J. p 1592 note 91.

66. Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435.

67. Kan.—Sundgren v. Topeka

Transp. Co., 283 P.2d 444, 178 Kan. 83—Krol v. Coryell, 175 P.2d 423, 162 Kan. 198.

68. Ky.—Berry v. Irwin, 6 S.W.2d 705, 224 Ky. 565.

71 C.J. p 1592 note 93.

69. N.Y.—Commissioners of State Ins. Fund v. Thames Trading Co., 64 N.Y.S.2d 91.

70. Ill.—C. J. De Wit Co. v. Central Lime & Cement Co., 250 Ill.App. 161.

71. Ill.—Geneva Const. Co. v. Martin Transfer & Storage Co., 114 N.

E.2d 906, 351 Ill.App. 289, affirmed 122 N.E.2d 540, 4 Ill.2d 273.

71 C.J. p 1592 note 96. Subrogee's oath in general see Subrogation § 68.

72. Ill.—Brennan Const. Co. v. Blair, 261 Ill.App. 9.

71 C.J. p 1592 note 97.

73. Ill.—Geneva Const. Co. v. Martin Transfer & Storage Co., 122 N.E.2d 540, 4 Ill.2d 273.

74. Me.—Foster v. Congress Square Hotel Co., 145 A. 500, 128 Me. 50, 67 A.L.R. 239.

of allegations in his pleading that the employee and his employer were subject to the compensation act,⁷⁵ or of a plea in bar setting forth an agreement under the act pursuant to which it is claimed, compensation was paid.⁷⁶ Even where plaintiff employee sets up a common-law right of action, however, the view has been expressed that under the general issue defendant may introduce evidence that plaintiff was under the workmen's compensation act.⁷⁷

It has been held that the issue as to whether, through acceptance of compensation payments, the employee has lost his right of action against the third person is properly raised by a motion as against a contention that it should have been raised by the answer.⁷⁸

b. Action by, or on Behalf of, Employer or Insurer

General rules as to issues, proof, and variance between pleading and proof in tort actions apply in an action by, or on behalf of, an employer or an insurer against a third-person tort-feasor; and an employer has to plead and prove that he was not guilty of negligence that was the proximate cause of the injury sustained by the employee.

General rules as to issues, proof, and variance between pleading and proof in tort actions apply in an action by, or on behalf of, an employer or an insurer against a person who caused the injury to, or the death of, an employee. Accordingly, an employer suing a third person under the compensation act for injuries sustained by his employee while in the course of his employment has been held required, both by pleading and proof, to bring himself within the requirements of the act as a condition to his right of recovery.⁷⁹ An insurer under a contract executed in one state is not entitled by reason of subrogation to maintain an action in another state against the alleged tort-feasor without pleading or proving the compensation law of the state of contract giving him subrogation rights even though the contract provides for subrogation.⁸⁰ In a suit by an employer for reimbursement for compensation paid

to the employee brought against a third-person tort-feasor, it has been held that the employer must plead and prove that neither he nor his employee was guilty of negligence that was the proximate cause of the injury sustained by the employee.⁸¹ Under a statute, however, providing that, for subrogation purposes, any payment made to the injured employee by, or on behalf of, defendants shall be considered as having been so paid as damages resulting from, and because said injury was caused under circumstances creating a legal liability against, such defendants, authorizes recovery by insurer of full damages against defendants without allegation or proof of negligence on the part of defendants or freedom from contributory negligence on the part of the injured employee.⁸²

Under acts providing for subrogation, the issues involved relate to the tortious liability of defendant both in an action by the employer,⁸³ and in an action for the benefit of insurer.⁸⁴ Under some acts, in an action on behalf of an employer to recover from a third person compensation paid or payable, the question as to whether the employer carries insurance is not a relevant issue.⁸⁵ In an action by an employer for the benefit of insurer, brought pursuant to a provision that if compensation is paid the employer may enforce for his own benefit or that of insurer the liability of a third person, it has been held that the liability under the policy of insurer to pay the compensation which it has already paid may not be litigated.⁸⁶

Where, under the statute, in an action in the name of the employee for the benefit of insurer the liability of defendant, including liability in respect of the amount recoverable, is the same as in an action for the benefit of the employee, evidence of payment of compensation in compliance with the act is unnecessary.⁸⁷ Where the right of the employer to maintain an action against a third person under a provision for subrogation is recognized notwithstanding compensation is being paid by insurer, as discussed supra § 1016, proof that compensation is being paid by insurer whereas the employer's peti-

75. Colo.—Arkansas Valley Ry., Light & Power Co. v. Ballinger, 178 P. 566, 65 Colo. 548.
71 C.J. p 1592 note 2.

76. R.I.—McHugh v. Williams, 110 A. 607, 43 R.I. 170.
71 C.J. p 1593 note 3.

77. Ill.—Wachuta v. Chicago Rys. Co., 222 Ill.App. 329.
71 C.J. p 1593 note 4.

78. U.S.—Freader v. Cities Service Transp. Co., D.C.N.Y., 14 F.Supp. 456.

79. Ill.—Sheppard v. Cummings, 57 N.E.2d 907, 324 Ill.App. 227.

80. Ky.—Employer's Liability Corp. v. Webb, 140 S.W.2d 825, 283 Ky. 115.

81. Ill.—Manion v. Chicago, R. I. & P. Ry. Co., 138 N.E.2d 98, 12 Ill. App.2d 1.

82. Iowa.—American Mut. Liability Ins. Co. v. State Auto. Ins. Ass'n, 72 N.W.2d 88, 246 Iowa 1294.

83. Me.—Fournier v. Great Atlantic

& Pacific Tea Co., 148 A. 147, 123 Me. 393, 68 A.L.R. 481.

84. Me.—Cullicut v. Burrill, 115 A. 172, 120 Me. 419.
71 C.J. p 1593 note 8.

85. Ill.—Foglio v. City of Chicago, 229 Ill.App. 472.
71 C.J. p 1593 note 9.

86. Mich.—Eber v. Bauer, 233 N.W. 419, 253 Mich. 571.
71 C.J. p 1593 note 10.

87. Me.—Donahue v. Thorndike & Hix, 109 A. 187, 110 Me. 20.

tion alleges that compensation is being paid by the employer does not constitute a failure of proof sufficient to support a recovery,⁸⁸ and the variance is not, therefore, fatal.⁸⁹

§ 1027. Evidence

Specific matters with respect to evidence in actions by employees against third persons are discussed infra §§ 1028-1030. Questions of evidence with respect to an election of remedies by an employee or his dependents or beneficiaries are considered supra § 990.

Examine Pocket Parts for later cases.

§ 1028. — Presumptions and Burden of Proof

- a. Action on behalf of employee, his dependents, or beneficiaries
- b. Action on behalf of employer or insurer

a. Action on Behalf of Employee, His Dependents, or Beneficiaries

General rules as to presumptions in tort and death actions apply in actions by an employee or his beneficiaries against a tort-feasor for injuries or death. The burden of proof in such actions is on the plaintiff to prove his right to recover, and is on the defendant to prove matters of defense.

General rules as to presumptions and burden of proof in a tort or death action apply in an action on behalf of an employee or his dependents or beneficiaries against a tort-feasor for injury or death, prosecuted notwithstanding the existence of a workmen's compensation act.⁹⁰ In an action against a general contractor, a judgment for compensation against a sub-contractor, who was the employee's employer, is presumed to have been in full satisfaction of the employee's industrial injuries.⁹¹

In the absence of evidence that an employee and his employer had given notice of nonacceptance of the compensation act, it is presumed that both were bound by the act.⁹² A presumption, under a provision of the compensation act, that a deceased employee and his employer were bound by the act, has apparently been given effect in an action by the personal representative for the death of such employee,⁹³ and where defendant seeks to avoid liability to an employee of another, under provisions of the act, on the ground that plaintiff, his employer, and defendant were all bound by the act, as considered supra § 985, and the evidence shows that the employee, his employer, and defendant are engaged in businesses which presumptively bring them under the act, such presumption is applicable in the action by the employee.⁹⁴ The fact, however, that the employer of plaintiff engages in some occupations which are within the compensation act does not of itself raise a presumption that plaintiff was engaged in an occupation within the act, where such employer also engages in occupations not within the act.⁹⁵

In general, defendant has the burden of proving facts on which it predicates a claim to immunity from a suit for damages,⁹⁶ and of proving defenses which arise under the compensation act.⁹⁷ So, defendant has the burden of proving compliance by the employer with the provisions of the act where non-compliance would permit the action,⁹⁸ the transfer of the cause of action to the employer,⁹⁹ assignment of the cause of action to insurer under the compensation act of another state,¹ plaintiff's status as an employee of defendant,² and defendant's liability for compensation under the act.³

Also, defendant has the burden of proving the allegations of a special plea setting up the claim that defendant and the employer of plaintiff employee were under the compensation act,⁴ that the employee

88. Mo.—Missouri Pac. R. Co. v. Haid, 59 S.W.2d 690, 332 Mo. 616. 71 C.J. p 1593 note 18.

89. Mo.—Missouri Pac. R. Co. v. Haid, supra. 71 C.J. p 1593 note 14.

90. N.Y.—In re Wales' Estate, 36 N.Y.S.2d 643, 178 Misc. 936. Pa.—Kauffman v. American Stores, Com.Pl., 5 Chest.Co. 68. 71 C.J. p 1593 note 17.

91. Cal.—Hard v. Hollywood Turf Club, 246 P.2d 716, 112 C.A.2d 263.

92. N.C.—Ward v. Bowles, 45 S.E.2d 354, 228 N.C. 273.

93. Minn.—Mahowald v. Thompson-Starratt Co., 158 N.W. 913, 159 N.W. 565, 134 Minn. 113.

94. Ill.—Purcell v. Chicago City Ry. Co., 221 Ill.App. 343—Berndt v. Chicago Rys. Co., 220 Ill.App. 307.

95. Ill.—O'Brien v. Chicago City Ry. Co., 127 N.E. 889, 293 Ill. 140. 71 C.J. p 1593 note 21.

96. Or.—Kosmecki v. Portland Stevedoring Co., 223 P.2d 1035, 190 Or. 85. Wash.—McClung v. Pratt, 270 P.2d 1063, 44 Wash.2d 779.

97. Ill.—Victor v. Dehmlow, 99 N.E.2d 639, 8 Ill.App.2d 565.

98. U.S.—Madden v. Northern Pac. Ry. Co., D.C.Wash., 242 F. 981. 71 C.J. p 1594 note 23.

99. Ill.—Christian v. Chicago & I. M. Ry. Co., 105 N.E.2d 741, 412 Ill. 171.

Rasmussen v. Clark, 104 N.E.2d 325, 346 Ill.App. 181.

1. N.M.—Kandelin v. Lee Moor Contracting Co., 24 P.2d 731, 37 N.M. 479. 71 C.J. p 1594 note 24.

2. N.Y.—Greenberg v. Sommer, 215 N.Y.S. 382, 216 App.Div. 416.

3. N.Y.—Clark v. Monarch Engineering Co., 161 N.E. 436, 243 N.Y. 107. 71 C.J. p 1594 note 26.

4. Ill.—Victor v. Dehmlow, 99 N.E.2d 724, 405 Ill. 249—Mueller v. Elm Park Hotel Co., 63 N.E.2d 365, 391 Ill. 391.

Sweat v. Aircraft & Diesel Equipment Corp., 81 N.E.2d 8, 335 Ill. App. 177—Anderson v. Chicago, B. & Q. R. Co., 230 Ill.App. 516.

was within the act,⁵ and that the injury or death arose out of, and in the course of, the employment.⁶

Defendant has the burden of proving the allegations of a special defense that the employee was employed by a subcontractor of defendant and that defendant is liable, if at all, only under the compensation act, and is not liable in an action at law for damages.⁷

A defendant who claims immunity from suit by an employee, by reason of the fact that defendant and plaintiff's employer were engaged on the premises where plaintiff was injured, which were under the joint supervision and control of defendant and the employer, has the burden of establishing these facts.⁸ Where defendant claims immunity on the basis that he and the employer were engaged on the premises in furtherance of a common enterprise, or the accomplishment of it, or related purposes in operation, he must prove those facts,⁹ as well as the facts as to the extent of the premises involved in such joint enterprise.¹⁰

An employee may be required to prove his freedom from contributory negligence,¹¹ and to prove the actionable negligence of the tort-feasor.¹² Under a statute authorizing the maintenance of a suit for damages against a person other than the employer, the employee must show that defendant was such a person.¹³

Plaintiff does not have the burden of proving, as a defense to a common-law action for damages, that he was not under the act,¹⁴ or that he was not acting in the course of his employment.¹⁵

Where the fact that defendant was not bound by the act is essential to plaintiff's right to recover, if the proof shows that plaintiff employee was bound by the act and that the injury arose out of and in the course of the employment and the pleadings and evidence show that defendant was engaged in a business which brought defendant within the provisions of the act, the view has been taken that plaintiff must prove that defendant was not bound by the act;¹⁶ and, where there is a presumption, based on the business in which defendant is engaged, that defendant is under the act, plaintiff must prove a due rejection of the act by defendant where the act permits such rejection.¹⁷

In an action by the employee, prosecuted, as authorized by an act, on the employer's or insurer's failure to sue to enforce the liability of the third-person wrongdoer under the right of subrogation given by the act, plaintiff employee need not prove the essentials, prescribed by the act, of his right to sue,¹⁸ or a waiver by the employer of the subrogated right to sue.¹⁹

The employee has been held required to establish the loss of wages suffered as a result of the acts causing his injury.²⁰

Where an employee's personal representative seeks recovery, under a statute of a particular state, on the theory that the contract of employment was entered into therein, it is necessary that plaintiff prove that fact.²¹

Defendant claiming benefit of provision applicable to person subject to act. There has been held to be no presumption, in an action by an injured em-

Or.—Brown v. Underwood Lumber Co., 141 P.2d 527, 172 Or. 261.

5. Ill.—Victor v. Dehmlow, 90 N.E. 2d 724, 405 Ill. 249—Mueller v. Elm Park Hotel Co., 63 N.E.2d 365, 391 Ill. 391.

Sweat v. Aircraft & Diesel Equipment Corp., 81 N.E.2d 8, 335 Ill.App. 177.

71 C.J. p 1594 note 28.

6. Ill.—Victor v. Dehmlow, 90 N.E. 2d 724, 405 Ill. 249—Mueller v. Elm Park Hotel Co., 63 N.E.2d 365, 391 Ill. 391.

Sweat v. Aircraft & Diesel Equipment Corp., 81 N.E.2d 8, 335 Ill.App. 177—Cohen v. Cummings, 71 N.E.2d 198, 330 Ill.App. 431—Runge v. Chicago Junction Ry. Co., 226 Ill.App. 187.

7. Conn.—Buytkus v. Second Nat. Bank, 16 A.2d 579, 127 Conn. 316.

8. Or.—Brown v. Underwood Lumber Co., 141 P.2d 527, 172 Or. 261—Inwall v. Transpacific Lumber Co., 108 P.2d 522, 165 Or. 560.

9. Or.—Kosmecki v. Portland Stevedoring Co., 223 P.2d 1035, 190 Or. 85—Brown v. Underwood Lumber Co., 141 P.2d 527, 172 Or. 261.

10. Or.—Kosmecki v. Portland Stevedoring Co., 223 P.2d 1035, 190 Or. 85.

11. N.Y.—Sweezy v. Arc Elec. Const. Co., 67 N.E.2d 369, 295 N.Y. 306, 166 A.L.R. 809.

12. N.Y.—Sweezy v. Arc Elec. Const. Co., supra.

Proximate cause

Employee can prove negligence by proving that negligence of defendant was proximate cause or one of proximate causes of injury.

N.C.—Jones v. Otis Elevator Co., 56 S.E.2d 684, 231 N.C. 285.

13. Fla.—Younger v. Giller Contracting Co., 196 So. 690, 143 Fla. 335.

14. Ill.—Mueller v. Elm Park Hotel Co., 63 N.E.2d 365, 391 Ill. 391.

15. Ill.—Victor v. Dehmlow, 90 N.E.

2d 724, 405 Ill. 249—Mueller v. Elm Park Hotel Co., 63 N.E.2d 365, 391 Ill. 391.

16. Ill.—Stevens v. Illinois Cent. R. Co., 137 N.E. 859, 306 Ill. 370.

17. Ill.—Purcell v. Chicago City Ry. Co., 221 Ill.App. 343—Berndt v. Chicago Rys. Co., 220 Ill.App. 307. Pa.—Kaufman v. American Stores, Com.Pl., 5 Chest.Co. 68.

18. Me.—Foster v. Congress Square Hotel Co., 145 A. 400, 128 Me. 50, 67 A.L.R. 239.

71 C.J. p 1594 note 32.

Rights of employee on employer's or insurer's failure to sue see supra § 1004.

19. Me.—Fournier v. Great Atlantic & Pacific Tea Co., 148 A. 147, 128 Me. 393, 68 A.L.R. 481.

20. U.S.—Cyr v. F. S. Payne Co., D.C.Conn., 112 F.Supp. 526, affirmed, C.A., 208 F.2d 356.

21. U.S.—Raiche v. Standard Oil Co., C.C.A.Iowa, 137 F.2d 446.

ployee, that a defendant who claims the benefit of a provision of the compensation act applicable to a third person subject to the act is or is not subject to the act.²²

Burden of going forward with evidence. In a negligence action, a tort-feasor does not have the burden of establishing that the action was brought under the compensation act, and not under the common law, until after plaintiff, who sues under the common law, has made out a prima facie case of liability on the legal principles relied on in the declaration.²³

b. Action on Behalf of Employer or Insurer

General rules as to presumptions in tort or death actions apply in an action by an employer or insurer to recover for injuries to, or the death of, an employee. In such action, the plaintiff may be required to prove the negligence of the tort-feasor.

In an action by, or on behalf of, an employer or an insurer against a person other than the employer for an injury to, or the death of, an employee, there is a presumption that the employer complied with the provisions of the act, if that question is involved.²⁴ In the absence of evidence to the contrary, it is presumed that a tort-feasor who is an employer is subject to the compensation law.²⁵

The conclusive presumption created by a compensation act that an employer engaged in certain employments or occupations has elected to be bound by the act unless he gives notice of an intention to the contrary applies to a defendant in an action by an employer against a third person,²⁶ and also to plaintiff in such action.²⁷ A presumption has been held to exist that the lineal kin of a deceased employee sustained actual damages by reason of his death.²⁸

In an action by, or on behalf of, an employer or insurer against a person other than the employer for

an injury to, or the death of, an employee, the employer or insurer may be required to show that the circumstances causing the death or injury occurred in the course of his employment.²⁹ The view has been taken that, in an action by an employee against a third person, proof of payment of compensation is not part of plaintiff's case, even though the action is actually brought for the benefit of insurer whose right to bring the action depends, under the compensation act, on the payment of compensation.³⁰ Although it has been held that an employer is not required to prove the payment of compensation, it being sufficient to offer a record of the proceeding before the commission to show the acceptance of compensation,³¹ proof of payment has been held necessary where insurer brings the action.³²

Waiver of right to subrogation. In an action by an employer under his right of subrogation given by the compensation act, proof of nonwaiver of the employer's right of subrogation is not necessary;³³ waiver of the employer's right of subrogation is a matter of defense, with the burden on defendant to prove it.³⁴

Actionable wrong, contributory negligence, and damages. In an action by, or on behalf of, an employer or insurer against a tort-feasor for an injury to, or the death of, an employee, a particular state of facts has been held to create a presumption of negligence on the part of the tort-feasor,³⁵ as well as to authorize the application of the maxim of *res ipsa loquitur*.³⁶ However, where the instrumentality causing the harm was not under the exclusive control of the tort-feasor,³⁷ or evidence of specific negligence is introduced into the case,³⁸ the doctrine of *res ipsa loquitur* is inapplicable.

In an action by an employer to recover from a third person, it is for plaintiff to prove all the essen-

22. Ala.—Demopolis Telephone Co. v. Hood, 102 So. 35, 212 Ala. 216. 71 C.J. p 1594 note 34.

23. Tenn.—Watson v. Borg-Warner Corp., 228 S.W.2d 1011, 190 Tenn. 209.

24. N.Y.—Thompson v. International Harvester Co., 253 N.Y.S. 190, 141 Misc. 757.

71 C.J. p 1594 note 37.

25. Ala.—Sloss-Sheffield Steel & Iron Co. v. Metropolitan Cas. Ins. Co. of New York, 185 So. 395, 28 Ala.App. 366, certiorari denied 185 So. 399, 237 Ala. 43.

26. Ill.—Vose v. Central Illinois Public Service Co., 122 N.E. 134, 286 Ill. 519.

27. Ill.—Vose v. Central Illinois Public Service Co., supra, 71 C.J. p 1594 note 39.

28. Ill.—U. S. Ice Co. v. Courts Bldg. Corp., 44 N.E.2d 330, 316 Ill. App. 145.

29. N.Y.—Travelers Ins. Co. v. Stieglitz, 30 N.Y.S.2d 306.

30. Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435.

31. Pa.—Paxos v. Jarka Corporation, 171 A. 468, 314 Pa. 148, applying federal Longshoremen's and Harbor Workers' Compensation Act.

32. Ala.—Foster & Creighton Co. v. St. Paul Mercury Indem. Co., 88 So.2d 825, 264 Ala. 581.

33. Me.—Fournier v. Great Atlantic & Pacific Tea Co., 148 A. 147, 128 Me. 393, 68 A.L.R. 481.

34. Me.—Fournier v. Great Atlantic & Pacific Tea Co., supra.

35. Fall of elevator

Proof that owner's employee permitted elevator to remain unattended and that elevator struck plaintiff's employee while falling from top floor to basement created presumption.

Ill.—Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp., 63 N.E.2d 411, 326 Ill.App. 598, affirmed 70 N.E.2d 604, 395 Ill. 429.

36. Fall of elevator

Ill.—Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp., supra.

37. Minn.—State v. Sprague, 276 N. W. 744, 201 Minn. 415.

38. Ill.—Wm. Wrigley, Jr., Co. v. Standard Roofing Co., 59 N.E.2d 510, 325 Ill.App. 210.

tial elements of the cause of action which the injured employee would have been called on to prove if his right of action had not been transferred to the employer.³⁹ Thus, plaintiff may be required to prove that defendant was in fact a wrongdoer,⁴⁰ facts creating a legal liability of defendant,⁴¹ and the resulting damages.⁴²

Also, in an action by the employer to recover the amount paid as compensation to an injured employee, the burden of proof is on plaintiff to show affirmatively that defendant was guilty of the negligence charged,⁴³ and that such negligence was the proximate cause of the injury.⁴⁴

The employer may also be required to show the employee's freedom from contributory negligence,⁴⁵ that just prior to, and at the time of, such injury the employee was in the exercise of ordinary care for his own safety,⁴⁶ that, at the time and place of the injury, the employer was exercising reasonable care for the safety of his employees,⁴⁷ or that the injuries for which compensation was paid were not proximately caused by the negligence of the employer or his employees.⁴⁸ A statutory provision that, on the trial of an action to recover damages for causing death, the contributory negligence of the person killed shall be a defense to be proved by defendant has been applied in an action by an insurer against a third person based on the death of an em-

ployee so as to impose on defendant the burden of proving the contributory negligence of the deceased employee.⁴⁹

The employer may also be required to prove the fixed amount of compensation that he must pay.⁵⁰ Since lineal kin are presumed to have sustained actual damage by an employee's death, an employer need not prove pecuniary loss to next of kin where the compensation was paid to one of such lineal kin.⁵¹

§ 1029. — Admissibility

- a. Action on behalf of employee, his dependents, or beneficiaries
- b. Action on behalf of employer or insurer

a. Action on Behalf of Employee, His Dependents, or Beneficiaries

In an action by an employee or his beneficiaries against a tort-feasor, evidence relating to compensation is generally not admissible.

General rules as to the admissibility of evidence applicable in actions based on torts or death apply in actions by an employee, or the dependents or personal representative of a deceased employee, for injury or death, prosecuted notwithstanding the existence of a workmen's compensation act.⁵² In such

39. Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealer's Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651.

40. Pa.—Broderick v. Great Lakes Casualty Co., 33 A.2d 658, 152 Pa. Super. 449.

41. Pa.—Broderick v. Great Lakes Casualty Co., supra.
71 C.J. p 1595 note 48.

42. Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealer's Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651.
71 C.J. p 1595 note 44.

43. U.S.—American General Ins. Co. v. Southwestern Gas & Elec. Co., C.C.A.Tex., 115 F.2d 706.
Cal.—Polk v. Garcia & Maggini Co., 30 P.2d 615, 137 C.A. 406.

Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealer's Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651.

Alschuler v. Rockford Bolt & Steel Co., 48 N.E.2d 435, 318 Ill. App. 564—Mississippi Lime & Material Co. v. Smith, 282 Ill.App. 361—Munsen v. Illinois Northern Utilities Co., 258 Ill.App. 438.

La.—International Paper Co. v. Arkansas & L. M. Ry. Co., App., 35 So. 2d 769.

Mich.—Lather, for Use and Benefit of Employers Mut. Cas. Co. v. Michigan Public Service Co., 52 N.W.2d 551, 332 Mich. 683.
N.Y.—Travelers Ins. Co. v. Stieglitz, 30 N.Y.S.2d 306.

Tex.—Texas Employers' Ins. Ass'n v. Fort Worth & D. C. Ry. Co., Civ. App., 181 S.W.2d 828.

44. Ill.—Alschuler v. Rockford Bolt & Steel Co., 48 N.E.2d 435, 318 Ill. App. 564—Munsen v. Illinois Northern Utilities Co., 258 Ill.App. 438.

Mich.—Lather, for Use and Benefit of Employers Mut. Cas. Co. v. Michigan Public Service Co., 52 N.W.2d 551, 332 Mich. 683.

45. Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealer's Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651.

Mich.—Lather, for Use and Benefit of Employers Mut. Cas. Co. v. Michigan Public Service Co., 52 N.W.2d 551, 332 Mich. 683.

46. Ill.—Alschuler v. Rockford Bolt & Steel Co., 48 N.E.2d 435, 318 Ill. App. 564—Munsen v. Illinois

Northern Utilities Co., 258 Ill.App. 438.

47. Ill.—Mississippi Lime & Material Co. v. Smith, 282 Ill.App. 361.

48. Ill.—Manion v. Chicago, R. I. & P. R. Co., 119 N.E.2d 498, 2 Ill.App. 2d 191.

49. N.Y.—Liberty Mut. Ins. Co. v. George Colon & Co., 256 N.Y.S. 628, 235 App.Div. 117, affirmed 183 N.E. 506, 260 N.Y. 305.

71 C.J. p 1595 note 48.

50. Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealer's Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651.

51. Ill.—U. S. Ice Co. v. Courts Bldg. Corp., 44 N.E.2d 830, 316 Ill.App. 145.

52. Evidence held admissible or improperly excluded

(1) Generally.

U.S.—Johnson v. Sword Line, Inc., C. A.Pa., 240 F.2d 954.

(2) Testimony that destination of railroad car was out of state was admissible to prove interstate character of train movement and to establish that rights of parties were not governed by state compensation act, particularly where railroad company

an action, where plaintiff is entitled to sue and to recover the full amount of damages notwithstanding there has been an award or payment of damages, only where the existence of compensation insurance is relevant to a material issue may it be considered by the jury;⁵³ accordingly, evidence is not admissible on behalf of defendant to show that plaintiff may secure compensation if the negligence action is unsuccessful.⁵⁴

Also inadmissible on behalf of defendant is evidence as to the fact of compensation,⁵⁵ or as to the compensation proceedings.⁵⁶ Other evidence relating to compensation which has been held inadmissible on behalf of defendant is evidence as to an agreement therefor,⁵⁷ as to the refusal or allowance of a claim therefor,⁵⁸ as to the receipt or acceptance thereof,⁵⁹ and as to the amount of the compensation received.⁶⁰ Similarly, evidence as to compensation has been held inadmissible on behalf of other parties to the action.⁶¹

Also, the file of papers which were used in the compensation proceedings may not be admitted at defendant's insistence where they are not material to the issues.⁶² Even in jurisdictions in which the compensation which plaintiff has received from the employer of the injured employee may be deducted from the amount of damages recoverable, as considered infra § 1040, the right of defendant to introduce at the trial evidence as to compensation paid has been denied,⁶³ but there is apparently authority to the contrary.⁶⁴

On the other hand, where evidence as to a claim for,⁶⁵ or payment of,⁶⁶ compensation is necessary for the jury properly to evaluate the testimony of a witness, it is admissible. Also, evidence as to the receipt of compensation may be admissible subject to the limitation that it be considered only on the question of whether plaintiff, therefore unnecessarily extended the period of his inactivity.⁶⁷

offered no records as to destination of cars.

Ill.—Burckhardt v. Elgin, J. & E. Ry. Co., 53 N.E.2d 497, 321 Ill.App. 643.

Evidence held inadmissible or properly excluded

(1) Generally.

U.S.—Sabol v. Merritt Chapman & Scott Corp., C.A.N.Y., 241 F.2d 765 —E. I. Du Pont De Nemours Co. v. Hall, C.A.S.C., 237 F.2d 145.

Ga.—J. M. High Co. v. Hague, App., 185 S.E. 141.

Tex.—Torres v. Dishman, Civ.App., 69 S.W.2d 501, error dismissed.

(2) Where defendants claimed that employee's only remedy was under compensation act on ground that employer was an independent contractor, evidence to show that employer had entered into contract with oil company to do a "part of or process in, the trade or business" of company was properly excluded, since such evidence was insufficient as matter of law to prove such fact.

Mass.—Whitehouse v. Cities Service Oil Co., 52 N.E.2d 414, 315 Mass. 108.

53. Cal.—Huber v. Henry J. Kaiser Co., 162 P.2d 693, 71 C.A.2d 273.

Right to sue notwithstanding award or receipt of compensation in general see supra § 1003.

54. N.Y.—Nappi v. Falcon Truck Renting Corp., 141 N.Y.S.2d 424, 286 App.Div. 123, affirmed 152 N.Y.S.2d 297, 1 N.Y.2d 750, 135 N.E.2d 751.

Drake v. New York State Elec. & Gas Corp., 294 N.Y.S. 227, 162 Misc. 167.

S.C.—Eudy v. Atlantic Greyhound Lines, 191 S.E. 85, 133 S.C. 306.

Claim for compensation immaterial before award made

N.Y.—Nappi v. Falcon Truck Renting Corp., 141 N.Y.S.2d 424, 286 App.Div. 123, affirmed 152 N.Y.S.2d 297, 1 N.Y.2d 750, 135 N.E.2d 51.

55. U.S.—Sprinkle v. Davis, C.C.A. Va., 111 F.2d 925, 128 A.L.R. 1101. Tex.—Pattison v. Highway Ins. Underwriters, Civ.App., 278 S.W.2d 207, refused no reversible error.

56. Ill.—Springer v. Illinois Transit Lines, 48 N.E.2d 206, 318 Ill.App. 403.

Kan.—Davison v. Martin K. Eby Const. Co., 218 P.2d 219, 169 Kan. 256.

57. Pa.—Lengle v. North Lebanon Tp., 117 A. 403, 274 Pa. 51.

Tex.—Myers v. Thomas, 186 S.W.2d 811, 143 Tex. 502.

Panhandle & Santa Fe Ry. Co. v. Dean, Civ.App., 269 S.W.2d 439, error refused no reversible error—Johnson v. Willoughby, Civ.App., 183 S.W.2d 201, error refused.

58. Tex.—Myers v. Thomas, 186 S.W.2d 811, 143 Tex. 502.

59. Ga.—Sheffield Co. v. Phillips, 24 S.E.2d 834, 69 Ga.App. 41.

Minn.—Peterson v. Minneapolis St. Ry. Co., 279 N.W. 588, 202 Minn. 630—Gulle v. Greenberg, 257 N.W. 649, 192 Minn. 548.

Mo.—Houfburg v. Kansas City Stock Yards Co. of Maine, 283 S.W.2d 539 —Pritt v. Terminal R. Ass'n of St. Louis, 251 S.W.2d 622.

N.H.—Abbott v. Hayes, 26 A.2d 842, 92 N.H. 126.

N.Y.—Cibiniak v. Franklin Properties, 78 N.Y.S.2d 53, 273 App.Div. 947.

Tex.—Dallas Ry. & Terminal Co. v. Hendrix, Civ.App., 261 S.W.2d 610, 71 C.J. p 1595 note 55.

60. Tex.—Myers v. Thomas, 186 S.W.2d 811, 143 Tex. 502.

Dallas Ry. & Terminal Co. v. Hendrix, Civ.App., 261 S.W.2d 610, 71 C.J. p 1595 note 55.

61. Kan.—Davison v. Martin K. Eby Const. Co., 218 P.2d 219, 169 Kan. 256.

71 C.J. p 1595 note 57.

62. Ala.—Coleman v. Hamilton Storage Co., 180 So. 553, 235 Ala. 553.

63. Ky.—Hardy v. Muensch, 242 S.W. 586, 195 Ky. 398—Book v. City of Henderson, 197 S.W. 449, 176 Ky. 785.

Reason for rule

Court properly refused to allow defendants to read to jury compensation proceedings and resulting award in support of defendants' prayer for allowance of credit for amount awarded on judgment for plaintiff, as right to such credit was for court's, not jury's, consideration.

Ky.—Rogers v. Price, 160 S.W.2d 371, 290 Ky. 153.

64. Tex.—Smith v. Galveston-Houston Electric Ry. Co., Civ.App., 265 S.W. 267, reversed on other grounds, Com.App., 277 S.W. 103.

71 C.J. p 1595 note 60.

65. N.Y.—Nappi v. Falcon Truck Renting Corp., 141 N.Y.S.2d 424, 286 App.Div. 123, affirmed 152 N.Y.S.2d 297, 1 N.Y.2d 750, 135 N.E.2d 51.

66. Mo.—Houfburg v. Kansas City Stock Yards Co. of Maine, 283 S.W.2d 539.

67. N.J.—Perry v. Public Service Coordinated Transport, 56 A.2d 617, 136 N.J.Law 398.

Furthermore, evidence as to the acceptance or rejection of a compensation act by the employer and his employees has been held to be admissible.⁶⁸

Defendants may properly show that plaintiff's physicians have been paid,⁶⁹ or that payments have been made by or for his employer because of the wages lost during his disability.⁷⁰

Findings, order, or judgment in compensation proceedings. The admissibility, on behalf of defendant, of the findings and order by the state compensation commissioner in a proceeding to which the employee who is plaintiff in the present action was a party has been denied,⁷¹ as has the admissibility of a judgment for dependents for compensation for the death of an employee, under the act, in an action by the personal representative in an action against a third-person wrongdoer for such death.⁷²

Payment of expenses. Evidence that the dependents of a deceased employee did not pay his medical and funeral expenses is properly excluded.⁷³

Employee's earning capacity. The admission, contrary to statute, of testimony as to plaintiff's earning capacity, after the introduction of evidence as to the amount of medical expenses and compensation paid by an insurance carrier, is not error where the record discloses that the parties had stipulated that the compensation fund had paid certain compensation and medical expenses, and there is no showing that the stipulation was made solely for the purpose of fixing the amount of insurer's lien in case judgment is for plaintiff.⁷⁴

b. Action on Behalf of Employer or Insurer

In an action by an employer or insurer against a tort-feasor to recover for injuries to, or the death of, an employee, any relevant evidence is admissible which bears on the existence of liability on the part of the tort-feasor.

In general, in an action by or for the benefit of an employer or insurer against a third person lia-

ble for an injury to, or the death of, an employee, any relevant evidence is admissible which bears on the existence of an actionable wrong, or of responsibility for the injury to, or death of, the employee, on the part of defendant,⁷⁵ or on the question as to the negligence of plaintiff employer, where such negligence would defeat recovery.⁷⁶

Existence of insurance. Where the employer is, under the governing act, authorized to bring an action in his own name, even though he carries insurance, in an action by an employer against a third person who has elected to be bound by the act, the exclusion of evidence offered by defendant that the employer was insured⁷⁷ and that the insurance company paid to the personal representative of a deceased employee all compensation that was paid⁷⁸ has been upheld. Where, however, the right of an insurer to appear as plaintiff depends on its being the insurance carrier of the employer of the injured employee, the policy of insurance issued by plaintiff insurer to the employer is admissible on behalf of plaintiff insurer.⁷⁹

Compensation proceedings, award, or payment, and employer's liability. Evidence as to the receipt of compensation by a deceased employee's dependents is admissible on behalf of a compensation insurer in order to prove an allegation of the complaint that the carrier was paying compensation.⁸⁰ The compensation agreement between the employer and a dependent, approved by the industrial board under the compensation act and having the effect of an award, is admissible on behalf of plaintiff on the issue as to whether an award had been made⁸¹ and as to the amount of the award.⁸² In an action by the employer against a third person to recover the amount of compensation paid, the order of the state industrial board allowing an award has been held to be properly admitted as the best evidence of the amount awarded;⁸³ but where, under the com-

68. Ga.—Sheffield Co. v. Phillips, 24 S.E.2d 834, 69 Ga.App. 41.

69. N.Y.—Drake v. New York State Elec. & Gas Corp., 294 N.Y.S. 227, 162 Misc. 167.

70. N.Y.—Drake v. New York State Elec. & Gas Corp., supra.

71. Neb.—Day v. Metropolitan Utilities Dist., 214 N.W. 647, 216 N.W. 556, 115 Neb. 711.

71 C.J. p 1595 note 62.

Effect of determination in compensation proceeding as bar to action see supra § 984.

72. S.D.—Stratton v. Sioux Falls Traction System, 206 N.W. 466, 49 S.D. 113.

71 C.J. p 1596 note 63.

73. Kan.—Patrick v. Riggs, 84 P.2d 840, 148 Kan. 741.

74. Cal.—Swearingen v. Dill, 68 P. 2d 388, 21 C.A.2d 151.

75. Mo.—American Veterinary Laboratories v. Glidden Co., App., 59 S. W.2d 53.

71 C.J. p 1596 note 66.

Verdict of coroner's jury

Ill.—Vose v. Central Illinois Public Service Co., 212 Ill.App. 105, affirmed 122 N.E. 134, 286 Ill. 519.

76. Ill.—East St. Louis Junction R. Co. v. Armour & Co., 247 Ill.App. 528.

71 C.J. p 1596 note 67.

77. Ill.—Vose v. Central Illinois

Public Service Co., 122 N.E. 134, 286 Ill. 519.

71 C.J. p 1596 note 69.

78. Ill.—Vose v. Central Illinois Public Service Co., supra.

79. Cal.—Western Indemnity Co. v. Wasco Land & Stock Co., 197 P. 390, 51 C.A. 672.

80. Ala.—Foster & Creighton Co. v. St. Paul Mercury Indem. Co., 88 So.2d 825, 264 Ala. 581.

81. Ind.—Wabash Water & Light Co. v. Home Telephone Co., 138 N.E. 692, 79 Ind.App. 395.

82. Ind.—Wabash Water & Light Co. v. Home Telephone Co., supra.

83. Ill.—Vose v. Central Illinois

pensation act, the damages recoverable by the employer are not necessarily the same as, but are limited by, the amount of compensation paid and payable, the award of compensation by the industrial commission is admissible, not to prove damages or to fix the amount to be recovered,⁸⁴ but to establish a limit to the recovery.⁸⁵

Under a statute so providing, in an action by an employer alone, evidence of any expenditure which the employer has paid, or has become obligated to pay, by reason of an injury to, or the death of, an employee is admissible,⁸⁶ and the provision is applicable in an action by an insurer where, by the compensation act, insurer is subrogated to the rights of the employer.⁸⁷ The view has been taken, however, that, in an action in the name of an employee for the benefit of insurer, evidence on behalf of defendant tending to show payment of compensation to the employee is properly excluded,⁸⁸ notwithstanding the act provides that the employee may not proceed both for compensation and damages and that if compensation is paid insurer may enforce the liability of the third person in the name of the employee or in its own name.⁸⁹ Findings of the industrial commission in a proceeding on the claim of the employee for compensation have, however, been regarded as admissible on behalf of insurer in an action by it against a third person on questions as to the making, allowance, and payment, of a claim for compensation, where such facts are in issue under the pleadings.⁹⁰

Where a compensation insurer establishes a prima facie case, entitling it to recover from the tortfeasor, by introducing the award of compensation and a judgment recovered by the employee's personal representative against the tortfeasor, the latter may use the minutes of the trial of the rep-

resentative's action, which were in evidence for another purpose, for the purpose of destroying the presumption of the validity of the award.⁹¹

In an action by an employer, the propriety of admitting evidence on behalf of plaintiff of the extent of disability suffered by the employee,⁹² and evidence which tends to fix the employer's liability under the compensation act⁹³ has apparently been recognized.

Evidence of things which an employee was required to do before compensation was paid have no relevancy to the issues in a suit by an insurer.⁹⁴

Waiver of objections. Where a party procures the giving of an instruction to the effect that the facts stated in exhibits introduced by the opposing party are not evidence of the existence of the stated facts, he waives his objections to the admission of the exhibits.⁹⁵

§ 1030. — Weight and Sufficiency

- a. In general
- b. Negligence or fault; assumption of risk

a. In General

General rules as to the weight and sufficiency of the evidence have been applied in actions against a tortfeasor for injuries to, or the death of, an employee.

General rules as to the weight and sufficiency of evidence in tort or death actions apply in actions for injuries to, or the death of, an employee, prosecuted notwithstanding the existence of a workmen's compensation act.⁹⁶ A party invoking the subrogation provision of a compensation act as a defense to a wrongful death action must maintain such defense by a preponderance of the evidence.⁹⁷ The right of recovery of an intervening insurance

Public Service Co., 212 Ill.App. 105, affirmed 122 N.E. 134, 286 Ill. 519.

84. Ill.—City of Taylorville v. Central Illinois Public Service Co., 133 N.E. 720, 301 Ill. 157.

85. Ill.—City of Taylorville v. Central Illinois Public Service Co., supra.

86. Cal.—City of Sacramento v. Central California Traction Co., 248 P. 307, 78 C.A. 215.

71 C.J. p 1596 note 78.

87. Cal.—Fitzgerald v. Quinn, 21 P. 2d 656, 131 C.A. 457.

71 C.J. p 1596 note 79.

88. Lump sum payment receipt

Where there was in evidence an assignment between insurer and beneficiaries whereby they were to receive half of amount recovered against tortfeasor, and it was not

shown that jury was unable to weigh properly any of insurer's evidence because jury was not informed of its true interest, exclusion of copy of lump sum payment receipt executed by beneficiaries in favor of insurer in satisfaction of its liability to beneficiaries under compensation act was not error.

Tex.—Foster v. Langston, Civ.App., 170 S.W.2d 250.

89. Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435.

71 C.J. p 1597 note 80.

90. Wis.—U. S. Casualty Co. v. Superior Hardware Co., 184 N.W. 694, 175 Wis. 162.

91. N.Y.—Travelers Ins. Co. v. Stieglitz, 30 N.Y.S.2d 806.

Attack on validity of award by tortfeasor generally see supra § 998.

92. Cal.—City of Sacramento v. Central California Traction Co., 248 P. 307, 78 C.A. 215.

93. Cal.—City of Sacramento v. Central California Traction Co., supra, 71 C.J. p 1597 note 83.

94. Tex.—Dallas Railway & Terminal Co. v. Bishop, Civ.App., 153 S.W.2d 298.

95. Ind.—Armstrong Cork Co. v. Maar, 111 N.E.2d 82, 124 Ind.App. 105, rehearing denied 112 N.E.2d 240, 124 Ind.App. 105.

96. Mo.—Kersey v. Conrad, App., 30 S.W.2d 167.

71 C.J. p 1597 notes 85 [c], 87 [d].

97. Ill.—Rasmussen v. Clark, 104 N.E.2d 325, 346 Ill.App. 141.

company depends on the same degree of proof as the right of the employee to recover.⁹⁸

In an action by an insurer against a third person, findings made by the industrial board on a claim for compensation are prima facie proof of the making, allowance, and payment of a claim for compensation,⁹⁹ but are not conclusive on the question of the liability of defendant.¹

Where a provision of the compensation act giving the employer the right to enforce the liability of the person causing the injury if compensation is paid is regarded as a provision merely for indemnification, in an action by an employer pursuant to such provision, proof of compensation paid by plaintiff to the employee under the act, either by agreement of the parties, approved by the state industrial accident board,² or by order of the board under, and as provided for, in the act,³ is prima facie evidence of plaintiff's damages. Under such circumstances,

defendant is at liberty to meet and overcome such evidence by any competent evidence⁴ showing that the amount is unreasonable,⁵ was not paid under, or in accordance with, the act,⁶ or was neither approved nor authorized by the board.⁷ Defendant has the right to contest the facts, adduced by plaintiff, relating to the legal liability of defendant and the resulting damages.⁸

The evidence has been held sufficient⁹ or insufficient¹⁰ to show various matters, to establish particular defenses,¹¹ and to raise particular inferences.¹²

So, the evidence has been held sufficient or insufficient to sustain a verdict for plaintiff,¹³ to warrant judgment for plaintiff,¹⁴ to warrant recovery by a compensation insurer,¹⁵ to sustain a determination in favor of defendant,¹⁶ or to sustain a judgment dismissing an action by a compensation insurer.¹⁷

98. U.S.—Dierks v. Alaska Air Transport, D.C.Alaska, 109 F.Supp. 695.

99. Wis.—U. S. Casualty Co. v. Superior Hardware Co., 184 N.W. 694, 175 Wis. 162.

1. Wis.—U. S. Casualty Co. v. Superior Hardware Co., supra.

2. Mich.—Grand Rapids Lumber Co. v. Blair, 157 N.W. 29, 190 Mich. 518.

3. Mich.—Currier Lumber Co. v. Van Every, 20 N.W.2d 241, 312 Mich. 375—Grand Rapids Lumber Co. v. Blair, 157 N.W. 29, 190 Mich. 518.

4. Mich.—Currier Lumber Co. v. Van Every, 20 N.W.2d 241, 312 Mich. 375.

5. Mich.—Grand Rapids Lumber Co. v. Blair, 157 N.W. 29, 190 Mich. 518.

71 C.J. p 1598 note 94.

6. Mich.—Grand Rapids Lumber Co. v. Blair, supra.

7. Mich.—Grand Rapids Lumber Co. v. Blair, supra.

8. Ill.—Taylorville v. Central Illinois Public Service Co., 133 N.E. 720, 301 Ill. 157.

9. Conn.—Crisanti v. Cremo Brewing Co., 72 A.2d 655, 136 Conn. 529. Ill.—Olin Industries, Inc. v. Wuellner, 117 N.E.2d 565, 1 Ill.App.2d 267—Sheppard v. Cummings, 57 N.E.2d 907, 324 Ill.App. 227—City of Flora, for Use of Liberty Mut. Ins. Co. v. Bryden, 21 N.E.2d 323, 300 Ill.App. 1.

Kan.—Bright v. Bragg, 264 P.2d 494, 175 Kan. 404.

La.—Jackson v. Thomas, App., 75 So. 2d 249—Travelers Ins. Co. v. Crescent Forwarding & Transportation Co., App., 176 So. 854, reinstated 178 So. 886.

Md.—Mech v. Storrs, 179 A. 525, 169 Md. 150.

Mass.—Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565.

Mich.—Currier Lumber Co. v. Van Every, 20 N.W.2d 241, 312 Mich. 375.

N.J.—Travelers Ins. Co. v. Gardner, 28 A.2d 507, 129 N.J.Law 159.

N.Y.—Travelers Ins. Co. v. American Foreign S. S. Corp., 48 N.Y.S.2d 899, 268 App.Div. 794.

Tenn.—U. S. Fidelity & Guaranty Co. v. Elam, 278 S.W.2d 693, 198 Tenn. 194.

Wash.—Muck v. Snohomish County Public Utility Dist. No. 1, 247 P.2d 233, 41 Wash.2d 81—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010. 71 C.J. p 1597 notes 85 [a], 87 [a].

10. Cal.—Globe Indemnity Co. v. Henderson, 202 P. 683, 54 C.A. 510. 71 C.J. p 1597 note 87 [b].

11. Evidence held insufficient

(1) Generally.

U.S.—Bryant v. Phoenix Bridge Co., D.C.Me., 43 F.Supp. 162.

(2) Where defendants alleged that plaintiff's intestate was in course of his employer's business at time he was killed, and that plaintiff was barred from maintaining common-law action by compensation act, established fact that intestate's employer was under act did not establish defense.

Ill.—Victor v. Dehmlow, 90 N.E.2d 724, 495 Ill. 249.

(3) In action for death of independent contractor's employee, evidence was insufficient to establish affirmative defense that independent contractor's employee was "statu-

tory employee" of defendant within meaning of compensation act. Mo.—Shafer v. Southwestern Bell Tel. Co., 295 S.W.2d 109.

12. Evidence held insufficient

Evidence of less than four metal clips on other window panes did not raise inference that pane in question contained less than four clips. Ill.—Olin Industries, Inc. v. Wuellner, 117 N.E.2d 565, 1 Ill.App.2d 267.

13. Evidence held sufficient

Ill.—Connolly v. Schutte, 79 N.E.2d 79, 334 Ill.App. 227.

Tenn.—General Shale Products Corp. v. Reese for Use and Benefit of U. S. Fidelity & Guaranty Co., 245 S.W.2d 738, 35 Tenn.App. 423.

71 C.J. p 1597 note 87 [c].

Evidence held insufficient

Mo.—Kersey v. Conrad, App., 30 S.W. 2d 167.

71 C.J. p 1597 note 85 [b].

14. Evidence held sufficient

Ill.—Philmore v. Stein, 24 N.E.2d 266, 302 Ill.App. 480.

N.Y.—City of New York v. Steers & Menke, 4 N.Y.S.2d 292, 167 Misc. 566, affirmed 4 N.Y.S.2d 992, 264 App.Div. 669.

15. Evidence held insufficient

U.S.—The Anderson, D.C.Md., 37 F. Supp. 695.

71 C.J. p 1597 note 87 [b] (6).

16. Evidence held sufficient

Mich.—Lather, for Use and Benefit of Employers Mut. Cas. Co. v. Michigan Public Service Co., 52 N.W.2d 551, 332 Mich. 683.

71 C.J. p 1597 note 87 [a] (7).

17. Evidence held sufficient

La.—Ettna Cas. & Sur. Co. v. Carabon, App., 11 So.2d 118.

Evidence has been held sufficient or insufficient to show that defendant is liable for the acts of his employees causing the injury,¹⁸ to establish the cause of the employee's death,¹⁹ to show that plaintiff and defendant, or defendant's decedent, were,²⁰ or were not,²¹ in the same employ at the time the cause of action arose, or to support a finding that a settlement between an employee and the tort-feasor was made without the employer's consent.²²

Similarly, the evidence has been held sufficient or insufficient to show the length of time of the employee's total disability,²³ the seaworthiness of a vessel,²⁴ that the employee was engaged in interstate commerce so as not to be subject to a state compensation law,²⁵ and that wages paid to injured employees were gratuities, and were not made because of any contractual obligation.²⁶

Evidence has also been held sufficient or insufficient to support a finding that plaintiff was acting within the scope and course of his employment at the time of the accident,²⁷ to establish that plaintiff was not an employee within the compensation act,²⁸ to establish that plaintiff was an independent contractor at the time of the injury,²⁹ to sustain a finding that defendant was a general contractor and

that the deceased employee's immediate employer was a subcontractor,³⁰ or that work being done by an injured employee was merely ancillary to the business of his employer,³¹ to prove that plaintiff was a borrowed servant when the injuries were sustained,³² or that defendant was a special employer at that time,³³ or to support a finding that plaintiff was an employee of his regular employer,³⁴ or that plaintiff had not become an employee of defendant, but remained an employee of the regular employer exclusively.³⁵

Under a particular statute, if an employee was an ordinary invitee on the premises of the tort-feasor at the time he met his death, his dependents would have a prima facie case based on such facts, in an action against the tort-feasor.³⁶

Evidence has been held to establish that a contract of employment entered into by a deceased employee and a foreign corporation was entered into in the state of the forum, and not in the foreign jurisdiction, so as to be governed by the law of the forum.³⁷ Where plaintiff employer is engaged in an occupation which the compensation act makes subject to the act unless he has made an election to the contrary, proof that neither such employer nor

18. Evidence held sufficient

D.C.—Haw v. Liberty Mut. Ins. Co. and to Use of Giacomo, 180 F.2d 18, 86 U.S.App.D.C. 86.

19. Evidence held sufficient

Medical testimony that immediate cause of death was septicemia caused by infection from wound made by piece of steel which flew from hammer and other evidence authorizes finding that death resulted from wound rather than from lack of proper medical care.

Ill.—City of Flora, for Use of Liberty Mut. Ins. Co. v. Bryden, 21 N.E. 2d 323, 300 Ill.App. 1.

20. Evidence held sufficient

U.S.—Ohlhaber v. Narron, C.A.N.C., 195 F.2d 676, applying New York law.

Mass.—Clark v. M. W. Leahy Co., 16 N.E.2d 57, 300 Mass. 565.

Ohio.—Gallick v. Ott, App., 51 N.E. 2d 404.

71 C.J. p 1597 note 85 [a] (4).

21. Evidence held sufficient

N.Y.—Puccio v. Carr, 33 N.Y.S.2d 684, 263 App.Div. 1042.

22. Evidence held sufficient

Mo.—U. S. Fidelity & Guaranty Co. v. Goodson, 54 S.W.2d 754, 227 Mo. App. 456.

23. Evidence held sufficient

U.S.—Cyr v. F. S. Payne Co., D.C. Conn., 112 F.Supp. 526, affirmed, C. A., 208 F.2d 356.

24. Evidence held sufficient

U.S.—Fireman's Fund Indem. Co. v. U. S., D.C.Fla., 110 F.Supp. 937, affirmed, C.A., 211 F.2d 773, certiorari denied 75 S.Ct. 79, 348 U.S. 855, 99 L.Ed. 673.

25. Evidence held sufficient

U.S.—Ralston Purina Co. v. Bansa, C.C.A.Ill., 73 F.2d 430.

26. Evidence held sufficient

Del.—Frank C. Sparks Co. v. Huber Baking Co., 96 A.2d 456, 9 Terry 9.

27. Evidence held sufficient

(1) Generally.

Tex.—Stephens v. Mendenhall, Civ. App., 287 S.W.2d 259, error refused no reversible error.

(2) To show that injury occurred on employer's premises, or during hours of service, as a matter of law. Minn.—Helfrich v. Roth, 258 N.W. 26, 193 Minn. 107.

(3) As a matter of law, to warrant conclusion that employee's injury was not sustained in course of his employment.

N.Y.—Parisi v. Langston, 138 N.Y.S. 2d 178, 285 App.Div. 483.

Evidence held insufficient to establish as a matter of law that employee's injury was sustained in course of his employment.

Ill.—Victor v. Dehmloew, 90 N.E.2d 724, 405 Ill. 249.

28. Evidence held sufficient

Ill.—Rasmussen v. Clark, 104 N.E.2d 325, 346 Ill.App. 181—Springer v.

Illinois Transit Lines, 48 N.E.2d 206, 318 Ill.App. 403.

29. Evidence held sufficient

Ill.—Springer v. Illinois Transit Lines, supra.

30. Evidence held sufficient

Va.—Sykes v. Stone & Webster Engineering Corp., 41 S.E.2d 469, 186 Va. 116.

31. Evidence held sufficient

Mass.—Abbott v. Link-Belt Co., 88 N. E.2d 551, 324 Mass. 673.

32. Evidence held insufficient

Mo.—Nolan v. Joplin Transfer & Storage Co., 203 S.W.2d 740, 239 Mo.App. 915.

33. Evidence held insufficient

Mo.—Nolan v. Joplin Transfer & Storage Co., supra.

34. Evidence held sufficient

Tex.—Stephens v. Mendenhall, Civ. App., 287 S.W.2d 259, error refused no reversible error.

35. Evidence held sufficient

Mass.—Abbott v. Link-Belt Co., 88 N. E.2d 551, 324 Mass. 673.

Tex.—Stephens v. Mendenhall, Civ. App., 287 S.W.2d 259, error refused no reversible error.

36. U.S.—Williamson v. Weyerhaeuser Timber Co., C.A.Or., 221 F.2d 5, applying Washington law.

37. U.S.—Standard Oil Co. v. Lyons, C.C.A.Iowa, 130 F.2d 965.

the injured employee elected not to be bound by the act is sufficient to show their election to be bound by the act.³⁸

Where defendant, in an action by relatives of a deceased employee, submitted a prayer to the jury to consider the damages of some of these relatives, thereby assuming that a finding of dependency by the compensation commission, which is in evidence, is sufficient evidence thereof, the evidence is sufficient to establish dependency, even though defendant was not privy, or a party, to the compensation proceedings.³⁹ Uncontradicted evidence of amounts paid to the injured employee has been regarded as sufficient in an action by insurer to recover amounts paid.⁴⁰

Reasonableness of payments for medical, hospital, and nursing services. In an action by an insurer, the amount paid by it for medical, hospital, and nursing is some evidence of the reasonable value of such services.⁴¹ However, the evidence in such an action has been held to be insufficient to establish the fair value of the medical treatment rendered to the injured employee.⁴²

b. Negligence or Fault; Assumption of Risk

General rules governing the weight and sufficiency of evidence as to negligence have been applied in actions to recover for injuries to, or the death of, employees.

In actions against a tort-feasor to recover for injuries to, or the death of, an employee, the evidence has been held sufficient or insufficient to show various matters involving negligence,⁴³ such as negligence on the part of defendant,⁴⁴ the absence of negligence on the part of defendant,⁴⁵ the negligence of defendant's employee,⁴⁶ that the negligence was the proximate cause of the accident,⁴⁷ or that the negligence was a substantial factor in causing the injury.⁴⁸

In other decisions, the evidence has been held sufficient or insufficient to show contributory negligence on the part of the employee,⁴⁹ the absence of contributory negligence,⁵⁰ the exercise by the employee of due care at the time of the injury,⁵¹ the failure of the employee to avail himself of the safeguards provided,⁵² and the absence of assumption of the risk.⁵³

Likewise, in particular cases, the evidence has been held sufficient or insufficient to show the neg-

38. Ill.—Vose v. Central Illinois Public Service Co., 122 N.E. 134, 286 Ill. 519.

39. Md.—Employers Liability Assur. Corporation, for Its Own Use and to Use of Jones v. Baltimore & O. R. Co., 195 A. 541, 173 Md. 238.

40. La.—Globe Indemnity Co. v. Toye Bros. Auto & Taxicab Co., 129 So. 234, 14 La.App. 142. 71 C.J. p 1598 note 97.

41. Cal.—Fitzgerald v. Quinn, 21 P. 2d 666, 131 C.A. 457.

42. La.—Travelers Ins. Co. v. Crescent Forwarding & Transp. Co., App., 176 So. 654, reinstated 178 So. 886.

43. Evidence held sufficient

U.S.—Cyr v. F. S. Payne Co., D.C. Conn., 112 F.Supp. 526, affirmed, C.A., 208 F.2d 356.

Evidence held insufficient

Mass.—Becker v. Eastern Massachusetts St. Ry. Co., 181 N.E. 757, 279 Mass. 435.

71 C.J. p 1597 note 87 [b] (3).

44. Evidence held sufficient

U.S.—Runnels v. City of Douglas, Alaska, D.C.Alaska, 123 F.Supp. 957, amended on other grounds 124 F. Supp. 657—Cyr v. F. S. Payne Co., D.C.Conn., 112 F.Supp. 526, affirmed, C.A., 208 F.2d 356—E. F. Hauserman Co., for Use and Benefit of Aetna Cas. & Sur. Co. v. U. S. D. C.Mich., 103 F.Supp. 358.

Ill.—City of Flora, for Use of Liberty Mut. Ins. Co. v. Bryden, 21 N.E. 2d 323, 300 Ill.App. 1—Carson-Payson Co. v. Peoria Terrazzo Co., 6 N. E.2d 534, 288 Ill.App. 583.

Mo.—U. S. Fidelity & Guaranty Co. v. Goodson, 54 S.W.2d 754, 227 Mo. App. 456.

Evidence held insufficient

(1) Generally.

Mass.—Bogner v. Casper Ranger Const. Co., 108 N.E.2d 665, 329 Mass. 412.

71 C.J. p 1597 note 87 [b] (4).

(2) Affirmative negligence.

Cal.—Hard v. Hollywood Turf Club, 248 P.2d 716, 112 C.A.2d 263.

45. Evidence held sufficient

Ill.—Weintraub v. John B. Sexton & Co., 64 N.E.2d 235, 327 Ill.App. 348.

46. Evidence held sufficient

U.S.—Bryant v. Phoenix Bridge Co., D.C.Me., 43 F.Supp. 162.

Mass.—Abbott v. Link-Belt Co., 88 N. E.2d 551, 324 Mass. 673.

47. Evidence held sufficient

U.S.—Runnels v. City of Douglas, Alaska, D.C.Alaska, 123 F.Supp. 957, amended on other grounds 124 F. Supp. 657.

48. Evidence held sufficient

U.S.—Cyr v. F. S. Payne Co., D.C. Conn., 112 F.Supp. 526, affirmed, C. A., 208 F.2d 356.

49. Evidence held sufficient

U.S.—E. F. Hauserman Co., for Use and Benefit of Aetna Cas. & Sur.

Co. v. U. S., D.C.Mich., 103 F.Supp. 358.

71 C.J. p 1597 note 87 [a] (9).

Evidence held insufficient

(1) Generally.

Mass.—Abbott v. Link-Belt Co., 88 N. E.2d 551, 324 Mass. 673.

(2) As a matter of law.

Md.—Foreman Co. v. Williams, to Use of Mayor and City Council of Baltimore, 188 A. 25, 171 Md. 55.

Me.—Shaw v. Piel, 27 A.2d 137, 139 Me. 57.

71 C.J. p 1597 note 87 [b] (2).

50. Evidence held sufficient

U.S.—Cyr v. F. S. Payne Co., D.C. Conn., 112 F.Supp. 526, affirmed, C. A., 208 F.2d 356.

Ill.—City of Flora, for Use of Liberty Mut. Ins. Co. v. Bryden, 21 N.E. 2d 323, 300 Ill.App. 1.

71 C.J. p 1597 note 87 [a] (6).

51. Evidence held sufficient

Ill.—Carson-Payson Co. v. Peoria Terrazzo Co., 6 N.E.2d 534, 288 Ill.App. 583.

Evidence held insufficient

Ill.—Munsen v. Illinois Northern Utilities Co., 253 Ill.App. 438.

71 C.J. p 1597 note 87 [b] (1).

52. Evidence held sufficient

U.S.—The Anderson, D.C.Md., 37 F. Supp. 695.

53. Evidence held sufficient

U.S.—Cyr v. F. S. Payne Co., D.C. Conn., 112 F.Supp. 526, affirmed, C. A., 208 F.2d 356.

ligence of the employer,⁵⁴ the absence of negligence on his part,⁵⁵ or his freedom from fault,⁵⁶ or to overcome a presumption, arising from lack of eye-witnesses to the accident, that the employee was free from contributory negligence.⁵⁷ The fact that the record in an action against an alleged tort-feasor conclusively shows that he was guilty of negligence does not necessarily establish that the injury complained about was not caused by the joint, concurrent, or combined negligence of plaintiff's employer or its employees and the tort-feasor.⁵⁸

§ 1031. Trial in General

- a. In general
- b. Instructions

a. In General

In actions against a tort-feasor for an employee's injuries, matters relating to compensation, such as an award, or settlement of a claim and payment thereunder, should not ordinarily be discussed before the jury, but the existence of compensation insurance may be discussed where it is relevant to a material issue. Matters relating to a trial preference in such cases have been adjudicated.

The existence of compensation insurance may be discussed in the argument to the jury, in an action at law to recover damages for injuries to an employee, only where it is relevant to a material issue.⁵⁹ In an injured employee's action against a tort-feasor, requiring defendant to refrain from allying to plaintiff's settlement of a compensation claim, and the payments thereunder, is not erroneous,⁶⁰ and it is erroneous for any pleadings relating to compensation to be brought before the jury.⁶¹ The refusal to permit defendant's attorney to state to the jury the amount of a compensation award which could be made for plaintiff's injury is not

error.⁶²

Where suit is brought in the name of a deceased employee's administratrix by a compensation insurer, and the named plaintiff has a substantial interest in the recovery sued for, she is entitled to have her counsel participate in the trial.⁶³ Where there is a direct conflict between the affidavits of the opposing parties on a motion to dismiss a complaint, and it is not possible to determine which one is correct, plaintiff is entitled to a trial of the issues raised in the affidavits.⁶⁴

Trial preference. A statutory provision giving a trial preference to an injured employee who elects to sue the tort-feasor has been held to be not inconsistent with other laws,⁶⁵ and has been held not to have been repealed by implication by another statute providing that the employee need not elect whether he will take compensation or pursue his remedy against the tort-feasor.⁶⁶ The commencement of an action against the tort-feasor is a sufficient election within the statute providing for trial preferences.⁶⁷

b. Instructions

In an action to recover for injuries to, or the death of, an employee, the instructions should correctly and fully state the law, should be confined to the issues raised, and should not invade the jury's province.

General rules governing instructions in actions for tort or death apply in an action against a person other than the employer, who caused injury to, or the death of, an employee, on behalf of an employer or insurer, or of an employee or his dependents or beneficiaries.⁶⁸ The instructions should correctly and fully state the law applicable to the case,⁶⁹ and these instructions should include the

54. Evidence held sufficient

U.S.—*E. F. Hauserman Co., for Use and Benefit of Aetna Cas. & Sur. Co. v. U. S.*, D.C.Mich., 108 F.Supp. 358.

Mich.—*Benton Harbor Malleable Industries, Inc. v. Pearson Const. Co.*, 83 N.W.2d 429, 348 Mich. 471.

55. Evidence held sufficient

U.S.—*Cyr v. F. S. Payne Co.*, D.C. Conn., 112 F.Supp. 526, affirmed, C. A., 208 F.2d 356.

Ill.—*City of Flora, for Use of Liberty Mut. Ins. Co. v. Bryden*, 21 N. E.2d 323, 300 Ill.App. 1.
71 C.J. p 1597 note 87 [a] (3).

56. Evidence held insufficient

N.H.—*McCullough v. John B. Varick Co.*, 10 A.2d 245, 90 N.H. 409.

57. Evidence held sufficient

Mich.—*Lather, for Use and Benefit of Employers Mut. Cas. Co. v. Michigan Public Service Co.*, 52 N. W.2d 551, 332 Mich. 683.

58. Ill.—*Manion v. Chicago, R. I. & P. R. Co.*, 119 N.E.2d 498, 2 Ill. App.2d 191.

59. Cal.—*Huber v. Henry J. Kaiser Co.*, 162 P.2d 693, 71 C.A.2d 278.

60. Tex.—*Smith v. Henger*, 226 S. W.2d 425, 148 Tex. 456, 20 A.L.R.2d 853.

61. Tex.—*Myers v. Thomas*, 186 S. W.2d 811, 143 Tex. 502.

Pattison v. Highway Ins. Underwriters, Civ.App., 278 S.W.2d 207, refused no reversible error—*Johnson v. Willoughby, Civ.App.*, 183 S.W.2d 201, error refused.

62. Okl.—*Rota-Cone Oil Field Operating Co. v. Chamness*, 168 P.2d 1007, 197 Okl. 103.

63. Va.—*Rea v. Ford*, 96 S.E.2d 92, 198 Va. 712.

64. N.Y.—*Fellows v. Seymour*, 19 N.Y.S.2d 960, 259 App.Div. 966.

65. N.Y.—*McGlone v. Nann*, 11 N.Y. S.2d 139, 256 App.Div. 549.

66. N.Y.—*McGlone v. Nann*, supra.

67. N.Y.—*McGlone v. Nann*, supra.

68. Iowa.—*Fidelity & Casualty Co. v. Cedar Valley Electric Co.*, 174 N.W. 709, 187 Iowa 1014.
71 C.J. p 1598 note 3 [b].

69. Idaho.—*Lebak v. Nelson*, 107 P. 2d 1054, 62 Idaho 96.

Instructions held proper

Ill.—*Manion v. Chicago, R. I. & P. Ry. Co.*, 138 N.E.2d 98, 12 Ill.App. 2d 1—*Victor v. Dehmloew*, 99 N.E. 2d 639, 8 Ill.App.2d 565.

Ind.—*New York Cent. R. Co. v. Milhiser*, 106 N.E.2d 453, 231 Ind. 180, rehearing denied 108 N.E.2d 57, 231 Ind. 180.

N.Y.—*Travelers Ins. Co. v. Shachner*, 8 N.Y.S.2d 450, 255 App.Div. 999, appeal dismissed 21 N.E.2d 533, 280 N.Y. 758.

question of the amount⁷⁰ or the apportionment⁷¹ of the damages recoverable, and should meet the issues in the case.⁷²

Also, the instructions should not invade the province of the jury⁷³ and should not be misleading.⁷⁴ The instructions should be confined to issues raised by the pleading⁷⁵ and evidence,⁷⁶ or the issues set forth in a pre-trial order.⁷⁷

An instruction which refers to an immaterial is-

sue,⁷⁸ or which is not based on any evidence in the case⁷⁹ should not be given.

A requested instruction which sets forth a correct statement of the law should be granted.⁸⁰ The refusal of a requested instruction which contains a mere abstract⁸¹ or erroneous⁸² proposition of law is not erroneous, nor is it error to refuse a requested instruction where the rule of law involved therein is fully covered in an instruction which is given.⁸³ However, the refusal of an instruction

Pa.—Jackson v. Gleason, 182 A. 498, 320 Pa. 545.

Wash.—D'Amico v. Conguista, 167 P.2d 157, 24 Wash.2d 674.

Instructions held erroneous

Ala.—Coleman v. Hamilton Storage Co., 180 So. 553, 235 Ala. 553.

Cal.—Hard v. Hollywood Turf Club, 246 P.2d 716, 112 C.A.2d 263.

Mich.—Schattilly v. Yonker, 81 N.W. 2d 343, 347 Mich. 586—Utley, for Use and Benefit of Travelers Ins. Co. v. Taylor & Gaskin, 9 N.W.2d 842, 305 Mich. 561.

N.J.—Stacy v. Greenberg, 102 A.2d 48, 14 N.J. 262, certiorari denied 74 S.Ct. 850, 347 U.S. 988, 98 L.Ed. 1123, applying New York law.

N.Y.—Nappi v. Falcon Truck Renting Corp., 141 N.Y.S.2d 424, 286 App.Div. 123, affirmed 152 N.Y.S.2d 297, 1 N.Y.2d 750, 135 N.E.2d 51—Utica Mut. Ins. Co. v. Amsterdam Color Works, 131 N.Y.S.2d 782, 284 App.Div. 376, affirmed 125 N.E.2d 871, 308 N.Y. 816—Massachusetts Bonding & Ins. Co. v. 201 East Eighteenth Street Corp., 11 N.Y.S.2d 65, 256 App.Div. 1077.

70. Instructions held proper

Conn.—Stavola v. Palmer, 73 A.2d 831, 136 Conn. 670.

Tenn.—General Shale Products Corp. v. Reese for Use and Benefit of U. S. Fidelity & Guaranty Co., 245 S.W.2d 788, 35 Tenn.App. 423.

Instructions held erroneous

Cal.—Eckman v. Arnold Taxi Co., 148 P.2d 877, 64 C.A.2d 229.

Ky.—Nashville, C. & St. L. Ry. v. Williams, 147 S.W.2d 93, 285 Ky. 211.

Deduction of compensation received

(1) In workman's action against third-party defendant, wherein insurer intervened, instruction that jury could deduct amount of compensation received from judgment awarded plaintiff against third party was erroneous and inadequate, in that, if instruction was carried out and insurer collected out of judgment, plaintiff would be paying back compensation twice.

Pa.—Collins, U. S. Cas. Intervener, v. Pennsylvania R. Co., 56 A.2d 236, 358 Pa. 168.

(2) It is better that jurors be fully instructed that workman should

be fully compensated according to rules for ascertaining damages without regard to compensation received, since insurer who paid compensation will be reimbursed out of judgment, than that jurors, knowing that workman received some compensation, but not knowing, or being uncertain as to, law applicable, should be left to speculate as to effect of their verdict.

Cal.—Sherrillo v. Stone & Webster Engineering Corp., 244 P.2d 70, 110 C.A.2d 785.

(3) Plaintiff would have been entitled to instruction, if so requested, that insurer had paid compensation to plaintiff, that carrier had first lien on any judgment recovered, and that therefore jury in assessing damages should not deduct any amounts received by plaintiff from insurer.

Cal.—Sherrillo v. Stone & Webster Engineering Corp., *supra*.

71. Instructions held improper

N.Y.—Morgan v. Robinson, 159 N.Y.S.2d 639, 3 A.D.2d 216.

72. Instruction held to meet issues Conn.—Doe v. Saracyn Corp., 82 A.2d 811, 138 Conn. 69.

73. Ala.—Day & Sachs v. Travelers' Ins. Co., 137 So. 409, 223 Ala. 558.

71 C.J. p 1599 note 4.

Instruction stating question to be one of fact held proper

Ind.—Samuel E. Pentecost Const. Co. v. O'Donnell, 39 N.E.2d 812, 112 Ind.App. 47.

74. Ala.—Day & Sachs v. Travelers' Ins. Co., 137 So. 409, 223 Ala. 558.

71 C.J. p 1599 note 5.

Instructions held not misleading

Md.—Virginia Dare Stores v. Schuman, 1 A.2d 897, 175 Md. 287.

75. Cal.—Massachusetts Bonding & Insurance Co. v. Los Angeles R. Corporation, 190 P. 161, 182 C. 781.

71 C.J. p 1599 note 6.

Instructions authorized by pleadings

Ga.—Pollard v. Balon, 6 S.E.2d 400, 61 Ga.App. 406.

Ill.—Manion v. Chicago, R. I. & P. Ry. Co., 138 N.E.2d 98, 12 Ill.App. 2d 1.

71 C.J. p 1598 note 3 [a].

76. Ala.—Foster & Creighton Co. v.

St. Paul Mercury Indem. Co., 88 So.2d 825, 264 Ala. 581.

71 C.J. p 1599 note 7.

Instructions held authorized by evidence

Idaho.—Benson v. Brady, 255 P.2d 710, 73 Idaho 553.

Ill.—Manion v. Chicago, R. I. & P. Ry. Co., 138 N.E.2d 98, 12 Ill.App. 2d 1.

Mont.—Sullivan v. City of Butte, 157 P.2d 479, 117 Mont. 215.

77. U.S.—Bryant v. Phoenix Bridge Co., D.C.Me., 43 F.Supp. 162.

78. Conn.—Stavola v. Palmer, 73 A. 2d 831, 136 Conn. 670.

Mass.—Portland Gaslight Co. v. Ruud, 136 N.E. 75, 242 Mass. 272.

71 C.J. p 1599 note 8.

79. Mo.—American Veterinary Laboratories v. Glidden Co., App., 59 S.W.2d 53.

Instructions held not authorized by evidence

Ill.—Wm. Wrigley, Jr., Co. v. Standard Roofing Co., 59 N.E.2d 510, 325 Ill.App. 210.

71 C.J. p 1599 note 9 [a].

80. N.Y.—Passzahl v. Metropolitan Distributors, 28 N.Y.S.2d 254, 262 App.Div. 778—Massachusetts Bonding & Ins. Co. v. 201 East Eighteenth Street Corp., 11 N.Y.S.2d 65, 256 App.Div. 1077.

Or.—Inwall v. Transpacific Lumber Co., 108 P.2d 522, 165 Or. 580.

81. Ill.—Carson, Pirie, Scott & Co. v. Chicago Railways Co., 141 N.E. 172, 309 Ill. 346.

Neb.—Kroeger v. Safranek, 72 N.W. 2d 831, 161 Neb. 182.

82. Conn.—Doe v. Saracyn Corp., 82 A.2d 811, 138 Conn. 69.

Ill.—Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp., 70 N.E.2d 604, 395 Ill. 429.

Mass.—Abbott v. Link-Belt Co., 88 N.E.2d 551, 324 Mass. 673.

Md.—Baltimore Transit Co. v. Worth, 52 A.2d 249, 188 Md. 119, 5 A.L.R.2d 740.

83. Ill.—Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp., 70 N.E.2d 604, 395 Ill. 429—Carson, Pirie, Scott & Co. v. Chicago Railways Co., 141 N.E. 172, 309 Ill. 346.

submitting an issue in the case to the jury may be erroneous.⁸⁴ A requested instruction which was not in perfect form has been held to be sufficient to call the attention of the court to its failure to inform the jury that plaintiff could not recover if his injuries were due solely to the negligence of one or more of his fellow employees.⁸⁵

§ 1032. Questions of Law or Fact and Right to Jury Trial

- a. Action on behalf of employee, his dependents, or beneficiaries
- b. Action on behalf of employer or insurer

a. Action on Behalf of Employee, His Dependents, or Beneficiaries

In an action by an employee or his dependents for injuries or death, questions of fact arise where the evidence is conflicting, and questions of law arise where only one inference can reasonably be drawn from the evidence.

General rules as to what constitutes a question of law or fact, applicable in actions for torts or death, apply in actions on behalf of an employee or his dependents or beneficiaries for injuries or death, prosecuted notwithstanding the existence of a workmen's compensation act.⁸⁶ A question as to a particular matter is one of fact where the evidence is contradictory⁸⁷ or it is reasonable to draw different inferences therefrom.⁸⁸

Thus, it is a question for the trier of fact whether an employee has accepted compensation from his employer under the compensation act,⁸⁹ whether he was contributorily negligent,⁹⁰ whether the injuries complained of were caused by the negligence of a fellow employee,⁹¹ whether plaintiff was acting within the scope of his employment when the accident occurred,⁹² whether his injuries arose out of, and in the course of, employment which was a part of, or process in, the trade or business carried on by defendant, and not merely ancillary or incidental thereto,⁹³ and whether plaintiff was dependent on a deceased employee.⁹⁴

Where, however, the evidence is such that reasonable men can draw only one reasonable inference therefrom, the question is one of law for the court and is not a question for the jury.⁹⁵ So, where the evidence as to whether plaintiff was engaged in the course of his employment at the time of the accident is not in dispute, whether he is barred by the compensation act from maintaining an action against a tort-feasor is a question of law for the court.⁹⁶ Where affidavits, on a motion to dismiss a cause of action on the ground that plaintiff pursued his remedy under the compensation act, are conflicting on the question whether the injury arose out of, and in the course of, the employment, it is error for the court to dismiss the suit on such motion.⁹⁷ In an action by an em-

84. Ill.—Victor v. Dehmlow, 99 N. E.2d 639, 8 Ill.App.2d 566.

85. U.S.—E. I. Du Pont De Nemours & Co. v. Frechette, C.C.A.Mich, 161 F.2d 318.

86. Cal.—Liberty Mut. Ins. Co. v. Superior Court in and for Los Angeles County, 145 P.2d 344, 62 C.A. 2d 601.

Mass.—Cozzo v. Atlantic Refining Co., 12 N.E.2d 744, 299 Mass. 260.

Tex.—Grandstaff v. Mercer, Civ. App., 214 S.W.2d 133, error refused no reversible error—Traders & General Ins. Co. v. West Texas Utilities Co., Civ.App., 156 S.W. 2d 271, reversed on other grounds 165 S.W.2d 713, 140 Tex. 57.

71 C.J. p 1599 note 13.

Questions of law or fact as to election of remedies by employee or his dependents or beneficiaries see supra § 990.

Evidence held sufficient to authorize or require submission of matters of fact to jury.

U.S.—Cyr v. F. S. Payne Co., C.A. Conn., 208 F.2d 356.

N.Y.—Callan v. Adams, 26 N.Y.S.2d 928, 261 App.Div. 1004.

71 C.J. p 1597 note 85 [a] (1), (8-10).

Course of employment

Ill.—Cohen v. Cummings, 71 N.E.2d 198, 330 Ill.App. 431.

87. Md.—Virginia Dare Stores v. Schuman, 1 A.2d 897, 175 Md. 287. Wash.—Harvey v. Chas. R. McCormick Lumber Co. of Delaware, 271 P. 65, 149 Wash. 368.

71 C.J. p 1599 note 14.

88. Tex.—Western Hills Hotel, Inc. v. Ferracci, Civ.App., 299 S.W.2d 335, error granted.

71 C.J. p 1599 note 15.

89. U.S.—McNaughton v. New York Cent. R. Co., C.A.Ind., 220 F.2d 835.

Ind.—Samuel E. Pentecost Const. Co. v. O'Donnell, 39 N.E.2d 812, 112 Ind.App. 47—Weis v. Wakefield, 88 N.E.2d 303, 111 Ind.App. 106—Marion County Construction Co. v. Kimberlin, 184 N.E. 574, 96 Ind. App. 145.

90. Md.—Virginia Dare Stores v. Schuman, 1 A.2d 897, 175 Md. 287. Mass.—Abbott v. Link-Belt Co., 88 N.E.2d 551, 324 Mass. 673, 193 Md. 20.

91. U.S.—E. I. Du Pont De Nemours & Co. v. Frechette, C.C.A.Minn., 161 F.2d 318.

Tex.—Faulkner v. Kleinman, Civ. App., 158 S.W.2d 891, error refused.

92. N.Y.—Carriero v. Iovino, 121 N. Y.S.2d 127, 281 App.Div. 1052.

93. Mass.—De Martin v. New York, N. H. & H. R. Co., 143 N.E.2d 542 —Cannon v. Crowley, 61 N.E.2d 662, 318 Mass. 373.

94. Md.—Employers Liability Assur. Corporation, for Its Own Use and to Use of Jones v. Baltimore & O. R. Co., 195 A. 541, 173 Md. 238.

95. U.S.—E. I. Du Pont De Nemours & Co. v. Frechette, C.C.A.Minn., 161 F.2d 318.

71 C.J. p 1599 note 16.

Evidence held insufficient to authorize or require submission of questions of fact to jury.

N.J.—Stacy v. Greenberg, 102 A.2d 48, 14 N.J. 262, certiorari denied 74 S.Ct. 850, 347 U.S. 988, 98 L.Ed. 1123, applying New York law.

96. Ill.—Sweat v. Aircraft & Diesel Equipment Corp., 81 N.E.2d 8, 335 Ill.App. 177.

97. Ill.—Walsh v. Central Cold Storage Co., 58 N.E.2d 325, 324 Ill.App. 402.

ployee, plaintiff's failure forthwith to notify the employer of the bringing of the action, pursuant to a provision of the compensation act, is not, it seems, ground for nonsuit, or for a peremptory instruction to the jury to return a verdict for defendant.⁹⁸

b. Action on Behalf of Employer or Insurer

In an action by an employer or insurer to recover for injuries to, or the death of, an employee, questions of fact on conflicting evidence are for the jury.

General rules as to what constitutes a question of law or fact applicable in actions for tort or for death apply in actions by, or on behalf of, an employer or insurer against a third person who caused the injury to, or the death of, an employee.⁹⁹ Where the evidence is conflicting as to a matter in issue,¹ or different inferences may be drawn from the evidence,² the question is one of fact for the jury.

Thus, it is a question of fact for the jury whether defendant³ or his employee⁴ was negligent,

whether the injured employee was contributorily negligent,⁵ whether he was exercising due care for his safety before, and at the time of, the accident,⁶ whether the employer or his other employees were negligent,⁷ whether the negligence of the employer contributed proximately to the employee's injuries,⁸ whether the relationship of respondeat superior existed between defendant and the person causing the injury,⁹ and whether the employer furnished the employee with reasonably safe equipment and place to work.¹⁰ Also, it is a question of fact whether the tort-feasor had re-entered his employer's business and was acting within the scope of his employment at the time of the accident.¹¹

Where, however, the evidence is of such a nature that there can be only one deduction or inference from the evidence and reasonable minds could not honestly have reached a different conclusion, the question is one of law,¹² and in such case it is proper to grant a motion for a nonsuit.¹³

98. Cal.—Van Zandt v. Sweet, 204 P. 860, 56 C.A. 164.

Notice to employer of bringing of action see supra § 1000.

99. N.Y.—Travelers' Ins. Co. v. Staten Island Rapid Transit Ry. Co., 234 N.Y.S. 293, 134 Misc. 6. 71 C.J. p 1599 note 19.

1. Ala.—Day & Sachs v. Travelers' Ins. Co., 137 So. 409, 223 Ala. 558. 71 C.J. p 1600 note 20.

2. N.Y.—Zurich General Accident & Liability Insurance Co. v. Childs Co., 171 N.E. 391, 253 N.Y. 324. 71 C.J. p 1600 note 21.

3. Ala.—Sloss-Sheffield Steel & Iron Co. v. Metropolitan Cas. Ins. Co. of New York, 185 So. 395, 28 Ala.App. 366, certiorari denied 185 So. 399, 237 Ala. 43.

Fla.—Haverty Furniture Co. v. McKesson & Robbins, 19 So.2d 59, 154 Fla. 772.

Ill.—Weintraub v. John B. Sexton & Co., 64 N.E.2d 235, 327 Ill.App. 348. Minn.—Standard Acc. Ins. Co. v. Minnesota Utilities Co., 289 N.W. 782, 207 Minn. 24.

N.Y.—Aetna Cas. & Sur. Co. v. Tucker, 59 N.Y.S.2d 355, 270 App.Div. 783.

N.D.—State v. Yellow Cab Co., 245 N.W. 382, 62 N.D. 733.

Evidence held sufficient to raise questions of fact.

Idaho.—Benson v. Brady, 255 P.2d 710, 73 Idaho 553.

71 C.J. p 1597 note 87 [a] (2).

Evidence considered

Evidence on question of negligence of defendant is required to be considered as a whole and in connection with all circumstances in evidence.

Ill.—Carson-Payson Co. v. Peoria

Terrazzo Co., 6 N.E.2d 534, 288 Ill.App. 583.

4. Ill.—Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp., 70 N.E.2d 604, 395 Ill. 429.

Evidence held sufficient to warrant submission to jury of question as to negligence of defendant's employee.

N.Y.—Royal Indemnity Co. v. Platt & Washburn Refining Co., 163 N.Y.S. 197, 98 Misc. 681.

5. Ala.—Sloss-Sheffield Steel & Iron Co. v. Metropolitan Cas. Ins. Co. of New York, 185 So. 395, 28 Ala.App. 366, certiorari denied 185 So. 399, 237 Ala. 43.

Fla.—Haverty Furniture Co. v. McKesson & Robbins, 19 So.2d 59, 154 Fla. 772.

Ill.—Connolly v. Schutte, 79 N.E.2d 79, 334 Ill.App. 227—Sheppard v. Cummings, 57 N.E.2d 907, 324 Ill. App. 227.

Md.—Foreman Co. v. Williams, to Use of Mayor and City Council of Baltimore, 188 A. 25, 171 Md. 55.

Mich.—Utley, for Use and Benefit of Travelers Ins. Co., v. Taylor & Gaskin, 9 N.W.2d 842, 305 Mich. 561.

Minn.—Standard Acc. Ins. Co. v. Minnesota Utilities Co., 289 N.W. 782, 207 Minn. 24.

N.Y.—Aetna Cas. & Sur. Co. v. Tucker, 59 N.Y.S.2d 355, 270 App.Div. 783.

Evidence held sufficient to raise questions of fact.

Idaho.—Benson v. Brady, 255 P.2d 710, 73 Idaho 553.

6. Consideration of all evidence

Whether employee was in exercise of due care just before, and at time

of, injury was required to be determined by jury from all the evidence and not under answer to one question which might justify conclusion that boards might have toppled over because employee might have stepped on something which caused them to become dislodged.

Ill.—Carson-Payson Co. v. Peoria Terrazzo Co., 6 N.E.2d 534, 288 Ill. App. 583.

7. Ill.—Manion v. Chicago, R. I. & P. Ry. Co., 138 N.E.2d 98, 12 Ill. App.2d 1—Sheppard v. Cummings, 57 N.E.2d 907, 324 Ill.App. 227.

Minn.—Standard Acc. Ins. Co. v. Minnesota Utilities Co., 289 N.W. 782, 207 Minn. 24.

8. Ill.—Manion v. Chicago, R. I. & P. Ry. Co., 138 N.E.2d 98, 12 Ill. App.2d 1.

9. Ill.—Westinghouse Elec. Elevator Co. v. La Salle Monroe Bldg. Corp., 63 N.E.2d 411, 326 Ill.App. 598, affirmed 70 N.E.2d 604, 395 Ill. 429.

10. Ill.—Manion v. Chicago, R. I. & P. Ry. Co., 138 N.E.2d 98, 12 Ill. App.2d 1.

11. Ala.—Scott v. Birmingham Elec. Co., 33 So.2d 344, 250 Ala. 61.

12. Mich.—Utley, for Use and Benefit of Travelers Ins. Co. v. Taylor & Gaskin, 9 N.W.2d 842, 305 Mich. 561.

71 C.J. p 1600 note 22.

Evidence held insufficient to authorize or require submission of matters of fact to jury.

Tenn.—Vandergriff v. Willett, 137 S.W.2d 957, 24 Tenn.App. 29.

13. Cal.—Globe Indemnity Co. v. Hook, 189 P. 797, 46 C.A. 760. 71 C.J. p 1600 note 23.

Where there is insufficient evidence for the jury on the question of defendant's negligence,¹⁴ or a total absence of proof, or any inference of proof, that would justify a verdict against defendant,¹⁵ a directed verdict for defendant is proper; and where there is no proof that defendant was negligent, an instructed verdict for defendant is proper.¹⁶

Authority of employer or insurer to prosecute action. Under some acts, the authority of an employer or an insurer to prosecute an action against a tort-feasor is a preliminary question to be heard and determined by the judge,¹⁷ and is not a matter for the consideration of the jury.¹⁸ So, where there is nothing in the record to show that an employee's dependent had accepted compensation under an award, a directed verdict against an employer on its cause of action is justified.¹⁹

Jury trial. The right of defendant to a jury trial as to the facts essential to uphold an award of compensation, in an action by an employer as statutory assignee of a cause of action for the death of an employee, has been recognized.²⁰

§ 1033. Verdict and Findings

General rules as to findings and verdicts have been applied in actions against tort-feasors to recover for injuries to, or the death of, employees.

In order for an employer to recover medical expenses incurred in the treatment of an injured employee, there must be a finding that the accident was caused solely by reason of the negligence of defendant without any contributing negligence on the part of the employer.²¹ In an action by an oil company employee for injuries incurred when he, at the request of a driver of a truck, engaged by the oil company, did some work on the truck, a finding that plaintiff was an employee of the oil company acting within the scope and course of his employment established that, in helping the driver,

he rendered services in furtherance of the business of his employer and not as a mere volunteer.²² A finding by a trial court that an employee was on the premises of the tort-feasor to inspect and service machinery sold to the tort-feasor by his employer is insufficient as a finding that the employee was in the course of his employment at the time of the accident.²³

In applying the general rules that findings are to be liberally construed in support of the judgment and that all findings are to be read and considered together and reconciled, if possible, to prevent conflict on material points, in an action by an insurer in which there has been a judgment for defendant, findings as to the negligence of the injured employee and of defendant have been construed and reconciled.²⁴

Under a particular compensation act, the verdict of the jury is required to declare the full amount of the damages suffered by plaintiff, notwithstanding any award or payment of compensation to him.²⁵ A general verdict for an injured employee and the employer has been held to be consistent with a joint count of the complaint, and to determine that both parties plaintiff are entitled to recover the sum awarded thereby.²⁶ In an action by an injured employee against a tort-feasor, wherein the employer intervened, a verdict providing for a recovery for the employee and for the employer has been held to be correctly interpreted as providing for a total of both amounts of recovery, rather than for a maximum of the amount awarded to the employee.²⁷

Under a particular statute, a special verdict is required on the issue of special damages for medical expenses, in an action by an employee against a tort-feasor.²⁸

§ 1034. Judgment and Relief

Rules applicable to judgment and relief in civil actions generally have been applied in actions against tort-

14. Mass.—*Bogner v. Casper Ranger Const. Co.*, 108 N.E.2d 665, 329 Mass. 412.

15. Mich.—*Benton Harbor Malleable Industries, Inc. v. Pearson Const. Co.*, 83 N.W.2d 429, 348 Mich. 471.

16. U.S.—*American General Ins. Co. v. Southwestern Gas & Elec. Co.*, C.C.A.Tex., 115 F.2d 706.

17. Idaho.—*Lebak v. Nelson*, 107 P. 2d 1054, 62 Idaho 96.
Mass.—*Furlong v. Cronan*, 26 N.E. 2d 382, 305 Mass. 464.
71 C.J. p 1600 note 24.

18. Idaho.—*Lebak v. Nelson*, 107 P. 2d 1054, 62 Idaho 96.
71 C.J. p 1600 note 25.

19. Ind.—*Gary Fish Co. v. Leisure*, 102 N.E.2d 209, 122 Ind.App. 190.

20. Wis.—*Verhelst Const. Co. v. Galles*, 235 N.W. 556, 204 Wis. 96.
71 C.J. p 1600 note 26.

21. N.Y.—*U. S. Trucking Corporation v. New York & Pennsylvania Motor Express*, 32 N.Y.S.2d 251, 177 Misc. 377.

22. Tex.—*Stephens v. Mendenhall*, Civ.App., 287 S.W.2d 259, error refused no reversible error.

23. U.S.—*Williamson v. Weyerhaeuser Timber Co.*, C.A.Or., 221 F. 2d 5.

24. Cal.—*Georgia Casualty Co. v. Lindauer Corporation*, 12 P.2d 107, 124 C.A. 72.

71 C.J. p 1600 note 29.

25. N.C.—*Lovette v. Lloyd*, 73 S.E. 2d 886, 236 N.C. 663.

26. Ill.—*Geneva Const. Co. v. Martin Transfer & Storage Co.*, 114 N. E.2d 908, 351 Ill.App. 289, affirmed: 122 N.E.2d 540, 4 Ill.2d 273.

27. Cal.—*Fernandez v. Consolidated Fisheries, Inc.*, 255 P.2d 863, 117 C.A.2d 254.

28. Minn.—*Dockendorf v. Lakie*, 61 N.W.2d 752, 240 Minn. 441.

feasors to recover for injuries to, or the death of, employees.

Under particular statutory provisions, when a verdict has been recovered by a compensated employee against a tort-feasor, the court, sitting without a jury, determines the amount of compensation paid or payable to the employee and then enters a judgment safeguarding the rights of any person entitled to share in the recovery, regardless of whether or not such person is a party to the action.²⁹ Where plaintiff cannot be subject to a nonsuit because he made out a prima facie case of liability on the part of defendant, and judgment cannot be granted to plaintiff because defendant was precluded from rebutting plaintiff's prima facie case, neither party is entitled to a judgment on the merits.³⁰ Notwithstanding a provision for subrogation if the employee or his dependents elect to receive compensation and the fact that dependents did so elect, the right of the employer and insurer to recover in an action by the personal representative of a deceased employee against a person liable other than the employer has been denied where neither the employer nor insurer was a party to the action and the personal representative had no right to sue.³¹

So, also, an employer who has failed properly to serve its intervention petition on defendants in an action by the parents of a deceased employee is not entitled to judgment against defendant,³² but may be entitled to reimbursement out of the judgment awarded to the parents as considered *infra* § 1041. An employer who has properly intervened in an action by an employee against a tort-feasor to recover compensation paid to the employee, as well as other expenses, is entitled to a direct judgment against the tort-feasor, rather than to mere reimbursement out of the judgment for the employee.³³ Where an employer intervenes, in an employee's action against a tort-feasor, for reimbursement of compensation paid to the employee, separate judgments may be rendered against the tort-

feasor in favor of the employee and the employer.³⁴

Where an employee is not a party to his employer's action against a tort-feasor to recover compensation paid or payable, the court has no power to diminish the rights that the employee has received under a compensation award by terminating the employer's obligation to the employee.³⁵ In an action by the personal representative of an employee, the trial court may require plaintiff to secure defendant from the possibility of a claim by employer or insurer as a condition precedent to the payment of the judgment.³⁶

Any recovery by an employee against a tort-feasor forecloses the employee's right against the latter.³⁷ Similarly, an adjudication in an action by an insurer against a tort-feasor for an employee's death is binding on the employee's dependents, even though they were not parties to the action.³⁸

Default judgment. Where a compensation insurer intervenes in a compensated employee's action against a tort-feasor after the entry of judgment for the employee, and the tort-feasor satisfies the judgment before the entry of a default judgment on the complaint in intervention, insurer is not entitled to a correction of the default judgment to show that it is entered against the tort-feasor instead of the employee, since, after the tort-feasor satisfied the judgment, recovered by the employee, no further judgment could be entered against him in favor of the employee or insurer.³⁹ Under such circumstances, where the prayer of the intervention complaint is for a judgment against the tort-feasor, the court is without power to enter a default judgment against the employee, since the relief given is limited to that requested in the demand for judgment.⁴⁰

Enforcement of judgment. Both the employee and the employer have an actual and enforceable interest in the judgment against a tort-feasor where

29. N.C.—*Lovette v. Lloyd*, 73 S.E. 2d 886, 236 N.C. 663.

30. N.Y.—*Travelers Ins. Co. v. Stieglitz*, 30 N.Y.S.2d 306.

31. Minn.—*Prebeck v. Village of Hibbing*, 240 N.W. 890, 185 Minn. 303.

71 C.J. p 1601 note 31.

32. La.—*Mahon v. Spence*, 123 So. 349, 11 La.App. 604.

Intervention of employer in action by employee, dependents, or personal representative in general see *supra* § 1021.

33. La.—*Bucklew v. Pattison*, App.,

186 So. 904—*Maddox v. Pattison*, App., 186 So. 894.

34. Cal.—*Fernandez v. Consolidated Fisheries, Inc.*, 255 P.2d 863, 117 C.A.2d 254.

35. Conn.—*Stavola v. Palmer*, 73 A. 2d 831, 136 Conn. 670. Conclusiveness and effect of award see *supra* §§ 655–659.

36. Wis.—*Theby v. Wisconsin Power & Light Co.*, 222 N.W. 826, 223 N.W. 791, 197 Wis. 601.

71 C.J. p 1601 note 35.

37. Tex.—*Otis Elevator Co. v. Allen*, Civ.App., 185 S.W.2d 117, af-

firmed in part and reversed in part on other grounds 187 S.W.2d 657, 143 Tex. 607.

Effect of employee's recovery on rights of subrogee against tort-feasor see *supra* § 1003.

38. N.Y.—*Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp.*, 53 N.Y.S.2d 835, 184 Misc. 941.

39. Minn.—*Dockendorf v. Lakie*, 61 N.W.2d 752, 240 Minn. 441.

40. Minn.—*Dockendorf v. Lakie*, *supra*.

it is in excess of the amount due the employer,⁴¹ and each has a right to enforce the collection of the judgment and the payment to him of the portion thereof legally belonging to him.⁴²

Suit in equity to restrain enforcement of judgment. In a suit in equity to restrain the enforcement of a judgment obtained by the personal representative of a deceased employee in an action by such representative against the complainant in such suit in equity, such complainant has the burden of establishing the facts which will entitle him to relief,⁴³ and must support his case by evidence which is properly admissible⁴⁴ and which is sufficient to warrant the granting of relief.⁴⁵

§ 1035. New Trial

Where an action for an employee's death is tried on an erroneous theory of damages, the court should not grant a new trial, but should reduce the verdict to an amount allowable under the compensation act.

Where, in an action by the personal representative for the death of an employee, the case is tried on the erroneous theory that a provision limiting the amount of damages and fixing such damages at the amount of compensation payable under the act does not apply, and the verdict establishes the liability of defendant for the death, the court, on being convinced of its error, should not grant a new trial, but should reduce the verdict to an amount allowable under the compensation act.⁴⁶

§ 1036. Appeal and Error

General rules governing questions of appeal and error in civil actions have been applied in actions to recover from a tort-feasor for injuries to, or the death of, an employee, as affected by workmen's compensation statutes.

General rules applicable to appeals in civil ac-

tions apply in an action by, on behalf of, an employee, his dependents, or beneficiaries, or by, or on behalf of, the employer or insurer, against a third-person tort-feasor, as affected by workmen's compensation statutes.⁴⁷ An order making an equitable distribution of a recovery against a tort-feasor is properly reviewable by appeal,⁴⁸ and cannot be reviewed by certiorari.⁴⁹

A judgment dismissing an action,⁵⁰ dismissing an amendment to an answer,⁵¹ or striking a portion of the answer containing an affirmative defense,⁵² has been held to be final and appealable. The refusal of a trial judge to vacate his order making an employer and its compensation insurer parties defendant to an action by an injured employee against a tort-feasor, which order violates the employee's exclusive privilege to prosecute the action without the presence of the employer and insurer as parties, is appealable, as it immediately affects a substantial right of the employee.⁵³

A party who is not aggrieved by a judgment of a trial court is not entitled to appeal therefrom.⁵⁴

Questions as to the sufficiency of the complaint may not be raised for the first time on appeal.⁵⁵ A general statement, in a motion for judgment notwithstanding the verdict, that the complaint is insufficient does not raise specific defects for purposes of appeal.⁵⁶

Where the trial court construes the evidence, any reasonable construction of the effect of the evidence which supports the order of that court is binding on an appellate court.⁵⁷ Where the parties agree at the trial that proof of an issue is unnecessary, the question of lack of proof thereof may not be presented on appeal,⁵⁸ and the question of the right to bring the action, which is de-

41. Ill.—Henson Robinson Co. v. Industrial Commission, 53 N.E.2d 881, 386 Ill. 232—Gones v. Fisher, 122 N.E. 95, 286 Ill. 606.

42. Ill.—Henson Robinson Co. v. Industrial Commission, 53 N.E.2d 881, 386 Ill. 232—Gones v. Fisher, 122 N.E. 95, 286 Ill. 606.

43. Ill.—Kelly-Atkinson Const. Co. v. Foreman Bros. Banking Co., 218 Ill.App. 345.
71 C.J. p 1601 note 86.

44. Ill.—Kelly-Atkinson Const. Co. v. Foreman Bros. Banking Co., supra.
71 C.J. p 1601 note 87.

45. Ill.—Kelly-Atkinson Const. Co. v. Foreman Bros. Banking Co., supra.
71 C.J. p 1601 note 88.

46. Minn.—Mahowald v. Thompson-

Starrett Co., 158 N.W. 913, 159 N.W. 565, 134 Minn. 113.

47. N.Y.—Diamond v. Ascenzo, 93 N.Y.S.2d 158, 276 App.Div. 848—Reinhart v. Gerosa Crane Service Co., 31 N.Y.S.2d 162, 263 App.Div. 28—Travelers Ins. Co. v. Stieglitz, 16 N.Y.S.2d 810, 258 App.Div. 928.

Utah.—Johanson v. Cudahy Packing Co., 120 P.2d 281, 101 Utah 219.
Vt.—Towne v. Rizzico, 32 A.2d 129, 113 Vt. 205.

71 C.J. p 1601 note 42, p 1602 note 43.

48. Fla.—Burdine's, Inc. v. Drennon, 97 So.2d 259.

49. Fla.—Burdine's, Inc. v. Drennon, supra.

50. Cal.—Aetna Cas. & Sur. Co. v. Pacific Gas & Elec. Co., 264 P.2d 5, 41 C.2d 785, 41 A.L.R.2d 1037.

51. Review by direct bill of exceptions

Ga.—Atkinson v. Fidelity & Cas. Co., 1 S.E.2d 744, 187 Ga. 590.

52. N.D.—La Duke v. El. W. Wylie Co., 44 N.W.2d 204, 77 N.D. 592.

53. N.C.—Lovette v. Lloyd, 73 S.E. 2d 886, 236 N.C. 663.

54. Cal.—State Compensation Ins. Fund v. Matulich, 131 P.2d 21, 55 C.A.2d 528.

55. Ill.—Sheppard v. Cummings, 57 N.E.2d 907, 324 Ill.App. 227.

56. Ill.—Sheppard v. Cummings, supra.

57. Cal.—Quisenberry v. Rullison, 277 P.2d 57, 129 C.A.2d 268.

58. D.C.—Haw v. Liberty Mut. Ins. Co., and to Use of Giacomo, 180 F.2d 18, 86 U.S.App.D.C. 86.

pendent on such proof, may not be questioned there.⁵⁹ A court will not reverse a judgment for error which was not raised in the trial court.⁶⁰

Questions of fact, in an action against a tortfeasor, are for the trial court in a case tried without a jury.⁶¹

Where a statute requires that an employer or its insurer shall have paid, or become liable to pay, compensation, before it can sue a tortfeasor, the proof of the pendency of an action by insurer against a tortfeasor does not require a reviewing court to find that there had been an acceptance of the award.⁶² A reviewing court will not consider the question whether a party is precluded from bringing an action by reason of its having received compensation, where it is questionable whether the issue was properly raised by the pleadings, and there is no showing that the party received compensation.⁶³ Where defendant contends that the denials of its motions for a directed verdict and for a judgment notwithstanding the verdict are error, a question of law is raised for the reviewing court whether, under the evidence and legal inferences considered most strongly in plaintiff's favor, defendant was guilty of negligence.⁶⁴

On appeal to the highest court of the jurisdiction from an intermediate reviewing court, the court will not determine whether a finding of the trial court is supported by the facts.⁶⁵

A reviewing court cannot make an assumption

that a factory employs the number of workmen which makes its operation under the compensation act compulsory.⁶⁶

A verdict for plaintiff which is general in form must be upheld on appeal if it can be sustained by any court of the complaint.⁶⁷

Where an appeal is effected only by a deceased employee's personal representative from a judgment for him and the employer, and it is determined that the charge on damages was erroneous, the judgment will be set aside as to both parties in whose favor it was rendered.⁶⁸

An intervenor, who was entitled to a judgment in the trial court in accordance with its complaint, is entitled to a judgment in the reviewing court recognizing its preference and priority to money awarded to an injured employee.⁶⁹ A determination by an appellate court that a compensation commission lacks jurisdiction of a particular matter is not *res judicata* of a person's right to litigate the matter in a court of law.⁷⁰

Harmless or prejudicial error. Errors occurring during the trial and not affecting the outcome of the case are harmless errors.⁷¹ Matters occurring on the trial⁷² or on an intermediate appeal⁷³ which are prejudicial to a party constitute reversible error.

An error in admitting papers, which were part of a compensation proceeding, in an action by the employee against the tortfeasor, is not cured by an

59. D.C.—Haw v. Liberty Mut. Ins. Co., and to Use of Giacomo, *supra*.

60. Ala.—Sloss-Sheffield Steel & Iron Co. v. Metropolitan Cas. Ins. Co. of New York, 185 So. 395, 28 Ala.App. 366, certiorari denied 185 So. 399, 237 Ala. 43.

61. Ill.—J. A. Lavery Motor Co. v. Weil, 85 N.E.2d 390, 311 Ill.App. 241.

62. Ind.—Northern Indiana Power Co. v. West, 32 N.E.2d 713, 218 Ind. 321.

63. Mich.—Campbell v. Osterland, 277 N.W. 875, 283 Mich. 175.

64. Ill.—Weintraub v. John B. Sexton & Co., 64 N.E.2d 235, 327 Ill. App. 848.

65. Ala.—Sloss-Sheffield Steel & Iron Co. v. Metropolitan Casualty Ins. Co. of New York, 185 So. 399, 237 Ala. 43.

66. Kan.—Bittle v. Shell Petroleum Corp., 75 P.2d 829, 147 Kan. 227.

67. Ill.—Geneva Const. Co. v. Martin Transfer & Storage Co., 114 N.E.2d 906, 351 Ill.App. 289, affirmed 123 N.E.2d 549, 4 Ill.2d 278.

68. Conn.—Mickel v. New England Coal & Coke Co., 47 A.2d 187, 132 Conn. 671, 171 A.L.R. 1001.

69. La.—Baker v. U. S. Fire Ins. Co., App., 89 So.2d 405.

70. Ark.—Maxcy v. John F. Beasley Const. Co., 306 S.W.2d 849.

71. Fla.—E. B. Elliott Co., for Use and Benefit of Bituminous Cas. Corp. v. City of Miami, 10 So.2d 435, 151 Fla. 753.

Ga.—Sheffield Co. v. Phillips, 24 S.E.2d 834, 69 Ga.App. 41.

N.Y.—Utica Mut. Ins. Co. v. Amsterdam Color Works, 181 N.Y.S.2d 782, 284 App.Div. 376, affirmed 125 N.E.2d 871, 308 N.Y. 816.

Va.—Rea v. Ford, 96 S.E.2d 92, 198 Va. 712.

Wis.—Western Casualty & Surety Co. v. Shafston, 283 N.W. 806, 231 Wis. 1, rehearing denied 285 N.W. 408, 231 Wis. 1.

71 C.J. p 1601 note 42 [c], p 1602 note 43 [c].

72. Tex.—Myers v. Thomas, 186 S.W.2d 811, 143 Tex. 502.

71 C.J. p 1601 note 42 [c] (4).

Pleading or proof relating to compensation

In suit by injured workman against third-party tortfeasor, it is reversible error for any pleading or proof relating to compensation to be brought before jury.

Tex.—Pattison v. Highway Ins. Underwriters, Civ.App., 278 S.W.2d 207, refused no reversible error.

Instructions

Ala.—Coleman v. Hamilton Storage Co., 180 So. 553, 235 Ala. 553.

Cal.—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 C.A.2d 254—Eckman v. Arnold Taxi Co., 148 P.2d 677, 64 C.A.2d 229.

Ill.—Alaimo v. Du Pont, 136 N.E.2d 542, 11 Ill.App.2d 238.

Mich.—Utley, for Use and Benefit of Travelers Ins. Co. v. Taylor & Gaskin, 9 N.W.2d 842, 305 Mich. 561.

N.Y.—Travelers Ins. Co. v. Shachner, 8 N.Y.S.2d 450, 255 App.Div. 999, appeal dismissed 21 N.E.2d 523, 280 N.Y. 758.

73. Ill.—Victor v. Dehmlow, 90 N.E.2d 724, 405 Ill. 249.

instruction relating to the subrogation rights of insurer who has paid compensation.⁷⁴ However, an argument to the jury that plaintiff will receive compensation was not prejudicial misconduct on the part of defendant's attorney, where the compensation insurer filed its lien for benefits paid, the jury was instructed not to consider the compensation insurance in determining the amount of damages to be awarded, and the court overruled a motion for a new trial based on the argument.⁷⁵

Remand. Where the record on review is inadequate

to justify a particular holding, the case is remanded to the court to which the question at issue is primarily addressed.⁷⁶ Where a trial court dismissed a motion to implead, before any facts were developed, the appellate court need not remand the case for further proceedings on the motion, but may consider the findings which were made after such dismissal, in order to determine whether they preclude a successful prosecution of the claim on which the motion is based, thus affording a basis for sustaining the dismissal.⁷⁷

E. Amount and Items of Recovery or Reimbursement and Beneficial Interests

§ 1037. Amount of Recovery in General

The amount of recovery in actions by the employee or his dependents or personal representative is considered *infra* § 1038, and in actions by, or on behalf of, an employer or insurer, *infra* § 1039.

Examine Pocket Parts for later cases.

§ 1038. — Action by Employee, Dependents, or Personal Representative

The plaintiff, in an action duly brought by the em-

ployee or his personal representative or dependents against a tort-feasor, may recover full damages to which the employee is entitled, and the amount of recovery is not limited to the amount of compensation awarded under the act.

Notwithstanding provisions giving the employer or insurer the right to recovery or reimbursement in respect of the liability of a person other than the employer for an injury to,⁷⁸ or the death of,⁷⁹ an employee, plaintiff, in an action duly brought by the employee, personal representative, or dependents, may recover full damages to which the employee is entitled,⁸⁰ including medical and hospital expenses⁸¹

74. Ala.—Coleman v. Hamilton Storage Co., 180 So. 553, 235 Ala. 553.

75. Cal.—Huber v. Henry J. Kaiser Co., 162 P.2d 693, 71 C.A.2d 278.

76. U.S.—Czaplicki v. The Hoegh Silvercloud, N.Y., 76 S.Ct. 946, 351 U.S. 525, 100 L.Ed. 1387.

77. U.S.—Crawford v. Pope & Talbot, Inc., C.A.Pa., 206 F.2d 784.

78. Iowa.—Black v. Chicago Great Western R. Co., 174 N.W. 774, 187 Iowa 904.

71 C.J. p 1602 note 45.

79. Ga.—Athens Ry. & Electric Co. v. Kinney, 127 S.E. 290, 160 Ga. 1.

71 C.J. p 1602 note 46.

80. U.S.—United Gas Corp. v. Guillery, C.A.La., 207 F.2d 308.

Conn.—Stavola v. Palmer, 73 A.2d 831, 136 Conn. 670.

Fla.—Holmes v. Carroll, 75 So.2d 203.

Ga.—Travelers Ins. Co. v. Georgia Power Co., 181 S.E. 111, 51 Ga.App. 579.

Ill.—Melohn v. Ganley, 100 N.E.2d 780, 344 Ill.App. 316.

Ind.—New York Cent. R. Co. v. Milhiser, 106 N.E.2d 453, 231 Ind. 180, rehearing denied 108 N.E.2d 57, 231 Ind. 188.

Weis v. Wakefield, 88 N.E.2d 303, 111 Ind.App. 106.

La.—Hecht v. Toye Bros. Yellow Cab Co., App., 62 So.2d 520—Ernst v.

New Orleans Public Belt R. R., App., 55 So.2d 657.

Deduction or credit of recovery by employee pursuing third person wrongdoer see *supra* § 396.

Right of employer or insurer to be indemnified or reimbursed out of amount recovered see *supra* §§ 1039, 1041.

Duty to assess full damages

In an action in tort by an injured employee against tort-feasor, court of appeal could not consider compromise settlement of workmen's compensation by injured employee's employer, and only duty of the court was to assess against tort-feasor full and actual damages sustained by injured employee, where neither employer nor its insurance carrier paying workmen's compensation intervened.

La.—Ernst v. New Orleans Public Belt R. R., *supra*.

Segregation of items of damages

Where employee is injured in course of employment as result of negligence of third person, workmen's compensation act comprehends segregation of items of damages which employee is entitled to recover from third person, so as to prevent double recovery from third person.

Cal.—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 C.A.2d 254.

Community of interest

Under provisions of workmen's compensation act pertaining to subrogation, there is a community of interest as between employer and employee in action against negligent third person.

U.S.—Lumbermens Mut. Cas. Co. v. Dodge City Cement Products Co., D.C.Kan., 88 F.Supp. 643—Black, Sivalis & Bryson v. Sheahan, D.C. Kan., 88 F.Supp. 639.

Kan.—Sundgren v. Topeka Transp. Co., 283 P.2d 444, 178 Kan. 83.

81. La.—Ernst v. New Orleans Public Belt R. R., App., 55 So.2d 657—deRoode v. Jahncke Service, Inc., App., 52 So.2d 736—Williams v. Campbell, App., 185 So. 683.

Mo.—Sommers v. Hartford Acc. & Indem. Co., App., 277 S.W.2d 645—Brouk v. United Wood Heel Co., App., 145 S.W.2d 475.

Or.—French v. Christner, 143 P.2d 674, 173 Or. 158—Cary v. Burris, 127 P.2d 126, 169 Or. 24.

Tex.—Dempster Mill Mfg. Co. v. Wiley, Civ.App., 131 S.W.2d 257, error dismissed, judgment correct.

Such expenses held compensation

Expenditures employer and its insurer are required, by compensation act, to make for medical aid and hospitalization for employee constitute payments of compensation recoverable by employee from third person.

or exemplary damages.⁸² The damages may be measured by the common-law standard of damages,⁸³ and the employee's recovery, it has been held, is limited to, and based on, the unliquidated damages which he has suffered.⁸⁴ An employee accepting a payment for his damages from the third-

party tort-feasor extinguishes all right again to collect for the same injury from such person.⁸⁵

The amount of recovery is not limited to the amount of compensation awarded under the act,⁸⁶ especially where the third person is not a resident of the state of the injured employee's employment;⁸⁷

Mo.—Sommers v. Hartford Acc. & Indem. Co., App., 277 S.W.2d 645.

No defense to third person

(1) In action by injured employee against third person for injuries allegedly sustained through negligence of third person, fact that medical expenses were not paid by employee but by his employer on his behalf who would be entitled to subrogation would not constitute a defense to third person as to such expenditures.

U.S.—The Etina, D.C.Pa., 46 F.Supp. 156, affirmed, C.C.A., 138 F.2d 37.

(2) In action by New Jersey workman for injuries sustained while a business invitee on defendant's premises in another state, defendant could not rely on alleged one hundred dollar limit of liability of workmen's compensation insurance carrier under New Jersey law as establishing that carrier's payment of seven hundred sixty-five dollars in hospital and medical bills, which carrier accepted as necessary and reasonable, amounted to a voluntary payment precluding recovery against defendant, in absence of objection to reasonableness of amounts of bills and in view of fact that statutory limitation is for protection of carrier representing employer, not for third-party tort-feasor.

U.S.—Reeves v. Philadelphia Import Co., C.C.A.Pa., 150 F.2d 854.

82. U.S.—Dudley v. Community Public Service Co., C.C.A.Tex., 108 F.2d 119.

83. Minn.—Monson v. Arcand, 58 N.W.2d 753, 239 Minn. 336—Gleason v. Sing, 297 N.W. 730, 210 Minn. 253.

84. La.—Smith v. McDonough, App., 29 So.2d 818.

Full compensation

In suit under longshoremen's compensation act against one whose negligence has caused injuries to an employee, measure of damages is such amount as will fairly compensate employee for his injuries, considering his pain and suffering, loss of time, extent of injuries, and whether employee was permanently or totally disabled, and amount paid out for doctors, nurses, medicines, and hospitalization, provided such expenses are shown to have been reasonable and necessary.

U.S.—R. C. Huffman Const. Co. v. East Coast Foundry & Boiler Co., for Use and Benefit of Central Sur-

& Ins. Corp., C.C.A.Fla., 112 F.2d 684.

General principles of liability

Under statute with respect to recovery against third-party tort-feasor or by employee entitled to compensation, tort-feasor is liable only for damages, and such liability is not increased because employer is liable to employee for compensation, and monetary liability of tort-feasor is determined by principles applicable in fixing liability in tort actions, and when so determined, statute does not provide that in addition, tort-feasor is liable to employer for what employer may be liable for.

La.—Todd-Johnson Dry Docks v. City of New Orleans, App., 55 So. 2d 650.

Pecuniary loss

Damages to compensation claimant are measured by pecuniary loss which claimant has sustained, depending on relation in which claimant stood to decedent and pecuniary benefit which claimant would have properly received from decedent had he continued to live.

Md.—Employers Liability Assur. Corporation, for Its Own Use and to Use of Jones v. Baltimore & O. R. Co., 195 A. 541, 173 Md. 238.

85. Ga.—Lloyd Adams, Inc., v. Liberty Mut. Ins. Co., 10 S.E.2d 46, 190 Ga. 633.

Right not to be defeated

Right of a wrongdoer against whom a judgment has been entered at suit of an injured employee to be released from further liability on payment of costs and of amount of judgment into court for carrier and employee to interplead, cannot be defeated by carrier's failure to notify employee of its intention to assert claim to subrogation and the employee's contention that he would not have accepted amount of verdict had he been aware that such a claim would be made.

Pa.—Crider v. Hock, 71 Pa.Dist. & Co. 247, 2 Lebanon 270.

86. U.S.—Pope & Talbot v. Hawk, Pa., 74 S.Ct. 202, 346 U.S. 408, 98 L.Ed. 143.

Moragnel v. Moore-McCormack Lines, D.C.Md., 75 F.Supp. 969.

D.C.—Tate v. Nelson, D.C., 71 F. Supp. 465.

Fla.—Vanlandingham v. Florida Power & Light Co., 18 So.2d 678, 154 Fla. 628.

Ga.—Williams Bros. Lumber Co. v. Meisel, 88 S.E.2d 384, 85 Ga.App. 72.

Idaho.—Department of Finance of State v. Union Pac. R. Co., 104 P. 2d 1110, 61 Idaho 484.

Ill.—Huntton v. Pritchard, 20 N.E. 2d 53, 371 Ill. 36.

Hulke v. International Mfg. Co., 142 N.E.2d 717, 14 Ill.App.2d 5—Leif v. Fleming, 52 N.E.2d 606, 321 Ill.App. 297.

Ky.—Bumpus v. Drinkard's Adm'x, 279 S.W.2d 4.

La.—Jackson v. Thomas, App., 75 So. 2d 249.

Md.—Baltimore Transit Co. v. State, to Use of Schrieffer, 39 A.2d 853, 183 Md. 674, 156 A.L.R. 460.

Mo.—Pritt v. Terminal R. R. Ass'n of St. Louis, 251 S.W.2d 622—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517.

N.Y.—Sills v. Wert, 139 N.Y.S.2d 132.

Or.—Personius v. Asbury Transp. Co. of Oregon, 53 P.2d 1065, 152 Or. 286.

Tex.—Dempster Mill Mfg. Co. v. Wiley, Civ.App., 131 S.W.2d 257, error dismissed, judgment correct—Dempster Mill Mfg. Co. v. Lester, Civ.App., 131 S.W.2d 254, error dismissed, judgment correct.

71 C.J. p 1603 note 48.

Compensation held not settlement

Compensation paid under compensation act is not settlement of a tort claim.

Ga.—Williams Bros. Lumber Co. v. Meisel, 88 S.E.2d 384, 85 Ga.App. 72.

Compensation statute contemplates that usually amount which would be awarded in tort damages would exceed amount which injured employee is entitled to in workmen's compensation; so, where employee's injuries had been properly assessed in workmen's compensation proceeding, his recovery against third-party tort-feasor would be limited to difference between what plaintiff could have earned, had he not been injured, and amount he was awarded in workmen's compensation proceeding plus a reasonable amount to compensate him for suffering.

La.—Jackson v. Thomas, App., 75 So. 2d 249.

87. Or.—Personius v. Asbury Transp. Co. of Oregon, 53 P.2d 1065, 152 Or. 286.

nor does a provision for assignment operate to diminish the recovery against a third person by the amount of the compensation awarded under the act.⁸⁸ According to some cases, whether or not the employer or insurer is entitled to any part of the recovery is no concern of defendant.⁸⁹ The liability, however, is not to be broadened merely because the employer was liable to the employee for compensation.⁹⁰

Under the construction given some provisions, however, the employee or dependents are not entitled to recover full damages and defendant is entitled to a credit for compensation paid, as considered *infra* § 1040, but where the employer or insurer has intervened in an action by the employee or personal representative, the full damages are ascertained.⁹¹ In an action by the injured employee or a dependent against a third person, there are elements of recoverable damages which the state industrial accident commission may⁹² and may not⁹³ consider and fix in determining compensation. Like-

wise, in determining the amount of damages some facts should not be considered, such as that plaintiff is receiving compensation because of the injury for which he seeks recovery⁹⁴ and that the insurance carrier has filed a lien for compensation benefits paid,⁹⁵ or the amount received by the injured employee under so-called benefit plan.⁹⁶

Amount of compensation and damages. Some compensation laws do not contemplate a full double recovery by an injured employee in both tort and workmen's compensation,⁹⁷ and the right to recover an amount equal to the compensation paid or payable in addition to the amount of damages otherwise recoverable has been denied.⁹⁸ The liability of a passively negligent third person, however, is reduced by the amount of compensation received by the employee from the actively negligent employer or his insurance carrier,⁹⁹ and the amount recovered from the wrongdoer is limited to the excess of damages over the compensation collected.¹

88. N.M.—Kandelin v. Lee Moor Contracting Co., 24 P.2d 731, 37 N.M. 479.

Wis.—Bernard v. Jennings, 244 N. W. 589, 209 Wis. 118.

89. U.S.—United Gas Corp. v. Guillery, C.A.La., 207 F.2d 308.

Cal.—Pacific Indem. Co. v. California Elec. Works, 84 P.2d 813, 29 C.A.2d 260, followed in Jacques v. Standard Oil Co. of California, 84 P.2d 322, 29 C.A.2d 745.

Conn.—Stulginski v. Cizauskas, 5 A. 2d 10, 125 Conn. 293.

Ill.—Johnson v. Turner, 49 N.E.2d 297, 319 Ill.App. 265.

Mo.—Pritt v. Terminal R. R. Ass'n of St. Louis, 251 S.W.2d 622—De Moulin v. Roetheli, 189 S.W. 2d 562, 354 Mo. 425.

N.C.—Yost v. Hall, 64 S.E.2d 554, 233 N.C. 463.

71 C.J. p 1603 note 50.

Legislative intent

Under statute providing that injured employee's right of action against third person shall not be affected by payment of compensation by employer, legislature intended that wrongdoer should not benefit by payment of compensation made to injured employee by employer, and that he should not be permitted to benefit from payments made by persons who were not joint tort-feasors, whether motive impelling payment is affection, philanthropy, or contract.

Conn.—Stulginski v. Cizauskas, 5 A. 2d 10, 125 Conn. 293.

90. La.—Ernst v. New Orleans Public Belt R. R., App., 55 So.2d 657.

91. Ky.—Napier v. John P. Gorman

Coal Co., 45 S.W.2d 1064, 242 Ky. 127.

Tex.—Jarbet Co. v. Hengst, Civ.App., 260 S.W.2d 88.

Recovery of compensation from employee by insurer where it does not intervene in action by employee against tort-feasor see *supra* § 993.

92. Cal.—Jacobsen v. State Industrial Accident Commission, 299 P. 66, 212 C. 440.

71 C.J. p 1603 note 55.

93. Cal.—Jacobsen v. State Industrial Accident Commission, *supra*.

71 C.J. p 1603 note 56.

Pain and suffering

Workmen's compensation comprehends pain and suffering connected with compensable injury for which award is made and precludes maintenance of an action by employee's personal representative for such pain and suffering after death of injured employee.

Okl.—Weatherman v. Victor Gasoline Co., 130 P.2d 527, 191 Okl. 423.

94. Cal.—Huber v. Henry J. Kaiser Co., 162 P.2d 693, 71 C.A.2d 278.

95. Cal.—Huber v. Henry J. Kaiser Co., *supra*.

96. Colo.—Riss & Co. v. Anderson, 114 P.2d 278, 108 Colo. 78.

97. La.—Geter v. Travelers Ins. Co. of Hartford, Conn., App., 79 So.2d 120.

Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 518.

Joint tort-feasors

Partial satisfaction of injured person by one joint tort-feasor is satisfaction pro tanto as to all, and rule

is applicable where partial payment for injury has been made from workmen's compensation fund because of one of joint tort-feasors being subscriber thereto.

W.Va.—Brewer v. Appalachian Constructors, 65 S.E.2d 87, 135 W.Va. 739.

98. Ga.—Western & A. R. R. v. Henderson, 133 S.E. 645, 35 Ga.App. 353.

71 C.J. p 1603 note 57.

99. N.C.—Hunsucker v. High Point Bending & Chair Co., 75 S.E.2d 768, 237 N.C. 559.

1. U.S.—Kelley v. Summers, C.A. Kan., 210 F.2d 885—Sunray Oil Corp. v. Allbritton, C.A.Tex., 187 F.2d 475, rehearing denied 188 F. 2d 751, certiorari denied 72 S.Ct. 51, 342 U.S. 828, 96 L.Ed. 626.

Tex.—Houston Gas & Fuel Co. v. Perry, 91 S.W.2d 1052, 127 Tex. 102—Texas Employers Ins. Ass'n v. Brandon, 89 S.W.2d 982, 126 Tex. 636.

Dallas Ry. & Terminal Co. v. Hendrix, Civ.App., 261 S.W.2d 610—Jarbet Co. v. Hengst, Civ.App., 260 S.W.2d 88—Hartford Acc. & Indem. Co. v. Weeks Drug Store, Civ.App., 161 S.W.2d 153, error refused—Traders & General Ins. Co. v. West Texas Utilities Co., Civ. App., 156 S.W.2d 271, reversed on other grounds 165 S.W.2d 713, 140 Tex. 57.

Interest

Where employee settled his claim against tort-feasor, employee was not entitled to recover from compensation carrier "interest" for time carrier had delayed release of part

Employee claiming under assignment from insurer. Where, under a provision for assignment, the employer or insurer is entitled to recover from a third person only the amount which has duly been paid under the award, as discussed infra §§ 1039, 1041, an injured employee to whom his employer who has paid compensation assigns the cause of action acquired by the employer under the act may recover from the third person only the amount which the employer has been compelled to pay under the award.²

Excessive damages. General rules as to the excessiveness of damages in actions for personal injuries apply in an action for damages brought by an employee who has elected to pursue his remedy against a third person.³

Federal Employees' Compensation Act. It has been said that an employee of the United States who has received compensation under the Federal Employees' Compensation Act gains nothing as a result of a recovery from a third person liable for

the injury in view of provisions of the act for payment of the amount recovered into the compensation fund or for crediting such recovery on future payments of compensation.⁴

§ 1039. — Action by or on Behalf of Employer or Insurer

Under some statutes the employer or insurer is entitled to recover the full amount of damages which the employee or dependents could recover, and the amount of compensation paid or payable is not the measure of damages; but the damages may be limited to an amount not in excess of compensation paid or payable by employer.

Where by a specific provision of the act the employee or the dependents of a deceased employee are, or may be, entitled to a share of the amount recovered from the third-person wrongdoer by the employer or insurer, it is usually held or recognized that the employer or insurer is entitled to recover the full amount of damages which the employee or dependents could recover⁵ including punitive dam-

of settlement money which had been paid into court.
Fla.—Insurance Co. of Tex. v. Rainey, 86 So.2d 447.

Periodical payments

Where injured employee recovered judgment against third person, balance due on award by board for such injuries would be payable in weekly installments beginning on date of award.

Ky.—Southern Quarries & Contracting Co. v. Hensley, 232 S.W.2d 999, 313 Ky. 640.

2. Okl.—Ridley v. United Sash & Door Co., 224 P. 351, 98 Okl. 80.
Assignment by employer or insurer in general see supra § 1006.

3. Colo.—Riss & Co. v. Anderson, 114 P.2d 278, 108 Colo. 78.
Okl.—Dolese Bros. v. Tollett, 19 P. 2d 570, 162 Okl. 158.

Excessive damages in general see Damages passim §§ 196-198.

4. U.S.—Hines v. Dahn, C.C.A.Iowa, 267 F. 105, affirmed Dahn v. Davis, 42 S.Ct. 320, 258 U.S. 421, 66 L.Ed. 696.

5. U.S.—United Gas Corp. v. Guillery, C.A.La., 207 F.2d 308.
Ala.—American Mut. Liability Ins. Co. v. Louisville & N. R. Co., 34 So. 2d 474, 250 Ala. 354.

Cal.—Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 881.

Conn.—Stavola v. Palmer, 73 A.2d 831, 136 Conn. 670.

La.—Walton v. Louisiana Power & Light Co., App., 152 So. 760.

Md.—Baltimore Transit Co. v. State, to Use of Schriever, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460.—Em-

ployers Liability Assur. Corp., for its Own Use and to Use of Jones v. Baltimore & O. R. Co., 195 A. 541, 173 Md. 238.

Pa.—Crider v. Hock, 71 Pa.Dist. & Co. 247, 2 Lebanon 270.

S.D.—Western Sur. Co. v. Addy, 42 N.W.2d 660, 78 S.D. 322.

Tex.—Texas Employers' Ins. Ass'n v. Fort Worth & D. C. Ry. Co., Civ. App., 181 S.W.2d 828.

Wis.—Eleason v. Western Cas. & Sur. Co., 35 N.W.2d 301, 254 Wis. 184—Standard Surety & Casualty Co. of New York v. Spewachek, 288 N.W. 758, 233 Wis. 158.

71 C.J. p 1603 note 64.
Right of employer or insurer to remedy of employee or to reimbursement or indemnity in general see supra § 992.

Mental suffering, loss of companionship, maintenance

In action by workmen's compensation insurer on behalf of itself and decedent's widow and minor daughter for death of insured's employee allegedly caused by defendant's negligent operation of truck, insurer was entitled to recover damages, not exceeding statutory amount, proportionate to all injury resulting from death of insured's employee to his widow and minor daughter, including mental suffering and loss of companionship and maintenance.

S.D.—Western Sur. Co. v. Addy, 42 N.W.2d 660, 78 S.D. 322.

Statute construed

Words "damages for which he was liable," in statute stating that an employer, who brings action against third persons allegedly responsible for employee's injuries for which

employer has paid compensation, may recover damages for which he was liable, mean damages for which third person was liable, and not damages for which employer or insurance carrier was liable.

Cal.—State Compensation Ins. Fund v. Matulich, 131 P.2d 21, 55 C.A.2d 528.

Interest

Under statute authorizing employer to recover workmen's compensation paid partly from third-party tortfeasor, where injury was sustained in manner creating liability against tortfeasor, employer could recover legal interest on amount of compensation paid by employer.

La.—Alford v. Louisiana & A. Ry. Co., App., 38 So.2d 258.

Segregation of items of damages

Where employee is injured in course of employment as result of negligence of third person, compensation act comprehends segregation of items of damages which employer is entitled to recover from third person, so as to prevent double recovery from third person.

Cal.—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 C.A.2d 254—Limited Mut. Compensation Ins. Co. v. Billings, 169 P. 2d 673, 74 C.A.2d 881.

Employer guilty of contributory negligence

Where employer's compensation insurer brought action against United States and War Shipping Administration as owners of steamship to establish third-party liability for negligence causing injury to employee and court found that em-

ages,⁶ and that the amount of compensation paid or payable is not the measure of damages.⁷ A recovery by an insurer, however, in its own right and for the benefit of a personal representative of decedent in an action against the third person will bar any further recovery from defendant because of such death.⁸ Some acts which contain a provision for payment over of the excess recovered also contain an express provision permitting the recovery of any amount that the employee or his dependents would have recovered.⁹

Even where the act does not contain a provision giving the employee any potential or fixed interest in the recovery, according to some cases a pro-

vision that the awarding of compensation shall operate as an assignment of a cause of action against a third person is not a provision for indemnification only¹⁰ and the person liable for compensation succeeds to the entire cause of action of the employee or, with limitations, of the dependents of a deceased employee, as discussed supra § 996. Accordingly, the employer or insurer so acquiring the whole cause of action may recover those damages¹¹ and, in the absence of any provision to the contrary, those only,¹² which the employee, or, in event of the death of an employee, the personal representative, could have recovered in an action by him; the compensation paid or payable is not the measure of damages.¹³

employee's injury was due to concurrent negligence of shipowners and employer, admiralty rule of contribution between tort-feasors could be applied although employer was not a party to action; contribution between tort-feasors could not operate against amount recovered by insurer as trustee for injured employee but against only so much of recovery as equaled compensation paid by employer or insurer and other items of expense.

U.S.—Coal Operators Cas. Co. v. U. S., D.C.Pa., 76 F.Supp. 681.

6. Ala.—American Mut. Liability Ins. Co. v. Louisville & N. R. Co., 34 So.2d 474, 250 Ala. 354.

7. Md.—Baltimore Transit Co. v. State, to Use of Schriefer, 39 A.2d 558, 183 Md. 674, 156 A.L.R. 460—Employers Liability Assur. Corp., for Its Own Use and to Use of Jones v. Baltimore & O. R. Co., 195 A. 541, 173 Md. 238.

71 C.J. p 1604 note 65.

Statutory construction

Provision in Virginia workmen's compensation act requiring court in action against third-party tort-feasor to determine amount due employer or insurance carrier for compensation benefits paid is mandatory only when such determination is requested by person who paid compensation and in absence of such request, judgment is not void for failure to make such determination; and provision that in action against tort-feasor, court shall, on petition of "employer" ascertain amount of expenses incurred by "employer" under act and require payment of such expenses out of judgment, uses quoted word as including employer's insurance carrier.

D.C.—Haw v. Liberty Mut. Ins. Co., and to Use of Giacomo, 180 F.2d 18, 86 U.S.App.D.C. 86.

Change of substantive law

Effect of 1947 amendment to Kansas workmen's compensation act giving former employer of deceased em-

ployee right to sue a third person whose alleged negligence caused employee's death for an amount in excess of amount paid by employer under compensation act was to change substantive law and not merely remedy, and not being clearly remedial, it could have only prospective application.

U.S.—Black, Sivals & Bryson v. Sheahan, D.C.Kan., 88 F.Supp. 639.

Kan.—Elam v. Bruenger, 193 P.2d 225, 165 Kan. 31.

8. S.D.—Western Sur. Co. v. Addy, 42 N.W.2d 660, 73 S.D. 322.

Prevention of double recovery as one of purposes of provisions for subrogation of employer see supra § 994.

9. Mo.—Everard v. Woman's Home Companion Reading Club, 122 S.W. 2d 51, 234 Mo.App. 760.

71 C.J. p 1604 note 66.

Not bound by settlement

An employer which was not a party to settlement between employee and third person whose negligence caused employee's injury was not bound by settlement, in bringing an action against third person as provided by subrogation provision of compensation act, with respect to amount recoverable by employer; and third person was chargeable with notice of employer's right of subrogation under act, and third person who settled with employee assumed risk of having to pay additional damages if settlement was made by fraud, accident, or mistake, or was not fair and adequate.

Mo.—Everard v. Woman's Home Companion Reading Club, supra.

Fair compensation

Under statute, amount paid by an employer's insurer to an injured employee under a compensation award is not recoverable from a third-party tort-feasor in addition to fair compensation for injury sustained, but is only to be paid from amount of such fair compensation, provided it is sufficient for that purpose.

N.C.—Rogers v. Southeastern Const. Co., 199 S.E. 41, 214 N.C. 269.

Amount enlarged

Amount originally awarded compensation claimant may not be reduced but may be enlarged by subsequent suit by employer or insurance carrier against tort-feasor.

N.C.—Roberts v. City Ice & Fuel Co., 185 S.E. 438, 210 N.C. 17.

10. N.Y.—Travelers' Ins. Co. v. Brass Goods Mfg. Co., 146 N.E. 377, 239 N.Y. 273, 37 A.L.R. 826.

71 C.J. p 1604 note 67.

11. N.Y.—Calagna v. Sheppard-Pol-lak, Inc., 35 N.Y.S.2d 934, 264 App. Div. 589, appeal dismissed 46 N.E. 2d 355, 289 N.Y. 753.

Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941—Lumber Mut. Cas. Ins. Co. v. William Spencer & Son Corp., 41 N.Y.S.2d 319, 181 Misc. 416—City of Buffalo v. New York Tel. Co., 1 N.Y.S.2d 842, 165 Misc. 904.

71 C.J. p 1604 note 70.

Interest

Where insurance carrier paid compensation to dependents of deceased employee and thereby became subrogated to rights and remedies of dependents, insurer was entitled to have interest added to judgment of damages for employee's death from date of death to entry of judgment.

N.Y.—Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups & Sugars, 54 N.Y.S.2d 451, affirmed 58 N.Y.S.2d 216, 269 App.Div. 931.

71 C.J. p 1604 note 70 [a].

12. N.Y.—Zurich General Accident & Liability Ins. Co. v. Childs Co., 171 N.E. 391, 253 N.Y. 324.

Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941.

13. N.Y.—Calagna v. Sheppard-Pol-lak, Inc., 35 N.Y.S.2d 934, 264 App.

Likewise, a provision giving the employer the right to indemnity from the person liable and to subrogation to the rights of the employee has been so construed as to authorize the employer to recover all that the employee could recover, even in the absence of any specific provision for the disposal of the excess in such case.¹⁴ Where, on an employee's electing to take compensation, "all right" of the employee to recover from the wrongdoer was assigned to the employer, the employer is entitled to recover damages for the employee's pain and suffering up to the time of his death¹⁵ as well as for a diminished earning capacity.¹⁶

The view has been expressed, however, that under a provision for the assignment to insurer of a cause of action in case of election to take compensation, the carrier is limited in its recovery to the amount which it has been compelled to pay under the award of compensation,¹⁷ and even in the absence from the provision of any specific restric-

tive words as to amount, a provision giving the employer the right to enforce the liability of a third person, if compensation is paid, has been treated as a provision for indemnification only,¹⁸ so that the employer is not entitled to recover the damages which the injured employee might recover, but is limited to an amount not in excess of compensation paid in accordance with the act,¹⁹ or is limited to the employer's financial loss.²⁰ By the express terms of some acts, in an action by the employer expenditures which the employer has paid or has become obligated to pay by reason of an injury to, or death of, an employee are to be deemed a part of the damages, including a reasonable attorney's fee to be fixed by the court.²¹

A tort-feasor is not liable to the employer for wages paid to the injured employee during incapacity, where such payments were gratuities and were not made because of any contractual obligation.²² Under a compensation policy providing for

Div. 589, appeal dismissed 46 N.E. 2d 355, 289 N.Y. 753.
Lumber Mut. Cas. Ins. Co. v. William Spencer & Son Corp., 41 N.Y.S.2d 319, 181 Misc. 416.
71 C.J. p 1605 note 72.

14. Iowa.—Southern Surety Co. v. Chicago, St. P., M. & O. Ry. Co., 174 N.W. 329, 187 Iowa 357.

15. Fla.—Haverty Furniture Co. v. McKesson & Robbins, 19 So.2d 59, 154 Fla. 772.

Verdict held excessive
Fla.—Haverty Furniture Co. v. McKesson & Robbins, supra.

16. Fla.—Haverty Furniture Co. v. McKesson & Robbins, supra.

17. Ind.—Liberty Mut. Ins. Co. v. Stitzle, 41 N.E.2d 133, 220 Ind. 180.
Ky.—National Biscuit Co. v. Employers Mut. Liability Ins. Co., 231 S. W.2d 52, 313 Ky. 305.

La.—Benoit v. Hunt Tool Co., App., 56 So.2d 292, followed in Holloway v. Hunt Tool Co., 56 So.2d 296 and Anchor Cas. Co. v. Hunt Tool Co., 56 So.2d 296—deRoode v. Jahncke Service, Inc., App., 52 So.2d 736—Gallennie v. Co-operative Produce Co., App., 199 So. 610.
71 C.J. p 1605 note 74.

State industrial commission
Ariz.—Industrial Commission v. Neville, 119 P.2d 934, 58 Ariz. 325.

State suing on assigned claim of widow of employee could collect only such damages as widow could have recovered up to and not exceeding amount of payments made to widow by state.

Wash.—State v. Starr, 52 P.2d 897, 185 Wash. 18.
71 C.J. p 1605 note 74 [a].

18. Mich.—Grand Rapids Lumber Co. v. Blair, 157 N.W. 29, 190 Mich. 518.
71 C.J. p 1605 note 75.

19. U.S.—Hartford Acc. & Indem. Co. v. Pettibone, D.C.Ind., 56 F. Supp. 328—John Deere Plow Co. v. Ortner, D.C.Mich., 11 F.Supp. 375.
Ind.—Liberty Mut. Ins. Co. v. Stitzle, 41 N.E.2d 133, 220 Ind. 180.
71 C.J. p 1605 note 76.

Statute construed

Provision of compensation act authorizing recovery by employer for compensation awarded employee against person liable for employee's injury would be construed as limiting amount of damages recoverable to amount of compensation for which employer became liable, and not as substituting compensation award for usual measure of damages in tort actions.

Ind.—Liberty Mut. Ins. Co. v. Stitzle, supra.

Where personal representative not party to suit

In employer's action against tort-feasor to recover compensation paid and payable to dependent of employee, where personal representative of employee was not a party, court properly adjudged that employer recover forthwith amount he had paid by way of compensation prior to date of trial and a weekly sum of damages continuing as long as employer was obligated to continue to pay that amount per week by virtue of compensation award, provided total sum of weekly payments and lump sum recovery did not exceed amount of verdict for employer.

Conn.—Stavola v. Palmer, 73 A.2d 831, 136 Conn. 670.

Payment into state treasury

Action of employer under provision of compensation law giving employer or insurer, who is required to make payment into state treasury, a right of action against a third person for reimbursement for any sums so paid, if injury or death of employee was due to actionable act, neglect, or default of third person, is one for reimbursement for money paid out pursuant to statute and is not an action for damages to which comparative negligence statute applies.

Wis.—Wisconsin Power & Light Co. v. Dean, 81 N.W.2d 486, 275 Wis. 236—Employers Mut. Liability Ins. Co. of Wis. v. Mueller, 79 N.W.2d 246, 273 Wis. 616—Western Cas. & Sur. Co. v. Shafter, 285 N.W. 408, 231 Wis. 1.

Prior to enactment of statute, Mich. Comp.Laws, 1954 Supp. § 413.15, it has been held that an employer or insurer in an action against third-party tort-feasor could recover only actual amount of compensation paid.
U.S.—Milan v. Kausch, C.A.Mich., 194 F.2d 263.

John Deere Plow Co. v. Ortner, D.C.Mich., 11 F.Supp. 375.

Mich.—Currier Lumber Co. v. Van Every, 20 N.W.2d 241, 312 Mich. 375.

20. Kan.—Elam v. Bruenger, 193 P. 2d 225, 165 Kan. 31—Krol v. Corryell, 175 P.2d 423, 162 Kan. 198.

21. Cal.—Merino v. Pacific Coast Borax Co., 12 P.2d 453, 124 C.A. 336.

71 C.J. p 1605 note 77.

Expenses of investigation and litigation see infra § 1041 f.

22. Del.—Frank C. Sparks Co. v. Huber Baking Co., 96 A.2d 456, 9 Terry 9.

the payment of all costs taxed against the employer in any legal proceeding defended by insurer, and all expenses incurred by the insurer, it cannot recover the expenses of appealing to the court from a subsequent insurer who was made primarily liable by the judgment appealed from.²³ Where an insurance carrier was required by the compensation law to pay a certain sum into special funds, he may recover such amounts from the tort-feasor, although a dependent had previously recovered from such tort-feasor for wrongful death.²⁴

An employer, whether self-insurer or otherwise, it has been held, cannot recover from any source any sum to reimburse an amount paid under the compensation law to the injured employee, whether the injury results from the negligence of some third person or otherwise.²⁵

Express limitation as to amount. Where the act provides that the employer may recover the damages sustained in an amount not exceeding the aggregate amount of compensation payable under the act by reason of injury or death of the employee, recovery is limited to the damages sustained which in no event can exceed the aggregate amount of compensation payable under the act,²⁶ and these damages include loss of time and other expenses.²⁷ A provision that the employer may collect from the person in whom the legal liability for damages exists the indemnity paid or payable to the injured employee authorizes the recovery by or for the employer of such damages as the injured employee could have recovered for the injury up to and not exceeding the amount of indemnity paid or payable by the employer.²⁸

Contemplation of excess recovery. A direction to the employer to pay over the excess to the employee or the dependents of a deceased employee

does not contemplate that there should always be such excess in an action by the employer against a negligent third person.²⁹

Reimbursement of fund. Where an employee injured by a third person receives compensation from the state insurance fund and assigns to it his cause of action against the third person, it is entitled, in an action against the third person, to be reimbursed not only for what had been paid to the employee at the time of trial, but also for any additional sum it was legally obligated to pay.³⁰

Breach of warranty. The compensation payments made by an employer or insurer pursuant to the requirements of the compensation act are not recoverable by insurer in its action against a third person for breach of warranty.³¹

§ 1040. Beneficial Interest of Employee or Dependent

- a. In general
- b. Deduction from damages of amount of compensation
- c. Amount of compensation paid or payable
- d. Distribution among dependents or next of kin
- e. Expenses of litigation

a. In General

Under some acts the balance of a recovery, after the employer or insurer has been reimbursed or indemnified, should be paid over to, or held for the benefit of, the employee or his dependents or personal representative.

Some acts provide for the payment over to, or for the holding for the benefit of, the employee, his dependents, or personal representative of the balance of a recovery after the employer or insurer has been reimbursed or indemnified,³² and after the

23. U.S.—Standard Surety & Casualty Co. of New York v. Standard Accident Ins. Co., C.C.A.Mo., 104 F. 2d 492, certiorari denied 60 S.Ct. 129, 308 U.S. 598, 84 L.Ed. 500, rehearing denied 60 S.Ct. 259, 308 U.S. 638, 84 L.Ed. 530.

24. N.Y.—Application of Grasso's Estate, 148 N.Y.S.2d 850, 1 Misc.2d 704.

25. Ohio.—Truscon Steel Co. v. Trumbull Cliffs Furnace Co., 166 N.E. 368, 120 Ohio St. 394.
Decker Const. Co. v. Mathis, Com. Pl., 122 N.E.2d 38.

26. Ill.—Wilson Garment Mfg. Co., for Use of Hardware Mut. Cas. Co. v. Edmonds, 38 N.E.2d 534, 312 Ill. App. 317.

71 C.J. p 1605 note 78.

27. Ill.—Wilson Garment Mfg. Co., for Use of Hardware Mut. Cas. Co. v. Edmonds, supra.

28. La.—Benenate v. Brooks, App., 95 So.2d 757—deRoode v. Jahncke Service, Inc., App., 52 So.2d 736—Smith v. McDonough, App., 29 So. 2d 818—Galennie v. Co-operative Produce Co., App., 199 So. 610.

71 C.J. p 1606 note 79.

Interest

Insurer was entitled to recover interest from date of settlement between workman and tort-feasor on amounts paid prior to such settlement, and to interest on amount subsequently paid from date stipulation was filed in insurer's proceeding to intervene in action between workman and tort-feasor.

Tenn.—U. S. Fidelity & Guaranty Co.

v. Elam, 278 S.W.2d 693, 198 Tenn. 194.

29. Mo.—Gayhart v. Monarch Wrecking Co., 49 S.W.2d 265, 226 Mo.App. 1118.

71 C.J. p 1606 note 80.

30. Utah.—Industrial Commission of Utah v. Wasatch Grading Co., 14 P.2d 988, 80 Utah 223.

31. N.J.—U. S. Cas. Co. v. Hercules Powder Co., 72 A.2d 190, 4 N.J. 157.

32. U.S.—Seas Shipping Co. v. Sieracki, Pa., 66 S.Ct. 872, 328 U.S. 85, 90 L.Ed. 1039, rehearing denied 66 S.Ct. 1116, 328 U.S. 878, 90 L.Ed. 1646.

Czaplicki v. The Hoegh Silvercloud, C.A.N.Y., 223 F.2d 189, reversed on other grounds 76 S.Ct. 946, 351 U.S. 525, 100 L.Ed. 1387—

employer has been reimbursed or indemnified out of a recovery by the employee, in general, the employee is entitled to the entire balance of the judgment recovered.³³ Under a provision that, if insurer recovers a sum greater than that paid by it to the employee, a certain fractional share of the excess shall be paid to the employee, the employee

does not take his share of the excess as the owner of the tort claim, but such share is additional compensation granted by the legislature under the act.³⁴ It is sometimes provided that the person entitled to compensation is also entitled in any event to a specified share of any recovery the employer may obtain.³⁵

U. S. Fidelity & Guaranty Co. v. U. S., C.C.A.N.Y., 152 F.2d 46—R. C. Huffman Const. Co. v. East Coast Foundry & Boiler Co., for Use and Benefit of Central Sur. & Ins. Corp., C.C.A.Fla., 112 F.2d 684.

Terminal Shipping Co. v. Branham, D.C.Md., 47 F.Supp. 561, affirmed, C.C.A., Branham v. Terminal Shipping Co., 136 F.2d 655.

Cal.—Limited Mut. Compensation Ins. Co. v. Billings, 169 P.2d 673, 74 C.A.2d 881.

Colo.—Wilson v. Smith, 130 P.2d 1053, 110 Colo. 68—Riss & Co. v. Anderson, 114 P.2d 278, 108 Colo. 78.

D.C.—Moore v. Hechinger, 127 F.2d 746, 75 U.S.App.D.C. 391—Chapman v. Griffith-Consumers Co., 107 F.2d 263, 71 App.D.C. 64.

Fla.—Bituminous Cas. Corp. v. Hawes, 82 So.2d 731.

Ill.—Melohn v. Ganley, 100 N.E.2d 780, 344 Ill.App. 316.

Ky.—Southern Quarries & Contracting Co. v. Hensley, 232 S.W.2d 999, 313 Ky. 640.

Mass.—Furlong v. Cronan, 26 N.E.2d 382, 305 Mass. 464.

Md.—Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp., 65 A.2d 304, 193 Md. 20—Mech v. Storrs, 179 A. 525, 169 Md. 150.

Mo.—Schumacher v. Leslie, 232 S.W. 2d 913, 360 Mo. 1238.

N.Y.—Commissioners of State Ins. Fund v. El. T. Clark Carting Co., 86 N.Y.S.2d 813, 274 App.Div. 559.

Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941.

Adreance v. Lorentzen, 60 N.Y.S. 2d 834.

N.C.—Eledge v. Carolina Power & Light Co., 55 S.E.2d 179, 230 N.C. 584, rehearing denied 57 S.E.2d 306, 231 N.C. 737.

N.D.—Breitwieser v. State, 62 N.W. 2d 900.

Or.—Cary v. Burris, 127 P.2d 126, 169 Or. 24.

S.D.—Western Sur. Co. v. Addy, 42 N.W.2d 660, 73 S.D. 322.

Tex.—Fort Worth Lloyds v. Haygood, 246 S.W.2d 865, 151 Tex. 149—Traders & General Ins. Co. v. West Texas Utilities Co., 165 S.W. 2d 713, 140 Tex. 57—Houston Gas & Fuel Co. v. Perry, 91 S.W.2d 1052, 127 Tex. 102.

101 C.J.S.—39

Wis.—Klotz v. Pfister & Vogel Leather Co., 264 N.W. 495, 220 Wis. 57. 71 C.J. p 1606 note 81.

Trust

In death action in Ohio against Ohio corporation by foreign private insurer in subrogation of rights, under Alabama statute, of a deceased employee's dependents to whom insurer, under insurance permitted by Alabama law, had paid compensation payable by Alabama employer, recovery would be impressed with trust for dependents.

Ohio.—American Mut. Liability Ins. Co. v. U. S. Elec. Tool Co., 9 N.E.2d 157, 55 Ohio App. 107.

Officer in city police department

who was injured in a collision between police ambulance and streetcar and who elected to and did receive compensation under compensation act from state compensation insurance fund was in event of recovery in action by state compensation insurance fund and officer against streetcar motorman and streetcar company entitled to balance of sum recovered after deduction by state compensation insurance fund for amount of compensation.

Colo.—Wilson v. Smith, 130 P.2d 1053, 110 Colo. 68.

Excess as property or chose in action

Right of injured employee to any excess recovery over against third person for injuring employee, above amount of compensation received by employee, is property and a chose in action and is subject to sale or assignment.

Tex.—Foster v. Langston, Civ.App., 170 S.W.2d 250.

Relevant considerations

In determining whether compensation claimant has suffered pecuniary loss as a consequence of deceased employee's death, duties, and obligations incident to relationship between claimant and decedent, as well as words and conduct of decedent manifesting an intention to make future contributions of money or other things of value to claimant, may be relevant.

Md.—Employers Liability Assur. Corp., for Its Own Use and to Use of Jones v. Baltimore & O. R. Co., 195 A. 541, 173 Md. 238.

33. Ill.—Gones v. Fisher, 122 N.E. 95, 286 Ill. 606.

34. Mass.—Jordan v. Orcutt, 181 N. E. 661, 278 Mass. 413. 71 C.J. p 1606 note 83.

35. Mass.—Meehan's Case, 56 N.E.2d 23, 316 Mass. 522—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631.

N.Y.—Employers Mut. Liability Ins. Co. of Wis. v. Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941—Lappin v. National Container Corp., 37 N.Y.S.2d 800, 179 Misc. 109.

Commissioners of State Ins. Fund v. El. T. Clark Carting Co., 83 N.Y.S.2d 783, reversed on other grounds 86 N.Y.S.2d 313, 274 App. Div. 559.

Wis.—Richtman (American Mut. Liability Ins. Co.) v. Honkamp, 13 N. W.2d 597, 245 Wis. 68—Employers Mut. Liability Ins. Co. v. Icke, 274 N.W. 283, 225 Wis. 304.

71 C.J. p 1606 note 84.

Legislative intent

Under compensation law, providing that if assignee recover from tort-feasor by judgment, settlement, or "otherwise" a sum in excess of total amount of compensation awarded to injured employee or dependents, assignee should pay to employee or dependents two thirds of excess, quoted word expresses legislative intent to leave assignee unhampered in method or means to be employed to effect purposes of statute.

N.Y.—Skakandy v. State, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S. 2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886.

Trust

Where injured employee, receiving weekly compensation, recovered judgment against third person, after deducting from judgment recovered, costs and one-third payable to employee and compensation paid to date, employee could be protected as to balance, which did not equal total liability of employer and insurer under compensation award, by directing payment thereof to insurer in trust for self reimbursement, or permitting such amount to remain in trust with clerk of court to be repaid to insurer as compensation payments were made.

Wis.—Richtman (American Mut. Liability Ins. Co.) v. Honkamp, 13 N. W.2d 597, 245 Wis. 68.

The amount recovered from the wrongdoer by the injured employee or by the personal representative of a deceased employee pursuant to a right of election given by some acts is not regarded as compensation under the act.³⁶ Where the insurance carrier is also the liability insurer of the wrongdoer and secures an order in an action for the death of the employee crediting the judgment with the compensation payments due and to become due, it is, on the death of the dependent before the compensation has been entirely paid, liable for the balance to the dependent's administrator, although the compensation act provides that compensation ceases on the death of the dependent.³⁷

Where a statutory assignment has become operative, the carrier is under no duty to prosecute against the third person, and has full authority to compromise and settle, even for a lesser amount than it has paid by way of compensation,³⁸ and the statute does not impose any limitation on this right by reason of the fact that a verdict or even a judgment has been secured.³⁹ The claim may also be settled for the amount of compensation paid,⁴⁰ and thus the right of the employee or his dependents to the excess damages above the compensation paid may be defeated.⁴¹ Where the assignment to the employer is not of the entire cause

of action, as discussed supra § 996, a compromise between the tort-feasor and the employer can affect only the employer's rights,⁴² and cannot affect the tort-feasor's liability to the employee or his dependents above the amount of compensation received;⁴³ and the employer may not release the whole claim against the tort-feasor in advance on consideration that the employer shall be personally relieved from liability for compensation.⁴⁴

Accident benefits. Where an injured employee received compensation and an additional amount for accident benefits, but later recovered a judgment from the third person and reimbursed the commission for the total amount of compensation and accident benefits, the employee is not entitled to repayment by the commission of the amount of the award for accident benefits.⁴⁵

b. Deduction from Damages of Amount of Compensation

The right of the defendant to a credit on the damages recoverable of the amount of compensation received by the plaintiff employee has been recognized.

The right of defendant to a credit on the damages recoverable of the amount of compensation received by the plaintiff employee has been recognized.⁴⁶ In the absence of a provision for subro-

36. U.S.—Jarka Corporation v. Monahan, C.C.A.Mass., 62 F.2d 588. 71 C.J. p 1607 note 86.

37. Ky.—Maryland Casualty Co. v. Huffaker's Adm'r, 13 S.W.2d 260, 227 Ky. 358.

38. N.Y.—Skakandy v. State, 80 N.Y. S.2d 849, 274 App.Div. 153. Corsi v. Jenkins, 66 N.Y.S.2d 98. Assignment of entire or part of cause of action to employer or insurer see supra § 996.

Settlement or release by employer or insurer see supra § 1005.

39. N.Y.—Skakandy v. State, 80 N.Y. S.2d 849, 274 App.Div. 153.

40. U.S.—Melella v. Savage, D.C. Del., 59 F.Supp. 258.

41. U.S.—Melella v. Savage, supra. Del.—Frank C. Sparks Co. v. Huber Baking Co., 96 A.2d 456, 9 Terry 9.

42. N.Y.—United States Fidelity & Guaranty Co. v. Graham & Norton Co., 171 N.E. 903, 254 N.Y. 50—Zirpola v. T. & E. Casselman, Inc., 143 N.E. 222, 237 N.Y. 367.

43. N.Y.—United States Fidelity & Guaranty Co. v. Graham & Norton Co., 171 N.E. 903, 254 N.Y. 50—Zirpola v. T. & E. Casselman, Inc., 143 N.E. 222, 237 N.Y. 367.

Under federal Longshoremen's and Harbor Worker's Compensation Act

(1) Rule of text has been followed.

U.S.—Doleman v. Levine, App.D.C., 55 S.Ct. 741, 295 U.S. 221, 79 L.Ed. 1402.

U. S. Fidelity & Guaranty Co. v. U. S., C.C.A.N.Y., 152 F.2d 46.

(2) Although employee, by accepting compensation, assigns his claim against tort-feasor to employer, assignee has been held to hold it for benefit of employee as far as it is not necessary for his own recoupment and assignee is in effect a trustee, and if he compromises claim he must not, in doing so, entirely disregard employee's interest.

U.S.—U. S. Fidelity & Guaranty Co. v. U. S., supra.

(3) According to other decisions, employer may compromise claim as he sees fit.

U.S.—The Etna, C.C.A.Pa., 138 F.2d 37.

Czaplicki v. The Hoegh Silvercloud, D.C.N.Y., 133 F.Supp. 353.

44. U.S.—U. S. Fidelity & Guaranty Co. v. U. S., C.C.A.N.Y., 152 F.2d 46.

45. Ariz.—Hubbell v. Industrial Commission, 250 P.2d 1000, 74 Ariz. 424.

46. U.S.—Palardy v. U. S., D.C.Pa., 102 F.Supp. 534.

Cal.—Baugh v. Rogers, 148 P.2d 633, 24 C.2d 200, 152 A.L.R. 1043.

Pa.—Smith v. Sanctis, 81 Pa.Dist. & Co. 281, 31 Wash.Co. 6. 71 C.J. p 1607 note 88.

Statute construed

Workmen's compensation statute giving third person right of contribution or indemnity from employer means third person when sued is entitled to deduct amount of compensation award received by employee or force employer to contribute to such extent.

U.S.—Burns v. Carolina Power & Light Co., D.C.S.C., 88 F.Supp. 769.

Agreement

A plaintiff, recovering judgment for wrongful death against decedent's employer and others on jury's verdict after such employer and fellow employee of decedent were brought in as additional defendants by original defendant, on scire facias, cannot recover entire amount of judgment from defendants other than employer while being paid compensation under workmen's compensation agreement with employer, but can collect from such other defendants only amount of judgment with interest, less amount paid under such agreement.

Pa.—Maio v. Fahs, 14 A.2d 105, 339 Pa. 180.

Consolidated action

Plaintiffs, who were injured as result of negligence of employee of

gation or reimbursement of the employer or insurer, however, defendant wrongdoer is not entitled to have the amount of an allowance of compensation under the compensation act deducted from the amount recoverable in an action by an injured employee,⁴⁷ or by the personal representative of a deceased employee.⁴⁸

c. Amount of Compensation Paid or Payable

Under some statutes where a third-party tort-feasor is subject to the compensation act, the liability of such a person is limited to the amount of compensation paid.

A provision that, under certain circumstances, if the employee or the dependents of an employee shall bring an action for the recovery of damages against a person who is subject to the act, other than the employer, the amount thereof, manner in which, and the persons to whom the recovery are payable, shall be as provided in that part of the act which deals with the award of compensation, limits the amount of recovery;⁴⁹ the amount of damages⁵⁰ and the manner of payment⁵¹ are as provided in that part of the act which deals with the award of compensation. While a provision of this character must be construed fairly and broadly with a view to confer the benefits intended,⁵² the mere fact that a third person is an employer of labor is not sufficient to bring him within, and give him the protection of, the above statutory provision⁵³ so as to permit him to claim the benefit of the limited

liability therein provided;⁵⁴ and in order to bring a case within the operation of such provision it must appear that the act complained of arose out of, or had some relation to, the business carried on by defendant.⁵⁵

Such a provision applies only where the third person is also subject to the compensation act,⁵⁶ and a person who is an officer of a corporation subject to the act but who occasioned the injury involved while acting entirely in a private capacity cannot take advantage of the provision.⁵⁷ It is not necessary, however, that defendant should be an employer in order that the provision may apply,⁵⁸ and, if otherwise applicable, the provision applies where plaintiff and defendant are employees of the same employer.⁵⁹

d. Distribution among Dependents or Next of Kin

Where the cause of action for the death of an employee is regarded as one for the benefit of the next of kin as defined by the general statute applicable to death actions, the distribution of the amount recovered is made in accordance with such general statute.

Where the cause of action for the death of an employee is regarded as one for the benefit of next of kin as defined by the general statute applicable to death actions, as discussed supra § 964, the distribution of the amount recovered is made in accordance with such general statute.⁶⁰ Where, how-

defendant, and who received from liability insurer of their employer workmen's compensation payments for loss of wages, were not entitled to recover from defendant for loss of such wages in consolidated actions against defendant by plaintiffs and liability insurer.

La.—Benoit v. Hunt Tool Co., App., 56 So.2d 292, followed in Holloway v. Hunt Tool Co., 56 So.2d 296, and Anchor Cas. Co. v. Hunt Tool Co., 56 So.2d 298.

Fact considered

Court of appeal considered fact that widow of truck driver killed in truck collision was receiving workmen's compensation in computing amount to be awarded to her and her children in action against parties liable for her husband's death. La.—Bergeron v. Saia, App., 37 So. 2d 866, rehearing refused 38 So.2d 415.

47. U.S.—Overland Const. Co. v. Sydnor, C.C.A.Ohio, 70 F.2d 338. 71 C.J. p 1607 note 89.

48. Ohio.—Brunk, Adm'x v. Cleveland, C. C. & St. L. Ry. Co., 20 Ohio N.P.N.S., 360.

49. Minn.—Rasmussen v. George

Benz & Sons, 212 N.W. 20, 168 Minn. 319.

71 C.J. p 1607 note 91.

In Illinois

(1) Provision limiting liability of a third-party tort-feasor who is subject to act has been declared invalid.

Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179.

(2) Under a prior provision in workmen's compensation act for adjustment of compensation where employee was injured by third person, liability of a third person who was under act was limited to amount of compensation paid.

Ill.—Huntoon v. Pritchard, 20 N.E. 2d 53, 371 Ill. 36.

50. Minn.—Behr v. Soth, 212 N.W. 461, 170 Minn. 278. 71 C.J. p 1607 note 92.

51. Minn.—Behr v. Soth, supra—Rasmussen v. George Benz & Sons, 212 N.W. 20, 168 Minn. 319.

52. Minn.—Mahowald v. Thompson-Starrett Co., 158 N.W. 913, 159 N.W. 565, 134 Minn. 113. 71 C.J. p 1607 note 94.

53. Minn.—Podgorski v. Kerwin, 175 N.W. 694, 144 Minn. 313.

54. Minn.—Podgorski v. Kerwin, supra.

55. Minn.—Podgorski v. Kerwin, supra.

71 C.J. p 1608 note 97.

56. Minn.—Hade v. Simmons, 157 N.W. 506, 132 Minn. 344.

57. Minn.—Hade v. Simmons, supra.

71 C.J. p 1608 note 99.

58. Minn.—Behr v. Soth, 212 N.W. 461, 170 Minn. 278.

59. Minn.—Behr v. Soth, supra. 71 C.J. p 1608 note 2.

60. N.Y.—Skakandy v. State, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y.S.2d 849, 274 App.Div. 153, affirmed 34 N.E.2d 804, 298 N.Y. 886.

71 C.J. p 1608 note 4.

Decree determining distribution

Where proceeds of compromise settlement of cause of action for wrongful death were subject to lien for workmen's compensation paid by decedent's self-insured employer, decree determining distributions of proceeds of settlement must provide for payment of proceeds directly to persons entitled thereto as determined by court.

ever, dependents elect to accept compensation, the excess recovery obtained through the settlement by the insurance fund is compensation money awarded pursuant to the compensation law and not unbequeathed assets left in the hands of the dependent to be distributed according to the general law.⁶¹ Some provisions are so construed as to limit the so-called homicide act by withdrawing from the personal representative of a deceased employee the right to pursue the remedy for the death of the employee and by providing for its enforcement for the benefit of the dependents of the deceased employee, as considered supra § 964, and the dependents are entitled to the balance, if any, after the claim of insurer, under its right of subrogation, has been satisfied.⁶²

e. Expenses of Litigation

Under the various statutes the reasonable cost of

collection may be charged against the recovery before the proceeds thereof are distributed.

Where the statute so provides, the reasonable cost of collection should be charged against the proceeds of an action against a third-party tort-feasor before such proceeds are distributed.⁶³ An attorney's fee has been included in computing the reasonable cost of collection,⁶⁴ but it has also been held that neither the employee nor the insurance carrier are entitled to include an attorney's fee in the cost of collection.⁶⁵ Under some statutes the employer is entitled to receive from the recovery the amount of compensation paid without deduction for attorneys' fees or other litigation costs incurred by the employee,⁶⁶ at least where the net amount received by the employee exceeds the amount of compensation paid;⁶⁷ but the employer's reimbursement may not exceed the net amount of the employee's recovery after paying necessary expenses and attorneys' fees.⁶⁸ Under other statutes

N.Y.—In re Lachman's Estate, 147 N. Y.S.2d 769, 208 Misc. 774.

61. N.Y.—Skakandy v. Wreckers & Excavators, 81 N.Y.S.2d 841, 274 App.Div. 220, affirmed 84 N.E.2d 805, 298 N.Y. 888.

62. Ala.—Georgia Casualty Co. v. Haygood, 97 So. 87, 210 Ala. 56.

63. Wis.—Richtman (American Mut. Liability Ins. Co.) v. Honkamp, 13 N.W.2d 597, 245 Wis. 68—Klotz v. Pfister & Vogel Leather Co., 284 N. W. 495, 220 Wis. 57.

71 C.J. p 1606 note 84.
Expenses of employer or his insurance carrier see infra § 1041 f.

Unrecoverable court costs may be included in reasonable costs of collection.

U.S.—Saint Paul-Mercury Indem. Co. v. Lanza, D.C.Ark., 131 F.Supp. 684, affirmed, C.A., St. Paul-Mercury Indem. Co. v. Sisney, 232 F.2d 747.

64. Conn.—Olszewski v. State Emp. Retirement Commission, 130 A.2d 801, 144 Conn. 322.

65. U.S.—St. Paul-Mercury Indem. Co. v. Sisney, C.A.Ark., 232 F.2d 747.

Mont.—Hardware Mut. Cas. Co. v. Butler, 148 P.2d 568, 116 Mont. 73.

66. U.S.—Davis v. U. S. Lines Co., D.C.Pa., 153 F.Supp. 912, affirmed, C.A., 253 F.2d 262—Fontana v. Pennsylvania R. Co., D.C.N.Y., 106 F.Supp. 461, affirmed, C.A., Fontana v. Grace Line, Inc., 205 F.2d 151, certiorari denied Fontana v. Huron Stevedoring Corp., 74 S.Ct. 137, 346 U.S. 886, 98 L.Ed. 390.

Ill.—Manton v. Chicago, R. I. & P. R. Co., 119 N.E.2d 498, 2 Ill.App.2d 191.

N.J.—Fireman's Fund Indem. Co. v. Batts, 78 A.2d 293, 11 N.J.Super. 242.

In Pennsylvania

(1) Under post-1945 subrogation provisions of workmen's compensation act, where dependents of deceased employee received sum in settlement of wrongful death action against third-party tort-feasor, employer and his insurance carrier were entitled to receive out of such sum amount of compensation already paid without reduction by proportionate share of counsel fees for services rendered in obtaining settlement.

Pa.—Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Barco, 103 A.2d 452, 175 Pa.Super. 369 —Kratsas v. Guest, 70 A.2d 672, 166 Pa.Super. 233.

(2) Statute relating to subrogation of employer to rights of employee against third persons when compensable injury was caused by third person, and providing for prorating between employer and employee attorney's fees incurred in obtaining recovery or effecting compromise settlement, was intended to relate only to costs and fees and not to change basic rights, and may properly affect pending actions.

Pa.—Pope v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co., 107 A.2d 191, 176 Pa.Super. 276.

(3) Even under pre-1945 subrogation provisions of workmen's compensation act, sum actually paid by compensation carrier, rather than compensation figure fixed in compensation agreement, would determine proportionate amount of attorney's fees, for services rendered in procuring settlement from third person, with which carrier, recouping com-

pensation payments out of sum received by deceased employee's dependents in settlement of their claim against tort-feasor, could be charged.

Pa.—Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Barco, supra—Conrad v. Aero-Mayflower Transit Co., 33 A.2d 91, 152 Pa.Super. 477.

67. Ky.—Aetna Cas. & Sur. Co. v. Snyder, 291 S.W.2d 14.

N.Y.—Application of Wiltsie, 160 N. Y.S.2d 596, 3 A.D.2d 796, appeal denied In re King's Estate, 163 N.Y. S.2d 936, 3 A.D.2d 960—Kussack v. Ring Const. Corp., 153 N.Y.S.2d 646, 1 A.D.2d 634.

Conflict of laws

Where injured employee was awarded \$1,123.40 in New York compensation proceeding, and award was paid by employer's insurance carrier, and thereafter employee brought action in New Jersey under New York workmen's compensation law against third parties to recover for same injuries, and action was settled for \$3,000, and draft for \$1,123.40 was drawn to order of employee's attorney and carrier to reimburse carrier for compensation payments to employee, New York workmen's compensation law was controlling, and carrier was entitled to draft without deductions.

N.J.—Privitera v. Hillcrest Homes, Inc., 103 A.2d 55, 29 N.J.Super. 591.

68. U.S.—Voris v. Gulf-Tide Stevedores, C.A.Tex., 211 F.2d 549, certiorari denied Gulf-Tide Stevedores v. Voris, 75 S.Ct. 37, 348 U.S. 323, 99 L.Ed. 649—Ocean S. S. Co. of Savannah v. Lumbermens Mut. Cas. Co. of Illinois, C.C.A.N.Y., 126 F. 2d 925.

the employee is entitled to deduct from the amount payable to the employer, who has paid compensation, a pro rata share of reasonable attorneys' fees for making a recovery from a third person,⁶⁹ although the amount of the employee's attorneys' fees which may be charged to the employer may be limited to a certain percentage of the portion of

the recovery which inures to the employer.⁷⁰

Under some provisions, for the purpose of determining a question of an attorney's fee allowance from the proceeds obtained against a third person, it is important to distinguish whether the case is a compromise settlement⁷¹ or a contested case.⁷²

N.Y.—Kussack v. Ring Const. Corp., 153 N.Y.S.2d 646, 1 A.D.2d 634.
In re Applebaum's Estate, 41 N.Y.S.2d 227, 180 Misc. 881.

Legislative intent

Amendments of compensation law providing that an insurance carrier should have a lien on proceeds of any recovery from a third person after deduction of reasonable and necessary expenditures, including attorney's fees incurred in effecting such recovery, shows legislature's clear intent that a reasonable attorney's fee should be deducted from any recovery as a necessary expense in all instances, and that expression "actually collected," as used in compensation law before amendment, should not be construed to mean net amount collected after reduction of all reasonable and necessary expenses including attorney's fees.

N.Y.—Hobbs v. Dairymen's League Co-op. Ass'n, 15 N.Y.S.2d 694, 258 App.Div. 836, appeal denied 17 N.Y.S.2d 860, 258 App.Div. 1002, appeal dismissed 26 N.E.2d 823, 282 N.Y. 710.

69. Minn.—Lang v. William Bros. Boiler & Mfg. Co., Manufacturers & Merchants Indem. Co., Intervenor, 85 N.W.2d 412.

Opposing claim in equitable settlement

Attorneys' fees contemplated are for prosecution of action against third person, and are not for opposing any claim which might be made in connection with equitable settlement on which employer's or carrier's pro rata share is to be based. **Fla.**—Insurance Co. of Tex. v. Rainey, 86 So.2d 447.

Statutory construction

Under Missouri workmen's compensation statute which provides that employer shall pay from his share of recovery a proportionate share of expenses of recovery for injuries sustained by an employee, including reasonable attorney fee whenever recovery against third person is effected by employee or his dependents, word "whenever" means "if" or "in event of" such recovery and date moneys are actually paid over in settlement of third-party action is date "recovery" is "effected."

U.S.—Liberty Mut. Ins. Co. v. Borsari Tank Corp., C.A.N.Y., 248 F.2d 277.

Not voluntary payment

Payment by an employer of his share of recovery expenses is not a "voluntary" payment, and such payment could be asserted in subrogation action against brewery by contractor's compensation insurer which was obligated by law to make payments for deaths of contractor's employees due to brewery's breach of construction contract to provide compensation insurance for contractor's employees.

U.S.—Liberty Mut. Ins. Co. v. Borsari Tank Corp., supra.

Prior law

Under former Missouri statute, an employer who was liable to pay workmen's compensation to dependent of a fatally injured employee was entitled to a subrogation credit out of proceeds of third-party action by employee's dependent without proportionately sharing cost of attorneys' fees.

Mo.—Zasslow v. Service Blue Print Co., App., 288 S.W.2d 377.

70. N.J.—Travelers Ins. Co. v. Lumber Mut. Cas. Ins. Co. of N. Y., 89 A.2d 717, 20 N.J.Super. 265.

Statute construed

Where third-party tort recovery is had by injured workman entitled to compensation for ensuing disability under workmen's compensation act, statutory provision making employer assessable for employer's proportionate share of workman's attorney's fee, but not in excess of thirty-three and one-third percent of portion of recovery which inured to employer, means total compensation liability of employer under act, however much obligation may remain unfulfilled at time of third-party recovery, rather than compensation payments then actually made to workman.

N.J.—Dante v. William T. Gotelli, Inc., 111 A.2d 267, 17 N.J. 264—Caputo v. Best Foods, 111 A.2d 261, 17 N.J. 259.

Waiver

Right of injured employee, who has made recovery from tort-feasor, to recover share of suit expenses and counsel fee incurred in negligence case from subrogated workmen's compensation insurance carrier, should not be taken away unless burden of showing voluntary waiver by employee is sustained by adequate proof; and an agreement by injured

employee to waive his right was not invalid as against public policy, but spirit of legislation imposed duty on one asserting waiver of establishing that it was made voluntarily and with full understanding of its import and consequences; and when injured employee proved that such expenses and fee had been invoked and that compensation carrier had been paid in full its lien for benefit payments made, he made prima facie case for recovery.

N.J.—McDermott v. Standard Acc. Ins. Co., 122 A.2d 371, 40 N.J.Super. 119.

Unjust enrichment

Any mistake or willful avoidance by third-party tort-feasor's insurance carrier of its statutory duty to inquire of workman as to counsel fees and suit expenses in negligence action before paying subrogated compensation insurance carrier full amount of latter's lien for compensation benefits paid did not relieve latter of its burden of sharing such suit expenses and counsel fees, or confer on it any greater right than it was entitled to under statute, and, in event of such mistake or willful avoidance, compensation carrier was unjustly enriched and liable to make restitution.

N.J.—McDermott v. Standard Acc. Ins. Co., supra.

71. U.S.—Hope Flooring & Lumber Co., Commercial Standard Ins. Co., v. Boulden, C.A.Ark., 227 F.2d 303.

Statutory construction

Terms "compromise settlement" and "contested case," as used by Arkansas supreme court with respect to attorney's fee allowance provision of Arkansas workmen's compensation act, relating to deduction of costs of collection from third-party tort-feasor, were not meant to be legalistic absolutes but were intended to have practical and flexible content, as matter of allowing realistic evaluation to be made compositely of incidents of skill, preparation, efforts, relationships, and processes which had entered into production of a result and disposition of a particular situation.

U.S.—Hope Flooring & Lumber Co., Commercial Standard Ins. Co., v. Boulden, supra.

72. U.S.—Hope Flooring & Lumber Co., Commercial Standard Ins. Co. v. Boulden, supra.

Where there is a settlement between an employee and the third person without a suit being contested, the settlement is a voluntary compromise settlement and the compensation commission has a right to approve the allowance of the attorney's fees and other reasonable costs of collection;⁷³ but a deduction from the proceeds of a jury verdict on a claim against the third person, as an allowance for attorneys' fees, may be approved by the court.⁷⁴ Where liability for compensation is admitted by an employer or insurer, no cost of collection may be deducted from the portion of settlement with the third-person wrongdoer except on approval of the compensation commission.⁷⁵

Failure to give notice. Where notice is not given to an employer or insurer of the employee's commencement of an action against a third-party tortfeasor in time to enable him to make a choice whether to join in the action, insurer has been held to be required to pay fees to the employee's attorney.⁷⁶

Lien. An employee's attorney has been held to have a lien for services rendered in a third-party action,⁷⁷ and it has been held that attorneys' fees are to be deducted before the lien of an insur-

ance carrier attaches to the employee's recovery.⁷⁸

§ 1041. Beneficial Interest of Employer or Insurer

- a. In general
- b. Lien
- c. Amount paid in excess of amount due for compensation
- d. Compensation not paid
- e. Medical, nursing, hospital, and burial expenses
- f. Expenses of investigation and litigation

a. In General

An employer or insurer who, under the compensation act, may assert rights in respect of the liability of a third person for injury to, or the death of, an employee, is entitled to reimbursement or recovery for his own benefit to the extent of the amount of compensation paid or of the amount of the award.

Usually the employer or insurer who, under the compensation act, may assert rights in respect of the liability of a third person for injury to, or the death of, an employee, is entitled to reimbursement or recovery for his own benefit to the extent of the amount of compensation paid,⁷⁹ and is entitled

Determination of meaning of term

Under Arkansas law, term "contested case," as used with respect to attorney's fee allowance provision of workmen's compensation act, may have varied meanings depending on context in which term is used, and meaning of term in a particular case must be determined from consideration of all facts and circumstances, particularly what was done and what was required to be done to bring about or to produce judgment or recovery.

U.S.—Hope Flooring & Lumber Co., Commercial Standard Ins. Co. v. Boulden, *supra*.

Reasonableness of attorney's fees

Where as result of diligent efforts of attorneys for injured employee and use of federal rules in taking medical testimony attorneys on contingent fee basis were without an actual trial able to convince third-party tortfeasors that fifteen thousand dollars would be reasonable recovery for death of employee, case was a "contested case," and a federal court has jurisdiction to determine reasonableness of settlement and reasonableness of attorneys' fees without approval of commission.

U.S.—Boulden v. Herring, Commercial Standard Ins. Co., D.C.Ark., 126 F.Supp. 885, affirmed, C.A., Hope Flooring & Lumber Co., Commercial Standard Ins. Co. v. Boulden, 227 F.2d 803.

73. Ark.—Maxcy v. John F. Beasley Const. Co., 306 S.W.2d 849.

74. Ark.—Winfrey & Carlile v. Nickles, 270 S.W.2d 923, 223 Ark. 894.

75. U.S.—Boulden v. Herring, Commercial Standard Ins. Co., D.C.Ark., 126 F.Supp. 885, affirmed, C.A., Hope Flooring & Lumber Co., Commercial Standard Ins. Co. v. Boulden, 227 F.2d 803.

76. Cal.—Quisenberry v. Rullison, 277 P.2d 57, 129 C.A.2d 268.

77. N.Y.—Jackson v. City of New York, 45 N.Y.S.2d 505, 182 Misc. 686—Drago v. Southern Blvd. R. Co., 43 N.Y.S.2d 451, 181 Misc. 917.

78. U.S.—Boulden v. Herring, Commercial Standard Ins. Co., D.C.Ark., 126 F.Supp. 885, affirmed, C.A., Hope Flooring & Lumber Co., Commercial Standard Ins. Co. v. Boulden, 227 F.2d 803.

79. U.S.—Doleman v. Levine, App.D. C., 55 S.Ct. 741, 295 U.S. 221, 79 L. Ed. 1402.

United Gas Corp. v. Guillory, C. A.La., 206 F.2d 49, rehearing denied 207 F.2d 308—Milan v. Kausch, C. A.Mich., 194 F.2d 263—U. S. v. Klein, C.C.A.Iowa, 153 F.2d 55.

Davis v. U. S. Lines Co., D.C. Pa., 153 F.Supp. 912, affirmed, C. A., 253 F.2d 262—Miranda v. City of Galveston, D.C.Tex., 123 F.Supp. 889—Fontana v. Pennsylvania R. Co., D.C.N.Y., 106 F.Supp. 461, affirmed, C.A., Fontana v. Grace Line,

Inc., 205 F.2d 151, certiorari denied Fontana v. Huron Stevedoring Corp., 74 S.Ct. 137, 346 U.S. 886, 98 L.Ed. 390—Moragnel v. McCormack Lines, D.C.Md., 75 F.Supp. 969.

Koepp v. Northwest Freight Lines, D.C.Minn., 10 F.R.D. 524.

Ariz.—Industrial Commission v. Neville, 119 P.2d 934, 58 Ariz. 325. Cal.—Record v. Indemnity Ins. Co. of North America, 229 P.2d 851, 103 C.A.2d 434.

Conn.—Olszewski v. State Emp. Retirement Commission, 130 A.2d 801, 144 Conn. 322.

Cote v. Boudreau, 120 A.2d 82, 20 Conn.Sup. 28.

Fla.—Bituminous Cas. Corp. v. Hawes, 82 So.2d 731.

Ga.—Travelers Ins. Co. v. Georgia Power Co., 181 S.E. 111, 51 Ga.App. 579.

Idaho.—Lebak v. Nelson, 107 P.2d 1054, 62 Idaho 96.

Ill.—Wintersteen v. National Cooperation & Woodenware Co., 197 N.E. 578, 361 Ill. 95.

Melohn v. Ganley, 100 N.E.2d 780, 344 Ill.App. 316—In re Shields' Estate, 51 N.E.2d 816, 320 Ill.App. 522.

Ind.—New York Cent. R. Co. v. Milhiser, 106 N.E.2d 453, 231 Ind. 180, rehearing denied 108 N.E.2d 57, 231 Ind. 180.

Ky.—Southern Quarries & Contracting Co. v. Hensley, 232 S.W.2d 999,

313 Ky. 640—Kentucky & I. Terminal R. Co. v. Whoberry, 204 S.W.2d 590, 305 Ky. 412—Rogers v. Price, 160 S.W.2d 371, 290 Ky. 153.

La.—Todd-Johnson Dry Docks v. City of New Orleans, App., 55 So.2d 650—Alford v. Louisiana & A. Ry. Co., App., 38 So.2d 258.

Mass.—Reidy v. Old Colony Gas Co., 53 N.E.2d 707, 315 Mass. 631.

Minn.—Nyquist v. Batchner, 51 N.W. 2d 566, 235 Minn. 491—Wagner v. City of Duluth, 300 N.W. 820, 211 Minn. 252.

Mo.—Relling v. Russell, 134 S.W.2d 33, 345 Mo. 517.

Sommers v. Hartford Acc. & Indem. Co., App., 277 S.W.2d 645.

Mont.—Hardware Mut. Cas. Co. v. Butler, 148 P.2d 563, 116 Mont. 73.

N.J.—Travelers Ins. Co. v. Lumber Mut. Cas. Ins. Co. of N. Y., 89 A.2d 717, 20 N.J.Super. 265—Dettman v. Goldsmith, 78 A.2d 626, 11 N.J.Super. 571.

Lucas v. U. S. Guarantee Co., 39 A.2d 493, 135 N.J.Eq. 543—Prudential Ins. Co. of America v. Leval, 23 A.2d 908, 131 N.J.Eq. 23—Scheno Trucking Co. v. Bickford, 170 A. 881, 115 N.J.Eq. 380, affirmed 174 A. 548, 116 N.J.Eq. 586.

N.Y.—Smith v. Majestic Iron Works, Inc., 141 N.E.2d 818, 2 N.Y.2d 544, 161 N.Y.S.2d 425.

Giannone v. Smith & Howell Film Service, Inc., 130 N.Y.S.2d 625, 283 App.Div. 976—Simonetti v. Munro Waterproofing Co., 124 N.Y.S.2d 789, 282 App.Div. 899—Rugiero v. Liberty Mut. Ins. Co., 74 N.Y.S.2d 428, 272 App.Div. 1027, reargument denied 75 N.Y.S.2d 525, 273 App.Div. 774, affirmed 83 N.E.2d 467, 298 N.Y. 775—Globe Indemnity Co. v. Atlantic Lighterage Corporation, 278 N.Y.S. 212, 244 App.Div. 97, affirmed 2 N.E.2d 640, 271 N.Y. 234.

Commissioners of State Ins. Fund v. Sims, 67 N.Y.S.2d 665, 187 Misc. 815—In re Applebaum's Estate, 41 N.Y.S.2d 227, 180 Misc. 881.

N.D.—Breitwieser v. State, 62 N.W. 2d 900, stating Minnesota law.

Pa.—Crider v. Hock, 71 Pa.Dist. & Co. 247, 2 Lebanon 270.

Baddorf v. City of Harrisburg, Com.Pl., 65 Dauph.Co. 86—Dotterer v. Nothstein, Com.Pl., 20 Leh. L.J. 188—Fitzpatrick v. Finnegan, Com.Pl., 33 Luz.Leg.Reg. 255—Gaetano v. Dorst, Com.Pl., 89 Pittsb.Leg.J. 371.

Tex.—Fort Worth Lloyds v. Haygood, 246 S.W.2d 865, 151 Tex. 149—Traders & General Ins. Co. v. West Texas Utilities Co., 165 S.W.2d 713, 140 Tex. 57.

Jarbet Co. v. Hengst, Civ.App., 260 S.W.2d 88—Foster v. Langston, Civ.App., 170 S.W.2d 250.

Wis.—Richtman, American Mut. Liability Ins. Co., Intervener, v. Honkamp, 13 N.W.2d 597, 245 Wis. 68

—Klotz v. Pfister & Vogel Leather Co., 264 N.W. 495, 220 Wis. 57, 71 C.J. p 1608 note 8.

Exclusive or concurrent right as between employer or insurers and employee or dependents to sue and recover see supra § 1003.

Necessity for, and sufficiency of, award of, agreement for, or payment of, compensation see supra § 998.

Transfer of part or entire cause of action see supra § 996.

Purpose

(1) Purpose of compensation act provision giving employer right to share in employee's recovery from third person is to protect and reimburse nonnegligent employer for compensation payments made necessary by intervening negligence of third person.

Ill.—F. K. Kettler Co. v. Industrial Commission, 65 N.E.2d 359, 392 Ill. 564—Huntton v. Pritchard, 20 N.E.2d 53, 371 Ill. 36.

(2) Purpose of section of workmen's compensation act providing for indemnification of employer out of proceeds of recovery against third-party wrongdoer for compensation paid injured employee must be ascertained from words employed by legislature.

Ill.—Manion v. Chicago, R. I. & P. R. Co., 119 N.E.2d 498, 2 Ill.App.2d 191.

(3) Primary purpose of provision of New York workmen's compensation law authorizing an employer, who has paid compensation to an injured employee, to secure reimbursement out of proceeds of employee's recovery in action against tort-feasor, is assurance of statutory compensation to employee.

U.S.—Ocean S. S. Co. of Savannah v. Lumbermens Mut. Cas. Co. of Illinois, C.C.A.N.Y., 125 F.2d 925.

Employee statutory trustee

Cal.—Pacific Indem. Co. v. California Elec. Works, 84 P.2d 313, 29 C.A.2d 260, followed in Jacques v. Standard Oil Co. of Cal., 84 P.2d 322, 29 C.A.2d 745.

Mo.—Schumacher v. Leslie, 232 S.W.2d 913, 360 Mo. 1238.

Reynolds v. Grain Belt Mills Co., 78 S.W.2d 124, 229 Mo.App. 380.

Limitation in amount

Insurer which, as subrogee of wife's right of action for death of her husband, sued only for amount it had paid, could recover no more than sued for, although greater award would have been justified if demanded.

La.—Metropolitan Casualty Ins. Co. of New York v. Bowdon, App., 164 So. 464.

Statutes construed

(1) Fact that Longshoremen's Compensation Act does not provide

that employee shall have a right to compensation and damages from third-party tort-feasor is a recognition that employer has a right to reimbursement for his outlay under act out of his employee's adequate recovery from a third person, regardless of whether employer has become assignee of employee's right of action against third person, by paying compensation under an award or has paid compensation without an award.

U.S.—The Etna, C.C.A.Pa., 138 F.2d 37.

N.Y.—American Lumbermens Mut. Cas. Co. of Ill. v. Beschner, 97 N.Y.S.2d 781, 198 Misc. 375.

(2) In construing provision of federal Employees' Compensation Act that if compensation has been paid in whole or in part to an employee, who receives money in satisfaction of liability of third person, employee shall refund to United States amount of compensation which has been paid by United States, court must take words as they are and give to them a common-sense interpretation.

U.S.—U. S. v. Crystal, D.C.Ohio, 39 F.Supp. 220.

(3) Word "compensation" as used in federal Compensation Act, 5 U.S.C.A. §§ 776, 777, must be interpreted as defined in § 790 of act and means money allowance payable to an employee or his dependents and any other benefits paid for out of compensation fund.

U.S.—U. S. v. Bettis, D.C.Cal., 39 F.Supp. 160.

(4) In compensation act authorizing actions against tort-feasor and subrogating insurance carrier to extent of one-half or all of amount received or paid as compensation, words "amount received" and "amount paid" are employed in their usual, customary, and ordinary sense, and "amount" means sum, "received" means actually received, and "paid" means actually paid.

Mont.—Hardware Mut. Cas. Co. v. Butler, 148 P.2d 563, 116 Mont. 73.

(5) Amendment to workmen's compensation law relating to reimbursement to employer or insurance carrier of compensation payments when injured employee recovers for injury from a third-person an amount in excess of compensation award is remedial in nature and must be liberally construed.

N.J.—Travelers Ins. Co. v. Lumber Mut. Cas. Ins. Co. of N. Y., 89 A.2d 717, 20 N.J.Super. 265.

Employer may not be considered as not being tort-feasor to injured employee and yet be considered as joint tort-feasor with another for purpose of deducting compensation received by employee from amount of liability of tort-feasor.

Ga.—Williams Bros. Lumber Co. v.

to such reimbursement or recovery with interest,⁸⁰ or of the amount of the award⁸¹ under the compensation act together with certain expenses, as discussed *infra* subsections e, f, of this section, but may not claim any additional amount.⁸² The right of insurer to reassign to the injured employee any part of the recovery of insurer against a third person over and above what insurer must pay as compensation has, however, been denied in the absence of any statutory provision for such reassignment.⁸³

Even where the compensation act permits the employee or the dependents or personal representative of a deceased employee to recover full damages from the person who caused the injury to, or death of, the employee, as considered *supra* § 1038, the right may be subject to the right of the employer or insurer to indemnification or reimbursement in respect of

the amount to which it is entitled,⁸⁴ especially where the employer or insurer has been made, or has become a party to the action by the employee or dependents.⁸⁵ There is no requirement, however, at least under some statutory provisions, that an employer participate in the third-party action as a condition to reimbursement.⁸⁶

Where, in an action by, or on behalf of, the employer or insurer, damages are recoverable to the same extent as though the action were by the employee or the dependents or personal representative of a deceased employee, as discussed *supra* § 1039, usually the employer or insurer is not entitled to retain the whole recovery for his or its own benefit,⁸⁷ but, according to some cases, in the absence of any provision as to the disposal of the excess insurer is entitled to recover and retain the full damages for

Meisel, 68 S.E.2d 384, 85 Ga.App. 72.

No duty to file claim

Where administrator of deceased employee brought a wrongful death action against tort-feasor and thereafter settled such claim, there was no duty on part of compensation insurer, which had paid compensation to dependent of deceased employee, to file a claim or petition until an attempt was made to make distribution of proceeds of settlement to persons other than compensation insurer.

Ill.—*In re Shields' Estate*, 51 N.E. 2d 816, 320 Ill.App. 522.

80. U.S.—*Miranda v. City of Galveston*, D.C.Tex., 123 F.Supp. 889. N.J.—*Fireman's Fund Indem. Co. v. Batts*, 78 A.2d 293, 11 N.J.Super. 242.

81. Ill.—*Johnson v. Turner*, 49 N.E. 2d 297, 319 Ill.App. 265—*People ex rel. Barrett v. Tull*, 87 N.E.2d 574, 311 Ill.App. 636.

N.J.—*Caputo v. Best Foods, Inc.*, 99 A.2d 668, 27 N.J.Super. 571, cause remanded on other grounds 105 A. 2d 445, 30 N.J.Super. 552, modified on other grounds 111 A.2d 261, 17 N.J. 259.

Werthman v. Prudential Ins. Co. of America, 22 A.2d 197, 19 N.J. Misc. 604.

71 C.J. p 1608 note 9.

Statute construed

Section of Longshoremen's Compensation Act providing that acceptance of compensation "under an award" shall operate as an assignment to employer of right of person entitled to compensation to damages from third person causing compensable injury does not manifest an intent to take away from employer paying compensation without an award his right to reimbursement out of his employee's recovery from

third person, but requires that employer's right to subrogation for compensation payments be recognized apart from assignment, and employer by paying compensation without an award foregoes only right to control employee's right of action against third person.

U.S.—*The Etina*, C.C.A.Pa., 138 F.2d 37.

Grasso v. Lorentzen, D.C.N.Y., 56 F.Supp. 51, affirmed 149 F.2d 127, certiorari denied 66 S.Ct. 57, 326 U.S. 743, 90 L.Ed. 444, rehearing denied 66 S.Ct. 1019, 328 U.S. 878, 90 L.Ed. 1646.

Contingent liability excluded

Under provision of workmen's compensation act pertaining to reimbursement of employer on recovery by employee from tort-feasor, on recovery and receipt of damages by an employee in a tort action and reimbursement of employer, employer was discharged from its liability for further payment of preexisting award and satisfaction of such claim precluded it from serving as basis of an existing unsatisfied judgment, even though there was a contingent liability of employer for additional compensation, incapable of present adjudication.

N.J.—*Caputo v. Best Foods*, 105 A.2d 445, 30 N.J.Super. 552, modified on other grounds 111 A.2d 261, 17 N.J. 259.

82. Fla.—*Arex Indem. Co. v. Radin*, 77 So.2d 839.

71 C.J. p 1609 note 11.

Not party to action

Compensation insurer which was not a party to actions for death of one employee, and injuries to another, brought against third-party tort-feasor, had no right, under law of Texas, to recover by way of reimbursement out of damages awarded against tort-feasor.

U.S.—*Kelley v. Summers*, C.A.Kan., 210 F.2d 665.

83. N.Y.—*Lang v. Brooklyn City R. Co.*, 217 N.Y.S. 277, 217 App.Div. 501.

Assignment of right of action by employer or insurer see *supra* § 1006.

84. Ill.—*Gones v. Fisher*, 122 N.E. 95, 286 Ill. 606.

71 C.J. p 1609 note 13.

Under agreement

Where interest of compensation insurer in judgment in favor of injured workman against third party whose negligence allegedly caused workman's injury was recognized under an agreement entered into subsequent to judgment by workman, attorney representing workman in suit against third party, third party, and compensation insurer, any secret agreement, in violation of such agreement, attempting to extinguish judgment without further payments to compensation insurer would be in derogation of insurer's rights, both under compensation act and under agreement itself.

Tex.—*Snodgrass v. American Surety Co. of New York*, Civ.App., 156 S.W.2d 1004.

85. La.—*Ainsworth v. Henry & Hall*, 79 So.2d 489, 227 La. 379.

Washington v. T. Smith & Son, App., 68 So.2d 337—*Cutrer v. Jones*, App., 9 So.2d 859.

Md.—*Johnson v. Miles*, 53 A.2d 30, 188 Md. 455.

71 C.J. p 1609 note 14.

86. N.Y.—*American Lumbermens Mut. Cas. Co. of Ill. v. Beschner*, 97 N.Y.S.2d 781, 198 Misc. 375.

87. Cal.—*Western Gas & Electric Co. v. Bayside Lumber Co.*, 187 P. 735, 182 C. 140.

71 C.J. p 1609 note 16.

which the third person is liable.⁸⁸ It seems, however, that such rule permitting the retention of the full damages will not be applied to defeat the interest of persons not benefited by the award of compensation, in the recovery in an action for the death of an employee, brought in a state other than that under whose act the award was made.⁸⁹

Where a deceased employee had not filed a claim for compensation and compensation was not paid to him by the employer or insurance carrier, the employer and insurance carrier are not entitled to credit against deficiency death benefits, under the compensation act, the distributive share which a dependent received from the employee's personal estate out of proceeds of a personal injury action.⁹⁰ Likewise, it has been held that an employer or insurer is not entitled to reimbursement where the employer was guilty of contributory negligence.⁹¹ An employer cannot recover for his own benefit the amount paid to the injured employee by the employer's insurer if the substantive right to recover these amounts from the third-party tort-feasor lies with insurer.⁹² The right of the employer to recover compensation paid does not, it has been held, include the right of a municipal corporation to recover amounts paid as a pension to an injured police officer which under the act could be taken in lieu of compensation.⁹³

The right of an employer or insurer to reimburse-

ment because of compensation paid to the employee is purely statutory,⁹⁴ and may be waived⁹⁵ or changed by contract.⁹⁶

Compensation paid pending action. Where the employer is entitled to bring an action for payments of compensation as they become due and are paid, the view has been taken that the recovery is not limited to the amount paid when action was begun,⁹⁷ and that the amount paid up to the time of trial may be recovered.⁹⁸

Legal liability. The compensation act provides for reimbursement only where a third person or corporation is legally liable,⁹⁹ and, accordingly, an employer and insurance carrier are not entitled to reimbursement because of compensation paid to an employee injured by the United States where at the time of the injury the United States had not consented to be sued for torts,¹ and any moneys paid by the United States would be a voluntary contribution from one who was under no legal liability to make it.² Hence, the court could not impress a trust on a nonexistent fund in favor of the employer and insurance carrier.³ The payment of money by a third-party tort-feasor to people who have no legal right of recovery does not give to the insurance carrier the right of subrogation to such funds.⁴

Limitation to expenditures on account of death. Where, prior to the death of the employee, insurer made payments to, and on behalf of, the employee,

88. N.Y.—Travelers' Insa. Co. v. Brass Goods Mfg. Co., 146 N.E. 377, 239 N.Y. 273, 37 A.L.R. 826. 71 C.J. p 1609 note 18.

89. Ill.—Corpus Juris cited in Stix, Baer & Fuller Co. v. Woesthaus Motor Co., 1 N.E.2d 796, 797, 284 Ill.App. 301.

N.H.—Saloshin v. Houle, 155 A. 47, 85 N.H. 126.

90. N.Y.—Schwabacher v. International Salt Co., 70 N.Y.S.2d 370, 272 App.Div. 173, appeal denied 72 N.Y.S.2d 420, 272 App.Div. 965, affirmed 83 N.E.2d 140, 298 N.Y. 726.

91. N.C.—Essick v. City of Lexington, 65 S.E.2d 220, 233 N.C. 600.

92. U.S.—Haslam v. Trailways of New England, D.C.Conn., 59 F. Supp. 441.

93. Mich.—Ford v. Kuehne, 219 N. W. 680, 242 Mich. 428.

94. N.J.—Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, 51 A.2d 218, 139 N.J.Eq. 318—Standard Sur. & Cas. Co. of New York v. Murphy, 19 A. 2d 229, 129 N.J.Eq. 284.

95. Ill.—Weaver v. Hodge, 94 N.E. 2d 297, 406 Ill. 537.

Tex.—Otis Elevator Co. v. Allen, Civ. App., 185 S.W.2d 117, affirmed in part and reversed in part on other grounds 187 S.W.2d 657, 143 Tex. 607.

Effect of assignment of right of action by employer or insurer see supra § 1006.

96. Tex.—Otis Elevator Co. v. Allen, supra—Foster v. Langston, Civ.App., 170 S.W.2d 250.

Not against public policy

Tex.—Otis Elevator Co. v. Allen, Civ. App., 185 S.W.2d 117, affirmed in part and reversed in part on other grounds 187 S.W.2d 657, 143 Tex. 607—Foster v. Langston, Civ.App., 170 S.W.2d 250.

97. Mich.—City of Grand Rapids v. Crocker, 189 N.W. 221, 219 Mich. 178.

98. Mich.—City of Grand Rapids v. Crocker, supra.

99. N.J.—Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, 51 A.2d 218, 139 N.J.Eq. 318—Standard Sur. & Cas. Co. of New York v. Murphy, 19 A.2d 229, 129 N.J.Eq. 284.

Strict construction

Workmen's compensation act relating to reimbursement of employer and insurance carrier because of compensation paid to injured employee where a third person or corporation is liable must be strictly construed.

N.J.—Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, 51 A.2d 218, 139 N.J. Eq. 318.

1. N.J.—Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, supra.

2. N.J.—Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, supra.

N.Y.—Schneider v. Archie Baxter's Flying Service, 44 N.Y.S.2d 541, 266 App.Div. 1037, appeal denied 47 N.Y.S.2d 277, 267 App.Div. 840.

3. N.J.—Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, 51 A.2d 218, 139 N.J.Eq. 318.

4. Tex.—Texas Emp. Ins. Ass'n v. Grimes, 269 S.W.2d 332, 153 Tex. 357.

the court has declined to limit the recovery to expenditures because of death.⁵

b. Lien

An employer or insurance carrier, on paying compensation to the employee or his dependents, usually has a lien on the proceeds of a recovery from a third-party tort-feasor to the extent of the obligations paid by the compensation carrier.

An employer or insurance carrier, on paying compensation to the employee or his dependents, usually has a lien on the proceeds of a recovery from a third-party tort-feasor⁶ to the extent of the obligations paid by the compensation carrier;⁷ and the employer or carrier is entitled to recoup the full

amount of its lien out of the entire amount of the judgment recovered.⁸ The lien is not dependent on the employer's freedom from concurrent negligence contributing to the injury,⁹ and the judgment debtor cannot challenge the lien.¹⁰ A provision conferring a lien is applicable only where the employee takes or intends to take compensation and also desires to bring a third-party action,¹¹ and is applicable to an employer who was compelled to make a payment of increased compensation because the injured employee was a minor and was permitted to work in violation of labor law.¹² Where there is a deficiency between the amount recovered by an injured employee in a third-party action and the amount of the

5. Cal.—Fitzgerald v. Quinn, 21 P. 2d 656, 181 C.A. 457.
71 C.J. p 1610 note 21.

6. Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Quisenberry v. Rulison, 277 P. 2d 57, 129 C.A.2d 268—Record v. Indemnity Ins. Co. of North America, 229 P.2d 851, 103 C.A.2d 434—Pacific Indemnity Co. v. California Electric Works, 84 P.2d 313, 29 C.A.2d 260, followed in Jacques v. Standard Oil Co. of California, 84 P.2d 322, 29 C.A.2d 745—Chase v. Southern Pac. Co., 43 P.2d 1108, 6 C.A.2d 273.

Ill.—Grasse v. Dealer's Transport Co., 106 N.E.2d 124, 412 Ill. 179, certiorari denied Dealer's Transport Co. v. Grasse, 73 S.Ct. 47, 344 U.S. 837, 97 L.Ed. 651.

Philmore v. Stein, 24 N.E.2d 266, 302 Ill.App. 480.

N.H.—Gagne v. Garrison Hill Greenhouses, 109 A.2d 840, 99 N.H. 292.

N.Y.—Moeller v. Associated Hospital Service of Capital Dist., 106 N.E.2d 16, 304 N.Y. 73—Curtin v. City of New York, 39 N.E.2d 903, 287 N.Y. 338, 142 A.L.R. 166.

Calhoun v. West End Brewing Co., 56 N.Y.S.2d 105, 269 App.Div. 398.

Ingham v. State, 158 N.Y.S.2d 557, 4 Misc.2d 1—Havens v. Hartshorn, 55 N.Y.S.2d 698, 184 Misc. 810.

Conflict of laws

Where widows who had claimed workmen's compensation under Missouri law brought actions in New Jersey for damages for wrongful deaths of their deceased husbands who had entered into contracts of employment in Missouri and had been killed in compensable accidents in New Jersey, employer's and insurance carrier's right to recover on statutory lien filed in third-party New Jersey actions and amount of their recovery and conditions attached thereto were governed by Missouri law.

U.S.—Liberty Mut. Ins. Co. v. Bor-

sari Tank Corp., C.A.N.Y., 248 F. 2d 277.

Pro rata share

(1) Under statute providing that notice of payment of compensation and medical benefits by employer or insurance carrier, shall constitute a lien on any judgment recovered by employee from third-party tort-feasor to extent that court may determine to be their pro rata share for compensation benefits paid, words "pro rata," must be construed in their broadest aspect and exact mathematical calculation cannot be applied to determine pro rata share. Fla.—Arex Indem. Co. v. Radin, 72 So.2d 393.

(2) Pro rata share based on equitable distribution is available to all compensation carriers.

Fla.—Insurance Co. of Tex. v. Rainey, 86 So.2d 447.

Not "class suit"

An action by injured employee against negligent third person is not a "class suit" in sense which would permit apportioning litigation expenses between employee and employer or insurance carrier asserting lien against recovery by employee, for compensation, etc., paid.

Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

Pain and suffering

Compensation act, before 1931 amendment, did not contemplate that subrogation of employer to employee's rights against third-party tort-feasor should include damages recovered by employee for pain and suffering, and amendment giving employer lien on employee's entire judgment was not intended to authorize lien on segregated damages for pain and suffering, but amendment merely obligates employee to cause segregation thereof to defeat lien.

Cal.—Dighton v. Martin, 41 P.2d 197, 4 C.A.2d 401.

Two injuries

Where employee, a truck driver, sustained a back injury and subse-

quently while in same employment he suffered further back injury when his truck was struck by another vehicle, and an award of compensation was made and apportioned equally between insurer at time of first injury and insurer at time of second injury, insurer at time of first injury was not entitled to reimbursement or a lien on employee's recovery in third-party action against operator of other vehicle. N.Y.—Giannone v. Smith & Howell Film Service, Inc., 130 N.Y.S.2d 625, 283 App.Div. 976.

7. N.Y.—Moeller v. Associated Hospital Service of Capital Dist., 106 N.E.2d 16, 304 N.Y. 73.

8. Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496—Heaton v. Kerlan, 186 P.2d 857, 27 C.2d 716.

Pacific Emp. Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 299 P.2d 928, 143 C.A.2d 646—Pacific Indemnity Co. v. California Electric Works, 84 P.2d 313, 29 C.A.2d 260, followed in Jacques v. Standard Oil Co. of Cal., 84 P.2d 322, 29 C.A.2d 745.

Employee held statutory trustee

Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

9. Cal.—Pacific Indem. Co. v. California Elec. Works, 84 P.2d 313, 29 C.A.2d 260, followed in Jacques v. Standard Oil Co. of Cal., 84 P.2d 322, 29 C.A.2d 745.

10. Cal.—Pacific Indemnity Co. v. California Electric Works, 84 P.2d 313, 29 C.A.2d 260, followed in Jacques v. Standard Oil Co. of Cal., 84 P.2d 322, 29 C.A.2d 745.

11. N.Y.—Schreiber v. American Employers' Ins. Co., 38 N.Y.S.2d 250, 265 App.Div. 167, affirmed 49 N.E.2d 627, 290 N.Y. 873.

Butchers' Mut. Cas. Co. of New York v. Emerald Cab Corp., 19 N.Y.S.2d 685, 174 Misc. 1.

12. N.Y.—Bogartz v. Astor, 59 N.E.2d 246, 293 N.Y. 563, motion denied 60 N.E.2d 390, 294 N.Y. 664.

lien of the insurance carrier, the carrier must make up the deficiency between the amount actually collected as a result of the third-party action and the compensation awarded.¹³

Under some statutes, the lien may be filed at any time before satisfaction of judgment,¹⁴ and the lien attaches under the statute itself and not by reason of a notice given pursuant to the statute.¹⁵ A statutory lien provided in favor of an employer has been held not to attach to the proceeds of recovery or settlement of an action by the administrator of the employee against third persons to recover damages arising out of the employee's death.¹⁶ The lien on the proceeds of the recovery in a third-party action is wholly unrelated to an additional and statutory cause of action created in a carrier's favor arising from its payment into the special funds,¹⁷ since the payment into the funds is not compensation, as discussed *supra* § 366, and a satisfaction of a lien cannot possibly operate as a release of an entirely independent cause of action.¹⁸

Where the statute so provides, the lien may be satisfied either out of the proceeds of a personal injury¹⁹ or a wrongful death²⁰ action. An employee may not defeat the employer's or insurer's right to the subrogation by suing only for what are claimed to be noncompensable elements of damage.²¹

c. Amount Paid in Excess of Amount Due for Compensation

Where the employer is entitled to recover from a third

person only the amount of an award which the employer is legally compelled to pay to the employee, there should not be included in the recovery an amount paid in excess of the amount legally payable.

Where the employer is entitled to recover from a third person only the amount of an award which the employer is legally compelled to pay to the employee, there should not be included in the recovery an amount paid in excess of the amount legally payable.²² While the view has been taken that a public body is entitled to reimbursement measured by whatever amount is payable under the compensation act and not by the amount of the salary paid to its employee,²³ there is apparently authority for the view that a municipal corporation which is within the compensation act and which is required, independently of the act, to pay to an injured employee or officer his full salary during the period of disability is entitled to reimbursement or recovery to the extent of the full amount paid, although such amount is greater than is required by the compensation act.²⁴

d. Compensation Not Paid

Under some acts the employer or insurer may recover the amount of compensation which he has become liable to pay although not actually paid, or he or it may have a lien for such amount.

Under some acts the employer or insurer may recover the amount of compensation which he has become liable to pay although not actually paid,²⁵

13. N.Y.—Kussack v. Ring Const. Corp., 153 N.Y.S.2d 646, 1 A.D.2d 634.

14. Cal.—Duprey v. Shane, 249 P.2d 8, 39 C.2d 781.

Dighton v. Martin, 41 P.2d 197, 4 C.A.2d 401.

15. N.Y.—Commissioners of State Ins. Fund v. Sims, 67 N.Y.S.2d 665, 187 Misc. 815.

16. N.H.—Gagne v. Garrison Hill Greenhouses, 109 A.2d 840, 99 N.H. 292—Dowd v. Moore, 109 A.2d 838, 99 N.H. 313.

17. N.Y.—Commissioners of State Ins. Fund v. Consolidated Edison Co., 151 N.Y.S.2d 215, 2 Misc.2d 410.

Not entitled to lien

Although incident to death of employee resulting from employment connected injury, insurance carrier was required by workmen's compensation law to pay five hundred dollars into vocational rehabilitation fund, and one thousand five hundred dollars into fund for reopened cases, insurance carrier was not entitled to lien in such amounts against amount widow recovered from per-

sons responsible for decedent's wrongful death.

N.Y.—Application of Grasso's Estate, 148 N.Y.S.2d 850, 1 Misc.2d 704.

18. N.Y.—Commissioners of State Ins. Fund v. Consolidated Edison Co., 151 N.Y.S.2d 215, 2 Misc.2d 410.

19. N.Y.—In re Prezioso's Estate, 109 N.Y.S.2d 288.

20. N.Y.—In re Lachman's Estate, 147 N.Y.S.2d 769, 208 Misc. 774. In re Winikoff's Estate, 116 N.Y.S.2d 262.

Not full reimbursement

Where amount of workmen's compensation paid because of death of employee to widow for herself and for the benefit of a minor child exceeded the amount widow and such child were authorized to receive from proceeds of compromise settlement of cause of action for wrongful death of employee, self-insured employer could not be reimbursed in full for such compensation payments and to discharge lien for such payments, respective shares of all dis-

tributees except a son, who was over sixteen years of age at time of father's death, should be charged with sums received from employer as compensation payments to extent of amount received from compromise settlement.

N.Y.—In re Lachman's Estate, 147 N.Y.S.2d 769, 208 Misc. 774.

21. Ark.—Barth v. Liberty Mut. Ins. Co., 208 S.W.2d 455, 212 Ark. 942.

Mo.—Sommers v. Hartford Acc. & Indem. Co., App., 277 S.W.2d 645.

22. Mich.—Martin Parry Corporation v. Berner, 244 N.W. 180, 259 Mich. 621.

71 C.J. p 1610 note 22.

23. La.—Varnado v. Rex Petroleum Corporation, App., 147 So. 513.

71 C.J. p 1610 note 23.

24. Cal.—Evans v. Los Angeles Ry. Corporation, 14 P.2d 752, 216 C. 495.

71 C.J. p 1610 note 24.

25. N.Y.—Simonetti v. Munro Waterproofing Co., 124 N.Y.S.2d 789, 282 App.Div. 899.

N.D.—Breitwieser v. State, 62 N.W. 2d 900.

but such right may be waived.²⁶ Where an employee died before compensation was paid to him, the right of the employer and insurance carrier to subrogation against the negligent third person has been held to be limited to the recovery in a wrongful death action,²⁷ and not to extend to the recovery by the legal representative under a survival statute.²⁸

Lien. It seems that the lien of an employer under a provision for a lien on the employee's judgment against a third person for the amount of the employer's expenditures for compensation includes, in addition to payments made, payments to be made under an award of compensation,²⁹ but the employer may waive the right to claim a lien for further expenditures by failure timely to assert a claim for

a lien for such expenditures,³⁰ and may estop himself to make a claim for reimbursement for such expenditures by conduct which induced the belief by the employee that no lien for such expenditures would be asserted.³¹

e. Medical, Nursing, Hospital, and Burial Expenses

Medical, hospital, and burial expenses may be regarded as compensation in respect of which the employer or insurer is entitled to recovery or reimbursement under the provisions of some acts.

Medical and hospital expenses have been regarded as compensation in respect of which the employer or insurer is entitled to recovery or reimbursement under the provisions of some acts,³² regardless of whether the suit was for such sums.³³ Where, how-

Wis.—Richtman, American Mut. Liability Ins. Co., Intervener, v. Honkamp, 13 N.W.2d 597, 245 Wis. 68. 71 C.J. p 1610 note 26.
Time to sue and successive actions see supra § 1014.

26. Ill.—Weaver v. Hodge, 94 N.E. 2d 297, 406 Ill. 537.

27. Pa.—Funk v. Buckley & Co., 45 A.2d 918, 158 Pa.Super. 586.

28. Pa.—Funk v. Buckley & Co., supra.

29. N.Y.—Havens v. Hartshorn, 55 N.Y.S.2d 698, 184 Misc. 310. 71 C.J. p 1610 note 27.

Fixing amount

Where compensation is paid injured employee by employer without proceedings in industrial accident commission, court, in ascertaining amount of lien employer is entitled to, against any recovery by employee against a third party for injury, must determine what amount will properly be expended in fulfillment of employer's duty to compensate employee.

Cal.—Heaton v. Kerlan, 166 P.2d 857, 27 C.2d 716.

30. Cal.—Jacobsen v. State Industrial Accident Commission, 299 P. 66, 212 C. 440.

71 C.J. p 1610 note 28.

31. Cal.—Jacobsen v. State Industrial Accident Commission, supra. 71 C.J. p 1610 note 29.

32. U.S.—U. S. v. Klein, C.C.A.Iowa, 153 F.2d 55—The Etna, C.C.A.Pa., 138 F.2d 37—R. C. Huffman Const. Co. v. East Coast Foundry & Boiler Co., for Use and Benefit of Central Sur. & Ins. Corp., C.C.A.Fla., 112 F.2d 684.

Pagano v. Aetna Cas. & Surety Co., D.C.Ill., 137 F.Supp. 295—Fontana v. Pennsylvania R. Co., D.C. N.Y., 106 F.Supp. 461, affirmed, C. A., Fontana v. Grace Line, Inc., 205 F.2d 151, certiorari denied Fontana v. Huron Stevedoring Corp.,

74 S.Ct. 137, 346 U.S. 886, 98 L.Ed. 390—Moragnel v. McCormack Lines, D.C.Md., 75 F.Supp. 969—U. S. v. Crystal, D.C.Ohio, 39 F. Supp. 220—U. S. v. Bettis, D.C. Cal., 39 F.Supp. 160.

Fla.—Haverty Furniture Co. v. McKesson & Robbins, 19 So.2d 59, 154 Fla. 772.

Ga.—Western Union Telegraph Co. v. Smith, 178 S.E. 472, 50 Ga.App. 585.

Ky.—Southern Quarries & Contracting Co. v. Hensley, 232 S.W.2d 999, 813 Ky. 640.

La.—Washington v. T. Smith & Son, App., 68 So.2d 337—deRoode v. Jahncke Service, Inc., App., 52 So. 2d 736—Galeennie v. Co-operative Produce Co., App., 199 So. 610—Williams v. Campbell, App., 185 So. 683.

Md.—Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp., 65 A.2d 304, 193 Md. 20.

Mass.—Meehan's Case, 56 N.E.2d 23, 316 Mass. 522—Bruso's Case, 4 N. E.2d 308, 295 Mass. 531.

Minn.—Dockendorf v. Lakie, 61 N. W.2d 752, 240 Minn. 441.

Mo.—Sommers v. Hartford Acc. & Indem. Co., App., 277 S.W.2d 645—Brouk v. United Wood Heel Co., App., 145 S.W.2d 475.

N.J.—Prudential Ins. Co. of America v. Laval, 23 A.2d 908, 131 N.J. Eq. 23.

N.Y.—Simonetti v. Munro Waterproofing Co., 124 N.Y.S.2d 789, 282 App.Div. 899—Calhoun v. West End Brewing Co., 56 N.Y.S.2d 105, 269 App.Div. 393.

Commissioners of State Ins. Fund v. Sims, 67 N.Y.S.2d 665, 187 Misc. 815—Lappin v. National Container Corp., 37 N.Y.S.2d 800, 179 Misc. 109—Liberty Mut. Ins. Co. v. New York & Queens Electric Light & Power Co., 292 N.Y.S. 439, 161 Misc. 491.

Or.—French v. Christner, 143 P.2d 674, 173 Or. 158.

Tenn.—U. S. Fidelity & Guaranty Co. v. Elam, 278 S.W.2d 693, 193 Tenn. 194—U. S. Fidelity & Guaranty Co. v. Union Ry. Co., 187 S.W. 2d 615, 182 Tenn. 412.

Tex.—Dempster Mill Mfg. Co. v. Wiley, Civ.App., 131 S.W.2d 257, error dismissed, judgment correct. Wis.—Klotz v. Pfister & Vogel Leather Co., 264 N.W. 495, 220 Wis. 57.

71 C.J. p 1611 note 32.

Assignment of employee's right not necessary

U.S.—U. S. v. Bettis, D.C.Cal., 39 F. Supp. 160.

Where city became a self-insurer and complied with statute authorizing it to secure compensation to its employees, employees of city were brought within compensation act for all purposes, and city was therefore entitled to recover against defendant, whose negligence had caused employee's injury for moneys expended for medical and hospital expenses of employee.

N.Y.—City of New York v. Steers & Menke, 4 N.Y.S.2d 292, 167 Misc. 566, affirmed 4 N.Y.S.2d 992, 254 App.Div. 669.

Discretion held not abused

Fla.—Arex Indem. Co. v. Radin, 72 So.2d 393.

Limitation in amount

Compensation act provision that where medical and hospital expenses exceed maximum statutory liability maximum amount should be apportioned among various claimants in accordance with amounts due does not give compensation insurer a right of subrogation to recover medical and hospital expenses paid in excess of statutory maximum.

Tenn.—U. S. Fidelity & Guaranty Co. v. Elam, 278 S.W.2d 693, 193 Tenn. 194.

33. Mo.—Sommers v. Hartford Acc. & Indem. Co., App., 277 S.W.2d 645.

ever, the recovery by an employee does not include medical expenses, the employer and insurer have been held not to be entitled to reimbursement for such expenses.³⁴ Under other acts, the right to recover the expense of medical and hospital treatment has been denied in the absence of an express provision permitting recovery.³⁵

Under some statutes, whether or not specifically provided, burial expenses paid by an employer are regarded as compensation and may be recovered,³⁶ although there is authority stating that the term "compensation" as used in connection with workmen's compensation does not include funeral expenses.³⁷

Lien. It seems that the lien of the employer against the employee's judgment against a person other than the employer for expenditures for compensation, given by some acts, covers expenditures for medical, nursing, and hospital services,³⁸ but the compensation insurer, otherwise entitled to assert the lien, may waive³⁹ or, by its conduct, be

estopped to assert,⁴⁰ its right to a lien for such services. A provision for assignment may include a claim for funeral expenses,⁴¹ and some acts give the employer the right to deduct from the amount recovered the expenses of the last sickness and burial of a deceased employee,⁴² or a lien for funeral allowance.⁴³

f. Expenses of Investigation and Litigation

Under some acts the employer or insurer is entitled to recovery or reimbursement for the costs or expenses of enforcing the liability of the third person.

Although some statutes do not provide for a deduction for counsel fees or other costs of litigation,⁴⁴ under other acts, in addition to compensation paid or payable, the employer or insurer who is entitled to recovery or reimbursement in respect of the liability of the third person for injury to, or the death of, an employee is entitled to recovery or reimbursement for the costs or expenses of enforcing the liability of such person,⁴⁵ such as attorneys' fees;⁴⁶ and, according to some cases, insurer is en-

34. N.Y.—Kushner v. Kingston Knitting Mills, Inc., 156 N.Y.S.2d 474, 2 A.D.2d 394.

35. Del.—Frank C. Sparks Co. v. Huber Baking Co., 96 A.2d 456, 9 Terry 9.
71 C.J. p 1611 note 34.

36. Fla.—Bituminous Cas. Corp. v. Hawes, 82 So.2d 731—Bituminous Cas. Corp. v. Williams, 17 So.2d 98, 154 Fla. 191.

La.—Alford v. Louisiana & A. Ry. Co., App., 38 So.2d 258.

Mich.—Michigan Boiler & Sheet Iron Works, for Use and Benefit of American Mut. Liability Co., v. Dressler, 282 N.W. 222, 286 Mich. 502.

N.Y.—In re Lachman's Estate, 147 N.Y.S.2d 769, 208 Misc. 774.

Pa.—Kugris v. Hammond Coal Co., 101 A.2d 155, 174 Pa.Super. 376—Leach v. Meadow Gold Dairies, Inc., 91 A.2d 293, 171 Pa.Super. 594—Myers v. Philadelphia Daily News, 79 A.2d 787, 168 Pa.Super. 594.

Gastano v. Dorst, Com.Pl., 89 Pittsb.Leg.J. 371.

Funeral and last sickness expenses in general see supra § 276.

37. N.J.—O'Brien v. New Jersey State Highway Dept., 78 A.2d 717, 11 N.J.Super. 548.

38. U.S.—Lundberg v. Prudential S. S. Corp., D.C.N.Y., 102 F.Supp. 115. Cal.—Heaton v. Kerlan, 186 P.2d 857, 27 C.2d 716.

Morris v. Standard Oil Co., 247 P. 583, 77 C.A. 720.

N.H.—Gagne v. Garrison Hill Greenhouses, 109 A.2d 840, 99 N.H. 292.

N.J.—Liberty Mut. Ins. Co. v. Ma-

hie Const. Co., 55 A.2d 907, 26 N.J.Misc. 12.

N.Y.—Application of Grasso's Estate, 148 N.Y.S.2d 850, 1 Misc.2d 704—Havens v. Hartshorn, 55 N.Y.S.2d 698, 184 Misc. 310—Butchers Mut. Cas. Co. of New York v. Emerald Cab Corp., 8 N.Y.S.2d 746, 169 Misc. 749, reversed on other grounds 19 N.Y.S.2d 685, 174 Misc. 1.

Purpose of statute giving workmen's compensation carrier enforceable lien against proceeds of any recovery in claimant's action against third-party tort-feasor is to make someone other than compensation carrier provide hospital and other similar services.

N.Y.—Moeller v. Associated Hospital Service of Capital Dist., 103 N.Y.S.2d 116, 278 App.Div. 723, reversed on other grounds 106 N.E.2d 16, 304 N.Y. 73.

Recovery by employee

Where insurance carrier or employer claims lien for medical expenses paid, injured employee can nevertheless recover such expenses from third-party tort-feasor.

N.Y.—Calhoun v. West End Brewing Co., 56 N.Y.S.2d 105, 269 App.Div. 398.

39. Cal.—Morris v. Standard Oil Co., 247 P. 583, 77 C.A. 720.
71 C.J. p 1611 note 36.

40. Cal.—Morris v. Standard Oil Co., supra.

41. Wis.—Verhelst Const. Co. v. Galles, 235 N.W. 556, 204 Wis. 96.
71 C.J. p 1611 note 38.

42. U.S.—Otis Elevator Co. v. Mil-

ler & Paine, Neb., 240 F. 376, 153 C.C.A. 302.

43. N.Y.—In re Precioso's Estate, 109 N.Y.S.2d 288.

44. Mass.—Meehan's Case, 56 N.E.2d 23, 316 Mass. 522.

Expenses incurred by employee see supra § 1040 e.

Statute construed

Where statute provided that in event employer's insurer, in action against wrongdoer, recovered a sum greater than that paid by insurer to employee, four-fifths of excess should be paid to employee, basis for computing employee's share was sum recovered without deductions for counsel fees or costs of litigation, since supreme judicial court could not read into statute a provision legislature did not include, or assume that deductions other than those provided for were intended; but legislature may authorize deductions for expenses of suit brought by employer's insurer against wrongdoer, in determining basis for computing employee's share of sum recovered in excess of compensation paid by insurer to employee.

Mass.—Meehan's Case, supra.

45. U.S.—Otis Elevator Co. v. Miller & Paine, Neb., 240 F. 376, 153 C.C.A. 302.

Neb.—Bronder v. Otis Elevator Co., 237 N.W. 671, 121 Neb. 581.

46. La.—Washington v. T. Smith & Son, App., 68 So.2d 337—Alford v. Louisiana & A. Ry. Co., App., 38 So.2d 258—Galannie v. Co-operative Produce Co., App., 199 So. 618.

titled to recover expenses and costs of investigation and of prosecution of the action even though the governing provision refers only to an employer.⁴⁷ An employer or his insurer may be entitled to attorneys' fees under the terms of the agreement between the employer and employee.⁴⁸ It has been held, however, that a contingent fee contract between an administrator and his attorneys for prosecution of a wrongful death claim is not binding on an insurer who has intervened to claim a share of proceeds as reimbursement for death benefits paid.⁴⁹

Under some provisions, the allowance of an attorney's fee is within the discretion of the court,⁵⁰ and a provision that any expenditure which the employer has paid or has become liable to pay by reason of the injury or death of an employee shall be deemed a part of the damages, including a reasonable attorney's fee, does not include an attorney's fee in the employer's action against the person liable.⁵¹

§ 1042. Apportionment and Distribution of Amount Recovered and Priorities

The purpose of subrogation provisions of the compensation law is to assure an equitable division of the proceeds of a recovery from a third person between an injured employee or his dependents and the one liable for his compensation, and in general the claim of an employer has priority over the claim of the employee, the dependents, or beneficiaries of a deceased employee.

The purpose of subrogation provisions of compensation law is to assure an equitable division of the proceeds of a recovery in a third-party action between an injured employee or his dependents and the one liable for his compensation.⁵² Where a statute prescribes the manner in which any amount recovered is to be disbursed, one who prosecutes the action is bound by the terms thereof.⁵³ In general the claim of the employer has priority over the claim of the employee or the dependents or beneficiaries of a deceased employee, in respect of a recovery from the third-party wrongdoers.⁵⁴ While the priority of a lien of an employee's attorney over those claims of the person who has paid compensation in respect of a fund recovered by the employee has been recognized,⁵⁵ under some provisions a fund

N.J.—Feinsod v. L. & F. Const. Co., 4 A.2d 692, 17 N.J.Misc. 65—Savitt v. L. & F. Const. Co., 4 A.2d 692, 17 N.J.Misc. 65, certiorari dismissed 8 A.2d 110, 123 N.J.Law 149, modified on other grounds 10 A.2d 728, 124 N.J.Law 173.

N.C.—Lovetta v. Lloyd, 73 S.E.2d 886, 236 N.C. 663.

Ohio.—American Mut. Liability Ins. Co. v. U. S. Electrical Tool Co., 9 N.E.2d 157, 55 Ohio App. 107.

Tex.—Fort Worth Lloyds v. Haygood, 246 S.W.2d 865, 151 Tex. 149—Smith v. Henger, 226 S.W.2d 425, 148 Tex. 456, 20 A.L.R.2d 853—Traders & General Ins. Co. v. West Texas Utilities Co., 165 S.W.2d 713, 140 Tex. 57.

Credit on, or deduction from, compensation award payable to compensation claimant of amount collected from third-person wrongdoer with or without reduction therefrom of attorney's fees and expenses of litigation incurred in obtaining it see supra § 396.

Proof of value of services

In view of fact that services performed by attorneys for compensation were literally performed in presence of, and under eyes of, court, proof of value of services rendered was not necessary before an award of attorney's fees could be made to compensation insurer, but court could, on its own initiative, fix a reasonable attorney's fee.

La.—Washington v. T. Smith & Son, App., 68 So.2d 337.

Reasonable and necessary expenses

Costs and expenses in a third-party action under Longshoremen's and Harbor Workers' Compensation Act, in order to be allowable, must be reasonable and necessary.

U.S.—Voris v. Gulf-Tide Stevedores, C.A.Tex., 211 F.2d 549, certiorari denied Gulf-Tide Stevedores v. Voris, 75 S.Ct. 37, 348 U.S. 823, 99 L.Ed. 649.

Limitation in amount

Amount of attorney's fee, for prosecuting a wrongful death action against third person in name of workman's compensation insurance carrier as subrogee, should be determined by industrial commission in accordance with statute and charged to entire recovery against third person as lawful expense incurred, but amount thereof should not exceed one-third of amount recovered as agreed in contract of employment.

Fla.—Bituminous Cas. Corp. v. Williams, 17 So.2d 98, 154 Fla. 191.

Reasonable fees

(1) Where record disclosed that trial had consumed approximately five days, appellate court before which matter was thereafter argued would, in consideration of record, award intervening compensation insurer sum of two hundred fifty dollars as a reasonable attorney's fee.

La.—Washington v. T. Smith & Son, App., 68 So.2d 337.

(2) In action wherein it was determined that compensation carrier was entitled to reimbursement for

compensation paid and costs incurred, evidence established that reasonable attorney's fees to which carrier would be entitled were ten thousand dollars.

U.S.—Miranda v. City of Galveston, D.C.Tex., 123 F.Supp. 889.

47. U.S.—Workmen's Compensation Exchange v. Chicago, M., St. P. & P. R. Co., D.C.Idaho, 45 F.2d 885. 71 C.J. p 1611 note 42.

Subrogation of insurer in general see supra § 993.

48. U.S.—Miranda v. City of Galveston, D.C.Tex., 123 F.Supp. 889.

49. Ark.—Winfrey & Carlile v. Nickles, 270 S.W.2d 923, 223 Ark. 894.

50. Conn.—Bombanello v. Thom, 133 A. 577, 104 Conn. 504.

71 C.J. p 1611 note 43.

51. Cal.—Merino v. Pacific Coast Borax Co., 12 P.2d 458, 124 C.A. 336.

71 C.J. p 1611 note 44.

52. N.Y.—Caulfield v. Elmhurst Contracting Co., 53 N.Y.S.2d 25, 268 App.Div. 661, affirmed 62 N.E. 2d 237, 294 N.Y. 803.

Skakandy v. State, 66 N.Y.S.2d 99, 188 Misc. 214, affirmed 80 N.Y. S.2d 849, 274 App.Div. 153, affirmed 84 N.E.2d 804, 298 N.Y. 886.

53. N.C.—Penny v. Stone, 45 S.E.2d 362, 228 N.C. 295.

54. Conn.—Bombanello v. Thom, 133 A. 577, 104 Conn. 504.

71 C.J. p 1612 note 45.

55. Mont.—Corpus Juris cited in

which represents the recovery from a third person by the dependents of a deceased employee and which is subject to insurer's right of subrogation is free from a lien of the attorney for dependents where there is no excess to which such dependents are entitled.⁵⁶ Under some acts the balance after deduction of the expenses of the action and the payment to the employer of the compensation paid is paid to the employee or dependent as an advance payment on future installments of compensation,⁵⁷ or, if such remainder is in excess of the amount of future installments, in full discharge of such installments.⁵⁸

Under the Longshoremen's and Harbor Workers' Compensation Act the recovery by the personal representative of a deceased employee against a third person does not result in the postponement of payment of an award of compensation for a deficiency; the due date of the installments is computed from the date of death.⁵⁹ Under the same act the expense of securing recovery from a third person responsible for injuries is a first charge against the

fund recovered itself, whether the fund was created in a suit brought by the employer or one brought by the employee.⁶⁰

Jurisdiction and form of proceeding for apportionment of distribution. The authority of the trial court to make due distribution or apportionment of the amount recovered from the third-party wrongdoer, between the employee and the employer or insurer, has been recognized.⁶¹ A bill of interpleader by the person liable for the death of an employee which seeks a settlement of conflicting claims of the personal representative of a deceased employee, his dependents, and insurer who claims subrogation has been upheld as against an objection that it contained no averment that the death of the employee arose out of, and in the course of, his employment.⁶²

Verdict and judgment. While the propriety of a verdict apportioning the recovery between the person liable for compensation and the dependents of a deceased employee has been recognized,⁶³ it has

Hardware Mut. Cas. Co. v. Butler, 148 P.2d 563, 569, 116 Mont. 73. N.J.—Belfatto v. Massachusetts Bonding & Ins. Co., 121 A.2d 431, 39 N.J.Super. 507.

N.Y.—Jackson v. City of New York, 45 N.Y.S.2d 505, 132 Misc. 686. 71 C.J. p 1612 note 46.

Applicability of statute

Statute vesting court with jurisdiction to determine and enforce attorney's lien was not rendered inapplicable to injured employee's third-party action by statute empowering industrial board to approve attorney's fees under workmen's compensation law; and latter statute applies solely to claims relating to awards for compensation benefits, and authority of board does not extend to third-party actions prosecuted by injured employee under process of court.

N.Y.—Jackson v. City of New York, *supra*.

Determination of fees

Attorney's lien for services rendered in injured employee's third-party action wherein seven thousand five hundred dollars was recovered was fixed at thirty-five per cent of judgment subject to payment of costs.

N.Y.—Jackson v. City of New York, *supra*.

Contingent fee

Where claimant's attorney was requested by employer's insurer to represent insurer and protect its interest in common-law action against third person by claimant, and standard one-third contingent fee was agreed on in writing for trial pro-

ceedings, and attorney recovered a judgment, which was affirmed on appeal, and insurer permitted attorney to proceed with appeal without an early objection, although insurer had knowledge of fact that attorney would claim fifty per cent of judgment as contingent fee, attorney was entitled to fifty per cent of total judgment in accordance with customary fee in such type of case.

U.S.—Pagano v. Aetna Cas. & Sur. Co., D.C.Ill., 137 F.Supp. 295.

56. Ala.—Georgia Casualty Co. v. Haygood, 97 So. 87, 210 Ala. 56.

57. Pa.—Wilson v. Pittsburgh Bridge & Iron Works, 85 Pa.Super. 537.

58. Pa.—Ellis v. Atlantic Refining Co., 163 A. 531, 309 Pa. 287.

71 C.J. p 1612 note 49.

59. U.S.—Jarka Corporation v. Monahan, C.C.A.Mass., 62 F.2d 588.

60. U.S.—Fontana v. Pennsylvania R. Co., D.C.N.Y., 106 F.Supp. 461, affirmed, C.A., Fontana v. Grace Line, Inc., 205 F.2d 151, certiorari denied Fontana v. Huron Stevedoring Corp., 74 S.Ct. 137, 346 U.S. 886, 98 L.Ed. 390.

61. Tex.—Houston Belt & T. Ry. Co. v. Rogers, Civ.App., 44 S.W.2d 420. 71 C.J. p 1612 note 51.

Proper distribution

Under statute providing that in successful actions brought by injured employee against third-party tort-feasor, court is empowered to determine pro rata share of employer or insurance carrier "for compensation benefits paid," trial court erred in considering anticipated ex-

penditures for medical care of employee in arriving at proper distribution of proceeds of judgment; and trial court erred in not charging insurance carrier with its pro rata share of court costs incurred and not taxed against tort-feasor; but court did not err in ordering reimbursement to carrier in full for amounts paid.

Fla.—Baughman v. Aetna Cas. & Sur. Co., 78 So.2d 694.

Sole jurisdiction

Circuit court is vested with sole jurisdiction of making an order of distribution of moneys recovered from negligent third party for death of workman and there is no appeal to deputy commissioner or full commissioner.

Fla.—Cushman Baking Co. v. Hoberman, 74 So.2d 69.

Equitable principles not abused

In action by employee against third-party tort-feasor, order of trial court that insurance carrier pay to employee's attorneys thirty per cent of sum allotted to carrier as pro rata share of judgment, was not an abuse of equitable principles, under statute providing for reasonable fee to be set by judge in a distribution which he may consider equitable, nor was it an impairment of employee's contract with attorneys which provided for fee of forty per cent.

Fla.—Baughman v. Aetna Cas. & Sur. Co., 78 So.2d 694.

62. Ala.—Georgia Casualty Co. v. Haygood, 97 So. 87, 210 Ala. 56. 71 C.J. p 1613 note 52.

63. Md.—Clough & Molloy v. Shilling, 131 A. 343, 149 Md. 189.

been held that it is not necessary that the jury should make an apportionment in the verdict between the employee and the employer or insurer in an action to which the employer or insurer is not a party.⁶⁴ A verdict which awards to the widow and children of a deceased employee the full amount of damages for the death of the employee in an action by an employer for the use of insurer and of the dependents of the deceased employee may be objected to by defendant when in any event the widow and children were not entitled to more than the excess over the award of compensation and the employer's expenses and costs of action.⁶⁵ Under a provision of the act for the apportionment of the damages where the employer and employee join as parties plaintiff, the judgment should provide for the re-

covery by each of the respective amounts to which they are entitled.⁶⁶

Employer's lien on judgment against third person. Under a provision that the court shall, on application, allow as a first lien against a judgment of an employee against a person other than the employer the amount of the employer's expenditures for compensation, only that amount of the judgment which is attributable to elements for which compensation may be awarded under the act is available for the application of the lien.⁶⁷ The authority to make a segregation of the amount of the judgment in respect of compensable and noncompensable elements of damages is vested exclusively in the court in which the judgment is rendered⁶⁸ and not in the state industrial accident commission.⁶⁹

2. PHYSICIAN OR SURGEON GUILTY OF MALPRACTICE

§ 1043. Rights of Employee or His Dependents

An employee or his dependent may, or may not, have a right of action for malpractice against an attending physician or surgeon who aggravates the original injury.

Under a number of the acts making the remedy provided by the act exclusive, and under which any aggravation of the original injury resulting from the negligence of the employer's physician is considered compensable, as discussed supra § 207, it has

been held that the employee's or dependent's right of action for negligence against an attending physician or surgeon is abrogated,⁷⁰ such action not coming within an exception to the act permitting the employee to seek damages from a third person causing the injury.⁷¹ Under such statutes, if the employee has received compensation or has settled with the employer as to the compensation he is to receive, no action may be brought by the employee against the negligent physician.⁷²

64. Md.—Stark v. Gripp, 133 A. 338, 150 Md. 655.

65. Md.—Bethlehem Steel Co. v. Raymond Concrete Pile Co., 118 A. 279, 141 Md. 67.

66. Conn.—Stavola v. Palmer, 73 A. 2d 831, 136 Conn. 670—Mickel v. New England Coal & Coke Co., 47 A.2d 187, 132 Conn. 671, 171 A.L.R. 1001.

71 C.J. p 1613 note 56.

67. Cal.—Jacobsen v. State Industrial Accident Commission, 299 P. 66, 212 C. 440.

71 C.J. p 1613 note 57.

68. Cal.—Jacobsen v. State Industrial Accident Commission, 299 P. 66, 212 C. 440.

71 C.J. p 1613 note 58.

69. Cal.—Zurich General Accident & Liability Ins. Co. v. State Industrial Accident Commission, 299 P. 70, 212 C. 451—Jacobsen v. State Industrial Accident Commission, 299 P. 66, 212 C. 440.

70. W.Va.—Makarenko v. Scott, 55 S.E.2d 88, 132 W.Va. 430.

71 C.J. p 1613 note 64.

Actions for malpractice generally see Physicians and Surgeons §§ 40-67.

Rights against third persons generally see supra § 983 et seq.

Pain and suffering

Injured employee could not maintain common-law action for pain and suffering caused by alleged negligence or carelessness of employer's physician in treating compensable injuries; matter being within exclusive jurisdiction of industrial commission.

Okl.—Alexander v. Von Wedel, 37 P. 2d 252, 169 Okl. 341—Markley v. White, 32 P.2d 716, 168 Okl. 244.

In Illinois

(1) Rule of text has been applied. Ill.—Hayes v. Marshall Field & Co., 115 N.E.2d 99, 351 Ill.App. 329—Spelman v. Pirie, 233 Ill.App. 6.

(2) Where employee, employer, and physician treating employee were all under workmen's compensation act, employee's cause of action against physician for alleged malpractice was transferred to employer and employee did not have legal capacity to sue physician.

Ill.—Duvardo v. Moore, 98 N.E.2d 855, 343 Ill.App. 304.

(3) It has been held, however, that an employee's receipt of compensation under workmen's compensation

act did not bar recovery in employee's subsequent action against physician for malpractice in treating employee's injuries.

Ill.—Huntton v. Pritchard, 20 N.E. 2d 53, 371 Ill. 86.

In New Jersey

(1) Text rule has been applied. N.J.—Burns v. Vilardo, 60 A.2d 94, 26 N.J.Misc. 277.

(2) In a later case, however, it has been held that common-law right of a person wronged to recover against wrongdoer is not negated by recovery of compensation by employee from employer and that this holds true where treating physician allegedly commits a wrong against an injured employee, thereby aggravating his injury.

N.J.—Dettman v. Goldsmith, 78 A.2d 626, 11 N.J.Super. 571.

71. Iowa.—Paine v. Wyatt, 251 N. W. 78, 217 Iowa 1147.

71 C.J. p 1613 note 65.

72. U.S.—Wheeler v. Logan General Hospital, D.C.W.Va., 98 F.Supp. 877.

N.J.—Burns v. Vilardo, 60 A.2d 94, 26 N.J.Misc. 277.

W.Va.—Makarenko v. Scott, 55 S.E. 2d 88, 132 W.Va. 430.

71 C.J. p 1613 note 66.

Under other statutes, however, the right of action for malpractice is not barred,⁷³ even though compensation has been allowed to the employee for the injury⁷⁴ resulting from such malpractice,⁷⁵ since such acceptance of compensation does not constitute an election of an inconsistent remedy.⁷⁶ The rule that an action for malpractice is not barred applies even where an employee of a physician goes to such physician for a treatment of an injury and the physician is negligent,⁷⁷ because in such event,

the employer-doctor is a "person other than the employer" within the meaning of the compensation act.⁷⁸ Where a physician is employed by the employer to furnish medical treatment to the injured employee, such physician is, likewise, a "person other than the employer," within a statute preserving employees' common-law rights against persons other than the employer,⁷⁹ or such physician is a third person against whom the common-law rights of action by employees are preserved.⁸⁰ Un-

73. Cal.—Duprey v. Shane, 249 P. 2d 8, 39 C.2d 781.

Smith v. Coleman, 116 P.2d 133, 46 C.A.2d 507.

Colo.—Froid v. Knowles, 36 P.2d 156, 95 Colo. 223.

Ga.—Gay v. Greene, 84 S.E.2d 847, 91 Ga.App. 78.

Ky.—Morrison v. Carbide & Carbon Chemicals Corporation, 129 S.W. 2d 547, 278 Ky. 746.

Minn.—McGough v. McCarthy Imp. Co., 287 N.W. 857, 206 Minn. 1.

N.Y.—Parchefsky v. Kroil Bros., 275 N.Y.S. 322, 242 App.Div. 346, reversed on other grounds 196 N.E. 308, 267 N.Y. 410, 98 A.L.R. 1387.

Baselice v. Fanoni, 57 N.Y.S.2d 531, 185 Misc. 593—McIntyre v. Stewart, 55 N.Y.S.2d 39, 184 Misc. 610, affirmed 55 N.Y.S.2d 128, 269 App.Div. 731.

Pa.—Howard v. Berg, 86 Pa.Dist. & Co. 358, 101 Pittsb.Leg.J. 439.

Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 518.

71 C.J. p 1614 note 67.

Negligence must be proved

An action against surgeon to recover damages for injury sustained as result of defendant's alleged negligence in performing operation under contract made by plaintiff's employer in compliance with Federal Longshoremen's Compensation Act, was not action in contract, but action for malpractice, wherein alleged negligence must be proved.

Wash.—Rundin v. Sells, 95 P.2d 1023, 1 Wash.2d 332, certiorari denied 60 S.Ct. 1094, 310 U.S. 645, 84 L.Ed. 1412.

Physician not entitled to benefits of act

(1) Physician who had treated employee was stranger to workmen's compensation act, purpose of which was to determine, define, and prescribe relations between employer and employee, and outsider who did not share burdens of act imposed on employer was entitled to none of its benefits.

Colo.—Froid v. Knowles, 36 P.2d 156, 95 Colo. 223.

(2) Statute providing that employee's rights under compensation law shall exclude all other rights or remedies of employee excludes only

employee's other rights against employer, and did not inure to benefit of third-person physician from whom employee sought damages.

Ga.—Gay v. Greene, 84 S.E.2d 847, 91 Ga.App. 78.

Plea of res judicata

In malpractice action by employee against employer, an insurer and physicians, answer alleging that findings and final award by industrial accident commission were bar to action was in effect a plea of res judicata which presented issues of fact for determination of trial court in exercise of jurisdiction.

Cal.—Liberty Mut. Ins. Co. v. Superior Court in and for Los Angeles County, 145 P.2d 344, 62 C.A.2d 601.

Relationship established

Physician designated to treat injured claimant under workmen's compensation law sustains relationship of physician to claimant, with respect to recovery for malpractice.

N.Y.—Greenstein v. Fornell, 257 N.Y.S. 673, 143 Misc. 880.

In Missouri

(1) Text rule is followed.

Mo.—Schumacher v. Leslie, 232 S.W. 2d 913, 360 Mo. 1238.

(2) When physician's malpractice, aggravating employee's injury compensable under workmen's compensation act, is not natural and probable consequence of original injury, chain of causation is broken and malpractice constitutes independent intervening cause, so as to entitle employee to recover damages from physician.

Mo.—Schumacher v. Leslie, supra.

(3) There was earlier authority to contrary.

Mo.—Hanson v. Norton, 103 S.W.2d 1, 340 Mo. 1012.

(4) It was also stated that in workmen's compensation cases, malpractice of physician selected by employer to treat injuries of employee is directly traceable to, and proximate result of, primary injury for which injured workman is being treated, and if injuries are aggravated by physician's negligence, compensation for such aggravation must be procured in proceeding provided

for in statute before compensation commission.

Mo.—Hughes v. Maryland Casualty Co., 76 S.W.2d 1101, 229 Mo.App. 472.

74. Cal.—Duprey v. Shane, 249 P. 2d 8, 39 C.2d 781.

Ga.—Gay v. Greene, 84 S.E.2d 847, 91 Ga.App. 78.

Pa.—Howard v. Berg, 86 Pa.Dist. & Co. 358, 101 Pittsb.Leg.J. 439.

Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 518.

71 C.J. p 1614 note 68.

75. Cal.—Cumming v. Auriemma, 46 P.2d 209, 7 C.A.2d 208.

71 C.J. p 1614 note 68.

Investigators of insurer

Although award to employee for negligent treatment of industrial injury does not bar action against doctor administering such treatment, action could not be maintained against investigators of insurer for death of employee allegedly resulting from their negligent examination of injury, where it was not alleged whether they were acting in medical or lay capacity.

Cal.—Fitzpatrick v. Fidelity & Cas. Co. of New York, 60 P.2d 276, 7 C. 2d 230.

76. N.Y.—Hoehn v. Schenk, 228 N.Y. S. 418, 221 App.Div. 371.

71 C.J. p 1614 note 69.

77. Cal.—Duprey v. Shane, 249 P.2d 8, 39 C.2d 781.

78. Cal.—Duprey v. Shane, supra.

79. Ga.—Gay v. Greene, 84 S.E.2d 847, 91 Ga.App. 78.

80. In Missouri

(1) Text rule is applicable.

Mo.—Schumacher v. Leslie, 232 S.W. 2d 913, 360 Mo. 1238.

(2) It was formerly held that injured employee who had received full compensation for original injury and aggravation of injuries caused by negligent treatment by physician was not entitled to maintain action for malpractice against physician, such physician not being "third person" within provision of workmen's compensation act authorizing action against third persons.

Mo.—Hanson v. Norton, 103 S.W.2d 1, 340 Mo. 1012.

der a statute providing that while insurance remains in force an employer or "those conducting his business" shall be liable to the employee only as specified, an attending physician or surgeon who treats compensatory injuries does not fall within the quoted category.⁸¹ There is authority, however, that where a physician treating an injured employee acts, not as an independent contractor, but as an agent, servant, or employee of insurer or employer, no recovery may be had against him,⁸² and that an action for malpractice will not lie where the service rendered was under the medical aid contract with the employer.⁸³

Under some statutes it has been held that a settlement between plaintiff and his employer or insurer, under a compensation act by which the employer was released from all claims because of the injury to plaintiff, does not operate as a settlement or release of any claim for malpractice which plaintiff might have against the physicians who treated him.⁸⁴

There are acts under which the employee is entitled to elect whether he will proceed under the compensation act or against the physician,⁸⁵ and such election may be made on discovery of the wrong if the employee has exercised ordinary diligence.⁸⁶ Under some of such acts an employee who accepts compensation cannot maintain an action against the physician where the employee fails to make a written demand on the employer to bring the action.⁸⁷ Having elected to accept compensation, under some of the acts, the employee may not thereafter pursue his remedy against the negligent

physician,⁸⁸ but an employee's acceptance of medical services from the employer does not constitute a waiver of his right to sue the physician for malpractice.⁸⁹ In order to constitute such an election as will bar his action against the physician, the compensation paid must have been for the entire injury suffered by the employee,⁹⁰ receipt of compensation for the original injury only not constituting such an election as will bar his right of action against the physician for the additional injury resulting from the physician's negligence.⁹¹

Where the settlement between the employee and his employer paying compensation expressly reserves to the employee any rights against the physician, the acceptance of compensation thereunder will not bar the action by the employee against such physician.⁹² Where an injury resulting from the negligence of the physician is not considered compensable, the right of action of the employee against such physician remains.⁹³ So, also, where the particular injury resulting from the negligence of the physician is not a compensable one, the fact that the employee received compensation therefor will not bar his action against the physician for such injury.⁹⁴

In view of the subrogation provisions of some compensation statutes, a suit by an injured employee against the physician for malpractice for the use of the employer to the extent of the compensation paid in medical expenses incurred by the employer will not lead to the double recovery of damages.⁹⁵ On subrogation of an insurance carrier to the employee's right of action against the physician for malpractice, the employee is entitled to the sum

81. Va.—Fauver v. Bell, 65 S.E.2d 575, 192 Va. 518.

82. U.S.—Martin v. Consolidated Cas. Ins. Co., C.C.A.Tex., 138 F.2d 896.

83. Wash.—Carmichael v. Kirkpatrick, 56 P.2d 686, 185 Wash. 609—Ross v. Erickson Construction Co., 155 P. 153, 89 Wash. 634, L.R.A. 1916F 319.

84. Cal.—Smith v. Coleman, 116 P. 2d 133, 46 C.A.2d 507.
Colo.—Froid v. Knowles, 36 P.2d 156, 95 Colo. 223.

Pa.—Howard v. Berg, 86 Pa. Dist. & Co. 358, 101 Pittsb. Leg. J. 439.
70 C.J. p 1614 note 70.

85. Idaho.—Hancock v. Halliday, 150 P.2d 137, 65 Idaho 645, 154 A. L.R. 295.

Ind.—Seaton v. U. S. Rubber Co., 61 N.E.2d 177, 223 Ind. 404.

Utah.—Baker v. Wycoff, 79 P.2d 77, 95 Utah 199.

71 C.J. p 1614 note 71.

Double recovery avoided

Where right of action is within chain of causation or adds to original injury and becomes part of injury for which compensation may be paid, an option is left employee to maintain action against physician or claim compensation for injury, but he is not entitled to double recovery.

Utah.—Baker v. Wycoff, *supra*.

86. Wis.—Pawlak v. Hayes, 156 N. W. 464, 162 Wis. 503, L.R.A.1917A 392.

71 C.J. p 1614 note 72.

87. Me.—Mitchell v. Peaslee, 63 A. 2d 302, 143 Me. 372.

88. Ind.—Seaton v. U. S. Rubber Co., 61 N.E.2d 177, 223 Ind. 404.
71 C.J. p 1614 note 73.

Part of compensation

Compensation for injury arising from aggravation through negligent treatment of original compensable

injury of employee is within principle that employee cannot, by claiming only part of compensation to which he is entitled, reserve right to proceed at law for damages against third person.

Mass.—McDonald v. Employers' Liability Assur. Corporation, 192 N.E. 608, 288 Mass. 170.

89. Ind.—Seaton v. U. S. Rubber Co., 61 N.E.2d 177, 223 Ind. 404.

90. Mich.—Overbeek v. Nex, 246 N. W. 196, 261 Mich. 156.

91. Mich.—Overbeek v. Nex, *supra*.

92. Tenn.—Keen v. Allison, 60 S. W.2d 158, 166 Tenn. 218.

93. Ky.—Powell v. Galloway, 16 S. W.2d 489, 229 Ky. 37.

71 C.J. p 1615 note 78.

94. Idaho.—Hancock v. Halliday, 171 P.2d 333, 67 Idaho 119.

71 C.J. p 1615 note 80.

95. Ga.—Gay v. Greene, 84 S.E.2d 847, 91 Ga. App. 78.

recovered, if any, over and above the amount of compensation paid by insurer.⁹⁶

Attorney's fees. An injured employee by whom a judgment is recovered against the physician for malpractice has been held not to be entitled to an allowance for the attorney's fees from that part of the judgment on which insurer is granted a lien.⁹⁷

Federal Tort Claims Act. Where a person was injured while on active service, and some time later after his discharge from the service an operation was negligently performed on him at the veterans administration hospital, he may recover from the United States under the tort claims act for the injury resulting from the negligent operation without being required to seek a relief under the compensation act.⁹⁸

§ 1044. Rights of Employer or Insurer as Subrogee or Transferee

Under some acts, on acceptance by the employee of compensation for all injuries suffered by him, his rights against a physician for malpractice pass to the employer or his insurer; and in some jurisdictions the employer or insurer has a lien against the amount of judgment recovered by the employee for the amount of expenditures for compensation.

Under a number of the acts on acceptance by the employee of compensation for all injuries suffered by him, his rights against a physician for malpractice pass to the employer or his insurer;⁹⁹ but the right of recovery has been held to depend on establishing a causal connection between the mal-

practice and injuries sustained in the employment.¹ Where the injury resulting from the negligence of the attending physician is not compensable under the act, as discussed supra § 207, the employer or his insurer paying compensation has no right of action against the physician for the injury to the employee.² Where, however, such injury is compensable, or where the employee is given a right of election to such compensation under the act or damages from the negligent physician, as considered supra § 1043, an employer paying compensation on the election of the employee may maintain an action against the physician,³ in the latter case even for the pain and suffering of the employee resulting from the negligent treatment.⁴

Under a statute, however, providing that the employer shall not be liable in damages for any malpractice of his physician but that any injury resulting from such malpractice shall be deemed part of the injury resulting from the accident and be compensated as such, the employer has no right of action over against such a physician in a suit by any employee against his employer for damages resulting from malpractice.⁵

Lien. Where an employee is paid an award including compensation for negligent treatment and receives a judgment for damages caused by that treatment, in order to avoid a double recovery there is a lien in favor of the employer or his insurance carrier paying compensation against the entire amount of any judgment for any damages recovered

96. Utah.—*Baker v. Wycoff*, 79 P. 2d 77, 95 Utah 199.

Damages in excess of compensation paid

An injured employee permanently disabled, as result of malpractice of physician in treating injury, so that he could never pursue his occupation as a machine man in a mine, and whose left hip was shorter than right one, necessitating use of a cane in walking, was entitled to damages in an amount in excess of amount paid as compensation by insurance carrier under compensation act. Utah.—*Baker v. Wycoff*, 79 P.2d 77, 95 Utah 199.

97. Cal.—*Dodds v. Stellar*, 183 P.2d 658, 30 C.2d 496.

98. U.S.—*Brown v. U. S.*, C.A.N.Y., 209 F.2d 463, affirmed 75 S.Ct. 141, 348 U.S. 110, 99 L.Ed. 139.

99. Cal.—*Dodds v. Stellar*, 183 P.2d 658, 30 C.2d 496.

Mo.—*Schumacher v. Leslie*, 232 S.W. 2d 913, 360 Mo. 1238.

Neb.—*Burks v. Packer*, 9 N.W.2d 471, 143 Neb. 373.

N.Y.—*Parchefsky v. Kroll Bros.*, 196

N.E. 308, 267 N.Y. 410, 98 A.L.R. 1387.

Utah.—*Corpus Juris* cited in *Baker v. Wycoff*, 79 P.2d 77, 81, 95 Utah 199.

71 C.J. p 1615 note 82.

Rights of employer or insurer against third persons see supra § 992 et seq.

Employee as trustee

Where employee of chiropractor received an injury in course of her employment, and thereafter chiropractor was allegedly guilty of malpractice in treatment of employee, causing her further injury, and compensation carrier for chiropractor paid one of employee's medical bills, and employee brought malpractice action against chiropractor, it was proper for judgment against chiropractor to include amount of medical bill paid by chiropractor's compensation carrier, and chiropractor's employee was statutory trustee of that portion of recovery for compensation carrier.

Cal.—*Duprey v. Shane*, 249 P.2d 8, 39 C.2d 781.

Want of written demand

Where employee was not entitled to maintain an action against a physician for alleged malpractice for want of written demand on employer as required by compensation act, and case was reported, employer was not entitled to a judgment on merits but, with pleadings waived, only to a nonsuit.

Me.—*Mitchell v. Peaslee*, 63 A.2d 302, 143 Me. 372.

1. Cal.—*Dodds v. Stellar*, 183 P.2d 658, 30 C.2d 496.

Hartford Accident & Indemnity Co. v. Sprague, 44 P.2d 361, 6 C.A. 2d 61.

2. Ky.—*Powell v. Galloway*, 16 S.W. 2d 489, 229 Ky. 37.

71 C.J. p 1615 note 84.

3. Pa.—*Howard v. Berg*, 86 Pa. Dist. & Co. 358, 101 Pittsb. Leg. J. 439.

71 C.J. p 1615 note 87.

4. Mass.—*Jordan v. Orcutt*, 181 N. E. 661, 279 Mass. 413.

Pain and suffering as compensable see supra § 200.

5. N.C.—*Hoover v. Globe Indemnity Co.*, 163 S.E. 758, 202 N.C. 655.

71 C.J. p 1615 note 89.

by the employee for the amount of expenditures for compensation.⁶ The lien has been held to attach to the entire judgment and it is not necessary to segregate the part thereof that represents damages for pain and suffering.⁷ The fact that the injury resulting from the alleged malpractice was not incurred in the course of employment does not preclude the carrier from filing a lien for any part of the compensation payments paid to the employee, since the aggravation of injuries by the physician's negligence is within the scope of the risk created by the original tortious act.⁸

The full satisfaction of an employee's judgment for malpractice does not require a dismissal of an

appeal of the carrier seeking a lien, on the ground that the controversy has become moot, where the carrier filed his notice of appeal before the satisfaction of the judgment.⁹ Insurer is entitled to a lien on the judgment limited to the amount that he is required to pay because of the malpractice.¹⁰ An insurer is not relieved, by the employee's stipulation that insurer spent a certain sum as compensation payments and a certain sum for medical expenses, of the duty of correlating its lien claim with the damages recoverable in the malpractice action.¹¹

The court and not the industrial commission may have jurisdiction to fix the amount of the lien.¹²

3. PRIVATE INSURERS

§ 1045. Rights and Liabilities

The existence of workmen's compensation does not affect the right of an employee to recover on a private accident insurance policy.

Accident insurance being a matter of private contract, a compensation law providing for payment of fixed compensation to injured employees will not affect their rights to recover on accident policies.¹³

WORKSHOP. It has been said that reference to the dictionaries and lexicons discloses a wide range of definitions for the word "workshop,"¹ and ordinarily the term means a building or room where any work is carried on,² especially a handicraft;³ a building where machinery is employed in the work of fabrication;⁴ a factory or manufacturing establishment;⁵ any place where goods or products are

manufactured or repaired, cleaned or sorted, in whole or in part, for sale or for wages;⁶ a shop or building where a workman, mechanic, or artificer, or a number of such, carry on their work;⁷ any plant, yard, premises, room, or place wherein power-driven machinery is employed and manual labor exercised;⁸ a place where a handicraft is carried on;⁹ a shop where any manufacture or handiwork

6. Cal.—Heaton v. Kerlan, 166 P.2d 857, 27 C.2d 716.

Evidence

Evidence established that an award for compensation which was made over seventeen months after last of a physician's treatment included compensation for disability caused by physician's malpractice with respect to right of insurance carrier which paid compensation award to assert a lien against employee's recovery from physician. Cal.—Heaton v. Kerlan, *supra*.

7. Cal.—Heaton v. Kerlan, *supra*.

8. Cal.—Heaton v. Kerlan, *supra*.

9. Cal.—Heaton v. Kerlan, *supra*.

10. Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496—Heaton v. Kerlan, 166 P.2d 857, 27 C.2d 716.

Employer as wrongdoer

(1) Although, as between employee, employer, and employer's compensation carrier, malpractice of employer in treating employee is compensable, in so far as injury is due to malpractice and not due to original industrial injury, carrier can recover from employer those

portions of amounts paid by carrier to employee that are due to malpractice.

Cal.—Duprey v. Shane, 249 P.2d 8, 39 C.2d 781.

(2) Employer-doctor considered as third person see *supra* § 1043.

11. Cal.—Dodds v. Stellar, 183 P.2d 658, 30 C.2d 496.

12. Cal.—Heaton v. Kerlan, 166 P.2d 857, 27 C.2d 716.

13. Wash.—Ross v. Erickson Constr. Co., 155 P. 153, 89 Wash. 634, L.R. A.1916F 319.

Rights and liabilities of private insurers generally see *supra* §§ 369-377.

1. Idaho.—City of Idaho Falls v. Grimmer, 117 P.2d 461, 464, 63 Idaho 90.

2. Ill.—Board of Education of High School Dist. No. 502 v. Industrial Commission, 134 N.E. 70, 71, 301 Ill. 611.

Mich.—*Corpus Juris* quoted in Fritz v. Christian Reformed City Mission Board, 275 N.W. 499, 500, 281 Mich. 582.

3. Ill.—Board of Education of High

School Dist. No. 502 v. Industrial Commission, 134 N.E. 70, 71, 301 Ill. 611.

4. Idaho.—*Corpus Juris* quoted in City of Idaho Falls v. Grimmer, 117 P.2d 461, 464, 63 Idaho 90. 71 C.J. p 1616 note 9.

5. Idaho.—*Corpus Juris* quoted in City of Idaho Falls v. Grimmer, 117 P.2d 461, 464, 63 Idaho 90. Ill.—Ritchie v. People, 40 N.E. 454, 455, 155 Ill. 98, 46 Am.S.R. 315, 29 L.R.A. 79.

6. Ill.—Ritchie v. People, *supra*.

7. Mich.—Fritz v. Christian Reformed City Mission Board, 275 N.W. 499, 500, 281 Mich. 582.

8. U.S.—Casey v. Barber Asphalt Paving Co., C.C.Wash., 192 F. 432, 436.

71 C.J. p 1616 note 12.

Oregon statutory definition recognized

Mich.—Fritz v. Christian Reformed City Mission Board, 275 N.W. 499, 500, 281 Mich. 582.

9. Cal.—In re Spencer, 86 P. 896, 897, 149 C. 396, 117 Am.S.R. 137, 9 Ann.Cas. 1105.

is carried on,¹⁰ whether for the purpose of repair¹¹ or manufacture;¹² a place where any work or handicraft is carried on;¹³ the place where the work of making, altering, etc., is done upon the product;¹⁴ and the term is also defined to mean a place in which no machinery moved or worked by any mechanical power is used.¹⁵

"Workshop" has been compared with, or distinguished from, "building" see the C.J.S. definition Building, "factory" see Manufactures § 1 c (2), and "mill" see Mills § 1 a.

The word "workshop" has been held to include a variety of establishments, places, or things,¹⁶ such as an airport or flying field,¹⁷ a barber shop,¹⁸ a cleaning and pressing establishment,¹⁹ a gas company's office,²⁰ a grain elevator,²¹ a manual training room,²² and particular property of a railroad.²³

The term has been held not to include an asphalt paving plant,²⁴ a coffee shop,²⁵ an elevator shaft,²⁶ a gasoline filling station,²⁷ a gas system manhole,²⁸ a laundry operated in connection with a nursing home,²⁹ a lot where farm implements were assembled, overhauled, adjusted, and reconditioned,³⁰ an open place on a farm where hay is baled,³¹ a plant for harvesting natural ice,³² a private house or room,³³ the projection room of a motion picture theatre,³⁴ a restaurant and confectionery business,³⁵ a retail meat market,³⁶ and a room for repairing fishing nets.³⁷

It has been said that the ordinary implication of the term "workshop," to the average person, would hardly comprehend a planing mill and various lathes, drills, saws, motors, and other electrically-driven machines and appliances used in a manufacturing plant turning out finished lumber products.³⁸

10. Mich.—Fritz v. Christian Reformed City Mission Board, 275 N. W. 499, 500, 281 Mich. 582. 71 C.J. p 1616 note 16.

11. Ill.—Doherty v. Western United Gas & Electric Co., 188 Ill.App. 494, 501.

Ind.—Hoffmeyer v. State, 77 N.E. 372, 374, 37 Ind.App. 526.

12. Ill.—Doherty v. Western United Gas & Electric Co., 188 Ill.App. 494, 501.

Ind.—Hoffmeyer v. State, 77 N.E. 372, 374, 37 Ind.App. 526.

13. Mich.—Fritz v. Christian Reformed City Mission Board, 275 N. W. 499, 500, 281 Mich. 582.

14. Ill.—Doherty v. Western United Gas & Electric Co., 188 Ill.App. 494, 501.

15. Idaho.—City of Idaho Falls v. Grimmer, 117 P.2d 461, 464, 63 Idaho 90.

16. Repair shops

(1) Establishment repairing calculating and check-writing machines. Wash.—Monroe Calculating Mach. Co. v. Department of Labor and Industries, 120 P.2d 466, 469, 470, 11 Wash.2d 636.

(2) Furniture repair and upholstery shop.

Okl.—Harbour-Longmire-Pace Co. v. State Industrial Commission, 296 P. 456, 457, 147 Okl. 207.

(3) Garage and automobile repair shop.

Okl.—Gooldy v. Lawson, 9 P.2d 22, 24, 155 Okl. 259.

(4) Street railroad repair shop.

Ind.—Hoffmeyer v. State, 77 N.E. 372, 374, 37 Ind.App. 526.

(5) Wagon and automobile repair shop.

Wash.—Wendt v. Industrial Insurance Commission of Washington, 141 P. 311, 315, 80 Wash. 111.

17. Okl.—Ft. Smith Aircraft Co. v. State Industrial Commission, 1 P. 2d 682, 685, 151 Okl. 67.

18. Cal.—In re Spencer, 86 P. 896, 897, 149 C. 396, 402, 117 Am.S.R. 137, 9 Ann.Cas. 1105.

19. Okl.—McClung v. Colclasure, 172 P.2d 623, 624, 197 Okl. 445.

20. Wash.—Gowey v. Seattle Lighting Co., 184 P. 339, 108 Wash. 479.

21. Minn.—Sorseleil v. Red Lake Falls Milling Co., 126 N.W. 903, 905, 111 Minn. 275.

22. Ill.—Board of Education of High School Dist. No. 502 v. Industrial Commission, 134 N.E. 70, 71, 301 Ill. 611.

23. N.C.—Richmond & D. R. Co. v. Commissioners of Alamance County, 76 N.C. 212, 214. 71 C.J. p 1616 note 30.

24. U.S.—Casey v. Barber Asphalt Paving Co., C.C.Wash., 192 F. 432, 435.

25. Okl.—McAlester Corp. v. Wheeler, 239 P.2d 409, 412, 205 Okl. 446.

26. Wash.—Remsnider v. Union Savings & Trust Co., 154 P. 135, 136, 89 Wash. 37, Ann.Cas.1917D 40.

27. Or.—State Indus. Acc. Commission v. Garreau, 267 P.2d 661, 664, 200 Or. 594.

28. Ill.—Doherty v. Western United Gas & Electric Co., 188 Ill.App. 494, 500.

29. Or.—Shaw v. State Indus. Acc. Commission, 254 P.2d 207, 210, 197 Or. 545.

30. Okl.—Kirkpatrick v. Hixon, 202 P.2d 703, 705, 201 Okl. 118.

31. Wyo.—In re Roby, 93 P.2d 940, 942, 54 Wyo. 439.

32. N.J.—Griffith v. Mountain Ice Co., 65 A. 853, 74 N.J.Law 272.

33. Ill.—Board of Education of High School Dist. No. 502 v. Industrial Commission, 134 N.E. 70, 72, 301 Ill. 611.

34. Okl.—Berry v. Johnson, 87 P.2d 1082, 1083, 184 Okl. 471.

35. Or.—Hoffman v. Broadway Hazelwood, 10 P.2d 349, 351, 139 Or. 519.

36. Tex.—Wade v. Taylor, Civ.App., 228 S.W.2d 922, 924.

In Oklahoma

(1) The mere fact that power-driven machinery is used in a retail meat market does not constitute the market a workshop.

Okl.—Hurley v. O'Brien, 137 P.2d 592, 595, 192 Okl. 490—Southwestern Grocery Co. v. State Industrial Commission, 205 P. 929, 931, 85 Okl. 248.

(2) At one time it was held that a retail meat market as such is not a workshop, but it would become a workshop if power-driven machinery were used.

Okl.—Sunshine Food Stores v. Moorehead, 5 P.2d 1066, 1067, 153 Okl. 301.

(3) The holding that a retail meat market which used power-driven machinery was a workshop has been specifically overruled.

Okl.—Hurley v. O'Brien, 137 P.2d 592, 595, 192 Okl. 490.

(4) However, where a retail grocery store is operated together with a butcher shop and a locker room, the establishment has been held to be a workshop.

Okl.—Gates v. Waldon, 223 P.2d 372, 374, 203 Okl. 488.

37. Eng.—Curtis v. Shinner, 21 Cox C.C. 210, 215, 219.

38. Idaho.—City of Idaho Falls v. Grimmer, 117 P.2d 461, 464, 63 Idaho 90.

WORLDLY. The term has been said to be of universal application to temporal matters;³⁹ and it has been defined as meaning concerned with the enjoyments of this present existence;⁴⁰ devoted to, interested in, or connected with, this present life, and its cares, advantages, or pleasures, to the exclusion of those of a future life;⁴¹ devoted to temporal, and neglectful of eternal, things;⁴² earthly;⁴³ not religious,⁴⁴ spiritual,⁴⁵ or holy;⁴⁶ of or pertaining to the world or present state of existence;⁴⁷ pertaining to the world;⁴⁸ secular⁴⁹ or lay, as opposed to churchly or monastic;⁵⁰ temporal.⁵¹

"Worldly" has been held to be synonymous with "temporal" see the C.J.S. definition Temporal, and it has been contrasted with "religious" see the C.J.S. definition "Religious."

Phrases employing the word "worldly" are set out in the note.⁵²

WORMGUT. A small sac taken from the silkworm in Spain, and stretched, dried, and cleaned.⁵³

WORN. See the C.J.S. definition Wear, ante.

WORRY. As a noun, the word "worry" means mental pain and suffering.⁵⁴

As a verb, "worry" means to harass or beset with importunity, or with care and anxiety; to vex; torment; fret; trouble; plague.⁵⁵ Also to run after, to chase, to bark at.⁵⁶

The right to kill a dog detected in the act of worrying domestic animals is treated in Animals § 219.

WORSHIP. It has been said that the word "worship" has not been technically defined by the courts,⁵⁷ but that it has a well-known and well-defined meaning in common use among the people.⁵⁸

As used in its religious sense, "worship," as a noun is defined as meaning the act of paying divine honors to a deity⁵⁹ or to the Supreme Being;⁶⁰ adoration;⁶¹ adoration paid to God or a being

39. Ohio.—Anderson v. Gibson, 157 N.E. 377, 379, 116 Ohio St. 684, 54 A.L.R. 92.

40. Pa.—Commonwealth v. American Baseball Club of Philadelphia, 138 A. 497, 499, 290 Pa. 136, 53 A.L.R. 1027.

41. Ohio.—Anderson v. Gibson, 157 N.E. 377, 379, 116 Ohio St. 684, 54 A.L.R. 92.

42. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Ass'n, 8 Pa. Dist. & Co. 77, 84.

43. Ohio.—Anderson v. Gibson, 157 N.E. 377, 379, 116 Ohio St. 684, 54 A.L.R. 92.

44. Pa.—Commonwealth v. American Baseball Club of Philadelphia, 138 A. 497, 499, 290 Pa. 136, 53 A.L.R. 1027.

71 C.J. p 1617 note 69.

45. Pa.—Commonwealth v. American Baseball Club of Philadelphia, supra.
Commonwealth v. Sesqui-Centennial Exhibition Ass'n, 8 Pa. Dist. & Co. 77, 84.

46. Pa.—Commonwealth v. American Baseball Club of Philadelphia, 138 A. 497, 499, 290 Pa. 136, 53 A.L.R. 1027.

47. Ohio.—Anderson v. Gibson, 157 N.E. 377, 379, 116 Ohio St. 684, 691, 54 A.L.R. 92.

48. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Ass'n, 8 Pa. Dist. & Co. 77, 84.

49. Pa.—Commonwealth v. American Baseball Club of Philadelphia, 138 A. 497, 499, 290 Pa. 136, 53 A.L.R. 1027.

Commonwealth v. Sesqui-Centennial Exhibition Ass'n, 8 Pa. Dist. & Co. 77, 84.

50. Pa.—Commonwealth v. Sesqui-Centennial Exhibition Ass'n, supra.

51. Ohio.—Anderson v. Gibson, 157 N.E. 377, 379, 116 Ohio St. 684, 54 A.L.R. 92.

52. Worldly goods

(1) The term has been held to include all kinds of property, both real and personal.

Ky.—Ford's Adm'r v. Wade's Adm'r, 45 S.W.2d 818, 820, 242 Ky. 18.

N.J.—Torrey v. Torrey, 59 A. 450, 451, 70 N.J.Law 772.

(2) The term has been held to mean personalty only.

Mo.—Farish v. Cook, 78 Mo. 212, 220, 47 Am.R. 107.

Other phrases

(1) "Worldly employment or business" as prohibited by Sunday laws see Sunday § 6.

(2) "Worldly substance" is defined to mean whatever can be turned to value.

U.S.—The Alpena, D.C.Mich., 7 F. 361, 362.

Eng.—Hogan v. Jackson, Cowp. 299, 304, 98 Reprint 1096.

As synonymous with "effects" see the C.J.S. definition Effect.

(3) Additional phrases employing the word and of which more recent adjudications have not been found see 71 C.J. p 1618 notes 80-88.

53. U.S.—Davies v. U. S., C.C.N.Y., 115 F. 232.

54. Fla.—Baldwin v. Baldwin, 9 So. 2d 717, 721, 151 Fla. 341.

Major affliction

It is one of the major afflictions which result in the destruction of both mental and physical health; it affects every vital organ and probably results in more mental and physical wrecks than any other one affliction.

Fla.—Baldwin v. Baldwin, supra.

55. Webster New Int.D.

56. Colo.—Falling v. People, 98 P. 2d 865, 867, 105 Colo. 399.

N.J.—Bunn v. Shaw, 69 A.2d 576, 577, 3 N.J. 195, 15 A.L.R.2d 574.

Wis.—Bass v. Nofsinger, 269 N.W. 303, 304, 222 Wis. 480.

71 C.J. p 1618 note 99.

Phrases employing the word and of which more recent adjudications have not been found see 71 C.J. p 1618 notes 1-4.

57. Ill.—People v. Board of Education of Dist. 24, 92 N.E. 251, 252, 245 Ill. 334, 29 L.R.A.N.S., 442, 19 Ann.Cas. 220.

Phrases employing the word "worship" and of which more recent adjudications have not been found see 71 C.J. p 1619 notes 28-36, 45, 46.

58. N.Y.—People v. Smith, 180 N.E. 891, 259 N.Y. 48.

59. N.Y.—People v. Smith, 255 N.Y. S. 528, 531, 142 Misc. 769.

60. Ill.—In re Walker, 66 N.E. 144, 146, 200 Ill. 566.

71 C.J. p 1618 note 9.

61. Ill.—People v. Board of Education of Dist. 24, 92 N.E. 251, 252, 245 Ill. 334, 29 L.R.A.N.S., 442, 19 Ann.Cas. 220.

viewed as God;⁶² any form of religious service showing reverence for the Divine Being;⁶³ a religious act of reverence;⁶⁴ exhortation to obedience to, or the following of, the mandates of a Divine Being;⁶⁵ honor and homage rendered to God;⁶⁶ honor paid to the Supreme Being or by heathen nations to their deities;⁶⁷ religious reverence and homage.⁶⁸ The term is also defined as meaning the honor which is due in a peculiar sense to God;⁶⁹ and in this sense it has been distinguished from "public worship."⁷⁰

It has been said that worship consists in adoration, confession, prayer, thanksgiving, and the like,⁷¹ in the performance of all those external acts and the observance of all those rites and ceremonies in which men engage with the professed and sole view of honoring God,⁷² and supremely in making Him the object of our affection, and rendering to Him our supreme obedience,⁷³ and that it includes any and every mode of worshipping Almighty God,⁷⁴ such as prayer, praise, thanksgiving;⁷⁵ and in the ordinary church meeting the congregation is regarded as engaged in religious worship while listening to a sermon, reading the holy scriptures or hearing them read, or engaged in singing;⁷⁶ but it has been held that worship does not include healing for compensation⁷⁷ or preaching atheism.⁷⁸

The word "worship" is commonly employed in a

nonreligious sense as meaning civil deference;⁷⁹ courtesy or reverence paid to merit or worth;⁸⁰ honor; respect.⁸¹

The verb "to worship" is defined as meaning to adore; to pay divine honors to; to perform religious exercises in honor of; to reverence with supreme respect and veneration; to venerate.⁸²

The right to worship God according to the dictates of one's own conscience is a natural, fundamental, and inalienable right as stated in Constitutional Law §§ 206(1)-206(3), and the "liberty" which is protected by constitutional due process of law provisions embraces the freedom of an individual to worship God according to the dictates of his own conscience as stated in Constitutional Law § 574.

Societies organized for the worship of God are treated in Religious Societies § 1 et seq.

WORSTED. The word "worsted" is employed either as a noun or as an adjective,⁸³ and as a noun primarily and popularly it means a material made out of wool, by combing, whereby it becomes a distinct article, and one well known in commerce;⁸⁴ a variety of woolen yarn or thread, spun from long-staple wool which has been combed, and in the spinning is twisted harder than is usual;⁸⁵ a yarn or fabric made wholly of wool;⁸⁶ wool spun

Wis.—State v. District Board of School Dist. No. 8, 44 N.W. 967, 979, 76 Wis. 177, 20 Am.S.R. 41, 7 L.R.A. 330.

62. Wis.—State v. District Board of School Dist. No. 8, supra.
71 C.J. p 1618 note 11.

63. N.Y.—People v. Smith, 180 N.E. 891, 259 N.Y. 48.

64. Ill.—People v. Board of Education of Dist. 24, 92 N.E. 251, 252, 245 Ill. 334, 29 L.R.A., N.S., 442, 19 Ann.Cas. 220.

Wis.—State v. District Board of School Dist. No. 8, 44 N.W. 967, 979, 76 Wis. 177, 20 Am.S.R. 41, 7 L.R.A. 330.

65. N.Y.—People v. Smith, 180 N.E. 891, 259 N.Y. 48.

66. N.Y.—People v. Smith, 255 N.Y. S. 528, 531, 142 Misc. 769.

67. Ill.—People v. Board of Education of Dist. 24, 92 N.E. 251, 252, 245 Ill. 334, 29 L.R.A., N.S., 442, 19 Ann.Cas. 220.

Wis.—State v. District Board of School Dist. No. 8, 44 N.W. 967, 979, 76 Wis. 177, 20 Am.S.R. 41, 7 L.R.A. 330.

68. Ill.—Hamsher v. Hamsher, 23 N.E. 1123, 1124, 132 Ill. 273, 285, 8 L.R.A. 556.

71 C.J. p 1619 note 17.

69. Wis.—State v. District Board of School Dist. No. 8, 44 N.W. 967, 979, 76 Wis. 177, 20 Am.S.R. 41, 7 L.R.A. 330.

70. Ill.—In re Walker, 66 N.E. 144, 146, 200 Ill. 566.
71 C.J. p 1619 note 19.

71. Wis.—State v. District Board of School Dist. No. 8, 44 N.W. 967, 979, 76 Wis. 177, 20 Am.S.R. 41, 7 L.R.A. 330.

72. Ill.—People v. Board of Education of Dist. 24, 92 N.E. 251, 252, 245 Ill. 334, 29 L.R.A., N.S., 442, 19 Ann.Cas. 220.
71 C.J. p 1619 note 21.

73. Wis.—State v. District Board of School Dist. No. 8, 44 N.W. 967, 979, 76 Wis. 177, 20 Am.S.R. 41, 7 L.R.A. 330.

74. Wis.—State v. District Board of School Dist. No. 8, supra.
71 C.J. p 1619 note 23.

75. Ill.—People v. Board of Education of Dist. 24, 92 N.E. 251, 252, 245 Ill. 334, 29 L.R.A., N.S., 442, 19 Ann.Cas. 220.
71 C.J. p 1619 note 24.

76. Ill.—People v. Board of Education of Dist. 24, supra.
71 C.J. p 1619 note 25.

77. Neb.—State v. Buswell, 58 N.W.

728, 729, 40 Neb. 153, 24 L.R.A. 68.

78. N.Y.—People v. Smith, 180 N.E. 891, 892, 259 N.Y. 48.

79. N.Y.—People v. Smith, 255 N.Y. S. 528, 531, 142 Misc. 769.

Wis.—State v. District Board of School Dist. No. 8, 44 N.W. 967, 979, 76 Wis. 177, 20 Am.S.R. 41, 7 L.R.A. 330.

80. N.Y.—People v. Smith, 255 N.Y. S. 528, 531, 142 Misc. 769.

81. N.Y.—People v. Smith, supra.

Wis.—State v. District Board of School Dist. No. 8, 44 N.W. 967, 979, 76 Wis. 177, 20 Am.S.R. 41, 7 L.R.A. 330.

82. N.Y.—People v. Smith, 255 N.Y. S. 528, 531, 142 Misc. 769.

83. Phrases employing the word "worsted" and of which more recent adjudications have not been found see 71 C.J. p 1620 notes 53-56, 58-65.

84. U.S.—Elliott v. Swartwout, N. Y., 10 Pet. 137, 150, 9 L.Ed. 373.

85. U.S.—U. S. v. Klumpp, N.Y., 18 S.Ct. 311, 312, 169 U.S. 209, 42 L. Ed. 720.

86. U.S.—Federal Trade Commission v. Winsted Hosiery Co., N. Y., 42 S.Ct. 384, 385, 258 U.S. 483, 66 L.Ed. 729.

and twisted in a particular manner;⁸⁷ and also cloths popularly known as "diagonals."⁸⁸

As an adjective, the word "worsted" means consisting of worsted, or made of worsted yarn.⁸⁹

WORT. See Intoxicating Liquors § 19.

WORTH. It has been said that the word has a common use and meaning which is clearly understood,⁹⁰ and the concept expressed by the term is associated with the idea of cost or price.⁹¹ "Worth" is the quality of a thing which gives it value;⁹² that sum of valuable qualities which renders a thing valuable and useful;⁹³ value;⁹⁴ cash⁹⁵ or pecuniary⁹⁶ value.

As an adjective, "worth" is defined as meaning furnishing an equivalent for.⁹⁷

"Worth" and "compensation" have been held to be synonymous, and the terms have also been distinguished, see the C.J.S. definition Compensation. "Worth" has also been held to be synonymous with "price" see the C.J.S. definition Price, and "value" see the C.J.S. definition Value.

WORTHIER TITLE DOCTRINE. See Descent and Distribution § 44.

WORTHLESS. The word "worthless" is of relative, and not absolute, signification.⁹⁸ It is defined as meaning valueless;⁹⁹ of no value or use;¹ destitute of worth;² no value; no merit; useless.³

Under the Internal Revenue Code a taxpayer is entitled to deduct the cost of property which becomes worthless during the taxable year, and he is entitled to a deduction for corporate stock owned by him which has become worthless during the taxable year, as stated in Internal Revenue §§ 330, 331. Deductions for worthless property, debts, or stock are allowable only for the taxable year during which the property, debt, or stock became worthless, as stated in Internal Revenue § 347.

WORTHY. The word has been said to be an adjective of common use, having a definite and precise meaning,⁴ but also elastic in its meaning, according to the context in which used.⁵ "Worthy" is defined as meaning deserved;⁶ merited;⁷ possessing merit;⁸ deserving of honor, or the like;⁹ having worth or excellence;¹⁰ valuable.¹¹

"Worthy" is also defined as meaning of high station; of high social position;¹² and it is further defined to mean virtuous,¹³ or in¹⁴ or of¹⁵ good standing.

87. U.S.—U. S. v. Klumpp, N.Y., 18 S.Ct. 311, 312, 169 U.S. 209, 42 L. Ed. 720.
71 C.J. p 1620 note 52.

88. U.S.—U. S. v. Klumpp, supra—Seeberger v. Cahn, Ill., 11 S.Ct. 28, 29, 137 U.S. 95, 34 L.Ed. 599.

89. U.S.—U. S. v. Klumpp, N.Y., 18 S.Ct. 311, 312, 169 U.S. 209, 42 L. Ed. 720.

90. Mo.—Sappington v. St. Joseph Town Mut. Fire Ins. Co., 77 Mo. App. 270, 271.

Phrases employing the word and of which more recent adjudications have not been found see 71 C.J. p 1621 notes 94-3, 6-14.

91. Pa.—McLane v. Pittsburg Rys. Co., 79 A. 237, 238, 230 Pa. 29.

Similarly expressed

(1) "A thing is worth what it can be sold for."
Md.—Mayor, etc., of Baltimore v. Latrobe, 61 A. 203, 205, 101 Md. 621
—Mayor, etc., of Baltimore v. Rice, 21 A. 181, 182, 73 Md. 307.

(2) "The worth of anything is 'just so much money as 'twill bring.'"

Pa.—Commonwealth v. Edgerton Coal Co., 30 A. 125, 126, 164 Pa. 284.

92. Pa.—McLane v. Pittsburg Rys. Co., 79 A. 237, 238, 230 Pa. 29.

93. Ala.—Duke v. City of Anniston, 60 So. 447, 449, 5 Ala.App. 348.

94. Ala.—Duke v. City of Anniston, supra.

95. Mo.—Sappington v. St. Joseph Town Mut. Fire Ins. Co., 77 Mo. App. 270, 271.

96. Ala.—Duke v. City of Anniston, 60 So. 447, 449, 5 Ala.App. 348.

71 C.J. p 1621 note 84.

97. Pa.—Herb v. Hallowell, 154 A. 582, 585, 304 Pa. 128.

71 C.J. p 1621 note 5.

98. U.S.—Colburn v. U. S., Mo., 223 F. 590, 593, 139 C.C.A. 136.

99. Ga.—Central of Georgia R. Co. v. Cooper, 82 S.E. 310, 311, 14 Ga. App. 738.

Phrases employing the word and of which more recent adjudications have not been found see 71 C.J. p 1621 note 17—p 1622 note 22.

1. U.S.—Spring City Foundry Co. v. Commissioner of Internal Revenue, 54 S.Ct. 644, 646, 292 U.S. 182, 78 L.Ed. 1200.

2. U.S.—Spring City Foundry Co. v. Commissioner of Internal Revenue, supra.

3. Iowa.—In re Behrend's Will, 10 N.W.2d 651, 657, 233 Iowa 812.

4. Conn.—Beardsley v. Bridgeport, 3 A. 557, 558, 53 Conn. 489, 55 Am. R. 152.

5. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, 40 A.2d 222, 227, 136 N.J.Eq. 62.

Wis.—Kronshage v. Varrell, 97 N.W. 928, 930, 120 Wis. 161.

6. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, 40 A.2d 222, 227, 136 N.J.Eq. 62.

Phrases employing the word and of which more recent adjudications have not been found see 71 C.J. p 1622 notes 28-35.

7. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, supra.

8. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, supra.

9. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, supra.

10. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, supra.

11. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, supra.

12. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, supra.

13. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, supra.

Wis.—Kronshage v. Varrell, 97 N.W. 928, 930, 120 Wis. 161.

14. N.J.—Woodstown Nat. Bank & Trust Co. v. Snelbaker, 40 A.2d 222, 227, 136 N.J.Eq. 62.

15. Wis.—Kronshage v. Varrell, 97 N.W. 928, 930, 120 Wis. 161.

WORTLE. A steel bar with several holes of diminishing diameters through which wire is drawn;¹⁶ also called a "draw-plate."¹⁷

WOULD. See the C.J.S. definition Will.

WOUND. While there is some difficulty in determining what constitutes a wound,¹⁸ it has been said that the term has a well-defined, generally accepted and understood meaning.¹⁹

As a noun, the word "wound" is defined to mean a hurt;²⁰ a hurt by violence;²¹ an abrasion, breach, or rupture of the skin or mucous membrane;²² an injury to the body causing an impairment of health or strength, or rendering the person more liable to contract disease or less able to resist its effects;²³ any injury breaking or cutting the skin;²⁴ an in-

jury to the person by which the skin is broken,²⁵ either internally or externally;²⁶ an injury to a person in which the skin or other membrane is broken, as by violence²⁷ or surgery;²⁸ a breach of the skin or of the skin and flesh,²⁹ produced by external violence;³⁰ an injury to the body of a person or animal, especially one caused by violence by which the continuity, as skin, mucous membrane, or conjunctiva is broken;³¹ any lesion of the body.³²

In a technical sense, a wound involves a breaking of the skin,³³ but in jurisprudence a wound may exist even if there is no effusion of blood³⁴ or severing of the skin;³⁵ and thus the courts have recognized that a difference exists in the meaning of the word "wound" when used as a legal term, or in legal medicine, or in medical jurisprudence, and the meaning of the word when used as a term of surgery.³⁶

16. U.S.—Newman v. U. S., N.Y., 159 F. 123, 124, 86 C.C.A. 511.

17. U.S.—Newman v. U. S., supra.

18. Mass.—Commonwealth v. Gallagher, 6 Metc. 565, 568.

Meaning dependent on use

"The term 'wound' has had two distinct interpretations given to it: the first, under the ordinary common law indictments for homicide; the second, under the English and American statutes, making 'wounding' specifically indictable."

Pa.—Commonwealth v. Graff, 33 Pa. Co. 49, 52.

19. U.S.—Paul Revere Life Ins. Co., Worcester, Mass., v. Stanfield, C. C.A.Okl., 151 F.2d 776, 777.

Not technical word

N.C.—State v. Owen, 5 N.C. 452, 456, 4 Am.D. 571.

Phrases employing the word "wound" and of which more recent adjudications have not been found see 71 C.J. p 1623 notes 61-89.

20. N.Y.—Bancroft v. Home Ben. Ass'n, 23 N.E. 997, 999, 120 N.Y. 14, 8 L.R.A. 68.

21. Mo.—State v. Nieuhaus, 117 S. W. 73, 77, 217 Mo. 332—State v. Leonard, 22 Mo. 449, 451.

Similarly defined

A hurt given by violence, no matter with what kind of a weapon.

State v. Owen, 5 N.C. 452, 455, 4 Am.D. 571.

22. U.S.—Fidelity & Casualty Co. of New York v. Thompson, Colo., 154 F. 484, 487, 83 C.C.A. 324, 11 L.R.A.N.S., 1069, 12 Ann.Cas. 181.

23. N.Y.—Bancroft v. Home Ben. Ass'n, 23 N.E. 997, 999, 120 N.Y. 14, 8 L.R.A. 68.

24. Mich.—Montgomery v. Lansing City Electric R. Co., 61 N.W. 543, 548, 103 Mich. 46, 29 L.R.A. 287—Shaddock v. Alpine Plank-Road Co., 44 N.W. 153, 159, 79 Mich. 7.

25. N.J.—Corpus Juris quoted in State v. Capawanna, 193 A. 902, 904, 118 N.J.Law 429.

5 C.J. p 741 note 40—71 C.J. p 1623 note 57.

26. N.J.—Corpus Juris quoted in State v. Capawanna, 193 A. 902, 904, 118 N.J.Law 429.

5 C.J. p 741 note 41.

27. U.S.—Stirk v. Mutual Life Ins. Co. of N. Y., C.A.Utah, 199 F.2d 874, 877.

28. U.S.—Paul Revere Life Ins. Co., Worcester, Mass., v. Stanfield, C.C.A.Okl., 151 F.2d 776, 777.

29. La.—State v. Foster, 101 So. 255, 257, 156 La. 891.

Va.—Harris v. Commonwealth, 142 S.E. 354, 355, 150 Va. 580, 58 A. L.R. 1316.

30. Va.—Harris v. Commonwealth, supra.

31. Mo.—Gasperino v. Prudential Ins. Co. of America, App., 107 S. W.2d 819, 827.

Tenn.—Ansley v. Travelers Ins. Co., 173 S.W.2d 702, 704, 27 Tenn.App. 720.

32. U.S.—Order of United Commercial Travelers of America v. Sevier, C.C.A.Mo., 121 F.2d 650, 654.

Mo.—Gasperino v. Prudential Ins. Co. of America, App., 107 S.W.2d 819, 827.

71 C.J. p 1622 note 44.

33. Tex.—American Nat. Ins. Co. v. Fox, Civ.App., 184 S.W.2d 937, 943.

Whole skin and not merely cuticle
To constitute a wound it must be the whole skin that is broken, and it is not sufficient to show the separation of the cuticle only.

Mass.—Commonwealth v. Gallagher, 6 Metc. 565, 568.

Pa.—Commonwealth v. Graff, 33 Pa. Co. 49, 51.

Under the technical rule there can be no wound without a solution or fracture of the skin; there must be a complete breaking of the skin, external or internal.

Va.—Harris v. Commonwealth, 142 S.E. 354, 355, 150 Va. 580, 58 A.L.R. 1316.

W.Va.—State v. Gibson, 68 S.E. 295, 67 W.Va. 548, 28 L.R.A.N.S., 965.

34. La.—State v. Foster, 101 So. 255, 257, 156 La. 891.

N.J.—State v. Capawanna, 193 A. 902, 903, 118 N.J.Law 429.

35. N.J.—State v. Capawanna, supra.
71 C.J. p 1623 note 60 [a].

Skullarily expressed

Accepted definitions of the word "wound" exclude the necessity of a breaking or cutting of the skin and are broad enough to include an injury to the subcutaneous tissue and to the skin, which has resulted from carbon monoxide poisoning and is revealed by scarlet blotches.

U.S.—Warbende v. Prudential Ins. Co. of America, C.C.A.Ill., 97 F.2d 749, 753, 117 A.L.R. 760.

36. Mo.—Gasperino v. Prudential Ins. Co. of America, App., 107 S.W. 2d 819, 827.

71 C.J. p 1622 note 46.

Medical meaning and legal meaning

"In medicine the word 'wounds' means injuries of every description that affect either the hard or soft parts of the body, and it comprehends bruises, contusions, fractures, luxations, etc. In law the word means any lesion of the body, and the correct definition of a lesion is a hurt, loss, or injury."

U.S.—Warbende v. Prudential Ins. Co. of America, C.C.A.Ill., 97 F.2d 749, 753, 117 A.L.R. 760.

Ill.—People v. Durand, 139 N.E. 78, 83, 307 Ill. 611.

As a term of surgery, "wound" refers only to a solution of continuity;³⁷ and is defined as meaning any solution of the natural continuity of a tissue of the body;³⁸ a solution of the natural continuity of any of the tissues of the body;³⁹ a complete parting or solution of the external or internal skin;⁴⁰ a recent solution of continuity in the soft parts;⁴¹ a solution of the continuity of any of the tissues of the body, involving also the skin and mucous membrane of the part, caused by some external agent, and not the result of disease.⁴²

In medical jurisprudence,⁴³ and as defined in law,⁴⁴ a "wound" is any lesion of the body resulting from external violence, whether or not accompanied by a rupture of the skin or mucous membrane;⁴⁵ an injury of any kind which affects the body;⁴⁶ an injury of any description that affects either the hard or soft parts of the body.⁴⁷ The legal definitions of the term raise no question as to the nature of the tissue damaged, be it skin and appendages, bone, joint, or internal organ;⁴⁸ and the legal definitions include bruises, contusions, fractures, discolorations, and the like.⁴⁹

The word "wound" is variously applied,⁵⁰ and the term has been held to include scarlet blotches on a person's skin resulting from carbon monoxide poisoning⁵¹ and cracked lips resulting from fever;⁵² but it has been said that it is difficult to think of pallor, perspiration, dilated pupils, or a bluish tint to the skin immediately preceding death as consti-

tuting wounds.⁵³ Although doctors may consider sunburn to be a wound,⁵⁴ it has been said that to hold that the word "wound" has this signification in ordinary usage would be straining language far beyond any reasonable meaning.⁵⁵

The words "wound" and "bruise" have been held to be synonymous, and also have been distinguished, see the C.J.S. definition Bruise. "Wound" has also been compared with, or distinguished from, "injury" see the C.J.S. definition Injury.

The verb "to wound" is defined as meaning to cut, slash, or lacerate; to damage; to hurt by violence; to injure;⁵⁶ to shoot.⁵⁷ It has been distinguished from "to maim" see Mayhem § 1.

Under statutes so providing, the wanton or intentional wounding of another is an aggravated assault, and what constitutes a "wound" within the meaning of such statutes is treated in Assault and Battery § 76 c.

WRAP. The verb "to wrap" means to fold, roll, or draw together, as a cloth or flexible fabric, so as to enclose or protect something; generally with "about" or "around;" as, to "wrap" a shawl or cloak about one.⁵⁸ It is also defined as meaning to surround and cover by winding or folding.⁵⁹

WRAPPER. The broad general definition of the word is that in which anything is wrapped or inclosed; covering; envelope.⁶⁰

37. Vt.—Robinson v. Masonic Protective Ass'n, 88 A. 531, 532, 87 Vt. 138, 47 L.R.A.N.S., 924.

38. Mo.—Gasperino v. Prudential Ins. Co. of America, App., 107 S.W. 2d 819, 827.

39. N.J.—State v. Capawanna, 193 A. 902, 903, 118 N.J.Law 429.

40. W.Va.—State v. Stalnaker, 76 S.E.2d 906, 911, 138 W.Va. 30.

41. Va.—Harris v. Commonwealth, 142 S.E. 354, 355, 150 Va. 530, 58 A.L.R. 1316.

42. U.S.—Fidelity & Casualty Co. of New York v. Thompson, Colo., 154 F. 484, 486, 83 C.C.A. 324, 11 L.R.A.N.S., 1069, 12 Ann.Cas. 181.

43. U.S.—Fidelity & Casualty Co. of New York v. Thompson, supra.

44. Mich.—Thompson v. Loyal Protective Ass'n, 132 N.W. 554, 557, 167 Mich. 31.

Mo.—Gasperino v. Prudential Ins. Co. of America, App., 107 S.W.2d 819, 827.

45. U.S.—Fidelity & Casualty Co. of New York v. Thompson, Colo., 154 F. 484, 486, 83 C.C.A. 324, 11 L.R.A.N.S., 1069, 12 Ann.Cas. 181. 71 C.J. p 1622 note 45.

46. Mich.—Thompson v. Loyal Protective Ass'n, 132 N.W. 554, 557, 167 Mich. 31.

Mo.—Gasperino v. Prudential Ins. Co. of America, App., 107 S.W.2d 819, 827.

47. U.S.—Warbende v. Prudential Ins. Co. of America, C.C.A.III., 97 F.2d 749, 752.

Mich.—Thompson v. Loyal Protective Ass'n, 132 N.W. 554, 557, 167 Mich. 31.

48. N.J.—State v. Capawanna, 193 A. 902, 903, 904, 118 N.J.Law 429.

49. U.S.—Warbende v. Prudential Ins. Co. of America, C.C.A.III., 97 F.2d 749, 752, 117 A.L.R. 760.

Mich.—Thompson v. Loyal Protective Ass'n, 132 N.W. 554, 557, 167 Mich. 31.

Mo.—Gasperino v. Prudential Ins. Co. of America, App., 107 S.W.2d 819, 827.

Includes a bruise

N.C.—State v. Owen, 5 N.C. 452, 456, 4 Am.D. 571.

Pa.—Commonwealth v. Graff, 33 Pa. Co. 49, 52.

50. Mo.—Gasperino v. Prudential Ins. Co. of America, App., 107 S.W.2d 819, 827.

51. U.S.—Warbende v. Prudential Ins. Co. of America, C.C.A.III., 97 F.2d 749, 117 A.L.R. 760.

52. Mo.—Gasperino v. Prudential Ins. Co. of America, App., 107 S.W.2d 819, 827.

53. U.S.—Paul Revere Life Ins. Co., Worcester, Mass., v. Stanfield, C.C.A.Okl., 151 F.2d 776, 777.

54. N.Y.—Dupee v. Travelers Ins. Co. of Hartford, Conn., 2 N.Y.S.2d 62, 64, 253 App.Div. 278.

Tenn.—Ansley v. Travelers Ins. Co., 173 S.W.2d 702, 705, 27 Tenn.App. 720.

55. N.Y.—Dupee v. Travelers Ins. Co. of Hartford, Conn., 2 N.Y.S.2d 62, 64, 253 App.Div. 278.

Tenn.—Ansley v. Travelers Ins. Co., 173 S.W.2d 702, 705, 27 Tenn.App. 720.

56. Pa.—Commonwealth v. Graff, 33 Pa.Co. 49, 51.

71 C.J. p 1623 note 73.

57. Kan.—State v. Hammerli, 58 P. 559, 560, 60 Kan. 860.

58. U.S.—U. S. v. Seeman Bros., 13 Ct.Cust.App. 660, 662.

59. U.S.—U. S. v. Seeman Bros., supra.

60. Webster New Int.D.

Under the postal laws it is an offense to mail libelous, defamatory, or threatening matter on wrappers or envelopes, as stated in Post Office §§ 47, 48, and under such statutes the word "wrapper" has been given a particular meaning as referring to the package wrapper which for convenience in mailing surrounds all the copies of newspapers, etc., sent to one office, rolled or wrapped together in one package.⁶¹

As used with reference to leaf tobacco, "wrappers" are leaves suitable for the outside finish of a cigar.⁶² The other two classes of tobacco, binders and fillers, have been distinguished, see the C.J.S. definition Fillers.

WRAPPING. That in which anything is wrapped.⁶³

WRATH. Violent anger.⁶⁴

WRECK. The meaning of the word "wreck" has been passed on in many cases arising under maritime law,⁶⁵ but outside maritime or marine law the term has no technical or legal signification.⁶⁶

The word may be used to signify one of two things, either a total or a partial destruction of the thing wrecked,⁶⁷ and thus in ordinary speech an article is said to have been wrecked when it is disabled or seriously damaged, although it may not be totally destroyed or rendered incapable of use.⁶⁸

As a noun, the word "wreck" is defined to mean the destruction, disorganization, or serious injury

of anything, especially by violence;⁶⁹ that which has been wrecked or is in a state of ruin; the remains of anything ruined or fatally injured.⁷⁰

The verb "to wreck," in common use,⁷¹ is defined as meaning to destroy, disable, or seriously damage;⁷² to reduce to a wreck or ruinous state by any kind of violence;⁷³ to cause to suffer ruin;⁷⁴ to overthrow, shatter, or destroy;⁷⁵ to disorganize or cause serious injury to anything;⁷⁶ to cause to crash or suffer ruin.⁷⁷

As a verb "to wreck" has been held to be synonymous with "demolish" see the C.J.S. definition Demolish, "ruin" see the C.J.S. definition Ruin, and "smash" see the C.J.S. definition Smash.

The antonyms of "wreck" are "preserve" see the C.J.S. definition Preserve, "save" see the C.J.S. definition Save, and "salvage" see the C.J.S. definition Salvage.

The word "wreck," and its cognate terms, are treated in titles dealing with maritime matters, and for specific references consult the indexes to the titles Admiralty, Collision, Navigable Waters, Salvage, Seamen, and Shipping.

Phrases employing the word "wreck," or cognate terms, are set out in the note.⁷⁸

WRECKAGE. The act of wrecking, implying that the thing wrecked is a passive instrumentality, acted upon by some force which wrecks it.⁷⁹

Covering of bacon held to be "wrapper."

N.Y.—People v. Armour & Co., 162 N.Y.S. 621, 625, 176 App.Div. 161.

Wrappers on ham held not to be a "container."

Puerto Rico.—People v. Walsh, 28 Puerto Rico 26, 29.

61. U.S.—U. S. v. Burnell, D.C.Iowa, 75 F. 824, 829.

62. U.S.—Falk v. Robertson, N.Y., 11 S.Ct. 41, 137 U.S. 225, 231, 34 L.Ed. 645.

U. S. v. Seventy-Five Bales of Tobacco, N.Y., 147 F. 127, 132, 77 C.C.A. 353.

63. U.S.—U. S. v. Seeman Bros., 13 Ct.Cust.App. 660, 662.

64. Kan.—Jerald v. Houston, 261 P. 351, 356, 124 Kan. 657.

65. Mass.—Aurnhammer v. Brotherhood Accident Co., 146 N.E. 47, 48, 250 Mass. 563.

66. Iowa.—Mochel v. Iowa State Traveling Men's Ass'n, 213 N.W. 258, 260, 203 Iowa 623, 51 A.L.R. 1327.

67. Iowa.—Mochel v. Iowa State Traveling Men's Ass'n, supra, 71 C.J. p 1624 note 16.

68. Cal.—Zohner v. Sierra Nevada Life & Casualty Co., 299 P. 749, 751, 114 C.A. 85.

Mass.—Aurnhammer v. Brotherhood Accident Co., 146 N.E. 47, 48, 250 Mass. 563.

69. Tex.—Houston Printing Co. v. Hunter, Civ.App., 105 S.W.2d 312, 317.

70. Eng.—The Olympic, [1913] P. 92, 115.

71. Cal.—Zohner v. Sierra Nevada Life & Casualty Co., 299 P. 749, 751, 114 C.A. 85.

Mass.—Aurnhammer v. Brotherhood Accident Co., 146 N.E. 47, 48, 250 Mass. 563.

72. Mass.—Aurnhammer v. Brotherhood Accident Co., supra, 71 C.J. p 1624 note 23.

73. Okl.—Star Mfg. Co. v. Quarries, 46 P.2d 497, 498, 172 Okl. 550.

74. Iowa.—Mochel v. Iowa State Traveling Men's Ass'n, 213 N.W. 259, 261, 203 Iowa 623, 51 A.L.R. 1327.

71 C.J. p 1624 note 23.

75. Okl.—Star Mfg. Co. v. Quarries, 46 P.2d 497, 498, 172 Okl. 550.

76. Okl.—Reddington v. North American Accident Ins. Co. of Illinois, 293 P. 204, 206, 148 Okl. 4.

71 C.J. p 1624 note 23.

77. Okl.—Star Mfg. Co. v. Quarries, 46 P.2d 497, 498, 172 Okl. 550.

78. Phrases

(1) "Train wreck" within risks of travel clause in insurance policy see Insurance § 900 f.

(2) "Wrecking or disablement" of conveyance within risk clause of insurance policy see Insurance § 770.

(3) Other phrases employing the terms and of which more recent adjudications have not been found see 71 C.J. p 1624 notes 18-22, p 1625 notes 24-33.

79. Cal.—Wilson v. Travelers' Ins. Co., 190 P. 366, 367, 183 C. 65.

Phrases employing the word and of which more recent adjudications have not been found see 71 C.J. p 1625 notes 36, 37.

WRECKER. In a maritime or marine sense, the term "wrecker" is used to denote a type of ship which engages in the service of salvage.⁸⁰

The term is also employed to signify a motor vehicle equipped for removing wrecked or disabled vehicles, as stated in Motor Vehicles § 8.

WRENCH. A violent twist; a sprain and injury by twisting, as in a joint.⁸¹ "Wrench" has been held to be synonymous with "strain" see the C.J.S. definition Strain.

WRESTLING. The sport consisting of the contest between two persons who seek to throw each other.⁸²

WRINKLE. A furrow.⁸³

WRINKLED. Contracted; corrugated; shirred.⁸⁴

WRIST. The segment of the upper extremity between the forearm and the hand.⁸⁵ The term may be used interchangeably or synonymous with "hand" see the C.J.S. definition Hand.⁸⁶

WRIT. A judicial instrument by which the court commands some act to be done by the person to whom it is directed;⁸⁷ a mandatory precept issued by the authority and in the name of the sovereign or the state, for the purpose of compelling defendant to do something therein mentioned;⁸⁸ a mandatory

precept issuing from a court of justice;⁸⁹ a precept in writing,⁹⁰ couched in the form of a letter, running in the name of the king, president or state, issuing from a court of justice and sealed with its seal, addressed to the sheriff or other officer of the law, or directly to the person whose action the court desires to command, either as the commencement of a suit or other proceeding, or as incidental to its progress, and requiring the performance of a specific act, or giving authority and commission to have it done;⁹¹ an order or precept in writing issued in the name of the state or of a court or judicial officer;⁹² an order in writing issued by a competent official in a judicial proceeding;⁹³ a written command, under the seal of the court authorizing and directing an officer to execute its judgment;⁹⁴ the command of the commonwealth to a wrongdoer to answer to the wrong charged against him;⁹⁵ the judicial notice to a debtor that his creditor demands justice.⁹⁶

At common law a writ is the first step taken to bring the party sued before the court,⁹⁷ and in old English law, and in the very ancient sense of the word, a "writ" was an instrument in the form of a letter; a letter or letters of attorney.⁹⁸

Under the old English practice, writs were divided into original and judicial writs,⁹⁹ an original writ being a mandate of the court, constituting the foundation of the action, and the commencement of a legal proceeding,¹ the first process or initiatory

80. U.S.—Andrews v. Wall, Fla., 3 How. 568, 571, 11 L.Ed. 729.

81. Tex.—Traders & General Ins. Co. v. Lincecum, Civ.App., 126 S. W.2d 692, 695.

82. Vt.—Jacobs v. Loyal Protective Ins. Co., 124 A. 848, 852, 97 Vt. 516.

83. U.S.—Maxim Mfg. Co. v. Imperial Mach. Co., C.C.A.III, 286 F. 79, 83.

71 C.J. p 1625 note 43.

"Wrinkle finishes, also known as 'Crinkle,' 'Shrivel,' 'Sag,' 'Morocco,' and by other designations, are defined as enamels, varnishes and paints which have been compounded from such materials and by such methods as to produce when applied and dried, a hard wrinkled surface on metal and other material. Wrinkle finishes are widely used as coverings for the surface of typewriters, cash registers, motors, adding machines, and many other articles of manufacture. They have the following advantages over smooth finishes such as ordinary enamels and varnishes: a. One coat of wrinkle finish is sufficient for many purposes for which two or more coats of smooth finish would be required; b. Surfaces to which

wrinkle finishes are to be applied need not be prepared as carefully as those which are to receive smooth finishes, since the wrinkle finishes cover small imperfections; and c. The original appearance of wrinkle-finished articles can be maintained with less cleaning and polishing than that of smooth-finished articles."

U.S.—U. S. v. New Wrinkle, Inc., Ohio, 72 S.Ct. 350, 351, 342 U.S. 371, 96 L.Ed. 417.

84. U.S.—Day v. Stellman, C.C.Md., 7 F.Cas.No.3,690, 1 Fish.Pat.Cas. 487.

Phrases employing the word and of which more recent adjudications have not been found see 71 C.J. p 1625 notes 46-48.

85. Stedman Med.D.

86. "Wrist-drop" see the C.J.S. definition Drop.

87. U.S.—In re Damon, D.C.N.Y., 104 F. 775, 776, 5 Am.Bankr. 133.

Phrases employing the word "writ" and of which more recent adjudications have not been found see 71 C.J. p 1627 note 85-p 1628 note 13.

88. Neb.—Moore v. Fedawa, 14 N. W. 170, 13 Neb. 379.

71 C.J. p 1625 note 54.

89. N.H.—Poirier v. East Coast Realty Co., 152 A. 612, 613, 84 N.H. 461.

90. Vt.—Temple v. Mead, 4 Vt. 535, 543.

91. Pa.—Hehn v. Franklin, 24 Pa. Dist. & Co. 560, 562, 25 Sch.Leg. Rec. 161, 3 Sch.Reg. 24.
71 C.J. p 1625 note 57.

92. Ky.—Gowdy v. Sanders, 11 S.W. 82, 88 Ky. 346, 10 Ky.L. 912.
71 C.J. p 1625 note 58.

93. Cal.—Painter v. Berglund, 87 P. 2d 360, 364, 31 C.A.2d 63.

94. Neb.—Burkett v. Clark, 64 N.W. 1113, 1115, 46 Neb. 466.
71 C.J. p 1626 note 62.

95. Pa.—Stewart v. Parnell, 8 Pa. Co. 604, 606.

96. S.C.—Hyams v. Boyce, 26 S.C.L. 95, 98.

97. U.S.—Wilson v. Winchester & P. R. Co., C.C.W.Va., 82 F. 15, 17.

98. Black L.D.

99. U.S.—In re Damon, D.C.N.Y., 104 F. 775, 776, 5 Am.Bankr. 133.
71 C.J. p 1628 note 20.

1. U.S.—In re Damon, supra.
71 C.J. p 1628 note 25.

step in prosecuting a suit;² also the judicial instrument by which the court commands something, there-in mentioned, to be done.³ Writs issued after the action was commenced are designated judicial writs as stated in the C.J.S. definition Judicial.

In modern times original writs have fallen into disuse, and most of them have been expressly abolished;⁴ and in the later practice writs are divided into original, of mesne process, and of execution,⁵ writs of mesne process being those by which interlocutory proceedings are initiated,⁶ and writs of execution being those by which the judgment or decree of the court is carried into effect.⁷ From the standpoint of their effect upon the property affected, it has also been said that writs may be divided into those pointing out, and those not specifically pointing out, the property to be seized.⁸

The word "writ" has been held to include a capias,⁹ a fee bill,¹⁰ an attachment,¹¹ an execution,¹² an order of sale in foreclosure proceedings,¹³ an or-

der to show cause;¹⁴ and a subpoena;¹⁵ but it has been distinguished from, or held not to include, a complaint,¹⁶ a declaration,¹⁷ an execution,¹⁸ an information,¹⁹ a notice,²⁰ a peace warrant,²¹ a petition,²² a petition and libel in divorce,²³ a rule to show cause,²⁴ a summons,²⁵ or a warrant.²⁶

It is stated in Process § 1 a (1) that "process" and "writ" or "writs" are synonymous in the sense that every writ is a process.

Although many of the ancient writs are not employed in modern practice, there are certain of such writs which continue in use, and certain of the titles in this work bear the name of the ancient writs.²⁷ Other ancient writs which continue to be used in modern practice are treated in various other titles throughout this work.²⁸

In the subjoined note are listed various other writs to which reference has been made in the adjudicated cases,²⁹ and for additional writs as to

2. Pa.—In re Original Writs, 37 Pa. Co. 522, 525.

Vt.—Walsh, Leonard & Jackson v. Haswell, 11 Vt. 85, 88.

3. Pa.—In re Original Writs, 37 Pa. Co. 522, 525.

4. Burrill L.D.

71 C.J. p 1628 note 21.

5. Bouvier L.D.

6. Cyclopedic L.D.

7. Cyclopedic L.D.

8. Neb.—Philips v. Spotts, 15 N.W. 332, 334, 14 Neb. 139.

71 C.J. p 1628 note 23.

9. N.Y.—Tyler v. Canaday, 2 Barb. 160, 162.

10. Ill.—Reddick v. Cloud's Adm'rs, 7 Ill. 670, 678.

11. Vt.—Bank of Rutland v. Parsons, 21 Vt. 199, 202.

12. Mass.—Lewis v. Norton, 34 N.E. 544, 159 Mass. 432.

71 C.J. p 1626 note 70.

13. U.S.—Insurance Co. v. Hallock, Ind., 6 Wall. 556, 561, 18 L.Ed. 948.

Neb.—Burkett v. Clark, 64 N.W. 1118, 1115, 46 Neb. 466.

14. U.S.—In re Damon, D.C.N.Y., 104 F. 775, 776, 5 Am.Bankr. 133.

15. Pa.—In re Original Writs, 37 Pa.Co. 522, 525.

16. U.S.—Wilson v. Winchester & P. R. Co., C.C.W.Va., 82 F. 15, 17.

17. U.S.—Wilson v. Winchester & P. R. Co., supra.

71 C.J. p 1626 note 75.

18. Cal.—Southern California Lumber Co. v. Ocean Beach Hotel Co., 29 P. 627, 629, 94 C. 217, 28 Am. S.R. 115.

71 C.J. p 1627 note 76.

19. Okl.—Caples v. State, 104 P. 493, 497, 3 Okl.Cr. 72, 26 L.R.A., N.S., 1033.

20. Notice of appeal

N.D.—Gooler v. Eidsness, 121 N.W. 83, 85, 18 N.D. 338.

71 C.J. p 1627 note 78 [a].

Notice of lien

N.H.—Poirier v. East Coast Realty Co., 152 A. 612, 613, 84 N.H. 461.

Notice to show cause

N.D.—Northern Pac. Ry. Co. v. Jurgenson, 141 N.W. 70, 71, 25 N.D. 14.

71 C.J. p 1627 note 78 [d].

21. Ga.—Hicks v. Pursley, 105 S.E. 317, 26 Ga.App. 34.

22. U.S.—In re Damon, D.C.N.Y., 104 F. 775, 777, 5 Am.Bankr. 133.

71 C.J. p 1627 note 80.

23. Pa.—In re Original Writs, 37 Pa.Co. 522, 525.

24. Mass.—Taylor v. Henry, 2 Pick. 397, 398.

25. Wis.—Porter v. Vandercook, 11 Wis. 70, 71.

71 C.J. p 1627 note 83.

26. Conn.—Stoddard v. Couch, 23 Conn. 238, 240.

27. See, for example, Assistance, Writ of; Audita Querela; Certiorari; Detinue; Entry, Writ of; Executions; Habeas Corpus; Injunctions; Mandamus; Ne Exeat; Prohibition; Quo Warranto; Review; Scire Facias; Sequestration; and Supersedeas.

28. See, for example, writ of error coram nobis, treated in Criminal Law § 1606; writ of dower unde nihil habet, treated in Dower § 86 b; and writ of estrepement, treated in Waste §§ 14, 15.

29. Writ of ad quod damnum

The writ of ad quod damnum is of ancient origin, and could be issued as a writ of right when a landowner was dissatisfied with the assessment of damages by a condemnation commission.

Del.—Lewis v. Du Pont, 22 A.2d 832, 834, 2 Terry 347.

71 C.J. p 1630 note 55 [a].

See Eminent Domain § 231.

Writ of false judgment

A writ which issues where the complaint is of false judgment rendered in the court below, and commands the sheriff to go to the court below and record the plaint, etc., if in a court where he did not preside. N.C.—Anonymous, 2 N.C. 469, 470.

71 C.J. p 1628 note 38.

As a method of review at common law in England see Appeal and Error § 8.

Writ of perambulation

A writ at common law which is sued by consent of both parties, when they are in doubt as to the bounds of their respective estates, and is directed to the sheriff, who is commanded to make the "perambulation" with a jury, and to set the bounds and limits between them in certainty.

N.C.—Green v. Williams, 56 S.E. 549, 550, 144 N.C. 60.

71 C.J. p 1629 note 44.

Writ of possession

The term is now generally employed to designate any writ by virtue of which the sheriff is commanded to place a person in possession of real or personal property.

La.—Decuir v. Loeb, 42 So. 955, 956, 113 La. 332.

71 C.J. p 1629 note 46.

which there have been no recent adjudications see 71 C.J. p 1630 note 55—p 1631 note 57.

WRITE. To compose;³⁰ as an author;³¹ to engrave;³² to express by means of letters;³³ to frame or combine ideas, and express them in written words;³⁴ to express one's thoughts in writing legible to others;³⁵ to express our ideas by letters visible to the eye;³⁶ to form by a pen on paper or other ma-

terial, or by a graver on wood or stone;³⁷ to impress;³⁸ to set down legible characters with pen and ink.³⁹

WRITING (Noun). The word "writing," as a noun, is a broad generic term,⁴⁰ of general significance,⁴¹ which has been given liberal construction;⁴² and when not used in connection with analogous words

Writ of prevention

A bill quia timet is in the nature of a writ of prevention, and is entertained as a measure of precautionary justice, and to forestall wrongs or anticipated mischief.

U.S.—Southern R. Co. v. North Carolina R. Co., C.C.N.C., 81 F. 595, 598.

N.Y.—Bailey v. Briggs, 56 N.Y. 407, 415.

Bills quia timet see Quieting Title § 2.

(2) In the practice of equity, writs of prevention are the same as bills of quia timet, and are used to accomplish the ends of precautionary justice.

N.Y.—Bailey v. Southwick, 6 Lans. 356, 364.

Writ of probable cause

A writ which in criminal prosecutions operates as an order to stay execution pending an appeal.

Cal.—In re Albori, 272 P. 321, 323, 95 C.A. 42.

Writ of procedendo

See the C.J.S. definition Procedendo.

Writ of protection

A writ issued to protect witnesses and parties coming from one state into another to attend a trial from arrest and detention upon civil process.

U.S.—Chanler v. Sherman, N.Y., 162 F. 19, 21, 88 C.C.A. 673, 22 L.R.A., N.S., 992.

Jurisdiction of federal courts to issue writs of protection see Federal Courts § 14.

Writ of restitution

A writ which issues to restore a party to the possession of property of which he had been wrongfully deprived by some previous order of the same court or some previous writ issuing from the same court.

Tenn.—Harrin v. Franklin, 1 Tenn. Ch.A. 95, 106.

54 C.J. p 732 note 64.

Writ of right

(1) Any writ which issues as a matter of course merely on filing an application in proper form.

Philippine.—Garcia v. Sweeney, 4 Philippine 751, 753.

(2) In a more specific sense, a writ the object of which is to try the whole title to property, as stated in

Real Actions § 2. See the C.J.S. definition Recto.

Writ of seizure and sale

The final process to enforce payment of a claim by the sale of property antecedently mortgaged.

La.—American Nat. Bank v. Childs, 22 So. 384, 386, 49 La. Ann. 1359.

71 C.J. p 1629 note 48.

Writ of supervisory control

(1) An extraordinary writ, one of whose functions is to enable a superior court to control the course of litigation in the inferior courts where those courts are proceeding within their jurisdiction, but by a mistake of law, or willful disregard of it, are doing a gross injustice.

Mont.—State v. District Court of Eighth Judicial Dist. in and for Cascade County, 292 P. 904, 907, 88 Mont. 290.

71 C.J. p 1629 note 50.

(2) The writ is issued only to correct rulings made by the lower court acting within jurisdiction but erroneously.

Mont.—State ex rel. State Bank of Townsend v. District Court of First Judicial Dist. in and for Lewis and Clark County, 25 P.2d 396, 398, 94 Mont. 551—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 147 P. 612, 613, 50 Mont. 428.

(3) The writ may be employed only in exigent cases to remedy manifest wrongs which cannot otherwise be righted.

Mont.—State v. District Court of Third Judicial Dist. in and for Powell County, 254 P. 414, 416, 78 Mont. 435.

71 C.J. p 1629 note 52.

(4) The writ may control where discretion is lodged in the inferior court.

Mont.—State ex rel. State Bank of Townsend v. District Court of First Judicial Dist. in and for Lewis and Clark County, 25 P.2d 396, 398, 94 Mont. 551.

(5) Resort may be had to the writ where there is no appeal, or where the remedy by appeal is inadequate.

Mont.—State v. District Court of Eighteenth Judicial Dist. in and for Hill County, 133 P. 865, 367, 57 Mont. 328.

71 C.J. p 1629 note 54.

30. Mass.—Henshaw v. Foster, 9 Pick. 312, 318.

Phrases employing the word and of which more recent adjudications have not been found see 71 C.J. p 1633 note 68—p 1634 note 96.

31. U.S.—Remick Music Corp. v. Interstate Hotel Co. of Neb., D.C. Neb., 58 F.Supp. 523, 531.

32. Me.—In re Justices' Opinion, 7 Me. 492, 495.

Mass.—Henshaw v. Foster, 9 Pick. 312, 318.

33. Me.—In re Justices' Opinion, 7 Me. 492, 495.

Mass.—Henshaw v. Foster, 9 Pick. 312, 318.

34. U.S.—Remick Music Corp. v. Interstate Hotel Co. of Neb., D.C. Neb., 58 F.Supp. 523, 531.

35. Hawaii.—In re Paikuli, 8 Hawaii 680, 682.

71 C.J. p 1633 note 62.

36. N.Y.—Clason's Ex'rs v. Bailey, 14 Johns. 484, 491.

Pa.—Commonwealth v. Receiver of Taxes, 32 Pa.Co. 305, 306.

37. Mass.—Henshaw v. Foster, 9 Pick. 312, 318.

38. Me.—In re Justices' Opinion, 7 Me. 492, 495.

Mass.—Henshaw v. Foster, 9 Pick. 312, 318.

39. La.—Succession of Robertson, 21 So. 586, 587, 49 La. Ann. 868, 870, 62 Am.S.R. 672.

40. Ga.—Saffold v. State, 75 S.E. 338, 339, 11 Ga.App. 329.

Phrases

(1) "Writing obligatory" see the C.J.S. definition Obligatory.

(2) Other phrases employing the word "writing" as a noun and of which more recent adjudications have not been found see 71 C.J. p 1633 note 65—p 1639 note 24.

41. W.Va.—Young v. Garred, 112 S.E. 181, 183, 90 W.Va. 767, 23 A.L.R. 1317.

42. U.S.—Metro - Goldwyn - Mayer Distributing Corporation v. Bijou Theatre Co. of Holyoke, D.C. Mass., 3 F.Supp. 66, 71.

M. B. Fahey Tobacco Co. v. Senior, D.C. Pa., 247 F. 809, 816.

of more special meaning, it has been said to be an extensive term.⁴³

In one sense the word is defined to mean a composition;⁴⁴ a letter;⁴⁵ an indorsement;⁴⁶ anything expressed in characters or letters;⁴⁷ anything written,⁴⁸ or expressed in letters,⁴⁹ or printed;⁵⁰ a paper;⁵¹ a representation addressed to the eye;⁵² a written instrument;⁵³ a written paper of any kind;⁵⁴ the written character or words;⁵⁵ words, or characters that stand for words or ideas, traced on some substance;⁵⁶ and it has been said that the term means not only words traced with a pen or stamped, but also words printed or engraved or made legible by any other device.⁵⁷

In another sense the noun "writing" is defined as meaning the act or art of tracing or inscribing on a surface letters or ideographs;⁵⁸ the act or art of forming letters or characters, on paper, parchment, wood, stone, the inner bark of certain trees, or other material, for the purpose of recording the ideas

which characters and words express, or of communicating them to others by visible signs;⁵⁹ the expression of ideas by visible letters;⁶⁰ conveying our ideas to others by letters or characters visible to the eye;⁶¹ the method of originally developing the composition, and of adding copies made singly, letter by letter;⁶² and it is generally used in opposition to "viva voce."⁶³

In its most frequent and most familiar sense the term "writing" is applied to books, pamphlets, and the literary and scientific productions of authors.⁶⁴ In law it is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds and notes, etc.⁶⁵ It may be on paper, wood, stone, or other material;⁶⁶ and ordinarily need not be in ink.⁶⁷ The term is not limited to words traced with a pen,⁶⁸ or brush,⁶⁹ or pencil;⁷⁰ but it has been held to include engraving,⁷¹ etching,⁷² lithographing,⁷³ motion pictures,⁷⁴ musical compositions,⁷⁵ photographs,⁷⁶ and printing.⁷⁷ It

43. U.S.—U. S. v. Chase, Mass., 10 S.Ct. 756, 757, 135 U.S. 255, 34 L. Ed. 117.

44. U.S.—Keene v. Wheatley, C.C. Pa., 14 F.Cas.No.7,644, 4 Phila. 157, 5 Clark 501.

45. U.S.—U. S. v. Gaylord, C.C.III, 17 F. 438, 441.
71 C.J. p 1635 note 12.

46. Ga.—Brent v. State, 163 S.E. 319, 44 Ga.App. 777.
Mo.—State v. Carragin, 109 S.W. 553, 559, 210 Mo. 351, 16 L.R.A.,N.S., 561.

47. Colo.—People v. Newell, 113 P. 643, 649, 49 Colo. 349.

48. Ind.—Thomas v. State, 2 N.E. 808, 811, 103 Ind. 419.

49. Mass.—Henshaw v. Foster, 9 Pick. 312, 318.

50. Colo.—People v. Newell, 113 P. 643, 646, 49 Colo. 349.

51. Ind.—Thomas v. State, 2 N.E. 808, 812, 103 Ind. 419.
71 C.J. p 1635 note 13.

52. U.S.—Benson v. McMahon, N.Y., 8 S.Ct. 1240, 1246, 127 U.S. 457, 32 L.Ed. 234.

53. Fla.—Scarborough v. State, 89 So. 805, 806, 82 Fla. 304.
71 C.J. p 1635 note 20.

54. Ind.—Thomas v. State, 2 N.E. 808, 812, 103 Ind. 419.

55. La.—Prudhomme v. Savant, 90 So. 640, 641, 150 La. 256.

56. Fla.—Scarborough v. State, 89 So. 805, 806, 82 Fla. 304.

N.Y.—Adler v. Todd, 78 N.Y.S. 1106, 28 Misc. 798,

57. Mo.—American Union Trust Co. v. Never Break Range Co., 190 S. W. 1045, 1047, 196 Mo.App. 206.
71 C.J. p 1635 note 24.

58. Or.—Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

59. Colo.—People v. Newell, 113 P. 643, 646, 49 Colo. 349.
71 C.J. p 1635 note 1.

60. Pa.—Myers v. Vanderbelt, 84 Pa. 510, 513, 24 Am.R. 227.
71 C.J. p 1635 note 2.

61. Pa.—Commonwealth v. Receiver of Taxes, 32 Pa.Co. 305, 307.
Vt.—Temple v. Mead, 4 Vt. 535, 542.

62. U.S.—Keene v. Wheatley, C.C. Pa., 14 F.Cas.No.7,644, 4 Phila. 157, 5 Clark 501.
71 C.J. p 1635 note 3.

63. Pa.—Commonwealth v. Receiver of Taxes, 32 Pa.Co. 305, 307.
Vt.—Temple v. Mead, 4 Vt. 535, 543.

64. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 25.

65. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.
71 C.J. p 1635 note 26.

66. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 27.

67. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 28.

68. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 29.

By statute, "in writing" includes "printing, engraving, lithographing and any other mode or representing words and letters."

Mass.—Assessors of Boston v. Neal, 40 N.E.2d 893, 895, 311 Mass. 192.

69. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 30.

70. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 31.

71. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 32.

72. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 33.

73. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 34.

74. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 35.

75. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 36.

76. U.S.—Harper & Bros. v. Kalem Co., N.Y., 169 F. 61, 64, 94 C.C.A. 429.

Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

77. Or.—Corpus Juris quoted in Spence v. Rasmussen, 226 P.2d 819, 824, 190 Or. 662.

71 C.J. p 1635 note 38.

has also been held to include stamping,⁷⁸ stenographic notes,⁷⁹ stickers or pasters,⁸⁰ telegrams,⁸¹ tickets,⁸² typewriting,⁸³ and any other mode of representing words and letters,⁸⁴ unless the context or the particular statutory provision requires otherwise;⁸⁵ and it has been held that any symbols or characters in general use in communicating ideas, and generally recognized for that purpose, are sufficient and constitute "writing."⁸⁶

In particular cases or under special circumstances, the word has been held not to include judgments,⁸⁷ phonograph records,⁸⁸ mere copies of photographs,⁸⁹ perforated music rolls,⁹⁰ printed labels,⁹¹ stenographic notes,⁹² telephone conversations,⁹³ or trademarks.⁹⁴

WRITTEN (Adjective). Expressed by letters;⁹⁵ in writing.⁹⁶ It has been said that the word may refer to something engraved or lithographed,⁹⁷ or

printed,⁹⁸ stamped,⁹⁹ typewritten,¹ or any mode of representing words or letters;² but it may import something more than the mere filling in of blanks.³ However, the term may be used as distinguished from "printed."⁴ In special connections it may mean contracted for.⁵

WRONG. As a noun. The word "wrong," as a noun, has more than one meaning,⁶ and frequently it is employed in a broad sense,⁷ and it is sometimes employed with an extended signification.⁸

In its broad sense, the word "wrong" means an injury;⁹ an injury to the person;¹⁰ every injury to another;¹¹ the opposite of "right."¹² The word is further defined to mean an invasion of right to the damage of the party who suffers it;¹³ the violation or invasion of a right, to the damage of the person whose right is invaded;¹⁴ an invasion of the prop-

78. Fla.—Scarborough v. State, 89 So. 805, 806, 82 Fla. 304.

71 C.J. p 1637 note 39.

79. N.Y.—Ostrowe v. Lee, 175 N.E. 505, 256 N.Y. 36.

71 C.J. p 1637 note 40.

80. Minn.—Snortum v. Homme, 119 N.W. 59, 60, 106 Minn. 464.

71 C.J. p 1637 note 41.

81. Md.—Snyder & Blankford Co. v. Farmers Bank of Tifton, 16 A.2d 337, 840, 178 Md. 601.

71 C.J. p 1637 note 42.

82. U.S.—Benson v. McMahon, N.Y., 8 S.Ct. 1240, 1246, 127 U.S. 457, 32 L.Ed. 234.

83. Neb.—Mack Inv. Co. v. Dominy, 1 N.W.2d 295, 297, 140 Neb. 709.

71 C.J. p 1637 note 44.

84. Kan.—State Savings Bank v. Krug, 193 P. 899, 901, 108 Kan. 108.

71 C.J. p 1637 note 45.

85. Cal.—McFarland v. Spengier, 248 P. 521, 523, 199 C. 147.

71 C.J. p 1637 note 46.

86. Colo.—People v. Newell, 113 P. 643, 646, 49 Colo. 349.

71 C.J. p 1637 note 47.

87. Va.—Fulkers v. Adm'x v. Taylor, 46 S.E. 309, 311, 102 Va. 314.

88. U.S.—Alpers v. U. S., C.A.Cal., 175 F.2d 137, 138.

89. U.S.—M. B. Fahey Tobacco Co. v. Senior, D.C.Pa., 247 F. 809, 816.

90. U.S.—White-Smith Music Pub. Co. v. Apollo Co., C.C.N.Y., 139 F. 427, 430.

91. U.S.—Higgins v. Keuffel, N.Y., 11 S.Ct. 731, 732, 140 U.S. 428, 35 L.Ed. 470.

71 C.J. p 1637 note 51.

92. Iowa.—Smith v. Wellslager, 74 N.W. 914, 915, 105 Iowa 140.

71 C.J. p 1637 note 52.

93. S.C.—In re Shier's Estate, 14 S.E. 931, 933, 35 S.C. 417.

94. U.S.—Higgins v. Keuffel, N.Y., 11 S.Ct. 731, 732, 140 U.S. 428, 35 L.Ed. 470.

71 C.J. p 1637 note 54.

95. Ma.—In re Justices' Opinion, 7 Ma. 492, 495.

Phrases

(1) "Written law" see the C.J.S. definition Law.

(2) "Written opinion" see the C.J.S. definition Opinion.

(3) "Written statement" see the C.J.S. definition Statement.

(4) Other phrases employing the word "written" as an adjective and of which more recent adjudications have not been found see 71 C.J. p 1640 notes 39-76.

96. Mo.—American Union Trust Co. v. Never Break Range Co., 190 S.W. 1045, 1047, 196 Mo.App. 206.

71 C.J. p 1639 note 27.

97. Kan.—State Savings Bank of Leavenworth v. Krug, 193 P. 899, 901, 108 Kan. 108.

71 C.J. p 1639 note 28.

98. Wyo.—Acme Coal Co. v. Northrup Nat. Bank of Iola, Kan., 146 P. 593, 594, 23 Wyo. 66, L.R.A. 1915D 1084.

71 C.J. p 1639 note 29.

99. U.S.—Deutsche v. Wilson, C.C.A.Iowa, 39 F.2d 406, 407.

1. Tex.—Johnson v. Mangum, Civ. App., 227 S.W. 750.

71 C.J. p 1639 note 31.

2. Kan.—State Savings Bank of Leavenworth v. Krug, 193 P. 899, 901, 108 Kan. 108.

Minn.—Snortum v. Homme, 119 N.W. 59, 106 Minn. 464.

3. Cal.—Browne v. Commercial Un-

ion Assur. Co. of London, England, 158 P. 765, 767, 30 C.A. 547.

4. Cal.—In re Dreyfus' Estate, 165 P. 941, 942, 175 C. 417, L.R.A.1917F 391.

71 C.J. p 1639 note 34.

5. Cal.—Browne v. Commercial Union Assur. Co. of London, England, 158 P. 765, 768, 30 C.A. 547.

6. Kan.—Union Pac. R. Co. v. Henry, 14 P. 1, 4, 36 Kan. 565.

Phrases employing the word "wrong" as a noun and of which more recent adjudications have not been found see 71 C.J. p 1641 note 4-p 1642 note 26.

7. La.—Victor v. Lewis, App., 157 So. 293, 295.

71 C.J. p 1641 note 80.

8. N.Y.—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 182, 152 Misc. 716.

9. Cal.—Rubino v. Utah Canning Co., 266 P.2d 163, 165, 123 C.A.2d 18.

La.—Victor v. Lewis, App., 157 So. 293, 295.

71 C.J. p 1641 note 80.

10. Mich.—People v. Quanstrom, 53 N.W. 165, 166, 93 Mich. 254, 17 L.R.A. 723.

11. Kan.—Union Pac. R. Co. v. Henry, 14 P. 1, 4, 36 Kan. 565.

La.—Victor v. Lewis, App., 157 So. 293, 295.

12. Ind.—Board of Com'rs of Howard County v. Armstrong, 91 Ind. 523, 536.

13. La.—Victor v. Lewis, App., 157 So. 293, 295.

Mo.—State ex rel. and to Use of Donelon v. Deuser, 134 S.W.2d 132, 133, 345 Mo. 628.

71 C.J. p 1641 note 86.

14. N.J.—Granahan v. Celanese

erty or civil rights of a party;¹⁵ a violation of one's right;¹⁶ a violation of the legal rights of another;¹⁷ a violation of the municipal law, the law of civil conduct, not a transgression of the divine law as such, nor a breach of etiquette;¹⁸ a trespass on the right of another;¹⁹ the breach of a legal duty;²⁰ the omission of a duty imposed by law.²¹

The word "wrong" is also defined as meaning a tort;²² "injuria" or legal injury,²³ negligence.²⁴

Blackstone has stated that, "In its most usual sense, wrong signifies an injury committed to the person or property of another, or to his relative rights unconnected with contract; and these wrongs are committed with or without force,"²⁵ and this statement has been accepted by the courts.²⁶ The Blackstone statement continues, "But in a more extended signification, wrong includes the violation of a contract; a failure by a man to perform his undertaking or promise is a wrong or injury to him to whom it was made,"²⁷ and this statement too has been accepted by the courts,²⁸ and in this connection it has been held that every breach of contract

may, in a qualified sense, be considered a wrong,²⁹ and thus the word "wrong" has been defined as meaning any deprivation of right, breach of contract, or injury done by one person to another.³⁰ However, a wrong is not the injuries which result from the violation or invasion of a right,³¹ and that which the law authorizes cannot constitute a legal wrong.³²

In law, the word "wrong" imports the invasion of a legal right,³³ and to say that a person has committed a wrong is to say that he has subjected himself to a cause of action.³⁴ A wrong consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it, since it may or may not have been done with bad motive;³⁵ the question of motive is usually a question of aggravation only.³⁶

The word "wrong" may be used as a term of morals to include a moral wrong, and as such it is not a term of pure legality;³⁷ but if the word is employed with a legal signification it signifies a legal injury,³⁸ and if it is employed with this signification

Corp. of America, Plastics Division, 69 A.2d 572, 574, 3 N.J. 187. 1 C.J. p 985 note 21.

Similarly expressed

All wrong may be considered as merely a privation of right. N.J.—Louis Kamm, Inc., v. Flink, 175 A. 62, 65, 113 N.J. Law 582, 99 A.L.R. 1.

15. Va.—Drummond v. Rowe, 156 S. E. 442, 444, 155 Va. 725.

16. Cal.—Rubino v. Utah Canning Co., 266 P.2d 163, 165, 123 C.A.2d 18.

La.—Victor v. Lewis, App., 157 So. 293, 295.

71 C.J. p 1641 note 90.

Similarly defined

The violation of another's legal right.

Pa.—Greek Catholic Congregation of Borough of Olyphant v. Plummer, 32 A.2d 299, 300, 347 Pa. 351.

No wrong without a right

A wrong being merely the infringement of a right, where there is no right there can be no wrong. N.H.—Manchester v. Fernald, 51 A. 657, 659, 71 N.H. 153.

17. Mo.—State ex rel. and to Use of Donelon v. Deuser, 134 S.W.2d 132, 133, 345 Mo. 628.

In legal contemplation, a wrong is the violation of a legal right, and is redressed through a legal remedy.

Ohio.—Gibson v. Johnston, App., 144 N.E.2d 310, 312, appeal dismissed 141 N.E.2d 767, 166 Ohio St. 288.

18. Ind.—Western Union Tel. Co. v. 101 C.J.S.—41

Ferguson, 60 N.E. 674, 676, 157 Ind. 64, 54 L.R.A. 846.

19. Wash.—Carton v. City of Seattle, 120 P. 111, 112, 66 Wash. 447.

20. Mont.—Riddell v. Peck-Williamson Heating & Ventilating Co., 69 P. 241, 243, 27 Mont. 44.

21. Wash.—Carton v. City of Seattle, 120 P. 111, 112, 66 Wash. 447.

22. Cal.—Rubino v. Utah Canning Co., 266 P.2d 163, 165, 123 C.A.2d 18.

La.—Victor v. Lewis, App., 157 So. 293, 295.

Mo.—State ex rel. and to Use of Donelon v. Deuser, 134 S.W.2d 132, 133, 345 Mo. 628.

71 C.J. p 1641 note 88.

23. N.C.—Thomason v. Seaboard Air Line R. Co., 55 S.E. 205, 209, 142 N.C. 313.

24. Kan.—Union Pac. R. Co. v. Henry, 14 P. 1, 4, 36 Kan. 565—Kansas Pac. R. Co. v. Pointer, 14 Kan. 37, 50.

25. 3 Blackstone Comm. 153.

26. Cal.—Rubino v. Utah Canning Co., 266 P.2d 163, 165, 123 C.A.2d 18.

N.Y.—Daurizio v. Merchants' Dispatch Transp. Co., 274 N.Y.S. 174, 132, 152 Misc. 716.

71 C.J. p 1641 note 83.

27. 3 Blackstone Comm. 153.

28. Cal.—Rubino v. Utah Canning Co., 266 P.2d 163, 165, 123 C.A.2d 18.

N.Y.—Daurizio v. Merchants' Dispatch Transp. Co., 274 N.Y.S. 174, 132, 152 Misc. 716.

29. N.Y.—Austin v. Rawdon, 44 N. Y. 63, 69.

30. W.Va.—O'Connor v. Dills, 26 S. E. 354, 355, 43 W.Va. 54.

31. N.J.—Granahan v. Celanese Corp. of America, Plastics Division, 69 A.2d 572, 574, 3 N.J. 187.

32. Va.—Yoder v. Givens, 18 S.E.2d 380, 384, 179 Va. 229.

33. N.J.—Granahan v. Celanese Corp. of America, Plastics Division, 69 A.2d 572, 574, 575, 3 N.J. 187.

34. N.J.—Granahan v. Celanese Corp. of America, Plastics Division, supra.

Several injuries resulting from one wrong

"If A strikes down B with a single blow, as a result of which B sustains several injuries to his person, there is only one 'wrong' and B has one and not several causes of action against A for the several injuries resulting from such striking."

N.J.—Granahan v. Celanese Corp. of America, Plastics Division, supra.

35. La.—Victor v. Lewis, App., 157 So. 293, 295.

71 C.J. p 1641 note 2.

36. La.—Victor v. Lewis, supra.

37. N.Y.—People v. Schmidt, 110 N. E. 945, 947, 216 N.Y. 324, Ann.Cas. 1916A 978, L.R.A.1916D 519.

38. N.C.—Thomason v. Seaboard Air Line Ry., 55 S.E. 205, 209, 142 N.C. 313.

it does not reach violations of mere moral rights.³⁹

Wrongs have been variously classified, and may be either *ex contractu* or *ex delicto*,⁴⁰ or they may be public or private.⁴¹

"Wrong" has been held to be synonymous with "injury" see the C.J.S. definition Injury, and it has been contrasted with "*damnum absque injuria*" see the C.J.S. definition Damnum, and "*injuria sine damno*" see the C.J.S. definition Injuria.

As an adjective. The word "wrong" as an adjective is defined to mean contrary to law, and to the accepted standards of morality;⁴² contrary to the laws of God and man.⁴³

WRONGDOER. The word is said to import an invasion of right to the damage of the victim;⁴⁴ and may be defined as a tort-feasor;⁴⁵ a trespasser;⁴⁶ everyone who violates an express statute;⁴⁷ he who

does what the law does not allow.⁴⁸

WRONGFUL. It has been said that a wide range of meaning is given to the word "wrongful" in the various dictionaries and encyclopedias.⁴⁹ The term imports the infringement of some right.⁵⁰

In its ordinary sense⁵¹ "wrongful" is defined as meaning injurious, heedless, reckless, unjust, unfair;⁵² unlawful;⁵³ negligent;⁵⁴ and it is used to describe any act which is unlawful or unauthorized, or any other act of this description which is a civil wrong, or without right.⁵⁵

In its ordinary legal sense, the word "wrongful" is not applied to that which is lawful;⁵⁶ and it has been said that the word does not necessarily convey the idea of moral turpitude⁵⁷ or involve crime;⁵⁸ and an act may be wrongful although not criminal or tortious, or in violation of a contractual duty.⁵⁹ Usually the word "wrongful" signifies a breach of legal

39. Wis.—Harrigan v. Gilchrist, 99 N.W. 909, 933, 121 Wis. 127.

As used in maxim

The equitable maxim that equity will not suffer a wrong without a remedy requires as a basis for its application the presence of a "wrong" which does not mean a moral duty only, unconnected with legal obligations.

U.S.—Whitaker & Co. v. Sewer Imp. Dist. No. 1 of Dardanelle, Ark., C. A. Ark., 221 F.2d 649, 652.

40. N.Y.—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 182, 152 Misc. 716.

41. N.Y.—Daurizio v. Merchants' Despatch Transp. Co., supra. 71 C.J. p 1641 note 3.

"Public wrong" see Criminal Law § 1 d; distinguished from "private wrong" see Torts § 1.

"Private wrong" see Torts § 1; as synonymous with "civil injury" see the C.J.S. definition Civil; distinguished from "private injuries" see the C.J.S. definition Injury.

42. N.Y.—People v. Schmidt, 110 N. E. 945, 949, 216 N.Y. 324, Ann.Cas. 1916A 978, L.R.A.1916D 519.

Phrases employing the word "wrong" as an adjective and of which more recent adjudications have not been found see 71 C.J. p 1643 notes 30-39.

43. N.Y.—People v. Schmidt, supra.

44. Wis.—Merrill v. Comstock, 143 N.W. 313, 317, 154 Wis. 434. 71 C.J. p 1642 note 41.

Wrongdoer by ratification

To constitute one a "wrongdoer by ratification," original act must have been done in his interest, or have been intended to further some purpose of his own.

Tenn.—Howard v. Haven, 281 S.W. 2d 480, 485, 198 Tenn. 572.

Other phrases employing the word and of which more recent adjudications have not been found see 71 C. J. p 1642 notes 46-49.

45. Black L.D.

46. Tex.—Pilcher v. Kirk, 55 Tex. 208, 216.

Not necessarily guilty of trespass or other tort

A tenant for a month may become a wrongdoer in a sense by holding over after the term, but not in the sense of being guilty of trespass or other tort, since he is a tenant at sufferance in absence of anything done by lessor to revest possession in himself.

Mass.—Everett v. Town of Canton, 21 N.E.2d 269, 271, 303 Mass. 166.

47. N.Y.—Jetter v. New York & Harlem R. Co., 2 Keyes 154, 162, 2 Abb.Dec. 458.

Freeman v. Glens Falls Paper-Mill Co., 15 N.Y.S. 657, 659, 61 Hun 125.

48. Ma.—Heywood v. Tillson, 75 Ma. 225, 237, 46 Am.R. 373.

N.C.—State v. Van Pelt, 49 S.E. 177, 187, 136 N.C. 633, 63 L.R.A. 760.

49. Ind.—Fidelity & Casualty Co. v. Blount Plow Works, 136 N.E. 559, 561, 78 Ind.App. 529.

50. Mo.—Willens v. Personnel Bd. of Kansas City, App., 277 S.W.2d 665, 671.

Tex.—Mathes v. Williams, Civ.App., 134 S.W.2d 853, 858. 71 C.J. p 1642 note 55.

51. Colo.—Jabich v. People, 143 P. 1092, 1095, 58 Colo. 175.

52. Colo.—Jabich v. People, supra.

Tex.—Mathes v. Williams, Civ.App., 134 S.W.2d 853, 858.

Phrases employing the word "wrongful" and of which more recent adjudications have not been found see 71 C.J. p 1643 note 74-p 1644 note 14.

53. Ind.—Cleveland, C., C. & St. L. R. Co. v. Marion County Com'rs, 49 N.E. 51, 53, 19 Ind.App. 58. 71 C.J. p 1643 note 65.

54. U.S.—Northern Pac. R. Co. v. Adams, Wash., 24 S.Ct. 408, 409, 192 U.S. 440, 48 L.Ed. 513. 71 C.J. p 1643 note 60.

55. Wis.—Webber v. Quaw, 49 N.W. 830, 831, 46 Wis. 118. 71 C.J. p 1643 note 68.

Disobedience to lawful authority

Ind.—Fidelity & Casualty Co. v. Blount Plow Works, 136 N.E. 559, 561, 78 Ind.App. 529.

Mo.—Willens v. Personnel Bd. of Kansas City, App., 277 S.W.2d 665, 671.

Tex.—Mathes v. Williams, Civ.App., 134 S.W.2d 853, 858.

56. Neb.—Brown v. Graham, 114 N. W. 153, 154, 80 Neb. 281.

Legal standard of wrong

"The standard of wrong must be a legal standard, and nothing can be said to be wrong in law which is lawful."

Neb.—Brown v. Graham, supra.

57. Colo.—Jabich v. People, 143 P. 1092, 1095, 58 Colo. 175.

58. Idaho.—State v. Churchill, 98 P. 853, 857, 15 Idaho 645, 16 Ann.Cas. 947.

59. N.J.—Futurity Realty Corp. v. Passaic Nat. Bank & Trust Co., 62 A.2d 706, 709, 2 N.J.Super. 175.

duty, independent of contract rights;⁶⁰ but this is by no means always true.⁶¹

"Wrongful" has been held to be equivalent to, or synonymous with, "felonious" see the C.J.S. definition Felonious, "illegal" see the C.J.S. definition Illegal, and "negligent" see Negligence § 1 e.

"Wrongful" has been compared with, or distinguished from, "felonious" see the C.J.S. definition Felonious, "malicious" see the C.J.S. definition Malicious, "unlawful" see the C.J.S. definition Unlawful, and "willful" see the C.J.S. definition Willful.

WRONGFULLY. The word "wrongfully" is not a term of art in the law;⁶² but it does have an accurate meaning well known to the law, and it also has a popular and less precise signification.⁶³ It is given many interpretations and meanings according to its context.⁶⁴

"Wrongfully" is variously defined as meaning illegally, or without right;⁶⁵ in a wrong manner; unjustly; in a manner contrary to the moral law or to justice;⁶⁶ injuriously, in violation of right, or tortiously;⁶⁷ negligently;⁶⁸ unlawfully;⁶⁹ or without authority of law.⁷⁰

The word "wrongfully," standing alone, ordinarily does not convey the impression that a willful act is intended to be charged,⁷¹ and it does not necessarily imply or import dishonesty,⁷² knowledge and intention,⁷³ or without governmental authority.⁷⁴

"Wrongfully" has been compared with, or distin-

guished from, "by mistake" see the C.J.S. definition Mistake, "feloniously" see the C.J.S. definition Feloniously, "fraudulently" see the C.J.S. definition Fraudulently, "irregularly" see the C.J.S. definition Irregularly, "maliciously" see the C.J.S. definition Maliciously, "negligently" see Negligence § 1 e, "unlawfully" see the C.J.S. definition Unlawfully, "wantonly" see the C.J.S. definition Wanton, and "willfully" see the C.J.S. definition Willful.

It is stated in Pleading § 32 b that a mere allegation that an act was wrongfully done is a conclusion of law.

WROUGHT. Worked up or upon; manufactured; not rough or crude;⁷⁵ fitted; formed; labored; performed; worked.⁷⁶

The reverse of "wrought" is "unwrought" as stated in the C.J.S. definition Unwrought.

WYE. As a term of railroading see Railroads § 1 p.

WYOMING. One of the states of the United States of America.⁷⁷

X. The twenty-fourth letter of the English alphabet.⁷⁸ The letter occurs in various abbreviations, see Abbreviations 1 C.J.S. p 276 note 5. The character also is used as a substitute for and meaning "by."⁷⁹

X-RAY or X-RAYS. The Röntgen rays, so-called by their discoverer because of their enigmatical character.⁸⁰

60. Minn.—Kelper v. Anderson, 165 N.W. 237, 239, 138 Minn. 392, L.R.A. 1918C 299.

61. Minn.—Kelper v. Anderson, supra.

62. U.S.—International Longshoremen's & Warehousemen's Union v. Ackerman, D.C.Hawaii, 82 F.Supp. 65, 106.

63. N.C.—State v. Van Pelt, 49 S.E. 177, 187, 136 N.C. 633, 68 L.R.A. 760.

71 C.J. p 1644 note 16.

64. Mo.—Willens v. Personnel Bd. of Kansas City, App., 277 S.W.2d 665, 671.

65. Ky.—Keyer v. Rives, 56 S.W. 4, 21 Ky.L. 1706.

Phrases employing the word "wrongfully" and of which more recent adjudications have not been found see 71 C.J. p 1644 note 34-p 1645 note 56.

66. U.S.—International Longshoremen's & Warehousemen's Union v. Ackerman, D.C.Hawaii, 82 F.Supp. 65, 106.

Mo.—Willens v. Personnel Bd. of Kansas City, App., 277 S.W.2d 665, 671.

71 C.J. p 1644 note 18.

67. Iowa.—Raver v. Webster, 3 Iowa 502, 506, 66 Am.D. 96.

Or.—State v. Nease, 80 P. 897, 898, 46 Or. 433.

68. Ind.—Green v. Eden, 56 N.E. 240, 242, 24 Ind.App. 583.

69. Kan.—Rhea v. Williams, 103 P. 119, 80 Kan. 698.

70. Or.—State v. Nease, 80 P. 897, 899, 46 Or. 433.

71. N.Y.—Cortillion Fabrics Corp. v. National Safety Bank & Trust Co. of N. Y., 84 N.Y.S.2d 880, 883, 193 Misc. 741.

72. Ala.—Spivey v. McGehee, 21 Ala. 417, 421.

Ky.—Keyer v. Rives, 56 S.W. 4, 21 Ky.L. 1706.

73. N.J.—Boice v. Gibbons, 8 N.J. Law 324, 330.

74. Ind.—Chicago, T. H. & S. E. R. Co. v. Collins, 142 N.E. 634, 637, 82 Ind.App. 41.

75. U.S.—U. S. v. Roessler & Hasslacher Chemical Co., N.Y., 137 F. 770, 772, 70 C.C.A. 346.

Phrases employing the word "wrought" and of which more recent adjudications have not been found see 71 C.J. p 1645 notes 60-72.

76. Mich.—Bancroft v. Peters, 4 Mich. 619, 625.

77. Bouvier L.D.

Historical note

By act of congress, approved July 25, 1868, the territory of Wyoming was constituted; and Wyoming became one of the states of the United States by virtue of the act of congress of July 10, 1890. Bouvier L.D.

78. Webster New Int.D.

79. Ind.—Jaqua v. Witham & Anderson Co., 7 N.E. 314, 315, 106 Ind. 545. 71 C.J. p 1645 note 78.

80. Webster New Int.D. 71 C.J. p 1645 note 79.

X-ray burn. A very painful burn, slow to respond to medical treatment, which frequently follows the application of the X-rays to the body in the case of some persons, but to which some others do not seem to be susceptible.⁸¹

X-ray photograph. A sciagraph or skiagraph.⁸²

X U R MESSAGE. See Telegraphs, Telephones, Radio, and Television § 141 b (4).

XYLOPHONE. An instrument consisting of a series of wooden bars, graduated in length to the musical scale, resting on belts commonly of straw, and sounded by striking with two small wooden hammers, sometimes by rubbing with rosined gloves.⁸³

Y. The twenty-fifth letter of the English alphabet.⁸⁴ The letter occurs in various abbreviations, see Abbreviations 1 C.J.S. p 276 note 5.⁸⁵

YACHT. A vessel larger than a rowboat, used for private pleasure, and for certain other purposes.⁸⁶

YAHREZEIT. In the Orthodox Jewish faith, "Yahrzeit" is an annual prayer for the repose of the soul of a dead person.⁸⁷ It is similar in purpose to masses in the Roman Catholic Church.⁸⁸

YAM. The true yam belongs to the genus "dioscorea,"⁸⁹ and may be lexically defined as the edible, starchy, tuberous root of various plants of the genus "dioscorea;"⁹⁰ but in its commercial or popular sense, as used in the Tariff Acts, it has been held to include tuberous roots which scientifically are not "yams."⁹¹

YARD. In one sense the word "yard" signifies a unit of measure, and it is treated in this sense in Weights and Measures § 1 b.

In an entirely different sense, the word "yard," by common and current acceptance,⁹² signifies an inclosure;⁹³ a small inclosed place in front of or around a house or barn;⁹⁴ an inclosure within which any work or business is carried on;⁹⁵ an inclosure, with or without buildings, devoted to some work or business.⁹⁶

While the word "yard" is generally defined as meaning an inclosure, yet, when used in connection with a dwelling, the term does not necessarily mean or suggest the idea of an inclosure, but rather the plat immediately surrounding, and upon which is situated the dwelling and other buildings used in connection therewith for domestic purposes.⁹⁷

A driveway may constitute a yard as stated in the C.J.S. definition Driveway, but it has been held that a golf course is not a yard.⁹⁸

The words "yard" and "inclosure" have been held to be synonymous, and also have been distinguished, see the C.J.S. definition Inclosure. "Yard" has also been compared with "orchard" see the C.J.S. definition Orchard.

Statutes or ordinances which are in the nature of health or zoning regulations sometimes provide for yards around dwellings. Health regulations containing such provisions are treated in Health § 22 b, and zoning regulations making such provisions are treated in Zoning §§ 48, 145.

81. Minn.—Henslin v. Wheaton, 97 N.W. 882, 883, 91 Minn. 219, 64 L.R.A. 126, 103 Am.S.R. 504, 1 Ann. Cas. 19.

82. Ind.—Aspy v. Botkins, 66 N.E. 462, 463, 160 Ind. 170.

Skiagraph is "a shadow like image or picture made on a sensitive surface especially by Röntgen rays." Webster New Int.D.

83. U.S.—U. S. v. F. W. Woolworth Co., 23 Ct.Cust.App. 234, 236.

84. Webster New Int.D.

85. **Fricative qualities and values in sound**

"The letter 'y,' a consonant (when it is not a vowel), has fricative (and, we might add, frisky) qualities and values in sound; for example, the sound of short or long 'i;' the sound of 'e,' as in ever (vide 'zephyr'); the sound of long 'a.'"

Mo.—Akins v. Adams, 164 S.W. 603, 607, 256 Mo. 2.

86. Mass.—Barker v. Inhabitants of Town of Fairhaven, 163 N.E. 901, 902, 265 Mass. 333.

Phrases

(1) "Yacht basin" see the C.J.S. definition Basin.

(2) Other phrases employing the word "yacht" and of which more recent adjudications have not been found see 71 C.J. p 1646 notes 89, 90.

87. N.Y.—In re Steiner's Estate, 16 N.Y.S.2d 613, 614, 172 Misc. 950—In re Fleishfarb's Will, 271 N.Y.S. 738, 737, 151 Misc. 399.

Yar Zeit

The annual prayers are sometimes called "Yar Zeit."

N.Y.—In re Kladneve's Estate, 234 N.Y.S. 246, 247, 133 Misc. 766.

88. N.Y.—In re Fleishfarb's Will, 271 N.Y.S. 738, 737, 151 Misc. 399.

89. U.S.—Kwong Yuen Shing v. U. S., C.C.N.Y., 175 F. 317, 318.

90. Webster New Int.D.

91. U.S.—See Kwong Yuen Shing v. U. S., C.C.N.Y., 175 F. 317, 318. 71 C.J. p 1646 note 94.

92. Ala.—Wright v. Sample, 50 So. 268, 162 Ala. 222. N.Y.—Cook v. Loew, 69 N.Y.S. 614, 34 Misc. 276.

93. Ala.—Wright v. Sample, 50 So. 268, 162 Ala. 222. Kan.—State v. Bugg, 72 P. 236, 66 Kan. 668.

94. Kan.—State v. Bugg, supra.

95. Kan.—State v. Bugg, supra. 71 C.J. p 1646 note 1.

96. N.J.—Grace Iron & Steel Corporation v. Ackerman, 7 A.2d 820, 821, 123 N.J.Law 54.

97. Kan.—State v. Bugg, 72 P. 236, 66 Kan. 668.

98. N.Y.—Union Free School Dist. No. 10 of Town of Hempstead, Nassau County, v. Baumgartner, 100 N.Y.S.2d 151, 152, 277 App.Div. 938.

Phrases employing the word "yard" are set out in the note.⁹⁹

YARDMAN. An employee who takes care of, or assists in the care of, yards and grounds.¹

YARN. In one sense the word "yarn" means any fibrous material from a natural source, whether animal, mineral, or vegetable, that is made for use in weaving, knitting, embroidery, etc.;² loosely, thread.³ Originally thread of any kind spun from natural fibers, vegetable or animal, or even mineral, but now, more usually, thread prepared for weaving as distinguished from sewing thread of any sort;⁴ something which is only spun, and produced longitudinally by the process of spinning;⁵ spun,⁶ or twisted⁷ fiber; spun wool;⁸ also a quantity of such spun material;⁹ the product of spinning a sliver;¹⁰ woolen thread; also thread of other material.¹¹ The term is also applied to stout woolen thread used for knitting, etc.;¹² and also to any of the threads forming the strand of a rope.¹³

"Yarn" has been compared with, or distinguished from, "filament" see the C.J.S. definition Filament, "strand" see the C.J.S. definition Strand, and "thread" see the C.J.S. definition Thread.

In another sense, the word "yarn" means a story;¹⁴ and, while the word is sometimes used with the implication of untruth or exaggeration, it does

not necessarily convey that meaning.¹⁵ In this sense, "yarn" has been held to be synonymous with "story" see the C.J.S. definition Story.

YAR ZEIT. See Jahrzeit ante.

YEAR. See Time § 9.

YEARBOOKS. Books of reports of cases in a regular series from the reign of King Edward I, inclusive, to the time of Henry VIII, which were taken by the prothonotaries or chief scribes of the courts, at the expense of the crown, and published annually.¹⁶

YEARLING. As defined by leading lexicographers, in its broadest sense, or ordinarily, an animal over a year old;¹⁷ any animal in the second year of its growth;¹⁸ a young animal one year old, or in the second year of its age,¹⁹ or past its first year and not yet two years old.²⁰

Although the word "yearling" may include many animals,²¹ and be applicable to all domestic animals,²² it has a special usage in special circles, such as among cattlemen, horsemen, and sheep growers,²³ and it is chiefly applied to cattle, sheep, and horses,²⁴ and as commonly employed in many parts of the country it denotes an animal of the cow

99. Phrases

(1) "Junk yard" see the C.J.S. definition Junk.

(2) "Mill yard" see Mills § 2.

(3) "Railroad yard," including "gravity yard" and "plugging yard" see Railroads § 1 h.

(4) "Yard engines" see Railroads § 1 i.

(5) Other phrases employing the word "yard" and of which more recent adjudications have not been found see 71 C.J. p 1646 note 8-p 1647 note 28.

1. Iowa.—Statter v. Herring, 251 N. W. 715, 716, 217 Iowa 410. 71 C.J. p 1647 note 29.

2. U.S.—U. S. v. Veit, Son & Co., 8 Ct.Cust.App. 290, 293. 71 C.J. p 1647 note 30.

Phrases employing the word "yarn" and of which more recent adjudications have not been found see 71 C.J. p 1647 notes 42-55.

3. U.S.—U. S. v. Veit, Son & Co., supra.

4. U.S.—U. S. v. Veit, Son & Co., supra.

5. U.S.—Walker v. Seeberger, D.C. Ill., 38 F. 724, 725.

6. U.S.—Lawson v. Whitlock Cordage Co., C.C.A.N.J., 60 F.2d 362. U. S. v. Veit, Son & Co., 8 Ct. Cust.App. 290, 293.

7. U.S.—Eckstein v. U. S., C.C.N.Y., 160 F. 287, 288. 71 C.J. p 1647 note 35.

8. U.S.—U. S. v. Veit, Son & Co., 8 Ct.Cust.App. 290, 293.

9. U.S.—U. S. v. Veit, Son & Co., supra.

10. U.S.—Lawson v. Whitlock Cordage Co., C.C.A.N.J., 60 F.2d 362, 363. 71 C.J. p 1647 note 38.

11. U.S.—U. S. v. Veit, Son & Co., 8 Ct.Cust.App. 290, 293, 294.

12. U.S.—U. S. v. Veit, Son & Co., supra.

13. U.S.—U. S. v. Veit, Son & Co., supra.

14. Cal.—People v. Santos, 26 P.2d 522, 527, 134 C.A. 736.

15. Cal.—People v. Santos, supra.

16. Black L.D. 71 C.J. p 1648 note 60.

17. Tex.—Kiggins v. Henne & Meyer Co., Civ.App., 199 S.W. 494, 496.

Phrases employing the word "yearling" and of which more recent adjudications have not been found see 71 C.J. p 1648 notes 68-79.

18. Ala.—Corpus Juris quoted in Henry v. State, 18 So.2d 140, 245 Ala. 487—Stollenwerk v. State, 55 Ala. 142.

Henry v. State, 18 So.2d 138, 139, 31 Ala.App. 444.

19. La.—State v. Majors, 59 So. 904, 905, 131 La. 466. 71 C.J. p 1648 note 64.

20. Miss.—Moran v. State, 135 So. 209, 160 Miss. 598.

21. Ala.—Stollenwerk v. State, 55 Ala. 142.

Henry v. State, 18 So.2d 138, 139, 31 Ala.App. 444.

22. Ark.—Bell v. State, 1 S.W.2d 1006, 1008, 175 Ark. 1169.

La.—State v. Majors, 59 So. 904, 905, 131 La. 466.

23. Ala.—Corpus Juris cited in Henry v. State, 18 So.2d 140, 141, 245 Ala. 487. 71 C.J. p 1648 note 66.

24. Ark.—Bell v. State, 1 S.W.2d 1006, 1008, 175 Ark. 1169.

kind²⁵ or cattle species,²⁶ which has reached the age of one year;²⁷ and thus the term "yearlings" is defined to mean cattle from ten months to eighteen months of age;²⁸ cattle past their first year and not yet two years old.²⁹ A yearling includes both sexes within the indicated age range,³⁰ and, accordingly, a heifer, a female, would be included in the designation.³¹

"Yearling" has been distinguished from "calf" see the C.J.S. definition Calf.

YEARLY. Accruing or coming every year; annual.³² It is sometimes said to be only a word of calculation.³³

YEAR OF OUR LORD. See Time § 9.

YEAS AND NAYS. The affirmative and negative votes on a bill or measure before a legislative assembly.³⁴

YEAST. A broad term which includes a wide va-

riety of both wild yeast and cultivated yeast.³⁵ In its ordinary significance, it is a conglomerate mass of infinitesimally small cells; a small cellular micro-organism;³⁶ a leaven.³⁷

YELLOW. The most luminous color of the spectrum, found between orange and green.³⁸

Statutes prohibiting the sale of oleomargarine unless it be of some other color than that of yellow butter are treated in Food § 6.

YEN. A Chinese (Pekingese) word meaning opium, or, literally, smoke.³⁹

YES. An affirmative reply; opposed to "no."⁴⁰

YIDDISH. A language used by German and other Jews, being a middle German dialect developed under Hebrew and Slavic influence;⁴¹ a Middle High German dialect, or number of dialects, containing a large number of Germanized Hebrew words and using Hebrew characters for its literature;⁴² Judea-

25. Ark.—Bell v. State, supra.
La.—State v. Majors, 59 So. 904, 905, 131 La. 466.

Miss.—Moran v. State, 135 So. 209, 160 Miss. 598.

In the common vernacular of Alabama, the words "white-faced yearling," in their connotation, would evoke a spontaneous concept of a white-faced yearling calf.

Ala.—Henry v. State, 18 So.2d 140, 141, 245 Ala. 487.

26. Miss.—Moran v. State, 135 So. 209, 160 Miss. 598.

Tex.—Barron v. San Angelo Nat. Bank, Civ.App., 138 S.W. 142, 144.

27. Ark.—Bell v. State, 1 S.W.2d 1008, 1008, 175 Ark. 1169.
71 C.J. p 1648 note 66.

28. Minn.—Vassau v. Campbell, 81 N.W. 829, 830, 79 Minn. 167.
71 C.J. p 1648 note 67.

29. U.S.—Sanderson v. Crowley, C. A.Tex., 180 F.2d 124, 126.

30. Ala.—Drakeford v. State, 79 So. 2d 443, 444, 38 Ala.App. 179.

31. Ala.—Drakeford v. State, supra.

32. Webster New Int.D.

Phrases employing the word "yearly" and of which more recent adjudications have not been found see 71 C.J. p 1649 notes 83-18.

33. Eng.—Doe v. Grafton, 18 Q.B. 496, 501, 83 E.C.L. 496, 118 Reprint 188.
71 C.J. p 1648 note 82.

34. Black L.D.

71 C.J. p 1649 note 19.

35. U.S.—Fleischman Yeast Co. v. Federal Yeast Corporation, D.C. Md., 8 F.2d 186, 187.

Phrases employing the word "yeast" and of which more recent adjudications have not been found see 71 C.J. p 1649 note 23-p 1650 note 31.

36. U.S.—Standard Brands v. National Grain Yeast Corporation, N. J., 60 S.Ct. 27, 28, 308 U.S. 34, 84 L.Ed. 17.

Fleischman Yeast Co. v. Federal Yeast Corporation, D.C.Md., 8 F.2d 186, 187.

Process of manufacture described

"It multiplies by self-propagation, limited by the means of subsistence, and the quality and yield are greatly affected by the conditions under which propagation is carried on. Yeast has been manufactured for at least fifty years by inoculating a wort; that is, by preparing a clear liquid solution and stocking it with a small amount of seed yeast. Such worts include substances to nourish the 'yeast cells,' and are called 'yeast nutrient solutions.' . . . The field for investigation and improvement has been the composition of the nutrient solution, and the character of the process employed during the period of growth."

U.S.—Standard Brands v. National Grain Yeast Corporation, N.J., 60 S.Ct. 27, 28, 308 U.S. 34, 84 L.Ed. 17.

Fleischman Yeast Co. v. Federal Yeast Corporation, D.C.Md., 8 F.2d 186, 187.

37. U.S.—See F. H. Leggett & Co. v. U. S., C.C.N.Y., 131 F. 817, 818.

"Yeast" as "leaven"

"In its most technical and limited sense, leaven is sour dough, and in

this sense the term was understood two thousand years ago. Later yeast was substituted for sour dough as a leaven. Each of these substances leaven, in the sense that they set up fermentation."

U.S.—F. H. Leggett & Co. v. U. S., supra.

38. Webster New Int.D.

Phrases

(1) "Yellow brass" see the C.J.S. definition Brass.

(2) "Yellow dog contract" defined see Contracts § 10; as to requirements of public policy see Contracts § 267; validity generally see Master and Servant § 28(40); enjoining see Injunctions § 138.

(3) "Yellow fever" see the C.J.S. definition Fever.

(4) Other phrases employing the word "yellow" and of which more recent adjudications have not been found see 71 C.J. p 1650 notes 34-44.

39. Webster New Int.D.

"Yen shée" and "yen-shing" see Poisons § 1.

Yen hook

A piece of metal sharpened at one end and blunt on the other end, used to cook an opium pill.

Cal.—People v. Graves, 191 P.2d 32, 33, 84 C.A.2d 531.

Yen hook

An opium pill.

Cal.—People v. Graves, supra.

40. Webster New Int.D.

41. Mo.—Gold v. S. Pian Time Payment Jewelry Co., 145 S.W. 1174, 1178, 165 Mo.App. 154.

71 C.J. p 1650 note 47.

42. U.S.—U. S. v. Tod, C.C.A.N.Y., 294 F. 820, 823.

German.⁴³

"Yiddish" has been distinguished from "Hebrew" see the C.J.S. definition Hebrew.

YIELD. The word "yield," as a noun, has a customary and well-established meaning in the investment world,⁴⁴ and it is generally understood to mean the proportionate rate which the income on an investment bears to the total cost, interest excepted, on that investment, taking into consideration the time when the investment may be outstanding before being paid off.⁴⁵ While this customary and well-established meaning is a rather technical use of the word,⁴⁶ the term "yield" has another meaning which may be called a "layman's interpretation;"⁴⁷ and it may mean the net return to the original subscriber, that is to say, the cost of securing the money by issuing the securities,⁴⁸ and except in cases where a given security is issued at a premium or a discount, that is, above or below par, this net return will be the coupon rate.⁴⁹

The verb "yield" is frequently employed in nearly the same sense as "accumulate" or "produce,"⁵⁰ and in this sense it is defined as meaning to bear, to give a return for labor, or to produce;⁵¹ to give in return for labor expended or to produce as payment or interest on what is expended or invested.⁵²

In a different sense, the verb "to yield" is defined

as meaning to give way,⁵³ as to superior physical force, to a conqueror;⁵⁴ to give place to;⁵⁵ to give up the contest;⁵⁶ to submit;⁵⁷ surrender; succumb;⁵⁸ to cease opposition.⁵⁹

Used in the sense of yielding up the possession of an estate, "yield" means to give as claimed of right; to give up; to resign; to surrender.⁶⁰

Yielding. As a verbal noun, "yielding" is defined to mean a giving away under physical pressure; a settling.⁶¹

As a participial adjective, "yielding" means compliant, flexible, inclined or fit to yield in any sense of the word, or inclined to give way or comply, soft, or unresisting;⁶² retractable at will.⁶³

Yielding and paying. The initial words of that clause in leases in which the rent to be paid by the lessee is mentioned and reserved,⁶⁴ which was said to be not an express covenant, but an implied one.⁶⁵

Other phrases employing the word "yielding" are set out in the note.⁶⁶

YOKE. Two animals yoked together; a pair that work together.⁶⁷

The phrase "yoke of oxen" found in various exemption statutes has been the subject of adjudication and is discussed in Exemptions § 54 a.

43. Mo.—Gold v. S. Plan Time Payment Jewelry Co., 145 S.W. 1174, 1178, 165 Mo.App. 184.

44. U.S.—Baltimore Mail S. S. Co. v. U. S., D.C.Md., 7 F.Supp. 651, 654, 655.

45. U.S.—Baltimore Mail S. S. Co. v. U. S., supra.

Stocks and bonds

"Stocks, as a rule, have no definite date of maturity. Therefore, they are usually figured as perpetual; but bonds and most other classes of investments have a fixed time to run. Therefore, the problem of determining the yield is somewhat more complicated with respect to bonds, and special tables are in use to which investors usually turn to ascertain what the net return of yield is upon bonds. Thus for example, on a bond bearing 5 per cent. interest, having exactly ten years to run before maturity, if it is sold at 108.18, that is to say, \$1,081.80 for each \$1,000 bond, the net yield to the investor would be 4 per cent. per annum, which is 4 per cent. for each of the ten years and is 4 per cent. upon the entire sum, \$1,081.80 invested."

U.S.—Baltimore Mail S. S. Co. v. U. S., supra.

46. U.S.—Baltimore Mail S. S. Co. v. U. S., supra.

47. U.S.—Baltimore Mail S. S. Co. v. U. S., supra.

48. U.S.—Baltimore Mail S. S. Co. v. U. S., supra.

49. U.S.—Baltimore Mail S. S. Co. v. U. S., supra.

50. Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 465, 96 Utah 403.

51. U.S.—Palmer v. Jordan Machine Co., C.C.N.Y., 186 F. 496, 501.

N.Y.—Corpus Juris quoted in In re Brown's Will, 70 N.Y.S.2d 878, 881, 189 Misc. 479.

52. N.Y.—Corpus Juris quoted in In re Brown's Will, 70 N.Y.S.2d 878, 881, 189 Misc. 479. 71 C.J. p 1650 note 51.

53. U.S.—Palmer v. Jordan Machine Co., C.C.N.Y., 186 F. 496, 501. N.M.—State v. Horton, 258 P.2d 371, 373, 57 N.M. 257.

54. U.S.—Palmer v. Jordan Machine Co., C.C.N.Y., 186 F. 496, 501.

55. Mass.—Drake v. Curtis, 1 Cush. 395, 405.

56. N.M.—State v. Horton, 258 P.2d 371, 373, 57 N.M. 257.

57. N.M.—State v. Horton, supra.

58. N.M.—State v. Horton, supra.

59. N.M.—State v. Horton, supra.

60. Mass.—Drake v. Curtis, 1 Cush. 395, 405.

71 C.J. p 1650 note 58.

61. U.S.—Palmer v. Jordan Mach. Co., C.C.N.Y., 186 F. 496, 501.

62. U.S.—Palmer v. Jordan Mach. Co., supra.

63. U.S.—Mergenthaler Linotype Co. v. International Typesetting Machine Co., D.C.N.Y., 229 F. 168, 192.

64. Black L.D.

71 C.J. p 1650 note 52.

65. Vt.—Kimpton v. Walker, 9 Vt. 191, 198.

71 C.J. p 1650 note 53.

66. Phrases

(1) "Yielding means" or "yielding mechanism."

U.S.—Palmer v. Jordan Mach. Co., C.C.N.Y., 186 F. 496, 501.

(2) "Yielding right of way" see Motor Vehicles § 35.

(3) Additional phrases employing the word "yielding" and of which more recent adjudications have not been found see 71 C.J. p 1650 note 55—p 1651 note 73.

67. Webster New Int.D.

71 C.J. p 1651 note 76.

YOM KIPPUR. The Day of Atonement; the most sacred and solemn holiday in the Jewish calendar. It is a day on which Jews throughout the world, after a period of fasting, congregate together at their respective synagogues to worship and pray and ask divine forgiveness for sins committed during the year.⁶⁸

YOU. A personal pronoun of the second person, indicating the person addressed.⁶⁹

YOUNG; YOUNGER; YOUNGEST. The word "young" means immature; inexperienced; juvenile; not old.⁷⁰

Younger is the comparative of "young."⁷¹ It is also a word affixed to a man's name to distinguish one individual from another whose names are the same.⁷²

Youngest is the superlative of "young."⁷³

YOUR. Of or belonging to you.⁷⁴

YOURSELF. As one of the "self" words, "yourself" is a word of emphasis only.⁷⁵

YOUTH. In one sense the word "youth" is defined to mean a young person; especially a young man.⁷⁶ The term is also employed with a slightly different shade of meaning to signify that part of life that succeeds childhood,⁷⁷ and denoting a quality that may well be ascribed to a young man, even above twenty-one years of age.⁷⁸

The words "youth" and "child" may be synonymous, or they may be distinguished, as stated in the C.J.S. definition Child. "Youth" and "childhood" have also been distinguished, see the C.J.S. definition Childhood.

YOUTHFUL. The word has been said to describe a quality that may be possessed by a man twenty-one years old or more.⁷⁹

Z. The twenty-sixth letter of the English alphabet.⁸⁰

ZANJERO. A Spanish word commonly used to designate a water boss of an irrigating concern;⁸¹ and defined as a person employed to distribute the water of an irrigating canal in due proportion among those entitled to use it;⁸² a water superintendent.⁸³

ZANTE CURRANT. See the C.J.S. definition Currant.

ZEIN. A proteide found in Indian corn, similar to gluten.⁸⁴

ZEOLITES. See Mines and Minerals § 2 b (8).

ZINC. See Mines and Minerals § 2 b (8).

ZIPPER. The term "zipper" was originally a trademark, but it is now commonly used to describe the characteristics of certain kinds of slide fastening devices.⁸⁵

ZOMBIE. A name given by certain primitive, superstitious, colored peoples, particularly in certain sections of Haiti, to disinterred human corpses endowed by sorcery with power to carry out in a mechanical way the wishes of the sorcerer. It is sometimes also applied to the supernatural power or essence which these superstitious practitioners believe may enter and reanimate the dead body. An

68. Mo.—Hoffman v. Graber, App., 153 S.W.2d 817, 818.

69. Webster New Int.D.

Phrases employing the word "you" and of which more recent adjudications have not been found see 71 C.J. p 1651 notes 82-87.

70. Webster New Int.D.

Phrases employing the word "young" and of which more recent adjudications have not been found see 71 C.J. p 1651 notes 90-94.

71. Webster New Int.D.

Phrases employing the word "younger" and of which more recent adjudications have not been found see 71 C.J. p 1651 notes 97-99.

72. Vt.—Isaacs v. Willey, 12 Vt. 674, 678.

71 C.J. p 1651 note 96.

Suffixes as not constituting part of a name see Names § 5 b.

73. Webster New Int.D.

Phrases employing the word "youngest" and of which more recent adjudications have not been found see 71 C.J. p 1652 notes 2-12.

74. Webster New Int.D.

Phrases employing the word "your" and of which more recent adjudications have not been found see 71 C.J. p 1652 notes 14-19.

75. Cal.—People v. Perkins, App., 226 P.2d 64, 65.

76. Ala.—Louisville & I. R. Co. v. Wilson, 50 So. 188, 191, 162 Ala. 588.

71 C.J. p 1652 note 21.

Phrases employing the word "youth" and of which more recent adjudications have not been found see 71 C.J. p 1652 notes 22-30.

77. Ala.—Sheffield v. Franklin, 44 So. 373, 374, 151 Ala. 492, 12 L.R.

A.N.S., 884, 125 Am.S.R. 37, 15 Ann.Cas. 90.

78. Ala.—Louisville & N. R. Co. v. Wilson, 50 So. 188, 191, 162 Ala. 588.

79. Ala.—Louisville & N. R. Co. v. Wilson, 50 So. 188, 162 Ala. 588.

80. Webster New Int.D.

81. Cal.—Everett v. Standard Accident Ins. Co., 187 P. 996, 1000, 45 C.A. 332.

82. Cal.—Everett v. Standard Accident Ins. Co., supra.

71 C.J. p 1653 note 34.

83. Ala.—Everett v. Standard Accident Ins. Co., supra.

84. U.S.—Application of Barrett, 182 F.2d 626, 631, 37 C.C.P.A. Patents 1073.

85. U.S.—Goheen Corporation v. White Co., 126 F.2d 481, 485, 29 C.C.P.A. Patents 926.

article of the Penal Code of Haiti makes the practice of Zombieism a criminal offense.⁸⁶

ZONE. In its original significance, the word "zone" means belt,⁸⁷ and it also means a district;⁸⁸ and

as the word is used in general or in its literary sense, it means a belt or girdle more or less symmetrical in outline.⁸⁹

The word is also employed as an electrical term, and as such is defined in Electricity § 1 b.

86. N.Y.—Amusement Securities Corporation v. Academy Pictures Distributing Corporation, 294 N.Y. S. 279, 286, 292, 162 Misc. 608.

Snake deity

The word "Zombi" originally in West African voodoo cults meant the deity of the python; hence in Haiti and southern U. S., the snake deity of voodoo rite; a hierarchy is some-

times recognized of the grand Zombi and various lesser Zombis.

N.Y.—Amusement Securities Corporation v. Academy Pictures Distributing Corporation, supra.

87. Ark.—Arkansas Motor Coaches v. White Bus Co., 210 S.W.2d 314, 315, 213 Ark. 298.

Phrases

(1) "Zone of employment" within the meaning of Workmen's Compen-

sation Acts see Workmen's Compensation Acts § 234.

(2) Other phrases employing the word "zone" and of which more recent adjudications have not been found see 71 C.J. p 1653 notes 59-61.

88. Tex.—Lombardo v. City of Dallas, Civ.App., 47 S.W.2d 495, 499.

89. Md.—Applestein v. City of Baltimore, 143 A. 666, 670, 156 Md. 40.

ZONING

This Title includes the purpose, validity, construction, operation, modification, amendment and repeal of statutes and ordinances pertaining to zoning; nature, source, and scope of the zoning power and the manner of its exercise; enforcement; nonconforming uses; granting of permits and variances or exceptions; and review of zoning regulations and proceedings.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

I. IN GENERAL, §§ 1-14

II. VALIDITY OF ZONING REGULATIONS, §§ 15-80

A. VALIDITY, §§ 15-67

1. *General Considerations*, §§ 15-23
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I. IN GENERAL**§ 1. In General**

Zoning, which constitutes legislative action, is the separation or division of a municipality into districts, the regulation of buildings and structures in such districts in accordance with their construction and the nature and extent of their use, and the dedication of such districts to the particular uses designed to subserve the general welfare.

Zoning is one of several types of regulation of property by a local government.¹

Although zoning regulations are of modern² or comparatively recent³ origin, they have been extensively adopted by municipalities throughout the United States,⁴ and the subject of zoning has become a very important branch of the law affecting municipal corporations.⁵

The terms "zone" and "zoning" as used in such law have a technical and artificial meaning which is different from their literary and etymological sig-

1. Ill.—Phillips Petroleum Co. v. City of Park Ridge, App., 149 N. E.2d 344.

2. U.S.—Village of Euclid v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.

"Zoning is a practice born within our own time in the United States." Ohio.—Partain v. City of Brooklyn, Com.Pl., 138 N.E.2d 180, 185, affirmed 133 N.E.2d 616, 101 Ohio App. 279.

3. N.C.—State v. Roberson, 150 S. E. 674, 198 N.C. 70.
 43 C.J. p 333 note 28.

"The general idea of that which we today know as 'zoning' existed

with the Romans, and as early as 1692 in this country . . . but its general acceptance and rapid progress was delayed until the present century."

N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 549, 4 N.J. 577.

4. Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

Annexed territory

Purpose of Dallas zoning ordinance applicable to newly annexed territory was to place such territory under same comprehensive zoning re-

strictions as apply to like territory within the city.

Tex.—Meserole v. Board of Adjustment, City of Dallas, Civ.App., 172 S.W.2d 528.

5. U.S.—Village of Euclid v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.

N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577.

"The importance of zoning laws and ordinances need hardly be stressed."

N.J.—Stirling v. City of Plainfield, 49 A.2d 38, 39, 134 N.J.Law 485, reversed on other grounds 53 A.2d 713, 136 N.J.Law 38.

nificance,⁶ and under such law they refer to a separation or division of a municipality into districts, and the regulation of buildings and structures in such districts in accordance with their construction and the nature and extent of their use, and the dedication of such districts to the particular uses designed to subserve the general welfare.⁷ In other

words, zoning is the regulation by districts of the building development and uses of property,⁸ and its essence is a territorial division according to the character of lands and structures and their peculiar suitability for particular uses, and the uniformity of use within the division.⁹

6. Md.—*Applestein v. Osborne*, 143 A. 666, 156 Md. 40.
43 C.J. p 333 note 20.

7. Cal.—*Smith v. Collison*, 6 P.2d 277, 119 C.A. 180.
N.J.—*Antonelli Const. v. Milstead*, 112 A.2d 608, 34 N.J.Super. 449.
Mansfield & Swett v. Town of West Orange, 198 A. 225, 120 N.J. Law 145.

Similar Definitions

(1) Zoning consists of a general plan to control and direct use and development of property in a municipality or a large part of it by dividing it into districts according to present and potential use of the properties.

Conn.—*Devaney v. Board of Zoning Appeals of City of New Haven*, 45 A.2d 828, 132 Conn. 537—*State ex rel. Spiros v. Payne*, 41 A.2d 908, 131 Conn. 647.

(2) Zoning signifies the division of a municipal corporation into separate areas and the application to each area of regulations which generally pertain to the use of buildings or to their structural or architectural design.

N.C.—*Elizabeth City v. Aydtlett*, 181 S.E. 78, 79, 201 N.C. 602.

(3) Zoning is setting aside of disconnected tracts for particular uses, to serve interests of whole territory affected.

Md.—*Applestein v. Osborne*, 143 A. 666, 156 Md. 40.

(4) Zoning is simply the division of a municipal corporation into districts and the prescription and application of different regulations in each district.

Me.—*Toulouse v. Board of Zoning Adjustment*, 87 A.2d 670, 147 Me. 387.

N.J.—*Mansfield & Swett v. Town of West Orange*, 198 A. 225, 120 N.J. Law 145.

Tex.—*Lombardo v. City of Dallas, Civ.App.*, 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1.

43 C.J. p 333 note 22.

(5) To "zone" means to separate the commercial or industrial district or districts from the resident district or districts, and to prohibit the establishment of places of business in any designated residence district, or vice versa.

La.—*State v. New Orleans*, 97 So. 440, 154 La. 271, 33 A.L.R. 260.

(6) Zoning means a division of a municipality into zones or districts and the imposition of structural and use restrictions within the established zones or districts.

U.S.—*Corpus Juris Secundum* cited in *Proffett v. Valley View Village*, D.C. Ohio, 123 F.Supp. 339, 343, reversed on other grounds, C.A., *Valley View Village v. Proffett*, 221 F. 2d 412.

(7) Zoning is a separation of a municipality into districts for the most appropriate use of the land by general rules according to a comprehensive plan for the common good in matters within the domain of the police power.

N.J.—*Rockhill v. Chesterfield Tp., Burlington County*, 128 A.2d 473, 480, 23 N.J. 117.

(8) Zoning is the regulation by districts of building development and uses of property in accordance with some well-considered comprehensive plan, which covers the entire municipality or a large part thereof.

N.J.—*N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge*, 69 A.2d 767, 771, 6 N.J.Super. 495.

(9) Zoning is the deprivation, for the public good, of certain uses by owners of property to which such property might otherwise be put.

Cal.—*Gilbert v. Stockton Port Dist.*, 60 P.2d 847, 7 C.2d 384.

Bank of America Nat. Trust & Savings Ass'n v. Town of Ather-ton, 140 P.2d 678, 60 C.A.2d 268.

Ordinance held not one of zoning

N.Y.—*People, on Inf. of Barker v. Elkin*, 80 N.Y.S.2d 525.

Proposed zoning ordinance not law of council

Pa.—*Silver v. Lyon*, Com.Pl., 61 Dauph.Co. 225.

8. Me.—In re Opinion of the Justices, 128 A. 181, 124 Me. 501.

Md.—*Ellicott v. Mayor and City Council of Baltimore*, 23 A.2d 649, 180 Md. 176.

Minn.—*Corpus Juris* cited in *Orme v. Atlas Gas & Oil Co.*, 13 N.W.2d 757, 761, 217 Minn. 27.

N.J.—*Borough of Cresskill v. Borough of Dumont*, 100 A.2d 182, 28 N.J.Super. 26, affirmed 104 A.2d 441, 15 N.J. 238.

Mansfield & Swett v. Town of West Orange, 198 A. 225, 120 N.J. Law 145.

Va.—*Blankenship v. City of Richmond*, 49 S.E.2d 321, 188 Va. 97.

"The genius of the constitutional and statutory zoning process is the regulation of land and buildings by districts according to the nature and extent of their use."

N.J.—*Katobimar Realty Co. v. Webster*, 118 A.2d 824, 829, 20 N.J. 114.

Regulation or restriction

A zoning ordinance regulates or restricts the use of property within the zoning area.

Va.—*Blankenship v. City of Richmond*, 49 S.E.2d 321, 188 Va. 97.

Individual pieces of property

Zoning of a municipality is regulation by districts in real sense of the term, and not by individual pieces of property.

N.H.—*Kimball v. Blanchard*, 7 A.2d 394, 90 N.H. 298.

Distrioting

(1) Zoning, within statute delegating authority for zoning to city, means distrioting.

N.Y.—*Van Auken v. Kimmey*, 252 N.Y.S. 343, 141 Misc. 117.

People, on Inf. of Barker v. Elkin, 80 N.Y.S.2d 525.

(2) Zoning divides the municipality into districts.

Ohio.—*Central Outdoor Advertising Co. v. Village of Evendale, Ohio*, Com.Pl., 124 N.E.2d 189.

(3) The power to zone means distrioting for the purpose of location of trades, industries, and buildings for specified uses.

N.Y.—*Howell v. Liebowitz*, 116 N.Y.S.2d 537.

Limitation on use

A zoning law necessarily limits the use which might otherwise be made of property, since the purpose of such a law is to establish limitations on the use of private property and prescribe how it may be used.

Wis.—*State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison*, 35 N.W.2d 312, 354 Wis. 42.

9. Md.—*Northwest Merchants Terminal v. O'Rourke*, 60 A.2d 743, 191 Md. 171—*Heath v. Mayor and City Council of Baltimore*, 49 A.2d 799, 188 Md. 296.

N.J.—*Bogert v. Washington Tp.*, 135 A.2d 1, 25 N.J. 57—*Raskin v. Town of Morristown*, 121 A.2d 378, 21 N.J. 180—*Katobimar Realty Co. v. Webster*, 118 A.2d 824, 20 N.J. 114—*Schmidt v. Board of Adjustment of City of Newark*, 88 A.2d 607, 9 N.J.

Roughly stated, those regulations which may be called "zoning regulations" are divided into two classes,¹⁰ those which regulate the height or bulk of buildings within certain designated districts,¹¹ that is, those regulations which have to do with structural and architectural designs of the building,¹² and those which prescribe the use to which buildings or property within certain designated districts may be put.¹³ An ordinance affecting only a single area or a few definite areas in a city is not in itself a zoning ordinance,¹⁴ although it designates that area, or those areas, by reference to their description in the zoning ordinance in effect in the city, as, for example, an ordinance forbidding loitering on the streets in business zones.¹⁵

Zoning is concerned with the use of specific existing buildings and lots, not primarily with their ownership.¹⁶ The zoning function is not confined to mere map-making.¹⁷

Zoning ordinances involve a reciprocity of benefit as well as restraint.¹⁸ A municipality has the power to regulate the use and enjoyment of property to a reasonable extent and in a reasonable manner above and beyond the constitutional authority to zone.¹⁹

Governmental and legislative function. Zoning regulations constitute the exercise or expression of a governmental function or capacity of the municipality.²⁰ Their adoption or enactment constitutes ac-

405—*Collins v. Board of Adjustment of Margate City*, 69 A.2d 708, 3 N.J. 200.

De Benedetti v. River Vale Tp., Bergen County, 91 A.2d 353, 21 N.J.Super. 430.

Visco v. City of Plainfield, 57 A.2d 490, 136 N.J.Law 659—*Potts v. Board of Adjustment of Borough of Princeton*, 43 A.2d 850, 133 N.J.Law 230.

Reasonable neighborhood uniformity
N.J.—*Speakman v. Mayor & Council of Borough of North Plainfield*, 84 A.2d 715, 8 N.J. 250.

Guaranty Construction Co. v. Bloomfield, 168 A. 34, 11 N.J.Misc. 613.

Other statement as to essence

The essence of zoning is to provide a balanced and well-ordered scheme for all activity deemed essential to the particular municipality.

N.J.—*Berdan v. City of Patterson*, 62 A.2d 680, 1 N.J. 199.

Newark Milk & Cream Co. of Newark v. Parsippany-Troy Tp., 136 A.2d 682, 47 N.J.Super. 306.

10. Cal.—*Miller v. Los Angeles Board of Public Works*, 234 P. 381, 195 C. 477, 38 A.L.R. 1479.

11. Cal.—*Miller v. Los Angeles Bd. of Public Works*, supra.

Tex.—*Lombardo v. City of Dallas*, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1.

12. Ala.—*Corpus Juris Secundum cited in Alabama Alcoholic Beverage Control Bd. v. City of Birmingham*, 44 So.2d 593, 598, 253 Ala. 402.

Cal.—*Miller v. Los Angeles Board of Public Works*, 234 P. 381, 195 C. 477, 38 A.L.R. 1479.

N.J.—*Mansfield & Swett v. Town of West Orange*, 198 A. 225, 120 N.J.Law 145.

Tex.—*Lombardo v. City of Dallas*, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1.

Ordinary use of term

Ala.—*Alabama Alcoholic Beverage*

Control Bd. v. City of Birmingham, 44 So.2d 593, 253 Ala. 402.

13. Ala.—*Corpus Juris Secundum cited in Alabama Alcoholic Beverage Control Bd. v. City of Birmingham*, 44 So.2d 593, 598, 253 Ala. 402.

Cal.—*Miller v. Los Angeles Board of Public Works*, 234 P. 381, 195 C. 477, 38 A.L.R. 1479.

Conn.—*Abbadessa v. Board of Zoning Appeals of City of New Haven*, 54 A.2d 675, 134 Conn. 28.

Minn.—*Orme v. Atlas Gas & Oil Co.*, 13 N.W.2d 757, 217 Minn. 27.

N.J.—*Mansfield & Swett v. Town of West Orange*, 198 A. 225, 120 N.J.Law 145.

Tex.—*Lombardo v. City of Dallas*, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1.

Ordinary use of term

Ala.—*Alabama Alcoholic Beverage Control Bd. v. City of Birmingham*, 44 So.2d 593, 253 Ala. 402.

Regulation of purpose or object of use

Zoning has, as one of its main purposes, regulation of "use" of property, which means regulation of purpose or object of the use, rather than mere conditions or circumstances of the use.

Ky.—*American Sign Corp. v. Fowler*, 276 S.W.2d 651.

Restriction on owner's right

(1) Zoning by municipality is a restriction on the right of a property owner to use his property as he chooses for any lawful purpose.

Ohio.—*State ex rel. Kuhlman v. City of Cincinnati*, 5 Ohio Supp. 286.

(2) A zoning restriction is merely a restraint on use of property for protection of the general well being, that is, to prevent harm to the public.

Iowa.—*Brackett v. City of Des Moines*, 67 N.W.2d 542, 246 Iowa 249.

Accordance with general policy

A zoning ordinance places limitations on the use of land within cer-

tain areas in accordance with a general policy which has been adopted by a municipality.

Cal.—*Rubin v. Board of Directors of City of Pasadena*, 104 P.2d 1041, 16 C.2d 119.

Barriers or buffers

The practice of zoning streets lying along the edges of residential districts for business and commercial purposes, in order that they may serve as barriers or buffers, is a recognized method of zoning.

Ill.—*Miller Bros. Lumber Co. v. City of Chicago*, 111 N.E.2d 149, 414 Ill. 162.

14. Conn.—*State ex rel. Spiros v. Payne*, 41 A.2d 908, 131 Conn. 647.

Single block

Ordinance which restricted use of business property only in single block of municipality was not, per se, a zoning ordinance.

N.J.—*N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge*, 69 A.2d 767, 6 N.J.Super. 495.

15. Conn.—*State ex rel. Spiros v. Payne*, 41 A.2d 908, 131 Conn. 647.

16. Conn.—*Abbadessa v. Board of Zoning Appeals of City of New Haven*, 54 A.2d 675, 134 Conn. 28.

17. N.Y.—*Congregation Beth Israel West Side Jewish Center v. Board of Estimate of City of New York*, 139 N.Y.S.2d 645, 285 App.Div. 629.

18. Ohio.—*Criterion Service v. City of East Cleveland*, App., 88 N.E.2d 300, appeal dismissed 89 N.E.2d 475, 152 Ohio St. 416.

19. N.J.—*Fred v. Mayor and Council of Borough of Old Tappan*, 85 A.2d 317, 17 N.J.Super. 153, affirmed 92 A.2d 473, 10 N.J. 515.

20. Ala.—*Jefferson County v. City of Birmingham*, 55 So.2d 196, 256 Ala. 436.

Cal.—*Johnston v. City of Claremont*, 323 P.2d 71.

Roach v. Hostetter, 119 P.2d 749, 48 C.A.2d 375.

tion in a legislative capacity,²¹ the performance of a legislative function,²² or an expression or exercise of the legislative power or authority,²³ and not of an executive or administrative authority,²⁴ although

in putting the ordinance into effect the municipality acts administratively.²⁵ Zoning regulations are legislative, rather than judicial, in character.²⁶

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 219.

N.Y.—Geisler v. Mitchell, 244 N.Y.S. 439, 137 Misc. 462.

Governmental agency

In enacting and enforcing zoning regulations, a municipality acts as a governmental agency.

N.C.—City of Raleigh v. Fisher, 61 S.E.2d 597, 232 N.C. 629.

21. U.S.—Dennis v. Village of Tonka Bay, C.C.A.Minn., 156 F.2d 672.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Cal.—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762.

Conn.—De Mars v. Zoning Commission of Town of Bolton, 115 A.2d 553, 142 Conn. 580.

Ga.—Toomey v. Norwood Realty Co., 89 S.E.2d 265, 211 Ga. 814.

Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

Ky.—Fried v. Louisville & Jefferson County Planning and Zoning Commission, 258 S.W.2d 466.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

Neb.—Kelley v. John, 75 N.W.2d 713, 162 Neb. 319.

N.J.—Roselle v. Wright, 122 A.2d 506, 21 N.J. 400.

Newark Milk & Cream Co. of Newark v. Parsippany-Troy Hills Tp., 135 A.2d 682, 47 N.J. Super. 306.

Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324.

N.Y.—Corning v. Town of Ontario, 121 N.Y.S.2d 288, 204 Misc. 38.

Pa.—Gratton v. Conte, 73 A.2d 381, 364 Pa. 578.

In re Imperial Asphalt Corporation's Zoning Appeal, Com.Pl., 51 Lanc.Rev. 9.

Tex.—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224, error refused.

—City of Dallas v. Lively, Civ. App., 161 S.W.2d 895.

Utah.—Walton v. Tracy Loan & Trust Co., 92 P.2d 724, 97 Utah 249.

Va.—Blankenship v. City of Richmond, 49 S.E.2d 321, 188 Va. 97.

Exercise by legislative body of power to promulgate zoning regulations see infra § 9.

"Zoning is legislative action, passed in an effort to bring about the greatest good for the greatest number."

Md.—Wakefield v. Kraft, 96 A.2d 27, 29, 202 Md. 136.

Ordinance purely legislative

Va.—Blankenship v. City of Richmond, 49 S.E.2d 321, 188 Va. 97.

Local scope

Establishment of zones in a community by a duly authorized body is basically a legislative process, although local in its scope.

Conn.—Park Regional Corp. v. Town Plan and Zoning Commission of Town of Windsor, 136 A.2d 785, 144 Conn. 677.

Furtherance of public welfare

With respect to zoning ordinances, what best furthers public welfare is matter primarily for determination of legislative body concerned.

Minn.—State ex rel. Howard v. Village of Roseville, 70 N.W.2d 404, 244 Minn. 343.

Controlling factor in zoning

N.Y.—Town of Cortlandt v. McNally, 115 N.Y.S.2d 624, reversed on other grounds 126 N.Y.S.2d 702, 282 App.Div. 1072, appeal denied 128 N.Y.S.2d 597, 283 App.Div. 800.

Fleetwood Manor, Inc. v. Village of Huntington Bay, 115 N.Y.S.2d 615.

Boundary between business and residence zones

Where boundary line between business zone and residence zone should be is a legislative question.

Pa.—Berman v. Exley, 50 A.2d 199, 355 Pa. 415.

22. Cal.—Johnston v. City of Claremont, 323 P.2d 71—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

Md.—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136.

Mich.—Randall v. Township Bd. of Meridian Tp., Ingham County, 70 N.W.2d 728, 342 Mich. 605.

Mo.—Downing v. City of Joplin, 312 S.W.2d 81.

N.Y.—Steers Sand & Gravel Corp. v. Village Bd. of Village of Northport, 129 N.Y.S.2d 403.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

Tex.—Lamkin v. City of Bellaire, Civ.App., 308 S.W.2d 70.

Purely legislative function

Ohio.—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

The District of Columbia zoning commission, acting by delegation from congress, performs a legislative function.

D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed Prentiss v. American University, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied Wrather v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

23. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 378.

D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed Prentiss v. American University, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied Wrather v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Fla.—Josephson v. Autrey, 96 So.2d 784.

Mich.—Dearborn Tp. v. Dall, 55 N.W.2d 201, 334 Mich. 673.

Neb.—Kelley v. John, 75 N.W.2d 713, 162 Neb. 319.

N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

N.Y.—Incorporated Village of Upper Brookville v. Faraco, 125 N.Y.S.2d 214, 282 App.Div. 943, affirmed 120 N.E.2d 835, 307 N.Y. 642.

Nehrbaas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145—Hewlett v. Town of Hempstead, 133 N.Y.S.2d 690, affirmed 150 N.Y.S.2d 922, 1 A.D.2d 954.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

Wash.—Lillions v. Gibbs, 289 P.2d 203, 47 Wash.2d 629.

Authority of municipal corporation and county

Same rules which govern the legislative authority of a municipal corporation under a zoning law apply to, and govern, a county.

Iowa.—Gannett v. Cook, 61 N.W.2d 703, 245 Iowa 750.

24. D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed Prentiss v. American University, 214 F.2d 282, 94 U.S.App. D.C. 204, certiorari denied Wrather v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Ga.—Toomey v. Norwood Realty Co., 89 S.E.2d 265, 211 Ga. 814.

Neb.—Kelley v. John, 75 N.W.2d 713, 162 Neb. 319.

25. Neb.—Kelley v. John, supra.

26. Cal.—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

Accordingly, in passing a zoning ordinance, the municipal council is engaged in legislating and not in contracting, so that no one is bound to the municipality as a result, and the municipality binds itself to no one thereby;²⁷ a zoning ordinance is not a contract between a municipality and its citizens.²⁸ Likewise, zoning regulations are not contracts of a county.²⁹

Matter of law and not equity. Zoning, being statutory, is exclusively a matter of law and not equity.³⁰

Regulatory and penal character. Zoning ordinances are held to be of a regulatory and penal character,³¹ and the regulatory sections are separable from the penal sections.³² Under other authority, zoning is primarily prohibitive rather than regulative,³³ or zoning ordinances may be permissive in form, permitting specified uses and buildings and

prohibiting all others within a district, or they may be prohibitive in form, prohibiting specified uses and buildings and permitting all others.³⁴

Safety. A zoning ordinance is not a safety statute, in the usual sense of that term,³⁵ but the general safety of the community is unquestionably improved by such ordinances.³⁶

Covenant restriction distinguished. A gulf of difference separates a zoning regulation from a covenant restriction;³⁷ what a covenantor specifically demands of the person to whom he sells his property has nothing to do with what the community, through municipal regulation, exacts of every property owner.³⁸

Effect of absence of zoning regulations. In the absence of a zoning ordinance, restrictions as to the use of property are viewed with hostility by the courts;³⁹ and in such absence an owner has the

Ga.—*Toomey v. Norwood Realty Co.*, 89 S.E.2d 265, 211 Ga. 814.

Ill.—*People ex rel. Joseph Lumber Co. v. City of Chicago*, 83 N.E.2d 592, 402 Ill. 321.

People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557—*City of Springfield v. Kable*, 29 N.E.2d 875, 306 Ill.App. 616.

Ky.—*Schloemer v. City of Louisville*, 182 S.W.2d 782, 298 Ky. 286.

Mass.—*Foster v. Mayor of City of Beverly*, 53 N.E.2d 693, 315 Mass. 567, 151 A.L.R. 737.

Mo.—*Colt v. Bernard*, App., 279 S.W.2d 527.

N.Y.—*Arverne Bay Const. Co. v. Thatcher*, 15 N.E.2d 537, 278 N.Y. 222.

Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App. Div. 1065, motion denied 86 N.Y.S.2d 288, 274 App. Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918.

Ohio.—*State ex rel. Snyder v. Yoter*, 30 N.E.2d 558, 65 Ohio App. 492.

Okl.—*Keaton v. Oklahoma City*, 102 P.2d 938, 187 Okl. 593, certiorari denied 61 S.Ct. 75, 311 U.S. 616, 85 L.Ed. 391.

Tenn.—*Brooks v. City of Memphis*, 241 S.W.2d 432, 193 Tenn. 371.

Tex.—*Lombardo v. City of Dallas*, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1.

Va.—*West Bros. Brick Co. v. City of Alexandria*, 192 S.E. 881, 169 Va. 271, appeal dismissed 53 S.Ct. 369, 392 U.S. 653, 82 L.Ed. 568, rehearing denied 53 S.Ct. 486, 302 U.S. 731, 82 L.Ed. 693.

Judicial review see *infra* §§ 320-339.

Function partly quasi judicial

However, the function of a county planning and zoning commission has been held to be in part quasi judicial.

Ky.—*Louisville & Jefferson County*

Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 307 Ky. 362.

27. N.C.—*Marren v. Gamble*, 75 S.E.2d 830, 237 N.C. 680.

Ohio.—*Clifton Hills Realty Co. v. City of Cincinnati*, 21 N.E.2d 993, 60 Ohio App. 443.

"Contracts thus have no place in a zoning plan, and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations."

N.J.—*Houston Petroleum Co. v. Automotive Products Credit Ass'n*, 87 A.2d 319, 322, 9 N.J. 122.

Change in boundaries

A zoning ordinance fixing the boundaries of zones did not result in a contract with persons occupying houses on adjoining lots preventing city from subsequently changing boundaries if it found a change desirable.

Pa.—*Hollearn v. Silverman*, 12 A.2d 292, 338 Pa. 346.

28. Cal.—*Wheeler v. Gregg*, 203 P.2d 37, 90 C.A.2d 348.

N.C.—*McKinney v. City of High Point*, 79 S.E.2d 730, 239 N.C. 232.

Pa.—*Appeal of Michener*, 115 A.2d 367, 332 Pa. 401.

29. Cal.—*Steiger v. Board of Supervisors of County of Los Angeles*, 390 P.2d 210, 143 C.A.2d 352.

"No contractual relations are created thereby."

Md.—*Offutt v. Board of Zoning Appeals of Baltimore County*, 105 A.2d 219, 224, 204 Md. 551.

30. Pa.—*Mazelka v. American Oil Co.*, 118 A.2d 142, 383 Pa. 191.

31. N.J.—*Scharf v. Recorder's Court of Borough of Ramsey*, 59 A.2d 595,

137 N.J.Law 231, affirmed 61 A.2d 765, 1 N.J. 59.

Offenses and penalties see *infra* §§ 417-422.

Authorizing statute as regulatory

Statute authorizing cities to pass ordinances prohibiting erection or occupation of any buildings, except residences, schoolhouses, churches, and similar structures, in certain districts without permits from city councils is not prohibitive, but regulatory.

Iowa.—*Funnell v. City of Clear Lake*, 30 N.W.2d 722, 239 Iowa 135.

32. N.J.—*Scharf v. Recorder's Court of Borough of Ramsey*, 59 A.2d 595, 137 N.J.Law 231, affirmed 61 A.2d 765, 1 N.J. 59.

33. N.J.—*Fred v. Mayor & Council of Borough of Old Tappan*, 92 A.2d 473, 10 N.J. 515.

34. Mo.—*State ex rel. Barnett v. Sappington*, App., 266 S.W.2d 774.

35. Minn.—*Hutchinson v. Cotton*, 53 N.W.2d 27, 236 Minn. 366, 31 A.L.R.2d 1465.

36. Minn.—*Hutchinson v. Cotton*, *supra*.

37. Pa.—*Haskell v. Gunson*, 137 A.2d 223, 391 Pa. 120.

38. Pa.—*Haskell v. Gunson*, *supra*.

39. Colo.—*Cross v. Bilett*, 221 P.2d 923, 122 Colo. 278.

Restriction to injury under police power

In absence of a zoning ordinance, where right of municipality is strictly limited to general police power for protection of public health and welfare, only such buildings and occupations may be restricted as are shown to be injurious under such police power.

Colo.—*Cross v. Bilett*, *supra*.

right to make any desired use of his premises not amounting to a nuisance.⁴⁰

So, subject to the requirements of building and zoning regulations, an owner of property may use it as he sees fit⁴¹ and erect a structure thereon for a legitimate purpose;⁴² and he may select the nature, location, and material for such structure.⁴³ Except as part of a valid comprehensive zoning program, a city may not prohibit a certain nature of building not violating building regulations and not dangerous or a nuisance per se.⁴⁴

The classification of realty as in a commercial use area by one purporting to act as the zoning commissioner of a county is nugatory where at the

time there are no zoning regulations in the county.⁴⁵

§ 2. Purpose

The purpose of zoning, as variously stated, is to stabilize the use, and conserve the value, of property, to preserve the character of neighborhoods, and to promote the health, safety, and welfare of the community.

Broadly, the purpose of a zoning ordinance is to limit the use of land in the interest of the public welfare.⁴⁶ The essential object or purpose of zoning regulations is to stabilize the use or uses,⁴⁷ or the occupancy,⁴⁸ of property, or to stabilize a neighborhood,⁴⁹ to preserve the character of the community,⁵⁰ and to preserve the character of neighborhoods by uniform and limited use thereof in the interest of the public generally.⁵¹

Farming

Township had no power to regulate the kind of farming to be conducted on property used for farming before adoption of zoning ordinance, except in the interest of the public health. N.J.—Stout v. Mitschele, 52 A.2d 422, 135 N.J.Law 406.

40. Mich.—Anchor Steel & Conveyor Co. v. City of Dearborn, 70 N.W.2d 753, 342 Mich. 361—Teglund v. Dodge, 25 N.W.2d 161, 316 Mich. 185.

Location in residential district

In absence of legal zoning prohibition, any business establishment may be located in a residential district, however it may affect the property values, unless, by its very nature, its operation shall physically annoy the inhabitants.

La.—Frederick v. Brown Funeral Times, Inc., 62 So.2d 100, 222 La. 57—Moss v. Burke & Trotti, Inc., 3 So.2d 281, 193 La. 76.

Light manufacturing, conducted so as not to cause a nuisance, is a lawful use of property, in absence of reasonable zoning regulations.

Md.—Amereihn v. Kotras, 71 A.2d 865, 194 Md. 591.

41. Ala.—Davis v. City of Mobile, 16 So.2d 1, 245 Ala. 80.

Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 85 C.A.2d 776.

42. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, supra.

43. Ala.—Davis v. City of Mobile, 16 So.2d 1, 245 Ala. 80.

44. Ala.—Davis v. City of Mobile, supra.

45. Md.—Amereihn v. Kotras, 71 A.2d 865, 194 Md. 591.

46. Ohio.—Smith v. Juillerat, 119 N.E.2d 611, 161 Ohio St. 424.

Carlton v. Riddell, App., 132 N.E.2d 772, appeal dismissed 130 N.E.2d 704, 164 Ohio St. 322.

47. Conn.—Smith v. F. W. Wool-

worth Co., 111 A.2d 552, 142 Conn. 88—Abbadessa v. Board of Zoning Appeals of City of New Haven, 54 A.2d 675, 134 Conn. 28—Devaney v. Board of Zoning Appeals of City of New Haven, 45 A.2d 828, 132 Conn. 537—Strain v. Mims, 193 A.754, 123 Conn. 275.

D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

Mass.—Bicknell Realty Co. v. Board of Appeal of Boston, 116 N.E.2d 570, 330 Mass. 676.

One of main purposes

Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

No vested right in zone classification

Although a landowner does not have a vested right to a particular zone classification, one of the essential purposes of zoning regulation is the stabilization of property uses.

N.J.—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117.

Stable community

Zoning law looks toward a stable, but not static or unchangeable, community.

N.J.—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

48. Mass.—Bicknell Realty Co. v. Board of Appeal of Boston, 116 N.E.2d 570, 330 Mass. 676.

49. N.Y.—Young Women's Hebrew Ass'n v. Board of Standards and Appeals of City of New York, 194 N.E. 751, 266 N.Y. 270.

Brown v. Village of Owego, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655.

50. N.Y.—Clune v. Walker, 170 N.Y.S.2d 604.

51. N.Y.—Daub v. Popkin, 171 N.Y.S.2d 513, 5 A.D.2d 283—Bazinsky v. Kesbec, Inc., 19 N.Y.S.2d 716, 259 App.Div. 467, affirmed 36 N.E.2d 694, 286 N.Y. 655, remittitur

amended on other grounds 37 N.E.2d 456, 286 N.Y. 723.

Pa.—Appeal of Blannik, Com.Pl., 15 Beaver 151.

Fundamental policy

Preservation of the true character of the neighborhood is a fundamental policy in zoning law.

Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry 13.

Places of assembly in residential districts

Provision in zoning ordinance that places of assembly in residential districts shall not be permitted within one-quarter mile of each other is designed for purpose of lowering hazards which can arise from close grouping of assembly buildings or structures which are exceptional in residential districts.

Pa.—Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit, 130 A.2d 240, 183 Pa. Super. 219, appeal dismissed Swift v. Borough of Bethel, Pa., 78 S.Ct. 120, 355 U.S. 40, 2 L.Ed.2d 71.

Zoning attempts to preserve rather than to uproot.

Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, Md., 60 A.2d 754, 191 Md. 249.

Excluding prejudicial uses; protection from impairment

(1) Zoning is designed to preserve true character of a neighborhood by excluding new uses and structures prejudicial to restricted purposes of the area, and gradual elimination of such existing structures and uses.

N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199.

(2) The two purposes of zoning act are to preserve character of a neighborhood by excluding new business and structures prejudicial to the restricted purposes of the area and gradual elimination of such existing structures and trades, and the protection of an owner's property or existing business from impairment

In other words, the purpose of zoning is to confine certain classes of buildings and uses of property to certain localities,⁵² without imposing undue hardship on property owners,⁵³ and thus to bring

about the orderly physical development of the community,⁵⁴ to conserve, protect, or maintain the value of buildings or other property,⁵⁵ and to put land to

which would result from enforced accommodation to new restrictions.

D.C.—Wood v. District of Columbia. Mun.App., 39 A.2d 67.

Similar statement

Purpose of zoning ordinance is to district territory of municipal corporation so that several uses for which such property may be legally employed will be, in so far as is possible, separated into zones so that greatest benefit as to one use may be achieved with least possible detriment to property employed for other uses; in other words, to separate residential districts from commercial districts and to separate both of these from property zoned for industrial use.

Ohio.—Criterion Service v. City of East Cleveland, App., 88 N.E.2d 300, appeal dismissed 89 N.E.2d 475, 152 Ohio St. 416.

52. Conn.—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 114 Conn. 15.

Ky.—Goodrich v. Selligman, 183 S.W. 2d 625, 298 Ky. 863.

N.J.—Hay v. Board of Adjustment of Borough of Fort Lee, 117 A.2d 650, 37 N.J.Super. 461—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154—Borough of Cresskill v. Borough of Dumont, 100 A.2d 182, 28 N.J.Super. 26, affirmed 104 A.2d 441, 15 N.J. 238.

Pa.—Appeal of Blamarik, Com.Pl., 15 Beaver 151.

"Zoning from its very name implies the setting of substantial districts for the grouping of various phases of the communal activity, the segregation of business, of residences and of industry so that the whole is not mixed together."

N.Y.—Santmyers v. Town of Oyster Bay, 169 N.Y.S.2d 959, 961.

Primary purpose

(1) Generally.

N.J.—Borough of Cresskill v. Borough of Dumont, 100 A.2d 182, 28 N.J.Super. 26, affirmed 104 A.2d 441, 15 N.J. 238.

(2) Primary purpose of zoning is the preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods.

Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381—Circle Lounge & Grill v. Board of Appeal of Boston, 86 N.E.2d 920, 324 Mass. 427.

Ultimate purpose

(1) Ultimate purpose of zoning is to confine certain classes of buildings and uses to certain localities.

Conn.—Langbein v. Board of Zoning Appeals of Town of Milford, 67 A. 2d 5, 135 Conn. 575—State ex rel. Chatlos v. Rowland, 38 A.2d 785, 131 Conn. 261.

(2) Ultimate purpose of zoning is to confine certain classes of buildings and uses to particular localities and to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected.

Cal.—Dienelt v. Monterey County, 247 P.2d 925, 113 C.A.2d 128.

(3) Nonconforming uses generally see *infra* §§ 150–200.

General areas or districts

The purpose of a zoning law is to devote general areas or districts to selected uses.

Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

Flexibility

One of the objects of zoning is to protect, so far as possible, property owners in more restricted districts from activities and uses permitted in less restricted areas, but complete separation of uses is not always feasible or desirable, and zoning statutes therefore permit a certain amount of flexibility with respect to zoning ordinances and their application.

Mass.—Burnham v. Board of Appeals of Gloucester, 128 N.E.2d 772, 333 Mass. 114.

53. Ky.—Goodrich v. Selligman, 183 S.W.2d 625, 298 Ky. 863—Selligman v. Von Allmen Bros., 179 S.W.2d 207, 297 Ky. 121.

Loss or benefit to property owners see *infra* § 37.

54. N.J.—Hay v. Board of Adjustment of Borough of Fort Lee, 117 A.2d 650, 37 N.J.Super. 461.

Pa.—Appeal of Blamarik, Com.Pl., 15 Beaver 151.

Prime purpose

N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154.

55. Del.—In re Auditorium, Inc., 84 A.2d 598, 7 Terry 430, cause remanded on other grounds Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Minn.—Hutchinson v. Cotton, 53 N.W.2d 27, 236 Minn. 366, 31 A.L.R.2d 1465.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.J.—Thornton v. Village of Ridgewood, 111 A.2d 899, 17 N.J. 493—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 1, 10 N.J. 442.

Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535.

Griggs v. City of Paterson, 39 A. 2d 231, 132 N.J.Law 145.

N.Y.—Daub v. Popkin, 171 N.Y.S.2d 513, 5 A.D.2d 283.

Capri Beach Club, Inc. v. Town of Hempstead, 170 N.Y.S.2d 68.

Pa.—Appeal of Borough of Speers, Quar.Sess., 28 Wash.Co. 234.

One of main purposes

Conn.—Libby v. Board of Zoning Appeals of City of New Haven, 118 A.2d 894, 143 Conn. 46.

Protection of property values against depreciation

N.Y.—Clune v. Walker, 170 N.Y.S.2d 604.

Incident

Protection of property values is an incident of zoning laws.

Pa.—Phillips v. Griffiths, 77 A.2d 375, 366 Pa. 468.

Damage by encroachment

Primary purpose of zoning ordinances is to prevent property of one person from being damaged by encroachment of a neighboring property in a manner not compatible with the general locality of the two properties.

Cal.—Neuber v. Royal Realty Co., 195 P.2d 501, 86 C.A.2d 596.

Sole objective or several objectives

(1) Protection of property values is objective of zoning ordinance within exercise of police power to promote general welfare, and it is immaterial whether ordinance is grounded solely on such objective or that such purpose is but one of several legitimate objectives thereof. Wis.—State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W. 2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed. 750.

(2) Conservation of property values is not by itself a proper sole objective for exercise of police power by township to zone particular areas for construction of residences of particular size.

Mich.—Elizabeth Lake Estates v. Waterford Tp., 26 N.W.2d 788, 317 Mich. 353.

the use or uses to which it is best adapted,⁵⁶ or the use which is most appropriate.⁵⁷

Zoning regulations are designed to create permanent conditions throughout a municipality.⁵⁸ They take care of problems of the present,⁵⁹ as by

protecting districts already established;⁶⁰ but zoning is not,⁶¹ or cannot be,⁶² static, and zoning ordinances are not restricted to the regulation of conditions in the immediate present,⁶³ and they may, and frequently do, look to the future or deal with conditions in the future,⁶⁴ to the extent that such condi-

Prevention of slums

Design of modern judicial approach to zoning ordinances is to save a repetition of blighting slums with the resultant depreciation of surrounding property values and the creation of a source of infection of the body social; and in suburban communities on the periphery of highly industrialized areas, the design is to contain, rather than to permit, extension of building processes which will break down such relatively small amounts of property as are still susceptible of protection.

N.J.—Fischer v. Bedminster Tp. Somerset County, 90 A.2d 757, 21 N.J. Super. 81, affirmed 93 A.2d 378, 11 N.J. 194.

56. Fla.—Forde v. City of Miami Beach, 1 So.2d 642, 146 Fla. 676.

Increase of values

Result will normally be to increase values.

Fla.—Forde v. City of Miami Beach, supra.

57. Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205 —Hutchinson v. Cotton, 53 N.W.2d 27, 236 Minn. 366, 31 A.L.R.2d 1465.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.J.—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117—Thornton v. Village of Ridgewood, 111 A.2d 899, 17 N.J. 499—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 1, 10 N.J. 442.

Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J. Super. 47—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 33 N.J. Super. 397—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J. Super. 535.

Griggs v. City of Paterson, 39 A.2d 231, 132 N.J. Law 145.

N.Y.—Capri Beach Club, Inc. v. Town of Hempstead, 170 N.Y.S.2d 68.

Pa.—Gratton v. Conte, 73 A.2d 381, 364 Pa. 578.

Appeal of Borough of Speers, Quar.Sess., 28 Wash.Co. 234.

Accordance with general plan

While all zoning regulations must be in accord with the general comprehensive plan, they should be made with view to encouraging most appropriate use of land.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

Factors in determining most appropriate use

What may be the most appropriate use of any particular property, in determining zoning boundaries and restrictions, depends not only on all conditions, physical, economic, and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which municipality is located and the use to which the land in that region has been or may be put most advantageously.

Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 628.

N.J.—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J. Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

58. Ill.—Mercer Lumber Cos. v. Village of Glencoe, 60 N.E.2d 913, 390 Ill. 138.

59. Ill.—Mercer Lumber Cos. v. Village of Glencoe, supra.

Crystallizing present uses

(1) It is the purpose of zoning to crystallize present uses and conditions and eliminate nonconforming uses as rapidly as is consistent with proper safeguards for those affected.

Cal.—Orange County v. Goldring, 263 P.2d 321, 121 C.A.2d 442.

(2) Nonconforming uses generally see infra §§ 180-200.

60. N.Y.—Barkmann v. Town of Hempstead, 49 N.Y.S.2d 262, 268 App.Div. 785, affirmed 62 N.E.2d 238, 294 N.Y. 805.

Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485.

61. N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115.

Soule v. Town of Perinton, 152 N.Y.S.2d 734, appeal dismissed 156 N.Y.S.2d 886, 2 A.D.2d 834—Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 878, 2 A.D.2d 889, affirmed 166 N.Y.S.2d 314, 3 N.Y. 2d 873, 145 N.E.2d 28.

Amendment see infra §§ 81-123.

62. Conn.—Kutcher v. Town Plan-

ning Commission, 88 A.2d 538, 133 Conn. 705.

N.J.—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324.

63. N.Y.—Arverne Bay Const. Co. v. Thatcher, 2 N.Y.S.2d 112, 253 App.Div. 285, reversed on other grounds 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.

Looking backward and forward

Zoning cannot look only to the immediate present, but it looks backward, to protect districts already established, and forward, to aid development of new districts, according to comprehensive plan, based on theory that what is best for city as a whole must prevail over private interests.

N.Y.—Arverne Bay Const. Co. v. Thatcher, supra.

64. Cal.—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778 and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777.

City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762—People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

Ill.—Mercer Lumber Cos. v. Village of Glencoe, 60 N.E.2d 913, 390 Ill. 138.

Md.—Kahl v. Consolidated Gas, Electric Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.

N.J.—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324.

N.Y.—Barkmann v. Town of Hempstead, 49 N.Y.S.2d 262, 268 App. Div. 785, affirmed 62 N.E.2d 238, 294 N.Y. 805.

City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 886, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

"Zoning ordinances, in the main, deal not with present conditions, but with conditions to come. They are . . . designed to . . . guide . . . [the] future growth [of a city]."

Va.—West Bros. Brick Co. v. City of Alexandria, supra.

tions can be reasonably anticipated.⁶⁵ So, these regulations may be intended to guide the future development and uses of land in certain areas⁶⁶ and to protect such areas during transition periods in connection with anticipated further development;⁶⁷ good zoning connotes community development in ac-

cordance with consistent plans and policies of the legislative body.⁶⁸

Zoning laws are intended to promote the public health, safety, welfare, convenience, morals, or prosperity of the community,⁶⁹ and they act not only

To be effective, zoning regulations must necessarily look to the future.

Cal.—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

Welfare of city at future time

Zoning restrictions are calculated to promote the general welfare of the city at some future time.

N.Y.—*City of Rochester v. Olcott*, 16 N.Y.S.2d 256, 173 Misc. 87.

65. Ill.—*Mercer Lumber Cos. v. Village of Glencoe*, 60 N.E.2d 913, 390 Ill. 138.

66. N.J.—*Stone v. Cray*, 200 A. 517, 89 N.J. 483.

Va.—*West Bros. Brick Co. v. City of Alexandria*, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 32 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 32 L.Ed. 603.

"The purpose of zoning is twofold. It should protect districts already established. It should control future development in a manner that is reasonable and for the best interests of the municipality in a comprehensive manner which would aid in the development of new areas." N.Y.—*Gignoux v. Village of Kings Point*, 99 N.Y.S.2d 280, 284, 199 Misc. 485.

"The power to zone is not limited to the protection of established districts. On the contrary, zoning looks not only backward to protect districts already established, but forward to aid in the development of new districts."

Cal.—*People v. Johnson*, 277 P.2d 45, 49, 129 C.A.2d 1.

Protection of residential areas

One of the bases for zoning regulations is the guidance of future development for the protection of residential areas.

Cal.—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

In zoning undeveloped areas, it is proper for municipality to take into account future uses to which area is best adapted as well as present condition.

Mass.—*City of Pittsfield v. Oleksak*, 47 N.E.2d 980, 313 Mass. 553.

Probable and desirable growth

The accepted methods of zoning of a municipality are adapted not only to present conditions but to require-

ment of probable and desirable growth.

N.H.—*Kimball v. Blanchard*, 7 A.2d 394, 90 N.H. 298.

67. N.Y.—*Barkmann v. Town of Hempstead*, 49 N.Y.S.2d 262, 268 App.Div. 785, affirmed 62 N.E.2d 238, 294 N.Y. 805.

68. N.Y.—*Hyde v. Incorporated Village of Baxter Estates*, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 378, 2 A.D.2d 889, affirmed 145 N.E.2d 28, 3 N.Y.2d 873, 166 N.Y.S.2d 314.

69. Conn.—*Florentine v. Town of Darien*, 115 A.2d 323, 142 Conn. 415—*Miller v. Town Planning Commission of Town of Manchester*, 113 A.2d 504, 142 Conn. 265—*Chouinard v. Zoning Commission of Town of East Hartford*, 97 A.2d 562, 139 Conn. 728—*Devaney v. Board of Zoning Appeals of City of New Haven*, 45 A.2d 828, 132 Conn. 537—*First Nat. Bank & Trust Co. of Port Chester, N. Y., v. Zoning Board of Appeals of Greenwich*, 10 A.2d 691, 126 Conn. 228.

Iowa.—*Brackett v. City of Des Moines*, 67 N.W.2d 542, 246 Iowa 249.

Ky.—*American Sign Co. v. Fowler*, 276 S.W.2d 651—*Goodrich v. Selligman*, 183 S.W.2d 625, 298 Ky. 863—*Seligman v. Belknap*, 155 S.W.2d 735, 288 Ky. 133.

Minn.—*Connor v. Chanhasen Tp.*, 81 N.W.2d 789, 249 Minn. 205.

Neb.—*Davis v. City of Omaha*, 45 N.W.2d 172, 153 Neb. 460—*Roncka v. Fogarty*, 41 N.W.2d 745, 152 Neb. 467.

N.J.—*Thornton v. Village of Ridgewood*, 111 A.2d 899, 17 N.J. 499—*Speakman v. Mayor & Council of Borough of North Plainfield*, 84 A.2d 715, 8 N.J. 250.

Gartland v. Borough of Maywood, 131 A.2d 529, 45 N.J.Super. 1—*Jones v. Zoning Bd. of Adjustment of Long Beach Tp.*, 108 A.2d 498, 32 N.J.Super. 397—*Pequanock Tp. v. De Wilde*, 91 A.2d 410, 21 N.J.Super. 517—*Town of Montclair v. Bryan*, 85 A.2d 231, 16 N.J.Super. 535.

Guaranty Construction Co. v. Bloomfield, 168 A. 34, 11 N.J.Misc. 613.

N.Y.—*Shepard v. Village of Skaneateles*, 89 N.E.2d 619, 300 N.Y. 115—*Baddour v. City of Long Beach*, 18 N.E.2d 18, 279 N.Y. 187, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794,

appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431—*Young Women's Hebrew Ass'n v. Board of Standards and Appeals of City of New York*, 194 N.E. 751, 286 N.Y. 270.

Brown v. Village of Owego, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655—*Bazinsky v. Kesbec, Inc.*, 19 N.Y.S.2d 716, 259 App.Div. 467, affirmed 36 N.E.2d 694, 286 N.Y. 655, remittitur amended on other grounds 37 N.E.2d 456, 286 N.Y. 723.

Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 208 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—*City of Rochester v. Olcott*, 16 N.Y.S.2d 256, 173 Misc. 87.

Clune v. Walker, 170 N.Y.S.2d 604—*Capri Beach Club, Inc. v. Town of Hempstead*, 170 N.Y.S.2d 68—*Vernon Park Realty v. City of Mount Vernon*, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, affirmed 121 N.E.2d 517, 307 N.Y. 493—*Delaware, L. & W. R. Co. v. City of Fulton*, 114 N.Y.S.2d 481, affirmed 121 N.Y.S.2d 582, 281 App.Div. 1005.

Ohio.—*State ex rel. Rosenthal v. City of Bedford*, App. 134 N.E.2d 727—*City of Cleveland Heights v. Glowe, App.*, 97 N.E.2d 226.

Okl.—*State ex rel. Hunzicker v. Pulliam*, 37 P.2d 417, 168 Okl. 632, 96 A.L.R. 1294.

Pa.—*Mazeika v. American Oil Co.*, 118 A.2d 142, 383 Pa. 191—*Appeal of Michener*, 115 A.2d 867, 382 Pa. 401.

Appeal of In re Zoning Bd., Harman, Com.Pl., 26 Lehigh. 862.

Appeal of Borough of Speers, Quar.Sess., 28 Wash.Co. 234.

R.I.—*Robinson v. Town Council of Narragansett*, 199 A. 808, 60 R.I. 422.

Tex.—*Ellis v. City of West University Place*, 175 S.W.2d 396, 141 Tex. 608.

City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

"Such a program promotes the welfare and good living of the municipality."

N.Y.—*Santmyers v. Town of Oyster Bay*, 169 N.Y.S.2d 959, 961.

"The complexity of urban life accompanied by the human desire for improvement, comfort, convenience and the advancement of the general

negatively, but also affirmatively, for the public welfare;⁷⁰ the benefit accrues not only to the municipality, but also to the abutting property owners.⁷¹ Furtherance of the social, as well as the economic

and political, advantages of a community are reasonable zoning objectives.⁷²

Other statements of the purpose of zoning are set out in the note.⁷³

public, brought about the enactment of zoning laws."

Ky.—*Selligman v. Von Allmen Bros.*, 179 S.W.2d 207, 209, 297 Ky. 121.

Dominant purpose

Mass.—*Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence*, 86 N.E.2d 906, 324 Mass. 433.

Primary object

Conn.—*Langbein v. Board of Zoning Appeals of Town of Milford*, 67 A.2d 5, 135 Conn. 575.

Ultimate purpose

N.Y.—*Incorporated Village of Upper Brookville v. Torr*, 158 N.Y.S.2d 899, 7 Misc.2d 725.

Real design and purpose of zoning ordinances are to promote general welfare.

Del.—*In re Auditorium, Inc.*, 84 A.2d 593, 7 Terry 430, cause remanded on other grounds *Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 8 Terry 373.

Chief purpose of zoning statute is promotion of public welfare.

Mass.—*Shannon v. Building Inspector of Woburn*, 105 N.E.2d 192, 328 Mass. 633—*Lamarre v. Commissioner of Public Works of Fall River*, 87 N.E.2d 211, 324 Mass. 542.

Implied liability of owner

Purpose of zoning ordinance is to meet and solve problems growing out of principle that every owner of property holds it under implied liability that his use of it shall not be injurious to equal enjoyment of others having equal right to enjoyment of their property, or injurious to rights of community.

Iowa.—*Call Bond & Mortgage Co. v. Sioux City*, 259 N.W. 33, 219 Iowa 572.

Residence district; family life

(1) Primary purpose of a residence district created by zoning ordinance is safe, healthful, and comfortable family life, rather than the development of commercial instincts and the pursuit of pecuniary profits.

N.Y.—*People v. Daly*, 28 N.Y.S.2d 603—*People v. Gold*, 6 N.Y.S.2d 264.

(2) Zoning for residential purpose is always impressed with wholesome objective of protecting civic and social values of American home.

Ill.—*Chicago Title & Trust Co. v. Village of Franklin Park*, 122 N.E.2d 804, 4 Ill.2d 304.

Loss of taxable value

Purpose in zoning ordinances to prevent an entire neighborhood from losing value and city suffering a re-

sulting loss in taxable value is directly related to the public welfare. Ill.—*Dunlap v. City of Woodstock*, 91 N.E.2d 434, 405 Ill. 410.

Independent regulations

The general aim both of town zoning bylaw and of bowling alley licensing statute is the promotion of public welfare, but each is independent of the other and seeks to accomplish its purpose by different means.

Mass.—*Marchesi v. Selectmen of Winchester*, 42 N.E.2d 817, 312 Mass. 28.

70. Colo.—*Colby v. Board of Adjustment*, 255 P. 443, 81 Colo. 344.

Police power

(1) Police power, as evidenced by comprehensive zoning ordinances, has much wider scope than mere suppression of offensive uses of property, and acts, not only negatively, but constructively and affirmatively, for promotion of public welfare.

Cal.—*Clemons v. City of Los Angeles*, 222 P.2d 439, 36 C.2d 95—*Jones v. City of Los Angeles*, 295 P. 14, 211 C. 304, followed in *Wittman v. City of Los Angeles*, 295 P. 22, 211 C. 778, *Stern v. City of Los Angeles*, 295 P. 23, 211 C. 778, and *Rutherford v. City of Los Angeles*, 295 P. 23, 211 C. 777—*Miller v. Board of Public Works*, 234 P. 381, 195 C. 477, 38 A.L.R. 1479.

People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

Tex.—*City of Corpus Christi v. Jones*, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

(2) Police power as source of zoning power see *infra* § 7.

71. Ohio.—*City of Cleveland Heights v. Glowe*, App., 97 N.E.2d 226.

72. N.J.—*Clary v. Borough of Eatontown*, 124 A.2d 54, 41 N.J.Super. 47.

73. Purpose stated

(1) Purpose of zoning is to set aside areas for specific uses and to protect them from encroachments in form of other uses inconsistent with uses to which they are dedicated.

Wis.—*Town of Hobart v. Collier*, 87 N.W.2d 868, 3 Wis.2d 182.

(2) One of the purposes of zoning is to furnish a protection to residential neighborhoods which will cause them to maintain themselves in a decent and sanitary way for a longer time than they otherwise would.

D.C.—*Lewis v. District of Columbia*, 190 F.2d 25, 89 U.S.App.D.C. 72.

(3) Power to impose zoning restrictions is conferred on a town for purpose of lessening congestion in streets, securing safety from fire, panic, and other dangers, providing adequate light and air, and preventing overcrowding of lands.

N.Y.—*Capri Beach Club, Inc. v. Town of Hempstead*, 170 N.Y.S.2d 68.

(4) Lawfully established boundaries must be permitted to stand to accomplish legislative objects of protecting property owners in the various districts, and of preventing invasion of business into residential section.

Mass.—*Bicknell Realty Co. v. Board of Appeal of Boston*, 116 N.E.2d 570, 330 Mass. 676.

(5) Original and primary purpose of zoning is to divide municipality into districts, prescribing and applying different regulations in each district, according to character of lands, and structures and their peculiar suitability for particular uses, among other considerations, and uniformity of use within division.

N.J.—*Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights in Bergen County*, 99 A.2d 591, 27 N.J.Super. 476, reversed on other grounds 105 A.2d 521, 15 N.J. 447.

(6) Essential considerations of zoning require municipality to adhere to basic purposes including security from fire, panic, and other dangers, adequate light and air, and character of district and its peculiar suitability for particular uses.

N.J.—*Thornton v. Village of Ridgewood*, 111 A.2d 899, 17 N.J. 499.

(7) Among the objects for which zoning law area regulations have been established are to secure quiet in residential sections, to afford adequate light, air, and sunshine, to promote sanitation, to reduce the hazards of fire, and to expedite transportation.

Md.—*Carney v. City of Baltimore*, 93 A.2d 74, 201 Md. 130.

(8) Ordinance providing that no part of filling station, bus terminal, etc., shall be within three hundred feet of lot line of plot on which is located building used as a theater, etc., or used as a church, etc., was not only intended to avoid traffic hazards in area where pedestrians converge on place of assemblage, but also risk of fire, and in case of a church, noises and interruptions that would interfere with worship and comfort and quiet of worshippers.

N.J.—*Vine v. Board of Adjustment*

The design is to promote the common good of all the people in the community,⁷⁴ or the welfare of the community as a whole,⁷⁵ rather than to further the desires or interests of a particular class, group, or individual in that community,⁷⁶ or to protect the value of the property of particular individuals.⁷⁷ So, the purpose of zoning is not to limit or restrict competition,⁷⁸ and a zoning ordinance cannot be used to control competition.⁷⁹

Control of density of population is a proper zoning objective,⁸⁰ and a commonly approved technique for that purpose is minimum building lot areas.⁸¹ So, one of the purposes of zoning is to prevent or avoid overcrowding⁸² or undue concentration of

population.⁸³

Safety ranks among the purposes for the enactment of zoning ordinances.⁸⁴

§ 3. Relation between Zoning Regulations and Building Regulations

Zoning regulations are distinct in character from building regulations; but the two sets of regulations are not necessarily inconsistent, so that both sets may remain in full force at the same time.

Regulations relating to the safety and structure of buildings are designed to promote the public welfare from a standpoint wholly different from that promoted by zoning regulations,⁸⁵ and building and

of Village of Ridgewood, 56 A.2d 122, 136 N.J.Law 416.

Advertising

Purpose of zoning ordinance regulating outdoor advertising and excluding advertising signs in all districts unless signs directed attention to businesses located on the premises was directed toward minimizing the abuses and hazards incident to the use of such signs, and to confine their use within reasonable requirements of businesses permitted to be conducted at places of their location. N.J.—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.

74. N.Y.—Daub v. Popkin, 171 N.Y. S.2d 513, 5 A.D.2d 283.

R.I.—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

75. Ill.—Skryszak v. Village of Mt. Prospect, 148 N.E.2d 721, 13 Ill.2d 329.

Ky.—Shemwell v. Speck, 265 S.W.2d 468.

N.Y.—Corning v. Town of Ontario, 121 N.Y.S.2d 288, 204 Misc. 38.

"Zoning involves a consideration of the community as a whole and a comprehensive view of its needs."

U.S.—Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214, 217.

"It is as a whole that a municipality or a community must be considered when zoning laws and ordinances are involved."

Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91.

"The state, through the authority which it vests in zoning commissions, regulates the use of property in the interest of the public health, safety, or welfare. To the extent that this is done reasonably, the public interest is supreme, and private interest must give way."

Conn.—Chouinard v. Zoning Commission of Town of East Hartford, 97 A.2d 562, 564, 139 Conn. 728.

Community at large

N.Y.—Clune v. Walker, 170 N.Y.S.2d 604.

Justification of zoning

(1) Zoning restrictions are justified by benefit which accrues to public as a whole.

Ky.—Fried v. Louisville and Jefferson County Planning and Zoning Commission, 258 S.W.2d 466.

(2) Zoning finds its justification in what is good for the community as a whole.

N.Y.—Hewlett v. Town of Hempstead, 133 N.Y.S.2d 690, affirmed 150 N.Y.S.2d 922, 1 A.D.2d 954.

Protection of public as well as all interested individuals

Tex.—Tonroy v. City of Lubbock, Civ.App., 242 S.W.2d 816, error refused no reversible error.

76. Ill.—Skryszak v. Village of Mt. Prospect, 148 N.E.2d 721, 13 Ill.2d 329.

N.Y.—Corning v. Town of Ontario, 121 N.Y.S.2d 288, 204 Misc. 38.

R.I.—Robinson v. Town Council of Narragansett, 199 A. 308, 315, 60 R.I. 422.

"Such laws are not designed to protect some individuals to the detriment and hardship of others."

R.I.—Robinson v. Town Council of Narragansett, supra.

"The public good means more than the special benefits from a zoning ordinance which are conferred only upon a few. It is not the purpose of the zoning law to permit special privileges to a few property owners."

Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 506, 408 Ill. 91.

77. Ky.—Shemwell v. Speck, 265 S.W.2d 468.

All property within use district

The public welfare must be considered from the standpoint of the objective of the zoning ordinance and of all the property within any particular use district.

Wash.—State ex rel. Miller v. Cain, 242 P.2d 505, 40 Wash.2d 216.

78. Pa.—Appeal of Lieb, 116 A.2d 860, 865, 179 Pa.Super. 318.

"It is not the duty of government to protect established merchandising businesses from fair competition from those whom shoppers find it more convenient to patronize."

Pa.—Appeal of Lieb, supra.

79. Ohio.—State ex rel. Rosenthal v. City of Bedford, App., 134 N.E. 2d 727.

Owner not entitled to protection

Owner of commercial building in original commercial district was not entitled to receive protection by means of zoning ordinance, against competition from proposed shopping center outside the original commercial district.

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

80. N.J.—Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47.

N.Y.—Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485.

Power to regulate density of population see *infra* § 8.

81. N.J.—Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47.

N.Y.—Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485.

82. N.J.—Thornton v. Village of Ridgewood, 111 A.2d 899, 17 N.J. 499.

83. Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

N.J.—Thornton v. Village of Ridgewood, 111 A.2d 899, 17 N.J. 499.

N.Y.—Capri Beach Club, Inc. v. Town of Hempstead, 170 N.Y.S.2d 68.

84. Minn.—Hutchinson v. Cotton, 53 N.W.2d 27, 236 Minn. 366, 31 A.L.R. 2d 1465.

85. Mass.—Norcross v. Building Dept. Board of Appeal, 150 N.E. 887, 255 Mass. 177.

zoning regulations are distinct from each other,⁸⁶ notwithstanding in a broad sense each pertains to the construction and alteration of buildings.⁸⁷ The line of demarcation is not easy to define,⁸⁸ and the dividing line must be found somewhere in the measure of the public interest sought to be protected.⁸⁹

Building regulations are not necessarily inconsistent with zoning regulations,⁹⁰ and both sets of regulations may remain in full force at the same time.⁹¹ Both sets rest on the police power,⁹² and both are designed to promote public safety, health, and welfare.⁹³

§ 4. Relation between Zoning and Planning

"Zoning" and "planning," while closely related, are not identical, "planning" being the broader term.

While "zoning" and "planning" have been considered so closely akin as to constitute a single concept,⁹⁴ and there is a definite and harmonious relationship between them,⁹⁵ they do not cover identical fields of municipal endeavor,⁹⁶ and the terms are not synonymous⁹⁷ or interchangeable,⁹⁸ although they are sometimes used interchangeably.⁹⁹ They are not identical in concept,¹ although closely related therein,² and there is a distinction, as well as a difference, between them,³ zoning being concerned primarily

Statute held for building code and not zoning

Statute providing that fiscal court of any county shall have authority to adopt, modify, or amend, and to enforce regulations governing construction, reconstruction, remodeling, repair, and maintenance of buildings other than buildings for agricultural purposes is a building-code statute and not a zoning statute.

Ky.—American Sign Corp. v. Fowler, 276 S.W.2d 651.

86. Mass.—Turner v. Board of Appeals of Town of Milton, 25 N.E.2d 203, 305 Mass. 189.

Mo.—Corpus Juris Secundum cited in Fleming v. Moore Bros. Realty Co., 251 S.W.2d 8, 15, 363 Mo. 305.

87. Mass.—Turner v. Board of Appeals of Town of Milton, 25 N.E.2d 203, 305 Mass. 189.

Incorporation of zoning ordinances into building code

Attempt of board of appeals to incorporate zoning ordinances by reference into building code was ineffectual.

Mass.—Turner v. Board of Appeals of Town of Milton, supra.

88. Ky.—American Sign Corp. v. Fowler, 276 S.W.2d 651.

89. Ky.—American Sign Corp. v. Fowler, supra.

90. Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15.

Mass.—Norcross v. Building Dept. Board of Appeal, 150 N.E. 887, 255 Mass. 177.

Mo.—Corpus Juris Secundum cited in Fleming v. Moore Bros. Realty Co., 251 S.W.2d 8, 15, 363 Mo. 305.

91. Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15.

Mass.—Norcross v. Building Dept. Board of Appeal, 150 N.E. 887, 255 Mass. 177.

Mo.—Corpus Juris Secundum cited in Fleming v. Moore Bros. Realty Co., 251 S.W.2d 8, 15, 363 Mo. 305.

Implied repeal

Where zoning ordinance was incompatible with, and repugnant to, the housing and restaurant code, and the zoning ordinance was the later ordinance enacted, the housing and restaurant code would be deemed to have been impliedly repealed, in so far as it was inconsistent with the zoning ordinance.

N.Y.—Inzerilli v. Pitney, 30 N.Y.S.2d 129.

92. Ky.—American Sign Corp. v. Fowler, 276 S.W.2d 651.

Mo.—Fleming v. Moore Bros. Realty Co., 251 S.W.2d 8, 363 Mo. 305.

Power to enact zoning regulations as based on police power see infra § 7.

93. Ky.—American Sign Corp. v. Fowler, 276 S.W.2d 651.

Purpose of zoning generally see supra § 2.

94. N.J.—Mansfield & Swett v. Town of West Orange, 198 A. 225, 120 N.J.Law 145.

95. Conn.—Kiska v. Skrensky, 138 A.2d 523, 145 Conn. 28.

Zoning as implementation of planning

Planning is comprehended in inherent sovereign right to order people's affairs so as to serve common essential need under constitutional provisions granting legislature full sovereign authority, including police power, save as therein limited, and zoning is an implementation of such planning, as being concerned with common social and economic interests and needs encompassed by basic power of government to make all such wholesome and reasonable laws, not repugnant to constitution, as may be deemed to be for good and welfare of commonwealth and all subjects thereof.

N.J.—Roselle v. Wright, 122 A.2d 506, 21 N.J. 400.

96. Ky.—Seligman v. Belknap, 155 S.W.2d 735, 288 Ky. 133.

N.J.—Mansfield & Swett v. Town of West Orange, 198 A. 225, 120 N.J.Law 145.

97. Ohio.—State ex rel. Kearns v. Ohio Power Co., 127 N.E.2d 394, 163 Ohio St. 451.

98. N.J.—Mansfield & Swett v. Town of West Orange, 198 A. 225, 120 N.J.Law 145.

99. Ohio.—State ex rel. Kearns v. Ohio Power Co., 127 N.E.2d 394, 163 Ohio St. 451.

1. N.J.—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117.

Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449.

2. Ky.—Seligman v. Belknap, 155 S.W.2d 735, 288 Ky. 133.

N.J.—Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449.

Mansfield & Swett v. Town of West Orange, 198 A. 225, 120 N.J.Law 145.

3. Conn.—Kiska v. Skrensky, 138 A.2d 523, 145 Conn. 28.

Distinction stated

(1) Zoning is concerned chiefly with the use and regulation of buildings and structures, whereas planning is of broader scope and significance and embraces the systematic and orderly development of a community with particular regard for streets, parks, industrial and commercial undertakings, civic beauty and other kindred matters properly included within police power.

Ohio.—State ex rel. Kearns v. Ohio Power Co., 127 N.E.2d 394, 163 Ohio St. 451.

(2) Zoning is separation of municipality into districts, and regulation of buildings and structures in districts so created, in accordance with their construction and nature and extent of their use, while planning is term of broader significance and connotes systematic development in trying to promote common interest of municipality, particularly with relation to its future physical growth, progress and needs.

N.J.—Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449.

with the use of property.⁴

So, zoning may not entirely exclude planning;⁵ planning embraces zoning,⁶ in a general way,⁷ but the converse is not true,⁸ municipal "planning" being a term of broader significance than "zoning."⁹

§ 5. Nature, Source, and Scope of Zoning Power

As a general rule, municipalities have the power, which is not unlimited, to enact reasonable zoning regulations.

The power to zone, using that term in its broadest sense, comprehends the power to create building

zones and to adopt zoning regulations, and to apply them, when questioned in a given situation, in harmony with their general purpose and intent so that unusual difficulties and unnecessary hardships are avoided.¹⁰

It has been said that the power of municipalities to enact zoning ordinances has been the subject of considerable discussion in recent years, resulting in conflicting decisions in various jurisdictions.¹¹ As a general rule, subject to the limitations discussed infra §§ 15-80, municipal corporations have, or may enjoy, the right or power to enact reasonable zoning regulations,¹² or, as otherwise expressed, to

4. Conn.—*Kiska v. Skrensky*, 138 A. 2d 523, 145 Conn. 28.

5. Ky.—*Seligman v. Belknap*, 155 S. W.2d 735, 288 Ky. 133.

N.J.—*Mansfield & Swett v. Town of West Orange*, 198 A. 225, 120 N.J. Law 145.

6. N.J.—*Mansfield & Swett v. Town of West Orange*, supra.

7. Ky.—*Seligman v. Belknap*, 155 S. W.2d 735, 288 Ky. 133.

8. N.J.—*Mansfield & Swett v. Town of West Orange*, 198 A. 225, 120 N.J. Law 145.

9. N.J.—*Antonelli Const. v. Milstead*, 112 A.2d 608, 34 N.J. Super. 449.

Mansfield & Swett v. Town of West Orange, 198 A. 225, 120 N.J. Law 145.

Ohio.—*State ex rel. Kearns v. Ohio Power Co.*, 127 N.E.2d 394, 163 Ohio St. 451.

"Municipal planning" with respect to zoning ordinances is the accommodation, through unity in construction, of the variant interests seeking expression in the local physical life to the interest of the community as a social unit.

N.J.—*Birkfield Realty Co. v. Board of Com'rs of City of Orange*, 79 A.2d 326, 12 N.J. Super. 192.

10. Conn.—*Florentine v. Town of Darien*, 115 A.2d 328, 142 Conn. 415.

11. Pa.—*Appeal of Kerr*, 144 A. 81, 294 Pa. 246—*In re Gillfillan's Permit*, 140 A. 136, 291 Pa. 358.

12. U.S.—*Valley View Village v. Proffett*, C.A. Ohio, 221 F.2d 412—*Texas Co. v. City of Tampa*, C.C.A. Fla., 100 F.2d 347.

Dennis v. Village of Tonka Bay, D.C. Minn., 64 F. Supp. 214, affirmed, C.C.A., 156 F.2d 672.

Cal.—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 7 A.L.R. 2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744—*Hurst v. City of Burlingame*, 277 P. 308, 207 C. 134—*Magruder v. Redwood City*, 265 P. 806, 203 C. 665—*Dwyer v. City Council of Berkeley*, 253 P. 932, 200 C. 505,

followed in *Foster v. City Council of City of Berkeley*, 255 P. 1118, 201 C. 769.

City of Beverly Hills v. Anger, 15 P.2d 867, 127 C.A. 223—*Smith v. Collison*, 6 P.2d 277, 119 C.A. 180—*Brougher v. Board of Public Works of City and County of San Francisco*, 290 P. 140, 107 C.A. 15—*Andrews v. City of Piedmont*, 281 P. 78, 100 C.A. 700, followed in *Andrews v. Barrett*, 281 P. 79, 100 C.A. 801, and *Williams v. City of Piedmont*, 281 P. 79, 100 C.A. 802—*City of Stockton v. Frisbie & Latta*, 270 P. 270, 93 C.A. 277.

Colo.—*City of Colorado Springs v. Miller*, 36 P.2d 161, 95 Colo. 337.

Conn.—*State v. Hillman*, 147 A. 294, 110 Conn. 92.

Del.—*Garden Court Apartments v. Hartnett*, 65 A.2d 231, 6 Terry 1.

Fla.—*State ex rel. S. A. Lynch Corp. v. Danner*, 33 So.2d 45, 159 Fla. 374—*City of Miami v. Rosen*, 10 So.2d 307, 151 Fla. 677—*Forde v. City of Miami Beach*, 1 So.2d 642, 146 Fla. 676—*State v. Du Bose*, 128 So. 4, 99 Fla. 812.

Ga.—*Awtry & Lowndes Co. v. City of Atlanta*, 50 S.E.2d 868, 78 Ga. App. 390, reversed on other grounds *City of Atlanta v. Awtry & Lowndes Co.*, 53 S.E.2d 358, 205 Ga. 296, conformed to *Awtry & Lowndes Co. v. City of Atlanta*, 54 S.E.2d 277, 79 Ga. App. 487.

Ill.—*People ex rel. Joseph Lumber Co. v. City of Chicago*, 83 N.E.2d 592, 402 Ill. 321—*Quilici v. Village of Mount Prospect*, 78 N.E.2d 240, 399 Ill. 418—*Speroni v. Board of Appeals of City of Sterling*, 15 N.E.2d 302, 363 Ill. 568—*Reschke v. Village of Winnetka*, 2 N.E.2d 718, 363 Ill. 478, certiorari denied *Village of Winnetka v. Reschke*, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431, and *Village of Winnetka v. Erickson*, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431.

Merrill v. City of Wheaton, 35 N.E.2d 807, 311 Ill. App. 301, reversed on other grounds 41 N.E.2d 508, 379 Ill. 504.

Kan.—*Piper v. Moore*, 183 P.2d 965,

163 Kan. 575—*Stafford v. City of Coffeyville*, 168 P.2d 91, 161 Kan. 311—*State ex rel. Burton v. Vandyne*, 155 P.2d 458, 159 Kan. 378.

Ky.—*Schloemer v. City of Louisville*, 182 S.W.2d 782, 298 Ky. 286—*Fowler v. Obier*, 7 S.W.2d 219, 224 Ky. 742.

La.—*Sampere v. City of New Orleans*, 117 So. 827, 166 La. 776, affirmed 49 S.Ct. 262, 279 U.S. 812, 73 L.Ed. 971.

Mass.—*Town of Burlington v. Dunn*, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441—*Simon v. Town of Needham*, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

Mich.—*Fass v. City of Highland Park*, 32 N.W.2d 875, 321 Mich. 156.

Minn.—*State v. Modern Box Makers*, 13 N.W.2d 731, 217 Minn. 41.

Mo.—*City of St. Louis v. Friedman*, 216 S.W.2d 475, 358 Mo. 681—*Ryan v. City of Warrensburg*, 117 S.W. 2d 303, 342 Mo. 761.

Neb.—*Davis v. City of Omaha*, 45 N.W.2d 172, 153 Neb. 460—*Cassel Realty Co. v. City of Omaha*, 14 N.W.2d 600, 144 Neb. 753.

N.J.—*Pierro v. Baxendale*, 118 A.2d 401, 20 N.J. 17—*Scarborough Apartments v. City of Englewood*, 87 A.2d 537, 9 N.J. 182.

Van Corp. v. Mayor and Council of Borough of Ridgefield, 124 A.2d 48, 41 N.J. Super. 74—*Town of Belleville v. Kiernan*, 121 A.2d 411, 39 N.J. Super. 480—*Pequannock Tp. v. De Wilde*, 91 A.2d 410, 21 N.J. Super. 517—*Dolan v. DeCapua*, 80 A.2d 655, 13 N.J. Super. 500—*Cassinari v. Union City*, 63 A.2d 891, 1 N.J. Super. 219—*Crompton & Co. v. Borough of Sea Girt*, 63 A.2d 834, 1 N.J. Super. 607.

Duffcon Concrete Products v. Borough of Cresskill, 58 A.2d 104, 137 N.J. Law 81.

N.Y.—*Vernon Park Realty v. City of Mount Vernon*, 121 N.E.2d 517, 307 N.Y. 493—*Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead*, 24 N.E.2d 319,

impose, by means of zoning ordinances, reasonable | restraints on the use of private property.¹³ Such

281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 84 L.Ed. 990—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.

Headley v. City of Rochester, 288 N.Y.S. 277, 247 App.Div. 562, reversed on other grounds 5 N.E.2d 198, 272 N.Y. 197—Falvo v. Kerner, 225 N.Y.S. 747, 222 App.Div. 289.

Village of Attica v. Day, 236 N.Y.S. 607, 134 Misc. 882, affirmed 243 N.Y.S. 915, 230 App.Div. 776.

People v. Sudierfi Realty Corp., 101 N.Y.S.2d 792—City of New Rochelle, on Complaint of Dassler v. Lore, 94 N.Y.S.2d 537.

Ohio.—Magid v. City of Cleveland Heights, App., 143 N.E.2d 718, appeal dismissed 146 N.E.2d 597, 167 Ohio St. 175—State ex rel. Geletka v. City of Campbell, App., 113 N.E.2d 601, appeal dismissed 106 N.E.2d 83, 157 Ohio St. 553—State ex rel. Gaddis v. City of Oakwood, App., 49 N.E.2d 956.

Or.—Page v. City of Portland, 165 P.2d 280, 178 Or. 682.

Pa.—Appeals of Sawdey, 82 A.2d 713, 169 Pa.Super. 214, reversed on other grounds 85 A.2d 28, 369 Pa. 19.

Toland v. Newtown Tp., Quar. Sess., 35 Del.Co. 21—Commonwealth ex rel. Lawrence Park Tp. v. Helmuth, Quar.Sess., 33 Erie Co. 91, 41 Mun.L.R. 248—Appeal of Bowtluch, Com.Pl., 49 Lack.Jur. 209.

S.D.—Corpus Juris cited in City of Sioux Falls v. Bessler, 5 N.W.2d 633, 634, 68 S.D. 635.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

Tex.—Caruthers v. Board of Adjustment of City of Bunker Hill Village, Civ.App., 290 S.W.2d 340—Newton v. Town of Highland Park, Civ.App., 282 S.W.2d 266, error refused no reversible error.

Ex parte Hobbs, 157 S.W.2d 397, 143 Tex.Cr. 100.

43 C.J. p 334 note 50.

Zoning is lawful regulatory power of city.

W.Va.—State ex rel. Baer v. City of Beckley, 57 S.E.2d 263, 133 W.Va. 459.

"Regulate and restrict"

As used in statute giving towns power to "regulate and restrict" buildings by zoning regulations, "regulation" is synonymous with "restrict" and "restrictions" are embraced in "regulations."

N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

Broad powers

(1) The legislative body of the city has broad discretionary powers with respect to zoning of the city.

Utah.—Dewey v. Doxey-Layton Realty Co., 277 P.2d 805, 3 Utah 2d 1.

(2) Municipal governing bodies may exercise broad powers in their zoning regulation of land and structures.

N.J.—Ward v. Scott, 105 A.2d 851, 16 N.J. 16.

(3) The modern trend in the law of zoning recognizes that a community has broad powers reasonably to achieve the purposes to be served by zoning to provide a balanced and well ordered scheme for all activity deemed essential to the particular community.

N.J.—Struyk v. Samuel Braen's Sons, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294—Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J.Super. 405.

Township

Pa.—Appeal of Scranton Lackawanna Indus. Bldg. Co., Com.Pl., 57 Lack.Jur. 173.

A village may adopt zoning plans suitable to its own peculiar location and needs.

N.Y.—Nehrbas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145.

Power not withdrawn

The statute vesting the general control of public utilities in the commerce commission has not taken from towns and villages the power conferred by zoning statute to enact ordinances zoning property therein and defining its particular use.

Ill.—Wolf v. Village of Mt. Prospect, 40 N.E.2d 778, 314 Ill.App. 23.

Liberal construction of right

The right of a city to classify its territory into use zones, under a complete zoning ordinance, must be liberally construed not only as it may affect the public health, morals, and safety, but also as such classifications are deemed necessary in promoting the public convenience, comfort, prosperity, and general welfare. Ohio.—Criterion Service v. City of East Cleveland, App., 88 N.E.2d 300, appeal dismissed 89 N.E.2d 475, 152 Ohio St. 416.

Leading case

U.S.—Village of Euclid v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.

Effect of home rule act

(1) The First Class City Home Rule Act does not limit the power of a city to zone.

Pa.—Bartle v. Zoning Bd. of Adjustment, 137 A.2d 239, 391 Pa. 207.

(2) Power to zone may properly be exercised by council of Philadelphia; action of city council of Philadelphia in adopting ordinance which was deemed to be necessary and proper for carrying into execution the power to classify areas of city into zoning districts was within grant of power contained in home rule act.

Pa.—Bartle v. Zoning Bd. of Adjustment, supra.

13. U.S.—Dennis v. Village of Tonka Bay, D.C.Minn., 64 F.Supp. 214, affirmed, C.C.A., 156 F.2d 672.

Ill.—City of Chicago v. Sachs, 115 N.E.2d 762, 1 Ill.2d 342—Ronda Realty Corp. v. Lawton, 111 N.E.2d 310, 414 Ill. 313—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—Harmon v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594—Taylor v. Village of Glencoe, 25 N.E.2d 62, 372 Ill. 507—Catholic Bishop of Chicago v. Kingery, 20 N.E.2d 583, 371 Ill. 257—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568—People ex rel. Kirby v. City of Rockford, 2 N.E.2d 842, 363 Ill. 531.

Cleaners Guild of Chicago v. City of Chicago, 37 N.E.2d 857, 312 Ill.App. 102.

N.Y.—Brous v. Town of Hempstead, 69 N.Y.S.2d 258, 272 App.Div. 31, amended on other grounds 70 N.Y.S.2d 576, 272 App.Div. 777.

"The use of land is subordinate to a valid exercise by a municipality of its power to zone and control land use within its boundaries."

N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 852, 24 N.J. 94.

"It is the province of the municipal body by a zoning ordinance to draw the line of demarcation as to the use and purpose to which property shall be assigned or placed."

Ill.—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 908, 407 Ill. 81.

"The mere ownership of property which could be utilized for the conduct of a lawful business does not constitute a right to so utilize it . . . which cannot be terminated by the enactment of a valid zoning ordinance" by a city.

Ky.—Darlington v. Board of Councilmen of City of Frankfort, 140 S.W.2d 392, 396, 282 Ky. 778.

Right of cities and villages

(1) Generally.

Ill.—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

power is not absolute,¹⁴ arbitrary,¹⁵ or unlimited.¹⁶ | Municipalities have the right to determine wheth-

(2) An incorporated noncharter village in Ohio had power, under Ohio statutes and constitution, to incorporate entire area of village into single use district by zoning ordinance.

U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412.

Justification

(1) The exercise of the drastic power to zone districts for various purposes is justified only on the theory of the greatest good to the greatest number.

N.Y.—Joyce v. Dobson, 4 N.Y.S.2d 648, 167 Misc. 723, reversed on other grounds 8 N.Y.S.2d 768, 255 App.Div. 348.

(2) Zoning laws regulate the use of property and may impair owners' rights therein to some reasonable extent without compensation because legislature acting under police power of the state deems free exercise of such rights detrimental to public interests, and no landowner can complain, notwithstanding he, in common with others similarly situated, may have to forego some use of his property, as long as power to enact zoning laws is exercised in public interests and for general welfare of community, reasonably, impartially, and without confiscation.

R.I.—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

Implied authority to draw line

Authority of municipalities to zone, that is, to define and restrict permissive use of property, implies authority to draw a line and provide that on one side of line property may be, and on the other side of line property may not be, used for certain purposes.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

Restrictive areas along highways

Statute conferring general power on county to determine areas anywhere in county in which trades and industries may be restricted gives county power to establish restrictive areas along highways, notwithstanding statute specifically grants power to establish restrictive areas along water courses and does not specifically state that the same power may be exercised along highways.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

14. N.J.—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.

Adherence to statutory purposes

Power to zone is not absolute, but is conditioned on an adherence to statutory purposes to be served.

Conn.—Miller v. Town Planning Commission of Town of Manchester, 113 A.2d 504, 142 Conn. 265.

Subordination to citizen's right as to property

Zoning power conferred on municipalities by statute is subordinate to citizen's right to acquire property and deal with it as he pleases, so long as he does not use it so as to harm another.

Tex.—Niday v. City of Bellaire, Civ. App., 251 S.W.2d 747.

15. Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415. Pa.—Toland v. Newtown Tp., Quar. Sess., 35 Del.Co. 21.

Tex.—City of Corpus Christi v. Allen, 254 S.W.2d 759, 153 Tex. 137.

16. U.S.—Nectow v. City of Cambridge, Mass., 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Conn.—Del Bueno v. Board of Zoning Appeals of Town of Stratford, 124 A.2d 915, 143 Conn. 673—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415—Miller v. Town Planning Commission of Town of Manchester, 113 A.2d 504, 142 Conn. 265.

Del.—Bave v. S & S Builders, Inc., 134 A.2d 709—Garden Court Apartments v. Hartnett, 65 A.2d 231, 6 Terry 1.

D.C.—Dorsey v. Gotwals, 57 F.2d 407, 61 App.D.C. 41.

Ill.—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 218—Kinney v. City of Joliet, 103 N.E.2d 473, 411 Ill. 289—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Zadworny v. City of Chicago, 44 N.E.2d 426, 330 Ill. 470—Harmon v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594—Catholic Bishop of Chicago v. Kingery, 20 N.E.2d 583, 371 Ill. 257—Merrill v. City of Wheaton, 190 N.E. 918, 356 Ill. 457.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130.

Mo.—Downing v. City of Joplin, 312 S.W.2d 81—Flora Realty & Investment Co. v. City of Ladue, 246 S.W.2d 771, 326 Mo. 1025.

State ex rel. Cooper v. Cowan, App., 307 S.W.2d 676.

N.J.—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 387.

N.Y.—Concordia Collegiate Institute v. Miller, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.

Alexander's Department Stores v. Murdock, 37 N.Y.S.2d 319.

Ohio.—Schick v. Ghent Road Inn, App., 132 N.E.2d 479.

Tex.—Lamkin v. City of Bellaire, Civ.App., 308 S.W.2d 70.

Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

Control of use of particular building

The act authorizing Richmond county authorities to adopt zoning ordinances as to construction of buildings and additions or repairs thereto, as to their location with respect to highways, and as to territory within zoned area within which any particular class of building can be erected, does not grant authority to control use to which a particular building may be devoted.

Ga.—Lanier v. Richmond County, 45 S.E.2d 415, 203 Ga. 39.

Constitutional provision that exercise of authority to adopt zoning ordinances shall be deemed to be within police power of state does not affect general principles applicable in determining what is proper and reasonable exercise of general powers delegated.

Del.—In re Ceresini, 189 A. 443, 8 W.W.Harr. 134.

Degradation of common-law rule

The statute authorizing cities to regulate construction of buildings therein by ordinances consistent with law gives cities no right to adopt ordinances or bylaws in derogation of common-law rule that one excavating on his own land is not liable for resulting injuries to buildings or improvements on adjoining land, in absence of actual negligence.

Mass.—Corcoran v. S. S. Kresge Co., 47 N.E.2d 257, 313 Mass. 299.

Need of people

Exercise by village of police power in enacting zoning ordinance must, in general, be kept within need of people under existing conditions.

Ohio.—State ex rel. Weber v. Vajner, 108 N.E.2d 569, 92 Ohio App. 233, appeal dismissed 106 N.E.2d 642, 158 Ohio St. 105.

No power to prohibit

Statutory provision that county commissioners, by resolution, may regulate size of buildings or structures and uses of land for trade, industry, and other purposes, is a clear grant of power to regulate such matters within reasonable limitations, but does not include any power, express or inherent, to prohibit.

Colo.—General Outdoor Advertising Co. v. Goodman, 262 P.2d 261, 138 Colo. 344.

Public utility

(1) First-class townships have power to zone with respect to buildings of a public utility company, subject to a determination by the public utility commission that the present or proposed situation of such buildings may be reasonably neces-

er public interests demand the exercise of the zoning power,¹⁷ and, if so, to select the measures necessary for the protection of such interests.¹⁸ In other words, the adoption of a system of zoning is optional with a municipality,¹⁹ and, where such a system has been adopted, it may thereafter be terminated.²⁰

The question whether a municipal corporation has the power to enact zoning regulations often depends on the character of the particular regulation in question,²¹ and on the surrounding conditions and circumstances.²²

A municipality having knowledge of the proposed use of certain property may by its actions be precluded from subsequently passing a zoning ordinance prohibiting such use,²³ but a city's conveyance of

land which the purchaser proposed to use for a certain purpose has been held not to deprive the city of the right to restrict the use of the land by a zoning ordinance to another purpose²⁴ or to broaden the character of use permitted within the area.²⁵

With respect to zoning ordinances, the power of a municipality to "regulate and restrict" necessarily includes the power to "prohibit" certain uses of property within certain limits, to "restrict" being defined as to restrain within bounds, or to confine.²⁶

The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance.²⁷

sary, but such townships do not have express or implied power to regulate utilities with respect to uses and structures other than building.

Pa.—Lower Chichester Tp. v. Pennsylvania Public Utility Commission, 119 A.2d 674, 180 Pa.Super. 583.

(2) In view of public policy, expressed in Public Utility Code, of committing the regulation of public utilities to a commission of statewide jurisdiction, and express provision of First Class Township Law that it shall not repeal or modify Public Utility Code, a public utility corporation engaged in generating, transmitting, and distributing electric energy was not subject to zoning ordinance of first-class township with respect to location and construction of a transmission line across township.

Pa.—Duquesne Light Co. v. Upper St. Clair Tp., 105 A.2d 287, 377 Pa. 323.

Restriction of lawful business

Municipalities do not have the power wholly to restrict by zoning ordinance a lawful business from their boundaries.

Ill.—People ex rel. Trust Co. of Chicago v. Village of Skokie, 97 N.E.2d 310, 408 Ill. 397.

Pa.—Appeal of Kanig, 56 Pa.Dist. & Co. 53, 47 Lack.Jur. 69, 37 Mun.L.R. 229.

Uses harmful to property

Provisions of zoning bylaw, forbidding construction or use of buildings for any purpose injurious to health, safety, morals, or welfare of community are consistent with purposes stated in enabling statute, but provision forbidding uses harmful to property is void as beyond scope of such statute.

Mass.—Tranfiglia v. Building Commissioner of Winchester, 28 N.E.2d 537, 306 Mass. 495.

Location of school site

City had no right to zone against a school district's right of location of a school site, whether such zoning was intended to be temporary or permanent.

Cal.—Town of Atherton v. Superior Court In and For San Mateo County, App., 324 P.2d 328.

17. Mass.—Simon v. Town of Needham, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

18. Mass.—Simon v. Town of Needham, supra.

19. Ala.—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36.

Conn.—Town of Madison v. Kimberly, 169 A. 909, 118 Conn. 6.

"The city is under no duty or obligation to zone."

Ala.—Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 593, 597, 253 Ala. 402.

Grant of power only

State-wide zoning laws are a grant of power only, and do not require the cities to which they apply to establish a comprehensive zoning system.

Fla.—Ellis v. City of Winter Haven, 60 So.2d 620.

20. Conn.—Town of Madison v. Kimberly, 169 A. 909, 118 Conn. 6.

21. N.Y.—Bartsch v. Ragonetti, 207 N.Y.S. 142, 123 Misc. 903, affirmed 210 N.Y.S. 825, 214 App.Div. 799.

Bowen v. Hider, 37 N.Y.S.2d 76.

22. Ohio.—Miesz v. Village of Mayfield Heights, 111 N.E.2d 20, 92 Ohio App. 471.

43 C.J. p 335 note 60.

Abstract consideration

Whether power exists in municipal authorities to forbid erection of building of a particular kind or for particular use is not to be determined by abstract consideration of the building, considered apart, but by considering it in connection with the circumstances and the locality.

Ohio.—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92

Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258 —State ex rel. Cook v. Turgeon, App., 77 N.E.2d 283.

23. Pa.—Appeal of Ferrine, 57 Pa. Dist. & Co. 185, 38 Mun.L.R. 132.

Notice held binding

Where mayor, prior to annexation of land by city, received actual notice of provision in contract for sale of land that land was to be used only for business purposes, and city received such notice when its council held formal meeting to act on purchaser's petition for change in zoning after land had been zoned for residence purposes, notice was binding on city, notwithstanding contract was not recorded and there was no notation as to restriction on plat filed in annexation proceedings.

Wyo.—Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202.

24. U.S.—American Land Co. v. City of Keene, C.C.A.N.H., 41 F.2d 484.

25. N.J.—Taylor v. City of Hackensack, 58 A.2d 788, 137 N.J.Law 139, affirmed 62 A.2d 686, 1 N.J. 211.

Restrictive covenant

A city, selling land at public sale subject to restrictive covenant limiting purchaser to construction of single-family dwellings thereon, was not estopped to amend its zoning ordinance by changing land from single-family to multiple-family zone, and such amendment was valid, in absence of showing that it was capricious or unreasonable.

N.J.—Taylor v. City of Hackensack, supra.

26. Ala.—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Tex.—Lombardo v. City of Dallas, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1—McEachern v. Town of Highland Park, Civ. App., 34 S.W.2d 676, affirmed 73 S.W.2d 487, 124 Tex. 36.

27. N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Ad-

Power not limited to nuisances. The power to zone extends to the regulation of property uses which do not actually amount to nuisances;²⁸ and the power to regulate zoning districts is not limited to nuisances per se.²⁹

District of Columbia. The commissioners of the District of Columbia are authorized to make and promulgate general regulations governing the matter of buildings.³⁰ As it was originally conferred and before it was limited by the zoning law, this authority was most comprehensive in character³¹ and included the power to make all kinds of building regulations, where they might reasonably be considered as relating to a proper subject,³² but not where they did not relate to such a subject.³³

There was no zoning law applicable to the District of Columbia until 1920,³⁴ but in that year congress passed an act, D.C.Code Title 25 §§ 521-530, creating a zoning commission, directing it to divide the

District into height, area, and use districts and to adopt regulations specifying the height and area of buildings to be erected or altered therein and the purposes for which buildings and premises therein may be used, and empowering it to make such orders and adopt such regulations not inconsistent with law as may be necessary to accomplish the purposes and effectuate the provisions of the act. The commission may act within the limits of the power conferred on it by this statute.³⁵

§ 6. — Source of Zoning Power

The power of a municipality or county to enact zoning regulations is not inherent, but must be derived from constitutional or statutory provisions. Such provisions have generally been held valid.

The original zoning power of the state resides in the state legislature.³⁶ A municipality or county has no inherent power to promulgate or enact zoning regulations;³⁷ its power to accomplish zoning

justment of City of Summit, 86 A. 2d 127, 8 N.J. 386.

Reason for rule

Public has an interest in zoning that cannot thus be set at naught. N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, supra.

28. Cal.—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778, and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777. People v. Johnson, 277 P.2d 46, 129 C.A.2d 1.

"The police power is not restricted to the suppression of nuisances. It includes the regulation of the use of property to the end that the public health, morals, safety, and general welfare may not be impaired or endangered. Zoning deals with many uses of property which are in no way harmful."

Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 38, 127 C.A.2d 442.

29. Cal.—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778 and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777—Miller v. Los Angeles Bd. of Public Works, 234 P. 381, 195 C. 477, 38 A.L.R. 1479.

Price v. Schwafel, 206 P.2d 683, 92 C.A.3d 77.

Md.—Jack Lewis, Inc., v. Mayor and City Council of Baltimore, 164 A. 230, 164 Md. 146, appeal dismissed 54 S.Ct. 56, 290 U.S. 585, 78 L.Ed. 517.

Pa.—Marple Tp. v. Grover, Com.Pl., 38 Del.Co. 448.

30. D.C.—D. J. Dunigan, Inc. v. District of Columbia, 44 F.2d 892, 59 App.D.C. 384.

18 C.J. p 1363 note 81.

31. D.C.—U. S. v. Ashford, 29 App. D.C. 350.

Power over location of buildings used for objectionable purposes

D.C.—Weeks v. Heurich, 40 App.D.C. 46, Ann.Cas.1914A 972—U. S. v. District of Columbia, 16 D.C. 389. 18 C.J. p 1363 note 86.

32. D.C.—Halpine v. Barr, 21 D.C. 331.

18 C.J. p 1363 note 83.

33. D.C.—Macfarland v. U. S., 18 App.D.C. 554.

18 C.J. p 1363 note 84.

34. D.C.—Hazen v. Hawley, 86 F.2d 217, 66 App.D.C. 266, certiorari denied 57 S.Ct. 315, 299 U.S. 613, 81 L.Ed. 452.

35. D.C.—Salter v. McLaughlin, 240 F.2d 891, 100 U.S.App.D.C. 29—Garrity v. District of Columbia, 86 F.2d 207, 66 App.D.C. 256.

American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Hagens v. District of Columbia, Mun.App., 97 A.2d 922.

36. N.C.—Application of O'Neal, 92 S.E.2d 189, 243 N.C. 714—Marren v. Gamble, 75 S.E.2d 880, 237 N.C. 680.

Provision of Town Law as to zoning N.Y.—Brous v. Smith, 106 N.E.2d 503, 304 N.Y. 164.

Restriction on power of town

A statutory provision that no permit for erection of building shall issue unless street is on plat duly filed and recorded, and that before permit

shall issue such street shall have been suitably improved to satisfaction of board as adequate with respect to public health, safety, and general welfare for special circumstances of particular street, is a reasonable and valid regulation. N.Y.—Brous v. Smith, supra.

37. U.S.—Proffett v. Valley View Village, D.C.Ohio, 123 F.Supp. 339, reversed on other grounds, C.A., Valley View Village v. Proffett, 221 F.2d 412.

Ala.—Corpus Juris Secundum cited in Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 593, 596, 253 Ala. 402.

Del.—Boozar v. Johnson, 98 A.2d 76, 33 Del.Ch. 554.

Iowa.—Downey v. Sioux City, 227 N.W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

Ky.—City of Somerset v. Weise, 263 S.W.2d 921.

Mo.—State ex rel. Kramer v. Schwartz, 82 S.W.2d 63, 336 Mo. 932.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827—Peterson v. Vasak, 76 N.W.2d 420, 162 Neb. 498.

N.J.—Bowen v. Jersey City, 132 A. 334, 4 N.J.Misc. 228.

N.C.—Kass v. Hedgpeth, 38 S.E.2d 164, 226 N.C. 405.

Tex.—City of West University Place v. Martin, Civ.App., 113 S.W.2d 295, cause dismissed 123 S.W.2d 638, 132 Tex. 354.

Richmond County Board of Commissioners of Roads and Revenues has no inherent authority to enact zoning ordinances.

Ga.—Barton v. Hardin, 48 S.E.2d 882, 204 Ga. 108.

exists by virtue of authority delegated by the state,³⁸ and such power may be exercised only when it is expressly conferred on the municipality or rises by necessary implication.³⁹ So, it has been held that zoning regulations may not be adopted or enforced without specific legislative⁴⁰ or constitutional⁴¹ authorization, and, as appears *infra* § 7, that in the absence of authorization, the power to enact such regulations cannot be exercised as an incident of the municipal police power embraced in the general

charter of the municipality; but it has also been held that municipalities have the power to promulgate zoning regulations under general powers of local self-government conferred by the state constitution.⁴²

The power of municipal corporations to enact zoning regulations may be derived from constitutional or statutory provisions.⁴³ In some jurisdictions the power is derived from the constitution of the state,⁴⁴ and such constitutional provisions have

32. Ga.—*Toomey v. Norwood Realty Co.*, 89 S.E.2d 265, 211 Ga. 814.
Vt.—*Thompson v. Smith*, 129 A.2d 638, 119 Vt. 488.
Delegation of police power see *infra* § 7.

39. Ala.—*Corpus Juris Secundum* cited in *Alabama Alcoholic Beverage Control Bd. v. City of Birmingham*, 44 So.2d 593, 596, 253 Ala. 402.

Fla.—*Metropolis Pub. Co. v. City of Miami*, 129 So. 913, 100 Fla. 784.

Ga.—*Wofford Oil Co. of Georgia v. David*, 183 S.E. 808, 181 Ga. 639.

Ill.—*Park Ridge Fuel & Material Co. v. City of Park Ridge*, 187 N.E. 119, 335 Ill. 509.

Iowa.—*Downey v. Sioux City*, 227 N.W. 125, 208 Iowa 1273, followed in *Wolle v. Sioux City*, 229 N.W. 214.

Ky.—*Fowler v. Obier*, 7 S.W.2d 219, 224 Ky. 742.

Pa.—*Jordan v. Township of Lower Merion*, 34 Pa. Dist. & Co. 551, 55 Montg. Co. 20.
Commonwealth v. Debaldo, Co., 99 Pittsb. Leg. J. 155.

Tex.—*City of West University Place v. Martin*, Civ. App., 113 S.W.2d 295, cause dismissed 123 S.W.2d 638, 132 Tex. 354.

43 C.J. p 335 note 56.

Power held not implied

Provision of First Class Township Law making article thereof conferring zoning power on such townships inapplicable to existing or proposed building or extension thereof used or to be used by public service corporations, if Public Utility Commission decides that present or proposed situation of such building is reasonably necessary or convenient for welfare of the public, merely gives a first-class township power to zone with respect to buildings of a public utility company, subject to determination by Public Utility Commission that present or proposed location of such buildings is not reasonably necessary, and it does not give such townships implied power to regulate public utilities by zoning ordinance with respect to uses and structures other than buildings.

Pa.—*Duquesne Light Co. v. Upper St. Clair Tp.*, 105 A.2d 287, 377 Pa. 323.

40. Del.—*Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 8 Terry 373.

Booser v. Johnson, 98 A.2d 76, 33 Del. Ch. 554.

Fla.—*State v. Du Bose*, 128 So. 4, 99 Fla. 812.

Ill.—*Trust Co. of Chicago v. City of Chicago*, 96 N.E.2d 499, 408 Ill. 91.

Ky.—*City of Somerset v. Weise*, 263 S.W.2d 921.

N.Y.—*Levitt v. Incorporated Village of Sands Point*, 148 N.Y.S.2d 798, 3 Misc.2d 92, modified on other grounds 152 N.Y.S.2d 711, 2 A.D.2d 688, reargument and appeal denied 154 N.Y.S.2d 842, 2 A.D.2d 781—

People, on Inf. of Barker, v. Elkin, 80 N.Y.S.2d 535, 196 Misc. 188.

N.C.—*State v. Owen*, 88 S.E.2d 832, 242 N.C. 525—*Town of Clinton v. Ross*, 40 S.E.2d 593, 226 N.C. 682—

Kass v. Hedgpeth, 38 S.E.2d 164, 226 N.C. 405.

Pa.—*Kelly v. City of Philadelphia*, 115 A.2d 238, 382 Pa. 459—*Kline v. City of Harrisburg*, 68 A.2d 182, 362 Pa. 438.

R.I.—*R. I. Home Builders v. Budlong Rose Co.*, 74 A.2d 237, 77 R.I. 147.

Village held not given power to zone

Md.—*Perry v. County Bd. of Appeals for Montgomery County*, 127 A.2d 507, 211 Md. 294.

Ordinance held not authorized

Statute authorizing municipal corporations to regulate building or removing of houses did not authorize cities of second class to enact zoning ordinances establishing residential districts.

Ark.—*City of Searcy v. Roberson*, 273 S.W.2d 26, 224 Ark. 344.

41. Pa.—*Kelly v. City of Philadelphia*, 115 A.2d 238, 382 Pa. 459.

42. U.S.—*Valley View Village v. Proffett*, C.A. Ohio, 221 F.2d 412.

Ohio.—*Fritz v. Messer*, 149 N.E. 30, 112 Ohio St. 628.

State ex rel. *Helsel v. Board of Com'rs of Cuyahoga County*, Com. Pl., 79 N.E.2d 698, affirmed 78 N.E.2d 694, 83 Ohio App. 388, appeal dismissed 79 N.E.2d 911, 149 Ohio St. 583.

43. U.S.—*Proffett v. Valley View Village*, D.C. Ohio, 128 F.Supp. 339,

reversed on other grounds, C.A., Valley View Village v. Proffett, 221 F.2d 412.

Cal.—*People v. Johnson*, 277 P.2d 45, 129 C.A.2d 1.

Mass.—*Brett v. Brookline Bldg. Comr.*, 145 N.E. 269, 250 Mass. 73, followed in *Bamel v. Brookline Bldg. Comr.*, 145 N.E. 272, 250 Mass. 82.

Neb.—*Weber v. City of Grand Island*, 87 N.W.2d 575, 165 Neb. 827—*Peterson v. Vasak*, 76 N.W.2d 420, 162 Neb. 493.

N.J.—*Borough of Cresskill v. Borough of Dumont*, 100 A.2d 182, 28 N.J. Super. 26, affirmed 104 A.2d 441, 15 N.J. 238.

Retroactive effect of constitutional amendment

Judgment based on invalidity of a zoning ordinance was not invalidated by subsequent adoption of constitutional amendment authorizing such ordinances.

N.J.—*Margolis v. Maplewood Tp.*, 139 A. 56, 104 N.J. Law 177, certiorari denied Township of Maplewood v. Margolis, 43 S.Ct. 212, second case, 276 U.S. 618, 72 L.Ed. 734—*Karke Realty Associates v. Jersey City*, 139 A. 55, 104 N.J. Law 178—*Robert Realty Co. v. City of Orange*, 139 A. 54, 103 N.J. Law 711.

Authority derived from statute and not city charter

Ohio.—*State ex rel. Gulf Refining Co. v. De France*, 101 N.E.2d 782, 89 Ohio App. 334.

44. Del.—*In re Ceresini*, 189 A. 443, 8 W.W. Harr. 134.

La.—*McCauley v. Albert E. Briede & Son*, 90 So.2d 78, 231 La. 36.

Mass.—*Building Com'r of Medford v. C. & H. Co.*, 65 N.E.2d 537, 319 Mass. 273.

Ohio.—*Pritz v. Messer*, 149 N.E. 30, 112 Ohio St. 628.

State ex rel. *Helsel v. Board of Com'rs of Cuyahoga County*, Com. Pl., 79 N.E.2d 698, affirmed 78 N.E.2d 694, 83 Ohio App. 388, appeal dismissed 79 N.E.2d 911, 149 Ohio St. 583.

43 C.J. p 333 note 33.

Vacant lands

(1) Constitutional amendment authorizing building zones in cities and towns does not apply to vacant lands.

been upheld as against the objection that they violated the federal Constitution⁴⁵ or that they were discriminatory.⁴⁶ In other jurisdictions, the state

constitution confers no power of zoning directly on cities,⁴⁷ but the power is vested in municipalities or counties by virtue of statutory provision,⁴⁸ so, a

Mass.—Town of Burlington v. Dunn, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S. Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

(2) Power to zone vacant lands generally see *Infra* § 8.

45. Mass.—Spector v. Milton Bldg. Inspector, 145 N.E. 265, 250 Mass. 63.

43 C.J. p 333 note 34.

46. Mass.—In re Opinion of the Justices, 127 N.E. 525, 234 Mass. 597.

47. Mich.—Krajenke Buick Sales v. Kopkowski, 33 N.W.2d 781, 322 Mich. 250.

48. Ala.—Jefferson County v. City of Birmingham, 55 So.2d 196, 256 Ala. 436.

Colo.—General Outdoor Advertising Co. v. Goodman, 262 P.2d 261, 128 Colo. 344.

Conn.—De Mars v. Zoning Commission of Town of Bolton, 109 A.2d 876, 19 Conn.Sup. 24, affirmed 115 A.2d 653, 142 Conn. 580.

Fla.—State v. Du Bose, 128 So. 4, 99 Fla. 812.

Ga.—Orr v. Hapeville Realty Investments, 85 S.E.2d 20, 211 Ga. 235.

Ill.—Chicago City Bank & Trust Co. v. City of Highland Park, 137 N.E.2d 835, 9 Ill.2d 364, certiorari denied 77 S.Ct. 681, 353 U.S. 922, 1 L.Ed.2d 719—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—Jacobson v. Village of Wilmette, 85 N.E.2d 753, 403 Ill. 250.

Iowa.—Scott v. City of Waterloo, 274 N.W. 897, 223 Iowa 1169.

Kan.—Piper v. Moore, 183 P.2d 965, 163 Kan. 565—Stafford v. City of Coffeyville, 168 P.2d 91, 161 Kan. 311.

Ky.—City of Louisville v. Bryan S. McCoy, Inc., 286 S.W.2d 546.

Me.—Bolduc v. Pinkham, 88 A.2d 817, 148 Me. 17.

Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.

Mich.—Dearborn Tp. v. Dail, 55 N.W.2d 201, 334 Mich. 673—Krajenke Buick Sales v. Kopkowski, 33 N.W.2d 781, 322 Mich. 250.

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

Nev.—State ex rel. Davie v. Coleman, 224 P.2d 309, 67 Nev. 636.

N.J.—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182.

Schack v. Trimble, 137 A.2d 22, 48 N.J.Super. 46—N. T. Hegeman Co. v. Mayor and Council of Bor-

ough of River Edge, 69 A.2d 767, 6 N.J.Super. 495—Lumund v. Board of Adjustment of Borough of Ruthersford, 69 A.2d 361, 6 N.J.Super. 474, affirmed 73 A.2d 545, 4 N.J. 577—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N.J.Super. 607.

Broad Ave. Corp. v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527—Duffcon Concrete Products v. Borough of Cresskill, 58 A.2d 104, 137 N.J.Law 81, reversed on other grounds 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

N.Y.—City of Olean v. Conkling, 283 N.Y.S. 66, 157 Misc. 63.

People, on Inf. of Barker, v. Elkin, 80 N.Y.S.2d 525.

N.C.—Application of O'Neal, 92 S.E.2d 189, 243 N.C. 714—Marren v. Gamble, 75 S.E.2d 880, 237 N.C. 680.

Okl.—Makrauer v. Board of Adjustment of City of Tulsa, 193 P.2d 291, 200 Okl. 285—Beveridge v. Harper & Turner Oil Trust, 35 P.2d 435, 168 Okl. 609.

Pa.—Bartle v. Zoning Bd. of Adjustment, 137 A.2d 239, 391 Pa. 207.

Commonwealth v. Kinsey, 59 Pa. Dist. & Co. 576.

Application of Devon Show Grounds, Inc., Com.Pl., 5 Chest.Co.

120—Kline v. City of Harrisburg, Com.Pl., 61 Dauph.Co. 67, affirmed

68 A.2d 182, 362 Pa. 438—Commonwealth v. Debaldo, Co., 99 Pittsb.Leg.J. 155.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

Tex.—Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

Fort Worth & D. C. Ry. Co. v. Ammons, Civ.App., 215 S.W.2d 407, refused on reversible error—Lombardo v. City of Dallas, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1—McEachern v. Town of Highland Park, Civ.App., 34 S.W.2d 676, affirmed 73 S.W.2d 487, 124 Tex. 36.

Utah.—Dewey v. Doney-Layton Realty Co., 277 P.2d 805, 3 Utah 2d 1.

Power to enact comprehensive zoning ordinance

Mich.—Osius v. City of St. Clair Shores, 75 N.W.2d 25, 344 Mich. 693.

Purpose of special zoning law applicable only to particular city was to authorize the city to regulate, systematize, and stabilize growth and development of its urban area, and fact that adoption of comprehensive zoning plan might at same time amount to regulation of location of places of business of liquor licensees, together with all other business establishments, would be only incident-

tal to accomplishment of main purpose.

Fla.—Ellis v. City of Winter Haven, 60 So.2d 620.

City charter

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621—Cassel Realty Co. v. City of Omaha, 14 N.W.2d 600, 144 Neb. 753.

Villages

(1) Villages are empowered by law to adopt zoning ordinances for the purpose of promoting the health, safety, morals, or general welfare of the community.

N.Y.—Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park, 107 N.Y.S.2d 858, 279 App. Div. 618, appeal denied 109 N.Y.S.2d 175, 279 App.Div. 746.

(2) Source of the village board's power to legislate on matters of zoning is found in the Village Law.

N.Y.—Levitt v. Incorporated Village of Sands Point, 148 N.Y.S.2d 798, 3 Misc.2d 92, modified on other grounds 152 N.Y.S.2d 711, 2 A.D.2d 688, reargument and appeal denied 154 N.Y.S.2d 842, 2 A.D.2d 781.

(3) Intent of statute authorizing villages to adopt zoning regulations was to insure village inhabitants against radical zoning changes not necessitated by public demand and by changing conditions of neighborhood, which would be detrimental to their established living conditions, their property values, and most desirable use of their land.

N.Y.—Flower Hill Bldg. Corp. v. Village of Flower Hill, Nassau County, 100 N.Y.S.2d 903, 199 Misc. 344.

General law

The statutes authorizing cities and incorporated villages to regulate structures and lands for trade, industry, residence, or other purposes constitute zoning laws of state and constitute a general law applicable to cities operating under home-rule amendment.

Tex.—Fort Worth & D. C. Ry. Co. v. Ammons, Civ.App., 215 S.W.2d 407.

Private property

City charter providing for beautification of public properties did not prohibit zoning ordinance affecting private property only.

Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 271 P. 487, 205 C. 426.

Single subject

Provisions of law authorizing mu-

county⁴⁹ or a town⁵⁰ may be expressly empowered by statute to adopt zoning laws for specific purposes, or a county may be authorized, by a state planning act, to provide in the county zoning ordinance for

reasonable and practical means for putting the master plan into effect.⁵¹

With some exceptions,⁵² such statutes have been held to be valid or constitutional,⁵³ under the police

municipality to enact zoning regulations held to relate only to such subject. Okl.—*In re Dawson*, 277 P. 226, 138 Okl. 113.

Provisions held cumulative
Ala.—*Chapman v. City of Troy*, 4 So. 2d 1, 241 Ala. 637.

Additional powers

Where act provided for city planning and zoning in cities of the first and second class, such powers were in addition to, and did not supersede, the powers given cities of the first class by the act conferring on cities of the first class power of regulating the character of buildings. Ark.—*Arnold v. City of Jonesboro*, 302 S.W.2d 91.

Statutes held not repealed

(1) Statute authorizing cities of the first class to regulate building or removing of houses was not repealed by the statute authorizing cities of first and second class to provide for city zoning and planning through creation of a planning commission.

Ark.—*City of Stuttgart v. Strait*, 205 S.W.2d 35, 212 Ark. 126.

(2) Public health law provision authorizing establishment in towns of hospitals for tuberculosis was not abrogated by statute authorizing town to enact zoning ordinances so as to permit town to prohibit establishment of tubercular hospital.

N.Y.—*Jewish Consumptives' Relief Soc. v. Town of Woodbury*, 243 N.Y.S. 686, 230 App.Div. 228, affirmed 177 N.E. 165, 256 N.Y. 619.

Planning commission not created

When a community establishes a zoning commission under statute, but fails to take any action under statute to create a planning commission, the zoning commission necessarily has the power to set up a comprehensive zoning plan of its own.

Conn.—*Couch v. Zoning Commission of Town of Washington*, 106 A.2d 173, 141 Conn. 349.

General and special statutes

(1) Where legislature had enacted a special enabling act vesting zoning board of particular town with power to enact zoning ordinance, general statute, which provided for establishment of the zoning boards generally, was inapplicable.

R.I.—*Baker v. Zoning Bd. of Review of Town of North Kingstown*, 111 A.2d 353, 82 R.I. 432.

(2) Where special law authorizing Town of West Hartford to create zoning districts provided that if another statute imposes other and high-

er standards, that statute shall govern, and higher standards referred to in special law were concerned with size of yards, number of stories, and the like, general law covering municipal zoning and planning, which imposed no higher standards of this type, did not supersede special law. Conn.—*Mallory v. Town of West Hartford*, 86 A.2d 668, 138 Conn. 497.

Zoning power to regulate billboards held not abrogated by Billboard Act. N.J.—*United Advertising Corp. v. Borough of Raritan*, 93 A.2d 362, 11 N.J. 144.

49. Del.—*Bave v. S & S Builders, Inc.*, 134 A.2d 709.
Iowa.—*Gannett v. Cook*, 61 N.W.2d 703, 245 Iowa 750.

Ky.—*Daugherty v. City of Lexington*, 249 S.W.2d 755—*Kesselring v. Wakefield Realty Co.*, 227 S.W.2d 416, 312 Ky. 334.

Mo.—*State ex rel. Field v. Randall*, 308 S.W.2d 637.

Broad discretionary power

Ky.—*Louisville & Jefferson County Planning & Zoning Commission v. Ogden*, 210 S.W.2d 771, 307 Ky. 362.

Zoning held not authorized by building-code statute.

Ky.—*American Sign Corp. v. Fowler*, 276 S.W.2d 651.

50. Mass.—*Simon v. Town of Needham*, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

Pa.—*Commonwealth ex rel. v. Kinsey*, 59 Pa.Dist. & Co. 576.

Ordinances for particular purposes

(1) Construction of buildings.

Mich.—*People v. Kelly*, 295 N.W. 341, 295 Mich. 622.

(2) Mining of coal.

Pa.—*Commonwealth v. Debaldo, Co.*, 99 Pittsb.Leg.J. 155.

(3) Structures for harboring of pigeons.

N.Y.—*Barkmann v. Town of Hempstead*, 49 N.Y.S.2d 262, 268 App. Div. 785, affirmed 62 N.E.2d 238, 294 N.Y. 805.

51. Cal.—*Johnston v. Board of Sup'rs of Marin County*, 187 P.2d 686, 31 C.2d 66.

52. Ga.—*Glynn County Com'rs v. Cate*, 187 S.E. 636, 183 Ga. 111.

Absence of provision for notice and hearing

(1) Statute relating to organization of port districts held unconstitutional in so far as it attempted to confer authority to zone property within boundaries of port district

where no provision was made for adequate notice and hearing of proposed zoning ordinances.

Cal.—*Gilbert v. Stockton Port Dist.*, 60 P.2d 847, 7 C.2d 384.

(2) Notice and hearing generally see *infra* § 11 b.

Election limited to resident freeholders

(1) Statute limiting to resident freeholders the right to vote at election to form county zoning district was in conflict with constitutional provision whereby legislature could limit eligibility to vote to taxpayers only on questions of levying special taxes or issuing public bonds, and election held pursuant to statute was void, and purported county zoning district was without validity, notwithstanding statutory provision authorizing district to levy taxes.

Or.—*J. Peterkort & Co. v. East Washington County Zoning Dist.*, 313 P. 2d 773, rehearing denied 314 P.2d 912.

(2) Where an election to form a county zoning district was attempted to be held pursuant to an unconstitutional law, neither the notice of the election given in accordance with its terms nor the election itself could have any legal efficacy, and therefore election could not be sustained on theory that there was no reason to believe that the result of the election would have been different had nonfreeholders been permitted to vote.

Or.—*J. Peterkort & Co. v. East Washington County Zoning Dist.*, 314 P. 2d 912.

53. Ark.—*City of Little Rock v. Pfeiffer*, 277 S.W. 883, 169 Ark. 1027.

Cal.—*Housing Authority of Los Angeles County v. Dockweiler*, 94 P. 2d 794, 14 C.2d 437.

Conn.—*Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel*, 86 A.2d 74, 138 Conn. 434.

Ga.—*Humthlett v. Reeves*, 85 S.E.2d 25, 211 Ga. 210—*Orr v. Hapeville Realty Investments*, 85 S.E.2d 20, 211 Ga. 235.

Ill.—*Pasfield v. Donovan*, 131 N.E.2d 504, 7 Ill.2d 563.

Iowa.—*Scott v. City of Waterloo*, 274 N.W. 897, 223 Iowa 1169.

Kan.—*Moore v. City of Pratt*, 79 P. 2d 871, 148 Kan. 53—*Corpus Juris cited in Ford v. City of Hutchinson*, 37 P.2d 39, 41, 140 Kan. 307.

Me.—*Bolduc v. Pinkham*, 88 A.2d 817, 148 Me. 17.

Md.—*Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore*, 66 A.2d 754, 191 Md. 249.

power of the state⁵⁴ or by virtue of a constitutional provision authorizing the grant of zoning power to municipalities⁵⁵ or authorizing the grant of zon-

Mass.—*Leahy v. Inspector of Buildings of City of New Bedford*, 31 N.E.2d 436, 308 Mass. 128.

Miss.—*City of Jackson v. McPherson*, 138 So. 604, 162 Miss. 164.

Mo.—*Wippler v. Hohn*, 110 S.W.2d 409, 341 Mo. 780.

N.J.—*Mansfield & Swett v. Town of West Orange*, 198 A. 225, 120 N.J. Law 145.

N.Y.—*Longley v. Rumsey*, 224 N.Y. S. 165, 130 Misc. 492.

Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App. Div. 1005, reargument and appeal denied 86 N.Y.S.2d 238, 274 App. Div. 1065, motion denied 84 N.E.2d 639, motion denied 85 N.E.2d 61. 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Pa.—*Lukens v. Zoning Bd. of Adjustment of Riley Tp., Del. County*, 80 A.2d 765, 367 Pa. 608.

43 C.J. p 333 note 32.

Requirements for validity

Zoning acts are valid and constitutional as structural or general legislation whenever they are necessary for preservation of public health, safety, morals, or general welfare and not unjustly discriminatory, arbitrary, or unreasonable, or confiscatory in their application to a particular or specific piece of property.

Pa.—*Appeal of Medinger*, 104 A.2d 118, 377 Pa. 217—*Appeal of Lord*, 81 A.2d 533, 368 Pa. 121.

Immaterial omissions

Zoning provision of city charter held not unconstitutional for failure to provide for notice, hearing, or compensation before rezoning district.

N.Y.—*Prescott v. Pierce*, 223 N.Y.S. 609, 130 Misc. 63.

No unlawful delegation of power

(1) Generally.

Iowa.—*Gannett v. Cook*, 61 N.W.2d 703, 245 Iowa 750.

N.C.—*Marren v. Gamble*, 75 S.E.2d 880, 237 N.C. 680.

Wash.—*Lauterbach v. City of Centralia*, 304 P.2d 656, 49 Wash.2d 550.

(2) Statute creating county planning and zoning commissions and authorizing a commission to fix a reasonable schedule of fees for the issuance of permits and certificates is an authorization to exercise discretion within reasonable bounds and is not a delegation of legislative power.

Ky.—*Kesseling v. Wakefield Realty Co.*, 227 S.W.2d 416, 312 Ky. 334.

Leading case

Pa.—*Taylor v. Moore*, 154 A. 799, 303 Pa. 469.

Portuguese amendment of prior act

Act conferring on the county commission of a named county the au-

thority to zone property outside incorporated cities of the county is not void because in its caption and in the body of the act, it purports to amend a prior act which never became effective, or because it mistakenly refers to such prior act.

Ga.—*Humthlett v. Reeves*, 85 S.E.2d 25, 211 Ga. 210.

54. Ala.—*Jefferson County v. City of Birmingham*, 55 So.2d 196, 256 Ala. 436.

Iowa.—*Boardman v. Davis*, 3 N.W.2d 608, 231 Iowa 1227.

Me.—*Toulouse v. Board of Zoning Adjustment*, 87 A.2d 670, 147 Me. 387.

Mass.—*Leahy v. Inspector of Buildings of City of New Bedford*, 31 N.E.2d 436, 308 Mass. 128—*Slack v. Building Inspector of Town of Wellesley*, 160 N.E. 235, 262 Mass. 404.

Mo.—*Wippler v. Hohn*, 110 S.W.2d 409, 341 Mo. 780.

Neb.—*Cassel Realty Co. v. City of Omaha*, 14 N.W.2d 600, 144 Neb. 753—*Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 213 N.W. 835, 115 Neb. 525.

N.J.—*N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge*, 69 A.2d 767, 6 N.J.Super. 435.

420 Broad Ave. Corporation v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527—*Duffcon Concrete Products v. Borough of Cresskill*, 58 A.2d 104, 137 N.J.Law 81, reversed on other grounds 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

N.Y.—*Prescott v. Pierce*, 223 N.Y.S. 609, 130 Misc. 63.

N.C.—*Vance S. Harrington & Co. v. Renner*, 72 S.E.2d 838, 236 N.C. 321.

Pa.—*Appeal of Bell Telephone Co. of Pennsylvania*, 10 A.2d 817, 138 Pa. Super. 527.

Schmalz v. Buckingham Tp. Bd. of Adjustment, Com.Pl., 6 Bucks Co. 285, reversed on other grounds 132 A.2d 233, 389 Pa. 295.

R.I.—*Robinson v. Town Council of Narragansett*, 199 A. 308, 60 R.I. 422.

Tex.—*Luse v. City of Dallas, Civ. App.*, 131 S.W.2d 1079, error refused.

43 C.J. p 334 notes 39-41.

Improvement of road

Provision requiring that road giving access to proposed structure be suitably improved before building permit may be issued is within police power, and is not objectionable as compelling construction of roads on land at owner's expense without compensation from town, and, since the requirements of the statute may be

relaxed, the statute does not deprive owner unreasonably of property if it is properly administered.

N.Y.—*Brous v. Smith*, 106 N.E.2d 503, 304 N.Y. 164.

55. Ga.—*Birdsey v. Wesleyan College*, 87 S.E.2d 378, 211 Ga. 583—*Herrod v. O'Beirne*, 80 S.E.2d 684, 210 Ga. 476.

N.J.—*Scarborough Apartments v. City of Englewood*, 87 A.2d 537, 9 N.J. 182.

Schack v. Trimble, 137 A.2d 22, 48 N.J.Super. 45.

420 Broad Ave. Corporation v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527—*Duffcon Concrete Products v. Borough of Cresskill*, 58 A.2d 104, 137 N.J.Law 81, reversed on other grounds 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

General grant of power

Constitutional provision, giving legislature power to grant certain municipalities authority to pass zoning and planning laws, authorizes general grant of power to pass such laws and does not limit such power to passage of single ordinance establishing one complete and comprehensive scheme of planning and zoning for entire area of municipality.

Ga.—*Schofield v. Bishop*, 16 S.E.2d 714, 192 Ga. 732.

Purpose of constitutional provisions

(1) Constitutional provisions relating to zoning were designed to remedy judicial denials of fullness of zoning power and to regulate its use so as to accommodate essential common and individual rights in fulfillment of zoning principle.

N.J.—*Roselle v. Wright*, 122 A.2d 506, 21 N.J. 400.

(2) Constitutional provision authorizing the legislature to enact general laws under which municipalities may adopt zoning ordinances was designed to reaffirm and define the basic sovereign power and to bring its operation within certain definite standards and principles in keeping with its essential nature.

N.J.—*Schmidt v. Board of Adjustment of City of Newark*, 88 A.2d 607, 9 N.J. 405.

Conformity to constitution

Where power is conferred by a constitutional provision, the statute must conform thereto.

N.J.—*Duffcon Concrete Products v. Borough of Cresskill*, 58 A.2d 104, 137 N.J.Law 81, reversed on other grounds 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

Broad discretion given to legislature by constitutional power.

N.J.—*Thornton v. Village of Ridgewood*, 111 A.2d 899, 17 N.J. 499.

ing power to counties,⁵⁶ and they have been upheld as against the objection that they were violative of the federal⁵⁷ or state⁵⁸ constitution. A constitutional provision authorizing the legislature to grant to certain cities the authority to pass zon-

ing ordinances does not authorize the grant of such power to the governing authorities of a county.⁵⁹

The state, in delegating zoning power to a municipality, may determine the extent of the power granted,⁶⁰ prescribe the terms and conditions under which

Police power set forth in constitutional authorization

Zoning power of municipalities rests not merely on the police power of the state, but on the police power as set forth in express constitutional authorization to the legislature to enact statutes giving municipalities the power to enact zoning ordinances. N.J.—Fischer v. Bedminster Tp., 93 A.2d 378, 11 N.J. 194.

Amendment not constituting new grant of power

The 1927 Amendment to 1844 Constitution, authorizing legislature to enact general laws under which municipalities may adopt zoning ordinances in exercise of state's police power, did not constitute new grant of power previously beyond legislature's domain, and neither such amendment nor similar provision of 1947 constitution invoked any residuum of sovereign power, apart from police power, for enlargement of general legislative function laid down in organic law.

N.J.—Roselle v. Wright, 122 A.2d 566, 21 N.J. 400.

56. Ga.—Birdsey v. Wesleyan College, 87 S.E.2d 378, 211 Ga. 583.

57. Ga.—Humthlett v. Reeves, 85 S.E.2d 25, 211 Ga. 210.

Me.—Boulduc v. Pinkham, 88 A.2d 817, 148 Me. 17.

Mass.—Spector v. Milton Bldg. Inspector, 145 N.E. 265, 250 Mass. 63.
—Lowell Bldg. Inspector v. Stoklosa, 145 N.E. 262, 250 Mass. 52.

58. Ga.—Orr v. Hapeville Realty Co., 94 S.E.2d 682, 212 Ga. 649.
—Humthlett v. Reeves, 85 S.E.2d 25, 211 Ga. 210.

Me.—Boulduc v. Pinkham, 88 A.2d 817, 148 Me. 17.

Mass.—Opinion of the Justices, 73 N.E.2d 881, 321 Mass. 759.

Amendment; single subject in title

Where zoning law amendment enlarged class of plaintiffs who might bring actions and increased allowable costs in those actions, fact that amendatory act was entitled an act to amend specified act satisfied constitutional requirement that amendments embrace not more than one subject and that subject be mentioned in title.

Ill.—Pasfield v. Donovan, 131 N.E.2d 564, 7 Ill.2d 563.

Single subject matter; subject limited to title

Statute to create and establish county planning commission and board of zoning appeals does not violate constitutional provision that no

law shall pass which refers to more than one subject matter or contains matter different from what is expressed in title thereof.

Ga.—Kirkpatrick v. Candler, 53 S.E.2d 889, 205 Ga. 449.

General or special law

(1) Amendment of general law, authorizing enactment of municipal zoning and planning ordinances and regulations, is not a special law for which provision has been made by an existing general law, in violation of constitution, although amendment applies only to municipalities having a population of more than three hundred thousand according to 1950 or any future United States census, since such classification on the basis of population is reasonably germane to the subject matter of legislation, and classification is left open to let in any municipality which by a future census may have the stipulated population.

Ga.—Orr v. Hapeville Realty Investments, 85 S.E.2d 20, 211 Ga. 235.

(2) Act conferring on the county commissioner of Cobb County authority to zone property outside incorporated cities of the county is not unconstitutional for violation of the provision that no special law shall be enacted in any case for which provision has been made by an existing general law, and provision requiring that tribunals for the transaction of county matters shall be uniform throughout the state and of the same jurisdiction and remedies, or on the ground that there is an existing general law with respect to zoning and because the law permits Cobb County to have a particular system different from other systems of zoning throughout the state.

Ga.—Humthlett v. Reeves, 85 S.E.2d 25, 211 Ga. 210.

(3) Public Service Commission Law has nothing to do with zoning, so that statutory authority given Baltimore County commissioners to adopt comprehensive plan of zoning regulations is not unconstitutional as applied to electric power company as being a special law for which provision has been made by general laws.

Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.

59. Ga.—Glynn County Com'rs v. Cate, 187 S.E. 636, 183 Ga. 111.

60. U.S.—Proffett v. Valley View Village, D.C.Ohio, 123 F.Supp. 339, reversed on other grounds, C.A.,

Valley View Village v. Proffett, 221 F.2d 412.

Ga.—Barton v. Hardin, 48 S.E.2d 882, 204 Ga. 108.

Mass.—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308 Mass. 128.

N.J.—N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge, 69 A.2d 767, 6 N.J.Super. 495.

N.Y.—Levitt v. Incorporated Village of Sands Point, 148 N.Y.S.2d 798, 3 Misc.2d 92, modified on other grounds 152 N.Y.S.2d 711, 2 A.D.2d 688, reargument and appeal denied 154 N.Y.S.2d 842, 2 A.D.2d 781.

"Zoning authorities can only exercise such power as has been validly conferred upon them by the General Assembly."

Conn.—Eden v. Town Plan and Zoning Commission of Town of Bloomfield, 89 A.2d 746, 748, 139 Conn. 59.

Single type of use regulation

Legislature can limit zoning authority conferred on local legislative body to one type of use regulation, leaving open other areas in which business or industrial uses are unregulated.

Md.—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.

Temporary or interim zoning ordinance

(1) Zoning provisions of statute do not carry with them implied or inherent power authorizing city to pass an interim zoning ordinance.

Pa.—Kline v. City of Harrisburg, 68 A.2d 182, 362 Pa. 438.

(2) Legislature has never authorized temporary zoning ordinances which prevent a property use from becoming a nonconforming use while the property is in flight from one municipality to another.

Pa.—Appeal of Rich & Co., 84 Pa. Dist. & Co. 393, 101 Pittsb.Leg.J. 85.

(3) Validity of temporary or emergency ordinance see *infra* §§ 18, 19.

Church or similar purpose

Statute providing that no bylaw or ordinance which prohibits or limits the use of land for any church or other religious purpose, or which prohibits or limits the use of land for any religious, sectarian, or denominational educational purpose shall be valid, was intended to deprive municipalities of all power to limit the use of land for church or

it may be exercised,⁶¹ as by requiring the consent of the majority of the people where the law is to operate,⁶² or designate the manner in, or the method by, which zoning shall be accomplished.⁶³ Where a permissive statute authorizes cities to establish building zones, it is not further required, to permit action by the city, that its charter be amended.⁶⁴

A statute designating the violation of a zoning ordinance as a nuisance has been held not invalid.⁶⁵

It has been held that statutes conferring on the municipal corporations the power to enact zoning regulations should be liberally construed⁶⁶ and that they should be interpreted in keeping with their evident reason and spirit.⁶⁷

other religious purposes or for religious, sectarian or denominational educational purposes, and applied both prospectively and retroactively. *Mass.—Attorney General v. Inhabitants of Town of Dover*, 100 N.E. 2d 1, 327 Mass. 601.

Fence as "structure"

Statute providing that township board of trustees may regulate use of land with reference to buildings and other structures contemplates that erection of fences can be controlled by a zoning resolution adopted by a township; a fence is a "structure" within such statute.

Ohio.—State v. Zumpano, App., 146 N.E.2d 871.

Area subject to zoning

(1) In statute defining municipal area which may be zoned by city as surrounding territory which "bears relation to planning and zoning of city," quoted phrase means territory which is so situated as to have bearing on planning and zoning scheme for city, and a remote, abstract relation to economic, commercial or social interest of city is not enough. *Ky.—American Sign Corp. v. Fowler*, 276 S.W.2d 651.

(2) Since a city of the fourth class has no power to annex land outside city limits in another county than that in which city is located, use of such land is not so reasonably related to city's development as to fall within purposes of statutes authorizing such cities to regulate and restrict use and type of buildings and requiring city planning commission to adopt master plan for physical development of city and municipal area, defined as surrounding territory bearing relation to city planning and zoning.

Ky.—Smeltzer v. Messer, 225 S.W.2d 96, 311 Ky. 692.

Ideal appearance of municipality; inflation of revenue

It is not within the scope of the act enabling cities and towns to enact zoning ordinances, for ordinances to be enacted for purpose of assisting a municipality to retain or assume a general appearance deemed to be ideal, or to inflate its taxable revenue. *Mass.—122 Main St. Corp. v. City of Brockton*, 84 N.E.2d 13, 323 Mass. 446, 8 A.L.R.2d 955.

61. Iowa.—Gannett v. Cook, 61 N.W. 2d 703, 245 Iowa 750.

Mass.—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308 Mass. 128.
N.C.—Marren v. Gamble, 75 S.E.2d 880, 237 N.C. 680.

Effect of constitutional provision

Statute prescribing certain conditions for zoning ordinances held not void on ground that constitutional provision authorizing zoning was without any restrictions.

La.—State ex rel. Holcombe v. City of Lake Charles, 144 So. 502, 175 La. 803.

Master plan adopted by planning commission is controlling only as to municipal improvements and regulation of subdivisions of land, and, under the general law, it does not control the zoning commission in enactment of zoning regulations. *Conn.—Levinsky v. Zoning Commission of City of Bridgeport*, 127 A. 2d 822, 144 Conn. 117.

Petition of property owners

The act providing that certain classes of cities may, and on petition of sixty per cent of the property owners within a given area of a city "shall," create a restricted residential district, is not unconstitutional as a delegation of legislative authority to private persons, since the legislation, if any is had, is by the council which is the recognized legislative body of the municipal government. *Iowa.—Des Moines v. Manhattan Oil Co.*, 184 N.W. 323, 188 N.W. 921, 193 Iowa 1096, 23 A.L.R. 1322.

62. Iowa.—Gannett v. Cook, 61 N.W. 2d 703, 245 Iowa 750.

63. Ala.—Chapman v. City of Troy, 4 So.2d 1, 241 Ala. 637.

Ky.—City of Somerset v. Weise, 263 S.W.2d 921.

Manner of exercising zoning power see *infra* § 11.

"When the method for exercising that power is prescribed by the statute, such method is the measure of . . . [the commission's] power to act."

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 773, 307 Ky. 362.

Statute guiding zoning process

Zoning statute would, unless repealed or amended by legislature or by referendum or initiative by people, guide zoning process of cities

and direct means by which it was to be accomplished.

Utah.—Dewey v. Doxey-Layton Realty Co., 277 P.2d 805, 3 Utah 2d 1.

Purpose of act authorizing municipalities to enact zoning ordinances is to divide the territory within corporate limits of a city into business, industrial, and residential zones or districts and to provide the kind, character, and use of structures and improvements that may be made or erected therein.

Ala.—Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 593, 253 Ala. 402.

64. Mich.—Dawley v. Collingwood, 218 N.W. 766, 242 Mich. 247.

65. Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

66. N.J.—Schack v. Trimble, 137 A. 2d 22, 48 N.J.Super. 45.

N.Y.—Utica v. Hanna, 195 N.Y.S. 225, 202 App.Div. 610.

Pa.—In re Gillilan's Permit, 140 A. 136, 291 Pa. 358.

Constitutional requirement

N.J.—Thornton v. Village of Ridge-wood, 111 A.2d 899, 17 N.J. 499—*United Advertising Corp. v. Borough of Raritan*, 93 A.2d 362, 11 N. J. 144.

Fischer v. Bedminster Tp., Somerset County, 90 A.2d 757, 21 N.J. Super. 81, affirmed 93 A.2d 378, 11 N.J. 194.

67. N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J. Law 129, affirmed 59 A.2d 622, 137 N.J. Law 280.

Main purpose of zoning statute is to authorize municipality to enact, in public interest and within scope of statute, zoning ordinance restricting use of realty as particular needs of any given municipality may reasonably require.

R.I.—Buckminster v. Zoning Board of Review of City of Pawtucket, 33 A.2d 199, 69 R.I. 396.

All cities

Statute authorizing establishment of building zones in cities held to enlarge powers of all cities.

Mich.—Dawley v. Collingwood, 218 N.W. 766, 242 Mich. 247.

Welfare of whole city

State zoning act, which requires that city zoning regulations be made in accordance with comprehensive plan, contemplates that a smaller

§ 7. — Police Power

Zoning regulations are based on, or constitute an exercise of, the police power, and must find their justification therein.

Broadly speaking, zoning laws or regulations are

based on, or constitute an application or exercise of, the police power to enact laws for the safety, health, morals, convenience, comfort, prosperity, or general welfare of the people,⁶⁸ and they are authorized

city's governing body, undertaking to deal with entire matter of zoning, shall keep in view welfare of whole city.

Ala.—Chapman v. City of Troy, 4 So. 2d 1, 241 Ala. 637.

68. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412—Dennis v. Village of Tonka Bay, C. C.A.Minn., 156 F.2d 672—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 593.

Proffett v. Valley View Village, D.C.Ohio, 123 F.Supp. 339, reversed on other grounds, C.A., Valley View Village v. Proffett, 221 F.2d 412.

Ala.—Jefferson County v. City of Birmingham, 55 So.2d 196, 256 Ala. 436.

Cal.—Hurst v. City of Burlingame, 177 P. 308, 207 C. 134.

Town of Atherton v. Superior Court In and For San Mateo County, App., 324 P.2d 328—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

Colo.—Flinn v. Treadwell, 207 P.2d 967, 120 Colo. 117.

Conn.—Miller v. Town Planning Commission of Town of Manchester, 113 A.2d 504, 142 Conn. 265—Ponelle v. Dudas, 106 A.2d 479, 141 Conn. 413.

Fla.—Josephson v. Autrey, 96 So.2d 784—Garvin v. Baker, 59 So.2d 360.

Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—City of Springfield v. Vancil, 76 N.E.2d 471, 398 Ill. 575—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213—Kennedy v. City of Evanston, 181 N.E. 312, 348 Ill. 426.

Phillips Petroleum Co. v. City of Park Ridge, App., 149 N.E.2d 344.

Ind.—Town of Homeroft v. Macbeth, 148 N.E.2d 563.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249—Gannett v. Cook, 61 N.W.2d 703, 245 Iowa 750—Livingston v. Davis, 50 N.W.2d 592, 243 Iowa 21, 27 A.L.R.2d 1237—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356.

Ky.—American Sign Corp. v. Fowler, 276 S.W.2d 651—Fried v. Louisville & Jefferson County Planning and Zoning Commission, 258 S.W.

2d 466—Bosworth v. City of Lexington, 125 S.W.2d 995, 277 Ky. 90.

Me.—Toulouse v. Board of Zoning Adjustment, 87 A.2d 670, 147 Me. 387.

Md.—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632—Dobres v. Schwartzman, 59 A.2d 684, 191 Md. 19—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816—Sugar v. North Baltimore M. E. Church, 165 A. 703, 164 Md. 487.

Mass.—Bicknell Realty Co. v. Board of Appeal of Boston, 116 N.E.2d 570, 330 Mass. 876—Barney & Casey Co. v. Town of Milton, 87 N.E. 2d 9, 324 Mass. 440.

Minn.—Connor v. Chanhasen Tp., 81 N.W.2d 789, 249 Minn. 205—State ex rel. Howard v. Village of Roseville, 70 N.W.2d 404, 224 Minn. 343—Kiges v. City of St. Paul, 62 N. W.2d 363, 240 Minn. 522—Gunderson v. Anderson, 251 N.W. 515, 190 Minn. 245.

Mo.—Fleming v. Moore Bros. Realty Co., 251 S.W.2d 8, 363 Mo. 305—Flora Realty & Investment Co. v. City of Ladue, 246 S.W.2d 771, 326 Mo. 1025.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386.

Van Corp. v. Mayor and Council of Borough of Ridgefield, 124 A.2d 48, 41 N.J.Super. 74—N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge, 69 A.2d 767, 6 N.J.Super. 495—Lumund v. Board of Adjustment of Borough of Rutherford, 69 A.2d 361, 6 N.J. Super. 474, affirmed 73 A.2d 545, 4 N.J. 577—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N. J.Super. 607.

420 Broad Ave. Corp. v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527—Tulsa Oil Co. v. Moroy, 60 A.2d 302, 137 N.J.Law 388—Duffcon Concrete Products v. Borough of Cresskill, 58 A.2d 104, 137 N.J.Law 81, reversed on other grounds 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

Iannella v. Piscataway Tp., 61 A.2d 687, 142 N.J.Bq. 763.

N.Y.—Daub v. Popkin, 171 N.Y.S.2d 513, 5 A.D.2d 283.

People v. Lederle, 132 N.Y.S.2d 693, 206 Misc. 244, affirmed 139 N.

Y.S.2d 915, 285 App.Div. 974, affirmed 131 N.E.2d 284, 309 N.Y. 866. Freitag v. Marsh, 106 N.Y.S.2d 927, transferred, see 115 N.Y.S.2d 838, 280 App.Div. 934—People v. Sudierfi Realty Corp., 101 N.Y.S.2d 792.

N.C.—Elizabeth City v. Aydtlett, 161 S.E. 78, 201 N.C. 602.

Ohio.—Cleveland Builders Supply Co. v. City of Garfield Heights, 136 N. E.2d 105, 102 Ohio App. 69—State ex rel. Rosenthal v. City of Bedford, App., 134 N.E.2d 727—Curtiss v. City of Cleveland, App., 130 N.E.2d 342—State ex rel. Geletka v. City of Campbell, App., 113 N. E.2d 601, appeal dismissed 106 N. E.2d 83, 157 Ohio St. 553—Kilko v. City of Cleveland, App., 102 N.E. 2d 476—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

Okl.—State ex rel. Hunzicker v. Pulliam, 37 P.2d 417, 168 Okl. 632, 96 A.L.R. 1294.

Pa.—Swade v. Zoning Bd. of Adjustment of Springfield Tp., 140 A.2d 597—Appeal of Michener, 115 A.2d 367, 382 Pa. 401—Kelly v. City of Philadelphia, 115 A.2d 238, 382 Pa. 459—Kline v. City of Harrisburg, 68 A.2d 182, 362 Pa. 438.

Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463—Borough of Kingston v. Kalanosky, 38 A.2d 393, 155 Pa.Super. 424.

McCully v. Borough of Dormont, 35 Berks Co. 391, 90 Pittsb.Leg.J. 553—Commonwealth ex rel. Lawrence Pk. Tp. v. Helmuth, Quar. Sess., 33 Erie Co. 91, 41 Mun.L.R. 248.

R.I.—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371—Davidson County v. Rogers, 198 S. W.2d 812, 184 Tenn. 327.

Tex.—City of Corpus Christi v. Allen, 254 S.W.2d 759, 152 Tex. 137.

Niday v. City of Bellaire, Civ. App., 251 S.W.2d 747—Fort Worth & D. C. Ry. Co. v. Ammons, Civ. App., 215 S.W.2d 407, refused no reversible error—Edge v. City of Bellaire, Civ.App., 200 S.W.2d 224, error refused.

Wis.—State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W. 2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed. 750.

43 C.J. p 230 note 74 [b].

"Zoning is inherent in the police power."

only under such power.⁶⁹ In other words, zoning laws and regulations find, or must find, their justification in some aspect of the police power asserted for the public welfare or in the public interest,⁷⁰ or must be justified by the fact that they have some tendency to promote the public health, public safety,

Cal.—People v. Johnson, 277 P.2d 45, 49, 129 C.A.2d 1.

Aspect of police power

Fla.—Hartnett v. Austin, 93 So.2d 86.

Comprehensive zoning has long been established as being a legitimate exercise of the police power.

Cal.—Beverly Oil Co. v. City of Los Angeles, 251 P.2d 865, 40 C.2d 352.

Rights of individuals

(1) Zoning is exercise of police power which takes away, for public good, some rights of individuals to use their property as they please while giving them rights to restrict injurious uses of others' property.

Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

(2) Right which every property owner has to use his property in his own way and for his own purposes is always subject to exercise of police power by city in the enactment of zoning ordinances.

Ill.—Ronda Realty Corp. v. Lawton, 111 N.E.2d 310, 414 Ill. 313.

Division of property by sales

Even an actual division or subdivision of property by reason of sales thereof would not place it beyond the authority of a city to regulate under zoning ordinance acting under the police power, provided such could be done without undue private hardship or loss, measured in relation to the public benefit of such regulation.

Tex.—Caruthers v. Board of Adjustment of City of Bunker Hill Village, Civ.App., 290 S.W.2d 346.

68. Ohio.—City of Miamisburg v. Clayman, App., 37 N.E.2d 94.

Pa.—In re Zoning Bd., Herman Appeal, Com.Pl., 26 Lehl.J. 362.

Tex.—City of Sherman v. Simms, 183 S.W.2d 415, 143 Tex. 115—Ellis v. City of West University Place, 175 S.W.2d 398, 141 Tex. 608.

Niday v. City of Bellaire, Civ. App., 251 S.W.2d 747.

70. U.S.—State of Washington ex rel. Seattle Title Trust Co. v. Roberge, Wash., 49 S.Ct. 50, 278 U.S. 116, 78 L.Ed. 216—Village of Euclid, Ohio v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.

Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., D. C.Mo., 54 F.2d 1071, reversed on other grounds, C.C.A., 58 F.2d 593—American Wood Products Co. v. City of Minneapolis, D.C.Minn., 21 F.2d 440, affirmed, C.C.A., 35 F.2d 657.

Ruben v. City of Pittsburgh, D.C. Pa., 142 F.Supp. 787.

Ala.—Walls v. City of Guntersville, 45 So.2d 465, 253 Ala. 450—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Colo.—Hedgecock v. People, 13 P.2d 261, 91 Colo. 155.

Conn.—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 51—Levine v. Board of Adjustment of City of New Britain, 7 A.2d 222, 125 Conn. 478.

Fla.—State v. Du Bose, 128 So. 4, 99 Fla. 812.

Ill.—People ex rel. Schimpff v. Norvell, 13 N.E.2d 960, 368 Ill. 325.

Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

La.—McCauley v. Albert E. Briede & Son, 90 So.2d 78, 231 La. 36.

Md.—Dobres v. Schwartzman, 59 A.2d 684, 191 Md. 19.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

Mich.—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331.

N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

Marie's Launderette v. City of Newark, 113 A.2d 190, 35 N.J.Super. 94—Sieber v. Laawe, 109 A.2d 470, 33 N.J.Super. 115.

DeMott Homes at Salem v. Margate City, 56 A.2d 423, 136 N.J. Law 330, affirmed 57 A.2d 388, 136 N.J. Law 639—United Advertising Corp. v. Board of Adjustment of Maplewood Tp., 56 A.2d 406, 136 N.J. Law 336—Piaget-Del Corp. v. Kulik, 45 A.2d 125, 133 N.J. Law 485, petitions denied 46 A.2d 379, 134 N.J. Law 147—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J. Law 135, affirmed 15 A.2d 598, 125 N.J. Law 387.

N.Y.—Concordia Collegiate Institute v. Miller, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 202 Misc. 295—Freeman v. City of Yonkers, 129 N.Y.S. 2d 703, 205 Misc. 947—Bove v. Donner-Hanna Coke Corporation, 254 N.Y.S. 403, 142 Misc. 329, affirmed 258 N.Y.S. 229, 236 App. Div. 37, motion denied 258 N.Y.S. 1075, 236 App.Div. 775.

People v. Calvar Corp., 69 N.Y. S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

N.C.—Vance S. Harrington & Co. v. Renner, 72 S.E.2d 838, 236 N.C. 321.

Ohio.—Cassell v. Lexington Tp. Bd. of Zoning Appeals, 127 N.E.2d 11, 163 Ohio St. 340.

Kessler v. Smith, 142 N.E.2d 281, 104 Ohio App. 213, appeal dismissed Smith v. Village of Glenwillow, 146 N.E.2d 308, 167 Ohio St. 91—State ex rel. Euverard v. Miller, 129 N.E.2d 209, 98 Ohio App. 253—State ex rel. Kangasser Co. v. Village of Beachwood, App., 128 N.E. 2d 127—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 259—State ex rel. Cook v. Turgeon, App. 77 N.E.2d 253—State v. Woodworth, 169 N.E. 713, 33 Ohio App. 406.

Tenn.—City of Knoxville v. Brown, 260 S.W.2d 264, 195 Tenn. 501.

Tex.—Lamkin v. City of Bellaire, Civ.App., 308 S.W.2d 70—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700—Fort Worth & D. C. Ry. Co. v. Ammons, Civ.App., 215 S.W.2d 407—Simms v. City of Sherman, Civ.App., 181 S. W.2d 100, affirmed 183 S.W.2d 415, 143 Tex. 115.

Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 152 W.Va. 881.

Wis.—State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 65 N.W.2d 43, 267 Wis. 91, appeal dismissed State of Wis. ex rel. Wisconsin Lutheran High School Conference v. Sinar, 75 S.Ct. 604, 349 U.S. 913, 99 L.Ed. 1248.

Loss to property owners as justified by exercise of police power see infra § 37.

Zoning finds its warrant in police power.

Conn.—Del Buono v. Board of Zoning Appeals of Town of Stratford, 124 A.2d 915, 143 Conn. 673.

Town ordinance

N.Y.—People v. Calvar Corp., 69 N. Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

Conservation of property values as objective

Conservation of property values is not by itself a proper sole objective for exercise of police power by township to zone particular areas for construction of residences of particular size.

Mich.—Elizabeth Lake Estates v. Waterford Tp., 26 N.W.2d 788, 317 Mich. 359.

or public welfare,⁷¹ or, as otherwise expressed, must | have a direct, substantial, or reasonable relation

71. U.S.—*Geneva Inv. Co. v. City of St. Louis*, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 31 L.Ed. 1348.

Ark.—*City of Little Rock v. Sun Building & Developing Co.*, 134 S.W.2d 582, 199 Ark. 333.

Cal.—*Ex parte Angelus*, 150 P.2d 908, 65 C.A.2d 441—*Ex parte Ruppe*, 252 P. 746, 80 C.A. 629.

Conn.—*Strain v. Mims*, 193 A. 754, 123 Conn. 275.

Del.—*Papaioanu v. Commissioners of Rehoboth*, 20 A.2d 447, 25 Del.Ch. 327.

Ill.—*Quilici v. Village of Mount Prospect*, 78 N.E.2d 240, 399 Ill. 418—*City of Springfield v. Vancil*, 76 N.E.2d 471, 398 Ill. 575—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138—*Anderman v. City of Chicago*, 40 N.E.2d 51, 379 Ill. 236—*Village of La Grange v. Leitch*, 35 N.E.2d 346, 377 Ill. 99—*State Bank & Trust Co. v. Village of Wilmette*, 193 N.E. 131, 358 Ill. 311, 96 A.L.R. 1327.

City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616.

Ky.—*Selligman v. Von Allmen Bros.*, 179 S.W.2d 207, 297 Ky. 121—*City of Louisville v. Koenig*, 162 S.W.2d 19, 290 Ky. 562, 140 A.L.R. 1369.

Md.—*Mayor and City Council of Baltimore v. Byrd*, 62 A.2d 588, 191 Md. 632.

Mass.—*Caires v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589—*City of Pittsfield v. Oleksak*, 47 N.E.2d 930, 313 Mass. 553—*Leahy v. Inspector of Buildings of City of New Bedford*, 31 N.E.2d 436, 308 Mass. 128—*Wilbur v. City of Newton*, 18 N.E.2d 365, 302 Mass. 38.

Mich.—*Frischkorn Const. Co. v. Lambert*, 24 N.W.2d 209, 315 Mich. 556.

Mo.—*City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n*, 213 S.W.2d 479, 358 Mo. 70.

Neb.—*City of Omaha v. Glissmann*, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621—*Cassel Realty Co. v. City of Omaha*, 14 N.W.2d 600, 144 Neb. 753.

N.J.—*Oliva v. City of Garfield*, 62 A.2d 673, 1 N.J. 184.

420 Broad Ave. Corp. v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527—*DeMott Homes at Salem v. Margate City*, 56 A.2d 423, 136 N.J.Law 330, affirmed 57 A.2d 388, 136 N.J.Law 363—*Crow v. Town of Westfield*, 56 A.2d 403, 136 N.J.Law 363—*Jersey Triangle Corporation v. Board of Adjustment of Jersey City*, 21 A.2d 845, 127 N.J.Law 194.

N.Y.—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298.

City of Rochester v. Olcott, 16 N.Y.S.2d 256, 173 Misc. 87—*City of Olean v. Conkling*, 283 N.Y.S. 66, 157 Misc. 63—*Fox Meadow Estates v. Livingston*, 242 N.Y.S. 86, 137 Misc. 22, reversed on other grounds 252 N.Y.S. 178, 233 App.Div. 250, affirmed *Fox Meadow Estates v. Culley*, 185 N.E. 714, 261 N.Y. 506.

Alexander's Department Stores v. Murdock, 37 N.Y.S.2d 319—*City of Little Falls v. Fisk*, 24 N.Y.S.2d 460.

Ohio.—*State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph*, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.

Miesz v. Village of Mayfield Heights, 111 N.E.2d 20, 92 Ohio App. 471—*State ex rel. Gaddis v. City of Oakwood*, App., 49 N.E.2d 956.

City of Cincinnati v. Struble, 29 Ohio N.P.N.S., 104.

Pa.—*Borough of Prospect Park v. McClaskey*, 30 A.2d 179, 151 Pa. Super. 467—*Miller v. Seaman*, 8 A.2d 415, 137 Pa. Super. 24.

Appeal of University of Pennsylvania, Com.Pl., 29 Del.Co. 322—*Binder v. Pottstown Borough*, Com.Pl., 71 Montg.Co. 237, 47 Mun.L.R. 39.

Tex.—*City of Dallas v. Meserole*, Civ. App., 155 S.W.2d 1019, error refused.

43 C.J.P. § 336 note 76.

"Zoning is in its essential policy and purpose a component of the reserve element of sovereignty denominated the police power, the sovereign right so to order the affairs of the people as to serve the common social and economic needs, the principle that brought them together in civilized society for their mutual advantage and welfare, to which all property is subject."

N.J.—*Rockhill v. Chesterfield Tp.*, Burlington County, 128 A.2d 473, 477, 23 N.J. 117.

"General welfare"

(1) Under statute granting power to zone to cities for purpose of promoting the health, safety, morals, or "general welfare" of the community, quoted phrase includes considerations of public convenience and general prosperity, but means adopted to promote such ends must bear a reasonable relation to the declared purpose.

Wis.—*State ex rel. Wisconsin Lutheran High School Conference v. Sinar*, 65 N.W.2d 43, 267 Wis. 91, appeal dismissed *State of Wis. ex rel. Wisconsin Lutheran High*

School Conference v. Sinar, 75 S.Ct. 604, 349 U.S. 913, 99 L.Ed. 1248.

(2) Within statute authorizing townships to enact zoning ordinances to promote, *inter alia*, "the general welfare," quoted phrase refers to community benefit in the sense of convenience and comfort, and does not include the power to zone or rezone for increased tax revenue.

Pa.—*Putney v. Abington Tp.*, 108 A.2d 134, 176 Pa. Super. 463.

Only justification

Constitutionally, the only justification for the restrictions imposed on the use of private property by zoning ordinances is the protection of public health, safety, or morals.

Md.—*Landay v. MacWilliams*, 196 A.293, 173 Md. 460, 114 A.L.R. 984.

Housing shortage did not justify a judgment voiding for all time applicability to plaintiffs' property of zoning ordinances prohibiting use of plaintiffs' property for other than a single family dwelling.

Cal.—*Donovan v. City of Santa Monica*, 199 P.2d 51, 88 C.A.2d 386.

Classification of property for town zoning purposes must bear some relation to promotion of health, safety, morals, and general welfare of town.

N.Y.—*Huntley Estates, Inc. v. Town of Eastchester*, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App.Div. 1090.

Constitutional grant of power to enact general laws

In exercise of police power for zoning purposes, legislative action is contained by constitutional grant of power to enact general laws under which municipalities may adopt zoning ordinances, so as to require zoning by districts according to character of lands and structures and their peculiar suitability for particular uses to serve general welfare in given areas of police action, and uniformity and equality of use within each division without invidious distinctions and discriminations not concerned with public purpose rightly in view.

N.J.—*Roselle v. Wright*, 122 A.2d 506, 21 N.J. 400.

Building of churches is subject to such reasonable regulations as may be necessary to promote public health, safety, morals, or general welfare.

Ind.—*Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses*, 117 N.E.2d 115, 233 Ind. 83.

Tex.—*Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City*, Civ.App., 287 S.W.2d 700.

thereto,⁷² or to the police power.⁷³

Zoning regulations, although operating locally, are referable to the police power of the state, and

are derived therefrom.⁷⁴ A zoning ordinance is an expression or exercise of the police power by local government;⁷⁵ so, the right, or power, to enact, or

72. U.S.—Nectow v. City of Cambridge, Mass., 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C. A.Mo., 58 F.2d 593.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Conn.—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

D.C.—Dorsey v. Gotwals, 57 F.2d 407, 61 App.D.C. 41—Bugher v. Gottwals, 54 F.2d 451, 60 App.D.C. 340.

Fla.—State ex rel. S. A. Lynch Corp. v. Danner, 33 So.2d 45, 159 Fla. 874—Forde v. City of Miami Beach, 1 So.2d 642, 146 Fla. 676.

Ill.—Kinney v. City of Joliet, 103 N.E.2d 473, 411 Ill. 289—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quillci v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—Zadworny v. City of Chicago, 44 N.E.2d 426, 380 Ill. 470—Village of La Grange v. Leitch, 35 N.E.2d 346, 377 Ill. 99—Harmon v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594—Taylor v. Village of Glencoe, 25 N.E.2d 62, 372 Ill. 507—Catholic Bishop of Chicago v. Kinergy, 20 N.E.2d 583, 371 Ill. 257—People ex rel. Kirby v. City of Rockford, 2 N.E.2d 842, 363 Ill. 531—Reschke v. Village of Winnetka, 2 N.E.2d 718, 363 Ill. 478, certiorari denied Village of Winnetka v. Reschke, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431 and Village of Winnetka v. Erickson, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431—Merrill v. City of Wheaton, 190 N.E. 918, 356 Ill. 457.

O'Brien v. City of Chicago, 105 N.E.2d 917, 347 Ill.App. 45.

Mich.—Fass v. City of Highland Park, 32 N.W.2d 375, 321 Mich. 156.

Mo.—Downing v. City of Joplin, 312 S.W.2d 81.

Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P. 2d 534, 97 Mont. 342.

N.J.—Delawanna Iron & Metal Co. v. Albrecht, 88 A.2d 616, 9 N.J. 424.

Grant v. Board of Adjustment of Borough of Haddon Heights, 45 A.2d 184, 133 N.J.Law 518—Frank J. Durkin Lumber Co. v. Fitzsimmons, 147 A. 555, 106 N.J.Law 183.

N.Y.—Concordia Collegiate Institute v. Miller, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

Or.—Ludgate v. Somerville, 256 P. 1043, 121 Or. 643, 54 A.L.R. 337.

Pa.—Jordan v. Township of Lower Merion, Com.Pl., 34 Pa.Dist. & Co. 551, 55 Montg.Co. 20—Appeal of Alloy Metal Wire Co., Com.Pl., 29 Del.Co. 488.

Wis.—State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 65 N.W.2d 43, 267 Wis. 91, appeal dismissed State of Wis. ex rel. Wisconsin Lutheran High School Conference v. Sinar, 75 S.Ct. 604, 349 U.S. 913, 99 L.Ed. 1248.

Zoning must be reasonably necessary and related to health, safety, morals, or general welfare of community.

Cal.—People v. Hawley, 279 P. 136, 207 C. 395.

73. La.—State ex rel. Dema Realty Co. v. Jacoby, 123 So. 314, 168 La. 752.

74. U.S.—Proffett v. Valley View Village, D.C.Ohio, 123 F.Supp. 339, reversed on other grounds, C.A., Valley View Village v. Proffett, 221 F.2d 412.

Ala.—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36.

Conn.—Bartram v. Zoning Commission of City of Bridgeport, 68 A. 2d 308, 136 Conn. 89.

Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

Md.—Colati v. Jerout, 47 A.2d 613, 186 Md. 652.

Mo.—Ryan v. City of Warrensburg, 117 S.W.2d 303, 342 Mo. 761.

State ex rel. Kaegel v. Holenkamp, App., 151 S.W.2d 685.

N.J.—Iannella v. Piscataway Tp., 61 A.2d 687, 142 N.J.Eq. 763.

N.Y.—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298.

N.C.—City of Raleigh v. Fisher, 61 S.E.2d 897, 232 N.C. 629.

Or.—Holt v. City of Salem, 234 P.2d 564, 192 Or. 200.

Pa.—Appeal of University of Pennsylvania, Com.Pl., 29 Del.Co. 322.

Wis.—State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 65 N.W.2d 43, 267 Wis. 91, appeal dismissed State of Wis. ex rel. Wisconsin Lutheran High School Conference v. Sinar, 75 S.Ct. 604, 349 U.S. 913, 99 L.Ed. 1248.

Wyo.—Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202.

"Zoning is permissible only as an exercise of the police power of the state."

Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 488, 195 Md. 348.

Power of legislature

As an exercise of police power, the legislature has power to authorize cities to enact zoning ordinances. Mich.—Krajenke Buick Sales v. Kopkowski, 33 N.W.2d 781, 322 Mich. 250.

Delegation to municipalities

(1) Zoning laws are enacted in the exercise of the police power, which may be, or is, delegated to municipalities by the state.

Fla.—Hartnett v. Austin, 93 So.2d 86.

Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91.

Iowa.—Livingston v. Davis, 50 N.W. 2d 592, 243 Iowa 21, 27 A.L.R.2d 1237—Granger v. Board of Adjustment of City of Des Moines, 44 N. W.2d 399, 241 Iowa 1356.

N.C.—Application of O'Neal, 92 S.E. 2d 189, 243 N.C. 714.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

Tex.—Fort Worth & D. C. Ry. Co. v. Ammons, Civ.App., 215 S.W.2d 407, refused no reversible error.

(2) General assembly, by statute authorizing municipalities to prohibit establishment of cemeteries within one mile from their municipal limits, delegated, in general terms, power which it might have exercised directly as a police regulation.

Ill.—City of Park Ridge v. American Nat. Bank & Trust Co. of Chicago, 122 N.E.2d 265, 4 Ill.2d 144.

(3) Delegation to municipalities of police power generally see Constitutional Law § 178.

Power not conferred by constitution

State constitution confers no police power of zoning directly on cities. Mich.—Krajenke Buick Sales v. Kopkowski, 33 N.W.2d 781, 322 Mich. 250.

Enactment of County Zoning Act was a delegation of police power of state to counties to be exercised by counties for benefit of county residents outside of incorporated cities and villages.

Ill.—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

75. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412.

Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415.

N.J.—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64.

Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights in Bergen County, 99 A.2d 591, 27 N.J.Super. 476, reversed on other grounds 105 A.2d 521, 15 N. J. 447.

adopt, zoning ordinances, as such expression or exercise, is possessed by cities,⁷⁶ counties,⁷⁷ municipalities,⁷⁸ and villages.⁷⁹ However, a municipal corporation has no power to zone by virtue of a grant to it of general police power;⁸⁰ and generalities in the charter of a municipality as to the police power do not give the right to zone.⁸¹

The police power to zone property may not be limited by private agreement.⁸²

§ 8. — Particular Applications of Power

The zoning power of municipalities may extend to such matters as the architectural and structural designs of buildings, the segregation of residences, industries, and commercial and mercantile business of diverse kinds to particular localities, vacant land, and density of population.

As a general rule, the zoning power of a municipal corporation may extend to the regulation of the architectural and structural designs of buildings within specified districts with respect to bulk, building lines, height, open spaces, yards, etc.⁸³ How-

76. D.C.—Hagans v. District of Columbia, Mun.App., 97 A.2d 922.

Ill.—Du Page County v. Halkier, 115 N.E.2d 635, 1 Ill.2d 491—Pioneer Trust & Sav. Bank v. Village of Oak Park, 97 N.E.2d 302, 408 Ill. 458—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

O'Brien v. City of Chicago, 105 N.E.2d 917, 347 Ill.App. 45.

La.—McCauley v. Albert E. Briede & Son, 90 So.2d 78, 231 La. 36.

Mich.—Fass v. City of Highland Park, 32 N.W.2d 375, 321 Mich. 156.

Neb.—Graham v. Graybar Elec. Co., 63 N.W.2d 774, 158 Neb. 527—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

Wis.—State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 65 N.W.2d 43, 267 Wis. 91, appeal dismissed State of Wis. ex rel. Wisconsin Lutheran High School Conference v. Sinar, 75 S.Ct. 604, 349 U.S. 913, 99 L.Ed. 1248.

"The right of a city to enact zoning ordinances as an exercise of its police power has long been established."

Ill.—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 152, 414 Ill. 162.

Comprehensive zoning scheme

A city, in the exercise of its police power, may enter into a comprehensive zoning scheme.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

City of Birmingham has full police power, which includes power to make a comprehensive zoning ordinance.

Ala.—Shell Oil Co. v. Edwards, 81 So.2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 885, 100 L.Ed. 780.

77. Ill.—Du Page County v. Halkier, 115 N.E.2d 635, 1 Ill.2d 491—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396.

Constitutional provision

Police power granted counties by constitutional provision that county may make and enforce therein all local, police, sanitary and other regulations not in conflict with general laws includes power to zone.

Cal.—People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

Charter

A county has power to enact zoning ordinances where its charter expressly confers on its legislative body all police powers vested in municipalities by constitution.

Cal.—People v. Johnson, supra.

78. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.III., 178 F.2d 214.

Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Ill.—People ex rel. Trust Co. of Chicago v. Village of Skokie, 97 N.E.2d 310, 408 Ill. 397—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418.

Iowa.—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356.

La.—City of New Orleans v. La Nasa, 88 So.2d 224, 230 La. 289.

N.C.—Application of O'Neal, 92 S.E.2d 189, 243 N.C. 714.

79. Ill.—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

80. Md.—Perry v. County Bd. of Appeals for Montgomery County, 127 A.2d 507, 211 Md. 294.

Reason for this rule is that zoning was unknown to the common law and restricts the free use of property and the economic use of land, so that the courts have felt that nothing less than specific language of the legislature gives municipalities the power to zone. Second, the police power of comprehensive zoning is the power to exclude completely harmless and even desirable activities and uses, as well as those harmful to the general public welfare, which is a basic concept far beyond that of the police power generally.

Md.—Perry v. County Bd. of Appeals for Montgomery County, supra.

81. Fla.—Hunter v. Green, 194 So. 379, 142 Fla. 104.

Md.—Perry v. County Bd. of Appeals for Montgomery County, 127 A.2d 507, 211 Md. 294—Benner v. Tribbitt, 57 A.2d 346, 190 Md. 6.

43 C.J. p 335 note 57.

82. Cal.—Griffin v. Marin County, App., 321 P.2d 148.

83. Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15—Thille v. Board of Public Works of City of Los Angeles, 255 P. 294, 82 C.A. 187.

Colo.—Di Salle v. Giggall, 261 P.2d 499, 128 Colo. 208.

La.—City of New Orleans v. Impastato, 3 So.2d 559, 198 La. 206.

Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed Full Salvation Union v. Portage Tp., Kalamazoo County, Mich., 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

Minn.—State v. Houghton, 213 N.W. 907, 171 Minn. 231.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

N.H.—Sundeen v. Rogers, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

N.J.—Greenway Homes v. Borough of River Edge, 60 A.2d 811, 137 N.J.Law 453—Duffcon Concrete Products v. Borough of Cresskill, 58 A.2d 104, 137 N.J.Law 81.

N.Y.—City of Rochester v. Olcott, 16 N.Y.S.2d 256, 173 Misc. 87—MacEwen v. City of New Rochelle, 267 N.Y.S. 36, 149 Misc. 251.

N.C.—Appeal of Parker, 197 S.E. 706, 214 N.C. 51, appeal dismissed Parker v. City of Greensboro, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358.

Pa.—Commonwealth v. McLaughlin, 78 A.2d 880, 168 Pa.Super. 442.

Tex.—Thompson v. City of Carrollton, Civ.App., 211 S.W.2d 970—Lombardo v. City of Dallas, Civ. App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1—Brown v. Gant, Civ.App., 2 S.W.2d 285.

Wis.—Bouchard v. Zetley, 220 N.W. 209, 196 Wis. 635.

43 C.J. p 338 note 7.

Access to public street

A municipality might properly

ever, the power to promulgate such regulations is not an inherent one;⁸⁴ it must be expressly granted or rise by necessary implication,⁸⁵ and in many instances the existence of the power, generally or in particular circumstances, has been denied.⁸⁶

As a general rule, municipal corporations or

counties enjoy the power and right reasonably to segregate residences, industries, and commercial and mercantile business of diverse kinds, to particular localities.⁸⁷ The power to limit the use of real estate in particular districts must be expressly granted or rise by necessary implication.⁸⁸ So, a municipi-

prohibit entirely the erection of a dwelling on property which has no access to a public street except through an easement on land of another, or might impose conditions of resubdivision or public dedication of the means of access.

Cal.—*Mitchell v. Morris*, 210 P.2d 857, 94 C.A.2d 446.

Power to city with commission form of government

N.D.—*Ujka v. Sturdevant*, 65 N.W.2d 292.

Distance from any property line
N.D.—*Ujka v. Sturdevant*, *supra*.

Type of building which may be erected in given localities has direct relationship to public welfare.
Ind.—*Goldsmith v. City of Indianapolis*, 196 N.E. 525, 208 Ind. 465.

Minimum living-floor space requirements for dwellings

N.J.—*Lionshead Lake, Inc. v. Wayne Tp.*, 89 A.2d 693, 10 N.J. 165, appeal dismissed *Lionshead Lake v. Wayne Tp.* Passaic County, 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

Location of transmission lines

Zoning regulations requiring electric power transmission lines within metropolitan zone to be located underground are not unreasonable or unduly oppressive, and are a valid exercise of the police power.

Md.—*Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore*, Md., 60 A.2d 754, 191 Md. 249.

Powers distinct

Power of municipalities to establish set back, side yard, and rear yard restrictions is distinct from, and does not arise out of, power to enact zoning ordinances.

N.Y.—*Howell v. Liebowitz*, 116 N.Y. S.2d 537.

84. N.J.—*Bowen v. Jersey City*, 132 A. 334, 4 N.J.Misc. 334.
43 C.J. p 339 note 11.

85. Iowa.—*Downey v. Sioux City*, 227 N.W. 125, 208 Iowa 1273, followed in *Wolle v. Sioux City*, 229 N.W. 214.

N.D.—*Ujka v. Sturdevant*, 65 N.W.2d 292.

43 C.J. p 339 note 11.

Implied authority as to floor space

Statute empowering municipality to act with respect to size and bulk of buildings by implication authorizes zoning regulations treating with livable floor space in dwellings, and by regulating livable floor area in dwellings, local authorities are only

giving effect to intent and spirit of such enabling statute.

N.Y.—*Flower Hill Bldg. Corp. v. Village of Flower Hill*, Nassau County, 100 N.Y.S.2d 903, 199 Misc. 344.

86. Tex.—*City of West University Place v. Martin*, Civ.App., 113 S.W.2d 295, cause dismissed 123 S.W.2d 638, 132 Tex. 354.
43 C.J. p 339 note 12.

Town's regulation of billboards under zoning law held unauthorized, under statute permitting zoning relative to structures and premises.
Mass.—*Inspector of Buildings of Town of Falmouth v. General Outdoor Advertising Co.*, 161 N.E. 899, 264 Mass. 85.

87. U.S.—*Women's Kansas City St. Andrew Soc. v. Kansas City*, D.C. Mo., 54 F.2d 1071, reversed on other grounds, C.C.A., 58 F.2d 592—*Oklahoma City, Okl., v. Dolese*, C.C.A. Okl., 48 F.2d 734.

Ala.—*City of Birmingham v. Leo A. Seltzer, Inc.*, 159 So. 203, 229 Ala. 675.

Cal.—*Smith v. Collison*, 6 P.2d 277, 119 C.A. 180—*City of Stockton v. Frisbie & Latta*, 270 P. 270, 93 C.A. 277—*Ex parte Ruppe*, 252 P. 746, 80 C.A. 629.

Colo.—*Colby v. Board of Adjustment*, 255 P. 443, 81 Colo. 344.

Ill.—*Cleaners Guild of Chicago v. City of Chicago*, 37 N.E.2d 857, 312 Ill.App. 102.

La.—*State ex rel. Hochfelder v. City of New Orleans*, 132 So. 786, 171 La. 1053—*State ex rel. Dema Realty Co. v. Jacoby*, 123 So. 314, 168 La. 752.

Neb.—*Davis v. City of Omaha*, 45 N.W.2d 172, 153 Neb. 460—*Roncka v. Fogarty*, 41 N.W.2d 745, 152 Neb. 467.

N.J.—*Midland Park Coal & Lumber Co. v. Terhune*, 56 A.2d 717, 136 N.J.Law 442, affirmed 61 A.2d 76, 127 N.J.Law 603.

N.Y.—*Buckley v. Baldwin*, 244 N.Y.S. 295, 230 App.Div. 245.

Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47—*Helmerie v. Village of Bronxville*, 5 N.Y.S.2d 1002, 168 Misc. 783, affirmed 11 N.Y.S.2d 367, 256 App. Div. 993.

People v. Sudierfi Realty Corp., 101 N.Y.S.2d 792.

Pa.—*Kistler v. Borough of Swarthmore*, 4 A.2d 244, 134 Pa.Super. 287.

Tex.—*City of Corpus Christi v. Jones*, Civ.App., 144 S.W.2d 383, error dis-

missed, judgment correct—*City of West University Place v. Ellis*, Civ. App., 118 S.W.2d 907, affirmed 134 S.W.2d 1039, 134 Tex. 222—*Lombardo v. City of Dallas*, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1—*Scruggs v. Wheeler*, Civ.App., 4 S.W.2d 616, error refused.

43 C.J. p 340 note 29.

Cotton gin

City may designate area within which cotton gins shall not be operated.

Tex.—*Harvey v. City of Seymour*, Civ.App., 14 S.W.2d 901.

Municipality predominantly residential in character has power wholly to exclude from its borders industrial enterprises or activities, or to impose limitations thereon, in order to preserve its residential character, and it need not restrict such enterprises to particular zones or areas, at least when there is present a concentration of industry in area peculiarly adapted to such development and sufficiently large to accommodate it for years to come.

N.J.—*Duffcon Concrete Products v. Borough of Cresskill*, 64 A.2d 317, 1 N.J. 509, 9 A.L.R.2d 678.

Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J.Super. 405.

Advertising sign was held part of "industry" within statute authorizing zoning of trade and industry.

Pa.—*Appeal of Liggett*, 139 A. 619, 291 Pa. 109.

Sewage disposal plant

Proposed operation of a sewage disposal plant by county would be a proprietary, and not a governmental, function, and therefore city, under its zoning power conferred by statute, could prohibit the construction and operation of a sewage disposal plant in a "B" residential district.

Ala.—*Jefferson County v. City of Birmingham*, 55 So.2d 196, 256 Ala. 436.

88. Colo.—*Corpus Juris* quoted in *People ex rel. Grommon v. Hedcock*, 104 P.2d 607, 609, 106 Colo. 300.

Fla.—*Hunter v. Green*, 194 So. 379, 142 Fla. 104.

N.J.—*179 Duncan Avenue Corporation v. Board of Adjustment of Jersey City*, 5 A.2d 68, 122 N.J. Law 292.

pality's zoning power includes the power to prohibit or restrict the exploration for, and production of, oil and gas in designated urban areas, when reasonably necessary to promote the public health, safety, or general welfare.⁸⁹ Whether such power should be exercised is wholly within the legislative discretion of the governing body of the municipality.⁹⁰ A statute delegating to certain cities the power to restrict the drilling of oil wells within the city for the protection of the public health, morals, safety, and general welfare does not include the power to prevent the waste of natural resources.⁹¹

Land apart from buildings. As a general rule, a municipality may have the power to adopt reasonable zoning regulations restricting the use of vacant land, or of land apart from buildings or other structures thereon,⁹² and in this connection it has been held that, even though a constitutional provision authorizing the establishment of building zones does

not refer to vacant land, a municipality may have the power to regulate the use of such land in particular districts under authority derived from state statutes.⁹³

Density of population. The power to regulate the density of population by zoning regulations is one which must be conferred by constitutional or statutory provision.⁹⁴ In the absence of proper authority conferred on a municipality, it may be without power to prohibit in certain districts the erection of dwellings accommodating more than a certain number of families on a specified area of land,⁹⁵ and it has been held that a statute giving municipalities the power to regulate the height and bulk of buildings and the area of open spaces confers no authority to restrict the number of families that might lawfully be housed on a certain area of land.⁹⁶ On the other hand, a statute empowering municipalities to regulate the density of population in any given area

Tex.—City of Texarkana v. Mabry, Civ.App., 94 S.W.2d 871, error dismissed.

43 C.J. p 342 note 32.

89. U.S.—Marblehead Land Co. v. City of Los Angeles, C.C.A.Cal., 47 F.2d 528, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540.

X & L Oil Co. v. Oklahoma City, D.C.Okla., 14 F.Supp. 492—Cromwell-Franklin Oil Co. v. Oklahoma City, D.C.Okla., 14 F.Supp. 370.

Okla.—Gruger v. Phillips Petroleum Co., 135 P.2d 485, 192 Okl. 259—

Keaton v. Oklahoma City, 102 P.2d 938, 187 Okl. 593, certiorari denied 81 S.Ct. 75, 311 U.S. 616, 85 L.Ed. 391—Van Meter v. H. F. Wilcox Oil

& Gas Co., 41 P.2d 904, 170 Okl. 604—Beveridge v. Harper & Turner

Oil Trust, 35 P.2d 435, 168 Okl. 609—Van Meter v. Westgate Oil Co.,

32 P.2d 719, 168 Okl. 200—Anderson-Kerr, Inc., v. Van Meter, 19

P.2d 1068, 162 Okl. 176.

Municipal regulations as to drilling permits and establishment of drilling blocks see Mines and Minerals § 230 a.

Law of capture

Laws passed in the exercise of the police power, such as city zoning ordinances restricting the drilling for oil in certain districts, do not abrogate the law of capture and are not self-executing, but merely authorize administrative boards to issue orders that have the effect of regulating or abrogating in a measure the law of capture.

Okla.—Gruger v. Phillips Petroleum Co., 135 P.2d 485, 192 Okl. 259.

90. Okla.—Keaton v. Brown, 45 P.2d 142, 171 Okl. 88.

92. Okla.—Indian Territory Illuminating Oil Co. v. Larkins, 81 P.2d 668, 168 Okl. 69.

101 C.J.S.—44

92. N.J.—Garrou v. Teaneck Tryon Co., 94 A.2d 332, 11 N.J. 294, 35 A.L.R.2d 1125.

Ramsbotham v. Board of Public Works of City of Paterson, 61 A.2d 196, 137 N.J.Law 559, followed in 61 A.2d 197, 137 N.J.Law 591, reversed on other grounds 65 A.2d 748, 2 N.J. 131—420 Broad Ave. Corp. v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527—Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J.Law 442—Yoemans v. Hillsborough Township, 54 A.2d 202, 135 N.J.Law 599.

N.Y.—People v. Calvar Corp., 69 N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

Ohio.—Miesz v. Village of Mayfield Heights, 111 N.E.2d 20, 92 Ohio App. 471.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

"Land" as comprehending vacant land

As used in statute empowering municipalities to regulate and restrict use of "land" for trade, industry, residence, etc., quoted word comprehended vacant land.

U.S.—City of Anchorage, Alaska, v. Paulk, D.C.Alaska, 118 F.Supp. 698.

Storage of used motor vehicles

City had power under statute to prohibit by implication the storage of used motor vehicles on vacant lots in residential districts.

U.S.—City of Anchorage, Alaska, v. Paulk, supra.

Limitation of constitutional authority

However, it has been held that,

since the constitutional authority for zoning refers only to buildings and structures, a zoning ordinance, in so far as it attempts to control the use of land separate and apart from buildings and structures, is invalid. N.J.—City of Newark v. Lippman, 177 A. 556, 13 N.J.Misc. 248.

93. Mass.—Town of Burlington v. Dunn, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

94. N.Y.—Hall v. Leonard, 21 N.Y.S. 2d 43, 174 Misc. 454, reversed on other grounds 23 N.Y.S.2d 360, 260 App.Div. 591, affirmed 34 N.E.2d 893, 285 N.Y. 719.

Control of density of population as purpose of zoning see supra § 2.

Cities of the metropolitan class are given such power.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

County commissioners held authorized by statute

Colo.—Di Salle v. Giggall, 261 P.2d 499, 128 Colo. 208.

95. Ill.—Bjork v. Safford, 164 N.E. 699, 338 Ill. 355, 61 A.L.R. 561.

96. N.Y.—City of Albany v. Anthony, 28 N.Y.S.2d 963, 262 App.Div. 401.

Subsequent amendment of statute

Regulation was void, notwithstanding after the adoption of the ordinance the statute was amended so as to authorize city to regulate density of population in any given area.

N.Y.—City of Albany v. Anthony, supra.

confers a broad and unrestricted power on each city to regulate such density in the reasonable exercise of its legislative power.⁹⁷

Intoxicating liquors; gaming. The legislature may properly provide by statute that a municipal corporation may, by proper zoning ordinance, establish zones or districts within which state liquor stores may be situated.⁹⁸ However, a municipality may not, in the guise of a zoning ordinance, regulate the business of dispensing liquor;⁹⁹ and legislative recognition of the authority of a town to restrict the use of buildings for the sale of alcoholic liquor to certain towns is not a delegation of authority to limit, in the guise of a zoning ordinance, the number of liquor outlets in the town as a whole.¹

The provisions of a particular statute under which zoning ordinances were passed have been held not repealed by the liquor code.²

The general provisions of a state beverage act reserving the power of cities to regulate liquor establishments and to establish zoning ordinances therefor operate in a field clearly distinct from a special zoning law applicable only to a particular city.³ As used in a statute authorizing municipalities to regulate the sale of liquor by establishing zoning ordinances restricting the location where a licensee may be permitted to conduct his "place of business," the quoted phrase means the entire premises to which the liquor license is issued, and not the particular place, within such premises, where the liquor is actually dispensed.⁴

Removal of sand, gravel, or topsoil. It has been

held to be within the power of the board of trustees of a village to legislate with respect to the removal of sand and gravel from the ground, as a matter of zoning;⁵ and the power of municipalities to regulate the use of land within certain areas includes the power to regulate the removal and stripping of topsoil therefrom.⁶

Riparian rights. To the extent that a municipality may, by zoning regulations, limit the uses to be made of property generally, it may also, by zoning regulations, limit the exercise of riparian rights.⁷

Service stations and garages. Municipalities may prohibit, either entirely or in all but certain specified instances, the issuance of permits for the erection or use of property for service stations or garages.⁸ Where the final decision on the application is to be made by the governing body of the municipality, the power of that body is plenary, since the regulation of service stations is well within its police power, and no standard is required to be laid down for the exercise of its discretion.⁹

Trailer camps or parks. A municipality has the power to prohibit, by zoning ordinance, the establishment of a trailer park or camp within its territorial limits,¹⁰ or to exclude such parks from residential districts.¹¹

§ 9. Who May Exercise Power to Promulgate Zoning Regulations

The power to promulgate zoning regulations may be exercised only by the body on which it has been conferred, and such power may not be unlawfully delegated.

97. N.Y.—City of Albany v. Anthony, 21 N.Y.S.2d 258, 174 Misc. 470, reversed on other grounds 28 N.Y.S.2d 963, 262 App.Div. 401.

98. Ala.—Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 593, 253 Ala. 402.

99. Pa.—Appeal of Sawdey, 85 A.2d 28, 369 Pa. 19.

Reed v. Borough of North Wales, 83 Pa. Dist. & Co. 69, 68 Montg. Co. 196.

Regulation not authorized by zoning law

It was not intention of legislature, in passing Texas zoning law, to authorize any city or town to regulate, control, or in any manner to legislate on any phase of liquor traffic. Tex.—Moore v. McCarver, Civ.App., 240 S.W.2d 443.

Independent regulation

Regulation of land use by municipal zoning ordinances does not preclude, and is not inconsistent with, the independent regulatory limitation or distribution of businesses pursuant to independent statutory author-

ity, including the independent regulation of bars and gaming houses. Nev.—Primm v. City of Reno, 252 P.2d 835, 70 Nev. 7.

1. Conn.—State ex rel. Haverback v. Thomson, 57 A.2d 259, 134 Conn. 288.

2. Pa.—Appeal of Flannery, 3 Pa. Dist. & Co.2d 97, 56 Lack.Jur. 85.

3. Fla.—Ellis v. City of Winter Haven, 60 So.2d 620.

4. Fla.—Simpson v. Goldworm, 59 So.2d 511.

5. N.Y.—Incorporated Village of Upper Brookville v. Faraco, 125 N.Y.S.2d 214, 282 App.Div. 943, affirmed 120 N.E.2d 835, 307 N.Y. 642.

6. Ohio.—Miesz v. Village of Mayfield Heights, 111 N.E.2d 20, 92 Ohio App. 471.

7. Conn.—Poneleit v. Dudas, 106 A.2d 479, 141 Conn. 413.

8. Conn.—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, 8 A.2d 1, 125 Conn. 714.

Iowa.—Scott v. City of Waterloo, 274 N.W. 897, 223 Iowa 1169.

N.J.—Jersey Land Co. v. Scott, 135 A. 462, 5 N.J.Misc. 61.

N.Y.—Boyd v. Walsh, 216 N.Y.S. 242, 217 App.Div. 461, affirmed People ex rel. Boyd v. Walsh, 155 N.E. 877, 244 N.Y. 512.

Sibek v. Sahm, 132 N.Y.S.2d 596.

Strict construction must be given such an ordinance.

N.J.—Savitz-Denbigh Co. v. Bigelow, 137 A. 439, 5 N.J.Misc. 533.

9. N.Y.—Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead, 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 84 L.Ed. 990.

Olp v. Town of Brighton, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App.Div. 944.

10. Ohio.—Carlton v. Riddell, App., 132 N.E.2d 772, appeal dismissed 130 N.E.2d 704, 164 Ohio St. 322.

11. Mich.—Stevens v. Royal Oak Tp., Oakland County, 68 N.W.2d 737, 342 Mich. 105.

Depending on the statute conferring it, zoning power may be exercised by a governing or legislative body, or by a board or commission.

The authority to organize or fix zoning districts or boundaries thereof and to fix the limitations on the use of property and the building structures to be permitted therein may be exercised only by the body on which it has been conferred;¹² and such authority may not be unlawfully delegated.¹³ Accordingly, when it is required that the zoning power be exercised by official action of the governing or legislative body of the locality, it cannot be delegated to administrative officers or boards,¹⁴ or to individuals.¹⁵

Under some statutory provisions, the zoning power is ordinarily exercised by the local governing¹⁶ or legislative¹⁷ body, and, while such body sometimes is first required to obtain the recommendation and report of a board or commission, as discussed *infra* § 12, the commission may only make recommendations,¹⁸ being merely advisory,¹⁹ and is not competent to zone any portion of the locality.²⁰

Under other statutes, however, boards or commissions may be given the authority to promulgate zoning regulations,²¹ subject, sometimes, to veto by the

12. Conn.—State ex rel. Bezzini v. Hines, 53 A.2d 299, 133 Conn. 592.
Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

43 C.J. p 345 note 90.

Exercise of power to modify or amend zoning regulations see *infra* § 82.

District of Columbia

Terms and construction of act operate to deprive commissioners of District of Columbia of jurisdiction to enact building regulations in conflict with jurisdiction conferred on zoning commission.

D.C.—Schwartz v. Brownlow, 270 F. 1019, 50 App.D.C. 279, reversed on other grounds Brownlow v. Schwartz, 43 S.Ct. 263, 261 U.S. 216, 67 L.Ed. 620.

13. N.Y.—Little v. Young, 82 N.Y.S. 2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Ohio.—State v. Woodworth, 169 N.E. 713, 33 Ohio App. 406.

Vt.—Thompson v. Smith, 129 A.2d 638, 119 Vt. 488.

43 C.J. p 345 note 91.

Unlawful delegation of authority not shown

Conn.—Murphy, Inc. v. Town of Westport, 40 A.2d 177, 131 Conn. 292, 156 A.L.R. 568.

14. Ky.—Sims v. Bradley, 218 S.W. 2d 641, 309 Ky. 626—Bray v. Beyer, 166 S.W.2d 290, 292 Ky. 162.

Mich.—City of Detroit v. S. Loewenstein & Son, 47 N.W.2d 646, 330 Mich. 559.

Mo.—State ex rel. Croy v. City of Raytown, App., 289 S.W.2d 153.

N.J.—Bowen v. Jersey City, 132 A. 334, 4 N.J.Misc. 228.

N.Y.—Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, affirmed 87 N.E.2d 74, 299 N.Y. 699.

N.C.—Application of O'Neal, 92 S.E. 2d 189, 243 N.C. 714—James v. Sutton, 50 S.E.2d 300, 229 N.C. 515.

Tex.—Driskell v. Board of Adjustment, Civ.App., 195 S.W.2d 594—

Luse v. City of Dallas, Civ.App., 131 S.W.2d 1079, error refused.

Utah.—Walton v. Tracy Loan & Trust Co., 92 P.2d 724, 97 Utah 249.

15. Pa.—Appeal of Perrin, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912, followed in Appeal of Goodman, 156 A. 309, 305 Pa. 55.

16. Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 271 P. 487, 205 C. 426.

Ga.—Washington Seminary v. Bass, 16 S.E.2d 565, 192 Ga. 808.

La.—State ex rel. Shaver v. Mayor and Councilmen of Town of Coushatta, App., 196 So. 388.

43 C.J. p 345 note 96.

Body possessing general powers

Under constitutional provision authorizing general assembly to grant "governing authorities" of municipalities and counties authority to pass zoning and planning laws, quoted phrase refers to city or county authorities who had authority to govern in usual sense of such words, and means city or county board which has authority to exercise general, not limited, powers.

Ga.—Humthlett v. Reeves, 90 S.E.2d 14, 212 Ga. 8.

17. Conn.—Kuehne v. Town Council of Town of East Hartford, 72 A.2d 474, 136 Conn. 452.

Ky.—City of Louisville v. Puritan Apartment Hotel Co., 284 S.W.2d 858—Schoemer v. City of Louisville, 182 S.W.2d 782, 298 Ky. 286.

Mo.—State ex rel. Croy v. City of Raytown, App., 289 S.W.2d 153.

N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397.

N.Y.—City of New Rochelle, on Complaint of Dassler v. Lore, 94 N.Y. S.2d 537.

N.C.—Application of O'Neal, 92 S.E. 2d 189, 243 N.C. 714.

Pa.—Freed v. Power, 139 A.2d 661, 392 Pa. 195—Gratton v. Conte, 73 A.2d 381, 364 Pa. 578.

In re Imperial Asphalt Corporation's Zoning Appeal, Com.Pl., 51 Lanc.L.Rev. 9.

Zoning as legislative function see *supra* § 1.

18. Ga.—Washington Seminary v. Bass, 16 S.E.2d 565, 192 Ga. 808.

Planning commission of city of second class

Pa.—Gratton v. Conte, 73 A.2d 381, 364 Pa. 578.

19. Ky.—City of Louisville v. Puritan Apartment Hotel Co., 264 S.W. 2d 888.

Mo.—State v. Davis, 259 S.W.2d 80, 302 Mo. 307.

20. Ga.—Washington Seminary v. Bass, 16 S.E.2d 565, 192 Ga. 808.

21. Conn.—Kuehne v. Town Council of Town of East Hartford, 72 A.2d 474, 136 Conn. 452—State ex rel. Bezzini v. Hines, 53 A.2d 299, 133 Conn. 592.

D.C.—Schwartz v. Brownlow, 270 F. 1019, 50 App.D.C. 279, reversed on other grounds Brownlow v. Schwartz, 43 S.Ct. 263, 261 U.S. 216, 67 L.Ed. 620, and certiorari denied Rudolph v. Schwartz, 41 S. Ct. 623, 256 U.S. 701, 65 L.Ed. 1178.

Appointment of zoning commission for town under statute is equivalent to adoption of zoning for town.

Conn.—Town of Madison v. Kimberly, 169 A. 909, 118 Conn. 6.

Continuance of existence

Under statute providing that in any city or town which prior to Oct. 1, 1947, had adopted statute recognizing zoning commissions and which had not abolished its zoning commission by local action, zoning commission could continue to function notwithstanding failure of municipality to act under 1947 Zoning Act, when zoning commission of city, previously constituted under general zoning law, was not abolished by local action, it was in legal existence subsequent to 1947, and its orders were not null and void.

Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650.

governing body of the locality,²² or to make findings of fact bearing on zoning legislation.²³

The establishing of a zoning commission by a municipality is not conditioned on the exercise of the power to create a planning commission.²⁴

The words "zoning commission" within a statute vesting power in a "zoning commission" constituted in compliance with the provisions thereof include a body which by special law had been previously granted zoning powers, even though it had been designated as a "zoning authority."²⁵

A constitutional prohibition against double-office holding has been held applicable to members of a zoning commission.²⁶

Annexed territory. A local ordinance providing, in effect, that annexed territory shall retain the zoning classification that it possessed under a county zoning regulation until reclassified by the locality has been held not to represent a delegation of authority to a county commission to zone property within the locality.²⁷

Effect of existence of planning commission

Under provision of statute that where city planning commission exists, it shall be zoning commission, when city planning commission came into existence, city zoning commission theretofore created ceased to have any power, and city planning commission became zoning commission with all powers, authority, and duties given to zoning commission by statute.

La.—*Mills v. City of Baton Rouge*, 28 So.2d 447, 210 La. 830.

Function of planning commission is advisory only, and comprehensive plan in accordance with which zoning regulations are adopted is such plan as zoning commission devises.

Conn.—*Levinsky v. Zoning Commission of City of Bridgeport*, 127 A.2d 822, 144 Conn. 117.

Park board

Statute giving zoning power in certain area to park board was held not impliedly repealed by statutes which provide for city plan commission and that member of park board shall serve as member of commission and board of zoning appeals.

Ind.—*Goldsmith v. City of Indianapolis*, 136 N.E. 525, 208 Ind. 465.

Statute held not invalid

Fact that statute authorizing town to appoint commission, empowered to adopt zoning regulations permitted, but did not require, town council to pass or approve regulations did not render statute unconstitutional.

Conn.—*Coombs v. Larson*, 152 A. 297, 113 Conn. 224.

22. N.Y.—431 Fifth Ave. Corp. v.

City of New York, 55 N.Y.S.2d 203, 184 Misc. 1001, modified on other grounds 59 N.Y.S.2d 25, 270 App. Div. 241, affirmed 68 N.E.2d 877, 296 N.Y. 588.

23. Mich.—*City of Detroit v. S. Loewenstein & Son*, 47 N.W.2d 646, 330 Mich. 359.

24. Conn.—*Levinsky v. Zoning Commission of City of Bridgeport*, 127 A.2d 822, 144 Conn. 117—*Couch v. Zoning Commission of Town of Washington*, 106 A.2d 173, 141 Conn. 349.

25. Conn.—*Kuehne v. Town Council of Town of East Hartford*, 72 A.2d 474, 136 Conn. 452.

26. N.C.—*Vance S. Harrington & Co. v. Renner*, 72 S.E.2d 838, 236 N.C. 321.

27. Ky.—*Hawkins v. Louisville and Jefferson County Planning and Zoning Commission*, 266 S.W.2d 314.

28. U.S.—*Texas Co. v. City of Tampa*, C.C.A.Fla., 100 F.2d 347.

29. Mass.—*David v. Board of Appeals of Reading*, 132 N.E.2d 386, 333 Mass. 657.

Conflict between statutes and local regulations with respect to punishment for violation thereof see infra §§ 417-421.

Statute relating to nonconforming use

Ordinance cannot interfere with statute authorizing continuance, indefinitely, of nonconforming use existing at time of passage of ordinance.

§ 10. Concurrent and Conflicting Exercise of Power by State and Local Authorities

Local zoning regulations or ordinances may not contravene zoning statutes. Local zoning regulations may be enacted on subjects on which the state has enacted legislation not relating to zoning only if the state has not pre-empted the field of legislation on such subjects.

A zoning statute which supersedes a local zoning regulation or ordinance is paramount and controlling.²⁸ Where the power of the state over the subject of zoning is supreme, local zoning regulations, ordinances, or by-laws may not contravene the statutes or general law of the state,²⁹ and, in the event of conflict between the two, the local regulations must yield.³⁰

Where a field of general legislation is wholly taken over by the state, local zoning regulations or ordinances,³¹ or local officials,³² may not interfere with its supreme authority in that field. So, a local ordinance may not defeat the statutory right of public school authorities to acquire school sites,³³ or

N.J.—*United Advertising Corp. v. Borough of Raritan*, 93 A.2d 362, 11 N.J. 144.

State v. Accera, 116 A.2d 203, 36 N.J.Super. 420.

30. Mass.—*Attorney General v. Inhabitants of Town of Dover*, 100 N.E.2d 1, 327 Mass. 601—*Bennett v. Board of Appeal of City of Cambridge*, 167 N.E. 659, 268 Mass. 419.

N.J.—*United Advertising Corp. v. Borough of Raritan*, 93 A.2d 362, 11 N.J. 144.

Validity or invalidity of regulation on ground of conflict see infra § 17.

31. Pa.—*Petition of Hilovsky*, 108 A.2d 705, 379 Pa. 118—*Appeal of Sawdew*, 85 A.2d 28, 369 Pa. 19.

Appeal of Obradovich, 119 A.2d 839, 180 Pa.Super. 383, reversed on other grounds 126 A.2d 435, 386 Pa. 342.

Manner of conducting business

Where liquor dealer was expressly authorized by statute to sell liquor by drink or in containers for consumption on or off premises where sold, city could not deprive him by zoning ordinance of right to sell beverages in manner prescribed by statute.

Fla.—*Simpson v. Goldworm*, 59 So.2d 511.

32. Conn.—*State ex rel. Gold v. Usher*, 84 A.2d 276, 138 Conn. 323.

33. N.Y.—*Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park*, 102 N.Y.S.2d 81, 198 Misc. 932, affirmed 103 N.Y.S.2d 831, 278 App.Div. 706.

the statutory right of health authorities to fix the location of hospitals.³⁴

The statutory right of a public utility to maintain facilities within a locality may not be contravened by a zoning ordinance.³⁵ Where a utility is required by statute to furnish adequate service and facilities, a zoning ordinance may not properly prevent the building of structures designed to carry out the statutory mandate.³⁶

A statute regulating matters other than zoning, but not pre-empting the field of legislation as to such matters, does not bar the adoption of local zoning ordinances, regulations, or resolutions relating to the subject matter of the statute.³⁷ Where the state has not pre-empted the regulation of an activity or business, the fact that a person has obtained a license from a state agency has been held not to relieve him from complying with a zoning ordinance.³⁸ It has been held that a statute giving a state agency jurisdiction over public utilities does not divest local authorities of the power, conferred by the zoning statute, to enact zoning ordinances.³⁹

Under a zoning statute so providing, where a reg-

ulation, enacted under the authority of that statute, conflicts with another regulation or statute not relating to zoning, the one having the higher standard controls.⁴⁰ Where the zoning statute provides that regulations enacted under it shall prevail when their standards are higher than those established by conflicting laws, the zoning regulations prevail only under such conditions.⁴¹

§ 11. Manner of Exercising Zoning Power

- a. In general
- b. Notice and hearing
- c. Voting; initiative and referendum

a. In General

Statutory provisions as to the procedure for exercising the zoning power or establishing zoning districts must be followed.

The procedure for exercising the zoning power and establishing zoning districts varies in different localities.⁴² Such procedure may be, and sometimes is, provided by statute, in which case the statutory provisions must be followed;⁴³ and the procedure laid down by the legislature has been required to be

Great Neck Community School v. Dick, 140 N.Y.S.2d 221, affirmed 158 N.Y.S.2d 379, 3 A.D.2d 664.

34. N.Y.—Jewish Consumptives' Relief Soc. v. Town of Woodbury, 243 N.Y.S. 638, 230 App.Div. 228, affirmed 177 N.E. 165, 256 N.Y. 619.

35. Electric transmission lines
N.Y.—Long Island Lighting Co. v. Village of Old Brookville, 72 N.Y. S.2d 718, affirmed 77 N.Y.S.2d 143, 273 App.Div. 856, affirmed 81 N.E. 2d 104, 298 N.Y. 569.

Railroad tracks
Tex.—Gulf, C. & S. F. Ry. Co. v. White, Civ.App., 281 S.W.2d 441, refused no reversible error.

36. Electric transmission lines
N.Y.—Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

37. Ohio.—Davis v. McPherson, App., 132 N.E.2d 626, appeals dismissed Billman v. McPherson, 130 N.E.2d 342, 164 Ohio St. 296, and Davis v. McPherson, 130 N.E.2d 794, 164 Ohio St. 375.

Licensing agency subordinated to ordinance

(1) Statute requiring liquor commission to refuse permits for sale of liquor where prohibited by zoning ordinance recognizes town's authority to restrict use of buildings for sale of such liquors to certain zones.
Conn.—State ex rel. Haverback v. Thomson, 57 A.2d 259, 134 Conn. 288.

(2) Under statute providing that permits for intoxicating liquors shall

be refused where prohibited by zoning ordinance, liquor commission does not have sole jurisdiction of number of outlets within district zoned for liquor.

Conn.—State ex rel. Wise v. Turkington, 63 A.2d 596, 135 Conn. 276.

Use of land along highway

Fact that legislature has conferred on commission power to restrict use of land along highway does not preclude county from doing so by proper zoning ordinance enacted pursuant to another statute, in absence of commission exercising power in such a way as to conflict with ordinance.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

Regulations held not to conflict with statute

(1) As applied to trailer parks.
Mich.—City of Howell v. Kaal, 67 N.W.2d 704, 341 Mich. 585.

(2) As applied to maintenance of cemeteries.
Mass.—Foster v. Mayor of City of Beverly, 53 N.E.2d 693, 315 Mass. 567, 151 A.L.R. 737.

(3) As applied to operation of boarding house for care of persons previously institutionalized for mental disorders.

N.Y.—Kanas v. Nugent, 135 N.Y.S. 2d 128, 206 Misc. 826, affirmed 145 N.Y.S.2d 638, 286 App.Div. 1038, appeal denied 148 N.Y.S.2d 455, 1 A.D.2d 681.

38. Mich.—Stevens v. Royal Oak Tp., Oakland County, 68 N.W.2d 787, 342 Mich. 105.

Ohio.—Carnabuci v. City of Norwalk, 46 N.E.2d 773, 70 Ohio App. 429.
Pa.—Appeal of Veltri, 40 A.2d 369, 355 Pa. 135.

39. Ill.—Wolf v. Village of Mt. Prospect, 40 N.E.2d 778, 314 Ill. App. 533.

40. Pa.—Hinton v. Zoning Bd. of Adjustment, 88 Pa.Dist. & Co. 265.

41. Ind.—Goldsmith v. City of Indianapolis, 196 N.E. 525, 208 Ind. 465.

Height of tenement building

N.Y.—Thorofare Developing Corporation v. Deegan, 235 N.Y.S. 544, 134 Misc. 592, affirmed 235 N.Y.S. 898, 226 App.Div. 871.

42. Mo.—State v. Davis, 259 S.W. 80, 302 Mo. 307.

43. Ala.—Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 593, 253 Ala. 402—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36.

Ariz.—Wood v. Town of Avondale, 232 P.2d 963, 72 Ariz. 217.

Cal.—Schofield v. City of Los Angeles, 7 P.2d 1076, 120 C.A. 240.

Ind.—Town of Homeroft v. Macbeth, 148 N.E.2d 563.

La.—State ex rel. Shaver v. Mayor and Councilmen of Town of Conshatta, App., 196 So. 388.

Minn.—W. H. Barber Co. v. City of Minneapolis, 34 N.W.2d 710, 237 Minn. 77.

N.J.—Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449, Burmore Co. v. Smith, 12 A.2d 353, 124 N.J.Law 541.

strictly construed⁴⁴ and strictly followed.⁴⁵ Even | the procedure established by general law may be required.⁴⁶ Where the statute authorizing townships

Bowen v. Jersey City, 132 A. 334, 4 N.J.Misc. 228.

N.Y.—Village of Williston Park v. Israel, 76 N.Y.S. 605, 191 Misc. 6.

N.C.—Shuford v. Town of Waynesville, 198 S.E. 555, 214 N.C. 135.

Pa.—Phoenixville v. Lachman, Com. Pl., 6 Chest.Co. 9.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

S.D.—City of Brookings v. Martinson, 246 N.W. 916, 61 S.D. 168.

Tenn.—State ex rel. Lightman v. City of Nashville, 60 S.W.2d 161, 166 Tenn. 191.

Utah.—Dewey v. Doxey-Layton Realty Co., 277 P.2d 805, 3 Utah 2d 1.

Provision held mandatory and not merely permissive or directory.

N.Y.—Longo v. Eilers, 93 N.Y.S.2d 517, 196 Misc. 909.

Absence of charter provisions

In absence of specific procedure outlined in city charter to enact zoning regulations, city, in enacting such ordinances, is controlled by statutory requirements.

Ohio.—State ex rel. Kling v. Nielsen, 144 N.E.2d 278, 103 Ohio App. 60.

City organized under general law

Method prescribed by Zoning Act for enactment of zoning ordinance is binding on city organized under general law.

Cal.—Hurst v. City of Burlingame, 277 P. 308, 207 C. 134.

Charter provisions held controlling

In case of city operating under freeholders' charter, manner of adopting zoning ordinance was held not controlled by general law, but by charter provisions.

Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 271 P. 487, 205 C. 426.

Lima v. Woodruff, 290 P. 480, 107 C.A. 285.

Cities of second class

Pa.—Appeal of Deiter, Com.Pl., 53 Lack.Jur. 85.

Advertisement before passage

Where city adopted an ordinance zoning a part only of city by setting out zones within which liquor could be sold by state liquor stores, and ordinance was not advertised before passage as required by act authorizing municipalities to establish zoning districts, it was not a "proper zoning ordinance" within statute authorizing municipalities, by "proper zoning ordinance," to establish zones within which state liquor stores may be established.

Ala.—Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 593, 283 Ala. 402.

Ordinance upheld despite noncompliance

(1) However, although statutory procedure had not been followed in adopting zoning ordinance, where ordinance had been amended thirty-two times since adopted in 1940, population of city had more than doubled, seven thousand one hundred permits which reflected millions of dollars in expenditures had been issued under ordinance and amendments, and defendants had obtained permits and licenses under ordinance, the ordinance would be upheld, in action by city to enjoin defendants from operation of commercial business in residential district.

Miss.—Walker v. City of Biloxi, 92 So.2d 227.

(2) Other circumstances.

N.J.—Struyk v. Samuel Braen's Sons, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294.

44. N.Y.—Application of Bayberry Huntington, Inc., 146 N.Y.S.2d 342, 1 Misc.2d 342—**Village of Williston Park v. Israel**, 76 N.Y.S.2d 605, 191 Misc. 6, affirmed 94 N.Y.S.2d 921, 276 App.Div. 968, affirmed 95 N.E.2d 208, 301 N.Y. 713.

Reason for rule

Zoning ordinances are in derogation of an owner's rights under the common law.

N.Y.—Application of Bayberry Huntington, Inc., 146 N.Y.S.2d 342, 1 Misc.2d 342—**Village of Williston Park v. Israel**, 76 N.Y.S.2d 605, 191 Misc. 6, affirmed 94 N.Y.S.2d 921, 276 App.Div. 968, affirmed 95 N.E.2d 208, 301 N.Y. 713.

45. N.Y.—Application of Bayberry Huntington, Inc., 146 N.Y.S.2d 342, 1 Misc.2d 342—**Longo v. Eilers**, 93 N.Y.S.2d 517, 196 Misc. 909—**Village of Williston Park v. Israel**, 76 N.Y.S.2d 605, 191 Misc. 6, affirmed 94 N.Y.S.2d 921, 276 App. Div. 968, affirmed 95 N.E.2d 208, 301 N.Y. 713.

Pa.—Pennsylvania Dri-Built Housing Corp. v. Borough of Emporium, 76 Pa. Dist. & Co. 331, 43 Mun.L.R. 97.

Appeal of Myers, Co., 103 Pittsb. Leg.J. 310.

Compliance with procedural requirements as affecting validity of exercise of zoning power see *infra* §§ 45-47.

Sale of alcoholic beverages

(1) In view of fact that when State Beverage Act was enacted there was no general law granting cities power to enact zoning ordinances, legislature could not have intended that authority in such act for cities to establish zoning ordinances relating to sale of alcoholic beverage-

es would be exercised in any way other than that regularly followed by cities in adopting their ordinances.

Fla.—Ellis v. City of Winter Haven, 60 So.2d 620.

(2) In view of provision of statewide zoning law that it should not be construed to repeal, impair, or modify any general or special law granting like or similar powers to municipalities, it must be presumed that language of zoning law was intended to preserve to cities their power to designate areas within their limits wherein alcoholic beverages could not be sold in the manner in which this power had theretofore been exercised under the Beverage Act.

Fla.—Ellis v. City of Winter Haven, *supra*.

(3) In absence of express statement of intent, or of such a diametrical repugnance as to leave court no alternative, a special zoning law applicable only to a particular city did not require city to exercise power of regulating location of liquor establishment in a manner different from that previously followed under State Beverage Act, and, therefore, enactment by city of a zoning ordinance for that purpose was not required to follow procedural requirements of special zoning law.

Fla.—Ellis v. City of Winter Haven, *supra*.

46. Ala.—Thompson v. Wingard, 34 So.2d 606, 250 Ala. 390.

Cal.—Berrata v. Sales, 255 P. 538, 82 C.A. 324.

Pa.—Fierst v. William Penn Memorial Corporation, 166 A. 761, 311 Pa. 263.

Provisions held mandatory

Provisions of statute that no ordinance intended to be of permanent operation shall be adopted by council at same meeting at which it is introduced unless the unanimous consent of those present is given for the immediate consideration of such ordinance and that consent is to be shown by a vote taken by yeas and nays with the names of the members voting to be entered on the minutes are mandatory.

Ala.—Thompson v. Wingard, 34 So.2d 606, 250 Ala. 390.

Reading prior to passage

Municipality must comply with requirement that the ordinance be read in substantially its final form at a meeting held within a specified time of its final passage.

N.J.—Grantwood Lumber Co. v. Schweitzer, 147 A. 741, 7 N.J.Misc. 1016.

Amendment of minutes of meetings

Where zoning ordinance was adopted while city was functioning under

to enact zoning ordinances does not outline the mechanics for passing such an ordinance, any clear and formal action by the governing board is sufficient.⁴⁷

Where the use of private property is to be affected by restrictions contained in a zoning plan, there must be a determination by the authorized legislative body that the public welfare will be furthered by the imposition of such restrictions.⁴⁸

The validity of temporary or emergency ordinances adopted without compliance with the procedure fixed by statute is discussed *infra* § 19.

Approval by coordinating committee. It will be conclusively presumed that an ordinance has been approved by a county coordinating committee where it was not disapproved by the committee.⁴⁹

Approval of county ordinance by town board. Under a statute authorizing a county board to enact a county zoning ordinance and requiring the approval of a town board as a condition precedent to

such ordinance being operative in the town, a town board which has approved an ordinance cannot later withdraw its approval.⁵⁰

A plebiscite of the neighborhood does not determine zoning.⁵¹

Resolution or ordinance. Where a statute authorizes the adoption of zoning regulations by means of resolution, the municipality may not act by way of ordinance;⁵² but where the statute requires an ordinance for the attainment of the zoning restriction, a resolution is ineffective to accomplish the desired result.⁵³ A city council may adopt an ordinance complete in itself, or it may adopt one fixing the location of the various districts by a map.⁵⁴

b. Notice and Hearing

A public hearing on a proposed regulation, preceded by adequate notice, may be required.

It is usually required that there be a public hearing on the proposed regulation.⁵⁵ A hearing by a

the "aldermanic" form of government, and the city subsequently changed to the commission form of government, commission had authority to amend minutes of council meetings at which the ordinance was adopted, to speak the truth according to the facts, where no intervening rights of third persons had arisen. Ala.—City of Guntersville v. Walls, 39 So.2d 567, 252 Ala. 66.

47. Pa.—Commonwealth ex rel. v. Kinsey, 59 Pa. Dist. & Co. 576.

Facts or evidence considered; disclosure

In adopting zoning regulations, zoning commission is not confined to consideration of such evidence as may be presented to it, but is entitled to take into consideration facts which may have been learned through personal observation, and it is not required to disclose at public hearing information on which it will act.

Conn.—De Mars v. Zoning Commission of Town of Bolton, 115 A.2d 653, 142 Conn. 580.

48. Conn.—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

49. Mich.—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242.

50. Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

51. Md.—Montgomery County Council v. Scrimgeour, 127 A.2d 528, 211 Md. 306—Benner v. Tribbitt, 57 A.2d 346, 190 Md. 6.

52. S.D.—City of Brookings v. Martinson, 246 N.W. 916, 61 S.D. 168.

53. N.J.—Antonelli Const. v. Mil-

stead, 112 A.2d 608, 34 N.J. Super. 449.

Pa.—Appeal from Radnor Tp., Quar. Sess., 40 Del. Co. 106.

54. Mass.—City of Newburyport v. Thurlow, 84 N.E.2d 450, 324 Mass. 40.

Map in custody of city clerk held the map referred to in ordinance, and part thereof.

Mass.—City of Newburyport v. Thurlow, *supra*.

55. Cal.—Gilbert v. Stockton Port Dist., 60 P.2d 847, 7 C.2d 384.

Conn.—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

Fla.—City of Hollywood v. Rix, 52 So.2d 135.

Ga.—Sikes v. Pierce, 94 S.E.2d 427, 212 Ga. 567.

La.—State ex rel. Holcombe v. City of Lake Charles, 114 So. 502, 175 La. 803.

Beauvais v. D. C. Hall Transport, App., 49 So.2d 44—State ex rel. Shaver v. Mayor and Councilmen of Town of Coushatta, App., 196 So. 388.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L. Ed. 792—Crozier v. County Com'rs of Prince George's County, 37 A.2d 296, 203 Md. 501, 37 A.L.R.2d 1137.

Mich.—Krajenke Buick Sales v. Kopkowski, 33 N.W.2d 781, 322 Mich. 250.

Mo.—Wippler v. Hone, 110 S.W.2d 409, 341 Mo. 780—State ex rel.

Kramer v. Schwartz, 82 S.W.2d 63, 336 Mo. 932.

N.J.—Burmore Co. v. Smith, 12 A.2d 353, 124 N.J. Law 541.

Bowen v. Jersey City, 132 A. 334, 4 N.J. Misc. 228.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.Y.S.2d 58, 276 App. Div. 1019, affirmed 96 N.E.2d 731, 302 N.Y. 115.

N.C.—Shuford v. Town of Waynesville, 198 S.E. 585, 214 N.C. 135.

Okl.—Voight v. Saunders, 243 P.2d 654, 206 Okl. 318—Makrauer v. Board of Adjustment of City of Tulsa, 193 P.2d 291, 200 Okl. 285.

Pa.—Toland v. Newtown Tp., Quar. Sess., 35 Del. Co. 21.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

S.D.—Dodds v. Bickle, 85 N.W.2d 284. Compliance with procedural requirements as to notice and hearing as affecting validity of exercise of zoning power see *infra* § 46.

Hearing provided by governing body

Proper construction of statute requiring public hearing relating thereto before zoning ordinances become effective required that hearing contemplated therein be provided by governing body of town, rather than by zoning board which was merely advisory body, without legislative power.

Fla.—Town of Hillsboro Beach v. Weaver, 77 So.2d 463.

Opportunity to be heard

A hearing by a zoning commission affords an opportunity for interested persons to be heard in justification or opposition of a proposed action, and their evidence should be received as aiding commission in discharge

zoning commission is not a trial,⁵⁶ although it is quasi-judicial.⁵⁷ adequate public notice;⁵⁸ but it has been held that, in the absence of statutory requirement, there is no

The hearing may be required to be preceded by necessity of notice or opportunity for hearing.⁵⁹

ing its duties in a manner consistent with preservation of common interests and general welfare as contemplated by zoning ordinances.

Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434.

"Effective"

Under statute providing that no zoning regulation shall become effective or be established until after public hearing, "effective" means able to produce and effect, and emphasizes actual production of an effect whose continuance it often suggests, as the law becomes effective at once; "establish" means to enact or ordain for permanence.

Conn.—Jack v. Tarrant, 71 A.2d 705, 136 Conn. 414.

County-wide hearing; town hearing

Under statute relating to county zoning ordinance, only one county-wide hearing is required to be held, and a public hearing is not required to be held in each town as a condition precedent to town board's voting approval of zoning ordinance.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

Adoption of town plan

Where town adopted, without notice or public hearing, a preliminary town plan as guide for future development and no regulations were adopted to compel landowners' compliance with plan, such plan was no more than a guide to future layout of town's highways and parks and could not curtail rights of private property or limit a landowner in use of his land; and board of zoning appeals was not justified in refusing to approve plan of plaintiff for subdivision of his property on ground that plaintiff did not contemplate construction of a road in location indicated roughly on preliminary town plan; and board acted illegally when it turned down plaintiff's application on ground that its discretion was controlled by existence of town plan.

Conn.—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

Record of hearing not required

R.I.—Allanelli v. Town Council of Town of East Providence, 117 A.2d 233.

Incapacity of hearing room

Pa.—Toland v. Newtown Tp. Quar. Comm., 36 Del.Co. 21.

58. Ky.—Hamilton Co. v. Louisville & Jefferson County Planning &

Zoning Commission, 287 S.W.2d 434.

57. Ky.—Hamilton Co. v. Louisville & Jefferson County Planning & Zoning Commission, supra.

58. Fla.—City of Hollywood v. Rix, 52 So.2d 135.

Ga.—Sikes v. Pierce, 94 S.E.2d 427, 212 Ga. 567.

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 307 Ky. 362.

La.—State ex rel. Holcombe v. City of Lake Charles, 114 So. 502, 175 La. 803.

Beauvals v. D. C. Hall Transport, App., 49 So.2d 44—State ex rel. Shaver v. Mayor and Councilmen of Town of Coushatta, App., 196 So. 388.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L. Ed. 792—Crozier v. County Com'rs of Prince George's County, 97 A.2d 296, 202 Md. 501, 37 A.L.R.2d 1137.

Mich.—Krajenke Buick Sales v. Kopkowski, 33 N.W.2d 781, 322 Mich. 250.

N.J.—Stirling v. City of Plainfield, 53 A.2d 713, 136 N.J.Law 38—Burmore Co. v. Smith, 12 A.2d 353, 124 N.J.Law 541.

Bowen v. Jersey City, 133 A.334, 4 N.J.Misc. 228.

N.Y.—Schlerloh v. Wood, 244 N.Y.S. 651, 230 App.Div. 788.

Okl.—Voight v. Saunders, 243 P.2d 654, 206 Okl. 318—Mackrauer v. Board of Adjustment of City of Tulsa, 193 P.2d 291, 200 Okl. 285.

Pa.—Appeal of Myers, Co., 103 Pittsb.Leg.J. 310.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

S.D.—City of Brookings v. Martinson, 246 N.W. 916, 61 S.D. 168.

Tex.—Peters v. Gough, Civ.App., 86 S.W.2d 515.

Property owners are entitled to notice before passage of a zoning ordinance which would limit use of their property.

Ariz.—Wood v. Town of Avondale, 223 P.2d 963, 72 Ariz. 217.

Cal.—Gilbert v. Stockton Port Dist., 60 P.2d 847, 7 C.2d 384.

Berrata v. Sales, 255 P. 538, 82 C.A. 324.

Conn.—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

Effect of validating act

An act validating failure to leave with property owners copies of notice of hearing on establishment of building lines did not validate action of board of selectmen in establishing building line where such action was defective because of inadequacy of notice at time of hearing and failure to file copy of notice and proposed order with town clerk.

Conn.—Alderman v. Town of West Haven, 200 A. 330, 124 Conn. 391.

Length of notice

(1) The publication of notice of public hearing on proposed zoning regulation is governed by statute requiring that at least fifteen days' notice shall be published and not by statute relating to notice of judicial sales.

S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

(2) Under zoning statute, it is the holding of public hearings, not the length of time notice of such hearing is published, that confers jurisdiction on a city having a planning commission to enact a valid original zoning ordinance.

Kan.—Piper v. Moore, 183 P.2d 965, 163 Kan. 565.

Notice held sufficient

(1) Generally.

Md.—Chayt v. Maryland Jockey Club of Baltimore City, 18 A.2d 856, 179 Md. 390.

N.J.—Stirling v. City of Plainfield, 53 A.2d 713, 136 N.J.Law 38.

N.Y.—Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47.

Syerson v. Saffer, 140 N.Y.S.2d 774, affirmed 150 N.Y.S.2d 551, 1 A.D.2d 897.

(2) Actual notice.

Ky.—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

Pa.—In re Schuylkill Tp. Zoning Ordinance, 7 Chest.Co. 123.

More than one publication of notice held not required by statute. S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

59. Mass.—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547. 43 C.J. p 345 note 98 [a].

Constitutional requirements

With respect to the necessity of notice and hearing prior to adoption of zoning regulation, constitutional requirements were satisfied by adequate opportunity given after passage of by-law to contest its validity and its application to property purporting to be affected by it.

Mass.—Town of Lexington v. Bean, supra.

Where notice is required, it must set forth the municipal authorities' intention to adopt the zoning regulation together with the plans setting forth the character of the regulation to be adopted.⁶⁰ It has been held that the notice should sufficiently describe the districts to be affected by the regulation;⁶¹ but it has also been held that, unless otherwise required by statutory provision, the published notice need not contain a map showing the boundaries and limits of the zones to be created by the regulation.⁶² According to one view, where sufficient notice is given prior to the hearing, the municipal zoning body may make changes or amendments to the proposed regulation in the course of its passage without giving further notice,⁶³ or without another public hearing;⁶⁴ under other authority, a zoning ordinance may be void where substantial amendments are made after the public hearing on the proposed ordinance without any new hearing on the changes and amendments.⁶⁵

Action subsequent to hearing. Under the statute, action subsequent to the hearing may be mandatory,⁶⁶ and of the essence of the procedure described,⁶⁷ so that a vote of the zoning commission taken before the hearing cannot be effective.⁶⁸

c. Voting; Initiative and Referendum

Substantial compliance with statutory requirements

with respect to voting and initiative and referendum proposals is necessary and sufficient.

Substantial compliance with the statute providing for the form of ballot to be used for voting on a zoning plan has been held sufficient.⁶⁹ Accordingly, the ballot may contain the theme of the issue rather than its text or a digest thereof.⁷⁰ Only votes registered for or against the proposed regulations will be considered.⁷¹ Under statute, a zoning ordinance becomes the law of a town when the zoning regulations of the selectmen are approved by the vote of the town meeting.⁷²

Adoption of a zoning ordinance under the initiative law must be in accordance with requirements as to public hearings prior to adoption.⁷³ A village ordinance requiring attachment to the zoning ordinance of a plat or map of the territory involved is not a condition precedent to the right of the village electors to initiate zoning legislation.⁷⁴

An ordinance adopting a comprehensive plan for zoning a city may be submitted to the qualified electors of the city in the form of a referendum to determine whether the ordinance shall be approved;⁷⁵ and a zoning ordinance adopted by the legislative body of a city under the general law, without complying with the requirements of the zoning act, has been held subject to referendum.⁷⁶ Under some statutes, in the adoption of a zoning regulation opportunity need not be given for a referendum vote.⁷⁷

Statutes held inapplicable

Statute requiring hearing before enactment of zoning ordinance by "city" was held inapplicable to town; statute that no zoning ordinance or by-law shall be modified or repealed except after reasonable notice and opportunity to objectors to be heard was held inapplicable to original passage of zoning by-law by town. Mass.—Town of Lexington v. Bean, supra.

60. Miss.—Morris v. City of Columbia, 186 So. 292, 184 Miss. 342.

61. Cal.—Berrata v. Sales, 255 P. 538, 82 C.A. 324.

62. Miss.—Arkansas Fuel Oil Co. v. City of Oxford, 195 So. 316, 188 Miss. 455.

N.J.—Burmore Co. v. Smith, 12 A. 2d 353, 124 N.J.Law 541.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

63. N.J.—Stirling v. City of Plainfield, 53 A.2d 713, 136 N.J.Law 38. Pa.—In re Schuylkill Tp. Zoning Ordinance, 7 Chest.Co. 123.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

Amendment generally see infra §§ 81-123.

No change in general purpose

An amendment which does not change the general purpose of an ordinance may be made during its passage.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

Change in map

Where mayor and aldermen discovered, at time of hearing on final issue of adoption of zoning ordinance, that unauthorized alteration had been made on use district map, order adjudicating and reciting such alteration, providing that such alteration be deleted and map restored to its original condition, was not an "amendment" requiring new publication of notice of adoption. Miss.—Arkansas Fuel Oil Co. v. City of Oxford, 195 So. 316, 188 Miss. 455.

64. N.Y.—Halpern v. Dasser, 135 N. Y.S.2d 8.

65. N.Y.—Village of Mill Neck v. Nolan, 251 N.Y.S. 533, 233 App. Div. 248, affirmed 182 N.E. 196, 259 N.Y. 596.

66. Conn.—Jack v. Tarrant, 71 A.2d 705, 136 Conn. 414.

67. Conn.—Jack v. Tarrant, supra.

68. Conn.—Jack v. Tarrant, supra.

69. Conn.—Jack v. Tarrant, supra.

zoning regulation shall become effective or be established until after a public hearing, action by zoning commission must be taken after it has held prescribed public hearing to afford property owners protection of exercise of composite deliberative consideration and judgment of commission, formally registered, after its members have had benefit of considering all claims made, and information afforded, at public hearing. Conn.—Jack v. Tarrant, supra.

70. Conn.—Jack v. Tarrant, supra.

71. Conn.—Jack v. Tarrant, supra.

72. Ohio.—Prosen v. Duffy, 87 N.E. 2d 342, 153 Ohio St. 139.

73. Ohio.—Prosen v. Duffy, supra.

74. Ohio.—Burnett v. Wooster, Com. Pl., 84 N.E.2d 261.

75. Vt.—Thompson v. Smith, 129 A. 2d 638, 119 Vt. 488.

76. Cal.—Hurst v. City of Burlingame, 277 P. 308, 207 C. 134.

77. Ohio.—Russell v. Linton, Com. Pl., 115 N.E.2d 429.

78. Neb.—Kelley v. John, 75 N.W. 3d 713, 162 Neb. 319.

79. Cal.—Johnston v. City of Claremont, 323 P.2d 71.

80. Conn.—Town of Madison v. Kimberly, 169 A. 903, 113 Conn. 8.

§ 12. — Recommendation of Board or Commission

Under some statutes, but not under others, the city governing body must obtain the recommendation of a board or commission as to a proposed zoning regulation before it may promulgate such regulation; but the recommendation is not binding.

Under some statutes, the municipal governing body may exercise the zoning power without first receiving the recommendation of any board or commission.⁷⁸ Under other statutes, a board or commission may be appointed to recommend the boundaries of the various districts and appropriate regulations to be enforced therein,⁷⁹ and it may be provided that the city governing body may not promulgate any zoning regulation before receiving such recommendation.⁸⁰

Such a board or commission holds public meetings,⁸¹ after due notice⁸² to the property owners,⁸³

and thereafter makes its recommendation to the municipal governing body.⁸⁴ The proceedings of such board or commission have been considered as not judicial in character,⁸⁵ but merely advisory, as discussed supra § 9, and the municipal or county governing body is not bound to adopt the plans submitted,⁸⁶ but may adopt or establish different regulations.⁸⁷

A statute providing that no member of the planning board shall be permitted to act on any matter in which he has either directly or indirectly any personal or financial interest is not confined to instances of possible material gain,⁸⁸ but extends to any situation in which the personal interest, direct or indirect, may have the capacity to exert an influence on his action in the matter before the board.⁸⁹ A statute providing that the legislative body shall appoint a commission to be known as the zoning commission does not authorize the creation

W.Va.—State ex rel. Baer v. City of Beckley, 57 S.E.2d 263, 133 W.Va. 459.

Original ordinance

Where a statute requires amendatory zoning ordinances to be submitted to a referendum, a zoning ordinance adopted after a prior ordinance had been adjudged void may be enacted without submission to voters.

Cal.—Wheat v. Barrett, 290 P. 1033, 210 C. 193.

78. N.J.—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

79. Cal.—Schofield v. City of Los Angeles, 7 P.2d 1076, 120 C.A. 240. Mo.—State ex rel. Kramer v. Schwartz, 32 S.W.2d 63, 336 Mo. 932.

43 C.J. p 345 note 99.

Appointment not mandatory

Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.

Different commission at time of enactment

Pa.—Complaint as to Legality of East Whiteland Tp. Zoning Ordinance of 1953, Quar.Sess., 6 Chest. Co. 172.

Member of county board as member of commission

(1) Legislative intent of statute, authorizing board of county commissioners to adopt county zoning ordinance providing for their appointment of county planning and zoning commission, that a member of board be a member of such commission, was complied with by county commissioners' appointment of president of board as member of zoning commission to fill unexpired term of resigning member.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L. Ed. 792.

(2) Failure of county commissioners to appoint successor of resigning member of county planning and zoning commission until over two months after his resignation did not invalidate creation of commission by zoning ordinance under statute requiring that commission consist of five members, in absence of showing that county commissioners did not act with reasonable promptness under circumstances to fill vacancy.

Md.—Walker v. Board of County Com'rs of Talbot County, supra.

80. U.S.—Standard Oil Co. of New Jersey v. City of Charlottesville, C.C.A.Va., 42 F.2d 88.

Cal.—Schofield v. City of Los Angeles, 7 P.2d 1076, 120 C.A. 240.

Ky.—City of Somerset v. Weise, 263 S.W.2d 921.

La.—State ex rel. Shaver v. Mayor and Councilmen of Town of Coushatta, App., 196 So. 388.

Mo.—State ex rel. Kramer v. Schwartz, 32 S.W.2d 63, 336 Mo. 932.

N.C.—Shuford v. Town of Waynesville, 198 S.E. 585, 214 N.C. 135.

Tenn.—State ex rel. Lightman v. City of Nashville, 60 S.W.2d 161, 166 Tenn. 191.

Wash.—Lauterbach v. City of Centralia, 304 P.2d 656, 49 Wash.2d 550.

Validity of temporary or emergency ordinance adopted before receiving report of commission see infra § 19.

81. Kan.—Piper v. Moore, 183 P.2d 965, 163 Kan. 565.

Pa.—Complaint as to Legality of

East Whiteland Tp. Zoning Ordinance of 1953, Quar.Sess., 6 Chest. Co. 172.

43 C.J. p 348 note 1.

82. Mass.—Town of Burlington v. Dunn, 61 N.E.2d 243, 318 Mass. 216, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

Pa.—Complaint as to Legality of East Whiteland Tp. Zoning Ordinance of 1953, Quar.Sess., 6 Chest. Co. 172.

43 C.J. p 345 note 2.

Kind of notice

Governing board of city is not required under zoning statute to give any directions to planning commission of kind of notice to be given of hearings preliminary to adoption of an original zoning ordinance.

Kan.—Piper v. Moore, 183 P.2d 965, 163 Kan. 565.

Notice held sufficient

Kan.—Piper v. Moore, supra.

83. Ill.—Deynzer v. Evanston, 149 N.E. 790, 319 Ill. 226.

84. N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

43 C.J. p 345 note 4.

Report held proper

N.Y.—Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47.

85. Mo.—State v. Davis, 259 S.W. 80, 302 Mo. 307.

86. Mo.—State v. Davis, supra.

Wash.—Lillions v. Gibbs, 289 P.2d 203, 47 Wash.2d 629.

87. Mo.—State v. Davis, 259 S.W. 80, 302 Mo. 307.

88. N.J.—Zell v. Borough of Roseland, 125 A.2d 890, 42 N.J.Super. 75.

89. N.J.—Zell v. Borough of Roseland, supra.

of such commission by the legislative body, but provides for a commission to be appointed thereby.⁹⁰

§ 13. — Filing, Recording, or Publication of Regulation after Adoption

Statutory requirements as to filing, recording, or publication in connection with zoning ordinances must be followed.

Where a statute requires a municipality enacting a zoning ordinance to file the plan, maps, charts, and descriptive matter thereof in the county clerk's office, this provision of the law must be followed,⁹¹ as must other provisions as to filing;⁹² but other statutory provisions requiring that the ordinance and a plat of the restricted district be recorded have

been held directory only, and not to affect the validity of the ordinance.⁹³ Copying zoning by-laws into the town records has been held not necessary to the legal enactment thereof,⁹⁴ provided they can be identified in some other manner and are embodied in permanent form so that their existence, adoption, and identification are not left uncertain.⁹⁵

A municipality or county must comply with statutory requirements as to publication⁹⁶ or posting⁹⁷ of the regulation after its adoption, and it may be required that a map constituting part of the ordinance be set out in the publication,⁹⁸ or that the publication either contain a copy of the plan or map or state where such plan or map is on file.⁹⁹ It has

90. Tex.—*Storm Bros. v. Town of Balcones Heights*, Civ.App., 239 S. W.2d 842, refused no reversible error.

De facto officers

Where state law provided for establishment of zoning commission, and mayor appointed commission which was confirmed by council, and members functioned as commission, even though irregularity existed in appointment of commission, members would have functioned as de facto officers and their recommendations to city council would have same effect as though each member was de jure member of commission.

Tex.—*Storm Bros. v. Town of Balcones Heights*, supra.

91. Ark.—*City of Searcy v. Robertson*, 273 S.W.2d 26, 224 Ark. 344.
—*City of Benton v. Phillips*, 88 S. W.2d 828, 191 Ark. 961.

Pa.—*Pennsylvania Dri-Built Housing Corp. v. Borough of Emporium*, 76 Pa. Dist. & Co. 331, 43 Mun. L.R. 97.

Purpose

Sole purpose of statutory requirement that master zoning plan be filed in office of clerk of county court is to furnish to the public additional constructive notice of zoning ordinance.

Ky.—*Polk v. Axton*, 208 S.W.2d 497, 306 Ky. 498.

Revised map

Where zoning map, by mistake, was not properly adopted as a part of a zoning ordinance, a revised map attached to, and made a part of, ordinance adopted by city council was sufficient to sustain ordinance.

W.Va.—*State ex rel. Baer v. City of Beckley*, 57 S.E.2d 263, 133 W. Va. 459.

92. Town board's approval of county ordinance

Filing with county board of written resolutions of town board approving county zoning ordinance and amendments thereto was sufficient compliance with statutory require-

ment that town board's written approval of ordinance be filed with county board, and what afterwards became of such filed resolutions of approval was immaterial.

Wis.—*Jefferson County v. Timmel*, 51 N.W.2d 518, 261 Wis. 39.

93. U.S.—*De Lano v. City of Tulsa*, C.C.A.Okla., 28 F.2d 640, certiorari denied *De Lano v. City of Tulsa*, 49 S.Ct. 179, 278 U.S. 654, 73 L.Ed. 564.

Iowa.—*Boardman v. Davis*, 3 N.W.2d 608, 231 Iowa 1227.

94. Mass.—*Mayo v. Inhabitants of Town of West Springfield*, 157 N. E. 700, 260 Mass. 594.

95. Mass.—*Mayo v. Inhabitants of Town of West Springfield*, supra.

Record showing vote

Town clerk's record showing vote to amend by-laws by adding zoning ordinance held sufficient to identify them as by-laws adopted.

Mass.—*Mayo v. Inhabitants of Town of West Springfield*, supra.

96. Minn.—*W. H. Barber Co. v. City of Minneapolis*, 34 N.W.2d 710, 227 Minn. 77.

N.Y.—*Longo v. Eilers*, 93 N.Y.S.2d 517, 196 Misc. 909—*Milano v. Town of Patterson*, 93 N.Y.S.2d 419, 197 Misc. 457—*Village of Williston Park v. Israel*, 76 N.Y.S.2d 605, 191 Misc. 6, affirmed 94 N.Y.S.2d 921, 276 App.Div. 968, affirmed 95 N.E. 2d 208, 301 N.Y. 713.

Pa.—*Kelly v. City of Philadelphia*, 115 A.2d 238, 382 Pa. 459—*Fierst v. William Penn Memorial Corporation*, 166 A. 761, 311 Pa. 263.

Sherwin v. City of Erie, 30 Pa. Dist. & Co. 701, 19 Erie Co. 383, 85 Pittsb.Leg.J. 761.

County zoning ordinance held sufficiently published

Wis.—*Jefferson County v. Timmel*, 51 N.W.2d 518, 261 Wis. 39.

97. N.Y.—*Longo v. Eilers*, 93 N.Y.S. 2d 517, 196 Misc. 909—*Milano v. Town of Patterson*, 93 N.Y.S.2d 419, 197 Misc. 457.

Affidavit of town clerk

Under statute, a certification by affidavit of town clerk that he posted copies of ordinance is presumptive evidence that ordinance was properly posted.

N.Y.—*Longo v. Eilers*, 93 N.Y.S.2d 517, 196 Misc. 909.

98. Mass.—*Inhabitants of Town of West Springfield v. Mayo*, 163 N.E. 653, 265 Mass. 41.

Map attached to pamphlet held zoning map

Wis.—*Jefferson County v. Timmel*, 51 N.W.2d 518, 261 Wis. 39.

Colored map

Where colored map reflecting decisions of city council with respect to zoning was not published as required by charter and black and white map was published by proper authority as a part of zoning ordinance, on the expiration of three years from the date of its publication the black and white map became the official zoning map of the city, although certain property zoned for "light industrial" use in the colored map was erroneously designated as zoned for "municipal dwelling" use in the black and white map.

Minn.—*W. H. Barber Co. v. City of Minneapolis*, 34 N.W.2d 710, 227 Minn. 77.

Publication held sufficient

Newspaper publication of town zoning by-law and map was held sufficient, although map was reduced in size and printed in black and white, instead of colors as on town meeting map.

Mass.—*Inhabitants of Town of West Springfield v. Mayo*, 163 N.E. 653, 265 Mass. 41.

99. Pa.—*Fierst v. William Penn Memorial Corporation*, 166 A. 761, 311 Pa. 263.

Reference to secretary

Where publication of zoning ordinance did not include map or refer to place of filing, reference in ordinance to name of township secretary did not make ordinance valid as in-

been held, under another statute, that publication of the ordinance is not required where compliance has been had with provisions that the proposed ordinance be published before adoption,¹ and that in any case the city council's failure to direct formally the publication of the regulation in a certain issue of a newspaper did not render the publication thereof in such issue ineffective.²

§ 14. Knowledge or Notice of Zoning Regulations or Orders

Property owners are charged with notice of zoning ordinances. Authorities differ as to whether a court will take judicial notice thereof.

Every property owner in a city is charged with notice of the zoning ordinances;³ and even a non-resident who deals with property within the limits of an unincorporated city is charged with knowledge of the zoning ordinance of the city regulating the use of such property.⁴ So, a purchaser of land is presumed to possess knowledge of the restrictions in a zoning ordinance applicable thereto;⁵ and a

purchaser of land has been held charged with knowledge that a hospital may be built in a section classified as a particular type of residential area.⁶ On the other hand, one who, relying on the fraudulent misrepresentations of the vendor, purchases a building containing a kitchen maintained and used in violation of a zoning ordinance has been held not bound by constructive notice of the ordinance.⁷

Judicial notice. It has been held that a court will take judicial notice of a zoning ordinance,⁸ and of the fact that zoning laws and ordinances affect property interests⁹ and that a constitutional amendment was required, in a particular case, to validate them.¹⁰ It has also been declared a matter of common knowledge that many municipalities have passed zoning ordinances prohibiting, within certain districts, industries, commercial enterprises, undertaking establishments, and other businesses which are conducted without noise, dust, or vibration.¹¹

Other authority holds that judicial notice will not be taken of a zoning ordinance or regulation,¹² or of an order of the zoning authorities.¹³

dicating that map was filed with him.

Pa.—*Fierst v. William Penn Memorial Corporation*, *supra*.

1. Tex.—*City of Corpus Christi v. Jones*, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

2. Tex.—*City of Corpus Christi v. Jones*, *supra*.

3. Tenn.—*Brooks v. City of Memphis*, 241 S.W.2d 432, 192 Tenn. 371.

4. Tex.—*City of Dallas v. Coffin*, Civ.App., 254 S.W.2d 203, refused no reversible error.

5. N.J.—*Lumund v. Board of Adjustment of Borough of Rutherford*, 69 A.2d 361, 6 N.J.Super. 474, affirmed 73 A.2d 545, 4 N.J. 577.

6. D.C.—*American University v. Prentiss*, D.C., 113 F.Supp. 389, affirmed *Prentiss v. American University*, 214 F.2d 282, 94 U.S.App. D.C. 204, certiorari denied *Wrather v. American University*, 75 S.Ct. 217, 348 U.S. 888, 99 L.Ed. 705.

7. Cal.—*Barder v. McClung*, 209 P. 2d 898, 33 C.A.2d 692.

8. Ala.—*Shell Oil Co. v. Edwards*, 81 So.2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 885, 100 L.Ed. 786.

Ill.—*Charles v. City of Chicago*, 109 N.E.2d 790, 413 Ill. 428, certiorari denied 73 S.Ct. 1123, 345 U.S. 974, 97 L.Ed. 1389.

Liberty Nat. Bank of Chicago v. Vance, 120 N.E.2d 349, 3 Ill.App.2d 1.

Pleading of zoning ordinance by giving its title and date of its passage invokes judicial notice of provisions of ordinance.

Utah.—*Dowse v. Salt Lake City Corp.*, 255 P.2d 723, 123 Utah 107.

Provision of off-street parking facilities

Judicial notice may well be taken of fact that enlightened zoning restrictions are more and more requiring property owners, both business and residential, to provide adequate off-street parking facilities for motor vehicles.

N.Y.—*People v. Taylor*, 111 N.Y.S.2d 703, 202 Misc. 265.

Lease allegedly violating ordinance

Where, in lessees' suit to cancel a lease, lessors filed a counterclaim for rent due, and lessees answered, denying that lessors were entitled to rent, on the ground that the lease was executed for a purpose in violation of zoning ordinance, court was bound to take judicial notice of ordinance.

Ill.—*Lind v. Spanuth*, 120 N.E.2d 381, 3 Ill.App.2d 112.

9. N.J.—*Stirling v. City of Plainfield*, 49 A.2d 38, 134 N.J.Law 485, reversed on other grounds 53 A.2d 713, 136 N.J.Law 38.

10. N.J.—*Stirling v. City of Plainfield*, *supra*.

11. Pa.—*Kistler v. Borough of Swarthmore*, 4 A.2d 244, 134 Pa. Super. 287.

12. Conn.—*Kiska v. Skrensky*, 138 A.2d 523, 145 Conn. 23—*Gilbert v. Town of Hamden*, 68 A.2d 157, 135 Conn. 630.

Ky.—*Butler v. Louisville & Jefferson County Bd. of Zoning Adjustment and Appeals*, 224 S.W.2d 658, 311 Ky. 663.

"We cannot take judicial notice of municipal ordinances. They are matter of fact to be alleged and proved like other facts."

Mass.—*Boyle v. Building Inspector of Malden*, 99 N.E.2d 925, 926, 327 Mass. 564.

Relevant and material regulations

Court of common pleas, in appeal from order of board of appeals on zoning, cannot take judicial notice of relevant and material zoning regulations.

Conn.—*Cohen v. Board of Appeals on Zoning of City of Bridgeport*, 94 A. 2d 793, 139 Conn. 450.

Ordinance adopted by county board

Zoning ordinance adopted by board of commissioners of roads and revenues for county for unincorporated areas of county could not be judicially noticed by state courts.

Ga.—*Lewenstein v. Curry*, 42 S.E.2d 158, 75 Ga.App. 22.

13. Ky.—*Butler v. Louisville & Jefferson County Bd. of Zoning Adjustment and Appeals*, 224 S.W. 2d 658, 311 Ky. 663.

II. VALIDITY OF ZONING REGULATIONS

A. VALIDITY

1. GENERAL CONSIDERATIONS

§ 15. In General

There is no fundamental objection to zoning laws and ordinances as long as they are reasonable in their scope and operation and apply without unnecessary discrimination; they are generally held valid.

Unconstitutionality of a zoning ordinance is illegality of the highest order;¹⁴ accordingly, as shown infra § 17, zoning regulations must not infringe the constitutional guaranties of the state or nation. There is no fundamental objection to zoning laws

and ordinances, however, as long as they are reasonable in their scope and operation and apply without unnecessary discrimination.¹⁵ They will be sustained unless it is shown that there is no substantial relation between them and the furtherance of any of the general objects which justify them,¹⁶ or unless the constitutional objections urged against them are supported by competent evidence or appear on their face.¹⁷ Accordingly, zoning regulations are generally held valid,¹⁸ and they have been upheld

14. Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

15. Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523. Reasonableness see infra §§ 68–80.

16. Mass.—Raymond v. Commissioner of Public Works of Lowell, 131 N.E.2d 189, 333 Mass. 410—Caires v. Building Com'r of Hingham, 83 N.E.2d 559, 323 Mass. 589.

Necessity of conforming with objectives specified in enabling act see infra § 17.

Not lightly invalidated

A zoning ordinance in effect for almost seventeen years without challenge or objection should not be lightly invalidated.

N.Y.—Fleetwood Manor, Inc. v. Village of Huntington Bay, 115 N.Y.S. 2d 615.

17. Mich.—Hammond v. Kephart, 50 N.W.2d 155, 331 Mich. 551.

Palpable inadequacy

Zoning ordinance must be upheld unless it is so plainly and palpably inadequate that it offends constitution.

Va.—Ours Properties, Inc. v. Ley, 96 S.E.2d 754, 198 Va. 848.

18. U.S.—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.

Ark.—City of West Helena v. Bockman, 256 S.W.2d 40, 221 Ark. 677.

Cal.—Steiger v. Board of Supervisors, 300 P.2d 210, 143 C.A.2d 352—People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

Colo.—Flinn v. Treadwell, 207 P.2d 967, 120 Colo. 117.

Conn.—Miller v. Zoning Commission of City of Bridgeport, 65 A.2d 577, 135 Conn. 405—State ex rel. Wise v. Turkington, 63 A.2d 596, 135 Conn. 276.

Del.—Papadonay v. Commissioners of Rehoboth, 20 A.2d 447, 25 Del.Ch. 327.

Fla.—City of Miami Beach v. First Trust Co., 45 So.2d 681.

Ga.—Birdsey v. Wesleyan College, 87 S.E.2d 378, 211 Ga. 583.

Ill.—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—People ex rel. Miller v. Gill, 59 N.E.2d 671, 339 Ill. 394—Zadworny v. City of Chicago, 44 N.E.2d 426, 380 Ill. 470—Neef v. City of Springfield, 43 N.E.2d 947, 380 Ill. 275.

Will County v. Stanfill, 129 N.E. 2d 46, 7 Ill.App.2d 52.

Ind.—General Outdoor Advertising Co. v. City of Indianapolis, Department of Public Parks, 172 N.E. 309, 202 Ind. 85, 72 A.L.R. 453.

Iowa.—Boardman v. Davis, 3 N.W.2d 608, 231 Iowa 1227.

Ky.—Smith v. Selligman, 109 S.W.2d 14, 270 Ky. 69—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.

La.—State ex rel. Manheim v. Harrison, 114 So. 159, 164 La. 564.

Archer v. City of Shreveport, App., 85 So.2d 337.

Md.—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589—Simon v. Town of Needham, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

Mich.—Bane v. Pontiac Tp., Oakland County, 72 N.W.2d 134, 343 Mich. 481—Stevens v. Royal Oak Tp., Oakland County, 68 N.W.2d 787, 342 Mich. 105—Hammond v. Kephart, 50 N.W.2d 155, 331 Mich. 551—Ervin Acceptance Co. v. City of Ann Arbor, 34 N.W.2d 11, 322 Mich. 404—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed Full Salvation Union v. Portage Tp., Kalamazoo County, Mich., 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

Mo.—Fairmont Inv. Co. v. Woermann, 210 S.W.2d 26, 357 Mo. 625.

Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P. 2d 534, 97 Mont. 342.

Neb.—Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 213 N.W. 835, 115 Neb. 525.

N.J.—Repp v. Shahadi, 38 A.2d 284, 132 N.J.Law 24—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 538, 125 N.J.Law 367.

Keiser v. Inhabitants of City of Plainfield, 159 A. 755, 10 N.J.Misc. 496.

N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431.

Curtiss-Wright Corp. v. Incorporated Village of Garden City, 61 N.Y.S.2d 678, 270 App.Div. 936, affirmed 72 N.E.2d 26, 296 N.Y. 839.

Fortieth St. & Park Ave. v. Walker, 234 N.Y.S. 708, 133 Misc. 907—Rice v. Van Vranken, 229 N.Y.S. 32, 132 Misc. 82, affirmed 232 N.Y.S. 506, 225 App.Div. 179, affirmed 175 N.E. 304, 255 N.Y. 541—Gordon v. Board of Appeals of City of Schenectady, 225 N.Y.S. 680, 131 Misc. 346.

Town of Perinton v. Muzeka, 141 N.Y.S.2d 607, appeal dismissed 149 N.Y.S.2d 251 four cases, 1 A.D.2d 795 and 149 N.Y.S.2d 252, 1 A.D.2d 795, amended on other grounds 151 N.Y.S.2d 622, 2 A.D.2d 647—Sibek v. Sahm, 132 N.Y.S.2d 596.

N.D.—Midgarden v. City of Grand Forks, 54 N.W.2d 659, 79 N.D. 18.

Ohio.—Central Outdoor Advertising Co. v. Village of Evendale, Ohio, Comm.Pl., 124 N.E.2d 189.

Santangelo v. City of Cincinnati, 25 Ohio N.P., N.S., 49.

Okla.—Weaver v. Bishop, 52 P.2d 853, 174 Okl. 492—Beveridge v. Harper & Turner Oil Trust, 35 P.2d 445, 168 Okl. 609.

Pa.—Appeal of Medinger, 104 A.2d 118, 377 Pa. 217—Appeal of Lord.

as against the objection that they were in violation of particular constitutional provisions¹⁹ or that they were discriminatory.²⁰ If the question of the constitutionality of a zoning order or regulation is fairly debatable, the order or regulation must stand;²¹ if not, it will be stricken down.²²

The strictly local interests of a town in enacting a zoning law must yield if it appears that such interests are plainly in conflict with the interests of the general public,²³ and zoning laws and applications thereof have been held invalid,²⁴ and required to be

81 A.2d 533, 368 Pa. 121—Appeal of Kerr, 144 A. 81, 294 Pa. 246.

Borough of Kingston v. Kalanovsky, 38 A.2d 393, 155 Pa.Super. 424.

Appeal of Tredyffrin Const. Co., Com.Pl., 8 Chest.Co. 85—Schlaastine v. Westtown Tp., Com.Pl., 7 Chest.Co. 217—Complaint as to Legality of East Whiteland Tp. Zoning Ordinance of 1953, Com.Pl., 6 Chest.Co. 172—Toland v. Newtown Tp., Quar.Sess., 35 Del.Co. 21—Commonwealth v. Campbell, Quar.Sess., 29 Erie Co. 113—Appeal of Strunk, Com.Pl., 27 North.Co. 324—Appeal of Lowden, Com.Pl., 96 Pittsb.Leg.J. 153—Richards v. Johns, Com.Pl., 88 Pittsb.Leg.J. 351, appeal dismissed, 13 A.2d 59, 338 Pa. 232.

Tex.—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224, error refused. Ex parte Hobbs, 157 S.W.2d 397, 143 Tex.Cr. 100.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

Wash.—State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 321 P.2d 195, 50 Wash.2d 378.

Wis.—Geisenfeld v. Village of Shorewood, 287 N.W. 683, 232 Wis. 410.

Existing or future status

Zoning ordinances are constitutional as valid exercises of police power, whether they merely protect existing status or involve plan for city's future development.

Mich.—Austin v. Older, 278 N.W. 727, 283 Mich. 667.

Held not invalid

(1) Fact that zoning regulations of town contain no provision for the establishment of any new cemeteries within the town did not invalidate the regulations.

Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 110 A.2d 495, 19 Conn.Sup. 131.

(2) Ordinance requiring occupied trailer to be located on a site licensed for that purpose was not invalid.

Mich.—Wyoming Tp. v. Herweyer, 33 N.W.2d 93, 321 Mich. 611.

(3) Where zoning ordinance provided for establishment of board of adjustment which was never appointed, and town refused permit for trailer camp in zone, application of ordinance to applicant was not illegal because no board of adjustment ex-

isted, since applicant could on proper application to court compel appointment of necessary members to pass on request for variance.

N.J.—Michaels v. Township Committee of Pemberton Tp., Burlington County, 67 A.2d 324, 3 N.J.Super. 523.

19. Conn.—Fitzgerald v. Merard Holding Co., 147 A. 513, 110 Conn. 130, certiorari denied Merard Holding Co. v. Fitzgerald, 50 S.Ct. 247, 281 U.S. 732, 74 L.Ed. 1148—State v. Hillman, 147 A. 294, 110 Conn. 92.

Iowa.—Marquis v. City of Waterloo, 228 N.W. 870, 210 Iowa 439.

Ky.—Kesselring v. Wakefield Realty Co., 227 S.W.2d 416, 312 Ky. 334.

La.—State ex rel. Shaver v. Mayor and Councilmen of Town of Coushatta, App., 196 So. 358.

Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed Full Salvation Union v. Portage Tp., Kalamazoo County, Mich., 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

S.C.—Momeier v. John McAlister, Inc., 27 S.E.2d 504, 203 S.C. 353.

Tex.—Ex parte Hobbs, 157 S.W.2d 397, 143 Tex.Cr. 100.

43 C.J. p 335 note 51.

Applicability of particular constitutional guaranties see Constitutional Law §§ 281, 498, 506, 703.

20. Cal.—Price v. Schwafel, 206 P. 2d 683, 92 C.A.2d 77—Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386.

Colo.—Flinn v. Treadwell, 207 P.2d 967, 120 Colo. 117.

Ga.—Orr v. Hapeville Realty Co., 94 S.E.2d 682, 212 Ga. 649.

Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed Full Salvation Union v. Portage Tp., Kalamazoo County, Mich., 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.Y.—Fox Meadow Estates v. Livingston, 252 N.Y.S. 178, 233 App. Div. 256, affirmed Fox Meadow Es-

tates v. Culley, 185 N.E. 714, 261 N.Y. 506.

Pa.—Lower Merion Tp. v. Frankel, 57 A.2d 900, 358 Pa. 430.

43 C.J. p 335 note 54, p 336 note 75 [a].

Requirement that exercise of zoning power be without discrimination generally see infra § 17.

Ordinance permitting reclassification

An ordinance is not invalid as discriminatory although it permits the owner to apply for a reclassification of his property and permits the city council to relieve the owner from any inequitable burden resulting from the general classification.

Cal.—City of San Mateo v. Hardy, 149 P.2d 307, 64 C.A.2d 794.

21. D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed Prentiss v. American University, 214 F.2d 282, 94 U.S.App. D.C. 204, certiorari denied Wrath v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

Md.—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.

Struyk v. Samuel Braen's Sons, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294.

22. Fla.—City of Miami Beach v. Lachman, 71 So.2d 148, appeal dismissed Lachman v. City of Miami Beach, 75 S.Ct. 292, 348 U.S. 906, 99 L.Ed. 711.

23. Mass.—Simon v. Town of Needham, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

24. Fla.—Mayer v. Dade County, 82 So.2d 513.

Ga.—Taylor v. Shetzen, 90 S.E.2d 572, 313 Ga. 101.

Ill.—Du Page County v. Halkier, 115 N.E.2d 635, 1 Ill.2d 491—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396.

Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440—Shea v. Inspector of Buildings of Quincy, 83 N.E.2d 457, 323 Mass. 552.

Mich.—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242—Oschin v. Redford Tp., 24 N.W.2d 152, 315 Mich. 359.

N.Y.—Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

set aside.²⁵ So, purported zoning regulation or ordinance promulgated without authority is void and of no effect;²⁶ and approval by the county commissioners of ultra vires regulations promulgated by a village adds nothing to their validity.²⁷

The validity of the regulation usually depends on the surrounding conditions and circumstances,²⁸

that is, on the physical facts and surrounding circumstances,²⁹ not the possible action of unidentified third persons,³⁰ and each case must be determined on its own facts.³¹

A zoning ordinance may be valid in its general aspects, yet invalid as applied to particular property and a particular set of facts,³² so that the constitu-

Pa.—Falls Tp. v. First Falls Realty Corp., Com.Pl., 6 Bucks Co. 6, 70 York Leg.Rec. 37—Application for Restaurant Liquor License, Hykel, Quar.Sess., 39 Del.Co. 108—Appeal from Peters Tp. Ordinance, Quar. Sess., 29 Wash.Co. 172.

25. Mich.—Pere Marquette Ry. Co. v. Township Board of Muskegon Tp., 298 N.W. 393, 298 Mich. 31.

26. Ga.—Humthlett v. Reeves, 90 S. E.2d 14, 212 Ga. 8—Herrod v. O'Beirne, 80 S.E.2d 684, 210 Ga. 476 —City of Pearson v. Glidden Co., 55 S.E.2d 125, 205 Ga. 738—Lanier v. Richmond County, 45 S.E.2d 415, 203 Ga. 39.

La.—Mills v. City of Baton Rouge, 28 So.2d 447, 210 La. 830.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

N.C.—Vance S. Harrington & Co. v. Renner, 72 S.E.2d 838, 236 N.C. 321.

27. Md.—Perry v. County Bd. of Appeals for Montgomery County, 127 A.2d 507, 211 Md. 294.

28. U.S.—American Wood Products Co. v. City of Minneapolis, D.C. Minn., 21 F.2d 440, affirmed, C.C.A., 35 F.2d 657.

Conn.—Corthouts v. Town of Newington, 99 A.2d 112, 140 Conn. 284, 38 A.L.R.2d 1136.

Idaho.—O'Connor v. City of Moscow, 202 P.2d 401, 69 Idaho 37, 9 A.L.R. 2d 1031.

Ill.—Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill. 2d 200.

Ky.—Smeltzer v. Messer, 225 S.W. 2d 96, 311 Ky. 692.

Neb.—Cassel Realty Co. v. City of Omaha, 14 N.W.2d 600, 144 Neb. 753.

N.Y.—Bowen v. Hider, 37 N.Y.S.2d 76.

Ohio.—Kessler v. Smith, App., 142 N. E.2d 231, appeal dismissed 146 N.E. 2d 308, 187 Ohio St. 91.

Or.—Shaffner v. City of Salem, 268 P.2d 599, 201 Or. 45.

Neighboring villages

Considerations in determining whether zoning ordinance is based on public good are not comparative powers of neighboring villages, but existing conditions.

Ill.—Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166.

Weighing of equities

Each case involving validity of a

zoning ordinance resolves itself into a weighing of equities.

Tex.—City of Lubbock v. Stubbs. Civ.App., 278 S.W.2d 519.

29. Cal.—McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644.

30. Cal.—McCarthy v. City of Manhattan Beach, supra.

Possible abuse of privilege

Because a privilege granted by a zoning ordinance may be abused is no reason for denying privilege.

Ill.—Bohan v. Village of Riverside, 138 N.E.2d 487, 9 Ill.2d 561.

31. U.S.—Standard Oil Co. v. City of Tallahassee, Fla., D.C.Fla., 87 F.Supp. 145, affirmed, C.A., 183 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647.

Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

Fla.—City of Miami Beach v. Ocean & Inland Co., 3 So.2d 364, 147 Fla. 480.

Ga.—Humthlett v. Reeves, 90 S.E.2d 14, 212 Ga. 8.

Ill.—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 81—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.

Mich.—White v. Southfield Tp., 79 N.W.2d 863, 347 Mich. 548—Anchor Steel & Conveyor Co. v. City of Dearborn, 70 N.W.2d 753, 342 Mich. 361—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702—Pringle v. Shevnock, 14 N.W.2d 827, 309 Mich. 179—Palmer v. City of Detroit, 11 N.W.2d 199, 306 Mich. 449.

Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205.

Mo.—Landau v. Levin, 213 S.W.2d 483, 258 Mo. 77—Fairmont Inv. Co. v. Woermann, 210 S.W.2d 26, 357 Mo. 625.

Deacon v. City of Ladue, App., 294 S.W.2d 616.

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L. Ed. 621.

N.J.—Blanchi v. Morey, 24 A.2d 566, 128 N.J.Law 219.

N.Y.—Heimerle v. Village of Bronxville, 5 N.Y.S.2d 1002, 168 Misc. 788, affirmed 11 N.Y.S.2d 367, 256 App.Div. 993—Fox Meadow Estates v. Livingston, 242 N.Y.S. 86, 137 Misc. 22, reversed on other grounds 252 N.Y.S. 178, 233 App. Div. 250, and affirmed Fox Meadow Estates v. Culley, 185 N.E. 714, 261 N.Y. 506.

Harrison v. Reidpath, 93 N.Y.S.2d 569.

Okl.—Royal Baking Co. v. Oklahoma City, 75 P.2d 1105, 182 Okl. 45.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206. Lamkin v. City of Bellaire, Civ. App., 308 S.W.2d 70, error granted —City of Lubbock v. Stubbs, Civ. App., 278 S.W.2d 519—Clesi v. Northwest Dallas Imp. Ass'n, Civ. App., 263 S.W.2d 820, refused no reversible error.

Wis.—Chrome Plating Co. v. City of Milwaukee, 17 N.W.2d 705, 246 Wis. 526—Eggebeen v. Sonnenburg, 1 N. W.2d 84, 239 Wis. 213, 138 A.L.R. 495.

32. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, C. C.A.Mo., 58 F.2d 593—Koch v. City of Toledo, C.C.A.Ohio, 37 F.2d 336.

Ill.—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344—Du Page County v. Halkier, 115 N.E.2d 635, 1 Ill.2d 491 —Pioneer Trust & Sav. Bank v. Village of Oak Park, 97 N.E.2d 302, 408 Ill. 458—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536 —People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265 —Anderman v. City of Chicago, 40 N.E.2d 51, 379 Ill. 236—Taylor v. Village of Glencoe, 25 N.E.2d 62, 372 Ill. 507—Johnson v. Village of Villa Park, 18 N.E.2d 887, 370 Ill. 272—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568.

Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

tionality of a zoning ordinance, when applied to any particular land, depends on the particular facts applicable thereto notwithstanding the validity of the general zoning ordinance has been determined.³³ There is authority, however, to the effect that where really in a certain area is of the same character, a zoning regulation may not be held valid as to certain property in such area but void as to other property in the area, since the regulation is either valid in its entirety or wholly void.³⁴

Zoning regulations which may be regarded as within the power of one municipal corporation may not be so regarded as to another.³⁵

Change of conditions or circumstances. Zoning under constitutional rights must not be made static;³⁶ but ordinarily, the validity of a zoning regulation depends on the facts existing at the time such validity is questioned,³⁷ and not on speculation on whether future developments, when and if they come into being, may render the zoning unconstitutional as to the changed conditions.³⁸ The confiscatory character of the regulation may be proved by conditions existing when the validity is questioned.³⁹ So, it has been held that a change of cir-

cumstances may be considered in determining the validity of a zoning regulation even though the regulation was reasonable when promulgated,⁴⁰ since a regulation which is valid in its application to a particular area at the time of its adoption may be rendered invalid by a subsequent change in conditions.⁴¹

It has been held, however, that the constitutionality of a zoning ordinance or of its application to particular property must be determined on the basis of the facts and conditions as they existed prior to the time that the complaining property owner proceeded in disregard of the ordinance,⁴² and that the landowner may not, after erecting a building in violation of restrictions, claim that the land is more adaptable for such a building than for the kind of structures for which the area is zoned.⁴³ A zoning ordinance which is a legitimate exercise of the police power will not be declared void because of a mere change of municipal council policy.⁴⁴

§ 16. As Dependent on Police Power

Zoning regulations are valid only when they are fairly within the scope of the police power to enact laws for

Minn.—*State v. Northwestern Preparatory School*, 37 N.W.2d 370, 228 Minn. 363.

Mo.—*Fairmont Inv. Co. v. Woermann*, 210 S.W.2d 26, 357 Mo. 625. *Deacon v. City of Ladue*, App., 294 S.W.2d 616.

Okl.—*Royal Baking Co. v. Oklahoma City*, 75 P.2d 1105, 182 Okl. 45.

Tex.—*City of Corpus Christi v. Jones*, Civ.App., 144 S.W.2d 338, error dismissed, judgment correct.

Question related in application to particular property

(1) Whether a zoning ordinance is discriminatory is related in its application to the particular property involved.

Cal.—*City of Los Angeles v. Gage*, 274 P.2d 34, 127 C.A.2d 442—*Morris v. City of Los Angeles*, 254 P.2d 935, 116 C.A.2d 856.

(2) As to particular lots, a court may declare a zoning ordinance void on a proper showing that its application is discriminatory.

Ark.—*City of Little Rock v. Hunter*, 228 S.W.2d 58, 216 Ark. 916.

Ill.—*Galt v. Cook County*, 91 N.E.2d 395, 405 Ill. 396.

Facts necessary to show invalidity

Where a zoning ordinance would preclude use of property for any purpose to which it is reasonably adapted, to sustain attack on validity thereof, it must appear that ordinance does not authorize a variation of general rule which would admit of such use or that such variation has been refused by administrative board

in exercise of discretion which ordinance confers on board.

N.Y.—*Arverne Bay Const. Co. v. Thatcher*, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.

In New Jersey

(1) It has been recognized that zoning restrictions may be such in a given case as to be confiscatory, and in those circumstances general rule must be struck down as oppressive. N.J.—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

(2) Validity of a zoning regulation is not to be determined, however, by reference to a single individual's property.

N.J.—*Fischer v. Bedminster Tp.*, 93 A.2d 378, 11 N.J. 194.

32. Mo.—*Taylor v. Schlemmer*, 183 S.W.2d 913, 353 Mo. 687—*Glencoe Lime & Cement Co. v. City of St. Louis*, 108 S.W.2d 143, 341 Mo. 689.

34. Va.—*Blankenship v. City of Richmond*, 49 S.E.2d 321, 188 Va. 97.

35. U.S.—*Village of Euclid v. Ambler Realty Co.*, Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1616.

43 C.J. p 336 note 70.

Size of city

A regulatory zoning ordinance which would be clearly valid as applied to a great city might be clearly unreasonable and invalid in a com-

munity of a much less congested nature.

U.S.—*Village of Euclid v. Ambler Realty Co.*, supra.

Del.—*In re Ceresini*, 189 A. 443, 8 W. W.Harr. 134.

Mich.—*Hitchman v. Oakland Tp.*, 45 N.W.2d 306, 329 Mich. 331.

36. Ohio.—*Krieger v. City of Cleveland*, App., 143 N.E.2d 142.

37. Mich.—*Gust v. Canton Tp.*, 70 N. W.2d 772, 342 Mich. 436.

N.Y.—*Bronxville Associates v. Brady*, 36 N.Y.S.2d 308.

Ohio.—*Krieger v. City of Cleveland*, App., 143 N.E.2d 142.

38. Cal.—*Lagiss v. Krantz*, 232 P. 2d 541, 104 C.A.2d 793.

Ohio.—*Krieger v. City of Cleveland*, App., 143 N.E.2d 142.

39. N.Y.—*Bronxville Associates v. Brady*, 36 N.Y.S.2d 308.

40. Fla.—*City of Miami Beach v. First Trust Co.*, 45 So.2d 681.

N.Y.—*Evans v. Gunn*, 29 N.Y.S.2d 368, 177 Misc. 85, affirmed 29 N.Y. S.2d 150, 262 App.Div. 865.

41. N.Y.—*Vernon Park Realty v. City of Mount Vernon*, 121 N.E.2d 517, 307 N.Y. 493.

People v. Leighton, 44 N.Y.S.2d 779.

42. Cal.—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332.

43. Cal.—*Wilkins v. City of San Bernardino*, supra.

44. Minn.—*Kiges v. City of St. Paul*, 62 N.W.2d 363, 240 Minn. 522.

the safety, health, morals, and general welfare of the people.

In general, zoning, or lawful zoning, is within and constitutes a lawful and valid exercise of the police power,⁴⁵ and its validity may be sustained thereunder.⁴⁶ Subject to constitutional and statutory guaranties, limitations, and restrictions, as discussed infra § 17, and to the requirement that they must be

reasonable, infra § 68, the validity of zoning enactments, regulations, and restrictions is dependent on their being within and constituting a valid exercise of the police power,⁴⁷ or on their having a reasonable relation thereto;⁴⁸ and, hence, they must fall as invalid unless they are within and can be supported as a legitimate exercise thereof.⁴⁹

45. Ala.—Walls v. City of Gunter-ville, 45 So.2d 468, 253 Ala. 480.
Cal.—McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644—Clemons v. City of Los Angeles, 222 P.2d 439, 36 C.2d 95—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.
People v. Johnson, 277 P.2d 45, 129 C.A.2d 1—Willett & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 C.A.2d 757—Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 342, 338 U.S. 939, 94 L.Ed. 579.
Fla.—State ex rel. S. A. Lynch Corp. v. Danner, 33 So.2d 45, 159 Fla. 871.
Ga.—Morgan v. Thomas, 63 S.E.2d 659, 207 Ga. 660.
Ill.—Gordon v. City of Wheaton, 146 N.E.2d 37, 12 Ill.2d 284.
Ind.—Town of Homecroft v. Macbeth, 148 N.E.2d 563—Lutz v. New Albany City Plan Commission, 101 N.E.2d 187, 230 Ind. 74.
Iowa.—Livingston v. Davis, 50 N.W.2d 592, 243 Iowa 21, 27 A.L.R.2d 1237—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356.
Ky.—Fried v. Louisville and Jefferson County Planning and Zoning Commission, 258 S.W.2d 466.
La.—Archer v. City of Shreveport, App., 85 So.2d 337.
Md.—Colati v. Jirout, 47 A.2d 613, 186 Md. 652—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.
Mich.—Scholnick v. City of Bloomfield Hills, 86 N.W.2d 324, 350 Mich. 187—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.
N.Y.—Daub v. Popkin, 171 N.Y.S.2d 513, 5 A.D.2d 283.
People v. Calvar Corp., 69 N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1876.
Ohio.—Smith v. Juillerat, 119 N.E.2d 611, 161 Ohio St. 424.
Morris v. Roseman, App., 118 N.E.2d 429, reversed on other grounds

- 123 N.E.2d 419, 162 Ohio St. 447—Kilko v. City of Cleveland, App., 102 N.E.2d 476.
Or.—Holt v. City of Salem, 234 P.2d 564, 192 Or. 200.
Pa.—Kline v. City of Harrisburg, 68 A.2d 182, 362 Pa. 438.
Appeal of Scranton Lackawanna Indus. Bldg. Co., Com.Pl., 57 Lack. Jur. 173—City of Williamsport v. Miller, Com.Pl., 4 Lycoming 35.
Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.
Tex.—City of Dallas v. Halbert, Civ. App., 246 S.W.2d 686, error refused no reversible error.

Basis for upholding

Constitutional guaranties of private rights are subject to qualification that they may be cut down by governmental agencies acting under police power of state, and it is under this concept that zoning ordinances are upheld.

- Ill.—Eleopoulos v. City of Chicago, 120 N.E.2d 555, 3 Ill.2d 247.

Foundation of authority

A municipality's authority to enact a zoning ordinance restricting use of privately owned property is founded not in eminent domain but in police power.

- S.C.—James v. City of Greenville, 88 S.E.2d 661, 227 S.C. 565.

General scheme or plan of zoning is constitutional because it has a definite relation to the public health, safety, morals, and welfare.

- Pa.—Swade v. Zoning Bd. of Adjustment of Springfield Tp., 140 A.2d 597.

Valid in principle

Zoning ordinances are constitutional in principle as a valid exercise of the police power.

- Mich.—Anchor Steel & Conveyor Co. v. City of Dearborn, 70 N.W.2d 753, 342 Mich. 361—Hammond v. Kephart, 50 N.W.2d 155, 331 Mich. 551—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757—Austin v. Older, 278 N.W. 727, 283 Mich. 667.
Wash.—State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195, 50 Wash.2d 378—State ex rel. Miller v. Cain, 242 P.2d 505, 40 Wash. 2d 216.

Not exhausted by use

Adoption of a zoning ordinance by a municipality is a valid exercise of police power, which is not exhausted by its use.

- N.C.—McKinney v. City of High Point, 79 S.E.2d 730, 239 N.C. 232.

46. Ill.—Dunlap v. City of Woodstock, 91 N.E.2d 434, 405 Ill. 410.
Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.
Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

47. Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

- Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171—Dobres v. Schwartzman, 59 A.2d 684, 191 Md. 19.

- N.Y.—Dilliard v. Village of North Hills, 91 N.Y.S.2d 542, 195 Misc. 875, reversed on other grounds 94 N.Y.S.2d 715, 276 App.Div. 969, order resettled 95 N.Y.S.2d 503, 276 App.Div. 1013.

- Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

- Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

Test of validity

In considering constitutionality of county zoning ordinance, the vital question is whether the ordinance constitutes a reasonable exercise of police power delegated to county by legislature enacting statute conferring power on county board to enact zoning ordinances.

- Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

Open area zoning

It is within police power to regulate open area zoning.

- Pa.—Fagan v. Philadelphia Zoning Bd. of Adjustment, 132 A.2d 279, 339 Pa. 99.

48. Pa.—Appeal of Sawdey, 85 A.2d 28, 369 Pa. 19—Lower Merion Tp. v. Frankel, 57 A.2d 900, 353 Pa. 439.

49. Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434—Town of Windsor v.

The justification for zoning enactments is the greater benefit which accrues therefrom to the public as a whole,⁵⁰ or the paramount interest of the public welfare and the realization that private interests must sometimes be subordinated to the public good,⁵¹ or, as stated supra § 7, it must be found in some aspect of the police power asserted for the public welfare. Such enactments, however, are subject to limitations on the police power,⁵² and cannot validly be extended beyond the accomplishment of purposes rightly within the scope thereof.⁵³

To be valid, they must be for the superior interest and rights of the public,⁵⁴ or they must be predicated on a public interest⁵⁵ and founded on a need of the

community,⁵⁶ and be conducive to, or subserve, the public welfare,⁵⁷ or be for the public good.⁵⁸ They must have a rational relation to the protection of the basic interest of society,⁵⁹ and a public benefit must be derived from them.⁶⁰ They are invalid if they disclose no purpose to prevent some public evil or fill some public need.⁶¹

In order to be valid as a proper exercise of the police power, especially where their application will cause a destruction of property values,⁶² zoning laws, ordinances, by-laws, regulations, and restrictions must advance, promote, or tend or be designed to promote, the public health, safety, morals, or general welfare,⁶³ or be reasonably necessary

Whitney, 111 A. 354, 95 Conn. 357, 12 A.L.R. 569.

50. Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

General welfare may be made a ground, with others, for interference with rights of property, in exercise of police power.

Mass.—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646—Welch v. Swasey, 79 N.E. 745, 193 Mass. 364, 23 L.R.A.N.S., 1160, 118 Am.S.R. 523, affirmed 29 S.Ct. 567, 214 U.S. 91, 53 L.Ed. 923.

51. Ill.—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 653, 350 U.S. 1013, 100 L.Ed. 873.

Basis of validity

Validity of zoning ordinances rests on the principle that the exercise of rights incident to ownership of private property may be restricted in interest of general welfare of inhabitants of municipality.

Ohio.—State ex rel. Helsel v. Board of Com'rs of Cuyahoga County, Com.Pl., 79 N.E.2d 698, affirmed 78 N.E.2d 694, appeal dismissed 79 N.E.2d 911, 149 Ohio St. 583.

Dominant consideration

When dealing with zoning ordinances with respect to exercise of police power, public welfare is dominant consideration.

Ill.—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

Prevails over individual interests

In determining constitutionality of a zoning ordinance what is best for body politic in a long run must prevail over interests of particular individuals.

N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115.

52. Ill.—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 295 Ill. 132.

53. Tex.—City of Sherman v.

Simms, 183 S.W.2d 415, 143 Tex. 115.

54. Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434.

Private interests

Zoning power may not be exerted to serve private interests merely nor may principle be subverted to that end.

N.J.—Houston Petroleum Co. v. Automotive Products Credit Ass'n, 87 A.2d 319, 9 N.J. 122.

55. Md.—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330.

56. N.J.—Crow v. Town of Westfield, 56 A.2d 403, 136 N.J.Law 363.

Means invoked must be in keeping with public need.

N.J.—Roselle v. Wright, 122 A.2d 506, 21 N.J. 400.

57. N.Y.—City of New York v. Jack Parker Associates, Inc., 161 N.Y.S.2d 731, 5 Misc.2d 633.

Tex.—Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

58. Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

59. N.J.—Marie's Launderette v. City of Newark, 113 A.2d 190, 35 N.J.Super. 94.

60. Ohio.—State ex rel. Rosenthal v. City of Bedford, App., 134 N.E.2d 727.

Power to amend zoning ordinance can be exercised only when public good demands that an amendment be made.

Ill.—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 298 Ill. 265.

61. U.S.—Proffett v. Valley View Village, D.C.Ohio, 123 F.Supp. 339, reversed on other grounds, C.A., Valley View Village v. Proffett, 221 F.2d 412.

62. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—Mack v. Cook County, 142 N.E.2d 785, 11 Ill.2d 310—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104.

63. Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

Mich.—Comer v. City of Dearborn, 70 N.W.2d 813, 342 Mich. 471—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146—Elizabeth Lake Estates v. Waterford Tp., 26 N.W.2d 788, 317 Mich. 359—Frischkorn Const. Co. v. Lambert, 24 N.W.2d 209, 315 Mich. 556.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

N.J.—Borough of Cresskill v. Borough of Dumont, 100 A.2d 182, 28 N.J.Super. 26, affirmed 104 A.2d 441, 15 N.J. 238—Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 554—Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708—Lionshead Lake v. Wayne Tp., 73 A.2d 287, 8 N.J.Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J.Super. 83.

N.Y.—Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App. Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736.

Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, affirmed 121 N.E.2d 517, 307 N.Y. 493—Gedney Estates v.

for the protection of the public health, safety, comfort, morals, or welfare,⁶⁴ or have or bear a real and substantial relation to public health, safety, morals, or the general welfare,⁶⁵ and it has been

City of White Plains, 99 N.Y.S.2d 111.

Test of constitutionality of zoning ordinance is its reasonable relationship to good and welfare of general public.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705.

Legality of zoning enactment rests on its being for general or common good with respect to some matter of public welfare in relation to safety, order, and morals of community.

Md.—Dobres v. Schwartzman, 59 A.2d 684, 191 Md. 19.

Specified statutory purposes

Zoning regulations must be designed to promote specified statutory purposes relating generally to the health, safety, and welfare of community.

N.J.—Dolan v. De Capua, 80 A.2d 655, 13 N.J.Super. 500.

64. Md.—Mayor and Council, Town of Bladensburg, Inc. v. Berg, 139 A.2d 703.

65. U.S.—Village of Euclid, Ohio v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303.

Ruben v. City of Pittsburgh, D.C.Pa., 142 F.Supp. 787—Transcontinental Gas Pipe Line Corp. v. Borough of Milltown, Middlesex County, D.C.N.J., 93 F.Supp. 287.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Cal.—Robinson v. City of Los Angeles, 304 P.2d 814, 146 C.A.2d 33.

Colo.—Bohn v. Board of Adjustment of City and County of Denver, 271 P.2d 1051, 129 Colo. 539.

Conn.—Del Buono v. Board of Zoning Appeals of Town of Stratford, 124 A.2d 915, 143 Conn. 673—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

D.C.—Prentiss v. American University, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied *Wrather v. American University*, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Fla.—Tollius v. City of Miami, 96 So.2d 122—City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428—City of Miami Beach v. Lachman, 71 So.2d 148, appeal dismissed *Lachman v. City of Miami Beach*, 75 S.Ct. 292, 348 U.S. 906, 99 L.Ed. 711—State ex rel. S. A. Lynch Corp. v. Danner, 33 So.2d 45, 159 Fla. 871.

Ga.—City of Thomson v. Davis, 88 S.E.2d 300, 92 Ga.App. 216.

Ill.—Skryszak v. Village of Mt. Prospect, 148 N.E.2d 721—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill.2d 169—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—Gordon v. City of Wheaton, 146 N.E.2d 37, 12 Ill.2d 284—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40—Zweifel Mfg. Corp. v. City of Peoria, 144 N.E.2d 593, 11 Ill.2d 489—Regner v. McHenry County, 138 N.E.2d 545, 9 Ill.2d 577—Bohan v. Village of Riverside, 138 N.E.2d 487, 9 Ill.2d 561—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E.2d 1, 6 Ill.2d 419—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344—Petropoulos v. City of Chicago, 125 N.E.2d 522, 5 Ill.2d 270—City of Park Ridge v. American Bank & Trust Co. of Chicago, 122 N.E.2d 265, 4 Ill.2d 144—Eleopoulos v. City of Chicago, 120 N.E. 555, 3 Ill.2d 247—Du Page County v. Halkier, 115 N.E.2d 635, 1 Ill.2d 491—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28—Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill.2d 200—Ronda Realty Corp. v. Lawton, 111 N.E.2d 310, 414 Ill. 313—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162—Kinney v. City of Joliet, 103 N.E.2d 473, 411 Ill. 289—People ex rel. Trust Co. of Chicago v. Village of Skokie, 97 N.E.2d 310, 408 Ill. 397—Pioneer Trust & Sav. Bank v. Village of Oak Park, 97 N.E.2d 302, 408 Ill. 458—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Pringle v. City of Chicago, 89 N.E.2d 365, 404 Ill. 473—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507—Jacobson v. Village of Wilmette, 85 N.E.2d 753, 403 Ill. 250—Metropolitan Life Ins. Co. v. City of Chicago, 84 N.E.2d 825, 402 Ill. 581—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Maryland Advertising Co. v. Mayor and City Council of Baltimore, 86 A.2d 169, 199 Md. 214—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

State ex rel. Cooper v. Cowan, App., 307 S.W.2d 676.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114—Delawanna Iron & Metal Co. v. Albrecht, 88 A.2d 616, 9 N.J. 424—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405—Collins v. Board of Adjustment of Margate City, 69 A.2d 708, 3 N.J. 200—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

Marie's Launderette v. City of Newark, 113 A.2d 190, 35 N.J.Super. 94—Borough of Cresskill v. Borough of Dumont, 100 A.2d 182, 28 N.J.Super. 26, affirmed 104 A.2d 441, 15 N.J. 238—Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708—Lionshead Lake v. Wayne Tp., 73 A.2d 287, 8 N.J.Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J.Super. 83—Cassinari v. Union City, 63 A.2d 891, 1 N.J.Super. 219.

DeMott Homes at Salem v. Margate City, 56 A.2d 423, 136 N.J. Law 330, affirmed 57 A.2d 388, 136 N.J. Law 639—United Advertising Corp. v. Board of Adjustment of Maplewood Tp., 58 A.2d 406, 136 N.J. Law 336.

N.Y.—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947—Flower Hill Bldg. Corp. v. Village of Flower Hill, Nassau County, 100 N.Y.S.2d 903, 199 Misc. 344—Dillard v. Village of North Hills, 91 N.Y.S.2d 542, 195 Misc. 875, reversed on grounds 94 N.Y.S.2d 715, 276 App.Div. 969, order resettled 15 N.Y.S.2d 503, 276 App.Div. 1013.

Gedney Estates v. City of White Plains, 99 N.Y.S.2d 111.

N.C.—Application of O'Neal, 92 S.E.2d 189, 243 N.C. 714.

held that such enactments must bear the required relation with respect to the particular premises to which they are applied.⁶⁶

To be within the public welfare a zoning regulation must confer on the public a benefit commensurate with its burden on private property.⁶⁷ The fact that zoning provisions may be said to promote the health, safety, or welfare of a few neighboring property owners is no justification for them where they are in derogation of general public welfare.⁶⁸

Zoning regulations may take into consideration factors not bearing on the public health, safety, or morals, but coming within the term "general welfare," and may deal with uses of property which are not harmful.⁶⁹

On the other hand, other questions aside, zoning enactments, regulations, or restrictions, generally are valid where they are fairly within the bounds of the police power,⁷⁰ or where they are properly related to the general welfare,⁷¹ or where they ad-

Ohio.—Schick v. Ghent Road Inn, App., 132 N.E.2d 479—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.

Loesch Allotment Co. v. Village of Newburgh Heights, Com.Pl., 100 N.E.2d 543.

Or.—Holt v. City of Salem, 234 P.2d 564, 192 Or. 200.

Pa.—Schmalz v. Buckingham Tp. Bd. of Adjustment, 132 A.2d 233, 389 Pa. 295—Appeal of Medinger, 104 A.2d 118, 377 Pa. 217.

Rubin v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 207—Medinger v. Springfield Tp., Com.Pl., 69 Montg.Co. 203—Schmitz v. Abington Tp., Com.Pl., 68 Montg.Co. 267—Murphy v. Abington Tp., Com.Pl., 67 Montg.Co. 259—Appeal of Jehovah's Witnesses, Co., 103 Pittsb.Leg.J. 489—Appeal of Borough of Speers, Quar.Sess., 28 Wash.Co. 221.

Tex.—Lamkin v. City of Bellaire, Civ.App., 308 S.W.2d 70, error granted—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700—City of Amarillo v. Meade, Civ.App., 286 S.W.2d 276—City of Waxahachie v. Watkins, Civ.App., 265 S.W.2d 843, reversed on other grounds 275 S.W.2d 477, 154 Tex. 206—Ham v. Weaver, Civ. App., 227 S.W.2d 286, reversed on other grounds Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

Wash.—Lillions v. Gibbs, 289 P.2d 203, 47 Wash.2d 629—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 381.

Wis.—Town of Caledonia v. Racine Limestone Co., 63 N.W.2d 697, 266 Wis. 475.

Other statement

Zoning regulations constitute a valid exercise of police power only when they have a rational relation to public health, safety, welfare, and prosperity of community.

Conn.—Lakeside Realty Co. v. Town

of Berlin, 129 A.2d 623, 20 Conn. Sup. 133.

Must reasonably serve

Conn.—Corthouts v. Town of Newington, 99 A.2d 112, 140 Conn. 284, 38 A.L.R.2d 1136.

Test of validity

Test of validity of a zoning ordinance or by-law is whether its provisions have no substantial relation to public health, safety, morals, or general welfare.

U.S.—Valley View Village v. Prof-fett, C.A.Ohio, 221 F.2d 412.

Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

Mass.—Connors v. Town of Burlington, 91 N.E.2d 212, 325 Mass. 494.

Maintenance of property values

Zoning ordinance was held unenforceable where purpose was to maintain property values and not to promote public health, safety, or welfare.

Mich.—Frischkorn Const. Co. v. Lambert, 24 N.W.2d 209, 315 Mich. 556.

Zoning enactment held invalid as not bearing required relation

D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed Prentiss v. American University, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied Wrather v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

N.J.—Lumpkin v. Township Committee of Bernards Tp., 48 A.2d 793, 134 N.J.Law 428, motion granted 49 A.2d 236, 134 N.J.Law 531.

66. Ohio.—Kessler v. Smith, 142 N.E.2d 231, 104 Ohio App. 213, appeal dismissed Smith v. Village of Glenwillow, 146 N.E.2d 308, 167 Ohio St. 91.

67. Conn.—West Hartford Methodist Church v. Zoning Bd. of Appeals of Town of West Hartford, 121 A.2d 640, 143 Conn. 263.

Regulations promote general welfare if they lie within police power and do not work solely for advantage of an individual.

N.J.—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

68. N.Y.—Consolidated Edison Co.

of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

69. Cal.—Acker v. Baldwin, 115 P.2d 455, 18 C.2d 341—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778, and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777.

Cal.—Price v. Schwafel, 206 P.2d 633, 92 C.A.2d 77.

Miss.—Palazzola v. City of Gulfport, 52 So.2d 611, 211 Miss. 737.

70. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 593.

Mich.—People v. Scraffano, 12 N.W.2d 325, 307 Mich. 655.

Ohio.—Ottawa Hills Co. v. Village of Ottawa Hills, 180 N.E. 903, 41 Ohio App. 276.

Pa.—In re Gilliland's Permit, 140 A. 136, 291 Pa. 353.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 338, error dismissed, judgment correct.

Necessity

Zoning laws in case of necessity are properly within exercise of police power.

N.Y.—Kovelman v. Plaut, 105 N.Y. S.2d 280, 201 Misc. 473.

71. U.S.—Dennis v. Village of Tonka Bay, C.C.A.Minn., 156 F.2d 672.

Ala.—Corpus Juris cited in Rochelle v. Lide, 180 So. 257, 258, 235 Ala. 596.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Ex parte Angelus, 150 P.2d 908, 65 C.A.2d 441—Del Fanta v. Sherman, 290 P. 1037, 107 C.A. 746.

Colo.—Board of Adjustment of City and County of Denver v. Handley, 95 P.2d 823, 105 Colo. 180.

Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434—Strain v. Mims, 193 A. 754, 123 Conn. 275—Fitzgerald v. Merard Holding Co., 147 A. 513, 110 Conn. 130, certiorari denied Merard Holding Co. v. Fitzgerald, 50 S.Ct. 247, 281 U.S. 732, 74 L.Ed. 1148.

Fla.—State ex rel. Landis v. Valz, 157 So. 651, 117 Fla. 311.

vance, protect, promote, or have or bear a direct, health, safety, morals, comfort, or general welfare,⁷² reasonable, or substantial relation to the public

- Idaho.—City of Idaho Falls v. Grimmer, 117 P.2d 461, 63 Idaho 90.
- Ill.—Housing Authority of Gallatin County v. Church of God, 81 N.E.2d 500, 401 Ill. 100—City of Springfield v. Vancil, 76 N.E.2d 471, 398 Ill. 575—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138—Anderman v. City of Chicago, 40 N.E.2d 51, 379 Ill. 236—Village of La Grange v. Leitch, 35 N.E.2d 346, 377 Ill. 99—Taylor v. Village of Glencoe, 25 N.E.2d 62, 372 Ill. 507—Johnson v. Village of Villa Park, 18 N.E.2d 887, 370 Ill. 272—Rothschild v. Hussey, 5 N.E.2d 92, 364 Ill. 557.
- Merrill v. City of Wheaton, 35 N.E.2d 807, 311 Ill.App. 301, reversed on other grounds 41 N.E.2d 508, 379 Ill. 504—City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616.
- Iowa.—Funnell v. City of Clear Lake, 30 N.W.2d 722, 239 Iowa 135—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.
- Ky.—Standard Oil Co. v. City of Bowling Green, 50 S.W.2d 960, 244 Ky. 362, 86 A.L.R. 648.
- La.—State ex rel. Dema Realty Co. v. McDonald, 121 So. 613, 168 La. 172, certiorari denied McDonald v. State of Louisiana ex rel. Dema Realty Co., 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 612.
- State ex rel. Shaver v. Mayor and Councilmen of Town of Couchatta, App., 196 So. 388.
- Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249—Colati v. Jirout, 47 A.2d 613, 186 Md. 652—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330.
- Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273—Kane v. Board of Appeals of City of Medford, 173 N.E. 1, 273 Mass. 97.
- Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P.2d 534, 97 Mont. 342.
- Neb.—City of Lincoln v. Logan-Jones, 235 N.W. 583, 120 Neb. 827—City of Lincoln v. Foss, 230 N.W. 592, 119 Neb. 666.
- N.Y.—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.
- Vesell v. Board of Standards and Appeals of City of New York, 243 N.Y.S. 518, 137 Misc. 806, affirmed Vesell v. Walsh, 232 N.Y.S. 904, 225 App.Div. 742.
- N.C.—State v. Roberson, 150 S.E. 674, 198 N.C. 70.
- Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443—State ex rel. Clifton-Highland Co. v. City of Lakewood, 179 N.E. 198, 41 Ohio App. 9, affirmed 178 N.E. 837, 124 Ohio St. 399, certiorari denied Clifton Highland Co. v. City of Lakewood, Ohio, 52 S.Ct. 406, 285 U.S. 549, 76 L.Ed. 940.
- Okl.—Beveridge v. Harper & Turner Oil Trust, 35 P.2d 435, 168 Okl. 609.
- Or.—Berger v. City of Salem, 284 P. 273, 131 Or. 674.
- Tex.—Ellis v. City of West University Place, 175 S.W.2d 396, 141 Tex. 608.
- Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224, error refused—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct—Luse v. City of Dallas, Civ.App., 131 S.W. 2d 1079, error refused.
- Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 32 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 32 L.Ed. 603.
- Wis.—Higbee v. Chicago, B. & Q. R. Co., 292 N.W. 320, 235 Wis. 91, 128 A.L.R. 734—State ex rel. Normal Eall v. Gurda, 291 N.W. 350, 234 Wis. 290.
- 43 C.J. p 335 notes 58, 61, 62.
- Zoning ordinance or regulation held to serve general welfare**
- N.J.—Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.
72. U.S.—Connor v. West Bloomfield Tp., C.A.Mich., 207 F.2d 482.
- Cal.—Acker v. Baldwin, 115 P.2d 455, 18 C.2d 341.
- Price v. Schwafel, 206 P.2d 683, 92 C.A.2d 77.
- Colo.—Jones v. Board of Adjustment, 204 P.2d 560, 119 Colo. 420.
- Conn.—De Mars v. Zoning Commission of Town of Bolton, 109 A.2d 876, 19 Conn.Sup. 24, affirmed 115 A.2d 653, 142 Conn. 580.
- D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed Prentiss v. American University, 214 F.2d 282, 94 U.S.App. D.C. 204, certiorari denied Wrathner v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.
- Fla.—Blitch v. City of Ocala, 195 So. 406, 142 Fla. 612.
- Ill.—Mahoney v. City of Chicago, 137 N.E.2d 37, 9 Ill.2d 156—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 658, 350 U.S. 1013, 100 L.Ed. 873—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—City of Springfield v.
- Vancil, 76 N.E.2d 471, 398 Ill. 575—Rothschild v. Hussey, 5 N.E.2d 92, 364 Ill. 557—Tews v. Woolhiser, 185 N.E. 827, 352 Ill. 212—Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166.
- Hibser v. Zoning Bd. of Appeals of Peoria County, 139 N.E.2d 325, 12 Ill.App.2d 365.
- Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.
- Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A. 2d 83, 214 Md. 48.
- Mass.—Opinion of the Justices to the Senate, 128 N.E.2d 557, 333 Mass. 773—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.
- Mich.—Smith v. Building Inspector of Plymouth Tp., 77 N.W.2d 332, 346 Mich. 57—McGiverin v. City of Huntington Woods, 72 N.W.2d 105, 343 Mich. 413—Janestick v. City of Detroit, 60 N.W.2d 452, 337 Mich. 549—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.
- Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P. 2d 534, 97 Mont. 342.
- N.J.—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.
- Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.
- Oxford Const. Co. v. City of Orange, 137 A. 545, 103 N.J.Law 355.
- N.Y.—Rodgers v. Village of Tarrytown, 96 N.Y.S.2d 58, 276 App.Div. 1019, appeal denied 97 N.Y.S.2d 376, 277 App.Div. 771, affirmed 96 N.E.2d 731, 302 N.Y. 115.
- Ohio.—City of Akron v. Chapman, 116 N.E.2d 697, 160 Ohio St. 382.
- State ex rel. Kangesser Co. v. Village of Beachwood, App., 128 N.E.2d 127—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.
- Pa.—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374—Silver v. Zoning Bd. of Adjustment, 112 A.2d 84, 381 Pa. 41—Appeal of Kerr, 144 A. 81, 294 Pa. 246.
- Appeal of Scranton Lackawanna Indus. Bldg. Co., Com.Pl., 57 Lack. Jur. 173.
- Wash.—Lillions v. Gibbs, 289 P.2d 203, 47 Wash.2d 629.
- Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

or are necessary for the preservation thereof,⁷³ or where the interests of the public require such action.⁷⁴ Under such circumstances they are valid, even though private interests are to some extent impaired,⁷⁵ or an owner is deprived of the right to use his property in the specific manner in which he intended.⁷⁶ Unless it clearly appears that zoning enactments have no substantial relation to public health, safety, morals, or the general welfare they will be sustained and not held invalid.⁷⁷

The required relationship of the zoning ordinance or regulation must be real and not feigned.⁷⁸ The law will not tolerate an invasion of the right of property under the guise of a police regulation in the professed interest of the public health or safety when it is manifest that such was not the object of the regulation.⁷⁹ Hence, a restrictive ordinance

which bears no material relation to the public health, safety, morals, or general welfare cannot, under the guise of a zoning regulation, either confiscate property or inflict a substantial injury on the owner thereof.⁸⁰

The question whether a zoning enactment or regulation constitutes a valid exercise of the police power must be determined in each case by the facts and circumstances surrounding it.⁸¹ The line which separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation, but varies with circumstances and conditions.⁸² Each case must be determined on its own particular facts in determining whether the regulation bears a sufficient relation to the public welfare,⁸³ and in determining whether there has been a valid exercise of police power, no one factor is

Any substantial relation

A zoning classification must be upheld if there is any substantial relation to public health, safety, comfort, morals, or welfare.

Ill.—*Bolger v. Village of Mount Prospect*, 141 N.E.2d 22, 10 Ill.2d 596.

Zoning enactments held valid as possessing required relation

Mich.—*Portage Tp. v. Full Salvation Union*, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

73. Pa.—*Whitpain Tp. v. Bodine*, 94 A.2d 737, 372 Pa. 509.

Appeal by *Dormont Borough, Co.*, 103 Pittsb.Leg.J. 423, 47 Mun.L.R. 232, affirmed 119 A.2d 827, 180 Pa. Super. 550.

74. Mass.—*Simon v. Town of Needham*, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

75. Conn.—*Poneleit v. Dudas*, 106 A.2d 479, 141 Conn. 413.

Ill.—*Hibser v. Zoning Bd. of Appeals of Peoria County*, 139 N.E.2d 325, 12 Ill.App.2d 365.

Incidental injury immaterial

An individual cannot complain of incidental injury if the police power is exercised for proper purposes of health, safety, morals, or general welfare.

Cal.—*City of Los Angeles v. Gage*, 274 P.2d 84, 127 C.A. 442.

76. U.S.—*Connor v. West Bloomfield Tp.*, C.A.Mich., 207 F.2d 482.

77. U.S.—*Village of Euclid, Ohio v. Ambler Realty Co.*, Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.

D.C.—*American University v. Prentiss*, D.C., 113 F.Supp. 389, affirmed *Prentiss v. American University*, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied *Wrather v. Amer-*

ican University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Mass.—*Caires v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589.

Ohio.—*Cleveland Trust Co. v. Village of Brooklyn*, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

Conclusiveness of judgment of local authorities

Judgment of municipal authorities with respect to zoning is conclusive unless it is shown to be unrelated to public health, safety, or general welfare.

Ill.—*La Salle Nat. Bank of Chicago v. City of Chicago*, 125 N.E.2d 609, 5 Ill.2d 344.

Affirmative requirement

To render a zoning ordinance invalid it must affirmatively appear that the restriction is clearly without substantial relations to public health, safety, morals, or general welfare.

Fla.—*Blitch v. City of Ocala*, 195 So. 406, 142 Fla. 612.

78. N.J.—*Delawanna Iron & Metal Co. v. Albrecht*, 88 A.2d 616, 9 N.J. 424.

79. N.J.—*Delawanna Iron & Metal Co. v. Albrecht*, supra.

80. Ill.—*Wehrmeister v. Du Page County*, 141 N.E.2d 26, 10 Ill.2d 604.

Wash.—*Hauser v. Arness*, 267 P.2d 691, 44 Wash.2d 358.

81. U.S.—*Village of Euclid, Ohio v. Ambler Realty Co.*, Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.

Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., D.C. Mo., 54 F.2d 1071, reversed on other grounds, C.C.A., 58 F.2d 593.

Ill.—*Gordon v. City of Wheaton*, 146 N.E.2d 37, 12 Ill.2d 284.

Mich.—*Anchor Steel & Conveyor Co.*

v. City of Dearborn, 70 N.W.2d 753, 342 Mich. 361.

Ohio.—*State ex rel. Cook v. Turgeon*, App., 77 N.E.2d 283.

82. Mich.—*Hitchman v. Oakland Tp.*, 45 N.W.2d 306, 329 Mich. 331.

83. Colo.—*Di Salle v. Giggall*, 261 P.2d 499, 128 Colo. 208.

Ill.—*Eleopoulos v. City of Chicago*, 120 N.E.2d 555, 3 Ill.2d 247—*Fisher v. Kemper*, 116 N.E.2d 332, 1 Ill.2d 603—*Zillien v. City of Chicago*, 114 N.E.2d 717, 415 Ill. 488—*Miller Bros. Lumber Co. v. City of Chicago*, 111 N.E.2d 149, 414 Ill. 162—*Kinney v. City of Joliet*, 103 N.E.2d 473, 411 Ill. 289—*Downey v. Grimshaw*, 101 N.E.2d 275, 410 Ill. 21—*Wesemann v. Village of La Grange Park*, 94 N.E.2d 904, 407 Ill. 81—*Dunlap v. City of Woodstock*, 91 N.E.2d 434, 405 Ill. 410—*Galt v. Cook County*, 91 N.E.2d 395, 405 Ill. 396—*People ex rel. Joseph Lumber Co. v. City of Chicago*, 83 N.E.2d 592, 402 Ill. 321—*Quilici v. Village of Mount Prospect*, 78 N.E.2d 240, 399 Ill. 418—*Offner Electronics v. Gerhardt*, 76 N.E.2d 27, 398 Ill. 265—*Zadworny v. City of Chicago*, 44 N.E.2d 426, 380 Ill. 470—*Anderman v. City of Chicago*, 40 N.E.2d 51, 379 Ill. 236—*Village of La Grange v. Leitch*, 35 N.E.2d 346, 377 Ill. 99—*Harmon v. City of Peoria*, 27 N.E.2d 525, 373 Ill. 594.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Mich.—*Elizabeth Lake Estates v. Waterford Tp.*, 26 N.W.2d 788, 317 Mich. 359—*Frischkorn Const. Co. v. Lambert*, 24 N.W.2d 209, 315 Mich. 556.

Factors considered

(1) In determining whether zoning ordinance has real and substantial relation to public health, safety, morals, or general welfare when applied to a particular property, the factors,

controlling.⁸⁴ Under some circumstances and conditions a zoning enactment or regulation may be held conducive to the public welfare and valid, and under other conditions and circumstances it may be considered to exceed the limits of the police power and be invalid.⁸⁵ The public welfare must be considered from the standpoint of the objective of zoning and of all the property within any particular use district.⁸⁶

In general, the validity of zoning enactments and regulations must be determined in the light of existing conditions.⁸⁷ The test of their validity is not whether they may at some future time bear the required relation to the public welfare, but whether they do so now.⁸⁸ In this connection the police power must be responsive, in the interest of common welfare to the changing conditions and developing needs of growing communities,⁸⁹ and zoning regulations which may at one time be regarded as invalid because not within the police power may, at another time, by reason of changed conditions, be

recognized as valid.⁹⁰ The necessity of the exercise of the police power to pass a zoning enactment or regulation may appear from existing conditions or the reasonable expectations of future growth and development of the municipality.⁹¹

Where reasonable minds differ as to whether a zoning law, ordinance, or regulation has a substantial relation to the public health, morals, safety, or general welfare, it must stand as a valid exercise of the police power.⁹²

§ 17. Limits on Exercise of Zoning Power in General

The municipality or other local agency exercising the zoning power has a wide discretion therein, but its power is not unlimited and must be exercised subject to the constitutional guaranties of the federal and state constitutions and subject to the limitations and restrictions imposed by the legislature.

A municipality or other governmental agency has wide discretion in enacting zoning ordinances and regulations,⁹³ and its action in the matter will be

among others, to be considered are: character of neighborhood; zoning classification and use of nearby properties; extent to which property values are diminished by particular restrictions involved; and gain to public as compared to hardship imposed on individual property owner.

III.—Gordon v. City of Wheaton, 146 N.E.2d 37, 12 Ill.2d 284—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344—Pioneer Trust & Sav. Bank v. Village of Oak Park, 97 N.E.2d 302, 408 Ill. 458—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507.

(2) Particular matters affecting validity of exercise of power see infra §§ 24-47.

84. Ill.—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

85. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 693.

N.Y.—City of New York v. Jack Parker Associates, Inc., 161 N.Y.S. 2d 731, 5 Misc.2d 633.
43 C.J. p 335 notes 64-66.

86. Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

87. Conn.—Lakeside Realty Co. v. Town of Berlin, 129 A.2d 628, 20 Conn.Sup. 188.

Mich.—Comer v. City of Dearborn, 70 N.W.2d 813, 342 Mich. 471.

88. Mich.—West Bloomfield Tp. v. Chapman, 88 N.W.2d 377, 351 Mich. 606—Gust v. Canton Tp., 70 N.W. 2d 771, 772, 342 Mich. 436.

Probable future developments in area restricted for residential purposes could not be taken into consideration to override constitutional limitations in determining validity of town zoning bylaw as applied to particular parcel of land within restricted area.

Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

89. Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

90. U.S.—Euclid v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.
43 C.J. p 336 note 69.

91. Ky.—Standard Oil Co. v. City of Bowling Green, 50 S.W.2d 960, 244 Ky. 362, 86 A.L.R. 648.

92. Ky.—City of Louisville v. Bryan S. McCoy, Inc., 286 S.W.2d 546—City of Louisville v. Puritan Apartment Hotel Co., 264 S.W.2d 888.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.
Lamkin v. City of Bellaire, Civ. App., 308 S.W.2d 70, error granted.

Beyond doubt

A court would be justified in striking down a county zoning regulation only if it was made clear beyond doubt that the restrictions imposed were directed at individuals and not imposed in general public interest.

Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.

93. Ala.—Chapman v. City of Troy,

4 So.2d 1, 241 Ala. 637—Leary v. Adams, 147 So. 391, 226 Ala. 472.
Conn.—Levinsky v. Zoning Commission of City of Bridgeport, 127 A. 2d 822, 144 Conn. 117—Bartram v. Zoning Commission of City of Bridgeport, 68 A.2d 308, 136 Conn. 89.

De Mars v. Zoning Commission of Town of Bolton, 109 A.2d 876, 19 Conn.Sup. 24, affirmed 115 A.2d 653, 142 Conn. 580.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 328 Mass. 589.

Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205.

Miss.—Palazzola v. City of Gulfport, 52 So.2d 611, 211 Miss. 737.

N.J.—Thornton v. Village of Ridgewood, 111 A.2d 899, 17 N.J. 493.

Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324.

N.Y.—Nehrbas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145—Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Or.—Page v. City of Portland, 165 P. 2d 280, 178 Or. 632.

Wis.—Eggebeen v. Sonnenburg, 1 N. W.2d 84, 239 Wis. 213, 138 A.L.R. 495.

Zoning commissioners are necessarily vested with broad discretionary powers.

held valid if the facts do not show the bounds of that discretion to have been exceeded.⁹⁴ Its exercise of such power, however, is not absolute and unlimited or unrestricted.⁹⁵ It is subject to the con-

stitutional guaranties of the federal and state constitutions and hence zoning enactments, regulations, and restrictions must conform to the requirements thereof in order to be valid,⁹⁶ regardless of how

Conn.—*Florentine v. Town of Darien*, 115 A.2d 328, 142 Conn. 415.

Presumed to know conditions

Local authorities are presumed to be familiar with local conditions and must be granted some measure of discretion in framing of zoning ordinance.

Ala.—*Marshall v. City of Mobile*, 35 So.2d 553, 250 Ala. 646.

Legislative discretion

Under police power, zoning is a matter within sound legislative discretion.

Iowa.—*Keller v. City of Council Bluffs*, 66 N.W.2d 113, 246 Iowa 202.

Policy of zoning is generally a matter within the discretion of the governing body of the municipal corporation.

Wis.—*City of La Crosse v. Elbertson*, 237 N.W. 99, 205 Wis. 207. 43 C.J. p 336 note 82.

Selection of particular method

Selection of one method of solving zoning problem in preference to another is entirely within discretion of city commission and does not, in and of itself, evidence an abuse of discretion.

Utah.—*Phi Kappa Iota Fraternity v. Salt Lake City*, 212 P.2d 177, 116 Utah 536.

System of zoning

Municipal authorities have large discretion in adoption of proper system of zoning.

Cal.—*Feraut v. City of Sacramento*, 269 P. 537, 204 C. 637.

Discretion permissible in zoning matters is that which is exercised by municipal authorities in adopting zone classifications with terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike, and acts of administering zoning ordinance do not go back to questions of policy and discretion, which were settled at time of adoption of ordinance.

Wash.—*State ex rel. Ogden v. City of Bellevue*, 275 P.2d 899, 45 Wash.2d 492.

94. Iowa.—*Keller v. City of Council Bluffs*, 66 N.W.2d 113, 246 Iowa 202.

Clear abuse of discretion is required in order for enforcement of zoning ordinance to be interfered with.

Tex.—*Lamkin v. City of Bellaire*, Civ.App., 303 S.W.2d 70, error granted.

Determination

Question whether bounds of discretion have been exceeded by municipality, must turn on facts and circumstances of particular case involved.

Tex.—*Clesi v. Northwest Dallas Emp. Ass'n*, Civ.App., 263 S.W.2d 820, refused no reversible error.

95. U.S.—*Ruben v. City of Pittsburgh*, D.C.Pa., 142 F.Supp. 787.

Ala.—*Alabama Alcoholic Beverage Control Bd. v. City of Birmingham*, 44 So.2d 593, 253 Ala. 402—*Marshall v. City of Mobile*, 35 So.2d 553, 250 Ala. 646.

Conn.—*Florentine v. Town of Darien*, 115 A.2d 328, 142 Conn. 415.

D.C.—*Prentiss v. American University*, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied *Wrather v. American University*, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Ill.—*First Nat. Bank of Lake Forest v. Lake County*, 130 N.E.2d 267, 7 Ill.2d 213—*Hannifin Corp. v. City of Berwyn*, 115 N.E.2d 315, 1 Ill.2d 23—*Miller Bros. Lumber Co. v. City of Chicago*, 111 N.E.2d 149, 414 Ill. 162—*Trust Co. of Chicago v. City of Chicago*, 96 N.E.2d 499, 408 Ill. 91.

Md.—*City of Baltimore v. Cohn*, 105 A.2d 482, 204 Md. 523.

Mo.—*Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

State ex rel. *Cooper v. Cowan*, App., 307 S.W.2d 676.

N.J.—*Speakman v. Mayor & Council of Borough of North Plainfield*, 84 A.2d 715, 8 N.J. 250.

Roselle v. Wright, 117 A.2d 661, 37 N.J.Super. 507, affirmed 122 A.2d 506, 21 N.J. 400—*Jones v. Zoning Bd. of Adjustment of Long Beach Tp.*, 108 A.2d 498, 32 N.J.Super. 397.

N.Y.—*Concordia Collegiate Institute v. Miller*, 93 N.E.2d 632, 301 N.Y. 139, 21 A.L.R.2d 544.

Ohio.—*Schick v. Ghent Road Inn*, App., 132 N.E.2d 479.

S.C.—*James v. City of Greenville*, 88 S.E.2d 661, 227 S.C. 565.

Wash.—*Hauser v. Arness*, 267 P.2d 691, 44 Wash.2d 358.

Blanket endorsement

Statute relating to zoning regulations does not give a blanket endorsement of every ordinance of zoning, but outlines tests to be applied to ordinance.

Mich.—*Grand Trunk Western R. Co. v. City of Detroit*, 40 N.W.2d 195, 326 Mich. 387.

96. Ala.—*Jefferson County v. City of Birmingham*, 55 So.2d 196, 256 Ala. 436—*Johnson v. City of Huntsville*, 29 So.2d 342, 249 Ala. 36.

Fla.—*City of Miami Beach v. Lachman*, 71 So.2d 148, appeal dismissed *Lachman v. City of Miami Beach*, 75 S.Ct. 292, 348 U.S. 906, 99 L.Ed. 711—*Griffin v. Sharpe*, 65 So.2d 751—*Forde v. City of Miami Beach*, 1 So.2d 642, 146 Fla. 676.

Ill.—*Trust Co. of Chicago v. City of Chicago*, 96 N.E.2d 499, 408 Ill. 91.

Iowa.—*Granger v. Board of Adjustment of City of Des Moines*, 44 N.W.2d 399, 241 Iowa 1356.

Md.—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

Minn.—*Connor v. Chanhassen Tp.*, 81 N.W.2d 789, 249 Minn. 205.

N.J.—*Rockhill v. Chesterfield Tp.*, *Burlington County*, 128 A.2d 473, 23 N.J. 117—*Schmidt v. Board of Adjustment of City of Newark*, 88 A.2d 607, 9 N.J. 405.

Schack v. Trimble, 137 A.2d 22, 48 N.J.Super. 45.

N.Y.—*Concordia Collegiate Institute v. Miller*, 93 N.E.2d 632, 301 N.Y. 139, 21 A.L.R.2d 544.

People v. Leighton, 44 N.Y.S.2d 779.

Ohio.—*City of Akron v. Chapman*, 116 N.E.2d 697, 160 Ohio St. 332, 42 A.L.R.2d 1140.

Pa.—*Baronoff v. Zoning Bd. of Adjustment of Lower Makefield Tp.*, 122 A.2d 65, 385 Pa. 110.

Appeal of *Berg*, Comp.Pl., 66 Montg.Co. 194.

Particular constitutional guaranties see *infra* §§ 24-47.

Zoning regulations as limited by scope of police power see *supra* § 16.

Must be consistent with prohibitions of constitution

Md.—*Mayor and Council, Town of Bladensburg, Inc. v. Berg*, 139 A.2d 703.

Enactment held within charter power

Where zoning act, amending charter of city, permitted a change or exception in the use of property previously zoned for a different use, section of city ordinance permitting such a change or exception was not void on ground that city was without charter power to adopt it.

Ga.—*Brown v. City of Brunswick*, 83 S.E.2d 12, 210 Ga. 738.

long or by whom they may have been recognized as legal.⁹⁷ There must be no unnecessary invasion of personal or property rights.⁹⁸

Zoning enactments, regulations, and restrictions may not override state law and policy.⁹⁹ They must be within the general limitations on the exercise of municipal powers,¹ and they are subject to, and must be within, the limitations and restrictions prescribed

by the enabling act authorizing them, or imposed by other legislation.²

Such enactments and regulations must rest primarily on the enabling act authorizing them and they must not go beyond the power delegated thereby.³ In order to be valid, they must be authorized by the enabling act,⁴ at least, where they are enacted pur-

97. Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91.

98. Fla.—Griffin v. Sharpe, 65 So.2d 751.

99. N.Y.—Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

General law

Zoning ordinances must conform to, and not be inconsistent with, the general law of state, including common law, equity, and public policy unless exceptions are permitted. Fla.—Griffin v. Sharpe, 65 So.2d 751.

1. Cal.—Parker v. Colburn, 236 P. 921, 196 C. 169.

Conn.—Perdue v. Zoning Board of Appeals of City of Norwalk, 171 A. 26, 118 Conn. 174.

Md.—Kramer v. Mayor and City Council of Baltimore, 171 A. 70, 166 Md. 324.

Wash.—Lauterbach v. City of Centralia, 304 P.2d 656, 49 Wash.2d 550.

2. Ala.—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36—Chapman v. City of Troy, 4 So.2d 1, 241 Ala. 637.

Ark.—City of Benton v. Phillips, 88 S.W.2d 828, 191 Ark. 961.

Cal.—Johnston v. Board of Sup'rs of Marin County, 137 P.2d 686, 31 C.2d 66.

Marculescu v. City Planning Commission of City and County of San Francisco, 46 P.2d 308, 7 C.A. 2d 371.

Conn.—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614—State ex rel. Spiros v. Payne, 41 A.2d 908, 131 Conn. 647.

Fla.—State v. Wilson, 25 So.2d 860, 157 Fla. 342.

La.—State ex rel. Fitzmaurice v. Clay, 23 So.2d 177, 208 La. 443.

Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

Mass.—City of Worcester v. New England Institute & New England School of Accounting, Inc., 140 N.E.2d 470, 335 Mass. 486—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 328 Mass. 589—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308

Mass. 128—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547.

Mich.—Krajenke Buick Sales v. Kopkowski, 33 N.W.2d 781, 322 Mich. 250.

Mo.—State ex rel. Kramer v. Schwartz, 82 S.W.2d 63, 336 Mo. 932.

N.J.—Duffcon Concrete Products v. Borough of Cresskill, 58 A.2d 104, 137 N.J.Law 81, reversed on other grounds 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

N.Y.—City of Albany v. Anthony, 28 N.Y.S.2d 963, 262 App.Div. 401.

Levitt v. Incorporated Village of Sands Point, 148 N.Y.S.2d 798, 3 Misc.2d 92, modified on other grounds 152 N.Y.S.2d 711, 2 A.D.2d 688, reargument and appeal denied 154 N.Y.S.2d 842, 2 A.D.2d 781—Geisler v. Mitchell, 244 N.Y.S. 439, 137 Misc. 462.

N.C.—Application of O'Neal, 92 S.E. 2d 189, 243 N.C. 714—Shuford v. Town of Waynesville, 198 S.E. 585, 214 N.C. 135.

Ohio.—State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.

Tenn.—State ex rel. Lightman v. City of Nashville, 60 S.W.2d 161, 166 Tenn. 191.

43 C.J. p 336 note 72.

Purpose of limitations is to protect property owners in a municipality against arbitrary and impulsive use of zoning power.

Pa.—Putney v. Abington Tp., 108 A. 2d 134, 176 Pa.Super. 463.

Controlling principle to which zoning must conform is territorial division according to character of lands and structures and their peculiar suitability for particular uses and uniformity of use within division.

N.J.—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117.

Strict compliance

Municipal corporation powers which may have serious consequence of depriving landowner of important uses of his land should be exercised only in strict compliance with authorizing statutes.

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

Necessity for conformity with all provisions

If a municipality should ignore

all of the criteria which the legislature has provided it should consider in acting on a zoning ordinance, it would not be complying with enabling statute, but each of the enumerated criteria need not be found advantageous to particular zoning classification in order for it to be valid.

Pa.—Appeal of Lieb, supra.

Public buildings

(1) Enabling act was held not to preclude legislative body of city from providing in zoning ordinance that ordinance shall not prevent city from erecting in any zone such municipal buildings and structures as may be deemed necessary for the safety, health, and general welfare of public.

Tex.—City of McAllen v. Morris, Civ. App., 217 S.W.2d 875, error refused.

(2) Statute authorizing municipalities to enact zoning ordinances to provide the kind, character, or use of structures that may be erected within different zones do not apply to structures in use by city in a governmental capacity.

Ala.—Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 593, 253 Ala. 402.

Provisions as to penalties

N.Y.—People v. Gold, 6 N.Y.S.2d 264.

Provision in loan and subsidy contract under the public housing law obligating city to rezone areas involved was not void as contrary to zoning law and city regulations in view of provision in public housing law authorizing city to zone or rezone.

N.Y.—Borek v. Golder, 74 N.Y.S.2d 675, 190 Misc. 366.

Open area zoning

City had power under statute to regulate "open area" zoning for purpose of promoting health, safety, morals, and general welfare of community.

Pa.—Fagan v. Philadelphia Zoning Bd. of Adjustment, 132 A.2d 279, 389 Pa. 99.

3. Conn.—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614.

4. N.C.—State v. Owen, 88 S.E.2d 832, 242 N.C. 525.

Location of schools

In absence of a specific grant of power, a village cannot by a zoning

suant to the authority conferred by such act,⁵ and they can be no broader than the statutory grant of power,⁶ although they can make additional, reasonable, and nondiscriminatory requirements as long as

the enabling act does not prohibit the enlargement of its requirements.⁷ Hence, a zoning regulation must conform to, and meet the requirements of, the statutes under the authority of which it is enacted,⁸

regulation prevent the location of a school within its borders and thereby prohibit the performance by the school district of the duty imposed on it by law.

N.Y.—Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park, 107 N.Y.S.2d 858, 279 App. Div. 618, appeal denied 109 N.Y.S. 2d 175, 279 App.Div. 746.

Matters not authorized

(1) Parking zones, school zones, hospital or quiet zones, speed zones, parking meter zones and limitation parking zones, do not constitute "zoning" in ordinary sense so as to be controlled by act authorizing municipalities to enact zoning ordinances, but are in exercise of police power as authorized by statute.

Ala.—Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 598, 253 Ala. 402.

(2) Provision, in township zoning ordinance prohibiting trailer coach parks, for special procedure whereby township board may make exceptions was held invalid, in view of absence of any authorization for such delegation of power in zoning act.

Mich.—Smith v. Building Inspector for Plymouth Tp., 77 N.W.2d 332, 346 Mich. 57.

(3) Permits and annual permit fees were held not authorized by enabling statute.

Ind.—Tomlinson v. Marion County Plan Commission, 122 N.E.2d 852, 234 Ind. 88.

(4) An urgency clause in zoning ordinance was held void and ineffective as enacted without legislative authority.

Cal.—Bailey v. Los Angeles County, 293 P.2d 449, 46 C.2d 132.

Interim zoning

(1) Zoning provisions have been held not to carry with them implied or inherent power authorizing city to pass an interim zoning ordinance.

Pa.—Kline v. City of Harrisburg, 68 A.2d 182, 362 Pa. 438.

(2) Validity of interim zoning ordinances generally see *infra* §§ 18-19.

Procedure

Mayor and council of city cannot affect comprehensive zoning ordinance passed pursuant to an enabling act by a subsequent charter provision or ordinance in a manner not authorized by enabling act.

Md.—Scrivner v. Mayor and City Council of Baltimore, 60 A.2d 190, 191 Md. 165.

Reasonable relation

An ordinance under the zoning act must bear a reasonable relation to powers conferred by the act.

N.J.—Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708—Lionshead Lake v. Wayne Tp., 73 A.2d 287, 8 N.J.Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J.Super. 83.

Brookdale Homes v. Johnson, 10 A.2d 477, 123 N.J.Law 602, affirmed 19 A.2d 868, 126 N.J.Law 516—Phillips v. Township Council of Township of Teaneck, 198 A. 368, 120 N.J.Law 45, affirmed 5 A.2d 698, 122 N.J.Law 485.

Ordinance held authorized

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

Mich.—Dawley v. Collingwood, 218 N. W. 766, 242 Mich. 247.

Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

N.J.—Concord Garden Apartments v. Board of Adjustment of City of Englewood, 64 A.2d 355, 1 N.J.Super. 301.

Ohio.—State ex rel. Fairmount Center Co. v. Arnold, 34 N.E.2d 777, 138 Ohio St. 259, 136 A.L.R. 840.

5. Wash.—Lauterbach v. City of Centralia, 304 P.2d 656, 49 Wash.2d 550.

General police power insufficient

A city with commission form of government and governed by laws applicable to second-class cities which laws do not include power to zone property within its boundaries, could not justify adoption of zoning ordinance in violation of enabling statute on ground that it had right to adopt zoning ordinance by virtue of its police power, where ordinance disclosed on its face that it was adopted pursuant to authority conferred by the enabling act, so that city did not purport to exercise its police power regardless of statute.

Wash.—Lauterbach v. City of Centralia, 304 P.2d 656, 49 Wash.2d 550.

6. Del.—Bave v. S & S Builders, Inc., Ch., 134 A.2d 709.

7. Iowa.—Gannett v. Cook, 61 N.W. 2d 703, 245 Iowa 750.

Pa.—Toland v. Newtown Tp., Quar. Sess., 35 Del.Co. 21.

8. Ala.—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36.

Ariz.—Wood v. Town of Avondale, 232 P.2d 963, 72 Ariz. 217.

Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

Ky.—City of Somerset v. Weise, 263 S.W.2d 921.

Neb.—Davis v. City of Omaha, 45 N. W.2d 172, 153 Neb. 460.

N.J.—Gross v. Allan, 117 A.2d 275, 37 N.J.Super. 262.

Duffcon Concrete Products v. Borough of Cresskill, 53 A.2d 104, 137 N.J.Law 81, reversed on other grounds 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678—Finn v. Municipal Council of City of Clifton, 53 A.2d 790, 136 N.J.Law 34.

N.Y.—Ballard v. Roth, 253 N.Y.S. 6, 141 Misc. 319.

Ohio.—Cassell v. Lexington Tp. Bd. of Zoning Appeals, 127 N.E.2d 11, 163 Ohio St. 340.

Pa.—Kline v. City of Harrisburg, 68 A.2d 182, 362 Pa. 438.

Tenn.—Henry v. White, 250 S.W.2d 70, 194 Tenn. 192.

Construction of power

Zoning power delegated from state must be strictly construed.

Iowa.—Livingston v. Davis, 50 N.W. 2d 592, 243 Iowa 21, 27 A.L.R.2d 1237—Granger v. Board of Adjustment of City of Des Moines, 44 N. W.2d 399, 241 Iowa 1356.

Test of validity

Municipal power to enact and enforce a zoning regulation does not exist in absence of statutory authorization and therefore validity of zoning ordinance must be tested by limitations of enabling act.

N.C.—State v. Owen, 88 S.E.2d 832, 242 N.C. 525.

Arbitrary deviation from general rule of enabling statute or ordinance is forbidden.

N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199.

Ordinance making definite statutory requirement

A zoning ordinance requiring written protest of affected property owners to be filed five days before date set for public hearing on proposed zoning change is not in conflict with statutory law, where ordinance merely makes definite statute requiring protest but not stating when protest is to be filed.

S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

Compliance with provisions of statute held shown

N.Y.—Delaware, L. & W. R. Co. v. City of Fulton, 114 N.Y.S.2d 481,

and an ordinance invalid under the enabling statute existing at the time of the enactment of the ordinance is not validated by a subsequent amendment of the enabling statute.⁹

Zoning regulations may be, and in various instances have been held to be, invalid or ineffective to the extent that they are inconsistent with, or violate the requirements of, a statute governing the matter.¹⁰ Where a statute provides for an appeal to a specified court from a decision in a statutory proceeding under the zoning law, an ordinance purporting to authorize a further appeal from the decision of such court is invalid.¹¹

The exercise of the zoning power is conditioned on adherence to the statutory purposes and considerations to be served by zoning.¹² The zoning powers may not be exerted by indirection, and their exercise must be in keeping with the principles of the enabling statutes.¹³ Zoning restrictions must carry out the policy of the enabling statutes,¹⁴ and must bear a substantial relation to, or promote, subserve, or have a fair tendency to accomplish or aid in the accomplishment of, one or more of the considerations, objectives, or purposes specified in the enabling act or properly to be served by zoning.¹⁵ Their relationship to the public welfare must be

affirmed 121 N.Y.S.2d 582, 281 App. Div. 1005.

9. N.C.—State v. Owen, 88 S.E.2d 832, 242 N.C. 525.

Zoning property outside corporate limits

Where city ordinance zoning property outside of municipal corporate limits was invalid under enabling statute existing at the time of enactment of ordinance, amendment of enabling statute to grant to city power to zone property outside corporate limits of city did not validate the pre-existing invalid ordinance. N.C.—State v. Owen, *supra*.

10. Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C.2d 66.

Mass.—Bennett v. Board of Appeal of City of Cambridge, 167 N.E. 659, 268 Mass. 419.

Mo.—State ex rel. Nigro v. Kansas City, 27 S.W.2d 1030, 325 Mo. 95.

N.J.—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.

Tenn.—Henry v. White, 250 S.W.2d 70, 194 Tenn. 192.

Existing statutes

Statute providing that zoning ordinances to be enacted must not be inconsistent with provisions of any statute governing same matter relates to existing statutes and is wholly prospective.

Pa.—City of Philadelphia v. Bartell, 11 A.2d 563, 139 Pa.Super. 319.

Statute limiting height of tenement houses to one and one-half times width of street could not be enlarged by city building zone resolution.

N.Y.—Thorofare Developing Corporation v. Deegan, 235 N.Y.S. 544, 134 Misc. 592, affirmed 235 N.Y.S. 898, 226 App.Div. 371.

Airfield

Where statute authorized city to acquire land for airport, either within or outside city limits, township ordinance prohibiting airport in por-

tion of township where proposed airport would be located was void as against city.

Mich.—Petition of City of Detroit (Airport Site), 14 N.W.2d 140, 308 Mich. 480.

Zoning ordinance or regulation held invalid

(1) Generally.

Ga.—Neal v. City of Atlanta, 94 S.E.2d 867, 212 Ga. 687.

N.J.—Weininger v. Borough of Metuchen, 45 A.2d 450, 133 N.J.Law 544, affirmed 49 A.2d 256, 134 N.J. Law 562.

N.C.—State v. Owen, 88 S.E.2d 832, 242 N.C. 525—Kass v. Hedgpeth, 38 S.E.2d 164, 226 N.C. 405.

(2) Zoning bylaw prohibiting use of land or buildings in residential district for sectarian educational purposes.

Mass.—Attorney General v. Inhabitants of Town of Dover, 100 N.E.2d 1, 327 Mass. 601.

Zoning enactment held not in violation of statute

(1) Generally.

Kan.—Kilcoyne v. City of Coffeyville, 269 P.2d 418, 176 Kan. 159.

Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

N.J.—Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J.Law 442, affirmed 61 A.2d 76, 137 N.J.Law 603.

(2) Zoning ordinance prohibiting trailer camps in residential districts was held not invalid on ground that it was in conflict with statutes dealing with licensing and regulating of trailer camps.

Mich.—City of Howell v. Kaal, 67 N.W.2d 704, 341 Mich. 585.

(3) Township ordinance which declared that house trailers used as dwellings outside licensed trailer parks were nuisances per se, but permitted temporary parking of trailers on premises of occupied dwellings in certain cases, was not invalid as in conflict with state house trailer camp law.

Mich.—Bane v. Pontiac Tp., Oakland County, 72 N.W.2d 134, 343 Mich. 481.

(4) Town zoning ordinance providing that no premises shall be used as a boarding house for institutional inmates or persons on parole from public or private institutions after care and treatment for mental ailments or disorders is not invalid on ground that it tends to abrogate or nullify provision of Mental Hygiene Law that the director of a state mental institution is authorized to make arrangements with suitable families for care, maintenance, and treatment of patients of institution.

N.Y.—Kanasy v. Nugent, 135 N.Y.S.2d 128, 206 Misc. 826, affirmed 145 N.Y.S.2d 638, 286 App.Div. 1038, appeal denied 148 N.Y.S.2d 456, 1 A.D.2d 681.

(5) Municipal ordinance limiting number of permits to be issued for sale of alcoholic beverages according to population was held not in conflict with statutes relating to license issuance and license fees.

Fla.—Ragozzino v. Town of Lake Maitland, 54 So.2d 364.

11. Md.—Sugar v. North Baltimore Methodist Protestant Church, 165 A. 703, 164 Md. 487.

12. N.J.—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250.

Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397.

Excesses in realization of statutory considerations by municipal zoning ordinance are inadmissible.

N.J.—Katobimar Realty Co. v. Webster, 113 A.2d 824, 20 N.J. 114.

13. N.J.—Reid Development Corp. v. Parsippany-Troy Hills Tp., 89 A.2d 667, 10 N.J. 229.

14. N.J.—Crow v. Town of Westfield, 56 A.2d 403, 136 N.J.Law 363.

15. Mass.—Shannon v. Building Inspector of Woburn, 105 N.E.2d 192, 328 Mass. 633.

Mo.—State ex rel. Cooper v. Cowan, App., 307 S.W.2d 676.

within at least one of the particulars specified in the enabling statute.¹⁶ The enumeration in an enabling act of specified purposes for which the use of land may be regulated implies that its use for other purposes is not subject to control.¹⁷

In general, a zoning ordinance or regulation enacted pursuant to an enabling statute is valid,¹⁸ and will be sustained, other questions aside, unless it is shown that there is no substantial relation between it and the furtherance of the general objects and purposes of the enabling act;¹⁹ and it will be set aside as invalid only where it is a mere arbitrary

exercise of power having no substantial relation to the objects and purposes of the enabling act.²⁰

The zoning power, except in so far as discrimination is necessary for the proper establishment of the various kinds of districts permitted,²¹ must be exercised impartially,²² without discrimination,²³ and in a fair manner for the promotion of the common good of a community as a whole.²⁴ Limitations or restrictions in enabling acts may apply to and invalidate prior zoning enactments and regulations.²⁵ The power of the municipality to zone is not limited to the protection of established dis-

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827—
Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L. Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.J.—Visco v. City of Plainfield, 57 A.2d 490, 136 N.J.Law 659.

Tex.—Ham v. Weaver, Civ.App., 227 S.W.2d 286, reversed on other grounds Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

Objectives and policy

Statutory enumeration of objectives and policy of zoning regulations must be regarded in exercise of zoning power.

N.J.—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

Motive prompting enactment immaterial

Courts are concerned not so much with motives prompting enactment of a zoning ordinance as with objective effect thereof on property rights of persons affected thereby. Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

Requirements held to accomplish purpose

Mass.—Howland v. Acting Superintendent of Bldgs. and Inspector of Bldgs. of Cambridge, 102 N.E.2d 423, 328 Mass. 155.

16. Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

17. Del.—Bave v. S & S Builders, Inc., Ch., 134 A.2d 709.

18. Tenn.—Henry v. White, 250 S.W.2d 70, 194 Tenn. 192—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.

19. Mass.—Lundy v. Town of Wayland, 105 N.E.2d 378, 328 Mass. 581—Shannon v. Building Inspector of Woburn, 105 N.E.2d 192, 328 Mass. 633—Lamarre v. Commissioner of Public Works of Fall River, 87 N.E.2d 211, 324 Mass. 542.

20. Mass.—Shannon v. Building Inspector of Woburn, 105 N.E.2d 192, 328 Mass. 633—Lamarre v. Commissioner of Public Works of Fall River, 87 N.E.2d 211, 324 Mass. 542.

21. Md.—Mayor v. City and Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

Reasonable discrimination

If there is discrimination between properties in zoning, such discrimination will not be disturbed if it may be rested on some reasonable basis and is not forbidden by charter. Tenn.—Henry v. White, 250 S.W.2d 70, 194 Tenn. 192.

22. Md.—Mayor and Council, Town of Bladensburg, Inc. v. Berg, 139 A.2d 703.

23. U.S.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

Ark.—City of Little Rock v. Hunter, 228 S.W.2d 58, 218 Ark. 916.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332—Reynolds v. Barrett, 83 P.2d 29, 12 C.2d 244.

Robinson v. City of Los Angeles, 304 P.2d 814, 146 C.A.2d 33.

Fla.—Griffin v. Sharpe, 65 So.2d 751—State ex rel. S. A. Lynch Corp. v. Danner, 33 So.2d 45, 159 Fla. 874—City of Miami v. Rosen, 10 So.2d 307, 151 Fla. 677.

Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Mo.—City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n, 213 S.W.2d 479, 358 Mo. 70.

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.J.—Delawanna Iron & Metal Co. v. Albrecht, 88 A.2d 616, 9 N.J. 424—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250.

Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397.

N.Y.—Fox Meadow Estates v. Livingston, 242 N.Y.S. 86, 137 Misc. 22, reversed on other grounds 252 N.Y.S. 178, 233 App.Div. 250, affirmed Fox Meadow Estates v. Culley, 185 N.E. 714, 261 N.Y. 506.

Pa.—Gratton v. Conte, 73 A.2d 381, 364 Pa. 578—Lower Merion Tp. v. Frankel, 57 A.2d 900, 358 Pa. 430—Taylor v. Moore, 154 A. 799, 393 Pa. 469.

De Biasis v. Bartell, 18 A.2d 478, 143 Pa.Super. 485.

Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700—City of Amarillo v. Meade, Civ.App., 286 S.W.2d 276, 43 C.J. p 336 note 75.

Exclusion from district

Zoning bylaw cannot be adopted to set up barrier against influx of thrifty and respectable citizens who desire to live in district in question and who are able and willing to erect homes on lots on which fair and reasonable restrictions have been imposed, or for purpose of protecting large estates already located in the district.

Mass.—Simon v. Town of Needham, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

Reasonable basis

Although a city has wide discretion in enacting zoning ordinances, it has no authority to place restrictions on one person's property and by mere favor remove such restrictions from another's property, but there must be reasonable basis for the discrimination.

Or.—Page v. City of Portland, 165 P.2d 280, 178 Or. 632.

24. Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434.

25. Mass.—City of Worcester v. New England Institute & New England School of Accounting, Inc., 140 N.E.2d 470, 335 Mass. 486.

tricts,²⁶ but extends to aid in the development of new districts.²⁷ A zoning enactment or regulation, it has been held, must be for the protection of the property restricted and not to give protection to surrounding property.²⁸

Ordinarily, the zoning power does not extend to the complete prohibition of a certain use or structure anywhere within the general limits of the municipality,²⁹ but it has been held that a zoning regulation may exclude from all zones certain structures constituting an increased fire hazard and that the fact that it does not authorize a permit to erect and maintain such a structure does not render it invalid as arbitrary, since the restriction of construction bears a direct relation to the public health and safety.³⁰

A zoning enactment, regulation, or restriction is invalid if it will cause property to be unimproved, or lie idle, for an unforeseeable time.³¹ Zoning enact-

ments may be invalid where the restrictions imposed create a monopoly.³²

Territorial limitations. In the absence of enabling legislation expressly providing otherwise, zoning enactments of a municipality are limited to its territorial boundaries and are invalid to the extent that they seek to impose zoning regulations and restrictions on land outside the city limits.³³

§ 18. Temporary or Emergency Regulation

An emergency regulation to be enforced pending investigation and enactment of a permanent zoning regulation may be valid.

Although a landowner in a zoning district has a right to expect that zoning regulations shall have a fair degree of permanency,³⁴ an emergency ordinance, with respect to building restrictions, to be enforced pending investigation and enactment of a permanent zoning ordinance may be valid,³⁵ and

26. Cal.—Zahn v. Los Angeles Bd. of Public Works, 234 P. 388, 195 C. 497.

People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

27. Cal.—Zahn v. Los Angeles Bd. of Public Works, 234 P. 388, 195 C. 497.

People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

Plan for future

A city ordinance, zoning land, well within city limits, along two intersecting roads, as part of residential district, pursuant to plan for future, notwithstanding comparatively rural conditions and scattered residences in region, was proper and effective, although much regrading would be necessary to adapt land to use for more closely built residences.

Md.—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

28. Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

29. Pa.—Appeal of Kanig, 56 Pa. Dist. & Co. 53, 47 Lack.Jur. 69, 37 Mun.L.R. 229.

Tuberculosis hospitals

Town ordinance prohibiting location of tuberculosis hospitals within town limits has been held void as in conflict with public health law. N.Y.—Jewish Consumptives' Relief Soc. v. Town of Woodbury, 243 N.Y.S. 636, 230 App.Div. 228, affirmed 177 N.E. 165, 256 N.Y. 619.

Utility

Village zoning ordinance which absolutely prohibited electric power company, a public utility corporation created and regulated by state law and charged with duty to erect and maintain transmission lines,

from constructing and maintaining a publicly needed high-tension line through village was invalid.

N.Y.—Consolidated Edison Co. of N.Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

30. N.J.—Home Fuel Oil Co. v. Borough of Glen Rock, 192 A. 516, 118 N.J.Law 340.

31. Cal.—Roney v. Board of Sup'rs of Contra Costa County, 292 P.2d 529, 138 C.A.2d 740.

"Freezing" use for future need

A city cannot "freeze property," thereby preventing owner from improving it so that he may enjoy beneficial use thereof, only because city may in future need such property in constructing a freeway.

Ohio.—Henle v. City of Euclid, 125 N.E.2d 355, 97 Ohio App. 258, appeal dismissed 122 N.E.2d 792, 162 Ohio St. 280.

32. Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Wickham v. Becker, 274 P. 397, 96 C.A. 443.

Pa.—Appeal of Kanig, 56 Pa. Dist. & Co. 53, 47 Lack.Jur. 69, 37 Mun.L.R. 229.

33. Ky.—Smeltzer v. Messer, 225 S.W.2d 96, 311 Ky. 692.

Municipality held not authorized by city charter, statewide enabling legislation, or other act to extend its zoning regulations beyond corporate limits.

N.C.—State v. Owen, 88 S.E.2d 832, 242 N.C. 525.

34. Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

35. Cal.—Lima v. Woodruff, 290 P. 480, 107 C.A. 285.

Ky.—Daugherty v. City of Lexington, 249 S.W.2d 755.

N.Y.—Hasco Elec. Corp. v. Dassler, 143 N.Y.S.2d 240.

Ohio.—State ex rel. Geletka v. City of Campbell, App., 113 N.E.2d 601, appeal dismissed 106 N.E.2d 83, 157 Ohio St. 553—Williams v. Village of Deer Park, 69 N.E.2d 536, 78 Ohio App. 231.

Interim regulations

(1) Fact that an ordinance is to some extent an interim measure does not make it invalid.

N.J.—Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.

(2) Fact that comprehensive county zoning ordinance recited that it was adopted because of "an emergency in the county" and referred to the regulation as "interim" regulations did not render it void.

Ga.—Taylor v. Shetzen, 90 S.E.2d 572, 212 Ga. 101.

Suspending other laws

Temporary ordinance restricting use of property pending enactment of permanent zoning ordinance was held not invalid as suspending city's building laws.

Ky.—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.

Annexed territory

When citizens' petition for annexation of territory was filed with city and council assented to annexation, potential jurisdiction was then attached to city and such action extended police power to permit city to enact emergency zoning regulation holding area in status quo pending final determination of annexation and zoning, and in the interim, changes made by property owners were made at their peril and they had no vested

such an ordinance may be within the power of a municipality at least where it has set up the machinery for the carrying out of the provisions of the statute dealing with zoning and the intent is merely to maintain the status quo until the general zoning ordinance can become operative.³⁶ On the other hand, an interim zoning ordinance enacted by a municipality having no power to do so is invalid.³⁷

Renewal. An attempt, by a board of county commissioners not expressly authorized by statute to do so, to renew an interim zoning ordinance from year to year is void.³⁸

§ 19. — Procedural Requirements

Although there is some authority holding that a municipality may pass a temporary zoning ordinance without complying with a statutory requirement as to hearing, it has also been held that mandatory statutory provisions as to the procedure to be followed in adopting zoning regulations cannot be disregarded or relaxed in the case of temporary or emergency ordinances.

It has been held that a statute authorizing a municipality to enact a comprehensive zoning ordinance after public hearing does not prevent the passage of

a temporary ordinance without compliance with the requirement as to hearing;³⁹ but it has also been held that the mandatory provisions of the statute with respect to the procedure to be followed in adopting zoning regulations cannot be disregarded or relaxed in the case of temporary or emergency ordinances,⁴⁰ and that a zoning ordinance is invalid even though regarded as an emergency measure, where passed without compliance with mandatory statutory provisions with respect to notice and public hearings,⁴¹ and reports containing recommendations of a zoning commission,⁴² or where not published in accordance with the requirements of law.⁴³

§ 20. Who May Attack Validity of Zoning Regulations

In general, only persons whose rights are injuriously affected by zoning regulations may attack their validity.

As a general rule, persons whose rights are not affected by a zoning ordinance or regulation or a particular provision thereof may not attack its validity.⁴⁴ Thus, the validity of a zoning regulation may not be questioned by a person whose property

right to pursue course of conduct free from lawful exercise of police power.

Tex.—City of Dallas v. Meserole, Civ. App., 155 S.W.2d 1019, error refused.

Viewed liberally and with sympathy
N.J.—Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.

Invalidity as emergency measure

Where, in attempted enactment of emergency zoning ordinance, city council failed to state reason for emergency, and for that reason ordinance lacked validity as emergency enactment, but no proceeding to institute referendum or other challenge was made during time limited for such attack, ordinance became effective in same manner as any other regular ordinance.

Ohio.—Reilly v. Conti, 112 N.E.2d 558, 93 Ohio App. 188, appeal dismissed 108 N.E.2d 281, 158 Ohio St. 232.

36. Ky.—Darlington v. Board of Councilmen of City of Frankfort, 140 S.W.2d 392, 282 Ky. 778.

37. Pa.—Kline v. City of Harrisburg, 68 A.2d 182, 362 Pa. 438.

38. Ind.—K. G. Horton & Sons, Inc. v. Board of Zoning Appeals of Madison County, 135 N.E.2d 243, 235 Ind. 510.

39. Okl.—McCurley v. City of El Reno, 280 P. 467, 138 Okl. 92.

Noncompliance with procedural requirements as affecting validity of zoning regulations generally see *infra* §§ 45-47.

40. Mo.—State ex rel. Kramer v. Schwartz, 82 S.W.2d 63, 336 Mo. 932.

Pa.—Kline v. City of Harrisburg, Com.Pl., 61 Dauph.Co. 67, affirmed 68 A.2d 182, 362 Pa. 438.

41. Mo.—State ex rel. Kramer v. Schwartz, 82 S.W.2d 63, 336 Mo. 932.

Ohio.—Morris v. Roseman, 123 N.E.2d 419, 162 Ohio St. 447.

State ex rel. Kling v. Nielsen, 144 N.E.2d 278, 103 Ohio App. 60.

Tenn.—State ex rel. Lightman v. City of Nashville, 60 S.W.2d 161, 166 Tenn. 191.

Substantial compliance not shown

Where a proposed zoning ordinance affecting newly annexed territory had been presented to city commission and there had been compliance with legal requirements as to publication of notice and public hearing but the proposed ordinance had been voted down by the commission and, on the same day, a substituted proposal had been enacted as an emergency measure without additional notice and hearing, compliance with statutory requirement as to notice and public hearing in the consideration of the rejected ordinance was not a substantial compliance with such requirements in the enactment of the emergency ordinance and such emergency ordinance was invalid.

Ohio.—State ex rel. Kling v. Nielsen, 144 N.E.2d 278, 103 Ohio App. 60.

42. Mo.—State ex rel. Kramer v. Schwartz, 82 S.W.2d 63, 336 Mo. 932.

Tenn.—State ex rel. Lightman v. City of Nashville, 60 S.W.2d 161, 166 Tenn. 191.

43. Ohio.—State ex rel. Geletka v. City of Campbell, App., 113 N.E.2d 601, appeal dismissed 106 N.E.2d 83, 157 Ohio St. 553.

44. Cal.—Ex parte Ellis, 76 P.2d 516, 25 C.A.2d 99.

Del.—Garden Court Apartments v. Hartnett, 65 A.2d 231, 45 Del. 1.

Ga.—Wofford v. City of Gainesville, 96 S.E.2d 490, 212 Ga. 818.

N.J.—Menges v. Bernards Tp., 73 A.2d 540, 4 N.J. 556.

N.Y.—Gilchrest Realty Corp. v. Village of Great Neck Plaza, 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619.

Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220—Buckley v. Fasbender, 118 N.Y.S.2d 799, modified on other grounds 121 N.Y.S.2d 3, 281 App.Div. 985.

Pa.—Huebner v. Philadelphia Sav. Fund Soc., 192 A. 139, 127 Pa.Super. 28.

Appeal of Tredyffrin Const. Co., Com.Pl., 8 Chest.Co. 85—Appeal of Murphy, Com.Pl., 62 Montg.Co. 310.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

Ground of attack

(1) Property owners not affected adversely by alleged irregularity in zoning bylaw in not providing for harmless occupation could not attack validity of bylaw on such ground.
Mass.—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547.

is not within the zoned area⁴⁵ or by a person who has been granted a permit for a nonconforming use of his property.⁴⁶ So, an owner whose property is within the favored boundaries cannot complain of lack of uniformity in a zoning enactment,⁴⁷ and a person will not be heard to complain that the rights of others are adversely affected by the provisions of a zoning ordinance,⁴⁸ or that the nonconforming use of another's property is unduly restricted.⁴⁹

On the other hand, those whose rights are or may be injuriously affected by the application or enforcement of a zoning regulation may attack its validity.⁵⁰ Thus, its validity may be attacked by the owner of property affected,⁵¹ such as the owner of

property within the zoned area and subject to the zoning regulation,⁵² or an owner whose property is in the neighborhood and is so situated that a use permitted other property injuriously affects it,⁵³ or a property owner refused a building permit because of the regulation or restriction.⁵⁴ The fact that an application for a permit under a zoning ordinance was filed by a prospective purchaser of the property, instead of by the owner, has been held not to be detrimental to the owner's action for a judgment declaring the zoning restrictions unconstitutional.⁵⁵

A cotenant in common of property affected by a zoning regulation may attack its validity on his own behalf.⁵⁶ One of several trustees, however, may

(2) Petitioner could not attack zoning ordinance on ground of alleged ambiguities existing in description of boundaries of commercial district in center of larger residential district, where commercial district was so far removed from petitioner's property that petitioner could not possibly be prejudiced.

Ill.—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568.

Ownership and residence alone insufficient

Status of resident and taxpayer of city and owner of realty situate in particular district to which zoning ordinance applies gives realty owner no right to attack validity of amendment.

N.Y.—Rose v. City of New Rochelle, 119 N.Y.S.2d 900.

Monopoly

In suit by chain store to compel city to rezone a particular parcel of property to permit commercial use thereof, store could not contend that zoning ordinance, as applied to such parcel, created a monopoly for business already existing where three of its stores were among businesses already existing in city at time of trial.

Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

45. Conn.—Kimberly v. Town of Madison, 17 A.2d 504, 127 Conn. 409.

46. N.Y.—Curtiss-Wright Corp. v. Incorporated Village of Garden City, 61 N.Y.S.2d 678, 270 App.Div. 936, affirmed 72 N.E.2d 26, 296 N.Y. 839.

47. N.Y.—Gilchrest Realty Corp. v. Village of Great Neck Plaza, 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619.

48. Va.—Fairfax County v. Parker, 44 S.E.2d 9, 186 Va. 675.

49. N.J.—H. Behlen & Bros., Inc. v. Mayor and Council of Town of

Kearny, 105 A.2d 894, 31 N.J.Super. 30.

Wis.—Rowland v. City of Racine, 271 N.W. 36, 223 Wis. 488.

50. Iowa.—Keller v. City of Council Bluffs, Iowa, 66 N.W.2d 113, 246 Iowa 202, 51 A.L.R.2d 251.

Mass.—Sunderland v. Building Inspector of North Andover, 105 N.E.2d 471, 328 Mass. 638.

Minn.—Connor v. Township of Chanhassen, 81 N.W.2d 789, 249 Minn. 205.

N.J.—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250—Menges v. Bernards Tp., 73 A.2d 540, 4 N.J. 556.

S. H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 105 A.2d 894, 31 N.J.Super. 30.

Pa.—Scholl v. Borough of Yeadon, 26 A.2d 135, 148 Pa.Super. 601.

"Aggrieved parties"

Owners of property in neighborhood of one given permit to construct building of size ordinance prohibited them from constructing were "aggrieved parties" within zoning statute entitled to question validity of ordinance.

Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 172 N.E. 710, 340 Ill. 284.

Availability of other locations for operating junk yard by complying with provisions of zoning ordinance did not abridge property owner's rights to question their validity.

Ill.—City of Watseka v. Blatt, 50 N.E.2d 589, 320 Ill.App. 191.

Single provision

Property owner may attack one clause of one section of zoning ordinance although conceding that ordinance generally was valid.

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

51. Ohio.—Henie v. City of Euclid, App., 118 N.E.2d 682.

52. N.J.—Borough of Cresskill v.

Borough of Dumont, 104 A.2d 441, 15 N.J. 238.

S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

53. Md.—Cassel v. Mayor & City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

Mass.—Sunderland v. Building Inspector of North Andover, 105 N.E.2d 471, 328 Mass. 638.

N.J.—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250.

H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 105 A.2d 894, 31 N.J.Super. 30.

N.Y.—Buckley v. Fasbender, 121 N.Y.S.2d 3, 281 App.Div. 985.

Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

Santmyers v. Town of Oyster Bay, 169 N.Y.S.2d 959—Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220.

Nonconforming use

Property owners had standing to challenge validity of zoning regulations relating to nonconforming uses, in so far as they related to nonconforming use of other properties within the same zone.

N.J.—H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 105 A.2d 894, 31 N.J.Super. 30.

Spot zoning

Owners of property in a zoned area may object to spot zoning discriminatory to them.

N.J.—H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, supra.

54. Ohio.—State ex rel. Lieux v. Village of Westlake, 96 N.E.2d 414, 154 Ohio St. 412.

Pa.—Scholl v. Borough of Yeadon, 26 A.2d 135, 148 Pa.Super. 601.

55. Ohio.—Henie v. City of Euclid, App., 118 N.E.2d 682.

56. N.Y.—Jones v. Incorporated Village of Lloyd Harbor, 100 N.Y.S.2d 948, 277 App.Div. 1124, affirmed 98 N.E.2d 589, 302 N.Y. 718.

not alone maintain an action to test the validity of zoning regulations affecting the trust estate, where the question of whether the action is in the best interests of the trust estate and should be maintained in behalf of it requires the exercise of discretion by the trustees.⁵⁷

An owner of property who chooses to commence an action to have a zoning ordinance declared illegal rather than attempt to have it amended so as to exempt his property is not entitled to complain because the municipality did not appoint a board of appeals.⁵⁸

A municipality cannot question the validity of its own zoning ordinance.⁵⁹

Exhaustion of administrative remedies. In general, a person who has not exhausted the administrative remedies available to him may not attack the validity of a zoning enactment.⁶⁰ As long as there is a possibility of the removal of certain property from alleged detrimental restrictions, the owner thereof has not suffered such injury as to entitle him to attack the restrictions as invalid.⁶¹ Thus, unless it could not be granted,⁶² a property owner who has failed to apply for a variance or permit may not

challenge the validity of a zoning regulation or restriction.⁶³ An owner, however, who believes a zoning enactment or restriction to be invalid in its entirety has been held not required to seek a variance or exemption from its application in order to attack its validity.⁶⁴

Purchase after cure of previously existing defect. An owner who purchased his land after constitutional and statutory changes had cured any previously existing defect in the zoning regulation has been held to have no vested right in the use of the land which would permit him to challenge the validity of the regulation.⁶⁵

§ 21. — Waiver, Estoppel, or Laches

- a. In general
- b. Purchaser of property

a. In General

A person may waive, or be estopped to question, the validity of zoning enactments, regulations, and restrictions.

The right to attack the validity of a zoning ordinance may be waived,⁶⁶ or a party by his actions may be precluded from attacking the ordinance.⁶⁷

57. N.Y.—Jones v. Incorporated Village of Lloyd Harbor, *supra*.

58. N.Y.—Brown v. Village of Owego, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655.

59. N.J.—Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.

60. Ohio.—State ex rel. Lieux v. Village of Westlake, 96 N.E.2d 414, 154 Ohio St. 412.

61. Pa.—Taylor v. Haverford Tp., 149 A. 639, 299 Pa. 402.

62. N.Y.—O'Brien Transfer & Storage Co., Inc. v. The Incorporated Village of Great Neck, 152 N.Y.S.2d 588, 2 A.D.2d 690.

63. U.S.—Downham v. City Council of Alexandria, D.C.Va., 58 F.2d 784. N.Y.—New York Trap Rock Corp. v. Town of Clarkstown, 149 N.Y.S.2d 290, 1 A.D.2d 890.

People v. Calvar Corp., 69 N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

Town, which had not requested permission of villages contained in town to acquire certain property within village for park purposes, could not attack village's zoning ordinances restricting such use, since it will be assumed that in a proper case, permission would be granted.

N.Y.—Incorporated Village of Lloyd Harbor v. Town of Huntington, 157 N.Y.S.2d 442, 3 Misc.2d 849, affirmed 165 N.Y.S.2d 705, 4 A.D.2d 763.

64. N.Y.—Union Free School Dist.

No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park, 102 N.Y.S.2d 81, 198 Misc. 932, affirmed 103 N.Y.S.2d 832, 278 App.Div. 706—Vangellow v. City of Rochester, 71 N.Y.S.2d 672, 190 Misc. 128.

Proper procedure

An attack on legality of city zoning ordinance prior to request for variance is proper procedure.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517, 307 N.Y. 493.

65. N.J.—Lappas v. Board of Adjustment of Borough of Westwood, Bergen County, 93 A.2d 406, 23 N.J.Super. 553.

66. Ill.—Village of Riverside v. Kuhne, 73 N.E.2d 286, 397 Ill. 108, transferred, see, 82 N.E.2d 500, 335 Ill.App. 547.

Miss.—Walker v. City of Biloxi, 92 So.2d 227.

Estoppel to assert validity of zoning ordinance see *infra* § 44.

Waiver may be shown by fact that right to attack validity was not invoked.

N.Y.—Brous v. Town of Hempstead, 69 N.Y.S.2d 253, 272 App.Div. 31, amended on other grounds 70 N.Y.S.2d 576, 272 App.Div. 777.

Waiver not shown

(1) In general. Conn.—National Transp. Co. v. Toquet, 196 A. 344, 123 Conn. 468.

N.Y.—Vernon Park Realty v. City of

Mount Vernon, 121 N.E.2d 517, 307 N.Y. 493.

(2) Failure to invoke constitutional right, in certiorari proceeding in which denial of property owner's application for a special exception permit to erect proposed buildings notwithstanding zoning ordinance was confirmed, did not bar separate action to have zoning ordinance declared unconstitutional.

N.Y.—Brous v. Town of Hempstead, 69 N.Y.S.2d 253, 272 App.Div. 31, amended on other grounds 70 N.Y.S.2d 576, 272 App.Div. 777.

(3) In city's suit to enjoin property owner from using his realty in a manner in violation of city's zoning ordinance, defendant could deny that he had violated the ordinance and also assert that ordinance was invalid.

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

Evidence as to waiver

Conn.—National Transp. Co. v. Toquet, 196 A. 344, 123 Conn. 468.

67. Miss.—Walker v. City of Biloxi, 92 So.2d 227.

Va.—Blankenship v. City of Richmond, 49 S.E.2d 321, 188 Va. 97.

Finality of decision of commission

Where it did not appear from the record that property owners had made any objection to another property owner's application to change for use or rezoned certain property to commercial and it did affirmatively

So, a person who has entered into a contractual agreement not to question the validity of a zoning ordinance may be precluded from attacking the ordinance in violation of the agreement.⁶⁸

Delay in attacking validity. Mere delay in attacking the validity of a zoning enactment with nothing to show that prejudice resulted to the town does not constitute laches,⁶⁹ so as to preclude a landowner from attacking its validity as applied to his land.⁷⁰ So, where the granting of relief would not be prejudicial to any inhabitant of the municipality, one who did not know of the invalidity of the ordinance until he instituted proceedings attacking it three years after its adoption is not estopped to bring his suit.⁷¹

A property owner who has entirely acquiesced in a zoning classification for a considerable period of time during which another owner has made large investments in reliance on such classification may be estopped, however, by waiver and laches to assert

that the property is improperly zoned;⁷² and waiver, estoppel, or laches may operate to preclude an attack on the validity of a zoning enactment because of noncompliance with formal requirements in the manner of its enactment, where it has been recognized and its validity relied on for many years.⁷³

Recognition of regulation or acceptance of benefits thereunder. Although compliance with a zoning enactment does not necessarily constitute a waiver of the right to contest its constitutionality,⁷⁴ a property owner who has accepted benefits thereunder is estopped to challenge its validity;⁷⁵ and hence where he has recognized and utilized zoning regulations by proceeding under them, it is not open to him to attack them as invalid.⁷⁶ Thus, he waives the right, or is estopped, to contest their validity, where he has applied for and accepted a special use permit,⁷⁷ or successfully applied for a variance.⁷⁸

An applicant for relief under a zoning enactment,

appear that property owners had had notice of the application, had been afforded an opportunity to be heard but had failed to appear and protest, property owners' objections to portion of zoning ordinance, providing that decision of city commission on an application to change for use or rezone property shall be final and conclusive as to all matters and things involved in the petition, on ground that it violated due process clauses of state and federal constitutions, could not be considered. Ga.—Brown v. City of Brunswick, 83 S.E.2d 12, 210 Ga. 738.

Estoppel not shown

Conn.—National Transp. Co. v. Toquet, 196 A. 344, 123 Conn. 468.
N.Y.—Huntley Estates, Inc. v. Town of Eastchester, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App.Div. 1090.

68. N.Y.—Kelley v. Levitt & Sons, 28 N.Y.S.2d 175, 262 App.Div. 92, reargument denied 29 N.Y.S.2d 726, 262 App.Div. 891.

Nature of agreement

Agreements not to violate or question validity of village building zone ordinance, entered into by parties on behalf of themselves and others with whom they were or might become associated, were not ordinary "restrictive covenants running with the land," but in effect incorporated in the agreements all provisions of the zone ordinance.
N.Y.—Kelley v. Levitt & Sons, supra.

Property conveyed by municipality

Where portions of plaintiffs' realty was conveyed to plaintiffs by city after a tax foreclosure after official street map of city became effective, official map requiring a ten-foot set-

back line for new building was binding on plaintiffs as a private contract irrespective of whether official act was valid as to other of plaintiffs' property.

N.Y.—Vangellow v. City of Rochester, 71 N.Y.S.2d 672, 190 Misc. 128.
69. Mass.—Cohen v. City of Lynn, 132 N.E.2d 664, 333 Mass. 699—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

Merely acquiescence, irrespective of the length thereof, cannot legalize clear usurpation of power offending against the basic law.

Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91.

Building line

A property owner's failure to assert invalidity of proceedings to establish building line on a certain street for more than fifteen years did not estop property owner thereafter to assert invalidity of proceedings, in absence of showing that municipality or any other party was prejudiced by such failure.

Conn.—Alderman v. Town of West Haven, 200 A. 330, 124 Conn. 391.

70. Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

71. Conn.—State ex rel. De Gregorio v. Woodruff, 60 A.2d 653, 135 Conn. 31.

72. Colo.—Fifth Church of Christ, Scientist, in Denver v. W. F. Pigg & Son, 122 P.2d 387, 109 Colo. 103.

73. Miss.—Walker v. City of Biloxi, 92 So.2d 227.

Noncompliance with procedural requirements as affecting validity of regulation generally see *infra* §§ 45-47.

Procedural irregularities

(1) A person may be barred by laches from complaining of irregularities which are merely procedural, such as that the ordinance had not been published in a qualified newspaper as required by statute.

N.J.—Benequit v. Borough of Monmouth Beach, 13 A.2d 847, 125 N.J. Law 65.

(2) Zoning ordinance will not be invalidated ten years after its enactment for any irregularity with respect to making of written reports which assertedly should be filed with the municipal records at the time of enactment.

N.J.—Struyk v. Samuel Braen's Sons, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294.

74. Ohio.—Miesz v. Village of Mayfield Heights, 111 N.E.2d 20, 92 Ohio App. 471.

75. N.C.—Convent of Sisters of St. Joseph of Chestnut Hill v. City of Winston-Salem, 90 S.E.2d 879, 243 N.C. 316.

76. Conn.—Strain v. Zoning Board of Appeals of Town of Greenwich, 74 A.2d 462, 137 Conn. 36—Chudnov v. Board of Appeals of Town of Bloomfield, 154 A. 161, 113 Conn. 49.

77. Conn.—Heady v. Zoning Bd. of Appeals for Town of Milford, 94 A.2d 789, 139 Conn. 463.

N.C.—Convent of Sisters of St. Joseph of Chestnut Hill v. City of Winston-Salem, 90 S.E.2d 879, 243 N.C. 316.

78. Conn.—Heady v. Zoning Bd. of Appeals for Town of Milford, 94 A.2d 789, 139 Conn. 463.

regulation, or restriction may not in that proceeding attack its validity,⁷⁹ and hence an applicant for an exception or variance to a zoning enactment⁸⁰ or a person in an appeal taken under the provisions of a zoning regulation⁸¹ cannot question, in that proceeding, the constitutionality or validity of the enactment or regulation.

On the other hand, a test of the constitutionality or validity of a zoning ordinance, regulation, or restriction is not barred by proceedings authorized by the zoning laws.⁸² The fact that a person has exhausted the administrative remedies available to him will not preclude him from later attacking the validity of the zoning regulation or restriction.⁸³ A property owner's right to attack the validity of a zoning regulation or restriction in a subsequent independent proceeding is not waived, nor is he estopped, by the circumstance that he has on a previ-

ous occasion unsuccessfully applied for a variance, exception, or permit,⁸⁴ and failed to present the question of validity in his application therefor,⁸⁵ or that he has unsuccessfully sought the rezoning of his property,⁸⁶ or taken an appeal under the provisions of a zoning regulation.⁸⁷

b. Purchaser of Property

As a general rule, a purchaser of property affected by zoning regulations is not by his act of purchase estopped to attack the validity of the regulations.

Although there is some authority to the contrary,⁸⁸ as a general rule, a purchaser of property subject to, or affected by, certain zoning regulations or restrictions is not by his act of purchase estopped to attack the validity of the regulation or restriction,⁸⁹ even though the purchase was made with knowledge of the restriction.⁹⁰ Such a person,

79. Cal.—*Rubin v. Board of Directors of City of Pasadena*, 104 P.2d 1041, 16 C.2d 119.

Conn.—*Florentine v. Darien*, 115 A.2d 328, 142 Conn. 415.

Ohio.—*State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph*, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.

Utah.—*Dewey v. Doxey-Layton Realty Co.*, 277 P.2d 805, 3 Utah 2d 1.

W.Va.—*Carter v. City of Bluefield*, 54 S.E.2d 747, 132 W.Va. 881.

At later stage

Property owner by his application for modification of a zoning ordinance and recourse to the zoning board of appeals recognizes its validity, and may not at a later stage of the proceedings claim that it is unconstitutional.

Conn.—*Lathrop v. Town of Norwich*, 151 A. 183, 111 Conn. 616.

80. Cal.—*Rubin v. Board of Directors of City of Pasadena*, 104 P.2d 1041, 16 C.2d 119.

R.I.—*Sweck v. Zoning Bd. of Review of North Kingstown*, 72 A.2d 679, 77 R.I. 8—*Allen v. Zoning Bd. of Review of City of Warwick*, 66 A.2d 369, 75 R.I. 321.

81. Conn.—*Strain v. Zoning Board of Appeals of Town of Greenwich*, 74 A.2d 462, 137 Conn. 36—*National Transp. Co. v. Toquet*, 196 A. 344, 123 Conn. 463—*Chudnov v. Board of Appeals of Town of Bloomfield*, 154 A. 161, 113 Conn. 49.

82. N.Y.—*Baddour v. City of Long Beach*, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431.

Pa.—*Appeal of Medinger*, 104 A.2d 118, 377 Pa. 217.

83. U.S.—*Proffett v. Valley View Village*, 123 F.Supp. 339, reversed on other grounds *Valley View Village v. Proffett*, D.C.Ohio, 221 F.2d 412.

Ohio.—*State ex rel. Lieux v. Village of Westlake*, 96 N.E.2d 414, 154 Ohio St. 412.

84. Conn.—*Florentine v. Town of Darien*, 115 A.2d 328, 142 Conn. 415—*Gionfriddo v. Town of Windsor*, 81 A.2d 266, 137 Conn. 701.

N.Y.—*Vernon Park Realty v. City of Mount Vernon*, 121 N.E.2d 517, 307 N.Y. 493—*Baddour v. City of Long Beach*, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431.

Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County, 60 N.Y.S. 2d 750, 271 App.Div. 33.

W.Va.—*Carter v. City of Bluefield*, 54 S.E.2d 747, 132 W.Va. 881.

Concurrent remedy

Right to seek permit for a variance and right to attack zoning ordinance as unconstitutional are concurrent and nonexclusive remedies, the former assumes validity of the ordinance and the latter attacks it. N.Y.—*Diocese of Rochester Planning Bd. of Town of Brighton*, 147 N.Y. S.2d 392, 1 A.D.2d 86, reversed on other grounds 154 N.Y.S.2d 849, 1 N.Y.2d 508, 136 N.E.2d 827.

85. N.Y.—*Arverne Bay Const. Co. v. Thatcher*, 294 N.Y.S. 926, 250 App.Div. 482.

86. U.S.—*Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.*, C.C.A.Mo., 58 F.2d 593.

87. Conn.—*National Transp. Co. v. Toquet*, 196 A. 344, 123 Conn. 468. *Ribeiro v. Town of Andover*, 116 A.2d 769, 19 Conn.Sup. 438.

88. Minn.—*State ex rel. Howard v. Village of Roseville*, 70 N.W.2d 404, 244 Minn. 343.

89. Fla.—*Mayer v. Dade County*, 82 So.2d 513—*City of Miami v. Rosen*, 10 So.2d 307, 151 Fla. 677—*City of Miami Beach v. Ocean & Inland Co.*, 200 So. 402, 146 Fla. 145.

Ill.—*Bolger v. Village of Mount Prospect*, 141 N.E.2d 22, 10 Ill.2d 596—*People ex rel. Alco Deree Co. v. City of Chicago*, 118 N.E.2d 20, 2 Ill.2d 350—*Trust Co. of Chicago v. City of Chicago*, 96 N.E.2d 499, 408 Ill. 91—*Harmon v. City of Peoria*, 27 N.E.2d 525, 373 Ill. 594—*Forbes v. Hubbard*, 180 N.E. 767, 348 Ill. 166.

City of Watseka v. Blatt, 50 N.E. 2d 589, 320 Ill.App. 191.

N.Y.—*Mallett v. Village of Mamaroneck*, 123 N.Y.S.2d 249, reversed on other grounds 131 N.Y.S.2d 504, 283 App.Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821.

Ohio.—*Murdock v. City of Norwood*, Com.Pl., 67 N.E.2d 867.

W.Va.—*Carter v. City of Bluefield*, 54 S.E.2d 747, 132 W.Va. 881.

Equitable owner

School district which had a right to acquire school sites when authorized by the voters and which had entered into a contract of purchase was authorized to attack validity of zoning ordinance excluding erection of schools in village, whether or not it might withdraw from contract.

N.Y.—*Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park*, 102 N.Y.S.2d 81, 198 Misc. 932, affirmed 103 N.Y.S.2d 831, 278 App.Div. 706.

90. N.Y.—*Plymouth Builders v. Village of Lindenhurst*, 134 N.Y.S.2d 225, 284 App.Div. 895.

however, does not occupy as favorable a position as an owner who purchased prior to the enactment of the zoning restriction and in reliance on the existing zoning regulations.⁹¹ One who purchased land in an area strictly residential with full knowledge that an adjacent area was zoned for other uses has been held precluded from later objecting to use of the unrestricted area in the manner permitted by the zoning regulations.⁹²

Estoppel by acts of predecessor in title. A purchaser stands in the place of his grantor and is estopped by acts of his predecessor in title which would have estopped the latter to contest the validity of the zoning enactment,⁹³ as by the vendor's waiver of the right to question its validity by the acceptance of benefits thereunder.⁹⁴ It has been held, however, that a purchaser is not prevented from attacking the validity of the restriction by the failure of his predecessor in title to challenge its validity.⁹⁵

§ 22. Effect of Invalidity

An invalid zoning enactment or regulation is without effect and does not affect the right of an owner of property to use such property in any manner he sees fit.

An invalid zoning enactment or regulation is without effect.⁹⁶ It does not affect the right of an owner of property to use such property in any man-

ner he sees fit,⁹⁷ or in a manner which was proper prior to the enactment of the invalid provision;⁹⁸ and a use authorized by an invalid enactment has been held illegal after the enactment was declared invalid.⁹⁹ A validating act, passed pursuant to a constitutional zoning amendment, has been held not to revive a previously invalid ordinance so as to impair rights then existing.¹

Where a zoning enactment prohibits the use of property in a specified district other than for enumerated uses, the invalidity of a provision that other uses may be permitted as a special exception will give an owner of property in the district no absolute right to use his property for other than the enumerated uses.²

§ 23. — Partial Invalidity

The invalidity of a portion of a zoning regulation will not render the entire regulation invalid where the invalid portion is separable from the rest and the legislative purpose can be made effective by sustaining the ordinance in part.

The invalidity of a portion of a zoning enactment or regulation will not render the entire regulation invalid where the portion which is invalid is separable from the rest and the legislative purpose can be made effective by sustaining the ordinance in part,³ at least where the zoning enactment provides

Huntley Estates, Inc. v. Town of Eastchester, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App.Div. 1090.

Reason for rule

Zoning ordinance has reference to land rather than to the owner. N.Y.—Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517, 307 N.Y. 493.

91. Ill.—People ex rel. Alco Deree Co. v. City of Chicago, 118 N.E.2d 20, 2 Ill.2d 350.

92. S.D.—Luedke v. Carlson, 41 N.W.2d 552, 73 S.D. 240.

93. Ill.—Reitman v. Village of River Forest, 137 N.E.2d 801, 9 Ill.2d 448.

94. N.C.—Convent of Sisters of St. Joseph of Chestnut Hill v. City of Winston-Salem, 90 S.E.2d 879, 243 N.C. 316.

95. N.Y.—Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App.Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.

Long acquiescence by predecessor in title does not defeat right to test constitutionality of zoning ordinance. N.Y.—Vernon Park Realty, Inc. v. City of Mount Vernon, 125 N.Y.S.

2d 112, 282 App.Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.

96. Conn.—Jack v. Torrant, 71 A.2d 705, 136 Conn. 414.

Ga.—Humthlett v. Reeves, 90 S.E.2d 14, 212 Ga. 8.

Ohio.—State ex rel. Geletka v. City of Campbell, App., 113 N.E.2d 601, appeal dismissed 106 N.E.2d 83, 157 Ohio St. 553.

97. N.J.—Borshesky v. Board of Works of City of Elizabeth, 150 A.237, 8 N.J.Misc. 386.

98. Mich.—M. and S. Builders v. City of Dearborn, 73 N.W.2d 283, 344 Mich. 17.

99. Tenn.—Henry v. White, 259 S.W.2d 862, 195 Tenn. 383.

1. N.J.—Borshesky v. Board of Works of City of Elizabeth, 150 A.237, 8 N.J.Misc. 386.

2. N.Y.—Brous v. Town of Hempstead, 69 N.Y.S.2d 258, 272 App.Div. 31, amended on other grounds 70 N.Y.S.2d 576, 272 App.Div. 777.

3. Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 C.A. 277.

People v. Binzley, 303 P.2d 903, 146 C.A.2d Supp. 889.

Ill.—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

N.J.—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.

Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights in Bergen County, 99 A.2d 591, 27 N.J.Super. 476, reversed on other grounds 105 A.2d 521, 15 N.J. 447—Lionshead Lake v. Wayne Tp., Passaic County, 74 A.2d 609, 9 N.J.Super. 83—N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge, 69 A.2d 767, 6 N.J. Super. 495.

N.Y.—Gilchrest Realty Corp. v. Village of Great Neck Plaza, 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619.

Gordon v. Town of Hempstead, 93 N.Y.S.2d 250, 196 Misc. 954—Ballard v. Roth, 253 N.Y.S. 6, 141 Misc. 319.

Crossroads Realty v. Gilbert, 109 N.Y.S.2d 59.

Pa.—Appeal of Junge, 89 Pa.Super. 548.

Commonwealth ex rel. v. Debaldo, 99 Pittsb.Leg.J. 155.

43 C.J. p 551 note 58 [a] (3).

that the invalidity of any section or provision thereof shall not invalidate any other section or provision.⁴ Under this rule the invalid part of the enactment is not inseparable from the remainder, unless all of the parts are so interdependent that to eliminate the invalid part would destroy the force of the whole.⁵

A zoning regulation which is in accordance with the statute and reasonable in character cannot be overthrown in its entirety even if in it there are instances of spot zoning which might be successfully attacked by a person who could show that his particular interests have been adversely affected.⁶

Regulatory and penal provisions. In the application of the general rule, the regulatory provisions of zoning enactments are separable from the penal

provisions.⁷ The invalidity of a penal provision of a zoning ordinance prohibiting certain uses of property in defined areas does not necessarily render void other provisions of the ordinance constituting a rule of civil conduct, since an act which is insufficient as a penal act may still be valid as a rule of civil conduct.⁸ So, a defective penalty clause, being separable from the balance of the ordinance, does not render such balance invalid so as to be incapable of amendment by the enactment of a valid penalty clause.⁹

Void emergency provision. Where the emergency provision of a zoning ordinance is invalid, the ordinance is not a factor to be considered in determining whether a building permit applied for prior to its enactment should have been granted.¹⁰

2. PARTICULAR MATTERS AFFECTING VALIDITY OF EXERCISE OF POWER

§ 24. In General

The validity of a zoning plan usually depends on whether the scheme of zoning is as a whole sound and whether the scheme of classification and districting ap-

plies fairly and impartially in each instance, taking into consideration public and private interests.

The validity of a zoning plan usually depends on whether the scheme of zoning is as a whole sound,¹¹

Inoperative provision

Where zoning ordinance was invalid with respect to classifying entire town as residential in that some property was not suited for residences, even if section excluding use of any premises within boundaries of residential district as junk or salvage yard were valid, it was inoperative since there was no residential district to which it could apply.

Wis.—Town of Hobart v. Collier, 87 N.W.2d 868, 3 Wis.2d 182.

Rule applied as to invalidity of particular provisions

(1) Generally.

Cal.—Bailey v. Los Angeles County, 293 P.2d 449, 46 C.2d 132.

Fla.—Phillips Petroleum Co. v. Anderson, 74 So.2d 544.

Vt.—Thompson v. Smith, 129 A.2d 638, 119 Vt. 488.

(2) Relative to completion of building for which permit had been granted.

Conn.—Fitzgerald v. Merard Holding Co., 147 A. 513, 110 Conn. 130, certiorari denied Merard Holding Co. v. Fitzgerald, 50 S.Ct. 247, 281 U.S. 732, 74 L.Ed. 1148.

(3) Authorizing council to grant permits without fixing standard.

La.—Bultman Mortuary Service v. City of New Orleans, 140 So. 503, 174 La. 360.

(4) Authorizing board to vary or modify application of ordinance in cases of practical difficulties or unnecessary hardships.

Ill.—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568.

Md.—Jack Lewis, Inc. v. Mayor and City Council of Baltimore, 164 A. 220, 164 Md. 146, appeal dismissed 54 S.Ct. 56, 290 U.S. 585, 78 L.Ed. 517.

N.Y.—Brous v. Town of Hempstead, 69 N.Y.S.2d 258, 272 App.Div. 31, amended on other grounds 70 N.Y.S.2d 576, 272 App.Div. 777.

(5) Prohibiting private schools in residential area unless approved by vote of percentage of frontage owners.

N.J.—Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 11 N.J. 341.

4. Ky.—Daugherty v. City of Lexington, 249 S.W.2d 755.

N.J.—Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 11 N.J. 341.

Declaration of intent

A severability clause in the enactment may be considered as a declaration of intention by the enacting body that a separable invalid portion of the enactment should not destroy the whole.

Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762.

5. Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, supra.

Test of inseparability

Invalid provision is inseparable from balance of municipal ordinance if the whole legislation depends on such invalid provision.

N.J.—Scharf v. Recorder's Court of Borough of Ramsey, 59 A.2d 595,

137 N.J.Law 231, affirmed 61 A.2d 765, 1 N.J. 59.

6. Mass.—Town of Marblehead v. Rosenthal, 55 N.E.2d 13, 316 Mass. 124.

Spot zoning as affecting validity of regulation see infra § 34.

7. N.J.—Scharf v. Recorder's Court of Borough of Ramsey, 59 A.2d 595, 137 N.J.Law 231, affirmed 61 A.2d 765, 1 N.J. 59.

8. Tex.—Eckert v. Jacobs, Civ.App., 142 S.W.2d 374.

Enforcement by injunction

Criminal provisions of a zoning ordinance which prohibited sale of beer in defined areas were severable from regulatory provisions of ordinance, where violation of regulatory provisions could, under provisions of ordinance, have been effectively enforced by injunction against pursuance of business of selling beer in prohibited areas.

Tex.—Eckert v. Jacobs, supra.

9. N.J.—Scharf v. Recorder's Court of Borough of Ramsey, 59 A.2d 595, 137 N.J.Law 231, affirmed 61 A.2d 765, 1 N.J. 59.

10. Ohio.—State ex rel. Geletka v. City of Campbell, App., 113 N.E.2d 601, appeal dismissed 106 N.E.2d 83, 157 Ohio St. 553.

11. Ala.—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Cal.—Miller v. Los Angeles Bd. of Public Works, 234 P. 381, 195 C. 477, 38 A.L.R. 1479.

N.C.—Elizabeth City v. Aydtlett, 161 S.E. 78, 201 N.C. 602.

Tex.—City of Corpus Christi v.

that is to say, whether the method of classification and the districting are reasonably necessary to the public health, safety, morals, or general welfare;¹² and whether the scheme of classification and districting applies fairly and impartially in each instance.¹³

While zoning regulations may involve complicated and conflicting elements and interests,¹⁴ it is generally the rule that such regulations may and should take account of the statutory considerations to be served by zoning,¹⁵ and be designed to achieve the purposes specified in the statute conferring the zoning power.¹⁶ As long as the grounds demanded by

the statute exist for zoning, there is no sound objection to the consideration of cost of municipal services in the establishment of the zones.¹⁷ All questions affecting the public¹⁸ and private¹⁹ interests must be considered. Zoning ordinances are not concerned, however, with the question of the economic rules of supply and demand²⁰ and are not media through which restrictions may be placed on one who may engage in legitimate enterprise.²¹

Although no one factor is controlling,²² zoning regulations may and should take into consideration the character of particular districts,²³ and the restrictions imposed should take account of the nature

Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

Purpose and relationship

In determining the validity of a zoning ordinance, the prime consideration is the general purpose and relationship of ordinance and not the hardship of an individual case.

Iowa.—Boardman v. Davis, 3 N.W.2d 608, 231 Iowa 1227.

12. Cal.—Miller v. Los Angeles Bd. of Public Works, 234 P. 381, 195 C. 477, 38 A.L.R. 1479.

Conn.—Fairlawn Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 343.

Mass.—Foster v. Mayor of City of Beverly, 53 N.E.2d 693, 315 Mass. 567, 151 A.L.R. 737.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.Y.—People v. Daly, 28 N.Y.S.2d 603—City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed judgment correct.

13. Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Cal.—Miller v. Los Angeles Bd. of Public Works, 234 P. 381, 195 C. 477, 38 A.L.R. 1479.

Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

Mo.—Ryan v. City of Warrensburg, 117 S.W.2d 303, 342 Mo. 761.

N.C.—Elizabeth City v. Aydtlett, 161 S.E. 78, 201 N.C. 602.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

14. Mass.—Ayer v. Boston Comrs. on Height of Bldgs., 136 N.E. 338, 242 Mass. 30.

15. Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

N.J.—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.

Tex.—Ham v. Weaver, Civ.App., 227 S.W.2d 286, reversed on other grounds 232 S.W.2d 704, 149 Tex. 309.

16. Mass.—Commonwealth v. Bragg, 103 N.E.2d 413, 328 Mass. 327—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308 Mass. 128.

N.J.—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 134.

Crow v. Town of Westfield, 56 A.2d 403, 136 N.J.Law 363—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J.Law 195, affirmed Appley v. Township Committee of Township of Bernards, 28 A.2d 197, 129 N.J.Law 73.

Tex.—City of Dallas v. Meserole, Civ. App., 155 S.W.2d 1019, error refused.

17. N.J.—Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.

18. Ala.—Chapman v. City of Troy, 4 So.2d 1, 241 Ala. 637. 43 C.J. p 337 note 87.

Welfare of whole city must be kept in view.

Ala.—Chapman v. City of Troy, supra.

Need of community

Zoning restrictions on a district enacted by the governing bodies of municipalities must be founded on a need of the community and to carry out the policy of the zoning statutes. N.J.—Crow v. Town of Westfield, 56 A.2d 403, 136 N.J.Law 363.

Effect on surrounding areas

(1) In determining what uses should be permitted in a zoned area, zoning authorities are entitled to consider effect of such uses on surrounding areas and to weigh possibility of injury to those areas by reason of permitting various types of activity, as against desirability of allowing other uses.

Cal.—Lockard v. City of Los Angeles, Cal., 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

(2) A town board, in exercising its legislative power to zone property in town, must consider over-all effect on area zoned and adjacent areas.

N.Y.—Hewlett v. Town of Hempstead, 133 N.Y.S.2d 690, 3 Misc.2d 945, affirmed 150 N.Y.S.2d 922, 1 A.D.2d 954.

19. Mass.—Ayer v. Boston Comrs. on Height of Bldgs., 136 N.E. 338, 242 Mass. 30.

Loss

In determining whether general welfare requires enactment of zoning ordinance interfering with property rights, municipality should, and presumably does, consider resulting loss to property owners.

Fla.—State ex rel. Skillman v. City of Miami, 134 So. 541, 101 Fla. 585.

Offensiveness to neighbors held not test

N.J.—Pequannock Tp. v. De Wilde, 91 A.2d 410, 21 N.J.Super. 517.

20. Ohio.—Henle v. City of Euclid, 125 N.E.2d 355, 97 Ohio App. 258, appeal dismissed 122 N.E.2d 792, 162 Ohio St. 280.

Housing shortage does not justify judgment voiding operation of zoning ordinance for all time to come.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Donovan v. City of Santa Monica, 199 P.2d 51, 38 C.A.2d 386.

21. Ohio.—Henle v. City of Euclid, 125 N.E.2d 355, 97 Ohio App. 258, appeal dismissed 122 N.E.2d 792, 162 Ohio St. 280.

22. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537.

23. Ill.—Myers v. City of Elmhurst, supra—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 61—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—Anderman v. City of Chicago, 40 N.E.2d 51, 379 Ill. 236.

Md.—Cassell v. Mayor and City Council of Baltimore, 73 A.2d 486, 195

and extent of existing uses of property within a neighborhood,²⁴ even though an intervening municipal line sets part of the neighborhood off into another municipality.²⁵ Zoning restrictions may and

should also take into consideration the future development of the municipality²⁶ and the direction of municipal improvements²⁷ and building development.²⁸ It is also proper and necessary to give con-

Md. 348—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Mass.—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308 Mass. 128.

Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182—Oliva v. City of Garfield, 62 A.2d 678, 1 N.J. 184.

Gartland v. Borough of Maywood, 131 A.2d 529, 45 N.J.Super. 1—Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397—De Benedetti v. River Vale Tp., Bergen County, 91 A.2d 353, 21 N.J.Super. 430—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535—Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J.Super. 405—Lionshead Lake v. Wayne Tp., 73 A.2d 287, 8 N.J.Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J.Super. 83—Collins v. Board of Adjustment of City of Margate, 67 A.2d 332, 3 N.J.Super. 553, affirmed 69 A.2d 708, 3 N.J. 200.

Crow v. Town of Westfield, 58 A.2d 403, 136 N.J.Law 363—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J.Law 195, affirmed Appley v. Township Committee of Township of Bernards, 28 A.2d 177, 129 N.J.Law 73.

N.Y.—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—City of Olean v. Conkling, 283 N.Y.S. 66, 157 Misc. 63.

Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App.Div. 890, affirmed 121 N.E.2d 517, 307 N.Y. 493—City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Pa.—Appeal of Borough of Speers, Quar.Sess., 28 Wash.Co. 234. 43 C.J. p 337 note 84.

Specific considerations

Considerations which may validly apply to influence the way property

in a district may be classified under zoning ordinance are prior existing uses in district, natural contours and topographical features of land, and in some instances the geological strata of the land with particular relation to the effect of drainage and seepage on water and sewage problems.

N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57.

24. Ill.—Bauske v. City of Des Plaines, 143 N.E.2d 584, 13 Ill.2d 169—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 61—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—People ex rel. Trust Co. of Chicago v. Village of Skokie, 97 N.E.2d 310, 408 Ill. 397—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321.

Md.—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.

Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276—De Benedetti v. River Vale Tp., Bergen County, 91 A.2d 353, 21 N.J.Super. 430.

Tulsa Oil Co. v. Morey, 60 A.2d 302, 137 N.J.Law 388.

Authority for uses

The uses which by whatever authority exist in a neighborhood constitute a condition which must be considered in determining what inhibitions may be justly imposed against other properties within the neighborhood.

N.J.—Bianchi v. Morey, 24 A.2d 566, 128 N.J.Law 219.

25. Ill.—La Salle Nat. Bank v. City of Chicago, 122 N.E.2d 519, 4 Ill.2d 253—Hannifin Corp. v. City of Berwin, 115 N.E.2d 315, 1 Ill.2d 28.

N.J.—Borough of Cresskill v. Borough of Dumont, 104 A.2d 441, 15 N.J. 238—Duffcon Concrete Products, Inc. v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

Gartland v. Borough of Maywood, 131 A.2d 529, 45 N.J.Super. 1—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

Tulsa Oil Co. v. Morey, 60 A.2d 302, 137 N.J.Law 388—Bianchi v.

Morey, 24 A.2d 567, 128 N.J.Law 219.

26. Ala.—White v. Luquire Funeral Home, 129 So. 84, 221 Ala. 440.

Cal.—Lagiss v. Krantz, 232 P.2d 541, 104 C.2d 793.

Mass.—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

Mich.—Bzovi v. City of Livonia, 87 N.W.2d 110, 350 Mich. 489—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

N.J.—Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47.

N.Y.—City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

43 C.J. p 337 note 85.

Lack of vacant land necessary to meet needs of community for different types of development is matter to be considered by council in determining how vacant land should be classified but is not the sole criterion, but only one of many.

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

Future needs

The zoning plan may and should be with a view to the future needs as well as the present conditions of the city.

N.H.—Mater v. City of Dover, 79 A.2d 844, 97 N.H. 13—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

N.J.—Duffcon Concrete Products, Inc. v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

De Benedetti v. River Vale Tp., Bergen County, 91 A.2d 353, 21 N.J.Super. 430—Lionshead Lake v. Wayne Tp., 73 A.2d 287, 8 N.J.Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J.Super. 83.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

27. N.Y.—Utica v. Hanna, 195 N.Y.S. 225, 202 App.Div. 610.

Tenn.—Spencer-Sturla Co. v. City of Memphis, 290 S.W. 608, 155 Tenn. 70.

28. N.Y.—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—City of Olean v. Conkling, 283 N.Y.S. 66, 157 Misc. 63.

Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App.Div. 890, affirmed 121 N.E.2d 517, 307 N.Y. 493.

sideration to the peculiar suitability of property for particular uses,²⁹ the encouragement of the most appropriate use of land throughout the municipality,³⁰ and the conservation of property values.³¹

A zoning regulation, otherwise reasonable and proper, is not to be condemned because of its simplicity³² and it may not be held invalid because it prohibits something which was theretofore permissible under building and fire protection regulations.³³ The validity of a zoning ordinance does not depend on whether the restrictions or limitations imposed thereby on the use of property are phrased in the

affirmative or negative.³⁴ An ordinance is not invalid because it exempts the city, as far as the erection of its own municipal buildings is concerned, from the restrictions as to the character of buildings which may be erected within restricted zones.³⁵

The length of time a property has been vacant as zoned is a fact to be considered in determining the validity of an ordinance.³⁶ Where a review of the findings of a planning commission may be obtained by a writ of certiorari, a zoning ordinance is not invalid because it fails to provide for an appeal from, or review of, the commission's findings.³⁷

29. Conn.—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433.

Ill.—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill. 169—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Mass.—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308 Mass. 123.

Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535—Guaclides v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J.Super. 405—Collins v. Board of Adjustment of City of Margate, 67 A.2d 332, 3 N.J.Super. 553, affirmed 69 A.2d 708, 3 N.J. 200.

Crow v. Town of Westfield, 56 A.2d 403, 136 N.J.Law 363—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J.Law 195, affirmed Appley v. Township Committee of Township of Bernards, 28 A.2d 177, 129 N.J.Law 73.

N.Y.—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284

App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—City of Olean v. Conkling, 283 N.Y.S. 66, 157 Misc. 63.

Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, affirmed 121 N.E.2d 517, 307 N.Y. 493—City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Pa.—Appeal of Borough of Speers, Quar.Sess., 28 Wash.Co. 221.

Tex.—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused.

43 C.J. p 337 note 89.

30. Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47—De Benedetti v. River Vale Tp., Bergen County, 91 A.2d 353, 21 N.J.Super. 430—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535—Lionshead Lake v. Wayne Tp., 73 A.2d 287, 8 N.J.Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J.Super. 83—Collins v. Board of Adjustment of City of Margate, 67 A.2d 332, 3 N.J.Super. 553, affirmed 69 A.2d 708, 3 N.J. 200.

Crow v. Town of Westfield, 56 A.2d 403, 136 N.J.Law 363.

Pa.—Appeal of Borough of Speers, Quar.Sess., 28 Wash.Co. 221.

31. Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114—

Cobble Close Farm v. Board of Ad-

justment of Middletown Tp., 92 A.2d 4, 10 N.J. 442—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535—Guaclides v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J.Super. 405—Collins v. Board of Adjustment of City of Margate, 67 A.2d 332, 3 N.J.Super. 553, affirmed 69 A.2d 708, 3 N.J. 200.

Crow v. Town of Westfield, 56 A.2d 403, 136 N.J.Law 363—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J.Law 195, affirmed Appley v. Township Committee of Township of Bernards, 28 A.2d 177, 129 N.J.Law 73.

N.Y.—City of Olean v. Conkling, 283 N.Y.S. 66, 157 Misc. 63.

City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Pa.—Appeal of Medinger, 104 A.2d 118, 377 Pa. 217.

Appeal of Borough of Speers, Quar.Sess., 28 Wash.Co. 221.

Tex.—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused.

43 C.J. p 337 note 90.

32. Md.—Board of Com'rs of Anne Arundel County v. Snyder, 46 A.2d 689, 186 Md. 342.

33. N.H.—Sundeen v. Rogers, 141 A.142, 83 N.H. 253, 57 A.L.R. 950.

34. Va.—Fairfax County v. Parker, 44 S.E.2d 9, 186 Va. 675.

35. Ohio.—City of Cincinnati v. Wegehof, 162 N.E. 389, 119 Ohio St. 136.

36. Ill.—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill. 169—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

37. W.Va.—State ex rel. Baer v.

As long as an ordinance meets the requisites of validity, the facts that the study of the planners would not be completed for a certain time and that some further revisions or refinements of the ordinance were in contemplation at the time the ordinance became effective do not militate against its legal efficacy.³⁸ The fact that an ordinance is enacted hastily does not make it invalid,³⁹ and neither does the fact that the community wants the regulation, or that its enactment was urged by a minority, by a majority, or by all of the community.⁴⁰

An ordinance which results in the restriction of competition is not unlawful because of such result,⁴¹ but an ordinance has been held invalid as undue burden on interstate commerce.⁴² Particular zoning ordinances have been upheld against the contention that they impair the obligation of contracts,⁴³ or that they violate the constitutional provision prohibiting either the legislative, executive, or judicial department from exercising any power properly belonging

to one of the others.⁴⁴

Traffic conditions. Zoning regulations should take into consideration the relief or avoidance of traffic congestion⁴⁵ and traffic hazards.⁴⁶ The zoning power, however, should not be used to regulate minor traffic problems, but only those in their major aspects as they affect the entire community or major portions thereof.⁴⁷ Moreover, it has been held that increased traffic burdens or hazards are matters which constitute police problems and are not for the zoning authorities.⁴⁸

§ 25. Certainty and Definiteness of Regulation

In order to be valid, a zoning ordinance or regulation should be clear and specific and should describe with certainty the districts within which particular restrictions are applicable.

A zoning ordinance or regulation should be clear and specific,⁴⁹ and definite and certain;⁵⁰ and where

City of Beckley, 57 S.E.2d 263, 133 W.Va. 459.

38. N.J.—Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.

Validity of temporary or emergency regulation see supra §§ 18-19.

39. N.J.—Rockaway Estates v. Rockaway Tp., supra.

40. Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.

41. Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 313.

42. U.S.—Transcontinental Gas Pipe Line Corp. v. Borough of Milltown, Middlesex County, D.C.N.J., 93 F.Supp. 287.

43. Fla.—Griffin v. Sharpe, 65 So.2d 751.

La.—State ex rel. Roberts v. City of New Orleans, 110 So. 201, 162 La. 202.

Ohio.—Smith v. Juillerat, 119 N.E.2d 611, 161 Ohio St. 424.

44. Ky.—Kesselring v. Wakefield Realty Co., 227 S.W.2d 416, 312 Ky. 334.

45. Md.—Price v. Cohen, 132 A.2d 125, 213 Md. 457—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

Pa.—Reed v. Borough of North Wales, 83 Pa.Dist. & Co. 69, 68 Montg.Co. 196.

Appeal of Jehovah's Witnesses, Co., 103 Pittsb.Leg.J. 489.

Traffic improvement

Although zoning for purpose of reducing traffic and avoiding congestion is a permissible exercise of police power, zoning ordinance for such

purpose must bear reasonable relation to public safety.

Ill.—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E.2d 1, 6 Ill.2d 419.

46. N.J.—Phillips Oil Co. v. Municipal Council of City of Clifton, 197 A. 730, 120 N.J.Law 13.

Pa.—Appeal of Jehovah's Witnesses, 103 Pittsb.Leg.J. 489.

47. N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57.

48. N.Y.—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—Property Owners Ass'n. of Garden City Estates v. Board of Zoning Appeals of Incorporated Village of Garden City, 123 N.Y.S.2d 716, 2 Misc.2d 309—Brooklyn Parking Corporation v. Cannella, 85 N.Y.S.2d 389, 193 Misc. 811.

Linn v. Town of Hempstead, 170 N.Y.S.2d 217—Plander v. Koehler, 150 N.Y.S.2d 879—Ratcliffe v. Morrison, 123 N.Y.S.2d 831—Huntley Estates, Inc. v. Town of Eastchester, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App.Div. 1090.

49. Ala.—Thompson v. Wingard, 34 So.2d 606, 250 Ala. 390.

N.J.—Schack v. Trimble, 137 A.2d 22, 48 N.J.Super. 45.

Piaget-Del Corp. v. Kulik, 45 A.2d 125, 133 N.J.Law 485, petitions denied 46 A.2d 379, 134 N.J.Law 147.

N.Y.—Village of Granville v. Krause, 228 N.Y.S. 204, 131 Misc. 752.

Tlune v. Walker, 170 N.Y.S.2d 604.

Pa.—Edmundson v. Johns, Com.Pl., 89 Pittsb.Leg.J. 215.

Wis.—Corpus Juris Secundum quoted in Town of Hobart v. Collier, 87 N.W.2d 868, 871, 3 Wis.2d 182.

Word "substantial" in an ordinance is not so indefinite as to render it void.

Wis.—State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed. 750.

Declaration as rule of law

The restriction on property rights in the several zones imposed by a zoning ordinance must be declared as a rule of law in the ordinance and not left to the uncertainty of proof by extrinsic evidence, parol or written.

Ala.—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36.

Fla.—Hartnett v. Austin, 93 So.2d 86.

N.Y.—Mallett v. Village of Mamaroneck, 123 N.Y.S.2d 249, reversed on other grounds 131 N.Y.S.2d 504, 283 App.Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821.

Regulation held sufficiently specific

Ill.—City of Chicago v. Reuter Bros. Iron Works, 75 N.E.2d 355, 393 Ill. 202, 173 A.L.R. 266.

50. D.C.—Garrity v. District of Columbia, 86 F.2d 207, 66 App.D.C. 256.

Mo.—Fairmont Inv. Co. v. Woermann, 210 S.W.2d 26, 357 Mo. 625.

N.Y.—Mallett v. Village of Mamaroneck, 123 N.Y.S.2d 249, reversed on other grounds 131 N.Y.S.2d 504, 283 App.Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821.

such a regulation is vague and indefinite it may be held invalid.⁵¹

Description of districts. The authority to zone contemplates fixed areas with defined boundaries,⁵² and the regulation should describe with certainty the district or districts within which particular restrictions are applicable.⁵³ Minor inaccuracies in the description of the boundaries of districts created by a zoning ordinance will not vitiate the ordinance,⁵⁴ and an ordinance is not invalid for uncertainty because the boundary lines of the districts are inaccurate and indefinite, where the boundary described in the ordinance may be determined from a reading of a map and provisions of the ordinance.⁵⁵

Where a zoning map is not attached to, and made a part of, a zoning ordinance as provided in the ordinance, the ordinance may be void for lack of definiteness of description and location of the several

zones.⁵⁶ A zoning ordinance is not invalid, however, for uncertainty on the ground that zones and their boundaries and limits are not defined in the ordinance itself and the map to which reference is had is not expressly made part of the ordinance, where it is clear from the language used that the map is in fact made part of the ordinance by reference,⁵⁷ or where a person is not in ignorance about the location of his property with reference to the pertinent zone lines.⁵⁸

§ 26. Standards Governing Conduct of Administrative Officials

To be valid, zoning regulations should provide a definite standard and furnish a uniform rule of action to govern the conduct of administrative officials.

A zoning regulation should prescribe a definite standard to govern the conduct of administrative officials,⁵⁹ and furnish a uniform rule of action

Va.—Ciaffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41.

51. Fla.—Phillips Petroleum Co. v. Anderson, 74 So.2d 544—City of West Palm Beach v. State ex rel. Duffey, 30 So.2d 491, 158 Fla. 363.

Ohio.—Village of Westlake v. Elrick, App., 83 N.E.2d 646.

Pa.—Taylor v. Moore, 154 A. 799, 303 Pa. 469.

Va.—Ciaffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41.

Wis.—Corpus Juris Secundum quoted in Town of Hobart v. Collier, 87 N.W.2d 868, 371, 3 Wis.2d 182.

Relation to adjacent buildings

Zoning ordinance requiring completed appearance of every new building or structure in subdivision substantially to equal that of adjacent buildings in appearance, square-foot area, and height was held void for uncertainty.

Fla.—City of West Palm Beach v. State ex rel. Duffey, 30 So.2d 491, 158 Fla. 363.

Cure of defect

Fatal vagueness in a zoning ordinance might be cured by substituting an authorization to proscribe public nuisances.

Fla.—Phillips Petroleum Co. v. Anderson, 74 So.2d 544.

52. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

43 C.J. p 338 note 96.

53. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Fla.—Hartnett v. Austin, 93 So.2d 86.

N.Y.—Village of Granville v. Krause, 228 N.Y.S. 204, 131 Misc. 752.

Ohio.—Village of Westlake v. Elrick, App., 83 N.E.2d 646.

43 C.J. p 338 note 95.

Effect of uncertainty

If it is impossible by enlargement process or otherwise to measure the distances on building zone map declared to be a part of building zone ordinance so as to permit establishment of zoning district boundaries with respect to particular property, the result is that such property is unzoned.

Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Boundary line held not uncertain

Ill.—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 363 Ill. 568.

54. Ill.—Speroni v. Board of Appeals of City of Sterling, supra.

Ohio.—Argo v. Kaiser, Com.Pl., 118 N.E.2d 162.

Va.—Ciaffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41.

Slight errors in zoning maps, included in draft of zoning ordinance, because of certain overlapping lines and wrong colors in minor areas, did not vitiate ordinance, where zones were reasonably capable of comprehension and none of such defects affected properties of parties attacking validity of ordinance, since such errors could be corrected by administrative action.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A. 2d 393, 208 Md. 72, certiorari de-

nied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

55. Ill.—Speroni v. Board of Appeals of City of Sterling, 15 N.E. 2d 302, 363 Ill. 568.

56. Fla.—Moon v. Smith, 139 So. 835, 138 Fla. 410.

57. N.J.—Burmore Co. v. Smith, 12 A.2d 353, 124 N.J.Law 541.

58. Me.—Bolduc v. Pinkham, 83 A. 2d 817, 148 Me. 17.

59. Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Cal.—Mitchell v. Morris, 210 P.2d 857, 94 C.A.2d 446.

Conn.—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614.

Fla.—North Bay Village v. Blackwell, 88 So.2d 524—Drexel v. City of Miami Beach, 64 So.2d 317.

Ill.—Illinois Bell Tel. Co. v. Fox, 85 N.E.2d 48, 402 Ill. 617.

Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

La.—McCauley v. Albert E. Briede & Son, 90 So.2d 78, 231 La. 36.

Mass.—Opinion of the Justices, 73 N.E.2d 831, 321 Mass. 759—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A. 2d 83, 214 Md. 48.

N.J.—Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449—Phillips v. City of Paterson, 66 A.2d 65, 3 N.J.Super. 281.

N.Y.—Aloe v. Dassler, 106 N.Y.S.2d 24, 278 App.Div. 975, affirmed 105 N.E.2d 104, 303 N.Y. 378—Mirschel v. Weissenberger, 100 N.Y.S.2d 452, 277 App.Div. 1039—Romig v. Weld, 95 N.Y.S.2d 571, 276 App.Div. 514—Little v. Young, 82 N.Y.S.2d 909, 27 App.Div. 1033, affirmed 85 N.Y.

therein;⁶⁰ and a failure to provide adequate standards will make an ordinance invalid.⁶¹ The application of the regulation may not be left to the arbitrary will of governing authorities;⁶² but an ordinance may be valid even though it confers a certain discretion provided that discretion is sufficiently limited by rules and standards to protect the people against any arbitrary or unreasonable exercise of power.⁶³ Furthermore, a person may be clothed with authority to determine when those standards

are complied with.⁶⁴

§ 27. Due Process

Zoning laws and regulations, in order to be valid, must meet the constitutional demands of due process; and, generally speaking, they meet these demands if they bear a substantial relation to public health, safety, morals, or general welfare, and are not arbitrary or unreasonable.

Zoning laws and regulations, in order to be valid, must meet the constitutional demands of due process.⁶⁵ Generally speaking, these demands are met

S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Application of Dengeles, 148 N.Y.S.2d 92, 1 Misc.2d 692, reversed on other grounds 160 N.Y.S.2d 83, 3 App.Div.2d 758—Roosevelt Field v. Town of North Hempstead, 95 N.Y.S.2d 126, 197 Misc. 621, motion denied 97 N.Y.S.2d 375, reversed on other grounds 98 N.Y.S.2d 350, 277 App.Div. 889—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939, appeal dismissed Siciliano v. Klaess, 84 N.Y.S.2d 922, Maxwell v. Klaess, 85 N.Y.S.2d 330, 274 App.Div. 943, and Goddard v. Klaess, 35 N.Y.S.2d 331.

Gilchrest Realty Corp. v. Village of Great Neck Plaza, 85 N.Y.S.2d 224, reversed on other grounds 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619. Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35—Taylor v. Moore, 154 A. 799, 303 Pa. 469.

Tex.—Young v. City of Abilene, Civ. App., 195 S.W.2d 838, refused no reversible error.

Va.—*Corpus Juris Secundum* cited in *Ours Properties, Inc. v. Ley*, 96 S.E. 2d 754, 757, 198 Va. 848.

Wis.—*Corpus Juris Secundum* quoted in *Town of Hobart v. Collier*, 87 N.W.2d 868, 871, 3 Wis.2d 182—*Smith v. City of Brookfield*, 74 N.W.2d 770, 272 Wis. 1.

Validity, as depending on definite standards, of provisions:

Granting, refusing, or revoking permits see *infra* § 65.

Granting variances and exceptions see *infra* § 66.

Accessibility to public

Standards must be reasonable, clear, and understandable, and should be accessible to the public by enactment into law like any other ordinance.

N.Y.—*Little v. Young*, 82 N.Y.S.2d 969, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

60. Ala.—*Pentecostal Holiness*

Church of Montgomery v. Dunn, 27 So.2d 561, 248 Ala. 314.

La.—*McCauley v. Albert E. Briede & Son*, 90 So.2d 78, 231 La. 36.

Mo.—*Fairmont Inv. Co. v. Woermann*, 210 S.W.2d 26, 357 Mo. 625.

Pa.—*Appeal of O'Hara*, 131 A.2d 587, 389 Pa. 35.

Wis.—*Corpus Juris Secundum* quoted in *Town of Hobart v. Collier*, 87 N.W.2d 868, 871, 3 Wis.2d 182.

61. Colo.—*General Outdoor Advertising Co. v. Goodman*, 262 P.2d 261, 128 Colo. 344.

Conn.—*Du Pont v. Liquor Control Commission*, 71 A.2d 84, 186 Conn. 286.

Fla.—*City of Eau Gallie v. Holland*, 98 So.2d 786.

Kan.—*Hudson Properties, Inc. v. City of Westwood*, 310 P.2d 936, 181 Kan. 320.

Mich.—*Osius v. City of St. Clair Shores*, 75 N.W.2d 25, 344 Mich. 693.

Mo.—*Fairmont Inv. Co. v. Woermann*, 210 S.W.2d 26, 357 Mo. 625.

N.Y.—*Romig v. Weld*, 95 N.Y.S.2d 571, 276 App.Div. 514—*Little v. Young*, 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Ohio.—*State ex rel. Selected Properties v. Gottfried*, 127 N.E.2d 371, 163 Ohio St. 469.

Pa.—*Shen-Penn Production Co. v. Shenandoah Borough*, Quar.Sess., 44 Sch.Leg.Rec. 31.

62. Ala.—*Pentecostal Holiness Church of Montgomery v. Dunn*, 27 So.2d 561, 248 Ala. 314.

Fla.—*North Bay Village v. Blackwell*, 88 So.2d 524—*Drexel v. City of Miami Beach*, 64 So.2d 817—*City of West Palm Beach v. State ex rel. Duffey*, 30 So.2d 491, 158 Fla. 863.

Iowa.—*Stoner McCray System v. City of Des Moines*, 78 N.W.2d 843, 247 Iowa 1313.

La.—*McCauley v. Albert E. Briede & Son*, 90 So.2d 78, 231 La. 36.

Mich.—*Osius v. City of St. Clair Shores*, 75 N.W.2d 25, 344 Mich. 693.

Mo.—*Fairmont Inv. Co. v. Woermann*, 210 S.W.2d 26, 357 Mo. 625.

Nev.—*State ex rel. Davie v. Coleman*, 224 P.2d 309, 67 Nev. 636.

N.Y.—*Little v. Young*, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Ohio.—*State ex rel. Selected Properties v. Gottfried*, 127 N.E.2d 371, 163 Ohio St. 469.

State ex rel. Ohio Oil Co. v. City of Defiance, 133 N.E.2d 392, 99 Ohio App. 398.

Pa.—*Appeal of O'Hara*, 131 A.2d 587, 389 Pa. 35.

Wis.—*Corpus Juris Secundum* quoted in *Town of Hobart v. Collier*, 87 N.W.2d 868, 871, 3 Wis.2d 182.

Whim or caprice

Zoning ordinance leaving exactions to whim or caprice of an administrative agency is void.

Fla.—*City of West Palm Beach v. State ex rel. Duffey*, 30 So.2d 491, 158 Fla. 863.

63. Md.—*Heath v. Mayor & City Council of Baltimore*, 58 A.2d 896, 190 Md. 478.

Minimum requirements set up

Zoning ordinance was not unconstitutional as granting an unlawful delegation of legislative authority to the board of adjustment because granting unlimited discretion, in view of provision that in applying the ordinance, the board should be held to minimum requirements for the promotion of health, safety, morals and general welfare of the township.

Pa.—*Appeal of O'Hara*, 131 A.2d 587, 389 Pa. 35.

64. N.Y.—*Little v. Young*, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

65. Ariz.—*Wood v. Town of Avondale*, 232 P.2d 963, 72 Ariz. 217.

Fla.—*City of Miami Beach v. Lachman*, 71 So.2d 143, appeal dismissed *Lachman v. City of Miami Beach*, 75 S.Ct. 292, 348 U.S. 906, 99 L.Ed. 711—*Griffin v. Sharpe*, 65 So.2d 751. Ky.—*Hager v. Louisville & Jeffer-*

if such laws or regulations bear a substantial relation to public health, safety, morals, or general welfare, and are not arbitrary or unreasonable.⁶⁶ Conversely, laws or regulations of this nature are un-

- son County Planning & Zoning Commission, 261 S.W.2d 619.
- Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.
- Miss.—Frederic v. Board of Sup'rs, Jackson County, 20 So.2d 92, 197 Miss. 293, suggestion of error overruled 20 So.2d 671, 197 Miss. 293.
- N.J.—Grosso v. Board of Adjustment of Millburn Tp. in Essex County, 61 A.2d 167, 137 N.J.Law 630.
- N.Y.—Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.
- Wis.—State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 65 N.W.2d 43, 267 Wis. 91.
66. U.S.—Village of Euclid, Ohio v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.
- Sinclair Refining Co. v. City of Chicago, C.A.III, 178 F.2d 214—Dennis v. Village of Tonka Bay, C. C.A.Minn., 156 F.2d 672.
- Ala.—Leary v. Adams, 147 So. 391, 226 Ala. 472.
- Cal.—Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865, 40 C.2d 552.
- People v. Johnson, 277 P.2d 45, 129 C.A.2d 1—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442—Bank of America Nat. Trust & Savings Ass'n v. Town of Atherton, 140 P.2d 678, 60 C.A.2d 268—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 C.A. 277—Thille v. Board of Public Works of City of Los Angeles, 255 P. 294, 82 C.A. 187.
- Colo.—Colby v. Board of Adjustment, 255 P. 442, 81 Colo. 344.
- Conn.—Fonelleit v. Dudas, 106 A.2d 479, 141 Conn. 413—Gionfriddo v. Town of Windsor, 81 A.2d 266, 137 Conn. 701—State v. Hillman, 147 A. 294, 110 Conn. 92.
- Del.—Papaioanu v. Commissioners of Rehoboth, 20 A.2d 447, 25 Del.Ch. 327.
- D.C.—Larrabee v. Bell, 10 F.2d 986, 56 App.D.C. 121—Varela v. Bell, 10 F.2d 989, 56 App.D.C. 124, certiorari denied U. S. ex rel. Varela v. Bell, 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143.
- Fla.—City of Miami Beach v. Ocean & Inland Co., 3 So.2d 364, 147 Fla. 480.
- Ga.—Humthlett v. Reeves, 85 S.E.2d 25, 211 Ga. 210—Reed v. White, 63 S.E.2d 597, 207 Ga. 623—Schofield v. Bishop, 16 S.E.2d 714, 192 Ga. 732—Howden v. City of Savannah, 159 S.E. 401, 172 Ga. 833.
- Ill.—Deynzer v. City of Evanston, 149 N.E. 790, 319 Ill. 226—City of Aurora v. Burns, 149 N.E. 784, 319 Ill. 84—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 61.
- Drueck v. Peterson, 91 N.E.2d 124, 340 Ill.App. 164.
- La.—Ransome v. Police Jury of Parish of Jefferson, 45 So.2d 601, 216 La. 994—State ex rel. Manhein v. Harrison, 114 So. 159, 164 La. 564—State ex rel. Roberts v. City of New Orleans, 110 So. 201, 162 La. 202—State ex rel. Giangrosso v. City of New Orleans, 106 So. 549, 159 La. 1016—State ex rel. Civello v. City of New Orleans, 97 So. 440, 154 La. 271, 33 A.L.R. 260.
- Me.—Bolduc v. Pinkham, 88 A.2d 817, 148 Me. 17.
- Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.
- Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 330, 92 L.Ed. 1757—People v. Scrafano, 12 N.W.2d 325, 307 Mich. 655.
- Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312—State v. Miller, 288 N. W. 713, 206 Minn. 345.
- Mo.—Kellogg v. Joint Council of Women's Auxiliaries Welfare Ass'n, 265 S.W.2d 374—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681—Landau v. Levin, 213 S.W.2d 483, 358 Mo. 77—City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n, 213 S.W. 2d 479, 358 Mo. 70—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 780—State ex rel. Oliver Cadillac Co. v. Christopher, 298 S.W. 720, 317 Mo. 1179, error dismissed Oliver Cadillac Co. v. Christopher, 49 S. Ct. 17, 278 U.S. 662, 73 L.Ed. 569.
- Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P. 2d 584, 97 Mont. 342.
- Neb.—Dundee Realty Co. v. City of Omaha, 13 N.W.2d 634, 144 Neb. 448—Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 213 N.W. 835, 115 Neb. 525.
- Nev.—State ex rel. Davis v. Coleman, 224 P.2d 309, 67 Nev. 636.
- N.J.—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.
- Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535.
- Max v. Saul, 127 A. 785, 3 N.J. Misc. 780—Jannarone v. Board of Adjustment of Town of Nutley, 153 A. 256, 9 N.J.Misc. 210.
- N.Y.—Presnell v. Teslie, 144 N.E.2d 381, 3 N.Y.2d 384, 165 N.Y.S.2d 488—City of Yonkers v. Rentways, Inc., 109 N.E.2d 597, 304 N.Y. 499—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222.
- Franklin v. Incorporated Village of Floral Park, 53 N.Y.S.2d 537, 269 App.Div. 695, affirmed 62 N.E. 2d 488, 294 N.Y. 862.
- Gignoux v. Village of Kings Point, Sup., 99 N.Y.S.2d 280, 199 Misc. 435—Fortieth St. & Park Ave. v. Walker, 234 N.Y.S. 708, 133 Misc. 907.
- Brous v. Smith, 109 N.Y.S.2d 289, affirmed 106 N.E.2d 503, 304 N.Y. 164—Gedney Estates v. City of White Plains, 99 N.Y.S.2d 111—People v. Perkins, 8 N.Y.S.2d 868, reversed on other grounds 26 N.E. 2d 278, 282 N.Y. 329.
- N.C.—Marren v. Gamble, 75 S.E.2d 880, 237 N.C. 680—Appeal of Parker, 197 S.E. 706, 214 N.C. 51.
- Ohio.—State ex rel. Jack v. Russell, 123 N.E.2d 261, 162 Ohio St. 281—State v. Stegner, 166 N.E. 226, 120 Ohio St. 418, 64 A.L.R. 916.
- Howell v. Cooper, 168 N.E. 757, 33 Ohio App. 287—Cahn v. Guion, 160 N.E. 868, 27 Ohio App. 141.
- State ex rel. Morris v. Osborn, 22 Ohio N.P., N.S., 549.
- Or.—Berger v. City of Salem, 284 P. 273, 131 Or. 674—Kroner v. City of Portland, 240 P. 536, 116 Or. 141.
- Pa.—Appeal of Perrin, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912—Appeal of Goodman, 156 A. 309, 305 Pa. 55.
- R.I.—Sundlun v. Zoning Board of Review of City of Pawtucket, 145 A. 451, 50 R.I. 108.
- S.D.—City of Bismarck v. Hughes, 208 N.W. 711, 53 S.D. 838.
- Tenn.—Spencer-Sturla Co. v. City of Memphis, 290 S.W. 608, 155 Tenn. 70.
- Tex.—Ellis v. City of West University Place, 175 S.W.2d 396, 141 Tex. 608—Lombardo v. City of Dallas, 73 S.W.2d 475, 124 Tex. 1.
- Va.—Fairfax County v. Parker, 44 S. E.2d 9, 186 Va. 675.
- W.Va.—State ex rel. Baer v. City of Beckley, 57 S.E.2d 263, 133 W.Va. 459—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 831.
- Wis.—State v. Harper, 196 N.W. 451, 182 Wis. 148, 33 A.L.R. 269.
- 43 C.J. p 335 note 52.

Courts not concerned with wisdom

It is not within judicial function for courts to pass on wisdom of zoning ordinances, and only judicial function is to determine whether ordinance is reasonably comprehensive in its application and has reasonable relation to preservation of public health, safety, and morals, and, where ordinance is so qualified, its enforcement does not constitute taking of property without compensation or without due process of law.

Ohio.—State ex rel. Jack v. Russell, 123 N.E.2d 261, 162 Ohio St. 281.

Due process not judicial process

Fact that municipal zoning ordinance provides for its administration by ministerial board does not deprive property owners of due process of

constitutional, either generally or as applied to particular property, if they bear no substantial relation to public health, safety, morals, or general welfare, or are arbitrary and unreasonable.⁶⁷

A zoning ordinance enacted to promote merely private rights or private comfort, or to satisfy purely aesthetic desires, is unconstitutional and violative of due process;⁶⁸ but the fact that considerations of an aesthetic nature entered into the reasons for the passage of an ordinance, which was other-

wise valid as a reasonable exercise of the police power, will not render it violative of due process.⁶⁹

§ 28. Equal Protection of the Laws

Zoning laws and regulations must satisfy the requirements of the constitutional guaranty of equal protection of the laws.

Zoning laws and regulations must satisfy the requirements of the constitutional guaranty of equal protection of the laws.⁷⁰ The constitutional guar-

law, since due process does not necessarily mean judicial process.

Mo.—Bormann v. City of Richmond Heights, App., 213 S.W.2d 249.

Unrestricted realty in adjoining city

Fact that realty in adjoining city opposite the area zoned is unrestricted will not render an otherwise valid zoning restriction invalid as denying due process.

Tex.—Gullo v. City of West University Place, Civ.App., 214 S.W.2d 851, error dismissed.

Emergency ordinance relative to building restrictions pending investigation and enactment of permanent zoning ordinance was not invalid as depriving citizen of property without due process of law.

Ky.—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.

67. U.S.—State of Washington ex rel. Seattle Title Trust Co. v. Roberge, Wash., 49 S.Ct. 50, 278 U.S. 116, 73 L.Ed. 210, 86 A.L.R. 654—Nectow v. City of Cambridge, Mass., 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Women's Kansas City St. Andrew Soc. v. Kansas City, C.C.A. Mo., 58 F.2d 593.

Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.

Ala.—Pentecostal Holiness Church of Montgomery v. Dunn, 27 So.2d 561, 248 Ala. 314.

Cal.—Bank of America Nat. Trust & Savings Ass'n v. Town of Atherton, 140 P.2d 678, 60 C.A.2d 268.

Conn.—Gionfriddo v. Town of Windsor, 81 A.2d 266, 137 Conn. 701.

Del.—In re Ceresini, 189 A. 443, 8 W. W.Harr. 134.

Corpus Juris Secundum cited in Papaloanu v. Commissioners of Rehoboth, 20 A.2d 447, 450, 25 Del. Ch. 327.

D.C.—Prentiss v. American University, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied Wrather v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Fla.—City of Miami Beach v. Lachman, 71 So.2d 148, appeal dismissed Lachman v. City of Miami Beach, 75 S.Ct. 292, 348 U.S. 906, 99 L.Ed. 711—Stengel v. Crandon, 23 So.2d 835, 156 Fla. 592, 161 A.L.R. 1228.

Ill.—Exchange Nat. Bank of Chicago

v. Cook County, 129 N.E.2d 1, 6 Ill. 2d 419—Petrooulos v. City of Chicago, 125 N.E.2d 522, 5 Ill.2d 270—Anderman v. City of Chicago, 40 N.E.2d 51, 379 Ill. 236—People ex rel. Kirby v. City of Rockford, 2 N.E.2d 842, 363 Ill. 531—Spies v. Board of Appeals, 169 N.E. 220, 337 Ill. 507.

Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

Iowa.—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356.

Miss.—Jones v. City of Hattiesburg, 42 So.2d 717, 207 Miss. 491.

Mo.—State ex rel. Better Built Home & Mortgage Co. v. McKelvey, 256 S.W. 495, 301 Mo. 130—City of St. Louis v. Evraiff, 256 S.W. 489, 301 Mo. 231—State ex rel. Penrose Inv. Co. v. McKelvey, 256 S.W. 474, 301 Mo. 1.

Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P.2d 534, 97 Mont. 342.

N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

Marie's Launderette v. City of Newark, 113 A.2d 190, 35 N.J.Super. 94.

Rice v. City of Newark, 40 A.2d 561, 132 N.J.Law 387—Ignacunas v. Risley, 121 A. 783, 98 N.J.Law 712, affirmed Ignacunas v. Town of Nutley, 125 A. 121, 99 N.J.Law 389.

N.Y.—Presnell v. Leslie, 165 N.Y.S. 2d 488, 3 N.Y.2d 384, 144 N.E.2d 381.

Vernon Park Realty v. City of Mount Vernon, 125 N.Y.S.2d 112, 282 App.Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958, and in which appeal is denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.

Plymouth Builders, Inc. v. Village of Lindenhurst, 117 N.Y.S.2d 583, affirmed 134 N.Y.S.2d 225, 284 App.Div. 895—Delaware, L. & W. R. Co. v. City of Fulton, 114 N.Y.S.2d 481, affirmed 121 N.Y.S.2d 582, 281 App.Div. 1005.

Ohio.—Kessler v. Smith, 142 N.E.2d 231, 104 Ohio App. 213, appeal dismissed Smith v. Village of Glenwillow, 146 N.E.2d 308, 167 Ohio St. 91—Mehl v. Stegner, 175 N.E. 712, 33 Ohio App. 416.

Loesch Allotment Co. v. Village of Newburgh Heights, Com.Pl., 100 N.E.2d 543.

Pa.—Taylor v. Moore, 154 A. 799, 303 Pa. 469.

R.I.—Sundlun v. Zoning Board of Review of City of Pawtucket, 145 A. 451, 50 R.I. 108—City of Providence v. Stephens, 133 A. 614, 47 R.I. 387.

Tex.—Simms v. City of Sherman, Civ.App., 181 S.W.2d 100, affirmed 183 S.W.2d 415, 143 Tex. 115—City of Texarkana v. Mabry, Civ.App., 94 S.W.2d 871, error dismissed.

Wash.—Manos v. City of Seattle, 24 P.2d 91, 173 Wash. 662.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Wis.—State ex rel. Scandrett v. Nelson, 3 N.W.2d 765, 240 Wis. 438.

68. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 593.

Colo.—Willison v. Cooke, 130 P. 828, 54 Colo. 320.

Del.—Papaloanu v. Commissioners of Rehoboth, 20 A.2d 447, 25 Del.Ch. 327.

Ohio.—City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 112 Ohio St. 654, 43 A.L.R. 662.

Tex.—City of Texarkana v. Mabry, Civ.App., 94 S.W.2d 871, error dismissed.

Aesthetic considerations as affecting validity of exercise of power generally see infra § 36.

69. U.S.—Welch v. Swasey, Mass., 29 S.Ct. 567, 214 U.S. 91, 53 L.Ed. 923.

Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

70. Fla.—Griffin v. Sharpe, Fla., 65 So.2d 751.

Ill.—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E.2d 1, 6 Ill.2d 419.

N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

N.Y.—Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

Facts in existence at date of passage of the zoning law have been held in the circumstances of the case before the court to be the only material factors for consideration in de-

anty requires that the law or regulation rest on some rational basis of classification,⁷¹ and bars arbitrary discrimination between persons or property similarly circumstanced.⁷² Classification is consistent with this principle if it is reasonably based on the public policy to be served.⁷³ It is not necessarily fatal that the classification be wanting in purely theoretical or scientific uniformity or mathematical nicety or that there be some inequality in practice.⁷⁴

In accordance with these principles zoning laws and regulations have, in many cases, been held not to deny equal protection of the laws.⁷⁵ A zoning law or regulation is offensive to the guaranty of equal protection, however, where it restricts the classes of persons who may occupy residential property which conforms to all requirements,⁷⁶ or where the areas within the terms of the zoning law are not

clearly and certainly defined,⁷⁷ or where it allows the granting or refusing of permits without the guidance of any standard,⁷⁸ or delegates power to control erection, alteration, or use of particular kinds of buildings, or maintenance of particular businesses, to private citizens.⁷⁹

§ 29. Taking of Property without Compensation

Building or zoning laws and regulations must meet the demands of the constitutional prohibition against the taking of private property for public use without just compensation, and restrictions which are arbitrary or unreasonable or lacking in any substantial relation to the public health, safety, morals, or general welfare come within the constitutional inhibition.

Building or zoning laws and regulations must meet the demands of the constitutional prohibition against the taking of private property for public use without just compensation,⁸⁰ and restrictions which are

termining whether the law operates to deny equal protection.

U.S.—Dennis v. Village of Tonka Bay, D.C.Minn., 64 F.Supp. 214, affirmed, C.C.A., 156 F.2d 672.

71. Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

72. Ill.—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E.2d 1, 6 Ill.2d 419—Petrooulos v. City of Chicago, 125 N.E.2d 522, 5 Ill.2d 409—Ronda Realty Corp. v. Lawton, 111 N.E.2d 310, 414 Ill. 313.

Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

N.J.—Delawanna Iron & Metal Co. v. Albrecht, 88 A.2d 616, 9 N.J. 424—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

Marie's Launderette v. City of Newark, 113 A.2d 190, 35 N.J.Super. 94—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 103 A.2d 498, 32 N.J.Super. 397.

N.Y.—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 831.

Wis.—Katt v. Village of Sturtevant, 70 N.W.2d 188, 269 Wis. 638.

73. N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

74. N.J.—Schmidt v. Board of Adjustment of City of Newark, supra.

75. U.S.—Dennis v. Village of Tonka Bay, C.C.A.Minn., 156 F.2d 672—Texas Co. v. City of Tampa, C.C.A.Fla., 100 F.2d 347—American Wood Products Co. v. City of Minneapolis, C.C.A.Minn., 35 F.2d 657—De

Lano v. City of Tulsa, C.C.A.Okl., 26 F.2d 640, certiorari denied Delano v. City of Tulsa, 49 S.Ct. 179, 278 U.S. 654, 73 L.Ed. 564.

Cal.—Otis v. City of Los Angeles, 126 P.2d 954, 52 C.A.2d 605.

Ga.—Orr v. Hapeville Realty Co., 94 S.E.2d 682, 212 Ga. 649—Morgan v. Thomas, 63 S.E.2d 659, 207 Ga. 660.

Ill.—City of Chicago v. Sachs, 115 N.E.2d 762, 1 Ill.2d 342—City of Aurora v. Burns, 149 N.E. 784, 319 Ill. 84.

Drueck v. Peterson, 91 N.E.2d 124, 340 Ill.App. 164.

Ind.—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 177 Ind.App. 314.

Kan.—Ware v. City of Wichita, 214 P. 99, 113 Kan. 153.

La.—State ex rel. Giangrosso v. City of New Orleans, 106 So. 549, 159 La. 1016.

Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

Mass.—Town of Lexington v. Governor, 3 N.E.2d 19, 295 Mass. 31.

Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P.2d 534, 97 Mont. 842.

Neb.—Dundee Realty Co. v. City of Omaha, 13 N.W.2d 634, 144 Neb. 448.

N.J.—Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 11 N.J. 341, 36 A.L.R.2d 639.

Greenway Homes v. Borough of River Edge, 60 A.2d 811, 137 N.J. Law 453—Repp v. Shahadi, 38 A.2d 284, 132 N.J. Law 24.

Jannarone v. Board of Adjustment of Town of Nutley, 153 A.256, 9 N.J. Misc. 210.

N.Y.—Brous v. Smith, 109 N.Y.S.2d 289, affirmed 106 N.E.2d 503, 304 N.Y. 164.

Okl.—In re Dawson, 277 P. 226, 136 Okl. 113.

Or.—Kroner v. City of Portland, 240 P. 536, 116 Or. 141.

Pa.—Application for Certificate of Occupancy 500 Paxinos Avenue, Easton, 66 A.2d 225, 362 Pa. 116.

Jordan v. Township of Lower Merion, 34 Pa. Dist. & Co. 551, 55 Montg. Co. 20.

R.I.—City of Providence v. Stephens, 133 A. 614, 47 R.I. 387.

Tex.—Faulk v. Buena Vista Burial Park Ass'n, Civ.App., 152 S.W.2d 891—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused—McEachern v. Town of Highland Park, Civ.App., 34 S.W.2d 676, affirmed 73 S.W.2d 487, 124 Tex. 36.

Ex parte Hobbs, 157 S.W.2d 397, 143 Tex. Cr. 100.

Wis.—State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 65 N.W.2d 43, 267 Wis. 91—Bouchard v. Zetley, 220 N.W. 209, 196 Wis. 635.

76. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 593.

Minn.—State v. Northwestern Preparatory School, 37 N.W.2d 370, 228 Minn. 363.

77. Ohio.—Village of Westlake v. Elrick, App., 83 N.E.2d 646.

78. La.—Bultman Mortuary Service v. City of New Orleans, 140 So. 503, 174 La. 360.

Pa.—Taylor v. Moore, 154 A. 799, 303 Pa. 469.

Wis.—State ex rel. Scandrett v. Nelson, 3 N.W.2d 765, 240 Wis. 438.

79. S.C.—Willis v. Town of Woodruff, 20 S.E.2d 699, 200 S.C. 266.

80. Ga.—City of Thomson v. Davis, 88 S.E.2d 300, 92 Ga.App. 216.

arbitrary or unreasonable or lacking in any substantial relation to the public health, safety, morals, or general welfare come within the constitutional inhibition,⁸¹ as where a regulation permanently so restricts the use of property that it cannot be used for any reasonable purpose.⁸²

Ill.—*Petropoulos v. City of Chicago*, 125 N.E.2d 522, 5 Ill.2d 270—*Quilici v. Village of Mount Prospect*, 78 N.E.2d 240, 399 Ill. 418.

Ky.—*Hager v. Louisville & Jefferson County Planning & Zoning Commission*, 261 S.W.2d 619.

Neb.—*City of Scottsbluff v. Winters Creek Canal Co.*, 53 N.W.2d 543, 155 Neb. 723.

N.J.—*Grosso v. Board of Adjustment of Millburn Tp. in Essex County*, 61 A.2d 167, 137 N.J.Law 630.

N.Y.—*King v. Incorporated Village of Ocean Beach*, 136 N.Y.S.2d 690, 207 Misc. 100, affirmed 143 N.Y.S.2d 637, 286 App.Div. 850—*Roer Const. Corp. v. City of New Rochelle*, 136 N.Y.S.2d 414, 207 Misc. 46—*Milano v. Town of Patterson*, 98 N.Y.S.2d 419, 197 Misc. 457.

Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 373, 2 A.D.2d 889—*Fleetwood Manor, Inc. v. Village of Huntington Bay*, 115 N.Y.S.2d 615.

R.I.—*Holgate v. Zoning Bd. of Review of City of Pawtucket*, 60 A.2d 732, 74 R.I. 333.

Tex.—*City of Corpus Christi v. Allen*, 254 S.W.2d 759, 152 Tex. 137.

Strong public desire to improve public conditions cannot excuse restriction in town zoning ordinance which amounts to a taking rather than a regulation.

N.Y.—*Huntley Estates, Inc. v. Town of Eastchester*, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App.Div. 1090.

Fla.—*Ex parte Wise*, 192 So. 872, 141 Fla. 222.

Ga.—*Glynn County Com'rs v. Cate*, 137 S.E. 686, 133 Ga. 111.

Ill.—*Pringle v. City of Chicago*, 89 N.E.2d 365, 404 Ill. 473—*Schneider v. Board of Appeals of City of Ottawa*, 84 N.E.2d 423, 402 Ill. 536—*Quilici v. Village of Mount Prospect*, 78 N.E.2d 240, 399 Ill. 418—*People ex rel. Kirby v. City of Rockford*, 2 N.E.2d 842, 363 Ill. 531—*Tews v. Woolhiser*, 185 N.E. 827, 352 Ill. 212—*Forbes v. Hubbard*, 180 N.E. 767, 348 Ill. 166.

Kleever Shampay Karpel Kleaners v. City of Chicago, 238 Ill.App. 291.

Mo.—*State ex rel. Better Built Home & Mortgage Co. v. Davis*, 259 S.W. 80, 302 Mo. 307—*State ex rel. Better Built Home & Mortgage Co. v. McKelvey*, 256 S.W. 495, 301 Mo. 130—*City of St. Louis v. Ebraiff*, 256 S.W. 489, 301 Mo. 231—*State ex rel. Penrose Inv. Co. v. McKelvey*, 256 S.W. 474, 301 Mo. 1.

N.J.—*Heller v. Village of South Orange*, 130 A. 534, 3 N.J.Misc. 1076.

N.Y.—*Hyde v. Incorporated Village of Baxter Estates*, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 373, 2 A.D.2d 889.

Ohio.—*City of Youngstown v. Kahn Bros. Bldg. Co.*, 148 N.E. 842, 112 Ohio St. 654, 43 A.L.R. 662.

Pa.—*In re White*, 85 Pa.Super. 502, affirmed 134 A. 409, 237 Pa. 259, 53 A.L.R. 1215.

Appeal of Garbev, Inc. from Bd. of Adjustment, Com.Pl., 42 Del.Co. 399, affirmed 122 A.2d 682, 385 Pa. 328.

Wash.—*State v. MacDuff*, 297 P. 733, 161 Wash. 600, followed in 297 P. 733, 161 Wash. 703.

Wis.—*Piper v. Ekern*, 194 N.W. 159, 130 Wis. 536, 34 A.L.R. 32.

20 C.J. p 523 note 57.

Taking for aesthetic purpose

Where an aesthetic purpose, rather than the public health or safety, was sought to be served, the regulation constitutes a taking without compensation.

N.J.—*Levy v. Mravlag*, 115 A. 350, 96 N.J.Law 367—*Romar Realty Co. v. Board of Com'rs of Borough of Haddonfield*, 114 A. 243, 96 N.J. Law 117.

Setback ordinance

N.J.—*Michel v. Village of South Orange*, 132 A. 337, 4 N.J.Misc. 802.

Valid scheme invalidly applied

(1) "The general scheme of a zoning ordinance may be valid, yet, as applied to a particular property within the area zoned, such facts may exist that if the terms of the ordinance are enforced it would result in an arbitrary and unreasonable injury to the owner of the property or the confiscation thereof. In that situation, as applied to such designated real estate, the ordinance is void."

Ill.—*People ex rel. Kirby v. City of Rockford*, 2 N.E.2d 842, 363 Ill. 531.

(2) "If the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his property, it would become the duty of the zoning board to relax its restrictions so as to prevent confiscation of complainant's lands without compensation, otherwise the ordinance would be held bad."

Fla.—*State ex rel. Hauck Investment Corporation v. City of Jacksonville*, 133 So. 117, 101 Fla. 1247—*State ex rel. Strepper Realty Corporation v. City of Jacksonville*, 133 So. 117, 101 Fla. 1247—*State ex rel. Taylor v. City of Jacksonville*, 133 So. 114, 101 Fla. 1241.

Prohibition of stores

N.J.—*Ignaciunas v. Risley*, 121 A.

733, 98 N.J.Law 712, affirmed *Ignaciunas v. Town of Nutley*, 125 A. 121, 99 N.J.Law 359.

Eaton v. Village of South Orange, 130 A. 362, 3 N.J.Misc. 956.

Prohibition of taking of deposits from land

N.Y.—*People v. Linabury*, 209 N.Y. S. 126.

Establishment of building lines

(1) "The weight of authority seems to be that building lines cannot be justified under the police power . . . but must be accomplished by the exercise of the right of eminent domain with compensation."

Me.—*In re Opinion of the Justices*, 128 A. 181, 185, 124 Me. 501.

(2) "A building line under . . . [statute] constitutes an encumbrance upon land in the nature of an equitable easement for the benefit of the public; it is a taking of private property by eminent domain for public use and the procedure prescribed for such taking must be followed."

Mass.—*Grove Hall Sav. Bank v. Town of Dedham*, 137 N.E. 182, 183, 234 Mass. 92.

(3) An order of street commissioners establishing building lines on a street was in the city of Boston, held to operate, and intended to operate, as a taking of private property for public use under the power of eminent domain.

Mass.—*Curtis v. City of Boston*, 142 N.E. 95, 247 Mass. 417.

(4) Town proceeding under special act providing for establishment of building lines and assessment of benefits and damages, was exercising right of eminent domain, not police power.

Conn.—*Bissell v. Town of Bethel*, 155 A. 232, 113 Conn. 323.

82. Ga.—*City of Thomson v. Davis*, 88 S.E.2d 300, 92 Ga.App. 216.

Ill.—*Tews v. Woolhiser*, 185 N.E. 827, 352 Ill. 212.

Md.—*Grant v. Mayor and City Council of Baltimore*, 129 A.2d 363, 212 Md. 301—*Walker v. Board of County Com'rs of Talbot County*, 116 A. 2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—*City of Baltimore v. Cohn*, 105 A.2d 482, 204 Md. 523.

Neb.—*City of Scottsbluff v. Winters Creek Canal Co.*, 53 N.W.2d 543, 155 Neb. 723.

N.Y.—*Roer Const. Corp. v. City of New Rochelle*, 136 N.Y.S.2d 414, 207 Misc. 46.

W.Va.—*Carter v. City of Bluefield*, 54 S.E.2d 747, 132 W.Va. 381.

The protection accorded by this constitutional prohibition is, however, qualified by the police power, and reasonable restrictions, bearing a substantial relation to the public health, safety, morals, or general welfare, imposed in the exercise of the police power, do not fall within the constitutional ban.⁸³ Where premises located in a certain zone can be used for a certain purpose if permission is obtained therefor, the validity of the regulation may not be challenged on the theory that there is a prohibition against using the property for that purpose, thus constituting a taking of property without compensa-

tion.⁸⁴

§ 30. Comprehensive, Well-Considered Plan

Zoning regulations should be in accordance with some well-considered and comprehensive plan, but the extent to which it is necessary to zone the entire municipal boundaries depends on circumstances and on the constitutional or statutory provisions conferring the zoning power.

In order to achieve specified statutory purposes, it is usually required that zoning regulations be in accordance with some well-considered⁸⁵ and comprehensive⁸⁶ plan; and such regulations must adopt

83. U.S.—*Armstrong v. Goyco, C.C.* A.Puerto Rico, 29 F.2d 900—*American Wood Products Co. v. City of Minneapolis, D.C.Minn.*, 21 F.2d 440, affirmed, C.C.A., 35 F.2d 657.

D.C.—*Varela v. Bell*, 10 F.2d 989, 56 App.D.C. 124, certiorari denied U. S. ex rel. *Varela v. Bell*, 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143—*Larabee v. Bell*, 10 F.2d 986, 56 App.D.C. 121, certiorari denied U. S. ex rel. *Varela v. Bell*, 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143.

Fla.—*State ex rel. Taylor v. City of Jacksonville*, 133 So. 114, 101 Fla. 1241.

Ill.—*Trust Co. of Chicago v. City of Chicago*, 96 N.E.2d 499, 408 Ill. 91—*People ex rel. Kirby v. City of Rockford*, 2 N.E.2d 842, 363 Ill. 531—*Tews v. Woolhiser*, 185 N.E. 827, 352 Ill. 212—*Forbes v. Hubbard*, 180 N.E. 767, 348 Ill. 166—*Deynzer v. City of Evanston*, 149 N.E. 790, 319 Ill. 226.

Iowa.—*City of Des Moines v. Manhattan Oil Co.*, 184 N.W. 823, 193 Iowa 1096, 23 A.L.R. 1322.

Kan.—*Ware v. City of Wichita*, 214 P. 99, 113 Kan. 153.

La.—*State ex rel. Dema Realty Co. v. Jacoby*, 123 So. 314, 168 La. 752—*State ex rel. Roberts v. City of New Orleans*, 110 So. 201, 162 La. 202—*State ex rel. Civello v. City of New Orleans*, 97 So. 440, 154 La. 271, 33 A.L.R. 260.

Mass.—*Slack v. Building Inspector of Town of Wellesley*, 160 N.E. 285, 262 Mass. 404.

Minn.—*Connor v. Chanhassen Tp.*, 81 N.W.2d 789, 249 Minn. 205.

Mo.—*City of St. Louis v. Friedman*, 216 S.W.2d 475, 358 Mo. 681—*State ex rel. Oliver Cadillac Co. v. Christopher*, 298 S.W. 720, 317 Mo. 1179, error dismissed *Oliver Cadillac Co. v. Christopher*, 49 S.Ct. 17, 278 U.S. 662, 73 L.Ed. 569—*City of St. Louis v. Nash*, 260 S.W. 985.

N.H.—*Sundeen v. Rogers*, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

N.J.—*Collins v. Board of Adjustment of Margate City*, 69 A.2d 708, 3 N. J. 200.

Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468—*Guacides v. Borough of Engle-*

wood Cliffs, 79 A.2d 435, 11 N.J. Super. 405.

Visco v. City of Plainfield, 57 A. 2d 490, 136 N.J.Law 659.

N.Y.—*Huntley Estates, Inc. v. Town of Eastchester*, 131 N.Y.S.2d 578, 283 App.Div. 1090.

MacEwen v. City of New Rochelle, 287 N.Y.S. 36, 149 Misc. 251.

People v. Calvar Corp., 69 N.Y. S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

Ohio.—*State ex rel. Jack v. Russell*, 123 N.E.2d 261, 162 Ohio St. 281—*Pritz v. Messer*, 149 N.E. 80, 112 Ohio St. 628.

Harris v. State, 155 N.E. 166, 23 Ohio App. 33.

R.I.—*Jenney Mfg. Co. v. Zoning Board of Review of Town of East Providence*, 9 A.2d 705, 63 R.I. 477—*Heffernan v. Zoning Board of Review of City of Cranston*, 144 A. 674, 50 R.I. 26.

S.C.—*Richards v. City of Columbia*, 88 S.E.2d 683, 227 S.C. 538—*James v. City of Greenville*, 88 S.E.2d 661, 227 S.C. 565.

Utah.—*Salt Lake City v. Western Foundry & Stove Repair Works*, 187 P. 829, 55 Utah 447.

Wis.—*State v. Harper*, 196 N.W. 451, 182 Wis. 148, 38 A.L.R. 269.

20 C.J. p 523 note 56.

Restrictions on rebuilding

Iowa.—*City of Shenandoah v. Replogle*, 199 N.W. 418, 198 Iowa 423.

Setback ordinance

La.—*Sampere v. City of New Orleans*, 117 So. 827, 166 La. 776, affirmed 49 S.Ct. 262, 279 U.S. 812, 73 L.Ed. 971.

Minn.—*State v. Houghton*, 213 N.W. 907, 171 Minn. 231.

Ohio.—*Harris v. State*, 155 N.E. 166, 23 Ohio App. 33.

Pa.—*Appeal of Kerr*, 144 A. 81, 294 Pa. 246.

Police power statute held applicable to ordinance, rather than eminent domain statute.

Mass.—*Slack v. Building Inspector of Town of Wellesley*, 160 N.E. 285, 262 Mass. 404.

84. N.Y.—*People v. Calvar Corp.*, 69

N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

85. Ala.—*Chapman v. City of Troy*, 4 So.2d 1, 241 Ala. 637.

N.J.—*Potts v. Board of Adjustment of Borough of Princeton*, 43 A.2d 850, 133 N.J.Law 230.

N.Y.—*Greenberg v. City of New Rochelle*, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—*City of Olean v. Conkling*, 283 N.Y.S. 66, 157 Misc. 63—*Village of Granville v. Krause*, 228 N.Y.S. 204, 131 Misc. 752.

Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, affirmed 121 N.E.2d 517, 307 N.Y. 493—*City of Little Falls v. Fisk*, 24 N.Y.S.2d 460, 43 C.J. p 337 note 93.

86. Ala.—*Jefferson County v. City of Birmingham*, 55 So.2d 196, 256 Ala. 436—*Alabama Alcoholic Beverage Control Bd. v. City of Birmingham*, 44 So.2d 593, 253 Ala. 402—*Johnson v. City of Huntsville*, 29 So.2d 342, 249 Ala. 36—*Chapman v. City of Troy*, 4 So.2d 1, 241 Ala. 637.

Cal.—*Beverly Oil Co. v. City of Los Angeles*, 254 P.2d 865, 40 C.2d 552.

Conn.—*Magnin v. Zoning Commission of Town of Madison*, 138 A.2d 522, 145 Conn. 26—*Miller v. Town Planning Commission of Town of Manchester*, 113 A.2d 504, 142 Conn. 265—*Hills v. Zoning Commission of Town of Newton*, 96 A.2d 212, 139 Conn. 603—*Fairlawn Cemetery Ass'n v. Zoning Commission of Town of Bethel*, 86 A.2d 74, 138 Conn. 434—*Kuehne v. Town Council of Town of East Hartford*, 72 A.2d 474, 136 Conn. 452—*Bartram v. Zoning Commission of City of Bridgeport*, 68 A.2d 308, 136 Conn. 89.

D.C.—*Lewis v. District of Columbia*, 190 F.2d 25, 89 U.S.App.D.C. 72.

Iowa.—*Brackett v. City of Des Moines*, 67 N.W.2d 542, 246 Iowa 249.

Md.—*American Oil Co. v. Miller*, 102 A.2d 727, 204 Md. 32—*Mayor and*

a definite policy.⁸⁷ A comprehensive plan, within a statute requiring municipal zoning regulations in accordance with such a plan, means a general plan to control the use of properties in the municipality or

a large part thereof by dividing it into districts according to the present and potential use of the properties.⁸⁸

An ordinance making each block a business or

City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

Neb.—Kelley v. John, 75 N.W.2d 713, 162 Neb. 319—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114—Conlon v. Board of Public Works of City of Paterson, 94 A.2d 660, 11 N.J. 363—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535—Dolan v. DeCapua, 80 A.2d 655, 13 N.J.Super. 500—Corpus Juris Secundum cited in N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge, 69 A.2d 787, 771, 6 N.J.Super. 495—Collins v. Board of Adjustment of City of Margate, 67 A.2d 332, 3 N.J.Super. 553, affirmed 69 A.2d 708, 3 N.J. 290—Kerrigan Development Co. v. City of Newark, 65 A.2d 142, 2 N.J.Super. 590—Cassinari v. Union City, 63 A.2d 891, 1 N.J. Super. 219.

Crow v. Town of Westfield, 56 A.2d 403, 136 N.J.Law 363—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J.Law 195, affirmed Appley v. Township Committee of Township of Bernards, 23 A.2d 177, 129 N.J.Law 73.

N.Y.—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939, appeal dismissed Seciliano v. Klaess, 84 N.Y.S.2d 922, Maxwell v. Klaess, 85 N.Y.S.2d 330, 274 App.Div. 943, and Goddard v. Klaess, 85 N.Y.S.2d 331—Van Auker v. Kimmey, 253 N.Y.S. 343, 141 Misc. 117.

Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, affirmed 121 N.E.2d 517, 307 N.Y. 493.

N.C.—Shuford v. Town of Waynesville, 198 S.E. 585, 214 N.C. 135.

Ohio—State ex rel. Gulf Refining Co. v. De France, 101 N.E.2d 782, 89 Ohio App. 334—State ex rel. Gulf Refining Co. v. De France, 100 N.E.2d 689, 89 Ohio App. 1.

Pa.—Gratton v. Conte, 73 A.2d 381, 264 Pa. 578.

Tex.—City of Waxahachie v. Watkins, Civ.App., 265 S.W.2d 843, reversed on other grounds 275 S.W.2d 477, 154 Tex. 206—City of Dallas v. Meserole, Civ.App., 155 S.W.2d 1019, error refused—City of Texarkana v. Mabry, Civ.App., 94 S.W.2d 871, error dismissed.

Purpose

(1) Specific statutory requirement that zoning regulations be in accordance with comprehensive plan designed to promote specified statutory purposes is intended to avoid arbitrary, unreasonable, or capricious exercise of zoning power.

Conn.—Miller v. Town Planning Commission of Town of Manchester, 113 A.2d 504, 142 Conn. 265.

N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250.

(2) Requirement in enabling statute that zoning regulations be enacted in accordance with a comprehensive plan is designed to protect property owners against radical and ill-advised departures from the existing plan or system of zoning.

Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

"Comprehensive," as used in zoning statute requiring a comprehensive plan, requires something beyond a piecemeal approach, both to be revealed by the ordinance considered in relation to the physical facts and purposes authorized by statute.

N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

"Plan," as used in zoning statute requiring a comprehensive plan, connotes an integrated product of a rational process.

N.J.—Kozesnik v. Montgomery Tp., supra.

Test of validity of a zoning action or ordinance is whether it is in accord with a comprehensive plan of zoning as required by enabling statutes.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

Materiality of digression from a settled section plan is a proper matter of consideration in connection with enforcement of zoning regulations.

Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 303.

Comprehensive zoning system

(1) A comprehensive zoning ordinance is valid.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Cal.—Kort v. City of Los Angeles, 127 P.2d 66, 52 C.A.2d 804.

Md.—Colati v. Jirout, 47 A.2d 613, 186 Md. 652—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.

(2) System adopted in creating municipal zoning districts was held sufficiently general, uniform, and comprehensive.

Cal.—Feraut v. City of Sacramento, 269 P. 537, 204 C. 687.

(3) Restrictions constituting part of comprehensive zoning system bearing definite and clear relationship to public health, safety, morals, and general welfare may be sustained, although invalid as independent regulation or proscription.

U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, C.C.A. Mo., 58 F.2d 593.

87. N.Y.—Utica v. Hanna, 195 N.Y. S. 225, 202 App.Div. 610.

88. Conn.—Miller v. Town Planning Commission of Town of Manchester, 113 A.2d 504, 142 Conn. 265—Couch v. Zoning Commission of Town of Washington, 106 A.2d 173, 141 Conn. 349—Kutcher v. Town Planning Commission of Town of Manchester, 88 A.2d 538, 138 Conn. 705—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434—Kuehne v. Town Council of Town of East Hartford, 72 A.2d 474, 136 Conn. 452—Bartram v. Zoning Commission of City of Bridgeport, 68 A.2d 308, 136 Conn. 89—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614—State ex rel. Spiros v. Payne, 41 A.2d 908, 131 Conn. 647. Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A.2d 83, 214 Md. 48.

Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205.

N.J.—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

Legislative intention in authorizing comprehensive zoning is to insure reasonable uniformity within districts having in fact the same general characteristics and to prevent the marking off, for peculiar uses or restrictions, of small districts essentially similar to the general area in which they are situated.

Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

residence district depending on the number of residences and vacant lots found within such block is invalid as not in compliance with the statutory requirement that the designation of zoning districts be in accordance with some comprehensive, well-considered plan.⁸⁹ A zoning plan, however, does not cease to be a comprehensive plan because it looks reasonably to foreseeable potential uses of land which cannot be precisely determined when the zoning is passed,⁹⁰ and a zoning ordinance does not fail to meet the requirements of a comprehensive zoning plan as provided for by the zoning act, because it fails to make specific provisions for all of the restrictions authorized by the act.⁹¹

To what extent it is necessary to zone the entire municipal boundaries often depends on circumstances⁹² and on the constitutional or statutory provisions conferring the zoning power,⁹³ and the rule may vary as to different municipal corporations.⁹⁴ Under some statutes, an entire municipality is not required to be zoned at one time,⁹⁵ and a municipality may create zoning districts of limited area without zoning its entire territory.⁹⁶ Certain portions of the municipality may be restricted and other portions left unrestricted,⁹⁷ and under particular circumstances zoning may be limited to one street only.⁹⁸

On the other hand, when the statute so requires it, zoning regulations should be in accordance with well-considered plans applying within the entire municipal boundaries, and not only to a portion thereof.⁹⁹ Accordingly, it has been held that a zon-

ing ordinance, whatever the source of its authorization, must apply to the city as a whole and not alone to particular streets,¹ and that an ordinance which did not attempt to establish zones in which buildings for business purposes might or might not be constructed, and which, by its terms, referred only to buildings and land in a certain area is invalid.² Likewise, a regulation which provides merely that a section should be zoned for certain uses, and which does not specify which portions of the section may be used for any or all of such purposes and which is not accompanied by a map designating such use areas, is not valid under a statute requiring that there be a comprehensive plan.³

Stability of plan. A zoning plan should be sufficiently stable to protect those who comply with the law, but it should be susceptible to change, so that it can be altered to meet changing conditions not adequately recognized or not possible to foresee when the ordinance is adopted.⁴

§ 31. Zoning by Districts

Although the test of the validity of a zoning ordinance is not the number of districts provided thereby, generally zoning must be by districts and not by individual pieces of property.

It is generally the rule that zoning must be by districts,⁵ and not by individual pieces of property⁶ or by blocks;⁷ and a zoning regulation may and should divide the municipality into districts of such number, shape, and area as may be best suited to carry out the zoning purposes.⁸ The test of the

89. N.Y.—City of Olean v. Conkling, 283 N.Y.S. 66, 157 Misc. 63—Longley v. Rumsey, 224 N.Y.S. 165, 130 Misc. 492.

90. Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A.2d 83, 214 Md. 43.

91. Ga.—Gay v. Mayor of Lyons, 93 S.E.2d 352, 212 Ga. 438.

92. La.—State v. New Orleans, 97 So. 440, 154 La. 271, 33 A.L.R. 260.

93. Ala.—Chapman v. City of Troy, 4 So.2d 1, 241 Ala. 637.

Ky.—Darlington v. Board of Councilmen of City of Frankfort, 140 S.W.2d 392, 282 Ky. 778.

94. La.—State v. New Orleans, 97 So. 440, 154 La. 271, 33 A.L.R. 260.

95. Fla.—State ex rel. Henry v. City of Miami, 158 So. 82, 117 Fla. 594.

Ga.—Taylor v. Shetzen, 90 S.E.2d 572, 212 Ga. 101.

Md.—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.

96. Fla.—State ex rel. Henry v. City of Miami, 158 So. 82, 117 Fla. 594.

La.—State ex rel. Dema Realty Co. v. Jacoby, 123 So. 314, 168 La. 752.

97. Mass.—Town of Marblehead v. Rosenthal, 55 N.E.2d 13, 316 Mass. 124.

98. La.—State v. New Orleans, 97 So. 440, 154 La. 271, 33 A.L.R. 260.

99. Ala.—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36—Corpus Juris cited in Chapman v. City of Troy, 4 So.2d 1, 3, 241 Ala. 637.

43 C.J. p 338 note 3.

1. Ky.—Darlington v. Board of Councilmen of City of Frankfort, 140 S.W.2d 392, 282 Ky. 778.

2. Ky.—Darlington v. Board of Councilmen of City of Frankfort, supra.

3. Ohio.—Cassell v. Lexington Tp. Bd. of Zoning Appeals, 127 N.E.2d 11, 163 Ohio St. 340.

4. Fla.—Forde v. City of Miami Beach, 1 So.2d 642, 146 Fla. 676.

5. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412—

Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.

N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

Pa.—Logan v. Bickel, 11 Pa.Dist. & Co.2d 405, 43 Del.Co. 272.

Certainty and definiteness in description of districts see supra § 25.

6. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.

N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

7. N.Y.—City of Olean v. Conkling, 283 N.Y.S. 66, 157 Misc. 63—Longley v. Rumsey, 224 N.Y.S. 165, 130 Misc. 492.

8. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412.

Cal.—Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 342, 338 U.S. 939, 94 L.Ed. 579.

D.C.—Hagans v. District of Columbia, Mun.App., 97 A.2d 922.

validity of a zoning ordinance, however, is not the number of districts provided thereby,⁹ and an ordinance is not void because it does not establish more than one zone;¹⁰ but an ordinance is invalid where the creation of districts fails to accomplish the purposes set out in the ordinance.¹¹

§ 32. Boundary Lines

While the municipality has broad discretion in fixing the boundaries of zoning districts, the establishment of boundary lines must rest on some rational basis.

A municipality has broad discretion in fixing the boundaries of zoning districts in which certain restrictions shall apply,¹² but zoning district boundaries must be established by the building zone ordinance itself and not by the application of any written or unwritten rule formulated by an administrative body.¹³ The fact that residential property im-

mediately abutting a boundary line will be of less value than property more remote from the boundary of a commercial zone affords no justification for constant erosion of boundaries.¹⁴

With respect to discretion, it has been held that the boundary line of a zoning district in the nature of things must always be more or less arbitrary in that the property on one side of the line cannot be very different from the property on the other side of the line,¹⁵ and that a zoning regulation is not invalid because the location of such a line may be in some degree arbitrary,¹⁶ or transitional in character.¹⁷ Nevertheless, the establishment of boundary lines must rest on some rational basis,¹⁸ and zoning ordinances are invalid where failing sufficiently to fix areas and define boundaries of the intended use districts created thereby,¹⁹ or

Neb.—Davis v. City of Omaha, 45 N. W.2d 172, 153 Neb. 460.

N.J.—Oliva v. City of Garfield, 62 A. 2d 673, 1 N.J. 184.

Collins v. Board of Adjustment of City of Margate, 67 A.2d 332, 3 N.J.Super. 553, affirmed 69 A.2d 708, 3 N.J.Super. 200.

Crow v. Town of Westfield, 56 A. 2d 403, 136 N.J.Law 363.

S.C.—Stevenson v. Board of Adjustment of City of Charleston, 96 S. E.2d 456, 230 S.C. 440.

Wis.—Town of Hobart v. Collier, 87 N.W.2d 868, 3 Wis.2d 182.

9. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412.

10. U.S.—Valley View Village v. Proffett, supra.

11. Wis.—Town of Hobart v. Collier, 87 N.W.2d 868, 3 Wis.2d 182.

12. Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15. Fla.—City of Miami v. Rosen, 10 So. 2d 807, 151 Fla. 677.

Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81.

Ky.—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

Md.—Francis v. MacGill, 75 A.2d 91, 196 Md. 77.

N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

Pa.—In re Imperial Asphalt Corporation's Zoning Appeal, Com.Pl., 51 Lanc.L.Rev. 9.

Va.—Claffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41.

Certainty and definiteness in description of boundaries see supra § 25.

Minimizing inconveniences

Zoning necessarily involves boundary problems and, when spot zoning is permitted in a certain district, the legislative body must determine where boundary is to be placed, attempting as far as possible to minimize resulting inconveniences, and such determination can be attacked only if there is no reasonable basis therefor.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Size of enterprises

Where dividing line between zones was drawn between small and large businesses, zoning authorities could reasonably make line of demarcation depend on size of enterprises involved as measured by number of employees.

Cal.—Lockard v. City of Los Angeles, Cal., 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

13. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

14. Ill.—Bolger v. Village of Mount Prospect, 141 N.E.2d 22, 10 Ill.2d 596.

15. U.S.—K. & L. Oil Co. v. Oklahoma City, D.C.Okl., 14 F.Supp. 492.

D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

Okl.—In re Dawson, 277 P. 226, 186 Okl. 113.

16. Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81.

Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169

Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

Similar characteristics in adjacent surrounding areas do not necessarily preclude zoning authorities from placing adjoining territories in different zones.

Cal.—Lockard v. City of Los Angeles, Cal., 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

More proximity of property to the line dividing higher and lower use districts is, of itself, insufficient to show that ordinance creating the zoning line is invalid.

Ill.—Hibser v. Zoning Bd. of Appeals of Peoria County, 139 N.E.2d 325, 12 Ill.App.2d 365.

17. N.J.—Raskin v. Morristown, 121 A.2d 378, 21 N.J. 180.

Gartland v. Borough of Maywood, 131 A.2d 529, 45 N.J.Super. 1.

18. U.S.—K. & L. Oil Co. v. Oklahoma City, D.C.Okl., 14 F.Supp. 492.

Factors considered

(1) Zoning of any city results in so-called "buffer" areas, but such lines of division cannot be arbitrarily drawn by zoning authorities without regard to existing characteristics of area itself or without regard to reasonable rights of owners.

Mich.—McGiverin v. City of Huntington Woods, 72 N.W.2d 105, 343 Mich. 413—Janasick v. City of Detroit, 60 N.W.2d 452, 337 Mich. 549.

(2) Development of one zoning district may be in part regulated by character of adjacent district.

Ill.—Schwartz v. Congregation Powoloi Zeduck, 181 N.E.2d 785, 8 Ill.App.2d 438.

19. N.Y.—Mallett v. Village of Ma-

where the fixing of the boundaries of zoning districts is left to the ungoverned discretion, caprice, or arbitrary action of municipal administrative bodies or officials.²⁰

§ 33. Propriety of Classification and Uniformity of Operation in General

Constitutional uniformity and equality requires that classification be founded in real and not feigned differences having to do with the purposes for which the classes are formed, and the classification of property for the imposition of different restrictions must be uniform and general.

A municipal corporation has the primary duty to make a zoning classification.²¹ Accordingly, it has broad discretion in classifying different restrictions and different areas of the municipality in which such

restrictions shall apply,²² and each of the criteria enumerated in the enabling act need not be found advantageous to a particular classification before the municipality has authority to make it.²³

In making classifications, a municipality must recognize natural reasons and differences suggested by necessity and circumstances existing in the area with which the ordinance deals,²⁴ and constitutional uniformity and equality requires that classification be founded in real and not feigned differences having to do with the purposes for which the classes are formed.²⁵ The classification, however, must be fair.²⁶ The classification or division of a city into districts by a zoning regulation must be reasonable, uniform, or universal, and nondiscriminatory,²⁷ and bear a reasonable and just relation to the general

maroneck, 123 N.Y.S.2d 249, reversed on other grounds 131 N.Y.S.2d 504, 283 App.Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821.

20. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

21. Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 780.

22. Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

Tex.—City of Dallas v. Lively, Civ. App., 161 S.W.2d 895, error refused.

Commercial property

City council, in establishing zones, has large discretion in determining what property is commercial.

Cal.—Feraut v. City of Sacramento, 269 P. 537, 204 C. 637.

Classification held justified

(1) In general.

N.J.—Lewis v. Board of Com'rs of Borough of Avon-by-the-Sea, 143 A. 865, 7 N.J.Misc. 27.

Wis.—City of La Crosse v. Elbertson, 237 N.W. 99, 205 Wis. 207.

(2) Classification in zoning ordinance which made distinction between municipally owned and privately owned play grounds and parks being reasonable, ordinance was valid.

N.Y.—McCarter v. Beckwith, 285 N.Y. S. 151, 247 App.Div. 289, affirmed 3 N.E.2d 882, 272 N.Y. 488, certiorari denied Beckwith v. McCarter, 57 S.Ct. 194, 299 U.S. 601, 81 L.Ed. 443.

(3) Zoning ordinance which exempts the municipal uses of township's real property from its terms is not unconstitutional as invalid exercise of police power since individuals and municipalities do not stand in equal relation to the objects of zoning regulations.

Pa.—Jordan v. Township of Lower Merion, 34 Pa.Dist. & Co. 551, 55 Montg.Co. 20.

23. Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

24. Wis.—Town of Hobart v. Collier, 87 N.W.2d 868, 3 Wis.2d 182.

25. N.J.—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117—Roselle v. Wright, 122 A.2d 506, 21 N.J. 400—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.

26. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.III., 178 F.2d 214.

27. Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650.

Ill.—Chicago City Bank & Trust Co. v. City of Highland Park, 137 N.E.2d 835, 9 Ill.2d 364, certiorari denied 77 S.Ct. 681, 353 U.S. 922, 1 L.Ed.2d 719—Saladino v. City of South Beloit, 137 N.E.2d 364, 9 Ill.2d 320.

Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

Mass.—McHugh v. Board of Zoning Adjustment of Boston, 147 N.E.2d 761.

Mich.—Korby v. Redford Tp., 82 N.W.2d 441, 348 Mich. 193.

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681—City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n, 213 S.W.2d 479, 358 Mo. 70.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57.

Newark Milk & Cream Co. of Newark v. Parsippany-Troy Hills Tp., 135 A.2d 682, 47 N.J.Super. 306—Rockaway Estate v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.

Ohio.—Smith v. Juillerat, 119 N.E.2d 611, 161 Ohio St. 424.

State v. Zumpano, App., 146 N.E.2d 871—Carlton v. Riddell, App., 182 N.E.2d 772, appeal dismissed 180 N.E.2d 704, 164 Ohio St. 322.

Particular statutes held valid

(1) Ordinance excluding gasoline filling stations, automobile repair garages, store buildings, and business buildings generally from residence districts, except with permission of counsel after hearing, are valid under the police power, and make no arbitrary or unreasonable classification.

Ark.—Herring v. Stannus, 275 S.W. 321, 169 Ark. 244.

(2) Zoning ordinance does not amount to class legislation because it provides that a structure or premises may be erected or used in any location by public service corporations for any purpose which the railroad commission decides is reasonably necessary for the public convenience or welfare.

Wis.—State v. Harper, 196 N.W. 451, 182 Wis. 148, 33 A.L.R. 269.

Ordinance held not discriminatory

(1) Mere presence of buildings or areas being put to a use to which person attacking the validity of zoning ordinance seeks to put his property is a wholly insufficient circumstance to show that ordinance is invalid or discriminatory as to property of one assailing ordinance.

Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

(2) Proximity of zoned property to a line of demarcation, such as a street zoned for business and commercial purposes and serving as a barrier or buffer between different zones, is of itself insufficient to show that the ordinance creating the zone for the property involved is invalid or discriminatory as to such property.

Ill.—Miller Bros. Lumber Co. v. City

object of the legislation²⁸ or to the public health, safety, or welfare.²⁹ Hence, it is usually required that there be reasonable uniformity of restrictions within districts having the same general characteristics,³⁰ that the restrictions imposed operate generally, equally, and uniformly within the particular zones established,³¹ and that lands in like situations be classified alike with respect to the restrictions on use imposed.³²

In determining the validity of a given zoning

classification, the question whether or not it is in conformity with the surrounding existing uses and the zoning classification of nearby property is considered of paramount importance,³³ but a classification as the means for attaining a permissible end is not to be declared invalid if any state of facts reasonably can be conceived that would sustain it.³⁴ Each case must be determined on its own facts,³⁵ and a small area may be zoned specially to meet a special safety or health problem.³⁶

of Chicago, 111 N.E.2d 149, 414 Ill. 162.

28. N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

Persons may be classified on basis of some reasonable distinction having reference to object of the ordinance.

Ill.—City of Chicago v. Sachs, 115 N.E.2d 762, 1 Ill.2d 342—Ronda Realty Corp. v. Lawton, 111 N.E.2d 310, 414 Ill. 313.

29. Ill.—City of Chicago v. Sachs, 115 N.E.2d 762, 1 Ill.2d 342.

N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

30. Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 343.

Mass.—Smith v. Board of Appeals of Salem, 48 N.E.2d 620, 313 Mass. 622.

31. Ala.—Thompson v. Wingard, 34 So.2d 606, 250 Ala. 390.

Ill.—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321.

Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Mo.—State ex rel. Field v. Randall, 308 S.W.2d 637.

N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117—Roselle v. Wright, 122 A.2d 506, 21 N.J. 400—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386.

Gross v. Allan, 117 A.2d 275, 37 N.J. Super. 262—Marie's Launderette v. City of Newark, 113 A.2d 190, 35 N.J. Super. 94—Beck v.

Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J. Super. 554—Corpus Juris Secundum cited in N. T. Hegeman Co. v. Mayor and Council, of Borough of River Edge, 69 A.2d 767, 771, 6 N.J. Super. 495—Kerrigan Development Co. v. City of Newark, 65 A.2d 142, 2 N.J. Super. 690.

Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J. Law 230—Leonard Inv. Co. v. Board of Adjustment of City of Trenton, 4 A.2d 768, 122 N.J. Law 308.

N.Y.—Halpern v. Dassler, 135 N.Y.S.2d 8—Gitlin v. Rowledge, 123 N.Y.S.2d 812.

Pa.—Norwalk Truck Line Co., 78 Pa. Dist. & Co. 254, 99 Pittsb. Leg. J. 489.

McConaghy's v. Haverford Tp. Board of Adjustment Ordinance, Com. Pl., 31 Del. Co. 120.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Like restrictions within class

(1) Restrictions must apply alike to all persons and things within a designated class.

Mo.—State ex rel. Oliver Cadillac Co. v. Christopher, 298 S.W. 720, 317 Mo. 1179, error dismissed Oliver Cadillac Co. v. Christopher, 49 S. Ct. 17, 278 U.S. 662, 73 L.Ed. 569.

(2) Even though a zoning ordinance of a city be based on proper statutory authority and is reasonably designed to protect public health or safety, it cannot, in such guise, under rights guaranteed by state and federal constitutions, effect an arbitrary discrimination against class on which it operates by omitting from its coverage persons and objects similarly situated.

Ill.—Ronda Realty Corp. v. Lawton, 111 N.E.2d 310, 414 Ill. 313.

Buildings and uses

Regulations or restrictions must be uniform for each class or kind of buildings, structures, or land, and for each class or kind of use, throughout each district.

Mass.—Whittemore v. Building Inspector of Falmouth, 46 N.E.2d 1016, 313 Mass. 248.

32. Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

Mo.—Downing v. City of Joplin, 312 S.W.2d 81—Ryan v. City of Warrensburg, 117 S.W.2d 303, 342 Mo. 761.

N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117—Roselle v. Wright, 122 A.2d 506, 21 N.J. 400—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.

Sieber v. Laawe, 109 A.2d 470, 33 N.J. Super. 115.

Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J. Law 195, affirmed Appley v. Township Committee of Township of Bernards, 28 A.2d 177, 129 N.J. Law 73.

Ohio.—Johnson v. Griffiths, App., 141 N.E.2d 774, appeal dismissed 131 N.E.2d 397, 164 Ohio St. 393—State ex rel. Rosenthal v. City of Bedford, App., 134 N.E.2d 727.

33. Ill.—Honeck v. Cook County, 146 N.E.2d 35, 12 Ill.2d 234—Mack v. Cook County, 142 N.E.2d 785, 11 Ill.2d 310—Liberty Nat. Bank of Chicago v. City of Chicago, 139 N.E.2d 235, 10 Ill.2d 137—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—La Salle Nat. Bank v. City of Chicago, 126 N.E.2d 643, 6 Ill.2d 22.

34. Mass.—Raymond v. Commissioner of Public Works of Lowell, 131 N.E.2d 189, 333 Mass. 410—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

N.J.—Sieber v. Laawe, 109 A.2d 470, 33 N.J. Super. 115.

Pa.—Commonwealth v. Krakover, 72 Montg. Co. 500, 48 Mun. L.R. 168, reargument denied 73 Montg. Co. 301.

Tenn.—Henry v. White, 250 S.W.2d 70, 194 Tenn. 192.

Wis.—Smith v. City of Brookfield, 74 N.W.2d 770, 272 Wis. 1.

35. Mich.—Ervin Acceptance Co. v. City of Ann Arbor, 34 N.W.2d 11, 322 Mich. 404.

36. N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

An absolute identity of treatment of particular parcels of land is not required,³⁷ and it is not necessarily fatal that the classification be wanting in purely theoretical or scientific uniformity or mathematical nicety or that there be some inequality in practice.³⁸ Accordingly, zoning one side of a street for purposes different from those prevailing on the other side is not per se illegal.³⁹ The relative density of population in permissive and restricted districts is not a conclusive test of the validity of a zoning ordinance⁴⁰ and of the classification effected by the zoning plan.⁴¹

§ 34. Spot Zoning

Spot zoning, or zoning of individual pieces of prop-

erty in a manner different from that of surrounding property, primarily for the private interest of the owner of the property so zoned, may be improper, but is not illegal in all cases.

Spot zoning is an attempt to wrench a single lot from its environment and give it a new rating that disturbs the tenor of the neighborhood,⁴² and which affects only the use of a particular piece of property or a small group of adjoining properties and is not related to the general plan for the community as a whole,⁴³ but is primarily for the private interest of the owner of the property so zoned;⁴⁴ and it is the very antithesis of planned zoning.⁴⁵ It has generally been held that spot zoning is improper,⁴⁶ and that one or two building lots may not be marked off

37. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.

Ill.—Aurora v. Burns, 149 N.E. 784, 319 Ill. 84.

N.J.—F. L. & P. Inv. Co. v. Dowling, 134 A. 555, 4 N.J.Misc. 824.

38. N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A. 2d 607, 9 N.J. 405.

39. N.J.—Conlon v. Board of Public Works of City of Paterson, 94 A.2d 660, 11 N.J. 363—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182.

40. Cal.—Sunny Slope Water Co. v. City of Pasadena, 33 P.2d 672, 1 C.2d 87.

41. Cal.—Sunny Slope Water Co. v. City of Pasadena, supra—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778, and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777.

42. Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381—Eden v. Town Plan and Zoning Commission of Town of Bloomfield, 89 A.2d 746, 139 Conn. 59.

N.J.—Linden Methodist Episcopal Church v. City of Linden, 173 A. 593, 113 N.J.Law 188.

"Lifting out" piece of property

"Spot zoning" generally relates to action in "lifting out" of a zoned area one unit or one particular piece of property.

Ga.—Neal v. City of Atlanta, 94 S.E. 2d 867, 212 Ga. 687—Birdsey v. Wesleyan College, 87 S.E.2d 878, 211 Ga. 583.

43. Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381—Eden v. Town Plan and Zoning Commission of Town of Bloomfield, 89 A.2d 746, 139 Conn. 59.

Mich.—Penning v. Owens, 65 N.W.2d 831, 340 Mich. 355.

N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397.

N.Y.—Fitchett Crescent Corp. v. City of New York, 155 N.Y.S.2d 272.

Elements

Two elements must coexist in order to constitute spot zoning in sense of an illegal exercise of power on part of zoning authority; there must be a change of zone applicable only to a small area and, this change must be out of harmony with comprehensive plan for good of community as a whole.

Conn.—Guerriero v. Galasso, 136 A. 2d 497, 144 Conn. 600.

44. Ill.—O'Brien v. City of Chicago, 105 N.E.2d 917, 347 Ill.App. 45.

Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A. 2d 83, 214 Md. 48—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115.

Soule v. Town of Perinton, 152 N.Y.S.2d 734, appeal dismissed 156 N.Y.S.2d 986, 2 A.D.2d 834—Hermann v. Incorporated Village of East Hills, 104 N.Y.S.2d 592, affirmed 109 N.Y.S.2d 182, 279 App. Div. 753, appeal denied 110 N.Y. S.2d 283, 279 App.Div. 799.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Tenn.—Grant v. McCullough, 270 S. W.2d 317, 196 Tenn. 671.

45. N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115.

Soule v. Town of Perinton, 152

N.Y.S.2d 734, appeal dismissed 156 N.Y.S.2d 986, 2 A.D.2d 834.

46. Ala.—Shell Oil Co. v. Edwards, 81 So.2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 885, 100 L.Ed. 780—Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 593, 253 Ala. 402—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36.

Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381—Eden v. Town Plan and Zoning Commission of Town of Bloomfield, 89 A.2d 746, 139 Conn. 59—Kuehne v. Town Council of Town of East Hartford, 72 A.2d 474, 136 Conn. 452—Bartram v. Zoning Commission of City of Bridgeport, 68 A.2d 308, 136 Conn. 89.

Fla.—Parking Facilities, Inc. v. City of Miami Beach, 88 So.2d 141.

Ga.—Orr v. Hapeville Realty Investments, 85 S.E.2d 20, 211 Ga. 235.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

Ky.—Parker v. Rash, 236 S.W.2d 687, 314 Ky. 609—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A. 2d 83, 214 Md. 48—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

Mass.—Smith v. Board of Appeals of Salem, 48 N.E.2d 620, 313 Mass. 622.

N.J.—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117.

Ohio.—Fartain v. City of Brooklyn, 138 N.E.2d 180, affirmed 133 N.E.2d 616, 101 Ohio App. 279—Corpus Juris Secundum quoted in State ex rel. Kangesser Co. v. Village of Beachwood, App., 128 N.E.2d 127, 129.

Or.—Shaffner v. City of Salem, 268 P.2d 599, 201 Or. 45—Page v. City of Portland, 165 P.2d 280, 178 Or. 632.

into a separate district or zone⁴⁷ and benefited by peculiar advantages or subjected to peculiar burdens not applicable to adjoining similar lands.⁴⁸

It appears, however, that so-called "spot zoning" is not illegal in all cases,⁴⁹ and whether it is so de-

pends on the particular facts of the case,⁵⁰ and on whether the municipality's action is properly related to the public health, safety, morals, and general welfare,⁵¹ designed to serve the best interests of the community as a whole,⁵² and in accordance with a comprehensive zoning plan.⁵³ The mere fact that

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

Zook v. Winger, Com.Pl., 15 Cambria 221—Cline v. Nether Providence Tp. Bd. of Adjustment, Com.Pl., 38 Del.Co. 293.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Tenn.—Grant v. McCullough, 270 S.W.2d 317, 196 Tenn. 671.

Spot zoning by amendatory ordinance or regulation see *infra* § 91.

Contravention of constitutional and statutory principles

Spot zoning contravenes constitutional and statutory principle of zoning by district in consonance with character of lands and structures and use, suitability, and uniformity of use within division.

N.J.—Rockhill v. Chesterfield Tp., Burlington County, 128 A.2d 473, 23 N.J. 117.

Classification of property held not invalid as spot zoning

Ind.—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 117 Ind.App. 314.

Md.—Fuller v. County Com'rs of Baltimore County, 133 A.2d 397, 214 Md. 168.

Neb.—Graham v. Graybar Elec. Co., 63 N.W.2d 774, 158 Neb. 527.

N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.

N.Y.—Nappi v. LaGuardia, 55 N.Y.S.2d 80, 184 Misc. 775, affirmed 54 N.Y.S.2d 722, 269 App.Div. 693, affirmed 64 N.E.2d 716, 295 N.Y. 652—Bowen v. Hider, 37 N.Y.S.2d 76.

Pa.—Putney v. Abington Tp., Quar. Sess., 70 Montg.Co. 102, affirmed 108 A.2d 134, 176 Pa.Super. 463.

Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

47. Ohio.—*Corpus Juris Secundum* quoted in State ex rel. Kangessar Co. v. Village of Beachwood, App., 128 N.E.2d 127, 129.

Pa.—Huebner v. Philadelphia Sav. Fund Soc., 192 A. 139, 127 Pa.Super. 28.

David Magen Builder v. Wilson, 34 Pa.Dist. & Co. 461.

48. Md.—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

Mass.—Smith v. Board of Appeals of Salem, 48 N.E.2d 620, 313 Mass. 622.

Ohio.—*Corpus Juris Secundum* quoted in State ex rel. Kangessar Co. v. Village of Beachwood, App., 128 N.E.2d 127, 129.

"Less rights"

Zoning ordinances are invalid "where a small parcel is restricted and given less rights than the surrounding property."

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

49. Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

Or.—Page v. City of Portland, 165 P.2d 280, 178 Or. 632.

Pa.—Barner v. City of Williamsport, Com.Pl., 4 Lycoming 261.

Implementation of general ordinance

Where city had general zoning ordinance covering entire city, separate ordinance dealing only with annexed property merely implemented the general ordinance, and was not invalid as attempted piecemeal zoning.

Ky.—Hawkins v. Louisville and Jefferson County Planning and Zoning Commission, 266 S.W.2d 314, 41 A.L.R.2d 1459.

50. Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.

Ohio.—Partain v. City of Brooklyn, Com.Pl., 138 N.E.2d 180, affirmed 133 N.E.2d 616, 101 Ohio App. 279.

Or.—Shaffner v. City of Salem, 268 P.2d 599, 201 Or. 45—Page v. City of Portland, 165 P.2d 280, 178 Or. 632.

Church

Action of city council in permitting church to resubdivide church property and dedicate alleys for sole purpose of allowing church to erect building in conformance with ordinance providing that church could be erected in district zoned for single family residences only on a lot entirely surrounded by streets or alleys did not constitute spot zoning.

Ill.—O'Brien v. City of Chicago, 105 N.E.2d 917, 347 Ill.App. 45.

Type of "island"

"So-called 'spot' zoning results in the creation of two types of 'islands.' . . . The objectionable type arises when the zoning authority improperly limits the use which may be made of a small parcel located in the

center of an unrestricted area. The second type of 'island' results when most of a large district is devoted to a limited or restricted use, but additional uses are permitted in one or more 'spots' in the district."

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 549, 29 C.2d 332.

51. Ky.—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A.2d 83, 214 Md. 48.

Mich.—Penning v. Owens, 65 N.W.2d 831, 340 Mich. 355.

N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

Siebert v. Laawe, 109 A.2d 470, 33 N.J.Super. 115.

Ohio.—Partain v. City of Brooklyn, Com.Pl., 138 N.E.2d 180, affirmed 133 N.E.2d 616, 101 Ohio App. 279.

Tex.—McNutt Oil & Refining Co. v. Brooks, Civ.App., 244 S.W.2d 872.

52. Conn.—Kutcher v. Town Planning Commission of Town of Manchester, 88 A.2d 538, 138 Conn. 705.

Abuse of discretion

Where zoning authority singles out for special treatment a small area in furtherance of a general plan adopted to serve interest of community as a whole, authority's decision can be assailed only on ground that it has abused its discretion.

Conn.—Kuehne v. Town Council of Town of East Hartford, 72 A.2d 474, 136 Conn. 452—Bartram v. Zoning Commission of City of Bridgeport, 68 A.2d 308, 136 Conn. 89.

53. Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A.2d 83, 214 Md. 48—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

N.H.—Mater v. City of Dover, 79 A.2d 844, 97 N.H. 13.

N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115.

Fitchett Crescent Corp. v. City of New York, 155 N.Y.S.2d 272.

Test

An ordinance is not to be labeled "spot zoning" merely because it singles out and affects one parcel of land, and the true test is whether

an ordinance creates numerous small zones indiscriminately scattered throughout the city, frequently consisting of only one lot, does not render it invalid,⁵⁴ and a mere allegation that a certain order constitutes spot zoning does not necessarily make the order illegal.⁵⁵

Whether a zoning ordinance is invalid as an entirety in that it is merely spot zoning depends on more than the size of the "spot",⁵⁶ although the size is an important consideration;⁵⁷ and, where it does not appear that there is a singling out of one lot for treatment different from that accorded to similar surrounding land indistinguishable from it in character, such spot zoning is not illegal.⁵⁸

§ 35. Equitable Application

The limitation on the use of property imposed by a zoning regulation must apply fairly to all and tend to promote the common good of all the people in the community.

The limitation on the use of property imposed by a zoning regulation or ordinance must apply fairly to all,⁵⁹ and some individuals should not be protected to the detriment and hardship of others.⁶⁰ A zoning ordinance may not deprive an individual own-

er of all useful benefits of his property,⁶¹ and impose on him a special hardship unnecessarily and unreasonably.⁶² Zoning restrictions must in some substantial manner tend to promote the common good of all the people in the community rather than to further the desires of a particular class, group, or individual in that community,⁶³ and the power to enact zoning ordinances cannot be invoked to further private interests which conflict with the rights of the public in general.⁶⁴ A restrictive act may not be passed merely because the community wants it,⁶⁵ but the fact that certain zoning action is urged by a minority, majority, or by all of the community neither brings the action within the police power nor prevents it from being valid and constitutional.⁶⁶

§ 36. Aesthetic Considerations

Although aesthetic considerations alone do not justify the enactment of zoning regulations, they may constitute a proper factor in determining whether a zoning regulation is valid.

It has generally been held that aesthetic considerations alone do not justify the enactment of zoning regulations,⁶⁷ and that a zoning ordinance, in so

the change is part of a well considered and comprehensive plan.

N.Y.—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed, 124 N.E.2d 716, 308 N.Y. 736.

Linn v. Town of Hempstead, 170 N.Y.S.2d 217.

54. Cal.—Feraut v. City of Sacramento, 269 P. 537, 204 C. 687.

Harris v. City of Piedmont, 42 P.2d 356, 5 C.A.2d 146.

N.J.—Conlon v. Board of Public Works of City of Paterson, 94 A. 2d 660, 11 N.J. 363.

55. Ky.—Bischoff v. Hennessy, 251 S.W.2d 582.

56. Mass.—Town of Marblehead v. Rosenthal, 55 N.E.2d 13, 316 Mass. 124.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

Graham v. Graybar Elec. Co., 63 N.W.2d 774, 153 Neb. 527.

Tex.—McNutt Oil & Refining Co. v. Brooks, Civ.App., 244 S.W.2d 872.

57. Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

58. Mass.—Town of Marblehead v. Rosenthal, 55 N.E.2d 13, 316 Mass. 124.

59. Conn.—Devaney v. Board of Zoning Appeals of City of New Haven, 45 A.2d 828, 132 Conn. 537.

N.Y.—Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.

S.C.—Talbot v. Myrtle Beach Bd. of

Adjustment, 72 S.E.2d 66, 222 S.C. 165.

60. R.I.—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R. I. 422.

Adjoining districts

Property owners in a residential district cannot create a "no man's land" at the border of their own district by forbidding one property owner in an adjoining district from making any use at all of his property, or any use for which it is particularly suitable, especially when the adjoining district has been zoned for different suitable uses for a number of years.

Md.—Northwest Merchants Terminal v. O'Rourke, Md., 60 A.2d 743, 191 Md. 171.

61. Mich.—Bassey v. City of Huntington Woods, 74 N.W.2d 897, 344 Mich. 701.

N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115.

Clune v. Walker, 170 N.Y.S.2d 604.

Ohio.—State ex rel. Rosenthal v. City of Bedford, App., 134 N.E.2d 727.

62. N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

63. Cal.—Bailey v. Los Angeles County, 293 P.2d 449, 46 C.2d 132.

Ill.—Regner v. McHenry County, 138 N.E.2d 545, 9 Ill.2d 577—Dunlap v. City of Woodstock, 91 N.E.2d 434, 405 Ill. 410.

N.J.—Guaclides v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J. Super. 405.

Pa.—Medinger v. Springfield Tp., Com.Pl., 69 Montg.Co. 203.

R.I.—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

64. Or.—Page v. City of Portland, 165 P.2d 280, 178 Or. 632.

65. Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.

66. Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

N.J.—Roselle v. Mayor and Council of Borough of Moonachie, 139 A.2d 42, 49 N.J.Super. 35.

67. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 593.

Del.—Papaioanu v. Commissioners of Rehoboth, 20 A.2d 447, 25 Del.Ch. 327.

Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Federal Electric Co. v. Zoning Bd. of Appeals of Village of Mt. Prospect, 75 N.E.2d 359, 398 Ill. 142—State Bank & Trust Co. v. Village of Wilmette, 193 N.E. 131, 358 Ill. 311, 96 A.L.R. 1327—Forbes v. Hubbard, 180 N.E. 676, 348 Ill. 166.

Mass.—Opinion of the Justices to the Senate, 128 N.E.2d 557, 333 Mass.

far as it is designed merely to preserve the appearance of a designated neighborhood, is invalid.⁶⁸ Causes which may depress highly sensitive persons furnish no basis for restrictions on the use of property by a zoning regulation.⁶⁹

It has also been held, however, that zoning regulations may extend beyond strict considerations of health and safety and include aesthetic considerations,⁷⁰ and that aesthetic considerations may constitute a proper factor in determining whether a zoning regulation is valid.⁷¹ When once it is determined that the regulation tends to promote the public health, public safety, or public welfare, aesthetic

considerations may be considered by the municipality in the enactment of the particular regulation,⁷² and it is not a valid objection to a regulation which can be sustained as promoting the public health and safety that it was induced by reason of aesthetic value.⁷³

§ 37. Hardship, Loss, or Benefit to Particular Persons

In determining the validity of zoning regulations, the public interest must be weighed against the right of individual owners, and while the effect of a regulation on the land values is not controlling, it is a proper element to be considered, since no basis for the exercise of the

773—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646.

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

Neb.—Baker v. Somerville, 293 N.W. 326, 138 Neb. 466.

N.Y.—Cordts v. Hutton Co., 262 N.Y. S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

Northport Water Works Co. v. Carll, 133 N.Y.S.2d 859—Crone v. Town of Brighton, 119 N.Y.S.2d 877—Householder v. Town of Grand Island, 114 N.Y.S.2d 852, affirmed 114 N.Y.S.2d 262, 280 App.Div. 874, appeal denied 116 N.Y.S.2d 925, 280 App.Div. 910, motion denied 109 N.E.2d 87, 304 N.Y. 796, affirmed 113 N.E.2d 555, 305 N.Y. 805.

Ohio.—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

Pa.—Appeal of Medinger, 104 A.2d 118, 377 Pa. 217—Appeal of Lord, 81 A.2d 533, 368 Pa. 121—Appeal of Kerr, 144 A. 81, 294 Pa. 246—Appeal of Liggett, 139 A. 619, 291 Pa. 109.

Miller v. Seaman, 8 A.2d 415, 137 Pa.Super. 24.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

43 C.J. p 338 note 5, p 416 note 95.

Moving factor

(1) In determining the validity of zoning restrictions under police power, aesthetics may be an incident but cannot be moving factor.

Mich.—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331—Frischkorn Const. Co. v. Lambert, 24 N.W. 2d 209, 315 Mich. 556—Wolverine Sign Works v. City of Bloomfield Hills, 271 N.W. 823, 279 Mich. 205.

(2) Regard for preservation of natural beauty of a neighborhood makes

enactment of a zoning regulation desirable but does not itself give vitality to regulation.

Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

It is "problematical" whether aesthetic considerations justify the imposing of zoning restrictions.

Ky.—Standard Oil Co. v. City of Bowling Green, 50 S.W.2d 960, 244 Ky. 362, 86 A.L.R. 648.

Regulation held not motivated by aesthetic considerations.

Pa.—Appeal of Liggett, 139 A. 619, 291 Pa. 109.

68. N.Y.—Fresnell v. Leslie, 165 N.Y. S.2d 488, 3 N.Y.2d 384, 144 N.E.2d 381.

Ohio.—State v. Woodworth, 169 N.E. 713, 33 Ohio App. 406.

Pa.—Appeal of Hessenbruch from Radnor Tp. Zoning Ordinance, Quar.Sess., 40 Del.Co. 43.

Tex.—Niday v. City of Bellaire, Civ. App., 251 S.W.2d 747.

69. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 598.

70. N.Y.—People, on Inf. of Barker, v. Elkin, 80 N.Y.S.2d 525—Elbert v. Village of North Hills, 28 N.Y.S. 2d 317, reversed on other grounds 28 N.Y.S.2d 172, 262 App.Div. 856, reargument denied 29 N.Y.S.2d 152, 262 App.Div. 872.

Wis.—State ex rel. Saveland Park Holding Corp. v. Wisland, 69 N.W. 2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed. 750.

71. Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A. L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431—Fresnell v. Leslie, 165 N.Y.S.2d 488, 3 N.Y.2d 384, 144 N.E.2d 381.

Krantz v. Town of Amherst, 80 N.Y.S.2d 812, 192 Misc. 912.

Northport Water Works Co. v. Carll, 133 N.Y.S.2d 859.

Ohio.—Criterion Service v. City of East Cleveland, App., 88 N.E.2d 300, appeal dismissed, 89 N.E.2d 475, 152 Ohio St. 416.

Pa.—Appeal of Kerr, 144 A. 81, 294 Pa. 246.

72. Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Neef v. City of Springfield, 43 N.E.2d 947, 380 Ill. 275.

Iowa.—Stoner McCray System v. City of Des Moines, 78 N.W.2d 843, 247 Iowa 1313—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

La.—City of New Orleans v. Levy, 64 So.2d 798, 223 La. 14.

Mass.—Opinion of the Justices to the Senate, 128 N.E.2d 557, 333 Mass. 773—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646.

Mich.—Frischkorn Const. Co. v. Lambert, 24 N.W.2d 209, 315 Mich. 556—Wolverine Sign Works v. City of Bloomfield Hills, 271 N.W. 823, 279 Mich. 205.

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

N.Y.—People v. Calvar Corp., 69 N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

N.H.—Sundeen v. Rogers, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

Ohio.—Davis v. McPherson, 132 N.E. 2d 626, appeal dismissed 130 N.E. 2d 342, 164 Ohio St. 296, and 130 N.E.2d 794, 164 Ohio St. 375.

Tex.—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

43 C.J. p 338 note 6.

73. N.H.—Sundeen v. Rogers, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

Pa.—Appeal of Liggett, 139 A. 619, 291 Pa. 109.

zoning power exists if the public gain is small compared with individual hardships and loss.

In determining the validity of zoning regulations the seriousness of the restriction on the private right must be considered in balance with the expediency of the public interest,⁷⁴ since the police power, which is the legal basis for zoning legislation, as discussed supra § 16, must be reconciled with the legitimate use of private property, in harmony with constitutional guaranties.⁷⁵ Ordinarily, where a municipal-

ity acts in the lawful exercise of its police power in enacting zoning regulations, the owners of property not taken have no redress because the value thereof is diminished,⁷⁶ and the fact that the exercise of the zoning power reduces the value of some individual rights does not render it invalid if the restriction is for the greater benefit accruing to the public as a whole.⁷⁷

Generally the effect of a zoning ordinance on land values is not controlling,⁷⁸ and the validity of a zon-

74. Ill.—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill. 169—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28.

Mich.—McGiverin v. City of Huntington Woods, 72 N.W.2d 105, 343 Mich. 413—Janessick v. City of Detroit, 60 N.W.2d 452, 337 Mich. 549. N.H.—Brady v. City of Keene, 4 A.2d 658, 90 N.H. 99.

N.J.—Roselle v. Mayor and Council of Borough of Moonachie, 139 A.2d 42, 49 N.J. Super. 35.

N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115. Clune v. Walker, 170 N.Y.S.2d 604.

Tex.—City of West University Place v. Ellis, 134 S.W.2d 1038, 134 Tex. 222.

Ordinance held invalid

Where purpose of township zoning ordinance and its enforcement was to conserve property values in immediate neighborhood and enforcement of ordinance would not tend to lessen congestion on public streets, promote public sanitation, health, safety, and general welfare, ordinance was invalid.

Mich.—Elizabeth Lake Estates v. Waterford Tp., 26 N.W.2d 782, 317 Mich. 359.

75. Colo.—People ex rel. Grommon v. Hedgcock, 104 P.2d 607, 106 Colo. 300.

76. Wis.—Higbee v. Chicago, B. & Q. R. Co., 292 N.W. 320, 235 Wis. 91, 123 A.L.R. 734.

Uncompensated burden

A zoning ordinance, which rests on police power of state, may lay an uncompensated burden on some property owners.

Iowa.—Boardman v. Davis, 3 N.W.2d 608, 231 Iowa 1227.

Land purchased from city

Company purchasing land from city for residence purposes could not recover, on ground of city's subsequent improper exercise of police power in passing zoning ordinance.

U.S.—America Land Co. v. City of Keene, C.C.A.N.H., 41 F.2d 484.

77. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 593.

Cal.—Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865, 40 C.2d 552—Clemons v. City of Los Angeles, 222 P.2d 439, 36 C.2d 95—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

Ill.—Dunlap v. City of Woodstock, 91 N.E.2d 434, 405 Ill. 410—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179—Neef v. City of Springfield, 43 N.E.2d 947, 380 Ill. 275—Evanston Best & Co. v. Goodman, 16 N.E.2d 131, 369 Ill. 207.

City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 618.

Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

Mo.—Ryan v. City of Warrensburg, 117 S.W.2d 303, 342 Mo. 761.

N.Y.—Brown v. Village of Owego, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655.

Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App. Div. 1005, reargument and appeal denied, 86 N.Y.S.2d 288, 274 App. Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Ohio.—State ex rel. Helsel v. Board of Com'rs of Cuyahoga County, Com.Pl., 79 N.E.2d 698, affirmed 78 N.E.2d 694, 83 Ohio App. 388, appeal dismissed 79 N.E.2d 911, 149 Ohio St. 583.

Pa.—Appeal of Liggett, 139 A. 619, 291 Pa. 109.

R.I.—Buckminster v. Zoning Board of Review of City of Pawtucket, 33 A. 2d 199, 69 R.I. 396.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327—Howe Realty Co. v. City of Nashville, 141 S.W.2d 904, 176 Tenn. 405.

Tex.—Luse v. City of Dallas, Civ. App., 131 S.W.2d 1079, error refused.

Public good means more than special benefits from a zoning ordinance which are conferred only on a few. Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91.

Speculative uses

Zoning ordinance cannot be declared unreasonable and invalid merely because it prohibits speculative uses which owner might desire to make of property in future.

Kan.—Hoel v. Kansas City, 291 P. 780, 131 Kan. 290.

Value of investments

(1) Right of municipal legislative body to pass zoning ordinance is not limited by fact that value of investments made in business prior to any legislative action will be greatly diminished, as business which was entirely unobjectionable when established may become, by growth of population in vicinity, a source of danger to health and comfort of occupants of surrounding territory.

Cal.—People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

(2) A property owner is not to be protected in face of a zoning ordinance against his losing maximum return from his investment.

N.Y.—Osborne v. Village of East Hampton, 61 N.Y.S.2d 142, affirmed 66 N.Y.S.2d 646, 271 App.Div. 837.

Particular benefits

Ordinarily, loss to individual from zoning regulations will not invalidate regulations where regulations reasonably serve to lessen congestion in streets, to secure safety from fire, panic, and other dangers, to promote health and general welfare, to provide adequate light and air, to prevent overcrowding of land, to avoid undue concentration of population, and to facilitate adequate provision for transportation, water, sewerage, schools, parks, and other public requirements.

Conn.—Strain v. Mims, 193 A. 754, 123 Conn. 275.

78. Ill.—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507—Metropolitan Life Ins. Co. v. City of Chicago, 84 N.E.2d 325, 402 Ill. 531.

ing ordinance is not to be tested solely by whether financial loss is caused,⁷⁹ since constitutional rights will not be measured in terms of money.⁸⁰ Accordingly, such a regulation, if otherwise reasonable and

in the public interest, is not invalid merely because it causes hardship to some individuals⁸¹ and depreciates the value of some property,⁸² or because it prevents any practical economic use of particular

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Mich.—Industrial Land Co. v. City of Birmingham, 78 N.W.2d 656, 346 Mich. 667—**Redford Moving & Storage Co. v. City of Detroit**, 58 N.W.2d 812, 336 Mich. 702.

N.J.—Birkfield Realty Co. v. Board of Com'rs of City of Orange, 79 A.2d 326, 12 N.J.Super. 192.

Ohio.—Partain v. City of Brooklyn, Com.Pl., 138 N.E.2d 180, affirmed 133 N.E.2d 616, 101 Ohio App. 279.

Pa.—Gracey v. Township of Springfield, Com.Pl., 37 Del.Co. 22.

79. Ala.—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Cal.—Lagless v. Krainitz, 282 P.2d 541.

Miss.—Palazzola v. City of Gulfport, 52 So.2d 611, 211 Miss. 737.

N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

N.Y.—Fox Meadow Estates v. Culley, 252 N.Y.S. 178, 233 App.Div. 250, affirmed 185 N.E. 714, 261 N.Y. 506.

Andrews v. Town Bd. of Town of Dewitt, Onondaga County, 98 N.Y. S.2d 494.

N.C.—Elizabeth City v. Aydtlett, 161 S.E. 78, 201 N.C. 602.

Pa.—Murphy v. Abington Tp., Com. Pl., 67 Montg.Co. 259.

Fairness as test

Financial loss to property owner is not test of constitutionality of zoning ordinance, which depends on fairness of ordinance and classification.

Ala.—Marshall v. City of Mobile, Ala., 35 So.2d 553, 280 Ala. 646.

Serious injury

Zoning may inflict serious pecuniary injury on the landowner without being arbitrary.

D.C.—Leventhal v. District of Columbia, 100 F.2d 94, 69 App.D.C. 229.

Ground of complaint

A landowner, even though he may be deprived by zoning ordinance of use of land that would be more profitable to him, has no just ground of complaint unless he shows that zoning ordinance as applied to him and his property is plainly arbitrary and unreasonable and has no rational relation to any of purposes mentioned in statute authorizing zoning ordinance or to any of purposes for which police power may be legitimately exercised.

Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

30. Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.

Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

81. Cal.—Livingston Rock & Gravel Co. v. Los Angeles County, 272 P. 2d 4, 43 C.2d 121—**McCarthy v. City of Manhattan Beach**, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S. Ct. 29, 348 U.S. 817, 99 L.Ed. 644—**Lockard v. City of Los Angeles**, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

Md.—Grant v. Mayor and City Council of Baltimore, 129 A.2d 363, 212 Md. 301—**Carney v. City of Baltimore**, 93 A.2d 74, 201 Md. 130.

Mo.—State ex rel. Oliver Cadillac Co. v. Christopher, 298 S.W. 720, 317 Mo. 1179, error dismissed Oliver Cadillac Co. v. Christopher, 49 S. Ct. 17, 278 U.S. 662, 73 L.Ed. 569.

Neb.—Graham v. Graybar Elec. Co., 63 N.W.2d 774, 158 Neb. 527—**Davis v. City of Omaha**, 45 N.W.2d 172, 153 Neb. 460.

N.Y.—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

Andrews v. Town Bd. of Town of Dewitt, Onondaga County, 98 N.Y. S.2d 494.

Pa.—Appeal of Kerr, 144 A. 81, 294 Pa. 246.

Dunlap v. Board of Adjustment of Sharon Hill, Com.Pl., 38 Del.Co. 164.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Determinative consideration

Where it appears that restrictions of a zoning ordinance bear substantial relation to public health, safety, morals, or general welfare, such a consideration is determinative regardless of fact that individuals may suffer an invasion of their property.

Ill.—Rector v. Board of Appeals Under Zoning Ordinance of City of Danville, 95 N.E.2d 99, 342 Ill.App. 51.

Expenses of business

A zoning ordinance does not become unreasonable by reason of the fact solely that it increases the expense of a business and consequently increases cost of the product of the business.

N.Y.—Krantz v. Town of Amherst, 80 N.Y.S.2d 812, 192 Misc. 912.

82. U.S.—Village of Euclid v. Amb-

ler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L. R. 1016.

Kroeger v. Stahl, C.A.N.J., 248 F. 2d 121—**American Wood Products Co. v. City of Minneapolis**, D.C. Minn., 21 F.2d 440, affirmed, C.C.A., 35 F.2d 657.

Standard Oil Co. v. City of Tallahassee, Fla., D.C.Fla., 87 F.Supp. 145, affirmed 183 F.2d 410, certiorari denied 71 S.Ct. 203, 340 U.S. 892, 95 L.Ed. 647.

Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762—**Roney v. Board of Sup'rs of Contra Costa County**, 292 P.2d 529, 138 C.A.2d 740.

Mass.—Pierce v. Town of Wellesley, 146 N.E.2d 666.

Mich.—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706—**City of Howell v. Kaal**, 67 N.W.2d 704, 341 Mich. 585—**Moreland v. Armstrong**, 297 N.W. 60, 297 Mich. 32.

N.Y.—Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47—**Nappi v. LaGuardia**, 55 N.Y.S. 2d 80, 184 Misc. 775, affirmed 54 N. Y.S.2d 722, 269 App.Div. 693, affirmed 64 N.E.2d 716, 295 N.Y. 652.

Vernon Park Realty v. City of Mount Vernon, 123 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, appeal denied 126 N.Y.S. 2d 200, 282 App.Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493—**Harrison v. Reidpath**, 93 N.Y. S.2d 569.

N.C.—Appeal of Parker, 197 S.E. 706, 214 N.C. 51, appeal dismissed Parker v. City of Greensboro, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358.

Ohio.—Morris v. Roseman, App., 118 N.E.2d 429, reversed on other grounds 128 N.E.2d 419, 162 Ohio St. 447.

Pa.—Appeal of Kerr, 144 A. 81, 294 Pa. 246.

Strawbridge v. Horsham Tp., 7 Pa.Dist. & Co.2d 161, 72 Montg.Co. 117.

Tenn.—White v. Henry, 285 S.W.2d 353, 199 Tenn. 219—**Henry v. White**, 250 S.W.2d 70, 194 Tenn. 192.

Tex.—Lombardo v. City of Dallas, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

Test

Where a destruction of value occurs, test to be applied is whether such destruction promotes public health, safety, morals, or general welfare.

property without commensurate advantage to other property.⁸³ Likewise, the welfare of the community may not be subordinated to the profit motive of an individual owner,⁸⁴ and the fact alone that the property in question may be more valuable if otherwise zoned is not decisive in determining the validity of an ordinance,⁸⁵ particularly where the proposed zoning would depreciate the value of other property in the area.⁸⁶

The objective effect of an ordinance on the prop-

erty rights of the persons affected thereby should be considered,⁸⁷ and may be persuasive in passing on the validity of an ordinance.⁸⁸ So, it has been held that in determining the validity of a zoning regulation it is proper to consider the hardship and loss imposed on individuals,⁸⁹ and the extent to which the value of property has been diminished by the regulation,⁹⁰ since no basis for the exercise of the zoning power exists if the public gain is small compared with individual hardships and loss.⁹¹

Where there is no material relation of the re-

Ill.—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104.

Knowledge of impediment

Where landowner, at time of acquisition of property, was aware of impediment to sell arising from zoning restrictions, landowner could not, under circumstances, secure removal of such restrictions, even though he was suffering material diminution in value of his property by refusal to remove restrictions.

Fla.—Garlick v. City of Miami, 67 So. 2d 440.

83. N.J.—Schaible v. Board of Adjustment, 49 A.2d 50, 184 N.J.Law 473.

84. N.J.—Rockaway Estate v. Rockaway Tp., 119 A.2d 461, 38 N.J. Super. 463.

85. Cal.—Lagiss v. Kraintz, 232 P. 2d 541, 104 C.A.2d 793.

Ill.—Zweifel Mfg. Corp. v. City of Peoria, 144 N.E.2d 593, 11 Ill.2d 489 —Bolger v. Village of Mount Prospect, 141 N.E.2d 22, 10 Ill.2d 596—Liberty Nat. Bank of Chicago v. City of Chicago, 139 N.E.2d 235, 10 Ill.2d 137—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 61—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—People ex rel. Alco Deree Co. v. City of Chicago, 118 N.E.2d 20, 2 Ill.2d 350—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81.

Hibser v. Zoning Bd. of Appeals of Peoria County, 139 N.E.2d 325, 12 Ill.App.2d 365.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 130, 350 U.S. 902, 100 L. Ed. 792.

N.J.—Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J. Super. 47.

N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115.

Plymouth Builders v. Village of Lindenhurst, 134 N.Y.S.2d 225, 284 App.Div. 895.

Scutori v. Incorporated Village of Bayville, 120 N.Y.S.2d 794.

Ohio.—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 153 Ohio St. 253.

Financial advantage to owner from particular zoning is not decisive test of validity of ordinance.

Mass.—Nectow v. City of Cambridge, 157 N.E. 618, 260 Mass. 441, reversed on other grounds 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Detriment to public welfare

Profit that would accrue to individual property owners, if zoning restrictions were removed, must be weighed against detriment to public welfare that would ensue, and one property owner should not be permitted to increase value of his property at expense of his neighbors.

Ill.—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162.

86. Ill.—Bolger v. Village of Mount Prospect, 141 N.E.2d 22, 10 Ill.2d 596.

87. Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

Ill.—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Mich.—Industrial Land Co. v. City of Birmingham, 78 N.W.2d 656, 346 Mich. 667—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702.

Ohio.—Pertain v. City of Brooklyn, 133 N.E.2d 180, affirmed 133 N.E.2d 616, 101 Ohio App. 279.

88. Ill.—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507—Metropolitan Life Ins. Co. v. City of Chicago, 84 N.E.2d 825, 402 Ill. 581.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

89. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 61.

90. Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

Ill.—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill. 169—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 61—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396.

Md.—Kracke v. Weinberg, 79 A.2d 387, 197 Md. 339.

Mich.—McGiverin v. City of Huntington Woods, 72 N.W.2d 105, 343 Mich. 413—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

Effect on adjoining property

Where value of a lot would be greatly impaired, without increasing value of adjoining property, zoning law would be invalid.

D.C.—Wolpe v. Foretsky, 154 F.2d 330, 81 U.S.App.D.C. 67, certiorari denied 67 S.Ct. 69, 329 U.S. 724, 91 L.Ed. 627.

91. Ill.—Wehrmeister v. Du Page County, 141 N.E.2d 26, 10 Ill.2d 604—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 61—Mahoney v. City of Chicago, 137 N.E.2d 37, 9 Ill.2d 156—Petrooulos v. City of Chicago, 125 N.E.2d 522, 5 Ill.2d 270—Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill.2d 432—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162—Pioneer Trust & Sav. Bank v. Village of Oak Park, 97 N.E.2d

strictive ordinance to the public good, such ordinance cannot, under the guise of a zoning regulation, either confiscate the property⁹² or inflict a substantial financial injury on the owner thereof.⁹³ Although zoning laws may inflict severe pecuniary damage on land owners without being confiscatory,⁹⁴ generally, they must not be confiscatory.⁹⁵ Hence, zoning laws that result in relatively little gain or benefit to the public while inflicting serious injury or loss on the property owner may not be sustained,⁹⁶ since they are confiscatory and void.⁹⁷ A municipality is without power so to zone property as to render it worthless,⁹⁸ or almost worthless,⁹⁹ so that the depreciation of the property amounts to a confiscation,¹ and the zoning power may not be used to depress the values of property which the city may in the future desire to take under the power of eminent domain.²

§ 38. Retroactive Operation

As a general rule a zoning ordinance or regulation should be prospective in operation.

As a general rule the restrictions of a zoning ordinance or regulation may not be made retroactive,³ but only prospective.⁴ It has been held, however, that despite their retroactive operation, ordinances which have no adverse effect on vested or substantial rights, or which merely regulate rights or change their form, are not invalid, particularly where such ordinances are in the proper exercise of police power.⁵

§ 39. Private Agreements

Private agreements have no bearing on the validity of a zoning ordinance.

Private agreements imposing restrictions on the ownership or use of property have no bearing on

- 302, 408 Ill. 458—Dunlap v. City of Woodstock, 91 N.E.2d 434, 405 Ill. 410—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418.
Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.
92. Ill.—Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill. 2d 200—People v. City of Rockford, 2 N.E.2d 842, 363 Ill. 531.
Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.
93. Ill.—Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill. 2d 200—People v. City of Rockford, 2 N.E.2d 842, 363 Ill. 531.
Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.
94. N.Y.—Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485.
95. Mich.—Fenner v. City of Muskegon, 50 N.W.2d 210, 331 Mich. 732.
Pa.—Appeal of Garbev, Inc. From Bd. of Adjustment, Com.Pl., 42 Del.Co. 399, affirmed 122 A.2d 682, 385 Pa. 328.
- Test of legality of zoning ordinance is whether it is confiscatory.**
Mich.—Fenner v. City of Muskegon, 50 N.W.2d 210, 331 Mich. 732.
- Held not confiscatory**
N.Y.—Curtiss-Wright Corp. v. Incorporated Village of Garden City, 61 N.Y.S.2d 678, 270 App.Div. 936, affirmed 72 N.E.2d 26, 296 N.Y. 839.
96. Ill.—National Brick Co. v. Lake County, 137 N.E.2d 494, 9 Ill.2d 191.
97. Ill.—Midland Elec. Coal Corp. v.

- Knox County, 115 N.E.2d 275, 1 Ill. 2d 200.
Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.
98. Ill.—Tews v. Woolhiser, 185 N.E. 327, 352 Ill. 212.
Ohio.—State ex rel. Rosenthal v. City of Bedford, App., 134 N.E.2d 727.
- City may not beautify property adjoining park by mere zoning process, if this results in rendering private property valueless.**
N.Y.—Eaton v. Sweeny, 177 N.E. 412, 257 N.Y. 176.
99. Mich.—Hammond v. Kephart, 50 N.W.2d 155, 331 Mich. 551—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146—Grand Trunk Western R. Co. v. City of Detroit, 40 N.W.2d 195, 326 Mich. 387—Ervin Acceptance Co. v. City of Ann Arbor, 34 N.W.2d 11, 322 Mich. 404.
1. N.Y.—Harrison v. Reidpath, 93 N.Y.S.2d 569.
2. Mich.—Robyns v. City of Dearborn, 67 N.W.2d 718, 341 Mich. 495—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.
Wis.—State v. Gurda, 243 N.W. 317, 209 Wis. 63.
3. Cal.—Acker v. Baldwin, 115 P.2d 455, 18 C.2d 341.
- Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.
- Mich.—Bane v. Pontiac Tp., Oakland County, 72 N.W.2d 134, 343 Mich. 481—City of Coldwater v. Williams Oil Co., 284 N.W. 675, 288 Mich. 140—Adams v. Kalamazoo Ice & Fuel Co., 222 N.W. 86, 245 Mich. 261.
- Ohio.—Kessler v. Smith, 142 N.E.2d 231, 104 Ohio App. 213, appeal dismissed Smith v. Village of Glenwillow, 146 N.E.2d 308, 167 Ohio St. 91.

- Reilly v. Conti, 112 N.E.2d 558, 93 Ohio App. 188, appeal dismissed 108 N.E.2d 281, 158 Ohio St. 232.
- Pa.—Appeal of Shade, Com.Pl., 23 Erie Co. 62.
- Tex.—Corpus Juris Secundum quoted in City of Corpus Christi v. Allen, 254 S.W.2d 759, 761, 152 Tex. 137.
- Construction of regulations with respect to retroactive operation see infra § 132.
- Validity of regulation as affecting nonconforming use see infra § 62.
- Prior expenditures**
Zoning ordinance was held void as to property owners who had expended money on improvement of property prior to passage of ordinance.
N.Y.—Best & Co. v. Incorporated Village of Garden City, 286 N.Y.S. 980, 247 App.Div. 893, affirmed Best & Co. v. Village of Garden City, 7 N.E.2d 694, 273 N.Y. 564.
- Regulations held not retroactive**
Ga.—Morgan v. Thomas, 63 S.E.2d 659, 207 Ga. 660.
- KY.—Louisville & Jefferson County Planning & Zoning Commission v. Stoker, 259 S.W.2d 443.
- Pa.—Leaver v. Board of Adjustment, 10 Pa.Dist. & Co.2d 333, 6 Bucks Co. 249.
4. Mich.—Bane v. Pontiac Tp., Oakland County, 72 N.W.2d 134, 343 Mich. 481.
- Tex.—Brown v. Gant, Civ.App., 2 S.W.2d 285.
- Improvement of land**
Zoning law, order, resolution, or ordinance must reasonably protect investment in improvement of land in nature of buildings constructed thereon.
Mo.—Brown v. Gambrel, 213 S.W.2d 931, 358 Mo. 192.
5. Ohio.—Cahn v. Guion, 160 N.E. 868, 27 Ohio App. 141.

the validity of a zoning ordinance,⁶ but a zoning law cannot constitutionally relieve land within a district covered by it from lawful restrictions affecting its use contained in deeds to such land.⁷

§ 40. Racial Status

Zoning restrictions based solely on racial status are invalid.

Zoning restrictions based solely on the racial status or color of the proposed occupant of property within certain districts are invalid.⁸

§ 41. Failure to Provide for, or Appoint, Board or Commission

A zoning ordinance may be invalid where no provision is made for the appointment of a board or commission required by the enabling act, but the mere failure to appoint a board provided for will not invalidate the regulation.

A zoning ordinance or enactment may be invalid where no provision is made for the appointment of a board or commission required by the enabling act,⁹ or where it provides that the membership of the required board or commission shall consist of municipal officials who cannot be appointed thereto under the express provisions of the enabling act.¹⁰ A zoning ordinance, however, will not be invalidated because an appeal board required by the enabling act was not created by the ordinance, where the board was legally created and its members legally appointed before the adoption of the ordinance.¹¹

According to some decisions, the failure of the

municipality to appoint such a board does not invalidate the zoning regulation,¹² at least where the statute is construed as permissive and not mandatory.¹³ So, if provision is made for the establishment and appointment of a required board of adjustment or review, the zoning ordinance will not be considered invalid merely because of delay in fulfilling the provisions as to the selection, organization, and proper functioning of the board;¹⁴ and the failure to appoint the board will not cause the application of the ordinance to be illegal, since the court, on proper application, may compel the appointment of the necessary members of the board.¹⁵ The failure to appoint a proper planning and zoning commission required by the enabling act will not invalidate the zoning ordinance as a whole, and it will take effect in so far as it authorizes the appointment of the commission, subject to the filling of vacancies by subsequent action of the appointing body.¹⁶

Under some statutes it is not mandatory that a zoning commission be appointed prior to the enactment of zoning regulations.¹⁷ A planning board has been held not mandatory in order for a comprehensive zoning plan to be evolved, it being proper for the local governing body to assume the duties and responsibilities of such a board.¹⁸

§ 42. Delegation of Zoning Power in General

Zoning enactments may not validly delegate legislative power with respect to zoning to a local board, com-

6. Cal.—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348—O'Rourke v. Teeters, 146 P.2d 983, 63 C.A.2d 349. Pa.—Appeal of Strunk, Com.Pl., 27 North.Co. 324.

7. Mass.—Brackett v. Board of Appeal of Building Department of City of Boston, 39 N.E.2d 956, 311 Mass. 52.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

8. Fla.—State v. Wilson, 25 So.2d 860, 157 Fla. 342.

N.C.—Clineard v. City of Winston-Salem, 6 S.E.2d 867, 217 N.C. 119, 126 A.L.R. 634.

School zoning

Where establishment by Board of Education for first time in city of zoning system with a gerrymandered district set up in two separate parts, designed to embrace practically entire colored population of city, was brought about as a subterfuge to segregate Negro children who had been admitted to schools where only white children had been admitted before, such zoning was in violation of law. U.S.—Clemmons v. The Board of Ed. of

Hillsboro, Ohio, C.A.Ohio, 228 F.2d 853, certiorari denied 76 S.Ct. 651, 350 U.S. 1006, 100 L.Ed. 868.

9. Mo.—State ex rel. Kramer v. Schwartz, 82 S.W.2d 63, 336 Mo. 932.

N.J.—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

Somers v. Borough of Bradley Beach, 178 A. 755, 115 N.J.Law 135.

Appointment of commission to make preliminary report and hold public hearing as essential to validity of regulation generally see infra § 45.

Board of adjustment

Provision of zoning ordinance for board of adjustment to prevent inequalities and injustices resulting from strict enforcement of ordinance is important to validity of ordinance and statute under which enacted.

Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P. 2d 534, 97 Mont. 342.

10. Ga.—Tucker v. City of Ocilla, 71 S.E.2d 652, 209 Ga. 278.

11. Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

12. N.Y.—Leone v. Brewer, 182 N.E. 57, 259 N.Y. 386, reargument and motion denied Leone v. Brewer, 184 N.E. 111, 260 N.Y. 604, amended remittitur denied 4 N.E.2d 423, 272 N.Y. 510.

13. Fla.—State ex rel. Henry v. City of Miami, 158 So. 82, 117 Fla. 594.

14. R.I.—Lamothe v. Zoning Bd. of Review of Town of Cumberland, 98 A.2d 918, 81 R.I. 96.

15. N.J.—Michaels v. Township Committee of Pemberton Tp., Burlington County, 67 A.2d 324, 3 N.J. Super. 523.

16. Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

17. Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.

18. N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J. Super. 397.

mission, or administrative officer, but power may be granted to such a board or commission to determine facts on which the application of the zoning enactment depends and to administer the enactment.

In general, zoning enactments, regulations, and restrictions may not validly delegate legislative power with respect to zoning to a local board, commission, or administrative officer, and where they attempt to delegate such power they are void.¹⁹ While, however, the power to make a zoning law cannot be delegated to an administrative officer or board, a delegation of power to determine some fact or state of things on which the law makes or intends to make its own action depend is valid.²⁰ Discretionary powers vested in a zoning commission to

ascertain the necessary facts to justify the granting of a permit under the ordinance or enactment is an exercise of quasi judicial, or perhaps administrative power, and does not amount to an exercise of legislative power.²¹

The administration of zoning ordinances and regulations may validly be committed to subordinate officers.²² Thus zoning statutes and ordinances, provided they furnish a reasonably adequate standard by which to act,²³ are not invalid as in violation of the principle against the delegation of legislative powers, where they grant to an administrative board or officer power to authorize or approve a variance from the terms of a zoning ordinance or other enactment,²⁴ to make certain special

19. Fla.—Griffin v. Sharpe, 65 So.2d 751.

N.C.—Application of O'Neal, 92 S.E. 2d 189, 243 N.C. 714—Vance S. Harrington & Co. v. Renner, 72 S.E. 2d 838, 236 N.C. 321—James v. Sutton, 50 S.E.2d 300, 229 N.C. 515.

Ohio.—State v. Zumpano, App., 146 N.E.2d 871—State ex rel. Ohio Oil Co. v. City of Defiance, 133 N.E.2d 392, 99 Ohio App. 398.

Validity of zoning ordinance as dependent on its providing a definite standard to govern conduct of administrative officials see supra § 26.

Approval of attorney general

Provision of town zoning ordinance making the taking effect of such ordinance conditional on approval of attorney general was invalid as in contravention of principle that delegated power cannot be recommitted to another agent.

Vt.—Thompson v. Smith, 129 A.2d 638, 119 Vt. 488.

Delegation of blanket authority

Under section of enabling act providing for establishment of board of review with authority to make special exceptions to terms of zoning ordinance, city council had no authority to clothe board with blanket authority to exercise the legislative power with respect to zoning which was delegated to council by enabling act.

R.I.—Flynn v. Zoning Bd. of Review of City of Pawtucket, 73 A.2d 808, 77 R.I. 118.

Matter of policy

Where village planning commission allowed, as a nonconforming use on the ground of undue hardship, the use of "residence A" zone property adjacent to a hospital as a parking lot for hospital, the use for parking purpose was not a minor change authorized under undue hardship provision of zoning ordinance, but was a matter of policy the determination of which could not be delegated by village council to such commission.

Ohio.—Vandervort v. Sisters of Mercy of Cincinnati, 117 N.E.2d 51, 97 Ohio App. 158.

Invalid delegation of legislative power held established

Fla.—Phillips Petroleum Co. v. Anderson, 74 So.2d 544.

Tex.—Board of Adjustment v. Stovall, Civ.App., 218 S.W.2d 286.

Unlawful delegation of legislative authority not established

(1) A zoning ordinance giving city planning and zoning commission the authority to permit in a use district any use in general keeping with authorized uses, subject to confirmation by city council, was authorized by statute and was not a delegation of legislative authority.

Ohio.—McCloud v. Woodmansee, 185 N.E.2d 316, 165 Ohio St. 271.

(2) Zoning ordinance requiring board to perform its duties in manner prescribed by law providing for minutes and records to be kept by the board in all matters before it and hearings to be held after notice given, and providing for complete review of the board's acts by an aggrieved party is not an unlawful delegation of legislative authority.

N.Y.—Holy Sepulchre Cemetery v. Town of Greece, 79 N.Y.S.2d 683, 191 Misc. 241, affirmed, 79 N.Y.S. 2d 863, 273 App.Div. 942.

20. Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Cal.—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

Mont.—Freeman v. Board of Adjustment, 34 P.2d 534, 97 Mont. 342.

21. Cal.—Mitchell v. Morris, 210 P. 2d 857, 94 C.A.2d 446—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

22. Fla.—State ex rel. Taylor v. City of Jacksonville, 133 So. 114, 101 Fla. 124.

Extent of discretion

Considerable freedom to exercise

discretion and judgment must be accorded to officials in charge under a zoning ordinance and courts will be liberal in upholding such ordinances in order to facilitate their proper administration.

Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Enforcement

Provision in zoning ordinance for enforcement by mayor or building inspector or other person delegated by mayor did not authorize an unlawful delegation of power to enforce.

Ala.—Walls v. City of Guntersville, supra.

23. Standards held sufficient

(1) Zoning statute, which details proper zoning purposes, provides for hearing on adequate notice to interested parties, and requires specific finding by administrative agency of extraordinary conditions or undue hardship or of specific reasons within contemplation of act and approval of municipal governing body before a variance can be granted, does not unconstitutionally delegate legislative power.

N.J.—Ward v. Scott, 93 A.2d 385, 11 N.J. 117.

(2) Where an ordinance or regulation implies that the board should act in accordance with the interest of public health, safety, morals, and general welfare of the community, such requirement has been held to be a sufficient standard or guide to meet a challenge that ordinance provisions are invalid as a delegation of legislative powers to the board.

N.Y.—Fox v. Adams, 134 N.Y.S.2d 534.

24. Cal.—Johnston v. Board of Suprs of Marin County, 187 P.2d 686, 31 C.2d 66.

Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

Ga.—McCord v. Ed. Bond & Condon Co., 165 S.E. 590, 175 Ga. 667.

III.—Downey v. Grimshaw, 101 N.E. 2d 275, 410 Ill. 21.

exceptions to a zoning ordinance,²⁵ or to grant a use permit.²⁶ Under some enabling acts the establishment of zone boundaries is a legislative function not delegable to an administrative body.²⁷

Requirement of consent or approval of board or governing body. Unless they violate fundamental laws and property rights,²⁸ ordinances providing that the right to erect, alter, or maintain particular buildings or to use property for particular purposes depends on first obtaining the consent or approval of the governing body or some other municipal authority are generally valid,²⁹ except where they fail to provide any standards to guide and control the action of the body to which the power is delegated.³⁰ General standards for the guidance of the local authority in making its determination, however,

need not be formulated in order to render such an enactment valid, where the body whose approval is required is a legislative body and the matter involved is one which may endanger the safety of persons and property.³¹

§ 43. Requirement of Consent of Property Owners

Provisions requiring the consent of adjacent property owners, or a stated per cent of them, as a prerequisite to the right to construct or use property in a particular manner have been held invalid as an improper delegation of governmental powers to private citizens; but provisions permitting a zoning restriction to be waived or modified with the consent of designated property owners have been held valid.

In a number of cases, ordinances under which the right to construct or use property in a particu-

Mont.—Freeman v. Board of Adjustment, 34 P.2d 534, 97 Mont. 342.

N.J.—Ward v. Scott, 93 A.2d 385, 11 N.J. 117.

Ohio.—L. & M. Inv. Co. v. Cutler, 180 N.E. 379, 125 Ohio St. 12, 86 A.L.R. 707.

Validity of provisions vesting administrative bodies with power to grant variances or exceptions generally see *infra* § 66.

25. Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

26. Ala.—Walls v. City of Gunterville, 45 So.2d 468, 253 Ala. 480.

Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C. 2d 66.

Meyers v. Board of Sup'rs of Los Angeles County, 243 P.2d 38, 110 C.A.2d 623.

Ga.—McCord v. Ed. Bond & Condon Co., 165 S.E. 590, 175 Ga. 667.

Ill.—Illinois Bell Tel. Co. v. Fox, 85 N.E.2d 43, 402 Ill. 617.

Md.—Montgomery County v. Merlands Club, Inc., 96 A.2d 261, 202 Md. 279.

Mass.—Sellers v. Town of Concord, 107 N.E.2d 784, 329 Mass. 259.

N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

N.Y.—Kanas v. Nugent, 135 N.Y.S. 2d 128, 206 Misc. 826, affirmed 145 N.Y.S.2d 638, 286 App.Div. 1038, appeal denied 148 N.Y.S.2d 455, 1 App.Div.2d 681—Romig v. Weld, 87 N.Y.S.2d 580, 194 Misc. 783, affirmed in part and reversed in part on other grounds, 95 N.Y.S.2d 571, 276 App.Div. 514.

Pa.—Katzin v. McShain, 89 A.2d 519, 371 Pa. 251.

Validity of provisions governing the grant or denial of permits generally see *infra* § 65.

Conditional use permit

Provision authorizing granting of conditional use permits by commission to permit certain uses, of public concern in zones from which such uses would otherwise be excluded, when it be found that such uses were deemed essential or desirable to the public convenience or welfare, was not unconstitutional as an unlawful delegation of legislative power.

Cal.—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

Subject to review

Ordinance giving chief of police discretionary power to grant or refuse dance hall permits, but providing for appeal to city council, which might in discretionary exercise of its police powers grant or refuse permit, and for appeal to courts from council's action, was valid.

Tex.—City of Dallas v. Stevens, Civ. App., 310 S.W.2d 750.

27. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Rule of administrative board

Unwritten rule of board of adjustment that zoning district boundary lines should be established in doubtful cases by the rear property lines of properties admittedly in one district was in direct contravention of statutory requirement that zoning district boundaries may be fixed or amended only after public hearing on at least fifteen days' notice.

Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

28. N.J.—Weininger v. Borough of Metuchen, 45 A.2d 450, 133 N.J. Law 544, affirmed 49 A.2d 256, 134 N.J. Law 562.

29. Cal.—Yuba City v. Cherniavsky, 4 P.2d 299, 117 C.A. 568—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 C.A. 277.

Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

N.Y.—Maxwell v. Klaess, 82 N.Y.S. 2d 588, 192 Misc. 939, appeal dismissed Siciliano v. Klaess, 84 N.Y. S.2d 922, Maxwell v. Klaess, '85 N.Y.S.2d 380, 274 App.Div. 943, and Goddard v. Klaess, 85 N.Y.S.2d 331.

Of planning commission

Zoning ordinance which granted permit for housing development on condition that development be accomplished in accordance with general plan submitted and approved both by city plan commission and city council was not invalid as a delegation by council to plan commission of its legislative authority.

Tex.—Prince v. W. H. Cothrum & Co., Civ.App., 227 S.W.2d 863.

Assumption of proper exercise of power

With respect to the validity of a provision requiring the approval of the board of estimate in certain cases, it may not be assumed in advance that the board would not approve any proper project or would not disapprove an improper one.

N.Y.—Nappi v. LaGuardia, 55 N.Y.S. 2d 80, 184 Misc. 775, affirmed 54 N.Y.S.2d 722, 269 App.Div. 693, affirmed 64 N.E.2d 716, 295 N.Y. 652.

30. N.Y.—Davison v. Flanagan, 76 N.Y.S.2d 849, 273 App.Div. 870.

31. Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead, 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 34 L.Ed. 990.

lar manner is dependent on obtaining the consent of adjacent property owners, or a stated per cent of them, have been held invalid³² as constituting an improper delegation of governmental power to private citizens³³ or as having the effect of permitting discrimination in behalf of certain individuals as against others entitled to equal rights.³⁴

In some of the cases, however, it has been held that not all such regulations are invalid, since there is a distinction between those which leave the enactment of law to individuals and those which are prohibitory in nature but which permit the prohibition to be waived or modified with the consent of the persons who are to be most affected by such modification.³⁵ According to this view, a municipal corporation may adopt zoning ordinances of the latter description which, within reasonable limits, require the consent of designated property owners,³⁶ the requirement of such consents not constituting an invalid delegation of legislative power;³⁷ but if the

ordinance permits a certain percentage of the property owners to impose or create a restriction on their neighbors' property by the device of consent provisions, such limitation constitutes an invalid delegation of legislative power.³⁸

The requirement of the consent of a certain percent of the adjoining or neighboring owners as a prerequisite to the allowance of a particular use not authorized by the general zoning regulations has been held proper and not unconstitutional with respect to a potentially dangerous or offensive use or structure,³⁹ such as the operation and maintenance of saloons, billboards, garages,⁴⁰ and gasoline filling or service stations.⁴¹ On the other hand, provisions requiring such consent have been held invalid with respect to uses clearly in furtherance of the health, safety, morals, and general welfare of the community.⁴² Under this view, ordinances requiring the consent of property owners for the erection of a community store,⁴³ commercial build-

32. Ala.—Longshore v. City of Montgomery, 119 So. 599, 22 Ala. App. 620, certiorari denied 119 So. 601, 218 Ala. 597.

Iowa.—Corpus Juris Secundum cited in Huff v. City of Des Moines, 56 N.W.2d 54, 58, 244 Iowa 89—Downey v. Sioux City, 227 N.W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

N.Y.—Starin v. Village Bd. of Zoning Appeals of Village of Hempstead, 101 N.Y.S.2d 80, 198 Misc. 785—Longley v. Rumsey, 224 N.Y.S. 165, 180 Misc. 492.

Crossroads Realty v. Gilbert, 109 N.Y.S.2d 59.

N.C.—Wilcher v. Sharpe, 72 S.E.2d 662, 236 N.C. 308.

S.C.—Willis v. Town of Woodruff, 20 S.E.2d 699, 200 S.C. 266.

43 C.J. p 246 note 46.
Consent of property owners as necessary to validity of amendment of zoning regulation see infra §§ 106, 108.

Validity of:

Ordinance or other enactment requiring consent or approval of board or governing body as prerequisite to allowance of particular structure or use see supra § 42.

Provisions requiring consent of adjacent property owners as condition to granting of permit see infra § 65.

Requirement that amendment of zoning regulation be adopted by a specified vote where specified percentage of interested property owners have protested it see infra § 114.

33. Iowa.—Corpus Juris Secundum cited in Huff v. City of Des Moines,

56 N.W.2d 54, 58, 244 Iowa 89—Downey v. Sioux City, 227 N.W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

N.C.—Wilcher v. Sharpe, 72 S.E.2d 662, 236 N.C. 308.

S.C.—Willis v. Town of Woodruff, 20 S.E.2d 699, 200 S.C. 266.

43 C.J. p 246 note 47.

34. Iowa.—Downey v. Sioux City, 227 N.W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

S.C.—Willis v. Town of Woodruff, 20 S.E.2d 699, 200 S.C. 266.

43 C.J. p 246 note 48.

35. Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 C.A. 277.

Colo.—Cross v. Bilett, 221 P.2d 923, 122 Colo. 278.

Iowa.—Corpus Juris Secundum cited in Huff v. City of Des Moines, 56 N.W.2d 54, 58, 244 Iowa 89—Downey v. Sioux City, 227 N.W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

36. Colo.—Cross v. Bilett, 221 P.2d 923, 122 Colo. 278.

Ill.—Valkanet v. City of Chicago, 148 N.E.2d 767, 13 Ill.2d 298.

Iowa.—Corpus Juris Secundum cited in Huff v. City of Des Moines, 56 N.W.2d 54, 58, 244 Iowa 89—Downey v. Sioux City, 227 N.W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

Ohio.—Eskridge v. City of Sandusky, Com.Pl., 136 N.E.2d 465.

Pa.—Appeal of Goodman, 156 A. 309,

305 Pa. 55—Appeal of Perrin, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912.

Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

43 C.J. p 246 notes 56, 57.

37. Ill.—Valkanet v. City of Chicago, 148 N.E.2d 767, 13 Ill.2d 298.

Ohio.—State ex rel. Standard Oil Company v. Combs, 194 N.E. 875, 129 Ohio St. 251.

Eskridge v. City of Sandusky, Com.Pl., 136 N.E.2d 465.

38. Ill.—Valkanet v. City of Chicago, 148 N.E.2d 767, 13 Ill.2d 298.

39. U.S.—Thomas Cusack Company v. City of Chicago, Ill., 37 S.Ct. 190, 242 U.S. 526, 61 L.Ed. 472.

N.Y.—Concordia Collegiate Institute v. Miller, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

Epstein v. Weissner, 102 N.Y.S.2d 678, 278 App.Div. 668, affirmed 100 N.E.2d 186, 302 N.Y. 916.

40. U.S.—Thomas Cusack Company v. City of Chicago, Ill., 37 S.Ct. 190, 242 U.S. 526, 61 L.Ed. 472.

41. Mich.—City of East Lansing v. Smith, 269 N.W. 573, 277 Mich. 495.

N.Y.—Epstein v. Weissner, 102 N.Y.S. 2d 678, 278 App.Div. 668, affirmed 100 N.E.2d 186, 302 N.Y. 916.

Application of Dolat, 75 N.Y.S. 2d 862, 191 Misc. 73.

Pa.—Appeal of Perrin, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912.

42. N.Y.—Concordia Collegiate Institute v. Miller, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

43. Ill.—Spies v. Board of Appeals, 169 N.E. 220, 337 Ill. 507.

ings,⁴⁴ a church,⁴⁵ an educational building,⁴⁶ or a philanthropic home for children,⁴⁷ in a residential district have been declared void.

Ordinances have been held valid which provide that certain prohibited uses of property in a district may be permitted if a certain per cent of adjacent landowners consent, where, on such consent being obtained, the decision as to whether such permission shall be granted still rests in the discretion of the governing body.⁴⁸

Legislation authorizing a government official to zone an area as residential on consent given to him by written petition of the owners of more than half of the realty within the area to be zoned is not unconstitutional;⁴⁹ nor is it unconstitutional for a statute to provide that when two or more corners at an intersection are zoned in a certain way, the zoning authorities must rezone the other corners of the intersection in the same manner on written application from the owners thereof.⁵⁰

Where residential districts are established by

some rational general rule, there is no invalidity in a provision of an ordinance which enables a public board, in the exercise of its sound judgment, to relax the rigidity of the bounds of those districts if and when a designated per cent of the landowners of the immediate neighborhood as bounded by the ordinance so request.⁵¹

§ 44. Violation of, or Failure to Enforce, Regulations

The violation of, or failure to enforce, zoning laws and regulations does not invalidate or nullify them or estop the municipality or other local authority to assert their validity.

Generally, the violation by municipal or other local authorities of a zoning regulation or restriction, or their acquiescence in its violation, or failure to enforce it against a violator does not invalidate it or estop such authorities to assert its validity;⁵² nor does the fact that it was violated by other persons, or other uses, constitute grounds for having it

44. Ala.—Longshore v. City of Montgomery, 119 So. 599, 22 Ala. App. 620, certiorari denied 119 So. 601, 218 Ala. 597.

45. Nev.—State ex rel. Roman Catholic Bishop of Reno v. Hill, 90 P. 2d 217, 59 Nev. 231.

Ordinance prohibiting buildings of a different type or size from existing buildings in immediate vicinity in a residential district unless consent of property owners in vicinity is obtained, as applied to property owner seeking to build a church, is unconstitutional as violative of the Fourteenth Amendment.

Ala.—Pentecostal Holiness Church of Montgomery v. Dunn, 27 So.2d 561, 248 Ala. 314.

46. N.J.—Yanow v. Seven Oaks Park, 87 A.2d 454, 18 N.J.Super. 411, reversed in part on other grounds 94 A.2d 482, 11 N.J. 341, 36 A.L.R.2d 639.

N.Y.—Concordia Collegiate Institute v. Miller, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

47. U.S.—State of Washington ex rel. Seattle Title Trust Co. v. Roberge, Wash., 49 S.Ct. 50, 278 U.S. 116, 73 L.Ed. 210, 86 A.L.R. 654.

48. Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 C.A. 277.

49. Ga.—Enzor v. Askew, 13 S.E.2d 374, 191 Ga. 576.

50. N.C.—Marren v. Gamble, 75 S. E.2d 880, 237 N.C. 680.

51. Mass.—Lowell Bldg. Inspector v. Stoklosa, 145 N.E. 262, 250 Mass. 52.

52. Cal.—Magruder v. Redwood City, 265 P. 806, 203 C. 665.

Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386. Colo.—Flinn v. Treadwell, 207 P.2d 967, 120 Colo. 117.

Ill.—Gore v. City of Carlinville, 137 N.E.2d 363, 9 Ill.2d 296.

Ky.—Feldman v. Hesck, 254 S.W.2d 914.

La.—City of New Orleans v. Lafon, App., 61 So.2d 270.

Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

Mich.—Corpus Juris Secundum quoted in Fass v. City of Highland Park, 39 N.W.2d 336, 340, 326 Mich. 19.

Minn.—McCavie v. De Luca, 46 N.W. 2d 373, 233 Minn. 372—Alexander Co. v. City of Owatonna, 24 N.W. 2d 244, 222 Minn. 312.

Mo.—Kansas City v. Wilhoit, App., 237 S.W.2d 919.

N.J.—Corpus Juris Secundum quoted in Adler v. Department of Parks & Public Property, Town of Irvington, 89 A.2d 704, 706, 20 N.J.Super. 240.

Giordano v. Mayor and Council of Borough of Dumont, 61 A.2d 245, 137 N.J.Law 740, 6 A.L.R.2d 956.

N.Y.—City of Yonkers v. Rentways, Inc., 109 N.E.2d 597, 304 N.Y. 499.

Premium Bond Corporation v. City of Long Beach, 291 N.Y.S. 834, 249 App.Div. 756.

Longo v. Eilers, 93 N.Y.S.2d 517, 196 Misc. 909.

Inzerilli v. Pitney, 30 N.Y.S.2d 129.

Ohio.—Corpus Juris Secundum quoted in

ed in Kilko v. City of Cleveland, App., 102 N.E.2d 476, 479.

R.I.—City of Warwick v. Campbell, 107 A.2d 334, 82 R.I. 300.

Tex.—Davis v. City of Abilene, Civ. App., 250 S.W.2d 685, error refused—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 383, error dismissed, judgment correct—Eckert v. Jacobs, Civ.App., 142 S.W.2d 374.

Acquiescence of municipal authorities in violation of ordinance or regulation as not constituting a good defense generally see Municipal Corporations § 319 c.

Duty to enforce zoning regulations see infra § 390.

Estoppel to attack validity of zoning regulation see supra § 21.

Administrative officer's conduct cannot estop legislative body of city to adopt and enforce police regulation, such as zoning ordinance.

Cal.—Lima v. Woodruff, 290 P. 480, 107 C.A. 285.

Vested right not acquired

Finding that property owner had long used his property for a commercial purpose would not warrant holding invalid a previously enacted zoning ordinance which restricted use to residential purposes, since no vested right to violate an ordinance may be acquired by continued violations. Cal.—Acker v. Baldwin, 115 P.2d 455, 18 C.2d 341.

Waiver

Village could not waive illegal use, under zoning ordinance, of its leased realty by subtenant.

N.Y.—Village of Tarrytown v. Tappan Airways, Inc., 128 N.Y.S.2d 509, 283 App.Div. 803.

set aside or excuse a defendant's violation of it.⁵³ Thus the maintenance of a livery stable in violation of a zoning ordinance is not excused by the fact that other stables are maintained in the same locality in violation of the ordinance.⁵⁴

In the enforcement of a zoning ordinance, bylaw, regulation, or restriction a municipality or other governmental subdivision acts in its governmental capacity as distinguished from its proprietary capacity, so that the doctrine of estoppel cannot be applied against it, as discussed *infra* § 390.

Issuance of permit in violation of regulation. A municipality or other local authority is not estopped or precluded from asserting the validity of its zoning

laws and regulations, and enforcing them, by its issuance, in violation of them, of a permit or license,⁵⁵ such as a building permit,⁵⁶ even though the holder of the permit or license has proceeded in reliance thereon to his detriment prior to the attempt to enforce the regulation or restriction against him.⁵⁷

§ 45. Procedural Requirements

Failure to comply with procedural requirements contained in statutes and charter provisions in adopting a zoning law or regulation may render it invalid.

Failure to comply with procedural requirements contained in statutes and charter provisions in adopting a zoning law or regulation may render it invalid.⁵⁸ So, a zoning law or regulation is in-

53. Ill.—*Village of Riverside v. Kuhne*, 82 N.E.2d 500, 335 Ill.App. 547.

Mass.—*Building Com'r of Medford v. C. & H. Co.*, 65 N.E.2d 537, 319 Mass. 273.

Mo.—*Kansas City v. Wilhoit*, App., 237 S.W.2d 919.

N.Y.—*A. C. Nurseries, Inc. v. Brady*, 105 N.Y.S.2d 933, 278 App.Div. 974 —*Brown v. Village of Owego*, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655.

Different uses

Fact that county zoning ordinance permitted a large number of uses within district zoned for farming which defendants deemed more detrimental to people and their property than conducting a manufacturing business did not authorize defendants to conduct a manufacturing business on their property in violation of ordinance.

Ill.—*Du Page County v. Henderson*, 83 N.E.2d 720, 402 Ill. 179.

Each case considered alone

Fact that nonpermissive uses are carried on by others contrary to county zoning ordinance neither fortifies nor weakens case of defendants who were charged with violation of ordinance, but each alleged violation is a complete case within itself and must stand or fall on facts and circumstances of that case alone.

Ill.—*Du Page County v. Henderson*, *supra*.

54. N.J.—*Berry v. Recorder's Court of Town of West Orange*, 11 A.2d 743, 124 N.J.Law 385, affirmed *Berry v. Recorder's Office of Town of West Orange*, 15 A.2d 758, 125 N.J.Law 273.

55. Mich.—*Fass v. City of Highland Park*, 39 N.W.2d 336, 326 Mich. 19. Minn.—*W. H. Barber Co. v. City of Minneapolis*, 34 N.W.2d 710, 227 Minn. 77 —*Alexander Co. v. City of Owatonna*, 24 N.W.2d 244, 222 Minn. 312.

Mo.—*Adams v. Board of Zoning Ad-*

justment of Kansas City, App., 241 S.W.2d 85.

N.J.—*Giordano v. Mayor and Council of Borough of Dumont*, 61 A.2d 245, 137 N.J.Law 740, 6 A.L.R.2d 956.

Ohio.—*Kilko v. City of Cleveland*, App., 102 N.E.2d 476.

Tex.—*Davis v. City of Abilene*, Civ. App., 250 S.W.2d 685, error refused —*Edge v. City of Bellaire*, Civ. App., 200 S.W.2d 224, error refused.

56. Md.—*Bruning Bros. v. Mayor & City Council of Baltimore*, 87 A.2d 589, 199 Md. 602 —*Board of Com'rs of Anne Arundel County v. Snyder*, 46 A.2d 639, 186 Md. 342.

N.Y.—*City of Yonkers v. Rentways, Inc.*, 109 N.E.2d 597, 304 N.Y. 499.

Wrongful issuance of permit

Fact that city officers might have wrongfully issued permit to another to erect a duplex dwelling in a district which authorized dwellings for "one family only" could not have effect of invalidating zoning ordinance.

Mo.—*State ex rel. Luechtefeld v. Arnold*, App., 149 S.W.2d 384.

57. Minn.—*W. H. Barber Co. v. City of Minneapolis*, 34 N.W.2d 710, 227 Minn. 77.

N.J.—*Giordano v. Mayor and Council of Borough of Dumont*, 61 A.2d 245, 137 N.J.Law 740, 6 A.L.R.2d 956.

58. Ala.—*Johnson v. City of Huntsville*, 29 So.2d 342, 249 Ala. 36. Ariz.—*Wood v. Town of Avondale*, 232 P.2d 963, 72 Ariz. 217.

Ark.—*City of Searcy v. Roberson*, 273 S.W.2d 26, 224 Ark. 344.

D.C.—*Garrity v. District of Columbia*, 86 F.2d 207, 66 App.D.C. 256.

Md.—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

Mo.—*Wippler v. Hohn*, 110 S.W.2d 409, 341 Mo. 780.

N.Y.—*Sheffer v. City of Geneva*, 147 N.Y.S.2d 400, 1 Misc.2d 807.

Connell v. Town of Brunswick, 172 N.Y.S.2d 266.

Pa.—Complaint as to Legality of East Whiteland Tp. Zoning Ordinance of 1953, Quar.Sess., 6 Chest. Co. 172—*Kline v. City of Harrisburg*, Com.Pl., 61 Dauph.Co. 67, affirmed 68 A.2d 182, 362 Pa. 438—*Appeal of Rankin*, Quar.Sess., 41 Del.Co. 239.

Manner of exercising zoning power generally see *supra* §§ 11-13.

Noncompliance with procedural requirements as affecting validity of temporary or emergency zoning regulation see *supra* § 19.

Approval by attorney general

To approve a town zoning bylaw, it was not necessary that attorney general personally approve a map separate and apart therefrom, or that it be physically before him or personally examined and boundaries of various zones traced by him, but it is sufficient that it was examined for him, with the bylaw, by one of his legal assistants, and that he approved bylaw on his own judgment after receiving assistant's report. Mass.—*Inhabitants of Town of West Springfield v. Mayo*, 163 N.E. 653, 265 Mass. 41.

Approval by property owners

Provision of county zoning law that no restriction shall become effective until approved by a majority of resident real property taxpayers in area involved, by their signing an appropriate document indicating their approval, was not violated by ordinance which required majority signatures plus the filing of the approval instrument for record before restrictions should become effective. Iowa.—*Gannett v. Cook*, 61 N.W.2d 703, 245 Iowa 750.

Council meeting outside boundaries; cure of defect

An alleged defect in a zoning ordinance because it was passed at a meeting of city council held outside boundaries of town may be cured by

valid where there has been a failure to comply with a statutory requirement that a zoning commission be appointed to make a preliminary report and hold public hearings;⁵⁹ and, on the other hand, the validity of various regulations has been upheld as against the objection that there was a failure to comply with a requirement that the zoning commission issue a preliminary report,⁶⁰ and that the preliminary report be submitted to the public.⁶¹ Public policy may forbid an attack based on informalities and irregularities in the procedure leading to the adoption of a zoning law or regulation when it has

been accepted as a valid enactment for a long period of time, and property owners affected by it have conformed to its provisions, and have fixed their status accordingly.⁶²

Title. A zoning law or regulation in order to be valid must comply with statutory and constitutional provisions with respect to titles of legislative acts and ordinances.⁶³ Under such provisions it has been held that the title of a zoning ordinance need not be an index of its provisions or a synopsis of its contents, but it is sufficient if it gives notice of the tenor of the ordinance to interested persons of a

a subsequently enacted validating statute.

Tex.—*Storm Bros. v. Town of Balcones Heights*, Civ.App., 239 S.W. 2d 842, refused no reversible error.

Failure to submit to committee; cure of defect

Where when zoning ordinance was adopted, no county zoning commission or coordinating committee had been appointed and none was appointed until after the ordinance was adopted but after the committee was appointed, the township submitted the ordinance to it and it was not disapproved, the ordinance was not invalid for failure to submit it to the nonexistent zoning coordinating committee and defect in any event was cured by subsequent action of committee.

Mich.—*Ritenour v. Dearborn Tp.*, 40 N.W.2d 137, 326 Mich. 242.

Introduction on date of passage

Where zoning ordinance was never introduced before the date on which it was passed and the unanimous consent of council members present was not given for immediate consideration of ordinance, ordinance was not legally adopted in view of violation of mandatory statutory provisions.

Ala.—*Thompson v. Wingard*, 34 So.2d 606, 250 Ala. 390.

Majority vote sufficient

Adoption by city council of ordinance providing that zoning ordinances may be adopted by majority vote of city council, even when more than twenty percent of owners of land immediately adjacent enter a protest, was within power granted under Home Rule Act and ordinance was valid, where it specifically provided that it superseded section of act of general assembly requiring three-fourths vote of members of city council if more than twenty percent of owners enter protest.

Pa.—*Bartle v. Zoning Bd. of Adjustment*, 137 A.2d 239, 391 Pa. 207.

Ordinance not affected by expiration of term of office

Where city charter provided that common council of city was a con-

tinuing body and that no measure before it abated or was discontinued by reason of expiration of term of office or removal of any of members thereof, fact that two councilmen, who were present at hearing when zoning ordinance was considered, were subsequently replaced by two newly elected councilmen, who voted for adoption of ordinance at subsequent meeting, did not render ordinance invalid.

N.Y.—*Halpern v. Dassler*, 135 N.Y.S. 2d 8.

Requirements inapplicable to regulation of liquor establishments

(1) In absence of express statement of intent, or of such a diametrical repugnance as to leave court no alternative, a special zoning law applicable only to City of Winter Haven did not require city to exercise power of regulating location of liquor establishment in a manner different from that previously followed under state Beverage Act, and, therefore, enactment by city of a zoning ordinance for that purpose was not required to follow procedural requirements of special zoning law.

Fla.—*Ellis v. City of Winter Haven*, 60 So.2d 620.

(2) City ordinance dividing city into business and residential areas and prohibiting retail sale of beer in residential area, which ordinance was passed pursuant to authority of Liquor Control Act and was not intended to be and was not in any sense a zoning ordinance, was not invalid because in passing ordinance procedure outlined in zoning law was not complied with.

Tex.—*Moore v. McCarver*, Civ.App., 240 S.W.2d 443.

59. Ky.—*City of Somerset v. Weise*, 263 S.W.2d 921.

Failure to provide for, or appoint board or commission as affecting, validity of regulation generally see supra § 41.

60. Documents constituting preliminary report

Maps in revised draft of proposed county zoning ordinance, tentatively

approved by county zoning commission, subject to further consideration at public hearing, and such ordinance, which county commissioners agreed to present with maps at such hearing, constituted preliminary report required by statute to be made by zoning commission to board of county commissioners.

Md.—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

Sufficiency of recommendation

Fact that zoning commission merely recommended prohibition of erection of certain kinds of buildings, without recommending further proposed "regulations" did not invalidate ordinance passed pursuant to commission's report.

N.H.—*Stone v. Cray*, 200 A. 517, 89 N.H. 483.

61. **Advertisement of public hearing** on proposed county zoning ordinance before county board of commissioners in newspaper published at county seat once in each of four weeks before such hearing and reference therein to maps and draft of ordinance, which were open for public inspection at zoning commission's office, met statutory requirement that commission's preliminary report to board be submitted to public in that it was thus presented in usable written form and served as proper and adequate basis for discussion at public meeting.

Md.—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

62. N.J.—*Struyk v. Samuel Braen's Sons*, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294.

Waiver, estoppel, or laches as operating to preclude attack on validity of zoning enactment because of noncompliance with formal requirements in manner of enactment see supra § 21.

63. Pa.—*City of Harrisburg v. Pass*, 93 A.2d 447, 372 Pa. 318.

reasonably inquiring state of mind and that as long as it indicates a general subject to which the provision involved is germane or incidental, the provision itself is sufficiently contained therein;⁶⁴ in short, that the title is not objectionable unless a substantive matter entirely disconnected therewith is included within the folds of the ordinance.⁶⁵

§ 46. — Notice and Hearing

A zoning law or regulation may be rendered invalid

by reason of failure to comply with statutory provisions requiring notice and hearing; and, apart from such statutory provisions, it is generally held that the constitutional prohibition against deprivation of property without due process of law demands that persons having interests or rights in property be given adequate notice and an opportunity for hearing before passage of zoning laws or regulations affecting their rights and interests.

A zoning law or regulation may be rendered invalid by reason of failure to comply with statutory provisions requiring notice⁶⁶ and by reason of failure to comply with statutory provisions requir-

64. Pa.—City of Harrisburg v. Pass, supra.

Sufficient compliance shown

Title describing zoning ordinance as providing for its own administration and enforcement, including payment of fees, was sufficient to put inquiring person on notice that a zoning permit was required prior to construction of building, and sufficiently complied with statutory and constitutional requirements relating to titles to legislative acts.

Pa.—City of Harrisburg v. Pass, supra.

65. Pa.—City of Harrisburg v. Pass, supra.

Commonwealth v. Krakover, Quar.Sess., 72 Montg.Co. 500, 48 Mun. 168, reargument denied 73 Montg.Co. 301.

66. Ariz.—Wood v. Town of Avondale, 232 P.2d 963, 72 Ariz. 217.

Ark.—City of Searcy v. Roberson, 273 S.W.2d 26, 224 Ark. 344.

Fla.—City of Hollywood v. Rix, 52 So.2d 135.

La.—Beauvais v. D. C. Hall Transport, App., 49 So.2d 44.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—Crozier v. County Com'rs of Prince George's County, 97 A.2d 296, 202 Md. 501, 37 A.L.R.2d 1137.

Mass.—Fish v. Town of Canton, 77 N.E.2d 231, 322 Mass. 219—Town of Burlington v. Dunn, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

Mich.—Krajenke Buick Sales v. Kopkowski, 33 N.W.2d 781, 322 Mich. 250.

Mo.—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 780.

N.Y.—Village of Sands Point v. Sands Point Country Day School, 148 N.Y.S.2d 312, affirmed 154 N.Y.S.2d 428.

Ohio.—Morris v. Roseman, 123 N.E.2d 419, 162 Ohio St. 447.

State ex rel. Kling v. Nielsen, 144 N.E.2d 278, 103 Ohio App. 60—State ex rel. Gulf Refining Co. v.

De France, 100 N.E.2d 689, 89 Ohio App. 1.

Okl.—Voight v. Saunders, 243 P.2d 654, 206 Okl. 318.

Pa.—Pittsburgh Outdoor Advertising Co. v. Borough of Monroeville, Com. Pl., 44 Mun.L.R. 174, 101 Pittsb. Leg.J. 95—Appeal of Myers, Co., 103 Pittsb.Leg.J. 310.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

S.D.—Dodds v. Bickie, 85 N.W.2d 284.

Manner of exercising zoning power generally see supra §§ 11-13.

Requirement jurisdictional and essential to due process

Publication of notice of public hearing in manner and form prescribed by statute is jurisdictional and necessary to satisfy requirements of due process.

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 307 Ky. 362.

Signature

Notice may be sufficient even though it is not signed by zoning commissioners individually, as where their names are attached to notice by an executive officer and attested by him.

D.C.—Larrabee v. Bell, 10 F.2d 986, 56 App.D.C. 121, certiorari denied U. S. ex rel. Varela v. Bell, 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143, followed in Varela v. Bell, 10 F.2d 989, 56 App.D.C. 124, certiorari denied U. S. ex rel. Varela v. Bell, 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143.

Insufficient notice

Mass.—Fish v. Town of Canton, 77 N.E.2d 231, 322 Mass. 219.

N.Y.—Village of Sands Point v. Sands Point Country Day School, 148 N.Y.S.2d 312, affirmed 154 N.Y.S.2d 428.

Pa.—Appeal of Myers, Co., 103 Pittsb. Leg.J. 310.

Sufficient notice

(1) An ordinance was valid and binding on objecting property owner as far as notice was concerned where zoning committee published an official notice of public hearing as to

ordinance to be held on specified date, and notice stated that meeting might be adjourned from time to time and ordinance was passed at a regular adjourned meeting.

Ill.—Jacobson v. Village of Wilmette, 85 N.E.2d 753, 403 Ill. 250.

(2) Similarly, a town zoning bylaw was not invalid because after hearing in which proposed bylaw delineated by reference to accompanying map was approved by planning board and before town meeting was held board held two more meetings, of which no public notice was given, which resulted in adding additional small parcels for business purposes, where board did not change identity of proposal.

Mass.—Town of Burlington v. Dunn, 61 N.E.2d 243, 318 Mass. 216, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

(3) Even though an area was originally zoned residential by a general ordinance imposed without notice required by statute, in view of fact area in question was rezoned by a subsequent ordinance specifically made applicable to the area, passed after proper notice, owners of area in question had no ground for objection.

Ill.—Williams v. Village of Schiller Park, 138 N.E.2d 500, 9 Ill.2d 596.

(4) Vote at town meeting adopting zoning bylaw was not invalid because accompanying map differed from that inserted in warrant for meeting with respect to several small parcels, since statute does not require that warrant contain accurate forecast of precise action which meeting will take on subjects to be acted on.

Ill.—Town of Burlington v. Dunn, supra.

Cure of defects

(1) Defects in a zoning ordinance because of lack of proper notice may be cured by a subsequently enacted statute.

Tex.—Storm Bros. v. Town of Balcones Heights, Civ.App., 239 S.W.2d 842, refused no reversible error.

(2) A prior city zoning ordinance which was invalid for failure to give notice of time and place when such ordinance would be brought up

ing hearing.⁶⁷ Although there is authority apparently to the contrary,⁶⁸ apart from such statutory provisions, the constitutional prohibition against deprivation of property without due process of law demands that persons having interests or rights in property be given adequate notice and an opportunity for hearing before passage of zoning ordinances or regulations affecting their rights and interests.⁶⁹ Where a full hearing is accorded, due process does not require that provision be made for administra-

tive review.⁷⁰

§ 47. — Publication, Posting, Filing, and Indexing of Ordinance

Failure to comply with a statute requiring zoning ordinances to be published, posted, filed, and indexed may render the ordinance void.

A zoning ordinance or regulation may be rendered void by failure to comply with a statute requiring it to be published,⁷¹ or by failure to comply

for adoption did not become effective by passage as a revised city ordinance without giving of required notice and hearing thereon.
S.D.—*Dodds v. Bickle*, 85 N.W.2d 284.

(3) Original zoning ordinance was not void on ground of failure of city planning commission to give required notice of public hearings conducted by commission on ordinance preliminary to its enactment in compliance with requirement of governing body of city where such body duly gave timely notice thereof and ratified notice of public hearing afforded public by planning commission, and validity of proceedings on which ordinance as enacted was based and ordinance itself before it became effective were not attacked by interested parties.

Kan.—*Piper v. Moore*, 183 P.2d 965, 163 Kan. 565.

Presence at hearings rendering notice immaterial

In proceeding wherein validity of zoning ordinance was attacked, any failure to have proper publication with respect to enactment of ordinance was immaterial where persons attacking ordinance had been present at hearings on it before planning commission and council.

Tenn.—*White v. Henry*, 285 S.W.2d 353, 199 Tenn. 219.

67. Ariz.—*Wood v. Town of Avondale*, 232 P.2d 963, 72 Ariz. 217.

Conn.—*Jack v. Torrant*, 71 A.2d 705, 136 Conn. 414.

Fla.—*City of Hollywood v. Rix*, 52 So.2d 135.

La.—*Beauvais v. D. C. Hall Transport, App.*, 49 So.2d 44.

Md.—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—*Crozier v. County Com'rs of Prince George's County*, 97 A.2d 296, 202 Md. 501, 37 A.L.R.2d 1137.

Mich.—*Krajenke Buick Sales v. Kopkowski*, 33 N.W.2d 781, 322 Mich. 250.

Mo.—*Wippler v. Hohn*, 110 S.W.2d 409, 341 Mo. 780.

Ohio.—*Morris v. Roseman*, 123 N.E.2d 419, 162 Ohio St. 447.

State ex rel. *Kling v. Nielsen*, 144 N.E.2d 273, 103 Ohio App. 60—*State ex rel. Gulf Refining Co. v. De France*, 100 N.E.2d 689, 89 Ohio App. 1.

Okl.—*Voight v. Saunders*, 243 P.2d 654, 206 Okl. 318.

R.I.—*R. I. Home Builders v. Budlong Rose Co.*, 74 A.2d 237, 77 R.I. 147.

Number and extent of hearings

A public hearing on a change of zoning is not invalid because a large number of tracts of property are considered thereat or because persons other than petitioners or protestants are allowed to appear and testify, in view of the facts that statute does not limit extent of hearing or require a separate hearing for each tract of property affected, and zoning commission acts in legislative capacity, and is not subject to rules of procedure governing conduct of judicial hearings.

D.C.—*Garrity v. District of Columbia*, 86 F.2d 207, 66 App.D.C. 256.

Changes following hearing

Changes made in a zoning ordinance after a public hearing do not invalidate it where the changes are not substantial or fundamental in character.

Md.—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

Mass.—*Town of Burlington v. Dunn*, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181.

Requirement complied with

Ill.—*Williams v. Village of Schiller Park*, 138 N.E.2d 500, 9 Ill.2d 596.

68. Self-prescribed limitation by city council

Even though ordinance prohibiting storage of new or secondhand lumber, empty packing boxes, or similar inflammable material on premises within fire limits, embracing business and industrial districts, except by special permission of common council after approval by building commissioner were a zoning ordinance, it would not be held void for want of public notice and hearing as provided in zoning ordinance adopted by common

council, since requirement of public notice and hearing was a self-prescribed limitation and could not serve as a delimitation of greater power vested in council by state.

N.Y.—*People, on Inf. of Barker, v. Elkin*, 80 N.Y.S.2d 525, 196 Misc. 188.

69. Ariz.—*Wood v. Town of Avondale*, 232 P.2d 963, 72 Ariz. 217.

Cal.—*Gilbert v. Stockton Port Dist.*, 60 P.2d 847, 7 C.2d 384.

Ga.—*Sikes v. Pierce*, 94 S.E.2d 427, 212 Ga. 567.

La.—*De Latour v. Morrison*, 34 So. 2d 783, 213 La. 292.

70. Tex.—*Luse v. City of Dallas, Civ.App.*, 131 S.W.2d 1079, error reversed.

71. N.Y.—*Milano v. Town of Patterson*, 93 N.Y.S.2d 419, 197 Misc. 457—*Village of Williston Park v. Israel*, 76 N.Y.S.2d 605, 191 Misc. 6, affirmed 94 N.Y.S.2d 921, 276 App. Div. 968, appeal denied 95 N.Y.S.2d 602, 276 App.Div. 1013, affirmed 95 N.E.2d 208, 301 N.Y. 713.

Pa.—*Kelly v. City of Philadelphia*, 115 A.2d 238, 332 Pa. 459.

Description of districts

Under law requiring publishing of every ordinance adopted, a zoning ordinance published without description in its text of use districts created, other than by reference to a map which was neither published, posted, included in ordinance as published, nor stated in publication to be on file in office of village clerk, was void.

N.Y.—*Village of Williston Park v. Israel*, 76 N.Y.S.2d 605, 191 Misc. 6, affirmed 94 N.Y.S.2d 921, 276 App.Div. 968, appeal denied 95 N.Y.S.2d 602, 276 App.Div. 1013, affirmed 95 N.E.2d 208, 301 N.Y. 713.

Proper publication shown

N.Y.—*Longo v. Eilers*, 93 N.Y.S.2d 517, 196 Misc. 909.

Invalidity of original zoning ordinance of village due to faulty publication did not invalidate subsequently adopted zoning ordinance which, although designated as an amendment to existing statutes, indicated a complete rewriting of zoning scheme and a repeal of everything

with statutes requiring it to be posted,⁷² filed,⁷³ and indexed.⁷⁴ Where a map is made a part of an ordinance, failure to include the map in the notice published or posted may render the ordinance invalid.⁷⁵ It has been held, however, that the failure to file a

copy of the zoning regulation in the clerk's office, if required by statute, does not invalidate the regulation as against a landowner who received actual notice of the regulation when he applied for a building permit.⁷⁶

3. REGULATIONS AS TO PARTICULAR MATTERS

§ 48. Architectural and Structural Designs

Generally, the zoning power may extend to the regulation of the architectural and structural designs of buildings within specified districts, including regulations with respect to yards, size of lots, area, and standards of construction; but the power must be exercised reasonably and within its scope.

A municipality may validly regulate the archi-

tectural and structural design of buildings within certain areas or districts⁷⁷ provided that the regulations are within the scope of its powers,⁷⁸ have a reasonable relation to the health, safety, general welfare, or other public interest to be served,⁷⁹ are reasonably definite and certain,⁸⁰ and nondiscrimina-

theretofore in effect by clear implication.

N.Y.—Fleetwood Manor, Inc. v. Village of Huntington Bay, 115 N.Y.S. 2d 615.

72. N.Y.—Milano v. Town of Patterson, 93 N.Y.S.2d 419, 197 Misc. 457.

Proper posting shown

N.Y.—Longo v. Eilers, 93 N.Y.S.2d 517, 196 Misc. 909.

73. Filing certified copy and map

A zoning ordinance is ineffective unless a certified copy thereof, together with a map or plan clearly delineating affected areas or zones, has been filed as required by statute.

Pa.—Pennsylvania Dri-Built Housing Corp. v. Borough of Emporium, 76 Pa.Dist. & Co. 331, 43 Mun.L.R. 97.

Refiling not necessary

Zoning regulations, filed for statutory period, and adopted by commission with only slight changes, were held valid, although not refiled, statute not requiring refiled.

Conn.—Coombs v. Larson, 152 A. 297, 112 Conn. 236.

74. Pa.—Pennsylvania Dri-Built Housing Corp. v. Borough of Emporium, 76 Pa.Dist. & Co. 331, 43 Mun.L.R. 97.

75. N.Y.—Milano v. Town of Patterson, 93 N.Y.S.2d 419, 197 Misc. 457.

76. Ky.—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

77. N.J.—Town of Belleville v. Kieran, 121 A.2d 411, 39 N.J.Super. 480.

N.Y.—Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Pa.—Appeal of Dunlap, 87 A.2d 299, 370 Pa. 31.

Wis.—State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W. 2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed.2d 750.

Requiring plans by licensed architects

Provisions of city building code that only architects licensed by state could prepare and submit plans and specifications for building or structure of public or semi-public nature were reasonable exercise of city's police power.

Colo.—Heron v. City of Denver, 283 P.2d 647, 131 Colo. 501.

Municipal building codes held valid

Ohio.—State ex rel. Hauser-Stander Tank Co. v. Kellogg, 116 N.E.2d 231, 94 Ohio App. 467.

Pa.—City of Philadelphia v. Houlihan, 37 Pa.Dist. & Co. 29.

Berwick Lumber & Supply Co. v. City of Harrisburg, Com.Pl., 52 Dauph.Co. 275.

78. Ill.—Brown v. Board of Appeals of City of Springfield, 159 N.E. 225, 327 Ill. 644, 56 A.L.R. 242.

Iowa.—Downey v. Sioux City, 227 N. W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

N.J.—Brookdale Homes v. Johnson, 10 A.2d 477, 123 N.J.Law 602, affirmed 19 A.2d 868, 126 N.J.Law 516.

43 C.J. p 339 note 19.

79. Ill.—Federal Elec. Co. v. Zoning Bd. of Appeals of Village of Mt. Prospect, 75 N.E.2d 359, 398 Ill. 142—Harmon v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594.

Md.—R. B. Const. Co. v. Jackson, 137 A. 278, 152 Md. 671.

Mass.—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646, 8 A.L.R.2d 955.

Mich.—Frischkorn Const. Co. v. Lambert, 24 N.W.2d 209, 315 Mich. 556—Senefsky v. Lawler, 12 N.W. 2d 387, 307 Mich. 728.

N.J.—Cox v. Wall Tp., 120 A.2d 779, 39 N.J.Super. 243—Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds 89 A.2d 698, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed.

708—Lionshead Lake v. Wayne Tp., 73 A.2d 287, 8 N.J.Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J.Super. 83.

Duffcon Concrete Products v. Borough of Cresskill, 58 A.2d 104, 137 N.J.Law 81, reversed on other grounds 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678—Brookdale Homes v. Johnson, 10 A.2d 477, 123 N.J. Law 602, affirmed 19 A.2d 868, 126 N.J.Law 576.

Pa.—Appeal of Hessenbruch from Radnor Tp. Zoning Ordinance, Quar.Sess., 40 Del.Co. 43.

Tex.—City of Amarillo v. Meade, Civ. App., 286 S.W.2d 276.

43 C.J. p 340 note 22.

Facts in each case determinative

Question whether building restrictions in a zoning ordinance promote public health, safety, or welfare must be determined in each case on basis of facts involved.

Mich.—Frischkorn Const. Co. v. Lambert, 24 N.W.2d 209, 315 Mich. 556.

Fact that zoning board believes proposed building is unartistic or not aesthetic cannot by itself be basis of depriving a home owner of right to use his property as he wishes.

Pa.—Appeal of Medinger, 104 A.2d 118, 377 Pa. 217—Appeal of Lord, 81 A.2d 538, 368 Pa. 121.

80. Fla.—City of West Palm Beach v. State ex rel. Duffey, 30 So.2d 491, 158 Fla. 863.

Tex.—City of Odessa v. Hallbrook, Civ.App., 103 S.W.2d 223.

Ordinance not indefinite

A zoning ordinance prohibiting issuance of building permit, unless board finds that proposed structure's exterior architectural appeal and functional plan will not be so at variance with those of other structures in immediate neighborhood as to cause substantial depreciation in property values thereof, was not so indefinite or ambiguous as to subject applicants for building permits to

tory,⁸¹ and do not otherwise impair constitutional rights.⁸²

In accordance with the foregoing rules, municipalities may validly promulgate reasonable zoning regulations with respect to front and rear yards,⁸³ side yards between dwellings,⁸⁴ minimum area,⁸⁵

board's uncontrolled arbitrary discretion or caprice.

Wis.—State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W. 2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed. 750.

81. Pa.—Appeal of White, 134 A. 409, 287 Pa. 259.

Jacobs v. Fetzer, Com.Pl., 41 Del. Co. 264.

No discrimination against prefabricated houses

Where an amended ordinance finally enacted required in substance and effect that in interest of safe building and health requirements all construction, both prefabricated houses and otherwise, must meet certain standards as described in amended code, there was no discrimination and no barring of prefabricated houses.

R.I.—Community Home Builders v. Town Council of North Kingstown, 117 A.2d 544.

82. Protection of vested right

Where a property owner has in good faith expended money or incurred obligations, which are substantial in relation to proposed project, in reliance on existing conditions of a zoning ordinance, he has a vested right and is entitled to protection against a subsequently enacted amendment, regulating architectural and structural designs within specified districts, even though no building permit had been issued.

Pa.—American Veterans Housing Corp., Inc. v. Zoning Bd. of Adjustment, 69 Pa. Dist. & Co. 449, 66 Montg. Co. 7.

83. Del.—Appeal of Blackstone, 190 A. 597, 8 W.V. Harr. 230.

Ill.—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568.

N.D.—City of Bismarck v. Hughes, 208 N.W. 711, 53 N.D. 838.

(Pa.—Sturm & Co., Inc. v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 193.

R.I.—Doherty v. Town Council of Town of South Kingstown, 200 A. 964, 61 R.I. 248.

Application of ordinance forbidding residences in rear yard except under certain conditions, so as to prohibit plaintiff's proposed alteration of second floor over garage, which had been used as living quarters for domestic employees of tenants of principal building, into modern efficiency apartment for commercial renting was not violative of plaintiff's rights under either state or federal constitution, and was not an improper

retrospective application of ordinance, especially as to one who purchased property years after zoning ordinance had gone into effect.

Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671.

Lot abutting public street

An ordinance requiring that every dwelling thereafter erected be on lot abutting public street having right of way of at least thirty feet has been sustained.

Ohio.—State ex rel. Jact v. Russell, 123 N.E.2d 261, 162 Ohio St. 281.

Reduction of size

Zoning ordinance, permitting reduction of size of rear yards, was held not in contravention of tenement house law.

Wis.—Bouchard v. Zetley, 220 N.W. 209, 196 Wis. 635.

84. Md.—R. B. Const. Co. v. Jackson, 137 A. 278, 152 Md. 671.

N.J.—Wynn v. Margate City, 157 A. 565, 9 N.J. Misc. 1324.

N.D.—City of Bismarck v. Hughes, 208 N.W. 711, 53 N.D. 838.

Pa.—Appeal of Dunlap, 87 A.2d 299, 370 Pa. 31.

Appeal of Junge, 89 Pa. Super. 548.

R.I.—Doherty v. Town Council of Town of South Kingstown, 200 A. 964, 61 R.I. 248.

85. Cal.—Clemons v. City of Los Angeles, 222 P.2d 439, 36 C.2d 95.

Conn.—De Mars v. Zoning Commission of Town of Bolton, 109 A.2d 876, 19 Conn. Sup. 24, affirmed 115 A.2d 653, 142 Conn. 580.

D.C.—Salver v. McLaughlin, 240 F.2d 891, 100 U.S. App. D.C. 29.

N.J.—Bierce v. Gross, 135 A.2d 561, 47 N.J. Super. 148—Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J. Super. 47.

N.Y.—Dilliard v. Village of North Hills, 94 N.Y.S.2d 715, 276 App. Div. 969 resettled 95 N.Y.S.2d 503, 276 App. Div. 1013.

Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485.

Pa.—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374.

Tex.—Caruthers v. Board of Adjustment of City of Bunker Hill Village, Civ. App., 290 S.W.2d 340.

When reasonably necessary for protection of public safety, health, morals, or general welfare, minimum area requirements in zoning ordinances are supportable.

Tex.—Caruthers v. Board of Adjustment of City of Bunker Hill Village, supra.

Criterion of general welfare

Increased capacity of soil for sew-

age absorption, curtailment of traffic, and community attractiveness are appropriate considerations within statutory criterion of general welfare in determining validity of zoning ordinances setting aside suitable areas for residences on larger plots.

N.J.—Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J. Super. 47.

One-, two-, or four-family buildings

Size of lots on which a one-family, two-family, or four-family building may be erected is a subject for police regulation, and, when not unreasonable, such regulations do not deprive a person of his property without due process of law.

Fla.—Garvin v. Baker, 59 So.2d 360.

Provision against reduction of size

Ordinance providing that no lot in certain area held under separate ownership at effective date and used for dwelling purposes should be reduced below area of five thousand square feet was a valid exercise of police power, and did not interfere with constitutional guarantees affecting property rights or right of contract.

Cal.—Clemons v. City of Los Angeles, 222 P.2d 439, 36 C.2d 95.

Different areas in different districts

Zoning ordinance fixing minimum lot area in town as 40,000 square feet in residence zone A, 22,500 square feet in residence zone B, and 40,000 square feet in business zone was not illegal.

Conn.—De Mars v. Zoning Commission of Town of Bolton, 109 A.2d 876, 19 Conn. Sup. 24, affirmed 115 A.2d 653, 142 Conn. 580.

Ordinance authorized by zoning statute

A statute providing for establishment in unincorporated portions of organized townships of zoning districts and for adoption of zoning ordinances regulating use of property has been held to authorize a zoning ordinance regulating size of lots on which residences may be erected.

Mich.—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331.

Particular requirements held valid

(1) Provision prescribing minimum area requirement of twenty thousand square feet for buildings erected in certain districts.

N.J.—Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J. Super. 47.

Pa.—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374.

(2) Minimum area restriction of two acres for buildings.

N.Y.—Frammor Realty Corp. v. Village of Old Westbury, 116 N.Y.S.2d 68, 280 App. Div. 945, appeal dismissed 109 N.E.2d 714, 304 N.Y.

width,⁸⁶ frontage,⁸⁷ and depth⁸⁸ of building lots. Zoning regulations may also validly provide as to minimum floor space of buildings,⁸⁹ standards of construction,⁹⁰ and the materials to be used in construction.⁹¹

On the other hand, in particular circumstances regulations have been held invalid which prohibit the use of certain materials in construction,⁹² prescribe minimum floor space⁹³ or cubic content,⁹⁴ or prohibit in certain districts buildings costing less than a certain sum,⁹⁵ or which require a minimum

848—*Dilliard v. Village of North Hills*, 94 N.Y.S.2d 715, 276 App.Div. 969, order resettled 95 N.Y.S.2d 503, 276 App.Div. 1013.

(3) Provision prohibiting building on lots of less than five acres.

III.—*Haneck v. Cook County*, 146 N.E. 2d 35, 12 Ill.2d 257.

N.J.—*Fischer v. Bedminster Tp.*, Somerset County, 90 A.2d 757, 21 N.J.Super. 81, affirmed 93 A.2d 378, 11 N.J. 194.

86. Cal.—*Morris v. City of Los Angeles*, 254 P.2d 935, 118 C.A.2d 856. D.C.—*Saylor v. McLaughlin*, 240 F. 2d 891, 100 U.S.App.D.C. 29.

N.J.—*Bierce v. Gross*, 135 A.2d 561, 47 N.J.Super. 143—*Fischer v. Bedminster Tp.*, Somerset County, 90 A.2d 757, 21 N.J.Super. 81, affirmed 93 A.2d 378, 11 N.J. 194.

87. Mich.—*Highland Oil Corp. v. City of Lathrup Village*, 85 N.W. 2d 185, 349 Mich. 650.

N.J.—*Clary v. Borough of Eatontown*, 124 A.2d 54, 41 N.J.Super. 47.

Greenway Homes v. Borough of River Edge, 60 A.2d 811, 137 N.J. Law 453.

88. N.J.—*Bierce v. Gross*, 135 A.2d 561, 47 N.J.Super. 143.

89. Conn.—*De Mars v. Zoning Commission of Town of Bolton*, 109 A. 2d 876, 19 Conn.Sup. 24, affirmed 115 A.2d 653, 142 Conn. 580.

N.J.—*Lionshead Lake v. Wayne Tp.*, Passaic County, 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S. Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

N.Y.—*Corning v. Town of Ontario*, 121 N.Y.S.2d 288, 204 Misc. 38.

Pa.—*Commonwealth v. McLaughlin*, 78 A.2d 880, 168 Pa.Super. 442.

Tex.—*Thompson v. City of Carrollton*, Civ.App., 211 S.W.2d 970.

Relation to health, safety, morals, and general welfare

(1) Health, safety, morals, and general welfare of community are closely associated with amount of space occupied by a family for living quarters.

N.Y.—*Corning v. Town of Ontario*, 121 N.Y.S.2d 288, 204 Misc. 38.

(2) A restriction of floor space in order to be valid must be consonant with character and need of community directly affected and properly related to public health, safety, morals, or general welfare.

N.J.—*Lionshead Lake v. Wayne Tp.*, 73 A.2d 287, 8 N.J.Super. 468, re-

versed on other grounds 74 A.2d 609, 9 N.J.Super. 83.

N.Y.—*Flower Hill Bldg. Corp. v. Village of Flower Hill*, Nassau County, 100 N.Y.S.2d 903, 199 Misc. 344.

Areas varying with type of building
Zoning ordinance fixing minimum floor areas of 860 square feet for a single story dwelling in town, 720 square feet ground-floor area for one and one-half or two-story building, with a total of 1,000 square feet in all, and 720 square feet of floor area for each family in a two or more story family dwelling, and fixing of a minimum ground-floor area of 624 square feet for any dwelling in zone B, is not invalid.

Conn.—*De Mars v. Zoning Commission of Town of Bolton*, 109 A.2d 876, 19 Conn.Sup. 24, affirmed 115 A.2d 653, 142 Conn. 580.

90. Mass.—*Kenney v. Building Com'r of Melrose*, 52 N.E.2d 683, 315 Mass. 291, 150 A.L.R. 490.

Prohibiting use and construction endangering water supply

Public had a direct interest in preservation of purity of water in reservoir of private corporation having franchise to supply water to a city and individual owner's right to convert his property near and above level of reservoir to a commercial use must be measured against such public interest in determining validity of restrictions imposed by county authorities on commercial use of such property.

Ky.—*Daugherty v. City of Lexington*, 249 S.W.2d 755.

91. N.J.—*Cox v. Wall Tp.*, 120 A.2d 779, 39 N.J.Super. 243.

Hard incombustible materials

Ordinance requiring buildings within fire limits to be composed of brick, stone, or Portland cement concrete or inclosed with walls of such materials, or, if approved by city council, other hard incombustible materials, was valid, as it fixed standard by which council should be guided in exercising its judgment as to other materials.

Tex.—*City of Odessa v. Halbrook*, Civ.App., 103 S.W.2d 223.

92. N.J.—*Cox v. Wall Tp.*, 120 A.2d 779, 39 N.J.Super. 243.

Regulations prohibiting erection of wooden buildings in certain districts have been held invalid.

N.J.—*White v. Bower*, 130 A. 365, 2 N.J.Misc. 357.

Tex.—*City of West University Place v. Martin*, Civ.App., 113 S.W.2d 295, cause dismissed 123 S.W.2d 638, 132 Tex. 354.

Prohibited materials as adequate as those permitted

Court may invalidate building regulations to extent that they prohibit devices or materials which are as adequate as those permitted.

N.J.—*Cox v. Wall Tp.*, 120 A.2d 779, 39 N.J.Super. 243.

93. Pa.—*American Veterans Housing Coop., Inc. v. Zoning Bd. of Adjustment*, 69 Pa.Dist. & Co. 449, 66 Montg.Co. 7.

Provisions held invalid

(1) Ordinance prescribing a minimum floor area of thirteen hundred feet has been held invalid where it appeared that in district affected a very substantial number of dwellings already erected did not comply with ordinance and on record it was difficult, if not impossible, to find any other justification for ordinance than a desire to enhance or protect value of improved property in area.

Mich.—*Senefsky v. Lawler*, 12 N.W. 2d 387, 307 Mich. 728, 149 A.L.R. 1433.

(2) Resolution prohibiting business use of structures less than twenty feet wide and fifty feet deep was a taking of property without due process.

N.Y.—*Oppenheimer v. Kraus*, 223 N. Y.S. 467, 221 App.Div. 773, affirmed 159 N.E. 651, 246 N.Y. 559.

94. Mich.—*Frischkorn Const. Co. v. Lambert*, 24 N.W.2d 209, 315 Mich. 556.

Held unenforceable

Provision requiring that single dwellings constructed in certain zone contain at least 14,000 cubic feet has been held unenforceable against owner desiring to construct houses containing only 12,556 cubic feet but which complied with state housing law, where purpose of provision was to maintain property values in zone and not to promote public health, safety, or welfare.

Mich.—*Frischkorn Const. Co. v. Lambert*, 24 N.W.2d 209, 315 Mich. 556.

95. N.J.—*Lionshead Lake v. Wayne Tp.*, Passaic County, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708—*Lionshead Lake v. Wayne Tp.*, 73 A.2d

space between buildings,⁹⁶ minimum side yards,⁹⁷ a minimum area and width of lots,⁹⁸ or a minimum depth for rear yards.⁹⁹ A regulation establishing a minimum area in one district and a different area in another district has been held invalid as having no substantial relation to the public health, safety, morals, or general welfare.¹

§ 49. — Building or Setback Lines

Generally, reasonable requirements with respect to the

setback of new buildings from the front line of the lots in particular districts are valid, but the regulation must be within the scope of the power conferred on the municipality and be properly related to the public health, safety, and welfare, and not confiscatory or discriminatory.

It has generally been held that a municipal corporation, or other political subdivision, under its power to enact building and zoning regulations, may fix reasonable requirements with respect to the setback of new buildings from the front line of the lots in particular districts, areas, or streets,² such as in

287, 8 N.J.Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J. Super. 83.

Brookdale Homes v. Johnson, 10 A.2d 477, 123 N.J.Law 602, affirmed 19 A.2d 868, 126 N.J.Law 516.

In entire community

Under its zoning power, a municipality cannot practically provide that no house costing less than a certain sum be erected in entire community, let alone a specified area.

N.J.—Lionshead Lake v. Wayne Tp., 73 A.2d 287, 8 N.J.Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J.Super. 83.

96. Mich.—Robyns v. City of Dearborn, 67 N.W.2d 718, 341 Mich. 495.

As applied to particular lots

(1) Where, under provisions of ordinance zoning lots for residential use only and providing for minimum distance of ten feet between residences, lot owners could not build residences on their lots more than ten feet wide, zoning ordinance rendered lots almost worthless, and was invalid as applied to such lots.

Mich.—Robyns v. City of Dearborn, supra.

(2) A zoning ordinance requiring two side yards, each not less than four feet in width and an aggregate width of not less than twelve feet, was invalid as applied to a twenty-foot lot, since dwelling could not exceed eight feet, and was also invalid as applied to corner lot with a thirty-two and one-half-foot frontage.

Mich.—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242.

97. N.J.—Le Mer v. Gill, 187 A. 730, 14 N.J.Misc. 826.

Regulation held invalid

Property owners held entitled, with consent of adjoining owners, to have set aside zoning ordinance requiring side yards to be at least eight feet wide with total width of eighteen feet, to extent that they might extend their dwelling within three feet of one line of lot, as neighboring owners had done prior to passage of ordinance, where restriction in their deed prevented a building nearer than fifteen feet from opposite side and where extension would not affect

light and air of any of surrounding properties.

N.J.—La Mer v. Gill, supra.

98. Mich.—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242.

As applied to particular lots

(1) Zoning ordinance limiting use of lots to one-family dwellings and requiring minimum lot of five thousand square feet and an average width of not less than fifty feet was invalid as applied to four contiguous lots each twenty feet by one hundred, since owner could not erect more than one dwelling on four lots.

Mich.—Ritenour v. Dearborn Tp., supra.

(2) A provision of city ordinance that no lot held under separate ownership in multiple dwelling zone when ordinance became effective shall be separated in ownership or reduced in size below minimum width fifty feet and minimum area of five thousand square feet required by ordinance is invalid and unenforceable as to sale of forty by forty-five feet portion of corner lot, with house thereon, in old settled residential district of small houses on small lots, or vendors' ownership of remaining forty-five by eighty feet portion thereof.

Cal.—Morris v. City of Los Angeles, 254 P.2d 935, 116 C.A.2d 856.

(3) Zoning ordinance defining one acre as minimum lot area for each building and necessary buildings appurtenant thereto in residence C district, as applied to a one and one-fourth acre building lot of which one-fourth acre was separated from main lot by a thirty-foot cliff, was void as constituting a taking of property without compensation.

N.Y.—Fleetwood Manor, Inc. v. Village of Huntington Bay, 115 N.Y.S. 2d 615.

Adequate provision for substandard parcels

(1) On dividing municipality into districts and prescribing minimum land dimensions for particular uses in such districts, municipal legislative body acts with constructive notice of existence therein of every substandard parcel held in single, separate ownership and has an absolute duty to make adequate provisions for

such parcels and cannot make them useless in limiting their use.

N.Y.—Long Island Land Research Bureau, Inc. v. Young, 159 N.Y.S.2d 414, 7 Misc.2d 469.

(2) Where frontage of plaintiffs' land was approximately twenty-three feet, and zoning ordinance prohibited erection of building on land in zoning district in which plaintiffs' land was located, on less than a sixty-foot frontage, so that plaintiffs could never erect a building on land under ordinance, ordinance was invalid as a taking of land without just compensation, even though board of appeals could grant relief so that some use of land could be made.

N.Y.—Milano v. Town of Patterson, 93 N.Y.S.2d 419, 197 Misc. 457.

99. Tex.—City of Amarillo v. Meade, Civ.App., 286 S.W.2d 276.

As to "attached" garage

Zoning ordinance requirement that rear yard have a minimum depth of twenty-five feet, construed as requiring such minimum depth as to garage, where garage was attached to house by roof extending ten inches between eaves of garage and house, had no substantial relationship to health, safety, morals, or general welfare of community and was in violation of owner's constitutional rights.

Tex.—City of Amarillo v. Meade, supra.

1. Pa.—American Veterans Housing Co-op., Inc. v. Zoning Bd. of Adjustment, 89 Pa.Dist. & Co. 449, 66 Montg.Co. 7.
Medinger v. Springfield Tp., Com. Pl., 69 Montg.Co. 203.

2. U.S.—Weiss v. Guion, D.C.Ohio, 17 F.2d 202.

Cal.—Thille v. Board of Public Works of City of Los Angeles, 255 P. 294, 82 C.A. 187.

Fla.—City of Miami v. Romer, 58 So. 2d 849.

Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

Minn.—McCavic v. DeLuca, 46 N.W. 2d 873, 233 Minn. 372.

N.J.—Fischer v. Bedminster Tp., Somerset County, 90 A.2d 757, 21

residential districts;³ but the regulation in order to be valid must satisfy statutory requirements,⁴ such as requirements of notice and hearing,⁵ must be within the scope of the power conferred,⁶ properly related to the public health, safety, and wel-

fare,⁷ and not be confiscatory⁸ or discriminatory.⁹ It has been held that the power to establish setback lines does not arise from the power to enact zoning ordinances, since "zoning" means districting, and establishing setback lines is no part thereof.¹⁰

N.J.Super. 81, affirmed 93 A.2d 378, 11 N.J. 194.

N.Y.—Van Auken v. Kimmey, 252 N.Y.S. 343, 141 Misc. 117.

Ohio.—Harris v. State, 155 N.E. 166, 23 Ohio App. 33.

Pa.—Appeal of Valicenti, 148 A. 308, 298 Pa. 276—Appeal of Kerr, 144 A. 81, 294 Pa. 246.

Pa.—Hamilton v. Lemoyne Borough, 73 Pa. Dist. & Co. 406, 1 Cumb.L.J. 61.

Sturm & Co. v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 193.

Not taking of property without due process

A zoning ordinance requiring buildings in a residential district or other locality to be set back a specified distance from property line is not a taking of property without due process.

U.S.—Gorlieb v. Fox, Va., 47 S.Ct. 675, 274 U.S. 603, 71 L.Ed. 1228, 53 A.L.R. 1210.

La.—Sampere v. City of New Orleans, 117 So. 327, 166 La. 776, affirmed 49 S.Ct. 262, 279 U.S. 812, 73 L.Ed. 971.

Wis.—Bouchard v. Zetley, 220 N.W. 209, 196 Wis. 635.

Fact that city had never adopted a general zoning ordinance did not preclude city from adopting ordinance establishing setback lines.

Minn.—McCavic v. DeLuca, 46 N.W. 2d 873, 233 Minn. 372.

Lessening congestion

Zoning ordinance requiring setback of ten feet for buildings erected on part of avenue zoned for business purposes held valid as reasonable regulation to lessen congestion.

N.Y.—Town of Islip v. F. E. Summers Coal & Lumber Co., 177 N.E. 409, 257 N.Y. 167.

Location of existing buildings

In fixing setback or building lines, regard may be had for location of existing buildings on street.

Minn.—State v. Houghton, 213 N.W. 907, 171 Minn. 231.

Prescriptive right

Municipality did not gain a prescriptive right to building line which was invalidly established in absence of any adverse or physical user of property.

Conn.—Alderman v. Town of West Haven, 200 A. 330, 124 Conn. 391.

Setback requirement not invalid as applied to church

Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Je-

hovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

3. Kan.—Moore v. City of Pratt, 79 P.2d 871, 148 Kan. 53.

Wis.—Bouchard v. Zetley, 220 N.W. 209, 196 Wis. 635.

Promoting public health and safety

In residential sections, setback ordinances tend to promote public health and comfort by admission of light and air, also to promote public safety, decreasing fire hazard by enlarging space between buildings and by facilitating efforts of firemen to extinguish fires.

Pa.—Appeal of Kerr, 144 A. 81, 294 Pa. 246.

Use of portion of lot

Ordinance requiring thirty-foot setback of buildings erected in strictly residential district, although permitting use of only thirty-seven per cent of surface of particular lot, was held within city's police power.

Pa.—Appeal of Kerr, supra.

4. Ariz.—Wood v. Town of Avondale, 232 P.2d 963, 72 Ariz. 217.

5. Ariz.—Wood v. Town of Avondale, supra.

Mich.—Krajenke Buick Sales v. Kopkowski, 33 N.W.2d 781, 322 Mich. 250.

Ample opportunity for hearing by persons aggrieved must be provided.

N.Y.—Van Auken v. Kimmey, 252 N.Y.S. 329, 141 Misc. 105.

6. Ill.—Lake County v. Cuneo, 76 N.E.2d 826, 333 Ill.App. 164.

Mass.—Slack v. Building Inspector of Town of Wellesley, 160 N.E. 285, 262 Mass. 404.

Regulation of "location"

Bylaw, requiring that buildings be specified distances from center of street, regulates "location" thereof within enabling statute.

Mass.—Slack v. Building Inspector of Town of Wellesley, supra.

7. Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

N.Y.—Van Auken v. Kimmey, 252 N.Y.S. 343, 141 Misc. 117.

Pa.—Schmalz v. Buckingham Tp. Bd. of Adjustment, 132 A.2d 233, 389 Pa. 295.

Appeal of Chertcoff, Quar.Sess., 1 Lebanon 71.

A zoning ordinance prohibiting junk yards, automobile graveyards, or dismantling plants, and storage of second-hand materials for resale in an industrial zone, except entirely

within an enclosure, no part of which is closer than two hundred feet to a public street or road, has been held void as not properly related to the public health, safety, or welfare without deciding whether fencing provision standing alone would be valid.

N.J.—Delawanna Iron & Metal Co. v. Albrecht, 83 A.2d 616, 9 N.J. 424.

Aesthetic considerations

Regulations establishing building lines and inhibiting abutting owners from encroaching thereon may not be based solely on aesthetic considerations.

W.Va.—Fruth v. Charleston Bd. of Affairs, 84 S.E. 105, 75 W.Va. 456, L.R.A.1915C 981.

8. N.Y.—Householder v. Town of Grand Island, 114 N.Y.S.2d 852, affirmed 114 N.Y.S.2d 262, 280 App. Div. 874, appeal denied 116 N.Y.S. 2d 925, 280 App.Div. 910, motion denied 109 N.E.2d 87, 304 N.Y. 796, affirmed 113 N.E.2d 555, 305 N.Y. 805.

Pa.—Appeal of Chertcoff, Quar.Sess., 1 Lebanon 71.

Depriving owners of river homesites

Ordinance prohibiting erection of buildings fronting on highway along river within ninety feet from center of right of way was unconstitutional as confiscatory in depriving owners of lands of appropriate use and enjoyment thereof as river homesites, where river's edge was within one foot to eight feet from building lines established by such measurement.

N.Y.—Householder v. Town of Grand Island, 114 N.Y.S.2d 852, affirmed 114 N.Y.S.2d 262, 280 App.Div. 874, appeal denied 116 N.Y.S.2d 925, 280 App.Div. 910. Motion denied 109 N.E.2d 87, 304 N.Y. 796, affirmed 113 N.E.2d 555, 305 N.Y. 805.

9. Pa.—Hamilton v. Lemoyne Borough, 73 Pa. Dist. & Co. 406, 1 Cumb.L.J. 61.

Appeal of Chertcoff, Quar.Sess., 1 Lebanon 71.

Line on one side of street only

A zoning ordinance is discriminatory and invalid in fixing a set-back line on one side of a street only, nor is it rendered valid by reason of subsequent enactment of a separate and distinct ordinance establishing a similar set-back line for other side of street.

Pa.—Hamilton v. Lemoyne Borough, 73 Pa. Dist. & Co. 406, 1 Cumb.L.J. 61.

10. N.Y.—Van Auken v. Kimmey, 252 N.Y.S. 329, 141 Misc. 105.

Location of auxiliary buildings. A municipal zoning regulation may reasonably restrict the location of sheds and outhouses,¹¹ and it may be provided that auxiliary buildings in residential districts be erected only on the rear half of lots.¹²

§ 50. — Height of Buildings and Structures

Zoning regulations of the height of buildings, structures, fences, and walls have been held valid or invalid according to the circumstances of the case.

Zoning regulations with respect to the height of buildings and structures,¹³ or fences and walls,¹⁴ have been held valid. Such regulations may prescribe different heights in different districts.¹⁵ A limitation on the height of structures in certain districts will not be sustained, however, where it bears no substantial relation to the public health, safety,

or morals,¹⁶ is uncertain,¹⁷ and is not within the scope of the power delegated by statute.¹⁸ So it has been held, generally or in particular circumstances, that municipal regulations which prohibit the erection of one-story buildings within a particular district,¹⁹ or prohibit the erection of buildings less than a certain height²⁰ are invalid.

§ 51. — One-Family, Two-Family, or Multiple Dwellings

Municipal zoning regulations may concern the particular number of families for which structures in certain districts may be built; and, where the power to zone is exercised reasonably and without discrimination, districts restricted to one-family or two-family dwellings may be established.

Municipal zoning regulations may concern the particular number of families for which structures

11. Mo.—City of Maplewood v. Provost, App., 25 S.W.2d 142.

Setback of garages

N.J.—Lewis v. Board of Com'rs of Borough of Avon-By-The-Sea, 143 A. 865, 7 N.J.Misc. 27.

12. N.H.—Sundeen v. Rogers, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

13. U.S.—Welch v. Swasey, Mass., 29 S.Ct. 567, 214 U.S. 91, 53 L.Ed. 923.

Mass.—Ayer v. Cram, 136 N.E. 338, 242 Mass. 30.

N.D.—City of Bismarck v. Hughes, 208 N.W. 711, 53 N.D. 838.

43 C.J. p 338 note 7 [a]—12 C.J. p 917 note 98 [a].

Courts cannot inquire into motives of legislature in passing laws limiting height of buildings in cities.
Wis.—Atkinson v. Piper, 195 N.W. 544, 181 Wis. 519.

Ordinance promoting public health

Ordinance restricting height of buildings held not enacted solely for aesthetic purposes, but to promote public health.

Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15.

Height of apartment houses may be limited to a certain number of stories.

N.J.—Harrison R. Van Dwyne, Inc. v. Senior, 143 A. 437, 105 N.J.Law 257, 6 N.J.Misc. 137.

Denying applicant for building permit right to erect building sixty-six and two-thirds per cent higher than other owners in same zoning district are allowed was not deprivation of property without due process.

Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 172 N.E. 710, 340 Ill. 284.

14. N.C.—Appeal of Parker, 197 S.E. 706, 214 N.C. 51, appeal dismissed

Parker v. City of Greensboro, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358.

15. Mass.—Ayer v. Cram, 136 N.E. 338, 242 Mass. 30.

Discrimination between business and residential districts as to height allowed will not render regulation void.

U.S.—Welch v. Swasey, Mass., 29 S.Ct. 567, 214 U.S. 91, 53 L.Ed. 923.

16. Ill.—Federal Elec. Co. v. Zoning Bd. of Appeals of Village of Mt. Prospect, 75 N.E.2d 359, 398 Ill. 142.

N.J.—Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

Brookdale Homes v. Johnson, 10 A.2d 477, 123 N.J.Law 602, affirmed 19 A.2d 868, 126 N.J.Law 516.

Pa.—Appeal of Luskuski, 79 Pa.Dist. & Co. 529, 39 Del.Co. 35.

43 C.J. p 339 note 12 [a].
17. Fla.—City of West Palm Beach v. State ex rel. Duffey, 30 So.2d 491, 158 Fla. 863.

18. Ill.—Brown v. Board of Appeals of City of Springfield, 159 N.E. 225, 327 Ill. 644, 56 A.L.R. 242.

N.J.—Eastern Boulevard Corporation v. Willaredt, 14 A.2d 537, 125 N.J.Law 173, affirmed 17 A.2d 173, 125 N.J.Law 511.

Four-story apartment houses

N.J.—Jersey Land Co. v. Scott, 126 A. 173, 100 N.J.Law 45.

43 C.J. p 339 note 13.

Minimum height

(1) Ordinance fixing minimum building height held not within zoning act as conserving taxable value.

Ill.—Brown v. Board of Appeals of City of Springfield, 159 N.E. 225, 327 Ill. 644, 56 A.L.R. 242.

(2) A grant of power to a municipality to zone its territory, or to regulate, control, or limit height of buildings, does not constitute a grant of power to prescribe minimum height of buildings.

Pa.—Appeal of Luskuski, 79 Pa.Dist. & Co. 529, 39 Del.Co. 35.

19. Mass.—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646, 8 A.L.R.2d 955.

S.D.—Mabridge v. Brown, 164 N.W. 94, 39 S.D. 270.

Manner and method of building

Authority to regulate "manner and method of building" does not authorize restriction of location of one-story buildings.

N.J.—Romar Realty Co. v. Haddonfield, 114 A. 248, 96 N.J.Law 117.

43 C.J. p 340 note 21.

20. Mass.—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646, 8 A.L.R.2d 955.

N.J.—Brookdale Homes v. Johnson, 10 A.2d 477, 123 N.J.Law 602, affirmed 19 A.2d 868, 126 N.J.Law 516.

Pa.—Appeal of Luskuski, 79 Pa.Dist. & Co. 529, 39 Del.Co. 35.

Value of surrounding property

An ordinance providing that no building should be erected with its roof ridge less than twenty-six feet above building foundation in a certain residential zone could not be justified on theory that presence of a building less than twenty-six feet in height caused a depreciation in value of surrounding property when such surrounding property was at least twenty-six feet in height and that, therefore, ordinance was valid exercise of police power under zoning act.

N.J.—Brookdale Homes v. Johnson, 10 A.2d 477, 123 N.J.Law 602, affirmed 19 A.2d 868, 126 N.J.Law 516.

in certain districts may be built,²¹ and may zone certain districts for apartments, tenements, and the like.²² On the other hand, where the power to zone exists and is exercised reasonably and without discrimination, a municipality may establish residential districts restricted to one-family dwellings,²³ or

21. Cal.—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332.

Ill.—*Speroni v. Board of Appeals of City of Sterling*, 15 N.E.2d 302, 368 Ill. 568.

N.H.—*Sullivan v. Anglo-American Inv. Trust*, 193 A. 225, 89 N.H. 112.

N.Y.—*Hall v. Leonard*, 23 N.Y.S.2d 360, 260 App.Div. 591, affirmed 34 N.E.2d 893, 285 N.Y. 719.

MacEwen v. City of New Rochelle, 267 N.Y.S. 36, 149 Misc. 251. N.D.—*City of Bismarck v. Hughes*, 208 N.W. 711, 53 N.D. 838. 43 C.J. p 339 note 9.

Fire protection

The enactment of special regulations for fire protection by city does not estop city to enact zoning regulation limiting number of families for a house in the interest of fire protection.

N.H.—*Sullivan v. Anglo-American Inv. Trust*, 193 A. 225, 89 N.H. 112.

Vagueness of term "family"

Zoning ordinance relating to regulation of number of families which might occupy buildings and lots was not void because of vagueness allegedly arising from definition of family which was the definition that had been followed by zoning officials for many years.

Md.—*Sommers v. Mayor and City Council of Baltimore*, 135 A.2d 625, 215 Md. 1.

22. N.J.—*Brookdale Homes v. Johnson*, 10 A.2d 477, 123 N.J.Law 602, affirmed 19 A.2d 868, 126 N.J.Law 516.

N.Y.—*Gedney Estates v. City of White Plains*, 99 N.Y.S.2d 111.

N.C.—*Appeal of Parker*, 197 S.E. 706, 214 N.C. 51, appeal dismissed *Parker v. City of Greensboro*, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358. 43 C.J. p 338 note 8.

Statute not against multiple dwellings

Provision in statute governing zoning, that regulations shall be designed to prevent overcrowding of land and to avoid undue concentration of population, has in mind the percentage of lot area that may be occupied by a structure and the number of persons who may reside in a small area and does not lay down any policy against multiple unit dwellings in cities with respect to validity of amendment reclassifying area as apartment house zone.

Ky.—*Byrn v. Beechwood Village*, 253 S.W.2d 395.

Change from single-family to multiple dwelling district

Ordinance under which single-family residence district was in part

changed to permit multiple unit low-rent housing project was not invalid where zoning authorities in exercise of discretion found that project would be for public good.

Ohio.—*Pearce v. City of Youngstown*, 135 N.E.2d 436, 100 Ohio App. 22.

23. Cal.—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332.

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 342, 338 U.S. 939, 94 L.Ed. 579—*Donovan v. City of Santa Monica*, 199 P.2d 51, 88 C.A.2d 386.

Ga.—*Tucker v. City of Atlanta*, 84 S.E.2d 362, 211 Ga. 157.

Ill.—*Haneck v. Cook County*, 146 N.E.2d 35, 12 Ill.2d 257—*Wesemann v. Village of La Grange Park*, 94 N.E.2d 904, 407 Ill. 81—*Jacobson v. Village of Wilmette*, 85 N.E.2d 753, 403 Ill. 250—*De Bartolo v. Village of Oak Park*, 71 N.E.2d 693, 396 Ill. 404, certiorari denied 68 S.Ct. 72, 332 U.S. 765, 92 L.Ed. 350—*Village of Western Springs v. Bernhagen*, 156 N.E. 753, 326 Ill. 100.

Ind.—*Antrim v. Hohlt*, 108 N.E.2d 197, 122 Ind.App. 681.

Mass.—*Locatelli v. City of Medford*, 192 N.E. 57, 287 Mass. 560, certiorari denied 55 S.Ct. 636, 294 U.S. 727, 79 L.Ed. 1257.

Mich.—*Hammond v. Kephart*, 50 N.W.2d 155, 331 Mich. 551.

Mo.—*Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n*, 265 S.W.2d 374—*City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n*, 213 S.W.2d 479, 358 Mo. 70.

Nev.—*State ex rel. Davie v. Coleman*, 224 P.2d 309, 67 Nev. 636.

N.J.—*Town of Montclair v. Bryan*, 85 A.2d 231, 16 N.J.Super. 535—*Guaclides v. Borough of Englewood Cliffs*, 78 A.2d 435, 11 N.J.Super. 405.

Repp v. Shaadi, 38 A.2d 284, 132 N.J.Law 24.

N.Y.—*Hall v. Leonard*, 23 N.Y.S.2d 360, 260 App.Div. 591, affirmed 34 N.E.2d 893, 285 N.Y. 719.

Fox Meadow Estates v. Culley, 252 N.Y.S. 178, 233 App.Div. 250, affirmed 185 N.E. 714, 261 N.Y. 506.

MacEwen v. City of New Rochelle, 267 N.Y.S. 36, 149 Misc. 251.

Pa.—*Appeal of Mutual Supply Co.*, 77 A.2d 612, 366 Pa. 424—In re

Jennings' Estate, 198 A. 621, 330 Pa. 154.

Suburban Counties Realty Corp. v. Ridley Tp., Com.Pl., 39 Del.Co. 184.

Ordinance permitting board to vary restrictions

Zoning ordinance, which classified area in which plaintiffs' property was located as a single-family dwelling district and which permitted board of zoning appeals to vary or modify restrictions where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of ordinance, provided that such modification is in harmony with the general purpose and intent so that spirit of ordinance shall be observed, public safety secured, and substantial justice done, was valid on its face.

Mich.—*Hammond v. Kephart*, 50 N.W.2d 155, 331 Mich. 551.

House convertible into apartments

Where property was being used as a one-family residence at time ordinance limiting property to one-family homes was passed, owner who purchased home after passage of ordinance was charged with knowledge that section in which property was located had been zoned; and fact that construction and arrangement of house had been such that it could have been converted into apartments, did not remove property from one-family residence restrictions of zoning ordinances.

Ga.—*Tucker v. City of Atlanta*, 84 S.E.2d 362, 211 Ga. 157.

Relation to safety and welfare

(1) A single-family restriction is a valid zoning regulation since it bears substantial relation to the public safety and to the general welfare.

Ind.—*Antrim v. Hohlt*, 108 N.E.2d 197, 122 Ind.App. 681.

N.H.—*Sullivan v. Anglo-American Inv. Trust*, 193 A. 225, 89 N.H. 112. N.J.—*Guaclides v. Borough of Englewood Cliffs*, 78 A.2d 435, 11 N.J.Super. 405.

(2) Such relation to public safety and general welfare exists in that a regulation designed to decrease number of families in one house may reasonably be thought to diminish risk of fire.

N.H.—*Sullivan v. Anglo-American Inv. Trust*, 193 A. 225, 89 N.H. 112.

Alterations

Application of single-dwelling zoning ordinance to restrain alteration and "possible use" of building as double apartment for occupation by lessee with relatives and friends is authorized by statute which permits

establish residential districts restricted to single and two-family houses,²⁴ to the exclusion of flats, multiple dwellings, apartment houses,²⁵ and other types of buildings.²⁶ Such a regulation is not discriminatory or otherwise invalid as to particular property merely because of the use of some nearby property for multiple dwelling purposes²⁷ or because

some adjacent property is zoned for commercial use.²⁸

Regulations restricting certain areas to single-family dwellings or prohibiting the erection of apartment houses may, however, be invalid, either generally or as applied to particular property, under some circumstances,²⁹ as where such regulations are

prohibition of alterations to "provide" for use in manner substantially different from use to which put before alteration, since "provide," as used in statute, means to take measures in view of an expected or a possible need.

N.H.—Sullivan v. Anglo-American Inv. Trust, supra.

Deliberate violation

Where property owner deliberately violated zoning ordinance restricting area to single-family dwellings, by erecting multiple dwelling on property adjacent to small business zone within larger residential zone, finding that use of property for multiple dwelling purposes was in enjoyment of substantial property right of owner was an improper conclusion of law; finding that use of property for multiple dwelling purposes did not impede, hinder, or interfere with attainment of objectives of zoning ordinance did not authorize property owner so to use the property in absence of facts showing that ordinance was unreasonable or invalid as applying to owner's property.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

24. U.S.—De Lano v. City of Tulsa, C.C.A.Okl., 26 F.2d 640, certiorari denied *Delano v. City of Tulsa*, 49 S.Ct. 179, 278 U.S. 654, 73 L.Ed. 564.

Ill.—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 61—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568.

N.D.—City of Bismarck v. Hughes, 208 N.W. 711, 53 N.D. 838.

Violations

Alleged fact that in some instances as many as four families occupied certain premises located in two-family districts in city would not sanction further violations of provisions of city's zoning ordinance.

Ill.—Cassidy v. Triebel, 85 N.E.2d 461, 337 Ill.App. 117.

Number of occupants

Fact that city zoning ordinance permitted a house which was occupied by a family consisting of eleven individuals to be converted into a duplex to house two families without any restriction as to the number of members of each family, but forbade the use of the house as a sorority house by ten girls and a house mother, did not deprive owners of house

who desired to sell house to sorority of their property without due process of law.

Ill.—Cassidy v. Triebel, supra.

25. U.S.—Village of Euclid, Ohio v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.

Koch v. City of Toledo, C.C.A. Ohio, 37 F.2d 336—De Lano v. City of Tulsa, C.C.A.Okl., 26 F.2d 640, certiorari denied *Delano v. City of Tulsa*, 49 S.Ct. 179, 278 U.S. 654, 73 L.Ed. 564.

N.Y.—Rice v. Van Vranken, 239 N.Y.S. 32, 132 Misc. 82, affirmed 232 N.Y.S. 506, 225 App.Div. 179, affirmed 175 N.E. 304, 255 N.Y. 541.

MacEwen v. City of New Rochelle, 287 N.Y.S. 36, 149 Misc. 251. N.D.—City of Bismarck v. Hughes, 208 N.W. 711, 53 N.D. 838.

Ohio—Cahn v. Guion, 160 N.E. 868, 27 Ohio App. 141.

Pa.—In re Jennings' Estate, 198 A. 621, 330 Pa. 154.

R.I.—City of Providence v. Stephens, 133 A. 614, 47 R.I. 387.

Fraternity house defined as multiple dwelling

Denial of permission to occupy a one-family dwelling in a one family zoning district, as a fraternity house, which was defined by ordinance as a multiple dwelling, was authorized.

Pa.—In re Jennings' Estate, 198 A. 621, 330 Pa. 154.

26. Cal.—Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 842, 338 U.S. 939, 94 L.Ed. 579.

27. Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386.

N.J.—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535.

Prior construction

Presence of multiple dwellings constructed prior to adoption of ordinance restricting district to single-family dwellings does not of itself invalidate ordinance.

Ill.—De Bartolo v. Village of Oak Park, 71 N.E.2d 693, 396 Ill. 404, certiorari denied 68 S.Ct. 72, 332 U.S. 765, 92 L.Ed. 350.

28. Ill.—De Bartolo v. Village of Oak Park, supra.

29. N.Y.—Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S. 2d 890, affirmed 156 N.Y.S.2d 378, 2 A.D.2d 839.

Zoning ordinance not restricting number of people or families residing in a building, provided they live as one housekeeping unit, etc., and permitting the renting of one or more rooms in a private residence, was held unconstitutional when so applied as to prevent plaintiffs from completing and using their building as a two-family dwelling, where plaintiffs' lot was near two apartment buildings and a busy street, and was located in a small tract zoned for residential use, which was surrounded by property zoned for either commercial uses or apartments.

Ill.—Anderman v. City of Chicago, 40 N.E.2d 51, 379 Ill. 236.

Rezoning

(1) Enactment of zoning ordinance to rezone area to restrict its use to single-family homes could not deprive owner of realty of right to construct apartment houses, where owner had purchased the realty for purpose of erecting the apartment houses thereon and had expended over fifty thousand dollars for surveys, architectural services, fees, etc., in preparation for construction of apartment houses and had applied for permit prior to enactment of such ordinance.

Wis.—State ex rel. Schroedel v. Pagens, 43 N.W.2d 349, 257 Wis. 376.

(2) Fact that all of lot owners in area zoned for garden type apartments except owners of tract who proposed to construct that type of apartment desired amendment to zoning ordinance replacing the area in a zone for one and two-family dwellings did not authorize enactment of the amendment unless they were adversely affected by conditions which were planned.

N.J.—Ridgfield Terrace Realty Co. v. Borough of Ridgfield, 55 A.2d 812, 136 N.J.Law 811.

Regulation greatly impairing value of lot

Where a lot constituted the corner of less restricted zone, lot was separated on three sides by public park and on all four sides by a park or street or both, from all present and probable future housing, and owner's

beyond the authorized powers of the municipality,³⁰ confiscatory,³¹ or not a proper exercise of the police power;³² but a housing shortage does not justify a judgment voiding for all time the applicability to one owner's property of an ordinance prohibiting the use of the property for other than a single-family dwelling,³³ and even if an ordinance prohibiting the erection or use of multiple dwellings in a borough were shown to be invalid as to one owner's property, it could not be declared a nullity throughout the borough, or even throughout the district in which the parcel is situated.³⁴

In particular circumstances, regulations have been held invalid which prohibit in certain districts the erection of single-family dwellings separated only by party walls³⁵ of two-family houses,³⁶ or of multiple dwellings designed and used for more than a certain number of families.³⁷

Suspending operation of ordinance. A housing

shortage may justify a city in temporarily suspending the operation of a zoning ordinance restricting an area to single-family dwellings during the emergency.³⁸

§ 52. — House Trailers

A municipality may prohibit any but temporary use of trailers within its borders when they do not meet building code requirements, but a trailer may not validly be prohibited in a residential zone merely because of aesthetic considerations.

A zoning ordinance prohibiting the use of house trailers in residential districts has been upheld as valid,³⁹ and it has been held that a municipality may prohibit any but temporary use of trailers for living purposes within its borders when such trailers do not meet the minimum requirements of the building code.⁴⁰ However, a house trailer may not validly be prohibited in a residential zone merely because of aesthetic considerations where the health, morals, and safety of the community are not affected;⁴¹

proposed apartment building would accommodate many more people than single dwellings which might be built on the lot, and enforcement of zoning commission's order restricting lot to single dwellings would greatly impair value of lot and would not increase value of adjoining property, zoning order was properly set aside. D.C.—Wolpe v. Poretzky, 154 F.2d 330, 81 U.S.App.D.C. 67, certiorari denied 67 S.Ct. 69, 329 U.S. 724, 91 L.Ed. 627.

Ordinance establishing fraction only of city into district, and providing that no building intended to be used as dwelling should be erected therein, except as single or two-family dwelling, where district was shown to be in most healthful part of municipality in which to erect apartment houses, denied due process.

Ohio.—City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 112 Ohio St. 654, 43 A.L.R. 662.

30. Iowa.—Downey v. Sioux City, 227 N.W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

N.Y.—Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 878, 2 A.D.2d 889.

43 C.J. p 339 note 16.

Ordinance held not authorized

(1) Ordinance prohibiting erection of apartment houses within particular district was not authorized by statute authorizing regulations by city for erection of buildings or by statute providing general plan of zoning, where city passed no general zoning ordinance.

Iowa.—Downey v. Sioux City, 227 N.

W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

(2) A regulation providing that no buildings shall be erected, altered, or used as a residence for more than one family, but not regulating the size of the lot or specifying how far buildings shall be separated, was not authorized by statute authorizing municipalities to regulate the location of industries and buildings with a view to promoting the public health, safety, and general welfare. N.J.—Handy v. South Orange, 118 A. 838, 38 N.J.Super. 365.

Emergency measure

Contemplated adoption by city of general zoning ordinance did not authorize it to prohibit erection of apartment houses in particular district as emergency measure.

Iowa.—Downey v. Sioux City, 227 N.W. 125, 208 Iowa 1273, followed in Wolle v. Sioux City, 229 N.W. 214.

Prior to change in constitution
N.J.—Robert Realty Co. v. City of Orange, 139 A. 54, 103 N.J.Law 711. Altschuler v. Scott, 137 A. 833, 5 N.J.Misc. 697.

31. Mich.—Rittenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242.

32. Pa.—Jacobs v. Fetzner, Com.Pl., 41 Del.Co. 139, exceptions dismissed 41 Del.Co. 264, reversed on other grounds 112 A.2d 356, 381 Pa. 262.

33. Cal.—Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 336.

34. N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

35. N.Y.—Westchester Housing Corporation v. Bunnell, 227 N.Y.S. 358, 131 Misc. 251.

36. N.J.—R. & B. Realty & Constr. Co. v. Jelleme, 130 A. 865, 2 N.J. Misc. 356.

37. N.J.—Easter Boulevard Corporation v. Willaredt, 14 A.2d 537, 125 N.J.Law 173, affirmed 17 A.2d 173, 125 N.J.Law 511.

Four-family flat

Minn.—State v. Minneapolis, 162 N.W. 477, 136 Minn. 479.

38. Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

39. U.S.—Connor v. West Bloomfield Tp., C.A.Mich., 207 F.2d 482.

40. Pa.—Township of Lower Merion v. Gallup, 46 A.2d 35, 158 Pa.Super. 572, appeal dismissed 67 S.Ct. 92, 329 U.S. 669, 91 L.Ed. 591.

Minimum floor space

An ordinance providing that all dwellings should have a minimum of three hundred eighty-four square feet of space on the first floor and defining a house trailer as any vehicle used for living or sleeping purposes, and providing that if so used for over thirty days in any one year it should be considered as a single-family dwelling, was not discriminatory as to house trailers.

Pa.—Commonwealth v. McLaughlin, 78 A.2d 880, 168 Pa.Super. 442.

41. Pa.—Commonwealth v. Flannery, Quar.Sess., 1 Pa.Dist. & Co.2d 680, 5 Cumb. 54.

Ordinance prohibiting storage of an unused house trailer on the owner's lot has been held invalid as having no direct relation with the health, comfort, safety, and welfare of the community.

N.Y.—Boxer v. Town of Harrison, 22 N.Y.S.2d 501, 175 Misc. 249.

and an ordinance prohibiting the use of a trailer anywhere within a municipality has been held invalid as applied to an individual placing a trailer on his own land in an area devoted to business and commercial use.⁴²

§ 53. — Provision for Off-Street Parking

Regulations requiring that provision be made for off-street parking in connection with a certain use of property must be related to the public health, safety, and general welfare, be within the scope of the enabling law, and be definite and certain in their terms.

The validity of regulations requiring that provision be made for off-street parking in connection with a certain use of property depends on

whether the regulations are properly related to the public health, safety, and general welfare,⁴³ are within the scope of the enabling law,⁴⁴ and are definite and certain in their terms.⁴⁵

§ 54. Use of Property

Zoning regulations may consist in regulating the use to which land in particular localities may be put, but power so to regulate the use of land is not unlimited and must be exercised within its scope and within the limitations imposed by statute or constitutional provision.

Zoning regulations enacted by a municipal corporation or other political subdivision may consist in regulating the use to which real estate, in particular localities may be put,⁴⁶ and such regulations

42. Pa.—Mountville Borough v. Miller, 7 Pa. Dist. & Co. 2d 577, 55 Lanc. L. Rev. 135.

43. Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

Requirement held invalid as applied to church

Fla.—State ex rel. Tampa, Fla., Co. of Jehovah's Witnesses, North Unit v. City of Tampa, 48 So.2d 78.

Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

44. Pa.—Staley v. Lower Merion Tp., Com.Pl., 69 Montg.Co. 407.

45. N.Y.—Mirschel v. Weissenberger, 100 N.Y.S.2d 452, 277 App.Div. 1039.

Suitable standards controlling exercise of authority

Zoning ordinance providing that a particular use is permissible on furnishing of suitable automobile parking facilities, the extent of which is to be determined by a board on application and due consideration of the public interest in respect of traffic congestion, is not a delegation of legislative authority to an administrative agency without provision for suitable standards to control exercise of authority.

N.Y.—Mirschel v. Weissenberger, supra.

Provisions as to private and public parking not in conflict

Section of zoning ordinance relating to private parking and requiring storage for not more than one passenger motor vehicle for each two thousand square feet of lot area was not in conflict with another provision of ordinance relating to parking with respect to places of public assembly and requiring one parking space for each seven persons present at any one time when maximum functional use of church plant was being made.

Mo.—McKinney v. Board of Zoning

Adjustment of Kansas City, App., 308 S.W.2d 320.

46. U.S.—K. & L. Oil Co. v. Oklahoma City, D.C. Okl., 14 F.Supp. 492.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646—Davis v. City of Mobile, 16 So.2d 1, 245 Ala. 80.

Cal.—McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 C.2d 79, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644—Skalko v. City of Sunnyvale, 93 P.2d 93, 14 C.2d 213—Magruder v. Redwood City, 265 P. 806, 203 C. 665.

Finstern v. San Bernardino County, 305 P.2d 266, 147 C.A.2d 549—Kort v. City of Los Angeles, 127 P.2d 66, 52 C.A.2d 804—Ex parte Ruppe, 252 P. 746, 80 C.A. 629.

Conn.—Park Regional Corp. v. Town Plan and Zoning Commission of Town of Windsor, 136 A.2d 785, 144 Conn. 677—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650—Fairlawn Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

D.C.—Hagans v. District of Columbia, Mun.App., 97 A.2d 922.

Fla.—City of Miami Beach v. Ocean & Inland Co., 3 So.2d 364, 147 Fla. 480.

Ill.—Jacobson v. City of Evanston, 139 N.E.2d 205, 10 Ill.2d 61—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568. Cleaners Guild of Chicago v. City of Chicago, 37 N.E.2d 857, 312 Ill. App. 102.

Kan.—Spurgeon v. Board of Com'rs of Shawnee County, 317 P.2d 798, 181 Kan. 1008.

Ky.—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

Mich.—Smith v. Building Inspector for Plymouth Tn., 77 N.W.2d 332,

346 Mich. 57—Gust v. Canton Tp., 70 N.W.2d 772, 342 Mich. 436.

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

Mo.—City of Washington v. Mueller, App., 218 S.W.2d 801.

N.J.—Town of Belleville v. Klernan, 121 A.2d 411, 39 N.J.Super. 480.

Duffcon Concrete Products v. Borough of Cresskill, 58 A.2d 104, 137 N.J.Law 81.

N.Y.—People v. Calvar Corporation, 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298.

Brous v. Town of Hempstead, 69 N.Y.S.2d 253, 272 App.Div. 31, opinion amended on reargument 70 N.Y.S.2d 576, 272 App.Div. 777—McCarter v. Beckwith, 285 N.Y.S. 151, 247 App.Div. 289, affirmed 3 N.E.2d 882, 272 N.Y. 488, certiorari denied Beckwith v. McCarter, 57 S.Ct. 194, 299 U.S. 601, 81 L.Ed. 443—Bond v. Cooke, 262 N.Y.S. 199, 237 App. Div. 229.

Borek v. Golder, 74 N.Y.S.2d 675, 190 Misc. 366—Buffalo Park Lane v. City of Buffalo, 294 N.Y.S. 413, 162 Misc. 207—Van Auken v. Kimmey, 252 N.Y.S. 329, 141 Misc. 105.

Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 283 App. Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958, and in which appeal is denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493—People v. Perkins, 8 N.Y.S.2d 868, reversed on other grounds 26 N.E.2d 278, 282 N.Y. 329.

Ohio.—State ex rel. Shaker Square Co. v. Guion, App., 145 N.E.2d 144—City of Miamisburg v. Clayman, App., 37 N.E.2d 94.

Pa.—Appeal of Dunlap, 87 A.2d 299, 370 Pa. 81.

Schmalz v. Buckingham Tp. Bd. of Adjustment, Com.Pl., 6 Bucks 285, reversed on other grounds 132 A.2d 233, 389 Pa. 295.

have frequently been upheld as a proper exercise | of the municipal police power.⁴⁷ Such power, in

Tenn.—Dooley v. City of Cleveland, 135 S.W.2d 649, 175 Tenn. 439.

Tex.—Ellis v. City of West University Place, 175 S.W.2d 396, 141 Tex. 608.

Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224, error refused—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct—Lombardo v. City of Dallas, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1.

43 C.J. p 340 note 28.

Ordinance permissive in form

Ordinance permitting specified uses and buildings in an area and prohibiting all others is not invalid because of failure to list prohibited uses.

Mo.—State ex rel. Barnett v. Sappington, App., 266 S.W.2d 774.

Interests subject to zoning

If a particular parcel of land is zoned for a particular use, the particular interest therein of any individual is subject to that zoning, so that easement or any interest less than fee, as well as fee, is subject to zoning.

Cal.—City and County of San Francisco v. Safeway Stores, Inc., 310 P.2d 68, 150 C.A.2d 327.

Requiring authorization for use

(1) Zoning ordinance provision, which requires property owner to secure and pay for a certificate authorizing him to use or occupy premises for purposes conforming with ordinance, is valid.

N.J.—Honigfeld v. Byrnes, 103 A.2d 593, 14 N.J. 600.

(2) Enactment of general resolution, withholding blanket approval beforehand, and requiring subsequent separate authorization for specific uses, has been held a valid exercise of legislative zoning power rather than grant of variance.

N.Y.—Congregation Beth Israel West Side Jewish Center v. Board of Estimate of City of New York, 139 N.Y.S.2d 645, 285 App.Div. 629.

(3) Mere fact that zoning ordinance required application to, and consent of, town board, before cemetery corporation could make use of its land for cemetery purposes, did not render the ordinance unconstitutional, since there could be no unlawful taking of corporation's property until there had been an application for a permit and unreasonable refusal to grant the permit.

N.Y.—Holy Sepulchre Cemetery v. Town of Greece, 79 N.Y.S.2d 683, 191 Misc. 241, affirmed 79 N.Y.S.2d 863, 273 App.Div. 942.

(4) Validity of provisions governing grant or denial of permits and certificates see *infra* § 65.

Suburban area

An ordinance which merely extends urban type of zoning to suburban area and places reasonable restrictions on use of property for roadside stands, gasoline filling stations, and similar enterprises, is proper.

N.H.—Kimball v. Blanchard, 7 A.2d 394, 90 N.H. 298.

Use of accessory buildings restricted to domestic

Zoning ordinance may restrict the use of accessory buildings for residence purposes to use by domestic employees of the tenant or owner of the premises.

N.J.—Collins v. Board of Adjustment of City of Margate, 69 A.2d 708, 3 N.J. 200.

Ordinance forbidding residences in rear yard except under certain conditions has been upheld.

Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671.

Excluding businesses and establishments from certain districts

(1) Legitimate businesses may validly be excluded from certain districts.

Ark.—Goldman & Co. v. City of North Little Rock, 249 S.W.2d 961, 220 Ark. 792.

(2) So, an ordinance prohibiting establishment of sanitariums for insane within certain districts, viewed as part of general zoning plan, has been held valid.

Cal.—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778 and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777.

(3) A municipal restriction of undertaking establishments or mortuaries to certain sections by reasonable and proper zoning regulations is valid.

Cal.—Ex parte Ruppe, 252 P. 746, 80 C.A. 629.

Fla.—State ex rel. Stephens v. City of Jacksonville, 137 So. 149, 103 Fla. 177—State ex rel. Skillman v. City of Miami, 134 So. 541, 101 Fla. 585.

N.Y.—Heimerle v. Village of Bronxville, 5 N.Y.S.2d 1002, 168 Misc. 783, affirmed 11 N.Y.S.2d 367, 256 App.Div. 993.

Pa.—Rick v. Cramp, 53 A.2d 84, 357 Pa. 83.

(4) An ordinance limiting mortuaries to certain district was held not unconstitutional, although adopted after erection of mortuary building in excluded residence district was commenced.

Ariz.—City of Tucson v. Arizona Mortuary, 272 P. 923, 34 Ariz. 495.

Independent regulatory limitations not precluded

Regulation of land use by municipal zoning ordinances does not preclude and is not inconsistent with the independent regulatory limitation or distribution of businesses pursuant to independent statutory authority, including the independent regulation of bars and gaming houses.

Nev.—Primm v. City of Reno, 252 P. 2d 835, 70 Nev. 7.

47. U.S.—Texas Co. v. City of Tampa, C.C.A.Fla., 100 F.2d 347—Oklahoma City, Okl. v. Dolese, C.C.A. Okl., 48 F.2d 734.

Cal.—Yuba City v. Cherniavsky, 4 P. 2d 299, 117 C.A. 568—Wickham v. Becker, 274 P. 397, 96 C.A. 443—Ex parte Ruppe, 252 P. 746, 80 C.A. 629.

Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650—Strain v. Mims, 193 A. 754, 123 Conn. 275.

Ind.—Goldsmith v. City of Indianapolis, 196 N.E. 525, 208 Ind. 465.

Md.—Engle v. City Com'rs of Cambridge, 22 A.2d 922, 180 Md. 82.

Mo.—City of Washington v. Mueller, App., 213 S.W.2d 801.

N.Y.—Little v. Young, 32 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N. E.2d 61, 298 N.Y. 918, affirmed 87 N. E.2d 74, 299 N.Y. 699—People v. Perkins, 8 N.Y.S.2d 868, reversed on other grounds 26 N.E.2d 278, 282 N.Y. 329.

Or.—Corpus Juris cited in Page v. City of Portland, 165 P.2d 280, 282, 178 Or. 632.

Tex.—Meserole v. Board of Adjustment, City of Dallas, Civ.App., 172 S.W.2d 528—City of Dallas v. Meserole Bros., Civ.App., 164 S.W.2d 564, error refused.

43 C.J. p 340 note 30.

Dentistry

Fact that dental offices and the practice of dentistry in districts zoned for single-family dwellings had not been theretofore regulated did not place regulation of such profession in such district without the domain of the police power of the city.

Tex.—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused.

Hardship

Fact that the limitation on the use of property by zoning ordinance will make it more difficult for owner to sell or dispose of the property or otherwise entail hardship does not necessarily mean that the constitutionality of the ordinance may be questioned.

N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.

any case, is not unlimited,⁴⁸ and it must be exercised within its scope,⁴⁹ and within the limitations and restrictions imposed by statute or constitutional

provision.⁵⁰ It must be exercised without arbitrary discrimination;⁵¹ and the regulations, in order to be valid, must have a real and substantial relation to

L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431.

48. U.S.—Nectow v. City of Cambridge, Mass., 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

D.C.—Prentiss v. American University, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied *Wrather v. American University*, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

N.J.—Borough of Cresskill v. Borough of Dumont, 100 A.2d 182, 28 N.J.Super. 26, affirmed 104 A.2d 441, 15 N.J. 238.

Yara Engineering Corp. v. City of Newark, 40 A.2d 559, 132 N.J. Law 370—Eastern Boulevard Corporation v. Willaredt, 14 A.2d 537, 125 N.J.Law 173, affirmed 17 A.2d 173, 125 N.J.Law 511.

N.Y.—Long Island University v. Tappan, 113 N.Y.S.2d 795, 202 Misc. 956, affirmed 118 N.Y.S.2d 767, 281 App.Div. 771, affirmed 114 N.E.2d 432, 305 N.Y. 893, reargument denied 115 N.E.2d 680, 306 N.Y. 570.

Ohio.—State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N.E.2d 515, 139 Ohio St. 229.

Okl.—Royal Baking Co. v. Oklahoma City, 75 P.2d 1105, 182 Okl. 45.

Pa.—Appeal of Garbev, Inc. from Bd. of Adjustment, Com.Pl., 42 Del. Co. 339, affirmed 122 A.2d 682, 385 Pa. 328.

Wash.—Manos v. City of Seattle, 24 P.2d 91, 173 Wash. 662.

Usual attributes of permitted use

If a particular use is authorized, a zoning regulation may not withhold the normal and usual attributes thereof.

Pa.—Leaver v. Board of Adjustment, 10 Pa.Dist. & Co.2d 333, 6 Bucks 249.

49. Ky.—Darlington v. Board of Councilmen of City of Frankfort, 140 S.W.2d 392, 283 Ky. 778.

Mass.—Smith v. Board of Appeals of Fall River, 65 N.E.2d 547, 319 Mass. 341.

N.Y.—Long Island University v. Tappan, 113 N.Y.S.2d 795, 202 Misc. 956, affirmed 118 N.Y.S.2d 767, 281 App.Div. 771, affirmed 114 N.E.2d 432, 305 N.Y. 893, reargument denied 115 N.E.2d 680, 306 N.Y. 570.

Albrecht Realty Co. v. Town of New Castle, 167 N.Y.S.2d 843—Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App. Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App. Div. 1065, motion denied 85 N.E.2d

61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

N.C.—Kass v. Hedgpeth, 38 S.E.2d 164, 226 N.C. 405.

Pa.—Commonwealth v. Krakover, Quar.Sess., 72 Montg.Co. 500, 48 Mun.L.R. 168, reargument denied 73 Montg.Co. 301.

43 C.J. p 342 note 83.

50. Ala.—Thompson v. Wingard, 34 So.2d 606, 250 Ala. 390—Chapman v. City of Troy, 4 So.2d 1, 241 Ala. 637.

D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed *Prentiss v. American University*, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied *Wrather v. American University*, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Fla.—State ex rel. Stephens v. City of Jacksonville, 137 So. 149, 103 Fla. 177.

Mass.—City of Worcester v. New England Institute & New England School of Accounting, Inc., 140 N. E.2d 470, 335 Mass. 486—Smith v. Board of Appeals of Fall River, 65 N.E.2d 547, 319 Mass. 341.

Mich.—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331.

N.J.—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J.Law 195, affirmed *Appley v. Township Committee of Township of Bernards*, 28 A.2d 177, 129 N.J.Law 73.

N.Y.—Davison v. Flanagan, 76 N.Y.S.2d 849, 273 App.Div. 870.

Pforzheimer v. Seidman, 99 N.Y. S.2d 87, reversed on other grounds 103 N.Y.S.2d 886, 278 App.Div. 780.

Pa.—Baronoff v. Zoning Bd. of Adjustment, 122 A.2d 65, 385 Pa. 110—Appeal of Sawdey, 85 A.2d 28, 369 Pa. 10.

Statute barring limitations on religious or educational uses

Statute making invalid any ordinance which prohibits or limits use of land for any church or other religious purpose or for any educational purpose, whether public, religious, sectarian, or denominational, was applicable to municipal zoning ordinance enacted prior to enactment of the statute. Under such statute institute, which was nonprofit corporation for teaching of principles of science of accounting, was "public," the provision not being confined to publicly supported or maintained institutions or to "public schools;" and fact that nonprofit institution charged fees for its services would not destroy public character of its purpose, and absence of endowment of gifts to institution would not be

controlling in determining public character of its purpose.

Mass.—City of Worcester v. New England Institute & New England School of Accounting, Inc., 140 N. E.2d 470, 335 Mass. 486.

Ordinance limiting annual number of permits

Zoning ordinance providing that no more than one hundred twelve residential building permits a year shall be issued for any land that town board shall declare to be within special residence district is invalid and void, both because it violates constitutional prohibition against taking property without just compensation and because no power to enact it was vested in town by law.

N.Y.—Albrecht Realty Co. v. Town of New Castle, 167 N.Y.S.2d 843.

Health law

Town may not, by zoning ordinance, exclude tuberculosis hospital from any part of town, where location is authorized pursuant to health law.

N.Y.—Jewish Consumptives' Relief Soc. v. Town of Woodbury, 243 N. Y.S. 686, 230 App.Div. 228, affirmed 177 N.E. 165, 256 N.Y. 619.

Gas plant

Statutory authority, together with franchises granted by town, gave right to erect and maintain gas manufacturing plant in town subject to regulation, which could not be nullified by town zoning ordinance enacted after granting of such franchises.

N.Y.—Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 App. Div. 551.

Power lines

Village had no right by zoning ordinance to prohibit maintenance of power lines within village by lighting company which was vested with powers and rights granted electric corporations by the transportation corporation law.

N.Y.—Long Island Lighting Co. v. Village of Old Brookville, 73 N.Y. S.2d 718, affirmed 77 N.Y.S.2d 143, 273 App.Div. 856, reargument and appeal denied 78 N.Y.S.2d 372, 273 App.Div. 910, affirmed 81 N.E.2d 104, 298 N.Y. 569.

51. U.S.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

Ala.—Thompson v. Wingard, 34 So. 2d 606, 250 Ala. 390.

Cal.—Endara v. City of Culver City, 294 P.2d 1003, 140 C.A.2d 33—Biscay v. City of Burlingame, 15 P.2d 784, 127 C.A. 213.

D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

the public health, safety, morals or general wel- | fare,⁵² and in order to be valid, the regulations

Fla.—Drexel v. City of Miami Beach, 64 So.2d 317—City of Miami Beach v. State ex rel. Lear, 175 So. 537, 128 Fla. 750.

Md.—Applestein v. Osborne, 143 A. 666, 156 Md. 40.

Mass.—Smith v. Board of Appeals of Fall River, 65 N.E.2d 547, 319 Mass. 341.

N.J.—Katobimar Realty Co. v. Webster, 113 A.2d 824, 20 N.J. 114—Delawanna Iron & Metal Co. v. Albrecht, 88 A.2d 616, 9 N.J. 424.

N.Y.—Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead, 12 N.Y.S.2d 79, 257 App.Div. 843, modified on other grounds 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 84 L.Ed. 990.

Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485.

Ohio.—Village of Ottawa v. Odenweller Milling Co., 13 N.E.2d 144, 57 Ohio App. 170.

Pa.—Huebner v. Philadelphia Sav. Fund Soc., 192 A. 139, 127 Pa.Super. 28.

Tex.—City of McAllen v. Morris, Civ. App., 217 S.W.2d 875, error refused.

43 C.J. p 343 note 55.

Discrimination in enforcement

Zoning ordinance lawful on its face and apparently fair in its terms may not be enforced in such manner as to work discrimination.

U.S.—City of Miami Beach, Fla. v. Benhow Realty, C.C.A.Fla., 168 F. 2d 378.

Permitting chickens but not pigeons

Fact that persons in undeveloped area were granted permission to maintain chickens but not pigeons furnished no substantial basis for invalidating ordinance prohibiting use of structures for harboring pigeons and providing for issuance of temporary permits with respect to various prohibited uses in undeveloped sections where pigeons were harbored merely as a pastime.

N.Y.—Barkmann v. Town of Hempstead, 49 N.Y.S.2d 262, 268 App.Div. 785, affirmed 62 N.E.2d 238, 294 N.Y. 805.

52. U.S.—State v. Roberge, Wash., 49 S.Ct. 50, 273 U.S. 116, 73 L.Ed. 210—Nectow v. City of Cambridge, Mass., 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348—Women's Kansas City St. Andrew Soc. v. Kansas City, C.C.A.Mo., 58 F.2d 593—Oklahoma City, Okl. v. Doles, C.C.A. Okl., 48 F.2d 734.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646—Johnson v.

City of Huntsville, 29 So.2d 342, 249 Ala. 36.

Cal.—Sunny Slope Water Co. v. City of Pasadena, 33 P.2d 672, 1 C.2d 87.

City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442—Ex parte Ellis, 76 P.2d 516, 25 C.A.2d 99—Biscay v. City of Burlingame, 15 P.2d 784, 127 C.A. 213.

Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650.

Lakeside Realty Co. v. Town of Berlin, 129 A.2d 628, 20 Conn.Sup. 188.

D.C.—Prentiss v. American University, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied *Wrather v. American University*, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Ill.—City of Park Ridge v. American Nat. Bank & Trust Co. of Chicago, 122 N.E.2d 265, 4 Ill.2d 144—Catholic Bishop of Chicago v. Kingery, 20 N.E.2d 583, 371 Ill. 257.

Ky.—*Corpus Juris* cited in *Polk v. Axton*, 208 S.W.2d 497, 501, 306 Ky. 498.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

Mich.—Smith v. Building Inspector for Plymouth Tp., 77 N.W.2d 332, 346 Mich. 57—Gust v. Canton Tp., 70 N.W.2d 772, 342 Mich. 436—Mooney v. Village of Orchard Lake, 53 N.W.2d 308, 333 Mich. 389.

N.H.—Kimball v. Blanchard, 7 A.2d 394, 90 N.H. 298.

N.J.—Delawanna Iron & Metal Co. v. Albrecht, 88 A.2d 616, 9 N.J. 424.

Borough of Cresskill v. Borough of Dumont, 100 A.2d 182, 28 N.J.Super. 26, affirmed 104 A.2d 441, 15 N.J. 238.

DeMott Homes at Salem v. Margate City, 56 A.2d 423, 136 N.J.Law 330, affirmed 57 A.2d 388, 136 N.J.Law 639—Eastern Boulevard Corporation v. Willaredt, 14 A.2d 537, 125 N.J.Law 173, affirmed 17 A.2d 173, 125 N.J.Law 511—179 Duncan Avenue Corporation v. Board of Adjustment of Jersey City, 5 A.2d 68, 122 N.J.Law 292.

N.Y.—Presnell v. Leslie, 165 N.Y.S. 2d 488, 8 N.Y.2d 384, 144 N.E.2d 381—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 293.

Property Owners Ass'n of Garden City Estates v. Board of Zoning Appeals of Incorporated Village of Garden City, 123 N.Y.S.2d 716, 2 Misc.2d 309—Long Island University v. Tappan, 113 N.Y.S. 2d 795, 202 Misc. 956, affirmed 118 N.Y.S.2d 767, 281 App.Div. 771, affirmed 114 N.E.2d 432, 305 N.Y.

893, reargument denied 115 N.E.2d 680, 306 N.Y. 570.

Householder v. Town of Grand Island, 114 N.Y.S.2d 852, affirmed 114 N.Y.S.2d 262, 280 App.Div. 874, appeal denied 116 N.Y.S.2d 925, 280 App.Div. 910, motion denied 109 N.E.2d 87, 304 N.Y. 796, affirmed 113 N.E.2d 555, 305 N.Y. 805.

Ohio.—State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.

State ex rel. Weber v. Vajner, 108 N.E.2d 569, 92 Ohio App. 233, appeal dismissed 106 N.E.2d 642, 158 Ohio St. 105.

City of Cincinnati v. Struble, 29 Ohio N.P.N.S., 104.

Okla.—Royal Baking Co. v. Oklahoma City, 75 P.2d 1105, 182 Okl. 45.

Or.—*Corpus Juris* cited in *Page v. City of Portland*, 165 P.2d 280, 283, 178 Or. 632.

Pa.—Baronoff v. Zoning Bd. of Adjustment, 122 A.2d 65, 385 Pa. 110. Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 313.

Tex.—City of Dallas v. Meserole, Civ.App., 155 S.W.2d 1019, error refused—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358—Manos v. City of Seattle, 24 P.2d 91, 173 Wash. 662.

Wis.—Town of Caledonia v. Racine Limestone Co., 63 N.W.2d 697, 266 Wis. 475.

43 C.J. p 342 notes 28–35.

Test of general welfare

Whether a zoning regulation as to the use of property is for the general welfare of the municipality may be tested by considerations of stabilization, orderliness, and development in the forms, branches, and grouping of the elements of residence, business, and industry in community life.

N.H.—Kimball v. Blanchard, 7 A.2d 394, 90 N.H. 298—Stone v. Cray, 200 A. 517, 89 N.H. 483.

Building on lots not fronting on street

Zoning ordinance which prohibited building of residences on lots in city not fronting on a dedicated street, and which prohibited plaintiff owners of lot fronting on an undedicated street from constructing a single-dwelling house on their lot, was unconstitutional where use proposed by plaintiffs would not affect public health, safety, morals or welfare of village citizens.

Ohio.—State ex rel. Weber v. Vajner, 108 N.E.2d 569, 92 Ohio App. 233, appeal dismissed 106 N.E.2d 642, 158 Ohio St. 105.

Special group

Under statute authorizing municipi-

must be certain and definite.⁵³

Circumstances affecting validity of regulation. Whether or not a zoning restriction on the use of property is valid, as applied to particular property, depends, in the final analysis, largely on the facts and circumstances of the particular case.⁵⁴ In accordance with the general principles discussed supra §§ 24-47, among the facts to be taken into consideration in adjudging the validity of a given zoning restriction on the use of property are the size and physical characteristics of the land involved,⁵⁵ its location⁵⁶ or the character of the neighborhood,⁵⁷ existing uses and zoning of nearby property,⁵⁸ the effect of permitted uses on the surrounding area,⁵⁹ the effect of the restrictions on income from the property,⁶⁰ the amount by which property values are decreased,⁶¹ the extent to which this diminution

of value promotes the health, safety, morals, or general welfare of the public,⁶² the relative gain to the public as compared to the hardship imposed on the individual property owner,⁶³ the suitability of the property for the purpose for which it is zoned,⁶⁴ and the length of time under existing zoning that the property has remained unimproved, considered in the context of land development in the area.⁶⁵ No one factor is controlling, but each must receive due consideration.⁶⁶

A zoning regulation is not invalid merely because a district near complainant's property is one in which a use prohibited to complainant's property is permitted;⁶⁷ and the existence of nonconforming uses within a district does not affect the validity of the classification,⁶⁸ at least where such noncon-

pal corporations to adopt zoning ordinance, the exercise of property rights cannot be left to the caprice, whim, or aesthetic sense of a special group of individuals who may object to the use by property owner of the rights fixed by such ordinance or left unrestricted thereby. Ala.—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36.

Zoning ordinance applied to pre-vent construction of jail on county premises in undeveloped part of city was without relation to public health, morals, safety, or welfare and invalid. Fla.—State v. Du Bose, 128 So. 4, 99 Fla. 812.

53. Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480—Thompson v. Wingard, 34 So.2d 606, 250 Ala. 390.

N.Y.—Romig v. Weld, 87 N.Y.S.2d 580, 194 Misc. 783, affirmed in part and reversed in part on other grounds 95 N.Y.S.2d 571, 276 App. Div. 514.

Zoning ordinance not defining with certainty location, boundaries, and areas into which municipality was divided is in violation of due process clause. Ohio.—Village of Westlake v. Elrick, App., 83 N.E.2d 646.

Ordinance sufficiently specific

Zoning ordinance prohibiting the use of premises for fabricating metals in such manner as would emit noises of a "disagreeable or annoying nature" is not unconstitutional as not being sufficiently specific, since the words "disagreeable" and "annoying" have an established meaning at common law in the definition of a common-law nuisance.

N.Y.—City of Chicago v. Reuter Bros. Iron Works, 75 N.E.2d 355, 398 Ill. 202, 173 A.L.R. 266.

54. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537.

Use considered not in abstract

Question whether power exists to forbid development of property for particular use is to be determined by considering its use not in abstract but in connection with circumstances and locality.

Ohio.—Kessler v. Smith, 142 N.E.2d 231, 104 Ohio App. 213, appeal dismissed Smith v. Village of Glenwillow, 146 N.E.2d 308, 167 Ohio St. 91.

Whether ordinance confiscatory

Whether zoning ordinance providing for penalty for violation was confiscatory and therefore unconstitutional would depend on facts developed on trial.

N.Y.—People ex rel. Jeffress v. Brown, 300 N.Y.S. 214, 252 App. Div. 891.

55. Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381.

56. Mass.—Kaplan v. City of Boston, supra.

57. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—People ex rel. Alco Deree Co. v. City of Chicago, 118 N.E.2d 20, 2 Ill.2d 350.

58. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381.

Zoning restrictions of adjacent community will be considered in determining the uses within the neighborhood.

N.J.—Tulsa Oil Co. v. Morey, 60 A.2d 802, 137 N.J.Law 388.

59. Cal.—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

60. Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381.

61. Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762.

D.C.—Wolpe v. Poretsky, 154 F.2d 330, 81 U.S.App.D.C. 67, certiorari denied 67 S.Ct. 69, 329 U.S. 724, 91 L.Ed. 627.

Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

62. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

63. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

64. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.

65. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

66. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

67. U.S.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

Ill.—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162.

68. Cal.—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453—Acker v. Baldwin, 115 P.2d 455, 18 C.2d 341.

forming uses are few in number,⁶⁹ although it may be a factor to be considered.⁷⁰ So the fact that property located in a certain use district would be more valuable or suitable for a prohibited use does not by itself render the restriction invalid.⁷¹

A zoning regulation may be invalid, however, as

applied to particular property where such property is entirely unsuited to, or not usable for, the only purpose permitted by the regulation,⁷² or where the application of the regulation has the effect of completely depriving the owner of the beneficial use of his property by precluding all uses or the only use to which it is reasonably adapted.⁷³ Indeed, in order

Ill.—People ex rel. Alco Deree Co. v. City of Chicago, 118 N.E.2d 20, 2 Ill.2d 350.

N.Y.—Beckmann v. Talbot, 264 N.Y.S. 193, 239 App.Div. 835.

Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485.

Ohio.—Schick v. Ghent Road Inn, App., 132 N.E.2d 479.

Tex.—Caruthers v. Board of Adjustment of City of Bunker Hill Village, Civ.App., 290 S.W.2d 340.

Validity of provisions relating to nonconforming use generally see infra § 63.

Commercial advantage

Fact that nonconforming uses are in existence within the district giving the property owner a commercial advantage over other persons intending to make such use of property and forced to locate elsewhere does not invalidate the ordinance.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

69. N.J.—Burmore Co. v. Smith, 12 A.2d 353, 124 N.J.Law 541.

70. Mich.—Morris G. Laramie & Son v. Gidley, 40 N.W.2d 205, 326 Mich. 410.

N.J.—Tulsa Oil Co. v. Morey, 60 A.2d 302, 137 N.J.Law 388.

Tex.—Caruthers v. Board of Adjustment of City of Bunker Hill Village, Civ.App., 290 S.W.2d 340.

71. U.S.—Dennis v. Village of Tonka Bay, C.C.A.Minn., 156 F.2d 672.

Cal.—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453.

D.C.—Leventhal v. District of Columbia, 100 F.2d 94, 69 App.D.C. 229.

Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381—Town of Burlington v. Dunn, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

N.J.—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442—Rexon v. Board of Adjustment of Borough of Hadonfield, 89 A.2d 233, 10 N.J. 1.

Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47—Closterman v. Cranford Tp., 91 A.2d 646, 22 N.J.Super. 204—Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J.Super. 405.

N.Y.—Plymouth Builders v. Village of Lindenhurst, 134 N.Y.S.2d 225,

284 App.Div. 895—Ulmer Park Realty Co. v. City of New York, 63 N.Y.S.2d 143, 270 App.Div. 1044, affirmed 77 N.E.2d 797, 297 N.Y. 788—Franklin v. Incorporated Village of Floral Park, 53 N.Y.S.2d 537, 269 App.Div. 695, affirmed 62 N.E.2d 488, 294 N.Y. 862.

Helmerle v. Village of Bronxville, 5 N.Y.S.2d 1002, 168 Misc. 788, affirmed 11 N.Y.S.2d 367, 256 App.Div. 993.

Osborne v. Village of East Hampton, 61 N.Y.S.2d 142, affirmed 66 N.Y.S.2d 646, 271 App.Div. 832.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

Ohio.—Morris v. Roseman, App., 118 N.E.2d 429, reversed on other grounds 123 N.E.2d 419, 162 Ohio St. 447—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351.

Pa.—Appeal of Dunlap, 87 A.2d 299, 370 Pa. 31.

Strawbridge v. Horsham Tp., 7 Pa.Dist. & Co.2d 161, 72 Montg.Co. 117.

Schmalz v. Buckingham Tp. Bd. of Adjustment, Com.Pl., 6 Bucks 285, reversed on other grounds 132 A.2d 233, 389 Pa. 295—Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks 131—Gracey v. Township of Springfield, Com.Pl., 37 Del.Co. 22. Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct—Luse v. City of Dallas, Civ.App., 131 S.W.2d 1079, error refused.

Wis.—State ex rel. Normal Hall v. Gurda, 291 N.W. 350, 234 Wis. 290.

Validity of regulations as affected by loss or benefit to property owners see supra § 37.

Suitability for several uses does not require zoning to permit all those uses as a matter of law.

N.J.—Newark Milk & Cream Co. of Newark v. Parsippany-Troy Hills Tp., 135 A.2d 682, 47 N.J.Super. 306.

Reduction of value of property

(1) The reduction of property in money value as an incidental effect of enactment of zoning regulations is not a compensable injury, rule of *damnum absque injuria* applying.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

(2) Although a zoning ordinance operates to reduce value of property the use of which is restricted, such damage does not constitute the taking of private property within the constitutional inhibition, the owner sharing in the benefits resulting from the exercise of the police power.

Ark.—City of West Helena v. Bockman, 256 S.W.2d 40, 221 Ark. 677—City of Little Rock v. Sun Building & Developing Co., 134 S.W.2d 582, 199 Ark. 333.

(3) "The mere fact that the ordinance is harsh and seriously depreciates the value of the complainant's property is not enough to establish its invalidity."

U.S.—American Wood Products Co. v. City of Minneapolis, D.C.Minn., 21 F.2d 440, 444, affirmed, C.C.A., 35 F.2d 657.

(4) Reduction in values, shared by most, if not all, owners in a locality, because of the common effect on properties of the general scheme of a zoning ordinance, is not enough in itself to constitute a denial of due process of law.

Pa.—Saylor v. Haverford Tp., 149 A. 639, 299 Pa. 402.

72. Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 322.

Fla.—Forde v. City of Miami Beach, 1 So.2d 642, 146 Fla. 676.

Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.

Mich.—Fenner v. City of Muskegon, 50 N.W.2d 210, 331 Mich. 732.

73. Fla.—Ocean Villa Apartments, Inc. v. City of Fort Lauderdale, 70 So.2d 901.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

Mich.—Bassey v. City of Huntington Woods, 74 N.W.2d 897, 344 Mich. 701.

N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57.

United Advertising Corp. v. Board of Adjustment of Maplewood Tp., 56 A.2d 406, 136 N.J. Law 336—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

to show the invalidity of a zoning regulation in a particular case, it may not be necessary to show that the zoned property is totally unsuitable for the purpose classified, but it may be sufficient to show that a substantial decrease in value results from a classification bearing no substantial relation to the public welfare.⁷⁴ Normally the question whether there is discrimination in the operation of a zoning ordinance cannot be determined by the question whether property can be acquired at an equitable price within the zone permitting a certain contemplated use.⁷⁵

Prohibition of legitimate use anywhere within municipal limits. It has been held that it is not a valid exercise of the zoning power to prohibit a legitimate use of property anywhere within the limits of the municipality.⁷⁶ So, a zoning ordinance which excludes churches⁷⁷ and schools⁷⁸ from the entire municipality is invalid. Under some circumstances, however, certain types of activities may be entirely excluded from a municipality,⁷⁹ and, accordingly, it has been held that some otherwise legitimate uses of property may be entirely excluded,

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110—Eaton v. Sweeney, 177 N.E. 412, 257 N.Y. 176.

Edward A. Lashins, Inc. v. Griffin, 132 N.Y.S.2d 896—Rose v. City of New Rochelle, 119 N.Y.S.2d 900—Buckley v. Fasbender, 118 N.Y.S.2d 799, modified on other grounds 121 N.Y.S.2d 3, 281 App.Div. 985—Plymouth Builders, Inc. v. Village of Lindenhurst, 117 N.Y.S.2d 583, affirmed 134 N.Y.S.2d 225, 284 App.Div. 895—Rockdale Const. Corp. v. Incorporated Village of Cedarhurst, Nassau County, 94 N.Y.S.2d 601, affirmed 91 N.Y.S.2d 926, 275 App.Div. 1043, reargument and appeal denied 93 N.Y.S.2d 151, 276 App.Div. 763, motion denied 90 N.E.2d 495, 300 N.Y. 642—Harrison v. Reidpath, 93 N.Y.S.2d 569.

Ohio—State ex rel. Rosenthal v. City of Bedford, App., 134 N.E.2d 727.

Pa.—Baronoff v. Zoning Bd. of Adjustment of Lower Makefield Tp., 122 A.2d 65, 385 Pa. 110.

Appeal of Hessenbruch from Radnor Tp. Zoning Ordinance, Quar.Sess., 40 Del.Co. 43.

Prospective demand

The mere opinion or belief that prospective demand would develop for property for private estate purposes in not distant future, as weighed against concrete fact that it was unfit as it stood for purpose to which it was restricted, could not indefinitely serve as basis for continuation of zoning restriction, and was not sufficient to overcome owner's inherent right to appropriate locus to presently beneficial use he proposed.

Fla.—Forde v. City of Miami Beach, 1 So.2d 642, 146 Fla. 676.

74. Ill.—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40—Mack v. Cook County, 142 N.E.2d 785, 11 Ill.2d 810.

75. Cal.—Safeway Stores v. City Council of City of San Mateo, App., 194 P.2d 720, 86 C.A.2d 277.

76. Ga.—Awtry & Lowndes Co. v.

City of Atlanta, 50 S.E.2d 868, 73 Ga.App. 390.

Public garages and gasoline filling stations see *infra* § 59.

Trailer parks or camps see *infra* § 61.

Ordinance prohibiting construction of drive-in theatre was held invalid against owner of land in business zone in which theatre was otherwise permitted who proposed to construct drive-in theatre where much of the general area was vacant, was swamp-land and unimproved, devoted in large measure to industrial and business uses and available for such uses, and there was ample residential property available; and ordinance could not be validated on ground that roads in rear leading into the back of acreage involved were narrow and unsuitable for vehicular traffic, since determination of such issue is reposed in State Traffic Commission by statute.

Conn.—Lakeside Realty Co. v. Town of Berlin, 129 A.2d 628, 20 Conn. Sup. 183.

Water supply

A municipal zoning ordinance which did not provide district in which water tower could be erected or reservoir could be placed for supplying water for fire protection and domestic consumption could not be permitted to prevent citizens of community from obtaining adequate water supply.

N.Y.—Wallerstein v. Westchester Joint Water Works No. 1, 1 N.Y.S.2d 111, 166 Misc. 34.

Slaughterhouse

Zoning ordinance prohibiting the operation of any slaughterhouse within a municipality is confiscatory and invalid as applied to a slaughterhouse properly constructed in a sparsely settled portion of the municipality and the operation of which would in no way interfere with or jeopardize the health, safety, morals, or general welfare of the municipality or of the nearest residents thereto.

Pa.—Appeal of Kanig, 56 Pa.Dist. & Co. 53, 47 Lack.Jur. 69, 87 Mun.L. R. 229.

77. Mich.—Mooney v. Village of Orchard Lake, 53 N.W.2d 308, 333 Mich. 389.

Public welfare not promoted

A municipality may not by zoning ordinance wholly exclude from within its borders churches and places of public worship, since such ordinance would not substantially promote health, safety, morals, or general welfare of community.

N.Y.—North Shore Unitarian Soc. v. Village of Plandome, 109 N.Y.S.2d 803, 200 Misc. 524.

78. Mich.—Mooney v. Village of Orchard Lake, 53 N.W.2d 308, 333 Mich. 389.

In absence of specific grant of power, municipality cannot by a zoning regulation prevent the location of a school within its borders and thereby prohibit the performance by school district of the duty imposed on it by law.

N.Y.—Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park, 107 N.Y.S.2d 858, 279 App.Div. 618, appeal denied 109 N.Y.S.2d 175, 279 App.Div. 746.

79. N.J.—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

Ordinance making no provision for industrial use of property within municipality is not for that reason invalid.

Pa.—Appeal of Mutual Supply Co., 77 A.2d 612, 366 Pa. 424.

Heavy industry

Where there exists a small residential municipality the physical location and circumstances of which are such that it is best suited for continuing residential development and, separated therefrom but in the same geographical region, there is present a concentration of industry in an area peculiarly adapted to industrial development, the municipality may restrict its territory to residential purposes and such small businesses, trades, and light industries as are needed to serve its residents, and validly exclude heavy industry from its territory.

N.J.—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

except for pre-existing nonconforming uses.⁸⁰ Whether a use may be wholly prohibited depends on its compatability with the circumstances of the particular municipality, judged in the light of the standards for zoning set forth in the controlling statute.⁸¹

Exemption of structures essential to public health, safety, or welfare. A municipality may exempt from the scope of a zoning ordinance buildings or structures essential to the performance of mandatory duties for the safety of all its inhabitants,⁸² or municipal buildings and structures deemed neces-

sary by the governing body of the municipality for the health, safety, and general welfare of the public.⁸³

§ 55. — Residence Districts

A municipality may validly enact reasonable zoning regulations establishing restricted residential and quasi-residential districts, but some regulations of this nature have been held invalid.

In the exercise of the zoning power, it may be proper for a municipality or other political subdivision to enact reasonable zoning regulations establishing restricted residential districts⁸⁴ and quasi-

80. Conn.—Fairlawn Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

Cemeteries and crematories

Zoning ordinance applicable nearly to the entire town involved which consisted of a residential and farming area and was likely to remain such indefinitely and which placed the entire area in a single zone and excluded cemeteries and crematories therefrom was valid.

Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, supra.

81. N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

82. N.Y.—Stiger v. Village of Hewlett Bay Park, 129 N.Y.S.2d 88, 283 App.Div. 827.

83. Tex.—City of McAllen v. Morris, Civ.App., 217 S.W.2d 875, error refused.

84. U.S.—Zahn v. Board of Public Works of City of Los Angeles, Cal., 47 S.Ct. 594, 274 U.S. 325, 71 L.Ed. 1074.

Downham v. City Council of Alexandria, D.C.Va., 58 F.2d 784—Women's Kansas City St. Andrew Soc. v. Kansas City, D.C.Mo., 54 F.2d 1071, reversed on other grounds, C.C.A., 58 F.2d 593—Koch v. City of Toledo, C.C.A.Ohio, 37 F.2d 336—Marblehead Land Co. v. City of Los Angeles, D.C.Cal., 36 F.2d 242, affirmed, C.C.A., 47 F.2d 528, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Ark.—Arnold v. City of Jonesboro, 302 S.W.2d 91, 227 Ark. 832.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332—Acker v. Baldwin, 115 P.2d 455, 18 C.2d 341—Reynolds v. Barrett, 83 P.2d 29, 12 C.2d 244—Rehfeld v. City and County of San Francisco, 21 P.2d 419, 218 C. 83.

Sladovich v. Fresno County, App., 322 P.2d 565—City of Los Angeles v. Gage, 274 P.2d 84, 127 C.A.2d 442—City and County of San Francisco v. Safeway Stores, Inc., 310 P.2d

68, 150 C.A.2d 327—Price v. Schwafel, Cal.App., 206 P.2d 683, 92 C.A.2d 77—Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 342, 338 U.S. 939, 94 L.Ed. 579—Burke v. City of Los Angeles, 156 P.2d 28, 68 C.A.2d 189—Roach v. Hostetter, 119 P.2d 749, 48 C.A.2d 375.

Colo.—Beszedes v. Board of Com'rs of Arapahoe County, 178 P.2d 950, 116 Colo. 123.

Conn.—Poneleit v. Dudas, 106 A.2d 479, 141 Conn. 413—Strain v. Mims, 193 A. 754, 123 Conn. 275.

D.C.—Hagans v. District of Columbia, Mun.App., 97 A.2d 922.

Ga.—Hunthlett v. Reeves, 85 S.E.2d 25, 211 Ga. 210—Schofield v. Bishop, 18 S.E.2d 714, 192 Ga. 732—Howden v. City of Savannah, 159 S.E. 401, 172 Ga. 833.

Ill.—Fox v. City of Springfield, 139 N.E.2d 732, 10 Ill.2d 198—La Salle Nat. Bank v. City of Chicago, 126 N.E.2d 643, 6 Ill.2d 22—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162—Housing Authority of Gallatin County v. Church of God, 81 N.E.2d 500, 401 Ill. 100.

Cassidy v. Triebel, 85 N.E.2d 461, 337 Ill.App. 117.

Iowa.—Scott v. City of Waterloo, 274 N.W. 897, 223 Iowa 1169.

Ky.—City of Richlawn v. McMakin, 230 S.W.2d 902, 313 Ky. 265, certiorari dismissed McMakin v. City of Richlawn, 71 S.Ct. 531, 340 U.S. 945, 95 L.Ed. 682.

La.—City of New Orleans v. La Nasa, 88 So.2d 224, 230 La. 289—Ransome v. Police Jury of Parish of Jefferson, 45 So.2d 601, 216 La. 994—State ex rel. Dema Realty Co. v. McDonald, 121 So. 613, 168 La. 172, certiorari denied McDonald v. State of Louisiana ex rel. Dema Realty Co., 50 S.Ct. 16, 280 U.S. 556, 74 L. Ed. 612.

Me.—Bolduc v. Pinkham, 88 A.2d 817, 148 Me. 17.

Md.—Board of Com'rs of Anne Arundel County v. Snyder, 46 A.2d 689, 186 Md. 342.

Mich.—West Bloomfield Tp. v. Chapman, 88 N.W.2d 377, 351 Mich. 606—City of Howell v. Kaal, 67 N.W. 2d 704, 341 Mich. 585—Hammond v. Kephart, 50 N.W.2d 155, 331 Mich. 551—Northwood Properties Co. v. Perkins, 39 N.W.2d 25, 325 Mich. 419—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed Full Salvation Union v. Portage Tp., Kalamazoo County, Mich, 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

Mo.—City of Washington v. Mueller, App., 218 S.W.2d 801—State ex rel. Kaegel v. Holskamp, App., 151 S. W.2d 685.

N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64.

Sexton v. Essex County Ritualarium, 91 A.2d 162, 21 N.J.Super. 329.

Dorsey Motors v. Davis, 180 A. 396, 13 N.J.Misc. 620.

N.Y.—Hayes v. City of Yonkers, 152 N.Y.S.2d 213, 1 A.D.2d 1031—Huntley Estates v. Town of Eastchester, 131 N.Y.S.2d 578, 283 App.Div. 1090—Rodgers v. Village of Tarrytown, 96 N.Y.S.2d 58, 276 App.Div. 1019, appeal denied 97 N.Y.S.2d 376, 277 App.Div. 771, affirmed 96 N.E.2d 731, 302 N.Y. 115—Curtiss-Wright Corp. v. Incorporated Village of Garden City, 61 N.Y.S.2d 678, 270 App.Div. 936, affirmed 72 N.E.2d 26, 296 N.Y. 839.

Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47—Town of Ramapo v. Bockar, 273 N.Y.S. 452, 151 Misc. 613.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

Ohio.—Santangelo v. City of Cincinnati, 25 Ohio N.P., N.S., 49.

Pa.—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374—Whitpain Tp. v. Boudine, 94 A.2d 787, 372 Pa. 509—

residential districts.⁸⁵

However, some regulations restricting the use of property within certain districts to residential pur-

poses have been held not to promote the public health, public safety, and public welfare,⁸⁶ and to be invalid,⁸⁷ as taking property without due process of law,⁸⁸ or as beyond the scope of the power con-

Appeal of Sawdey, 85 A.2d 28, 369 Pa. 19—Appeal of Mutual Supply Co., 77 A.2d 612, 366 Pa. 424—In re Jennings' Estate, 198 A. 621, 330 Pa. 154—Appeal of Ward, 137 A. 630, 289 Pa. 458.

Petition of Townsend, 21 Pa. Dist. & Co. 340.

Appeal of Borough of Speers Ordinance, Quar. Sess., 28 Wash. Co. 221.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Tenn.—Spencer-Sturla Co. v. City of Memphis, 290 S.W. 608, 155 Tenn. 70.

Tex.—Harmon v. City of Dallas, Civ. App., 229 S.W.2d 825, refused no reversible error—Luse v. City of Dallas, Civ. App., 131 S.W.2d 1079, error refused.

Va.—Fairfax County v. Parker, 44 S.E.2d 9, 186 Va. 675.

Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

Regulations making classification effective

Since a legislative body has the power to establish residential districts, it has the power to make such classification really effective by adopting such reasonable regulations as will be conducive to the welfare, health, and safety of those desiring to live in such district and enjoy the benefits thereof.

Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

Relation to public welfare

(1) Restriction, by zoning ordinance, of an area for residential use, has substantial relation to the public welfare, for by such regulation the property owners are protected from uses which reduce values and create hazards, such as undue vehicle traffic, noises, and the like.

Ill.—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162.

(2) Every intendment is in favor of validity of exercise of police power, and even though court might differ from determination of legislative body, if there is reasonable basis for belief that establishment of strictly residential district has substantial relation to public health, safety, morals, or general welfare, zoning measure will be within police power.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

In absence of proof that property could not be used for residential purposes, court could not declare zoning ordinance unconstitutional and void in so far as it restricts property to a residential use.

N.Y.—Scuteri v. Incorporated Village of Bayville, 120 N.Y.S.2d 794.

Primary purpose of a residence district created by a zoning ordinance is the fostering of safe, healthful, and comfortable family life, rather than the development of commercial instincts and the pursuit of pecuniary profits.

N.Y.—Colasuonno v. Dassler, 51 N.Y. S.2d 870, 183 Misc. 904.

People v. Daly, 28 N.Y.S.2d 603—People v. Gold, 6 N.Y.S.2d 264.

Ordinance creating multiple dwelling district and forbidding erection therein of addition to factories or new factory buildings did not amount to taking of property.

U.S.—American Wood Products Co. v. City of Minneapolis, C.C.A. Minn., 35 F.2d 657.

Individual lots

Zoning plan which restricts the use of certain areas to residential purposes need not be sustained by showing that public welfare demands the exclusion of business uses for each individual lot in the area zoned.

Cal.—Acker v. Baldwin, 115 P.2d 455, 18 C.2d 341—Otis v. City of Los Angeles, 126 P.2d 954, 52 C.A.2d 605.

85. Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

86. Conn.—Lakeside Realty Co. v. Town of Berlin, 129 A.2d 628, 20 Conn. Sup. 188.

Fla.—Lippow v. City of Miami Beach, 68 So.2d 827.

N.H.—Kimball v. Blanchard, 7 A.2d 394, 90 N.H. 298.

N.J.—Karke Realty Associates v. Jersey City, 139 A. 55, 104 N.J. Law 173.

Ohio.—Loesch Allotment Co. v. Village of Newburgh Heights, Com. Pl., 100 N.E.2d 543.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Wyo.—State ex rel. George v. Hull, 199 P.2d 832, 65 Wyo. 251. 43 C.J. p 342 note 38.

Justification not shown

Increase in fire hazard and increase in traffic and resulting danger to school children were held not to justify ordinance restricting locality to private residences.

N.J.—Karke Realty Associates v. Jersey City, 139 A. 55, 104 N.J. Law 173.

87. Ark.—City of Searcy v. Robertson, 273 S.W.2d 26, 224 Ark. 344. Conn.—Lakeside Realty Co. v. Town of Berlin, 129 A.2d 628, 20 Conn. Sup. 188.

Fla.—Lippow v. City of Miami Beach, 68 So.2d 827—City of Miami Beach v. First Trust Co., 45 So.2d 681.

Ga.—Morrow v. City of Atlanta, 133 S.E. 345, 162 Ga. 223—Smith v. City of Atlanta, 132 S.E. 66, 161 Ga. 769, certiorari denied City of Atlanta v. Smith, 46 S.Ct. 486, 271 U.S. 672, 70 L.Ed. 1144.

N.H.—Kimball v. Blanchard, 7 A.2d 394, 90 N.H. 298.

N.J.—Karke Realty Associates v. Jersey City, 139 A. 55, 104 N.J. Law 173—Ignaciunas v. Risley, 121 A. 783, 98 N.J. Law 712, affirmed Ignaciunas v. Town of Nutley, 125 A. 121, 99 N.J. Law 389.

Ohio.—Loesch Allotment Co. v. Village of Newburgh Heights, Com. Pl., 100 N.E.2d 543.

Tex.—Simms v. City of Sherman, Civ. App., 181 S.W.2d 100, affirmed 183 S.W.2d 415, 143 Tex. 115.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Wyo.—State ex rel. George v. Hull, 199 P.2d 832, 65 Wyo. 251.

43 C.J. p 342 note 39.

Rezoning invalid as not based on uniform plan

Where under original ordinance, block was set aside as a business center permitting the erection of stores and offices, and under amending ordinance block was rezoned to a second residential zone, and property on which plaintiff sought a permit in the block, to erect a commercial building, was acquired previous to the passage of the amending ordinance, such ordinance was invalid as not based on a uniform or comprehensive scheme, although property surrounding the block was used for residential purposes.

N.J.—Kerrigan Development Co. v. City of Newark, 65 A.2d 142, 2 N. J. Super. 590.

88. U.S.—Nectow v. City of Cambridge, Mass., 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Ill.—Petroopoulos v. City of Chicago, 125 N.E.2d 522, 5 Ill.2d 276.

Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.

Ohio.—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287—Mehl v. Stegner, 175 N.E. 712, 38 Ohio App. 416.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Ordinance confiscatory as applied Where most of the value of plain-

ferred on the municipality.⁸⁹ The power to restrict certain districts to residential uses does not permit the restriction of such districts to a particular class of residents.⁹⁰ An ordinance creating a single residential zone or district in a city without taking account of other areas equally residential in character and without any comprehensive plan with a view to the general welfare of the inhabitants of the city as a whole may be invalid.⁹¹

The length of time during which a business has existed in a particular locality does not make its prohibition for the future unconstitutional;⁹² nor is the size of the territory affected by the ordinance a criterion by which to judge its validity;⁹³ nor does the fact that the occupation or business may never have been obnoxious or injurious in the past affect the validity of the regulation.⁹⁴ The fact that a person purchased property at the time free of restrictions with the intent to use it for business purposes does not invalidate a zoning ordinance subsequently adopted restricting the use of the property for residential purposes.⁹⁵

Zoning entire city as residential or preserving residential character of city. It has been held that

the residents of a city which is primarily a residential city by charter have a legal right, within constitutional limits, to keep the city a residential city by means of zoning regulations,⁹⁶ and that an ordinance placing an entire municipality in a residential district is not invalid as a matter of law.⁹⁷ So, an ordinance designed to preserve the residential character of a community and to limit business activities to the supply of demands within the community has been held upheld.⁹⁸ However, an ordinance zoning an entire municipality as residential is invalid when made without regard to differences existing in the area of the municipality and for an improper purpose.⁹⁹

Future development. A municipality in enacting a zoning regulation establishing a residence district may properly take into account the probable future development of the entire region.¹ So, the municipality in the interest of future growth may classify as a residence district land which is vacant² or sparsely settled.³ A more or less remote possibility that some time in the future, whether immediate or distant, there might be an opportunity to make residential use of property, is not sufficient, however,

tiff's property in lots was for business purposes and lots were restricted to that use both by restrictive covenants and the zoning ordinance then in effect, and subsequent zoning ordinances limiting use to one-family dwellings destroyed most of the value of plaintiff's property in the lots, the zoning ordinances as applied were confiscatory.
Mich.—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242.

89. Ky.—Covington v. Summe, etc., Co., 276 S.W. 534, 210 Ky. 520.

Statute barring limitations on educational uses

Use of premises, located within "residence A district" under city zoning ordinance, by nonprofit corporation for teaching of principles of science of accounting, which included business law, mathematics, and English, taxes, and typing as incidental to accounting, was proper by virtue of statute making invalid any ordinance prohibiting or limiting any educational purpose, whether public, religious, sectarian, or denominational.

Mass.—City of Worcester v. New England Institute & New England School of Accounting, Inc., 140 N.E.2d 470, 335 Mass. 486.

90. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 593.

Old ladies' home
That the use of property in a resi-

dential district by an old ladies' home may depress highly sensitive persons furnishes no basis for restrictions against such use.

U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., supra.

91. Ala.—Johnson v. City of Huntsville, 29 So.2d 342, 249 Ala. 36—Chapman v. City of Troy, 4 So.2d 1, 241 Ala. 637.

92. N.C.—Turner v. New Bern, 122 S.E. 469, 187 N.C. 541.
43 C.J. p 343 note 49.

93. Cal.—Brown v. Los Angeles, 192 P. 716, 183 C. 783.
N.C.—Turner v. New Bern, 122 S.E. 469, 187 N.C. 541.

94. Cal.—Boyd v. Sierra Madre, 183 P. 230, 41 C.A. 520.

Innocent buildings or uses

When the general plan is to exclude objectionable buildings and uses, the ordinance is not invalid because innocent buildings or uses may fall within proscription.

N.Y.—Bond v. Cooke, 262 N.Y.S. 199, 237 App.Div. 229.

95. Cal.—O'Rourke v. Teeters, 146 P. 2d 983, 63 C.A.2d 349.

Me.—Bolduc v. Pinkham, 88 A.2d 817, 148 Me. 17.

96. Cal.—Reynolds v. Barrett, 83 P. 2d 29, 12 C.2d 244.

97. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412.

Sparsely settled village outside metropolitan center

An ordinance placing entire area of sparsely settled residential and agricultural village on periphery of large metropolitan center in residential district was not, as matter of law, invalid as without substantial relation to public health, safety, morals or general welfare, such village not being a self-contained community with its own business and industrial, as well as residential, areas.

U.S.—Valley View Village v. Proffett, supra.

98. N.J.—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

99. Wis.—Town of Hobart v. Collier, 87 N.W.2d 868, 3 Wis.2d 182.

Where town knew that owners planned to use their property as salvage yard and zoned entire town as residential for sole purpose of preventing such use, and area where owners' property was located was not suited for residences, town abused its discretion in enacting ordinance.
Wis.—Town of Hobart v. Collier, supra.

1. Mass.—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

2. U.S.—Marblehead Land Co. v. City of Los Angeles, C.C.A.Cal., 47 F.2d 528, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540.

3. Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

to sustain the validity of a restriction to residential use where there is no present demand for such use.⁴

Under power of eminent domain. Residential zoning regulations, providing for compensation to persons damaged thereby, are valid.⁵

As limited to nuisances. The exclusion of places of business from residential districts is not a declaration that such places are nuisances,⁶ or that they are to be suppressed as such.⁷ Businesses, occupations, or trades which are not nuisances per se, but which are liable to become such,⁸ or which may become nuisances by reason of the inappropriateness of the places in which they are conducted,⁹ may be excluded from particular localities. Whether a business or occupation is a nuisance so as to justify a zoning ordinance prohibiting the use of property for such business in certain districts is a question of fact.¹⁰

§ 56. — — — Classification of Uses Permitted

A zoning ordinance establishing residential districts may, in proper circumstances, provide for and permit uses incidental or accessory to residential use, and may also permit nonresidential, or business or commercial uses in such districts.

A zoning ordinance establishing residential districts may, in proper circumstances, provide for and permit within such districts uses incidental or accessory to residential use,¹¹ and may also permit therein nonresidential,¹² or business or commercial¹³ uses. Generally, the legislative classification of nonresidential uses permitted in a residential district will be upheld,¹⁴ provided it is not arbitrary and discriminatory.¹⁵

A municipality or other political subdivision may exclude from residential districts business uses of property¹⁶ and may exclude from such districts

4. Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

5. Mo.—Kansas City of Liebi, 252 S. W. 404, 298 Mo. 569.

6. N.Y.—Keenly v. McCarty, 244 N. Y.S. 63, 137 Misc. 524.
43 C.J. p 344 note 60.

7. Ill.—Aurora v. Burns, 149 N.E. 784, 319 Ill. 84.

8. N.Y.—Corpus Juris cited in Helmerle v. Village of Bronxville, 5 N.Y.S.2d 1002, 1010, 168 Misc. 788, affirmed 11 N.Y.S.2d 367, 256 App. Div. 993.
43 C.J. p 344 note 63.

9. N.Y.—Corpus Juris cited in Helmerle v. Village of Bronxville, 5 N.Y.S.2d 1002, 1010, 168 Misc. 788, affirmed 11 N.Y.S.2d 367, 256 App. Div. 993.
43 C.J. p 344 note 64.

10. Mo.—St. Louis v. Evraiff, 256 S.W. 489, 301 Mo. 231.

11. Tenn.—Meador v. City of Nashville, 220 S.W.2d 876, 188 Tenn. 441.

Use of rear residence by domestic servants

Zoning ordinance prohibiting a building in rear of principal building on the same lot to be used for residential purposes is not rendered invalid because of right given thereunder for the rear residence to be occupied by domestic servants of those living in the principal residence, since servants constitute a part of the family, and such use is an accessory use validly permitted in restrictive zoning ordinances.

Tenn.—Meador v. City of Nashville, *supra*.

Restriction to incidental uses

Ordinance may properly restrain secondary detached building in residential district to uses purely inci-

dental to residence in main building on premises, and such provisions are to be upheld where consistent with intent and effect of ordinance as a whole.

N.Y.—Griffin v. Reville, 149 N.Y.S.2d 312, 1 Misc.2d 1045.

12. Tex.—Dunaway v. City of Austin, Civ.App., 290 S.W.2d 703.

Philanthropic institutions

Provision in zoning ordinance empowering board to permit the location of institutions of a philanthropic nature in certain residential districts, in discretion of the board, was not in excess of authority conferred on board by statute.

Ky.—Thomson v. Tafel, 218 S.W.2d 977, 309 Ky. 753.

Use of apartments by physicians

New York City planning commission had statutory sanction to promulgate zoning resolution permitting independent use of apartments in multiple dwellings in residence districts by physicians whose offices are on first or second floors and access to which can be had from other than public hall.

N.Y.—People v. 960 Park Ave. Corp., 145 N.Y.S.2d 190, 286 App.Div. 493, affirmed 135 N.E.2d 585, 1 N.Y.2d 771, 153 N.Y.S.2d 46.

13. Md.—Oursler v. Board of Zoning Appeals of Baltimore County, 104 A.2d 568, 204 Md. 397.

Permitting business in small area

(1) Generally, there is no inherent objection to creation of small districts within a residential zone for operation of such establishments as grocery stores, drug stores, barber shops, and even gasoline stations, for accommodation and convenience of residents.

Md.—Temmink v. Board of Zoning

Appeals of Baltimore County, 109 A.2d 55, 205 Md. 439.

(2) Permitting business in a small area within resident zone may fall within general plan adopted by zoning authority for best interest of whole community, and to do so is not unlawful unless action is arbitrary or unreasonable.

Conn.—Kuehne v. Town Council of Town of East Hartford, 72 A.2d 474, 136 Conn. 452—Bartram v. Zoning Commission of City of Bridgeport, 68 A.2d 308, 136 Conn. 89.

14. Ill.—Will County v. Stanfill, 129 N.E.2d 46, 7 Ill.App. 52.

Erection by city of isolation hospital in residential district was not in violation of Fourteenth Amendment.

Cal.—Jardine v. City of Pasadena, 248 P. 225, 199 C. 64, 48 A.L.R. 509.

15. Ariz.—Ellsworth v. Gercke, 156 P.2d 242, 62 Ariz. 198.

An ordinance prohibiting erection of garage within ten feet of private dwelling has been held valid.

N.J.—Max v. Saul, 127 A. 785, 3 N.J.Misc. 265.

16. U.S.—Village of Euclid, Ohio v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.

Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.

Dennis v. Village of Tonka Bay, D.C.Minn., 64 F.Supp. 214, affirmed, C.C.A., 156 F.2d 672.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646—State ex rel. Turner v. Baumhauer, 174 So. 514, 234 Ala. 286.

Ark.—Arnold v. City of Jonesboro, 302 S.W.2d 91, 227 Ark. 832.

Cal.—Sunny Slope Water Co. v. City of Pasadena, 33 P.2d 672, 1 C.2d 87,

business or trade of whatever kind or character,¹⁷ establishments;¹⁸ or a zoning regulation may classify objectionable business, commercial, or industrial fy businesses or trades and exclude some and per-

City and County of San Francisco v. Safeway Stores, Inc., 310 P.2d 68, 150 C.A.2d 327.

Colo.—City of Colorado Springs v. Miller, 36 P.2d 161, 95 Colo. 337.

Conn.—Poneleit v. Dudas, 106 A.2d 479, 141 Conn. 413.

Kan.—City of Norton v. Hutson, 46 P.2d 630, 142 Kan. 305—Ware v. City of Wichita, 214 P. 99, 113 Kan. 153.

La.—City of New Orleans v. La Nasa, 88 So.2d 224, 230 La. 289—Ransome v. Police Jury of Parish of Jefferson, 45 So.2d 601, 216 La. 994—State ex rel. Dema Realty Co. v. Jacoby, 123 So. 314, 168 La. 752.

Mass.—Wilbur v. City of Newton, 18 N.E.2d 865, 302 Mass. 38.

Mich.—Northwood Properties Co. v. Perkins, 39 N.W.2d 25, 325 Mich. 419.

Neb.—Dundee Realty Co. v. City of Omaha, 13 N.W.2d 634, 144 Neb. 448.

N.J.—Lemp v. Township of Millburn, 28 A.2d 767, 129 N.J.Law 221.

N.Y.—City of Yonkers v. Rentways, Inc., 109 N.E.2d 597, 304 N.Y. 499

—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431.

Hayes v. City of Yonkers, 152 N.Y.S.2d 213, 1 A.D.2d 1031.

Village of Old Westbury v. Foster, 83 N.Y.S.2d 143, 193 Misc. 47.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

Ohio.—Cahn v. Guion, 160 N.E. 868, 27 Ohio App. 141.

Pa.—Appeal of O'Hara, Com.Pl., 73 Montg.Co. 89, reversed on other grounds 131 A.2d 587, 389 Pa. 35.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Tex.—Harmon v. City of Dallas, Civ. App., 229 S.W.2d 325, refused no reversible error.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

Advertising signs see infra § 60.

Oil, gas, or water wells see infra § 62.

Public garages and gasoline filling stations see infra § 59.

Trailer parks or camps see infra § 61.

Requiring consent of owners or permit

Zoning ordinance defining a residential district and providing that thereafter no building shall be erected, altered, or used for any business or trade purposes without owner thereof either obtaining written consent of owners of property within the district or a permit therefor from

city commission has been held valid. Wash.—Chief Petroleum Corp. v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

Circumstances sustaining ordinance

Where subdivisions in city were originally sold under a general plan restricting them to residences, and less than one-fourth the area set aside for business in city was being used for business, zoning ordinance restricting property in subdivisions to residential uses was valid and not a denial of due process.

Tex.—Gullo v. City of West University Place, Civ.App., 214 S.W.2d 851, error dismissed.

Storage of owner's trucks barred

Zoning ordinance restricting uses of property in residence district to one-family dwellings and uses accessory thereto, construed to prohibit owner from storing in garage on such premises trucks used in his business, was not unconstitutional as denying due process.

Mich.—People v. Scrafano, 12 N.W.2d 325, 307 Mich. 655.

Public accountant

Fact that plaintiff's business as a public accountant was lawful, inoffensive, and dignified was not ground for invalidating a general zoning ordinance in so far as it prohibited him from carrying on the business at his dwelling house.

Cal.—Kort v. City of Los Angeles, 127 P.2d 66, 52 C.A.2d 804.

17. Cal.—Smith v. Collison, 6 P.2d 277, 119 C.A. 180.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Separate designation

Zoning ordinance excluding all commercial enterprises should be upheld, although not designating enterprises separately unless blanket exclusion is unrelated to community's general welfare.

Cal.—Smith v. Collison, 6 P.2d 277, 119 C.A. 180.

18. U.S.—American Wood Products Co. v. City of Minneapolis, C.C.A. Minn., 35 F.2d 657.

Cal.—Sunny Slope Water Co. v. City of Pasadena, 33 P.2d 672, 1 C.2d 87.

Ga.—Schofield v. Bishop, 16 S.E.2d 714, 192 Ga. 732.

Ill.—Fox v. City of Springfield, 139 N.E.2d 732, 10 Ill.2d 198—La. Salle Nat. Bank v. City of Chicago, 126 N.E.2d 643, 6 Ill.2d 22.

La.—State ex rel. Dema Realty Co. v. Jacoby, 123 So. 314, 168 La. 752.

Mass.—Wilbur v. City of Newton, 18 N.E.2d 865, 302 Mass. 38.

Mich.—West Bloomfield Tp. v. Chapman, 88 N.W.2d 377, 351 Mich. 606.

Minn.—State v. Modern Box Makers, 13 N.W.2d 731, 217 Minn. 41.

Neb.—Dundee Realty Co. v. City of Omaha, 13 N.W.2d 634, 144 Neb. 448.

N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

Linwood Co. v. Board of Adjustment of Town of Bloomfield, 142 A. 436, 6 N.J.Misc. 606.

N.Y.—People v. Giorgi, 16 N.Y.S.2d 923.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

Ohio.—Ottawa Hills Co. v. Village of Ottawa Hills, 180 N.E. 903, 41 Ohio App. 276—State ex rel. Clifton-Highland Co. v. City of Lakewood, 179 N.E. 198, 41 Ohio App. 9, affirmed 178 N.E. 837, 124 Ohio St. 399, certiorari denied Clifton-Highland Co. v. City of Lakewood, Ohio, 52 S.Ct. 406, 285 U.S. 549, 76 L.Ed. 940.

Pa.—Appeal of Mutual Supply Co., 77 A.2d 612, 366 Pa. 1—Appeal of Ward, 137 A. 630, 289 Pa. 458.

Appeal of Alloy Metal Wire Co., Com.Pl., 29 Del.Co. 438.

Tex.—Meserole v. Board of Adjustment, City of Dallas, Civ.App., 172 S.W.2d 528—City of Dallas v. Meserole Bros., Civ.App., 164 S.W.2d 564, error refused.

Va.—Fairfax County v. Parker, 44 S.E.2d 9, 186 Va. 675.

43 C.J. p 341 note 31.

Exclusion of businesses from multiple dwelling district

U.S.—American Wood Products Co. v. City of Minneapolis, D.C.Minn., 21 F.2d 440, affirmed, C.C.A., 35 F.2d 657.

Particular businesses which may properly be excluded

(1) Barber shops.

Mo.—Ryan v. City of Warrensburg, 117 S.W.2d 303, 342 Mo. 761.

(2) Cotton gins.

Tex.—Scruggs v. Wheeler, Civ.App., 4 S.W.2d 616, error refused.

(3) Funeral parlor, undertaking establishment, or mortuary.

Ill.—City of Springfield v. Vancil, 76 N.E.2d 471, 398 Ill. 575.

Md.—Ullrich v. State, 46 A.2d 637, 186 Md. 353, 165 A.L.R. 1107—Jack Lewis, Inc., v. Mayor and City Council of Baltimore, 164 A. 220, 164 Md. 146, appeal dismissed 54 S.Ct. 56, 290 U.S. 585, 78 L.Ed. 517.

N.J.—Town of Belleville v. Klernan, 121 A.2d 411, 39 N.J.Super. 486.

N.Y.—Bond v. Cooke, 262 N.Y.S. 199, 237 App.Div. 229.

Okl.—In re Dawson, 277 P. 226, 136 Okl. 113.

mit others within the district,¹⁹ although some regulations prohibiting the establishment or maintenance of retail business stores within residential districts have been held invalid,²⁰ as not being a proper exercise of the municipal police power.²¹

So, a municipality may create by regulation a limited residential district wherein quasi-commercial and multiple occupancy structures may be erected,²² and property may be zoned for residential income use as distinguished from private residential, business, and manufacturing uses.²³ Accordingly, a

city may permit in one class of residential district as distinguished from another customary home occupations engaged in by the occupants of the dwellings, including the office of a professional person when situated in the same dwelling used by such professional person as his private dwelling.²⁴

The permission to use property in a so-called residential district for some nonresidential uses but not others may be invalid where the classification is purely capricious and without relation to the public welfare.²⁵ It has been held that an ordinance which

(4) Hotels and taverns.

Pa.—Appeal of Sawdey, 85 A.2d 28, 369 Pa. 19.

(5) Junk yard.

Va.—Fairfax County v. Parker, 44 S.E.2d 9, 186 Va. 675.

(6) Practice of dentistry.

Tex.—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused.

(7) Restaurants.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

County sewage disposal plant

City zoning ordinance, although construed to prohibit the location, construction, and operation of sewage disposal plant by county within residential district of city did not violate constitutional amendment dealing with county sewer.

Ala.—Jefferson County v. City of Birmingham, 55 So.2d 196, 256 Ala. 436.

19. Cal.—Magruder v. Redwood City, 265 P. 806, 203 C. 665.

Fla.—Parking Facilities, Inc. v. City of Miami Beach, 88 So.2d 141.

Excluding professional offices and permitting garages

Fact that zoning ordinance which excluded professional offices permitted multiple level garages and other uses in multiple family use district did not render the ordinance unconstitutional.

Fla.—City of Miami Beach v. Silver, 67 So.2d 646.

20. N.J.—Karke Realty Associates v. Jersey City, 139 A. 55, 104 N.J.Law 173.

43 C.J. p 342 note 42.

21. Colo.—Willison v. Cooke, 130 P. 828, 54 Colo. 320, 44 L.R.A., N.S., 1030.

43 C.J. p 342 note 43.

22. Ill.—Evanston Best & Co. v. Goodman, 16 N.E.2d 131, 369 Ill. 207.

Garage without stores in multiple family district

City ordinance permitting construction of a multiple level parking

garage in multiple family district, in which stores are prohibited, but excluding use of any part of garage building for stores, is a valid and constitutional exercise of police power of city, in absence of showing that such ordinance deprives landowner of the beneficial use of its property.

Fla.—Parking Facilities, Inc. v. City of Miami Beach, 88 So.2d 141.

23. Cal.—Kort v. City of Los Angeles, 127 P.2d 66, 52 C.A.2d 804.

Discrimination

Under a general zoning ordinance which permitted the businesses of operating hotels and private clubs and rooming and boarding houses with signs advertising such places, but which prohibited plaintiff from maintaining a sign advertising plaintiff's business as a public accountant in front of plaintiff's dwelling house and from carrying on such business at that place, was not unreasonable and did not invalidate ordinance, where district in which house was located was zoned for residential income uses.

Cal.—Kort v. City of Los Angeles, supra.

24. Tex.—City of Harlingen v. Feener, Civ.App., 153 S.W.2d 671, error refused.

Legislative policy

Whether provision should be made for location of doctor's offices in residential zones is a question of legislative policy.

Conn.—Paul v. Board of Zoning Appeals of City of New Haven, 110 A.2d 619, 142 Conn. 40.

25. Ariz.—Ellsworth v. Gercke, 156 P.2d 242, 62 Ariz. 198.

Limitation to parking

Where zoning ordinance limited business use of privately owned open area to parking of automobiles and incidental services, and area was completely surrounded by business buildings and had no possibilities for residential use, and area was most readily adaptable to business use, ordinance was unconstitutional.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517, 307 N.Y. 493.

Excluding hotels but not rooming houses

Where borough contemplated exclusion of hotels, motels, and similar businesses from residential zones within borough without curbing right of dwelling house owners or occupants to use their premises for boarding or rooming house purposes, such classification would fall if it was without reasonable basis; but zoning ordinance, which permitted boarding and rooming houses in which not more than six persons not related to owner or occupant were lodged and boarded for compensation, but which prohibited hotels, motor courts, motor lodges, motor hotels, tourist camps, tourist courts, and structures of similar character intended for similar use, was not invalid.

N.J.—Pierro v. Baxendale, 118 A.2d 401, 20 N.J. 17.

Discrimination not shown

(1) The practice of profession of a physician in a block, in absence of a further showing, does not disturb residential character of block, so that presence of physician's office in block could not be relied on by property owner who had been denied permission to put his property to a business use, as an indication of discrimination.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

(2) Provision in city zoning ordinance authorizing accessory uses and buildings and commercial activities in residential area, if carried on by members of owner's immediate family, and if not more than two employed persons are permitted, is not an unlawful discrimination.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

(3) Zoning ordinance confining use of premises in a restricted residential area, for a fraternity or sorority, to an area not more than six hundred feet from the lands occupied by the institution to which the fraternity or sorority is an incident, did not constitute a discrimination against rightful use of premises by a fraternity or resident located in restricted area

declares that no business can be conducted in the residential district of the municipality without any classification of businesses because of their nature or the necessary incidents of such business is invalid.²⁶

Uses by municipality. Despite the fact that they are located in a residence use district, a municipality or other political subdivision may store and maintain the vehicles necessarily used in performing governmental functions,²⁷ and may provide quarters for workers engaged in the performance of such functions.²⁸

Humanitarian noncommercial uses generally. Generally, the exclusion, either absolutely or subject to arbitrary conditions, of humanitarian noncommercial uses,²⁹ such as philanthropic homes for old people³⁰ or orphans,³¹ or schools,³² from residential districts is invalid as violating due process in the absence of an adequate showing that such exclusion is in furtherance of public health, safety, morals, or welfare. It may be invalid to permit public schools in a residential area but exclude private or parochial schools,³³ or to permit a church

school but prohibit a nonsectarian private boarding school,³⁴ or to admit schools but to exclude dormitories therefor.³⁵ On the other hand, a zoning ordinance which has the effect of permitting public and parochial schools to be maintained in a residential area, but which excludes schools of higher learning and specialty schools, has been held to be based on a reasonable classification and not in violation of the constitutional requirements of due process.³⁶ It has been held that a valid discrimination may be made between dormitories of a school for mentally deficient children which are excluded from a certain district and dormitories of other schools which are permitted.³⁷

Hospitals. A municipality may within reasonable limits regulate the location of hospitals within residential districts,³⁸ or exclude them from residential districts.³⁹ It has been held, however, that the exclusion from a residential district of a private hospital maintained in a private residence, which to all outward appearances is a residence, and in no sense a nuisance or offensive or annoying to anyone, can-

and ordinance was not an abuse of city's discretion.

Utah.—Phi Kappa Iota Fraternity v. Salt Lake City, 212 P.2d 177, 116 Utah 536.

Undertaking establishment

A zoning ordinance under which property in class B residential district therein defined might be used for a medical college containing a morgue, or for a hospital, farm, private club, hotel, or rooming house, was an invalid exercise of the police power as applied to lots in class B area on which owners were thereby prohibited from operating an undertaking establishment, because purely capricious and without relation to public welfare.

Ill.—Johnson v. Village of Villa Park, 18 N.E.2d 887, 370 Ill. 272.

26. Miss.—Fitzhugh v. Jackson, 97 So. 190, 132 Miss. 585, 33 A.L.R. 279.

43 C.J. p 343 note 45.

27. N.Y.—Nehrbas v. Incorporated Village of Lloyd Harbor, 152 N.Y. S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145.

28. N.Y.—Nehrbas v. Incorporated Village of Lloyd Harbor, supra.

29. Ohio.—State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N.E.2d 515, 139 Ohio St. 229, 133 A.L.R. 1274.

30. U.S.—Seattle Title Trust Co. v. Roberge, Wash., 49 S.Ct. 50, 278

U.S. 116, 73 L.Ed. 210, 86 A.L.R. 654.

Women's Kansas City St. Andrew Society v. Kansas City, C.C.A.Mo., 58 F.2d 593.

31. U.S.—Village of University Heights v. Cleveland Jewish Orphans' Home, C.C.A.Ohio, 20 F.2d 743, 54 A.L.R. 1008.

32. Or.—Roman Catholic Archbishop v. Baker, 15 P.2d 391, 140 Or. 600.

33. Cal.—Roman Catholic Welfare Corp. of San Francisco v. City of Piedmont, 289 P.2d 438, 45 C.2d 325.

N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y. S.2d 849.

Ordinance, providing standards discriminating between public and private schools as to educational use of land for zoning board's guidance in deciding what uses should be denied to private schools, would be invalid, as educational use is harmonious with public interest.

N.Y.—Property Owners Ass'n of Garden City Estates v. Board of Zoning Appeals of Incorporated Village of Garden City, 123 N.Y.S. 2d 716, 2 Misc.2d 309.

Violation of due process

An ordinance which permits the maintenance of a public school but excludes the operation of a private school within the same area violates due process.

Fla.—City of Miami Beach v. State

ex rel. Lear, 175 So. 537, 128 Fla. 750.

Ill.—Catholic Bishop of Chicago v. Kingery, 20 N.E.2d 583, 371 Ill. 257.

34. N.J.—Lumpkin v. Township Committee of Bernards Tp., 48 A. 2d 798, 134 N.J.Law 428, motion granted 49 A.2d 236, 134 N.J.Law 531.

35. Ill.—Western Theological Seminary v. City of Evanston, 162 N.E. 863, 331 Ill. 257.

36. N.J.—Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 11 N.J. 341, 36 A.L.R.2d 639.

37. Pa.—Application of Devereux Foundation, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

38. Wash.—Shepard v. Seattle, 109 P. 1067, 59 Wash. 363, 40 L.R.A., N.S., 647.

39. Cal.—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778 and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777.

Hospitals for insane

Cal.—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittmann v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778 and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777.

not be upheld as a valid exercise of the police power.⁴⁰

Places of worship. Although in some instances the exclusion of churches from residential districts has been upheld,⁴¹ it is generally held that a zoning regulation may not wholly exclude a church, synagogue, or place of public worship from a residential district,⁴² although appropriate restrictions may be imposed.⁴³ A regulation excluding churches, but permitting other nonresidential uses such as farming, swimming pools, golf courses, and schools has been held invalid.⁴⁴

§ 57. — Validity of Districting

The fixing of boundaries of a residential district and the inclusion of particular property as within such a district will be held valid where reasonable and properly related to the public welfare.

The fixing of the boundaries of a residential district and the inclusion of particular property within such a district will be held valid where reasonable and properly related to the public welfare,⁴⁵ and invalid where unreasonable and not so related to the public welfare.⁴⁶ An ordinance establishing a residential district and bearing a reasonable relation

40. Del.—*Wilmington v. Turk*, 129 A. 512, 14 Del.Ch. 392.

43 C.J. p 388 note 47.

41. Cal.—*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 73, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 342, 338 U.S. 939, 94 L.Ed. 579.

42. Ind.—*Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses*, 117 N.E.2d 115, 233 Ind. 83.

Nev.—*State ex rel. Roman Catholic Bishop of Reno v. Hill*, 90 P.2d 217, 59 Nev. 231.

N.Y.—*Temple Israel of Lawrence v. Plaut*, 170 N.Y.S.2d 393.

Ohio.—*State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph*, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.

Tex.—*Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City*, Civ.App., 287 S.W.2d 700—*Simms v. City of Sherman*, Civ.App., 181 S.W.2d 100, affirmed 183 S.W.2d 415, 143 Tex. 115.

Reason for rule

Such an exclusion would bear no substantial relation to public health, safety, morals, peace, or general welfare of the community.

N.Y.—*Diocese of Rochester v. Planning Bd. of Town of Brighton*, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y.S.2d 849.

43. Ill.—*O'Brien v. City of Chicago*, 105 N.E.2d 917, 347 Ill.App. 45.

Ind.—*Board of Zoning Appeals of Decatur v. Decatur, Indiana Co. of Jehovah's Witnesses*, 117 N.E.2d 115, 233 Ind. 83.

N.Y.—*Temple Israel of Lawrence v. Plaut*, 170 N.Y.S.2d 393.

Lot surrounded by streets or alleys

If purpose of ordinance restricting erection of church building, in district zoned for single-family residences, to a lot entirely surrounded by streets or alleys, is related to traffic requirements which might be created by construction of new

church or necessity for space between church structure and adjoining property, such purpose is amply fulfilled by adequate dedication of streets and alleys on a proposed site. Ill.—*O'Brien v. City of Chicago*, 105 N.E.2d 917, 347 Ill.App. 45.

44. Ariz.—*Ellsworth v. Gercke*, 156 P.2d 242, 62 Ariz. 198.

45. Cal.—*Sladovich v. Fresno County*, App., 322 P.2d 555—*Willett & Crane v. City of Palos Verdes Estates*, 216 P.2d 85, 96 C.A.2d 757—*Price v. Schwafel*, 206 P.2d 683, 92 C.A.2d 77.

Ill.—*Wehrmeister v. Du Page County*, 141 N.E.2d 26, 10 Ill.2d 604—*Miller Bros. Lumber Co. v. City of Chicago*, 111 N.E.2d 149, 414 Ill. 162—*Mundelein Estates v. Village of Mundelein*, 99 N.E.2d 144, 409 Ill. 291—*Offner Electronics v. Gerhardt*, 76 N.E.2d 27, 398 Ill. 265.

La.—*City of New Orleans v. La Nasa*, 88 So.2d 224, 230 La. 289.

Md.—*Francis v. MacGill*, 75 A.2d 91, 196 Md. 77.

Mass.—*Connors v. Town of Burlington*, 91 N.E.2d 212, 325 Mass. 494.

Mich.—*West Bloomfield Tp. v. Chapman*, 88 N.W.2d 377, 351 Mich. 606—*Robinson v. City of Bloomfield Hills*, 86 N.W.2d 166, 350 Mich. 425.

Minn.—*Kiges v. City of St. Paul*, 62 S.W.2d 363, 240 Minn. 522.

Miss.—*City of Jackson v. McPherson*, 138 So. 604, 162 Miss. 164.

N.J.—*Visco v. City of Plainfield*, 57 A.2d 490, 136 N.J.Law 659.

N.Y.—*Huntley Estates, Inc. v. Town of Eastchester*, 131 N.Y.S.2d 578, 283 App.Div. 1090—*Fliedner v. Village of Great Neck*, 17 N.Y.S.2d 978, 258 App.Div. 1087.

Ohio.—*State ex rel. Clifton-Highland Co. v. City of Lakewood*, 178 N.E. 837, 124 Ohio St. 399, certiorari denied *Clifton Highland Co. v. City of Lakewood, Ohio*, 52 S.Ct. 406, 285 U.S. 549, 76 L.Ed. 940.

Pa.—*Appeal of Blannarik*, Com.Pl., 15 Beaver 25, exceptions overruled 15 Beaver 151, affirmed 100 A.2d 53, 375 Pa. 209.

Tenn.—*Davidson County v. Rogers*, 198 S.W.2d 812, 184 Tenn. 327.

Utah.—*Dowse v. Salt Lake City Corp.*, 255 P.2d 723, 123 Utah 107.

Reasonableness of zoning regulations see *infra* §§ 68-80.

Residential district defined in terms of intended use

Zoning ordinance defining a residential district as any district within limits of city where seventy-five per cent of property is used, or intended to be used, for residential purposes is valid.

Wash.—*Chief Petroleum Corp. v. City of Walla Walla*, 116 P.2d 560, 10 Wash.2d 297.

Unused lands and buildings not within other zones

Comprehensive county zoning ordinance, which declared all vacant or unused lands or buildings not included within boundaries of an industrial, commercial, or apartment district to be construed to be within boundaries of residential districts was not discriminatory or unconstitutional.

Ga.—*Taylor v. Shetzen*, 90 S.E.2d 572, 212 Ga. 101.

Description sufficiently definite

Description of residence district as beginning at point on westerly side of named drive specified distance generally north of its intersection with named terrace, running thence northerly along westerly side of such drive and southerly and easterly sides of another named terrace, which did not exist, a specified distance to a point, and running thence northeasterly through block stated distance to point or place of beginning, was sufficiently definite to indicate legislative intent to cover particular parcel.

N.Y.—*Mallett v. Village of Mamaroneck*, 131 N.Y.S.2d 504, 283 App.Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821.

46. Conn.—*Lakeside Realty Co. v. Town of Berlin*, 129 A.2d 623, 20 Conn.Sup. 188.

Fla.—*Lippow v. City of Miami Beach*, 68 So.2d 827—*Miami Shores Village v. Bessemer Properties*, 54 So. 2d 108—*City of Miami Beach v. First Trust Co.*, 45 So.2d 681.

to the public health, comfort, morals, safety, and general welfare is not rendered invalid by the fact that a commercial or nonresidential use of some of the property within the district would not create a health, safety, or morals hazard.⁴⁷

The existence of nonconforming business or commercial uses, limited in number, or confined to a relatively small portion of an area reasonably and naturally comprising a residential area does not disable the municipality from classifying the whole as a residential area.⁴⁸ So, the fact that property in a residential district is located in close proximity or adjacent to property devoted to business or in-

dustrial uses will not of itself render the zoning line invalid,⁴⁹ or make the residential restriction discriminatory.⁵⁰ Thus a zoning ordinance is not rendered invalid, as applied to such territory, by the mere fact that residential territory under the ordinance is adjacent to railroad tracks⁵¹ or to a street on which there is heavy vehicular traffic.⁵²

A classification of certain property as residential is not invalid solely because such property is adaptable and suitable for business or industrial purposes and would be of greater value if used for such purposes,⁵³ or because such property has depreciated in value due to its designation as residential instead of

Ill.—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E.2d 1, 6 Ill. 2d 419.

Ky.—Hamilton Co. v. Louisville & Jefferson County Planning & Zoning Commission, 287 S.W.2d 434.

Md.—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294.

Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

Mich.—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242.

N.J.—Cooper Lumber Co. v. Dammers, 125 A. 325, 2 N.J.Misc. 289.

N.Y.—Kraushaar & Son, Inc. v. City of New York, 145 N.Y.S.2d 511, 286 App.Div. 1094, affirmed 135 N.E.2d 586, 1 N.Y.2d 774, 153 N.Y.S.2d 47. Harrison v. Reidpath, 93 N.Y.S.2d 569.

Ohio.—State ex rel. Euverard v. Miller, 129 N.E.2d 209, 98 Ohio App. 283.

Loesch Allotment Co. v. Village of Newburgh Heights, Com.Pl., 100 N.E.2d 543.

Pa.—Jones v. Borough of Aldan, 74 Pa.Dist. & Co. 523, 37 Del.Co. 441. Appeal of Hessenbruch from Radnor Tp. Zoning Ordinance, Quar.Sess., 40 Del.Co. 43.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Wis.—Town of Hobart v. Collier, 87 N.W.2d 868, 3 Wis.2d 182.

Wyo.—State ex rel. George v. Hull, 199 P.2d 832, 65 Wyo. 251.

47. Ky.—City of Richlawn v. McMakin, 230 S.W.2d 902, 313 Ky. 265, certiorari dismissed McMakin v. City of Richlawn, 71 S.Ct. 531, 340 U.S. 945, 95 L.Ed. 682.

48. Ill.—City of Springfield v. Vancil, 76 N.E.2d 471, 398 Ill. 575.

N.J.—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535.

Burmore Co. v. Smith, 12 A.2d 353, 124 N.J.Law 541—Dubin v. Wich, 200 A. 751, 120 N.J.Law 469.

N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115.

49. Cal.—Johnston v. City of Claremont, 323 P.2d 71.

Price v. Schwafel, 206 P.2d 683, 92 C.A.2d 77.

Ill.—Williams v. Village of Schiller Park, 138 N.E.2d 500, 9 Ill.2d 596 —Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162.

Md.—City of Baltimore v. Cohn, 105 A.2d 432, 204 Md. 523.

Neb.—Graham v. Graybar Elec. Co., 63 N.W.2d 774, 158 Neb. 527.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Zoning must begin somewhere and end somewhere, and therefore, even though property touches on industrially zoned areas, a residential classification is not thereby necessarily precluded.

Ill.—Williams v. Village of Schiller Park, 138 N.E.2d 500, 9 Ill.2d 596.

Near "first industrial" zone

The fact that property zoned as "residential" is near property zoned as "first industrial" does not make the ordinance illegal.

Neb.—Graham v. Graybar Elec. Co., 63 N.W.2d 774, 158 Neb. 527.

Proximity to vicinity largely devoted to business

Mere fact that residential territory under a zoning ordinance is in proximity to a vicinity largely devoted to business purposes, does not of itself render the ordinance invalid as applied to such territory.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Fact that use of building on rear of lot might have been commercial would not give commercial character to other parts of lot or adjacent lots.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

50. Cal.—Johnston v. City of Claremont, 323 P.2d 71.

Price v. Schwafel, 206 P.2d 683, 92 C.A.2d 77—Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A. 2d 386.

Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

Ky.—Schloemer v. City of Louisville, 182 S.W.2d 782, 298 Ky. 286.

Fact that three corners of intersection are zoned for business and one for residence does not of itself show discriminatory zoning.

Cal.—Smith v. Collison, 6 P.2d 277, 119 C.A. 180.

51. Ill.—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162.

52. Cal.—O'Rourke v. Teeters, 146 P.2d 933, 63 C.A.2d 349.

53. Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332—Reynolds v. Barrett, 33 P.2d 29, 12 C.2d 244.

Lagiss v. Krantz, 232 P.2d 541, 104 C.A.2d 793.

D.C.—Leventhal v. District of Columbia, 100 F.2d 94, 69 App.D.C. 229.

Ill.—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Ky.—City of Richlawn v. McMakin, 230 S.W.2d 902, 313 Ky. 265, certiorari dismissed McMakin v. City of Richlawn, 71 S.Ct. 531, 340 U.S. 945, 95 L.Ed. 682—Schloemer v. City of Louisville, 182 S.W.2d 782, 298 Ky. 286.

Mass.—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

Mich.—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706.

N.J.—Gabrielson v. Borough of Glen Ridge, 176 A. 676, 13 N.J.Misc. 142.

N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115.

New York Trap Rock Corp. v. Town of Clarkstown, 149 N.Y.S.2d 290, 1 A.D.2d 890, affirmed 144 N.E.2d 725, 3 N.Y.2d 844, 166 N.Y.S.2d 82—Plymouth Builders v. Village of Lindenhurst, 134 N.Y.S. 2d 225, 284 App.Div. 895—Town of Cortlandt v. McNally, 126 N.Y.S.2d 702, 282 App.Div. 1072, appeal denied 128 N.Y.S.2d 597, 283 App. Div. 800—Ulmer Park Realty Co.

business property,⁵⁴ or because near-by business property has the same characteristics as the restricted parcel.⁵⁵

Circumstances considered in determining validity in general. In accordance with the general rules stated supra §§ 24-47, in determining the validity of a residential zoning restriction, the facts and circumstances to be considered include the character of the neighborhood,⁵⁶ the zoning classification and use of nearby property,⁵⁷ the extent to which property values are diminished by the restriction,⁵⁸ and the

gain to the public, compared to the hardship imposed on the individual.⁵⁹

Suitability of property for residential purposes. A classification of property as residential is invalid where the property is not suitable for residential purposes and the classification is not warranted as promoting the general welfare.⁶⁰ However, in determining the validity of a residential zoning restriction, the best interests of the entire district is the controlling factor, and not the adaptability and suitability of particular property located within the

v. City of New York, 63 N.Y.S.2d 143, 270 App.Div. 1044, affirmed 77 N.E.2d 797, 297 N.Y. 788.

Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47.

Scutori v. Incorporated Village of Bayville, 120 N.Y.S.2d 794.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

Ohio.—Morris v. Roseman, App., 118 N.E.2d 429, reversed on other grounds 123 N.E.2d 419, 162 Ohio St. 447—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.

Tex.—Luse v. City of Dallas, Civ. App., 131 S.W.2d 1079, error refused.

Wis.—State ex rel. Normal Hall v. Gurda, 291 N.W. 350, 234 Wis. 290.

Lots five times more valuable for manufacturing

Alleged fact that lots originally zoned for manufacturing uses would be five times as valuable for that purpose as for residential purposes was not decisive of the validity of ordinance rezoning lots to residential use. Ill.—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162.

54. Cal.—Smith v. Collison, 6 P.2d 277, 119 C.A. 180.

Damage to realty by reason of being in a residential zone adjoining business property would not render zoning ordinance restricting the property to residential use invalid. Cal.—Reynolds v. Barrett, 83 P.2d 29, 13 C.2d 244.

55. Cal.—Reynolds v. Barrett, supra. Price v. Schwafel, 206 P.2d 683, 92 C.A.2d 77.

56. Ill.—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E.2d 1, 6 Ill.2d 419—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28.

N.J.—Cooper Lumber Co. v. Dammers, 125 A. 325, 2 N.J.Misc. 289.

Utah.—Dowse v. Salt Lake City Corp., 255 P.2d 723, 123 Utah 107.

57. Fla.—Lippow v. City of Miami Beach, 68 So.2d 827—City of Miami Beach v. First Trust Co., 45 So.2d 681.

Ill.—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138.

Ohio.—State ex rel. Euverard v. Miller, 129 N.E.2d 209, 98 Ohio App. 283.

Pa.—Pasquino v. Keating, Com.Pl., 3 Bucks 302, 68 York Leg.Rec. 37—Martin v. Haverford Tp., Com.Pl., 36 Del.Co. 155.

Normal expansion of business district may make invalid a residential classification of property adjacent to the business district.

Ark.—City of Little Rock v. Joyner, 208 S.W.2d 446, 212 Ark. 508—City of Little Rock v. Bentley, 165 S.W.2d 890, 204 Ark. 727—City of Little Rock v. Pfeifer, 277 S.W. 883, 169 Ark. 1027.

Proximity to railroad property

Zoning regulation restricting use of plaintiff's land, which was situated short distance from railroad property, including passenger station, parking lot, and freight yard, to use for one and two-family dwellings, was invalid.

N.Y.—Kraushaar & Son, Inc. v. City of New York, 145 N.Y.S.2d 511, 286 App.Div. 1094, affirmed 135 N.E.2d 586, 1 N.Y.2d 774, 153 N.Y.S.2d 47.

Use in adjoining municipality

(1) In determination of validity of zoning ordinance restricting property to residential use, fact that much of contiguous use was in adjoining municipal corporation was of no consequence.

Ill.—LaSalle Nat. Bank v. City of Chicago, 122 N.E.2d 519, 4 Ill.2d 253—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28.

(2) This is so because question to be determined was one of existing conditions, and not of geographical and territorial limits, or of powers of neighboring municipalities.

Ill.—Hannifin Corp. v. City of Berwyn, supra.

58. Fla.—City of Miami Beach v. First Trust Co., 45 So.2d 681.

Ill.—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28.

59. Ill.—Hannifin Corp. v. City of Berwyn, supra.

Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.

60. Ill.—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E.2d 1, 6 Ill.2d 419.

Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434.

Mich.—Scholnick v. City of Bloomfield Hills, 86 N.W.2d 324, 350 Mich. 187—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242—Oschin v. Redford Tp., 24 N.W.2d 152, 315 Mich. 359.

N.Y.—Rockdale Const. Corp. v. Incorporated Village of Cedarhurst, Nassau County, N. Y., 94 N.Y.S.2d 601, affirmed 91 N.Y.S.2d 926, 275 App.Div. 1043, reargument and appeal denied 93 N.Y.S.2d 151, 276 App.Div. 763, motion denied 90 N.E.2d 495, 300 N.Y. 642, affirmed 93 N.E.2d 76, 301 N.Y. 519.

Harrison v. Reidpath, 93 N.Y.S.2d 569—Maxwell v. Incorporated Village of Rockville Centre, 84 N.Y.S.2d 544.

Pa.—Baronoff v. Zoning Bd. of Adjustment, 122 A.2d 65, 385 Pa. 110. Jones v. Borough of Aldan, 74 Pa.Dist. & Co. 523, 37 Del.Co. 441. Martin v. Haverford Tp., Com.Pl., 36 Del.Co. 155.

Tex.—City of Dallas v. Rosenthal, Civ.App., 239 S.W.2d 636, error refused no reversible error.

Property of little value for residential use

Zoning ordinances restricting a certain area to residential use are void as to property located in such area, but so situated, in its relation to a commercial zone, as to render it peculiarly unattractive and of little value for residential purposes if at all salable therefor.

Ill.—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104.

district.⁶¹ Where the suitability of particular property for residential use is fairly debatable, a zoning regulation restricting the use of such property to residential use will be upheld.⁶²

Boundary dividing street. The zoning of one side of a street for business and the other side for residential uses may in certain circumstances be improper⁶³ as discriminatory;⁶⁴ and it has been held that the lines of zoning districts should be fixed in such a way as to avoid making one side of a main artery of travel purely residential where the opposite side of the street is already so uniformly used for business purposes as to have established its character in that regard.⁶⁵ A zoning regulation is not invalid, however, merely because it zones one side of a street for residential use and the other side for

business use;⁶⁶ and such division will be upheld where the matter is fairly debatable.⁶⁷

§ 58. — Business, Commercial, and Industrial Districts

A municipality has broad discretion in fixing the location and boundaries of business, commercial, and industrial districts, and its action in this regard will generally be upheld if bearing a substantial relation to the health, safety, morals, and general welfare of the community, not discriminatory, and meeting statutory requirements.

A municipality has broad discretion in fixing the location and boundaries of business, commercial, and industrial districts,⁶⁸ and its action in this regard will generally be upheld if bearing a substantial relation to the health, safety, morals and general welfare of the community,⁶⁹ not discriminatory,⁷⁰ and

61. Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

62. N.Y.—Berger v. City of New York, 127 N.Y.S.2d 430, 283 App. Div. 714, affirmed 125 N.E.2d 876, 308 N.Y. 830, motion denied 138 N.E.2d 796, 309 N.Y. 740.

63. Ill.—Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166.

N.J.—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J. Law 195, affirmed Appley v. Township Committee of Bernards of Bernards, 28 A.2d 177, 129 N.J. Law 73.

Pa.—Appeal of Shaffer, Com.Pl., 40 Del.Co. 179—Freeman v. Lansdowne Borough, Quar.Sess., 34 Del.Co. 449.

64. Pa.—Taylor v. Haverford Tp., 149 A. 639, 299 Pa. 402.

65. Ill.—Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill. 2d 432.

Pa.—Taylor v. Haverford Tp., 149 A. 639, 299 Pa. 402.
Freeman v. Lansdowne Borough, Quar.Sess., 34 Del.Co. 449.

Zoning confiscatory

Zoning of corner lot in seventy-acre residential tract abutting on chief artery of travel as purely residential, while opposite side was given over to business purposes, is confiscatory.

Pa.—Taylor v. Haverford, Tp., 149 A. 639, 299 Pa. 402.

66. Cal.—Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386.
D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

Pa.—Murphy v. Abington Tp., Com. Pl., 67 Montg.Co. 259.

67. Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

68. Cal.—Lockard v. City of Los

Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

Ohio.—State ex rel. Castle National v. Village of Wickliffe, App., 80 N.E.2d 200, appeal dismissed 74 N.E.2d 270, 148 Ohio St. 410.

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

Proper exercise of discretion

Permitting business uses at nine intersections along state highway and prohibiting business uses at intersection on which defendant owned property was proper exercise of discretion, where view from one direction of people approaching intersection on which defendant owned property was obstructed by hill while the view of the nine intersections was open from either direction.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

69. Ill.—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

Mass.—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646, 8 A.L.R.2d 955.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

Ohio.—City of Akron v. Chapman, 116 N.E.2d 697, 160 Ohio St. 382.

Or.—Holt v. City of Salem, 234 P.2d 564, 192 Or. 200.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

No monopoly is fostered or created by requiring stores and factories to be located in districts allotted to them.

Ill.—Aurora v. Burns, 149 N.E. 784, 319 Ill. 84.

Ordinance held invalid

Zoning ordinance did not promote public health, safety, or welfare of community by requiring lands in

midst of heavy industrial area, lacking pavement and utilities, in part used as public dump and elsewhere traversed by creek into which raw sewage was emptied, to be used for residential or commercial purposes and was invalid.

Ohio.—Loesch Allotment Co. v. Village of Newburgh Heights, Com. Pl., 100 N.E.2d 543.

70. N.J.—H. Behlen & Bros., Inc. v. Mayor & Council of Town of Kearny, 105 A.2d 894, 31 N.J. Super. 30.

Ordinance unlawfully discriminating

(1) An amendatory zoning ordinance, creating modified commercial zone comprising only a certain manufacturing company's foundry property in residence zone created by original zoning ordinance, adopted after commencement of foundry's operation, was invalid as limited to purpose of enabling such company to continue indefinitely operation of foundry, as enlarged since adoption of first ordinance, as legally conforming use, thereby granting special exception or variance from restrictive residential regulation, and as not part of comprehensive plan, circumventing functions of borough board of adjustment, and unlawfully discriminating in favor of such company and against owners of property in neighborhood of foundry.

N.J.—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250.

(2) Where, in prior action, city had been enjoined from prohibiting or interfering with use of certain realty for uses under "Use District RE," which allowed construction of hotels with one hundred or more guest rooms and certain business establishments if in interior of the hotel and not visible from the outside, zoning ordinance amendment, which purported to restrict the types of business establishments that could be contained in such a hotel on such land was

meeting statutory requirements, such as a requirement that it be in accordance with a comprehensive plan.⁷¹

In the exercise of the zoning power, particular businesses and industries may validly be classified for segregation in different districts,⁷² provided that the classification is reasonable and not discriminatory and bears a reasonable relation to the public health, safety, morals, and general welfare.⁷³ Gen-

erally speaking, the prohibition of a particular business, establishment, or activity in a particular district is valid where the particular business, establishment, or activity is unrelated to, and inconsistent with, the activities permitted in the particular district and which activities are the basis of establishing the district.⁷⁴ In accordance with this principle, the exclusion of certain businesses, establishments, or activities from business districts,⁷⁵ or the exclu-

discriminatory, and void, in absence of showing of change in conditions warranting such rezoning.

Fla.—Charnofree Corp. v. City of Miami Beach, 76 So.2d 665.

71. Conn.—Couch v. Zoning Commission of Town of Washington, 106 A.2d 173, 141 Conn. 349.

Rezoning of small area, somewhat isolated from other industrial zones, to permit industrial use is not necessarily prohibited as spot zoning, but if zone change proposed is one that will permit the use of the property affected in an appropriate manner, having regard to its type, location, and nature of use being made, or which could be made, of the surrounding territory, and change is one which presents reasonable and logical development of comprehensive plan, rezoning is proper.

Conn.—Kutcher v. Town Planning Commission of Town of Manchester, 88 A.2d 538, 138 Conn. 705.

72. Cal.—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

Ill.—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162.

Minn.—State v. Miller, 288 N.W. 713, 206 Minn. 345.

Mo.—City of Washington v. Mueller, App., 218 S.W.2d 801.

N.J.—Newark Milk & Cream Co. of Newark v. Parsippany-Troy Hills Tp., 135 A.2d 682, 47 N.J.Super. 306—H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 105 A.2d 894, 31 N.J.Super. 30.

N.Y.—Brous v. Town of Hempstead, 69 N.Y.S.2d 258, 272 App.Div. 31, amended on other grounds 70 N.Y.S.2d 576, 272 App.Div. 777.

Romig v. Weld, 87 N.Y.S.2d 580, 194 Misc. 783, affirmed in part and reversed in part on other grounds 95 N.Y.S.2d 571, 276 App.Div. 514. Pa.—Appeal of Flannery, 3 Pa.Dist. & Co.2d 97, 56 Lack.Jur. 85.

Commonwealth ex rel. v. Debaldo, Co., 99 Pittsb.Leg.J. 155.

Tenn.—Rawlins v. Braswell, 231 S.W. 2d 1021, 191 Tenn. 285.

Tex.—Loudner v. Texas Liquor Control Bd., Civ.App., 214 S.W.2d 336,

refused no reversible error—City of Corpus Christi v. Jones, Civ. App., 144 S.W.2d 388, error dismissed, judgment correct—Scruggs v. Wheeler, Civ.App., 4 S.W.2d 616, error refused.

Public garages and gasoline filling stations see *infra* § 59.

Existence of nuisance is not necessarily the basis on which zoning ordinance may operate against a particular industry.

Cal.—Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865, 40 C.2d 552.

73. Ill.—Mack v. Cook County, 142 N.E.2d 785, 11 Ill.2d 310.

N.J.—Borough of West Caldwell v. Zell, 91 A.2d 763, 22 N.J.Super. 188.

Ohio.—Loesch Allotment Co. v. Village of Newburgh Heights, Com. Pl., 100 N.E.2d 543.

Pa.—Morgan v. Chester Zoning Bd., Com.Pl., 36 Del.Co. 236—Rex v. Borough of Lansdale, Quar.Sess., 68 Montg.Co. 186, 44 Mun.L.R. 153.

Tenn.—Rawlins v. Braswell, 231 S.W.2d 1021, 191 Tenn. 285.

Basis of classification

Classification must be based on natural distinguishing characteristics, must bear a reasonable relation to the subject of legislation, must be founded on distinctions reasonable in principle and have a just relation to the subject sought to be accomplished, and must be based on substantial difference between the situation of such class or classes of other individuals or classes to which it does not apply.

Tenn.—Rawlins v. Braswell, *supra*.

Prohibiting pick-up and delivery service by laundrettes

Zoning ordinance defining laundrettes and prohibiting pickup or delivery service in connection therewith, the prohibition not applying to other stores in the district, is invalid as discriminatory.

N.J.—Marie's Launderette v. City of Newark, 113 A.2d 190, 35 N.J.Super. 94.

Exclusion of auction sales void

Where conduct of auction sales was no more obnoxious than many other businesses conducted in a BA business district, and unrestricted districts were either unsuitable or pre-empted, and enforcement of zoning ordinance would, in effect, sup-

press and prohibit the conduct of auction sales in the city, provisions of zoning ordinance prohibiting such sales except in a certain portion of BB business district and in BC business district were void.

Fla.—City of Miami Beach v. Perell, 52 So.2d 906.

Classification held proper as to:

(1) Dry cleaning plants.

Ill.—Cleaners Guild of Chicago v. City of Chicago, 37 N.E.2d 857, 312 Ill.App. 102.

(2) Merry-go-rounds, Ferris wheels, or similar amusements.

N.J.—Piaget-Del Corp. v. Kulik, 45 A.2d 125, 133 N.J.Law 485, petitions denied 46 A.2d 379, 134 N.J.Law 147.

(3) Ice factory.

Md.—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.

(4) Public utility plant producing power and electricity as well as ice. Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

Storage of automobiles

Zoning regulation, applied so as to prohibit storage of automobiles, although allowing parking of automobiles, was not unconstitutional, in view of the substantial differences between use of land for storage, and use for parking.

N.Y.—Incorporated Village of Great Neck v. Green, 166 N.Y.S.2d 219, 8 Misc.2d 356, affirmed 170 N.Y.S.2d 297, 5 A.D.2d 779.

74. Ohio.—Central Outdoor Advertising Co. v. Village of Evendale, Ohio, Com.Pl., 124 N.E.2d 189.

75. Mich.—Fass v. City of Highland Park, 32 N.W.2d 375, 321 Mich. 156.

Killing and dressing of poultry

Mich.—Fass v. City of Highland Park, *supra*.

Truck terminal

N.J.—Borough of West Caldwell v. Zell, 91 A.2d 763, 22 N.J.Super. 188.

Undertaking establishment

Ga.—Awtry & Lowndes Co. v. City of Atlanta, 53 S.E.2d 358, 205 Ga. 296.

Used car lots

N.J.—Van Corp. v. Mayor and Council of Borough of Ridgefield, 124 A.2d 48, 41 N.J.Super. 74.

sion of certain businesses, establishments, or activities from commercial,⁷⁶ industrial,⁷⁷ manufacturing,⁷⁸ and farming⁷⁹ districts has been sustained. Certain business establishments may be restricted to a location outside a specified distance from other specified premises.⁸⁰ On the other hand, a zoning regulation prohibiting a particular activity may, as

applied to particular property, be confiscatory and invalid.⁸¹

The classification of certain property for business, commercial, or industrial use rather than residential use is proper where reasonable and properly related to the public welfare.⁸² While an existing business

Place of amusement; bathhouses

Zoning ordinance forbidding construction of a "place of amusement" in a business district unless especially permitted was not invalid as applied to beach property of petitioner who was refused a permit for a large increase in the number of bathhouses on his ocean-front property notwithstanding there were a large number of bathhouses on adjacent property. N.Y.—Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

76. Pa.—Commonwealth ex rel. v. Debaldo, Co., 99 Pittsb.Leg.J. 155. Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

77. Conn.—State v. Hillman, 147 A. 284, 110 Conn. 92.

Bag-cleaning industry

Minn.—State v. Miller, 288 N.W. 713, 206 Minn. 345.

Storage of scrap iron and junk

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

Slaughter of poultry

N.J.—Greenstein v. Bigelow, 135 A. 661, 5 N.J.Misc. 124.

Sale of used lumber and building materials

N.J.—Baris Lumber Co. v. Town of Secaucus in Hudson County, 90 A. 2d 130, 20 N.J.Super. 586.

78. Cal.—People v. Johnson, 277 P. 2d 45, 129 C.A.2d 1.

Keeping of hogs

Zoning ordinance, declaring the keeping and maintenance of more than five hogs on land in limited manufacturing district or zone a public nuisance, is not invalid, if construed to support injunction against such use of land, as in conflict with statute providing that no commercial or manufacturing use expressly permitted shall be deemed a nuisance without evidence of employment of unnecessary and injurious methods of operation.

Cal.—People v. Johnson, supra.

Noise constituting nuisance

Where noise created by plaintiffs' manufacturing business constituted a nuisance, zoning ordinance prohibiting certain noisy manufacturing processes was not unconstitutional

in its application to plaintiffs and their property.

Ill.—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 658, 350 U.S. 1013, 100 L.Ed. 878.

79. Ill.—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

Manufacturing business

Ill.—Du Page County v. Henderson, supra.

80. N.J.—Vine v. Board of Adjustment of Village of Ridgewood, 56 A.2d 122, 136 N.J.Law 416.

Public garages and gasoline filling stations generally see infra § 59. Regulations as to sale of intoxicating liquors see infra § 67.

Factory emitting loud noise

Zoning ordinance providing that no factory should be operated within two hundred feet of a residence in such a way that loud and unusual noises are emitted, was not unconstitutional in its application to plaintiffs' property, since a municipality is not required, in a case where danger is to be apprehended, to wait until a nuisance actually exists before taking action to safeguard public health.

Ill.—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 658, 350 U.S. 1013, 100 L.Ed. 873.

81. Wash.—Manos v. City of Seattle, 24 P.2d 91, 173 Wash. 662.

Skating rink

Zoning ordinance prohibiting skating rink within public park, school ground, or playground and within specified distance therefrom, which had effect to prohibit established skating rink not nuisance in fact, was void as not based on valid exercise of police power.

Wash.—Manos v. City of Seattle, supra.

82. Ala.—White v. Luquire Funeral Home, 129 So. 84, 221 Ala. 440.

Ill.—Kinney v. City of Joliet, 103 N.E.2d 473, 411 Ill. 289.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

N.Y.—Andrews v. Town Bd. of Town of Dewitt, Onondaga County, 98 N.Y.S.2d 494.

Or.—Holt v. City of Salem, 234 P.2d 564, 192 Or. 200.

Pa.—Toland v. Newtown Tp., Quar. Sess., 35 Del.Co. 21.

Prohibiting residences

Zoning ordinance which provides

for an industrial district and prohibits the erection of residences therein is valid.

Pa.—Logan v. Bickel, 11 Pa.Dist. & Co.2d 405, 43 Del.Co. 272.

Business "island"

(1) City may determine whether a business "island" permitted by a zoning ordinance in a residential district should be enlarged, and the mere fact that the owner may enjoy greater benefits or that his property will be enhanced in value if the size of the "island" is increased cannot entitle him to compel allowance of such increase in size.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

(2) Ordinance which creates island of commercial use in area of residences is of itself not illegal where such different uses promote welfare of general community and are part of comprehensive plan or scheme. N.Y.—Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220.

(3) Where single corner lot which by zoning ordinance was transferred from residential classification to a restricted business district was situated in one of ten blocks in an area divided by a heavily traveled street, and having therein numerous business uses, the ordinance was not invalid as creating a "commercial island," and thereby amounting to spot zoning.

Or.—Shaffner v. City of Salem, 268 P.2d 599, 201 Or. 45.

Restriction to heavy industrial uses

Where preventing construction of residences in industrial area appeared to have a relation to public health and safety, and there was no showing that land in question was not usable for industrial purposes within a reasonable time, county zoning ordinance restricting use of land to heavy industrial purposes, to exclusion of residential use, was not unconstitutional in its application to property in question.

Cal.—Roney v. Board of Sup'rs of Contra Costa County, 292 P.2d 529, 138 C.A.2d 740.

Ordinance benefiting member of council

Alleged fact that member of city council procured passage of zoning ordinance changing certain area from a residential district to business dis-

building within a residential district may be placed in a business zone,⁸³ a single lot within a residential district may not ordinarily be placed in a business zone.⁸⁴

Limited or insufficient area for development. The mere fact that an ordinance zones only a small portion of the municipality for business does not make it invalid.⁸⁵ A municipality cannot, however, under the guise of regulating and segregating business establish business or commercial districts of a limited area where there is little unoccupied land for future development, and thereby grant a monopoly to existing business establishments in such districts;⁸⁶ but the fact that one of two business districts created by a zoning ordinance contains no vacant lots available for business buildings does not invalidate the ordinance where the other business district is only partly built up and where the ordinance creates

numerous small zones apparently unoccupied.⁸⁷ It is immaterial to the validity of the regulation whether property can be acquired within a business zone at an equitable price.⁸⁸

§ 59. — Gasoline Filling Stations, Public Garages, and Parking Lots

Zoning regulations may validly restrict to certain localities the erection of gasoline filling stations, public garages, and parking lots, where such exercise of power is within the scope of the authority delegated by statute and bears a substantial relation to public health, safety, morals, convenience, or welfare.

As a general rule, zoning regulations may validly restrict to certain localities the construction or maintenance of gasoline filling and automobile service stations,⁸⁹ public garages,⁹⁰ and parking lots,⁹¹ where such exercise of power is within the scope of the authority delegated by statute⁹² and bears a real

trict, so that such member could erect and maintain a filling station in that area, did not render the ordinance void under statute prohibiting a council member from contracting with the municipality for personal gain.

Va.—Blankenship v. City of Richmond, 49 S.E.2d 321, 188 Va. 97.

83. Conn.—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614.

84. Ky.—Parker v. Rash, 236 S.W. 2d 687, 314 Ky. 609.

85. N.Y.—Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47.

86. Cal.—Wickham v. Becker, 274 P. 397, 96 C.A. 443.

One vacant lot

Ordinance creating a small business district with only one vacant lot may be void as granting a monopoly to existing business enterprises therein.

Cal.—Wickham v. Becker, *supra*.

87. Cal.—Reynolds v. Barrett, 83 P. 2d 29, 12 C.2d 244.

Harris v. City of Piedmont, 42 P.2d 356, 5 C.A.2d 146.

88. Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

89. U.S.—Texas Co. v. City of Tampa, C.C.A.Fla., 100 F.2d 347.

Ala.—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Ark.—City of Little Rock v. Pfeifer, 277 S.W. 883, 169 Ark. 1027.

Ga.—Howden v. City of Savannah, 159 S.E. 401, 172 Ga. 833.

Ill.—Gore v. City of Carlinville, 137 N.E.2d 368, 9 Ill.2d 296.

Ky.—Schloemer v. City of Louisville, 182 S.W.2d 782, 298 Ky. 286—Cayce v. City of Hopkinsville, 289 S.W.

223, 217 Ky. 135—Slaughter v. Post, 282 S.W. 1091, 214 Ky. 175.

Mich.—Highland Oil Corp. v. City of Lathrup Village, 85 N.W.2d 185, 349 Mich. 650.

N.H.—Kimball v. Blanchard, 7 A.2d 394, 90 N.H. 298.

N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 554—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A.2d 752, 9 N.J.Super. 529.

Salisbury v. Borough of Ridgefield, 60 A.2d 877, 137 N.J.Law 515—Vine v. Board of Adjustment of Village of Ridgewood, 56 A.2d 122, 136 N.J.Law 416—Phillips v. Town of Belleville, 52 A.2d 441, 135 N.J.Law 271—Albright v. Johnson, 50 A.2d 399, 135 N.J.Law 70—Schnell v. Township Committee of Ocean Tp., 198 A. 759, 120 N.J.Law 194. New Jersey Land Co. v. City of East Orange, 134 A. 839, 4 N.J. Misc. 856.

N.Y.—Osborne v. Village of East Hampton, 66 N.Y.S.2d 646, 271 App. Div. 837.

N.C.—City of Fayetteville v. Spur Distributing Co., 5 S.E.2d 838, 216 N.C. 596—Elizabeth City v. Aydtlett, 161 S.E. 78, 201 N.C. 602.

Okl.—Baxley v. City of Frederick, 271 P. 257, 133 Okl. 84—City of Muskogee v. Morton, 261 P. 183, 128 Okl. 17.

Or.—Berger v. City of Salem, 284 P. 273, 131 Or. 674.

Pa.—Appeal of Perrin, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912, followed in Appeal of Goodman, 156 A. 309, 305 Pa. 55.

Tex.—McEachern v. Town of Highland Park, 73 S.W.2d 487, 124 Tex.

36—Lombardo v. City of Dallas, 73 S.W.2d 475, 124 Tex. 1.

42 C.J. p 1307 notes 26, 27.

Prohibition for future

Zoning ordinance having effect of prohibiting erection of gasoline filling station was valid under police power, although permitting continuance of existing uses that were forbidden for future.

N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

90. U.S.—Texas Co. v. City of Tampa, C.C.A.Fla., 100 F.2d 347.

Ark.—City of Little Rock v. Pfeifer, 277 S.W. 883, 169 Ark. 1027.

Ill.—Gore v. City of Carlinville, 137 N.E.2d 368, 9 Ill.2d 296.

38 C.J. p 73 notes 10, 11, p 74 note 23.

91. N.Y.—Boardwalk & Seashore Corporation v. Murdock, 36 N.E.2d 678, 286 N.Y. 494.

Bazinsky v. Kesbec, Inc., 19 N.Y.S.2d 716, 259 App.Div. 467, affirmed 36 N.E.2d 694, 286 N.Y. 655, remittitur amended 37 N.E.2d 456, 286 N.Y. 723.

Pa.—Lyons v. Zoning Bd. of Adjustment, Com.Pl., 38 Del.Co. 275.

92. N.Y.—Hoffer v. Schwab, 213 N.Y.S. 659, 126 Misc. 289.

N.C.—Shuford v. Town of Waynesville, 198 S.E. 585, 214 N.C. 135.

Power held not granted

Miss.—Dart v. City of Gulfport, 113 So. 441, 147 Miss. 534.

42 C.J. p 1307 note 29.

Ordinance not providing for statutory method of appeal

Ordinance prohibiting absolutely gasoline service stations in residential districts and in business districts without permission from municipal council and requiring fire and police departments to certify that such use will not create a fire hazard before issuance of a permit is invalid under

and substantial relation to public health, safety, morals, convenience, or welfare.⁹³ Such regulations, however, must be uniform⁹⁴ and not discriminatory,⁹⁵ and may not interfere with or impair vested rights.⁹⁶ A regulation applied so as to prohibit storage of automobiles, although allowing parking of automobiles, is not unconstitutional, in view of

the substantial difference between the use of land for storage and its use for parking.⁹⁷

It has been held that it is not within the scope of the zoning power to prohibit the use of land for a garage or gasoline filling station anywhere within the territorial limits of the municipality;⁹⁸ but such

zoning statute as not providing for statutory method of appeal to a board of adjustment.

N.J.—Finn v. Municipal Council of City of Clifton, 53 A.2d 790, 136 N.J.Law 34.

93. Mich.—Hering v. City of Royal Oak, 40 N.W.2d 133, 326 Mich. 232. N.J.—Roselle v. Wright, 122 A.2d 506, 21 N.J. 400—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

Considerations of safety and general convenience enter largely into regulation by municipality of gasoline service stations.

N.J.—Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J.Law 190.

Requiring discontinuance of station

Where gasoline service station was near state capitol, state supreme court building and several other state office buildings, and a public school, ordinance requiring discontinuance of station was justified as exercise of police power, and was not invalid as bearing no relation to safety and general welfare of community affected.

U.S.—Standard Oil Co. v. City of Tallahassee, C.A.Fla., 183 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647.

94. N.J.—Roselle v. Wright, 122 A.2d 506, 21 N.J. 400.

Excluding storage garages but not public garages

Zoning ordinance excluding all storage garages from business zones, open to private and public garages, was invalid as contravening constitutional precept and basic policy of zoning statute because of lack of uniformity and equality.

N.J.—Roselle v. Wright, *supra*.

Permitting garages in part of district

Under zoning statute providing that all regulations shall be uniform for each class or kind of buildings throughout each district, but that regulation in one district may differ from those in other districts, ordinance which authorized use of buildings on certain streets in designated district for a public garage while at same time prohibiting such use elsewhere in same district, is invalid.

Tenn.—Henry v. White, 250 S.W.2d 70, 194 Tenn. 192.

95. Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

N.C.—Shuford v. Town of Waynesville, 198 S.E. 585, 214 N.C. 135.

Discrimination not shown

(1) Zoning ordinance excluding gasoline filling stations from certain district was held not unlawfully discriminatory because it allowed maintenance of previously erected stations.

N.C.—Elizabeth City v. Aydtlett, 161 S.E. 78, 201 N.C. 602.

(2) An ordinance which provides that it shall not be lawful for anyone to locate, build, construct, or maintain a public garage except subject to certain conditions is not void as discriminatory in favor of persons engaged in a like business at the time the ordinance became effective.

Ill.—People v. Oak Park, 107 N.E. 636, 266 Ill. 365.

96. N.Y.—Caponi v. Walsh, 238 N.Y.S. 438, 228 App.Div. 86—New York State Investment Co. v. Brady, 212 N.Y.S. 605, 214 App.Div. 592.

Prior use and improvement

(1) Where oil company purchased property in 1938, in a residential district at a time when service stations were permitted in such district, and constructed service station, and in 1939, area in which property was located was rezoned so as to place it in a business district and provision was made for discontinuance of service stations within district by 1949, and in 1948, area was again rezoned and placed in residential district and the provision requiring discontinuance of service stations in the area by 1949, was made applicable, enforcement of ordinance did not operate to deprive oil company of vested rights, where it appeared that service station was near state capitol, other state buildings, and a public school, and zoning ordinance was, under all circumstances, a legitimate exercise of police power.

U.S.—Standard Oil Co. v. City of Tallahassee, C.A.Fla., 183 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647.

(2) So, use of a lot for parking purposes contrary to provisions of zoning ordinance has been held unlawful even though such use had been established prior to adoption of ordinance.

N.Y.—Boardwalk & Seashore Corporation v. Murdock, 36 N.E.2d 678, 286 N.Y. 494, reargument denied 27 N.Y.S.2d 431, 261 App.Div. 972.

(3) This is true even though prior use was accompanied by an investment representing expense of grading lot for such purposes.

N.Y.—Bazinsky v. Kesbec, Inc., 19 N.Y.S.2d 716, 259 App.Div. 467, affirmed 36 N.E.2d 694, 286 N.Y. 655, remittitur amended 37 N.E.2d 456, 286 N.Y. 723.

(4) However, a property owner may, in some circumstances, be deemed to have acquired a vested right by completing work of a substantial character in construction of a station or garage, so that a change in zoning regulations may not prevent him from continuing such construction and use.

N.Y.—Caponi v. Walsh, 238 N.Y.S. 438, 228 App.Div. 86—New York State Investment Co. v. Brady, 212 N.Y.S. 605, 214 App.Div. 592.

97. N.Y.—Incorporated Village of Great Neck v. Green, 166 N.Y.S.2d 219.

98. Ill.—People v. Ericsson, 105 N.E. 315, 263 Ill. 268, L.R.A.1915D 607, Ann.Cas. 1915C 183.

N.J.—First Church of Christ, Scientist, Newark v. Board of Adjustment of City of Newark, 26 A.2d 246, 128 N.J.Law 376—Gulf Oil Co. v. Board of Com'rs of City of Newark, 26 A.2d 246, 128 N.J.Law 376.

Failure specifically to permit in other districts

(1) Where zoning ordinance prohibited gasoline service stations in residential districts, court would not declare entire ordinance void merely because it failed specifically to mention and allow service stations in any zoning district since character of operation in a particular case was to be tested by reviewing enforcement of ordinance in each case.

N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 69 A.2d 361, 6 N.J.Super. 474, affirmed 73 A.2d 545, 4 N.J. 577.

(2) Fact that ordinance does not specifically permit gasoline service stations anywhere in municipality does not render invalid prohibition against stations in residential districts where ordinance permits in other districts "any retail store or stand where goods are sold or serv-

businesses may properly be excluded from a residential district.⁹⁹ So, garages and filling stations may sometimes be validly excluded from certain restricted business districts,¹ or from all districts ex-

cept those reserved for industrial uses.² On the other hand, it may be proper to permit filling and service stations and garages as a commercial use in business districts³ or to permit filling and service

ices rendered," such language being broad enough to embrace service stations.

N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577.

Prohibition of parking places except as special exception

While ordinance prohibiting public parking places in any district except as a special exception by board of appeals was invalid as to portion granting board of appeals unlimited discretion, the portion prohibiting parking places in any district remained and did not leave municipality without authority to permit proper public parking places where ordinance had been amended to read "no public parking place shall be conducted in any district except as a special exception by the Town Board."

N.Y.—Gordon v. Town of Hempstead, 93 N.Y.S.2d 250, 196 Misc. 954.

99. U.S.—Texas Co. v. City of Tampa, C.C.A.Fla., 100 F.2d 347.

Ala.—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Ill.—Wehrmeister v. Du Page County, 141 N.E.2d 26, 10 Ill.2d 604—Fox v. City of Springfield, 139 N.E.2d 732, 10 Ill.2d 198—La Salle Nat. Bank v. City of Chicago, 126 N.E.2d 643, 6 Ill.2d 22—People v. Ericsson, 105 N.E. 315, 263 Ill. 263, L.R.A.1915D 607, Ann.Cas.1915C 183.

Kan.—Heckman v. City of Independence, 274 P. 732, 127 Kan. 658.

Mich.—Highland Oil Corp. v. City of Lathrup Village, 85 N.W.2d 185, 349 Mich. 650.

N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577.

Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 554—Phillips v. City of Paterson, 66 A.2d 65, 3 N.J.Super. 281.

Hazley v. Jersey City, 157 A. 251, 9 N.J.Misc. 1118—Priscell v. City of East Orange, 136 A. 803, 5 N.J.Misc. 434.

Or.—Berger v. City of Salem, 284 P. 273, 131 Or. 674.

Pa.—Dave Reese Olds, Inc. v. Haverford Tp., Com.Pl., 40 Del.Co. 157—Murphy v. Abington Tp., Com.Pl., 67 Montg.Co. 259—Appeal of Mattel, Com.Pl., 92 Pittsb.Leg.J. 313.

Tex.—McEachern v. Town of Highland Park, 73 S.W.2d 487, 124 Tex. 1—Lombardo v. City of Dallas, 73 S.W.2d 475, 124 Tex. 1.

Scott v. Champion Bldg. Co., Civ. App., 28 S.W.2d 178.

Fact that property would have a much greater value if used as a gasoline service station site than if devoted to residential purposes was insufficient reason for upsetting municipal zoning ordinance placing property in a residential classification.

Ill.—Fox v. City of Springfield, 139 N.E.2d 732, 10 Ill.2d 198.

Mich.—Anderson v. City of Holland, 74 N.W.2d 394, 344 Mich. 706.

Failure to enforce ordinance prohibiting location or maintenance of a gasoline filling station within a residential district as against filling station which had been located and maintained on a lot within a residential district for many years since adoption of ordinance did not render ordinance inapplicable or void as to such lot.

Ill.—Gore v. City of Carlinville, 137 N.E.2d 368, 9 Ill.2d 296.

Garage permitted only if part of main building

Zoning ordinance permitting storage garages in apartment districts only if constructed as part of main building is not invalid.

Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

Commercial lot not adequate

Where when oil company purchased additional lot it was zoned for apartment or residential use and immediate neighborhood was devoted to such use and neighborhood since passage of zoning ordinance had not radically changed and all that company had shown was that original lot as now improved and which was zoned for commercial use was not adequate for conduct of a filling station and that if company were permitted to erect a modern station on both lots, assessed value thereof would be increased, application of zoning ordinance to additional lot was not invalid as denying due process but was proper exercise of police power.

U.S.—Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.

Restriction invalid as applied

(1) A zoning ordinance which restricted use of plaintiff's lots to residential use and prevented erection of service station was invalid where property was located at intersection of busy highways, two other corners were used for service stations, and property was not suitable for residential purposes.

Mich.—Hering v. City of Royal Oak, 40 N.W.2d 133, 326 Mich. 232.

(2) So, where probability of use of property for residential purposes had been virtually destroyed by prior acquisitions for highway and utility purposes, and property was located at busily traveled intersection, both roads of which formed access highways to state turnpike, and two corners of intersection were used for gasoline filling stations as conforming uses, owners of property had clear legal right to erect gasoline filling station on premises, notwithstanding residential zoning classification.

Ohio.—State ex rel. Rosenthal v. City of Bedford, App., 134 N.E.2d 727.

(3) Where decision of board of zoning appeals denied owner a variance in use of residentially zoned property located on busy state highway so as to permit erection of filling station thereon, ordinance precluded owner's use of property for any purpose to which it was reasonably adapted and was unconstitutional as applied to owner.

Ind.—Town of Homecroft v. Macbeth, 148 N.E.2d 563.

1. N.J.—Albright v. Johnson, 50 A. 2d 399, 135 N.J.Law 70—Citizens Nat. Bank of Englewood v. City of Englewood, 24 A.2d 819, 128 N.J.Law 147.

N.Y.—Suburban Tire & Battery Co. v. Village of Mamoroneck, 104 N.Y.S. 2d 850, affirmed 113 N.Y.S.2d 449, 279 App.Div. 1084.

Retail shopping district

Ill.—Rothschild v. Hussey, 5 N.E.2d 92, 364 Ill. 557.

Storage and parking of trucks in commercial zone

Zoning ordinance giving city zoning board of adjustment discretion to refuse a certificate permitting use of realty in a "A" commercial zone for storage and parking of trucks is not an unconstitutional delegation of police power to board.

Pa.—Katzin v. McShain, 89 A.2d 519, 371 Pa. 251.

2. N.J.—Salisbury v. Borough of Ridgely, 60 A.2d 877, 137 N.J. Law 515.

3. Ala.—Bloch v. McCown, 135 So. 633, 223 Ala. 348.

N.J.—Barry, Inc., v. Board of Adjustment of City of Newark, 75 A.2d 752, 9 N.J.Super. 529.

N.Y.—Aloe v. Dassler, 106 N.Y.S.2d 24, 278 App.Div. 975, affirmed 105 N.E.2d 104, 303 N.Y. 878—Eckerman v. Murdock, 94 N.Y.S.2d 557, 276 App.Div. 927.

Wike v. Herms, 61 N.Y.S.2d 244, 187 Misc. 111.

stations and garages as a commercial use in commercial,⁴ industrial,⁵ or multiple family residential⁶ districts. An ordinance which prohibits the erection of further filling stations in a single block, where a specified number of such stations are already in operation, is invalid.⁷

In exercising its zoning power, a municipality may reserve the authority to control the location of garages and filling stations in parts of the city from which they are not excluded by the zoning ordinance.⁸ So, the municipality may validly prohibit the construction or maintenance of filling stations and garages within a specified distance of similar buildings and structures,⁹ or certain other buildings and structures such as schools, theatres, churches, or

residences,¹⁰ or on a portion of a street on which such a building is located.¹¹ A municipality may not waive such requirement with respect to a particular lot merely because of a desire to satisfy the owner of the lot.¹²

§ 60. — Signs and Billboards

A zoning ordinance may regulate or prohibit the use of signs and billboards.

A zoning ordinance may reasonably regulate or prohibit the use of signs¹³ and billboards.¹⁴ The validity of such a regulation must be determined by considering it in connection with the circumstances and the locality,¹⁵ and as an exercise of the police

N.Y.—Sibek v. Sahm, 132 N.Y.S.2d 596.

Okl.—Weaver v. Bishop, 52 P.2d 853, 174 Okl. 492.

4. Tenn.—White v. Henry, 285 S.W. 2d 353, 199 Tenn. 219.

5. N.J.—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A. 2d 752, 9 N.J.Super. 529.

6. Fla.—Parking Facilities, Inc. v. City of Miami Beach, 88 So.2d 141.

Multiple level parking garage
Fla.—Parking Facilities, Inc. v. City of Miami Beach, *supra*.

7. Pa.—Coane v. City of Philadelphia, 16 Pa.Dist. & Co. 159.

8. Md.—Kramer v. Mayor and City Council of Baltimore, 171 A. 70, 166 Md. 324.

9. N.J.—O'Connor v. Mayor and Council of Borough of North Arlington, 65 A.2d 127, 1 N.J.Super. 638.

On heavily traveled highway

Where highway was a segment of state highway route, one of main and heavily traveled highways in state, resolution of borough council and mayor that there shall be a thousand feet between gasoline service stations on such highway was not invalid.

N.J.—O'Connor v. Mayor and Council of Borough of North Arlington, *supra*.

10. Md.—Jones v. MacWilliams, 197 A. 319, 173 Md. 669—Kramer v. Mayor and City Council of Baltimore, 171 A. 70, 166 Md. 324.

N.J.—Vine v. Board of Adjustment of Village of Ridgewood, 56 A.2d 122, 136 N.J.Law 416—Sun Oil Co. v. Borough of Bradley Beach, 55 A. 2d 778, 136 N.J.Law 307, affirmed 61 A.2d 236, 137 N.J.Law 658.

Eggie v. Board of Com'rs of Borough of Audubon, 143 A. 747, 6 N.J.Misc. 1094—Savitz-Denbigh Co. v. Bigelow, 137 A. 439, 5 N.J. Misc. 533—Johnston v. Hague, 136

A. 407, 2 N.J.Misc. 77—Hartman v. Bigelow, 136 A. 201, 5 N.J.Misc. 227—Jersey Land Co. v. Scott, 135 A. 462, 5 N.J.Misc. 61—M. & G. Const. Co. v. Board of Com'rs of Jersey City, 134 A. 776, 4 N.J.Misc. 864—Savitz-Denbigh Co. v. Bigelow, 134 A. 557, 4 N.J.Misc. 819, affirmed 140 A. 921, 104 N.J.Law 445—Wittkop v. Garner, 132 A. 339, 4 N.J.Misc. 234.

N.Y.—Joyce v. Dobson, 8 N.Y.S.2d 768, 255 App.Div. 348—People ex rel. Jane David Holding Corporation v. Murdock, 268 N.Y.S. 662, 241 App.Div. 625, affirmed 191 N.E. 588, 264 N.Y. 609—In re Peck, 246 N. Y.S. 280, 231 App.Div. 99, affirmed 177 N.E. 186, 256 N.Y. 669.

Ohio.—Lavin v. Barbini, App., 88 N. E.2d 417.

Pa.—Huetsch v. Grove, 16 Pa.Dist. & Co. 86, 23 Berks Co. 154.

38 C.J. p 74 notes 19-22.

Intent

City ordinance providing that no part of filling station, bus terminal, etc., shall be within three hundred feet of lot line of plot on which is located building used as a theater, etc., or used as a church, etc., was not only intended to avoid traffic hazards in area where pedestrians converge on place of assemblage, but also risk of fire, and in case of a church, noises and interruptions that would interfere with worship and comfort and quiet of worshippers.

N.J.—Vine v. Board of Adjustment of Village of Ridgewood, 56 A.2d 122, 136 N.J.Law 416.

Entrance or exit of playground

N.Y.—Suburban Tire & Battery Co. v. Village of Mamoroneck, 104 N.Y. S.2d 850, affirmed 113 N.Y.S.2d 449, 279 App.Div. 1084.

Residential district

Municipality may validly prohibit entrances or exits to such businesses within a specified distance of a residential district.

Ohio.—Lavin v. Barbini, App., 88 N.E. 2d 417.

11. N.Y.—Boyd v. Walsh, 216 N.Y.S. 242, 217 App.Div. 461, affirmed People ex rel. Boyd v. Walsh, 155 N.E. 877, 244 N.Y. 512.

12. Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 538, 191 Md. 632.

13. Pa.—Dobison v. Zoning Bd. of Adjustment, 87 Pa.Dist. & Co. 172.

In residential districts

(1) Zoning ordinance excluding advertising signs from residence districts was held within city's powers. Pa.—Appeal of Liggett, 139 A. 619, 291 Pa. 109.

(2) So, a municipal ordinance prohibiting placing of advertising signs in any certain residential area with exception of signs not exceeding one foot square for physicians, dentists, or similar professions has been held a valid exercise of police power.

Ill.—McGuire v. Purcell, 129 N.E.2d 598, 7 Ill.App.2d 407.

(3) Fact that plaintiff's business as a public accountant was lawful, inoffensive, and dignified was not ground for invalidating a general zoning ordinance in so far as it prohibited plaintiff from maintaining a sign advertising business in front of plaintiff's dwelling house.

Cal.—Kort v. City of Los Angeles, 127 P.2d 66, 52 C.A.2d 804.

14. Pa.—Silver v. Zoning Bd. of Adjustment, 112 A.2d 84, 381 Pa. 41.

Separate classification justified

Unique nature of outdoor advertising and nuisance fostered by billboards and other similar structures located by persons in business of outdoor advertising justify separate classification of such structures for purposes of municipal regulation and restriction.

N.J.—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.

15. Conn.—Murphy, Inc. v. Town of Westport, 40 A.2d 177, 131 Conn. 292, 156 A.L.R. 568.

power and not of the power of eminent domain.¹⁶ So, a prohibition of, or restriction on, the erection of billboards and signs on private property, in so far as they constitute a menace to public safety or welfare, may be valid¹⁷ and not objectionable as a taking of property without compensation,¹⁸ although the removal or destruction of structures existing before the enactment and not constituting nuisances per se cannot be compelled without compensation.¹⁹ Unless the public safety or welfare is endangered, however, regulations which so restrict the use of private property are invalid²⁰ as an attempt to take the property for public use without compensation.²¹

It has been held that the mere fact that such a regulation makes an exception as to a sign or billboard which refers to a business conducted on the property on which it stands does not render it invalid as discriminatory,²² or as designed to protect

local business.²³

§ 61. — Trailer Parks or Camps

Generally speaking, the regulation and restriction of trailer parks or camps by a municipality is a legitimate exercise of the police power.

Generally speaking, the regulation and restriction of trailer parks or camps by a municipality is a legitimate exercise of the police power.²⁴ Zoning regulations prohibiting trailer parks or camps within a municipality,²⁵ or within certain districts within the municipality,²⁶ have been held valid, as against various objections, such as that they are not within the scope of enabling zoning statutes,²⁷ have no reasonable relation to the preservation of the public health, safety, and morals,²⁸ contravene federal and state constitutional provisions,²⁹ or conflict with general state laws regulating such camps.³⁰

16. Okl.—Gibbons v. Missouri, K. & T. R. Co., 285 P. 1040, 142 Okl. 146.

17. Iowa.—Stoner McCray System v. City of Des Moines, 78 N.W.2d 843, 247 Iowa 1313.

N.J.—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.

Regulation limiting size of commercial signs to forty square feet has been held valid.

Fla.—Merritt v. Peters, 65 So.2d 861.

18. Ind.—General Outdoor Advertising Co. v. City of Indianapolis, Department of Public Parks, 172 N.E. 309, 202 Ind. 85, 72 A.L.R. 453.

30 C.J. p 523 note 58.

19. Ind.—General Outdoor Advertising Co. v. City of Indianapolis, Department of Public Parks, supra. Iowa.—Stoner McCray System v. City of Des Moines, 78 N.W.2d 843, 247 Iowa 1313.

Beyond power of municipality

Where zoning statute expressly provides that nonconforming uses may be continued, it is beyond power of municipality to limit statutory right to continue nonconforming use.

N.J.—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.

20. N.J.—United Advertising Corp. v. Board of Adjustment of Maplewood Tp., 56 A.2d 406, 136 N.J. Law 336.

Pa.—Dobison v. Zoning Bd. of Adjustment, 87 Pa. Dist. & Co. 172.

Prohibition in heavy and light industrial zones

Where heavy industrial zone was devoted to practically all uses except residential, retail, or local business and nuisances per se, and where light industrial zone was devoted to manufacturing of products, regard-

less of where sold, and ordinance prohibited uses which in general would be obnoxious or offensive by reason of emission of odor, dust, smoke, gas, or noise, provision of zoning ordinance prohibiting erection of billboards in heavy and light industrial zones was inconsistent with principle on which establishment of such zones was based, and was invalid.

Ohio.—Central Outdoor Advertising Co. v. Village of Evendale, Ohio, Com.Pl., 124 N.E.2d 189.

Fact that sign does not relate to premises to which it is an accessory but is to be erected by a lessee of roof to direct public to its establishment several blocks away does not justify refusal to permit erection, since owner's right to use his land for advertising purposes is a property right which may be transferred by lease, lessee acquiring same rights in kind and degree as owner.

Pa.—Dobison v. Zoning Bd. of Adjustment, 87 Pa. Dist. & Co. 172.

21. N.J.—Passaic v. Paterson Bill Posting Co., 62 A. 267, 72 N.J. Law 285.

20 C.J. p 523 note 59.

22. Conn.—Murphy, Inc., v. Town of Westport, 40 A.2d 177, 131 Conn. 292, 156 A.L.R. 568.

A business sign is a part of business itself, and authority to conduct business in a municipal zoning district carries with it right to maintain business sign on premises, subject to reasonable regulations by municipality.

N.J.—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.

23. N.J.—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.

24. Iowa.—Huff v. City of Des

Moines, 56 N.W.2d 54, 244 Iowa 89.

25. Ohio.—Davis v. McPherson, App., 132 N.E.2d 626, appeals dismissed Billman v. McPherson, 130 N.E.2d 342, 164 Ohio St. 296, and Davis v. McPherson, 130 N.E.2d 794, 164 Ohio St. 375.

26. Iowa.—Huff v. City of Des Moines, 56 N.W.2d 54, 244 Iowa 89.

Public camping ground for private gain may be prohibited in certain zones.

Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

Residential districts

Municipalities may exclude trailer parks from residential districts by proper zoning regulations.

Mich.—Stevens v. Royal Oak Tp., Oakland County, 68 N.W.2d 787, 342 Mich. 105.

27. Ohio.—Davis v. McPherson, App., 132 N.E.2d 626, appeals dismissed Billman v. McPherson, 130 N.E.2d 342, 164 Ohio St. 296, and Davis v. McPherson, 130 N.E.2d 794, 164 Ohio St. 375.

28. Ohio.—Davis v. McPherson, App., 132 N.E.2d 626, appeals dismissed Billman v. McPherson, 130 N.E.2d 342, 164 Ohio St. 296, and Davis v. McPherson, 130 N.E.2d 794, 164 Ohio St. 375.

29. Ohio.—Davis v. McPherson, App., 132 N.E.2d 626, appeals dismissed Billman v. McPherson, 130 N.E.2d 342, 164 Ohio St. 296, and Davis v. McPherson, 130 N.E.2d 794, 164 Ohio St. 375.

30. Ohio.—Davis v. McPherson, App., 132 N.E.2d 626, appeals dismissed Billman v. McPherson, 130 N.E.2d 342, 164 Ohio St. 296, and Davis v. McPherson, 130 N.E.2d 794, 164 Ohio St. 375.

Under particular circumstances, however, zoning regulations prohibiting trailer parks or camps within a municipality,³¹ or within certain districts within a municipality,³² have been held invalid as not bearing a substantial relation to the protection of the public health, safety, and morals. Moreover, zoning ordinances cannot lawfully compel persons who had incurred substantial expenditures in purchasing and installing trailer parks to move to new locations and to force those who had established trailers on their own land to move them to trailer parks and to pay rent to the owners of those parks, thus destroying vested rights.³³

31. Mich.—*Smith v. Building Inspector for Plymouth Tp.*, 77 N.W. 2d 332, 346 Mich. 57.

Where landowner's thirty-three acres of land were located in open country, and it was not contended that establishment of trailer camps on such land at this time would be detrimental to public health, safety, morals, and general welfare, ordinances zoning land as two-family residential, country home and general industrial zones, and forbidding establishment of trailer camps were unconstitutional and void as applied to landowner, although his land might in future be used for industrial purposes.

Mich.—*Gust v. Canton Tp.*, 70 N.W.2d 772, 342 Mich. 436.

32. Mich.—*Clark v. Joslin*, 82 N.W. 2d 433, 348 Mich. 173.

Ordinance void as applied

Where plaintiff's eighty acres was at least two miles from the nearest populated area, contained railroad mainline, and was located in agrarian area, and it was not shown that establishment of trailer camp on such land would be detrimental to public health, safety, morals, or general welfare, zoning ordinance, which outlawed trailer camps in most of sections of city and restricted permitted use of plaintiffs' land to farming, agricultural, or residential purposes and uses incidental thereto, and which would forbid establishment of house trailer camp which plaintiff sought to construct, was void as applied to plaintiffs with respect to such camp.

Mich.—*Clark v. Joslin*, supra.

33. N.H.—*City of Manchester v. Webster*, 128 A.2d 924, 100 N.H. 409.

34. N.Y.—*People v. Calvar Corp.*, 69 N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

35. Mich.—*Buckley v. City of*

Bloomfield Hills, 72 N.W.2d 210, 343 Mich. 83.

Keeping residential land hilly

There is no possible relationship to public health, safety, morals, or general welfare by a municipal regulation under police power that land zoned for residential purposes shall be kept hilly rather than made flat.

Mich.—*Buckley v. City of Bloomfield Hills*, supra.

36. Cal.—*Ex parte Angelus*, 150 P.2d 908, 65 C.A.2d 441.

Ordinance requiring owner to secure permit to make excavation in property, except an excavation for foundation for erection of a building for which a building permit has been issued, is valid as a proper exercise of police power.

Cal.—*Ex parte Angelus*, supra.

37. Va.—*West Bros. Brick Co. v. City of Alexandria*, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S. Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

Public nuisance

Deep excavation of clay in village which filled with water constituted a hazard and was a "public nuisance," authorizing imposition of zoning regulation excluding such use of property from residential district.

N.Y.—*Post Brick Co. v. Thompson*, 68 N.Y.S.2d 159.

38. Mass.—*Town of Billerica v. Quinn*, 71 N.E.2d 235, 320 Mass. 687 —*Town of Burlington v. Dunn*, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S. Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

N.J.—*Fred v. Mayor and Council of Borough of Old Tappan*, 85 A.2d 317, 17 N.J.Super. 153, affirmed 92 A.2d 478, 10 N.J. 515.

N.Y.—*People v. Sessano*, 29 N.Y.S.2d 45, 176 Misc. 723.

Relation to public welfare

(1) Facts that removal of loam in

§ 62. — Land Apart from Structures

A municipality in the exercise of its zoning powers may properly regulate the use of land apart from structures, provided that the regulation bears a substantial relationship to the public health, safety, morals, or general welfare, and may prohibit or restrict excavation operations, or the removal of soil, sand and gravel, stone or rock, and other uses of land.

A municipality in the exercise of its zoning powers may properly regulate the use of land apart from structures³⁴ provided that the regulation bears a substantial relationship to the public health, safety, morals, or general welfare.³⁵ It has been held that a zoning regulation may properly prohibit or restrict the use of land apart from structures for the purpose of excavation operations³⁶ in clay beds,³⁷ or its use for the removal of soil or loam,³⁸ sand and gravel,³⁹

residential area commonly left land almost valueless, that effect of such waste would permanently depress values of other lands in neighborhood, and that town must continue to maintain roads and public services past such blighted areas notwithstanding taxable values were destroyed and development retarded, concerned public welfare in sense of constitutional amendment in effect authorizing reasonable regulation of use of vacant lands for public welfare.

Mass.—*Town of Burlington v. Dunn*, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S. Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

(2) In a fast growing community of millions of people greater care must be taken to protect health and welfare of individual than in areas less densely populated, and, therefore, a restriction on removal of top soil in a densely populated area may be a proper exercise of police power, although it might not be such in other areas.

N.Y.—*People v. Sessano*, 29 N.Y.S.2d 45, 176 Misc. 723.

Prior removal

Bylaw of town, enacted under statute conferring on towns power to pass zoning bylaws but providing that they shall not apply to existing use of any land to extent to which it is used at time of adoption of bylaw, is not unconstitutional in its application to owner of tract who had stripped loam from a small portion of land, although bylaw was construed to forbid him from stripping any more of land.

Mass.—*Town of Billerica v. Quinn*, 71 N.E.2d 235, 320 Mass. 687.

39. N.Y.—*People v. Calvar Corp.*, 69 N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

Regulation of business

It is proper for a municipality, through a zoning ordinance, to regu-

or stone or rock,⁴⁰ or for drilling a water well;⁴¹ and a regulation may forbid the use of land in a certain district for a public or private dump.⁴²

On the other hand, it has been broadly stated that zoning may not be employed to prevent an owner from taking earth products from his land;⁴³ and regulations prohibiting or restricting excavation operations,⁴⁴ or the removal of top soil,⁴⁵ or sand and gravel⁴⁶ have, under particular circumstances, been held invalid. Thus, to the extent that the owner of subsurface minerals can effectively mine

them without any interference of any kind with normal surface uses and living, a zoning ordinance prohibiting subsurface mining has been held unconstitutional as not founded on any public need.⁴⁷

Oil production. The business of operating oil and gas wells may be prohibited,⁴⁸ or regulated and restricted,⁴⁹ within certain districts, if reason appears for so doing. However, regulations exceeding constitutional limitations and not reasonably necessary to promote the general welfare of the community have been held invalid.⁵⁰

late sand and gravel pit business with respect to natural water courses, natural drainage, flying dust and rocks, grading, and hours of operation, even though such regulation affects private interest, since such interest must yield to public good.

N.Y.—Town of Somers v. Camarico, 126 N.Y.S.2d 154, modified on other grounds 135 N.Y.S.2d 42, 284 App.Div. 979, affirmed 127 N.E.2d 327, 308 N.Y. 537, motion denied 128 N.E.2d 813, 309 N.Y. 772.

Treatment of product in residential district

If a sand pit or quarry is in a residential district, owner may be prevented from treating product in that place.

Conn.—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

40. Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.

In residential area

Prohibition of stone quarrying on an area of two hundred seventy acres owned by defendants, which was part of an area of one thousand two hundred fifty acres classified as residential, was a proper subject for zoning restriction.

Tenn.—Davidson County v. Rogers, supra.

Distance from "road"; validity of decision as to particular road

Under an ordinance permitting quarries in a limited industrial zone conditioned on issuance of permit and providing that no part of any of use shall be conducted within four hundred feet from nearest right of way "of any public road or highway now maintained by public authority," where a road was a mere paper way, and not a reality, municipality's decision that such road did not and would not need protection as a public road or highway maintained by public authority was unassailable.

N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

Duty to provide buffer

An ordinance permitting quarrying in a certain zone and recognizing

potential nuisance unless operation is isolated should require quarry operator to provide necessary buffer and not cast burden on neighboring property owner.

N.J.—Kozesnik v. Montgomery Tp., supra.

Land more valuable as rock quarry

Fact that land, which was capable of being used for rock quarry, but which was included within residential district by zoning ordinance which prohibited removal of rock from land, was worth considerably more as a quarry than as a residential site would not invalidate zoning ordinance.

N.Y.—New York Trap Rock Corp. v. Town of Clarkstown, 149 N.Y.S.2d 290, 1 A.D.2d 890, affirmed 144 N.E.2d 725, 3 N.Y.2d 844, 166 N.Y.S.2d 82.

41. Cal.—Sunny Slope Water Co. v. City of Pasadena, 33 P.2d 672, 1 C.2d 87.

Commercial water well and pumping plant is commercial use, and may properly be excluded from residence zone by zoning ordinance.

Cal.—Sunny Slope Water Co. v. City of Pasadena, supra.

42. Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

43. Conn.—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

44. Cal.—People v. Hawley, 279 P. 136, 207 C. 395.

In residential district

Cal.—People v. Hawley, supra.

45. N.Y.—Lizza & Sons, Inc. v. Town of Hempstead, 23 N.Y.S.2d 811, 175 Misc. 383—Town of Harrison v. Sunny Ridge Builders, 8 N.Y.S.2d 632, 170 Misc. 161.

Not authorized by statute

A bylaw of town prohibiting removal, without permit, of sand and loam from premises on certain conditions is not authorized by statute giving towns authority to make bylaws for directing and managing their prudential affairs, preserving

peace and good order, and maintaining their internal police, and is void.

Mass.—Town of North Reading v. Drinkwater, 34 N.E.2d 631, 309 Mass. 200.

46. U.S.—Village of Terrace Park v. Errett, C.C.A.Ohio, 12 F.2d 240, certiorari denied 47 S.Ct. 100, 273 U.S. 710, 71 L.Ed. 852.

47. Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

48. Cal.—Pacific Palisades Association v. City of Huntington Beach, 237 P. 538, 196 C. 211, 40 A.L.R. 782.

In residential districts

U.S.—Cromwell-Franklin Oil Co. v. Oklahoma City, D.C.Okl., 14 F. Supp. 370.

49. Okl.—Ptak v. City of Oklahoma City, 229 P.2d 567, 204 Okl. 336—Gruger v. Phillips Petroleum Co., 135 P.2d 485, 192 Okl. 259—Gant v. City of Oklahoma City, 6 P.2d 1065, 150 Okl. 86, 86 A.L.R. 794.

Prohibition of new wells or redrilling of old beyond present level

City ordinance which expressly permitted operation of existing oil wells as nonconforming use, and which permitted redrilling of existing wells to present level to improve their production, but which forbade drilling of new wells or redrilling of old wells to depths beyond present level, was not void as to oil company having nonconforming use.

Cal.—Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865, 40 C.2d 552.

Ordinance enacted after drilling

Ordinance regulating drilling of oil wells within municipality was held binding on defendant notwithstanding ordinance was not enacted until after defendant had commenced drilling.

Okl.—Hud Oil & Refining Co. v. Oklahoma City, 30 P.2d 169, 167 Okl. 457—C. C. Julian Oil & Royalties Co. v. Oklahoma City, 29 F.2d 952, 167 Okl. 384.

50. Cal.—Sindell v. Smutz, 222 P.2d 903, 100 C.A.2d 10.

§ 63. — Nonconforming Use

Zoning laws and regulations may validly provide for the continuance of existing buildings and uses not in conformity with the restrictions made applicable to the particular district, and, as a general rule, may not operate to restrict or remove nonconforming buildings and uses.

Zoning laws and regulations providing for the continuance of existing buildings and uses not in conformity with the restrictions made applicable to a particular district have been held not invalid,⁵¹ and alterations, enlargement, or replacement of such

buildings may properly be permitted.⁵² To exempt buildings and lands already devoted to a particular use from a prohibition against such use in a specified area is not an unlawful discrimination invalidating the law or regulation,⁵³ provided that there is a reasonable basis therefor.⁵⁴

Indeed, as a general rule, zoning laws and regulations may not operate to restrict or remove existing buildings and uses not in conformity with the restrictions applicable to the district,⁵⁵ at least

51. Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683.
Iowa.—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356.
Kan.—City of Norton v. Hutson, 46 P.2d 630, 142 Kan. 305.
La.—Sampere v. City of New Orleans, 117 So. 827, 166 La. 776, affirmed 49 S.Ct. 262, 279 U.S. 812, 73 L.Ed. 971—State ex rel. Mannheim v. Harrison, 114 So. 159, 164 La. 564.
Miss.—Jones v. City of Hattiesburg, 42 So.2d 717, 207 Miss. 491.
N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.
N.J.—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.
N.Y.—People v. Sudierfi Realty Corp., 101 N.Y.S.2d 793.
Pa.—Appeal of Peirce, Com.Pl., 16 Beaver 244—Appeal of Pierce, Com.Pl., 47 Mun.L.R. 65.

Amelioration of hardship

A city, given right by constitution to zone property in interest of public health, safety, convenience, comfort, and general welfare, may attach conditions ameliorating hardship arising on exercise of its rights and provide that property previously occupied for purposes conflicting with general view of community's welfare when zoning ordinance is passed may continue to be occupied for nonconforming use.

- Ohio.—Francisco v. City of Columbus, App., 31 N.E.2d 236, rehearing denied 31 N.E.2d 243, appeal dismissed 18 N.E.2d 404, 134 Ohio St. 526.

52. Mass.—Spector v. Milton Bldg. Inspector, 145 N.E. 265, 250 Mass. 63.

- R.I.—Baggs v. Zoning Bd. of Review of Town of Barrington, 86 A.2d 658, 79 R.I. 211.

Statute held not restrictive

A statute limiting the zoning power of municipalities so as to protect nonconforming uses does not prevent municipality from permitting broader nonconforming uses by a provision that existing buildings devoted to a nonconforming use may be altered and use changed to any

use not more detrimental to character of district in which it is situated.

- Mass.—LaMontagne v. Kenney, 193 N.E. 9, 288 Mass. 363.

53. Cal.—Magruder v. Redwood City, 265 P. 806, 203 C. 665.

- Ga.—Schofield v. Bishop, 16 S.E.2d 714, 192 Ga. 732.

- Iowa.—Marquis v. City of Waterloo, 228 N.W. 870, 210 Iowa 439.

- La.—Sampere v. City of New Orleans, 117 So. 827, 166 La. 776, affirmed 49 S.Ct. 262, 279 U.S. 812, 73 L.Ed. 971.

- Mass.—Spector v. Building Inspector of Milton, 145 N.E. 265, 250 Mass. 63.

- Okl.—Baxley v. City of Frederick, 271 P. 257, 133 Okl. 84.

- S.C.—Momeier v. John McAlister, Inc., 27 S.E.2d 504, 203 S.C. 353.

- Tenn.—Spencer-Sturla Co. v. City of Memphis, 290 S.W. 608, 155 Tenn. 70.

- 43 C.J. p 343 note 57.

Offensive industry

City is not required to permit an offensive industry to operate in a particular district because another such industry was operating therein before passage of zoning ordinance and continues thereafter as a nonconforming use.

- Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 338, error dismissed, judgment correct.

54. Ordinance unreasonable and unlawfully discriminatory

An ordinance prescribing a certain district in which no junk business shall be established or maintained, with a proviso that it shall not apply to any junk shops already conducted or maintained in district is void as unreasonable and unlawfully discriminatory where it appeared that traffic in junk had become centralized in restricted locality, there was no attempt to exclude it from other localities and validity of ordinance was not defended as an exercise of police power.

- Mich.—Weadock v. Judge Detroit Recorder's Ct., 120 N.W. 991, 156 Mich. 376, 132 Am.S.R. 527, 16 Ann.Cas. 720.

55. Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

- Idaho.—O'Connor v. City of Moscow, 202 P.2d 401, 69 Idaho 37, 9 A.L.R. 2d 1031.

- Ill.—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

- Village of Skokie v. Almendinger, 126 N.E.2d 421, 5 Ill.App.2d 522—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

- Ky.—Standard Oil Co. v. City of Bowling Green, 50 S.W.2d 960, 244 Ky. 362, 86 A.L.R. 648.

- Md.—Board of Zoning Appeals of Howard County v. Meyer, 114 A.2d 626, 207 Md. 389—Roach v. Board of Zoning Appeals, 199 A. 812, 175 Md. 1.

- Mich.—Austin v. Older, 278 N.W. 727, 283 Mich. 667.

- Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205.

- N.H.—City of Manchester v. Webster, 128 A.2d 924, 100 N.H. 409.

- N.J.—Atlantic City v. Le Beck, 11 A.2d 602, 124 N.J.Law 310, affirmed 15 A.2d 653, 125 N.J.Law 373.

- N.Y.—Town of Somers v. Camarco, 127 N.E.2d 327, 308 N.Y. 537—People v. Miller, 106 N.E.2d 34, 304 N.Y. 105.

- Harbison v. City of Buffalo, 169 N.Y.S.2d 598, 4 A.D.2d 999—Elsignore Property Owners Ass'n v. Morwand Homes, 146 N.Y.S.2d 78, 286 App.Div. 1105—Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 App.Div. 551.

- Henning v. Goldman, 169 N.Y.S. 2d 817, 8 Misc.2d 228—Application of Rogers, 144 N.Y.S.2d 869, 208 Misc. 785—Curtiss-Wright Corp. v. Incorporated Village of Garden City, 57 N.Y.S.2d 377, 185 Misc. 508, reversed on other grounds 61 N.Y.S.2d 678, 270 App.Div. 936, affirmed 72 N.E.2d 26, 296 N.Y. 839—Boardwalk & Seashore Corporation v. Murdock, 22 N.Y.S.2d 611, 175 Misc. 208, affirmed 26 N.Y.S.2d 319, 261 App.Div. 813, reargument denied 27 N.Y.S.2d 431, 261 App.Div. 972, affirmed 36 N.E.2d 678, 286 N.Y. 494.

where such buildings and uses are not nuisances,⁵⁶ and were in existence prior to the effective date of any zoning law or regulation,⁵⁷ and their restriction or removal is not justified as promoting the public health, morals, safety, or welfare.⁵⁸ Any attempt

to deprive the owner of the preëxisting use is generally regarded as unconstitutional as a taking of private property without compensation⁵⁹ and without due process of law,⁶⁰ at least, where the pre-

Town of Somers v. Camarco, 126 N.Y.S.2d 154, modified on other grounds 135 N.Y.S.2d 42, 284 App. Div. 979, affirmed 127 N.E. 327, 308 N.Y. 537, motion denied 128 N.E.2d 813, 309 N.Y. 772—People ex rel. Dassler v. Bellizzi, 53 N.Y. S.2d 2—People, on Complaint of Kelly, v. Shell, 26 N.Y.S.2d 188—People v. Giorgi, 16 N.Y.S.2d 923. N.C.—Town of Clinton v. Ross, 40 S.E.2d 593, 226 N.C. 682.

Ohio.—Schick v. Ghent Road Inn, App., 132 N.E.2d 479.

S.C.—James v. City of Greenville, 88 S.E.2d 661, 227 S.C. 565.

Tex.—Corpus Juris Secundum quoted in Christi v. Allen, 254 S.W.2d 759, 761, 152 Tex. 137.

Wash.—State v. MacDuff, 297 P. 733, 161 Wash. 600, followed in 297 P. 733, 161 Wash. 703.

Wis.—State ex rel. Schroedel v. Pagels, 43 N.W.2d 349, 257 Wis. 376—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358.

Destruction of substantial businesses or structures developed or built prior to adoption of a zoning ordinance is not deemed to be balanced or justified by advantage to public, in terms of more complete and effective zoning, accruing from cessation of such uses.

N.Y.—People v. Miller, 106 N.E.2d 34, 304 N.Y. 105.

Town of Somers v. Camarco, 126 N.Y.S.2d 154, modified on other grounds 135 N.Y.S.2d 42, 284 App. Div. 979, affirmed 127 N.E. 327, 308 N.Y. 537, motion denied 128 N.E.2d 813, 309 N.Y. 772.

Statutory authority, together with franchises granted by town, gave right to erect and maintain gas manufacturing plant in town subject to regulation, which could not be nullified by town zoning ordinance enacted after granting of such franchises.

N.Y.—Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 App. Div. 551.

Hospitals for insane

Ordinance zoning hospitals for insane within certain districts, although valid as to additional hospitals, was invalid as applied to sanitariums within district annexed to city and excluded from permitted area.

Cal.—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C.

778, Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777.

56. Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778, and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777.

Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

Tex.—Corpus Juris Secundum quoted in Christi v. Allen, 254 S.W.2d 759, 761, 152 Tex. 137.

Wash.—State v. MacDuff, 297 P. 733, 161 Wash. 600, followed in 297 P. 733, 161 Wash. 703.

57. Tex.—Allen v. City of Corpus Christi, Civ.App., 247 S.W.2d 130, affirmed City of Corpus Christi v. Allen, 254 S.W.2d 759, 152 Tex. 137.

Where a unique business activity was commenced on certain land prior to adoption of a zoning ordinance, and such activity was a valid and proper undertaking, and was continued to date as a protected interest of landowner, it was a use of which landowner could not be deprived by adoption of a zoning ordinance.

N.Y.—Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S. 2d 358.

Application for permit

Fact that a property owner had applied for a building permit prior to enactment of a zoning ordinance which would prohibit its grant, does not render ordinance invalid as to him where permit had not been granted and no construction had been begun.

Pa.—Hamilton v. Lemoyne Borough, 73 Pa.Dist. & Co. 406, 1 Cumb.L.J. 61.

58. Ill.—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

Village of Skokie v. Almendinger, 126 N.E.2d 421, 5 Ill.App.2d 522.

S.C.—James v. City of Greenville, 88 S.E.2d 661, 227 S.C. 565.

Tex.—Corpus Juris Secundum quoted in Christi v. Allen, 254 S.W.2d 759, 761, 152 Tex. 137.

Wash.—State v. MacDuff, 297 P. 733, 161 Wash. 600, followed in 297 P. 733, 161 Wash. 703.

59. Tex.—Allen v. City of Corpus Christi, Civ.App., 247 S.W.2d 130, affirmed City of Corpus Christi v.

Allen, 254 S.W.2d 759, 152 Tex. 137.

60. Idaho.—O'Connor v. City of Moscow, 202 P.2d 401, 69 Idaho 37, 9 A.L.R.2d 1031.

Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

Miss.—Jones v. City of Hattiesburg, 42 So.2d 717, 207 Miss. 491.

Ohio.—Kessler v. Smith, 142 N.E.2d 231, 104 Ohio App. 213, appeal dismissed Smith v. Village of Glenwillow, 146 N.E.2d 308, 167 Ohio St. 91.

Tex.—Allen v. City of Corpus Christi, Civ.App., 247 S.W.2d 130, affirmed City of Corpus Christi v. Allen, 254 S.W.2d 759, 152 Tex. 137.

Facts in existence at date of passage of zoning ordinance are only material factors to consider in determining whether application of ordinance to particular property would deprive owner of property without due process.

U.S.—Dennis v. Village of Tonka Bay, D.C.Minn., 64 F.Supp. 214, affirmed, C.C.A., 156 F.2d 672.

When right vests

(1) Right to utilize one's property to conduct a lawful business becomes entitled to constitutional protection against otherwise valid legislative restrictions as to locality by city's zoning ordinance, or becomes "vested" within full meaning of that term, when, prior to enactment of such restrictions, owner has in good faith substantially entered on performance of a series of acts necessary to accomplishment of end intended, and so where owner of residence had begun to convert his residence into a florist shop prior to enactment of zoning ordinance, he acquired a vested right.

Ky.—Darlington v. Board of Councilmen of City of Frankfort, 140 S.W. 2d 392, 282 Ky. 778.

(2) However, where at time of enactment of zoning ordinance proposed service station on land had not been constructed and one lease entered into with an oil company before enactment of ordinance was impossible of performance and a second lease entered into was after passage and effective date of ordinance, leases created no vested rights in landowners and ordinance as it applied did not violate due process of law.

Ind.—Lutz v. New Albany City Plan Commission, 101 N.E.2d 187, 230 Ind. 74.

existing use is not a nuisance or harmful to public health, safety, morals, or welfare.⁶¹

Necessary addition to, or a natural expansion of, a preëxisting use may also fall within the protection of the constitutional safeguards;⁶² and the fact that the law or regulation permits the continuance of the use of a building and merely bars the use of the land surrounding the building will not obviate the constitutional infirmity where the use of the surrounding land is essential to the conduct of the owner's business.⁶³

Under some circumstances, however, a zoning law or regulation may require the discontinuance of an existing nonconforming use.⁶⁴ Thus, enforcement of a zoning regulation against a prior nonconforming use or structure may be sustained where the

resulting loss to the owner is relatively slight and insubstantial.⁶⁵ This may be regarded as a corollary of the rule that an existing nonconforming use will be permitted to continue, if, and only if, enforcement of the ordinance would, by rendering valueless substantial improvements or businesses built up over the years, cause serious financial harm to the property owner.⁶⁶ This rule, with its emphasis on pecuniary and economic loss, is inapplicable to a purely incidental use of property for recreational or amusement purposes only.⁶⁷

Regulations providing for eventual liquidation or stoppage of expansion. Zoning laws and regulations have been held invalid and unconstitutional even though they do not call for the immediate liquidation of nonconforming uses but provide for their liquidation within a specified period of time.⁶⁸

Revocation of gasoline station permit deprived permittee of property without due process.
U.S.—City of Evansville, Ind., v. Gaseteria, Inc., C.C.A.Ind., 51 F. 2d 232.

Change of ownership

Provision of ordinance deeming any change of ownership of existing business in which pool, billiard, card, or dice game is played, or in which draft beer or liquor by the drink is sold, or in which any coin operated amusement device is maintained and operated, to be a new or additional business under other provisions prohibiting opening or operating within specified areas new businesses within ordinance, is unconstitutional as depriving owners of existing businesses of type involved in prohibited areas of property, without due process of law.

Idaho.—O'Connor v. City of Moscow, 202 P.2d 401, 69 Idaho 37, 9 A.L.R.2d 1031.

61. Idaho.—O'Connor v. City of Moscow, *supra*.

Ky.—Darlington v. Board of Councilmen of City of Frankfort, 140 S. W.2d 392, 232 Ky. 778.

Tex.—City of Corpus Christi v. Allen, 254 S.W.2d 759, 152 Tex. 137.

Junk yard in light industrial district

Where operators of automobile wrecking yards in light industrial district of city were operating prior to enactment of zoning ordinance of city, and nonconforming uses by operators of yards did not constitute a nuisance and did not appear to be harmful in any way to public health, safety, morals, or welfare, invoking ordinance to compel them to cease operating their business or to move to another district was a taking of property without due process of law.
Tex.—City of Corpus Christi v. Allen, *supra*.

62. Pa.—Molnar v. George B. Henne & Co., 105 A.2d 325, 377 Pa. 571.

Pontzer v. Borough of St. Marys, 69 Pa. Dist. & Co. 251.

Miller v. Zoning Bd. of Middletown Tp., Com.Pl., 2 Bucks Co. 237—Schuster v. Board of Zoning Appeals of City of Scranton, Com.Pl., 52 Lack.Jur. 1—White v. Lower Moreland Tp. Bd. of Adjustment, Com.Pl., 73 Montg.Co. 55—Appeal of Thomas, Com.Pl., 66 York Leg. Rec. 129.

Extension after condemnation to property not condemned

Where state condemned property on which landowners maintained repair shop, provision of zoning ordinance prohibiting extension of nonconforming use on a greater area of land than that occupied at time of adoption of ordinance, in so far as its interpretation would deny landowners right to continue operation of their business on remainder of property not condemned was invalid as depriving landowners of property without due process of law, and could not be validated on ground that landowners might retain their business and good will by moving operations to a location where such activity was permitted, where landowners operated essentially a neighborhood business, value of which depended on its immediate location in neighborhood where customers resided.

Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205.

63. Tex.—Allen v. City of Corpus Christi, Civ.App., 247 S.W.2d 130, affirmed City of Corpus Christi v. Allen, 254 S.W.2d 759, 152 Tex. 137.

64. U.S.—Standard Oil Co. v. City of Tallahassee, C.A.Fla., 183 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647.

When justified as promoting public safety and general welfare, an existing nonconforming use may be ordered discontinued.

U.S.—Standard Oil Co. v. City of Tallahassee, *supra*.

65. N.Y.—Town of Somers v. Camarco, 127 N.E.2d 327, 308 N.Y. 537—People v. Miller, 106 N.E.2d 34, 304 N.Y. 105.

Application of Rogers, 144 N.Y.S. 2d 869, 208 Misc. 785.

66. N.Y.—People v. Miller, 106 N.E. 2d 34, 304 N.Y. 105.

Joynt v. Zoning Bd. of Appeals of Town of Cicero, 171 N.Y.S.2d 3, 9 Misc.2d 762—Henning v. Goldman, 169 N.Y.S.2d 817, 8 Misc.2d 228.

Town of Somers v. Camarco, 126 N.Y.S.2d 154, modified on other grounds 135 N.Y.S.2d 42, 284 App. Div. 979, affirmed 127 N.E. 327, 308 N.Y. 537, motion denied 128 N.E.2d 813, 309 N.Y. 772.

67. N.Y.—People v. Miller, 106 N.E. 2d 34, 304 N.Y. 105.

Harboring of pigeons as a hobby
N.Y.—People v. Miller, *supra*.

68. **More than year and half for discontinuance of automobile wrecking yards in light industrial district**

Tex.—City of Corpus Christi v. Allen, 254 S.W.2d 759, 152 Tex. 137.

Provision for termination after reasonable period

Zoning ordinance, which was passed while defendant was lawfully engaged in junk business and which provided that existing undesirable businesses could be ordered terminated after reasonable period, and ordinance which directed defendant to close junk business within one year, deprived defendant of his right to continued lawful use of property and of his right to due process of law.

However, it has been recognized that zoning laws and regulations may validly effect the eventual liquidation of nonconforming uses, provided the method of operation is not unreasonable or arbitrary.⁶⁹ To this end, provisions which prohibit or limit the extension or enlargement of such uses have been sustained as a valid exercise of the police power,⁷⁰ and so have provisions which prohibit or regulate a

change from one nonconforming use to another,⁷¹ forbid resumption of a use when terminated,⁷² or provide a reasonable time within which the use must cease.⁷³

When the nonconforming use relates to the existence of a type of structure, provisions which look to the elimination thereof through obsolescence or destruction have been approved.⁷⁴ So, it has been

Ohio.—City of Akron v. Chapman, 116 N.E.2d 697, 160 Ohio St. 382.

Action violative of protective statute

Where statute provides that nonconforming use existing at time of passage of ordinance may be continued and serves to protect nonconforming uses under some circumstances, even though there has been a break in user for more than a year, municipality's attempt to foreclose all nonconforming uses, under all circumstances, because of such break was violative of such statute.

N.J.—State v. Accera, 116 A.2d 203; 36 N.J.Super. 420.

69. U.S.—Standard Oil Co. v. City of Tallahassee, D.C.Fla., 87 F.Supp. 145, affirmed, C.A., 183 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647.

Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

La.—State ex rel. Dema Realty Co. v. McDonald, 121 So. 613, 168 La. 172, certiorari denied McDonald v. State of Louisiana ex rel. Dema Realty Co., 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 612.

Gradual elimination of nonconforming businesses which are in existence at time of enactment of zoning ordinances is within city's police power.

Mich.—Austin v. Older, 278 N.W. 727, 283 Mich. 667.

70. Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762.

Ill.—Mercer Lumber Cos. v. Village of Glencoe, 60 N.E.2d 913, 390 Ill. 138.

Village of Round Lake Park v. Dice, 127 N.E.2d 875, 6 Ill.App.2d 408—Dube v. Allman, 77 N.E.2d 855, 333 Ill.App. 538.

Md.—Colati v. Jirout, 47 A.2d 613, 186 Md. 652.

N.J.—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N.J.Super. 607.

De Vito v. Pearsall, 180 A. 202, 115 N.J.Law 323.

Pa.—Appeal of Peirce, Com.Pl., 16 Beaver 244—Phillips v. Zoning Bd. of Adjustment, Com.Pl., 1 Bucks Co. 25—Appeal of Pierce, Com.Pl., 47 Mun.L.R. 65.

Wash.—State ex rel. Miller v. Cain, 242 P.2d 505, 40 Wash.2d 216.

Expansion of use beyond necessity for protecting original property interest may be prohibited without offending due process.

Pa.—Molnar v. George B. Henne & Co., 105 A.2d 325, 377 Pa. 571.

Nonconforming uses may be gradually eliminated by limiting extension of such uses.

Mich.—Austin v. Older, 278 N.W. 727, 283 Mich. 667.

Pa.—See Application of Ericson Memorial Studio, 29 Erie Co. 279.

71. Ill.—Mercer Lumber Cos. v. Village of Glencoe, 60 N.E.2d 913, 390 Ill. 138.

After discontinuance

A zoning ordinance providing that a nonconforming use which has been discontinued for more than a certain period of time shall not be resumed or replaced by another nonconforming use is valid and constitutional. N.Y.—Franmor Realty Corp. v. LeBoeuf, 104 N.Y.S.2d 247, 201 Misc. 220, affirmed 109 N.Y.S.2d 525, 279 App.Div. 795, reargument and appeal denied 110 N.Y.S.2d 910, 279 App.Div. 874.

72. Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762.

Discontinuance for one year

Zoning resolution classifying certain premises as being in residential district, and providing that use of land must conform with resolution after discontinuance of nonconforming use for one year, was not unconstitutional.

Colo.—Beszedes v. Board of Com'rs of Arapahoe County, 178 P.2d 950, 116 Colo. 123.

73. Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762.

Period commensurate with investment

Valid zoning legislation may provide for eventual liquidation of nonconforming uses within a prescribed period commensurate with investment involved.

Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, supra.

Liquidation within one year not invalid as applied

(1) A zoning ordinance establish-

ing a residential district and providing that all businesses then in operation within district should be liquidated within a year of passage of ordinance was not invalid as applied to a grocery business, no substantial reason having been shown why business could not be liquidated and closed out within a year.

La.—State ex rel. Dema Realty Co. v. McDonald, 121 So. 613, 168 La. 172, certiorari denied McDonald v. State of Louisiana ex rel. Dema Realty Co., 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 612.

(2) Zoning ordinance requiring discontinuance of nonconforming uses of land within five-year period and discontinuance of nonconforming commercial and industrial uses of residential buildings in residential zones within same five-year period, was a constitutional exercise of police power in so far as it required discontinuance of wholesale and retail plumbing business, which had been established prior to enactment of ordinance, in residential district.

Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

Ordinance invalid as conflicting with statute

Provision of zoning ordinance which required removal of nonconforming signs within two years of effective date of ordinance was invalid for conflicting with statute providing that any nonconforming use of structure existing at time of passage of an ordinance might be continued on lot or buildings so occupied.

N.J.—United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 11 N.J. 144.

74. Cal.—Rehfeld v. City and County of San Francisco, 21 P.2d 419, 218 C. 83.

City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762.

Structural alterations prolonging life

(1) A zoning ordinance may properly limit use of an existing building to building as it was at time ordinance became effective and provide that any change therein which calls for a structural alteration thereof must be done in accordance with prescribed regulations.

held that regulations may validly provide that if nonconforming uses are discontinued or changed to a higher classification or to a conforming use they may not thereafter be changed to a use of lower classification.⁷⁵ However, an ordinance providing for continuance of nonconforming uses has been held invalid in so far as it prohibits a change to a higher grade nonconforming use in the same building.⁷⁶

§ 64. Density of Population

Zoning regulations which have their justification in the prevention of overcrowding of land and the avoidance of undue concentration of population bear a substantial relation to the public health, safety, morals, or general welfare.

Generally speaking, zoning regulations which have their justification in the prevention of overcrowding of land and the avoidance of undue concentration of population bear a substantial relation to the public health, safety, morals or general welfare.⁷⁷ Where statutory authority therefor exists, an ordinance regulating the density of population in a given

area is not invalid merely because an owner of property is deprived of a more beneficial use of his property than he would have without the restriction.⁷⁸ However, an ordinance regulating the density of population in a given area is void in the absence of statutory authority therefor,⁷⁹ and a zoning ordinance prohibiting dwellings accommodating more than fourteen families on any acre of land has been held invalid and discriminatory if applicable to flats.⁸⁰

§ 65. Permits and Certificates

Provisions governing the grant or denial of permits and certificates will generally be upheld if they are reasonable and within the general limitations on the exercise of municipal powers; and, generally, regulations must lay down a sufficiently definite norm or standard to guide and control the body or official authorized to grant or deny permits in the exercise of its or his power and discretion.

Provisions governing the grant or denial of permits will generally be upheld if they are reasonable and within the general limitations on the exercise of municipal powers,⁸¹ and provided the manner of

Iowa.—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356.

(2) Provisions prohibiting or regulating structural alteration of buildings used for a nonconforming use, which will indefinitely prolong life of building are not invalid and do not violate due process clause.

Ky.—Selligman v. Von Allmen Bros., 179 S.W.2d 207, 297 Ky. 121.

Pa.—Appeal of Pierce, Com.Pl., 47 Mun.L.R. 65.

(3) Zoning statute and orders providing that no structure shall be constructed, enlarged, or altered to prolong life of building without first obtaining permit does not unconstitutionally deprive owner of property devoted to lawful nonconforming use of property rights without due process of law.

Mo.—Women's Christian Ass'n of Kansas City v. Brown, 190 S.W.2d 900, 354 Mo. 700.

Repair of nonconforming buildings damaged by fire to extent of more than a certain per cent of their physical proportions and value may validly be prohibited.

Cal.—Baird v. Bradley, 240 P.2d 1016, 109 C.A.2d 865.

N.Y.—Koerber v. Bedell, 3 N.Y.S.2d 108, 254 App.Div. 584, affirmed 21 N.E.2d 200, 280 N.Y. 692.

Navin v. Early, 56 N.Y.S.2d 346.

75. Ala.—State ex rel. Turner v. Baumhauer, 174 So. 514, 234 Ala. 286.

76. Mich.—Palmer v. City of Detroit, 11 N.W.2d 199, 306 Mich. 449.

77. N.Y.—Incorporated Village of

Upper Brookville v. Torr, 158 N.Y. S.2d 899, 7 Misc.2d 725.

Regulations as to number of families in dwellings see supra § 51.

78. N.Y.—City of Albany v. Anthony, 21 N.Y.S.2d 258, 174 Misc. 470, reversed on other grounds 28 N.Y.S.2d 963, 262 App.Div. 401.

79. N.Y.—City of Albany v. Anthony, 28 N.Y.S.2d 963, 262 App. Div. 401.

80. Ill.—Bjork v. Safford, 164 N.E. 699, 333 Ill. 355, 61 A.L.R. 561.

81. Ark.—Seiz v. City of Hot Springs, 108 S.W.2d 897, 194 Ark. 544.

Cal.—Ex parte Angelus, 150 P.2d 908, 65 C.A.2d 441.

Iowa.—Marquis v. City of Waterloo, 228 N.W. 370, 210 Iowa 439.

Mo.—Brown v. Gambrel, 213 S.W.2d 931, 258 Mo. 192.

N.J.—Wulster v. Borough of Upper Saddle River, 124 A.2d 323, 41 N.J. Super. 199—Fred v. Mayor and Council of Borough of Old Tappan, 85 A.2d 317, 17 N.J. Super. 153, affirmed 92 A.2d 473, 10 N.J. 515.

Rinhart v. Wright, 44 A.2d 385, 133 N.J. Law 374.

N.Y.—People v. Sessano, 29 N.Y.S.2d 45, 176 Misc. 723.

Ohio.—State ex rel. Snyder v. Yoter, 30 N.E.2d 558, 65 Ohio App. 492.

Pa.—Berwick Lumber & Supply Co. v. City of Harrisburg, Com.Pl., 52 Dauph. Co. 275.

Permits and certificates in general see infra §§ 219-249.

Held not invalid as stopgap Ordinance, authorizing city council to refuse issuance of building permit

on application conflicting with regulations therein, although substantially same as those of pending zoning ordinance later enacted, was not invalid as stopgap or interim zoning ordinance, but merely announced council's intention to refuse any permit conflicting with proposed zoning ordinance.

Pa.—A. J. Aberman, Inc. v. City of New Kensington, 105 A.2d 586, 377 Pa. 520.

Due process

(1) Provision of city zoning ordinance authorizing granting of conditional use permits to permit certain uses, of public concern in zones from which such uses would otherwise be excluded, when it be found that such uses were deemed essential or desirable to public convenience or welfare, was not unconstitutional, as a denial of due process.

Cal.—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

(2) A permit is a reasonable requirement for a change from one nonconforming use to another nonconforming use regardless of whether applicant considers it to be within same class, and such requirement does not constitute an unconstitutional deprivation of owners' property and rights without due process of law. So, where there was considerable basis for dispute as to whether lawful nonconforming use was for a commercial and riding stable or for a public stable, and it was necessary to decide whether proposed change to a dance hall was to same or lower nonconforming use, and whether nonconforming use was proposed to

their adoption conforms to the rules governing the methods of adoption of ordinances, resolutions, and bylaws generally.⁸²

The grant or refusal of such permits must not be left to arbitrary discretion,⁸³ whether that discre-

tion is that of the council or governing body⁸⁴ or of some municipal board or official,⁸⁵ to permit an agency, in its uncontrolled discretion, to forbid a use of property in one block because it would create hazards from fire or disease, while permitting an

be expanded, application of zoning law to require permit for such change was reasonable and did not unconstitutionally deprive owners of their property and rights without due process of law.

Mo.—Women's Christian Ass'n of Kansas City v. Brown, 190 S.W.2d 900, 354 Mo. 700.

Provision for notice and hearing

Where an ordinance provides for a hearing by municipal council in event that administrative officials act unfavorably on an application for a building permit, it is not legally defective in failing to provide for notice and hearing by administrative officials.

Del.—Garden Court Apartments v. Hartnett, 65 A.2d 231, 6 Terry 1.

Prohibition of issuance of permit

(1) Where garage owner had been denied a permit for a curb cut and driveway across sidewalk on a street, subsequently enacted ordinance providing that no permit shall be issued for construction of any curb cut or driveway leading onto certain portions of streets, including street on which garage was located, was valid as against garage owner and not retroactive.

Tex.—City of San Antonio v. Pigeonhole Parking of Tex., Inc., 311 S.W.2d 218.

(2) Ordinance, prohibiting city engineer from issuing building permit for building within residential district of city except after application had been referred to city council unless building was a church, residence, school, private garage, or other similar building, is within police power of municipality.

Iowa.—Hirsch v. City of Muscatine, 10 N.W.2d 71, 233 Iowa 590.

Permitting certain businesses in business districts

(1) Regulations requiring approval of municipality before activities or businesses of certain types can be established in a business, commercial, or industrial district are generally valid.

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

(2) Under provision authorizing county legislative body to determine reasonable and practical means for putting master plan into effect, county board of supervisors could require approval of planning commission and board of supervisors for construction of fish reduction plant in heavy industry zone, and was not required

to reserve to itself authority to permit such construction regardless of decision of planning commission.

Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C.2d 66.

Requirements held invalid or unenforceable

N.J.—Weininger v. Borough of Metuchen in Middlesex County, 45 A.2d 450, 133 N.J.Law 544, affirmed 49 A.2d 256, 134 N.J.Law 562—Kosich v. Township Committee of Dover Tp., 170 A.2d 112, 112 N.J.Law 281—Frank J. Durkin Lumber Co. v. Fitzsimmons, 147 A.555, 106 N.J.Law 183.

Tex.—Continental Oil Co. v. City of Wichita Falls, Civ.App., 42 S.W.2d 236.

Imposition of conditions

A city may not impose restrictions on granting or withholding of building permit other than those contained in law, and such conditions, if imposed, are ultra vires.

N.Y.—Ballard v. Roth, 253 N.Y.S. 6, 141 Misc. 319.

Ratliffe v. Morrison, 123 N.Y.S.2d 831.

Unreasonable classification not germane to interests of public health, safety, welfare, or convenience, makes ordinance void.

Wis.—Town of Caledonia v. Racine Limestone Co., 63 N.W.2d 697, 266 Wis. 475.

82. Ala.—Lewis v. Jenkins, 112 So.205, 215 Ala. 680.

Ill.—Jacobs v. City of Chicago, 244 Ill.App. 132.

83. Kan.—Corpus Juris cited in City of Tribune v. Connelly, 26 P.2d 439, 440, 138 Kan. 398.

Ky.—Town of Jamestown v. Allen, 144 S.W.2d 807, 284 Ky. 347—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

N.Y.—ViHage of Granville v. Krause, 228 N.Y.S. 204, 131 Misc. 752.

Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App. Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App. Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Pa.—Humphreys v. Schofield, 14 Pa. Dist. & Co. 127.

Tex.—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed.

43 C.J. p 346 note 12.

Discretion to permit use not offensive or hazardous

Provision in zoning ordinance permitting any use in industrial district but providing that no use should be permitted which would be offensive because of noise, smoke, etc., or would be hazardous because of fire or explosion, was not void on ground that uncontrolled and arbitrary discretion was vested in agency or official to determine who should be issued a building permit and to say what was offensive.

Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

84. Idaho.—Continental Oil Co. v. City of Twin Falls, 286 P. 353, 49 Idaho 89, followed in Independent School Dist. No. 1 of Twin Falls County v. Continental Oil Co., 286 P. 360, 49 Idaho 109.

N.J.—Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449, 43 C.J. p 346 note 13.

85. Conn.—Keating v. Patterson, 43 A.2d 659, 132 Conn. 210.

Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

Mich.—Osus v. City of St. Clair Shores, 75 N.W.2d 25, 344 Mich. 693.

Mo.—Fey v. Woermann, 230 S.W.2d 681, 360 Mo. 728.

Or.—Roman Catholic Archbishop of Diocese of Oregon v. Baker, 15 P.2d 391, 140 Or. 600.

Tex.—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed.

43 C.J. p 346 note 14.

Ordinances held not invalid

(1) Generally.

Ark.—Seiz v. City of Hot Springs, 108 S.W.2d 897, 194 Ark. 544.

Minn.—Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co. of City of New York, 253 N.W. 8, 191 Minn. 60.

Mo.—Fairmont Inv. Co. v. Woermann, 210 S.W.2d 26, 357 Mo. 625.

N.Y.—Olp v. Town of Brighton, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App. Div. 944.

(2) An ordinance requiring a license as a condition precedent to issuance of a permit by inspector of buildings to carry on business of plastering is not unconstitutional on ground that it delegates undue discretion to building inspector.

Minn.—State ex rel. Remick v. Clousing, 285 N.W. 711, 205 Minn. 296, 123 A.L.R. 465

identical use in another similar block because it would not create such hazards, would be to delegate to the agency the power to deprive a citizen of his property and vested rights without due process of law.⁸⁶

It is generally held that a regulation or ordinance requiring permits must contain the conditions in pursuance of which applicant is entitled to his per-

mit,⁸⁷ and must lay down a sufficiently definite norm or standard to guide and control the body or official authorized to grant or deny the permits in the exercise of its or his power and discretion.⁸⁸ An ordinance which authorizes city officials to grant, refuse, or revoke particular building or use permits without laying down sufficiently definite standards or uniform rules to control the discretion of such officials may be invalid,⁸⁹ even though the officials will prob-

86. Md.—Applestein v. Osborne, 143 A. 666, 156 Md. 40.

87. Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

N.Y.—Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.
43 C.J. p 346 note 15.

88. Cal.—Roney v. Board of Sup'rs of Contra Costa County, 292 P.2d 529, 138 C.A.2d 740.

Fla.—North Bay Village v. Blackwell, 88 So.2d 524.

Ill.—City of Monmouth v. Lawson, 102 N.E.2d 188, 345 Ill.App. 44.

Mass.—Burnham v. Board of Appeals of Gloucester, 128 N.E.2d 772, 333 Mass. 114—Sellors v. Town of Concord, 107 N.E.2d 784, 329 Mass. 259.

Mo.—Women's Christian Ass'n v. Brown, 190 S.W.2d 900, 354 Mo. 790.

N.J.—Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449—Fred v. Mayor and Council of Borough of Old Tappan, 85 A.2d 317, 17 N.J.Super. 153, affirmed 92 A.2d 473, 10 N.J. 515—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A.2d 752, 9 N.J.Super. 529—Phillips v. City of Paterson, 66 A.2d 65, 3 N.J.Super. 281.

Lehrer v. Board of Adjustment of City of Newark, 58 A.2d 265, 137 N.J.Law 100—Finn v. Municipal Council of City of Clifton, 53 A.2d 790, 136 N.J.Law 34—Phillips v. Town of Belleville, 52 A.2d 441, 135 N.J.Law 271—Phillips v. Borough of East Paterson, 46 A.2d 667, 134 N.J.Law 161, affirmed 50 A.2d 869, 135 N.J.Law 203.

N.Y.—Titus St. Paul Property Owners Ass'n v. Board of Zoning Appeals of Town of Irondequoit, 132 N.Y.S.2d 148, 205 Misc. 1083.

Kessel v. Michaelis, 159 N.Y.S.2d 109, affirmed 167 N.Y.S.2d 1004, 4 A.D.2d 884.

Ohio.—State ex rel. Selected Properties v. Gottfried, 127 N.E.2d 371, 163 Ohio St. 469.

Tex.—City of Texarkana v. Mabry, Civ.App., 94 S.W.2d 871, error dismissed.

Validity of zoning regulation as de-

pendent on prescription of definite standard generally see supra § 26.

Nonresidential uses in residential district

Where nonresidential or business uses are allowed only in a residential district on the issuance of a permit by administrative officials, regulation in order to be valid must set up definite standards governing issuance of permit.

N.Y.—Gilchrest Realty Corp. v. Village of Great Neck Plaza, 85 N.Y.S.2d 224, reversed on other grounds 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619.

Tex.—City of Dallas v. Urbish, Civ. App., 252 S.W. 258.

Matters which ordinance should contain

A zoning ordinance containing a delegation of legislative power to a zoning board of appeals must contain a declaration of legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which board must conform with a proper regard for protection of public interest and with such degree of certainty as nature of case permits and to require a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.

Conn.—Keating v. Patterson, 43 A.2d 659, 132 Conn. 210.

Ordinance held valid

(1) In general.

Mass.—Burnham v. Board of Appeals of Gloucester, 128 N.E.2d 772, 333 Mass. 114—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 587, 319 Mass. 273.

Minn.—Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co. of City of New York, 253 N.W. 8, 191 Minn. 60.

N.J.—Tulsa Oil Co. v. Morey, 60 A.2d 302, 137 N.J.Law 388.

N.Y.—Aloe v. Dassler, 106 N.Y.S.2d 24, 278 App.Div. 975, affirmed 105 N.E.2d 104, 303 N.Y. 878—Mirschel v. Weissenberger, 100 N.Y.S.2d 452, 277 App.Div. 1039.

Maxwell v. Klaess, 83 N.Y.S.2d 588, 192 Misc. 939, appeal dismissed 85 N.Y.S. 330, 274 App.Div. 943, and Goddard v. Klaess, 85 N.Y.S.2d 331—Olp v. Town of Brighton, 19 N.

Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App.Div. 944.
Okla.—Ptak v. City of Oklahoma City, 229 P.2d 567, 204 Okl. 386.

(2) Not indefinite or ambiguous.

Wis.—State ex rel. Saveland Park Holding Corp. v. Wisland, 69 N.W.2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed. 750.

General standards capable of reasonable application

Standards of zoning ordinance which, although stated in general terms, were capable of reasonable application and were sufficient to limit and define board of zoning appeals' discretionary powers, prevented zoning ordinance from being unconstitutional as applied to property on ground that no standards had been enacted to govern determination of board with respect to granting of permit for erection of gasoline filling station.

N.Y.—Crossroads Realty v. Gilbert, 109 N.Y.S.2d 59.

89. Conn.—Keating v. Patterson, 43 A.2d 659, 132 Conn. 210.

Fla.—North Bay Village v. Blackwell, 88 So.2d 524.

Ill.—People ex rel. Schimpff v. Norvell, 13 N.E.2d 960, 368 Ill. 325.

City of Monmouth v. Lawson, 102 N.E.2d 188, 345 Ill.App. 44—City of Watseka v. Blatt, 50 N.E.2d 589, 320 Ill.App. 191.

Kan.—Hudson Properties, Inc. v. City of Westwood, 310 P.2d 936, 181 Kan. 320.

Ky.—Colyer v. City of Somerset, 208 S.W.2d 976, 306 Ky. 797—Bowman v. Board of Councilmen of City of Elizabethtown, 196 S.W.2d 730, 303 Ky. 1.

La.—McCauley v. Albert E. Briede & Son, 90 So.2d 78, 231 La. 36.

Mich.—Osius v. City of St. Clair Shores, 75 N.W.2d 25, 344 Mich. 693.

Mo.—State ex rel. Ludlow v. Guffey, 306 S.W.2d 552.

N.J.—Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449.

Phillips v. Borough of East Paterson, 46 A.2d 667, 134 N.J.Law 161, affirmed 50 A.2d 869, 135 N.J. Law 203.

N.Y.—Little v. Young, 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288,

ably use the power so granted only for the public good.⁹⁰ Standards are provided, however, where, although stated in general terms, they are capable of a reasonable application and are sufficient to limit and define the board's discretion.⁹¹

It has been held that an ordinance is not invalidated by its failure to contain rules and regulations for the granting of permits, where the incorporation of such rules and regulations is permitted, but not required, by the statute authorizing the ordinance;⁹² and also that, if the governing body enacting the regulation has legislative power to prohibit the erection of a particular structure, or otherwise to regulate the use of property, it may retain the power to pass on each application for a permit under a particular regulation without setting forth the standards which will govern its decision.⁹³ So, exceptions to the general rule requiring the ordinance to prescribe definite standards exist where necessity requires the vesting of discretion in the officer charged with the enforcement of an ordinance,⁹⁴ as where it is impracticable or impossible to fix a definite rule or standard.⁹⁵

An ordinance requiring a person using property for a particular purpose to obtain a certificate of occupancy depends for its validity on the right of the municipality to prohibit such use;⁹⁶ hence, where

such prohibition in its application to particular property bears no substantial relationship to the public health, safety, or general welfare, the provision requiring a certificate of occupancy therefor is invalid.⁹⁷ It is within the power of a municipality to authorize the refusal of a permit for any house or structure deemed to be unsafe, obnoxious or detrimental to public welfare;⁹⁸ but it has been held that where a municipality determines that a district is suitable for general industrial use, it may not reserve the power to decide on individual application which industrial uses will be admitted.⁹⁹

Consent of adjacent property owners. In accordance with the rules stated supra § 43, provisions requiring as a condition to the granting of a permit that the consent of a stated percentage of adjacent property owners be obtained are generally held valid,¹ unless the area in which the property owners' consents must be obtained is unreasonably large.² It is, however, only as to buildings, the location of which a municipal corporation has power to direct, that it may require the consent of property owners as a condition of granting building permits.³ Moreover, provisions requiring the consent of property owners have been held void where they imposed restrictions or conditions on the granting of a permit

274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Village of Granville v. Krause, 228 N.Y.S. 204, 131 Misc. 752.

Gilchrest Realty Corp. v. Village of Great Neck Plaza, 85 N.Y.S.2d 224, reversed on other grounds 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 486, 300 N.Y. 619.

Pa.—Shen-Penn Production Co. v. Shenandoah Borough, Quar.Sess., 44 Sch.Leg.Rec. 31.

Tex.—City of Houston v. Freedman, Civ.App., 293 S.W.2d 515, error refused no reversible error—Gulf Refining Co. v. City of Dallas, Civ. App., 10 S.W.2d 151, error dismissed.

90. Ky.—Town of Jamestown v. Allen, 144 S.W.2d 807, 284 Ky. 347.

91. N.Y.—Aloe v. Dassler, 106 N.Y.S.2d 24, 278 App.Div. 975.

Crossroads Realty v. Gilbert, 109 N.Y.S.2d 59.

92. Iowa.—Hirsch v. City of Muscatine, 10 N.W.2d 71, 233 Iowa 590—Scott v. City of Waterloo, 274 N.W. 397, 223 Iowa 1169—Marquis v. City of Waterloo, 228 N.W. 870, 210 Iowa 439.

93. N.Y.—Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead, 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 84 L.Ed. 990—

Olp v. Town of Brighton, 19 N.Y.S. 2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App.Div. 944. 43 C.J. p 346 note 16.

94. Mo.—State ex rel. Ludlow v. Guffey, 306 S.W.2d 552.

95. Mo.—State ex rel. Ludlow v. Guffey, supra.

Ordinance held valid

Zoning ordinance provision, which prescribed procedure for determining whether filling station in certain zone would promote health, safety, morals, or general welfare of community by determining whether such use would adversely affect character of neighborhood, traffic conditions, public utility facilities, and other matters pertaining to general welfare, and which required that such determination be made on evidence and facts adduced before city council sufficiently circumscribed legislative discretion delegated to council.

Mo.—State ex rel. Ludlow v. Guffey, supra.

96. N.J.—Frank J. Durkin Lumber Co. v. Fitzsimmons, 147 A. 555, 106 N.J.Law 183.

N.Y.—Stafford v. Incorporated Village of Sands Point, 102 N.Y.S.2d 910, 200 Misc. 57.

97. N.J.—Frank J. Durkin Lumber Co. v. Fitzsimmons, 147 A. 555, 106 N.J.Law 183.

98. Ark.—City of West Helena v. Bockman, 256 S.W.2d 40, 221 Ark. 677—Seiz v. City of Hot Springs, 108 S.W.2d 897, 194 Ark. 544.

N.J.—Contras v. Jersey City, 135 A. 472, 5 N.J.Misc. 59.

99. N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

1. Mich.—City of East Lansing v. Smith, 269 N.W. 573, 277 Mich. 495 —C. K. Eddy & Sons v. Tierney, 267 N.W. 862, 276 Mich. 333.

N.Y.—Epstein v. Weisser, 102 N.Y.S.2d 678, 278 App.Div. 668, affirmed 100 N.E.2d 186, 302 N.Y. 916 —Sanders v. Davidson, 17 N.Y.S.2d 627, 258 App.Div. 1058, affirmed 31 N.E.2d 764, 284 N.Y. 780.

Application of Dolat, 75 N.Y.S. 2d 862, 191 Misc. 73.

Ohio.—State ex rel. Standard Oil Co. v. Combs, 194 N.E. 875, 129 Ohio St. 251.

Pa.—Appeal of Perrin, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912, followed in Appeal of Goodman, 156 A. 309, 305 Pa. 55.

38 C.J. p 75 note 34.

2. Ill.—People v. Oak Park, 107 N. E. 636, 266 Ill. 365.

3. Ill.—People v. Oak Park, 109 N. E. 11, 268 Ill. 256.

Iowa.—Downey v. Sioux City, 227 N. W. 125, 208 Iowa 1273, followed in Wollé v. Sioux City, 229 N.W. 214.

other than those contained in the law,⁴ or where the ordinance could not be construed as containing a prohibition.⁵ A provision requiring public hearings on an application for permission to conduct certain enterprises does not render an ordinance invalid as requiring a plebiscite of the neighborhood where there is nothing in the ordinance which makes the opinions expressed at such hearing binding on the board.⁶

Unauthorized delegation or reservation of power. An unauthorized delegation to, or reservation by, a particular body or official of power with respect to the granting or refusal of permits is invalid.⁷

Imposition of permit fee. Where the statute authorizing the adoption of the zoning ordinance does not specifically or impliedly provide for the imposition of an annual permit fee for license for the operation of a business or occupation, an ordinance provision is invalid which requires the operators of a specified business to pay annual permit fees.⁸

Provision as to appeal. An ordinance purporting to give to aggrieved adjoining landowners a remedy of appeal from the granting of a permit is

invalid where the town was not authorized by the statute to provide for such appeal.⁹ On the other hand, an ordinance expressly authorizing rehearings by the board of appeals has been held valid as wholly consistent with the broad discretion conferred by charter on the board in passing on a case on appeal.¹⁰

§ 66. Variances or Exceptions

Provisions vesting administrative bodies with power to grant a variance or exception are generally valid if they are reasonable and conform to the general limitations on the exercise of power by municipal corporations, but they must contain sufficiently definite standards to guide and control the action of the board.

Provisions vesting administrative bodies with power, within prescribed limits, to grant or deny particular property owners a right, generally termed a variance or exception, to use property in nonconformity with the regulations, where unnecessary hardships or practical difficulties would otherwise result, ordinarily will be held valid if they are reasonable and conform to the general limitation on the exercise of power by municipal corporations;¹¹ and it has even been held that a provision

4. N.Y.—Ballard v. Roth, 253 N.Y. S. 6, 141 Misc. 319.

5. Conn.—Du Pont v. Liquor Control Commission, 71 A.2d 84, 136 Conn. 286.

Sale of liquor

Where sale of liquor was not prohibited in business zone and other parts of ordinance were devoted to granting of permits therefor, ordinance could not be construed as containing a prohibition so as to render valid requirement of consent of property owners on theory that consent was only essential to permit waiver of an existing restriction.

Conn.—Du Pont v. Liquor Control Commission, *supra*.

6. Wis.—Smith v. City of Brookfield, 74 N.W.2d 770, 272 Wis. 1.

7. N.J.—Atlantic Refining Co. v. Township of Landis, 197 A. 722, 120 N.J.Law 60.

Ohio.—State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.

Regulations granting to administrative board or officer power to grant use permits as not invalid delegation of legislative power generally see *supra* § 42.

Power held improperly delegated

Requirement of zoning ordinance that location or operation of junk yard in industrial district shall be subject to approval of board of zoning appeals is invalid as delegating to board a power which zoning act

exclusively committed to city council.

Ill.—City of Watseka v. Blatt, 50 N.E.2d 589, 320 Ill.App. 191.

Power held not improperly delegated

(1) Generally.

Del.—Papaloanu v. Commissioners of Rehoboth, 20 A.2d 447, 25 Del. Ch. 327.

Minn.—Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co. of City of New York, 253 N.W. 8, 191 Minn. 60—State v. Lindquist, 214 N.W. 260, 171 Minn. 334.

N.J.—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 126 N.J.Law 367.

N.Y.—Village of Attica v. Day, 236 N.Y.S. 607, 134 Misc. 882, affirmed 248 N.Y.S. 915, 230 App.Div. 776.

(2) A provision in zoning ordinance, that planning commission finding that detriment or injury to neighborhood would not result from issuance of permit, could approve and transmit permit, together with complete report of commission's findings and recommendations to city council for approval and indorsement, was not a delegation of power or authority of city council to planning commission.

Cal.—Hopkins v. MacCulloch, 95 P. 2d 950, 35 C.A.2d 442.

Power held not improperly reserved

Zoning ordinance, which uniformly provided that special uses may be made of land in a business district subject to consent of a town board,

was not objectionable on ground that power to create variance in zoning law is expressly given by legislature to zoning board of appeals and not to town board, since provision requiring approval of town board did not involve "variance."

N.Y.—Green Point Sav. Bank v. Board of Hempstead, 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 84 L.Ed. 990.

8. Ind.—Tomlinson v. Marion County Plan Commission, 122 N.E.2d 852, 234 Ind. 88.

9. Mass.—Tranfaglia v. Building Commissioner of Winchster, 28 N.E.2d 537, 306 Mass. 495.

10. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C. 2d 303.

11. U.S.—Gorieb v. Fox, Va., 47 S. Ct. 675, 274 U.S. 603, 71 L.Ed. 1228, 53 A.L.R. 1210.

Cal.—Johnston v. Board of Sup'rs of Marin County, 137 P.2d 686, 31 C. 2d 66.

Steiger v. Board of Sup'rs of Los Angeles County, 300 P.2d 210, 143 C.A.2d 352—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

La.—State ex rel. Manhein v. Harrison, 114 So. 159, 164 La. 564.

Md.—R. B. Const. Co. v. Jackson, 137 A. 278, 152 Md. 671.

N.Y.—Eckerman v. Murdock, 94 N.Y. S.2d 557, 276 App.Div. 927.

Burke v. Cohen, 13 N.Y.S.2d 984.

for variances is frequently essential to the validity and constitutionality of the regulations themselves;¹² although there is some authority to the effect that the fact that the regulations contain no provisions for exceptions and variances other than for nonconforming uses is not fatal to their validity.¹³ As shown supra § 42, the power to authorize a variance from the terms of a zoning ordinance may be granted to an administrative board without violating the principle against the delegation of

legislative powers.

In order to be valid, provisions for the granting of variances or special exceptions must affect alike all persons in the same situations,¹⁴ must prescribe an adequate method of giving the parties affected due notice of the hearing before the board,¹⁵ and must contain sufficiently definite standards to guide and control the action of the board;¹⁶ and where such requirements are not satisfied the provision may be invalid.¹⁷ On the other hand, such provisions are

R.I.—Dunham v. Zoning Board of Town of Westerly, 26 A.2d 614, 68 R.I. 88.

Tex.—Driskell v. Board of Adjustment, Civ.App., 195 S.W.2d 594. Variances or exceptions in general see infra §§ 268-315.

Lawful exercise of police power
Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

Revocation of exceptions

Provisions of county rezoning ordinance authorizing regional planning commission to revoke automatic exception of existing uses from zoning restrictions therein, if commission finds that use of excepted property only for purposes permitted in zone wherein it is located, would not impair any person's constitutional right, or that use for which approval was granted is being so exercised as to be detrimental to public health or safety or constitutes a nuisance, are constitutional and within prescribed objectives of police power. Cal.—Livingston Rock & Gravel Co. v. Los Angeles County, 272 P.2d 4, 43 C.2d 121.

Finality of decision

A provision of a zoning ordinance that when an application for a variance is passed on by board of directors, its decision shall be final is valid. Cal.—Rubin v. Board of Directors of City of Pasadena, 104 P.2d 1041, 16 C.2d 119.

When no application made

Where there exists a provision for variance and no application is made thereunder, there is no such complete and absolute prohibition of use as to bring before court question as to whether there has been an unconstitutional deprivation of property. N.Y.—Incorporated Village of Upper Brookville v. Faraco, 125 N.Y.S. 2d 214, 282 App.Div. 943, affirmed 120 N.E.2d 835, 307 N.Y. 642.

Provision for notice and hearing

Where zoning ordinance provided for hearing on application for variance by planning commission on notice and that planning commission should make recommendation as to action on application to city council, and due notice and full hearing was

accorded by commission, failure of ordinance to provide for second notice did not make action of council in refusing permit a taking of applicant's property without due process of law, but even though notice of proceedings before council was essential to due process, a provision in ordinance requiring council to pass on recommendations of commission at its next regular meeting after filing of recommendations was sufficient notice of hearing. Cal.—Regan v. Council of City of San Mateo, 110 P.2d 95, 42 C.A.2d 801.

12. Cal.—Triangle Ranch v. Union Oil Co. of Cal., 287 P.2d 537, 135 C.A.2d 428—City of San Mateo v. Hardy, 149 P.2d 307, 64 C.A.2d 794.

N.J.—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

N.Y.—Thomas v. Board of Standards and Appeals of City of New York, 33 N.Y.S.2d 219, 263 App.Div. 352, reversed on other grounds 48 N.E.2d 284, 290 N.Y. 109.

Van Auken v. Kimmey, 252 N.Y.S. 343, 141 Misc. 117.

Pa.—Casper v. Exley, 45 Pa.Dist. & Co. 664.

"The history of all the litigation involving zoning regulations shows that to insure the validity of the zoning plan for an entire municipality, the legislative body must vest in some subordinate body the power to grant variances in appropriate cases."

Cal.—Metcalf v. Los Angeles County, 148 P.2d 645, 647, 24 C.2d 267.

N.Y.—Thomas v. Board of Standards and Appeals of City of New York, 33 N.Y.S.2d 219, 230, 263 App.Div. 352.

13. Me.—Bolduc v. Pinkham, 83 A.2d 817, 148 Me. 17.

14. Md.—Sugar v. North Baltimore Methodist Protestant Church, 165 A. 703, 164 Md. 487.

N.Y.—Young Women's Hebrew Ass'n v. Board of Standards and Appeals of City of New York, 194 N.E. 751, 266 N.Y. 270, reargument denied 195 N.E. 376, 266 N.Y. 672, appeal dismissed Gelkam Realty Corporation v. Young Women's Hebrew

Ass'n, 56 S.Ct. 109, 296 U.S. 537, 80 L.Ed. 382.

Aberdeen Garage v. Murdock, 15 N.Y.S.2d 66, 257 App.Div. 645, affirmed 28 N.E.2d 45, 283 N.Y. 650.

15. N.Y.—In re Cobb, 217 N.Y.S. 593, 128 Misc. 67.

16. Fla.—North Bay Village v. Blackwell, 88 So.2d 524.

Md.—Jack Lewis, Inc., v. Mayor and City Council of Baltimore, 164 A. 220, 164 Md. 146, appeal dismissed 54 S.Ct. 56, 290 U.S. 585, 78 L.Ed. 517.

N.J.—Ward v. Scott, 93 A.2d 385, 11 N.J. 117.

Phillips v. City of Paterson, 66 A.2d 65, 3 N.J.Super. 281.

Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.

N.Y.—Freitag v. Marsh, 106 N.Y.S. 2d 927, transferred, see, 115 N.Y.S. 2d 838, 280 App.Div. 934.

Pa.—Food Corporation v. Zoning Board of Adjustment of City of Philadelphia, 121 A.2d 94, 384 Pa. 288.

Rubin v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 207—Miller v. Zoning Bd. of Middletown Tp., Com.Pl., 2 Bucks Co. 237—Marrone v. Zoning Bd. of Adjustment, Com.Pl., 43 Del.Co. 166—Congregation Adath Jeshurun v. Cheltenham Tp., Com.Pl., 70 Montg. Co. 345.

Validity of zoning regulation as dependent on prescription of definite standards generally see supra § 26.

17. Ill.—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568—Welton v. Hamilton, 176 N.E. 333, 344 Ill. 82.

La.—McCauley v. Albert E. Briede & Son, 90 So.2d 78, 231 La. 36.

Md.—Chayt v. Board of Zoning Appeals of Baltimore City, 9 A.2d 747, 177 Md. 426—Sugar v. North Baltimore Methodist Protestant Church, 165 A. 703, 164 Md. 487—Jack Lewis, Inc. v. Mayor and City Council of Baltimore, 164 A. 220, 164 Md. 146, appeal dismissed 54 S.Ct. 56, 290 U.S. 585, 78 L.Ed. 517—Goldman v. Crowther, 128 A. 50, 147 Md. 282, 38 A.L.R. 1455.

not invalid where they are otherwise unobjectionable and contain sufficiently definite standards to govern and control the action of the body authorized to grant the variance¹⁸ and do not give the board power to change zoning lines or make other material or permanent changes in zoning ordinances as enacted;¹⁹ and in the absence of standards or guides to aid the commission in determining whether or not a variance should be granted, an ordinance which provides for a final approval by the city council is not unconstitutional.²⁰

§ 67. Other Matters

The validity of zoning regulations as to various other particular matters has been adjudicated.

Zoning regulations as to various particular matters have been upheld as valid exercises of the police power,²¹ including regulations requiring electric transmission lines within certain districts to be located underground,²² prohibiting the sale of intoxicating liquors within certain zones or distances from certain buildings,²³ or restricting the number of

Mass.—*Smith v. Board of Appeals of Fall River*, 65 N.E.2d 547, 319 Mass. 341.

Mo.—*Fairmont Inv. Co. v. Woermann*, 210 S.W.2d 26, 357 Mo. 625.

N.J.—*Duffcon Concrete Products v. Borough of Cresskill*, 58 A.2d 104, 137 N.J.Law 81, reversed on other grounds 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

N.Y.—*Concordia Collegiate Institute v. Miller*, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

Underhill v. Board of Appeals of Town of Oyster Bay, 72 N.Y.S.2d 588, affirmed 75 N.Y.S.2d 327, 273 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937.

R.I.—*Flynn v. Zoning Bd. of Review of City of Pawtucket*, 73 A.2d 808, 77 R.I. 118.

Tex.—*Texas Consol. Theatres v. Pittillo*, Civ.App., 204 S.W.2d 396—*Gulf Refining Co. v. City of Dallas*, Civ.App., 10 S.W.2d 151.

Ordinance considered ineffectual

Zoning ordinance, which provided for variances based on practical difficulty or unnecessary hardship, was ineffectual to empower zoning board of appeals to grant special exception use.

N.Y.—*Freitag v. Marsh*, 106 N.Y.S. 2d 927, transferred, see, 115 N.Y.S. 2d 838, 280 App.Div. 934.

18. Conn.—*Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich*, 109 A.2d 256, 141 Conn. 632—*Bishop v. Board of Zoning Appeals of City of New Haven*, 53 A.2d 659, 133 Conn. 614.

Del.—*Appeal of Blackstone*, 190 A. 597, 8 W.W.Harr. 230.

Fla.—*City of Miami Beach v. State ex rel. Ross*, 193 So. 543, 141 Fla. 407—*State ex rel. Landis v. Valz*, 157 So. 651, 117 Fla. 311.

Ga.—*McCord v. Ed. Bond & Condon Co.*, 165 S.E. 590, 175 Ga. 667, 86 A.L.R. 703.

Iowa.—*Zimmerman v. O'Meara*, 245 N.W. 715, 215 Iowa 1140.

La.—*State ex rel. Manhein v. Harrison*, 114 So. 159, 164 La. 564.

Md.—*Heath v. Mayor & City Council of Baltimore*, 58 A.2d 896, 190 Md. 478—*Heath v. Bond and City*

Council of Baltimore, 49 A.2d 799, 187 Md. 296—*R. B. Construction Co. v. Jackson*, 137 A. 278, 152 Md. 671.

Mass.—*Opinion of the Justices*, 73 N.E.2d 881, 321 Mass. 759.

N.H.—*Fortuna v. Zoning Bd. of Adjustment of City of Manchester*, 60 A.2d 133, 95 N.H. 211—*Sundeen v. Rogers*, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

N.J.—*Mistretta v. City of Newark*, 109 A.2d 677, 33 N.J.Super. 205—*Phillips v. City of Paterson*, 66 A. 2d 65, 3 N.J.Super. 281.

N.Y.—*Perri v. Zoning Bd. of Appeals of Incorporated Village of Scarsdale, Westchester County*, 128 N.Y.S.2d 774, 283 App.Div. 818—*Thomas v. Board of Standards and Appeals of City of New York*, 33 N.Y.S.2d 219, 263 App.Div. 352, reversed on other grounds 48 N.E.2d 284, 290 N.Y. 109.

Application of Arlington Village Development Corp., 124 N.Y.S.2d 172, 204 Misc. 395, affirmed 128 N.Y.S.2d 596, 283 App.Div. 800—*St. Basil's Church v. Kerner*, 211 N.Y. S. 470, 125 Misc. 526.

Kessel v. Michaels, 159 N.Y.S. 2d 109, affirmed 167 N.Y.S.2d 1004, 4 A.D.2d 884.

Ohio.—*L. & M. Investment Co. v. Cutler*, 180 N.E. 379, 125 Ohio St. 12, 86 A.L.R. 707.

Okl.—*In re Dawson*, 277 P. 226, 136 Okl. 113.

Pa.—*Root v. City of Erie Zoning Bd. of Appeals*, 118 A.2d 297, 180 Pa. Super. 38—*Huebner v. Philadelphia Sav. Fund Soc.*, 192 A. 139, 127 Pa. Super. 28.

Commonwealth v. Campbell, Quar.Sess., 29 Erie Co. 113.

S.C.—*Momeier v. John McAlister, Inc.*, 27 S.E.2d 504, 203 S.C. 353.

Tenn.—*Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 155 Tenn. 70.

Wis.—*Thalhofer v. Patri*, 3 N.W.2d 761, 240 Wis. 404.

Delegation of power not unlawful

(1) Delegation of power to a board to grant variances, which was not a delegation of power unaccompanied by a prescription of standard for guidance, was not unlawful.

N.Y.—*Roosevelt Field v. Town of North Hempstead*, 98 N.Y.S.2d 350, 277 App.Div. 889.

(2) Zoning ordinance providing that board of appeals shall perform its duties in manner prescribed by section of statute providing for minutes and records to be kept by board and hearings to be held after notice given, and providing for complete review of board's acts by aggrieved party, is not an unlawful delegation of legislative authority by town board.

N.Y.—*Holy Sepulchre Cemetery v. Town of Greece*, 79 N.Y.S.2d 633, 191 Misc. 241, affirmed 79 N.Y.S.2d 863, 273 App.Div. 942.

19. Ala.—*Nelson v. Donaldson*, 50 So.2d 244, 255 Ala. 76.

Fla.—*Tau Alpha Holding Corporation v. Board of Adjustments of City of Gainesville*, 171 So. 819, 126 Fla. 858.

20. Ill.—*Petterson v. City of Naperville*, 137 N.E.2d 371, 9 Ill.2d 233.

21. Denying vehicular access to abutting property

City may, in interest of public safety, impose such restrictions as it may find necessary to preservation of public safety even to extent of denying vehicular access to property of abutting owner and under such circumstances denial of access does not violate due process.

Minn.—*Alexander Co. v. City of Owatonna*, 24 N.W.2d 244, 222 Minn. 312.

22. Md.—*Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore*, 60 A.2d 754, 191 Md. 249.

23. Fla.—*Ellis v. City of Winter Haven*, 60 So.2d 620.

Church or school

A zoning ordinance prohibiting sale of intoxicating liquors within one thousand five hundred feet of any church or school is a valid exercise of police power.

Miss.—*Fanning v. Town of Hickory*, 30 So.2d 65, 201 Miss. 620.

Liquor outlet

(1) Zoning ordinance could properly impose one thousand five hundred foot limitation with respect to liquor outlets so as to prevent use of build-

places used for the sale of liquor within a zone.²⁴ On the other hand, zoning regulations as to various other particular matters have been held invalid.²⁵

The general rule, as discussed supra 17, that zon-

ing regulations must conform to the statutes under the authority of which they are enacted has been applied to regulations as to various particular matters.²⁶

B. REASONABLENESS

§ 68. In General

The zoning power must be exercised reasonably, not arbitrarily, and a zoning ordinance or regulation must be reasonable; on its reasonableness depend its validity and the validity of its application.

Zoning authorities may not, under the guise of police power, impose restrictions by way of zoning regulations if the restrictions are unreasonable and unnecessary.²⁷ The zoning power must be exercised reasonably,²⁸ and it is a well-settled principle of law

ing under unlimited liquor permit within one thousand five hundred feet of another building containing outlet operating under same kind of permit.

Conn.—Rudis v. Zoning Commission of the Town of Fairfield, 65 A.2d 579, 135 Conn. 410.

(2) Zoning ordinance forbidding use of building for sale of alcoholic liquor under full permit if located within one thousand five hundred feet of any other building used for sale of liquor under such permit, and prohibiting increase of limited liquor use already permitted on premises within one thousand five hundred feet of other unlimited uses, was a proper classification to regulate health and welfare of community.

Conn.—Miller v. Zoning Commission of City of Bridgeport, 65 A.2d 577, 135 Conn. 405.

(3) Adopters of zoning ordinance requiring all premises selling alcoholic liquors to be at least one thousand feet apart in business zone, with single exception of grocery stores selling beer under package store permit could reasonably distinguish between such grocery stores, and drug stores selling all kinds of liquor.

Conn.—State ex rel. Wise v. Turkington, 63 A.2d 596, 135 Conn. 276.

An ordinance permitting sale of beer and wine in a designated zone and prohibiting sale of hard liquors in same zone was not invalid as unlawfully discriminatory.

Fla.—State ex rel. Rimer v. City of Miami Beach, 27 So.2d 524, 158 Fla. 83.

Commercial area

Fact that sale of intoxicants is accompanied by objectionable features not common to other types of commercial enterprises, constitutes valid grounds for a separate classification or prohibition thereof in a given commercial area, for protection of health, morals, safety, peace, and convenience of public.

Tex.—Loudner v. Texas Liquor Control Bd., Civ.App., 214 S.W.2d 336, refused no reversible error.

Limitation to sale from package stores

Statute granting cities power to establish zoning ordinances restricting locations wherein retail liquor licensees may conduct their places of business authorizes cities to limit sales of liquor in particular zones to sales from package stores.

Fla.—Gross v. City of Miami, 62 So. 2d 418.

24. Conn.—Miller v. Zoning Commission of City of Bridgeport, 65 A.2d 577, 135 Conn. 405.

25. High-tension line

Zoning ordinance in so far as absolutely prohibiting electric power company from constructing and maintaining through village, a publicly needed high-tension electric line was invalid.

N.Y.—Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

Prohibiting pipe line

Enforcement by municipal corporation of its zoning ordinance to prohibit pipe line company holding certificate of public convenience and necessity under Natural Gas Act from constructing its interstate transmission pipe line through municipality along route chosen by company could not be sustained as exercise of its police power, in absence of showing that pipe line would endanger health, safety, or welfare of residents of the municipality.

U.S.—Transcontinental Gas Pipe Line Corp. v. Borough of Milltown, Middlesex County, D.C.N.J., 93 F.Supp. 287.

26. Regulations as to enforcement

Provisions of zoning ordinance that inspector of buildings shall enforce provisions of ordinance, and, when he finds any violations, he shall at once issue order for removal are consistent with enabling statute providing for enforcement of such an ordinance by proper local authorities of municipality.

N.H.—Carrick v. Langtry, 108 A.2d 546, 99 N.H. 251.

27. Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146

—Grand Trunk Western R. Co. v. City of Detroit, 40 N.W.2d 195, 326 Mich. 387.

28. U.S.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., D.C.Mo., 54 F.2d 1071, reversed on other grounds, C. C.A., 58 F.2d 593.

Cal.—Ex parte Angelus, 150 P.2d 908, 65 C.A.2d 441—Corpus Juris cited in Yuba City v. Cherniavsky, 4 P.2d 299, 301, 117 C.A. 568.

Colo.—Colby v. Board of Adjustment, 255 P. 443, 31 Colo. 344.

Conn.—Mills v. Town Plan and Zoning Commission of Town of Windsor, 134 A.2d 250, 144 Conn. 493—Corthouts v. Town of Newington, 99 A.2d 112, 140 Conn. 284, 38 A.L. R.2d 1136.

Lakeside Realty Co. v. Town of Berlin, 129 A.2d 628, 20 Conn.Sup. 188.

Fla.—State ex rel. S. A. Lynch Corp. v. Danner, 33 So.2d 45, 159 Fla. 374—City of Miami v. Rosen, 10 So.2d 307, 151 Fla. 677—Forde v. City of Miami Beach, 1 So.2d 642, 146 Fla. 676.

Idaho.—O'Connor v. City of Moscow, 202 P.2d 401, 69 Idaho 37, 9 A.L. R.2d 1031.

Iowa.—Granger v. Board of Adjustment of City of Des Moines, 44 N. W.2d 399, 241 Iowa 1356—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434—City of Louisville v. Koenig, 162 S.W.2d 19, 290 Ky. 562, 140 A.L. R. 1369.

Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

Mass.—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

Mich.—McGiverin v. City of Huntington Woods, 72 N.W.2d 105, 343 Mich. 413—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331—Ervin Acceptance Co. v. City of

that the power to zone must not be exercised in an | arbitrary manner.²⁹ A zoning ordinance or regu-

- Ann Arbor, 34 N.W.2d 11, 322 Mich. 404—Faucher v. Sherwood, 32 N.W.2d 440, 321 Mich. 193—Pringle v. Shevnock, 14 N.W.2d 827, 309 Mich. 179—People v. Scrafano, 12 N.W.2d 325, 307 Mich. 655—Palmer v. City of Detroit, 11 N.W.2d 199, 306 Mich. 449—Pere Marquette Ry. Co. v. Township Board of Muskegon Township, 298 N.W. 393, 298 Mich. 31—Moreland v. Armstrong, 297 N.W. 60, 297 Mich. 32—City of North Muskegon v. Miller, 227 N.W. 743, 249 Mich. 52.
- Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681—Brown v. Gambrel, 213 S.W.2d 931, 358 Mo. 192—City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n, 213 S.W.2d 479, 358 Mo. 70.
- Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460—Cassel Realty Co. v. City of Omaha, 14 N.W.2d 600, 144 Neb. 753.
- N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57—Roselle v. Wright, 122 A.2d 506, 21 N.J. 400—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.
- Newark Milk & Cream Co. of Newark v. Parsippany-Troy Hills Tp., 135 A.2d 682, 47 N.J.Super. 306—Gartland v. Borough of Maywood, 131 A.2d 529, 45 N.J.Super. 1.
- National House & Farms Ass'n v. Board of Adjustment of Borough of Oakland, 61 A.2d 55, 137 N.J.Law 542, reversed on other grounds 65 A.2d 518, 2 N.J. 11—Visco v. City of Plainfield, 57 A.2d 490, 136 N.J.Law 659—DeMott Homes at Salem v. Margate City, 56 A.2d 423, 136 N.J.Law 330, affirmed 57 A.2d 388, 136 N.J.Law 369—United Advertising Corp. v. Board of Adjustment of Maplewood Tp., 56 A.2d 406, 136 N.J.Law 336—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J.Law 195, affirmed Appley v. Township Committee of Township of Bernards, 28 A. 177, 129 N.J.Law 73—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367—Phillips v. Township Council of Teaneck Tp., 198 A. 368, 120 N.J.Law 45, affirmed 5 A.2d 698, 122 N.J.Law 485.
- Iannella v. Piscataway Tp., 61 A.2d 687, 142 N.J.Eq. 763.
- La Mer v. Gill, 187 A. 730, 14 N.J.Misc. 826.
- N.Y.—Town of Somers v. Camarco, 127 N.E.2d 327, 308 N.Y. 537—Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517, 307 N.Y. 493—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.
- Brown v. Village of Owego, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655—Headley v. City of Rochester, 288 N.Y.S. 277, 247 App.Div. 562, reversed on other grounds 5 N.E.2d 198, 272 N.Y. 197.
- Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47—Ballard v. Roth, 253 N.Y.S. 6, 141 Misc. 319—Fox Meadow Estates v. Livingston, 242 N.Y.S. 86, 137 Misc. 22, reversed on other grounds 252 N.Y.S. 178, 233 App.Div. 250, and affirmed Fox Meadow Estates v. Culley, 185 N.E. 714, 261 N.Y. 506.
- People v. Leighton, 44 N.Y.S.2d 779.
- Ohio.—Cassell v. Lexington Tp. Bd. of Zoning Appeals, 127 N.E.2d 11, 163 Ohio St. 340.
- Pa.—In re Gilliland's Permit, 140 A. 136, 291 Pa. 358.
- Miller v. Seaman, 8 A.2d 415, 137 Pa.Super. 24.
- Appeal of Kanig, 56 Pa.Dist. & Co. 53, 47 Lack.Jur. 69, 37 Mun.L.R. 229.
- Tex.—City of Lubbock v. Stubbs, Civ. App., 278 S.W.2d 519.
- Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.
- Wis.—City of La Crosse v. Elbertson, 237 N.W. 99, 205 Wis. 207.
- 43 C.J. p 336 note 73.
- Grouping power**
- There must be a reasonable exercise of grouping power; such is of essence of comprehensive zoning.
- N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.
- Enactment under general power**
- A zoning ordinance passed under a general power and not in the exercise of a specific power is subject to the test of reasonableness.
- Tex.—City of West University Place v. Ellis, 134 S.W.2d 1038, 134 Tex. 222.
- Unreasonableness as to others**
- Persons seeking to establish invalidity of zoning ordinance cannot predicate claim of unreasonableness on fact that ordinance might be unreasonable as to others.
- U.S.—Marblehead Land Co. v. City of Los Angeles, C.C.A.Cal., 47 F.2d 528, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540.
- Law of nuisance is not controlling in determining reasonableness of zoning ordinance.**
- N.H.—Sundeen v. Rogers, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.
- Regulations held reasonable or not unreasonable**
- Ala.—Bobo v. City of Florence, 69 So.2d 463, 290 Ala. 239.
- Ark.—Goldman & Co. v. City of North Little Rock, 249 S.W.2d 961, 220 Ark. 792.
- Ill.—Whitehead v. Village of Lombard, 121 N.E.2d 745, 3 Ill.2d 464—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568.
- Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.
- Mo.—State ex rel. Luechtefeld v. Arnold, App., 149 S.W.2d 384.
- Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1870, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.
- N.J.—Collins v. Board of Adjustment of City of Margate, 67 A.2d 332, 3 N.J.Super. 553, affirmed 69 A.2d 708, 3 N.J. 200.
- N.Y.—Barkmann v. Town of Hempstead, 49 N.Y.S.2d 262, 268 App.Div. 785, affirmed 62 N.E.2d 238, 294 N.Y. 805.
- Rice v. Van Vranken, 229 N.Y.S. 32, 132 Misc. 82, affirmed 232 N.Y.S. 506, 225 App.Div. 179, affirmed 175 N.E. 304, 255 N.Y. 541.
- Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.
- 43 C.J. p 336 note 73 [a].
29. Ark.—City of West Helena v. Bockman, 256 S.W.2d 40, 221 Ark. 677—City of Little Rock v. Sun Building & Developing Co., 134 S.W.2d 582, 199 Ark. 333.
- Cal.—Robinson v. City of Los Angeles, 304 P.2d 814, 146 C.A.2d 810.
- Conn.—Del Buono v. Board of Zoning Appeals of Town of Stratford, 124 A.2d 915, 143 Conn. 673—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415.
- Lakeside Realty Co. v. Town of Berlin, 129 A.2d 628, 20 Conn.Sup. 188.
- Ill.—Johnson v. Village of Villa Park, 18 N.E.2d 887, 370 Ill. 272—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568.
- Iowa.—Central States Theatre Corp. v. Sar, 66 N.W.2d 450, 245 Iowa 1254—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.
- Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.
- Mass.—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.
- Mich.—Bassey v. City of Huntington Woods, 74 N.W.2d 897, 344 Mich.

lation it has been held must be reasonable and must | not be arbitrary;³⁰ and on its reasonableness de-

- 701—*Fass v. City of Highland Park*, 32 N.W.2d 375, 321 Mich. 156.
 Mo.—*City of St. Louis v. Friedman*, 216 S.W.2d 475, 358 Mo. 681.
 Neb.—*Davis v. City of Omaha*, 45 N.W.2d 172, 153 Neb. 460—*Cassel Realty Co. v. City of Omaha*, 14 N.W.2d 600, 144 Neb. 753.
 N.J.—*Bogert v. Washington Tp.*, 135 A.2d 1, 25 N.J. 57—*Roselle v. Wright*, 122 A.2d 506, 21 N.J. 400—*Katobimar Realty Co. v. Webster*, 118 A.2d 824, 20 N.J. 114—*Delawanna Iron & Metal Co. v. Albrecht*, 88 A.2d 616, 9 N.J. 424—*Speakman v. Mayor & Council of Borough of North Plainfield*, 84 A.2d 715, 8 N.J. 250.
 Gartland v. Borough of Maywood, 131 A.2d 529, 45 N.J.Super. 1—*Clary v. Borough of Eatontown*, 124 A.2d 54, 41 N.J.Super. 47—*Marie's Launderette v. City of Newark*, 113 A.2d 190, 35 N.J.Super. 94.
 Visco v. City of Plainfield, 57 A.2d 490, 136 N.J.Law 559—*Appley v. Township Committee of Bernards Tp., Somerset County*, 24 A.2d 805, 128 N.J.Law 195, affirmed *Appley v. Township Committee of Township of Bernards*, 28 A.2d 177, 129 N.J.Law 73—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367—*Phillips v. Township Council of Teaneck Tp.*, 198 A. 368, 120 N.J.Law 45, affirmed 5 A.2d 698, 122 N.J.Law 485.
 N.Y.—*Vernon Park Realty v. City of Mount Vernon*, 121 N.E.2d 517, 307 N.Y. 493.
 McCarter v. Beckwith, 285 N.Y.S. 151, 247 App.Div. 289, affirmed 3 N.E.2d 882, 272 N.Y. 488, certiorari denied Beckwith v. McCarter, 57 S.Ct. 194, 299 U.S. 601, 81 L.Ed. 443.
 Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47.
 Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 378, 2 App.Div.2d 889—*Hoyt v. Incorporated Village of Cedarhurst*, 121 N.Y.S.2d 899, affirmed 113 N.Y.S.2d 922, 280 App.Div. 809.
 Ohio.—*Cassell v. Lexington Tp. Bd. of Zoning Appeals*, 127 N.E.2d 11, 163 Ohio St. 340.
 Kessler v. Smith, 142 N.E.2d 231, 104 Ohio App. 213, appeal dismissed *Smith v. Village of Glenwillow*, 146 N.E.2d 308, 187 Ohio St. 91.
 Pa.—*Appeal of Medinger*, 104 A.2d 118, 377 Pa. 217—*Gratton v. Conte*, 73 A.2d 381, 364 Pa. 578—*Appeal of Kerr*, 144 A. 81, 294 Pa. 246.
 Commonwealth v. Campbell, 29 Erie Co. 113.
 Tex.—*City of Lubbock v. Stubbs*, Civ. App., 278 S.W.2d 519—*City of West University Place v. Ellis*, Civ.App., 118 S.W.2d 907, affirmed 184 S.W.2d 1038, 134 Tex. 222.
 Va.—*West Bros. Brick Co. v. City of Alexandria*, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.
 W.Va.—*Carter v. City of Bluefield*, 54 S.E.2d 747, 132 W.Va. 881.
 43 C.J. p 336 note 74.
Decision reached prior to public hearing
 If public hearing was had by zoning commission merely to comply with statutory requirement that such a public hearing be held, and if commission had previously resolved that, regardless of what might be developed by those in attendance at public hearings, zones were to be established as previously determined, the action of the commission might well be classified as arbitrary.
 Conn.—*Couch v. Zoning Commission of Town of Washington*, 106 A.2d 173, 141 Conn. 349.
Destruction of property rights
 Property rights cannot be wrongfully destroyed by arbitrary enactment.
 Fla.—*City of Miami Beach*, Fla. v. Benhow Realty, C.C.A.Fla., 168 F.2d 378.
Regulations held not arbitrary
 (1) In general.
 Cal.—*Price v. Schwafel*, 206 P.2d 683, 92 C.A.2d 77.
 Neb.—*City of Omaha v. Glissmann*, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.
 Nev.—*State ex rel. Davie v. Coleman*, 224 P.2d 309, 67 Nev. 636.
 N.J.—*Collins v. Board of Adjustment of City of Margate*, 67 A.2d 332, 3 N.J.Super. 553. Affirmed 69 A.2d 708, 3 N.J. 200.
 Pa.—*Silver v. Zoning Bd. of Adjustment*, 112 A.2d 84, 381 Pa. 41.
 (2) Regulation prohibiting issuance of permit for erection of building unless a street or highway giving access to such proposed building has been placed on official map or plan, or, if there is no official map or plan, except under specified conditions.
 N.Y.—*Brous v. Smith*, 109 N.Y.S.2d 289, affirmed 106 N.E.2d 503, 304 N.Y. 164.
 30. Ark.—*City of West Helena v. Bockman*, 256 S.W.2d 40, 221 Ark. 877.
 Cal.—*Price v. Schwafel*, 206 P.2d 683, 92 C.A.2d 77.
 Colo.—*Di Salle v. Giggall*, 261 P.2d 499, 128 Colo. 208.
 Conn.—*West Hartford Methodist Church v. Zoning Bd. of Appeals of Town of West Hartford*, 121 A.2d 640, 143 Conn. 263.
 Ga.—*City of Rome v. Shadyside Memorial Gardens, Inc.*, 92 S.E.2d 734, 93 Ga.App. 759.
 Ill.—*Northern Trust Co. v. City of Chicago*, 123 N.E.2d 330, 4 Ill.2d 432—*Hannifin Corp. v. City of Berwyn*, 115 N.E.2d 315, 1 Ill.2d 28.
 Mich.—*West Bloomfield Tp. v. Chapman*, 88 N.W.2d 377, 351 Mich. 606—*McHugh v. City of Dearborn*, 83 N.W.2d 222, 348 Mich. 311—*Industrial Land Co. v. City of Birmingham*, 78 N.W.2d 656, 346 Mich. 667—*Warner v. City of Muskegon*, 73 N.W.2d 837, 344 Mich. 408—*McGivern v. City of Huntington Woods*, 72 N.W.2d 105, 343 Mich. 413—*Comer v. City of Dearborn*, 70 N.W.2d 813, 342 Mich. 471—*Anchor Steel & Conveyor Co. v. City of Dearborn*, 70 N.W.2d 753, 342 Mich. 361—*Plum Hollow Golf and Country Club v. Southfield Tp.*, 67 N.W.2d 122, 341 Mich. 84—*Janestick v. City of Detroit*, 60 N.W.2d 452, 337 Mich. 549—*Redford Moving & Storage Co. v. City of Detroit*, 58 N.W.2d 812, 336 Mich. 702—*Fenner v. City of Muskegon*, 50 N.W.2d 210, 331 Mich. 732—*Hammond v. Kephart*, 50 N.W.2d 155, 331 Mich. 551—*Morris G. Laramie & Son v. Gidley*, 40 N.W.2d 205, 326 Mich. 410—*Ritenour v. Dearborn Tp.*, 40 N.W.2d 137, 326 Mich. 242—*Faucher v. Sherwood*, 32 N.W.2d 440, 321 Mich. 193—*Elizabeth Lake Estates v. Waterford Tp.*, 26 N.W.2d 788, 317 Mich. 359—*Frischkorn Const. Co. v. Lambert*, 24 N.W.2d 209, 315 Mich. 556—*Oschin v. Redford Tp.*, 24 N.W.2d 152, 315 Mich. 359—*Pere Marquette Ry. Co. v. Township Board of Muskegon Tp.*, 298 N.W. 393, 298 Mich. 31.
 Miss.—*Jones v. City of Hattiesburg*, 42 So.2d 717, 207 Miss. 491.
 Mo.—*Landau v. Levin*, 213 S.W.2d 483, 358 Mo. 77.
 N.J.—*Marie's Launderette v. City of Newark*, 113 A.2d 190, 35 N.J.Super. 94.
 N.Y.—*City of New York v. Jack Parker Associates, Inc.*, 161 N.Y.S.2d 731, 5 Misc.2d 633.
 Gitlin v. Rowledge, 123 N.Y.S.2d 812—*Pforzheimer v. Seidman*, 99 N.Y.S.2d 87, reversed on other grounds 103 N.Y.S.2d 886, 278 App.Div. 780.
 Ohio.—*Loesch Allotment Co. v. Village of Newburgh Heights*, Conn. Pl., 100 N.E.2d 543.
 Pa.—*Appeal of Volpe*, 121 A.2d 97, 384 Pa. 374.
 Commonwealth ex rel. v. Debaldo, Co., 99 Pittsb.Leg.J. 155.

pend its validity³¹ and the validity of its application.³²

A zoning regulation is legal or valid when it is reasonable,³³ or when it is reasonable in object and

not arbitrary in operation,³⁴ or if it is not arbitrary, and bears a reasonable and substantial relation to the public health, safety, comfort, morals, and general welfare,³⁵ and the means employed are reason-

"Zoning laws and regulations must be reasonable in their application to any particular condition or situation."

Mo.—Women's Christian Ass'n v. Brown, 190 S.W.2d 900, 904, 354 Mo. 700.

Connection with power

Reasonableness is essentially connected with power or competency of a town to adopt or to enforce by-law as to a particular parcel of land within restricted area.

Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

31. Ark.—City of Little Rock v. Hunter, 228 S.W.2d 58, 216 Ark. 916.
Cal.—Parker v. Colburn, 236 P. 921, 196 C. 169.

Conn.—Perdue v. Zoning Board of Appeals of City of Norwalk, 171 A. 26, 118 Conn. 174.

Ill.—Bohan v. Village of Riverside, 138 N.E.2d 487, 9 Ill.2d 561—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344—Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill.2d 432.

Md.—Grant v. Mayor and City Council of Baltimore, 129 A.2d 363, 212 Md. 301—Kramer v. Mayor and City Council of Baltimore, 171 A. 70, 166 Md. 324.

Mass.—Town of Lexington v. Simeone, 134 N.E.2d 123, 334 Mass. 127—Caputo v. Board of Appeals of Somerville, 111 N.E.2d 674, 330 Mass. 107—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

Mich.—Hammond v. Kephart, 50 N.W. 2d 155, 331 Mich. 551—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331—Morris G. Laramie & Son v. Gidley, 40 N.W.2d 205, 326 Mich. 410—Frischkorn Const. Co. v. Lambert, 24 N.W.2d 209, 315 Mich. 556—Pere Marquette Ry. Co. v. Township Board of Muskegon Tp., 298 N.W. 393, 298 Mich. 31.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.
N.J.—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64—Collins v. Board of Adjustment of Margate City, 69 A.2d 708, 3 N.J. 200.

Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights in Bergen County, 99 A. 2d 591, 27 N.J.Super. 476, reversed on other grounds 105 A.2d 521, 15 N.J. 447.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, af-

firmed 125 N.Y.S.2d 112, 282 App. Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 706, affirmed 121 N.E.2d 517, 307 N.Y. 493.

Ohio.—Kessler v. Smith, 142 N.E.2d 231, 104 Ohio App. 213, appeal dismissed Smith v. Village of Glenwillow, 146 N.E.2d 308, 167 Ohio St. 91.

Pa.—Schlaanastine v. Westtown Tp., 7 Chest.Co. 217.

Tenn.—Henry v. White, 250 S.W.2d 70, 194 Tenn. 192—Meador v. City of Nashville, 220 S.W.2d 876, 188 Tenn. 441.

Tex.—City of Sherman v. Simms, 183 S.W.2d 415, 143 Tex. 115.

Lamkin v. City of Bellaire, Civ. App., 308 S.W.2d 70, error granted—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700—City of Amarillo v. Meade, Civ.App., 286 S.W.2d 276.

Due process of law as affected by reasonableness or unreasonableness of ordinance see supra § 27.

Reasonableness held test of legality

Mich.—West Bloomfield Tp. v. Chapman, 88 N.W.2d 377, 351 Mich. 606—Scholnick v. City of Bloomfield Hills, 86 N.W.2d 324, 350 Mich. 187—McHugh v. City of Dearborn, 83 N.W.2d 222, 348 Mich. 311—Korby v. Redford Tp., 82 N.W.2d 441, 348 Mich. 193—Industrial Land Co. v. City of Birmingham, 78 N.W.2d 656, 346 Mich. 667—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706—Warner v. City of Muskegon, 73 N.W.2d 837, 344 Mich. 408—McGiverin v. City of Huntington Woods, 72 N.W.2d 105, 343 Mich. 413—Comer v. City of Dearborn, 70 N.W.2d 813, 342 Mich. 471—Anchor Steel & Conveyor Co. v. City of Dearborn, 70 N.W.2d 753, 342 Mich. 361—Plum Hollow Golf and Country Club v. Southfield Tp., 67 N.W.2d 122, 341 Mich. 84—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702—Fenner v. City of Muskegon, 50 N.W.2d 210, 331 Mich. 732—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

Unreasonableness as test of invalidity

One test of invalidity of a zoning ordinance is whether it is arbitrary or unreasonable.

Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

Arbitrary fiat

To hold an ordinance, which prohibits certain uses of property, invalid it must be found that prohibition passes beyond bounds of reason and assumes character of merely arbitrary fiat.

N.Y.—People v. Calvar Corp., 69 N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

Belief in necessity of amendment held not unreasonable

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

32. Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

Pa.—Alenovitz v. East Whiteland Tp., 7 Chest.Co. 3.

33. Ill.—Anderson v. County of Cook, 138 N.E.2d 485, 9 Ill.2d 568.
Kan.—Spurgeon v. Board of Com'rs of Shawnee County, 317 P.2d 798, 181 Kan. 1008.

Mich.—Scholnick v. City of Bloomfield Hills, 86 N.W.2d 324, 350 Mich. 187—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706—Ervin Acceptance Co. v. City of Ann Arbor, 34 N.W.2d 11, 322 Mich. 404.
N.Y.—Consolidated Edison Co. of N.Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

Ohio.—Smith v. Juillerat, 119 N.E.2d 611, 161 Ohio St. 424.

Carlton v. Riddell, App., 132 N.E.2d 772, appeal dismissed 130 N.E.2d 704, 164 Ohio St. 322.

Pa.—Whitpain Tp. v. Bodine, 94 A. 2d 737, 372 Pa. 509—Appeal of Lord, 81 A.2d 533, 368 Pa. 121.

Appeal by Dormont Borough Co., 47 Mun.L.R. 232, 103 Pittsb.Leg.J. 423, affirmed 119 A.2d 827, 180 Pa. Super. 550.

34. Cal.—Livingston Rock & Gravel Co. v. Los Angeles County, 272 P. 2d 4, 43 C.2d 121—Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865, 40 C.2d 552—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C. 2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762.

35. Ill.—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 658, 350 U.S. 1013, 100 L.Ed. 873—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344.

Kan.—Spurgeon v. Board of Com'rs of Shawnee County, 317 P.2d 798, 181 Kan. 1008.

ably necessary for the accomplishment of its purpose.³⁶ An ordinance is not void because its enforcement might sometimes be arbitrary or discriminatory.³⁷

Zoning ordinances or regulations will not be declared unreasonable and arbitrary unless they are found to be plainly and palpably so,³⁸ or unless it is shown that if the ordinance is enforced the consequent restrictions will preclude the use of property for any purpose to which it is reasonably adapted.³⁹ Accordingly, where the reasonableness of a zoning ordinance is fairly debatable, it must be upheld.⁴⁰ A zoning ordinance is arbitrary and unreasonable

where it has no substantial relation to the public health, safety, morals, and general welfare,⁴¹ or where it does not bear a rational relation to the end to be served by zoning;⁴² but a city's action is not rendered arbitrary and unreasonable by the fact that it may have acted with the purpose of assisting the county zoning commission,⁴³ or by the fact that prior to annexation to the city, the property had been zoned differently by a different zoning authority.⁴⁴ Reasonableness is judged by its application to the particular circumstances of the case,⁴⁵ and each case must be determined on its own particular facts in deciding whether the regulation is reasonable.⁴⁶

36. Mass.—*Simon v. Town of Needham*, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

37. Ala.—*Walls v. City of Guntersville*, 45 So.2d 468, 253 Ala. 480.

38. U.S.—*Village of Euclid, Ohio v. Ambler Realty Co.*, Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303.

D.C.—*American University v. Prentiss*, D.C., 113 F.Supp. 389, affirmed *Prentiss v. American University*, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied *Wrather v. American University*, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Conn.—*Fairlawn Cemetery Ass'n v. Zoning Commission of Town of Bethel*, 86 A.2d 74, 138 Conn. 434.

Fla.—*Blitch v. City of Ocala*, 195 So. 406, 142 Fla. 612.

La.—*City of New Orleans v. La Nasa*, 88 So.2d 224, 230 La. 289.

Archer v. City of Shreveport, App., 85 So.2d 337—State ex rel. Prats v. City Planning & Zoning Commission of City of New Orleans, App., 59 So.2d 832.

Mich.—*Certain-Teed Products Corp. v. Paris Tp.*, 88 N.W.2d 705, 351 Mich. 434.

Minn.—*Kiges v. City of St. Paul*, 62 N.W.2d 363, 240 Minn. 522.

N.Y.—*Zenith-Godley Co. v. Wiley*, 121 N.Y.S.2d 795.

Test of invalidity of a zoning ordinance is whether it is arbitrary, unreasonable and discriminatory, and has no substantial relation to public health, safety, morals, or general welfare.

Md.—*Cassel v. Mayor and City Council of Baltimore*, 73 A.2d 486, 195 Md. 348.

39. Md.—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

40. Cal.—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

Willett & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 C.A.2d 757.

Md.—*Missouri Realty, Inc. v. Ramer*, 140 A.2d 655—*Board of Com'rs of Anne Arundel County v. Snyder*, 46 A.2d 689, 186 Md. 342.

Mass.—*Raymond v. Commissioner of Public Works of Lowell*, 131 N.E.2d 189, 333 Mass. 410—*Caires v. Building Com'r of Hingham*, 83 N.E.2d 550, 328 Mass. 589.

Mo.—*Downing v. City of Joplin*, 312 S.W.2d 81.

Tex.—*City of Lubbock v. Stubbs*, Civ.App., 278 S.W.2d 519.

If issue is in doubt, regulation must be sustained.

N.J.—*Bogert v. Washington Tp.*, 185 A.2d 1, 25 N.J. 57.

41. Fla.—*City of Miami Beach v. Lachman*, 71 So.2d 148, appeal dismissed *Lachman v. City of Miami Beach*, 75 S.Ct. 292, 348 U.S. 906, 99 L.Ed. 711.

Ill.—*Bauske v. City of Des Plaines*, 148 N.E.2d 584, 13 Ill.2d 169—*Exchange Nat. Bank of Chicago v. Cook County*, 129 N.E.2d 1, 6 Ill.2d 419.

Mich.—*Comer v. City of Dearborn*, 70 N.W.2d 813, 342 Mich. 471.

N.J.—*Collins v. Board of Adjustment of Margate City*, 69 A.2d 708, 3 N.J. 200.

Lionshead Lake v. Wayne Tp., Passaic County, 74 A.2d 609, 9 N.J. Super. 83—*Borough of Point Pleasant Beach v. Point Pleasant Pavilion*, 66 A.2d 40, 3 N.J. Super. 222.

Tex.—*Ham v. Weaver*, Civ.App., 227 S.W.2d 286, reversed on other grounds *Weaver v. Ham*, 232 S.W.2d 704, 149 Tex. 309.

42. N.J.—*Delawanna Iron & Metal Co. v. Albrecht*, 88 A.2d 616, 9 N.J. 424.

43. Ky.—*City of Louisville v. Bryan S. McCoy, Inc.*, 286 S.W.2d 546.

44. Ky.—*City of Louisville v. Bryan S. McCoy, Inc.*, supra.

45. Ill.—*Myers v. City of Elmhurst*, 147 N.E.2d 300, 12 Ill.2d 537—

Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—*Midland Elec. Coal Corp. v. Knox County*, 115 N.E.2d 275, 1 Ill.2d 200.

Mich.—*Comer v. City of Dearborn*, 70 N.W.2d 813, 342 Mich. 471—*Long v. City of Highland Park*, 45 N.W.2d 10, 329 Mich. 146—*Ritenour v. Dearborn Tp.*, 40 N.W.2d 137, 326 Mich. 242—*Pere Marquette Ry. Co. v. Township Board of Muskegon Tp.*, 298 N.W. 393, 298 Mich. 31.

N.Y.—*City of New York v. Jack Parker Associates, Inc.*, 161 N.Y.S.2d 731, 5 Misc.2d 633.

Pa.—*Falls Tp. v. First Falls Realty Corp.*, 6 Bucks 6, 70 York Leg.Rec. 37—*Commonwealth ex rel. v. Debaldo*, 99 Pittsb.Leg.J. 155.

Tex.—*Clesi v. Northwest Dallas Imp. Ass'n*, Civ.App., 263 S.W.2d 820, error refused no reversible error—*Edge v. City of Bellaire*, Civ. App., 200 S.W.2d 224, error refused—*City of University Park v. Hoblitzelle*, Civ.App., 150 S.W.2d 169.

Suitability as applied to character of area involved

Reasonableness of a zoning regulation may depend on suitability of its particular provisions as applied to character of area involved.

Minn.—*Connor v. Chanhausen Tp.*, 81 N.W.2d 789, 249 Minn. 205.

46. Cal.—*City of Los Angeles v. Gage*, 274 P.2d 84, 127 C.A.2d 442.

Colo.—*Di Salle v. Giggall*, 261 P.2d 499, 128 Colo. 208.

Ill.—*Gordon v. City of Wheaton*, 146 N.E.2d 37, 12 Ill.2d 284—*La Salle Nat. Bank v. City of Chicago*, 136 N.E.2d 643, 6 Ill.2d 22—*Trust Co. of Chicago v. City of Chicago*, 96 N.E.2d 499, 408 Ill. 91.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Iowa.—*Keller v. City of Council Bluffs*, 66 N.W.2d 113, 246 Iowa 202.

Mass.—*City of Pittsfield v. Oleksak*, 47 N.E.2d 930, 313 Mass. 553.

Mich.—*West Bloomfield Tp. v. Chapman*, 88 N.W.2d 377, 351 Mich. 606

Although there is some authority holding that reasonableness of an ordinance is to be tested by its general effect, and not by its effect on any particular property owner,⁴⁷ a zoning ordinance may be valid in its general aspects, and yet, as to a particular state of facts involving a particular parcel of real estate affected thereby, be so clearly arbitrary and unreasonable as to be invalid as applied thereto⁴⁸ and result in confiscation;⁴⁹ and a determination that the classification of a particular lot for zoning purposes is arbitrary and unreasonable does not affect the validity of the regulation as to other property the classification of which is not arbitrary,⁵⁰ at least where the provisions of the zoning regulation are by their express terms severable.⁵¹

Provisions invalid as applied to certain property because unreasonable and confiscatory are not made valid with respect thereto by the transfer of title from one owner to another.⁵²

§ 69. Considerations Involved in Determination

In determining whether a zoning regulation is reasonable, all the existing circumstances or contemporaneous conditions may or must be considered.

In determining whether a zoning regulation is reasonable, matters which may or must be considered include all the existing circumstances or contemporaneous conditions,⁵³ such as the necessity or

—Korby v. Redford Tp., 82 N.W.2d 441, 348 Mich. 193—Industrial Land Co. v. City of Birmingham, 78 N.W.2d 656, 346 Mich. 667—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706—Warner v. City of Muskegon, 73 N.W.2d 837, 344 Mich. 408—Plum Hollow Golf and Country Club v. Southfield Tp., 67 N.W.2d 122, 341 Mich. 84—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702—Hammond v. Kephart, 50 N.W.2d 155, 331 Mich. 551—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146—Ervin Acceptance Co. v. City of Ann Arbor, 34 N.W.2d 11, 322 Mich. 404—Seneffsky v. Lawler, 12 N.W.2d 387, 307 Mich. 728, 149 A.L.R. 1433—Palmer v. City of Detroit, 11 N.W.2d 199, 306 Mich. 449—Pere Marquette Ry. Co. v. Township Board of Muskegon Township, 298 N.W. 393, 298 Mich. 31—Moreland v. Armstrong, 297 N.W. 60, 297 Mich. 32.

Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205.
Miss.—Palazzola v. City of Gulfport, 52 So.2d 611, 211 Miss. 737—Jones v. City of Hattiesburg, 42 So.2d 717, 207 Miss. 491.

Mo.—Downing v. City of Joplin, 312 S.W.2d 81—City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n, 213 S.W.2d 478, 358 Mo. 70.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57.

Lionshead Lake v. Wayne Tp., Passaic County, 74 A.2d 609, 9 N.J. Super. 83.

Ohio.—Johnson v. Griffiths, App., 141 N.E.2d 774, appeal dismissed 131 N.E.2d 397, 164 Ohio St. 393.

Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 153 Ohio St. 253.

Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

Facts not conclusions as determinative

Whether zoning board's action was arbitrary must be determined from facts from which conclusion was drawn, not from the conclusion itself.

Md.—Temmink v. Board of Zoning Appeals of Baltimore County, 109 A.2d 85, 205 Md. 489—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Zang & Sons, Builders, Inc. v. Taylor, 102 A.2d 723, 203 Md. 628.

47. N.Y.—Servodidio v. Board of Appeals of Town of Somers, 146 N.Y. S.2d 125.

48. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., C.C.A.Mo., 58 F.2d 593.

Ill.—Eleopoulos v. City of Chicago, 120 N.E.2d 555, 3 Ill.2d 247—City of Chicago v. Sachs, 115 N.E.2d 762, 1 Ill.2d 342—Du Page County v. Halkier, 115 N.E.2d 635, 1 Ill.2d 491—Pringle v. City of Chicago, 89 N.E.2d 365, 404 Ill. 473—Metropolitan Life Ins. Co. v. City of Chicago, 84 N.E.2d 825, 402 Ill. 581—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536—Village of La Grange v. Leitch, 35 N.E.2d 346, 377 Ill. 99.
American Smelting & Refining Co. v. City of Chicago, 105 N.E.2d 803, 347 Ill.App. 32.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.
Mo.—Downing v. City of Joplin, 312 S.W.2d 81—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 78 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

Tex.—Lamkin v. City of Bellaire, Civ. App., 308 S.W.2d 70, error granted.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Arbitrary and unnatural running of boundary lines

Zoning regulation may be voided as to particular property included in given zone by arbitrary and unnatural running of boundary lines not in keeping with well-considered plan. N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.

Question related in application to particular property

Whether a zoning ordinance is unreasonable or arbitrary is related in its application to the particular property involved.

Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442—Morris v. City of Los Angeles, 254 P.2d 935, 116 C.A.2d 856.

49. Ga.—Humthlett v. Reeves, 90 S.E.2d 14, 212 Ga. 8.

Ill.—Petropoulos v. City of Chicago, 125 N.E.2d 522, 5 Ill.2d 270—Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill.2d 432—Eleopoulos v. City of Chicago, 120 N.E.2d 555, 3 Ill.2d 247—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265.

50. Ark.—City of Little Rock v. Bentley, 165 S.W.2d 890, 204 Ark. 727.

51. Ark.—City of Little Rock v. Sun Building & Developing Co., 134 S.W.2d 582, 199 Ark. 333.

52. Mich.—Robyns v. City of Dearborn, 67 N.W.2d 718, 341 Mich. 495.

Ordinance held not relieved of unreasonable and confiscatory character by facts that twenty-two years had passed and lots had been transferred from owner to owner since passage of ordinance.

Mich.—Robyns v. City of Dearborn, supra.

53. Idaho.—O'Connor v. City of Mos-

lack of necessity for the adoption of the regulation,⁵⁴ the object sought to be accomplished,⁵⁵ the location, size, and physical characteristics of the land involved,⁵⁶ the character of the neighborhood,⁵⁷ the density of the population in the city, town, or village involved,⁵⁸ the aesthetics of the situation,⁵⁹ the nature of other land in the vicinity,⁶⁰ traffic and transportation influences on the property

and the surrounding area,⁶¹ the use to which nearby property is put⁶² or may be put most advantageously,⁶³ the zoning classification and use of nearby property,⁶⁴ including zoning and use in a neighboring municipality,⁶⁵ the requirements of the locality,⁶⁶ the local housing situation and the plans of the proper authorities for relieving it,⁶⁷ and the

cow, 202 P.2d 401, 69 Idaho 37, 9 A.L.R.2d 1031.

N.J.—Fischer v. Bedminster Tp., Somerset County, 90 A.2d 757, 21 N.J.Super. 81, affirmed 93 A.2d 378, 11 N.J. 194.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.

54. Idaho.—O'Connor v. City of Moscow, 202 P.2d 401, 69 Idaho 37, 9 A.L.R.2d 1031.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.

Tex.—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224, error refused —City of University Park v. Hoblitzelle, Civ.App., 150 S.W.2d 169.

55. Idaho.—O'Connor v. City of Moscow, 202 P.2d 401, 69 Idaho 37, 9 A.L.R.2d 1031.

Nev.—State ex rel. Davie v. Coleman, 224 P.2d 309, 67 Nev. 636.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.

Tex.—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224, error refused —City of University Park v. Hoblitzelle, Civ.App., 150 S.W.2d 169.

Ordinance intended to conserve property values

Where purpose of ordinance and its enforcement was to conserve property values and enforcement of ordinance would not tend to lessen congestion on public streets, promote public sanitation, health, safety, and general welfare, ordinance was invalid as unreasonable.

Mich.—Elizabeth Lake Estates v. Waterford Tp., 26 N.W.2d 788, 317 Mich. 359.

56. Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381

—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

57. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.

Ill.—Mack v. Cook County, 142 N.E.2d 785, 11 Ill.2d 310—Wehrmeister v. Du Page County, 141 N.E.2d 26, 10 Ill.2d 604—Liberty Nat. Bank of Chicago v. City of Chicago, 139 N.E.2d 235, 10 Ill.2d 137—Rams-Head Co. v. City of Des Plaines, 137 N.E.2d 259, 9 Ill.2d 326—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396 —People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Nev.—State ex rel. Davie v. Coleman, 224 P.2d 309, 67 Nev. 636.

N.J.—Fischer v. Bedminster Tp., Somerset County, 90 A.2d 757, 21 N.J.Super. 81, affirmed 93 A.2d 378, 11 N.J. 194.

Tex.—City of Lubbock v. Stubbs, Civ. App., 278 S.W.2d 519.

58. N.Y.—Town of Somers v. Camarico, 127 N.E.2d 327, 308 N.Y. 537.

Not conclusive test

Relative density of population in permissive and restricted districts is not a conclusive test of the reasonableness of a zoning ordinance.

Cal.—Sunny Slope Water Co. v. City of Pasadena, 33 P.2d 672, 1 C.2d 87.

59. Mass.—Town of Burlington v. Dunn, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

N.Y.—New York Trap Rock Corp. v. Town of Clarkstown, 149 N.Y.S.2d 290, 1 A.D.2d 890, affirmed 144 N.E.2d 725, 3 N.Y.2d 844, 166 N.Y. S.2d 82.

People v. Gerus, 69 N.Y.S.2d 283.

60. Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381 —Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

61. Ill.—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill.2d 169.

62. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.

Ill.—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418.

Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

Development of surrounding area in municipality and adjacent area outside municipality must be given weight in considering whether ordinance is arbitrary or unreasonable.

Ky.—City of Louisville v. Bryan S. McCoy, Inc., 286 S.W.2d 546.

63. N.J.—Fischer v. Bedminster Tp., Somerset County, 90 A.2d 757, 21 N.J.Super. 81, affirmed 93 A.2d 378, 11 N.J. 194.

64. Ill.—Mack v. Cook County, 142 N.E.2d 785, 11 Ill.2d 310—Wehrmeister v. Du Page County, 141 N.E.2d 26, 10 Ill.2d 604—Liberty Nat. Bank of Chicago v. City of Chicago, 139 N.E.2d 235, 10 Ill.2d 137—Rams-Head Co. v. City of Des Plaines, 137 N.E.2d 259, 9 Ill.2d 326—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Tex.—City of Lubbock v. Stubbs, Civ. App., 278 S.W.2d 519.

65. Ill.—Gordon v. City of Wheaton, 146 N.E.2d 37, 12 Ill.2d 284—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91.

66. Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

67. Mass.—Lamarre v. Commissioner of Public Works of Fall River, 87 N.E.2d 211, 324 Mass. 542.

effect on the value of other property.⁶⁸

Matters not germane to the issue are not to be considered.⁶⁹ The fact that there may be a difference of opinion among expert witnesses does not require a finding that the reasonableness of an ordinance is debatable,⁷⁰ and it is not an appropriate test for determining the reasonableness of a zoning regulation that the regulation had the support of substantial public opinion in the municipality.⁷¹

Although a zoning ordinance which is reasonable today may at some future time by reason of changed conditions prove to be unreasonable, in which case it may then be set aside,⁷² the reasonableness of a zoning regulation must be determined as it applies to conditions presently existing,⁷³ or, it has been held, as of the time when the ordinance was adopted, considering the physical facts then existing.⁷⁴ The court will not foretell what will happen in the future to property subject to zoning regulations,⁷⁵ and the fact that in the future the area may change does not furnish an appropriate test for determining the reasonableness of the regulation.⁷⁶

Comprehensive plan. The requirement that a zoning regulation be in accordance with a comprehensive plan is intended to avoid an arbitrary and unreasonable exercise of the zoning power.⁷⁷ A zoning ordinance which is not formulated on a comprehensive plan is an unreasonable exercise of the police power, and, therefore, unconstitutional.⁷⁸

68. Ill.—Wehrmeister v. Du Page County, 141 N.E.2d 26, 10 Ill.2d 604.
—Liberty Nat. Bank of Chicago v. City of Chicago, 139 N.E.2d 285, 10 Ill.2d 137.—Rams-Head Co. v. City of Des Plaines, 137 N.E.2d 259, 9 Ill.2d 326.—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213.—People ex rel. Al-co Deree Co. v. City of Chicago, 118 N.E.2d 20, 2 Ill.2d 350.

N.Y.—People v. Gerus, 69 N.Y.S.2d 283.

69. Cal.—McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644.

Public destruction of fence plaintiffs had placed around their property while it was zoned for residential use would not be germane to issue of reasonable zoning under subsequent ordinance.

Cal.—McCarthy v. City of Manhattan Beach, supra.

Use made of premises prior and subsequent to the passing of a zoning ordinance limiting the use of property to certain business uses is immaterial in determining whether

it is unreasonable to apply such ordinance to the premises.

N.J.—Albright v. Johnson, 50 A.2d 399, 135 N.J.Law 70.

70. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537.—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40.

71. Pa.—Schmalz v. Buckingham Tp., Zoning Bd. of Adjustment, 132 A.2d 233, 389 Pa. 295.

72. N.J.—Fischer v. Bedminster Tp., 93 A.2d 373, 11 N.J. 194.

73. Pa.—Schmalz v. Buckingham Tp. Zoning Bd. of Adjustment, 132 A.2d 233, 389 Pa. 295.

74. Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

75. Mich.—Grand Trunk Western R. Co. v. City of Detroit, 40 N.W.2d 195, 326 Mich. 387.

76. Pa.—Schmalz v. Buckingham Tp., Zoning Bd. of Adjustment, 132 A.2d 233, 389 Pa. 295.

§ 70. — Boundary Lines

The fact that, when the line is drawn by a zoning regulation, situations immediately beyond it are affected, without more, will not render invalid the drawing of a line which otherwise cannot be said to be arbitrary; but the drawing of lines regardless of whether they cut through properties, or of the uses to which properties are put, is unreasonable.

The fact that when the line is drawn by a zoning regulation, situations immediately beyond it are affected, without more, will not render invalid the drawing of a line which otherwise cannot be said to be arbitrary.⁷⁹ The fixing of zoning lines with a different classification on either side of such boundary lines does not render limitation on use of the property near the boundary line in a more restricted district unreasonable and void.⁸⁰

A zoning ordinance which fixes zoning districts by reference to a map wherein divisional lines were drawn regardless of whether they cut through dwelling houses, industrial establishments, and other properties, or of the uses to which properties are put has been held not reasonable.⁸¹ A zoning ordinance is not arbitrary or unreasonable, however, because some boundary lines bisect a number of lots, as against a property owner whose lot is not so divided.⁸²

Adding isolated lot to distant district. An ordinance is an unreasonable exercise of the power to enact general zoning regulations where it does not create a district but merely undertakes to add an

77. N.J.—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182.—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250.

Requirement of comprehensive plan generally see supra § 30.

78. Conn.—Magnin v. Zoning Commission of Town of Madison, 138 A.2d 522, 145 Conn. 26.

N.J.—N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge, 69 A.2d 767, 6 N.J.Super. 495.

79. N.J.—Pequanock Tp. v. De Wilde, 91 A.2d 410, 21 N.J.Super. 517.

80. Ill.—La Salle Nat. Bank v. City of Chicago, 126 N.E.2d 643, 6 Ill.2d 22.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81.

81. N.Y.—Cordts v. Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App.Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

82. Ill.—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568.

isolated lot to a district from which it is distantly separated.⁸³

§ 71. — Propriety of Classification

The classification of property for the imposition of different restrictions must rest on some rational basis.

The classification of property for the imposition of different restrictions must rest on some rational basis.⁸⁴ A zoning regulation creating a classification without a real and substantial relation to the considerations, one or more, to be advanced by zoning is arbitrary and unreasonable;⁸⁵ and a classification permanently restricting the enjoyment of property to such an extent that it cannot be utilized for any reasonable purpose is unreasonable and confiscatory.⁸⁶ The relative density of population in permissive and restricted districts is not a conclusive test of the classification effected by the zoning plan.⁸⁷ The final test must be whether the municipality is seeking to advance the community interest rather than some private or sectional advantage.⁸⁸

Uniformity of classification is necessary to avoid arbitrary action,⁸⁹ but dissimilar treatment does not

inevitably bespeak capriciousness.⁹⁰ Where the situation of a piece of property appears to be the same as that of surrounding property and no facts justifying its special treatment are apparent, placing it in a different classification from that of the surrounding territory will on its face appear arbitrary, capricious, and unreasonable;⁹¹ but, where the piece of property is by its situation distinguishable in character from the surrounding or adjoining property, there is no apparent unreasonableness in its different classification.⁹²

Spot zoning. An ordinance which provides for unreasonable spot zoning is invalid.⁹³

§ 72. — Hardship, Loss, or Benefit

A zoning regulation which renders property almost worthless is unreasonable and confiscatory; and, accordingly, in determining whether a regulation is reasonable, it is proper to consider the hardship and loss imposed on individuals, the extent to which property has been diminished by the regulation, and the gain to the public compared to the hardship imposed.

A zoning regulation which renders property almost worthless is unreasonable and confiscatory, and therefore illegal.⁹⁴ Accordingly, it has been held

83. N.J.—*Crow v. Town of Westfield*, 56 A.2d 403, 136 N.J.Law 363.

84. Ill.—*City of Chicago v. Sachs*, 115 N.E.2d 762, 1 Ill.2d 342.

Mich.—*Korby v. Redford Tp.*, 82 N.W.2d 441, 348 Mich. 193—*Anderson v. City of Holland*, 74 N.W.2d 894, 344 Mich. 706—*McGiverin v. City of Huntington Woods*, 72 N.W.2d 105, 343 Mich. 413.

Mo.—*Downing v. City of Joplin*, 312 S.W.2d 81—*Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626—*Ryan v. City of Warrensburg*, 117 S.W.2d 303, 342 Mo. 761—*State ex rel. Oliver Cadillac Co. v. Christopher*, 298 S.W. 720, 317 Mo. 1179, error dismissed *Oliver Cadillac Co. v. Christopher*, 49 S.Ct. 17, 278 U.S. 662, 73 L.Ed. 569.

N.J.—*Pierro v. Baxendale*, 118 A.2d 401, 20 N.J. 17.

Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.

Tenn.—*Henry v. White*, 250 S.W.2d 70, 194 Tenn. 192.

Wis.—*Town of Caledonia v. Racine Limestone Co.*, 63 N.W.2d 697, 266 Wis. 475.

Classification held unreasonable

(1) Prohibiting the establishment of a slaughterhouse within the municipal limits.

Pa.—*Appeal of Kanig*, 58 Pa.Dist. & Co. 53, 47 Lack.Jur. 69, 37 Mun. L.R. 229.

(2) Separating land from which clay and sand were procured by manufacturers of brick and adjoining plants in which brick was manufactured.

N.Y.—*Cordts v. Hutton Co.*, 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

85. N.J.—*Roselle v. Wright*, 122 A.2d 506, 21 N.J. 400.

Marie's Launderette v. City of Newark, 113 A.2d 190, 35 N.J.Super. 94.

Classification based on irrelevant circumstance of whether surrounding properties were or were not improved at the time of the introduction of the ordinance is unreasonable and arbitrary.

N.J.—*Kozesnik v. Montgomery Tp.*, 131 A.2d 1, 24 N.J. 154.

86. Conn.—*Suffield Heights Corp. v. Town Planning Commission of Town of Manchester*, 133 A.2d 612, 144 Conn. 425—*Del Buono v. Board of Zoning Appeals of Town of Stratford*, 124 A.2d 915, 143 Conn. 673.

87. Cal.—*Sunny Slope Water Co. v. City of Pasadena*, 33 P.2d 672, 1 C.2d 87.

Ordinance excluding additional hospitals for insane from residential districts was held not based on arbitrary and unreasonable classifications because permitted districts contained densely populated areas and prohib-

ited districts were sparsely populated.

Cal.—*Jones v. City of Los Angeles*, 295 P. 14, 211 C. 304, followed in *Wittman v. City of Los Angeles*, 295 P. 22, 211 C. 778, *Stern v. City of Los Angeles*, 295 P. 23, 211 C. 778, and *Rutherford v. City of Los Angeles*, 295 P. 23, 211 C. 777.

88. N.J.—*Kozesnik v. Montgomery Tp.*, 131 A.2d 1, 24 N.J. 154.

89. Mass.—*McHugh v. Board of Zoning Adjustment of Boston*, 147 N.E.2d 761.

90. N.J.—*Kozesnik v. Montgomery Tp.*, 131 A.2d 1, 24 N.J. 154.

91. Ky.—*Byrn v. Beechwood Village*, 253 S.W.2d 895.

92. Ky.—*Byrn v. Beechwood Village*, supra.

93. Conn.—*Magnin v. Zoning Commission of Town of Madison*, 138 A.2d 522, 145 Conn. 26—*Zuckerman v. Board of Zoning Appeals of Town of Stratford*, 128 A.2d 325, 144 Conn. 160.

Ky.—*Polk v. Axton*, 208 S.W.2d 497, 306 Ky. 498.

Md.—*Cassel v. Mayor and City Council of Baltimore*, 73 A.2d 486, 195 Md. 348.

94. Mich.—*McGiverin v. City of Huntington Woods*, 72 N.W.2d 105, 343 Mich. 413—*Robyns v. City of Dearborn*, 67 N.W.2d 718, 341 Mich. 495—*Hammond v. Kephart*, 50 N.W.2d 155, 331 Mich. 551—*Long v. City of Highland Park*, 45 N.W.2d 10, 329 Mich. 146—*Grand Trunk*

that in determining whether a zoning regulation is reasonable it is proper to consider the hardship and loss imposed on individuals,⁹⁵ the extent to which the value of property has been diminished by the regulation,⁹⁶ and the gain to the public compared to the hardship imposed on the individual owner.⁹⁷ No basis for the exercise of the zoning power exists if the public gain is small compared with individual

hardships and loss,⁹⁸ and, where such a situation prevails, the courts are fully justified in declaring an ordinance or regulation unreasonable,⁹⁹ especially where the values of surrounding property will not be seriously affected by a proposed use of the property.¹

The fact that some hardship is experienced or that it may be more profitable to make other use

Western R. Co. v. City of Detroit, 40 N.W.2d 195, 326 Mich. 387—Ervin Acceptance Co. v. City of Ann Arbor, 34 N.W.2d 11, 322 Mich. 404.

Tex.—City of West University Place v. Ellis, 134 S.W.2d 1038, 134 Tex. 222.

Beautification of village

An ordinance which restricts property on boundary of a village to a use for which the property is not adapted, and which thereby destroys the greater part of its value in order that beauty of village as a whole may be enhanced, is unreasonable as applied to the property owner.

N.Y.—Evans v. Gunn, 29 N.Y.S.2d 368, 177 Misc. 85, affirmed 29 N.Y.S.2d 150, 262 App.Div. 865.

95. Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

Careful consideration

Whether zoning regulation serves public welfare and recognized purposes of zoning must be carefully considered where value of property of individual is seriously affected by a zoning regulation especially applicable to individual's property.

Conn.—Strain v. Mims, 193 A. 754, 123 Conn. 275.

Limitation of profits

Fact that zoning law would limit profits of property owner would be considered in determining its validity.

Mass.—Simon v. Town of Needham, 42 N.E.2d 518, 311 Mass. 560, 141 A.L.R. 688.

96. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.III, 178 F.2d 214.

Cal.—City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 803, 146 C.A.2d 762.

Ill.—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill.2d 169—Gordon v. City of Wheaton, 146 N.E.2d 37, 12 Ill.2d 284—Honeck v. Cook County, 146 N.E.2d 35, 12 Ill.2d 257—Mack v. Cook County, 142 N.E.2d 785, 11 Ill.2d 310—Kennedy v. City of Chicago, 142 N.E.2d 697, 11 Ill.2d 302—Liberty Nat. Bank of Chicago v. City of Chicago, 139 N.E.2d 235, 10 Ill.2d 137—Rams-Head Co. v. City of Des

Plaines, 137 N.E.2d 259, 9 Ill.2d 326—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—Petrooulos v. City of Chicago, 125 N.E.2d 522, 5 Ill.2d 270—People ex rel. Alco Deree Co. v. City of Chicago, 118 N.E.2d 20, 2 Ill.2d 350—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28—Midland Electric Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill.2d 200—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—Anderman v. City of Chicago, 40 N.E.2d 51, 379 Ill. 236—Taylor v. Village of Glencoe, 25 N.E.2d 62, 372 Ill. 507—People ex rel. Kirby v. City of Rockford, 2 N.E.2d 842, 363 Ill. 531—Reschke v. Village of Winnetka, 2 N.E.2d 718, 363 Ill. 478—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213—Tews v. Woolhiser, 185 N.E. 827, 352 Ill. 212.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Mich.—McGiverin v. City of Huntington Woods, 72 N.W.2d 105, 343 Mich. 413—Janesick v. City of Detroit, 60 N.W.2d 452, 337 Mich. 549—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242—Ervin Acceptance Co. v. City of Ann Arbor, 34 N.W.2d 11, 322 Mich. 404.

Tex.—City of West University Place v. Ellis, 134 S.W.2d 1038, 134 Tex. 222.

City of Lubbock v. Stubbs, Civ. App., 278 S.W.2d 519.

Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

97. Ill.—Mack v. Cook County, 142 N.E.2d 785, 11 Ill.2d 310—Liberty Nat. Bank of Chicago v. City of Chicago, 139 N.E.2d 235, 10 Ill.2d 137

137—Rams-Head Co. v. City of Des Plaines, 137 N.E.2d 259, 9 Ill.2d 326—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Tex.—City of San Antonio v. Pigeonhole Parking of Tex., Inc., 311 S.W.2d 218.

98. Cal.—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

Ill.—Midland Electric Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill.2d 200—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—Anderman v. City of Chicago, 40 N.E.2d 51, 379 Ill. 236—Harmon v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594.

N.Y.—Brown v. Village of Owego, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655. Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

Doubtful protection

If attempted protection to the public involves an oppressive loss to the property owner and the protection afforded appears to be doubtful or inconsiderable, zoning ordinance will not be sustained.

Tex.—City of West University Place v. Ellis, 134 S.W.2d 1038, 134 Tex. 222.

Serious damage

Inclusion of private land in residential district under zoning ordinance to owner's serious damage violates constitution, if general welfare of city affected will not be promoted thereby.

Ohio.—Mehl v. Stegner, 175 N.E. 712, 38 Ohio App. 416.

99. Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537.

1. Ill.—Myers v. City of Elmhurst, supra.

of the property is not controlling in determining whether the regulations are arbitrary or unreasonable,² and the highest and best use of the property involved is but one factor to be considered.³

Equitable application. The limitation on the use of property imposed by a zoning regulation must apply reasonably and fairly to all.⁴ A general zoning regulation may be reasonable, notwithstanding strict enforcement thereof might cause unnecessary hardship or damage, provided the general rule is subject to variation in such cases.⁵

§ 73. Regulations as to Architectural and Structural Designs

The power to regulate the architectural and structural designs of buildings within specified districts with respect to bulk, building lines, height, open spaces, yards, and the like must be exercised reasonably, but reasonable classification may be permitted.

The power to regulate the architectural and structural designs of buildings within specified districts with respect to bulk, building lines, height, open spaces, yards, and the like must be exercised reasonably,⁶ and such regulatory power must not be

2. Cal.—*Johnston v. City of Claremont*, 323 P.2d 71—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C. 2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

Robinson v. City of Los Angeles, 304 P.2d 814, 146 C.A.2d 810. Colo.—*Hoskinson v. City of Arvada*, 319 P.2d 1090.

Ill.—*Honeck v. Cook County*, 146 N.E.2d 35, 12 Ill.2d 257—*Kennedy v. City of Chicago*, 142 N.E.2d 697, 11 Ill.2d 302—*Rams-Head Co. v. City of Des Plaines*, 137 N.E.2d 259, 9 Ill.2d 326—*People ex rel. Alco Deree Co. v. City of Chicago*, 118 N.E.2d 20, 2 Ill.2d 350—*Galt v. Cook County*, 91 N.E.2d 395, 405 Ill. 396.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Ky.—*Fried v. Louisville and Jefferson County Planning and Zoning Commission*, 258 S.W.2d 466.

Mass.—*Howland v. Acting Superintendent of Bldgs. and Inspector of Bldgs. of Cambridge*, 102 N.E.2d 423, 328 Mass. 155—*Building Com'r of Medford v. C. & H. Co.*, 65 N.E.2d 537, 319 Mass. 273—*Simon v. Town of Needham*, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

Mich.—*Anderson v. City of Holland*, 74 N.W.2d 894, 344 Mich. 706—*Janessick v. City of Detroit*, 60 N.W.2d 452, 337 Mich. 549—*Redford Moving & Storage Co. v. City of Detroit*, 58 N.W.2d 812, 336 Mich. 702—*Long v. City of Highland Park*, 45 N.W.2d 10, 329 Mich. 146.

Mo.—*Downing v. City of Joplin*, 312 S.W.2d 81—*Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626. N.J.—*Cobble Close Farm v. Board of Adjustment of Middletown Tp.*, 92 A.2d 4, 10 N.J. 442.

N.Y.—*Corning v. Town of Ontario*, 121 N.Y.S.2d 288, 204 Misc. 38.

Nonproductiveness of income and deprivation of beneficial use

In determining whether zoning regulation was arbitrary and unreasonable, facts that realty did not pro-

duce income and that regulation resulted in deprivation of some beneficial use thereof, while material, were not sole determining factors. Mass.—*Kaplan v. City of Boston*, 113 N.E.2d 856, 330 Mass. 381.

Mere inconvenience and depreciation in value are not sufficient within themselves to constitute a zoning ordinance unreasonable.

Tex.—*City of West University Place v. Ellis*, 134 S.W.2d 1038, 134 Tex. 222.

Difference in value

Where market value of realty which was situated just within boundary of a restricted zoned area would be increased by fifty per cent or more if restrictions were no greater than those on property across the street and outside the zone, zoning was not so unreasonable as to be invalid.

Fla.—*State ex rel. Townsend v. Farrey*, 182 So. 448, 133 Fla. 15.

3. Ill.—*Liberty Nat. Bank of Chicago v. City of Chicago*, 139 N.E.2d 235, 10 Ill.2d 137—*Rams-Head Co. v. City of Des Plaines*, 137 N.E.2d 259, 9 Ill.2d 326—*First Nat. Bank of Lake Forest v. Lake County*, 130 N.E.2d 267, 7 Ill.2d 213—*People ex rel. Alco Deree Co. v. City of Chicago*, 118 N.E.2d 20, 2 Ill.2d 350.

4. Conn.—*Devaney v. Board of Zoning Appeals of City of New Haven*, 45 A.2d 828, 132 Conn. 537.

Md.—*Northwest Merchants Terminal v. O'Rourke*, 60 A.2d 743, 191 Md. 171.

Burdens resulting from division of cities into zoning districts must be equally distributed.

N.Y.—*Eaton v. Sweeny*, 177 N.E. 412, 257 N.Y. 176.

Cordts v. Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

5. N.Y.—*Shepard v. Village of Skaneateles*, 89 N.E.2d 619, 300 N.Y. 115—*Dowsey v. Village of Kensington*, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

Variances in cases of hardship see *infra* §§ 290-294.

6. Del.—*Appeal of Lloyd*, 196 A. 155, 9 W.W.Harr. 15.

Mich.—*Senefsky v. Lawler*, 12 N.W.2d 387, 307 Mich. 728, 149 A.L.R. 1433.

N.J.—*Mulleady v. City of Trenton*, 156 A. 843, 9 N.J.Misc. 1102, followed in *Steward v. City of Trenton*, 156 A. 844, 9 N.J.Misc. 1100.

Pa.—*Borough of Prospect Park v. Forrest*, Com.Pl., 37 Del.Co. 151.

Tex.—*City of Amarillo v. Meade*, Civ. App., 286 S.W.2d 276.

48 C.J. p 340 note 23.

Inclosure of porch

Zoning ordinance prohibiting inclosure with glass and screen of porch of residence in business district in which part might have been inclosed with brick in case of a store is unreasonable and void.

Del.—*In re Ceresini*, 189 A. 443, 8 W.W.Harr. 134.

Single lot

Provision in zoning ordinance restricting customary uses incidental to residential establishments to a single lot according to a plat, as applied to a residential property consisting of two abutting lots, is unreasonable and arbitrary.

Minn.—*Village of St. Louis Park v. Casey*, 16 N.W.2d 459, 213 Minn. 394, 155 A.L.R. 1128.

Fence

City ordinance providing that "no fence, wall or anything similar shall be permitted in front yards," as applied to thirty inch high fence erected by landowners thirty-two feet back from the street, to landscape their yard and for their own privacy, and to keep out dogs, is so unreasonable as to be unenforceable.

Tex.—*Lamkin v. City of Bellaire*, Civ.App. 308 S.W.2d 70, error granted.

Use of engine

Ordinance prohibiting use of engine in excess of five horse power within residential district, regardless of surrounding population or conditions, is unreasonable.

Cal.—*Del Fanta v. Sherman*, 290 P. 1087, 107 C.A. 746.

exercised arbitrarily,⁷ although reasonable classification may be permitted.⁸ The mere fact that the municipality has been empowered by statute to promulgate regulations and restrictions of the character under consideration does not furnish an appropriate test of the reasonableness of regulations made.⁹

Reasonable regulations as to the height of buildings or structures are valid,¹⁰ but an ordinance restricting the maximum permissible height for a building is unreasonable and arbitrary where there is no substantial relation between the height restriction and the public health, safety, comfort, or welfare.¹¹ Where the regulation is arbitrary or unreasonable, a municipality may be precluded from prohibiting the erection of apartment houses containing more than a certain number of stories¹² or designed and used for more than a certain number of families.¹³ A prohibition against more than one dwelling on a lot may be reasonable and not arbitrary.¹⁴

trary.¹⁴

Lot area. An ordinance fixing the minimum lot area in residence zones may be reasonable where related to the public health and welfare,¹⁵ and unreasonable where its requirements are not necessary for the health, safety, and well being of the occupants and public generally,¹⁶ or where use of the land in question for residential purposes in compliance with the ordinance was a physical impossibility.¹⁷

Floor area or cubic content. Local authorities may not legislate without reason or capriciously in fixing the amount of livable floor area to be devoted to each dwelling, but their regulations, to be valid, must be consonant with the character and needs of the community directly affected.¹⁸ Accordingly, a zoning regulation may not unreasonably provide for minimum requirements as to floor area¹⁹ or cubic feet of content,²⁰ and an ordinance providing for minimum floor area requirements may be

Regulations held reasonable

Md.—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420.

N.H.—Sundeen v. Rogers, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

N.Y.—Fox Meadow Estates v. Culley, 252 N.Y.S. 178, 233 App.Div. 250, affirmed 185 N.E. 714, 261 N.Y. 506.

Attempted enforcement held unreasonable and arbitrary

Attempted enforcement of requirement that rear yard have a minimum depth of twenty-five feet by requiring that roof by which garage was attached to house, extending ten inches between eaves of garage and house, be removed or severed was capricious, arbitrary, and unreasonable.

Tex.—City of Amarillo v. Meade, Civ. App., 286 S.W.2d 276.

7. Cal.—Del Fanta v. Sherman, 290 P. 1087, 107 C.A. 746.

Mich.—Senefsky v. Lawler, 12 N.W.2d 387, 307 Mich. 728, 149 A.L.R. 1433.

N.J.—Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 78 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

Brookdale Homes v. Johnson, 10 A.2d 477, 123 N.J.Law 602, affirmed 19 A.2d 868, 126 N.J.Law 516.

Pa.—Appeal of White, 134 A. 409, 287 Pa. 359.

Appeal of Chertcoff, Quar.Sess., 1 Lebanon Co. 83.

Regulation held not arbitrary

N.C.—Appeal of Parker, 197 S.E. 706, 214 N.C. 51, appeal dismissed Parker v. City of Greensboro, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358.

8. Mass.—Brett v. Brookline Bldg. Comr., 145 N.E. 269, 250 Mass. 73. 43 C.J. p. 340 note 26.

9. Pa.—Schmalz v. Buckingham Tp., Zoning Bd. of Adjustment, 132 A.2d 233, 389 Pa. 295.

10. Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 151.

Inadequate sewage facilities

Limitation of height of apartment buildings to three stories was held reasonable, in view of inadequacy of town's sewage facilities.

N.J.—Harrison R. Van Duyn, Inc., v. Senior, 143 A. 437, 105 N.J.Law 257, 6 N.J.Misc. 137.

11. Ill.—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344.

12. N.J.—Eastern Boulevard Corporation v. Willaredt, 14 A.2d 537, 125 N.J.Law 173, affirmed 17 A.2d 173, 125 N.J.Law 511.

13. N.J.—Eastern Boulevard Corporation v. Willaredt, supra.

14. N.J.—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442.

15. Conn.—De Mars v. Zoning Commission of Town of Bolton, 115 A.2d 653, 142 Conn. 530.

Ill.—Reitman v. Village of River Forest, 137 N.E.2d 801, 9 Ill.2d 448.

Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

N.J.—Honigfeld v. Byrnes, 103 A.2d 598, 14 N.J. 600.

Clary v. Borough of Eatontown, 124 A.2d 54, 41 N.J.Super. 47.

N.Y.—Gignoux v. Village of Kings

Point, 99 N.Y.S.2d 280, 199 Misc. 485.

Pa.—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374.

Five-acre requirement held not unreasonable per se

N.J.—Fischer v. Bedminster Tp., 93 A.2d 378, 11 N.J. 194.

Previously platted lots

Landowners whose property was extensive enough in width to accommodate several residences built in conformity with the ordinance could not escape classification and restrictions imposed by ordinance on ground of unreasonableness merely because realty had been platted with lines at twenty-foot intervals for lot boundaries.

Mich.—Highland Oil Corp. v. City of Lathrup Village, 85 N.W.2d 185, 349 Mich. 650—Korby v. Redford Tp., 82 N.W.2d 441, 348 Mich. 193.

16. Mich.—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242.

17. Mich.—Robyns v. City of Dearborn, 67 N.W.2d 718, 341 Mich. 495.

18. N.Y.—Flower Hill Bldg. Corp. v. Village of Flower Hill, Nassau County, 100 N.Y.S.2d 903, 199 Misc. 344.

19. Mich.—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331—Elizabeth Lake Estates v. Waterford Tp., 26 N.W.2d 788, 317 Mich. 359—Senefsky v. Lawler, 12 N.W.2d 387, 307 Mich. 728, 149 A.L.R. 1433.

20. Mich.—Elizabeth Lake Estates v. Waterford Tp., 26 N.W.2d 788, 317 Mich. 359.

held unreasonable where a substantial number of the dwellings already erected do not come within the ordinance and a smaller floor area satisfies the requirements of public health, safety, and welfare.²¹ So a provision fixing the minimum floor area in each unit of a multiple dwelling may be unreasonable as applied to a motel in view of the purpose for which motels are constructed and operated.²² On the other hand, a restriction with respect to minimum floor space may be reasonable under the circumstances of the particular case.²³

An ordinance limiting the floor area in a business building to one and one-half times the area of the lot has been held not unreasonable or confiscatory.²⁴

Single-family or multiple dwellings. A zoning regulation may reasonably restrict residential districts to single and two-family houses²⁵ or permit the use of land for multiple dwelling purposes.²⁶ A regulation establishing residential districts restricted to single and two-family houses is not unreasonable or arbitrary merely because of the use of some nearby property for multiple dwelling purposes,²⁷ or because some adjacent property is zoned for commercial use.²⁸ On the other hand, regulations restricting certain areas to single-family dwellings or prohibiting the erection of apartment houses have, under the particular circumstances of the case, been held arbitrary and unreasonable.²⁹

21. Conn.—*De Mars v. Zoning Commission of Town of Bolton*, 109 A.2d 876, 19 Conn.Sup. 24, affirmed 115 A.2d 653, 142 Conn. 580.

Mich.—*Senefsky v. Lawler*, 12 N.W.2d 387, 307 Mich. 728, 149 A.L.R. 1433.

22. Mich.—*Comer v. City of Dearborn*, 70 N.W.2d 813, 342 Mich. 471.

23. Conn.—*De Mars v. Zoning Commission of Town of Bolton*, 109 A.2d 876, 19 Conn.Sup. 24, affirmed 115 A.2d 653, 142 Conn. 580.

N.J.—*Lionshead Lake, Inc. v. Wayne Tp.*, 89 A.2d 693, 10 N.J. 165, appeal dismissed *Lionshead Lake v. Wayne Tp.* Passaic County, N. J., 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

Tex.—*Thompson v. City of Carrollton*, Civ.App., 211 S.W.2d 970.

Application to prohibit use of house trailers

(1) Provision that one-story residential buildings in district should contain at least nine hundred square feet, as applied to prohibit use of house trailer as living quarters in district, was neither arbitrary nor unreasonable.

N.Y.—*Corning v. Town of Ontario*, 121 N.Y.S.2d 288, 204 Misc. 38.

(2) Provision that all dwellings should have a minimum of three hundred and eighty-four square feet of space on first floor and defining a house trailer as any vehicle used for living or sleeping purposes, and providing that if so used for more than thirty days in any one year it would be considered as a single-family dwelling, was not unreasonable or arbitrary as to house trailers.

Pa.—*Commonwealth v. McLaughlin*, 78 A.2d 880, 168 Pa.Super. 442.

24. N.Y.—*Pondfield Road Co. v. Village of Bronxville*, 150 N.Y.S.2d 910, 1 A.D.2d 897, affirmed 135 N.E.2d 725, 1 N.Y.2d 841, 153 N.Y.S.2d 221.

25. N.J.—*Collins v. Board of Adjustment of Margate City*, 69 A.2d 708, 2 N.J. 200.

Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J. Super. 405.

Ohio.—*Schick v. Ghent Road Inn, App.*, 132 N.E.2d 479.

Elements to be considered

Before zoning ordinance could be stricken down as arbitrary and unreasonable, general residential character of district, its peculiar suitability to single-family residences, propriety of conserving property values for such purposes, and direction of building development in district for single-family residences must be taken into consideration.

Nev.—*State ex rel. Davie v. Coleman*, 224 P.2d 309, 67 Nev. 636.

Prohibition of apartment house

Evidence of increasing traffic on avenue near property, whereon erection of apartment house was prohibited by ordinance, proximity of apartment houses, park, high school, and athletic field thereto, and other circumstances, were held not to establish invalidity of ordinance as unreasonable.

N.Y.—*MacEwen v. City of New Rochelle*, 267 N.Y.S. 86, 149 Misc. 251.

Extension to vacant tracts

Zoning ordinance, expanding one-family dwelling region to include vacant tracts adjoining lake, was held not unreasonable or arbitrary exercise of council's discretion.

Ill.—*Minkus v. Pond*, 153 N.E. 121, 326 Ill. 467.

26. Mass.—*Lamarre v. Commissioner of Public Works of Fall River*, 87 N.E.2d 211, 324 Mass. 542.

N.Y.—*Rodgers v. Village of Tarrytown*, 96 N.E.2d 731, 302 N.Y. 115.

27. Cal.—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332.

Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386.

Ill.—*De Bartolo v. Village of Oak Park*, 71 N.E.2d 693, 396 Ill. 404, certiorari dismissed 68 S.Ct. 72, 332 U.S. 765, 92 L.Ed. 350.

28. Ill.—*De Bartolo v. Village of Oak Park*, supra.

29. Ill.—*Myers v. City of Elmhurst*, 147 N.E.2d 300, 12 Ill.2d 537—*Petropoulos v. City of Chicago*, 125 N.E.2d 522, 5 Ill.2d 270—*Trust Co. of Chicago v. City of Chicago*, 96 N.E.2d 499, 408 Ill. 91.

Mich.—*Freudo v. Southfield Tp.*, 85 N.W.2d 130, 349 Mich. 693—*Industrial Land Co. v. City of Birmingham*, 78 N.W.2d 656, 346 Mich. 667—*Bassey v. City of Huntington Woods*, 74 N.W.2d 897, 344 Mich. 701—*M. and S. Builders v. City of Dearborn*, 73 N.W.2d 283, 344 Mich. 17—*McGiverin v. City of Huntington Woods*, 72 N.W.2d 105, 343 Mich. 413—*Ritenour v. Dearborn Tp.*, 40 N.W.2d 137, 326 Mich. 242. N.J.—*Spring Brook Gardens v. Board of Adjustment of Springfield Tp.*, 60 A.2d 288, 137 N.J.Law 398—*DeMott Homes at Salem v. Margate City*, 56 A.2d 423, 136 N.J.Law 330, affirmed 57 A.2d 388, 136 N.J.Law 639.

N.Y.—*Hyde v. Incorporated Village of Baxter Estates*, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 378, 2 A.D.2d 889, affirmed 145 N.E.2d 28, 3 N.Y.2d 873, 166 N.Y.S.2d 314.

Pa.—*Jacobs v. Fetzner, Com.Pl.*, 41 Del.Co. 139, exceptions dismissed 41 Del.Co. 264, reversed on other grounds 112 A.2d 356, 381 Pa. 262, 43 C.J. p 339 note 12 [b].

Number of persons in "family"

A zoning ordinance restricting use of property in a one-family district to one-family dwellings was invalid as applied to plaintiffs who were denied the privilege of using their property as a multiple family dwelling, where, under the ordinance, any number of persons might occupy a house as a "family" within the contemplation of the ordinance and divide the housekeeping expenses provided only they lived as a solitary housekeeping unit, using a single kitchen.

Ill.—*Anderman v. City of Chicago*, 40 N.E.2d 51, 379 Ill. 236—*Harmon*

Building or setback lines. Regulations fixing requirements with respect to the setback of new buildings from the front line of the lots in particular districts, areas, or streets must not be arbitrary or unreasonable.³⁰ A setback requirement considerably in excess of what is reasonably adequate to promote and safeguard public welfare is unreasonable.³¹

§ 74. Regulations as to Use of Property

Zoning regulations must not unreasonably deprive the property owner of the use of his property; and the power to regulate the use of property must be exercised reasonably and not arbitrarily.

Zoning regulations must not unreasonably deprive the property owner of the use of his property.³² The power to regulate the use of property must not be exercised arbitrarily,³³ but such power, with

v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594.

Conversion

Zoning ordinance prohibiting landowners from changing one-family house into two-family house was arbitrary and void where half of residences in same block consisted of two-family homes, and where, under ordinance, landowner might use dwelling to accommodate twenty-eight persons besides own family in operating boarding and rooming house.

Ill.—Merrill v. City of Wheaton, 190 N.E. 918, 356 Ill. 457.

30. Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

Mich.—Bassey v. City of Huntington Woods, 74 N.W.2d 897, 344 Mich. 701—Faucher v. Sherwood, 32 N.W. 2d 440, 321 Mich. 193.

N.Y.—Van Auken v. Kimmey, 252 N.Y.S. 329, 141 Misc. 105.

Ohio.—State ex rel. Book v. City of Cleveland, 20 Ohio Cir.Ct., N.S., 538.

Pa.—Schmalz v. Buckingham Tp., Zoning Bd. of Adjustment, 132 A.2d 233, 389 Pa. 295.

Scholl v. Borough of Yeadon, 26 A.2d 135, 148 Pa.Super. 601.

Hamilton v. Lemoyne Borough, 73 Pa.Dist. & Co. 406, 1 Cumb.Law J. 61.

Appeal of Chertcoff, 1 Lebanon Co. 83—Appeal of Chertcoff, 1 Lebanon 71.

Conformity to existing buildings

Ordinance requiring conformity to minimum setback, established by one-half of buildings, was held unconstitutional.

N.J.—Ricci v. Meyer, 135 A. 666, 5 N. J.Misc. 102.

Variable measure

(1) Attempt to enforce setback provision of zoning rules determined by a variable measure having no relation to width of street or surrounding conditions is unreasonable.

N.Y.—Van Auken v. Kimmey, 252 N. Y.S. 329, 141 Misc. 105.

(2) Zoning ordinance providing for side yard setback on corner lot contiguous to residence district without intervening street, width of yard varying with width of corner lot, was held void.

Mich.—James S. Holden Co. v. Connor, 241 N.W. 915, 257 Mich. 580.

Provisions held not arbitrary or unreasonable

U.S.—Weiss v. Guion, D.C.Ohio, 17 F. 2d 202.

Fla.—Mayer v. Dade County, 82 So. 2d 513—City of Miami v. Romer, 58 So.2d 849.

Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

Iowa.—Boardman v. Davis, 3 N.W.2d 608, 231 Iowa 1227.

N.J.—Builders' Const. Co. v. Daly, 161 A. 189, 10 N.J.Misc. 861.

N.Y.—Gitlin v. Rowledge, 123 N.Y.S. 2d 812—Stevens v. Connor, 120 N. Y.S.2d 345.

31. Ill.—Galt v. Cook County, 91 N. E.2d 395, 405 Ill. 896.

32. Ark.—City of West Helena v. Bockman, 256 S.W.2d 40, 221 Ark. 677.

Mich.—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331.

Jail

Zoning ordinance applied to prevent construction of jail on county premises in undeveloped part of city is arbitrary and unreasonable.

Fla.—State v. Du Bose, 128 So. 4, 99 Fla. 812.

33. U.S.—Oklahoma City, Okl. v. Dolesse, C.C.A.Okl., 48 F.2d 734—Marblehead Land Co. v. City of Los Angeles, C.C.A.Cal., 47 F.2d 528, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540—Koch v. City of Toledo, C.C.A.Ohio, 37 F.2d 336.

Ark.—City of Little Rock v. Sun Building & Developing Co., 134 S. W.2d 582, 199 Ark. 383.

Ill.—Du Page County v. Halkier, 115 N.E.2d 635, 1 Ill.2d 491—Catholic Bishop of Chicago v. Kingery, 20 N.E.2d 583, 371 Ill. 257—Western Theological Seminary v. City of Evanston, 162 N.E. 863, 331 Ill. 257

—City of Watseka v. Blatt, 50 N.E. 2d 589, 320 Ill.App. 191, transferred, see, 46 N.E.2d 374, 331 Ill. 276.

Md.—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

Mass.—City of Pittsfield v. Oleksak, 47 N.E.2d 930, 313 Mass. 553.

Mo.—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 780—Glencoe Lime & Cement Co. v. City of St. Louis, 108 S.W.2d 143, 341 Mo. 689—St. Louis v. Evraiff, 256 S.W. 489, 301 Mo. 231.

Neb.—Coulthard v. Board of Adjustment of City of Neligh, 265 N.W. 530, 130 Neb. 543.

N.H.—Kimball v. Blanchard, 7 A.2d 394, 90 N.H. 298.

N.J.—DeMott Homes at Salem v. Margate City, 56 A.2d 423, 136 N. J.Law 330, affirmed 57 A.2d 388, 136 N.J.Law 639—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

Dorsey Motors v. Davis, 180 A. 396, 13 N.J.Misc. 620.

N.Y.—Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485—Buffalo Park Lane v. City of Buffalo, 294 N.Y.S. 413, 162 Misc. 207.

Pa.—Sun Oil Co. v. Schofield, 17 Pa. Dist. & Co. 313.

Tex.—City of West University Place v. Ellis, Civ.App., 118 S.W.2d 907, affirmed 134 S.W.2d 1038, 134 Tex. 222.

Wis.—Chrome Plating Co. v. City of Milwaukee, 17 N.W.2d 705, 246 Wis. 526.

Restrictions held not arbitrary

Ark.—Goldman & Co. v. City of North Little Rock, 249 S.W.2d 961, 220 Ark. 792.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Ill.—Evanston Best & Co. v. Goodman, 16 N.E.2d 131, 369 Ill. 207.

Ky.—City of Richlawn v. McMakin, 230 S.W.2d 902, 313 Ky. 265, certiorari dismissed 71 S.Ct. 531, 340 U. S. 945, 95 L.Ed. 682.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 32 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 32 L.Ed. 603.

Wis.—State ex rel. Normal Hall v. Gurda, 291 N.W. 350, 234 Wis. 290.

respect to the enactment of zoning ordinances and | regulations, must be exercised reasonably.³⁴ Re-

34. U.S.—*State v. Roberge*, Wash., 49 S.Ct. 50, 278 U.S. 116, 73 L.Ed. 210.
- Women's Kansas City St. Andrew Soc. v. Kansas City, C.C.A. Mo., 58 F.2d 593—*Oklahoma City*, Okl. v. Dolese, C.C.A.Okla., 48 F.2d 734—*Marblehead Land Co. v. City of Los Angeles*, C.C.A.Cal., 47 F.2d 528, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540—*Koch v. City of Toledo*, C.C.A.Ohio, 37 F.2d 336—*Village of University Heights v. Cleveland Jewish Orphans' Home*, C.C.A.Ohio, 20 F.2d 743, 54 A.L.R. 1008, certiorari denied *Village of University Heights v. Cleveland Jewish Orphan Home*, 48 S.Ct. 141, 275 U.S. 569, 72 L.Ed. 431.
- Cal.—*Reynolds v. Barrett*, 83 P.2d 29, 12 C.2d 244—*Sunny Slope Water Co. v. City of Pasadena*, 33 P.2d 672, 1 C.2d 87.
- City of La Mesa v. Tweed & Gambrell Planing Mill, 304 P.2d 808, 146 C.A.2d 762—*Ex parte Ellis*, 76 P.2d 516, 25 C.A.2d 99—*Biscay v. City of Burlingame*, 15 P.2d 784, 127 C.A. 213.
- Colo.—*Jones v. Board of Adjustment*, 204 P.2d 560, 119 Colo. 420.
- Fla.—*Forde v. City of Miami Beach*, 1 So.2d 642, 146 Fla. 676—*City of Miami Beach v. State ex rel. Lear*, 175 So. 537, 128 Fla. 750—*State v. Du Bose*, 128 So. 4, 99 Fla. 812.
- Ill.—*City of Watseka v. Blatt*, 50 N.E.2d 589, 320 Ill.App. 191.
- Ky.—*City of Louisville v. Koenig*, 162 S.W.2d 19, 290 Ky. 562, 140 A.L.R. 1369.
- Mass.—*City of Pittsfield v. Oleksak*, 47 N.E.2d 930, 313 Mass. 553.
- Mich.—*City of North Muskegon v. Miller*, 227 N.W. 743, 249 Mich. 53.
- Neb.—*Coulthard v. Board of Adjustment of City of Neligh*, 265 N.W. 530, 130 Neb. 543.
- N.H.—*Kimball v. Blanchard*, 7 A.2d 394, 90 N.H. 298.
- N.J.—*Borough of Point Pleasant Beach v. Point Pleasant Pavilion*, 66 A.2d 40, 3 N.J.Super. 222.
- DeMott Homes at Salem v. Margate City, 56 A.2d 423, 136 N.J. Law 330, affirmed 57 A.2d 388, 136 N.J. Law 639—*Appley v. Township Committee of Bernards Tp. Somerset County*, 24 A.2d 805, 128 N.J. Law 195, affirmed *Appley v. Township Committee of Township of Bernards*, 28 A.2d 177, 129 N.J. Law 73.
- City of Newark v. Lippmen, 177 A. 556, 13 N.J.Misc. 248.
- Ohio.—*State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph*, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.
- City of Cincinnati v. Struble, 30 Ohio N.P., N.S., 380.
- Pa.—*Huebner v. Philadelphia Sav. Fund Soc.*, 192 A. 139, 127 Pa.Super. 28.
- Sun Oil Co. v. Schofield, 17 Pa. Dist. & Co. 313.
- Tex.—*Edge v. City of Bellaire*, Civ. App., 200 S.W.2d 224, error refused—*City of West University Place v. Ellis*, Civ.App., 118 S.W.2d 907, affirmed 134 S.W.2d 1038, 134 Tex. 222.
- Wis.—*Chrome Plating Co. v. City of Milwaukee*, 17 N.W.2d 705, 246 Wis. 526—*Rowland v. City of Racine*, 271 N.W. 36, 223 Wis. 488, 43 C.J. p 342 note 34.
- Loss or benefit to property owners generally see supra § 72.
- Slow development**
- Where commercial zone was necessarily limited as to expansion by development of surrounding residential area, fact that district had developed slowly was not determinative of reasonableness of restriction.
- Cal.—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 970, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.
- Unnecessary hardship**
- Whether terms of zoning ordinance impose an "unnecessary hardship" in a particular instance depends on whether use restriction, viewing the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property.
- N.J.—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J. Law 135, affirmed 15 A.2d 598, 125 N.J. Law 367.
- Best interest of entire district**, rather than adaptability and suitability of particular piece of property, determines reasonableness of zoning ordinance.
- Cal.—*Smith v. Collison*, 6 P.2d 277, 119 C.A. 180.
- Regulations held not unreasonable**
- (1) In general.
- Ala.—*White v. Luquire Funeral Home*, 129 So. 84, 221 Ala. 440.
- Ark.—*Goldman & Co. v. City of North Little Rock*, 249 S.W.2d 961, 220 Ark. 792.
- Cal.—*McCarthy v. City of Manhattan Beach*, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644.
- Ga.—*Howden v. City of Savannah*, 159 S.E. 401, 172 Ga. 833.
- Ky.—*City of Richlawn v. McMakin*, 230 S.W.2d 902, 313 Ky. 265, certiorari dismissed 71 S.Ct. 531, 340 U.S. 945, 95 L.Ed. 682.
- Mass.—*Building Com'r of Medford v. C. & H. Co.*, 65 N.E.2d 537, 319 Mass. 273.
- N.J.—*Cobble Close Farm v. Board of Adjustment of Middletown Tp.*, 92 A.2d 4, 10 N.J. 442.
- Visco v. City of Plainfield, 57 A.2d 490, 136 N.J. Law 659.
- N.Y.—*Fliedner v. Village of Great Neck*, 17 N.Y.S.2d 978, 258 App.Div. 1087—*Hamlett v. Snedeker*, 283 N.Y.S. 906, 246 App.Div. 758.
- Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47.
- Tex.—*City of Corpus Christi v. Jones*, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.
- Va.—*West Bros. Brick Co. v. City of Alexandria*, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 655, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.
- Wis.—*State ex rel. Normal Hall v. Gurda*, 291 N.W. 350, 234 Wis. 290.
- (2) As to undertakers operating mortuary in prohibited zone where notified of illegality before erecting building.
- Cal.—*Ex parte Ruppe*, 252 P. 746, 80 C.A. 629.
- (3) Zoning exclusively for residential and agricultural purposes.
- Cal.—*Johnston v. City of Claremont*, 323 P.2d 71.
- Ga.—*Humthlett v. Reeves*, 85 S.E.2d 25, 211 Ga. 210.
- Ill.—*Du Page County v. Henderson*, 83 N.E.2d 720, 402 Ill. 179.
- Md.—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—*Board of Com'rs of Anne Arundel County v. Snyder*, 46 A.2d 689, 186 Md. 342.
- Mich.—*West Bloomfield Tp. v. Chapman*, 88 N.W.2d 377, 351 Mich. 606.
- Minn.—*Connor v. Chanhassen Tp.*, 81 N.W.2d 789, 249 Minn. 205.
- (4) Ordinance providing that permittees should not be allowed to operate liquor businesses within seven hundred and fifty feet of each other within municipal limits.
- Fla.—*Ragozzino v. Town of Lake Maitland*, 54 So.2d 364.
- (5) Zoning ordinance applying to land in question a rural urban farm classification under which drive-in theater was prohibited as a commercial use.
- Mich.—*Bzovi v. City of Livonia*, 87 N.W.2d 110, 350 Mich. 489.
- (6) Ordinance limiting occupancy of trailers to licensed areas.
- Mich.—*Bane v. Pontiac Tp., Oakland County*, 72 N.W.2d 134, 343 Mich. 481.
- (7) Ordinance prohibiting building in rear of principal building on same lot for use for residential purposes except under limited conditions.

strictions imposed by zoning regulations on the use of property are not reasonable unless fairly necessary for attainment of one or more of the intents set forth in the zoning statute.³⁵ A restriction must be regarded as arbitrary and unreasonable as to a property owner who is unable to use his property for any of the permitted purposes and is therefore deprived of all beneficial use thereof.³⁶

Every municipality need not provide for every use somewhere within its borders;³⁷ and a municipal zoning ordinance placing the entire area of the municipality into a single use district is not necessarily so arbitrary and unreasonable as to be invalid, if otherwise permitted by the state constitution and statutes.³⁸ A provision barring the use of accessory buildings for residence purposes except by the domestic employees of the tenant or owner of the premises is not arbitrary or unreasonable.³⁹

Use dependent on consent of adjacent property owners. A provision of a zoning regulation making the use of property for a particular purpose depend

on the consent of adjacent property owners is arbitrary and unreasonable.⁴⁰

Temporary or occasional use. In determining the reasonableness of a zoning regulation as applied to certain structures and uses of property, the permanency of the structure⁴¹ and its use⁴² must be considered, and a temporary or occasional use of one's property which is not of a permanent character cannot be prohibited.⁴³

§ 75. — Residence Districts

- a. In general
- b. Classification of uses permitted

a. In General

Regulations establishing restricted residential districts have been held reasonable under some circumstances and arbitrary and unreasonable under others.

Regulations establishing restricted residential districts have, under the facts of particular cases, been held reasonable,⁴⁴ and the fact that the highest and

Tenn.—Meador v. City of Nashville, 220 S.W.2d 876, 188 Tenn. 441.

(8) Ordinance which restricted most of undeveloped areas in township to agricultural uses except for five hundred-foot zone on each side of railroad right of way, which could be used for commercial and industrial development, and which provided for extension of industrial zone an additional one thousand feet upon special application and finding that such extension would not injuriously affect neighborhood contiguous thereto.

Mich.—Certain-Tweed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

35. N.J.—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

36. Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.

Mich.—Bassey v. City of Huntington Woods, 74 N.W.2d 897, 344 Mich. 701.

Miss.—City of Hattiesburg v. Pittman, 102 So.2d 352.

Restriction to use for which property not adapted

Zoning ordinance which restricts property to a use for which the property is not adapted and thereby destroys the greater part of its value is unreasonable.

Mich.—Fenner v. City of Muskegon, 50 N.W.2d 210, 331 Mich. 732—Grand Trunk Western R. Co. v.

City of Detroit, 40 N.W.2d 195, 326 Mich. 387—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242.

Minn.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Minn. 146.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App. Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493—Huntley Estates, Inc. v. Town of Eastchester, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App. Div. 1090.

Pa.—Appeal of Hessenbruch from Radnor Tp. Zoning Ordinance, Com. Pl., 40 Del.Co. 43.

37. N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

38. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412.

Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205.

Exclusion of cemeteries and crematories held reasonable

Conn.—Fairlawn Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

39. N.J.—Collins v. Board of Adjustment of Margate City, 69 A.2d 708, 3 N.J. 200.

40. U.S.—State v. Roberge, Wash., 49 S.Ct. 50, 278 U.S. 116, 73 L.Ed. 210.

Public garages and gasoline filling stations see *infra* § 77.

Availability of other locations for operating junk yard by complying with provision of zoning ordinance does not validate provision or abridge

property owner's rights to question its validity.

Ill.—City of Watseka v. Blatt, 50 N.E.2d 589, 320 Ill.App. 191.

41. N.Y.—Bartsch v. Ragonetti, 207 N.Y.S. 142, 123 Misc. 903, affirmed 210 N.Y.S. 325, 214 App. Div. 799.

42. N.Y.—Bartsch v. Ragonetti, *supra*.

43. N.Y.—Bartsch v. Ragonetti, *supra*.

43 C.J. p 343 note 59.

Temporary office

A zoning ordinance restricting use of lots to "residence" purposes as applied to trailer placed on corner lot by owner for purpose of using trailer as temporary office to sell lots had no relation to the betterment of health, safety, or welfare of the public and could not be enforced against trailer owner, since restrictions contained in the ordinance were directed at the permanent use to which lots in zone were to be devoted and not to temporary use.

Ill.—Village of La Grange v. Leitch, 35 N.E.2d 346, 377 Ill. 99.

44. Colo.—Hoskinson v. City of Arvada, 319 P.2d 1090.

Conn.—Chouinard v. Zoning Commission of Town of East Hartford, 97 A.2d 562, 139 Conn. 728.

Ga.—Humthlett v. Reeves, 85 S.E.2d 25, 211 Ga. 210.

Ill.—La Salle Nat. Bank v. City of Chicago, 122 N.E.2d 519, 4 Ill.2d 253—Eleopoulos v. City of Chicago, 120 N.E.2d 555, 3 Ill.2d 247—People ex rel. Alco Deree Co. v. City of Chicago, 118 N.E.2d 20, 2 Ill.2d 350.

best use of the property is for business purposes does not conclusively show that the zoning ordinance is unreasonable.⁴⁵ Before an ordinance restricting the use of property in certain zones for residential purposes only can be declared unconstitutional, its provisions must be shown to be clearly arbitrary and unreasonable.⁴⁶ Arbitrary and unreasonable classification is not shown by the mere existence of some adjacent property devoted to other uses,⁴⁷ by the fact that three corners of an intersection are zoned for business and one for residence,⁴⁸ by the existence of a nonconforming busi-

ness use,⁴⁹ or by the fact that an interim ordinance had permitted use of the property as a shopping center;⁵⁰ the reasonableness of the regulation must be determined by whether the district in a larger view is better adapted to residential uses than to the business uses to which the adjoining lands are devoted.⁵¹

Notwithstanding the power may exist to segregate residences and businesses in particular districts, the classification of particular property as residential may be arbitrary and unreasonable under the circumstances;⁵² and placing of property in a resi-

Md.—Francis v. MacGill, 75 A.2d 91, 196 Md. 77—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171—Board of Com'rs of Anne Arundel County v. Snyder, 46 A.2d 689, 186 Md. 342.

Mass.—Town of Seekonk v. John J. McHale & Sons, 90 N.E.2d 325, 325 Mass. 271.

Mich.—Robinson v. City of Bloomfield Hills, 86 N.W.2d 166, 350 Mich. 425—City of Howell v. Kaal, 67 N.W.2d 704, 341 Mich. 585—Hammond v. Kephart, 50 N.W.2d 155, 331 Mich. 551.

Mo.—Schell v. Kansas City, Mo., 226 S.W.2d 718, 360 Mo. 27.

N.J.—Bogert v. Washington Tp. Bergen County, 131 A.2d 535, 45 N.J. Super. 13.

N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115. New York Trap Rock Corp. v. Town of Clarkstown, 149 N.Y.S.2d 290, 1 A.D.2d 890, affirmed 166 N.Y.S.2d 82, 3 N.Y.2d 844, 144 N.E.2d 725.

Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47. Ohio—Smith v. Juillerat, 119 N.E.2d 611, 161 Ohio St. 424.

Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

Policy or plan of housing authority restricting use of lots in housing authority addition to city to residential purposes was neither capricious nor unreasonable.

Ill.—Housing Authority of Gallatin County v. Church of God, 81 N.E.2d 500, 401 Ill. 100.

Residential districts embracing all land not included in other districts

Comprehensive county zoning ordinance, which declared all vacant or unused lands or buildings not included within boundaries of an industrial, commercial, or apartment district to be construed to be within boundaries of residential districts, was not arbitrary, unreasonable, or capricious.

Ga.—Taylor v. Shetzen, 90 S.E.2d 572, 212 Ga. 101.

45. Ill.—Wehrmeister v. Du Page County, 141 N.E.2d 26, 10 Ill.2d 604—Liberty Bank of Chicago v. City of Chicago, 139 N.E.2d 235, 10 Ill.2d 137—People ex rel. Alco Deree Co. v. City of Chicago, 118 N.E.2d 20, 2 Ill.2d 350.

46. U.S.—Kroeger v. Stahl, C.A.N.J., 248 F.2d 121.

47. Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332—Reynolds v. Barrett, 83 P.2d 29, 12 C.2d 244.

Price v. Schwafel, 206 P.2d 683, 92 C.A.2d 77—Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386—O'Rourke v. Teeters, 146 P.2d 983, 63 C.A.2d 349.

Ill.—Williams v. Village of Schiller Park, 138 N.E.2d 500, 9 Ill.2d 596.

Mich.—City of Howell v. Kaal, 67 N.W.2d 704, 341 Mich. 585.

Ohio—Central Trust Co. v. City of Cincinnati, 23 N.E.2d 450, 62 Ohio App. 139.

Wis.—State ex rel. Normal Hall v. Gurda, 291 N.W. 350, 234 Wis. 290.

Isolated business houses

Prior establishment of few isolated business houses in district, natural industrial development thereof, and greater value of property therein for business purposes, do not invalidate ordinance classifying district as residential.

Ariz.—City of Tucson v. Arizona Mortuary, 272 P. 923, 34 Ariz. 495.

48. Cal.—Smith v. Collison, 6 P.2d 277, 119 C.A. 180.

Ill.—Hibser v. Zoning Bd. of Appeals of Peoria County, 139 N.E.2d 325, 12 Ill.App.2d 365.

49. N.Y.—Scuteri v. Incorporated Village of Bayville, 120 N.Y.S.2d 794.

50. Cal.—Price v. Schwafel, 206 P.2d 683, 92 C.A.2d 77.

51. N.J.—Dubin v. Wich, 200 A. 751, 120 N.J.Law 469.

52. U.S.—Nectow v. City of Cambridge, Mass., 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Women's Kansas City St. Andrew Soc. v. Kansas City, C.C.A. Mo., 58 F.2d 593.

Ark.—City of Little Rock v. Sun Building & Developing Co., 134 S.W.2d 582, 199 Ark. 333.

Cal.—Hurst v. City of Burlingame, 277 P. 308, 207 C. 134.

Fla.—Ex parte Wise, 192 So. 372, 141 Fla. 222.

Ga.—Humphlett v. Reeves, 90 S.E.2d 14, 212 Ga. 8.

Ill.—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill.2d 169—Reschke v. Village of Winnetka, 2 N.E.2d 718, 363 Ill. 478, certiorari denied Village of Winnetka v. Reschke, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431 and Village of Winnetka v. Erickson, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431—People ex rel. Lind v. City of Rockford, 188 N.E. 446, 354 Ill. 377—People ex rel. Deitenbeck v. Village of Oak Park, 163 N.E. 445, 331 Ill. 406.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376.

Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

Mich.—Industrial Land Co. v. City of Birmingham, 78 N.W.2d 656, 346 Mich. 667—Warner v. City of Muskegon, 73 N.W.2d 837, 344 Mich. 408—Janessick v. City of Detroit, 60 N.W.2d 452, 337 Mich. 549—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702—Ervin Acceptance Co. v. City of Ann Arbor, 34 N.W.2d 11, 322 Mich. 404.

Mo.—Glencoe Lime & Cement Co. v. City of St. Louis, 108 S.W.2d 143, 341 Mo. 689.

N.J.—Tulsa Oil Co. v. Morey, 60 A.2d 302, 137 N.J.Law 388.

Dorsey Motors v. Davis, 180 A. 396, 13 N.J.Misc. 620.

N.Y.—Curtiss-Wright Corp. v. Incorporated Village of Garden City, 57 N.Y.S.2d 377, 185 Misc. 508—Buffalo Park Lane v. City of Buffalo, 294 N.Y.S. 413, 162 Misc. 207.

dential district of a certain classification rather than in a residential district of a less restricted character in some cases may be unreasonable.⁵³

It may be improper to dedicate to residential use property which is beyond any reasonable doubt located in an actual business district,⁵⁴ or property on the boundary line between a residential and industrial district which is adjacent to a large factory and railroad operations,⁵⁵ or to a traveled highway on which numerous business establishments are located,⁵⁶ but heavy traffic on an adjoining street has been held insufficient to establish the unreasonableness of a residential classification.⁵⁷ Where

business is permitted on the front of a lot and the rear is restricted to residential use, the application of the regulation may be held to be unreasonable.⁵⁸

It has been held that, when a business district has been rightly established, owners of property adjacent thereto cannot be restricted so as to prevent them from using it as ordinary business property,⁵⁹ not hurtful to adjacent residence property,⁶⁰ except as it makes such property less desirable for residence uses.⁶¹ A municipality may not single out one lot within what is essentially a residential district and impose restrictions on this lot that are

Maxwell v. Incorporated Village of Rockville Centre, 84 N.Y.S.2d 544.

Ohio.—City of Cincinnati v. Struble, 30 Ohio N.P., N.S., 380.

Pa.—Taylor v. Haverford Tp., 149 A. 689, 299 Pa. 402.

Zook v. Winger, Com.Pl., 15 Cambria 221.—Appeal of Hessenbruch from Radnor Tp. Zoning Ordinance, Quar.Sess., 40 Del.Co. 43.

Tex.—City of West University Place v. Ellis, 134 S.W.2d 1038, 134 Tex. 222.

City of Lubbock v. Stubbs, Civ. App., 278 S.W.2d 519.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Wis.—Chrome Plating Co. v. City of Milwaukee, 17 N.W.2d 705, 246 Wis. 526.—Rowland v. City of Racine, 271 N.W. 36, 223 Wis. 488.

Wyo.—State ex rel. George v. Hull, 199 P.2d 832, 65 Wyo. 251.

Adjacent property

Fact that a ward could be generally characterized as residential was no reason why vacant fifty-three-acre tract in such ward should be zoned as residential property irrespective of the nature of the property adjacent to such tract.

Ill.—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138.

Hotel

A zoning ordinance restricting use of property in certain zone to residential purposes was arbitrary and unenforceable as applied to property of an owner who had purchased property after agreement of town officials to remove zoning restrictions and issue a permit to build a hotel, where it appeared that owner was required to pay an ad valorem tax annually on property in sum of one thousand six hundred dollars on an assessed valuation of fifty thousand dollars, that area surrounding locus was business property, and that property was unusable for residential purposes.

Fla.—Ehinger v. State ex rel. Gottesman, 2 So.2d 357, 147 Fla. 129.

Prior issuance of permit

A zoning ordinance classifying certain property as class B residential was valid, but was unreasonable and unenforceable as applied to property of owner who had been issued a permit to construct a building on a lot therein with full knowledge that owner intended to operate a packing house as well as to live therein, in absence of showing that business was deleterious to the health, safety, or welfare of the people.

Fla.—Ex parte Wise, 192 So. 872, 141 Fla. 222.

Excavation of materials

Zoning ordinance classifying as residential property adjacent to defendants' brick manufacturing plants from which defendants were excavating materials was held unreasonable.

N.Y.—Cordts v. Hutton Co., 262 N.Y. S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

53. Wis.—State ex rel. Scandrett v. Nelson, 3 N.W.2d 765, 240 Wis. 438.

Possible park use

Where parcel was surrounded immediately by district which had been used for many years for extensive industrial, commercial, and railroad operations and had been definitely separated by railroad right of way from property classified as "C" residential, application of "A" residential classification to such parcel could not be justified on theory that it might be required by the city in future enlargement of park.

Wis.—State ex rel. Scandrett v. Nelson, supra.

54. Ill.—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396.

N.J.—Newark Milk & Cream Co. of Newark v. Parsippany-Troy Hills, Tp., 135 A.2d 682, 47 N.J.Super. 306.

Dorsey Motors v. Davis, 180 A. 396, 13 N.J.Misc. 620.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, af-

firming 125 N.Y.S.2d 112, 282 App. Div. 890, appeal denied 126 N.Y.S. 2d 200, 282 App.Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.

Tex.—City of West University Place v. Ellis, Civ.App., 118 S.W.2d 907, affirmed 134 S.W.2d 1038, 134 Tex. 222.

Property surrounded by industrial areas

(1) On three sides.

Ill.—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28.

(2) Completely.

Ill.—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E.2d 1, 6 Ill. 2d 419.

55. Cal.—Skalko v. City of Sunnyvale, 93 P.2d 93, 14 C.2d 213.

56. N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

Where real estate was situated on heavily traveled highway intersection and property adjacent thereto and diagonal therefrom was used for commercial purposes, zoning of real estate for residential purposes only was arbitrary and unreasonable.

Ohio.—State ex rel. Euverard v. Miller, 129 N.E.2d 209, 98 Ohio App. 283.

57. Ill.—Fox v. City of Springfield, 139 N.E.2d 732, 10 Ill.2d 198.—La Salle Nat. Bank v. City of Chicago, 126 N.E.2d 643, 6 Ill.2d 22.

58. Ga.—Fauss v. McConnell, 157 S.E. 625, 172 Ga. 444.

59. Ark.—City of Little Rock v. Joyner, 206 S.W.2d 446, 212 Ark. 508.—City of Little Rock v. Bentley, 165 S.W.2d 890, 204 Ark. 727.—Little Rock v. Pfeifer, 277 S.W. 883, 169 Ark. 1027.

Wyo.—State ex rel. George v. Hull, 199 P.2d 832, 65 Wyo. 251.

60. Ark.—Little Rock v. Pfeifer, 277 S.W. 883, 169 Ark. 1027.

61. Ark.—Little Rock v. Pfeifer, supra.

less onerous than those imposed on the remaining portions of what is really the same zoning district.⁶²

Boundary dividing street. There is nothing arbitrary or unreasonable in the mere zoning of one side of a street for business and the other side for residential uses,⁶³ since the zoning of streets along the edges of residential districts for business and commercial purposes is a recognized method of zoning.⁶⁴ The zoning of one side of a street for business and the other side for residential uses should be made with reasonable consideration for the character of the district and its peculiar suitability for particular uses, however, and with a view to conserving the value of property and encouraging the most appropriate use of land throughout the municipality,⁶⁵ and such zoning may in certain circumstances be unreasonable.⁶⁶

Preservation of residential character of village.

It is not clearly arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character, as long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large,⁶⁷ and an ordinance which places into a residential district the entire area of a sparsely settled residential and agricultural village on the periphery of a large metropolitan center is not, as a matter of law, invalid as per se arbitrary and unreasonable.⁶⁸

Property not suited for residential use. It may be arbitrary or unreasonable to restrict to residential use property which is not reasonably suited therefor,⁶⁹ such as an isolated single lot surrounded by a business district,⁷⁰ and this has been held to be the case especially where the property in question is largely valueless for residential use by reason of its location in a commercial area,⁷¹ and it would

62. Mass.—Whittemore v. Building Inspector of Falmouth, 46 N.E.2d 1016, 313 Mass. 248.

63. Cal.—Reynolds v. Barrett, 83 P. 2d 29, 12 C.2d 244—Feraut v. City of Sacramento, 269 P. 537, 204 C. 687.

Donovan v. City of Santa Monica, 199 P.2d 51, 83 C.A.2d 386—Kort v. City of Los Angeles, 127 P. 2d 66, 52 C.A.2d 804—Biscay v. City of Burlingame, 15 P.2d 784, 127 C.A. 213.

D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

Ill.—La Salle Nat. Bank v. City of Chicago, 126 N.E.2d 643, 6 Ill.2d 22—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

Depreciation or enhancement of value

(1) Fact that placing property in residence district immediately across street from business district depreciated value was held immaterial.

Cal.—Feraut v. City of Sacramento, 269 P. 537, 204 C. 687.

(2) Zoning ordinance was held not invalidated because property in business district directly across street from residential district was greatly enhanced in value, because of classification.

Cal.—Feraut v. City of Sacramento, supra.

64. Ill.—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265.

65. N.J.—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182.

66. N.J.—Scarborough Apartments v. City of Englewood, supra.

Pa.—Taylor v. Haverford Tp., 149 A. 639, 299 Pa. 402.

67. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412.

Adoption of only two classifications held not unreasonable

An ordinance providing comprehensive plan for regulation of use of land in a sixth-class city was not unreasonable merely because it provided for only A-1 and B-1 residential zones.

Ky.—City of Richlawn v. McMakin, 230 S.W.2d 902, 313 Ky. 265, certiorari dismissed McMakin v. City of Richlawn, 71 S.Ct. 531, 340 U.S. 945, 95 L.Ed. 682.

68. U.S.—Valley View Village v. Proffett, C.A.Ohio, 221 F.2d 412.

Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205.

N.Y.—Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485.

Keeping village practically free from business

If village authorities desire to keep village practically free from business, they may do so, unless zoning regulations imposed to carry out such purpose are unreasonable, arbitrary, or an unequal exercise of power.

N.Y.—Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47.

69. Fla.—Hammond v. Carlyon, 96 So.2d 219—Town of Surfside v. Normandy Beach Development Co., 57 So.2d 844.

Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E.2d 1, 6 Ill.2d 419—Tower Cabana Club v. City of Chicago, 123 N.E.2d 834, 5 Ill.2d 11.

Mich.—Frendo v. Southfield Tp., 85 N.W.2d 130, 349 Mich. 693—Grand Trunk Western R. Co. v. City of Detroit, 40 N.W.2d 195, 326 Mich. 387—Ritenour v. Dearborn Tp., 40

N.W.2d 137, 326 Mich. 242—Hering v. City of Royal Oak, 40 N.W.2d 133, 326 Mich. 232—Ervin Acceptance Co. v. City of Ann Arbor, 34 N.W.2d 11, 322 Mich. 404—Oschin v. Redford Tp., 24 N.W.2d 152, 315 Mich. 359.

Miss.—City of Hattiesburg v. Pittman, 102 So.2d 352.

N.Y.—Cordts v. Hutton Co., 262 N.Y. S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

Harrison v. Reidpath, 93 N.Y.S. 2d 569.

Ohio.—State ex rel. Euverard v. Miller, 129 N.E.2d 209, 98 Ohio App. 283.

Tex.—City of West University Place v. Ellis, 134 S.W.2d 1038, 134 Tex. 222.

Wis.—Town of Hobart v. Collier, 87 N.W.2d 868, 3 Wis.2d 182.

Inability to borrow money for development

In determining whether city zoning ordinances were reasonable when applied to certain land zoned for residential purposes, court should consider that owners were unable to borrow money to develop land as residential property because financial institutions found land unsuitable for homesites.

Mich.—Janesick v. City of Detroit, 60 N.W.2d 452, 337 Mich. 549.

70. Cal.—Reynolds v. Barrett, 83 P. 2d 29, 12 C.2d 244.

N.J.—Jersey Triangle Corporation v. Board of Adjustment of Jersey City, 21 A.2d 845, 127 N.J.Law 194.

71. Wis.—Rowland v. City of Racine, 271 N.W. 36, 223 Wis. 488—State v. Gurda, 243 N.W. 317, 209 Wis. 63.

Triangular block

Zoning ordinance placing single

be greatly enhanced in value if devoted to business or industrial purposes.⁷² The fact that vacant lots in a residential area have not enjoyed a brisk sale for use as private residences does not, however, establish that the zoning for residential use is unreasonable or arbitrary.⁷³

b. Classification of Uses Permitted

A zoning ordinance may reasonably permit the use of land in a residential district for nonresidential purposes such as schools, churches, hospitals, philanthropic institutions, and the like, and under some circumstances it may be arbitrary and unreasonable to prohibit such use, although as a general rule business uses may reasonably be excluded.

An ordinance may reasonably permit in a strictly residential zone public schools,⁷⁴ private or parochial schools,⁷⁵ houses of worship,⁷⁶ and Sunday schools,⁷⁷ and may permit the use of the land for agricultural purposes.⁷⁸ An ordinance permitting clubs, associations, or recreation rooms, including

youth centers, in an area theretofore zoned for residences, parks, playgrounds, recreation and field houses, churches, schools, hotels, business and professional offices, and hospitals, is not unreasonable or arbitrary.⁷⁹ A zoning ordinance is not unreasonable because it requires an applicant for the conduct of private school classes in a residential district to satisfy the board of appeals that such use will not be detrimental to the neighborhood or to the residents thereof, or create a hazard to health, safety, morals, or the general welfare.⁸⁰

It may be arbitrary and unreasonable to exclude from a residential district schools,⁸¹ churches,⁸² private hospitals,⁸³ or philanthropic homes.⁸⁴ An ordinance which excludes private schools while permitting public schools has been held unreasonable and arbitrary,⁸⁵ but there is also authority to the contrary.⁸⁶ An ordinance which permits use of property in the zoned area for grade school, high

residence restriction on triangular block, where property was valueless as residence property and all property around it was zoned for commercial use, was held unreasonable and void.

III.—*Tews v. Woolhiser*, 185 N.E. 327, 352 Ill. 212.

72. II.—*Taylor v. Village of Glencoe*, 25 N.E.2d 62, 372 Ill. 507.

Mich.—*Janesick v. City of Detroit*, 60 N.W.2d 452, 337 Mich. 549.

73. III.—*Mundelein Estates v. Village of Mundelein*, 99 N.E.2d 144, 409 Ill. 291.

74. N.J.—*Corpus Juris Secundum* cited in *Yanow v. Seven Oaks Park, Inc.*, 94 A.2d 482, 490, 11 N.J. 341, 36 A.L.R.2d 639.

75. N.J.—*Yanow v. Seven Oaks Park, Inc.*, 94 A.2d 482, 11 N.J. 341, 36 A.L.R.2d 639.

76. N.J.—*Yanow v. Seven Oaks Park, Inc.*, *supra*.

77. N.J.—*Yanow v. Seven Oaks Park, Inc.*, *supra*.

78. III.—*Will County v. Stanfill*, 129 N.E.2d 46, 7 Ill.App.2d 52.

Held not unreasonable or arbitrary classification

County zoning ordinance provision that, until duly reclassified by zoning authorities, residential districts could continue to be used for all agricultural purposes except that certain animals could not be housed closer than fifty feet from any residence other than that of owner or user of the property did not constitute an arbitrary and unreasonable classification of property.

III.—*Will County v. Stanfill*, *supra*.

79. III.—*Bohan v. Village of Riverdale*, 138 N.E.2d 487, 9 Ill.2d 561.

80. N.Y.—*Schweizer v. Board of*

Zoning Appeals of Incorporated Village of Garden City, 167 N.Y.S.2d 764, 8 Misc.2d 878.

81. N.Y.—*Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park*, 107 N.Y.S.2d 858, 279 App.Div. 618, appeal denied 109 N.Y.S.2d 175, 279 App.Div. 746.

82. Ariz.—*Ellsworth v. Gercke*, 156 P.2d 242, 62 Ariz. 193.

Ohio.—*State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph*, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.

Tex.—*City of Sherman v. Simms*, 183 S.W.2d 415, 143 Tex. 115.

Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

Ordinance permitting other uses

Ordinance, excluding churches and places of public worship but permitting village and municipal buildings, railroad stations, public schools and club houses, is arbitrary and discriminatory.

N.Y.—*North Shore Unitarian Soc. v. Village of Plandome*, 109 N.Y.S.2d 803, 200 Misc. 524.

83. Del.—*Wilmington v. Turk*, 129 A. 512, 14 Del.Ch. 392.

43 C.J. p 388 note 47.

84. U.S.—*State v. Roberge*, Wash., 49 S.Ct. 50, 278 U.S. 116, 73 L.Ed. 210.

Old ladies' home

U.S.—*Women's Kansas City St. Andrew Soc. v. Kansas City, C.C.A. Mo.*, 58 F.2d 593.

Orphanage

Under police power, city cannot exclude orphanage merely because chil-

dren have same religious belief or nationality.

U.S.—*Village of University Heights v. Cleveland Jewish Orphans' Home, C.C.A. Ohio*, 20 F.2d 743, 54 A.L.R. 1008, certiorari denied, 48 S.Ct. 141, 275 U.S. 569, 72 L.Ed. 431.

85. Cal.—*Roman Catholic Welfare Corp. of San Francisco v. City of Piedmont*, 289 P.2d 438, 45 C.2d 325.

Fla.—*City of Miami Beach v. State ex rel. Lear*, 175 So. 537, 128 Fla. 750.

III.—*Catholic Bishop of Chicago v. Kingery*, 20 N.E.2d 583, 371 Ill. 257.

As to private schools already established in district before date of ordinance, zoning ordinance permitting use of property in residential districts for public schools only is an arbitrary and discriminatory classification.

Ala.—*Phillips v. City of Homewood*, 50 So.2d 267, 255 Ala. 180.

Private nursery school

Barring a nursery school from a residential district on the sole ground that it was privately operated is an unreasonable discrimination, for discrimination between public and private nursery schools bears no reasonable relation to the public health, safety, morals, or general welfare.

N.Y.—*Merrick Community Nursery School v. Young*, 171 N.Y.S.2d 522.

86. Wis.—*State ex rel. Wisconsin Lutheran High School Conference v. Sinar*, 65 N.W.2d 43, 267 Wis. 91, appeal dismissed State of Wis. ex rel. Wisconsin Lutheran High School Conference v. Sinar, 75 S. Ct. 604, 349 U.S. 913, 99 L.Ed. 1248.

school, boarding school, vocational school, college, or university, but excludes use of the property for nursery school or prekindergarten school, is unreasonable.⁸⁷

On the other hand a zoning ordinance may be reasonable although excluding from some residential areas institutions⁸⁸ and churches;⁸⁹ and the ordinance may reasonably exclude, as constituting business uses, educational buildings,⁹⁰ seminaries,⁹¹ colleges,⁹² universities,⁹³ trade or professional schools,⁹⁴ or schools for the teaching of special arts, crafts, or social activities,⁹⁵ and may also reasonably exclude professional offices,⁹⁶ funeral homes or undertaking establishments,⁹⁷ junk yards,⁹⁸ and boarding houses for institutional patients or pa-roles.⁹⁹

Accessory uses. A provision limiting the use of premises in a residence district to accessory uses customarily incidental to permitted uses and not seriously detrimental to a residential neighborhood is a reasonable limitation or restriction.¹ A provision authorizing accessory uses and buildings and

commercial activities if carried on by members of the immediate family of the owner and if not more than two employed persons are permitted has a reasonable relation to the end in view.²

Motels and trailer camps. An ordinance relating to the construction of motels in a residential district is not arbitrary or unreasonable merely because it permits³ or prohibits⁴ such construction. Although an ordinance restricting the use of property for trailer camps has been held arbitrary and unreasonable where it bears no relationship to present public health, safety, morals, or general welfare,⁵ or as applied to property adjacent to unzoned property within which the city maintains a trailer camp,⁶ under the circumstances of the particular case it has been held that an ordinance is not arbitrary or unreasonable where it prohibits the use for a trailer camp of property which lies within an area zoned for residential purposes,⁷ or where it not only prohibits trailer parks within the entire township, but fails to provide any district where they may be constructed or operated.⁸

87. Ill.—City of Chicago v. Sachs, 115 N.E.2d 762, 1 Ill.2d 342.

Barring school in all residential districts in town

Zoning ordinance barring the establishment of nursery schools in all residential districts in the entire town and containing no provisions for exemptions is unreasonable on the ground that such prohibition in a residential district has no relation to the public health, safety, morals or general welfare of the community.

N.Y.—Merrick Community Nursery School v. Young, 171 N.Y.S.2d 522.

88. Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S. Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

89. Cal.—Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 342, 338 U.S. 939, 94 L.Ed. 579.

90. N.Y.—Concordia Collegiate Institute v. Miller, 88 N.Y.S.2d 825, affirmed 93 N.Y.S.2d 922, 276 App. Div. 872, reargument and appeal denied, 94 N.Y.S.2d 829, 276 App. Div. 918, reversed on other grounds 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

91. N.J.—Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 11 N.J. 341, 36 A.L.R.2d 639.

92. N.J.—Yanow v. Seven Oaks Park, Inc., supra.

93. N.J.—Yanow v. Seven Oaks Park, Inc., supra.

94. N.J.—Yanow v. Seven Oaks Park, Inc., supra.

95. N.J.—Yanow v. Seven Oaks Park, Inc., supra.

96. Mass.—Town of Lexington v. Govenar, 3 N.E.2d 19, 295 Mass. 31.

Public accountant

Cal.—Kort v. City of Los Angeles, 127 P.2d 66, 52 C.A.2d 804.

Professional signs for advertising purposes

Construction of zoning law to prohibit erection of professional signs for advertising purposes in residential district was held proper and not violative of rights of property owner, where it could not be said that classifications were unreasonable.

Mass.—Town of Lexington v. Govenar, 3 N.E.2d 19, 295 Mass. 31.

97. Ill.—Mahoney v. City of Chicago, 137 N.E.2d 37, 9 Ill.2d 156.

98. Va.—Fairfax County v. Parker, 44 S.E.2d 9, 186 Va. 675.

99. N.J.—Frizen v. Poppy, 86 A.2d 134, 17 N.J. Super. 390.

N.Y.—Kanas v. Nugent, 135 N.Y.S.2d 128, 206 Misc. 826, affirmed 145 N.Y.S.2d 638, 286 App. Div. 1038, appeal denied 148 N.Y.S.2d 455, 1 A.D.2d 681.

1. Pa.—Appeal of Lord, 77 A.2d 728, 168 Pa. Super. 299, reversed on other grounds 81 A.2d 533, 368 Pa. 121.

2. N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

3. Mass.—Burnham v. Board of Ap-

peals of Gloucester, 128 N.E.2d 772, 333 Mass. 114.

4. Pa.—City of Harrisburg v. Pass, 93 A.2d 447, 372 Pa. 318.

Ordinance held not unreasonable

Ordinance permitting, in residential districts, boarding and rooming houses in which not more than six persons not related to owner or occupant were lodged and boarded for compensation, but prohibiting hotels, motor courts, motor lodges, motor hotels, tourist camps, tourist courts, and structures of similar character intended for similar use.

N.J.—Pierro v. Baxendale, 118 A.2d 401, 20 N.J. 17.

5. Mich.—Gust v. Canton Tp., 70 N.W.2d 772, 342 Mich. 436.

6. Mich.—Fringie v. Shevnock, 14 N.W.2d 827, 309 Mich. 179.

7. N.C.—City of Raleigh v. Morand, 100 S.E.2d 870, 247 N.C. 363.

Property outside city

Ordinance, prohibiting trailer camps in residential areas of city and within one mile thereof in all directions, was not unreasonable and arbitrary merely because it allegedly affected property lying outside of city, not subject to city taxes, and peopled by nonresidents receiving no benefits from city.

N.C.—City of Raleigh v. Morand, supra.

8. Ohio.—Davis v. McPherson, App., 132 N.E.2d 626, appeals dismissed Billman v. McPherson, 130 N.E.2d 342, 164 Ohio St. 296, and Davis v. McPherson, 130 N.E.2d 794, 164 Ohio St. 375.

§ 76. — Business, Commercial, and Industrial Districts

Regulations classifying certain property for business, commercial, or industrial, rather than residential, use are reasonable where related to the public comfort and welfare, but such classification will not be sustained where it is arbitrary and unreasonable.

Regulations classifying certain property for business, commercial, or industrial, rather than residential, use have been held reasonable where related to the public comfort and welfare⁹ and where made in accordance with a comprehensive plan and designed to lessen congestion in the streets;¹⁰ but such a classification will not be sustained where it is arbitrary or unreasonable,¹¹ as where not made in

accordance with a comprehensive plan and design to lessen congestion in the streets.¹² Where the dividing line is drawn between small and large businesses, it is not unreasonable to make the line of demarcation depend on the size of the enterprises involved as measured by the number of employees.¹³

An ordinance may reasonably exclude certain uses of property from a business, commercial, or industrial district,¹⁴ and, accordingly, may exclude certain businesses from such district,¹⁵ or exclude apartment houses while permitting one- and two-family homes;¹⁶ but the exclusion of certain uses of property from a business, commercial, or industrial zone may be arbitrary and unreasonable in some circumstances.¹⁷ A provision declaring a

9. Ala.—*White v. Luquire Funeral Home*, 129 So. 84, 221 Ala. 440.

Ill.—*Kinney v. City of Joliet*, 103 N.E.2d 473, 411 Ill. 289.

Md.—*Eckes v. Board of Zoning Appeals of Baltimore County*, 121 A.2d 249, 209 Md. 432.

Mass.—*Caires v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589.

N.J.—*Newark Milk & Cream Co. of Newark v. Parsippany-Troy Hills Tp.*, 135 A.2d 682, 47 N.J.Super. 306—*Closterman v. Cranford Tp.*, 91 A.2d 646, 22 N.J.Super. 204—*Anderson v. Mayor and Council of Town of Bloomfield*, 65 A.2d 270, 2 N.J.Super. 605.

N.Y.—*Andrews v. Town Bd. of Town of Dewitt, Onondaga County*, 98 N.Y.S.2d 494, 277 App.Div. 925, affirmed 103 N.E.2d 60, 303 N.Y. 702.

Ohio.—*Johnson v. Griffiths, App.*, 141 N.E.2d 774, appeal dismissed 131 N.E.2d 897, 164 Ohio St. 393—*Par-tain v. City of Brooklyn*, 133 N.E.2d 616, 101 Ohio App. 279—*Schick v. Ghent Road Inn, App.*, 132 N.E.2d 479.

Pa.—*Appeal of Lieb*, 116 A.2d 860, 179 Pa.Super. 313.

Barner v. City of Williamsport, Com.Pl., 4 Lycoming 261.

Tex.—*Kenny v. Kelly, Civ.App.*, 254 S.W.2d 535.

10. Md.—*Nelson v. County Council for Montgomery County*, 136 A.2d 873, 214 Md. 587.

11. Mich.—*Comer v. City of Dearborn*, 70 N.W.2d 813, 342 Mich. 471—*Penning v. Owens*, 65 N.W.2d 831, 340 Mich. 355.

Minn.—*Gunderson v. Anderson*, 251 N.W. 515, 190 Minn. 245.

N.J.—*Raskin v. Town of Morristown*, 121 A.2d 379, 21 N.J. 180.

12. Md.—*Temmink v. Board of Zoning Appeals of Baltimore County*, 128 A.2d 256, 212 Md. 6.

13. Cal.—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 9 A.L.R.2d 970, certiorari denied 39

S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

14. Fla.—*Merritt v. Peters*, 65 So.2d 861.

Limiting size of commercial signs
Regulation adopted by county commissioners limiting size of commercial signs to be erected in limited and special business zone to forty square feet is not unconstitutional as being arbitrary or unreasonable.
Fla.—*Merritt v. Peters, supra*.

15. N.J.—*Borough of West Caldwell v. Zell*, 91 A.2d 763, 22 N.J.Super. 188.

N.Y.—*Servodidio v. Board of Appeals of Town of Somers*, 146 N.Y.S.2d 125—*Edward A. Lashins, Inc. v. Griffin*, 132 N.Y.S.2d 896.

Public garages and gasoline filling stations see *infra* § 77.

Bag-cleaning industry

Exclusion of bag-cleaning industry from the city's light industrial zone was not unreasonable or arbitrary.
Minn.—*State v. Miller*, 288 N.W. 713, 206 Minn. 345.

Sale of hard liquor

An ordinance permitting sale of beer and wine in a designated zone and prohibiting sale of hard liquors in the same zone was not invalid as arbitrary or unreasonable.

Fla.—*State ex rel. Rimer v. City of Miami Beach*, 27 So.2d 524, 158 Fla. 33.

Slaughterhouse

Kan.—*Kilcoyne v. City of Coffeyville*, 269 P.2d 418, 176 Kan. 159.

16. N.J.—*Fanale v. Borough of Hasbrouck Heights*, 139 A.2d 749, 26 N.J. 320.

17. Fla.—*Charnoffree Corp. v. City of Miami Beach*, 76 So.2d 665.

Ill.—*Midland Elec. Coal Corp. v. Knox County*, 115 N.E.2d 275, 1 Ill. 2d 200—*Zilfen v. City of Chicago*, 114 N.E.2d 717, 415 Ill. 488.

N.J.—*Delawanna Iron & Metal Co. v. Albrecht*, 88 A.2d 616, 9 N.J. 424.
Tex.—*City of Amarillo v. Stapf, Civ.*

App., 109 S.W.2d 258, error dismissed.

Billboards

Under some circumstances a regulation prohibiting the erection of billboards in a business or industrial zone may be unreasonable or arbitrary.

N.J.—*United Advertising Corp. v. Board of Adjustment of Maplewood Tp.*, 56 A.2d 406, 136 N.J.Law 336.

Ohio.—*Central Outdoor Advertising Co. v. Village of Evendale, Ohio, Com.Pl.*, 124 N.E.2d 189.

Coal yard

Coal yard is not "nuisance per se," and hence, although city may prevent coal yards from becoming nuisances in fact by reasonable regulations, city cannot declare absolute prohibition of them within area zoned for commercial purposes under guise of police power.

Ohio.—*Wolarz v. Village of Cuyahoga Heights*, 4 N.E.2d 400, 53 Ohio App. 161.

Foundries

City zoning ordinance which forbade foundries in first manufacturing district, but permitted other plants which had objectionable features as to smell, sight, noise, and smoke, of equal or greater degree than proposed foundry, was unreasonable and unenforceable as to builder of proposed foundry in restricted area.

Tex.—*City of Amarillo v. Stapf, Civ. App.*, 109 S.W.2d 258, error dismissed.

Theaters

(1) It would be clearly unreasonable, as matter of zoning, to prohibit all theaters outside city or town limits.

Iowa.—*Central States Theatre Corp. v. Sar*, 66 N.W.2d 450, 245 Iowa 1254.

(2) Where much of general area was vacant, swampland and unimproved, devoted in large measure to

change in ownership of an existing business to be a new business within another provision prohibiting the opening or operating of a new business within specified areas is an arbitrary and unreasonable exercise of the police power.¹⁸

A zoning regulation permitting business in a small area within a residence zone may fall within the scope of a comprehensive zoning plan and is not unlawful, unless unreasonable or arbitrary,¹⁹ and the fact that a zoning ordinance establishes here and there small commercial districts where stores may be maintained within comparatively short distances from residence districts does not make it irrational or discriminatory.²⁰

Exclusion of higher uses. It is not arbitrary or unreasonable in the abstract, as a matter of law, to

exclude the so-called higher uses, such as residential and commercial uses, from an industrial district,²¹ although under the facts of the particular case it has been held unreasonable to exclude commercial activity from a light industrial district.²²

§ 77. — Public Garages and Gasoline Filling Stations

Zoning regulations restricting to certain localities the construction or maintenance of public garages and gasoline filling stations must be reasonable and not arbitrary, and will be held valid as applied to particular property where the classification of such property for restricted use is reasonable.

Zoning regulations restricting to certain localities the construction or maintenance of public garages and gasoline filling stations must be reasonable and not arbitrary,²³ and will be held valid as applied to

industrial and business uses, and there was ample property in town for residences, ordinance prohibiting use of such land for drive-in theater was unreasonable and arbitrary. Conn.—Lakeside Realty Co. v. Town of Berlin, 129 A.2d 628, 20 Conn. Sup. 188.

(3) Where all territory surrounding tract on which it was desired to construct drive-in theater was, with few exceptions, either vacant, unimproved land or devoted to heavy industrial plants, and there was ample vacant property available for industrial development and residential use, zoning ordinance of village prohibiting construction of such theaters was unreasonable and arbitrary. Ill.—People ex rel. Trust Co. of Chicago v. Village of Skokie, 97 N.E. 2d 310, 408 Ill. 397.

Mich.—Bzovi v. City of Livonia, 87 N.W.2d 110, 350 Mich. 489.

Auction sales

Where conduct of auction sales was no more obnoxious than many other businesses conducted in BA business district, and unrestricted districts were either unsuitable or pre-empted, and enforcement of zoning ordinance would, in effect, suppress and prohibit conduct of auction sales in city, provisions of zoning ordinance prohibiting auction sales except in a certain portion of BB business district and in BC business district were unreasonable, arbitrary and void.

Fla.—City of Miami Beach v. Perell, 52 So.2d 906.

Retail liquor business

In any zoning district in which other retail businesses are allowed, it would probably be unreasonable and arbitrary to exclude the sale of liquor.

Cal.—Town Council of Town of Los Gatos v. State Bd. of Equalization, 296 P.2d 909, 141 C.A.2d 344.

18. Idaho.—O'Connor v. City of Moscow, 202 P.2d 401, 69 Idaho 37, 9 A.L.R.2d 1031.

19. Cal.—Kort v. City of Los Angeles, 127 P.2d 66, 52 C.A.2d 804. Conn.—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614.

20. Mo.—City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n, 213 S.W.2d 479, 358 Mo. 70—State ex rel. Oliver Cadillac Corp. v. Christopher, 298 S.W. 720, 317 Mo. 1179, error dismissed Oliver Cadillac Co. v. Christopher, 49 S.Ct. 17, 278 U.S. 662, 73 L.Ed. 569.

21. N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154. Newark Milk & Cream Co. of Newark v. Parsippany-Troy Hills Tp., 135 A.2d 682, 47 N.J.Super. 306.

22. N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.

23. N.J.—A. G. Construction Co. v. Scott, 141 A. 760, 104 N.J.Law 596. Fischer v. Borough Council of Toms River, 181 A. 630, 13 N.J. Misc. 852—Trusdell v. Scott, 137 A. 886, 5 N.J.Misc. 695—Bloom v. Ventnor City, 132 A. 243, 4 N.J. Misc. 174.

N.Y.—In re Peck, 246 N.Y.S. 280, 231 App.Div. 99, affirmed 177 N.E. 186, 256 N.Y. 669.

N.C.—Shuford v. Town of Waynesville, 198 S.E. 585, 214 N.C. 135.

Ohio.—Henle v. City of Euclid, 125 N.E.2d 356, 97 Ohio App. 258, appeal dismissed 122 N.E.2d 792, 162 Ohio St. 280.

Test of reasonableness

(1) Question whether zoning ordinance permitting filling station on certain property was reasonable depended on previous use of property, use of near-by property, growth and

development of property in vicinity, and traffic on adjoining streets.

Kan.—Simmonds v. Meyn, 7 P.2d 506, 134 Kan. 419.

(2) The danger to pedestrians from motor vehicles crossing sidewalk to enter service station is proper consideration in testing reasonableness of zoning ordinance restricting location of such a station.

N.J.—Citizens Nat. Bank of Englewood v. City of Englewood, 24 A. 2d 819, 128 N.J.Law 147.

Held not unreasonable or arbitrary

(1) Ordinance, preventing storage of liquid petroleum products within one hundred feet of place of public assembly.

N.Y.—Gencarelli v. Balint, 171 N.Y. S.2d 283.

(2) Ordinance prohibiting location of filling stations within three hundred feet from any church, and providing for measurement of prescribed distance from curtilage rather than from church edifice.

N.J.—Vine v. Board of Adjustment of Village of Ridgewood, 56 A.2d 122, 136 N.J.Law 416.

(3) Ordinance permitting use of particular area for an automobile sales room or parking lot and prohibiting use of premises for an automobile filling station.

N.J.—Albright v. Johnson, 50 A.2d 399, 135 N.J.Law 70.

(4) Ordinance prohibiting use of property as an automobile sales lot. N.J.—Gross v. Allan, 117 A.2d 275, 37 N.J.Super. 262.

(5) Resolution which narrowed previous restrictions against operation of garages in certain area so as to exclude only such garages as sell gasoline and oil.

N.Y.—Congregation Beth Israel West Side Jewish Center v. Board of Estimate of City of New York, 139 N.Y.S.2d 645, 285 App.Div. 629.

particular property where the classification of such property for restricted use is reasonable,²⁴ but not where it is unreasonable.²⁵

Exclusion of garages and gasoline filling stations from certain restricted business districts may be reasonable,²⁶ but in particular circumstances it has been held that the exclusion of such enterprises from a district zoned for commercial uses is unreasonable.²⁷ A regulation is not arbitrary or unreasonable because it permits the operation of a garage in a commercial zone,²⁸ but an ordinance which allows the establishment and operation of public garages in the business district while prohibiting a storage garage is unreasonable and arbitrary.²⁹

One who has been granted a variation permitting him to operate a new automobile agency in a re-

stricted zone may not complain that a restriction against the storage and sale of second-hand automobiles therein is arbitrary and capricious.³⁰

Use dependent on consent of adjacent property owners. Where the site for a proposed gasoline service station is within an area devoted to business purposes, an ordinance requiring consent of adjacent property owners before the property can be used for a gasoline service station is arbitrary and unreasonable.³¹ An ordinance requiring an applicant for a filling station permit to obtain the consents of a specified percentage of property owners has been held not an unreasonable restriction on the use of the property, however, where the question of variance is still left with the board of appeals.³²

(6) Ordinance requiring discontinuance of gasoline service station near the state capitol, the state supreme court building, and several other state office buildings and a public school.

U.S.—Standard Oil Co. v. City of Tallahassee, C.A.Fla., 183 F.2d 410. Certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647.

(7) Ordinance which zoned property for residential purposes only and which had the effect of forbidding use of any twenty-foot lots for any purpose unless four lots were accumulated in one ownership, and amendment thereto which permitted construction of buildings for professional offices only on lots having a frontage more than fifty feet, as applied to oil company's seven contiguous twenty-foot lots, even though ordinance and amendment thereto had been adopted after oil company had brought mandamus to compel issuance of permits to build gasoline station in zoned area, where company had waived objections to the legal effect of adopting zoning ordinance and amendment thereto after company had filed petition.

Mich.—Highland Oil Corp. v. City of Lathrup Village, 85 N.W.2d 185, 349 Mich. 650.

(8) Ordinance as applied to realty which, although located on a principal street of city, was suitable for residential purposes and had for many years been zoned for such use, although realty would be worth substantially more for commercial purposes and had recently been purchased at a price in excess of its value for residential purposes for purpose of constructing a service station thereon.

Mich.—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706.

24. Ill.—Neef v. City of Springfield, 43 N.E.2d 947, 380 Ill. 275.

Mich.—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706.

N.J.—Salisbury v. Borough of Ridgefield, 60 A.2d 877, 137 N.J.Law 515. Portnoff v. Bigelow, 133 A. 534, 4 N.J.Misc. 539.

N.Y.—Brown v. Village of Owego, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655. Gencarelli v. Balint, 171 N.Y.S.2d 283—Suburban Tire & Battery Co. v. Village of Mamaroneck, 104 N.Y.S.2d 850, affirmed 113 N.Y.S.2d 449, 279 App.Div. 1084, affirmed 110 N.E.2d 894, 304 N.Y. 971.

Tex.—Lombardo v. City of Dallas, 73 S.W.2d 475, 124 Tex. 1.

McEachern v. Town of Highland Park, Civ.App. 34 S.W.2d 676, affirmed 73 S.W.2d 487, 124 Tex. 36.

Value of lot

Fact that lot would be more valuable if used for filling station rather than for residence did not make ordinance zoning lot in residential district invalid.

Ill.—Neef v. City of Springfield, 43 N.E.2d 947, 380 Ill. 275.

Tex.—City of Dallas v. Lively, Civ. App., 161 S.W.2d 895.

25. Ill.—People ex rel. Kirby v. City of Rockford, 2 N.E.2d 842, 363 Ill. 531.

N.J.—A. G. Construction Co. v. Scott, 141 A. 760, 104 N.J.Law 596.

Myslivec v. Bigelow, 134 A. 551, 4 N.J.Misc. 814.

Residential district

Zoning ordinance which restricted use of plaintiffs' lots to residence B purposes was invalid as unreasonable as applied to such property to prevent its use for erection of automobile service station, where the property was located at the intersection of busy highways and two other corner properties at the intersection were used for gasoline service sta-

tions and plaintiffs' property was not suitable for residence purposes.

Mich.—Hering v. City of Royal Oak, 40 N.W.2d 133, 326 Mich. 232.

26. N.J.—Dickinson v. Inhabitants of City of Plainfield, 4 A.2d 91, 122 N.J.Law 63.

Used automobile business

Ordinance providing that no premises should be used and no building erected, etc., in business district for operation of used automobile business was not unreasonable in regulating conduct of used automobile business as distinguished from business of selling of new automobiles.

N.J.—420 Broad Ave. Corp. v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527.

27. Ill.—State Bank & Trust Co. v. Village of Wilmette, 193 N.E. 131, 358 Ill. 311, 96 A.L.R. 1327.

N.J.—Fischer v. Borough Council of South Toms River, 181 A. 630, 13 N.J.Misc. 852.

Alteration

An ordinance precluding alteration of a garage in a business zone would be unreasonable.

N.J.—Bronston v. Inhabitants of City of Plainfield, 194 A. 809, 119 N.J. Law 139.

28. Tenn.—White v. Henry, 285 S. W.2d 353, 199 Tenn. 219.

29. N.J.—Roselle v. Wright, 117 A. 2d 661, 37 N.J.Super. 507, affirmed 122 A.2d 506, 21 N.J. 400.

30. Ill.—Zweifel Mfg. Corp. v. City of Peoria, 144 N.E.2d 593, 11 Ill.2d 489.

31. Ill.—Wolford v. City of Chicago, 138 N.E.2d 502, 9 Ill.2d 613—Koos v. Saunders, 182 N.E. 415, 349 Ill. 442—People ex rel. Deitenbeck v. Village of Oak Park, 163 N.E. 445, 331 Ill. 406.

32. Miss.—Application of Dolat, 75 N.Y.S.2d 862, 191 Misc. 73.

§ 78. — Use of Land Apart from Structures

The validity of zoning regulations in their application to particular lands where, if valid, they would have the effect of preventing the removal of some natural product from the land must be determined with respect to their reasonableness under the circumstances.

The validity of zoning regulations in their application to particular lands where, if valid, they would have the effect of preventing the removal of some natural product from the land must be determined with respect to their reasonableness under the circumstances.³³ Thus under the circumstances of the particular cases, regulations forbidding excavation operations have been held reasonable³⁴ and unreasonable.³⁵

Drilling for oil. The classification of particular property as within or without a zone in which drilling for oil is permitted is not invalid where such classification has some reasonable basis,³⁶ and the fact that operations of an oil company are restricted in a zone where other businesses are permitted is not in itself a sufficient basis for holding that the zoning authorities have acted in an arbitrary or unreasonable manner;³⁷ but an ordinance prohibiting drilling operations within the territorial boundaries of a city without reference to the question of whether the drilling would be injurious or harmful is unreasonable and arbitrary.³⁸

§ 79. — Nonconforming Use

A provision exempting nonconforming structures and uses existing at the enactment of the zoning ordinance is not unreasonable, but an ordinance which prohibits the continuance of existing lawful businesses within a zoned area may be an unreasonable exercise of the police power.

A provision of a zoning ordinance exempting nonconforming structures and uses existing at the enactment of the ordinance is not unreasonable,³⁹ and neither is a provision permitting continuance of a nonconforming use existing on the effective date of the ordinance if a certificate of occupancy is applied for within one year after passage of the ordinance,⁴⁰ although a permitted continuance of a nonconforming use of neighboring property after passage of a zoning ordinance has been held to undermine the restrictions thereof as they apply to the immediate locality.⁴¹

An ordinance which prohibits the continuance of existing lawful businesses within a zoned area may be an unreasonable exercise of the police power,⁴² and any provision which takes away the right to a nonconforming use in an unreasonable manner is invalid.⁴³ An ordinance prohibiting the restoration of a commercial building in a residential area after the building has been destroyed to more than fifty per cent of its value is not an unreasonable exercise of the police power.⁴⁴

The stopping of expansion of a nonconforming use is not an arbitrary or unreasonable exercise of

33. Mass.—Town of Burlington v. Dunn, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

34. N.J.—Fred v. Mayor and Council of Borough of Old Tappan, 85 A.2d 317, 17 N.J.Super. 153, affirmed 92 A.2d 473, 10 N.J. 515.

35. Cal.—People v. Hawley, 279 P. 136, 207 C. 395.

Gravel pit

Zoning ordinance, as applied to gravel pit within residence district, was held unreasonable.

U.S.—Village of Terrace Park v. Errrett, C.C.A.Ohio, 12 F.2d 240, certiorari denied 47 S.Ct. 100, 273 U.S. 710, 71 L.Ed. 852.

36. U.S.—Marblehead Land Co. v. City of Los Angeles, C.C.A.Cal., 47 F.2d 528, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540.

Adkins v. City of West Frankfort, D.C.Ill., 51 F.Supp. 532—K. & L. Oil Co. v. Oklahoma City, D.C.Okl., 14 F.Supp. 492.

Cal.—Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865, 40 C.2d 552.

Okl.—Beveridge v. Harper & Turner Oil Trust, 35 P.2d 435, 168 Okl. 609.

Extension of zone

City council's refusal to include in extension of oil zone unimproved forty-acre tract in densely settled and highly restricted residential section was held not so capricious and unreasonable as to amount to arbitrary exercise of power so as to entitle property owner to injunction against enforcement of zoning ordinance.

U.S.—K. & L. Oil Co. v. Oklahoma City, D.C.Okl., 14 F.Supp. 492.

Farm tract

Zoning ordinance prohibiting drilling of wells on farm tract recently acquired by city within residence district was held not unreasonable exercise of police power on ground that city permitted drilling of wells in more densely populated district, where record disclosed that such district was different from residence district which was highly developed residence section adjoining capitol.

U.S.—Cromwell-Franklin Oil Co. v. Oklahoma City, D.C.Okl., 14 F.Supp. 370.

37. Cal.—Beverly Oil Co. v. City of

Los Angeles, 254 P.2d 865, 40 C.2d 552.

38. Cal.—Monterey Oil Co. v. City Court of City of Seal Beach, Orange County, 260 P.2d 846, 120 C.A.2d 31.

39. N.C.—Kinney v. Sutton, 53 S.E. 2d 306, 230 N.C. 404.

40. N.Y.—Braun v. McGillian, 40 N.Y.S.2d 791, 180 Misc. 711.

41. Mich.—Morris G. Laramie & Son v. Gidley, 40 N.W.2d 205, 326 Mich. 410.

42. Cal.—Endara v. City of Culver City, 294 P.2d 1003, 140 C.A.2d 33. Idaho.—O'Connor v. City of Moscow, 202 P.2d 401, 69 Idaho 37, 9 A.L.R. 2d 1031.

43. Ill.—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

Village of Skokie v. Almendinger, 126 N.E.2d 421, 5 Ill.App.2d 522.

N.Y.—Town of Somers v. Camarco, 127 N.E.2d 327, 308 N.Y. 537.

44. Miss.—Palazzola v. City of Gulfport, 52 So.2d 611, 211 Miss. 737.

governmental power,⁴⁵ but an ordinance providing for continuance of nonconforming uses has been held unreasonable in so far as it prohibits a change to a higher grade nonconforming use in the same building.⁴⁶

Requiring discontinuance after specified time. The constitutionality of a zoning ordinance which requires existing uses to stop after a reasonable time depends on its overall reasonableness and on the importance of the public gain in relation to the private loss.⁴⁷ It has been held that a provision requiring that businesses in an area zoned exclusively for residences be liquidated or discontinued within a specified time is not unreasonable;⁴⁸ but an ordinance which grants the city council discretion to discontinue and remove a lawful nonconforming use when in the council's opinion such nonconforming use has been permitted to continue for a reasonable time is unreasonable.⁴⁹ A zoning resolution providing that

the use of the land in a residential district must conform to the resolution after discontinuance of a nonconforming use for one year is not arbitrary or unreasonable.⁵⁰

§ 80. Regulations as to Density of Population

A regulation of the density of population in a given area embodying a method which is not arbitrary or unreasonable may be valid.

A regulation of the density of population in a given area embodying a method which is not arbitrary or unreasonable may be valid under a statute conferring a broad and unrestricted power on a city to regulate such density in the reasonable exercise of its legislative power.⁵¹ A zoning ordinance prohibiting dwellings accommodating more than fourteen families on any acre of land is unreasonable if applicable to flats.⁵²

III. MODIFICATION OR AMENDMENT; REPEAL

A. MODIFICATION OR AMENDMENT

1. IN GENERAL

§ 81. Power to Modify or Amend in General

As a general rule, zoning regulations are subject to amendment or modification so as to meet changed conditions where justice requires it.

As a general rule, subject to the limitations and exceptions of the various statutory provisions, as

discussed infra § 83, zoning ordinances and regulations are subject to change by amendment, modification, rezoning, or reclassification, at the will of the county, municipality, or other governmental entity which enacted them,⁵³ so as to meet changed conditions where justice requires it;⁵⁴ and reasonable

45. Md.—*Colati v. Jirout*, 47 A.2d 613, 186 Md. 652.

Enlargement of building

A zoning ordinance is not unreasonable in that it prohibits the enlarging of an existing business building in a residence district.

Wis.—*State v. Harper*, 196 N.W. 451, 182 Wis. 148, 33 A.L.R. 269.

46. Mich.—*Palmer v. City of Detroit*, 11 N.W.2d 199, 306 Mich. 449.

47. Md.—*Grant v. Mayor and City Council of Baltimore*, 129 A.2d 363, 212 Md. 301.

48. Cal.—*City of Los Angeles v. Gage*, 274 P.2d 34, 127 C.A.2d 442. Kan.—*Spurgeon v. Board of Com'rs of Shawnee County*, 317 P.2d 798, 181 Kan. 1008.

La.—*State ex rel. Dema Realty Co. v. McDonald*, 121 So. 613, 168 La. 172, certiorari denied *McDonald v. State of Louisiana ex rel. Dema Realty Co.*, 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 612.

Billboards

Zoning ordinance provision, which required that billboards, which were nonconforming uses, had to be re-

moved from residential areas after a five-year tolerance period was reasonable and constitutional.

Md.—*Grant v. Mayor and City Council of Baltimore*, 129 A.2d 363, 212 Md. 301.

Authority not limited

Statutes relating to zoning ordinances do not limit authority to order removal of business establishments from residential districts or require that any time limit be fixed. La.—*State ex rel. Dema Realty Co. v. McDonald*, 121 So. 613, 168 La. 172, certiorari denied *McDonald v. State of Louisiana ex rel. Dema Realty Co.*, 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 612.

49. Ohio.—*City of Akron v. Chapman*, 116 N.E.2d 697, 160 Ohio St. 382.

50. Colo.—*Beszedes v. Board of Com'rs of Arapahoe County*, 178 P.2d 950, 116 Colo. 123.

51. N.J.—*Clary v. Borough of Eatontown*, 124 A.2d 54, 41 N.J.Super. 47.

N.Y.—*City of Albany v. Anthony*, 21 N.Y.S.2d 258, 174 Misc. 470, re-

versed on other grounds 28 N.Y.S. 2d 963, 262 App.Div. 401.

52. Ill.—*Bjork v. Safford*, 164 N.E. 699, 333 Ill. 355, 61 A.L.R. 561.

53. N.Y.—*Borek v. Golder*, 74 N.Y.S. 2d 675, 190 Misc. 366.

N.C.—*McKinney v. City of High Point*, 79 S.E.2d 730, 239 N.C. 232.

Plenary power

A municipality's power to alter its zoning ordinance is plenary and inherent in grant to it of legislative power to enact ordinance.

N.Y.—*Stillbar Const. Co. v. Town of Harrison*, 143 N.Y.S.2d 804.

54. U.S.—*Wilcox v. City of Pittsburgh*, C.C.A.Pa., 121 F.2d 835—*Geneva Inv. Co. v. City of St. Louis*, C.C.A.Mo., 37 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

Cal.—*City of Los Angeles v. Gage*, 274 P.2d 34, 127 C.A.2d 442.

Conn.—*Winslow v. Zoning Bd. of City of Stamford*, 122 A.2d 789, 143 Conn. 381—*Rommell v. Walsh*, 16 A.2d 483, 127 Conn. 272—*De Palma v. Town Plan Commission of*

alterations of zoning regulations may be made in the exercise of the police power.⁵⁵

Accordingly, the zoning authority, or the governing or legislative body of the particular government-

al entity, notwithstanding it has enacted zoning ordinances, ordinarily is not precluded from changing the regulations in the future where the growth and progress of the municipality require it, or where it is for the general welfare of the municipality.⁵⁶ In-

Greenwich, 193 A. 868, 123 Conn. 257.
 Fla.—Siegel v. Adams, 44 So.2d 427—City of Miami v. Rosen, 10 So.2d 307, 151 Fla. 677.
 Ga.—Neal v. City of Atlanta, 94 S.E. 2d 867, 212 Ga. 687—Birdsey v. Wesleyan College, 87 S.E.2d 378, 211 Ga. 583.
 Idaho.—*Corpus Juris Secundum* cited in *Moerder v. City of Moscow*, 263 P.2d 993, 996, 74 Idaho 410.
 Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.
 Ky.—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.
 La.—Collett v. City of Shreveport, App., 168 So. 346, followed in *Patterson v. City of Shreveport*, 168 So. 349.
 Md.—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176—Chayt v. Maryland Jockey Club of Baltimore City, 18 A.2d 856, 179 Md. 390.
 Mass.—Brackett v. Board of Appeal of Building Department of City of Boston, 39 N.E.2d 956, 311 Mass. 52.
 Neb.—Cassel Realty Co. v. City of Omaha, 14 N.W.2d 600, 144 Neb. 753.
 N.J.—Dolan v. DeCapua, 80 A.2d 655, 13 N.J.Super. 500—Cassinari v. Union City, 63 A.2d 891, 1 N.J. Super. 219.
 Taylor v. City of Hackensack, 58 A.2d 788, 137 N.J.Law 139, affirmed, 62 A.2d 686, 1 N.J. 211—Durrwachter v. Mayor & Council of Borough of Fair Lawn, 55 A.2d 832, 136 N.J.Law 314.
 N.Y.—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—Borek v. Golder, 74 N.Y.S.2d 675, 190 Misc. 366.
 Okl.—Makrauer v. Board of Adjustment of City of Tulsa, 193 P.2d 291, 200 Okl. 285.
 Or.—Page v. City of Portland, 165 P. 2d 280, 173 Or. 632.
 Pa.—Hollearn v. Silverman, 12 A.2d 292, 338 Pa. 346.
 Tex.—Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.
 Wis.—Eggebeen v. Sonnenburg, 1 N.W.2d 84, 239 Wis. 213, 138 A.L.R. 495—Higbee v. Chicago, B. & Q. R. Co., 292 N.W. 320, 235 Wis. 91, 128 A.L.R. 734.
 43 C.J. p 344 note 82.

Power of council or board to grant variances in cases of hardship see *infra* § 278.

Flexibility and stability

(1) Zoning does not remain static and thereby afford permanent rules and regulations for all times, but must be flexible.

Md.—Missouri Realty, Inc. v. Ramer, 140 A.2d 655.

N.Y.—Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 378, 2 App.Div.2d 889, affirmed 145 N.E.2d 28, 3 N.Y.2d 873, 166 N.Y.S.2d 314.

(2) Zoning, like all restrictions and reforms in a free government, is a matter calling for reasonable stability without absolute rigidity and is not immutable.

Ohio.—Partain v. City of Brooklyn, Com.Pl., 138 N.E.2d 180, affirmed 133 N.E.2d 616, 101 Ohio App. 279.

Successive changes

(1) Zoning ordinance changing character of district held valid, in absence of evidence of illegality, although another ordinance was passed shortly after first ordinance became effective changing district back to its original character.

Wash.—State v. Superior Court of King County, 284 P. 93, 155 Wash. 244.

(2) Where property was returned to the zone in which it lay when purchased after it had been legally placed in a zone where less restricted uses were permitted, mere fact that, before second amendment of zoning ordinance, owner had removed some shrubbery and cut down a few trees and entered into negotiations to lease the property was not sufficient to entitle owner to continue preparation of property for use forbidden by second amendment.

N.H.—Brady v. City of Keene, 4 A.2d 658, 90 N.H. 99.

55. U.S.—Ruben v. City of Pittsburgh, D.C.Pa., 142 F.Supp. 787—Leighton v. City of Minneapolis, D. C.Minn., 16 F.Supp. 101.

Ala.—Shell Oil Co. v. Edwards, 81 So.2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 885, 100 L.Ed. 780.

Conn.—De Palma v. Town Plan Commission of Greenwich, 193 A. 868, 123 Conn. 257.

Ga.—Birdsey v. Wesleyan College, 87 S.E.2d 378, 211 Ga. 583.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

Mo.—Taylor v. Schlemmer, 183 S.W. 2d 913, 353 Mo. 687.

N.Y.—Gedney Estates v. City of White Plains, 99 N.Y.S.2d 111.

Ohio.—Johnson v. Griffiths, App., 141 N.E.2d 774, appeal dismissed 131 N.E.2d 397, 164 Ohio St. 393.

Pa.—Kelly v. City of Philadelphia, 115 A.2d 238, 382 Pa. 459.

Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

56. Cal.—Johnston v. City of Claremont, 323 P.2d 71, 49 C.2d 826.

Conn.—Hills v. Zoning Commission of Town of Newington, 96 A.2d 212, 139 Conn. 603.

Idaho.—*Corpus Juris Secundum* cited in *Moerder v. City of Moscow*, 263 P.2d 993, 996, 74 Idaho 410.

Ill.—Langguth v. Village of Mount Prospect, 124 N.E.2d 879, 5 Ill.2d 49—Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill.2d 432—Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 1 Ill.2d 28.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

Md.—Missouri Realty, Inc. v. Ramer, 140 A.2d 655—Oftutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

N.J.—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324—Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.

Sun Oil Co. v. Borough of Bradley Beach, 55 A.2d 778, 136 N.J. Law 307, affirmed 61 A.2d 236, 137 N.J.Law 658.

N.Y.—Lo Cascio v. Kristensen, 113 N.Y.S.2d 723, 280 App.Div. 835.

Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736.

Okl.—Keaton v. Oklahoma City, 103 P.2d 938, 187 Okl. 593, certiorari denied 61 S.Ct. 75, 311 U.S. 616, 85 L.Ed. 391.

Tex.—Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

City of Lubbock v. Stubbs, Civ. App., 278 S.W.2d 519.

Who may change, modify, or amend zoning regulations or rezone or reclassify property see *infra* § 82.

Amendment in various respects

Mayor and council of city of Atlanta could amend number of districts zoned, shape, boundary, or

deed, the failure or refusal to make such a change in the regulations may, under certain circumstances, constitute an arbitrary, unreasonable, and capricious exercise of power, without reasonable relation to the public health, safety, morals, or welfare.⁵⁷

A municipality has the power in the enactment of a zoning ordinance to continue the valid limitations of a preëxisting ordinance.⁵⁸

Nature of "rezoning." "Rezoning" has been defined or described as contemplating a change in existing zoning rules and regulations within a district, subdivision, or other comparatively large area in a given governmental unit, which theretofore has been uniformly zoned in its entirety.⁵⁹

area of zoned districts, and regulations applicable to any district or districts, but they had no power to spot zone by ordinance, or to remove a small tract for business or commercial purposes from a district zoned for residences.

Ga.—Orr v. Hapeville Realty Investments, 85 S.E.2d 20, 211 Ga. 235.

Character or use of district

A city is empowered to amend a zoning ordinance when character and use of district or surrounding territory have become so changed since original ordinance was enacted that public health, morals, safety, and welfare would be promoted if change were made in boundaries or in regulations prescribed for certain districts.

Mass.—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308 Mass. 128.

Zoning restrictions made inapplicable to municipal structures

Where board of adjustment refused to grant city's petition for an exception to zoning ordinance in order to permit erection of city fire station in residential district, city commission was authorized to amend zoning ordinance to provide that ordinance should not be applicable to municipal buildings and structures deemed necessary by board of commissioners for safety, health, and general welfare of public.

Tex.—City of McAllen v. Morris, Civ. App., 217 S.W.2d 875, error refused.

57. Fla.—City of Miami v. Ross, 78 So.2d 152.

Miss.—City of Hattiesburg v. Pittman, 102 So.2d 352.

N.J.—Corpus Juris Secundum cited in Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 151, 33 N.J. Super. 324.

Blanchi v. Morey, 11 A.2d 405, 124 N.J. Law 258.

"Confiscation"

When property restricted to a de-

fined use by zoning ordinance changes its character from natural causes to extent that it is no longer adaptable to use for which it is zoned, it becomes duty of zoning authorities to relax their restrictions to prevent "confiscation" just as much as in case where regulation was invalid in first instance.

Fla.—Forde v. City of Miami Beach, 1 So.2d 642, 146 Fla. 676.

58. N.J.—Berry v. Recorder's Court of Town of West Orange, 11 A.2d 743, 124 N.J. Law 385, affirmed Berry v. Recorder's Office of Town of West Orange, 15 A.2d 758, 125 N.J. Law 273.

59. Fla.—Troup v. Bird, 53 So.2d 717.

"Rezoning" distinguished from "variance" or "exception" see *infra* § 275.

60. Conn.—State ex rel. Bezzini v. Hines, 53 A.2d 299, 133 Conn. 592.

Mo.—State ex rel. Town of Olivette v. American Tel. & Tel. Co., App., 280 S.W.2d 134.

N.Y.—Nappi v. LaGuardia, 55 N.Y.S.2d 80, 184 Misc. 775, affirmed 54 N.Y.S.2d 722, 269 App.Div. 693, affirmed 64 N.E.2d 716, 295 N.Y. 652. Who may exercise zoning power see *supra* § 9.

Same officials acting in different capacities

County court judges, sitting as county board of zoning adjustment, were without authority to amend county zoning order or any of its regulations then in effect.

Mo.—State ex rel. Barr v. Fleming, App., 259 S.W.2d 417.

Self-denying resolution

Power of board of estimate conferred by statute to make alterations in redistricting of city could not be impaired by self-denying resolution.

N.Y.—Morrill Realty Corporation v. Rayon Holding Corporation, 172 N. E. 494, 254 N.Y. 268.

§ 82. — Who May Exercise Power

The authority to change, modify, or amend zoning regulations may and should be exercised only by the body on which it has been conferred, generally the legislative or governing body of the municipality or other governmental entity.

The authority to change, modify, or amend zoning regulations, as with respect to the boundaries of zoning districts and the regulations to be enforced therein, may and should be exercised only by the body on which it has been conferred;⁶⁰ and which body is so empowered depends on the provisions of the governing statute.⁶¹

In general, the power to modify or amend a zoning ordinance or regulation rests in the body which had the power to adopt it in the first instance,⁶²

Town selectmen held not authorized to make order establishing boundary between local business district and general residence district different from that established by zoning bylaw adopted by town meeting.

Mass.—Nelson v. Town of Belmont, 174 N.E. 320, 274 Mass. 35.

Statement of chairman of planning commission with respect to spot zoning could not bind city council, which was granting authority relating to rezoning, and could not even bind a future planning commission.

Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

County commissioner of roads and revenues

Ga.—Toomey v. Norwood Realty Co., 39 S.E.2d 265, 211 Ga. 814.

61. Conn.—Mallory v. Town of West Hartford, 86 A.2d 668, 138 Conn. 497.

62. Cal.—Johnston v. City of Claremont, 323 P.2d 71, 49 C.2d 826.

Conn.—O'Connor v. Board of Zoning Appeals of Town of Stratford, 98 A.2d 515, 140 Conn. 65—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186—Greenwich Gas Co. v. Tuthill, 155 A. 850, 113 Conn. 684.

Tex.—Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

Implied power

Authority conferred by statute to divide municipality into districts and to regulate buildings and structures therein implies power to change districts from time to time as same becomes necessary.

N.Y.—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736.

which is, generally, the legislative or governing body of the municipality or other governmental entity,⁶³ and not, except as appears below, the zoning board of appeals or board of adjustment or similar body,⁶⁴ although in some instances such municipal governing body must first obtain the advice of a

zoning commission, as discussed *infra* § 105.

Power in board or commission; limited power.

In some localities a zoning board or commission may be authorized, within limits, to modify or amend zoning regulations,⁶⁵ and such a board or commis-

63. Conn.—Greenwich Gas Co. v. Tuthill, 155 A. 850, 113 Conn. 684.
Ga.—Johnson v. Evangelical Church of Messiah, 54 S.E.2d 722, 79 Ga. App. 671.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.
Md.—Montebello Land Co. v. Frank Novak Realty Co., 172 A. 911, 167 Md. 185.

N.J.—Taylor v. City of Hackensack, 58 A.2d 788, 137 N.J.Law 139, affirmed 62 A.2d 686, 1 N.J. 211.

N.Y.—Application of Buckley, 89 N.Y.S.2d 123, 275 App.Div. 853, rearrangement and appeal denied 91 N.Y.S.2d 759, 275 App.Div. 1001, appeal dismissed 87 N.E.2d 638, 299 N.Y. 796—Rohman v. City of Yonkers, 88 N.Y.S.2d 350, 275 App.Div. 842, appeal denied 90 N.Y.S.2d 663, 275 App.Div. 944—Homesfield Ass'n of Yonkers v. Frank, 75 N.Y.S.2d 384, 273 App.Div. 788, affirmed 80 N.E.2d 664, 298 N.Y. 524—Welch v. Niagara Falls, 205 N.Y.S. 454, 210 App.Div. 170.

Ohio.—W. B. Gibson Co. v. Warren Metropolitan Housing Authority, 29 N.E.2d 286, 65 Ohio App. 34.

Pertain v. City of Brooklyn, Com. Pl., 138 N.E.2d 180, affirmed 133 N.E.2d 616, 101 Ohio App. 279.

Okl.—Makrauer v. Board of Adjustment of City of Tulsa, 193 P.2d 291, 200 Okl. 285.

Pa.—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516.

Barner v. City of Williamsport, Com.Pl., 4 Lyoucoming 261.

R.I.—Adams v. Zoning Bd. of Review of City of Providence, 135 A.2d 357—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199—Bruzzi v. Board of Appeals of City of Pawtucket, 122 A.2d 877.

Tex.—Ham v. Weaver, Civ.App., 227 S.W.2d 286, reversed on other grounds Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

Substantial changes

When substantial changes become advisable after adoption of zoning ordinance, they must be made by legislative body of municipality which alone can change city maps and allow a business center in a residential section.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

64. Conn.—O'Connor v. Board of Zoning Appeals of Town of Strat-

ford, 93 A.2d 515, 140 Conn. 65—Stavela v. Bulkeley, 56 A.2d 645, 134 Conn. 186—Greenwich Gas Co. v. Tuthill, 155 A. 850, 113 Conn. 684.

Ga.—Washington Seminary v. Bass, 16 S.E.2d 565, 192 Ga. 808.

N.Y.—Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20—Schroeder v. Kreuter, 132 N.Y.S.2d 144, 206 Misc. 198, affirmed 135 N.Y.S.2d 637, 284 App. Div. 972, affirmed 127 N.E.2d 845, 308 N.Y. 993.

N.C.—Application of O'Neal, 92 S.E.2d 189, 243 N.C. 714.

Pa.—Appeal of Frabotta, 6 Pa. Dist. & Co.2d 400, 14 Law.L.J. 134.

Appeal of Spencer, Com.Pl., 7 Chest.Co. 107.

County rural zoning commission
under statute is a recommending body which recommends to board of county commissioners plans for carrying out by board of county commissioners powers, purposes, and provisions as set forth in statute, and is not a separate and distinct commission with right to rezone particular areas as separate transactions.

Ohio.—Kreutz v. Lauderbaugh, Com. Pl., 136 N.E.2d 627.

Board's decision null and void

Where board of review had no jurisdiction over subject matter of petition for creation of new lots by subdivision, decision of board purporting to grant petition was null and void.

R.I.—Young v. Board of Review of City of Newport, 110 A.2d 436, 82 R.I. 408.

Power not delegable to boards

(1) City council had no authority to delegate legislative power to board of adjustment by enabling board to change zoning map of city and create business districts beyond those designated and established by city council.

Tex.—Harrington v. Board of Adjustment of City of Alamo Heights, Bexar County, Civ.App., 124 S.W.2d 401, error refused.

(2) Legislature, in enacting enabling act, authorizing a municipal council to amend zoning ordinances or to make substantial changes in lines of established zones, did not intend to authorize council to delegate to zoning boards of review legislative power conferred on it in such act.

R.I.—Adams v. Zoning Bd. of Review of City of Providence, 135 A.2d 357.

Amendment by grant of variance or exception

(1) Board of appeals or adjustment may not amend zoning ordinance under guise of variance.

Fla.—Josephson v. Autrey, 96 So.2d 784.

N.Y.—Miller v. Silver, 105 N.Y.S.2d 474, 278 App.Div. 962.

Pa.—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516.

(2) Zoning board of review, in granting an exception for construction of apartment houses in a one-family zone, improperly sought to effect a substantial change in lines of a zone through granting of such application, and in so doing invaded authority of city council, exceeded its authority, and abused its discretion.

R.I.—Adams v. Zoning Bd. of Review of City of Providence, 135 A.2d 357.

(3) However, action of town zoning board of review in granting an exception to permit construction of a combined funeral home and dwelling in a residential district was not objectionable as constituting an amendment of zoning ordinance.

R.I.—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199.

(4) Where board of appeals acted under zoning ordinance permitting it to approve extension of a use or building into a more restricted district immediately adjacent thereto and granted permission for proposed forty by one hundred-foot addition to existing seventy by one hundred-foot braid factory so situated that after addition one lot and substantial portions of two lots out of four lots owned by factory would be unoccupied, board did not in effect amend zoning ordinance in violation of statute vesting that authority in city council.

R.I.—Bruzzi v. Board of Appeals of City of Pawtucket, 122 A.2d 877.

(5) Power to grant variance or exception generally see *infra* § 276.

65. Ga.—Birdsey v. Wesleyan College, 87 S.E.2d 378, 211 Ga. 583.

Mass.—Brackett v. Board of Appeal of Building Department of City of Boston, 39 N.E.2d 956, 311 Mass. 52.

43 C.J. p 353 note 21.

sion may be vested with broad discretionary powers in this respect.⁶⁶ Where the power to make zoning changes is vested in a zoning commission exclusively, the commission cannot delegate such power to another body,⁶⁷ such as a town meeting;⁶⁸ and the commission cannot provide that no zoning change adopted by the commission shall become effective until approved by a town meeting.⁶⁹

Under some statutes a proposed change in zoning regulations by the planning commission becomes effective if not overruled by the city's governing body;⁷⁰ but, if the proposed change is objected to by a certain per cent of interested property owners, such change does not become effective unless approved by the city's governing body by unanimous vote.⁷¹ Under such a statute the city's governing body need not act on the proposed change within the period during which protests may be filed.⁷²

§ 83. Statutory Provisions and Limitations

Authority to modify or amend zoning regulations ex-

ists only by virtue of constitutional or statutory provisions. The action taken must be within the scope of the power, if any, so granted, and must conform to the limitations thereon, including limitations on the original zoning power.

The authority to modify or amend zoning ordinances or regulations exists only by virtue of constitutional or statutory provisions.⁷³ Thus, the action taken must be within the scope of the power so granted,⁷⁴ and a change or amendment which is clearly arbitrary and not authorized or contemplated by the zoning statute is invalid and of no effect.⁷⁵

No power to amend or modify. A county, municipality, or other governmental entity cannot amend or change its zoning regulations where it has been granted only the power to create or establish zones, and has not been granted the power, expressly or by implication, to supervise or control its action, or to amend or modify its zoning ordinances.⁷⁶

Town meeting

Sole authority to amend or repeal zoning regulations was vested by statute in zoning commission which any town was authorized to create, and although voters at a town meeting could repeal vote creating such commission and so do away with zoning, they could not repeal or prevent enforcement of regulations adopted by commission without abolishing commission.

Conn.—State ex rel. Bezzini v. Hines, 53 A.2d 299, 133 Conn. 592.

66. Conn.—Kutcher v. Town Planning Commission of Town of Manchester, 88 A.2d 538, 138 Conn. 705.
Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 307 Ky. 362.

Mo.—State ex rel. Swofford v. Randall, App., 236 S.W.2d 354.

67. Conn.—Olson v. Town of Avon, 123 A.2d 279, 143 Conn. 448.

68. Conn.—Olson v. Town of Avon, supra.

69. Not simply manner of exercising power

Zoning enabling statute providing that commission should provide for manner in which regulations and boundaries would be established or changed did not validate regulations adopted by commission requiring approval of town meeting as condition precedent to zoning change on any theory that such approval merely provided for manner in which regulation should be changed.

Conn.—Olson v. Town of Avon, supra.

Lack of approval by town meeting immaterial

In view of fact that Avon zoning regulations requiring as condition precedent to approval of zoning change approval of town meeting was in contravention of statutes, action of a town meeting purporting to withhold approval for such change was a nullity.

Conn.—Olson v. Town of Avon, supra.

70. N.Y.—McCabe v. City of New York, 18 N.Y.S.2d 676, 257 App.Div. 1010, appeal denied 14 N.Y.S.2d 996, 257 App.Div. 1076, reversed on other grounds 23 N.E.2d 529, 281 N.Y. 349.

Final determination

Power to determine finally whether proposed change of zoning resolution shall become effective resides in board of estimate, hence any change in zoning resolution, while it may have its inception in city planning commission as an administrative agency, is, when finally consummated, a legislative function performed by board.

N.Y.—Ulmer Park Realty Co. v. City of New York, 45 N.Y.S.2d 527, 267 App.Div. 291, appeal denied 47 N.Y.S.2d 316, 267 App.Div. 879.

71. N.Y.—McCabe v. City of New York, 23 N.E.2d 529, 281 N.Y. 349. Number of votes required in enactment of amendment or change by governing body see infra §§ 113, 114.

72. N.Y.—McCabe v. City of New York, 23 N.E.2d 529, 281 N.Y. 349.

73. Ga.—Barton v. Hardin, 48 S.E.2d 882, 204 Ga. 108.

74. Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91.

Ky.—Hager v. Louisville & Jefferson County Planning & Zoning Commission, 261 S.W.2d 619.

Mass.—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308 Mass. 128.

N.J.—Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J. Super. 405.

Power held not unfettered

Ill.—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265.

75. Ill.—Kennedy v. City of Evanston, 181 N.E. 312, 348 Ill. 426.

Ohio.—Curtiss v. City of Cleveland, App., 130 N.E.2d 342—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

Prior ordinance still in effect

If amendment to city ordinance, permitting construction of colleges and libraries only on issuance of special permit after application, notice, and hearing was invalid, ordinance, as it existed prior to amendment, authorizing construction of libraries, colleges, etc., in residential areas without issuance of any special permit, was still in effect.

Tex.—Dunaway v. City of Austin, Civ.App., 290 S.W.2d 703.

76. Ga.—Barton v. Hardin, 48 S.E.2d 882, 204 Ga. 108.

Limited powers of certain counties

(1) Statutory authority given to a particular class of counties may differ from that granted various other

Limitations on original zoning power. A change or amendment must be enacted in conformity to the grant of power and the enabling statute to the same extent as an original zoning ordinance.⁷⁷ Thus, the rules as to the limitations on the zoning power apply to an amendatory ordinance or regulation as well as to an original zoning ordinance or regulation;⁷⁸ and amendments may be enacted to accomplish any of the purposes for which such an ordinance could originally be enacted.⁷⁹ Accordingly, the validity of an amendatory zoning ordinance must be determined by the same rules and tests as those applied in ascertaining the validity of original zoning ordinances.⁸⁰

Time limitation. While under some statutes the

authorized body, if the conditions prescribed in the statute are met, may rezone an area at any time,⁸¹ under other statutes, where the municipality takes final action on a proposed regulation, such action, as affecting certain property, may not be reviewed or changed by the municipality within a specified period of time.⁸²

§ 84. Reasonableness and Uniformity

A zoning regulation or classification may be changed or amended only when such action is reasonable and uniform; and a modifying regulation may be invalid where it is arbitrary and unreasonable or discriminatory.

A zoning regulation or classification may be changed or amended when, and only when, such action is reasonable.⁸³ Hence, an amendatory regula-

counties and municipalities under a statute which specifically authorizes governing body to make changes or to amend or modify classifications. Ga.—Barton v. Hardin, supra.

(2) An amendment of a statute so as to permit "unzoning" of a district or zone previously zoned does not grant authority to amend a previously adopted valid zoning ordinance by rezoning an isolated strip so as to permit it to be used for a purpose prohibited by provisions of prior general zoning ordinance covering area.

Ga.—Hardin v. Croft, 60 S.E.2d 395, 207 Ga. 115.

77. Mass.—Lamarre v. Commissioner of Public Works of Fall River, 87 N.E.2d 211, 324 Mass. 542—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646, 8 A.L.R.2d 955.

N.C.—Marren v. Gamble, 75 S.E.2d 880, 237 N.C. 680.

Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

Acceptance of dedication

Where dedication of private way and its acceptance by city were for public purpose, action of city in accepting dedication after suit had been brought to enjoin use of private way in violation of city zoning ordinances, was not arbitrary and capricious, and did not constitute an amendment of zoning ordinances without notice and hearing, in view of discretion vested in municipal authorities in such matters.

Okl.—Dorris v. Hawk, 292 P.2d 417.

78. D.C.—Prentiss v. American University, 214 F.2d 282, 94 U.S.App. D.C. 204, certiorari denied *Wrather v. American University*, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Md.—Scrivner v. Mayor and City Council of Baltimore, 60 A.2d 190, 191 Md. 165.

Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

Tex.—Ham v. Weaver, Civ.App., 227 S.W.2d 286, reversed on other grounds *Weaver v. Ham*, 232 S.W.2d 704, 149 Tex. 309.

79. Mass.—Shannon v. Building Inspector of Woburn, 105 N.E.2d 192, 328 Mass. 633.

At least one purpose

Amendment to zoning ordinance would be valid if serving at least one of purposes for which zoning ordinances are authorized under statute.

Mass.—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646, 8 A.L.R.2d 955.

80. Ill.—Bohan v. Village of Riverside, 138 N.E.2d 487, 9 Ill.2d 561—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91.

Land not in substantial use

An otherwise valid amendatory zoning ordinance, reclassifying uses to which land may be put is, as to vacant land, and land not thereto put to a substantial permitted use, subject only to same tests of constitutionality as an original comprehensive zoning ordinance.

Ohio.—Curtiss v. City of Cleveland, 144 N.E.2d 177, 166 Ohio St. 509.

Particular provisions or amendment held not invalid

(1) Fact that village zoning ordinance amendments providing for garden apartment zones called for separate legislative authorization for each project presented no obstacle or drawback to validity of ordinance; nor did fact that village zoning ordinance required that applicant own plot of at least ten acres render amendments void, and choice of ten

acres as minimum plot was well within range of unassailable legislative judgment.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115.

(2) Amended zoning ordinance of village placing entire village in a single residence district and eliminating business section entirely was not unconstitutional on ground that it had no logical connection with health, morals, safety, or welfare of village, or on ground that it was not adopted pursuant to any comprehensive plan or program.

N.Y.—Nehrbas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145.

81. Ga.—Johnson v. Evangelical Lutheran Church of Messiah, 54 S.E.2d 722, 79 Ga.App. 671.

82. La.—De Latour v. Morrison, 34 So.2d 783, 213 La. 292.

Md.—Tyrie v. Baltimore County, 137 A.2d 156, 215 Md. 135.

Statute applicable to commission, not to city council

Comprehensive zoning ordinance provision, that no application for change of zoning could be resubmitted within twelve months from date of action by commissioner or council, whichever was later, unless commission found that substantial change had occurred, was for guidance of city plan commission and did not apply to action of city council in passing amendatory ordinance rezoning certain property within twelve months after passage of comprehensive ordinance.

Tex.—McNutt Oil & Refining Co. v. Brooks, Civ.App., 244 S.W.2d 872.

83. Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381.

Md.—Missouri Realty, Inc. v. Ramer, 140 A.2d 655.

tion may be invalid where it is arbitrary and unreasonable;⁸⁴ and an amendment of zoning regulations unreasonably changing the classification of property in a district is unconstitutional as a violation of due process of law.⁸⁵

Uniformity. The action taken as to changing zoning regulations or rezoning or reclassifying property must be uniform and not discriminatory as among property owners,⁸⁶ and a modifying regulation may be invalid where it effects a special privi-

lege or benefit.⁸⁷

§ 85. Public Interest

A zoning regulation or classification may be changed only when such action is in the public interest, in that it has a reasonable relation to the health, safety, welfare, or prosperity of the community.

A zoning regulation or classification may be changed or amended when, and only when, such action is in the public interest,⁸⁸ in that it has a rea-

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 228 Mass. 589.

N.H.—Brady v. City of Keene, 4 A.2d 658, 90 N.H. 99.

N.J.—Sun Oil Co. v. Borough of Bradley Beach, 55 A.2d 778, 136 N.J. Law 307, affirmed 61 A.2d 236, 137 N.J. Law 658.

Pa.—Jarrett v. Horsham Tp. Bd. of Adjustment, Com.Pl., 73 Montg.Co. 264.

84. Conn.—Mills v. Town Plan and Zoning Commission of Town of Windsor, 140 A.2d 871, 145 Conn. 237.

Ill.—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 844—Kennedy v. City of Evanston, 181 N.E. 312, 348 Ill. 426.

N.J.—Phillips v. Township Council of Teaneck Tp., 198 A. 368, 120 N.J. Law 45, affirmed 5 A.2d 698, 122 N.J. Law 485.

N.Y.—Lengel v. Pirnie, 128 N.Y.S.2d 490.

Pa.—Lower Merion Tp. v. Frankel, Com.Pl., 64 Montg.Co. 14, affirmed 57 A.2d 900, 158 Pa. 430.

A change in zoning boundaries or classifications may be invalid where unreasonable or discriminatory.

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 223, 117 A.L.R. 1110.

Prescott v. Pierce, 223 N.Y.S. 609, 130 Misc. 63.

Pa.—De Blasils v. Bartell, 18 A.2d 478, 143 Pa.Super. 485.

Effect of decision

A decision holding invalid an attempt to modify amended zoning ordinance does not do disruptive violence to established doctrine that city council cannot bind its successors in office in legislative matters, where ground of invalidity was that amended ordinance was arbitrary and unreasonable.

Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

85. Conn.—Gionfriddo v. Town of Windsor, 81 A.2d 266, 137 Conn. 701.

D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied *Wrather v. Amer-*

ican University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Ill.—Phipps v. City of Chicago, 171 N.E. 289, 339 Ill. 315.

N.J.—Yara Engineering Corp. v. City of Newark, 40 A.2d 559, 132 N.J. Law 370.

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 223.

Vernon Park Realty, Inc. v. City of Mount Vernon, 125 N.Y.S.2d 112, 282 App.Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.

Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

Ohio.—Curtiss v. City of Cleveland, App., 130 N.E.2d 342, reversed on other grounds 144 N.E.2d 177, 166 Ohio St. 509—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

86. Md.—Zang & Sons, Builders, Inc. v. Taylor, 102 A.2d 723, 203 Md. 628.

N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

Baris Lumber Co. v. Town of Secaucus in Hudson County, 90 A.2d 130, 20 N.J.Super. 586.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115. Callanan Road Imp. Co. v. Town of Newburgh, 167 N.Y.S.2d 780, 6 Misc.2d 1071.

Lengel v. Pirnie, 128 N.Y.S.2d 490.

Reclassification held not discriminatory

(1) Where property situated across a street from that of plaintiffs was a vacant triangle of some two and one-half acres bounded by busy streets on which a residential development could not logically be expected and it appeared that location and characteristics of two and one-half-acre segment were such that its reclassification from residential to commercial would expose neighboring residential areas to a minimum of commercial encroachment, and where plaintiffs' property was not similarly situated, differentiation by Zoning Commission of District of Columbia in refusing to change clas-

sification of plaintiffs' property from residential to commercial was not discriminatory so as to render commission's action arbitrary per se. D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

(2) Where amendatory zoning ordinance applied to all land in area of which owner's premises were only a part and classification suited area, owner could not claim ordinance invalid as special legislation directed at particular property.

Pa.—Shender v. Zoning Bd. of Adjustment, 131 A.2d 90, 388 Pa. 265.

Violation of due process clause

If intent and effect of legislation are arbitrarily to discriminate, rather than to promote general welfare, act is an arbitrary and improper exercise of legislative power and offends due process clause.

N.Y.—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

87. Ky.—Mathis v. Hannan, 306 S.W. 2d 278.

N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

Restriction of competition

Zoning ordinance, which results in restriction of competition, is not unlawful because of such result, but purpose of zoning is not to limit or restrict competition, and it would be unlawful for council to zone or rezone or to refuse to zone or rezone for such purpose.

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

88. Conn.—Suffield Heights Corp. v. Town Planning Commission of Town of Manchester, 133 A.2d 612, 144 Conn. 425—Bartram v. Zoning Commission of City of Bridgeport, 68 A.2d 308, 136 Conn. 89.

Ga.—Toomey v. Norwood Realty Co., 89 S.E.2d 265, 211 Ga. 814.

Ill.—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—Phipps v. City of Chicago, 171 N.E. 289, 339 Ill. 315.

Mass.—Leahy v. Inspector of Buildings of City of New Bedford, 31 N. E.2d 436, 308 Mass. 128.

N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244—

sonable relation to the health, safety, welfare, or prosperity of the community.⁸⁹ Hence, an amendatory regulation may be invalid where it bears no substantial relation to public health, safety, morals, or general welfare.⁹⁰

Test of validity. The test of the validity of a rezoning ordinance is whether the rezoning is for the general health, safety, and welfare, or whether by such rezoning the body taking such action is guilty of an unreasonable, arbitrary, or capricious exercise of legislative power.⁹¹

Relative gain and hardship. If the gain to the public from a rezoning of realty is small, and the hardship to the owner is great, no valid reason ex-

ists for the exercise of the police power.⁹²

§ 86. Necessity of Changed Conditions

Subject to some exceptions, changes or amendments in zoning regulations should be made only when changed conditions clearly require them, unless the original zoning is invalid, or was erroneous, unwise, or unjust.

Subject to some exceptions, it is a general rule that amendments or other changes in zoning regulations or classifications should be made with caution, and only when changed conditions clearly require a modification of the regulations,⁹³ although a change or amendment may be proper, even though there has been no change in conditions, where the

Scott v. Davis, 45 A.2d 654, 94 N.H. 35.

N.J.—Greenway Homes v. Borough of River Edge, 60 A.2d 811, 137 N.J.Law 453.

N.Y.—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—Prescott v. Pierce, 223 N.Y.S. 609, 130 Misc. 63.

Ohio.—Curtiss v. City of Cleveland, App., 130 N.E.2d 342—State ex rel. Castle National v. Village of Wickliffe, App., 80 N.E.2d 200, appeal dismissed 74 N.E.2d 270, 148 Ohio St. 410.

Pa.—Toland v. Newtown Tp., Quar. Sess., 35 Del.Co. 21.

Tex.—Ciesl v. Northwest Dallas Imp. Ass'n, Civ.App., 263 S.W.2d 820, error refused no reversible error—Ham v. Weaver, Civ.App., 227 S.W.2d 286, reversed on other grounds Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

39. Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381.

90. D.C.—Prentiss v. American University, 214 F.2d 282, 94 U.S.App. D.C. 204, certiorari denied Wraith v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Ill.—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344—Chicago Title & Trust Co. v. Village of Franklin Park, 122 N.E.2d 804, 4 Ill.2d 304—Zillien v. City of Chicago, 114 N.E.2d 717, 415 Ill. 488—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Metropolitan Life Ins. Co. v. City of Chicago, 84 N.E.2d 825, 402 Ill. 581.

Mo.—State ex rel. Cooper v. Cowan, App., 307 S.W.2d 676.

91. Ohio.—Pearce v. City of Youngstown, 135 N.E.2d 430, 100 Ohio App. 22.

92. Ill.—Langguth v. Village of Mount Prospect, 124 N.E.2d 879, 5

Ill.2d 49—Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill.2d 432.

93. Conn.—De Mars v. Zoning Commission of Town of Bolton, 115 A.2d 653, 142 Conn. 530.

Fla.—Hartnett v. Austin, 93 So.2d 86.

Md.—Missouri Realty, Inc. v. Ramer, 140 A.2d 655—Nelson v. County Council for Montgomery County, 136 A.2d 373, 214 Md. 587—Board of County Com'rs of Talbot County v. Troxell, 132 A.2d 845, 214 Md. 135—State Roads Commission v. Warriner, 128 A.2d 248, 211 Md. 480—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420—Serio v. Mayor and City Council of Baltimore, 119 A.2d 387, 208 Md. 545—Temmink v. Board of Zoning Appeals of Baltimore County, 109 A.2d 85, 205 Md. 489—Orfutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136—Kracke v. Weinberg, 79 A.2d 887, 197 Md. 389.

N.Y.—Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 378, 2 App. Div.2d 889, affirmed 145 N.E.2d 28, 3 N.Y.2d 873, 166 N.Y.S.2d 314.

Or.—Page v. City of Portland, 165 P.2d 280, 178 Or. 632.

Reasonable belief in necessity of change

Belief on part of voters that change in zoning bylaw was necessary in order to permit location of hay and grain business and lumber yard in what had theretofore been a railroad yard located in residential district was not unreasonable.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

Change held improper

(1) Where property, originally zoned "Agricultural," was rezoned "Cottage Residential" on application of owner, rezoning of such property, six months later, on owner's application, to "Heavy Commercial," was improper, and null and void, in absence of any evidence of change in character of neighborhood after first rezoning to "Cottage Residential," or evidence of error in such first rezoning.

Md.—Zang & Sons, Builders, Inc. v. Taylor, 102 A.2d 723, 203 Md. 628.

(2) Where a city made investigations, held public hearings, and then adopted a comprehensive zoning ordinance for future development of city and since that time conditions had not changed, except that city continued to grow and develop in keeping with plan, in absence of any evidence that public would benefit from any change in zoning ordinance, action of city commission in amending zoning ordinance so as to permit defendant to put up a tourist camp in area, which was previously zoned only for family residence, was invalid.

Tex.—Davis v. Nolte, Civ.App., 231 S.W.2d 471, error refused no reversible error.

Refusal of change held proper

(1) In general.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

(2) Where light manufacturing was carried on by property owners in violation of zoning regulations, some activities having been commenced under war time emergency variances and others having been started in expectation that attempts to have area rezoned would be successful, zoning authorities could properly refuse to rezone area to permit light manufacturing notwithstanding claim that area was presently predominantly light industrial in nature.

original zoning is invalid,⁹⁴ or it appears that the original zoning was erroneous, unwise, or unjust.⁹⁵

On the other hand, it has been held in some instances that it is not necessary or controlling that there shall have been a substantial change in the locus to support a change in its zoning classification,⁹⁶ since the municipality may provide for what the future welfare of the city may reasonably be thought to require.⁹⁷

Authorize changes "from time to time." Under a statute governing zoning in certain cities and authorizing amendments or changes "from time to time" to correct or adjust improper classifications, changes or amendments may be made even though there has been no change of conditions in the area since the adoption of the original ordinance.⁹⁸

§ 87. Master or Comprehensive Plan

A zoning ordinance is amendable even though it con-

stitutes a master or comprehensive plan; but the change should conform to, or bear some reasonable relation to, the basic zoning scheme.

While a zoning regulation or classification may be changed when, and only when, such action is in furtherance of the design of the zoning statute,⁹⁹ a zoning ordinance is mutable or amendable even though it constitutes a master or comprehensive plan,¹ when the public good demands such change,² as where events prove that the plan does not fully or correctly meet or anticipate the needs of the total community;³ and if the ordinance, as thus amended, reveals a comprehensive plan, it is of no moment that the new plan so revealed differs from the original one.⁴

On the other hand, under some charter or statutory provisions, a zoning change or amendment may not permit a use in any area which is contrary to the general land use established for such area by the master plan.⁵ Moreover, under statutes so pro-

Cal.—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

94. Original zoning not legally effected

An attack against a county zoning regulation on ground that certain area classified as "agricultural" was reclassified as "residential" with no supporting change in circumstance or condition, would not be sustained where original zoning of tract as "agricultural" was not legally effected.

Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.

95. Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381.

Md.—Nelson v. County Council for Montgomery County, 136 A.2d 373, 214 Md. 587—Board of County Com'rs of Talbot County v. Troxell, 132 A.2d 845, 214 Md. 135—State Roads Commission v. Warriner, 128 A.2d 248, 211 Md. 480—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420—Serio v. Mayor and City Council of Baltimore, 119 A.2d 387, 208 Md. 545—Temmink v. Board of Zoning Appeals of Baltimore County, 109 A.2d 85, 205 Md. 489—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136—Kracke v. Weinberg, 79 A.2d 387, 197 Md. 339.

N.Y.—Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890,

affirmed 156 N.Y.S.2d 378, 2 A.D.2d 889, affirmed 145 N.E.2d 28, 3 N.Y. 2d 873, 166 N.Y.S.2d 314.

Pa.—Jarrett v. Horsham Tp. Bd. of Adjustment, Com.Pl., 73 Montg.Co. 264.

96. Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381.

Mass.—Cohen v. City of Lynn, 132 N.E.2d 684, 333 Mass. 699—Raymond v. Commissioner of Public Works of Lowell, 131 N.E.2d 189, 333 Mass. 410—Lamarre v. Commissioner of Public Works of Fall River, 87 N.E.2d 211, 324 Mass. 542.

97. Mass.—Lamarre v. Commissioner of Public Works of Fall River, supra.

98. Ky.—Mathis v. Hannan, 306 S.W. 2d 278—Shemwell v. Speck, 265 S.W.2d 468.

99. Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381.

N.J.—Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J. Super. 405.

Taylor v. City of Hackensack, 58 A.2d 788, 137 N.J.Law 139, affirmed, 62 A.2d 686, 1 N.J. 211.

1. N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

Tex.—Bliss v. City of Fort Worth, Civ.App., 288 S.W.2d 558, error refused no reversible error.

Change in use

City may amend its comprehensive zoning plan by changing an area in plan from one use to another.

Ala.—Shell Oil Co. v. Edwards, 81 So.2d 535, 263 Ala. 4, certiorari de-

nied 76 S.Ct. 139, 350 U.S. 885, 100 L.Ed. 780.

2. Tex.—Bliss v. City of Fort Worth, Civ.App., 288 S.W.2d 558, error refused no reversible error.

Well-balanced community

Municipality may change its zoning ordinance in pursuit of a well-balanced community.

N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

3. N.J.—Fanale v. Borough of Hasbrouck Heights, supra—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

Recency of comprehensive zoning

The 1951 general re-enactment of municipal comprehensive zoning ordinance classifying property as residential did not foreclose owners from relying on vast change of conditions since 1941 when property was first zoned residential from asserting in 1952 their right to shift of restrictions away from residential.

Tex.—Clesi v. Northwest Dallas Imp. Ass'n, Civ.App., 263 S.W.2d 820, error refused no reversible error.

4. Ala.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

5. Conn.—Miller v. Town Planning Commission of Town of Manchester, 113 A.2d 504, 142 Conn. 265.

Sale of liquor

Amendment of zoning regulations, by recital that limitation on new use of premises for sale of liquor after specified date should not apply to a restaurant which was in existence in a general commercial zone before such date, did not violate charter prohibition of amendment permitting

viding, the power to amend a zoning ordinance must be exercised in accordance with a comprehensive zoning plan;⁶ and, in accordance with the rules governing zoning regulations generally, discussed supra § 30, reclassifications or zoning changes representing a departure from a comprehensive zoning plan should not be made on a piece-meal basis, but as the result of a general survey.⁷

Since the amendment to a comprehensive zoning ordinance or plan itself becomes part of the existing comprehensive ordinance or plan,⁸ it is not necessary that the amendment itself should be comprehensive in its nature;⁹ nor is a rezoning invalid merely because such action was taken before the adoption of a full, complete, and comprehensive zoning plan.¹⁰ All that is required to comply with a requirement of the enabling statute that zoning regulations be enacted in accordance with a comprehensive plan is that a change of classification bear some reasonable relation to the zoning scheme adopted in the basic ordinance.¹¹

A statute providing for the change of the master plan of zoning within a territory does not authorize, under the guise of an amendment, the transfer to the municipality of rights in private property.¹²

Absence of plan. The mere fact that a town does not have a town plan does not prevent the making of a change in zoning regulations or boundaries.¹³

a use contrary to that established by master plan.

Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381.

6. Tex.—City of Waxahachie v. Watkins, Civ.App., 265 S.W.2d 843, reversed on other grounds 275 S.W.2d 477, 154 Tex. 206.

Additional encroachment

Refusal by municipal governing body to permit still another encroachment to do violence to an existing zoning ordinance is not arbitrary where it is grounded in a determination to adhere to and to further an approved and adopted zoning program essential to larger plan for physical development of municipality and reasonably adapted to promote public health, safety, morals, and general welfare of city.

N.J.—Birkfield Realty Co. v. Board of Com'rs of City of Orange, 79 A.2d 826, 12 N.J.Super. 192.

7. Md.—Board of County Com'rs of Talbot County v. Troxell, 132 A.2d 845, 214 Md. 135.

Refusal of reclassification pending complete study

County board of supervisors did not, as a matter of law, act arbitrarily in refusing to reclassify tract

at present time as heavy industrial, particularly where board was apparently endeavoring, in good faith, to hold question of reclassification in abeyance pending result of complete study of situation in entire county, and afforded landowner opportunity again to present a petition for reclassification.

Cal.—Sladovich v. Fresno County, App., 322 P.2d 565.

8. Ala.—Phillips v. City of Homewood, 50 So.2d 267, 255 Ala. 180.

9. Ala.—Phillips v. City of Homewood, supra.

Conn.—Suffield Heights Corp. v. Town Planning Commission of Town of Manchester, 133 A.2d 612, 144 Conn. 425.

Del.—Boozer v. Johnson, 98 A.2d 76, 33 Del.Ch. 554.

10. Ga.—Birdsey v. Wesleyan College, 87 S.E.2d 378, 211 Ga. 583.

11. Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

Garden apartments

Village zoning ordinance amendments providing for establishment of garden apartment zones, when viewed in light of area involved and present and reasonably foreseeable needs of community, were enacted to promote comprehensive zoning plan

§ 88. Contracts for Amendments; Conditions

In general a municipality does not have authority to enter into a contract with a property owner for the reclassification or rezoning of property or the enactment of amendments to the zoning law.

A municipality does not have authority to enter into a contract with a property owner for the reclassification or rezoning of property or the enactment of amendments to the zoning law,¹⁴ such a contract being in contravention of public policy incorporated in the constitutional and statutory provisions relating to zoning;¹⁵ and such an agreement is ultra vires, illegal, and void.¹⁶ Similarly, a municipality does not have authority to enter into a private contract with a property owner for the amendment of a zoning ordinance subject to various covenants and restrictions in a collateral deed or agreement to be executed between the city and the property owner.¹⁷

Grant of change on conditions or agreements. While it has been held that the granting of a zoning change on conditions or agreements, or subject to the recording of restrictive covenants, is an unauthorized exercise of the police power delegated to the municipality,¹⁸ it has also been held that a rezoning amendment may be passed subject to the

and were not only in accord with sound zoning principles but complied with every requirement of law and were accomplished in proper, careful, and reasonable manner.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115.

12. Ky.—Hager v. Louisville & Jefferson County Planning & Zoning Commission, 261 S.W.2d 619.

13. Conn.—Hills v. Zoning Commission of Town of Newington, 96 A.2d 212, 139 Conn. 603.

14. N.J.—Houston Petroleum Co. v. Automotive Products Credit Ass'n, 87 A.2d 319, 9 N.J. 122.

N.Y.—Church v. Town of Islip, 160 N.Y.S.2d 45, 6 Misc.2d 810.

15. N.J.—Houston Petroleum Co. v. Automotive Products Credit Ass'n, 87 A.2d 319, 9 N.J. 122.

16. N.J.—Houston Petroleum Co. v. Automotive Products Credit Ass'n, supra.

N.Y.—Church v. Town of Islip, 160 N.Y.S.2d 45, 6 Misc.2d 810.

Tex.—Urso v. City of Dallas, Civ. App., 221 S.W.2d 869, error refused.

17. Fla.—Hartnett v. Austin, 93 So. 2d 86.

18. N.Y.—Town of Greenburgh v. Buser, 148 N.Y.S.2d 550, 4 Misc.2d 513.

performance of such a condition precedent on the part of the property owner to be affected thereby.¹⁹

The right to attach conditions to privilege of building under plans filed prior to amendment is discussed *infra* § 90.

§ 89. Rights of Property Owners

While property owners have no vested rights in the continuance of zoning regulations, and the doctrine of estoppel is ordinarily not applicable to preclude zoning changes, persons owning or purchasing property have a right to rely on the rule that a general classification will not be changed unless required for the public good.

Property owners ordinarily have no vested rights by reason of the enactment of a zoning regulation so as to preclude a change in such regulation.²⁰

since zoning regulations are not contracts made by a county, city, or other governmental entity with the landowner, and therefore may be modified by such entity,²¹ and the use of the land is subordinate to the valid exercise by a municipality of its power to zone and control the land used within its boundaries for the public good.²² Similarly the doctrine of estoppel is ordinarily not applicable to prevent the enactment or enforcement of a change in zoning regulations.²³

On the other hand, persons owning or purchasing property in an area classified under a zoning ordinance have a right to rely on the rule that a general classification will not be changed unless required for the public good,²⁴ and the doctrine of estoppel may

19. Condition held performed

Where board of township trustees amended zoning ordinance, and provided that rezoning was subject to filing with county recorder of land-owners' restrictive covenants running with land not to strip mine, and owners executed such covenants and filed them in trust with board pending appeals to determine validity of amended ordinance, there was sufficient compliance with filing requirement.

Ohio.—Johnson v. Griffiths, App., 141 N.E.2d 774, appeal dismissed 131 N.E.2d 397, 164 Ohio St. 393.

20. Cal.—Case v. City of Los Angeles, 298 P.2d 50, 142 C.A.2d 66—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

Ga.—Neal v. City of Atlanta, 94 S.E. 2d 867, 212 Ga. 687.

Md.—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A. 2d 219, 204 Md. 551—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136.

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.J.—Taylor v. City of Hackensack, 58 A.2d 788, 137 N.J.Law 139, affirmed 62 A.2d 686, 1 N.J. 211.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115. Glass v. Zoning Bd. of Appeals of City of Yonkers, 173 N.Y.S.2d 448, 5 A.D.2d 991.

Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 391, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736.

N.C.—Marren v. Gamble, 75 S.E.2d 880, 237 N.C. 680.

Ohio.—Curtiss v. City of Cleveland, 144 N.E.2d 177, 166 Ohio St. 509.

Or.—Page v. City of Portland, 165 P. 2d 280, 178 Or. 632.

Pa.—Schmidt v. Philadelphia Zoning

Bd. of Adjustment, 114 A.2d 902, 382 Pa. 521.

Barner v. City of Williamsport, Com.Pl., 4 Lycoming 261—Fehna v. Churchill Borough, Quar.Sess., 102 Pittsb.Leg.J. 7.

Tex.—City of McAllen v. Morris, Civ. App., 217 S.W.2d 875, error refused. Wash.—Park v. Stolzheise, 167 P.2d 412, 24 Wash.2d 781.

Use, not ownership, as primary concern

Fact that landowner had only recently purchased property, which was useless for residential purposes for which it was zoned, was immaterial on question of right to change in zoning, since zoning is concerned with use of property and not primarily with its ownership. Conn.—Del Buono v. Board of Zoning Appeals of Town of Stratford, 124 A.2d 915, 143 Conn. 673.

Rights of vendor retaining adjacent property

Fact that land conveyed to purchaser was then subject to zoning restrictions did not subject and burden property with such restrictions in favor of vendor retaining adjacent property, under doctrine of implied easements or mutual servitudes and other equitable grounds, as such a theory of vested rights under an ordinance disregards fact that rights granted by legislative action under police power could be taken away when in valid exercise of legislative discretion legislative body should see fit.

Cal.—Triangle Ranch v. Union Oil Co. of Cal., 287 P.2d 537, 135 C.A. 2d 428.

21. Cal.—Triangle Ranch v. Union Oil Co. of Cal., *supra*—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348. Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

Enactment as legislating, not contracting

In enacting a zoning ordinance, a municipality is engaged in legis-

lating and not in contracting, and, consequently, a zoning ordinance fixing boundaries of zones does not result in a contract between municipality and property owners precluding municipality from afterwards changing boundaries if it deems a change to be desirable.

N.C.—Marren v. Gamble, 75 S.E.2d 880, 237 N.C. 680.

22. N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94.

23. N.J.—Taylor v. City of Hackensack, 58 A.2d 788, 137 N.J.Law 139, affirmed 62 A.2d 686, 1 N.J. 211.

Property owners charged with notice of power

Every property owner in city is charged with notice of authority of municipality to amend ordinances by legal procedure as in discretion of municipal authority need arises.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

24. Fla.—City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428.

Ill.—Kennedy v. City of Chicago, 142 N.E.2d 697, 11 Ill.2d 302—Bolger v. Village of Mount Prospect, 141 N. E.2d 22, 10 Ill.2d 596—Langguth v. Village of Mount Prospect, 124 N. E.2d 879, 5 Ill.2d 49—Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill.2d 432—Baltis v. Village of Westchester, 121 N.E.2d 495, 8 Ill.2d 388—Zillen v. City of Chicago, 114 N.E.2d 717, 415 Ill. 488—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81—Metropolitan Life Ins. Co. v. City of Chicago, 84 N.E.2d 825, 402 Ill. 581—City of Springfield v. Vancil, 76 N.E.2d 471, 398 Ill. 575—De Bartolo v. Village of Oak Park, 71 N.E.2d 693, 396 Ill. 404, certiorari denied 68 S.Ct. 72, 332 U.S. 765, 92 L.Ed. 350—Kennedy v. City of Evanston, 181 N.E. 312, 348 Ill.

be applicable in some circumstances where the elements of estoppel are present.²⁵

The enforceability of a zoning amendment as against a property owner who has substantially altered his position in reliance on the zoning regulations is discussed *infra* § 90.

§ 90. — Enforceability of Amendment

A zoning change or amendment may be ineffective or

unenforceable as against a property owner who has legally engaged in, or obtained a permit for, a use authorized under the regulations and has substantially altered his position in reliance thereon.

A zoning change or amendment may be ineffective or unenforceable as against a property owner who has legally engaged in, or obtained a permit for, a certain use authorized under the regulations and has substantially altered his position in reliance thereon;²⁶ and in some jurisdictions or municipalities

426—*Phipps v. City of Chicago*, 171 N.E. 289, 339 Ill. 315.

Md.—*Offutt v. Board of Zoning Appeals of Baltimore County*, 105 A. 2d 219, 204 Md. 551—*Wakefield v. Kraft*, 96 A.2d 27, 202 Md. 136.

N.J.—*Springfield Tp. v. Bensley*, 88 A.2d 271, 19 N.J.Super. 147.

N.Y.—*Rosenzweig v. Crinnion*, 126 N.Y.S.2d 692.

Ohio.—*Curtiss v. City of Cleveland, App.*, 146 N.E.2d 323—*Curtiss v. City of Cleveland, App.*, 130 N.E.2d 342—*Clifton Hills Realty Co. v. City of Cincinnati*, 21 N.E.2d 993, 60 Ohio App. 443.

Or.—*Page v. City of Portland*, 165 P.2d 280, 178 Or. 632.

Pa.—*Levitt & Sons, Inc. v. Bristol Tp., Quar.Sess.*, 4 Bucks Co. 230—*Appeal of Berg, Com.Pl.*, 66 Montg. Co. 134—*Lower Merion Tp. v. Frankel, Com.Pl.*, 64 Montg.Co. 14, affirmed 57 A.2d 900, 158 Pa. 430.

Tex.—*Bliss v. City of Fort Worth, Civ.App.*, 288 S.W.2d 558, error refused no reversible error.

Special legislation aimed at particular land

History of events and contents of amendatory ordinance and resolution announcing intention to enact such ordinance designed to prevent establishment of amusement parks in "A" commercial district except when authorized by certificate of zoning board of adjustment established that amendatory ordinance was special legislation directed at particular land for which permits for its use as a kiddie amusement park had already been issued as a matter of right under existing law, and hence such permits were not affected by amendatory ordinance enacted more than three weeks after issuance of permits had been ordered by court. Pa.—*Shapiro v. Zoning Bd. of Adjustment*, 105 A.2d 299, 377 Pa. 621.

Status of successors in title

For purposes of application of amendment to zoning ordinance, any successors in title to original owners are in same position as were owners at time of enactment of amendment.

N.Y.—*Bayport Civic Ass'n v. Koehler*, 138 N.Y.S.2d 524, followed in 138 N.Y.S.2d 532.

Change pending delayed consideration of permit

Where landowner applied for building permit in order to improve his land in conformity with long established zoning regulations of village at time when no zoning change was in process, and issuance of permit to permit erection of multiple dwellings was delayed, and in interim village board, on its own motion or on urging of property owners or civic groups, hastily revised zoning ordinance so as to prohibit multiple dwellings, although there was no substantial change in neighborhood, ordinance was invalid.

N.Y.—*Hyde v. Incorporated Village of Baxter Estates*, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 378, 2 A.D.2d 889, affirmed 145 N.E.2d 28, 3 N.Y.2d 873, 166 N.Y.S.2d 314.

25. Fla.—*City of Miami Beach v. 8701 Collins Ave.*, 77 So.2d 428—*Bregar v. Britton*, 75 So.2d 753, certiorari denied *Brown v. Britton*, 75 S.Ct. 534, 348 U.S. 972, 99 L.Ed. 757.

Interim ordinance

Enactment of an interim zoning ordinance permitting use of plaintiff's property as a shopping center did not estop municipality subsequently to rezone property for residential use only where no building permit was issued so that no vested right had been created and plaintiffs waited until interim ordinance was in process of repeal before filing their application for a building permit.

Cal.—*Price v. Schwafel*, 206 P.2d 683, 92 C.A.2d 77.

26. Fla.—*City of Miami Beach v. 8701 Collins Ave.*, 77 So.2d 428.

N.Y.—*Glenel Realty Corp. v. Worthington*, 164 N.Y.S.2d 635, 4 A.D. 2d 702.

Capri Beach Club, Inc. v. Town of Hempstead, 170 N.Y.S.2d 68.

Pa.—*Commonwealth v. Briggs*, 72 Pa.Dist. & Co. 437, 37 Del.Co. 88, 42 Mun.L.R. 135, 64 York Leg.Rec. 82.

Rex v. Borough of Lansdale, Quar.Sess., 68 Montg.Co. 186, 44 Mun.L.R. 158.

Revocation or nullification of building or zoning permits generally see *infra* § 244.

Professional offices of doctors and dentists

Where dentist, who, together with two other doctors, officed in dentist's house, had applied for and obtained building permit for, and had substantially completed, extension on house for additional office space, which he rented to three more doctors, when town board amended zoning ordinance authorizing professional office of doctor or dentist if located in dwelling meeting floor area requirements, so as to limit use of residences by doctors and dentists to houses in which practitioner resided and to practice of no more than one profession or specialty thereof, amendment was ineffective with respect to dentist's premises.

N.Y.—*Town of North Hempstead v. White*, 144 N.Y.S.2d 358, 1 Misc. 2d 228, affirmed 148 N.Y.S.2d 461, 1 A.D.2d 781.

Exemption of nonconforming uses

(1) Property users' rights, as existing under prevailing zoning conditions at time of adoption of rezoning ordinance, are protected, so that provision exempting existing nonconforming uses is ordinarily included in such an ordinance because of hardship and doubtful constitutionality of compelling immediate discontinuance of such uses.

Cal.—*Livingston Rock & Gravel Co. v. Los Angeles County*, 272 P.2d 4, 43 C.2d 121.

(2) Where prior to enactment of original zoning ordinances tracts involved were used as sand and gravel pits in a town, ordinance as amended, requiring removal of structures and improvements on such land at termination of approval period provided for in ordinance as applied to owners' substantial investment in lands, plants and structures was unconstitutional as depriving owners of a "vested" right and seeking to relegate them to position of seeking permission to do that which they had a legal right to do.

N.Y.—*Town of Somers v. Camarco*, 127 N.E.2d 327, 308 N.Y. 537.

(3) An amendment of zoning ordinance creating a new "Motor Hotel (Motel) District" permitting motels as a "special use" after public hearing and subject to specified conditions and restrictions was inapplicable

this rule has been embodied in some legislative action, such as a resolution.²⁷ The validity of a zoning change is not affected by the fact that the district line bisects the property of one who purchased the property after the enactment of such change.²⁸

Sufficiency of work done. In order to invoke the rule rendering a zoning change or amendment ineffective as to certain property owners, the owner must have commenced work of a substantial character, so as to impose serious loss on him, prior to such change or amendment.²⁹ So, also, substantial

construction must have been performed in order to invoke a provision or regulation that construction, which does not conform to regulations as changed after its start, may proceed under stated conditions.³⁰

Application for permit; filing of plan. A mere application for a permit, or the mere fact that the purchaser of property has filed a plot plan in accordance with the former zoning plan, does not render ineffective a zoning amendment otherwise valid.³¹

ble to a motel which was a permitted use under ordinance prior to its amendment, where vested rights had been created by work commenced, expenditures made, and obligations incurred after permit was issued and before effective date of amendment. N.Y.—Downey v. Incorporated Village of Ardsley, 158 N.Y.S.2d 306, 3 A.D.2d 668.

Rights not affected

Vitiation of contract between township and parties granted permit by township building inspector for erection of garden apartment buildings in compliance with amended zoning ordinance would not affect builders' rights under such permit or validity of amended ordinance.

N.J.—Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.

27. N.Y.—Rosenzweig v. Crinainon, 139 N.Y.S.2d 172, appeal dismissed 148 N.Y.S.2d 912, 286 App.Div. 1066.

Intent of resolution

Obvious intent of New York City Zoning Resolution pertaining to effect of zoning change after construction has been started is to protect against hardship a property owner who, in good faith and in reliance on existing zoning laws, has commenced to erect a structure which would have been legal under those laws but which would be forbidden under changed zoning restrictions.

N.Y.—Rosenzweig v. Crinnion, 139 N.Y.S.2d 172, appeal dismissed 148 N.Y.S.2d 912, 286 App.Div. 1066—Rosenzweig v. Crinnion, 126 N.Y.S.2d 692.

28. Va.—Claffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41.

29. N.Y.—Miller v. Dassler, 155 N.Y.S.2d 975.

Relative extent of expenditure

Amendment to zoning ordinance was not enforceable against an individual property owner who had commenced work on his property prior to such amendment where owner had made an expenditure of \$4,000 of a contemplated expenditure of from \$25,000 to \$30,000, which work was all performed almost a month before amendment.

N.Y.—Miller v. Dassler, supra.

Gasoline or service station

(1) Where county planning commission approved plans submitted for construction of gasoline station on corner of property, county building inspector issued permit to landowners and petroleum corporation, and, immediately after permit was issued, contractor was employed to clean surface and level off high places in reliance on permit, action, of county board in thereafter rezoning landowners' property from light industrial to one-family residence and in instructing county building inspector to revoke permit amounted to a discriminatory, arbitrary, capricious, confiscatory, and oppressive use of police power.

Cal.—Griffin v. Marin County, App., 321 P.2d 148.

(2) Where amount of work done toward construction of service station under building permit was of small consequence, permittee acquired no vested right to complete construction of such building, and permittee having acquired no vested right, board of supervisors had power to rezone property, changing its classification from commercial to residential.

Ariz.—Verner v. Redman, 271 P.2d 468, 77 Ariz. 310.

Drive-in theater

A board of county commissioners' rescission of its resolution, changing classification of certain land from agricultural zone to zone wherein construction of drive-in theater thereon was specifically authorized, after owner of land made large expenditures in preparing land for construction of theater and buying sound equipment and accessories in reliance on resolution, was illegal and void under principles of equitable estoppel.

Fla.—Bregar v. Britton, 75 So.2d 753, certiorari denied Brown v. Britton, 75 S.Ct. 534, 348 U.S. 972, 99 L.Ed. 757.

Showing held insufficient

Where there was no showing by landowners that there had been substantial construction by them in reliance on old zoning ordinance or that they had incurred substantial lia-

bilities, they had no vested right in continuance of old ordinance, and new zoning ordinance, which superseded old ordinance after action was instituted, was effective to regulate use of landowners' property.

Ill.—Ward v. Village of Elmwood Park, 130 N.E.2d 287, 8 Ill.App.2d 37.

30. N.Y.—Astor Village Taxpayers v. Board of Standards and Appeals of City of New York, 134 N.Y.S.2d 5.

Sufficiency of construction to invoke rule

(1) Under zoning regulation that, if regulations are changed after construction not in conformance with change has lawfully been started, construction may proceed within one year as authorized in permit and that, if substantial work is done during year, such construction may be completed within five years, operations must be commenced prior to effective date of zoning change, substantial work above foundations must be performed within one year after zoning change and completion must occur within five years.

N.Y.—Astor Village Taxpayers v. Board of Standards and Appeals of City of New York, supra.

(2) Where there had been some excavation and one foundation wall had been completed before effective date of change in zoning regulations, construction was in compliance with regulation even though owner had commenced work prior to obtaining permit.

N.Y.—Astor Village Taxpayers v. Board of Standards and Appeals of City of New York, supra.

(3) However, mere clearing of site prior to issuance of permit does not constitute a commencement of "operations" within contemplation and intent of such resolution.

N.Y.—Rosenzweig v. Crinnion, 139 N.Y.S.2d 172, appeal dismissed 148 N.Y.S.2d 912, 286 App.Div. 1066—Rosenzweig v. Crinnion, 126 N.Y.S.2d 692.

31. N.J.—Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J.Super. 405.

except in so far as the amendment makes provision therefor, on certain conditions, as discussed below.

Conditions on acting under plans filed prior to amendment. Where an amendment changing a zoning ordinance extends, to owners who had filed plans prior to such amendment, the privilege of acting under the plans, the enacting body may attach to the privilege any conditions which in its judgment it deems proper,³² such as that the construction under the plans be begun within a specified period of time.³³

§ 91. Spot Zoning

A change or amendment of regulations involving only

a single or very few properties, and removing therefrom restrictions imposed on surrounding property, may be improper spot zoning except where the change is reasonably related to the public welfare.

Quoted in: *Neb.—Weber v. City of Grand Island*, 87 N.W.2d 575, 579, 165 Neb. 827.

Spot zoning, by which a specific parcel of property is placed in a different zone from that of neighboring property, frequently is accomplished by amendment of a general zoning ordinance,³⁴ or by other change or modification of zoning laws or regulations;³⁵ and such an amendment or change is improper where the change in the regulations is unreasonable and discriminatory.³⁶

Ordinarily, a change in zoning regulations in-

N.Y.—*Rosenzweig v. Crinnion*, 126 N.Y.S.2d 692.

32. N.Y.—*Glass v. Zoning Bd. of Appeals of City of Yonkers*, 173 N.Y.S.2d 448, 5 A.D.2d 991.

33. N.Y.—*Glass v. Zoning Bd. of Appeals of City of Yonkers*, supra.

Extension of time to begin construction

Amendments to zoning ordinance, increasing time, after grant of a permit, within which construction was to begin, first to one hundred fifty and then to two hundred ten days, in order to be exempt from provisions thereof, were not unconstitutional, but valid exercises of city's power to amend its zoning ordinance.

N.Y.—*Seltzer v. City of Yonkers*, 145 N.Y.S.2d 664, 286 App.Div. 557, affirmed 135 N.E.2d 588, 1 N.Y.2d 782, 153 N.Y.S.2d 51.

34. Cal.—*Safeway Stores v. City Council of City of San Mateo*, 194 P.2d 720, 86 C.A.2d 277.

Iowa.—*Keller v. City of Council Bluffs*, 66 N.W.2d 113, 246 Iowa 202.

Mich.—*Penning v. Owens*, 65 N.W.2d 831, 340 Mich. 355.

Mo.—*Corpus Juris Secundum* cited in *Huff v. Board of Zoning Appeals of Baltimore County*, 133 A.2d 83, 89, 214 Md. 48—*Cassel v. Mayor and City Council of Baltimore*, 73 A.2d 486, 195 Md. 848.

Mo.—*Corpus Juris Secundum* cited in *State ex rel. Christopher v. Matthews*, 240 S.W.2d 934, 937, 362 Mo. 242.

Neb.—*Weber v. City of Grand Island*, 87 N.W.2d 575, 165 Neb. 827.

N.J.—*Esso Standard Oil Co. v. Town of Westfield*, 110 A.2d 148, 33 N.J. Super. 324.

N.Y.—*Deligtisch v. Town of Greenburgh*, 135 N.Y.S.2d 220.

Tenn.—*Grant v. McCullough*, 270 S.W.2d 317, 196 Tenn. 671.

Tex.—*Corpus Juris Secundum* cited in *McNutt Oil & Refining Co. v. Brooks*, Civ.App., 244 S.W.2d 872, 877.

Reclassification

Spot zoning signifies a carving out of one or more properties located in a given use district and reclassifying them in a different use district.

Md.—*Chayt v. Maryland Jockey Club of Baltimore City*, 18 A.2d 856, 179 Md. 390.

35. Conn.—*Miller v. Town Planning Commission of Town of Manchester*, 113 A.2d 504, 142 Conn. 265.

Md.—*Eckes v. Board of Zoning Appeals of Baltimore County*, 121 A.2d 249, 209 Md. 432—*Cassel v. Mayor and City Council of Baltimore*, 73 A.2d 486, 195 Md. 848.

Mass.—*Sunderland v. Building Inspector of North Andover*, 105 N.E.2d 471, 328 Mass. 638.

36. Cal.—*Safeway Stores v. City Council of City of San Mateo*, 194 P.2d 720, 86 C.A.2d 277.

Conn.—*Levinsky v. Zoning Commission of City of Bridgeport*, 127 A.2d 822, 144 Conn. 117—*Miller v. Town Planning Commission of Town of Manchester*, 113 A.2d 504, 142 Conn. 265—*Elden v. Town Plan and Zoning Commission of Town of Bloomfield*, 89 A.2d 746, 139 Conn. 59.

Ga.—*Orr v. Hapeville Realty Investments*, 85 S.E.2d 20, 211 Ga. 285.

Iowa.—*Keller v. City of Council Bluffs*, 66 N.W.2d 113, 246 Iowa 202.

Ky.—*Mathis v. Hannan*, 306 S.W.2d 278.

Md.—*Corpus Juris Secundum* cited in *Huff v. Board of Zoning Appeals of Baltimore County*, 133 A.2d 83, 89, 214 Md. 48.

Mass.—*Sunderland v. Building Inspector of North Andover*, 105 N.E.2d 471, 328 Mass. 638.

Neb.—*Weber v. City of Grand Island*, 87 N.W.2d 575, 165 Neb. 827.

N.J.—*Esso Standard Oil Co. v. Town of Westfield*, 110 A.2d 148, 33 N.J. Super. 324—*Campbell v. Borough of Hillsdale*, 79 A.2d 321, 12 N.J. Super. 182.

N.Y.—*Freeman v. City of Yonkers*, 129 N.Y.S.2d 703, 205 Misc. 947.

Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220.

Pa.—*Cline v. Nether Providence Tp. Bd. of Adjustment*, Com.Pl., 33 Del. Co. 293.

Tenn.—*Grant v. McCullough*, 270 S.W.2d 317, 196 Tenn. 671.

Tex.—*Corpus Juris Secundum* cited in *McNutt Oil & Refining Co. v. Brooks*, Civ.App., 244 S.W.2d 872, 877.

Validity of spot zoning generally see supra § 34.

Close scrutiny

(1) A zoning ordinance, or amendment thereof, creating a small zone of inconsistent use within a larger zone, is commonly designated as "spot zoning", and such ordinance is closely scrutinized by court and sustained only when facts and circumstances indicate a valid exercise of zoning power.

Mich.—*Penning v. Owens*, 65 N.W.2d 831, 340 Mich. 355.

(2) Attempt to wrench single small lot from its environment and give it new rating that disturbs tenor of neighborhood should receive close scrutiny of courts lest zoning enactments be diverted from their true objectives.

N.J.—*Linden M. E. Church v. City of Linden*, 173 A. 593, 113 N.J. Law 188.

Particular changes held improper

(1) In general.

Neb.—*Weber v. City of Grand Island*, 87 N.W.2d 575, 165 Neb. 827.

(2) Fact that lot zoned by city ordinance as in residential district is advantageous site for filling station profitable to owner is not sufficient reason for excepting it from operation of such ordinance.

Md.—*Ellicott v. Mayor and City Council of Baltimore*, 23 A.2d 649, 180 Md. 176.

(3) Where planning and zoning board rezoned a hundred-foot square parcel of land in a large industrial zone in order to make it available for business use as a package liquor store, and such action was not part

volving a single or a very few properties should be made only where new or additional facts, such as a change in conditions, or other considerations materially affecting the merits have intervened since the adoption of the regulations;³⁷ and whether such a change will be permitted depends on whether the change is reasonably related to the public welfare,³⁸

and is in accord with the statutory purposes or the general scheme of a comprehensive zoning plan.³⁹

As a general rule, a municipality is without authority to single out one or a few lots in an amendatory regulation and arbitrarily remove therefrom restrictions imposed on the remaining portions of the same zoning district.⁴⁰ Accordingly, a re-

of any comprehensive plan of zoning, it constituted "spot zoning" and board of zoning appeals acted illegally, and arbitrarily, and abused its discretion in refusing to nullify such change in zoning.

Conn.—Zuckerman v. Board of Zoning Appeals of Town of Stratford, 128 A.2d 325, 144 Conn. 160.

Discrimination not shown

(1) Proof of three instances of spot zoning for commercial use within residential districts did not establish discrimination against petitioner in his application for a spot zone to use his property for operation of a grocery store, where first instance a block from petitioner's property, while technically zoned as commercial, use was actually residential in appearance, second instance, across street, was actually within terms of ordinance for surrounding residential district, and third instance was in an altogether different neighborhood.

Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

(2) An amendatory township zoning ordinance, permitting landscaped administrative offices and research laboratories as special uses in residential districts, treated all similarly circumstanced property alike and hence was not invalid as constituting spot zoning.

N.J.—Sieber v. Laawe, 109 A.2d 470, 33 N.J.Super. 115.

37. Conn.—Hills v. Zoning Commission of Town of Newington, 96 A.2d 212, 139 Conn. 603—Strain v. Mims, 193 A. 754, 123 Conn. 275.

Ky.—Mathis v. Hannan, 306 S.W.2d 278.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

Tenn.—Grant v. McCullough, 270 S.W.2d 817, 196 Tenn. 671.

Corners of intersection

A zoning body could not reasonably vote to change property at all four corners of intersection from business zone to residential zone where there had been no substantial change in neighborhood since adoption of original zoning regulation, and plaintiffs' property would thereby be diminished seventy per cent and public welfare would not be promoted.

Conn.—Strain v. Mims, 193 A. 754, 123 Conn. 275.

38. Ky.—Mathis v. Hannan, 306 S.W.2d 278—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

N.J.—Borough of Cresskill v. Borough of Dumont, 104 A.2d 441, 15 N.J. 238.

Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J.Super. 324.

N.Y.—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

Soule v. Town of Perinton, 152 N.Y.S.2d 734, appeal dismissed 156 N.Y.S.2d 936, 2 A.D.2d 834.

Tex.—Barrington v. City of Sherman, Civ.App., 155 S.W.2d 1008, error refused.

Riparian lots

Zoning ordinance, which changed residential area composed of about three city blocks, from multiple dwelling zone to one-family and two-family zone, although surrounded by area zoned for multiple dwellings and business establishments, and even though neighborhood remained unchanged, was spot zoning and was invalid as to pencil shaped lots having riparian position on river, in absence of showing that public health, safety, or welfare required rezoning.

Mich.—Trenton Development Co. v. Village of Trenton, 75 N.W.2d 814, 345 Mich. 353.

39. N.J.—Borough of Cresskill v. Borough of Dumont, 104 A.2d 441, 15 N.J. 238.

Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J.Super. 324.

40. Ga.—Hardin v. Croft, 60 S.E.2d 395, 207 Ga. 115—Snow v. Johnston, 28 S.E.2d 270, 197 Ga. 146.

Ky.—Parker v. Rash, 236 S.W.2d 687, 314 Ky. 609—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

Md.—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

Mass.—McHugh v. Board of Zoning Adjustment of Boston, 147 N.E.2d 761—Whittmore v. Building Inspector of Falmouth, 46 N.E.2d 1016, 313 Mass. 248—Leahy v. Inspector of Buildings of City of

New Bedford, 31 N.E.2d 436, 308 Mass. 128.

Mich.—Penning v. Owens, 65 N.W.2d 831, 340 Mich. 355.

N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

N.J.—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J.Super. 324.

N.Y.—Santmyers v. Town of Oyster Bay, 169 N.Y.S.2d 959, 10 Misc.2d 614.

Pa.—Cline v. Nether Providence Tp. Bd. of Adjustment, Com.Pl., 33 Del. Co. 293.

No change of conditions

A spot zoning ordinance permitting one lot in two-family residential district to be used for a four-family apartment house was arbitrary, unreasonable, and discriminatory and without substantial relation to public welfare, so as to be invalid, where there was no substantial change of conditions in the district warranting change of classification of one lot alone.

Ky.—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

Addition to business zone

Amendment to zoning ordinance adding to business zone one lot surrounded by residential zone and within one hundred feet of church for purpose of opening saloon held void as unreasonable exercise of municipal power.

N.J.—Linden M. El. Church v. City of Linden, 173 A. 593, 113 N.J. Law 188.

Power to grant variance distinguished

(1) Zoning Act denies to a municipality power to grant a variance by amending a zoning ordinance.

N.J.—Conlon v. Board of Public Works of City of Paterson, 94 A.2d 660, 11 N.J. 363.

(2) Action of board of public works in adopting ordinance, which removed a single lot from Residence A Zone and constituted it Business 3 Zone, to relieve lot of difficulties special to it under zoning ordinance and permit construction of branch bank as not inharmonious with residential character of the district, constituted an unlawful usurpation of jurisdiction exclusively reserved by Zoning Act to local board of adjustment to grant or recommend to governing body grant of a variance.

classification of only the lot or lots of a single person from a residential to a business, commercial, or industrial district, without lawful basis and without reference to the public welfare, is improper spot zoning.⁴¹ An application for such a change should be regarded with suspicion and should be denied unless the change requested will conform to a comprehensive plan and serve one or more of the purposes enumerated in the zoning statute.⁴²

On the other hand, the mere fact that an amendment to a zoning regulation zones a small area at the request of a single owner does not of itself make the result improper spot zoning,⁴³ since the municipal legislative or governing body generally has the legislative power to rezone, or amend with respect to, a small area, as long as such action is not arbitrary or unreasonable;⁴⁴ and whether an amendment relating to a small area is improper spot zoning depends on the circumstances of each case,⁴⁵

N.J.—Conlon v. Board of Public Works of City of Paterson, *supra*.

(3) Power to grant variances and exceptions see *infra* Chapter IX.

41. Mass.—Smith v. Board of Appeals of Salem, 48 N.E.2d 620, 313 Mass. 622.

Mo.—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 780.

N.J.—Cassinari v. Union City, 63 A.2d 891, 1 N.J.Super. 219.

N.Y.—Dellgitsch v. Town of Greenburgh, 135 N.Y.S.2d 220.

Or.—Page v. City of Portland, 165 P.2d 280, 178 Or. 632.

Addition to distant district

Amendment to zoning ordinance adding one isolated lot surrounded by residential zone to business district half mile away held void as violating statute requiring zoning ordinance to create districts suited to purpose of act.

N.J.—Guaranty Const. Co. v. Town of Bloomfield, 168 A. 34, 11 N.J.Misc. 613.

42. Conn.—Eden v. Town Plan and Zoning Commission of Town of Bloomfield, 89 A.2d 746, 139 Conn. 59.

43. Conn.—Winslow v. Zoning Bd. of City of Stamford, 132 A.2d 789, 143 Conn. 381.

Iowa.—Corpus Juris Secundum cited in Keller v. City of Council Bluffs, 66 N.W.2d 113, 117, 246 Iowa 202. N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

N.J.—Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J. Super. 405.

N.Y.—Soule v. Town of Perinton, 152 N.Y.S.2d 734, appeal dismissed 156 N.Y.S.2d 886, 2 A.D.2d 834.

Ohio.—Partain v. City of Brooklyn, Com.Pl., 138 N.E.2d 180, affirmed 133 N.E.2d 616, 101 Ohio App. 279.

Tex.—Corpus Juris Secundum cited in McNutt Oil & Refining Co. v. Brooks, Civ.App., 244 S.W.2d 872, 877.

Wis.—Eggebeen v. Sonnenburg, 1 N.W.2d 84, 239 Wis. 213, 138 A.L.R. 495.

Passenger depot

An ordinance creating a two-acre public utility district for railroad's passenger depot in residential section was not void as spot zoning.

Wis.—Higbee v. Chicago, B. & Q. R. Co., 292 N.W. 320, 235 Wis. 91, 128 A.L.R. 784.

Property segregated from other properties

Where property in question was entirely segregated from that of objectors by three public streets and other property of applicant for rezoning, rezoning of property for commercial purposes was not spot zoning.

Ga.—Birdsey v. Wesleyan College, 87 S.E.2d 378, 211 Ga. 583.

44. S.C.—Momeier v. John McAlister, Inc., 99 S.E.2d 177, 231 S.C. 526.

Entire rezoning not required

There is no constitutional requirement that an entire municipality be rezoned at one time.

S.C.—Momeier v. John McAlister, Inc., *supra*.

45. Conn.—Levinsky v. Zoning Commission of City of Bridgeport, 127 A.2d 822, 144 Conn. 117.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

Md.—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432.

Mo.—State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 362 Mo. 242.

N.J.—Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J. Super. 405.

Tex.—Kenny v. Kelly, Civ.App., 254 S.W.2d 535.

Substantive question

Issue of whether change in zoning constituted spot zoning was a substantive question and not a procedural question.

Pa.—Wynne v. Lower Merion Tp., 124 A.2d 487, 181 Pa.Super. 524.

Difference of surrounding property

There must be substantial and reasonable grounds or basis for discrimination when one lot or tract is singled out in amendatory ordinance removing therefrom restrictions imposed on remaining portions of same zoning district, and when tract is shown to be clearly different in character or use from those around it, discrimination may be legally justified.

Iowa.—Keller v. City of Council

Bluffs, 66 N.W.2d 113, 246 Iowa 202, 51 A.L.R.2d 251.

Particular reclassifications held not spot zoning

(1) Changing zoning of a five-acre tract which was useless for residential purposes for which it was zoned, where all of surrounding property was in either a business or an industrial zone.

Conn.—Del Buono v. Board of Zoning Appeals of Town of Stratford, 124 A.2d 915, 143 Conn. 673.

(2) Where proposed zoning change was from one residential use to another and there was already considerable amount of property adjoining subject property or in its immediate vicinity falling within proposed classification and there was also considerable amount of other property close by at such lower classification.

Md.—Hedin v. Board of County Comrs of Prince Georges County, 120 A.2d 663, 209 Md. 224.

(3) Where a sixty-one-acre parcel of land immediately contiguous to a thirty-one-acre parcel of land zoned industrial in a neighboring city and bounded on its northern border by railroad tracks was rezoned by municipality from dwelling house district to industrial district.

Ohio.—Partain v. City of Brooklyn, 133 N.E.2d 616, 101 Ohio App. 279.

(4) Village's rezoning from commercial use to single-family use of one of eight tracts which were widely scattered through village, in view of fact that rezoning brought rezoned and adjacent property under a similar use classification, without prejudice to, or preference of, property rezoned.

Ohio.—State ex rel. Kangesser Co. v. Village of Beachwood, App., 128 N.E.2d 127.

(5) Other instances.

N.Y.—Hayes v. City of Yonkers, 143 N.Y.S.2d 699, affirmed 152 N.Y.S.2d 213, 1 A.D.2d 1031.

Ohio.—Partain v. City of Brooklyn, Com.Pl., 138 N.E.2d 180, affirmed 133 N.E.2d 616, 101 Ohio App. 279.

Pa.—Jarrett v. Horsham Tp. Bd. of Adjustment, Com.Pl., 78 Montg.Co. 264.

Tex.—Goddard v. Stowers, Civ.App., 272 S.W.2d 400—Skinner v. Reed, Civ.App., 265 S.W.2d 850.

such as the relative size and nature of the areas involved.⁴⁶

Where the zoning amendment is part of a comprehensive plan it is not spot zoning;⁴⁷ and considerations of public health, safety, and welfare may sometimes justify such a change as part of a comprehensive, well-considered plan in the public interest.⁴⁸ So, a municipality may sometimes have power to relieve a particular lot from a restriction applicable to a general district if the peculiar conditions of such lot or the public good so requires, as in the case of special hardship caused by the prohibition of the only or best use of which the lot is susceptible;⁴⁹ and the refusal so to rezone the property may be arbitrary, discriminatory, confiscatory, and an abuse of discretion.⁵⁰

It has been held that an amendatory zoning ordinance placing nearby properties in a lower classification, and to that extent freeing such property from the burden of the original ordinance, deprives owners of other property of no legal rights, since the amendatory ordinance took nothing from them on which they had a right to insist.⁵¹

Property subject to nonconforming use. The reclassification of certain property for a use different from that of the surrounding area is not improper spot zoning where such property was subject to a nonconforming use, the effect of which was the same as though the property had been originally classified for the use to which it was subsequently changed.⁵²

46. Relative size as determining factor

Determining factor of whether rezoning is spot rezoning and illegal and invalid is not merely size of lot rezoned but rather size of rezoned area in comparison with size of other zoned areas within municipality as represented by zoning plan.

N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397.

Self-integrated tract

Where city amended zoning ordinance so that a tract was changed from a second-residential district to a third-residential district, thereby making lawful erection of multiple dwelling houses and apartment houses, and amendment affected a territory of forty-seven acres composed of thirty-two acres on which it was proposed to erect apartment houses, and thirty-two acre tract was self-integrated and unrelated to adjoining property, change in zone applying to whole of forty-seven acres was not spot zoning and action of city commission in amending ordinance was not arbitrary or capricious.

N.J.—Hendlin v. Fairmount Const. Co., 72 A.2d 541, 8 N.J.Super. 310.

47. Ala.—Shell Oil Co. v. Edwards, 81 So.2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 855, 100 L.Ed. 780.

Conn.—Levinsky v. Zoning Commission of City of Bridgeport, 127 A.2d 822, 144 Conn. 117.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

N.Y.—Fitchett Crescent Corp. v. City of New York, 155 N.Y.S.2d 272.

48. Conn.—Levinsky v. Zoning Commission of City of Bridgeport, 127 A.2d 822, 144 Conn. 117—Hills v. Zoning Commission of Town of Newington, 96 A.2d 212, 139 Conn. 603.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202. Md.—Corpus Juris Secundum cited in Huff v. Board of Zoning Appeals of Baltimore County, 133 A.2d 83, 89, 214 Md. 48—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

N.J.—Sieber v. Laawe, 109 A.2d 470, 33 N.J.Super. 115.

N.Y.—Hermann v. Incorporated Village of East Hills, 104 N.Y.S.2d 592, affirmed 109 N.Y.S.2d 182, 279 App. Div. 753, appeal denied 110 N.Y.S.2d 283, 279 App.Div. 799.

Tex.—Corpus Juris Secundum cited in McNutt Oil & Refining Co. v. Brooks, Civ.App., 244 S.W.2d 872, 877.

Relation to public welfare as essential element of spot zoning

A reclassification of realty can be considered as improper spot zoning only when it fails to bear a substantial relation to public health, safety, morals, and general welfare, and is out of harmony and in conflict with comprehensive zoning ordinance.

Md.—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—Hedin v. Board of County Com'rs of Prince Georges County, 120 A.2d 663, 209 Md. 224—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551.

Electric plant

Where public utility intended to construct steam generating plants on land which was unfit for any other purpose because of floodwaters, amendment rezoning land from residential district to heavy industrial area in order to permit construction of steam electric generating plants was not void as spot zoning or violative of due process clause of state or federal Constitution.

Mo.—State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 362 Mo. 242.

Parking lot

An ordinance granting property owner a special permit to use rear part of his premises located in an apartment district as free automobile parking lot, which was adopted in accordance with plan designed to afford parking space for stores in block across from the lot which was in a commercial zone, was not invalid as unreasonable or arbitrary.

N.Y.—Bowen v. Hider, 37 N.Y.S.2d 76.

49. Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

Within spirit of comprehensive scheme

Spirit of comprehensive city zoning ordinance is not violated, nor is it inconsistent with ordinance to grant a just and reasonable exception by amendment based on character and use of property not similar to other property in district, but which is now and was distinguishable before adoption of ordinance.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

50. Fla.—Hammond v. Carlyon, 96 So.2d 219.

51. Md.—Chayt v. Maryland Jockey Club of Baltimore City, 13 A.2d 856, 179 Md. 390.

52. Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P. 2d 720, 86 C.A.2d 277.

Iowa.—Corpus Juris Secundum quoted in Keller v. City of Council Bluffs, 66 N.W.2d 113, 120, 246 Iowa 202.

Md.—Chayt v. Maryland Jockey Club of Baltimore City, 13 A.2d 856, 179 Md. 390.

Tex.—Corpus Juris Secundum quoted in Goddard v. Stowers, Civ.App., 272 S.W.2d 400, 403.

Mortuaries or funeral homes. The rule against spot zoning has been applied to zoning amendments which created a special district of a small area in order to permit the operation of a funeral home or mortuary.⁵³

§ 92. Other Circumstances and Conditions to Be Considered

The necessity or advisability of changes in zoning regulations must be determined after consideration of all relevant circumstances and conditions.

The necessity or advisability of making a change or amendment in zoning regulations,⁵⁴ and the propriety thereof,⁵⁵ must be determined in the light of,

and after consideration of, all relevant circumstances and conditions, existing at the time of its enactment.⁵⁶ Since, as discussed above, § 83, the power to change or amend zoning regulations is subject to the same limitations as the original zoning power, matters which are required to be considered in making the original zoning regulations must also be considered in making changes in such regulations.⁵⁷ It is appropriate, in considering a zoning change, to view the municipality as a whole and to plan for the future.⁵⁸

On the other hand, various matters have been held not to be entitled to substantial consideration,⁵⁹ or

53. Md.—Cassel v. Mayor and City Council of Baltimore, 78 A.2d 486, 195 Md. 348.

Absence of objections

Where city zoning ordinance prohibited use of property in residential use district for funeral home, and amendment which created separate commercial district of a single lot located in residential use district to enable operation of a funeral home thereon was spot zoning notwithstanding no objections were raised prior to its enactment.

Md.—Cassel v. Mayor and City Council of Baltimore, *supra*.

Enlargement of existing mortuary

Where mortuary, which was located in residential district, was sought to be enlarged but building permit was refused, whereupon a spot zone ordinance was passed amending the general zoning ordinance by classifying the mortuary premises as being in a commercial district instead of residential, leaving the premises surrounded by residential district, such classification was arbitrary, without substantial reason, and void.

Mo.—Mueller v. C. Hoffmeister Undertaking & Livery Co., 121 S.W.2d 775, 343 Mo. 430.

54. D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

55. Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

Weight of collective judgment at town meeting

Due regard must be accorded to collective judgment of those familiar with locality and circumstances prevailing in town, in passing on validity of amendment of zoning bylaw.

Mass.—Caires v. Building Com'r of Hingham, *supra*.

Eccency of last consideration or action

Where town plan and zoning commission refused to grant application to change comprehensive plan and to

change zone of certain land from agricultural to business to permit establishment of local shopping center because, among other things, major portion of land was subject to flooding and zoned business areas were adequate for local needs for a number of years, commission acted illegally and arbitrarily and abused its discretion in two months later granting an application for change of zone from agricultural to business for use as regional shopping area.

Conn.—Mills v. Town Plan and Zoning Commission of Town of Windsor, 140 A.2d 871, 145 Conn. 237.

Circumstances held not to establish invalidity

Facts, if true, that it did not occur to council to change zoning ordinance until landowner filed petition for change, that council did not have idea what sort of enterprise owner intended to conduct on rezoned land, that borough did not need additional commercial land but had critical shortage of residential land, that plans to raze buildings and erect new ones in original commercial districts were being interfered with by threat of shopping center on rezoned tract, that amended zoning ordinance did not adhere to zoning plan, and that business facilities should be placed in geographical center of borough were not sufficient to show that amended zoning ordinance was not in conformity with enabling statute.

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

56. Ohio.—White v. City of Cincinnati, 138 N.E.2d 412, 101 Ohio App. 160.

57. Conn.—Mallory v. Town of West Hartford, 86 A.2d 668, 138 Conn. 497.

D.C.—Prentiss v. American University, 214 F.2d 282, 94 U.S.App.D.C. 204, certiorari denied *Wrather v. American University*, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Same reasons and basis justifying zoning of an area in first instance will likewise justify change in classi-

fications if and when conditions and circumstances warrant and justify same.

La.—Archer v. City of Shreveport, App., 85 So.2d 337.

Particular considerations

Statutory principles that zoning regulations of town be made with reasonable consideration as to character of district and its peculiar suitability for particular uses, and with view to encouraging most appropriate use of land throughout such municipality, control action of a zoning commission with respect to a proposed change of zone as well as with respect to original zoning.

Conn.—Hills v. Zoning Commission of Town of Newington, 96 A.2d 212, 139 Conn. 603.

58. Mass.—Cohen v. City of Lynn, 132 N.E.2d 664, 333 Mass. 699.

59. N.J.—Hendlin v. Fairmount Const. Co., 72 A.2d 541, 8 N.J.Super. 310.

Sufficiency of school, water, and fire-fighting facilities

Objection to amendment of zoning ordinance which changed area from a second-residential district to a third-residential district, thereby permitting erection of multiple dwellings, on ground that school facilities, water service and pressure, and fire-fighting facilities would be inadequate when apartment houses to be constructed were completed and occupied, was not valid, since it was city's duty to supply all such facilities as needed.

N.J.—Hendlin v. Fairmount Const. Co., *supra*.

Morality of legal gambling

In view of fact that gambling is legal, amendment to zoning ordinance which would permit enlargement of facilities at race track where pari-mutuel betting was carried on could not be invalidated on ground that it would not promote morals of community.

N.J.—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

at least not to constitute a conclusive consideration,⁶⁰ or to preclude rezoning.⁶¹

Motive for initiation of proceeding. The validity of a proceeding to change zoning regulations is not affected by the motive of the commission in initiating the proceeding.⁶²

Efficient or best use of property. A change in the zoning plan should not be made in order to preclude an efficient and economic use of particular lands.⁶³ On the other hand, a zoning change or amendment is not invalid as to a property owner because such change does not permit the best possible use of his property.⁶⁴

Increase in municipality's tax yield. The fact that an amendment or rezoning might operate to increase the tax yield to the town or municipality is not, of itself, sufficient to sustain the change.⁶⁵

§ 93. — Existing Uses of Properties

Consideration may and should be given to the nature of existing uses and the marked tendencies therein, and the sufficiency of existing buildings for the uses to which they are presently put.

In making zoning changes, consideration may and should be given to the nature of the existing uses in the area and the marked tendencies therein,⁶⁶ and the real character of the neighborhood and the uses existing on neighboring properties;⁶⁷ and a change in zoning classification which brings it into harmony with property use and development and serves to protect existing uses and values usually represents a desirable zoning practice.⁶⁸

So, also, the body authorized to make amendments to zoning laws is entitled to consider such factors as the adequacy and good condition of existing buildings for the uses to which they are presently being put,⁶⁹ the need of the community for those

Knowledge of future use of property
Council may rezone an area without detailed knowledge of particular use to be made of it.

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

60. Increased demand for homesites

A city is not required to lessen its zoning standards because of increased demands for homesites in a community and such demands cannot be a foundation for a claim that reasonable administration of the zoning laws requires a reduction of zoning classifications to make way for a greater concentration of population. Ohio.—City of Euclid v. Lakeshore Co., 133 N.E.2d 872, 102 Ohio App. 96.

61. N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

Availability of other land

Fact that there is other land in city available for manufacturing did not require that subject area which had previously been zoned for residential be kept in residential classification.

Mass.—Raymond v. Commissioner of Public Works of Lowell, 131 N.E.2d 189, 333 Mass. 410.

Extensiveness of development

Municipality did not lose its power to change its zoning ordinance merely because it was about ninety per cent developed.

N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

62. D.C.—Larrabee v. Bell, 10 F.2d 986, 56 App.D.C. 121, certiorari denied U. S. ex rel. Varela v. Bell, 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143, followed in Varela v. Bell, 10 F.2d 989, 56 App.D.C. 124, certiorari denied U. S. ex rel. Varela v. Bell,

46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143.

63. N.J.—Ridgefield Terrace Realty Co. v. Borough of Ridgefield, 55 A.2d 812, 136 N.J.Law 311.

N.Y.—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 378, 2 App. Div.2d 389, affirmed 145 N.E.2d 28, 3 N.Y.2d 873, 166 N.Y.S.2d 314.

Hasty adoption

Where city commissioners at time of property owner's application for permit to erect apartment buildings hastily adopted prohibitory ordinance, such attempt to prevent highest use of property, for which it had been zoned for seven years, was arbitrary and did not preclude contemplated use of property.

N.J.—Vine v. Zabriskie, 3 A.2d 886, 122 N.J.Law 4.

Use for drive-in theater

Where all territory surrounding tract on which it was desired to construct an outdoor drive-in moving picture theater, was, with few exceptions, either vacant, unimproved land, or devoted to heavy industrial plants, and about fifty-seven per cent of land in village was vacant, so that there were several hundred acres of vacant, unimproved land available for industrial development, and ample vacant property for residential use, amendment of zoning ordinance of village so as, in effect, to prohibit construction of such theaters within village was unreasonable and arbitrary.

Ill.—People ex rel. Trust Co. of Chicago v. Village of Skokie, 97 N.E.2d 310, 408 Ill. 397.

64. N.Y.—Hayes v. City of Yonkers, 143 N.Y.S.2d 699, affirmed 152 N.Y.S.2d 213, 1 A.D.2d 1031.

65. Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

Municipality in financial straits

Fact that municipality had only very small areas for industrial use from which tax revenues could be obtained and that rapid growth created serious financial problems in furnishing the municipal services would not justify the rezoning of an area to give nonconforming users commercial privileges.

Mich.—South Central Imp. Ass'n v. City of St. Clair Shores, 82 N.W.2d 453, 343 Misc. 153.

66. N.J.—Bogert v. Washington Tp., Bergen County, 131 A.2d 535, 45 N.J.Super. 13.

Use of property as unit

Where property located in residential district had been used for many years as a railroad yard, property was properly treated as a unit in reclassifying it as a business zone, although parts of area could not be made available for construction of buildings without filling and other work.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

67. D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App. D.C. 72.

Md.—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432.

Ohio.—Curtiss v. City of Cleveland, App., 130 N.E.2d 342.

68. Ill.—Liberty Nat. Bank of Chicago v. City of Chicago, 139 N.E.2d 235, 10 Ill.2d 137.

69. D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

uses,⁷⁰ and the style and attractiveness of the existing buildings.⁷¹

§ 94. — Property Values

The extent to which the value of property is affected by a zoning amendment will be considered in determining its validity, although incidental benefit or detriment is of no direct consequence and is not controlling.

In determining the validity of a zoning amendment, the extent to which the value of property is affected thereby will be considered.⁷² Nevertheless, incidental benefit or detriment to the owners, either of the re-zoned property or of neighborhood property, is generally of no direct consequence in determining the validity of rezoning legislation,⁷³ and certainly is not controlling;⁷⁴ and where a change in a zoning regulation is reasonable and proper in other respects, it is not rendered invalid

because of the adverse effect of such change on certain properties.⁷⁵

Accordingly, regulations should not be changed or amended merely because certain individuals desire a change⁷⁶ or because economic gain would accrue to some property owners.⁷⁷ Conversely, the zoning authority is not deprived of power to make a proper change, nor should it refuse to make it, by the fact that the change may be detrimental to, and opposed by, numerous property owners and residents of the area, where the change is for the general welfare of the municipality.⁷⁸

§ 95. — Traffic Conditions

Traffic conditions in an area involved in a zoning change, and the effect of such change on traffic conditions, must be considered.

70. D.C.—Lewis v. District of Columbia, *supra*.

71. D.C.—Lewis v. District of Columbia, *supra*.

72. Ill.—Metropolitan Life Ins. Co. v. City of Chicago, 84 N.E.2d 825, 102 Ill. 581.

Factors affecting weight in consideration

Although depreciation of value resulting from rezoning is ordinarily only one circumstance to be considered in determination of validity of zoning ordinance, its greatest weight is found in cases where it is proposed to change zone, not because of any change of condition in locality of rezoning, but to satisfy or relieve condition in some other and unspecified location.

Ohio.—White v. City of Cincinnati, 138 N.E.2d 412, 101 Ohio App. 160.

73. Mass.—Raymond v. Commissioner of Public Works of Lowell, 131 N.E.2d 139, 333 Mass. 410.

N.Y.—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

Schloeger v. Incorporated Village of Manorhaven, Nassau County, 96 N.Y.S.2d 146.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.

Reclassification of entire area justified

Where circumstances surrounding a three-block area were such that a reclassification of entire area to remove zoning restriction would have been justified, and restriction was removed as to only a small segment of that area, although adjoining owners in that area might logically have complained of discrimination by failure to remove restrictions from their property, they were not entitled to complain that reclassification of a portion thereof damaged value of their property.

Ky.—Shemwell v. Speck, 265 S.W.2d 468.

74. Ill.—Metropolitan Life Ins. Co. v. City of Chicago, 84 N.E.2d 825, 402 Ill. 581.

75. Cal.—Robinson v. City of Los Angeles, 304 P.2d 814, 146 C.A.2d 810.

76. Ill.—Mahoney v. City of Chicago, 137 N.E.2d 37, 9 Ill.2d 156—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—Kennedy v. City of Evanston, 181 N.E. 312, 348 Ill. 426.

N.Y.—Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220.

77. Conn.—Strain v. Mims, 193 A. 754, 128 Conn. 275.

Ill.—Kennedy v. City of Chicago, 142 N.E.2d 697, 11 Ill.2d 302—Mahoney v. City of Chicago, 137 N.E.2d 37, 9 Ill.2d 156.

Liebling v. Fradine, 127 N.E.2d 684, 6 Ill.App.2d 409.

Md.—Texas Co. v. Harker, 129 A.2d 384, 212 Md. 138—Mettee v. County Com'rs of Howard County, 129 A.2d 136, 212 Md. 257—Montgomery County Council v. Scrimgeour, 127 A.2d 528, 211 Md. 306.

Mass.—Whittemore v. Building Inspector of Falmouth, 46 N.E.2d 1016, 313 Mass. 243—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308 Mass. 128.

Mo.—State ex rel. Swofford v. Randall, App., 236 S.W.2d 354.

Or.—Page v. City of Portland, 165 P. 2d 280, 178 Or. 632.

Legislative discretion

A municipal legislative body can determine whether business island permitted by zoning ordinance in res-

idential district should be enlarged, and mere fact that owner may enjoy greater benefits or that his property will be enhanced in value if size of islands is increased cannot entitle him to compel allowance of such increase in size.

Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 434.

Refusal held not arbitrary

Mere fact that commercial use may be more profitable than residential use of realty is not sufficient showing of unwarranted hardship on part of landowner to make refusal to change zoning classification to commercial use an arbitrary or discriminatory act.

Ky.—Fried v. Louisville and Jefferson County Planning and Zoning Commission, 258 S.W.2d 466.

Property capable of full use

Economic gain to landowner is insufficient reason for invoking amending power of township board to rezone landowner's property, when such property is capable of full use within limitations for which it is zoned.

Mich.—Penning v. Owens, 65 N.W.2d 831, 340 Mich. 355.

78. Conn.—Bartram v. Zoning Commission of City of Bridgeport, 68 A.2d 308, 136 Conn. 89.

N.Y.—Palmer v. Furman, 127 N.Y.S. 2d 7, 283 App.Div. 664.

Fitchett Crescent Corp. v. City of New York, 155 N.Y.S.2d 272—Soule v. Town of Perinton, 152 N.Y.S.2d 734, appeal dismissed 156 N.Y.S.2d 986, 2 A.D.2d 834—Schloeger v. Incorporated Village of Manorhaven, Nassau County, 96 N.Y.S.2d 146.

Ohio.—Curtiss v. City of Cleveland, 144 N.E.2d 177, 166 Ohio St. 509.

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

Traffic conditions in an area involved in an amendment or change in zoning regulations or classification, and the effect of such change on the traffic conditions, must be given consideration;⁷⁹ and consideration with respect to traffic conditions may properly be given not only to the welfare of the inhabitants of the municipality, but also to the convenience and welfare of the traveling public.⁸⁰ Thus, an increased volume of traffic may be such a change of condition as to constitute a reasonable basis for rezoning property nearby,⁸¹ although it has also been held that the changing of zoning districts merely because of traffic conditions is improper and destroys the stability of zoning.⁸² In any event, a rezoning is not invalidated by the mere fact that it may result in an increase of traffic congestion.⁸³

§ 96. — Apartment Houses

In passing on the advisability of zoning changes with respect to the construction of apartment houses, consideration should be given to all relevant circumstances and conditions.

In passing on the advisability of changes of zoning laws with respect to the construction of apartment houses, consideration may and should be given to all relevant circumstances and conditions.⁸⁴ Thus, consideration may be given to the fact that apartment houses are not inherently benign, but, on the contrary, present problems and congestion and may have deleterious impact on other uses,⁸⁵ so that even

though apartment houses were initially deemed desirable, the municipality may later conclude that more of them would be inimicable to its total welfare, and may change the zoning laws to prohibit the erection of more of them.⁸⁶

Need of county as affecting borough. The fact that the county in which a borough is situated needs more apartment houses is not such a consideration as will oblige the borough to leave its area open for them,⁸⁷ in the absence of a showing of extraordinary need, as that the county has so developed that the borough is the last hope for the solution of its problem.⁸⁸

Vacant land. In determining the advisability of a zoning change to permit the construction of apartment houses, the fact that the land involved was a large tract mostly vacant may be considered as relevant if other relevant factors permit such use.⁸⁹

§ 97. Regulations As to Particular Uses or Restrictions

Particular amendments and changes have been considered, including changes effecting a rezoning of property from residential to business, commercial, or industrial use, and vice versa.

Where an amendment or change in the regulations is reasonable under the circumstances and justified by considerations of the public welfare, property may be rezoned with respect to various uses or restrictions,⁹⁰ such as from residential to business or

79. Md.—Price v. Cohen, 132 A.2d 125, 213 Md. 457.

Failure as abuse of discretion

Granting of reclassification of proposed shopping center site without giving material consideration to traffic conditions was an abuse of discretion.

Md.—Price v. Cohen, supra.

80. After construction of arterial highway

In changing zoning classification of territory after construction of main arterial highway, city council could properly consider not only welfare of inhabitants of city, but convenience and welfare of traveling public using such highway.

Tex.—McNutt Oil & Refining Co. v. Brooks, Civ.App., 244 S.W.2d 872.

81. Result of street widening

Tremendously increased volume of traffic ensuing since widening of street was such change of condition as constituted reasonable basis for rezoning property facing road from residential to apartment use.

Tex.—Ciesl v. Northwest Dallas Imp. Ass'n, Civ.App., 263 S.W.2d 820, error refused no reversible error.

82. N.Y.—Deigtisch v. Town of Greenburgh, 135 N.Y.S.2d 220.

Restrictions should not be lowered on residential property merely because it abuts on heavily traveled street.

N.Y.—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

83. Presumption of improvement in roads

City ordinance rezoning of vacant land, which had previously been zoned for agricultural uses, to light industrial uses, was not invalid, on ground that industrial uses would create intolerable congestion of traffic and inadequacy of sewer service, where contention that such situation would result presupposed that roads and sewers would remain in their present limited capacity, rather than that they would be improved in proportion to increasing public demands.

Cal.—Robinson v. City of Los Angeles, 304 P.2d 814, 146 C.A.2d 810.

84. N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

85. N.J.—Fanale v. Borough of Hasbrouck Heights, supra.

86. N.J.—Fanale v. Borough of Hasbrouck Heights, supra.

87. N.J.—Fanale v. Borough of Hasbrouck Heights, supra.

88. N.J.—Fanale v. Borough of Hasbrouck Heights, supra.

89. Mass.—Cohen v. City of Lynn, 132 N.E.2d 664, 333 Mass. 699.

90. N.Y.—Hoelzer v. Incorporated Village of New Hyde Park, 150 N.Y.S.2d 765, 4 Misc.2d 96.

From family district to community business district

Ga.—Seckinger v. City of Atlanta, 100 S.E.2d 192, 213 Ga. 566.

From commercial to business uses

Ordinance reclassifying area from commercial to business uses, thereby excluding business of spraying paint and protective coatings on metal parts or fabrications manufactured elsewhere, had substantial relationship to public health, safety, and welfare, and would not be disturbed.

Ill.—Wechter v. Board of Appeals, 119 N.E.2d 747, 3 Ill.2d 13.

Hospitals prohibited

Zoning ordinance amendment of borough prohibiting hospitals in residential zones bore a substantial relationship to public health, safety, morals, and general welfare.

commercial use,⁹¹ or to industrial use⁹² or light industrial use,⁹³ or from agricultural use to industrial or light industrial use.⁹⁴ Indeed, under some circumstances the refusal to rezone property from residential to business use may be arbitrary and unreasonable.⁹⁵

N.J.—Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights in Bergen County, 99 A.2d 591, 27 N.J.Super. 476, reversed on other grounds 105 A.2d 521, 15 N.J. 447.

Permitting construction of motels

Mass.—Burnham v. Board of Appeals of Gloucester, 128 N.E.2d 772, 333 Mass. 114.

Permitting erection of incinerator

Action of town plan commission, in changing zoning regulations so as to permit erection of an incinerator on a certain site, did not constitute a taking of adjoining landowner's property without due process of law, where it was found that improvements contemplated in connection with erection of incinerator and erection of incinerator itself by removal of an existing nuisance would increase property values.

Conn.—De Palma v. Town Plan Commission of Greenwich, 193 A. 868, 123 Conn. 257.

91. Ark.—City of Little Rock v. Henson, 249 S.W.2d 118, 220 Ark. 663.

Conn.—Mallory v. Town of West Hartford, 86 A.2d 668, 138 Conn. 497.

Fla.—Frink v. Orleans Corp., 32 So. 2d 425, 159 Fla. 646.

Md.—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A. 2d 249, 209 Md. 432.

N.J.—Durrwachter v. Mayor & Council of Borough of Fair Lawn, 55 A. 2d 832, 136 N.J.Law 314.

N.Y.—Penataquit Ass'n v. Furman, 129 N.Y.S.2d 221, 283 App.Div. 875.

S.C.—Momeier v. John McAllister, Inc., 99 S.E.2d 177, 231 S.C. 526.

Tex.—Goddard v. Stowers, Civ.App., 272 S.W.2d 400.

Change as improper spot zoning see supra § 91.

No shopping district in area

Conn.—Bartram v. Zoning Commission of City of Bridgeport, 68 A.2d 308, 136 Conn. 89.

Tex.—Skinner v. Reed, Civ.App., 265 S.W.2d 850.

Property formerly railroad yard

Where property in residential district had been used for many years as a railroad yard, amendment of zoning bylaw so as to permit use of property for business purposes did not constitute an arbitrary selection or classification of property.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

Change from apartment house use

Where tract of land zoned for apartment house use had for years

been undeveloped and only buildings on it were constructed for commercial use, whether amendatory ordinance rezoning tract for commercial use thereby depreciating values of adjoining tract which was zoned and developed for apartment house use was an unreasonable exercise of city's police power was within discretion of municipal legislative body primarily charged with the duty and responsibility of solving the matter.

Ill.—Zadworny v. City of Chicago, 44 N.E.2d 426, 380 Ill. 470.

Effect on nearby property

Mere fact, if it was a fact, that extension of boundary of class A commercial zone to bring within zone one hundred feet along a certain street might depreciate market value of nearby residential property would not render invalid an ordinance changing classification of those one hundred feet from class A residential to class A commercial.

Pa.—Hollearn v. Silverman, 12 A.2d 292, 338 Pa. 846.

Effect of vote

Where only area mentioned in vote on zoning bylaw amendment was entire area which had been located in residential district, effect of vote, as expressly stated on its face, was to change bylaw so that thereafter area should be put in a business zone, and vote in favor of amendment was a vote in favor of placing entire area in business district, notwithstanding a reference to "the whole or any part of" locus.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

Change to public utility district

Wis.—Higbee v. Chicago, B. & Q. R. Co., 292 N.W. 320, 235 Wis. 91, 128 A.L.R. 734.

Rezoning of part of race track

An amendment to borough zoning ordinance to change from Class A residential zone to business zone a twenty-six acre triangle containing part of race track which had existed therein as prior nonconforming use and containing other largely unimproved property, to permit enlargement of facilities at race track could not be deemed so clearly contrary to broad community zoning aims so as to require court to nullify it.

N.J.—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

92. Mass.—Raymond v. Commissioner of Public Works of Lowell, 131 N.E.2d 189, 333 Mass. 410—Shannon v. Building Inspector of Woburn, 105 N.E.2d 192, 328 Mass. 633.

N.Y.—Soule v. Town of Perinton, 152 N.Y.S.2d 734, appeal dismissed 156 N.Y.S.2d 986, 2 A.D.2d 834.

Ohio.—Johnson v. Griffiths, App., 141 N.E.2d 774, appeal dismissed 131 N.E.2d 397, 164 Ohio St. 393.

Steam generating plant

Where public utility intended to construct steam generating plants on land which was unfit for any other purpose because of floodwaters, amendment rezoning land from residential district to heavy industrial area in order to permit construction of steam electric generating plants was not void as violative of due process clause.

Mo.—State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 362 Mo. 242.

93. Conn.—Parsons v. Town of Wethersfield, 60 A.2d 771, 135 Conn. 24.

94. Effect on nearby property

Fact that a zoning change may have some adverse effect on nearby property, as in depreciating value of such property, will not render invalid an ordinance rezoning land, which had previously been zoned for agricultural use, to light industrial uses.

Cal.—Robinson v. City of Los Angeles, 304 P.2d 814, 146 C.A.2d 810.

95. Conn.—Suffield Heights Corp. v. Town Planning Commission of Town of Manchester, 133 A.2d 612, 144 Conn. 425—Del Buono v. Board of Zoning Appeals of Town of Stratford, 124 A.2d 915, 143 Conn. 673.

Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434.

Md.—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294.

N.J.—Bianchi v. Morey, 11 A.2d 405, 124 N.J.Law 258.

Refusal to permit construction of hotel courts

Refusal of city council to rezone lots abutting on highway by-pass from residential to commercial classification to permit construction of hotel courts thereon was manifestly arbitrary and capricious and unsupported by any substantial evidence, in view of showing that such lots had been so reduced in depth by construction of highway by-pass as to make them unsuitable for residential construction, several other lots in the vicinity had been rezoned for commercial use, and a distinct need existed for sleeping accommodations in the area.

Miss.—City of Hattiesburg v. Pittman, 102 So.2d 352.

It may be proper to add certain business uses of property to the character of buildings which may be erected in certain residential districts,⁹⁶ or to exclude certain kinds of businesses from a business district,⁹⁷ or otherwise exclude certain kinds of businesses from certain areas.⁹⁸ So, also, property may be changed from business or commercial to residential use,⁹⁹ or from industrial to residential use,¹ or from a business district to a multi-family district.² An existing business zone may be extended to include a vacant residential lot opposite and

near which many business establishments had been permitted, as under previous exceptions.³

On the other hand, where a change in the regulations is unreasonable and is not justified by considerations of the public welfare, various zone changes have, under the particular circumstances, been held improper,⁴ such as a change from an industrial or business use to a residential use,⁵ or from residential use to business, commercial, or industrial use,⁶ or in other cases under the particular cir-

96. N.Y.—Nappi v. LaGuardia, 55 N. Y.S.2d 80, 184 Misc. 775, affirmed 54 N.Y.S.2d 722, 269 App.Div. 693, affirmed 64 N.E.2d 716, 295 N.Y. 652.

97. N.J.—420 Broad Ave. Corp. v. Borough of Palisades Park, 61 A. 2d 23, 137 N.J.Law 520.

98. Gasoline service stations

Municipality could amend zoning ordinance so as to exclude gasoline service stations from within five hundred feet of any dwelling house, public school, hospital, church, theater, public library or other public building housing offices and public records of municipality, since limitation was reasonable and in interest of public health and safety.

N.J.—Sun Oil Co. v. Borough of Bradley Beach, 55 A.2d 778, 136 N.J.Law 307, affirmed 61 A.2d 236, 137 N.J.Law 658.

99. U.S.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

Md.—Serio v. Mayor and City Council of Baltimore, 119 A.2d 387, 208 Md. 545—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

N.Y.—Schloeger v. Incorporated Village of Manorhaven, Nassau County, 96 N.Y.S.2d 146.

Ohio.—State ex rel. Kangesser Co. v. Village of Beachwood, App., 128 N. E.2d 127.

Buffer area

(1) Fact that a particular piece of property is desired to be a buffer between residential and industrial sections of a city, is not a valid reason for zoning so-called buffer area as residential property.

Md.—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294.

(2) Where, except for two gasoline stations and a storage garage across the street from plaintiff's lot, there was no business or industry within at least five hundred feet of lot and area in which plaintiff's lot was located was adjacent to extensive park lands and to a large class A residential zone, the rezoning of such area from industrial to class B residential

to form a buffer between industrial area and park and class A residential areas was proper zoning practice.

N.J.—Oliva v. City of Garfield, 62 A. 2d 678, 1 N.J. 184.

1. Fla.—Atlantic Coast Line R. Co. v. City of Jacksonville, 68 So.2d 570.

N.J.—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64.

2. Ohio.—Curtiss v. City of Cleveland, 144 N.E.2d 177, 166 Ohio St. 509.

3. Conn.—Suffield Heights Corp. v. Town Planning Commission of Town of Manchester, 133 A.2d 612, 144 Conn. 425.

N.J.—Durrwachter v. Mayor & Council of Borough of Fair Lawn, 55 A. 2d 332, 136 N.J.Law 314.

4. Ky.—Hager v. Louisville & Jefferson County Planning & Zoning Commission, 261 S.W.2d 619.

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222.

5. Ill.—Chicago Title & Trust Co. v. Village of Franklin Park, 122 N.E. 2d 804, 4 Ill.2d 304—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138.

Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Mass.—Caputo v. Board of Appeals of Somerville, 120 N.E.2d 753, 331 Mass. 547.

N.Y.—Evanns v. Gunn, 29 N.Y.S.2d 868, 177 Misc. 85, affirmed 29 N.Y.S. 2d 150, 262 App.Div. 865.

Comparative value

In determining reasonableness of rezoning ordinance changing classification of area from commercial use to duplex residence use, factor of comparative value of property for residence and commercial purposes should be considered.

Ill.—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265.

Effect of petition

Fact that a petition for changing a business zone to a residential zone

was signed by nearly one hundred per cent of the property owners in the vicinity did not prevent setting aside of zoning ordinance as unreasonable and arbitrary, where none of such owners who signed petition was adversely affected by challenged ordinance.

N.J.—Phillips v. Township Council of Teaneck Tp., 198 A. 368, 120 N. J.Law 45, affirmed 5 A.2d 698, 122 N.J.Law 485.

Improvement of plot

A zoning ordinance changing business zone to residential zone was unreasonable and would not prevent erection of one-story office building on a lot in front of existing business building, where proposed new building was entirely innocuous as regards neighboring buildings and was a considerable improvement of the plot.

N.J.—Piccadilly Ice Cream Co. v. Board of Com'rs of Town of Belleville, 46 A.2d 563, 24 N.J.Misc. 263.

6. Conn.—Kuehne v. Town Council of Town of East Hartford, 72 A.2d 474, 136 Conn. 452.

Ga.—Snow v. Johnston, 28 S.E.2d 270, 197 Ga. 146.

Ill.—Kennedy v. City of Chicago, 142 N.E.2d 697, 11 Ill.2d 302.

Mass.—Atherton v. Selectmen of Bourne, 149 N.E.2d 232—Smith v. Board of Appeals of Salem, 48 N. E.2d 620, 313 Mass. 622—Whittemore v. Building Inspector of Falmouth, 46 N.E.2d 1016, 313 Mass. 248.

Mich.—Scholnick v. City of Bloomfield Hills, 86 N.W.2d 324, 350 Mich. 187.

Mo.—Mueller v. C. Hoffmeister Undertaking & Livery Co., 121 S.W.2d 775, 343 Mo. 430—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 780.

N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

N.J.—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J.Law 195, affirmed Appley v. Township Committee of Township of Bernards, 23 A.2d 177, 129 N.J.Law 73—Linden M. E. Church v. City of Linden, 173 A. 593, 113 N.J.Law 188.

Guaranty Const. Co. v. Town of

cumstances, a change from a suburban to a business use,⁷ or from waterfront to suburban use,⁸ or from agricultural to business or commercial use.⁹ So, also, it may be improper to impose certain restrictions on the kinds of businesses which may be conducted,¹⁰ or to make a change in the height of buildings permitted within a certain zone.¹¹ It may be improper to rezone certain property from a multiple dwelling to a commercial classification,¹² or from a business zone to a multiple dwelling zone¹³ or industrial zone,¹⁴ or to change certain property from one class of business zone to another.¹⁵

The fact that an area has been widely used for industrial purposes in violation of zoning regulations does not preclude the zoning authorities from refusing to rezone the area to permit such activity.¹⁶

Service stations. While under some circumstances an amendment or rezoning to permit the use of property for a service station may be improper as not in furtherance of public health, safety, morals, or general welfare,¹⁷ under other circumstances an amendment or rezoning so as to preclude the use of certain property for service station purposes may be improper and invalid.¹⁸

Governmental use of property. Since a municipality acting in a governmental capacity is not bound by, and may exempt itself from, the provisions of its basic zoning ordinance, as discussed infra § 135, it may amend such ordinance to permit the use of residential property for governmental purposes deemed advisable and beneficial to general public welfare.¹⁹

Bloomfield, 168 A. 34, 11 N.J.Misc. 613.

Commercial garage

Municipal authorities did not act capriciously or arbitrarily in refusing to rezone a designated area so that property owner could operate a commercial garage in a residential district over objections of surrounding home owners.

Ark.—Noble v. City of Little Rock, 266 S.W.2d 78, 223 Ark. 409.

Residential growth prohibited

Where landowner purchased property within an area zoned for industry, but ordinance permitted residential growth, and town subsequently amended zoning ordinance to prohibit any residential building in industrial zone and even though no industrial use was made of immediate area surrounding landowner's property, amendment was an unconstitutional exercise of police power as applied to such property.

Conn.—Corthouts v. Town of Newington, 99 A.2d 112, 140 Conn. 284, 38 A.L.R.2d 1136.

Adjacent nonconforming commercial use

Existence of a nonconforming commercial use adjacent to landowner's lots, gradual elimination of which was contemplated under basic plan of zoning ordinance, could not be used as a reason justifying action of township board in rezoning landowner's lots as commercial.

Mich.—Penning v. Owens, 65 N.W.2d 331, 340 Mich. 355.

Evidence of increased traffic over a city street, whether due to war activities of a temporary nature or otherwise, was insufficient in and of itself to afford reasonable ground for enactment of amendatory ordinance changing a use district from residential to business.

Or.—Page v. City of Portland, 165 P.2d 280, 178 Or. 682.

7. Refusal to rezone held proper

Where landowner's property was adjacent to land zoned as a business district and where testimony at hearing disclosed two opinions were possible as to proper use of land, refusal of board of county commissioners to rezone property zoned suburban as a business was not arbitrary, capricious, and discriminatory.

Wash.—Lillions v. Gibbs, 289 P.2d 203, 47 Wash.2d 629.

8. Md.—Board of County Com'rs of Talbot County v. Troxell, 132 A.2d 345, 214 Md. 135.

9. Conn.—Mills v. Town Plan and Zoning Commission of Town of Windsor, 140 A.2d 871, 145 Conn. 237.

Md.—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32.

10. Certain stores in hotels

Amendment of zoning ordinance so as to eliminate from permissive uses beachwear, clothing, jewelry, and other similar shops within hotels of one hundred rooms or more, while permitting barber, beauty, tobacco, magazine, newspaper and drug sundry shops, and valet and massage services, bears no substantial relation to health, morals, welfare, or safety of public and is discriminatory, unconstitutional, and void as to hotel, construction of which had been planned and commenced prior to amendment.

Fla.—City of Miami Beach v. 3701 Collins Ave., 77 So.2d 428.

11. Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 172 N.E. 710, 340 Ill. 284.

12. Mo.—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 780.

13. N.J.—Ingannamort v. Borough of Fair Lawn, 43 A.2d 684, 133 N.J.Law 194.

14. Ohio.—Murdock v. City of Norwood, Com.Pl., 67 N.E.2d 867.

15. Pa.—De Blasius v. Bartell, 18 A.2d 478, 143 Pa.Super. 485.

Illegal addition to building

An ordinance amending a zoning ordinance so as to change designation of defendant's corner property from class A commercial to class C commercial, passed to enable defendant to maintain an illegal addition to second story of his building in violation of zoning regulations with respect to airspaces to be left open for dwellings which defendant had previously been ordered to remove by city authorities and by court action by owners of adjoining properties used solely for residence purposes, was void as discriminatory and unreasonable.

Pa.—De Blasius v. Bartell, supra.

16. Cal.—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

17. Mo.—State ex rel. Cooper v. Cowan, App., 307 S.W.2d 676.

18. Property undesirable for residential purposes

An ordinance rezoning property from business to residential was invalid as not a proper exercise of police power as applied to lots plaintiff had purchased in connection with its gasoline service station, where lots had very little desirability for residential purposes and commercial use thereof in connection with plaintiff's service station would do very little, if any, damage to other properties in neighborhood.

Ill.—Langguth v. Village of Mount Prospect, 124 N.E.2d 878, 5 Ill.2d 49.

19. Cal.—Bailey v. Los Angeles County, 293 P.2d 449, 46 C.2d 132.

§ 98. — Dwellings

The propriety of various amendatory regulations with respect to dwellings has been adjudicated, as relating to frontage size requirements, minimum area, number of family occupancy units per block, and whether an area may be rezoned from a single-family dwelling district to a multiple-dwelling district or from a multiple-dwelling district to a single-family dwelling district.

Depending on the circumstances in the particular cases, it has been held to be proper,²⁰ or improper,²¹ to change the frontage size requirements for the building of dwellings in certain districts; and it has been held improper to make a change in the minimum area on which a residence may be built,²²

or to make a change in the number of family occupancy units in a block.²³

Single-family dwellings or multiple dwellings. Under the circumstances of particular cases, it has been held that an area may properly be rezoned from a single-family dwelling district to a multiple-dwelling district,²⁴ or from a multi-family dwelling district into a single-family dwelling district;²⁵ or apartment houses may be prohibited.²⁶ On the other hand, it may be improper to change an area zoned for garden apartments to one restricted to one- and two-family dwellings²⁷ or from apartment use generally to single-family residence use.²⁸ Un-

20. N.J.—Greenway Homes v. Borough of River Edge, 60 A.2d 811, 137 N.J.Law 453.

Facts not invalidating change

Amendment to zoning ordinance increasing frontage requirement was not invalid merely because of facts that most lots in municipality were built on shorter frontage, that permit was granted to another builder whose plan of development involved curved street and circles to proceed without strict compliance with frontage requirement, that builder objecting to amendment would suffer some loss of anticipated profits, or that increased municipal revenue or reduced municipal costs were considerations in adoption of amendment.

N.J.—Greenway Homes v. Borough of River Edge, *supra*.

21. Effect on pre-existing lots

Amended village zoning ordinance, allowing issuance of building permits only for lots with frontage of at least one hundred feet, or for lots which existed and were shown on village records at time of amendment with frontage of at least eighty-five feet, was discriminatory and not a reasonable use of police power as it affected a fifty-eight foot lot which existed and appeared on village records at time of amendment.

N.Y.—Lengel v. Pirnie, 123 N.Y.S.2d 490.

22. Pendency of permit proceeding

Where plaintiff's irregularly shaped tract met requirements of zoning ordinance establishing minimum area on which a residence might be built, trustees of Village of Sands Point had no power to deprive plaintiff of this permitted use by enacting, during pendency of proceeding on plaintiff's application for permit to build residence, an amendatory ordinance excluding from computation of necessary area any area within a right of way or any area less than seventy-five feet in width.

N.Y.—Weissmantel v. Village of Sands Point, 129 N.Y.S.2d 640.

23. Change designed to permit apartment houses

City rezoning ordinance actually designed to permit erection of apartment houses containing more than four hundred apartments in a block in city in which previous zoning ordinance permitted a maximum of thirty-family occupancy units was an unreasonable and arbitrary exercise of zoning power under record and rezoning ordinance was void.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

24. Ill.—People ex rel. Miller v. Gill, 59 N.E.2d 671, 389 Ill. 394.

Mass.—Lamarre v. Commissioner of Public Works of Fall River, 87 N.E.2d 211, 324 Mass. 542.

N.J.—Taylor v. City of Hackensack, 58 A.2d 783, 137 N.J.Law 139, affirmed 62 A.2d 686, 1 N.J. 211—Crow v. Town of Westfield, 56 A.2d 403, 136 N.J.Law 363.

Dispute between experts

Where there was reasonable dispute between real estate experts as to adaptability of property in residential zone to apartment house use, zoning ordinance amendment permitting apartment house use was valid.

Tex.—Ciesi v. Northwest Dallas Imp. Ass'n, Civ.App., 263 S.W.2d 820, error refused no reversible error.

Method of rezoning

Where area originally classified as single-family residential district was rezoned into an apartment house district because area was unsuitable for single-family residences, rezoning was not invalid on ground that apartment house district was entirely surrounded by single-family residence district, where rezoning by method adopted was the only way of protecting rights which council was required to recognize.

Wis.—Eggebeen v. Sennenburg, 1 N.W.2d 84, 239 Wis. 213, 138 A.L.R. 495.

Refusal to reclassify held improper

If land is not susceptible of use or development for one-family residences as restricted by zoning ordinance

and development and use thereof for one and two-story, two-, three-, and four-family apartment buildings will not adversely affect value and use of other residential property in neighborhood, rejection of application for reclassification of property as an apartment district would be unreasonable and arbitrary in that it would unlawfully deprive owners of use of their property.

Ark.—City of Little Rock v. Hocott, 247 S.W.2d 1012, 220 Ark. 421.

25. N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J. Super. 405.

26. N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

Effect of prior amendments

Fact that zoning ordinance had been amended in several instances before to permit erection of apartments and multi-dwellings in residential zones before adoption of present program did not make refusal to permit further erection of apartments in a residential zone arbitrary and capricious.

N.J.—Birkfield Realty Co. v. Board of Com'rs of City of Orange, 79 A.2d 326, 12 N.J. Super. 192.

27. N.J.—Ridgefield Terrace Realty Co. v. Borough of Ridgefield, 55 A.2d 812, 136 N.J.Law 311.

Building in surrounding area

Fact that, surrounding area zoned for garden type apartments, attractive single-family houses had been built did not authorize change in zoning ordinance in order to preclude use of tract of land in area by constructing garden type apartment thereon.

N.J.—Ridgefield Terrace Realty Co. v. Borough of Ridgefield, *supra*.

28. Ill.—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91.

der some circumstances, the refusal to relax a zoning restriction limiting the use of property to single-family dwellings may constitute an abuse of discretion.²⁹

§ 99. — Shopping Centers

The propriety and validity of amendments of zoning regulations, or reclassification or rezoning of property, in order to permit the use of property for a shopping center depends on whether, under the circumstances, such action is reasonable and justified by considerations of public policy.

Where such action is reasonable under the circumstances and justified by considerations of public policy, a zoning regulation may be properly amended, or a rezoning or reclassification may be made, to permit the use of property for a shopping center,³⁰ as where the property so rezoned touches other commercial zones and merely extends existing commercial zones,³¹ the size, shape, and location of the

area make it undesirable for residential purposes,³² there is a need for a shopping center at the proposed location,³³ the change would result in a lessening of traffic congestion in the downtown areas,³⁴ and the change is in accordance with a comprehensive plan or policy.³⁵ Indeed, under certain circumstances the refusal to rezone property or amend the regulations to permit such use may be unreasonable, arbitrary, and capricious.³⁶

On the other hand, under some circumstances the amendment of zoning regulations, or the rezoning or reclassification of property, in order to permit the use of property as a shopping center may be arbitrary and unreasonable and in violation of statutory requirements,³⁷ as where the site is on a street already heavily traveled and inadequate to handle the existing volume of traffic and there are no plans for improving the street,³⁸ or the change is not in accordance with a comprehensive plan.³⁹

29. Location at corner of busy intersection

Denying rezoning of plaintiff's lots located at corner of a busy intersection for buildings other than single-family dwellings was an abuse of discretion where block in which plaintiff's property lay, was a veritable island and changes in neighborhood to commercial purposes required that the restrictions for single-family dwellings be relaxed. Fla.—*Toillius v. City of Miami*, 96 So.2d 122.

30. Conn.—*Levinasky v. Zoning Commission of City of Bridgeport*, 127 A.2d 822, 144 Conn. 117.

La.—*Archer v. City of Shreveport*, App., 85 So.2d 337.

Md.—*Eckes v. Board of Zoning Appeals of Baltimore County*, 121 A.2d 249, 209 Md. 432.

Tex.—*City of Waxahachie v. Watkins*, 275 S.W.2d 477, 154 Tex. 206.

Discretion to permit erection of additional buildings

Where zoning ordinance provided for erection of shopping center subject to approval of board of trustees on landowner's application accompanied by plan of detailed specification of buildings, and additional buildings not shown in such plans could not be erected without similar application and approval, discretion was left to trustees to permit erection of additional buildings in established shopping center by amendment of ordinance.

N.Y.—*Application of Morton Glen Cove Realty Co.*, 145 N.Y.S.2d 474, 286 App.Div. 1040.

31. Pa.—*Putney v. Abington Tp.*, 108 A.2d 134, 176 Pa.Super. 463.

Tex.—*City of Waxahachie v. Watkins*, 275 S.W.2d 477, 154 Tex. 206.

Three corners occupied by filling stations

Where three of corners at intersection, at which shopping center was proposed for fourth corner, were occupied under special permits by filling stations, and there were other commercial establishments in immediate vicinity of that intersection, rezoning of such location from residential to commercial could not be considered piecemeal or spot zoning. Md.—*Eckes v. Board of Zoning Appeals of Baltimore County*, 121 A.2d 249, 209 Md. 432.

32. Tex.—*City of Waxahachie v. Watkins*, 275 S.W.2d 477, 154 Tex. 206.

33. Md.—*Eckes v. Board of Zoning Appeals of Baltimore County*, 121 A.2d 249, 209 Md. 432.

34. Tex.—*City of Waxahachie v. Watkins*, 275 S.W.2d 477, 154 Tex. 206.

35. N.Y.—*Fitchett Crescent Corp. v. City of New York*, 155 N.Y.S.2d 272.

Pa.—*Putney v. Abington Tp.*, 108 A.2d 134, 176 Pa.Super. 463.

Policy of decentralization of business

Action of city zoning commission in changing classification of a lot from residential zone to a business zone in residential area where there was no shopping center within one mile, and only one house would be affected by change, pursuant to commission's policy to encourage decentralization of business to relieve traffic congestion was not improper as spot zoning.

Conn.—*Bartram v. Zoning Commission of City of Bridgeport*, 68 A.2d 308, 138 Conn. 89.

36. Light industrial zone

A borough zoning ordinance

amendment, prohibiting use of lands or structures in light industrial zone for retail commercial purposes, was void with respect to proposed retail shopping center therein as unreasonable, arbitrary, and capricious and bearing no real and substantial relation to public health, safety, morals, comfort, convenience or general welfare, in violation of constitutional precepts and essential policy of zoning statute, such center and light industrial uses not being incompatible, but congruous, in absence of showing of overriding public interest.

N.J.—*Katobimar Realty Co. v. Webster*, 118 A.2d 824, 20 N.J. 114.

37. Ky.—*Mathis v. Hannan*, 306 S.W.2d 278.

Md.—*Temmink v. Board of Zoning Appeals of Baltimore County*, 128 A.2d 256, 212 Md. 6.

38. Md.—*Temmink v. Board of Zoning Appeals of Baltimore County*, supra.

39. Md.—*Temmink v. Board of Zoning Appeals of Baltimore County*, supra.

Property suitable for residences

Where block which borough sought to change, by amendment to zoning ordinance, from residential zone to business district, in order to permit construction of shopping center, was suitable for construction of residences and could be used profitably for such purpose, and lay within an area which, as evidenced by comprehensive zoning plan, was intended to be maintained as residential zone, and proposed change would result in achievement of objectives which zoning was designed to prevent, proposed change did not promote any of statutory purposes relating to zoning and amendment, which in effect

2. MANNER OF EXERCISE OF POWER

§ 100. In General

Compliance with statutory procedure is a prerequisite to valid change in zoning boundaries or regulations in a municipality or other governmental entity.

Compliance with the procedure prescribed by statute is a prerequisite to any valid change in zonal boundaries or regulations in a municipality or other governmental entity.⁴⁰ Accordingly, where a commissioner or other official is authorized to change, modify, or amend a zoning plan, the statutory provisions prescribing the method and procedures to be followed in exercising such power must be complied with.⁴¹ Changes of uses and restrictions, and rezoning of use districts, can ordinarily be accomplished only through an amendment of a zoning ordinance.⁴²

In amending the zoning law, the official or body making the amendment is enacting law, binding on the public, and is not merely dealing with the rights of the owners of the particular property affected,⁴³ and the act is legislative and based on present facts, rather than judicial and dependent on past facts.⁴⁴

granted a zoning variance, would be set aside as constituting spot zoning. N.J.—*Borough of Cresskill v. Borough of Dumont*, 104 A.2d 441, 15 N.J. 238.

40. Conn.—*Couch v. Zoning Commission of Town of Washington*, 106 A.2d 173, 141 Conn. 349.

41. Order signed long after hearing

Under a provision that the commissioner of roads and revenues shall, on the recommendation of the planning commission, proceed on a set date to hear and determine the recommendation and dispose of the zone, where rezoning order had not been signed or issued by county commissioner of roads and revenues at public hearing held to consider petition for rezoning, and was not signed or issued on any subsequent date named by commissioner at time of the hearing, and hearing was not continued, commissioner was without power to sign and promulgate, ten months later, an amendment to the zoning resolution which had been passed at the hearing.

Ga.—*Toomey v. Norwood Realty Co.*, 89 S.E.2d 265, 211 Ga. 814.

42. Cal.—*Johnston v. City of Claremont*, 323 P.2d 71.

43. Ga.—*Toomey v. Norwood Realty Co.*, 89 S.E.2d 265, 211 Ga. 814.

44. Ga.—*Toomey v. Norwood Realty Co.*, supra.

45. Mass.—*Caires v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589.

§ 101. By Town Meeting

Under some statutes zoning changes must be adopted by a vote of a town meeting and approved by the attorney general.

Under some statutes a change in zoning, as in the case of a change in a zoning bylaw, must or may be adopted by a vote of a town meeting;⁴⁵ and there must be a compliance with statutory requisites as to notice or warrant for such meeting.⁴⁶ The vote of the town meeting on an amendment to a zoning bylaw must be reasonably construed.⁴⁷

Approval of attorney general. Under a statute so providing, before a town bylaw making a zoning change takes effect it must be approved by the attorney general who, in the event of disapproval, must give his reasons therefor.⁴⁸

Advisory report of planning board. It has been held that the town meeting should be preceded by an advisory report by the planning board on the need for the proposed change.⁴⁹

Construction of vote

(1) Vote of town on amendment to zoning bylaw, referring to whole or any part of locus, immediately followed by specific description by metes and bounds of entire area so that thereafter the area, which had been located in residential district, should be used for business purposes, was to be reasonably construed, and every reasonable presumption was to be made in its favor. Mass.—*Caires v. Building Com'r of Hingham*, supra.

(2) Where only area mentioned in vote on zoning bylaw amendment was entire area which had been located in residential district, effect of vote, as expressly stated on its face, was to change bylaw so that thereafter area should be put in a business zone, and vote in favor of amendment was a vote in favor of placing entire area in business district, notwithstanding a reference to "the whole or any part of" the locus.

Mass.—*Caires v. Building Com'r of Hingham*, supra.

46. Mass.—*Fish v. Town of Canton*, 77 N.E.2d 231, 322 Mass. 219.

Warrant held insufficient

Where original article on which town's planning board held its hearing, and which was inserted in warrant for town meeting, sought to repeal town's zoning bylaw in its entirety, and warrant did not indicate with substantial certainty the nature

of the business to be acted on, amendment of zoning bylaw was invalid.

Mass.—*Fish v. Town of Canton*, supra.

Variance between warrant and actual change

Zoning bylaw could not be modified by establishing line between districts different from that proposed in warrant for town meeting; modification of zoning bylaw different from that proposed in warrant was not justified by words "or in any way act thereon" in warrant.

Mass.—*Nelson v. Town of Belmont*, 174 N.E. 320, 274 Mass. 35.

47. Mass.—*Caires v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589.

48. Purpose of requirement; valid reasons for rejection

Requirement for statement of reasons for disapproval was to enable the determination in appropriate proceedings, whether the bylaw was rightfully ruled out, and the only valid reasons for rejection of the bylaw intended are those based on legal grounds, and not on matters of legislative policy in opposition to a unanimous vote of a town meeting to amend a zoning bylaw.

Mass.—*Town of Concord v. Attorney General*, 142 N.E.2d 360.

49. Mass.—*Caires v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589.

§ 102. By Governing Body

The governing body of a municipality or other governmental entity having the power to modify or amend zoning regulations must exercise such power in the proper manner and comply with all statutory requirements. The power so exercised is generally a legislative one, and the proper procedure is generally the promulgation of an ordinance.

Where the power to modify or amend zoning regulations is vested in the governing body of the municipality or other governmental entity, such body must exercise its power in the proper manner and comply with all statutory requirements,⁵⁰ which, while usually the same as those governing the original enactment,⁵¹ may be different, and governed by different statutes, from those governing the adoption of an original zoning ordinance.⁵²

and a failure to observe the statutory requirements renders the amendment invalid.⁵³ However, the action of the governing body of a municipality in rezoning an area is not rendered invalid by the fact that it violates certain sections of the zoning ordinance,⁵⁴ since the rezoning action is in itself an amendment to the zoning ordinance.⁵⁵ In redistricting a city under some zoning statutes, the governing body will not be required to proceed, by separate resolution, to zone block by block.⁵⁶

Legislative function and discretion. The enactment by a municipal governing body of a rezoning ordinance, or of a modification or change in the zoning regulations, generally represents an exercise of a legislative function and legislative discretion;⁵⁷ and the governing body is vested with a

50. Conn.—State ex rel. Spiros v. Payne, 41 A.2d 908, 131 Conn. 647—Alderman v. Town of West Haven, 200 A. 330, 124 Conn. 391.

Del.—Boozar v. Johnson, 98 A.2d 76, 33 Del.Ch. 554.

Ga.—Johnson v. Evangelical Church of Messiah, 54 S.E.2d 722, 79 Ga. App. 671.

Ill.—Cain v. Lyddon, 175 N.E. 391, 343 Ill. 217.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

La.—De Latour v. Morrison, 34 So. 2d 783, 213 La. 292.

Mass.—Leahy v. Inspector of Buildings of City of New Bedford, 31 N.E.2d 436, 308 Mass. 128.

Mo.—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 780.

State ex rel. Luechtefeld v. Arnold, App., 149 S.W.2d 384.

Nev.—Frimm v. City of Reno, 253 P.2d 835, 70 Nev. 7.

N.J.—N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge, 69 A.2d 767, 6 N.J.Super. 495.

N.Y.—Rohman v. City of Yonkers, 88 N.Y.S.2d 350, 275 App.Div. 842, appeal denied 90 N.Y.S.2d 663, 275 App.Div. 944—Palmer v. Mann, 201 N.Y.S. 525, 206 App.Div. 484.

Nappi v. LaGuardia, 55 N.Y.S.2d 80, 184 Misc. 775, affirmed 54 N.Y.S.2d 722, 269 App.Div. 693, affirmed 64 N.E.2d 716, 295 N.Y. 652—Pressel v. Ferris, 266 N.Y.S. 517, 148 Misc. 910.

Pallotto v. Harwood, 173 N.Y.S. 2d 103—Sheffer v. City of Geneva, 147 N.Y.S.2d 401—Howell v. Liebowitz, 116 N.Y.S.2d 537.

Ohio.—State ex rel. Fairmount Center Co. v. Arnold, 34 N.E.2d 777, 138 Ohio St. 253, 136 A.L.R. 840.

State ex rel. Castle National v. Village of Wickliffe, App., 80 N.E.2d 200, appeal dismissed 74 N.E.2d 270, 148 Ohio St. 410—W. B. Gibson Co. v. Warren Metropolitan Housing Authority, 29 N.E.2d 236, 65 Ohio App. 84.

Okl.—Makrauer v. Board of Adjustment of City of Tulsa, 193 P.2d 291, 200 Okl. 285.

Pa.—In re Zoning Amendment of West Goshen Tp., Quar.Sess., 7 Chest. Co. 133—Stern v. Township of Marple, Com.Pl., 36 Del.Co. 49—Kuznowski v. Board of Zoning Appeals, Com.Pl., 53 Lack.Jur. 53. R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

Tenn.—Clapp v. Knox County, 273 S.W.2d 694, 197 Tenn. 422.

Tex.—Ham v. Weaver, Civ.App., 227 S.W.2d 286, reversed on other grounds Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

No rule prescribed by city charter Ohio.—Humphrey v. City of Youngstown, Mahoning County, App., 143 N.E.2d 321.

Accomplishing legislative design

Statutes fixing manner of changing zoning ordinances should, in case of doubt, be construed so as to accomplish legislative design that the matter be fully considered and in the public interest, and to give just protection to rights of individual property owners; and such statutory requirements should not be readily relaxed.

Conn.—Strain v. Mims, 193 A. 754, 123 Conn. 275.

Particular action held not to constitute amendment

N.J.—Passaic Jr. Chamber of Commerce, Inc. v. Housing Authority of City of Passaic, 132 A.2d 813, 45 N.J.Super. 381.

51. Cal.—Johnston v. City of Claremont, 323 P.2d 71.

52. N.J.—N. T. Hegeman Co. v. Mayor and Council of Borough of River Edge, 69 A.2d 767, 6 N.J.Super. 495.

Ordinance held amendment

Township of Montgomery ordinance setting up a limited industrial

district along with four other districts, even though extensive in its operative effect, nevertheless was not an original zoning ordinance subject to statute dealing with adoption of zoning ordinance, but was an amendment subject to statute dealing with amendments of zoning ordinances. N.J.—Kozesnik v. Montgomery Tp., 131 A.2d 1, 24 N.J. 154.

53. N.Y.—Pallotto v. Harwood, 173 N.Y.S.2d 103—Miller v. Dassler, 155 N.Y.S.2d 975.

Ohio.—State ex rel. Ldoux v. Village of Westlake, Com.Pl., 126 N.E.2d 829.

54. Ga.—Johnson v. Evangelical Lutheran Church of Messiah, 54 S.E.2d 722, 79 Ga.App. 671.

55. Ga.—Johnson v. Evangelical Lutheran Church of Messiah, supra.

56. N.Y.—Morrill Realty Corporation v. Rayon Holding Corporation, 172 N.E. 494, 254 N.Y. 268.

57. Cal.—Johnston v. City of Claremont, 323 P.2d 71.

N.J.—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324.

N.Y.—Penataquit Ass'n v. Furman, 129 N.Y.S.2d 221, 283 App.Div. 875. Pelham Jewish Center v. Board of Trustees of Village of Pelham Manor, 170 N.Y.S.2d 136, 9 Misc. 2d 564.

Hayes v. City of Yonkers, 143 N.Y.S.2d 699, affirmed 152 N.Y.S. 2d 213, 1 A.D.2d 1031—Soule v. Town Bd. of Perinton, 141 N.Y.S.2d 167.

Ohio.—Johnson v. Griffiths, App., 141 N.E.2d 774, appeal dismissed 131 N.E.2d 397, 164 Ohio St. 893.

Pa.—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

large measure of discretion to determine the effect on the public welfare of the exercise of its authority.⁵⁸ However, it has been held that where an ordinance changing zoning classifications is adopted to carry out the purposes of a comprehensive zoning ordinance such action is executive or administrative in character,⁵⁹ as distinguished from the legislative character of the action in embarking on the basic zoning policy.⁶⁰

The nature of the function exercised by a board or commission in making zoning changes is discussed infra § 116.

Amendment by ordinance or resolution. Usually the proper and necessary procedure for rezoning land or amending a zoning regulation is the promulgation of an ordinance,⁶¹ or, in some instances, a resolution,⁶² although it has been held that a mere resolution will not serve to modify a zoning ordinance;⁶³ and an amendment to the zoning ordinance must be proposed and adopted with the same formality as the original ordinance.⁶⁴

Provisions of amending ordinance. Under statutes so providing, the amending ordinance must suf-

ficiently identify the ordinance amended.⁶⁵ A city council's motion without an enacting clause to exclude certain land from a zoning ordinance has been held not to amend or otherwise affect such ordinance.⁶⁶ Where an amending ordinance does not purport to be a substitute for all the regulations originally adopted, it may be valid as against the objection that it does not contain a complete statement of the alterations made in the zoning regulations.⁶⁷ Where an original zoning ordinance was defective in part, an amending ordinance which sets out the complete ordinance with the exception of the penalty clause, which was declared to be the section provided in the original ordinance, has been held not invalid as not providing a penalty.⁶⁸

Necessity and sufficiency of map changes. The character of property as zoned for certain purposes on a city zoning map may not be changed merely by alterations of the map subsequent to the passage of the original zoning ordinance;⁶⁹ and in the absence of a provision to that effect, it is not essential that a new map be drawn in order to effect a change in zoning districts.⁷⁰

Tex.—*Clesi v. Northwest Dallas Imp. Ass'n*, Civ.App., 263 S.W.2d 820, refused no reversible error.

Wash.—*Besselman v. City of Moses Lake*, 280 P.2d 689, 46 Wash.2d 279.

Legislative, not quasi judicial function

Va.—*Blankenship v. City of Richmond*, 49 S.E.2d 321, 188 Va. 97.

Legislative, not judicial or administrative function

R.I.—*Alaniello v. Town Council of Town of East Providence*, 117 A.2d 238.

58. N.J.—*Birkfield Realty Co. v. Board of Com'rs of City of Orange*, 79 A.2d 326, 12 N.J.Super. 192.

Necessity of amendment

Determination of when public interest requires an amendment of zoning regulations is within discretion of legislative agency.

Conn.—*Winslow v. Zoning Bd. of City of Stamford*, 122 A.2d 789, 143 Conn. 381.

59. Neb.—*Kelley v. John*, 75 N.W.2d 713, 162 Neb. 319.

60. Neb.—*Kelley v. John*, supra.

61. Ohio.—*W. B. Gibson Co. v. Warren Metropolitan Housing Authority*, 29 N.E.2d 236, 65 Ohio App. 84.

Tenn.—*Clapp v. Knox County*, 273 S.W.2d 694, 197 Tenn. 422.

Amendments to master zoning plan are made as a result of preliminary investigation and final adoption by the city council, and where any considerable change is to be made, it must be made by ordinance.

Ind.—*Antrim v. Hohlt*, 108 N.E.2d 197, 112 Ind.App. 681.

Ordinances held sufficient to effect amendment

Tex.—*Prince v. W. H. Cothrum & Co.*, Civ.App., 227 S.W.2d 863.

Perfection of prior invalid ordinance

An ordinance which covered and perfected a previous defective ordinance is valid where its enactment was followed by publication and the formalities of an original act.

Wis.—*City of La Crosse v. Elbertson*, 237 N.W. 99, 205 Wis. 207.

Plurality of subjects

An ordinance with a title stating that it was an ordinance amending a numbered ordinance, relating to zoning by making extensions to a residence district, and repealing another numbered ordinance, was not void on ground that it conflicted with city charter providing that no bill should contain more than one subject which should be clearly expressed in its title.

Mo.—*Taylor v. Schlemmer*, 183 S.W.2d 913, 353 Mo. 687.

62. Cal.—*Lockhart v. City of Bakersfield*, 267 P.2d 871, 123 C.A.2d 728.

Equally effective

A resolution indicating an intention to make an amendment to the zoning regulations has been held to be as effective as a formal ordinance would have been.

Tenn.—*Clapp v. Knox County*, 273 S.W.2d 694, 197 Tenn. 422.

63. N.J.—*Antenelli Const. v. Milstead*, 112 A.2d 608, 34 N.J.Super. 449.

64. Tex.—*Clesi v. Northwest Dallas Imp. Ass'n*, Civ.App., 263 S.W.2d 820, refused no reversible error.

65. Iowa.—*Brackett v. City of Des Moines*, 67 N.W.2d 542, 246 Iowa 249.

Form immaterial

Statute requiring that an ordinance revising or amending an ordinance shall specifically repeal the ordinance or section it amends or revises does not require that identification of amended ordinance be made in any particular language or form, and it is sufficient that identification be such that lawmakers and people be not left in doubt as to ordinance affected.

Iowa.—*Brackett v. City of Des Moines*, supra.

66. Tex.—*Harvey v. City of Seymour*, Civ.App., 14 S.W.2d 901.

67. Conn.—*Osborn v. Town of Darien*, 175 A. 578, 119 Conn. 182.

68. Wis.—*City of La Crosse v. Elbertson*, 237 N.W. 99, 205 Wis. 207.

69. Ark.—*City of Little Rock v. Bentley*, 165 S.W.2d 890, 204 Ark. 727.

70. N.Y.—*Levitt v. Incorporated Village of Sands Point*, 152 N.Y.S.2d 711, 2 A.D.2d 688.

§ 103. — Initiation of Proceedings; Applications

In general, any citizen, or at least any property owner, may apply for an amendment to a zoning regulation, although the governing body of the municipality may also amend zoning regulations of its own motion.

In the absence of statutory restriction, any citizen acting in good faith,⁷¹ or at least, any property owner,⁷² may apply for an amendment to a zoning regulation, and may actively advocate the passage thereof;⁷³ and in so applying for a change the statutes must be followed.⁷⁴ Ordinarily, however, the governing body of the municipality may amend zoning regulations of its own motion without regard to any request or petition therefor by property owners.⁷⁵

Under a statute so providing, a change of zone proceeding may be instituted by a petition of a certain percentage of the owners affected by the pro-

posed change.⁷⁶

A landowner seeking a change in the zoning classification of his land is not required to state whether he intends to sell the land if the classification is changed or to use the land for some designated purpose which will be permitted if the classification is changed.⁷⁷

§ 104. — Successive Applications

Subject to statutory limitations, the action taken by a governing body on a previous application does not prevent it from reconsidering and entertaining another application.

Where there is no limitation on the time when a governing body may amend a zoning regulation, the action taken by such body on a previous application for rezoning does not prevent it from reconsidering the matter and entertaining another application;⁷⁸ but the rule may be otherwise where

71. Ohio.—*Murdock v. City of Norwood*, Com.Pl., 67 N.E.2d 867.

Form of petition

The common council had power to enact ordinances changing zone districts without presentation to it of any particular form of petition.

N.Y.—*Homefield Ass'n of Yonkers v. Frank*, 75 N.Y.S.2d 334, 273 App. Div. 788, affirmed 80 N.E.2d 664, 298 N.Y. 524.

72. Mass.—*Pitman v. City of Medford*, 45 N.E.2d 973, 312 Mass. 618.

One holding option to purchase land comprising the locus involved in zoning ordinance had sufficient interest to enable him to apply for an amendment to the ordinance.

Mass.—*Pitman v. City of Medford*, supra.

Invalid limitation

Ordinance requiring petition for rezoning to be signed and verified by owner of property held ineffectual to limit class of persons entitled to apply for rezoning under charter requiring hearing on change in classification on application of "interested property owner."

Cal.—*Marculescu v. City Planning Commission of City and County of San Francisco*, 46 P.2d 308, 7 C.A. 2d 371.

"Interested property owners"

Owners of adjacent property held "interested property owners" within charter provision authorizing hearing on rezoning on application of interested property owner, where it was sought to have property rezoned from commercial to residential classification.

Cal.—*Marculescu v. City Planning Commission of City and County of San Francisco*, supra.

Statutory right of owner of "corner" Within zoning statute providing

that where two or more corners at intersection are restricted to a particular use, other corners must be rezoned in conformity on owners' application there were no "corners" along top of the "T" intersection, and owner of land in lower corner, whose land was zoned residential, was not entitled to have it rezoned for business uses, even though other corner and land along top of "T" were zoned for business.

N.C.—*Robbins v. City of Charlotte*, 84 S.E.2d 814, 241 N.C. 197.

73. Amendment not tainted by activity of supporters

Activity of interested parties in getting amendment of zoning bylaw before annual town meeting, in advocating its passage by newspaper advertisements and pamphlets, and in addressing meeting, would not taint amendment which was otherwise valid.

Mass.—*Caires v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589.

74. N.Y.—*Fitchett Crescent Corp. v. City of New York*, 155 N.Y.S.2d 272.

75. La.—*State ex rel. Pleasant v. Hardy*, App., 157 So. 130.

Attack on petition

Court would not order names stricken from petition to amend zoning ordinance as obtained through mistake and misrepresentation and signed by unauthorized persons, where city council could amend ordinance of its own motion without regard to petition.

La.—*State ex rel. Pleasant v. Hardy*, supra.

76. Or.—*Holt v. City of Salem*, 234 P.2d 564, 192 Or. 200.

Property subject to nonconforming use

Under zoning ordinance providing

for change of zone by city council on petition by owners of fifty per cent or more of affected area, railroad property, which was within boundaries of affected area as set by ordinance, and which represented a non-conforming use, less restrictive than that proposed by change, was part of affected area and could not be disregarded for purposes of changing part of zone from residential district to business district.

Or.—*Holt v. City of Salem*, supra.

Right of signers to withdraw names

(1) Under zoning ordinance providing for change of zone by city council on petition by owners of fifty per cent or more of affected area, unless prior to hearing, remonstrance in writing against change is made by over fifty per cent of owners of property in affected area, owners in affected area who were not induced to sign petition through misrepresentation of facts, undue influence or coercion, could not withdraw their names from the petition, and legality of petition was not affected by attempted withdrawals.

Or.—*Holt v. City of Salem*, supra.

(2) Persons who attempted but were not entitled to withdraw names from petition for change of zone by city council, which could make the change on petition by owners of fifty per cent or more of affected area, would have, with other persons particularly interested and general public, an opportunity to be heard before zoning commission and also before council previous to final action being taken on petition by council.

Or.—*Holt v. City of Salem*, supra.

77. Ohio.—*Murdock v. City of Norwood*, Com.Pl., 67 N.E.2d 867.

78. Ga.—*Johnson v. Evangelical Lutheran Church of Messiah*, 54 S. E.2d 722, 79 Ga.App. 671.

the zoning ordinance forbids further petitions to rezone property within a specified period after the rejection of a like petition concerning the same property.⁷⁹

Limitations on the time when zoning regulations may be amended are discussed *supra* § 83.

§ 105. — Report or Approval of Board or Commission

It is sometimes required that proposed changes or amendments to zoning regulations be submitted for report and recommendation to a board or commission prior to their adoption by the governing body of the municipality.

Where a statute so provides,⁸⁰ it is required, in

certain circumstances, that a governing body intending to change, modify, or amend zoning regulations obtain the advice,⁸¹ or the recommendation or concurrence⁸² of a zoning or planning board or commission prior to taking action, provided there is such a board or commission in the borough or municipality.⁸³

Accordingly, amendments to a zoning ordinance must be submitted to the local planning or zoning commission;⁸⁴ and a petition for a change submitted by interested persons should be referred to such board or commission.⁸⁵ In fact, it has been held to be immaterial whether the hearing by the planning board was held on the board's own initiative, or

79. Failure to act on petition distinguished

Failure to act on rezoning petition merely caused petition to expire with no adverse effect, and did not bring into operation provision of zoning ordinance forbidding further petitions to rezone property within six months after rejection of like petition concerning same property.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

80. N.Y.—Hermann v. Incorporated Village of East Hills, 104 N.Y.S.2d 592, affirmed 109 N.Y.S.2d 182, 279 App.Div. 753, appeal denied 110 N.Y.S.2d 283, 279 App.Div. 799.

Statutory requirement as to variances only

Change in classification of certain property in order to carry out comprehensive plan created by original ordinance was proper subject for amendment by town council, and such change was not a variance which should first be referred to board of adjustment.

N.J.—Anderson v. Mayor and Council of Town of Bloomfield, 65 A.2d 270, 2 N.J.Super. 605.

Statutes applicable only to original ordinances

Del.—Boozar v. Johnson, 93 A.2d 76, 33 Del.Ch. 554.

N.Y.—Hermann v. Incorporated Village of East Hills, 104 N.Y.S.2d 592, affirmed 109 N.Y.S.2d 182, 279 App.Div. 753, appeal denied 110 N.Y.S.2d 283, 279 App.Div. 799.

81. Mass.—Whittemore v. Town Clerk of Falmouth, 12 N.E.2d 187, 299 Mass. 64.

N.J.—Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights, Bergen County, 105 A.2d 521, 15 N.J. 447.

N.Y.—Welch v. Niagara Falls, 210 App.Div. 170, 205 N.Y.S. 454.

Ohio.—State ex rel. Castle National v. Village of Wickliffe, App., 80 N.E.2d 200, appeal dismissed 74 N.E.2d 270, 148 Ohio St. 410.

Pa.—Appeal of Bristol Tp. Zoning Ordinance, Quar.Sess., 7 Bucks Co. 51.

Statute held valid

Statute providing that a zoning ordinance may be amended on recommendation of or with concurrence of planning commission is not invalid as unconstitutional delegation of power to planning commission since limitation imposed by statute is not a delegation of power but a withholding of power, and powers of city commission are subject to such limitations as legislature sees fit to impose on it.

Wash.—Lauterbach v. City of Centralia, 304 P.2d 656, 49 Wash.2d 550.

Requirement imposed subsequent to ordinance or amendment

(1) Amendatory ordinance was not invalid because it was not referred to the city planning commission, where charter section requiring such reference did not go into effect until later date and showed no intention that it should operate retrospectively.

Md.—Chayt v. Maryland Jockey Club of Baltimore City, 18 A.2d 856, 179 Md. 390.

(2) Validity is not to be denied zoning ordinance to extent that it covers land lying within three hundred feet of boundary line between village and unincorporated town area on ground that 1951 enactment of village zoning ordinance was not submitted to, and approved by, county planning commission and town board, in view of fact that 1951 ordinance was merely an amendment to a 1933 ordinance which antedated County Government Law provision requiring such approval.

N.Y.—Incorporated Village of Upper Brookville v. Faraco, 125 N.Y.S.2d 214, 282 App.Div. 943, affirmed 120 N.E.2d 835, 307 N.Y. 642.

Statement of official

Statement of chairman of planning commission with respect to spot zoning could not bind city council, which was the granting authority with ref-

erence to rezoning, and could not even bind a future planning commission.

Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

Rule not affected by other statute

Statute providing that a council may not, by ordinance, bind itself or successors so as to prevent free legislation does not operate to allow council of municipality, which has adopted the Zoning Law which prevents such municipalities from changing zoning plans except on submission of changes for recommendation to planning board, to amend its zoning ordinance requiring a three-fourths vote to change zoning in certain instances, without submission of amended ordinance to planning board.

Ga.—Mayor and Council of Waynesboro v. McDowell, 99 S.E.2d 92, 213 Ga. 407.

Change by operation of law held not within rule

Where between election on proposed zoning regulations for unincorporated portion of township, and certification by township zoning commission of a plan including text and maps, to township trustees, a portion of unincorporated area of township was withdrawn by operation of law by the incorporation of a village in township, the incorporation was not a "change in or departure from the text or maps" within statute prohibiting such a change unless first submitted to commission.

Ohio.—Burnett v. Wooster, Com.Pl., 84 N.E.2d 261.

82. Wash.—Lauterbach v. City of Centralia, 304 P.2d 656, 49 Wash.2d 550.

83. N.J.—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

84. Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 836, 31 C.2d 66.

85. N.Y.—Welch v. Niagara Falls, 205 N.Y.S. 454, 210 App.Div. 170.

on the petition of certain property owners, or was otherwise initiated.⁸⁶

The board or commission should submit its report and recommendations to the council or other governing body,⁸⁷ which body is not required to hear any evidence in order to accept the report of the

commission reclassifying property.⁸⁸ It has been held that the governing body cannot validly act without first receiving the report of the board or commission⁸⁹ and its recommendation,⁹⁰ although there is also some authority to the contrary where the recommendation of the planning commission is merely advisory.⁹¹

86. Suggestion of mayor

Rezoning amendment of city did not violate city ordinance making it the duty of the planning board, on petition of certain property owners, or on the planning board's own initiative, to hold a public hearing for consideration of any amendment to zoning ordinance, because of fact that planning board acted at suggestion of the mayor.

Mass.—Shannon v. Building Inspector of Woburn, 105 N.E.2d 192, 328 Mass. 633.

87. Mass.—Whittemore v. Town Clerk of Falmouth, 12 N.E.2d 187, 299 Mass. 64.

N.Y.—Welch v. Niagara Falls, 205 N.Y.S. 454, 210 App.Div. 170.

Unanimous vote

Statute permitting commission to recommend zoning alterations by unanimous vote of commission requires only unanimous vote of members present, if constituting quorum.

Ky.—Gumm v. City of Lexington, 56 S.W.2d 703, 247 Ky. 139.

Essential finding presumed

Finding by regional planning commission that proposed amendment of zoning ordinance, authorizing county officials to locate juvenile hall in single-family use residential zone, was necessary for general public welfare and interest may be presumed from commission's recommendation of such amendment to county board of supervisors.

Cal.—Bailey v. Los Angeles County, 293 P.2d 449, 146 C.2d 132.

Weight accorded recommendation

Under the statute with respect to the submission of proposed amendments to zoning ordinances to the planning board, legislative intent accords important, although not decisive, weight to the recommendations of the board concerning the zoning ordinance amendments when based on legitimate considerations of public interest and such reasonable supervision as may be essential for the common welfare.

N.J.—Birkfield Realty Co. v. Board of Com'rs of City of Orange, 79 A.2d 326, 12 N.J.Super. 192.

Recommendation held sufficient report

Where prior to enactment of amending ordinance rezoning area from business to residential use, there was a hearing before city planning commission, which objecting landowners and their attorney attend-

ed, as well as six residents of the neighborhood who favored the amendment, and the commission recommended approval of the change, there was a sufficient report by the commission in compliance with Enabling Act.

Mo.—Schell v. Kansas City, Mo., 226 S.W.2d 718, 360 Mo. 27.

88. Ky.—Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018.

89. Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C.2d 66.

Schofield v. City of Los Angeles, 7 P.2d 1076, 120 C.A. 240.

Ga.—Mayor and Council of Waynesboro v. McDowell, 99 S.E.2d 92, 213 Ga. 407.

Kan.—Corpus Juris cited in Ford v. City of Hutchinson, 37 P.2d 39, 41, 140 Kan. 307—Armourdale State Bank v. Kansas City, 292 P. 745, 131 Kan. 419.

Mo.—State ex rel. Luechtefeld v. Arnold, App., 149 S.W.2d 384.

N.Y.—Welch v. Niagara Falls, 205 N.Y.S. 454, 210 App.Div. 170.

Ohio.—State ex rel. Fairmount Center Co. v. Arnold, 34 N.E.2d 777, 138 Ohio St. 259, 136 A.L.R. 840.

State ex rel. Castle National v. Village of Wickliffe, App., 80 N.E.2d 200, appeal dismissed 74 N.E.2d 270, 148 Ohio St. 410.

Validity of temporary or emergency ordinance enacted without report of commission see supra § 19.

Written report required

N.J.—Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights, Bergen County, 105 A.2d 521, 15 N.J. 447.

Planning commission

Zoning ordinance adopted by city council on notice, hearing, and recommendation by city zoning commission after creation of a city planning commission was void, since all powers and duties of zoning commission were vested in city planning commission when city planning commission came into existence.

La.—Mills v. City of Baton Rouge, 28 So.2d 447, 210 La. 330.

90. Mass.—Whittemore v. Town Clerk of Falmouth, 12 N.E.2d 187, 299 Mass. 64.

What constitutes "recommendation"

(1) "Recommendation," as used in statute requiring submission of a final report "with recommendations" by the planning board before any

change may be made in zoning districts as established by by-law or ordinance, connotes advice based on information and enlightenment elicited at a public hearing and on study and reflection to ascertain the wisest course for the town to follow; a report submitted by a planning board that it was "unable at this time to make any recommendation" because of a tie vote, did not confer jurisdiction on town meeting to take up a consideration of the merits of the proposed change.

Mass.—Whittemore v. Town Clerk of Falmouth, supra.

(2) City planning commission's action in returning application for reclassifying certain property under zoning ordinance without recommendation was held tantamount to "recommendation" that application be denied.

Kan.—Simmonds v. Meyn, 7 P.2d 506, 134 Kan. 419.

(3) Opinion of city planning board sent to board of aldermen stating that planning board considered it inadvisable to recommend spot zone change, would be regarded as a final report with definite negative recommendations, notwithstanding allusion to continuing comprehensive consideration of subject of zoning, and therefore ordinance changing zoning classification after receipt by aldermen of such opinion was not invalid as being violative of such statute.

Mass.—Caputo v. Board of Appeals of Somerville, 111 N.E.2d 674, 330 Mass. 107.

(4) Where planning board reported that it recommended the passage of rezoning amendment for the best interest of the city, and stated that reasons in detail for report would be made to city council at a later date, and detailed reasons were sent by planning board to city council before hearing by city council, there was sufficient compliance with requirement of statute that planning board submit a final report with recommendations to the city council.

Mass.—Shannon v. Building Inspector of Woburn, 105 N.E.2d 192, 328 Mass. 633.

91. City commission not powerless

City plan commission acted merely in an advisory capacity in making recommendations to city council as to classification of property and matters pertaining to zoning, and fact that amended zoning ordinance was not

Except as statutes may otherwise provide, the governing body is under no duty to follow the decision of the planning commission.⁹² Thus, it has been held that the governing body is not limited to the acceptance or rejection of the report or recommendations of the board or commission;⁹³ and, where the commission recommended the rejection of an application for reclassification, the governing body could not merely reject the recommendation of the commission, but could grant the property owner's application.⁹⁴ However, under statutes so providing, a change must, in some circumstances, receive the approval of a planning commission.⁹⁵ Moreover, in other jurisdictions, while the governing body is not required to adopt the recommendation of the planning commission,⁹⁶ since it may reject such recommendation,⁹⁷ it cannot amend a zoning ordinance contrary to the recommendation, or without the concurrence, of the planning commission.⁹⁸

Under a statute so providing, the amendment made by the governing body to a master plan must

be returned to the planning commission for consideration,⁹⁹ and becomes effective at the expiration of a specified period, unless the planning commission makes its report sooner.¹

Requirement as statutory or by ordinance. Where the requirement is contained in the statute, an ordinance is void in so far as it purports to dispense with the necessity of the recommendation or concurrence of the planning commission in order to amend a prior zoning ordinance.² However, where the requirement is contained in a zoning ordinance, rather than in a statute, the failure to comply with it is not fatal to the amendment.³

Hearings and notice; voting by board. In so far as the statute may provide therefor, the board or commission to which the proposed change or amendment has been submitted for its report or recommendation may and should hold public hearings on the proposed amendment or change after proper notice;⁴ and the report or recommendation must be voted on by the members of the board or commission in accordance with statutory provisions.⁵

initially considered by city plan commission and fact that no recommendations were given by that body, did not render city commission powerless to grant change in classification by adoption of amended zoning ordinance.

Tex.—*Clesi v. Northwest Dallas Imp. Ass'n*, Civ.App., 263 S.W.2d 820, error refused no reversible error.

92. Ohio.—*Johnson v. Griffiths*, App., 141 N.E.2d 774, appeal dismissed 131 N.E.2d 397, 164 Ohio St. 393.

Pa.—*Appeal of Bristol Tp. Zoning Ordinance*, Quar.Sess., 7 Bucks Co. 51.

93. Ga.—*Morgan v. Thomas*, 63 S.E. 2d 659, 207 Ga. 660.

94. Ga.—*Morgan v. Thomas*, supra.

95. Circumstances held not to require approval

Amendment of zoning ordinance by city council classifying realty involved from residential use to apartment use did not present situation requiring site plan approved by city plan commission under city ordinance code making site plan relating to private housing projects and shopping centers necessary.

Tex.—*Clesi v. Northwest Dallas Imp. Ass'n*, Civ.App., 263 S.W.2d 820, error refused no reversible error.

96. Wash.—*Lauterbach v. City of Centralia*, 304 P.2d 656, 49 Wash.2d 550.

97. Wash.—*Lauterbach v. City of Centralia*, supra.

98. Requirement construed as condition

Under statute providing that any

zoning ordinance may be amended "upon recommendation of or with the concurrence of" the planning commission, the preposition "upon" connotes the same as "on condition that," and indicates a state of dependence. Wash.—*Lauterbach v. City of Centralia*, supra.

99. Ind.—*Tomlinson v. Marion County Plan Commission*, 122 N.E.2d 852, 234 Ind. 88.

1. Ind.—*Tomlinson v. Marion County Plan Commission*, supra.

2. Wash.—*Lauterbach v. City of Centralia*, 304 P.2d 656, 49 Wash.2d 550.

3. N.J.—*Stalford v. Barkalow*, 106 A. 2d 342, 31 N.J.Super. 193.

4. Cal.—*Johnston v. Board of Sup'rs of Marin County*, 187 P.2d 686, 31 C.2d 66.

Kan.—*Ford v. City of Hutchinson*, 37 P.2d 39, 140 Kan. 307.

Mass.—*Whittemore v. Town Clerk of Falmouth*, 12 N.E.2d 187, 299 Mass. 64.

Hearing and notice held sufficient Kan.—*Moore v. City of Pratt*, 79 P. 2d 871, 148 Kan. 53.

Power to administer oaths and subpoena witnesses

Section of the Zoning Act empowering chairman of county board of appeals on hearing to administer oaths and compel attendance of witnesses does not create an absolute requirement as to all hearings; and where petition was presented to county board for rezoning of realty, and county board transmitted petition to board of appeals for hearing, and at

the hearing there was a discussion of merits and demerits of proposed resolution, and various groups presented their views which were duly registered with county board before county board passed ordinance amending zoning ordinance, there was adequate compliance with Zoning Act.

Ill.—*Village of Justice v. Jamieson*, 129 N.E.2d 269, 7 Ill.App.2d 113.

More change in amendment

Provision in proposed zoning ordinance amendment, recommended to county board of supervisors by regional planning commission, that property in any residential zone might be used for any governmental uses, was broad enough to encompass use of land in single-family use residential zone for county juvenile hall, so that board's ordinance authorizing such use was not a new ordinance initiated by board, but merely a change in amended ordinance proposed by commission, and no further public hearing was required before commission on its receipt or board's proposed change in amendment so recommended.

Cal.—*Bailey v. Los Angeles County*, 293 P.2d 449, 46 C.2d 132.

5. Disqualification of member of board

Under statute providing that no member of planning board shall be permitted to act on any matter in which he has either directly or indirectly any personal or financial interest, a member who operated horsemen's kitchen at race track had a "personal or financial interest" in

Irregularities. The failure to conform to requirements, in connection with the obtaining of the recommendation of the commission, which are not of the essence of the legislation will not necessarily invalidate the amendment.⁶

§ 106. — Consent of Property Owners

Under some statutes a zoning change may be made only after the filing of consent thereto of a certain per cent of the owners of realty within a certain distance of the realty affected.

Under a statute or ordinance so providing, as it may validly do,⁷ alteration in a zoning regulation may be made by the municipal governing body only after filing of consent thereto of a certain per cent of the owners of realty situated within a certain distance of the realty affected;⁸ and in determining the owners within the prescribed distance, the distance is to be measured from the outer perimeter

of the entire area of land affected by the zoning provision.⁹

Where an ordinance so provides, municipal authorities cannot establish a business district within a residential district except under a petition by all the property owners within the proposed business district.¹⁰

§ 107. — Initiative and Referendum

Under some statutes an amending or rezoning ordinance or resolution may be subject to initiative and referendum.

An amending or rezoning ordinance or resolution may be subject to initiative¹¹ and referendum¹² under the terms of some statutory provisions, and an amending ordinance subject to referendum after proper petition therefor does not become effective and remains suspended until a referendum is had.¹³

amendment to zoning ordinance which would permit enlargement of facilities at track and his interest vitiated board's approval of amendment; and fact that borough council voted in favor of amendment would not cure infirmity in planning board's action.

N.J.—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

6. Time for recommendation

(1) Under statute and ordinance provisions pertaining to amendment of zoning ordinance, requirement that thirty days elapse before planning commission, board, or officer approve or disapprove proposed amendment is not of the essence of the legislation where rights of persons are not prejudiced.

Ohio.—Brow v. Sherwin-Williams Co., App., 109 N.E.2d 864.

(2) Under Maryland-Washington regional district act, providing that no amendment shall be passed until it be first submitted to commission for approval, disapproval, or suggestions, and providing that commission shall be allowed not less than six months for consideration and report, council's failure to hold application for six months did not invalidate rezoning where council received, before acting, a "suggestion" from the commission that application be held pending outcome of a proposed revised plan.

Md.—Nelson v. County Council for Montgomery County, 136 A.2d 373, 214 Md. 587.

7. U.S.—Leighton v. City of Minneapolis, D.C.Minn., 16 F.Supp. 101.

8. U.S.—Leighton v. City of Minneapolis, supra.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

Purpose of provision of zoning statute authorizing alteration in zoning regulations on consent of two thirds of owners within one hundred feet of realty affected is to enable property owner to secure modification of restriction and to open way for citizens to meet requirements of development and changing conditions.
U.S.—Leighton v. City of Minneapolis, D.C.Minn., 16 F.Supp. 101.

9. Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

10. Hawaii.—Andersen v. Arnold, 30 Hawaii 526.

11. Cal.—Dwyer v. City Council of Berkeley, 253 P. 932, 200 C. 505, followed in Foster v. City Council of City of Berkeley, 255 P. 1118, 201 C. 769.

12. U.S.—Jackson v. Denver Producing & Refining Co., C.C.A.Okl., 96 F.2d 457.

Cal.—Johnston v. City of Claremont, 323 P.2d 71—Dwyer v. City Council of Berkeley, 253 P. 932, 200 C. 505, followed in Foster v. City Council of City of Berkeley, 255 P. 1118, 201 C. 769.

Ohio.—State ex rel. Holmes v. Lauderdalebaugh, App., 149 N.E.2d 33.

Okl.—State ex rel. Hunzicker v. Pulliam, 37 P.2d 417, 168 Okl. 632, 96 A.L.R. 1294.

Effect of prior resolution

Agreement on part of city to co-operate with housing authority in certain respects and to plan or re-plan, zone or rezone, area in city, was merely a resolution to rezone and co-operate with the housing authority, and was not a rezoning ordinance, and hence a rezoning ordinance subsequently passed was not prevented from being subject to referendum under statute providing that a

referendum shall apply only to the first ordinance.

Ohio.—W. B. Gibson Co. v. Warren Metropolitan Housing Authority, 29 N.E.2d 236, 65 Ohio App. 84.

Amendment without protest by referendum

Statutes relating to zoning ordinance referendum and to zoning ordinance amendment will not be construed so as to give township board an opportunity to pass zoning ordinance acceptable to township residents and then after thirty days, without protest by referendum, to amend ordinance in such a way as to be unacceptable to majority of residents.

Mich.—Stadle v. Battle Creek Tp., 77 N.W.2d 329, 346 Mich. 64.

Statute held inapplicable

Resolution which was passed pursuant to statute giving cities power, when exercised in connection with housing projects, to rezone any part of their territory or to make exceptions to building regulations by resolution of their governing bodies, was not subject to referendum provisions of city charter of city which entered into agreement with housing authority, and city's action in rezoning, by resolution, one part of area, which had been first zoned after housing authority obtained approval for development, was valid, even though prior ordinance to same effect had been suspended by referendum.

Cal.—Lockhart v. City of Bakersfield, 267 P.2d 871, 123 C.A.2d 728.

13. U.S.—Jackson v. Denver Producing & Refining Co., C.C.A.Okl., 96 F.2d 457.

Ohio.—State ex rel. Holmes v. Lauderdalebaugh, App., 149 N.E.2d 33—W. B. Gibson Co. v. Warren Metro-

However, a referendum may not be required in the absence of a valid statutory authorization thereof;¹⁴ and it has been held that where the referendum provisions of the statutes apply only to legislative acts and not to administrative or executive matters,¹⁵ they do not apply to an ordinance changing zoning classifications, adopted to carry out the purposes of a comprehensive zoning ordinance,¹⁶ since, as discussed supra § 102, such an action is executive or administrative in character.

An ordinance requiring two-thirds vote of the city council to rezone territory over the protests of a certain per cent of the owners of property in the area to be affected does not apply to direct legislation under the initiative and referendum.¹⁷

Compelling submission of question to voters. Since, where a proper petition for the submission to the electors of the question whether a zoning amendment should be adopted has been filed, the action to be taken by the governing body in submitting the question to the voters is purely administrative,¹⁸ a writ of mandamus will lie to compel the board

to certify such petition so that the question of rezoning can be placed on the ballot.¹⁹

Informal poll. While a municipal governing body may conduct an informal referendum, as by polling votes by letter, and may enact a zoning amendment pursuant to the consensus expressed, such poll or referendum has no binding effect and the full responsibility to enact proper zoning laws remains with the governing body.²⁰

§ 108. — Hearing and Notice

In general, compliance must be had with requirements as to hearing and notice prior to enactment of an amendment to zoning regulations.

Statutes authorizing the amendment by a city of its zoning regulations may contemplate the same careful, serious, and intelligent consideration of an amendment as is required in the preparation and enactment of an original zoning ordinance,²¹ and ordinarily compliance must be had with requirements as to hearing and notice prior to enactment of the amendment.²² In the sense that hearing and

politan Housing Authority, 29 N.E. 2d 236, 65 Ohio App. 84.

14. Provision held invalid

Where charter of the City of New Rochelle was adopted as a local law under the city home rule law, and the city home rule law expressly states the instances where it is mandatory to hold a referendum and sets forth the instances in which a referendum may be secured by petition, without granting any authority to a city to provide for a referendum on a zoning ordinance or an amendment thereto charter section permitting a referendum on amendments to zoning ordinance was invalid. N.Y.—Elkind v. City of New Rochelle, 163 N.Y.S.2d 370, 5 Misc. 2d 296.

15. Neb.—Kelley v. John, 75 N.W.2d 713, 162 Neb. 319.

16. Neb.—Kelley v. John, supra.

17. Cal.—Dwyer v. City Council of Berkeley, 253 P. 932, 200 C. 505, followed in Foster v. City Council of City of Berkeley, 255 P. 1118, 201 C. 769.

18. Ohio.—State ex rel. Holmes v. Lauderbaugh, App., 149 N.E.2d 33.

19. Ohio.—State ex rel. Holmes v. Lauderbaugh, supra.

20. N.J.—Campbell v. Borough of Hillsdale, 79 A.2d 321, 12 N.J. Super. 182.

21. Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202. Mo.—Taylor v. Schlemmer, 183 S.W. 2d 913, 353 Mo. 687.

State ex rel. Cooper v. Cowan, App., 307 S.W.2d 676—Allega v. Associated Theatres, Inc., App., 295 S.W.2d 849—State ex rel. Luechtefeld v. Arnold, App., 149 S.W.2d 384.

22. Cal.—Johnston v. City of Claremont, 323 P.2d 71.

Berkeley Crematory, Inc. v. City of El Cerrito, 303 P.2d 769, 146 C.A.2d 265.

Conn.—Alderman v. Town of West Haven, 200 A. 330, 124 Conn. 391.

Ga.—Sirota v. Kay Homes, Inc., 65 S.E.2d 597, 208 Ga. 113—Jennings v. Suggs, 178 S.E. 282, 180 Ga. 141.

Johnson v. Evangelical Lutheran Church of Messiah, 54 S.E.2d 722, 79 Ga.App. 671.

Kan.—Ford v. City of Hutchinson, 37 P.2d 39, 140 Kan. 307.

Mass.—Nelson v. Town of Belmont, 174 N.E. 320, 274 Mass. 35.

Mo.—Wippler v. Hohn, 110 S.W.2d 409, 341 Mo. 780.

N.J.—Stirling v. City of Plainfield, 53 A.2d 718, 136 N.J.Law 38—Burmore Co. v. Smith, 12 A.2d 353, 124 N.J.Law 541.

N.Y.—Maxwell v. Klaess, 82 N.Y.S.2d 583, 192 Misc. 939.

Paliotto v. Harwood, 173 N.Y.S. 2d 103.

N.C.—Marren v. Gamble, 75 S.E.2d 380, 237 N.C. 680.

Ohio.—State ex rel. Fairmount Center Co. v. Arnold, 84 N.E.2d 777, 138 Ohio St. 259, 136 A.L.R. 840.

State ex rel. Castle National v. Village of Wickliffe, App., 80 N.E. 2d 200, appeal dismissed 74 N.E.2d 270, 148 Ohio St. 410—State ex rel.

Del Monte v. Woodmansee, App., 72 N.E.2d 789.

Okl.—Makrauer v. Board of Adjustment of City of Tulsa, 193 P.2d 291, 200 Okl. 285.

Pa.—Todd v. Norristown Borough, 85 Pa.Dist. & Co. 403, 68 Montg.Co. 302.

In re Zoning Amendment of West Goshen Tp., Quar.Sess., 7 Chest.Co. 133.

Validity of temporary or emergency ordinance enacted without hearing see supra § 19.

Purpose of provision

(1) Statute requiring public hearing and notice thereof to property owners within two hundred feet of property which will be affected by proposed change in zoning ordinance is for protection of property owners and to safeguard them from arbitrary exercise of powers granted by law, and, in absence of such preliminary steps, there is no jurisdiction in governing body of municipality to enact change to zoning ordinance.

Tex.—Tonroy v. City of Lubbock, Civ. App., 242 S.W.2d 816, error refused no reversible error.

(2) Purpose of public hearing, after due advertisement, of proposed change in zoning ordinance is to give interested citizens an opportunity to enter their objections.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Strict compliance

Changes in zoning ordinances affect property rights, and therefore provisions concerning notice of hearing of

notice are required, a proceeding for rezoning is quasi judicial in nature.²³

More specifically, the statutory provisions must be observed with respect to who may or must give

notice,²⁴ to whom it must be given²⁵ and in what manner,²⁶ the time notice must be given in relation to the hearing,²⁷ the time and place for the public hearing,²⁸ the nature and conduct of the hearing,²⁹

such changes must be strictly complied with.

N.Y.—Brachfeld v. Sforza, 114 N.Y.S. 2d 722.

Jurisdictional condition precedent

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

Effect of notice

N.Y.—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939.

Particular ordinance held amendment within requirement

Ordinance whereby city rescinded prior zoning ordinance and established new districts and uses and boundaries throughout whole city purported to amend and change regulations and districts under prior ordinance, and public notice and hearing were required.

N.Y.—Sheffer v. City of Geneva, 147 N.Y.S.2d 401.

Reconsideration at special meeting without new notice

Where meeting of town board was called after notice of public hearing, and meeting was closed after defeat of resolution in favor of proposed amendments of zoning ordinances, and meeting was not adjourned to a further date, or to the call of the chair, reconsideration of proposed zoning amendments at special meeting on later date, without new notice of public hearing, was illegal.

N.Y.—Rabasco v. Town of Greenburgh, 137 N.Y.S.2d 802, 285 App. Div. 895, affirmed 128 N.E.2d 425, 309 N.Y. 735.

23. Ga.—Johnson v. Evangelical Lutheran Church of Messiah, 54 S.E.2d 722, 79 Ga.App. 671.

24. **No particular person designated**
Statute pertaining to notice to be given before amendment to county zoning ordinance is finally adopted does not require that the notice be given by county court clerk, by zoning commission, or by any other particular person.

Tenn.—Clapp v. Knox County, 273 S.W.2d 694, 197 Tenn. 422.

25. N.Y.—Sheffer v. City of Geneva, 147 N.Y.S.2d 401.

Pa.—Putney v. Abington Tp., Quar. Sess., 70 Montg.Co. 102, affirmed 108 A.2d 134, 176 Pa.Super. 463.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

Pendency of suit on validity of prior act

Fact that municipality failed to give personal notice to trial court or to plaintiffs who had instituted suit attacking validity of amendment

to zoning ordinance did not affect powers of municipality to enact a new amendment.

Ill.—Bohan v. Village of Riverside, 138 N.E.2d 487, 9 Ill.2d 561.

Persons rendering property for taxes

Under statute relating to exercise by municipality of its power to enact zoning ordinances and requiring at least ten days' notice of public hearing on proposed change to owners of property within two hundred feet of property affected by change, or to person rendering property located within two hundred feet for taxes, fact that parties who owned property affected had not rendered their property for city taxes at time of enacting amendment to zoning ordinance did not obviate necessity for notice in view of fact that final date for rendering property for taxes for such year had not been reached and fact that there had been entire absence of notice.

Tex.—Tonroy v. City of Lubbock, Civ.App., 242 S.W.2d 816, error refused no reversible error.

26. Pa.—Putney v. Abington Tp., Quar.Sess., 70 Montg.Co. 102, affirmed 108 A.2d 134, 176 Pa.Super. 463.

R.I.—R. I. Home Builders v. Budlong Rose Co., 74 A.2d 237, 77 R.I. 147.

S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

Formal public notice

(1) Informal notice by word of mouth or by news article is not an adequate substitute for required formal public notice to affected owners of the change in zoning ordinance.
N.Y.—Sheffer v. City of Geneva, 147 N.Y.S.2d 401.

(2) Compliance with statutes relating to notice of amendment of zoning bylaw could not be had by informal advertisement in local newspaper and announcement by sound truck of possible reconsideration of zoning question at adjourned town meeting.

Mass.—Fish v. Town of Canton, 77 N.E.2d 231, 322 Mass. 219.

No personal service of notice on neighbor

Where part of defendant's plot previously in residence district was by resolution of city planning commission rezoned, amendment to zoning resolution was not invalidated by fact that notice of hearing was not personally served on neighboring owner of private dwelling.

N.Y.—Elgar v. S. H. Kress & Co., 116 N.Y.S.2d 527, 280 App.Div. 621, ap-

peal dismissed 125 N.E.2d 115, 308 N.Y. 767, vacated 125 N.E.2d 162, 308 N.Y. 773, and reversed on other grounds 127 N.E.2d 325, 308 N.Y. 533.

27. Conn.—Ribeiro v. Town of Andover, 116 A.2d 769, 19 Conn.Sup. 438.

S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

Tex.—Tonroy v. City of Lubbock, 242 S.W.2d 816, error refused no reversible error.

Amendments held invalid

(1) In general.

Conn.—Ribeiro v. Town of Andover, 116 A.2d 769, 19 Conn.Sup. 438.

Pa.—Shender v. Zoning Bd. of Adjustment, 181 A.2d 90, 388 Pa. 265.

(2) Failure to comply with home rule act provision requiring that fifteen days notice be given before hearing on amendment of zoning ordinance rendered ordinance void, even in absence of a showing of prejudice.

Pa.—Kelly v. City of Philadelphia, 115 A.2d 238, 382 Pa. 459.

28. Del.—Klaw v. Pau-Mar Const. Co., 135 A.2d 123.

Pa.—In re Zoning Amendment of West Goshen Tp., Quar.Sess., 7 Chest.Co. 133.

29. Ill.—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507.

Pa.—Todd v. Borough of Norristown, 85 Pa.Dist. & Co. 409, 68 Montg. Co. 302.

"Public hearing" required in passage of amendment of a zoning ordinance means the right to appear and give evidence and the right to hear and examine the witnesses whose testimony is presented by the opposing parties.

Ill.—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507.

Right to examine witnesses under oath

Where ordinance committee of city council held hearing to become informed of pertinent facts concerning proposed amendment to zoning ordinance, its action was not judicial or quasi judicial under enabling statute, and refusal to permit property owners, who opposed amendment, to examine witnesses under oath was not a denial of due process.
R.I.—Smith v. Brock, 118 A.2d 336.

Duty to hear objectors as well as proponents

In hearing on petition to board of county commissioners to rezone suburban land as business property, board did not abuse its discretion by

and, as discussed *infra* § 110, the nature of the proposed change.

§ 109. — — Requirements Imposed by Municipalities

Within statutory limits, municipalities may themselves prescribe details with respect to hearings and notice in the matter of amending zoning regulations which must be complied with, although some authorities hold that such requirements are directory and may be waived.

Within statutory limits laid down, municipalities themselves may prescribe details with respect to hearings and notice in the matter of amending zoning regulations;³⁰ and a statute authorizing cities to provide for notice of proposed zoning changes is mandatory and requires the adoption of such provisions.³¹ It has been held that an amendment, change, or rezoning not passed in accordance with the requirements of a previous ordinance with respect to notice and hearing is invalid.³²

On the other hand, it has also been held that a

zoning ordinance amendment is not invalid for want of public notice and hearing as provided in the original zoning ordinances, where the requirement of notice and hearing is a self-prescribed limitation which may not serve as a delimitation of the greater power vested in the city governing body by the state,³³ that such requirement is merely directory,³⁴ and that it may be waived by the municipal body, and is waived by its action in passing the amendment;³⁵ and a change or amendment is valid notwithstanding such failure, provided the notice prescribed in the enabling statutes is given.³⁶

§ 110. — — Nature of Change Proposed; Variance

The notice must apprise the public of the changes to be made, and the amendment must conform substantially to such proposed changes, although minor or formal variances are immaterial.

The notice must reasonably apprise the public of the essence of the regulations to be adopted, that is, the changes to be made.³⁷ Moreover, the power of

hearing the objectors as well as the proponents.

Wash.—Lillions v. Gibbs, 289 P.2d 203, 47 Wash.2d 629.

Duty to hear residents of adjoining boroughs

Where area embracing several boroughs was built up to such extent that dividing line between them was not noticeable, borough which sought to change a block which bordered on other boroughs from residential zone to business district owed a duty to hear any residents and taxpayers of the adjoining boroughs who might be adversely affected by the proposed zoning change, and to give as much consideration to their rights as it would give to those of its own residents and taxpayers.

N.J.—Borough of Cresskill v. Borough of Dumont, 104 A.2d 441, 15 N.J. 233.

Hearing by commission or committee

Under statute providing that no amendments of zoning ordinance shall be made without a hearing before some commission or committee designated by the corporate authorities, reference of amendments to a standing committee of the city council for hearings was sufficient.

Ill.—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138.

Hearing prior to election of new members

Under provision of enabling statute requiring public hearing before adoption of amendment to zoning ordinance, fact that such hearing was held before election at which several new members of city council were elected did not render void

amendment which was finally adopted by new council after election.

Mass.—Morgan v. Banas, 122 N.E.2d 369, 331 Mass. 694.

Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C. 2d 66.

30. Ill.—Cain v. Lyddon, 175 N.E. 391, 343 Ill. 217.

Ordinance provisions held valid

(1) Rule that city cannot bind itself by ordinance not to do what it may do by ordinance is not violated by provision in city's original zoning ordinance that changes and amendments thereof may be made only after reasonable notice and hearing, since such provision neither prohibits nor unreasonably burdens, hinders, or delays future ordinance action by city board of commissioners.

Okl.—Makrauer v. Board of Adjustment of City of Tulsa, 193 P.2d 291, 200 Okl. 285.

(2) Ordinance prescribing that ordinance amending zoning ordinance shall not be offered for passage until ten days after presentation is not inconsistent with zoning statute and is not invalid as unreasonable.

Ill.—Cain v. Lyddon, 175 N.E. 391, 343 Ill. 217.

31. Ga.—Jennings v. Suggs, 178 S. E. 282, 180 Ga. 141.

32. Cal.—Berkeley Crematory, Inc. v. City of El Cerrito, 303 P.2d 769, 146 C.A.2d 265.

Ga.—Sirota v. Kay Homes, Inc., 65 S.E.2d 597, 203 Ga. 113.

Ill.—Cain v. Lyddon, 175 N.E. 391, 343 Ill. 217.

Okl.—Makrauer v. Board of Adjust-

ment of City of Tulsa, 193 P.2d 291, 200 Okl. 285.

Notice held insufficient

Ga.—Jennings v. Suggs, 178 S.E. 282, 180 Ga. 141.

33. N.Y.—People, on Inf. of Barker, v. Elkin, 80 N.Y.S.2d 525.

34. S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

35. Del.—Boozer v. Johnson, 98 A. 2d 76, 33 Del.Ch. 554.

Fla.—Bregar v. Britton, 75 So.2d 753, certiorari denied Brown v. Britton, 75 S.Ct. 534, 348 U.S. 972, 99 L.Ed. 757.

36. Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

37. Del.—Klay v. Pau-Mar Const. Co., 135 A.2d 123.

Resolution of ambiguity

Any ambiguity in a notice to the public of a hearing to consider changes in zoning ordinance should be resolved against the notice.

N.Y.—Brachfeld v. Sforza, 114 N.Y. S.2d 722.

Notice held sufficient

(1) In general.

N.Y.—In re Durning, 241 N.Y.S. 539, 137 Misc. 173, affirmed Durning v. Reville, 249 N.Y.S. 908, 232 App. Div. 790.

Va.—Claffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41.

(2) Notice which merely stated that certain property would be rezoned from one classification to another, rather than setting forth the specific zoning amendment itself, substantially complied with statute per-

the governing body to amend an ordinance is delimited by the purpose as stated in the notice of hearing;³⁸ and, while a slavish and technical adherence to the notice is not required,³⁹ there cannot be substantial and extensive deviations from the expressed objectives of the hearing.⁴⁰ Thus, in general, the amendment or change adopted must conform substantially to the proposal contained in the notice or warrant;⁴¹ and where there is a substantial variance between the notice and the actual change or amendment such change or amendment is invalid.⁴²

On the other hand, the validity of the amendment or change will not be affected where the variance is minor or merely formal,⁴³ or where the variance is a liberalization of the amendment rather than an enlarged restraint.⁴⁴ Thus, it has been held that requirements as to notice of hearing on the adoption of amendments to a zoning ordinance may be inapplicable to amendments made in the course of passage of an ordinance amending prior regulations;⁴⁵ and, under provisions to that effect, the municipal governing body may, after the hearing, adopt the proposed change, reject it, or amend it and adopt it as amended.⁴⁶

taining to notices of hearing on petition for amendment in county zoning regulations.

Tenn.—Clapp v. Knox County, 273 S. W.2d 694, 197 Tenn. 422.

(3) Where published notice of hearing on question of rezoning certain land, so as to authorize construction of drive-in theater thereon, clearly stated fact that hearing was to be held on an application to rezone land from agricultural to commercial light industrial district, notice was not invalid because it did not contain words "drive-in theater." Fla.—Bregar v. Britton, 75 So.2d 753, certiorari denied Brown v. Britton, 75 S.Ct. 534, 348 U.S. 972, 99 L.Ed. 757.

(4) Notice of a hearing to be had at regular meeting on a certain day sufficiently complied with statutory requirement that commissioners set a time (day and hour) for hearing and give notice thereof to public, notwithstanding given notice did not name the hour numerically. Ga.—Ellis v. Stokes, 61 S.E.2d 806, 207 Ga. 423.

(5) Where requirements for notice and hearing on proposed amendatory zoning ordinance of city were sufficient as to that ordinance, they were also sufficient as to subsequent amendatory zoning ordinance dealing with identical subject matter and correctly describing property which was not correctly described in first amendatory zoning ordinance.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.

Notice held insufficient

(1) Where notice referred only to amending ordinance in relation to "applications and permits and permit fees," amendment which converted certain property owners' absolute right to use property as they had been using it to right conditioned on obtaining certificate of occupancy from building inspector was not validly enacted.

N.Y.—Village of Sands Point v. Sands Point Country Day School, 148 N.Y.S.2d 312, 2 Misc.2d 885,

affirmed 154 N.Y.S.2d 428, 2 A.D.2d 769.

(2) Where notice of public hearing on request for rezoning failed to specify name of municipality or place of hearing as required by statute making a lawful public hearing a condition precedent to the enactment of zoning regulations, and zoning ordinance was subsequently passed, there was fatal defect in notice of hearing which rendered ordinance void.

Miss.—Brooks v. City of Jackson, 51 So.2d 274, 211 Miss. 246.

38. N.Y.—Callanan Road Imp. Co. v. Town of Newburgh, 167 N.Y.S.2d 780, 6 Misc.2d 1071.

39. N.Y.—Callanan Road Imp. Co. v. Town of Newburgh, supra.

40. N.Y.—Callanan Road Imp. Co. v. Town of Newburgh, supra.

41. N.Y.—Paliotto v. Cohalan, 163 N.Y.S.2d 353, 6 Misc.2d 1.

42. N.Y.—Paliotto v. Cohalan, supra.

Amendments held invalid

(1) Where notice of public hearing on amendment of zoning ordinance gave notice of proposal to amend ordinance so as to prohibit quarrying in the entire town, such notice was not sufficient to validate subsequent amendment banning quarrying in entire town except a certain portion thereof.

N.Y.—Callanan Road Imp. Co. v. Town of Newburgh, 167 N.Y.S.2d 780, 6 Misc.2d 1071.

(2) Amendment to town zoning ordinance providing that it would be unlawful to use any land in town for gasoline station purposes would be unlawful if notice of public hearing preliminary to enactment gave no clear notice that an amendment concerning gasoline and service stations would be considered but merely gave notice that town board would hold hearing in connection with an amendment to prohibit used car lots and other specified uses.

N.Y.—Brachfeld v. Sforza, 114 N.Y.S. 2d 722.

43. Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

Changes in amendment held not invalidating

(1) Where amendment to zoning ordinance creating restricted apartment districts was advertised for a public hearing thereon, fact that amendment as finally enacted by council had been further changed by increasing bulk requirements of individual properties did not render amendment invalid on ground that amendment as advertised was not passed.

Del.—Klaw v. Pau-Mar Const. Co., 135 A.2d 123.

(2) Fact that the description of rezoned land in resolution was different from that in published notice was not material, where description in such notice included property described in resolution.

Fla.—Bregar v. Britton, 75 So.2d 753, certiorari denied Brown v. Britton, 75 S.Ct. 534, 348 U.S. 972, 99 L.Ed. 757.

(3) Fact that local commercial zone shown on map included in notice of public hearing on proposed amendment of county zoning ordinance differed from local commercial zone on maps included as part of amended ordinance did not invalidate amended ordinance.

Va.—Claffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41.

44. N.J.—Manning v. Borough of Paramus, 118 A.2d 60, 37 N.J.Super. 574.

Pa.—Todd v. Norristown Borough, 85 Pa.Dist. & Co. 409, 68 Montg.Co. 302.

45. N.J.—Stirling v. City of Plainfield, 53 A.2d 713, 136 N.J.Law 38.

Rezoning of part of tract described

Under provision of enabling statute, authorizing city council, after hearing, to adopt, reject, or amend and adopt proposed zoning ordinance, amendment to zoning ordinance which allegedly rezoned only part of

Where a zoning ordinance has been enacted with a change of use classification, amendments thereto which are germane to the subject matter and are in accordance with the recommendations of the planning commission may be added without further and additional advertisement and public hearing.⁴⁷

§ 111. — Failure to See Notice; Irregularities

The validity of a zoning amendment is not affected by the failure of property owners to see the notice; nor may a property owner object to defects therein where he had an opportunity to be heard; nor may he object to irregularities which did not affect him.

The validity of an amendment of zoning regulations is not affected by the failure of property owners to see the notice where everything required by statute with respect to notice was done;⁴⁸ and a property owner may not object to defects in the notice where he had an opportunity to be heard⁴⁹ and made no objection at the hearing to defects in the notice.⁵⁰

A property owner may not object to mere irregularities in the notice where he was not adversely affected thereby.⁵¹ Thus a published notice of the amendment of a zoning ordinance and of the time and place of the hearing thereon, which is otherwise in full compliance with the statutory requirements, is not invalid merely because there was included in the published notice an erroneous statement of the date on which the ordinance was adopted;⁵² nor is an amendment rendered invalid by the fact that

the statutory time was not allowed between the date of the notice and the date of the hearing, where the parties were not misled thereby to their hurt and injury.⁵³

§ 112. — Evidence

Original zones are presumed well planned, and the burden of proving the need for a change is on the proponents thereof. Action on a rezoning application must be based on, and supported by, competent and substantial evidence.

Since there is a presumption, in proceedings for a zoning change, that the zones established by the original zoning ordinance or regulation were well planned and arranged, and were intended to be permanent,⁵⁴ the proponents of a change in the zoning regulations have the burden of proof as to the need therefor.⁵⁵ Thus, before property is rezoned there should be proof either that there was some mistake in the original zoning or that the character of the neighborhood has changed to such an extent that the reclassification should be granted.⁵⁶

Competency and sufficiency of evidence. Under or apart from provisions to that effect, the action on an application for rezoning must be based on, and supported by, competent and substantial evidence.⁵⁷ The personal knowledge of the members of the body passing on the proposed amendment, or of other persons on whom they rely, cannot be considered as evidence as to whether there has been a change in conditions in the neighborhood or a need for reclassification.⁵⁸

tract originally described in proposed amendment was not thereby rendered invalid.

Mass.—Morgan v. Banas, 122 N.E.2d 369, 331 Mass. 694.

47. Ohio.—Magid v. City of Cleveland Heights, App., 143 N.E.2d 718.

48. Ill.—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507.

Va.—Blankenship v. City of Richmond, 49 S.E.2d 321, 188 Va. 97.

49. Mass.—Pitman v. City of Medford, 45 N.E.2d 973, 312 Mass. 618. N.J.—Closterman v. Cranford Tp., 91 A.2d 646, 22 N.J.Super. 204.

Pa.—Zook v. Winger, Com.Pl., 15 Cambria 221—Labell v. Norristown Borough, Quar.Sess., 73 Montg.Co. 170, 48 Mun.L.R. 310.

50. Mo.—State ex rel. Luechtefeld v. Arnold, App., 149 S.W.2d 384.

N.Y.—North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 115 N.Y.S.2d 670.

No protesters

Fact that amendment to zoning ordinance led to contraction of area could not mislead property owners therein on ground that it lessened the

number of property owners which would have a standing to protest change, where no protesting property owner from proposed district appeared at the hearing.

Del.—Klaw v. Pau-Mar Const. Co., 135 A.2d 123.

51. Mass.—Town of Lexington v. Bean, 172 N.E. 367, 272 Mass. 547. Pa.—Todd v. Borough of Norristown, 85 Pa.Dist. & Co. 409, 68 Montg.Co. 302.

In re Zoning Amendment of West Goshen Tp., Quar.Sess., 7 Chest.Co. 133.

52. N.J.—Closterman v. Cranford Tp., 91 A.2d 646, 22 N.J.Super. 204.

53. Ga.—Ellis v. Stokes, 61 S.E.2d 806, 207 Ga. 423.

54. Md.—Board of County Com'rs of Talbot County v. Troxell, 132 A.2d 845, 214 Md. 135—Kracke v. Weinberg, 79 A.2d 387, 197 Md. 339.

Presumptions as to zoning ordinances in judicial proceedings generally see *infra* § 362.

55. Md.—Board of County Com'rs of Talbot County v. Troxell, 132 A.2d 845, 214 Md. 135.

Miss.—W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 217 Miss. 892.

56. Md.—Nelson v. County Council for Montgomery County, 136 A.2d 373, 214 Md. 587—State Roads Commission v. Warriner, 128 A.2d 248, 211 Md. 480—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Kracke v. Weinberg, 79 A.2d 387, 197 Md. 339.

57. Md.—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136.

Mo.—State ex rel. Horn v. Randall, App., 275 S.W.2d 758.

Tex.—Ham v. Weaver, Civ.App., 227 S.W.2d 286, reversed on other grounds Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

Attorney's remarks held not evidence Mo.—State ex rel. Cooper v. Cowan, App., 307 S.W.2d 676.

Evidence held insufficient to warrant denial of zoning petition

Md.—Hedin v. Board of County Com'rs of Prince Georges County, 120 A.2d 663, 209 Md. 224.

58. Arbitrary action

Denial of petition for rezoning, by

§ 113. — Meetings; Number of Votes Required

There must be a compliance with statutes as to the meetings of the governing body to amend a zoning ordinance, the vote required, and related matters.

With respect to the meeting of the governing body of a municipality for the purpose of amending a zoning ordinance, statutes fixing the vote required and stating requirements as to related matters govern and must be complied with.⁵⁹ Thus, under statutes to that effect, a majority of the membership of the governing body constitutes a quorum.⁶⁰ Moreover, a zoning amendment may be invalid if the requisite vote is not obtained.⁶¹

The number of votes required for the exercise of the power to amend or modify a zoning regulation by a board or commission is discussed infra §§ 121, 122.

Distinction between grant and denial of amendment. Under some statutes there is a distinction in the vote requirements between the granting of a zoning amendment and the denial thereof, in that while the concurrence of a majority of the total membership is necessary to grant a zoning amendment,⁶² such a concurrence is not required to deny a

proposed amendment, a simple majority of those present being sufficient.⁶³

Personal interest of member of body or others. Since the enactment of a zoning change is a legislative act rather than merely quasi-judicial, the change will not be declared void because of the fact that one member of the body was instrumental in having the change passed because of his personal interest in the property,⁶⁴ or because an interested party was present at the deliberations of the authorized body;⁶⁵ but there is also some authority to the contrary.⁶⁶

§ 114. — More than Majority Required

Under some statutes it may be required that a zoning change be adopted by a specified vote of more than a majority, as where the requisite number of property owners have protested such change.

Under statutes so providing, it may be required that a zoning ordinance amendment be adopted by a specified vote of more than a majority,⁶⁷ as where statutes so provide with respect to cases where a certain per cent of the interested property owners have protested the proposed amendment.⁶⁸ Accordingly, where such a protest is filed, it may be neces-

board of county commissioners, apparently almost entirely on personal opinion of one of its members, without support for the opinion in evidence, was arbitrary action entitling petitioner to some form of relief in equity.

Md.—Hedin v. Board of County Com'rs of Prince Georges County, 120 A.2d 663, 209 Md. 224.

59. N.Y.—Steers Sand & Gravel Corp. v. Village Bd. of Village of Northport, 129 N.Y.S.2d 403.

60. N.Y.—Steers Sand & Gravel Corp. v. Village Bd. of Village of Northport, supra.

61. U.S.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

Vote held sufficient

Conn.—Mallory v. Town of West Hartford, 86 A.2d 668, 138 Conn. 497.

62. N.Y.—Steers Sand & Gravel Corp. v. Village Bd. of Village of Northport, 129 N.Y.S.2d 403.

63. N.Y.—Steers Sand & Gravel Corp. v. Village Bd. of Village of Northport, supra.

64. Va.—Blankenship v. City of Richmond, 49 S.E.2d 321, 188 Va. 97.

65. Warden present but not voting
Facts that warden's father's half-sister was the mother-in-law of an agent who assisted applicants for

zone change in negotiations for motel and gasoline stations, and that warden was present at executive session voting change, did not invalidate action of court of burgesses in changing zone.

Conn.—Hamelin v. Zoning Bd. of the Borough of Wallingford, 117 A.2d 86, 19 Conn.Sup. 445.

66. Pa.—Appeal of Bristol Tp. Zoning Ordinance, Quar.Sess., 7 Bucks Co. 61.

67. Tex.—City of Alamo Heights v. Gerety, Civ.App., 264 S.W.2d 778, refused no reversible error.

Four-fifths approval required
Mass.—McHugh v. Board of Zoning Adjustment of Boston, 147 N.E.2d 761.

Different treatment from basic ordinances

Where statute authorizing villages and certain cities to enact comprehensive zoning ordinances provided that thereafter council could alter the regulations or plans, and that such alterations could only be made by two-thirds vote of all members of governing body, statute would be construed to manifest intent that alterations or amendments were to be treated differently from comprehensive zoning ordinances themselves.

Minn.—Minneapolis-Honeywell Regulator Co. v. Nadasdy, 76 N.W.2d 670, 247 Minn. 159.

Disqualified member not voting

Under statute requiring a favor-

able vote of three fourths of "all members of the legislative body" of the municipality for rezoning, quoted phrase means the same as members of the whole council, and hence where at hearing all five aldermen were present but one disqualified himself for interest, and three voted in favor of rezoning, the rezoning carried, since the statute required only three fourths of the four votes and not three fourths of the five.

Tex.—City of Alamo Heights v. Gerety, Civ.App., 264 S.W.2d 778, refused no reversible error.

68. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, Mo., D.C.Mo., 54 F.2d 1071, reversed on other grounds, C.C.A., 58 F.2d 593.

N.J.—Durrwachter v. Mayor & Council of Borough of Fair Lawn, 55 A.2d 832, 136 N.J.Law 314.

N.Y.—Rabasco v. Town of Greenburgh, 137 N.Y.S.2d 802, 285 App. Div. 895, affirmed 128 N.E.2d 425, 309 N.Y. 735.

Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

Zoning ordinance held void in so far as it authorized amendment by only majority vote of aldermen instead of three-fourths vote required by statute in case of protest by land-owners.

U.S.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

sary that the amendment be adopted by the governing body by a three-fifths vote,⁶⁹ by a three-fourths vote,⁷⁰ or even by a unanimous vote;⁷¹ but adoption by a vote of more than a majority ordinarily is not required where the requisite protests have not been filed.⁷²

Sufficiency of protests; property owners eligible.

69. R.I.—Rhode Island Episcopal Convention v. City Council of Providence, 159 A. 647, 52 R.I. 182.

70. N.J.—Durrwachter v. Mayor & Council of Borough of Fair Lawn, 55 A.2d 832, 136 N.J.Law 314.

N.Y.—Bowen v. Hider, 37 N.Y.S.2d 76.

Pa.—Kelly v. City of Philadelphia, 115 A.2d 238, 382 Pa. 459.

Putney v. Abington Tp., 108 A. 2d 134, 176 Pa.Super. 463.

Appeal of Radnor, Ithan and St. David's Civic Ass'n, 5 Pa.Dist. & Co.2d 156, 41 Del.Co. 396—Grabosky v. McLaughlin, 36 Pa.Dist. & Co. 215.

Appeal of Bristol Tp. Zoning Ordinance, Quar.Sess., 7 Bucks Co. 51—Levitt & Sons, Inc. v. Bristol Tp., Quar.Sess., 4 Bucks Co. 230.

Requirement held valid

Zoning ordinance providing that amendment thereto, if protested by owners of twenty per cent or more of frontage of certain affected property, shall become effective only on three-fourths vote of municipal legislative body is not unconstitutional as constituting an unlawful delegation of legislative power to private individuals.

Mich.—Northwood Properties Co. v. Perkins, 39 N.W.2d 25, 325 Mich. 419.

Strict construction

Statute providing that three-fourths vote of council shall be required to pass amendment of zoning regulations if protest duly signed and acknowledged by owners of twenty per cent or more of area of land included in proposed change be presented is a limitation on general legislative powers of the common council and must be strictly construed.

N.Y.—Viscusi v. City of Schenectady, 100 N.Y.S.2d 791, 198 Misc. 732.

Statutory requirement

(1) Statute authorizing zoning ordinances was held self-executing in so far as it provided for amendment of regulations by three-fourths vote of municipality's legislative body in case of protest by landowners, and hence amending ordinance, having been unanimously adopted, was properly enacted, notwithstanding invalid provision of original zoning ordinance purporting to authorize amendment by only majority vote of aldermen.

U.S.—Geneva Inv. Co. v. City of St.

Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U. S. 692, 81 L.Ed. 1348.

(2) Statute providing that in case of protest an amendment to, or change in, a zoning regulation shall not become effective except by favorable vote of three fourths of all members of municipal legislative body was required to prevail over ordinance providing that in case of protest such an amendment or change shall become effective by favorable vote of a majority of all city commissioners.

N.C.—Eldridge v. Mangum, 5 S.E.2d 721, 216 N.C. 532.

Three fourths of all members

For purposes of statute requiring a three-fourths vote of municipal governing body as a prerequisite to effectiveness of zoning ordinance amendment when a protest complying with statute has been filed, an affirmative vote by three fourths of all members of governing body, rather than a mere three-fourths vote of a quorum of such governing body is required.

Fla.—Streep v. Sample, 84 So.2d 586.

N.Y.—Rabasco v. Town of Greenburgh, 137 N.Y.S.2d 802, 285 App. Div. 895, affirmed 128 N.E.2d 425, 309 N.Y. 735.

71. N.Y.—McCabe v. City of New York, 23 N.E.2d 529, 281 N.Y. 349.

Palmer v. Mann, 201 N.Y.S. 525, 206 App.Div. 484.

Dole v. City of New York, 44 N.Y.S.2d 250, 182 Misc. 408.

Validity of provision

Requirement of unanimous vote of board of estimate for amendment of zoning resolution, where property owners protest, held not illegal delegation of governmental power.

N.Y.—Fortieth St. & Park Ave. v. Walker, 234 N.Y.S. 703, 133 Misc. 907.

Legislative intent

Provision for unanimous action by a governing body like the board of estimate of the city of New York is extraordinary and it should only be invoked when demanded by a clear, unambiguous expression of legislative policy and intent.

N.Y.—431 Fifth Ave. Corp. v. City of New York, 55 N.Y.S.2d 203, 184 Misc. 1001, modified on other grounds 59 N.Y.S.2d 25, 270 App. Div. 241, affirmed 68 N.E.2d 877, 296 N.Y. 588.

In order to render operative statutory provisions requiring approval of a zoning amendment by the governing body by more than a majority vote in case of protests by certain property owners, the protests must be made by the requisite percentage of the property owners eligible to protest,⁷³ must be properly executed,⁷⁴ must be made within the prescribed time,⁷⁵ and must be filed with the appropriate

72. Md.—Montebello Land Co. v. Frank Novak Realty Co., 172 A. 911, 167 Md. 185.

Pa.—Putney v. Abington Tp., 108 A. 2d 134, 176 Pa.Super. 463.

Unanimous vote not required

N.Y.—Morrill Realty Corporation v. Rayon Holding Corporation, 172 N.E. 494, 254 N.Y. 268.

Nappi v. LaGuardia, 55 N.Y.S.2d 80, 184 Misc. 775, affirmed 54 N. Y.S.2d 722, 269 App.Div. 693, affirmed 64 N.E.2d 716, 295 N.Y. 652.

73. Protest by insufficient percentage

Under statute requiring that amendment to building zone ordinance must be adopted by four members of town board if twenty per cent of owners of land in specified area protest amendment, vote of 3-1 was sufficient to adopt amendment rezoning area from residential to commercial, where protest was actually signed by less than twenty per cent of owners in surrounding area as result of one of owners signing protest only as individual and failing to indicate he was also attorney in fact for another property owner; and residential property owner could not supplement protest which had insufficient number of signatures by adding signature of another property owner whose power of attorney he held but use of which he had not indicated on protest.

N.Y.—Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220.

74. Protest not acknowledged

Under the statute providing that common council may amend zoning laws by majority vote unless protest against proposed change duly signed and acknowledged by owners of twenty per cent or more of area of land included in proposed change be presented, and that in such event amendment must be passed by three-fourths vote, protest which was not acknowledged was insufficient, and majority vote was adequate to pass valid ordinance.

N.Y.—Viscusi v. City of Schenectady, 100 N.Y.S.2d 791, 198 Misc. 732.

75. N.Y.—McCabe v. City of New York, 10 N.Y.S.2d 383, 170 Misc. 325, reversed on other grounds 13 N.Y.S.2d 676, 257 App.Div. 1010, reversed on other grounds 23 N.E. 2d 529, 281 N.Y. 349.

Protest filed after hearing

(1) Affected property owners' writ-

body.⁷⁶

The computation of the protesting per cent should be made in accordance with the provisions of the statute;⁷⁷ and under such provisions the property owners whose protests are to be considered may in-

clude those owning property within the area of land included in the proposed change,⁷⁸ or immediately adjacent,⁷⁹ or within a certain distance thereof,⁸⁰ or those owning frontage immediately in the rear of,⁸¹ or directly opposite to,⁸² the land involved or affected.⁸³

ten protest filed a week after date fixing for hearing on proposed zoning changes was not timely filed under statute requiring protest to be offered or presented before or at the time of the hearing.

S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

(2) However, under other statutes it was held not necessary that protest be filed on date fixed by notice for consideration of application for rezoning, and it was sufficient that protest had been before commissioner at time rezoning was approved.

Fla.—Streep v. Sample, 84 So.2d 586.

76. N.Y.—McCabe v. City of New York, 23 N.E.2d 529, 281 N.Y. 349.

Board of estimate

Filing of protests against changes in zoning regulations with board of estimate, instead of city planning commission, is sufficient.

N.Y.—McCabe v. City of New York, supra.

77. N.J.—Durrwachter v. Mayor & Council of Borough of Fair Lawn, 55 A.2d 832, 136 N.J.Law 314.

N.Y.—431 Fifth Ave. Corp. v. City of New York, 59 N.Y.S.2d 25, 270 App. Div. 241, affirmed 68 N.E.2d 877, 296 N.Y. 583.

"Streets"

Under city charter providing for amendment of zoning regulation, city has the right to base its computation of protesting per cent of property owners on "streets" as set forth on the city map and is not required to base computation on "public streets" or "streets in use" and hence could include a private street that did not appear on the city map during zoning proceedings, although it had appeared on a city map from 1895 to 1939.

N.Y.—Dole v. City of New York, 44 N.Y.S.2d 250, 182 Misc. 408.

Owners of twenty per cent of land, not twenty per cent of owners

Protest against amendment of village zoning ordinance by twenty per cent of owners of land in village adjacent to estate affected by amendment was insufficient to require unanimous vote of village board of trustees in favor of amendment, under Village Law, to render amendment legal, such protest not being within statutory specifications requiring signature of protest by owners of twenty per cent of land included in proposed change, immediately adjacent land, or land directly opposite rezoned land, in order to

require unanimous vote of trustees.

N.Y.—Hermann v. Incorporated Village of East Hills, 104 N.Y.S.2d 592, affirmed 109 N.Y.S.2d 182, 279 App.Div. 753, appeal denied 110 N.Y.S.2d 283, 279 App.Div. 799.

78. N.Y.—431 Fifth Ave. Corp. v. City of New York, 59 N.Y.S.2d 25, 270 App.Div. 241, affirmed 68 N.E.2d 877, 296 N.Y. 583.

Separable areas

Where residential use districts and retail use districts were differently affected by amendment, they were separable areas in ascertaining area of land included in proposed change.

N.Y.—431 Fifth Ave. Corp. v. City of New York, supra.

Frontage

(1) Opposition to resolution of board of estimate and apportionment creating new retail district, to be effective, must be made by owners of twenty per cent of entire frontage of whole new district.

N.Y.—Morrill Realty Corporation v. Rayon Holding Corporation, 240 N.Y.S. 38, 135 Misc. 845, affirmed 241 N.Y.S. 918, 229 App.Div. 760, affirmed 172 N.E. 494, 254 N.Y. 268.

(2) The "frontage proposed to be altered" by adoption of amendatory ordinance did not embrace entire block on side of street on which lot was located, within statute authorizing a protest by owners of frontage proposed to be altered.

N.Y.—Bowen v. Hider, 37 N.Y.S.2d 76.

79. Separation by railroad right of way

Where the property of landowners who protested zoning change was separated from the land in question by a railroad right of way, the protestants' land was not "immediately adjacent" to the land in question, within statute providing that when sufficient landowners of immediately adjacent land protest change, zoning amendments must be passed by three-fourths vote of the board of commissioners.

Pa.—Putney v. Abington Tp., 108 A.2d 134, 176 Pa.Super. 463.

80. N.Y.—Deligitsch v. Town of Greenburgh, 135 N.Y.S.2d 220.

Amendment of application to create buffer zones

(1) Where applicant for a zoning change amends application by creating buffer zones of one hundred feet between properties of protesting adjacent owners and property for

which change is sought, such action avoids that section of the township code and of the township zoning ordinance requiring a three-fourths vote in order to approve a requested change where twenty per cent or more of adjacent owners, whose property is within a distance of one hundred feet of the property proposed to be changed, file a protest.

Pa.—Appeal of Radnor, Ithan and St. David's Civic Ass'n, 5 Pa.Dist. & Co.2d 156, 41 Del.Co. 396.

(2) Creation of such buffer zones, although in fact an avoidance of the cited sections of the code and ordinance, is not an evasion thereof, and authorize the township commissioners to approve the change by a simple majority instead of a three-fourths vote.

Pa.—Appeal of Radnor, Ithan and St. David's Civic Ass'n, supra.

81. N.Y.—Bowen v. Hider, 37 N.Y.S.2d 76.

Property included

(1) "Frontage immediately in rear", within statute authorizing a protest against proposed amendment altering zoning district by owners of the frontage immediately in the rear of frontage proposed to be altered, embraces street frontage of those plots in single ownership which lie immediately outside of and adjoining boundary line of property which it is proposed should be altered.

N.Y.—Bowen v. Hider, supra.

(2) "Frontage immediately in rear" includes frontage of plot in single ownership adjoining boundary of property proposed to be altered, "frontage" denoting line of property on street.

N.Y.—Smidt v. McKee, 186 N.E. 869, 262 N.Y. 373.

Per cent of total rear frontages

Per cent that rear protesting frontages bear to total rear frontages and not to total frontages to be altered determines whether amendment altering zoning district must be passed by unanimous vote of board of estimate and apportionment.

N.Y.—Nichols v. O'Brien, 267 N.Y.S. 7, 149 Misc. 280.

82. N.Y.—Bowen v. Hider, 37 N.Y.S.2d 76.

83. Particular lots which may possibly be affected

Where zoning ordinance amendment permitting erection in a residential zone of parochial as well as public schools was general in nature and affected all residential property

Where numerous changes affecting different districts are made by different sections of an amendatory regulation, each of these separate sections should be considered as though it had been separately enacted with respect to the right of protest of property owners of a certain per cent of the area of land included in the proposed change;⁸⁴ and in such case it may not be urged that, since the regulation is comprehensive and city-wide, protests are required from the prescribed per cent of the area of the land in all of the districts affected by any provision of the amendment.⁸⁵

§ 115. — Filing and Publication

While under some statutes it is not required that a copy of the amendment be filed with the clerk after its adoption, or that notice be given to the property owner, under other statutes the amendment must be published and posted.

Under some statutes it is not required that a copy of the amendment or of the plan be filed in the clerk's office after adoption of the amendment,⁸⁶ and notice to the property owner of the enactment of the amendment is not necessary to make the amendment effective as to such property.⁸⁷

On the other hand, where requirements as to publication and posting of the ordinance are im-

posed by statute, they must be complied with,⁸⁸ where the statute is applicable;⁸⁹ and the amendment will not become effective until it is published.⁹⁰ However, under some statutes, it has been held that the ordinance is not rendered invalid by delayed publication, in the absence of a showing that someone was harmed thereby.⁹¹

Entire ordinance or amendment only. Where there has been a general amendment of the zoning ordinance, the entire ordinance must be published; but, if the amendment is not general, publication of the particular amendment only is sufficient.⁹²

§ 116. By Board or Commission

Where a board or commission is authorized to change or modify zoning regulations, statutory provisions prescribing the manner of exercising such power are the measure of the power of the board or commission to act and must be complied with, as with respect to the initiation of the proceeding, successive applications, the filing of the proposed change with the clerk, and the publication and posting of the adopted amendment.

Where a board or commission is authorized to change or modify zoning regulations, the method prescribed by statute for exercising such power is the measure of the power of the board or commission to act.⁹³ Thus, the board or commission must

within a village, and not merely two specific lots, in absence of proof of protest by the owners of twenty per cent of the total area affected, there was no necessity for adoption of the amendment to be unanimous despite protest of owners of twenty per cent of the land immediately adjacent or directly opposite to two certain lots which might be devoted to parochial purposes.

N.Y.—Hoelzer v. Incorporated Village of New Hyde Park, 150 N.Y.S.2d 765, 4 Misc.2d 96.

84. N.Y.—431 Fifth Ave. Corp. v. City of New York, 59 N.Y.S.2d 25, 270 App.Div. 241, affirmed 88 N.E.2d 877, 296 N.Y. 588.

85. N.Y.—431 Fifth Ave. Corp. v. City of New York, *supra*.

86. Conn.—Osborn v. Town of Darien, 175 A. 578, 119 Conn. 182.

87. Conn.—Osborn v. Town of Darien, *supra*.

88. N.Y.—Pressel v. Ferris, 266 N.Y.S. 517, 148 Misc. 910.

Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220.

Sufficiency of publication prior to amendment in requirements

Where statute requiring that amendments to zoning ordinances must be published once a week for two consecutive weeks and be posted in six public places in town for not less than ten days was amended, on

July 1, 1952, by statute requiring a single publication and posting only on town clerk's sign board, amendment did not validate zoning ordinance amendments which were void for lack of proper publication prior to July 1, 1952.

N.Y.—North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 115 N.Y.S.2d 670.

89. N.Y.—North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 129 N.Y.S.2d 697, affirmed 153 N.Y.S.2d 579, 1 A.D.2d 1043.

Statute inapplicable to unincorporated village

N.Y.—O'Beirne v. Koehler, 83 N.Y.S.2d 140, 193 Misc. 101.

Nature of change

Under provisions to that effect, the statute applicable depends on whether the amendment involves broad basic changes of zoning or modifications of lesser degree.

N.Y.—North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 129 N.Y.S.2d 697, affirmed 153 N.Y.S.2d 579, 1 A.D.2d 1043.

90. *Amendment as to grant of exceptions*

Amendment to building zone ordinance so as to provide that certain special exceptions formerly granted by board of appeals should be granted only by action of town board

would not become effective until published.

N.Y.—Gordon v. Town of Hempstead, 93 N.Y.S.2d 250, 196 Misc. 954.

91. *Validity not dependent on publication*

Where city charter specified no time for publication of city ordinance and did not provide that an ordinance would be invalid unless or until it was published, fact that amendatory zoning ordinance of city was not published until eight and one half months after ordinance was passed, did not render the ordinance invalid, in absence of showing that someone was harmed by the delay.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.

92. N.Y.—Pressel v. Ferris, 266 N.Y.S. 517, 148 Misc. 910.

93. Conn.—Low v. Town of Madison, 60 A.2d 774, 135 Conn. 1—Strain v. Mims, 193 A. 754, 123 Conn. 275.

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 307 Ky. 362.

Jurisdictional prerequisites

Compliance with provisions of zoning regulations of town permitting change in zone was a prerequisite to any valid and effective change in zone boundaries, and failure to comply with required steps constituted a jurisdictional defect.

Conn.—Hutchison v. Board of Zoning

exercise its powers reasonably⁹⁴ and in accordance with the statutory procedures and requirements of law.⁹⁵

Nevertheless, the proceedings before the administrative body are essentially informal in their nature.⁹⁶

Nature of proceeding as legislative. While the modification of zoning regulations by a commission partakes of the nature of a legislative proceeding,⁹⁷ nevertheless it is not legislative in the broad sense but, on the contrary, the power emanates from a

specific grant and the manner of its exercise is limited.⁹⁸

Initiation of proceeding. In the absence of statutory restrictions, any property owner may apply to the zoning board or commission for an amendment or change of zoning regulations;⁹⁹ and, where the proceeding for a proposed change or amendment may be initiated by the petition of a property owner or by the commission itself on its own initiative, the fact that the petition of a property owner is defective or irregular will not affect the validity of the action taken by the commission.¹

Appeals of Town of Stratford, 83 A.2d 201, 138 Conn. 247.

Veto power of mayor

Under charter granting mayor veto power over every "resolution . . . adopted or passed" by city planning commission, veto power held not conferred where approval of rezoning application automatically resulted from commission's inaction; hence proceedings were not void for failure of commission to certify inaction to mayor.

Cal.—*Belli v. Board of Sup'rs of City and County of San Francisco*, 10 P.2d 793, 123 C.A. 44.

Statement of reason

The commission or board is not required to state the reason in an order changing the boundaries of the districts as revised by a previous order.

Mass.—*Ayer v. Boston Comrs. on Height of Bldgs.*, 136 N.E. 338, 242 Mass. 80.

94. Conn.—*Mills v. Town Plan and Zoning Commission of Town of Windsor*, 134 A.2d 250, 144 Conn. 493.—*Low v. Town of Madison*, 60 A.2d 774, 135 Conn. 1.

Ascertainment of facts

Obligation of zoning board as regards changing zoning district boundaries was to ascertain relevant facts and apply statute to them according to board's judgment for general public welfare as well as for private interests.

Mass.—*Fandel v. Board of Zoning Adjustment of Boston*, 182 N.E. 343, 280 Mass. 195.

95. Conn.—*Couch v. Zoning Commission of Town of Washington*, 106 A.2d 173, 141 Conn. 349.

Record; reasons for change

Where municipal zoning commission increased minimum size permissible for building lots in all various zones of municipality, and record of zoning commission showed that change was made in order to provide larger areas for sewage disposal and by so doing to lessen danger to residential water supply, commission's record set forth facts which were sufficient for compliance with statu-

tory requirement that its record shall state reason why such change is made.

Conn.—*De Mars v. Zoning Commission of Town of Bolton*, 115 A.2d 653, 142 Conn. 580.

96. Conn.—*Village Builders, Inc. v. Town Plan and Zoning Commission of the Town of Farmington*, 140 A.2d 477, 145 Conn. 213.

Ky.—*Louisville & Jefferson County Planning & Zoning Commission v. Ogden*, 210 S.W.2d 771, 307 Ky. 362.

97. Conn.—*Mills v. Town Plan and Zoning Commission of Town of Windsor*, 134 A.2d 250, 144 Conn. 493.—*Kutcher v. Town Planning Commission of Town of Manchester*, 88 A.2d 533, 138 Conn. 705.—*Low v. Town of Madison*, 60 A.2d 774, 135 Conn. 1.

Appeal rules held inapplicable

Rules applicable to an appeal board do not necessarily apply to the actions of a legislative body such as a zoning commission.

Conn.—*Suffield Heights Corp. v. Town Planning Commission of Town of Manchester*, 133 A.2d 612, 144 Conn. 425.

Quasi-judicial function

Function of commission in modifying regulations is partly quasi-judicial and, while proceeding before commission may be informal, its decisions carry presumption of fairness and correctness.

Ky.—*Louisville & Jefferson County Planning & Zoning Commission v. Ogden*, 210 S.W.2d 771, 307 Ky. 362.

98. Conn.—*Mills v. Town Plan and Zoning Commission of Town of Windsor*, 134 A.2d 250, 144 Conn. 493.—*Low v. Town of Madison*, 60 A.2d 774, 135 Conn. 1.

Strict rules of judicial procedure are not imposed with respect to inquiries by members of zoning board while adopting zoning changes.

Mass.—*Fandel v. Board of Zoning Adjustment of Boston*, 182 N.E. 343, 280 Mass. 195.

99. Ky.—*Hatch v. Fiscal Court of Fayette County*, 242 S.W.2d 1018.

Nature of "property" owned

In statute authorizing property owners to seek amendment of zoning regulations, "property" was used in embracive sense as including everything which is subject of ownership; and a corporation which did not own land in city, but owned long-term lease and considerable personal property, could apply as a "property owner" for amendment of zoning regulations.

Conn.—*Winslow v. Zoning Bd. of City of Stamford*, 122 A.2d 789, 143 Conn. 381.

Holder of option to purchase realty had right to make application to city and county zoning commission to have residence district reclassified to a business district.

Ky.—*Hatch v. Fiscal Court of Fayette County*, 242 S.W.2d 1018.

Failure to object to overall plan

Where property owner was told by chairman of town plan and zoning commission that property owner's failure to object to overall plan of a proposed zoning ordinance would not prejudice his right to appear before commission on petition for change of zone of his property, such statement by chairman created no rights in property owner beyond those enjoyed by citizens at large.

Conn.—*Eden v. Town Plan and Zoning Commission of Town of Bloomfield*, 89 A.2d 746, 139 Conn. 59.

1. N.Y.—*Rosenzweig v. Crinnton*, 139 N.Y.S.2d 172, appeal dismissed 148 N.Y.S.2d 912, 286 App.Div. 1066.

Application disregarded as limiting time to act

Fact that request for rezoning was first brought to planning commission's attention by letter dated within time prescribed by New York City Charter for filing of applications for changes in resolutions or regulations did not require that the request be treated as a formal application under this section, which limits time within which commission may act, and commission could act under charter section authorizing it to adopt a resolution at any time.

Successive applications; effect of prior action. The action taken on a previous application for reclassification does not ordinarily prevent the zoning commission from entertaining another application after the lapse of a reasonable time.²

Filing of proposed change. Under a statute so providing, the zoning commission must file a copy of the proposed change of zonal boundaries in the office of the town clerk for public inspection at least a specified period of time before the public hearing;³ and a failure to do so will render the attempt to change the zonal boundaries invalid.⁴

Publication and posting. Statutory provisions as to publication and posting of the adopted amendment, or other provisions as to notice thereof, must be complied with.⁵

§ 117. — Submission of Changes to Other Bodies

Under some provisions the action taken by the board or commission in making zone changes must be submitted to the governing body for consideration or approval, or the proposed change must be submitted to the planning board before consideration by the local board.

N.Y.—*Fieldston Garden Apartments v. City of New York*, 145 N.Y.S.2d 907, 7 Misc.2d 147, affirmed 163 N.Y.S.2d 402, 3 A.D.2d 903.

Independent investigation by commission

Where property owners' petition to city planning commission concerning zoning change did not comply with procedure required under New York City charter, but commission made an independent investigation, determined that changes were needed, and made a use change in addition to area change sought by petition, such changes were valid in view of fact that charter elsewhere authorized commission to make such changes on its own initiative.

N.Y.—*Rosenzweig v. Crinnion*, 139 N.Y.S.2d 172, appeal dismissed 148 N.Y.S.2d 912, 286 App.Div. 1066—*Rosenzweig v. Crinnion*, 126 N.Y.S.2d 692.

2. Conn.—*Suffield Heights Corp. v. Town Planning Commission of Town of Manchester*, 133 A.2d 612, 144 Conn. 425.

Prior action not conclusive; change of conditions

(1) Notwithstanding determination of Zoning Commission of District of Columbia that classification of plaintiffs' property should not be changed from residential to commercial, if, after reasonable time elapsed, a new application was made to zoning commission based on a showing of intervening occurrences and changed conditions, commission would not be entitled to regard its previous action

and the affirmance of its action by the court as conclusive against the plaintiffs.

D.C.—*Lewis v. District of Columbia*, 190 F.2d 25, 89 U.S.App.D.C. 72.

(2) Town zoning commission which had refused to grant application for change of zone at earlier hearing could reverse itself at second hearing after there was a substantial change in conditions owing to construction in adjacent business zones. Conn.—*Suffield Heights Corp. v. Town Planning Commission of Town of Manchester*, 133 A.2d 612, 144 Conn. 425.

3. Conn.—*State ex rel. Capurso v. Flis*, 133 A.2d 901, 144 Conn. 473.

4. Conn.—*State ex rel. Capurso v. Flis*, supra.

5. Conn.—*State ex rel. Capurso v. Flis*, supra.

Notice of date of change

Compliance with statutory procedure requiring that notice of the effective date of change be published at least seven days before the date fixed by commission as the effective date was a prerequisite to any valid and effective change in zonal boundaries.

Conn.—*State ex rel. Capurso v. Flis*, supra.

Statute held inapplicable

While publication and posting are required in the case of zoning amendments enacted by villages, they are not required for the action of a town. N.Y.—*O'Beirne v. Koehler*, 83 N.Y.S.2d 140, 193 Misc. 101.

Under some provisions, the action taken by the commission in making zoning changes must be submitted to the municipal legislative or governing body for consideration or approval.⁶

Submission of changes to planning board. Under provisions to that effect, a proposed zoning amendment must be submitted to the planning board, which prepared and controls the master zoning plan, before it can be acted on by the local zoning board.⁷

§ 118. — Consent of Property Owners

Under some statutes, a provision requiring the consent of a specified per cent of certain owners of property is not a jurisdictional requirement on which the power of the amending body to act is dependent.

Under some statutes to that effect, such as a statute giving the zoning commission the privilege of instituting a zoning change either on its own motion or on the urging or petition of a person,⁸ a provision requiring the consent of a specified per cent of the owners of property within a certain distance of the proposed change is not a jurisdictional requirement on which the power of the amending body to act is dependent,⁹ but is a limitation on the right

6. Rule as postponing effective date of change

Under provision of New York City charter that resolution adopted by city planning commission be filed with secretary of board of estimate within five days from its adoption, and that unless board modifies or disapproves resolution within thirty days it shall thereupon take effect, except that if protest is theretofore presented resolution shall not be effective unless approved by board by unanimous vote, zoning change did not take effect on date of filing of zoning resolution of planning commission with board.

N.Y.—*Bentrovato v. Crinnion*, 133 N.Y.S.2d 120, 206 Misc. 648.

7. Particular amendments not within rule

Charter provisions requiring proposed zoning amendment to be submitted to planning board do not require such submission if subject matter involves only a relaxation of restrictions upon a presently permitted land use.

Conn.—*Winslow v. Zoning Bd. of City of Stamford*, 122 A.2d 789, 143 Conn. 381.

8. Ariz.—*Hart v. Arganese*, 313 P.2d 756, 82 Ariz. 380.

9. Ariz.—*Hart v. Arganese*, supra.

Withdrawal of consents

Withdrawal of consent of any number of signatories from petition at any stage of proceeding has no effect on jurisdiction of either commission

of a person to have his petition for a zoning change heard by such body.¹⁰

§ 119. — Hearing and Notice

The board or commission must exercise its powers in accordance with statutory requirements with respect to hearings and notice thereof.

The board or commission authorized to change or modify zoning regulations must exercise its powers in accordance with statutory requirements with re-

spect to hearings¹¹ and notice thereof;¹² and the failure to comply with hearing and notice requirements renders invalid not only the particular change made, but also all subsequent zone changes dependent thereon.¹³

Contents of notice; sufficiency. The notice should be sufficient and clear to inform the public or parties interested of the proposed change;¹⁴ and where the notice is insufficient the amendment is invalid,¹⁵ unless the insufficiency is cured, as by sub-

or board to act on proposed zoning change.

Ariz.—Hart v. Arganese, *supra*.

10. Ariz.—Hart v. Arganese, *supra*.

11. Conn.—National Transp. Co. v. Toquet, 196 A. 344, 123 Conn. 468.

Mass.—Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston, 101 N.E.2d 888, 328 Mass. 103.

Purpose of public hearing required by statute to be held before enactment of change in zoning regulations or boundaries was to inform members of zoning commission as to reasons why change should or should not be made.

Conn.—Strain v. Mims, 193 A. 754, 123 Conn. 275.

Time of hearing

Requirement of public hearing on petitions to amend zoning regulations is mandatory, but provision for such hearing within 60 days is merely directory and jurisdiction is not lost by delay.

Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381.

Tentative action before hearing

Zoning commission of town, which was considering proposed change in zoning regulations, could, prior to public hearing required by statute, take tentative action affecting the proposed change; and where zoning commission of town held a public meeting to consider question of change in zoning regulations, and all persons present had an opportunity to speak against adoption of new zones, and commission did not register its official vote on the change until hearing had been held, change made by commission was not invalid on ground that commission voted to make the change before the hearing was held, even though meaning of minutes of meetings of commission might be stretched to support claim that members of commission had made up their minds before meeting was held.

Conn.—Couch v. Zoning Commission of Town of Washington, 106 A.2d 178, 141 Conn. 349.

Communications after hearing

Single circumstance that some communications were read to zoning

board after public hearing on changing boundaries of zoning districts held insufficient to warrant quashing proceeding.

Mass.—Fandel v. Board of Zoning Adjustment of Boston, 182 N.E. 343, 280 Mass. 195.

Hearing held in accordance with statute

Mo.—State ex rel. Swofford v. Randall, App., 236 S.W.2d 354.

12. Conn.—Treat v. Town Plan and Zoning Commission of Town of Orange, 139 A.2d 601, 145 Conn. 186.
Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 307 Ky. 362.
43 C.J. p 355 notes 81, 86, 87.

Underlying purpose of provisions of zoning regulations permitting change in zone was not to permit changes, exceptions, or relaxations in zoning regulations except after such full notice as should enable all those interested to know what was projected and to have opportunity to protest, and as should insure fair presentation and consideration of all aspects of proposed modification.

Conn.—Hutchinson v. Board of Zoning Appeals of Town of Stratford, 83 A. 2d 201, 138 Conn. 247.

Presumption

Determination by zoning board of property owners affected by proposed change in zoning and entitled to notice is presumed to be proper.

Mass.—Godfrey v. Building Commissioner of City of Boston, 161 N.E. 819, 263 Mass. 589.

Ascertainment of correct addresses

(1) In the absence of any specific statutory requirement, the board of adjustment was required to make reasonable efforts to ascertain the correct addresses of owners of property to be notified of a hearing of the board with respect to changes in zoning.

Mass.—Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston, 101 N.E.2d 888, 328 Mass. 103.

(2) Evidence established that the board of zoning adjustment complied with the statute in mailing notice of hearing of change of zoning to one of the owners of the property deemed by the board to be affected, where

notice was mailed by an agent of the board to address of the owner given in the tax collector's department which notice was returned because there was no such address and no other notice was mailed.

Mass.—Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston, *supra*.

13. Ky.—Mulkern v. Louisville & Jefferson County Planning & Zoning Commission, 210 S.W.2d 774, 307 Ky. 368.

Nonexistent classification

Where court of appeals held that creation of "B-3 Multi-Family Residence District" by city and county zoning commission was void for lack of proper notice, commission's order, changing the zoning of tract of land near city limits to such district from an "A One-Family Residence Area," was unauthorized as assigning tract to nonexistent classification.

Ky.—Mulkern v. Louisville & Jefferson County Planning & Zoning Commission, *supra*—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W. 2d 771, 307 Ky. 362.

14. N.Y.—Palmer v. Mann, 201 N.Y. S. 525, 206 App.Div. 484.

Notice held sufficient

A notice of proposed zoning amendments which referred to everything on which the zoning board proposed to act and to which public attention was invited, and which fully and fairly advised affected persons of their opportunity to be heard on specific matters, was adequate although it indicated that amendment would apply to industrial zones without stating reasons for making such addition, since requirement that zoning board's reasons be incorporated in notice of zoning amendments, when board is proponent of change, is merely directory.

Conn.—Winslow v. Zoning Bd. of City of Stamford, 122 A.2d 789, 143 Conn. 381.

15. Conn.—National Transp. Co. v. Toquet, 196 A. 344, 123 Conn. 468.

Erroneous statement of date of hearing

Publication of notice in one issue of newspaper that hearing would be had before Louisville and Jefferson

sequent publication correcting the omission.¹⁶

Variance. Where there is a substantial variance between the nature of the change proposed in the notice and the change actually enacted, such change is a nullity.¹⁷

§ 120. — Evidence

There is a presumption in a proceeding before a zoning board or commission that the original zones were well planned, and the proponents of a change have the burden of proof as to the need therefor. Action taken on a rezoning application must be based on competent and substantial evidence.

Since there is a presumption, in proceedings for a zoning change by a zoning board or commission, that the zones established by the original zoning ordinance or regulation were well planned and arranged and were intended to be permanent,¹⁸ the proponents of a change in such ordinances or regulations have the burden of proof as to the need therefor.¹⁹ Thus, there should be proof either that there was some mistake in the original zoning or that the character of the neighborhood has changed to such an extent that the reclassification should be granted.²⁰

Competency and sufficiency of evidence. The ac-

tion taken on an application for rezoning must be based on, and supported by, competent and substantial evidence.²¹ The personal knowledge of the members of the board or commission, or of other persons on whom they rely, may not be considered as evidence as to whether there has been a change in conditions in the neighborhood or a need for reclassification.²²

However, in view of the informal nature of the proceedings before the administrative body, as discussed supra § 116, evidential facts contained in a statement by counsel in a proceeding for a change in zone are properly before the commission for consideration.²³

§ 121. — Meetings; Number of Votes Required

In general, a zoning change may be made at a meeting at which a majority is present, and by a vote of a majority of those present.

In the absence of legislative restriction the commission generally can take valid action with respect to changes in zoning at a meeting of which all members have proper notice and at which a majority is present,²⁴ and a vote of a majority of those pres-

County Planning and Zoning Commission to adjust comprehensive zoning plan and to create new classification on certain day, which was legal holiday, and in next week's issue that hearing would be held on day following that originally stated, was insufficient as not conforming to law, and posting of placards, announcing postponement of hearing, at customary places on night before, or morning of, day specified in first notice, did not remedy defect.

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 307 Ky. 362.

16. Availability of texts and maps

Where township zoning commission published notice of public hearing on proposed zoning change and such notice failed to state the availability of texts and maps for examination and the texts and maps were available and were inspected and a second hearing was held and prior to second hearing availability of maps and texts for inspection was advertised by publication, there was substantial compliance with statutory requirement specifying that notice must advertise availability of such texts and maps for examination.

Ohio—Johnson v. Griffiths, App., 141 N.E.2d 774, appeal dismissed 181 N.E.2d 397, 164 Ohio St. 393.

17. Variance in zone classification

Where zoning regulations of town required publication of notice of pub-

lic hearing on question of whether zone boundaries should be changed, and petition for change of zone boundaries so that petitioner's property would be in light industrial zone rather than in residence zone was filed, and published notice and hearing related only to petition for change to light industrial zone, action of board in purporting to change zone boundaries so that part of petitioner's property was in a business instead of a residence zone was a nullity.

Conn.—Hutchison v. Board of Zoning Appeals of Town of Stratford, 83 A.2d 201, 138 Conn. 247.

18. Md.—Hardesty v. Board of Zoning Appeals of Baltimore County, 126 A.2d 621, 211 Md. 172—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420.

19. Md.—Hardesty v. Board of Zoning Appeals of Baltimore County, 126 A.2d 621, 211 Md. 172—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420.

20. Md.—Nelson v. County Council for Montgomery County, 136 A.2d 373, 214 Md. 537—Hardesty v. Board of Zoning Appeals of Baltimore County, 126 A.2d 621, 211

Md. 172—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432.

21. Md.—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420.

Evidence held sufficient to sustain zoning change

Conn.—Kutcher v. Town Planning Commission of Town of Manchester, 88 A.2d 533, 138 Conn. 705.

22. Md.—Tammink v. Board of Zoning Appeals of Baltimore County, 109 A.2d 35, 205 Md. 439.

23. Conn.—Village Builders, Inc. v. Town Plan and Zoning Commission of the Town of Farmington, 140 A.2d 477, 145 Conn. 218.

24. Conn.—Strain v. Mims, 193 A.754, 123 Conn. 275.

Quorum

The statute requiring that words giving authority to three or more public officers or other persons be construed as giving authority to majority thereof controls in determining whether quorum of administrative body, such as zoning commission, was present at time of vote on question before it, unless contrary intention is indicated in particular law by express words or clear implication; and commission's order changing zoning by vote of three of ten members of commission when only five members were present, was void, although commission's bylaw

ent is ordinarily sufficient.²⁵

Members of the board or commission who have an interest in the zoning change being considered are disqualified from voting thereon;²⁶ but the fact that one who may be so disqualified participated in the decision does not necessarily invalidate the action taken by the board or commission.²⁷

The number of votes required for the exercise of the power to amend or modify a zoning regulation by the governing body of a municipality or other governmental entity is discussed *supra* §§ 113, 114.

Number attending hearing. In some jurisdictions, a decision by the requisite number or percentage of votes is valid even though such number did not attend the hearing on the amendment and even though some of the members who did attend the hearing did not participate in the decision.²⁸

provided that quorum should consist of five members and zoning statute authorized commission to adopt rules and regulations for transaction of its business.

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 307 Ky. 362.

Status of ex officio members

Ex officio members of public body are members for all purposes and must be counted in determining presence of quorum thereof.

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, *supra*.

Quorum as including one disqualified to vote

Where wife of mayor was owner of part of residential property to be rezoned, and mayor was wife's agent in attempted sale of property for business purposes, even if mayor were thereby disqualified to vote on question of rezoning to permit business uses, mayor was not disqualified to sit on zoning commission as a quorum member in view that his vote was not necessary under procedure under which property was rezoned, and resolution passed by vote of majority exclusive of mayor and with quorum present could legally rezone the property.

Ky.—Sims v. Bradley, 218 S.W.2d 641, 309 Ky. 626.

25. Ky.—Sims v. Bradley, *supra*.

26. Member of church affected

Under statute providing that no member of zoning planning board shall be permitted to act on any matter in which he has either directly or indirectly any personal or financial interest, reclassification of portion of property within block from residential to commercial by an ordinance

having as one of its prime purposes the enablement of a church located on such rezoned property to sell property for use by a bank was void, where member of planning board approving change and voting for adoption of ordinance was also member of church.

N.J.—Zell v. Borough of Roseland, 125 A.2d 890, 42 N.J.Super. 75.

27. Decision supported by other members

Alleged fact that one of the seven planning commissioners of county owned land near landowner's forty-acre tract, which landowner sought to have reclassified from rural residential and agricultural land to heavy industrial land, and such commissioner believed that reclassification of forty-acre tract would detrimentally affect his land, would not necessarily void actions of remaining members in denying reclassification and would not void action of county board of supervisors, which reconsidered action of planning commission and denied reclassification.

Cal.—Sladovich v. Fresno County, App., 322 P.2d 565.

28. Mass.—McHugh v. Board of Zoning Adjustment of Boston, 147 N.E.2d 761.

Four-fifths approval required

Where application to Board of Zoning Adjustment of Boston for extension of boundaries of zoning district was heard at meeting attended by nine of the twelve members of the board, and written record of board's decision was signed by ten members, including two who did not attend hearing, board's decision granting application was not invalid for want of participation of requisite number of its members as required

§ 122. — More than Majority Required

The board or commission may be required to act by a unanimous vote, or other specified vote of more than a majority, where a certain per cent of property owners protest the proposed change.

The board or commission may be required to act by unanimous vote, or other specified vote of more than a majority, where a certain per cent of the interested property owners object to the proposed change or modification of the regulations;²⁹ and, where it is required that changes be made by a unanimous vote of the commission, all members of the commission must vote for the change, and it is not sufficient that all members at a meeting at which a majority of the commission was present should so vote.³⁰ However, in determining the sufficiency of the vote and the proceedings, members of the commission who are disqualified, as by interest, must be excluded.³¹

by statute providing that no change of boundaries shall be made except by decision of not less than four fifths of members of board.

Mass.—McHugh v. Board of Zoning Adjustment of Boston, *supra*.

29. Conn.—Strain v. Mims, 193 A. 754, 123 Conn. 275.

Katona v. Town Plan and Zoning Commission of Town of Fairfield, 125 A.2d 75, 20 Conn.Sup. 77.

Purpose of statute requiring unanimous vote of zoning commission to rezone land in event twenty per cent of lots immediately adjacent protest the change was to define the protesting interest deemed sufficient to require unanimous action by commission.

Conn.—Parsons v. Town of Wethersfield, 60 A.2d 771, 135 Conn. 24.

30. Conn.—Strain v. Mims, 193 A. 754, 123 Conn. 275.

31. Conn.—Mills v. Town Plan and Zoning Commission of Town of Windsor, 134 A. 250, 144 Conn. 493.

Particular members held disqualified

(1) Member of town zoning commission could not properly vote on his wife's application for change of area in which her land was situated from residential to business zone, and commission's action in granting application by unanimous vote, including that of applicant's husband, was invalid.

Conn.—Low v. Town of Madison, 60 A.2d 774, 135 Conn. 1.

(2) Where one of commission members had acted as dummy in purchasing land proposed for industrial use on behalf of stockholder of corporation which was interested in developing a regional shopping center near property petitioners had sought to have rezoned for development of

It has been held that the statute requiring the approval of a zoning amendment by more than a majority vote in case of protests by certain property owners is not applicable where the zoning ordinance is not truly an amendment or rezoning, but is in effect the first zoning, as where the zoning previously passed was merely a general zoning and intended as a temporary measure until more adequate provisions were substituted therefor.³²

Sufficiency of protests. In order to invoke the statutory provisions requiring the approval of a zoning change by more than a majority vote in case of protests by certain property owners, the protests must be made by the requisite percentage of the property owners eligible to protest under the statute,³³ and must be timely made and filed.³⁴ Where a protest petition has been properly made, whether any of the protesters should be permitted to with-

draw their names therefrom is a matter for the discretion of the zoning commission.³⁵

§ 123. — Review by Board of Its Own Action

Under some statutes, the board having original jurisdiction to change zoning regulations has the power to review its own decisions.

Under some statutes the power to review its own decisions is conferred on the board having original jurisdiction to change zoning regulations;³⁶ and such review is in the nature of an appeal or rehearing³⁷ and is not to be construed with the statutory strictness required in a motion for a new trial.³⁸

When the appeal from the commission's order revising districts is to the commission or board itself, the commission or board is not confined in its deliberations to the reasons set forth in the appeal.³⁹

shopping center, and another commission member had discussed matter of reducing size of petitioners' shopping center with town planner so that it would not injure nearby shopping center, commission's action in denying petitioner's application to rezone for industrial use was invalid, since under statute commission members were disqualified.

Conn.—*Mills v. Town Plan and Zoning Commission of Town of Windsor*, 134 A.2d 250, 144 Conn. 493.

Duty of member to avoid conflicting interests

Public office is a trust conferred by public authority for a public purpose, and status of each member of a zoning commission forbids him from placing himself in a position where private interests conflict with his public duty.

Conn.—*Mills v. Town Plan and Zoning Commission of Town of Windsor*, supra.

32. Ky.—*Sims v. Bradley*, 218 S.W. 2d 641, 309 Ky. 626.

33. Conn.—*Katona v. Town Plan and Zoning Commission of Town of Fairfield*, 125 A.2d 75, 20 Conn. Sup. 77.

"Immediately adjacent" lots

Owners of houses and lots opposite property which was proposed to be rezoned were not "immediately adjacent" to such property so as to require such change to be by unanimous action of zoning commission in face of owners' protests, where railroad owned strip of land for its

tracks between houses and lots and the property sought to be rezoned. Conn.—*Parsons v. Town of Wethersfield*, 60 A.2d 771, 135 Conn. 24.

Percentage of area, not of lots

Under special act requiring unanimous vote of zoning commission for proposed zoning change if protest was filed by owners of twenty per cent of area of lots immediately adjacent in the rear of land included in proposed change, and extending one hundred feet therefrom, it is required that protest be filed by owners of at least twenty per cent of certain areas and not by owners of twenty per cent of lots; and, in determining total area within meaning of law, it was necessary to include portion of lot immediately adjacent to, or in rear of, lot included in proposed change, even though the entire lot did not fall within that description.

Conn.—*Park Regional Corp. v. Town Plan and Zoning Commission of Town of Windsor*, 136 A.2d 785, 144 Conn. 677.

34. Hearing at which protest filed

Under statute providing that if a protest is filed at a hearing, held pursuant to a request for a change of zone, with the zoning commission against such change, signed by the owners of twenty per cent or more of the area of the lots within five hundred feet of the proposed change, such change shall not be adopted except by a vote of three fourths of all the members of the zoning commission, the designation of "hearing" ap-

plied to the public hearing and not to hearing held by commission for final action on proposed change.

Conn.—*Katona v. Town Plan and Zoning Commission of Town of Fairfield*, 125 A.2d 75, 20 Conn. Sup. 77.

35. Refusal held not abuse of discretion

Refusal of zoning commission to permit the withdrawal of names from protest petition after the public hearing held pursuant to a request for a change of zone had adjourned, but before any action was taken on the proposed change by the commission, was not an abuse of discretion.

Conn.—*Katona v. Town Plan and Zoning Commission of Town of Fairfield*, 125 A.2d 75, 20 Conn. Sup. 77.

36. Mass.—*Ayer v. Boston Comrs. on Height of Bldgs.*, 136 N.E. 338, 242 Mass. 30.

37. Mass.—*Ayer v. Boston Comrs. on Height of Bldgs.*, supra.

General notice

Under some statutes no notice of the hearing to the owners of adjacent or near-by property at whose instance an appeal from the commission's order has been made is required, the general notice and public hearing being sufficient.

Mass.—*Ayer v. Boston Comrs. on Height of Bldgs.*, supra.

38. Mass.—*Ayer v. Boston Comrs. on Height of Bldgs.*, supra.

39. Mass.—*Ayer v. Boston Comrs. on Height of Bldgs.*, supra.

B. REPEAL

§ 124. In General

The legislative body of a municipality ordinarily has the power to repeal previously adopted zoning regulations, but such power should be exercised reasonably.

Except where the county or municipal body is granted only the power to create or establish zones, and is not granted the power, expressly or by implication, to supervise, control, or repeal its zoning ordinances,⁴⁰ a municipality or other governmental entity may repeal a zoning ordinance or regulation,⁴¹ although such course cannot adversely affect rights theretofore acquired under the sanction of the ordinance.⁴² This power should be exercised reasonably.⁴³ An amendment is in some instances affected by repeal of the ordinance to be amended and enactment of the new ordinance.⁴⁴

Effect of repeal. The effect of a repeal of a zoning regulation or provisions thereof is to render the repealed regulation or provisions nonexistent,⁴⁵ ex-

cept in so far as there may be a saving clause.⁴⁶

When repeal effective. The time when the repeal becomes effective depends on the provisions of the repealer;⁴⁷ and where an ordinance was enacted which contained a repealer of a prior zoning ordinance, the repealer became effective simultaneously with the approval of the new ordinance.⁴⁸

§ 125. Who May Repeal

In general, the power to repeal a zoning regulation rests in the municipal body which had the power to adopt it in the first instance, generally the governing or legislative body.

In general, the power to repeal a zoning ordinance or regulation rests in the municipal body which had the power to adopt it in the first instance,⁴⁹ generally the governing or legislative body of the municipality,⁵⁰ and not in an administrative agency,⁵¹ such as the zoning board of appeals.⁵²

40. Limited powers of certain counties

Ge.—Barton v. Hardin, 48 S.E.2d 882, 204 Ga. 108.

41. N.J.—Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.
N.C.—McKinney v. City of High Point, 79 S.E.2d 730, 239 N.C. 232.

Plenary power

Municipality's power to revoke or repeal its zoning ordinance is plenary and inherent in the grant to it of legislative power to enact ordinances. N.Y.—Stillbar Const. Co. v. Town of Harrison, 143 N.Y.S.2d 804.

Repealing ordinance held valid

Mo.—State ex rel. Luechtefeld v. Arnold, App., 149 S.W.2d 384.

Building line

Abutting owner could acquire no vested interest in city ordinance establishing building line, and ordinance could be repealed by city council.

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.

Repeal not shown

(1) In general.

Cal.—Ex parte Ruppe, 252 P. 746, 30 C.A. 629.

Conn.—State ex rel. Bezzini v. Hines, 53 A.2d 299, 133 Conn. 592.

N.J.—Salisbury v. Borough of Ridgefield, 60 A.2d 877, 137 N.J.Law 515.

Va.—Delta Oil Sales Co. v. Holmes, 42 S.E.2d 262, 186 Va. 301.

(2) City council's order granting building permit held not to operate as repeal of prior ordinance restricting granting of such permits.

Ill.—Sinclair Refining Co. v. City of Chicago, 246 Ill.App. 152.

42. N.J.—Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.

43. N.H.—Brady v. City of Keene, 4 A.2d 658, 90 N.H. 99.

Binding successors in office

A decision holding invalid an attempt to repeal amended zoning ordinance does not do disruptive violence to established doctrine that city council cannot bind its successors in office in legislative matters, where ground of invalidity was that amended ordinance was arbitrary and unreasonable.

Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

44. Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

45. Mo.—Royal Meat Products Co. v. Kansas City, App., 214 S.W.2d 713.

Repeal of all prior zoning action

Where town not governed by special act appointed zoning commission, subsequent vote, adopting resolution that all actions previously taken relating to zoning ordinances and establishment of zoning commission be repealed, abolished zoning commission and terminated zoning system and freed property of zoning restrictions.

Conn.—Town of Madison v. Kimberly, 169 A. 909, 118 Conn. 6.

Repeal of limiting provisions

Where the limiting provisions of zoning ordinance were repealed and were not reenacted in later ordinance such limiting conditions no longer

existed and could not be read into the later ordinance.

Mo.—Royal Meat Products Co. v. Kansas City, App., 214 S.W.2d 713.

46. Uncompleted prosecutions

Repeal of building zone ordinance, saving violations thereof which may be prosecuted, preserved uncompleted prosecutions under ordinance repealed.

N.Y.—City of Rochester v. Crittenenden Park Riding Academy, 238 N.Y.S. 215, 135 Misc. 451.

47. N.J.—Berry v. Recorder's Court of Town of West Orange, 11 A.2d 743, 124 N.J.Law 385, affirmed Berry v. Recorder's Office of Town of West Orange, 15 A.2d 758, 125 N.J.Law 273.

48. N.J.—Berry v. Recorder's Court of Town of West Orange, 11 A.2d 743, 124 N.J.Law 385, affirmed Berry v. Recorder's Office of Town of West Orange, 15 A.2d 758, 125 N.J.Law 273.

49. Conn.—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186—Greenwich Gas Co. v. Tuthill, 155 A. 850, 113 Conn. 684.

50. Conn.—Greenwich Gas Co. v. Tuthill, supra.

Okl.—Keaton v. Oklahoma City, 102 P.2d 938, 187 Okl. 593, certiorari denied 61 S.Ct. 75, 311 U.S. 616, 85 L.Ed. 391.

51. Ohio.—Curtiss v. City of Cleveland, App., 130 N.E.2d 342.

52. Conn.—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186—Greenwich Gas Co. v. Tuthill, 155 A. 850, 113 Conn. 684.

§ 126. Manner of Effecting Repeal

In repealing a zoning regulation, compliance must be had with statutory procedural requirements.

In repealing a zoning ordinance or regulation, compliance must be had with procedural requirements imposed by statute.⁵³

Initiative election. Under provisions to that effect, the repeal of a zoning ordinance may be effected by an initiative election.⁵⁴

Submission to commission. The requirement that a proposed zoning regulation be first submitted to a commission for report has been held not a prerequisite to the enactment of an ordinance eliminating a prior invalid zoning ordinance.⁵⁵

Invalidity of amendment containing repeal provisions. Where an amendment is invalid, the accompanying repealing provisions also fail.⁵⁶

Nonenforcement of regulation. The mere fact that a zoning regulation has not been enforced does not work its repeal.⁵⁷

Express preservation of consistent ordinances. Ordinances enacted under a statute are not repealed

by virtue of the repeal of such statute where the later enactment expressly preserves ordinances not inconsistent therewith.⁵⁸

§ 127. — Repeal by Implication

A zoning regulation may be repealed by implication by the adoption of a later enactment incompatible with the former one.

A zoning regulation may be impliedly repealed by the adoption of a later enactment which is so incompatible with, or repugnant to, the former one that both cannot stand together,⁵⁹ as where the later enactment is a comprehensive zoning ordinance intended to cover the entire subject matter of zoning;⁶⁰ and a repeal in this manner is certainly effected where the subsequent enactment contains a provision that all inconsistent ordinances or parts thereof are thereby repealed.⁶¹

On the other hand, a zoning ordinance will not be regarded as repealed by implication where there is no such inconsistency or repugnancy with the later enactment as to indicate a legislative intent to effect a repeal of the earlier ordinance.⁶²

53. Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

N.J.—Stirling v. City of Plainfield, 53 A.2d 713, 136 N.J.Law 38.

Pendency of suit

Fact that municipality failed to give personal notice to trial court or to plaintiffs who had instituted suit attacking validity of amendment to zoning ordinance did not affect powers of municipality to repeal amendment and to enact a new amendment. Ill.—Bohan v. Village of Riverside, 138 N.E.2d 487, 9 Ill.2d 561.

54. Village ordinance held inapplicable

Petition of village electors for initiative election on ordinance to repeal certain zoning ordinance was not controlled by village ordinance which provided that proposed ordinance amendments concerning zoning first be referred to planning and zoning commission for report. Ohio.—Russell v. Linton, Com.Pl., 115 N.E.2d 429.

Proposed initiative ordinance held sufficient

Where proposed initiative ordinance calling for repeal of certain village zoning ordinance by its terms clearly indicated that its plain intention was to repeal such zoning ordinance and to place territory involved back into former zoning classification, and clearly presented such issue to voters, proposed ordinance was not void for failure to enable voters intel-

ligently to determine on what subject they were voting.

Ohio.—Russell v. Linton, supra.

55. Mo.—State ex rel. Luechtefeld v. Arnold, App., 149 S.W.2d 384.

56. N.Y.—Concordia Collegiate Institute v. Miller, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

57. Colo.—Finn v. Treadwell, 207 P.2d 967, 120 Colo. 117.

N.Y.—Inzerilli v. Pitney, 30 N.Y.S. 2d 129.

Tex.—Corpus Juris Secundum cited in Hill v. Board of Adjustment of City of Castle Hills, Civ.App., 301 S.W.2d 490, 491, error refused.

58. N.J.—Smith v. Kearny Zoning Board of Appeals, 143 A. 151, 6 N.J.Misc. 954.

59. N.J.—Peterson v. Board of Adjustment of Town of Montclair, 73 A.2d 69, 7 N.J.Super. 282.

Conaway v. Atlantic City, 154 A. 6, 107 N.J.Law 404.

Pa.—Sheets v. Armstrong, 161 A. 359, 307 Pa. 385.

60. La.—Bultman Mortuary Service v. City of New Orleans, 140 So. 503, 174 La. 360.

N.Y.—Leach v. Kenyon, 261 N.Y.S. 676, 146 Misc. 571.

Fleetwood Manor, Inc. v. Village of Huntington Bay, 115 N.Y.S.2d 615.

Tex.—Scott v. Champion Bldg. Co., Civ.App., 28 S.W.2d 178.

61. N.J.—Peterson v. Board of Ad-

justment of Town of Montclair, 73 A.2d 69, 7 N.J.Super. 282.

62. Md.—Cleveland v. Mayor & City Council of Baltimore, 84 A.2d 49, 198 Md. 440.

N.J.—Peterson v. Board of Adjustment of Town of Montclair, 73 A.2d 69, 7 N.J.Super. 282.

Pa.—Borough of Kingston v. Kalanowsky, 38 A.2d 393, 155 Pa.Super. 424. Alenovitz v. East Whiteland Tp., Com.Pl., 6 Chest.Co. 184.

Particular ordinances held not repealed by implication

(1) Ordinance which enlarged scope of "apartment" zone to include office buildings did not repeal prior ordinances changing classification of area involved from "apartment" to "commercial."

Ky.—City of Louisville v. Puritan Apartment Hotel Co., 264 S.W.2d 838.

(2) Later building code not applying to store building already in existence does not repeal earlier building code in effect when building was erected.

Okl.—Harbour-Longmire Bldg. Co. v. Carson, 208 P.2d 173, 201 Okl. 580.

(3) City's amending ordinance, reciting in its preamble that it was imperative that city have additional housing space until certain date, did not by implication repeal general zoning ordinance of the city.

Mo.—Landau v. Levin, 213 S.W.2d 483, 358 Mo. 77.

IV. CONSTRUCTION, OPERATION, AND EFFECT

A. IN GENERAL

§ 128. Construction of Zoning Regulations in General

A zoning regulation may be subject to construction, and general rules governing the construction of statutes and ordinances apply in the construction thereof.

A zoning ordinance or regulation may be subject to construction in order to ascertain its meaning and

effect,⁶³ and such construction under the facts ordinarily is a question of law.⁶⁴ The construction of zoning regulations ordinarily is governed by the general rules applicable to the construction of statutes and ordinances,⁶⁵ and the cardinal rule in such construction is to ascertain and give effect to the intention of the lawmaking body.⁶⁶

63. R.I.—Doherty v. Town Council of Town of South Kingstown, 200 A. 964, 61 R.I. 248.

Resort to previous ordinance

Where zoning ordinance was clear and unambiguous it was not necessary to resort to previous ordinance on the subject.

Mo.—Royal Meat Products Co. v. Kansas City, App., 214 S.W.2d 713.

Boundaries

Where one of the boundaries of restricted zone was not clearly described in town's ordinance, it was, therefore, open to interpretation.

R.I.—Doherty v. Town Council of Town of South Kingstown, 200 A. 964, 61 R.I. 248.

Provision as to construction

A provision of a zoning ordinance requiring that the provisions thereof be held to the minimum requirements for the promotion of the public safety and general welfare in interpreting and applying them is a mere rule of construction.

Mo.—Fairmont Inv. Co. v. Woermann, 210 S.W.2d 26, 357 Mo. 625.

64. Ga.—City of Rome v. Shadyside Memorial Gardens, Inc., 92 S.E.2d 734, 93 Ga.App. 759.

Pa.—Bregman v. Exley, 46 A.2d 272, 354 Pa. 25.

Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 267 Wis. 609—State ex rel. Bollenbeck v. Village of Shorewood Hills, 297 N.W. 568, 237 Wis. 501—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358.

65. Cal.—Markey v. Danville Warehouse & Lumber, Inc., 259 P.2d 19, 119 C.A.2d 1—*Corpus Juris* cited in Yuba City v. Cherniavsky, 4 P.2d 299, 301, 117 C.A. 568.

Fla.—Nichols Engineering & Research Corp. v. State ex rel. Knight, 59 So.2d 374.

La.—Carrere v. Orleans Club, 37 So. 2d 715, 214 La. 303.

Md.—Hare v. Mayor and City Council of Baltimore, 90 A.2d 217, 200 Md. 477.

Mo.—Fleming v. Moore Bros. Realty Co., 251 S.W.2d 8, 363 Mo. 305.

N.J.—Piaget-Del Corp. v. Kulik, 45 A. 2d 125, 133 N.J.Law 485, petitions

denied 46 A.2d 379, 134 N.J.Law 147.

Tenn.—*Corpus Juris Secundum* quoted in City of Knoxville v. Brown, 260 S.W.2d 264, 267, 195 Tenn. 501.

History and policy

In construing statute relative to control of zoning by local authorities, court would look to the wording of the statute, its history, and its basic policy, as they might be disclosed by preëxisting legislation and the circumstances that brought about the enactment of the statute.

Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650.

Circumstances at time of enactment

Court, when construing zoning ordinance enacted in 1922, would look to circumstances existing as of that time for enlightenment as to intent of municipal governing body as exhibited by the words used.

N.J.—Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 11 N.J. 341, 36 A. L.R.2d 639.

Major and minor regulations

Town Law §§ 264, 265, are intended to cover different situations, the former having application when districts are being established, restrictions are being instituted, and broad changes of zoning are being effected, while the provisions of latter section apply to modifications of a lesser degree, as well as to instances involving applications of individual property owners.

N.Y.—North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 129 N.Y.S.2d 697, affirmed 153 N.Y.S.2d 579, 1 A.D.2d 1043.

Enabling act relating to zoning in county contemplates uniformity for each class or type of building or structure in a particular district and permits restrictions to vary as between districts.

Md.—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.

66. Conn.—Hutchison v. Board of Zoning Appeals of Town of Stratford, 100 A.2d 839, 140 Conn. 381—Langbein v. Board of Zoning Appeals of Town of Milford, 67 A.2d 5, 135 Conn. 575.

Ga.—City of Rome v. Shadyside Memorial Gardens, Inc., 92 S.E.2d 734, 93 Ga.App. 759.

N.Y.—City of Buffalo v. Roadway Transit Co., 104 N.E.2d 96, 303 N. Y. 453.

City of New York v. Jack Parker Associates, Inc., 161 N.Y.S.2d 731, 5 Misc.2d 865.

S.D.—City of Sioux Falls v. Cleveland, 70 N.W.2d 62, 75 S.D. 548.

Conflict

(1) Apparent conflicts in the provisions of zoning ordinance were to be considered in the light of its policy to divide city into business and residence districts, and wherever necessary such policy was to be given effect as against any doubtful expression of intention apparently inconsistent therewith.

Minn.—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 108.

(2) Where, in construction of a zoning ordinance, a literal interpretation of a phrase would create a conflict in the provisions of the ordinance, the conflict should be resolved, by adopting that construction carrying out the clear intention of the legislative body.

N.Y.—Seltzer v. City of Yonkers, 145 N.Y.S.2d 664, 286 App.Div. 557, affirmed 135 N.E.2d 588, 1 N.Y.2d 782, 153 N.Y.S.2d 51.

Homes excluded from industrial and manufacturing areas

Building zone ordinance of town, as amended, disclosed legislative intent to exclude places of habitation from all industrial and manufacturing areas and to permit them in business areas only conditionally, subject to enumerated controls and safeguards, in accordance with purposes stated in town law.

N.Y.—Hinna v. Board of Appeals of Town of Hempstead, 170 N.Y.S.2d 12.

Inadvertent provision

Paragraph relating to zoning headed "Conflict with other laws" was made a part of that section by inadvertence of codifiers when law was recodified so that paragraph should not be construed in connection with other paragraphs in section.

The court may not legislate in the guise of construction, and may not insert in a zoning regulation a provision not included by the legislative body.⁶⁷ Zoning regulations are construed in the light of their language and the purposes they are designed to serve.⁶⁸ The primary object of zoning is to promote health, safety, welfare, and prosperity of community, and the ultimate purpose is to confine certain classes of buildings and uses to certain localities, and zoning ordinances should be construed with such objects in mind.⁶⁹ Whenever the language of a zoning statute or ordinance is susceptible of more than one reasonable interpretation, that interpretation will be adopted which will best carry out its evident purpose.⁷⁰

That construction of a zoning regulation is to be adopted which will avoid conflict with the constitution.⁷¹ A zoning regulation should be so interpreted as to render it consistent and harmonious with the enabling statute as far as reasonably practicable,⁷² but the amendment of such a statute does not enlarge an existing zoning regulation in the absence of municipal action to that end.⁷³ Zoning and taxing statutes are separate and distinct, and those relating to taxation and exemptions therefrom have no relevancy in a zoning proceeding.⁷⁴

A zoning ordinance must be construed as a whole,⁷⁵ and in such manner as to reconcile⁷⁶ and give effect⁷⁷ to all of its provisions; no part of the ordinance is to be eliminated unless it is plainly and

N.Y.—Gordon v. Town of Hempstead, 93 N.Y.S.2d 250, 196 Misc. 954.

Impeachment by parol evidence

Where county had zoned landowners' property for light industrial use, county, several years later and when landowners had contracted to sell portion of land for purposes of constructing gasoline service station, could not impeach unambiguous terms of its own zoning ordinance by parol evidence of intentions of the members of the board when they passed it.

Cal.—Griffin v. Marin County, App., 321 P.2d 148.

Land under water

Although ordinance indicated an intent to zone all land, including that under water, within city, such intent alone, without implementation, was not sufficient to bind any land; where zoning ordinance fixed boundaries of districts as shown on zoning map, zoning district lines were drawn on map at shore line, and land under water was not included in a district, land under water was not zoned and no permit was required from city for use of systems of floats and piles for mooring boats.

N.Y.—City of Rye v. Boardman, 171 N.Y.S.2d 885.

67. N.Y.—Glass v. Zoning Bd. of Appeals of City of Yonkers, 173 N.Y.S.2d 448, 5 A.D.2d 991.

Pa.—Appeal of Scranton Lackawanna Indus. Bldg. Co., Com.Pl., 57 Lack.Jur. 178.

68. Conn.—Hutchison v. Board of Zoning Appeals of Town of Stratford, 100 A.2d 839, 140 Conn. 381.
Mass.—Opinion of the Justices to the Senate, 128 N.E.2d 557, 333 Mass. 773.

N.Y.—Milano v. Town of Patterson, 93 N.Y.S.2d 419, 197 Misc. 457.
Fleetwood Manor, Inc. v. Village of Huntington Bay, 115 N.Y.S.2d 615.

69. Conn.—Langbein v. Board of

Zoning Appeals of Town of Milford, 67 A.2d 5, 135 Conn. 575.

70. R.I.—Taft v. Zoning Bd. of Review of City of Warwick, 64 A.2d 200, 75 R.I. 117.

71. Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.
Md.—Higgins v. City of Baltimore, 110 A.2d 503, 206 Md. 89.

In view of presumption of validity of zoning ordinance, court adopts that interpretation which will prevent any conflict with constitution.
Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35.

If two constructions of zoning ordinance were possible the supreme court would adopt the construction upholding the ordinance rather than the one which would defeat it.

Tenn.—Rawlins v. Braswell, 231 S.W.2d 1021, 191 Tenn. 285.

Avoiding constitutional question

County zoning ordinance will be given interpretation which avoids necessity of passing on constitutional questions.

Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

Partial invalidity

Where use of property for filling station was permitted under zoning ordinance which provided that in case of conflict with any existing ordinance the most restrictive was to apply, but enforcement of existing ordinance would permit only part of property to be so used resulting in an arbitrary distinction between different kinds and classes of business where conditions were similar, and such provision was separable, the court would elide such provision so as to make the earlier act inapplicable and permit use of all the property for filling station purposes.

Tenn.—Rawlins v. Braswell, 231 S.W.2d 1021, 191 Tenn. 285.

72. Mass.—LaMontagne v. Kenney, 193 N.E. 9, 288 Mass. 363.

73. Mass.—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547.

74. Mass.—Assessors of Dover v. Dominican Fathers Province of St. Joseph, 137 N.E.2d 225, 334 Mass. 530.

75. Cal.—Regan v. Council of City of San Mateo, 110 P.2d 95, 42 C.A. 2d 801.

Conn.—Hutchison v. Board of Zoning Appeals of Town of Stratford, 100 A.2d 839, 140 Conn. 381.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

N.Y.—Howell v. Liebowitz, 116 N.Y.S.2d 537.

Pa.—Leaver v. Board of Adjustment, 10 Pa.Dist. & Co.2d 333, 6 Bucks Co. 249.

R.I.—Taft v. Zoning Bd. of Review of City of Warwick, 64 A.2d 200, 75 R.I. 117.

Nursery school; boarding house

Amendment to zoning ordinance which authorized mayor and board of city, in their discretion, to issue a temporary license permit for certain businesses including child nursery or kindergarten, must be read in pari materia with zoning ordinance which permitted boarding houses in residential district and operator of a boarding house, which boarded six children, was not required to have the special temporary permit authorized by amendment.

Miss.—City of Gulfport v. Daniels, 97 So.2d 918.

76. Conn.—Hutchison v. Board of Zoning Appeals of Town of Stratford, 100 A.2d 839, 140 Conn. 381.

77. Kan.—Kilcoyne v. City of Coffeyville, 269 P.2d 418, 176 Kan. 159.
N.Y.—Boudreau v. Albanese, 106 N.Y.S.2d 649.

R.I.—Taft v. Zoning Bd. of Review of City of Warwick, 64 A.2d 200, 75 R.I. 117.

clearly ambiguous, or redundant, or contradictory, or impossible of application.⁷⁸ In construing a zoning ordinance, the court will not isolate one part of the ordinance and ignore the plain meaning and import of the other parts, but will give force and effect to all of the provisions of the ordinance germane to the subject involved.⁷⁹ Zoning regulations may not be dissected and considered as a multitude of ordinances having no relation to the general scheme of zoning.⁸⁰

Related regulations are to be read together.⁸¹ Where the building code and zoning ordinances of a municipality both deal with the construction and occupancy of new buildings, they are to be read together and harmonized, if possible, so that all of the provisions of each might be given effect.⁸²

Contemporaneous construction. It has been held that the courts must extend great and often controlling weight to the construction which those administering the regulation have uniformly given it throughout its history,⁸³ but the construction put on a zoning ordinance by city officials and by real estate men cannot alter its meaning.⁸⁴ The question of good faith or bad faith of a property owner in acting on his understanding of the meaning of the regulation cannot aid in the interpretation of the regulation.⁸⁵

Off-street parking. A provision that specified types of buildings hereafter erected afford adequate off-the-street parking facilities is to be reasonably construed.⁸⁶

78. N.Y.—Boudreau v. Albanese, 106 N.Y.S.2d 649.

79. Kan.—Kilcoyne v. City of Coffeyville, 269 P.2d 418, 176 Kan. 159.

80. Cal.—Kort v. City of Los Angeles, 127 P.2d 66, 52 C.A.2d 804. Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

81. Ill.—People ex rel. Jackson & Morris v. Smuczynski, 102 N.E.2d 168, 345 Ill.App. 63.

Liquor regulation

Amendment to liquor regulatory ordinance which refers to zones within city and refers to city zoning ordinances and general zoning ordinance of city are in pari materiae and should be construed together and such municipal ordinances should be construed with legislative acts on the same subject.

La.—Simmons v. City of Shreveport, 60 So.2d 867, 221 La. 902.

82. Mo.—Fleming v. Moore Bros. Realty Co., 251 S.W.2d 8, 363 Mo. 305.

83. Ala.—Drennen v. Mason, 133 So. 689, 222 Ala. 652.

La.—Carrere v. Orleans Club, 37 So. 2d 715, 214 La. 303.

N.Y.—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298.

Pa.—Edmundson v. Johns, Com.Pl., 89 Pittsb.Leg.J. 215.

Persuasive

Construction of zoning ordinance by town officials is entitled to persuasive, if not controlling, weight in application of ordinance to property owner.

N.Y.—Glenel Realty Corp. v. Worthington, 164 N.Y.S.2d 635, 4 A.D.2d 702, appeal dismissed 145 N.E.2d 880, 3 N.Y.2d 924, 167 N.Y.S.2d 939.

Draftsman

Great consideration should be given interpretation placed on city zoning ordinance by official who prepared it, but court is not bound by such interpretation, where officer's testimony shows that his conclusion that ordinance was not being violated was reached without giving consideration to the factual situation.

La.—Rabalais v. Hillary Builders, App., 62 So.2d 846.

Implied construction

La.—State ex rel. Szodomka v. Gruber, 10 So.2d 899, 201 La. 1068.

Rule held inapplicable

Where issue was what city ordinance prohibited and what it did not prohibit with reference to conducting an undertaking business in a residential use district, the principle that contemporaneous construction of statutes by an administrative body long continued in may sometime have the force of law had no application. Md.—Ulrich v. State, 46 A.2d 637, 186 Md. 553, 165 A.L.R. 1107.

Administrative acquiescence

Courts must extend great and, many times, controlling weight to administrative acquiescence in a specified interpretation of a zoning ordinance.

N.Y.—Howell v. Liebowitz, 116 N.Y. S.2d 537.

Judicial construction

Contemporaneous construction of Zoning Act by supreme court for ten years must be respected by court of errors and appeals in absence of anything done by legislature to indicate its disapproval of such construction.

N.J.—Lane v. Bigelow, 50 A.2d 688, 135 N.J.Law 195.

84. Ga.—Snow v. Johnston, 28 S.E. 2d 270, 197 Ga. 146.

Mo.—Evans v. Roth, 201 S.W.2d 357, 356 Mo. 237.

85. Ga.—Snow v. Johnston, 28 S.E. 2d 270, 197 Ga. 146.

86. Md.—Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore, 73 A.2d 531, 195 Md. 383.

Place of public assembly

(1) Under zoning ordinance requiring certain number of parking places in relation to number of persons present at one time when maximum functional use of church plant was being made be provided and requiring, in determining maximum functional use, that seating capacity of chapel, auditorium, sanctuary and classrooms, as well as capacity of areas devoted to education and recreational uses, be included, capacity of a cafeteria in church school need not be computed in total, in as much as a "cafeteria" should not be classified as an "area of recreation."

Mo.—McKinney v. Board of Zoning Adjustment of Kansas City, App., 308 S.W.2d 320.

(2) Parking requirements of zoning law are calculated on number of seats and not seating capacity, and, where requirements of zoning ordinance as to ratio of "off-street" parking to seats in defendant's theater were satisfied, use of building as theater was permissible, notwithstanding actual seating capacity may have been larger.

La.—City of New Orleans v. Leeco, Inc., 76 So.2d 387, 226 La. 335.

One-way driveway

Zoning ordinance requirement that there be furnished with multiple dwelling unit parking spaces with adequate "access" to street is not satisfied by driveway suitable only for one-way use, and "adequate" access involves probability that all clearly foreseeable traffic will be able to proceed with reasonable safety to and from parking area.

Pa.—Fleishon v. Philadelphia Zoning Bd. of Adjustment, 122 A.2d 673, 385 Pa. 295.

Cemeteries. The act of a town board in enacting zoning ordinances regulating the use of land for burial purposes is to be read in light of its expressed or apparent purpose in order to determine the meaning of the language used and to avoid thwarting the board's intention as expressed in that language,⁸⁷ and a particular ordinance has been held sufficient to regulate or restrict a cemetery corporation's land, although no listing of uses prohibited was set forth in detail.⁸⁸ Property owned by a cemetery association and reserved for future cemetery purposes is not exclusively residential property within an ordinance requiring fifty per cent of the owners

of such property within a radius of a specified number of feet to consent to the use of adjacent property for a used-auto parts business.⁸⁹

§ 129. — Strict or Liberal Construction

As a general rule, zoning ordinances are subject to strict construction and will not be extended by interpretation to cases not clearly within their scope and purpose.

Since zoning laws are in derogation of common-law rights to the use of property, as discussed *infra* § 131, it has been held that they are subject to strict construction⁹⁰ in favor of the right of a property

Intersecting street

Street which did not go through block in which church's proposed parking lot was located was not an "intersecting street" within zoning ordinance requirement that parking facilities located on opposite side of street from structures used for public assembly be within nearest intersecting streets.

Mo.—Summers v. Board of Zoning Adjustment of Kansas City, App., 299 S.W.2d 883.

87. N.Y.—Holy Sepulchre Cemetery v. Town of Greece, 79 N.Y.S.2d 633, 191 Misc. 241, affirmed 79 N.Y.S.2d 863, 273 App.Div. 942.

88. N.Y.—Holy Sepulchre Cemetery v. Town of Greece, *supra*.

89. Mich.—Perry Mount Park Cemetery Ass'n v. Netzel, 264 N.W. 303, 274 Mich. 97.

90. Ariz.—Kubby v. Hammond, 198 P.2d 134, 68 Ariz. 17.

Ark.—City of Little Rock v. Williams, 177 S.W.2d 924, 206 Ark. 861.
Colo.—Jones v. Board of Adjustment, 204 P.2d 560, 119 Colo. 420—Cosmos v. City and County of Denver, 70 P.2d 341, 101 Colo. 69.

Ga.—City of Rome v. Shadyside Memorial Gardens, Inc., 92 S.E.2d 734, 93 Ga.App. 759.

Kan.—Kilcoyne v. City of Coffeyville, 269 P.2d 418, 176 Kan. 159.

La.—Carrere v. Orleans Club, 37 So. 2d 715, 214 La. 303.

Audubon Area Zoning Ass'n v. Krushevski, App., 82 So.2d 460—City of New Orleans v. Buffa, App., 69 So.2d 140.

Me.—Toulouse v. Board of Zoning Adjustment, 87 A.2d 670, 147 Me. 387.

Md.—Heath v. Mayor & City Council of Baltimore, 58 A.2d 896, 190 Md. 478.

N.J.—Wittkop v. Garner, 132 A. 339, 4 N.J.Misc. 234.

N.Y.—City of Buffalo v. Roadway Transit Co., 104 N.E.2d 96, 303 N.Y. 453—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298.

Glenel Realty Corp. v. Worthing-

ton, 164 N.Y.S.2d 635, 4 A.D.2d 702, appeal dismissed 145 N.E.2d 880, 3 N.Y.2d 924, 167 N.Y.S.2d 939—Dunkirk Aerie, No. 2447, Fraternal Order of Eagles v. City of Dunkirk, 87 N.Y.S.2d 202, 274 App.Div. 635—Gemelli v. Murdock, 79 N.Y.S.2d 277, 273 App.Div. 1019, affirmed 82 N.E.2d 401, 298 N.Y. 664—City of Albany v. Anthony, 28 N.Y.S.2d 963, 262 App.Div. 401—People ex rel. Ortenberg v. Bales, 229 N.Y.S. 550, 224 App.Div. 87, affirmed 166 N.E. 339, 250 N.Y. 598.

City of New York v. Jack Parker Associates, Inc., 161 N.Y.S.2d 731, 5 Misc.2d 865—People v. Hanco Realty & Finance Corp., 149 N.Y.S.2d 333, 1 Misc.2d 850—Application of Dengeles, 148 N.Y.S.2d 92, 1 Misc.2d 692, reversed on other grounds 160 N.Y.S.2d 83, 3 App.Div. 2d 758—Kovelman v. Plaut, 105 N.Y.S.2d 230, 201 Misc. 473.

City of Rye v. Boardman, 171 N.Y.S.2d 885—Hinna v. Board of Appeals of Town of Hempstead, 170 N.Y.S.2d 12—Flanagan v. Zoning Bd. of Appeals of Village of Bayville, 149 N.Y.S.2d 666, affirmed 151 N.Y.S.2d 618, 1 A.D.2d 979—Mallett v. Village of Mamaroneck, 123 N.Y.S.2d 249, reversed on other grounds 131 N.Y.S.2d 504, 283 App. Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821—Lake Mohopac Heights, Inc. v. Zoning Bd. of Appeals of Town of Carmel, 119 N.Y.S.2d 809—New York Ambassador, Inc. v. Board of Standards & Appeals of City of New York, 114 N.Y.S.2d 901, reversed on other grounds 119 N.Y.S.2d 805, 281 App. Div. 342, affirmed 113 N.E.2d 302, 305 N.Y. 791—Freitag v. Marsh, 106 N.Y.S.2d 927, transferred, see, 115 N.Y.S.2d 838, 280 App.Div. 934—Gilchrist Realty Corp. v. Village of Great Neck Plaza, 85 N.Y.S.2d 224, reversed on other grounds 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619—People v. Daly, 28 N.Y.S.2d 603.

Ohio.—State ex rel. Gulf Refining Co. v. De France, 100 N.E.2d 689, 89 Ohio App. 1.

Hardy v. Horst, Com.Pl., 101 N. E.2d 398.

Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35—United Cerebral Palsy Ass'n of Philadelphia and Vicinity v. Zoning Bd. of Adjustment, 114 A.2d 331, 382 Pa. 67—Shapiro v. Zoning Bd. of Adjustment, 105 A.2d 299, 377 Pa. 621—Philadelphia Art Alliance v. Zoning Bd. of Adjustment of City of Philadelphia, 104 A.2d 492, 377 Pa. 144—Appeal of Medinger, 104 A.2d 118, 377 Pa. 217—Appeal of Rolling Green Golf Club, 97 A.2d 523, 374 Pa. 450—Appeal of Lord, 81 A.2d 533, 368 Pa. 121.

D. B. S. Bldg. Ass'n v. City of Erie, 111 A.2d 367, 177 Pa.Super. 487—Appeal of Langol, 104 A.2d 343, 175 Pa.Super. 320.

Leaver v. Board of Adjustment, 10 Pa.Dist. & Co.2d 333, 6 Bucks Co. 249—Commonwealth v. Flannery, 1 Pa.Dist. & Co.2d 680, 5 Cumb.L.J. 54—Appeal of Rich & Co., 84 Pa.Dist. & Co. 393, 101 Pittsb.Leg.J. 85—Humphreys v. Schofield, 14 Pa.Dist. & Co. 127.

Appeal of Scranton Lackawanna Indus. Bldg. Co., Com.Pl., 57 Lack. Jur. 173—Feagley v. Coho, Com. Pl., 53 Lanc.Rev. 29—Boyer v. Zoning Bd., Com.Pl., 27 Leh.L.J. 272—In re Zoning Bd., Herman Appeal, Com.Pl., 26 Leh.L.J. 362—Appeal by Dormont Borough, Co., 47 Mun.L.R. 232, 103 Pittsb.Leg.J. 423, affirmed 119 A.2d 827, 180 Pa. Super. 550—Appeal of Shapiro, Com.Pl., 94 Pittsb.Leg.J. 133—Appeal of Atlantic Refining Co., Com. Pl., 66 York Leg.Rec. 81.

R.I.—Lamothe v. Zoning Bd. of Review of Town of Cumberland, 98 A. 2d 918, 81 R.I. 96.

S.D.—Luedke v. Carlson, 41 N.W.2d 552, 73 S.D. 240.

Tenn.—City of Knoxville v. Brown, 260 S.W.2d 264, 195 Tenn. 901—Red Acres Imp. Club v. Burkhalter, 241 S.W.2d 921, 193 Tenn. 79.

Tex.—Corpus Juris Secundum cited in Thomas v. Zoning Bd. of Adjustment of City of University Park, Civ.App., 241 S.W.2d 955, 957—

owner to the unrestricted use of his property⁹¹ and should not be extended by interpretation⁹² to cases not clearly within their scope and purpose;⁹³ but the legislative intention may not be disregarded

Bryan v. Darlington, Civ.App., 207 S.W.2d 681, error refused, no reversible error.

Vt.—In re Willey, 140 A.2d 11.

Wash.—Pearson v. Evans, 320 P.2d 300—Morin v. Johnson, 300 P.2d 569, 49 Wash.2d 275.

Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 267 Wis. 609—State ex rel. Bollenbeck v. Village of Shorewood Hills, 297 N.W. 568, 237 Wis. 501.

Restriction must be clearly established

General rule that restrictions on use of private property are not favored and that any claim that there are restrictions on such use must be clearly established applies with equal force whether the restriction by implication is based on a restrictive covenant in a deed or on a zoning ordinance.

Ga.—Richardson v. Passmore, 63 S. E.2d 392, 207 Ga. 572.

Uncertainties

Municipal zoning ordinance must be construed strictly and all uncertainties resolved against parties seeking its enforcement.

Tex.—City of Grand Prairie v. Finch, Civ.App., 294 S.W.2d 851.

Well-founded doubts as to meaning of obscure provisions of zoning ordinance should be resolved in favor of free use of property.

S.D.—City of Sioux Falls v. Cleveland, 70 N.W.2d 62, 75 S.D. 548.

Violation of zoning ordinance occurs only when there is a plain disregard of its limitations imposed by its express words.

Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 267 Wis. 609.

Extension of use

Zoning ordinance, which extends use which owner may make of his land, is not subject to the same strict interpretation as is one which restricts the use which he can make of his land.

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

Penal provisions

Strict rule of construction applied in prosecutions to enforce penal provisions of zoning ordinance was not applicable in action for a declaratory judgment determining validity of county zoning ordinance.

Va.—Claffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41.

91. Colo.—Jones v. Board of Adjustment, 204 P.2d 560, 119 Colo. 420.

Ga.—City of Rome v. ShadySide Memorial Gardens, Inc., 92 S.E.2d 734, 93 Ga.App. 759.

La.—City of New Orleans v. Buffa, App., 69 So.2d 140.

N.Y.—City of Buffalo v. Roadway Transit Co., 104 N.E.2d 96, 303 N. Y. 453.

Liberal construction in favor of free use of property

Zoning ordinances should be construed in a reasonably liberal fashion in favor of the free use of property by owners.

Ill.—City of Chicago v. Krema Trucking Co., 86 N.E.2d 431, 337 Ill.App. 662.

92. Colo.—Cosmos v. City and County of Denver, 70 P.2d 341, 101 Colo. 69—Chamberlain v. Roberts, 253 P. 27, 81 Colo. 28, followed in Roberts v. Gross, 275 P. 1118, 85 Colo. 333.

Conn.—Fisher v. Board of Zoning Appeals of Town of Monroe, 122 A. 2d 729, 143 Conn. 358—Park Const. Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 110 A.2d 614, 142 Conn. 30—Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 109 A.2d 256, 141 Conn. 632—State ex rel. Heimov v. Thomson, 37 A.2d 689, 131 Conn. 8.

Iowa.—Livingston v. Davis, 50 N.W. 2d 592, 243 Iowa 21, 27 A.L.R.2d 237.

Me.—Toulouse v. Board of Zoning Adjustment, 87 A.2d 670, 147 Me. 387.

N.J.—Hrycenko v. Board of Adjustment of City of Elizabeth, 99 A.2d 430, 27 N.J.Super. 376.

N.Y.—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298—Monument Garage Corporation v. Levy, 194 N.E. 848, 266 N.Y. 339.

Gemelli v. Murdock, 79 N.Y.S.2d 277, 278 App.Div. 1019, affirmed 82 N.E.2d 401, 298 N.Y. 664—City of Albany v. Anthony, 28 N.Y.S.2d 963, 262 App.Div. 401.

City of Olean v. Conkling, 283 N. Y.S. 66, 157 Misc. 63.

City of Rye v. Boardman, 171 N. Y.S.2d 885—Mallett v. Village of Mamaroneck, 123 N.Y.S.2d 249, reversed on other grounds 131 N.Y. S.2d 504, 283 App.Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821—Gilchrist Realty Corp. v. Village of Great Neck Plaza, 85 N.Y.S.2d 224, reversed on other grounds 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619.

Ohio.—State ex rel. Gulf Refining Co. v. De France, 100 N.E.2d 689, 89 Ohio App. 1.

Tenn.—City of Knoxville v. Brown, 260 S.W.2d 264, 195 Tenn. 501—Corpus Juris Secundum cited in Red Acres Imp. Club v. Burkhalter, 241 S.W.2d 921, 923, 193 Tenn. 79.

Tex.—Thomas v. Zoning Bd. of Adjustment of City of University Park, Civ.App., 241 S.W.2d 955.

Wash.—Morin v. Johnson, 300 P.2d 569, 49 Wash.2d 275.

Indirection

Planning and zoning ordinances may not be exerted by indirection.

Ky.—Robertson v. Western Baptist Hospital, 267 S.W.2d 395.

Effectuation of purpose

N.Y.—Westchester County Soc. for Prevention of Cruelty to Animals v. Mengel, 54 N.E.2d 329, 292 N.Y. 121.

Application of La Porte, 150 N.Y. S.2d 467, 1 Misc.2d 945, reversed on other grounds 152 N.Y.S.2d 916, 2 A.D.2d 710.

Proviso

Where effect of zoning statute proviso was to enlarge the scope of the statute, by giving it a mandatory operation of extended application on the happening of the event designated in the proviso, the proviso would be held to include no case not clearly within its plain terms.

N.C.—Robbins v. City of Charlotte, 84 S.E.2d 814, 241 N.C. 197.

93. Conn.—Park Const. Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 110 A.2d 614, 142 Conn. 30—Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 109 A.2d 256, 141 Conn. 632.

Ky.—Robertson v. Western Baptist Hospital, 267 S.W.2d 395.

Md.—Landay v. MacWilliams, 196 A. 293, 173 Md. 460, 114 A.L.R. 984.

Ohio.—State ex rel. Gulf Refining Co. v. De France, 100 N.E.2d 689, 89 Ohio App. 1.

Okl.—City of Tulsa v. Mizel, 265 P.2d 496—Modern Builders v. Building Inspector of City of Tulsa, 168 P. 2d 883, 197 Okl. 80.

Pa.—Appeal of Scranton Lackawanna Indus. Bldg. Co., Com.Pl., 57 Lack. Jur. 173.

Tenn.—Corpus Juris Secundum cited in Red Acres Imp. Club v. Burkhalter, 241 S.W.2d 921, 923, 193 Tenn. 79.

Tex.—Thomas v. Zoning Bd. of Adjustment of City of University Park, Civ.App., 241 S.W.2d 955.

Wash.—Morin v. Johnson, 300 P.2d 569, 49 Wash.2d 275.

Exclusion of use

The restrictions on the use of property by a zoning ordinance may not be extended by any administrative board or judicial tribunal in order to exclude a use which in its opinion should have been excluded.

Mass.—Moulton v. Building Inspector of Milton, 43 N.E.2d 662, 312 Mass. 195.

when it is clearly found in the language used.⁹⁴

A zoning ordinance should be liberally construed to accomplish its plain purpose,⁹⁵ and should receive a reasonable and fair construction in the light of the subject dealt with and the manifest intention of the

legislation,⁹⁶ but a provision of such an ordinance for an exception to the general rule established therein must be strictly construed.⁹⁷ However, exceptions favoring property owners should be liberally construed in their favor.⁹⁸

N.Y.—Westchester County Soc. for Prevention of Cruelty to Animals v. Mengel, 54 N.E.2d 329, 292 N.Y. 121.

94. N.Y.—City of Buffalo v. Roadway Transit Co., 104 N.E.2d 96, 303 N.Y. 453.

95. Md.—Landay v. MacWilliams, 196 A. 293, 173 Md. 460, 114 A.L.R. 984.

N.J.—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182.

Extension by implication

While zoning ordinances, which are in derogation of common-law right to use private property so as to realize its highest utility, should be liberally construed to accomplish their plain purpose and intent, they should not be extended by implication to cases not clearly within scope of purpose and intent manifest in their language.

Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

Temporary ordinance

A liberal rule of construction will be applied to a temporary zoning ordinance seeking to control building before the adoption of a permanent zoning ordinance.

Okl.—McCurley v. City of El Reno, 280 P. 467, 138 Okl. 92.

Safety of school children

Protection of school children is a matter of public concern and a zoning ordinance which protects them should be liberally construed in favor of the public for whose benefit it is enacted.

N.Y.—Brown v. Village of Owego, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655.

Bruchhausen v. Murdock, 9 N.Y. S.2d 923, 170 Misc. 187, affirmed 16 N.Y.S.2d 103, 258 App.Div. 797, reargument denied 17 N.Y.S.2d 480, 258 App.Div. 906—14th Street Warehouse Corporation v. Murdock, 297 N.Y.S. 420, 163 Misc. 399.

Strict application

N.J.—Kurovski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433.

96. Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

Pa.—Appeal of Perrin, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912, followed in Appeal of Goodman, 156 A. 309, 305 Pa. 55.

Township of Marple v. Lynam, 30 A.2d 208, 151 Pa.Super. 288.

R.I.—Doherty v. Town Council of

Town of South Kingstown, 200 A. 964, 61 R.I. 248.

Object and general structure

A zoning ordinance must be construed reasonably with regard both to the object sought to be attained and to the general structure of the ordinance as a whole.

Cal.—Markey v. Danville Warehouse & Lumber, Inc., 259 P.2d 19, 119 C. A.2d 1.

Mass.—Petros v. Superintendent and Inspector of Buildings of City of Lynn, 28 N.E.2d 233, 306 Mass. 368, 128 A.L.R. 1210.

Mich.—Fass v. City of Highland Park, 30 N.W.2d 828, 320 Mich. 182, reheard 32 N.W.2d 375, 321 Mich. 156.

Miss.—City of Gulfport v. Daniels, 97 So.2d 218.

Ohio.—Francisco v. City of Columbus, App., 31 N.E.2d 236, rehearing denied 31 N.E.2d 243, appeal dismissed 18 N.E.2d 404, 134 Ohio St. 526.

Va.—Mooreland v. Young, 91 S.E.2d 438, 197 Va. 771.

Object of restriction

In determining scope and meaning of zoning regulation, court must look at object of restriction.

Conn.—Gilbert v. Town of Hamden, 68 A.2d 157, 135 Conn. 630.

Conflicting interests

Zoning legislation constitutes deprivation for public good of certain uses by owners of property to which their property might otherwise be put, and such legislation should be given fair and reasonable construction with due regard for conflicting interests involved.

Ohio.—Davis v. Miller, 126 N.E.2d 49, 163 Ohio St. 91.

Absurd result

Zoning resolution must be given a sensible construction to prevent an absurd result.

N.Y.—MacMillan v. McCaffrey, 106 N.Y.S.2d 673, 201 Misc. 574.

Reasonable expectation and purpose

In construing a zoning ordinance, the court should be guided by the reasonable expectation and purpose, as expressed in the ordinance or fairly to be inferred therefrom, of the ordinary person who sits in council and enacts laws for the welfare of the general public.

Ohio.—Steudel v. Troberg, 63 N.E.2d 241, 76 Ohio App. 136.

Repeal of general laws

Zoning ordinances being constitutional only because adopted under po-

lice power, and as health, safety, moral, or general welfare measures, they cannot be construed to repeal general laws except to extent that such laws, if effective, might affect safety, morals, health, or general welfare.

La.—Zeller v. A. S. La Nasa Bakery, App., 172 So. 33.

Intent of particular provisions

N.J.—Plaget-Del Corp. v. Kulik, 45 A.2d 125, 133 N.J.Law 485, petitions denied 46 A.2d 379, 134 N.J. Law 147.

Ohio.—Steudel v. Troberg, 63 N.E.2d 241, 76 Ohio App. 136.

Salem v. Arnold, 16 Ohio Supp. 159.

97. Md.—Heath v. Mayor & City Council of Baltimore, 58 A.2d 896, 190 Md. 478.

Lot of record

Where county zoning ordinance excepted from its restrictions those lots which were of record at time of passage of the ordinance, and a "lot of record" was defined therein as a "lot or parcel of land, the deed to which has been recorded" prior to adoption of ordinance, a plat by landowners dividing land into lots at variance with restrictions was not a "plat of record" within the definition, and zoning restrictions were applicable to the area involved, even though an ordinary person might have considered the plat of record as a lot of record.

Iowa.—Gannett v. Cook, 61 N.W.2d 703, 245 Iowa 750.

98. Conn.—Goldreyer v. Board of Zoning Appeals of City of Bridgeport, 136 A.2d 789, 144 Conn. 641—Devaney v. Board of Zoning Appeals of City of New Haven, 122 A.2d 303, 143 Conn. 322—Langbein v. Board of Zoning Appeals of Town of Milford, 67 A.2d 5, 135 Conn. 575.

La.—Carrere v. Orleans Club, 37 So. 2d 715, 214 La. 303.

Audubon Area Zoning Ass'n v. Krushevski, App., 82 So.2d 460—City of New Orleans v. Buffa, App., 69 So.2d 140—State ex rel. Prats v. City Planning & Zoning Commission of City of New Orleans, App., 59 So.2d 832.

Me.—Toulouse v. Board of Zoning Adjustment, 87 A.2d 670, 147 Me. 387.

N.C.—In re W. P. Rose Builders' Supply Co., 163 S.E. 462, 202 N.C. 496.

Tenn.—Corpus Juris Secundum cited in Red Acres Imp. Club v. Burk-

§ 130. — Meaning of Words

The words of a zoning ordinance ordinarily will be construed in accordance with their natural import in common and approved usage.

The words of a zoning ordinance ordinarily will be construed according to their natural import in common and approved usage,⁹⁹ and the courts will not give a strained meaning to words of the ordinance in order to effectuate its purpose.¹ In determining the sense in which a word is used, the court will consider it in the context of the entire zoning ordinance.² It will be presumed for purposes of construction that words used in one part of the regulation had, for the draftsman, the same meaning in all parts of the regulation.³

halter, 241 S.W.2d 921, 923, 193 Tenn. 79.

Tex.—Thomas v. Zoning Bd. of Adjustment of City of University Park, Civ.App., 241 S.W.2d 955.
Vt.—In re Willey, 140 A.2d 11.

99. Mass.—Town of Needham v. Winslow Nurseries, Inc., 111 N.E. 2d 453, 330 Mass. 95, 40 A.L.R.2d 1450—Foster v. Mayor of City of Beverly, 53 N.E.2d 693, 315 Mass. 567, 151 A.L.R. 737.

Miss.—City of Gulfport v. Daniels, 97 So.2d 218.

Neb.—City of Omaha v. Gsantner, 77 N.W.2d 663, 162 Neb. 839—Peterson v. Vasak, 76 N.W.2d 420, 162 Neb. 498—Henke v. Zimmer, 64 N.W.2d 458, 158 Neb. 697.

N.Y.—Von Der Heide v. Zoning Bd. of Appeals of Town of Somers, Westchester County, 123 N.Y.S.2d 726, 204 Misc. 746, affirmed 126 N.Y.S.2d 852, 282 App.Div. 1076, reargument and appeal denied 127 N.Y.S.2d 852, 283 App.Div. 713.

Pa.—Shapiro v. Zoning Bd. of Adjustment, 105 A.2d 299, 377 Pa. 621.
Bryan v. Zoning Bd. of Adjustment, Com.Pl., 2 Bucks Co. 16—Township of Whitemarsh v. Chemical Concentrates Corp., Com.Pl., 62 Montg.Co. 258.

Plain and natural meaning

In the interpretation of a zoning ordinance, words in common use must be given their plain and natural meaning in the absence of any showing that, in the enactment of such ordinance, words and expressions contained therein were used in any other than their usual and ordinary sense.

Mo.—Killian v. Brith Sholom Congregation, App., 154 S.W.2d 387.

Exact terminology is not required in zoning cases, and courts will treat the matter for what it really is, notwithstanding the terminology used.

Pa.—Root v. City of Erie Zoning Bd. of Appeals, 118 A.2d 297, 180 Pa. Super. 88.

"Avenue" and "street"

Under zoning ordinance the words "avenue" and "street" were used in their ordinary sense and included sidewalks.

Ga.—Snow v. Johnston, 28 S.E.2d 270, 197 Ga. 146.

1. N.Y.—Westchester County Soc. for Prevention of Cruelty to Animals v. Mengel, 54 N.E.2d 329, 292 N.Y. 121.

Application of La Porte, 150 N.Y.S.2d 467, 1 Misc.2d 945, reversed on other grounds 152 N.Y.S.2d 916, 2 A.D.2d 710.

2. Okl.—City of Tulsa v. Mizel, 265 P.2d 496.

Words "general welfare" must be construed in connection with their statutory context as well as with reference and subordinate to the individual and property rights which are guaranteed by the constitution.

Pa.—Appeal of Medinger, 104 A.2d 118, 377 Pa. 217.

3. Md.—Chayt v. Board of Zoning Appeals of Baltimore City, 9 A.2d 747, 177 Md. 426.

Where word "dwelling" in zoning ordinance was first used in section designating one of permitted uses of property as use as "multiple family dwelling," it was not reasonable to imply, in absence of express qualification, that term would have been used in more restrictive sense in clause requiring any "dwelling" to have five-foot setback from side property line, and five-foot setback requirement was applicable to proposed addition to existing apartment house.

Fla.—State ex rel. Lacedonia v. Harvey, 68 So.2d 817.

4. N.Y.—Von Der Heide v. Zoning Bd. of Appeals of Town of Somers, Westchester County, 123 N.Y.S.2d 726, 204 Misc. 746, affirmed 126 N.Y.S.2d 852, 282 App.Div. 1076, reargument and appeal denied 127 N.Y.S.2d 852, 283 App.Div. 713.

The courts are ordinarily bound by the express definition in a zoning ordinance of a term used therein.⁴ Where zoning statutes or ordinances contain definitions which require judicial interpretation, the court cannot by such interpretation supply what the legislative body might have provided but which the court by reasonable construction cannot say that such body did provide.⁵

Under the principle of ejusdem generis, general words following particular and specific words in a zoning ordinance are not given their natural and ordinary sense standing alone, but are confined to persons and things of the same kind or genus as those enumerated.⁶

5. Ky.—Robertson v. Western Baptist Hospital, 267 S.W.2d 395.

6. N.J.—Piaget-Del Corp. v. Kulik, 45 A.2d 125, 133 N.J.Law 485, petitions denied 46 A.2d 379, 134 N.J.Law 147.

Tenn.—City of Knoxville v. Brown, 260 S.W.2d 264, 195 Tenn. 501.

"Public hazard"

Where a zoning ordinance specifically enumerates prohibited types of uses and in general terms prohibits a use which constitutes a "public hazard," the latter expression is interpreted to mean uses which are similar to those specifically enumerated.

Pa.—Tornetta v. Whitemarsh Tp., 67 Pa. Dist. & Co. 591, 65 Montg.Co. 49.

Institutions

As used in city zoning ordinance permitting hospitals, sanitariums, "eleemosynary and public institutions" in a residential district, provided buildings for such uses are at least seventy-five feet from any adjoining lot, quoted phrase must be construed under rule of ejusdem generis to mean institutions of the nature of hospitals or sanitariums.

Pa.—United Cerebral Palsy Ass'n of Philadelphia and Vicinity v. Zoning Bd. of Adjustment, 114 A.2d 331, 382 Pa. 67.

Store, shop, or office

Under doctrine of ejusdem generis, where village restrictions provided that no "store, shop, or permanent office" of any kind or "business of any kind" should be permitted on tract, only the conducting of such trades as that of store, shop, office, or some similar business would be prohibited, and provision could not be extended to include the conducting of a children's nursery and day school.

Tex.—Bryan v. Darlington, Civ.App., 207 S.W.2d 681 refused no reversible error.

§ 131. Operation and Effect of Zoning Regulations Generally

Zoning regulations, when adopted pursuant to statutory authority, have the force and effect of legislative enactments necessitating compliance by property owners.

Zoning regulations are in derogation of common-law rights to the use of property.⁷ Zoning acts create rights unknown to the common law.⁸ Zoning restrictions do not constitute an "easement" on property, but they are merely a restraint on the

owner's use of property for the protection of the general well-being.⁹

Such regulations, when adopted pursuant to statutory authority, have the force and effect of legislative enactments,¹⁰ and they constitute the controlling authority as to what buildings may be erected and uses made of property in a given district.¹¹ Accordingly, owners of property subject to such regulations must comply therewith,¹² and the mere fact

7. *Ariz.*—Kubby v. Hammon, 198 P. 2d 134, 68 *Ariz.* 17.
- Ark.*—City of West Helena v. Bockman, 256 S.W.2d 40, 221 *Ark.* 677—City of Little Rock v. Williams, 177 S.W.2d 924, 206 *Ark.* 361.
- Conn.*—Goldreyer v. Board of Zoning Appeals of City of Bridgeport, 136 A.2d 789, 144 *Conn.* 641—Fisher v. Board of Zoning Appeals of Town of Monroe, 122 A.2d 729, 143 *Conn.* 358—Devaney v. Board of Zoning Appeals of City of New Haven, 122 A.2d 303, 143 *Conn.* 322—Park Const. Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 110 A.2d 614, 142 *Conn.* 30—Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 109 A.2d 256, 141 *Conn.* 632.
- Ky.*—Robertson v. Western Baptist Hospital, 267 S.W.2d 395.
- La.*—Carrere v. Orleans Club, 37 So. 2d 715, 214 *La.* 303.
- La.*—Audubon Area Zoning Ass'n v. Krushevski, App., 82 So.2d 460—City of New Orleans v. Buffa, App., 69 So.2d 140.
- Me.*—Toulouse v. Board of Zoning Adjustment, 87 A.2d 670, 147 *Me.* 387.
- Md.*—Landay v. MacWilliams, 196 A. 293, 173 *Md.* 460, 114 A.L.R. 984.
- N.Y.*—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 *N.Y.* 293—Monument Garage Corporation v. Levy, 194 N.E. 848, 266 *N.Y.* 339.
- Gemelli v. Murdock*, 79 N.Y.S.2d 277, 273 App.Div. 1019, affirmed 82 N.E.2d 401, 298 *N.Y.* 664—City of Albany v. Anthony, 28 N.Y.S.2d 963, 262 App.Div. 401—People ex rel. Ortenberg v. Bales, 229 N.Y.S. 550, 224 App.Div. 87, affirmed 166 N.E. 339, 250 *N.Y.* 598.
- Milano v. Town of Patterson*, 93 N.Y.S.2d 419, 197 *Misc.* 457—Village of Williston Park v. Israel, 76 N.Y.S.2d 605, 191 *Misc.* 6—City of Olean v. Conkling, 283 N.Y.S. 66, 157 *Misc.* 63.
- Hinna v. Board of Appeals of Town of Hempstead*, 170 N.Y.S.2d 12—Gluehrst Realty Corp. v. Village of Great Neck Plaza, 85 N.Y.S.2d 224—City of Little Falls v. Fisk, 24 N.Y.S.2d 460.
- N.C.*—In re W. P. Rose Builders' Supply Co., 163 S.E. 462, 202 *N.C.* 496.
- Okl.*—Modern Builders v. Building Inspector of City of Tulsa, 168 P. 2d 883, 197 *Okl.* 80.
- Pa.*—Appeal of O'Hara, 131 A.2d 537, 389 *Pa.* 85—Philadelphia Art Alliance v. Zoning Bd. of Adjustment of City of Philadelphia, 104 A.2d 492, 377 *Pa.* 144—Appeal of Medinger, 104 A.2d 118, 377 *Pa.* 217—Appeal of Lord, 81 A.2d 533, 368 *Pa.* 121.
- Appeal of Shapiro*, Com.Pl., 94 *Pittsb.Leg.J.* 133—Edmundson v. Johns, Com.Pl., 89 *Pittsb.Leg.J.* 215.
- Wash.*—Pearson v. Evans, 320 P.2d 300—Morin v. Johnson, 300 P.2d 569, 49 *Wash.* 275.
- Wis.*—State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison, 35 N.W.2d 312, 354 *Wis.* 42.
8. *Ind.*—State ex rel. Marion County Plan Commission v. Supreme Court of Marion County, 135 N.E.2d 516, 235 *Ind.* 607.
9. *Iowa.*—Boardman v. Davis, 3 N.W.2d 608, 231 *Iowa* 1227.
10. *N.Y.*—Bressler v. Amsterdam Operating Corp., 86 N.Y.S.2d 250, 194 *Misc.* 76—People v. Walsh, 199 N.Y.S. 534, 120 *Misc.* 467.
- Okl.*—Weaver v. Bishop, 52 P.2d 853, 174 *Okl.* 492.
11. *D.C.*—Commissioners of District of Columbia v. Shannon & Luch's Const. Co., 17 F.2d 219, 57 App.D.C. 67.
- Ind.*—Goldsmith v. City of Indianapolis, 196 N.E. 525, 208 *Ind.* 465.
- Mass.*—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 *Mass.* 273.
- N.J.*—Wynn v. Margate City, 157 A. 565, 9 N.J.Misc. 1324.
- N.Y.*—Goelet v. Moss, 290 N.Y.S. 573, 248 App.Div. 499, affirmed 6 N.E.2d 425, 273 *N.Y.* 503.
- Longo v. Eilers*, 93 N.Y.S.2d 517, 196 *Misc.* 909—Brooklyn Parking Corp. v. Cannella, 85 N.Y.S.2d 389, 193 *Misc.* 811.
- Kay v. Pearliris Realty Corp.*, 106 N.Y.S.2d 443.
- W.Va.*—Sudduth v. Snyder, 200 S.E. 55, 120 *W.Va.* 746.
- Inconsistent agreement**
- City and property owners after enactment of zoning ordinance were estopped to invoke inconsistent provisions of setback and driveway agreement.
- Mich.*—Sandenburgh v. Michigamme Oil Co., 228 N.W. 707, 249 *Mich.* 372.
- Assessment map**
- Township zoning ordinance and map, not assessment map of township, controls in determining whether ordinance prohibits building of apartment house on certain property.
- N.J.*—Capital Homes v. Dandrow, 8 A.2d 325, 123 *N.J.Law* 362.
- Particular regulations held in effect**
- Minn.*—State v. Houghton, 233 N.W. 831, 182 *Minn.* 77.
12. *Cal.*—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683.
- Ky.*—Selligman v. Von Allmen Bros., 179 S.W.2d 207, 297 *Ky.* 121.
- N.J.*—Collins v. Board of Adjustment of Margate City, 69 A.2d 708, 3 *N.J.* 200.
- De Benedetti v. River Vale Tp.*, Bergen County, 91 A.2d 353, 21 *N.J.Super.* 430—Sun Oil Co. v. City of Clifton, 80 A.2d 258, 13 *N.J.Super.* 89, affirmed 84 A.2d 555, 16 *N.J.Super.* 265.
- Character of construction**
- With respect to municipal zoning regulations, character of construction of building in violation of regulations cannot be disguised by giving it another name.
- Pa.*—In re Valicenti's Appeal, 99 *Pa.* Super. 279.
- Estoppel**
- A use in violation of zoning ordinance cannot operate as an estoppel against another property owner objecting thereto.
- Ohio.*—Salem v. Arnold, 16 *Ohio* Supp. 159.
- Hardship**
- A property owner cannot proceed in face of zoning laws and then complain that a great hardship is being imposed on him when municipal authorities will not allow him to complete work.
- Ky.*—Selligman v. Von Allmen Bros., 179 S.W.2d 207, 297 *Ky.* 121.
- Violation not interfering with object of zoning ordinance**
- Where property owner deliberately violated zoning ordinance restricting area to single-family dwellings by erecting multiple dwelling on property adjacent to small business zone

that a certain business is lawful under the provisions of statute¹³ or that a person has been granted a license or permit by governmental authorities to engage in such business¹⁴ does not authorize him to conduct the business at a location in violation of zoning regulations.

Zoning ordinances are not a grant of power to the landowner; rather, they impose limitations on his rights.¹⁵ A property owner has the right to use his property in a manner permitted by the zoning laws,¹⁶ and, in the absence of establishment of a zoning regulation, there is no presumption that an owner of property is restricted or limited in the use of his property.¹⁷ However, a zoning regulation does not

grant legislative sanction to carry on in a district every kind of business that may not be expressly excluded therefrom, and, if there are reasons apart from the zoning law why a particular business may not legally be carried on in the district, the zoning law furnishes no protection to it.¹⁸ The fact that a zoning ordinance permits a certain use does not exempt the owner of the property from compliance with health ordinances¹⁹ or licensing requirements,²⁰ and a zoning ordinance does not ordinarily supersede building ordinances.²¹

A zoning ordinance or regulation must be applied in accordance with its letter and spirit,²² and the declared purpose of a zoning ordinance to promote

within larger residential zone, finding that use of property for multiple dwelling purposes did not impede, hinder, or interfere with attainment of objectives of zoning ordinance did not authorize property owner so to use the property in absence of facts showing that ordinance was unreasonable or invalid as applying to owner's property.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

13. N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

14. Mass.—Town of Lincoln v. Giles, 57 N.E.2d 554, 317 Mass. 185.

Building permit

Cal.—Markey v. Daville Warehouse & Lumber, Inc., 259 P.2d 19, 119 C.2d 1.

Md.—Francis v. MacGill, 75 A.2d 91, 196 Md. 177.

N.Y.—Daub v. Popkin, 169 N.Y.S.2d 399, 9 Misc.2d 362, modified on other grounds 171 N.Y.S.2d 513, 5 A.D. 2d 283.

Liquor license

Pa.—Appeal of Veltri, 49 A.2d 369, 355 Pa. 135.

Authority to establish jail

Statutes giving city right to establish jail beyond its corporate limits did not, expressly or impliedly, authorize city to establish penal institution at any place, inside or outside city, in violation of zoning ordinance of such place; and city would have either to establish its jail or jail farm in district of county within which county zoning laws permitted such institutions or would have to follow procedure prescribed by county ordinance for procuring amendment permitting use of other land for such purpose.

Va.—City of Richmond v. Board of Sup'rs of Henrico County, 101 S.E. 2d 641, 199 Va. 679.

15. Ill.—Phillips Petroleum Co. v. City of Park Ridge, 149 N.E.2d 344, 16 Ill.App.2d 555.

16. Ala.—Davis v. City of Mobile, 16 So.2d 1, 245 Ala. 80.

Mich.—Tel-Craft Civic Ass'n v. City of Detroit, 60 N.W.2d 294, 337 Mich. 328.

Mo.—Royal Meat Products Co. v. Kansas City, App., 214 S.W.2d 713. Pa.—Miller v. Seaman, 8 A.2d 415, 137 Pa.Super. 24.

Borough of Prospect Park v. McClaskey, Com.Pl., 30 Del.Co. 451, affirmed 30 A.2d 179, 151 Pa.Super. 467.

Value of neighboring property

Where amendment of zoning ordinance changed area from a second residence district to a third residence district, thereby permitting erection of multiple dwellings, objection to proposed construction of apartment houses on ground that a decline in market value of neighboring property would result was of no validity.

N.Y.—Hendlin v. Fairmount Const. Co., 72 A.2d 541, 8 N.J.Super. 310.

Erection of dwelling

An owner of lot, containing minimum area required by city zoning regulations to authorize erection of dwelling house thereon, may erect one-story frame dwelling house, complying with all such regulations, thereon, although not in harmony or aesthetic agreement with buildings on adjoining lots, in absence of showing that it cannot and will not be used as dwelling.

Pa.—Miller v. Seaman, 8 A.2d 415, 137 Pa.Super. 24.

Public nuisances

Ordinance defining and punishing public nuisances does not outlaw an otherwise lawful use of a factory located in a zone set apart for manufacturing.

Wis.—City of Milwaukee v. Milbrew, Inc., 3 N.W.2d 386, 240 Wis. 527, 141 A.L.R. 277.

Fast use

Lawful use of plaintiffs' farm could not be fixed or "pegged" on basis of its past use.

Mich.—Clark v. Joslin, 82 N.W.2d 433, 343 Mich. 173.

17. Ohio.—State v. Kreuzweiser, 166 N.E. 228, 120 Ohio St. 352.

Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

Owner may use his property without restriction, except as may be found in statutes.

N.Y.—City of New Rochelle, on Complaint of Dassler, v. Dillon, 89 N.Y. S.2d 630.

18. Md.—Dobres v. Schwartzman, 59 A.2d 684, 191 Md. 19.

Mass.—Beane v. H. K. Porter, Inc., 182 N.E. 823, 280 Mass. 538—Marshall v. Holbrook, 177 N.E. 504, 276 Mass. 341.

Nev.—Primm v. City of Reno, 252 P.2d 835, 70 Nev. 7.

19. Cal.—Finstern v. San Bernardino County, 305 P.2d 266, 147 C.A.2d 549.

20. Mass.—City of Waltham v. Mignosa, 98 N.E.2d 495, 327 Mass. 250.

Power to license

U.S.—City of Anchorage v. Brady's Floor Covering, D.C.Alaska, 105 F. Supp. 717.

Bowling alleys

Fact that zoning bylaw of town permitted bowling alleys in districts in which they were sought to be located by petitioner did not authorize their use in absence of a license from town selectmen.

Mass.—Marchesi v. Selectmen of Winchester, 42 N.E.2d 817, 312 Mass. 28.

21. Mass.—Massachusetts Feather Co. v. Aldermen of Chelsea, 120 N.E.2d 766, 381 Mass. 527.

22. N.Y.—Monument Garage Corporation v. Levy, 194 N.E. 848, 266 N.Y. 339.

Securing public welfare

The spirit as well as the letter of the ordinance must be observed so that the public health, safety, and general welfare are secure, and substantial and equal justice done.

Pa.—Huebner v. Philadelphia Sav. Fund Soc., 192 A. 139, 127 Pa.Super. 23.

the public welfare is a weighty element to be considered in its administration.²³ Each case involving restrictions on property by reason of a zoning ordinance must be determined on the merits in accordance with the particular facts.²⁴ Zoning ordinances and regulations are intended to apply uniformly where conditions are uniform, and thus treat all property alike.²⁵

General rules apply as to the operation and effect of amendments²⁶ and repeals²⁷ of zoning ordinances and regulations. An amendment cannot affect a prior amendment which had not yet become effective at the date the notice of the subsequent amendment was given.²⁸

§ 132. — Time of Taking Effect; Retroactive Operation

Zoning measures are essentially prospective in operation and ordinarily have no retroactive effect.

As a general rule, a zoning ordinance or regulation is operative from its effective date, and only from such date.²⁹ No effect can be given to restrictive provisions of a zoning ordinance which municipal officials contemplate enacting at some time in the future.³⁰ A property owner's knowledge that a zoning ordinance is pending does not deprive him of the right to use his land for the establishment of a cemetery.³¹ Zoning measures are essentially prospective in operation³² and ordinarily have no retroactive effect³³ unless the authorizing legislation

23. Conn.—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 114 Conn. 15—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

24. Ky.—Robertson v. Western Baptist Hospital, 267 S.W.2d 395.

25. Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 172 N.E. 710, 340 Ill. 284.

Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

N.J.—Leonard Inv. Co. v. Board of Adjustment of City of Trenton, 4 A.2d 768, 122 N.J.Law 308.

Pa.—Appeal of Hasley, 30 A.2d 187, 151 Pa.Super. 192.

Zoning and planning legislation

Statutes manifest the legislative intent not to require that the application of the Zoning Act and of the Official Map and Building Permit Act be identical in all cases, in view that zoning and planning legislation is cognate and complementary.

N.J.—Phillips v. Board of Adjustment of Town of Westfield, 130 A. 2d 866, 44 N.J.Super. 491.

26. Ga.—Birdsey v. Wesleyan College, 87 S.E.2d 378, 211 Ga. 583.

N.J.—Stalford v. Barkalow, 106 A.2d 842, 31 N.J.Super. 193.

Validity of original ordinance

City ordinance, purporting to amend specified section of zoning ordinance and providing that, notwithstanding any provision of such section or any other zoning ordinance, buildings might be erected or used in any location within city for public service or public utility or similar purposes, was complete in itself, and a valid ordinance, regardless of whether section of zoning ordinance purportedly amended had been legally enacted and was in force at time of purported amendment.

Ga.—McCallum v. Bryant, 84 S.E.2d 39, 211 Ga. 98.

27. Mo.—Royal Meat Products Co.

v. Kansas City, Mo., 214 S.W.2d 713, 240 Mo.App. 688.

N.J.—Salisbury v. Borough of Ridgefield, 60 A.2d 877, 137 N.J.Law 515.

N.C.—City of Raleigh v. Fisher, 61 S.E.2d 897, 232 N.C. 629.

Repeal and reenactment

Where plaintiffs commenced operating bakery in residence zone in violation of existing city ordinance, which was subsequently repealed and replaced by a new ordinance which reenacted in substantially the same terms provisions of old ordinance, defendant was at all times violating zoning ordinances of city.

N.C.—City of Raleigh v. Fisher, supra.

28. N.Y.—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939, appeal dismissed Siciliano v. Klaess, 84 N.Y.S.2d 922, Maxwell v. Klaess, 85 N.Y.S.2d 330, 274 App.Div. 943, and Goddard v. Klaess, 85 N.Y.S.2d 331.

29. Cal.—London v. Robinson, 271 P. 921, 94 C.A. 774.

Approval by voters

Zoning plan of township had no effect during interim period between time of its adoption by trustees and its approval or rejection by voters.

Ohio.—Henn v. Universal Atlas Cement Co., App., 144 N.E.2d 917.

30. Conn.—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

Ohio.—State v. Kreuzweiser, 166 N.E. 228, 120 Ohio St. 352.

Town plan

Where town adopted, without notice or public hearing, a preliminary town plan to be used as a guide for future development and no regulations were adopted to compel landowners' compliance with the plan, such plan was no more than a guide to future layout of the town's highways and parks and could not curtail rights of private property or limit a landowner in the use of his land.

Conn.—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

31. Pa.—Fierst v. William Penn Memorial Corporation, 166 A. 761, 311 Pa. 263.

32. Cal.—Morris v. City of Los Angeles, 254 P.2d 935, 116 C.A.2d 856.

Ga.—Toomey v. Norwood Realty Co., 89 S.E.2d 265, 211 Ga. 814.

Md.—Higgins v. City of Baltimore, 110 A.2d 503, 206 Md. 89.

33. Cal.—Corpus Juris quoted in London v. Robinson, 271 P. 921, 94 C.A. 774.

Iowa.—McJimsey v. City of Des Moines, 2 N.W.2d 65, 231 Iowa 693.

N.J.—Frank J. Durkin Lumber Co. v. Fitzsimmons, 147 A. 555, 106 N.J. Law 183.

Francisco v. Department of Institutions and Agencies, 130 A. 843, 13 N.J.Misc. 683.

Okl.—Corpus Juris cited in Shaw v. Calvary Baptist Church, 88 P.2d 327, 329, 184 Okl. 454.

Pa.—Rodgers v. Bennett Bldg. Co., Com.Pl., 89 Pittsb.Leg.J. 359.

Tex.—Allen v. City of Corpus Christi, Civ.App., 247 S.W.2d 130, affirmed City of Corpus Christi v. Allen, 254 S.W.2d 759, 152 Tex. 137.

Wash.—State ex rel. Ogden v. City of Bellevue, 275 P.2d 899, 45 Wash. 2d 492.

Wis.—Rosenberg v. Village of Whitefish Bay, 225 N.W. 838, 199 Wis. 214.

43 C.J. p 344 note 70.

Rights under prior ordinance

Rights are acquired by property owner under zoning ordinance as of date of operation and will not be divested by subsequent passage of another ordinance.

Wash.—State v. Superior Court of King County, 284 P. 93, 155 Wash. 244.

Building line

Ordinance prohibiting building nearer street than established build-

specifically so states.³⁴

It has been held that property is subject to such an ordinance where construction of a building in violation thereof was not commenced prior to the effective date of the regulation,³⁵ but it has also been held that a zoning ordinance does not apply to a proposed building for which plans had been drawn and expenses incurred prior to the enactment of the ordinance.³⁶ Under some provisions a zoning ordinance may be inapplicable to a building under construction at the time of its passage,³⁷ but a zoning regulation is applicable to a building unlawfully commenced before its passage.³⁸

Invalid emergency clause. If the emergency clause of a zoning ordinance is invalid, the operation of the ordinance is postponed until the time when it should take effect in the absence of an emergency.³⁹

ing line held not to require removal of existing buildings on establishment of building line.

Conn.—McGrath v. City of Waterbury, 149 A. 733, 111 Conn. 237.

Knowledge of false representations
Village having knowledge of false representations inducing repeal of zoning ordinance for long time prior to enactment of new ordinance could not contend that new ordinance was retroactive.

Wis.—Rosenberg v. Village of Whitefish Bay, 225 N.W. 838, 199 Wis. 214.

34. Cal.—Corpus Juris quoted in London v. Robinson, 271 P. 921, 94 C.A. 774.

43 C.J. p 344 note 71.

Validity of retroactive application of zoning ordinance see supra § 38.

Retroactive operation not favored

Construction of a municipal ordinance which gives the ordinance retrospective effect is not favored, especially where vested rights are affected.

Wis.—State ex rel. Schroedel v. Pagels, 43 N.W.2d 349, 257 Wis. 376.

35. N.Y.—Caponi v. Walsh, 238 N.Y.S. 438, 228 App.Div. 86.

Tex.—City of University Park v. Rahl, Civ.App., 36 S.W.2d 1075, error dismissed.

36. N.Y.—City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Wis.—Rosenberg v. Village of Whitefish Bay, 225 N.W. 838, 199 Wis. 214.

37. Mich.—City of Coldwater v. Williams Oil Co., 284 N.W. 675, 288 Mich. 140.

N.Y.—Seltzer v. City of Yonkers, 145 N.Y.S.2d 664, 286 App.Div. 557, affirmed 135 N.E.2d 588, 1 N.Y.2d 782, 153 N.Y.S.2d 51—Caponi v. Walsh, 238 N.Y.S. 438, 228 App.Div. 86.

Tex.—Scott v. Champion Bldg. Co., Civ.App., 28 S.W.2d 178.

Plans filed or building permit obtained

Zoning ordinance manifested intent to exempt from provisions thereof, a structure for which plans had been filed prior to the effective date thereof, or for which a building permit had theretofore been issued, on condition that, where the plans had been filed as therein provided, construction should begin within ninety days of the date of issuance of the permit, regardless of whether or not that date was subsequent to the enactment of the ordinance.

N.Y.—Seltzer v. City of Yonkers, 145 N.Y.S.2d 664, 286 App.Div. 557, affirmed 135 N.E.2d 588, 1 N.Y.2d 782, 153 N.Y.S.2d 51.

Word "started" in zoning ordinance, which did not apply to certain types of buildings on which construction was started within ninety days after ordinance became effective held synonymous with "commence" or "begin;" whether acts constituted "starting construction" held for jury.

N.C.—In re W. P. Rose Builders' Supply Co., 163 S.E. 462, 202 N.C. 496.

38. N.Y.—Cohen v. Rosevale Realty Co., 199 N.Y.S. 4, 120 Misc. 416, affirmed 199 N.Y.S. 916, 206 App.Div. 681.

Tex.—Scott v. Champion Bldg. Co., Civ.App., 28 S.W.2d 178.

39. Okl.—State ex rel. Hunzicker v. Pulliam, 37 P.2d 417, 168 Okl. 632, 96 A.L.R. 1294.

40. Minn.—Orme v. Atlas Gas & Oil Co., 13 N.W.2d 757, 217 Minn. 27.

Churches and religious organizations are proper subjects for valid zoning regulations; that is, churches are not exempt from zoning regulations.

§ 133. — Application to Persons and Places

Zoning restrictions bind all persons having an interest in the property, including subsequent purchasers.

As a general rule, the restrictions on the use of land imposed by a zoning ordinance or regulation attach to, and run with, the land⁴⁰ and bind all persons having an interest in the property.⁴¹ In this connection a person purchasing property after the adoption of a zoning ordinance presumably purchases subject to the limitations of the ordinance.⁴² Conveyances of land are conditioned by all regulations made in a reasonable exercise of the zoning power.⁴³ An express exemption from the operation of zoning laws is confined to property owners within the terms of the regulation.⁴⁴ Property used by public utilities is sometimes exempt from the pro-

Pa.—Appeal of Jehovah's Witnesses, Co., 103 Pittsb.Leg.J. 489.

41. Mass.—Siegemund v. Building Com'r of City of Boston, 160 N.E. 795, 263 Mass. 212.

42. N.Y.—Eaton v. Sweeny, 251 N.Y.S. 246, 232 App.Div. 459, reversed on other grounds 177 N.E. 412, 257 N.Y. 176.

43. N.J.—Home Builders Ass'n of Northern N. J. v. Borough of Paramus, 81 A.2d 753, 7 N.J. 335—Collins v. Board of Adjustment of Margate City, 69 A.2d 708, 3 N.J. 200.

Purchaser or grantee of property

(1) Grantee takes subject to local zoning, whether or not there is a specific recital in the deed to that effect.

N.Y.—Nehrbas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145.

(2) Purchasers of property had no greater right to use property in a manner prohibited by zoning ordinance in force at time of purchase than had their vendor who requested ordinance.

Mich.—Stevens v. Royal Oak Tp., Oakland County, 68 N.W.2d 787, 342 Mich. 105.

44. Mass.—Marinelli v. Board of Appeal of Building Department of City of Boston, 175 N.E. 479, 275 Mass. 169.

Lease to others

Exemption of railroads and terminal companies from zoning law held not to permit such a company to lease its premises to private individuals for filling station.

Okl.—McCurley v. City of El Reno, 280 P. 467, 138 Okl. 92.

visions of zoning ordinances.⁴⁵

Contiguous land owned by the same proprietor does not necessarily constitute one parcel or lot for zoning purposes.⁴⁶ In order to avoid a situation where the boundary lines of a zoning district run through a lot, it is sometimes provided that the lot line shall be deemed the zoning boundary line where the two lines are close to each other.⁴⁷

§ 134. — — — Annexed Territory

The zoning status of property annexed to a municipality depends on the provisions of the municipal ordinances.

45. N.J.—Application of Hackensack Water Co., 125 A.2d 281, 41 N.J.Super. 408.

"Public utility"

(1) Meaning of "public utility" in statute exempting public utility from zoning regulations could not be determined from use of term in other statutes.

Ohio.—Motor Cargo, Inc. v. Board of Tp. Trustees of Richfield Tp., Com. Pl., 117 N.E.2d 224.

(2) Interstate trucking company operating by authority of law on public highways as a common carrier in interstate commerce and devoting its equipment solely for the purpose of carrying freight was a "public utility," exempt in rural area from zoning regulations, even though it did not have power of eminent domain. Ohio.—Motor Cargo, Inc. v. Board of Tp. Trustees of Richfield Tp., supra.

(3) Gas company was a "public service corporation" under statute permitting public service corporations to petition department of public utilities for exemption from zoning ordinances, even if such company had no power of eminent domain and had to buy its land as best it could.

Mass.—Town of Wenham v. Department of Public Utilities, 127 N.E. 2d 791, 333 Mass. 15.

Location

In determining reasonable necessity and public convenience or welfare under statute permitting building, structure, or land of public service corporation to be exempt from zoning requirement if department of public utilities determines that present or proposed situation of building, structure, or land is reasonably necessary for convenience or welfare of public, it is immaterial whether location has been acquired by eminent domain or by purchase; and fact that proposed location was not the most economic and efficient one or that other sites were more available or that there were no efforts to purchase more suitable sites, in so far as such matters were pertinent at all, were merely matters of fact bearing

on the main question whether the proposed site was reasonably necessary for convenience or welfare of public.

Mass.—Town of Wenham v. Department of Public Utilities, 127 N.E. 2d 791, 333 Mass. 15.

Utility's need of property

Under statute providing that zoning regulations shall not apply to existing property or to buildings or structures used or to be used by public utilities in furnishing service, if on petition of public utility, board of public utility commissioners shall, after a hearing, of which municipality affected shall have notice, decide that present or proposed situation of building or structure in question is reasonably necessary for service, convenience, or welfare of the public, duty of board of public utility commissioners goes far beyond a mere rubber stamp of approval of utility's choice.

N.J.—Application of Hackensack Water Co., 125 A.2d 281, 41 N.J.Super. 408.

Public served by utility and protected by zoning

Word "public," as used in statute providing that zoning regulations shall not apply to existing property or to buildings or structures used or to be used by public utilities in furnishing service, if, on petition of public utility, board of public utility commissioners shall after a hearing, of which municipality affected shall have notice, decide that present or proposed situation of building or structure for service, convenience, or welfare of the "public," refers to the public served by the utility and not the limited group benefited by the zoning ordinance.

N.J.—Application of Hackensack Water Co., supra.

Hardship

Under zoning ordinance provision authorizing nonpermitted uses in cases where the property is that of a public utility corporation and where public convenience and welfare would be promoted, a finding of unneces-

The zoning status of property annexed to a municipality depends on the provisions of the municipal ordinances,⁴⁸ and in the absence of any provision covering the matter it has been held that unincorporated territory, on being annexed to a city, occupies the status of unzoned property regardless of its zoning status before annexation.⁴⁹ County zoning regulations cease to apply to territory which has become part of a city.⁵⁰

Some zoning provisions by their terms are applicable to newly annexed territory,⁵¹ and on the legal annexation of territory to a city, the zoning ordi-

nary hardship, as in case of a variance, is necessary.

Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry 13.

48. Conn.—Schultz v. Zoning Bd. of Appeals of Town of Berlin, 130 A. 2d 789, 144 Conn. 332.

47. La.—City of New Orleans v. La Nasa, 88 So.2d 224, 230 La. 289.

49. Ky.—Hawkins v. Louisville and Jefferson County Planning and Zoning Commission, 266 S.W.2d 814.

Pa.—Appeal of Rich & Co., 84 Pa. Dist. & Co. 393, 101 Pittsb.Leg.J. 85.

Use pending at time of annexation

(1) University which owned property in town validly annexed by village would have to abide by any valid ordinances of village, including building code, notwithstanding permits issued to it prior to annexation by board of town in which such territory was situated.

N.Y.—Long Island University v. Tappan, 113 N.Y.S.2d 795, 202 Misc. 956, affirmed 118 N.Y.S.2d 767, 281 App. Div. 771, affirmed 114 N.E.2d 432, 305 N.Y. 893, reargument denied 115 N.E.2d 680, 306 N.Y. 570.

(2) Where city had passed on first reading an ordinance providing for annexation and zoning of defendants' property as residential area, defendants held such property subject to city's right to annex the property and to plan zoning of such property when and if annexation was accomplished, and city was entitled to injunction, enjoining defendants in construction of a commercial building on the property.

Tex.—Westwood Development Co. v. City of Abilene, Civ.App., 273 S.W. 2d 652, refused no reversible error.

49. Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Fortner, 243 S.W.2d 492.

50. Cal.—City of South San Francisco v. Berry, 260 P.2d 1045, 120 C.A.2d 252.

51. Tex.—Messerole v. Board of Adjustment, City of Dallas, Civ.App., 172 S.W.2d 528.

nances may become binding and effective on the annexed territory without any further act on the part of the city.⁵²

§ 135. — Governmental Bodies

Ordinarily, a governmental body is not subject to zoning restrictions in its use of property for governmental purposes.

Adoption of prior status

City zoning ordinance providing, in effect, that on annexation of any property by city, such property should come into city with same zoning classification that it possessed under regulations of county planning and zoning commission until reclassified by board of aldermen in accordance with city zoning ordinances indicated no adoption of any procedural status that might exist at the time of annexation, and thus did not adopt proceedings pending before county zoning authorities and their action in refusing a special use permit for the annexed area, and did not entitle landowner to proceed in circuit court against city zoning authorities because of refusal of special use permit by county zoning authorities.

Ky.—Hawkins v. Louisville and Jefferson County Planning and Zoning Commission, 266 S.W.2d 314.

Liquor license

Zoning provision of city charter confining sale of alcoholic beverages to certain area in downtown business section applied to annexed areas without further action on part of city, and after annexation liquor control board properly refused to renew liquor licenses for stores located in annexed areas, notwithstanding alleged fact that annexed areas were business areas not suitable for residential purposes.

Tex.—Louder v. Texas Liquor Control Bd., Civ.App., 214 S.W.2d 336, refused no reversible error.

52. Idaho.—Boise City v. Better Homes, 243 P.2d 303, 72 Idaho 441.

Ill.—City of Highland Park v. Calder, 269 Ill.App. 255.

53. Ala.—Corpus Juris Secundum cited in Water Works Bd. of City of Birmingham v. Stephens, 78 So. 2d 267, 272, 262 Ala. 203.

Ill.—Baltis v. Village of Westchester, 121 N.E.2d 495, 3 Ill.2d 388.

Mich.—Taber v. City of Benton Harbor, 274 N.W. 324, 280 Mich. 522.

N.Y.—Nehrbas v. Incorporated Village of Lloyd Harbor, 140 N.E.2d 241, 2 N.Y.2d 140, 159 N.Y.S.2d 145.

O'Brien v. Town of Greenburgh, 268 N.Y.S. 173, 239 App.Div. 555, affirmed 195 N.E. 210, 266 N.Y. 582.

Pa.—Berwick Lumber & Supply Co. v. City of Harrisburg, Com.Pl., 52 Dauph.Co. 275.

Town bound by own bylaw

Town was bound to comply with any general provisions of its zoning bylaw applicable to it.

Mass.—Pierce v. Town of Wellesley, 146 N.E.2d 666.

Housing projects planned by the housing authority are subject to all planning and zoning ordinances and regulations applicable to locality in which the housing project is situated. N.J.—Passaic Jr. Chamber of Commerce, Inc. v. Housing Authority of City of Passaic, 132 A.2d 813, 45 N.J.Super. 381.

Sewage plant

County could not ignore city zoning ordinance and construct and maintain sewage disposal plant in a B residential zone in city.

Ala.—Jefferson County v. City of Birmingham, 55 So.2d 196, 256 Ala. 436.

Erection of garage

Village had no right to violate its ordinance by erection of general municipal garage.

N.Y.—Brocoris Realty Corporation v. Village of Scarsdale, 269 N.Y.S. 746, 241 App.Div. 735.

Water system

(1) Where city water works board was corporation organized by law to perform an undertaking as agency of city, it was subject to city zoning ordinance in course of engaging in proprietary business of owning and operating water system.

Ala.—Water Works Bd. of City of Birmingham v. Stephens, 78 So.2d 267, 262 Ala. 203.

(2) Village, which operated a municipal water system and supplied public water needs of village, its own inhabitants, and inhabitants of neighboring communities, was engaged in a private or proprietary function and was therefore subject to zoning ordinance of borough, in which village sought to construct a water tank, and was also subject to the provisions of its own zoning ordinance.

N.J.—Washington Tp., Bergen County v. Village of Ridgewood, Bergen County, 134 A.2d 345, 46 N.J.Super. 152.

Nuisance

Officers and agents of the state may not disregard local zoning regulations when and if to disregard such regulations the result would be to create a nuisance.

A governmental body such as a county or municipality may be subject to the operation of zoning regulations in its use of property, at least where such use is in a proprietary capacity,⁵³ but a state, county, municipality, or other government body using property for governmental purposes ordinarily is not subject to zoning regulations.⁵⁴ The construc-

Tenn.—Davidson County v. Harmon, 292 S.W.2d 777.

54. Ala.—Corpus Juris Secundum cited in Water Works Bd. of City of Birmingham v. Stephens, 78 So. 2d 267, 272, 262 Ala. 203—Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 44 So.2d 593, 253 Ala. 402.

N.Y.—Nehrbas v. Incorporated Village of Lloyd Harbor, 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145.

Wallerstein v. Westchester Joint Water Works No. 1, 1 N.Y.S.2d 111, 166 Misc. 34.

Ohio.—State ex rel. Ohio Turnpike Commission v. Allen, 107 N.E.2d 345, 158 Ohio St. 168.

Pa.—Harward v. Haas, 59 Pa.Dist. & Co. 658, 58 Dauph.Co. 316.

Lees v. Sampson Land Co., Com. Pl., 101 Pittsb.Leg.J. 8, affirmed 92 A.2d 692, 372 Pa. 126.

Tenn.—Davidson County v. Harmon, 292 S.W.2d 777.

W.Va.—City of Charleston v. Southeastern Const. Co., 64 S.E.2d 676, 134 W.Va. 666.

Areas owned by the United States Government within the corporate limits of a city may not be zoned by the city.

Va.—Washington & Old Dominion R. R. v. City of Alexandria, 60 S.E.2d 40, 191 Va. 184.

Administration building and assembly hall

Zoning ordinance prohibiting in one-family zone any industrial, manufacturing, trade or commercial purpose, and also use for purposes other than, inter alia, any governmentally owned or operated building, barred governmental buildings devoted to industrial or proprietary use, manufacturing or trade use, or commercial use, but governmental administration building and assembly hall was not within these categories, and was sui generis, constituting distinct class capable of distinguishment from these categories.

N.J.—Thornton v. Village of Ridgewood, 111 A.2d 899, 17 N.J. 499.

Highway maintenance and garbage removal, essential to health and welfare, are governmental functions, so that village may store and maintain vehicles necessarily used by it in performing such functions and provide quarters for highway workers at premises owned by it although located in residence use district.

tion of housing units under federal law has been held not to be governed by municipal zoning ordinances.⁵⁵ In any event, a zoning regulation may expressly exempt from its operation property devoted to public or governmental uses.⁵⁶ In the absence of legislation to the contrary, the immunity

N.Y.—*Nehrbas v. Incorporated Village of Lloyd Harbor*, 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145.

Erection of fire station by city was necessary governmental use of property, and fact that area involved was zoned for other uses did not affect city's right to make such use of land whether land was acquired by condemnation or purchase.

Ga.—*Mayor, etc., of Savannah v. Collins*, 84 S.E.2d 454, 211 Ga. 191.

Water tank

(1) City had right to erect water tank in area zoned as residence zone by city zoning ordinances, since city was not bound by ordinances, and any damages caused to surrounding realty by reason of erection and maintenance of water tank were consequential in nature, and no recovery could be had therefor by owners of realty.

N.C.—*McKinney v. City of High Point*, 79 S.E.2d 730, 239 N.C. 232—*McKinney v. City of High Point*, 74 S.E.2d 440, 237 N.C. 66.

(2) Where city erected water tank and tank did not comply with zoning requirements in area zoned for residential purposes, and construction of tank allegedly cheapened and damaged value of plaintiffs' realty located in shadow of tank, which was painted bright silver color and reflected sun's rays, causing continual blinding glare, construction and maintenance of tank constituted taking of plaintiffs' realty without just compensation.

N.C.—*McKinney v. City of High Point*, 74 S.E.2d 440, 237 N.C. 66.

Wells and pumps

City is not bound by its zoning ordinance with respect to right to have wells and pumps in restricted area.

Cal.—*Sunny Slope Water Co. v. City of Pasadena*, 33 P.2d 672, 1 C.2d 87.

Garage

(1) Where village zoning ordinance permitted construction of private garages as accessories to residences, village could construct and maintain comparable structure to house equipment necessary in discharge of duty to maintain streets and regulate traffic.

N.Y.—*Stiger v. Village of Hewlett Bay Park*, 129 N.Y.S.2d 38, 233 App. Div. 827.

(2) Where county maintained a municipal garage, which was located on land outside village limits, and which was used for storing trucks and other equipment used by county highway department, county's driving of its trucks over land, which was owned by county within village, and which was in residential area

would not constitute a violation of the zoning ordinance.

N.Y.—*Incorporated Village of Hempstead v. Nassau County*, 141 N.Y.S.2d 165.

Jail

County was not subject to terms, conditions, and provisions of city zoning ordinance in location and construction of county jail on county property located within city.

Wis.—*Green County v. City of Monroe*, 87 N.W.2d 827, 3 Wis.2d 196.

Consent of municipality

City zoning ordinance enacted after statute creating state office building commission was inapplicable to commission, notwithstanding provision in statute that construction of building by commission should be subject to such consent and approval of city in any case as may be necessary.

W.Va.—*City of Charleston v. Southeastern Const. Co.*, 64 S.E.2d 676, 134 W.Va. 666.

Highway authority

Under legislation authorizing New Jersey Highway Authority to construct, maintain, repair, and operate project known as Garden State Parkway, authority was not subject, in construction of service areas, to local zoning and building requirements.

N.J.—*Town of Bloomfield v. New Jersey Highway Authority*, 113 A.2d 658, 18 N.J. 237.

Airport

Ohio.—*State ex rel. Helsel v. Board of Com'rs of Cuyahoga County*, Com.Pl., 79 N.E.2d 698, affirmed 78 N.E.2d 694, appeal dismissed 79 N.E.2d 911, 149 Ohio St. 533.

Public alley

Mich.—*Johnson v. Fred L. Kircher Co.*, 42 N.W.2d 117, 327 Mich. 377.

Incinerator

Pa.—*Jordan v. Township of Lower Merion*, 34 Pa. Dist. & Co. 551, 55 Montg. Co. 20.

Power lines

Construction, operation, and maintenance by City of Los Angeles of overhead steel tower high tension electric transmission line on strip of land between roadways of street in residential zone was not unlawful, in view of amendment of city zoning laws so as to exempt electric power transmission lines from all zoning restrictions and like exemption granted by county to city.

Cal.—*Thompson v. City of Los Angeles*, 185 P.2d 393, 32 C.A.2d 45.

55. U.S.—*U. S. v. City of Chester*, C.C.A. Pa., 144 F.2d 415.

N.J.—*Tim v. City of Long Branch*, 53 A.2d 164, 135 N.J. Law 549.

Ohio.—*Curtis v. Toledo Metropolitan Housing Authority*, 78 N.E.2d 676, 149 Ohio St. 386.

Under supremacy clause of federal Constitution and statutes authorizing erection of houses, for persons engaged in national defense activities and their families in areas where acute shortage of housing exists, Federal Works Administrator had authority to proceed with construction of emergency housing to house war workers without regard to application of municipal building regulations.

U.S.—*U. S. v. City of Chester*, C.C.A. Pa., 144 F.2d 415.

56. Cal.—*Bailey v. Los Angeles County*, 293 P.2d 449, 46 C.2d 132.

Ga.—*McCallum v. Bryant*, 84 S.E.2d 39, 211 Ga. 98.

N.Y.—*Hewlett v. Town of Hempstead*, 133 N.Y.S.2d 690, 3 Misc.2d 945, affirmed 150 N.Y.S.2d 922, 1 A.D.2d 954.

"Municipal use"

Operation and maintenance by a township of a sewage treatment and disposal plant were a "municipal use" within township zoning ordinance authorizing municipal use of premises in area zoned for single-family dwelling.

Pa.—*Lees v. Sampson Land Co.*, 92 A.2d 692, 372 Pa. 126, 40 A.L.R.2d 1171.

Power of state

(1) Legislature has power to immunize its public authorities from provisions of local zoning and building restrictions.

N.J.—*Town of Bloomfield v. New Jersey Highway Authority*, 113 A.2d 658, 18 N.J. 237.

(2) Where immunity from local zoning regulation is claimed by any agency or authority which occupies a superior position in the governmental hierarchy, there is a presumption that such immunity was intended in absence of express statutory language to the contrary.

N.J.—*Aviation Services v. Board of Adjustment of Hanover Tp.*, 119 A.2d 761, 20 N.J. 275.

(3) Where there was an absence of any statutory language which would limit a municipal airport undertaking, either within or without its boundaries, the bestowing of the power of eminent domain to subserve the program reflected legislative intent to immunize the acquisition and maintenance of a municipal airport from the zoning power.

N.J.—*Aviation Services v. Board of Adjustment of Hanover Tp.*, supra.

which the government may have from the prohibitions of a zoning ordinance do not extend to a private owner leasing the property for governmental purposes.⁵⁷

The effect of zoning ordinances on the exercise of the power of eminent domain is discussed *infra* § 137.

§ 136. — Collateral Operation and Effect of Zoning Laws

The operation and effect of zoning laws and ordinances on various collateral matters, such as the right to compensation for services as an architect or broker where a violation of the zoning laws is involved, have been the subject of judicial decisions.

The operation and effect of zoning laws and ordinances on various collateral matters have been the subject of judicial decisions.⁵⁸ The violation of a zoning ordinance is not negligence.⁵⁹ An indemnity company, giving bond for the completion of a building, is not relieved from liability where construction of the building is prevented by a zoning ordinance.⁶⁰

Architects. Where an architect is employed generally to draw the plans and specifications for a building of a given style and dimensions, he may

recover for his services on a compliance with the terms of his employment even though the building planned is one which the employer cannot erect at the place at which it was his purpose to erect it,⁶¹ but the rule is otherwise where the lot or place where the building is to be erected is made known to the architect.⁶²

Brokers. A broker is not entitled to a commission for his services in obtaining a lease where the lease is for a use not allowed by the zoning laws.⁶³

Contracts. Where a contract is made for a use of property which the zoning laws do not permit, the contract fails, and any consideration paid should be returned where neither party knew of the zoning law.⁶⁴ However, zoning laws will not vitiate a building contract unless performance of the contract without violating the zoning laws is impossible.⁶⁵

An agreement to convey property to a municipality if it relaxed its zoning regulations is invalid as contrary to public policy.⁶⁶

A conveyance in violation of zoning regulations is not void, but voidable.⁶⁷

Fraud and misrepresentation. Misrepresentations by the vendor⁶⁸ or by the broker⁶⁹ that the property

57. N.J.—Carroll v. Board of Adjustment of Jersey City, 83 A.2d 448, 15 N.J.Super. 363.

Lease of government property
N.Y.—Village of Tarrytown v. Tappan Airways, Inc., 128 N.Y.S.2d 509, 283 App.Div. 803.

58. *Reformation of instrument*

Where county zoning ordinance prohibited construction of buildings within fifty feet of lot lines, and grantor had conveyed lot, which had north-south width of only one hundred feet, to grantee whom grantor knew intended to build dwelling thereon, court would, as matter of equity, require grantor, as adjoining property owner, to sign necessary zoning waiver to allow legal construction of house on such lot.

Ill.—Schmitt v. Heinz, 125 N.E.2d 457, 5 Ill.2d 372.

Testamentary disposition

Where directions in will that, on death of widow, a specific residence should be conveyed to a Christian denomination to be selected to operate and maintain a home for orphan children and that a specified sum should be paid out of residuary estate for maintenance, were impossible of fulfillment because of zoning regulations and because value of residuary estate was not such as to provide such a sum for maintenance, the gifts failed entirely.

N.J.—Fidelity Union Trust Co. v. Laise, 60 A.2d 250, 142 N.J.Eq. 366.

59. Minn.—Hutchinson v. Cotton, 53 N.W.2d 27, 236 Minn. 366.

60. Pa.—Real Estate-Land Title & Trust Co. v. Lloyd Bldg. Corporation, 159 A. 168, 306 Pa. 189.

61. Wash.—Bebb v. Jordan, 189 P. 553, 111 Wash. 73.

Violation of zoning ordinance

The owner may not defend on the ground that the architect's plans were in violation of a zoning ordinance and therefore made for an illegal purpose.

N.Y.—Weiser v. Stadium of Carnarsie, 244 N.Y.S. 61, 137 Misc. 881.

Quantum meruit

Where a zoning ordinance prevents the erection of a building for which the architect prepared plans, he may recover upon quantum meruit for work performed.

N.Y.—Weiser v. Stadium of Carnarsie, *supra*.

62. Wash.—Bebb v. Jordan, 189 P. 553, 111 Wash. 73.

63. N.Y.—Markowitz v. Arrow Const. Co., 169 N.Y.S. 159, 102 Misc. 532.

Ohio.—Reef v. Bon Ton Grill, App., 84 N.E.2d 247.

64. Fla.—Marks v. Fields, 36 So.2d 612, 160 Fla. 789.

Fraudulent representation

The fact that purchaser could have

gone to records and learned that land was zoned for residential purposes did not prevent purchaser from prosecuting action against vendor on ground of fraudulent representation that land could be used for sale of liquor.

Ky.—Stallard v. Adams, 228 S.W.2d 430, 312 Ky. 532.

65. Tex.—Carras v. Birge, Civ.App., 211 S.W.2d 998, refused no reversible error.

Permit

Contract to construct a building on a certain lot, which provides that the contractor is to apply for and obtain the necessary building permit, is not rendered an illegal contract within the meaning of the rule that a court will not enforce a remedy to a party who seeks to enforce an illegal contract, by reason of the fact that the construction called for was violative of an existing zoning ordinance so that a permit could not be obtained.

Pa.—Lockwood v. Chessman, 83 Pa. Dist. & Co. 245, 39 Del.Co. 261.

66. Tenn.—City of Knoxville v. Ambriester, 263 S.W.2d 528, 196 Tenn. 1.

67. Cal.—Clemons v. City of Los Angeles, 222 P.2d 439, 36 C.2d 95.

68. Cal.—Bobak v. Mackey, 236 P.2d 626, 107 C.A.2d 55.

69. Ala.—Hollins v. Nalls, 58 So.2d 112, 257 Ala. 175.

is usable for the purpose desired by the purchaser, when such use is forbidden by the zoning regulations, may support an action for damages for fraud. Failure of the vendor to disclose that the existing use of the premises violates the zoning laws has been held to be actionable fraud.⁷⁰

Intoxicating liquors. A license for the sale of intoxicating liquors may not be issued for a location where such sale is forbidden by the zoning laws.⁷¹

Mechanics' lien. It has been held that one furnishing materials to another to be used on certain realty is charged with knowledge of the existing zoning regulations relative to such realty and may not assert a lien based on such person's violation of the ordinances in building a structure with such materials.⁷²

Merchantable title. Restrictions imposed on property by zoning laws are not encumbrances such as render the title unmerchantable,⁷³ but the violation of such a restriction creates an encumbrance which affects the merchantability of the title to the property.⁷⁴ A nonconforming use which was in operation prior to the adoption of the zoning regulation is not an encumbrance where the zoning regulation permits the continuance of such uses.⁷⁵

Specific performance of a contract for the sale of realty has been refused where an unanticipated change in the zoning laws renders the property un-

usable for the purpose for which the purchaser intended to use it.⁷⁶

§ 137. — — — Eminent Domain

The power of eminent domain is not limited by zoning ordinances, but such regulations are a factor to be considered in determining the value of the property taken.

The power of eminent domain is not limited by zoning ordinances,⁷⁷ and the grant by the state of the power to establish zoning regulations is ineffective to limit the exercise of the right of eminent domain by the federal government or any of its constituted agencies, such as the Tennessee Valley Authority.⁷⁸ The propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations.⁷⁹ Thus it has been held that a town may take property for a use which its own zoning regulations forbid,⁸⁰ and a school district may condemn land for a school although the location of the proposed school is in conflict with the municipality's zoning ordinances.⁸¹

It has been held that the power of eminent domain granted by the state to a railroad takes precedence over the zoning power of a municipality, and that a municipal zoning ordinance may not prevent a railroad use of property.⁸² However, it has been held that a utility company having the power of eminent domain is subject to zoning regulations,⁸³ and that compliance with such regulations is a condition pre-

70. Cal.—Barder v. McClung, 209 P. 2d 808, 93 C.A.2d 692.

71. Conn.—Hutchison v. Board of Zoning Appeals of Town of Stratford, 100 A.2d 839, 140 Conn. 381—State ex rel. Wise v. Turkington, 63 A.2d 596, 135 Conn. 276—Kamerman v. Leroy, 50 A.2d 175, 133 Conn. 232—Town of Newington v. Mazzocchi, 48 A.2d 729, 133 Conn. 146.

Pa.—License of Cichy, 82 Pa. Dist. & Co. 336, 42 Luz. Leg. Reg. 67.

Where zoning ordinance was permissive in form, and did not list as a permitted use in certain zone the sale of intoxicating liquor in the original package, operator of drug store in such zone was not entitled as a matter of right to the issuance of such a liquor license, even though, in the absence of the ordinance, there would have been no impediment to the granting of a license. Mo.—State ex rel. Barnett v. Sappington, App., 266 S.W.2d 774.

Transfer of license

Pa.—Appeal of Flannery, 3 Pa. Dist. & Co.2d 97, 56 Lack. Jur. 85.

72. Ill.—Wolthausen v. Lederer, 39 N.E.2d 71, 313 Ill. App. 143.

73. La.—Oatis v. Delcuze, 77 So.2d 28, 226 La. 751.

Wis.—Lasker v. Patrovsky, 60 N.W. 2d 336, 264 Wis. 589.

74. La.—Oatis v. Delcuze, 77 So.2d 28, 226 La. 751.

75. La.—Oatis v. Delcuze, supra.

76. Va.—Clay v. Landreth, 45 S.E.2d 875, 137 Va. 169, 175 A.L.R. 1047.

Approval of zoning board

Where contract for sale of realty was contingent on obtaining approval of zoning board for use of dwelling house as dental office, letter to zoning board made full disclosure of purchaser's intended use of premises, and reply from secretary of zoning board stated that no formal approval would be required, the contingency clause was sufficiently complied with and purchaser was entitled to specific performance. Pa.—Funke v. Paist, 52 A.2d 655, 356 Pa. 594.

77. Ohio.—State ex rel. Helsel v. Board of Com'rs of Cuyahoga County, Com.Pl., 79 N.E.2d 698, affirmed App., 78 N.E.2d 694, appeal dismissed 79 N.E.2d 911, 149 Ohio St. 583.

78. U.S.—Rainbow Realty Co. v. Tennessee Val. Authority, D.C. Tenn., 124 F.Supp. 436.

79. U.S.—Rainbow Realty Co. v. Tennessee Val. Authority, supra.

80. Mass.—Sellers v. Town of Concord, 107 N.E.2d 784, 329 Mass. 259.

81. Cal.—Town of Atherton v. Superior Court in and for San Mateo County, App., 324 P.2d 328, followed in Landi v. Superior Court In and For San Mateo County, App., 324 P.2d 326.

Power to zone schools

Assuming that a city council has power to zone schools, such zoning is merely advisory or recommendatory and is not binding on the school district.

Cal.—Town of Atherton v. Superior Court in and for San Mateo County, App., 324 P.2d 328.

82. Tex.—Fort Worth & D. C. Ry. Co. v. Ammons, Civ.App., 215 S.W. 2d 407, refused no reversible error.

83. N.Y.—New York State Elec. & Gas Corp. v. Statler, 122 N.Y.S.2d 190, 204 Misc. 7.

cedent to its exercise of the power of condemnation.⁸⁴ On the other hand, it has been held that even where the condemning body is amenable to the zoning regulations, its compliance therewith is not a condition precedent to its exercise of the power of condemnation.⁸⁵

Zoning regulations are a factor to be considered in determining the value of property taken in condemnation proceedings.⁸⁶

The applicability of zoning regulations to governmental bodies and public utilities generally is discussed supra § 135.

§ 138. — — — Landlord and Tenant

A lease which provides for a use not in conformity with the zoning regulations is not necessarily illegal where the regulations provide for variances and authorize the continuance of prior nonconforming uses.

A lease of premises to be used in a manner forbidden by the zoning laws may be void,⁸⁷ and is not validated by the landlord's agreement to seek a modification of the law and the tenant's agreement to pay rent while using the premises.⁸⁸ On the other hand, it has been held that a lease which provides for a use not in conformity with the zoning regulations is not necessarily illegal, where the regulations permit the continuance of prior nonconforming uses and provide for variances.⁸⁹ A lease to conduct a business, in a district where such business is prohibited by a zoning ordinance but may be authorized by permit from the local authorities, is enforceable in the absence of a showing of refusal of such authorities to issue the permits.⁹⁰ Similarly, a lease providing for its termination in the event that it is determined that the planned use is forbidden by the zoning laws is not illegal or against public

84. N.Y.—New York State Elec. & Gas Corp. v. Statler, supra.

85. Ga.—West v. Housing Authority of City of Atlanta, 84 S.E.2d 30, 211 Ga. 133.

86. Cal.—Long Beach City High School Dist. of Los Angeles County v. Stewart, 185 P.2d 585, 30 C.2d 763, 173 A.L.R. 249.

Ill.—Forest Preserve Dist. of Cook County v. Kercher, 66 N.E.2d 873, 394 Ill. 11.

Md.—Reindollar v. Kaiser, 73 A.2d 493, 195 Md. 314.

Mich.—In re Condemnation of Lands in City of Battle Creek for Park Purposes, 67 N.W.2d 49, 341 Mich. 412.

Tex.—City of Austin v. Cannizzo, 267 S.W.2d 808, 153 Tex. 324.

City of Tyler v. Ginn, Civ.App., 225 S.W.2d 997, application dismissed, Ginn v. City of Tyler, 227 S.W.2d 1022, 148 Tex. 604.

Va.—Kornegay v. City of Richmond, 41 S.E.2d 46, 185 Va. 1013.

Suitability for prohibited use

(1) Where zoning ordinances or other legal restrictions apply to property which is the subject of condemnation proceeding, whether consideration should be given to the use for which the property is reasonably suitable and adaptable, although prohibited by the zoning ordinance, for purpose of arriving at market value, is dependent on whether trial judge is satisfied from the evidence as a whole that there is reasonable probability that the zoning or other restrictions will be lifted within a reasonable time, in which event the evidence of other uses may be considered, but a contrary conclusion requires an exclusion of the evidence. Tex.—City of Austin v. Cannizzo, 267 S.W.2d 808, 153 Tex. 324.

(2) In city's proceeding to condemn land for site of National Guard armory, testimony offered by landowner to show that parts of lands were adaptable to uses not then permitted by city zoning regulations, such as construction of church or similar institution and modern medical clinic, and evidence that there was a large church across street from land and garden type apartment development in neighborhood thereof, were properly excluded. Mo.—In re Army Site in Kansas City, 282 S.W.2d 464.

(3) In suit by city to condemn a 4.57-acre piece of a larger tract owned by defendants, it was not error, under evidence as to probability of removal of zoning restrictions in the future, to permit a consideration of value of the 4.57 acres for commercial purposes in the face of contrary zoning restrictions.

Tex.—City of Austin v. Cannizzo, supra.

(4) In action by high school district to condemn realty formerly used as farm land but recently zoned by city as residential district, instructions were not prejudicially erroneous as limiting jury's consideration of value to use to which property might be put under existing zoning ordinance.

Cal.—Long Beach City High School Dist. of Los Angeles County v. Stewart, 185 P.2d 585, 30 C.2d 763, 173 A.L.R. 249.

87. Lease for forbidden use not established

Where plaintiffs leased property to defendants to be occupied for eggs and poultry, wholesale only, evidence that defendants were ordered to discontinue use of premises as such premises were in district zoned com-

mercial and were later found guilty of violating zoning ordinance, and that their application to operate property for sale of eggs and poultry, wholesale only, was rejected, did not establish that plaintiffs had leased premises for a use prohibited by zoning ordinance, and defendants were liable under the lease.

Ill.—Strauss v. Boris, 89 N.E.2d 862, 339 Ill.App. 278.

Subsequent change in zoning law

Landlords were not entitled to terminate holdover tenancy of tenant because of fact that lease, at time of its execution, violated city zoning ordinance forbidding rooming houses, where, before effective date of termination notice, new zoning ordinance permitted use of premises as a rooming house.

Ill.—Twichell v. Robinson, 80 N.E.2d 79, 334 Ill.App. 611.

88. N.Y.—Hartsin Const. Corporation v. Millhauser, 241 N.Y.S. 428, 136 Misc. 646.

89. Ill.—Warshawsky v. American Automotive Products Co., 142 N.E.2d 180, 13 Ill.App.2d 427—Lind v. Spanuth, 120 N.E.2d 381, 3 Ill.App.2d 112.

N.Y.—Elk Realty Co. v. Yardney Elec. Corp., 153 N.Y.S.2d 730.

90. N.Y.—Louis Friedman Realty Co. v. De Stefan, 222 N.Y.S. 371, 220 App.Div. 661.

Say-Phil Realty Corporation v. De Lignemare, 228 N.Y.S. 365, 181 Misc. 827.

Assertion of illegality

Lease for drugstore in residence district made expressly subject to zoning laws places the burden on tenant of obtaining variation of such laws and precluded him asserting illegality of lease.

N.Y.—Say-Phil Realty Corporation v. De Lignemare, supra.

policy⁹¹ and rent may be recovered for the period prior to the determination that the use is not permissible,⁹² but not for the subsequent period.⁹³ Where a lease is void under a zoning restriction, the tenant has been held to be entitled to recover rent paid.⁹⁴

Where a covenant by the lessor is made impossible of performance by the enactment of a zoning ordinance, the lessee may treat the lease as terminated,⁹⁵ and a use by a tenant which violates the zoning law gives the landlord the right to void the lease.⁹⁶ The use of housing accommodations in violation of the zoning laws is ground for the eviction of the tenant.⁹⁷ Where a tenancy violates the

zoning regulations, the tenant has been denied the right to regain possession although his eviction was illegal.⁹⁸

§ 139. — — — Nuisance

The fact that an activity is permitted by the zoning laws is not ordinarily conclusive that it is not a nuisance.

Under a statute providing that nothing done under the authority of a statute shall be deemed a nuisance, it has been held that an activity authorized by a zoning ordinance cannot be a nuisance.⁹⁹ Ordinarily, however, the fact an activity is permitted by the zoning law does not mean that it is not a nuisance,¹ but the fact that the activity is permitted

91. Mass.—Adamsky v. Mendes, 96 N.E.2d 236, 326 Mass. 603.

Lease conditioned on obtaining permit

Lease provision that, in event it were impossible to secure approval by zoning board of lessee's occupancy, advanced rent would be refunded and contract would be considered null and void, constituted a condition precedent, and lease was nullified when it was possible only to procure from zoning board a permit for use of premises for less than full term of lease.

Ohio.—Kallins v. Rex, Inc., App., 125 N.E.2d 371.

Revocation of zoning variance

In proceeding for declaratory relief to determine rights of parties under ambiguous lease, which provided for its termination on determination, by duly constituted authority, that operation of business specified in purpose clause was contrary to municipal zoning ordinance, evidence on question whether lease was terminated by revocation of zoning variance granted lessees was admissible to prove that event contemplated by parties had occurred.

Cal.—Dexter v. Stevenson Properties, 247 P.2d 11, 39 C.2d 407.

92. Mass.—Adamsky v. Mendes, 96 N.E.2d 236, 326 Mass. 603.

N.Y.—Elk Realty Co. v. Yardney Elec. Corp., 153 N.Y.S.2d 730.

93. Mass.—Adamsky v. Mendes, 96 N.E.2d 236, 326 Mass. 603.

94. N.Y.—Louis Friedman Realty Co. v. De Stefan, 217 N.Y.S. 142, 127 Misc. 608, reversed on other grounds 222 N.Y.S. 371, 220 App. Div. 661.

95. U.S.—Wachs v. Great Atlantic & Pacific Tea Co., D.C.Pa., 87 F. Supp. 730.

Rear-door delivery

Where municipal authorities, acting under city ordinance allegedly prohibiting rear-door deliveries, issued a cease and desist order forbidding lessee to make rear-door deliv-

eries to leased premises, the order, whether legal or merely under color of law, effectively interfered with lessee's right to rear-door deliveries, and lessee was under no obligation to contest the order in order to contend successfully in action for rent that there had been a breach by lessor of covenant in lease for rear-door delivery, so as to relieve lessee from liability for rent after moving from premises.

U.S.—Wachs v. Great Atlantic & Pacific Tea Co., supra.

96. N.Y.—47 East 74th St. Corp. v. Simon, 69 N.Y.S.2d 746, 188 Misc. 885.

Trivial violation insufficient

Even if the having of gold lettering on windows of drug store amounted to violation of zoning ordinance prohibiting signs in that area, and as such was violation of covenant in lease, such violation was of a trivial and inconsequential nature, insufficient for forfeiture of long term lease.

N.Y.—Madison Stores, Inc. v. Enkay Sales Corp., 142 N.Y.S.2d 132, 207 Misc. 1091.

Waiver

Where exterior signs and window lettering had been used on leased premises for many years, and landlord and his predecessors, with knowledge of such use, had accepted rent without any objection that such use was violative of zoning resolutions, or covenants of lease, landlord waived alleged breach of covenant of lease that lessee would abide by such zoning resolutions, and should be estopped to maintain summary proceedings to recover possession of premises because of violation of zoning resolutions and covenant in lease requiring lessee to abide by such resolutions.

N.Y.—Madison Stores, Inc. v. Enkay Sales Corp., supra.

97. Cal.—Haig v. Hogan, 187 P.2d 426, 32 C.A.2d 876.

Pa.—Lower Merion Tp. v. 34 Derwen Road, 80 A.2d 797, 367 Pa. 265.

Illegal use not established

N.Y.—Broadway-Sheridan Arms v. Phillips, 85 N.Y.S.2d 806, 194 Misc. 35, affirmed 88 N.Y.S.2d 389, 194 Misc. 34.

License

Where defendant occupied plaintiff's garage as a habitation under a license from plaintiff, and municipal authorities asserted that such occupancy violated zoning ordinance and demanded that plaintiff evict defendant under pain of criminal action, defendant's rights as licensee did not impose on plaintiff obligation of securing an adjudication nullifying demand of municipal authorities.

Cal.—Bryant v. Marstelle, 173 P.2d 846, 76 C.A.2d 740.

98. N.Y.—Bressler v. Amsterdam Operating Corp., 86 N.Y.S.2d 250, 194 Misc. 76.

99. Cal.—Kornoff v. Kingsburg Cotton Oil Co., 238 P.2d 507, 45 C.2d 265.

Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

1. Cal.—Fendley v. City of Anaheim, 294 P. 769, 110 C.A. 731.

Mass.—Weltshe v. Graf, 82 N.E.2d 795, 323 Mass. 498—Tortorella v. H. Traiser & Co., 188 N.E. 254, 234 Mass. 497, 90 A.L.R. 1203.

Mo.—Fuchs v. Curran Carbonizing & Engineering Co., App., 279 S.W.2d 211.

Pa.—Toland v. Newtown Tp., Quar. Sess., 35 Del.Co. 21.

Freight terminal

Where freight terminal was located in district zoned for business but was located on boundary near residential district, and employees at terminal worked all night loading and unloading trucks and sorting merchandise, making loud noises so as to interfere with sleep of persons in the area, there was a "nuisance" and operation of terminal would be enjoined between 8 P.M. and 7 A.M. Mass.—Weltshe v. Graf, 82 N.E.2d 795, 323 Mass. 498.

under the zoning laws is to be considered in determining whether or not it is a nuisance.² It has been held that zoning laws are conclusive as to what is or is not a public nuisance, but that they are not conclusive on the question of private nuisance.³

The use of property in violation of a zoning law has been held to be a nuisance per se.⁴ The fact that the ordinance under which the use is prohibited is invalid does not mean that the activity may not

be treated as a nuisance.⁵

§ 140. — — — Restrictions Imposed by Act of Parties

A valid restriction on the use of realty is not nullified or superseded by the adoption of a zoning ordinance.

A valid restriction on the use of real property is neither nullified nor superseded by the adoption or enactment of a zoning ordinance,⁶ nor is the valid-

Funeral home

An ordinance which allows establishment or maintenance of a funeral home or undertaking establishment in a district zoned either for residential or commercial purposes is permissive only, and not controlling as to whether such undertaking establishment would constitute a nuisance which might be enjoined by equity court.

Mich.—Rockenbach v. Apostle, 47 N. W.2d 636, 330 Mich. 338.

Use not authorized

Provision in city zoning ordinance that there should be excluded from industrial districts those uses which may be obnoxious or offensive by reason of emission of odor, dust, smoke, gas, noise, or vibration makes it unlawful for occupants of industrial districts to maintain such nuisances whether they affect industrial workers in other industries or residents of nearby residential districts.

La.—Ryan v. Louisiana Soc. for Prevention of Cruelty to Animals, App., 62 So.2d 296.

Manner of use

City, by granting privilege to operate "boiler works" in district zoned for heavy industrial use, did not imply that such works could be conducted in a way and manner to amount to a private nuisance.

La.—Ellis v. Blanchard, App., 45 So. 2d 100.

Spot zoning

Nature of the business of operating a private garbage dump is inherently obnoxious in a residential area, and spot rezoning of the area proposed to be used for the dump does not change residential character of the community in general or permit a nuisance in fact to exist.

Wash.—Harris v. Skirving, 248 P.2d 408, 41 Wash.2d 200.

2. Mass.—Weitshe v. Graf, 82 N.E. 2d 795, 323 Mass. 498.

Mich.—Rockenbach v. Apostle, 47 N. W.2d 636, 330 Mich. 338.

3. Colo.—Robinson Brick Co. v. Luthi, 169 P.2d 171, 115 Colo. 106, 166 A.L.R. 655.

4. Cal.—McIvor v. Mercer-Fraser Co., 172 P.2d 758, 76 C.A.2d 247.

La.—City of New Orleans v. Lafon, App., 61 So.2d 270.

Private and public nuisance

Valid zoning ordinance, in legal effect, determines that a use which is prohibited by ordinance in a particular area is both a private and public nuisance in that area.

N.J.—Borough of Cresskill v. Borough of Dumont, 100 A.2d 182, 28 N.J.Super. 26, affirmed 104 A.2d 441, 15 N.J. 238.

5. La.—Beauvais v. D. C. Hall Transport, Inc., 49 So.2d 44.

6. D.C.—Castleman v. Avignone, 12 F.2d 326, 56 App.D.C. 253.

Ill.—Dolan v. Brown, 170 N.E. 425, 338 Ill. 412.

Iowa.—Burgess v. Magarian, 243 N. W. 356, 214 Iowa 694.

Ky.—Parrish v. Newbury, 279 S.W. 2d 229—City of Richlawn v. McMakin, 230 S.W.2d 902, 313 Ky. 265, certiorari dismissed McMakin v. City of Richlawn, 71 S.Ct. 531, 340 U.S. 945, 95 L.Ed. 682.

La.—Corpus Juris Secundum cited in Alfortish v. Wagner, 7 So.2d 708, 712, 200 La. 198.

Mass.—Jenney v. Hynes, 184 N.E. 444, 282 Mass. 182—Nelson v. Town of Belmont, 174 N.E. 320, 274 Mass. 35.

Mich.—Abrams v. Shuger, 57 N.W.2d 445, 336 Mich. 59—Phillips v. Lawler, 244 N.W. 165, 259 Mich. 567.

Minn.—Corpus Juris Secundum cited in Burger v. City of St. Paul, 64 N.W.2d 73, 80, 241 Minn. 285—Strauss v. Ginzberg, 15 N.W.2d 130, 218 Minn. 57, 155 A.L.R. 1000.

Mo.—Corpus Juris Secundum cited in Scallet v. Stock, 253 S.W.2d 143, 147, 363 Mo. 721.

N.J.—Scillia v. Szalai, 59 A.2d 435, 142 N.J.Eq. 92.

N.Y.—Corpus Juris Secundum cited in Brown v. Williams, 148 N.Y.S. 2d 841, 844, 4 Misc.2d 312, affirmed 163 N.Y.S.2d 712, 3 A.D.2d 939, reargument and appeal denied 165 N.Y.S.2d 699, 4 A.D.2d 745.

Premium Point Park Ass'n v. Polar Bar, Inc., 121 N.Y.S.2d 596, reversed on other grounds 122 N.Y. S.2d 425, 282 App.Div. 785, affirmed 119 N.E.2d 360, 306 N.Y. 507.

N.C.—Corpus Juris Secundum cited in Shuford v. Asheville Oil Co., 91 S.E.2d 903, 912, 243 N.C. 636.

Ohio.—Oiberding v. Smith, App., 34 N.E.2d 296.

Mahrt v. First Church of Christ Scientist, Com.Pl., 142 N.E.2d 567, affirmed, App., 142 N.E.2d 678.

Okl.—Southwest Petroleum Co. v. Logan, 71 P.2d 759, 180 Okl. 477.

Or.—Heitkemper v. Schmeer, 29 P. 2d 540, 146 Or. 304, rehearing denied 30 P.2d 1119, 146 Or. 304—Crawford v. Senosky, 274 P. 306, 128 Or. 229—Ludgate v. Somerville, 256 P. 1043, 121 Or. 643, 54 A.L.R. 837.

Pa.—Appeal of Michener, 115 A.2d 367, 382 Pa. 401.

Blossick v. Huber, Com.Pl., 54 Lanc.L.Rev. 385.

R.I.—Hill v. Ogradnik, 113 A.2d 734, reargument denied 114 A.2d 398.

Tex.—Corpus Juris Secundum cited in Farmer v. Thompson, Civ.App., 289 S.W.2d 351, 355—Eakens v. Garrison, Civ.App., 278 S.W.2d 510, refused no reversible error—Clesi v. Northwest Dallas Imp. Ass'n, Civ.App., 263 S.W.2d 820, error refused no reversible error—Spencer v. Maverick, Civ.App., 146 S.W.2d 319.

Va.—Ault v. Shipley, 52 S.E.2d 56, 189 Va. 69.

"We recognize the law to be that a zoning ordinance may not relieve land from lawful covenants of restrictions of use inter partes contained in deeds embracing a given area, for such ordinance cannot affect or impair the contractual obligation granted by such restriction.

. . . But if the zoning ordinance is less stringent its provisions do not diminish the legal effect of private building restrictions."

Ky.—City of Richlawn v. McMakin, 230 S.W.2d 902, 906, 313 Ky. 265, certiorari dismissed McMakin v. City of Richlawn, 71 S.Ct. 531, 340 U.S. 945, 95 L.Ed. 682.

Rezoning as not change of condition

Va.—Schwarzschild v. Welborne, 45 S.E.2d 152, 186 Va. 1052.

Approval of attempted replat

Valid restrictive covenants cannot be abrogated by subsequently attempting to replat, even when the replat has the approval of the city planning or zoning commission.

Tex.—Witte v. Sebastian, Civ.App., 278 S.W.2d 200.

Change expressly negated

Without deciding whether such ordinance may lawfully change use of

ity of the covenant thereby affected.⁷ Thus, the action of the zoning authorities of a city declaring land in a restricted area to be a business district does not have the effect of destroying the restrictive covenants,⁸ or prevent enforcement thereof,⁹ although it may show, or be persuasive evidence of, the substantial transformation of the district into a

commercial district.¹⁰ On the other hand, the effect of the amendment of a zoning ordinance may be to wipe out, to all intents and purposes, restrictive covenants imposed by a deed by the city.¹¹

Private restrictions subsequent to valid zoning restrictions may be more, but not less, restrictive.¹²

B. ARCHITECTURAL AND STRUCTURAL DESIGNS

§ 141. In General

General rules apply in the construction and operation of zoning restrictions dealing with the architectural and structural design of buildings.

General rules as to the construction and operation

of zoning ordinances or regulations apply in the case of restrictions imposed with respect to the architectural and structural design of buildings in certain districts,¹³ such as the position of buildings with respect to the street,¹⁴ the number of rooms,¹⁵ floor space¹⁶ or area and cubic feet,¹⁷ and the mini-

property contrary to restriction in deed it was held that a zoning ordinance, designating street as business street, did not govern as against restrictions in deed, where ordinance expressly negated any attempt to annul or abrogate covenants or agreements.

Wis.—Kramer v. Nelson, 208 N.W. 252, 189 Wis. 560.

7. Ind.—Sorrentino v. Cunningham, 39 N.E.2d 473, 111 Ind.App. 212.

8. Iowa.—Burgess v. Magarian, 243 N.W. 356, 214 Iowa 694.

Ky.—Goodwin Bros. v. Combs Lumber Co., 120 S.W.2d 1024, 275 Ky. 114.

La.—Corpus Juris Secundum cited in Alfortish v. Wagner, 7 So.2d 708, 712, 200 La. 198.

Mass.—Snow v. Van Dam, 197 N.E. 224, 291 Mass. 477.

N.M.—Chuba v. Glasgow, 299 P.2d 774, 61 N.M. 302.

Ohio.—Hayslett v. Shell Petroleum Corporation, 175 N.E. 888, 38 Ohio App. 164.

Tex.—Faubian v. Busch, Civ.App., 240 S.W.2d 361, error refused no reversible error.

9. Ind.—Bachman v. Colpaert Realty Corporation, 194 N.E. 783, 101 Ind.App. 306.

N.J.—Scillia v. Szalai, 59 A.2d 435, 142 N.J.Eq. 92.

Okl.—Magnolia Petroleum Co. v. Drauver, 83 P.2d 840, 183 Okl. 579, 119 A.L.R. 1112.

Or.—Ludgate v. Somerville, 256 P. 1043, 121 Or. 643, 54 A.L.R. 837.

10. Ky.—Goodwin Bros. v. Combs Lumber Co., 120 S.W.2d 1024, 275 Ky. 114.

Ohio.—Hayslett v. Shell Petroleum Corporation, 175 N.E. 888, 38 Ohio App. 164.

R.I.—Hill v. Ogrodnik, 113 A.2d 734, reargument denied 114 A.2d 398.

Va.—Ault v. Shipley, 52 S.E.2d 56, 189 Va. 69—Booken v. Old Domin-

ion Land Co., 49 S.E.2d 314, 188 Va. 143.

11. N.J.—Hendlin v. Fairmount Const. Co., 72 A.2d 541, 8 N.J.Super. 310.

Amendment permitting erection of multiple dwellings

N.J.—Hendlin v. Fairmount Const. Co., supra.

12. Ohio.—Connelly v. Morris, Com. Pl., 125 N.E.2d 765.

13. Fla.—Godson v. Town of Surfside, 8 So.2d 497, 150 Fla. 614.

Mass.—Bianco v. City Engineer & Building Inspector of City of North Adams, 187 N.E. 101, 284 Mass. 20.

N.H.—Sullivan v. Anglo-American Inv. Trust, 193 A. 225, 89 N.H. 112.

N.J.—Benequit v. Borough of Monmouth Beach, 13 A.2d 847, 125 N.J.Law 65.

N.Y.—Gordon v. Board of Appeals of City of Schenectady, 225 N.Y. S. 680, 131 Misc. 346.

Okl.—Modern Builders v. Building Inspector of City of Tulsa, 168 P. 2d 883, 197 Okl. 80.

Pa.—Appeal of Alpern, 139 A. 740, 291 Pa. 150.

Construction of garages

Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

N.J.—Lewis v. Board of Com'rs of Borough of Avon-By-The-Sea, 143 A. 865, 7 N.J.Misc. 27.

14. Tex.—Woods v. Klersky, Com. App., 14 S.W.2d 825.

Building on lot abutting street

Zoning ordinance requiring that any dwelling thereafter erected be on lot abutting public street having right of way of at least thirty feet requires that there be only one dwelling erected on such lot.

Ohio.—State ex rel. Jack v. Russell, 123 N.E.2d 261, 162 Ohio St. 281.

15. Bedrooms

Rooms in proposed structure

which were designated as "bedrooms" and "living bedrooms" and which were to be used as and for sleeping purposes were "bedrooms" within zoning ordinance prohibiting structures with less than specified number of bedrooms.

N.J.—Schermer v. Fremar Corp., 114 A.2d 757, 36 N.J.Super. 46.

16. N.Y.—Corning v. Town of Ontario, 121 N.Y.S.2d 288, 204 Misc. 38.

Motel

Proposed motel consisting of an "L" shaped structure, the longer wing of which would contain eight rental units, each of which would contain two hundred and eighty square feet by exterior measurement, complied with township's zoning ordinance requiring multiple dwellings to have a minimum floor space of five hundred and seventy-six square feet and to consist of at least three rooms, of which one should contain at least one hundred and fifty square feet, notwithstanding separate units of proposed motel did not have a minimum floor space of five hundred and seventy-six square feet and separate units consisted of one room each and did not have at least three rooms.

Mich.—Long v. Norton Tp., Muskegon County, 42 N.W.2d 764, 327 Mich. 627.

17. "Principal building"

The proposed construction of a building, which did not meet zoning ordinance requirements with respect to area and cubic feet of a "principal building," was not violative of zoning ordinance, where the construction did not change the original building which had been in existence for many years but was confined to the construction of an addition thereto, and hence was not a principal building within the meaning of the ordinance.

Mich.—Hanson v. Huetter, 62 N.W.2d 663, 339 Mich. 130.

mum cost of buildings.¹⁸ An ordinance regulating the construction of buildings on lots applies to land under water, the word "land" including water.¹⁹

Height of buildings. Zoning provisions regulating the height of buildings are reasonably construed.²⁰ The "front wall" of a building within a zoning ordinance limiting the height of such wall is the one fronting on the street, and not the one designated as such by the builder, and the height of the "front" wall of a building must be measured from the street side of the building, notwithstanding the entrance is at the rear.²¹

An exception in a zoning ordinance limiting buildings to two and a half stories and a specified maximum height except in case of church steeples, chimneys, or flagpoles is to be read as containing words of exclusion having a generic rather than a specific connotation to avoid undue discrimination in relation to purposes to be served by the zoning.²² Where a single lot lay in a residential use district, in which apartment houses were permissible, the fact that the front part of the lot was in a one and one-half times height district, while the rear part was in a forty-foot height district, did not preclude

the use of the part of the lot in the forty-foot height district as the required rear yard for an apartment house to be erected entirely on the part of the lot in the one and one-half times height district.²³

Rear lot line. In determining what is the rear lot line for zoning purposes, the general location, the manner in which the lots have been laid out, the customs of surveyors in that respect, the uses to which the lot has been and will be put, the practices of public officers charged with duties with respect to it, and the pertinent fact touching the customs of the neighborhood may be considered; and in the light of such considerations, it was held not to have been established as a matter of law that the long side of a rectangular lot adjacent to plaintiff's lot was the "rear lot line" of another lot within a zoning ordinance creating a building restriction.²⁴

§ 142. Setback Lines

Provisions in zoning ordinances relating to setback lines are construed in accordance with the language used and the purpose to be served.

Zoning provisions as to setback lines are construed in accordance with the language used and the purpose to be served.²⁵ The phrase "block front,"

18. N.J.—Benequit v. Borough of Monmouth Beach, 13 A.2d 847, 125 N.J.Law 65.

Old and new buildings

A zoning ordinance permitting construction and use of hotels and apartment houses costing one hundred thousand dollars in single dwelling residence zone did not apply to construction of new buildings only, but included both new buildings erected for hotel purposes and costing one hundred thousand dollars, and use of old buildings for such purposes and having a present value of one hundred thousand dollars.

N.J.—Benequit v. Borough of Monmouth Beach, *supra*.

19. N.Y.—Wynn v. Margate City, 157 A. 565, 9 N.J.Misc. 1324.

20. Mich.—Taber v. City of Benton Harbor, 274 N.W. 324, 280 Mich. 522.

N.Y.—444 East Fifty-Seventh St. Corporation v. Deegan, 235 N.Y.S. 11, 226 App.Div. 507.

"Coal elevator" exempted from restriction

Mass.—Cochran v. Roemer, 192 N.E. 58, 287 Mass. 500.

21. N.Y.—Rollins v. Armstrong, 167 N.E. 466, 251 N.Y. 349.

22. Radio antenna

A radio antenna was held within the sphere of the exception and not a violation although it exceeded the specified maximum height.

N.J.—Wright v. Vogt, 80 A.2d 108, 7 N.J. 1.

23. Md.—Hutzler v. City of Baltimore, 114 A.2d 608, 207 Md. 424.

24. Mass.—Blanco v. City Engineer & Building Inspector of City of North Adams, 187 N.E. 101, 284 Mass. 20.

25. Ark.—City of Little Rock v. Southwest Builders, 276 S.W.2d 679, 224 Ark. 871.

Fla.—Mayer v. Dade County, 82 So.2d 513.

La.—Rabalais v. Hillary, App., 62 So. 2d 846—Ewing v. Braun, App., 198 So. 571.

Md.—Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore, 60 A.2d 192, 191 Md. 155.

Mich.—Davis v. Sarvari, 230 N.W. 176, 250 Mich. 427.

Neb.—Frank v. Russell, 70 N.W.2d 306, 160 Neb. 354.

N.J.—Mulleady v. City of Trenton, 156 A. 843, 9 N.J.Misc. 1102, followed in Steward v. City of Trenton, 156 A. 844, 9 N.J.Misc. 1100—Lewis v. Board of Com'rs of Borough of Avon-By-The-Sea, 143 A. 865, 7 N.J.Misc. 27.

N.Y.—Fimiani v. Board of Appeals of City of Buffalo, 253 N.Y.S. 757, 233 App.Div. 552, affirmed Fimiani v. Swift, 180 N.E. 355, 253 N.Y. 613.

Ohio.—Smith v. Home Echo Club, App., 69 N.E.2d 414.

Pa.—Appeal of Alpern, 139 A. 740, 291 Pa. 150.

Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks Co. 131.

R.I.—Pedro v. Muratore, 113 A.2d 731.

Wis.—State ex rel. Bollenbeck v. Village of Shorewood Hills, 297 N.W. 568, 237 Wis. 501.

"Structural alterations" within setback ordinance prohibiting structural alterations at less than a fixed distance from center line of street are not words of fixed and definite legal meaning and under such ordinances, question as to each building is one of fact.

U.S.—City of Miami v. McCrory Stores Corp., C.A.Fla., 181 F.2d 368.

Word "alter," as used in a building ordinance making it unlawful to erect any new building or to rebuild or alter the front of any existing building without making it recede to a building line established by the ordinance, means a material or substantial change.

Pa.—Colonial Federal Sav. & Loan Ass'n v. Porreca, 59 Pa.Dist. & Co. 163.

First sentence not overriding last sentence of ordinance

The last sentence of a zoning ordinance, which provides that in no case shall a building be required to set back further than the maximum distance established for the zone in which it was situated, does not modify or override the first sentence of the same ordinance which provides that when fifty per cent or more of

as used in an ordinance with respect to setback of existing buildings within the same "block front," includes only realty located on and fronting on the particular street, and not realty on the square block,²⁶ and a court on which a proposed tenement fronted has been held not to be a "street" within a provision relating to setbacks.²⁷ The public's acquisition by user of rights for highway purposes over some land between a highway right of way and river's edge cannot properly be considered in fixing location of building line established by town ordinance prohibiting erection of buildings fronting on such highway within ninety feet from center of the right of way.²⁸

A canvas and wood awning supported by iron piping, in the absence of proof to the contrary, is not a part of a building, within the scope of an ordinance requiring a specified setback from street property line to nearest part of the building, so as to preclude the erection of such awning on a building extending to the setback line;²⁹ and a front porch of permanent construction with solid foundation and roofing and firmly attached to the house is a "building" within an ordinance prohibiting the extension of a building beyond the official building line.³⁰ Also, where building line was ten feet back from property line and vestibule was constructed between the two lines, vestibule was constructed in violation of setback requirement of zoning resolution.³¹ A zoning ordinance permitting "a bay win-

dow" to project into a yard within certain distance was held to permit a single bay window only.³²

A zoning ordinance provision requiring at least two hundred feet between property lines and farm structures used for customary incidental farming occupations, and enumerating certain uses, is intended to remove neighbors from conditions customarily surrounding farming occupation, and was applicable not only to types of farm buildings enumerated but to all those buildings whose uses were usual accessories to occupation of farming.³³ An ordinance which required all buildings and accessory buildings on corner lots to conform to front yard requirements on side street requires only the twenty feet setback imposed on the side street and did not require forty feet setback which existed on intersecting street.³⁴

§ 143. Single-Family or Multiple Dwellings

Whether a particular building or structure is proper or is in violation of restrictions imposed by a zoning regulation concerning the number of families for which structures may be built depends on a construction of the language used in the regulation and the nature of the proposed use.

Whether a particular building or structure is proper or is in violation of restrictions imposed in a zoning ordinance or regulation concerning the particular number of families for which structures may be built depends on a construction of the language used in the regulation and the nature of the proposed use.³⁵ A single-family dwelling restriction

lot frontage in a block is occupied by existing buildings, the setback line for new buildings shall be determined by an average established between setback lines of the nearest buildings within two hundred feet in each direction.

N.Y.—Boudreau v. Albanese, 106 N.Y.S.2d 649.

26. N.J.—Alker v. Collins, 64 A.2d 870, 2 N.J.Super, 11.

27. Mass.—Siegismund v. Building Com'r of City of Boston, 156 N.E. 852, 259 Mass. 329.

28. N.Y.—Householder v. Town of Grand Island, 114 N.Y.S.2d 852, affirmed 114 N.Y.S.2d 262, 280 App. Div. 874, appeal denied 116 N.Y.S.2d 925, 280 App.Div. 910, motion denied 109 N.E.2d 87, 304 N.Y. 796, affirmed 113 N.E.2d 555, 305 N.Y. 805.

29. N.J.—French v. Cooper, 43 A.2d 880, 133 N.J.Law 246.

30. N.J.—Lattanzi v. Commissioner of Public Works of City of Camden, 48 A.2d 788, 134 N.J.Law 437.

31. N.Y.—Daskal v. Borus, 102 N.Y.S.2d 258, 278 App.Div. 588.

32. Mass.—Sinclair v. Superintendent of Public Buildings of City of Waltham, 174 N.E. 510, 274 Mass. 338.

33. N.Y.—Johnson v. Debaun, 135 N.Y.S.2d 217, 206 Misc. 806.

34. N.Y.—Olsen v. Simkins, 123 N.Y.S.2d 573, 204 Misc. 412.

35. Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Md.—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.

N.Y.—Westchester Housing Corporation v. Bunnell, 227 N.Y.S. 358, 131 Misc. 251.

Okl.—Howard v. Mahoney, 106 P.2d 267, 188 Okl. 89.

Structure suitable only for commercial purposes

Structure which was structurally suitable only for commercial purposes and which was so advertised by owners was in violation of ordinance requiring that, in area involved, structures be single-family dwellings.

Tex.—Newton v. Town of Highland

Park, Civ.App., 282 S.W.2d 266, refused no reversible error.

Apartment house

(1) Prohibition against erection of apartment house held violated.

Okl.—Howard v. Mahoney, 106 P.2d 267, 188 Okl. 89.

Pa.—City of Williamsport v. Miller, Com.Pl., 4 Lycoming 126.

(2) Lack of kitchens in two dwelling units did not deprive four separate independent and disconnected suites of their character as apartments and so permit the building to be operated as a duplex under zoning ordinance.

Mo.—Evans v. Roth, 201 S.W.2d 357, 356 Mo. 237.

(3) Fact that proposed two-story apartment buildings were not of type contemplated at time of adoption of ordinance authorizing apartment uses did not preclude property owner from erecting proposed buildings containing usual and essential features of apartment houses.

N.J.—Vine v. Zabriskie, 3 A.2d 886, 122 N.J.Law 4.

(4) Where unit constructed on tract purchased by construction com-

may be applicable to one-family dwellings divided only by party walls³⁶ or to a house divided into two apartments regardless of whether the occupants of the second apartment are relatives or friends of the owner of the house and pay no rent or that they do

not occupy the premises for the entire year.³⁷

It has been held that a group of related persons, occupying a single dwelling, constitute only a single family within such a regulation.³⁸ The ordinance may define the term "family" as used therein,³⁹ but

pany from city for housing development consisting of one and two-family dwellings consisted of four independent family apartments, each containing its own separate living facilities, units were four-family houses notwithstanding existence of a partition wall from basement to roof of each unit.

N.J.—Hendlin v. Fairmount Const. Co., 72 A.2d 541, 8 N.J.Super. 310.

(5) Inference was that it was intention of legislative body that building as home for the aged was included within the classification of apartment house.

N.Y.—Hoffman v. Board of Appeals of City of Rochester, 125 N.Y.S.2d 222, 282 App.Div. 850.

House under one roof partitioned
in center, without access from one side to other except from outside, held "two-family dwelling" or "double house" within zoning ordinance. N.Y.—Buckley v. Baldwin, 244 N.Y.S. 295, 230 App.Div. 245.

Flats not included

Zoning ordinance, prohibiting dwelling or group of dwellings accommodating more than fourteen families on any acre of land, held not to include flats.

Ill.—Bjork v. Safford, 164 N.E. 699, 333 Ill. 355, 61 A.L.R. 561.

36. N.Y.—Westchester Housing Corporation v. Bunnell, 227 N.Y.S. 358, 181 Misc. 251.

37. N.H.—Sullivan v. Anglo-American Inv. Trust, 193 A. 225, 89 N.H. 112.

Two-fold test

Where petitioner erected dwelling with two kitchens and multiple uses for other rooms in area restricted to one-family dwellings, and housed petitioner's family, his mother, and sister therein, the combination of design of house and nature of occupancy was two-fold test of character as one or two-family residence.

N.Y.—Stafford v. Incorporated Village of Sands Point, 102 N.Y.S.2d 910, 200 Misc. 57.

Accessory use

(1) A use of premises restricted to single-family dwelling for occupation by the owner and by his relatives and friends in separate apartments is not an accessory use customarily incident to the permitted use.

N.H.—Sullivan v. Anglo-American Inv. Trust, 193 A. 225, 89 N.H. 112.

(2) Accessory uses generally see *infra* § 176.

38. Ill.—Village of Riverside v. Reagan, 270 Ill.App. 355.

N.Y.—Driscoll v. Brunner, 64 N.Y.S. 2d 161.

Blood relatives

(1) The occupation of a residence by the owner with various blood relatives has been held not to violate a one-family dwelling limitation.

N.Y.—Driscoll v. Brunner, *supra*.

(2) In order to classify premises on basis of occupancy as two-family residence within prohibition of zoning regulation restricting area to one-family residences, it is necessary to have two separate families not living together as a unit under a single head or management.

N.Y.—Stafford v. Incorporated Village of Sands Point, 102 N.Y.S.2d 910, 200 Misc. 57.

College fraternity with twenty-three resident members was not a "single family" within zoning ordinances limiting dwellings to single-family residences.

N.Y.—City of Schenectady v. Alumni Ass'n of Union Chapter, Delta Chi Fraternity, 168 N.Y.S.2d 754, 5 A.D.2d 14.

Sorority

Members of college sorority were not entitled to establish a sorority house in area in city classified by zoning ordinance as a two-family district, since sorority was not a "family" within meaning of ordinance.

Ill.—Cassidy v. Triebel, 85 N.E.2d 461, 337 Ill.App. 117.

Family of servant

Woman living alone in her dwelling house was not a "family," and hence did not violate county zoning ordinance, excluding occupancy of single dwelling house by more than one family in certain district from permitted uses thereof, by permitting family of domestic servant to move into basement of house.

Va.—Carroll v. Arlington County, 44 S.E.2d 6, 186 Va. 575, 172 A.L.R. 1169.

Two kitchens

Defendant did not change character of house as family residence, in violation of ordinance, by installing and maintaining second kitchen in attic of home to be occupied by himself, wife, and his son and son's wife.

Ill.—City of Chicago v. Kurowski, 124 N.E.2d 579, 4 Ill.App.2d 586.

39. Conn.—Neptune Park Ass'n v. Steinberg, 84 A.2d 687, 138 Conn. 857.

N.Y.—Application of Laporte, 152 N.Y.S.2d 916, 2 A.D.2d 710.

"Single housekeeping unit"

(1) Where zoning ordinance definition of word "family" included one or more persons living as a "single housekeeping unit," quoted phrase was not in itself an exclusionary provision but merely declared negatively the interpretation that should be given to word "family," and the negative should not outweigh the positive; and use of residence as home for about twenty nurses, who would have their own rooms, either singly or in pairs, have joint use of parlor, have limited kitchen facilities for lunches if they furnished their own food, and have a matron or housemother in charge of housekeeping, constituted use of such home by a single "family" within zoning ordinance placing such home in a one family zone, since home was occupied by only one "housekeeping unit."

Ky.—Robertson v. Western Baptist Hospital, 267 S.W.2d 395.

(2) Zoning ordinance defining family as one or more individuals living, sleeping, cooking, or eating on premises as a single housekeeping unit was not intended to restrict use and occupancy to members of single family related within degrees of consanguinity or affinity; and group of priests and lay brothers merely living together in a single housekeeping unit constituted "family" within zoning ordinance restricting use of buildings to single-family dwelling and defining family as one or more individuals living, sleeping, cooking, or eating on premises as single housekeeping unit.

Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 267 Wis. 609.

(3) A proposed use of college building as a residence for about sixty student members of religious order, which conducted the college, would not deprive the building of its character as a one-family dwelling for purposes of city zoning ordinance, and owner of such building would not be deprived of benefit of yard restrictions applicable to one-family dwellings under city zoning ordinance, even though the building in use might be accessory to the main structure or use.

N.Y.—Application of Laporte, 152 N.Y.S.2d 916, 2 A.D.2d 710.

(4) Under zoning ordinance, providing that no dwelling shall be

the word should not be construed, when not so defined in the ordinance itself, as limited in its meaning to individuals sleeping, cooking, and eating as a single housekeeping unit.⁴⁰

A motel primarily designed for temporary occupancy by transients is within the provision of an ordinance permitting erection of "multiple dwellings," where the quoted term was not defined by the ordinance which provided that undefined words should be construed as defined in the state housing code which classified hotels, lodging houses, boarding houses, furnished room houses and dwellings similarly occupied as multiple dwellings.⁴¹

§ 144. Area of Building Lots or Plots

Zoning restrictions as to the area of building lots or plots are construed in accordance with the language used, the purposes served, and the particular facts and circumstances of the case.

Zoning regulations as to the area of building lots or plots are construed in accordance with the language used, the purposes served, and the particular facts and circumstances of the case.⁴² The meaning of the word "plot" as used in an ordinance limiting intensity of use depends on the sense in which the legislative body used the word.⁴³ The word "lot" has been said to refer generically to any undefined parcels or units of land, identifiable by ownership or use, but without limitation or standardization in any degree as to shape, size, or manner of development except as further regulated by other express provisions of the ordinance in specific contexts.⁴⁴

A zoning ordinance providing in its definition section that a lot is a parcel of ground which is occupied by one principal building and accessories, but nowhere limiting a lot in a business district to only one building, does not prohibit a property owner from construction of a welding shop at the rear of his lot within a business district.⁴⁵ A zoning ordinance defining a lot as land occupied or to be occupied by a building and its accessory buildings together with required open spaces included a tract which was to be occupied by a building, even though the tract was not laid out as a lot but was the remainder of the subdivision after lots were laid out.⁴⁶ Under a zoning ordinance defining a lot as any parcel of ground under one ownership, a description of which was filed with building inspector, the owner of one lot, who acquired an adjoining lot but did not file the description mentioned in the ordinance, did not thereby cause a joinder of the two into a single "lot."⁴⁷

Where a house was placed partly on one lot owned by defendant and partly on the one half of an adjacent lot also owned by him, and the combined area of property owned exceeded fifteen thousand square feet, he was entitled to build another house on such property under a city ordinance providing that minimum site area should be one lot, or seven thousand five hundred square feet of lot area for each dwelling, notwithstanding that on the lot on which defendant proposed to construct a house, without including the area of the other one-half lot owned by him, there was not sufficient land to provide a seven

erected, altered, or used except as a one-family dwelling, and defining family as any number of individuals living and cooking together as a single housekeeping unit, test of whether any house is being used for a single-family dwelling house is whether it is being occupied by only one housekeeping unit not whether it is being occupied by one-family unit as the term might otherwise be defined; and where four families used a fourteen-room house together, two of them continuously and two of them only during the summer, but did not occupy separate quarters within the house and the lodging, cooking, and eating facilities were common to all, house was being used as a single-family dwelling within the ordinance prohibiting use of any building except as a one-family dwelling and defining family as any number of individuals living and cooking together as a single housekeeping unit.

Conn.—Neptune Park Ass'n v. Steinberg, 84 A.2d 687, 138 Conn. 357.

40. Ill.—Village of Riverside v. Reagan, 270 Ill.App. 355.

41. Mich.—Long v. Norton Tp., Muskegon County, 42 N.W.2d 764, 327 Mich. 627.

42. Ill.—Wehrmeister v. Carlman, 149 N.E.2d 453, 17 Ill.App.2d 171. Md.—Akers v. Mayor and City Council of Baltimore, 20 A.2d 181, 179 Md. 448.

Mich.—Federation of Livonia Civic Ass'ns v. Lewis, 88 N.W.2d 161, 350 Mich. 210.

Okl.—Modern Builders v. Building Inspector of City of Tulsa, 168 P.2d 833, 197 Okl. 80.

Special exception

Township zoning ordinance requiring a lot area of seven thousand five hundred square feet per family and a width of fifty feet applied to single dwellings only and not to multiple dwellings erected under a special exception to zoning ordinance.

Pa.—Appeal of Elkins Park Imp. Ass'n, 64 A.2d 783, 361 Pa. 322.

Power of board

Ordinance giving zoning board power to determine in each individual application restrictions as to area, height, and accessory uses, refers to

percentage of lot which may be occupied by an apartment house, and does not give board discretion to permit erection of apartment house on lot smaller than minimum prescribed for particular zone.

R.I.—Carey v. Cassidy, 103 A.2d 793, 81 R.I. 411.

43. Ill.—Reitman v. Village of River Forest, 137 N.E.2d 801, 9 Ill.2d 448.

"Plot" as "block" or "lot"

Ordinance was not susceptible to construction which would interpret "plot" as referring to block in which lot was situated rather than to individual lot.

Ill.—Reitman v. Village of River Forest, supra.

44. Pa.—Levitt & Sons, Inc. v. Bristol Tp., Quar.Sess., 4 Bucks Co. 230.

45. N.J.—Hrycenko v. Board of Adjustment of City of Elizabeth, 99 A.2d 430, 27 N.J.Super. 376.

46. Neb.—Peterson v. Vasak, 76 N.W.2d 420, 162 Neb. 493.

47. N.J.—Schack v. Trimble, 137 A.2d 22, 43 N.J.Super. 45.

thousand five hundred square feet site.⁴⁸ A zoning ordinance limiting uses on one lot to principal dwelling and accessory uses, when read in connection with other ordinances which required, among other things, that lots be two acres in size, would not be construed to forbid two dwellings on a five and one-half acre parcel of land, where dwellings were so situated that they would not violate the two-acre lot requirement.⁴⁹ Although a landowner had acquired two adjoining tracts of slightly more than six thousand square feet each at different times from different sources, and although lots were recorded as separate lots, both lots, as one unit, became subject to zoning restrictions prohibiting the building of a new dwelling on a lot of less than twelve thousand square feet and the landowner could not after the conveyance of one of the lots on which a house was situated, erect a house on the other lot, in absence of a variance permit, although the ordinance provided that the restriction should not prevent the erection of a building on a lot containing a smaller area than twelve thousand square feet.⁵⁰

A lot containing a home and a detached garage with an apartment may not be divided where the division would result in a violation of a zoning provision requiring a minimum lot area of ten thousand square feet.⁵¹ A zoning ordinance, which referred to the lot area requirements as to single-family dwellings, two-family dwellings, and multiple dwellings was held to be without application to a mixed-use building where the ordinance was silent with respect thereto.⁵² Where a zoning ordinance expressly stated that the minimum lot area requirements were to be the same in a central business district as in a wholly residential area, the ordinance would apply to a building containing retail stores on the street floor and apartments in the upper two stories located in the central business district.⁵³

The term "any such family dwelling" within a township zoning ordinance providing that any lot of record on effective date of resolution may be used for any single-family dwelling irrespective of the area of said lot was held not to mean that only one single-family dwelling could be built on a given

lot.⁵⁴ Where a zoning ordinance provided that single-family dwellings could be erected on lots separately owned at the time of the passage of the ordinance, a contention that conveyances had been made in bad faith to comply with the ordinance could not defeat a claim of single separate ownership as against the recorded deed.⁵⁵ Where defendant's proposed structure would be a small frame building that would be from five to eight feet in front of the main building and the two structures would be connected at the foundations and at the roofs and there would be a concrete walkway between the two buildings, but there was no indication that there would be an opening in a division wall to permit passage from the new building to the old, the proposed structure would violate a zoning ordinance providing that only one building may be placed on a single lot.⁵⁶

Alley as part of lot. The bed of a nine foot alley at the rear of a lot could not be included in determining whether or not a lot met the area requirements of a zoning ordinance, notwithstanding the fact that the title to the bed of the alley was held by the lot owner.⁵⁷

Gravestones and monuments. Under a zoning ordinance provision that in any residence district, principal buildings shall not occupy more than fifty per cent of the area of the lot on which they are located, graves, gravestones, and similar monuments are properly excluded in determining the area of a lot occupied by a church, since they are not "buildings."⁵⁸

Separation by thoroughfare. Tracts of land, separated by a public thoroughfare, do not constitute a single lot.⁵⁹

An undivided twenty-three-acre tract on which were located interconnected buildings, including a cottage and barns, grouped around a cobbled court and formerly accessory to a mansion house located on larger tract and sold separately to others, was held to be a "lot" within the meaning of a township zoning ordinance and subject to prohibition therein against more than one dwelling on a lot ex-

48. Cal.—Christensen v. Thurber, 261 P.2d 312, 120 C.A.2d 517.

49. N.Y.—Incorporated Village of Upper Brookville v. Torr, 158 N.Y.S.2d 899, 7 Misc.2d 725.

50. Mass.—Vetter v. Zoning Bd. of Appeal of Attleboro, 116 N.E.2d 277, 330 Mass. 628.

51. N.Y.—Griffin v. Reville, 149 N.Y.S.2d 312, 1 Misc.2d 1045.

52. Pa.—Appeal by Borough of Dor-

mont, 119 A.2d 827, 180 Pa.Super. 550.

53. Ill.—Chicago City Bank & Trust Co. v. City of Highland Park, 137 N.E.2d 835, 9 Ill.2d 364, certiorari denied 77 S.Ct. 681, 353 U.S. 922, 1 L.Ed.2d 719.

54. Ohio.—Hardy v. Horst, Com.Pl., 101 N.E.2d 398.

55. N.Y.—Bayport Civic Ass'n v. Koehler, 138 N.Y.S.2d 524, followed in 138 N.Y.S.2d 532.

56. Ark.—Parker-Mayflower Dairy Co. v. Collie, 248 S.W.2d 104, 220 Ark. 429.

57. Md.—Sommers v. Mayor and City Council of Baltimore, 135 A.2d 625, 215 Md. 1.

58. S.C.—Stevenson v. Board of Adjustment of City of Charleston, 96 S.E.2d 456, 230 S.C. 440.

59. Pa.—Appeal of Becker, Com.Pl., 68 York Leg.Rec. 174.

cept for necessary living quarters for domestic servants.⁶⁰

§ 145. Yards

General rules of construction of statutes and ordinances apply in construing zoning ordinances containing provisions as to yards.

General rules apply as to the construction and operation of zoning regulations with respect to yard space.⁶¹ The provisions as to yards apply only to uses permitted by the ordinance and do not apply to a sewerage lift station.⁶² An ordinance, requiring a side yard between the building and the lot line from the street line to the rear yard, does not require a side yard where there is no rear yard.⁶³ A provision in zoning ordinance that for a building of accessory use or garage no yard except on a street frontage is required refers to accessory buildings which are separate and distinct from other structures, and a garage constructed as a part of a residence and architecturally in harmony with the house of which it is a part is not such an "accessory building."⁶⁴

A covered porch of a usual type at the front of a dwelling house cannot be counted in determining whether there is a yard of not less than twenty-five feet to front line of building, as required by zoning ordinance, where it also requires a yard of not less than fifteen feet to front line of open porch or paved terrace.⁶⁵ A requirement of a zoning ordinance that there be a front yard of not less than twenty-five feet from street property line to front line of building in residential district could not be avoided by construction of provision in ordinance for side yard of not less than five feet on each side

of building in such district as permitting lot owners to face building toward alley on one side of lot and consider space between building and street as side yard instead of front yard.⁶⁶ Where entrance of four-family dwelling proposed to be constructed on corner lot faced street on long side instead of short side of lot, "front line" of proposed building was on street which building faced and controlled application of zoning ordinance provisions with respect to front, rear, and side yards.⁶⁷

A provision that side yard regulations applicable to interior lots should apply to corner lots except in case of "reversed frontage" refers to the situation where a lot owner has caused the building to face what would otherwise be the side or intersecting street.⁶⁸

§ 146. House Trailers

A house trailer may become subject to zoning regulations when it is removed from the highway, connected with sanitary facilities and electricity, and used as living quarters.

A house trailer may be subject to zoning regulations with respect to architecture and structure when it is removed from the highway, attached to the soil, and occupied as living quarters.⁶⁹ A house trailer which has been placed on cinder-blocks and connected to the water and sewage systems of the area and to the power lines, is a dwelling within the purview of a zoning ordinance which limits residences to single-family detached dwellings and defines such a dwelling as "a detached building designed for or occupied by one family and having no party wall in common with an adjacent house."⁷⁰

A trailer need not be attached to the land by a permanent foundation to subject it to zoning regu-

60. N.J.—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442. Accessory buildings see *infra* § 178.

61. Ark.—City of Little Rock v. Southwest Builders, 276 S.W.2d 679, 224 Ark. 371.

Mo.—Fairmont Inv. Co. v. Woermann, 210 S.W.2d 26, 357 Mo. 625.

N.Y.—Fimiani v. Board of Appeals of City of Buffalo, 253 N.Y.S. 757, 233 App.Div. 552, affirmed Fimiani v. Swift, 180 N.E. 355, 253 N.Y. 613.

Gordon v. Board of Appeals of City of Schenectady, 225 N.Y.S. 680, 131 Misc. 346.

Gitlin v. Rowledge, 123 N.Y.S.2d 812.

Ohio.—Howell v. Cooper, 168 N.E. 757, 33 Ohio App. 287.

Pa.—Fleishon v. Zoning Bd. of Adjustment, 6 Pa.Dist. & Co.2d 337—Hamilton v. McKinley Fire Co., 54

Pa.Dist. & Co. 184, 61 Montg.Co. 150.

Tex.—Stuckert v. Morris, Civ.App., 194 S.W.2d 606.

Alley as meaning public alley

Provision in zoning ordinance for waiver of front yard building line requirements as to corner lot in commercial district under specified circumstances, except where such lot abuts on an "alley," uses quoted word as meaning a public alley and not a private alley or driveway at rear of lot.

Mo.—Fey v. Woermann, 230 S.W.2d 681, 350 Mo. 728.

"Rear yard" defined

Wis.—State ex rel. Bollenbeck v. Village of Shorewood Hills, 297 N.W. 568, 237 Wis. 501.

62. N.Y.—Howell v. Liebowitz, 116 N.Y.S.2d 537.

63. Mo.—State ex rel. Winkley v. Welsch, App., 131 S.W.2d 364.

64. Conn.—Misuk v. Zoning Bd. of Appeals of City of Meriden, 86 A.2d 180, 138 Conn. 477.

Accessory buildings and garages generally see *infra* §§ 178, 179.

65. Tex.—Stuckert v. Morris, Civ. App., 194 S.W.2d 606.

66. Tex.—Davis v. City of Abilene, Civ.App., 250 S.W.2d 685, error refused.

67. Wyo.—In re McInerney, 34 P.2d 35, 47 Wyo. 258.

68. Wyo.—In re McInerney, *supra*.

69. N.Y.—Corning v. Town of Ontario, 121 N.Y.S.2d 288, 204 Misc. 33.

Trailer camps and trailers generally see *infra* § 159.

70. Pa.—Commonwealth v. Flannery, 1 Pa.Dist. & Co.2d 680, 5 Cumb.L.J. 54.

lations;⁷¹ the connection of the trailer to sanitary facilities, including a septic tank and a well, and to an electrical source was held to affix the trailer to the land for zoning purposes.⁷² Similarly, it has been held that a trailer is a dwelling subject to the zoning laws where it is connected to the water mains, sewers, and electric lines.⁷³

An ordinance may fix a time limit after which a house trailer shall be deemed to have lost its mobility and become a dwelling.⁷⁴ Thus, a trailer occupied as living quarters at the same location for more than thirty days was held under such an ordinance to be a dwelling and subject to a provision prescribing a certain square foot area for single-family dwellings.⁷⁵ A provision in a zoning ordinance requiring a minimum lot area of two thousand four hundred square feet per family for a one-family dwelling may properly be enforced against house trailers brought into a trailer camp subsequent to the enactment of the ordinance.⁷⁶

A temporary and movable trailer on wheels was held not to be a "house" for purposes of a zoning bylaw permitting only one-family detached houses in a single residence district.⁷⁷ Where a property owner rented part of lots for parking and servicing of house trailers and automobiles at a certain rate per week, and each trailer was occupied by one family as living quarters, and trailers contained facilities for cooking, eating, and sleeping, and toilets and showers were provided by property owner in rear of area, and some trailers were detached from automobiles and placed on blocks, the trailers

were not one or two-family "dwellings" within a zoning ordinance.⁷⁸ On the other hand, trailer homes have been regarded as single-family dwellings the use of which is permissible in a residential district classified for "every use as a dwelling house, double house, or duplex house."⁷⁹

§ 147. Garden Type Apartments

A garden type apartment house, built like a row of individual houses, but operated, used, and owned as a single unit, may be taken as one, rather than a series of buildings, in so far as zoning requirements are concerned.

A garden type apartment house, built like a row of individual houses, but operated, used, and owned as one unit, may be taken as one, rather than as a series of buildings, in so far as some zoning requirements are concerned.⁸⁰ An ordinance prescribing that part of each lot should be devoted to a "yard," which is defined as "the clear unoccupied space on the same lot with the building," does not prevent the use of yards for parking spaces for automobiles,⁸¹ and the areas set aside for automobile parking space are to be regarded as open or unoccupied space in computing area, yard spaces, and density under zoning regulations.⁸²

A garden type apartment project covering less than five acres but providing separate lots for each of the three proposed buildings was not within a zoning ordinance permitting garden type apartments without providing a separate lot for each building, provided the area of such project should cover at least five acres of land.⁸³

C. USES AND USE DISTRICTS

1. IN GENERAL

§ 148. General Rules

The nature of the use or proposed use is to be considered in connection with the wording, scope, and intent of the zoning regulations in determining whether a proposed use is permitted or prohibited.

The nature of the use or proposed use of the property by its owner is to be considered in connection with the wording, scope, and intent of the zoning regulations in determining whether a particular use is permitted or prohibited.⁸⁴ The language

71. N.Y.—*Corning v. Town of Ontario*, 121 N.Y.S.2d 288, 204 Misc. 38.

72. N.Y.—*Corning v. Town of Ontario*, *supra*.

73. Ga.—*Kimsey v. City of Rome*, 67 S.E.2d 206, 84 Ga.App. 671.

74. Ga.—*Kimsey v. City of Rome*, *supra*.

N.Y.—*Corning v. Town of Ontario*, 121 N.Y.S.2d 288, 204 Misc. 38.

75. Ga.—*Kimsey v. City of Rome*, 67 S.E.2d 206, 84 Ga.App. 671.

76. Pa.—*Commonwealth v. Helmuth*, 73 Pa.Dist. & Co. 370.

77. Mass.—*Town of Marblehead v. Gilbert*, 137 N.E.2d 921, 334 Mass. 602.

78. La.—*City of New Orleans v. Louviere*, App., 52 So.2d 751.

79. S.D.—*City of Sioux Falls v. Cleveland*, 70 N.W.2d 62, 75 S.D. 543.

80. Md.—*Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore*, 73 A.2d 531, 195 Md. 383—*Akers v. Mayor and City Council of Baltimore*, 20 A.2d 181, 179 Md. 443.

81. Md.—*Akers v. Mayor and City Council of Baltimore*, *supra*.

82. Md.—*Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore*, 73 A.2d 531, 195 Md. 383.

83. Md.—*Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore*, *supra*.

84. N.Y.—*Shedda v. Village of Lancaster*, 80 N.Y.S.2d 517, 192 Misc. 560.

43 C.J. p 344 note 66 [a].

Fair balance

Reasonable interpretation of zoning ordinance would require that

of the regulation as to the uses which are permitted or which are prohibited in particular districts will be interpreted according to the common and approved usages of language without enlargement or restriction.⁸⁵ The name by which a business or use is designated or called is not of controlling importance in determining whether the use comes within the terms of the ordinance, and the question is determined by the activities or character of the business or service.⁸⁶

A zoning law may limit the use of land as well as the use of buildings.⁸⁷ The erection of a building which is to be used in part for a permitted use and in part for a use not permitted is a violation of the zoning ordinance.⁸⁸ Unless the zoning regulation otherwise provides, a higher use, such as a

residential use, is permitted in a less restricted district, such as an industrial or commercial district.⁸⁹

Some provisions have been construed as excluding all uses not expressly permitted and as permitting only those uses for which definite provision is made,⁹⁰ even though the ordinance does not specify the prohibited uses or expressly provide that uses not permitted are prohibited.⁹¹ However, under other provisions certain uses not expressly mentioned have been held permissible in particular districts.⁹² The fact that a certain use is not expressly prohibited by a zoning ordinance does not render it permissible if it comes within the scope of other prohibited uses.⁹³ Where certain specific uses are named in a zoning regulation and then follows a general term, the rule of ejusdem generis may apply

court seek to achieve fair balance between purpose of preserving true character of neighborhood by excluding new uses and structures prejudicial to restricted purposes of area and gradual elimination of such existing structures and uses and purpose of protecting owner's property or existing residence, building, or industry from impairment which would result from enforced accommodation to new restrictions.

N.C.—Application of O'Neal, 92 S.E. 2d 189, 243 N.C. 714.

Manner in which a use may affect area and not type of building in which such use occurs is criterion for determining permissibility of such use.

N.Y.—140 Riverside Drive v. Murdock, 78 N.Y.S.2d 890.

Regulation of aviation fields is within scope of zoning act.

N.J.—Ridgewood Air Club v. Board of Adjustment of Village of Ridgewood, Bergen County, 55 A.2d 100, 136 N.J.Law 222.

Use held permissible

N.Y.—Kaufman v. City of Glen Cove, 42 N.Y.S.2d 508, 266 App.Div. 870.

85. Mass.—Moulton v. Building Inspector of Milton, 43 N.E.2d 662, 312 Mass. 195.

N.J.—Grace Iron & Steel Corporation v. Ackerman, 7 A.2d 820, 123 N.J. Law 54.
38 C.J. p 74 note 24.

Incidental uses

(1) Words used in a zoning ordinance will not be extended beyond their ordinary meaning to include uses not customarily incidental to uses permitted by the words.

N.Y.—Colasuonno v. Dassler, 51 N.Y.S.2d 870, 183 Misc. 904.
People v. Gold, 6 N.Y.S.2d 264.

(2) Accessory uses generally see *infra* § 176.

86. Conn.—Langbein v. Board of

Zoning Appeals of Town of Milford, 67 A.2d 5, 135 Conn. 575.

Ky.—Crain v. City of Louisville, 182 S.W.2d 787, 298 Ky. 421.

87. Mass.—Town of Brookline v. Co-Ray Realty Co., 93 N.E.2d 581, 326 Mass. 206.—Lexington v. Menotomy Trust Co., 23 N.E.2d 559, 304 Mass. 283.

88. Ky.—Parker v. Rash, 236 S.W. 2d 687, 314 Ky. 609.

89. Mo.—Royal Meat Products Co. v. Kansas City Mo., App., 214 S.W.2d 713.

N.J.—Katobimar Realty Co. v. Webster, 118 A.2d 824, 20 N.J. 114.

90. Ill.—City of Chicago v. Sachs, 115 N.E.2d 762, 1 Ill.2d 842.

Mo.—State ex rel. Barnett v. Sappington, App., 266 S.W.2d 774.—City of St. Louis v. Art Publication Soc., App., 203 S.W.2d 902.

N.J.—Dolan v. DeCapua, 80 A.2d 655, 13 N.J.Super. 500.

N.Y.—White v. Hartnett, 104 N.Y.S.2d 669, 278 App.Div. 750, reargument denied 105 N.Y.S.2d 535, 278 App.Div. 889.

Howell v. Liebowitz, 116 N.Y.S. 2d 537.

Pa.—Silver v. Zoning Bd. of Adjustment, 112 A.2d 84, 381 Pa. 41.

Appeal of Hasley, 30 A.2d 187, 151 Pa.Super. 192.

R.I.—City of Warwick v. Campbell, 107 A.2d 334, 82 R.I. 300.

Tenn.—City of Knoxville v. Brown, 280 S.W.2d 264, 195 Tenn. 501.

Tex.—City of Dallas v. Haworth, Civ.App., 218 S.W.2d 264, refused no reversible error.

Real estate office

Under the rule of *expressio unius est exclusio alterius*, which means that the express mention of a thing implies the exclusion of another different thing, the provision in a zoning ordinance that a temporary real estate office may be maintained for a limited purpose and time implies

the exclusion of a real estate office for any other purpose or time.

Cal.—Jones v. Robertson, 180 P.2d 929, 79 C.A.2d 813.

Removal of sand and gravel

Exclusion of use of land in village for removal of sand and gravel from uses specifically authorized by village zoning ordinance was effective to prevent such use, even though ordinance did not expressly prohibit excavation of sand and gravel from lands in village.

U.S.—Valley View Village v. Prof-fett, C.A.Ohio, 221 F.2d 412.

91. U.S.—City of Anchorage, Alaska v. Paulk, D.C.Alaska, 113 F. Supp. 698.

92. Ala.—Pentecostal Holiness Church of Montgomery v. Dunn, 27 So.2d 561, 248 Ala. 314.

Pa.—Appeal of Seranton Lackawanna Indus. Bldg. Co., Com.Pl., 57 Lack.Jur. 173.

Bus storage

Where zone was one in which any use not prohibited in city was expressly permitted, and nowhere in zoning ordinance was a bus storage facility expressly permitted or expressly prohibited, such facility could be maintained within zone.

Cal.—People v. Binzley, 303 P.2d 903, 146 C.A.2d Supp. 889.

Commercial or business district

Any business, not expressly excluded by city zoning ordinance, may be conducted in district designated as commercial or business, if so conducted as not to constitute nuisance.

Conn.—Fisher v. Board of Zoning Appeals of Town of Monroe, 122 A. 2d 729, 143 Conn. 358.

Iowa.—Kirk v. Mabis, 246 N.W. 759, 215 Iowa 769.

93. N.Y.—Westchester County Soc. for Prevention of Cruelty to Animals v. Mengel, 41 N.Y.S.2d 605, 266 App.Div. 151, affirmed 54 N.E. 2d 329, 292 N.Y. 121.

to restrict the general term to include only uses that are of the same kind and species as those particularly named, and to exclude other uses which are dissimilar.⁹⁴

The regulations may zone areas or districts,⁹⁵ and the courts have construed such provisions with respect to the physical location of property as within a particular zone,⁹⁶ and in particular instances it has been held that a zoning ordinance or regulation was violated⁹⁷ or was not violated.⁹⁸

Where a manufacturer has plans on lots in different municipal zones, the use of each lot ordinarily is governed by the requirements applicable in

the particular zone wherein the lot is located,⁹⁹ but the right of a property owner under a zoning regulation to construct a gasoline filling station on a portion of his property has been held to include the right to construct necessary approaches thereto on another portion of his property, notwithstanding the approaches would lie without the zone in which the erection and operation of filling stations is permitted.¹ Where a building was used in the conduct of a business permitted in a certain district, it may be replaced by the erection of another building for a use of the same classification.²

Temporary structures or use. A temporary use of one's property which is not of a permanent

94. Mo.—State ex rel. Kaegel v. Holekamp, App., 151 S.W.2d 685.
Tex.—Bryan v. Darlington, Civ.App., 207 S.W.2d 681, error refused, no reversible error.

Business of similar character

Under zoning ordinance permitting restaurants, moving picture shows, tearooms, parking stations or lots for passenger cars, gasoline and oil filling stations and other businesses of similar character, a drive-in serving root beer and ice cream was not a "restaurant" but was a business of character expressly permitted by such ordinance and revocation of permit for operation of such drive-in was arbitrary and unreasonable and was properly set aside.

Mo.—Fryer v. Board of Zoning Adjustment of Kansas City, 222 S.W. 2d 761, 359 Mo. 559.

95. Manufacturing district

Tex.—City of Amarillo v. Stapf, 101 S.W.2d 229, 129 Tex. 81.

Agricultural zone

Under county zoning regulations including certain land within agricultural zone, use of land within that zone for recreational purposes was permissible.

U.S.—Hart v. Knox County, D.C. Tenn., 79 F.Supp. 654, appeal dismissed, C.A., 171 F.2d 45.

96. Ga.—Howden v. City of Savannah, 159 S.E. 401, 172 Ga. 833.

N.J.—Mengle v. Mauger, 149 A. 523, 8 N.J.Misc. 231.

Pa.—Sun Oil Co. v. Schofield, 17 Pa. Dist. & Co. 313.

Lot fronting on street separating lot from park fronts on park was within zoning ordinance prohibiting erection of certain buildings fronting on park.

Ga.—Howden v. City of Savannah, 159 S.E. 401, 172 Ga. 833.

Boundaries

(1) A zoning ordinance which provides that boundaries between districts are, unless otherwise indicated, either center lines of streets or such lines extended or lines parallel or

perpendicular thereto, permits zone lines to be center line of street, parallel or perpendicular thereto, but does not allow zone lines to cross at angles.

Pa.—Frabotta v. Zoning Bd. of Adjustment, 6 Pa.Dist. & Co.2d 400, 14 Law L.J. 134.

(2) In rezoning ordinance, even though there was some inaccuracy in length of a course, monumenting of that course prevailed, since property or street lines constituted monuments and, as such, controlled courses.

N.J.—Closterman v. Cranford Tp., 91 A.2d 646, 22 N.J.Super. 204.

(3) Under rule established by board providing that, where boundary line adjoins railroad, it shall be deemed to coincide with boundary line of right of way, boundary line coincides with boundary of railroad right of way only where it is shown as adjoining railroad.

N.Y.—People ex rel. Joletto Const. Corporation v. Walsh, 228 N.Y.S. 282, 223 App.Div. 764.

Map

Incorporation of a map as part of city zoning ordinance, showing certain intersection and platted extension of one of intersecting streets beyond intersection, although such street had never been opened or maintained by city as public street, had effect of establishing four "corners" at the intersection, within zoning statute providing that where two or more corners at intersection are restricted to a particular use, other corners must be rezoned in conformity on owners' application.

N.C.—Bryan v. City of Sanford, 92 S. E.2d 420, 244 N.C. 30.

Lot divided by zone boundary line

Proposal for multifamily dwellings on interior lot, whereby building would extend from point in residence A zone one hundred and twenty-five feet from street, to point in business 1-A zone eighty-five feet from highway, was within ordinance providing that lot in interior of block and divided by zone boundary line

into two different zones may, in so far as situated at least one hundred feet from any street bounding block in which located, be used in accordance with use regulations of less restricted zone.

Conn.—Spesa v. Zoning Bd. of Appeals of City of New London, 109 A.2d 362, 141 Conn. 653.

97. Md.—Ullrich v. State, 46 A.2d 637, 186 Md. 353, 165 A.L.R. 1107.

Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed Full Salvation Union v. Portage Tp., Kalamazoo County, Mich., 68 S.Ct. 785, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

N.Y.—People v. Hein, 65 N.Y.S.2d 318, 187 Misc. 6.

38 C.J. p 74 note 25 [a]—[c].

98. U.S.—City of Evansville, Ind., v. Gaseteria, Inc., C.C.A.Ind., 51 F. 2d 232.

La.—Wilkie v. Walmsley, 136 So. 296, 173 La. 141.

N.Y.—People v. Collins, 83 N.Y.S.2d 124, 191 Misc. 553.

Driscoll v. Brunner, 64 N.Y.S. 2d 161, affirmed 63 N.Y.S.2d 644, 270 App.Div. 1025.

Pa.—Borough of Edgewood v. Apfel, 33 Pa.Dist. & Co. 675, 86 Pittsb. Leg.J. 405.

Commonwealth v. Heiner, 87 Pittsb.Leg.J. 542.

99. Conn.—Abbadessa v. Board of Zoning Appeals of City of New Haven, 54 A.2d 675, 134 Conn. 28.

Plant constituting a nonconforming use in zone different from that in which another plant exists as permitted use acquires no additional standing because both plants are operated by one organization.

Conn.—Abbadessa v. Board of Zoning Appeals of City of New Haven, supra.

1. W.Va.—Sudduth v. Snyder, 200 S. E. 55, 120 W.Va. 746.

2. Md.—John J. Moylan, Inc., v. Bramble, 24 A.2d 297, 180 Md. 316.

character does not necessarily constitute a violation of a zoning ordinance.³ So, the excavation of sand for property in a residential district and the erection of temporary structures thereon, used solely as adjuncts to such excavation, has been held not a violation of a zoning ordinance prohibiting the intrusion of business buildings in a residential district.⁴ It has also been held, however, that structures are not exempt from the prohibition of a zoning ordinance even though they are temporary in the sense that they can be removed and set up elsewhere.⁵

Vacant or improved land. A zoning regulation restricting the use of buildings or premises has been held to preempt the entire field of use of land for business purposes within prescribed areas, whether the land is vacant or improved.⁶

3. N.Y.—Peacock Point Corporation v. Meudon Land & Improvement Corporation, 33 N.Y.S.2d 96.

4. N.Y.—Bartsch v. Ragonetti, 207 N.Y.S. 142, 123 Misc. 903, affirmed 210 N.Y.S. 825, 214 App.Div. 799.

5. Mass.—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

6. N.Y.—In re Borgeaud, 274 N.Y.S. 599, 153 Misc. 546.

Term "premises" as used in a regulation prohibiting use of buildings or premises for any use other than a use specified in regulation has broad significance and includes vacant lands.

N.Y.—Monument Garage Corporation v. Levy, 194 N.E. 848, 266 N.Y. 339. In re Borgeaud, 274 N.Y.S. 599, 153 Misc. 546—City of New York v. Off-Streets Parking, 274 N.Y.S. 562, 153 Misc. 150, affirmed 275 N.Y.S. 334, 242 App.Div. 767.

7. Ohio.—Murdock v. City of Norwood, Com.Pl., 67 N.E.2d 867. Pa.—Culp v. Seidel, Com.Pl., 39 Berks Co. 291.

Strict construction

Zoning regulations prohibiting use of building in residential districts for business must be strictly construed.

Conn.—Town of Darien v. Webb, 162 A. 890, 115 Conn. 581.

Word "residence" in zoning ordinance establishing residence, business, and industrial zones, means dwellings or structures wherein people live.

Ohio.—Murdock v. City of Norwood, Com.Pl., 67 N.E.2d 867.

Purpose for which "designed"

In zoning ordinance defining residence zone as land where less than

certain per cent of frontage was then designed for business or industrial purposes, etc., there must be overt act or setting apart of land for purposes before it is "designed" for purposes.

Ky.—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.

"Block"

(1) Definition of word "block", in city ordinance prohibiting construction of any building other than residence in a "block" wherein buildings are used exclusively for residential purposes, as including area of land facing on one street between two intersecting streets, embraced both sides of street between intersecting streets.

Ky.—Bowman v. Board of Councilmen of City of Elizabethtown, 196 S.W.2d 730, 303 Ky. 1. 43 C.J. p 332 note 91.

(2) So, existence of post office and library on one side of street removed from limitations of a residential district property on opposite side of street on which automobile service station was sought to be erected. N.Y.—City of Olean v. Conkling, 283 N.Y.S. 66, 157 Misc. 63.

8. La.—Carrere v. Orleans Club, 37 So.2d 715, 214 La. 303.

Mass.—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547.

N.C.—James v. Sutton, 50 S.E.2d 300, 229 N.C. 515.

Pa.—Appeal of Hasley, Com.Pl., 90 Pittsb.Leg.J. 205, affirmed 30 A.2d 187, 151 Pa.Super. 192.

Wash.—Liberty Lumber Co. v. City of Tacoma, 253 P. 122, 142 Wash. 377.

Greenhouse or nursery see *infra* § 157.

Motel or trailer camp see *infra* § 159.

§ 149. Residential Districts

Provisions establishing residential districts are reasonably construed in the light of the language used, the purposes served, and the facts and circumstances of the particular case.

Provisions establishing residential districts or areas are to be reasonably construed in the light of the language used, the purposes served, and the facts and circumstances of the case.⁷ Particular uses of property have been held to be permissible or have been held to be excluded from such residential districts.⁸

The construction, operation, and maintenance of electric power transmission lines, in a residential district have been permitted.⁹ The incidental use of a dwelling by its occupant for business purposes, as by using a desk and telephone in his home or by keeping a light truck in a residence garage, is not

Uses held proper

Ala.—Drennen v. Mason, 133 So. 689, 222 Ala. 652.

Ill.—Decatur Park Dist. v. Becker, 14 N.E.2d 490, 368 Ill. 442.

La.—City of New Orleans v. Estrade, 8 So.2d 536, 200 La. 552.

N.H.—Faulkner v. City of Keene, 155 A. 195, 85 N.H. 147.

N.Y.—People v. Collins, 83 N.Y.S.2d 124, 191 Misc. 553.

Pa.—Ziel v. Borough of Crafton, 42 Pa.Dist. & Co. 586, 89 Pittsb.Leg. J. 518.

Tex.—Bryan v. Darlington, Civ.App., 207 S.W.2d 681, refused no reversible error.

Uses held excluded

Conn.—Chudnov v. Board of Appeals of Town of Bloomfield, 154 A. 161, 113 Conn. 49.

Md.—Ullrich v. State, 46 A.2d 637, 186 Md. 353, 165 A.L.R. 1107.

Mass.—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403.

Neb.—City of Lincoln v. Logan-Jones, 285 N.W. 583, 120 Neb. 827.

N.J.—Frank J. Durkin Lumber Co. v. Fitzsimmons, 147 A. 555, 106 N.J. Law 183.

N.Y.—Village of Great Neck Estates v. Bemak & Lehman, 228 N.Y.S. 917, 223 App.Div. 853, affirmed 162 N.E. 562, 248 N.Y. 651.

People v. Daly, 28 N.Y.S.2d 603. R.I.—D'Acchioli v. Zoning Bd. of Review of City of Cranston, 60 A.2d 707, 74 R.I. 327.

Utah.—Provo City v. Claudin, 63 P.2d 570, 91 Utah 60.

Beauty parlor

Pa.—Kovach v. Board of Adjustment, Com.Pl., 37 Del.Co. 6—Appeal of Clust, Com.Pl., 2 Lycoming 52.

9. Cal.—Thompson v. City of Los Angeles, 185 P.2d 393, 82 C.2d 45.

prohibited in a residential district,¹⁰ and the construction and use of a driveway on residential property as a means of access to and egress from adjoining business property has been permitted.¹¹ The maintenance of a little league baseball field is not the pursuit of a "trade" or "industry" within zoning ordinance prohibiting such pursuits in a residential zone.¹²

The removal of the top soil of land to a depth of approximately twelve inches is not a violation of an ordinance restricting the area to residential uses,¹³ and a construction company excavating gravel from its premises and using such gravel in performing a road construction contract requiring the company to furnish certain quantities of gravel and to do the work and to turn over to the commonwealth a completed highway, and providing that the company is to be paid for gravel at a certain price per cubic yard, does not violate a zoning ordinance forbidding the removal of gravel for sale, since the contract is for "work and labor" rather than for "purchase and sale of personalty."¹⁴ Where the purpose in removing sand and gravel from a hill located within a zoning district is primarily a commercial one, such use of the hill is not within the uses permitted by a zoning ordinance making the area a residential district.¹⁵

Where an area is zoned for residential purposes only, the use of a building for commercial purposes is illegal.¹⁶ The maintenance of a real estate office in a residential district is prohibited by a zoning ordinance which permits uses customarily incidental to and subordinate to residential use and not involving the maintenance of a store, shop, or commercial enterprise.¹⁷ The construction by the owner of a road across a lot zoned by the county for residential use is not a permitted use.¹⁸

Operating or storing commercial trucks and ve-

hicles on a vacant lot in a residential district and using the lot as an entrance to, or exit from, the adjoining premises, which are in a business district, and maintaining tanks for the storage of gasoline on the lot, are business or commercial uses not permitted.¹⁹ A proposed double garage for storing, servicing, and repairing feed grinders and motor trucks and for taking of orders for grinding, where fuel is to be stored in large tanks on premises, is a "business building" for business purposes within an ordinance prohibiting the erection of such a building in a residential district.²⁰ One using his yard in a one-family zone for the purpose of removing parts from automobiles and trucks and making racing cars which he drove as a hobby violates an ordinance providing that no land in such district shall be used except for one-family dwellings, churches, schools, and other specified uses not including such use of the yard.²¹

Where an area was previously zoned for one-family houses only, a provision permitting conversion into multiple dwellings provided that there is no major structural change in the exterior of the building impliedly prohibits the erection of apartment houses in such district.²² The proposed use of land in single residential district in one community as a rear yard and service entrance for an apartment house located in an adjoining city is violative of a zoning bylaw of the community, and the incidental presence of a lawn and shrubs, trees, and flowers does not transform the rear yard and service entrance into the permitted use of a "park" or "ornamental grounds."²³

Model homes. While the use of homes as model homes on a tract sought to be developed may not be violative of a zoning ordinance restricting such tract to residences only,²⁴ where homes are being used as model homes for purpose of inducing sale of other structures to be erected at another location

10. Ill.—*Village of Riverside v. Kuhne*, 82 N.E.2d 500, 335 Ill.App. 547.

Uses accessory to residence generally see *infra* § 177.

11. N.J.—*Beckmann v. Teaneck Tp.*, 79 A.2d 301, 6 N.J. 530.

Driveway as business see *infra* § 161.

12. N.J.—*Lieberman v. Saddle River Tp.*, 116 A.2d 809, 37 N.J.Super. 62.

Trade or industry generally see *infra* § 173.

13. N.Y.—*Town of Harrison v. Sunny Ridge Builders*, 7 N.Y.S.2d 521, 169 Misc. 471.

14. Mass.—*Town of Saugus v. B. Perini & Sons*, 26 N.E.2d 1, 305 Mass. 403.

15. N.Y.—*Incorporated Village of Upper Brookville v. Faraco*, 125 N.Y.S.2d 214, 282 App.Div. 943, affirmed 120 N.E.2d 835, 307 N.Y. 642.

16. N.Y.—*Lustgarten v. 36 C. P. S. Inc.*, 101 N.Y.S.2d 709.

17. Cal.—*Jones v. Robertson*, 180 P. 2d 929, 79 C.A.2d 813.

Real estate office as accessory to residential use, see *infra* § 177.

18. Del.—*Bave v. S & S Builders, Inc., Ch.*, 134 A.2d 709.

19. N.Y.—*City of Yonkers v. Rentways, Inc.*, 113 N.Y.S.2d 803, 280 App.Div. 821, motion to dismiss appeal denied 108 N.E.2d 401, 304 N.Y. 733, affirmed 109 N.E.2d 597, 304 N.Y. 499.

Parking lots generally see *infra* § 163.

Parking lots as accessory uses see *infra* § 176.

20. Neb.—*Henke v. Zimmer*, 64 N. W.2d 458, 158 Neb. 697.

Garages generally see *infra* § 163.

21. Tenn.—*City of Knoxville v. Brown*, 260 S.W.2d 264, 195 Tenn. 501.

22. Mich.—*Jones v. De Vries*, 40 N. W.2d 317, 326 Mich. 126.

23. Mass.—*Town of Brookline v. Co-Ray Realty Co.*, 93 N.E.2d 581, 326 Mass. 206.

24. N.Y.—*City of New York v. Jack Parker Associates, Inc.*, 161 N.Y.S. 2d 731, 5 Misc.2d 633.

more than five blocks away, and the premises constituted no part or parcel of such other location, such use is in violation of a zoning ordinance providing that only one-family dwellings intended or designed exclusively for use as such are permitted, notwithstanding such homes are intended, eventually, to be used as dwellings.²⁵

§ 150. — Apartment House Districts

Ordinances creating and regulating apartment house districts are to be reasonably construed.

Ordinances creating and regulating apartment house districts are to be reasonably construed.²⁶ A provision in a zoning ordinance permitting the conduct of specified types of business within the ground or street floor of apartment houses or buildings fronting on stated streets does not nullify prior provisions of the ordinance prohibiting the erection of buildings and the use of premises in the district for business.²⁷ A city ordinance authorizing in an apartment district uses customarily incident to enumerated uses when situated in the same dwelling, including home occupations such as the office of a physician, surgeon, dentist, musician, or artist, does not authorize operation of a one-chair beauty shop.²⁸ A freight terminal has been prohibited in an apartment house district.²⁹

§ 151. Business Districts

Under the provisions of particular ordinances, various uses have been permitted or prohibited in business districts.

Under the provisions of particular ordinances, various uses have been permitted or prohibited in

business districts.³⁰ Where the ordinances establish a business zone without defining the term "business," it will be construed to mean the barter, sale, or exchange of things of value.³¹ A zoning regulation prohibiting in a business district any kind of manufacturing or processing of products other than that incidental to the conduct of a retail business on the premises is ambiguous and is not to be extended to prohibit a use not clearly defined or fairly implied.³²

An ordinance creating a retail or local business district is intended to permit the conduct in the district of a retail business and of any local business not retail in character.³³ A print shop business is a local business and is permitted in such a district.³⁴

The fact that a use is permitted in an industrial district does not mean that it is prohibited in a business district.³⁵ Where a lot is adjacent to a residential district but located in a business district, the use of its back or side yards is governed by the regulations with respect to business districts and not by those dealing with residential districts.³⁶

An automobile wrecking plant has been permitted in a business district although the ordinance prohibited industrial or manufacturing uses in such district.³⁷ A storage tank constructed on premises in a business district to be used in connection with the retail sale of fuel oils does not violate a prohibition against the construction of structures on premises in a business district for any kind of manufacture or processing except that which is incidental to the operation of a retail business conducted on the premises.³⁸ A zoning ordinance permitting

25. N.Y.—City of New York v. Jack Parker Associates Inc., *supra*.

26. La.—Carrere v. Orleans Club, 37 So.2d 715, 214 La. 303.

Ohio.—Smith v. Home Echo Club, App., 69 N.E.2d 414.

27. N.Y.—Glochrest Realty Corp. v. Village of Great Neck Plaza, 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619.

28. Tex.—Board of Adjustment of City of San Antonio v. Levinson, Civ.App., 244 S.W.2d 281.

Uses accessory to residence generally see *infra* § 177.

29. Mass.—City of Everett v. Capital Motor Transp. Co., 114 N.E.2d 547, 330 Mass. 417.

30. N.J.—Lowenthal v. Bratt, 53 A.2d 306, 135 N.J.Law 572.

N.Y.—Packer v. Board of Standards and Appeals of City of New York, 62 N.Y.S.2d 54, affirmed 66 N.Y.S.2d 634, 271 App.Div. 874—Sweet v. Campbell, 9 N.Y.S.2d 281, affirmed

12 N.Y.S.2d 359, 256 App.Div. 1069, reversed on other grounds 25 N.E.2d 963, 282 N.Y. 146.

Maintenance of motels in business district see *infra* § 159.

Uses held permitted

Ariz.—Kubby v. Hammond, 198 P.2d 134, 68 Ariz. 17.

N.J.—Plaget-Del Corp. v. Kulik, 45 A.2d 125, 133 N.J.Law 485, petitions denied 46 A.2d 379, 134 N.J.Law 147—Rupprecht v. Draney, 19 A.2d 813, 126 N.J.Law 383.

N.Y.—Kaufman v. City of Glen Cove, 45 N.Y.S.2d 53, 180 Misc. 349, affirmed 42 N.Y.S.2d 508, 266 App. Div. 870.

Packer v. Board of Standards and Appeals of City of New York, 62 N.Y.S.2d 54, affirmed 66 N.Y.S.2d 634, 271 App.Div. 874.

Ohio.—Salem v. Arnold, 16 Ohio Supp. 159.

Uses held excluded

Mich.—Fass v. City of Highland Park, 30 N.W.2d 828, 320 Mich. 182,

modified on other grounds 32 N.W.2d 375, 321 Mich. 156.

31. Ohio.—Murdock v. City of Norwood, Com.Pl., 67 N.E.2d 867.

What constitutes "business" within zoning ordinance see *infra* § 161.

32. Conn.—Fisher v. Board of Zoning Appeals of Town of Monroe, 122 A.2d 729, 143 Conn. 358.

33. Ohio.—Brow v. Sherwin-Williams Co., App., 109 N.E.2d 864.

34. Ohio.—Brow v. Sherwin-Williams Co., *supra*.

35. Conn.—Fisher v. Board of Zoning Appeals of Town of Monroe, 122 A.2d 729, 143 Conn. 358.

36. R.I.—Pedro v. Muratore, 113 A.2d 731.

37. Ariz.—Kubby v. Hammond, 198 P.2d 134, 68 Ariz. 17.

38. Conn.—Fisher v. Board of Zoning Appeals of Town of Monroe, 122 A.2d 729, 143 Conn. 358.

a business district building to be used in whole or in part for any enterprise for profit or convenience and service of, and dealing directly with, and immediately accessible to, ultimate consumers, and not injurious to adjacent premises or occupants thereof, does not prohibit a combination candy factory and retail sales plant in the district.³⁹

A gasoline filling station has been excluded from a business district;⁴⁰ and where lunch wagons, gasoline filling stations, new or used car lots, garages, or automobile repair shops are prohibited in a business zone, property in the zone may not be used for the storage of moving trucks, vans, and trailers.⁴¹ Manufacturing, other than light manufacturing, may be prohibited in a business district.⁴²

Preparation and sale of doughnuts. The use of premises for the preparation and sale of doughnuts has been permitted in a business district whether such use is that of a retail store or a restaurant.⁴³ Under a zoning ordinance permitting in a business district a store for the conduct of a retail business and drive-in retail establishment and other similar uses, but not including any use specifically listed in a less restricted district, and permitting in a commercial district a plant for the manufacture of bakery products, a building for the baking and retail sale of doughnuts and other bakery goods on the premises may be constructed in a business district.⁴⁴

§ 152. Commercial Districts

Ambiguities and conflicts as to the uses permitted in a commercial district are to be resolved in favor of the owner's full use of his premises.

Where a zoning ordinance creates a commercial district, ambiguities and conflicts as to the uses permitted are to be resolved in favor of the landowner's full use of his premises.⁴⁵ An ordinance establishing a commercial district and specifying the uses permitted therein does not limit permitted uses to

such as will suffice for the needs of the residents of the neighborhood.⁴⁶ A use permitted in a manufacturing zone is not thereby excluded from a commercial zone.⁴⁷

Various uses have been permitted or prohibited in commercial districts.⁴⁸ A gas station,⁴⁹ a new-car salesroom,⁵⁰ and a truck distribution terminal⁵¹ have been permitted. The operation of a tire recapping plant may be permitted, although the ordinance excludes the manufacture of rubber goods and the manufacture or treatment of rubber from such area.⁵²

Under a zoning ordinance authorizing, in a commercial zone, the manufacturing of, inter alia, clay or glass products and products from bone celluloid, cloth cork, feathers, etc., premises in such district may be used for the manufacture of automobile parts.⁵³ The word "sale" as used in city zoning ordinance providing that property in a commercial district may be used for the sale or storage of goods, merchandise, or commodities in stores or showrooms, includes sales at wholesale as well as at retail.⁵⁴

A ready mixed or transit mixed concrete plant is an industrial plant which may not be maintained in a general commercial district created by county zoning ordinance which permits the manufacture or processing of concrete in heavy industrial districts, notwithstanding part of mixing may have taken place when trucks were in transit.⁵⁵ While a zoning ordinance provision that "other similar business, trades or uses which in the opinion of the council are not more obnoxious or detrimental to the welfare of the particular community than the businesses, trades or uses herein in this section enumerated" could be maintained in a commercial zone is too vague and uncertain to constitute valid legislation, a use, not one of those expressly permitted for such a zone, is not, because of the invalid provision, thereby authorized; and, until listed as a

39. N.C.—James v. Sutton, 50 S.E. 2d 300, 229 N.C. 515.

40. N.Y.—Rosak Properties v. Dwyer, 100 N.Y.S.2d 891, 277 App.Div. 1058, reargument denied 103 N.Y.S.2d 428, 277 App.Div. 570, affirmed 99 N.E.2d 558, 302 N.Y. 801.

41. N.Y.—Town of Eastchester v. Noble, 148 N.Y.S.2d 592, 2 Misc. 2d 1034, affirmed 153 N.Y.S.2d 600, 2 App.Div.2d 714.

42. N.J.—Lowenthal v. Bratt, 58 A. 2d 306, 135 N.J.Law 572.

43. N.Y.—Kane v. Livingston, 170 N.Y.S.2d 98.

44. Mass.—Kraft v. Board of Ap-

peals of Lynnfield, 132 N.E.2d 163, 333 Mass. 573.

45. Okl.—City of Tulsa v. Mizel, 265 P.2d 496.

46. Pa.—Bregman v. Exley, 46 A.2d 272, 354 Pa. 25.

47. Ill.—Strauss v. Boris, 89 N.E. 2d 862, 339 Ill.App. 278.

48. Pa.—Bregman v. Exley, 46 A. 2d 272, 354 Pa. 25.

Friedman v. Exley, 57 Pa.Dist. & Co. 586.

Jones v. Rezzetano, Com.Pl., 92 Pittsb.Leg.J. 369.

Garages, parking lots, or used-car lots see *infra* § 163.

49. Ala.—Shell Oil Co. v. Edwards,

81 So.2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 885, 100 L.Ed. 780.

50. Md.—Nyburg v. Solmson, 106 A. 2d 483, 205 Md. 150.

51. Md.—Nyburg v. Solmson, *supra*.

52. Wash.—Morin v. Johnson, 300 P.2d 569, 49 Wash.2d 300.

53. Ill.—Warshawsky v. American Automotive Products Co., 138 N.E. 2d 816, 12 Ill.App.2d 178.

54. Pa.—Bregman v. Exley, 46 A.2d 272, 354 Pa. 25.

55. Cal.—Markey v. Danville Warehouse & Lumber, Inc., 259 P.2d 19, 119 C.A.2d 1.

permissible use, a bus-storage facility use is prohibited in such a commercial zone.⁵⁶

§ 153. Industrial Districts

Manufacturing is authorized in an industrial zone.

An ordinance establishing an industrial zone without defining the term "industrial" as used therein authorizes the use of property within the district for manufacturing.⁵⁷ Under a provision permitting industrial uses in an industrial zone as well as any use permitted in a residential or commercial district, except that the erection or operation of structures or uses for any purpose which constitutes a nuisance is not permitted, the use of a building as a labor camp is not a nuisance and is permitted in an industrial zone.⁵⁸ A provision in a zoning ordinance prohibiting the erection in an industrial area of any building for use so dangerous as to constitute a public hazard does not justify refusal to permit a truck terminal, even though the trucks may constitute a traffic hazard, but must be limited in its construction to such public menaces as fireworks factories, poison manufacturing plants, etc.⁵⁹ Au-

thorization for a "freight terminal" in an industrial district includes a railroad, waterway, and motor freight terminal.⁶⁰

Where land adjacent to land then owned by a light company was already purchased, or being purchased, by the company at the time of the enactment of a zoning ordinance putting property owned by a light company, and extensions thereof adjacent to and contiguous to company's existing buildings, in an industrial district, the land purchased is included within the industrial area.⁶¹

§ 154. Use within Specified Distance of Particular Premises

General rules apply as to the construction and operation of zoning provisions prohibiting specified uses and businesses within specified distances from particular types of premises.

General rules as to the construction and operation of ordinances or regulations apply in the case of provisions prohibiting certain businesses and uses of property at a location within a certain distance of specified other premises,⁶² such as a church,⁶³ and within certain distance of premises

56. Cal.—*People v. Binzley*, 303 P.2d 903, 146 C.A.2d Supp. 889.

57. Ohio.—*Murdock v. City of Norwood*, Com.Pl., 67 N.E.2d 867. "Manufacturing" as a permitted use see *infra* § 168.

58. N.Y.—*White v. Hartnett*, 104 N.Y.S.2d 669, 278 App.Div. 750, reargument denied 105 N.Y.S.2d 535, 278 App.Div. 889.

59. Pa.—*Tornetta v. Whitemarsh Tp.*, 67 Pa.Dist. & Co. 591, 65 Montg. Co. 49.

60. N.Y.—*City of Buffalo v. Roadway Transit Co.*, 104 N.E.2d 96, 303 N.Y. 453.

61. Pa.—*In re A. N. "AB" Young Co.*, 89 A.2d 493, 371 Pa. 274.

62. N.J.—*Newark Athletic Club v. Board of Adjustment of Newark*, 144 A. 167, 7 N.J.Misc. 55.

Pa.—*Staples v. McShain*, 70 Pa.Dist. & Co. 556.

38 C.J. p. 74 notes 24, 25.

Designated street

Ordinance restricting use of property within specified distance of certain street is applicable only to street designated.

Pa.—*Humphreys v. Schofield*, 14 Pa. Dist. & Co. 127.

Sign

(1) Under zoning resolution prohibiting maintaining of a sign within two hundred feet of an arterial highway, advertising a business or service, terms "business" and "service" had a commercial meaning and related to an activity performed for

compensation or profit, and maintenance of a sign soliciting memberships in a nonprofit organization which advocated remodeling of United Nations into a world government as best means of achieving peace, was not prohibited.

N.Y.—*People v. Purvis Estate, Inc.*, 128 N.Y.S.2d 482, 283 App.Div. 811.

(2) Erection of signs as permitted use see *infra* § 158.

Filling station

(1) With respect to distance within which gasoline station may be erected from the nearest exit or entrance to a public school, the same need exists for protection, regardless of whether the district is restricted or unrestricted.

N.Y.—*Bruchhausen v. Murdock*, 9 N.Y.S.2d 923, 170 Misc. 187, affirmed 16 N.Y.S.2d 103, 258 App.Div. 797, reargument denied 17 N.Y.S.2d 480, 258 App.Div. 906.

(2) Facts that two filling stations, lawfully built, were within one hundred feet from two moving picture theaters, that third filling station, proposed to be built on opposite side of street from such other stations, would give opportunity for drivers of automobiles on such side of street to get supplies without crossing traffic, and that considerable parking space was intended to be established on part of lot occupied by new station, thereby lessening traffic hazards, showed no exceptional conditions justifying waiver of rule, established by city ordinance,

against erection or use of buildings for sale of gasoline within three hundred feet from motion picture theater.

Md.—*Mayor and City Council of Baltimore v. Byrd*, 62 A.2d 588, 191 Md. 632.

(3) City ordinance providing that no part of filling station, bus terminal, etc., shall be within three hundred feet of lot line of plot on which is located building used as a theater, etc., or used as a church, etc., was not only intended to avoid traffic hazards in area where pedestrians converge on place of assemblage, but also risk of fire, and in case of a church, noises and interruptions that would interfere with worship and comfort and quiet of worshippers.

N.J.—*Vine v. Board of Adjustment of Village of Ridgewood*, 56 A.2d 122, 136 N.J.Law 416.

Regulation held inapplicable

N.J.—*Savitz-Denbigh Co. v. Bigelow*, 137 A. 439, 5 N.J.Misc. 533.

63. Md.—*Miles v. McKinney*, 199 A. 540, 174 Md. 551, 117 A.L.R. 207. N.J.—*Newark Athletic Club v. Board of Adjustment of Newark*, 144 A. 167, 7 N.J.Misc. 55.

Filling station is within meaning of word "garage," in zoning ordinance forbidding garage within specified distance of church.

N.J.—*Willinski v. Haddon Tp.*, 153 A. 97, 9 N.J.Misc. 140.

such as school,⁶⁴ hospital,⁶⁵ or public gathering place.⁶⁶ The restricted area must be measured in accordance with the provisions of the regulation,⁶⁷ and ordinarily such area is measurable by a straight line from one point to the other, and not necessarily along a course accessible to travel.⁶⁸

§ 155. Other Terms and Uses

In determining the operation and effect of zoning regulations as permitting or excluding particular uses of property, the courts have construed various provisions of, or terms in, such regulations.

In determining the operation and effect of zoning ordinances or regulations as permitting or excluding particular uses of property, the courts have construed various provisions of, or terms in, such regulations,⁶⁹ such as "cabana,"⁷⁰ "commercial enterprise,"⁷¹ "commercial purposes,"⁷² "contractor's

plant and storage therefor,"⁷³ "electric plants,"⁷⁴ "freight terminal,"⁷⁵ "frontage,"⁷⁶ "industrial establishment,"⁷⁷ "industrial process,"⁷⁸ "oil filling station,"⁷⁹ "public or semi-public buildings,"⁸⁰ "store, shop, or permanent office,"⁸¹ and "structure."⁸²

"Community" water works. Under a zoning ordinance permitting the use of land for a "community" water works, the water works of a village serving the inhabitants of the village and contiguous areas is a "community" water works.⁸³

"Convent." The living together of a group of men who are priests and lay brothers of a religious organization does not constitute the premises a "convent" as that term is used in a zoning regulation.⁸⁴

64. N.J.—Newark Athletic Club v. Board of Adjustment of Newark, 144 A. 167, 7 N.J.Misc. 55.

Religious school held included

N.Y.—People ex rel. Jane David Holding Corporation v. Murdock, 268 N.Y.S. 662, 241 App.Div. 625, affirmed 191 N.E. 588, 264 N.Y. 609. Jane David Holding Corporation v. Murdock, 271 N.Y.S. 177, 150 Misc. 697.

65. N.Y.—Frax Realty Co., Inc. v. Kleinert, 205 N.Y.S. 728, 123 Misc. 255.

38 C.J. p. 74 note 24 [a].

Hospitals generally see infra § 164.

Accessory building

Building used as laundry, power house, and ambulance garage, in which gasoline and fuel were stored but no patients or staff members housed, was not a "hospital building" within zoning resolution establishing prohibited area within two hundred-foot radius of hospital buildings, and gasoline service station could therefore be properly extended to a point within two hundred feet thereof.

N.Y.—Application of Sinclair Refining Co., 92 N.Y.S.2d 521, 276 App.Div. 774.

66. N.J.—Bentley v. Board of Adjustment of Lawrence Tp., Mercer County, 10 A.2d 459, 123 N.J.Law 556.

67. N.J.—Vine v. Board of Adjustment of Village of Ridgewood, 56 A.2d 122, 136 N.J.Law 416.

38 C.J. p. 74 notes 19 [a], 21 [a].

Word "structure," within zoning ordinance providing that a gasoline service station may be established with consent of owners of majority of property within one hundred feet of proposed structure, referred to and contemplated only proposed main

building, and it is from that structure that one hundred feet measurement must be made in order to determine from which properties owners' consent is required.

Pa.—Appeal of Hertrick, 137 A.2d 310, 391 Pa. 148.

68. N.J.—Vine v. Board of Adjustment of Village of Ridgewood, 56 A.2d 122, 136 N.J.Law 416—Langella v. City of Bayonne, 46 A.2d 789, 134 N.J.Law 235.

69. Conn.—State ex rel. Heimov v. Thomson, 37 A.2d 689, 131 Conn. 8. Pa.—Bryan v. Zoning Bd. of Adjustment, Com.Pl., 2 Bucks Co. 16—Appeal of Krechovitz, Com.Pl., 3 Chest.Co. 58—City of Williamsport v. Grieco, Com.Pl., 6 Lycoming 78—Appeal of Senn, Com.Pl., 5 Lycoming 70—Appeal of Lycoming County School Bd., Com.Pl., 3 Lycoming 152—Lower Merion Tp. v. Hobson, Com.Pl., 70 Montg. Co. 90—Township of Whitmarsh v. Chemical Concentrates Corp., Com.Pl., 62 Montg.Co. 258.

70. Fla.—Godson v. Town of Surfside, 8 So.2d 497, 150 Fla. 614.

71. Cal.—Jones v. Robertson, 180 P. 2d 929, 79 C.A.2d 813.

72. Mass.—Building Com'r of Town of Brookline v. McManus, 160 N.E. 887, 263 Mass. 270.

73. Pa.—Appeal of Kiddy, 143 A. 909, 294 Pa. 209.

74. N.Y.—People ex rel. Taylor v. Walsh, 248 N.Y.S. 753, 140 Misc. 25.

"Electric central station power plants" within building zoning resolution are chief or central stations in which fuel is burned for generating current; transformer and distributing station were held not within prohibition of zoning law as "electric central station power plants."

N.Y.—People ex rel. Taylor v. Walsh, supra.

75. N.Y.—City of Buffalo v. Roadway Transit Co., 104 N.E.2d 96, 303 N.Y. 453.

76. Term "frontage" includes streets on which a lot fronts breadthwise but does not include a street on which such lot abuts lengthwise. Ohio.—State ex rel. Gulf Refining Co. v. De France, 100 N.E.2d 689, 89 Ohio App. 1.

77. Conn.—Abbadessa v. Board of Zoning Appeals of City of New Haven, 54 A.2d 675, 134 Conn. 28.

78. R.I.—Ralston Purina Co. v. Zoning Board of Town of Westerly, 12 A.2d 219, 64 R.I. 197.

Coal business not included

R.I.—Ralston Purina Co. v. Zoning Board of Town of Westerly, supra.

79. Kan.—Simmonds v. Meyn, 7 P. 2d 506, 134 Kan. 419.

80. Utah.—Provo City v. Claudin, 63 P.2d 570, 91 Utah 60.

Children's nursery and day school not included

Tex.—Bryan v. Darlington, Civ.App., 207 S.W.2d 681.

82. Mich.—C. K. Eddy & Sons v. Tierney, 267 N.W. 852, 276 Mich. 333.

Minn.—Village of St. Louis Park v. Casey, 16 N.W.2d 459, 218 Minn. 394, 155 A.L.R. 1128.

Tex.—Fort Worth & D. C. Ry. Co. v. Ammons, Civ.App., 215 S.W.2d 407.

83. Ill.—Odd Fellows Oakridge Cemetery Ass'n v. Oakridge Cemetery Corp., 144 N.E.2d 853, 14 Ill.App. 2d 378.

84. Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 267 Wis. 609.

"*Neighborhood*" as used in a zoning ordinance prohibiting buildings whose architectural appeal and functional plan is so at variance with the other structures in the immediate neighborhood as to cause substantial depreciation in the property values thereof extends further than the adjoining property and varies according to the conditions.⁸⁵

"*Office*." The term "office" as used in a zoning ordinance is to be construed in accordance with its ordinary and generally accepted meaning.⁸⁶

"*Office building*." Under ordinance permitting use of premises for "office building," quoted phrase identifies a type of business enterprise in which the supplying of office space to tenants is the primary business conducted by the owner on the premises.⁸⁷

"*Profession*"; "*professional*." The words "profession" or "professional" may be used in different senses in zoning ordinances depending on the circumstances.⁸⁸ In a narrow and classic sense, the term "profession" should be confined to the so-called learned professions of theology, medicine, and law;⁸⁹ while in a broad sense, the term "profession" may be considered as including an occupation, if not purely commercial, mechanical, agricultural, or the like, to which one devotes oneself; a calling in which one professes to have acquired some special knowledge used by way either of instructing, guiding, or advising others, or of serving them in some art.⁹⁰

A radio mast seventy feet in height was not within a provision of a zoning ordinance permitting public utilities in a residential zone.⁹¹

"*Stoneyard*." The use of premises for the display and sale of finished monuments, which are neither fabricated nor lettered on the premises, does not constitute such premises a "stoneyard" within meaning of zoning ordinance prohibiting the use of property in a commercial district for a stoneyard or

monumental works, a stoneyard being defined in the ordinary sense as a yard in which stones are cut, shaped, broken, or the like.⁹²

§ 156. — Abattoir; Slaughterhouse; Stockyard

"Abattoir" and "slaughterhouse" will not be construed as synonymous where the zoning regulations treat them differently.

The fact that the dictionary regards "abattoir" and "slaughterhouse" as synonymous must be disregarded where the zoning regulations treat them differently.⁹³ A structure for the slaughter of animals used exclusively by the owner for his own purposes without making the facilities available to the public has been held to be a "slaughterhouse" and not an "abattoir" where the zoning ordinances impose greater restrictions on the use of property for an abattoir.⁹⁴ The killing and dressing of fowl by poultry raisers and dealers does not make the premises where such work is done an "abattoir" or "stockyard."⁹⁵

§ 157. — Agricultural Use; Farm; Nursery; Greenhouse

A provision exempting agricultural use from zoning regulations is to be construed in accordance with common and approved usage.

The term "agricultural use" in a provision exempting such use from the zoning regulations is to be construed in accordance with common and approved usage without enlargement or restriction and without regard to conceptions of expediency.⁹⁶ A use is within the exemption if it is agricultural, without regard to how detrimental such use may be to property in the neighborhood.⁹⁷ The storage of tobacco in a barn is within the protection of the provision that the zoning regulations shall not be deemed to prohibit the use of land for agricultural purposes or the construction or use of buildings

85. Wis.—State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed. 750.

86. Colo.—Jones v. Board of Adjustment, 204 P.2d 560, 119 Colo. 420.

87. Colo.—Jones v. Board of Adjustment, supra.

88. Pa.—Leaver v. Board of Adjustment, 10 Pa.Dist. & Co.2d 333, 6 Bucks Co. 249.

Professional office as accessory to residential use see infra § 177.

89. Pa.—Leaver v. Board of Adjustment, supra.

90. Pa.—Leaver v. Board of Adjustment, supra.

91. U.S.—Kroeger v. Stahl, D.C.N.J., 148 F.Supp. 408.

Radio mast permitted as accessory to residential use see infra § 177.

92. Mo.—Killian v. Brith Sholom Congregation, App., 154 S.W.2d 387. N.J.—City of Newark v. Lippman, 177 A. 556, 13 N.J.Misc. 248.

93. Mich.—Baura v. Thomasma, 32 N.W.2d 369, 321 Mich. 139.

94. Mich.—Baura v. Thomasma, supra.

95. Mass.—Petros v. Superintendent and Inspector of Buildings of City of Lynn, 28 N.E.2d 233, 306 Mass. 368, 128 A.L.R. 1210.

Fowl not "animals"
A zoning ordinance prohibiting

"stockyards, slaughtering of animals" did not prohibit killing of chickens as carried on in retail poultry business, the term "animals" meaning quadruped and not a bird or fowl.

Ohio.—State ex rel. Del Monte v. Woodmansee, App., 72 N.E.2d 789.

96. Mass.—Moulton v. Building Inspector of Milton, 43 N.E.2d 662, 312 Mass. 195.

Pa.—Marple Tp. v. Grover, Com.Pl., 33 Del.Co. 448.

Use of land for silo held permissible Mass.—Moulton v. Building Inspector of Milton, 43 N.E.2d 662, 312 Mass. 195.

97. Mass.—Moulton v. Building Inspector of Milton, supra.

incident to the use of the land on which the buildings are located for agricultural purposes.⁹⁸

"Farming" as used in a zoning regulation permitting use as a farm in certain districts is the act or business of cultivating and using land and soil for the production of crops for the use of man and animals and incidental purposes, such as animal husbandry, stock-raising, or dairying;⁹⁹ and does not include the use of premises exclusively for the raising of hogs.¹ The erection of a building for the purpose of keeping swine before slaughtering violates a zoning provision prohibiting the erection of a building for any commercial purposes except farming.²

In determining whether a building sought to be erected and the use to which it was sought to be put constitutes a farm within a zoning ordinance permitting the operation of a farm in a residential district, consideration is required to be given to all of surrounding circumstances.³ It has been held that such a provision has as its purpose the promotion of an atmosphere of family life rather than the development of a commercial enterprise,⁴ and does not authorize the use of premises substantially solely for the raising of poultry.⁵

The test of whether or not a use not normally considered farming is "farming" is within a zon-

ing regulation permitting farming is whether such use is incidental to farming operations or is an independent or dominant enterprise.⁶ The production of a synthetic compost made of hay and corn-cobs and treated with cyanamid, potash, and gypsum and used as a manure in the growing of mushrooms has been held not to be a forbidden "manufacturing" but to be within the ambit of authorized "farming in all its branches."⁷ A use of premises for the sale and distribution of milk not produced on the premises,⁸ or the raising of racing dogs⁹ is not a farm use.

A provision in a zoning ordinance permitting the sale of farm products on farms from a roadside stand, provided the products sold are raised on the farm, authorizes the sale of milk, ice cream, and cheese where all the ingredients except the flavoring are produced on the farm;¹⁰ such a provision does not restrict the farmer to the sale of farm produce in its natural state and permits the sale of farm-manufactured products.¹¹

Nursery; greenhouse. Where the circumstances indicate that the term was used with such meaning, "farm" has been held to include gardening or horticulture, so as to permit the operation in a residential district of a nursery for the raising of plants.¹² The words "greenhouse" and "nursery"

98. Ky.—*Southard v. Biddle*, 305 S. W.2d 762.

99. N.Y.—*Town of Mount Pleasant v. Van Tassel*, 166 N.Y.S.2d 458, 7 Misc.2d 643.

Pa.—*Marple Tp. v. Grover*, Com.Pl., 33 Del.Co. 448.

Commonly understood significance

Word "farm" within town zoning bylaw, permitting use of lands in single residential district as farms, should be given its commonly understood significance as land used for production of crops, livestock grazing, raising of hay for cows to produce milk and other dairy products, raising of poultry and sale of chickens and eggs, or growing of fruit. Mass.—*Town of Lincoln v. Murphy*, 49 N.E.2d 453, 314 Mass. 16, 146 A.L.R. 1196.

1. Mass.—*Town of Lincoln v. Murphy*, supra.

Farms in community

Raising of pigs in such quantities or for purposes not usual to operation of farms in community is not generally embraced within zoning ordinance provision allowing use of premises as "farm" unless clearly so indicated.

N.Y.—*Johnson v. Debaun*, 135 N.Y.S. 2d 217, 206 Misc. 806.

Not incidental to use for agricultural purposes

Raising of pigs or other animals as a business, with their confinement all or most of time in buildings or pens occupying a small part of a large tract of land, with raising thereof not being incidental to use of tract for agricultural purposes, is not "farming" within meaning of zoning ordinance permitting such use.

N.Y.—*Town of Mount Pleasant v. Van Tassel*, 166 N.Y.S.2d 458, 7 Misc.2d 643.

Piggery not farming

N.Y.—*Town of Mount Pleasant v. Van Tassel*, 166 N.Y.S.2d 458.

2. Mass.—*Inspector of Buildings of Burlington v. Murphy*, 68 N.E.2d 918, 320 Mass. 207.

3. N.Y.—*Colasuonno v. Dassler*, 51 N.Y.S.2d 870, 183 Misc. 904.

4. N.Y.—*Colasuonno v. Dassler*, supra.

5. N.Y.—*Colasuonno v. Dassler*, supra.

6. Conn.—*Chudnov v. Board of Appeals of Town of Bloomfield*, 154 A. 161, 118 Conn. 49.

Truck gardening and greenhouses

Fact that zoning regulations allowing farming in residential zone, specified, in addition, truck garden-

ing, nurseries, and greenhouses, negated intent that enterprises less obviously related to farming be allowed.

Conn.—*Chudnov v. Board of Appeals of Town of Bloomfield*, supra.

7. Pa.—*Gaspari v. Board of Adjustment of Muhlenberg Tp.*, 139 A.2d 544, 392 Pa. 7.

Growing of mushroom spawn in horse manure is not "manufacture" but is "agriculture" and consequently is "farming in all its branches" permitted by zoning ordinance.

Pa.—*Gaspari v. Board of Adjustment of Muhlenberg Tp.*, supra.

8. Mass.—*Mioduszewski v. Town of Saugus*, 148 N.E.2d 655.

9. Mass.—*Mioduszewski v. Town of Saugus*, supra.

10. Mass.—*Deutschmann v. Board of Appeals of Canton*, 90 N.E.2d 313, 325 Mass. 297.

11. Mass.—*Deutschmann v. Board of Appeals of Canton*, supra.

N.H.—*Kimball v. Blanchard*, 7 A.2d 994, 90 N.H. 298.

12. Cal.—*Hagenburger v. City of Los Angeles*, 124 P.2d 345, 51 C.A. 2d 161.

Pa.—*Township of Marple v. Lynam*, 30 A.2d 208, 151 Pa.Super. 288.

as used in a zoning bylaw permitting such uses in residential districts are to be interpreted according to common and approved usage without enlargement or restriction.¹³ However, such terms must be construed with respect to the context,¹⁴ and a provision requiring a permit for the construction of a greenhouse does not apply as to a small conservatory located in the rear of a private residence, to be used to raise plants and flowers solely for the personal pleasure of the resident.¹⁵

A permitted greenhouse or nursery use includes the purchase and storage of plants until transplanted in season,¹⁶ but Christmas trees and wreaths, consisting of dead wood, are not incidental or accessory to the greenhouse or nursery business and the storage and sale of such articles is not authorized.¹⁷ A permitted nursery or greenhouse use does not authorize the sale, on the greenhouse premises, of tools and equipment for garden work; but does permit the sale, in connection with the sale of plants, of fungicides, insecticides, chemicals, peat moss, humus, mulches, and fertilizers to be used in preserving the life and health of the plants sold.¹⁸

The use of a soil sterilization plant, if limited to improving the soil of the nursery, is within the scope of a nursery or greenhouse use;¹⁹ but the right to sell the sterilized soil is subject to the restriction that such sales must be in conjunction with sales of plants from the nursery.²⁰ A zoning regulation permitting a nursery and greenhouse use in a residential district does not authorize the opera-

tors of such an establishment to engage in contract landscaping by using such premises as the headquarters for trucks and men in so far as such business does not concern the transplanting of the nursery or greenhouse stock.²¹

§ 158. — Billboard; Sign

A zoning regulation permitting certain advertising signs in a district prohibits advertising signs other than those specifically permitted.

General rules are applied in the construction of zoning regulations as to advertising billboards and signs.²² Thus, a zoning regulation permitting certain advertising signs in a district prohibits advertising signs other than those specifically permitted.²³ Gold-leaf letterings on the inside of the windows and door of a drug store are not "signs" within the meaning of a zoning resolution regulating signs.²⁴ The erection in a residential area of a sign advertising a business conducted outside the area has been held improper;²⁵ but an ordinance permitting the display of signs in a commercial district relating to the business conducted on the premises has been held not to prevent the maintenance of a sign referring to a business conducted in another section.²⁶ A zoning regulation prohibiting billboards, signboards, and advertising signs has been construed as limited to boards and signs used for general advertising purposes and does not forbid a sign designating the owner and user of a commercial building.²⁷

13. Mass.—Town of Needham v. Winslow Nurseries, Inc., 111 N.E. 2d 453, 330 Mass. 95, 40 A.L.R.2d 1450.

Uses permitted in residential districts in general see supra § 149.

"Greenhouse" defined

Word "greenhouse" as used in municipal zoning bylaw authorizing such use in single residence district, refers to building principally constructed of glass wherein plants, flowers, and sometimes vegetables are raised for purposes of sale, and greenhouse business involves cultivation of these or similar products of soil and disposal of them to purchasers.

Mass.—Town of Needham v. Winslow Nurseries, Inc., supra.

"Nursery" defined

A "nursery," as that term is used in zoning bylaw permitting such use in single residential district is essentially a tree plantation, or place where trees, shrubs, plants, and the like, are propagated from seed or otherwise for transplanting, for use as stock for grafting, and for sale.

Mass.—Town of Needham v. Winslow Nurseries, Inc., supra.

14. Mass.—Kenney v. Building Com'r of Melrose, 52 N.E.2d 683, 315 Mass. 291, 150 A.L.R. 490.

15. Mass.—Kenney v. Building Com'r of Melrose, supra.

16. Mass.—Town of Needham v. Winslow Nurseries, Inc., 111 N.E. 2d 453, 330 Mass. 95, 40 A.L.R.2d 1450.

17. Mass.—Town of Needham v. Winslow Nurseries, Inc., supra.

18. Mass.—Town of Needham v. Winslow Nurseries, Inc., supra.

19. Mass.—Town of Needham v. Winslow Nurseries, Inc., supra.

20. Mass.—Town of Needham v. Winslow Nurseries, Inc., supra.

21. Mass.—Town of Needham v. Winslow Nurseries, Inc., supra.

22. La.—Ewing v. Braun, App., 196 So. 571.

Pa.—Silver v. Zoning Bd. of Adjustment, 112 A.2d 84, 381 Pa. 41.

Commonwealth v. Parker, Quar. Sess., 33 Del.Co. 197, 37 Mun.L.R. 80—Commonwealth v. Pressman, 69 Montg.Co. 27, 66 York Leg.Rec. 202.

Size of sign

Under zoning ordinance which permitted a sign pertaining to use as a permissible accessory on a lot occupied by dwelling provided sign did not exceed more than one square foot in area, erection of a sign eight square feet would not be permitted. N.H.—Lee Sing Foo v. City of Manchester, 88 A.2d 171, 97 N.H. 346.

23. Mass.—Town of Needham v. Winslow Nurseries, Inc., 111 N.E. 2d 453, 330 Mass. 95.

24. N.Y.—Madison Stores, Inc. v. Enkay Sales Corp., 142 N.Y.S.2d 132, 207 Misc. 1091.

25. N.J.—Beckmann v. Teaneck Tp., 79 A.2d 301, 6 N.J. 530.

26. Pa.—Borough of Prospect Park v. McClaskey, 30 A.2d 179, 151 Pa. Super. 467.

27. Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

§ 159. — Boarding House; Hotel; Motel; Trailer Court

A zoning provision permitting the operation of a boarding house will be construed as referring to a residence occupied by a private family which accepts lodgers, unless the ordinance indicates that the term is not to be so limited.

A provision authorizing the operation of a boarding house will ordinarily be construed in accordance with its popular meaning as referring to a residence occupied as a private family which accepts permanent boarders or lodgers as a business undertaking;²⁸ but where the ordinance defines a boarding or lodging house as a dwelling other than a hotel where lodging for compensation is provided, it is not necessary that the house be occupied as a residence by a private family,²⁹ and the use of a building as a home for music students is authorized.³⁰ The propriety of the operation of a boarding house as accessory to a residential use of the property is discussed *infra* § 177, and the housing of hospital personnel in a dwelling as accessory to a hospital use and not within a prohibition of boarding houses is considered *infra* § 176.

The boarding of children has been held to be³¹ and not to be³² within a provision permitting the operation of a boarding house within a residential district. An ordinance, providing that in a dwelling or apartment occupied as a private residence one or more rooms may be rented or table board furnished, permits the use of an eight-room house to provide room and board to aged persons in connection with an arrangement of the welfare department to refer aged persons needing physical assistance, but not medical attention.³³ A zoning ordi-

nance permitting the operation of a boarding house in a residential district does not authorize the operation of a "health farm" primarily to furnish health and reducing treatments, with room and board being furnished as merely incidental thereto.³⁴ A convalescent home has been held within a zoning provision permitting boarding houses although a nurse is on the premises to render any necessary services.³⁵

Where the zoning regulations differentiate between hotels and boarding houses, the distinguishing characteristic of a hotel is the transitory nature of its patronage, its guests being entertained from day to day, whereas in a boarding house, the guest is ordinarily under an express contract at a certain rate for a certain time.³⁶ Where the zoning regulations permit boarding houses, but exclude hotels and inns, an establishment which furnishes board and lodging, but does not accept transient guests, is a boarding house and not a hotel or inn although it has accommodations for a hundred guests and is listed in the telephone directory as a hotel.³⁷

Under a zoning ordinance which requires that the use of a building in an apartment house district as well as the building shall conform to the requirements for a dwelling, the use of a building as a family hotel or a hotel for transients, and to furnish meals to its residents and their guests, but not to the general public, is proper.³⁸

Motel. Unless the zoning regulations specially define the term "hotel" so as to exclude motels and motor courts,³⁹ a motel or motor court is generally regarded as a hotel within the meaning of the zoning regulations,⁴⁰ despite its name, mode of con-

28. Mo.—City of St. Louis v. Art Publication Soc., App., 203 S.W.2d 902.

Limitation on number of boarders

Under zoning ordinance creating single-family district and providing that as an accessory use rooms in main building could be rented, and table and board furnished for pay to not more than four persons for definite periods, comma after word "rented" did not create a right to use property in single-family district as a lodging house for more than four persons although no board was furnished.

Ohio.—City of Cleveland Heights v. Glowe, App., 97 N.E.2d 226.

29. Mo.—City of St. Louis v. Art Publication Soc., App., 203 S.W.2d 902.

30. Mo.—City of St. Louis v. Art Publication Soc., *supra*.

31. Miss.—City of Gulfport v. Daniels, 97 So.2d 218.

32. N.Y.—City of Yonkers v. Horowitz, 226 N.Y.S. 252, 222 App.Div. 297.

33. R.I.—Von Housen v. Zoning Bd. of Review of Town of East Providence, 124 A.2d 550.

34. N.Y.—People v. Gold, 6 N.Y.S.2d 264.

35. N.Y.—Shegda v. Village of Lancaster, 80 N.Y.S.2d 517, 192 Misc. 560, affirmed 86 N.Y.S.2d 655, 274 App.Div. 1087.

Nursing home as a boarding or lodging house see *infra* § 164.

36. N.Y.—People v. Gold, 6 N.Y.S.2d 264.

37. N.Y.—Simmons v. Pinsky, 58 N.Y.S.2d 578, 185 Misc. 549.

38. N.H.—Lee Sing Foo v. City of Manchester, 88 A.2d 171, 97 N.H. 346.

39. N.Y.—Maturi v. Balint, 130 N.Y.S.2d 122, 204 Misc. 1011.

40. N.J.—Schermer v. Fremar Corp., 114 A.2d 757, 36 N.J.Super. 46.

N.Y.—Maturi v. Balint, 130 N.Y.S.2d 122, 204 Misc. 1011.

"Tourist court" or "motor court" are equivalent to hotel within municipal zoning ordinance allowing construction of hotels in residential districts and permit to construct tourist court should have been granted.

S.C.—Purdy v. Moise, 75 S.E.2d 605, 223 S.C. 298.

Motel as an "inn"

Whether motel was an inn within meaning of town zoning ordinance permitting use of property in business district for a tearoom, boarding house, or inn depended on what members of town legislative body meant when they used word "inn" in ordinance.

N.Y.—Von Der Heide v. Zoning Bd. of Appeals of Town of Somers, Westchester County, 123 N.Y.S.2d 726, 204 Misc. 746, affirmed 126 N.Y.S.2d

struction, and the fact that food and drink are not available at the option of the guest.⁴¹ Thus a motel has been held to be a hotel within a zoning regulation permitting hotels and apartment houses within a designated area.⁴² A motel is not within a zoning provision permitting the operation of a boarding house or inn, where the ordinance is subsequently amended to provide that the terms "boarding house" and "inn" shall not include a motel or tourist camp.⁴³ A motor court has been permitted under a zoning ordinance permitting lodging houses in a multiple-residence district, where the ordinance defines "lodging house" as a dwelling other than a hotel providing lodging for at least a specified number of persons.⁴⁴

A motel has been permitted in a business district.⁴⁵ A zoning ordinance unqualifiedly excluding dwellings and tourist camps from light manufacturing districts, and expressly permitting motels only in business districts, discloses a legislative intent to treat motels as a variety of tourist camp and to exclude them from manufacturing and industrial areas.⁴⁶

General zoning regulations will not control, with respect to the construction of motels, over sections dealing directly with the construction of motels in residential districts.⁴⁷

A trailer camp is not permitted in a residential district restricted to dwellings, apartment houses and

hotels, and lodging houses and boarding houses.⁴⁸ Under a zoning ordinance prohibiting uses not expressly authorized, a house-trailer court is prohibited where it is not expressly mentioned.⁴⁹ The rental of lots for use by house trailers is a use of the premises for commercial and not for residential purposes within an ordinance zoning the area as residential.⁵⁰ An ordinance prohibiting the use of property within a commercial zone for a trailer camp, or the placing of trailers on land for occupancy as a place of temporary or permanent residence is violated by one in the business of repairing trailers who permits the owners of trailers being repaired to reside in trailers on his premises until the repair is finished.⁵¹ House trailers as subject to zoning regulations as to the architectural and structural design of dwellings is discussed supra § 146.

§ 160. — Building

Recourse must be had to the legislative purpose and to the particular facts and circumstances in construing the word "building" as used in a zoning ordinance.

In construing the word "building" as used in a zoning ordinance or regulation, recourse must be had to the legislative purpose and to the particular facts and circumstances;⁵² but in the absence of anything to indicate that such construction is improper the word will be construed in accordance with its ordinary and popular meaning.⁵³ An open-air motion picture theater, having no roof and enclosed only by fences with the seats set on the

852, 282 App.Div. 1076, reargument and appeal denied 127 N.Y.S.2d 852, 283 App.Div. 713.

41. N.J.—Schermmer v. Fremar Corp., 114 A.2d 757, 36 N.J.Super. 46.

42. N.J.—Schermmer v. Fremar Corp., supra.

43. N.Y.—Von Der Heide v. Zoning Bd. of Appeals of Town of Somers, Westchester County, 126 N.Y.S.2d 852, 282 App.Div. 1076, reargument and appeal denied 127 N.Y.S.2d 852, 283 App.Div. 713.

44. S.D.—Luedke v. Carlson, 41 N.W.2d 552, 73 S.D. 240.

Motel as apartment house or hotel

Under zoning ordinance defining apartment house as building designed to be occupied by three or more families living independently of each other as separate housekeeping unit, and defining a hotel in same manner except that individuals live independently but have common heating system and general dining room, a two-story building containing thirty-two rooms, each of which had housekeeping facilities, with other facilities, including parking facilities for thirty-six automobiles, being provided in addition thereto, though com-

monly referred to as a "motel," was an apartment or hotel, and could be constructed in districts in which such uses were permitted.

N.Y.—Maturi v. Ballint, 130 N.Y.S.2d 122, 204 Misc. 1011.

45. N.Y.—Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 App.Div.2d 663.

Uses permitted and prohibited in business districts generally see supra § 151.

46. N.Y.—Hinna v. Board of Appeals of Town of Hempstead, 170 N.Y.S.2d 12.

47. Vt.—Thompson v. Smith, 129 A.2d 638, 119 Vt. 488.

48. N.J.—Michaels v. Township Committee of Pemberton Tp., Burlington County, 67 A.2d 324, 3 N.J.Super. 523.

49. La.—City of New Orleans v. Lafon, App., 61 So.2d 270.

50. La.—City of New Orleans v. Louviere, App., 52 So.2d 751.

51. Pa.—Commonwealth v. Reed, 67 A.2d 288, 165 Pa.Super. 114.

52. Conn.—Middlesex Theatre v.

Commissioner of State Police, 20 A.2d 412, 128 Conn. 20.

Ky.—Netter v. Scholtz, 138 S.W.2d 951, 282 Ky. 493.

N.Y.—Corning v. Town of Ontario, 121 N.Y.S.2d 288, 204 Misc. 38.

Zoning regulations with respect to architectural and structural designs generally see supra §§ 141-147.

53. Mass.—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

Pa.—Appeal of Shapiro, Com.Pl., 94 Pittsb.Leg.J. 133.

S.C.—Stevenson v. Board of Adjustment of City of Charleston, 96 S.E.2d 456, 230 S.C. 440.

Words "existing building" as used in zoning ordinance of city providing that in all apartment districts all lots should have front yards of a minimum of fifteen feet depth except where an "existing building" in apartment district has a front yard depth greater than fifteen feet, and such depth should be established depth of front yards for all lots in block on same side of street, means a building which was in existence at time of adoption of ordinance.

Fla.—Fortunato v. City of Coral Gables, 47 So.2d 321.

ground between the screen and the projection booth, is not a "building,"⁵⁴ but a sand hopper may properly be regarded as a "building."⁵⁵

§ 161. — Business

The word "business" as used in a zoning ordinance is a comprehensive term embracing everything at which a person may be employed.

The word "business" as used in zoning ordinances is a comprehensive term embracing everything at which a person may be employed, and means that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit, and in its broad sense connotes the efforts of men, by dealing with each other, to improve their individual economic conditions.⁵⁶ The use of a building as an armory is not a "business" or "business use" within a zoning regulation prohibiting such uses.⁵⁷ The use of a room in the basement of a multiple dwelling as a depositary for a tailor shop located elsewhere has been held not to be a business use of the premises;⁵⁸ but where plaintiffs propose, not merely a basement room in a multi-family house to be used for the purpose of pick-up by any merchant of any tailoring and cleaning firm but a room equipped to operate as an integral part of a business of dry-cleaning to be systematically served by it and in effect to function as its inlet, the occupation constitutes a "business" within the prohibition of a zoning

ordinance excluding business from residential districts.⁵⁹ The use of a building for office purposes is within the prohibition of an ordinance forbidding the use of any structure in the area for business of any kind.⁶⁰

§ 162. — Club; Fraternity

In the absence of a definition of the word "club" in a zoning ordinance, it will be given its usual meaning as an organization or association of persons who meet or live together for social, educational, or similar purposes.

Where the term "club" as used in a zoning ordinance is not defined therein, it is to be construed as meaning an organization or association of persons who meet or live together for the purposes of social intercourse or the promotion of some common object such as the pursuit of literature, science, politics, or good fellowship.⁶¹ A nonprofit corporation organized to provide its members and their families swimming, recreational, and social facilities is a "club,"⁶² and a corporation whose members are the affiliated clubs and their members is a private club.⁶³

Where no provision of the zoning ordinances specifically restricts the right to use property as a clubhouse, the court will not resort to a strained construction of the ordinances to reach that result.⁶⁴ Where a zoning ordinance permits "clubhouses" and "dormitories" in a residential district, and the quoted terms are not defined in the ordinance, they are to

54. Conn.—Middlesex Theatre v. Commissioner of State Police, 20 A.2d 412, 128 Conn. 20.

55. Mass.—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

56. N.J.—Zahn v. Board of Adjustment of City of Newark, 133 A.2d 353, 45 N.J.Super. 516.

Business districts or zones see *supra* § 151.

Funeral establishment as business see *infra* § 174.

Maintenance of driveway across corner of lot in residential district zone to afford access to parking space at rear of defendants' restaurant, and the use of a part of vacant lot as a parking lot for patrons of defendants' restaurant did not constitute use of lot for purpose of conducting restaurant business within restrictions of comprehensive zoning ordinance.

La.—State ex rel. Szodomka v. Gruber, 10 So.2d 899, 201 La. 1068.

57. Ga.—Snow v. Johnston, 28 S.E. 2d 270, 197 Ga. 146.

58. Miss.—Flagg v. Murdock, 15 N. Y.S.2d 635, 172 Miss. 1048.

Laundries and dry-cleaning establishments generally see *infra* § 167.

59. N.J.—Zahn v. Board of Adjust-

ment of City of Newark, 133 A.2d 353, 45 N.J.Super. 516.

Garment pick-up depot as accessory use see *infra* § 176.

60. N.J.—Carroll v. Board of Adjustment of Jersey City, 83 A.2d 443, 15 N.J.Super. 363.

61. Pa.—United Cerebral Palsy Ass'n of Philadelphia and Vicinity v. Zoning Bd. of Adjustment, 114 A.2d 331, 382 Pa. 67.

D. B. S. Bldg. Ass'n v. City of Erie, 111 A.2d 367, 177 Pa.Super. 487.

Pollock v. Borough of Pottstown, Com.Pl., 68 Montg.Co., 340.

Community club

Where zoning ordinance established residential zone but permitted therein "community house, or club, except where the principal activity is one customarily carried on as a business," only type of club permitted in residence zone was a community club; where membership in club was limited to employees of certain corporation with associate memberships for their immediate families and club was operated for benefit of members and guests for sports, recreation, and social activities, club was not a "community club."

Conn.—Gilbert v. Town of Hamden, 68 A.2d 157, 135 Conn. 630.

62. Pa.—Steppler v. Board of Adjustment of Radnor Tp., 5 Pa.Dist. & Co.2d 8, 42 Del.Co. 341.

63. Tex.—Waco Federation of Women's Clubs v. Goddard, Civ.App., 275 S.W.2d 541.

64. N.Y.—Dunkirk Aerie, No. 2447, Fraternal Order of Eagles v. City of Dunkirk, 87 N.Y.S.2d 202, 274 App.Div. 635.

Conduct for profit

Furnishing of food and drink by fraternal organization to its members in its proposed clubhouse would not constitute a use of premises for public eating or drinking conducted for "profit" within purview of city ordinance providing that business districts were intended for certain uses including a place of public assembly, entertainment, eating, or shelter when conducted for "profit," since word "profit" as used in ordinance related to commercial or business enterprises.

N.Y.—Dunkirk Aerie, No. 2447, Fraternal Order of Eagles v. City of Dunkirk, *supra*.

be construed in their broadest possible sense.⁶⁵ Under a zoning regulation permitting clubs except those whose chief activity is a service customarily carried on as a business, a club engaged primarily in social activities and the operation of a dining room may build an addition to their building for use as a lecture hall.⁶⁶

A college fraternity is within a zoning provision authorizing fraternities,⁶⁷ and a labor union maintaining premises for the use and entertainment of its members and to carry on the business of the union is a fraternity within such a provision.⁶⁸

§ 163. — Garage; Parking Lot; Used Car Lot

Garages, parking lots, and used car lots have been the subject of zoning regulations permitting or prohibiting their operation in particular use zones.

Garages have been permitted in areas zoned for commercial uses.⁶⁹ Under a building zone resolution prohibiting any garage on the portion of a street between two intersecting streets in which there is a public school entrance or exit, a garage may not be located on the same side of the street between the same intersections as a public school which has an entrance on such portion of the street, notwithstanding the entrance to the garage is located on an intersecting street.⁷⁰ A garage as a permitted accessory building is discussed *infra* § 179.

There have been decisions construing the term "garage" as used in a zoning ordinance or regulation,⁷¹ and a gasoline service station has been held to be a "garage" within such an ordinance or regulation.⁷² The use by the owner of a small garage

located in the rear yard adjoining his one-family home, located in a residential district, for the purpose of installation of reconditioned motor blocks in automobiles, for customers of a retail store which sold the motor blocks to them, was a use of the garage as a "public garage" within a zoning ordinance prohibiting such use in a residential district.⁷³ An ordinance prohibiting the erection of a garage for other than the private use of the owner or occupant of the premises on which it stands has been construed as not forbidding the building of a large number of individual garages for rental to car owners.⁷⁴

A provision authorizing garages for private use authorizes the construction of a garage by a business for the storage of its motor vehicles.⁷⁵ Similarly, a provision prohibiting public garages does not prohibit the owner of a fleet of taxicabs from maintaining a garage for the exclusive use of his taxicabs.⁷⁶ A parking lot maintained by a restaurant for the convenience of its patrons has been held not to be a garage within a zoning regulation forbidding such use.⁷⁷ A proposed parking lot adjacent and auxiliary to ice cream and frozen custard business premises does not constitute a "public garage" within municipal zoning ordinance defining that term as meaning any building or premises in which business, service, or industry connected with motor vehicles is conducted or rendered, including all premises used for motor vehicles either housed or unhoused.⁷⁸ A provision that property zoned as a business district may be used for retail business uses including a public or private garage does not authorize the use of property in the area as a storage place for moving

65. Pa.—United Cerebral Palsy Ass'n of Philadelphia and Vicinity v. Zoning Bd. of Adjustment, 114 A.2d 331, 332 Pa. 67.

Uses permitted in residential districts generally see *supra* § 149.

66. La.—Carrere v. Orleans Club, 37 So.2d 715, 214 La. 303.

67. N.Y.—City of Schenectady v. Alumni Ass'n of Union Chapter, Delta Chi Fraternity, 168 N.Y.S.2d 754, 5 A.D.2d 14.

68. Ill.—Brotherhood of R. R. Signalmen of America v. Zoning Bd. of Appeals of City of Chicago, 108 N.E.2d 43, 848 Ill.App. 106.

69. Md.—Nyburg v. Solmson, 106 A.2d 433, 205 Md. 150.

Use for storage

Section of zoning ordinance forbidding manufacturing and uses of a noxious, noisy, or odoriferous character in first commercial use districts, did not preclude use of seven garages for storage of materials as

an adjunct to operation of machine shop located in center of lot and tiers of garages.

Md.—Hare v. Mayor and City Council of Baltimore, 90 A.2d 217, 200 Md. 477.

70. N.Y.—14th Street Warehouse Corporation v. Murdock, 297 N.Y.S. 420, 163 Misc. 399.

71. Mich.—C. K. Eddy & Sons v. Tierney, 267 N.W. 352, 276 Mich. 333.

"Commercial garage"
N.Y.—City of New Rochelle, on Complaint of Dassler, v. Dandry, 79 N.Y.S.2d 126, 191 Misc. 977.

People, on Complaint of Dassler, v. Damore, 79 N.Y.S.2d 124.

72. N.J.—Northern New Jersey Oil Co. v. Board of Adjustment of City of Newark, 142 A. 557, 6 N.J. Misc. 698, followed in Peck v. Board of Adjustment of City of Newark, 142 A. 558.

73. Kan.—Piper v. Moore, 133 P.2d 965, 133 Kan. 565.

74. N.Y.—Wittkop v. Garner, 132 A. 339, 4 N.J. Misc. 234.

75. Ga.—Mitchell v. Green, 39 S.E. 2d 696, 201 Ga. 256.

76. Ill.—Ketter v. City of Highland Park, 78 N.E.2d 347, 334 Ill.App. 76.

77. La.—State ex rel. Szodomka v. Gruber, 10 So.2d 899, 201 La. 1068.

Definition of garage
Ordinance definition of garage as including parking lot has reference to parking lots on which business of parking automobiles temporarily is conducted for a stipulated rental, and does not include parking lot maintained by restaurant for convenience of its patrons.

La.—State ex rel. Szodomka v. Gruber, 10 So.2d 899, 201 La. 1068.

78. N.J.—Facher v. Bates, 86 A.2d 137, 17 N.J. Super. 412.

vans, trucks, and trailers used in the moving business.⁷⁹

The zoning of an area as residential has been held to bar the use of property in the area for commercial parking space;⁸⁰ but the use of premises for commercial parking space has been permitted in a business district.⁸¹

Where defendant owned a vacant lot in a residential district contiguous to a building on a separate lot lawfully operated as a business property under a variance, the use of the residential lot for the parking of automobiles for the occupants and employees of the abutting business property was unauthorized.⁸² Under a zoning ordinance prohibiting the use of a building or "premises" in business districts for "storage" of more than five motor vehicles, and a zoning resolution prohibiting the use of a building or premises in residential districts for use other than use specified therein which did not include use for commercial parking, the owner of a vacant plot abutting on a street in business district and on a street in a residential district was entitled to use the premises in the business district for commercial parking, but not the premises in the residential district.⁸³ In construing provision permitting the use of land as a parking lot, when the "best interests of the community" will thereby be served, the quoted phrase refers to the interests of the community at large rather than the interests of the immediate neighborhood.⁸⁴

A lot for the sale of used automobiles is not a "parking lot" within the meaning of a zoning ordinance.⁸⁵ The storage of new vehicles on a lot is a use of the lot for the storage of motor vehicles and not for parking, where the vehicles are not in condition for immediate use on the road.⁸⁶

A zoning ordinance forbidding used car lots in a business district prohibits a used car lot adjacent to, and conducted as an adjunct to, the owner's new car business.⁸⁷ A zoning ordinance relating to the use of "unimproved" lots for the sale of used cars is intended by the quoted word to distinguish a vacant lot from one with a building thereon, and, therefore, the fact that the lot has been leveled and paved and that retaining walls have been erected does not take the lot out of the "unimproved" category.⁸⁸ The business of buying and selling used automobiles and motor vehicles at retail does not constitute the business of conducting "a warehouse and storage yard" within the meaning of a zoning ordinance, where all of the vehicles kept on the lot are there on display for sale or exchange, even though the turnover may be slow.⁸⁹

Where an ordinance does not include the storage of used motor vehicles among the permitted uses of land located in residential districts, such use is prohibited by necessary implication although the ordinance does not specify the prohibited uses or expressly provide that any use not authorized is prohibited.⁹⁰

79. N.Y.—Town of Eastchester v. Noble, 148 N.Y.S.2d 592, 2 Misc.2d 1034, affirmed 153 N.Y.S.2d 600, 2 A.D.2d 714.

80. Ga.—Orr v. Hapeville Realty Investments, 85 S.E.2d 20, 211 Ga. 235.

N.Y.—Boardwalk & Seashore Corporation v. Murdock, 36 N.E.2d 678, 286 N.Y. 494—In re Monument Garage Corp. v. Levy, 194 N.E. 848, 266 N.Y. 339.

Parking lots as accessory uses see *infra* § 176.

Special uses

Section of ordinance pertaining to special uses and commencing with phrase "subject to the rules set forth in this section" meant that special uses mentioned in section were subject only to rules contained in section and therefore other sections of ordinance imposing maximum limits on ground area and height of buildings were not applicable and did not prohibit a parking lot serving transients from being established in a district zoned for duplex residence use.

Ill.—Moran v. Zoning Bd. of Appeals of City of Chicago, 149 N.E.2d 480, 17 Ill.App.2d 280.

Vacant land

Use of phrase "building or premises" in zoning resolution preempted entire field of use of land for business purposes, and use of vacant land for open air parking space was prohibited.

N.Y.—City of New York v. Off-Streets Parking, 274 N.Y.S. 562, 153 Misc. 150, affirmed 275 N.Y.S. 334, 242 App.Div. 767.

81. N.Y.—Boardwalk & Seashore Corporation v. Murdock, 36 N.E.2d 678, 286 N.Y. 494—Matter of Monument Garage Corp. v. Levy, 194 N.E. 848, 266 N.Y. 339.

82. N.Y.—People v. Franshir Realty Co., 163 N.Y.S.2d 692, 4 A.D.2d 685.

83. N.Y.—Monument Garage Corporation v. Levy, 194 N.E. 848, 266 N.Y. 339.

84. Ohio.—Steisapir v. Sears Roebuck & Co., App., 112 N.E.2d 548.

Unreasonable interference

Whether use of unimproved lot in residential district as parking lot would interfere "unreasonably" within meaning of zoning regulations, with use of neighborhood properties

under zone plan, could only be determined in light of all circumstances, and these included critical parking problem.

D.C.—Selden v. Capitol Hill Southeast Citizens Ass'n, 219 F.2d 33, 95 U.S.App.D.C. 62, certiorari denied Capitol Hill Southeast Citizens Ass'n v. Coe, 75 S.Ct. 873, 349 U.S. 944, 99 L.Ed. 1271.

85. Pa.—Frabotta v. Zoning Bd. of Adjustment, 6 Pa.Dist. & Co.2d 400, 14 Law.L.J. 134.

86. N.Y.—Incorporated Village of Great Neck v. Green, 166 N.Y.S.2d 219, 8 Misc.2d 856, affirmed 170 N.Y.S.2d 297, 5 A.D.2d 779.

87. N.J.—Van Corp. v. Mayor and Council of Borough of Ridgefield, 124 A.2d 48, 41 N.J.Super. 74.

88. N.Y.—Sterling-Nash Corp. v. Combes, 122 N.Y.S.2d 413, 282 App. Div. 734.

89. Pa.—Keller v. Lyman, 66 Pa. Dist. & Co. 591.

90. U.S.—City of Anchorage, Alaska, v. Faulk, D.C.Alaska, 113 F.Supp. 698.

§ 164. — Hospital; Nursing Home

No distinction has been made between a private, public, or charitable hospital in construing a zoning regulation as to hospitals.

In construing a zoning provision as to hospitals, it has been held that no distinction is to be made between a private, public, or charitable hospital.⁹¹ A doctors' office building is not within a provision permitting a hospital in a residential area.⁹² A veterinary hospital has been excluded from a business district under a provision prohibiting the maintenance of a "nuisance."⁹³

A nursing home has been held to have the attributes of both a hospital and a boarding and lodging house so that such use is permissible in an area zoned for hospitals and boarding houses.⁹⁴ A nursing home has likewise been considered to be a hospital within an ordinance permitting hospitals,⁹⁵ and within a zoning ordinance prohibiting hospitals in a residential district.⁹⁶ On the other hand, a home for the aged has been deemed not to be a hospital within a provision prohibiting the building of a garage within a specified distance of a hospital.⁹⁷ The operation of a nursing home may be a business use forbidden in a residential district.⁹⁸

"Sanitarium" as used in a zoning ordinance, means a health center or retreat or an institution for the recuperation and treatment of persons suffering from physical or mental disease,⁹⁹ and does not include a residence occupied by a group of persons handicapped by cerebral palsy to whom no medical treatment is administered on the premises.¹

§ 165. — Institution

A shelter for housing animals has been held to be, or not to be, within a zoning provision as to philanthropic institutions.

An animal rescue league and its shelter for animals have been considered to be within the protection of a zoning provision permitting the construction and use in a residential district of a building for a public or semi-public institution of a philanthropic, charitable, or religious character;² but it has also been held that a provision permitting philanthropic or eleemosynary institutions related solely to such institutions for human beings and did not authorize a building for housing animals.³ The question of whether or not an institution is a correctional institution within a zoning regulation excluding correctional institutions from residential districts depends on the powers which the institution is lawfully authorized to exercise,⁴ and a home for girls, which does not detain them for reformatory purposes, but for observation and study, and to make recommendations as to their future, is not within the prohibition.⁵

§ 166. — Junk Yard

In construing "junk yard" as used in a zoning ordinance, recourse may be had to the ordinary meaning of the individual words.

In determining the meaning of the term "junk yard" as used in a zoning ordinance which does not define the term, recourse will be had to the ordinary meaning of the individual words where the term as such has no commonly accepted meaning.⁶ The

91. Del.—Mayor & Council of Wilmington v. Turk, 129 A. 512, 14 Del.Ch. 392.

Ky.—Crain v. City of Louisville, 182 S.W.2d 787, 298 Ky. 421.

92. Ky.—Parker v. Rash, 236 S.W.2d 687, 314 Ky. 609.

Ohio.—McCloud v. Woodmansee, App., 125 N.E.2d 347, appeal dismissed 130 N.E.2d 341, 164 Ohio St. 295, reversed on other grounds 135 N.E.2d 316, 165 Ohio St. 271.

Uses permitted in residential district generally see supra § 149.

93. Pa.—Sell v. Zoning Bd. of Adjustment, Com.Pl., 25 Leh.L.J. 478.

94. Ky.—Crain v. City of Louisville, 182 S.W.2d 787, 298 Ky. 421.

Boarding and lodging houses generally see supra § 159.

95. Pa.—Brodsky v. McShain, 71 Pa. Dist. & Co. 595.

96. Del.—Mayor & Council of Wilmington v. Turk, 129 A. 512, 14 Del.Ch. 392.

97. N.Y.—Fray Realty Company v. Kleinert, 205 N.Y.S. 728, 123 Misc. 728.

Uses prohibited within particular distance of certain premises generally see supra § 154.

98. Pa.—Appeal of Hasley, 30 A.2d 187, 151 Pa.Super. 192.

Uses permitted in residential districts generally see supra § 149.

99. Pa.—United Cerebral Palsy Ass'n of Philadelphia and Vicinity v. Zoning Bd. of Adjustment, 114 A.2d 331, 332 Pa. 87.

1. Pa.—United Cerebral Palsy Ass'n of Philadelphia and Vicinity v. Zoning Bd. of Adjustment, 114 A.2d 331, 332 Pa. 87.

2. Mass.—Gangi v. Board of Appeal of Salem, 134 N.E.2d 451, 334 Mass. 183.

Uses permitted in residential districts generally see supra § 149.

"Benevolent" and "charitable"

With respect to rights under a zoning ordinance, an institution must be deemed both "benevolent" and "charitable" which educates men in diseases of domestic animals, and proper mode of dealing with them, even though it also inculcates duty of

kindness and humanity to them, and provides appropriate means of discharging it.

Mass.—Gangi v. Board of Appeal of Salem, supra.

An "institution" is commonly an established corporation and especially one of public character and the term may be applied both to the organization itself and to the place where its operations are conducted.

Mass.—Gangi v. Board of Appeal of Salem, supra.

3. N.Y.—Westchester County Soc. for Prevention of Cruelty to Animals v. Mengel, 41 N.Y.S.2d 605, 266 App.Div. 151, affirmed 54 N.E.2d 329, 292 N.Y. 121.

Contra Westchester County Soc. for Prevention of Cruelty to Animals v. Mengel, 36 N.Y.S.2d 531, 92 Hun 349.

4. N.Y.—Rochester v. Rochester Girls' Home, 194 N.Y.S. 236, 43 C.J. p 344 note 80.

5. N.Y.—Rochester v. Rochester Girls' Home, supra.

6. N.J.—Grace Iron & Steel Corpora-

storage of junk on a wharf or dock, preparatory to shipment, does not constitute the premises a "junk yard".⁷ One who salvages and sells useable parts from old automobiles, which remain only temporarily on his lot, and are removed when the parts have been sold, is engaged in the operation of a "junk yard" or "salvage yard" within the meaning of a zoning regulation forbidding such uses in certain areas,⁸ or is engaged in the "storage of scrap iron and junk" forbidden by a zoning ordinance.⁹

§ 167. — Laundry; Dry Cleaning Establishment

A "launderette service" is not within the prohibition of a zoning ordinance forbidding steam or wet wash laundries.

A laundromat or "launderette service" is a retail self-service laundry making available to the general public individual coin operated washing machines, and is not within the prohibition of a zoning ordinance forbidding steam or wet wash laundries in certain districts,¹⁰ and the rule is the same where, in addition to washing machines, extractors and dryers are furnished.¹¹ Under a zoning resolution providing that in a business district, no building shall be used for a "steam or wet wash laundry other than in a hotel or hospital," a hotel may not operate a laundry to provide service for another separately owned and operated hotel;¹² but the operation by a hotel of a laundry on its premises for the cleaning of its own linen and that of another hotel under the same management is permissible as accessory to a hotel use of the premises and is not a commercial activity prohibited by the zoning ordinance where no laundry is done for guests or the general public.¹³

The terms of a zoning ordinance specifically excluding hand laundries from retail business districts

will not be construed as excluding a specialized mechanical laundry conducting the business of washing diapers which does no hand work.¹⁴ A laundry using electrically powered mechanical devices to perform its operations is not a "steam laundry."¹⁵ A zoning ordinance prohibiting "laundries or dyeing and cleaning works with capacity for more than ten employees" does not apply to an establishment employing fewer than ten employees.¹⁶ A dry cleaning and shirt laundering business is within a zoning provision prohibiting cleaning and dyeing establishments.¹⁷

Under a zoning ordinance permitting dry cleaning establishments to operate in retail districts provided the articles are delivered directly by the customer or collected directly from the customer, a dry cleaning establishment may maintain a chain of stores to collect articles and then transport them to the establishment for cleaning.¹⁸

The view has been taken that the term "manufacturing" as used in zoning ordinance prohibiting manufacturing, except light manufacturing, in a business district, includes laundries,¹⁹ but the view has also been taken that a cleaning establishment is not a "manufacturing plant" within the meaning of that term in an ordinance prohibiting manufacturing plants in a prescribed area.²⁰ The maintenance of the pick-up room in the basement of a multiple dwelling for the collection of garments as a "business" use of such premises is discussed *supra* § 161.

§ 168. — Manufacturing

A zoning regulation may be construed to forbid manufacturing within a designated area.

A zoning regulation may be construed to forbid manufacturing within a designated area.²¹ The metal fabricating, processing, and assembling of

tion v. Ackerman, 7 A.2d 820, 123 N.J.Law 54.

7. N.J.—Grace Iron & Steel Corporation v. Ackerman, *supra*.

Stevedoring

The use of premises located in industrial zone of city for storage of scrap iron and steel preliminary to loading on vessels for shipment was not prohibited by ordinance, prohibiting operation of "junk yards" in city's industrial districts, such use being in nature of "stevedoring" rather than maintenance of junk yard, and, hence, license was required to be granted for use of the premises for such storage.

N.J.—Grace Iron & Steel Corporation v. Ackerman, *supra*.

8. Md.—Laque v. State, 113 A.2d 893, 207 Md. 242, certiorari denied

76 S.Ct. 105, 350 U.S. 863, 100 L.Ed. 765.

9. Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

10. N.Y.—Packer v. Board of Standards and Appeals of City of New York, 62 N.Y.S.2d 54, affirmed 66 N.Y.S.2d 634, 271 App.Div. 874.

11. N.Y.—MacMillan v. McCaffrey, 106 N.Y.S.2d 673, 201 Misc. 574.

12. N.Y.—New York Ambassador, Inc. v. Board of Standards & Appeals of City of New York, 119 N.Y.S.2d 805, 281 App.Div. 342, affirmed 113 N.E.2d 302, 305 N.Y. 791. Uses permitted in business districts generally see *supra* § 151.

13. Fla.—City of Miami Beach v. Stearns, 77 So.2d 626.

Accessory uses generally see *infra* § 176.

14. Ohio.—Salem v. Arnold, 16 Ohio Supp. 159.

15. Ohio.—Salem v. Arnold, *supra*.

16. N.J.—Figula v. Board of Adjustment of City of Passaic, 53 A.2d 303, 135 N.J.Law 546, affirmed 57 A.2d 246, 136 N.J.Law 638.

17. N.Y.—Edward A. Lashins, Inc. v. Griffin, 132 N.Y.S.2d 896.

18. N.Y.—People v. Hanco Realty & Finance Corp., 149 N.Y.S.2d 383, 1 Misc.2d 850.

19. N.J.—Lowenthal v. Bratt, 53 A.2d 306, 135 N.J.Law 512.

20. Tex.—Young v. City of Abilene, Civ.App., 195 S.W.2d 838.

21. N.J.—Lowenthal v. Bratt, 53 A.2d 306, 135 N.J.Law 512.

structural steel is "manufacturing" within the meaning of a zoning ordinance.²² The making of ready mixed or transit mixed concrete in its plastic state is "manufacture" as distinct from "commerce", and is included in "industrial" within the meaning of a zoning ordinance.²³

The operation of a laundry as manufacturing is discussed supra § 167.

§ 169. — Recreational Facility

A bathing beach is not within the terms "parks" and "playgrounds" as used in a zoning ordinance.

A bathing beach is not within the terms "parks" and "playgrounds" as used in a zoning ordinance.²⁴ The use of a tract for swimming, boating, and other recreational sports is authorized in an area zoned for public and private parks and recreational areas and resorts, even though such tract is not to be open to the public but is to be limited to a certain number of families paying an annual fee.²⁵ A children's playground wherein rides were to be operated at a charge may not be located in an area zoned for public parks, playgrounds, and recreational areas, but may be located in an area zoned for theatres, assembly halls, bowling alleys, and commercial public recreational uses.²⁶

An intention to authorize amusement parks among the permitted uses of zoned property should be plainly indicated by the zoning ordinance.²⁷ An essential attribute of an "amusement park" has been held to be the grouping together in one place of various amusements for pleasurable diversion,²⁸ so that a swimming pool with incidental bath houses, refreshment stands, and picnic areas is not barred by a zoning regulation prohibiting "amusement parks."²⁹

A nonprofit corporation engaged in the operation of a swimming pool and picnic ground for the benefit of its members is not engaged in the operation of a business within the meaning of the zoning regulations.³⁰ A provision permitting the location in any district of a state or municipal building, swimming pool, etc., does not authorize a private swimming pool.³¹

A *bowling alley* is a "place of amusement" within a zoning provision permitting such use.³²

A *skating rink* in a building is not a "similar amusement" within an ordinance providing that in business zones no building or premises shall be used for merry-go-rounds, Ferris wheels, or similar amusement.³³

§ 170. — Restaurant

A "restaurant," as used in a zoning regulation, includes a diner and a drive-in restaurant.

The term "restaurant" as used in zoning ordinances has been the subject of judicial construction.³⁴ A drive-in, self-service restaurant is a "restaurant" within the meaning of a zoning ordinance although the consumption of the food takes place in the automobiles.³⁵ A "diner" is included within the term "restaurant."³⁶ A restaurant having a permit for the retail sale of beer and cider on the premises in which hot meals are regularly served is subject to a zoning ordinance prohibiting taverns and grills in a business zone within a specified number of feet of a church.³⁷ A zoning ordinance forbidding a "lunch wagon" applies to a roadside diner.³⁸

The operation of a restaurant has been regarded as contrary to a resolution restricting the area for first-class residential purposes, although only per-

22. Ill.—City of Chicago v. Reuter Bros. Iron Works, 41 N.E.2d 213, 314 Ill.App. 315.

23. Cal.—Markey v. Danville Warehouse & Lumber, Inc., 259 P.2d 19, 119 C.A.2d 1.

24. N.Y.—McCarter v. Beckwith, 285 N.Y.S. 151, 247 App.Div. 289, affirmed 3 N.E.2d 882, 272 N.Y. 488. *Certiorari denied Beckwith v. McCarter*, 57 S.Ct. 194, 299 U.S. 601, 81 L.Ed. 443.

25. Va.—Mooreland v. Young, 91 S. E.2d 438, 197 Va. 771.

26. N.Y.—Gruberg v. Henry, 163 N. Y.S.2d 1003, 5 Misc.2d 223.

27. Pa.—Shapiro v. Zoning Bd. of Adjustment, 105 A.2d 299, 377 Pa. 621.

28. N.J.—Tice v. Borough of Wood-cliff Lake, Bergen County, 78 A.2d 825, 12 N.J.Super. 20.

29. N.J.—Tice v. Borough of Wood-cliff Lake, Bergen County, *supra*.

30. Pa.—Stepler v. Board of Adjustment of Radnor Tp., 5 Pa.Dist. & Co.2d 8, 42 Del.Co. 341.

"Business" generally see *supra* § 161.

31. Tex.—Thomas v. Zoning Bd. of Adjustment of City of University Park, Civ.App., 241 S.W.2d 955.

32. Mass.—Tranfaglia v. Building Commissioner of Winchester, 28 N. E.2d 537, 306 Mass. 495.

33. N.J.—Piaget-Del Corp. v. Kulik, 45 A.2d 125, 133 N.J.Law 485, petitions denied 46 A.2d 379, 134 N.J. Law 147.

34. Pa.—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85.

Sale of liquor

A "restaurant" is an eating house and not a place where intoxicants

are dispensed under guise of running a restaurant.

Ala.—Fulford v. Board of Zoning Adjustment of City of Dothan, 54 So.2d 580, 256 Ala. 336.

35. Pa.—Food Corp. v. Zoning Bd. of Adjustment of City of Philadelphia, 121 A.2d 94, 384 Pa. 288.

36. N.Y.—Application of Dengeles, 148 N.Y.S.2d 92, 1 Misc.2d 692, reversed on other grounds 160 N.Y.S. 2d 83, 3 App.Div.2d 758.

37. Conn.—Town of Newington v. Mazzoccoli, 48 A.2d 729, 133 Conn. 146.

Uses permitted in business zones generally see *supra* § 151.

Uses prohibited within specified distance of particular premises generally see *supra* § 154.

38. N.J.—Keystone Lunch v. First

sons who make reservations in advance are served.³⁹ The operation of a restaurant is a "commercial activity" within a zoning ordinance permitting commercial activities in a residential district provided not more than two persons are employed.⁴⁰ Park authorities may operate a refreshment stand in a picnic area of a park although the district is zoned for single residences.⁴¹

The operation of a parking lot as accessory to a restaurant is considered *infra* § 176.

§ 171. — Retail Store

Various stores have been held to be, or not to be, retail stores within a zoning regulation.

A store is not deprived of its status as a "retail store" permitted by a zoning ordinance, although most of its sales are to other stores rather than to consumers where each sale is in small quantities.⁴² A self-service food market is a retail store.⁴³ A poultry market has been held to be,⁴⁴ or not to be,⁴⁵ a retail store permitted by a zoning ordinance. As stated *infra* § 176, the killing, defeathering, and dressing of poultry has been held not to be permissible as accessory to a retail store use.

A drug store is within a zoning provision permitting "retail shops."⁴⁶

The phrase "retail enterprise", as used in provision of zoning ordinance describing retail business to include a retail enterprise for profit not specifically mentioned as permitted in a less restricted

use district, includes businesses which render service to, and deal directly with, ultimate consumers as well as businesses engaged in the sale of merchandise in small quantities.⁴⁷

§ 172. — School; Church; College; Educational Institution

Schools and churches are suitable for areas zoned as residential and the courts frown on efforts to exclude them.

Schools are suitable for an area zoned as residential,⁴⁸ and the courts have frowned on efforts to exclude schools from residential districts.⁴⁹ The use of property may be permitted or excluded as a "school."⁵⁰ Where the zoning ordinance permits the use of property within a residential district as a school, it has been deemed to be immaterial that the school is operated as a business;⁵¹ but the view has been taken that a music school is a business and is not a "private school" permitted by a zoning ordinance.⁵² A regulation permitting schools in an area restricted to one-family dwellings has been construed as limited to schools meeting the requirements of the state compulsory education law and as excluding schools of higher or specialized education.⁵³

A kindergarten or nursery although it may not be a "school" within the meaning of the education law is a "school" within the meaning of a zoning ordinance,⁵⁴ but such a school is not within the phrase

Criminal Court of Newark, 35 A.2d 472, 22 N.J.Misc. 82.

39. Wash.—King County v. Lunn, 200 P.2d 381, 32 Wash.2d 116.

Uses permitted in residential districts generally see *supra* § 149.

40. N.C.—Kinney v. Sutton, 53 S.E. 2d 306, 230 N.C. 404.

41. Ohio.—Board of Park Com'rs of Cleveland Metropolitan Park Dist. v. City of Bay Village, App., 141 N.E.2d 769.

42. Mass.—Petros v. Superintendent and Inspector of Buildings of City of Lynn, 28 N.E.2d 233, 306 Mass. 368, 128 A.L.R. 1210.

43. N.J.—Leonard Inv. Co. v. Board of Adjustment of City of Trenton, 4 A.2d 768, 122 N.J.Law 308.

44. Mass.—Petros v. Superintendent and Inspector of Buildings of City of Lynn, 28 N.E.2d 233, 306 Mass. 368, 128 A.L.R. 1210.

45. Pa.—Muldowney v. Spinillo, 53 Pa. Dist. & Co. 119, 46 Lack.Jur. 45.

Poultry market neither wholesale or retail store

Pa.—Muldowney v. Spinillo, *supra*.

46. Conn.—State ex rel. Wise v. Turkington, 63 A.2d 596, 135 Conn. 276.

47. Ohio.—Salem v. Arnold, 16 Ohio Supp. 159.

48. Iowa.—Livingston v. Davis, 50 N.W.2d 592, 243 Iowa 21, 27 A.L.R. 2d 1237.

49. Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35.

50. N.Y.—People v. Collins, 83 N.Y. S.2d 124, 191 Misc. 553.

Question of law and fact

Meaning of term "school" as used in zoning ordinance permitting operation of schools within residential areas was a question of law but whether a particular institution came within that definition was a question of fact.

Conn.—Langbein v. Board of Zoning Appeals of Town of Milford, 67 A.2d 5, 135 Conn. 575.

51. Iowa.—Livingston v. Davis, 50 N.W.2d 592, 243 Iowa 21, 27 A.L.R. 2d 1237.

52. N.J.—Medinets v. Hansen, 106 A.2d 39, 31 N.J.Super. 102, appeal

dismissed 109 A.2d 675, 33 N.J.Super. 237.

53. N.J.—Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 11 N.J. 341, 36 A.L.R.2d 639.

54. Ga.—Duncan v. Entrekkin, 85 S. E.2d 771, 211 Ga. 311.

N.Y.—People v. Collins, 83 N.Y.S.2d 124, 191 Misc. 553.

"Private elementary school"

Where operators of private pre-school or nursery school for children from two to five had a regular school schedule and rules and issued report cards and employed teachers to teach children singing, drawing, and other things, and employed a registered nurse to inspect children daily, school was a "private elementary school" within city zoning ordinance, which, among other uses, restricted area in which school was located to such schools, although none of teachers had a certificate to teach in public schools.

Iowa.—Livingston v. Davis, 50 N.W. 2d 592, 243 Iowa 26, 27 A.L.R.2d 1237.

Summer play school

Private institution for boys and

"grade school."⁵⁵ The operation of a nursery and day school in a private home is not within a provision forbidding any "store, shop, or permanent office."⁵⁶

A dancing school is not embraced in the term "educational institutions" as used in a zoning ordinance.⁵⁷ The words "dormitory of an educational institution" in a zoning ordinance authorizing a use for educational purposes including such a dormitory, but excluding accommodations for mentally deficient or abnormal persons, means a dormitory for normal students ordinarily attending the usual type of educational institution.⁵⁸ A convent for nuns who are to teach in an adjoining parochial school does not constitute a "school with living quarters maintained" within the prohibition of a zoning ordinance.⁵⁹ An ordinance permitting college buildings authorizes dormitories and student commons.⁶⁰

There have been decisions construing the word "church" as used in zoning ordinances,⁶¹ and churches are proper in residential areas.⁶² A zoning ordinance prohibiting the erection of buildings of a substantially different type or size from existing buildings in a residential district does not exclude churches from residential sections.⁶³ A zoning board may not refuse to permit the construction of a church or synagogue in an exclusive residential area on the basis of a finding that it would depreciate or tend to depreciate the value of property in

the neighborhood, and would be detrimental to the neighborhood and its residents;⁶⁴ in view of the high moral purposes and moral values of schools and churches, the possibility of pecuniary loss to a few should not bar their erection and use in residential areas.⁶⁵

"*Adjoining*," within municipal code provision permitting schools and churches in a family-residence district or duplex-residence district where such structures are on lots adjoining an apartment house, does not require that the lot actually touch the apartment house use, and a lot "adjoined" an apartment house lot even though the lots were separated by an alley which marked the zoning district boundary.⁶⁶

Riding academy. A provision permitting schools in a residential district unless a chief activity thereof is one customarily carried on as a gainful business does not permit the conduct of a riding academy for gain in such a district.⁶⁷ A "private school" may mean a purely academic school and not embrace a school for the teaching of horsemanship.⁶⁸

§ 173. — Trade; Industry

With respect to a zoning regulation, a "trade" is a mechanical employment or commercial enterprise, and an "industry" is that branch of a trade employing capital and labor.

The term "trade," within zoning regulation, means mechanical employment or commercial enterprises,

girls between ages of five and fourteen years devoted to teaching swimming, arts and crafts, boating, hiking, basketball, soft-ball, tetherball, volley-ball, badminton, horse-shoes, story telling, photography, croquet, fishing and free play for summer months, was a "school" within meaning of zoning ordinance permitting operation of schools within residential areas.

Conn.—Langbein v. Board of Zoning Appeals of Town of Milford, 67 A.2d 5, 135 Conn. 575.

55. Ill.—City of Chicago v. Sachs, 115 N.E.2d 762, 1 Ill.2d 342.

56. Tex.—Bryan v. Darlington, Civ. App., 207 S.W.2d 681, error refused, no reversible error.

57. Mo.—State ex rel. Kaegel v. Holekamp, App., 151 S.W.2d 685. Dancing instruction as accessory to residential use see *infra* § 177.

Institution of learning

Term "educational institutions," contemplates schools in usual sense, that is, institutions of learning which exist independently as such, and have a definite curriculum or course of study, and are designed to serve as the medium for imparting to students who attend them a knowledge

of those things broadly covered within field of education.

Mo.—State ex rel. Kaegel v. Holekamp, *supra*.

58. Pa.—Application of Devereux Foundation, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

59. Ind.—Board of Zoning Appeals of City of Indianapolis v. Wheaton, App., 76 N.E.2d 597, 118 Ind.App. 88.

60. Ill.—Western Theological Seminary v. City of Evanston, 156 N.E. 778, 325 Ill. 511.

61. Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed Full Salvation Union v. Portage Tp., Kalamazoo County, Mich., 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.
48 C.J. p 344 note 66 [b].

A *mikvah*, which is devoted to performance of certain religious rites by females, was not "church" within meaning of zoning ordinance.

N.J.—Sexton v. Essex County Ritualarium, 91 A.2d 162, 21 N.J.Super. 329.

"Camp meeting" not included

Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed Full Salvation Union v. Portage Tp., Kalamazoo County, Mich., 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

62. W.Va.—State ex rel. Howell v. Meador, 154 S.E. 876, 109 W.Va. 368.

63. Ala.—Pentecostal Holiness Church of Montgomery v. Dunn, 27 So.2d 561, 248 Ala. 314.

64. N.Y.—Application of Garden City Jewish Center, 155 N.Y.S.2d 523, 2 Misc.2d 1009.

65. N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y.S.2d 849.

66. Ill.—Schwartz v. Congregation Powolei Zeduck, 131 N.E.2d 785, 8 Ill.App.2d 438.

67. N.Y.—Village of East Hampton v. Mulford, 65 N.Y.S.2d 455, 188 Misc. 1037.

68. N.J.—Wadsworth v. Board of Adjustment of Bedminster Tp., 78 A.2d 619, 11 N.J.Super. 502.

and "industries" means that branch of a trade employing capital and labor.⁶⁹ The practice of a profession is not included within those terms,⁷⁰ and the teaching of music or singing is a profession and not a "trade" or "industry" within the meaning of a zoning law.⁷¹

§ 174. — Undertaker; Funeral Home

A funeral home is properly classified as a business in determining the application of zoning regulations.

A funeral home is properly classified as a business in determining the application of zoning regulations,⁷² and is not to be regarded as a public or semi-public building.⁷³ The zoning ordinance may provide that an undertaking establishment may be located in any district provided the use in such location will, in the judgment of the zoning board, substantially serve the public convenience and welfare and will not substantially and permanently injure the appropriate use of the neighboring property.⁷⁴

The undertaking or funeral business as accessory to a residential use is considered infra § 177.

§ 175. — Warehouse; Storage

The use of premises for the storage of merchandise and supplies incidental to a permitted business is not a storage use or business forbidden by a zoning ordinance.

The use of premises for the storage of merchan-

dise and supplies as incidental to a permitted business is not a storage use or business in violation of a zoning ordinance.⁷⁵ Similarly, the use of land for the display and sale of finished monuments is not use as a "storage yard."⁷⁶ A zoning ordinance prohibiting a "warehouse or storage plant" does not forbid the use of a yard for tools and appliances and for supplies of brick, cement, and cinder blocks necessary for the conduct of the owner's business as a general contractor.⁷⁷

Premises used as a warehouse are not removed from the prohibition of a zoning ordinance forbidding warehouses by reason of the fact that the customers who have made purchases at the owner's stores sometimes pick up their purchases at the warehouse.⁷⁸ The use of land for the parking of trucks, whether or not the trucks are loaded, is not a use of the premises as a "commercial warehouse" forbidden by a zoning ordinance.⁷⁹ A plant operated for the cold storage and curing of meat is a "cold storage" plant.⁸⁰

A zoning ordinance which prohibits the storage of gasoline within a certain district except "in such amounts as may be necessary to supply retail trade at service stations" does not prevent the storage at one place within the district of sufficient gasoline to supply several service stations.⁸¹

2. ACCESSORY USES AND BUILDINGS

§ 176. Accessory Uses

The uses of property permitted in particular zones include accessory uses customarily incident to the permitted uses.

Generally, the uses of property permitted in particular zones by a zoning ordinance or regulation include accessory uses customarily incident to the permitted uses,⁸² but this rule does not warrant a use

69. N.Y.—People ex rel. Fullam v. Kelly, 175 N.E. 108, 255 N.Y. 396.

70. Fla.—Yocum v. Feld, 176 So. 753, 129 Fla. 764.

71. N.Y.—People ex rel. Fullam v. Kelly, 175 N.E. 108, 255 N.Y. 396. Teaching music as accessory to residential use see infra § 177.

72. Okl.—In re Dawson, 277 P. 226, 136 Okl. 113.

73. Utah.—Provo City v. Claudin, 63 P.2d 570, 91 Utah 60.

74. Ga.—City of Atlanta v. Awtry & Lowndes Co., 53 S.E.2d 358, 205 Ga. 296, opinion conformed to 54 S.E.2d 277, 79 Ga.App. 487.

75. Cal.—Haupt v. La Brea Heating & Air Conditioning Co., 284 P.2d 985, 133 C.A.2d Supp. 784.

Pa.—Appeal of Sechler, Com.Pl., 1 Lycoming 81.

76. Mo.—Killian v. Brith Sholom Congregation, App., 154 S.W.2d 387, 101 C.J.S.—59

77. N.Y.—Gemelli v. Murdock, 79 N.Y.S.2d 277, 273 App.Div. 1019, affirmed 82 N.E.2d 401, 298 N.Y. 664.

Ordinance permitting general contracting business

Where zoning ordinance permitted carrying on of general contracting business as usually conducted and with usual accessories in connection with buildings and uses, general contractor was held entitled to store on premises, machinery, equipment, tools, and accessories regularly used in conduct of his business.

Cal.—Greenfield v. Board of City Planning Com'rs of Los Angeles, 45 P.2d 219, 6 C.A.2d 515.

78. Pa.—Sears, Roebuck & Co. v. Power, 134 A.2d 659, 390 Pa. 206.

79. Pa.—Nicholson v. Zoning Bd. of Adjustment of City of Allentown, 140 A.2d 604, 392 Pa. 278.

80. Tex.—Rosenthal v. City of Dallas, Civ.App., 211 S.W.2d 279.

81. Pa.—Borough of Edgewood v. Apfel, 33 Pa.Dist. & Co. 675, 86 Pittsb.Leg.J. 405.

82. Del.—Application of Emmet S. Hickman Co., 108 A.2d 667, 10 Terry 13.

N.J.—Wright v. Vogt, 80 A.2d 108, 7 N.J. 1.

N.Y.—Flagg v. Murdock, 15 N.Y.S.2d 635, 172 Misc. 1048—Buffalo Park Lane v. City of Buffalo, 294 N.Y.S. 413, 162 Misc. 207.

Pa.—Appeal of Hasley, Com.Pl., 90 Pittsb.Leg.J. 205, affirmed 80 A.2d 187, 151 Pa.Super. 192.

Accessory use to existing nonconforming use see infra § 191.

Accessory, auxiliary, and incidental uses

Allowance of a primary use for a zoning ordinance generally authorizes all uses normally accessory, auxiliary, or incidental thereto.

N.J.—Zahn v. Board of Adjustment

which is not customarily incidental and subordinate to the authorized principal use.⁸³ Even though the ordinance is silent as to accessory uses, they will be permitted where they do not involve a departure from the purpose of the ordinance.⁸⁴

A use is "accessory" when it is customarily incidental to the main use,⁸⁵ or when it is so necessary or so commonly to be expected in connection with the main use that it cannot be supposed that the ordinance was intended to prevent it.⁸⁶ A zoning ordinance permitting, as accessory uses, uses customary with, or incidental to, the main use has been construed to require that the use be both incidental to, and customary with, the main use.⁸⁷

The view has been taken that the accessory use must be located on the same lot as the building to which it is accessory.⁸⁸ Accordingly, a residential lot may not be maintained as a parking lot incident to the use of adjacent business property, since such use is not accessory to a principal residential use.⁸⁹

A variety of uses have been permitted as accessory to a permitted or authorized use.⁹⁰ A provision permitting the erection of "school and college buildings" was held to authorize the erection of all buildings ordinarily part of a college plant,⁹¹ and an athletic stadium has been allowed as incidental to a permitted use of the property for a high school.⁹² The construction of a hotel with a banquet hall for five hundred people has been permitted under a provision allowing the construction of a hotel,⁹³ and the maintenance of a candy, tobacco, and newspaper counter by a hotel for the convenience of its guests has been regarded as a proper accessory use.⁹⁴ Auto races have been permitted as accessory to the use of property as a fairground.⁹⁵ The operation of a gasoline filling station in the basement garage of a large apartment building has been allowed as a use customarily incidental and necessary to the main use.⁹⁶ The owner of a farm may be permitted, as an accessory use, to sell farm produce on the premises.⁹⁷ Where a hospital, which

of City of Newark, 133 A.2d 358, 45 N.J.Super. 516.

Kind and degree of use

"Accessory and customarily incidental use" for zoning purposes comprehends not only kind but degree of use.

N.J.—*Dolan v. DeCapua*, 80 A.2d 655, 18 N.J.Super. 500.

83. Cal.—*Jones v. Robertson*, 180 P. 2d 929, 79 C.A.2d 813.

Conn.—*First Nat. Bank & Trust Co. of Port Chester, N. Y., v. Zoning Board of Appeals of Greenwich*, 10 A.2d 691, 126 Conn. 228.

Mich.—*Fass v. City of Highland Park*, 30 N.W.2d 828, 320 Mich. 182, modified on other grounds 32 N.W. 2d 375, 321 Mich. 156.

R.I.—*D'Acchiali v. Zoning Bd. of Review of City of Cranston*, 60 A.2d 707, 74 R.I. 327.

Educational use

Under building zone ordinance limiting use of buildings or premises to those specified, with usual accessories, and permitting conduct for gain of an educational building, a certificate of occupancy for educational purposes conducted for gain would have to be limited to building and premises could be used only for those accessory uses customarily incident to expressly permitted use. N.Y.—*Streeter v. Cowle*, 168 N.Y.S.2d 583, 10 Misc.2d 183.

84. Mass.—*Pratt v. Building Inspector of Gloucester*, 113 N.E.2d 816, 380 Mass. 844.

85. Del.—*Application of Emmett S. Hickman Co.*, 108 A.2d 667, 10 Terry 13.

N.J.—*Zahn v. Board of Adjustment*

of City of Newark, 133 A.2d 358, 45 N.J.Super. 516.

R.I.—*City of Warwick v. Campbell*, 107 A.2d 334, 82 R.I. 300.

An incidental or accessory use under a zoning law is a use which is dependent on, or pertains to, principal or main use.

Mass.—*Town of Needham v. Winslow Nurseries, Inc.*, 111 N.E.2d 453, 330 Mass. 95, 40 A.L.R.2d 1450.

86. N.J.—*Zahn v. Board of Adjustment of City of Newark*, 133 A.2d 358, 45 N.J.Super. 516.

87. Del.—*Application of Emmett S. Hickman Co.*, 108 A.2d 667, 10 Terry 13.

88. R.I.—*City of Warwick v. Campbell*, 107 A.2d 334, 82 R.I. 300.

Mikvah or ritualarium, which was not to be located on same lot as synagogue, was not accessory to church permitted by municipal zoning ordinance in view of fact that accessory use must be located on same lot with building to which it is accessory.

N.J.—*Sexton v. Bates*, 85 A.2d 833, 17 N.J.Super. 246, affirmed *Sexton v. Essex County Ritualarium*, 91 A.2d 162, 21 N.J.Super. 329.

Primary use

Use of leased premises one block from paint store operated by lessor solely for purpose of advertising such store by means of billboard erected on leased premises, was a "primary use" and not an "accessory use" within provision of city zoning ordinance permitting enumerated and accessory uses within any particular zone.

Pa.—*Silver v. Zoning Bd. of Adjustment*, 112 A.2d 84, 381 Pa. 41.

89. N.Y.—*People v. Franshir Realty Co.*, 163 N.Y.S.2d 692, 4 A.D.2d 685.

90. Fla.—*City of Miami Beach v. Stearns*, 77 So.2d 626.

Servants

Provision may be made by city in zoning ordinance for a use accessory or incidental to principal dwelling in order to permit residence for servants of occupant of principal dwelling.

N.J.—*Collins v. Board of Adjustment of Margate City*, 69 A.2d 708, 3 N.J. 200.

91. Ill.—*Western Theological Seminary v. City of Evanston*, 156 N.E. 778, 325 Ill. 511.

92. Ky.—*Board of Ed. of Louisville v. Klein*, 197 S.W.2d 427, 303 Ky. 234.

93. Mass.—*Bennett v. Inspector of Buildings of Cambridge*, 170 N.E. 412, 270 Mass. 436.

94. N.Y.—*140 Riverside Drive v. Murdock*, 95 N.Y.S.2d 860, 276 App. Div. 550.

95. Mich.—*Boissonneault v. Saginaw County Agr. Soc.*, 47 N.W.2d 53, 330 Mich. 143.

96. Pa.—*Silver v. Board of Appeals*, 85 Pa. Dist. & Co. 538, 66 Dauph. Co. 140.

97. N.H.—*Kimball v. Blanchard*, 7 A.2d 394, 90 N.H. 298.

Use not restricted to farm produce in natural state

N.H.—*Kimball v. Blanchard*, supra.

Farming and usual accessories

Extensive raising of pigs on farm which had been used principally for raising crops for market was not among "usual accessories" contemplated by zoning ordinance exception

was a permitted use in a residential district, purchased adjoining dwellings for residential use by its personnel, such use was a permissible accessory use and was not a violation of the prohibition against the maintenance of lodging houses in such district.⁹⁸

On the other hand, certain uses have been held not permissible as accessory uses.⁹⁹ The maintenance of an animal hospital has been held not to be a use accessory to the practice of a veterinarian.¹ The use of the premises in connection with the business of a roofing contractor is not a use accessory to the principal use as a nursery.² The killing, defeathering, and dressing of poultry is not permissible as accessory to a retail store use.³

An ordinance authorizing the operation of a garage permits all operations incidental to the operation of a garage business.⁴ The operation of a "car wash" is a use customarily accessory and incidental to the operation of a garage, automobile repair shop, or gas or oil service station.⁵

The use of property for a parking lot has been allowed as incidental to a permitted use for a church,⁶ an apartment hotel,⁷ a clubhouse,⁸ a busi-

ness,⁹ and a professional office;¹⁰ but off-street parking facilities have been held not to be permissible as accessory to a restaurant¹¹ or a commercial building.¹² A provision that a driveway shall not be permitted as an accessory use does not bar a parking lot as an accessory use.¹³

§ 177. — Residence

A professional office or a home occupation may be authorized as a use accessory to a residence.

Zoning ordinances providing for residential use or the use of property for one-family dwellings usually authorize accessory uses customarily incident to such uses.¹⁴ Residence on the property is usually essential to the maintenance of a use accessory to a residential use.¹⁵ The nonresidential use of residential property may not be upheld as an accessory use where the property is not used as a residence.¹⁶

The construction of a swimming pool for the owner's private recreation has been allowed as accessory to a one-family dwelling.¹⁷ The erection of radio poles and wires for use as an aerial for a short-wave amateur set has been regarded as a use customarily incident to a residential use.¹⁸ The

allowing premises and buildings in residential zone to be used for farming and its usual accessories.

N.Y.—*Johnson v. Debaun*, 135 N.Y.S. 2d 217, 206 Misc. 806.

98. N.Y.—*De Mott v. Notey*, 143 N.E.2d 804, 3 N.Y.2d 116, 164 N.Y.S.2d 398.

Boarding houses generally see supra § 159.

Hospitals generally see supra § 164.

99. N.J.—*Zahn v. Board of Adjustment of City of Newark*, 133 A.2d 358, 45 N.J.Super. 516.

1. Pa.—*Appeal of Grant*, 60 Pa.Dist. & Co. 340.

Grant v. Abington Tp., Com.Pl., 63 Montg.Co. 214.

2. N.Y.—*A. C. Nurseries Inc. v. Brady*, 105 N.Y.S.2d 933, 278 App. Div. 974.

3. Mich.—*Fass v. City of Highland Park*, 32 N.W.2d 375, 321 Mich. 156. Poultry market as a retail store see supra § 171.

Sale of live poultry was not permissible as accessory to operation of generally recognized retail stores.

Mich.—*Fass v. City of Highland Park*, 39 N.W.2d 336, 326 Mich. 19.

4. N.Y.—*Wike v. Herms*, 61 N.Y.S. 2d 244, 187 Misc. 111.

5. Pa.—*Novello v. Zoning Bd. of Adjustment*, 121 A.2d 91, 384 Pa. 294.

6. Ind.—*Board of Zoning Appeals of City of Indianapolis v. Wheat-*

on, App., 76 N.E.2d 597, 118 Ind. App. 38—*Keeling v. Board of Zoning Appeals of City of Indianapolis*, 69 N.E.2d 613, 117 Ind.App. 255. Ohio.—*Mahrt v. First Church of Christ, Scientist*, App., 142 N.E.2d 678.

Parking lots generally see supra § 163.

7. N.Y.—*Buffalo Park Lane v. City of Buffalo*, 294 N.Y.S. 413, 162 Misc. 207.

8. Pa.—*D. B. S. Bldg. Ass'n v. City of Erie*, 111 A.2d 367, 177 Pa.Super. 487.

9. Mass.—*Town of Needham v. Winslow Nurseries, Inc.*, 111 N.E. 2d 453, 330 Mass. 95, 40 A.L.R.2d 1450.

10. Ohio.—*McCloud v. Woodmansee*, 135 N.E.2d 316, 165 Ohio St. 271.

11. Pa.—*Food Corp. v. Zoning Bd. of Adjustment of City of Philadelphia*, 121 A.2d 94, 384 Pa. 288.

12. Del.—*Application of Emmett S. Hickman Co.*, 108 A.2d 667, 10 Terry 13.

13. Del.—*Application of Emmett S. Hickman Co.*, supra.

14. Tenn.—*City of Knoxville v. Brown*, 260 S.W.2d 264, 195 Tenn. 501.

Judicial and personal knowledge

In determining what a one-family dwelling may necessarily be used for, as required in construing city zoning ordinance prohibiting use of property

in certain neighborhood except for one-family dwellings and things which customarily and ordinarily go with such dwellings, justices must use their common sense and judicial and personal knowledge of what such dwellings are customarily and ordinarily used for or what ordinary man would consider a one-family dwelling to be.

Tenn.—*City of Knoxville v. Brown*, supra.

15. N.J.—*Keller v. Town of Westfield*, 121 A.2d 419, 39 N.J.Super. 430.

Lease of residence

Where owner of structure in residential zone used portion of structure for clinical laboratory, and leased remainder for residential purposes, laboratory was not an "accessory use," within zoning ordinances permitting certain professional uses in a residential zone where uses are accessory to residential use, since ordinances require that professional use be by person who resides in building.

N.J.—*State v. Mair*, 120 A.2d 487, 39 N.J.Super. 18.

16. R.I.—*City of Warwick v. Campbell*, 107 A.2d 334, 82 R.I. 300.

17. Tex.—*Thomas v. Zoning Bd. of Adjustment of City of University Park*, Civ.App., 241 S.W.2d 955.

18. Minn.—*Village of St. Louis Park v. Casey*, 16 N.W.2d 459, 218 Minn. 394, 155 A.L.R. 1128.

taking of roomers and boarders may be permissible as accessory to a residential use,¹⁹ but an ordinance which restricts the use of buildings in a district to one-family detached houses for one housekeeping unit with only accessory uses customarily incident thereto prohibits the principal use of a house within the district as a boarding or rooming house.²⁰

The stabling of horses has been held not to be a permissible accessory use to residential property.²¹ The operation of a private residence as a banquet hall for private parties is not accessory to the use of the premises as a three-room tourist home.²² Permission granted by a zoning ordinance to maintain a multiple dwelling in a residential district does not authorize the operation of a garment cleaning pick-up depot in the basement of the building.²³ An apartment house is not entitled to maintain a candy, newspaper, and tobacco counter as an accessory use.²⁴

Ordinarily a proper accessory use to a building in a residential district does not include a business²⁵ or commercial enterprise,²⁶ although incidental use of a dwelling by its occupant for business purposes as by using a desk and telephone in the home may be proper.²⁷ A provision prohibiting the conduct of a business in a residential area has been held to bar the conduct of a profession such as dentistry.²⁸ The conduct of a real estate business with advertising signs inviting customers to come and do business on the premises is not "accessory" or "customarily incident" to a residential use.²⁹ The use by an undertaker of his home in a residential district, which excludes undertaking establishments, in connection with, and in furtherance of, his undertaking business violates the zoning ordinance.³⁰

By express provision of some regulations, an accessory use to a building in a residential district may include the office of a physician, surgeon, dentist, musician, or artist,³¹ or the pursuit of a home occu-

Sixty-foot tower

(1) Under ordinance creating residential zone and expressly permitting accessory buildings customarily incidental to residence and other uses permissible in residential zones sixty-foot mast or tower support for amateur's radio antenna was a permissible accessory use if not in conflict with other provisions of ordinance limiting height of buildings. N.J.—Wright v. Vogt, 80 A.2d 108, 7 N.J. 1.

(2) Radio mast as not within provision permitting housing of utilities in a residential zone see supra § 149.

19. N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431.

R.I.—Von Housen v. Zoning Bd. of Review of Town of East Providence, 124 A.2d 550.

Use as a boarding house generally see supra § 159.

20. N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431.

21. Mass.—Pratt v. Building Inspector of Gloucester, 113 N.E.2d 816, 330 Mass. 344.

22. Mass.—City of Haverhill v. Di Burro, 148 N.E.2d 642.

23. N.J.—Zahn v. Board of Adjustment of City of Newark, 133 A.2d 358, 45 N.J.Super. 516.

Garment pick-up depot as "business" use see supra § 161.

24. N.Y.—140 Riverside Drive v.

Murdock, 95 N.Y.S.2d 860, 276 App. Div. 550.

25. Kan.—Piper v. Moore, 183 P.2d 965, 163 Kan. 565.

N.Y.—Flagg v. Murdock, 15 N.Y.S.2d 635, 172 Misc. 1048.

140 Riverside Drive v. Murdock, 78 N.Y.S.2d 890.

Pa.—Appeal of Hasley, 30 A.2d 187, 151 Pa.Super. 192.

Tex.—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused.

26. Cal.—Jones v. Robertson, 180 P. 2d 929, 79 C.A.2d 813.

27. Ill.—Village of Riverside v. Kuhne, 82 N.E.2d 500, 335 Ill.App. 547.

Newspaper column

A licensed physician whose home was in district zoned as residential, did not violate zoning ordinance, where, in addition to writing a syndicated newspaper column on premises, defendant employed secretaries to take dictation, address envelopes, and enclose pamphlets relating to health problems which were requested by readers of column, some of which were supplied to readers on payment of specified charge, where pamphlets were advertised only in syndicated column, and were not sold at a profit, and complained of activities did not interfere with primarily residential character and aesthetic harmonies of district.

Cal.—City of Beverly Hills v. Brady, 215 P.2d 460, 34 C.2d 854.

28. Tex.—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused.

29. Ill.—Village of Riverside v. Kuhne, 82 N.E.2d 500, 335 Ill.App. 547.

30. Md.—Ullrich v. State, 46 A.2d 637, 186 Md. 353, 165 A.L.R. 1107.

Undertakers and funeral parlors generally see supra § 174.

Transportation to home

Fact that it may be regarded as lawful for a citizen to bury his dead from his home, even though home is located in a residential use district which excludes undertaking establishments, does not make it lawful for one engaged in undertaking business to transport a body, which he has been employed as an undertaker to prepare for burial and bury, from his place of business to his home in a residential use district and bury it therefrom.

Md.—Ullrich v. State, supra.

31. Mo.—State ex rel. Kaegel v. Holekamp, App., 151 S.W.2d 685.

N.Y.—City of New Rochelle, on Complaint of Dassler v. Friedman, 78 N.Y.S.2d 681, 190 Misc. 654.

Tenn.—Red Acres Imp. Club v. Burkhalter, 241 S.W.2d 921, 193 Tenn. 79.

Dual use

Zoning ordinances have sanctioned practice of professional men to have offices in their homes and practice of maintaining home occupations such as dressmaking, millinery, music instructions and the like because dominant use of premises is residential and practice of profession or home occupation merely incidental, and because such dual use is considered compatible with zoning plan and without tendency to set in motion a process of disintegration.

N.J.—Keller v. Town of Westfield, 121 A.2d 419, 39 N.J.Super. 430.

Only one office

Zoning ordinance authorizing professional office of "a doctor or den-

pation which is customarily incident to the use of premises as a dwelling place.³² A provision permitting certain uses which are accessory to the use of a home such as the pursuit of a profession and customary home occupations does not authorize a use which is specifically prohibited in residential districts by other provisions,³³ and such a provision does not apply where the use of the premises as a dwelling place is largely incidental to the occupation carried on.³⁴

Under an ordinance permitting a physician to have an office at his residence, the number of patients treated at such office is not material on the question of the propriety of such use,³⁵ and the physician

may have necessary employees and equipment at the office.³⁶ A Christian Science practitioner has been held to be within a provision permitting offices for a physician, surgeon, dentist, or other professional person.³⁷

An ordinance permitting the use of a dwelling by an artist has been held to justify the maintenance of a dance studio at a dwelling,³⁸ but it has also been held that a dancing instructor is not an "artist."³⁹ The use of a residence for giving dancing instruction to a large number of persons is not authorized as a "home occupation."⁴⁰ The conducting of a ceramic class at a home is not authorized by a provision permitting an artist or similar professional

tist" was intended to permit but one doctor or dentist to practice his profession in a one-family residence in such use district.

N.Y.—Town of North Hempstead v. White, 144 N.Y.S.2d 358, 1 Misc.2d 228, affirmed 148 N.Y.S.2d 461, 1 A.D.2d 781.

Dental laboratory not dental office

Pa.—Appeal of Leventhal, Com.Pl., 3 Lycoming 90.

Records

Phrase "professional office or studio" as used in zoning ordinance, contemplates locus where a particular enterprise which might be said to be a profession would have its situs or headquarters and location of practice; it would include, but particularly in view of words "professional" and "studio" would not necessarily be confined to, a place for making and keeping of records.

Pa.—Leaver v. Board of Adjustment, 10 Pa.Dist. & Co.2d 888, 6 Bucks Co. 249.

Colorer of neon signs

N.Y.—People v. Daly, 28 N.Y.S.2d 603.

32. Md.—Mauer v. Snyder, 87 A.2d 612, 199 Md. 551.

Mo.—State ex rel. Kaegel v. Holekamp, App., 151 S.W.2d 685.

In light of ejusdem generis rule of construction, words "such as the office of a physician, surgeon, dentist, musician, or artist" limited and contracted broader term "home occupation" as used in zoning ordinance of city permitting in a D-apartment district uses customarily incident to enumerated uses when situated in same dwelling, including "home occupation" "such as office of a physician, surgeon, dentist, musician, or artist," and words "such as" required that home occupations be like or similar to classifications or kinds named.

Tex.—Board of Adjustment of City of San Antonio v. Levinson, Civ. App., 244 S.W.2d 281.

Limitation

A zoning ordinance limiting "home occupations" to "such occupations that shall be conducted solely by resident occupants" and requiring "no display of products shall be visible from the street" indicates intention to permit only such light occupations in home that could not change character of building from a home to a business or industrial establishment.

N.J.—Jantausch v. Borough of Verona, 131 A.2d 881, 24 N.J. 326.

Lemp v. Township of Millburn, 28 A.2d 767, 129 N.J.Law 221.

Manufacture and sale of trusses and belt braces, utilizing a sewing machine, shears, knives, vices and wrenches within an area designated by the zoning board as "B" residential district is not included within the purview of permitted accessory uses designated as "An office such as that of a physician, dentist, musician, artist, or other professional person; * * * and similar home occupations such as dressmaking or millinery."

Pa.—In re Appeal from Zoning Bd. of Appeals of Akerly, 6 Pa.Dist. & Co.2d 517, 39 Erie Co. 95.

"Baby-sitting" is a customary home occupation.

Tex.—City of Grand Prairie v. Finch, Civ.App., 294 S.W.2d 851.

Garage

In construing zoning ordinance permitting alterations or use of buildings in one-family district for home occupations incident to their use as residences, use incidental to use of premises as a residence may as a matter of law be effectively carried on in garage as well as in main part of the house.

N.J.—Jantausch v. Borough of Verona, 131 A.2d 881, 24 N.J. 326.

33. Md.—Dobres v. Schwartzman, 59 A.2d 684, 191 Md. 19.

34. Mo.—State ex rel. Kaegel v. Holekamp, App., 151 S.W.2d 685.

35. Tenn.—Red Acres Imp. Club v. Burkhalter, 241 S.W.2d 921, 193 Tenn. 79.

36. Tenn.—Red Acres Imp. Club v. Burkhalter, supra.

37. La.—Audubon Area Zoning Ass'n v. Krushevski, App., 82 So.2d 460.

38. Ohio.—Stewart v. Humphries, App., 132 N.E.2d 758.

Dancing school as an "educational institution" see supra § 172.

Dancing is an "art"

Ohio.—Stewart v. Humphries, supra.

Instruction to children

Activity of owner of residence in residential district in giving dancing instructions to children in basement of her residence, was authorized by provision of zoning ordinance that residence may contain professional office or studio of resident doctor, dentist, artist, musician, or person engaged in comparable professional services, although owner of residence who gave dancing instructions advertised for pupils, and although traffic problem resulted because of coming and going of pupils.

N.Y.—Delpriore v. Ball, 118 N.Y.S.2d 53, 281 App.Div. 214, affirmed Delpriore v. Zoning Bd. of Appeal of the Town of Amherst, 118 N.E.2d 478, 306 N.Y. 775.

Limitation as to area

Dance studio, which was constructed at rear of dwelling in dwelling-house district, and which was twenty feet by twenty-six feet, and which did not occupy more than twenty-five percent of lot area, and which did not exceed one third of area of whole building, came within provision of city zoning ordinance that accessory uses of dwelling are permissible where business or industry does not occupy more than twenty-five percent of lot area.

Ohio.—Stewart v. Humphries, App., 132 N.E.2d 758.

39. Mo.—State ex rel. Kaegel v. Holekamp, App., 151 S.W.2d 685.

40. Mo.—State ex rel. Kaegel v. Holekamp, supra.

person to have an office or studio at his home.⁴¹ One engaged in teaching persons to ride horses is not a member of a "recognized profession" within an ordinance permitting such persons to maintain an office in a residential district.⁴²

A real estate office is not a "professional" office within the meaning of an ordinance permitting a professional office as a use accessory to a residence,⁴³ nor is it a "home occupation" of a kind permitted as accessory to a residential use.⁴⁴ Similarly, a beauty shop is not a professional office.⁴⁵

It has been held that the occupation of an undertaker or funeral director is not a profession within an ordinance permitting a professional office as accessory to a residential use;⁴⁶ but there is also authority that the practice of undertaking may be considered a profession within the meaning of such an ordinance.⁴⁷ The operation of a funeral home is not a "customary home occupation" permitted by an ordinance regulating the use of buildings in residential districts.⁴⁸

§ 178. Accessory Buildings

Zoning ordinances permitting and regulating accessory buildings are to be reasonably construed.

Zoning ordinances permitting and regulating accessory buildings are to be reasonably construed.⁴⁹ The accessory building must be on the same premises as the main building, even though the ordinance does not expressly so provide.⁵⁰ The words "accessory," "subordinate," "incidental," and "main" when used in a zoning ordinance in connection with buildings, denote the relationship of one building

to another.⁵¹ An "accessory building" is a subordinate building, the use of which is incidental to the use of the main building.⁵² A "main building" is one to which other buildings are accessory or subordinate in use.⁵³

A chicken house may not be regarded as accessory to a dwelling where the ordinance defines an accessory building as one subordinate to the main building on the lot and used for purposes customarily incident to those of the main building.⁵⁴ An addition to a building, which is to be an integral part of the building, such as an enlargement of a dwelling to provide an additional bedroom and bath, may not be considered an accessory building.⁵⁵

Occupancy by servants. Under a zoning ordinance providing that nothing in the ordinance authorizes or will be construed to permit the occupancy or use of any accessory building as a place of abode or dwelling by any one other than a bona fide servant actually then regularly employed by the occupant of the main structure, the use of an accessory building as a place of abode is confined to bona fide servants employed by the main occupant of the premises, and the owners are precluded from making use of the quarters for independent occupancy.⁵⁶ A provision, regulating accessory buildings in a residential district and providing that an accessory building may not be used for residential purposes except by domestic servants of the occupant of the main dwelling, may not be evaded by a sale of a portion of the premises;⁵⁷ thus where there was erected on one lot a dwelling house and in the rear of the lot a garage with dwelling quarters, the conveyance of the rear of the lot together with

41. N.Y.—Schweizer v. Board of Zoning Appeals of Incorporated Village of Garden City, 167 N.Y.S. 2d 764, 8 Misc.2d 878.

42. N.Y.—Village of East Hampton v. Mulford, 65 N.Y.S.2d 455, 188 Misc. 1037.

Riding academy as a "school" within zoning ordinance see supra § 172.

43. Cal.—Jones v. Robertson, 180 P. 2d 929, 79 C.A.2d 813.

III.—Village of Riverside v. Kuhne, 82 N.E.2d 500, 335 Ill.App. 547.

Pa.—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa. Dist. & Co. 686, 63 Montg.Co. 247.

44. Ill.—Village of Riverside v. Kuhne, 82 N.E.2d 500, 335 Ill.App. 547.

45. Pa.—Bonasi v. Board of Adjustment of Haverford Tp., 115 A.2d 225, 382 Pa. 307.

46. N.J.—Frizen v. Poppy, 86 A.2d 134, 17 N.J.Super. 390.

Undertakers and funeral parlors generally see supra § 174.

47. Pa.—Leaver v. Board of Adjustment, 10 Pa. Dist. & Co. 2d 333, 6 Bucks Co. 249—Paxtang Borough Bd. of Adjustment v. Arnold, 8 Pa. Dist. & Co. 2d 98, 68 Dauph.Co. 214, 49 Mun.L.R. 47.

Contra: Hampton v. Board of Adjustment of Borough of Norristown, Com.Pl., 66 Montg.Co. 164.

48. Utah.—Provo City v. Claudin, 63 P.2d 570, 91 Utah 60.

49. Md.—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130.

N.J.—Hrycenko v. Board of Adjustment of City of Elizabeth, 99 A.2d 430, 27 N.J.Super. 376.

Conservatory

Under zoning ordinance authorizing erection in residential district of a structure for "accessory purposes" such as are proper and usual with residences for one family, small conservatory to be erected in rear of private residence for raising of plants and flowers solely for person-

al pleasure of resident, was authorized.

Mass.—Kenney v. Building Com'r of Melrose, 52 N.E.2d 683, 315 Mass. 291, 150 A.L.R. 490.

50. Minn.—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 103.

51. Minn.—Lowry v. City of Mankato, supra.

52. Md.—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130.

53. Minn.—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 103.

54. N.J.—De Benedetti v. River Vale Tp., Bergen County, 91 A.2d 353, 21 N.J.Super. 430.

55. Md.—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130.

56. Tex.—Town of Highland Park v. Marshall, Civ.App., 235 S.W.2d 658, refused no reversible error.

57. N.J.—Collins v. Board of Adjustment of Margate City, 69 A.2d 703, 3 N.J. 200.

the adjoining vacant lot does not free the garage for general residential use.⁵⁸

An accessory building is not transformed into an independent building by its rental so as to avoid restrictions on its occupancy except by servants, even though the premises are large enough so that the property could be divided and each division be occupied by a dwelling without violating the zoning ordinances.⁵⁹ Where a tract on which were located a cottage and other buildings accessory to a mansion house was sold separately from the portion of the property on which the mansion house was located, and the cottage was used as a residence, the cottage became the main building within a provision that not more than one dwelling may be constructed on a lot, except that living quarters may be provided in accessory structures for persons employed in domestic service on the premises.⁶⁰

Rental of accessory building. The alteration of a four-car garage on the owner's premises so that the owner might rent part of it to other persons as living quarters does not constitute a customary "accessory use" within a zoning ordinance which permits use of residential lots only for a single-family detached dwelling and for "accessory use" customarily incidental to such dwelling.⁶¹ Where at time of enactment of zoning ordinance a parcel contained a main dwelling house and a carriage house and the latter over the years had been occupied independently either as servants quarters or guest accommodations, the carriage house may be occupied by a rent paying tenant, notwithstanding the zoning ordi-

nance prescribes a minimum area of 40,000 square feet for a family dwelling and the parcel does not contain 80,000 square feet and the ordinance provided that an accessory use shall not include an activity conducted for gain.⁶²

§ 179. — Garage

Ordinarily, a private garage is a proper accessory building to a permitted private residence.

A private garage ordinarily is a proper accessory building to a permitted private residence,⁶³ and unless so required by the zoning ordinance, the garage need not be on the same lot as the dwelling.⁶⁴ The maintenance of a six-car garage housing vehicles used for hire as cabs or omnibuses is not permissible as an accessory use or a use customary or incident to a one-family house.⁶⁵ A provision in a zoning ordinance authorizing the erection in a residential district of accessory buildings, including private garages, does not authorize the construction of a private garage in a residential district for use by a business located outside of the district.⁶⁶

A garage connected to the house by a breezeway has been held to be part of the main building so that it need not be constructed in accordance with a zoning ordinance governing the location of an accessory building.⁶⁷

The conversion of a garage on the rear of a hotel lot to use for living quarters for hotel guests transforms the building from an accessory to a principal building and may violate the rear yard requirements of the zoning ordinance.⁶⁸

58. N.J.—Collins v. Board of Adjustment of Margate City, *supra*.

59. N.Y.—Griffin v. Reville, 149 N.Y.S.2d 312, 1 Misc.2d 1045.

60. N.J.—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442.

61. Pa.—Deane v. Board of Adjustment of Zoning Bd. of Borough of Edgeworth, 94 A.2d 112, 172 Pa. Super. 502.

62. N.Y.—Clune v. Walker, 170 N.Y.S.2d 604.

63. Mich.—People v. Scrafano, 12 N.W.2d 325, 307 Mich. 655.

Minn.—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 108. Garages generally see *supra* § 163.

Absence of express permission

Right to construct a garage for uses incidental and accessory to residential uses is not to be considered forbidden, even though not expressly permitted by a zoning ordinance.

N.H.—Dumais v. Somersworth, 134 A.2d 700.

Independent structure

A purely private residential garage constructed at same time as residence would be classified as being "constructed as a part of main building" within zoning ordinance permitting private garages constructed as a part of main building, notwithstanding garage might not be structurally dependent on residence and not under same roof.

Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

Storage of resident's business vehicle

Ill.—Village of Riverside v. Kuhne, 82 N.E.2d 500, 335 Ill.App. 547.

Mich.—People v. Scrafano, 12 N.W.2d 325, 307 Mich. 655.

N.Y.—City of New Rochelle, on Complaint of Dassler, v. Dandry, 79

N.Y.S.2d 126, 191 Misc. 977.

City of New Rochelle, on Complaint of Dassler, v. Lore, 94 N.Y.S.2d 537—City of Rochelle, on Complaint of Dassler, v. Dillon, 89 N.Y.S.2d 630—People on Complaint of Dassler v. Damore, 79 N.Y.S. 124.

Pa.—Aiken v. Conti, Com.Pl., 5 Chest. Co. 163—Sylvester v. Board of Zoning Appeals, Com.Pl., 50 Lack. Jur. 200.

64. N.J.—Schack v. Trimble, 137 A.2d 22, 48 N.J.Super. 45.

65. N.J.—Dolan v. DeCapua, 80 A.2d 655, 13 N.J.Super. 500.

66. Minn.—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 108.

67. Tex.—Dodson v. Dooley, Civ. App., 280 S.W.2d 753, refused no reversible error.

68. N.J.—Honigfeld v. Byrnes, 103 A.2d 598, 14 N.J. 600.

V. NONCONFORMING USES

§ 180. General Rule

Zoning regulations sometimes expressly provide and are generally construed to permit the continuance of such uses of land and structures as were in existence at the time of the adoption of the regulations notwithstanding similar uses are not permitted by the regulations in the area in which the property so used is located.

The term "nonconforming uses," as used in the law of zoning, refers to uses of certain property which are permitted to continue notwithstanding the zoning regulations do not permit similar uses in the area in which the property so used is located,⁶⁹ although the term is sometimes used in its more general sense as referring to a use of a building or property that does not agree with the regulations of the use district in which it is situated.⁷⁰

As a general rule, zoning regulations do not limit the right of a landowner to continue such uses of land and structures as were in existence at the time of the adoption of the regulations,⁷¹ and it is sometimes expressly provided that nonconforming uses and structures may be continued,⁷² at least for a

69. Md.—Beyer v. Mayor and Council of Baltimore City, 34 A.2d 765, 182 Md. 444.

70. Ohio.—Ohio State Student Trailer Park Co-op. v. Franklin County, Com.Pl., 123 N.E.2d 286, affirmed, App., 123 N.E.2d 542.

Permitted use is not a nonconforming use.

La.—Audubon Area Zoning Ass'n v. Krushovski, App., 32 So.2d 460.

71. U.S.—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499. Ariz.—Kubby v. Hammond, 198 P.2d 134, 68 Ariz. 17.

Cal.—Edmonds v. Los Angeles County, 255 P.2d 772, 40 C.2d 642.—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683.

Biscay v. City of Burlingame, 15 P.2d 784, 127 C.A. 213.

D.C.—Larrabee v. Bell, 10 F.2d 986, 56 App.D.C. 121, certiorari denied U. S. ex rel. Varela v. Bell, 46 S. Ct. 484, 271 U.S. 670, 70 L.Ed. 1143, followed in Varela v. Bell, 10 F.2d 989, 56 App.D.C. 124, certiorari denied U. S. ex rel. Varela v. Bell, 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143.

Fla.—Corpus Juris Secundum cited in Fortunato v. City of Coral Gables, 47 So.2d 321, 323.

Ill.—City of Chicago v. Reuter Bros. Iron Works, 75 N.E.2d 355, 393 Ill. 202, 173 A.L.R. 266.

Ind.—Lutz v. New Albany City Plan Commission, 101 N.E.2d 187, 230 Ind. 74.

Iowa.—McJimsey v. City of Des Moines, 2 N.W.2d 65, 231 Iowa 693.

Ky.—Butler v. Louisville & Jefferson County Bd. of Zoning Adjustment and Appeals, 224 S.W.2d 658, 311 Ky. 663.

Md.—Francis v. MacGill, 75 A.2d 91, 196 Md. 77—Green v. Garrett, 63 A.2d 326, 192 Md. 52—Colati v. Jirout, 47 A.2d 613, 186 Md. 652—John J. Moylan, Inc., v. Bramble, 24 A.2d 297, 180 Md. 316.

Nev.—State ex rel. Davie v. Coleman, 224 P.2d 309, 67 Nev. 636.

N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

N.J.—Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J.Law 442, affirmed 61 A.2d 76, 137 N.J.Law 603—Pieretti v. Johnson, 41 A.2d 896, 132 N.J.Law 576.

Francisco v. Department of Institutions and Agencies, 180 A. 843, 13 N.J.Misc. 663—Lamb v. A. D. McKee, Inc., 160 A. 563, 10 N.J.Misc. 649.

N.Y.—Canberg v. Kleinert, 232 N.Y. S. 640, 225 App.Div. 875.

Madison Stores, Inc. v. Enkay Sales Corp., 142 N.Y.S.2d 132, 207 Misc. 1091—Curtiss-Wright Corp. v. Incorporated Village of Garden City, 57 N.Y.S.2d 377, 185 Misc. 508—Pisicchio v. Board of Appeals of Village of Freeport, 300 N.Y.S. 368, 165 Misc. 156.

People v. Perkins, 3 N.Y.S.2d 868, reversed on other grounds 26 N.E.2d 278, 232 N.Y. 329.

Pa.—Appeal of Peirce, 119 A.2d 596, 384 Pa. 100—Whitpain Tp. v. Bodine, 94 A.2d 737, 372 Pa. 509.

Feagley v. Coho, Com.Pl., 53 Lanc.L.Rev. 29—Commonwealth v. Booth, Quar.Sess., 63 Montg.Co. 133—Veltri v. Borough of Munhall, Com.Pl., 94 Pittsb.Leg.J. 387.

Constitutionality and validity of regulations prohibiting continuation of existing use of property see supra § 63.

Existing property right

(1) Zoning law and zoning ordinance passed thereunder were held inapplicable to existing lawful property right not derived therefrom.

Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

(2) Right to a nonconforming use of property within a zoning ordinance is a property right.

Ill.—Brown v. Gerhardt, 125 N.E.2d 53, 5 Ill.2d 106—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

Village of Skokie v. Almendinger, 126 N.E.2d 421, 5 Ill.App.2d 522.

N.J.—Scavone v. Mayor and Council of Borough of Totowa, 140 A.2d 238, 49 N.J.Super. 423.

Annexed property

At time property was taken into

city, owners had property right in its then nonconforming use.

Tex.—City of Dallas v. Halbert, Civ. App., 246 S.W.2d 686, error refused no reversible error.

72. Conn.—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161—Corpus Juris cited in Levine v. Board of Adjustment, 7 A.2d 222, 224, 125 Conn. 478—Lehmaier v. Wadsworth, 191 A. 539, 122 Conn. 571—Lathrop v. Town of Norwich, 151 A. 183, 111 Conn. 616.

D.C.—Hagans v. District of Columbia, Mun.App., 97 A.2d 922.

Ill.—City of Chicago v. Reuter Bros. Iron Works, 75 N.E.2d 355, 393 Ill. 202, 173 A.L.R. 266.

Village of Skokie v. Almendinger, 126 N.E.2d 421, 5 Ill.App.2d 522—Thomas v. Village of Southern View, 107 N.E.2d 277, 347 Ill.App. 569—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 Md. 623—Colati v. Jirout, 47 A.2d 613, 186 Md. 652—Chayt v. Board of Zoning Appeals of Baltimore City, 9 A.2d 747, 177 Md. 426.

Mass.—Foster v. Mayor of City of Beverly, 53 N.E.2d 693, 315 Mass. 567, 151 A.L.R. 737—Paul v. Selectmen of Scituate, 17 N.E.2d 193, 301 Mass. 365.

Mich.—Civic Ass'n of Dearborn Tp., Dist. No. 3, v. Horowitz, 28 N.W.2d 97, 318 Mich. 333.

N.J.—Gerkin v. Village of Ridgewood, 86 A.2d 275, 17 N.J.Super. 472.

Ackerman Fuel Oil Co. v. Board of Adjustment of Borough of Paramus, 54 A.2d 661, 136 N.J.Law 93—Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21—De Vito v. Pearsall, 180 A. 202, 115 N.J.Law 323—Frank J. Durkin Lumber Co. v. Fitzsimmons, 147 A. 555, 106 N.J.Law 183.

N.Y.—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298.

specified period of time.⁷³ Under a provision that "nonconforming uses" may be continued, the quoted phrase comprehends both the physical structure on the land and the functional use of the land or structure.⁷⁴ Unless otherwise provided by the zoning ordinances, a permit is not required to continue a nonconforming use.⁷⁵ On the other hand, the fact that property formerly designated as commercial is later placed in a residential zone does not give the owner who used the land before the change the same rights as to use as if the property were still zoned as commercial.⁷⁶

A business existing at the time of the enactment of a zoning regulation forbidding such business may be continued,⁷⁷ and property used for business may continue in such use although the area in which the property is located is subsequently zoned as residential.⁷⁸ The continuation of particular uses which have been held not to be affected by the subsequent enactment of a zoning regulation prohibiting such use includes the operation of a carnival,⁷⁹ a cemetery,⁸⁰ a livery stable,⁸¹ a piggery,⁸² a rendering plant,⁸³ a sign hanging from an office building,⁸⁴ and a trailer camp.⁸⁵ Farming may be continued in a district subsequently zoned as residential,⁸⁶ and a

A. C. Nurseries, Inc., v. Brady, 105 N.Y.S.2d 933, 278 App.Div. 974—*People on Complaint of Ketcher v. Miano*, 254 N.Y.S. 105, 234 App. Div. 94—*Eaton v. Sweeny*, 251 N.Y.S. 246, 232 App.Div. 459, reversed on other grounds 177 N.E. 412, 257 N.Y. 176.

Curtiss-Wright Corp. v. Incorporated Village of Garden City, 57 N.Y.S.2d 377, 185 Misc. 508, reversed on other grounds 61 N.Y.S. 2d 678, 270 App.Div. 936, affirmed 72 N.E.2d 26, 296 N.Y. 839—*Collins v. Moore*, 211 N.Y.S. 437, 125 Misc. 777.

N.C.—Town of Clinton v. Ross, 40 S.E.2d 593, 226 N.C. 682.

Pa.—Appeal of Haller Baking Co., 145 A. 77, 295 Pa. 257.

Appeal of Alloy Metal Wire Co., Com.Pl., 29 Del.Co. 488—*Honig v. Lonsdorf, Com.Pl.*, 53 Lack.Jur. 209—*Wren v. Westfahl, Com.Pl.*, 46 Lack.Jur. 169.

Validity of such provisions see *supra* § 63.

Traffic congestion

Fact that there was a great deal of congestion in traffic around corner where business was located would have no bearing on right to conduct business as a nonconforming use under zoning ordinance, traffic congestion being a matter for police regulation rather than a concern in enforcement of zoning ordinance. *N.Y.—City of Syracuse v. Bronner*, 133 N.Y.S.2d 153.

Limitation on delegation of power

Statute authorizing a local legislative body to divide municipality into districts within which it may regulate and restrict the erection, construction, alteration, or use of buildings, structures, or land, and providing that no regulations shall be enacted that will affect the status of nonconforming usage for commercial purposes where usage has existed from Jan. 1, 1929, means that the use of an existing building as of Jan. 1, 1929, is not to be disturbed by the provisions of any subsequently adopted municipal or local ordinance.

La.—City of New Orleans v. Langenstein, App., 91 So.2d 114.

73. La.—State ex rel. Hochfelder v. City of New Orleans, 132 So. 786, 171 La. 1053.

74. N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154.

75. Ohio.—State v. Pierce, 132 N.E. 2d 102, 164 Ohio St. 482.

Permits and certificates generally see *infra* § 219 et seq.

Certificate of occupancy

Under statute and zoning ordinance providing that the lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at time of enactment of a zoning resolution or amendment may be continued although such use does not conform to such resolution or amendment, a person has a clear right to a certificate of occupancy on an existing nonconforming residential use even though premises do not conform to zoning resolution. *Ohio.—State ex rel. Cubbon v. Winterfeld, App.*, 148 N.E.2d 523.

76. Pa.—In re Blanarik, 100 A.2d 58, 375 Pa. 209.

77. N.Y.—People v. Hein, 65 N.Y.S. 2d 318, 187 Misc. 6.

Moving business

Where petitioner was engaged in business of local and long distance moving for some time prior to zoning change, he was entitled to continue such use. *N.Y.—Gscheidle v. Murdock*, 111 N.Y. S.2d 740, 280 App.Div. 74.

78. Ind.—Lutz v. New Albany City Plan Commission, 101 N.E.2d 187, 230 Ind. 74.

La.—Ewing v. Braun, App., 196 So. 571.

Md.—Amereihn v. Kotras, 71 A.2d 865, 194 Md. 591.

N.Y.—Horan v. Koehler, 14 N.Y.S.2d 875, 258 App.Div. 729, appeal denied 15 N.Y.S.2d 829, 258 App.Div. 804, affirmed 24 N.E.2d 989, 282 N.Y. 573.

Grocery business conducted on lot in unincorporated section of town

prior to adoption of zoning ordinance permitting use of such land for residential and other purposes, but not for commercial purposes, could nevertheless be continued as a nonconforming use.

N.Y.—Town of Cortlandt v. McNally, 126 N.Y.S.2d 702, 282 App.Div. 1072, appeal denied 128 N.Y.S.2d 597, 283 App.Div. 800.

Railroad

Where railroad belt line had been located on private right of way prior to enactment of ordinance which zoned as residential part of land through which belt line extended, belt line was a nonconforming use as to such zone, and the railroading was not a nuisance *per se*, and, therefore, railroad company's right to continue its operation over the belt line remained unaffected by the zoning. *Ohio.—City of Hamilton v. Hausenhein*, 139 N.E.2d 459, 102 Ohio App. 556.

Commercial garage

N.J.—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N.J.Super. 607.

Pa.—Sylvester v. Board of Zoning Appeals, Com.Pl., 50 Lack.Jur. 200.

79. Mich.—Civic Ass'n of Dearborn Tp., Dist. No. 3, v. Horowitz, 28 N.W.2d 97, 318 Mich. 333.

80. Kan.—City of Wichita v. Schwertner, 286 P. 266, 130 Kan. 397.

81. Cal.—Ryan v. Andriano, 266 P. 831, 91 C.A. 136.

N.J.—Walton v. Stephens, 11 A.2d 364, 124 N.J.Law 216.

82. Mass.—Connors v. Town of Burlington, 91 N.E.2d 212, 325 Mass. 494.

83. Pa.—Schuster v. Board of Zoning Appeals of City of Scranton, Com.Pl., 52 Lack.Jur. 1.

84. Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

85. Pa.—Alenovitz v. East Whiteland Tp., Com.Pl., 6 Chest.Co. 237.

86. N.J.—Stout v. Mitschele, 52 A.2d 422, 135 N.J.Law 406.

two-family or rooming house may be continued in a single-family house zone.⁸⁷

A provision of an ordinance requiring that every lot in multiple dwelling zones should have a certain minimum width and area will be assumed to have been enacted with the understanding that it would not be given effect in old settled districts developed under different standards where its application would oppress the owners of property and would not do any good.⁸⁸ Rear yard requirements imposed by a zoning ordinance do not apply as to existing buildings which do not comply therewith,⁸⁹ and plots existing at the time an ordinance is enacted may be excepted from the frontage requirements imposed by the ordinance.⁹⁰

The repeal of a provision excepting house trailers used in connection with the owner's dwelling from a requirement that trailer houses be kept only in licensed camp grounds has been held not to apply to one who had established such use at the time the repeal was enacted.⁹¹ Property used for commercial purposes under an ordinance rezoning it from residential to commercial use may be continued in such use under a subsequent ordinance repealing all prior zoning ordinances and zoning the area as residential, but excepting lawfully operated nonconforming uses.⁹²

Use of land apart from structures. The excavation of products of the soil may constitute an existing nonconforming use protected by a provision preserving the right to continue existing uses,⁹³

but some provisions merely preserve the use of existing buildings and structures and not the use of land on which there are no buildings.⁹⁴ Open areas in connection with an improvement existing at the time of enactment of a zoning ordinance are exempt from the restrictions of the ordinance under a provision permitting continuance of a nonconforming existing use, if the open areas were in use at the time of enactment of the ordinance.⁹⁵ The use of a vacant lot for the dismantling of automobiles is not affected by a subsequent amendment of the zoning ordinance prohibiting such use in the area.⁹⁶

Intoxicating liquor. A zoning ordinance prohibiting the sale of beer in residential areas has been construed as not preserving the right of a restaurant, doing business in a residential area as a nonconforming use, to continue to sell beer.⁹⁷

The right to apply for a variance does not preclude a claim of a nonconforming use.⁹⁸

§ 181. — Purpose of Rule

The continuation of nonconforming uses is permitted to avoid hardship and with the doubtful constitutionality of compelling the immediate cessation of existing uses in mind.

The granting of permission for continuation of a nonconforming use is designed to avoid the imposition of hardship on the owner of property already devoted to a proscribed use,⁹⁹ and has in mind the injustice and doubtful constitutionality of compelling the immediate removal of objectionable buildings and uses already in the district.¹

87. N.Y.—Sackett Lake Property Owners Ass'n v. Levine, 48 N.Y.S.2d 490, 268 App.Div. 809, appeal denied 51 N.Y.S.2d 748, 268 App. Div. 934.

88. Cal.—Morris v. City of Los Angeles, 254 P.2d 935, 116 C.A.2d 856.

89. Pa.—United Cerebral Palsy Ass'n of Philadelphia and Vicinity v. Zoning Bd. of Adjustment, 114 A.2d 331, 382 Pa. 67.

90. Purchaser of portion of plot
Provision of village zoning ordinance that building can be erected on plot of less than fifty feet frontage if plot was in existence at time of adoption of ordinance was applicable to such a plot, although one relying on such provision purchased only a portion of the original plot, and the portion purchased had a depth of two hundred fifty-five feet, while original depth was one thousand two hundred fifty.

N.Y.—Flanagan v. Zoning Bd. of Appeals of Village of Bayville, 149 N.Y.S.2d 666, 2 Misc.2d 922, affirmed 151 N.Y.S.2d 618, 1 A.D.2d 979.

91. Wis.—Des Jardin v. Town of Greenfield, 53 N.W.2d 784, 262 Wis. 43.

92. Ill.—Thomas v. Village of Southern View, 107 N.E.2d 277, 347 Ill.App. 569.

93. Cal.—McIvor v. Mercer-Fraser Co., 172 P.2d 758, 76 C.A.2d 247.

94. Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

95. Md.—Chayt v. Board of Zoning Appeals of Baltimore City, 9 A.2d 747, 177 Md. 426.

Airport

Where area on which it was sought to erect a building incidental to use of an airport had been held as a unit with land actually used for the landing and taking off of airplanes since before enactment of village zoning ordinance, the fact that area had been fenced off, in the absence of evidence that it had been put to a use for other than airport purposes, did not exclude it from airport and bring it within zoning restrictions.

N.Y.—Great South Bay Marine Corp. v. Norton, 58 N.Y.S.2d 172, affirmed 75 N.Y.S.2d 304, 272 App.Div. 1069.

96. Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 Md. 623.

97. Tex.—City of Dallas v. Haworth, Civ.App., 218 S.W.2d 264, refused no reversible error.

98. Md.—Hare v. Mayor and City Council of Baltimore, 90 A.2d 217, 200 Md. 477.

Variances generally see *infra* § 268 et seq.

99. Cal.—Orange County v. Goldring, 263 P.2d 321, 121 C.A.2d 442.

Fla.—Fortunato v. City of Coral Gables, 47 So.2d 321.

Iowa.—McJimsey v. City of Des Moines, 2 N.W.2d 65, 231 Iowa 693.

Mich.—South Central Imp. Ass'n v. City of St. Clair Shores, 82 N.W.2d 453, 348 Mich. 153—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702—Cole v. City of Battle Creek, 298 N.W. 466, 298 Mich. 98.

1. Cal.—Rehfeld v. City and County

§ 182. — Strict Construction

Provisions for the continuation of nonconforming uses are strictly construed.

The spirit of the zoning ordinances and regulations is to restrict rather than to increase any nonconforming uses,² and to secure their gradual elimination.³ Accordingly, provisions of a zoning regulation for the continuation of such uses should be strictly construed,⁴ and provisions limiting nonconforming uses should be liberally construed.⁵ The right to continue a nonconforming use is not a perpetual easement to make a use of one's property detrimental to his neighbors and forbidden to them,⁶

and nonconforming uses will not be permitted to multiply⁷ when they are harmful or improper.⁸

It has also been held, however, that it is as much the purpose of a zoning ordinance to protect an owner's right to a lawful nonconforming use as it is to protect the rights of other property owners to prevent unlawful nonconforming uses.⁹

§ 183. — Persons Entitled to Maintain Nonconforming Use

The right to continue a nonconforming use is not limited to the owner of the property at the time the ordinance was enacted, but extends to subsequent purchasers.

of San Francisco, 21 P.2d 419, 218 C. 83.

Orange County v. Goldring, 263 P.2d 321, 121 C.A.2d 442.

Pa.—Appeal of Becker, Com.Pl. 68 York Leg.Rec. 174.

Constitutionality and validity of zoning regulations prohibiting continuation of existing use of property see supra § 63.

2. Ala.—Moore v. Pettus, 71 So.2d 814, 260 Ala. 616—Fulford v. Board of Zoning Adjustment of City of Dothan, 54 So.2d 580, 256 Ala. 336.

Cal.—Edmonds v. Los Angeles County, 255 P.2d 772, 40 C.2d 642—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683.

Conn.—Salerni v. Scheuy, 102 A.2d 528, 140 Conn. 566—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 114 Conn. 15.

Md.—Cleveland v. Mayor & City Council of Baltimore, 84 A.2d 49, 198 Md. 440—Colati v. Jirout, 47 A.2d 613, 186 Md. 652.

Mo.—Brown v. Gambrel, 213 S.W.2d 931, 358 Mo. 192.

N.J.—Ranney v. Istituto Pontificio Delle Maestre Filippini, 119 A.2d 142, 20 N.J. 189.

Hay v. Board of Adjustment of Borough of Fort Lee, 117 A.2d 650, 37 N.J.Super. 461—Gross v. Allan, 117 A.2d 275, 37 N.J.Super. 262—Martin v. Cestone, 110 A.2d 54, 33 N.J.Super. 267—Kramer v. Town of Montclair, 109 A.2d 292, 33 N.J.Super. 16—Barbarisi v. Board of Adjustment, 103 A.2d 164, 30 N.J.Super. 11—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154—Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161—Morris v. Borough of Haledon, 90 A.2d 113, 20 N.J.Super. 433, reversed on other grounds 93 A.2d 781, 24 N.J.Super. 171—Adler v. Department of Parks & Public Property, Town of Irvington, 89 A.2d 704, 20 N.J.Super. 240—Gerkin v. Village of Ridgewood, 86 A.2d 275, 17 N.J.Super. 472—

Struyk v. Samuel Braen's Sons, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294—Shipman v. Town of Montclair, 84 A.2d 652, 16 N.J.Super. 365—State v. Casper, 68 A.2d 545, 5 N.J.Super. 150.

Rupprecht v. Draney, 61 A.2d 220, 137 N.J.Law 564—Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21—Lane v. Bigelow, 50 A.2d 638, 135 N.J.Law 195—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J.Law 95—Burmores Co. v. Smith, 12 A.2d 353, 124 N.J.Law 541—Home Fuel Oil Co. v. Borough of Glen Rock, 192 A. 516, 118 N.J.Law 340.

Pa.—Molnar v. George B. Henne & Co., 105 A.2d 325, 377 Pa. 571.

Policy of law with respect to nonconforming uses is to subordinate individual interests of nonconforming user to interests which the community has in preserving its zoning plan.

N.J.—Heagen v. Borough of Allendale, 127 A.2d 181, 42 N.J.Super. 472.

3. Cal.—Livingston Rock & Gravel Co. v. Los Angeles County, 272 P.2d 4, 43 C.2d 121.

Conn.—Beerwort v. Zoning Bd. of Appeals of Town of Coventry, 137 A.2d 756, 144 Conn. 731—Salerni v. Scheuy, 102 A.2d 528, 140 Conn. 566—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449.

Md.—Schiff v. Board of Zoning Appeals of Baltimore County, 114 A.2d 644, 207 Md. 365—Colati v. Jirout, 47 A.2d 613, 186 Md. 652.

Mich.—South Central Imp. Ass'n v. City of St. Clair Shores, 82 N.W.2d 453, 348 Mich. 153—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702—Cole v. City of Battle Creek, 298 N.W. 466, 298 Mich. 98.

N.J.—Barbarisi v. Board of Adjustment, 103 A.2d 164, 30 N.J.Super. 11—Borough of Rockleigh, Bergen

County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154.

N.Y.—Franmor Realty Corp. v. LeBoeuf, 104 N.Y.S.2d 247, 201 Misc.2d, affirmed 109 N.Y.S.2d 525, 279 App.Div. 795, reargument and appeal denied 110 N.Y.S.2d 910, 279 App.Div. 874.

Nonconforming uses are thorn in side of proper zoning and should not be perpetuated any longer than necessary.

Pa.—Beck v. Zoning Bd. of Adjustment, 69 Pa.Dist. & Co. 438.

Fundamental principle of zoning is that the aggregate extent of nonconforming use is to be reduced as rapidly as destruction of the property or discontinuance of nonconforming uses occurs.

Conn.—Farr v. Zoning Bd. of Appeals of Town of Manchester, 95 A.2d 792, 139 Conn. 577.

4. Cal.—Orange County v. Goldring, 263 P.2d 321, 121 C.A.2d 442.

Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

5. N.Y.—Crotty v. Poersch, 129 N.Y.S.2d 793.

6. Cal.—City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442.

Md.—Dorman v. Mayor and City Council of Baltimore, 51 A.2d 658, 187 Md. 678.

Right not perpetual

A nonconforming use is a legally protected interest and one not readily abrogated; however, rights arising from a nonconforming use are not perpetual and may be lost.

N.Y.—Larson v. Howland, 124 N.Y.S.2d 754.

7. Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

N.H.—Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 95 N.H. 244.

8. N.H.—Edgewood Civic Club v. Blaisdell, supra.

9. Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358.

An express or implied provision excepting existing nonconforming uses from the operation of a zoning regulation is directed to the use of the land and buildings at the time of the adoption of the ordinance and not to the persons occupying the land and buildings at that time.¹⁰ The right to continue a nonconforming use is not limited to the person who owned the property at the time the zoning ordinance or regulation was adopted¹¹ and such right passes to subsequent purchasers of the property.¹² Likewise, lessees have the right to use the premises for a nonconforming use to the extent of the prior use of the lessor.¹³

§ 184. What Constitutes Existing Use

The right of a landowner to continue a nonconforming use of property applies only to a nonconforming use which existed at the time of promulgation of the zoning ordinance or regulation prohibiting such uses.

The rule permitting a landowner to continue a

nonconforming use of property in a certain area applies only to a lawful nonconforming use which existed at the time of promulgation of the zoning ordinance or regulation.¹⁴ Normally the critical date is that on which the regulation prohibiting the use becomes effective rather than the date of its passage,¹⁵ and a warehouse erected after the passage of, but before the effective date of, an ordinance forbidding such use is protected as a nonconforming use.¹⁶ However, such a result may be avoided by a provision in the ordinance defining a nonconforming use as one in existence at the time of the initial passage of the ordinance.¹⁷

The phrase "existing use" means a utilization of premises so that they may be known in the neighborhood as being employed for a given purpose,¹⁸ and ordinarily an existing use for business combines two factors: (1) Construction or adaptability of a building or room for the purpose. (2) Employment

10. Ill.—*Village of Skokie v. Almendinger*, 126 N.E.2d 421, 5 Ill. App.2d 532.

Mich.—*Civic Ass'n of Dearborn Tp., Dist. No. 3, v. Horowitz*, 28 N.W.2d 97, 318 Mich. 333.

11. N.Y.—*Flanagan v. Zoning Bd. of Appeals of Village of Bayville*, 149 N.Y.S.2d 666, 2 Misc.2d 922, affirmed 151 N.Y.S.2d 618, 1 A.D.2d 979.

12. Ill.—*Schneider v. Board of Appeals of City of Ottawa*, 84 N.E.2d 428, 402 Ill. 536.

Village of Skokie v. Almendinger, 126 N.E.2d 421, 5 Ill.App.2d 532.

Division of plot and sale to several purchasers

Proposed division by single owner of single lot into three separate lots for proposed sale to three different persons would be contrary to zoning ordinances of city, and beyond protection of previously nonconforming use existing when ordinance was enacted, and board properly refused to allow landowner a variance to enable him to make such change of use.

Mass.—*Howland v. Acting Superintendent of Bldgs. and Inspector of Bldgs. of Cambridge*, 102 N.E.2d 423, 328 Mass. 155.

13. Ill.—*Dube v. Allman*, 77 N.E.2d 855, 333 Ill.App. 538.

14. Cal.—*City of Los Angeles v. Gage*, 274 P.2d 34, 127 C.A.2d 442—*City of San Mateo v. Hardy*, 149 P.2d 307, 64 C.A.2d 794.

Conn.—*Poneleit v. Dudas*, 106 A.2d 479, 141 Conn. 413—*Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel*, 86 A.2d 74, 138 Conn. 434.

Ill.—*People ex rel. Delgado v. Morris*, 79 N.E.2d 889, 334 Ill.App. 557.

Md.—*Chayt v. Board of Zoning Ap-*

peals of Baltimore City, 9 A.2d 747, 177 Md. 426.

Mass.—*Town of Billerica v. Quinn*, 71 N.E.2d 235, 320 Mass. 687.

Mo.—*State ex rel. Beacon Court, Inc. v. Wing, App.*, 309 S.W.2d 663.

N.J.—*Scavone v. Mayor and Council of Borough of Totowa*, 140 A.2d 238, 49 N.J.Super. 423—*Martin v. Castone*, 110 A.2d 54, 33 N.J.Super. 267—*Baris Lumber Co. v. Town of Secaucus in Hudson County*, 90 A.2d 130, 20 N.J.Super. 586—*Crompton & Co. v. Borough of Sea Girt*, 63 A.2d 834, 1 N.J.Super. 607.

Burmore Co. v. Smith, 12 A.2d 353, 124 N.J.Law 541.

N.Y.—*Rapasadi v. Phillips*, 156 N.Y.S.2d 746, 2 A.D.2d 451.

Ohio.—*Reilly v. Conti*, 112 N.E.2d 558, 93 Ohio App. 188, appeal dismissed 108 N.E.2d 281, 158 Ohio St. 232.

Pa.—*Triolo v. Zoning Bd. of Adjustment*, 59 Pa.Dist. & Co. 211—*Giunta v. McLaughlin*, 30 Pa.Dist. & Co. 644.

Cheswick Borough v. Bechman, Com.Pl., 93 Pittsb.Leg.J. 321, affirmed 42 A.2d 60, 352 Pa. 79.

Tex.—*Corpus Juris Secundum cited in Caruthers v. Board of Adjustment of the City of Bunker Hill Village*, Civ.App., 290 S.W.2d 840, 347—*Town of Highland Park v. Marshall*, Civ.App., 235 S.W.2d 658, error refused no reversible error.

What preceded zoning ordinance permitting existing uses was immaterial as regards maintenance of livery stable, except to show owner's intention and use of property.

Pa.—*Appeal of Haller Baking Co.*, 145 A. 77, 295 Pa. 257.

Business property

Use of building for business pur-

poses when zoning ordinance was adopted fixes its status as business property, as well as its permissible floor space therefor.

La.—*State ex rel. Hochfelder v. City of New Orleans*, 132 So. 786, 171 La. 1053.

Zoning map

Fact that property was designated on zoning map of city, which was adopted as part of zoning ordinance, as occupied by a conforming use, when it was in fact occupied by a lawful nonconforming use, did not deprive property of its right to the nonconforming use.

Ill.—*Schneider v. Board of Appeals of City of Ottawa*, 84 N.E.2d 428, 402 Ill. 536.

15. N.C.—*Town of Clinton v. Ross*, 40 S.E.2d 593, 226 N.C. 682.

16. N.C.—*Town of Clinton v. Ross*, 40 S.E.2d 593, 226 N.C. 682.

17. Md.—*Laque v. State*, 113 A.2d 893, 207 Md. 242, certiorari denied 76 S.Ct. 105, 350 U.S. 863, 100 L.Ed. 765.

18. Ariz.—*Kubby v. Hammond*, 198 P.2d 134, 68 Ariz. 17.

Conn.—*De Felice v. Zoning Board of Appeals of Town of East Haven*, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

Md.—*Chayt v. Board of Zoning Appeals of Baltimore City*, 9 A.2d 747, 177 Md. 426—*Landay v. MacWilliams*, 196 A. 293, 173 Md. 460, 114 A.L.R. 984.

Pa.—*Appeal of Haller Baking Co.*, 145 A. 77, 295 Pa. 257.

Collingdale Borough v. Moyer, Com.Pl., 32 Del.C. 305—*Feagley v. Coho*, Com.Pl., 53 Lanc.L.Rev. 29—*Appeal of Thomas*, Com.Pl., 66 York Leg.Rec. 129.

of the building or room or land within the purpose.¹⁹ So, the use for which premises were designed, arranged, or intended when the zoning ordinance became operative is an element in determining the nature of the existing use.²⁰ In this context, it has been held that "use" means what is customarily or habitually done or the subject of a common practice.²¹ Neither the extent, quantity, nor quality of the use which may be continued is prescribed by some provisions, but it is only required that the use must have existed,²² and in this connection it has been held that no particular number of acts or business transactions is necessary to constitute an "existing" use.²³ There need only be a use before the date of the ordinance, an intent to continue, and an effort made to effectuate the purpose.²⁴ Actual operation or visible use on the effective date of the ordinance is not necessary in the case of a nonconforming use which is seasonal in nature.²⁵

In particular cases, it has been held that a nonconforming use was established,²⁶ as that the premises were being used as a multi-family dwelling at the effective date of the ordinance,²⁷ that a garage

use was established,²⁸ that a trailer camp was in operation,²⁹ that the premises were used for funeral purposes,³⁰ or that a building had been operated without a rear yard.³¹

In other cases, it has been held that a nonconforming use was not established³² in the case of a claimed use as a junk yard,³³ as a multi-family dwelling,³⁴ as a rooming house,³⁵ as a quarry,³⁶ as a dog kennel,³⁷ as a place for the dismantling of used automobiles,³⁸ or as a place for the excavation of clay.³⁹

Where premises were used for a single-family dwelling before the adoption of the ordinance, it may not be urged that a nonconforming use for multiple dwelling purposes existed because the premises contained a kitchen and bathroom on each floor.⁴⁰ The fact that a fifteen-year-old schoolboy employed his spare time in making keys or by doing occasional repair work on batteries, radios, or automobiles did not give the premises on which the work was done, which were subsequently zoned as a residential zone, a "business status" within the

19. *Ariz.*—Kubby v. Hammond, 198 P. 2d 134, 68 *Ariz.* 17.

Conn.—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 *Conn.* 156, 147 A.L.R. 161.

Md.—Dorman v. Mayor and City Council of Baltimore, 51 A.2d 658, 187 *Md.* 678—Chayt v. Board of Zoning Appeals of Baltimore City, 9 A.2d 747, 177 *Md.* 426—Landay v. MacWilliams, 196 A. 293, 173 *Md.* 460, 114 A.L.R. 984.

Pa.—Whitpain Tp. v. Bodine, 94 A.2d 737, 372 *Pa.* 509—Borough of Cheswick v. Bechman, 42 A.2d 60, 352 *Pa.* 79—Appeal of Haller Baking Co., 145 A. 77, 295 *Pa.* 257.

20. *U.S.*—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.

21. *Ky.*—Durning v. Summerfield, 235 S.W.2d 761, 314 *Ky.* 318.

22. *Conn.*—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 *Conn.* 156, 147 A.L.R. 161.

N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 *N.J.* 94.

Pa.—Borough of Cheswick v. Bechman, 42 A.2d 60, 352 *Pa.* 79—Appeal of Haller Baking Co., 145 A. 77, 295 *Pa.* 257.

Appeal of Becker, Com.Pl., 68 *York Leg.Rec.* 174.

23. *Conn.*—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 *Conn.* 156, 147 A.L.R. 161.

Pa.—Appeal of Haller Baking Co., 145 A. 77, 295 *Pa.* 257.

24. *Pa.*—Appeal of Haller Baking Co., *supra*.

25. *Mich.*—Civic Ass'n of Dearborn Tp., Dist. No. 3, v. Horowitz, 28 N.W.2d 97, 318 *Mich.* 333—Adams v. Kalamazoo Ice & Fuel Co., 222 N.W. 86, 245 *Mich.* 261.

26. *Ariz.*—Kubby v. Hammond, 198 P.2d 134, 68 *Ariz.* 17.

Md.—Green v. Garrett, 63 A.2d 326, 192 *Md.* 52—Roach v. Board of Zoning Appeals, 199 A. 812, 175 *Md.* 1.

N.Y.—Bowen v. Hider, 37 N.Y.S.2d 76.

27. *Ala.*—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 *Ala.* 504.

28. *Md.*—Higgins v. City of Baltimore, 110 A.2d 503, 206 *Md.* 89—Nyburg v. Solmsen, 106 A.2d 483, 205 *Md.* 150.

29. *Ill.*—Village of Skokie v. Almen-dinger, 126 N.E.2d 421, 5 *Ill.App.2d* 522.

30. *Mo.*—Cunningham v. Leimkueh-ler, App., 276 S.W.2d 633.

31. *N.J.*—Spickofsky v. Board of Adjustment of Borough of East Rutherford, 60 A.2d 888, 137 *N.J.* Law 494.

32. *Ark.*—Branch v. Powers, 197 S. W.2d 928, 210 *Ark.* 336.

N.Y.—Coopersmith v. Murdock, 30 N. Y.S.2d 317, 262 *App.Div.* 1032, affirmed 42 N.E.2d 605, 288 *N.Y.* 598. People v. Hain, 65 N.Y.S.2d 318, 137 *Misc.* 6.

Ohio.—Davis v. Miller, 126 N.E.2d 49, 163 *Ohio St.* 91.

Pa.—Appeal of Kiddy, 143 A. 909, 294 *Pa.* 209.

Use for business purpose not shown
Ga.—Snow v. Johnston, 28 S.E.2d 270, 197 *Ga.* 146.

33. *Md.*—Boulevard Scrap Co. v. City of Baltimore, 130 A.2d 743, 213 *Md.* 6.

34. *Md.*—Aaron v. City of Balti-more, 114 A.2d 639, 207 *Md.* 401.

35. *Mo.*—Bartholomew v. Board of Zoning Adjustment, App., 307 S.W. 2d 730.

36. *Mo.*—State ex rel. Beacon Court Inc. v. Wind, App., 309 S.W.2d 663.

Adjacent lot

Hauling of equipment over a lot adjacent to a quarry and the cleaning up of loose rock on such lot do not establish that such adjacent lot was used as a quarry.

N.J.—Struyk v. Samuel Braen's Sons, 85 A.2d 279, 17 *N.J.Super.* 1, affirmed 88 A.2d 201, 9 *N.J.* 294.

37. *N.Y.*—Little Home For Friend-less Animals v. Koehler, 76 N.Y.S. 2d 621, 273 *App.Div.* 859, appeal denied 78 N.Y.S.2d 370, 273 *App.* Div. 910.

38. *Md.*—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 *Md.* 623.

39. *N.Y.*—Post Brick Co. v. Thomp-son, 68 N.Y.S.2d 159.

40. *N.H.*—Sullivan v. Anglo-Ameri-can Inv. Trust, 193 A. 225, 89 *N.H.* 112.

meaning of a zoning ordinance providing that a use not conforming to a use allowed under the ordinance may be continued if so used on the date the ordinance became effective.⁴¹

Gratuitous use. The use of an accessory building as a second single-family dwelling on a lot subsequently restricted to one single-family residence establishes a nonconforming use without regard to whether such use was gratuitous or for a valid consideration.⁴²

§ 185. — Contemplated or Intended Use

A use which was merely contemplated or intended but not realized at the effective date of the zoning regulation prohibiting such use is not protected as a nonconforming use.

Provisions preserving the right to continue an existing use do not apply in the case of a use of property which was merely contemplated for the future but unrealized at the effective date of the regulation.⁴³ The use must be actual,⁴⁴ as distinguished from the acquisition, setting apart, and dedication of property in contemplation of a future use.⁴⁵ The mere fact that property is purchased for

the purpose of devoting it to a use subsequently forbidden by the zoning regulations does not give the owner the right subsequently to devote the property to that use.⁴⁶

Mere intentions do not establish a nonconforming use,⁴⁷ and it is not enough that the plans for the proposed use have been put on paper.⁴⁸ Accordingly, the mere fact that ground has been purchased and plans made for the erection of a building before the adoption of a zoning ordinance prohibiting the kind of building contemplated does not exempt the property from the operation of the zoning ordinance.⁴⁹ Likewise, the change of the zoning ordinance to require residential lots to have a frontage of at least a hundred feet whereas only a fifty-foot frontage was formerly required does not entitle one having a lot with less than a hundred-foot frontage on which he intended to build to go ahead with his plans on the theory of a nonconforming use.⁵⁰

A new ordinance operates retroactively to require a denial of an application for or to nullify a permit already issued, provided the holder of the latter has not already engaged in construction or incurred

41. N.Y.—*People v. Hein*, 65 N.Y.S. 2d 318, 187 Misc. 6.

42. Tex.—*Town of Highland Park v. Marshall*, Civ.App., 235 S.W.2d 658, error refused no reversible error.

43. Cal.—*San Diego County v. McClurken*, 234 P.2d 972, 37 C.2d 683. Conn.—*Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel*, 86 A.2d 74, 138 Conn. 434.—*De Felice v. Zoning Board of Appeals of Town of East Haven*, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

Md.—*Board of Com'rs of Anne Arundel County v. Snyder*, 46 A.2d 689, 186 Md. 342.—*Chayt v. Board of Zoning Appeals of Baltimore City*, 9 A.2d 747, 177 Md. 426.

Mo.—*State ex rel. Beacon Court, Inc. v. Wind*, App., 309 S.W.2d 663.

N.J.—*Ardolino v. Board of Adjustment of Borough of Florham Park*, Morris County, 125 A.2d 543, 41 N.J.Super. 583.—*Martin v. Cestone*, 110 A.2d 54, 33 N.J.Super. 267.

N.Y.—*Larson v. Howland*, 124 N.Y.S. 2d 754.

Ohio.—*Ohio State Students Trailer Park Co-op. v. Franklin County*, Ohio, App., 123 N.E.2d 542.

Pa.—*Whitpain Tp. v. Bodine*, 94 A.2d 737, 372 Pa. 509.—*City of Harrisburg v. Pass*, 93 A.2d 447, 372 Pa. 318.

Trailer park

Although student cooperative contemplated using its land as a trailer park prior to time of zoning resolution which would not allow such use, cooperative was not entitle to a

nonconforming use permit to use land as trailer park.

Ohio.—*Ohio State Students Trailer Park Co-op. v. Franklin County*, Ohio, App., 123 N.E.2d 542.

44. Conn.—*Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel*, 86 A.2d 74, 138 Conn. 434.

Tex.—*Caruthers v. Board of Adjustment of the City of Bunker Hill Village*, Civ.App., 290 S.W.2d 340.

Land, which was vacant at time of adoption of new zoning ordinance, could not qualify for any exemption from ordinance provisions on ground of nonconforming use.

N.J.—*Ardolino v. Board of Adjustment of Borough of Florham Park*, 130 A.2d 847, 24 N.J. 94.

45. Tex.—*Caruthers v. Board of Adjustment of the City of Bunker Hill Village*, Civ.App., 290 S.W.2d 340.

46. Conn.—*Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel*, 86 A.2d 74, 138 Conn. 434.

Ind.—*Lutz v. New Albany City Plan Commission*, 101 N.E.2d 187, 230 Ind. 74.

Pa.—*Panos v. Board of Adjustment of Millcreek Tp., Erie County, Pa.*, 72 Pa. Dist. & Co. 373, 33 Erie Co. 242.

47. N.J.—*Ardolino v. Board of Adjustment of Borough of Florham Park*, Morris County, 125 A.2d 543, 41 N.J.Super. 583.—*Martin v. Cestone*, 110 A.2d 54, 33 N.J.Super.

267.—*Baris Lumber Co. v. Town of Secaucus in Hudson County*, 90 A. 2d 130, 20 N.J.Super. 586.

Pa.—*Whitpain Tp. v. Bodine*, 94 A.2d 737, 372 Pa. 509.

Acts rather than intentions constitute a "non-conforming use" of land, as that term is used in a city's zoning legislation.

N.Y.—*Marshak v. City of Long Beach*, 81 N.Y.S.2d 74, 195 Misc. 125, affirmed 105 N.Y.S.2d 983, 278 App.Div. 966.

Stables for racetrack

Intention to use land, purchased prior to enactment of ordinance zoning area as a residential area, for erection of stables to be used in connection with existing enclosed racetrack was not an existing use within provision of ordinance permitting continuance of nonconforming existing use, notwithstanding holding of land for future expansion might be natural incident of racetrack business.

Md.—*Chayt v. Board of Zoning Appeals of Baltimore City*, 9 A.2d 747, 177 Md. 426.

48. Conn.—*Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel*, 86 A.2d 74, 138 Conn. 434.

49. Ind.—*Lutz v. New Albany City Plan Commission*, 101 N.E.2d 187, 230 Ind. 74.

50. N.J.—*Ardolino v. Board of Adjustment of Borough of Florham Park*, 130 A.2d 847, 24 N.J. 94.

obligations directly in relation thereto, when such application or permit seeks or grants a use no longer permitted under the new ordinance.⁵¹ A zoning ordinance prohibiting the operation of gas stations in certain areas passed pending certiorari to review the action of the municipal authorities in denying a permit to erect and operate gas station is applicable to the case.⁵²

Cemetery. Where a cemetery corporation purchased realty under a permissive legislative enactment for the expressed and exclusive use as a cemetery or place for burial of the dead, and held the realty for that purpose and no other, it was not necessary that actual burials be made in order to evidence a nonconforming use by the corporation.⁵³ Where, however, land had been purchased by individuals and deeded to an association to be used as a cemetery and there had been no sales of burial lots and no interments, sufficient work had not been done to put the property into actual utilization as a cemetery so as to authorize its continuance as a nonconforming use, since the association was not irrevocably committed by an accepted dedication of the property to a cemetery use.⁵⁴

Clay beds. The owner of land containing clay beds, which had been bought for future use but had never been used, was not entitled to begin excavation operations after the enactment of a prospec-

tive zoning ordinance restricting the area to residential purposes, on the theory that the owner was simply continuing a use already in effect.⁵⁵ The mere making of borings to determine the presence of clay prior to the adoption of the ordinance did not establish a nonconforming use of the property for the excavation of clay.⁵⁶

§ 186. — Building or Use in Course of Construction

A structure or use in the course of construction at the time of the enactment of a zoning regulation prohibiting such use may be regarded as a nonconforming use.

A structure in the course of construction at the time of the enactment of the ordinance is protected as a nonconforming use,⁵⁷ but mere preliminary work which is not of a substantial nature does not constitute a nonconforming use.⁵⁸ It has been held that the fact that a building was erected before the ordinance took effect would not establish a use existing before the ordinance took effect, and that the protection to which the building was entitled would not extend to a use not then in existence,⁵⁹ but it has also been held that if a person commences to erect on his realty a building for the purpose of conducting light manufacturing and expends money in erection of such a building, or in partially erecting such a building, subsequent zoning regulations cannot prevent him from completing the building and

51. Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 Md. 623.

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

52. N.J.—Krugman v. Municipal Council of City of Clifton, 53 A.2d 803, 136 N.J.Law 32.

53. N.Y.—Holy Sepulchre Cemetery v. Town of Greece, 79 N.Y.S. 683, 191 Misc. 241, affirmed 79 N.Y.S.2d 863, 273 App.Div. 942.

54. Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

55. Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 430, 302 U.S. 781, 82 L.Ed. 603.

56. N.Y.—Post Brick Co. v. Thompson, 68 N.Y.S.2d 159.

57. Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683.
Ind.—Lutz v. New Albany City Plan

Commission, 101 N.E.2d 187, 230 Ind. 74.

Md.—Amereihn v. Kotras, 71 A.2d 865, 194 Md. 591.

Hotel

Ordinance providing that no license for the sale of liquor should issue in the area was inapplicable to a hotel in process of construction at time the ordinance was enacted.

Pa.—Appeal of Sawdey, 85 A.2d 28, 369 Pa. 19.

58. Mere laying of pipes and sewers, especially adapted for use by row houses, many years prior to adoption of zoning ordinance prohibiting row houses, did not bring plan for construction of row houses so near completion that lots could be used only for erection of row houses, so as to constitute a nonconforming use in existence prior to ordinance.

Pa.—Appeal of Dunlap, 87 A.2d 299, 370 Pa. 31.

Flatting

Zoning ordinance establishing minimum area for residential lots and permitting nonconforming uses existing at time of the enactment of the ordinance did not permit an exception on the basis of substantial preliminary work including the platting of the area for residential purposes

in the absence of actual use of the property for such purposes.

Tex.—Caruthers v. Board of Adjustment of the City of Bunker Hill Village, Civ.App., 290 S.W.2d 340.

Tests for strip-mining

Where a coal company had leased land for strip-mining coal operations, but had not removed coal, although it had made tests to determine the advisability of beginning operations, which tests had not been completed, there was not an existing nonconforming use, and the ordinance effectively prohibited such operations.

Ohio.—Smith v. Juillerat, 119 N.E.2d 611, 161 Ohio St. 424.

59. Mass.—City of Everett v. Capitol Motor Transp. Co., 114 N.E.2d 547, 330 Mass. 417.

Freight terminal

Even if building being used as a freight terminal, allegedly in violation of zoning ordinance, was erected before effective date of such ordinance and remained substantially unchanged thereafter, such fact would not render ordinance inapplicable, in absence of any evidence of actual use of building as freight terminal before ordinance took effect.

Mass.—City of Everett v. Capitol Motor Transp. Co., supra.

conducting light manufacturing therein.⁶⁰ Where a zoning law provides that structures not in conformity therewith, and started within the six months prior to its effective date, must be discontinued unless there has been substantial construction, a purported contract, which is in fact so vague as to be unenforceable, or a contract to do work consistent with the zoning ordinance, will not be considered as "substantial construction."⁶¹

If after a purchase or leasing of lands a permit is obtained to use lands for a use then permissible under the zoning ordinance and either substantial construction is made thereon, or substantial liabilities are incurred relating directly thereto, or both, before the permit is canceled or revoked, the right to such use has become established and vests as a permissive nonconforming use;⁶² but the expenditure of a small amount of money under a permit does not effect a nonconforming use.⁶³

Actual use prevented. A nonconforming use has been held not to exist where the institution of construction was prevented by an injunction obtained by adjoining landowners and in the interim, an ordinance forbidding such use was enacted;⁶⁴ but where actual construction had been started and would have proceeded further at the time of the enactment of the zoning ordinance had construction not been enjoined in an action later determined to be without merit, the view has been taken that a

nonconforming use was established.⁶⁵ One who, when an amendatory ordinance prohibiting the use of premises in a certain area for the purpose of conducting auction sales was adopted, had commenced to use the premises in the area as a place at which to conduct such sales, although prevented from actually conducting sales by unlawful actions of the municipality, is entitled to the benefit of the nonconforming use provision of the amended ordinance.⁶⁶

§ 187. — Prior Abandoned Use

A use which was abandoned or discontinued prior to the enactment of the restrictive ordinance is not protected as a nonconforming use.

A use which was abandoned or discontinued prior to the enactment of the restrictive ordinance is not protected as a nonconforming use.⁶⁷ Accordingly, a use at some remote period prior to the enactment of the ordinance does not establish a nonconforming use,⁶⁸ and where a commercial use of the property was discontinued by the owner prior to the zoning of the property as residential, the subsequent use of the property must conform to the ordinance.⁶⁹

The use for which property is adapted need not have been in actual operation at the time of adoption of the ordinance if the property was used for such purpose before such time and the attending circumstances connected with the property bear out the conclusion that the owner intended to resume

60. Md.—*Amereihn v. Kotras*, 71 A. 2d 865, 194 Md. 591.

61. Pa.—*Panos v. Board of Adjustment of Millcreek Tp., Erie County, Pa.*, 72 Pa. Dist. & Co. 373, 33 Erie Co. 242.

62. Neb.—*City of Omaha v. Glissmann*, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1870, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

Ohio.—*Meuser v. Smith*, Com.Pl., 143 N.E.2d 757, affirmed, App., 141 N.E. 2d 209.

Book crushing plant

Action of county commissioners in classifying as "agricultural" land theretofore zoned as "unclassified" did not deprive city of the right theretofore acquired under a permit issued by the county planning commission to occupy such land for a rock crushing plant, even though zoning ordinance prohibited the operation of a rock quarry in an agricultural zone.

Wash.—*Turner v. City of Spokane*, 285 P.2d 300, 39 Wash.2d 332.

63. Zoning regulations under consideration

Where landowners obtained permit

for construction of addition to machine shop at time when proposed zoning regulations were under consideration, and owners had knowledge of the fact, and after adoption of regulations, owners did some grading, dug footing trenches, drilled a well, and made certain electrical installations but did not commence building, small amount spent on property did not affect it with a nonconforming use.

Md.—*Francis v. MacGill*, 75 A.2d 91, 196 Md. 77.

64. Ohio.—*Ohio State Student Trailer Park Co-op. v. Franklin County*, Com.Pl., 123 N.E.2d 286, affirmed, App., 123 N.E.2d 542.

65. Trailer park

Ohio.—*Meuser v. Smith*, Com.Pl., 143 N.E.2d 757, affirmed, App., 141 N.E. 2d 209.

66. Fla.—*Daoud v. City of Miami Beach*, 7 So.2d 585, 150 Fla. 395.

67. Md.—*Dorman v. Mayor and City Council of Baltimore*, 51 A.2d 658, 187 Md. 678.

Mass.—*Town of Wayland v. Lee*, 91 N.E.2d 835, 325 Mass. 637.

Pa.—*Triolo v. Zoning Bd. of Adjustment*, 59 Pa. Dist. & Co. 211.

Abandonment or discontinuance of nonconforming use after enactment of restrictive zoning ordinance see *infra* § 198.

Brewery

Premises originally designed and used for brewery, having been used for manufacturing ice and, hence, having acquired manufacturing status when zoning ordinance was adopted, could be used to manufacture other products, but could not be used as brewery prohibited everywhere within village.

U.S.—*Knickerbocker Ice Co. v. Sprague*, D.C.N.Y., 4 F.Supp. 499.

Garage put to a conforming use for a number of years before the enactment of the zoning ordinance and continued in such use for a number of years thereafter could not be returned to an earlier nonconforming use.

Ark.—*Branch v. Powers*, 197 S.W.2d 928, 210 Ark. 836.

68. Mo.—*State ex rel. Beacon Court, Inc. v. Wind*, App., 309 S.W.2d 663.

69. Mich.—*Penning v. Owens*, 65 N. W.2d 831, 340 Mich. 355.

the use of the property for that purpose.⁷⁰ Thus, where property is built or adapted for a particular use, the question of existing use is determined by the ascertainment as near as possible of the intention of the owner, in connection with the fact of a discontinuance or apparent abandonment of use, and is not to be determined by actual use on the date of the adoption of the zoning ordinance.⁷¹ Likewise, where a mining operation was suspended because of the plant's obsolescence, but it did not appear that the owner intended to abandon mining, he was entitled to resume active mining as a nonconforming use after the enactment of an ordinance prohibiting such use.⁷² Where, however, the use of land as a piggery was abandoned prior to the enactment of an ordinance prohibiting such use, it has been held that there was no nonconforming use although the owner may have intended again to use the property for such purpose.⁷³

The owners of buildings destroyed by a hurricane have been protected on the theory of nonconforming use from the restrictions of a subsequent zoning ordinance in so far as they may wish to rebuild or replace buildings or improvements of identical size and for the identical use.⁷⁴

§ 188. — Unlawful Use

A use which was unlawful at the time the ordinance prohibiting such use was enacted is not ordinarily regarded as a nonconforming use.

A landowner acquires no advantage from a nonconforming use previously enjoyed where it appears

that such use was surreptitiously and fraudulently effected,⁷⁵ or was unlawful at the time the zoning regulation took effect.⁷⁶ A use may be continued as a nonconforming use despite a subsequent zoning regulation forbidding such use where the use conformed to the zoning regulations in effect prior to such enactment,⁷⁷ but not where such use was in violation of the prior zoning regulations.⁷⁸

Where a garage business was conducted in violation of a zoning ordinance which classified the area as residential, a subsequent revision of the ordinance which does not change the classification of the area does not render the prior operation of the garage lawful so as to permit its continuance as a nonconforming use.⁷⁹ A use of realty, violative of prior zoning ordinance, was not rendered valid by enactment of subsequent ordinance, containing a repealer of the prior ordinance and exempting pre-existing nonconforming uses, defined as any use not complying with the subsequent ordinance and which was not in violation of any prior ordinance in effect at time of the enactment of the subsequent ordinance, since the purpose of the subsequent ordinance relating to conforming uses was to continue use restrictions embodied in the prior ordinance unless expressly excluded from, or modified by, the subsequent ordinance.⁸⁰

Where the use was unlawful and illegal because of the failure to secure a permit for use on Sundays and holidays, a nonconforming use was not established as against a subsequent ordinance prohibiting that use of the property.⁸¹ However, it has

70. Conn.—*De Felice v. Zoning Board of Appeals of Town of East Haven*, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

Pa.—*Appeal of Haller Baking Co.*, 145 A. 77, 295 Pa. 257.

Giunta v. McLaughlin, 30 Pa. Dist. & Co. 644.

71. Md.—*Chayt v. Board of Zoning Appeals of Baltimore City*, 9 A.2d 747, 177 Md. 426.

Pa.—*Appeal of Haller Baking Co.*, 145 A. 77, 295 Pa. 257.

Cheswick Borough v. Bechman, Com.Pl., 93 Pittsb.Leg.J. 321, affirmed 42 A.2d 60, 352 Pa. 79.

72. Ohio.—*Cleveland Builders Supply Co. v. City of Garfield Heights*, 136 N.E.2d 105, 102 Ohio App. 69.

73. Pa.—*Whitpain Tp. v. Bodine*, 94 A.2d 737, 372 Pa. 509.

74. R.I.—*Bates v. Stiteley*, 125 A.2d 108.

75. N.J.—*Levy v. Ackerman*, 42 A.2d 372, 133 N.J.Law 69.

76. N.Y.—*Incorporated Village of Great Neck v. Green*, 166 N.Y.S.2d 219, 8 Misc.2d 356, affirmed 170 N.

Y.S.2d 297, 5 A.D.2d 779—*Heimerle v. Village of Bronxville*, 5 N.Y.S.2d 1002, 168 Misc. 788, affirmed 11 N.Y.S.2d 387, 256 App.Div. 993.

Use in violation of ordinance when begun cannot rise to status of nonconforming use.

N.J.—*Gross v. Allan*, 117 A.2d 275, 37 N.J.Super. 262.

77. N.Y.—*Rapasadi v. Phillips*, 156 N.Y.S.2d 746, 2 A.D.2d 451.

N.C.—*Application of O'Neal*, 92 S.E. 2d 189, 243 N.C. 714.

Reenactment of the defective zoning ordinance does not make defendant chargeable thereunder for the reason that his operations prior to reenactment became a nonconforming use.

Pa.—*Commonwealth v. Booth*, Quar. Sess., 63 Montg.Co. 133.

Motor truck freight terminal

Ill.—*City of Chicago v. Krema Trucking Co.*, 86 N.E.2d 431, 337 Ill.App. 662.

78. N.J.—*Baris Lumber Co. v. Town of Secaucus in Hudson County*, 90 A.2d 130, 20 N.J.Super. 586.

N.Y.—*Incorporated Village of Great Neck v. Green*, 166 N.Y.S.2d 219, 8 Misc.2d 356, affirmed 170 N.Y.S.2d 297, 5 A.D.2d 779.

Laundry

R.I.—*Paolella v. Zoning Bd. of Review of City of Providence*, 122 A. 2d 157.

Commercial parking

Use of land for commercial parking may not be upheld as a nonconforming use despite an ordinance zoning the area as residential where such use was illegal under the prior zoning ordinance.

Pa.—*Commonwealth v. Cieslak*, 115 A.2d 418, 179 Pa.Super. 441.

79. N.Y.—*Rapasadi v. Phillips*, 156 N.Y.S.2d 746, 2 A.D.2d 451.

80. N.J.—*Berry v. Recorder's Court of Town of West Orange*, 11 A.2d 743, 124 N.J.Law 385, affirmed *Berry v. Recorder's Office of Town of West Orange*, 15 A.2d 758, 125 N.J.Law 273.

81. Drag racing

Ga.—*Troutman v. Aiken*, 96 S.E.2d 585, 213 Ga. 55.

been held that a parking lot was not deprived of its status as a nonconforming use by reason of the fact that the user had failed to renew the parking lot license at the time the ordinance forbidding such use was enacted.⁸² Persons building a dam and creating a lake without complying with the conservation law until after the effective date of a town zoning ordinance excluding commercial uses from district in which work was done may not assert that a small proportion of the work done before such date removed the construction from the effect of the ordinance.⁸³ Where an automobile wrecking business was conducted in violation of both licensing and fencing ordinances, but after such business was prohibited by a new zoning ordinance, the operators complied with the fencing ordinance and county officials with knowledge of the prior violations issued a license, the county may be estopped to complain of prior violations and may not refuse to issue a renewal license.⁸⁴

A use which violated a restrictive covenant is not

entitled to protection as a nonconforming use.⁸⁵

§ 189. Continuance or Change of Use

The rule as to the preservation of nonconforming uses protects the right of a landowner to continue only the same use of property as existed before the date of the zoning regulation, and he may not change to a different kind of nonconforming use except when such a change is permitted by the terms of the zoning regulation.

Generally, the rule as to the preservation of nonconforming uses protects the right of a landowner to continue only the same use of the property as existed before the date of the zoning regulation,⁸⁶ rather than another kind of nonconforming use⁸⁷ differing in quality or character,⁸⁸ unless the ordinance otherwise provides.⁸⁹

In other words, a lawful nonconforming use of land existing at the time of adoption of a zoning regulation which may be continued is substantially the same use which existed at the time of adoption of the regulation and not some other nonconforming use which the owner might subsequently find

82. N.Y.—Henning v. Goldman, 169 N.Y.S.2d 817, 8 Misc.2d 228.

83. N.Y.—Town of Ramapo v. Bockar, 278 N.Y.S. 452, 151 Misc. 613.

84. Cal.—Woodie v. Byram, 282 P. 2d 920, 132 C.A.2d 651.

85. N.Y.—Larson v. Howland, 108 N.Y.S.2d 231.

86. Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683. Md.—Green v. Garrett, 63 A.2d 326, 192 Md. 52.

Mass.—Building Com'r of Medford v. McGrath, 45 N.E.2d 265, 312 Mass. 461.

N.J.—Heagen v. Borough of Allendale, 127 A.2d 181, 42 N.J.Super. 472—Gross v. Allan, 117 A.2d 275, 37 N.J.Super. 262—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535—State v. Casper, 68 A.2d 545, 5 N.J.Super. 150—Scherbo v. Board of Adjustment of Jersey City, 67 A.2d 472, 4 N.J.Super. 409—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N.J.Super. 607.

Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21.

N.Y.—People v. Perkins, 26 N.E.2d 278, 282 N.Y. 329.

People v. Hein, 65 N.Y.S.2d 318, 187 Misc. 6.

Pa.—Wren v. Westpfahl, Com.Pl., 46 Lack.Jur. 169.

Change of use as abandonment of nonconforming use see *infra* § 200. Increase in amount or intensity of use as change of use see *infra* § 193.

Use of modern instrumentalities as change of use see *infra* § 194.

To be entitled to protection, a nonconforming use must be the same both before and after passage of zoning ordinance.

N.J.—Ranney v. Istituto Pontificio Delle Maestre Filippini, 119 A.2d 142, 20 N.J. 189.

Ardolino v. Board of Adjustment of Borough of Florham Park, Morris County, 125 A.2d 543, 41 N.J. Super. 582.

87. Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683. Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433—Town of Burlington v. Dunn, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

Mo.—Killian v. Brith Sholom Congregation, App., 154 S.W.2d 387.

N.J.—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

Scavone v. Mayor and Council of Borough of Totowa, 140 A.2d 238, 49 N.J.Super. 423—Struyk v. Samuel Braen's Sons, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J. Super. 535—Scherbo v. Board of Adjustment of Jersey City, 67 A.2d 472, 4 N.J.Super. 409.

Simone v. Peters, 53 A.2d 315, 135 N.J.Law 495—Lane v. Bigelow, 50 A.2d 638, 135 N.J.Law 195—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J.Law 95—Home Fuel Oil Co. v. Borough of Glen Rock, 192 A. 516, 118 N.J. Law 340.

N.Y.—Eaton v. Sweeny, 251 N.Y.S. 246, 232 App.Div. 459, reversed on other grounds 177 N.E. 412, 257 N.Y. 176.

Application of Braunsdorf, 111 N.Y.S.2d 507, 202 Misc. 471—People v. Hein, 65 N.Y.S.2d 318, 187 Misc. 6.

Hyams v. Amchir, 57 N.Y.S.2d 77—Bowen v. Hider, 37 N.Y.S.2d 76—People v. Perkins, 8 N.Y.S.2d 868, reversed on other grounds 26 N.E. 2d 278, 282 N.Y. 329.

Pa.—In re Imperial Asphalt Corporation's Zoning Appeal, Com.Pl., 51 Lanc.Rev. 9—Township of Whitmarsh v. Chemical Concentrates Corp., 63 Montg.Co. 258.

Wash.—Corpus Juris cited in State v. MacDuff, 297 P. 733, 735, 161 Wash. 600.

43 C.J. p 359 note 49.

88. Mass.—Town of Marblehead v. Rosenthal, 55 N.E.2d 13, 316 Mass. 124.

Mechanized establishment

The use of premises for operation of a neighborhood tailor shop in which light hand labor played the principal part did not give owner any right to operate a fully mechanized industrial cleaning establishment on theory of an existing use at time of adoption of zoning by-law. Mass.—Town of Marblehead v. Rosenthal, *supra*.

89. Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

Pa.—Appeal of Peirce, Com.Pl., 16 Beaver 244—Appeal of Pierce, Com. Pl., 47 Mun.L.R. 65.

profitable or advantageous,⁹⁰ or one substantially different;⁹¹ and a prohibited use cannot be substituted for a different prohibited use under the guise of continuance of a nonconforming use.⁹² A change to a narrower use within the scope of the prior use is protected as a continuation of the nonconforming use.⁹³

The use at the time of the enactment of the ordinance establishes the nonconforming use which the owner is entitled to continue,⁹⁴ and a mere intention to put the property to a different use at a future time is not material.⁹⁵ The fact that the new use is no more detrimental to the neighborhood than the original nonconforming use is of no consequence;⁹⁶ a different nonconforming use is not allowed even though such new use is less objectionable, less obnoxious, and less noisy than the

original nonconforming use.⁹⁷ The advantages that the owners of nonconforming property acquire by the enactment of a zoning ordinance are not to be subsequently augmented except as permitted by the ordinance.⁹⁸

Whether or not the use has been changed is a question of fact,⁹⁹ and in determining the question whether the nonconforming use was the same before and after the passage of the zoning ordinance, so as to be permissible, each case must stand on its own facts.¹ Where activities merely incidental to the nonconforming use are made the main use, there is a change of use.² The particular use and not the general classification governs the question of whether or not the use has been changed.³

In particular cases, it has been held that the use was not substantially changed.⁴ For example, a

90. Cal.—*People v. Johnson*, 277 P. 2d 45, 129 C.A.2d 1.

Mo.—*In re Botz*, 159 S.W.2d 367, 236 Mo.App. 566.

N.J.—*Burmore Co. v. Smith*, 12 A.2d 353, 124 N.J.Law 541—*Kensington Realty Holding Corporation v. Jersey City*, 191 A. 787, 118 N.J. Law 114, affirmed 196 A. 691, 119 N.J.Law 338.

N.Y.—*People v. Hain*, 65 N.Y.S.2d 318, 187 Misc. 6.

Estoppel

Where municipal zoning ordinance required city officials within six months of adoption of zoning ordinance to issue certificates to owner of premises defining nonconforming uses which owner was permitted to make of the premises, city officials who had not issued such certificate to owner of garage in residential zone were not precluded from asserting that lessees of owner had made a change in the original nonconforming use.

Ky.—*Feldman v. Hesch*, 254 S.W.2d 914.

91. N.J.—*Gross v. Allan*, 117 A.2d 275, 37 N.J.Super. 262.

92. N.Y.—*Bowen v. Hider*, 37 N.Y.S. 2d 76.

Prohibited business

There can be no substitution of a prohibited business for another one. Minn.—*State v. Miller*, 288 N.W. 713, 206 Minn. 345.

N.Y.—*Collins v. Moore*, 211 N.Y.S. 437, 125 Misc. 777.

93. N.Y.—*Rogers v. Association For the Help of Retarded Children*, 123 N.E.2d 806, 308 N.Y. 126.

Where gasoline pumps were located either two feet from street line or immediately adjacent to street line, and subsequently enacted zoning ordinance required ten foot setback and permitted continuance of

existing nonconforming use and reconstruction and alteration of nonconforming buildings and change in nonconforming use subject to certain regulations, pumps could be relocated so as to increase the setback to seven feet without regard to such regulations.

N.Y.—*Kovelman v. Plaut*, 105 N.Y.S. 2d 280, 201 Misc. 473.

94. N.J.—*Ardolino v. Board of Adjustment of Borough of Florham Park, Morris County*, 125 A.2d 543, 41 N.J.Super. 582—*Struyk v. Samuel Braen's Sons*, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294.

95. Conn.—*Lehmaier v. Wadsworth*, 191 A. 539, 122 Conn. 571.

N.Y.—*Marshall v. City of Long Beach*, 81 N.Y.S.2d 74.

Pa.—*Borough of Cheswick v. Bechman*, 42 A.2d 60, 352 Pa. 79.

96. Mass.—*Public Bldg. Com'r of Newton v. Star Market Co.*, 84 N.E. 2d 529, 324 Mass. 75.

N.J.—*Monmouth Lumber Co. v. Ocean Tp.*, 87 A.2d 9, 9 N.J. 64—*Speakman v. Mayor & Council of Borough of North Plainfield*, 84 A. 2d 715, 8 N.J. 250.

97. N.J.—*Lynch v. Borough of Hillsdale*, 54 A.2d 723, 136 N.J. Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

Pa.—*Appeal of Ferraro*, 102 A.2d 186, 174 Pa.Super. 570.

98. Mass.—*Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence*, 86 N.E.2d 906, 324 Mass. 433.

99. Cal.—*People v. Johnson*, 277 P. 2d 45, 129 C.A.2d 1.

1. Cal.—*Edmonds v. Los Angeles County*, 255 P.2d 772, 40 C.2d 642. N.J.—*Lane v. Bigelow*, 50 A.2d 638, 135 N.J.Law 195—*National Lumber Products Co. v. Ponzio*, 42 A.2d 753, 133 N.J.Law 95.

Related activities of owner

Where manufacturer has plants on lots in different municipal zones, use of each lot is ordinarily governed by requirements applicable in particular zone wherein lot is located, and plant constituting a nonconforming use in zone different from that in which another plant exists as permitted use acquires no additional standing because both plants are operated by one organization.

Conn.—*Abbadessa v. Board of Zoning Appeals of City of New Haven*, 54 A.2d 675, 134 Conn. 28.

2. Ky.—*Feldman v. Hesch*, 254 S.W.2d 914.

Racing dogs

Raising and keeping of few dogs in connection with operation of cow farm do not warrant devoting premises solely to raising and training of racing dogs.

Mass.—*Mioduszewski v. Town of Saugus*, 148 N.E.2d 655.

Sale of used cars

Display for sale of occasional used car as incident of nonconforming service station business does not warrant use of premises for general used car business.

N.J.—*Gross v. Allan*, 117 A.2d 275, 37 N.J.Super. 262.

Storage of fuel

Use for the storage of fuels as an incident to an industrial use does not permit such use as an incident to a service station use.

Cal.—*San Diego County v. McClurken*, 234 P.2d 972, 37 C.2d 683.

3. Ill.—*Dube v. City of Chicago*, 131 N.E.2d 9, 7 Ill.2d 318, certiorari denied 76 S.Ct. 658, 350 U.S. 1013, 100 L.Ed. 873.

4. N.J.—*Stout v. Mitschele*, 52 A.2d 422, 135 N.J.Law 406.

Pa.—*Mutimer Co. v. Cheltenham Tp. Bd. of Adjustment, Com.Pl.*, 69 Montg. Co. 127.

right to a nonconforming use of the premises for the parking of one and one-half ton trucks is not unlawfully altered by the parking of six-ton trucks.⁵ An admitted nonconforming right to maintain an advertising sign is not limited strictly to the kind which existed prior to the relevant zoning ordinance in so far as material, lighting, legend, size, and location are concerned, provided the changes made are de minimis under all the circumstances, as where there has been a slight change in size and location and the substitution of a different type of lighting and material.⁶

In other cases, it has been held that the use was changed or that there was a substantial departure from the authorized nonconforming use.⁷ Accordingly, a prior use of a building for tinsmith and woodworking shops is not the same as its proposed use for the business of spraying paint and protective coatings on metal parts or fabrications manufactured elsewhere.⁸ Premises used as a dance hall before they were included within an apartment house district may not thereafter be used as a

restaurant or a store in which food is served or sold.⁹ The raising and selling of livestock as a nonconforming use do not authorize the operation of a dog kennel.¹⁰ A permissible nonconforming use of land for farming, with incidental use of horses in furtherance of farming, does not justify the conduct of a riding academy or stable.¹¹

The use of property for the operation of a garage is too great a change from the spare-time use of the property to make keys or to do occasional repair work for it to be considered as a continuation of the same nonconforming use.¹² The use of a building for the manufacture of syrup is not the continuation of a use for the manufacture of piano and organ supplies.¹³ The use of the premises for the manufacture and repair of industrial machinery is a new use and different from the storage and repair of delivery trucks.¹⁴

Likewise, a nonconforming use as a vocational school does not justify a lease of the premises to a woodworking firm, a truck-body painting and repair business, and a sheet metal works.¹⁵ A non-

Uses held not substantially changed

(1) From convalescent home for cardiac children with incidental use as school to school for mentally retarded children.

N.Y.—Rogers v. Association for Help of Retarded Children, 123 N.E.2d 806, 308 N.Y. 126.

(2) From use as tuberculosis hospital to hospital or sanitarium for care and treatment of mentally ill and defective children.

N.Y.—Saich v. Balint, 167 N.Y.S.2d 545, 9 Misc.2d 11.

(3) Where farming was permitted as a nonconforming use, from dairy business to raising of horses.

N.J.—Stout v. Mitschle, 52 A.2d 422, 135 N.J.Law 406.

(4) Where, prior to adoption of regulation, stables and carriage houses on certain premises were converted into garages for storage of automobiles, and buildings were later destroyed, subsequent use of premises for parking of automobiles was permissible under building zone resolution allowing continuance of nonconforming use, since there had been no essential change in use of premises even though buildings had been demolished.

N.Y.—People v. Emigrant Industrial Sav. Bank, 25 N.Y.S.2d 605, 261 App.Div. 402.

(5) Where building which was equipped as stable had been used for nonconforming use of buying and selling horses, subsequent use of premises for keeping horses for rent and boarding horses for others was

continuance of prior nonconforming use.

S.C.—Wood v. District of Columbia, Mun.App., 39 A.2d 67.

5. N.J.—Kramer v. Town of Montclair, 109 A.2d 292, 33 N.J.Super. 16.

6. Pa.—Alden Park Corp. v. Philadelphia Zoning Bd. of Adjustment, 84 Pa.Dist. & Co. 40.

7. Cal.—Markey v. Danville Warehouse & Lumber, Inc., 259 P.2d 19, 119 C.A.2d 1.

III.—Price v. Ackmann, 102 N.E.2d 194, 345 Ill.App. 1—Dube v. Allman, 77 N.E.2d 855, 333 Ill.App. 538.

N.J.—Simone v. Peters, 53 A.2d 315, 135 N.J.Law 495.

N.Y.—President and Trustees of Village of Ossining v. Meredith, 88 N.Y.S.2d 775, 275 App.Div. 850.

People v. Hein, 65 N.Y.S.2d 318, 187 Misc. 6.

Cow stable

Building used as a cow stable could not be used as a processing plant.

N.Y.—Application of Furman Ave. Realty Corp., 87 N.Y.S.2d 693, 275 App.Div. 775, affirmed Furman Ave. Realty Corp. v. Board of Standards and Appeals of City of New York, 87 N.E.2d 676, 299 N.Y. 768.

Dairy

(1) Nonconforming use as dairy farm did not warrant use as general food depot involving cooking of meats, washing, processing, and packaging of vegetables and other food products.

Mass.—Public Bldg. Com'r of Newton v. Star Market Co., 84 N.E.2d 529, 324 Mass. 75.

(2) Use as dairy store where sandwiches, ice cream, and soft drinks were sold did not authorize sale of intoxicating liquors.

Pa.—Appeal of Veltri, 49 A.2d 369, 355 Pa. 135.

Manufacture and sale of cement blocks

Violation of zoning ordinance by using premises in residential district for manufacture and sale of cement blocks could not be justified on the ground of a nonconforming use enjoyed by predecessor in title who had used premises for uses incidental to business of general contracting.

N.Y.—People v. Giorgi, 16 N.Y.S.2d 923.

8. Ill.—Wechter v. Board of Appeals, 119 N.E.2d 747, 3 Ill.2d 13.

9. Mass.—City of Lynn v. Deam, 87 N.E.2d 349, 324 Mass. 607.

10. Neb.—City of Omaha v. Gsantner, 77 N.W.2d 663, 162 Neb. 339.

11. N.J.—Berry v. Recorder's Court of Town of West Orange, 11 A.2d 743, 124 N.J.Law 385, affirmed Berry v. Recorder's Office of Town of West Orange, 15 A.2d 753, 125 N.J.Law 273.

12. N.Y.—People v. Hein, 65 N.Y.S.2d 318, 187 Misc. 6.

13. N.Y.—Application of Braunsdorf, 111 N.Y.S.2d 507, 202 Misc. 471.

14. Pa.—Appeal of Ferraro, 102 A.2d 186, 174 Pa.Super. 570.

15. N.J.—Morris v. Borough of Haledon, 93 A.2d 731, 24 N.J.Super. 171.

conforming use as a nursery school has been held not to warrant the operation of a summer day camp for children.¹⁶

Further, a nonconforming use as a commercial garage does not authorize the use of the premises for the storage of food or other materials not connected with the garage business.¹⁷ Where, before passage of a zoning bylaw, building was used for repairing motor vehicles belonging to the owner as incidental to trucking business, the use of the building for the repair of automobiles for pay is not a continuation of the existing use.¹⁸ The owner of a lot located in an apartment district authorized to operate a row of stall garages as a nonconforming use is not entitled to demolish the stall garages and utilize substantially the same area for outdoor parking on the theory that the use of the premises as an outdoor parking lot is essentially the same and is a continuance of the prior nonconforming use.¹⁹ The fact that a dwelling house was used either as a doctor's office or tearoom at the time of the adoption of the zoning ordinance designating the district in which the building was located as residential does not permit the subsequent use of the building as a funeral home.²⁰

Under an ordinance fixing the minimum size of a lot in a residential district, but providing that

the provision should not apply as to nonconforming lots existing prior to the enactment, the owner of a nonconforming lot may build on it, but it has been held that he may not combine two or more nonconforming lots for the purpose of erecting a single-family dwelling thereon unless the combined lots conform to the ordinance.²¹ A nonconforming use as a rooming house does not warrant changing the house into three separate apartments.²²

Storage. A nonconforming use of a building for storage of certain articles ordinarily is not changed by a use of the building for storage of other articles,²³ but, where the nature of the thing stored is vastly different and in itself creates new problems, it will be considered a change of use.²⁴

§ 190. — Change Permitted by Regulations

Under some zoning ordinances, a nonconforming use may be changed to another use of the same or a more restricted classification.

The express provisions of some zoning regulations authorize a change from one nonconforming use to another, subject to certain limitations,²⁵ and, under such a provision, a nonconforming use of a building may be changed to another nonconforming use of the same or more restricted classification.²⁶

16. N.Y.—Margo Operating Corp. v. Village of Great Neck, 129 N.Y.S. 2d 436.

17. N.J.—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N. J. 607.

18. Mass.—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547.

19. N.Y.—Bowen v. Hider, 37 N.Y. S.2d 76.

20. N.J.—Kensington Realty Holding Corporation v. Jersey City, 191 A. 787, 118 N.J.Law 114, affirmed 196 A. 691, 119 N.J.Law 338.

21. Conn.—State ex rel. La Voie v. Building Commission of Town of Trumbull, 65 A.2d 165, 135 Conn. 415.

22. N.J.—State v. Casper, 68 A.2d 545, 5 N.J.Super. 150.

23. N.Y.—President and Trustees of Village of Ossining v. Meredith, 73 N.Y.S.2d 897, 190 Misc. 122.

24. N.Y.—President and Trustees of Village of Ossining v. Meredith, supra.

25. Conn.—State ex rel. Chatlos v. Rowland, 38 A.2d 785, 131 Conn. 261—Rice v. Zoning Board of Appeals of Town of Milford, 190 A. 257, 122 Conn. 435.

Md.—Bruning Bros. v. Mayor & City Council of Baltimore, 87 A.2d 589, 199 Md. 602.

Pa.—Smith v. Westpfahl, 52 Pa. Dist. & Co. 51, 46 Lack.Jur. 25.

Successor in occupancy and ownership of grantee of permit to conduct nonconforming business on property could not be deprived of right to subject property to higher grade nonconforming use.

Mich.—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 386 Mich. 702.

Warehouse on railroad right of way Construction and maintenance of warehouse for storage of freight by lessee on railroad right of way which, although in residential zone, had been used for commercial purposes for many years before adoption of zoning ordinance, was a reasonable use of the property no more objectionable than operation of trains and was authorized under zoning ordinance permitting the continuance of pre-existing nonconforming use.

Miss.—Jones v. City of Hattiesburg, 42 So.2d 717, 207 Miss. 491.

Extent of alteration

Under zoning ordinance permitting nonconforming use of building to be changed to another nonconforming use in case no structural alterations are made, building which had been used for baking purposes and as a drug store at time of enactment of ordinance could be used for wholesale

and retail baking purposes, requiring only minor alterations.

Ark.—City of Little Rock v. Williams, 177 S.W.2d 924, 206 Ark. 861.

26. Colo.—Board of Adjustment of City and County of Denver v. Abe Perlmutter Const. Co., 280 P.2d 1107, 131 Colo. 230.

Md.—Higgins v. City of Baltimore, 110 A.2d 503, 206 Md. 89—Nyburg v. Solmsion, 106 A.2d 483, 205 Md. 150—Part v. Bradyhouse, 9 A.2d 751, 177 Md. 245—Roach v. Board of Zoning Appeals, 199 A. 812, 175 Md. 1.

N.Y.—Sedgwick Mach. Works v. Perlmutter, 80 N.Y.S.2d 113, 274 App. Div. 821.

Ohio.—Steudel v. Troberg, 63 N.E.2d 241, 76 Ohio App. 136.

R.I.—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A.2d 478, 74 R.I. 316.

Change to higher classification as constituting abandonment or loss of right to resume less restricted use see *infra* § 200.

Purpose of zoning ordinance in permitting change from nonconforming use existent when ordinance took effect to another use, subject to limitation that latter shall be similar to the former, is that the change shall be to a use no more obnoxious than the present use, and when possible less obnoxious.

Thus it has been held permissible to use a garage for the storage of merchandise by a peddler,²⁷ and to change the use of a building from the storage and repair of the owner's delivery trucks to the operation of a machine shop.²⁸ A garage may be used for the sale of new cars or as a truck distribution center.²⁹ An ice factory may be used for the cold storage and curing of meat,³⁰ and a "store" may be used as a "restaurant."³¹

However, a change may not be made from a nonconforming use of a higher classification to one of a lower classification.³² Thus, premises used as an architect's and real estate operator's office may not be used as a tailor shop,³³ and the conversion of a public garage to a freight terminal is not authorized.³⁴

A provision that a nonconforming use of a building may be changed to another nonconforming use of the same or a more restricted classification applies only to the use of buildings erected before the enactment of the zoning ordinance and does not extend to the use of unimproved land.³⁵ If a nonconforming building is removed, every future use of the premises must be in conformity with the provisions of the ordinance.³⁶ A provision authoriz-

ing the continued use of nonconforming business premises for any business of substantially the same character has been held to relate only to approval of the use of premises theretofore used for one business purpose, for another business purpose, and it does not permit the use for business of a nonconforming building not previously used for business.³⁷ Under a provision permitting a nonconforming use to be extended by enlargement, reconstruction, or alteration on any tract of land held under one ownership, an abrupt departure from the prior use is not permissible.³⁸

Where a garage use was changed to another nonconforming use at a time when such change of use was legal, a subsequent amendment of the ordinance to prohibit the change of a nonconforming garage use to another nonconforming use will not be construed to operate retroactively.³⁹

§ 191. Enlargement or Extension of Use

A substantial enlargement or extension of a nonconforming use ordinarily is not permitted.

Under the rule preserving the right of a landowner to continue an existing nonconforming use, a substantial enlargement or extension of the prior nonconforming use usually is not permitted.⁴⁰

Conn.—*Stern v. Zoning Bd. of Appeals of City of Norwich*, 99 A.2d 130, 140 Conn. 241.

"Similar class"

Where a zoning ordinance provides that no premises devoted to a nonconforming use at the date of its passage shall be used for any other nonconforming use except one of a similar class, any use within the class of the nonconforming use, as classified by such ordinance, may be made of the premises, since the words "similar class" mean a class of use specified in the same zone in which such nonconforming use is listed.

Pa.—*Smith v. Westpfahl*, 52 Pa. Dist. & Co. 51, 46 Lack. Jur. 25.

27. Ark.—*Branch v. Powers*, 197 S. W.2d 928, 210 Ark. 836.

28. Pa.—*Appeal of Ferraro*, 102 A. 2d 186, 174 Pa. Super. 570.

29. Md.—*Nyburg v. Solmson*, 106 A. 2d 483, 205 Md. 150.

30. Tex.—*Rosenthal v. City of Dallas*, Civ. App., 211 S.W.2d 279, refused no reversible error.

31. Pa.—*Appeal of Langol*, 104 A.2d 343, 175 Pa. Super. 320.

32. Md.—*Roach v. Board of Zoning Appeals*, 199 A. 812, 175 Md. 1.

Ohio.—*Steudel v. Troberg*, 63 N.E.2d 241, 76 Ohio App. 136.

Pa.—*Smith v. Westpfahl*, 52 Pa. Dist. & Co. 51, 46 Lack. Jur. 25.

Permit

Issuance of a permit by the director of buildings could not help defendants, since such a permit could not confer rights in contravention of zoning laws.

N.Y.—*City of Buffalo v. Roadway Transit Co.*, 104 N.E.2d 96, 303 N. Y. 453.

33. Pa.—*Darling v. Zoning Bd. of Adjustment of City of Philadelphia*, 54 A.2d 829, 357 Pa. 428.

34. N.Y.—*City of Buffalo v. Roadway Transit Co.*, 104 N.E.2d 96, 303 N.Y. 453.

35. Mo.—*In re Botz*, 159 S.W.2d 367, 236 Mo. App. 566.

36. N.Y.—*Bowen v. Hider*, 37 N.Y.S. 76.

37. Ga.—*Snow v. Johnston*, 28 S.E. 2d 270, 197 Ga. 146.

38. Wash.—*Shields v. Spokane School Dist. No. 81*, 196 P.2d 352, 31 Wash.2d 247.

39. Md.—*Higgins v. City of Baltimore*, 110 A.2d 503, 206 Md. 89.

40. Cal.—*Edmonds v. Los Angeles County*, 255 P.2d 772, 40 C.2d 642—*Rehfeld v. City and County of San Francisco*, 21 P.2d 419, 218 C. 83.

Orange County v. Goldring, 263 P.2d 321, 121 C.A.2d 442.

Conn.—*De Felice v. Zoning Board of Appeals of Town of East Haven*, 32 A.2d 635, 130 Conn. 156, 147 A.L.R.

161—*Piccolo v. Town of West Haven*, 181 A. 615, 120 Conn. 449—*Thayer v. Board of Appeals of City of Hartford*, 157 A. 273, 114 Conn. 15.

Iowa.—*McJinsey v. City of Des Moines*, 2 N.W.2d 65, 231 Iowa 693.

Md.—*Colati v. Jirout*, 47 A.2d 613, 186 Md. 652.

Mass.—*Town of Billerica v. Quinn*, 71 N.E.2d 235, 320 Mass. 687—*Town of Burlington v. Dunn*, 61 N. E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441.

Minn.—*State ex rel. Howard v. Village of Roseville*, 70 N.W.2d 404, 244 Minn. 343.

N.J.—*Scavone v. Mayor and Council of Borough of Totowa*, 140 A.2d 233, 49 N.J. Super. 423—*Ardolino v. Board of Adjustment of Borough of Florham Park, Morris County*, 125 A.2d 543, 41 N.J. Super. 582—*Hay v. Board of Adjustment of Borough of Fort Lee*, 117 A.2d 650, 37 N.J. Super. 461—*Gerkin v. Village of Ridgewood*, 86 A.2d 275, 17 N.J. Super. 472—*Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp.*, 84 A.2d 18, 16 N.J. Super. 113.

Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J. Law 21—*Pieretti v. Johnson*, 41 A.2d 896, 132 N.J. Law 576—*Melxner v. Board of Adjustment of City of Newark*, 37 A.2d 678, 131 N.J. Law 599—*Green v.*

except as authorized by the zoning regulations,⁴¹ and some provisions expressly prohibit the extension of a nonconforming use.⁴² This rule is designed to prevent any increase in nonconforming uses and eventually to lessen and do away with nonconforming uses.⁴³ The fact that adjacent landowners would not suffer any additional injury by reason of the enlargement of the nonconforming use does not warrant an extension of such use.⁴⁴

There is authority to the effect that the prohibition is only against new uses and imposes no restraint on broadening the scope of a nonconforming use,⁴⁵ and that reasonable accessory uses to the prior use may be permitted.⁴⁶ However, an ordinance

permitting the building of a garage as accessory to property in a residential district has been held not to apply to property devoted to a nonconforming use.⁴⁷

In determining whether or not an activity is within the scope of a permitted nonconforming use, each case must rest on its own particular facts, and the terms of the particular ordinance,⁴⁸ and an extension should not be allowed where there is doubt as to whether or not the extension is substantial.⁴⁹

Under the facts of particular cases, it has been held that a nonconforming use was unlawfully enlarged or extended.⁵⁰ For example, the fact that a

Board of Com'rs of City of New-ark, 36 A.2d 610, 131 N.J.Law 336—De Vito v. Pearsall, 180 A. 202, 115 N.J.Law 323.

N.Y.—Piscicchio v. Board of Appeals of Village of Freeport, 300 N.Y.S. 368, 165 Misc. 156.

People v. Gerus, 69 N.Y.S.2d 283—Hyams v. Amchir, 57 N.Y.S.2d 77.

Pa.—White v. Lower Moreland Tp. Bd. of Adjustment, Com.Pl., 73 Montg.Co. 55.

R.I.—Crudeli v. Zoning Bd. of Review of City of Warwick, 55 A.2d 284, 73 R.I. 301.

Utah.—Benjamin v. Lietz, 211 P.2d 449, 116 Utah 476.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

Closely restricted

(1) Courts follow a strict policy against the extension or enlargement of nonconforming uses found within an area properly zoned by municipality.

Cal.—Dienelt v. Monterey County, 247 P.2d 925, 113 C.A.2d 128.

(2) Extension of uses not conforming to zoning ordinance is closely restricted.

N.J.—Rupprecht v. Draney, 61 A.2d 220, 137 N.J.Law 564, affirmed 64 A.2d 66, 1 N.J. 407.

Change in ownership did not constitute extension of nonconforming use.

Minn.—Hawkins v. Talbot, 80 N.W.2d 863, 248 Minn. 549.

Estoppel

Where enlargement had continued for almost twenty years without any action by municipal authorities, municipality could not act as against purchaser of property without knowledge that enlargement was beyond scope of nonconforming use.

Tex.—Town of Highland Park v. Marshall, Civ.App., 235 S.W.2d 658, error refused no reversible error.

41. Cal.—Ricciardi v. Los Angeles County, 252 P.2d 773, 115 C.A.2d 569.

Ill.—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

Md.—Colati v. Jirout, 47 A.2d 613, 186 Md. 652.

Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

Pa.—Rubin v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 207—Zoning Appeal of Cease, Com.Pl., 28 Erie Co. 155.

42. La.—City of New Orleans v. Langenstein, App., 91 So.2d 114.

Md.—Colati v. Jirout, 47 A.2d 613, 186 Md. 652.

Floor area

Some provisions limit the right to increase the floor area of a nonconforming use.

La.—State ex rel. Hochfelder v. City of New Orleans, 132 So. 786, 171 La. 1053.

43. Conn.—Beerwort v. Zoning Bd. of Appeals of Town of Coventry, 137 A.2d 756, 144 Conn. 731.

Nonconforming uses are closely watched and limited and are not to be enlarged in derogation of general scheme of ordinance for use of property.

Wis.—Town of Yorkville v. Fonk, 88 N.W.2d 319, 3 Wis.2d 371.

44. N.J.—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250.

Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

45. Pa.—Firth v. Scherzberg, 77 A.2d 443, 366 Pa. 443—Borough of Cheswick v. Bechman, 42 A.2d 60, 352 Pa. 79.

Appeal of Pierce, Com.Pl., 47 Mun.L.R. 65.

46. N.Y.—Marcus v. Village of Maroneck, 16 N.Y.S.2d 626, 258 App.Div. 328, reversed on other grounds 28 N.E.2d 856, 283 N.Y. 325.

Okl.—Royal Baking Co. v. Oklahoma City, 75 P.2d 1105, 182 Okl. 45.

Commercial garage

Where premises were being used as a commercial garage at time business zone was converted to a residential zone, the nonconforming use which lessee was entitled to continue included incidental storage of gasoline, oil, and automobile parts, but did not include storage of food products or other oils and materials.

N.J.—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N.J.Super. 607.

Accessory use not shown

The storage of finished products by manufacturer in buildings of his original manufacturing plant, which constituted nonconforming use in apartment house district under city zoning ordinance, after removal of manufacturing equipment from such plant to new manufacturing plant a mile and a half away was not "accessory use," defined by such ordinance as subordinate use or building customarily incident to and located on same lot occupied by main use or building.

Ohio.—Francisco v. City of Columbus, App., 31 N.E.2d 236, rehearing denied 31 N.E.2d 243, appeal dismissed 18 N.E.2d 404, 134 Ohio St. 526.

47. N.J.—Adler v. Department of Parks & Public Property, Town of Irvington, 89 A.2d 704, 20 N.J. Super. 240.

48. Ala.—Fulford v. Board of Zoning Adjustment of City of Dothan, 54 So.2d 580, 256 Ala. 336. N.C.—Application of O'Neal, 92 S.E.2d 189, 243 N.C. 714.

49. N.J.—Heagen v. Borough of Allendale, 127 A.2d 181, 42 N.J.Super. 472.

50. Md.—Boulevard Scrap Co. v. City of Baltimore, 130 A.2d 743, 213 Md. 6—Shannahan v. Ringgold, 129 A.2d 797, 212 Md. 481.

Additional machinery

Where retail lumber yard owner,

building which does not conform to current zoning requirements as to height, yard area, and design is permitted as a nonconforming use does not authorize the use of the building for a nonconforming use where it was not put to such use before the zoning ordinance became effective.⁵¹ The unlawful extension of a nonconforming use by the construction of a water tank and water mains to protect the plant in case of fire by providing necessary water for a new sprinkler system may not be justified on the ground that the fire-fighting equipment of the municipality affords insufficient protection.⁵²

Particular matters have been held not to constitute an unlawful extension or enlargement of a nonconforming use.⁵³ Accordingly, parking six-ton trucks is not an unlawful enlargement of a nonconforming use of the property for the parking of one and one-half ton trucks.⁵⁴ The erection of a neon sign on the building has been held not to be a prohibited expansion of the nonconforming use of the property.⁵⁵ A stadium used for football games and an occasional baseball game prior to the enactment of the restrictive ordinance may be regularly used for baseball games thereafter.⁵⁶

Change of use. The problem of enlargement or extension of use may involve the question of change of use, discussed supra § 189, since an enlarged or expanded use may in substance be a new or changed use.⁵⁷ Where enlargement of use changes its character from light industrial use to heavy industrial

use, such enlargement is improper.⁵⁸ A small existing nonconforming business may not be so enlarged as to be different in kind in its effect on the neighborhood.⁵⁹

Effect of improper extension. Certain uses of property constituting improper extensions of previously existing nonconforming uses do not work a loss of the other nonconforming uses, since violation of the ordinance pertains only to the improperly extended uses.⁶⁰ Where owner of a coal yard in a single-dwelling zone attempted to extend his yard to adjacent vacant land formerly owned by a traction company, itself a nonconforming user, and such land was to be used in conjunction with the presently owned yards and building of such owner, both premises were regarded as a unit and subject to the prevailing zoning restrictions.⁶¹

Garage. A nonconforming use of a garage for the incidental repair and maintenance of trucks used in a particular business is unlawfully extended where the garage is used to recondition automobiles for sale elsewhere.⁶² The use of a garage as a warehouse and place of storage is an unlawful extension of a nonconforming garage use.⁶³

On the other hand, where an automobile repair business had been conducted in the open on the premises for many years, the fact that, in connection with granting a right to erect a public garage on the premises as an exception or variance under a zoning ordinance, the applicant was to be permitted

prior to adoption of zoning ordinance placing premises in residence zone, used a five horsepower motor to operate a saw to cut lumber, and thereafter used a fifteen horsepower planer for dressing of rough lumber, such latter use did not constitute a permissible continuation of nonconforming use.

N.J.—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J.Law 95.

Stable to dance hall

Conversion of a barn used as a riding academy and stable to a dance hall constitutes an unlawful expansion of a nonconforming use.

Mo.—Brown v. Gambrel, 213 S.W.2d 931, 358 Mo. 192.

Storage tanks

The erection of four new permanent gasoline storage tanks double the size of the largest of the three movable tanks which were formerly on the land constituted an unwarranted enlargement of the use.

Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683.

51. Mo.—Bartholomew v. Board of Zoning Adjustment, App., 307 S.W.2d 730.

Right to construct new buildings or additions to existing buildings see infra §§ 195, 196.

52. N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154.

53. Ill.—Federal Elec. Co. v. Zoning Bd. of Appeals of Village of Mt. Prospect, 75 N.E.2d 359, 398 Ill. 142.

Mass.—Moulton v. Building Inspector of Milton, 43 N.E.2d 662, 312 Mass. 195.

Wash.—King County v. High, 219 P.2d 113, 36 Wash.2d 580.

54. N.J.—Kramer v. Town of Montclair, 109 A.2d 292, 33 N.J.Super. 16.

55. Ill.—Federal Elec. Co. v. Zoning Bd. of Appeals of Village of Mt. Prospect, 75 N.E.2d 359, 398 Ill. 142.

56. Md.—Green v. Garrett, 63 A.2d 326, 192 Md. 52.

57. Ala.—Fulford v. Board of Zoning Adjustment of City of Dothan, 54 So.2d 580, 256 Ala. 336.

Coal yard

Owner of coal yard in single-dwell-

ing zone was not entitled to enlarge yard on to land formerly owned by a traction company, itself a nonconforming user, since prospective use represented a substantial change from one nonconforming use to another nonconforming use.

N.J.—Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J.Law 442, affirmed 61 A.2d 76, 137 N.J.Law 603.

Use held changed by substantial expansion

Cal.—Edmonds v. Los Angeles County, 255 P.2d 772, 40 C.2d 642.

58. N.J.—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

59. Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207.

60. Conn.—Lehmaier v. Wadsworth, 191 A. 539, 122 Conn. 571.

61. N.J.—Midland Park Coal & Lumber Co. v. Terhune, 61 A.2d 76, 137 N.J.Law 603.

62. Ky.—Feldman v. Hesck, 254 S.W.2d 914.

63. Mass.—Adamsky v. Mendes, 96 N.E.2d 236, 326 Mass. 603.

to use the street as a means of ingress and egress did not constitute an illegal extension of an existing nonconforming use, in view of hardship in providing a means of ingress to, and egress from, any other street.⁶⁴

Intoxicating liquors. The sale of distilled spirits is an extension and enlargement of a nonconforming use involving the sale of wine and beer.⁶⁵ The sale of beer is an unlawful extension of a nonconforming restaurant business;⁶⁶ a restaurant permitted to continue in a residential area as a nonconforming use may not expand its business to include the sale of beer even though it secures a license for such purpose.⁶⁷ A restaurant which sold beer in an area in which the operation of a restaurant and the sale of beer and liquor were subsequently forbidden could not expand its operations to include the sale of liquor.⁶⁸ The right to operate a bar and restaurant as a nonconforming use does not authorize music and dancing on the premises as an incident to such use.⁶⁹ A grocery store use may not be extended by the issuance of a retail beverage license.⁷⁰

Trailer park or court. The year around instead of the seasonal use of a trailer park has been considered an unlawful extension of a nonconforming use.⁷¹ Where a county zoning ordinance prohibited an increase in the number of trailers on property being used for a trailer court and prohibited any in-

crease in the size of buildings on the property, trailer court operators, in the absence of an exception, could not construct additional sanitary facilities.⁷²

§ 192. — Area of Use

As a general rule, the area of a nonconforming use may not be enlarged or extended, except as such enlargement or extension is permitted by the zoning ordinances.

Ordinarily, the area of a nonconforming use may not be enlarged or extended;⁷³ a nonconforming use may not be extended to land not so used at the time of the enactment of the restrictive regulation.⁷⁴ An ordinance forbidding the extension of a nonconforming use has been held to preclude an extension in area either vertically or horizontally.⁷⁵

The owner of property devoted to a nonconforming use may not expand it to adjoining lots owned by him,⁷⁶ particularly where the adjoining lots are acquired by him after the enactment of the restrictive ordinance;⁷⁷ and a nonconforming use may not be extended to an adjoining plot which was vacant at the time the restrictive ordinance was enacted.⁷⁸ Likewise, where one's land is bisected by a public highway and comprises two separate and distinct parcels, one of which had been used for a certain use before the enactment of a zoning resolution prohibiting that activity, the other parcel may not subsequently be devoted to the prohibited use.⁷⁹

64. R.I.—Crudell v. Zoning Bd. of Review of City of Warwick, 55 A. 2d 284, 73 R.I. 301.

65. Cal.—Town Council of Town of Los Gatos v. State Bd. of Equalization, 296 P.2d 909, 141 C.A.2d 344.

66. Ala.—Fulford v. Board of Zoning Adjustment of City of Dothan, 54 So.2d 580, 256 Ala. 336.

67. Ala.—Fulford v. Board of Zoning Adjustment of City of Dothan, supra.

68. Conn.—Salerni v. Scheuy, 102 A. 2d 528, 140 Conn. 566.

69. N.J.—Heagen v. Borough of Allendale, 127 A.2d 181, 42 N.J.Super. 472.

70. Pa.—License of Cichy, Quar. Sess., 82 Pa. Dist. & Co. 336, 42 Luz. Leg. Reg. 67.

71. Conn.—Beerwort v. Zoning Bd. of Appeals of Town of Coventry, 137 A.2d 756, 144 Conn. 731.

72. Cal.—Edmonds v. Los Angeles County, 255 P.2d 772, 40 C.2d 642.

73. Mass.—Town of Billerica v. Quinn, 71 N.E.2d 235, 320 Mass. 687. N.J.—Martin v. Cestone, 110 A.2d 54, 33 N.J.Super. 267.

Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J.

Law 442, affirmed 61 A.2d 76, 137 N.J.Law 603.

74. Ill.—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 653, 350 U.S. 1013, 100 L.Ed. 873.

Pa.—Humphreys v. Stuart Realty Corp., 73 A.2d 407, 364 Pa. 616. Appeal of Peirce, Com.Pl., 16 Beaver 244—Honig v. Lonsdorf, Com.Pl., 53 Lack.Jur. 209.

75. Md.—Boulevard Scrap Co. v. City of Baltimore, 130 A.2d 743, 213 Md. 6.

Extension, either in time or in space, of a nonconforming use beyond one current at time of passage of zoning regulations is a proscribed extension of a nonconforming use not competent with policy of such zoning regulations.

Conn.—Beerwort v. Zoning Bd. of Appeals of Town of Coventry, 137 A.2d 756, 144 Conn. 731.

76. Ark.—Evans v. City of Little Rock, 253 S.W.2d 347, 221 Ark. 252.

Coal yard
N.J.—Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J.Law 442, affirmed 61 A.2d 76, 137 N.J.Law 603.

77. N.J.—Struyk v. Samuel Braen's

Sons, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294.

Quarry
N.J.—Struyk v. Samuel Braen's Sons, supra.

Trailer camp

Where at time of passage of ordinance limiting trailer camps to twenty-five spaces owner of camp had completed twenty-three spaces and had substantially completed twenty-four spaces which were subsequently turned into a playground when additional land was procured by owner for erection of additional trailer spaces, owner could not erect additional trailer spaces on newly acquired land on ground that it was a continuance of a nonconforming use, since continuance of use of property undertaken at date of ordinance could not be extended to new property.

Wis.—Town of Yorkville v. Fonk, 88 N.W.2d 319, 3 Wis.2d 871.

78. N.J.—Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J.Law 442, affirmed 61 A.2d 76, 137 N.J.Law 603.

79. Cemetery

Provision prohibiting new cemeteries, but permitting the extension of an existing cemetery, did not jus-

It is not essential that the use as exercised at the time the ordinance was enacted should have utilized the entire tract available therefor;⁸⁰ but the inception of a nonconforming use on a limited part of a plot does not necessarily constitute a preëmption of the entire plot for uses of that character, as against a later prohibitory zoning ordinance, and the criterion is whether the nature of the incipient nonconforming use, in light of its character and adaptability to the use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance.⁸¹ Where part of the lot on which a nonconforming business is conducted is taken by condemnation, the owner may not be prevented from removing the building from such portion of the plot and continuing the business on the remaining part of the lot.⁸²

In the case of uses which cannot be continued without expanding the area of activity, such as a gravel pit, it has been held that the area of activity may not be extended,⁸³ and that the stripping of topsoil from a portion of a tract prior to the date of the ordinance does not warrant a continuance of such stripping operations on other portions of the tract.⁸⁴ However, it has also been held that such uses may be extended to the entire area of the tract,⁸⁵ and that the fact that a person conducting an excavation business on land extended his operations in depth and area on such tract after the adoption of the ordinance did not bring the use

within the prohibition of the ordinance.⁸⁶

Where only part of a building is devoted to a nonconforming use, expansion of such use into another part of the building may not be permitted,⁸⁷ although it has been indicated that this rule would not necessarily apply if the building were one designed and intended for the nonconforming use.⁸⁸ Some regulations permit a nonconforming use to be extended throughout the building in which it is carried on provided no structural alterations, except such as may be required by law, are made.⁸⁹

Under some ordinances, an extension of the area of a nonconforming use is permitted subject to the restrictions and limitations imposed by the ordinance,⁹⁰ and a nonconforming use may not be extended without complying with a provision of the ordinance requiring that a certificate of occupancy be obtained as a basis for extending an established nonconforming use.⁹¹ A provision that a nonconforming building, which is nonconforming because of its area or height, may be extended in height does not permit an extension of a nonconforming building in area.⁹²

An ordinance permitting the extension of nonconforming buildings and uses provided the extension does not exceed a stated percentage of the area of the building has been construed as applicable to vacant land devoted to a nonconforming use, so as to permit the extension of a nonconforming use of land to the extent of the stated percentage of the area or tract already devoted to that use.⁹³ The

tify a proposed cemetery separated from an existing cemetery by a broad public highway, on the theory that it was an extension of that cemetery. Conn.—*Antenucci v. Hartford Roman Catholic Diocesan Corp.*, 110 A.2d 495, 19 Conn.Sup. 131.

Quarrying and crushing of stone
Ohio.—*Davis v. Miller*, 126 N.E.2d 49, 163 Ohio St. 91.

80. Conn.—*De Felice v. Zoning Board of Appeals of Town of East Haven*, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

Pa.—*Appeal of Mack*, 122 A.2d 48, 384 Pa. 586—*Appeal of Peirce*, 119 A.2d 506, 384 Pa. 100—*Humphreys v. Stuart Realty Corp.*, 73 A.2d 407, 364 Pa. 616—*Borough of Cheswick v. Bechman*, 42 A.2d 60, 352 Pa. 79. *Rubin v. Zoning Bd. of Adjustment, Com.Pl.*, 5 Bucks Co. 207.

Expansion of a nonconforming use does not, in and of itself, entitle the owner to erect structure on portion of his land not previously occupied by his business enterprise, but it is an important factor in considering whether a variance should be granted for that purpose.

Pa.—*Appeal of Mack*, 122 A.2d 48, 384 Pa. 586.

Storing heavy equipment

Where only a quarter of a parcel of land was devoted to the nonconforming use of storing heavy equipment at the time the restrictive ordinance was enacted, the extension of such use to the entire parcel was not permitted.

N.J.—*Martin v. Cestone*, 110 A.2d 54, 33 N.J.Super. 267.

81. N.J.—*Gross v. Allan*, 117 A.2d 275, 37 N.J.Super. 262.

82. Minn.—*Connor v. Chanhassen Tp.*, 81 N.W.2d 789, 249 Minn. 205.

83. Mass.—*Town of Wayland v. Lee*, 91 N.E.2d 835, 325 Mass. 637—*Town of Billerica v. Quinn*, 71 N.E.2d 285, 320 Mass. 687.

84. Mass.—*Town of Billerica v. Quinn*, *Supra*.

85. Minn.—*Hawkins v. Talbot*, 80 N.W.2d 863, 248 Minn. 549.

N.J.—*Lamb v. A. D. McKee, Inc.*, 160 A. 563, 10 N.J.Misc. 649.

86. Pa.—*Borough of Cheswick v. Bechman*, 42 A.2d 60, 352 Pa. 79.

Single lot

Ten-acre tract was held "lot" under statute so that nonconforming use in excavating sand, lawful when instituted, could be continued on entire tract, even though only commenced on one acre.

N.J.—*Lamb v. A. D. McKee, Inc.*, 160 A. 563, 10 N.J.Misc. 649.

87. N.J.—*Heagen v. Borough of Allendale*, 127 A.2d 181, 42 N.J.Super. 472.

88. N.J.—*Heagen v. Borough of Allendale*, *supra*.

89. Cal.—*San Diego County v. McClurken*, 234 P.2d 972, 37 C.2d 683.

Ill.—*People ex rel. Delgado v. Morris*, 79 N.E.2d 839, 334 Ill.App. 557.

Md.—*Colati v. Jirout*, 47 A.2d 613, 136 Md. 652.

90. N.J.—*Frank v. Luther*, 87 A.2d 17, 18 N.J.Super. 193.

91. N.Y.—*Lapham v. Roulan*, 169 N.Y.S.2d 346, 10 Misc.2d 152.

92. Pa.—*Fagan v. Philadelphia Zoning Bd. of Adjustment*, 132 A.2d 279, 389 Pa. 99.

93. Pa.—*Philadelphia Art Alliance v. Zoning Bd. of Adjustment of*

area of the building, for the purpose of calculating the permissible extension under such an ordinance, is the area of the building at the time of the enactment of the original restrictive ordinance without including additions permitted thereafter.⁹⁴ The word "area" as used in a zoning resolution, providing that a building or structure devoted to a nonconforming use at time resolution took effect may not be altered or enlarged so as to extend the nonconforming use more than ten per cent in "area," means ground area and not floor space.⁹⁵

Where the owners of property maintained an apartment on their premises with accommodations for three families at the time of the enactment of a zoning ordinance which restricted the area to one-family dwellings, and the ordinance allowed an extension of existing nonconforming uses when such could be accomplished without structural changes, and the building was partitioned into four apartments, and an ordinance was subsequently enacted which allowed a certificate of occupancy on the basis of nonconforming uses existing at the time of the enactment, the partitioning has been regarded as an enlargement of the nonconforming use by natural expansion and the owners were entitled to a certificate of occupancy under the new zoning or-

dinance.⁹⁶ Under a municipal zoning ordinance exempting farm enterprises and permitting the continuation of a farming operation to extent of reconstructing, enlarging, or erecting additional buildings in the normal course of such business, the erection of additional chicken houses on plaintiff's residential premises has been considered proper regardless of the amount of time plaintiff devoted to the chicken business.⁹⁷

§ 193. — Increase in Amount or Intensity of Use

The rule forbidding the extension or enlargement of a nonconforming use does not prevent an increase in the amount of use within the same area.

Generally speaking, the rule forbidding the enlargement or extension of a nonconforming use does not prevent an increase in the amount of use within the same area,⁹⁸ so that a nonconforming use may be not only continued but also increased in volume⁹⁹ and intensity.¹ A nonconforming use is not limited to the precise magnitude thereof which existed at the date of the ordinance, but may be increased by natural expansion,² and a nonconforming use is not unlawfully enlarged or extended although the number of employees has almost doubled.³ The natural growth of a business⁴ or an

City of Philadelphia, 104 A.2d 492, 377 Pa. 144.

94. N.Y.—Cordes v. Moore, 129 N.Y.S.2d 777, 283 App.Div. 893, affirmed 125 N.E.2d 112, 308 N.Y. 761.

95. Slaughterhouse

Owner of slaughterhouse could not eliminate second floor of building and use the amount of the surrendered second floor space for new construction on ground floor.

Ohio.—A. Dicillo & Sons v. Chester Zoning Bd. of Appeals, Com.Pl., 103 N.E.2d 44, motion dismissed 109 N.E.2d 8, 158 Ohio St. 302.

96. Pa.—In re 501 Paxinosa Ave., Easton, 80 A.2d 789, 367 Pa. 340.

97. N.J.—De Benedetti v. River Vale Tp., Bergen County, 91 A.2d 353, 21 N.J.Super. 430.

98. Mass.—Town of Billerica v. Quinn, 71 N.E.2d 235, 320 Mass. 687.

N.Y.—Kovellmann v. Plaut, 105 N.Y.S.2d 280, 201 Misc. 473.

No change in plant

A zoning regulation cannot prevent a landowner from doing a much greater business of the same sort without change in plant.

Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207.

Restrictions not implied

Where zoning ordinance contained no provision limiting extension of a nonconforming use, such restrictions against increase in volume could not be implied from mere existence of the zoning plan.

Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

In New York

(1) The text rule has been followed.

N.Y.—People v. Perkins, 26 N.E.2d 278, 282 N.Y. 329.

(2) Right to carry on fish fry business as nonconforming use would not be affected by increase in volume of business.

N.Y.—City of Syracuse v. Bronner, 133 N.Y.S.2d 153.

(3) Nonconforming use as a gas station is not unlawfully extended by a relocation of the pumps so that customers may be served from both sides of the pumps.

N.Y.—Kovellmann v. Plaut, 105 N.Y.S.2d 280, 201 Misc. 473.

(4) It has also been held, however, that owners of nonconforming uses in zoning areas are required to adhere to the excepted use in volume of trade as well as character of business.

N.Y.—Pisicchio v. Board of Appeals of Village of Freeport, 300 N.Y.S. 368, 165 Misc. 156.

99. Conn.—Salerni v. Scheuy, 102 A.2d 528, 140 Conn. 566.

Ill.—Village of Round Lake Park v. Dice, 127 N.E.2d 875, 6 Ill.App.2d 408—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557. Mass.—Town of Billerica v. Quinn, 71 N.E.2d 235, 320 Mass. 687—Building Com'r of Medford v. McGrath, 45 N.E.2d 265, 312 Mass. 461—Cochran v. Roemer, 192 N.E. 58, 287 Mass. 500.

Pa.—Alton Park Homeowner's Group v. Zoning Bd. of Adjustment, Com. Pl., 25 Lehigh 474.

Tex.—Gulf, C. & S. F. Ry. Co. v. White, Civ.App., 281 S.W.2d 441, error refused no reversible error.

1. Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

2. Pa.—Appeal of Mack, 122 A.2d 48, 384 Pa. 586—Humphreys v. Stuart Realty Corp., 73 A.2d 407, 364 Pa. 616.

Rubin v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 207.

3. Pa.—Appeal of Associated Contractors, Inc., 138 A.2d 99, 391 Pa. 347.

4. Pa.—Appeal of Peirce, 119 A.2d 506, 384 Pa. 100—In re 501 Paxinosa Ave., Easton, 80 A.2d 789, 367 Pa. 340—Firth v. Scherzberg, 77 A.2d 443, 366 Pa. 443.

increase in the amount of business done⁵ is not a change from the nonconforming use permitted by the zoning ordinances. A garage owner's nonconforming use of the open space in front of his garage for parking automobiles was regarded as merely intensified where he used such space to store new automobiles preliminary to their distribution to dealers.⁶

On the other hand, an abrupt departure from a former use may not be justified as a mere enlargement of that use.⁷ Also, a provision of the zoning ordinance forbidding the enlargement of extension of nonconforming uses has been construed to confine a nonconforming use to its scale of operations at the time of the enactment of the restrictive ordinance,⁸ and a provision forbidding the expansion of a nonconforming use has been construed to prohibit an extension or an increase in intensity of a nonconforming use.⁹

§ 194. Use of New Instrumentalities

The use of new and more effective instrumentalities to conduct a nonconforming use is not an unlawful change or enlargement of the use.

The fact that new and more effective instrumentalities are used in the business conducted on the property will not bring the business within the pro-

hibition of the ordinance as a change of use where such instrumentalities are ordinarily and reasonably adapted to the carrying on of the existing business;¹⁰ but the employment of new instrumentalities and methods may constitute an objectionable extension of a nonconforming use where they operate to change the original nature and purpose of the undertaking.¹¹ Accordingly, the use of machinery to replace work formerly done by hand,¹² the use of power shovels¹³ or a rock crusher¹⁴ in a sand or gravel pit, or a change from steam to internal combustion engines in a plant,¹⁵ has been permitted.

§ 195. Repair, Alteration, or Reconstruction of Buildings

While ordinary repairs and maintenance, and minor alterations and additions are permitted in the case of a building operated as a nonconforming use, substantial or structural alterations and additions are usually not permitted except within such limitations as the zoning ordinances may prescribe.

As a general rule, in the absence of any restriction imposed by the zoning ordinance or regulation, a nonconforming use which existed at the time of the adoption of the zoning regulation may be continued to the extent of ordinary repairs and maintenance¹⁶ and minor alterations and addi-

Change of use generally see *supra* § 189.

5. Mass.—Town of Marblehead v. Rosenthal, 55 N.E.2d 13, 316 Mass. 124.

6. Md.—Nyburg v. Solmson, 106 A. 2d 483, 205 Md. 150.

7. **Elementary school to trade school**
Proposed enlargement or extension of what was originally elementary school in a residential district so that property could be used as a trade school, with its shops, machinery, noise, and fumes, would be such an abrupt departure from use of school property as an elementary school that it could not be considered as an enlargement of a pre-existing use.

Wash.—Shields v. Spokane School Dist. No. 81, 196 P.2d 352, 31 Wash. 2d 247.

8. N.C.—Application of O'Neal, 92 S.E.2d 189, 248 N.C. 714.

9. Ill.—People v. Triem Steel & Processing, Inc., 125 N.E.2d 678, 5 Ill.App.2d 371.

10. Cal.—Endara v. City of Culver City, 294 P.2d 1003, 140 C.A.2d 33. Conn.—Salerni v. Scheuy, 102 A.2d 528, 140 Conn. 566.

Pa.—In re 501 Paxinosa Ave., Easton, 80 A.2d 789, 367 Pa. 340—Firth v. Scherzberg, 77 A.2d 443, 366 Pa.

443—Borough of Cheswick v. Bechman, 42 A.2d 60, 352 Pa. 79.

Schuster v. Board of Zoning Appeals of City of Scranton, Com. Pl., 52 Lack.Jur. 1—Appeal of Johnson, Co., 102 Pittsb.Leg.J. 406.

Transit company

Where, although means by which transit company carried on its business at one of its terminals in city had changed from period to period, as transportation media improved and changed, the essential character of company's business remained unchanged, city zoning ordinance could not be used to thwart the company's natural evolution and growth.

N.Y.—Vella v. City Zoning Bd. of Appeals, City of Rochester, 135 N. Y.S.2d 704, 206 Misc. 941.

Railway spur

Where contractor had, prior to adoption of zoning ordinance in 1942, put city block to a nonconforming use, which was open and obvious, and continuance of nonconforming uses was allowed under the ordinance, contractor was not restricted to 1942 conditions but could utilize improved instrumentalities, such as a railway spur on the land, in pursuit of the nonconforming use provided spur would not operate to change the use. Tex.—Kenny v. Kelly, Civ.App., 254 S.W.2d 535.

11. Ill.—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 658, 350 U.S. 1013, 100 L.Ed. 873.

12. Mass.—Town of Wayland v. Lee, 91 N.E.2d 835, 325 Mass. 637.

13. Conn.—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

14. Minn.—Hawkins v. Talbot, 80 N. W.2d 863, 248 Minn. 549.

Ice plant

La.—Irby v. Panama Ice Co., 168 So. 306, 184 La. 1082.

16. Cal.—Ricciarde v. Los Angeles County, 252 P.2d 773, 115 C.A.2d 569 —San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683.

N.J.—Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21.

Right to repair may not be denied
unless repairs would amount to a substantial reconstruction of building.

Tex.—City of Houston v. Lurie, 224 S.W.2d 871, 148 Tex. 391, 14 A.L. R.2d 61.

Unreasonable curtailment

Owner's right to repair should not be unreasonably curtailed by judicial construction of zoning ordinance permitting nonconforming uses under certain conditions.

tions¹⁷ of the buildings in which such use is conducted. Thus, a substitution of aluminum for canvas on semi-permanent structures used in connection with a nonconforming carnival use was permitted.¹⁸ Similarly, the enclosing of a loading and unloading platform used in connection with a nonconforming dairy business was allowed.¹⁹ Likewise, a change in the location of the doors and the addition of modern toilet facilities is not an unlawful extension or enlargement of the nonconforming use of a building.²⁰

It has been broadly held that alterations or additions to an existing building may be made where they are in furtherance of an existing nonconforming use.²¹ On the other hand, it has been held that in the absence of authority derived from the zoning ordinance, an existing building may not be enlarged by alteration or addition,²² and some ordinances expressly forbid alterations or additions to buildings devoted to nonconforming uses.²³ A stat-

ute protecting nonconforming uses has been construed as not authorizing or protecting from zoning regulation extensions of existing buildings for nonconforming uses.²⁴ The restriction on the extension or enlargement of a nonconforming use, as discussed supra § 191, applies to structures as well as their use,²⁵ and a building or structure containing a nonconforming use may not be enlarged.²⁶ Under some provisions, an alteration or addition for a nonconforming use is permitted provided it does not exceed a specified percentage of the area of the building at the time the restrictive ordinance was enacted.²⁷

Under particular zoning ordinances, it has been held that the operators of a children's camp as a nonconforming use may not enlarge their building in order to accommodate an increased use,²⁸ and that an addition, made by constructing another story over the one-story wing of a building is an unlaw-

Mich.—Paye v. City of Grosse Pointe, 271 N.W. 826, 279 Mich. 254.

17. Cal.—Ricciarde v. Los Angeles County, 252 P.2d 773, 115 C.A.2d 569.

N.J.—Lane v. Bigelow, 50 A.2d 638, 135 N.J.Law 195.

Replacement of sign

Under zoning ordinance and statute permitting preexisting nonconforming use or structure, new occupant of service station was entitled to replace a sign identifying kind of gasoline sold which had been maintained on premises for many years before enactment of zoning ordinance prohibiting erection of signs within two hundred feet of street intersection or entrance to service station and until shortly before new occupant took possession.

N.J.—Ackerman Fuel Oil Co. v. Board of Adjustment of Borough of Paramus, 54 A.2d 661, 136 N.J.Law 93.

Addition to accommodate filing cabinets

Application for a permit to erect an addition to building to accommodate filing cabinets constituted a normal expansion of a nonconforming use and was properly granted.

Pa.—Appeal of Associated Contractors, Inc., 138 A.2d 99, 391 Pa. 347.

18. Mich.—Horwitz v. Dearborn Tp., 52 N.W.2d 235, 332 Mich. 623.

19. Pa.—E. C. Schneider, Inc. v. Zoning Bd. of Adjustment of Borough of Whitehall, 133 A.2d 536, 389 Pa. 593.

20. N.J.—Home Fuel Oil Co. of Ridgewood v. Board of Adjustment of Borough of Glen Rock, Bergen County, 68 A.2d 412, 5 N.J.Super. 63.

21. Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

Ky.—A. L. Carrithers & Son v. City of Louisville, 63 S.W.2d 493, 250 Ky. 462.

Md.—John J. Moylan, Inc. v. Bramble, 24 A.2d 297, 130 Md. 316.

Mass.—Cochran v. Roemer, 192 N.E. 58, 287 Mass. 500.

43 C.J. p 344 note 77.

In absence of express prohibition of extension of nonconforming use, where landowner sought to construct an addition to a greenhouse which was a nonconforming use, landowner was entitled to extension of such nonconforming use, and refusal of building commissioner to issue permit was an abuse of discretion.

Ohio.—State ex rel. Lileux v. Village of Westlake, Com.Pl., 126 N.E.3d 829.

22. Cal.—Rehfeld v. City and County of San Francisco, 21 P.2d 419, 218 C. 83.

Md.—Boulevard Scrap Co. v. City of Baltimore, 130 A.2d 743, 213 Md. 6.

Mich.—South Central Imp. Ass'n v. City of St. Clair Shores, 82 N.W. 2d 453, 348 Mich. 153.

Increase in size of building

(1) A nonconforming use does not entitle owner of property to increase size of his permanent building.

Cal.—Edmonds v. Los Angeles County, 255 P.2d 772, 40 C.2d 642.

(2) Where use of property for fuel-oil storage antedated enactment of zoning ordinance, enlargement of building on premises and increasing facilities for storage of fuel oil were properly denied as extension of a nonconforming use.

N.J.—Home Fuel Oil Co. of Ridgewood v. Board of Adjustment of Borough of Glen Rock, Bergen County, 68 A.2d 412, 5 N.J.Super. 63.

23. Cal.—Dienelt v. Monterey County, 247 P.2d 925, 113 C.A.2d 128.

Miss.—Mayor and Bd. of Aldermen of City of Pontotoc v. White, 93 So.2d 852.

N.Y.—Application of French v. Incorporated Village of North Haven, Suffolk County, 148 N.Y.S.2d 151, 1 A.D.2d 788.

24. Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E. 2d 918, 320 Mass. 207.

25. N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154.

26. N.Y.—Crossroads Recreation, Inc. v. Broz, 149 N.E.2d 66, 4 N.Y. 2d 39, 173 N.Y.S.2d 129.

27. Pa.—Humphreys v. Stuart Realty Corp., 73 A.2d 407, 364 Pa. 616.

Metal tanks used by company engaged in business of buying and selling petroleum products for storage of materials, which were either laid in shallow pits surrounded by a dirt embankment or were entirely covered by two or three feet of earth, and which were not attached to any foundation or supports, were not "structures" within city zoning ordinance precluding erection of new buildings or structures or any additions to buildings for a nonconforming use beyond twenty-five per cent allowance provided for in ordinance.

Pa.—Humphreys v. Stuart Realty Corp., supra.

28. N.Y.—Chandler v. Corbett, 86 N.Y.S.2d 646, 274 App.Div. 1073.

ful extension of the nonconforming use.²⁹ The construction of an outdoor concrete dance floor has been held an unlawful extension of a nonconforming resort use.³⁰ The construction of a large water tank which was separated from the main building being used for a nonconforming use, and which was constructed solely to protect the plant in the event of fire by providing necessary water for a new sprinkler system was regarded as an unlawful enlargement of the nonconforming use.³¹ On the other hand, an auto dealer has been permitted to alter and enlarge his premises when necessary to enable him to retain his dealer's franchise.³²

A provision permitting reasonably necessary additional structures in connection with a nonconforming use has been construed as limited to the erection of additional structures which are ancillary or

reasonably necessary to the further development of the specific nonconforming use which existed at the time of the adoption of the zoning ordinance and has since continued,³³ and does not permit the erection of a pump house and the installation of oil tanks in order to operate a fuel-oil business on premises devoted to a nonconforming business of manufacturing ice.³⁴

Some provisions expressly limit the right of an owner of a nonconforming building to make structural alterations thereto,³⁵ which will extend the existing nonconforming use and prolong the life of the existing nonconforming building;³⁶ and, under such a provision, an owner may be prohibited from making such alterations as would convert the existing building into a different structure³⁷ or ex-

29. N.J.—Heagen v. Borough of Allendale, 127 A.2d 181, 42 N.J. Super. 472.

30. Cal.—Dienelt v. Monterey County, 247 P.2d 925, 113 C.A.2d 128.

31. N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J. Super. 154.

32. Pa.—Pontzer v. Borough of St. Marys, 69 Pa. Dist. & Co. 251.

33. Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

34. Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, supra.

35. Iowa.—McJimsey v. City of Des Moines, 2 N.W.2d 65, 231 Iowa 693. La.—State ex rel. Hochfelder v. City of New Orleans, 132 So. 786, 171 La. 1053.

Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207.

Mich.—Cole v. City of Battle Creek, 298 N.W. 466, 298 Mich. 98.

Decrease in area of use

Where plaintiff was permitted under zoning ordinance to use his property in a residential district for conducting a greenhouse as a nonconforming use, plaintiff's proposal to tear down some of buildings and build two new wings on one building contemplated "structural alterations," prohibited by ordinance, notwithstanding proposed changes would decrease amount of square feet used for nonconforming use.

Mich.—Cole v. City of Battle Creek, supra.

"Structural alteration" shown

(1) Reflooring of fifty per cent of floor space of a multi-family dwelling in a single residential district, re-roofing fifty per cent of dwelling, making separate entrances and in-

stalling separate water, heating, and lighting systems was such a "structural" alteration to dwelling as to prolong indefinitely life of nonconforming use within a zoning ordinance.

Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So. 2d 906, 265 Ala. 504.

(2) Change of flat-roofed wooden building on concrete foundation, used for storage of construction materials at time of adoption of zoning ordinance, and located within short distance of adjacent lot line, into four-room dwelling with peaked roof at estimated cost of two thousand dollars, was prohibited by zoning ordinance providing that no building should be "structurally altered" except in conformity with regulations and limiting premises to one-family dwellings costing no less than four thousand dollars.

R.I.—Taft v. Zoning Bd. of Review of City of Warwick, 64 A.2d 200, 75 R.I. 117.

(3) The replacement of decayed wooden walls of a building, which was being used as a milk plant as a nonconforming use, by brick walls constituted a "structural alteration," within zoning ordinance prohibiting structural alterations of a building used for a nonconforming use.

Ky.—Selligman v. Von Allmen Bros., 179 S.W.2d 207, 297 Ky. 121.

"Structural alteration" not shown

(1) In general.

Ill.—Klumpp v. Rhoads, 200 N.E. 153, 362 Ill. 412.

N.Y.—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298.

(2) Where entire tract was used as veterinary clinic at time of enactment of ordinance, which did not permit such use, and one building was moved one hundred fifty feet and

joined to another at cost of fifteen thousand dollars, most of which covered improvements on inside of building, owner did not accomplish a "structural alteration" within ordinance provision that lawful nonconforming use of building might be continued if no structural alterations were made therein, and owner was entitled to an occupancy permit for veterinary clinic in building.

Tex.—Zoning Bd. of Adjustment of City of San Antonio v. Lawrence, Civ. App., 309 S.W.2d 833.

Structural change

Further excavations of sand and clay by manufacturers of brick on lands zoned for residential purposes were held within prohibition of zoning ordinance as being "structural changes."

N.Y.—Cordts v. Hutton Co., 262 N.Y. S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case) 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

36. Cal.—Ricciardi v. Los Angeles County, 252 P.2d 773, 115 C.A.2d 569.

Ky.—Selligman v. Von Allmen Bros., 179 S.W.2d 207, 297 Ky. 121.

Mich.—Cole v. City of Battle Creek, 298 N.W. 466, 298 Mich. 98.

Proper test to determine what a "structural alteration" to a nonconforming use within a zoning ordinance is, is whether an existing nonconforming use is extended and life of existing nonconforming building prolonged, and not whether there is an increase or decrease in number of square feet utilized by nonconforming use.

Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504.

37. Ky.—Goodrich v. Selligman, 183 S.W.2d 625, 298 Ky. 863—Selligman

tend the area of the existing use,³⁸ and he may be prevented from erecting additions to existing nonconforming buildings.³⁹

It has been held, however, that such provisions do not prohibit alterations not changing the form or character of the building, its general appearance, or structural quality.⁴⁰ A provision forbidding structural alterations has been construed to refer to such an alteration as would convert the structure into a different one and as not forbidding reasonable repairs necessitated by depreciation and deterioration.⁴¹

Under some provisions, structural alterations of

a specified value may be made in a building for the purpose of changing the nonconforming use provided the building is not enlarged.⁴²

§ 196. — New Buildings

Ordinarily, the right to continue a nonconforming use does not authorize the erection of a new building or the replacement of an existing building by another.

Ordinarily, and sometimes by express provision of the zoning ordinances, the right to continue a nonconforming use does not warrant the erection of a new building⁴³ or the replacement of the existing building by a substantially larger building.⁴⁴

v. Von Allmen Bros., 179 S.W.2d 207, 297 Ky. 121.

Mich.—Paye v. City of Grosse Pointe, 271 N.W. 826, 279 Mich. 254.

Evidence of inconveniences and noises from operation of milk plant in four-family zoning district was held immaterial on issue of right to enlarge plant to comply with health ordinance under zoning ordinance authorizing continued use of existing buildings, but forbidding structural alterations.

Ky.—A. L. Carrithers & Son v. City of Louisville, 63 S.W.2d 493, 250 Ky. 462.

38. Mass.—Town of Billerica v. Quinn, 71 N.E.2d 235, 320 Mass. 687.

N.J.—Conaway v. Atlantic City, 154 A. 6, 107 N.J.Law 404.

Extension of area of nonconforming use generally see supra § 192.

39. Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683.

Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

40. Mich.—Paye v. City of Grosse Pointe, 271 N.W. 826, 279 Mich. 254.

Change or substitution

A building is enlarged, extended, reconstructed, or structurally altered within the prohibition of a zoning resolution relating to nonconforming uses only where there is a change or substitution in a substantial particular in the structure of the building itself or in one of its parts or by the addition of another structure to it so that there is an effective conversion of an existing building into a different structure.

N.Y.—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298.

Change of front and access

Where wall between two-story building of brick and frame construction and connecting one-story brick building had been removed, and store

occupied entire ground floor and had glass display windows and three doorways, buildings were held not "structurally altered" within zoning ordinance by proposed installation of modern plate-glass front across both buildings, with access into store through center door.

Mich.—Paye v. City of Grosse Pointe, 271 N.W. 826, 279 Mich. 254.

Milk plant

Enlargement of milk plant in four-family zoning district to enclose space for can-washing and by-products rooms to comply with health ordinance, not being a vital change of the building in its fundamental purpose, was not within zoning ordinance prohibiting structural alterations.

Ky.—A. L. Carrithers & Son v. City of Louisville, 63 S.W.2d 493, 250 Ky. 462.

41. Iowa.—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356.

42. Conn.—Rice v. Zoning Board of Appeals of Town of Milford, 190 A. 257, 122 Conn. 435.

Installation of drive-in gasoline station

N.J.—Lion Building & Loan Ass'n of Newark v. City of Plainfield, 10 A. 2d 473, 123 N.J.Law 610—Bronston v. Inhabitants of City of Plainfield, 194 A. 809, 119 N.J.Law 139.

43. Md.—Boulevard Scrap Co. v. City of Baltimore, 130 A.2d 743, 213 Md. 6.

Mich.—South Central Imp. Ass'n v. City of St. Clair Shores, 82 N.W.2d 453, 348 Mich. 153.

Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207.

Location on lot

Zoning ordinance was held to prohibit, by necessary implication, construction of an entirely new nonconforming building at place on lot remote from original one which was used for nonconforming purpose, unless council approves.

Cal.—Yuba City v. Cherniavsky, 4 P.2d 299, 117 C.A. 568.

Piggery

Where petitioners' operation of piggery on their land as conducted before adoption of zoning bylaw was valid as a nonconforming use, a new building erected after adoption of zoning bylaw would not be protected as nonconforming use.

Mass.—Connors v. Town of Burlington, 91 N.E.2d 212, 325 Mass. 494.

In New York

(1) Under ordinance providing that no building shall be erected or altered for other than conforming use and that nonconforming use shall not be changed unless changed to conforming use, application for permit to construct building within which to conduct nonconforming business should be denied.

N.Y.—Application of French v. Incorporated Village of North Haven, Suffolk County, 148 N.Y.S.2d 151, 1 A.D.2d 788.

(2) Protection of vested rights in nonconforming structure, existing or in process of erection at time of imposition of zoning restrictions, does not extend to subsequent new construction; and where roof over porch was not included in original plans for building which landowners were allowed to complete notwithstanding zoning change made after excavation work and foundation had been fully completed, landowners had no right to convert terrace into roofed porch.

N.Y.—Application of Rogers, 170 N. Y.S.2d 644, 5 A.D.2d 784.

(3) A landowner, however, has right to accommodate an increase in business and to erect buildings necessary thereto if business in essence is same as a nonconforming use existing prior to adoption of a zoning regulation.

N.Y.—Gerling v. Board of Zoning Appeals of Town of Clay, 167 N. Y.S.2d 858.

44. Ill.—Gore v. City of Carlinville, 137 N.E.2d 368, 9 Ill.2d 296.

However, where a provision forbidding structural alterations of buildings devoted to nonconforming uses and one providing for the eventual termination of all nonconforming uses were repealed, the legislative purpose evidenced by these repeals has been held to warrant a construction of a provision permitting the continuance of nonconforming uses as allowing the owner of a building devoted to a nonconforming use to demolish the building and replace it by a larger one devoted to the same use.⁴⁵

An ordinance which prohibits structural alterations forbids the erection of a new building.⁴⁶ The fact that a building does not conform to rear yard and open area requirements of a zoning ordinance subsequently enacted does not entitle the owner to erect an additional nonconforming building on an adjoining lot subsequently purchased.⁴⁷

On the other hand, the replacement of a frame by a fireproof building has been allowed where the continued use of the frame building is in violation of other laws.⁴⁸ A new building has been permitted where it will enclose work previously done in the open, and will be less objectionable to the neighborhood than the existing situation,⁴⁹ and it has been broadly stated that unless prohibited by ordinance, a nonconforming use carried on in the open may be enclosed by a building.⁵⁰ On the other hand, the enclosure of a nonconforming use as a junk yard by a building was held to be in violation of an ordinance providing that a nonconforming use may not be extended or increased and that buildings may not be erected or extended on land used as a nonconforming use.⁵¹

Service station. The owner of a service station does not have such a vested right in the perpetuation of that use of the property as would compel the issuance of a building permit for a new and larger nonconforming building to make that use effective.⁵² Any right to a nonconforming use of a lot as it had been used for gasoline filling station purposes prior to the enactment of an ordinance prohibiting a filling station within a residential district does not entitle the owner or lessees of such lot to replace the existing station structures, occupying approximately one-half of the corner lot, by new and larger structures utilizing the entire lot and increasing the volume of gasoline to be stored and transferred.⁵³ Where a service station operated as a nonconforming use in a one-family residential zone became in need of modernization and repair, the proposed complete destruction of the existing structures and the construction of new and larger structures at different locations on the lot so that, inter alia, former outdoor activities, such as repair work and work done at outdoor grease pits, could be conducted indoors, constitutes an unlawful enlargement of the nonconforming use.⁵⁴

§ 197. — Restoration and Repair of Damaged or Destroyed Building

It would appear that where a building devoted to a nonconforming use is substantially destroyed, it may not be reconstructed; but repair and restoration are generally permitted in the case of partial damage or destruction.

It has been held that a nonconforming use which existed at the time of adoption of the regulation may

N.J.—Hay v. Board of Adjustment of Borough of Fort Lee, 117 A.2d 650, 37 N.J.Super. 461.

Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21—De Vito v. Pearsall, 180 A. 202, 115 N.J.Law 323.

Insubstantial shed or outbuilding

Not every replacement or modification of every insubstantial shed or auxiliary outbuilding used in connection with nonconforming use need be regarded as action with respect to a structure whose replacement is forbidden by zoning regulations.

Mass.—Town of Manchester v. Leahy, 143 N.E.2d 198.

45. Ky.—Butler v. Louisville & Jefferson County Bd. of Zoning Adjustment and Appeals, 224 S.W.2d 658, 311 Ky. 663.

46. Cal.—San Diego County v. McClurken, 284 P.2d 972, 37 C.2d 633.

Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207—Wilbur v. City

of Newton, 18 N.E.2d 365, 302 Mass. 38.

Wash.—State ex rel. Miller v. Cain, 242 P.2d 505, 40 Wash.2d 216.

Gasoline storage tanks are "buildings" within text rule.

Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 C.A.2d 633.

Replacement of building

Destruction of old building devoted to nonconforming use and replacement of such building with an entirely new building covering much more space was in violation of zoning ordinance relating to structural alteration of nonconforming use and new building would be abated.

Ill.—Price v. Ackmann, 102 N.E.2d 194, 345 Ill.App. 1.

47. Pa.—Fagan v. Philadelphia Zoning Bd. of Adjustment, 132 A.2d 279, 389 Pa. 99.

48. N.C.—Application of O'Neal, 92 S.E.2d 189, 243 N.C. 714.

49. Ill.—Winnebago County v. Harrington, 68 N.E.2d 619, 329 Ill.App. 344.

50. Pa.—Appeal of Peirce, 119 A.2d 506, 384 Pa. 100.

Inapplicable ordinance

Provision of zoning ordinance authorizing continuation of preexisting, nonconforming use and extension of such use throughout a building provided no structural alterations are made other than those ordered by authorized public officer relates to any building which entirely houses nonconforming use which may be extended, as of right, throughout building, and is inapplicable where open-air portion of a lot is already devoted to preexisting, nonconforming use. Pa.—Appeal of Peirce, supra.

51. Md.—Boulevard Scrap Co. v. City of Baltimore, 130 A.2d 743, 213 Md. 6.

52. Wash.—State ex rel. Miller v. Cain, 242 P.2d 505, 40 Wash.2d 216.

53. Ill.—Gore v. City of Carlinville, 137 N.E.2d 368, 9 Ill.2d 296.

54. N.J.—Hay v. Board of Adjustment of Borough of Fort Lee, 117 A.2d 650, 37 N.J.Super. 461.

be continued to the extent of restoring, or making substantial repairs to, buildings in which such use existed,⁵⁵ where such buildings have been damaged or destroyed,⁵⁶ and the ordinance may provide for such repair and restoration,⁵⁷ but it has also been held that, even when a nonconforming building has been destroyed by an act of God, the owner should not be allowed to rebuild it as a matter of right.⁵⁸ The reconstruction of a nonconforming garage partially destroyed by fire has been allowed;⁵⁹ and a refinery operated as a nonconforming use in a residential area has been permitted to restore and repair the part of its plant destroyed by an explosion and fire.⁶⁰

Under some zoning ordinances, the restoration or reconstruction of a nonconforming building which

has been damaged or destroyed is expressly permitted within the limitations and conditions imposed by the ordinance,⁶¹ as where the damage or destruction does not exceed a specified percentage of the physical structure or financial value of the nonconforming building,⁶² and where the work of reconstruction is performed within the time limited by the ordinance.⁶³

A provision authorizing the restoration or repair of a nonconforming structure in the event of its partial destruction does not warrant its reconstruction where it is substantially destroyed.⁶⁴ An ordinance which permits the alteration or extension of a building which is being put to a nonconforming use does not authorize its reconstruction.⁶⁵ Under a provision that a building devoted to a noncon-

55. N.J.—*Sitgreaves v. Board of Adjustment of Town of Nutley*, 54 A. 2d 451, 136 N.J.Law 21—*Pieretti v. Johnson*, 41 A.2d 896, 132 N.J. Law 576—*Meixner v. Board of Adjustment of City of Newark*, 37 A. 2d 678, 131 N.J.Law 599—*Green v. Board of Com'rs of City of Newark*, 36 A.2d 610, 131 N.J.Law 336.

56. Ky.—*Louisville & Jefferson County Planning & Zoning Commission v. Stoker*, 259 S.W.2d 443. N.J.—*De Vito v. Pearsall*, 180 A. 202, 115 N.J.Law 323.

N.Y.—*Brous v. Town of Hempstead*, 69 N.Y.S.2d 258, 272 App.Div. 31, reheard 70 N.Y.S.2d 576, 272 App. Div. 777.

Ohio.—*Eskridge v. City of Sandusky*, Com.Pl., 136 N.E.2d 465.

57. N.J.—*Ardolino v. Board of Adjustment of Borough of Florham Park, Morris County*, 125 A.2d 543, 41 N.J.Super. 582.

58. Md.—*Colati v. Jirout*, 47 A.2d 613, 186 Md. 652.

59. N.J.—*Spickofsky v. Board of Adjustment of Borough of East Rutherford*, 60 A.2d 888, 137 N.J.Law 494.

60. Ohio.—*Eskridge v. City of Sandusky*, Com.Pl., 136 N.E.2d 465.

61. Md.—*Colati v. Jirout*, 47 A.2d 613, 186 Md. 652.

N.Y.—*Navin v. Early*, 56 N.Y.S.2d 346.

Pa.—*Nemtol Apartments, Inc. v. City of Philadelphia*, 84 Pa.Dist. & Co. 351—*Kellman v. Philadelphia Zoning Bd. of Adjustment*, 75 Pa.Dist. & Co. 504—*Beck v. Zoning Board of Adjustment*, 69 Pa.Dist. & Co. 438.

62. Ky.—*Louisville & Jefferson County Planning & Zoning Commission v. Stoker*, 259 S.W.2d 443.

N.Y.—*Jetter v. Hofheins*, 70 N.Y.S. 2d 808, 190 Misc. 99.

Pa.—*Chakofsky v. Board of Zoning Appeals of City of Scranton*, Com.

Pl., 48 Lack.Jur. 173—*Appeal of Texas Co.*, Com.Pl., 53 Lanc.L.Rev. 257.

R.I.—*Constantino v. Zoning Bd. of Review of City of Cranston*, 60 A. 2d 478, 74 R.I. 316.

Computation of value

In arriving at value of sawmill before fire, which destroyed part of it, for purpose of determining the question whether its reconstruction is prevented by village zoning ordinance, providing that nonconforming buildings, destroyed by fire to extent of over seventy-five per cent of their assessed valuations, shall not be rebuilt, sawmill machinery, not destroyed by fire, must be included.

N.Y.—*Incorporated Village of North Hornell v. Rauber*, 40 N.Y.S.2d 938, 181 Misc. 546.

Restoration is prohibited where more than specified percentage of financial value of nonconforming building is destroyed by a hurricane. Miss.—*Palazzola v. City of Gulfport*, 52 So.2d 611, 211 Miss. 737.

63. Miss.—*Palazzola v. City of Gulfport*, supra.

Tolling of time limitation

Where a nonconforming apartment is destroyed by fire and thereafter, but before rebuilding, area is downgraded, and action is then instituted to test constitutionality of downgrading, whereupon by action of council property was restored to its original classification, neither reclassification nor institution and pendency of action to test validity thereof toll period within which nonconforming structure may be rebuilt, at least in absence of some further showing of prejudice.

Pa.—*Nemtol Apartments, Inc. v. City of Philadelphia*, 84 Pa.Dist. & Co. 351.

Fire; explosion

Requirement of city zoning ordinance, with respect to reconstruction

to a nonconforming use, that rebuilding following "fire" must be begun within three years of destruction, did not apply to rebuilding after an explosion.

Pa.—*Kellman v. McShain*, 85 A.2d 32, 369 Pa. 14.

Kellman v. Philadelphia Zoning Bd. of Adjustment, 75 Pa.Dist. & Co. 504.

64. N.J.—*Hay v. Board of Adjustment of Borough of Fort Lee*, 117 A.2d 650, 37 N.J.Super. 461—*D'Agostino v. Jaguar Realty Co.*, 91 A.2d 500, 22 N.J.Super. 74.

Determination of partial destruction

Under statute providing that a structure devoted to a nonconforming use may be restored or repaired in event of partial destruction, what constitutes partial destruction depends on facts of each case, and town zoning ordinance limiting right to restore to cases of destruction of less than seventy-five per cent of replacement value was not authorized. N.J.—*H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny*, 105 A.2d 894, 31 N.J.Super. 30.

Use terminated by destruction

(1) Valid nonconforming use of premises as automobile repair shop was terminated on destruction of garage by fire.

N.J.—*Barbarisi v. Board of Adjustment*, 103 A.2d 164, 30 N.J.Super. 11.

(2) Where defendants' factory, which was a use of realty nonconforming to zoning ordinance, was totally destroyed, nonconforming use was destroyed, and defendants were not entitled to rebuild factory.

N.J.—*D'Agostino v. Jaguar Realty Co.*, 91 A.2d 500, 22 N.J.Super. 74.

65. Mass.—*David v. Board of Appeals of Reading*, 132 N.E.2d 386, 333 Mass. 657.

forming use may not be reconstructed or altered beyond a certain extent, and that a building destroyed by fire or other specified causes could be restored, a building which collapsed because it was completely worn out may not be rebuilt.⁶⁶

A provision permitting the reconstruction of a nonconforming building destroyed by fire should be construed in accordance with the intent of the zoning regulations to eliminate nonconforming uses as completely and speedily as possible,⁶⁷ and, while such provision does not require an exact reproduction of the old building, and permits minor variations in construction if a similar use of the building is intended,⁶⁸ a building constructed on a greater street frontage and substantially increasing the nonconformity is not permissible.⁶⁹

Demolition or removal of buildings. Demolition of the buildings on certain premises subject to a nonconforming use does not, of itself, remove the exemption where such exemption applies to the premises as well as to the buildings thereon, as long as there is no change or extension in use or structural alteration of any building in connection with such a change.⁷⁰ A building permitted in a

certain district as a nonconforming use retains its status as such only in its existing location, and it may not be removed into another district in which it does not conform to the zoning regulations.⁷¹

§ 198. Discontinuance or Abandonment

Where a nonconforming use existing at the date of promulgation of a zoning ordinance has been permanently discontinued or abandoned, the right to such use is lost and compliance must thereafter be had with the zoning regulations.

The right to resume a nonconforming use after a period of nonuse depends in most cases on the question of what amounts to an abandonment or discontinuance of the use, and on the effect of such abandonment or discontinuance under the zoning statute or ordinance.⁷² Where a nonconforming use of property existing at the date of promulgation of a zoning ordinance has been permanently discontinued or abandoned, the right to such use is lost and compliance must thereafter be had with the zoning regulations.⁷³ The abandonment of a nonconforming use prevents the subsequent reestablishment of such use;⁷⁴ once the abandonment is clearly indicated by intention and action, or failure of action for a suffi-

66. Ind.—Fidelity Trust Co. v. Downing, 68 N.E.2d 789, 224 Ind. 457.

67. Conn.—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449.

68. Conn.—Piccolo v. Town of West Haven, supra.

Open space in roof

Where portion of building used previously in city as a stable was covered by a roof that had in the center an opening ten feet by ten feet in size through which hay was lowered, and at time of destruction of roof by explosion, the stable was used to garage trucks, which was a nonconforming use, no variance was required under zoning to rebuild roof without leaving an open space ten feet by ten feet.

Pa.—Kellman v. McShain, 85 A.2d 32, 369 Pa. 14.

Height

(1) Whether owner of a building housing a nonconforming use, roof of which has been destroyed by explosion, should be permitted to rebuild a higher roof depends on whether hardship to applicant in refusing permission to do so would render any advantage to neighbors insignificant in comparison.

Pa.—Kellman v. Philadelphia Zoning Bd. of Adjustment, 75 Pa. Dist. & Co. 504.

(2) Under zoning ordinance, where a building constituting a nonconforming use is destroyed by fire, it

may be rebuilt only to original height, which, when a gable is involved, is mean height between eaves and ridge, it is improper to square off building to a height approximately that of former ridge.

Pa.—Drake v. Zoning Bd. of Adjustment, 65 Pa. Dist. & Co. 293.

69. Conn.—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449.

70. N.Y.—People v. Emigrant Industrial Sav. Bank, 25 N.Y.S.2d 605, 261 App. Div. 402.

Cessation or change of use as abandonment of nonconforming use see *infra* §§ 199, 200.

71. Mass.—Bianchi v. Commissioner of Public Buildings for City of Somerville, 181 N.E. 120, 279 Mass. 136.

72. N.Y.—Frammor Realty Corp. v. LeBoeuf, 104 N.Y.S.2d 247, 201 Misc. 220, affirmed 109 N.Y.S.2d 525, 279 App. Div. 795, reargument and appeal denied 110 N.Y.S.2d 910, 279 App. Div. 874.

Fact that an owner allows his business to decline does not affect his or his vendee's right to continue a nonconforming use if circumstances show owner's intent to so employ his property; right to continue such a use can be lost only by its abandonment.

Pa.—Alton Park Homeowner's Group v. Zoning Bd. of Adjustment, Com. Pl., 25 Lehigh L.J. 474.

73. Ala.—State ex rel. Turner v. Baumhauer, 174 So. 514, 234 Ala. 286.

Ark.—Branch v. Powers, 197 S.W.2d 928, 210 Ark. 886.

Md.—Dorman v. Mayor and City Council of Baltimore, 51 A.2d 658, 187 Md. 678—Beyer v. Mayor and Council of Baltimore City, 34 A.2d 765, 182 Md. 444.

N.J.—Chipolone v. Municipal Council of City of Clifton, 61 A.2d 896, 1 N.J. 93.

State v. Casper, 68 A.2d 545, 5 N.J. Super. 150.

N.Y.—Frammor Realty Corp. v. LeBoeuf, 104 N.Y.S.2d 247, 201 Misc. 220, affirmed 109 N.Y.S.2d 525, 279 App. Div. 795, reargument and appeal denied 110 N.Y.S.2d 910, 279 App. Div. 874.

People, on Complaint of Kelly, v. Shell, 26 N.Y.S.2d 188.

Pa.—McNichol v. Gallagher, 66 Pa. Dist. & Co. 328.

Collingdale Borough v. Moyer, Com. Pl., 32 Del. Co. 305—Sylvester v. Board of Zoning Appeals, Com. Pl., 50 Lack. Jur. 200.

Discontinuance or abandonment of use prior to enactment of restrictive ordinance see *supra* § 187.

74. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Pa.—Honig v. Lonsdorf, Com. Pl., 53 Lack. Jur. 209.

cient period of time, the owner has lost his right to the nonconforming use.⁷⁵

The word "discontinued," as used in a zoning ordinance provision that, if a nonconforming use is discontinued, any new use of the premises shall be in conformity with provisions of the ordinance, connotes a voluntary act and is synonymous with "abandoned,"⁷⁶ and the discontinuance of a nonconforming use results from the concurrence of the intent to abandon and some overt act or failure to act which carries the implication of abandonment.⁷⁷ However, it has been held that the court is not required to read into a zoning ordinance, providing that a nonconforming use existing on the date of the passage thereof may be continued until the aban-

donment of such use, the restriction, "with the intention to abandon," or similar intention precluding possible return, as modifying the word "abandonment."⁷⁸

The question of the abandonment of a nonconforming use is largely a matter of intention,⁷⁹ and is to be determined in the light of all of the facts and circumstances and the terms of the zoning ordinance.⁸⁰ An intention to go back into a business some day, which has been to all intents and purposes completely discontinued, is not sufficient to hold property in a nonconforming status.⁸¹

In some cases, the facts and circumstances have been held to establish an abandonment or discontinuance of the nonconforming use.⁸² For example,

75. Md.—*Beyer v. Mayor and Council of Baltimore City*, 34 A.2d 765, 182 Md. 444.

76. Ala.—*Board of Zoning Adjustment for City of Lanett v. Boykin*, 92 So.2d 906, 265 Ala. 504.

Del.—*Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 8 Terry 373.

Ill.—*Douglas v. Village of Melrose Park*, 58 N.E.2d 864, 389 Ill. 98.

N.Y.—*Navin v. Early*, 56 N.Y.S.2d 346.

Pa.—*Appeal of Associated Contractors, Inc.*, 138 A.2d 99, 391 Pa. 347—*Appeal of Haller Baking Co.*, 145 A. 77, 295 Pa. 257.

Wis.—*State v. Manders*, 238 N.W. 835, 206 Wis. 121.

77. Ala.—*Board of Zoning Adjustment for City of Lanett v. Boykin*, 92 So.2d 906, 265 Ala. 504.

Del.—*Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 8 Terry 373.

D.C.—*Wood v. District of Columbia, Mun.App.*, 39 A.2d 67.

Ill.—*People ex rel. Delgado v. Morris*, 79 N.E.2d 839, 334 Ill.App. 557.

Md.—*Landay v. MacWilliams*, 196 A. 293, 173 Md. 460, 114 A.L.R. 984.

Mo.—*Brown v. Gambrel*, 213 S.W.2d 931, 358 Mo. 192.

N.Y.—*City of Binghamton v. Gartell*, 90 N.Y.S.2d 556, 275 App.Div. 457.

Franmor Realty Corp. v. Le Boeuf, 104 N.Y.S.2d 247, 201 Misc. 220, affirmed 109 N.Y.S.2d 525, 279 App.Div. 795, reargument and appeal denied 110 N.Y.S.2d 910, 279 App.Div. 874—*Longo v. Eilers*, 93 N.Y.S.2d 517, 196 Misc. 909.

City of Syracuse v. Bronner, 133 N.Y.S.2d 153.

Pa.—*Appeal of Associated Contractors, Inc.*, 138 A.2d 99, 391 Pa. 347.

Tex.—*Corpus Juris Secundum* quoted in *Town of Highland Park v. Marshall, Civ.App.*, 235 S.W.2d 658, 664, error refused no reversible error.

Affirmative or negative act

In order to find that nonconforming use under city zoning ordinance has been discontinued there must be intent to abandon and voluntary conduct, whether affirmative or negative, which carries implication of abandonment, and lapse of time, although it is evidential, is not controlling factor.

Mass.—*Pioneer Insulation & Modernizing Corp. v. City of Lynn*, 120 N.E.2d 913, 331 Mass. 560.

Voluntary relinquishment of known right

Under rule that right of realty owner to continue a nonconforming use may be lost through abandonment of such use, abandonment is actual, voluntary, intentional relinquishment of a known right together with a concurring intention to abandon.

N.Y.—*Franmor Realty Corp. v. Le Boeuf*, 104 N.Y.S.2d 247, 201 Misc. 220, affirmed 109 N.Y.S.2d 525, 279 App.Div. 795, reargument and appeal denied, 110 N.Y.S.2d 910, 279 App.Div. 874—*Longo v. Eilers*, 93 N.Y.S.2d 517, 196 Misc. 909.

Substantial change

In order to constitute an abandonment of a nonconforming use, the change must be substantial and the evidence such as to afford a rational basis to support it.

N.J.—*Haulenbeek v. Borough of Allenhurst*, 57 A.2d 52, 136 N.J.Law 557.

Offensive business

The question whether right to use property as a junk shop in a nonconforming use was lost by discontinuance of use for a certain period was not affected by fact that the junk business might be offensive, since it is a lawful business regulated and licensed by the state.

Md.—*Landay v. MacWilliams*, 196 A. 293, 173 Md. 460, 114 A.L.R. 984.

78. Ohio.—*Francisco v. City of Columbus, App.*, 31 N.E.2d 236, re-

hearing denied 31 N.E.2d 243, appeal dismissed 18 N.E.2d 404, 134 Ohio St. 526.

79. Conn.—*Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel*, 86 A.2d 74, 138 Conn. 434.

Pa.—*Appeal of McDermott, Com.Pl.*, 54 Lack.Jur. 45.

80. Del.—*Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 8 Terry 373.

Wis.—*State ex rel. Morehouse v. Hunt*, 291 N.W. 745, 235 Wis. 358.

Acts and words

In determining whether nonconforming use has been abandoned, case should turn primarily on acts and not on statements except in so far as words took form of action.

N.J.—*Town of Montclair v. Bryan*, 85 A.2d 231, 16 N.J.Super. 535.

81. Md.—*Dorman v. Mayor and City Council of Baltimore*, 51 A.2d 658, 187 Md. 678—*Beyer v. Mayor and Council of Baltimore City*, 34 A.2d 765, 182 Md. 444.

Removal of manufacturing equipment from manufacturing plant, constituting nonconforming use in apartment house district under city zoning ordinance, to new manufacturing plant about a mile and a half away, constituted "abandonment" of such use even though some equipment, which might have been used in new plant, was left in place in anticipation of possible emergency requiring use of old plant for manufacturing purposes.

Ohio.—*Francisco v. City of Columbus, App.*, 31 N.E.2d 236, rehearing denied 31 N.E.2d 243, appeal dismissed 18 N.E.2d 404, 134 Ohio St. 526.

82. N.Y.—*Curtiss-Wright Corp. v. Incorporated Village of Garden City*, 61 N.Y.S.2d 678, 270 App.Div. 936, affirmed 72 N.E.2d 26, 296 N.Y. 839.

whatever right the owner had to maintain a shed as a nonconforming use in a residential district is lost by its voluntary demolition.⁸³ Where a house was operated as a rooming house by partners, but after the death of one of the partners, the roomers were asked to leave, and the house was closed for upwards of four years and no effort was made to continue the business there was no longer a nonconforming use.⁸⁴ Where realty owner had ceased using realty as a race track for five years, permitted the grand stand to deteriorate, and allowed the realty to be foreclosed for taxes, the right to continue to use the realty for a race track on the theory of a prior nonconforming use was abandoned.⁸⁵ Where a multiple-family dwelling permitted as a nonconforming use in a residential zone was converted to a single-family residence by the purchaser and was so used for many years, the fact that there were occasional boarders in the home did not show a continuation of the nonconforming use, where the ordinance permitted boarders in a single-family residence.⁸⁶

Under other particular facts and circumstances,

an abandonment or discontinuance of the nonconforming use has been held not to be established.⁸⁷ Thus, where a purchaser of a multiple-unit dwelling established as a nonconforming use under zoning ordinance providing for single-family residential area, made extensive improvements to units immediately on obtaining possession of the premises, there was no intention to abandon or loss of the nonconforming use of the dwelling as a multiple-unit dwelling.⁸⁸

§ 199. — Cessation of Use

Unless otherwise provided by the zoning ordinance, cessation of a nonconforming use does not of itself work an abandonment of the right to continue such use.

In the absence of a statute otherwise providing, cessation of use does not of itself work an abandonment,⁸⁹ but the duration of nonuse is an important factor in determining whether or not the nonconforming use has been abandoned.⁹⁰ Accordingly, unless so provided in the zoning ordinance, the cessation or discontinuance of a nonconforming use without the substitution of another use or without evidence of an intention to abandon the noncon-

Pa.—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa.Dist. & Co. 686, 83 Montg.Co. 247—Elkins-Rydal Co. v. Brigham, 69 Montg.Co. 185, exceptions dismissed 84 Pa. Dist. & Co. 136.

Cemetery

Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

Gasoline service station

N.Y.—Larson v. Howland, 124 N.Y.S. 2d 754.

Public stable or riding academy

Mo.—Brown v. Gambrel, 213 S.W.2d 931, 358 Mo. 192.

83. N.J.—Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A. 2d 451, 136 N.J.Law 21.

84. N.J.—State v. Casper, 68 A.2d 545, 5 N.J.Super. 150.

85. N.Y.—Longo v. Eilers, 93 N.Y. S.2d 517, 196 Misc. 909.

86. N.J.—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535.

87. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504.

Ill.—Douglas v. Village of Melrose Park, 58 N.E.2d 864, 389 Ill. 98.

Pa.—Schmidt v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 326.

Md.—Landay v. MacWilliams, 196 A. 293, 173 Md. 460, 114 A.L.R. 984.

N.Y.—Marshak v. City of Long Beach, 81 N.Y.S.2d 74.

Pa.—Appeal of McDermott, Com.Pl., 54 Lack.Jur. 45—Feagley v. Coho, Com.Pl., 53 Lanc.L.Rev. 29.

Apartment building

Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

Junk yard

N.Y.—City of Binghamton v. Gartell, 90 N.Y.S.2d 556, 275 App.Div. 457.

Sand pits

Mass.—Town of Wayland v. Lee, 91 N.E.2d 835, 325 Mass. 637.

88. Ill.—Brown v. Gerhardt, 125 N. E.2d 53, 5 Ill.2d 106.

89. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Ill.—Douglas v. Village of Melrose Park, 58 N.E.2d 864, 389 Ill. 98.

People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

Md.—Beyer v. Mayor and Council of Baltimore City, 34 A.2d 765, 182 Md. 444—Landay v. MacWilliams, 196 A. 293, 173 Md. 460, 114 A.L.R. 984.

Mass.—Pioneer Insulation & Modernization Corp. v. City of Lynn, 120 N.E.2d 913, 331 Mass. 560—Paul v. Selectmen of Scituate, 17 N.E.2d 193, 301 Mass. 365.

N.J.—Haulenbeek v. Borough of Allenhurst, 57 A.2d 52, 136 N.J.Law 557.

N.Y.—Park Ave.—Fifty-Ninth St. Corp. v. Murdock, 156 N.Y.S.2d 39—Larson v. Howland, 124 N.Y.S.2d 754—Marshak v. City of Long Beach, 81 N.Y.S.2d 74.

Pa.—Appeal of Associated Contractors, Inc., 138 A.2d 99, 391 Pa. 347

—Null v. Power, 137 A.2d 316, 391 Pa. 51.

Appeal of Associated Contractors, Inc., Com.Pl., 44 Del.Co. 205—Radnor Tp. v. Civitella, Com.Pl., 43 Del.Co. 192—Appeal of McDermott, Com.Pl., 54 Lack.Jur. 45—Commonwealth ex rel. v. McBride Co., 95 Pittsb.Leg.J. 337—Appeal of Walsh, Com.Pl., 89 Pittsb.Leg.J. 333.

Tex.—Corpus Juris Secundum quoted in Town of Highland Park v. Marshall, Civ.App., 235 S.W.2d 658, 664, refused no reversible error.

Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358—State v. Manders, 238 N.W. 835, 206 Wis. 121.

43 C.J. p 344 note 76.

Twelve years

Under city zoning ordinance, discontinuance of nonconforming use of premises in "C" residential district for manufacturing purposes for twelve years did not constitute abandonment of such use.

Pa.—Null v. Power, 137 A.2d 316, 391 Pa. 51.

90. Ill.—Brown v. Gerhardt, 125 N. E.2d 53, 5 Ill.2d 106.

N.J.—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535.

Duration of nonuse is not conclusive, but is entitled to consideration particularly in connection with facts evidencing an intention to change or abandon.

Ill.—Brown v. Gerhardt, 125 N.E.2d 53, 5 Ill.2d 106.

forming use will not prevent a resumption of the nonconforming use.⁹¹ Abandonment of a nonconforming use is not to be assumed from the fact that a building is permitted to remain vacant⁹² and periods of interruption of use due to lack of demand, inability to get a tenant, and financial difficulty do not change the character of the use.⁹³

The repair or remodeling of a building shows an intention to continue rather than to abandon a nonconforming use,⁹⁴ and temporary nonoccupancy for the purpose of making repairs does not amount to a discontinuance of the use.⁹⁵ A nonconforming use is not abandoned by the owner through the taking of a part of the premises by the

city and the demolition of buildings thereon,⁹⁶ or by the destruction of a building by fire.⁹⁷

A discontinuance of a nonconforming use, in order to work an abandonment thereof, should be done voluntarily.⁹⁸ Thus, a discontinuance of a nonconforming use under the compulsion of an injunction cannot be regarded as an abandonment of the use,⁹⁹ and a similar conclusion has been reached where the discontinuance of the use was due to wartime restrictions.¹

Under some provisions, nonuse for a stated time is conclusively deemed an abandonment of the nonconforming use,² and nonuse for less than the stated

91. N.Y.—City of Binghamton v. Gartell, 90 N.Y.S.2d 556, 275 App. Div. 457.

Where retail lumber yard, which had been operated by owner for about ten years, was closed down because of financial difficulties and remained closed for about three years until purchased by another person, closing down under such circumstances did not constitute an abandonment or discontinuance of nonconforming use of yard.

N.J.—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J. Law 95.

92. Mass.—Paul v. Selectmen of Scituate, 17 N.E.2d 193, 301 Mass. 365. Tex.—Corpus Juris Secundum quoted in Town of Highland Park v. Marshall, Civ.App., 235 S.W.2d 658, 664, refused no reversible error.

Retention in same condition

Fact that building which was equipped as a stable, and which had been used for the nonconforming use of buying and selling horses, had been vacant for about six years before being taken over by defendant, did not establish abandonment of the nonconforming use, where building during extended period of vacancy was retained in same condition and was being advertised for lease as a stable.

D.C.—Wood v. District of Columbia, Mun.App., 39 A.2d 67.

93. Ill.—Douglas v. Village of Melrose Park, 58 N.E.2d 864, 389 Ill. 98.

N.J.—Haulenbeek v. Borough of Allenhurst, 57 A.2d 52, 136 N.J. Law 557.

Pa.—Appeal of Langol, 104 A.2d 343, 175 Pa. Super. 320.

Marple v. Tarquinio, 81 Pa. Dist. & Co. 210, 38 Del. Co. 362.

Radnor Tp. v. Civitella, Com. Pl., 43 Del. Co. 192.

Tex.—Corpus Juris Secundum quoted in Town of Highland Park v. Marshall, Civ.App., 235 S.W.2d 658, 664, refused no reversible error.

Tenant's insolvency

Zoning ordinance did not destroy owner's right to continue nonconforming use of premises merely because tenant became insolvent.

Wis.—State v. Manders, 238 N.W. 835, 206 Wis. 121.

94. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504.

Set-back line

Where owner of building extending to old building line at time of establishment of ten-foot set-back by village authorities had right to continue that nonconforming use, reconstruction of entire front of building and roof did not constitute abandonment of right to nonconforming use. N.Y.—Nassau-Fulton Realty Co. v. Schlamm, 67 N.Y.S.2d 501.

95. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504.

96. N.Y.—440 East 102nd Street Corporation v. Murdock, 34 N.E.2d 329, 285 N.Y. 298.

97. N.Y.—440 East 102nd Street Corporation v. Murdock, supra. Navin v. Early, 56 N.Y.S.2d 346.

Failure to restore property

If owner, after fire, refused to restore property for use of junk shop which was a nonconforming use under zoning ordinance, refused to rent it for junk business and later rented part of it as a warehouse, and if neither owner nor his son ever made any other business use of rented or unrented part of property, nonconforming use was abandoned or changed to use of higher classification.

Md.—Dorman v. Mayor and City Council of Baltimore, 51 A.2d 658, 187 Md. 678.

Refusal of license renewal

Where owner was using property for sale of used automobiles at time of adoption of a zoning amendment prohibiting that use of property, and his cessation of such use after enactment of the ordinance, when mu-

nicipal officials refused his application for renewal of his license, was involuntary, owner had a right to continue nonconforming use of property free of prohibitive amendment to ordinance, even though he had not complied with all statutory regulations governing conduct of business constituting that use.

N.J.—Scavone v. Mayor and Council of Borough of Totowa, 140 A.2d 238, 49 N.J. Super. 423.

Requirement that use be one which was lawful prior to enactment of restrictive zoning ordinance see supra § 188.

99. La.—Cantelli v. Hamlin, App., 83 So.2d 563.

1. Wash.—King County v. High, 219 P.2d 118, 36 Wash.2d 580.

Airport

Fla.—Crandon v. State ex rel. Uricho, 28 So.2d 159, 158 Fla. 133.

Service station

N.Y.—Franmor Realty Co. v. Le Boeuf, 104 N.Y.S.2d 247, 201 Misc. 220, affirmed 109 N.Y.S.2d 525, 279 App. Div. 795, reargument and appeal denied 110 N.Y.S.2d 910, 279 App. Div. 874.

2. Colo.—Beszedes v. Board of Com'rs of Arapahoe County, 178 P.2d 950, 116 Colo. 123.

Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Pa.—Appeal of Roncase, Com. Pl., 71 Mont. Co. 362.

Wartime restrictions

Where village zoning ordinance prohibited resumption of nonconforming use after discontinuance for more than twelve months, owner of premises in residential zone which had been used for many years as gasoline service station was not entitled to resume such nonconforming use after discontinuance of such use for several years, although nonuse during at least part of period was due to wartime restrictions on gaso-

time ordinarily is not deemed an abandonment.³ Such a provision applies only to nonconforming uses and does not apply to a use permissible as an accessory to a conforming use.⁴

§ 200. — Change of Use

The general rule, sometimes expressly stated in the zoning ordinance, is that the right to continue a nonconforming use is lost or abandoned by the devotion of the property to a different use.

Ordinarily, and sometimes by express provision of the zoning ordinances, whenever a nonconforming use has been changed to a more restricted use or to a conforming use, the owner loses his right thereafter to devote the property to the original nonconforming use.⁵ A provision that nonuse of a nonconforming use for a stated period shall be deemed an abandonment of the use, as discussed supra § 199, has been held to apply where there is a change from the nonconforming use to another use.⁶ Under a provision prohibiting the resumption

of nonconforming uses which have been changed into conforming uses, the right to resume a nonconforming use is not terminated by a temporary interruption or suspension of a nonconforming use without the substitution of a conforming use, or without such definite and substantial departure from the previously existing conditions and uses as to signify an abandonment of the nonconforming uses.⁷ The right to resume a nonconforming use is not preserved by a change to a use not permitted under the zoning regulations.⁸

Where a building in a residential district used as restaurant when the zoning regulations were enacted was subsequently used as a residence, the subsequent resumption of a restaurant business therein was held not a continuation of the nonconforming use authorized by the regulations.⁹ Where a garage which projected over the set-back or building line as a nonconforming use was moved back part of the distance pursuant to a consent decree in an ac-

line and owner had not affirmatively abandoned such nonconforming use. N.Y.—Frammor Realty Corp. v. Le Boeuf, 109 N.Y.S.2d 525, 279 App. Div. 795, reargument and appeal denied 110 N.Y.S.2d 910, 279 App. Div. 874.

Subdivision into lots

While subdivision of land into lots for building of residences may constitute a "use" of land within meaning of a zoning ordinance, where such a use becomes a nonconforming one on passage of ordinance, its status as such is lost by abandonment when nothing is done to preserve it within one year after passage of ordinance, as required by ordinance in order to preserve a nonconforming right.

Pa.—Elkins-Rydal Co. v. Brigham, 84 Pa. Dist. & Co. 136.

Liquor package store

Conn.—Berkman v. Board of Appeals on Zoning of City of Bridgeport, 64 A.2d 875, 135 Conn. 893.

Garage

La.—State ex rel. Harris v. Zoning Bd. of Appeal and Adjustment, 60 So.2d 880, 221 La. 941.

3. Me.—Toulouse v. Board of Zoning Adjustment, 87 A.2d 670, 174 Me. 387.

4. Mich.—Boissonneault v. Saginaw County Agr. Soc., 47 N.W.2d 53, 330 Mich. 148.

What constitutes accessory uses see supra § 176.

5. Ill.—Brown v. Gerhardt, 125 N.E.2d 53, 5 Ill.2d 106.

Md.—Beyer v. Mayor and Council of Baltimore City, 34 A.2d 765, 182 Md. 444.

N.J.—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535.

Pa.—Collingdale Borough v. Moyer, Com.Pl., 32 Del.Co. 305.

Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358.

Purpose of rule

Provisions in zoning ordinance that nonconforming structures which are converted to conformance shall not be reconverted to nonconformance expresses principle that nonconforming uses should be abolished as quickly as possible and should not be allowed to increase.

Conn.—Salerni v. Scheuy, 102 A.2d 528, 140 Conn. 566.

Such change indicates an abandonment of nonconforming use.

N.Y.—Huntley Estates, Inc. v. Town of Eastchester, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App.Div. 1090.

"Change" as "abandon"

Under zoning ordinance which provided that nonconforming use if changed to conforming use shall not thereafter be changed back to nonconforming use, "change" was synonymous with "to abandon."

Ill.—Brown v. Gerhardt, 125 N.E.2d 53, 5 Ill.2d 106.

Use restricted by ordinance

Under a zoning ordinance providing that, whenever a nonconforming use of a building has been changed to a more "restricted use" or to a conforming use, such use shall not thereafter be changed to a less "restricted use," quoted words mean a use restricted by the ordinance and not a restricted use in the opinion of the trial court or of a zoning expert.

Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358.

Radical change

To effect abandonment of nonconforming use, change of use need not be a radical one.

N.J.—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535.

6. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

7. Conn.—Lehmaier v. Wadsworth, 191 A. 539, 122 Conn. 571.

8. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Mo.—Brown v. Gambrel, 213 S.W.2d 931, 358 Mo. 192.

Change from stable to dance hall

Where owners made improvements costing thirty-five thousand dollars to change barn used as riding academy and public stable into modern dance hall with concrete floor and other modern facilities, such expansion into different use in same classification was sufficient to support finding that owner abandoned original nonconforming use as a public stable.

Mo.—Brown v. Gambrel, supra.

Automobile repair shop

Valid nonconforming use of premises as automobile repair shop which was succeeded by invalid nonconforming rug-cleaning business could not be revived by reestablishment of automobile repair shop on premises.

N.J.—Barbarisi v. Board of Adjustment, 103 A.2d 164, 30 N.J.Super. 11.

9. Conn.—Town of Darien v. Webb, 162 A. 690, 115 Conn. 531.

tion for its removal from the way, it was held to have lost its status as a nonconforming use and to be in violation of the ordinance.¹⁰ The owner does not preserve the right to return to a nonconforming use by a mere expression of an intention to return to such use in a lease of the premises for a substantial period for a conforming use.¹¹

However, a simple change from one local retail use to another in a residential district is not an abandonment of a nonconforming use.¹² The fact that the property is temporarily devoted to a conforming use with intent that the nonconforming use be resumed when opportunity therefor should arise has been held not to establish an abandonment of the nonconforming use.¹³ Where a nonconforming use as a multiple-unit dwelling had been estab-

lished prior to the effective date of a zoning ordinance providing for a single-family residential district, the leasing of the entire building to a single family, who occupied the premises without removal of fixtures to make it a one-family unit, is not conclusive of an intention to abandon the building for multiple-unit purposes.¹⁴

Provision for resumption of use. The ordinance may provide for the resumption of a discontinued nonconforming use.¹⁵ Under a provision that a nonconforming use when discontinued may be resumed, the nonconforming use sought to be resumed must be a use in existence at the time when the ordinance was adopted and not one discontinued before such time.¹⁶

VI. ADMINISTRATION IN GENERAL

A. ADMINISTRATIVE BODIES OR OFFICIALS GENERALLY

§ 201. Designation or Establishment

Particular persons or bodies are generally designated to administer zoning regulations, and in the administration thereof the purposes of such regulations must be given due consideration.

Particular persons or bodies are generally designated by statutes or ordinances, within stated limits, to take the necessary steps to carry into effect, and administer, zoning regulations;¹⁷ and it has been held that a township zoning board does not go out of existence so as to render its subsequent actions ineffective when the township adopts the provisions of a statute creating urban townships.¹⁸ The purposes of the zoning provisions are weighty elements to be considered in their administration.¹⁹

§ 202. Powers and Duties

The powers, duties, and authority of particular bodies or officials charged with the administration of the zoning regulations are such as are conferred on them by the controlling legislative provisions.

The powers, duties, and authority of particular bodies or officials charged with the administration of the zoning regulations are such as are conferred on them by the controlling legislative provisions.²⁰ The local legislative body may delegate to the administrative agency full authority to execute the legislative policy, controlled by specified rules of conduct, or it may clothe the administrative authority with recommendatory power merely, reserving to itself superintendency of such affirmative discretionary action guided by the same standards.²¹

10. Mass.—Commonwealth v. Dillon, 178 N.E. 521, 277 Mass. 196.

11. N.Y.—Park Ave.—Fifty-Ninth St. Corp. v. Murdock, 156 N.Y.S.2d 39.

Alteration of premises

Where owner of premises eligible for a nonconforming use, leased such premises to tenant for a conforming use, approval by superintendent of buildings of application to alter premises for use by tenant did not allow landlord to revert property to nonconforming use at end of lease, merely because application to alter premises stated that upon completion of lease space would revert to nonconforming use.

N.Y.—Park Ave.—Fifth-Ninth St. Corp. v. Murdock, supra.

12. N.Y.—People v. Sudierfi Realty Corp., 101 N.Y.S.2d 792.

13. Pa.—Appeal of Associated Contractors, Inc., 138 A.2d 99, 391 Pa. 347.

Appeal of McDermott, Com.Pl., 54 Lack.Jur. 45.

Tex.—Corpus Juris Secundum quoted in Town of Highland Park v. Marshall, Civ.App., 235 S.W.2d 658, 664, refused no reversible error.

Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358.

14. Ill.—Brown v. Gerhardt, 125 N.E.2d 53, 5 Ill.2d 106.

15. Pa.—Molnar v. George B. Henne & Co., 105 A.2d 325, 377 Pa. 571.

16. Pa.—Triolo v. Zoning Bd. of Adjustment, 59 Pa.Dist. & Co. 211.

17. Mich.—City of East Lansing v. Smith, 269 N.W. 573, 277 Mich. 495.

Pa.—Appeal from Refusal of Bd. of

Supervisors of Upper Yoder Tp. to Approved Plan of Lots Laid Out for Berkley's Estate, Com.Pl., 16 Cambria 198, 229.

18. Kan.—Duggins v. Board of County Com'rs in Johnson County, 293 P.2d 258, 179 Kan. 101.

19. Conn.—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

20. Ohio.—Kreutz v. Lauderbaugh, Com.Pl., 136 N.E.2d 627.

Wide and liberal discretion

Zoning commissions are endowed with wide and liberal discretion.

Conn.—Isdale v. Town Plan and Zoning Commission of Town of Orange, 107 A.2d 267, 141 Conn. 509.

21. N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

Administrative authorities are properly concerned with questions of compliance with the zoning ordinance, not with its wisdom.²² In the absence of any statutory authority, they have no power to entertain an application for a change from one nonconforming use in a residential district to a different nonconforming use,²³ and a denial of such an application under the circumstances is a nullity in law.²⁴ On the other hand, it has been held that an official empowered to administer and enforce the zoning ordinance is authorized to determine that a particular business constitutes a continuation of an existing nonconforming use.²⁵ No administrative officer may pick or choose as to who may or may not, in a particular way, use with area coverage the property classified by the city as within a certain height and area district.²⁶

A zoning inspector has no general injunctive powers; if there is merely a threatened violation of a zoning ordinance, the remedy is to apply to the courts.²⁷ A provision of a zoning ordinance empowering the inspector to cause any building or premises to be inspected and to order the remedying of any condition there found to exist in violation of the ordinance, and declaring violation of such an order to be a misdemeanor, does not authorize the inspector to issue a cease and desist order directing the owner permanently to discontinue the alleged unlawful use of the premises, or to refrain from a threatened sale of the property for a

use violating the ordinance where there is no present use, improvement, or building operation in violation of the ordinance.²⁸

§ 203. — Exercise of Powers

A commission authorized to revoke automatic exceptions of existing uses from zoning restrictions exercises quasi-judicial powers in a proceeding to revoke such exception; and an administrative official acts within his powers in ordering the operator of a business to cease work excluded from a business zone.

A commission authorized to revoke automatic exceptions of existing uses from zoning restrictions for specified reasons is a local board exercising quasi-judicial powers in a proceeding to revoke such exception.²⁹ When a zoning regulation excludes from a business zone any business or service detrimental to the neighborhood because of noise, vibration, smoke, dust, odor, or fumes, an administrative official acts within his powers in ordering the operator of a business to cease particular work within the zone because of disturbance caused by noise and vibration, if in fact there is such disturbance.³⁰ A court may not exercise as a matter of original jurisdiction a function committed by a zoning act to the sound discretion and experienced judgment of the board.³¹

Conclusiveness of determination. A decision which an administrative official is empowered to make is conclusive in the absence of an appeal.³²

B. BOARDS OF APPEALS OR ADJUSTMENT

§ 204. In General

Boards of appeals or adjustment are creatures of statute entrusted with the enforcement of zoning ordinances in the interests of the public.

Boards of appeals or adjustment are statutory creations³³ entrusted with the duty of enforcing the provisions of the zoning ordinance and gener-

22. Wash.—State ex rel. Ogden v. City of Bellevue, 275 P.2d 899, 45 Wash.2d 492.

Reason for rule

To subject owners of realty to questions of policy in administrative matters would be unconstitutional.

Wash.—State ex rel. Ogden v. City of Bellevue, supra.

23. R.I.—M. & L. Die & Tool Co. v. Board of Review of City of Newport, 76 A.2d 537, 77 R.I. 443.

24. R.I.—M. & L. Die & Tool Co. v. Board of Review of City of Newport, supra.

25. Tex.—City of Dallas v. Rosenthal, Civ.App., 239 S.W.2d 636, error refused no reversible error.

26. Mo.—Fairmont Inv. Co. v. Woermann, 210 S.W.2d 26, 357 Mo. 625.

27. N.Y.—Lake Mohopac Heights, Inc. v. Zoning Bd. of Appeals of Town of Carmel, 119 N.Y.S.2d 809.

28. N.Y.—Lake Mohopac Heights, Inc. v. Zoning Bd. of Appeals of Town of Carmel, supra.

29. Cal.—Livingston Rock & Gravel Co. v. Los Angeles County, 272 P.2d 4, 43 C.2d 121.

30. Conn.—Saporiti v. Zoning Bd. of Appeals of Town of Manchester, 78 A.2d 741, 137 Conn. 478.

Lettering of monuments

Conn.—Saporiti v. Zoning Bd. of Appeals of Town of Manchester, supra.

31. N.J.—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 134.

32. Tex.—City of Dallas v. Rosenthal, Civ.App., 239 S.W.2d 636, refused no reversible error.

33. N.J.—Kurowski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433.

Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

N.Y.—Waldorf v. Coffey, 159 N.Y.S.2d 852, 5 Misc.2d 80.

Creation by city

(1) Boards of appeals or adjustment may be created by the municipal governing body under duly delegated authority.

Neb.—City of Lincoln v. Foss, 230 N.W. 592, 119 Neb. 666.

Pa.—Appeal of Valicenti, 148 A. 308, 298 Pa. 276.

Wyo.—Stewart v. City of Cheyenne, 154 P.2d 355, 60 Wyo. 497.

(2) Power of municipal governing body to create board must be acted on in manner provided by law in order to bring board into existence.

ally adjusting difficulties arising in the application thereof³⁴ in the public interest.³⁵ They have been held indispensable to the zoning process, both from a constitutional and a practical standpoint.³⁶

Expenses of a board of adjustment may be met through appropriation by the governing body.³⁷

Abolition. A board of appeals or adjustment may

be abolished by act of the legislature.³⁸

§ 205. Nature

Boards of appeals or adjustment are administrative and quasi-judicial bodies, and not legislative bodies.

A zoning board of appeals or adjustment is not a legislative body,³⁹ but an administrative body,⁴⁰ an

Wis.—State v. Rosenthal, 191 N.W. 562, 179 Wis. 243.

(3) City cannot be required to create a "board of appeals or review" to discharge duties under its zoning ordinance, where a "board of adjustment" performing substantially similar functions has already been provided under its charter and the general law, with additional recourse to the courts by certiorari.

Tex.—Luse v. City of Dallas, Civ. App., 131 S.W.2d 1079, error refused.

Ordinance held not to create board
N.Y.—City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Statutes held inapplicable to proceedings had before enactment
N.J.—Peshine Realty Co. v. Scott, 135 A. 80, 4 N.J.Misc. 977.

Power of appointment

(1) Power of appointment of members of board is governed by statutes and ordinances.

N.J.—Orre v. Roosma, 185 A. 922, 14 N.J.Misc. 529.

(2) Where city board of commissioners adopted ordinance investing mayor with power of appointment to board of adjustment, and succeeding board of commissioners passed resolution assigning duties and authority relating to board of adjustment into department of public affairs under supervision of director, persons appointed to board of adjustment by such director were entitled to office as against those who had been appointed by mayor, since mayor's power of appointment was suspended by Commission Government Act and resolution.

N.J.—Orre v. Roosma, *supra*.

34. Conn.—Stern v. Zoning Bd. of Appeals of City of Norwich, 99 A. 2d 130, 140 Conn. 241—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614.

Iowa.—Call Bond & Mortgage Co. v. Sioux City, 259 N.W. 33, 219 Iowa 572.

Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 137 Md. 623.

Mo.—Adams v. Board of Zoning Adjustment of Kansas City, App., 241 S.W.2d 35.

Pa.—City of Pittsburgh v. Quase, Com.Pl., 94 Pittsb.Leg.J. 385.

Tenn.—Qualls v. City of Memphis, 15 Tenn.App. 575.

43 C.J. p 352 note 19 [a].

Essential purpose of a zoning board of appeals is to deal with regulations adversely affecting individual rights by furnishing elasticity in their application so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional manner.

Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415.

35. N.J.—Borough of Cresskill v. Borough of Dumont, 100 A.2d 182, 28 N.J.Super. 26, affirmed 104 A.2d 441, 15 N.J. 238.

Effectuation of legislative policy

Boards of appeals and adjustment are created by statute for the effectuation of the essential legislative policy.

N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

36. Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415.

37. N.J.—Tomko v. Vissers, 121 A. 2d 502, 21 N.J. 226.

38. N.J.—Smith v. Kearny Zoning Board of Appeals, 143 A. 151, 6 N.J.Misc. 954.

Repeal of statute creating board

Board may be abolished by repeal of statute creating it.

N.J.—Smith v. Kearny Zoning Board of Appeals, *supra*.

Wis.—State v. Rosenthal, 191 N.W. 562, 179 Wis. 243.

Creation of another board

Board may be abolished by enactment of statute creating another board to replace it.

N.J.—Smith v. Kearny Zoning Board of Appeals, 143 A. 151, 6 N.J.Misc. 954.

39. N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 236 N.C. 107, 168 A.L. R. 1.

Pa.—Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A.2d 292, 180 Pa.Super. 105.

Evitts v. Board of Adjustment, 42 Del.Co. 275—City of Williamsport v. Grieco, 6 Lycoming 76.

S.D.—Graves v. Johnson, 63 N.W. 341, 75 S.D. 261.

Tex.—Texas Consol. Theatres v. Pittillo, Civ.App., 204 S.W.2d 396.

Board as without legislative power see *infra* § 208.

City council sitting as board

Although made up of members of legislative body of city, zoning board of appeals functions as a separate entity and keeps minutes and records of its meeting as such, and, when so acting, it sits as a board, not as city council, and, therefore, lacks power to enact ordinances and adopt resolutions for government of city.

Mich.—Osius v. City of St. Clair Shores, 75 N.W.2d 25, 344 Mich. 693.

Not "special commission"

Zoning board of appeals has been held not to come within provision prohibiting legislature from creating "special commissions" to perform municipal functions.

Pa.—Appeal of Ward, 137 A. 630, 289 Pa. 458.

40. Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415 —Spesa v. Zoning Board of Appeals of City of New London, 109 A.2d 362, 141 Conn. 653—Watson v. Howard, 86 A.2d 67, 138 Conn. 464 —Saporiti v. Zoning Board of Appeals, 78 A.2d 741, 137 Conn. 478.

Koslow v. Board of Zoning Appeals of City of New Haven, 112 A.2d 513, 19 Conn.Sup. 303.

Ill.—Illinois Bell Tel. Co. v. Fox, 85 N.E.2d 43, 402 Ill. 617—Welton v. Hamilton, 176 N.E. 333, 344 Ill. 82.

Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 137 Md. 296.

Mo.—State ex rel. Nigro v. Kansas City, 27 S.W.2d 1030, 325 Mo. 95.

Phillips v. Board of Adjustment of City of Bellefontaine Neighbors, App., 308 S.W.2d 765—Adams v. Board of Zoning Adjustment of Kansas City, App., 241 S.W.2d 35.

N.Y.—Stevens v. Connor, 120 N.Y.S. 2d 345—Lake Mohopac Heights, Inc. v. Zoning Bd. of Appeals of Town of Carmel, 119 N.Y.S.2d 809—Ellish v. Goldman, 117 N.Y.S.2d 867.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1—In re Pine Hill Cemeteries, 15 S.E.2d 1, 219 N.C. 735.

arm of the executive branch of the government within constitutional provisions with respect to separation of powers.⁴¹ While its acts have been characterized as judicial,⁴² it is not a court,⁴³ even though its proceedings involve a hearing and examination of witnesses,⁴⁴ but is generally regarded as a quasi-judicial body.⁴⁵ The members of the board have been held to be public officers, as distinguished from employees.⁴⁶

Governmental agency. A board of adjustment created by city ordinance under authority granted by statute and the city charter has been held to be a governmental agency of the city,⁴⁷ but under some provisions, such boards are not agencies of local governing bodies,⁴⁸ but may be agencies of the

state.⁴⁹

§ 206. Composition; Qualifications and Removal of Members

The composition and number of members of a board of appeals or adjustment is determined by the statute. Members must be properly qualified to act, and may be removed in the manner provided by law.

There must be compliance with statutory requirements as to the composition and number of members of the board,⁵⁰ and the members must be properly qualified to act;⁵¹ but a statute prohibiting board members from holding any elective office in the municipality does not prevent them from holding an appointive office.⁵²

Okl.—*Torrance v. Bladel*, 155 P.2d 546, 195 Okl. 68—*Oklahoma City v. Harris*, 126 P.2d 988, 191 Okl. 125.

Pa.—*Schaub v. Brentwood Borough Zoning Bd. of Adjustment*, 118 A.2d 292, 180 Pa.Super. 105.

Appeal of *Robinson*, Com.Pl., 47 Luz.Leg.Reg. 51—*City of Williamsport v. Grieco*, 6 Lycoming 76.

Tex.—*City of Dallas v. Halbert*, Civ. App., 246 S.W.2d 686—*Texas Consol. Theatres v. Pittillo*, Civ.App., 204 S.W.2d 396.

Wyo.—*In re McInerney*, 34 P.2d 85, 47 Wyo. 258.

43 C.J. p 353 note 25.

Fact-finding body

Tex.—*City of Dallas v. Halbert*, Civ. App., 246 S.W.2d 686—*Texas Consol. Theatres v. Pittillo*, Civ.App., 204 S.W.2d 396.

41. Ill.—*Illinois Bell Tel. Co. v. Fox*, 85 N.E.2d 43, 402 Ill. 617.

42. Neb.—*Peterson v. Vasak*, 76 N.W.2d 420, 162 Neb. 498.

43. N.Y.—*Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor*, 144 N.Y.S.2d 379, 208 Misc. 295.

Ellish v. Goldman, 117 N.Y.S.2d 867.

Not judicial board

Ill.—*Welton v. Hamilton*, 176 N.E. 333, 344 Ill. 82.

N.Y.—*West Side Mortg. Co. v. New York*, 174 N.Y.S. 451.

Not judicial officers

Members of board are not to be regarded as judicial officers.

Mass.—*Murphy v. Boston*, 107 N.E. 378, 220 Mass. 73.

44. N.Y.—*Ellish v. Goldman*, 117 N.Y.S.2d 867.

45. Conn.—*Koslow v. Board of Zoning Appeals of City of New Haven*, 112 A.2d 513, 19 Conn.Sup. 303.

N.J.—*Tzeses v. Board of Trustees of Village of South Orange*, 91 A.2d 588, 22 N.J.Super. 45.

Siegel v. Board of Adjustment of City of Newark, 60 A.2d 626, 137 N.J.Law 423.

Tex.—*City of Dallas v. Halbert*, Civ. App., 246 S.W.2d 686—*Montgomery v. City of Dallas*, Civ.App., 245 S.W.2d 753, refused no reversible error.

Vt.—*Thompson v. Smith*, 129 A.2d 638, 119 Vt. 488.

46. Mass.—*Bradley v. Boston Bd. of Zoning Adjustment*, 150 N.E. 892, 255 Mass. 160.

47. Tex.—*Board of Adjustment of City of Fort Worth v. Stovall*, 216 S.W.2d 171, 147 Tex. 366.

48. N.J.—*Kurowski v. Board of Adjustment of City of Bayonne*, 78 A.2d 429, 11 N.J.Super. 433.

Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

49. Conn.—*Silver Lane Pickle Co. v. Zoning Bd. of Appeals of Town of East Hartford*, 122 A.2d 218, 143 Conn. 316.

50. N.Y.—*Gray v. Maislen*, 130 N.Y.S.2d 466.

Pa.—*Wharton v. Cheltenham Tp.*, 82 Pa.Dist. & Co. 408, 68 Montg.Co. 264.

Staley v. Lower Merion Tp., Com. Pl., 69 Montg.Co. 407—*Jeffrey v. Cheltenham Tp., Com.Pl.*, 68 Montg.Co. 312.

R.I.—*Menard v. Zoning Bd. of Review of City of Woonsocket*, 115 A.2d 538.

Composition governed by statute and ordinance

Composition of board is governed by statutes and ordinances.

Mass.—*Real Properties v. Board of Appeal of Boston*, 42 N.E.2d 499, 311 Mass. 430.

Legislative intent as to number

General enabling act which authorized cities and towns to pass zoning ordinances and regulated certain procedures thereunder and which pro-

vided that concurring vote of three members of five-member board was necessary to reverse any order, requirement, decision, or determination of any such administrative officer, and that concurring vote of four members was required to decide in favor of applicant on any matter within discretion of board, indicated legislative intent that board should at all times consist of five participating members.

R.I.—*May-Day Realty Corp. v. Zoning Bd. of Review of City of Pawtucket*, 77 A.2d 539, 77 R.I. 469.

Auxiliary members

(1) Amendment to general enabling act authorizing cities and towns to pass zoning ordinances and regulating certain procedures thereunder, which gave mayor or town council right to name an auxiliary or sixth member of board of review of such city or town, who would sit as an active member on request of chairman of board when and if a member thereof was unable to serve at any hearing, indicated legislative intent that five members of board would always be available to sit at hearing, and thus make up number which general assembly deemed necessary in order to have a legal hearing by a board.

R.I.—*May-Day Realty Corp. v. Zoning Bd. of Review of City of Pawtucket*, supra.

(2) Right to name auxiliary or sixth member of board of review under such statute was a duty to act imposed on naming authority, and not a mere privilege extended to it.

R.I.—*May-Day Realty Corp. v. Zoning Bd. of Review of City of Pawtucket*, supra.

51. N.J.—*Protomastro v. Board of Adjustment of City of Hoboken*, 67 A.2d 231, 3 N.J.Super. 539, reversed on other grounds 70 A.2d 873, 3 N.J. 494.

52. N.J.—*Protomastro v. Board of Adjustment of City of Hoboken*, supra.

Members of a zoning board may be removed from office in the manner provided by the city charter,⁵³ and where the charter so authorizes, the removal may be by the mayor for such cause as he deems sufficient⁵⁴ without the necessity of specific charges or a hearing.⁵⁵

§ 207. Powers and Duties

The powers vested in boards of appeals or adjustment in the administration of zoning regulations are broad and should be liberally construed, but they are limited to such as are conferred expressly or by implication.

It has been said that in the administration of zoning regulations the powers of boards of appeals or adjustment are broad,⁵⁶ and that the authority vested

in them is to be liberally construed.⁵⁷ As a general rule, however, their powers are such, and only such, as are conferred on them either expressly or by implication,⁵⁸ and are governed and controlled by the terms of the statute creating them,⁵⁹ which must be strictly construed and pursued;⁶⁰ and such powers may not be circumscribed, altered, or extended by the municipal governing body.⁶¹ The inclusion in a zoning ordinance of a word for word recital of the statutory powers of the board would be superfluous.⁶²

Adoption of procedural rules. A statute providing that the board shall adopt procedural rules in accordance with the provisions of the zoning ordinances means merely that any rules adopted must

53. Mass.—Ray v. Mayor of Everett, 103 N.E.2d 269, 328 Mass. 305.

54. Mass.—Ray v. Mayor of Everett, supra.

55. Mass.—Ricci v. Mayor of Everett, 127 N.E.2d 669, 333 Mass. 766 —Ray v. Mayor of Everett, 103 N.E.2d 269, 328 Mass. 305.

56. Colo.—Board of Adjustment of City and County of Denver v. Kuehn, 290 P.2d 1114, 132 Colo. 348.

Conn.—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

43 C.J. p 353 note 41.

Creation or abolition of boards of appeals and adjustment see supra § 204.

57. N.Y.—St. Basil's Church v. Kerner, 211 N.Y.S. 470, 125 Misc. 526. Crotty v. Poersch, 129 N.Y.S.2d 793.

58. Del.—In re Auditorium, Inc., 84 A.2d 598, 7 Terry 430, remanded Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Ky.—Goodrich v. Selligman, 183 S.W. 2d 625, 298 Ky. 863.

La.—State ex rel. Bringham v. Zoning Board of Appeal and Adjustment, 4 So.2d 820, 198 La. 758.

Md.—Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore, 73 A.2d 531, 195 Md. 383.

N.J.—James v. Board of Adjustment of Town of Montclair, 122 A.2d 660, 40 N.J.Super. 206.

N.Y.—Schroeder v. Kreuter, 132 N.Y.S.2d 144, 206 Misc. 198, affirmed 135 N.Y.S.2d 637, 284 App.Div. 972, affirmed 127 N.E.2d 845, 308 N.Y. 993—Property Owners Ass'n of Garden City Estates v. Board of Zoning Appeals of Incorporated Village of Garden City, 123 N.Y.S.2d 716, 2 Misc.2d 309—Hoffman v. Murdock, 56 N.Y.S.2d 753, 185 Misc. 486—In re Durning, 241 N.Y.S. 539, 137 Misc. 173, affirmed Durning v.

Reville, 249 N.Y.S. 908, 232 App. Div. 790—Hoffman v. Fraad, 224 N.Y.S. 694, 130 Misc. 667, affirmed 229 N.Y.S. 868, 224 App.Div. 717, appeal dismissed 164 N.E. 574, 249 N.Y. 537, motion denied 164 N.E. 607, 249 N.Y. 620.

Lake Mohopac Heights, Inc. v. Zoning Bd. of Appeals of Town of Carmel, 119 N.Y.S.2d 809.

Ohio.—State ex rel. Shaker Square Co. v. Guion, App., 145 N.E.2d 144.

Kreutz v. Lauderbaugh, Com.Pl., 136 N.E.2d 627.

Pa.—Norwalk Truck Line Co., 78 Pa. Dist. & Co. 254, 99 Pittsb.Leg.J. 489.

Wetherill v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 264 —Application of Shade, Com.Pl., 30 Erie Co. 252—Appeal of Costolo, Com.Pl., 93 Pittsb.Leg.J. 43—Appeal of Borough of Dormont, Com.Pl., 88 Pittsb.Leg.J. 5.

R.I.—Di Palma v. Zoning Board of Review of Town of Bristol, 50 A. 2d 779, 72 R.I. 286, 175 A.L.R. 399.

Wis.—State v. Cooper, 230 N.W. 50, 201 Wis. 359.

43 C.J. p 354 note 43.

Divesting title or rights

The board of standards and appeals may not divest an owner of property of his title or rights in bed of street.

N.Y.—Nemet v. Edgemere Garage & Sales Co., 73 N.Y.S.2d 921.

Discontinuance of business

Where fire destroyed over fifty per cent of company's plant, board of appeals was authorized under zoning regulations to order company to remove stock and discontinue business. Conn.—State v. Hillman, 147 A. 294, 110 Conn. 92.

Derived from police power

(1) Powers of boards of appeal or adjustment derive from municipality's police power.

R.I.—Di Palma v. Zoning Bd. of Review of Town of Bristol, 50 A. 2d 779, 72 R.I. 286, 175 A.L.R. 399.

(2) Protection against fire hazard which such board gives community is proper exercise of police power.

Md.—Hoffman v. Mayor and City Council of Baltimore, 51 A.2d 269, 187 Md. 593.

59. Ala.—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.

Conn.—Mabank Corp. v. Board of Zoning Appeals of City of Stamford, 120 A.2d 149, 143 Conn. 132.

Ind.—Anderson Lumber & Supply Co. v. Fletcher, 89 N.E.2d 449, 228 Ind. 383.

N.J.—Dolan v. De Capua, 109 A.2d 615, 16 N.J. 599—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

Giordano Sons v. Ciliberti, 91 A. 2d 638, 22 N.J.Super. 179—Lacey v. Zoning Bd. of Adjustment of Hamilton Tp., Mercer County, 67 A.2d 466, 4 N.J.Super. 422.

Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

Pa.—Evitts v. Board of Adjustment, Com.Pl., 42 Del.Co. 275—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85—Nugent v. Whitemarsh Tp., Com.Pl., 68 Montg.Co. 98.

60. Pa.—Lukens v. Zoning Bd. of Adjustment of Ridley Tp., Del. County, 80 A.2d 765, 367 Pa. 608.

61. Ala.—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.

N.J.—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

Tzses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J.Super. 45.

N.Y.—Wernert v. McHaffie, 158 N.Y. S.2d 438.

62. Ala.—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.

N.J.—Duffcon Concrete Products v. Borough of Cresskill, 64 A.2d 347, 1 N.J. 509, 9 A.L.R.2d 678.

conform to such ordinances, not that the ordinances themselves must provide specifically for such rules.⁶³

Employment of assistants. The board of adjustment may be authorized to employ an attorney and clerical personnel necessary to fulfill its function.⁶⁴

§ 208. — Legislative Power

Zoning boards of appeals or adjustment have no legislative power.

In view of the fact that boards of appeals or adjustment are not legislative bodies, as discussed supra § 205, they do not exercise legislative power,⁶⁵ and may not be invested with a valid exercise of such power on behalf of the municipality.⁶⁶ It follows that they are without power to modify, amend, or repeal the general rules and regulations of a zoning ordinance,⁶⁷ although, as shown infra § 278, they generally have power to grant variances or exceptions.

Progressive planning for a city is not the function of a zoning board of review.⁶⁸

§ 209. — Judicial or Quasi-Judicial Power

Zoning boards of appeals or adjustment may not pass

on the validity of the act or ordinance under which they are authorized to act, and in the absence of provisions conferring such power they have no power to determine the status of the use of property or to issue injunctions, although they perform quasi-judicial functions and act in a quasi-judicial capacity.

Since, as discussed supra § 205, zoning boards of appeals or adjustment, are not courts, they may not pass on the constitutionality or validity of the act or ordinance under which they are authorized to act;⁶⁹ and, in the absence of provisions expressly or impliedly conferring such power, they have no power to determine the status of the use of property,⁷⁰ as that certain property enjoyed a nonconforming use status,⁷¹ and possess no original jurisdiction to act on an application for a change from one nonconforming use in a residential district to a different nonconforming use.⁷² Furthermore, they do not have general injunctive power, the remedy in case of a threatened violation being to apply to the courts.⁷³

In accordance, however, with the rule discussed supra § 205, that such boards are regarded as quasi-judicial bodies, it has been held that they exercise or perform quasi-judicial functions⁷⁴ and act in a

63. N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

64. N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

65. Cal.—Bernstein v. Smutz, 188 P.2d 48, 83 C.A.2d 108.

Mo.—Phillips v. Board of Adjustment of City of Bellefontaine Neighbors, App., 308 S.W.2d 765—State ex rel. Croy v. City of Raytown, App., 289 S.W.2d 153—Adams v. Board of Zoning Adjustment of Kansas City, App., 241 S.W.2d 35.

N.Y.—Stevens v. Connor, 120 N.Y.S.2d 345.

Tex.—Harrington v. Board of Adjustment of City of Alamo Heights, Bexar County, Civ.App., 124 S.W.2d 401, error refused.

Power to review act which is part of legislative process see infra § 210.

66. Tex.—Texas Consol. Theatres v. Pittillo, Civ.App., 204 S.W.2d 396.

67. Cal.—Bernstein v. Smutz, 188 P.2d 48, 83 C.A.2d 108.

Ind.—Antrim v. Hohit, 108 N.E.2d 197, 122 Ind.App. 681.

Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671.

Mich.—Smith v. Building Inspector for Plymouth Tp., 77 N.W.2d 332, 346 Mich. 57.

Mo.—Fairmont Inv. Co. v. Woerman, 210 S.W.2d 26, 357 Mo. 625—State ex rel. Nigro v. Kansas City, 27 S.W.2d 1030, 325 Mo. 95.

Phillips v. Board of Adjustment of City of Bellefontaine Neighbors,

App., 308 S.W.2d 765—Adams v. Board of Zoning Adjustment of Kansas City, App., 241 S.W.2d 35.

N.C.—James v. Sutton, 50 S.E.2d 300, 229 N.C. 515—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374.

Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A.2d 292, 180 Pa.Super. 105.

Kuznowski v. Board of Zoning Appeals, Com.Pl., 53 Lack.Jur. 53—City of Williamsport v. Grieco, Com.Pl., 6 Lycoming 76—Strawbridge v. Horsham Tp., Com.Pl., 71 Montg.Co. 246, set aside 72 Montg.Co. 117.

R.I.—Harte v. Zoning Bd. of Review of City of Cranston, 91 A.2d 33, 80 R.I. 43—Matteson v. Zoning Bd. of Review of City of Warwick, 84 A.2d 611, 79 R.I. 121.

S.D.—Graves v. Johnson, 63 N.W.2d 341, 75 S.D. 261.

68. R.I.—Flynn v. Zoning Bd. of Review of City of Pawtucket, 73 A.2d 808, 77 R.I. 118.

69. Colo.—Cross v. Bilett, 221 P.2d 923, 122 Colo. 278.

Ga.—Toomey v. Norwood Realty Co., 89 S.E.2d 265, 211 Ga. 814.

Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003.

Selleck v. Waterbury, 18 N.Y.S.2d 591, 257 App.Div. 753—Cherry v. Brumbaugh, 7 N.Y.S.2d 956, 255 App.Div. 880.

Municipal Gas Co. v. Nolan, 201 N.Y.S. 582, 121 Misc. 606, affirmed 202 N.Y.S. 939, 208 App.Div. 793—Lyle v. Avis, 148 N.Y.S.2d 874, 1 Misc.2d 880—Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

Pa.—Cohen v. Cheltenham Tp., Com. Pl., 69 Montg.Co. 299.

70. N.Y.—Foss v. Town of Oyster Bay, 146 N.Y.S.2d 582.

71. N.Y.—Foss v. Town of Oyster Bay, supra.

72. R.I.—M. & L. Die & Tool Co. v. Board of Review of City of Newport, 76 A.2d 537, 77 R.I. 443—Garreau v. Board of Review of City of Newport, 63 A.2d 214, 75 R.I. 44.

73. N.Y.—Lake Mohopac Heights, Inc. v. Zoning Bd. of Appeals of Town of Carmel, 119 N.Y.S.2d 809.

74. Ala.—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.

Mass.—Murphy v. Boston, 107 N.E. 378, 220 Mass. 73.

N.J.—Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J.Super. 164—Kurowski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433.

Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, af-

quasi-judicial capacity.⁷⁵ So, they may be vested with original jurisdiction in certain proceedings,⁷⁶ and may be empowered to hear and rule on a petition requesting interpretation and enforcement of a provision of the zoning ordinance.⁷⁷

Subpoena. The chairman of a zoning board may have the power to issue subpoenas for the attendance of witnesses,⁷⁸ and the production of records.⁷⁹

Administration of oath. The chairman of the board has power, under some regulations, to administer oaths at the hearing before the board.⁸⁰

§ 210. — Appellate Jurisdiction

Boards of appeal or adjustment may have jurisdiction under the zoning laws to hear and decide appeals from orders or determinations made by zoning officials.

Boards of appeal or adjustment may have appellate jurisdiction;⁸¹ and under some zoning laws such a board is empowered to hear and decide appeals from any order, requirement, or determination made by zoning officials pursuant to statutes authorizing them to amend, modify, and rezone property.⁸² Where, however, the zoning act confers on the board the power to hear and decide appeals from orders

of an administrative official or agency in the enforcement of the zoning ordinance, the board has no power to review an action of a city planning board in overruling objections to a tentative zoning ordinance, which is part of the legislative process in the enactment of the ordinance and not an administrative act.⁸³

A board of appeals has no jurisdiction to entertain an application to review a ruling made for the purpose of obtaining an opinion which would be essentially of an advisory nature.⁸⁴ Moreover, appellate jurisdiction cannot be exercised unless the officer from whose decision the appeal was taken had the authority in law to entertain and act on the particular application under consideration;⁸⁵ but a decision, made by an administrative official empowered to make it, that a particular business constitutes a continuation of a nonconforming use is reviewable by the board of adjustment.⁸⁶

The board, on appeal from an order of a zoning inspector, has power to reverse or affirm, wholly or partly, or to modify the order of the inspector,⁸⁷ and has all the powers possessed by the inspector

affirmed 59 A.2d 622, 137 N.J.Law 280—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.
Tex.—Texas Consol. Theatres v. Pittillo, Civ.App., 204 S.W.2d 396.
Vt.—Thompson v. Smith, 129 A.2d 638, 119 Vt. 433.

Proceedings held quasi judicial in character

N.Y.—McGarry v. Walsh, 210 N.Y.S. 286, 213 App.Div. 289.
43 C.J. p 353 note 30.

75. Conn.—Spesa v. Zoning Bd. of Appeals of City of New London, 109 A.2d 362, 141 Conn. 653—Watson v. Howard, 86 A.2d 67, 138 Conn. 464—Wadell v. Board of Zoning Appeals of City of New Haven, 68 A.2d 152, 136 Conn. 1—Burr v. Rago, 180 A. 444, 120 Conn. 287.
Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Ky.—Goodrich v. Selligman, 183 S. W.2d 625, 298 Ky. 863.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Mass.—Coleman v. Board of Appeal of Building Department of Boston, 183 N.E. 166, 281 Mass. 112.

N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280—Hendey v. Ackerman, 136 A. 733, 103 N.J.Law 305, followed in Marvin v. Board of Adjustment of Town of Westfield, 137 A. 924, 5 N. J.Misc. 663.

N.Y.—Riker v. Board of Standards and Appeals of City of New York, 234 N.Y.S. 42, 225 App.Div. 570.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1—State v. Roberson, 150 S.E. 674, 198 N.C. 70.

Wyo.—In re McInerney, 34 P.2d 35, 47 Wyo. 258.

Cannot act otherwise

It has been said that the board can in no sense act otherwise than in a quasi-judicial capacity, and that it does not perform a single administrative or legislative act.

N.Y.—People v. Leo, 198 N.Y.S. 397, 120 Misc. 355, affirmed 212 N.Y.S. 897, 215 App.Div. 696.

78. Mich.—Osius v. City of St. Clair Shores, 75 N.W.2d 25, 344 Mich. 693.

Deliberations similar to those of courts

Board passes on matters formally brought to its attention much the same as courts.

N.Y.—People v. Leo, 198 N.Y.S. 397, 120 Misc. 355, affirmed 212 N.Y.S. 897, 215 App.Div. 696.

77. N.Y.—Crotty v. Poersch, 129 N. Y.S.2d 793.

78. N.J.—Tomko v. Vissers, 121 A. 2d 502, 21 N.J. 226.

79. N.J.—Tomko v. Vissers, *supra*.

80. N.J.—Tomko v. Vissers, *supra*.

81. Mich.—Osius v. City of St. Clair

Shores, 75 N.W.2d 25, 344 Mich. 693.

Administrative review of proceedings relating to permits and certificates see *infra* §§ 262-267.

Appellate tribunal

As its name generally implies, a board of appeals or adjustment is an appellate tribunal.

Conn.—Burr v. Rago, 180 A. 444, 120 Conn. 287.

43 C.J. p 353 note 34.

Purpose of statutes providing appeals to zoning board of adjustment for persons aggrieved by decision of administrative officers in enforcement of zoning ordinance that any alleged error should first be passed on by local board charged with supervising administration of ordinance.

N.H.—Carrick v. Langtry, 108 A.2d 546, 99 N.H. 251.

82. Ga.—Kirkpatrick v. Candler, 53 S.E.2d 889, 205 Ga. 449.

83. Ga.—Gay v. City of Lyons, 74 S.E.2d 839, 209 Ga. 599.

84. N.Y.—Kent Stores v. Murdock, 105 N.Y.S.2d 111, 278 App.Div. 946.

85. R.I.—M. & L. Die & Tool Co. v. Board of Review of City of Newport, 76 A.2d 537, 77 R.I. 443.

86. Tex.—City of Dallas v. Rosenthal, Civ.App., 239 S.W.2d 636, refused no reversible error.

87. N.Y.—Lake Mohopac Heights, Inc. v. Zoning Bd. of Appeals of Town of Carmel, 119 N.Y.S.2d 809.

with respect to the making of a cease and desist order.⁸⁸

§ 211. — Exercise of Powers

The powers of zoning boards of appeals or adjustment must be exercised within their proper limits; but in the exercise thereof, such boards are endowed with wide and liberal discretion.

The powers of zoning boards of appeals or adjustment must be exercised within their proper limits,⁸⁹ and any action taken by them beyond their authority is void and subject to attack for want of jurisdiction at any time an attempt is made to enforce claims founded on such action.⁹⁰ Thus, the board may not prohibit a use of property permissible in the absence of an ordinance and equally permissible under the terms of an ordinance.⁹¹

Discretion in exercise of power. In the exercise of their powers boards of appeals or adjustment are endowed with wide and liberal discretion,⁹² which must be soundly exercised,⁹³ and which may not be abused.⁹⁴ So, if the construction by the board of a zoning ordinance as applied to a particular piece of property and a particular set of facts is so arbitrary and unreasonable as to result in an invasion of property rights, the action of the board thereunder will be invalidated.⁹⁵

§ 212. Procedure

The proceedings before a board of appeals and adjustment are informal, but they must substantially conform to requirements imposed by statute and ordinance.

Proceedings before a zoning board of appeals or adjustment are informal,⁹⁶ and the rules of practice should not be rigidly applied,⁹⁷ but the proceedings

88. N.Y.—Lake Mohopac Heights, Inc. v. Zoning Bd. of Appeals of Town of Carmel, *supra*.

89. Md.—Applestein v. Osborne, 143 A. 666, 156 Md. 40.

Mich.—Anchor Steel & Conveyor Co. v. City of Dearborn, 70 N.W.2d 753, 342 Mich. 361.

N.J.—Hendey v. Ackerman, 136 A. 733, 103 N.J.Law 305, followed in Marvin v. Board of Adjustment of Town of Westfield, 137 A. 924, 5 N.J.Misc. 668.

N.Y.—People v. Walsh, 199 N.Y.S. 534, 120 Misc. 467—People v. Leo, 180 N.Y.S. 553, 110 Misc. 516, affirmed 183 N.Y.S. 954, 193 App.Div. 910, affirmed 180 N.E. 910, 230 N.Y. 602.

S.D.—Corpus Juris cited in City of Sioux Falls v. Bessler, 5 N.W.2d 633, 634, 68 S.D. 635.

Vt.—Thompson v. Smith, 129 A.2d 638, 119 Vt. 488.
43 C.J. p 354 note 50.

90. N.Y.—Kaufman v. City of Glen Cove, 45 N.Y.S.2d 53, 180 Misc. 349, affirmed 42 N.Y.S.2d 508, 266 App. Div. 870.

R.I.—Di Palma v. Zoning Bd. of Review of Town of Bristol, 50 A.2d 779, 72 R.I. 286, 175 A.L.R. 399.

91. Mich.—Anchor Steel & Conveyor Co. v. City of Dearborn, 70 N.W.2d 753, 342 Mich. 361—Teglund v. Dodge, 25 N.W.2d 161, 316 Mich. 185.

92. Conn.—Devaney v. Board of Zoning Appeals of City of New Haven, 122 A.2d 303, 143 Conn. 322—Abramson v. Zoning Bd. of Appeals of Town of Westport, 120 A.2d 827, 143 Conn. 211—Talmadge v. Board of Zoning Appeals of City of New Haven, 109 A.2d 253, 141 Conn. 639.

Md.—Aaron v. City of Baltimore, 114 A.2d 639, 207 Md. 401—Board of Zoning Appeals of Howard Coun-

ty v. Meyer, 114 A.2d 626, 207 Md. 389—Oursler v. Board of Zoning Appeals of Baltimore County, 104 A.2d 568, 204 Md. 397.

N.J.—Tomko v. Viissers, 121 A.2d 502, 21 N.J. 226.

Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

N.Y.—Chandler v. Corbett, 86 N.Y.S.2d 646, 274 App.Div. 1073.

Magde v. Crowley, 102 N.Y.S.2d 271, 200 Misc. 109.

Zeltner v. Board of Appeals of Incorporated Village of Great Neck, 136 N.Y.S.2d 851.

Pa.—Sylvester v. Board of Zoning Appeals, Com.Pl., 50 Lack.Jur. 200—Appeal of Robinson, Com.Pl., 47 Luz.Leg.Reg. 51—Appeal of Y. M. C. A., Com.Pl., 68 Montg.Co. 175.

93. Cal.—Desert Turf Club v. Board of Supervisors, 296 P.2d 882, 141 C. A.2d 466.

Conn.—Kamerman v. Leroy, 50 A.2d 175, 133 Conn. 232—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

Md.—Aaron v. City of Baltimore, 114 A.2d 639, 207 Md. 401.

Mass.—Coleman v. Board of Appeal of Building Department of Boston, 183 N.E. 166, 281 Mass. 112.

Neb.—Frank v. Russell, 70 N.W.2d 306, 160 Neb. 354.

N.J.—Siegel v. Board of Adjustment of City of Newark, 60 A.2d 626, 137 N.J.Law 423—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J. Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

Pa.—Tornetta v. Whitmarsh Tp., 67 Pa.Dist. & Co. 591, 65 Montg.Co. 49—Drago v. Board of Adjustment of Borough of Norristown, 53 Pa. Dist. & Co. 380, 61 Montg.Co. 139.

Rubin v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 207—

Yagiello v. Board of Zoning Appeals, Com.Pl., 53 Lack.Jur. 21—Schmitz v. Abington Tp., Com.Pl., 68 Montg.Co. 267—Appeal of Berg, Com.Pl., 66 Montg.Co. 194—Appeal of Carbide & Carbon Chemicals Corp., Com.Pl., 65 Montg.Co. 173.
43 C.J. p 354 note 46.

Where guides prescribed

In exercising its discretion under zoning ordinance which requires board of appeals to approve plan and location of operation of certain enterprises and which provides, in its preamble, guides for exercise of discretion in accordance with objective of zoning ordinance, board must consider every factor in plan of operation which would have bearing on purposes for which ordinance was enacted, and must determine whether particular proposed plan will not conflict with those purposes.

Wis.—Smith v. City of Brookfield, 74 N.W.2d 770, 272 Wis. 1.

94. N.Y.—Boyd v. Walsh, 216 N.Y. S. 242, 217 App.Div. 461.
43 C.J. p 354 note 47.

95. N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y.S.2d 849.

96. Conn.—Mitchell Land Co. v. Planning & Zoning Board of Appeals of Town of Greenwich, 102 A.2d 316, 140 Conn. 527—Parsons v. Board of Zoning Appeals of New Haven, 99 A.2d 149, 140 Conn. 290—Saporiti v. Zoning Board of Appeals, 78 A.2d 741, 137 Conn. 478.
N.Y.—Fox v. Adams, 134 N.Y.S.2d 534.

R.I.—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 319.

97. Ky.—Goodrich v. Selligman, 183 S.W.2d 625, 298 Ky. 863.

must substantially follow the provisions of the statute or ordinance.⁹⁸ The rule-making power given the board contemplates that certain standards of guidance will be promulgated to insure an orderly hearing, but a rigid formality is neither practical nor necessary.⁹⁹ The only requirement is that the conduct of the hearing shall not violate the fundamentals of natural justice.¹

Petition or notice of appeal. Ordinarily, the board acts on the presentation of a petition or notice of appeal,² sufficiently stating the grounds of complaint,³ made by any person or persons aggrieved.⁴

Time for appeal. When authorized to do so, the board may, and should, fix a reasonable time within which it will entertain appeals.⁵ In particular cases where justice requires it, the board has power to extend the time of appeal.⁶ Failure properly to object that the appeal was not taken in time is a waiver of such objection.⁷

§ 213. — Notice, Hearing, and Evidence

There must be compliance with statutory requirements as to notice and hearing.

In the absence of statute the board may, in a proper case, exercise its judgment and discretion without the hearing of witnesses.⁸ Ordinarily, however, it is necessary to give due notice of hearings before the board⁹ to all persons interested,¹⁰ as well as to the public.¹¹ An insufficiency of a notice of hearing is waived by appearance.¹²

Pursuant to the required notice, a hearing is generally had,¹³ at which any proper party may appear in person¹⁴ or by attorney;¹⁵ and, under statutes and ordinances so requiring, meetings of the board must be open to the public,¹⁶ and a non-public meeting at the home of the chairman of the board held for the purpose of completely discussing, prior to the public meeting, what the law is and any other factors which might come up is improper.¹⁷

Where no particular method of procedure for the conduct of hearings is prescribed, the hearings

N.Y.—West Side Mortg. Co. v. Leo, 174 N.Y.S. 451.

98. N.Y.—Palmer v. Mann, 201 N.Y.S. 525, 206 App.Div. 484.
43 C.J. p 355 note 68.

99. N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

1. Conn.—Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 316, 140 Conn. 527—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290.

2. N.Y.—People v. Walsh, 196 N.Y.S. 672, 203 App.Div. 468.

3. N.Y.—People v. Walsh, *supra*.

4. Mass.—Ayer v. Boston Comrs. on Height of Bldgs., 136 N.E. 338, 242 Mass. 30.
43 C.J. p 355 note 72.

Adjoining neighbors have status to object to any zoning procedure which affects them.

Pa.—Seeney v. Dintenfass, Inc., 6 Pa. Dist. & Co. 289.

Tenant is a "party aggrieved" who may appeal to zoning board of adjustment from adverse decision of a zoning official.

Pa.—Nicholson v. Zoning Bd. of Adjustment of City of Allentown, 140 A.2d 604, 392 Pa. 278.

5. N.J.—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

N.Y.—People v. Walsh, 196 N.Y.S. 672, 203 App.Div. 468.

6. N.Y.—People v. Walsh, *supra*.

7. N.Y.—West Side Mortg. Co. v. Leo, 174 N.Y.S. 451.

8. N.Y.—Aisloff v. Murdock, 81 N.Y.S.2d 872, appeal dismissed in part, modified in part on other grounds Application of Aisloff, 94 N.Y.S.2d 226, 276 App.Div. 907.

9. Conn.—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L. Ed. 792.

N.J.—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

R.I.—Richard v. Woonsocket Board of Review, 129 A. 736.
43 C.J. p 355 note 78.

10. N.Y.—McGarry v. Walsh, 210 N.Y.S. 286, 213 App.Div. 289.
43 C.J. p 355 note 79.

Ascertainment of persons entitled

In absence of any specific statutory requirement, board of adjustment was required to make reasonable efforts to ascertain correct addresses of owners of property to be notified of a hearing of board with respect to changes in zoning.

Mass.—Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston, 101 N.E.2d 888, 328 Mass. 103.

11. R.I.—Richard v. Woonsocket Board of Review, 129 A. 736.

12. Ind.—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 117 Ind.App. 314.

13. Pa.—Jones v. Lewis, 7 Pa. Dist.

& Co. 785, 27 Lack.Jur. 60, 17 Mun. L.R. 253.

43 C.J. p 355 note 88.

14. R.I.—Richard v. Woonsocket Board of Review, 129 A. 736.

15. R.I.—Richard v. Woonsocket Board of Review, *supra*.

16. N.Y.—Blum v. Board of Zoning and Appeals of Town of North Hempstead, 149 N.Y.S.2d 5, 1 Misc. 2d 668.

Ohio.—Hardy v. Horst, Com.Pl., 101 N.E.2d 398.

Pa.—Jones v. Lewis, 7 Pa. Dist. & Co. 785, 27 Lack.Jur. 60, 17 Mun.L.R. 253.

43 C.J. p 355 note 88.

"Executive session"

(1) An "executive session" of a public board is one from which public is excluded and at which only such selected persons as board may invite are permitted to be present.

N.Y.—Blum v. Board of Zoning and Appeals of Town of North Hempstead, 149 N.Y.S.2d 5, 1 Misc.2d 668.

(2) Action taken by board of zoning and appeals while in executive session with public excluded is illegal and void and invalidity of such action is not cured by an announcement subsequently made at a public meeting, of action already taken at executive session.

N.Y.—Blum v. Board of Zoning and Appeals of Town of North Hempstead, 149 N.Y.S.2d 5, 1 Misc.2d 668.

17. Ohio.—Hardy v. Horst, Com.Pl., 101 N.E.2d 398.

must be governed by established rules of procedure applicable generally to administrative tribunals.¹⁸ Although proceedings before the board are not carried out under the strict rules of evidence,¹⁹ one may not be deprived of the right to produce relevant evidence,²⁰ or be fairly apprised of the facts on which the board is asked to act.²¹ Under a statute to such effect, all witnesses appearing before the board are required to be sworn,²² but under others it has been held that the swearing of witnesses is not necessary,²³ or may be waived.²⁴ A stenographic record of the hearing is not required in the absence of an express provision to that effect.²⁵

Parties appearing before a zoning board are entitled to cross-examination of witnesses;²⁶ and the board may not control proceedings before it by requiring that attorneys desiring to cross-examine witnesses ask their questions through the board.²⁷

The board must weigh the evidence presented to it,²⁸ but it has the right to disregard and disbelieve evidence which in its judgment is not credible, although there is no countervailing evidence to dispute or contradict it.²⁹ Statements of counsel made in the hearing, where they are subject to contradiction from the opposition, are entitled to such weight and

credence as the board deems them worthy to receive.³⁰

§ 214. — Determination

The decision of the board should be based on properly established facts, and be assented to by the required number of members of the board.

The board of appeals or adjustment must determine the facts.³¹ Unless otherwise required by statute, the board is not required to make findings of fact on which it bases its action,³² although disclosure in its minutes of the reasons for its decision is highly desirable;³³ but under some statutes the board is required to render findings of fact and conclusions of law.³⁴ The determination of the board should be governed by the law as it exists at the time the matter is heard.³⁵

According to some decisions, the findings or determination of the board should be based only on facts established by evidence in a proper hearing before it.³⁶ On the other hand it has been held that the board may act on facts known to it although they are not produced at the hearing,³⁷ or may make its own survey,³⁸ but it may not acquire evidence outside of a hearing room in the absence of the parties and their attorneys and then base its determination, even in part, on such information.³⁹

18. Ill.—Flick v. Gately, 65 N.E.2d 137, 328 Ill.App. 81.

19. Conn.—Mitchell Land Co. v. Planning & Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 316, 140 Conn. 527—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290.

20. Conn.—Parsons v. Board of Zoning Appeals of City of New Haven, *supra*.

21. Conn.—Parsons v. Board of Zoning Appeals of City of New Haven, *supra*.

22. Ill.—Flick v. Gately, 65 N.E.2d 137, 328 Ill.App. 81.

23. N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

24. N.J.—Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J.Law 478.

25. N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

26. Conn.—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290—Wadell v. Board of Zoning Appeals of City of New Haven, 68 A.2d 152, 136 Conn. 1.

27. Conn.—Wadell v. Board of Zoning Appeals of City of New Haven, *supra*.

28. Mo.—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied

73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

Evidence held sufficient

Md.—Oursler v. Board of Zoning Appeals of Baltimore County, 104 A.2d 568, 204 Md. 397.

N.Y.—People ex rel. Natale v. Murdock, 86 N.Y.S.2d 492, 275 App.Div. 676, affirmed 87 N.E.2d 50, 299 N.Y. 637.

29. Mo.—Carroll Const. Co. v. Kansas City, App., 278 S.W.2d 817—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

30. Conn.—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290.

31. Mo.—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

32. Conn.—Miller v. Zoning Bd. of Appeals of City of Hartford, 87 A.2d 808, 138 Conn. 610—Saporiti v. Zoning Bd. of Appeals of Town of Manchester, 78 A.2d 741, 137 Conn. 478.

33. Conn.—Saporiti v. Zoning Bd. of Appeals of Town of Manchester, *supra*.

34. Ohio.—Hardy v. Horst, Com.Pl., 101 N.E.2d 398—A. Diccillo & Sons

Inc. v. Chester Zoning Board of Appeals, Com.Pl., 98 N.E.2d 352.

35. N.Y.—West Side Mortg. Co. v. Leo, 174 N.Y.S. 451.

36. Ill.—Flick v. Gately, 65 N.E.2d 137, 328 Ill.App. 81.

Md.—Aaron v. City of Baltimore, 114 A.2d 630, 207 Md. 401.

N.J.—Izenberg v. Board of Adjustment of City of Paterson, 114 A.2d 732, 35 N.J.Super. 583.

Pa.—Appeal of Bowtich, Com.Pl., 49 Lack.Jur. 209—Nugent v. Whitmarsh Tp., Com.Pl., 68 Montg.Co. 98.

37. Conn.—Hlavati v. Board of Adjustment of City of New Britain, 116 A.2d 504, 142 Conn. 659—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290—Dadukian v. Zoning Bd. of Appeals of City of Bridgeport, 68 A.2d 123, 135 Conn. 706—Mrowka v. Board of Zoning Appeals, 55 A.2d 909, 134 Conn. 149.

N.Y.—Community Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

Russo v. Stevens, 173 N.Y.S.2d 344—Innet v. Liberman, 155 N.Y.S.2d 383.

R.I.—Ferrier v. Board of Appeals of City of Pawtucket, 134 A.2d 141.

38. N.Y.—Russo v. Stevens, 173 N.Y.S.2d 344.

39. N.Y.—Russo v. Stevens, *supra*.

The number of members of the board whose assent is required for a decision of the board may be governed by statutory provisions,⁴⁰ and the vote of the board adopting a resolution should show that the required number of members voted in favor of the resolution.⁴¹ In order to be the action of the board, the action must be that of the board as such and not merely the action of the individual members thereof or even of a majority of the members.⁴²

§ 215. — — — Form and Requisites

When so required by statute, the decision of the board should be in writing, and, as far as practicable, in the form of a general statement or resolution; and it should state the grounds on which it is based.

When so required by statute, the decision should be in writing,⁴³ and, as far as practicable, in the form of a general statement or resolution⁴⁴ which shall be applicable to cases similar to, or falling within, the principles passed on.⁴⁵ In the absence of direct requirement, the power may be exercised by resolution.⁴⁶ The decision of the board should, it has been held, state the grounds on which it is based;⁴⁷ but it is not necessary that the decision use the precise language of the statute.⁴⁸

§ 216. — — — Filing, Publication, or Service

There should be a compliance with legislative provisions as to the filing and publication of the decision of

a board of appeals or adjustment; but in the absence of a provision therefor, personal service of a decision is not required.

Under some statutes or ordinances, the decision of a board of appeals or adjustment may be required to be filed in a designated place or with a designated officer⁴⁹ or published in an official publication;⁵⁰ and, in the absence of a provision therefor, personal service of a decision is not required.⁵¹ The board should promulgate its own decisions that they may be accessible to the public;⁵² and must comply with a peremptory statutory requirement that it shall make a detailed record of all its proceedings, and set forth therein the reasons for its decisions.⁵³

§ 217. — — — Conclusiveness

Decisions of the board of adjustment are not subject to collateral attack; but a provision making the decision final as far as it involves discretion or the finding of facts does not make the decision final as to matters of law.

Decisions of the board of adjustment are not subject to collateral attack.⁵⁴ A provision making the decision of the board final as far as it involves discretion or the finding of facts does not make its decision final as to matters of law,⁵⁵ such as the construction of a zoning ordinance.⁵⁶

Matters not essential to decision. Findings on matters not essential to the decision are not conclusive.⁵⁷

40. Mass.—*Real Properties v. Board of Appeal of Boston*, 42 N.E.2d 499, 311 Mass. 430.

43 C.J. p 355 note 8 [b].

41. N.Y.—*Lapham v. Roulan*, 169 N.Y.S.2d 346.

42. N.Y.—*Stanley v. Board of Appeals of Village of Piermont*, 5 N.Y.S.2d 956, 168 Misc. 797.

43. N.Y.—*West Side Mortg. Co. v. Leo*, 174 N.Y.S. 451.

Pa.—*Appeal of University of Pennsylvania*, Com.Pl., 29 Del.Co. 322.

44. N.Y.—*West Side Mortg. Co. v. Leo*, 174 N.Y.S. 451.

45. N.Y.—*West Side Mortg. Co. v. Leo*, supra.

46. N.J.—*Allen v. Paterson*, 121 A. 610, 98 N.J.Law 661.

47. Pa.—*Appeal of Valicenti*, 148 A. 308, 298 Pa. 276.

Yancale v. Philadelphia Zoning Board of Adjustment, 68 Pa.Dist. & Co. 233.

Kuznowski v. Board of Zoning Appeals, Com.Pl., 53 Lack.Jur. 53—*Appeal of Strunk*, Com.Pl., 27 North.Co. 324.

43 C.J. p 356 note 8.

48. N.Y.—*People v. Walsh*, 207 N. 101 C.J.S.—62

Y.S. 324, 211 App.Div. 205, affirmed 148 N.E. 724, 240 N.Y. 606.

49. N.Y.—*Stanley v. Board of Appeals of Village of Piermont*, 5 N.Y.S.2d 956, 168 Misc. 797.

Fleischer v. Murdock, 62 N.Y.S. 2d 417, appeal dismissed 77 N.Y.S. 2d 393.

"Office of the board"

(1) A provision requiring decision of village board of zoning appeals to be filed in office of board required decision to be filed with village clerk as clerk of board.

N.Y.—*Stanley v. Board of Appeals of Village of Piermont*, 5 N.Y.S.2d 956, 168 Misc. 797.

(2) Under statute providing that petition for certiorari to review action of board of adjustment must be presented to court of record within ten days after filing of decision in office of board, filing of minutes in room of building inspector where board transacted all of its business rather than in office of city clerk was proper.

Tex.—*Hall v. Board of Adjustment of City of McAllen*, Civ.App., 239 S.W.2d 647.

Decision held properly filed when longhand minutes, taken by a person

who customarily acted as secretary of board, were typed into board's minute book, whether or not minutes were read and approved by board and signed by chairman.

Tex.—*Hall v. Board of Adjustment of City of McAllen*, supra.

50. N.Y.—*Fleischer v. Murdock*, 62 N.Y.S.2d 417, appeal dismissed 77 N.Y.S.2d 393.

51. N.Y.—*Fleischer v. Murdock*, 62 N.Y.S.2d 417, appeal dismissed 77 N.Y.S.2d 393.

52. N.Y.—*People v. Walsh*, 196 N.Y.S. 672, 203 App.Div. 468.

53. Mass.—*Bradley v. Boston Board of Zoning Adjustment*, 150 N.E. 892, 255 Mass. 160.

54. Tex.—*City of Dallas v. Halbert*, Civ.App., 246 S.W.2d 686, error refused no reversible error.

55. Mich.—*Paye v. City of Grosse Pointe*, 271 N.W. 828, 279 Mich. 254.

56. Mich.—*Paye v. City of Grosse Pointe*, supra.

57. Mass.—*Town of Wayland v. Lee*, 91 N.E.2d 835, 325 Mass. 637.

§ 218. ——— Reconsideration

A board has inherent power to review its own decisions, but it should not, in the absence of mistake or fraud, reopen a matter which has once been terminated and rehear it on the same facts.

The power of a zoning board to review its own decision has frequently been before the courts.⁵⁸ While such a board may be said to have inherent power to review its own decision in a proper case,⁵⁹ and to be vested with a liberal discretion in deciding whether to do so,⁶⁰ such discretion must be reasonably and legally exercised⁶¹ and is subject to review in the courts.⁶²

As a general rule, a board of appeal and adjustment should not reopen a matter which has once

been terminated and rehear it on the same facts,⁶³ at least in the absence of fraud, surprise, or mistake in the prior proceedings,⁶⁴ but the board may entertain an application for reconsideration if new facts materially changing the aspects of the case are presented,⁶⁵ and the determination of whether there are such substantial changes is primarily a matter for the board.⁶⁶ A petition for rehearing must be timely filed.⁶⁷

Amendment of records. In a proper case a zoning board may amend its own records,⁶⁸ but in so doing it is bound by the rule that controls all such proceedings, and its power in this respect is limited and must be exercised with caution and meticulous attention to fundamental requirements of justice.⁶⁹

VII. PERMITS AND CERTIFICATES

A. IN GENERAL

§ 219. Requirement in General

Although such permits or certificates are not necessary in the absence of provisions of statutes or ordinances requiring them, municipalities may, in the proper exercise of their police power, require that permits or certificates be obtained as a prerequisite to the erection,

alteration, improvement, or use of buildings or other property in a particular manner or in a particular area.

In the absence of any statute or ordinance imposing such a requirement, a building or other structure may be erected, altered, or used in a particular manner without a permit.⁷⁰ Nevertheless, municipal cor-

58. Conn.—Rommell v. Walsh, 16 A. 2d 483, 127 Conn. 272.

59. N.Y.—Canzano v. Hanley, 66 N. Y.S.2d 709, 188 Misc. 167.

60. Conn.—Sipperley v. Board of Appeals on Zoning of Town of Westport, 98 A.2d 907, 140 Conn. 164—Torello v. Board of Zoning Appeals of New Haven, 16 A.2d 591, 127 Conn. 307—Rommell v. Walsh, 16 A.2d 483, 127 Conn. 272—Burr v. Rago, 180 A. 444, 120 Conn. 287.

61. Conn.—Torello v. Board of Zoning Appeals of New Haven, 16 A. 2d 591, 127 Conn. 307—Rommell v. Walsh, 16 A.2d 483, 127 Conn. 272—Burr v. Rago, 180 A. 444, 120 Conn. 287.

Vt.—*Corpus Juris Secundum* cited in Thompson v. Smith, 129 A.2d 638, 651, 119 Vt. 488.

62. Conn.—Sipperley v. Board of Appeals on Zoning of Town of Westport, 98 A.2d 907, 140 Conn. 164—Torello v. Board of Zoning Appeals of New Haven, 16 A.2d 591, 127 Conn. 307—Rommell v. Walsh, 16 A.2d 483, 127 Conn. 272—Burr v. Rago, 180 A. 444, 120 Conn. 287.

63. Conn.—Dadukian v. Zoning Bd. of Appeals of City of Bridgeport, 68 A.2d 123, 135 Conn. 706—*Corpus Juris* cited in St. Patrick's Church Corporation v. Daniels, 154 A. 343, 345, 113 Conn. 132.

N.Y.—Hall v. Walsh, 248 N.Y.S. 602, 137 Misc. 448, affirmed 222 N.Y.S. 816, 221 App.Div. 756.

Watkins v. Gormley, 59 N.Y.S.2d 747—Ellsworth Realty Co. v. Kramer, 48 N.Y.S.2d 623, reversed on other grounds 49 N.Y.S.2d 512, 268 App.Div. 824.

43 C.J. p 356 note 14.

64. Md.—*Corpus Juris* quoted in Miles v. McKinney, 199 A. 540, 546, 174 Md. 551, 117 A.L.R. 207.

43 C.J. p 356 note 15.

65. N.Y.—Ellsworth Realty Co. v. Kramer, 49 N.Y.S.2d 512, 268 App. Div. 824.

Petition of illiterate person.

(1) Where petition for rehearing filed with municipal zoning board of review was signed by illiterate person with her mark, it was not required that such signature be supported by affidavit showing that petition was read to such person and that she understood its contents.

R.I.—Abbott v. Zoning Bd. of Review of City of Warwick, 79 A.2d 620, 78 R.I. 84.

(2) Where no affidavit showing that petition was read to, and understood by, illiterate signer, in absence of proof to contrary, it would not be presumed that signer was improperly induced to sign petition.

R.I.—Abbott v. Zoning Bd. of Review of City of Warwick, supra.

66. N.Y.—Ellsworth Realty Co. v. Kramer, 49 N.Y.S.2d 512, 268 App. Div. 824.

67. Tenn.—Arendale v. Rasch, 268 S.W.2d 102, 196 Tenn. 374.

68. Vt.—Thompson v. Smith, 129 A. 2d 638, 119 Vt. 488.

69. Vt.—Thompson v. Smith, supra.

70. Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185. Kan.—Fuhr v. Kansas City, 51 P.2d 911, 142 Kan. 704.

Mass.—Turturro v. Calder, 29 N.E. 2d 744, 307 Mass. 159.

Minn.—Morse v. Wind, 1 N.W.2d 369, 211 Minn. 356.

N.J.—Guttman v. Borough of Bradley Beach, 83 A.2d 538, 15 N.J.Super. 409.

N.Y.—Maxwell v. Incorporated Village of Rockville Centre, 84 N.Y.S. 2d 544.

Pa.—Appeal of McHugh, Com.Pl., 63 Montg.Co. 32—Appeal of Weldon Bocci Club, Com.Pl., 60 Montg.Co. 277.

Provisions held not to require

(1) Certificate of occupancy.

Cal.—Neuber v. Royal Realty Co., 195 P.2d 501, 86 C.A.2d 596.

(2) Permit for repairs to buildings or structures.

Ga.—Berry v. City of Atlanta, 43 S. E.2d 191, 75 Ga.App. 278.

N.Y.—Jetter v. Hofheins, 70 N.Y.S. 2d 808, 190 Misc. 99.

porations, in the proper exercise of their police power,⁷¹ may, and generally do, require that permits or certificates be obtained from designated public officials or boards as a prerequisite to the erection, alteration, or use of buildings or similar structures, or for the use or improvement of land in a particular manner or in a particular area;⁷² and it is illegal for a property owner to proceed with any of the acts for which such a permit or certificate is re-

quired without having procured it,⁷³ even if the refusal of the official to issue the permit was wrongful,⁷⁴ although the requirement may, under certain circumstances, be waived by the municipal authorities.⁷⁵

Permit for nonconforming use. In the absence of provisions requiring it, a permit to continue a nonconforming use is not required,⁷⁶ and the board

(3) Permit for inclosing porch.

Pa.—*De Frees v. White*, 147 A. 834, 298 Pa. 19.

(4) Additional license to install additional and essential equipment, such as extractor and dryer, where party had been granted license to operate laundrette.

N.Y.—*MacMillan v. McCaffrey*, 106 N.Y.S.2d 673, 201 Misc. 574.

71. Cal.—*Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 194 P.2d 148, 85 C.A.2d 776—*Ex parte Angelus*, 150 P.2d 908, 65 C.A.2d 441.

Md.—*Engle v. City Com'rs of Cambridge*, 22 A.2d 922, 180 Md. 82.

Mont.—*Lazich v. City of Butte*, 154 P.2d 260, 116 Mont. 386.

Pa.—*Berwick Lumber & Supply Co. v. City of Harrisburg, Com.Pl.*, 52 Dauph.Co. 275.

Tex.—*Meserole v. Board of Adjustment, City of Dallas, Civ.App.*, 172 S.W.2d 528—*City of Dallas v. Meserole, Civ.App.*, 155 S.W.2d 1019, error refused.

Wash.—*Chief Petroleum Corporation v. City of Walla Walla*, 116 P.2d 560, 10 Wash.2d 297.

Supreme control

The issuance of permits for erection of buildings within its territorial limits is a "municipal affair" over which a city having the power of municipal home rule with respect to matters of local or internal concern has supreme control.

Cal.—*Lindell Co. v. Board of Permit Appeals of City and County of San Francisco*, 144 P.2d 4, 23 C. 2d 303.

72. Ark.—*Seiz v. City of Hot Springs*, 108 S.W.2d 897, 194 Ark. 544.

Cal.—*McIvor v. Mercer-Fraser Co.*, 172 P.2d 758, 76 C.A.2d 247—*Corpus Juris cited in Yuba City v. Cherniavsky*, 4 P.2d 299, 301, 117 C.A. 568.

Conn.—*Jennings v. Connecticut Light & Power Co.*, 103 A.2d 585, 140 Conn. 650.

Iowa.—*Hirsch v. City of Muscatine*, 10 N.W.2d 71, 233 Iowa 590.

Kan.—*Stafford v. City of Coffeyville*, 168 P.2d 91, 161 Kan. 311.

Mass.—*Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence*, 86 N.E.2d 906, 324 Mass. 433—*Wolbarsht v. Donnelly*, 20 N.E.2d 415, 302 Mass. 568—*Bellevue Hotel Co.*

v. Building Com'r of Boston, 12 N.E.2d 94, 299 Mass. 73.

Minn.—*Alexander Co. v. City of Owatonna*, 24 N.W.2d 244, 222 Minn. 312.

N.J.—*Honigfeld v. Byrnes*, 103 A.2d 598, 14 N.J. 600.

N.Y.—*Euclid Holding Co. v. Schulte*, 274 N.Y.S. 515, 153 Misc. 455, reversed on other grounds 276 N.Y.S. 533, 153 Misc. 832.

Okl.—*Ptak v. City of Oklahoma City*, 229 P.2d 567, 204 Okl. 336.

Pa.—*Berwick Lumber & Supply Co. v. City of Harrisburg, Com.Pl.*, 52 Dauph.Co. 275.

Tex.—*Fort Worth & D. C. Ry. Co. v. Ammons, Civ.App.*, 215 S.W.2d 407, refused no reversible error. 43 C.J. p 345 note 11.

Matter of common knowledge

That a zoning ordinance ordinarily contains a requirement of a permit prior to construction of a building is common knowledge among all persons interested in zoning legislation.

Pa.—*City of Harrisburg v. Pass*, 93 A.2d 447, 372 Pa. 318.

Persons or bodies subject to requirement

(1) Generally.

Pa.—*Collingdale Borough v. Hood & Gross*, 29 Pa.Dist. & Co. 22, 26 Del. Co. 435, 29 Mun.L.R. 10—*Berwick Lumber & Supply Co. v. City of Harrisburg, Com.Pl.*, 52 Dauph.Co. 275.

(2) Church.

N.Y.—*Application of Garden City Jewish Center*, 155 N.Y.S.2d 523, 2 Misc.2d 1009.

(3) Materialmen and workmen.

Ill.—*Wolthausen v. Lederer*, 39 N.E.2d 71, 313 Ill.App. 143.

City-owned land

A city could lawfully require building permit for erection of schoolhouse on land owned by the city.

Mass.—*M. Spinelli & Sons Co. v. City of Cambridge*, 28 N.E.2d 240, 306 Mass. 342.

73. Ga.—*Hunter v. City of Atlanta*, 91 S.E.2d 338, 212 Ga. 179.

Ill.—*Litwin v. Pioneer Trust & Sav. Bank*, 105 N.E.2d 807, 347 Ill.App. 75.

Mass.—*Beane v. H. K. Porter, Inc.*, 182 N.E. 823, 260 Mass. 538.

N.Y.—*People v. Dennis*, 133 N.Y.S.2d

586, 206 Misc. 402—*People v. Lederle*, 132 N.Y.S.2d 693, 206 Misc. 244, affirmed 139 N.Y.S.2d 915, 285 App.Div. 974, affirmed 131 N.E.2d 284, 309 N.Y. 866—*Boardwalk & Seashore Corporation v. Murdock*, 22 N.Y.S.2d 611, 175 Misc. 208, affirmed 26 N.Y.S.2d 319, 261 App.Div. 913, reargument denied 27 N.Y.S.2d 431, 261 App.Div. 972, affirmed 36 N.E.2d 678, 286 N.Y. 494—*Heimerle v. Village of Bronxville*, 5 N.Y.S.2d 1002, 168 Misc. 788, affirmed 11 N.Y.S.2d 367, 256 App.Div. 993—*Euclid Holding Co. v. Schulte*, 274 N.Y.S. 515, 153 Misc. 455, reversed on other grounds 276 N.Y.S. 533, 153 Misc. 832.

People v. Gerus, 69 N.Y.S.2d 283.

Lack of knowledge

Plaintiff who commenced construction of a building constituting a nonconforming use in a residence zone was chargeable with knowledge that a permit was required under law, and his lack of knowledge did not preclude town building inspector from ordering a stoppage of the construction work.

Conn.—*Pallman v. Town of East Haven*, 67 A.2d 560, 135 Conn. 593.

Obtaining other permit

Where zoning ordinance required permit from building commissioner with approval of board of aldermen for use of land as a dump and board of health had authority to regulate dumping of refuse, a permit from board of health would not authorize landowner to maintain dump in violation of zoning ordinance without permit from building commissioner.

Mass.—*Building Com'r of Medford v. C. & H. Co.*, 65 N.E.2d 537, 319 Mass. 273.

74. D.C.—*Hagans v. District of Columbia, Mun.App.*, 97 A.2d 922.

75. N.Y.—*John F. Kaiser Co. v. Ehler*, 221 N.Y.S. 520, 220 App.Div. 737.

Estoppel see *infra* § 223.

76. Colo.—*Board of Adjustment of City and County of Denver v. Abe Perlmutter Const. Co.*, 280 P.2d 1107, 131 Colo. 230.

Md.—*Amerehm v. Kotras*, 71 A.2d 865, 194 Md. 591.

Mich.—*Civic Ass'n of Dearborn Tp., Dist. No. 3, v. Horowitz*, 28 N.W.2d 97, 318 Mich. 333.

of adjustment has no jurisdiction to deny a permit therefor.⁷⁷

§ 220. Statutes, Ordinances, and Regulations

Provisions of zoning acts or regulations governing the grant or denial of building permits are subject to the usual rules of construction.

Provisions of zoning acts, ordinances, or regulations governing the grant or denial of zoning permits are subject to the usual rules of construction,⁷⁸ and the meaning of words used therein must be determined in the light of the provisions of the ordinance or regulation as a whole and its intended purposes.⁷⁹ The provisions cannot clothe the official, whose duty it is to grant or refuse the permits, with greater power than that authorized by the statute

which enabled their enactment.⁸⁰ A statute relating to the procedure for the granting of permits, being derogatory of the common law, must be strictly construed.⁸¹

§ 221. — Retroactive Operation

Property is not exempt from subsequent regulations with respect to permits unless the owner has acquired a vested right to use the property in a particular manner.

Unless a property owner has acquired a vested right to use his property in the manner in question, his property is not exempt from the operation of subsequent regulations and ordinances with respect to permits properly enacted by a municipal corporation in the exercise of its police power.⁸²

N.Y.—*Village of Sands Point v. Sands Point Country Day School*, 148 N.Y.S.2d 312, 2 Misc.2d 885, affirmed 154 N.Y.S.2d 428, 2 A.D.2d 769.

Ohio.—*State v. Pierce*, 132 N.E.2d 102, 164 Ohio St. 482.

Power to issue permit for nonconforming use see *infra* § 225.

Where property is not zoned, no occupancy permit to continue a nonconforming use is necessary, for the reason that a nonconforming use presumes a valid zoning ordinance.

Pa.—*Appeal of Rich & Co.*, 84 Pa. Dist. & Co. 393, 101 Pittsb.Leg.J. 85.

Reconstruction or alteration of building and change of use

Buildings which were designed and used as lodging house and meeting hall for many years prior to adoption of zoning ordinance could be reconstructed, structurally altered, and their use changed, provided there was compliance with restrictions of zoning ordinance, without any approval by zoning board of appeals.

N.Y.—*Ratcliffe v. Morrison*, 123 N.Y.S.2d 831.

77. Colo.—*Board of Adjustment of City and County of Denver v. Abe Perlmutter Const. Co.*, 280 P.2d 1107, 131 Colo. 230.

More restrictive use

Where owners of land zoned for residential purposes have continued a nonconforming industrial use of the land as a brick yard, the board has no jurisdiction to deny a building permit for the erection of structures to make a business use of the land as a shopping center.

Colo.—*Board of Adjustment of City and County of Denver v. Abe Perlmutter Const. Co.*, *supra*.

78. La.—*City of New Orleans v. Impastato*, 3 So.2d 559, 193 La. 206.

Minn.—*Julius v. Lenz*, 9 N.W.2d 255, 215 Minn. 106—*Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co. of*

City of New York, 253 N.W. 8, 191 Minn. 60.

N.J.—*Ackerman v. Steiner*, 147 A.746, 7 N.J.Misc. 1056.

N.Y.—*S. S. Kresge Co. v. City of New York*, 87 N.Y.S.2d 313, 194 Misc.645, affirmed 92 N.Y.S.2d 414, 275 App.Div. 1036, appeal denied 93 N.Y.S.2d 729, 276 App.Div. 834—*Vangellow v. City of Rochester*, 71 N.Y.S.2d 672, 190 Misc. 128.

Validity of regulations as to permits and certificates see *supra* § 65.

Construction by municipality

It is the duty of the municipality primarily to construe its ordinances when an application for a permit is applied for.

Tex.—*Woods v. Kiersky*, Civ.App., 297 S.W. 518, reversed on other grounds, Com.App., 14 S.W.2d 825.

Requirement of access to proposed structure

(1) Provision requiring that road giving access to proposed structure be suitably improved before building permit may be issued is concerned with problem of community planning and is designed to secure uniform and harmonious development of growth.

N.Y.—*Brous v. Smith*, 106 N.E.2d 503, 304 N.Y. 164.

(2) Provision does not require, as condition of issuance of permit, any form of physical access, but merely any reasonable means.

N.Y.—*Anndale, Inc. v. Brienza*, 148 N.Y.S.2d 17, 1 A.D.2d 785.

79. Conn.—*Abbadessa v. Board of Zoning Appeals of City of New Haven*, 54 A.2d 675, 134 Conn. 28.

80. La.—*State ex rel. Romero v. Viator*, 46 So.2d 256, 217 La. 239.

81. N.Y.—*Lunmor Homes, Inc. v. Johnson*, 122 N.Y.S.2d 149.

82. Md.—*Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore*, 60 A.2d 764, 191 Md. 249.

Mo.—*Corpus Juris Secundum* cited in *Fleming v. Moore Brothers Realty Co.*, 251 S.W.2d 8, 16, 363 Mo. 305.

N.Y.—*Application of White Plains Housing Authority*, 103 N.Y.S.2d 549, 278 App.Div. 125.

Riverdale Community Planning Ass'n v. Crinnion, 133 N.Y.S.2d 706, affirmed 141 N.Y.S.2d 510, 285 App. Div. 1047, appeal dismissed 133 N.E.2d 839, 1 N.Y.2d 689, 150 N.Y.S.2d 616.

Pa.—*Appeal of Mutual Supply Co.*, 77 A.2d 612, 366 Pa. 424.

Tex.—*City of Dallas v. Meserole*, Civ.App., 155 S.W.2d 1019, error refused—*City of University Park v. Rahl*, Civ.App., 38 S.W.2d 1075, error dismissed.

Newly annexed area

Under city's temporary zoning ordinance providing that persons constructing buildings incomplete at time land on which they are situated is annexed shall apply for a permit before proceeding further and requiring that applications for non-dwelling uses should be passed on by city council, plaintiff who had commenced work on foundations of commercial buildings after annexation petition had been presented held such property and property on which commercial buildings were contemplated subject to city's police regulations when plaintiff's area was subsequently annexed.

Tex.—*City of Dallas v. Meserole Bros.*, Civ.App., 164 S.W.2d 564, error refused.

Purchase in contemplation of ordinance

One who purchases property at a time when proceedings to adopt zoning regulations are under way does so in contemplation of the forthcoming regulations and is bound by them when adopted as respects his right to a permit.

Colo.—*Colby v. Board of Adjustment*, 255 P. 443, 81 Colo. 344.

According to some authorities, where, after the making of an application for a permit but before a decision thereon, the regulations applicable to the subject matter of the permit sought are changed, the application is governed by the regulations as changed,⁸³ and a municipality may properly refuse a building permit for a land use repugnant to a pending and later-enacted zoning ordinance even though the application for the permit is made when the intended use conforms to existing regulations, provided that no permit has been issued and relied on in good faith to the substantial detriment of the holder of the permit.⁸⁴

This rule, however, will not be applied where applicant has met every requirement for the granting of the permit but decision on his application is improperly delayed for a considerable time until a zoning ordinance is enacted prohibiting the use sought;⁸⁵ the right to a permit which was wrongfully withheld is not affected by a subsequent ordinance, especially where it preserves the rights of holders of permits issued before its passage.⁸⁶

It has been held, on the other hand, that an owner of property has the right to rely on zoning acts and ordinances existing at the time of his application,⁸⁷ and that his right to put his property to a

permissible use as provided for by prevailing zoning ordinances accrues at the time an application for a building permit is made.⁸⁸ Accordingly, there is authority to the effect that an application for a permit should not be affected by an amendatory ordinance enacted after the application was filed when the ordinance does not upgrade land use.⁸⁹ It has also been held that municipal authorities cannot by emergency legislation make provisions of a pending ordinance applicable to an application for a permit filed before the enactment of such ordinance,⁹⁰ although there is authority to the contrary.⁹¹

Existing projects for which permits had been theretofore obtained may be expressly excepted from the operation of a subsequently enacted zoning regulation,⁹² and in the absence of any revocation or cancellation of the permit a construction in accordance therewith does not constitute a violation of a subsequently enacted regulation.⁹³

§ 222. Power to Grant

A valid permit may not be granted by a body or official not authorized or empowered to grant it, the power to grant or deny a permit being in the body or official designated.

A valid permit may not be granted by a body or official not authorized or empowered to grant it.⁹⁴

Statute curing invalid ordinance

Building superintendent's refusal of permit for erection of apartment house in district restricted under invalid zoning ordinance would be sustained under subsequent curative statute validating the ordinance.

N.J.—*Steinberg v. Board of Adjustment of Town of Nutley*, 146 A. 313, 106 N.J.Law 603, followed in *Paramount Realty & Const. Co. v. Schmitt*, 146 A. 319, 106 N.J. Law 587.

Koplin v. Village of South Orange, 142 A. 235, 6 N.J.Misc. 489.

83. Cal.—*Brougher v. Board of Public Works of City and County of San Francisco*, 271 P. 487, 205 C. 426.

Felice v. City of Inglewood, 190 P.2d 317, 84 C.A.2d 263.

La.—*State ex rel. Manhein v. Harrison*, 114 So. 159, 164 La. 564.

N.J.—*Rodee v. Lee*, 81 A.2d 517, 14 N.J.Super. 188.

Burmore Co. v. Champion, 12 A. 2d 713, 124 N.J.Law 548, 550—*Eastern Boulevard Corporation v. Willaredt*, 8 A.2d 688, 123 N.J. Law 269.

Lewis v. Board of Com'rs of Borough of Avon-by-the-Sea, 143 A. 865, 7 N.J.Misc. 27—*Sharff v. Board of Adjustment of City of East Orange*, 143 A. 77, 6 N.J.Misc. 905.

Pa.—*Appeal of A. N. "Ab" Young Co.*, 61 A.2d 839, 360 Pa. 429.

Gheen v. Mencer, 52 Pa.Dist. & Co. 422.

Tex.—*Connor v. City of University Park*, Civ.App., 142 S.W.2d 706, error refused.

84. Cal.—*Price v. Schwafel*, 206 P. 2d 683, 92 C.A.2d 77.

Pa.—*Shender v. Zoning Bd. of Adjustment*, 131 A.2d 90, 388 Pa. 265

—*A. J. Aberman, Inc. v. City of New Kensington*, 105 A.2d 586, 377 Pa. 520—*Appeal of Mutual Supply Co.*, 77 A.2d 612, 366 Pa. 424—*Appeal of A. N. "Ab" Young Co.*, 61 A.2d 839, 360 Pa. 429.

Logan v. Bickel, 11 Pa.Dist. & Co.2d 405, 43 Del.Co. 272.

Hunsberger v. Stanbridge, Com. Pl., 73 Montg.Co. 1, 48 Mun.L.R. 243.

85. Cal.—*Munns v. Stenman*, 314 P. 2d 67, 152 C.A.2d 548.

N.J.—*Sgromolo v. City of Asbury Park*, 46 A.2d 661, 134 N.J.Law 195.

86. La.—*Shreveport v. Dickason*, 107 So. 427, 160 La. 563.

87. Ill.—*Downey v. Grimshaw*, 101 N.E.2d 375, 410 Ill. 21.

88. Wash.—*State ex rel. Ogden v. City of Bellevue*, 275 P.2d 899, 45 Wash.2d 492.

89. Pa.—*Appeal of Hertrick*, 137 A. 2d 810, 391 Pa. 143.

90. Ohio.—*State ex rel. Fairmount Center Co. v. Arnold*, 34 N.E.2d 777, 138 Ohio St. 259, 136 A.L.R. 840.

State ex rel. Waltz v. Village of Independence, App., 125 N.E.2d 911—*State ex rel. Castle National v. Village of Wickliffe*, App., 80 N.E. 2d 200, appeal dismissed 74 N.E.2d 270, 148 Ohio St. 410—*State ex rel. Del Monte v. Woodmansee*, App., 72 N.E.2d 789.

Williams v. Village of Deer Park, Com.Pl., 70 N.E.2d 102, reversed on other grounds 69 N.E.2d 536, 78 Ohio App. 231.

91. La.—*State ex rel. Shaver v. Mayor and Councilmen of Town of Coushatta*, App., 196 So. 388.

92. Conn.—*City of New Britain v. Kilbourne*, 147 A. 124, 109 Conn. 422.

93. Mo.—*Fleming v. Moore Brothers Realty Co.*, 251 S.W.2d 8, 363 Mo. 305.

Revocation or nullification of permit see *infra* § 261.

94. Minn.—*Lowry v. City of Mankato*, 42 N.W.2d 553, 231 Minn. 108—*Alexander Co. v. City of Owatonna*, 24 N.W.2d 244, 222 Minn. 312.

Mo.—*State ex rel. Town of Olivette v. American Tel. & Tel. Co.*, 280 S. W.2d 134.

Unauthorized permit as nullity generally see *infra* § 233.

The power to grant or deny a permit in the first instance resides in the body or official designated,⁹⁵ and such authority may be exclusive.⁹⁶ Under some statutes, however, application need not be made in the first instance to the designated administrative officer but may be made to the municipality's governing authority.⁹⁷ Furthermore, municipal legislative bodies may reserve to themselves the power to grant or deny licenses or permits.⁹⁸

§ 223. — Nature

The acts of a municipality relative to the issuance of

permits fall within its governmental rather than proprietary functions, and generally the board or officer passing on the application acts in an administrative capacity.

The acts of a municipality relative to the issuance of permits under zoning ordinances fall within its governmental rather than proprietary functions,⁹⁹ and, as a general rule, the board or officer passing on an application for a permit or certificate acts in an administrative capacity,¹ and must follow the literal provisions of the ordinances.² Under some statutes the zoning commission in passing

Application to unauthorized body

Where the zoning commission is without authority to pass on an application for a building permit in the first instance, an application made to it should be dismissed.

Conn.—Osborn v. Town of Darien, 175 A. 578, 119 Conn. 182.

95. Ark.—Meyer v. Seifert, 225 S.W. 2d 4, 216 Ark. 293.

Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C. 2d 66.

Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650.

Mass.—Raimondo v. Board of Appeals of Bedford, 118 N.E.2d 67, 331 Mass. 228.

N.J.—Jantausch v. Borough of Verona, 131 A.2d 881, 24 N.J. 326.

N.Y.—Town Bd. of Town of Huntington v. Zoning Bd. of Appeals of Town of Huntington, 165 N.Y.S.2d 954, 7 Misc.2d 210—In re Allered Realty Corporation, 244 N.Y.S. 531, 138 Misc. 232.

Authority of official implied

Act providing for review of order of administrative official impliedly authorized official to grant or deny applications under zoning ordinance.

N.Y.—Village of Attica v. Day, 236 N.Y.S. 607, 134 Misc. 882, affirmed 243 N.Y.S. 915, 230 App.Div. 776.

96. Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650.

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

N.Y.—In re Allered Realty Corporation, 244 N.Y.S. 531, 138 Misc. 232.

97. La.—State ex rel. Calvary Baptist Church v. City of Alexandria, 114 So. 492, 164 La. 628.

98. La.—McCauley v. Albert E. Briede & Son, 90 So.2d 78, 231 La. 36.

99. U.S.—Madison v. Reichelt, D.C. Md., 158 F.Supp. 401.

Md.—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 108—W. H. Barber Co.

v. City of Minneapolis, 34 N.W.2d 710, 227 Minn. 77.

1. Cal.—Johnston v. City of Claremont, 323 P.2d 71—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C.2d 66.

Mo.—State ex rel. Ludlow v. Guffey, 306 S.W.2d 552.

N.J.—Deer-Glen Estates v. Board of Adjustment and Appeal of Borough of Fort Lee, 121 A.2d 26, 39 N.J.Super. 380.

N.Y.—Plander v. Koehler, 150 N.Y.S. 2d 879—Application of Kunz, 128 N.Y.S.2d 680.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Ohio.—State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.

State ex rel. Anshe Chessed Congregation v. Bruggemeier, 115 N.E.2d 65, 97 Ohio App. 67.

Pa.—Herskovits v. Irwin, 149 A. 195, 299 Pa. 155.

City of Williamsport v. Grieco, Com.Pl., 6 Lycumeng 76.

Va.—Corpus Juris Secundum cited in Ours Properties v. Ley, 96 S.E.2d 754, 757, 198 Va. 848.

Dual duty

Building commissioner, when acting in issuance of permits for erection or alteration as provided in building code, has dual duty of ascertaining whether contemplated use of building to be erected or altered is in compliance with building code and zoning ordinance.

Mo.—Veal v. City of St. Louis, 289 S.W.2d 7, 365 Mo. 836.

2. Md.—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.

N.Y.—Gordon v. Board of Appeals of City of Schenectady, 225 N.Y.S. 680, 131 Misc. 346.

Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App. Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App. Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E. 2d 74, 299 N.Y. 699.

Plander v. Koehler, 150 N.Y.S.2d 879—Application of Kunz, 128 N.Y.S.2d 680.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—Herskovits v. Irwin, 149 A. 195, 299 Pa. 155.

Limited to application of zoning ordinance

N.Y.—J. L. Hennessy Associates, Inc. v. Griffin, 155 N.Y.S.2d 378.

Restricted to enforcement of zoning ordinance as enacted

R.I.—Ajootian v. Zoning Bd. of Review of City of Providence, 132 A. 2d 836.

Standards specified in ordinance

Board in exercising its discretion to grant permit to use land for religious purposes was limited to applying the rules and standards as specified in the ordinance authorizing the use of property for church or school purposes.

N.Y.—Titus St. Paul Property Owners Ass'n v. Board of Zoning Appeals of Town of Irondequoit, 132 N.Y.S.2d 148, 205 Misc. 1083.

No inherent power

Board does not have the inherent power regardless of terms of zoning ordinance to grant permit.

Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C. 2d 66.

Bound by terms of ordinance

In granting permits under zoning ordinance, board is bound by terms of ordinance, until ordinance is amended through proper legislative procedure.

Cal.—Johnston v. Board of Sup'rs of Marin County, supra.

Public convenience and welfare

Word "public" in village ordinance authorizing inspector of building, with consent of council, to issue special permit for erection of a church in residence zone if such church would serve public convenience and welfare and would not substantially and permanently injure appropriate use of neighboring property, refers to people generally and not just to citizens of village.

on an application for a permit acts as a special agency of the state.³

Estoppel. Since the acts of a municipality relative to the issuance of permits under zoning ordinances fall within its governmental rather than proprietary functions, estoppel will not lie against it for its acts performed in connection therewith.⁴

§ 224. — Discretion in Exercise of Power

The grant or refusal of a permit is to a certain ex-

tent within the sound discretion of the board or official authorized to issue it, but the discretion must be exercised reasonably, and if an applicant meets all the requirements of the zoning regulations and there is no valid ground for denial of the application, the permit should be issued.

Under some statutes or ordinances the grant or refusal of a permit is to a certain extent within the sound discretion of the board or official authorized to issue it;⁵ but the discretion must be exercised reasonably and not arbitrarily,⁶ and, if an

Ohio.—State ex rel. Anshe Chesed Congregation v. Bruggemeier, 115 N.E.2d 65, 97 Ohio App. 67.

3. Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650.

4. Minn.—W. H. Barber Co. v. City of Minneapolis, 34 N.W.2d 710, 227 Minn. 77.

Unauthorized permit as not constituting basis of estoppel see *infra* § 238.

Municipality held not estopped

(1) Where town planning commission was established under special law providing that before exercise of powers, commission should adopt regulations governing subdivision of land, and regulations adopted required all lots to be of size required by zoning regulations, commission was without power to approve revised map of lots for residential use, which did not comply with zoning regulations, and such erroneous action could not, in absence of large expenditures incurred in reliance on approval of map, establish such an estoppel as would compel building commission to grant landowner's applications for permits to erect houses on such lots.

Conn.—State ex rel. La Voie v. Building Commission of Town of Trumbull, 65 A.2d 165, 135 Conn. 415.

(2) Where owners acquired first lot and built a house thereon, and thereafter they discovered that, due to error in surveying, a portion of house was actually on second lot, and they purchased second lot, giving them a total frontage of 126.83 feet, and borough adopted a zoning ordinance requiring building lots in district to have minimum street frontage of 100 feet, and owners then purchased third lot having a frontage of 50 feet and applied to planning board for realignment of lot lines to give first lot a frontage of 50 feet, second lot a frontage of 64.83 feet, and third lot a frontage of 62 feet, and application was granted, with proviso that no building permit be issued for third lot without further referral to planning board, owners could not meritoriously assert an estoppel, which would preclude borough

from denying a permit for building of a house on third lot.

N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, Morris County, 125 A.2d 543, 41 N.J.Super. 582.

(3) Fact that construction of a building constituting a nonconforming use was in progress openly and notoriously so that town officials knew or should have known of the work does not estop a town building inspector to order a work stoppage for failure to obtain a required permit.

Conn.—Pallman v. Town of East Haven, 67 A.2d 580, 135 Conn. 593.

(4) Prosecution of owner for violation of zoning ordinance by maintaining nonconforming use did not estop superintendent of buildings and city from questioning maintenance of nonconforming use and failure to object to other use of premises in violation of zoning ordinance did not estop building superintendent to refuse to issue permit to alter premises.

N.Y.—A. C. Nurseries, Inc. v. Brady, 105 N.Y.S.2d 933, 278 App.Div. 974.

5. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 303.

Roney v. Board of Sup'rs of Contra Costa County, 292 P.2d 529, 138 C.A.2d 740—Cohn v. County Bd. of Sup'rs of Los Angeles County, 286 P.2d 836, 135 C.A.2d 180—Felice v. City of Inglewood, 190 P.2d 317, 84 C.A.2d 263.

Conn.—Miller v. Zoning Bd. of Appeals of City of Hartford, 87 A.2d 808, 138 Conn. 610—Kamerman v. Leroy, 50 A.2d 175, 133 Conn. 232.

Delmar v. Planning and Zoning Bd. of Town of Milford, 109 A.2d 604, 19 Conn.Sup. 21.

Ga.—City of Atlanta v. Awtry & Lowndes Co., 53 S.E.2d 358, 205 Ga. 296, opinion conformed to 54 S.E.2d 277, 79 Ga.App. 487.

Mass.—Pendegast v. Board of Appeals of Barnstable, 120 N.E.2d 916, 331 Mass. 555.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 83 N.W.2d 705, 351 Mich. 434.

Mo.—State ex rel. Ludlow v. Guffey, 306 S.W.2d 552.

N.Y.—Corbett v. Zoning Bd. of Appeals of City of Rochester, 128 N.Y.S.2d 12, 233 App.Div. 282.

Brooklyn Parking Corp. v. Cannella, 85 N.Y.S.2d 389, 193 Misc. 811.

Ohio.—McCloud v. Woodmansee, 135 N.E.2d 316, 165 Ohio St. 271.

Pa.—Katzin v. McShain, 89 A.2d 519, 371 Pa. 251.

Bender v. Zoning Bd. of Adjustment, 4 Pa.Dist. & Co.2d 359—Taddeo v. Zoning Bd. of Adjustment, 3 Pa.Dist. & Co.2d 454, 47 Mun.L.R. 190.

Va.—Corpus Juris Secundum cited in Ours Properties v. Ley, 96 S.E.2d 754, 757, 198 Va. 848.

Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

Wis.—State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed. 750.

Wyo.—Knight v. City of Riverton, 259 P.2d 748, 71 Wyo. 459. 43 C.J. p 346 note 17.

6. Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Ark.—City of Little Rock v. Stannus, 239 S.W.2d 283, 218 Ark. 893.

Cal.—People v. Amdur, 267 P.2d 445, 123 C.A.2d Supp. 951.

Conn.—Miller v. Zoning Bd. of Appeals of City of Hartford, 87 A.2d 808, 138 Conn. 610—Kamerman v. Leroy, 50 A.2d 175, 133 Conn. 232.

N.Y.—Brooklyn Parking Corp. v. Cannella, 85 N.Y.S.2d 389, 193 Misc. 811.

Ohio.—State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274.

Young Israel Organization of Cleveland v. Dworkin, App., 133 N.E.2d 174.

Pa.—Appeals of Rolling Green Golf Club, 97 A.2d 523, 374 Pa. 450—Appeal of Lord, 81 A.2d 533, 368 Pa. 121.

In re Appeal from Zoning Bd. of Appeals of Akerly, 6 Pa.Dist. & Co.2d 517, 39 Erie Co. 95.

Appeal of Alloy Metal Wire Co., Com.Pl., 29 Del.Co. 448—Kuznowski v. Board of Zoning Appeals,

applicant for a permit meets all the requirements of the regulations and there is no valid ground for denial of the application, the permit should be issued.⁷ A denial of, or refusal to issue, the permit

Com.Pl., 53 Lack.Jur. 53—Appeal of Livingston Apts., Inc., Com.Pl., 26 Lehl.J. 575—Krapf v. Zoning Bd. of Appeals, Com.Pl., 23 Lehl.J. 348—Appeal of Whitenight, Com.Pl., 33 Luz.Leg.Reg. 57—Appeal of Leventhal, Com.Pl., 3 Lycoming 90—Appeal of Valicenti, Com.Pl., 94 Pittsb.Leg.J. 439—Appeal of Dithridge Development Corporation, Com.Pl., 93 Pittsb.Leg.J. 1—Rose Appeal From Bd. of Adjustment, Com.Pl., 28 Wash.Co. 6.

R.I.—Newport Poster Advertising Co. v. City Council of City of Newport, 122 A.2d 170.

Wis.—State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W. 2d 217, 269 Wis. 262, certiorari denied 76 S.Ct. 81, 350 U.S. 841, 100 L.Ed. 750.

43 C.J. p 346 note 18.

Discretion not disturbed unless abused see infra § 328.

Whim or caprice

Where ordinance offered industry sites for development, board could not act because of whim or caprice to exclude a particular industry which sought location in its industrial zone.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

Grant held not arbitrary, unreasonable, or abuse of discretion

(1) In general.

Iowa.—Funnell v. City of Clear Lake, 30 N.W.2d 722, 239 Iowa 75.

Mass.—Burnham v. Board of Appeals of Gloucester, 128 N.E.2d 772, 338 Mass. 114.

N.Y.—Nelson v. Pierce, 117 N.Y.S. 2d 61, affirmed 120 N.Y.S.2d 804, 281 App.Div. 994.

Tex.—Dodson v. Dooley, Civ.App., 280 S.W.2d 758, refused no reversible error.

(2) Grant of permit conditioned on limitation of use of building by church as day school to two hundred and seventy students, where, due to absence of recreational facilities, traffic jam was created when children were marched three blocks away each recess period to city playground. S.C.—Stevenson v. Board of Adjustment of City of Charleston, 96 S.E. 2d 456, 230 S.C. 440.

(3) Granting temporary five-year permit for construction and operation of a drive-in theatre on large unoccupied and undeveloped tract of land located in a "C" residence zone and adjacent to a business zone. Conn.—Hertzsch v. Zoning Bd. of Appeals of Town of Bloomfield, 79 A.2d 767, 137 Conn. 599.

(4) Issuance of permit to locate house trailer, consisting of two bed-

rooms, living room, and bath, in residential zone of city and classifying trailer as a one-family house under zoning ordinance.

Vt.—In re Willey, 140 A.2d 11.

(5) Permitting the occupancy of a building for a combination of authorized uses.

Pa.—Appeal of Floersheim, 34 A.2d 62, 348 Pa. 98.

Refusal held not arbitrary, unreasonable, or abuse of discretion

(1) In general.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

N.J.—Wulster v. Borough of Upper Saddle River, 124 A.2d 323, 41 N.J. Super. 199.

(2) Refusal to permit erection of church on ground erection would cause serious traffic problem, where proposed church was to be erected in residential area with business establishments located on adjacent streets, and congregation had one hundred and seventy-five members and would hold meetings three times a week, and an average of twenty-six to thirty members would attend in automobiles.

Ga.—Galfas v. Ailor, 57 S.E.2d 834, 81 Ga.App. 13.

(3) Refusal to issue building permit for erection of private high school in zone where public school is permitted.

Wis.—State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 65 N.W.2d 43, 267 Wis. 91, appeal dismissed State of Wis. ex rel. Wisconsin Lutheran High School Conference v. Sinar, 75 S. Ct. 604, 349 U.S. 913, 99 L.Ed. 1248.

(4) Refusal to permit conversion of one-family dwelling into two-family dwelling.

Conn.—Isdale v. Town Plan and Zoning Commission of Town of Orange, 107 A.2d 267, 141 Conn. 509.

7. Ark.—City of Little Rock v. Stanus, 239 S.W.2d 283, 213 Ark. 893. Cal.—Cohn v. County Bd. of Sup'rs of Los Angeles County, 286 P.2d 836, 135 C.A.2d 180—Palmer v. Fox, 258 P.2d 30, 118 C.A.2d 453—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

Colo.—Jones v. Board of Adjustment, 204 P.2d 560, 119 Colo. 420.

Conn.—Loew v. Falsey, 127 A.2d 67, 144 Conn. 67—Dostmann v. Zoning Bd. of Appeals of Town of Glastonbury, 122 A.2d 19, 143 Conn. 297—Levine v. Zoning Board of Appeals of Meriden, 198 A. 173, 124 Conn. 53.

D.C.—Barnard v. Commissioners of District of Columbia, C.A., 246 F. 2d 685, 100 U.S.App.D.C. 404.

Fla.—Frink v. Orleans Corp., 32 So. 2d 425, 159 Fla. 646.

Ill.—Kushner v. Lawton, 115 N.E.2d 581, 351 Ill.App. 422.

Iowa.—Call Bond & Mortgage Co. v. Sioux City, 259 N.W. 33, 219 Iowa 572.

Ky.—Crain v. City of Louisville, 182 S.W.2d 787, 298 Ky. 421.

La.—State ex rel. Romero v. Viator, 46 So.2d 256, 217 La. 239—Carrere v. Orleans Club, 37 So.2d 715, 214 La. 715.

Md.—Akers v. Mayor and City Council of Baltimore, 20 A.2d 181, 179 Md. 448.

Mass.—Fellsway Realty Corp. v. Building Com'r of Medford, 125 N. E.2d 791, 332 Mass. 471—Caputo v. Board of Appeals of Somerville, 111 N.E.2d 674, 330 Mass. 107—D'Ambra v. Zoning Bd. of Appeal of Attleboro, 84 N.E.2d 456, 324 Mass. 61—Kenney v. Building Com'r of Melrose, 52 N.E.2d 683, 315 Mass. 291, 150 A.L.R. 490.

Mich.—Plum Hollow Golf and Country Club v. Southfield Tp., 87 N.W. 2d 122, 341 Mich. 84.

Minn.—Minneapolis-Honeywell Regulator Co. v. Nadasy, 76 N.W.2d 670, 247 Minn. 159.

N.J.—Schack v. Trimble, 137 A.2d 22, 48 N.J.Super. 45—Guttman v. Borough of Bradley Beach, 83 A. 2d 538, 15 N.J.Super. 409—Kilburg v. Township Committee of Hillside Tp., 32 A.2d 499, 14 N.J.Super. 533.

Sgromolo v. City of Asbury Park, 46 A.2d 661, 134 N.J.Law 195—Piaget-Del Corp. v. Kulik, 45 A.2d 125, 133 N.J.Law 485, petitions denied 46 A.2d 379, 134 N.J.Law 147—Tzesses v. Barbahenn, 17 A.2d 539, 125 N.J.Law 643—Capital Homes v. Dandrow, 8 A.2d 325, 123 N.J. Law 362—179 Duncan Avenue Corporation v. Board of Adjustment of Jersey City, 5 A.2d 68, 122 N.J. Law 292—Leonard Inv. Co. v. Board of Adjustment of City of Trenton, 4 A.2d 768, 122 N.J.Law 308—Dornbusch v. Board of Adjustment of City of Newark, 189 A. 52, 117 N.J.Law 424—Adams v. Jersey City, 151 A. 863, 107 N.J. Law 149, followed in Melosh v. Jersey City, 151 A. 865, 8 N.J.Misc. 802.

Mongiello Bros. v. Board of Com'rs of Jersey City, 158 A. 325, 10 N.J.Misc. 131.

N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y. S.2d 849—Concordia Collegiate Institute v. Miller, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544—

Westchester County Soc. for Prevention of Cruelty to Animals v. Mengel, 54 N.E.2d 329, 292 N.Y. 121.

Long Island Lighting Co. v. City of Long Beach, 113 N.Y.S.2d 762, 280 App.Div. 823, affirmed 114 N.E.2d 429, 305 N.Y. 880—Application of Miller, 35 N.Y.S.2d 506, 264 App. Div. 868.

Application of Garden City Jewish Center, 155 N.Y.S.2d 523, 2 Misc.2d 1009—Stafford v. Incorporated Village of Sands Point, 102 N.Y.S.2d 910, 200 Misc. 57—Neiburger v. Lewis, 57 N.Y.S.2d 542, 185 Misc. 437—Gordon v. Board of Appeals of City of Schenectady, 225 N.Y.S. 680, 131 Misc. 346.

Application of Blitstein, 171 N.Y.S.2d 244—J. L. Hennessy Associates, Inc. v. Griffin, 155 N.Y.S.2d 378—Plander v. Koehler, 150 N.Y.S.2d 879—Application of Kunz, 128 N.Y.S.2d 680—Alexander's Department Stores v. Murdock, 37 N.Y.S.2d 319—Shorehaven in Manhasset v. Village of Great Neck Estates, 22 N.Y.S.2d 944.

N.C.—Mitchell v. Barfield, 59 S.E.2d 810, 232 N.C. 325.

Ohio.—State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N.E.2d 515, 139 Ohio St. 229, 138 A.L.R. 1274—State v. Kreuzweiser, 166 N.E. 228, 120 Ohio St. 352.

Village of Ottawa v. Odenweller Milling Co., 13 N.E.2d 144, 57 Ohio App. 170.

Okl.—Magnolia Petroleum Co. v. City of Tonkawa, 114 P.2d 474, 189 Okl. 125.

Pa.—Shapiro v. Zoning Bd. of Adjustment, 105 A.2d 299, 377 Pa. 631—Appeal of Rolling Green Golf Club, 97 A.2d 523, 374 Pa. 450—Application of Imperial Asphalt Corp., 59 A.2d 121, 359 Pa. 402—In re Gillilan's Permit, 140 A. 136, 291 Pa. 353.

Appeal by Borough of Dormont, 119 A.2d 827, 180 Pa.Super. 550.

Appeal of Stark, 72 Pa.Dist. & Co. 168, 98 Pittsb.Leg.J. 361—Gelfond v. Philadelphia Zoning Board, 27 Pa.Dist. & Co. 679—Huetsch v. Grove, 16 Pa.Dist. & Co. 86, 23 Berks Co. 154.

Silver v. Lyon, Com.Pl., 61 Dauph.Co. 225—Application of Ericson Memorial Studio, Com.Pl., 29 Erie Co. 279—Hull v. Zoning Board, Com.Pl., 28 Erie Co. 131, 37 Mun.L.R. 127—Appeal of Whitenight, Com.Pl., 33 Luz.Leg.Reg. 57—Appeal of Engler, Com.Pl., 4 Lycoming 245—Medinger v. Springfield Tp., Com.Pl., 69 Montg.Co. 203—Appeal of Carr, Com.Pl., 98 Pittsb.Leg.J. 1—Appeal of North Side Laundry Co., Com.Pl., 93 Pittsb.Leg.J. 534—Appeal of Susey, Com.Pl., 91 Pittsb.Leg.J. 339—Bream v. City of York, Com.Pl., 54 York Leg.Rec. 189.

R.I.—Carrolo v. Zoning Board of Town of Westerly, 21 A.2d 265, 67 R.I. 128—Madden v. Zoning Board of Review of City of Providence, 136 A. 493, 48 R.I. 175.

S.C.—Stevenson v. Board of Adjustment of City of Charleston, 96 S.E.2d 456, 230 S.C. 440.

Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700—Warren v. Gau, Civ. App., 18 S.W.2d 768, error dismissed.

Va.—Hopkins v. O'Meara, 89 S.E.2d 1, 197 Va. 202.

Wash.—State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195, 50 Wash.2d 378—State ex rel. Ogden v. City of Bellevue, 275 P.2d 899, 45 Wash.2d 492.

43 C.J. p 346 note 20.

Under express provision of ordinance
N.J.—Rinhart v. Wright, 44 A.2d 385, 133 N.J.Law 374.

Irregularities in adoption, and indefiniteness, of zoning ordinance
Irregularities of town in proceedings for adoption of zoning ordinance and the indefiniteness thereof constituted no basis for denial of right to building permit to which property owner was entitled under the ordinance.

S.C.—Kerr v. City of Columbia, 102 S.E.2d 364.

Private restrictions

(1) A building permit may not be refused on the ground that the building involved would be in violation of private restrictions or restrictive covenants.

Miss.—City of Jackson v. Ashley, 199 So. 91, 189 Miss. 818.

Mo.—State ex rel. Folkers v. Welsch, 124 S.W.2d 636, 235 Mo.App. 15.

N.J.—Green v. Jones, 135 A. 802, 5 N.J.Misc. 188.

(2) Covenant in original deed subjecting property to subsequent ordinances was not ground for denial of application for a building permit, notwithstanding subsequent adoption of ordinance making lot substandard.
N.Y.—Macchia v. Board of Appeals of Incorporated Village of Kings Point, 164 N.Y.S.2d 463, 7 Misc.2d 763.

(3) A municipal building commissioner has no authority to determine whether private restrictions of record are valid, but only a court of competent jurisdiction may do so.
Mo.—State ex rel. Folkers v. Welsch, 124 S.W.2d 636, 235 Mo.App. 15.

Requirements for variance inapplicable

(1) Where a variance is not asked for or the provisions relating thereto invoked, the requirements for the granting of a variance should not be considered.

Colo.—People ex rel. Grommon v. Hedgcock, 104 P.2d 607, 106 Colo. 300.

Conn.—Levine v. Zoning Board of Appeals of Meriden, 198 A. 173, 124 Conn. 53.

N.Y.—Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 A.D.2d 551.

F. & L. Building Corp. v. Murdock, 58 N.Y.S.2d 114, reversed on other grounds 65 N.Y.S.2d 114, 271 App.Div. 830.

Pa.—Lavelle v. Zoning Bd. of Adjustment, 4 Pa.Dist. & Co.2d 361.

(2) A request for permission to make an alteration which is necessary in order to preserve owner's original right under an automatic exception to a county zoning ordinance cannot be subject to limitations under which the board may grant an exception, allow a structure to be altered so as to enlarge the original use, or directly or indirectly extend life of structure.

Cal.—Ricciardi v. Los Angeles County, 252 P.2d 773, 115 C.A.2d 569.

Unauthorized condition

(1) Where board imposed unauthorized condition on granting of a permit, applicant was entitled to the permit without such condition as a matter of right.

N.Y.—Titus St. Paul Property Owners Ass'n v. Board of Zoning Appeals of Town of Irondequoit, 132 N.Y.S.2d 148, 205 Misc. 1083.

(2) Effect of unauthorized condition generally see *infra* § 234.

Liability for delay

Building inspector, who, relying on validity of municipal zoning ordinance, refused to issue building permit, and who appealed to supreme court from order of circuit court to issue permit but who complied with order of supreme court to issue permit, was not liable to applicant for damages due to delay in issuing permit.

Mo.—Kramer v. City of Jefferson, 124 S.W.2d 525, 233 Mo.App. 685.

Annexation of town improperly refusing permit

(1) Where property owner was equitably entitled to obtain from town a permit to build for business purposes, and town was thereafter annexed to city, equity and good conscience required that city stand in town's shoes with respect to property owner's right to permit.

S.C.—Kerr v. City of Columbia, 102 S.E.2d 364.

(2) Equitable maxim that court will regard as done that which ought to have been done governed, and right to building permit from city which had annexed the area was to be considered as if council of town which had been annexed had issued the permit when first applied for.

in such case is held to be arbitrary and unreasonable.⁸

The board or official has no discretion to refuse the permit for improper reasons.⁹ Thus, a building

S.C.—Kerr v. City of Columbia, supra.

(3) Where property owner had had an equitable right to permit from town to build for business purposes, but permit was denied prior to annexation of town by city, city's delay in promulgation of comprehensive plan of zoning of area of former town constituted an additional equity in favor of property owner's right to obtain permit from city.

S.C.—Kerr v. City of Columbia, supra.

Applicant held entitled to permit

(1) To erect in back yard of licensed radio amateur's home an aluminum antenna thirty-two feet high with a thirty-nine inch triangular base.

Pa.—Appeal of Lord, 81 A.2d 533, 368 Pa. 121.

(2) For operation, as a home occupation, of a beauty parlor.

N.J.—Jantausch v. Borough of Verona, 131 A.2d 881, 24 N.J. 326.

Pa.—Lavelle v. Zoning Bd. of Adjustment, 4 Pa.Dist. & Co.2d 361.

(3) For operation of boarding house for aged people under arrangement with welfare department, as use accessory to use permitted in residence district.

R.I.—Von Housen v. Zoning Bd. of Review of Town of East Providence, 124 A.2d 550.

(4) For construction, in area zoned for single-family residences, of residence, which included accessory boat-house large enough for storage of two hydroplanes and with living quarters occupying only about one fifth of total building.

Wash.—Pearson v. Evans, 320 P.2d 300.

(5) For operation of junk yard at property which was formerly used as junk yard and which was located in area zoned heavy industrial.

Md.—Mayor and Council, Town of Bladenburg, Inc. v. Berg, 139 A.2d 703, 351 Mich. 434.

8. Ark.—City of Little Rock v. Stan-nus, 239 S.W.2d 233, 218 Ark. 893.

Colo.—People ex rel. Friedman v. Webber, 132 P.2d 183, 110 Colo. 161.
—People ex rel. Grommon v. Hedgcock, 104 P.2d 607, 106 Colo. 300.
Hedgcock v. People, 13 P.2d 264, 91 Colo. 155.

Fla.—State ex rel. Tampa, Fla., Co. of Jehovah's Witnesses, North Unit v. City of Tampa, 48 So.2d 78.

Ky.—Perkins v. Spicer, 6 S.W.2d 243, 224 Ky. 257.

Md.—Maryland Advertising Co. v. Mayor and City Council of Baltimore, 86 A.2d 169, 199 Md. 214.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351

Mich. 434—Anchor Steel & Conveyor Co. v. City of Dearborn, 70 N.W.2d 753, 342 Mich. 361.

Miss.—Jones v. City of Hattiesburg, 42 So.2d 717, 207 Miss. 491.

N.J.—Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449.

Nusser v. Board of Adjustment of City of Newark, 46 A.2d 657, 134 N.J.Law 174.

Mulleady v. City of Trenton, 156 A. 843, 9 N.J.Misc. 1102, followed in Steward v. City of Trenton, 156 A. 844, 9 N.J.Misc. 1100—Mangiello v. Jersey City, 142 A. 179, 6 N.J. Misc. 536.

N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y.S.2d 849.

Application of Kingsway Plumbing Supply Co., 15 N.Y.S.2d 833, 258 App.Div. 167.

Property Owners Ass'n of Garden City Estates v. Board of Zoning Appeals of Incorporated Village of Garden City, 123 N.Y.S.2d 716, 2 Misc.2d 309.

Plander v. Koehler, 150 N.Y.S.2d 879—Ratchliffe v. Morrison, 123 N.Y.S.2d 831.

Ohio.—Cassell v. Lexington Tp. Bd. of Zoning Appeals, 127 N.E.2d 11, 163 Ohio St. 340.

Pa.—Appeal of Fisher, 49 A.2d 626, 355 Pa. 364.

Camilli v. Stuffed, 76 Pa.Dist. & Co. 294, 43 Berks Co. 155—Covenant Presbyterian Church v. Board of Adjustment, 56 Pa.Dist. & Co. 309, 94 Pittsb.Leg.J. 151.

R.I.—Von Housen v. Zoning Bd. of Review of Town of East Providence, 124 A.2d 550.

Tenn.—City of Memphis v. Qualls, 64 S.W.2d 548, 16 Tenn.App. 387.

Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700—Board of Adjustment of City of West University Place v. Jones, Civ.App., 153 S.W.2d 510.

Wash.—Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195, 50 Wash.2d 378.

W.Va.—State ex rel. Howell v. Meador, 154 S.E. 876, 109 W.Va. 363.
Wis.—Kewaunee, G. B. & W. Ry. Co. v. City of Green Bay, 285 N.W. 333, 231 Wis. 53.

Denial on mere speculation

Board could not deny application to erect motel in business district on mere speculation that state might at some future date condemn some of the property in order to widen highway.

N.Y.—De Angelis v. Minor, 166 N.Y.S.2d 568, 8 Misc.2d 994.

Factors considered in determining legitimacy of exercise of power

In determining whether action of town mayor and council in denying permit for operation of junk yard was legitimate exercise of police power delegated to town, fact that applicant's property was located in area zoned heavy industrial and zoning permitted operation of junk yards were factors to be considered.

Md.—Mayor and Council, Town of Bladenburg, Inc. v. Berg, 139 A.2d 703.

Denial of due process

Owner of large tract in a residential zone in which zoning ordinance permitted conduct of schools by churches was entitled to a certificate of occupancy to use such premises as a nonsectarian private boarding school for boys, and refusal to permit such use of the premises was arbitrary, and a denial of due process of law.

N.J.—Lumpkin v. Township Committee of Bernards Tp., 48 A.2d 798, 134 N.J.Law 428, motion granted 49 A.2d 236, 134 N.J.Law 531.

9. Cal.—Palmer v. Fox, 258 P.2d 30, 118 C.A.2d 453.

La.—State ex rel. Romero v. Viator, 46 So.2d 256, 217 La. 239—State ex rel. Calvary Baptist Church v. City of Alexandria, 114 So. 492, 164 La. 628.

Md.—Maryland Advertising Co. v. Mayor and City Council of Baltimore, 86 A.2d 169, 199 Md. 214.

Minn.—Minneapolis-Honeywell Regulator Co. v. Nadasdy, 76 N.W.2d 670, 247 Minn. 159.

N.J.—179 Duncan Avenue Corporation v. Board of Adjustment of Jersey City, 5 A.2d 68, 122 N.J.Law 292—Leonard Inv. Co. v. Board of Adjustment of City of Trenton, 4 A.2d 768, 122 N.J.Law 308.

Okla.—Fidelity Laboratories v. Oklahoma City, 125 P.2d 757, 190 Okl. 488.

Pa.—White v. Old York Road Country Club, 185 A. 316, 322 Pa. 147.
Covenant Presbyterian Church v. Board of Adjustment, 56 Pa.Dist. & Co. 309, 94 Pittsb.Leg.J. 151.

Silver v. Lyon, Com.Pl., 61 Dauph.Co. 225—Appeal of Sechler, Com.Pl., 1 Lycoming 81—Cities Service v. Borough of McKees Rocks, Com.Pl., 44 Mun.L.R. 208, 101 Pittsb.Leg.J. 111.

Wash.—State ex rel. Ogden v. City of Bellevue, 275 P.2d 899, 45 Wash.2d 492.

43 C.J. p 346 note 21.

Effect of contemplated ordinance

(1) The granting of permits may, under some circumstances, be suspended pending the adoption of zon-

ing regulations by a municipal corporation.

N.J.—Horowitz v. Rath, 153 A. 250, 9 N.J.Misc. 203—Deerfield Realty Co. v. Hague, 151 A. 373, 8 N.J. Misc. 637—Butvinik v. Mayor and Aldermen of Jersey City, 142 A. 759, 6 N.J.Misc. 803.

(2) However, where the passage of the proposed zoning ordinance is inexcusably delayed for an unreasonable period, the application for a permit may not be denied.

N.J.—Mongiello Bros. v. Board of Com'rs of Jersey City, 158 A. 325, 10 N.J.Misc. 131—Deerfield Realty Co. v. Hague, 151 A. 373, 8 N.J. Misc. 637.

(3) A building inspector was required to issue permit for ice plant, where there was no law or ordinance forbidding it, but merely possible conflict with ordinance introduced but not yet passed.

Ohio.—State v. Kreuzweiser, 166 N. E. 228, 120 Ohio St. 352.

(4) Where there was no zoning ordinance affecting the area either at date of formal application for a building permit or at time of judgment, the fact that zoning of the area was being contemplated was not pertinent to question of mayor's authority to refuse building permit.

La.—State ex rel. Romero v. Viator, 46 So.2d 256, 217 La. 239.

(5) Refusal of permit repugnant to zoning ordinance enacted after making of application see supra § 221.

(6) Retroactive operation of regulations see supra § 221.

Independent violation by owner

A lot owner's failure to remove obstruction, declared unlawful by courts, from lot, is no ground for refusal of permit for construction of lawful building thereon.

Pa.—Miller v. Seaman, 8 A.2d 415, 137 Pa.Super. 24.

Loss of tax revenue

(1) In view of provision of constitution that real or personal property used exclusively for religious, educational, or charitable purposes shall be exempt from taxation, denial of a permit for erection of a school and church cannot be justified on the ground that there will be a loss of tax revenue and such a loss would not be in the furtherance of the general welfare.

N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, supra.

(2) No municipal corporation can justly refuse a permit to build a church only because the property will no longer be subject to taxation.

N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, supra.

Ohio.—State ex rel. Anshe Chesed

Congregation v. Bruggemeier, 115 N.E.2d 65, 97 Ohio App. 67.

Inconvenience

(1) Mere inconvenience to neighbors is not a valid reason for denying church permit to construct church in residential district; maintenance of churches is such valuable right that their existence will not be denied because of such inconvenience.

Tex. — Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

(2) Noise and other inconveniences are not sufficient grounds on which to deny a building permit to a church.

N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.S.2d 508, 154 N. Y.S.2d 849.

Size of lot or open space

(1) Size of lot is not sufficient ground for refusal to permit construction of church in residential area where, under zoning ordinance, lot size was not material if building would not materially injure neighboring property for residential purposes, and there was no claim that lot size accomplished injury, or that lot size had any substantial relation to health, morals, safety, or general welfare of community.

Tex. — Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

(2) Board improperly refused to grant a use registration permit for the use of premises on the ground that such use would violate statute which requires that there be space to the rear or the side of a tenement of at least twenty per cent of the area or the lot, and at least eight feet in width throughout its entire length, where premises consists of two adjacent buildings with a frontage of thirty-two feet, the westward half having no rear yard but occupying the full ninety feet depth, and the eastward half having a rear yard twenty-one and a half feet deep.

Pa.—Shore v. Zoning Bd. of Adjustment, Com.Pl., 3 Pa.Dist. & Co.2d 14.

Inadequacy of site and parking accommodations

(1) Lack of parking accommodations is not sufficient grounds for refusal to permit construction of church in residential area where church showed substantial compliance with zoning regulation relating to availability of parking facilities.

Tex. — Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

(2) Where only limitations prescribed by zoning ordinance on use of any premises for church purposes were in respect to adequacy of off-street parking and suitability and adequacy of site, board did not have authority to determine whether or not church might be established on petitioner's property, in sense of having power to decide that church could or could not be established at particular location chosen by petitioner; board could only determine whether provision had been made for adequate off-street parking, and whether site was suitable and adequate for church purposes.

N.Y.—Application of Garden City Jewish Center, 155 N.Y.S.2d 523, 2 Misc.2d 1009.

(3) Where off-street parking facilities were presently adequate, board could not refuse to permit construction of synagogue on ground that possible growth in church membership would make those facilities inadequate in future.

N.Y.—Application of Garden City Jewish Center, supra.

(4) On application of synagogue for permission to construct church, under zoning ordinance permitting use of any premises for church purposes as long as off-street parking and site were adequate, function of board is only to make determination on questions of adequacy of off-street parking and suitability and adequacy of site for intended use of premises for church purposes.

N.Y.—Application of Garden City Jewish Center, supra.

Change in character of use and enjoyment of area

Where municipal ordinance provided that churches and schools might be erected and used in residential districts by special permit, planning board could not properly justify denial of a permit to erect a church or school in a residence area on ground granting of permit would change the character of the residential use and enjoyment of the area.

N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y. S.2d 849.

Possible depreciation in value of surrounding property

(1) Fact that building a residence on a substandard lot might depreciate the value of neighboring properties was no ground for denying a building permit if the property had continued in single and separate ownership for a period commencing prior to the zoning ordinance making it substandard.

N.Y.—Macchia v. Board of Appeals of Incorporated Village of Kings Point, 164 N.Y.S.2d 463, 7 Misc.2d 763.

permit cannot be denied merely because applicant intends to put the building to an illegal use,¹⁰ or will be in a position to do so,¹¹ or because the permit will be useless to applicant because injunctive relief might be granted to prevent the use of the building for the purpose,¹² or because applicant has not yet obtained a license to operate the business which he proposes to conduct in the building for which the permit is sought,¹³ or because the use

of a right of way on which the property is located would endanger the safety of children and pedestrians,¹⁴ or because of objections by adjacent property owners,¹⁵ or solely because another than applicant claims the title to the premises.¹⁶

On the other hand, a permit or certificate may not and should not be issued for the construction, alteration, or use of property in violation of a building or zoning regulation,¹⁷ or for a change in the

(2) Possible depreciation in value of surrounding property is not sufficient ground for refusal to allow construction of church in residential area.

N.Y.—Application of Garden City Jewish Center, 155 N.Y.S.2d 523, 2 Misc.2d 1009.

Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

Noncompliance with building code is not proper ground for refusal of zoning board to permit use of religious building in residence district where it is the function of the board of trustees of the village, and not of the zoning board, to pass on the matter of compliance with the building code.

N.Y.—Application of Garden City Jewish Center, 155 N.Y.S.2d 523, 2 Misc.2d 1009.

Failure to secure approval of state traffic commission.

City building inspector could not withhold issuance of permit for erection of a concession building in connection with open-air drive-in theater because applicant had failed first to secure certificate of approval of location from state traffic commission as required by statute, where there is no language in the statute or in the city charter, ordinances, or building code indicating intent that approval of location must precede all else.

Conn.—Loew v. Falsey, 127 A.2d 67, 144 Conn. 67.

Refusal of reasonable offer for substandard property from an adjoining property owner was an improper ground for denying application for a building permit, because no administrative board may compel a property owner either to sell his property or to purchase additional property, and every form of coercion used to accomplish this aim is a violation of his constitutional rights.

N.Y.—Macchia v. Board of Appeals of Incorporated Village of Kings Point, 164 N.Y.S.2d 463, 7 Misc.2d 763.

10. Colo.—Short v. Oriental Refining Co., 149 P.2d 245, 112 Colo. 297.

Fla.—City of Jacksonville v. State ex rel. Mann, 27 So.2d 727, 158 Fla. 98. N.C.—Mitchell v. Barfield, 59 S.E.2d 810, 232 N.C. 325.

Pa.—Huetsch v. Grove, 16 Pa. Dist. & Co. 86, 23 Berks Co. 154.

Silver v. Lyon, Com.Pl., 61 Dauph.Co. 225—Appeal of White-night, Com.Pl., 33 Luz.Leg.Reg. 57. 43 C.J. p 347 note 22.

"The question as to the legality of the alleged intended use must await determination in proper proceedings after such use is attempted to be made of the building."

Colo.—Short v. Oriental Refining Co., 149 P.2d 245, 247, 112 Colo. 297.

11. N.J.—Guttman v. Borough of Bradley Beach, 83 A.2d 538, 15 N.J. Super. 409.

McAllister v. Moffett, 142 A. 556, 6 N.J.Misc. 692.

Possible use as garage

Where an ordinance prohibits the maintenance or conduct of a public garage, a permit for the construction of a building will not be refused merely because of the fact that it is adaptable for use for the purpose of a garage.

N.Y.—People v. Stroebel, 103 N.E. 735, 209 N.Y. 434.

12. Pa.—Coynne v. Prichard, 116 A. 315, 272 Pa. 424.

13. Mass.—Jaffarian v. Building Com'r of City of Somerville, 175 N.E. 641, 275 Mass. 267, 74 A.L.R. 403.

14. N.Y.—Macchia v. Board of Appeals of Incorporated Village of Kings Point, 164 N.Y.S.2d 463, 7 Misc.2d 763.

15. N.J.—Advance Development Corporation v. Jersey City, 140 A. 788, 6 N.J.Misc. 238, appeal dismissed 143 A. 447, 105 N.J.Law 234.

N.Y.—Brooklyn Parking Corp. v. Cannella, 85 N.Y.S.2d 389, 193 Misc. 811.

16. N.Y.—People ex rel. Curtin v. Deegan, 242 N.Y.S. 516, 137 Misc. 287.

43 C.J. p 347 notes 24-26.

17. Ark.—Meyer v. Selfert, 225 S.W. 2d 4, 216 Ark. 293.

Cal.—Bernstein v. Smutz, 188 P.2d 48, 83 Cal.2d 108.

Fla.—Godson v. Town of Surfside, 8 So.2d 497, 150 Fla. 614.

Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 324 Ill.App. 557. Md.—Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore, 60 A.2d 192, 191 Md. 155—Dobres v. Schwartzman, 59 A.2d 684, 190 Md. 750—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.

Mass.—Publico v. Building Inspector of Quincy, 142 N.E.2d 767—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433—Olson v. Zoning Bd. of Appeal of Attleboro, 84 N.E.2d 544, 324 Mass. 57, 7 A.L.R.2d 591—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403.

Mo.—State ex rel. Field v. Randall, App., 308 S.W.2d 637—State ex rel. Town of Olivette v. American Tel. & Tel. Co., App., 280 S.W.2d 134—State ex rel. Barr v. Fleming, App., 259 S.W.2d 417.

N.J.—Berdau v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

Deer-Glen Estates v. Board of Adjustment and Appeal of Borough of Fort Lee, 121 A.2d 26, 39 N.J.Super. 380—Frizen v. Poppy, 86 A.2d 134, 17 N.J.Super. 390—Kurowski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433—Michaels v. Township Committee of Pemberton Tp., Burlington Tp., 67 A.2d 324, 3 N.J. Super. 523.

Burmore Co. v. Champion, 12 A. 2d 713, 124 N.J.Law 548, 550—Borinsky v. Board of Adjustment of City of Newark, 4 A.2d 53, 122 N.J. Law 111—Kensington Realty Holding Corporation v. Jersey City, 196 A. 691, 119 N.J.Law 338.

N.Y.—Burke v. Connell, 274 N.Y.S. 745, 242 App.Div. 795.

Gruberg v. Henry, 163 N.Y.S.2d 1003, 5 Misc.2d 223—Berger v. Dumper, 160 N.Y.S.2d 530, 7 Misc. 2d 183, affirmed 169 N.Y.S.2d 433, 5 A.D.2d 687—Long Island Land Research Bureau, Inc. v. Young, 159 N.Y.S.2d 414, 7 Misc.2d 469—Lyle v. Avis, 148 N.Y.S.2d 874, 1 Misc.2d 880—S. B. Garage Corp. v. Murdock, 55 N.Y.S.2d 456, 185 Misc. 56—Horwitz v. Schwab, 224 N.Y.S. 41, 130 Misc. 448.

Cybulski v. Eagan, 173 N.Y.S.2d 379—Stillbar Const. Co. v. Town of

Harrison, 143 N.Y.S.2d 804—Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, affirmed 87 N.E.2d 61, 299 N.Y. 699—Underhill v. Board of Appeals of Town of Oyster Bay, 72 N.Y.S.2d 588, affirmed 75 N.Y.S.2d 327, 273 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937—Altschul v. Ludwig, 166 N.Y.S. 529, affirmed 168 N.Y.S. 1100, 182 App.Div. 887.

Pa.—Fleishon v. Philadelphia Zoning Bd. of Adjustment, 122 A.2d 673, 385 Pa. 295—Appeal of Brosnan, 198 A. 629, 330 Pa. 161.

Triolo v. Zoning Board of Adjustment, 59 Pa.Dist. & Co. 211—Gheen v. Mencer, 52 Pa.Dist. & Co. 422.

Appeal of Bowtiuch, Com.Pl., 49 Lack.Jur. 209.

R.I.—Ajootian v. Zoning Bd. of Review of City of Providence, 132 A. 2d 836—Paoletta v. Zoning Bd. of Review of City of Providence, 122 A.2d 157—Carey v. Cassidy, 103 A. 2d 793, 81 R.I. 411.

W.Va.—State ex rel. Baer v. City of Beckley, 57 S.E.2d 263, 138 W.Va. 459.

More hardship caused to property owner by enforcement of regulations does not justify relaxation of requirements in his favor where the power to grant a variance or special exception is not invoked.

Conn.—Osborn v. Town of Darien, 175 A. 578, 119 Conn. 182.

Laxity of enforcement of an ordinance in other instances does not require the granting of a building permit in violation of the ordinance.

La.—Gibbs v. City of Natchitoches, 162 So. 731, 182 La. 926.

Critical housing shortage does not warrant granting of application for permit in violation of zoning regulation.

Md.—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330, 165 A.L.R. 816.

N.J.—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.

Effect of improper permit to another Fact that city officers might have wrongfully issued permit to another to erect a duplex dwelling in a district which authorized dwellings for "one family only" could not have effect of invalidating zoning ordinance, and could have no bearing on relator's right to permits to build five duplex dwellings in district.

Mo.—State ex rel. Luechtefeld v. Arnold, Mo.App., 149 S.W.2d 384.

Insufficiency of lot area

Area of proposed streets could not fairly be included as a part of project for construction of garden type apartments under zoning ordinance requiring that area of project should

cover at least five acres of land, and therefore board should not have approved application for permit for such project where tract of land contained slightly over five acres, but if proposed streets on side of tract were excluded, tract contained only 4.4201 acres.

Md.—Clarks Lane Garden Apartments v. Schloss, 79 A.2d 538, 197 Md. 457.

Permits held improperly issued

(1) Permits for stabling horses in residential district.

Mass.—Pratt v. Building Inspector of Gloucester, 113 N.E.2d 816, 330 Mass. 344.

(2) Permit for use of residential premises for boat rentals, sales and service of boats, motors and boating and fishing equipment.

Mass.—Todd v. Board of Appeals of Yarmouth, 143 N.E.2d 380.

(3) Permit to construct a multiple dwelling.

Pa.—Fleishon v. Zoning Bd. of Adjustment, 6 Pa.Dist. & Co.2d 337.

Permits held not improperly issued Kan.—Babb v. Rose, 134 P.2d 655, 156 Kan. 587.

Permit properly denied

(1) Generally.

Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 271 P. 487, 205 C. 426.

Colo.—City of Colorado Springs v. Miller, 36 P.2d 161, 95 Colo. 337.

Conn.—State ex rel. La Voie v. Building Commission of Town of Trumbull, 65 A.2d 165, 135 Conn. 415.

Iowa.—Hirsch v. City of Muscatine, 10 N.W.2d 71, 233 Iowa 590.

La.—Gibbs v. City of Natchitoches, 162 So. 731, 182 La. 926.

Mass.—Raimondo v. Board of Appeals of Bedford, 118 N.E.2d 67, 331 Mass. 228.

Minn.—State ex rel. Sheffield v. City of Minneapolis, 50 N.W.2d 296, 235 Minn. 174—Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co. of City of New York, 253 N.W. 8, 191 Minn. 60.

N.J.—Michaels v. Township Committee of Pemberton Tp., Burlington County, 67 A.2d 324, 3 N.J.Super. 523.

Chipolone v. Municipal Council of City of Clifton, 59 A.2d 815, 137 N.J.Law 307, affirmed 61 A.2d 896—French v. Cooper, 43 A.2d 880, 133 N.J.Law 246.

N.Y.—Shoen v. Bowne, 79 N.Y.S.2d 292, 273 App.Div. 1020, affirmed 81 N.E.2d 350, 298 N.Y. 611—Koeber v. Bedell, 3 N.Y.S.2d 108, 254 App. Div. 584, affirmed 21 N.E.2d 200, 280 N.Y. 692—Sagamore Road Corporation v. Lee, 230 N.Y.S. 58, 224 App.Div. 744, affirmed 166 N.E. 313, 250 N.Y. 532.

Macchia v. Board of Appeals of Incorporated Village of Kings

Point, 164 N.Y.S.2d 463, 7 Misc.2d 763—Johnson v. Debaun, 135 N.Y. S.2d 217, 206 Misc. 806—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939, appeal dismissed Siciliano v. Klaess, 84 N.Y.S.2d 922, and 85 N.Y. S.2d 330, 274 App.Div. 943—Goddard v. Klaess, 85 N.Y.S.2d 331—Colasuonno v. Dassler, 51 N.Y.S.2d 870, 183 Misc. 904.

Hinna v. Board of Appeals of Town of Hempstead, 170 N.Y.S.2d 12—Levine v. Young, 104 N.Y.S.2d 1004.

Ohio.—State ex rel. Clifton-Highland Co. v. City of Lakewood, 179 N.E. 198, 41 Ohio App. 9, affirmed 178 N.E. 837, 124 Ohio St. 399, certiorari denied Clifton Highland Co. v. City of Lakewood, Ohio, 52 S.Ct. 406, 285 U.S. 549, 76 L.Ed. 940.

Pa.—Application for Certificate of Occupancy 500 Paxinosa Avenue, Easton, 68 A.2d 225, 362 Pa. 116—Appeal of Jewish National Folk School, 195 A. 9, 327 Pa. 578.

In re Valicenti's Appeal, 99 Pa. Super. 279.

Petition of North Wales Park Homes, Inc., Quar.Sess., 72 Montg. Co. 105—Appeal of Dithridge Development Corporation, Com.Pl., 93 Pittsb.Leg.J. 1—Appeal of Mattel, Com.Pl., 92 Pittsb.Leg.J. 313—Appeal of Hasley, Com.Pl., 90 Pittsb. Leg.J. 205, affirmed 30 A.2d 187, 151 Pa.Super. 192—Appeal of Dunn, Com.Pl., 88 Pittsb.Leg.J. 547—Appeal of Folk School, Com.Pl., 86 Pittsb.Leg.J. 612—Appeal of Jennings, Com.Pl., 86 Pittsb.Leg.J. 282. Tex.—City of Harlingen v. Feener, Civ.App., 153 S.W.2d 671, error refused—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused—City of Odessa v. Halbrook, Civ.App., 103 S.W.2d 223.

(2) For repair of building or erection of new one after fire had largely or entirely destroyed building, where proposed new building would have the effect of substantially increasing the nonconformity of building to the zoning regulation.

Conn.—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449.

Pa.—Appeal of Berberian, 41 A.2d 670, 351 Pa. 475.

(3) For operation of funeral home in restricted zone.

Ky.—Smith v. Selligman, 109 S.W.2d 14, 270 Ky. 69.

Tenn.—Qualls v. City of Memphis, 15 Tenn.App. 575.

(4) For operation, as a home occupation, of a beauty parlor or barber shop.

Pa.—Bender v. Zoning Bd. of Adjustment, 4 Pa.Dist. & Co.2d 359—Taddeo v. Zoning Bd. of Adjustment, 3 Pa.Dist. & Co.2d 454, 47 Mun. 190.

(5) For operation, as a home occupation, of a one-man business of

structural quality of a building in violation of such building or zoning regulation,¹⁸ unless the regulation is invalid,¹⁹ at least as applied to the particular property.²⁰ A municipal board is not authorized either to grant or refuse a building permit under an invalid building ordinance.²¹ The question whether a building inspector has acted in excess of the power conferred on him and in violation of the zoning ordinance is a legal and not an administrative question which has to be determined by an interpretation of the ordinance as applied to the facts and circumstances under which the building permit was issued.²²

§ 225. — Permits for Nonconforming Uses

A permit or certificate for the use of premises or for

the construction or alteration of a building in nonconformity with the zoning regulations may be issued under the authority of some provisions which may specify the conditions for such issuance or place the matter within the discretion of a designated board or official.

Although, as shown supra § 219, a permit to continue a nonconforming use is not required in the absence of specific provisions to that effect, and although there is some authority holding that after the adoption of a zoning regulation excluding a particular type of business from a district the issuance of a new permit for a nonconforming use would be void,²³ provision is sometimes made for the issuance under specified conditions of a permit or certificate for the use of premises, or for the construction or alteration of a building, in nonconformity with zoning regulations.²⁴

Authorization for the issuance of such permits

making, fitting, and selling trusses and belt braces.

Pa.—Akerly v. Zoning Bd. of Appeals, 6 Pa. Dist. & Co. 2d 517, 39 Erie Co. 95.

(6) For drilling of oil.

Okl.—Anderson-Kerr, Inc., v. Van Meter, 19 P.2d 1068, 162 Okl. 176.

18. Mich.—Austin v. Older, 278 N. W. 727, 283 Mich. 667.

N.J.—Kensington Realty Holding Corporation v. Jersey City, 196 A. 691, 119 N.J. Law 338.

Permit unauthorized

(1) For alteration of nonconforming building to permit another nonconforming use, where proposed alteration would cost in excess of fifty per cent of the assessed value of building.

Conn.—Rice v. Zoning Board of Appeals of Town of Milford, 190 A. 257, 122 Conn. 435.

(2) For making a "structural alteration" which would permit the indefinite prolongation of the life of a nonconforming structure and thereby defeat purpose of zoning ordinance.

Ky.—Goodrich v. Selligman, 183 S.W. 2d 625, 298 Ky. 863.

Change from non-conforming to conforming use of building did not entitle owner to permit as a matter of right, where change structurally altered building in disregard of regulations of building and zoning ordinances.

R.I.—Taft v. Zoning Bd. of Review of City of Warwick, 64 A.2d 200, 75 R.I. 117.

19. Colo.—People ex rel. Friedman v. Webber, 132 P.2d 183, 110 Colo. 161.

Conn.—Alderman v. Town of West Haven, 200 A. 330, 124 Conn. 391.
N.Y.—Little v. Young, 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288,

274 App.Div. 1065, affirmed 87 N.E. 2d 74, 299 N.Y. 699.

Lengel v. Pirnie, 128 N.Y.S.2d 490.

Ohio.—State ex rel. Lieux v. Village of Westlake, Com.Pl., 126 N.E. 2d 829.

Pa.—Medinger v. Springfield Tp., Com.Pl., 69 Montg.Co. 203.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Applicant held entitled to permit

(1) For construction of buildings and facilities for use in operation of trailer coach park in area of rural township which was largely agricultural and open country without any residential or industrial development in zoning district itself or surrounding districts, although invalid township zoning ordinance prohibited trailer parks in the township.

Mich.—Smith v. Building Inspector for Plymouth Tp., 77 N.W.2d 332, 346 Mich. 57.

(2) For construction of a house which was to be erected facing on a private entranceway, where zoning ordinance which required that a lot on which a house is to be built have its principal frontage on a street or officially approved place, but which prescribed no conditions or terms on which the commissioner of buildings was to determine what should be "an officially approved place," was unconstitutional.

Ill.—People ex rel. Schimpff v. Norvell, 13 N.E.2d 960, 368 Ill. 325.

20. Wis.—State ex rel. Scandrett v. Nelson, 3 N.W.2d 765, 240 Wis. 438.

21. Ky.—Bloomfield v. Bayne, 266 S.W. 885, 206 Ky. 68.

Issuance before effective date of ordinance authorizing permit

Permit for building of multiple dwelling was void where ordinance in effect when permit was issued pro-

hibited the issuance of such permit, and ordinance authorizing multiple dwellings had not yet taken effect when permit issued.

N.Y.—Cybulski v. Eagan, 178 N.Y.S. 2d 379.

22. N.J.—Jantausch v. Borough of Verona, 131 A.2d 881, 24 N.J. 326.

23. Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 Md. 623.

24. Ill.—Illinois Bell Tel. Co. v. Fox, 85 N.E.2d 43, 402 Ill. 617.

Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

N.J.—Burmore Co. v. Champion, 12 A.2d 713, 124 N.J. Law 548, 550—North American Building & Loan Ass'n v. Board of Adjustment of City of New Brunswick, 186 A. 727, 117 N.J. Law 63.

Schaible v. Board of Adjustment of Township of Millburn, 194 A. 388, 15 N.J. Misc. 707—Provident Institution for Savings v. Castles, 168 A. 169, 11 N.J. Misc. 773.

N.Y.—Boardwalk & Seashore Corporation v. Murdock, 36 N.E.2d 678, 286 N.Y. 494.

Village of Mill Neck v. Nolan, 251 N.Y.S. 533, 233 App.Div. 248, affirmed 182 N.E. 196, 259 N.Y. 596.

Chandler v. Corbett, 85 N.Y.S.2d 488, reversed on other grounds 86 N.Y.S.2d 646, 274 App.Div. 1073.

Pa.—Gish v. Exley, 34 A.2d 925, 153 Pa. Super. 653—Appeal of Consolidated Cleaning Shops, 157 A. 811, 103 Pa. Super. 66.

Triolo v. Zoning Board of Adjustment, 59 Pa. Dist. & Co. 211—Leichthammer v. Board of Adjustment of Norristown Borough, 43 Pa. Dist. & Co. 391, 58 Montg. Co. 140.

Chakofsky v. Board of Zoning Appeals of City of Scranton, Com. Pl., 48 Lack. Jur. 173—Transicoil

may place the matter within the discretion of a designated board or official,²⁵ provided it does not confer an arbitrary discretion or constitute an improper delegation of power.²⁶ Under some provisions of this nature, a permit may be issued for a nonconforming use different from that under which the structure has been operated in the past, provided the new use is in the same or a higher classifica-

tion;²⁷ but under the provisions of other statutes, a permit may not be issued for a new nonconforming use substantially different from the existing one regardless of classification,²⁸ or to extend a nonconforming use.²⁹

The right to continue a nonconforming use does not carry with it a right to a permit for an extension of such use.³⁰ Authority may, however, be

Corp. v. Worcester Tp. Bd. of Adjustment, Com.Pl., 72 Montg.Co. 155
—Appeal of Continental Motor Sales, Com.Pl., 31 North.Co. 250.

Right to operate property in nonconforming use see *supra* § 63.

Lot divided by boundary line

Where a zone boundary line divides a lot, in a single ownership at the time of the passage of the ordinance, the board may be authorized to permit a limited extension of the use permitted in one zone into the other zone in which such use is ordinarily prohibited.

Conn.—Corden v. Zoning Bd. of Appeals of City of Waterbury, 41 A. 2d 912, 131 Conn. 654, 159 A.L.R. 849.

Temporary permit

Pa.—Allen v. Zoning Board of Adjustment, 56 Pa.Dist. & Co. 402.

Effect of nonconforming use on neighbors or on property values was not relevant to determination of application for building permit.

Pa.—Appeal of Peirce, 119 A.2d 506, 384 Pa. 100.

Applicant held entitled to permit

(1) For construction of new fireproof building for use in continued operation of a nonconforming nursing home presently housed in a frame building not complying with requirements of building code in respect of fireproof facilities for a nursing home.

N.C.—Application of O'Neal, 92 S.E. 2d 189, 243 N.C. 714.

(2) For alteration of nonconforming building, which extended to old building line prior to establishment of ten-foot setback by village authorities, which permit included reconstruction of front of building.

N.Y.—Nassau-Fulton Realty Corp. v. Schlamm, 67 N.Y.S.2d 501.

Refusal to issue permit held not unreasonable

(1) When proofs do not show that general scheme has been so far shattered as to require conclusion that ordinance no longer subserves objectives which underlie zoning.

N.J.—Casper v. City of Long Branch, 86 A.2d 691, 18 N.J.Super. 90.

(2) Where land was vacant at time of adoption of new zoning ordinance.

N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94.

25. Conn.—Corden v. Zoning Board of Appeals of City of Waterbury, 41 A.2d 912, 131 Conn. 654, 159 A.L.R. 849.

N.Y.—Cordes v. Moore, 129 N.Y.S.2d 777, 283 App.Div. 893, affirmed 125 N.E.2d 112, 308 N.Y. 761.

Pa.—Mutimer Co. v. Wagner, 103 A. 2d 417, 376 Pa. 575.

Appeal of Consolidated Cleaning Shops, 157 A. 811, 103 Pa.Super. 66.

Mutimer Co. v. Cheltenham Tp. Bd. of Adjustment, Com.Pl., 69 Montg.Co. 127.

R.I.—Drabble v. Zoning Board of Review of City of Providence, 159 A. 828, 52 R.I. 228.

Tex.—City of San Angelo v. Boehme Bakery, 190 S.W.2d 67, 144 Tex. 281.

Matters considered

N.J.—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.

26. La.—State ex rel. Manheim v. Harrison, 114 So. 159, 164 La. 564.
Mo.—Kalbfell v. City of St. Louis, 211 S.W.2d 911, 357 Mo. 986.

Improper delegation of power as affecting validity of zoning regulation generally see *supra* § 42.

27. Conn.—Abbadessa v. Board of Zoning Appeals of City of New Haven, 54 A.2d 675, 134 Conn. 28.

Md.—Bruning Bros. v. Mayor & City Council of Baltimore, 87 A.2d 589, 199 Md. 602—Beyer v. Mayor and Council of Baltimore City, 34 A.2d 765, 182 Md. 444.

Pa.—Mutimer Co. v. Wagner, 103 A. 2d 417, 376 Pa. 575—Darling v. Zoning Board of Adjustment of City of Philadelphia, 54 A.2d 829, 357 Pa. 428.

Appeal of Johnson, Co., 102 Pittsb.Leg.J. 405.

Tex.—Rosenenthal v. City of Dallas, Civ.App., 211 S.W.2d 279.

Not matter of discretion

Where part of lot, on which building had been erected, had been used prior to passage of zoning ordinance placing lot in residential use district, as place for storage of second-hand building materials or for a livery stable, and where nonconforming use had not been abandoned, owners were entitled to certificate of occupancy as a nonconforming use, for purpose of storing hardware,

sheetrock, nails, and cement in building and matter was not within board's discretion.

Md.—City of Baltimore v. Weinberg, 103 A.2d 567, 204 Md. 257.

Permit properly denied

Md.—Fritze v. City of Baltimore, 96 A.2d 4, 202 Md. 265.

28. Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

N.J.—Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N. J.Law 442, affirmed 61 A.2d 76, 137 N.J.Law 603.

29. Md.—Colati v. Jirout, 47 A.2d 613, 186 Md. 652.

Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

30. Del.—In re Auditorium, Inc., 84 A.2d 598, 7 Terry 430, cause remanded on other grounds Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671.

Minn.—State ex rel. Howard v. Village of Roseville, 70 N.W.2d 404, 244 Minn. 343.

N.J.—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J. Law 442, affirmed 61 A.2d 76, 137 N. J.Law 603—Burmore Co. v. Smith, 12 A.2d 353, 124 N.J.Law 541—Home Fuel Oil Co. v. Borough of Glen Rock, 192 A. 516, 118 N.J. Law 340.

N.Y.—Hyams v. Amchir, 57 N.Y.S. 2d 77.

R.I.—Paoletta v. Zoning Bd. of Review of City of Providence, 123 A. 2d 157.

Permit properly denied or improperly granted

(1) Permit to sell beer in nonconforming restaurant in residential area.

Ala.—Fulford v. Board of Zoning Adjustment of City of Dothan, 54 So. 2d 580, 256 Ala. 336.

(2) Permit to expand clinic building to within eight feet of property line of small crowded lot in growing residential section.

Ark.—City of West Helena v. Bockman, 256 S.W.2d 40, 221 Ark. 677.

conferred on a board of appeals or similar body to permit an extension of a nonconforming use;³¹ but such power must be exercised strictly within the limitations imposed by the provisions conferring it.³²

On an application for a permit to make an alteration in a structure pursuant to a right to continue a nonconforming use thereof, the question whether such alteration is a mere continuance of the nonconforming use or constitutes an extension thereof is for the determination of the board.³³

Abandonment of nonconforming use. Under a provision that no premises wherein or whereon a nonconforming usage is discontinued for a stated period shall again be devoted to any use prohibited by the regulation, no power to issue a permit for a nonconforming use which has been discontinued for the specified period exists.³⁴

§ 226. Who May Procure

Only a person having a right to erect the structure

or use the property in the manner for which a permit is sought is entitled thereto, but the application need not necessarily be made by the absolute owner of the property.

Only a person having a right to erect the structure or use the property in the particular manner for which a permit is sought is entitled thereto,³⁵ but the application need not be made by the absolute owner of the property, it being sufficient if it is made by one who holds the legal title,³⁶ as for instance, a joint owner³⁷ or a lessee,³⁸ or by an owner of the legal title to only a portion of the property who was in possession of, and operating and managing, all of it.³⁹ Furthermore, in the absence of such a requirement in the zoning ordinance, it has been held that the applicant need not be the legal owner of the property.⁴⁰

In a proper case application may be made by a person having only a contract to purchase the property⁴¹ if he has the consent and approval of the owner,⁴² but not, it has been held, where the prospective purchaser has no present right to erect

(3) Permit to add to a storehouse, which was a nonconforming use, a storeroom onto one side of it, and to inclose a shed attached to it, and then to remove interior walls to make one large storeroom, where zoning ordinance authorizes pre-existing nonconforming use but precludes structural alterations therein. *Miss.—Mayor and Bd. of Aldermen of City of Pontotoc v. White*, 93 So.2d 852.

31. Conn.—*Lathrop v. Town of Norwich*, 151 A. 183, 111 Conn. 616.
Mass.—*La Charite v. Board of Appeals of Lawrence*, 99 N.E.2d 66, 327 Mass. 417.
N.Y.—*People v. Gerus*, 69 N.Y.S.2d 283.

Pa.—*In re 501 Paxinosa Ave., Easton*, 80 A.2d 789, 367 Pa. 340.
Reale v. Board of Adjustment, 27 Pa. Dist. & Co. 502—*Shore v. Zoning Bd. of Adjustment*, 3 Pa. Dist. & Co.2d 14.

Transcoil Corp. v. Worcester Tp. Bd. of Adjustment, Com.Pl., 72 Montg.Co. 155.

Permit held improperly denied

Permit to demolish old building and construct a larger and more suitable one for carrying on present business.

Ky.—*Butler v. Louisville & Jefferson County Bd. of Zoning Adjustment and Appeals*, 224 S.W.2d 658, 31 Ky. 668.

32. Md.—*Colati v. Jirout*, 47 A.2d 613, 186 Md. 652.
N.Y.—*Lapham v. Roulan*, 169 N.Y.S. 2d 346.

Permit issued pursuant to illegal order held illegal

Ala.—*Moore v. Pettus*, 71 So.2d 814, 260 Ala. 616.

33. Conn.—*De Felice v. Zoning Board of Appeals of Town of East Haven*, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

34. Fla.—*Peters v. Thompson*, 68 So.2d 581.

35. N.J.—*Malone v. Jersey City*, 147 A. 571, 7 N.J.Misc. 955.

Pa.—*Silver v. Lyon*, Com.Pl., 61 Dauph.Co. 225—*Kuznowski v. Board of Zoning Appeals*, Com.Pl., 53 Lack.Jur. 53.

Tenn.—*Corpus Juris Secundum* cited in *Hickerson v. Flannery*, App., 302 S.W.2d 508, 514.

Professional person residing on premises

N.Y.—*Stillbar Const. Co. v. Town of Harrison*, 143 N.Y.S.2d 804.

Who may invoke rule

Adjacent property owners could not raise contention that purchaser had no interest entitling him to erect building for which permit was sought.

N.J.—*Adams v. Jersey City*, 151 A. 863, 107 N.J.Law 149, followed in *Melosh v. Jersey City*, 151 A. 865, 8 N.J.Misc. 802.

On application by a stranger who has no interest whatever in the property, the building official or board authorized to issue permits may refuse to issue it, although the reason for the refusal affords no support for the action.

N.J.—*Krieger v. Scott*, 134 A. 901, 4 N.J.Misc. 942.

36. N.J.—*Losick v. Binda*, 130 A. 537, 102 N.J.Law 157.

37. N.J.—*Losick v. Binda*, supra.

38. R.I.—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 64 R.I. 197.

39. Conn.—*Antenucci v. Hartford Roman Catholic Diocesan Corp.*, 114 A.2d 216, 142 Conn. 349.

40. Cal.—*Gray v. Board of Sup'rs of Stanislaus County*, 316 P.2d 678, 154 C.A.2d 700.

Application by church held proper

Cal.—*Gray v. Board of Sup'rs of Stanislaus County*, supra.

41. N.J.—*Jersey Triangle Corporation v. Board of Adjustment of Jersey City*, 21 A.2d 845, 127 N.J. Law 194—*Brown v. Terhune*, 18 A. 2d 73, 125 N.J.Law 618, appeal dismissed 23 A.2d 575, 127 N.J.Law 554.

N.Y.—*Hasco Elec. Corp. v. Dassler*, 144 N.Y.S.2d 857, affirmed 150 N.Y. S.2d 552, 1 A.D.2d 889.

Ohio.—*State ex rel. Sun Oil Co. v. City of Euclid*, 130 N.E.2d 336, 164 Ohio St. 265.

Owner made party at hearing

Where applicants for permit to operate a trailer camp merely held a contract to purchase land but at hearing before county zoning board owners were made parties to proceeding and title passed to applicants before final order issuing permit, any irregularity was so trivial it would not void the proceedings. *Mo.—Colt v. Bernard*, App., 279 S. W.2d 527.

42. N.J.—*Wilson v. Township Committee of Union Tp., Union County*, 9 A.2d 771, 123 N.J.Law 474.
Siamowitz v. Jelleme, 130 A. 883, 8 N.J.Misc. 1169.

the structure.⁴³ The application may be made by one acting in the capacity of agent for the owner,⁴⁴ but a stranger who has no interest whatever in the property is not entitled to a permit.⁴⁵

Waiver of right. The fact that an applicant had erroneous recourse to an application for a variance does not bar him from seeking a certificate of conformance in respect of the use of property on the theory that he was entitled thereto as a consequence of a vested right which made a variance unnecessary.⁴⁶ So a property owner not subject to exclusion from a residential zone, and hence under no legal compulsion to seek a variance in order to erect an extension of his present structure in a residential zone does not, by applying for a variance, waive his right to issuance of a building permit.⁴⁷

§ 227. Proceedings to Procure

There must be a substantial compliance with all procedural requirements and conditions precedent before a valid permit may be issued.

In general, the rules applicable to the obtaining of municipal permits generally, as discussed in Municipal Corporations § 170, apply to proceedings to procure a permit or certificate under the zoning laws,⁴⁸ and it is necessary and sufficient that there

be a substantial compliance with all procedural requirements and conditions precedent before a valid permit may be issued.⁴⁹ Where a specific proceeding is provided in case exceptions need to be made or conditions imposed, a different method of procedure may not be adopted.⁵⁰

Mere neglect of the official issuing the permit to do certain required things may not prejudice the rights of the person receiving a permit to which he would otherwise be entitled.⁵¹

The enactment of a zoning ordinance forbidding the excavation of rock, sand, and gravel in a certain area will not estop the municipality thereafter to grant a conditional use permit to excavate rock, sand, and gravel therein.⁵²

*The allowance of a variance carries with it the right to any permits authorized under the variance.*⁵³

§ 228. — Application

In general, a proper application must be filed in order to secure a zoning or building permit or certificate.

Ordinarily, a person desiring to secure a permit or certificate under the zoning laws, is required to make an application⁵⁴ in writing,⁵⁵ in a prescribed form and manner⁵⁶ and setting forth specified in-

43. N.J.—Malone v. Jersey City, 147 A. 571, 7 N.J.Misc. 955.

44. N.J.—Reimer v. Dallas, 129 A. 390.

43 C.J. p 347 note 31.

45. N.J.—Krieger v. Scott, 134 A. 901, 4 N.J.Misc. 942.

46. N.Y.—McCory v. Langdon, 53 N. Y.S.2d 833, 269 App.Div. 701.

47. N.Y.—Temple Israel of Lawrence v. Plaut, 170 N.Y.S.2d 393.

48. Okl.—Corpus Juris quoted in Weaver v. Bishop, 52 P.2d 853, 858, 174 Okl. 492.

Proceedings to procure variance see infra §§ 295-315, 318-319.

49. Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C.2d 66.

Mass.—Fellsway Realty Corp. v. Building Com'r of Medford, 125 N. E.2d 791, 332 Mass. 471.

N.J.—Lehigh Valley R. Co. v. Jersey City, 144 A. 578, 7 N.J.Misc. 154, affirmed 147 A. 555, 106 N.J.Law 248.

Wash.—State ex rel. Ogden v. City of Bellevue, 275 P.2d 899, 45 Wash. 2d 492.

Applicability of zoning provisions enacted after the making of an application for a permit but before a decision thereon see supra § 221.

50. N.Y.—Lunmor Homes, Inc. v. Johnson, 122 N.Y.S.2d 149.

Reference to town board

Under ordinance requiring building inspector to refer one who requested building permit to town board, which had reserved to itself power to make special exception in such case, if proposed operation in building might produce noise, vibrations, and noxious fumes, where building inspector failed to make such reference of request for permit to build industrial plant which might produce noise, vibration, and noxious fumes, building inspector committed error of judgment.

N.Y.—J. L. Hennessy Associates, Inc. v. Griffin, 155 N.Y.S.2d 378.

51. N.Y.—Village of Attica v. Day, 236 N.Y.S. 607, 134 Misc. 882, affirmed 243 N.Y.S. 915, 230 App.Div. 776.

52. Cal.—Wheeler v. Gregg, 203 P. 2d 37, 90 C.A.2d 348.

53. N.J.—Kurowski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433.

54. Kan.—Corpus Juris Secundum quoted in Hudson Properties, Inc. v. City of Westwood, 310 P.2d 936, 937, 181 Kan. 320.

Md.—Osborne v. Grauel, 110 A. 199, 136 Md. 88.

Pa.—Petition of North Wales Park Homes, Inc., Quar.Sess., 72 Montg. Co. 105.

Hunsberger v. Stanbridge, Com. Pl., 73 Montg.Co. 1, 48 Mun.L.R. 243.

43 C.J. p 347 note 37.

Who may apply see supra § 226.

Alterations

An application should be made for a permit to make alterations to property subject to a zoning ordinance.

Cal.—Ricciardi v. Los Angeles County, 252 P.2d 773, 115 C.A.2d 569.

Appeal to board of appeals from oral order revoking permit was regarded as an original application for a permit.

N.Y.—Wyler v. Eckert, 73 N.Y.S.2d 789.

Informal referral by building inspector to zoning board of appeals was held insufficient to authorize board to direct inspector to issue certificate of occupancy.

N.Y.—Streeter v. Cowie, 168 N.Y.S. 2d 583.

55. Kan.—Corpus Juris Secundum quoted in Hudson Properties, Inc. v. City of Westwood, 310 P.2d 936, 937, 181 Kan. 320.

N.J.—Decker v. Moffett, 141 A. 784, 6 N.J.Misc. 510.

43 C.J. p 347 note 38.

56. Kan.—Corpus Juris Secundum quoted in Hudson Properties, Inc. v. City of Westwood, 310 P.2d 936, 937, 181 Kan. 320.

Ohio.—State v. Rapp, 16 Ohio N.P. N.S., 1.

formation,⁵⁷ and such application is required to be filed with the board or officer authorized to grant the permit.⁵⁸ Sometimes it is required that the petition be verified by affidavit,⁵⁹ in which case the cost of such verification, in the absence of legislation putting that duty on the corporation, is on applicant.⁶⁰

Substantial compliance with the requirements as to the application is sufficient.⁶¹ The validity of the permit is not affected by an irregularity in the application not amounting to a jurisdictional defect⁶² or by an immaterial discrepancy in the application,⁶³ nor is such discrepancy ground for refusal of the permit.⁶⁴

In the absence of legislative or judicial expression limiting the time within which a building permit may be issued following the grant of a variance, a delay in making application therefor will not cause it

to be denied.⁶⁵

Under some zoning ordinances or other acts a permit may not be issued before application has been made for a certificate of occupancy.⁶⁶

Waiver of defects. Defects in the application may be waived,⁶⁷ as, for instance, by granting the permit,⁶⁸ or by a consideration of the application on its merits.⁶⁹

§ 229. — Plans and Specifications

Under some provisions, the plans and specifications of the proposed structure must accompany the application to a zoning board or commission for a building permit and be approved by designated officials.

Under some provisions, the application to a zoning board or commission for a building permit or certificate must be accompanied by plans and specifications of the proposed structure,⁷⁰ in all re-

Wash.—State v. Spokane, 116 P. 878, 64 Wash. 388.

57. Kan.—*Corpus Juris Secundum* quoted in Hudson Properties, Inc. v. City of Westwood, 310 P.2d 936, 937, 181 Kan. 320.

N.J.—Slamowitz v. Jelleme, 130 A. 883, 3 N.J.Misc. 1169.

43 C.J. p 347 note 40.

Cross references in several applications

Mere cross references between applications filed with Bronx borough superintendent of buildings for office building and fire prevention permits showing that applications referred to same premises could not change their character as separate applications for doing separate kinds of work for which separate permits should be secured.

N.Y.—Tralow Realty Corporation v. Murdock, 24 N.Y.S.2d 561, 261 App. Div. 173.

58. Kan.—*Corpus Juris Secundum* quoted in Hudson Properties, Inc. v. City of Westwood, 310 P.2d 936, 937, 181 Kan. 320.

Md.—Osborne v. Grauel, 110 A. 199, 136 Md. 88.

Wash.—State v. Spokane, 116 P. 878, 64 Wash. 388.

Who may grant zoning permit or certificate see supra § 222.

59. N.J.—Decker v. Moffett, 141 A. 784, 6 N.J.Misc. 510.

Pa.—Black v. Pittsburgh, 109 A. 616, 266 Pa. 97.

60. Pa.—Black v. Pittsburgh, supra.

61. Conn.—Loew v. Falsey, 127 A.2d 67, 144 Conn. 67.

Ill.—People v. Oak Park, 109 N.E. 11, 268 Ill. 256.

Kan.—*Corpus Juris Secundum* quoted in Hudson Properties, Inc. v.

City of Westwood, 310 P.2d 936, 937, 181 Kan. 320.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 939, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

62. Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

63. Kan.—Hudson Properties, Inc. v. City of Westwood, 310 P.2d 936, 937, 181 Kan. 320.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Wash.—State v. Spokane, 116 P. 878, 64 Wash. 388.

64. Ill.—People v. Oak Park, 109 N.E. 11, 268 Ill. 256.

Kan.—*Corpus Juris Secundum* quoted in Hudson Properties, Inc. v. City of Westwood, 310 P.2d 936, 937, 181 Kan. 320.

Md.—Osborne v. Grauel, 110 A. 199, 136 Md. 88.

65. N.J.—Board of Ed. of Borough of Ft. Lee v. Mayor and Council of Borough of Ft. Lee, 105 A.2d 399, 31 N.J.Super. 22.

66. Mass.—La Charite v. Board of Appeals of Lawrence, 99 N.E.2d 66, 327 Mass. 417.

Condition precedent

Application for a certificate of occupancy and compliance was a condition precedent to granting of building permit under building code.

Mich.—City of East Lansing v. Wilson, 50 N.W.2d 730, 332 Mich. 96.

Substantial compliance with requirement that building permit shall not be issued before application for a certificate of occupancy has been made, which was intended to inform

officials of use to which building was to be put, was held shown where, although a formal application for a certificate of occupancy was not made prior to, or at time of, issuance of building permit, use to which building was to be put was well known to officials at time of issuance of building permit, and when in fact a certificate of occupancy was later issued before building was used.

Ohio.—Brow v. Sherman-Williams Co., App., 109 N.E.2d 864.

67. Colo.—Denver v. Spiegleman, 231 P. 204, 76 Colo. 307.

N.J.—Antonelli Const. v. Milstead, 112 A.2d 608, 34 N.J.Super. 449.

68. Wash.—State v. Spokane, 116 P. 878, 64 Wash. 388.

43 C.J. p 347 note 46.

69. N.Y.—Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

70. Ill.—People ex rel. State Bank & Trust Co. v. Moore, 76 N.E.2d 201, 332 Ill.App. 500.

La.—City of New Orleans v. Impastato, 30 So.2d 559, 198 La. 206.

Mass.—Opinion of the Justices to the Senate, 128 N.E.2d 563, 338 Mass. 783—Karl V. Wolsey Co. v. Building Inspector of Bedford, 86 N.E.2d 644, 324 Mass. 419.

Mich.—City of East Lansing v. Wilson, 50 N.W.2d 730, 332 Mich. 96.

Pa.—Appeal from Refusal of Bd. of Supervisors of Upper Yoder Tp. to Approved Plan of Lots Laid Out for Berkley's Estate, Com.Pl., 16 Cambria 198, 16 Cambria 229.

43 C.J. p 347 note 49.

Reasonableness of requirements

Building code requirements for submission of both front and side elevations of proposed structure with

spects complying with building regulations,⁷¹ and it also may be required that such plans and specifications be approved by designated municipal officials.⁷² Although substantial compliance with the requirement is sufficient,⁷³ failure to file the required plans and specifications has been held to be more than a mere informality,⁷⁴ and where they are insufficient, the applicant, for that reason, will not be entitled to the issuance of a permit.⁷⁵ The mere approval of the plans does not authorize the builder to disregard zoning ordinances or entitle him to a permit to construct a building in accordance with the plans and specifications where such building will violate zoning regulations.⁷⁶

§ 230. — Consents to Erection, Alteration, or Use of Property

Under some zoning acts the consent or approval of a

designated governing body or other municipal authority is required as a prerequisite to the issuance of a zoning or building permit.

Under some zoning ordinances or acts, a permit or certificate to erect, alter, or maintain particular buildings or to use property for particular purposes cannot be granted until after it has received the consent or approval of a designated governing body or other municipal authority.⁷⁷ Such approval is not required in situations not contemplated by the provision in question.⁷⁸

In approving or disapproving a project the municipal or local board or authority must act reasonably,⁷⁹ and not in an arbitrary or discriminatory manner.⁸⁰ An application under such a provision is distinguishable from an application for a variance

application for permit were reasonable.

Ark.—City of Little Rock v. Tate, 209 S.W.2d 92, 212 Ark. 1003.

Filing wrong set of plans

Applicant for building permit must file set of correct plans, and city is not estopped by building inspector's failure to advise applicant of mistake.

N.J.—Deymann v. Jersey City, 136 A. 602, 5 N.J.Misc. 369.

71. Ill.—Tews v. Woolhiser, 185 N.E. 827, 352 Ill. 212.

People ex rel. State Bank & Trust Co. v. Moore, 76 N.E.2d 201, 332 Ill.App. 500.

Mass.—Karl V. Wolsey Co. v. Building Inspector of Bedford, 86 N.E. 2d 644, 324 Mass. 419.

N.J.—Decker v. Moffett, 141 A. 784, 6 N.J.Misc. 510.

N.Y.—Colonial Beacon Oil Co. v. Finn, 283 N.Y.S. 384, 245 App.Div. 459, affirmed 1 N.E.2d 345, 270 N.Y. 591.

Sufficiency of detail

(1) The plans and specifications must be in sufficient detail so that it may be ascertained whether the contemplated construction complies with the requirements of the building ordinances.

Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

(2) Statements in plans and specifications that work will be performed "to the satisfaction of the building inspector" or "as specified in the code" are deemed to be indefinite.

Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

72. Kan.—City of Tribune v. Connelly, 26 P.2d 439, 138 Kan. 398.

N.Y.—Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 App.Div. 551.

43 C.J. p 347 note 50.

Sufficiency of approval

Where statute relating to approval of building specifications did not require approval by stamp or by letter, an oral approval was sufficient, and provision of municipal ordinance purporting to require a stamp and a letter of approval for buildings to be erected in village was void.

Ohio.—Village of Ottawa v. Odenweller Milling Co., 13 N.E.2d 144, 57 Ohio App. 170.

73. Ohio.—Brow v. Sherman-Williams Co., App., 109 N.E.2d 864.

74. N.J.—Deymann v. Jersey City, 136 A. 602, 5 N.J.Misc. 369.

75. Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

Mich.—City of East Lansing v. Wilson, 50 N.W.2d 730, 332 Mich. 96.

76. N.J.—Steinberg v. Board of Adjustment of Town of Nutley, 146 A. 318, 106 N.J.Law 603, followed in Paramount Realty & Const. Co. v. Schmitt, 146 A. 319, 106 N.J.Law 587.

77. Kan.—City of Tribune v. Connelly, 26 P.2d 439, 138 Kan. 398.

Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

Minn.—State ex rel. Rose Bros. Lumber & Supply Co. v. Clousing, 268 N.W. 844, 198 Minn. 35.

N.Y.—Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead, 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 84 L.Ed. 990.

Buffalo Red-I-Mix Concrete Corp. v. Foell, 147 N.Y.S.2d 404, 1 A.D.2d 702.

Approval of plans and specifications see supra § 229.

Motion or ordinance

The consent of the town council to the construction of a structure in

violation of a zoning ordinance may be required to be expressed by an ordinance rather than by a mere motion.

Fla.—Godson v. Town of Surfside, 8 So.2d 497, 150 Fla. 614.

Change of form of government

City's adoption of commission form of government did not affect application of building code provisions requiring approval of governing body of city for granting of certain permits.

N.J.—Schumacher v. Union City, 154 A. 406, 9 N.J.Misc. 492.

Disapproval by required body prevents issuance of permit.

Cal.—Johnston v. Board of Sup'rs of Marin County, 187 P.2d 686, 31 C. 2d 66.

Contemporaneous construction

Action of county board of supervisors in granting applications for use permits after planning commission's denial thereof was not such contemporaneous construction of zoning ordinance as to require court to construe ordinance as authorizing board to issue permit after commission's denial thereof, where board granted applications two and six years after enactment of ordinance.

Cal.—Johnston v. Board of Sup'rs of Marin County, supra.

78. N.Y.—Braun v. McGillian, 40 N.Y.S.2d 791, 180 Misc. 711.

79. N.Y.—Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead, 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 84 L.Ed. 990.

80. N.Y.—Nappi v. LaGuardia, 55 N.Y.S.2d 80, 184 Misc. 775, affirmed 54 N.Y.S.2d 722, 269 App.Div. 693, affirmed 64 N.E.2d 716, 295 N.Y. 652.

in that no showing of undue hardship is necessary for the granting of the former.⁸¹

§ 231. — — — Adjacent Property Owners

Under some zoning regulations the consent of a specified per cent of the adjacent or neighboring landowners is necessary before a nonconforming use of the property can be permitted.

Under the provisions of some zoning regulations, the validity of which is discussed supra § 43, the consent of a specified per cent of the adjacent or neighboring landowners is necessary before a nonconforming use of the property can be permitted,⁸² and such provisions are held specifically to limit the authority of the administrative officials to permit such use.⁸³ This principle has been frequently applied in cases involving permits for the construction of, or use of property for, garages or service stations, as discussed infra § 256. A similar requirement, found in some zoning provisions relating to the granting of variances or exceptions, is treated infra § 298.

§ 232. — — — Notice

There must be a substantial compliance with the re-

quirements as to notice in order to render proceedings for zoning or building permits or certificates valid.

As a general rule, notice must be given of applications for zoning or building permits or certificates,⁸⁴ in some public manner, or to persons who may be interested in contesting the application, or whose property rights may be adversely affected,⁸⁵ and failure to comply substantially with the requirements of statute or other enactment as to notice renders the proceedings invalid.⁸⁶ Mere informalities in the notice, however, do not affect the validity of the permit or certificate,⁸⁷ and one who received notice of the hearing, attended it, and participated therein cannot be heard to complain of alleged insufficiency of the notice.⁸⁸ Where no notice is required by an ordinance applicable to building permits or municipal permits generally, a permit issued without notice is not invalid.⁸⁹

§ 233. — — — Hearing and Evidence

Depending on the controlling regulations, a public hearing on an application involving a permit may or may not be necessary, or it may be left to the discretion of the body or official passing on it; and if a hearing is held it may be more or less informal.

Under some provisions, a proper hearing on an application relating to a permit must be had,⁹⁰ but

Denial held improper

N.Y.—Clark v. Fogelsonger, 132 N.Y. S.2d 590, 284 App.Div. 832.

Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348.

81. N.Y.—Long Island Lighting Co. v. Griffin, supra.

Variances see infra §§ 297-298.

82. Colo.—Cross v. Bilett, 221 P.2d 923, 122 Colo. 278.

Pa.—Appeal of Zimmerman, Com.Pl., 6 Lycoming 65—Appeal of Hertrick, Co., 106 Pittsb.Leg.J. 157.

83. Colo.—Cross v. Bilett, 221 P.2d 923, 122 Colo. 278.

84. Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

85. Md.—Osborne v. Grauel, 110 A.199, 136 Md. 88.

N.Y.—Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477.

Wash.—State v. Spokane, 116 P. 878, 64 Wash. 388.

Posting property

Under some provisions premises with respect to which permit is sought must be posted in manner prescribed for a stated period prior to hearing.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

86. Mich.—Baura v. Thomasma, 32 N.W.2d 369, 321 Mich. 139.

Specification of time of hearing

Published notice which failed to specify time of hearing is insufficient.

Mich.—Baura v. Thomasma, supra.

Notice held sufficient

(1) In general.

Cal.—Cohn v. County Bd. of Sup'rs of Los Angeles County, 286 P.2d 836, 135 C.A.2d 180.

(2) Where hearing on application for permit to build a church in a residential zone was set by board of zoning appeals for Aug. 27, 1945, notice of hearings served on interested parties involved as property owners by registered mail on Aug. 22, 1945, and publication of notice on Aug. 20, 1945, complied with provisions in zoning ordinance requiring five-day notice to interested parties and publication of notice at least seven days before hearing, as against contention that five and seven full days of twenty-four hours each should elapse prior to day of hearing.

Ind.—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 117 Ind.App. 314.

87. Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Wash.—State v. Spokane, 116 P. 878, 64 Wash. 388.

Color and visibility of posted notice, although irregular, were held

sufficient to constitute substantial compliance.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

88. Cal.—McLain v. Planning Commission of City of Chico, App. 319 P.2d 24.

89. N.J.—Adams v. Jersey City, 151 A. 863, 107 N.J.Law 149, followed in Melosh v. Jersey City, 151 A. 865, 8 N.J.Misc. 802.

N.Y.—Gazan v. Corbett, 105 N.Y.S.2d 187, 278 App.Div. 953, affirmed 110 N.E.2d 739, 304 N.Y. 920, reargument denied 112 N.E.2d 775, 305 N.Y. 693, certiorari denied 74 S.Ct. 38, 346 U.S. 822, 98 L.Ed. 348.

Okla.—Weaver v. Bishop, 52 P.2d 853, 174 Okl. 492.

Provision requiring notice held inapplicable

Section of city charter authorizing city planning commission to adopt master plan for whole city and official detailed plans for particular areas, only after notice and public hearing thereon, was not applicable to subdivision plans attached to application for building permits, and planning commission could approve permits and plans without notice and hearing.

Md.—Feldman v. Star Homes, Inc., 84 A.2d 903, 199 Md. 1.

90. Md.—Osborne v. Grauel, 110 A.199, 136 Md. 88.

persons whose rights will not be affected have no right to be heard.⁹¹ Under other provisions, with certain exceptions, a public hearing need not be held;⁹² and under still others, the question whether there should be a public hearing on the application is placed within the sound discretion of the body or official passing on it.⁹³

When a hearing is held it may be more or less informal, and technical legal rules of evidence and procedure may be disregarded, but no essential element of a fair trial can be dispensed with; the

party whose rights are being determined must be given the opportunity to cross-examine witnesses, inspect documents, and offer evidence in explanation or rebuttal.⁹⁴ On the hearing issues properly before the board or commission are required to be considered by it.⁹⁵

Ordinarily, the burden of proving the existence of facts warranting the grant of the permit or certificate is on the applicant,⁹⁶ and, in the absence of proof of compliance with all requirements and regulations, the application is properly denied.⁹⁷

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

N.Y.—Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477.

Pa.—Fleishon v. Zoning Bd. of Adjustment, 2 Pa. Dist. & Co.2d 45, affirmed 122 A.2d 673, 385 Pa. 295.

Wash.—State v. Spokane, 166 P. 878, 64 Wash. 383.

Hearing on erroneous issue is a denial of required hearing.

N.Y.—Navin v. Early, 56 N.Y.S.2d 346.

91. Md.—Feldman v. Star Homes, Inc., 84 A.2d 903, 199 Md. 1.

Proposed roads in subdivision

Approval by city planning commission of subdivision plans, attached to application for building permits, providing for proposed roads, did not alter private character of roads or bind city to take them over by condemnation or otherwise in future, but constituted only a designation of location for future acquisition for public use, and rights of property owners adjacent to planned subdivision were not affected and they had no right to hearing on approval of plans.

Md.—Feldman v. Star Homes, Inc., *supra*.

92. Cal.—McLain v. Planning Commission of City of Chico, App., 319 P.2d 24.

Ex parte hearing is sufficient

Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650.

93. Tex.—Ikard v. City of Henrietta, Civ.App., 33 S.W.2d 578.

94. N.Y.—Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477.

Fair unbiased hearing held granted

(1) Generally.

Cal.—Patterson v. Board of Sup'rs of Los Angeles County, 180 P.2d 945, 79 C.A.2d 670.

(2) Refusal of city council to hear testimony of city engineer with respect to his right to grant permit, which was a question of law, was

held not to deprive applicant of a full and fair hearing.

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

95. Whether building was nonconforming structure was held issue before board so as to require its consideration.

N.J.—Spickofsky v. Board of Adjustment of Borough of East Rutherford, 60 A.2d 888, 137 N.J.Law 494.

96. N.J.—Lowenthal v. Bratt, 53 A.2d 306, 135 N.J.Law 572.

Pa.—Appeal of Krinks, 2 A.2d 700, 332 Pa. 236.

Chakofsky v. Board of Zoning Appeals of City of Scranton, Com. Pl., 48 Lack.Jur. 173.

Tex.—Washington v. City of Dallas, Civ.App., 159 S.W.2d 579.

Interest in property

In proceeding for building permit, burden is on petitioner to make proper proof of ownership of, or interest in, lot.

R.I.—Dimitri v. Zoning Board of Review of City of Warwick, 200 A.963, 61 R.I. 325.

Particular matters

(1) Property owners must show a proper compliance with requirements of building code.

Ill.—People ex rel. Delgado v. Morris, 79 N.E.2d 339, 334 Ill.App. 557.

(2) Applicant for special permit to conduct restaurant in residential zone was not required to show that denial of permit would result in practical difficulty, or unnecessary or unreasonable hardship, as in case of variance, but was only required to show that exception would be in harmony with zoning plan and would not be detrimental to welfare of neighborhood.

Md.—Oursler v. Board of Zoning Appeals of Baltimore County, 104 A.2d 568.

Evidence held admissible

Evidence to effect that at time application for permit was presented a zoning ordinance was under consideration and later passed making proposed building a violation,

Pa.—Hunsberger v. Stanbridge, Com. Pl., 73 Montg.Co. 1, 48 Mun.L.R. 243.

Evidence held sufficient

(1) Generally.

Colo.—Richards v. Batterton, 298 P.2d 390, 133 Colo. 553.

Mo.—McKinney v. Board of Zoning Adjustment of Kansas City, App., 308 S.W.2d 320.

N.Y.—Crone v. Town of Brighton, 119 N.Y.S.2d 377.

Pa.—Garner v. Zoning Board of Adjustment of City of Philadelphia, 130 A.2d 148, 388 Pa. 98.

(2) To authorize grant of permit to operate a trailer camp.

Mo.—Colt v. Bernard, App., 279 S.W.2d 527.

(3) To establish that proposed industrial operation might produce noise, vibration, and noxious fumes.

N.Y.—J. L. Hennessy Associates, Inc. v. Griffin, 155 N.Y.S.2d 378.

(4) To establish nonconforming use.

Tex.—Gulf, C. & S. F. Ry. Co. v. White, Civ.App., 281 S.W.2d 441.

(5) To support decision that nonconforming use did not exist.

Md.—Knox v. Mayor and Council of Baltimore City, 23 A.2d 15, 180 Md. 88.

(6) To establish that use of premises was to be for a school and not a sanitarium.

Pa.—Walker v. Zoning Bd. of Adjustment, 110 A.2d 414, 380 Pa. 228.

(7) To sustain finding that no substantial injury would occur to neighborhood.

Tex.—Gulf, C. & S. F. Ry. Co. v. White, Civ.App., 281 S.W.2d 441.

Evidence held not to authorize refusal of permit

N.C.—Mitchell v. Barfield, 59 S.E.2d 810, 232 N.C. 325.

Evidence held insufficient

Ill.—Chicago City Bank & Trust Company v. City of Highland Park, 137 N.E.2d 335, 9 Ill.2d 364, certiorari denied 77 S.Ct. 681, 353 U.S. 922, 1 L.Ed. 719.

97. N.Y.—Bregman v. Reville, 226 N.Y.S. 285, 131 Misc. 486.

Where, however, the application is for a permit under a zoning ordinance permitting all legal uses except certain specified ones, the burden is on those objecting to the permit to show that one of the excepted uses is intended.⁹⁸

Official investigation or examination of premises. In the absence of a provision to the contrary, the body or official passing on the application may make any desired investigation and act on any facts coming to its knowledge.⁹⁹ Under some acts and ordinances, before a certificate of occupancy can issue, a building inspector is obliged to view and examine the premises to determine conformity with all appropriate regulations.¹

§ 234. — Determination

An application for a permit or certificate should be decided primarily on the evidence offered at the hearing when a hearing is required; and the determination or decision should be within the authority granted.

The members of a zoning commission should decide an application for a permit or certificate primarily on the evidence offered at the hearing, when a hearing is required, although they may take into consideration personal knowledge properly acquired.² The determination or decision must be within

the authority granted,³ but the granting of a permit may be accomplished by resolution rather than by ordinance without violating a municipal charter provision requiring all legislative power to be exercised by ordinance.⁴ The denial of a gaming license to an applicant desiring to operate in an area where the zoning laws permit such businesses to operate does not amount to a change in the zoning ordinances without the taking of the prescribed procedural steps therefor.⁵

Notice of action and reasons therefor. Applicants for permits and certificates are entitled, under some zoning regulations, to notice of the action taken thereon with the reasons therefor.⁶ Thus, it is good practice for the body or official making the decision to state the reasons for refusing an application for a permit or certificate,⁷ and failure to show the basis of the decision has been held sufficient to invalidate it.⁸ It has been held, however, that, in the absence of a statute so requiring, it is not necessary that the reasons for the decision be set forth.⁹

Statement or findings of fact. Under a statute to such effect, the board in its return must make a statement of fact based on the evidence sufficient to show that a judicially exercised discretion justified the action taken,¹⁰ or the board, in making any

98. N.Y.—Plander v. Koehler, 150 N. Y.S.2d 879.

99. Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650—Mrowka v. Board of Zoning Appeals of Town of Plainville, 55 A.2d 909, 134 Conn. 149.

Tex.—City of Dallas v. Meserole Bros., Civ.App., 164 S.W.2d 564, error refused.

Inspection, required before grant of building permit, could be done before as well as after application for permit, and prior inspection and knowledge of conditions were sufficient.

N.Y.—Village of Attica v. Day, 236 N.Y.S. 607, 134 Misc. 882, affirmed 243 N.Y.S. 915, 230 App.Div. 776.

1. N.J.—Honigfeld v. Byrnes, 103 A. 2d 598, 14 N.J. 600.

2. Conn.—Jennings v. Connecticut Light & Power Co., 103 A.2d 535, 140 Conn. 650.

3. Mo.—Phillips v. Board of Adjustment of City of Bellefontaine Neighbors, App., 308 S.W.2d 765.

Approval of subdivision

Board of adjustment, on application for building permit, was held not authorized to decide propriety of approval of subdivision by zoning commission, even though commission acted improperly in approving it.

Mo.—Phillips v. Board of Adjustment

of City of Bellefontaine Neighbors, supra.

Release from set back requirement

Where existing building development extended to street line on both sides of applicant's property, zoning board had authority to relieve applicant from zoning ordinance requiring a ten-foot set back space.

Pa.—Root v. City of Erie Zoning Bd. of Appeals, 118 A.2d 297, 130 Pa. Super. 38.

Findings construed to include matter implicit therein.

Pa.—Appeal of Lord, 77 A.2d 723, 168 Pa.Super. 299, reversed on other grounds 81 A.2d 533, 363 Pa. 121.

4. Cal.—Essick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.

5. Nev.—Primm v. City of Reno, 252 P.2d 835, 70 Nev. 7.

6. D.C.—Savage v. District of Columbia, Mun.App., 54 A.2d 562.

7. Conn.—Levine v. Zoning Board of Appeals of Meriden, 198 A. 173, 124 Conn. 53—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449.

Burden is on board to support its refusal to grant a permit by showing reasons for its action.

Md.—Applestein v. Osborne, 143 A. 686, 156 Md. 40.

Record

The decision of a city council on a

petition for building permit should be open to judicial review which requires that some sort of record should be made of the rule or standard applied and of the factual basis for the decision made by the application of such rule or standard.

R.I.—Tillotson v. City Council of City of Cranston, 200 A. 767, 61 R.I. 293.

8. R.I.—Tillotson v. City Council of City of Cranston, supra.

9. Conn.—Levine v. Zoning Board of Appeals of Meriden, 198 A. 173, 124 Conn. 53—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449.

Mich.—City of Detroit v. S. Loewenstein & Son, 47 N.W.2d 646, 330 Mich. 359.

Minn.—Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co. of City of New York, 253 N.W. 8, 191 Minn. 60.

10. Pa.—Application of Imperial Asphalt Corp., 59 A.2d 121, 359 Pa. 402.

Arbitrary refusal

A property owner's constitutional right to use his property is not satisfied by arbitrary refusal of zoning authorities of request for a permit, and it is not sufficient merely to state that refusal resulted after due consideration.

Pa.—Application of Imperial Asphalt Corp., 59 A.2d 121, 359 Pa. 402.

determination which the court may be called on to review, must make findings which are sufficient to inform the court and the parties as to the findings made and the basis for them.¹¹ Where a zoning board acts on its own knowledge of conditions or on its own personal inspection it should set forth in its return the facts known to its members but not otherwise disclosed.¹²

Conditions. In granting a permit or certificate,

Sufficiency of statement

Decision of township zoning authorities denying request for a permit to remodel and change use of property must disclose constitutional right of owner to use of property has not been infringed by zoning regulation and there should be a sufficient discussion to enable court, on appeal, to see that zoning authorities appreciated the legal questions raised by the facts.

Pa.—Application of Imperial Asphalt Corp., *supra*.

11. N.Y.—Long Island Land Research Bureau, Inc. v. Young, 159 N.Y.S.2d 414, 7 Misc. 469.

Findings held immaterial

N.Y.—Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 A.D. 551.

12. N.Y.—Community Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

13. Conn.—Levine v. Zoning Board of Appeals of Meriden, 198 A. 173, 124 Conn. 53.

Mass.—La Charite v. Board of Appeals of Lawrence, 99 N.E.2d 66, 327 Mass. 417.

N.Y.—Community Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

On appropriate conditions

N.Y.—Nelson v. Pierce, 120 N.Y.S.2d 804, 281 App.Div. 994.

Provision authorizing conditional permit strictly construed

N.Y.—Lunmor Homes, Inc. v. Johnson, 122 N.Y.S.2d 149.

Uniformity of conditions

Board need not impose exactly same conditions on each nonconforming applicant within same zone.

Pa.—Appeal of Consolidated Cleaning Shops, 157 A. 811, 103 Pa.Super. 66.

Condition held not imposed

Finding of board made with knowledge of actual height of partially completed, proposed structure, that there had been a shed on premises approximately same size as proposed structure did not make it a condition of building permit that height of proposed structure should not exceed height of former shed.

Md.—Kulbitsky v. Zimnoch, 77 A.2d 14, 196 Md. 504.

14. Conn.—Abbadessa v. Board of Zoning Appeals of City of New Haven, 54 A.2d 875, 134 Conn. 28.

Parking areas

(1) Under zoning ordinance which allows board to require religious organization seeking permit to use realty in residential zone for public worship or other strictly religious use to file site plan setting forth approximate location of proposed parking areas and which provides that size and location of parking and recreation areas shall be determined by board, board was not authorized to impose on applicant ultimate burden of proposing proper parking areas leaving it as duty of board to approve or disapprove.

N.Y.—Community Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

(2) Where ordinance prescribed standards only as to size of lot, setback lines and height of building, zoning board of appeals exceeded its authority by imposing condition based on providing off-street parking.

N.Y.—Titus St. Paul Property Owners Ass'n v. Board of Zoning Appeals of Town of Irenedqueit, 132 N.Y.S.2d 148, 205 Misc. 1083.

Height of proposed structure

Where proposed concrete block structure replacing frame shed met all requirements of zoning ordinance authorizing accessory buildings in rear yards, including those regulating height and size, neither building engineer nor board of municipal and zoning appeals had authority to impose on building permit condition that height of proposed structure should not exceed height of former shed.

Md.—Kulbitsky v. Zimnoch, 77 A.2d 14, 196 Md. 504.

Protection of adjoining property

Board has no power to attach to building permit a condition subsequent that permittee defray expense of any under-pinning, shoring up, or other protection required for adjoining property.

Mo.—Fey v. Woermann, 230 S.W.2d 681, 360 Mo. 728.

Plans and specifications

Under zoning ordinance providing that the board of appeals may require as condition of any permit is-

the board may, in a proper case, impose conditions;¹³ but the board may not impose a condition not warranted by the ordinance.¹⁴ A finding which attempts to impose a nonexistent duty on the applicant or petitioner is improper and may not be sustained.¹⁵ A permit or certificate should not be granted where conditions prescribed by the issuing body or by ordinance are not met.¹⁶ Objectors to the issuance of a zoning permit may not complain

sued that applicant and buildings and their accessory structures on premises shall comply with provisions of proposed general building construction code and may require that premises shall not be used for purposes permitted by board except on issuance by building inspector of certificate of occupancy certifying that terms and conditions of permit have been complied with, board did not have power to require applicant to submit plans and specifications as a condition precedent to obtaining change of use permit.

N.Y.—Community Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

Effect of unauthorized condition

Unauthorized condition that permittee pay specified expenses if required for protection of adjacent property was held to add nothing to legal duty of permittee to take all proper precaution in erection of his building.

Mo.—Fey v. Woermann, 230 S.W.2d 681, 360 Mo. 728.

15. N.Y.—Community Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

Size of plot

Findings of zoning board which imposed on religious organization, seeking permit to use realty for synagogue, burden of showing that no other smaller site for synagogue was available and which found that subject premises were too large were not authorized under zoning ordinance which contained restrictions with respect to size of premises only relating to minimum requirements.

N.Y.—Community Synagogue v. Bates, *supra*.

16. Ga.—Pierce v. Cullens, 100 S.E. 2d 732, 213 Ga. 849.

Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 Md. 623—Colati v. Jirout, 47 A.2d 613, 186 Md. 652.

N.Y.—Little Home for Friendless Animals v. Koehler, 76 N.Y.S.2d 621, 273 App.Div. 859, appeal denied 78 N.Y.S.2d 370, 273 App.Div. 910—Eaton v. Sweeny, 251 N.Y.S. 246, 232 App.Div. 459, reversed on other grounds 177 N.E. 412, 257 N. Y. 176.

stantially the same proposal may not be acted on until after a specified period of time from the date of the last disapproval;²⁸ after the lapse of the time specified, a zoning board or commission may consider and act on a new application for a permit previously denied, but it may properly grant it only if there has been a substantial change in conditions.²⁹ Provisions of a zoning ordinance prohibiting a zoning board from considering and acting on a new application for a permit previously denied, until after the lapse of a specified period of time, do not dispense with the rule of *res judicata* resulting from a court decision.³⁰

§ 237. — Fee

A reasonable fee may ordinarily be charged for issuing a zoning permit or other license or certificate issuable under the zoning laws.

In general, applicant for a building or zoning permit or other license or certificate may be charged a reasonable fee for issuing it,³¹ and for the examination of the premises by a building inspector as a pre-

subsequently amended zoning ordinance so as to permit construction of fire station, and which sought to proceed under ordinances as amended.

Tex.—City of McAllen v. Morris, Civ. App., 217 S.W.2d 875, error refused.

23. *Md.*—Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore, 60 A.2d 192, 191 Md. 155.

Application held not for substantially same proposal

Application for a permit to erect on a fifteen-acre tract ten apartment buildings made up of thirty-four units containing one hundred sixty-eight suites and open parking spaces for one hundred sixty-eight automobiles thereon was not substantially same proposal as previous application for apartment buildings for one hundred seventy-nine families, one hundred fifty parking spaces and twenty-six garage buildings within meaning of ordinance providing that when an application is disapproved board shall take no further action on another application for substantially same proposal on same premises until after six months from date of last disapproval.

Md.—Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore, *supra*.

29. *Md.*—Whittle v. Board of Zoning Appeals of Baltimore County, 125 A.2d 41, 211 Md. 36.

Basis of rule

Rule seems not to rest strictly on doctrine of *res judicata*, but on the proposition that it would be arbitrary for board to arrive at opposite con-

clusions on substantially same state of facts and same law.

Md.—Whittle v. Board of Zoning Appeals of Baltimore County, *supra*.

30. *Md.*—Whittle v. Board of Zoning Appeals of Baltimore County, *supra*.

31. *Ky.*—Kesselring v. Wakefield Realty Co., 227 S.W.2d 416, 312 Ky. 334.

Mass.—M. Spinelli & Sons Co. v. City of Cambridge, 28 N.E.2d 240, 306 Mass. 342.

Pa.—Commonwealth v. McFadden, Quar.Sess., 14 Beaver 242, 44 Mun. L.R. 202—Berwick Lumber & Supply Co. v. City of Harrisburg, Com. Pl., 52 Dauph.Co. 275.

Delay in granting until after date of increase

Where subdivider would not have been subject to requirement that five hundred dollars per housing unit be paid for building permit for new construction after specified date if it were not for municipality's error or delay, subdivider could not thus be penalized because of such error or delay.

N.Y.—Stance v. Suozzi, 171 N.Y.S.2d 997.

32. *Cal.*—P. I. Wilsey & Co. v. San Bernardino County, App., 317 P.2d 71.

Fee held reasonable

Where, before certificate of occupancy could issue under zoning ordinance, building inspector was obligated to view and examine premises to determine whether they conformed with all appropriate regulations, two dollar charge would appear reasonable.

requisite to the issuance of a certificate of occupancy.³² Under some acts the amount of the fee may be fixed by the zoning board or commission³³ which should be commensurate with the amount of work and study required of it.³⁴

§ 238. Form, Requisites, and Validity

Permits and certificates must comply substantially with the requirements of zoning acts and ordinances under which they are issued, and they are void if they fail to do so.

A permit or certificate should comply with the requirements of the zoning act or ordinance under which it is issued,³⁵ as to matters to be stated or described in the permit, including the naming or description of the person to whom the permit is granted³⁶ and the place where the work is to be carried on or the structure erected.³⁷

Generally, an unauthorized permit or certificate, or one which violates, or does not comply with, the zoning laws or ordinances is void, or a nullity, and confers no rights on the permittee³⁸ or his as-

N.J.—Honigfeld v. Byrnes, 103 A.2d 598, 14 N.J. 600.

33. *Ky.*—Kesselring v. Wakefield Realty Co., 227 S.W.2d 416, 312 Ky. 334.

34. *Ky.*—Kesselring v. Wakefield Realty Co., *supra*.

35. *Md.*—Osborne v. Grauel, 110 A. 199, 136 Md. 88.

36. *Md.*—Osborne v. Grauel, *supra*. 43 C.J. p 348 note 62.

Agent

Permit issued to architect who acted as agent for corporation was held not invalid for that reason.

N.J.—Protomastro v. Board of Adjustment of City of Hoboken, 67 A.2d 231, 3 N.J.Super. 539, reversed on other grounds 70 A.2d 873, 3 N. J. 494.

37. *Mass.*—Alter v. Dodge, 5 N.E. 504, 140 Mass. 594.

38. *Ala.*—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504.

Fla.—Miami Shores Village v. Wm. N. Brockway Post No. 124 of American Legion, 24 So.2d 33, 156 Fla. 485.

Ill.—Sinclair Refining Co. v. City of Chicago, 246 Ill.App. 152.

Iowa.—McCartney v. Schuette, 54 N. W.2d 462, 243 Iowa 1358.

Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207.

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386.

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Mass.—M. Spinelli & Sons Co. v. City of Cambridge, 28 N.E.2d 240, 306 Mass. 342.

Pa.—Commonwealth v. McFadden, Quar.Sess., 14 Beaver 242, 44 Mun. L.R. 202—*Berwick Lumber & Supply Co. v. City of Harrisburg*, Com. Pl., 52 Dauph.Co. 275.

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N.Y.—Stanco v. Suozzi, 171 N.Y.S.2d 997.

32. *Cal.—P. I. Wilsey & Co. v. San Bernardino County*, App., 317 P.2d 71.

Fee held reasonable

Where, before certificate of occupancy could issue under zoning ordinance, building inspector was obligated to view and examine premises to determine whether they conformed with all appropriate regulations, two dollar charge would appear reasonable.

N.J.—Honigfeld v. Byrnes, 103 A.2d 598, 14 N.J. 600.

33. *Ky.—Kesselring v. Wakefield Realty Co.*, 227 S.W.2d 416, 312 Ky. 334.

34. *Ky.—Kesselring v. Wakefield Realty Co.*, supra.

35. *Md.—Osborne v. Grauel*, 110 A. 199, 136 Md. 88.

36. *Md.—Osborne v. Grauel*, supra. 43 C.J. p 348 note 62.

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Ill.—Sinclair Refining Co. v. City of Chicago, 246 Ill.App. 152.

Iowa.—McCartney v. Schuette, 54 N.W.2d 462, 243 Iowa 1358.

Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207.

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386.

signee,³⁹ and does not bind the municipality in any respect,⁴⁰ even though the permittee may have commenced building operations, or otherwise incurred expenses or obligations thereunder.⁴¹ Thus, a permit is invalid where it does not contain the limitations and restrictions specified by the zoning board in granting the variance under which the permit was issued,⁴² or where it is based on a void zoning ordinance,⁴³ or on the unauthorized attempt of a zoning board to rezone an entire block.⁴⁴ An unauthorized permit does not constitute a basis for an estoppel,⁴⁵ or prejudice or destroy the rights of the public to require the enforcement of zoning laws valid on their face.⁴⁶

Irregularities; discrepancy between application and permit. While mere irregularities in a building permit will not vitiate it,⁴⁷ there should be no serious discrepancy between the application for the

permit and the permission granted.⁴⁸

Signing and delivery. Mere manual signing of a building permit by the official authorized to issue it is not an issuance of the permit;⁴⁹ in order to complete the issuance there must be a delivery thereof.⁵⁰

§ 239. Operation and Effect

A permit or certificate issued under the zoning laws partakes of the nature of both a personal privilege and a grant which attaches to the land, and evidences the permittee's compliance with zoning regulations and that the structure or use is permissible in the light thereof.

A permit or certificate issued under the zoning laws partakes of both a personal privilege and a grant which attaches to the land,⁵¹ and does not ordinarily confer a purely personal privilege,⁵² although it may do so.⁵³ Its issuance is not, and cannot

Adler v. Department of Parks & Public Property, Town of Irvington, 89 A.2d 704, 20 N.J.Super. 240.
Ostrowsky v. City of Newark, 139 A. 911, 102 N.J.Eq. 169.

N.Y.—Ramundo v. Murdock, 39 N.Y.S. 2d 324, 265 App.Div. 526, appeal denied 41 N.Y.S.2d 938, 266 App. Div. 720, motion dismissed 50 N.E.2d 246, 290 N.Y. 864, motion denied 50 N.E.2d 1020, 291 N.Y. 638, affirmed 60 N.E.2d 127, 293 N.Y. 913—Rosenbush v. Keller, 285 N.Y.S. 636, 247 App.Div. 748, affirmed 2 N.E.2d 659, 271 N.Y. 282—Colonial Beacon Oil Co. v. Finn, 283 N.Y.S. 384, 245 App.Div. 459, affirmed 1 N.E.2d 345, 270 N.Y. 591—Rollins v. Armstrong, 234 N.Y.S. 36, 226 App.Div. 752, affirmed 167 N.E. 466, 251 N.Y. 349.

Van Auken v. Kimmey, 252 N.Y.S. 343, 141 Misc. 117.

Lunmor Homes, Inc. v. Johnson, 122 N.Y.S.2d 149—Underhill v. Board of Appeals of Town of Oyster Bay, 72 N.Y.S.2d 588, affirmed 75 N.Y.S.2d 327, 273 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937.

Pa.—Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66—Vogt v. Borough of Port Vue, 85 A.2d 688, 170 Pa.Super. 526.

Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks Co. 131—Appeal of Volpi, Com.Pl., 73 Montg.Co. 217, 71 York Leg.Rec. 27.

Reason for rule

Granting of a permit and varying of a zoning restriction involve exercise of governmental power, which cannot be exercised by an officer on whom it has not been conferred, or set at naught by action of a property owner proceeding in defiance thereof.

Minn.—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 108.

From unauthorized official or board
Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

Notice or knowledge of invalidity

(1) Applicant for permit is charged with notice of its illegality.

N.J.—Giordano v. Mayor and Council of Borough of Dumont, 61 A.2d 245, 137 N.J.Law 740, 6 A.L.R.2d 956.

(2) Landowner, who contracted with zoning board for special exemption on condition from zoning regulation, would be presumed to have known of invalidity of exception and to have acted at his peril.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386.

39. N.J.—Ostrowsky v. City of Newark, 139 A. 911, 102 N.J.Eq. 169.

40. N.Y.—Lunmor Homes, Inc. v. Johnson, 122 N.Y.S.2d 149.

41. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504.

Minn.—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 108.

N.H.—Dumais v. Somersworth, 134 A.2d 700, 101 N.H. 111.

N.J.—Adler v. Department of Parks & Public Property, Town of Irvington, 89 A.2d 704, 20 N.J.Super. 240.
Pa.—Vogt v. Borough of Port Vue, 85 A.2d 688, 170 Pa.Super. 526.

42. N.Y.—Lapham v. Roulan, 169 N.Y.S.2d 346.

43. Ga.—Taylor v. Shetzen, 90 S.E. 2d 572, 212 Ga. 101.

N.Y.—Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead, 12 N.Y.S.2d 79, 257

App.Div. 843, modified on other grounds 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 84 L.Ed. 990.

44. Ind.—Civil City of Indianapolis v. Ostrom Realty & Construction Co., 176 N.E. 246, 95 Ind.App. 376.

45. Md.—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.

N.Y.—Wyler v. Eckert, 73 N.Y.S.2d 789.

46. Tex.—Edge v. City of Bellaire, Civ.App., 200 S.W.2d 224, error reversed.

Reason for rule

In enforcing a valid ordinance, city officials discharge a governmental function and city and its citizens cannot be bound or estopped by unauthorized acts of its officers in performance of such function.

Tenn.—Edge v. City of Bellaire, supra.

47. Mass.—Foss v. Wexler, 136 N.E. 243, 242 Mass. 277.

48 C.J. p 348 note 65.

48. Md.—Osborne v. Grauel, 110 A. 199, 136 Md. 88.

49. Md.—Osborne v. Grauel, supra.

50. Md.—Osborne v. Grauel, supra.

51. Mass.—Simon v. Meyer, 158 N.E. 537, 261 Mass. 178—Hanley v. Cook, 139 N.E. 654, 245 Mass. 563.

52. Mass.—Brett v. Brookline Bldg. Comr., 145 N.E. 269, 250 Mass. 73, followed in Bamel v. Brookline Bldg. Comr., 145 N.E. 272, 250 Mass. 82.

Tenn.—Hickerson v. Flannery, 302 S. W.2d 508.

Retroactive operation of provisions generally see supra § 221.

53. Mass.—Todd v. Board of Appeals of Yarmouth, 148 N.E.2d 380.

Use permit held personal

Where board of appeals' decision recited that petitioner requested per-

not be, an adjudication of rights in and to property⁵⁴ or of the mutual rights of property owners who are not parties to the proceeding.⁵⁵

Although there is authority to the contrary,⁵⁶ it is generally held that a building permit has none of the elements of a contract.⁵⁷ It has accordingly been held that a permit does not require the owner to erect the building but merely permits him to do so;⁵⁸ and, even though the owner has started erection of the building, he may stop before its completion and cannot be compelled to go on.⁵⁹

The function of a zoning or building permit or certificate is to evidence the permittee's compliance with the ordinances and regulations and that the structure or use is permissible in the light thereof.⁶⁰ It can confer no greater rights on the permittee than the ordinance or act under which it was issued.⁶¹ Its issuance does not alter or amend the building or zoning codes or ordinances,⁶² and it will not confer on the permittee the right to erect buildings in violation of, or not in conformity with, a zoning act or code.⁶³

The granting of a special use permit extending an area previously zoned for a particular use so as to embrace adjacent property zoned for a different use does not constitute spot zoning,⁶⁴ nor does the

grant of a special permit for a specific purpose, as authorized by the zoning ordinance or law constitute spot zoning.⁶⁵ So, the granting of a permit authorizing the construction and operation of a particular type of building, as authorized by the zoning laws or ordinances, does not constitute a rezoning or the granting of a variance.⁶⁶

A zoning permit or certificate duly issued by an administrative body or official of a municipality is binding on all agencies thereof until set aside by a proper authority or by the courts,⁶⁷ and it may not be collaterally attacked.⁶⁸ Where, however, the permit was illegally issued, as where it clearly was not authorized by, or in compliance with, the zoning enactments, it may be collaterally attacked.⁶⁹ The rights which a permittee has under a preliminary permit issued to him are not waived by his application for a final permit.⁷⁰

§ 240. — Time for Exercise of Privilege

The time for starting or completing the work under a zoning or building permit or certificate may be limited; where no time is fixed for the exercise of the privilege granted under a permit, it must be exercised within a reasonable time.

The time within which work under a zoning or building permit must start, or be completed, or a

mit, that extension of existing permit was not detrimental, and that grant of permit did not contemplate expansion beyond owner's existing bounds, but there was no finding that statutory requirement for granting of variance had been met, even though decision stated that board authorized variance and that variance ran only to petitioner, a permit and not a variance was granted, permit was personal, and there was no existing grant which was available to any other occupant of petitioner's land.

Mass.—Todd v. Board of Appeals of Yarmouth, *supra*.

54. N.Y.—Nemet v. Edgemere Garage & Sales Co., 73 N.Y.S.2d 921.

55. Okl.—Weaver v. Bishop, 52 P. 2d 853, 174 Okl. 492.

56. Tex.—Brown v. Grant, Civ.App., 2 S.W.2d 285.

57. Ark.—Corpus Juris quoted in Tankersley Bros. Industries, Inc. v. City of Fayetteville, 296 S.W.2d 412, 415, 227 Ark. 130.

Iowa.—Rehmann v. City of Des Moines, 215 N.W. 957, 204 Iowa 798, 55 A.L.R. 430.

Ohio.—Santangelo v. City of Cincinnati, 25 Ohio N.F.N.S., 49.

Pa.—Commonwealth v. Devlin, 158 A. 161, 305 Pa. 440.

Tenn.—Corpus Juris quoted in Howe Realty Co. v. City of Nashville, 141 S.W.2d 904, 906, 176 Tenn. 405. 43 C.J. p 349 note 82.

58. Pa.—Commonwealth v. Devlin, 158 A. 161, 305 Pa. 440.

59. Pa.—Commonwealth v. Devlin, *supra*.

60. Okl.—Weaver v. Bishop, 52 P. 2d 853, 174 Okl. 492.

Pa.—Foster v. Daugherty, Com.Pl., 59 Dauph.Co. 243—Robb v. Luria Engineering Corp., Com.Pl., 25 Lehigh L.J. 330.

Certificate of occupancy

(1) Is evidence only of permissible legal use of premises, not what actual use was or is.

N.Y.—Loriole v. Walker, 130 N.Y.S. 2d 776, 205 Misc. 1038.

(2) Constitutes a tangible manifestation of proper use of one's property in accordance with zoning ordinance and is not a license promulgated without legislative sanction granted under statute dealing with issuance of licenses in other situations.

N.J.—Honigfeld v. Byrnes, 103 A.2d 598, 14 N.J. 600.

61. N.H.—Dumais v. Somersworth, 134 A.2d 700, 101 N.H. 111.

62. Mo.—H. B. Deal & Co. v. Kuhlmann, App., 244 S.W.2d 390.

63. Md.—Board of Com'rs of Anne

Arundel County v. Snyder, 46 A.2d 639, 186 Md. 342.

Mo.—H. B. Deal & Co. v. Kuhlmann, App., 244 S.W.2d 390.

N.J.—Pequannock Tp. v. De Wilde, 91 A.2d 410, 21 N.J.Super. 517.

64. Ga.—Neal v. City of Atlanta, 94 S.E.2d 867, 212 Ga. 687.

Spot zoning defined see *supra* § 34.

65. Kan.—Duggins v. Board of County Com'rs in Johnson County, 293 P.2d 258, 179 Kan. 101.

66. Mass.—Burnham v. Board of Appeals of Gloucester, 128 N.E.2d 772, 333 Mass. 114.

67. N.Y.—Robitzek Investing Co. v. Colonial Beacon Oil Co., 40 N.Y.S. 2d 819, 265 App.Div. 49, motion denied 42 N.Y.S.2d 922, 266 App.Div. 775, motion denied 50 N.E.2d 555, 291 N.Y. 830.

Pa.—Robb v. Luria Engineering Corp., Com.Pl., 25 Lehigh L.J. 330.

68. N.Y.—Robitzek Investing Co. v. Colonial Beacon Oil Co., 40 N.Y.S. 2d 819, 265 App.Div. 49, motion denied 42 N.Y.S.2d 922, 266 App.Div. 775, motion denied 50 N.E.2d 555, 291 N.Y. 830.

69. N.J.—Jantausch v. Borough of Verona, 124 A.2d 14, 41 N.J.Super. 89, affirmed 131 A.2d 881, 24 N.J. 326.

70. Pa.—Herskovits v. Irwin, 149 A. 195, 299 Pa. 155.

portion thereof be completed, may be limited, in which case the permit expires by limitation where the work is not commenced or completed within the required time.⁷¹ Where a use permit is granted for a limited period of time, the use becomes illegal after the expiration of the prescribed period.⁷² A permit which fixes no time must be exercised within a reasonable time after its issuance,⁷³ and a non-user of the permit for an unreasonable time may work a forfeiture of all right to exercise the permit.⁷⁴

Where the permit is revocable only for cause, if the construction begins within a stated period of time, and the permit is arbitrarily withheld until issued in obedience to a final judgment in mandamus, applicant is entitled to an extension of time from the final determination of the mandamus suit within which to begin construction of the building;⁷⁵ such period of extension is the same as that specified by the building regulation under which construc-

tion must be begun.⁷⁶

§ 241. — Construction; Privileges Embraced

The privileges granted by a zoning or building permit or certificate is determined by the application, the decision thereon, and the language of the permit itself; a permit cannot be extended to privileges not embraced by it; nor can a building permit authorize violation of a zoning ordinance.

The privilege granted by a zoning or building permit is determined by the application and the decision thereon, and by the language of the permit.⁷⁷ Generally, plain and unambiguous words in a permit must be construed in their ordinary sense.⁷⁸ Prima facie, a permit or certificate authorizes the person to whom it is issued to construct, alter, or use the property in the manner specified therein,⁷⁹ but it must be strictly confined thereto and does not confer the right to exercise or pursue other distinct privileges or acts,⁸⁰ or authorize the construction of a build-

71. N.J.—Sun Oil Co. v. Borough of Bradley Beach, 55 A.2d 778, 136 N. J. Law 307, affirmed 61 A.2d 236, 142 N.J. Eq. 722.

Permits subject to time limitation

Zoning ordinance voiding building permits issued by administrative officer if the operations authorized thereunder are not commenced within sixty days after date of permit was held not applicable to special permit authorized under statute and ordinance reasonably to extend non-conforming uses already existing. Mass.—La Charite v. Board of Appeals of Lawrence, 99 N.E.2d 66, 327 Mass. 417.

Renewal

A building permit, which became invalid on failure to commence construction thereunder within three months, could not be renewed more than two and one-half years later. N.J.—Kurowski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J. Super. 433.

Failure to complete due to suspension orders

Building permit was held to expire for failure to perform specified portion of work within required time, notwithstanding failure of required construction progress was due to repeated suspension orders issued in connection with petition for rezoning area within which proposed building site was located.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

Period held reasonable

N.J.—Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J. Law 190.

72. Pa.—Lower Merion Tp. v. 34

Derwen Road, 80 A.2d 797, 367 Pa. 265.

73. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 85 C.A.2d 776.

Mass.—Hanley v. Cook, 139 N.E. 654, 245 Mass. 563.

74. Mass.—Hanley v. Cook, supra.

75. La.—Shreveport v. Dickason, 107 So. 427, 160 La. 563.

76. La.—Shreveport v. Dickason, supra.

77. Ark.—Tankersley Bros. Industries, Inc. v. City of Fayetteville, 296 S.W.2d 412, 227 Ark. 130.

N.Y.—Pilling v. Davison, 80 N.Y.S.2d 97, affirmed 35 N.Y.S.2d 163, 264 App. Div. 737, appeal denied 36 N.Y.S.2d 240, 264 App. Div. 731.

Pa.—In re Anderle, 39 A.2d 829, 350 Pa. 589.

Tex.—Ikard v. City of Henrietta, Civ. App., 33 S.W.2d 578.

Permit for religious use

Provision in permit granting use of building for religious purposes was construed to allow congregation's corporate meetings, sisterhood and men's club meetings, and Boy Scout and Girl Scout meetings.

N.Y.—Application of Garden City Jewish Center, 157 N.Y.S.2d 435.

78. Mass.—Whittaker v. Town of Brookline, 60 N.E.2d 85, 318 Mass. 9.

Refusal to modify language of permit

Fact that board declined to change language of its decision granting permission to use building for religious purposes was not tantamount to giving that language restricted meaning which religious body asking change claimed to fear.

N.Y.—Application of Garden City Jewish Center, 157 N.Y.S.2d 435.

79. Ark.—City of Little Rock v. Griffin, 210 S.W.2d 915, 213 Ark. 465. N.Y.—MacMillan v. McCaffrey, 106 N.Y.S.2d 673, 201 Misc. 574.

Pa.—Sheldrake v. Upper Darby, Com. Pl., 28 Del. Co. 46.

Tex.—Ikard v. City of Henrietta, Civ. App., 33 S.W.2d 578.

Use impliedly permitted

A permit to make additions to frame church at designated location in residential district implied, at least prima facie, permission to use such building for church purposes. Ga.—New Mission Baptist Church v. City of Atlanta, 37 S.E.2d 377, 200 Ga. 518.

Immaterial variations

Where defendant constructed commercial building under permit from, and supervision of, city and operated wholesale business for four months, and adjoining property owners complained that defendant's trucks were parking in street in front of their houses, it made no material difference whether business operated there was wholesale or retail.

Ark.—Tankersley Bros. Industries, Inc. v. City of Fayetteville, 296 S.W.2d 412, 227 Ark. 130.

80. Conn.—State v. Hillman, 147 A. 294, 110 Conn. 92.

Kan.—Fink v. Smith, 36 P.2d 976, 149 Kan. 345.

Mich.—West Bloomfield Tp. v. Chapman, 88 N.W.2d 377, 351 Mich. 606.

N.J.—Honigfeld v. Byrnes, 103 A.2d 598, 14 N.J. 600.

N.Y.—Application of Furman Ave. Realty Corporation, 87 N.Y.S.2d

ing which does not conform therewith.⁸¹

A building permit obtained for building a structure to use for a particular purpose does not permit the use of the structure for another purpose without the permission of the authorized official or board,⁸² but the fact that the owner at the time of applying for the permit entertained, and later executed, an intent to use the structure for a forbidden purpose does not preclude him from using it for permissible purposes as long as the permit is in effect.⁸³ Permission to remove a building does not authorize alterations thereof without obtaining a permit;⁸⁴ nor does it authorize the permittee to locate it in a position unlawful under an ordinance.⁸⁵

With respect to the privilege intended to be conferred by the permit, the permittee is chargeable with knowledge of existing zoning ordinances at

the time of issuance and of the fact that city officers and agents have no authority to disregard them.⁸⁶ A building permit or certificate of occupancy issued by an administrative official or body cannot authorize, condone, or afford immunity for the violation of a zoning ordinance,⁸⁷ and a person does not acquire any rights under a permit which goes beyond the authority contained in the zoning ordinance or act under which it was issued.⁸⁸

The question whether certain conditions were attached to the granting of a permit cannot always be determined solely from the terms of the permit; and, in a proper case, extraneous evidence may be considered.⁸⁹ The fact that a building permit requires the owner to build a certain number of feet from the sidewalk does not give the owner any right to have other lots similarly restricted, and the owner is not damaged by the abandonment of such line.⁹⁰

693, 275 App.Div. 779, affirmed 87 N.E.2d 676, 299 N.Y. 768.
43 C.J. p 350 note 10.

Parking area

Permit for beach club was held not to include parking area, where club had adequate parking area directly across street from club house. N.Y.—Capri Beach Club, Inc. v. Town of Hempstead, 170 N.Y.S.2d 68.

Authorization of permit to maintain owners' boats in residential district not support application of subsequent occupant to use premises for sales and service of boats, motors, and boating and fishing equipment. Mass.—Todd v. Board of Appeals of Yarmouth, 143 N.E.2d 380.

81. Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207.

82. Idaho.—City of Idaho Falls v. Grimmer, 117 P.2d 461, 63 Idaho 90.

Md.—Baltimore City v. Scott, 101 A. 674, 131 Md. 228.

Mass.—Beane v. H. K. Porter, Inc., 182 N.E. 823, 280 Mass. 538.
42 C.J. p 1307 note 43.

"Tool shed"

Where owner submitted to township authorities plan for erection of a "tool shed" and stated that building was to be used for agricultural purposes only and owner subsequently used building for manufacturing purposes owner could claim no rights by building permit.

Mich.—West Bloomfield Tp. v. Chapman, 88 N.W.2d 377, 351 Mich. 606.

83. Ky.—City of Louisville v. Koenig, 162 S.W.2d 19, 290 Ky. 562, 140 A.L.R. 1369.

84. N.Y.—Hurwitz v. Moore, 116 N.Y.S. 248, 132 App.Div. 29.

Reason for rule

Permission to move a building across a highway and permission to make alterations thereto are independent; neither is a condition precedent to the grant of the other. N.Y.—Hurwitz v. Moore, supra.

85. Mo.—City of Maplewood v. Provost, App., 25 S.W.2d 142.

86. Idaho.—City of Idaho Falls v. Grimmer, 117 P.2d 461, 63 Idaho 90.

87. Cal.—Ex parte Ruppe, 252 P. 746, 80 C.A. 629.

Ill.—City of Chicago v. Reuter Bros. Iron Works, 41 N.E.2d 213, 314 Ill. App. 315.

Ind.—Civil City of Indianapolis v. Ostrom Realty & Construction Co., 176 N.E. 246, 95 Ind.App. 376.

Mass.—Inspector of Buildings of Burlington v. Murphy, 68 N.E.2d 918, 320 Mass. 207—Cochran v. Roemer, 192 N.E. 58, 287 Mass. 500.

N.Y.—Marcus v. Village of Mamaroneck, 28 N.E.2d 856, 283 N.Y. 325.

S. B. Garage Corp. v. Murdock, 55 N.Y.S.2d 456, 135 Misc. 55—Gordon v. Board of Appeals of City of Schenectady, 225 N.Y.S. 680, 131 Misc. 346.

Stillbar Const. Co. v. Town of Harrison, 143 N.Y.S.2d 804—Wyller v. Eckert, 73 N.Y.S.2d 789—Inzerilli v. Pitney, 30 N.Y.S.2d 129.

Pa.—Appeal of Krinks, 194 A. 231, 128 Pa.Super. 405, affirmed 2 A.2d 700, 332 Pa. 236.

Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

No estoppel

Generally, a municipality is not precluded from enforcing a zoning or fire limit regulation by fact that one or more of its officers or servants has exceeded his authority by issuing a permit contravening terms of such regulation, notwithstanding permit holder has proceeded thereunder to his detriment before municipality seeks to enforce regulation against him.

Conn.—Fallman v. Town of East Haven, 67 A.2d 560, 135 Conn. 593.

88. N.Y.—Stillbar Const. Co. v. Town of Harrison, 143 N.Y.S.2d 804.

Approval of plans

If building inspector's approval of plans for building containing professional office suite constituted permission to construct professional office in building, such permission could not sanction a use not authorized by town zoning ordinance.

N.Y.—Stillbar Const. Co. v. Town of Harrison, supra.

89. Cal.—Sovereign Oil Corporation v. Fenton, 114 P.2d 18, 45 C.A.2d 412.

Statutory limitations

Question whether limitations prescribed by statute on reserved power and authority vested in city commission with respect to artesian wells were written into permit to drill wells granted to a corporation was immaterial, since statutory provisions became part of contract and permit just as effectually as if they had been written into them.

Fla.—National Container Corporation v. State ex rel. Stockton, 189 So. 4, 138 Fla. 32, 122 A.L.R. 1000.

90. Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.

§ 242. — Transfer of Rights

In so far as the right conferred by a zoning or building permit or certificate is a personal privilege it is not assignable, but to the extent that it is a grant which attaches to the land, it runs with the land and passes as an incident thereto on a conveyance thereof.

A zoning or building permit, in so far as it is a personal privilege, as discussed supra § 239, is not assignable,⁹¹ and it must be exercised by the grantee.⁹² To the extent that it is a grant, however, it attaches to the land when exercised,⁹³ runs with the land,⁹⁴ and passes as an incident thereto on a conveyance of the land.⁹⁵ Under this rule, the successor in title to an owner who has a vested right based on substantial construction or work which took place prior to the amendment of a zoning act or ordinance succeeds to that right.⁹⁶

Special use permits under zoning ordinances or

other enactments run with the land,⁹⁷ and a permittee's interest in the permit may be assigned to the owner of the property.⁹⁸ Similarly, a certificate of occupancy permitting the use of a building for a particular purpose inures to the benefit of a purchaser.⁹⁹

§ 243. — Vested or Property Rights

The mere issuance of a zoning or building permit or certificate gives no vested or property rights to the permittee, but after he has acted on the faith of a permit validly issued, and incurred expenses or obligations in reliance thereon, he acquires a vested or property right.

The mere issuance of a permit gives no vested rights to the permittee,¹ nor does he acquire a property right in the permit.² The mere fact that a permit has been issued does not exempt the property from the operation of subsequent ordinances and regulations legally enacted,³ where the permittee

91. Mass.—Simon v. Meyer, 158 N. E. 537, 261 Mass. 178—Hanley v. Cook, 139 N.E. 654, 245 Mass. 563.

92. Mass.—Hanley v. Cook, supra.

93. Mass.—Hanley v. Cook, supra—Quinn v. Middlesex Electric Light Co., 3 N.E. 204, 140 Mass. 109.

94. Mass.—Hanley v. Cook, 139 N.E. 654, 245 Mass. 563.

Tenn.—Corpus Juris Secundum cited in Hickerson v. Flannery, 302 S.W. 2d 508, 514.

95. Mass.—Todd v. Board of Appeals of Yarmouth, 148 N.E.2d 380.

Mass.—Hanley v. Cook, 139 N.E. 654, 245 Mass. 563—Quinn v. Middlesex Electric Light Co., 3 N.E. 204, 140 Mass. 109.

Successor in ownership and occupancy is entitled to benefits granted by permit authorizing particular use of property.

Mich.—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 386 Mich. 702.

96. N.Y.—Elsinore Property Owners Ass'n v. Morwand Homes, 146 N.Y.S.2d 78, 286 App.Div. 1105.

97. Cal.—Cohn v. County Bd. of Sup'rs of Los Angeles County, 286 P.2d 836, 135 C.A.2d 180.

98. Cal.—Cohn v. County Bd. of Sup'rs of Los Angeles County, supra.

99. N.Y.—Simmons v. Pinsky, 58 N.Y.S.2d 573, 185 Misc. 549.

1. Ohio.—A. DiCillo & Sons v. Chester Zoning Bd. of Appeals, Com. Pl., 103 N.E.2d 44, motion to certify dismissed 109 N.E.2d 8, 158 Ohio St. 302.

Interpretation of zoning rule

Issuance of permit by board on basis of particular interpretation of zoning regulation does not prevent,

board from thereafter changing its interpretation.

Ohio.—A. DiCillo & Sons v. Chester Zoning Bd. of Appeals, supra.

Beer permit is not a property right, but is a mere license or privilege.

Tex.—City of Dallas v. Haworth, Civ. App., 218 S.W.2d 264.

2. Ohio.—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.

3. Ariz.—City of Tucson v. Arizona Mortuary, 272 P. 923, 34 Ariz. 495. Ark.—Corpus Juris quoted in Tankersley Bros. Industries, Inc. v. City of Fayetteville, Ark., 296 S.W.2d 412, 415, 227 Ark. 130.

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.H.—Winn v. Lamoy Realty Corp., 124 A. 211, 100 N.H. 280.

N.Y.—Fairchild Sons v. Rogers, 282 N.Y.S. 916, 246 App.Div. 555.

Atlas v. Dick, 81 N.Y.S.2d 126, 192 Misc. 843, reversed on other grounds 86 N.Y.S.2d 231, 275 App. Div. 670, affirmed 87 N.E.2d 55, 299 N.Y. 654.

Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 153 N.Y.S.2d 306, 3 A.D.2d 663.

Okl.—Hud Oil & Refining Co. v. Oklahoma City, 30 P.2d 169, 167 Okl. 457—Corpus Juris quoted in C. C. Julian Oil & Royalties Co. v. Oklahoma City, 29 P.2d 952, 953, 167 Okl. 334.

Pa.—Sunnybrook, Inc., v. Upper Dublin Tp., 69 Pa. Dist. & Co. 344, 65 Montg.Co. 233.

Tenn.—Corpus Juris quoted in Howe

Realty Co. v. City of Nashville, 141 S.W.2d 904, 906, 176 Tenn. 405.

43 C.J. p 349 note 86.

Ordinance expressly not retroactive

Ordinance amending previous zoning ordinance providing that provisions were not retroactive as to existing permits did not preclude erection of building under permit theretofore issued.

Cal.—London v. Robinson, 271 P. 921, 94 C.A. 774.

Extension of fire limits

The property of a permittee may be made subject to an ordinance or regulation extending the fire limits. Ark.—Wilder v. Little Rock, 234 S.W. 479, 150 Ark. 439.

Partial permits

(1) Issuance of permits for construction of part of a building pending issuance of a permit for entire structure confers no assurance that total construction permit will be issued, except in those cases where builder can establish vested rights to such permit.

N.Y.—Riverdale Community Planning Ass'n v. Crinnion, 133 N.Y.S.2d 706, affirmed 141 N.Y.S.2d 510, 285 App.Div. 1047, appeal dismissed 133 N.E.2d 839, 1 N.Y.2d 689, 150 N.Y.S.2d 616.

(2) In cases where zoning ordinances have been amended so as to render projected buildings, construction on which has been begun without permits to complete, nonconforming, it is only where work of a substantial character has been commenced prior to amendment that amended ordinance will be declared inoperative as affecting vested rights. N.Y.—Riverdale Community Planning Ass'n v. Crinnion, supra.

Day before annexation by village

Building permit issued by county day before annexation of area to a

has not commenced to operate thereunder, made substantial expenditures, or incurred substantial obligations in reliance thereon.⁴

Where, however, the proper authorities grant a zoning or building permit or certificate, after the permittee has acted on the faith of the permit and made contracts and incurred expenses or obligations in reliance thereon, he acquires a property or vested right⁵ on which he is entitled to protection,⁶ even though, by reason of subsequent changes in the zoning acts or ordinances, the privilege or use granted

becomes a prohibited or nonconforming privilege or use.⁷

§ 244. Revocation, Nullification, or Change

In general, a permit or certificate under the zoning laws is subject to revocation or to the operation of subsequent ordinances or regulations where the permittee has not acquired any vested right thereunder; but where he has acquired such right, the permit may not be revoked.

It is generally held that a permit or certificate under the zoning laws may be changed or entirely revoked⁸ if it becomes necessary so to change or revoke it in the exercise of the police power,⁹ even

village which, concurrently with annexation of area, enacted a zoning ordinance prohibiting structure authorized by permit gave permittee no vested rights.

Ohio.—Williams v. Village of Deer Park, 69 N.E.2d 536, 78 Ohio App. 231.

4. Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.H.—Winn v. Lamoy Realty Corp., 124 A.2d 211, 100 N.H. 280.

N.Y.—Rice v. Van Vranken, 232 N.Y.S. 506, 225 App.Div. 179, affirmed 175 N.E. 304, 255 N.Y. 541.

Klanof v. Watson, 156 N.Y.S.2d 881.—Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D.2d 663.—Halpern v. Dassler, 135 N.Y.S.2d 8.—Application of Kunz, 128 N.Y.S.2d 680.

Ohio.—Santangelo v. City of Cincinnati, 25 Ohio N.P., N.S., 49.

Pa.—Appeal of Clarke, 37 Pa. Dist. & Co. 670.

5. Ark.—Corpus Juris Secundum cited in Tankersley Bros. Industries, Inc. v. City of Fayetteville, 296 S.W.2d 412, 415, 227 Ark. 130.

Ill.—Deer Park Civic Ass'n v. City of Chicago, 106 N.E.2d 823, 347 Ill. App. 346.

Iowa.—Crow v. Board of Adjustment of Iowa City, 288 N.W. 145, 227 Iowa 324.

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.J.—Sun Oil Co. v. City of Clifton, 84 A.2d 555, 16 N.J. Super. 265.

N.Y.—Glenel Realty Corp. v. Worthington, 164 N.Y.S.2d 635, 4 A.D.2d 702, appeal dismissed 145 N.E.2d 880, 3 N.Y.2d 934, 167 N.Y.S.2d 939.—Elsinore Property Owners Ass'n v. Morwand Homes, 146 N.Y.S.2d 78, 286 App.Div. 1105.

Atlas v. Dick, 81 N.Y.S.2d 126,

192 Misc. 843, reversed on other grounds 88 N.Y.S.2d 231, 275 App. Div. 670, affirmed 87 N.E.2d 55, 299 N.Y. 654.

Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D.2d 663.—Application of Kunz, 128 N.Y.S.2d 680.

Pa.—Appeal of Dunlap, 87 A.2d 299, 370 Pa. 31.—Herskovits v. Irwin, 149 A. 195, 299 Pa. 155.

Appeal of Myers, Co., 193 Pittsb. Leg. J. 310.—Appeal of Atlantic Refining Co., Com. Pl., 66 York Leg. Rec. 81.

S.C.—Corpus Juris cited in Pendleton v. City of Columbia, 40 S.E.2d 499, 501, 209 S.C. 394.

Tex.—Corpus Juris cited in Gulf Refining Co. v. City of Dallas, Civ. App., 10 S.W.2d 151, 156, error dismissed.

43 C.J. p 349 note 83.

Express provision in statute or ordinance.

Mass.—Watertown Bldg. Inspector v. Nelson, 153 N.E. 798, 267 Mass. 346.

Validation by subsequent ordinance
Zoning ordinance did not affect previously issued building permit, where subsequent ordinance validated outstanding permits substantially complied with.

La.—St. Bernard Oil Co. v. City of New Orleans, 115 So. 817, 165 La. 665.

6. Ark.—Corpus Juris Secundum cited in Tankersley Bros. Industries, Inc. v. City of Fayetteville, 296 S.W.2d 412, 415, 227 Ark. 130.

Iowa.—Crow v. Board of Adjustment of Iowa City, 288 N.W. 145, 227 Iowa 324.

N.Y.—Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D.2d 663.

Pa.—Herskovits v. Irwin, 149 A. 195, 299 Pa. 155.

S.C.—Corpus Juris cited in Pendleton v. City of Columbia, 40 S.E.2d 499, 501, 209 S.C. 394.—Corpus Juris quoted in Willis v. Town of Woodruff, 20 S.E.2d 699, 701, 200 S.C. 266.

Tex.—Corpus Juris cited in Gulf Refining Co. v. City of Dallas, Civ. App., 10 S.W.2d 151, 156, error dismissed.

43 C.J. p 349 note 83.

7. Ill.—Deer Park Civic Ass'n v. City of Chicago, 106 N.E.2d 823, 347 Ill. App. 346.

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.Y.—Glenel Realty Corp. v. Worthington, 164 N.Y.S.2d 635, 4 A.D.2d 702, appeal dismissed 145 N.E.2d 880, 3 N.Y.2d 934, 167 N.Y.S.2d 939.
Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D.2d 663.—Larson v. Howland, 108 N.Y.S.2d 231.

8. Ark.—Corpus Juris Secundum cited in Tankersley Bros. Industries, Inc. v. City of Fayetteville, Ark., 296 S.W.2d 412, 415, 227 Ark. 130.

Mo.—Corpus Juris Secundum cited in Fleming v. Moore Brothers Realty Co., 251 S.W.2d 8, 363 Mo. 305.

Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

N.J.—Kensington Realty Holding Corporation v. Jersey City, 191 A. 787, 118 N.J. Law 114, affirmed 198 A. 691, 119 N.J. Law 338.

N.Y.—Application of Kunz, 128 N.Y.S.2d 680.

Ohio.—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.

Pa.—Sheldrake v. Upper Darby, Com. Pl., 28 Del. Co. 46.—Moyerman v. Glanzberg, Com. Pl., 73 Montg. Co. 212.

43 C.J. p 349 note 83.

9. Ark.—Corpus Juris Secundum cited in Tankersley Bros. Industries, Inc. v. City of Fayetteville, 296 S.W.2d 412, 415, 227 Ark. 130.

Ohio.—State v. Rendigs, 120 N.E. 836, 93 Ohio St. 251.

Tenn.—Corpus Juris quoted in Howe Realty Co. v. City of Nashville, 141 S.W.2d 904, 906, 176 Tenn. 405.

though it is based on a valuable consideration,¹⁰ at least where the permittee has not commenced work thereunder or incurred substantial expense or obligations on the faith of it.¹¹ Thus, a permit may be revoked where no vested right has been acquired thereunder and a subsequent change in the zoning laws or regulations is made which prohibits the permitted use or construction or under which the permit would not be authorized;¹² and a use permit may be changed after a building permit is granted, provided the proposed use is not prohibited.¹³

The authorities, however, do not possess unlimited discretion in the matter of revoking permits.¹⁴

A permit which the inspector cannot rightfully refuse in the first instance cannot be arbitrarily revoked;¹⁵ and a zoning board or commission may not refuse an applicant a use permit in order to prevent him from exercising privileges held by him under a prior validly issued zoning permit.¹⁶ Furthermore, a permit properly obtained and under which the permittee has commenced to operate or has incurred substantial expense or obligations cannot be revoked arbitrarily, without cause,¹⁷ because of subsequent changes in the zoning laws,¹⁸ in the absence of fraud or deceit or other fault on the part of applicant¹⁹ or in the absence of any public ne-

Tex.—City of San Antonio v. Robert Thompson & Co., Civ.App., 30 S.W.2d 339, error dismissed Robert Thompson & Co. v. City of San Antonio, Com.App., 44 S.W.2d 972.

10. Ark.—Corpus Juris Secundum cited in Tankersley Bros. Industries, Inc. v. City of Fayetteville, Ark., 296 S.W.2d 412, 415, 227 Ark. 130.

Ohio.—State v. Rendigs, 120 N.E. 886, 98 Ohio St. 251.

11. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 85 C.A.2d 776.

Iowa.—Call Bond & Mortgage Co. v. Sioux City, 259 N.W. 33, 219 Iowa 572.

Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 Md. 623.

Mo.—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S. Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

N.H.—Winn v. Lamoy Realty Corp., 124 A.2d 211, 100 N.H. 280.

N.Y.—Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D.2d 663—Halpern v. Dassler, 135 N.Y. S.2d 8.

Ohio.—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.

12. N.Y.—Huron Place Corp. v. Schnieder, 159 N.Y.S.2d 733, 3 A.D. 2d 722.

Pa.—Appeal of Hertrick, 137 A.2d 310, 391 Pa. 148.

Prior to substantial investment or expenditure

N.J.—Roselle v. Mayor and Council of Borough of Moonachie, 139 A.2d 42, 49 N.J.Super. 35.

Expenditures and work held insufficient to give vested right

Where last portion of realty was acquired by petitioner, plans for apartments were submitted to building official of city, piling plan was submitted, and building permit was issued by building official, and petitioner promptly caused realty to be cleared of large trees and surface waters to be removed, architect's

fee in substantial sum was incurred, test borings were made, public liability policy was furnished to city, required fee for permit had been paid, and commitment for substantial mortgage was obtained, and new zoning ordinance of city became effective, building official was authorized to revoke permit on ground that substantial portion of building construction was not under way when new zoning ordinance became effective.

N.Y.—Halpern v. Dassler, 135 N.Y.S.2d 8.

13. N.Y.—Horwitz v. Schwab, 224 N.Y.S. 41, 130 Misc. 448.

14. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 85 C.A.2d 776.

15. N.J.—Freeman v. Hague, 147 A. 553, 166 N.J.Law 137.

Dornbusch v. Board of Adjustment of City of Newark, 180 A. 552, 13 N.J.Misc. 779, affirmed 189 A. 52, 117 N.J.Law 424.

N.Y.—Jewell v. Murphy, 229 N.Y.S. 754, 224 App.Div. 763.

Van Auken v. Kimmey, 252 N.Y. S. 329, 141 Misc. 105.

Pa.—Shapiro v. Zoning Bd. of Adjustment, 105 A.2d 299, 377 Pa. 621—Herskovits v. Irwin, 149 A. 195, 299 Pa. 155.

Appeal of Myers, Co., 103 Pittsb. Leg.J. 310.

16. Va.—Hopkins v. O'Meara, 89 S. E.2d 1, 197 Va. 202.

17. Ark.—Tankersley Bros. Industries, Inc. v. City of Fayetteville, 296 S.W.2d 412, 227 Ark. 130.

Ill.—Deer Park Civic Ass'n v. City of Chicago, 106 N.E.2d 823, 347 Ill. App. 346.

N.H.—Winn v. Lamoy Realty Corp., 124 A.2d 211, 100 N.H. 280.

N.J.—Jantausch v. Borough of Verona, 124 A.2d 14, 41 N.J.Super. 89, affirmed 131 A.2d 881, 24 N.J. 326—Sun Oil Co. v. City of Clifton, 84 A.2d 555, 16 N.J.Super. 265.

N.Y.—Ageloff v. Young, 122 N.Y.S.2d 46, 282 App.Div. 707.

Kianof v. Watson, 156 N.Y.S.2d 881.

Pa.—Sun Oil Co. v. Schofield, 17 Pa. Dist. & Co. 313.

Hall v. Board of Adjustment, Com.Pl., 37 Del.Co. 58.

S.C.—Pendleton v. City of Columbia, 40 S.E.2d 499, 209 S.C. 394—Willis v. Town of Woodruff, 20 S.E.2d 699, 200 S.C. 266.

Distinguished from license

A building permit duly and legally issued by a municipality is more than a mere "license" revocable at the will of the licensor.

Iowa.—Crow v. Board of Adjustment of Iowa City, 288 N.W. 145, 227 Iowa 324—Rehmann v. Des Moines, 204 N.W. 267, 200 Iowa 286.

18. Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.Y.—Elsinore Property Owners Ass'n v. Morwand Homes, 146 N.Y.S.2d 78, 286 App.Div. 1105.

Pa.—Appeal of A. N. "Ab" Young Co., 61 A.2d 839, 360 Pa. 429.

19. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 85 C.A.2d 776.

Iowa.—Call Bond & Mortgage Co. v. Sioux City, 259 N.W. 33, 219 Iowa 572.

Mich.—Sandenburgh v. Michigamme Oil Co., 228 N.W. 707, 249 Mich. 372.

N.J.—Jantausch v. Borough of Verona, 124 A.2d 14, 41 N.J.Super. 89, affirmed 131 A.2d 881, 24 N.J. 326—Sun Oil Co. v. City of Clifton, 84 A.2d 555, 16 N.J.Super. 265.

Atlantic Broadcasting Co. v. Wayne Tp., 162 A. 631, 109 N.J. Law 442.

Seashore Realty Co. v. Ocean City, 173 A. 612, 12 N.J.Misc. 623—Horwitz v. Jones, 171 A. 552, 12 N.J.Misc. 375—Pabst v. Ferner, 151 A. 368, 8 N.J.Misc. 621—Kornylak v. Hague, 150 A. 669, 8 N.J.Misc. 481—Lehigh Valley R. Co. v. Jersey City, 144 A. 578, 7 N.J.Misc.

cessity for such action.²⁰

To the extent that a conflict appears in the cases on the question of power to revoke a permit after work has been commenced, it has been said that the cases appear to turn on the degree of construction completed at the time the revocation is attempted, it being suggested that the weight of authority would support the rule that, if work was no more than barely begun, the permit is subject to revocation, but it cannot be revoked if a substantial part of the work has been performed.²¹

Some authorities have held that a permittee cannot acquire a vested right against the police power of the state or municipality,²² but even under

this view it is held that, if the municipality has no power to regulate the construction of buildings existing at the time of the enactment of an ordinance, such ordinance cannot nullify or authorize the revocation of a permit for a building already constructed.²³

Estoppel. In some cases it is held that the local authority which issued the permit is estopped to revoke it where the permittee has commenced to operate or incurred substantial expense;²⁴ and, conversely, it is also held that the permit may be revoked where the elements of equitable estoppel are not present,²⁵ as where the permittees had notice before they commenced operations that the people disapproved of the permit and an election was held

154, affirmed 147 A. 555, 106 N.J. Law 248—Citizens' Holding Co. v. Board of Adjustment of City of Newark, 144 A. 329, 7 N.J.Misc. 61—Grossman v. Jersey City, 142 A. 558, 6 N.J.Misc. 638—Nelson Bldg. Co. v. Greene, 136 A. 503, 5 N.J.Misc. 331.

N.Y.—Braun v. McGilligan, 40 N.Y.S. 2d 791, 180 Misc. 711—City of Rochester v. Olcott, 16 N.Y.S.2d 256, 173 Misc. 87—Village of Attica v. Day, 236 N.Y.S. 607, 134 Misc. 882, affirmed 243 N.Y.S. 915, 230 App.Div. 776—Pelham View Apartments v. Switzer, 224 N.Y.S. 56, 130 Misc. 545.

City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Pa.—Appeal of A. N. "Ab" Young Co., 61 A.2d 839, 360 Pa. 429—Herskovits v. Irwin, 149 A. 195, 299 Pa. 155.

Freeman v. Lansdowne Borough, Quar.Sess., 34 Del.Co. 449—Marlyn Const. Co. v. Upper Darby Tp. Officers, Com.Pl., 28 Del.Co. 297.

Tenn.—Corpus Juris quoted in Howe Realty Co. v. City of Nashville, 141 S.W.2d 904, 906, 176 Tenn. 405.

Tex.—Corpus Juris cited in Gulf Refining Co. v. City of Dallas, Civ. App., 10 S.W.2d 151, 156, error dismissed.

Wis.—Corpus Juris cited in Lindemann v. City of Kenosha, 240 N.W. 373, 375, 206 Wis. 364.

Wyo.—Wikstrom v. City of Laramie, 262 P. 22, 37 Wyo. 389, 43 C.J. p 349 note 90.

Revocable only for fraud and deceit
Tex.—City of Dallas v. Rosenthal, Civ.App., 239 S.W.2d 636, error refused no reversible error.

Failure to obtain consent of owners
Where a proper officer has issued a building permit on full showing by applicant therefor of nature and character of building and use to be made thereof, permit was not revocable for failure of applicant to procure consent of other property owners of district as promised.

Iowa.—Rehmann v. Des Moines, 204 N.W. 267, 200 Iowa 286, 40 A.L.R. 880.

S.C.—Corpus Juris quoted in Willis v. Town of Woodruff, 20 S.E.2d 699, 701, 200 S.C. 266.

Fraud held not shown

(1) Where township committee and building inspector had possession of revised map, distinctly showing number of apartments in proposed garden apartment buildings, when committee amended township zoning ordinance to permit erection of buildings and inspector issued permit, such permit will not be revoked on ground that builders palmed off revised map in place of earlier map showing fewer apartments without township officials being conscious of change.

N.J.—Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.

(2) Builders were not guilty of fraud justifying revocation of building permit, even though they substituted revised map for earlier map and misrepresented number of apartments before adoption of necessary zoning ordinance amendment and issuance of permit; in absence of evidence that reduction of number of six-room apartments and substitution of greater number of three-room apartments, without increasing size of buildings, effected any material change or that zoning ordinance or building code limited number of apartments or families.

N.J.—Springfield Tp. v. Bensley, supra.

20. Ark.—Corpus Juris Secundum cited in Tankersley Bros. Industries, Inc. v. City of Fayetteville, 296 S.W.2d 412, 415, 227 Ark. 130.

S.C.—Corpus Juris cited in Pendleton v. City of Columbia, 40 S.E.2d 499, 501, 209 S.C. 394—Corpus Juris quoted in Willis v. Town of Woodruff, 20 S.E.2d 699, 701, 200 S.C. 266.

Tenn.—Corpus Juris quoted in Howe

Realty Co. v. City of Nashville, 141 S.W.2d 904, 906, 176 Tenn. 405, 48 C.J. p 349 note 91.

21. Tenn.—Howe Realty Co. v. City of Nashville, 141 S.W.2d 904, 176 Tenn.App. 405.

22. N.Y.—Buffalo v. Chadeayne, 31 N.E. 443, 134 N.Y. 163.

23. N.Y.—Buffalo v. Chadeayne, supra, 43 C.J. p 349 note 97.

24. Fla.—Kaeslin v. Adams, 97 So. 2d 461.

Wis.—State ex rel. A. Hynek & Sons Co. v. Board of Appeals of City of Racine, 64 N.W.2d 741, 267 Wis. 309, mandate vacated on rehearing on other grounds 66 N.W.2d 623, 267 Wis. 309.

Purchase of valuable property for particular use

(1) Municipality or other local authority which permits and encourages a person to purchase valuable property for particular use and issues permit therefor may be estopped to enforce zoning ordinance or regulation, subsequently enacted, forbidding such use.

Fla.—Texas Co. v. Town of Miami Springs, 44 So.2d 808.

Pa.—Appeal of Perrine, 57 Pa.Dist. & Co. 185, 38 Mun.L.R. 132.

(2) Acquiescence by a municipality in a particular use of property over a long period of time may estop it to object to such use by innocent purchasers of the property for value.

Tex.—Town of Highland Park v. Marshall, Civ.App., 235 S.W.2d 658, error refused no reversible error.

25. Fla.—Miami Shores Village v. Wm. N. Brockway Post No. 124 of American Legion, 24 So.2d 83, 156 Fla. 485.

Municipality not estopped to revoke or nullify illegal permit see *infra* § 246.

for the purpose of defeating it.²⁶ So, a city is not estopped to revoke a permit which was obtained by deception of the applicant who expended money in converting a building in alleged reliance on the permit, since it was not the applicant who was misled, but the city;²⁷ and a letter written to the city council by the city attorney with respect to the questionable validity of a petition requesting amendment of the zoning ordinance to prohibit an owner from building a store on his property and continuing suspension of the owner's building permit does not estop the city further to interfere with the owner's building plans.²⁸

Necessity for objection by aggrieved party. Where, in the absence of any fraud or deceit on the part of the permittee, a permit for the construction or use of a building has been issued under circumstances in which the issuance of such a permit was improper although seemingly reasonably debatable, such permit will not be revoked where construction has proceeded or money has been expended on the faith of the permit and no appeal from its issuance was taken by aggrieved parties.²⁹

The vitiation of a contract between the municipality and the permittee has been held not to affect the rights of the permittee under his permit.³⁰

§ 245. — Grounds

Where an ordinance or regulation or the permit itself provides for revocation under certain circumstances, the necessary circumstances or causes must be shown to exist in order to warrant revocation.

Where an ordinance or regulation or the permit itself provides for revocation under certain circumstances, the necessary circumstances or causes must be shown to exist in order to warrant that action;³¹

but, if such circumstances are shown to exist, the permit may properly be revoked.³² Under some ordinances or acts a zoning permit may be revoked if operations thereunder are not commenced within a specified time,³³ and under others, a building inspector or administrative officer may prohibit a permittee from proceeding under a permit until he receives proper assurances that the work will be done in accordance with the laws and ordinances.³⁴ Zoning enactments and regulations specifying the conditions under which a permit may not be revoked after a change in the zoning regulations are controlling.³⁵

A permit may ordinarily be revoked if the permittee fails to comply with reasonable terms or conditions expressed in the permit,³⁶ or if the work is not performed in conformity with the statement, plans, or specifications on which the permit is issued,³⁷ at least where the departure from plans on which the permit was granted involves an extension of a nonconforming use for which no variance has been sought or granted.³⁸ A permit may be revoked for misrepresentation as to a material fact in the application on which the permit was based.³⁹ So, a permit should be vacated where it does not contain the limitations and restrictions specified by the zoning board in granting the variance under which the permit was issued.⁴⁰

A building permit validly issued in conformity with the zoning laws may not be revoked on the ground that the activity to be conducted therein will constitute a nuisance.⁴¹ The inadequacy of facilities presently available in a neighborhood will not authorize the revocation of a permit otherwise permissible under the zoning laws.⁴²

26. Fla.—Miami Shores Village v. Wm. N. Brockway Post No. 124 of American Legion, *supra*.

27. Pa.—City of Philadelphia v. Wyszynski, 112 A.2d 327, 381 Pa. 153.

28. Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

29. Fla.—State ex rel. S. A. Lynch Corp. v. Danner, 33 So.2d 45, 159 Fla. 874.

N.J.—Tim v. City of Long Branch, 47 A.2d 4, 134 N.J.Law 285, affirmed 53 A.2d 164, 135 N.J.Law 549—Freeman v. Hague, 147 A. 553, 106 N.J.Law 137.

Tex.—Rosenthal v. City of Dallas, Civ.App., 211 S.W.2d 279.

30. N.J.—Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.

31. N.Y.—People v. Kleiner, 195 N. Y.S. 711, 201 App.Div. 751. 43 C.J. p 350 note 98.

32. Ohio.—Tenbusch Realty Co. v. Vorce, 29 Ohio Cir.Ct. 145.

33. Ohio.—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.

34. N.J.—Rivera v. Hunt, 76 A.2d 842, 10 N.J.Super. 419.

35. N.Y.—Astor Village Taxpayers v. Board of Standards and Appeals of City of New York, 134 N.Y.S.2d 5.

36. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 85 C.A.2d 776.

N.Y.—Friedland v. Ingersoll, 291 N. Y.S. 32, 249 App.Div. 623.

37. Ga.—Harper v. Jonesboro, 22 S. E. 139, 94 Ga. 801. 43 C.J. p 350 note 1.

38. N.J.—Meixner v. Board of Adjustment of City of Newark, 37 A. 2d 678, 131 N.J.Law 599.

Permits for nonconforming uses see *supra* § 225.

Variances see *infra* §§ 268-319.

39. N.Y.—Ramundo v. Murdock, 39 N.Y.S.2d 824, 265 App.Div. 526, appeal denied 41 N.Y.S.2d 938, 266 App.Div. 720, motion dismissed 50 N.E.2d 246, 290 N.Y. 864, motion denied 50 N.E.2d 1020, 291 N.Y. 638, affirmed 60 N.E.2d 127, 293 N.Y. 913.

Bentrovato v. Crinnion, 133 N.Y. S.2d 120, 206 Misc. 648.

40. N.Y.—Lapham v. Roulan, 169 N. Y.S.2d 346, 10 Misc. 152.

41. Fla.—City of Jacksonville v. State ex rel. Mann, 27 So.2d 727, 153 Fla. 98.

42. N.J.—Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.

Schools and sanitation facilities
Threatened additional burdens to township's school and sewer sanita-

§ 246. ——— Illegality of Permit

A permit may be revoked, nullified, or changed where it was illegally issued.

A permit may be revoked or nullified where it was illegally issued, as where it was unauthorized, or violates or does not comply with, or conform to, the zoning laws,⁴³ or where it was issued under a mistake of fact.⁴⁴ This rule applies where the permittee has not changed his position in reliance on the permit,⁴⁵ or has expended only small amounts in

reliance thereon.⁴⁶ It also applies even though the permittee has acted on the permit,⁴⁷ as where he has incurred substantial expenses or obligations in reliance thereon,⁴⁸ or although the building has been used for a considerable period in the manner purported to be allowed by the invalid permit or certificate,⁴⁹ or obligations were incurred prior to the issuance of the permit in reliance on the assurance that it would be issued,⁵⁰ the municipality not being estopped in such case.⁵¹ The rule is particu-

tion systems and other municipal services as likely result of erection of garden apartment buildings in township, as authorized by building permit issued by township building inspector, constitute no valid objection to such erection, in absence of violation of township zoning ordinance or building code.
N.J.—Springfield Tp. v. Bensley, *supra*.

43. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504.

Md.—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.

Minn.—State ex rel. Howard v. Village of Roseville, 70 N.W.2d 404, 244 Minn. 343—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 108—W. H. Barber Co. v. City of Minneapolis, 34 N.W.2d 710, 227 Minn. 77—State v. Houghton, 213 N.W. 907, 171 Minn. 231.

N.H.—Dumais v. Somersworth, 134 A.2d 700, 101 N.H. 111.

N.J.—Adler v. Department of Parks & Public Property, Town of Irvington, 89 A.2d 704, 20 N.J.Super. 240. Giordano v. Mayor and Council of Borough of Dumont, 61 A.2d 245, 137 N.J.Law 740, 6 A.L.R.2d 956—Kensington Realty Holding Corporation v. Jersey City, 196 A. 691, 119 N.J.Law 338.

N.Y.—Town of Greenburgh v. Buser, 140 N.Y.S.2d 2, 285 App.Div. 1090, appeal denied 143 N.Y.S.2d 819, 286 App.Div. 879, appeal dismissed 130 N.E.2d 611, 309 N.Y. 808—Application of Tarnapel, 60 N.Y.S.2d 618, 270 App.Div. 857—Rollins v. Armstrong, 234 N.Y.S. 36, 226 App.Div. 752, affirmed 167 N.E. 466, 261 N.Y. 349.

S. B. Garage Corp. v. Murdock, 55 N.Y.S.2d 456, 185 Misc. 55—Van Auken v. Kimmey, 252 N.Y.S. 329, 141 Misc. 105—In re Durning, 241 N.Y.S. 539, 137 Misc. 173, affirmed Durning v. Revilla, 249 N.Y.S. 908, 232 App.Div. 790—Horwitz v. Schwab, 224 N.Y.S. 41, 130 Misc. 448—People v. Kleinert, 200 N.Y.S. 813, 120 Misc. 836.

Westchester County Soc. for Prevention of Cruelty to Animals v. Mengel, 36 N.Y.S.2d 531, reversed on other grounds 41 N.Y.S.2d 605,

266 App.Div. 151, affirmed 54 N.E. 2d 329, 292 N.Y. 121.

Pa.—Ventresca v. Exley, 56 A.2d 210, 358 Pa. 98—Appeal of Valicenti, 148 A. 308, 298 Pa. 276.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66—Vogt v. Borough of Port Vue, 85 A.2d 688, 170 Pa.Super. 526.

Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks Co. 131—Appeal of Volpi, Com.Pl., 73 Montg.Co. 217, 71 York Leg.Rec. 27—Appeal of John Albrecht Nurseries, Inc., Com. Pl., 61 Montg.Co. 111.

Tenn.—Howe Realty Co. v. City of Nashville, 141 S.W.2d 904, 176 Tenn. 405.

Tex.—City of Amarillo v. Stapf, 101 S.W.2d 229, 129 Tex. 81.

Davis v. City of Abilene, Civ. App., 250 S.W.2d 685, error refused—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224, error refused.

44. Pa.—Vogt v. Borough of Port Vue, 85 A.2d 688, 170 Pa.Super. 526.

Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks Co. 131.

Distance of building line from shore
Where application for permit to build hotel was accompanied by plat showing that the building line would not violate city ordinance prohibiting erection of buildings within forty feet of high-water mark of the Atlantic Ocean but shore line of permittee's lot retreated so that the proposed building line came within the prohibited distance before permit was granted, there was a "mistake of fact" and a violation of the ordinance justifying cancellation of the permit.

Fla.—Godson v. Town of Surfside, 8 So.2d 497, 150 Fla. 614.

45. N.J.—Breese v. Hutchins, 165 A. 94, 11 N.J.Misc. 74.

Okl.—McCurley v. City of El Reno, 280 P. 467, 138 Okl. 92.

46. N.H.—Winn v. Lamoy Realty Corp., 124 A. 211, 100 N.H. 280.

Pa.—Ventresca v. Exley, 56 A.2d 210, 358 Pa. 98.

47. Fla.—Godson v. Town of Surfside, 8 So.2d 497, 150 Fla. 614.

Iowa.—Crow v. Board of Adjustment of Iowa City, 288 N.W. 145, 227 Iowa 324—Zimmerman v. O'Meara, 245 N.W. 715, 215 Iowa 1140.

Ky.—O'Bryan v. Highland Apartment Co., 108 S.W. 257, 128 Ky. 282, 33 Ky.L. 349, 15 L.R.A.N.S., 419.

Minn.—Lowry v. City of Mankato, 42 N.W.2d 553, 231 Minn. 108.

N.H.—Dumais v. Somersworth, 134 A.2d 700, 101 N.H. 111.

N.J.—Giordano v. Mayor and Council of Borough of Dumont, 55 A.2d 671, 136 N.J.Law 294, affirmed 61 A.2d 245, 137 N.J.Law 740, 6 A.L.R.2d 956—Dickinson v. Inhabitants of City of Plainfield, 4 A.2d 91, 122 N.J.Law 63—Home Fuel Oil Co. v. Borough of Glen Rock, 192 A. 516, 118 N.J.Law 340.

Dickinson v. Inhabitants of City of Plainfield, 176 A. 716, 13 N.J. Misc. 260, affirmed 184 A. 195, 116 N.J.Law 336.

Pa.—Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66—Vogt v. Borough of Port Vue, 85 A.2d 688, 170 Pa.Super. 526.

Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks Co. 131—Appeal of Volpi, Com.Pl., 73 Montg.Co. 217, 71 York Leg.Rec. 27.

48. Minn.—State ex rel. Howard v. Roseville, 70 N.W.2d 404, 244 Minn. 343.

49. N.Y.—S. B. Garage Corp. v. Murdock, 55 N.Y.S.2d 456, 185 Misc. 55.

Laches on part of municipality in seeking revocation of certificate of occupation issued contrary to zoning ordinance could not be interposed as a bar, where occupant never had any right to vest and, therefore, had no vested right by lapse of time.

N.Y.—S. B. Garage Corp. v. Murdock, *supra*.

50. Tex.—City of Amarillo v. Stapf, 101 S.W.2d 229, 129 Tex. 81.

51. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504.

Md.—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.

N.J.—Adler v. Department of Parks & Public Property, Town of Irvington, 89 A.2d 704, 20 N.J.Super. 240. Estoppel to revoke permit generally see *supra* § 244.

Oil tanks

Under zoning ordinance inhibiting erection of oil tanks constituting increased fire hazard over previous nonconforming use, board of adjust-

larly applicable where work by the permittee was commenced pending an appeal from the grant of the permit⁵² or continued after issuance of a stop order.⁵³

It has been held, however, that the validity of a permit cannot be contested, even though it was erroneously issued, where the zoning map was not available to the permittee and he has made substantial expenditures in reliance on the permit.⁵⁴

Modification. A permit illegally or improperly granted may ordinarily be modified.⁵⁵ Moreover, a building inspector has no power to revoke a permit to occupy a factory building for use as a tannery in compliance with the zoning ordinance on the ground that the conduct of such business therein would violate the city sanitary code, the provisions of which have no precedence over those of the zoning ordinance.⁵⁶

§ 247. — Who May Revoke

Municipal or other authorities vested with the power to grant or deny permits generally have the power to revoke them.

Apart from the question of the right to exercise it in a particular case, as a general rule the discretionary power of municipal or other authorities with

respect to granting and denying permits includes the power to revoke;⁵⁷ and the power may be impliedly conferred on a particular official by an ordinance providing that the board of zoning appeals should decide appeals from the refusal, granting, or revocation of permits by such official.⁵⁸

Where a permit has been properly issued by an administrative official for a use permitted under the zoning laws or ordinances, and all prerequisites have been fully met, and no complaints made or an appeal requested, a zoning board or commission authorized to review his rulings is not authorized to revoke the permit.⁵⁹

§ 248. — Procedure

In determining whether or not a permit should be revoked, the authorities act in a quasi-judicial capacity; and they should act with reasonable promptness, and only on a hearing after due notice.

In determining whether or not a permit should be revoked, the authorities act in a quasi-judicial capacity.⁶⁰ Such action should be taken with reasonable promptness,⁶¹ and only on a hearing⁶² after due notice⁶³ and on evidence substantially supporting the decision.⁶⁴ Failure to proceed against other violators of a zoning ordinance is no defense to a proceeding for revocation of a building permit.⁶⁵

ments was not estopped to revoke permit for construction of oil tanks erroneously granted by building department after construction had been commenced as against contention revocation was unconstitutional as depriving owner of his property without due process of law.

N.J.—Home Fuel Oil Co. v. Borough of Glen Rock, 192 A. 516, 118 N.J. Law 840.

52. Md.—Heath v. Mayor & City Council of Baltimore, 58 A.2d 896, 190 Md. 478.

53. Mass.—Siegemund v. Building Com'r of City of Boston, 156 N.E. 852, 259 Mass. 329.

Pa.—Appeal of Valicenti, 148 A. 308, 298 Pa. 276.

54. Colo.—City and County of Denver v. Stackhouse, 310 P.2d 296, 135 Colo. 289.

55. N.Y.—Horwitz v. Schwab, 224 N.Y.S. 41, 130 Misc. 448.

56. Wis.—Great Lakes Tanning Co. v. City of Milwaukee, 26 N.W.2d 152, 250 Wis. 74.

57. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 303.

N.J.—Breese v. Hutchins, 165 A. 94, 11 N.J.Misc. 74.

Nonconforming use

A certificate of occupancy of nonconforming use may be discontinued

and revoked by the board in its sound discretion under specified conditions. Pa.—Drago v. Board of Adjustment of Borough of Norristown, 53 Pa. Dist. & Co. 380, 61 Montg.Co. 139.

58. Tenn.—Howe Realty Co. v. City of Nashville, 141 S.W.2d 904, 176 Tenn. 405.

59. N.J.—D. Giorano Sons v. Ciliberti, 91 A.2d 638, 22 N.J.Super. 179.

60. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 85 C.A.2d 776.

61. Pa.—Appeal of Valicenti, 148 A. 308, 298 Pa. 276.

62. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 85 C.A.2d 776.

Ex parte action

(1) A permit, issued by city building inspector, to make additions to church building in residential district, could not be revoked by inspector's mere ex parte declaration, in letter to chairman of church's board of deacons, that permit was void and revoked, and, such attempted revocation being void, permit remained in force.

Ga.—New Mission Baptist Church v. City of Atlanta, 37 S.E.2d 377, 200 Ga. 518.

(2) Ex parte modification of permit is invalid.

N.Y.—Babcock v. Port Washington Little League, 144 N.Y.S.2d 179.

Matters considered

In proceeding for rescission of village board's resolution authorizing issuance of permit for the construction of a motel any traffic problem which might eventuate was a matter in the domain of the police and not the concern of the zoning authorities. N.Y.—Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D. 2d 663.

63. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 85 C.A.2d 776.

64. Cal.—Trans-Oceanic Oil Corp. v. City of Santa Barbara, supra.

Sufficiency of evidence

Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 137 Md. 623.

Mo.—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

N.J.—Meixner v. Board of Adjustment of City of Newark, 37 A.2d 678, 131 N.J.Law 599.

N.Y.—Astor Village Taxpayers v. Board of Standards and Appeals of City of New York, 134 N.Y.S.2d 5.

65. Pa.—Appeal of Valicenti, 148 A. 308, 298 Pa. 276.

The inclusion in the order of revocation of a finding that to allow the permit to remain in force would be detrimental to the neighborhood, whether right or wrong, necessary or not, does not vitiate the order, where the board reached a permissible conclusion on the basis of other findings within its jurisdiction to make.⁶⁶

§ 249. — — — Change in Zoning Regulations

A permit cannot be revoked by ordinance where the charter of the municipality exclusively vests the power elsewhere; but in a proper case permits under the zoning laws may be specifically or in effect revoked by subsequent changes of law or ordinances.

A permit cannot be revoked by ordinance where

B. PERMITS AND CERTIFICATES FOR GARAGES, FILLING STATIONS, AND PARKING LOTS

§ 250. Requirement

Although such permits or certificates are not necessary in the absence of statutes or ordinances requiring them, municipal corporations in the proper exercise of their police power may make the acquisition of a permit or certificate a prerequisite to the construction, alteration, or operation of service stations, garages, or parking lots in specified areas.

Generally speaking, a building or other structure may be erected, altered, or used for the operation

of the charter of the municipality exclusively vests the power elsewhere,⁶⁷ but in a proper case, permits under the zoning laws may be specifically or in effect revoked by subsequent changes of law or ordinances.⁶⁸ A permit or certificate has been held not ipso facto revoked or rendered inoperative by the subsequent adoption of a zoning law or ordinance, not expressly providing for its revocation, under which it would not be authorized;⁶⁹ and once the permittee's rights have vested, the adoption of an ordinance under which the permit would not be authorized does not ipso facto revoke the permit or render it inoperative.⁷⁰ It has been held, however, that the adoption of a zoning ordinance ipso facto revokes a permit where the permittee had not incurred liabilities or expenses thereunder.⁷¹

of a gasoline filling station or a motor vehicle service station, or for the storage of automobiles without a permit or consent where there is no statute or ordinance requiring a permit.⁷² Nevertheless, although this method of regulation is not exclusive,⁷³ municipal corporations in the proper exercise of their police power⁷⁴ may make the acquisition of a permit or certificate a prerequisite to the construc-

66. Mo.—*Veal v. Leimkuehler*, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

67. N.Y.—*Miller v. Dassler*, 155 N.Y.S.2d 975.

68. N.Y.—*Halpern v. Dassler*, 135 N.Y.S.2d 8—Application of Kunz, 128 N.Y.S.2d 680.

69. Mo.—*Fleming v. Moore Brothers Realty Co.*, 251 S.W.2d 8, 363 Mo. 305.

70. Cal.—*Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 194 P.2d 148, 85 C.A.2d 776.

Ill.—*Deer Park Civic Ass'n v. City of Chicago*, 106 N.E.2d 823, 347 Ill. App. 346.

Mich.—*Sandenburgh v. Michigamme Oil Co.*, 228 N.W. 707, 249 Mich. 372.

Neb.—*City of Omaha v. Glissmann*, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.Y.—*People ex rel. Ortenberg v. Bales*, 229 N.Y.S. 550, 224 App.Div. 87, affirmed 166 N.E. 339, 250 N.Y. 598.

Atlas v. Dick, 81 N.Y.S.2d 126,

192 Misc. 843, reversed on other grounds 86 N.Y.S.2d 231, 275 App. Div. 670, affirmed 87 N.E.2d 55, 299 N.Y. 654—*Pelham View Apartments v. Switzer*, 224 N.Y.S. 56, 130 Misc. 545.

City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Pa.—*Marlyn Const. Co. v. Upper Darby Tp. Officers*, Com.Pl., 28 Del.Co. 237.

Tex.—*Brown v. Grant*, Civ.App., 2 S.W.2d 285.

Power to adopt ordinance unaffected

The granting of a permit to erect a building and the expenditure of moneys on faith thereof did not tie the hands of the city council or prevent it from exercising its police power with respect to subject matter of permit or from passing a new ordinance concerning such matter, but made it subject to investigation by the courts with the view of determining whether the ordinance was a lawful exercise of police power or whether it was an arbitrary interference with the rights of permittee. U.S.—*City of Miami Beach, Fla., v. Benhow Realty, C.C.A.Fla.*, 168 F.2d 378.

71. N.Y.—*Klanof v. Watson*, 156 N.Y.S.2d 881.

72. N.Y.—1525 Myrtle Ave. Realty Co. v. Murdock, 280 N.Y.S. 277, 245 App.Div. 749.

Structures not within ordinances

(1) Small garages rented to apartment house tenants were not within ordinance requiring garage permit.

N.Y.—*People v. Chatlos*, 176 N.E. 819, 256 N.Y. 403.

(2) A proposed two-car garage not shown to be intended for use as a public garage or filling station was not within ordinance prohibiting erection of such structures until a permit had been secured.

Ind.—*Griffin v. Hubbell*, 11 N.E.2d 136, 212 Ind. 684.

73. Mass.—*Pierce v. Town of Wellesley*, 146 N.E.2d 666.

Alternative method of regulation

Town was not limited to "permit" method of preventing widespread invasion of residential areas by parking lots, and could accomplish that purpose by reserving to itself a monopoly over operation of such lots in residence areas.

Mass.—*Pierce v. Town of Wellesley*, supra.

74. N.J.—*Tulsa Oil Co. v. Morey*, 60 A.2d 302, 137 N.J.Law 388.

tion, alteration, or operation, in specified areas, of a service station or garage,⁷⁵ or a parking lot,⁷⁶ provided such regulations affect all properties equally.⁷⁷ A building erected under a permit issued for other purposes cannot be used as a filling station.⁷⁸

§ 251. Effect of Change of Regulations on Pending Application

Where after the making of an application for a permit to construct a garage or filling station, but before a decision thereon, the regulations are changed, the application is governed by the regulations as changed; but if the decision on the application is deliberately delayed while the regulation is amended to bar the construction, applicant is entitled to the permit.

Where after the making of an application for a permit to construct or alter a garage or filling station, but before a decision thereon, the regulations are changed, applicant's request for a permit there-

after is governed by the regulations as changed,⁷⁹ and the same rule has been applied where the ordinance was enacted after denial of the application but before decision on review.⁸⁰ The rule is especially applicable where the application is made after publication of the required notice prior to adoption of the ordinance.⁸¹ Where the decision on the application is deliberately delayed, however, while the zoning ordinance is amended to bar such construction, applicant is entitled to the permit,⁸² at least where the amendment is invalid as having no relation to the public health, safety, or morals.⁸³

§ 252. Power to Grant

Generally the power with respect to granting or denying a permit for the construction or operation of a filling station or garage, or storing and parking lots, is discretionary.

Generally, the power with respect to granting or denying a permit for the construction or operation

Hazley v. Jersey City, 157 A. 251, 9 N.J.Misc. 1118—Jersey Land Co. v. Scott, 135 A. 462, 5 N.J. Misc. 61—Long v. Scott, 133 A. 767, 4 N.J.Misc. 587.
N.Y.—Gencarelli v. Balint, 171 N.Y. S.2d 283.

75. Cal.—Parker v. Colburn, 236 P. 921, 196 C. 169.
Ga.—Wofford Oil Co. of Georgia v. David, 183 S.E. 808, 181 Ga. 639.
Mass.—Storer v. Downey, 102 N.E. 321, 215 Mass. 273.

Mich.—Austin v. Older, 278 N.W. 727, 283 Mich. 667.

N.H.—Shell Oil Co. v. City of Manchester, 133 A.2d 501, 101 N.H. 76.
N.Y.—Lunmor Homes, Inc. v. Johnson, 122 N.Y.S.2d 149.

R.I.—Roberts v. Zoning Board of Review of City of Pawtucket, 197 A. 461, 60 R.I. 202.

Validity of ordinances granting or denying building and zoning permits see supra § 65.

Regulation of filling stations generally see Motor Vehicles §§ 776, 776.

Bodies or officials authorized to grant Conn.—Glanz v. Board of Zoning Appeals of New Haven, 195 A. 186, 123 Conn. 311.

Structures and uses within requirement

(1) Automatic car wash.

Mich.—Janigian v. City of Dearborn, 57 N.W.2d 876, 336 Mich. 261.

(2) Gasoline tanks and fuel oil tank and necessary accessories.

N.J.—Bauer v. Board of Fire and Police Com'rs of Paterson, 132 A. 515, 102 N.J.Law 235.

Operation of filling station held legitimate business and not nuisance per se.

Ind.—Town of Homeroft v. Macbeth, 148 N.E.2d 563.

76. Cal.—McLain v. Planning Commission of City of Chico, App., 319 P.2d 24.

Ill.—Moran v. Zoning Bd. of Appeals of City of Chicago, App., 149 N.E. 2d 480.

N.Y.—Mosher v. Crowley, 110 N.Y.S. 2d 626.

Pa.—Fleishon v. Philadelphia Zoning Bd. of Adjustment, 122 A.2d 673, 385 Pa. 295.

For use of customers

Parking space maintained by property owner on its property for use of its customers is structure and use within requirement.

N.Y.—Best & Co. v. Incorporated Village of Garden City, 286 N.Y.S. 930, 247 App.Div. 893, affirmed Best & Co. v. Village of Garden City, 7 N.E.2d 694, 273 N.Y. 564.

Planning commission was authorized to establish its own requirements for furnishing of parking by company in residential zone when company applied for permit to construct addition to its building.

Cal.—McLain v. Planning Commission of City of Chico, App., 319 P. 2d 24.

77. Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 583, 191 Md. 632.

78. Md.—Baltimore v. Scott, 101 A. 674, 131 Md. 228—Stubbs v. Scott, 95 A. 1060, 127 Md. 86.

79. N.Y.—Rosenbush v. Keller, 285 N.Y.S. 636, 247 App.Div. 748, affirmed 2 N.E.2d 659, 271 N.Y. 283.

Okl.—Baxley v. City of Frederick, 271 P. 257, 133 Okl. 84.

Or.—Berger v. City of Salem, 284 P. 273, 131 Or. 674.

Ordinance adopted after hearing but before determination

N.Y.—Application of White Plains Housing Authority, 103 N.Y.S.2d 549, 278 App.Div. 135.

80. N.J.—Krugman v. Municipal Council of City of Clifton, 53 A.2d 803, 136 N.J.Law 32—Phillips v. Town of Belleville, 52 A.2d 441, 135 N.J.Law 271.

N.Y.—Nagaven Realities v. Banzhaf, 267 N.Y.S. 729, 149 Misc. 361.

Tex.—McEachern v. Town of Highland Park, 73 S.W.2d 487, 124 Tex. 36.

81. N.J.—Schumacher v. Union City, 154 A. 406, 9 N.J.Misc. 492.

82. N.J.—Brown v. Terhune, 18 A. 2d 73, 125 N.J.Law 618, dismissed 23 A.2d 575, 127 N.J.Law 554.

Invalid attempt to suspend regulation allowing construction

Where city council by resolution invalidly attempted to suspend application of zoning regulation allowing erection of gasoline filling station on land located in area zoned for such purposes at the time of application for permit, and pending appeal of mandamus proceeding brought to compel issuance of permit, zoning ordinance was amended so as to prohibit erection of filling station on such land, landowner had right to issuance of permit since invalid action of city in withholding permit in first instance prevented owner from acquiring any vested right under ordinance.

Ill.—Phillips Petroleum Co. v. City of Park Ridge, 149 N.E.2d 844.

83. N.J.—Brown v. Terhune, 18 A. 2d 73, 125 N.J.Law 618, dismissed 23 A.2d 575, 127 N.J.Law 554.

of a filling station or garage,⁸⁴ or storing and parking lots,⁸⁵ is discretionary even after an applicant complies with the standards and requirements imposed by the ordinance.⁸⁶ It is subject, however, to the underlying requirement that any such permit granted must be consistent with the general health, safety, and moral welfare of the community.⁸⁷

§ 253. — Exercise of Power

The discretion to grant or deny a permit for the con-

struction or operation of a garage, filling station, or parking lot must be exercised reasonably and on a proper factual foundation.

The discretion to grant or deny a permit for the construction or operation of a garage, filling station, or parking lot must be exercised reasonably and on a proper factual foundation,⁸⁸ and the refusal to grant a permit or certificate must not be arbitrary and unreasonable.⁸⁹ The board may and should consider all the relevant circumstances,⁹⁰ such as

84. N.J.—*Bashlow v. City Council of City of Clifton*, 193 A. 538, 118 N.J.Law 390.

N.Y.—*Sibek v. Sahm*, 132 N.Y.S.2d 596.

Pa.—*Silver v. Board of Appeals*, 88 Pa.Dist. & Co. 538, 66 Dauph.Co. 140.

Provision not mandatory

The word "may" within zoning ordinance providing that planning board may, on special application, issue temporary permit for operation of filling station could not be construed as "must" where to do so would not only distort ordinary meaning of word but would nullify careful plan for community growth and specific provisions of ordinance. N.Y.—*Olp v. Town of Brighton*, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App. Div. 944.

85. Colo.—*Richards v. Batterton*, 298 P.2d 390, 133 Colo. 553.

Ill.—*Moran v. Zoning Bd. of Appeals of City of Chicago*, App., 149 N.E. 2d 480.

Mo.—*Summers v. Board of Zoning Adjustment of Kansas City*, App., 299 S.W.2d 883.

N.Y.—*Brooklyn Parking Corp. v. Cannella*, 85 N.Y.S.2d 389, 193 Misc. 811.

Pa.—*Katzin v. McShain*, 89 A.2d 519, 371 Pa. 251.

86. N.Y.—*Zelazny v. Town Bd. of Town of North Hempstead*, Nassau County, 101 N.Y.S.2d 178.

87. Ill.—*Gore v. City of Carlinville*, 137 N.E.2d 368, 9 Ill.2d 296.

Moran v. Zoning Bd. of Appeals of City of Chicago, App., 149 N.E. 2d 480.

Mass.—*Kidder v. City Council of Brockton*, 107 N.E.2d 774, 329 Mass. 288—*Carson v. Board of Appeals of Lexington*, 75 N.E.2d 116, 321 Mass. 649.

Md.—*Erdman v. Board of Zoning Appeals of Baltimore County*, 129 A. 2d 124, 212 Md. 288.

Mich.—*Janigian v. City of Dearborn*, 57 N.W.2d 876, 336 Mich. 261.

N.Y.—*Olp v. Town of Brighton*, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App.Div. 944.

Turner v. Cook, 168 N.Y.S.2d 556. R.I.—*Radick v. Zoning Bd. of Review*

of Town of East Providence, 125 A.2d 105—*Sundlun v. Zoning Board of Review of City of Pawtucket*, 145 A. 451, 50 R.I. 108.

"Districts" construed as "areas"

Paragraph of zoning ordinance that zoning board of review might, on application and after public notice and hearing, and subject to such conditions and safeguards as board should deem necessary in public interest, authorize erection of a filling station in certain "districts" would be construed as though word "areas" was used instead of word "districts" when necessary, in order to avoid an absurd result.

R.I.—*Radick v. Zoning Bd. of Review of Town of East Providence*, 125 A.2d 105.

88. N.Y.—*Brooklyn Parking Corp. v. Cannella*, 85 N.Y.S.2d 389, 193 Misc. 811.

Denial of permit held erroneous

Determination of town board of zoning appeals, denying application for permit to demolish gasoline service station, constituting nonconforming use, and erect new station on same land, solely on ground of board's lack of power under zoning ordinance to grant application, was erroneous, in view of sections of ordinance authorizing board to consider and determine application on merits.

N.Y.—*Pasciuti v. Grimes*, 153 N.Y.S. 2d 665, 2 A.D.2d 755.

89. Conn.—*Executive Television Corp. v. Zoning Bd. of Appeals of City of Danbury*, 85 A.2d 904, 138 Conn. 452.

Ill.—*Phillips Petroleum Co. v. City of Park Ridge*, App., 149 N.E.2d 844—*People ex rel. Kohout v. Village of North Riverside*, 144 N.E.2d 828, 14 Ill.App.2d 503.

Ky.—*Parkrite Auto Park v. Shea*, 235 S.W.2d 986, 314 Ky. 520.

N.J.—*Eso Standard Oil Co. v. Board of Adjustment of City of Newark*, 84 A.2d 667, 16 N.J.Super. 409.

Spickofsky v. Board of Adjustment of Borough of East Rutherford, 60 A.2d 888, 137 N.J.Law 494—*Tulsa Oil Co. v. Morey*, 60 A.2d 302, 137 N.J.Law 388—*Lehrer v. Board of Adjustment of City of Newark*, 58 A.2d 265, 137 N.J.Law

100—*Phillips v. Town of Belleville*, 52 A.2d 441, 135 N.J.Law 271—*Phillips v. Borough of East Paterson*, 46 A.2d 667, 134 N.J.Law 161, affirmed 50 A.2d 869, 135 N.J.Law 203.

N.Y.—*Sibek v. Sahm*, 132 N.Y.S.2d 596.

R.I.—*MC. & S. Realty, Inc. v. City Council of City of Cranston*, 133 A.2d 765—*Aldee Corp. v. Flynn*, 49 A.2d 469, 72 R.I. 199.

Denial of permit held presumptively within police power

Md.—*Hoffman v. Mayor and City Council of Baltimore*, 51 A.2d 269, 187 Md. 593.

Denial held not unreasonable, arbitrary, or unlawful

Denial of a certificate of approval is not unreasonable, arbitrary, or unlawful merely because the premises were in an industrial zone in which the proposed use was permissible.

Conn.—*Mrowka v. Board of Zoning Appeals of Town of Plainville*, 55 A.2d 909, 134 Conn. 149.

90. Conn.—*Mrowka v. Board of Zoning Appeals of Town of Plainville*, 55 A.2d 909, 134 Conn. 149.

Mass.—*Kidder v. City Council of Brockton*, 107 N.E.2d 774, 329 Mass. 288—*Amero v. Board of Appeal of City of Gloucester*, 186 N.E. 61, 283 Mass. 45.

N.Y.—*Wiegman v. Board of Standards and Appeals of City of New York*, 241 N.Y.S. 456, 229 App.Div. 320, affirmed 173 N.E. 883, 254 N.Y. 599.

Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 178 Misc. 325.

Pa.—*Koelle-Greenwood Co. v. Zoning Bd. of Adjustment*, 5 Pa.Dist. & Co.2d 267.

Factors considered but not controlling

(1) On application to town board for permit to construct a filling station, consideration of existence of other filling stations in neighborhood adequate to serve needs of the traveling public was a proper exercise of discretion by the board.

N.Y.—*Turner v. Cook*, 168 N.Y.S.2d 556.

(2) Existence and continuance of other gasoline stations in vicinity do

the nature of the surrounding property,⁹¹ the hazard to traffic,⁹² the peril from inflammable materials,⁹³ the impact on residential property values,⁹⁴ the danger to pedestrians and school children,⁹⁵ protests of adjacent property owners,⁹⁶ the size of the lot,⁹⁷ and the relation of the contemplated use of the prop-

erty to a well-considered plan of community growth as embodied in the zoning ordinances.⁹⁸

If applicant meets all the requirements of the regulations and there is no valid ground for denial of the application, the board or official in charge may grant the permit,⁹⁹ and the board or official in

not constitute ground for permitting petitioner's like use of premises.

N.Y.—*Conwall Realty Corp. v. Murdock*, 138 N.Y.S.2d 195, 285 App. Div. 951.

Ballard v. Roth, 253 N.Y.S. 6, 144 Misc. 319.

(3) Permit for construction of a service station on property classified under zoning ordinance as residential may be denied notwithstanding other nonresidential uses within the neighborhood.

Ark.—*McKinney v. City of Little Rock*, 146 S.W.2d 167, 201 Ark. 618.

(4) Alleged private restrictions of record prohibiting use of premises for gasoline filling station do not warrant denial of permit.

Mo.—*State ex rel. Folkers v. Welsch*, 124 S.W.2d 636, 235 Mo.App. 15.

Open-air parking of automobiles

Standards to be observed by zoning board of adjustment in granting or refusing certificate for open-air parking of automobiles in certain residential districts and in commercial districts are lessening of congestion in streets, promotion of health and general welfare, provision for adequate light, air and transportation, prevention of overcrowding of land and similar requirements.

Pa.—*Food Corp. v. Zoning Bd. of Adjustment of City of Philadelphia*, 121 A.2d 94, 384 Pa. 288.

91. N.Y.—*Olp v. Town of Brighton*, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App. Div. 944.

Knowledge of conditions

Where one buys home adjacent to land with notice that it is already zoned for business or commercial use, he cannot be heard to complain that its future development for such use will change essential character of community.

N.Y.—*Syosset Holding Corp. v. Schlimm*, 159 N.Y.S.2d 88.

92. Conn.—*Silver Lane Pickle Co. v. Zoning Bd. of Appeals of Town of East Hartford*, 122 A.2d 218, 143 Conn. 316.

Mass.—*Kidder v. City Council of Brockton*, 107 N.E.2d 774, 329 Mass. 288.

N.Y.—*Olp v. Town of Brighton*, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App. Div. 944.

Turner v. Cook, 168 N.Y.S.2d 556.

Ministerial function

Where city zoning board granted

a person lawful right to use certain land in business A district as parking lot on condition that he apply for and receive curb-lowering permit from city council, council's function with respect to such permit was merely ministerial, not legislative, and it was not empowered to reject application therefor on findings contrary to those of zoning board on questions of traffic congestion and public safety.

N.Y.—*Oleet v. Hildreth*, 142 N.Y.S.2d 283, 286 App.Div. 886, affirmed 135 N.E.2d 595, 1 N.Y.2d 61, 153 N.Y.S. 2d 61.

93. Md.—*Hoffman v. Mayor and City Council of Baltimore*, 51 A.2d 269, 187 Md. 593.

N.Y.—*Olp v. Town of Brighton*, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App.Div. 944.

Turner v. Cook, 168 N.Y.S.2d 556.

94. Mass.—*Kidder v. City Council of Brockton*, 107 N.E.2d 774, 329 Mass. 288.

N.Y.—*Olp v. Town of Brighton*, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App. Div. 944.

Turner v. Cook, 168 N.Y.S.2d 556.
Pa.—*Foster v. Daugherty, Com.Pl.*, 59 Dauph.Co. 248.

95. Md.—*Mayor and Council of City of Baltimore v. Biermann*, 50 A.2d 804, 187 Md. 514.

Mass.—*Kidder v. City Council of Brockton*, 107 N.E.2d 774, 329 Mass. 288.

N.Y.—*Olp v. Town of Brighton*, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App. Div. 944.

Uncompleted school building

Ordinance prohibition, against storage of liquid petroleum products within one hundred feet of a place of public assembly, was not aimed at manner of distribution of gasoline but rather at storage thereof, and would be applicable to gasoline service station as well as to wholesale distributors; and fact that school building was not completed and that school was not presently in operation would not be sufficient to compel issuance of permit for gasoline service station to be located within one hundred feet thereof.

N.Y.—*Gencarelli v. Balint*, 171 N.Y.S.2d 283.

96. N.Y.—*Olp v. Town of Brighton*, 19 N.Y.S.2d 546, 173 Misc. 1079, af-

firmed 29 N.Y.S.2d 956, 262 App. Div. 944.

Pa.—*Katzin v. McShain*, 89 A.2d 519, 371 Pa. 251.

Private restrictions

(1) Where owner of subdivision had recorded a "declaration of restrictions" imposing residential restrictions on lots in subdivision, which restrictions were to be effective until mayor and city council should pass an appropriate zoning ordinance and ordinance providing for zoning commission was passed but no appropriate zoning ordinance was adopted, planning and zoning commission did not have authority to exercise power conferred by restrictions and could not permit operator to construct filling station.

Md.—*Concord Co. v. Matherly*, 140 A. 2d 900.

(2) Objectors desiring to prevent municipal building commissioner from issuing a permit to build gasoline filling station on ground that private restrictions of record prohibited proposed use cannot accomplish this by protesting to commissioner, but should bring action in which all rights and obligations of interested parties could be determined according to the general laws governing such matters.

Mo.—*State ex rel. Folkers v. Welsch*, 124 S.W.2d 636, 235 Mo.App. 15.

In absence of complaint by nearby property owners or proof that addition in question would be offensive to surrounding community, it is proper for court to permit completion of a small addition to an automobile repair shop in locality zoned for agricultural purposes by county zoning ordinance.

Ill.—*Winnebago County v. Harrington*, 68 N.E.2d 619, 329 Ill.App. 344.

97. Conn.—*Dadukian v. Zoning Bd. of Appeals of City of Bridgeport*, 68 A.2d 123, 135 Conn. 706.

98. N.J.—*Phillips Oil Co. v. Municipal Council of City of Clifton*, 197 A. 730, 120 N.J.Law 13.

N.Y.—*Olp v. Town of Brighton*, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App.Div. 944.

99. Iowa.—*Scott v. City of Waterloo*, 274 N.W. 897, 223 Iowa 1169.

N.H.—*Shell Oil Co. v. City of Manchester*, 133 A.2d 501, 101 N.H. 76.

N.Y.—*Hacker v. Board of Appeals of City of Buffalo*, 227 N.Y.S. 627, 223 App.Div. 196.

charge generally must grant the permit;¹ and, depending on the circumstances, it has been held that a person is entitled to a permit as a matter of right and not as a matter of discretion.² In a proper case, a property owner may be entitled to the issuance of a permit or certificate to operate a service station or garage in a restricted zone as a continuation or permissible extension of a noncon-

forming use.³

On the other hand, a permit for the construction, alteration, or use of property for a service station, garage, or parking lot should not be issued where the circumstances do not warrant or where it would constitute a violation of a building or zoning regulation,⁴ or where the safety of the public will be

Brooklyn Parking Corp. v. Cannella, 85 N.Y.S.2d 389, 193 Misc. 811.

Application of Sinclair Refining Co., 83 N.Y.S.2d 3, affirmed 92 N.Y.S.2d 521, 276 App.Div. 774.

Pa.—Garner v. Zoning Bd. of Adjustment of City of Philadelphia, 130 A.2d 148, 388 Pa. 98.

Public convenience and necessity need not be shown as basis for permit under zoning ordinance to erect motor vehicle service and gasoline station.

Conn.—Burr v. Rago, 180 A. 444, 120 Conn. 287.

Installation of tanks and pumps

Where ordinance authorized issuance of permits for installation of gasoline tanks and pumps for storage and handling of gasoline, city inspector of buildings had authority to issue permit for installation of pumps and storage tanks, notwithstanding property on which they were located was restricted against use as a gasoline filling station.

N.J.—Dickinson v. Busch, 4 A.2d 95, 122 N.J.Law 71.

1. **Conn.—State ex rel. Gold v. Usher**, 84 A.2d 276, 138 Conn. 323.

III.—**Phillips Petroleum Co. v. City of Park Ridge**, 149 N.E.2d 344.

People ex rel. Mid-Continent Petroleum Corp. v. City of Savanna, 127 N.E.2d 676, 6 Ill.App.2d 411.

Md.—John J. Moylan, Inc. v. Bramble, 24 A.2d 297, 180 Md. 316.

Mo.—State ex rel. Folkers v. Welsch, 124 S.W.2d 636, 235 Mo.App. 15.

Neb.—Coulthard v. Board of Adjustment of City of Neligh, 265 N.W. 530, 130 Neb. 543.

N.J.—Phillips v. Town of Belleville, 52 A.2d 441, 135 N.J.Law 271—**Phillips v. Borough of East Paterson**, 46 A.2d 667, 134 N.J.Law 161, affirmed 50 A.2d 869, 135 N.J.Law 203—**Gulf Oil Corporation v. Board of Adjustment of City of Newark**, 22 A.2d 570, 127 N.J.Law 327, affirmed **Gulf Oil Co. v. Board of Commissioners of City of Newark**, 26 A.2d 246, 128 N.J.Law 376—**First Church of Christ, Scientist, v. Board of Adjustment of City of Newark**, 22 A.2d 569, 127 N.J.Law 325, affirmed 26 A.2d 246, 128 N.J.Law 376—**Hirschorn v. Castles**, 174 A. 211, 113 N.J.Law 277—**A. G. Construction Co. v. Scott**, 141 A. 760, 104 N.J.Law 596.

Newark Athletic Club v. Board of Adjustment of Newark, 144 A. 167, 7 N.J.Misc. 55—**Cahill v. Hague**, 132 A. 331, 4 N.J.Misc. 254—**Finkel v. Kaltenbach**, 132 A. 197, 4 N.J.Misc. 135.

Okl.—Magnolia Petroleum Co. v. City of Tonkawa, 114 P.2d 474, 189 Okl. 125.

R.I.—Mastrati v. Strauss, 67 A.2d 29, 75 R.I. 417.

Subject to determination of rights

Where application for permit for erection of a gasoline service station was made about June 6, 1956, and building commissioner refused to issue permit because board of trustees passed a resolution in March prohibiting issuance of any permits until a committee had time to recommend zoning changes and on September 4 zoning ordinance was amended so as to prohibit erection of any more gasoline stations in village, property owner was entitled to issuance of building permit, leaving to be determined in a subsequent action question as to whether he had any vested rights under permit to construct his station.

N.Y.—Kianof v. Watson, 156 N.Y.S.2d 881.

2. **N.Y.—Caponi v. Walsh**, 238 N.Y.S. 438, 228 App.Div. 86.

3. **N.J.—Crompton & Co. v. Borough of Sea Girt**, 63 A.2d 834, 1 N.J. Super. 607.

Campbell v. Board of Adjustment of Borough of South Plainfield, 191 A. 742, 118 N.J.Law 116.

38 C.J. p 74 note 26 [c].

Facilitation of nonconforming use

(1) One operating automobile service station on his land before passage of city zoning ordinance, under which land was placed in residential zone, was entitled to permit to change and facilitate nonconforming use thereof by removing front of building on land to widen driveway entrance.

N.J.—Lane v. Bigelow, 50 A.2d 638, 135 N.J.Law 195.

(2) Where automobile repair business had been conducted in the open on premises for sixteen years, fact that, in connection with granting right to erect public garage on premises, applicant was to be permitted to use street as a means of ingress and egress did not constitute an illegal extension of an existing nonconforming use.

R.I.—Crudeli v. Zoning Bd. of Review of City of Warwick, 55 A.2d 284, 73 R.I. 301.

Restoration of equipment

Where tenants, without landowner's consent, removed gasoline tanks and pumps which were on premises when zoning ordinance was adopted, refusal to permit landowner to restore premises to former condition was error.

N.J.—Weisman v. Spoerer, 168 A. 217, 11 N.J.Misc. 731.

Decreasing nonconforming use

Where gasoline pumps were located immediately adjacent to street line, and subsequently enacted zoning ordinance required a set-back and permitted continuance of existing nonconforming use and reconstruction and alteration of nonconforming buildings and change in nonconforming use subject to certain regulations, pumps could be relocated so as to increase the set-back without regard to such regulations.

N.Y.—Kovelman v. Plaut, 105 N.Y.S. 2d 280, 201 Misc. 473.

4. **Conn.—Dadukian v. Zoning Bd. of Appeals of City of Bridgeport**, 68 A.2d 123, 135 Conn. 706—**Mrowka v. Board of Zoning Appeals of Town of Plainville**, 55 A.2d 909, 134 Conn. 149—**St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford**, 8 A.2d 1, 125 Conn. 714.

Md.—Serio v. Mayor and City Council of Baltimore, 119 A.2d 387, 203 Md. 545—**Mayor and Council of City of Baltimore v. Biermann**, 50 A.2d 804, 187 Md. 514—**Engle v. City Com'rs of Cambridge**, 22 A.2d 922, 180 Md. 82.

Mass.—Kidder v. City Council of Brockton, 107 N.E.2d 774, 329 Mass. 288.

N.J.—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A.2d 752, 9 N.J. Super. 529.

Romano v. Village of Ridgewood, 184 A. 411, 14 N.J.Misc. 301—**Hazley v. Jersey City**, 157 A. 251, 9 N.J.Misc. 1118—**Mannino v. Mofett**, 153 A. 381, 9 N.J.Misc. 257, appeal dismissed 158 A. 434, 108 N.J.Law 545—**Hartman v. Bigelow**, 136 A. 201, 5 N.J.Misc. 227.

N.Y.—Cunningham v. Planning Bd. and Bd. of Appeals of Town of Brighton, 164 N.Y.S.2d 601, 4 A.D. 2d 313—**Hamblen v. Briante**, 8 N.Y.

unduly imperiled;⁵ and where the refusal of a permit or certificate is based on such grounds there is no abuse of discretion.⁶ A permit or certificate may not be denied, however, where the regulation is not in effect⁷ or where the regulation bears no substantial relation to the public health, safety, morals, or general welfare.⁸

§ 254. Proceedings to Procure

The procedure for obtaining a permit to construct, or

use property for, a service station, garage, or parking lot ordinarily is governed by building and zoning rules and regulations, and there must be substantial compliance with requirements as to application, posting of premises, and submission of data to designated officials.

The procedure for obtaining a permit to construct, alter, or use property for a service station, garage, or parking lot is ordinarily governed by building and zoning rules and regulations.⁹ Generally an application for the permit must be presented to the officials designated or qualified to receive it,¹⁰ and

S.2d 739, 256 App.Div. 820, reargument denied 10 N.Y.S.2d 676, 256 App.Div. 931, affirmed 23 N.E.2d 535, 281 N.Y. 696—Hacker v. Board of Appeals of City of Buffalo, 227 N.Y.S. 627, 223 App.Div. 196.

Zelazny v. Town Bd. of Town of North Hempstead, Nassau County, 101 N.Y.S.2d 178.

Ohio.—State ex rel. Cataland v. Birk, 125 N.E.2d 748, 97 Ohio App. 299.

Pa.—McNichol v. Gallagher, 66 Pa. Dist. & Co. 328—Fleixhon v. Zoning Bd. of Adjustment, 6 Pa. Dist. & Co. 2d 337.

Wager v. Board of Adjustment of Upper Darby Tp., Com.Pl., 38 Del.Co. 301.

S.C.—Pendarvis v. City of Orangeburg, 154 S.E. 756, 157 S.C. 496.

Tex.—Hill v. Board of Adjustment of City of Castle Hills, Civ.App., 301 S.W.2d 490—Harrington v. Board of Adjustment of City of Alamo Heights, Bexar County, Civ.App., 124 S.W.2d 401, error refused.

Insufficient standards

Where ordinance did not prescribe rules and conditions sufficiently definite for guidance of board in execution of discretionary power, order denying permit to construct gasoline service station on that ground, notwithstanding fact that governing body of municipality had enacted, in interim, zoning ordinance amendment forbidding gasoline service station in area for which permit was sought, would be affirmed.

Fla.—Broach v. Young, 100 So.2d 411.

Storage of commercial trucks

Although erection of a three-stall garage in a residential district, for storage of private automobiles, was permissible in a residential zone, use of the garage for storage of commercial trucks was forbidden, and therefore, portion of building permit authorizing use of garage for storage of trucks was void, although portion of permit authorizing construction and use of the garage for storage of private automobiles was valid.

N.H.—Dumais v. Somersworth, 134 A. 2d 700.

Nonconforming use held not to warrant permit

(1) For proposed alteration or construction of garage.

Md.—Knox v. Mayor and Council of

Baltimore City, 23 A.2d 15, 180 Md. 38.

N.J.—Adler v. Department of Parks & Public Property, Town of Irvington, 89 A.2d 704, 20 N.J.Super. 240.

Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21—Dickinson v. Inhabitants of City of Plainfield, 176 A. 716, 13 N.J.Misc. 260, affirmed 184 A. 195, 116 N.J.Law 336.

N.Y.—Texas Co. v. Sinclair, 109 N.Y. S.2d 478, 279 App.Div. 803, affirmed 109 N.E.2d 472, 304 N.Y. 817.

(2) To maintain a parking lot on land formerly used for a garage but not as a parking lot.

Mo.—In re Botz, 159 S.W.2d 367, 236 Mo.App. 566.

Effect of order to issue permit

An ordinance prohibiting the construction or maintenance of a garage in a specific location cannot be abrogated by an order of the city council directing the issuance of a permit therefor by a commissioner of buildings.

Ill.—People v. Thompson, 209 Ill.App. 570.

5. Conn.—Executive Television Corp. v. Zoning Bd. of Appeals of City of Danbury, 85 A.2d 904, 138 Conn. 452.

6. Conn.—Miller v. Zoning Bd. of Appeals of City of Hartford, 87 A. 2d 808, 138 Conn. 610.

Pa.—Katzin v. McShain, 89 A.2d 519, 371 Pa. 251.

R.I.—Elder v. Mayor of City of Newport, 57 A.2d 653, 73 R.I. 482.

7. Ohio.—State ex rel. Gaede v. Guion, 158 N.E. 748, 117 Ohio St. 327.

Referendum vote pending

Permit for gasoline filling station could not be denied for failure to comply with zoning ordinance suspended pending vote on referendum.

Ohio.—State ex rel. Gaede v. Guion, supra.

8. N.J.—Diller v. Mayor and Council of Borough of Stone Harbor, 3 A. 2d 872, 121 N.J.Law 611.

Felter v. Board of Zoning Adjustment of Borough of Glen Rock, 183 A. 684, 14 N.J.Misc. 247, affirmed 189 A. 366, 117 N.J.Law 532—

Gabrielson v. Borough of Glen Ridge, 176 A. 676, 13 N.J.Misc. 142. 42 C.J. p 1308 note 48.

9. Ill.—Moran v. Zoning Bd. of Appeals of City of Chicago, App., 149 N.E.2d 480.

Mass.—Carson v. Board of Appeals of Lexington, 75 N.E.2d 116, 321 Mass. 649.

Md.—Schroeder Holding Co. v. Mayor and City Council of Baltimore, 9 A.2d 220, 177 Md. 186.

N.J.—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A.2d 752, 9 N.J.Super. 529.

Spickofsky v. Board of Adjustment of Borough of East Rutherford, 60 A.2d 888, 137 N.J.Law 494. Proceedings to procure building or use permit generally see supra § 227.

Agent for legislature

Under statute requiring certificate of approval from municipal zoning board for operation of motor vehicle repair business, the board acts as local agent of the state legislature.

Conn.—Mason v. Board of Zoning Appeals of City of Bridgeport, 124 A. 2d 920, 143 Conn. 634.

10. N.J.—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A. 2d 752, 9 N.J.Super. 529.

Who may apply

Where oil company executed a contract for purchase of land on condition that city would issue a permit to it for the erection and maintenance of a gasoline filling station thereon, oil company together with approval and participation of owner, could lawfully make an application to city for issuance of such permit.

Ohio.—State ex rel. Sun Oil Co. v. City of Euclid, 130 N.E.2d 336, 164 Ohio St. 265.

To whom application made

N.J.—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A. 2d 752, 9 N.J.Super. 529.

N.Y.—Sanders v. Davidson, 17 N.Y.S. 2d 627, 258 App.Div. 1058, affirmed 31 N.E.2d 764, 284 N.Y. 780.

Amendment of application

An amendment to an application for permit to install additional gasoline tanks and pumps at existing gasoline station so as to provide for in-

before any action on the application may be taken under some provisions the premises must be posted,¹¹ and the data must be submitted to various administrative officers, such as the commissioners of fire, health, police, and other municipal departments, for investigation and report.¹²

§ 255. — Approval of, or Consent to, Erection, Alteration, or Use of Property

Under some zoning acts or ordinances garages and filling stations are permitted only if the application is approved by the board of adjustment.

Under the express provisions of some zoning acts or ordinances a public or commercial garage or repair shop, or gas and oil service stations, are permitted if, and only if, the application is approved by the board of adjustment.¹³ Under such provisions, the fact that the zoning official notes that the zoning is approved merely indicates that a service station can be erected in the zone if the board of adjustment approves such use and issues a certificate.¹⁴ Applications of this sort are hybrid in nature; the board takes original jurisdiction, and it is the practice for the zoning official to refer all such

applications automatically to the board of adjustment.¹⁵ The failure of the board to issue either a certificate of exception or a certificate of variance does not constitute a reversal under all the circumstances of the order, decision, or determination of the administrative officer,¹⁶ and the matter is, therefore, not governed by a further provision for the concurring vote of four members of the board to reverse any order or to decide in favor of the applicant on any matter on which it is required to pass under the ordinance or to effect any variation.¹⁷

§ 256. — — — Adjacent Property Owners

Where zoning regulations so provide, the consent of a stated percentage of adjacent property owners is required as a condition to the construction of, or use of property for, a service station or garage; but under some provisions the board has the power to consider an application on the merits although the consents of adjoining owners were not obtained, where practical difficulties and unnecessary hardships exist.

Where required by applicable zoning regulations, the consent of a stated percentage of adjacent property owners must be obtained as a condition to the construction of, or use of property for, a service station or garage or as a condition to the granting of a permit therefor;¹⁸ but under some provisions

stallation of a new gasoline station had the practical effect of a new application and the amended application would be required to be submitted by the board of zoning appeals to city officials designated by ordinance for investigation and report, notwithstanding the original application had been so submitted and approved. Md.—Schroeder Holding Co. v. Mayor and City Council of Baltimore, 9 A. 2d 220, 177 Md. 186.

11. Md.—Schroeder Holding Co. v. Mayor and City Council of Baltimore, *supra*.

12. Md.—Schroeder Holding Co. v. Mayor and City Council of Baltimore, *supra*.

Conclusiveness of reports

The recommendation of one or more city officials that permit for erection of filling station be granted would not preclude board of zoning appeals or the court on review of board's action from considering other matters contained in the record.

Md.—Hoffman v. Mayor and City Council of Baltimore, 51 A.2d 269, 187 Md. 593.

13. Pa.—Appeal of Palletz, 71 Pa. Dist. & Co. 303.

Recommendation based on finding of nondetrimental use

(1) Under a provision to such effect, service station, garage, or parking lot permits may not be issued in any case except on application first being made to the proper board or

commission and a recommendation made by it that a permit for such use be granted, based on its finding that the use will not be detrimental to public health, safety, and general welfare, and is reasonably necessary for the welfare of the community.

N.J.—Lehrer v. Board of Adjustment of City of Newark, 58 A.2d 265, 137 N.J.Law 100—Schnell v. Township Committee of Ocean Tp., 198 A. 759, 120 N.J.Law 194.

(2) Recommendation made without such finding is not conclusive on body authorized to act on the recommendation.

Cal.—Regan v. Council of City of San Mateo, 110 P.2d 95, 42 C.A.2d 801.

14. Pa.—Appeal of Palletz, 71 Pa. Dist. & Co. 303.

15. Pa.—Appeal of Palletz, *supra*.

16. Pa.—Appeal of Palletz, *supra*.

17. Pa.—Appeal of Palletz, *supra*.

18. Mass.—Bennett v. Board of Appeal of City of Cambridge, 167 N. E. 659, 268 Mass. 419.

N.Y.—Sloane v. Walsh, 156 N.E. 663, 245 N.Y. 208—People ex rel. Fordham Manor Reformed Church v. Walsh, 155 N.E. 575, 244 N.Y. 280. People ex rel. Spinelli v. Walsh, 241 N.Y.S. 459, 229 App.Div. 745, affirmed 173 N.E. 884, 254 N.Y. 601, reargument denied 175 N.E. 316, 255 N.Y. 566—Hacker v. Board of Appeals of City of Buffalo, 227 N. Y.S. 627, 223 App.Div. 196.

Esdora Realty Corporation v. Walsh, 240 N.Y.S. 792, 136 Misc. 476, reversed on other grounds 243 N.Y.S. 809, 229 App.Div. 866, affirmed 173 N.E. 883, 254 N.Y. 600.

Pa.—Appeal of Skarvells, 185 A. 635, 322 Pa. 541.

Appeal of Zimmerman, Com.Pl., 6 Lycoming 65—Appeal of Hert- 157. rick, Co., 105 Pittsb.Leg.J. 157.

Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

Purpose of zoning ordinance providing that no permit shall be issued for construction of gasoline filling station unless, with application, is filed written consent of majority of property owners whose holdings front on same street within a certain distance of proposed structure, in which case permit may be granted on approval of board of appeals, was to empower neighboring lot owners to determine whether there would be a hearing on an application for permit. N.Y.—Sena v. Gallagher, 170 N.Y.S.2d 953.

Amendatory ordinance

Where application for permit to build gasoline service station was filed while ordinance provided that gasoline service station might be established with consent of owners of majority of all property within one hundred feet of proposed structure, fact that, while appeal from decision of board of adjustment of borough

it has been held that the board has power and jurisdiction to consider an application on the merits although the consents of adjoining owners were not obtained,¹⁹ where practical difficulties and unnecessary hardships exist.²⁰ Technical defects in the form in which consents are procured will not prevent the issuance of a permit.²¹

Under an ordinance requiring consents of owners of a stated percentage of the frontage of the "affected area," and imposing on the board of appeals the duty of stating the extent of the area to be affected by the proposed structure, the board in making such determination acts in a quasi-judicial capacity and must not act arbitrarily or unreasonably.²² Thus, it may not act arbitrarily in the exclusion of particular property as not affected by the proposed structure and in regarding it as property the owners of which need not consent.²³

Where the consent of a majority of the property owners is required by ordinance to the erection of a public garage, where two thirds of the buildings within a specified radius are used exclusively for residence purposes, it has been held that buildings

used as barns and private garages on lots occupied as residences used in connection with the residences are to be counted as buildings.²⁴

The fact that an owner of the property situated within the required distance of the proposed main building of the gasoline station is the record owner of the tract of land from which the property of the applicant for the gas station was obtained does not disqualify him from giving consent.²⁵

Revocation of consents. Consents when given may be revoked at any time before they are acted on.²⁶

§ 257. — Notice, Hearing, and Evidence

Proper notice of all hearings on an application for a permit for the construction of, or use of property for, a garage, filling station, or parking lot must be given, and the hearing or hearings must be held publicly.

Proper and sufficient notice of all hearings before the board on an application for a permit or certificate of approval for the construction of, or use of property for, a garage, filling station, or parking lot must be given to the public generally,²⁷ and,

was pending in county court, the borough amended ordinance to require application for building permit to be accompanied by a written consent of owners of eighty per cent of all property within one hundred and ten feet of deed line of property in question did not preclude issuance of permit under ordinance in effect at time application was filed; amendment was not an effort to improve community by upgrading land use, but rather was an enactment which increased power and domination of neighboring landowners over particular piece of land.

Pa.—Appeal of Hertrick, 137 A.2d 310, 39 Pa. 148.

Authority to consent

Commissioner of public works of borough cannot consent to garage construction in behalf of the city.

N.Y.—Ammanna v. Walsh, 241 N.Y.S. 252, 136 Misc. 653.

19. N.Y.—Chapman v. Hapeman, 167 N.Y.S.2d 342, 8 Misc.2d 19.

Crossroads Realty v. Gilbert, 109 N.Y.S.2d 59.

20. N.Y.—Sena v. Gallagher, 170 N.Y.S.2d 953.

21. N.Y.—People v. Leo, 178 N.Y.S. 213, 109 Misc. 255.

22. N.Y.—Stalb v. Davidson, 23 N.Y.S.2d 729, 260 App.Div. 1020—Sanders v. Davidson, 17 N.Y.S.2d 627, 258 App.Div. 1058, affirmed 31 N.E. 2d 764, 284 N.Y. 780.

"Frontage" within such a provision means frontage on a public street or place.

N.Y.—People ex rel. Spinelli v. Walsh, 241 N.Y.S. 459, 229 App.Div. 745, affirmed 178 N.E. 884, 254 N.Y. 601, reargument denied 175 N.E. 315, 255 N.Y. 566.

23. N.Y.—People v. Leo, 180 N.Y.S. 554, 110 Misc. 519, modified on other grounds 184 N.Y.S. 943, 194 App. Div. 921.

38 C.J. p 75 note 38.

Difficulty of obtaining consent

Where district affected by proposed erection of filling station was determined by resolution as extending three hundred feet in three directions and one hundred feet in fourth direction, subsequent exclusion of several scattered parcels in the area, because of difficulty of obtaining consent of owners of such parcels, was beyond power of board of appeals, and determination granting permission to erect station must be annulled.

N.Y.—Stalb v. Davidson, 23 N.Y.S.2d 729, 260 App.Div. 1020.

24. Ill.—People v. Oak Park, 107 N.E. 636, 266 Ill. 365.

25. Pa.—Appeal of Hertrick, 137 A. 2d 310, 39 Pa. 148.

26. N.Y.—Sloane v. Walsh, 216 N.Y.S. 181, 217 App.Div. 614, reversed on other grounds 156 N.E. 668, 245 N.Y. 208.

People v. Walsh, 195 N.Y.S. 264.

Effect of withdrawal

Where some of consents to application for permit to erect filling station withdrew their consent after sufficient consents had been filed, but

prior to granting of permit by zoning board, issuance of another permit, after surrender of first permit by permittee, on renewal by permittee of application with additional consents sufficient with those remaining to constitute compliance with city ordinance was proper.

Pa.—Appeal of Skarvelis, 185 A. 635, 322 Pa. 541.

27. Md.—Schroeder Holding Co. v. Mayor and City Council of Baltimore, 9 A.2d 220, 177 Md. 186.

Mass.—Carson v. Board of Appeals of Lexington, 75 N.E.2d 116, 321 Mass. 649.

N.Y.—Buffalo Cremation Co. v. March, 226 N.Y.S. 477, 222 App.Div. 447, affirmed 164 N.E. 572, 249 N.Y. 531.

R.I.—Radick v. Zoning Bd. of Review of the Town of East Providence, 117 A.2d 84.

Notice held not defective

Notice and petition by bus company, which petitioned town's board of appeals for a special permit, under town's zoning ordinance for construction of a garage, was not defective because board authorized erection of a garage to be used for storage of busses, and for light repair, on ground that authorization enlarged the scope of petition and notice, since fact that petitioner was a bus company was notice to neighboring landowners that proposed garage would be a sizable garage; and notice was not defective because clerk of board, rather than the board itself as provided in zoning bylaw, sent notices to interested parties.

likewise, such proper and sufficient notice must be given to applicant.²⁸ It has been held, however, that where a certificate of restrictions against the use of property for a filling station made by the owner when his property was removed from residential to business use was intended to supplement an agreement with the village board and was not intended to constitute an enforceable agreement with the surrounding property owners, the board could cancel the restrictions and grant a permit for a gasoline station without giving notice to the surrounding property owners.²⁹

A hearing or hearings must be held³⁰ publicly,³¹ although the deliberations of the board may be in private.³² Expert testimony is not necessary.³³

Rehearing; waiver of objections. The appearance before the zoning board of property owners objecting to the granting of a permit for the use of

property for off-street parking, and their exhaustive participation in a rehearing on the merits, and submission of written information thereafter, constitute a waiver on their part of any objection that they might have otherwise interposed on the ground that the applicant did not comply with the rules and regulations governing rehearings of applications for permits.³⁴

§ 258. — Determination

In passing on an application for a permit for the construction or operation of a garage, filling station, or parking lot, the board must consider all the facts developed on the hearing and make such findings as are required by the zoning regulations.

In passing on an application for a permit for the construction or operation of a garage, filling station, or parking lot, the board must consider all the facts developed on the hearing,³⁵ and may not

Mass.—Carson v. Board of Appeals of Lexington, 75 N.E.2d 116, 321 Mass. 649.

Curing irregularity

The insufficiency of public notices of hearing on application to city zoning board of adjustments or appeals for certificate of approval of location of gasoline station was immaterial, where subsequent publication of notice thereof complied with statutory requirements.

Conn.—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, 8 A.2d 1, 125 Conn. 714.

28. Conn.—Colonial Beacon Oil Co. v. Zoning Board of Appeals of City of Hartford, 23 A.2d 151, 128 Conn. 351.

29. N.Y.—Chapman v. Hapeman, 167 N.Y.S.2d 342.

30. N.J.—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A.2d 752, 9 N.J.Super. 529.

N.Y.—Buffalo Cremation Co. v. March, 226 N.Y.S. 477, 222 App.Div. 447, affirmed 164 N.E. 572, 249 N.Y. 531.

Hearing two applications simultaneously

There is nothing irregular in city zoning board of adjustments or appeals hearing simultaneously two applications concerning same subject matter, such as applications for certificate of approval of gasoline station location and variance of requirements of zoning rules and regulations.

Conn.—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, 8 A.2d 1, 125 Conn. 714.

Purpose of hearing

Statutory hearing before zoning

board of appeals on application for certificate of approval for gasoline station is designed to afford safeguard that board shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach its conclusion uninfluenced by extraneous considerations.

Conn.—Watson v. Howard, 86 A.2d 67, 138 Conn. 464.

31. Conn.—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, 8 A.2d 1, 125 Conn. 714.

32. Conn.—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, supra.

33. Conn.—Gulf Oil Corp. v. Board of Selectmen of Town of Brookfield, 127 A.2d 48, 144 Conn. 61—Dadukian v. Zoning Bd. of Appeals, 68 A.2d 123, 135 Conn. 706.

34. Ohio.—Mahrt v. First Church of Christ, Scientist, Com.Pl., 142 N.E.2d 567, affirmed, App., 142 N.E.2d 578.

35. Mass.—Pierce v. Town of Wellesley, 146 N.E.2d 668.

N.Y.—Wiegman v. Board of Standards and Appeals of City of New York, 241 N.Y.S. 456, 229 App.Div. 320, affirmed 178 N.E. 883, 254 N.Y. 599.

Russo v. Stevens, 173 N.Y.S.2d 344—Sibek v. Sahn, 132 N.Y.S.2d 596.

Necessity of hearing evidence

(1) Failure to hear evidence before granting permit for garage was immaterial where issue involved only application of zoning ordinance.

N.J.—Newark Athletic Club v. Board of Adjustment of Newark, 144 A. 167, 7 N.J.Misc. 55.

(2) However, under ordinance enjoining board of adjustment to hear

an application for a permit to erect a filling station or public garage the same as it is empowered to hear cases and make exceptions to a zoning ordinance, board was required to determine on legal evidence whether proposed use of land for a filling station or garage was inimical to the public safety and general welfare, and hence granting of permit by board was invalid where no witnesses were sworn, and no testimony was taken, even though action was approved by township committee.

N.J.—Schnell v. Township Committee of Ocean Tp., 198 A. 759, 120 N.J. Law 194.

Admissibility of evidence

On an administrative hearing with respect to permitting the erection of a gasoline station, fact that letter opposing the grant of the application from the capital planning commission was apparently based on hearsay and that neither its writer nor the member of the staff who made the investigation was present for cross-examination did not affect the admissibility of the letter, as would be case at a trial before the judicial tribunal.

D.C.—O'Boyle v. Coe, D.C., 155 F. Supp. 581.

Evidence held sufficient

(1) To warrant granting of permit.

Ill.—Moran v. Zoning Bd. of Appeals of City of Chicago, 149 N.E.2d 480.

(2) To warrant denial of permit.

Md.—Hoffman v. Mayor and City Council of Baltimore, 51 A.2d 269, 187 Md. 593.

(3) To establish that applicants had operated building as a nonconforming structure in conformity with law.

N.J.—Spickofsky v. Board of Adjustment of Borough of East Rutherford, 60 A.2d 888, 137 N.J.Law 494.

rest solely on what amounts to nothing more than the personal view of the board members,³⁶ although, in the absence of any provision to the contrary, the board may regard any facts learned by its members through personal observation to the same extent as though such facts had been offered in evidence.³⁷ Moreover, the board is not bound to adopt the opinion of the traffic engineer stating that traffic conditions in vicinity are such that the operation of the station would not create an unusual or undue hazard.³⁸

The action of the board must be taken at a proper meeting with a sufficient number of members present and voting.³⁹ In the absence of a provision so requiring, the board in passing on an application for a service station or garage permit need not make formal findings of the facts on which its action is based,⁴⁰ but under some zoning regulations it has

been held that the board must make a finding that in its judgment the issuance of a permit will not be detrimental to the welfare of the community, and is reasonably necessary,⁴¹ at least where the board acts as an advisory body.⁴² Under some provisions, findings by the board are required only in so far as they embrace facts known to the members of the board which do not appear in the evidence.⁴³ Refusal of a permit does not amount to a taking of property but is merely the denial of a favor.⁴⁴

§ 259. — — — Conclusiveness

The board may not ordinarily reconsider its decision in the absence of fraud or mistake unless there has been a change of conditions affecting the right to a permit, and it is not concluded by a prior decision which has been set aside or which was decided on different grounds.

As a general rule, the board will not be permitted to reopen the matter and reconsider its decision

36. N.Y.—Sibek v. Sahm, 132 N.Y.S. 2d 596.

37. Conn.—Gulf Oil Corp. v. Board of Selectmen of Town of Brookfield, 127 A.2d 48, 144 Conn. 61—Dadukian v. Zoning Bd. of Appeals of City of Bridgeport, 68 A.2d 123, 135 Conn. 706—Mrowka v. Board of Zoning Appeals of Town of Plainville, 55 A.2d 909, 134 Conn. 149.

38. Conn.—Gulf Oil Corp. v. Board of Selectmen of Town of Brookfield, 127 A.2d 48, 144 Conn. 61.

39. Conn.—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, 8 A.2d 1, 125 Conn. 714.

40. Md.—Mayor and Council of City of Baltimore v. Biermann, 50 A.2d 804, 187 Md. 514.

Majority lacking

Where five members of zoning board had public meeting on application for permit to erect gasoline station, and two members voted to grant permit, one member voted against, and one member and chairman abstained, vote of two to one did not constitute majority within statute requiring that application be approved by majority of board.

N.Y.—Gollob v. Bevans, 161 N.Y.S. 2d 225, 5 Misc.2d 958.

Estoppel

Property owners appealing from action of zoning board of appeals in granting gasoline service station license were estopped to claim that board did not grant application where board's granting of application was alleged in appeal and admitted by answer.

Conn.—Perdue v. Zoning Board of Appeals of City of Norwalk, 171 A. 26, 118 Conn. 174.

Resolution as action of board

Resolution granting garage permit

on theory of hardship is board of appeals' action and cannot be disturbed by concurring members' oral statements.

N.Y.—Sloane v. Walsh, 156 N.E. 668, 245 N.Y. 208.

Disqualification

(1) Where interest of three members of board of adjustment which granted permit to corporation for construction of parking lot was too remote to disqualify them, fact that they did not disclose such connections prior to hearing on application for permit was of no consequence.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

(2) Mere fact that the board passed on the application of one of its members for permission to erect a gasoline station in a district did not make board's action improper, even though members might have avoided criticism by deferring consideration of application until newly constituted board had taken office, where member who made application did not participate in the determination.

N.Y.—Sanders v. Davidson, 17 N.Y.S. 2d 627, 258 App.Div. 1055, affirmed 31 N.E.2d 764, 284 N.Y. 780.

Member not entitled to vote

Where zoning board of appeals was composed of only four members at time of hearing on application for certificate of approval for gasoline station, fifth member who was subsequently appointed and who had merely read minutes of the preceding meeting in relation to application and visited proposed location but who did not examine all evidence presented to other members, was not entitled to vote on application, and subsequent granting of application

based on fifth member's vote was illegal.

Conn.—Watson v. Howard, 86 A.2d 67, 138 Conn. 464.

40. Conn.—Perdue v. Zoning Board of Appeals of City of Norwalk, 171 A. 26, 118 Conn. 174.

Mo.—Summers v. Board of Zoning Adjustment of Kansas City, App., 299 S.W.2d 883.

Finding of undue hardship held not required where application for a permit for erection of a gasoline station was made under zoning ordinance providing that no gasoline station may be erected without a special permit granted by zoning board of review of town and that board, in acting on such application, shall be governed by provisions of ordinance relative to exceptions, which require findings that granting thereof will serve public welfare and convenience and will not substantially or permanently injure appropriate use of neighboring property.

R.I.—Radick v. Zoning Bd. of Review of Town of East Providence, 125 A.2d 105.

41. N.J.—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A. 2d 752, 9 N.J.Super. 529.

Lehrer v. Board of Adjustment of City of Newark, 58 A.2d 265, 137 N.J.Law 100.

42. N.J.—Barry, Inc. v. Board of Adjustment of City of Newark, 75 A.2d 752, 9 N.J.Super. 529.

Lehrer v. Board of Adjustment of City of Newark, 58 A.2d 256, 137 N.J.Law 100.

43. N.Y.—Hopkins v. Board of Appeals of City of Rochester, 39 N.Y. S.2d 167, 179 Misc. 325.

44. Cal.—Regan v. Council of City of San Mateo, 110 P.2d 95, 42 C. A.2d 801.

on an application for a permit or certificate in the absence of fraud, surprise, mistake, or inadvertence;⁴⁵ but it may do so where there has been a substantial change of conditions affecting the right to the permit.⁴⁶ The board is not concluded by a prior decision which has been set aside as arbitrary and illegal.⁴⁷ Furthermore, an application for a certificate of approval of a gasoline station location may be denied although some years previously the board had approved the same location for such use;⁴⁸ and the denial of an application for a permit will not preclude the grant of a permit on a new application based on different facts or changed conditions,⁴⁹ or on different grounds and under a different ordinance.⁵⁰

§ 260. Requisites, Validity, Operation, and Effect of Permit

A garage permit may, in the absence of a statute or regulation to the contrary, be signed by means of a

rubber stamp; and a certificate of approval of a location as a site for a gasoline station pertains to the suitability of the location, and not to the person who proposes to sell the gasoline.

A garage permit may, in the absence of a statute or regulation to the contrary, be signed by means of a rubber stamp.⁵¹ A permit for the storage of automobiles on the same lot on which a tenement house or hotel is located may be issued when authorized by ordinance.⁵² A certificate of approval of a location as a site for a gasoline station pertains to the suitability of the location from which the gasoline is to be sold, and not to the person or persons who propose to sell it.⁵³

Where a petition to use lots as a parking space is granted, prima facie any necessity for pursuing further the matter of rezoning is superseded in so far as the use of the lots as a parking space is concerned.⁵⁴ Where a permit expires by its own limitation it is not susceptible of extension or renewal

45. Conn.—*Dadukian v. Zoning Bd. of Appeals of City of Bridgeport*, 68 A.2d 123, 135 Conn. 706.

Md.—*Miles v. McKinney*, 199 A. 540, 174 Md. 551, 117 A.L.R. 207.

Use for sale of gasoline

Under municipal ordinance providing that board of zoning appeals shall not consider or approve an application for a permit within two years after rejection of an application for a similar "permit" for same premises, as applied to applications for gasoline stations, quoted word comprehends use of premises for sale of gasoline.

Md.—*Nuova Realty Co. v. Mayor and City Council of Baltimore City*, 78 A.2d 765, 197 Md. 266.

46. Conn.—*Burr v. Rago*, 180 A. 444, 120 Conn. 287.

Changes held insufficient to justify board of appeals in reversing its decisions denying permit.

Conn.—*Burr v. Rago*, *supra*.

New application

If there has been change in physical condition since appeal from denial of application for permit to construct garage, new application should be filed with building inspector.

N.J.—*Sitgreaves v. Board of Adjustment of Town of Nutley*, 54 A.2d 451, 136 N.J.Law 21.

47. Conn.—*Watson v. Howard*, 86 A.2d 67, 138 Conn. 464—Colonial Beacon Oil Co. v. Zoning Board of Appeals of City of Hartford, 23 A.2d 151, 128 Conn. 351.

Absence of majority

Where zoning board's determination that application for permit to erect gasoline station was invalid because there had not been a majority vote of board for granting per-

mit, fact that board had new member in place of one who resigned after determination would not prevent reconsideration of matter.

N.Y.—*Gollob v. Bevans*, 161 N.Y.S.2d 225, 5 Misc.2d 958.

Effect of action to get aside

Owner's court action to have order of city authorities denying building permit to repair garage declared unreasonable did not preclude subsequent application.

Kan.—*State v. Wade*, 278 P. 1067, 128 Kan. 646.

48. Conn.—*Dadukian v. Zoning Bd. of Appeals of City of Bridgeport*, 68 A.2d 123, 135 Conn. 706.

Detrimental effects not previously apparent

City zoning board of appeal's denial of certificate of approval of gasoline station location on application made therefor some eighteen years after board's approval of same location for such use was not precluded by principle that administrative tribunal should not ordinarily be permitted to review its own decisions and revoke action once taken by it, since effect of such use on traffic safety and fire hazards might not have been apparent at time of previous approval.

Conn.—*Dadukian v. Zoning Bd. of Appeals of City of Bridgeport*, *supra*.

Held not criterion of issue

Detriment to lot owner individually because of his inability to resume gasoline station business on lot is not criterion for determining issue whether city zoning board of appeals acted beyond its powers in refusing approval of such location for station on application made some eight-

een years after board's approval of location for such use.

Conn.—*Dadukian v. Zoning Bd. of Appeals of City of Bridgeport*, *supra*.

49. N.C.—*Application of Broughton Estate*, 185 S.E. 434, 210 N.C. 62.

50. N.Y.—*Esdora Realty Corporation v. Walsh*, 240 N.Y.S. 792, 136 Misc. 476, reversed on other grounds 243 N.Y.S. 810, 229 App. Div. 866, affirmed 173 N.E. 883, 254 N.Y. 680.

51. Mass.—*Foss v. Wexler*, 136 N.E. 243, 242 Mass. 277.

52. N.Y.—*People ex rel. Benedict v. Milleman*, 218 N.Y.S. 256, 128 Misc. 367.

"Located"

(1) "Located," within the meaning of a provision authorizing the issuance of a permit for the storage of automobiles on the same lot on which a tenement house or hotel is located, means a tenement house or hotel which is either in existence at the time of the application or has been designated and assigned to occupy a certain plot absolutely by one not a stranger to the title.

N.Y.—*People ex rel. Benedict v. Milleman*, *supra*.

(2) In this sense, an apartment house may be "located" on a lot by the filing of an application for a permit and plans of the proposed house with the building inspector.

N.Y.—*People ex rel. Benedict v. Milleman*, *supra*.

53. Conn.—*State ex rel. Gold v. Usher*, 84 A.2d 276, 138 Conn. 323.

54. Ark.—*City of Little Rock v. Griffin*, 210 S.W.2d 915, 213 Ark. 465.

after its expiration, and when a second permit for the same purpose is issued which makes no mention of its being an extension or renewal of the first, the second permit may not be regarded as an extension or renewal of the first permit.⁵⁵

Illegal or unauthorized permit. A property owner is charged with notice of the illegality of a permit issued to him after the enactment of a zoning ordinance prohibiting erection of a filling station;⁵⁶ and an illegal or unauthorized filling station permit is a nullity and confers no rights on the permittee.⁵⁷

§ 261. Revocation or Nullification

A permit for the construction, alteration, or use of property for a service station or garage is subject to revocation where the permittee has not acted on the faith of the permit and has no vested rights thereunder.

A permit obtained from a municipality for the construction, alteration, or use of property for a service station or garage is subject to revocation by the proper exercise of the police power vested in the municipality.⁵⁸ Accordingly, where the per-

mittee has not acted on the faith of the permit and no substantial work has been done on the structure, the permittee has no vested rights and the permit may be revoked or nullified by a change in the zoning regulations.⁵⁹

After such a permit has been granted, however, and the permittee has acted on the faith of it and made contracts and incurred expenses and liabilities or completed a substantial amount of work toward the construction of the proposed structure, the permittee has a vested right,⁶⁰ and the permit cannot be revoked in the absence of fraud or deceit or other fault on the part of the permittee;⁶¹ nor can it be nullified by a change in the zoning ordinance.⁶² It is ordinarily improper to revoke a permit or certificate without notice to the owner and an opportunity for him to be heard;⁶³ but there may be instances where doing so is not illegal.⁶⁴

An illegal or unauthorized permit may be revoked,⁶⁵ at least in the absence of any circumstances working an estoppel;⁶⁶ and it has been held that it may be revoked or invalidated notwithstanding that a person may have acted on the permit.⁶⁷

55. N.J.—*Giordano v. Mayor and Council of Borough of Dumont*, 61 A.2d 245, 137 N.J.Law 740, 6 A.L.R. 2d 956.

56. N.J.—*Giordano v. Mayor and Council of Borough of Dumont*, supra.

57. N.J.—*Giordano v. Mayor and Council of Borough of Dumont*, supra.

N.Y.—*Rosenbush v. Keller*, 285 N.Y.S. 636, 247 App.Div. 748, affirmed 2 N.E.2d 659, 271 N.Y. 282.

58. U.S.—*Geneva Inv. Co. v. City of St. Louis*, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

N.Y.—*Crone v. Town of Brighton*, 119 N.Y.S.2d 877.

Tex.—*City of San Antonio v. Humble Oil & Refining Co.*, Civ.App., 27 S.W.2d 868, error dismissed.

Zoning change effecting revocation. Amended zoning ordinance whereby property was transferred from commercial to residential district has been held in effect to revoke permits previously granted to landowner to install gasoline tanks and pumps and to erect filling station.

U.S.—*Geneva Inv. Co. v. City of St. Louis*, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

59. Conn.—*Town of Milford v. Commissioner of Motor Vehicles*, 96 A.2d 806, 133 Conn. 677.

N.H.—*Winn v. Lamoy Realty Corp.*, 124 A.2d 211, 100 N.H. 280.

Tenn.—*Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904, 176 Tenn. 405.

60. N.Y.—*Edwards v. City of Watertown*, 286 N.Y.S. 923, 247 App.Div. 860.

Pa.—*Kahn v. Seeds No. 1*, 20 Pa. Dist. & Co. 361.

Revocation and nullification of building or use permit generally see supra § 244.

61. Colo.—*Pratt v. Denver*, 209 P. 508, 72 Colo. 51.

Mich.—*Sandenburgh v. Michigamme Oil Co.*, 228 N.W. 707, 249 Mich. 372.

N.J.—*Peerless Oil Co. of Pennsylvania v. Hague*, 132 A. 332, 4 N.J. Misc. 148.

N.Y.—*Robitzek Investing Co. v. Murdock*, 62 N.Y.S.2d 737, 271 App.Div. 250, motion denied 69 N.E.2d 481, 296 N.Y. 632, affirmed 72 N.E.2d 32, 296 N.Y. 852—*Carpenter v. Kreuter*, 15 N.Y.S.2d 1002, 258 App. Div. 808—*Edwards v. City of Watertown*, 286 N.Y.S. 923, 247 App. Div. 860.

Tex.—*Gulf Refining Co. v. City of Dallas*, Civ.App., 10 S.W.2d 151, error dismissed.

62. N.Y.—*Robitzek Investing Co. v. Colonial Beacon Oil Co.*, 40 N.Y.S.2d 819, 265 App.Div. 749, appeal denied 42 N.Y.S.2d 922, 266 App.Div. 775—*Edwards v. City of Watertown*, 286 N.Y.S. 923, 247 App. Div. 860.

Pa.—*Kahn v. Seeds No. 2*, 20 Pa. Dist. & Co. 365.

63. N.J.—*Dickinson v. Busch*, 4 A. 2d 95, 122 N.J.Law 71.

N.Y.—*Robitzek Investing Co. v. Murdock*, 62 N.Y.S.2d 737, 271 App.

Div. 250, motion denied 69 N.E.2d 481, 296 N.Y. 632, affirmed 72 N.E. 2d 32, 296 N.Y. 852.

64. N.J.—*Sun Oil Co. v. Borough of Bradley Beach*, 55 A.2d 778, 136 N.J.Law 307, affirmed 61 A.2d 236, 137 N.J.Law 658.

65. N.Y.—*Kaltenbach v. Board of Standards and Appeals*, 8 N.E.2d 287, 274 N.Y. 34.

Sage v. Hand, 21 N.Y.S.2d 17, 259 App.Div. 1087.

Pa.—*Vogt v. Borough of Port Vue*, 85 A.2d 688, 170 Pa.Super. 526.

False representation by applicant for permit to construct filling station that plot was in unrestricted use area, even if innocent, authorized revocation of permit by commissioner of building.

N.Y.—*Rosenbush v. Keller*, 285 N.Y.S. 636, 247 App.Div. 748, affirmed 2 N.E.2d 659, 271 N.Y. 282.

66. Ky.—*Selligman v. Western & Southern Life Ins. Co.*, 126 S.W.2d 419, 277 Ky. 551.

Enlargement of unauthorized use

Where owner of nonconforming use in residential zone, under a permit issued by superintendent of buildings to build a three-car garage, expended money thereon, and building inspector had inspected the work twice, city was not estopped to revoke permit as being an enlargement of an unauthorized use.

N.J.—*Adler v. Department of Parks & Public Property, Town of Irvington*, 89 A.2d 704, 20 N.J.Super. 240.

67. N.J.—*Giordano v. Mayor and*

C. ADMINISTRATIVE REVIEW

§ 262. In General

Under some zoning laws an appeal lies to a higher board or commission from the decision of the original official or board on an application relating to a permit or certificate.

Under some zoning laws an appeal lies to a higher board or commission from the decision of the

original official or board on an application relating to a permit or certificate,⁶⁸ and the power to review such a decision may be vested exclusively in the designated board.⁶⁹ Accordingly such appeal may be taken by an aggrieved party from a decision granting,⁷⁰ or denying a permit⁷¹ or may be taken by an aggrieved party from a decision revok-

Council of Borough of Dumont, 61 A.2d 245, 137 N.J.Law 740, 6 A.L.R.2d 956.

Pa.—Vogt v. Borough of Port Vue, 85 A.2d 688, 170 Pa.Super. 526.

68. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 303.

Conn.—Comley v. Boyle, 162 A. 26, 115 Conn. 406.

Ill.—Cann v. City of Chicago, 241 Ill.App. 21.

Mass.—Lambert v. Board of Appeals of City of Lowell, 3 N.E.2d 784, 295 Mass. 224.

N.Y.—Towne v. Sherk, 13 N.Y.S.2d 153, 257 App.Div. 983, affirmed 23 N.E.2d 18, 281 N.Y. 686—People v. Walsh, 196 N.Y.S. 672, 203 App.Div. 468.

Van Auken v. Kimmey, 252 N.Y. S. 329, 141 Misc. 105—In re Allerad Realty Corporation, 244 N.Y.S. 531, 138 Misc. 232—Gordon v. Board of Appeals of City of Schenectady, 225 N.Y.S. 680, 131 Misc. 346.

Hilton v. Board of Appeals of City of Geneva, 18 N.Y.S.2d 213. N.C.—In re Pine Hill Cemeteries, 15 S.E.2d 1, 219 N.C. 735.

Tenn.—Howe Realty Co. v. City of Nashville, 141 S.W.2d 904, 176 Tenn. 405.

Tex.—Washington v. City of Dallas, Civ.App., 159 S.W.2d 579.

43 C.J. p 348 note 70.

To emergency housing commission

Mass.—Opinion of the Justices, 73 N.E.2d 881, 321 Mass. 759.

69. N.Y.—In re Kalen, 289 N.Y.S. 58, 248 App.Div. 777.

70. Ga.—Ledbetter v. Callaway, 87 S.E.2d 317, 211 Ga. 607.

Ill.—Flick v. Gately, 65 N.E.2d 137, 328 Ill.App. 81.

Iowa.—Call Bond & Mortgage Co. v. Sioux City, 259 N.W. 33, 219 Iowa 572.

Md.—Akers v. Mayor and City Council of Baltimore, 20 A.2d 181, 179 Md. 448.

Mass.—Colabufalo v. Board of Appeal or City of Newton, 143 N.E.2d 536.

N.Y.—Retoske v. Boettger, 290 N.Y. S. 957, 249 App.Div. 624.

"Person aggrieved"

(1) Spirit and intent of zoning combined with justice itself require that statute allowing any person aggrieved by an officer, department,

board, or bureau of the village to take an appeal to the board of appeals be given the broadest possible interpretation.

N.Y.—Horan v. Board of Appeals, Village of Scarsdale, 164 N.Y.S.2d 543, 6 Misc.2d 571.

(2) "Person aggrieved" under such a statute is a person directly affected by the action of the administrative official or board charged with enforcement of the ordinance.

Ind.—Fidelity Trust Co. v. Downing, 68 N.E.2d 789, 224 Ind. 457.

(3) Where appeal was taken by adjoining land owner who made no special showing of injury or damage, acceptance by zoning board of appeals of jurisdiction of appeal was not unreasonable or arbitrary.

N.Y.—Edward A. Lashins, Inc. v. Griffin, 132 N.Y.S.2d 896.

(4) On the face of it, without proof of special injury or damage, an owner of property has sufficient interest to enable him to appeal determination permitting an unauthorized zoning use of adjoining premises and is an aggrieved person entitled to appeal.

N.Y.—Edward A. Lashins, Inc. v. Griffin, *supra*.

(5) Persons living in homes located within five hundred feet of premises for which village building inspector had issued a building permit for erection of shopping center which allegedly would not be in compliance with zoning ordinances and would not promote the general health and welfare were "aggrieved persons" entitled to take an appeal to village board of appeals.

N.Y.—Horan v. Board of Appeals, Village of Scarsdale, *supra*.

(6) Action of the board in refusing to accept the appeal of the petitioners and in deciding as a matter of law and without a hearing that petitioners are not "aggrieved persons" entitled to take an appeal was arbitrary, capricious, and without legal basis.

N.Y.—Horan v. Board of Appeals, Village of Scarsdale, *supra*.

Treated as proceeding by city in own behalf

Even though proceeding, for review of building inspector's action in issuing permit, was instigated by complaint of private citizens, it

would be treated, for purposes of determining whether it had been timely brought, as a proceeding by city in its own behalf, where objectors were not represented by counsel and did not conduct their own case, and instead city attorney conducted inquisition, calling as witnesses the building inspector, two of the objectors, the city planning superintendent and the permittee.

Wis.—State ex rel. A. Hynek & Sons Co. v. Board of Appeals of City of Racine, 64 N.W.2d 741, 267 Wis. 309, vacated on other grounds 66 N.W.2d 623, 267 Wis. 309.

Effect of mayor's approval

Board of zoning appeals is authorized to entertain appeal from building engineer's granting of permit to use building for a particular purpose, notwithstanding mayor's approval of such use has been obtained as required.

Md.—Cook v. Howard, 141 A. 340, 155 Md. 7.

71. Mo.—State ex rel. Beacon Court v. Wind, App., 309 S.W.2d 663.

N.Y.—Beckmann v. Talbot, 15 N.E.2d 556, 278 N.Y. 146, reargument denied 16 N.E.2d 849, 278 N.Y. 700.

Flanagan v. Zoning Bd. of Appeals of Village of Bayville, 149 N.Y.S.2d 668, 2 Misc.2d 922, affirmed 151 N.Y.S.2d 618, 1 A.D.2d 979.

Werner v. Kasotsky, 158 N.Y.S.2d 106—Concordia Collegiate Institute v. Miller, 88 N.Y.S.2d 825, affirmed 93 N.Y.S.2d 922, 276 App.Div. 872, reargument and appeal denied, 94 N.Y.S.2d 829, 276 App.Div. 918, reversed on other grounds 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 87 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—Miller v. Zoning Bd. of Middletown Tp., Com.Pl., 2 Bucks Co. 237.

Exclusiveness of remedy

The procedure prescribed by statute as the course to be followed by one whose application for a permit to alter a building has been refused must be followed to the exclusion of other remedies.

Mass.—Bellevue Hotel Co. v. Building Com'r of Boston, 12 N.E.2d 94, 299 Mass. 73.

Other remedy available to co-party
Petition and appeal, from building commissioner's decision denying per-

ing⁷² a permit, although in the absence of statutes authorizing the remedy, aggrieved landowners have no remedy by appeal from the action of a building commissioner in granting a permit.⁷³ It has been held that a board of appeals has no jurisdiction to review a decision which is a nullity,⁷⁴ or a determination as to matters or acts under invalid regulations.⁷⁵

Ordinarily such an appeal must be predicated on a decision of an administrative body or official on an application made to it,⁷⁶ and it has been held that an ordinance empowering a board to adopt rules necessary to carry into effect the provisions of the zoning ordinance and to review rulings of the building inspector does not invest the board, on

its own motion, with appellate jurisdiction for the purpose of reviewing the legal or equitable character of the building inspector's act in allowing a building permit;⁷⁷ but where the original board, such as the department of public works, refuses to issue a permit, and informs the applicant that he must go to the board of zoning adjustment, and the applicant requests the latter to issue the permit, there is such an application to the department and such a denial of the application and such an appeal to the board as gives the board authority to act.⁷⁸

The appeal may be made only to a duly authorized board on which appellate jurisdiction has been conferred.⁷⁹ Statutes and zoning ordinances au-

mit, by both fuel company and railroad, were not barred because railroad, if alone interested, might have proceeded under another statute to obtain relief from the department of public utilities.

Mass.—Marinelli v. Board of Appeal of Building Department of City of Boston, 175 N.E. 479, 275 Mass. 169.

Held reviewable decision

Where building inspector unequivocally denied application for permit on ground that construction would violate zoning ordinance, his denial and statement that variance was needed before building permit could be issued constituted a decision from which an appeal might be taken by application to village zoning board of appeals for variance.

N.Y.—Hunter v. Board of Appeals of Village of Saddle Rock, 168 N.Y.S. 2d 148, 4 A.D.2d 961.

Denial by village building inspector

Village building inspector who refused to grant building permit and certificate of occupancy was an "administrative official" within section of village law authorizing appeals to board of appeals from determination of administrative official charged with enforcement of ordinance.

N.Y.—Weiss v. Village of Lindenhurst, 144 N.Y.S.2d 228.

Refusal to entertain appeal held violation of law

In proceeding on application for permission to construct gypsum manufacturing plant in an area devoted mostly to scattered light industry and agriculture, zoning board of appeals had jurisdiction of appeal from decision of township board denying application, and refusal of board to entertain appeal was in violation of law.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

72 N.Y.—Huron Place Corp. v.

Schnieder, 159 N.Y.S.2d 733, 3 A.D. 2d 722.

73. Mass.—Tranfaglia v. Board of Appeals of Winchester, 35 N.E.2d 481, 306 Mass. 619—Tranfaglia v. Building Commissioner of Winchester, 28 N.E.2d 537, 306 Mass. 495—Petros v. Superintendent of Buildings of Lynn, 28 N.E.2d 233, 306 Mass. 388, 128 A.L.R. 1210—Turner v. Board of Appeals of Town of Milton, 25 N.E.2d 203, 305 Mass. 189.

74. R.I.—M. & L. Die & Tool Co. v. Board of Review of City of Newport, 76 A.2d 537, 77 R.I. 443.

75. N.Y.—Melita v. Nolan, 213 N.Y. S. 674, 126 Misc. 345.

76. Conn.—Kelley v. Board of Zoning Appeals of New Haven, 13 A.2d 675, 126 Conn. 648.

N.Y.—Kaufman v. City of Glen Cove, 45 N.Y.S.2d 53, 180 Misc. 349, affirmed 42 N.Y.S.2d 508, 266 App.Div. 870.

Wyler v. Eckert, 73 N.Y.S.2d 789. Ohio.—Vandervort v. Sisters of Mercy of Cincinnati, 117 N.E.2d 51, 97 Ohio App. 153.

Pa.—Fox v. Warrington Tp. Zoning Bd., 3 Pa. Dist. & Co.2d 1.

Wetherill v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 264—Fox v. Zoning Bd. of Adjustment, Com.Pl., 4 Bucks Co. 260—Urquhart v. Tredyffrin Tp. Sup'rs, Quar.Sess., 6 Chest.Co. 104.

R.I.—Garreau v. Board of Review of City of Newport, 63 A.2d 214, 75 R.I. 44.

Proceedings held to invoke appellate power of board

(1) Appeal to town board of appeals from building inspector's interpretation of building zone ordinance, resulting in denial of application for permit to erect a motel on applicant's property, invoked appellate power of board and not its power to vary terms of ordinance.

N.Y.—Hinna v. Board of Appeals of Town of Hempstead, 170 N.Y.S.2d 12.

(2) Where zoning board of appeals, in affirming building inspector's determination granting permit for commercial sand and gravel pit, acted on erroneous legal interpretation of section of zoning ordinance and not in exercise of its discretion as on an application for a variance or similar relief, hearing on appeal from building inspector's determination could not be considered to have been a hearing on application for variance or the like.

N.Y.—Bayley v. Adams, 105 N.Y.S.2d 652, 278 App.Div. 962, affirmed 106 N.E.2d 57, 303 N.Y. 967.

77. N.J.—D. Giordano Sons v. Ciliberti, 91 A.2d 638, 22 N.J.Super. 179.

78. Mo.—State ex rel. Beacon Court, Inc. v. Wind, App., 309 S.W.2d 663.

79. N.J.—Kantorowitz v. Bigelow, Sup., 130 A. 811, 102 N.J.Law 13—Losick v. Binda, 130 A. 537, 102 N.J.Law 157.

Greenstein v. Bigelow, 135 A. 661, 5 N.J.Misc. 124.

Pa.—Application of Devon Show Grounds, Inc., Com.Pl., 5 Chest.Co. 120.

Board abolished

Where zoning board of appeals, reversing finding of building superintendent denying permit, had been abolished by statute, proceedings on appeal and resulting judgment were nullities.

N.J.—Smith v. Kearny Zoning Board of Appeals, 143 A. 151, 6 N.J.Misc. 954.

Particular boards

(1) Under building code provisions that there shall be no appeal to board of building appeals where appeal lies to zoning board of adjustments under provisions of zoning ordinance, board of adjustment had jurisdiction to review act of building commissioner in refusing to re-

thorizing the board of zoning appeals to vary or modify the terms of the ordinances in case of practical or unnecessary hardships do not render a showing or claim of undue hardship or practical difficulty a prerequisite to the board's review of a refusal of a permit.⁸⁰

Effect of appeal. Under a statute so providing, an appeal to the board or commission stays all proceedings in furtherance of the action appealed from,⁸¹ and, after an appeal is taken from the refusal to grant the permit, the permit cannot be granted until the board of appeal or adjustment has disposed of the appeal by some official act.⁸²

Withdrawal of appeal. After an appeal has been taken to the board or commission from the refusal to issue the permit, and various parties in interest have appeared and been heard, complainant cannot withdraw the appeal without the consent of the municipal corporation or the officer from whose action the appeal is taken.⁸³

Arbitration. Under some provisions an appeal from a decision of an administrative body or official may be in the form of arbitration proceedings

in the prescribed manner.⁸⁴

Laches or estoppel. Where an appeal from the issuance of a permit is taken within the time allowed therefor, reliance on the permit in the time intervening between its issuance and the taking of the appeal will not suffice to sustain a plea of estoppel,⁸⁵ nor will laches be found under the circumstances.⁸⁶ A township is not estopped to contest the jurisdiction of its board of adjustment to hear an appeal from the township building inspector's refusal to issue a certificate of occupancy for certain premises to persons without a valid building permit.⁸⁷

§ 263. Nature and Extent of Jurisdiction on Appeal

In exercising its appellate jurisdiction on review of a decision relating to a permit, the board is vested with judicial or quasi-judicial powers, and, subject to review by the courts, its decisions are final and may not be collaterally attacked.

In exercising its appellate jurisdiction on review of a decision relating to a permit or certificate, the board has been held to be vested with judicial or at least quasi-judicial and discretionary powers,⁸⁸

voke alteration permit to allow residence to be converted to funeral parlor, as real issue was whether there was right to use different from that for which property was zoned, and board's revocation of alteration permit was also, in effect, revocation of occupancy permit for same use, although more appropriate procedure would have been to revoke expressly both permits.

Mo.—Veal v. City of St. Louis, 289 S.W.2d 7, 365 Mo. 836.

(2) City zoning ordinance providing for right of appeal to board of appeals by any person aggrieved by decision of inspector of buildings, and providing that other ordinances pertaining to same subject matter should remain in full force and effect unless clearly inconsistent, superseded right of appeal to board of aldermen under prior building ordinance.

Mass.—Massachusetts Feather Co. v. Aldermen of Chelsea, 120 N.E.2d 766, 331 Mass. 527.

80. Mich.—Mitchell v. Grewal, 61 N.W.2d 3, 338 Mich. 81.

81. N.J.—Gibbs Bldg. & Const. Co. v. Town of Belleville, 135 A. 333, 100 N.J.Eq. 240.

Extent of stay

Under town law provision that appeal to zoning board of appeals stays all proceedings in furtherance of action appealed from, the status quo is to be maintained pending appeal, and where appeal was taken from action

issuing building permit, pending determination of appeal, only the issuance of the building permit and nothing else was stayed.

N.Y.—Blum v. O'Connor, 163 N.Y.S.2d 516, 6 Misc.2d 641.

Rule held inapplicable to appeal from issuance of permit as a result of judicial action in a mandamus proceeding.

Pa.—Lower Merion Tp. v. Frankel, 57 A.2d 900, 358 Pa. 430.

Review in courts

(1) While appeal is pending before board of adjustment, neither act appealed from nor action pending final disposition is reviewable in courts. N.J.—Ostrowsky v. City of Newark, 139 A. 911, 102 N.J.Eq. 169.

(2) Judicial review of proceedings of boards of appeal or adjustment see *infra* § 328.

82. N.J.—Gibbs Bldg. & Const. Co. v. Town of Belleville, 135 A. 333, 100 N.J.Eq. 240.

83. N.J.—Gibbs Bldg. & Const. Co. v. Town of Belleville, *supra*.

84. Conclusiveness of arbitration and award

(1) Arbitrators' award, authorized by ordinance, upholding mayor's revocation of building permit, held conclusive, in absence of reservation of right of appeal.

Tex.—City of San Antonio v. Robert Thompson & Co., Civ.App., 30 S.W.2d 339, error dismissed Robert Thompson & Co. v. City of San Antonio, Com.App., 44 S.W.2d 972.

(2) Where village, on builder's appeal from decision of building commissioner refusing to issue building permits, took part in the selection of arbitrators as provided by village ordinance, appeared and took part in the hearing, made no objection and made no showing as to reasons that might have been urged against the issuance of permits, in absence of fraud, village and building commissioner were estopped to deny authority of arbitrators and justness of award.

Ill.—People ex rel. Baltis v. Village of Westchester, 51 N.E.2d 990, 320 Ill.App. 639.

85. N.J.—Jantausch v. Borough of Verona, 124 A.2d 14, 41 N.J.Super. 89, affirmed 131 A.2d 881, 24 N.J. 326.

86. N.J.—Jantausch v. Borough of Verona, *supra*.

Expenditure in reliance on permit

Rule of the text was applied in a case where a building permit was granted October 11, and an appeal was taken November 3, after the permittee had spent three thousand dollars in reliance on the permit. N.J.—Jantausch v. Borough of Verona, *supra*.

87. N.J.—Cella v. Cedar Grove Tp., 133 A.2d 389, 45 N.J.Super. 585.

88. Ga.—Gay v. City of Lyons, 74 S.E.2d 839, 209 Ga. 599. N.J.—Harrison v. Board of Adjustment of Town of Montclair, 142 A. 353, 6 N.J.Misc. 570.

and, subject to review by the courts, discussed *infra* § 328, its decisions are final⁸⁹ and may not be collaterally attacked.⁹⁰

Under some provisions the function of the board is limited to consideration of applications, exceptions, and variances on appeal from decisions of the building inspector,⁹¹ and the board is limited to determination of whether the officer whose decision is appealed from applied the zoning ordinance correctly.⁹² Under other provisions the board is under no restrictions in its consideration of the matter;⁹³ it is not limited to a determination of whether the ordinances regulating the permit procedure have been complied with,⁹⁴ but is given all the powers of the officers from whom the appeal is taken,⁹⁵ and has jurisdiction to hear the entire controversy⁹⁶ *de novo*,⁹⁷ and to draw its own conclusions from conflicting evidence before it.⁹⁸ So it has been said that an application to the board of appeals on appeal from an order of an administrative officer refusing a building permit as contrary to the zoning resolution is not strictly an appeal, although it is so designated,⁹⁹ but presents a matter within the original jurisdiction of the board

to vary the resolution,¹ and that the board has jurisdiction to treat the case as an application for a variance.²

The board deals strictly with zoning, which determines how an owner can use or not use his land,³ and has no authority to construe the state corporation law,⁴ or the municipal building code,⁵ or to deal with a refusal to issue a certificate of occupancy where the refusal was not predicated on an infraction of the zoning law, but was occasioned by noncompliance with the requirements as to subdivision, namely, lack of proper street facilities.⁶ Moreover it has no power to pass on the validity or invalidity of ordinances.⁷

§ 264. Procedure

The procedure prescribed by statute for an appeal to a reviewing board from the decision of an administrative officer relating to permits or certificates is exclusive, and there must be substantial compliance with the rules governing the time and manner of taking the appeal.

The procedure prescribed by statute for an appeal to a reviewing board from the decision of an administrative officer relating to permits or certificates is exclusive,⁸ and there must be substantial

N.C.—*In re Pine Hill Cemeteries*, 15 S.E.2d 1, 219 N.C. 735.
Tex.—*Washington v. City of Dallas*, Civ.App., 159 S.W.2d 579.

Action of board held not to constitute legislation

On appeal from decision of building inspector denying permit, action of board of appeals under local zoning ordinance in permitting substitution of a new service station building for, or extension or alteration of, particular building or structure existing as nonconforming use, was not in nature of legislation, but was exercise of discretionary determination properly vested in administrative board.

N.Y.—*Fox v. Adams*, 134 N.Y.S.2d 534.

89. Tex.—*Washington v. City of Dallas*, Civ.App., 159 S.W.2d 579.

Determination of facts by board of adjustment, acting in a judicial capacity, is conclusive if supported by evidence.

N.J.—*Meixner v. Board of Adjustment of City of Newark*, 37 A.2d 678, 131 N.J.Law 599.

N.C.—*In re Pine Hill Cemeteries*, 15 S.E.2d 1, 219 N.C. 735.

90. N.C.—*State v. Roberson*, 150 S.E. 674, 198 N.C. 70.

91. Colo.—*Board of Adjustment of City and County of Denver v. Abe Perlmutter Const. Co.*, 280 P.2d 1107, 131 Colo. 280.

92. N.Y.—*J. L. Hennessy Associates, Inc. v. Griffin*, 155 N.Y.S.2d 378.

Hardship, traffic congestion, and effect on value

Town zoning board of appeals, on appeal from action of building inspector on request for building permit, should not have considered hardship, traffic congestion, and effect on value of neighboring properties.

N.Y.—*J. L. Hennessy Associates, Inc. v. Griffin*, *supra*.

93. Cal.—*Lindell Co. v. Board of Permit Appeals of City and County of San Francisco*, 144 P.2d 4, 23 C.2d 303.

Hardship and necessity

Hearing of an appeal from the issuance of a building permit is the occasion for consideration of the question of hardship and necessity, and the board can consider such evidence on the appeal.

N.Y.—*Application of Furlong*, 111 N.Y.S.2d 398.

94. Cal.—*Lindell Co. v. Board of Permit Appeals of City and County of San Francisco*, 144 P.2d 4, 23 C.2d 303.

95. Neb.—*Roncka v. Fogarty*, 41 N.W.2d 745, 152 Neb. 467.

R.I.—*Ajootian v. Zoning Bd. of Review of City of Providence*, 132 A.2d 836.

Wyo.—*In re McInerney*, 34 P.2d 35, 47 Wyo. 253.

96. Cal.—*Lindell Co. v. Board of Permit Appeals of City and County of San Francisco*, 144 P.2d 4, 23 C.2d 303.

97. Mo.—*Brown v. Montgomery*, 193 S.W.2d 23, 354 Mo. 1041.

98. Cal.—*Lindell Co. v. Board of Permit Appeals of City and County of San Francisco*, 144 P.2d 4, 23 C.2d 303.

Mo.—*Brown v. Montgomery*, 193 S.W.2d 23, 354 Mo. 1041.

99. N.Y.—*People v. Walsh*, 199 N.Y.S. 534, 120 Misc. 467.

1. N.Y.—*People v. Walsh*, *supra*.

2. R.I.—*Ajootian v. Zoning Bd. of Review of City of Providence*, 132 A.2d 836.

3. Md.—*Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore*, 72 A.2d 1, 195 Md. 1.

4. Md.—*Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore*, *supra*.

5. Md.—*Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore*, *supra*.

6. N.J.—*Cella v. Cedar Grove Tp.*, 133 A.2d 389, 45 N.J.Super. 585.

7. Ga.—*Gay v. City of Lyons*, 74 S.E.2d 839, 209 Ga. 599.

8. Pa.—*City of Philadelphia v. Wyszynski*, 112 A.2d 327, 381 Pa. 153.

Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 113 A.2d 292, 180 Pa.Super. 105.

compliance with rules governing the time⁹ and manner¹⁰ of taking the appeal. The petition for appeal must set out specifically the facts which petitioner contends show a violation of the zoning ordinance.¹¹ Notice of the appeal is generally required,¹² and such notice should be filed with the board of appeals and the officer from whom the appeal is taken,¹³ and should specify the grounds of appeal;¹⁴ but where it does not appear that complaining property owners have been prejudiced by reason of the failure of the notice of appeal to specify the grounds of appeal, and objection to the deficiency is raised for the first time after full hearing, the proceedings will not be voided on this

ground.¹⁵

§ 265. — Hearing and Evidence

Although under some provisions the power of the board reviewing an administrative decision relating to permits or certificates to grant a hearing de novo is discretionary, ordinarily there must be a formal and proper hearing on due notice, and evidence must be introduced.

Although under some provisions the power of the board, as a reviewing body reviewing an administrative decision relating to permits or certificates, to grant a hearing de novo is discretionary, and not mandatory,¹⁶ ordinarily there must be a formal and proper hearing¹⁷ on due notice.¹⁸ Evidence must

9. N.J.—*Ostrowsky v. City of Newark*, 139 A. 911, 102 N.J.Eq. 169.
N.Y.—*Application of Kalen*, 15 N.Y.S.2d 546, 258 App.Div. 798.

10. N.J.—*Dickinson v. Inhabitants of City of Plainfield*, 176 A. 716, 13 N.J.Misc. 260, affirmed 184 A. 195, 116 N.J.Law 336.

Necessity of fixing procedural rules

Failure of board of adjustment, acting under zoning ordinance, to provide by rule for procedure before it on appeal from decision of superintendent was not cause for complaint by property owner where her rights were fully protected under statute regulating the taking of such appeals.

N.H.—*Sundeen v. Rogers*, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

11. Md.—*Norwood Heights Imp. Ass'n v. Mayor & City Council of Baltimore*, 73 A.2d 529, 195 Md. 368.

Petition held fatally defective

Petition on appeal from approval of application for building permits alleging that drawings submitted by applicant violated certain section of zoning ordinance without stating facts as to how section was violated. Md.—*Norwood Heights Imp. Ass'n v. Mayor & City Council of Baltimore*, supra.

12. Del.—*Application of Emmett S. Hickman Co.*, 108 A.2d 667, 10 Terry 13.

Notice of appeal held insufficient

(1) In General.

Wis.—*State ex rel. Russell v. Board of Appeals of Village of Prairie du Sac*, 27 N.W.2d 378, 250 Wis. 394.

(2) Even though notice was not required to be given to public of appeals to zoning board, once the board undertook to give notice, it devolved on board to give such notice as would reasonably apprise public of premises involved, and where board failed to state which of two maps was referred to and gave wrong distance of property from street, notice was insufficient.

N.Y.—*Dietz v. Remington*, 118 N.Y.S. 2d 177.

Lack of notice held immaterial

Where zoning law was unreasonably applied, property owner's lack of notice of intention to appeal to zoning board was immaterial.

Ga.—*Fauss v. McConnell*, 157 S.E. 625, 172 Ga. 444.

Waiver of objections to sufficiency

Objections to sufficiency of notice of appeal may be waived by participation in appeal and in hearing and arguments.

N.Y.—*Hilton v. Board of Appeals of City of Geneva*, 18 N.Y.S.2d 213.

13. N.Y.—*Lapham v. Roulan*, 169 N.Y.S.2d 346.

Purpose of statute is to set the officer in motion to transmit to board of appeals all papers constituting record on which action appealed from was taken.

N.Y.—*Lapham v. Roulan*, supra.

Waiver of filing

Where superintendent of buildings and zoning knew of property owner's desire to appeal from his ruling rejecting application for building permit and transmitted papers constituting record on which action was taken to board of appeals of city without formal filing of notice of appeal and board entertained appeal on such papers, and neither superintendent nor board objected to the informal procedure, they waived statutory provision that notice of appeal shall be filed with officer from whom appeal is taken and with board of appeals.

N.Y.—*Lapham v. Roulan*, supra.

14. Del.—*Application of Emmett S. Hickman Co.*, 108 A.2d 667, 10 Terry 13.

Notice not to be judged harshly

Notice of appeal to board of appeals from decision of planning board, which notice is required by statute merely to specify grounds for appeal, is not to be judged as harshly and as rigorously as pleading in civil action.

N.Y.—*Hilton v. Board of Appeals of City of Geneva*, 18 N.Y.S.2d 213.

15. Del.—*Application of Emmett S. Hickman Co.*, 108 A.2d 667, 10 Terry 13.

16. Cal.—*Meyers v. Board of Sup'rs of Los Angeles County*, 243 P.2d 38, 110 C.A.2d 623.

Board held not to have exceeded jurisdiction in denying hearing de novo.

Cal.—*Meyers v. Board of Sup'rs of Los Angeles County*, supra.

17. Ill.—*Flick v. Gately*, 65 N.E.2d 137, 328 Ill.App. 81.

18. Mass.—*Opinion of the Justices*, 73 N.E.2d 881, 321 Mass. 759.

Mich.—*Baura v. Thomasma*, 32 N.W. 2d 369, 321 Mich. 139.

N.J.—*Roberts v. Board of Adjustment of Borough of Fort Lee*, 61 A.2d 896, 1 N.J.Super. 29.

Hendey v. Ackerman, 136 A. 733, 103 N.J.Law 305, followed in *Marvin v. Board of Adjustment of Town of Westfield*, 137 A. 924, 5 N.J.Misc. 668.

Requirement held jurisdictional

N.J.—*Oliva v. City of Garfield*, 62 A. 2d 673, 1 N.J. 184.

Notice to assignee

Assignee of building permit is not entitled to notice of hearing on review unless notice of assignment is given to municipality.

N.J.—*Ostrowsky v. City of Newark*, 139 A. 911, 102 N.J.Eq. 169.

Officer as interested party

Under statute providing that appeals to board of adjustment may be taken by any officer, department, or board of the municipality or by any person having substantial interest in any decision of administrative officer or agency, official whose decision is appealed from is an interested party who must receive notice and be given opportunity to be present at the hearing of such appeal, and if no such notice is given to such official, proceeding of board is not valid.

Ga.—*Ledbetter v. Roberts*, 98 S.E.2d 654, 95 Ga.App. 652.

be introduced before the board so as to furnish a basis for its decision,¹⁹ and the evidence on which the board acts must be sufficient to sustain its decision or findings.²⁰ Where the board ordered a permit and considered all objections to its order as proved, its refusal to grant a continuance to present additional evidence was not prejudicial.²¹

§ 266. Disposition

The action of the board on appeal must conform to the laws and regulations applicable to the case, but under regulations so providing it may, in the exercise of an independent judgment in the matter, affirm, modify, or

overrule the decision appealed from, or make such determination as should be made.

The action of the board on appeal must not exceed its power or authority and must conform to the laws and regulations applicable to the case.²² Although under some statutes the board may deny the appeal,²³ under other statutes, it is held that it has no right to grant or deny the appeal,²⁴ but should only affirm, reverse, or modify the decision appealed from.²⁵ So under some provisions the board may, in the exercise of an independent judgment in the matter, affirm, modify, or overrule the decision appealed from²⁶ or make such determina-

Sufficiency of notice

Where notice of hearing on appeal from building inspector's refusal to grant applicant a permit to construct building which would have violated zoning ordinance did not give notice that applicant was seeking a variance, zoning board of appeals had no jurisdiction to grant the permit, and the grant thereof was void.

Conn.—Smith v. F. W. Woolworth Co., 111 A.2d 552, 142 Conn. 88.

Waiver

Under statute requiring city board of review to give personal notice to parties interested in hearing of appeal from order of city officer, notice was waived by landowner who, without objection to hearing, appeared and argued controversy before board on appeal from order of city building inspector.

R.I.—Hirsch v. Zoning Board of Review of City of Pawtucket, 187 A. 844, 56 R.I. 463.

19. Ill.—Flick v. Gately, 65 N.E.2d 137, 328 Ill.App. 81.

N.J.—Hendey v. Ackerman, 136 A. 733, 103 N.J.Law 305, followed in Marvin v. Board of Adjustment of Town of Westfield, 137 A. 924, 5 N.J.Misc. 668.

On appeal from refusal of permit, in order to obtain a reversal of such refusal, some evidence should be proffered to show error and overcome presumption that zoning ordinance was reasonable.

N.J.—Sharif v. Board of Adjustment of City of East Orange, 143 A. 77, 6 N.J.Misc. 905.

20. Evidence held sufficient to support findings.

N.J.—Levine v. Board of Adjustment of Borough of Rutherford, 142 A. 234, 6 N.J.Misc. 548.

R.I.—Doherty v. Town Council of Town of South Kingstown, 200 A. 964, 61 R.I. 248.

Wis.—State ex rel. Robst v. Board of Appeals of City of Wauwatosa, 13 N.W.2d 64, 244 Wis. 566.

Hearsay evidence

Affidavits as to prior nonconforming use made by persons who did not

testify at hearing on appeal from order of building commissioner granting a permit to alter for use as a funeral home premises shortly thereafter rezoned as residential property constituted hearsay evidence, the probative force of which was for city board of adjustment to determine.

Mo.—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S. Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

21. Va.—Burkhardt v. Board of Zoning Appeals, 66 S.E.2d 565, 192 Va. 606.

22. Ga.—Taylor v. Shetzen, 90 S.E. 2d 572, 212 Ga. 101—Toomey v. Norwood Realty Co., 89 S.E.2d 265, 211 Ga. 814—Gay v. City of Lyons, 74 S.E.2d 839, 209 Ga. 599—Lewenstein v. Brown, 37 S.E.2d 332, 200 Ga. 433.

Kitchings v. Hennessy, 38 S.E. 2d 431, 73 Ga.App. 848.

N.J.—179 Duncan Avenue Corporation v. Board of Adjustment of Jersey City, 5 A.2d 68, 122 N.J.Law 292—Leonard Inv. Co. v. Board of Adjustment of City of Trenton, 4 A.2d 768, 122 N.J.Law 308.

Granting variance

(1) Board of appeals in reviewing action of building superintendent in granting an extension of a nonconforming use of property was without power to grant variance applied for in landowner's answer on such appeal, where no public notice was given of intention to ask for a variance.

N.Y.—Retoske v. Boettger, 290 N.Y.S. 957, 249 App.Div. 624.

(2) The powers of city board of adjustment, sitting as appeal body to review city building inspector's decisions, are limited to minor and practical difficulties and such variations in detail and construction as inspector might have allowed, and board cannot grant variance in use of land as fixed by zoning ordinance of city commission.

Utah.—Walton v. Tracy Loan & Trust Co., 92 P.2d 724, 97 Utah 249.

(3) City board of zoning appeals is not limited to affirmance or rever-

sal of action of city building commissioner or other administrative officer charged with enforcement of zoning ordinance on appeal therefrom, but may use its judgment and discretion in modifying official's order and attach such conditions and restrictions to granting of variance from ordinance as should be made in board's opinion so that spirit thereof shall be observed and substantial justice done.

Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.

23. Conn.—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

24. N.Y.—People v. Leo, 173 N.Y.S. 217, 105 Misc. 372.
West Side Mortg. Co. v. Leo, 174 N.Y.S. 451.

25. N.Y.—People v. Leo, 173 N.Y.S. 217, 105 Misc. 372.
43 C.J. p 355 note 3.

26. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C. 2d 303.

Meyers v. Board of Sup'rs of Los Angeles County, 243 P.2d 38, 110 C.A.2d 623.

Neb.—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

Pa.—Appeal of Floersheim, 34 A.2d 62, 348 Pa. 98.

R.I.—Ajootian v. Zoning Bd. of Review of City of Providence, 132 A. 2d 836.

Considerations affecting judgment

Board was bound to give due heed to all public considerations and private interests in passing upon appeal from action of central permit bureau in issuing building permits for defense housing project in first class residential district.

Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 303.

Overruling error of judgment

Zoning board of appeals may properly overrule an error of judgment of the building inspector in failing to

tion as should be made.²⁷ An appeal may be dismissed in a proper case,²⁸ as where it was not taken in time.²⁹

The board may order the issuance of a permit on condition that the applicant perform specified acts;³⁰ and on appeal from the granting of a permit, it may in a proper case revoke the permit³¹ or impose conditions conforming to the ordinances.³² It has been held, however, that the board does not issue permits; that is done by the original official after the board has decided any contest.³³ The action of the board in granting a permit in violation of requirements of an ordinance is improper.³⁴ Where no greater powers are conferred, the board, sitting as an appeal body to review the decision of an administrative body or official, may do only what such

body or official might have done in the first place.³⁵

Time for rendering decision. The time within which the board may or must render its decision on appeal may be regulated by statute.³⁶ Thus the board may be required to decide the matter within a reasonable time;³⁷ and, where this is the case, the board cannot indefinitely table the appeal.³⁸

§ 267. Reconsideration of Decision

The board may in a proper case grant a rehearing, but in the absence of statutory authorization it may not reopen the matter and rehear it on the same facts.

Under appropriate provision therefor, the board may in a proper case grant a rehearing³⁹ pursuant to a timely application setting forth proper grounds,⁴⁰ such as newly discovered evidence tend-

refer to the town board a request involving an operation which might produce noise, vibrations and noxious fumes.

N.Y.—J. L. Hennessy Associates, Inc. v. Griffin, 155 N.Y.S.2d 378.

Appeal to governing body

With respect to the limitations, if any, on the power of a town board in reviewing the denial of a permit as provided for in the zoning ordinance, the board, which was the legislative body of the town government, whose power over regulation of use of property in town was plenary could not shed its legislative for administrative capacity and subject itself to restraint which it did not acknowledge or recognize as a legislative body, since there can be no restraint in legal sense, when power to act without it is undisputed.

N.Y.—Olp v. Town of Brighton, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App.Div. 944.

Expenses incurred pending appeal

Completion of a considerable part of construction work under building permits before expiration of ten-day period allowed for appeal, where permit expressly stated it was subject to appeal, did not operate as an equitable estoppel against cancellation of permits by board of permit appeals, but presented merely a matter for determination by the board in the exercise of its sound discretion.

Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 303.

27. R.I.—Ajootian v. Zoning Bd. of Review of City of Providence, 132 A.2d 836.

28. Pa.—Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks Co. 131.

R.I.—Elmcrest Realty Co. v. Zoning Bd. of Review of City of Warwick, 82 A.2d 846, 78 R.I. 432.

Dismissal held improper

Where property owner's application for a zoning variation was denied, board's dismissal of appeal from order of commissioner of buildings denying subsequent application of property owner for a machine shop license as a lawful nonconforming use, on ground of former adjudication, was improper.

Ill.—Foertsch v. Fox, 86 N.E.2d 900, 338 Ill.App. 208.

29. R.I.—Elmcrest Realty Co. v. Zoning Bd. of Review of City of Warwick, 82 A.2d 846, 78 R.I. 432.

Reasonable time

Where building permits were granted, and building operations thereunder were commenced almost immediately, and issuance of permits and proposed building operations were public and were known to the remonstrants who also knew that building inspector would not intervene to prevent building operations under permits, and remonstrants did not file appeal from granting of permits until almost three months after issuance of permits when the buildings had been substantially completed, the appeal was not taken within reasonable time as required by ordinance and so would be dismissed.

R.I.—Elmcrest Realty Co. v. Zoning Bd. of Review of City of Warwick, supra.

30. N.Y.—Del Ferraro v. Howell, 130 N.Y.S.2d 75.

Conditions for permitting erection on interior lots

On appeal from refusal of city authorities to issue building permit for erection of dwelling on interior lot which did not abut on a public highway but had access thereto by means of fifty-foot easement contained in deed to lot, board of appeals properly ordered issuance of building permit on condition that applicant construct sewer line, curbs, and water main,

covering frontage of lot on right of way.

N.Y.—Del Ferraro v. Howell, supra.

31. N.J.—Ostrowsky v. City of Newark, 139 A. 911, 102 N.J.Eq. 169.

32. N.J.—Ostrowsky v. City of Newark, supra.

33. Md.—Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore, 72 A.2d 1, 195 Md. 1—Akers v. Mayor and City Council of Baltimore, 20 A.2d 181, 179 Md. 448.

34. Pa.—Fleishon v. Zoning Bd. of Adjustment, 6 Pa.Dist. & Co.2d 337.

Off-street parking

Action of zoning board of adjustment on appeal in granting a permit to construct a building containing fifty-four family dwelling units, and also for an outdoor parking lot in violation of requirements of ordinance as to off-street parking, is improper.

Pa.—Fleishon v. Zoning Bd. of Adjustment, supra.

35. Utah.—Walton v. Tracy Loan & Trust Co., 92 P.2d 724, 97 Utah 249.

36. N.J.—Ehrhardt v. Board of Adjustment of City of Passaic, 142 A. 315, 6 N.J.Misc. 560—Leschinsky v. Ackerman, 142 A. 242, 6 N.J.Misc. 530.

37. R.I.—Richard v. Woonsocket Bd. of Review, 129 A. 736.

38. R.I.—Richard v. Woonsocket Bd. of Review, supra.

39. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C. 2d 303.

40. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, supra.

Mich.—McVeigh v. City of Battle Creek, 86 N.W.2d 279, 350 Mich. 214.

ing to show that the prior decision was based on a mistake of fact.⁴¹ Thus, if there has been a substantial change in the fact situation, the matter may be reopened and reheard.⁴²

In the absence of statutory authorization, however, the board, having once decided an appeal, cannot reopen the matter and rehear it on the same facts;⁴³ and the power of the board to review the decision or determination of an inferior official, on the motion of one of its members, does not confer the power to review, on such motion, an appeal once heard or determined by the board.⁴⁴

Where a new appeal comes to the board from a new ruling, the matter must be passed on,⁴⁵ and if the facts are substantially different the prior determination may be modified or reversed,⁴⁶ the decision as to whether there has been such a change being primarily within the province of the board.⁴⁷

An irregularity or informality in the resolution passed by the board of appeals may be corrected by the board on its own motion,⁴⁸ or the board may be compelled to correct it by an ordinance.⁴⁹ An irregularity is not sufficient to set aside the action of the board, if otherwise legal.⁵⁰

VIII. VARIANCES OR EXCEPTIONS

A. IN GENERAL

§ 268. In General

Zoning laws are said to be unique as to the allowance of variations from their terms.

With respect to the allowance of variations from their prescribed terms, zoning laws have been said to be unique.⁵¹

Necessity. Ordinarily there must be a compliance with zoning regulations or a variance must be

obtained dispensing with full compliance.⁵² Under some circumstances, however, the seeking of a variance is not necessary,⁵³ and where a zoning ordinance is invalid as an invasion of an owner's property rights, he should not be required to ask, as a special privilege, for a variance of the restriction, in order to be allowed to continue his use of the property.⁵⁴

41. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 803.

42. N.C.—In re Pine Hill Cemeteries, 15 S.E.2d 1, 219 N.C. 735.

43. N.Y.—Hall v. Walsh, 243 N.Y.S. 602, 137 Misc. 448, affirmed 222 N.Y.S. 816, 221 App.Div. 756.

Prior findings as res judicata

Findings of the board of adjustment on controverted questions of fact made in good faith and supported by evidence are res judicata on petition to the board to reopen and rehear upon the same evidence.

N.C.—In re Pine Hill Cemeteries, 15 S.E.2d 1, 219 N.C. 735.

Rehearing not required

Zoning board of appeals was under no duty to grant rehearing on original appeal.

Conn.—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449.

44. N.Y.—McGarry v. Walsh, 210 N.Y.S. 286, 213 App.Div. 289.

45. N.Y.—Hall v. Walsh, 243 N.Y.S. 602, 137 Misc. 448, affirmed 222 N.Y.S. 816, 221 App.Div. 756.

Pa.—Appeal of Crawford, 57 A.2d 862, 358 Pa. 636.

Effect of prior adjudication

(1) Where, in proceeding on building association's appeal from denial of certificate of occupancy authoriz-

ing parking lot use of association's land, which adjoined association's clubhouse, zoning board of appeals entertained association's second appeal to it and decided the matter on merits at such time, prior adjudication of such board would not be res judicata, even though an appeal had not been taken from such prior adjudication.

Pa.—D. B. S. Bldg. Ass'n v. City of Erie, 111 A.2d 867, 177 Pa.Super. 487.

(2) Zoning board's refusal to issue a certificate of occupancy for a vacant lot adjoining premises of appellant organization for parking automobiles does not preclude applicant's rights on second application where the board entertained the second appeal and decided it on its merits.

Pa.—Appeal of Crawford, 57 A.2d 862, 358 Pa. 636.

D. S. B. Bldg. Ass'n v. City of Erie, Com.Pl., 38 Erie Co. 25, affirmed 111 A.2d 867, 177 Pa.Super. 487.

46. N.Y.—Hall v. Walsh, 243 N.Y.S. 602, 137 Misc. 448, affirmed 222 N.Y.S. 816, 221 App.Div. 756.

47. N.Y.—Hall v. Walsh, supra.

48. N.Y.—Barker v. Boettger, 208 N.Y.S. 295, 124 Misc. 461.

49. N.Y.—Barker v. Boettger, supra.

50. N.Y.—Barker v. Boettger, supra.

51. Ill.—Warshawsky v. American Automotive Products Co., 138 N.E. 2d 816, 12 Ill.App.2d 178.

52. Church

A building may not be used for church purposes in the absence of compliance with building code requirements or procurement of a variance dispensing with full compliance. N.Y.—Application of Garden City Jewish Center, 155 N.Y.S.2d 523, 2 Misc.2d 1009.

53. Implied approval of permit by town council

Town council which had failed promptly to fulfill provisions of zoning ordinance as to selection, organization, and proper functioning of zoning board of review, and had impliedly approved issuance by building inspector of a permit for addition to a pre-existing nonconforming use of petitioners, did not, in absence of ordinance providing therefor, act as an interim zoning board of review, and petitioners were not required to file a petition with town council for a variance before commencing construction pursuant to permit.

R.I.—Lamothe v. Zoning Bd. of Review of Town of Cumberland, 98 A.2d 913, 81 R.I. 96.

54. N.Y.—Maxwell v. Incorporated Village of Rockville Centre, 84 N.Y. S.2d 544.

Effect of grant of variance or exceptions. The grant of a variance is not a general authorization to convert to any use in the class without further approval by the zoning authorities.⁵⁵ Exceptions granted to a property owner from a zoning ordinance do not subject him to liability to abutting owners for obtaining them.⁵⁶

Duration. An ordinance may prescribe a time during which variances or exceptions shall be effective.⁵⁷

§ 269. Purpose or Function

The general purpose or function of variances or exceptions is to avoid the harsh or oppressive operation of the zoning laws which would otherwise result.

Various statements of the purpose or function of variances or exceptions have been enunciated by the courts,⁵⁸ such as that they are granted in order to minimize the acknowledged evils of spot zoning by amendment of the zoning ordinances,⁵⁹ or to relieve the harshness, or prevent the oppressive operation, of a zonal restriction in a particular instance;⁶⁰ to apply the discretion of experts to exceptional instances where permits are desired, not strictly conforming to the regulations provided in the ordinance;⁶¹ to correct maladjustments and inequi-

ties in the operation of the general regulation;⁶² or to permit reasonable use of particular property and thus guard against unwarranted interference with the fundamental right of property, that is, to secure reasonable zoning.⁶³

Other statements are that they are granted to afford a safety valve so that the carrying out of the strict letter of an ordinance may not occasion unnecessary hardship to particular property owners;⁶⁴ to relieve against the unnecessary and unjust invasion of the right of property which, under special conditions and singular circumstances, would ensue from the burden of the general rule;⁶⁵ to permit the amelioration of the rigors of necessarily general regulations by eliminating the necessity of slavish adherence to the precise letter of limitations where, in a given case, little or no good on the one side and undue hardship on the other would result from a literal enforcement, and to protect the ordinance against attack on the ground of unreasonable interference with private rights;⁶⁶ or to permit the modification of an otherwise legitimate restriction in the exceptional case where, due to unusual conditions, it becomes more burdensome than was intended, and may be modified without impairment of the public purpose.⁶⁷

B. PARTICULAR TERMS OR MATTERS CONSIDERED OR DISTINGUISHED

§ 270. Extension of Nonconforming Use

The grant of an extension of a nonconforming use is the exercise of a power different from, and more limited than, the variance power.

The extension of a nonconforming use is the exercise of a power different from, and more limited than, the variance power;⁶⁸ not only are the ap-

55. Pa.—Molnar v. George B. Henne & Co., 105 A.2d 325, 377 Pa. 571.

56. Cal.—Triangle Ranch v. Union Oil Co. of Cal., 287 P.2d 537, 135 C.A. 428.

57. Exception held effective

Where ordinance provided that all variances or exceptions shall be effective for two years only and if not acted on in that time shall be void, but also provided that exceptions or variances granted previous to adoption of ordinance are granted two years from date of ordinance, exception granted previously was effective within two years after date of ordinance.

Pa.—Schwartz v. Wagner, 123 A.2d 417, 385 Pa. 364.

58. Conn.—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, 8 A.2d 1, 125 Conn. 714.

N.J.—Visco v. City of Plainfield, 57 A.2d 490, 136 N.J.Law 659.

N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

431 Fifth Ave. Corp. v. City of New York, 55 N.Y.S.2d 203, 184 Misc. 1001, modified on other grounds 59 N.Y.S.2d 25, 270 App.Div. 241, affirmed 68 N.E.2d 877, 296 N.Y. 588. N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107.

59. U.S.—Wilcox v. City of Pittsburgh, C.C.A.Pa., 121 F.2d 835. Cal.—Rubin v. Board of Directors of City of Pasadena, 104 P.2d 1041, 16 C.2d 119.

60. Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206. N.Y.—Woltman v. Murdock, 163 N.Y.S.2d 572, 8 Misc.2d 969.

61. Ala.—White v. Board of Adjustment of City of Birmingham, 15 So.2d 585, 245 Ala. 48.

62. N.J.—Beck v. Board of Adjustment of City of East Orange, Essex

County, 83 A.2d 720, 15 N.J.Super. 554.

63. N.J.—United Advertising Corp. v. Board of Adjustment of Maplewood Tp., 56 A.2d 406, 136 N.J.Law 336—Scaduto v. Town of Bloomfield, 20 A.2d 649, 127 N.J.Law 1.

64. N.Y.—Bazinsky v. Kesbec, Inc., 19 N.Y.S.2d 716, 259 App.Div. 467, affirmed 36 N.E.2d 694, 286 N.Y. 655, remittitur amended 37 N.E.2d 456, 286 N.Y. 723.

Crone v. Town of Brighton, 119 N.Y.S.2d 877.

65. N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386.

66. Neb.—Peterson v. Vasak, 76 N.W.2d 420, 162 Neb. 498.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

67. S.C.—Hodge v. Pollock, 75 S.E.2d 752, 223 S.C. 342.

68. Mass.—Colabufalo v. Board of Appeal of City of Newton, 143 N.E.2d 536.

pllicable criteria different, but also the scope and effect of permissible action may not be the same.⁶⁹

§ 271. "Exception" or "Special Exception"

In some jurisdictions zoning authorities may grant an "exception" or "special exception," which is a dispensation permissible where the authority finds existing those facts and circumstances specified in the ordinance as sufficient to warrant a deviation from the general rule.

Assumption as to action of board

Where board of aldermen consciously and intentionally purported to grant variance, persons at interest were entitled to act, or refrain from acting, on assumption that board was undertaking to grant variance and not to grant extension of nonconforming use.

Mass.—Colabufalo v. Board of Appeal of City of Newton, *supra*.

69. Mass.—Colabufalo v. Board of Appeal of City of Newton, *supra*.

70. Ala.—Water Works Bd. of City of Birmingham v. Stephens, 78 So.2d 267, 262 Ala. 203.

Conn.—Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 109 A.2d 256, 141 Conn. 632—Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 316, 140 Conn. 527.

Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry 13.

D.C.—Hyman v. Coe, D.C., 146 F. Supp. 24.

Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Mass.—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378—Pendergast v. Board of Appeals of Barnstable, 120 N.E.2d 916, 331 Mass. 555—Carson v. Board of Appeals of Lexington, 75 N.E.2d 116, 321 Mass. 649.

Mich.—Mitchell v. Grewal, 61 N.W.2d 3, 338 Mich. 81.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

Vangellow v. City of Rochester, 71 N.Y.S.2d 672, 190 Misc. 128.

Syosset Holding Corp. v. Schlimm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 768.

Okl.—Van Meter v. H. F. Wilcox Oil & Gas Co., 41 P.2d 904, 170 Okl. 604.

Pa.—Appeal of O'Hara, 131 A.2d 537, 389 Pa. 35—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516—Lukens v. Zoning Bd. of Adjustment of Ridley Tp., Del. County, 80 A.2d 765, 367 Pa. 608—Application of Devereux Foundation, 41

A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

Appeal of Palletz, Com.Pl., 71 Pa. Dist. & Co. 303—Appeal of University of Pennsylvania, Com.Pl., 29 Del.Co. 322—Schmitz v. Abington Tp., Com.Pl., 68 Montg.Co. 267—Scherger v. Zoning Bd. of Adjustment of Penn Tp., Co., 103 Pittsb. Leg.J. 397.

R.I.—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 819—Lough v. Zoning Bd. of Review of Town of North Providence, 60 A.2d 839, 74 R.I. 366—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135—Olevson v. Zoning Board of Review of Town of Narragansett, 44 A.2d 720, 71 R.I. 303—Buckminster v. Zoning Board of Review of City of Pawtucket, 33 A.2d 199, 69 R.I. 396—Dunham v. Zoning Board of Town of Westerly, 26 A.2d 614, 68 R.I. 88—Miriam Hospital v. Zoning Board of Review of City of Providence, 23 A.2d 191, 67 R.I. 295—Jacques v. Zoning Board of Review of City of Pawtucket, 12 A.2d 223, 64 R.I. 284.

Tex.—City of Amarillo v. Stapf, 101 S.W.2d 229, 129 Tex. 81.

Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error—Boehme Bakery v. City of San Angelo, Civ.App., 185 S.W.2d 601, reversed on other grounds 190 S.W.2d 67, 144 Tex. 281—Harrington v. Board of Adjustment of City of Alamo Heights, Bexar County, Civ. App., 124 S.W.2d 401, error refused.

Two kinds of exceptions authorized

Under special statute enabling municipality to enact zoning ordinance and grant exceptions to terms of ordinance in first instance where exception is in harmony with general purpose and intent of ordinance and in accordance with general or special rules contained in ordinance and, secondly, where such exception is reasonably necessary for convenience or welfare of public, exceptions granted in first instance are dependent on general or special rules contained in ordinance, but, in sec-

In some jurisdictions zoning boards or other bodies or officials, in addition to their authority to grant or recommend variances, are empowered to grant "exceptions" or "special exceptions" to zoning ordinances to the extent and under the circumstances specified in such ordinances,⁷⁰ and an "exception," within the meaning of zoning ordinances, has been defined as a dispensation permis-

and instance, board's authority arises directly under the act.

R.I.—Baker v. Zoning Bd. of Review of Town of North Kingstown, 111 A.2d 353, 82 R.I. 432.

Ordinance provisions held valid

(1) In general.

N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

N.Y.—Barkmann v. Town of Hempstead, 49 N.Y.S.2d 262, 268 App. Div. 785, affirmed 62 N.E.2d 238, 294 N.Y. 805.

Pa.—Appeal of Stevens, Com.Pl., 41 Del.Co. 383.

(2) Provision in county zoning ordinance that special exception permit for junk yard or salvage yard was authorized only where yard itself was invisible from and at least three hundred feet distant from any state or county highway was not void on ground that it was arbitrary or unreasonable.

Md.—Laque v. State, 113 A.2d 893, 207 Md. 242, certiorari denied 76 S. Ct. 105, 350 U.S. 863, 100 L.Ed. 765.

(3) Where property of petitioner located in industrial district of village was bounded by a private right of way, railroad tracks, a deep water channel, and industrial property, and it did not appear that village ordinances prohibited storage of petroleum products, village board of zoning appeals was authorized to grant variation of regulation in zoning ordinance prohibiting erection of buildings for storage of petroleum. N.Y.—Beckmann v. Talbot, 15 N.E.2d 556, 278 N.Y. 146, reargument denied 16 N.E.2d 849, 278 N.Y. 700.

Special permit held not spot zoning

Without mention of exception, the grant of a special permit, under a regulation of the township zoning board which provided for such other uses as the board might in its discretion authorize by special permit, does not constitute spot zoning.

Kan.—Duggins v. Board of County Com'rs in Johnson County, 293 P.2d 258, 179 Kan. 101.

Standards not set out

(1) Where the zoning code of a city does not contain general or specific rules in accordance with which a special exception may be granted the zoning board of appeals is without authority to grant such an exception.

sible where the board of zoning appeals finds existing those facts and circumstances specified in the ordinance as sufficient to warrant a deviation from the general rule.⁷¹ Exceptions fulfill the practical recognition that certain uses of property are compatible with the essential design of a particular zone although the use is contrary to the restrictions imposed thereon.⁷²

The jurisdiction of a board or other agency to act under this power is original.⁷³ An application for such a special exception may be made directly to the board⁷⁴ and is addressed to its discretion,⁷⁵ within the latitude fixed by the provisions as to the granting of special exceptions;⁷⁶ and the power is to be exercised pursuant to the standards stated in the ordinance.⁷⁷

Pa.—Appeal of Kleinman from Zoning Bd. of Appeals of Chester, 6 Pa. Dist. & Co. 2d 659, 42 Del. Co. 413.

Appeal of Becker, Com. Pl., 68 York Leg. Rec. 174.

(2) Where zoning ordinance allowed board of adjustment to make special exceptions to authorized uses but failed to prescribe rules or standards for making exceptions, board properly refused to grant a special exception.

Pa.—Dooling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Twp., 89 A.2d 505, 371 Pa. 290.

71. D.C.—Hyman v. Coe, D.C., 146 F. Supp. 24.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

N.Y.—Syosset Holding Corp. v. Schlimm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 766—Goldberg v. Mackreth, 142 N.Y.S.2d 281.

Pa.—Lukens v. Zoning Bd. of Adjustment of Ridley Twp., Del. County, 80 A.2d 765, 367 Pa. 608.

Appeal of Palletz, 71 Pa. Dist. & Co. 303.

Appeal of Spencer, Com. Pl., 7 Chest. Co. 107.

72. N.J.—Ranney v. Istituto Pontificio Delle Maestre Filippini, 119 A.2d 142, 20 N.J. 189.

Exceptions should not be piecemeal
Special exceptions representing departure from comprehensive zoning plan should not be made on a piecemeal basis, but as result of a general resurvey.

Md.—Board of County Com'rs of Talbot County v. Troxell, 132 A.2d 845, 214 Md. 135.

73. N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199.

James v. Board of Adjustment of Town of Montclair, 122 A.2d 660, 40 N.J. Super. 206.

N.Y.—Roosevelt Field v. Town of North Hempstead, 98 N.Y.S.2d 350, 277 App. Div. 889—Barkmann v. Town of Hempstead, 49 N.Y.S.2d 262, 268 App. Div. 785, affirmed 62 N.E.2d 238, 294 N.Y. 805.

Freitag v. Marsh, 106 N.Y.S.2d 927, transferred, see, 115 N.Y.S.2d 838, 280 App. Div. 934.

R.I.—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135.

74. R.I.—Harrison v. Zoning Bd. of Review of City of Pawtucket, supra.

75. D.C.—Hyman v. Coe, D.C., 146 F. Supp. 24—Hyman v. Coe, D.C., 102 F. Supp. 254.

Mass.—Pendergast v. Board of Appeals of Barnstable, 120 N.E.2d 916, 331 Mass. 555.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

Pa.—Phillips v. Zoning Bd. of Adjustment, Com. Pl., 1 Bucks Co. 25.

R.I.—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 319—Buckminster v. Zoning Board of Review of City of Pawtucket, 30 A.2d 104, 68 R.I. 515—Spirito v. Zoning Board of Review of City of Cranston, 12 A.2d 727, 64 R.I. 411.

Evidentiary basis

Denial of special exception was arbitrary exercise of power where it was without any substantial evidence to sustain it.

Pa.—Appeal of North End Fire Co. No. 1 of Pottstown, 85 Pa. Dist. & Co. 287, 69 Montg. Co. 46.

Broad discretion

Cal.—Patterson v. Board of Sup'rs of Los Angeles County, 180 P.2d 945, 79 C.A.2d 670.

R.I.—Baker v. Zoning Bd. of Review of Town of North Kingstown, 111 A.2d 353, 83 R.I. 432—Lough v. Zoning Bd. of Review of Town of North Providence, 60 A.2d 839, 74 R.I. 366.

Sound legal discretion

Administrative discretion committed to the board of zoning adjustment to grant exceptions to zoning regulations is not unlimited and it must be a sound legal discretion, and whether a dispensation should be granted is not a matter of grace, but must be determined on legal principles.

D.C.—O'Boyle v. Coe, D.C., 155 F. Supp. 581.

76. D.C.—Hyman v. Coe, D.C., 102 F. Supp. 254.

Discretion held not unfettered

(1) Grant or refusal of a particular use as a special exception to a zoning ordinance does not lie within the unfettered discretion of either the board of adjustment or the courts, and such discretion can only

be constitutionally exercised within the standards provided in the ordinance, and unless the proposed use adversely affects health, safety, and morals of the community, it must be allowed.

Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35.

(2) However, it has also been held that it was not intent of zoning regulation, relating to authorization of District of Columbia Board of Zoning Adjustment to grant request for special exceptions in certain cases on certain conditions, that appeal for exception must be granted if certain requirements are met.

D.C.—Hyman v. Coe, D.C., 146 F. Supp. 24.

Scope of discretion as legislative matter

Scope of discretion to grant an exception to zoning ordinance to be vested in zoning board of review is a question for town council and not for courts, and in determining whether board has abused its discretion in such respect, zoning ordinance must be applied as it stands.

R.I.—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199.

In harmony with general principles of statute and ordinance

Statute providing for establishment of city zoning board of review with power to make special exceptions to terms of zoning ordinance in harmony with its general purpose and intent did not authorize unrestricted exercise of such power by board, resulting in unreasonable and unnecessary spot zoning, changes in boundary lines of existing zoning districts and substantial changes in the character of a well-established residential neighborhood since such results were contrary to, rather than in harmony with, the general principles of statute and ordinance.

R.I.—Flynn v. Zoning Bd. of Review of City of Pawtucket, 73 A.2d 808, 77 R.I. 118.

77. D.C.—Hyman v. Coe, D.C., 102 F. Supp. 254.

N.Y.—Barkmann v. Town of Hempstead, 49 N.Y.S.2d 262, 268 App. Div. 785, affirmed 62 N.Y.S.2d 238, 294 N.Y. 805.

The conditions permitting an exception must be found in the regulations themselves,⁷⁸ and these conditions, if any, may not be altered.⁷⁹ All that is necessary for the grant of an exception is that it be within the scope of the authorization contained in the ordinance and constitute a proper exercise of the sound discretion of the board;⁸⁰ and it has been held that the only function of the board is to de-

termine whether the requirements set forth in the authorizing provision have been met.⁸¹

While a provision in a zoning ordinance granting to the appropriate agency the power to grant special exceptions to such legislation, to the extent and under the circumstances specified therein, gives flexibility to the application of the ordinance,⁸² the

78. Conn.—Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 109 A.2d 256, 141 Conn. 632—Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 816, 140 Conn. 527. Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

Existence of nonconforming use assumed

Zoning ordinance of town authorizing zoning board of review to grant an exception necessary to secure appropriate development of a lot adjacent to buildings that do not conform to ordinance expressly assumed existence of adjacent nonconforming use as a reason for granting an exception, and fact that such use may be a legal nonconforming use does not deprive board of authority to grant an exception.

R.I.—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199.

79. Conn.—Abramson v. Zoning Bd. of Appeals of Town of Westport, 120 A.2d 827, 143 Conn. 211—Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 109 A.2d 256, 141 Conn. 632—Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 816, 140 Conn. 527.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

80. Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry 13.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 137 Md. 296.

Mich.—Mitchell v. Grewal, 61 N.W. 2d 3, 338 Mich. 81.

N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 App.Div. 551.

Pa.—Borden v. Cheltenham Tp., Com. Pl., 67 Montg.Co. 72.

R.I.—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A. 2d 478, 74 R.I. 366—Harrison v. Zoning Bd. of Review of City of

Pawtucket, 59 A.2d 361, 74 R.I. 135.

Particular limitations stated

Only statutory limitations on zoning exceptions are that they must be applicable to all other districts of a particular class and of a character set forth in zoning ordinance and in harmony with its general purpose and intent.

Mass.—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378.

Grant held proper

Mass.—Carson v. Board of Appeals of Lexington, 75 N.E.2d 116, 321 Mass. 649.

R.I.—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 319.

Denial held improper

(1) In general.

N.Y.—Goldberg v. Mackreth, 142 N. Y.S.2d 281.

Ohio.—Young Israel Organization of Cleveland v. Dworkin, App., 133 N. E.2d 174.

Pa.—Hood v. Zoning Bd. of Adjustment, 6 Pa.Dist. & Co.2d 275, 72 Montg.Co. 12, 43 Mun.L.R. 87.

Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 100.

(2) To refuse a proposed use as an exception to a zoning ordinance on the ground that it has no substantial relationship to the standards provided by the ordinance is beyond the powers both of the board of adjustment and the court and such excessive power can be corrected both on broad and narrow certiorari.

Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35.

(3) Denying special exception for the erection of a parochial high school and accessory buildings on the ground that expense would be occasioned to the township by the widening of streets and other factors was error, on the ground that such bore no relationship to the health, morals, and safety of the community. Pa.—Appeal of O'Hara, supra.

(4) Denying special exception on the ground that the granting of the exception would increase traffic with attendant dangers to the public and

change the residential character of the neighborhood and have a slight damaging effect on real estate values was error.

Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35.

Reed v. Borough of North Wales, 83 Pa.Dist. & Co., 69, 68 Montg. Co. 196.

Denial held proper

Conn.—Abramson v. Zoning Bd. of Appeals of Town of Westport, 120 A.2d 827, 143 Conn. 211.

N.J.—Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J.Law 442, affirmed 61 A.2d 76, 137 N.J.Law 603.

Grant held improper

N.Y.—Underhill v. Board of Appeals of Town of Oyster Bay, 72 N.Y.S. 2d 538, affirmed 75 N.Y.S.2d 327, 273 App.Div. 738, affirmed 80 N.E. 2d 342, 297 N.Y. 937.

R.I.—Cardin v. Zoning Bd. of Review of Town of North Providence, 104 A.2d 752, 81 R.I. 497—Paterson v. Zoning Bd. of Review of Town of East Providence, 98 A.2d 847, 80 R.I. 494—Abbott v. Zoning Bd. of Review of City of Warwick, 79 A. 2d 620, 78 R.I. 84.

81. N.H.—Shell Oil Co. v. City of Manchester, 133 A.2d 501, 101 N.H. 76.

Satisfaction of conditions

For special exception to zoning regulations to have been justified, it must have appeared, and zoning board of appeals must have concluded, that the manner in which the owner proposed to use his property would satisfy the conditions imposed by regulations.

Conn.—Abramson v. Zoning Bd. of Appeals of Town of Westport, 120 A.2d 827, 143 Conn. 211.

Board must perform duty

A township zoning board of adjustment cannot refuse to perform statutory functions to hear and decide special exceptions to terms of an ordinance.

Pa.—Appeal of Lindquist, 73 A.2d 378, 364 Pa. 561.

82. N.Y.—Barkmann v. Town of Hempstead, 49 N.Y.S.2d 262, 268 App.Div. 785, affirmed 62 N.Y.S. 2d 232, 294 N.Y. 805.

R.I.—Flynn v. Zoning Bd. of Review of City of Pawtucket, 73 A.2d 808, 77 R.I. 118—Lough v. Zoning Bd.

extent of the power granted under a particular ordinance depends on the language employed therein.⁸³ The grant of power must be strictly construed;⁸⁴ and the power is strictly limited to the situations provided for by the statute and in the ordinance.⁸⁵ However, where the provision authorizing the granting of special exceptions is clear and unambiguous, it requires no construction.⁸⁶ Accordingly, in granting special exceptions the board of zoning appeals must consider the factors set out,⁸⁷ and its action must be reasonable in the light of these and all other pertinent facts.⁸⁸

§ 272. — Confusion with "Variance"

The terms "variance" and "exception" or "special exception" are frequently used incorrectly, confusingly, and undiscriminatingly.

While the terms "variance" and "exception" or "special exception" are generally regarded as sepa-

rate and distinct, as discussed *infra* § 273, the words are frequently used incorrectly in applications for zoning dispensations,⁸⁹ and have been used confusingly and indiscriminatingly even in some ordinances.⁹⁰ Indeed, the two words have often been used as synonymous.⁹¹

It is a common practice to join an application for an exception with an application for a variance on appeal from a denial of a permit, leaving it to the board to determine on which ground it may grant the application;⁹² and many cases discuss exceptions and variances without differentiating one from the other.⁹³

§ 273. — "Variance" Distinguished

"Exceptions" or "special exceptions" are distinguished from "variance" in that the latter permits the use of property in a manner forbidden by the zoning law

of Review of Town of North Providence, 60 A.2d 839, 74 R.I. 366—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 861, 74 R.I. 135.

83. N.Y.—Freitag v. Marsh, 106 N. Y.S.2d 927, transferred, see, 115 N.Y.S.2d 838, 280 App.Div. 934.

Pa.—Rubin v. Zoning Bd. of Adjustment, 5 Bucks Co. 207.

R.I.—Harte v. Zoning Bd. of Review of City of Cranston, 91 A.2d 33, 80 R.I. 43—Lough v. Zoning Bd. of Review of Town of North Providence, 60 A.2d 839, 74 R.I. 366.

Terms construed; "public convenience"

Under regulation providing that special exception may be granted when "public convenience and welfare" will be substantially served, "public convenience" is not used in colloquial manner and is not synonymous with "handy," but connotes that which is suitable and fitting. Conn.—West Hartford Methodist Church v. Zoning Bd. of Appeals of Town of West Hartford, 121 A.2d 640, 143 Conn. 263.

Construction of particular provisions

(1) Provision of zoning regulation, authorizing District of Columbia Board of Zoning Adjustment to permit construction of office buildings and banks in certain residential area if certain conditions were satisfied, was not directive to board to preserve residential character of area, especially in view of fact that board had already allowed in area many changes which could not be said to have preserved residential character of area.

D.C.—Hyman v. Coe, D.C., 146 F. Supp. 24.

(2) Zoning regulation empowering board of adjustment to permit, in

residential district, "use of unimproved lot for temporary parking of motor vehicles" meant use for temporary parking and not temporary use for parking.

D.C.—Selden v. Capitol Hill Southeast Citizens Ass'n, 219 F.2d 33, 95 U.S.App.D.C. 62, certiorari denied Capitol Hill Southeast Citizens Ass'n v. Coe, 75 S.Ct. 873, 349 U.S. 944, 99 L.Ed. 1271.

84. Md.—Easter v. Mayor and City Council of Baltimore, 73 A.2d 491, 195 Md. 395.

85. Ind.—Antrim v. Hohlt, 108 N.E. 2d 197, 122 Ind.App. 681.

Mich.—Mitchell v. Grewal, 61 N.W. 2d 3, 338 Mich. 81.

Situation held not within ordinance

Under zoning ordinance authorizing board of adjustment to permit extension of district where boundary line divided lot in a single ownership at time of passage, board was without authority to grant permit to build outdoor theater on eighteen and one-half-acre tract of land zoned to depth of two hundred feet for family residences with remainder designated as a commercial district as a special exception on ground that tract was a divided "lot."

Tex.—Board of Adjustment v. Stovall, Civ.App., 218 S.W.2d 286.

86. R.I.—Flynn v. Zoning Bd. of Review of City of Pawtucket, 73 A. 2d 808, 77 R.I. 118.

87. D.C.—Selden v. Capitol Hill Southeast Citizens Ass'n, 219 F.2d 33, 95 U.S.App.D.C. 62, certiorari denied Capitol Hill Southeast Citizens Ass'n v. Coe, 75 S.Ct. 873, 349 U.S. 944, 99 L.Ed. 1271.

Md.—Easter v. Mayor and City Council of Baltimore, 73 A.2d 491, 195 Md. 395.

88. Md.—Easter v. Mayor and City Council of Baltimore, *supra*.

89. Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

90. Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry 13.

91. Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

92. R.I.—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A. 2d 361, 74 R.I. 135.

Specifying ground of exception

Application for exception under zoning ordinance must be treated as an application for a variance in absence of allegation of provision of ordinance under which exception should be granted.

R.I.—Minnear v. Zoning Bd. of Review of City of Cranston, 132 A.2d 198—Winters v. Zoning Bd. of Review of City of Warwick, 96 A.2d 337, 80 R.I. 275—Cardin v. Zoning Bd. of Review of Town of North Providence, 93 A.2d 304, 80 R.I. 136—Caldarone v. Zoning Bd. of Review of City of Warwick, 60 A. 2d 158, 74 R.I. 196.

No provision for exception

Application to be relieved from restriction of zoning ordinance must be treated as an application for a variance, in absence of provision in ordinance for an exception as to the particular restriction.

R.I.—Caccia v. Zoning Bd. of Review of City of Providence, 113 A.2d 870.

93. R.I.—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135.

while "exception" relates to a use permitted by the law, and in that an exception ordinarily need not be based on a showing of hardship.

While the terms are frequently confused or used as synonymous, as discussed supra § 272, an "exception" or "special exception" in zoning law is separate and distinct from a "variance,"⁹⁴ and the two authorizations are different in several particulars.⁹⁵

Thus, exceptions may be treated as a legislative process or the exercise of a legislative function, the

conditions for which must be found in the zoning ordinance and may not be varied, while variances may be treated as an exercise of the judicial function, whereby literal enforcement of ordinances may be disregarded.⁹⁶ So, also, a variance is authority extended to the owner to use his property in a manner forbidden by the zoning enactment, while an exception allows him to put his property to a use which the enactment expressly permits.⁹⁷

Interests served. Exceptions are allowable to serve the general good and welfare rather than in-

94. Ala.—Water Works Bd. of City of Birmingham v. Stephens, 78 So. 2d 267, 262 Ala. 203.

Conn.—Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 109 A.2d 256, 141 Conn. 632—Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 316, 140 Conn. 527.

Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry 13. Md.—Montgomery County v. Merlands Club, Inc., 96 A.2d 261, 202 Md. 279.

Mass.—Pendergast v. Board of Appeals of Barnstable, 120 N.E.2d 916, 331 Mass. 555.

N.Y.—Syosset Holding Corp. v. Schlimm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 766.

Pa.—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516—Lukens v. Zoning Bd. of Adjustment of Ridley Tp., Del. County, 80 A.2d 765, 367 Pa. 608.

Appeal of Palletz, 71 Pa. Dist. & Co. 303.

Borden v. Cheltenham Tp., Com. Pl., 67 Montg. Co. 72—Appeal of Becker, Com.Pl., 68 York Leg. Rec. 174—York Housing Authority v. York Zoning Bd., Com.Pl., 68 York Leg. Rec. 162.

Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

Statute held not to authorize exceptions

Statute authorizing zoning board of adjustment to grant variances was not intended to authorize grant of exceptions.

N.J.—Ranney v. Istituto Pontificio Delle Maestre Filippini, 119 A.2d 142, 20 N.J. 189.

No distinction in Baltimore City

"Ordinarily, there is a marked distinction in the law of zoning between a variance and an exception, but there is none in Baltimore City

since an exception, apparently, overlaps a variance inasmuch as both may be granted where there are 'practical difficulties or unnecessary hardships'. This is the reason why many cases which arise in Baltimore City, such as this one, discuss exceptions and variances without differentiation."

Md.—Marino v. City of Baltimore, 137 A.2d 198, 201, 215 Md. 206.

95. N.Y.—Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 App. Div. 551.

Pa.—Application of Devereux Foundation, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

R.I.—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135.

Tex.—Harrington v. Board of Adjustment of City of Alamo Heights, Bexar County, Civ.App., 124 S.W.2d 401, error refused.

Circumstances held to show exception, not variance

(1) Under zoning ordinance expressly authorizing board of appeals to grant such permits when in its judgment public convenience and welfare would be substantially served and status of neighborhood improved, application for permit to use one-family dwelling in single residence district as a funeral home was an application for a permit under "exception" created by zoning ordinance, and not an application for a "variance."

Mass.—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378.

(2) Zoning ordinance providing that in addition to general powers granted to board of adjustment, board may, in harmony with, and subject to, provisions of statute, allowing board to make special exceptions to terms of ordinance, permit a garage, or filling station to be built in district, was intended to create a special exception rather than a variance.

N.H.—Shell Oil Co. v. City of Manchester, 133 A.2d 501, 101 N.H. 76.

Circumstances held to show variance, not exception

N.H.—Suprenant v. Nashua, 131 A.2d 632, 101 N.H. 43.

96. Mich.—Mitchell v. Grewal, 61 N.W.2d 3, 338 Mich. 81.

N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199.

James v. Board of Adjustment of Town of Montclair, 122 A.2d 660, 40 N.J. Super. 206.

"In practice sharp distinctions between exceptions and variances may not in all cases be readily made, but the approach to the former as a legislative process and to the latter through appeals from administrative orders as a judicial function will generally serve to avoid an overreaching of a variance into the field of exceptions."

N.H.—Stone v. Cray, 200 A. 517, 521, 89 N.H. 483.

N.Y.—Freitag v. Marsh, 106 N.Y.S.2d 927, 931, transferred, see 115 N.Y.S.2d 838, 280 App. Div. 934.

Other statement

In case of an exception, the law itself has foreseen the possibility that a departure from its provisions may be desirable if certain specified facts or circumstances are found to exist, while a variance involves an overriding of the law itself, based on a finding that the law as written would inflict unnecessary hardship on the property owner.

Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry 13.

97. Conn.—Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 109 A.2d 256, 141 Conn. 632—Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 316, 140 Conn. 527. N.Y.—Syosset Holding Corp. v. Schlimm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 766.

Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

dividual interests merely,⁹⁸ while a variance is a relaxation of the general rule of the ordinance to alleviate conditions peculiar to particular property.⁹⁹

Showing of hardship or other prerequisites. An important distinction between an exception or special exception and a variance is that a special exception need not ordinarily be based on a showing of hardship¹ or other matters required to be proved in a proceeding for a variance,² or satisfy other conditions necessary for the grant of a variance.³ Nevertheless, under an ordinance so providing, the term "unnecessary hardship" may be used as a standard of guidance for the board in cases of special exception.⁴

Appellate or original jurisdiction. It has been

held that another distinction between variances and exceptions or special exceptions is that applications for variances come within the appellate jurisdiction of the zoning board of appeals, whereas the application for special exceptions is considered as a matter of original jurisdiction for the board.⁵

§ 274. Conditional Use Permit

In some jurisdictions zoning authorities may grant a "conditional use permit," which is distinct from a variance in that it is granted for a public or quasi-public purpose within the terms of the zoning law, rather than to obviate unnecessary hardship or other conditions for which a variance may be granted.

In some jurisdictions certain zoning bodies or officials are empowered to grant a "conditional use

98. Ala.—Water Works Bd. of City of Birmingham v. Stephens, 78 So. 2d 267, 262 Ala. 203.

Accommodation of zoning practice and public needs

Exceptions involve exercise of original jurisdiction for accommodation of zoning practice and public needs exceptional in nature, and thus reasonably to advance essential common interest as integral part of zoning process to same end.

N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199.

99. Reasonableness of regulation presupposed

A "variance" presupposes reasonableness of zone regulation as a whole, and is a relaxation of general rule of the ordinance to alleviate conditions peculiar to particular property, and thus to permit a use to which it is adapted and avoid undue invasion of right of private property by compelling conformance to unsuitable permissible use, a burden on individual landowner that would be disproportionate to common need.

N.J.—Moriarty v. Pozner, *supra*.

1. Ala.—Water Works Bd. of City of Birmingham v. Stephens, 78 So. 2d 267, 262 Ala. 203.

Cal.—Patterson v. Board of Sup'rs of Los Angeles County, 180 P.2d 945, 79 C.A.2d 670.

Conn.—Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 316, 140 Conn. 527.

Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry 13.

D.C.—Hyman v. Coe, D.C., 102 F. Supp. 254.

Mich.—Mitchell v. Grewal, 61 N.W. 2d 8, 338 Mich. 81.

N.J.—James v. Board of Adjustment of Town of Montclair, 122 A.2d 660, 40 N.J. Super. 206.

N.Y.—Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 App. Div. 551.

Kessel v. Michaelis, 159 N.Y.S.2d 109, affirmed 167 N.Y.S.2d 1004, 4 A.D.2d 884—Syosset Holding Corp. v. Schlamm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 766—Goldberg v. Mackreth, 142 N.Y.S.2d 281—Freitag v. Marsh, 106 N.Y.S.2d 927, transferred, see, 115 N.Y.S.2d 838, 280 App.Div. 934.

Pa.—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516—Lukens v. Zoning Bd. of Adjustment of Ridley Tp., Del. County, 80 A.2d 765, 367 Pa. 608.

Root v. City of Erie Zoning Bd. of Appeals, 118 A.2d 297, 180 Pa. Super. 38.

Appeal of Palletz, 71 Pa. Dist. & Co. 303.

Hutchinson v. Board of Adjustment of Marple Tp., Com.Pl., 38 Del.Co. 311—Appeal of Livingston Apts., Inc., Com.Pl., 26 LeH.L.J. 575—Borden v. Cheltenham Tp., Com. Pl., 67 Montg.Co. 72.

R.I.—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A.2d 478, 74 R.I. 316—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135—Dunham v. Zoning Board of Town of Westerly, 26 A.2d 614, 68 R.I. 88.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

Requirement of urgent necessity held error

Where county zoning ordinance empowered county board of zoning appeals to grant exception and permit private club in residential district, when in judgment of board such exception should be in harmony with general purpose and intent of zoning plan, board erred in deciding that there was required to be urgent necessity to justify a granting of ap-

plication for private club in residential section, and great injustice if application were denied.

Md.—Montgomery County v. Merlands Club, Inc., 96 A.2d 261, 202 Md. 279.

Exception not substitute for variance

Zoning ordinance enabling statute did not contemplate that applications for exceptions would be an easy means to avoid necessity of seeking variance with consequent burden thereunder of showing undue hardship.

R.I.—Harte v. Zoning Bd. of Review of City of Cranston, 81 A.2d 33, 80 R.I. 43.

2. Md.—Montgomery County v. Merlands Club, Inc., 96 A.2d 261, 202 Md. 279.

Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35.

3. Mass.—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

Pa.—Root v. City of Erie Zoning Bd. of Appeals, 118 A.2d 297, 180 Pa. Super. 38.

Hutchinson v. Board of Adjustment of Marple Tp., 38 Del.Co. 311.

4. Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

Construction of provision

In zoning ordinance provision that board of adjustment shall have power to authorize special exceptions to provisions of ordinance to relieve or prevent unnecessary hardship, "prevent" authorizes the board to take a prospective view.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

5. N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

N.Y.—Freitag v. Marsh, 106 N.Y.S.2d 927, transferred, see, 115 N.Y.S.2d 838, 280 App.Div. 934.

permit,"⁶ which is a separate and distinct mechanism from a "variance,"⁷ in that it is granted for a public or quasi-public purpose within the terms of the zoning plan or ordinance itself,⁸ rather than to obviate the practical difficulties, or unnecessary hardships, or results inconsistent with the general purposes of the zoning regulations as applied to individual property owners, which must be shown before a variance may be granted.⁹ Thus, conditional use permits are confined to uses of public concern, such as airports, cemeteries, development of natural resources, public utilities, educational institutions, libraries, and governmental enterprises.¹⁰ By the specific terms of the ordinance such uses are permitted in any zoning district subject only to a finding by the planning commission in the first instance, or the city council on appeal, that the use is essential or desirable to the public convenience or welfare.¹¹

The grant of a conditional use permit does not create a new zone;¹² it merely affirms as a fact the existence of the circumstances under which the ordinance by its terms prescribes that such permit shall issue.¹³

§ 275. Amendment; Rezoning

"Variance" is distinguished from "amendment" or "rezoning" in that amendment is concerned primarily with the welfare of the entire community, and only incidentally with a landowner's burdens and rights, and rezoning ordinarily contemplates a zoning change in a comparatively large area rather than in a specific instance.

While "variance" and "amendment" are both mechanisms of release provided by the law of zoning,¹⁴ they are separate and distinct measures.¹⁵ The difference is that variance operates to relieve a particular property of certain burdens in certain circumstances,¹⁶ whereas amendment is concerned primarily with the welfare of the entire community and only incidentally with a landowner's burdens and rights.¹⁷

A "variance" and a "rezoning" are likewise separate and distinct measures,¹⁸ in that "rezoning" ordinarily contemplates a change in existing zoning rules and regulations within a district, subdivision, or other comparatively large area in a given governmental unity, which theretofore has been uniformly zoned in its entirety,¹⁹ while the granting of a "variance" usually contemplates only a special exception to existing zoning laws and regulations in a specific instance, permitting a nonconforming use in order to alleviate undue burden or unnecessary hardship on the property owner which the zoning rules and regulations otherwise impose.²⁰

Modification, amendment, and rezoning are discussed supra §§ 81-123.

Act as legislative or administrative. Where the wording of ordinances must be changed in order to accomplish the desired revision, the act is legislative and not administrative; but, on the other hand, where a regulation is changed pursuant to a provision of an existing ordinance permitting an administrative variance on the finding of certain facts, the act is administrative.²¹

6. Cal.—Essick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.
Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

7. Cal.—Essick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.

8. Cal.—Essick v. City of Los Angeles, supra.

9. Cal.—Essick v. City of Los Angeles, supra.

10. Cal.—Essick v. City of Los Angeles, supra.
Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

11. Cal.—Essick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.
Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

12. Cal.—Wheeler v. Gregg, supra.
No change of zoning ordinance Resolution granting a conditional

use permit did not constitute the "changing of a zoning ordinance" within provisions of Los Angeles City Charter prescribing the procedure with respect to applications for such changes.

Cal.—Essick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.

13. Cal.—Essick v. City of Los Angeles, supra.
Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348.

14. N.J.—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

15. N.J.—Tzseses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J.Super. 45—Lumund v. Board of Adjustment of Borough of Rutherford, 69 A.2d 361, 6 N.J.Super. 474, affirmed 73 A.2d 545, 4 N.J. 597.

16. N.J.—Hochberg v. Borough of Freehold, 123 A.2d 46, 40 N.J.Super. 276.

17. N.J.—Hochberg v. Borough of Freehold, supra.

18. Variance as not effecting rezoning

City board of zoning appeals, in granting variance from zoning ordinance, merely varies use to which particular piece of property may be put and does not rezone land covered by variance, power to rezone being vested in common council.

Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.

19. Fla.—Troup v. Bird, 53 So.2d 717.

20. Fla.—Troup v. Bird, supra.

21. Cal.—Johnston v. City of Claremont, 323 P.2d 71, 49 C.2d 826.

C. POWER TO GRANT

§ 276. In General

Boards of adjustment or appeal are generally given power to grant variances or exceptions from zoning regulations, so as to allow a nonconforming use of property in situations where hardship or practical difficulties would otherwise result.

Since the literal enforcement of zoning regulations in all cases might result in serious injustice

to particular individuals in isolated cases, boards of appeal or adjustment or similar bodies usually are vested with power, within prescribed limits, to grant particular property owners a right, generally termed a variance or exception, to use property in nonconformity with the regulations, in certain cases where hardship or practical difficulties would otherwise result,²² or in certain other cases where the

22. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.
- Ariz.—Nicolai v. Board of Adjustment of City of Tucson, 101 P.2d 199, 55 Ariz. 283, followed in *McCrea v. Board of Adjustment of City of Tucson*, 105 P.2d 1119, 56 Ariz. 82.
- Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 Cal.2d 683.
City of San Mateo v. Hardy, 149 P.2d 307, 64 Cal.2d 794.
- Colo.—People ex rel. Grommon v. Hedgcock, 104 P.2d 607, 106 Colo. 300—Board of Adjustment of City and County of Denver v. Handley, 95 P.2d 823, 105 Colo. 180.
- Conn.—Spalding v. Board of Zoning Appeals of City of New Haven, 137 A.2d 755, 144 Conn. 719—Finch v. Montanari, 124 A.2d 214, 143 Conn. 542—Devaney v. Board of Zoning Appeals of City of New Haven, 122 A.2d 303, 143 Conn. 322—Mabank Corp. v. Board of Zoning Appeals of City of Stamford, 120 A.2d 149, 143 Conn. 132—Plumb v. Board of Zoning Appeals of City of New Haven, 108 A.2d 899, 141 Conn. 599—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433—Cohen v. Board of Appeals on Zoning of City of Bridgeport, 94 A.2d 793, 139 Conn. 450—Wadell v. Board of Zoning Appeals of City of New Haven, 68 A.2d 152, 136 Conn. 1—Berkman v. Board of Appeals on Zoning of City of Bridgeport, 64 A.2d 875, 135 Conn. 393—Rafala v. Zoning Bd. of Appeals of City of Hartford, 62 A.2d 337, 135 Conn. 142—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614—Devaney v. Board of Zoning Appeals of City of New Haven, 45 A.2d 828, 132 Conn. 537—Nielsen v. Board of Appeals on Zoning of City of Bridgeport, 27 A.2d 392, 129 Conn. 285—Benson v. Zoning Board of Appeals of City of Hartford, 27 A.2d 389, 129 Conn. 280—Levine v. Board of Adjustment of City of New Britain, 7 A.2d 222, 125 Conn. 478—Grady v. Katz, 1 A.2d 187, 124 Conn. 525—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.
- Fla.—Troup v. Bird, 53 So.2d 717—Tau Alpha Holding Corporation v. Board of Adjustments of City of Gainesville, 171 So. 819, 126 Fla. 855.
- Ind.—City of South Bend v. Marckle, 18 N.E.2d 764, 215 Ind. 74.
Board of Zoning Appeals of City of Mishawaka v. School City of Mishawaka, App., 145 N.E.2d 302.
- Ky.—Willoughby v. Tafel, 190 S.W. 2d 475, 300 Ky. 792—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551—Bosworth v. City of Lexington, 125 S.W.2d 995, 277 Ky. 90—Smith v. Selligman, 109 S.W.2d 14, 270 Ky. 69.
- Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.
- Mass.—Real Properties v. Board of Appeal of Boston, 65 N.E.2d 199, 319 Mass. 180—Brackett v. Board of Appeal of Building Department of City of Boston, 39 N.E.2d 956, 311 Mass. 52—Amero v. Board of Appeal of City of Gloucester, 186 N.E. 61, 283 Mass. 45—Bennett v. Board of Appeal of City of Cambridge, 167 N.E. 659, 268 Mass. 419.
- Mich.—Teglund v. Dodge, 25 N.W.2d 161, 316 Mich. 185.
- Minn.—State v. Gunderson, 268 N.W. 850, 198 Minn. 51.
- Mo.—State ex rel. Nigro v. Kansas City, 27 S.W.2d 1030, 325 Mo. 95.
In re Botz, 159 S.W.2d 367, 236 Mo.App. 366.
- Neb.—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.
- N.J.—Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 554—Kurowski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433—Roberts v. Board of Adjustment of Borough of Fort Lee, 61 A.2d 896, 1 N.J.Super. 29.
Ramsbotham v. Board of Public Works of City of Paterson, 61 A.2d 196, 137 N.J.Law 559, followed in 61 A.2d 197, 137 N.J.Law 591—Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J.Law 473—Brandon v. Board of Com'rs of Town of Montclair, 15 A.2d 598, 125 N.J. Law 367.
- Ehrhardt v. Board of Adjustment of City of Passaic, 142 A. 315, 6 N.J.Misc. 560.
- N.Y.—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673—Otto v. Steinhilber, 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110—People v. New York Board of Appeals, 138 N.E. 416, 234 N.Y. 484.
Ryback v. Murdock, 148 N.Y.S.2d 322, 1 A.D.2d 132—Long Island Lighting Co. v. Incorporated Village of East Rockaway, 110 N.Y.S. 2d 884, 279 App.Div. 926, reargument and appeal denied 113 N.Y.S. 2d 241, 279 App.Div. 1023, affirmed 110 N.E.2d 743, 304 N.Y. 932, reargument denied 112 N.E.2d 851, 305 N.Y. 738—Ernst v. Board of Appeals on Zoning of City of New Rochelle, 79 N.Y.S.2d 798, 274 App. Div. 809—Seinfeld v. Murdock, 20 N.Y.S.2d 464, 259 App.Div. 694, reargument denied 21 N.Y.S.2d 610, 259 App.Div. 1074, affirmed 34 N.E. 2d 488, 285 N.Y. 718—Cherry v. Brumbaugh, 7 N.Y.S.2d 956, 255 App.Div. 880.
- Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947—Sherwood Realty Corp. v. Feriola, 82 N.Y.S.2d 505, 193 Misc. 194—Van Auken v. Kimmey, 252 N.Y. S. 343, 141 Misc. 117—Van Auken v. Kimmey, 252 N.Y.S. 329, 141 Misc. 105—Esdora Realty Corporation v. Walsh, 240 N.Y.S. 792, 136 Misc. 476, reversed on other grounds, 243 N.Y.S. 810, 229 App.Div. 866, affirmed 173 N.E. 883, 254 N.Y. 600.
- Marks v. Board of Zoning Appeals of City of Dunkirk, 154 N.Y. S.2d 118—Stevens v. Connor, 120 N.Y.S.2d 345—Mosher v. Crowley, 110 N.Y.S.2d 626—Burke v. Cohen, 13 N.Y.S.2d 984.

effect of the application of the zoning ordinance or regulation, if literally enforced, would be arbitrary.²³

§ 277. Source of Power

Power to grant a variance or exception may stem directly from a statute or ordinance.

Ohio.—*L. & M. Investment Co. v. Cutler*, 180 N.E. 379, 125 Ohio St. 12, 86 A.L.R. 707.

Okl.—*Beveridge v. Westgate Oil Co.*, 44 P.2d 26, 171 Okl. 360—*Van Meter v. H. F. Wilcox Oil & Gas Co.*, 41 P.2d 904, 170 Okl. 604.

Pa.—*Appeal of Peirce*, 119 A.2d 506, 384 Pa. 100—*In re Blanakik*, 100 A.2d 58, 375 Pa. 209—*Lukens v. Zoning Bd. of Adjustment of Ridley Tp.*, Del. County, 80 A.2d 765, 367 Pa. 608—*Application for Certificate of Occupancy*, 500 Paxinosa Ave., Easton, 66 A.2d 225, 382 Pa. 116—*Appeal of Crawford*, 57 A.2d 862, 358 Pa. 636—*Appeal of Floersheim*, 34 A.2d 62, 348 Pa. 98.

Appeal of Grant, 60 Pa.Dist. & Co. 340—*Casper v. Exley*, 45 Pa. Dist. & Co. 664—*Baumgartner v. Philadelphia Zoning Board of Adjustment*, 29 Pa.Dist. & Co. 103.

Appeal of Geisinger, Com.Pl., 35 Del.Co. 333—*Appeal of Deiter*, Com. Pl., 58 LackJur. 85—*Logan Square, Inc. v. Norristown Borough Bd. of Adjustment*, Com.Pl., 72 Montg.Co. 79—*Grant v. Abington Tp.*, Com. Pl., 63 Montg.Co. 214—*Appeal of Continental Motor Sales*, Com.Pl., 31 North.Co. 250—*Appeal of LeDonne*, Com.Pl., 86 Pittsb.Leg.J. 494—*Appeal of Houlden*, Com.Pl., 86 Pittsb.Leg.J. 115.

R.I.—*Harte v. Zoning Bd. of Review of City of Cranston*, 91 A.2d 38, 80 R.I. 43—*Miriam Hospital v. Zoning Board of Review of City of Providence*, 23 A.2d 191, 67 R.I. 298.

Tenn.—*Bubis v. City of Nashville*, 124 S.W.2d 238, 174 Tenn. 134.

Tex.—*City of Amarillo v. Stapf*, 101 S.W.2d 229, 129 Tex. 81.

Driskell v. Board of Adjustment, Civ.App., 195 S.W.2d 594.

Wis.—*State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison*, 35 N.W.2d 312, 254 Wis. 42, 43 C.J. p 354 note 45.

Power to grant special exceptions see supra § 271.

Validity of provisions as to variance see supra § 66.

"The ordinance may be arbitrary and discriminatory in isolated cases as applied to certain property, and compliance therewith may present unusual difficulties in many other instances. But it is manifestly impracticable, if not impossible, to enumerate in the ordinance itself the varied factual situations to which the ordinance is not applicable because of constitutional objections or other special considerations. Consequently, almost every zoning ordinance . . . contains provisions whereby an owner may apply to an

administrative body for permission to put his land to a nonconforming use."

Cal.—*Metcalf v. Los Angeles County*, 148 P.2d 645, 647, 24 C.2d 267.

Requirements as to hardship or practical difficulties

(1) Term "hardship," as used in zoning ordinance incorporating statutory provision that city zoning board of review may authorize variance in application of terms of ordinance where literal enforcement thereof will result in unnecessary hardship, refers to degree of interference with ordinary legal property rights and loss or hardship arising therefrom.

R.I.—*Tripp v. Zoning Bd. of Review of City of Pawtucket*, 123 A.2d 144—*Caccia v. Zoning Bd. of Review of City of Providence*, 113 A.2d 870—*Winters v. Zoning Bd. of Review of City of Warwick*, 96 A.2d 337, 80 R.I. 275.

(2) Statute allowing board of adjustment to grant variance where strict application of ordinance would result in peculiar and exceptional practical difficulties to, or undue hardship on, the owner provides but one criteria, since undue hardship necessarily is inclusive of peculiar and exceptional practical difficulties.

N.J.—165 Augusta St. v. Collins, 87 A.2d 889, 9 N.J. 259.

(3) Under ordinance permitting zoning board of appeals to vary zoning ordinance where there are "practical difficulties" or "unnecessary hardships," the words "practical difficulties" are insufficient to afford guide to determine whether variation should be granted, and phrase is to be construed as a whole.

Conn.—*Stavola v. Bulkeley*, 56 A.2d 645, 134 Conn. 186.

(4) Fact that hardship would be caused applicant for variance would not alone be sufficient to sustain grant of variance.

N.Y.—*Gilbert v. Stevens*, 135 N.Y.S. 2d 357, 284 App.Div. 1016.

(5) Change of area may be granted as a variance from a zoning ordinance on the ground of practical difficulties alone, without considering whether or not there is an unnecessary hardship.

N.Y.—*Village of Bronxville v. Francis*, 150 N.Y.S.2d 908, 1 A.D.2d 236, affirmed 135 N.E.2d 724, 1 N.Y.2d 889, 153 N.Y.S. 220.

Fulton v. Board of Appeals of Town of Oyster Bay, 158 N.Y.S.2d 434.

(6) Hardship as ground for variances see infra §§ 290-294.

Emergency conditions

Ordinances providing that because of wartime housing emergency administrative officials "may" waive certain building regulations, and regulations applying to the use and occupancy of buildings, sanction the authority of granting power to issue permits where compliance with building regulations is precluded by wartime restrictions.

Cal.—*Lindell Co. v. Board of Permit Appeals of City and County of San Francisco*, 144 P.2d 4, 23 C.2d 303.

Variance rather than change of zone

Where municipality was residential community and zoning ordinance was part of comprehensive plan to preserve character of community, proper method to secure permission to use residential property for non-residential purpose was to apply to board of adjustment for a variance rather than seek change of zone from town council.

N.J.—*Esso Standard Oil Co. v. Town of Westfield*, 110 A.2d 143, 33 N.J. Super. 324.

Spot zoning

(1) An order by board of adjustment and appeals granting a variance so as to permit use of dwelling in an "A" one-family district as a home for the aged was not contrary to public policy and was not void as spot zoning.

Ky.—*Thomson v. Tafel*, 218 S.W.2d 977, 309 Ky. 753.

(2) Spot zoning held not involved. Ind.—*Keeling v. Board of Zoning Appeals of City of Indianapolis*, 69 N. E.2d 613, 117 Ind.App. 314.

Distinguished from licensing power

Cal.—*Rubin v. Board of Directors of City of Pasadena*, 104 P.2d 1041, 16 C.2d 119.

23. Conn.—*Devaney v. Board of Zoning Appeals of City of New Haven*, 122 A.2d 303, 143 Conn. 322—*McMahon v. Board of Zoning Appeals of City of New Haven*, 101 A.2d 284, 140 Conn. 433.

Failure to provide for doctor's offices

Fact that failure of zoning ordinance to provide for doctor's offices in residence zones might prevent ready access to doctors did not render ordinance arbitrary, within ordinance provision authorizing grant of variances where effect of application of ordinance is arbitrary.

Conn.—*Paul v. Board of Zoning Appeals of City of New Haven*, 110 A.2d 619, 142 Conn. 40.

The power to grant a variance or exception may stem directly from a statute or ordinance;²⁴ the authority of a board in this connection has been held solely statutory.²⁵

§ 278. Power in Particular Bodies

Where the power to grant a variance or exception is

vested in a particular body, a decision of a different body, granting a variance or exception, is a nullity.

The power to grant a variance or exception from a zoning regulation may be vested in a particular body.²⁶ For example, the power to grant a variance or exception from a zoning regulation may be vested in a board of adjustment²⁷ or a board of

24. Mich.—*Teglund v. Dodge*, 25 N. W.2d 161, 316 Mich. 185.

N.J.—*Home Builders Ass'n of Northern N. J. v. Borough of Paramus*, 81 A.2d 753, 71 N.J. 335.

Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 554. N.Y.—*Mosher v. Crowley*, 110 N.Y.S. 2d 626.

Pa.—*Appeal of Bowtiuch*, Com.Pl., 49 Lack.Jur. 209.

Tex.—*Driskell v. Board of Adjustment, Civ.App.*, 195 S.W.2d 594, refused no reversible error.

Va.—*Wicker Apartments, Inc. v. City of Richmond*, 99 S.E.2d 656, 199 Va. 263.

Amendment not retroactive

(1) Variances from zoning ordinance granted prior to effective date of amendment of zoning statute are not governed by such amendment.

N.J.—*Ramsbotham v. Board of Public Works of City of Paterson*, 65 A.2d 748, 2 N.J. 131.

(2) Validity of action of board of adjustment on application for zoning variance must be determined under the law in force when such action was taken, without regard to subsequent amendments to zoning statute enlarging board's powers.

N.J.—*Ackerman v. Board of Com'rs of Town of Belleville*, 62 A.2d 476, 1 N.J.Super. 69.

(3) Where owner applied to the township for a special exception or variance, and the township forthwith repealed the section of the ordinance under which the application was filed, it was held that the repeal voided the application filed thereunder.

Pa.—*Sunnybrook, Inc., v. Upper Dublin Tp.*, 75 Pa.Dist. & Co. 385, 67 Montg.Co. 48.

Power not limited by regulation

Zoning board of appeals of city was legally justified in acting in accordance with general statutes of the state and special acts relating to the city in granting variance, and power granted in city charter to board to grant a variance could not be limited to any regulations which purported to restrict the exercise of the power to cases wherein undue hardship resulted solely from the size, shape, or topography of lot.

Conn.—*MaBank Corp. v. Board of Zoning Appeals of City of Stamford*, 120 A.2d 149, 143 Conn. 132.

Special statute not authorizing variance

Where petitioner applied for variance from zoning ordinance enacted by zoning board established under special statute, which did not authorize variances in hardship cases, he could neither invoke provision of general statute, vesting power in zoning boards established thereunder to grant variances in such cases, nor could he raise question as to validity of special statute in omitting such provision in this action.

R.I.—*Baker v. Zoning Bd. of Review of Town of North Kingstown*, 111 A.2d 853, 82 R.I. 432.

Powers of village board not enlarged

Section of a village ordinance did not have the effect of enlarging on the general powers of the village board in the matter of granting of variances, where the ordinance merely supplemented provisions of the village law, by specifically setting forth what the board was required to find, in order to justify the grant of a variance, because of practical difficulties or unnecessary hardship.

N.Y.—*Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor*, 144 N.Y.S.2d 379, 208 Misc. 295.

25. Pa.—*Lukens v. Zoning Bd. of Adjustment of Ridley Tp., Del. County*, 80 A.2d 765, 367 Pa. 608.

Ordinance superseded by statute

Provisions of prior zoning ordinance of city, which gave city planning commission authority to grant a variance in use of property, were superseded by general zoning act when city elected to come under provisions of such act.

Ga.—*Ledbetter v. Callaway*, 87 S.E.2d 317, 211 Ga. 607.

26. Cal.—*Steiger v. Board of Sup'rs of Los Angeles County*, 300 P.2d 210, 143 C.A.2d 352.

Board of Standards and Appeals of City of New York

N.Y.—*Eckerman v. Murdock*, 91 N.Y.S.2d 637, 195 Misc. 280, affirmed 94 N.Y.S.2d 557, 276 App.Div. 927.

Emergency housing commission

Statute which empowered emergency housing commission to allow variances, which granted commission jurisdiction over decisions of municipal boards of appeal, or decision of any board specially appointed, and which was enacted to alleviate housing shortage in entire commonwealth, was sufficiently broad to empower

commission to allow variances with respect to zoning in city controlled by zoning statute.

Mass.—*Miller v. Emergency Housing Commission*, 118 N.E.2d 663, 330 Mass. 693.

Selectmen

Provision of zoning ordinance of town that selectmen shall constitute an adjusting board to hear and adjust complaints and shall determine the fitness and unfitness of various uses gave board right to grant variances.

Me.—*Casino Motor Co. v. Needham*, 118 A.2d 781, 151 Me. 333.

27. Ga.—*Orr v. Hapeville Realty Investments*, 85 S.E.2d 20, 21 Ga. 235.

N.H.—*Fortuna v. Zoning Bd. of Adjustment of City of Manchester*, 60 A.2d 133, 95 N.H. 211.

N.J.—*Tzses v. Board of Trustees of Village of South Orange*, 91 A.2d 588, 22 N.J.Super. 45—*Kurowski v. Board of Adjustment of City of Bayonne*, 78 A.2d 429, 11 N.J.Super. 433.

N.C.—*James v. Sutton*, 50 S.E.2d 300, 229 N.C. 515—*Lee v. Board of Adjustment of City of Rocky Mount*, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—*Lukens v. Zoning Bd. of Adjustment of Ridley Tp., Del. County*, 80 A.2d 765, 367 Pa. 608—*Phillips v. Griffiths*, 77 A.2d 375, 366 Pa. 468—*Appeal of Lindquist*, 73 A.2d 378, 364 Pa. 561—*Berman v. Exley*, 50 A.2d 199, 355 Pa. 415.

Casper v. Exley, 45 Pa.Dist. & Co. 664.

Bary v. Zoning Bd. of Adjustment, Com.Pl., 4 Bucks Co. 269—*Smith v. Bristol Tp. Zoning Bd., Com.Pl.*, 4 Bucks Co. 131—*Appeal of Gelsinger, Com.Pl.*, 35 Del.Co. 333.

Proper function

Proper function of township zoning boards of adjustment is to grant variances from zoning restrictions, give relief from consequent special hardships to individual landowners, and thus forestall and prevent unwarranted invasion of right of private property.

N.J.—*United Advertising Corp. v. Board of Adjustment of Maplewood Tp.*, 56 A.2d 406, 136 N.J.Law 336.

Resolution declaring determination illegal

Special resolution of board of trus-

appeals;²⁸ and where the power to grant a variance or exception from a zoning regulation is vested in a particular body, a decision of a board or other body granting a variance is a nullity where such board or body has no power to grant variances.²⁹

tees declaring illegal, for lack of jurisdiction, determination by board of adjustment granting variance was without foundation in law and invalid.

N.J.—*Tzses v. Board of Trustees of Village of South Orange*, 91 A.2d 588, 22 N.J.Super. 45.

Proper conditions

(1) Zoning board of adjustment has no power to grant a variance unless conditions specified by enabling act and ordinance exist, and, when they do not, the only remedy of an applicant for a variance is through legislative action.

Pa.—*Appeal of Lindquist*, 73 A.2d 378, 364 Pa. 561.

(2) Board of adjustment, and not landlord or lessee, was chargeable with responsibility of determining whether statutory prerequisites to exceptions had been met and what was required to serve the public need.

N.J.—*Crompton & Co. v. Borough of Sea Girt*, 63 A.2d 834, 1 N.J.Super. 607.

23. Ill.—*Rector v. Board of Appeals Under Zoning Ordinance of City of Danville*, 95 N.E.2d 99, 342 Ill.App. 51.

Ind.—*Board of Zoning Appeals of City of Mishawaka v. School City of Mishawaka*, App., 145 N.E.2d 302.

Mass.—*Vetter v. Zoning Bd. of Appeal of Attleboro*, 116 N.E.2d 277, 330 Mass. 628.

Neb.—*Roncka v. Fogarty*, 41 N.W.2d 745, 152 Neb. 467.

N.Y.—*Hunter v. Board of Appeals of Village of Saddle Rock*, 168 N.Y.S. 2d 148, 4 A.D.2d 961.

Narragansett Inn v. Mielke, 134 N.Y.S.2d 363.

Original jurisdiction

Zoning board of appeals has original jurisdiction to entertain applications for variances.

N.Y.—*Roosevelt Field v. Town of North Hempstead*, 98 N.Y.S.2d 350, 277 App.Div. 889—*Hickox v. Griffin*, 79 N.Y.S.2d 193, 274 App.Div. 792, reversed on other grounds 83 N.E.2d 836, 298 N.Y. 365.

Adequate safeguards

Power to grant variances of a discretionary nature, not requiring a showing of unnecessary hardship, must be given to the board of appeals by the board of trustees, and

when such power is given, adequate safeguards to limit and define the discretionary power of the board of appeals must be set up.

N.Y.—*Village of Bronxville v. Francis*, 134 N.Y.S.2d 59, 206 Misc. 339, modified on other grounds 150 N.Y.S.2d 906, 1 A.D.2d 236, affirmed 153 N.Y.S.2d 220, 1 N.Y.2d 839, 135 N.E.2d 724.

Regulations subject to variance by particular board

Where a zoning board of appeals was limited to consideration of matters arising under ordinances enacted under provisions of the town law relating to zoning and planning, and the building code of the municipality was not enacted under those provisions of the town law, the board was without jurisdiction to grant a variance as to any matter contained in the building code.

N.Y.—*Village of Island Park v. Bulk Plants*, 15 N.Y.S.2d 968, 258 App. Div. 185—*Cassety v. Dobson*, 8 N.Y.S.2d 740, 255 App.Div. 928, reargument denied 10 N.Y.S.2d 217, 256 App.Div. 895.

29. Conn.—*Smith v. F. W. Woolworth Co.*, 111 A.2d 552, 142 Conn. 88.

Mass.—*Colabufalo v. Board of Appeal of City of Newton*, 143 N.E.2d 536.

Minn.—*Lowry v. City of Mankato*, 42 N.W.2d 553, 231 Minn. 108.

N.J.—*Conlon v. Board of Public Works of City of Paterson*, 94 A.2d 660, 11 N.J. 363.

N.Y.—*Firestone v. Town Bd. of Town of Oyster Bay*, 134 N.Y.S.2d 882.

Planning board

City in which zoning act of 1946 was effective was required, under such act, to set up a planning board, but such board had no authority to permit a variance in the use of property previously zoned, and under general zoning act of 1946, sole authority to issue special permits varying the use of property previously zoned was vested in board of adjustment.

Ga.—*Ledbetter v. Callaway*, 87 S.E.2d 317, 211 Ga. 607.

Town board

Application for variance must be presented to, and acted on, by zoning board of appeals, and variance may not be granted by town board.

N.Y.—*Firestone v. Town Bd. of Town of Oyster Bay*, 134 N.Y.S.2d 882.

§ 279. Construction of Authorizing Provisions

Provisions authorizing the grant of variances are subject to the usual rules of construction.

Provisions authorizing the grant of variances or exceptions are subject to the usual rules of construction;³⁰ and particular words or phrases therein

City council

Where neither city zoning ordinance nor basic statute authorizes permits for exceptions to ordinance, city council may not grant such permits by resolution.

Ark.—*Meyer v. Seifert*, 225 S.W.2d 4, 216 Ark. 293.

Board of aldermen

Where statute gave board of appeals of city power to grant variances, but provided that exceptions to ordinances may be allowed by either board of appeals of city or council of city or selectmen of town, board of appeals had exclusive power to grant variance, ordinance empowering board of aldermen to grant variance was in conflict with enabling statute, and board of aldermen was not empowered to grant variance; it was in no sense a court when it granted variance, and there was little basis for implying in its decision an adjudication of its authority to act so as to preclude collateral attack on its decision based on its want of authority.

Mass.—*Colabufalo v. Board of Appeal of City of Newton*, 143 N.E.2d 536.

Review by proper board as not initial decision

Review by city board of appeals of propriety of granting of variance by board of aldermen, which was not empowered to grant variance, was not equivalent of initial decision by board of appeals to grant variance, and all at interest were entitled to decision of board of appeals unaffected by prior decision.

Mass.—*Colabufalo v. Board of Appeal of City of Newton*, supra.

No estoppel to deny building inspector's authority

Pa.—*Gibson v. Borough of Wilkesburg*, Com.Pl., 98 Pittsb.Leg.J. 439.

30. Conn.—*Rafala v. Zoning Bd. of Appeals of City of Hartford*, 62 A.2d 337, 135 Conn. 142.

Mass.—*Bennett v. Board of Appeal of City of Cambridge*, 167 N.E. 559, 268 Mass. 419.

N.J.—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

Independent provisions of zoning regulation

Sections 7 and 21 of the New York City zoning resolution are two independent provisions conferring distinct

must be construed in the light of the ordinance as a whole and with a view to its purposes.³¹

§ 280. Nature and Extent of Power

The power of a board to grant or refuse variances is discretionary.

and separate powers on board of standards and appeals, and when application is made under section 21 it must be shown that there are practical difficulties or unnecessary hardships in the way of carrying out strict letter of provisions of resolution which justify variance in specific case; but when application is made under section 7, field of inquiry is restricted.

N.Y.—Reed v. Board of Standards and Appeals of City of New Haven, 174 N.E. 301, 255 N.Y. 126.

Application of Laurelton Civic Ass'n, 141 N.Y.S.2d 180.

Extension or enlargement of building

Zoning ordinance, authorizing board of zoning appeals to grant a variance permitting extension of an existing or proposed building into a more restricted district, limits the extension of use to the enlargement of a building.

Conn.—Spencer v. Board of Zoning Appeals of City of New Haven, 104 A.2d 373, 141 Conn. 155.

Transfer of nonconforming use

Provision of zoning ordinance which permitted variances under certain conditions, but which required determination with respect thereto to be in accord with comprehensive plan set forth in regulations, would be violated by permitting transfer of nonconforming use from one location to another location, where no such use had previously existed.

Conn.—Farr v. Zoning Bd. of Appeals of Town of Manchester, 95 A.2d 792, 139 Conn. 577.

Provision inapplicable

Paragraph of zoning ordinance providing that, where there are practical difficulties or unnecessary hardships in way of carrying out strict letter of any provision of ordinance, board of zoning appeals may vary such provision in harmony with its general purpose and intent, does not control board's action on application for permit to extend store building in business zone into adjacent residence zone, as authorized by one of six preceding paragraphs.

Conn.—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614.

31. Conn.—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186.

Existing establishment

Store under construction, but not yet in operation, was not an "existing commercial or industrial estab-

lishment" within zoning ordinance authorizing board of zoning appeals to grant variances permitting extension of existing commercial or industrial establishments in any district.

Conn.—Spencer v. Board of Zoning Appeals of City of New Haven, 104 A.2d 373, 141 Conn. 155.

Specific piece of property

Determination of whether a given piece of realty is "a specific piece of property" within meaning of zoning statute, so as to be properly the subject of consideration for a variance, should take into account the size of the piece of realty in relation to the sizes generally of pieces of property in the zone devoted to the permitted use.

N.J.—Leimann v. Board of Adjustment of Cranford Tp., Union County, 88 A.2d 337, 9 N.J. 336.

"Building involved"

Where board was vested with authority to grant a variance where strict application of zoning ordinance would deprive owner of reasonable use of lands "or building involved," quoted phrase contemplated situations other than those specifically named in statute, in which a variance could be granted, and included a situation where a permit was sought for improvement and expansion of an existing business.

N.Y.—Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y. S.2d 358.

Other terms

Conn.—Abbadessa v. Board of Zoning Appeals of City of New Haven, 54 A.2d 675, 134 Conn. 28—Corden v. Zoning Bd. of Appeals of City of Waterbury, 41 A.2d 912, 131 Conn. 654, 159 A.L.R. 849.

32. N.Y.—Boyd v. Walsh, 216 N.Y. S. 242, 217 App.Div. 461.

33. Ala.—White v. Board of Adjustment of City of Birmingham, 15 So.2d 585, 245 Ala. 48.

Del.—Appeal of Blackstone, 190 A. 597, 8 W.W.Harr. 230.

Fla.—Kazlow v. Peters, 53 So.2d 321.

Ind.—Board of Zoning Appeals of City of Indianapolis v. Moyer, 27 N.E.2d 905, 108 Ind.App. 198.

Mass.—Howland v. Acting Superintendent of Bldgs. and Inspector of Bldgs. of Cambridge, 102 N.E.2d 423, 328 Mass. 155.

N.J.—Wyndham Const. Co. v. Board of Adjustment of Teaneck Tp., 63 A.2d 707, 1 N.J.Super. 197.

N.Y.—Holy Sepulchre Cemetery v. Board of Appeals of Town of

Provisions authorizing boards to vary zoning regulations are generally held to be permissive rather than mandatory.³² Hence, a property owner or other person is not entitled to a variance as a matter of right,³³ the power of the board in the matter of

Greece, Monroe County, 60 N.Y.S. 2d 750, 271 App.Div. 33.

No legal right

Mass.—Pendergast v. Board of Appeals of Barnstable, 120 N.E.2d 916, 331 Mass. 555.

No vested right is affected by either denial or grant of zoning variance.

Cal.—Flagstad v. City of San Mateo, 318 P.2d 825, 156 C.A.2d 138.

Constitutional rights not violated

(1) Generally.

Pa.—In re Application for Certificate of Occupancy, Com.Pl., 32 North. Co. 31.

(2) If, in determining in a particular case whether a variance should be authorized, the board acts within the powers conferred on it, and its action is not arbitrary or capricious, there is no violation of property owner's constitutional rights.

Wis.—State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison, 35 N.W.2d 312, 254 Wis. 42.

(3) Where board acted within power granted to it by zoning ordinance, and there was no contention that ordinance was unconstitutional, action of board in denying application for variance could not be deemed violation of plaintiff's constitutional rights.

Conn.—Talmadge v. Board of Zoning Appeals of City of New Haven, 109 A.2d 253, 141 Conn. 639.

Renewal of variance permit

Whether variance permit for use of buildings in removal of sand and gravel from private residence district should be renewed was for aldermen to determine.

Mass.—Wilbur v. City of Newton, 18 N.E.2d 365, 302 Mass. 38.

Compliance with building permit

Where permit was obtained in non-commercial zone for avowed purpose of constructing place to be used for sale of ice cream made from products of farm upon which building was to be located, but thereafter landowner intended to manufacture and sell ice cream on substantial commercial scale, to be made from products coming from out of town, he was not entitled to variance by operation of law on ground that building was erected in accordance with permit of building inspector.

R.I.—Kent v. Zoning Bd. of Review of Town of Barrington, 63 A.2d 731, 75 R.I. 64.

granting or refusing variances being discretionary.³⁴ | In exercising its power, the board has been said

Ordinance passed after date of application

Mere application for a permit for a variance confers no vested right as of that time, and an application may be refused, or the permit vacated, because of an ordinance passed after the date of the application where no improvements have been made or any money expended in connection therewith; and the fact that area in which property of applicant for variance was limited to single-family dwellings was reclassified for such dwelling use while the application of a permit to mine coal from the area was pending was not ground for complaint by the applicant where the board had disposed of the application according to the law in effect at the time of its action with respect thereto.

Pa.—Appeal of Mutual Supply Co., 77 A.2d 612, 366 Pa. 424.

34. Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646—White v. Board of Adjustment of City of Birmingham, 15 So.2d 585, 245 Ala. 48.

Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 303. Flagstad v. City of San Mateo, 318 P.2d 825, 156 C.A.2d 138—Steiger v. Board of Sup'rs of Los Angeles County, 300 P.2d 210, 143 C. A.2d 352.

Conn.—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433—Wadell v. Board of Zoning Appeals of City of New Haven, 68 A.2d 152, 136 Conn. 1—Nielsen v. Board of Appeals on Zoning of City of Bridgeport, 27 A.2d 392, 129 Conn. 285—Rommell v. Walsh, 16 A.2d 483, 127 Conn. 272—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, 8 A.2d 1, 125 Conn. 714—Levine v. Board of Adjustment of City of New Britain, 7 A.2d 222, 125 Conn. 478—Blake v. Board of Appeals of City of Hartford, 169 A. 195, 117 Conn. 527—Comley v. Boyle, 162 A. 26, 115 Conn. 406.

Del.—Appeal of Blackstone, 190 A. 597, 8 W.W.Harr. 230.

D.C.—Hyman v. Coe, D.C., 146 F. Supp. 24.

Me.—Casino Motor Co. v. Needham, 118 A.2d 781, 151 Me. 333.

Mich.—Teglund v. Dodge, 25 N.W.2d 161, 816 Mich. 185.

Ind.—Board of Zoning Appeals of City of Mishawaka v. School City of Mishawaka, App., 145 N.E.2d 302—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69

N.E.2d 613, 117 Ind.App. 314—Board of Zoning Appeals of City of Indianapolis v. Wheaton, 76 N.E.2d 597, 118 Ind.App. 38—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 117 Ind.App. 314—Board of Zoning Appeals of City of Indianapolis v. Moyer, 27 N.E.2d 905, 108 Ind.App. 198—Board of Zoning Appeals of City of Indianapolis v. Waintrup, 193 N.E. 701, 99 Ind.App. 576.

Ky.—Selligman v. Von Allmen Bros., 179 S.W.2d 207, 297 Ky. 121—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551—Bosworth v. City of Lexington, 125 S.W.2d 995, 277 Ky. 90—Smith v. Selligman, 109 S.W.2d 14, 270 Ky. 69—A. L. Carrithers & Son v. City of Louisville, 63 S.W.2d 493, 250 Ky. 462.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Mo.—In re Botz, 159 S.W.2d 867, 236 Mo.App. 566.

Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P. 2d 534, 97 Mont. 342.

N.J.—165 Augusta St. v. Collins, 87 A.2d 889, 9 N.J. 259—Home Builders Ass'n of Northern N. J. v. Borough of Paramus, 81 A.2d 753, 7 N.J. 335.

Ardolino v. Board of Adjustment of Borough of Florham Park, Morris County, 125 A.2d 543, 41 N.J. Super. 582—Tzesses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J. Super. 45—Peterson v. Board of Adjustment of Town of Montclair, 73 A. 2d 69, 7 N.J. Super. 282.

Protomastro v. Board of Adjustment of City of Hoboken, 59 A. 2d 644, 137 N.J. Law 250—Stout v. Mitschele, 52 A.2d 422, 135 N.J. Law 406—Albright v. Johnson, 50 A.2d 399, 135 N.J. Law 70—Schable v. Board of Adjustment, 49 A. 2d 50, 134 N.J. Law 473—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J. Law 95—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J. Law 135, affirmed 15 A.2d 598, 125 N.J. Law 367—Aschenbach v. Inhabitants of City of Plainfield, 3 A.2d 814, 121 N.J. Law 598, affirmed 8 A.2d 579, 123 N.J. Law 265—Dubin v. Wich, 200 A. 751, 120 N.J. Law 469.

Werblin v. Wigton, 153 A. 103, 9 N.J. Misc. 194.

N.Y.—Del Vecchio v. Tuomey, 130 N.Y.S.2d 481, 283 App.Div. 955, affirmed 125 N.E.2d 107, 308 N.Y. 749, reargument denied 126 N.E. 174, 308 N.Y. 834—Cordes v. Moore, 129 N.Y.S.2d 777, 283 App.Div. 893,

affirmed 125 N.E.2d 112, 300 N.Y. 761—Corbett v. Zoning Bd. of Appeals of City of Rochester, 128 N.Y.S.2d 12, 283 App.Div. 282—Falvo v. Kerner, 225 N.Y.S. 747, 222 App. Div. 289.

North Am. Holding Corp. v. Murdock, 167 N.Y.S.2d 120, 9 Misc. 2d 632—Application of Central Queens Allied Civic Council, 145 N.Y.S.2d 153, 208 Misc. 809—Smith v. Hartman, 144 N.Y.S.2d 13, 208 Misc. 880—Rochester Transit Corp. v. Crowley, 131 N.Y.S.2d 493, 205 Misc. 933—North Titus Residential Ass'n of Irondequoit, N. Y. v. Board of Zoning Appeals of Town of Irondequoit, 127 N.Y.S.2d 502, 205 Misc. 518—Vesell v. Board of Standards and Appeals of City of New York, 243 N.Y.S. 518, 137 Misc. 806, affirmed Vesell v. Walsh, 232 N.Y.S. 904, 225 App.Div. 742—Ft. Tryon Arms v. Walsh, 232 N.Y.S. 33, 133 Misc. 353.

Aisloff v. Murdock, 81 N.Y.S.2d 872, appeal dismissed in part, modified on other grounds in part, Application of Aisloff, 94 N.Y.S.2d 226, 276 App.Div. 907—In re Fein, 67 N.Y.S.2d 218, affirmed 72 N.Y.S. 2d 264, 272 App.Div. 819, motion denied 74 N.E.2d 486, 297 N.Y. 1034—In re Cosden, 64 N.Y.S.2d 37, affirmed 63 N.Y.S.2d 640, 270 App. Div. 1018.

N.C.—Application of O'Neal, 92 S.E. 2d 189, 243 N.C. 714—James v. Sutton, 50 S.E.2d 300, 229 N.C. 515—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901, 334 Pa. 379—Phillips v. Griffiths, 77 A.2d 375, 366 Pa. 468—Appeal of Lindquist, 73 A.2d 378, 364 Pa. 561—Berman v. Exley, 50 A.2d 199, 355 Pa. 415.

Hinton v. Zoning Bd. of Adjustment, 88 Pa. Dist. & Co. 265—Brodskey v. McShain, 71 Pa. Dist. & Co. 595—Drake v. Zoning Bd. of Adjustment, 65 Pa. Dist. & Co. 293—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa. Dist. & Co. 686, 63 Montg. Co. 247.

Heiser v. Spring Tp., Com.Pl., 47 Berks Co. 21—Appeal of Plymouth Homes, Inc., Com.Pl., 25 Lehigh. 296—Grant v. Abington Tp., Com. Pl., 68 Montg. Co. 214—Appeal of Floersheim, Com.Pl., 92 Pittsb. Leg. J. 16, affirmed 34 A.2d 62, 348 Pa. 98—Appeal of Houlden, Com.Pl., 86 Pittsb. Leg. J. 115—Appeal of Atlantic Refining Co., Com.Pl., 66 York Leg. Rec. 81.

R.I.—Denton v. Zoning Bd. of Review of City of Warwick, 133 A.2d 718—Fogarty v. Zoning Bd. of Review of City of Warwick, 133 A.2d 641—Winters v. Zoning Bd. of Re-

to perform an administrative duty or function.³⁵

§ 281. — Judicial Power or Function

It is frequently said that a board in granting or denying an application for a variance exercises a quasi-judicial function.

It has been both affirmed³⁶ and denied³⁷ that a board, in passing on an application for a variance, exercises judicial powers; but it is frequently said that in so doing it exercises a quasi-judicial function,³⁸ which is to be exercised only in the light

view of City of Warwick, 96 A.2d 337, 80 R.I. 275—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A.2d 478, 74 R.I. 316—Kent v. Zoning Bd. of Review of Town of Barrington, 58 A.2d 623, 74 R.I. 189—Fiske v. Zoning Bd. of Review of Town of East Providence, 50 A.2d 65, 72 R.I. 217, rehearing denied 50 A.2d 779, 72 R.I. 217—Buckminster v. Zoning Board of Review of City of Pawtucket, 30 A.2d 104, 68 R.I. 515.

Tex.—Board of Adjustment of City of San Antonio v. Levinson, Civ. App., 244 S.W.2d 281—Driskell v. Board of Adjustment, Civ.App., 195 S.W.2d 594.

Wis.—State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison, 35 N.W.2d 312, 254 Wis. 42.

Review of exercise of discretion see infra §§ 329, 338, 349.

"In allowing or denying a variance a . . . board exercises a function committed by the Zoning Act to its sound discretion and experienced judgment, controlled by law and reason."

N.J.—Bierce v. Gross, 135 A.2d 561, 566, 47 N.J.Super. 148—Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 601, 22 N.J.Super. 161.

Broad discretion

Ky.—Stout v. Jenkins, 268 S.W.2d 643.

Wide discretion

(1) Generally.

N.Y.—Woltman v. Murdock, 168 N.Y.S.2d 572, 8 Misc.2d 969.

S.C.—Hodge v. Pollock, 75 S.E.2d 752, 223 S.C. 342.

(2) Although board of standards and appeals has wide discretion given to it in matter of granting variances, it cannot, without reasonable basis, vary zoning laws which have been imposed by legislative body for general good.

N.Y.—Application of American Seminary of The Bible, 104 N.Y.S.2d 660, modified on other grounds 112 N.Y.S.2d 904, 280 App.Div. 792.

Discretion and judgment controlled by law and reason

N.J.—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

Mistretta v. City of Newark, 109 A.2d 677, 33 N.J.Super. 205.

Discretion not personal

However, the power has been held not one of personal discretion,

Tex.—Caruthers v. Board of Adjustment of the City of Bunker Hill Village, Civ.App., 290 S.W.2d 340.

Questions presented

On a property owner's application for a variation, sole questions are whether ordinance confers on administrative board power to grant variation which is asked and whether exercise of wise discretion calls for the use of such power in the particular case, and issue whether without such variation strict enforcement of general rule would work such hardship as to constitute taking of property without due process is not directly presented.

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 537, 278 N.Y. 222, 117 A.L.R. 1110.

Arbitrary refusal to exercise discretion

Where zoning board of review denied property owners' application for exception or variance in application of terms of ordinance to permit erection of one-family dwelling and garage on undersized lot on ground that such hardship was self-imposed, such action was an arbitrary refusal to exercise discretion.

R.I.—Denton v. Zoning Bd. of Review of City of Warwick, 133 A.2d 713.

35. Cal.—Essick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.

Ind.—Board of Zoning Appeals of City of Indianapolis v. Wheaton, 76 N.E.2d 597, 118 Ind.App. 38.

Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

N.Y.—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673.

Falvo v. Kerner, 225 N.Y.S. 747, 222 App.Div. 289.

Hepner v. Zoning Bd. of Appeals of City of Mt. Vernon, 152 N.Y.S. 2d 984—Stevens v. Connor, 120 N.Y. S.2d 345—Burke v. Cohen, 13 N.Y. S.2d 984.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Okl.—Torrance v. Bladel, 155 P.2d 546, 195 Okl. 68—Oklahoma City v. Harris, 126 P.2d 988, 191 Okl. 125.

Tex.—Texas Consol. Theatres v. Pittillo, Civ.App., 204 S.W.2d 396.

Policy-making function

City board of adjustment, in determining whether a variance should be granted, is engaged in a delegated policy-making function which is an essential part of proper administration of zoning ordinance, and the public, as well as affected private parties, has an interest in upholding board's order if valid.

Tex.—Board of Adjustment of City of Fort Worth v. Stovall, 216 S.W. 2d 171, 147 Tex. 366.

36. N.J.—Piggott v. Borough of Hopewell, 91 A.2d 667, 22 N.J.Super. 106.

Schnell v. Township Committee of Ocean Tp., 198 A. 759, 120 N.J. Law 194.

Concord Development Co. v. Dowling, 142 A. 356, 6 N.J.Misc. 552—Bellofatto v. Board of Adjustment of Town of Montclair, 141 A. 781, 6 N.J.Misc. 512, followed in Burg v. Board of Adjustment of City of Passaic, 142 A. 919, 6 N.J. Misc. 804, Claremont Bldg. Co. v. Board of Adjustment of City of Newark, 142 A. 919, 6 N.J.Misc. 805, Park & Prospect v. Board of Adjustment of City of Orange, 142 A. 924, 6 N.J.Misc. 804, and Crystal Holding Co. v. Town of Westfield, 147 A. 916, 7 N.J.Misc. 975.

Applicant is entitled to a judicially exercised discretion on the granting or refusal of his application.

Pa.—Appeal of Lindquist, 73 A.2d 378, 364 Pa. 561.

37. Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

38. Cal.—Essick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.

Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386.

Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J.Super. 574—Cassinari v. Union City, 63 A.2d 891, 1 N.J.Super. 219—Crompton & Co. v. Borough of Sea Girt, 63 A. 2d 834, 1 N.J.Super. 607.

Siegel v. Board of Adjustment of City of Newark, 60 A.2d 626, 137 N.J.Law 423—Kindergan v. Board of Adjustment of Borough of River Edge, 59 A.2d 857, 137 N.J.Law 296—Protomastro v. Board of Adjustment of City of Hoboken, 59 A.2d 644, 137 N.J. Law 250—Stout v. Mitschels, 52 A. 2d 422, 135 N.J.Law 406—Albright

of equitable principles.³⁹

§ 282. — Limitations on Power

The power to grant or refuse a variance is not an arbitrary one; it must be exercised within the scope of the authority granted, and not in such a way as to frustrate the scheme or intent of the zoning regulations.

The power to grant or refuse a variance is not an arbitrary one, and may not be exercised arbitrarily,⁴⁰ or with fraud⁴¹ or bad faith,⁴² but is one that may be exercised only where the grounds, circumstances, situations, or conditions specified or contemplated by the empowering provision are present,⁴³ since such specifications are in the nature

v. Johnson, 50 A.2d 399, 135 N.J. Law 70—Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J. Law 473—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J. Law 230—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J. Law 95—Sandler v. Board of Com'rs of City of Trenton, 19 A.2d 788, 126 N.J. Law 392—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J. Law 135, affirmed 15 A.2d 598, 125 N.J. Law 367—Dubin v. Wich, 200 A. 751, 120 N.J. Law 469.

N.Y.—Riker v. Board of Standards and Appeals of City of New York, 234 N.Y.S. 42, 225 App.Div. 570.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107.

Okl.—Torrance v. Bladel, 155 P.2d 546, 195 Okl. 68—Oklahoma City v. Harris, 126 P.2d 988, 191 Okl. 125.

R.I.—Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston, 138 A.2d 818—De Stefanis v. Zoning Bd. of Review of Town of North Providence, 124 A.2d 544.

Tex.—Texas Consol. Theatres v. Pittillo, Civ.App., 204 S.W.2d 396—Boehme Bakery v. City of San Angelo, Civ.App., 185 S.W.2d 601, reversed on other grounds 190 S.W. 2d 67, 144 Tex. 281.

39. Tex.—Caruthers v. Board of Adjustment of the City of Bunker Hill Village, Civ.App., 290 S.W.2d 340.

40. Ky.—Bray v. Beyer, 166 S.W.2d 290, 292 Ky. 162.

Mich.—Teglund v. Dodge, 25 N.W.2d 161, 316 Mich. 185.

Minn.—Newcomb v. Teske, 30 N.W.2d 354, 225 Minn. 223.

N.H.—Nundeen v. Rogers, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

Siegel v. Board of Adjustment of City of Newark, 60 A.2d 626, 137 N.J. Law 423.

N.J.—Aokerman v. Board of Com'rs of Town of Belleville, Super.A.D., 62 A.2d 476, 1 N.J. Super. 69.

N.Y.—Application of Central Queens Allied Civic Council, 145 N.Y.S.2d 153, 208 Misc. 809.

Pa.—Dooling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Tp., 39 A.2d 505, 371 Pa. 290—Ventresca v. Exley, 56 A.2d 210, 358 Pa. 98.

Appeal of Junge, 89 Pa. Super. 543.

Friedman v. Exley, 57 Pa. Dist. & Co. 586.

R.I.—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A.2d 478, 74 R.I. 316.

Tex.—Caruthers v. Board of Adjustment of the City of Bunker Hill Village, Civ.App., 290 S.W.2d 340.

Grant held arbitrary

R.I.—Del Toro v. Zoning Bd. of Review of Town of Bristol, 107 A.2d 460, 82 R.I. 317—Matteson v. Zoning Bd. of Review of City of Warwick, 84 A.2d 611, 79 R.I. 121.

Grant held not arbitrary

(1) Generally.

Conn.—Goldreyer v. Board of Zoning Appeals of City of Bridgeport, 136 A.2d 789, 144 Conn. 641—Bishop v. Board of Zoning Appeals of City of New Haven, 58 A.2d 659, 133 Conn. 614.

Ky.—Thompson v. Tafel, 218 S.W.2d 977, 309 Ky. 753.

R.I.—Bruzzi v. Board of Appeals of City of Pawtucket, 122 A.2d 877.

(2) Area variance.

N.Y.—Feldman v. Nassau Shores Estates, Inc., 172 N.Y.S.2d 769.

Refusal held arbitrary

(1) Generally.

N.J.—Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J. Law 473—Hann v. Borough of Sea Girt, 46 A.2d 47, 134 N.J. Law 74.

Pa.—In re Blanakik, 100 A.2d 58, 375 Pa. 209.

(2) Where petitioner's property could not comply, because of area limitations, with zoning provisions excluding all lots within area of less than three thousand seven hundred and fifty square feet, and at least one parcel in the neighborhood, having the same dimensions as the petitioner's lot, had been improved with a one-family dwelling since the ordinance was amended, decision of board refusing to grant a variance in order to permit the petitioner to erect a residence on the lot was arbitrary, notwithstanding such use might have an adverse effect on neighboring property.

N.Y.—Waldorf v. Coffey, 159 N.Y.S. 2d 852, 5 Misc.2d 80.

Refusal held not arbitrary

(1) Generally.

Ala.—Marshall v. City of Mobile, 35 So.2d 552, 250 Ala. 646.

Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671.

N.J.—Cobble Close Farm v. Board

of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442.

Marocco v. Board of Adjustment of City of Passaic, 63 A.2d 470, 5 N.J. Super. 94.

Visco v. City of Plainfield, 57 A. 2d 490, 136 N.J. Law 659.

N.Y.—Corbett v. Zoning Bd. of Appeals of City of Rochester, 128 N.Y.S.2d 12, 283 App.Div. 282.

Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

R.I.—Kent v. Zoning Bd. of Review of Town of Barrington, 63 A.2d 731, 75 R.I. 64.

Wis.—State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison, 35 N.W.2d 312, 254 Wis. 42.

(2) Fact that board might have reached a different conclusion did not render arbitrary or capricious its decision refusing to grant a variance.

Wis.—State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison, supra.

(3) Denial of variance to land owner who had, subsequent to enactment of ordinance, created foundation wall 5.70 feet nearer the highway line than permitted by the ordinance was not arbitrary or contrary to law.

N.Y.—Stevens v. Connor, 120 N.Y.S. 2d 345.

No greater or additional harm

(1) Mere fact that prohibited use is no more objectionable than other uses in a zoned district does not justify its allowance, and municipal sanction allowed on that basis is arbitrary and capricious.

N.J.—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

(2) Temporary variance granted on ground that nonconforming use thereby permitted would be no more harmful than present use of the property was invalid as being arbitrary and capricious.

N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J. Law 129, affirmed 59 A.2d 622, 137 N.J. Law 280.

41. Mich.—Teglund v. Dodge, 25 N.W.2d 161, 316 Mich. 185.

42. Mich.—Teglund v. Dodge, supra.

43. Conn.—O'Connor v. Board of Zoning Appeals of Town of Stratford, 98 A.2d 515, 140 Conn. 65—Cohen v. Board of Appeals on Zoning of City of Bridgeport, 94 A.2d

of limitations on the power of the board,⁴⁴ and the board cannot effectively act with respect to excep- | tions or variances beyond the authority conferred on it.⁴⁵

- 793, 139 Conn. 450—Devaney v. Board of Zoning Appeals of City of New Haven, 45 A.2d 828, 132 Conn. 537—Benson v. Zoning Board of Appeals of City of Hartford, 27 A.2d 389, 129 Conn. 280.
- Ind.—Anderson Lumber & Supply Co. v. Fletcher, 89 N.E.2d 449, 228 Ind. 383.
- Antrim v. Hohlt, 108 N.E.2d 197, 122 Ind.App. 681—O'Connor v. Overall Laundry, 183 N.E. 134, 98 Ind.App. 29.
- Iowa.—Zimmerman v. O'Meara, 245 N.W. 715, 215 Iowa 1140.
- Ky.—Bray v. Beyer, 166 S.W.2d 290, 292 Ky. 162.
- La.—McCauley v. Albert E. Briede & Son, 90 So.2d 78, 231 La. 36.
- Md.—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 538, 191 Md. 632.
- Mass.—Todd v. Board of Appeals of Yarmouth, 148 N.E.2d 380—Bradley v. Boston Bd. of Zoning Adjustment, 150 N.E. 892, 255 Mass. 160.
- Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.
- N.J.—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.
- Skaf v. Zoning Bd. of Adjustment of City of Asbury Park, 113 A.2d 843, 35 N.J.Super. 215.
- Kindergan v. Board of Adjustment of Borough of River Edge, 59 A.2d 857, 137 N.J.Law 296.
- Jannarone v. Board of Adjustment of Town of Nutley, 153 A. 256, 9 N.J.Misc. 210—Smith v. Kearny Zoning Board of Appeals, 143 A. 151, 6 N.J.Misc. 954.
- N.Y.—Barrett v. Bedell, 7 N.Y.S.2d 987, 255 App.Div. 874.
- Village of Bronxville v. Francis, 134 N.Y.S.2d 59, 206 Misc. 339, modified on other grounds 150 N.Y.S.2d 906, 1 A.D.2d 236, affirmed 135 N.E. 2d 724, 1 N.Y.2d 839, 153 N.Y.S.2d 220—North Titus Residential Ass'n of Irondequoit, N. Y. v. Board of Zoning Appeals of Town of Irondequoit, 127 N.Y.S.2d 502, 205 Misc. 518.
- Stevens v. Connor, 120 N.Y.S.2d 345.
- N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107.
- Pa.—Appeal of Junge, 89 Pa.Super. 543.
- Cline v. Nether Providence Tp. Board of Adjustment, Com.Pl., 33 Del.Co. 293—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85—Hampton v. Board of Adjustment of Borough of Norristown, Com.Pl., 66 Mont. Co. 164—Appeal of Continental Motor Sales, Com.Pl., 31 North.Co. 250.
- R.I.—Fogarty v. Zoning Bd. of Review of City of Warwick, 133 A.2d 641—Adams v. Zoning Bd. of Review of City of Providence, 124 A. 2d 242—Kent v. Zoning Bd. of Review of Town of Barrington, 63 A. 2d 731, 75 R.I. 64.
- Additional requisite**
- Statutory proviso, proscribing grant of variance unless such relief can be granted without substantial detriment to public good and will not substantially impair intent and purpose of zone plan and ordinance, represents a requisite in addition to, not substitutionary for, affirmative statutory requirement of special reasons in aid of zoning purposes.
- N.J.—Skaf v. Zoning Bd. of Adjustment of City of Asbury Park, 113 A.2d 843, 35 N.J.Super. 215.
- Addition to nonconforming use**
- N.H.—Fortuna v. Zoning Bd. of Adjustment of City of Manchester, 60 A.2d 133, 95 N.H. 211.
- Adaptation to conforming use**
- (1) Most especially, variance is not granted unless there is proof that it is impractical to adapt the property in question to a conforming use.
- Del.—Searles v. Darling, 83 A.2d 96, 7 Terry 263.
- (2) Mere irregularity in contour of tract of realty in residential zone does not justify granting of variance, since statute contemplates proof that tract, because of its shape, cannot reasonably be put to permitted use in manner of properties generally in district.
- N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199—Leimann v. Board of Adjustment of Cranford Tp. Union County, 88 A.2d 337, 9 N.J. 336.
- Duty of board**
- Board of adjustment and not landlord or lessee was chargeable with responsibility of determining whether statutory prerequisites to exceptions from zoning ordinance had been met and what was required to serve the public need.
- N.J.—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N.J.Super. 607.
- Any one of the grounds enumerated may ordinarily form the basis of a variance.
- Mass.—Bradley v. Boston Bd. of Zoning Adjustment, 150 N.E. 892, 255 Mass. 160.
- House held not unfit for use as residence** within rule authorizing variance from residential zoning restriction where property is located on boundary of a residential district adjacent to property devoted to commercial or other uses and is unfit for use as a residence.
- Mich.—Hammond v. Kephart, 50 N. W.2d 155, 331 Mich. 551.
- Practical difficulty held not shown**
- Mo.—Adams v. Board of Zoning Adjustment of Kansas City, App., 241 S.W.2d 35.
- Variance held improperly allowed**
- (1) Generally.
- Conn.—Heady v. Zoning Bd. of Appeals for Town of Milford, 94 A.2d 789, 139 Conn. 463.
- (2) Where owner sought a variation to permit the use of land in a residential district as a parking lot for accessory use to its plant, there was no warrant for granting the variance in absence of a showing that land could not yield a reasonable return if used for purpose allowed in the residential district, and variance granted was required to be annulled.
- N.Y.—Bobrowski v. Feriolo, 153 N.Y. S.2d 157, 2 A.D.2d 708.
44. Conn.—O'Connor v. Board of Zoning Appeals of Town of Stratford, 98 A.2d 515, 140 Conn. 65.
- Mass.—Bradley v. Boston Bd. of Zoning Adjustment, 150 N.E. 892, 255 Mass. 160.
- N.Y.—Stevens v. Connor, 120 N.Y.S. 2d 345.
- Pa.—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85.
- "In exercising its discretion, the board of adjustment is not left free to make any determination whatever that appeals to its sense of justice. It must abide by and comply with the standard prescribed by the local ordinance and zoning statutes."
- S.C.—Hodge v. Pollock, 75 S.E.2d 752, 755, 223 S.C. 342.
- Peculiar internal problems; salutary motivations**
- Statute authorizing grant of variance in particular cases and for special reasons does not authorize board to grant or recommend variance solely on basis of peculiar internal problems or salutary motivations or activities of particular landowner.
- N.J.—Skaf v. Zoning Bd. of Adjustment of City of Asbury Park, 113 A.2d 843, 35 N.J.Super. 215.
- Parking lot; new and used-car lot**
- For the purposes of zoning, use as a parking lot and use as a new and used-car lot are not the same, and the allowance of a variance on this basis will not be sustained.
- Pa.—Appeal of Frabotta, 6 Pa.Dist. & Co.2d 400, 14 Law.L.J. 184.
45. Iowa.—Zimmerman v. O'Meara, 245 N.W. 715, 215 Iowa 1140.
- Ky.—Arrow Transp. Co. v. Planning and Zoning Commission of City of Paducah and Municipal Area, McCracken County, 299 S.W.2d 95.
- Md.—Heath v. Mayor and City Coun-

The jurisdiction of the board extends to, and is limited by, the issues properly raised by the application before it,⁴⁶ and does not extend to the determination of the validity of the ordinance in question.⁴⁷

The power of a board with respect to variances

or exceptions does not include the power to waive, suspend, disregard, or ignore the zoning regulations,⁴⁸ to depart from them, set them aside, set them at naught, or nullify them,⁴⁹ or to change, modify, amend, revise, review, or repeal them.⁵⁰ Also, the board may not reclassify land uses,⁵¹ zone or rezone,⁵² change the boundary lines of a

cil of Baltimore, 49 A.2d 799, 187 Md. 296.

Mich.—Teglund v. Dodge, 25 N.W.2d 161, 316 Mich. 185.

Neb.—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

N.Y.—Von Elm v. Zoning Board of Appeals of Incorporated Village of Hempstead, Nassau County, 17 N.Y.S.2d 548, 258 App.Div. 989—Cassety v. Dobson, 8 N.Y.S.2d 740, 255 App.Div. 928, reargument denied 10 N.Y.S.2d 217, 256 App.Div. 895.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107.

Pa.—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85.

R.I.—Paterson v. Zoning Bd. of Review of Town of East Providence, 98 A.2d 847, 80 R.I. 494—Ralston Purina Co. v. Zoning Board of Town of Westerly, 12 A.2d 219, 64 R.I. 197.

Tex.—City of Amarillo v. Stapf, 101 S.W.2d 229, 129 Tex. 81.

Boehme Bakery v. City of San Angelo, Civ.App., 185 S.W.2d 601, reversed on other grounds 190 S.W.2d 67, 144 Tex. 281.

Utah.—Walton v. Tracy Loan & Trust Co., 92 P.2d 724, 97 Utah 249.

Power to extend nonconforming uses strictly construed

Md.—Colati v. Jirout, 47 A.2d 613, 186 Md. 652.

Power to vary as to construction

The power to vary zoning regulations relating to the construction and structural designs of buildings or structures does not empower the board to vary or modify a regulation as to the use of a building or structure.

N.Y.—McGarry v. Walsh, 210 N.Y.S. 286, 213 App.Div. 289.

Power not implied

A provision in zoning ordinance restraining the making of exceptions to cases in which no hazards from fire or disease were created, or the public health, security, or morals were not menaced, did not authorize board to permit erection of nonconforming buildings in area zoned as residential section, where provision giving board power to make exceptions was invalid.

Md.—Chayt v. Board of Zoning Appeals of Baltimore City, 9 A.2d 747, 177 Md. 426.

State housing law held not violated
Mich.—Mitchell v. Grewal, 61 N.W.2d 8, 338 Mich. 81.

46. Fla.—Troup v. Bird, 53 So.2d 717.

N.J.—Burg v. Ackerman, 135 A. 672, 5 N.J.Misc. 96.

N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431.

R.I.—Spirito v. Zoning Board of Review of City of Cranston, 12 A.2d 727, 64 R.I. 411.

47. N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 794, appeal dismissed 60 S.Ct. 77, 308 U.S. 503, 84 L.Ed. 431.

R.I.—Matteson v. Zoning Bd. of Review of City of Warwick, 84 A.2d 611, 79 R.I. 121.

Judicial determination of validity of ordinance generally see infra § 323.

Validity assumed by court

Md.—Easter v. Mayor and City Council of Baltimore, 73 A.2d 491, 195 Md. 395.

Ordinance arbitrary or unreasonable
Board of zoning appeals may not, in passing on an application for a variance, determine that the zoning ordinance itself is arbitrary or unreasonable.

N.Y.—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673.

48. La.—State ex rel. Harris v. Zoning Bd. of Appeal and Adjustment, 60 So.2d 880, 221 La. 941—City of New Orleans v. Leeco, 53 So.2d 490, 219 La. 550.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

R.I.—Fogarty v. Zoning Bd. of Review of City of Warwick, 133 A.2d 641.

49. Pa.—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516—Lukens v. Zoning Bd. of Adjustment of Ridley Tp., Del. County, 80 A.2d 765, 367 Pa. 608—Application of Devereux Foundation, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

Covenant Presbyterian Church v. Board of Adjustment, 56 Pa. Dist. & Co. 309, 94 Pittsb.Leg.J. 151.

R.I.—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A.2d 478, 74 R.I. 316.

50. Ind.—Antrim v. Hohlt, 108 N.E. 2d 197, 122 Ind.App. 681.

Mo.—Wilson v. Douglas, App., 297 S.W.2d 588.

N.J.—Leimann v. Board of Adjustment of Cranford Tp., Union County, 88 A.2d 337, 9 N.J. 336.

Grimley v. Village of Ridgewood, 133 A.2d 648, 45 N.J.Super. 574—Keller v. Town of Westfield, 121 A.2d 419, 39 N.J.Super. 430.

N.Y.—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673.

N.C.—Application of O'Neal, 92 S.E. 2d 189, 243 N.C. 714—James v. Sutton, 50 S.E.2d 300, 229 N.C. 515—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—Application of Devereux Foundation, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

R.I.—Fogarty v. Zoning Bd. of Review of City of Warwick, 133 A.2d 641—Harte v. Zoning Bd. of Review of City of Cranston, 91 A.2d 33, 80 R.I. 43—Abbott v. Zoning Bd. of Review of City of Warwick, 79 A.2d 620, 73 R.I. 84.

51. Tex.—Board of Adjustment of City of San Antonio v. Levinson, Civ.App., 244 S.W.2d 281.

52. Fla.—Troup v. Bird, 53 So.2d 717.

Ky.—Sims v. Bradley, 218 S.W.2d 641, 309 Ky. 626.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254.

Appeals of Frabotta, 6 Pa. Dist. & Co.2d 400, 14 Law.L.J. 134.

Helser v. Spring Tp., Com.Pl., 47 Berks Co. 21—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85.

zoning district,⁵³ or alter the essential character of the neighborhood.⁵⁴

In passing on an application for a variance or

exception, a board may not so act as to annul, weaken, or change the scheme, plan, intent, or purpose of the zoning law;⁵⁵ the board must not lose

R.I.—*De Stefanis v. Zoning Bd. of Review of Town of North Providence*, 124 A.2d 544.

Board has jurisdiction only when the petition is for a variance and not where it is for a rezoning under the guise of a variance.

Pa.—*Lukens v. Zoning Bd. of Adjustment of Ridley Tp. Del. County*, 80 A.2d 765, 367 Pa. 608.

Change of residential area to commercial

Even if contention of unsuccessful applicants for store building permit that residential area had partially changed to commercial were true, such fact would not justify the allowance of a variance by township board of adjustment, but would at best warrant a call on the township commissioners to rezone the district. Pa.—*Lukens v. Zoning Bd. of Adjustment of Michener*, 115 A.2d 367, 382 Pa. 401.

Cemetery

Granting of a variance for an area of one hundred eighty-five acres for cemetery would, in effect, constitute a rezoning of that area.

Pa.—*Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh*, 109 A.2d 537, 379 Pa. 516.

53. N.J.—*Kindergan v. Board of Adjustment of Borough of River Edge*, 59 A.2d 857, 137 N.J.Law 296.

Pa.—*Appeal of Frabotta*, 6 Pa.Dist. & Co.2d 400, 14 Law.L.J. 134.

"Care should be taken lest the boundaries of a residence district be pared down in successive proceedings granting variances to owners who from time to time through such proceedings find their respective properties abutting upon premises newly devoted to business purposes." Mass.—*Real Properties v. Board of Appeal of Boston*, 65 N.E.2d 199, 201, 319 Mass. 180.

54. N.Y.—*Calcagno v. Town Board of Town of Webster*, 41 N.Y.S.2d 140, 285 App.Div. 687, affirmed 52 N.E.2d 592, 291 N.Y. 701—*Henry Steers, Inc. v. Rembaugh*, 20 N.Y. S.2d 72, 259 App.Div. 908, affirmed 29 N.E.2d 934, 284 N.Y. 621.

Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325.

Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.

Pa.—*Huebner v. Philadelphia Sav. Fund Soc.*, 192 A. 139, 127 Pa.Super. 28.

Appeal of Hood, 6 Pa.Dist. & Co. 2d 275, 72 Montg.Co. 12.

55. Conn.—*Libby v. Board of Zoning Appeals of City of New Haven*,

118 A.2d 894, 143 Conn. 46—*Parsons v. Board of Zoning Appeals of City of New Haven*, 99 A.2d 149, 140 Conn. 290—*Wadell v. Board of Zoning Appeals of City of New Haven*, 68 A.2d 152, 136 Conn. 1—*Berkman v. Board of Appeals on Zoning of City of Bridgeport*, 64 A.2d 875, 135 Conn. 393—*Rafala v. Zoning Bd. of Appeals of City of Hartford*, 62 A.2d 337, 135 Conn. 142—*Delaney v. Zoning Bd. of Appeals of City of Hartford*, 56 A.2d 647, 134 Conn. 240—*Stavola v. Bulkeley*, 56 A.2d 645, 134 Conn. 186—*Bishop v. Board of Zoning Appeals of City of New Haven*, 53 A.2d 659, 133 Conn. 614.

Fla.—*Troup v. Bird*, 53 So.2d 717.

Ga.—*Washington Seminary v. Bass*, 16 S.E.2d 565, 192 Ga. 808.

Ind.—*Antrim v. Hohit*, 108 N.E.2d 197, 122 Ind.App. 681—*Civil City of Indianapolis v. Ostrom Realty & Construction Co.*, 176 N.E. 246, 95 Ind.App. 376.

Ky.—*Bray v. Beyer*, 166 S.W.2d 290, 292 Ky. 162.

Md.—*Sugar v. North Baltimore Methodist Protestant Church*, 165 A. 703, 164 Md. 487.

Mass.—*Miller v. Emergency Housing Commission*, 116 N.E.2d 663, 330 Mass. 693—*Brackett v. Board of Appeal of Building Department of City of Boston*, 39 N.E.2d 956, 311 Mass. 52—*Norcross v. Boston Bd. of Appeal Bldg. Dept.*, 150 N.E. 887, 255 Mass. 177.

Mo.—*State ex rel. Negro v. Kansas City*, 27 S.W.2d 1030, 325 Mo. 95.

Neb.—*Roncka v. Fogarty*, 41 N.W.2d 745, 152 Neb. 467.

N.J.—*Moriarty v. Pozner*, 121 A.2d 527, 21 N.J. 199—*Ranney v. Istituto Pontificio Delle Maestre Filippini*, 119 A.2d 142, 20 N.J. 189—*Cobble Close Farm v. Board of Adjustment of Middletown Tp.*, 92 A. 2d 4, 10 N.J. 442—*Leimann v. Board of Adjustment of Cranford Tp., Union County*, 88 A.2d 337, 9 N.J. 336.

Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J.Super. 574—*Keller v. Town of Westfield*, 121 A.2d 419, 39 N.J.Super. 430—*Barbarisi v. Board of Adjustment*, 103 A.2d 164, 30 N.J.Super. 11—*Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County*, 102 A.2d 73, 29 N.J.Super. 164—*Tzseses v. Board of Trustees of Village of South Orange*, 91 A.2d 588, 22 N.J.Super. 45—*Ward v. Scott*, 86 A.2d 613, 18 N.J.Super. 36, reversed on other grounds 93 A.2d 385, 11 N.J. 117—*Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp.*, 84 A.2d 18, 16 N.J.Super.

113—*Beck v. Board of Adjustment of City of East Orange, Essex County*, 83 A.2d 720, 15 N.J.Super. 554.

Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367—*Leonard Inv. Co. v. Board of Adjustment of City of Trenton*, 4 A.2d 768, 122 N.J.Law 308.

N.Y.—*Taxpayers' Ass'n of South East Oceanside v. Board of Zoning Appeals of Town of Hempstead*, 93 N.E.2d 645, 301 N.Y. 215—*Thomas v. Board of Standards and Appeals of City of New York*, 48 N.E.2d 284, 290 N.Y. 109—*Otto v. Steinhilber*, 24 N.E.2d 851, 282 N.Y. 71—*Levy v. Board of Standards and Appeals of City of New York*, 196 N.E. 284, 267 N.Y. 347.

Corbett v. Zoning Bd. of Appeals of City of Rochester, 128 N.Y.S.2d 12, 283 App.Div. 282—*Joyce v. Dobson*, 8 N.Y.S.2d 768, 255 App. Div. 348—*Cherry v. Brumbaugh*, 7 N.Y.S.2d 956, 255 App.Div. 880—*Beckmann v. Talbot*, 300 N.Y.S. 6, 252 App.Div. 370, reversed on other grounds 15 N.E.2d 556, 278 N.Y. 146, reargument denied 16 N.E.2d 849, 278 N.Y. 700.

Woltman v. Murdock, 168 N.Y.S. 2d 572, 8 Misc.2d 969—*In re Mark Block Holding Corporation*, 253 N.Y.S. 321, 141 Misc. 818, reversed on other grounds *Mark Block Holding Corporation v. Warshaw*, 261 N.Y. S. 914, 237 App.Div. 839.

Aisloff v. Murdock, 81 N.Y.S.2d 872, appeal dismissed in part, modified on other grounds in part, Application of Aisloff, 94 N.Y.S.2d 226, 276 App.Div. 907.

N.C.—*James v. Sutton*, 50 S.E.2d 300, 229 N.C. 515—*Lee v. Board of Adjustment of City of Rocky Mount*, 37 S.E.2d 128, 226 N.C. 107.

Pa.—*Huebner v. Philadelphia Sav. Fund Soc.*, 192 A. 139, 127 Pa.Super. 28.

Cline v. Nether Providence Tp. Bd. of Adjustment, Com.Pl., 33 Del. Co. 293—*Appeal of Deiter, Com.Pl.*, 53 Lack.Jur. 85—*Appeal of Continental Motor Sales, Com.Pl.*, 31 North.Co. 250—*Appeal of Costolo, Com.Pl.*, 93 Pittsb.Leg.J. 43—*Appeal of Yarov, Com.Pl.*, 91 Pittsb.Leg.J. 391—*Appeal of Blank, Com.Pl.*, 90 Pittsb.Leg.J. 159.

R.I.—*Lynch v. Zoning Bd. of Review of City of Pawtucket*, 133 A. 2d 769—*Baggs v. Zoning Bd. of Review of Town of Barrington*, 86 A. 2d 658, 79 R.I. 211—*Costantino v. Zoning Bd. of Review of City of*

sight of the general purpose and intent of the ordinance.⁵⁶ Whether a proposed change will derogate from the intent and purpose of the zoning regulation is primarily a question of fact,⁵⁷ although it may become a question of law.⁵⁸

A provision for variance contemplates no substan-

tial change,⁵⁹ but only such as will soften the rigors of the provisions of the zoning ordinance.⁶⁰

The power of the board with respect to variances does not authorize it to deny or revoke a permit to which an applicant is clearly entitled under the zoning regulations;⁶¹ it cannot be exercised so as to

Cranston, 60 A.2d 478, 74 R.I. 316—Fiske v. Zoning Bd. of Review of Town of East Providence, 50 A.2d 65, 72 R.I. 217, rehearing denied 50 A.2d 779, 72 R.I. 217—Haffernan v. Zoning Board of Review of City of Cranston, 144 A. 674, 50 R.I. 26.

Wis.—State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison, 35 N.W.2d 312, 254 Wis. 42—State v. Gurda, 243 N.W. 317, 209 Wis. 63.

"In the determination whether a variance is permissible, the requirement that any change shall be in harmony with the general intent and purpose of the ordinance is highly important."

Conn.—Talmadge v. Board of Zoning Appeals of City of New Haven, 109 A.2d 253, 255, 141 Conn. 639—Gunther v. Board of Zoning Appeals of City of New Haven, 71 A. 2d 91, 95, 136 Conn. 303.

Contiguity to less restricted zone

With respect to the power of the board of appeal to grant variance, fact that the premises involved are contiguous to an area zoned for business is of slight weight when such contiguity existed at the passage of the zoning act.

Mass.—Real Properties v. Board of Appeal of Boston, 65 N.E.2d 199, 319 Mass. 180.

Mere size of parcel, which was held as an entirety and was an integral, undivided tract, did not render grant of variance as to parcel an impairment of zone plan.

N.J.—Moriarty v. Pozner, 116 A.2d 704, 36 N.J.Super. 586, reversed on other grounds 121 A.2d 527, 21 N.J. 199.

Variance held in conformity with zoning act

Ill.—Downey v. Grimshaw, 101 N.E. 2d 275, 410 Ill. 21.

Grant of variance held improper or erroneous

(1) Generally.

N.Y.—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N. E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673.

(2) Where area in zoning district was a homogeneous unit for zoning purposes and had been used exclusively for residential purposes, permitting parcel of substantially more

than one acre to be opened up for commercial use by one engaged in business of building, repairing, and storing boats would nullify, or substantially derogate from, intent, or purpose of the zoning ordinance, and, therefore, granting variance to permit such commercial use was error. Mass.—Atherton v. Board of Appeals of Town of Bourne, 136 N.E.2d 201, 334 Mass. 451.

Nonconforming use

Privilege of erecting a nonconforming building or a building for a nonconforming use may not be granted under guise of a variance permit, since action to that effect is in direct conflict with the general purpose and intent of the ordinance and does violence to its spirit.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

56. Del.—In re Auditorium, Inc., 84 A.2d 598, 7 Terry 430, remanded on other grounds Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Tendency of general area toward business

Where tendency of entire general area in which was located a small plot of land for which owner sought a variance, so as to permit a nonconforming business use of such property, was toward business and industry, granting of the variance did not do violence to general purpose and intent of zoning ordinance.

Conn.—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433.

57. Mass.—Norcross v. Boston Bd. of Appeal Bldg. Dept., 150 N.E. 877, 255 Mass. 177.

Establishment of fraternal club

Where area zoned residential had been developed for public and quasi-public uses such as schools, churches, synagogues, and outdoor shrines, grant of variance to permit construction and establishment of fraternal club which had to be relocated because its property had been taken for public purposes was not out of harmony with general purpose and intent of zoning ordinance.

Conn.—Goldreyer v. Board of Zoning Appeals of City of Bridgeport, 136 A.2d 789, 144 Conn. 641.

58. Mass.—Norcross v. Boston Bd. of Appeal Bldg. Dept., 150 N.E. 877, 255 Mass. 177.

59. Conn.—Heady v. Zoning Bd. of Appeals for Town of Milford, 94 A. 2d 789, 139 Conn. 463—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186.

"No variance is lawful which does precisely what a change of map would accomplish. . . . When such substantial changes become advisable they must be made by the legislative body of the municipality which alone can change the map and allow a business center in a residential section. It is a legislative matter and not a situation for a variance permit."

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 133, 226 N.C. 107, 168 A.L.R. 1.

Proposed change held substantial

Ind.—Antrim v. Hohlt, 108 N.E.2d 197, 122 Ind.App. 681.

Change held of small consequence, so as to justify grant of variance. Mass.—Tanzilli v. Casassa, 85 N.E. 2d 220, 324 Mass. 113.

Change of classification

(1) Board of adjustment was without authority to grant variance which would, in effect, change property from one classification to another, even though three fourths of tract had originally been zoned for heavy industrial usage and remainder had been zoned for general business usage and variance was sought, on grounds of hardship, in order to permit industrial usage of such remainder.

Ky.—Arrow Transp. Co. v. Planning and Zoning Commission of City of Paducah and Municipal Area, McCracken County, 299 S.W.2d 95.

(2) Variance held not objectionable as constituting change in classification.

Ill.—Rector v. Board of Appeals Under Zoning Ordinance of City of Danville, 95 N.E.2d 99, 342 Ill.App. 51.

60. Conn.—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186.

61. Mich.—Teglund v. Dodge, 25 N. W.2d 161, 316 Mich. 185.

N.J.—Leonard Inv. Co. v. Board of Adjustment of City of Trenton, 4 A.2d 768, 122 N.J.Law 308.

R.I.—Ralston Purina Co. v. Zoning Board of Town of Westerly, 12 A. 2d 219, 64 R.I. 197—Hirsch v. Zoning Board of Review of City of Pawtucket, 187 A. 844, 56 R.I. 463.

place on specific property restrictions more severe than those imposed by the ordinance itself.⁶²

§ 283. — — — Legislative Functions

The power of a board as to variances does not include power to exercise legislative functions.

The power of a board with respect to variances or exceptions cannot be extended so as to include power to exercise legislative functions;⁶³ variances should not be employed as a substitute for the normal legislative process,⁶⁴ and the discretion of a board to

vary a zoning ordinance is not the power to legislate.⁶⁵

§ 284. — — — Power to Grant or to Recommend Variance

The board, under certain circumstances, may not itself be authorized to grant a variance, but may only be empowered to recommend that a variance be granted.

Under some statutes the board or other body is, under certain circumstances, not itself authorized to make a variance, but is empowered to recommend to the governing body of the municipality that a variance be granted,⁶⁶ and this limitation on the

62. Mich.—Teglund v. Dodge, 25 N. W.2d 161, 316 Mich. 185.

Pa.—Covenant Presbyterian Church v. Board of Adjustment, 56 Pa.Dist. & Co. 309, 94 Pittsb.Leg.J. 151.

63. Cal.—Essick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.

Ky.—Bray v. Beyer, 166 S.W.2d 290, 292 Ky. 162.

Mo.—Bartholomew v. Board of Zoning Adjustment, App., 307 S.W.2d 730.

N.H.—Sundeen v. Rogers, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950.

N.J.—Leimann v. Board of Adjustment of Cranford Tp., Union County, 88 A.2d 337, 9 N.J. 336.

Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161.

Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

N.Y.—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673—Levy v. Board of Standards and Appeals of City of New York, 196 N.E. 284, 267 N.Y. 347.

Spadafora v. Ferguson, 48 N.Y. S.2d 698, 182 Misc. 161, affirmed 50 N.Y.S.2d 408, 268 App.Div. 820.

Hepner v. Zoning Bd. of Appeals of City of Mt. Vernon, 152 N.Y.S.2d 984—Stevens v. Connor, 120 N.Y. S.2d 345.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Okl.—Oklahoma City v. Harris, 126 P.2d 988, 191 Okl. 125—Van Meter v. H. F. Wilcox Oil & Gas Co., 41 P.2d 904, 170 Okl. 604—Beveridge v. Harper & Turner Oil Trust, 35 P. 2d 435, 168 Okl. 609.

Pa.—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516—Application of Devereux Foundation, 41

A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A. 2d 292, 180 Pa.Super. 105.

Reed v. Borough of North Wales, 83 Pa.Dist. & Co. 69, 68 Montg.Co. 196.

Rubin v. Zoning Bd. of Adjustment, Com.Pl., 5 Bucks Co. 207—Cline v. Nether Providence Tp. Bd. of Adjustment, Com.Pl., 33 Del.Co. 293—City of Williamsport v. Grieco, Com.Pl., 6 Lycoming 76.

R.I.—Matteson v. Zoning Bd. of Review of City of Warwick, 84 A.2d 611, 79 R.I. 121—Abbott v. Zoning Bd. of Review of City of Warwick, 79 A.2d 620, 78 R.I. 84.

S.D.—Graves v. Johnson, 63 N.W.2d 341, 75 S.D. 261.

Tex.—City of Amarillo v. Stapf, 101 S.W.2d 229, 129 Tex. 81.

Texas Consol. Theatres v. Pittillo, Civ.App., 204 S.W.2d 396—Harrington v. Board of Adjustment of City of Alamo Heights, Bexar County, Civ.App., 124 S.W.2d 401, error refused.

"The function of the board of adjustment is to administer the zoning plan rather than to formulate or revise it."

N.J.—Grimley v. Village of Ridgewood, 133 A.2d 648, 654, 45 N.J. Super. 574.

Legislative power held not exercised or assumed

(1) Generally.

Pa.—Cohen v. Cheltenham Tp., Com. Pl., 69 Montg.Co. 299.

Va.—Wicker Apartments, Inc. v. City of Richmond, 99 S.E.2d 656, 199 Va. 263.

(2) An order of city zoning board of appeals, granting variance to permit use of certain premises in residence zone as lumber yard, was not invalid, as assumption of legislative power, not given board by city charter, to place premises in different zone, since order merely purported to relieve premises of some of restrictions imposed by ordinance on property within such residence zone.

Conn.—Plumb v. Board of Zoning Appeals of City of New Haven, 108 A.2d 899, 141 Conn. 595.

Use classification as legislative province

It would be palpable misuse of administrative function of board of adjustment to provide for business use of tract, zoned for residences by local legislative authority, in order to avoid cost of school facilities and administration were it devoted to ordained use, nor could board by means of variance supply omission from ordinance or provision for shopping centers, since use classification is a legislative province and board has no legislative power.

N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199.

Spot zoning as test of nature of remedy

If the relief sought could not be obtained by municipal legislation because it would be spot zoning, then the proper remedy is an application for a variance, but where the relief sought would not be open to attack as spot zoning, then the remedy is within the jurisdiction of the legislative body and not the board of adjustment.

Pa.—Sunnybrook, Inc., v. Upper Dublin Tp., 75 Pa.Dist. & Co. 385, 67 Montg.Co. 48.

64. N.J.—Keller v. Town of Westfield, 121 A.2d 419, 39 N.J.Super. 430.

65. Tex.—Board of Adjustment of City of San Antonio v. Levinson, Civ.App., 244 S.W.2d 281.

66. Cal.—Hopkins v. MacCulloch, 95 P.2d 950, 35 C.A.2d 442.

N.J.—Ward v. Scott, 93 A.2d 385, 11 N.J. 117—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64—National House & Farms Ass'n v. Board of Adjustment of Borough of Oakland, 65 A. 2d 518, 2 N.J. 11.

Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J.Super. 574—Mistretta v. City of Newark, 109

power of the board may be made to apply to all cases, including cases of unnecessary hardship, where the property involved is more than a stated distance beyond the border of a district wherein the proposed use is permitted.⁶⁷ The board may have power actually to grant a variance where the property is within a stated distance of a district in which the proposed use is permitted;⁶⁸ but where the property is situated beyond the stated distance of a district in which the proposed use is permitted, the governing body is without authority to grant a variance in the absence of a recommendation by the board.⁶⁹

The governing body of the city is not required to approve such recommendations, but must exercise an independent determination,⁷⁰ and it may, by resolution, approve or disapprove an affirmative recommendation of a board of adjustment with respect to a variance.⁷¹ If a local governing body chooses to accept and to confirm the findings and conclusions of a board of adjustment on an application for a

variance, it may do so by passing a resolution to that effect, but the governing body is free to draw different or additional conclusions from the facts as determined by the board.⁷² The governing body is not required to give notice or to hold a hearing before rejecting the recommendation of the board that a request for a variance be granted.⁷³

The action of a board of adjustment in recommending to the municipal governing body that a variance be granted is presumed to be valid, and the burden of proof to rebut such presumption rests on one attacking the action taken.⁷⁴

§ 285. Exercise of Power in General

It is improper to deny a variance to which the applicant is clearly entitled; but a variance should be granted only if reasonable and within the scope of the authority granted.

Whether a variance should be granted must be determined on the facts and circumstances of each particular case.⁷⁵ It is proper to grant, and improper

A.2d 677, 33 N.J.Super. 205—Kurovski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433—Ackerman v. Board of Com'rs of Town of Belleville, 62 A.2d 476, 1 N.J.Super. 69.

Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280—Bieloch v. Board of Adjustment of Margate City, 49 A.2d 501, 134 N.J.Law 564—Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J.Law 473—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367—Aschenbach v. Inhabitants of City of Plainfield, 3 A.2d 814, 121 N.J.Law 593, affirmed 8 A.2d 579, 123 N.J.Law 265—Progress Holding Co. v. Board of Adjustment of East Orange, 191 A.799, 118 N.J.Law 135.

Shaiman v. Mayor, Board of Com'rs and Board of Adjustment of City of Newark, 191 A.735, 15 N.J.Misc. 437—Pennington Courts v. Board of Adjustment of City of Passaic, 147 A.732, 7 N.J.Misc. 1037.

Refusal to recommend variance held arbitrary

N.J.—Bieloch v. Board of Adjustment of Margate City, 49 A.2d 501, 134 N.J.Law 564.

Restriction on power to recommend

(1) The exercise of power under statutory subsection authorizing boards of adjustment to recommend to governing boards of municipalities that a structure or use be allowed in

a district restricted against such structure or use is conditioned on compliance with standards prescribed by preceding subsection under which boards may authorize variance from terms of ordinance when literal enforcement will result in unnecessary hardship, to the end that the spirit of the ordinance shall be observed and substantial justice done.

N.J.—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

(2) Under zoning statute, the board of adjustment may grant a variance on showing of extraordinary condition of the property and undue hardship, but where there are special reasons, the board may, without showing of practical difficulties or undue hardship, recommend a variance for approval or disapproval by the municipality involved.

N.J.—Ward v. Scott, 93 A.2d 385, 11 N.J. 117.

67. N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280—Verniero v. Board of Com'rs of City of Passaic, 45 A.2d 890, 134 N.J.Law 71—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.

68. N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.

69. N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

70. N.J.—Sun Oil Co. v. City of Clifton, 80 A.2d 253, 13 N.J.Super. 89, affirmed 84 A.2d 555, 16 N.J.Super. 265.

Verniero v. Board of Com'rs of City of Passaic, 45 A.2d 890, 134 N.J.Law 71.

71. N.J.—Schmidt v. Board of Adjustment of City of Newark, 88 A.2d 607, 9 N.J. 405.

Sun Oil Co. v. City of Clifton, 84 A.2d 555, 16 N.J.Super. 265.

72. N.J.—Tomko v. Viassers, 121 A.2d 502, 21 N.J. 226.

73. N.J.—Sun Oil Co. v. City of Clifton, 84 A.2d 555, 16 N.J.Super. 265.

74. N.J.—Mistretta v. City of Newark, 109 A.2d 677, 33 N.J.Super. 205.

75. Ill.—Downey v. Grimshaw, 101 N.E.2d 275, 410 Ill. 21.

Ind.—Town of Homeroft v. Macbeth, 148 N.E.2d 563—City of East Chicago, Ind., v. Sinclair Ref. Co., 111 N.E.2d 459, 232 Ind. 295.

N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94.

Interboro Trucking Co. v. Board of Adjustment of City of Perth Amboy, 53 A.2d 213, 135 N.J.Law 520—Hann v. Borough of Sea Girt, 46 A.2d 47, 134 N.J.Law 74—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.

Benbak Const. Co. v. Board of Adjustment of City of Orange, 142 A.357, 6 N.J.Misc. 543.

N.Y.—Thomas v. Board of Standards and Appeals of City of New York, 48 N.E.2d 284, 290 N.Y. 109.

Arditi Realty Co. v. Murdock, 67 N.Y.S.2d 809.

er to deny, an exception or variance to which the applicant is clearly entitled,⁷⁶ if substantial justice is to be done.⁷⁷ On the other hand, a proposed variance should be granted only if it is reasonable⁷⁸

Pa.—*Richman v. Philadelphia Zoning Bd. of Adjustment*, 137 A.2d 280, 391 Pa. 254—*Triolo v. Exley*, 57 A.2d 878, 358 Pa. 555.

Pasquino v. Keating, Com.Pl., 3 Bucks Co. 302, 68 York Leg.Rec. 37—*Miller v. Zoning Bd. of Middletown Tp.*, Com.Pl., 2 Bucks Co. 237—*Appeal of Vellicenti*, 94 Pittsb. Leg.J. 39.

R.I.—*Sundlum v. Zoning Board of Review of City of Pawtucket*, 145 A.451, 50 R.I. 108.

Special conditions of individual case

Pa.—*Hinton v. Zoning Bd. of Adjustment*, 88 Pa.Dist. & Co. 265.

Meaning of "particular case"

For purposes of statute authorizing board of adjustment to recommend, and governing body to grant, variances in particular cases and for special reasons, a "particular case" is simply a given case, that is, one involving an individual piece of property for which relief is sought from use restraint imposed on zone where it is located.

N.J.—*Grimley v. Village of Ridgewood*, 133 A.2d 649, 45 N.J.Super. 574.

Theory of "single separate ownership" was not available in proceeding for variance where no contiguous strip of property for which variance was sought was owned or legally under control of any single separate owner.

N.Y.—*Bayport Civic Ass'n v. Koehler*, 138 N.Y.S.2d 524, followed in 138 N.Y.S.2d 532.

76. Ala.—*Nelson v. Donaldson*, 50 So.2d 244, 255 Ala. 76.

Ill.—*People ex rel. Miller v. Gill*, 59 N.E.2d 671, 389 Ill. 394.

Mass.—*Marinelli v. Board of Appeal of Building Department of City of Boston*, 175 N.E. 479, 375 Mass. 169.

N.H.—*St. Onge v. City of Concord*, 63 A.2d 221, 95 N.H. 306—*Fortuna v. Zoning Bd. of Adjustment of City of Manchester*, 60 A.2d 133, 95 N.H. 211.

N.J.—*De Moss v. Borough of Watchung*, 60 A.2d 890, 137 N.J. 503.

Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J.Law 473—*Nusser v. Board of Adjustment of City of Newark*, 46 A.2d 657, 134 N.J. Law 174.

Gabrielson v. Borough of Glen Ridge, 176 A. 676, 13 N.J.Misc. 142.

N.Y.—*Mark Block Holding Corporation v. Warshaw*, 261 N.Y.S. 914, 237 App.Div. 839.

People ex rel. Saypol v. Griffin, 44 N.Y.S.2d 68, 182 Misc. 454.

Cusberth v. Board of Standards and Appeals of City of New York, 82 N.Y.S.2d 207, reversed on other grounds 83 N.Y.S.2d 258, 274 App.

Div. 912—*Anderson v. Board of Standards & Appeals*, 82 N.Y.S.2d 206—*Arditti Realty Co. v. Murdock*, 67 N.Y.S.2d 809—*Banister v. Board of Appeals of Village of East Hampton*, 65 N.Y.S.2d 15.

Okl.—*Indian Territory Illuminating Oil Co. v. Larkins*, 31 P.2d 608, 168 Okl. 69.

Pa.—*Sunnybrook, Inc., v. Upper Dublin Tp.*, 69 Pa.Dist. & Co. 344, 65 Montg.Co. 233—*Casper v. Exley*, 45 Pa.Dist. & Co. 664—*Leichthammer v. Board of Adjustment of Norristown Borough*, 43 Pa.Dist. & Co. 391, 58 Montg.Co. 140.

Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks Co. 131—*Appeal of Michener from Bd. of Adjustment of Haverford Tp.*, Com.Pl., 40 Del.Co. 254—*McConaghy's v. Haverford Tp. Board of Adjustment Ordinance*, Com.Pl., 31 Del.Co. 120—*Appeal of Plymouth Homes, Inc.*, Com.Pl., 25 Lehigh.J. 296—*Appeal of Floersheim*, Com.Pl., 92 Pittsb. Leg.J. 16, affirmed 34 A.2d 62, 348 Pa. 98—*Appeal of Sukits*, Com.Pl., 86 Pittsb.Leg.J. 481—*Appeal of Steinmark*, Com.Pl., 86 Pittsb.Leg. J. 86.

R.I.—*Kent v. Zoning Bd. of Review of Town of Barrington*, 58 A.2d 623, 74 R.I. 189—*Robinson v. Town Council of Narragansett*, 199 A. 308, 60 R.I. 422—*East Providence Mills v. Zoning Board of Review of Town of East Providence*, 155 A. 531, 51 R.I. 428—*Sundlum v. Zoning Board of Review of City of Pawtucket*, 145 A. 451, 50 R.I. 108.

Tenn.—*Bubis v. City of Nashville*, 124 S.W.2d 238, 174 Tenn. 134.

Wis.—*Thalhofer v. Patri*, 3 N.W.2d 761, 240 Wis. 404.

Circumstances justifying variance

Use variance may be granted on a showing that land would not yield a reasonable return if used for permitted purposes, that owner's plight is unique, and that use applied for will not alter essential character of neighborhood.

N.Y.—*Lapham v. Roulan*, 169 N.Y.S. 2d 346, 10 Misc.2d 152.

Too narrow application of rules

The doctrine that special hardship must be shown to fall on owner of particular property before exception thereof from application of city zoning ordinance can be granted should not be applied so narrowly as to destroy power of city zoning board of appeals to make exception, where grounds therefor really exist.

N.Y.—*Hopkins v. Board of Appeals of City of Rochester, Monroe County*, 39 N.Y.S.2d 167, 179 Misc. 325.

Frontage

Where zoning ordinance, at time owner purchased lot, authorized con-

struction of dwelling on lot having frontage of forty feet, and most dwellings in area surrounding lot had been constructed on lots having sixty foot frontage or less, board was justified in granting variance from amended zoning ordinance which required seventy-five-foot frontage, authorizing construction on lot with frontage of less than seventy-five but more than forty feet.

N.Y.—*Weeks v. Koehler*, 134 N.Y.S. 2d 796.

Effect of setback restrictions

Where setback restrictions reduced usable portion of corner lot in residential district to about one-fifth of lot and limited construction of dwelling to width of eleven feet, lot owner was entitled to variance to permit construction of dwelling with width of twenty-one feet.

N.Y.—*Richards v. Zoning Board of Appeals of Village of Malverne*, 137 N.Y.S.2d 603, 285 App.Div. 287.

Church building; parking lot

Right to erect and use a modern church building in a residential zone as a variance could include a parking lot for use of members and all such rooms and facilities under one roof as ordinarily constitute a part of the building or equipment, and are deemed necessary or useful in connection with modern church of the particular denomination involved.

Ind.—*Keeling v. Board of Zoning Appeals of City of Indianapolis*, 69 N.E.2d 613, 117 Ind.App. 314.

77. Conn.—*Culinary Institute of America v. Board of Zoning Appeals of City of New Haven*, 121 A.2d 637, 143 Conn. 257.

Md.—*Carney v. City of Baltimore*, 93 A.2d 74, 201 Md. 130.

N.H.—*Gelinas v. City of Portsmouth*, 85 A.2d 896, 97 N.H. 248.

N.J.—*Schaible v. Board of Adjustment*, 49 A.2d 50, 134 N.J.Law 473.

N.Y.—*People v. Walsh*, 207 N.Y.S. 324, 211 App.Div. 205, affirmed 148 N.E. 724, 240 N.Y. 606.

People v. Leo, 180 N.Y.S. 553, 110 Misc. 516, affirmed 183 N.Y.S. 954, 193 App.Div. 910, affirmed 130 N.E. 910, 230 N.Y. 602.

78. Iowa.—*Anderson v. Jester*, 221 N.W. 354, 206 Iowa 452.

Md.—*Hare v. Mayor and City Council of Baltimore*, 90 A.2d 217, 200 Md. 477—*Easter v. Mayor and City Council of Baltimore*, 73 A.2d 491, 195 Md. 395.

Use not unreasonable in particular environment

Even though a lot owner proves his right to a variance by reason of special situation of his property, the relief must be in terms of the authorizing of a specific variant use which

and within the scope of the authority granted;⁷⁹ particular grants of variances or exceptions have | been held to be within the authority of the grant-
ing body,⁸⁰ while other grants have been held ultra

has been determined by the local board not to be unreasonable in the particular environment.

N.J.—*Conlon v. Board of Public Works of City of Paterson*, 94 A.2d 660, 11 N.J. 363.

Grant held not unreasonable

(1) Generally.
Conn.—*Goldreyer v. Board of Zoning Appeals of City of Bridgeport*, 136 A.2d 789, 144 Conn. 641.

Pa.—*Appeal of Siddall*, 44 Del.Co. 293, exceptions dismissed, Com.Pl., 45 Del.Co. 38.

R.I.—*Bruzzi v. Board of Appeals of City of Pawtucket*, 122 A.2d 877.

(2) Area variance.
N.Y.—*Feldman v. Nassau Shores Estates, Inc.*, 172 N.Y.S.2d 769.

Refusal held not unreasonable

N.J.—*Marrocco v. Board of Adjustment of City of Passaic*, 68 A.2d 470, 5 N.J.Super. 94.

N.Y.—*Corbett v. Zoning Bd. of Appeals of City of Rochester*, 128 N.Y.S.2d 12, 283 App.Div. 282.

Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295.

79. Conn.—*Devaney v. Board of Zoning Appeals of City of New Haven*, 45 A.2d 828, 132 Conn. 537.

Md.—*Heath v. Mayor & City Council of Baltimore*, 58 A.2d 896, 190 Md. 478.

N.J.—*Kindergan v. Board of Adjustment of Borough of River Edge*, 59 A.2d 857, 137 N.J.Law 296—

Protomastro v. Board of Adjustment of City of Hoboken, 59 A.2d 644, 137 N.J.Law 250—*Albright v. Johnson*, 50 A.2d 399, 135 N.J.Law 70.

Stevens v. Connor, 120 N.Y.S.2d 345.

Ohio.—*State ex rel. Shaker Square Co. v. Guion*, App., 145 N.E.2d 144.

Pa.—*Appeal by Cadden and Cohen from Board of Zoning Appeals*, Com.Pl., 40 Lack.Jur. 54.

R.I.—*Goudailler v. Zoning Bd. of Review of City of Warwick*, 135 A.2d 839—*De Stefanis v. Zoning Bd. of Review of Town of North Providence*, 124 A.2d 544—*Harte v. Zoning Bd. of Review of City of Cranston*, 80 A.2d 881, 78 R.I. 228.

"The power to grant a variation . . . is to be used only where a situation falls fully within the authority granted."

Conn.—*Misuk v. Zoning Bd. of Appeals of City of Meriden*, 86 A.2d 180, 182, 138 Conn. 477.

Intention to provide relief outside of statute

Where board made no pretense of adherence to statutory principle in granting variance, but intended to provide measure of relief outside of

statute itself and in direct conflict with statutory terms, action constituted excess of jurisdiction.

N.J.—*V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit*, 86 A.2d 127, 8 N.J. 386.

Ordinance in conflict with statute

City's zoning ordinance, if interpreted, as limiting power of board of adjustment in granting variances, is in conflict with statute giving a board of adjustment power to authorize, on appeal in specific cases, such variance from terms of ordinance as will not be contrary to public interest where, owing to special conditions, a literal enforcement of ordinance will result in unnecessary hardship.

N.H.—*St. Onge v. City of Concord*, 63 A.2d 221, 95 N.H. 306.

Variance as to usable area

The rules with reference to what must be shown to warrant a variance of zoning regulations with respect to use also apply with respect to a variance from a restriction as to the proportion of the area of property which may be used.

N.Y.—*Court Boulevard v. Board of Standards and Appeals of City of New York*, 72 N.Y.S.2d 753.

Extension of use into prohibited zone

Zoning ordinance permitting board of zoning appeals to grant a variance permitting extension of an existing commercial or industrial establishment in any district does not authorize extension of a use, permitted in one zone, across a zone boundary into another zone where that use is prohibited.

Conn.—*Spencer v. Board of Zoning Appeals of City of New Haven*, 104 A.2d 373, 141 Conn. 155.

Ownership of adjoining lot

Under provision of town law authorizing board to vary or modify application of any regulation or provisions of ordinance on an appeal, board had jurisdiction to grant variance to owner of lot who also owned adjoining lot, although zoning ordinance provided for such variance for separately owned lots.

N.Y.—*Weeks v. Koehler*, 134 N.Y.S. 2d 796.

Contract vesting special privilege or exemption

(1) It was not within authority of zoning board of adjustment to vest in landowner by contract special privilege or exemption on condition to use premises in violation of general use restriction under zoning regulations binding on all other landowners within zone.

N.J.—*V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment*

of City of Summit, 86 A.2d 127, 8 N.J. 386.

(2) Purported contract between board and landowner granting landowner such special privilege or exemption was ultra vires, and all proceedings to effectuate contract were coram non iudice and void.

N.J.—*V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit*, supra.

Elements of estoppel wanting

Where board granted exception, on certain conditions, to terms of zoning ordinance, and its action was coram non iudice and void, and landowner was presumed to know of invalidity of exception when he expended money to make lands suitable for prohibited use, want of fundamental power by board to grant variance could not be indirectly supplied by application of doctrine of estoppel in pais, as elements of estoppel were wanting.

N.J.—*V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit*, supra.

Side yards

Under zoning ordinance granting board of adjustment authority to vary provisions relating to buildings and locations in cases where literal enforcement of provisions of ordinance would work a hardship, board had authority to vary provisions of zoning ordinance applying to side yards.

Ohio.—*McCauley v. Ash*, 124 N.E.2d 739, 97 Ohio App. 208.

Motor lodge

Fact that there was no reference to a motor lodge anywhere in zoning ordinance did not deprive board of authority to allow exception in residential district for erection of motor lodge, in absence of specific definition to contrary in ordinance.

R.I.—*Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston*, 138 A.2d 818.

80. Fla.—*Troup v. Bird*, 53 So.2d 717.

R.I.—*Bruzzi v. Board of Appeals of City of Pawtucket*, 122 A.2d 877.

Temporary variance

Mass.—*Sheehan v. Board of Appeals of Saugus*, 124 N.E.2d 253, 332 Mass. 188.

Grant held not unconstitutional

Where record failed to disclose that zoning board acted unlawfully or arbitrarily in granting permission to erect a church in a residential zone under provision in zoning ordinance authorizing a variance, board's action was not unconstitutional as depriving interested property owners of vested property rights without due process of law.

vires.⁸¹ Under a statute conferring on the board, in broad terms, the right to authorize variances, a court cannot, by judicial legislation, restrict the power of the board to the allowance of slight variances from the terms of the board.⁸²

A reasonable basis for a conclusion of difficulty or hardship is essential to the case of a property owner seeking a variance,⁸³ and the failure to establish any of the prerequisites to the granting of a

variance is fatal.⁸⁴

§ 286. — Sparing Exercise

The power to grant variances or exceptions should, or must, be exercised sparingly.

Since the spirit of the zoning act has been to restrict, rather than to increase, nonconforming uses,⁸⁵ the power to grant variances or exceptions should, or must, be exercised sparingly,⁸⁶ or very

Ind.—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 117 Ind.App. 314.

81. Md.—Dobres v. Schwartzman, 59 A.2d 684, 191 Md. 19.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386.

N.Y.—Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

R.I.—Paterson v. Zoning Bd. of Review of Town of East Providence, 98 A.2d 847, 80 R.I. 494—Baggs v. Zoning Bd. of Review of Town of Barrington, 86 A.2d 658, 79 R.I. 211.

Tex.—Board of Adjustment of City of San Antonio v. Levinson, Civ. App., 244 S.W.2d 281.

82. N.H.—Fortuna v. Zoning Bd. of Adjustment of City of Manchester, 60 A.2d 133, 95 N.H. 211.

83. Conn.—Paul v. Board of Zoning Appeals of City of New Haven, 110 A.2d 619, 142 Conn. 40.

Basis in harmony with purpose of resolution

(1) In granting a variance from use district regulations, board must act on some reasonable basis in harmony with general purpose of zoning resolution.

N.Y.—Woltman v. Murdock, 168 N.Y.S.2d 572, 8 Misc.2d 969.

(2) Town building zone ordinance, authorizing board to grant variance in harmony with general purposes and intent thereof and subject to appropriate conditions and safeguards and declaring provisions of ordinance minimum requirements adopted for promotion of public health, morals, safety, comfort, convenience or general welfare, restricted, rather than increased, nonconforming use of land, so as to require reasonable basis for granting of variance in harmony with general purpose of decision.

N.Y.—Innet v. Liberman, 155 N.Y.S.2d 383.

Ignorance of petitioner

Failure of city planning engineer, who assisted petitioner in making out

application for variance, to inform petitioner of restrictive zoning provision of ordinance applicable to site to which petitioner applied for permit to move his business, or petitioner's ignorance thereof, did not afford a basis for a favorable ruling on petitioner's application for variance.

N.Y.—Smith v. Hartman, 144 N.Y.S.2d 13, 208 Misc. 880.

Natural growth of business

If use of additional ground immediately adjacent to portion already used for pre-existing nonconforming use was reasonably necessary to accommodate requirements of natural growth of the business, owner's remedy was to secure variance.

Pa.—Appeal of Peirce, 119 A.2d 506, 384 Pa. 100.

84. Mass.—Spaulding v. Board of Appeals of Leicester, 138 N.E.2d 367, 334 Mass. 688—Atherton v. Board of Appeals of Town of Bourne, 136 N.E.2d 201, 334 Mass. 451—Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198, 334 Mass. 446.

N.Y.—Taxpayers' Ass'n of South East Oceanside v. Board of Zoning Appeals of Town of Hempstead, 93 N.E.2d 645, 301 N.Y. 215.

Refusal of variance held not denial of due process

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Miss.—Jones v. City of Hattiesburg, 42 So.2d 717, 207 Miss. 491.

Conditions inherent in land

Special treatment of applicant for variance must be based on considerations inhering in land sought to be built on by applicant.

N.J.—Skaf v. Zoning Bd. of Adjustment of City of Asbury Park, 113 A.2d 843, 35 N.J.Super. 215.

Action held not to amount to variance

Resolutions of municipal planning board and board of commissioners approving site selected by housing authority for construction of a low income public housing project together with a co-operation agreement entered into between housing authority and city under which city agreed to co-operate with the authority in connection with such project did not amount in substance to an amendment of the zoning ordinance or a

variance, but some action on the part of the municipal body was required to authorize construction of the project on a site not zoned therefor.

N.J.—Passaic Jr. Chamber of Commerce, Inc. v. Housing Authority of City of Passaic, 132 A.2d 813, 45 N.J.Super. 381.

85. N.J.—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577.

Freye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161—D'Agostino v. Jaguar Realty Co., 91 A.2d 500, 22 N.J.Super. 74—Gerkin v. Village of Ridgewood, 86 A.2d 275, 17 N.J.Super. 472.

N.Y.—Innet v. Liberman, 155 N.Y.S.2d 383.

Nonconforming uses generally see supra §§ 180-200.

"Given the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement."

Ala.—Moore v. Pettus, 71 So.2d 814, 323, 260 Ala. 616.

Enlargement of nonconforming use

Requirement of zoning act which permits variance, that intent and purpose of zone plan and zoning ordinance be not substantially impaired thereby, and policy in favor of restricting rather than increasing nonconforming uses, would tend to support denial by zoning board of adjustment of recommendation for enlargement of a nonconforming use.

N.J.—Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp., 84 A.2d 18, 16 N.J.Super. 113.

86. Conn.—Lindy's Restaurant, Inc. v. Zoning Board of Appeals of City of Hartford, 124 A.2d 918, 143 Conn. 620—Longo v. Board of Zoning Appeals of Town of Milford, 122 A.2d 784, 143 Conn. 395—Mabank Corp. v. Board of Zoning Appeals of City of Stamford, 120 A.2d 149, 143 Conn. 132—Paul v. Board of Zoning Appeals of City of New Haven, 110 A.2d 619, 142 Conn. 40—Talmadge v. Board of Zoning Appeals of City of New Haven, 109 A.2d 253, 141 Conn. 639—Plumb v. Board of Zoning Appeals of City of New Haven,

moderately,⁸⁷ lest the power to grant variances or exceptions should be abused.⁸⁸

The power should be exercised only in exceptional circumstances,⁸⁹ or should be exercised only in

108 A.2d 899, 141 Conn. 595—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433—Cohen v. Board of Appeals on Zoning of City of Bridgeport, 94 A.2d 793, 139 Conn. 450—Plumb v. Board of Zoning Appeals of City of New Haven, 108 A.2d 899, 141 Conn. 595—Piccirillo v. Board of Appeals on Zoning of City of Bridgeport, 90 A.2d 647, 139 Conn. 116—Misuk v. Zoning Bd. of Appeals of City of Meriden, 86 A.2d 180, 138 Conn. 477—Celentano v. Zoning Bd. of Appeals of City of Hartford, 73 A.2d 101, 136 Conn. 584—Berkman v. Board of Appeals on Zoning of City of Bridgeport, 64 A.2d 875, 135 Conn. 393—Kammerman v. Leroy, 50 A.2d 175, 133 Conn. 232—Devaney v. Board of Zoning Appeals of City of New Haven, 45 A.2d 828, 132 Conn. 537—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161—Nielsen v. Board of Appeals of Zoning of City of Bridgeport, 27 A.2d 392, 129 Conn. 285—Rommell v. Walsh, 16 A.2d 483, 127 Conn. 272—First Nat. Bank & Trust Co. of Port Chester, N. Y., v. Zoning Board of Appeals of Greenwich, 10 A.2d 691, 126 Conn. 228—Grady v. Katz, 1 A.2d 137, 124 Conn. 525—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 114 Conn. 15.

Mass.—Bicknell Realty Co. v. Board of Appeal of Boston, 118 N.E.2d 570, 330 Mass. 676—Gaunt v. Board of Appeals of Methuen, 99 N.E.2d 60, 327 Mass. 380—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433—Tanzilli v. Casassa, 85 N.E.2d 220, 324 Mass. 113—Real Properties v. Board of Appeal of Boston, 65 N.E.2d 199, 319 Mass. 180—Phillips v. Board of Appeals of Building Department of City of Springfield, 190 N.E. 601, 286 Mass. 469.

N.J.—Leimann v. Board of Adjustment of Cranford Tp., Union County, 88 A.2d 337, 9 N.J. 336—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577.

Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161—D'Agostino v. Jaguar Realty Co., 91 A.2d 500, 22 N.J.Super. 74—Gerkin v. Village of Ridgewood, 86 A.2d 275, 17 N.J.Super. 472.

Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21—Potts v.

Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J. Law 230.

N.Y.—Young Women's Hebrew Ass'n v. Board of Standards and Appeals of City of New York, 194 N.E. 751, 266 N.Y. 270, reargument denied 195 N.E. 376, 266 N.Y. 672, appeal dismissed Gelkam Realty Corporation v. Young Women's Hebrew Ass'n, 56 S.Ct. 109, 296 U.S. 537, 80 L.Ed. 382.

Aberdeen Garage v. Murdock, 15 N.Y.S.2d 66, 257 App.Div. 645, affirmed 28 N.E.2d 45, 283 N.Y. 650.

Syosset Holding Corp. v. Schlamm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 766—Rubin v. Green, 66 N.Y.S.2d 521.

Pa.—Application of Devereux Foundation, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa.Dist. & Co. 686, 63 Montg.Co. 247—Covenant Presbyterian Church v. Board of Adjustment, 56 Pa.Dist. & Co. 309, 94 Pittsb.Leg.J. 151.

Appeal of O'Hara, Com.Pl., 73 Montg.Co. 89, reversed on other grounds 131 A.2d 587, 389 Pa. 35—York Housing Authority v. York Zoning Bd., Com.Pl., 68 York Leg. Rec. 162.

R.I.—Harte v. Zoning Bd. of Review of City of Cranston, 91 A.2d 33, 80 R.I. 43—Flynn v. Zoning Bd. of Review of City of Pawtucket, 73 A.2d 808, 77 R.I. 118—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A.2d 478, 74 R.I. 316.

Tex.—Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 809.

Bliss v. City of Fort Worth, Civ. App., 288 S.W.2d 558, refused no reversible error—Board of Adjustment of City of San Antonio v. Levinson, Civ.App., 244 S.W.2d 281.

Reasons for rule

(1) To do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations, and thus detrimentally affect marketability of property within zoned areas.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

(2) Unless great caution is used and variations are granted only in proper cases, whole fabric of town- and city-wide zoning will be worn through in spots and raveled at the edges until its purpose in protecting property values and securing an orderly development of community is completely, thwarted.

Conn.—Heady v. Zoning Bd. of Appeals for Town of Milford, 94 A.2d 789, 139 Conn. 463.

(3) Conditions should be reduced to conformity with city zoning regulations as speedily as is compatible with justice.

Conn.—Gunther v. Board of Zoning Appeals of City of New Haven, 71 A.2d 91, 136 Conn. 303.

Cases of practical necessity

Pa.—Cella v. Schaefer, Com.Pl., 43 Del.Co. 23—Appeal of Felice, Com. Pl., 66 Montg.Co. 62—York Housing Authority v. York Zoning Bd., Com.Pl., 68 York Leg.Rec. 162.

87. N.J.—Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J.Super. 164.

88. R.I.—Flynn v. Zoning Bd. of Review of City of Pawtucket, 73 A.2d 808, 77 R.I. 118.

89. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504.

Conn.—Longo v. Board of Zoning Appeals of Town of Milford, 122 A.2d 784, 143 Conn. 395—Mabank Corporation v. Board of Zoning Appeals, 120 A.2d 149, 143 Conn. 132—Piccirillo v. Board of Appeals on Zoning of City of Bridgeport, 90 A.2d 647, 139 Conn. 116.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

N.J.—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529—Leiman v. Board of Adjustment of Cranford Tp., Union County, 88 A.2d 337, 9 N.J. 336.

Pa.—Appeal of Elkins Park Imp. Ass'n, 64 A.2d 783, 361 Pa. 322.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

Covenant Presbyterian Church v. Board of Adjustment, 56 Pa.Dist. & Co. 309, 94 Pittsb.Leg.J. 151.

Reason for rule

Otherwise there would be little left of zoning law to protect public rights; prospective purchasers of property would hesitate if confronted by a tribunal which could arbitrarily set aside zoning provisions designed to establish standards of occupancy in neighborhood.

Pa.—Application of Devereux Foundation, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

Exceptional circumstances peculiar in their nature

Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

N.Y.—Syosset Holding Corp. v. Schlamm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 766.

exceptional situations,⁹⁰ or cases,⁹¹ or in peculiar circumstances,⁹² and in rare instances.⁹³

§ 287. — Reasons for Grant

The reasons for granting a variance must be substantial and compelling.

The reasons for granting a variance or exception must be substantial,⁹⁴ serious,⁹⁵ and compelling.⁹⁶ The mere fact that more money would be derived from taxation if the variance were granted is imma-

terial in determining the propriety of granting a variance.⁹⁷

§ 288. — Public Interest and Other Factors

In determining whether a variance is warranted, the public interest is the primary consideration, although other factors may be relevant; there should be due regard to the rights of neighbors, and remonstrances may be considered, but are not conclusive.

The public interest⁹⁸ and the spirit of the ordi-

90. N.J.—Ward v. Scott, 105 A.2d 851, 16 N.J. 16.

91. Conn.—Kammerman v. Leroy, 50 A.2d 175, 133 Conn. 232.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

R.I.—Harte v. Zoning Bd. of Review of City of Cranston, 91 A.2d 33, 80 R.I. 43.

92. Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

N.Y.—Syosset Holding Corp. v. Schlamm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 766.

Pa.—Appeal of Elkins Park Imp. Ass'n, 64 A.2d 783, 361 Pa. 322—Application of Devereux Foundation, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

Covenant Presbyterian Church v. Board of Adjustment, 56 Pa.Dist. & Co. 309, 94 Pittsb.Leg.J. 151.

93. Conn.—Piccirillo v. Board of Appeals on Zoning of City of Bridgeport, 90 A.2d 647, 139 Conn. 116.

Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

N.Y.—Syosset Holding Corp. v. Schlamm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 766.

"This is of the very essence of the zoning process—an attribute indispensable to its integrity."

N.J.—Beirne v. Morris, 103 A.2d 361, 364, 14 N.J. 529.

94. Pa.—Appeal of Valicenti, 148 A. 308, 298 Pa. 276—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

Cella v. Schaefer, Com.Pl., 43 Del.Co. 23—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85—Appeal of Plymouth Homes, Inc., Com.Pl., 25 Lehl.J. 296—Appeal of Felice, Com.Pl., 66 Montg.Co. 62—York

Housing Authority v. York Zoning Bd., Com.Pl., 68 York Leg.Rec. 162.

Substantial need

Md.—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130.

Reliance on word of ministerial officer

Reliance by party constructing building in violation of zoning ordinance on word of a mere ministerial officer can not suffice to uphold granting of a variance for less than substantial, serious, and compelling reasons.

Pa.—Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

95. Pa.—Appeal of Valicenti, 148 A. 308, 298 Pa. 276.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

Cella v. Schaefer, Com.Pl., 43 Del.Co. 23—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85—Appeal of Plymouth Homes, Inc., Com.Pl., 25 Lehl.J. 296—Appeal of Felice, Com.Pl., 66 Montg.Co. 62—York Housing Authority v. York Zoning Bd., Com.Pl., 68 York Leg.Rec. 162.

96. Pa.—Appeal of Valicenti, 148 A. 308, 298 Pa. 276.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

Cella v. Schaefer, Com.Pl., 43 Del. Co. 23—Appeal of Plymouth Homes, Inc., Com.Pl., 25 Lehl.J. 296—Appeal of Felice, Com.Pl., 66 Montg.Co. 62—York Housing Authority v. York Zoning Bd., Com. Pl., 68 York Leg.Rec. 162.

Compelling force

Pa.—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516.

Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85.

Urgent need

Md.—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130.

Consistency with spirit and policy of regulations

A variance is permissible only for most compelling reasons consistent with spirit and policy of zoning statute and ordinance involved.

N.J.—Preye v. Board of Adjustment

of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161.

Prior nonconforming use or variance

Neither a preexisting use of premises for purpose not conforming to zoning resolution or a nonconforming use thereof by virtue of variance granted by city board of standards and appeals can constitute a basis for granting a new variance.

N.Y.—Tulbro Realty Corp. v. Murdock, 132 N.Y.S.2d 691.

97. Conn.—Dixon v. Zoning Bd. of Appeals of Town of Milford, 113 A. 2d 606, 19 Conn.Super. 349.

Increase of tax ratables

(1) Intrusion of a forbidden business use in a residential zone, by means of a variance, to increase tax ratables, real or personal, is inadmissible, since such course would contravene constitutional and statutory principle of zoning by districts in accordance with character of lands and structures and their peculiar suitability for particular uses, and uniformity of use within division, and would make for "spot zoning" and disintegration of zone classification. N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199.

(2) Board of adjustment was unauthorized to grant variance to permit construction of shopping center in residential district on ground that erection of center would produce substantial ratables for township and would impose no financial burden for erection of additional schools which would result if premises were developed for residential purposes. N.J.—Moriarty v. Pozner, supra.

98. N.H.—St. Onge v. City of Concord, 63 A.2d 221, 95 N.H. 306.

Pa.—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85.

Public interest weighed against individual interest

In deciding whether a relaxation of zoning regulations in a given situation is warranted, board must inevitably weigh considerations of public interest against individual interest.

Conn.—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433.

Health, safety, and morals

Primary concern of a zoning board

nance⁹⁹ may be factors of controlling importance in determining whether a variance is warranted; public convenience has been held not a deciding factor,¹ although it may, in some cases, have weight;² and the character of the neighborhood is always an

important element in variance cases.³

The power to grant variances should be exercised only for the benefit of the public,⁴ with due regard for the preservation or protection of the rights of others, including neighboring landowners,⁵ and not

of adjustment, in passing on an application for a variance, is not health, safety, morals, etc., but rather to what extent specific use of property will affect them.

Pa.—Levinson v. Power, 3 Pa. Dist. & Co. 2d 170.

Acquisition of realty in public interest

Where corporation acquired realty in residential use district with intent to use it as an electric distribution substation, fact that realty was acquired in public interest did not entitle company to a variance where statutory prerequisite to variance was not met.

N.Y.—Long Island Lighting Co. v. Incorporated Village of East Rockaway, 110 N.Y.S.2d 884, 279 App. Div. 926, reargument and appeal denied 113 N.Y.S.2d 241, 279 App. Div. 1023, affirmed 110 N.E.2d 743, 304 N.Y. 932, reargument denied 112 N.E.2d 851, 305 N.Y. 738.

Use of property by children

Where property was privately owned, zoning board could not deny variation or exception to allow construction on it merely because children who had been using it for years would be thereby denied free use of it.

R.I.—School Committee of City of Pawtucket v. Zoning Bd. of Review of City of Pawtucket, 133 A.2d 734.

99. N.H.—St. Onge v. City of Concord, 63 A.2d 221, 95 N.H. 306.

Pa.—Appeal of Deiter, Com.Pl., 53 Lack.Jur. 85—Kuznowski v. Board of Zoning Appeals, Com.Pl., 53 Lack.Jur. 53.

"A variance is a departure from the letter, but not the spirit, of the zoning statute."

Pa.—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 283, 391 Pa. 254.

1. Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry, 13.

2. Del.—Application of Emmett S. Hickman Co., supra.

Public convenience construed

(1) In zoning regulations providing that special exception may be granted to permit location of churches in certain districts when "public convenience and welfare" will be substantially served, "public convenience" is not used in colloquial manner and is not synonymous with "handy," but it connotes that which is suitable or fitting.

Conn.—West Hartford Methodist

Church v. Zoning Bd. of Appeals of Town of West Hartford, 121 A. 2d 640, 143 Conn. 263.

(2) As used in section of zoning ordinance providing that "Subject to the rules set forth in this Section," zoning board of appeals shall approve any special use of any lot area or building within any use district if special use is necessary at that location for public convenience, quoted words mean that special uses mentioned in such section are subject only to rules contained in such section, that other sections can have no application, and that only test is public convenience and necessity.

Ill.—Illinois Bell Tel. Co. v. Fox, 85 N.E.2d 43, 402 Ill. 617.

(3) Word "necessary," as used in such ordinance, means "reasonably convenient" or "expedient."

Ill.—Illinois Bell Tel. Co. v. Fox, supra.

(4) Erection of new telephone exchange held "necessary," within meaning of ordinance.

Ill.—Illinois Bell Tel. Co. v. Fox, supra.

Variance held for public convenience and welfare

Ill.—Baird v. Board of Zoning Appeals of City of Kankakee, 106 N. E.2d 343, 347 Ill.App. 158.

3. N.J.—Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J. Super. 574, petition denied 135 A.2d 59, 25 N.J. 102.

4. N.H.—Gelinis v. City of Portsmouth, 85 A.2d 896, 97 N.H. 248.

Pa.—Appeal of Kiker, Com.Pl., 72 Montg.Co. 161.

Tex.—Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

Bliss v. City of Fort Worth, Civ. App., 288 S.W.2d 558, refused no reversible error.

General welfare

N.J.—Skaf v. Zoning Bd. of Adjustment of City of Asbury Park, 113 A.2d 843, 35 N.J. Super. 215.

Merely private interest

Power to grant a variance may not be exerted to serve a merely private interest.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386.

National emergency

Where building could be used for light industrial purposes in residential zone on ground of nonconforming use, fact that lessee commenced

operations on premises during war, and after cessation of hostilities converted to civilian production by installing heavy machine shop could not justify granting of variance on ground that prohibited activity related to national emergency.

N.J.—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

5. Md.—Oursler v. Board of Zoning Appeals of Baltimore County, 104 A.2d 568, 204 Md. 397.

Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

Pa.—Dooling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Tp., 89 A.2d 505, 371 Pa. 290—Ventresca v. Exley, 56 A.2d 210, 358 Pa. 98.

Appeal of Deiter, Com.Pl., 53 Lack.Jur. 85—In re Application for Certificate of Occupancy, Com.Pl., 32 North.Co. 31.

Tex.—Moody v. City of University Park, Civ.App., 273 S.W.2d 912, refused no reversible error.

Rights acquired under original zoning ordinances

Tex.—Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

Bliss v. City of Fort Worth, Civ. App., 288 S.W.2d 558, refused no reversible error.

Depreciation of value of nearby residences

N.J.—Skaf v. Zoning Bd. of Adjustment of City of Asbury Park, 113 A.2d 843, 35 N.J. Super. 215.

Constitutional rights held not taken away

Ill.—Downey v. Grimshaw, 101 N.E. 2d 275, 410 Ill. 21.

Exception of particular dwelling

Board is not empowered to say that general welfare of other property owners in zoning area is secured, and spirit of ordinance observed and substantial justice done, by excepting from operation of ordinance a particular dwelling as to which a variance is sought.

Pa.—Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

No diminution in value of surrounding properties

N.H.—Gelinis v. City of Portsmouth, 85 A.2d 896, 97 N.H. 248.

Balance of equities

Board was not obligated to grant a variance in zoning on ground of unnecessary hardship alone, but was required to balance such hardship against equities, namely, to what ex-

in a manner which is contrary to the public interest or good.⁶ So, the board may grant a variance or exception only where doing so will not be contrary to the public interest or welfare, where sub-

stantial justice will thereby be done, and where the use permitted will be in harmony with, rather than contrary to, the spirit, intent, and general purpose of the zoning regulation;⁷ but the fact that

tent variance would interfere with whole zoning plan and rights of owners of other property.

N.Y.—*Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County*, 60 N.Y.S. 2d 750, 271 App.Div. 33.

Rochester Transit Corp. v. Crowley, 131 N.Y.S.2d 493, 205 Misc. 933.

Stability of property values not affected

Where owners of one-family dwelling, which belonged to another era, had, because of size of dwelling, been unable, over two-year period, to sell dwelling, and dwelling, if changed to two-family dwelling, would still have same appearance and would not materially affect stability of property values in neighborhood or adversely affect public health and safety, grant of variance to enable change into two-family dwelling was proper.

Conn.—*Libby v. Board of Zoning Appeals of City of New Haven*, 118 A. 2d 894, 143 Conn. 46.

New use no more harmful than old one

Fact that new structure or new use will be no more harmful than old one, to adjacent landowners, cannot be considered such a special reason as is contemplated by statute.

N.J.—*Barbarisi v. Board of Adjustment*, 103 A.2d 164, 30 N.J.Super. 11.

Acquisition of property with notice

Owner who acquires his property with notice of zoning resolution permitting commercial use is presumed to have paid a consideration appropriate to limitation of use, and his plight with respect to proposed variance by another owner from commercial uses allowed is not aggravated by the unexpected or incalculable.

N.Y.—*Crone v. Town of Brighton*, 119 N.Y.S.2d 877.

6. Mass.—*Miller v. Emergency Housing Commission*, 116 N.E.2d 663, 330 Mass. 693.

N.J.—*Trees v. Board of Trustees of Village of South Orange*, 91 A.2d 588, 22 N.J.Super. 45.

Pa.—*Appeal of Peirce*, 119 A.2d 506, 384 Pa. 100—*Dooling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Tp.*, 89 A.2d 505, 371 Pa. 290.

Yancale v. Philadelphia Zoning Bd. of Adjustment, 68 Pa.Dist. & Co. 233—*Cummer v. Narberth Borough Bd. of Adjustment*, 59 Pa. Dist. & Co. 686, 63 Montg.Co. 247—*Hewlett v. Zoning Bd. of Adjustment*, 8 Pa.Dist. & Co. 75, 49 Mun.

L.R. 57—*Appeal of Hood*, 6 Pa. Dist. & Co.2d 275, 72 Montg.Co. 12.

Heiser v. Spring Tp., Com.Pl., 47 Berks Co. 21—*Board of Adjustment of Susquehanna Tp. v. Procasco*, Com.Pl., 69 Dauph.Co. 204—*Appeal of Associated Contractors, Inc.*, Com.Pl., 44 Del.Co. 105, exceptions dismissed 44 Del.Co. 205—*Appeal of Stevens*, Com.Pl., 41 Del.Co. 3, exceptions dismissed 41 Del.Co. 337—*Appeal of Deiter*, Com.Pl., 58 Lack.Jur. 85—*Appeal of Lindquist*, Com.Pl., 66 Montg.Co. 27, affirmed 73 A.2d 378, 364 Pa. 561—*Grant v. Abington Tp.*, Com.Pl., 63 Montg.Co. 214—*Appeal of Continental Motor Sales*, Com.Pl., 31 North.Co. 250—*Appeal of Thomas*, Com.Pl., 66 York Leg.Rec. 129.

R.I.—*Denton v. Zoning Bd. of Review of City of Warwick*, 133 A.2d 718.

Tex.—*Moody v. City of University Park, Civ.App.*, 278 S.W.2d 912, refused no reversible error.

"The Board of Adjustment . . . must not . . . fail to guard the public interest at all times."

Del.—*In re Auditorium, Inc.*, 84 A.2d 598, 603, 7 Terry, 430, remanded on other grounds *Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 8 Terry, 378.

"Our duty is toward the public good even though it thwarts the individual."

Pa.—*Hinton v. Zoning Bd. of Adjustment*, 88 Pa.Dist. & Co. 265.

Substantial detriment to public good

N.J.—*Cobble Close Farm v. Board of Adjustment of Middletown Tp.*, 92 A.2d 4, 10 N.J. 442.

Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J.Super. 574—*Barbarisi v. Board of Adjustment*, 103 A.2d 164, 30 N.J.Super. 11—*Herman v. Board of Adjustment of Parsippany-Troy Hills Tp.*, Morris County, 102 A.2d 73, 29 N.J.Super. 164—*Ward v. Scott*, 86 A.2d 613, 18 N.J.Super. 36, reversed on other grounds 93 A.2d 335, 11 N.J. 117—*Beck v. Board of Adjustment of City of East Orange, Essex County*, 83 A.2d 720, 15 N.J.Super. 554.

Wis.—*State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison*, 35 N.W.2d 312, 254 Wis. 42.

Balancing of considerations

In any determination of question whether there exists situations of practical difficulty or unnecessary hardship justifying relaxation of zoning regulations, there is necessarily a balancing of considerations in-

involved in general public interests and those affecting individual.

Conn.—*Piccirillo v. Board of Appeals on Zoning of City of Bridgeport*, 90 A.2d 647, 139 Conn. 116—*Torello v. Board of Zoning Appeals*, 16 A. 2d 591, 127 Conn. 307.

7. Colo.—*People ex rel. Grommon v. Hedgcock*, 104 P.2d 607, 106 Colo. 300.

Conn.—*Florilla v. Zoning Bd. of Appeals of City of Norwalk*, 129 A.2d 619, 144 Conn. 275—*Culinary Institute of America v. Board of Zoning Appeals of City of New Haven*, 121 A.2d 637, 143 Conn. 257—*Libby v. Board of Zoning Appeals of City of New Haven*, 118 A.2d 894, 143 Conn. 46—*Paul v. Board of Zoning Appeals of City of New Haven*, 110 A.2d 619, 142 Conn. 40—*Plumb v. Board of Zoning Appeals of City of New Haven*, 108 A.2d 899, 141 Conn. 599—*O'Connor v. Board of Zoning Appeals of Town of Stratford*, 98 A.2d 515, 140 Conn. 65—*Heady v. Zoning Bd. of Appeals for Town of Milford*, 94 A. 2d 789, 139 Conn. 463—*Rafala v. Zoning Bd. of Appeals of City of Hartford*, 62 A.2d 837, 135 Conn. 142—*Delaney v. Zoning Bd. of Appeals of City of Hartford*, 56 A.2d 647, 134 Conn. 240—*Stavola v. Bulkeley*, 56 A.2d 645, 134 Conn. 186—*Bishop v. Board of Zoning Appeals of City of New Haven*, 53 A. 2d 659, 133 Conn. 614—*Kamerman v. Leroy*, 50 A.2d 175, 133 Conn. 232—*Devaney v. Board of Zoning Appeals of City of New Haven*, 45 A.2d 828, 132 Conn. 537—*Nielsen v. Board of Appeals on Zoning of City of Bridgeport*, 27 A.2d 392, 129 Conn. 285—*St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford*, 8 A.2d 1, 125 Conn. 714—*Levine v. Board of Adjustment of City of New Britain*, 7 A. 2d 222, 125 Conn. 478—*Thayer v. Board of Appeals of City of Hartford*, 157 A. 273, 114 Conn. 15.

Del.—*Searles v. Darling*, 83 A.2d 96, 7 Terry 263.

Ind.—*City of East Chicago, Ind. v. Sinclair Refining Co.*, 111 N.E.2d 459, 232 Ind. 295—*City of South Bend v. Marckle*, 18 N.E.2d 764, 215 Ind. 74.

Iowa.—*Zimmerman v. O'Meara*, 245 N.W. 715, 215 Iowa 1140.

Ky.—*Willoughby v. Tafel*, 190 S.W. 2d 475, 300 Ky. 792—*Bray v. Beyer*, 166 S.W.2d 290, 292 Ky. 162.

Md.—*Oursler v. Board of Zoning Appeals of Baltimore County* 104 A. 2d 568, 204 Md. 397.

these circumstances or conditions exist does not necessarily mean that a variance may be granted,⁸ and an owner is not entitled to a variance simply because the granting of it would do no great harm.⁹

In this connection, it has been held that the board must treat the provisions of the ordinance as constitutional and reasonable, and should regard the particular provisions under consideration before it as,

Mass.—*Real Properties v. Board of Appeal of Boston*, 65 N.E.2d 199, 319 Mass. 180—*Brackett v. Board of Appeal of Building Department of City of Boston*, 39 N.E.2d 956, 311 Mass. 52.

Mo.—*In re Botz*, 159 S.W.2d 867, 236 Mo.App. 566—*Berard v. Board of Adjustment of City of St. Louis*, App., 138 S.W.2d 731.

Neb.—*Roncka v. Fogarty*, 41 N.W.2d 745, 152 Neb. 467.

N.H.—*Gelinas v. City of Portsmouth*, 85 A.2d 896, 97 N.H. 248—*St. Onge v. City of Concord*, 63 A.2d 221, 95 N.H. 306.

N.J.—*Ranney v. Istituto Pontificio Delle Maestre Filippini*, 119 A.2d 142, 20 N.J. 189—*Leiman v. Board of Adjustment of Cranford Tp., Union County*, 88 A.2d 337, 9 N.J. 336.

Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 554—*Ackerman v. Board of Com'rs of Town of Belleville*, 62 A.2d 476, 1 N.J.Super. 69.

Kindergan v. Board of Adjustment of Borough of River Edge, 59 A.2d 857, 137 N.J.Law 296—*Protomastro v. Board of Adjustment of City of Hoboken*, 59 A.2d 644, 137 N.J.Law 250—*Visco v. City of Plainfield*, 57 A.2d 490, 136 N.J.Law 659—*Lynch v. Borough of Hillsdale*, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280—*Potts v. Board of Adjustment of Borough of Princeton*, 43 A.2d 850, 133 N.J.Law 230—*National Lumber Products Co. v. Ponzio*, 42 A.2d 753, 133 N.J.Law 95—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367—*Dubin v. Wich*, 200 A.751, 120 N.J.Law 469.

N.Y.—*Levy v. Board of Standards and Appeals of City of New York*, 196 N.E. 284, 267 N.Y. 347.

Bazinsky v. Kesbec, Inc., 19 N.Y.S.2d 716, 259 App.Div. 467, affirmed 36 N.E.2d 694, 286 N.Y. 656, remittitur amended 37 N.E.2d 456, 286 N.Y. 723.

Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325—*Ellish v. Zoning Board of Appeals of Town of Ramapo*, 253 N.Y.S. 547, 141 Misc. 916—*In re Mark Block Holding Corporation*, 253 N.Y.S. 321, 141 Misc. 813, reversed on other grounds *Mark Block Holding Corporation v. Warshaw*, 261 N.Y.S. 914, 237 App.Div. 339.

Marks v. Board of Zoning Appeals of City of Dunkirk, 154 N.Y.

S.2d 118—*Aisloff v. Murdock*, 81 N.Y.S.2d 372—*Hilton v. Board of Appeals of City of Geneva*, 18 N.Y.S. 2d 213.

Okl.—*Appeal of Fred Jones Co.*, 220 P.2d 245, 203 Okl. 321—*Thompson v. Phillips Petroleum Co.*, 147 P.2d 451, 194 Okl. 77—*Oklahoma City v. Harris*, 126 P.2d 938, 191 Okl. 125—*Van Meter v. H. F. Wilcox Oil & Gas Co.*, 41 P.2d 904, 170 Okl. 604—*Beveridge v. Harper & Turner Oil Trust*, 35 P.2d 435, 168 Okl. 609—*Van Meter v. Westgate Oil Co.*, 32 P.2d 719, 168 Okl. 200.

Pa.—*Moyerman v. Glanzberg*, 138 A.2d 681, 391 Pa. 387—*Richman v. Philadelphia Zoning Bd. of Adjustment*, 137 A.2d 280, 391 Pa. 254.

Root v. Zoning Bd. of Appeals of City of Erie, Com.Pl., 38 Erie Co. 212, affirmed 118 A.2d 297, 180 Pa. Super. 38—*Appeal of Deiter, Com.Pl.*, 58 Lack.Jur. 85—*Appeal of Continental Motor Sales, Com.Pl.*, 31 North.Co. 250—*Appeal of Blank, Com.Pl.*, 90 Pittsb.Leg.J. 159—*Appeal of Walsh, Com.Pl.*, 89 Pittsb.Leg.J. 333—*Appeal of Thomas, Com.Pl.*, 66 York Leg.Rec. 129.

R.I.—*Caccia v. Zoning Bd. of Review of City of Providence*, 113 A.2d 870—*Kent v. Zoning Bd. of Review of Town of Barrington*, 63 A.2d 731, 75 R.I. 64—*Kent v. Zoning Bd. of Review of Town of Barrington*, 58 A.2d 623, 74 R.I. 89—*Fiske v. Zoning Bd. of Review of Town of East Providence*, 50 A.2d 65, 72 R.I. 217, rehearing denied 50 A.2d 774, 72 R.I. 217—*Heffernan v. Zoning Board of Review of City of Cranston*, 144 A. 674, 50 R.I. 26.

Wis.—*State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison*, 35 N.W.2d 312, 254 Wis. 42.

"The result [of granting a variance] must not clash with the general scheme of zoning provided by the ordinance. It must be in harmony with the objectives sought to be accomplished."

Pa.—*Schaub v. Brentwood Borough Zoning Bd. of Adjustment*, 118 A.2d 292, 296, 180 Pa.Super. 105.

Zoning act does not contemplate variations which would frustrate general regulations and impair overall scheme which is set up for general welfare of several zoning districts and entire community.

N.J.—*Dolan v. De Capua*, 109 A.2d 615, 16 N.J. 599.

Liberality as to changes in nonconforming uses

Where zoning ordinance provided that every variance had to be in harmony with general purpose and in-

tent of zoning regulation so that substantial justice could be done, granting of variance to permit extension of nonconforming use was proper in view of fact that ordinance permitted city zoning board of appeals great liberality as to changes in nonconforming uses.

Conn.—*Fiorilla v. Zoning Bd. of Appeals of City of Norwalk*, 129 A.2d 619, 144 Conn. 275.

Permitting prohibited use

(1) Under some statutes and ordinances, power of board is held to be so limited that it cannot permit a structure to be erected or used in a manner expressly prohibited in district.

Ariz.—*Nicolai v. Board of Adjustment of City of Tucson*, 101 P.2d 199, 55 Ariz. 283, followed in *McCrea v. Board of Adjustment of City of Tucson*, 105 P.2d 1119, 56 Ariz. 82.

Ky.—*Bray v. Beyer*, 166 S.W.2d 290, 292 Ky. 162.

N.C.—*James v. Sutton*, 50 S.E.2d 300, 229 N.C. 515—*Lee v. Board of Adjustment of City of Rocky Mount*, 37 S.E.2d 128, 226 N.C. 107.

N.D.—*Livingston v. Peterson*, 228 N.W. 816, 59 N.D. 104.

Okl.—*Beveridge v. Harper & Turner Oil Trust*, 35 P.2d 435, 168 Okl. 609.

Tex.—*Harrington v. Board of Adjustment of City of Alamo Heights, Bexar County, Civ.App.*, 124 S.W.2d 401, error refused.

Utah.—*Walton v. Tracy Loan & Trust Co.*, 92 P.2d 724, 97 Utah 249.

(2) Under other authority, application to board for variance presupposes that applicant, under literal requirements of zoning ordinances, may not use his land in manner he desires, and thus invokes authority of board to permit that use, and hence board may not deny application merely because ordinance expressly prohibits such use.

R.I.—*Kent v. Zoning Bd. of Review of Town of Barrington*, 58 A.2d 623, 74 R.I. 189.

8. Mo.—*Wilson v. Douglas*, App., 297 S.W.2d 538.

Pa.—*Swade v. Zoning Bd. of Adjustment of Springfield Tp.*, 140 A.2d 597, 392 Pa. 269.

Appeal of Felice, Com.Pl., 66 Montg.Co. 62.

9. Conn.—*Talmadge v. Board of Zoning Appeals of City of New Haven*, 109 A.2d 253, 141 Conn. 639.

Pa.—*Appeal of Felice, Com.Pl.*, 66 Montg.Co. 62.

in general, representing the public interest.¹⁰

Generally speaking, the board should take into consideration the interest of the owner, the general policy of the ordinance, the needs of the traveling

public, the effects on property values, and other relevant circumstances,¹¹ such as neighborhood conditions,¹² traffic congestion,¹³ the existence of an emergency,¹⁴ and the financial burden on the mu-

10. R.I.—Heffernan v. Zoning Board of Review of City of Cranston, 144 A. 674, 50 R.I. 26.

11. Conn.—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 114 Conn. 15.

Ind.—O'Connor v. Overall Laundry, 183 N.E. 134, 98 Ind.App. 29.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 474.

Mass.—Hammond v. Springfield Bd. of Appeal, 154 N.E. 82, 257 Mass. 446—Norcross v. Boston Bd. of Appeal Bldg. Dept., 150 N.E. 887, 255 Mass. 177.

N.J.—Cook v. Board of Adjustment of City of Trenton, 193 A. 191, 118 N.J.Law 372.

N.Y.—Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County, 60 N.Y.S. 2d 750, 271 App.Div. 33.

Spadafora v. Ferguson, 48 N.Y.S. 2d 698, 182 Misc. 161, affirmed 50 N.Y.S.2d 408, 268 App.Div. 820.

Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.

Okl.—Application of Shadid, 238 P.2d 794, 205 Okl. 462.

Pa.—Aldan Memorial Home Ass'n v. Sauers, Com.Pl., 44 Del.Co. 125.

R.I.—D'Acchioli v. Zoning Bd. of Review of City of Cranston, 60 A.2d 707, 74 R.I. 327—Fiske v. Zoning Bd. of Review of Town of East Providence, 50 A.2d 65, 72 R.I. 217, rehearing denied 50 A.2d 779, 72 R.I. 217—Potter v. Zoning Board of Review of City of Cranston, 14 A.2d 669, 65 R.I. 286—Morgan v. Zoning Board of Review of Town of Warwick, 180 A. 922, 52 R.I. 338.

The test to be applied in granting a variance under zoning regulations is whether the variance or regulation promotes public health, safety, and general welfare after giving reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development in accordance with a well-considered plan.

N.Y.—Thomas v. Board of Standards and Appeals of City of New York, 33 N.Y.S.2d 219, 263 App.Div. 352, reversed on other grounds 48 N.E. 2d 284, 290 N.Y. 109.

Circumstances not justifying variance

(1) Property owner who sought variance in order to convert private dwelling into grocery in a single-residence district was not entitled to

variance on grounds that value of real estate in immediate vicinity would not be lessened, that no substantial physical changes in property were necessary or contemplated, that changes were commenced in ignorance of ordinance, and that denial of variance would impose financial hardship.

N.H.—Mater v. City of Dover, 79 A. 2d 844, 97 N.H. 13.

(2) Although convalescent home had been operated in an A-1 residential district for fourteen years in violation of zoning ordinance, and department of health had issued to petitioners and their predecessors annual permits for conduct of such a home, board properly denied their application for a variance to permit continued maintenance and operation of home.

N.Y.—Hepner v. Zoning Bd. of Appeals of City of Mount Vernon, 152 N.Y.S.2d 984.

Difficulty of access

(1) Difficulty of access to rear of tract of realty held not sufficient basis to support variance.

N.J.—Leimann v. Board of Adjustment of Cranford Tp., Union County, 88 A.2d 337, 9 N.J. 336.

(2) Fact that rear seventy feet of thirty-seven-foot lot retained by owner when front part of lot was sold before enactment of city zoning ordinance had no street frontage and was accessible only across owner's adjoining lot and was therefore not adaptable to any other use warranted granting a variance to permit completion on such lot in an "A" residential zone of storage building to be used in connection with business which owner had conducted at rear of adjoining lot for many years.

N.J.—Kurovski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433.

Life of permit

(1) The granting of a variance which would otherwise be improper is not justified by the fact that the permit is made temporary rather than permanent.

N.J.—Berdan v. City of Paterson, N. J., 62 A.2d 680, 1 N.J. 199.

Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

(2) Variant use of property does not derive validity from mere time limitation.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment

of City of Summit, 86 A.2d 127, 8 N.J. 386.

Prevention of competition to existing businesses of the same character is not a factor to be considered in passing on an application for a variance.

Conn.—Benson v. Zoning Board of Appeals of City of Hartford, 27 A. 2d 389, 129 Conn. 280.

Expansion of a nonconforming use does not, in and of itself, entitle the owner to erect structure on portion of his land not previously occupied by his business enterprise, but it is an important factor in considering whether a variance should be granted for that purpose.

Pa.—Appeal of Mack, 122 A.2d 48, 384 Pa. 586.

No substantial inconvenience to neighborhood

Board of standards and appeals may grant a variance to enable owner to make reasonable and profitable use of his property, if that can be done without violence to general zoning plan and without substantial inconvenience to immediate neighborhood.

N.Y.—Woltman v. Murdock, 168 N.Y. S.2d 572, 8 Misc.2d 969.

Restrictive covenants not considered

In proceeding on application for grant of special exception, board properly made determination without reference to restrictive covenants allegedly binding land in question.

Md.—Perry v. County Bd. of Appeals for Montgomery County, 127 A.2d 507, 211 Md. 294.

12. Existing uses

The uses which exist in neighborhood constitute a condition which must be considered in determining what inhibitions may be justly imposed against other properties in the neighborhood, and conditions which exist on a part of a restricted street may serve to call for an exception as to that part.

N.J.—Hann v. Borough of Sea Girt, 46 A.2d 47, 134 N.J.Law 74—Bianchi v. Morey, 24 A.2d 566, 128 N.J. Law 219.

13. Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

14. Alleviation of hazards

A temporary and conditional permit in contravention of the regular zoning restrictions should be allowed where it is necessary to promote the good of the municipality as a whole as well as to alleviate and reduce effectively the hazards of a serious emergency.

nicipality.¹⁵ Remonstrances or objections, by adjacent landowners or others, to the grant of a variance may be given some consideration, but are not conclusive.¹⁶ The determination of a petition for a variance cannot be determined by a poll of the sentiment of the neighborhood.¹⁷

A board, in passing on an application for a variance or exception, must give consideration to factors specified in the zoning provision.¹⁸ It has been held that the action of the board of appeal in varying a zoning regulation to permit the alteration of a residence for use as a retail store is not erroneous when it appears that the neighborhood, when the zoning regulation went into effect, was not exclusively residential.¹⁹

Aesthetic grounds. While aesthetic grounds are not to be completely disregarded in determining whether a variance should be granted,²⁰ they are

not enough to warrant a denial.²¹

Duration of variance. Whatever the duration of the variance, whether for a definite or an indefinite period, it must ex necessitate be grounded in the policy of the statute.²²

§ 289. — Effect of Other Applications or Nonconforming Uses

In passing on an application for a variance, action taken on other applications, or the existence of nonconforming uses in the vicinity, is not conclusive.

The fact that variances have been granted to some owners and denied to others does not establish unreasonable discrimination.²³ Likewise, the fact that other premises in the vicinity have been permitted to be put to a use contrary to the zoning restrictions is not a sufficient ground to require the granting of a variance or exception to an applicant for a similar use of his property,²⁴ particularly where it is not

N.Y.—Burke v. Cohen, 13 N.Y.S.2d 984.

15. Possibility not controlling

Fact that zoning variance might result in concentration of so many families as to financially burden township in maintenance of public schools and police protection, was not controlling, consequences suggested being too remote.

Pa.—Appeal of Elkins Park Imp. Ass'n, 64 A.2d 783, 361 Pa. 322.

16. Pa.—Sunnybrook, Inc. v. Upper Dublin Tp., 69 Pa.Dist. & Co. 344, 65 Montg.Co. 233.

Appeal of University of Pennsylvania, Com.Pl., 29 Del.Co. 322—Appeal of Y. M. C. A., Com.Pl., 68 Montg.Co. 175—Appeal of Felice, Com.Pl., 66 Montg.Co. 62.

R.I.—Kent v. Zoning Bd. of Review of Town of Barrington, 58 A.2d 623, 74 R.I. 189—Jenney Mfg. Co. v. Zoning Board of Review of Town of East Providence, 9 A.2d 705, 63 R.I. 477—Heffernan v. Zoning Board of Review of City of Cranston, 144 A. 674, 50 R.I. 26.

Number of protestants; nature and quality of objections

A board of adjustment does not properly exercise its discretion on application for a variance if it considers number of protestants rather than nature and quality of their objections.

Pa.—Appeal of Lindquist, 73 A.2d 378, 364 Pa. 561.

Reed v. Borough of North Wales, 83 Pa.Dist. & Co. 69, 68 Montg.Co. 196.

Absence of protestants or objectors does not necessarily alter conclusion that a variance should be denied.

Pa.—Hinton v. Zoning Bd. of Adjustment, 88 Pa.Dist. & Co. 265.

17. Ind.—Town of Homecroft v. Macbeth, 148 N.E.2d 563.

18. Md.—Hare v. Mayor and City Council of Baltimore, 90 A.2d 217, 200 Md. 477.

Diminution of property values in surrounding area was held not a question for board's determination where not specified in charter.

Va.—Wicker Apartments, Inc. v. City of Richmond, 99 S.E.2d 656, 199 Va. 263.

19. Mass.—Hammond v. Springfield Bd. of Appeal, 154 N.E. 82, 257 Mass. 446.

20. N.Y.—Crone v. Town of Brighton, 119 N.Y.S.2d 877.

21. N.Y.—Crone v. Town of Brighton, supra.

22. N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A. 2d 127, 8 N.J. 386.

23. Cal.—San Diego County v. McClurken, 234 P.2d 972, 37 C.2d 683.

24. Conn.—Chudnov v. Board of Appeals of Town of Bloomfield, 154 A. 161, 113 Conn. 49.

Ky.—A. L. Carrithers & Son v. City of Louisville, 63 S.W.2d 493, 250 Ky. 462.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206—Easter v. Mayor and City Council of Baltimore, 73 A.2d 491, 195 Md. 395.

N.J.—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529.

Hay v. Board of Adjustment of Borough of Fort Lee, 117 A.2d 650, 37 N.J.Super. 461—Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J.Super. 164—O'Connor v. Mayor and Council of Borough of North Arlington, 65 A. 2d 127, 1 N.J.Super. 638.

Greenway Homes v. Borough of River Edge, 60 A.2d 811, 137 N.J. Law 453—Scaduto v. Town of Bloomfield, 20 A.2d 649, 127 N.J. Law 1.

N.Y.—Brous v. Town of Hempstead, 69 N.Y.S.2d 258, 272 App.Div. 31, opinion amended on other grounds 70 N.Y.S.2d 576, 272 App.Div. 777—Eaton v. Sweeny, 251 N.Y.S. 246, 232 App.Div. 459, reversed on other grounds 177 N.E. 412, 257 N.Y. 176.

Okl.—Van Meter v. Westgate Oil Co., 32 P.2d 719, 168 Okl. 200.

Pa.—Application for Certificate of Occupancy, 500 Paxinos Ave., Easton, 66 A.2d 225, 362 Pa. 116—Ventresca v. Exley, 56 A.2d 210, 358 Pa. 98.

Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85.

R.I.—R. D'Ordine & Son v. Zoning Bd. of Review of Town of East Providence, 90 A.2d 416, 79 R.I. 489.

Tex.—Young v. City of Abilene, Civ. App., 195 S.W.2d 838.

Reason for rule

If the rule were not so, one variation would sustain, if it did not compel, others; and thus the general regulation would eventually be nullified.

Md.—Easter v. Mayor and City Council of Baltimore, 119 A.2d 387, 208 Md. 545.

N.J.—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 350, 133 N.J.Law 230.

Violation by others

Neighboring violations of zoning ordinance do not justify granting a variance.

N.Y.—Von Elm v. Zoning Board of Appeals of Incorporated Village of Hempstead, Nassau County, 17 N.Y.S.2d 548, 258 App.Div. 989—Peo-

shown that such use by others did not exist before the zoning ordinance was adopted.²⁵ Conversely, the denial of a similar application for a variance in the vicinity does not require a denial of a pending application, since each applicant is entitled to a determination on the facts affecting him alone.²⁶

The grant of a variance to permit a particular use should not be controlling, as a matter of law, as to a subsequent application for a variance to permit a different use,²⁷ but is a circumstance of some force

in the search for special reasons.²⁸

§ 290. — Hardship, Loss, or Injury as Ground for Variance

Where a variance is sought on the ground of hardship, an unnecessary and substantial hardship must generally be shown.

Where a variance is sought on the ground of hardship, an unnecessary hardship must, as a general rule, be shown.²⁹ The courts, it has been said,

ple ex rel. Santora v. Kreuter, 1 N.Y.S.2d 879, 253 App.Div. 898.
Pa.—Friedman v. Exley, 57 Pa.Dist. & Co. 586.

Violations not dealt with by authorities

Fact that there are numerous violations in district not dealt with by zoning authorities does not furnish a reason for granting a particular applicant a variance.

Pa.—Hinton v. Zoning Bd. of Adjustment, 88 Pa.Dist. & Co. 265.

Surrounding ill-advised or illegal variances

It is not proper to consider the existence of surrounding ill-advised or illegal zoning variances as grounds for granting additional variances.

Md.—Park Shopping Center, Inc. v. Lexington Park Theatre Co., 139 A.2d 843.

25. Md.—Easter v. Mayor and City Council of Baltimore, 73 A.2d 491, 195 Md. 395.

N.J.—Green v. Board of Com'rs of City of Newark, 36 A.2d 610, 131 N.J.Law 336.

Nonconforming uses in small portion of area

Existence of nonconforming uses in relatively small portion of area does not prove that refusal to permit another is in any real sense arbitrary or unreasonable.

N.J.—Casper v. City of Long Branch, 86 A.2d 691, 18 N.J.Super. 90.

26. N.Y.—Arditi Realty Co. v. Murdock, 67 N.Y.S.2d 809.

27. N.J.—Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J.Super. 574.

Use for physician's office or law office

N.J.—Grimley v. Village of Ridgewood, supra.

28. N.J.—Grimley v. Village of Ridgewood, supra.

29. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.

30. Colo.—Cross v. Bilett, 221 P.2d 923, 122 Colo. 273.

Conn.—Florilla v. Zoning Bd. of Appeals of City of Norwalk, 129 A.2d 619, 144 Conn. 275—Finch v. Mon-

tanari, 124 A.2d 214, 143 Conn. 542

—Libby v. Board of Zoning Appeals of City of New Haven, 118 A.2d 894, 143 Conn. 46—Talmadge v. Board of Zoning Appeals of City of New Haven, 109 A.2d 253, 141 Conn. 639—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290—Wadell v. Board of Zoning Appeals of City of New Haven, 68 A.2d 152, 136 Conn. 1—Berkman v. Board of Appeals on Zoning of City of Bridgeport, 64 A.2d 875, 135 Conn. 393—Rafala v. Zoning Bd. of Appeals of City of Hartford, 62 A.2d 337, 135 Conn. 142.

Del.—In re Auditorium, Inc., 84 A.2d 598, 7 Terry 430, remanded on other grounds Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373—Searles v. Darling, 33 A.2d 96, 7 Terry 263.

Ind.—Board of Zoning Appeals of City of Mishawaka v. School City of Mishawaka, App., 145 N.E.2d 302.

Neb.—Peterson v. Vasak, 76 N.W.2d 420, 162 Neb. 498.

N.H.—Gelinas v. City of Portsmouth, 85 A.2d 896, 97 N.H. 248.

N.J.—Home Builders Ass'n of Northern N. J. v. Borough of Paramus, 81 A.2d 753, 7 N.J. 335—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291—National House & Farms Ass'n v. Board of Adjustment of Borough of Oakland, 65 A.2d 518, 2 N.J. 11.

Berdan v. City of Paterson, 59 A.2d 659, 137 N.J.Law 286, affirmed 62 A.2d 680, 1 N.J. 199.

N.Y.—Long Island Lighting Co. v. Incorporated Village of East Rockaway, 110 N.Y.S.2d 884, 279 App. Div. 926, reargument and appeal denied 113 N.Y.S.2d 241, 279 App. Div. 1023, affirmed 110 N.E.2d 743, 304 N.Y. 932, reargument denied 112 N.E.2d 851, 305 N.Y. 738.

Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 169 N.Y.S.2d 388, 5 Misc.2d 20.

Syosset Holding Corp. v. Schlimm, 159 N.Y.S.2d 88, modified on other grounds, 164 N.Y.S.2d 890, 4 A.D.2d 766—Application of Wender, 89 N.Y.S.2d 41.

N.C.—Lee v. Board of Adjustment of

City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Okl.—Appeal of Fred Jones Co., 220 P.2d 245, 203 Okl. 321.

Pa.—Appeal of Edwards, 140 A.2d 110, 392 Pa. 138—Moyerman v. Glanzberg, 138 A.2d 681, 391 Pa. 387—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254—Dooling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Tp., 89 A.2d 505, 371 Pa. 290—Lukens v. Zoning Bd. of Adjustment of Ridley Tp., Del. County, 80 A.2d 765, 367 Pa. 608—Appeal of Elkins Park Imp. Ass'n, 64 A.2d 783, 361 Pa. 322—Appeal of Crawford, 57 A.2d 862, 358 Pa. 636—Ventresca v. Exley, 56 A.2d 210, 358 Pa. 98.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

Hinton v. Zoning Bd. of Adjustment, 88 Pa.Dist. & Co. 265—Brodsky v. McShain, 71 Pa.Dist. & Co. 595—Straessle v. Philadelphia Zoning Bd. of Adjustment, 71 Pa.Dist. & Co. 266—Yancale v. Philadelphia Zoning Bd. of Adjustment, 68 Pa. Dist. & Co. 233—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa.Dist. & Co. 686, 63 Montg.Co. 247—Friedman v. Exley, 57 Pa. Dist. & Co. 586—Hewlett v. Zoning Bd. of Adjustment, 3 Pa.Dist. & Co. 75, 49 Mun.L.R. 57—Levinson v. Power, 3 Pa.Dist. & Co.2d 170.

Heiser v. Spring Tp., Com.Pl., 47 Berks Co. 21—Schmalz v. Buckingham Tp. Bd. of Adjustment, Com. Pl., 6 Bucks Co. 285, reversed on other grounds 132 A.2d 233, 389 Pa. 295—Baronoff v. Zoning Bd. of Adjustment, Com.Pl., 4 Bucks Co. 277, reversed on other grounds 122 A.2d 65, 385 Pa. 110—Board of Adjustment of Susquehanna Tp. v. Procasco, Com.Pl., 69 Dauph.Co. 204—Appeal of Associated Contractors, Inc., Com.Pl., 44 Del.Co. 105, exceptions dismissed 44 Del.Co. 205—Appeal of Zimmerman, Com.Pl., 44 Del.Co. 42—Appeal of Garber, Inc., from Bd. of Adjustment, Com.Pl., 42 Del.Co. 399, affirmed 122 A.2d 682, 385 Pa. 828—Appeal of McLaughlin, Com.Pl., 42 Del.Co. 388—Application of Ross to Zoning Bd. of Adjustment of Marple Tp., Com.

have never undertaken to formulate an all-inclusive definition of "unnecessary hardship;"³⁰ the term has been interpreted as referring to hardship peculiar to the situation of the applicant which amounts to substantial injustice to him and the imposition

of which is unnecessary to carry out the spirit of the ordinance.³¹ No single factor determines what constitutes unnecessary hardship,³² but all relevant factors must be considered.³³

To justify the grant of a variance, the hardship

Pl., 42 Del.Co. 328—Reavey v. Coffin Co., 41 Del.Co. 192—Appeal of Stevens, Com.Pl., 41 Del.Co. 3, exceptions dismissed 41 Del.Co. 387—Appeal of Deiter, Com.Pl., 58 Lack Jur. 85—Appeal of Rorer, Com.Pl., 72 Montg.Co. 58—Appeal of Carson College, Com.Pl., 71 Mont.Co. 300—Dachino v. Plymouth Tp., Com.Pl., 70 Montg.Co. 198—Rochelle v. Whitmarsh Tp., Com.Pl., 69 Montg.Co. 328—Cohen v. Cheltenham Tp., Com.Pl., 69 Montg.Co. 299—Appeal of Janke, Com.Pl., 69 Montg.Co. 87—Appeal of Berg, Com.Pl., 66 Montg.Co. 194—Hampton v. Board of Adjustment of Borough of Norristown, Com.Pl., 66 Montg.Co. 164—Appeal of Lindquist, Com.Pl., 66 Montg.Co. 27, affirmed 73 A.2d 378, 364 Pa. 561—Appeal of Continental Motor Sales, Com.Pl., 31 North.Co. 250—Appeal of Jehovah's Witnesses, Co., 103 Pittsb.Leg.J. 489—Appeal of Thomas, Com.Pl., 66 York Leg.Rec. 129.

R.I.—Denton v. Zoning Bd. of Review of City of Warwick, 133 A.2d 718—Berard v. Zoning Bd. of Review of Town of Barrington, 139 A.2d 867—Caccia v. Zoning Bd. of Review of City of Providence, 113 A.2d 870—Cardin v. Zoning Bd. of Review of Town of North Providence, 93 A.2d 304, 80 R.I. 136.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

Exception usually justified

Existence of an unnecessary hardship usually justifies granting of an exception.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

What must be shown

(1) All relevant factors, taken together, must indicate such special conditions that property cannot reasonably be put to a conforming use because of limitation imposed by its classification under ordinance to warrant variance on ground of unnecessary hardship.

Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.

(2) Before board may exercise discretion to grant a variance on ground of unnecessary hardship, record must show that land cannot yield a reasonable return if used only for purpose allowed in particular zone, that plight of owner is due to unique circumstances and not to general conditions in neighborhood which may reflect unreasonableness of zoning or-

dinance itself, and that use to be authorized by variance will not alter essential character of locality.

Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., supra.

N.Y.—Crossroads Recreation, Inc. v. Broz, 149 N.E.2d 65, 4 N.Y.2d 39, 172 N.Y.S.2d 129—Taxpayers' Ass'n of South East Oceanside v. Board of Zoning Appeals of Town of Hempstead, 93 N.E.2d 645, 301 N.Y. 215—Otto v. Steinhilber, 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681.

Village of Bronxville v. Francis, 150 N.Y.S.2d 906, 1 A.D.2d 236, affirmed 135 N.E.2d 724, 1 N.Y.2d 839, 153 N.Y.S.2d 220—Allen v. Fersh, 149 N.Y.S.2d 798, 1 A.D.2d 918—Lathrop v. Ferioli, 93 N.Y.S.2d 568, 276 App.Div. 850—Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County, 60 N.Y.S.2d 750, 271 App.Div. 33.

North Am. Holding Corp. v. Murdock, 167 N.Y.S.2d 120, 9 Misc.2d 632—Rochester Transit Corp. v. Crowley, 131 N.Y.S.2d 493, 205 Misc. 933—North Titus Residential Ass'n of Irondequoit, N. Y. v. Board of Zoning Appeals of Town of Irondequoit, 127 N.Y.S.2d 502, 205 Misc. 518—Sherwood Realty Corp. v. Ferioli, 82 N.Y.S.2d 505, 193 Misc. 194.

Teschner v. Town of Pittsford, 129 N.Y.S.2d 803, affirmed 137 N.Y.S.2d 640, 285 App.Div. 851—Stevens v. Connor, 120 N.Y.S.2d 345—Goldstein v. Board of Appeals of Town of Oyster Bay, 102 N.Y.S.2d 922—Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.

(3) In this holding, phrase "unique circumstances" is not to be construed as "unique hardship," as though there were a requirement for proving something more severe than an unnecessary hardship.

N.Y.—Village of Bronxville v. Francis, 150 N.Y.S.2d 906, 1 A.D.2d 236, affirmed 135 N.E.2d 724, 1 N.Y.2d 839, 153 N.Y.S.2d 220.

Off-street parking

To authorize variance in case of a commercial establishment where off-street parking requirements are involved, building must be devoted to some extraordinary use which makes requirement of off-street parking unnecessary, or enforcement of parking requirement must be shown to work an unreasonable hardship.

La.—State ex rel. Latter v. Board of

Zoning Adjustments of City of New Orleans, App., 94 So.2d 138.

30. S.C.—Hodge v. Pollock, 75 S.E.2d 752, 223 S.C. 342.

31. Okl.—Board of Adjustment of City of Tulsa v. Shore, 249 P.2d 1011, 207 Okl. 381.

"Unnecessary" defined

(1) The word "unnecessary" as used in statute empowering a board of adjustment to authorize such variance from terms of ordinance as will not be contrary to public interest, where, owing to special conditions, a literal enforcement of ordinance will result in "unnecessary" hardship, means "not required to give full effect to purpose of ordinance."

N.H.—St. Onge v. City of Concord, N.H., 63 A.2d 221, 223, 95 N.H. 306.

(2) "Unnecessary," qualifying word "hardships," means hardships which would not follow as ordinary results of adoption of zoning plan as a whole.

Conn.—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 188.

Test of necessity

Where property use to be permitted by variance sought runs counter to fundamental zoning principles, hardship resulting from strict application of ordinance to such property is necessary hardship which must be borne by owner thereof, but if there is real hardship, which can be alleviated by granting variance without materially impairing effectiveness of zoning regulations as whole so as to be out of harmony with their purposes, board has power to grant variance.

Conn.—Plumb v. Board of Zoning Appeals of City of New Haven, 108 A.2d 899, 141 Conn. 599.

Abrogation of intent of ordinance

"Unnecessary hardship," as used in zoning statute, does not embrace restriction of desire to perform an act which would abrogate very intent and purpose of ordinance enacted pursuant thereto, amend, if not partially repeal, an act regularly adopted by local legislature, and create a means by which entire ordinance could be frustrated at will by limitless exceptions.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

32. Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.

33. Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., supra.

must be substantial,³⁴ serious,³⁵ real,³⁶ and of compelling force,³⁷ as distinguished from instances of variances sought for reasons of convenience, profit, or caprice,³⁸ although under some provisions variances may be granted under other specified circumstances,³⁹ as for example, the granting of an ex-

Matters not to be considered

Where lot did not have sufficient frontage to conform with minimum frontage requirements for residential lots under zoning ordinance, fact that lot owners may have violated the law in starting construction without a proper permit, or may have interfered with right of borough in regard to a drainage easement on the lot, and, as result, might have caused harm to others, should not have been considered in determining the existence of that degree of hardship which would require granting of a variance.

N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94.

34. Mass.—Spaulding v. Board of Appeals of Leicester, 138 N.E.2d 367, 334 Mass. 688.

Pa.—O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901, 384 Pa. 379—Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh, 109 A.2d 537, 379 Pa. 516—Ventresca v. Exley, 56 A.2d 210, 358 Pa. 98—Appeal of Valicenti, 148 A. 308, 298 Pa. 276—Appeal of Kerr, 144 A. 81, 294 Pa. 246.

Appeal of Junge, 89 Pa.Super. 548.

Hewlett v. Zoning Bd. of Adjustment, 8 Pa.Dist. & Co.2d 75, 49 Mun. L.R. 57—Brodsky v. McShain, 71 Pa.Dist. & Co. 595—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa.Dist. & Co. 686, 63 Montg.Co. 247.

Appeal of Deiter, Com.Pl., 53 Lack.Jur. 85—In re Application for Certificate of Occupancy, Com.Pl., 32 North.Co. 31—Appeal of Jehovah's Witnesses, Co., 103 Pittsb. Leg.J. 489.

Upgrading of zoned section

When a hardship is created by the upgrading of an already zoned section, although it is not necessarily controlling, it entitles the owners of isolated pieces of land to more consideration than they would otherwise receive when applying for an exception.

Pa.—Appeal of Hood, 6 Pa.Dist. & Co. 2d 275, 72 Montg.Co. 12.

35. Pa.—Hewlett v. Zoning Bd. of Adjustment, 8 Pa.Dist. & Co.2d 75, 49 Mun.L.R. 57.

36. Pa.—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa. Dist. & Co. 686, 63 Montg.Co. 247.

37. Pa.—O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901, 384 Pa. 379—Appeal of Catholic Cemeteries Ass'n of the Diocese

of Pittsburgh, 109 A.2d 537, 379 Pa. 516—Ventresca v. Exley, 56 A.2d 210, 358 Pa. 98.

Hewlett v. Zoning Bd. of Adjustment, 8 Pa.Dist. & Co.2d 75, 49 Mun.L.R. 57.

Appeal of Deiter, Com.Pl., 53 Lack.Jur. 85—In re Application for Certificate of Occupancy, Com.Pl., 32 North.Co. 31—Appeal of Jehovah's Witnesses, Co., 103 Pittsb. Leg.J. 489.

Annoyance from noise held insufficient

Pa.—Appeal of Michener, 115 A.2d 367, 382 Pa. 401.

Circumstances held insufficient

Fact that other buildings extended to front line of lot and lot was irregular did not authorize board to grant a permit for construction of addition on front of store and dwelling in variance of set-back rules and occupancy requirement, on ground of hardship.

Md.—Easter v. Mayor and City Council of Baltimore, 73 A.2d 491, 195 Md. 395.

38. Conn.—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 114 Conn. 15.

Ky.—Willoughby v. Tafel, 190 S.W.2d 475, 300 Ky. 792.

Md.—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130—Gleason v. Keswick Imp. Ass'n, 78 A.2d 164, 197 Md. 46.

N.J.—Garden View Homes v. Board of Adjustment of City of Passaic, 57 A.2d 677, 137 N.J.Law 44—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J. Law 367.

N.Y.—People ex rel. Home for Hebrew Infants of City of New York v. Walsh, 227 N.Y.S. 570, 131 Misc. 581.

Pa.—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa.Dist. & Co. 686, 63 Montg.Co. 247.

R.I.—Cardin v. Zoning Bd. of Review of Town of North Providence, 104 A.2d 752, 81 R.I. 497—Taft v. Zoning Bd. of Review of City of Warwick, 71 A.2d 886, 76 R.I. 443.

Convenience to tenants

Fact that establishment by commercial cleaner of a depot in the basement of a multi-family house where clothing to be cleaned may be deposited would be a convenience to tenants would not justify grant of a variance on ground that service was merely incidental to primary residential function of building and not primarily commercial in nature.

N.J.—Zahn v. Board of Adjustment,

of City of Newark, 133 A.2d 358, 45 N.J.Super. 516.

Urgent necessity

(1) Special exceptions to a zoning ordinance will never be granted to gratify mere convenience; there must be a necessity, and that necessity must be so urgent, and the facts so extraordinary, as to require withdrawal of that particular case from application of accepted rule.

Md.—Cleland v. Mayor & City Council of Baltimore, 84 A.2d 49, 193 Md. 440.

(2) This rule applies to provision of zoning ordinance authorizing board of municipal and zoning appeals to grant within one hundred feet of a boundary line between two use districts any use permitted in that one of such use districts which has lower classification.

Md.—Cleland v. Mayor & City Council of Baltimore, supra.

Land located in two zones

Fact that land lies partly in zone in which proposed buildings may be erected and partly in contiguous zone in which such buildings are prohibited is not a sufficient reason for a variance.

N.J.—Kindergan v. Board of Adjustment of Borough of River Edge, 59 A.2d 857, 137 N.J.Law 296.

39. Conn.—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614.

Ind.—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 618, 117 Ind.App. 314.

Extension into adjacent district

Under ordinance authorizing zoning board of review to approve extension of use or building into more restricted district immediately adjacent thereto, it was not incumbent on applicant to prove unnecessary hardship, even though his application stated that he was requesting an exception or a variation.

R.I.—Perrier v. Board of Appeals of City of Pawtucket, 134 A.2d 141.

Special reasons

(1) A municipal board of adjustment may recommend variance for approval or disapproval by municipal governing body, where there are special reasons therefor, as required by statute, without proof of exceptional undue hardship to applicant for variance or showing of uniqueness because of extraordinary condition of property involved.

N.J.—Ward v. Scott, 93 A.2d 385, 11 N.J. 117—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64.

Mistretta v. City of Newark, 109

ception in the case of area variances.⁴⁰

By way of a guiding principle, it may be said that a variance should be granted where, and only where, the application of the regulation in question to particular property greatly decreases or practically destroys its value for any permitted use,⁴¹

or where such application bears so little relationship to the purposes of zoning that, as to the property in question, the regulation is in effect confiscatory, arbitrary, or capricious,⁴² or constitutes an unnecessary, unwarranted, or unjust invasion of, or interference with, a fundamental right of property.⁴³

A.2d 677, 33 N.J.Super. 205—Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 554.

(2) Quoted term, in statute subsection authorizing board of adjustment to recommend, and governing body to grant, variances in particular cases and for "special reasons," was intended to have a broader and more liberal significance than "undue hardship" specified in preceding subsection.

N.J.—Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J.Super. 574.

(3) Disagreement by board of adjustment with policy of zoning ordinance is not special reason which will justify granting of variance.

N.J.—Keller v. Town of Westfield, 121 A.2d 419, 39 N.J.Super. 430.

Limitation on authority of board

Statutory provision authorizing board of adjustment to grant variance in a case of exceptional narrowness, shallowness, or shape of a specific property at time of enactment of ordinance, or of other extraordinary and exceptional situation or condition of such piece of property, constitutes a legislative declaration of elements of proof of a restrictive nature and a limitation on authority of board of adjustment to grant a variance on ground of unnecessary hardship. N.J.—165 Augusta St. v. Collins, 87 A.2d 889, 9 N.J. 259.

40. Special hardship not required

In absence of statutory provision to contrary, special hardship need not be established as a condition to granting an area variance from provisions of a zoning ordinance.

N.Y.—Village of Bronxville v. Francis, 150 N.Y.S.2d 906, 1 A.D.2d 236, affirmed 135 N.E.2d 724, 1 N.Y.2d 839, 153 N.Y.S.2d 220—Perri v. Zoning Bd. of Appeals of Incorporated Village of Scarsdale, Westchester County, 128 N.Y.S.2d 774, 283 App. Div. 818.

Feldman v. Nassau Shores Estates, Inc., 172 N.Y.S.2d 769—Fulton v. Board of Appeals of Town of Oyster Bay, 158 N.Y.S.2d 434—Gruen v. Simpson, 153 N.Y.S.2d 287, affirmed 161 N.Y.S.2d 843, 3 App. Div.2d 841.

41. Conn.—Culinary Institute of America v. Board of Zoning Appeals of City of New Haven, 121 A.2d 537, 143 Conn. 257.

Neb.—Peterson v. Vasak, 76 N.W.2d 420, 162 Neb. 498.

N.J.—Sigretto v. Board of Adjustment of Borough of Rutherford, 50 A.2d 492, 134 N.J.Law 587.

N.Y.—Slater v. Toohill, 84 N.Y.S.2d 182, 274 App.Div. 944—Calcagno v. Town Board of Town of Webster, 41 N.Y.S.2d 140, 265 App.Div. 687, affirmed 52 N.E.2d 592, 291 N.Y. 701—Marjen Realty Co. v. Reynolds, 26 N.Y.S.2d 988, 261 App.Div. 1098.

Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325.

Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.

Okl.—Oklahoma City v. Harris, 126 P.2d 988, 191 Okl. 125.

Pa.—Levinson v. Power, 3 Pa.Dist. & Co. 170.

R.I.—McCabe v. Zoning Board of Review of City of Providence, 148 A.601, 50 R.I. 449.

42. Colo.—Board of Adjustment of City and County of Denver v. Handley, 95 P.2d 823, 105 Colo. 180.

Conn.—Culinary Institute of America v. Board of Zoning Appeals of City of New Haven, 121 A.2d 637, 143 Conn. 257—Devaney v. Board of Zoning Appeals of City of New Haven, 45 A.2d 828, 132 Conn. 537.

Mass.—Brackett v. Board of Appeal of Building Department of City of Boston, 39 N.E.2d 956, 311 Mass. 52.

Neb.—Peterson v. Vasak, 76 N.W.2d 420, 162 Neb. 498.

N.H.—St. Onge v. City of Concord, 63 A.2d 221, 95 N.H. 306.

N.J.—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291.

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.

Pa.—Levinson v. Power, 3 Pa.Dist. & Co. 170.

Inquiry, in determining whether a variance to a use restriction should be granted, is whether such restriction, viewing property in setting of its environment, is so unreasonable as to be confiscatory.

N.J.—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529.

Avoidance of confiscation

Where it is shown that deprivation of beneficial use of land would follow a literal enforcement of ordinance and it does not appear that the interest of the public would be violated,

it is the duty of zoning boards of review to so exercise their discretion as to avoid confiscation.

R.I.—Denton v. Zoning Bd. of Review of City of Warwick, 133 A.2d 718.

43. Md.—Park Shopping Center, Inc. v. Lexington Park Theatre Co., 139 A.2d 843—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130.

Neb.—Frank v. Russell, 70 N.W.2d 306, 160 Neb. 354.

N.H.—Fortuna v. Zoning Bd. of Adjustment of City of Manchester, 60 A.2d 133, 95 N.H. 211.

N.J.—Leiman v. Board of Adjustment of Cranford Tp., Union County, 88 A.2d 337, 9 N.J. 336—V. F. Zahodickin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N.J. 386—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291—Protomastro v. Board of Adjustment of City of Hoboken, 70 A.2d 873, 3 N.J. 494.

Kurowski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433—Roberts v. Board of Adjustment of Borough of Fort Lee, 61 A.2d 896, 1 N.J. Super. 29.

Berdan v. City of Paterson, 59 A.2d 659, 137 N.J.Law 286, affirmed 62 A.2d 680, 1 N.J. 199—Protomastro v. Board of Adjustment of City of Hoboken, 59 A.2d 644, 137 N.J.Law 250—United Advertising Corp. v. Board of Adjustment of Maplewood Tp., 56 A.2d 406, 136 N.J.Law 336—Interboro Trucking Co. v. Board of Adjustment of City of Perth Amboy, 53 A.2d 213, 135 N.J. Law 520—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J.Law 95—Scaduto v. Town of Bloomfield, 20 A.2d 649, 127 N.J. Law 1—Brandon v. Board of Comrs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

"Any hardship suffered by the defendant as a result of the interference with its right to use its property, without commensurate public advantage, is an unnecessary hardship."

N.H.—St. Onge v. City of Concord, 63 A.2d 221, 223, 95 N.H. 306.

Essential inquiry on application for variance is whether denial thereof constitutes an invasion of fundamental right of property.

N.J.—Albright v. Johnson, 50 A.2d 399, 135 N.J.Law 70.

The possibility or probability of undue hardship is not a sufficient ground for the grant of a variance.⁴⁴

Disappointment in use of property does not constitute exceptional difficulty or unusual hardship so as to authorize a variance.⁴⁵

§ 291. — — — Exceptional or Unusual Hardship

The hardship relied on as ground for a variance must

be unusual or peculiar to the property involved, and different from that suffered throughout the zone or neighborhood.

Proof of an exceptional and undue hardship to the individual landowner is a jurisdictional prerequisite, or sine qua non, to the alleviating action of the board in granting a variance or exception.⁴⁶ To justify the grant, the claimed hardship must be peculiar, singular, unique, or exceptional in nature.⁴⁷

Taking of property without compensation

(1) Generally.

Neb.—Peterson v. Vasak, 76 N.W.2d 420, 162 Neb. 498.

(2) Legislature, in conferring on boards of review authority to grant a variance in application of terms of an ordinance on a showing of unnecessary hardship flowing from literal enforcement of terms of ordinance, intended to vest such boards with authority to prevent indirect taking of land without compensation by depriving owner of all beneficial use thereof.

R.I.—Denton v. Zoning Bd. of Review of City of Warwick, 133 A.2d 718.

44. Pa.—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254.

45. Conn.—Longo v. Board of Zoning Appeals of Town of Milford, 122 A.2d 784, 143 Conn. 395.

46. Conn.—Finch v. Montanari, 124 A.2d 214, 143 Conn. 542.

N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577—Ramsbotham v. Board of Public Works of City of Paterson, 65 A.2d 748, 2 N.J. 131—National House & Farms Ass'n v. Board of Adjustment of Borough of Oakland, 65 A.2d 518, 2 N.J. 11. Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J. Super. 164—O'Connor v. Mayor and Council of Borough of North Arlington, 65 A.2d 127, 1 N.J. Super. 638.

Siegel v. Board of Adjustment of City of Newark, 60 A.2d 626, 137 N.J. Law 423—Kindergan v. Board of Adjustment of Borough of River Edge, 59 A.2d 857, 137 N.J. Law 296—Protomastro v. Board of Adjustment of City of Hoboken, 59 A.2d 644, 137 N.J. Law 250—United Advertising Corp. v. Board of Adjustment of Maplewood Tp., 56 A.2d 408, 136 N.J. Law 336—Scaduto v. Bloomfield, 20 A.2d 649, 127 N.J. Law 1.

Pa.—McDonald v. West View Adjustment Bd., Com.Pl., 98 Pittsb. Leg. J. 191.

Oppression; individual burdens

In enactment of statute empowering municipal boards of adjustment

to authorize, in specific cases, such variance from terms of zoning ordinances as will not be contrary to public interest, where a literal enforcement of ordinance will result in unnecessary hardship, legislature intended that where no oppression or unnecessarily great burden exists and no great individual injustice results, ordinance should be applied strictly, but, if a situation causes oppression and unnecessary individual burdens, zoning ordinance should not be applied strictly and literally. Ala.—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.

Board's opinion as to original zoning

Opinion of zoning board of review that original zoning of a particular area was improper or illegal does not constitute undue hardship for which a variance may be granted.

R.I.—Matteson v. Zoning Board of Review of City of Warwick, 84 A.2d 611, 79 R.I. 121.

47. Conn.—Goldreyer v. Board of Zoning Appeals of City of Bridgeport, 136 A.2d 789, 144 Conn. 641—Finch v. Montanari, 124 A.2d 214, 143 Conn. 542—Cohen v. Board of Appeals on Zoning of City of Bridgeport, 94 A.2d 793, 139 Conn. 450—Rafala v. Zoning Bd. of Appeals of City of Hartford, 62 A.2d 337, 135 Conn. 142—Delaney v. Zoning Bd. of Appeals of City of Hartford, 56 A.2d 647, 134 Conn. 240—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186—Kammerman v. Leroy, 50 A.2d 175, 133 Conn. 232—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161—Nielsen v. Board of Appeals on Zoning of City of Bridgeport, 27 A.2d 392, 129 Conn. 285—Benson v. Zoning Board of Appeals of City of Hartford, 27 A.2d 389, 129 Conn. 280—Rommell v. Walsh, 16 A.2d 483, 127 Conn. 272—First Nat. Bank & Trust Co. of Port Chester, N. Y., v. Zoning Board of Appeals of Greenwich, 10 A.2d 691, 126 Conn. 228—Grady v. Katz, 1 A.2d 137, 124 Conn. 525.

Ky.—Willoughby v. Tafel, 190 S.W.2d 475, 300 Ky. 792—Bray v. Beyer, 166 S.W.2d 290, 292 Ky. 162.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206—Carney v.

City of Baltimore, 93 A.2d 74, 201 Md. 130—Heath v. Mayor & City Council of Baltimore, 58 A.2d 896, 190 Md. 478.

Mass.—Real Properties v. Board of Appeal of Boston, 65 N.E.2d 199, 319 Mass. 180—Brackett v. Board of Appeal of Building Department of City of Boston, 39 N.E.2d 956, 311 Mass. 52—Coleman v. Board of Appeal of Building Department of Boston, 183 N.E. 166, 281 Mass. 112. Mo.—Berard v. Board of Adjustment of City of St. Louis, App., 138 S.W. 2d 781.

Neb.—Frank v. Russell, 70 N.W.2d 306, 160 Neb. 354.

N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 69 A.2d 361, 6 N.J. Super. 474, affirmed 73 A.2d 545, 4 N.J. 577—Wyndham Const. Co. v. Board of Adjustment of Teaneck Tp., 63 A.2d 707, 1 N.J. Super. 197.

Oliva v. City of Garfield, 60 A.2d 628, 137 N.J. Law 475, affirmed 62 A.2d 673, 1 N.J. 184—Siegel v. Board of Adjustment of City of Newark, 60 A.2d 626, 137 N.J. Law 423—Kindergan v. Board of Adjustment of Borough of River Edge, 59 A.2d 857, 137 N.J. Law 296—Berdan v. City of Paterson, 59 A.2d 659, 137 N.J. Law 286, affirmed 62 A.2d 680, 1 N.J. 199—Protomastro v. Board of Adjustment of City of Hoboken, 59 A.2d 644, 137 N.J. Law 250—United Advertising Corp. v. Board of Adjustment of Maplewood Tp., 56 A.2d 406, 136 N.J. Law 336—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J. Law 135, affirmed 15 A.2d 598, 125 N.J. Law 367—Cook v. Board of Adjustment of City of Trenton, 193 A. 191, 118 N.J. Law 372—Fonda v. O'Donohue, 163 A. 2, 109 N.J. Law 584.

St. Mary's of Mt. Virgin's Church of New Brunswick v. Board of Adjustment of City of New Brunswick, 184 A. 516, 14 N.J. Misc. 288.

N.Y.—Taxpayers' Ass'n of South East Oceanside v. Board of Zoning Appeals of Town of Hempstead, 93 N. E.2d 645, 301 N.Y. 215—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town

and must relate to the particular property for which the variance is sought.⁴⁸

It is necessary that the property suffer some un-

usual hardship from application of the regulation different from, and greater than, that suffered by other property in the district or neighborhood;⁴⁹ a variance cannot legally be granted for reasons

of *Hempstead v. Clark*, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673—*Arverne Bay Const. Co. v. Thatcher*, 15 N.E. 2d 587, 278 N.Y. 222, 117 A.L.R. 1110—*Young Women's Hebrew Ass'n v. Board of Standards and Appeals of City of New York*, 194 N.E. 751, 266 N.Y. 270, reargument denied 195 N.E. 376, 266 N.Y. 672, appeal dismissed *Gelkam Realty Corporation v. Young Women's Hebrew Ass'n*, 56 S.Ct. 109, 296 U.S. 537, 80 L.Ed. 382.

Miller v. Silver, 105 N.Y.S.2d 474, 278 App.Div. 962—*Lathrop v. Feriolo*, 93 N.Y.S.2d 568, 276 App.Div. 850—*Ostrove v. Cohen*, 58 N.Y.S.2d 900, 269 App.Div. 1064, appeal denied 60 N.Y.S. 295, 270 App.Div. 818—*Aberdeen Garage v. Murdock*, 15 N.Y.S.2d 66, 257 App.Div. 645, affirmed 28 N.E.2d 45, 283 N.Y. 650—*New York & Richmond Gas Co. v. Connell*, 272 N.Y.S. 915, 242 App. Div. 691.

Spadafora v. Ferguson, 48 N.Y.S. 2d 698, 182 Misc. 161, affirmed 50 N.Y.S.2d 408, 268 App.Div. 820—*Pounds v. Walsh*, 223 N.Y.S. 459, 129 Misc. 676.

Application of Wender, 89 N.Y.S. 2d 41—*Underhill v. Board of Appeals of Town of Oyster Bay*, 72 N.Y.S.2d 588, affirmed 75 N.Y.S.2d 327, 273 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937—*Burke v. Cohen*, 13 N.Y.S.2d 984.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 87 S.E.2d 128, 226 N.C. 107.

Okl.—Thompson v. Phillips Petroleum Co., 147 P.2d 481, 194 Okl. 77—*Van Meter v. Westgate Oil Co.*, 32 P.2d 719, 168 Okl. 200.

Pa.—Moyerman v. Glanzberg, 138 A. 2d 681, 391 Pa. 387—*Richman v. Philadelphia Zoning Bd. of Adjustment*, 137 A.2d 280, 391 Pa. 254—*Smolow v. City of Philadelphia Zoning Bd. of Adjustment*, 137 A.2d 251, 391 Pa. 71—*Appeal of Michener*, 115 A.2d 367, 382 Pa. 401—*Ventresca v. Exley*, 56 A.2d 210, 358 Pa. 98—*Application of Devereux Foundation*, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403—*Appeal of Valicenti*, 148 A. 308, 298 Pa. 276.

Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A. 2d 292, 180 Pa.Super. 105—*Huebner v. Philadelphia Sav. Fund Soc.*, 192 A. 139, 127 Pa.Super. 28—*Appeal of Junge*, 89 Pa.Super. 543.

Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa.Dist. & Co. 686, 63 Montg.Co. 247—*Friedman v. Exley*, 57 Pa.Dist. & Co. 586.

Cella v. Schaefer, Com.Pl., 43 Del. Co. 23—*Appeal of McLaughlin*, Com.Pl., 42 Del.Co. 388—*Price v. Chester Zoning Board of Appeals*, Com.Pl., 30 Del.Co. 478—*In re Application for Certificate of Occupancy*, Com.Pl., 32 North.Co. 31—*Appeal of Continental Motor Sales*, Com.Pl., 31 North.Co. 250—*Appeal of Sucola*, Com.Pl., 92 Pittsb.Leg. J. 345—*Appeal of Walsh*, Com.Pl., 89 Pittsb.Leg.J. 383.

R.I.—Caldarone v. Zoning Bd. of Review of City of Providence, 137 A.2d 419—*Caccia v. Zoning Bd. of Review of City of Providence*, 113 A.2d 870—*D'Accioli v. Zoning Bd. of Review of City of Cranston*, 60 A.2d 707, 74 R.I. 327—*Kent v. Zoning Bd. of Review of Town of Barrington*, 58 A.2d 623, 74 R.I. 89.

S.C.—Hodge v. Pollock, 75 S.E.2d 752, 223 S.C. 342.

Wis.—State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison, 35 N.W.2d 312, 254 Wis. 42.

43 C.J. p. 354 note 61.

Peculiar condition or location of land

A hardship resulting from peculiar topography or condition of land or its particular location rendering it unsuitable for use permitted in zone wherein it lies may be hardship contemplated by city ordinance authorizing board of zoning appeals to vary application of regulations therein, where there are unnecessary hardships in way of carrying out strict letter of any provision thereof.

Conn.—Florilla v. Zoning Bd. of Appeals of City of Norwalk, 129 A.2d 619, 144 Conn. 275—*Talmadge v. Board of Zoning Appeals of City of New Haven*, 109 A.2d 253, 141 Conn. 639—*Plumb v. Board of Zoning Appeals of City of New Haven*, 108 A. 2d 899, 141 Conn. 595.

Adjacent dwellings similarly affected

Where factors and disadvantages asserted as unfavorable to use of a lot for construction of dwelling in conformity with zoning use restriction were not peculiar to particular lot, but adjacent dwellings were similarly affected, lot was not so uniquely circumstanced as is required for grant of a variance to a zoning regulation.

N.J.—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529.

48. *Del.—Application of Emmett S. Hickman Co.*, 108 A.2d 667, 10 Terry 13—*Searles v. Darling*, 83 A.2d 96, 7 Terry 263.

Md.—Gleason v. Keswick Imp. Ass'n, 78 A.2d 164, 197 Md. 46—*Easter v. Mayor and City Council of Baltimore*, 73 A.2d 491, 195 Md. 395.

Structures on two lots involved

Where applicant sought variance to zoning ordinance so that he could erect garage on one lot to serve applicant's apartment house on another lot, hardship asserted related to apartment house property, and not property for which variance was sought, and variance could not be granted.

Del.—Searles v. Darling, 83 A.2d 96, 7 Terry 263.

49. *Conn.—Talmadge v. Board of Housing Appeals of City of New Haven*, 109 A.2d 253, 141 Conn. 639—*Plumb v. Board of Zoning Appeals of City of New Haven*, 108 A.2d 899, 141 Conn. 595—*Stavola v. Bulkeley*, 56 A.2d 645, 134 Conn. 186.

Md.—Marino v. City of Baltimore, 137 A.2d 193, 215 Md. 206—*Gleason v. Keswick Imp. Ass'n*, 78 A.2d 164, 197 Md. 46.

Mass.—Brackett v. Board of Appeal of Building Department of City of Boston, 39 N.E.2d 956, 311 Mass. 52.

N.J.—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529—*Leiman v. Board of Adjustment of Cranford Tp., Union County*, 88 A.2d 337, 9 N.J. 336—*Home Builders Ass'n of Northern N. J. v. Borough of Paramus*, 81 A. 2d 753, 7 N.J. 335—*Stolz v. Ellenstein*, 81 A.2d 476, 7 N.J. 291—*Lumund v. Board of Adjustment of Borough of Rutherford*, 73 A.2d 545, 4 N.J. 577—*Ramsbotham v. Board of Public Works of City of Paterson*, 65 A.2d 748, 2 N.J. 131.

Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161—*Tzeses v. Board of Trustees of Village of South Orange*, 91 A.2d 588, 22 N.J.Super. 45—*Beck v. Board of Adjustment of City of East Orange, Essex County*, 83 A.2d 720, 15 N.J.Super. 554—*Scerbo v. Board of Adjustment of Jersey City*, 67 A.2d 472, 4 N.J.Super. 409—*Protomastro v. Board of Adjustment of City of Hoboken*, 67 A.2d 231, 3 N.J.Super. 539, reversed on other grounds 70 A.2d 873, 3 N.J. 494—*Ackerman v. Board of Com'rs of Town of Belleville*, 62 A.2d 476, 1 N.J.Super. 69.

Scaduto v. Town of Bloomfield, 20 A.2d 649, 127 N.J.Law 1—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J. Law 367.

N.Y.—Taxpayers' Ass'n of South East Oceanside v. Board of Zoning Appeals of Town of Hempstead,

which also apply to other properties in the same neighborhood, or to the whole neighborhood or district,⁵⁰ and the power of the board with respect to

variances cannot be extended so as to remedy hardship which, under the ordinance, is general throughout the zone and not confined to a particular piece

93 N.E.2d 645, 301 N.Y. 215—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673—Otto v. Steinhilber, 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1010—Levy v. Board of Standards and Appeals of City of New York, 196 N.E. 284, 267 N.Y. 347.

Miller v. Silver, 105 N.Y.S.2d 474, 278 App.Div. 962—Lathrop v. Feriolo, 93 N.Y.S.2d 568, 276 App.Div. 850—Ulmer Park Realty Co. v. City of New York, 45 N.Y.S.2d 527, 267 App.Div. 291, appeal denied 47 N.Y.S.2d 316, 267 App.Div. 879—Cargano v. Town Board of Town of Webster, 41 N.Y.S.2d 140, 265 App.Div. 686, affirmed 52 N.E.2d 592, 291 N.Y. 701—Henry v. Steers, Inc., v. Rembaugh, 20 N.Y.S.2d 72, 259 App.Div. 908, affirmed 29 N.E.2d 934, 284 N.Y. 621—People ex rel. Black v. Randall, 5 N.Y.S.2d 40, 254 App.Div. 310—People ex rel. Arverne Bay Const. Co. v. Murdock, 286 N.Y.S. 785, 247 App.Div. 889, affirmed 3 N.E.2d 457, 271 N.Y. 631.

Application of Graham, 165 N.Y.S.2d 154, 7 Misc.2d 34—North Titus Residential Ass'n of Irondequoit, N. Y. v. Board of Zoning Appeals of Town of Irondequoit, 127 N.Y.S.2d 502, 205 Misc. 518.

Syosset Holding Corp. v. Schlimm, 159 N.Y.S.2d 88, modified on other grounds, 164 N.Y.S.2d 890, 4 App.Div.2d 766.

Mosher v. Crowley, 110 N.Y.S.2d 626—Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.

Pa.—Appeal of Edwards, 140 A.2d 110, 392 Pa. 188—Moyerman v. Glanzberg, 138 A.2d 681, 391 Pa. 387—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254—Smolow v. City of Philadelphia Zoning Bd. of Adjustment, 137 A.2d 251, 391 Pa. 71—Appeal of Michener, 115 A.2d 367, 382 Pa. 401.

Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A.2d 292, 180 Pa.Super. 105.

McConaghy's v. Haverford Tp. Board of Adjustment Ordinance, Com.Pl., 31 Del.Co. 120—Appeal of Sloan, Com.Pl., 80 Del.Co. 555—Price v. Chester Zoning Board of

Appeals, Com.Pl., 30 Del.Co. 478—In re Zoning Bd., Herman Appeal, Com.Pl., 26 LeH.L.J. 362—Appeal of Jehovah's Witnesses, Co., 103 Pittsb.Leg.J. 489.

S.C.—*Corpus Juris Secundum* quoted in Application of Groves, 85 S.E.2d 708, 711, 226 S.C. 459.

"Economic distress is unavailing in a case of this kind where, for all that appears, it may be a burden commonly shared by other owners in the district."

Mass.—Real Properties v. Board of Appeal of Boston, 65 N.E.2d 199, 201, 319 Mass. 180.

Oppressiveness to applicant's property

In order to justify a variance, circumstances must be peculiarly oppressive to applicant's property.

Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 10 Terry 73—Searles v. Darling, 83 A.2d 96, 7 Terry 263.

Adaptability of property to permitted use

(1) Situation or condition of property is not to be deemed extraordinary and exceptional, or to impose undue hardship on owner within intentment of statute allowing granting of variances, if, viewed in setting of its environment, property may reasonably be adapted to a permitted use.

N.J.—Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161.

(2) Under statute permitting variance where, by reason of exceptional topographic conditions, application of zoning regulation would result in undue hardship, a situation or condition of a piece of property is not to be deemed extraordinary and exceptional and to impose undue hardship on owner if, viewed in setting of its environment, property may reasonably be adapted to a permitted use.

N.J.—Rexon v. Board of Adjustment of Borough of Haddonfield, 89 A.2d 233, 10 N.J. 1.

Changes in neighborhood which could support change in zoning ordinance do not necessarily support variance for benefit of one property owner therein.

Mass.—Reynolds v. Board of Appeal of Springfield, 140 N.E.2d 491, 335 Mass. 464.

Effect of amendment

Amendment of 1948 to statute authorizing municipal board of adjustment to grant a variance on ground of undue hardship did not obviate necessity of applicant showing that

his land is uniquely affected by ordinance.

N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577.

50. Md.—Gleason v. Keswick Imp. Ass'n, 78 A.2d 164, 197 Md. 46—Easter v. Mayor and City Council of Baltimore, 73 A.2d 491, 195 Md. 395.

N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577.

Tzses v. Board of Trustees of Village of South Orange, 91 A.2d 589, 22 N.J.Super. 45—Ackerman v. Board of Com'rs of Town of Belleville, 62 A.2d 476, 1 N.J.Super. 69.

N.Y.—Taxpayers' Ass'n of South East Oceanside v. Board of Zoning Appeals of Town of Hempstead, 93 N.E.2d 645, 301 N.Y. 215—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673. Lathrop v. Feriolo, 93 N.Y.S.2d 568, 276 App.Div. 850.

Pa.—Appeal of Edwards, 140 A.2d 110, 392 Pa. 188.

Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A.2d 292, 180 Pa.Super. 105.

Hinton v. Zoning Bd. of Adjustment, 88 Pa. Dist. & Co. 265.

Cella v. Schaefer, Com.Pl., 43 Del. Co. 23—Appeal of McLaughlin, Com.Pl. 42 Del.Co. 388—Appeal of Jehovah's Witnesses, Co., 103 Pittsb.Leg.J. 489.

Conditions rendering property unsuitable for residential use

An application for permission to put property zoned as residential to a nonconforming use is properly denied where conditions which render applicant's property unsuitable for residential use are general and not confined to such property, remedy being by revision of general regulation and not by granting special privilege of a variation to single owners.

N.J.—Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 554.

Lack of particular business in town

Zoning board of appeals had no power to grant variance solely on ground that the lack of type of business sought to be conducted worked a hardship on town as a whole.

Conn.—Finch v. Montanari, 124 A.2d 214, 143 Conn. 542.

of property.⁵¹ General hardship is relievable only by a revision of the general rule of the zoning ordinance, a local legislative process, or the judicial process,⁵² or by an attack on the constitutionality of the ordinance,⁵³ or a change in the regulation.⁵⁴

§ 292. — Self-Created Hardship; Prior Knowledge

Except for area restrictions, a variance will not be

granted for a self-created or self-inflicted hardship. Where property is purchased with knowledge of use restrictions thereon, a claim of variance on the ground of hardship will generally be denied or looked on with much disfavor.

Except for area restrictions,⁵⁵ a self-created or self-inflicted hardship may not be made the basis for a variance or for a claim thereof;⁵⁶ the hardship complained of must arise directly out of the application of the ordinance to circumstances or conditions

51. Md.—*Sugar v. North Baltimore Methodist Protestant Church*, 165 A. 703, 164 Md. 487.

N.J.—*Tzseses v. Board of Trustees of Village of South Orange*, 91 A.2d 588, 22 N.J.Super. 45.

N.Y.—*Clark v. Board of Zoning Appeals of Town of Hempstead*, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. *Clark*, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673—*Otto v. Steinhilber*, 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681—*Arverne Bay Const. Co. v. Thatcher*, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110—*Levy v. Board of Standards and Appeals of City of New York*, 196 N.E. 284, 267 N.Y. 347.

Ostrove v. Cohen, 58 N.Y.S.2d 900, 269 App.Div. 1054, appeal denied 60 N.Y.S. 295, 270 App.Div. 818. 431 Fifth Ave. Corp. v. *City of New York*, 55 N.Y.S.2d 203, 184 Misc. 1001, modified on other grounds 59 N.Y.S.2d 25, 270 App.Div. 241, affirmed 68 N.E.2d 877, 296 N.Y. 538—*Spadafora v. Ferguson*, 48 N.Y.S.2d 698, 182 Misc. 161, affirmed 50 N.Y.S.2d 408, 268 App.Div. 820.

Bronxville Associates v. Brady, 36 N.Y.S.2d 308—*Hilton v. Board of Appeals of City of Geneva*, 18 N.Y.S.2d 213.

N.C.—*Lee v. Board of Adjustment of City of Rocky Mount*, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—*McConaghy's v. Haverford Tp. Board of Adjustment Ordinance*, Com.Pl., 81 Del.Co. 120—*Appeal of Sloan*, Com.Pl., 30 Del.Co. 555—*Price v. Chester Zoning Board of Appeals*, Com.Pl., 80 Del.Co. 478—*Appeal of Felice*, Com.Pl., 66 Montg. Co. 62.

"No administrative body may destroy the general scheme of a zoning law by granting special exemption from hardships common to all."

N.Y.—*Clark v. Board of Zoning Appeals of Town of Hempstead*, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. *Clark*, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673.

52. N.J.—*Beirn v. Morris*, 103 A.2d 361, 14 N.J. 529—*Lumund v. Board of Adjustment of Borough of Rutherford*, 73 A.2d 545, 4 N.J. 577.

53. N.Y.—*Application of Graham*, 165 N.Y.S.2d 154, 7 Misc.2d 34.

54. N.J.—*Tzseses v. Board of Trustees of Village of South Orange*, 91 A.2d 588, 22 N.J.Super. 45—*Beck v. Board of Adjustment of City of East Orange, Essex County*, 83 A.2d 720, 15 N.J.Super. 554—*Lumund v. Board of Adjustment of Borough of Rutherford*, 69 A.2d 361, 6 N.J.Super. 474, affirmed 73 A.2d 545, 4 N.J. 577.

N.Y.—*Taxpayers' Ass'n of South East Oceanside v. Board of Zoning Appeals of Town of Hempstead*, 93 N.E.2d 645, 301 N.Y. 215—*Clark v. Board of Zoning Appeals of Town of Hempstead*, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. *Clark*, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673. *Miller v. Silver*, 105 N.Y.S.2d 474, 278 App.Div. 962.

Application of Graham, 165 N.Y.S.2d 154, 7 Misc.2d 34.

Mosher v. Crowley, 110 N.Y.S.2d 626.

Pa.—*Schaub v. Brentwood Borough Zoning Bd. of Adjustment*, 118 A.2d 292, 180 Pa.Super. 105.

Hinton v. Zoning Bd. of Adjustment, 88 Pa. Dist. & Co. 265.

55. N.Y.—293 North Broadway Corp. v. *Lange*, 126 N.Y.S.2d 374, 282 App.Div. 1056.

Feldman v. Nassau Shores Estates, Inc., 172 N.Y.S.2d 769—*Lehrer v. Michaelis*, 171 N.Y.S.2d 679.

56. Fla.—*Josephson v. Autrey*, 96 So.2d 784.

Minn.—*Newcomb v. Teske*, 30 N.W.2d 354, 225 Minn. 223.

N.J.—*Ranney v. Istituto Pontificio Delle Maestre Filippini*, 119 A.2d 142, 20 N.J. 189—*Cobble Close Farm v. Board of Adjustment of Middletown Tp.*, 92 A.2d 4, 10 N.J. 442.

Deer-Glen Estates v. Board of Adjustment and Appeal of Borough of Fort Lee, 121 A.2d 26, 39 N.J.Super. 380—*Peterson v. Board of Adjustment of Town of Mont-*

clair, 73 A.2d 69, 7 N.J.Super. 282. N.Y.—*Thomas v. Board of Standards and Appeals of City of New York*, 33 N.Y.S.2d 219, 263 App.Div. 352, reversed on other grounds 48 N.E.2d 284, 290 N.Y. 109.

Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

Lehrer v. Michaelis, 171 N.Y.S.2d 679—*Cunningham v. Planning Bd. and Bd. of Appeals of Town of Brighton*, 157 N.Y.S.2d 698, modified on other grounds, 164 N.Y.S.2d 601, 4 A.D.2d 313—*Hepner v. Zoning Bd. of Appeals of City of Mt. Vernon*, 152 N.Y.S.2d 984.

Pa.—*Appeal of Hood*, 6 Pa. Dist. & Co.2d 275, 72 Montg.Co. 12.

Schmalz v. Buckingham Tp. Bd. of Adjustment, Com.Pl., 6 Bucks Co. 285, reversed on other grounds 132 A.2d 233, 389 Pa. 295—*Sturm & Co. v. Zoning Bd. of Adjustment*, Com.Pl., 5 Bucks Co. 193—*Appeal of McLaughlin*, Com.Pl., 42 Del.Co. 388.

R.I.—*Caccia v. Zoning Bd. of Review of City of Providence*, 113 A.2d 870.

Hardship deliberately or ignorantly incurred

Self-created or self-inflicted hardship, deliberately or ignorantly incurred, affords no basis for special treatment under zoning regulations. N.Y.—*Sherwood Realty Corp. v. Feriolo*, 82 N.Y.S.2d 505, 193 Misc. 194. *Stevens v. Connor*, 120 N.Y.S. 345.

Reckless conduct

Difficulties and hardships for which a zoning variance will be granted do not include those occasioned solely by reckless conduct of him who seeks variation. Conn.—*Misuk v. Zoning Bd. of Appeals of City of Meriden*, 86 A.2d 180, 138 Conn. 477.

One who has continued construction of building after it has been seriously questioned whether plan of construction complies with zoning ordinance cannot ordinarily secure a variance on basis of his self-inflicted hardship.

Pa.—*Kovacs v. Board of Adjustment of Ross Tp.*, 95 A.2d 350, 173 Pa. Super. 66.

Construction too near lot lines

Where building inspector refused certificate of occupancy on ground that building was constructed too

beyond the control of the party involved.⁵⁷ So, a hardship which has been willfully and intentionally created does not justify the grant of a variance.⁵⁸

Prior knowledge of existing zoning restrictions has been held a material element in determining the existence of hardship,⁵⁹ although not conclusive.⁶⁰ Under other authority, the question whether an applicant is entitled to a variance because of the hard-

ship flowing from a literal application of the terms of the ordinance is in no way dependent on his knowledge or lack of knowledge of the existence of zoning restrictions affecting the land.⁶¹

So, one who purchases property with knowledge of use restrictions thereon will generally not be permitted to claim special or unnecessary hardship,⁶² although there is authority to the contrary effect.⁶³

near lot lines, hardship resulting was, under circumstances, self-imposed or self-created, and not one imposed by zoning ordinance, as contemplated by statutory provision authorizing variance.

N.J.—Deer-Glen Estates v. Board of Adjustment and Appeal of Borough of Fort Lee, 121 A.2d 26, 39 N.J.Super. 380.

Conversion to prohibited use

One who buys a property which is at the time, devoted to a permissible use, cannot create a hardship for himself by attempting to convert it to another use which he knew at the time of his purchase was not allowed in its existing condition.

Pa.—Brodsky v. McShain, 71 Pa. Dist. & Co. 595.

Rule of self-imposed hardship was inapplicable to an area restriction, and therefore, determination of zoning board of appeals allowing variance from area restriction in its zoning ordinance was proper, notwithstanding fact that applicant for variance obtained title to his premises subsequent to adoption of zoning ordinance in question.

N.Y.—Gapinski v. Zoning Bd. of Appeals of Town of Cheektowaga, 162 N.Y.S.2d 945, 3 A.D.2d 976, appeal dismissed 145 N.E.2d 878, 3 N.Y. 2d 920, 167 N.Y.S.2d 936.

57. Conn.—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433.

N.J.—Deer-Glen Estates v. Board of Adjustment and Appeal of Borough of Fort Lee, 121 A.2d 26, 39 N.J.Super. 380.

58. Pa.—Moyerman v. Glanzberg, 138 A.2d 681, 391 Pa. 387.

Baronoff v. Zoning Bd. of Adjustment, Com.Pl., 4 Bucks Co. 277, reversed on other grounds 122 A. 2d 65, 385 Pa. 110.

59. N.J.—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577.

Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161.

Belief that use would be valid

Where landowners knew of zoning plan when they constructed their garage, their ostensible belief that contemplated use thereof would not be violative of zoning regulations

could not be elevated to dignity of proof of special reasons for grant of variance, including alleged undue hardship in legal sense.

N.J.—Dolan v. De Capua, 109 A.2d 615, 16 N.J. 599.

60. N.J.—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577.

Escape clause

Fact that petitioner seeking a variance purchased property under an agreement of sale containing an escape clause in event that proposed use was disallowed did not justify disallowance of variance, since purchaser stood in same position as legal owner in seeking variance.

Pa.—O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901, 384 Pa. 379.

61. R.I.—Denton v. Zoning Bd. of Review of City of Warwick, 133 A. 2d 718.

62. Conn.—Spalding v. Board of Zoning Appeals of City of New Haven, 137 A.2d 755, 144 Conn. 719.

N.Y.—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 678.

O'Brien Transfer & Storage Co. v. Incorporated Village of Great Neck, 152 N.Y.S.2d 588, 2 A.D.2d 690—293 North Broadway Corp. v. Lange, 126 N.Y.S.2d 374, 282 App. Div. 1056—Long Island Lighting Co. v. Incorporated Village of East Rockaway, 110 N.Y.S.2d 884, 279 App.Div. 926, reargument and appeal denied 113 N.Y.S.2d 241, 279 App.Div. 1023, affirmed 110 N.E.2d 743, 304 N.Y. 932, reargument denied 112 N.E.2d 851, 305 N.Y. 738.

North Titus Residential Ass'n of Irondequoit, N. Y. v. Board of Zoning Appeals of Town of Irondequoit, 127 N.Y.S.2d 502, 205 Misc. 518—Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park, 102 N.Y.S.2d 81, 198 Misc. 932, affirmed 103 N.Y.S.2d 831, 278 App.Div. 706.

Cunningham v. Planning Bd. and Bd. of Appeals of Town of Brighton, 157 N.Y.S.2d 698, modified on

other grounds 164 N.Y.S.2d 601, 4 A.D.2d 313—Hepner v. Zoning Bd. of Appeals of City of Mt. Vernon, 152 N.Y.S.2d 984—Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y. S.2d 112, 282 App.Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App. Div. 958, and appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493—Application of Wender, 89 N.Y.S.2d 41.

Pa.—Appeal of Michener, Com.Pl., 41 Del.Co. 208, affirmed 115 A.2d 367, 382 Pa. 401—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85—Application of Cities Service Oil Co., Co., 104 Pittsb.Leg.J. 201.

"One who acquires property intending to circumvent the use restrictions of a zoning ordinance does so at his financial peril."

Pa.—Appeal of Edwards, 140 A.2d 110, 113, 392 Pa. 188.

Intention to apply for variance

(1) Where one purchases realty with intention to apply for variance, he cannot contend that restrictions cause him such peculiar hardships that entitles him to special privileges which he seeks.

Md.—Gleason v. Keswick Imp. Ass'n, 78 A.2d 164, 197 Md. 46.

(2) This is universally recognized rule.

Ky.—Arrow Transp. Co. v. Planning and Zoning Commission of City of Paducah and Municipal Area, McCracken County, 299 S.W.2d 95.

Motive of landowners, who acquired property fully cognizant of use restrictions, to make a more profitable use of lands than conformance to use and regulation would permit, in order to serve their own private business and interests at time, was not an adequate ground for a variance.

N.J.—Beirn v. Morris, 103 A.2d 861, 14 N.J. 529.

63. R.I.—School Committee of City of Pawtucket v. Zoning Bd. of Review of City of Pawtucket, 133 A. 2d 734.

Area restriction

Rule does not apply to a variance of an area restriction.

N.Y.—293 North Broadway Corp. v. Lange, 126 N.Y.S.2d 374, 282 App. Div. 1056.

Such a purchase is not conclusive in determining the existence of a hardship,⁶⁴ but such knowledge is a material element, or a circumstance, to be considered,⁶⁵ and weighs heavily against the claim.⁶⁶ Another view is that an application by such a purchaser for a variance is not altogether foreclosed, but is looked on with much disfavor.⁶⁷

§ 293. — — Single Owner's Profit or Disadvantage

While they are elements which may be considered,

Feldman v. Nassau Shores Estates, Inc., 172 N.Y.S.2d 769.

Use of contiguous property

Doctrine did not apply where intervenor seeking a variance was engaged in lawful use of property contiguous to subject land prior to acquisition thereof and where he was compelled, by limitation of that contiguous land and because of its location in a residential district, to seek a way out of its plight occasioned by such limitations.

N.Y.—Bobrowski v. Feriolo, 153 N.Y.S.2d 157, 2 A.D.2d 708.

64. N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442.

Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148—Tzesses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J.Super. 45.

65. N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529.

Tzesses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J.Super. 45.

Subdivision of property

Fact that property owner, who was an attorney, had prior knowledge of existing zoning ordinance which would make it impossible for him to subdivide property which he purchased, to permit erection of two homes, was material element to be considered in determining existence of hardship on later application for variance, but such prior knowledge was not conclusive.

N.J.—Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148.

66. N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442.

67. Del.—Searles v. Darling, 83 A.2d 96, 7 Terry 263.

Evaluating extent of injury

Fact that a landowner acquires

property after zoning ordinance is in full force and effect, although not precluding him from attacking validity of such ordinance, will weigh heavily against him in evaluating extent of injury to his property.

U.S.—Kroeger v. Stahl, C.A.N.J., 248 F.2d 121.

Hardship held shown

(1) Generally.

N.J.—Roberts v. Board of Adjustment of Borough of Fort Lee, 61 A.2d 896, 1 N.J.Super. 29.

(2) Where, in hands of its then owner at time of adoption of new zoning restrictions, lot, which could not comply with the new frontage restrictions adopted, was entitled to variance on ground of undue hardship, plaintiffs who subsequently purchased lot, increased frontage, and, in good faith, severed lot from adjoining land, would be entitled to a variance, but building permit should not issue in absence of showing that construction would not adversely affect municipality's rights in drainage easement.

N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94.

Owners not estopped to obtain variance

Owners of land accessible from public street only by means of passageway thirty-four feet wide were not estopped to obtain a variance to permit its practical and economic use by reason of fact that they purchased property subject to restrictions of zoning ordinance preventing such use, where such property was detached from land abutting on public street and came into separate ownership before adoption of ordinance, at a time when use for which variance was sought would have been permissible under then applicable zoning ordinance.

N.J.—Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J.Law 473.

68. Conn.—First Nat. Bank & Trust Co. of Port Chester, N. Y., v. Zoning Board of Appeals of Greenwich, 10 A.2d 691, 126 Conn. 228.

Mass.—Phillips v. Board of Appeals of Building Department of City of

Springfield, 190 N.E. 601, 286 Mass. 469.

Although it is an element in the situation which is entitled to fair and careful consideration,⁶⁸ mere disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, ordinarily does not warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship,⁶⁹ and

Springfield, 190 N.E. 601, 286 Mass. 469.

S.C.—Corpus juris secundum quoted in Application of Groves, 85 S.E.2d 708, 710, 226 S.C. 459.

69. Conn.—Culinary Institute of America v. Board of Zoning Appeals of City of New Haven, 121 A.2d 637, 143 Conn. 257—Libby v. Board of Zoning Appeals of City of New Haven, 118 A.2d 894, 143 Conn. 46—Talmadge v. Board of Housing Appeals of City of New Haven, 109 A.2d 253, 141 Conn. 639—Plumb v. Board of Zoning Appeals of City of New Haven, 108 A.2d 899, 141 Conn. 599—Rafala v. Zoning Bd. of Appeals of City of Hartford, 62 A.2d 337, 135 Conn. 142—Delaney v. Zoning Bd. of Appeals of City of Hartford, 56 A.2d 647, 134 Conn. 240—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186—Devaney v. Board of Zoning Appeals of City of New Haven, 45 A.2d 828, 132 Conn. 537—Benson v. Zoning Board of Appeals of City of Hartford, 27 A.2d 389, 129 Conn. 280—First Nat. Bank & Trust Co. of Port Chester, N. Y., v. Zoning Board of Appeals of Greenwich, 10 A.2d 691, 126 Conn. 228—Levine v. Board of Adjustment of City of New Britain, 7 A.2d 222, 125 Conn. 478—Grady v. Katz, 1 A.2d 137, 124 Conn. 525—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449—Comley v. Boyle, 162 A. 26, 115 Conn. 406—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 114 Conn. 15.

Mass.—Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198, 334 Mass. 446—Real Properties v. Board of Appeal of Boston, 65 N.E. 2d 199, 319 Mass. 180—Phillips v. Board of Appeals of Building Department of City of Springfield, 190 N.E. 601, 286 Mass. 469—Prusik v. Board of Appeal of Building Department of City of Boston, 160 N. E. 312, 262 Mass. 451.

N.H.—St. Onge v. City of Concord, 63 A.2d 221, 95 N.H. 306.

N.J.—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

Oliva v. City of Garfield, 60 A. 2d 628, 137 N.J.Law 475, affirmed 62 A.2d 673, 1 N.J. 184—Siebold

it is not sufficient to show that the applicant will be inconvenienced if the variance is not granted.⁷⁰ Although the fact is an element entitled to consideration,⁷¹ a variance is not warranted on the ground

that the owner would find it more profitable or convenient to put his property to a nonconforming or prohibited use;⁷² variances are not granted on the

- v. Mayfield, 57 A.2d 248, 136 N.J. Law 512—Scaduto v. Town of Bloomfield, 20 A.2d 649, 127 N.J. Law 1—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J. Law 135, affirmed 15 A.2d 598, 125 N.J. Law 367.
- N.Y.—Young Women's Hebrew Ass'n v. Board of Standards and Appeals of City of New York, 194 N.E. 751, 266 N.Y. 270, reargument denied 195 N.E. 376, 266 N.Y. 672, appeal dismissed *Gelkam Realty Corporation v. Young Women's Hebrew Ass'n*, 56 S.Ct. 109, 296 U.S. 537, 80 L.Ed. 382.
- Seinfeld v. Murdock, 20 N.Y.S.2d 464, 259 App.Div. 694, reargument denied 21 N.Y.S.2d 610, 259 App. Div. 1074, affirmed 34 N.E.2d 498, 285 N.Y. 718—Aberdeen Garage v. Murdock, 15 N.Y.S.2d 66, 257 App. Div. 645, affirmed 28 N.E.2d 45, 283 N.Y. 650—Joyce v. Dobson, 8 N.Y. S.2d 768, 255 App.Div. 348—Tenian Realty Corporation v. Board of Standards and Appeals of City of New York, 296 N.Y.S. 740, 251 App. Div. 811, affirmed 12 N.E.2d 592, 276 N.Y. 594.
- Sherwood Realty Corp. v. Feriolla, 82 N.Y.S.2d 505, 193 Misc. 194.
- Reisberg v. Board of Standards and Appeals of New York City, 81 N.Y.S.2d 511—Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.
- Okl.—American Oil & Refining Co. v. Beveridge, 58 P.2d 337, 177 Okl. 203.
- Pa.—Pincus v. Power, 101 A.2d 914, 376 Pa. 175.
- Cline v. Nether Providence Tp. Bd. of Adjustment, Com.Pl., 33 Del. Co. 293—In re Radnor Tp. Zoning Ordinance, Com.Pl., 31 Del.Co. 330—Price v. Chester Zoning Board of Appeals, Com.Pl., 30 Del.Co. 478—Appeal of Continental Motor Sales, Com.Pl., 31 North.Co. 250.
- R.I.—D'Aochioli v. Zoning Bd. of Review of City of Cranston, 60 A.2d 707, 74 R.I. 327.
- S.C.—*Corpus juris secundum* quoted in Application of Groves, 85 S.E.2d 708, 710, 226 S.C. 459.
70. La.—State ex rel. Latter v. Board of Zoning Adjustments of City of New Orleans, App., 94 So.2d 138.
- Md.—Carney v. City of Baltimore, 93 A.2d 74, 201 Md. 130.
- Handling business with greater ease**
Fact that proposed building, which was enlargement of present building, would enable applicant for building permit to handle present business with greater ease, did not require that board of zoning appeals grant a variance on ground of hardship.
- N.Y.—McNeice v. Richter, 88 N.Y.S. 2d 781.
71. S.C.—Application of Groves, 85 S.E.2d 708, 226 S.C. 459.
72. Ala.—Moore v. Pettus, 71 So.2d 814, 260 Ala. 616.
- Ill.—Welton v. Hamilton, 176 N.E. 333, 344 Ill. 82.
- Md.—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294—Gleason v. Keswick Imp. Ass'n, 78 A.2d 164, 197 Md. 46—Easter v. Mayor and City Council of Baltimore, 73 A.2d 491, 195 Md. 395.
- Mass.—Brackett v. Board of Appeal of Building Department of City of Boston, 89 N.E.2d 956, 311 Mass. 52—Amoro v. Board of Appeal of City of Gloucester, 186 N.E. 61, 283 Mass. 45—Prusik v. Board of Appeal of Building Department of City of Boston, 160 N.E. 312, 262 Mass. 451.
- Mo.—Wilson v. Douglas, App., 297 S.W.2d 588.
- N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529—Home Builders Ass'n of Northern N. J. v. Borough of Paramus, 81 A.2d 753, 7 N.J. 335—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291—Lumund v. Board of Adjustment of Borough of Rutherford, 73 A.2d 545, 4 N.J. 577—Protomastro v. Board of Adjustment of City of Hoboken, 70 A.2d 873, 3 N.J. 494—Ramsbotham v. Board of Public Works of City of Paterson, 65 A.2d 748, 2 N.J. 131—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.
- Barbarisi v. Board of Adjustment, 103 A.2d 164, 30 N.J. Super. 11—Prye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J. Super. 161—Tzses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J. Super. 45—Scerbo v. Board of Adjustment of Jersey City, 67 A.2d 472, 4 N.J. Super. 409—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N.J. Super. 607—Ackerman v. Board of Com'rs of Town of Belleville, 62 A.2d 476, 1 N.J. Super. 69.
- Oliva v. City of Garfield, 60 A.2d 628, 137 N.J. Law 475, affirmed 62 A.2d 673, 1 N.J. 184—Garden View Homes v. Board of Adjustment of City of Passaic, 57 A.2d 677, 137 N.J. Law 44—Albright v. Johnson, 50 A.2d 399, 135 N.J. Law 70—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J. Law 95—
- Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J. Law 190—Scaduto v. Town of Bloomfield, 20 A.2d 649, 127 N.J. Law 1—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J. Law 135, affirmed 15 A.2d 598, 125 N.J. Law 367.
- N.Y.—Otto v. Steinhilber, 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681.
- Henry Steers, Inc., v. Rembaugh, 20 N.Y.S.2d 72, 259 App.Div. 908, affirmed 29 N.E.2d 934, 284 N.Y. 621—Joyce v. Dobson, 8 N.Y.S.2d 768, 255 App.Div. 348—Barrett v. Bedell, 7 N.Y.S.2d 937, 255 App.Div. 874—People ex rel. Black v. Randall, 5 N.Y.S.2d 40, 254 App.Div. 310—People ex rel. Santora v. Kreuter, 1 N.Y.S.2d 879, 253 App.Div. 898—New York & Richmond Gas Co. v. Connell, 272 N.Y.S. 915, 242 App.Div. 691—Falvo v. Kerner, 225 N.Y.S. 747, 222 App.Div. 289—Stillman v. Board of Standards and Appeals of City of New York, 225 N.Y.S. 402, 222 App.Div. 19, affirmed 161 N.E. 197, 247 N.Y. 599, motion denied 162 N.E. 537, 248 N.Y. 591.
- Sherwood Realty Corp. v. Feriolla, 82 N.Y.S.2d 505, 193 Misc. 194—Pounds v. Walsh, 223 N.Y.S. 459, 129 Misc. 676.
- Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.
- N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.
- Pa.—Appeal of Edwards, 140 A.2d 110, 392 Pa. 188—Appeal of Mutual Supply Co., 77 A.2d 612, 366 Pa. 424—Application for Certificate of Occupancy 500 Paximosa Ave., Easton, 66 A.2d 225, 362 Pa. 116.
- Yancale v. Philadelphia Zoning Bd. of Adjustment, 68 Pa. Dist. & Co. 233.
- Cline v. Nether Providence Tp. Bd. of Adjustment, Com.Pl., 33 Del. Co. 293—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85—Dachino v. Plymouth Tp., Com.Pl., 70 Montg.Co. 198—In re Application for Certificate of Occupancy, Com.Pl., 32 North.Co. 31—Appeal of Continental Motor Sales, Com.Pl., 31 North. Co. 250—Application of Cities Service Oil Co., Co., 104 Pittsb.Leg.J. 201—Appeal of Valicenti, Com.Pl., 94 Pittsb.Leg.J. 439.
- R.I.—Berard v. Zoning Bd. of Review of Town of Barrington, 139 A.2d 867—Fiske v. Zoning Bd. of Review of Town of East Providence, 50 A.2d 65, 72 R.I. 217, rehearing denied 50 A.2d 779, 72 R.I. 217,

simple claim of economic advantage⁷³ or economic loss.⁷⁴

So, financial considerations alone cannot govern.⁷⁵ Mere financial hardship, or loss,⁷⁶ or an op-

—Strauss v. Zoning Bd. of Review of City of Warwick, 48 A.2d 349, 72 R.L. 107.

S.C.—Corpus Juris Secundum quoted in Application of Groves, 85 S.E.2d 708, 711, 226 S.C. 459.

Reason for rule

Statute aims to conserve and not enhance property values.

N.J.—Albright v. Johnson, 50 A.2d 399, 135 N.J.Law 70.

Welfare of a community will not be sacrificed for purpose of permitting most profitable use of premises. N.J.—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64.

Enlargement of nonconforming use

Fact that enlargement of nonconforming use would be more profitable to plaintiff and no more harmful to neighborhood does not require allowance of a variance.

N.J.—Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp., 84 A.2d 18, 16 N.J.Super. 113.

Rental to "choice" tenant

N.Y.—Ryback v. Murdock, 148 N.Y.S. 2d 322, 1 A.D.2d 132.

Gain from new business in residential district

Mass.—Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 86 N.E.2d 906, 324 Mass. 433.

Use of house as funeral home

Fact that use of twenty-two-room dwelling house as a funeral home might be more profitable to owner, than use as a rooming house was not controlling on application of owner for a variance.

N.J.—Marrocco v. Board of Adjustment of City of Passaic, 68 A.2d 470, 5 N.J.Super. 94.

Division into two plots

N.J.—Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148.

Difficulty in selling; expense of maintenance

(1) A zoning ordinance does not necessarily permit each owner to make maximum use of his property, and even though it might become more difficult for an owner to sell property because of neighborhood changes, that would not furnish ground for grant of a variance.

Pa.—Appeal of Michener, 115 A.2d 367, 382 Pa. 401.

(2) Mere fact that it was expensive to maintain as a residence a house located in a residential zone, and that it would be difficult to sell such house, was not sufficient ground for granting a variance, since it merely established that it would be more profitable to put property to a commercial use.

N.J.—Second Reformed Church v. Board of Adjustment of Borough

of Freehold, 104 A.2d 703, 30 N.J. Super. 338.

73. Del.—Searles v. Darling, 83 A.2d 96, 7 Terry 263.

Pa.—Appeal of Edwards, 140 A.2d 110, 392 Pa. 188.

In re Application for Certificate of Occupancy, Com.Pl., 32 North. Co. 31.

"Economic advantage alone does not justify a variance."

Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 674, 10 Terry 13.

Injury from business competition

With respect to right to variance for zoning regulations, injury from business competition is generally considered *damnum absque injuria*. Mass.—Circle Lounge & Grille v. Board of Appeal of Boston, 86 N.E.2d 920, 324 Mass. 427.

Increase of business

(1) Generally.

La.—State ex rel. Latter v. Board of Zoning Adjustments of City of New Orleans, App., 94 So.2d 138.

(2) A landowner in a strictly residential district who is permitted to operate a nonconforming business may not thereafter increase his business and then assert hardship as basis of variance permitting installation of new facilities required as result of increased business.

N.J.—Gerkin v. Village of Ridgewood, 86 A.2d 275, 17 N.J.Super. 472.

74. N.Y.—Sherwood Realty Corp. v. Feriola, 82 N.Y.S.2d 505, 193 Misc. 194.

Pa.—Hinton v. Zoning Bd. of Adjustment, 88 Pa. Dist. & Co. 265.

Not decisive factor

Conn.—Longo v. Board of Zoning Appeals of Town of Milford, 122 A.2d 784, 143 Conn. 395—Culinary Institute of America v. Board of Zoning Appeals of City of New Haven, 121 A.2d 637, 143 Conn. 257—Libby v. Board of Zoning Appeals of City of New Haven, 118 A.2d 894, 143 Conn. 46.

Deprivation of employment

Where light industrial activity was permitted in building in residential zone on ground of nonconforming use, granting of variance to permit conduct of heavy industrial machine shop could not be justified on ground that two hundred or more persons would be deprived of employment if variance were denied.

N.J.—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

Reduction in attractiveness or value is not sufficient to establish showing of unnecessary hardship required

to sustain application for a variance or exception.

N.J.—Oliva v. City of Garfield, 60 A.2d 628, 137 N.J.Law 475, affirmed 62 A.2d 673, 1 N.J. 184.

75. Conn.—Piccirillo v. Board of Appeals on Zoning of City of Bridgeport, 90 A.2d 647, 130 Conn. 116.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—Appeal of Mutual Supply Co., 77 A.2d 612, 366 Pa. 424—Application for Certificate of Occupancy, 500 Paxinosa Ave., Easton, 66 A.2d 225, 362 Pa. 116.

Hinton v. Zoning Bd. of Adjustment, 88 Pa. Dist. & Co. 265.

"Where the basis upon which the claim of hardship rests is financial in nature, there rarely can be justification for a variance."

Conn.—Celentano v. Zoning Bd. of Appeals of City of Hartford, 78 A.2d 101, 102, 136 Conn. 584.

"Financial consideration alone . . . cannot govern the action of the board. They are bound to take a broader view than the apparent monetary distress of the owner. Conn.—Torello v. Board of Zoning Otherwise, there would be no occasion for any zoning law."

Appeals of New Haven, 16 A.2d 591, 593, 127 Conn. 307—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 275, 114 Conn. 15.

Avoidance of expenditure

Conn.—Celentano v. Zoning Bd. of Appeals of City of Hartford, 78 A.2d 101, 136 Conn. 584.

Obligation to pay rent

Where light industrial activity was permitted in building in residential area on ground of nonconforming use, obligation under lease to pay rent regardless of whether tenant occupied premises could not justify variance allowing tenant to conduct heavy manufacturing at that location.

N.J.—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

76. Conn.—Spalding v. Board of Zoning Appeals of City of New Haven, 137 A.2d 755, 144 Conn. 719—Paul v. Board of Zoning Appeals of City of New Haven, 110 A.2d 619, 142 Conn. 40—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

Mass.—Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198, 334 Mass. 446—Tanzilli v. Cassa, 85 N.E.2d 220, 324 Mass. 113. Mo.—Bartholomew v. Board of Zon-

portunity to get an increased return from the property,⁷⁷ is not a sufficient reason for granting a variance or exception; but financial advantage, although not controlling, is not entirely irrelevant,⁷⁸ and financial loss is a factor to be considered.⁷⁹ The fact that an increase⁸⁰ or decrease⁸¹ in the value of the property will result from the grant or refusal of a variance will not, standing alone, constitute a sufficient hardship.

*The fact that the owner has incurred expenses in anticipation of a grant of a variance is not a controlling reason for the grant thereof.*⁸²

§ 294. — — Existence of Hardship in Particular Cases

Whether hardship exists is a question of fact; what constitutes unnecessary hardship depends on all the circumstances of each case.

Whether or not hardship exists is a question of fact;⁸³ what constitutes unnecessary hardship must depend on all the circumstances of each case⁸⁴ without any rights of prior owners tacked on.⁸⁵

In addition to matter in the preceding and following notes, particular decisions or circumstances

ing Adjustment, App., 307 S.W.2d 730.

N.H.—Mater v. City of Dover, 79 A.2d 844, 97 N.H. 13—St. Onge v. City of Concord, 68 A.2d 221, 95 N.H. 306.

N.J.—Ranney v. Istituto Pontificio Delle Maestre Filippini, 119 A.2d 142, 20 N.J. 189.

N.Y.—Rochester Transit Corp. v. Crowley, 131 N.Y.S.2d 493, 205 Misc. 933.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Pa.—Appeal of Edwards, 140 A.2d 110, 392 Pa. 188.

Hinton v. Zoning Bd. of Adjustment, 88 Pa. Dist. & Co. 265.

Appeal of Robinson, Com.Pl., 47 Luz.Leg.Reg. 51—Appeal of Continental Motor Sales, Com.Pl., 31 North.Co. 250.

The mere possibility of financial loss is not enough to warrant a variance.

Pa.—Frabotta v. Zoning Bd. of Adjustment, 6 Pa. Dist. & Co.2d 400, 14 Law.L.J. 134.

Sale of intoxicating liquors

Conn.—Lindy's Restaurant, Inc. v. Zoning Board of Appeals of City of Hartford, 124 A.2d 918, 143 Conn. 620.

Expenditure of money

(1) Reasons advanced for granting of variance, that property owner expended money in making improvements and therefore undue hardship would be imposed on him if he was not granted variance did not constitute special reasons contemplated by statute as basis for excusing non-compliance with ordinance.

N.J.—Keller v. Town of Westfield, 121 A.2d 419, 39 N.J.Super. 430.

(2) Evidence of expenses, undertaken by applicants for variance, in starting construction of building on their lot in violation of ordinance,

without first obtaining permission from town zoning board of review to extend their previous nonconforming use of lot, was not evidence of undue hardship required to support variance.

R.I.—Del Toro v. Zoning Bd. of Review of Town of Bristol, 107 A.2d 460, 82 R.I. 317.

(3) Expense of filling a depression to bring land to grade would not of itself necessarily amount to undue hardship such as would warrant grant of variance, or make impracticable proper use of such land within zone in which it is located.

R.I.—Cardin v. Zoning Bd. of Review of Town of North Providence, 104 A.2d 752, 81 R.I. 497—Taft v. Zoning Bd. of Review of City of Warwick, 71 A.2d 886, 76 R.I. 443.

Fact that owner can afford an illegal use, but not a conforming one, is not such a special reason as is contemplated by statute.

N.J.—Barbarisi v. Board of Adjustment, 103 A.2d 164, 30 N.J.Super. 11.

77. Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

78. Md.—Marino v. City of Baltimore, supra.

79. Conn.—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433.

Betterment of neighborhood

A board's discretion to permit a variance is not so circumscribed as to require a property owner to reconstruct building to a conforming use regardless of financial burden that would be incident thereto, especially where change sought is one from a nonconforming use to another more desirable nonconforming use that will not adversely affect, but will better, neighborhood.

Pa.—O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901, 384 Pa. 379.

80. Pa.—Moyerman v. Glanzberg, 138 A.2d 681, 391 Pa. 387—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254—Pincus v. Power, 101 A.2d 914, 376 Pa. 175.

Hewlett v. Zoning Bd. of Adjustment, 8 Pa. Dist. & Co. 75, 49 Mun.L.R. 57.

Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85.

81. Pa.—Moyerman v. Glanzberg, 138 A.2d 681, 391 Pa. 387—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254.

82. Ky.—Selligman v. Von Allmen Bros., 179 S.W.2d 207, 297 Ky. 121. N.J.—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J.Law 95.

Pa.—Giunta v. McLaughlin, 30 Pa. Dist. & Co. 644.

Appeal of Yarov, Com.Pl., 91 Pittsb.Leg.J. 391.

R.I.—Kent v. Zoning Bd. of Review of Town of Barrington, 63 A.2d 731, 75 R.I. 64.

83. Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.

Board of Zoning Appeals of City of Mishawaka v. School City of Mishawaka, App., 145 N.E.2d 302.

Ky.—Stout v. Jenkins, 268 S.W.2d 643.

84. N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

85. N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94.

in which hardship has been held to exist, so as to justify the grant of a variance or exception,⁸⁶ or in which such hardship has been held not to exist,⁸⁷ are set out in the notes.

86. Conn.—Goldreyer v. Board of Zoning Appeals of City of Bridgeport, 136 A.2d 789, 144 Conn. 641—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433—Heady v. Zoning Board of Appeals for Town of Milford, 94 A.2d 789, 139 Conn. 463.

Fla.—Troup v. Bird, 53 So.2d 717.

N.J.—Rodee v. Lee, 81 A.2d 517, 14 N.J.Super. 188—Roberts v. Board of Adjustment of Borough of Fort Lee, 61 A.2d 896, 1 N.J.Super. 29.

De Moss v. Borough of Wat-chung, 60 A.2d 890, 137 N.J.Law 503—Schaible v. Board of Adjust-ment, 49 A.2d 50, 134 N.J.Law 473.

N.Y.—North Am. Holding Corp. v. Murdock, 167 N.Y.S.2d 120, 9 Misc. 2d 632.

Crone v. Town of Brighton, 119 N.Y.S.2d 877.

Okl.—Appeal of Fred Jones Co., 220 P.2d 245, 203 Okl. 321.

Pa.—O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901, 384 Pa. 379—Appeal of Elkins Park Imp. Ass'n, 64 A.2d 783, 361 Pa. 322—Appeal of Crawford, 57 A.2d 862, 358 Pa. 636.

Drake v. Zoning Bd. of Adjust-ment, 65 Pa.Dist. & Co. 293.

Board of Adjustment of Susque-hanna Tp. v. Procasco, Com.Pl., 69 Dauph.Co. 204—Appeal of Zim-merman, Com.Pl., 44 Del.Co. 42—Bartholomew v. Aston Tp., Com.Pl., 44 Del.Co. 13—Appeal of Garbev Inc., from Bd. of Adjustment, Com. Pl., 42 Del.Co. 399, affirmed 123 A.2d 682, 385 Pa. 328—Application of Ross to Zoning Bd. of Adjustment of Marple Tp., Com.Pl., 42 Del.Co. 328—Dooling's Windy Hill, Inc. v. Zoning Bd. of Adjustment of Springfield Tp., Com.Pl., 38 Del.Co. 110, affirmed 89 A.2d 505, 371 Pa. 290—Root v. Zoning Bd. of Appeals of City of Erie, Com.Pl., 38 Erie Co. 212, affirmed 118 A.2d 297, 180 Pa. Super. 38—In re Zoning Bd., Her-man Appeal, Com.Pl., 26 Lehigh.L.J. 362—Rochelle v. Whitemarsh Tp., Com.Pl., 69 Montg.Co. 328—Cohen v. Cheltenham Tp., Com.Pl., 69 Montg.Co. 299—Appeal of Lind-quist, Com.Pl., 66 Montg.Co. 27, af-firmed 73 A.2d 378, 364 Pa. 561.

Alteration of house

Where character of district had already changed to such a degree that proposed alteration of house to convert it from a four-apartment building into a six-apartment building, would be consistent with conditions already existing, and owner could not operate building profitably unless converted to a six-apartment building, unnecessary hardship existed so as to authorize variance.

N.H.—St. Onge v. City of Concord, 63 A.2d 221, 95 N.H. 306.

Land rendered unavailable for public use

Where land was subdivided prior to effective date of zoning ordinance, operation of ordinance to render un-available for economic use the por-tion retained by subdivider would im-pose an unnecessary hardship, with-in statute providing for appropriate relief from unnecessary hardship.

Neb.—Peterson v. Vasak, 76 N.W.2d 420, 162 Neb. 498.

Squaring building

Where board of adjustment per-mitted owner of building to extend portion of front of building beyond setback requirement of building ordi-nance, subsequent refusal of board to permit extension of remainder of frontage, so as to square building, would result in unnecessary hard-ship to owner.

Okl.—Board of Adjustment of City of Tulsa v. Shore, 249 P.2d 1011, 207 Okl. 381.

87. Conn.—Misuk v. Zoning Bd. of Appeals of City of Meriden, 86 A.2d 180, 138 Conn. 477.

Ky.—Arrow Transp. Co. v. Planning and Zoning Commission of City of Paducah and Municipal Area, McCracken County, 299 S.W.2d 95.

Md.—Park Shopping Center, Inc. v. Lexington Park Theatre Co., 139 A.2d 843.

Mo.—Adams v. Board of Zoning Ad-justment of Kansas City, App., 241 S.W.2d 35.

N.J.—Leimann v. Board of Adjust-ment of Cranford Tp., Union Coun-ty, 88 A.2d 337, 9 N.J. 336—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291.

Hochberg v. Board of Adjust-ment of Borough of Freehold, 123 A.2d 53, 40 N.J.Super. 271—Her-man v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J.Super. 164—Gerkin v. Village of Ridge-wood, 86 A.2d 275, 17 N.J.Super. 472—Rodee v. Lee, 81 A.2d 517, 14 N.J.Super. 188—Peterson v. Board of Adjustment of Town of Mont-clair, 73 A.2d 69, 7 N.J.Super. 282—Wyndham Const. Co. v. Board of Adjustment of Teaneck Tp., 63 A.2d 707, 1 N.J.Super. 197.

Kindergan v. Board of Adjust-ment of Borough of River Edge, 59 A.2d 857, 137 N.J.Law 296—Berdan v. City of Paterson, 59 A.2d 659, 137 N.J.Law 286, af-firmed 62 A.2d 680, 1 N.J. 199—Visco v. City of Plainfield, 57 A.2d 490, 136 N.J.Law 659—Cortese v. Board of Adjustment of City of Summit, 56 A.2d 714, 136 N.J.Law

455, affirmed 61 A.2d 238, 137 N.J. Law 609.

N.Y.—Clark v. Board of Zoning Ap-peals of Town of Hempstead, 92 N.E.2d 903, 301 N.Y. 86, motion de-nied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zon-ing Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673.

Long Island Lighting Co. v. Incorporated Village of East Rock-away, 110 N.Y.S.2d 884, 279 App. Div. 926, reargument and appeal denied 113 N.Y.S.2d 241, 279 App. Div. 1023, affirmed 110 N.E.2d 743, 304 N.Y. 932, reargument denied 112 N.E.2d 851, 305 N.Y. 738.

Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295—North Titus Residential Ass'n of Ironde-quoit, N. Y. v. Board of Zoning Ap-peals of Town of Irondequoit, 127 N.Y.S.2d 502, 205 Misc. 518.

Teschner v. Town of Pittsford, 129 N.Y.S.2d 803, affirmed 137 N.Y. S.2d 640, 285 App.Div. 851—Ap-plication of Wender, 89 N.Y.S.2d 41.

Okl.—Application of Shadid, 238 P.2d 794, 205 Okl. 462.

Pa.—Appeal of Edwards, 140 A.2d 110, 392 Pa. 188—Richman v. Phila-delphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254.

Hinton v. Zoning Bd. of Adjust-ment, 88 Pa.Dist. & Co. 265—Bro-dsky v. McShain, 71 Pa.Dist. & Co. 595—Yancale v. Philadelphia Zon-ing Bd. of Adjustment, 68 Pa.Dist. & Co. 233—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa. Dist. & Co. 686, 63 Montg.Co. 247.

Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks Co. 131—Appeal of Carson College, Com.Pl., 71 Montg.Co. 300—Hampton v. Board of Adjustment of Borough of Nor-ristown, Com.Pl., 66 Montg.Co. 164.

R.I.—Berard v. Zoning Bd. of Review of Town of Barrington, 139 A.2d 887—Fogarty v. Zoning Bd. of Re-view of City of Warwick, 133 A.2d 641—R. D'Ordine & Son v. Zoning Bd. of Review of Town of East Providence, 90 A.2d 416, 79 R.I. 489.

Personal hardship because of physical infirmities is insufficient to justify grant of a variance.

R.I.—Winters v. Zoning Bd. of Re-view of City of Warwick, 96 A.2d 337, 80 R.I. 275.

Use of additional land

Fact that zoning ordinance which provided for minimum area, width, and depth of residential lots would force property owner, who had been unable to purchase extra footage from neighbors, to use more land than minimum restrictions prescribed

D. PROCEDURE

§ 295. In General

In order that a variance permit be valid, there must be substantial compliance with procedural requirements.

In order that a variance permit be valid, there must be substantial compliance with procedural requirements,⁸⁸ and failure to pursue the remedy of application for a variance or special exception will ordinarily bar the property owner from seeking the aid of the courts.⁸⁹ Failure to comply with directory provisions of the zoning ordinance that the application shall be accompanied by complete plans and description of the property, and by evidence of the ability and intention of the applicant to proceed with

actual construction within a designated time from the date of approval does not require that the variance be denied.⁹⁰

§ 296. Application

An application for a variance or exception is necessary and there must be a compliance with requirements as to the form and contents of the application.

Ordinarily, the board may not grant a variance or exception on its own motion.⁹¹ An application for such relief is necessary,⁹² and it is the duty of the board authorized to grant variances to entertain a proper application for such relief.⁹³ Unless the statute or ordinance so requires, application to a

for residential lots was not in itself a hardship which would warrant granting of a variance permitting subdivision of property to permit erection of two houses.

N.J.—*Bierce v. Gross*, 135 A.2d 561, 47 N.J.Super. 148.

Increase of business

(1) Under former statute authorizing variances where, due to exceptional conditions, strict application of ordinance would result in undue hardship, landowner in residential district who has been permitted to operate a nonconforming business may not thereafter increase his business and successfully assert hardship as basis of variance permitting installation of new facilities required as result of increase of business.

N.J.—*Hochberg v. Board of Adjustment of Borough of Freehold*, 123 A.2d 53, 40 N.J.Super. 271—*Gerkin v. Village of Ridgewood*, 86 A.2d 275, 17 N.J.Super. 472.

(2) Single owner's profit or disadvantage, see *supra* § 293.

Development purposes

A desire to make property useful for development purposes did not constitute hardship entitling landowner to variance authorizing construction of sand and gravel processing plant in a residential use district.

N.Y.—*Goldstein v. Board of Appeals of Town of Oyster Bay*, 102 N.Y.S. 2d 922.

Existence of nonconforming uses

Existence in a use district of nonconforming uses did not justify granting of a variance when circumstances did not show undue hardship, since one variation from a use cannot sustain or compel a second.

N.J.—*Beirn v. Morris*, 103 A.2d 361, 14 N.J. 529.

Building restriction

Fact that land in residential zone in city was burdened with a building restriction set up by deed in chain of title, did not constitute unneces-

sary hardship entitling owner of lot to variance, since building restriction was a burden voluntarily accepted by owner of lot when he purchased lot subject to building restriction.

N.J.—*Protomastro v. Board of Adjustment of City of Hoboken*, 70 A.2d 873, 3 N.J. 494.

Effect on light or air of adjoining properties

Fact that granting use variance will not deprive adjoining properties of light, air, or ventilation is not justification for granting such variance on grounds of unnecessary hardship.

N.Y.—*Ryback v. Murdock*, 148 N.Y.S. 2d 322, 1 A.D.2d 132.

Conditional agreement of sale

Where prospective purchasers of real estate have entered into an agreement of sale conditioned on their being able to obtain a permit from zoning board of adjustment for conducting their business on premises, refusal to grant such a permit does not place any unnecessary hardships on them.

Pa.—*McNichol v. Gallagher*, 66 Pa. Dist. & Co. 338.

Veterinary hospital

Purchase of a lot for prohibited purpose of building a veterinary hospital does not constitute a hardship, since a lot does not attain character of a veterinary hospital merely because of profession of its owner.

Pa.—*Sell v. Zoning Bd. of Adjustment*, Com.Pl., 25 Lehigh. 478.

88. Cal.—*Bartholomae Oil Corporation v. Seager*, 94 P.2d 614, 35 C.A. 2d 77.

Colo.—*Cross v. Bilett*, 221 P.2d 923, 122 Colo. 278.

Ill.—*East Maine Tp. Community Ass'n v. Pioneer Trust and Sav. Bank*, 145 N.E.2d 777, 15 Ill.App. 2d 290.

Md.—*Tyrie v. Baltimore County*, 137 A.2d 156, 215 Md. 135.

Mass.—*Sesnovich v. Board of Appeal of Boston*, 47 N.E.2d 943, 313 Mass. 393—*Kane v. Board of Appeals of City of Medford*, 173 N.E. 1, 273 Mass. 97.

N.J.—*Gaston v. Ackerman*, 142 A. 545, 6 N.J.Misc. 694.

N.Y.—*Hickox v. Griffin*, 79 N.Y.S.2d 193, 274 App.Div. 792, reversed on other grounds 83 N.E.2d 836, 298 N.Y. 365.

Eckerman v. Murdock, 91 N.Y.S. 2d 637, 195 Misc. 280, affirmed 94 N.Y.S.2d 557, 276 App.Div. 927.

Pa.—*Lukens v. Zoning Bd. of Adjustment of Ridley Tp., Del. County*, 80 A.2d 765, 367 Pa. 608—*Phillips v. Griffiths*, 77 A.2d 375, 366 Pa. 468.

Marrone v. Zoning Bd. of Adjustment, Com.Pl., 43 Del.Co. 166—*Yagiello v. Board of Zoning Appeals*, Com.Pl., 53 Lack.Jur. 21—*Staley v. Lower Merion Tp.*, Com.Pl., 69 Montg.Co. 407.

Tex.—*Prince v. W. H. Cothrum & Co.*, Civ.App., 227 S.W.2d 863.

Vt.—*Thompson v. Smith*, 129 A.2d 638, 119 Vt. 488.

89. Cal.—*Metcalf v. County of Los Angeles*, 148 P.2d 645, 24 C.2d 267.

City of San Mateo v. Hardy, 149 P.2d 307, 64 C.A.2d 794.

Md.—*Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore*, 60 A.2d 754, 191 Md. 249.

90. Cal.—*Miller v. Planning Commission of City of Torrance*, 292 P. 2d 278, 138 C.A.2d 598.

91. Ind.—*Civil City of Indianapolis v. Ostrom Realty & Construction Co.*, 176 N.E. 246, 95 Ind.App. 376.

92. Ill.—*East Maine Tp. Community Ass'n v. Pioneer Trust and Sav. Bank*, 145 N.E. 777, 15 Ill.App.2d 290.

Ind.—*Civil City of Indianapolis v. Ostrom Realty & Construction Co.*, 176 N.E. 246, 95 Ind.App. 376.

93. R.I.—*Heffernan v. Zoning Board of Review of City of Cranston*, 142 A. 479, 49 R.I. 283.

building inspector or similar administrative officer or body for a permit to do something prohibited by a regulation, and denial of such application, are not prerequisite to an application to a board of appeals or adjustment for a variance.⁹⁴

An application for a variance concedes, for the purposes of the application, the validity and constitutionality of the zoning ordinance⁹⁵ and also precludes the assertion of a claim of nonconforming use,⁹⁶ although there is some authority holding that an application for an exception from a zoning ordinance is an appropriate way to raise the question of the validity of a zoning ordinance as applied to a particular parcel of property.⁹⁷

Form and requisites. An application for a variance should comply with such requirements as may be imposed with respect to its form and contents;⁹⁸

but irregularities in the application have been held merely formal or waived, or at least not fatally prejudicial to the parties opposing the application where the board was unquestionably familiar with the circumstances and the parties were given, and took, advantage of the opportunity at a hearing to present evidence.⁹⁹ Although orderly practice requires that an application for a variance be in writing, the board may consider an oral application where the ordinance does not expressly require a written application.¹ Exact terminology is not required,² and an application which really calls for a special exception rather than a variance will be so treated, even though the language of the application does not use the term "special exception" or "variance,"³ or although the applicant misnames the relief sought as a "variance,"⁴ at least where the

94. N.J.—Schnell v. Township Committee of Ocean Tp., 198 A. 759, 120 N.J.Law 194.

95. N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y.S.2d 849—Vernon Park Realty v. City of Mount Vernon, 121 N.E. 2d 517, 307 N.Y. 493.

Jurisdiction of board as not extending to determination of validity of ordinance see supra § 282.

Attack on validity distinguished

Application for favor of a variance of restrictions of a zoning ordinance is distinguished from an attack on validity of ordinance in that former is an appeal primarily to discretion of board of standards and appeals conferred on it by ordinance and necessarily assumes validity of ordinance while a successful attack on validity of a zoning ordinance destroys foundation of any discretion conferred on administrative board by ordinance.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.

Prior attack on validity not res judicata

Unsuccessful attack by lot owner on constitutionality of zoning ordinance was not res judicata in subsequent proceeding on application by lot owner for a variance.

N.Y.—Richards v. Zoning Board of Appeals of Village of Malverne, 137 N.Y.S.2d 603, 285 App.Div. 287.

96. Ind.—Anderson Lumber & Supply Co. v. Fletcher, 89 N.E.2d 449, 228 Ind. 383.

R.I.—Winters v. Zoning Bd. of Review of City of Warwick, 96 A.2d 337, 80 R.I. 275.

Inconsistent theories

An application for variance from zoning ordinance based on theory of continuation of nonconforming use and on variance from strict adherence to ordinance is improper, since the theories are irreconcilable, but such inconsistency was not fatal where testimony was fully taken by respective parties on both theories and both theories were fully argued. N.J.—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J.Law 95.

97. Md.—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294.

"The question now presented is whether the Zoning Ordinance, as applied to this property now is (i. e. originally was in 1931, or has since become) invalid. Such a question ordinarily may or must be raised by bill in equity, but it may also be raised on appeal from the zoning board, although (it is said) it may not be heard before the board. Elliott v. Mayor and City Council of City of Baltimore, supra, 180 Md. 180, 181, 23 A.2d 649. Application for an 'exception' is an appropriate way to raise such a question."

Md.—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294.

98. Cal.—Childs v. City Planning Commission of City of Sacramento, 180 P.2d 433, 79 C.A.2d 808.

Pa.—Bary v. Zoning Bd. of Adjustment, Com.Pl., 4 Bucks Co. 269—Everts v. Board of Adjustment, Com.Pl., 42 Del.Co. 275.

Wis.—State ex rel. Russell v. Board of Appeals of Village of Prairie du Sac, 27 N.W.2d 378, 250 Wis. 394.

Time for application

Section of municipal zoning ordinance requiring that extension of nonconforming use of buildings must

be undertaken within five years of enactment of ordinance could not have effect of limiting general power conferred by statute on board of adjustment without any limitation on time within which application for special exception or variance could be presented.

Ky.—Bosworth v. City of Lexington, 125 S.W.2d 995, 277 Ky. 90.

Signature

The application need not be signed by persons not required to do so by statute or ordinance.

Ind.—Board of Zoning Appeals of City of Indianapolis v. Moyer, 27 N.E.2d 905, 108 Ind.App. 198.

Applications held sufficient

Cal.—Miller v. Planning Commission of City of Torrance, 292 P.2d 278, 138 C.A.2d 598—Childs v. City Planning Commission of City of Sacramento, 180 P.2d 433, 79 C.A.2d 808.

Mass.—Carson v. Board of Appeals of Lexington, 75 N.E.2d 116, 321 Mass. 649.

R.I.—Strauss v. Zoning Bd. of Review of City of Warwick, 48 A.2d 349, 72 R.I. 107.

Method of application held immaterial under statute

Fla.—Troup v. Bird, 53 So.2d 717.

99. R.I.—Taft v. Zoning Bd. of Review of City of Warwick, 71 A.2d 896, 76 R.I. 443.

Waiver of notice see infra § 302.

1. N.Y.—Lapham v. Roulan, 169 N.Y. S.2d 346.

2. Pa.—Root v. City of Erie Zoning Bd. of Appeals, 118 A.2d 297, 180 Pa.Super. 38.

3. Pa.—Root v. City of Erie Zoning Bd. of Appeals, supra.

4. Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

misnomer was not prejudicial to the parties.⁵

The application should ordinarily specify the provision of the statute or ordinance under which relief is sought,⁶ and where applicant fails to allege under what provision of the ordinance, if any, he should be granted an exception, his application can be treated as one for a variance only.⁷ An application to be relieved from lot coverage restrictions must be treated as one for a variance rather than an exception where there is no provision in the zoning ordinance for an exception as to such lot coverage restrictions.⁸

It has been held that an application which seeks relief which is available only by way of an amendment of the zoning ordinance is not effective to invoke the jurisdiction of the board,⁹ but it has also been held that a petition for an amendment of the zoning ordinance may be treated as an application for a variance.¹⁰

Amendment. In a proper case, the board may suggest and permit an amendment of the application.¹¹

§ 297. Consent or Approval

Under an ordinance authorizing the city council after a public hearing and after recommendation from a board or commission to grant variances in certain circumstances, the commission need not recommend approval before the council may act, but it is only necessary that the council approve or disapprove the variance on a de novo hearing after the commission has passed on the matter.

Under a zoning ordinance authorizing the city council after a public hearing and proper notice to all persons affected, and after recommendation from the city plan commission to grant variances in certain circumstances, the commission need not recommend approval of the project before the council may act, but it is only necessary that the council approve or disapprove the variance on a de novo hearing after the commission has passed on the matter.¹²

cil may act, but it is only necessary that the council approve or disapprove the variance on a de novo hearing after the commission has passed on the matter.¹² In proceedings before the council on a recommendation for a variance, it is the duty of the municipal attorney to recommend to the council the remand of the matter to the recommending board where the findings or proofs in the record in support of the recommendation of the board are deficient.¹³

§ 298. — Adjacent Property Owners

An applicant for a variance or exception must comply with zoning provisions requiring him to file consents of adjacent property owners.

An applicant for a variance or exception must comply with zoning provisions requiring him to file with the board consents of adjacent property owners,¹⁴ and in the absence of compliance therewith the petitioner is not entitled to invoke the board's discretion to grant him an exception.¹⁵ The paper containing such consents must, when the ordinance so provides, be acknowledged by the signers,¹⁶ and when the consent of the owners of a stated per cent of the area of all the lands within a designated distance of the proposed business use or structure is required, the paper must clearly and unequivocally state that the signers own that amount of property.¹⁷

§ 299. Who May Apply

Ordinarily, any property owner who claims to be unreasonably restricted by a zoning regulation may apply for a variance.

A landowner who honestly believes that he will be unnecessarily or unreasonably restricted in the use of his land by literal enforcement of a regulation is entitled to apply for a variance or exception as a matter of right,¹⁸ and he may apply for a variance

5. Tex.—Congregation committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, *supra*.

6. N.J.—Deer-Glen Estates v. Board of Adjustment and Appeal of Borough of Fort Lee, 121 A.2d 26, 39 N.J.Super. 380.

R.I.—Minnear v. Zoning Bd. of Review of City of Cranston, 122 A.2d 198—Caldarone v. Zoning Bd. of Review of City of Warwick, 60 A.2d 158, 74 R.I. 196.

Objectant held not prejudiced by applicant's failure to specify express provisions of ordinance on which he was relying where there was some evidence in record to show that a request for a specific exception was being made, and objectant was present at hearing before reviewing board and presented her objections to application.

R.I.—Perrier v. Board of Appeals of City of Pawtucket, 134 A.2d 141.

7. R.I.—Caldarone v. Zoning Bd. of Review of City of Warwick, 60 A.2d 158, 74 R.I. 196.

8. R.I.—Caccia v. Zoning Bd. of Review of City of Providence, 113 A.2d 870.

9. R.I.—Young v. Board of Review of City of Newport, 110 A.2d 436, 82 R.I. 408.

10. Ill.—Rector v. Board of Appeals Under Zoning Ordinance of City of Danville, 95 N.E.2d 99, 342 Ill.App. 51.

11. N.J.—Tzseses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J.Super. 45.

12. Tex.—Prince v. W. H. Cothrum & Co., Civ.App., 227 S.W.2d 863.

13. N.J.—Dolan v. De Capua, 109 A.2d 615, 16 N.J. 599.

14. R.I.—Baker v. Zoning Bd. of Review of Town of North Kingstown, 111 A.2d 353, 82 R.I. 432.

15. R.I.—Zoning Bd. of Review of Town of North Kingstown, 111 A.2d 353, 82 R.I. 432.

16. R.I.—Zoning Bd. of Review of Town of North Kingstown, *supra*.

17. R.I.—Zoning Bd. of Review of Town of North Kingstown, *supra*.

18. R.I.—Dunham v. Zoning Board of Town of Westerly, 26 A.2d 614, 68 R.I. 88—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

Real party in interest

N.Y.—Underhill v. Board of Appeals of Town of Oyster Bay, 72 N.Y.S.2d 588, affirmed 75 N.Y.S.2d 327, 273 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937.

which will be for the benefit of a conditional purchaser.¹⁹ The equitable owner of the property under a contract to purchase is entitled to apply for a variance,²⁰ special exception, or permit,²¹ even though his contract for the purchase of the property is conditioned on the grant of the relief sought.²² One may also make application for a variance as agent of the holder of the legal title.²³ Thus, the owner of all of the stock of a corporation which holds the legal title to the property may apply for a variance as the equitable owner or as agent of the owner.²⁴

Only one with a legal or equitable interest in the property may apply for a variance or exception

from a zoning ordinance,²⁵ and one without any incident to ownership in the property may not apply for a variance.²⁶ A lessee has sufficient interest to apply for a variance;²⁷ but a person who holds an option to purchase the property involved,²⁸ or who merely intends to submit a bid for it,²⁹ does not have a sufficient interest.

§ 300. Notice

As a general rule variances and exceptions should not be granted unless full and adequate notice has been given to all interested persons.

Unless required by statute or ordinance, notice to the public is not necessary.³⁰ As a general rule,

Uncompleted contract of sale

Where there is an uncompleted contract of sale, the legal owner may be permitted to intervene in proceedings instituted by the purchaser.
Pa.—Elvan v. Exley, 58 Pa. Dist. & Co. 538.

Effect of application by former owner

Fact that predecessor in title of owner of realty used for dairy purposes made an allegedly erroneous application for variance under city's zoning ordinance, was not a waiver of any right of owner of realty thereafter to make application for alteration of cowbarn to convert it into a building for a pasteurizing, bottling, and distributing plant.

N.Y.—Application of Furman Ave. Realty Corp., 86 N.Y.S.2d 429, 9 Misc.2d 566, reversed on other grounds 87 N.Y.S.2d 693, 275 App. Div. 779, reversed on other grounds 87 N.E.2d 676, 299 N.Y. 768.

Plan to sell

Fact that landowners seeking an exception intend to sell house they wish to construct rather than live in it makes no difference as far as proceeding for exception is concerned.

Pa.—Hood v. Zoning Bd. of Adjustment, 6 Pa. Dist. & Co. 2d 275, 72 Montg. Co. 12, 48 Mun. L.R. 87.

Interest of applicant established

R.I.—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199.

19. Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.

20. Conn.—Loew v. Falsey, 127 A.2d 67, 144 Conn. 67.

Mass.—Carson v. Board of Appeals of Lexington, 75 N.E.2d 116, 321 Mass. 649.

N.Y.—Hickox v. Griffin, 79 N.Y.S.2d 193, 274 App. Div. 792, reversed on other grounds 83 N.E.2d 836, 298 N.Y. 865.

Pa.—Board of Adjustment of Susquehanna Tp. v. Procascio, Com. Pl., 69 Dauph. Co. 204.

Right of purchaser with knowledge of zoning restriction to assert special hardship see supra § 292.

With full knowledge and consent of owner

N.Y.—Titus St. Paul Property Owners Ass'n v. Board of Zoning Appeals of Town of Irondequoit, 132 N.Y.S.2d 148, 205 Misc. 1083.

21. Mass.—Carson v. Board of Appeals of Lexington, 75 N.E.2d 116, 321 Mass. 649.

22. N.Y.—Slater v. Toohill, 93 N.Y.S. 2d 153, 276 App. Div. 850.

Pa.—Silverco, Inc. v. Zoning Bd. of Adjustment and Dept. of Licenses and Inspection, City of Philadelphia, 109 A.2d 147, 379 Pa. 497—Appeal of Elkins Park Imp. Ass'n, 64 A.2d 783, 361 Pa. 322.

23. N.Y.—Slater v. Toohill, 93 N.Y.S. 2d 153, 276 App. Div. 850—Hickox v. Griffin, 79 N.Y.S.2d 193, 274 App. Div. 792, reversed on other grounds 83 N.E.2d 836, 298 N.Y. 865.

Equitable owner of realty would be entitled to apply for a variance of zoning ordinance as agent acting with consent of holder of legal title.

Conn.—Loew v. Falsey, 127 A.2d 67, 144 Conn. 67.

N.Y.—Hickox v. Griffin, 79 N.Y.S.2d 193, 274 App. Div. 792, reversed on other grounds 83 N.E.2d 836, 298 N.Y. 865.

Waiver

Fact that application for variance from zoning ordinance was not filed by owner but by owner's agent which intended to construct a building on premises was not prejudicial to objecting property owners but any irregularity in such respect was waived when they failed to make property owner a party to their appeal from granting of variance, as they might have done.

Ky.—Stout v. Jenkins, 288 S.W.2d 643.

24. Conn.—Loew v. Falsey, 127 A.2d 67, 144 Conn. 67.

25. Pa.—Appeal of Schaeffer, 7 Pa. Dist. & Co. 2d 468, 72 Montg. Co. 515.

26. N.Y.—Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20.

Undue "hardship" within contemplation of statute authorizing variance in application of terms of zoning ordinance of city, where variance will not be contrary to public interest, and where, owing to special conditions, a literal enforcement of provisions of ordinance will result in unnecessary "hardship" consists in depriving owner of land of beneficial use thereof, and there can be no such deprivation where applicant for variance is without any incident of ownership.

R.I.—Tripp v. Zoning Bd. of Review of City of Pawtucket, 123 A.2d 144.

27. Pa.—Nicholson v. Zoning Bd. of Adjustment of City of Allentown, 140 A.2d 604, 392 Pa. 278—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254. Contra Appeal of Kleinman from Zoning Bd. of Appeals, 6 Pa. Dist. & Co. 2d 659, 42 Del. Co. 413.

Appeal of McLaughlin, Com. Pl., 42 Del. Co. 388.

28. R.I.—Tripp v. Zoning Bd. of Review of City of Pawtucket, 123 A.2d 144.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107.

29. Pa.—Appeal of Schaefer, 7 Pa. Dist. & Co. 2d 468, 72 Montg. Co. 515.

30. N.Y.—Ottinger v. Arenal Realty Co., 178 N.E. 665, 257 N.Y. 371.

Board of commissioners

Where parties opposed to granting of permit for use of property as funeral home in restricted district had their day before zoning board and proofs sustained result, failure of board of commissioners to give notice or to conduct a hearing before approving zoning board's recommendation that permit be granted was not error, in absence of request therefor.

N.J.—Sandler v. Board of Com'rs of

however, variances and exceptions should not be granted unless full and adequate notice has been given to all interested persons,³¹ and under some provisions the giving of adequate notice is jurisdictional.³² Notice is required so that all interested parties may be advised of their opportunity to be heard and to be apprised of the relief sought.³³ The failure of the statute or ordinance to require notice does not invalidate a grant of a variance where the board adopted a rule providing for notice, and all interested persons actually received notice.³⁴

Failure to give direct notice to adjoining landowners of an adjourned hearing may not be fatal,³⁵ and it may be unnecessary to give notice of a hearing which is merely for the purpose of correcting a clerical error in a resolution of the board granting a variance.³⁶

Time of giving notice. A requirement that the notice given shall be reasonable is implicit in a requirement of public notice,³⁷ and what is a reasonable time for notification to result in notice is dependent on the circumstances surrounding the particular transaction.³⁸ In computing whether or not the statutory number of days of notice was given

by a notice published in a newspaper, it is the day on which the paper is made available to the public, and not the date appearing on the paper, which marks the time of giving notice.³⁹

To whom notice must be given. Under some statutes and ordinances notice should be given to the owners of property affected in the area by a desired variance.⁴⁰ Under a city charter provision that due notice of the hearing shall be given to the "parties," neighboring landowners are not "parties" within the meaning of the provision.⁴¹ Under a statute to such effect, the board itself must determine the persons entitled to notice and give such notice in the manner prescribed;⁴² and these duties cannot be delegated to the petitioner.⁴³

§ 301. — Form and Requisites

The notice of the hearing on an application for a variance or exception should be at least substantially in accordance with the requirements of the statute or ordinance.

Although the right to notice is measured by the terms of the statute, ordinance, or resolution requir-

City of Trenton, 19 A.2d 788, 126 N.J.Law 392.

Zoning board of city held not required by statute to publish notice.
N.Y.—Griest v. Hooley, 128 N.Y.S.2d 341, 205 Misc. 396.

31. Conn.—Smith v. F. W. Woolworth Co., 111 A.2d 552, 142 Conn. 88.

Ill.—East Maine Tp. Community Ass'n v. Pioneer Trust and Sav. Bank, 145 N.E.2d 777, 15 Ill.App.2d 290.

N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280.

Notice of application for building permit

Notice and hearing afforded on application for building permit where application conformed to zoning regulations could not validate subsequent proceedings where zoning board of adjustment granted exception thereto without notice to persons objecting to granting thereof.
Vt.—Thompson v. Smith, 129 A.2d 638, 119 Vt. 488.

Town board of zoning appeals must, under statute, give notice prior to hearing.

N.Y.—Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S.2d 358.

32. Mass.—Roman Catholic Archbishop of Boston v. Board of Appeal of Building Department of

City of Boston, 167 N.E. 672, 268 Mass. 416.

Rules adopted by board

Under a statute providing that board "may adopt rules, not inconsistent with the provisions of this act, governing notice and procedure," after board had specified way in which notice must be given, it could acquire jurisdiction to deal with merits of appeal only after there had been compliance with that way; and board had no power to waive compliance with its order.

Mass.—Roman Catholic Archbishop of Boston v. Board of Appeal of Building Department of City of Boston, 167 N.E. 672, 268 Mass. 416.

Validity of action

Compliance with provision for notice must be had before any action by board or commissioner can be held valid.

Conn.—Slagle v. Zoning Bd. of Appeals of City of Meriden, 137 A.2d 542, 144 Conn. 690—Smith v. F. W. Woolworth Co., 111 A.2d 552, 142 Conn. 88.

Ohio.—Vandervort v. Sisters of Mercy of Cincinnati, 117 N.E.2d 51, 97 Ohio App. 153.

33. Conn.—Slagle v. Zoning Bd. of Appeals of City of Meriden, 137 A.2d 542, 144 Conn. 690.

R.I.—Ferrier v. Board of Appeals of City of Pawtucket, 134 A.2d 141—Petrarca v. Zoning Board of Re-

view of City of Warwick, 80 A.2d 156, 78 R.I. 130.

34. Ky.—Thomson v. Tafel, 218 S.W. 2d 977, 309 Ky. 753.

35. N.Y.—Lapham v. Roulan, 169 N.Y.S.2d 346.

36. N.Y.—Eckerman v. Murdock, 94 N.Y.S.2d 557, 276 App.Div. 927.

37. Conn.—Slagle v. Zoning Bd. of Appeals of City of Meriden, 137 A.2d 542, 144 Conn. 690.

38. Conn.—Slagle v. Zoning Bd. of Appeals of City of Meriden, supra.

Eighty-one hours' notice of a hearing on an application for a zoning variance could not be held adequate as a matter of law, nor would court of common pleas be said to have erred in finding that such notice was not adequate.

Conn.—Slagle v. Zoning Bd. of Appeals of City of Meriden, supra.

39. N.Y.—Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S.2d 358.

40. Ill.—East Maine Tp. Community Ass'n v. Pioneer Trust and Sav. Bank, 145 N.E.2d 777, 15 Ill.App.2d 290.

41. N.Y.—Ottinger v. Arenal Realty Co., 178 N.E. 665, 257 N.Y. 371.

42. Mass.—Kane v. Board of Appeals of City of Medford, 173 N.E. 1, 273 Mass. 97.

43. Mass.—Kane v. Board of Appeals of City of Medford, supra.

ing it,⁴⁴ notice of hearings substantially in accordance with the requirements of the statute or ordinance must be given.⁴⁵ Where the statute does not prescribe the character of the notice, some sort of reasonable notice must be given;⁴⁶ and where a provision requiring public notice is silent as to the method by which such notice is to be given, it may be given in any reasonable form.⁴⁷ A notice which locates the premises by giving the proper address and which states the proposed use in the event the variance is granted has been held sufficient.⁴⁸ A failure to mail notices to residents within a reasonable radius has been held not to render the proceedings void.⁴⁹

It is not necessary that those who attend a public hearing in opposition to the granting of an exception should be notified in advance of the basis on

which the board may act.⁵⁰

§ 302. — Waiver; Effect of Actual Notice

Unless the requirement of notice is jurisdictional, actual notice of the proceedings for a variance or exception may be sufficient, and defects in the notice may be waived by an appearance and participation in the proceedings.

Where adequate notice is a jurisdictional, and not merely a procedural, matter, persons who appear at the hearing and fail to object are not estopped to object later.⁵¹ Where, however, the defect in the notice is not jurisdictional, actual notice may be sufficient,⁵² and the requirement that notice be given in strict accordance with the method prescribed by statute may be waived by personal appearance of the objectors at the hearing,⁵³ particularly where

44. N.Y.—Ottinger v. Arenal Realty Co., 178 N.E. 665, 257 N.Y. 371.
Griest v. Hooley, 128 N.Y.S. 341, 205 Misc. 396.

Mistake in order directing notice

Board of standards and appeals did not lose jurisdiction of application to vary zoning resolution because of failure to discover true name of adjoining owners to whom it directed notice, since such owners, apart from the order directing mailing of notices to them, had no right to special information respecting hearing.

N.Y.—Ottinger v. Arenal Realty Co., 178 N.E. 665, 257 N.Y. 371.

45. Cal.—Bartholomae Oil Corporation v. Seager, 94 P.2d 614, 35 C.A. 2d 77.

Conn.—Slagle v. Zoning Bd. of Appeals of City of Meriden, 137 A.2d 542, 144 Conn. 690—Smith v. F. W. Woolworth Co., 111 A.2d 552, 142 Conn. 88.

Mass.—Kane v. Board of Appeals of City of Medford, 173 N.E. 1, 273 Mass. 97—Roman Catholic Archbishop of Boston v. Board of Appeal of Building Department of City of Boston, 167 N.E. 672, 268 Mass. 416.

N.J.—Amon v. City of Rahway, 190 A. 568, 117 N.J.Law 589.

Schumacher v. Union City, 154 A. 406, 9 N.J.Misc. 492.

N.Y.—Selleck v. Waterbury, 13 N.Y.S. 2d 591, 257 App.Div. 1049.

Purpose of provision

A provision in zoning ordinance requiring publication of notice of public hearing on application for permit to remodel nonconforming building was for the protection of the public.

Cal.—Hopkins v. MacCulloch, 95 P.2d 950, 35 C.A.2d 442.

Notice held sufficient

Ind.—Keeling v. Board of Zoning Ap-

peals of City of Indianapolis, 69 N. E.2d 613, 117 Ind.App. 314.

Mass.—Carson v. Board of Appeals of Lexington, 75 N.E.2d 116, 321 Mass. 649.

N.J.—Roberts v. Board of Adjustment of Borough of Fort Lee, 61 A.2d 896, 1 N.J.Super. 29.

Mingle v. Board of Adjustment of City of Orange, 142 A. 367, 6 N.J.Misc. 595.

R.I.—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135.

Notice held insufficient

Mass.—Kane v. Board of Appeals of City of Medford, 173 N.E. 1, 273 Mass. 97.

N.Y.—Deile v. Boettger, 295 N.Y.S. 115, 250 App.Div. 633.

Ordinance subordinate to statute

An ordinance intended to supplement and enlarge requirements of public notice contained in town law cannot abridge, modify, or limit statutory enactment.

N.Y.—Babcock v. Port Washington Little League, 144 N.Y.S.2d 179.

Posting

Where statute did not require newspaper notice of an application for variance, notice given by posting notices on lot in question was sufficient, particularly where it was apparent that interested parties had actual notice of application.

Ky.—Stout v. Jenkins, 268 S.W.2d 643.

46. Ky.—Thomson v. Tafel, 218 S. W.2d 977, 309 Ky. 753.

47. N.Y.—Ottinger v. Arenal Realty Co., 178 N.E. 665, 257 N.Y. 371.

Publication in official bulletin

Publication of notice of application to vary zoning resolution in official bulletin of board of standards and appeals was held sufficient.

N.Y.—Ottinger v. Arenal Realty Co., supra.

48. Conn.—Slagle v. Zoning Bd. of Appeals of City of Meriden, 137 A.2d 542, 144 Conn. 690.

49. N.Y.—Gazan v. Corbett, 105 N. Y.S.2d 187, 278 App.Div. 953, affirmed 110 N.E.2d 739, 304 N.Y. 920, reargument denied 112 N.E.2d 775, 305 N.Y. 693, certiorari denied 74 S.Ct. 38, 346 U.S. 822, 98 L.Ed. 348.

50. Conn.—Hlavati v. Board of Adjustment of City of New Britain, 116 A.2d 504, 142 Conn. 659.

51. Conn.—Slagle v. Zoning Bd. of Appeals of City of Meriden, 137 A. 2d 542, 144 Conn. 690.

52. N.J.—Wilson v. Township Committee of Union Tp., Union County, 9 A.2d 771, 123 N.J.Law 474.

Pa.—Appeal of Sechler, Com.Pl., 1 Lycoming 81.

Waiver of informality

Board of adjustment of township was not deprived of jurisdiction to recommend a variance on theory that there had been improper service of notice on interested property owners, where complaining owners were present at meeting of board when question was before board for consideration and waived informality of notice, which had been given by registered mail, and did not claim that notice was not received.

N.J.—Wilson v. Township Committee of Union Tp., Union County, 9 A.2d 771, 123 N.J.Law 474.

53. Cal.—Hopkins v. MacCulloch, 95 P.2d 950, 35 C.A.2d 442.

Cal.—De Luca v. Board of Sup'rs of Los Angeles County, 286 P.2d 395, 134 C.A.2d 606.

Ind.—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 117 Ind.App. 314.

N.Y.—Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S.2d 358.

their objections and arguments were heard and considered by the zoning board.⁵⁴

§ 303. Hearing

As a general rule, it is a prerequisite to valid action on an application for a variance or exception, that there be a hearing, on due notice, at which proof may be presented of the circumstances or conditions affecting the right of the applicant to the relief sought.

As a general rule, a hearing, on due notice, is a prerequisite to valid action on an application for a variance permit⁵⁵ unless the necessity of such a hearing is dispensed with by the terms of the statute;⁵⁶ but where an application for a variance is precisely the same as that involved in a prior application previously disposed of by the board, and the second application shows no change of circumstances, the board is not required to hold another public hearing on the second application.⁵⁷ Requirements of a statute or ordinance must be complied with in order to render a hearing valid;⁵⁸ and it may be necessary that a record be kept of the proceedings, including a report of the evidence, as dis-

cussed *infra* § 313. The failure of interested persons to appear does not affect the validity of the hearing.⁵⁹

Under a statute requiring official action by the zoning board to be taken at a meeting open to the public, action taken by the board at an executive session with the public excluded has been held void,⁶⁰ and such illegality is not cured by a subsequent announcement of the decision at a public meeting.⁶¹ Ordinarily, however, where a public hearing on a zoning variance application is held, the fact that the board thereafter considered the case in private conference is immaterial,⁶² and it may meet after the public hearing, without the attendance of counsel for interested parties, in order to discuss and render its opinion on the matter, since such a meeting is not a hearing or rehearing of the matter on the merits.⁶³

The hearing on an application for a variance may be informal,⁶⁴ and technical rules of evidence and procedure may be disregarded;⁶⁵ but ordinarily no

Personal notice

R.I.—Hirsch v. Zoning Board of Review of City of Pawtucket, 187 A. 844, 56 R.I. 463.

54. N.Y.—Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S.2d 358—North Shore Beach P. O. Ass'n v. Town of Brookhaven, 115 N.Y.S.2d 670.

Proof of opportunity to present facts

In proceeding on application for exception or variance to zoning ordinance, appearance of objectant before zoning board of review was proof that objectant had opportunity to present facts which would assist board in performance of its duties and had availed himself of such opportunity by expressing his opposition to granting permit.

R.I.—Perrier v. Board of Appeals of City of Pawtucket, 134 A.2d 141.

55. Cal.—Bartholomae Oil Corporation v. Seager, 94 P.2d 614, 35 C.A. 2d 77.

Conn.—Koslow v. Board of Zoning Appeals of City of New Haven, 112 A.2d 513, 19 Conn.Sup. 303.

N.Y.—Werner v. McHaffie, 158 N.Y.S. 2d 438.

Adjournment

Board of commissioners properly denied application for adjournment of hearing on application for permit to convert part of apartment house into store contrary to zoning ordinance, where one seeking permit had already had one adjournment and gave no adequate grounds for second.

N.J.—Shaiman v. Mayor, Board of Com'rs and Board of Adjustment

of City of Newark, 191 A. 735, 15 N.J.Misc. 437.

Original jurisdiction

Trial of cause on application for zoning variance represented an exercise of original jurisdiction which was bestowed on local bodies under statutory scheme.

N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

56. Cal.—McLain v. Planning Commission of City of Chico, App., 319 P.2d 24.

57. N.Y.—Ardolino v. White, 142 N.Y.S.2d 253, 286 App.Div. 382—Casper v. Parker, 66 N.Y.S.2d 10, 271 App.Div. 839.

58. Fixing time for hearing

Where board of zoning and appeals failed to meet as a body to set a time for hearing of an application for a variance, but merely had matter put on its calendar, it failed to comply with directions set forth in a town ordinance that board shall fix a time for hearing of an application for variance, and therefore its action on application was void.

N.Y.—Blum v. Board of Zoning and Appeals of Town of North Hempstead, 149 N.Y.S.2d 5, 1 Misc.2d 668.

59. R.I.—Petrarca v. Zoning Bd. of Review of City of Warwick, 80 A. 2d 156, 78 R.I. 130.

Absence of proponent

Fact that no one supported application for permission to erect addition to dwelling located in a residential zone, for use as a store, a hearing on application did not require

zoning board of review of city to deny application.

R.I.—Jacques v. Zoning Board of Review of City of Pawtucket, 12 A. 2d 222, 64 R.I. 284.

60. N.Y.—Blum v. Board of Zoning and Appeals of Town of North Hempstead, 149 N.Y.S.2d 5, 1 Misc. 2d 668.

61. N.Y.—Blum v. Board of Zoning and Appeals of Town of North Hempstead, *supra*.

62. N.J.—Keiser v. Inhabitants of City of Plainfield, 159 A. 785, 10 N. J.Misc. 496.

63. Ohio.—Mahrt v. First Church of Christ, Scientist, Com.Pl., 142 N.E. 2d 567, affirmed App., 142 N.E.2d 678.

64. Cal.—Bradbeer v. England, 232 P.2d 308, 104 C.A.2d 704.

N.Y.—Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477.

65. N.Y.—Branche v. Board of Trustees of Incorporated Village of Great Neck, *supra*.

Adoption of statements of counsel

Where counsel for applicant for permit to establish parking lot for physicians and their employees on property where physicians' offices were located made unsworn statement of situation to board of municipal and zoning appeals, and two physicians were then called, who adopted counsel's statement, physicians were subject to cross-examination on any statements made by counsel, and method of procedure was not to be commended as a general proposition.

element essential to a fair trial can be dispensed with,⁶⁶ and one whose property rights are being determined usually must be given the opportunity to present evidence, cross-examine witnesses, and inspect documents.⁶⁷ According to some authority, however, unless it is otherwise provided by statute or ordinance, it is not always necessary that witnesses be heard⁶⁸ or sworn⁶⁹ at hearings. So, it has been held that, provided there is a sufficient basis for the board's action, it is not essential that there be testimony or that documents or exhibits be received in evidence;⁷⁰ and where there is no dispute over the facts and they are well known to the board and all the parties, the board may act on an application for a zoning variance without taking testimony or making a formal inspection of the site.⁷¹

Ordinarily, the members of the board may make

a personal investigation of the property in question to inform themselves of the facts,⁷² and in reaching their decision they may take into consideration facts within their personal knowledge,⁷³ as with respect to practical difficulties and unnecessary hardship as a basis for a variance.⁷⁴ However, such facts and personal knowledge should be revealed at the hearing,⁷⁵ and set forth in the record, as discussed *infra* § 313; and persons interested should be afforded an opportunity to present argument or evidence as to such matters.⁷⁶

Ordinarily, questions not raised by the application will not be considered.⁷⁷

Irregularities in the hearing, which are merely formal, may be waived, at least where they are not fatally prejudicial and all the parties presented evidence for and against the application.⁷⁸

Md.—Cleland v. Mayor & City Council of Baltimore, 84 A.2d 49, 198 Md. 440.

66. N.Y.—Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477.

Action held not arbitrary

Refusal of zoning board of review to compel applicant for variance to a zoning ordinance to have prospective buyer or tenant present at the hearing or to divulge their names was not arbitrary, because action of board is concerned basically with land and its use and not with person who owns or occupies it.

R.I.—Guenther v. Zoning Bd. of Review of City of Warwick, 125 A.2d 214.

67. N.Y.—Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477.

68. N.J.—Ackerman v. Board of Com'rs of Town of Belleville, 62 A.2d 476, 1 N.J.Super. 69.

N.Y.—People ex rel. Fordham Manor Reformed Church v. Walsh, 155 N.E. 575, 244 N.Y. 280.

Reed v. Board of Standards & Appeals of City of N. Y., 243 N.Y.S. 263, 230 App.Div. 21, affirmed 174 N.E. 301, 255 N.Y. 126.

Aisloff v. Murdock, 81 N.Y.S.2d 872—**Hannigan v. Murdock**, 47 N.Y.S.2d 855.

Reason for rule

Primary purpose of the hearing is to assist the zoning board of review of the city in discharging its duty of determining whether the granting of the exception is consistent with preservation of common interests and general welfare as contemplated by zoning ordinance, and not to test strength of conflicting personal desires and interests, or to poll the neighborhood on question involved. **R.I.**—Jacques v. Zoning Board of Re-

view of City of Pawtucket, 12 A.2d 222, 64 R.I. 284.

As denial of day in court

Where record did not indicate that prosecutors offered themselves as witnesses or requested that they be sworn at proceedings before board, prosecutors were not denied their day in court on theory that no witnesses were sworn or heard on their behalf before board.

N.J.—Wilson v. Township Committee of Union Tp., Union County, 9 A.2d 771, 123 N.J.Law 474.

69. Cal.—Flagstad v. City of San Mateo, App., 318 P.2d 825—**Jackson v. City of San Mateo**, 307 P.2d 451, 148 C.A.2d 687.

N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

Wilson v. Township Committee of Union Tp., Union County, 9 A.2d 771, 123 N.J.Law 474—**Amon v. City of Rahway**, 190 A. 506, 117 N.J.Law 589.

N.Y.—Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20.

Waiver

At hearing before township board of adjustment on application for a variance, the swearing of witnesses may be waived.

N.J.—Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J.Law 473.

70. N.J.—Wilson v. Township Committee of Union Tp., Union County, 9 A.2d 771, 123 N.J.Law 474.

71. N.J.—Ackerman v. Board of Com'rs of Town of Belleville, 62 A.2d 476, 1 N.J.Super. 69.

72. Cal.—Flagstad v. City of San Mateo, App., 318 P.2d 825.

Judicial approval

Practice, where practical, of a

board of adjustment making an inspection of site and neighborhood generally, is judicially approved.

N.J.—Giordano v. City Commission of City of Newark, 67 A.2d 454, 2 N.J. 585.

73. N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

N.Y.—Levy v. Board of Standards and Appeals of City of New York, 196 N.E. 284, 267 N.Y. 347.

Hickox v. Griffin, 79 N.Y.S.2d 193, 274 App.Div. 792, reversed on other grounds 83 N.E.2d 836, 298 N.Y. 365.

Hopkins v. Board of Appeals of City of Rochester, 33 N.Y.S.2d 396, 178 Misc. 186—**Riverside St. Clair Corporation v. Walsh**, 228 N.Y.S. 88, 131 Misc. 652, affirmed 231 N.Y.S. 869, 231 App.Div. 655.

Lapham v. Roulan, 169 N.Y.S.2d 346.

R.I.—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 319—**Harrison v. Zoning Bd. of Review of City of Pawtucket**, 59 A.2d 361, 74 R.I. 135—**Robinson v. Town Council of Narragansett**, 199 A. 308, 60 R.I. 422—**Haffernan v. Zoning Board of Review of City of Cranston**, 144 A. 674, 50 R.I. 26.

74. N.Y.—Slater v. Toohill, 84 N.Y.S.2d 182, 274 App.Div. 944.

75. D.C.—Hyman v. Coe, D.C., 102 F.Supp. 254.

76. D.C.—Hyman v. Coe, *supra*.

77. R.I.—Allen v. Zoning Bd. of Review of City of Warwick, 66 A.2d 369, 75 R.I. 321.

78. R.I.—Taft v. Zoning Bd. of Review of City of Warwick, 71 A.2d 886, 76 R.I. 443.

§ 304. — Bias or Disqualification of Member

A member of a zoning board should not, in matters affecting applications for exceptions or variances, say or do anything which would furnish a basis for an inference that he was biased in favor of one side or the other, or participate in the hearing or determination of the application if he is interested in the property which is the subject of the application.

A member of a zoning board should not, in any matter affecting the granting or denying of applications for exceptions or variances, say or do anything which would furnish a basis for raising an inference that he was biased in favor of one side or the other,⁷⁹ and should not participate in the hearing or determination of the application if he is interested in the property which is the subject of the application.⁸⁰ So, it is imperative, in order that the zoning board be free from suspicion of prejudice or partiality, that interested parties refrain from approaching any member of the board privately; and the only legitimate way for anyone to influence or persuade the board in making its decision is to make his opinions known at the hearing.⁸¹

The interest which disqualifies a member is a personal or private one, not such an interest as he has in common with all other citizens or owners of

property.⁸² A decision will not be invalidated because of the interest of one of the board members who, on being challenged, voluntarily withdrew from further participation in the proceedings, took no part in the deliberations or vote, and in no manner influenced the decision of the other members of the board;⁸³ and a remote relationship to counsel for the applicants has been held not ground for disqualification of a member of the board.⁸⁴

Objection to the participation of a board member claimed to be biased or interested should be made promptly;⁸⁵ but one may be justified in reserving his objection until he can show by corroborative evidence that the member of the board had actually made certain statements, indicating prejudgment of the application for a variance, imputed to him by another.⁸⁶

§ 305. Evidence

The evidence presented to, or considered by, the board should be competent and relevant, but it need not be of the same character as that required for presentation to a court.

While the evidence presented to, or considered by, the board should be competent and relevant,⁸⁷ it need not be of the same character as that which would be required for presentation to a court.⁸⁸

79. R.I.—*Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston*, 128 A.2d 342.

80. N.J.—*Piggott v. Borough of Hopewell*, 91 A.2d 667, 22 N.J.Super. 106.

Interest as lessee

Where member of borough council sold realty retaining right, as lessee, to use garage on premises for about three years, he should have disqualified himself when council voted on question of grant of variance to purchaser, and where such member participated in voting without disqualifying himself, entire procedure was voidable.

N.J.—*Piggott v. Borough of Hopewell*, supra.

81. R.I.—*Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston*, 128 A.2d 818.

82. N.J.—*Piggott v. Borough of Hopewell*, 91 A.2d 667, 22 N.J.Super. 106.

83. N.J.—*Cobble Close Farm v. Board of Adjustment of Middletown Tp.*, 92 A.2d 4, 10 N.J. 442.

84. R.I.—*Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston*, 128 A.2d 342.

Relationship of brother of uncle by marriage

Fact that brother of chairman of board was uncle by marriage of attorney for applicants for variance

would not be grounds for disqualification of chairman of board from hearing application.

R.I.—*Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston*, supra.

85. N.H.—*Gelinas v. City of Portsmouth*, 85 A.2d 896, 97 N.H. 248.

Objections raised too late

Where member of board which was acting on application for variance from zoning ordinance was related to applicant, and such board member expressly disqualified himself and took no part in deliberations or decision although present and acting as clerk, and no objection to such procedure was made by parties contesting application for variance until after board's decision had been rendered despite fact that relationship was known prior to hearing, objection to qualifications of board member made thereafter were too late.

N.H.—*Gelinas v. City of Portsmouth*, supra.

86. R.I.—*Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston*, 128 A.2d 342.

87. Pa.—*Richman v. Philadelphia Zoning Bd. of Adjustment*, 137 A.2d 280, 391 Pa. 254.

Evidence held irrelevant

(1) Evidence of other variances granted in same and other districts is not relevant.

Mass.—*Reynolds v. Board of Appeal of Springfield*, 140 N.E.2d 491, 335 Mass. 464.

Pa.—*Richman v. Philadelphia Zoning Bd. of Adjustment*, 137 A.2d 280, 391 Pa. 254—*Ventresca v. Exley*, 56 A.2d 210, 358 Pa. 98.

Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit, 130 A.2d 240, 133 Pa.Super. 219, appeal dismissed *Swift v. Borough of Bethel, Pa.*, 78 S.Ct. 120, 355 U.S. 40, 2 L.Ed.2d 71.

(2) Fact that a restaurant located in an area zoned as business district had a liquor license had no relevancy on question of whether restaurant was entitled to a variance so that it might operate also as a hotel.

Pa.—*Dooling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Tp.*, 89 A.2d 505, 371 Pa. 290.

88. N.Y.—*Chad Homes, Inc. v. Board of Appeals of City of Rochester*, Monroe County, 159 N.Y. S.2d 383, 5 Misc.2d 20.

Records and exhibits of earlier hearing

Zoning board's action in admitting records and exhibits from earlier hearing on same subject, even though objected to, did not constitute such error as would vitiate board's action in granting exception to zoning ordinance.

men may act.³ The rule that insufficient evidence is no evidence applies before the zoning board in a proceeding to obtain a variance just as it does in a court of law.⁴

An informal discussion is not a substitute for competent and credible evidence in support of an application for a zoning variance.⁵ Statements of counsel in the proceeding before the board ordinarily are not evidence,⁶ although they may in some cir-

cumstances be accepted as such;⁷ and recitals in an application for a building permit and assertions in the brief of counsel do not have the status of proofs that the applicant is entitled to a variance.⁸

In particular cases, the evidence has been held sufficient to warrant or support the granting of a variance or exception,⁹ to warrant or support the denial of a variance or exception,¹⁰ to sustain the

Review of City of Cranston, 60 A.2d 478, 74 R.I. 316—Kent v. Zoning Bd. of Review of Town of Barrington, 58 A.2d 623, 74 R.I. 89.

Jurisdictional prerequisite

Statutory showing of exceptional circumstances is a jurisdictional prerequisite to granting of a valid variance by board of adjustment.

N.J.—Lacey v. Zoning Bd. of Adjustment of Hamilton Tp., Mercer County, 67 A.2d 466, 4 N.J.Super. 422.

3. N.Y.—Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20.

4. N.Y.—Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, *supra*.

5. N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

6. Conn.—Celentano v. Zoning Bd. of Appeals of Hartford, 60 A.2d 510, 135 Conn. 16.

7. Contradiction of opposing counsel

Where attorney for applicants for zoning variance to authorize use of basement and first two floors of single-family dwelling for offices for physicians, surgeons, and dentists, made unsworn statement at hearing before board with respect to number of doctors' offices already in neighborhood, in presence of counsel for residents of city who objected to granting of variance, and counsel for objectors contradicted statement in certain particulars, board was entitled to accept statement in lieu of sworn testimony and to give it such credence and weight as, in their minds, it merited.

Conn.—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290.

8. N.J.—St. Mary's of Mt. Virgin's Church of New Brunswick v. Board of Adjustment of City of New Brunswick, 184 A. 516, 14 N.J.Misc. 288.

9. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin, 92 So.2d 906, 265 Ala. 504—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.

Ark.—City of Little Rock v. Stannus, 289 S.W.2d 283, 218 Ark. 893—City of Little Rock v. Bentley, 165 S.W. 2d 890, 204 Ark. 727.

Cal.—Miller v. Planning Commission of City of Torrance, 292 P.2d 278, 138 C.A.2d 698—Patterson v. Board of Sup'rs of Los Angeles County, 180 P.2d 945, 79 C.A.2d 670.

Conn.—Plumb v. Board of Zoning Appeals of the City of New Haven, 108 A.2d 899, 141 Conn. 595—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290.

Del.—Application of Emmett S. Hickman Co., 108 A.2d 667, 49 Del. 13.

Ind.—Board of Zoning Appeals of City of Indianapolis v. Wheaton, App., 76 N.E.2d 597, 118 Ind.App. 38.

La.—State ex rel. Latter v. Board of Zoning Adjustments of City of New Orleans, App., 94 So.2d 138.

Md.—Perry v. County Bd. of Appeals for Montgomery County, 127 A.2d 507, 211 Md. 294.

Mass.—Rodenstein v. Board of Appeal of Boston, 149 N.E.2d 382—Amoro v. Board of Appeal of City of Gloucester, 186 N.E. 61, 283 Mass. 45.

Mich.—Mitchell v. Grewal, 61 N.W. 2d 3, 338 Mich. 81.

Mo.—Barnhart v. Kansas City, App., 303 S.W.2d 209—Summers v. Board of Zoning Adjustment of Kansas City, App., 299 S.W.2d 883.

N.H.—Fortuna v. Zoning Bd. of Adjustment of City of Manchester, 60 A.2d 133, 95 N.H. 211.

N.J.—165 Augusta St. v. Collins, 87 A.2d 889, 9 N.J. 259.

Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J.Super. 574.

Ramsbotham v. Board of Public Works of City of Paterson, 61 A.2d 196, 137 N.J.Law 559, followed in 61 A.2d 197, 137 N.J.Law 591—Kindergan v. Board of Adjustment of Borough of River Edge, 59 A.2d 857, 137 N.J.Law 296.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

Taub v. Pirnie, 160 N.Y.S.2d 447, 3 A.D.2d 753—Perri v. Zoning Bd. of Appeals of Incorporated Village of Scarsdale, Westchester County, 128 N.Y.S.2d 774, 283 App.Div. 818—359 West 34th St. v. Board of Standards & Appeals of City of

New York, 112 N.Y.S.2d 30, 279 App.Div. 1032, affirmed 114 N.E.2d 218, 305 N.Y. 878.

Vella v. City Zoning Bd. of Appeals, City of Rochester, 135 N.Y. S.2d 704, 206 Misc. 941—Magde v. Crowley, 102 N.Y.S.2d 271, 200 Misc. 109.

Temple Israel of Lawrence v. Plaut, 170 N.Y.S.2d 393—Bayport Civic Ass'n v. Koehler, 138 N.Y.S. 2d 524, followed in 138 N.Y.S.2d 532—Crone v. Town of Brighton, 119 N.Y.S.2d 877.

Pa.—Nicholson v. Zoning Bd. of Adjustment of City of Allentown, 140 A.2d 604—Garner v. Zoning Bd. of Adjustment of City of Philadelphia, 130 A.2d 148, 388 Pa. 98—Schwartz v. Wagner, 123 A.2d 417, 385 Pa. 364—Appeal of Mack, 122 A.2d 48, 384 Pa. 586—O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901, 384 Pa. 379—Doolling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Tp., 89 A.2d 505, 371 Pa. 290—Philadelphia Fairfax Corporation v. McLaughlin, 9 A.2d 538, 336 Pa. 342.

R.I.—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199—Bruzzi v. Board of Appeals of City of Pawtucket, 122 A.2d 877—Coffin v. Zoning Bd. of Review of City of Providence, 98 A.2d 843, 81 R.I. 112—Dunham v. Zoning Board of Town of Westerly, 26 A.2d 614, 68 R.I. 88—Smith v. Zoning Board of Review of City of Pawtucket, 170 A. 75—Morris v. Zoning Board of Review of City of Pawtucket, 155 A. 654, 52 R.I. 26.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

10. Conn.—Talmadge v. Board of Zoning Appeals of City of New Haven, 109 A.2d 253, 141 Conn. 639—Isdale v. Town Plan and Zoning Commission of Town of Orange, 107 A.2d 267, 141 Conn. 509.

Mass.—Vetter v. Zoning Bd. of Appeal of Attleboro, 116 N.E.2d 277, 330 Mass. 628.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

Mo.—In re Botz, 159 S.W.2d 367, 236 Mo.App. 566.

findings of the board,¹¹ or to establish certain claims | evidence has been held insufficient to warrant or
or contentions of the parties.¹² In other cases, the | support the granting of a variance or exception,¹³

- N.H.—*Plourde v. Zoning Bd. of Adjustment of City of Nashua*, 42 A. 2d 736, 93 N.H. 376.
- N.J.—*Moriarty v. Pozner*, 121 A.2d 527, 21 N.J. 199—*Rexon v. Board of Adjustment of Borough of Had-donfield*, 89 A.2d 233, 10 N.J. 1—*Home Builders Ass'n of Northern N. J. v. Borough of Paramus*, 81 A. 2d 753, 7 N.J. 335.
- Gross v. Allan*, 117 A.2d 275, 37 N.J.Super. 262—*Ackerman v. Board of Com'rs of Town of Belleville*, 62 A.2d 476, 1 N.J.Super. 69.
- Krilov v. Board of Adjustment of City of Newark*, 57 A.2d 659, 137 N.J.Law 39—*National Lumber Products Co. v. Ponzio*, 42 A.2d 753, 133 N.J.Law 95.
- N.Y.—*Ferryman v. Weissner*, 158 N. Y.S.2d 587, 3 A.D.2d 674—*Stanco v. Halperin*, 136 N.Y.S.2d 509, 285 App.Div. 815—*Application of White Plains Housing Authority*, 103 N. Y.S.2d 549, 278 App.Div. 125—*Court Boulevard, Inc. v. Board of Stand-ards and Appeals of City of New York*, 79 N.Y.S.2d 816, 274 App.Div. 809—*Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County*, 60 N.Y.S. 2d 750, 271 App.Div. 33.
- Application of Graham*, 165 N.Y. S.2d 154, 7 Misc.2d 34.
- Chapmald Realty Corp. v. Board of Standards & Appeals of New York City*, 76 N.Y.S.2d 296.
- Okl.—*Beveridge v. Westgate Oil Co.*, 44 P.2d 26, 171 Okl. 360.
- Pa.—*Fagan v. Philadelphia Zoning Bd. of Adjustment*, 132 A.2d 279, 389 Pa. 99.
- Perelman v. Board of Adjust-ment of Borough of Yeadon*, 18 A. 2d 438, 144 Pa.Super. 5.
- R.I.—*Tripp v. Zoning Bd. of Review of City of Pawtucket*, 123 A.2d 144—*Baker v. Zoning Bd. of Review of Town of North Kingstown*, 111 A.2d 353, 82 R.I. 432—*Allen v. Zon-ing Bd. of Review of City of War-wick*, 68 A.2d 369, 75 R.I. 321—*Gar-reau v. Board of Review of City of Newport*, 63 A.2d 214, 75 R.I. 44—*D'Acchioli v. Zoning Bd. of Re-view of City of Cranston*, 60 A.2d 707, 74 R.I. 327.
- S.C.—*Talbot v. Myrtle Beach Bd. of Adjustment*, 72 S.E.2d 66, 222 S.C. 165.
- Il. Ala.—*Nelson v. Donaldson*, 50 So.2d 244, 255 Ala. 76.
- Conn.—*Abramson v. Zoning Bd. of Appeals of Town of Westport*, 120 A.2d 827, 143 Conn. 211—*Hlavati v. Board of Adjustment of City of New Britain*, 116 A.2d 504, 143 Conn. 659—*Atlantic Refining Co. v. Zoning Bd. of Appeals of Town of Milford*, 111 A.2d 1, 142 Conn. 64—*McMahon v. Board of Zoning Ap-peals of City of New Haven*, 101 A.2d 284, 140 Conn. 433.
- D.C.—*Selden v. Capitol Hill South-east Citizens Ass'n*, 219 F.2d 33, 95 U.S.App.D.C. 62, certiorari denied *Capitol Hill Southeast Citizens Ass'n v. Coe*, 75 S.Ct. 873, 349 U.S. 944, 99 L.Ed. 1271.
- Ill.—*Baird v. Board of Zoning Ap-peals of City of Kankakee*, 106 N. E.2d 843, 347 Ill.App. 158.
- N.J.—*James v. Board of Adjustment of Town of Montclair*, 122 A.2d 660, 40 N.J.Super. 206.
- Pieretti v. Johnson*, 41 A.2d 896, 132 N.J.Law 576—*Griggs v. City of Paterson*, 39 A.2d 231, 132 N.J. Law 145—*Wilson v. Township Committee of Union Tp., Union County*, 9 A.2d 771, 123 N.J.Law 474—*Paramount Realty & Const. Co. v. Schmitt*, 142 A. 247, 6 N.J. Misc. 547, affirmed 146 A. 319, 106 N.J.Law 587.
- N.Y.—*Community Synagogue v. Bates*, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.
- Consolidated Edison Co. of New York v. Gillorist*, 127 N.Y.S.2d 365, 283 App.Div. 718, reargument & appeal denied 128 N.Y.S.2d 596, 283 App.Div. 799.
- J. L. Hennessy Associates, Inc. v. Griffin*, 155 N.Y.S.2d 378.
- Okl.—*Application of Shadid*, 238 P. 2d 794, 205 Okl. 462.
- Pa.—*Appeal of Trustees of Congrega-tion of Jehovah's Witnesses, Bethel Unit*, 130 A.2d 240, 183 Pa. Super. 219, appeal dismissed *Swift v. Borough of Bethel, Pa.*, 78 S.Ct. 120, 355 U.S. 40, 2 L.Ed.2d 71.
- R.I.—*Perrier v. Board of Appeals of City of Pawtucket*, 134 A.2d 141—*R. D'Ordine & Son v. Zoning Bd. of Review of Town of East Providence*, 90 A.2d 416, 79 R.I. 489.
- Nutini v. Zoning Bd. of Review of City of Cranston*, 82 A.2d 883, 78 R.I. 421—*D'Acchioli v. Zoning Bd. of Review of City of Cranston*, 60 A.2d 707, 74 R.I. 327.
- Va.—*Burkhardt v. Board of Zoning Appeals*, 66 S.E.2d 565, 192 Va. 606.
- Wis.—*State ex rel. A. Hynek & Sons Co. v. Board of Appeals of City of Racine*, 66 N.W.2d 623, 267 Wis. 309.
12. Md.—*Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore*, 72 A.2d 1, 195 Md. 1.
- N.Y.—*Crone v. Town of Brighton*, 119 N.Y.S.2d 877.
13. Conn.—*Paul v. Board of Zoning Appeals of City of New Haven*, 110 A.2d 619, 142 Conn. 40—*Spencer v. Board of Zoning Appeals of City of New Haven*, 104 A.2d 373, 141 Conn. 155—*O'Connor v. Board of Zoning Appeals of Town of Stratford*, 98 A.2d 515, 140 Conn. 65—*Rafala v. Zoning Bd. of Appeals of City of Hartford*, 62 A.2d 337, 135 Conn. 142—*Delaney v. Zoning Bd. of Ap-peals of City of Hartford*, 56 A.2d 647, 134 Conn. 240—*Grady v. Katz*, 1 A.2d 137, 124 Conn. 525.
- Md.—*Park Shopping Center, Inc. v. Lexington Park Theatre Co.*, 139 A.2d 843.
- Heath v. Mayor & City Council of Baltimore*, 58 A.2d 896, 190 Md. 478.
- Mass.—*Bicknell Realty Co. v. Board of Appeal of Boston*, 116 N.E.2d 570, 330 Mass. 676.
- N.J.—*Ardolino v. Board of Adjust-ment of Borough of Florham Park*, 130 A.2d 847, 24 N.J. 94.
- Van Corp. v. Mayor and Council of Borough of Ridgefield*, 124 A.2d 48, 41 N.J.Super. 74—*Keller v. Town of Westfield*, 121 A.2d 419, 39 N.J.Super. 430—*Cummins v. Board of Adjustment of Borough of Leonia, Bergen County*, 121 A.2d 405, 39 N.J.Super. 452—*Izenberg v. Board of Adjustment of City of Paterson*, 114 A.2d 732, 35 N.J.Super. 583—*Ackerman v. Board of Com'rs of Town of Belleville*, 62 A.2d 476, 1 N.J.Super. 478.
- Krilov v. Board of Adjustment of City of Newark*, 57 A.2d 659, 137 N.J.Law 39—*Siebold v. Mayfield*, 57 A.2d 248, 136 N.J.Law 512—*Cor-tesse v. Board of Adjustment of City of Summit*, 56 A.2d 714, 136 N.J.Law 455, affirmed 61 A.2d 238, 137 N.J.Law 609—*Interboro Truck-ing Co. v. Board of Adjustment of City of Perth Amboy*, 53 A.2d 213, 135 N.J.Law 520.
- N.Y.—*Crossroads Recreation, Inc. v. Broz*, 149 N.E.2d 65, 4 N.Y.2d 39, 172 N.Y.S.2d 129—*Hickox v. Grif-fin*, 83 N.E.2d 836, 298 N.Y. 365—*Otto v. Steinhilber*, 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681.
- Ryback v. Murdock*, 148 N.Y.S.2d 322, 1 A.D.2d 132—*Slater v. Toohill*, 84 N.Y.S.2d 182, 274 App.Div. 944—*Stevens v. Clarke*, 215 N.Y.S. 190, 216 App.Div. 351.
- North Titus Residential Ass'n of Irondequoit, N. Y. v. Board of Zoning Appeals of Town of Iron-dequoit*, 127 N.Y.S.2d 502, 205 Misc. 518—*Van Auken v. Kimmey*, 252 N.Y.S. 343, 141 Misc. 117.
- Teschner v. Town of Pittsford*, 129 N.Y.S.2d 803, affirmed 137 N.Y. S.2d 640, 285 App.Div. 851—*Under-hill v. Board of Appeals of Town of Oyster Bay*, 72 N.Y.S.2d 588, af-firmed 75 N.Y.S.2d 327, 273 App. Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937.
- Okl.—*Van Meter v. Westgate Oil Co.*, 32 P.2d 719, 168 Okl. 200.

to support the findings of the board,¹⁴ or to establish particular matters involved in the proceeding.¹⁵

§ 308. Determination

The determination by the board need not contain formal findings or set forth the reasons for the decision, except to the extent required by statute or ordinance.

In the absence of a provision so requiring, neither

formal findings¹⁶ nor a statement of reasons¹⁷ is required to be incorporated in or accompany the determination of the board on an application for a variance so as to render it valid.¹⁸ However, under some statutes the board is expressly required to set forth the facts, findings, or reasons on which its action is based,¹⁹ and, under some statutes, since the board cannot grant a variance without finding the necessary conditions to exist,²⁰ it is required to

Pa.—Appeal of Michener, 115 A.2d 367, 382 Pa. 401—Silverco, Inc. v. Zoning Bd. of Adjustment and Dept. of Licenses and Inspection, City of Philadelphia, 109 A.2d 147, 379 Pa. 497.
Appeal of Johnson, 93 Pa.Super. 599.

R.I.—Caldarone v. Zoning Bd. of Review of City of Providence, 137 A.2d 419—R. D'Ordine & Son v. Zoning Bd. of Review of Town of East Providence, 90 A.2d 416, 79 R.I. 489—Caldarone v. Zoning Bd. of Review of City of Warwick, 60 A.2d 158, 74 R.I. 196.
S.C.—Application of Groves, 85 S.E.2d 708, 226 S.C. 459—Hodge v. Pollock, 75 S.E.2d 752, 223 S.C. 342.
Tex.—Board of Adjustment v. Stovall, Civ.App., 218 S.W.2d 286.

14. Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 Md. 623.

N.Y.—Community Synagogue v. Bates, 136 N.E.2d 483, 1 N.Y.2d 445, 154 N.Y.S.2d 15.
Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20.

Innet v. Liberman, 155 N.Y.S.2d 383—Crone v. Town of Brighton, 119 N.Y.S.2d 877.

Wash.—State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195, 50 Wash.2d 378.

15. N.Y.—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939, appeal dismissed Siciliano v. Klaess, 84 N.Y.S.2d 922, Maxwell v. Klaess, 85 N.Y.S.2d 330, 274 App.Div. 943, and Goddard v. Klaess, 85 N.Y.S.2d 331.

16. Cal.—Patterson v. Board of Sup'rs of Los Angeles County, 180 P.2d 945, 79 C.A.2d 670—Bartholomae Oil Corporation v. Seager, 94 P.2d 614, 35 C.A.2d 77.

Conn.—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186—Grady v. Katz, 1 A.2d 137, 124 Conn. 525.

17. Conn.—Hlavati v. Board of Adjustment of City of New Britain, 116 A.2d 504, 142 Conn. 659—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614.

Mich.—Beardsley v. Evangelical

Lutheran Bethlehem Church, 246 N.W. 180, 261 Mich. 458.

Statement in minutes sufficient

Mich.—City of Detroit v. S. Loewenstein & Son, 47 N.W.2d 646, 330 Mich. 359.

18. Conn.—Nielsen v. Board of Appeals on Zoning of City of Bridgeport, 27 A.2d 392, 129 Conn. 285.

19. Ill.—Lindburg v. Zoning Bd. of Appeals of City of Springfield, 133 N.E.2d 266, 8 Ill.2d 254—Downey v. Grimshaw, 101 N.E.2d 275, 410 Ill. 21.

Mass.—Cefalo v. Board of Appeal of Boston, 124 N.E.2d 247, 332 Mass. 178—Bennett v. Board of Appeal of City of Cambridge, 167 N.E. 659, 268 Mass. 419—Prusik v. Board of Appeal of Building Department of City of Boston, 160 N.E. 312, 262 Mass. 451.

N.Y.—Gilbert v. Stevens, 135 N.Y.S.2d 357, 284 App.Div. 1016.

Long Island Land Research Bureau, Inc. v. Young, 159 N.Y.S.2d 414, 7 Misc.2d 469—Lyle v. Avis, 148 N.Y.S.2d 874, 1 Misc.2d 880—Sherwood Realty Corp. v. Feriola, 93 N.Y.S.2d 750, 197 Misc. 77, transferred, see, 101 N.Y.S.2d 236, 277 App.Div. 1049—Sherwood Realty Corp. v. Feriola, 82 N.Y.S.2d 505, 193 Misc. 194.

Wernert v. McHaffie, 158 N.Y.S.2d 438—Application of J. Clarence Davies, Inc., 155 N.Y.S.2d 476.

Pa.—Application of Imperial Asphalt Corp., 59 A.2d 121, 359 Pa. 402.

Bryan v. Zoning Bd. of Adjustment, Com.Pl., 2 Bucks Co. 16—Board of Adjustment of Susquehanna Tp. v. Procascio, Com.Pl., 69 Dauph.Co. 204—Kuznowski v. Board of Zoning Appeals, Com.Pl., 53 Lack.Jur. 53—Appeal of Bowtlich, Com.Pl., 49 Lack.Jur. 210—Appeal of O'Hara, Com.Pl., 73 Montg.Co. 89, reversed on other grounds 131 A.2d 587, 389 Pa. 35—Appeal of Berg, Com.Pl., 66 Montg.Co. 194—Appeal of Walsh, Com.Pl., 89 Pittsb.Leg.J. 383.

R.I.—Coffin v. Zoning Bd. of Review of City of Providence, 98 A.2d 843, 81 R.I. 112—Winters v. Zoning Bd. of Review of City of Warwick, 96 A.2d 337, 80 R.I. 275—Petrarca v. Zoning Bd. of Review of City of Warwick, 80 A.2d 156, 78 R.I. 130—Berg v. Zoning Board of Review

of City of Warwick, 12 A.2d 225, 64 R.I. 290—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

Sufficiency of statement

Mere repetition of the general language of the statute adds nothing to the power of the board of appeals to render a decision varying the application of zoning law, but there must be a definite statement of rational causes and motives, founded on adequate findings.

Mass.—Gaunt v. Board of Appeals of Methuen, 99 N.E.2d 60, 327 Mass. 380—Real Properties v. Board of Appeal of Boston, 65 N.E.2d 199, 319 Mass. 180—Brockett v. Board of Appeal of Building Department of City of Boston, 39 N.E.2d 956, 311 Mass. 52.

Decision held invalid

Where board of appeals granted special permit to vary zoning bylaws and to subdivide lot as indicated by plan, and only records filed by board with town clerk were its decision and plan, and no other records were in existence, requirements of statute, which authorized variation of zoning bylaws, were not complied with, and board's decision was invalid.

Mass.—Gaunt v. Board of Appeals of Methuen, 99 N.E.2d 60, 327 Mass. 380.

Report of testimony

Even though there is a stenographic or otherwise substantial report of testimony, supreme court will not speculate as to grounds on which the board bases its decision, especially where board has taken into consideration information which allegedly was within its own knowledge or secured from outside sources but of which not even the substance is disclosed in record brought up for review.

R.I.—Berg v. Zoning Board of Review of City of Warwick, 12 A.2d 225, 64 R.I. 290.

20. N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226—Augusta St. v. Collins, 87 A.2d 889, 9 N.J. 259—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291.

Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148—Wharton Sand & Stone Co. v. Montville Twp., 120 A.2d 858, 39 N.J.Super. 278—Izen-

state its findings²¹ and to specify its reasons²² for granting a variance.

Nevertheless, under a statute of the latter character the board need not expressly set forth its reasons for approving the application, at least where its resolution impliedly finds that the variance sought will not be contrary to the popular interest;²³ nor need the board in denying the variance specify any reasons for its action,²⁴ or suggest what uses would be approved.²⁵

Where the board bases its decision on a view of the location involved, it has been held that it must set forth what it found on such view to justify its action;²⁶ and where the board acts on its own knowledge it should set forth in its findings and decision the facts which are known to it and which

form the basis of such decision but which are not otherwise disclosed in the record.²⁷

Whether the official action of the board on the application must be taken at a public meeting is considered *supra* § 303.

Dismissal of a petition for a variance or exception is equivalent to a nonsuit,²⁸ and such an order has been held void.²⁹

§ 309. — Vote of Members of Board

The decision must be made by the number of members of the board required by statute, and the vote must be recorded as required.

The decision must be made by the number of members of the board required by statute,³⁰ and the

berg v. Board of Adjustment of City of Paterson, 114 A.2d 732, 35 N.J.Super. 583—Skaf v. Zoning Bd. of Adjustment of City of Asbury Park, 113 A.2d 843, 35 N.J.Super. 215—Tzseses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J.Super. 45—Giordano v. City Commission of City of Newark, 64 A.2d 462, 2 N.J.Super. 45, affirmed 67 A.2d 454, 2 N.J. 585—Protomastro v. Board of Adjustment of City of Hoboken in Hudson County, 62 A.2d 694, 1 N.J. Super. 102.

Protomastro v. Board of Adjustment of City of Hoboken, 59 A.2d 644, 137 N.J.Law 250—Sandler v. Board of Com'rs of City of Trenton, 19 A.2d 788, 126 N.J.Law 392—Brandon v. Board of Com'rs of Town of Montclair, 15 A.2d 598, 125 N.J.Law 367.

Pa.—Yagiello v. Board of Zoning Appeals, Com.Pl., 53 Lack.Jur. 21.

R.I.—Cardin v. Zoning Bd. of Review of Town of North Providence, 93 A.2d 304, 80 R.I. 136—Nutini v. Zoning Bd. of Review of City of Cranston, 82 A.2d 883, 78 R.I. 421—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 319.

Findings held insufficient

N.J.—Ward v. Scott, 93 A.2d 385, 11 N.J. 117.

Skaf v. Zoning Bd. of Adjustment of City of Asbury Park, 113 A.2d 843, 35 N.J.Super. 215.

21. Pa.—Appeal of Johnson, 93 Pa. Super. 599.

Va.—Burkhardt v. Board of Zoning Appeals, 66 S.E.2d 565, 192 Va. 606.

Subsequent resolution stating findings

(1) Where recommendation of town board of adjustment that a zoning variance be allowed contained no finding of facts or other recitals,

but, after such recommendation had been approved by board of commissioners and writ of certiorari allowed to review such action, board of adjustment adopted a second resolution declaring that at time of its former action it had found certain facts which were the basis of its recommendation, recitals and findings contained in second resolution would be given the same effect as if part of board's original action.

N.J.—Ackerman v. Board of Com'rs of Town of Belleville, N. J., 62 A.2d 476, 1 N.J.Super. 69.

(2) Filing of supplemental findings by board of adjustment months after it has granted variance, and after institution of action challenging grant, is to be condemned as loose and undesirable practice.

N.J.—Tzseses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J.Super. 45.

22. N.J.—Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148.

National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J. Law 95—Brandon v. Board of Com'rs of Town of Montclair, 15 A.2d 598, 125 N.J.Law 367.

Va.—Burkhardt v. Board of Zoning Appeals, 66 S.E.2d 565, 192 Va. 606.

23. N.J.—Ranney v. Istituto Pontificio Delle Maestre Filippini, 119 A.2d 142, 20 N.J. 189.

Board of Ed. of Borough of Ft. Lee v. Mayor and Council of Borough of Ft. Lee, 105 A.2d 899, 31 N.J.Super. 22.

Wilson v. Township Committee of Union Tp., Union County, 9 A.2d 771, 123 N.J.Law 474.

24. N.J.—Wharton Sand & Stone Co. v. Montville Tp., 120 A.2d 858, 39 N.J.Super. 278.

National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J. Law 95.

Keiser v. Inhabitants of City of Plainfield, 159 A. 785, 10 N.J.Misc. 496.

25. N.J.—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442.

26. Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

N.J.—Giordano v. City Commission of City of Newark, 67 A.2d 454, 2 N.J. 585.

Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161—Rodee v. Lee, 81 A.2d 517, 14 N.J.Super. 188.

Scaduto v. Town of Bloomfield, 30 A.2d 649, 127 N.J.Law 1.

R.I.—Buckminster v. Zoning Board of Review of City of Pawtucket, 30 A.2d 104, 68 R.I. 515.

27. N.Y.—Lapham v. Roulan, 169 N. Y.S.2d 346—Wernert v. McHaffie, 158 N.Y.S.2d 438—Application of Furlong, 111 N.Y.S.2d 398.

R.I.—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 319—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135.

Necessity of disclosing in record facts within personal knowledge of board on which it acted see *infra* § 313.

28. Ind.—Anderson Lumber & Supply Co. v. Fletcher, 89 N.E.2d 449, 228 Ind. 383.

Pa.—Warrick v. Zoning Bd. of Adjustment, 77 Pa.Dist. & Co. 396.

29. Ind.—Anderson Lumber & Supply Co. v. Fletcher, 89 N.E.2d 449, 228 Ind. 383.

30. Ala.—Moore v. Pettus, 71 So.2d 814, 260 Ala. 616.

Conn.—Koslow v. Board of Zoning Appeals of City of New Haven, 112 A.2d 513, 19 Conn.Sup. 303.

N.Y.—Corpus Juris Secundum cited in Giuliano v. Entrass, 158 N.Y.S. 2d 961, 964, 4 Misc.2d 546.

vote must be recorded as required⁸¹ and show that the required number of members voted in favor of the resolution granting the variance.⁸² A requirement that the vote of each member of the board on the application must be shown merely requires a showing of the vote on the ultimate question whether the variance permit should be granted, and it is not necessary that the vote on each incidental claim of applicant be shown.⁸³

Although a board member may not make a judicial determination with respect to an application for a zoning variance without knowledge of the material evidence,⁸⁴ the mere fact that one member of the board who voted for the variance, and whose vote was necessary to pass the resolution granting the variance, was not present during the public hearing

of the application for the variance, at which no testimony was taken, and had not read the transcript of the proceedings does not invalidate the proceeding where he actually had full knowledge of the problems presented by the request for the variance and had considered the matters aired at the public hearing before casting his vote.⁸⁵

§ 310. — Conditions

A variance may be granted on stated conditions which must be reasonable, and not arbitrary, unnecessary, or oppressive; and under some statutes an exception may be granted only under appropriate conditions and safeguards.

A board of appeal or adjustment may grant a variance on stated conditions,⁸⁶ and sometimes it

R.I.—May-Day Realty Corp. v. Zoning Bd. of Review of City of Pawtucket, 77 A.2d 539, 77 R.I. 469.

Who must be present

Under zoning statute providing that no variance of application of zoning act should be authorized except by unanimous decision of entire membership of board of appeal rendered after a public hearing, all members of board are required to be present at public hearing, and, where one of members was ill and not present at hearing even though he read record of testimony, visited premises, and participated in decision, and objecting party consented to such procedure, there was no public hearing by "entire membership of board" as required by statute, and board was without jurisdiction to act.

Mass.—Sesnovich v. Board of Appeal of Boston, 47 N.E.2d 943, 313 Mass. 393.

Quorum

In absence of any provision that one member may constitute a quorum of a board of adjustment, a majority of board of adjustment is necessary, and a quorum is not present where one member of a two-man board disqualifies himself and application for a special exception is heard by other.

Pa.—Wharton v. Cheltenham Tp., 82 Pa. Dist. & Co. 408, 68 Montg. Co. 264.

31. Ala.—Moore v. Pettus, 71 So.2d 814, 260 Ala. 616.

32. N.Y.—Lapham v. Roulan, 169 N.Y.S.2d 346.

"Unanimous decision of entire board"

A unanimous decision consisting of four of the five regularly appointed members and a substitute member sitting in place of the fifth regularly appointed member was "unanimous decision of entire board," as required by zoning law.

Mass.—Real Properties v. Board of

Appeal of Boston, 42 N.E.2d 499, 311 Mass. 430.

33. Conn.—Torello v. Board of Zoning Appeals of New Haven, 16 A.2d 591, 127 Conn. 307.

34. N.Y.—Taub v. Pirnie, 160 N.Y.S.2d 447, 3 A.D.2d 753, affirmed 144 N.E.2d 3, 3 N.Y.2d 188, 165 N.Y.S.2d 1.

35. N.Y.—Taub v. Pirnie, 144 N.E.2d 3, 3 N.Y.2d 188, 165 N.Y.S.2d 1.

36. Conn.—Kelley v. Board of Zoning Appeals of New Haven, 13 A.2d 675, 126 Conn. 648—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

N.Y.—Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, 96 N.Y.S.2d 380, 196 Misc. 1005—Spadafora v. Ferguson, 48 N.Y.S.2d 698, 182 Misc. 161, affirmed 50 N.Y.S.2d 408, 268 App.Div. 820—Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325—Peekskill Packing Co. v. Board of Health of Village of Peekskill, 14 N.Y.S.2d 229, 172 Misc. 176, reversed on other grounds Peekskill Packing Co. v. Board of Health of Village of Peekskill, Westchester County, 25 N.Y.S.2d 366, 261 App. Div. 915, reargument denied Application of Peekskill Packing Co., 29 N.Y.S.2d 717, 262 App.Div. 863.

Fleischer v. Murdock, 62 N.Y.S.2d 417, appeal dismissed, A.D., 77 N.Y.S.2d 393—Henry Steers, Inc. v. Rembaugh, 15 N.Y.S.2d 880, reversed on other grounds 20 N.Y.S.2d 72, 259 App.Div. 908, affirmed 29 N.E.2d 984, 284 N.Y. 621—Burke v. Cohen, 13 N.Y.S.2d 984.

Pa.—Hinton v. Zoning Bd. of Adjustment, 88 Pa. Dist. & Co. 265—Appeal of North End Fire Co. No. 1 of Pottstown, 85 Pa. Dist. & Co. 287, 69 Montg. Co. 46.

Appeal of Houlden, Com.Pl., 86 Pittsb. Leg. J. 115.

R.I.—Fiske v. Zoning Bd. of Review of Town of East Providence, 40 A.2d 485, 70 R.I. 426—Morris v. Zoning Board of Review of City of Pawtucket, 155 A. 654, 52 R.I. 26.

Painting and landscaping

A determination of village zoning board of appeals on waterworks company's application for variation of zoning ordinances to permit erection of additional facilities on company's land in residential district was proper as to board's requirements that reservoir, permitted by board to be erected on land be painted green and immediately surrounding area landscaped to screen reservoir.

N.Y.—Northport Water Works Co. v. Carll, 133 N.Y.S.2d 859.

Termination of right to continue variance

Where an antique dealer who has been granted a variance under a zoning ordinance to conduct a shop in a residence leased by her for term of lease, purchases property, right to continue variance is terminated by its very terms.

Pa.—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa. Dist. & Co. 686, 63 Montg. Co. 247.

Estoppel to object

A party who has accepted and retained advantages of an order of zoning board of appeal granting variation from construction and use requirement of property cannot be heard to attack validity or propriety of conditions upon which its right to such advantages was expressly predicated, and by accepting advantages of variation he has waived whatever error may have existed in imposing conditions upon which variation was granted.

Ill.—Zweifel Mfg. Corp. v. City of Peoria, 144 N.E.2d 593, 11 Ill.2d 489.

should do so,³⁷ although it may not reserve to itself the right to modify or revoke the privilege granted on violation of the condition.³⁸ Where a variance is granted on condition that certain requirements be complied with or certain alterations made, the variance is not effective until such conditions are met;³⁹ nevertheless, if applicant, although he has not fully complied with the conditions, has made substantial progress toward compliance within the prescribed time, the board may in its discretion grant an extension of time,⁴⁰ and the failure of applicant to comply within the prescribed time does not invalidate the grant or empower the board to reverse its original order.⁴¹

Conditions imposed must be reasonable, not arbitrary, unnecessary, or oppressive,⁴² or beyond the jurisdiction of the board to impose;⁴³ and unreasonable conditions may be stricken by the court.⁴⁴ The

proper way to raise the question whether the condition has been violated is to petition the building inspector for an order forbidding improper use of the premises;⁴⁵ and it is likewise proper for the board, on an application to determine the propriety of the issuance of a variance permit, to consider whether the conditions imposed with the granting of the variance should be dispensed with or have been complied with.⁴⁶

Under a statute expressly providing that exceptions may be granted subject to appropriate conditions and safeguards, the conditions must be such as under all the circumstances of any given case are fit, suitable, and proper;⁴⁷ such conditions and safeguards are placed on the use of the premises and run with the land,⁴⁸ and for that reason they should be specifically and separately enumerated.⁴⁹ Where a condition is invalid, and such condition

37. R.I.—Taft v. Zoning Bd. of Review of City of Warwick, 71 A.2d 886, 76 R.I. 443.

38. Conn.—Kelley v. Board of Zoning Appeals of New Haven, 13 A.2d 675, 126 Conn. 648.

39. Ala.—Moore v. Pettus, 71 So.2d 814, 260 Ala. 616.

N.Y.—La Sala v. Garcia, 70 N.Y.S.2d 833, affirmed 75 N.Y.S.2d 295, 273 App.Div. 752.

40. N.Y.—Fleischer v. Murdock, 62 N.Y.S.2d 417, appeal dismissed, A.D., 77 N.Y.S.2d 393.

41. N.Y.—Fleischer v. Murdock, supra.

42. N.J.—Soho Park & Land Co. v. Board of Adjustment of Town of Belleville, 142 A. 548, 6 N.J.Misc. 683.

R.I.—Olevson v. Zoning Board of Review of Town of Narragansett, 44 A.2d 720, 71 R.I. 303—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

Conformity to precedent

A condition imposed in a variance does not have to conform to any precedent.

Pa.—Springfield Tp. v. Flourbowl, Inc., 7 Pa.Dist. & Co.2d 28, 72 Montg.Co. 304.

Conditions held reasonable or valid

(1) Where building zone ordinance of town empowered zoning board of appeals to attach conditions to a variance, rule adopted by board limiting validity of special exception or variance granted to one year from date of order, unless within that period applicant has applied for building permit and has commenced construction or use or has obtained an extension, is valid.

N.Y.—Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, 96 N.Y.S.2d 380, 196 Misc. 1005.

(2) Action of a zoning board in requiring as a condition to grant of a variance to permit an eight-lane bowling alley that a paved parking area be provided for thirty cars is reasonable, and is not satisfied by spreading a three-quarter inch surface of loose stone over lot, since "paved" means a hard, smooth, prepared surface.

Pa.—Springfield Tp. v. Flourbowl, Inc., 7 Pa.Dist. & Co.2d 28, 72 Montg.Co. 304.

(3) Even though there is no ordinance on subject, requiring a variance permittee to pave his accessory parking lot is not an unreasonable or discriminatory condition merely because other businesses which have accessory parking lots have not likewise been required to pave.

Pa.—Springfield Tp. v. Flourbowl, Inc., supra.

Retroactive application

Rule adopted by zoning board of appeals of town limiting validity of special exception or variance from terms of building zone ordinance to period of one year from date of order, unless within that period applicant has applied for building permit, and has commenced construction or use, or has obtained an extension, could be applied retroactively to a variance previously granted.

N.Y.—Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, 96 N.Y.S.2d 380, 196 Misc. 1005.

43. Mass.—Assessors of Dover v. Dominican Fathers Province of St. Joseph, 137 N.E.2d 225, 334 Mass. 530.

N.Y.—Rand v. City of New York, 155 N.Y.S.2d 753, 3 Misc.2d 769.

Pa.—Appeal of Tool & Mfg. Co., 104 Pittsb.Leg.J. 243.

44. N.J.—Soho Park & Land Co. v. Board of Adjustment of Town of

Belleville, 142 A. 548, 6 N.J.Misc. 683.

45. Conn.—Kelley v. Board of Zoning Appeals of New Haven, 13 A.2d 675, 126 Conn. 648.

46. N.Y.—In re Hempstead, 280 N.Y.S. 448, 245 App.Div. 750.

47. R.I.—Olevson v. Zoning Board of Review of Town of Narragansett, 44 A.2d 720, 71 R.I. 303.

Time limitation

Under ordinance permitting zoning board of review, subject to appropriate provisions and safeguards, to make special exceptions where necessary for welfare of public, board had power to impose a time limitation on granting of exception or variance.

R.I.—Guenther v. Zoning Bd. of Review of City of Warwick, 125 A.2d 214.

48. R.I.—Strauss v. Zoning Bd. of Review of City of Warwick, 48 A.2d 349, 72 R.I. 107.

A personal condition applicable to the person who owns or occupies the property rather than to the property itself is invalid.

R.I.—Olevson v. Zoning Board of Review of Town of Narragansett, 44 A.2d 720, 71 R.I. 303.

Term of lease

Where an antique dealer, who has been granted a variance permit under a zoning ordinance to conduct a shop in a residence leased by him for the term of the lease, purchases the property, the right to continue the variance is terminated by the very terms of the permit.

Pa.—Cummer v. Narberth Borough Bd. of Adjustment, 59 Pa.Dist. & Co. 686, 63 Montg.Co. 247.

49. R.I.—Strauss v. Zoning Bd. of Review of City of Warwick, 48 A.2d 349, 72 R.I. 107.

was the chief factor in the granting of the exception, the exception must fail.⁵⁰

§ 311. — Filing, Notice, or Service

A report of the proceedings and decision must be filed, and notice of the decision mailed to interested parties, when required by statute, but personal service is not necessary in the absence of statutory requirement.

Where so required by statute, a report of the proceedings and decision must be filed in the proper manner,⁵¹ and notice of the decision must be mailed to each party in interest.⁵² Personal service of the decision has been held not necessary when not required by statute.⁵³ The failure to file the decision is not ground for vacating it where the persons petitioning for review were not deprived of access

to, or knowledge of, the decision.⁵⁴

§ 312. — Conclusiveness and Effect

The decision of the board on an application for a variance or exception is generally final and binding until set aside in a proper manner.

Under an appropriate provision of a zoning code, the decision of the board on an application for a variance may be made final.⁵⁵ Even in the absence of such a provision, the action of the board within its jurisdiction and in the absence of fraud or other abuse is valid, final, and binding until set aside in a proper manner;⁵⁶ but such decision is not res judicata,⁵⁷ at least as to matters not directly in issue.⁵⁸ Where the practice is for the board

50. R.I.—Olevson v. Zoning Board of Review of Town of Narragansett, 44 A.2d 720, 71 R.I. 303.

51. Mass.—Amero v. Board of Appeal of City of Gloucester, 186 N.E. 61, 283 Mass. 45.

Showing compliance as to notice
Omission of words "most recent," as used in statute, in describing tax list used in sending notice of variance in zoning ordinances to property owners was not fatal where board of appeals referred to "local tax list."

Mass.—Amero v. Board of Appeal of City of Gloucester, 186 N.E. 61, 283 Mass. 45.

52. Mass.—Del Grosso v. Board of Appeal of Revere, 110 N.E.2d 836, 330 Mass. 29—Amero v. Board of Appeal of City of Gloucester, 186 N.E. 61, 283 Mass. 45.

Failure to notify consenting parties
Refusing to quash decision of board of appeals varying zoning ordinance on ground that others than petitioners and remonstrants were not notified was held not error where others consented in advance to board's decision.

Mass.—Amero v. Board of Appeal of City of Gloucester, supra.

Owners failing to give notice to board
Where property owners did not give notice to board of zoning adjustment of any desire to be considered parties to proceedings for granting a variance in zoning ordinance, they could not complain of lack of notice of decision of board in granting variance under statute requiring notice to be given to all parties in interest.

Pa.—Blank v. Board of Adjustment of Borough of West Mifflin, 136 A. 2d 695, 390 Pa. 636.

53. N.Y.—Hercher v. Murdock, 105 N.Y.S.2d 164, 200 Misc. 275.

54. N.Y.—Lapham v. Roulan, 169 N.Y.S.2d 346.

55. Cal.—Rubin v. Board of Directors of City of Pasadena, 104 P.2d 1041, 16 C.2d 119.

56. Ga.—Washington Seminary v. Bass, 16 S.E.2d 565, 192 Ga. 808.
Ind.—Board of Zoning Appeals of City of Indianapolis v. Moyer, 27 N.E.2d 905, 108 Ind.App. 198.

N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280—Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21—Potts v. Board of Adjustment of Borough of Princeton, 48 A.2d 850, 133 N.J.Law 230—Pieretti v. Johnson, 41 A.2d 896, 132 N.J.Law 576—Brandon v. Board of Com'rs of Town of Montclair, 15 A.2d 598, 125 N.J.Law 367.

Soho Park & Land Co. v. Town of Belleville, 142 A. 547, 6 N.J. Misc. 683—Concord Development Co. v. Dowling, 142 A. 356, 6 N.J. Misc. 552—Chancellor Dev. Corp. v. Senior, 134 A. 337, 4 N.J.Misc. 633.

N.Y.—People ex rel. St. Albans-Springfield Corporation v. Connell, 177 N.E. 313, 257 N.Y. 73—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

Riker v. Board of Standards and Appeals of City of New York, 234 N.Y.S. 42, 225 App.Div. 570.

Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E. 2d 128, 226 N.C. 107.

Okl.—Torrance v. Bladel, 155 P.2d 546, 195 Okl. 68.

W.Va.—Mustard v. City of Bluefield, 45 S.E.2d 326, 130 W.Va. 763.

Indirect attack

Where decision of board granting a zoning variance became final on failure of anyone to institute a pro-

ceeding to review board's decision within statutory time limit, a second proceeding seeking an order directing board formally to deny the original zoning variance on ground that conditions imposed by board in its decision had not been fully complied with was an attempt to obtain indirectly the relief which could not be obtained directly, and would not be allowed.

N.Y.—Fleischer v. Murdock, 62 N.Y. S.2d 417, appeal dismissed, A.D., 77 N.Y.S.2d 393.

Deception

Party seeking to uphold grant of variance by board of adjustment based in part on building inspector's approval of construction can derive no advantage from approval of construction gained by deception.

Pa.—Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66.

57. Md.—Knox v. Mayor and Council of Baltimore City, 23 A.2d 15, 180 Md. 88.

Pa.—Congregation Adath Jeshurun v. Cheltenham Tp., Com.Pl., 70 Montg.Co. 345—Jeffrey v. Cheltenham Tp., Com.Pl., 68 Montg.Co. 312.

58. N.Y.—Kaufman v. City of Glen Cove, 45 N.Y.S.2d 53, 180 Misc. 349, affirmed 42 N.Y.S.2d 508, 266 App. Div. 870.

Issues not concluded

The denial of a property owner's application for a variation of the zoning resolution does not constitute binding adjudication that without such variation enforcement of general rule would deprive owner of his property without due process of law, notwithstanding courts on review by certiorari sustain the determination of the board denying variation.

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.

of adjustment to recommend to the governing body that the application for a variance be granted, if on such recommendation the governing body refuses to approve the application, the application falls, and such refusal cannot be set aside except on adequate grounds.⁵⁹

A variance for the use of property in a particular manner is not personal to the owner at the time of the grant, but is available to any subsequent owner, until it expires according to its terms or is effectively revoked,⁶⁰ and this is true even though the original owner did not act on it.⁶¹ Where no appeal is taken from the denial of a petition for a variance, the findings and rulings on hardship and on the effect of the present use on the values of surrounding properties are significant only as they relate to the issue of public need.⁶²

§ 313. Record

It is generally necessary that a proper record be kept of the proceedings on an application for a variance, and such record must be made and filed in the manner prescribed by statute.

As a general rule, it is necessary that a record be kept of the proceedings on an application for a variance,⁶³ and such record must be made and filed in the manner prescribed by statute.⁶⁴ Ordinarily, the record must contain a résumé of the evidence,⁶⁵ and, even apart from any statutory requirement, it

has been held that the regard accorded to the proceedings is considerably enhanced where a stenographic record is made;⁶⁶ but where the record contains a summary of the testimony, and sets forth in general terms the grounds for the board's decision, the failure of the board to keep a stenographic record of the proceedings is not error.⁶⁷

Where the board acts on the basis of matters within the personal knowledge of its members, such facts should be set forth in the record.⁶⁸

§ 314. Reconsideration or Revocation; New Application

The board will not ordinarily review its own decision on an application for a variance or exception or revoke action once taken thereon; but variances may be revoked entirely when no vested rights have accrued, and the board may entertain a new application based on different facts.

In conformity with the general rules as to the power of a board of appeals and adjustment to review its own prior decisions, as discussed supra § 218, it is the general rule that such a board will ordinarily not be permitted to review its own decision on an application for a variance or exception and revoke action once taken thereon,⁶⁹ at least in the absence of a mistake in the prior proceedings,⁷⁰ or of new evidence or additional facts,⁷¹ or a change in circumstances;⁷² and this is particularly true

59. N.J.—Shaiman v. Mayor, Board of Com'rs and Board of Adjustment of City of Newark, 191 A. 735, 15 N.J.Misc. 437.

60. Cal.—*Corpus Juris Secundum* quoted in Cohn v. County Bd. of Sup'rs of Los Angeles County, 286 P.2d 836, 839, 135 C.A.2d 180. N.Y.—Neiburger v. Lewis, 57 N.Y.S. 2d 542, 185 Misc. 437.

Pa.—Schwartz v. Wagner, Com.Pl., 72 Montg.Co. 470, 48 Mun.L.R. 134, affirmed 123 A.2d 417, 385 Pa. 364.

61. Cal.—*Corpus Juris Secundum* quoted in Cohn v. County Bd. of Sup'rs of Los Angeles County, 286 P.2d 836, 839, 135 C.A.2d 180.

N.Y.—Neiburger v. Lewis, 57 N.Y.S. 2d 542, 185 Misc. 437.

62. N.H.—City of Keene v. Paren-teau, 112 A.2d 667, 99 N.H. 415.

63. N.J.—Tomko v. Vissers, 121 A. 2d 502, 21 N.J. 226.

64. Mass.—Amero v. Board of Appeal of City of Gloucester, 186 N. E. 61, 283 Mass. 45.

65. N.J.—Tomko v. Vissers, 121 A. 2d 502, 21 N.J. 226.

66. N.J.—Tomko v. Vissers, supra.

67. R.I.—Jacques v. Zoning Board of Review of City of Pawtucket, 12 A.2d 222, 64 R.I. 284.

68. N.J.—Tomko v. Vissers, 121 A. 2d 502, 21 N.J. 226.

N.Y.—Bobrowski v. Feriolo, 153 N.Y. S.2d 157, 2 A.D.2d 708—Slater v. Toohill, 84 N.Y.S.2d 182, 274 App. Div. 944.

Application of American Seminary of The Bible, 104 N.Y.S.2d 660, modified on other grounds 112 N.Y.S.2d 904, 280 App.Div. 792—Goldstein v. Board of Appeals of Town of Oyster Bay, 102 N.Y.S. 2d 922.

69. Conn.—Torello v. Board of Zoning Appeals of New Haven, 16 A. 2d 591, 127 Conn. 807—Rommell v. Walsh, 16 A.2d 483, 127 Conn. 272—Burr v. Rago, 180 A. 444, 120 Conn. 287—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

N.Y.—Caper v. Parker, 66 N.Y.S.2d 10, 271 App.Div. 889—Town of Greece v. Smith, 9 N.Y.S.2d 21, 256 App.Div. 886—Riker v. Board of Standards and Appeals of City of New York, 234 N.Y.S. 42, 225 App.Div. 570.

Hoffman v. Fraad, 224 N.Y.S. 694, 130 Misc. 667, affirmed 229 N.Y.S. 868, 224 App.Div. 717, appeal dismissed 164 N.E. 574, 249 N.Y. 537, motion denied 164 N.E. 607, 249 N.Y. 620.

Chapmald Realty Corp. v. Board of Standards & Appeals of New York City, 76 N.Y.S.2d 298.

43 C.J. p 356 note 14.

70. N.Y.—McGarry v. Walsh, 210 N.Y.S. 286, 213 App.Div. 289.

71. N.Y.—Narragansett Inn v. Mielke, 134 N.Y.S.2d 363.

72. Conn.—Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 316, 140 Conn. 527—Sipperley v. Board of Appeals on Zoning of Town of Westport, 98 A.2d 907, 140 Conn. 164.

N.Y.—Heyman v. Walsh, 242 N.Y.S. 517, 137 Misc. 278, affirmed 245 N.Y.S. 769, 230 App.Div. 822—Riverside St. Clair Corporation v. Walsh, 228 N.Y.S. 88, 131 Misc. 652, affirmed 231 N.Y.S. 869, 231 App.Div. 655.

N.C.—Little v. Board of Adjustment of City of Raleigh, 143 S.E. 827, 195 N.C. 793.

Discretion of board

(1) A board of zoning appeals may exercise a liberal discretion in deciding on a new application, whether to reverse earlier decision.

Conn.—Spencer v. Board of Zoning Appeals of City of New Haven, 104 A.2d 373, 141 Conn. 155.

after certiorari proceedings have been instituted.⁷³ So, under a statute providing that no new petition for reclassification or special exception shall be entertained in any case which has been considered and acted on until the expiration of a specified time from the date of the final order thereon, an application for special exception will not be entertained within the statutory time from the denial of a petition for reclassification.⁷⁴

Variances may be revoked entirely, however, when no vested rights have accrued,⁷⁵ and even after a permit has been issued.⁷⁶ Furthermore, the board may entertain a new application based on different or additional facts and make a new determination,⁷⁷ even aside from a statute specifically providing that the board of appeals may review any order, decision, or determination which it has not previously reviewed.⁷⁸ A board of appeals has jurisdiction to reach a decision contrary to that

reached on a previous application for similar relief,⁷⁹ and the mere fact that the board grants an application for a variance which it had previously denied does not ipso facto show bad faith or arbitrary action.⁸⁰ A new board has been held to have the power to review the action of a prior board provided it exercises such power within the statutory time allotted within which to appeal to the courts.⁸¹

If the board has power to rescind its prior decision, it cannot legally do so without giving the applicants for the variance notice of the proceeding to reconsider.⁸²

Revocation of a variance previously granted by a city council was held arbitrary and capricious where three of the five members of the council were disqualified to vote on the revocation ordinance because they were biased and prejudiced and had determined in advance of hearings to vote for the revocation or because they had not heard the evidence

(2) Reversal of action of zoning board of adjustment in granting a certificate of variance in belief that, since premises had previously been used in a given manner, board was required to permit a resumption of such nonconforming use regardless of time which had elapsed during which use was discontinued, did not constitute a holding that board acted arbitrarily so as to preclude subsequent grant of a variance in exercise of board's discretion.
Pa.—Triolo v. Exley, 57 A.2d 878, 358 Pa. 555.

Question for board

Whether there is such a change of facts or circumstances as to justify a rehearing on matter of granting of variance and authorization of issuance of building permit is primarily for determination of zoning board of appeals of municipality on application for rehearing.

N.Y.—Application of American Seminary of Bible, 112 N.Y.S.2d 904, 280 App.Div. 792.

Griest v. Hooley, 128 N.Y.S.2d 341, 205 Misc. 396.

Application of J. Clarence Davies, Inc., 155 N.Y.S.2d 476.

73. N.Y.—Riker v. Board of Standards and Appeals of City of New York, 234 N.Y.S. 42, 225 App.Div. 570.

74. Md.—Tyrie v. Baltimore County, 137 A.2d 156, 215 Md. 135.

75. N.Y.—Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, 96 N.Y.S.2d 380, 196 Misc. 1005.

76. N.Y.—Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, supra.

77. Cal.—Steiger v. Board of Supervisors, 300 P.2d 210, 143 C.A.2d 352.

Conn.—Fiorilla v. Zoning Bd. of Appeals of City of Norwalk, 129 A.2d 619, 144 Conn. 275—Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 102 A.2d 316, 140 Conn. 527—Torello v. Board of Zoning Appeals of New Haven, 16 A.2d 591, 127 Conn. 307—Rommell v. Walsh, 16 A.2d 483, 127 Conn. 272—Burr v. Rago, 180 A. 444, 120 Conn. 287—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

N.J.—Tzeses v. Board of Trustees of Village of South Orange, 91 A.2d 538, 22 N.J.Super. 45.

Mingle v. Board of Adjustment of City of Orange, 142 A. 367, 6 N.J.Misc. 595.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

Burlinson v. Zoning Bd. of Appeals of City of Yonkers, 87 N.Y.S.2d 412, 275 App.Div. 723—Ficaro v. Walsh, 235 N.Y.S. 254, 226 App. Div. 441.

Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20—Lyle v. Avis, 148 N.Y.S.2d 874, 1 Misc.2d 880—Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, 96 N.Y.S.2d 380, 196 Misc. 1005—Vesell v. Board of Standards and Appeals of City of New York, 243 N.Y.S. 518, 137 Misc. 806, affirmed Vesell v. Walsh, 232 N.Y.S. 904, 225 App. Div. 742—Riverside St. Clair Corporation v. Walsh, 228 N.Y.S. 88, 131 Misc. 652, affirmed 231 N.Y.S. 869, 231 App.Div. 655.

Application of J. Clarence Davies, Inc., 155 N.Y.S.2d 476—Chapmald Realty Corp. v. Board of

Standards & Appeals of New York City, 76 N.Y.S.2d 296.

Pa.—Warrick v. Zoning Bd. of Adjustment, 77 Pa.Dist. & Co. 396.

Lyons v. Zoning Bd. of Adjustment, Com.Pl., 38 Del.Co. 275.
W.Va.—Mustard v. City of Bluefield, 45 S.E.2d 326, 130 W.Va. 763.

New plans which purported to introduce numerous new details would be deemed materially to change aspects of building application.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

Subsequent purchase of property

Fact that owner of realty purchased it after board of adjustment of city had denied his first application for a variance of zoning ordinance, although not an absolute bar to relief on his second application for a variance, was a material element which board properly considered.

N.J.—Marrocco v. Board of Adjustment of City of Passaic, 68 A.2d 470, 5 N.J.Super. 94.

78. N.Y.—Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, 96 N.Y.S.2d 380, 196 Misc. 1005.

79. N.Y.—Bach v. Board of Zoning & Appeals of Town of North Hempstead, 124 N.Y.S.2d 744, 282 App.Div. 879.

80. N.Y.—Application of J. Clarence Davies, Inc., 155 N.Y.S.2d 476.

81. Pa.—Silverco, Inc. v. Zoning Bd. of Adjustment and Dept. of Licenses and Inspection, City of Philadelphia, 109 A.2d 147, 379 Pa. 497.

82. N.Y.—Narragansett Inn v. Mielke, 134 N.Y.S.2d 363.

presented and one of the two remaining members voted against the ordinance;⁸³ and where the ordinance granting the variance thus attempted to be revoked reserved the right to revoke them after regular public hearings, such attempt to revoke was also invalid as made without the required public hearing.⁸⁴ In the absence of compliance with provisions of the zoning law requiring that notice be given and hearings held as to the possible effect of a proposed zoning law on property rights, an ordinance adopted by the electors of a city revoking variances is void.⁸⁵

§ 315. Review

An administrative review of proceedings for a variance may be had when authorized by the zoning laws.

The right of appeal by the applicant or any party aggrieved by the decision of an administrative body on an application for a variance is governed by controlling statutory provisions.⁸⁶ Thus, an administrative review may be had where provision is made therefor by the zoning laws,⁸⁷ as where statutes provide for an appeal from the decision of the board of appeals to the state emergency housing commission.⁸⁸ Judicial review of proceedings before the board is treated *infra* § 329.

E. VARIANCES FOR GARAGES, FILLING STATIONS, AND PARKING LOTS

§ 316. In General

In a proper case, a variance or exception may be granted from a regulation prohibiting or restricting the construction of, or use of property for, a service station, garage, or parking lot.

In accordance with the general rules, as discussed *supra* §§ 268-315, a variance or exception from a regulation prohibiting or restricting the construction of, or use of property for, a service station, garage, or parking lot in a particular manner or place may be granted in a proper case,⁸⁹ as where literal en-

forcement of the regulation will result in unnecessary hardship.⁹⁰

A variance should not be granted merely because use of the property for a service station, garage, or parking lot will be more convenient or profitable to the owner, or because he will suffer some financial disadvantage or hardship if denied such use;⁹¹ it is essential that applicant should suffer some unusual hardship from the literal enforcement of the regulation different from, and greater than, that suffered by other property owners in the district.⁹² The

83. Cal.—*Saks & Co. v. City of Beverly Hills*, 237 P.2d 32, 107 C.A.2d 260.

84. Cal.—*Saks & Co. v. City of Beverly Hills*, *supra*.

Reason for rule

A public hearing contemplates a fair and impartial hearing at which competent evidence may be presented before a fair and impartial tribunal.

Cal.—*Saks & Co. v. City of Beverly Hills*, *supra*.

85. Cal.—*Saks & Co. v. City of Beverly Hills*, *supra*.

86. Ill.—*East Maine Tp. Community Ass'n v. Pioneer Trust and Sav. Bank*, 145 N.E. 777, 15 Ill.App.2d 290.

87. Mass.—*Miller v. Emergency Housing Commission*, 116 N.E.2d 663, 330 Mass. 693.

88. Mass.—*Miller v. Emergency Housing Commission*, *supra*.

89. N.J.—*James v. Board of Adjustment of Town of Montclair*, 122 A. 2d 660, 40 N.J.Super. 206.

N.Y.—*Mazzarelli v. Walsh*, 238 N.Y.S. 318, 135 Misc. 719, affirmed 251 N.Y.S. 869, 233 App.Div. 877.

Hannigan v. Murdock, 47 N.Y.S. 2d 855.

R.I.—*Perrier v. Board of Appeals of City of Pawtucket*, 134 A.2d 141—

Sundlun v. Zoning Board of Review of City of Pawtucket, 145 A. 451, 50 R.I. 108.

Tex.—*Moody v. City of University Park, Civ.App.*, 278 S.W.2d 912, refused no reversible error. 38 C.J. p 74 note 26 [a], [b].

90. N.J.—*Bianchi v. Morey*, 24 A.2d 566, 128 N.J.Law 219.

St. Mary's of Mt. Virgin's Church of New Brunswick v. Board of Adjustment of City of New Brunswick, 184 A. 516, 14 N.J.Misc. 288.

N.Y.—*Ficaro v. Walsh*, 235 N.Y.S. 254, 226 App.Div. 441.

38 C.J. p 74 note 26 [d].

The effect of the provision is that it empowers board to enable the owner of land to make reasonable and proper use of his property, if other things are equal.

N.Y.—*Thomas v. Board of Standards and Appeals of City of New York*, 48 N.E.2d 284, 290 N.Y. 109.

91. Del.—*Application of Emmett S. Hickman Co.*, 108 A.2d 667, 49 Del. 13.

Md.—*Cleland v. Mayor & City Council of Baltimore*, 84 A.2d 49, 198 Md. 440.

N.J.—*Albright v. Johnson*, 50 A.2d 399, 135 N.J.Law 70.

N.Y.—*Young Women's Hebrew Ass'n v. Board of Standards and Appeals*

of City of New York, 194 N.E. 751, 266 N.Y. 270, reargument denied 195 N.E. 376, 266 N.Y. 672, appeal dismissed *Gelkam Realty Corporation v. Young Women's Hebrew Ass'n*, 56 S.Ct. 109, 296 U.S. 537, 80 L.Ed. 382.

Halpert v. Murdock, 292 N.Y.S. 75, 249 App.Div. 777, affirmed 10 N.E.2d 530, 274 N.Y. 523—*Broadway Corporation v. Board of Standards and Appeals of City of New York*, 232 N.Y.S. 266, 225 App. Div. 97, affirmed 166 N.E. 328, 250 N.Y. 571—*Falvo v. Kerner*, 225 N.Y.S. 747, 222 App.Div. 289.

Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325—*Hopkins v. Board of Appeals of City of Rochester*, 33 N.Y.S.2d 396, 178 Misc. 186—*Finn v. Board of Standards and Appeals of City of New York*, 298 N.Y.S. 256, 163 Misc. 296—*People ex rel. Home for Hebrew Infants of City of New York v. Walsh*, 227 N.Y.S. 570, 131 Misc. 581.

Hilton v. Board of Appeals of City of Geneva, 18 N.Y.S.2d 213.

R.I.—*Riedi v. Zoning Board of Review of City of Cranston*, 47 A.2d 923, 72 R.I. 58.

38 C.J. p 74 note 26 [d] (1).

92. N.J.—*Ramsbotham v. Board of*

mere fact that the board had recently granted permission to modernize a gasoline station across the street from the applicant's property does not furnish a valid basis for insisting that the applicant was entitled to a variance to permit enlargement and modernization of his gasoline station.⁹³

§ 317. Exercise of Power

The board cannot properly grant or recommend a variance for the construction of, or use of property for, a garage, filling station, or parking lot where to do so

would be entirely unauthorized and contrary to law, or unless all the conditions contemplated by the statute or ordinance are present.

The board cannot properly grant or recommend a variance for the construction of, or use of property for, a garage, filling station, or parking lot where to do so would be entirely unauthorized and contrary to law;⁹⁴ and unless all of the conditions contemplated by the statute or ordinance are present, it is improper to grant or recommend and proper to deny the variance or exception.⁹⁵ The variance or excep-

Public Works of City of Paterson, 65 A.2d 748, 2 N.J. 131.
Lumund v. Board of Adjustment of Borough of Rutherford, 69 A.2d 361, 6 N.J.Super. 474, affirmed 73 A.2d 545, 4 N.J. 577.
N.Y.—Levy v. Board of Standards and Appeals of City of New York, 196 N.E. 284, 267 N.Y. 347.
Thomas v. Board of Standards and Appeals of City of New York, 33 N.Y.S.2d 219, 263 App.Div. 352, reversed on other grounds 48 N.E. 2d 284, 290 N.Y. 109.
R.I.—Goudailler v. Zoning Bd. of Review of City of Warwick, 135 A.2d 839.
Necessity for providing for off-street parking
Operation of small animal hospital is not such an extraordinary business as to make it unnecessary that off-street parking be provided, as ground for granting variance from off-street parking requirements.
La.—State ex rel. Latter v. Board of Zoning Adjustments of City of New Orleans, App. 94 So.2d 138.
93. N.Y.—Crossroads Recreation, Inc. v. Broz, 149 N.E.2d 65, 4 N.Y. 2d 89, 172 N.Y.S.2d 129.
94. Conn.—Spencer v. Board of Zoning Appeals of City of New Haven, 104 A.2d 378, 141 Conn. 155—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, 8 A.2d 1, 125 Conn. 714.
Fla.—Josephson v. Autrey, 96 So.2d 784.
N.J.—Albright v. Johnson, 50 A.2d 399, 135 N.J.Law 70.
Oster v. Mayor and Common Council of Borough of Westwood in Bergen County, 180 A. 556, 13 N.J.Misc. 771.
N.Y.—Boyd v. Walsh, 216 N.Y.S. 242, 217 App.Div. 461, affirmed People ex rel. Boyd v. Walsh, 155 N.E. 877, 244 N.Y. 512.
14th Street Warehouse Corporation v. Murdock, 297 N.Y.S. 420, 163 Misc. 399.
Pa.—Application of Cities Service Oil Co., Co., 104 Pittsb.Leg.J. 201.
Tex.—Harrington v. Board of Adjustment of City of Alamo Heights, Bexar County, Civ.App., 124 S.W. 2d 401, error refused.

Consent of property owners

(1) Under a provision of a zoning law allowing the board to vary any provision in harmony with the general purpose and intent of the law, the board may grant a permit for a garage, although the required consents of property owners have not been procured.
N.Y.—People v. Leo, 178 N.Y.S. 513, 109 Misc. 255.
(2) Consent of adjacent property owners or a stated percentage of them is sometimes made a condition precedent to the exercise by the board of its discretion to grant a variance.
N.Y.—Application of Dolat, 75 N.Y. S.2d 862, 191 Misc. 73—Ammanna v. Walsh, 241 N.Y.S. 252, 136 Misc. 653—Esdora Realty Corporation v. Walsh, 240 N.Y.S. 792, 136 Misc. 476, reversed on other ground 243 N.Y.S. 809, 229 App.Div. 866, affirmed 173 N.E. 883, 254 N.Y. 600.
(3) Failure to obtain necessary consents leaves board without jurisdiction to grant variance or exception where such consents are required.
N.Y.—Sloane v. Walsh, 216 N.Y.S. 181, 217 App.Div. 614, reversed on other grounds 156 N.E. 668, 245 N. Y. 208.
95. Cal.—Otis v. City of Los Angeles, 126 P.2d 954, 52 C.A.2d 605.
N.J.—Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148—Barbarisi v. Board of Adjustment, 103 A.2d 164, 30 N.J.Super. 11—Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161.
Lehrer v. Board of Adjustment of City of Newark, 58 A.2d 265, 137 N.J.Law 100—Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J. Law 190.
N.Y.—People ex rel. Arseekay, Syndicate v. Murdock, 191 N.E. 871, 265 N.Y. 158.
Graham v. Board of Appeals of City of Elmira, 15 N.Y.S.2d 186, 253 App.Div. 821, appeal denied, 25 N.E.2d 881, 282 N.Y. 809—Joyce v. Dobson, 8 N.Y.S.2d 768, 255 App. Div. 348.

Pa.—Ventresca v. Exley, 56 A.2d 210, 353 Pa. 98.
Keller v. Board of Adjustment of Springfield Tp., Com.Pl., 43 Del. Co. 379.
R.I.—Roberts v. Zoning Board of Review of City of Pawtucket, 197 A. 461, 60 R.I. 202.
Denial held proper
(1) Generally.
Conn.—Lathrop v. Town of Norwich, 151 A. 183, 111 Conn. 616.
N.Y.—Larson v. Howland, 124 N.Y. S.2d 754.
Pa.—Appeal of Mattel, Com.Pl., 92 Pittsb.Leg.J. 313.
R.I.—Caccia v. Zoning Bd. of Review of City of Providence, 113 A.2d 870.
(2) Where proposed site for gasoline service station was in an area where vehicular traffic was heavy and proximity of post office, schools, and churches caused pedestrian traffic to be heavy, refusal to recommend a variance from ordinance prohibiting gasoline service station in that area so as to permit building of a service station was not error.
N.J.—Citizens Nat. Bank of Englewood v. City of Englewood, 24 A.2d 819, 128 N.J.Law 147.
(3) Refusal to grant exception to ordinance, forbidding gasoline filling stations in business zone, to corner building owners was not arbitrary or unreasonable, where automobiles entering and leaving station would menace safety of heavy pedestrian and vehicular traffic, and owners could maintain station on side street.
N.J.—Dickinson v. Inhabitants of City of Plainfield, 4 A.2d 91, 122 N.J.Law 63.
(4) The board of adjustment of city properly refused to make exception to zoning ordinance to permit construction and operation of gasoline filling station, where evidence showed that property in question immediately adjoined civic center and that there were adequate facilities in neighborhood and that further gasoline stations would depreciate property value.
N.J.—Cook v. Board of Adjustment of City of Trenton, 193 A. 191, 118 N.J.Law 372.

tion should not be granted unless the proposed use of the property is within the spirit of the zoning regulations.⁹⁶ Conversely, it is proper to grant and improper to deny a variance for the construction or use of property for a service station, garage, or parking lot where applicant is clearly entitled to it.⁹⁷

The grant or denial of such a variance or exception rests within the sound discretion of the board of appeals or adjustment or other designated body,⁹⁸ but this discretion is not to be abused or exercised arbitrarily;⁹⁹ and a variance should be granted only where substantial justice will thereby be done,¹ and, in the case of a variance based on hard-

96. N.Y.—*Sanders v. Davidson*, 17 N.Y.S.2d 627, 258 App.Div. 1058, affirmed 31 N.E.2d 764, 284 N.Y. 780.

Submission of plans

On application to the board of appeals for permission to erect a gasoline station in a district, a proper determination of whether the proposed structure would come within the spirit of the regulations cannot be made without at least the examination of the proposed plans.

N.Y.—*Sanders v. Davidson*, supra.

Public parking lots

Under zoning ordinance authorizing board of zoning appeals to permit public parking lot in residential district where such facility is needed to serve permitted uses in district, board had no power by variance or otherwise to permit land in one-family residential district to be used as parking lot for patrons of restaurant in nearby retail use district.

Ohio.—*State ex rel. Shaker Square Co. v. Guion*, App., 145 N.E.2d 144.

97. Mass.—*Tanzilli v. Casassa*, 85 N.E.2d 220, 324 Mass. 113—*Smith v. City Council of Marlborough*, 20 N.E.2d 408, 302 Mass. 571.

N.H.—*Fortuna v. Zoning Bd. of Adjustment of City of Manchester*, 60 A.2d 133, 95 N.H. 211.

N.J.—*Lehrer v. Board of Adjustment of City of Newark*, 58 A.2d 265, 137 N.J.Law 100—*Gulf Oil Corp. v. Board of Adjustment of City of Newark*, 40 A.2d 774, 132 N.J.Law 435—*Rehels v. City of Newark*, 190 A. 777, 117 N.J.Law 593.

N.Y.—*People ex rel. St. Albans-Springfield Corporation v. Connell*, 177 N.E. 313, 257 N.Y. 73.

Muenzer v. Roos, 95 N.Y.S.2d 190, 276 App.Div. 982—*Collins v. Behan*, 22 N.Y.S.2d 553, 260 App. Div. 890, reversed on other grounds 33 N.E.2d 86, 285 N.Y. 187.

Nagaven Realities v. Banzhaf, 267 N.Y.S. 729, 149 Misc. 361.

Crone v. Town of Brighton, 119 N.Y.S.2d 877—*Arditi Realty Co. v. Murdock*, 67 N.Y.S.2d 809.

Ohio.—*Mahrt v. First Church of Christ, Scientist, Com.Pl.*, 142 N.E.2d 567.

Pa.—*Appeal of Peirce*, 119 A.2d 506, 384 Pa. 100.

Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A.2d 292, 180 Pa.Super. 105.

Canning v. Haverford Tp. Bd. of Ad., Com.Pl., 37 Del.Co. 323—*Ap-*

peal of Blew, Com.Pl., 37 Del.Co. 1—*Wunderle v. Board of Adjustment of Borough of Hatboro, Com.Pl.*, 62 Montg.Co. 231.

R.I.—*Holgate v. Zoning Bd. of Review of City of Pawtucket*, 60 A.2d 732, 74 R.I. 333—*Sundlun v. Zoning Board of Review of City of Pawtucket*, 145 A. 451, 50 R.I. 108.

Tex.—*Moody v. City of University Park, Civ.App.*, 278 S.W.2d 912, refused no reversible error.

38 C.J. p 74 note 26 [d] (8).

Off-street parking

(1) A plan for off-street parking in crowded area of city to relieve traffic congestion is adequate ground for granting variance from zoning ordinance, and lack of street parking space for demands of business establishments in crowded area of city and traffic congestion therein constituted special reasons, for which city board of adjustment could validly recommend that city board of commissioners grant requested variance from city zoning ordinance to permit savings and loan association to establish restricted noncommercial parking area in residential district behind association's building in business zone on finding that variance could be granted without substantial detriment to public good and that proposed use of land would not substantially impair intent and purpose of zone plan and ordinance.

N.J.—*Mistretta v. City of Newark*, 109 A.2d 677, 33 N.J.Super. 205.

(2) Variance from zoning for apartment house use would be granted to permit off-street parking of automobiles on property located in an area where parking problem was acute and traffic so congested that fire-fighting apparatus could not pass along streets if occasion arose, notwithstanding abutting property would depreciate and housing units on property would be destroyed to create parking area.

Ind.—*Bromley v. City of Indianapolis*, 85 N.E.2d 93, 119 Ind.App. 184.

98. Cal.—*Otis v. City of Los Angeles*, 126 P.2d 954, 52 C.A.2d 605.

Ky.—*Selligman v. Western & Southern Life Ins. Co.*, 126 S.W.2d 419, 277 Ky. 551.

N.Y.—*Eckels v. Murdock*, 193 N.E. 313, 265 N.Y. 545, motion denied 195 N.E. 172, 266 N.Y. 500.

Hopkins v. Board of Appeals of

City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325.

R.I.—*Costantino v. Zoning Bd. of Review of City of Cranston*, 60 A.2d 478, 74 R.I. 316—*Ricci v. Zoning Board of Review of City of Cranston*, 47 A.2d 933, 72 R.I. 58.

99. N.Y.—*Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead*, 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S. Ct. 719, 309 U.S. 633, 84 L.Ed. 990.

Decision held arbitrary or abuse of discretion

R.I.—*Thomas v. Zoning Bd. of Review of Town of Bristol*, 124 A.2d 859—*Holgate v. Zoning Bd. of Review of City of Pawtucket*, 60 A.2d 732, 74 R.I. 333—*Costantino v. Zoning Bd. of Review of City of Cranston*, 60 A.2d 478, 74 R.I. 316.

Decision held not arbitrary or abuse of discretion

Cal.—*Flagstad v. City of San Mateo, App.*, 318 P.2d 825.

N.J.—165 Augusta St. v. *Collins*, 87 A.2d 889, 9 N.J. 258.

Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 554—*Sun Oil Co. v. City of Clifton*, 80 A.2d 258, 13 N.J.Super. 89, affirmed 84 A.2d 555, 16 N.J.Super. 265.

N.Y.—*Rochester Transit Corp. v. Crowley*, 131 N.Y.S.2d 493, 205 Misc. 933.

Application of Laurelton Civic Ass'n, 141 N.Y.S.2d 180—*Tulbro Realty Corp. v. Murdock*, 132 N.Y.S.2d 691.

Ohio.—*Mahrt v. First Church of Christ, Scientist, Com.Pl.*, 142 N.E.2d 567, affirmed App., 142 N.E.2d 678.

R.I.—*Minnear v. Zoning Bd. of Review of City of Cranston*, 122 A.2d 198—*Lough v. Zoning Bd. of Review of Town of North Providence*, 60 A.2d 839, 74 R.I. 366.

1. N.Y.—*Thomas v. Board of Standards and Appeals of City of New York*, 48 N.E.2d 284, 290 N.Y. 109—*Young Women's Hebrew Ass'n v. Board of Standards and Appeals of City of New York*, 194 N.E. 751, 266 N.Y. 270, appeal dismissed *Gelkam Realty Corporation v. Young Women's Hebrew Ass'n*, 56 S.Ct. 109, 296 U.S. 537, 80 L.Ed. 382.

ship, only where there are special conditions or exceptional circumstances creating the kind and degree of hardship contemplated by the zoning provisions,² as where the property is of little or no value unless so used³ or where there is no reasonable possibility that the property can be adapted to any conforming use except at such risk as to render it impractical as a business venture.⁴

§ 318. Procedure

The board is empowered to grant a variance or exception for the use of property for a garage, filling

station, or parking lot only on proof of the existence of necessary conditions.

The board is empowered to grant a variance or exception for the use of property for a garage, filling station, or parking lot only on proof of the existence of necessary conditions;⁵ and the burden of proof is on the applicant,⁶ who must persuade the board of the specific presence of each of the prerequisites by a preponderance of the evidence.⁷ The determination of whether those conditions are present is primarily a matter for the board⁸ which must give due consideration to all the factors bearing on the question.⁹

2. Conn.—St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford, 8 A.2d 1, 125 Conn. 714—Lathrop v. Town of Norwich, 151 A. 183, 111 Conn. 616.

Dixon v. Zoning Bd. of Appeals of Town of Milford, 113 A.2d 606, 19 Conn.Sup. 349.

Ky.—Bray v. Beyer, 166 S.W.2d 290, 292 Ky. 162.

Fla.—Josephson v. Autrey, 96 So.2d 784.

Mass.—Hurley v. Kolligian, 129 N.E. 2d 920, 333 Mass. 170.

Mo.—Berard v. Board of Adjustment of City of St. Louis, App., 138 S.W. 2d 731.

N.J.—Oliva v. City of Garfield, 60 A. 2d 628, 137 N.J.Law 475, affirmed 62 A.2d 673, 1 N.J. 184—Grant v. Board of Adjustment of Borough of Haddon Heights, 45 A.2d 184, 133 N.J.Law 518.

St. Mary's of Mt. Virgin's Church of New Brunswick v. Board of Adjustment of City of New Brunswick, 184 A. 516, 14 N.J.Misc. 288.

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110—Young Women's Hebrew Ass'n v. Board of Standards and Appeals of City of New York, 194 N.E. 751, 266 N.Y. 270, appeal dismissed Gelkam Realty Corporation v. Young Women's Hebrew Ass'n, 56 S.Ct. 109, 296 U. S. 537, 80 L.Ed. 382—People ex rel. Fordham Manor Reformed Church v. Walsh, 155 N.E. 575, 244 N.Y. 280.

Graham v. Board of Appeals of City of Elmira, 15 N.Y.S.2d 186, 258 App.Div. 821, appeal denied, 25 N. E.2d 881, 282 N.Y. 809—Aberdeen Garage v. Murdock, 15 N.Y.S.2d 66, 257 App.Div. 645, affirmed 28 N.E. 2d 45, 283 N.Y. 650—Cirrito v. Board of Standards and Appeals of City of New York, 280 N.Y.S. 608, 245 App.Div. 762, affirmed 200 N.E. 289, 270 N.Y. 499—Dempsey v. Murdock, 271 N.Y.S. 9, 241 App.Div. 64, appeal dismissed 4 N.E.2d 249, 272 N.Y. 496.

Pa.—Fleming v. Board of Adjustment

of Borough of Prospect Park, 178 A. 813, 318 Pa. 582.

Appeal of LeDonne, Com.Pl., 86 Pittsb.Leg.J. 494.

Pecuniary hardship or financial condition of a single property owner alone does not warrant variance.

N.Y.—Ward v. Murdock, 286 N.Y.S. 280, 247 App.Div. 808.

3. N.Y.—Revorg Realty Co. v. Walsh, 232 N.Y.S. 141, 225 App. Div. 774, affirmed 168 N.E. 410, 251 N.Y. 516, reargument denied 168 N.E. 426, 251 N.Y. 557.

4. N.Y.—Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325.

5. N.J.—Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J.Law 190—Schnell v. Township Committee of Ocean Tp., 198 A. 759, 120 N.J. Law 194.

N.Y.—Sanders v. Davidson, 17 N.Y.S. 2d 627, 258 App.Div. 1058, affirmed 31 N.E.2d 764, 284 N.Y. 780.

Evidence not adduced before board

Depositions taken by prosecutrix after allowance of writ of certiorari did not serve prosecutrix in establishing right to variance.

N.J.—Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J.Law 190.

6. Md.—Robertson v. County Board of Appeals for Montgomery County, 122 A.2d 751, 210 Md. 190.

N.J.—Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J.Law 190—Cook v. Board of Adjustment of City of Trenton, 193 A. 191, 118 N.J.Law 372.

N.Y.—Hilton v. Board of Appeals of City of Geneva, 18 N.Y.S.2d 213.

7. Md.—Robertson v. County Board of Appeals for Montgomery County, 122 A.2d 751, 210 Md. 190.

Evidence held sufficient

(1) To warrant or support denial of variance.

N.J.—Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d

451, 136 N.J.Law 21—Grant v. Board of Adjustment of Borough of Haddon Heights, 45 A.2d 184, 133 N.J.Law 518.

N.Y.—Rubel Corporation v. Murdock, 7 N.Y.S.2d 358, 255 App.Div. 224, reargument denied 8 N.Y.S.2d 121, 255 App.Div. 868.

Hilton v. Board of Appeals of City of Geneva, 18 N.Y.S.2d 213.

R.I.—Berard v. Zoning Bd. of Review of Town of Barrington, 139 A.2d 867—Jenney Mfg. Co. v. Zoning Board of Review of Town of East Providence, 9 A.2d 705, 63 R.I. 477.

(2) To warrant or support grant of variance or exception.

N.Y.—Application of Arlington Village Development Corp., 124 N.Y. S.2d 172, 204 Misc. 395, affirmed 128 N.Y.S.2d 596, 283 App.Div. 800, —Mazzarelli v. Walsh, 238 N.Y.S. 313, 135 Misc. 719, affirmed 251 N. Y.S. 869, 233 App.Div. 877.

N.H.—Gelines v. City of Portsmouth, 85 A.2d 896, 97 N.H. 248.

R.I.—Minnear v. Zoning Bd. of Review of City of Cranston, 122 A.2d 198—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A. 2d 478, 74 R.I. 316.

Evidence held insufficient

To warrant or support granting of variance.

N.J.—Dannenbaum v. Board of Adjustment of Atlantic City, 9 A.2d 670, 123 N.J.Law 439.

N.Y.—Freitag v. Marsh, 115 N.Y.S. 2d 838, 280 App.Div. 934—Fortuna v. Murdock, 18 N.Y.S.2d 712, 257 App.Div. 993, affirmed 24 N.E.2d 21, 281 N.Y. 763.

Pa.—Coppock v. Middletown Tp., Com.Pl., 40 Del.Co. 295.

8. N.Y.—Joyce v. Dobson, 8 N.Y.S. 2d 768, 255 App.Div. 348.

Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325.

9. R.I.—Jenney Mfg. Co. v. Zoning Board of Review of Town of East Providence, 9 A.2d 705, 63 R.I. 477.

Other nonconforming uses in vicinity

With respect to application for permission to erect and maintain gaso-

Under some provisions the board is under no obligation to grant an exception to permit the operation of a filling station under a zoning ordinance unless the application sets forth the particular section relied on,¹⁰ but where the application and the evidence make it clear that the applicant is seeking an exception under a particular provision of the ordinance, the board is not precluded from making pertinent findings and, if proper, granting the application as one for such exception.¹¹

Right to open and close hearing. The board did no injustice to the parties resisting the application in compelling them to open the hearing before the board where it also permitted them to close.¹²

§ 319. — Determination

In granting a variance or exception for the construc-

tion of, or use of property for, a filling station, garage, or parking lot, reasonable conditions may, and sometimes must, be imposed.

In granting a variance or exception for the construction of, or use of property for, a filling station, garage, or parking lot, the board may¹³ or must¹⁴ impose reasonable conditions, and granting such permission without imposing conditions or safeguards is improper.¹⁵ However, a body having no authority to grant a variance cannot, in granting a permit which it is required to grant under the circumstances, attach thereto an unauthorized condition under the guise of a variance permit.¹⁶

Reconsideration. An application for a variance once denied may be reopened on a showing of a change of circumstances sufficient to justify the determination of the board to reopen it.¹⁷

IX. JUDICIAL REVIEW OR RELIEF

A. IN GENERAL

§ 320. General Principles

Generally, judicial review may be had of the validity of municipal zoning and building regulations, and of the exercise of power by zoning boards or officers, as with respect to applications for variances, exceptions, and permits; and the courts have power to grant relief in appropriate proceedings against zoning which is unrea-

sonable, discriminatory, unconstitutional, or otherwise invalid.

While municipal zoning and building regulations are a legislative, not a judicial, matter, as discussed supra § 5, they are subject to judicial review as to their validity,¹⁸ and an opportunity for appeal to

line service station in residential district, presence of milk plant and grocery store in vicinity, both of which commercial plants existed before enactment of zoning ordinance, did not justify departure from a general plan of municipal development established by zoning ordinance.

N.Y.—Hilton v. Board of Appeals of City of Geneva, 18 N.Y.S.2d 213.

10. R.I.—Minnear v. Zoning Bd. of Review of City of Cranston, 122 A. 2d 198.

11. R.I.—Minnear v. Zoning Bd. of Review of City of Cranston, supra.

12. N.H.—Gelinis v. City of Portsmouth, 85 A.2d 896, 97 N.H. 248.

13. Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

N.Y.—Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325.

Hannigan v. Murdock, 47 N.Y.S. 2d 855.

Restrictions Improper

Municipal zoning regulations giving zoning board authority to attach to a granted special exception appropriate conditions and safeguards in accordance with public interest and comprehensive plan set forth in regulations and in harmony with purpose and intent thereof did not em-

power board, in granting special exception authorizing property owner to use a lot in business zone for automobile salesroom and repair garage, to restrict amount of permissive parking on such lot, where comprehensive plan of zoning as set forth in regulations was to take parking off streets and general purpose and intent of regulations was lessening of congestion in streets.

Conn.—Service Realty Corp. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 109 A.2d 256, 141 Conn. 632.

14. Conn.—Youngs v. Zoning Board of Appeals of City of Norwalk, 17 A.2d 513, 127 Conn. 715.

15. R.I.—Sundlun v. Zoning Board of Review of City of Pawtucket, 145 A. 451, 50 R.I. 108.

16. Va.—City of Alexandria v. Texas Co., 1 S.E.2d 296, 172 Va. 209.

17. N.Y.—Application of American Seminary of Bible, 112 N.Y.S.2d 904, 280 App.Div. 792.

Change in plans to provide for construction of brick wall along most of frontage of premises for which variance was sought to permit gasoline station in business use district was a change in circumstances sufficiently material to justify determination of

board of standards and appeals to reopen application for such variance.

N.Y.—Application of American Seminary of Bible, supra.

18. Ga.—Awtry & Lowndes Co. v. City of Atlanta, 50 S.E.2d 868, 78 Ga.App. 390.

Ill.—Du Page County v. Halkier, 115 N.E.2d 635, 1 Ill.2d 491—Pringle v. City of Chicago, 89 N.E.2d 365, 404 Ill. 473—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138—Johnson v. Village of Villa Park, 18 N.E.2d 887, 370 Ill. 272—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568—People ex rel. Kirby v. City of Rockford, 2 N.E. 2d 842, 363 Ill. 531.

City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

Md.—Maryland Advertising Co. v. Mayor and City Council of Baltimore, 86 A.2d 169, 199 Md. 214.

Mass.—Atherton v. Selectmen of Bourne, 149 N.E.2d 232.

Mo.—Corpus Juris Secundum quoted in State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 938, 362 Mo. 242.

N.Y.—431 Fifth Ave. Corp. v. City of New York, 59 N.Y.S.2d 25, 270 App.

the courts must be given on the question whether the restriction is justified under the police power.¹⁹ Accordingly, the courts have power to grant relief in appropriate proceedings against zoning which is unreasonable, discriminatory, unconstitutional, or otherwise invalid,²⁰ and a court on review has the duty to annul a zoning order or regulation which is invalid.²¹ It has been held, however, that in the absence of statutes authorizing such appeals, a court is without jurisdiction to consider an appeal

from the order of a city zoning body amending or refusing to amend zoning regulations,²² even though no board of adjustment from which the statute authorizes an appeal to the courts was ever appointed.²³

Review of decisions of zoning boards. Although boards of appeal or adjustment exercise a sound discretion in the exercise of their power, their action may be subject to review by the courts,²⁴ and

Div. 241, affirmed 68 N.E.2d 877, 298 N.Y. 588.

Northport Water Works Co. v. Carlil, 133 N.Y.S.2d 859.
Wyo.—Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202.

Courts have jurisdiction to entertain an action of property owner challenging validity of amendment to zoning ordinance once it is adopted.
Mich.—Randall v. Township Bd. of Meridian Tp., Ingham County, 70 N.W.2d 728, 342 Mich. 605.

19. Conn.—Lordship Park Ass'n v. Board of Zoning Appeals of Town of Stratford, 75 A.2d 379, 137 Conn. 84.

20. Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202, 51 A.L.R.2d 251.

Md.—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294.

N.Y.—Town of Cortlandt v. McNally, 115 N.Y.S.2d 624, reversed on other grounds 126 N.Y.S.2d 702, 282 App. Div. 1072, appeal denied 128 N.Y.S.2d 597, 283 App.Div. 800—Andrews v. Town Bd. of Town of Dewitt, Onondaga County, 98 N.Y.S.2d 494.

Ohio.—Hardy v. Horst, Com.Pl., 101 N.E.2d 338.

Pa.—Appeal of Kanig, 56 Pa.Dist. & Co. 53, 47 Lack.Jur. 69, 37 Mun.L.R. 229.

Other statement of rule

Courts will strike down zoning restrictions, where the burdening of a particular piece of property with such restrictions is not necessary for the health, morals, safety, or general welfare of the community or where such restrictions are arbitrary, unreasonable, oppressive, and confiscatory.

N.Y.—Fleetwood Manor, Inc. v. Village of Huntington Bay, 115 N.Y.S.2d 615.

Effect of presumption

Where constitutional rights of citizen are assaulted, court cannot bypass its duty to adjudicate them by applying rule that zoning ordinance is presumptively valid and should be upheld if question is fairly debatable.
Fla.—City of Miami Beach v. First Trust Co., 45 So.2d 681.

21. Ill.—Myers v. City of Elmhurst, 143 N.E.2d 300, 12 Ill.2d 537—

Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill.2d 432.

Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

Miss.—City of Hattiesburg v. Pittman, 102 So.2d 352.

N.J.—Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

Imperative and unceasing duty

The duty of the courts to maintain the constitution as the fundamental law of the state is imperative and unceasing, and applies as imperatively when properly invoked against a zoning ordinance as it does against an act of the legislature.

Fla.—City of Miami Beach v. Lachman, 71 So.2d 148, appeal dismissed Lachman v. City of Miami Beach, 75 S.Ct. 292, 348 U.S. 906, 99 L.Ed. 711.

22. Conn.—Bardes v. Zoning Bd. of City of Stamford, 106 A.2d 160, 141 Conn. 317—Long v. Zoning Commission of City of Norwalk, 50 A.2d 172, 133 Conn. 248.

N.J.—Schumacher v. Union City, 154 A. 406, 9 N.J.Misc. 492.

Direct change of master plan

In view of failure of statute to afford appeal when Jefferson county fiscal court directly, by ordinance, resolution, or order, effectuates county master plan through construction of public utilities, property owners had no right to appeal to circuit court from direct action of fiscal court changing master plan to permit special use of residentially zoned property for construction of municipal sewage disposal system, notwithstanding statute affords appeal when fiscal court indirectly through administrative agency so effectuates the master plan.

Ky.—East Jeffersontown Imp. Ass'n v. Louisville & Jefferson County Planning & Zoning Commission, 285 S.W.2d 507.

23. Conn.—Long v. Zoning Commission of City of Norwalk, 50 A.2d 172, 133 Conn. 248.

24. Colo.—Bacon v. Steigman, 225 P.2d 1046, 128 Colo. 62.

Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415—Kammerman v. Leroy, 50 A.2d 175, 133 Conn. 232.

Ind.—City of South Bend v. Marckle, 18 N.E.2d 764, 215 Ind. 74.

Mich.—McVeigh v. City of Battle Creek, 86 N.W.2d 279, 350 Mich. 214—Jones v. De Vries, 40 N.W.2d 317, 326 Mich. 126.

Mo.—McKinney v. Board of Zoning Adjustment of Kansas City, App., 308 S.W.2d 320.

N.J.—Ostrowsky v. City of Newark, 139 A. 911, 102 N.J.Eq. 169.

N.Y.—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939, appeal dismissed Siciliano v. Klaess, 84 N.Y.S.2d 922, Maxwell v. Klaess, 85 N.Y.S.2d 330, 274 App.Div. 943, and Goddard v. Klaess, 85 N.Y.S.2d 331—Caper v. Parker, 58 N.Y.S.2d 374, 185 Misc. 948.

Nathan v. Murdock, 62 N.Y.S.2d 415.

Pa.—Gogolkiewicz v. Oldakowski, Com.Pl., 46 Lack.Jur. 117—Northrop v. Steinberg, Com.Pl., 72 Montg. Co. 263—Appeal of Continental Motor Sales, Com.Pl., 31 North.Co. 250.

Wis.—Smith v. City of Brookfield, 74 N.W.2d 770, 272 Wis. 1.

43 C.J. p 356 note 21.

Constitutional right of review

Ind.—Ballman v. Duffecy, 102 N.E.2d 646, 230 Ind. 220.

Judicial function

Power of a court to determine the legality of a decision of a zoning body or agency on review is a "judicial function" and not in violation of constitutional provision with respect to separation of powers.

Ill.—Illinois Bell Tel. Co. v. Fox, 85 N.E.2d 43, 403 Ill. 617.

Review of order distinguished

An action to review a decision of the board of zoning adjustment differs from an action to review an order of the zoning commission in that latter suit involves the question of whether the property has been taken without due process of law.

D.C.—O'Boyle v. Coe, D.C., 155 F. Supp. 581.

Reversal of earlier decision

While a board of zoning appeals may exercise a liberal discretion in

set aside for errors of law.²⁵ A zoning ordinance is not invalid because it fails to provide for an appeal from, or review of, the planning commission's findings where review of the findings may be obtained by a writ of certiorari.²⁶

The action of boards of appeal or adjustment in passing on applications for exceptions or variances is subject to review by the courts,²⁷ provided the determination below is final and of a nature subject to review,²⁸ and relief will be granted in a

deciding, on a new application, whether to reverse earlier decision, its decision is subject to judicial review on question of whether it has exercised its discretion in a reasonable and legal way and on evidence which fairly sustains its actions.
Conn.—Spencer v. Board of Zoning Appeals of City of New Haven, 104 A.2d 373, 141 Conn. 155.

Decisions reviewable

(1) Appeal to superior court from decision of board of zoning appeals was not restricted to cases where the board had exercised its authority in acting on an appeal to it from a decision or ruling of the building inspector, and appeal could be taken from its denial of petition addressed directly to it, unless the action sought by such petition was entirely beyond the board's powers.

Conn.—Kelley v. Board of Zoning Appeals of New Haven, 13 A.2d 675, 126 Conn. 648.

(2) Recommendation of board of adjustment for modification of zoning ordinance, there being no judgment, is not reviewable.

N.J.—Schumacher v. Union City, 154 A. 406, 9 N.J.Misc. 492.

(3) Right to review hearing before city board of appeals did not survive new hearing and decision on same subject matter by such board, in absence of showing of enforceable stipulation by parties for new hearing without prejudice to review of determination on prior hearing.

N.Y.—Kaufman v. Board of Appeals of City of Glen Cove, 35 N.Y.S.2d 912, 264 App.Div. 892.

(4) Petitioner was not entitled to corrective order to review decision of village board of zoning appeals, where decision of board had not yet been filed with village clerk as required by statute, and minutes of board did not show that formal vote of members had been taken or that decision was formal determination by board as a body as required by statute.

N.Y.—Stanley v. Board of Appeals of Village of Piermont, 5 N.Y.S.2d 956, 168 Misc. 797.

(5) Where city solicitor acted on instructions from zoning officer in notifying billboard advertising firm to remove its signboards before effective date of zoning ordinance, such notification constituted decision of an "administrative officer," for purposes of statutory review by appeal.
Pa.—Pittsburg Outdoor Advertising

Co. v. City of Clairton, 133 A.2d 542, 390 Pa. 1.

25. N.H.—Lee Sing Foo v. City of Manchester, 88 A.2d 171, 97 N.H. 346.

Unreasonable or arbitrary action

Where decision of zoning adjustment board, on review, is clearly unreasonable and arbitrary, it will be set aside; court is not bound by arbitrary or capricious action of board, or where there has been a manifest abuse of discretion.

D.C.—Hyman v. Coe, D.C., 146 F. Supp. 24.

Illegal ruling

An arbitrary or capricious or otherwise illegal ruling by board should be set aside.

Mo.—Phillips v. Board of Adjustment of City of Bellefontaine Neighbors, App., 308 S.W.2d 765.

26. W.Va.—State ex rel. Baer v. City of Beckley, 57 S.E.2d 263, 133 W. Va. 459.

27. Cal.—Mitchell v. Morris, 210 P. 2d 857, 94 C.A.2d 446.

Conn.—Grady v. Katz, 1 A.2d 137, 124 Conn. 525.

Mass.—Clap v. Municipal Council of City of Attleboro, 39 N.E.2d 431, 310 Mass. 605.

N.J.—Gerkin v. Village of Ridgewood, 86 A.2d 275, 17 N.J.Super. 472.

Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J.Law 280—Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J.Law 473.

N.Y.—Frantellizzi v. Herman, 151 N. Y.S.2d 396, 1 A.D.2d 980—Otto v. Steinhilber, 11 N.Y.S.2d 910, 257 App.Div. 837, reversed on other grounds 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681—Town of Greece v. Smith, 9 N.Y.S.2d 21, 256 App.Div. 886.

Pa.—Pincus v. Power, 101 A.2d 914, 376 Pa. 175—Philadelphia Fairfax Corporation v. McLaughlin, 9 A.2d 538, 336 Pa. 342—In re Gilfillan's Permit, 140 A. 136, 291 Pa. 358.

Appeal of Hutchinson, Com.Pl., 39 Del.Co. 1—Appeal of Geisinger, Com.Pl., 35 Del.Co. 333—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85—Appeal of Robinson, Com.Pl., 47 Luz.Leg.Reg. 51.

43 C.J. p 356 note 21.

Standards for exercise of judgment

Decision of board of appeals that in its judgment public convenience and welfare will be substantially served by granting an exception to zoning ordinance is subject to judicial re-

view, even though ordinance states few or no express standards for exercise of such judgment.

Mass.—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378.

Decisions held subject to appeal

(1) Whatever terminology was employed by zoning board of adjustment and whatever was the legal effect of board's action, practical effect of board's vote to grant exception to ordinance and its subsequent order granting such exception, was a decision from which property owners had a right to appeal.

Pa.—Blank v. Board of Adjustment of Borough of West Mifflin, 136 A. 2d 695, 390 Pa. 636.

(2) Where zoning board of adjustment lacked jurisdiction to enter into contract granting special exception on condition to zoning regulations and action of board did not constitute inquiry and adjudication within statutory limits, resolution of board purporting to authorize exception was utterly void and subject to collateral attack at any time as well as direct review within time prescribed by law.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N. J. 386.

Provision rendering decision final

A provision of a zoning code that, when an application for a variance is passed on by the board of directors, its decision shall be final could not be attacked on appeal from refusal of the board to grant a variance; but such a provision may be attacked in a judicial proceeding as unconstitutional as applied to particular property, and the denial of the application to secure a variance is not "res judicata" in such a proceeding, notwithstanding the same type of evidence may be used in such proceeding as was presented to zoning committee and board of directors in support of application to secure a variance.

Cal.—Rubin v. Board of Directors of City of Pasadena, 104 P.2d 1041, 16 C.2d 119.

28. Pa.—Hinton v. Zoning Bd. of Adjustment, 86 Pa.Dist. & Co. 192.

Number of votes

Where four affirmative votes are necessary for approval of an application for a variance by virtue of statute and only three members of a six-member zoning board voted on the application, there has been no sufficient disposition of the case by the

proper case, where the board has exceeded its powers.²⁹ Similarly, the action of a zoning board with respect to an application for a permit is subject to challenge and review by the courts.³⁰ So, in a proper case a proceeding may be brought to review the granting of a permit;³¹ and where the grant of a permit is within the discretion of the board of appeal, its exercise of that discretion in granting a permit is subject to review.³² Under some statutes, however, it is held that there is no appeal from the granting of a permit or from a decision purporting to affirm such grant.³³

§ 321. Right of Review and Persons Entitled Thereto

An owner of property is entitled to direct access to the courts to litigate the question of the reasonableness and validity of a zoning ordinance or regulation, and persons aggrieved by any decision of a zoning board or officer may obtain judicial review thereof in proceedings properly instituted for this purpose.

As a general rule, an owner of property is entitled to direct access to the courts for the purpose of litigating the question whether or not a zoning ordinance is unreasonable, arbitrary, or discriminatory,³⁴ regardless of whether or not the zoning

board to permit an appeal from its action to the courts.

Pa.—Hinton v. Zoning Bd. of Adjustment, *supra*.

Pending determination of validity of zoning change

An appeal from order of board of zoning appeals denying trucking company's application for permission to erect addition to its building would not be determined where validity of change in zoning regulation, on basis of which application was denied, was not determined, and appeal was continued on docket of supreme court of errors until determination of validity of change and further action by parties with reference to it.

Conn.—National Transp. Co. v. Toquet, 196 A. 344, 123 Conn. 468.

29. Conn.—Paul v. Board of Zoning Appeals of City of New Haven, 110 A.2d 619, 142 Conn. 40.

Koslow v. Board of Zoning Appeals of City of New Haven, 112 A.2d 513, 19 Conn.Supp. 308.

D.C.—Hyman v. Coe, D.C., 146 F. Supp. 24.

Md.—Montgomery County v. Merlands Club, Inc., 98 A.2d 261, 202 Md. 279.

N.J.—Second Reformed Church v. Board of Adjustment of Borough of Freshhold, 104 A.2d 703, 30 N.J.Super. 338—Gerkin v. Village of Ridgewood, 86 A.2d 275, 17 N.J.Super. 472.

Pa.—Root v. Zoning Bd. of Appeals of City of Erie, 38 Erie Co. 212, affirmed 118 A.2d 297, 180 Pa.Super. 38.

Use of unauthorized standard

While court cannot substitute its judgment for that of city zoning board within such board's sphere of action unless action of board is arbitrary, capricious or unreasonable, board acts beyond its sphere of action and so can be corrected by court when board uses unauthorized standard for determining unnecessary hardship as ground for variance from zoning ordinance.

N.J.—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291—Ramsbotham v. Board

of Public Works of City of Paterson, 65 A.2d 748, 2 N.J. 131.

Basis of decision

Decision of zoning board with respect to grant or denial of variance will not be upheld where it is based on errors of law, or fraud, or where there is no legal evidence to support it, or where board acts arbitrarily, unreasonably or in a discriminatory manner, or where, in general, board has abused its discretion.

S.C.—Hodge v. Pollock, 75 S.E.2d 752, 223 S.C. 342.

30. N.Y.—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939, appeal dismissed Siciliano v. Klaess, 84 N.Y.S.2d 922, Maxwell v. Klaess, 85 N.Y.S.2d 330, 274 App.Div. 943, and Goddard v. Klaess, 85 N.Y.S.2d 331.

Final decision

Decision of board of adjustment which clearly showed that board reversed decision of general building inspector, and in effect granted building permit provided applicant would submit certain plans and specifications and give certain assurances as to construction of proposed building, was a final decision from which an appeal to the superior court would lie.

Ga.—Ledbetter v. Roberts, 98 S.E.2d 654, 95 Ga.App. 652.

31. Ill.—Michigan-Lake Bldg. Corporation v. Hamilton, 172 N.E. 710, 340 Ill. 284.

Okl.—McGrath v. Brown, 120 P.2d 624, 190 Okl. 144.

Pa.—Rodgers v. Bennett Bldg. Co., 88 Pittsb.Leg.J. 236.

32. Conn.—Corden v. Zoning Bd. of Appeals of City of Waterbury, 41 A.2d 912, 181 Conn. 654, 159 A.L.R. 849.

N.C.—In re Pine Hill Cemeteries, 15 S.E.2d 1, 219 N.C. 735.

Pa.—Gogolkiewicz v. Oldakowski, Com.Pl., 46 Lack.Jur. 117.

33. Mass.—Tranfiglia v. Board of Appeals of Winchester, 35 N.E.2d 481, 306 Mass. 619—Tranfiglia v. Building Commissioner of Winchester, 28 N.E.2d 587, 306 Mass.

495—Petros v. Superintendent of Buildings of Lynn, 28 N.E.2d 233, 306 Mass. 368, 128 A.L.R. 1210.

"Order, requirement or direction"

Issuance of a building permit by building inspector is not "an order, requirement or direction" within statute providing that any person aggrieved by an order, requirement, or direction of a building inspector may appeal to judge of superior court.

Mass.—Old Colony Trust Co. v. Merchant Enterprises, 126 N.E.2d 112, 332 Mass. 484.

34. Ark.—City of Little Rock v. Pfeifer, 277 S.W. 883, 169 Ark. 1027.

Fla.—Josephson v. Autrey, 96 So.2d 784.

N.J.—Borough of Cresskill v. Borough of Dumont, 104 A.2d 441, 15 N.J. 238.

N.Y.—Bronxville Associates v. Brady, 36 N.Y.S.2d 308.

R.I.—R. I. Home Builders v. Hunt, 60 A.2d 496, 74 R.I. 255.

Tex.—City of Amarillo v. Stapf, 101 S.W.2d 229, 129 Tex. 81.

Who may attack validity of zoning regulations generally see *supra* § 20.

Reason for rule

The very scheme of Zoning Act connotes a neighborhood interest in enactment and enforcement of zoning ordinance.

N.J.—Speakman v. Mayor & Council of Borough of North Plainfield, 84 A.2d 715, 8 N.J. 250.

Conaway v. Atlantic City, 154 A. 6, 107 N.J.Law 404.

Association

Incorporated property owners association as plaintiff was entitled to maintain proceeding to declare zoning amendment invalid and to enjoin city from proceeding thereunder.

N.Y.—North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 115 N.Y.S.2d 670.

"Proper parties"

Property owners residing within residential use district in which property in dispute was originally classified were "proper parties" to suit attacking validity of amending

ordinance has made provision therefor;³⁵ but under some statutes persons who are not real parties in interest are not entitled to maintain a review proceeding to litigate questions as to the validity or construction of zoning regulations.³⁶ Similarly, there may be a right of review of decisions by zoning boards, in proceedings properly instituted for this purpose.³⁷ So, a person aggrieved by a decision with respect to a permit or certificate for the

construction, alteration, or use of a building may, on compliance with all conditions precedent, obtain a judicial review;³⁸ and a property owner whose application for a permit is denied, or whose permit, if he has been granted one, is revoked, may invoke the aid of the court to review the decision complained of and to prevent unreasonable denial or revocation of the permit;³⁹ regardless of whether provision is made for such remedy in a statute

ordinance creating separate first commercial use district of lot in residential district, and praying for an injunction against use of property thereon as a funeral home.

Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

Adjacent property

Owners of property near premises affected by relocation of dividing line of industrial zone by amendment of zoning ordinance had sufficient standing to bring a proceeding to determine validity of the amendment.

N.J.—Menges v. Bernards Tp., 73 A.2d 540, 4 N.J. 556.

Prior to specific action

If zoning bylaw was improperly amended, any party aggrieved was entitled at once to take appropriate steps to cause invalid amendment to be disregarded, and would not be forced to wait until some specific action was proposed or begun pursuant to it, such as issuance of building permit.

Mass.—Sunderland v. Building Inspector of North Andover, 105 N.E.2d 471, 328 Mass. 638.

Suit against city

An action against municipal building inspector to determine validity of amendment to zoning ordinance was in effect a suit against the city where inspector was administrative officer with executive and quasi-judicial powers.

S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

35. Ark.—City of Little Rock v. Pfeifer, 277 S.W. 883, 169 Ark. 1027.

Tex.—City of Amarillo v. Stapf, 101 S.W.2d 229, 129 Tex. 81.

36. Ark.—City of Little Rock v. Goodman, 260 S.W.2d 450, 222 Ark. 350.

Corporate officer or stockholder

One who was a principal stockholder and officer, and another who was a stockholder of corporation which owned property asserted to be injuriously affected by amendment to zoning ordinance had no standing to bring a proceeding in the nature of certiorari to determine validity of the amendment.

N.J.—Menges v. Bernards Tp., 73 A.2d 540, 4 N.J. 556.

37. Pa.—Appeal of Tredyffrin Const. Co., Com.Pl., 8 Chest.Co. 85—Moyerman v. Zoning Bd. of Adjustment of Clifton Heights, Com.Pl., 39 Del. Co. 87.

Wis.—Smith v. City of Brookfield, 74 N.W.2d 770, 272 Wis. 1.

Statute conferring right held not repealed

Mich.—Jones v. De Vries, 40 N.W.2d 317, 326 Mich. 126.

38. Md.—Applestein v. Osborne, 143 A. 666, 156 Md. 40.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107, 168 A.L.R. 1.

Laches

Owner who sought permit to improve, for business purposes, his plot which had been placed in residence zone was not guilty of laches where, as soon as permit was denied, he moved speedily from one municipal body to another and then to supreme court.

N.J.—Dorsey Motors v. Davis, 180 A.396, 13 N.J.Misc. 620.

Approval of restaurant

Where planning and zoning board of town purported to change zone so that part of property was in light industrial zone and part in business zone, rather than in residence zone, but action was a nullity as to part of property zoned for business because hearing and publication of notice of hearing related only to petition for change to light industrial zone, and under regulations alcoholic liquors could be sold only in a business area, fact that plaintiff took no appeal from such action did not preclude plaintiff from appealing from action of board in approving a restaurant with full liquor license privileges on property purportedly rezoned to business.

Conn.—Hutchison v. Board of Zoning Appeals of Town of Stratford, 83 A.2d 201, 138 Conn. 247.

Application for service station or garage permit

Conn.—Perdue v. Zoning Board of Appeals of City of Norwalk, 171 A.26, 118 Conn. 174.

Nonconforming building

Landowner was entitled to review of determination of board of trustees of incorporated village denying permission to rebuild a nonconforming

building allegedly more than fifty per cent. destroyed as result of fire.

N.Y.—Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477.

39. Conn.—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161—Levine v. Zoning Board of Appeals of Meriden, 198 A. 173, 124 Conn. 53.

Mass.—Kenney v. Building Com'r of Melrose, 52 N.E.2d 683, 315 Mass. 291, 150 A.L.R. 490.

Mich.—Corpus Juris cited in City of East Lansing v. Smith, 269 N.W. 573, 575, 277 Mich. 495.

Okl.—Indian Territory Illuminating Oil Co. v. Larkins, 31 P.2d 608, 168 Okl. 69.

Pa.—Appeal of Lord, 81 A.2d 533, 368 Pa. 121.

43 C.J. p 348 note 68.

Applicant not owner of property

Statute authorizing appeal to circuit court by any "person aggrieved" by decision of board of adjustment and appeals authorizes appeal by any one whose application for permit is refused, regardless of whether applicant owns property on which he seeks permission to establish business.

Ky.—Smith v. Selligman, 109 S.W.2d 14, 270 Ky. 69.

Effect of board's lack of jurisdiction

Under statute relating to jurisdiction of superior court on appeal from decision of board of appeals, where board of appeals had no authority to hear neighboring landowner's appeal from action of inspector granting an occupancy permit, superior court was not thereby deprived of jurisdiction to hear appeal from action of the board annulling the occupancy permit.

Mass.—Turner v. Board of Appeals of Town of Milton, 25 N.E.2d 203, 305 Mass. 189.

Validity of provision

Remedy provided in zoning law of appeal from denial of permit by board of adjustment to court was of uniform operation as respects validity of provision.

Pa.—Taylor v. Moore, 154 A. 799, 303 Pa. 469.

Waiver of right to question revocation

Parties filing another application for building permit, after one pre-

or ordinance.⁴⁰ Where an application to review a ruling is for the purpose of obtaining an opinion essentially of an advisory nature, in the absence of constitutional or statutory provision therefor, the court has no jurisdiction to entertain such an application or proceeding.⁴¹

Limitation of right to persons aggrieved or affected. Statutes providing that persons aggrieved by any decision of the zoning board or commission

may appeal to the court have been construed and applied in a number of cases,⁴² and have been held to authorize an aggrieved person to appeal from the action of the city council, since the board of adjustment is only an authorized arm or agency of the city council.⁴³ Under statutes of this nature, any aggrieved or interested person may appeal from a decision of a board of appeals or adjustment or a zoning commission,⁴⁴ and, on the other hand, the

viously granted was revoked, waived question as to right to retain advantage gained by issue of original permit.

N.J.—Urban v. Board of Adjustment of Hillside Tp., 142 A. 364, 6 N.J. Misc. 602.

Board as appellee

In proceeding by owner in city court to review a decision of the board of zoning appeals affirming decision of building engineer, appeal was properly dismissed as to the board of zoning appeals, since it has no right to litigate in the city court. Md.—Knox v. Mayor and Council of Baltimore City, 23 A.2d 15, 180 Md. 88.

40. Mich.—Corpus Juris quoted in City of East Lansing v. Smith, 269 N.W. 573, 575, 277 Mich. 495.

43 C.J. p 348 note 69.

41. N.Y.—Kent Stores v. Murdock, 105 N.Y.S.2d 111, 278 App.Div. 946.

42. N.H.—Scott v. Davis, 45 A.2d 654, 94 N.H. 35.

N.Y.—Bayport Civic Ass'n v. Koehler, 138 N.Y.S.2d 524, followed in 138 N.Y.S.2d 532.

Pa.—Darling v. Zoning Bd. of Adjustment of City of Philadelphia, 54 A.2d 829, 357 Pa. 428.

Freeman v. Lansdowne Borough, Quar.Sess., 34 Del.Co. 449—Toland v. Newtown Tp., Quar.Sess., 34 Del. Co. 446—In re Appeal Ordinance of Borough of Freeland, Quar.Sess., 35 Luz.Leg.Reg. 114—Appeal of Murphy, 62 Montg.Co. 310—City of Pittsburgh v. Quase, Com.Pl., 94 Pittsb.Leg.J. 385.

Wyo.—State ex rel. George v. Hull, 199 P.2d 832, 65 Wyo. 251.

Remedy

Statute allowing the person aggrieved to appeal from a decision of the board of appeal of Boston granting a variance with respect to zoning regulations does no more than confer a remedy, and does not create in anyone arbitrary rights to interfere with the use of another's land.

Mass.—Circle Lounge & Grille v. Board of Appeal of Boston, 86 N.E. 2d 920, 324 Mass. 427.

Presumption

In proceeding for zoning variance, there is presumption that property

owners to whom board, in performance of statutory obligation, has sent notice as persons "deemed by the board to be affected thereby," have an interest so as to be "persons aggrieved" of its decision, entitled to appeal to the superior court, under statutes, but if issue is contested and any additional evidence offered, jurisdiction is to be determined on all evidence with no benefit to plaintiff from presumption as such. Mass.—Marotta v. Board of Appeals of Revere, 143 N.E.2d 270.

Rezoning

Plaintiff who owned no property near area rezoned "commercial" and who suffered no monetary loss as result of amendment to building zone ordinance was not an "aggrieved person" and had no right to maintain action contesting legality of amendment; but where residential property values near area rezoned commercial by amendment to building zone ordinance were substantially and adversely affected, owners of such property were "aggrieved persons" and entitled to maintain action contesting validity of rezoning amendment.

N.Y.—Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220.

43. Pa.—Huebner v. Philadelphia Sav. Fund Soc., 192 A. 139, 127 Pa. Super. 28.

Grabosky v. McLaughlin, 36 Pa. Dist. & Co. 215.

44. Fla.—Josephson v. Autrey, 96 So.2d 784.

Mass.—Reynolds v. Board of Appeal of Springfield, 140 N.E.2d 491, 335 Mass. 464.

Neb.—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

Pa.—Seaney v. Dintenfuss, Inc., 6 Pa. Dist. & Co.2d 289.

Appeal of Tredyffrin Const. Co., Com.Pl., 7 Chest.Co. 153.

R.I.—Madden v. Zoning Board of Review of City of Providence, 136 A. 493, 48 R.I. 175.

Any landowner or resident within city whose situation is such that decision of board may adversely affect him in use of property owned or occupied by him in some manner within scope of purposes of zoning ordinance would be "aggrieved" within

statute giving any person aggrieved right of appeal from board's decision. Conn.—O'Connor v. Board of Zoning Appeals of Town of Stratford, 98 A.2d 515, 140 Conn. 65—Kamerman v. Leroy, 50 A.2d 175, 133 Conn. 232.

Issuance of permit

(1) Where prior to issuance of building permit, board of aldermen issued order purporting to grant variance for construction of building, issuance of permit had relevant effect, on rights of another resident to appeal from granting of variance, only in bringing proceedings to stage where statutory provision for appeal was surely applicable.

Mass.—Colabufalo v. Board of Appeal of City of Newton, 143 N.E. 2d 536.

(2) Interested landowners in same zoning district and in immediate vicinity of property affected are entitled to challenge legality of permit claimed to violate zoning ordinance. N.J.—Conaway v. Atlantic City, 154 A. 6, 107 N.J.Law 404.

(3) In action objecting to granting of permit for building of additional garage as exception to general limit established by city zoning ordinance, allegation that petitioner resided within one hundred feet of premises in question and was a taxpayer of the city was sufficient to confer a right to contest granting of the permit.

Md.—Heath v. Mayor & City Council of Baltimore, 58 A.2d 896, 190 Md. 478.

(4) Taxpayers of city had right, under city zoning ordinance, to protest against, and appeal to city court from, granting of permit by board of municipal and zoning appeals to construct automobile sales and service building on certain lot under ordinance waiving provisions of zoning ordinance, prohibiting erection of structures for sale of gasoline within three hundred feet from motion picture theater, as applied to particular lot although they did not live in neighborhood thereof and no near neighbors objected.

Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

court has jurisdiction to review a zoning determination only by means of a proceeding brought by a person or persons aggrieved.⁴⁵ Where so provided by the statute, the right to review a zoning decision is limited to the parties of record to the proceedings before the zoning body whose rights, privileg-

es, or duties are affected by the decision.⁴⁶

In order to be "aggrieved" by a determination so as to entitle one to the right of review, a person must have a specific personal and legal interest in the subject matter of the zoning decision, and be specially and adversely affected thereby.⁴⁷ A per-

"Interested persons"

Persons who were residents of town and owners of real estate adjacent to site for which variance had been granted for construction of proposed theater were "interested persons" within meaning of statute authorizing appeals from decisions of town zoning board of appeals.

Mass.—Spaulding v. Board of Appeals of Leicester, 138 N.E.2d 367, 334 Mass. 688.

45. Mass.—Marotta v. Board of Appeals of Revere, 143 N.E.2d 270—Carr v. Board of Appeals of Medford, 134 N.E.2d 10, 334 Mass. 77—Circle Lounge & Grille v. Board of Appeal of Boston, 86 N.E.2d 920, 324 Mass. 427.

N.Y.—Downey v. Incorporated Village of Ardsley, 158 N.Y.S.2d 306, 3 A.D.2d 663.

Application of Jonas, 155 N.Y.S.2d 506, affirmed 158 N.Y.S.2d 579, 3 A.D.2d 668—Blumberg v. Hill, 119 N.Y.S.2d 855.

Adjacent property owners who have no interest specially and injuriously affected by the decision are not entitled to institute the proceeding.

N.J.—Adams v. Jersey City, 151 A. 863, 107 N.J.Law 149, followed in Melosh v. Jersey City, 151 A. 865, 8 N.J.Misc. 802.

Association

(1) In general.

Pa.—Alton Park Homeowner's Group v. Zoning Bd. of Adjustment, Com. Pl., 25 LeH.L.J. 474—Putney v. Abington Tp., Quar.Sess., 70 Montg. Co. 102, affirmed 108 A.2d 134, 176 Pa.Super. 463.

(2) Where there was no showing that complaining association was a taxpayer, or that any of its members were taxpayers and lived in neighborhood of property involved, association had no standing to appeal from a decision of board of municipal and zoning appeals.

Md.—Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore, 72 A.2d 1, 195 Md. 1.

(3) An improvement association, not in existence at time of decision of board of municipal and zoning appeals was rendered approving application for permit for construction of garden type apartments, was not "person aggrieved" or "taxpayer" entitled to appeal from decision where its capacity to appeal was merely based on ground that it represented

taxpayers and property owners near the property in question.

Md.—Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore, 73 A.2d 531, 195 Md. 383.

(4) Where improvement association was neither a "person aggrieved" nor "taxpayer," and hence not authorized to appeal from decision of board of municipal and zoning appeals approving a permit for construction of garden type apartments, petition for intervention after expiration of time for appeal by taxpayer and president of association, could not validate association's attempt to appeal.

Md.—Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore, supra.

46. Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, 95 N.E.2d 864, 407 Ill. 588.

47. N.Y.—Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D.2d 663—Blumberg v. Hill, 119 N.Y.S.2d 855.

Directly affected

Under statute providing that any "person aggrieved" may appeal from administrative decision under zoning ordinance, quoted phrase is limited to person directly affected by action of administrative official or board charged with enforcement of the ordinance.

Ind.—Fidelity Trust Co. v. Downing, 68 N.E.2d 789, 224 Ind. 457.

Same district

(1) Statute providing that any owner of property in same contiguous zoning district may bring action or proceeding to prevent zoning violations did not authorize such an owner to bring proceeding to review granting of variance, and such an owner was required to allege and prove that he would be adversely affected by board's decision.

Ill.—222 East Chestnut St. Corp. v. Board of Appeals of City of Chicago, 139 N.E.2d 221, 10 Ill.2d 130, certiorari denied 77 S.Ct. 1284, 353 U.S. 984, 1 L.Ed.2d 1143—222 East Chestnut St. Corp. v. Board of Appeals of City of Chicago, 139 N.E.2d 218, 10 Ill.2d 132, certiorari denied 77 S.Ct. 1284, 353 U.S. 984, 1 L.Ed.2d 1143.

(2) Where public buildings commissioner issued permit for erection of garage, workshop, and office building on land in private residential

district, person whose residence was in same zoning district and about three hundred feet away had right to appeal to board of appeal from decision of building commissioner and to superior court from decision of board.

Mass.—Colabufalo v. Board of Appeal of City of Newton, 143 N.E.2d 536.

Held "persons aggrieved"

(1) In general.

Conn.—Mills v. Town Plan and Zoning Commission of Town of Windsor, 140 A.2d 871, 145 Conn. 237—Zuckerman v. Board of Zoning Appeals of Town of Stratford, 128 A.2d 325, 144 Conn. 160.

Ohio.—Ohio State Students Trailer Park Co-op. v. Franklin County, Ohio, App., 123 N.E.2d 542.

Pa.—Appeal of Mirro, Quar.Sess., 103 Pittsb.Leg.J. 494.

(2) An owner of property in close proximity to property involved in application for variance is an "aggrieved party" and has standing to institute proceeding to annul order granting variance.

N.Y.—Feldman v. Nassau Shores Estates, Inc., 172 N.Y.S.2d 769.

(3) Adjoining landowner in a residence A zone of town was a person aggrieved by action of planning and zoning board of town in granting variance to physician to permit him to rent a portion of dwelling house to a dentist for maintenance of an office.

Conn.—Heady v. Zoning Bd. of Appeals for Town of Milford, 94 A.2d 789, 139 Conn. 463.

(4) Where variance which would permit operation of diner in business district contrary to prohibition against operation of restaurants within one hundred feet of a residence district was sought, residents living within two hundred feet of the property in controversy were entitled to file complaint in law division against granting of variance, although the property of the residents was located in a different zone. N.J.—Lacey v. Zoning Bd. of Adjustment of Hamilton Tp., Mercer County, 67 A.2d 466, 4 N.J.Super. 422.

(5) Members of town board, collectively and in their representative capacities, and owners of properties in neighborhood of a corporation's land were "persons aggrieved" by, and hence proper party petitioners for review of, determination of town zon-

son having only a general interest may not undertake to promote the judicial enforcement or interpretation of zoning regulations;⁴⁸ and a mere resident owner of zoned property whose only interest is to have strict enforcement of zoning regulations for the benefit of the general welfare of the community or general enhancement of property values is not an aggrieved person.⁴⁹ Moreover, a person is not "aggrieved" within the meaning of a statute with respect to the right to appeal from the granting of a variance or rezoning of property merely because the variance or rezoning even if improvidently granted will increase competition in the business of the party appealing.⁵⁰

According to some authority, however, a resident and taxpayer owning property located on a different street and some distance from the premises which are the subject of the zoning decision may be an "aggrieved person" entitled to prosecute review proceedings;⁵¹ and it has been held that resident taxpayers of the town in which a borough was located, who attended the hearing in a zoning case and took part in the proceedings, are entitled to have orders of the borough commission reviewed, even though they were not residents, landowners, or taxpayers in the borough.⁵² Members of a town planning board may be entitled to appeal to the court from the action of the board of appeals in granting

ing board of appeals granting corporation a variance from town building zone ordinance and directing town building inspector to issue permit for construction and use of swimming pool on such land located in one-half residential district.

N.Y.—Innet v. Liberman, 155 N.Y.S. 2d 383.

Held not "aggrieved person"

(1) In general.

Ill.—222 East Chestnut St. Corp. v. Board of Appeals of City of Chicago, 139 N.E.2d 221, 10 Ill.2d 130, certiorari denied 77 S.Ct. 1284, 353 U.S. 984, 1 L.Ed.2d 1143.

Mass.—Circle Lounge & Grille v. Board of Appeal of Boston, 86 N.E. 2d 920, 324 Mass. 427.

N.Y.—Blum v. Board of Zoning and Appeals of Town of North Hempstead, 166 N.Y.S.2d 32, 8 Misc.2d 403.

Application of Jonas, 155 N.Y.S. 2d 506, affirmed 158 N.Y.S.2d 579, 3 A.D.2d 668—Downey v. Incorporated Village of Ardsley, 152 N.Y.S. 2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D.2d 663.

(2) A nonproperty owner is not an "aggrieved party" and has no right to institute a proceeding to annul an order granting a zoning variance. N.Y.—Feldman v. Nassau Shores Estates, Inc., 173 N.Y.S.2d 769.

(3) Owners of property in village and village property owners' association owning no property therein were not aggrieved parties entitled to review and correction of village board of zoning appeals' determination approving in part college's application for permission to erect seating stands adjacent to its athletic field in village, in absence of showing that any property rights of such association or individual property owners were adversely affected by such determination.

N.Y.—Property Owners Ass'n of Garden City Estates v. Board of Zoning Appeals of Incorporated Vil-

lage of Garden City, 123 N.Y.S.2d 716, 2 Misc.2d 309.

(4) Proprietor in a less restricted zone is not a "person aggrieved" within meaning of the statute with respect to right to appeal from a decision of the board of appeal granting a variance in zoning regulations, by the introduction into a more restricted zone of any use permitted in the zone in which the proprietor's property is located, and the mere circumstance that the properties are near the border line is immaterial. Mass.—Circle Lounge & Grille v. Board of Appeal of Boston, 86 N.E. 2d 920, 324 Mass. 427.

(5) Owners of residential properties, which were located in residential district but which were situated a mile and a half or more by straight line or two miles or more by road from property in residential district for which town zoning board of appeals had directed the issuance of building permit for a guest house in the nature of a motel, were not "aggrieved persons" who could review board's determination.

N.Y.—Blumberg v. Hill, 119 N.Y.S.2d 855.

(6) In proceeding by owner of residential property to review a determination of a municipal board granting a variance from building code requirements where determination was made on application of a builder selling premises to the owners after the builder was served with notice of violation and directed to remove it, the owners were not persons aggrieved by the determination and so could not maintain the proceeding.

N.Y.—Application of Jonas, 158 N.Y. S.2d 579, 3 A.D.2d 668.

(7) Fact that property owned by one complaining of granting of zoning variance was located 184.5 feet from corner of property for which variance was granted did not authorize it to maintain proceeding to review granting of variance when it

failed to prove that it would be adversely affected by board's decision, and its property bounded on another street.

Ill.—222 East Chestnut St. Corp. v. Board of Appeals of City of Chicago, 139 N.E.2d 218, 10 Ill.2d 132, certiorari denied 77 S.Ct. 1284, 353 U.S. 984, 1 L.Ed.2d 1143.

48. Ill.—Garner v. Du Page County, 133 N.E.2d 303, 8 Ill.2d 155.

49. N.Y.—Property Owners Ass'n of Garden City Estates v. Board of Zoning Appeals of Incorporated Village of Garden City, 123 N.Y.S. 2d 716, 2 Misc.2d 309.

Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D.2d 663—Blumberg v. Hill, 119 N.Y.S. 2d 855.

50. Conn.—Zuckerman v. Board of Zoning Appeals of Town of Stratford, 128 A.2d 325, 144 Conn. 160.

Mass.—Circle Lounge & Grille v. Board of Appeal of Boston, 86 N.E. 2d 920, 324 Mass. 427.

51. Md.—Mayor and City Council of Baltimore v. Byrd, 62 A.2d 588, 191 Md. 632.

Package store

Resident and taxpayer of town, who owned home located on a different street and approximately one-half mile from premises as to which town planning board had granted waiver of zoning ordinance forbidding operation of package store within one thousand feet of any other premises where alcoholic liquors are sold and had approved premises for use as a package store, was a person "aggrieved" by board's decision and was thereby entitled to appeal from decision to court of common pleas.

Conn.—O'Connor v. Board of Zoning Appeals of Town of Stratford, 98 A.2d 515, 140 Conn. 65.

52. Conn.—Hamelin v. Zoning Bd. of the Borough of Wallingford, 117 A.2d 86, 19 Conn.Supp. 448.

a permit,⁵³ and a town building inspector may be a person aggrieved by the decision of the zoning board granting an application for variance from the town zoning regulations after his denial of the applicant's request for a permit to make a use of land prohibited by such regulations.⁵⁴

Under a statute providing that a municipal officer or board may appeal to the courts a decision of a zoning board, appeals are limited to such municipal officers as have some duties to perform in relation to the building code or zoning.⁵⁵ A statute of this nature may permit proceedings for review of a zoning board determination to be instituted by the mayor, board of trustees, or building inspector.⁵⁶

§ 322. Nature and Scope of Review

The scope and extent of judicial review of zoning matters may depend on the mode of review adopted and on constitutional and statutory restrictions.

The scope and extent of judicial review of zoning matters may be limited by the mode of review adopted,⁵⁷ and by permissible constitutional and statutory restrictions.⁵⁸

Review in particular proceedings is considered *infra* §§ 335-349.

Under a statute providing that the court on appeal from the action of a zoning board shall review the "proceedings" of the board, the reasons for the decision stated by the board and the transcript of the evidence before it both constitute the "proceedings."⁵⁹

§ 323. — Review of Building and Zoning Regulations in General

The courts will review municipal zoning and building ordinances and regulations to determine whether they are a proper exercise of the police power, and whether they are reasonable or arbitrary; but the scope of review is subject to limitations arising from the nature of zoning as governmental and legislative, and from the separation of judicial and legislative power.

As a general rule, the courts will review municipal zoning and building ordinances and regulations to determine whether they are a proper exercise of the police power,⁶⁰ whether they are reasonable or arbitrary,⁶¹ whether such ordinances and regulations

53. Mass.—David v. Board of Appeals of Reading, 132 N.E.2d 336, 333 Mass. 657.

54. Conn.—Dixon v. Zoning Bd. of Appeals of Town of Milford, 113 A. 2d 606, 19 Conn.Sup. 349.

55. Mass.—Carr v. Board of Appeals of Medford, 134 N.E.2d 10, 334 Mass. 77.

Member of city council of city operating under a plan E charter had no such interest in subject matter of city's building code or zoning ordinances that he could, acting alone and in individual capacity, without other members of council, maintain appeal from decision of board of zoning appeals to superior court, under statute giving such appeal to municipal officers.

Mass.—Carr v. Board of Appeals of Medford, *supra*.

56. N.Y.—Fox v. Adams, 132 N.Y.S. 2d 560, 206 Misc. 236.

Mayor

Ga.—Ledbetter v. Roberts, 98 S.E.2d 654, 95 Ga.App. 652.

Interest in official capacity

When officer or board of municipality appeals to court from a determination of zoning board of appeals, question is does particular officer or board have interest in official capacity in subject matter.

N.Y.—Fox v. Adams, 132 N.Y.S.2d 560, 206 Misc. 236.

57. D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed Prentiss v. American University, 214 F.2d 282, 93 U.S.App.D. C. 204, certiorari denied *Wrather*

v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

N.D.—Livingston v. Peterson, 228 N. W. 816, 59 N.D. 104.

58. Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

Defects or irregularities

Where action to have zoning ordinance declared invalid was brought under township code section providing that any complaint attacking legality of any ordinance may be brought in court of quarter sessions within thirty days after any ordinance or resolution takes effect and also providing that determination and order of court thereon shall be conclusive, court of quarter sessions properly limited scope of its review to procedural defects or irregularities in the ordinance.

Pa.—Wynnewood Civic Ass'n v. Lower Merion Tp., 119 A.2d 799, 180 Pa. Super. 453.

59. Conn.—Wadell v. Board of Zoning Appeals of City of New Haven, 63 A.2d 152, 136 Conn. 1.

60. Ill.—Mack v. Cook County, 142 N.E.2d 785, 11 Ill.2d 310—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265.

Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

Mich.—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

Mo.—*Corpus Juris Secundum* quoted in *State ex rel. Christopher v. Mat-*

thews, 240 S.W.2d 934, 938, 362 Mo. 242.

Okl.—City of Muskogee v. Morton, 261 P. 183, 128 Okl. 17.

Or.—Page v. City of Portland, 165 P.2d 280, 178 Or. 632.

61. Cal.—Johnston v. City of Claremont, 323 P.2d 71—Skalko v. City of Sunnyvale, 93 P.2d 93, 14 C.2d 213.

Colo.—Heron v. City of Denver, 283 P.2d 647, 131 Colo. 501.

Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

Fla.—Stengel v. Crandon, 23 So.2d 835, 156 Fla. 592, 161 A.L.R. 1228 —Forde v. City of Miami Beach, 1 So.2d 642, 146 Fla. 676.

Ill.—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—La. Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344—Langguth v. Village of Mount Prospect, 124 N.E.2d 879, 5 Ill.2d 49—Tower Cabana Club v. City of Chicago, 123 N.E.2d 834, 5 Ill.2d 11 —Du Page County v. Halkier, 115 N.E.2d 635, 1 Ill.2d 491—Zillen v. City of Chicago, 114 N.E.2d 717, 415 Ill. 488—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162—Pioneer Trust & Sav. Bank v. Village of Oak Park, 97 N.E.2d 302, 408 Ill. 458—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507—Schneider v.

are discriminatory,⁶² or whether they have a substantial relation to the public health, comfort, morals, or welfare.⁶³ On the other hand, judicial power to inquire into, review, and set aside municipi-

Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138—Mercer Lumber Cos. v. Village of Glencoe, 60 N.E.2d 913, 390 Ill. 138—Anderman v. City of Chicago, 40 N.E.2d 51, 379 Ill. 236—Village of La Grange v. Leitch, 35 N.E.2d 346, 377 Ill. 99—Harmon v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594—Merrill v. City of Wheaton, 190 N.E. 918, 356 Ill. 457.

Kan.—Spurgeon v. Board of Com'rs of Shawnee County, 317 P.2d 798, 181 Kan. 1008.

Ky.—Schloemer v. City of Louisville, 182 S.W.2d 782, 298 Ky. 286.

Md.—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—Hedin v. Board of County Com'rs of Prince Georges County, 120 A.2d 663, 209 Md. 224—Temmink v. Board of Zoning Appeals of Baltimore County, 109 A.2d 85, 205 Md. 489—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551—Benner v. Tribbitt, 57 A.2d 346, 190 Md. 6—Mayor and Council of Pocomoke City v. Standard Oil Co. of New Jersey, 159 A. 902, 162 Md. 368.

Mass.—Nectow v. City of Cambridge, 157 N.E. 618, 260 Mass. 441, reversed on other grounds 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Mich.—Senafsky v. Lawler, 12 N.W.2d 387, 307 Mich. 728, 149 A.L.R. 1433.

Miss.—Jones v. City of Hattiesburg, 42 So.2d 717, 207 Miss. 491—Bradley v. City of Jackson, 119 So. 811, 153 Miss. 136.

Mo.—Corpus Juris Secundum quoted in State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 938, 362 Mo. 242.

N.J.—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 83 N.J. Super. 324.

Tulsa Oil Co. v. Morey, 60 A.2d 302, 137 N.J.Law 388—Blanchi v. Morey, 11 A.2d 405, 124 N.J.Law 258.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115.

Ohio.—State ex rel. Jack v. Russell, 123 N.E.2d 261, 162 Ohio St. 281.

Okl.—Keaton v. Oklahoma City, 102 P.2d 938, 187 Okl. 593, certiorari denied 61 S.Ct. 75, 311 U.S. 616, 85 L.Ed. 391.

Pa.—Schmalz v. Buckingham Tp. Zoning Bd. of Adjustment, 132 A.2d 238, 389 Pa. 295.

Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

Petition of Stott, Com.Pl., 58 Montg.Co. 372.

Tex.—City of University Park v. Hoblitzelle, Civ.App., 150 S.W.2d 169, error dismissed, judgment correct, appeal dismissed and certiorari denied Hoblitzelle v. City of University Park, 62 S.Ct. 806, 315 U.S. 781, 86 L.Ed. 1188—City of West University Place v. Ellis, Civ.App., 118 S.W.2d 907, affirmed 134 S.W.2d 1038, 134 Tex. 222.

Question of law

(1) Question of reasonableness, as well as of constitutionality, of an ordinance, is a question of law for the court.

Minn.—State v. Clarke Plumbing & Heating, Inc., 56 N.W.2d 667, 238 Minn. 192.

(2) Whether an ordinance excluding business and trade from a residential district is reasonable and whether the power conferred on a governmental agent of a city is arbitrarily exercised is for court to determine as a matter of law, and, in determining the law, court will have due regard to all the circumstances of city, object sought to be attained, and necessity existing for the ordinance.

Tex.—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224, error refused.

(3) Reasonableness of spot zoning, if authorized by statute, is a question of law for the court to decide. Ga.—Birdsey v. Wesleyan College, 87 S.E.2d 378, 211 Ga. 583—Orr v. Hapeville Realty Investments, 85 S.E.2d 20, 211 Ga. 235.

(4) Where property in question was entirely segregated from that of objectors by three public streets and other property of applicant for rezoning, rezoning of the property for commercial purposes was not "spot zoning" and rule that reasonableness or unreasonableness of "spot zoning" is always question for court's determination is not applicable. Ga.—Birdsey v. Wesleyan College, supra.

Application to given situation

(1) Courts will inquire into reasonableness of zoning ordinance in its application to given situation. Colo.—Hedgcock v. People ex rel. Arden Realty & Investment Co., 57 P.2d 891, 98 Colo. 522.

(2) Where property owner is unable reasonably to use land because of zoning restrictions, if fault lies in fact that particular zoning restriction is unreasonable in application to certain locality, relief is by way of direct attack upon terms of ordinance.

N.Y.—Otto v. Steinhilber, 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681.

Test of reasonableness

(1) When reasonableness of zoning ordinance is challenged, the question for the court is whether the ordinance has a rational relation to public health, morals, safety, or welfare.

Ill.—City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616.

(2) The courts will not classify a zoning ordinance as unreasonable so long as there is an apparent legal reason for the enacted requirements imposed by such limitations.

Ky.—City of Louisville v. Koenig, 162 S.W.2d 19, 290 Ky. 562, 140 A.L.R. 1369.

Temporary ordinance

Court, in passing on reasonableness of temporary city zoning ordinance, would not scrutinize it with same strictness as though it were permanent ordinance.

Ky.—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.

Facts on which reasonableness depends

Courts may determine facts on which reasonableness of zoning ordinance depends.

Minn.—Gunderson v. Anderson, 251 N.W. 515, 190 Minn. 245.

62. Mo.—Corpus Juris Secundum quoted in State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 938, 362 Mo. 242.

Okl.—Keaton v. Oklahoma City, 102 P.2d 938, 187 Okl. 593, certiorari denied 61 S.Ct. 75, 311 U.S. 616, 85 L.Ed. 391.

63. U.S.—Women's Kansas City St. Andrew Soc. v. Kansas City, C.C.A. Mo., 58 F.2d 593.

D.C.—Dorsey v. Gotwals, 57 F.2d 407, 61 App.D.C. 41—Bugher v. Gotwals, 54 F.2d 451, 60 App.D.C. 340.

Fla.—Stengel v. Crandon, 23 So.2d 835, 156 Fla. 592, 161 A.L.R. 1228.

Ill.—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344—Zillen v. City of Chicago, 114 N.E.2d 717, 415 Ill. 488—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162—Pioneer Trust & Sav. Bank v. Village of Oak Park, 97 N.E.2d 302, 408 Ill. 458—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507—Schneider v. Board of Appeals

pal zoning is subject to limitations arising from the nature of zoning as governmental and legislative, and from the separation of judicial and legislative power.⁶⁴ Accordingly, judicial review of the action taken by zoning authorities is restricted and narrow in scope,⁶⁵ and the general rule against

judicial encroachment on the legislature's domain is applicable.⁶⁶

Judicial review of zoning regulations is generally limited to validity,⁶⁷ and the courts may not substitute their judgment for that of the zoning body, acting within its powers,⁶⁸ nor may the courts by

of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—Offner Electronics v. Gerhardt, 76 N.E.2d 27, 398 Ill. 265—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138—Mercer Lumber Cos. v. Village of Glencoe, 60 N.E.2d 913, 390 Ill. 138—Anderman v. City of Chicago, 40 N.E.2d 51, 379 Ill. 236—Village of La Grange v. Leitch, 35 N.E.2d 346, 377 Ill. 99—Harmon v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594—Merrill v. City of Wheaton, 190 N.E. 918, 356 Ill. 457.

City of Watseka v. Blatt, 50 N.E.2d 589, 320 Ill.App. 191.

Ky.—Schloemer v. City of Louisville, 182 S.W.2d 782, 298 Ky. 286.

Mass.—Nectow v. City of Cambridge, 157 N.E. 618, 260 Mass. 441, reversed on other grounds 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842.

Mich.—Pere Marquette Ry. Co. v. Township Board of Muskegon Tp., 298 N.W. 393, 298 Mich. 31.

Mo.—Corpus Juris Secundum quoted in State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 938, 362 Mo. 242.

Ohio.—State ex rel. Jack v. Russell, 123 N.E.2d 261, 162 Ohio St. 281.

Okl.—Keaton v. Oklahoma City, 102 P.2d 938, 187 Okl. 593, certiorari denied 61 S.Ct. 75, 311 U.S. 616, 85 L.Ed. 39.

Pa.—Appeal of Kerr, 144 A. 81, 294 Pa. 246.

Question in each case on appeal from the action of zoning commission is whether its action can be sustained on the ground that it was for the promotion of the common good of the community as a whole and bears a substantial relation to the public health, safety, morals, or welfare.

Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434.

64. N.Y.—Andrews v. Town Bd. of Town of Dewitt, Onondaga County, 98 N.Y.S.2d 494.

65. Md.—Fuller v. County Com'rs of Baltimore County, 133 A.2d 397, 214 Md. 168—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 482—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209

Md. 420—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Zang & Sons, Builders, Inc. v. Taylor, 102 A.2d 723, 203 Md. 628—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136.

Mo.—State ex rel. Cooper v. Cowan, App., 307 S.W.2d 676.

Ohio.—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

66. N.J.—Sun Oil Co. v. City of Clifton, 84 A.2d 555, 16 N.J.Super. 265. N.Y.—Smidt v. McKee, 186 N.E. 869, 262 N.Y. 373, reargument denied 268 N.Y.S. 936, 239 App.Div. 769.

Andrews v. Town Board of Town of Dewitt, Onondaga County, 98 N.Y.S.2d 494.

Pa.—Appeal of Flannery, Quar.Sess., 56 Lack.Jur. 85.

Wash.—Shields v. Spokane School Dist. No. 81, 196 P.2d 352, 31 Wash. 2d 247.

67. Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C. A. 15.

Ill.—Mercer Lumber Cos. v. Village of Glencoe, 60 N.E.2d 913, 390 Ill. 138.

Mo.—Corpus Juris Secundum quoted in State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 938, 362 Mo. 242.

Ohio.—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.

43 C.J. p 228 note 53 [a].

68. U.S.—Zahn v. Board of Public Works of City of Los Angeles, Cal., 47 S.Ct. 594, 274 U.S. 325, 71 L.Ed. 1074.

Standard Oil Co. v. City of Tallahassee, C.A.Fla., 183 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647—Dennis v. Village of Tonka Bay, C.C.A.Minn., 156 F.2d 672—Downham v. City Council of Alexandria, D.C.Va., 58 F.2d 784—Women's Kansas City St. Andrew Soc. v. Kansas City, D.C. Mo., 54 F.2d 1071, reversed on other grounds, C.C.A., 58 F.2d 593.

Ala.—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Cal.—Johnston v. City of Claremont, 323 P.2d 71.

City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15. People v. Norton, 238 P. 33, 108 C.A., Supp., 767.

Conn.—Couch v. Zoning Commission of Town of Washington, 106 A.2d 173, 141 Conn. 349—Mallory v. Town of West Hartford, 86 A.2d 668, 138 Conn. 497—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434—Bartram v. Zoning Commission of City of Bridgeport, 68 A.2d 308, 136 Conn. 89—De Palma v. Town Plan Commission of Greenwich, 193 A. 868, 123 Conn. 257.

Delmar v. Planning and Zoning Bd. of Town of Milford, 109 A.2d 604, 19 Conn.Sup. 21.

D.C.—Bugher v. Gottwals, 54 F.2d 451, 60 App.D.C. 340.

Fla.—Quattrocchi v. MacVicar, 82 So.2d 873—Segal v. City of Miami Beach, 63 So.2d 496—City of Miami Beach v. Hogan, 63 So.2d 493, certiorari denied Hogan v. City of Miami, 74 S.Ct. 33, 346 U.S. 819, 98 L.Ed. 346—State ex rel. Office Realty Co. v. Ehinger, 46 So.2d 601—City of Miami Beach v. Ocean & Inland Co., 3 So.2d 364, 147 Fla. 480—Forde v. City of Miami Beach, 1 So.2d 642, 146 Fla. 676.

Ga.—Schofield v. Bishop, 16 S.E.2d 714, 192 Ga. 732.

Ill.—LaSalle Nat. Bank v. City of Chicago, 122 N.E.2d 519, 4 Ill.2d 253—Downey v. Grimshaw, 101 N.E.2d 275, 410 Ill. 21—Burkholder v. City of Sterling, 46 N.E.2d 45, 381 Ill. 564—Zadworny v. City of Chicago, 44 N.E.2d 426, 380 Ill. 470—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568—Michigan-Lake Bldg. Corporation v. Hamilton, 172 N.E. 710, 340 Ill. 284.

Rector v. Board of Appeals Under Zoning Ordinance of City of Danville, 95 N.E.2d 99, 342 Ill.App. 51.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

Kan.—Spurgeon v. Board of Com'rs of Shawnee County, 317 P.2d 798, 181 Kan. 1008.

Ky.—Bischoff v. Hennessy, 251 S.W. 2d 582.

judicial review disturb an exercise of the discretion of the municipality in zoning matters,⁶⁹ un-

Md.—Fuller v. County Com'rs of Baltimore County, 133 A.2d 397, 214 Md. 168—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420—Hedin v. Board of County Com'rs of Prince Georges County, 120 A.2d 663, 209 Md. 224—Serio v. Mayor and City Council of Baltimore, 119 A.2d 387, 208 Md. 545—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551.

Mass.—Town of Concord v. Attorney General, 142 N.E.2d 360—Foster v. Mayor of City of Beverly, 53 N.E.2d 693, 315 Mass. 587, 151 A.L.R. 737.

Mo.—Corpus Juris Secundum quoted in State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 938, 362 Mo. 242—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681—Brown v. Gambrel, 213 S.W.2d 931, 358 Mo. 192—Landau v. Levin, 213 S.W.2d 483, 358 Mo. 77.

N.H.—Scott v. Davis, 45 A.2d 654, 94 N.H. 35.

N.J.—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324—Marie's Launderette v. City of Newark, 110 A.2d 65, 33 N.J. Super. 279, reversed on other grounds 113 A.2d 190, 35 N.J. Super. 94—Sieber v. Laawe, 109 A.2d 470, 33 N.J. Super. 115—Closterman v. Cranford Tp., 91 A.2d 646, 22 N.J. Super. 204—Lionshead Lake v. Wayne Tp., 73 A.2d 287, 8 N.J. Super. 468, reversed on other grounds 74 A.2d 609, 9 N.J. Super. 33.

Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J. Law 190.

N.Y.—Commercial Properties v. Griffin, 131 N.Y.S.2d 619, 283 App. Div. 1109—Fox Meadow Estates v. Culley, 252 N.Y.S. 178, 233 App. Div. 250, affirmed Fox Meadow Estates v. Culley, 185 N.E. 714, 261 N.Y. 506.

Rochester Transit Corp. v. Crowley, 131 N.Y.S.2d 493, 205 Misc. 933—North Titus Residential Ass'n of Irondequoit, N. Y. v. Board of Zoning Appeals of Town of Irondequoit, 127 N.Y.S.2d 502, 205 Misc. 518—Cordts v. Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

Ohio—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.

Pa.—Steppler v. Board of Adjustment of Radnor Tp., 5 Pa. Dist. & Co.2d 8, 42 Del. Co. 341—Kelechava

v. Hanover Tp., 32 Pa. Dist. & Co. 587, 25 Lehigh L.J. 43.

Wunderle v. Board of Adjustment of Borough of Hatboro, Com. Pl., 62 Montg. Co. 231.

Tenn.—Davidson County v. Rogers, 198 S.W.2d 812, 184 Tenn. 327.

Tex.—McNutt Oil & Refining Co. v. Brooks, Civ. App., 244 S.W.2d 872—Thompson v. City of Carrollton, Civ. App., 211 S.W.2d 970—Barrington v. City of Sherman, Civ. App., 155 S.W.2d 1008, error refused—Connor v. City of University Park, Civ. App., 142 S.W.2d 706, error refused.

Wash.—Shields v. Spokane School Dist., No. 81, 196 P.2d 352, 31 Wash. 2d 247.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Persuasive reasons

In reviewing exercise of discretion given to zoning commission for establishment of a comprehensive zoning plan, it is not function of the court to substitute its judgment for that of the commission even for reasons which appear most persuasive. **D.C.**—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S. App. D.C. 72.

Reasonable justification

(1) Fact that a court may not agree with the legislative determination does not authorize the judicial branch of the government to substitute its judgment for that of the zoning authority if there is any reasonable justification for the action of the latter.

Cal.—Willett & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 C.A.2d 757.

(2) Where there is any substantial basis or reason for action taken by city council in zoning matter, it is not prerogative of court to take issue with members of council and substitute its own judgment.

La.—Archer v. City of Shreveport, App., 85 So.2d 337.

Debatable considerations

(1) Modification of zone boundaries and regulations by zoning commission partakes of nature of legislative proceedings, and court cannot substitute its judgment for that of commission when commission's considerations are fairly debatable.

Conn.—Kutcher v. Town Planning Commission of Town of Manchester, 88 A.2d 538, 138 Conn. 705.

(2) Where suitability of plaintiff's property for residential use presents a debatable question, court cannot substitute its judgment for that of local legislative body adopting zoning resolution.

N.Y.—Ulmer Park Realty Co. v. City of New York, 63 N.Y.S.2d 143, 270 App. Div. 1044, affirmed 77 N.E.2d 797, 297 N.Y. 788.

Scuteri v. Incorporated Village of Bayville, 120 N.Y.S.2d 794.

(3) In zoning matters, courts will not substitute their judgment for that of legislative body, if question decided was fairly debatable.

Md.—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Zang & Sons, Builders, Inc. v. Taylor, 102 A.2d 723, 203 Md. 628.

N.Y.—Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485—Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47.

Gilchrest Realty Corp. v. Village of Great Neck Plaza, 85 N.Y.S.2d 224, reversed on other grounds 90 N.Y.S.2d 740, 275 App. Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619.

Use of particular locus

Necessity for using a particular locus as compared with other available sites was a matter to be decided by the legislative body of the municipality with respect to validity of ordinance amending zoning ordinance. **Mass.**—Lamarre v. Commissioner of Public Works of Fall River, 87 N.E.2d 211, 324 Mass. 542.

69. Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Cal.—McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644—Skalko v. City of Sunnyvale, 93 P.2d 93, 14 C.2d 213.

Ga.—Johnson v. Evangelical Lutheran Church of Messiah, 54 S.E.2d 722, 79 Ga. App. 671.

Ill.—Burkholder v. City of Sterling, 46 N.E.2d 45, 381 Ill. 564—Zadworny v. City of Chicago, 44 N.E.2d 426, 380 Ill. 470—Michigan-Lake Bldg. Corporation v. Hamilton, 172 N.E. 710, 340 Ill. 284—Minkus v. Pond, 158 N.E. 121, 326 Ill. 467.

Rector v. Board of Appeals Under Zoning Ordinance of City of Danville, 95 N.E.2d 99, 342 Ill. App. 51.

Ky.—Cayce v. City of Hopkinsville, 289 S.W. 223, 217 Ky. 135.

Mo.—Corpus Juris Secundum quoted in State ex rel. Christopher v. Matthews, 240 S.W.2d 934, 938, 362 Mo. 242.

N.Y.—Eaton v. Sweeny, 251 N.Y.S. 246, 232 App. Div. 459, reversed on other grounds 177 N.E. 412, 257 N.Y. 176.

Northport Water Works Co. v. Carll, 133 N.Y.S.2d 859.

Wash.—Besselman v. City of Moses Lake, 280 P.2d 639, 46 Wash.2d 279.

Wis.—Eggebeen v. Sonnenburg, 1 N.W.2d 84, 239 Wis. 213, 138 A.L.R. 495—Geisenfeld v. Village of Shorewood, 287 N.W. 633, 232 Wis. 410—

less the discretion is clearly abused.⁷⁰ On review, much weight must be accorded to the judgment of the local legislative body,⁷¹ and the validity of a zoning ordinance cannot be challenged on hypothetical grounds.⁷² The courts may not interfere with or control a municipality's zoning power⁷³ or

Bouchard v. Zetley, 220 N.W. 209, 196 Wis. 635.

43 C.J. p 250 note 87.

Legislative decision

Except as to matters specified in statute pertaining to limitations on zoning ordinances, landowner does not have right to have the supreme court review a purely legislative decision of town council concerning enactment, amendment, or repeal of the zoning ordinance.

R.I.—*Beauregard v. Town Council of Town of South Kingstown*, 107 A. 2d 283, 82 R.I. 244, reargument denied 108 A.2d 253, 82 R.I. 244.

Impairment of established zones

Courts should not lend themselves to impairment of established residential zones, and thus undo the careful thought that has gone into a zoning arrangement projected by a planning board and implemented by action of the governing body in passing the necessary zoning ordinance.

N.J.—*Bierce v. Gross*, 135 A.2d 561, 47 N.J.Super. 148.

70. Ark.—*City of Fordyce v. Dunn*, 220 S.W.2d 430, 215 Ark. 276.

Cal.—*Johnston v. City of Claremont*, 323 P.2d 71, 49 C.2d 826—*McCarthy v. City of Manhattan Beach*, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 343 U.S. 817, 99 L.Ed. 644—*Clemons v. City of Los Angeles*, 222 P.2d 439, 36 C.2d 95—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332—*Rehfeld v. City and County of San Francisco*, 21 P.2d 419, 218 C. 83.

Conn.—*Bartram v. Zoning Commission of City of Bridgeport*, 68 A.2d 308, 136 Conn. 89.

Ill.—*Wechter v. Board of Appeals*, 119 N.E.2d 747, 3 Ill.2d 13—*Burkholder v. City of Sterling*, 64 N.E. 2d 45, 381 Ill. 564—*Zadworny v. City of Chicago*, 44 N.E.2d 426, 380 Ill. 470—*Michigan-Lake Bldg. Corporation v. Hamilton*, 172 N.E. 710, 340 Ill. 284—*Minkus v. Pond*, 158 N.E. 121, 326 Ill. 467.

People ex rel. Delgado v. Morris, 79 N.E.2d 839, 334 Ill.App. 557.

Ky.—*City of Louisville v. Puritan Apartment Hotel Co.*, 264 S.W.2d 888—*Cayce v. City of Hopkinsville*, 289 S.W. 223, 217 Ky. 135.

Md.—*Hedin v. Board of County Com'rs of Prince Georges County*, 120 A.2d 663, 209 Md. 224.

Mo.—*Corpus Juris Secundum* quoted in *State ex rel. Christopher v. Matthews*, 240 S.W.2d 934, 938, 362 Mo. 242.

Neb.—*Graham v. Graybar Elec. Co.*, 63 N.W.2d 774, 158 Neb. 527—*City of Omaha v. Glissmann*, 39 N.W.2d

828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.J.—*Esso Standard Oil Co. v. Town of Westfield*, 110 A.2d 148, 33 N.J. Super. 324.

N.Y.—*Northport Water Works Co. v. Carll*, 133 N.Y.S.2d 859—*Concordia Collegiate Institute v. Miller*, 88 N.Y.S.2d 825, affirmed 93 N.Y.S.2d 922, 276 App.Div. 872, reargument and appeal denied 94 N.Y.S.2d 829, 276 App.Div. 918, reversed on other grounds 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

Ohio.—*State ex rel. Cook v. Turgeon*, 77 N.E.2d 283, 84 Ohio App. 287.

Pa.—*Silver v. Zoning Bd. of Adjustment*, 112 A.2d 84, 381 Pa. 41—*Appeal of Kerr*, 144 A. 81, 294 Pa. 246—*Appeal of Liggett*, 139 A. 619, 291 Pa. 109.

Appeal of Lowden, Com.Pl., 96 Pittsb.Leg.J. 153.

Tex.—*City of Waxahachie v. Watkins*, 275 S.W.2d 477, 154 Tex. 206.

Lamkin v. City of Bellaire, Civ. App., 308 S.W.2d 70—*Skinner v. Reed*, Civ.App., 265 S.W.2d 850—*City of Dallas v. Lively*, Civ.App., 161 S.W.2d 895, error refused.

Utah.—*Phi Kappa Iota Fraternity v. Salt Lake City*, 212 P.2d 177, 116 Utah 536.

Vt.—*In re Willey*, 140 A.2d 11.

Va.—*West Bros. Buick Co. v. City of Alexandria*, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 608.

Wis.—*Eggebeen v. Sonnenberg*, 1 N.W.2d 84, 239 Wis. 213, 138 A.L.R. 495—*Geisenfeld v. Village of Shorewood*, 287 N.W. 683, 232 Wis. 410—*City of La Crosse v. Elbertson*, 237 N.W. 99, 205 Wis. 207.

43 C.J. p 250 note 87.

Beyond reasonable doubt

Court will not disturb legislative or administrative action in zoning unless beyond reasonable doubt the action is an abuse of discretion or an excess of power having no substantial relation to evils to be remedied or to public health, safety, and welfare or other proper object of police power.

Mo.—*Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n*, 265 S.W.2d 374.

Honest judgment

Where it appears that an honest judgment has been reasonably and fairly exercised by zoning authority after full hearing, courts will be cautious about disturbing such determination.

Conn.—*Kutcher v. Town Planning Commission of Town of Manchester*, 88 A.2d 538, 133 Conn. 705.

71. Mass.—*Burnham v. Board of Appeals of Gloucester*, 128 N.E.2d 772, 338 Mass. 114.

Findings of council

In determining the validity of a zoning ordinance, the council's findings will be given great weight.

U.S.—*Marblehead Land Co. v. City of Los Angeles*, C.C.A.Cal., 47 F. 2d 528.

Local conditions

Appellate court, in passing on validity of zoning ordinance, should give great weight to determination of local authorities and local courts especially familiar with local conditions.

U.S.—*Marblehead Land Co. v. City of Los Angeles*, C.C.A.Cal., 47 F.2d 528, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540.

Neb.—*City of Omaha v. Glissmann*, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621—*Dundee Realty Co. v. City of Omaha*, 13 N.W.2d 634, 144 Neb. 448.

72. Mo.—*Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

73. U.S.—*Standard Oil Co. v. City of Tallahassee*, C.A.Fla., 133 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647.

Cal.—*City of San Mateo v. Hardy*, 149 P.2d 307, 64 C.A.2d 794—*Wickham v. Becker*, 274 P. 397, 96 C.A. 443.

Ill.—*La Salle Nat. Bank v. City of Chicago*, 122 N.E.2d 519, 4 Ill.2d 253.

La.—*State ex rel. Pleasant v. Hardy*, App., 157 So. 130.

Mich.—*Randall v. Township Bd. of Meridian Tp., Ingham County*, 70 N.W.2d 728, 343 Mich. 605—*Tel-Craft Civic Ass'n v. City of Detroit*, 60 N.W.2d 294, 337 Mich. 326—*Northwood Properties Co. v. Perkins*, 39 N.W.2d 25, 325 Mich. 419.

Minn.—*State ex rel. Howard v. Village of Roseville*, 70 N.W.2d 404, 244 Minn. 343.

N.Y.—*Griffin v. Revilla*, 149 N.Y.S. 2d 312, 1 Misc.2d 1045.

Hinna v. Board of Appeals of Town of Hempstead, 170 N.Y.S.2d 12—*Steers Sand & Gravel Corp. v. Village Bd. of Village of Northport*, 129 N.Y.S.2d 403—*Little v. Young*, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86

direct zoning ordinances to be repealed, enacted, or amended.⁷⁴ In other words, the court, on review, does not act as an independent zoning authority, and the question before it is whether the action of the

commission is to be affirmed or reversed.⁷⁵

The courts will not hold a municipal zoning or building ordinance or resolution invalid in a doubtful case or where its validity is fairly debatable.⁷⁶

N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Pa.—Kuznowski v. Board of Zoning Appeals, Com.Pl., 53 Lack.Jur. 53. S.D.—Luedke v. Carlson, 41 N.W.2d 552, 73 S.D. 240.

Description of residence district

Supreme court has no authority to make such a material change in description of residence district in village zoning ordinance amendment creating such district as would be tantamount to new description of land intended.

N.Y.—Mallett v. Village of Mamaronck, 123 N.Y.S.2d 249, reversed on other grounds 131 N.Y.S.2d 504, 283 App.Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821.

Temporary suspension of zoning ordinance

Housing shortage may justify court in temporarily suspending zoning ordinance restricting area to single family dwellings during the emergency, but does not warrant suspension of ordinance for all time to come.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Zoning of entire area

Whether entire area of county should be zoned is legislative matter, delegated by General Assembly, through enabling act, to county board of supervisors, and supreme court of appeals is not concerned therewith. Va.—Fairfax County v. Parker, 44 S.E.2d 9, 186 Va. 675.

74. Ill.—People ex rel. Danielson v. City of Rockford, 87 N.E.2d 660, 338 Ill.App. 347.

La.—State ex rel. Pleasant v. Hardy, App., 157 So. 130.

Pa.—Kuznowski v. Board of Zoning Appeals, Com.Pl., 53 Lack.Jur. 53.

Calling of meeting

Court had no power to direct board of trustees of a village to call a new meeting for purpose of voting on a petition for a change of zone or to direct that a new hearing be held.

N.Y.—Steers Sand & Gravel Corp. v. Village Bd. of Village of Northport, 129 N.Y.S.2d 403.

Multiple dwellings

In action by property owner against city for an order directing city inspector to issue a permit for erection of multiple dwellings on property zoned for single residences, trial court could not compel mayor of city and city commission members

to amend ordinance to permit erection of multiple dwellings thereon.

Mich.—Northwood Properties Co. v. Perkins, 39 N.W.2d 25, 325 Mich. 419.

Any change in wording of municipal ordinance must be made by municipal legislative body, not court.

N.Y.—Mallett v. Village of Mamaronck, 123 N.Y.S.2d 249, reversed on other grounds 131 N.Y.S.2d 504, 283 App.Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821.

75. Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Fortner, 243 S.W.2d 492.

Other statements of rule

(1) On appeal from an order of a zoning board, reviewing court has not the function or right to zone or rezone, but merely to decide whether board's action was arbitrary, capricious, discriminatory, or illegal.

Md.—Nelson v. County Council for Montgomery County, 136 A.2d 378, 214 Md. 587—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420—Hedin v. Board of County Com'rs of Prince Georges County, 120 A.2d 663, 209 Md. 224—Temmink v. Board of Zoning Appeals of Baltimore County, 109 A.2d 85, 205 Md. 489—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136.

(2) When court declares a zoning ordinance arbitrary and unreasonable and therefore void, it has no authority to rezone the lands.

Fla.—Quattrocchi v. MacVicar, 82 So. 2d 873.

Exception to zoning ordinance

(1) Court may not grant exceptions to provisions of zoning ordinance which violates spirit of ordinance, nor can it, under pretext of granting exception, assume position of superior legislative body.

Okl.—Beveridge v. Harper & Turner Oil Trust, 35 P.2d 485, 168 Okl. 809.

(2) Action of local legislative body in establishing reasonable exceptions to zoning ordinance is not judicially reviewable.

N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

76. U.S.—Zahn v. Board of Public Works of City of Los Angeles, Cal., 47 S.Ct. 594, 274 U.S. 325, 71 L.Ed. 1074.

Dennis v. Village of Tonka Bay, C.C.A.Minn., 156 F.2d 672.

Downham v. City Council of Alexandria, D.C.Va., 58 F.2d 784—Women's Kansas City St. Andrew Soc. v. Kansas City, C.C.A.Mo., 58 F.2d 593.

Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480—Leary v. Adams, 147 So. 391, 226 Ala. 472. Cal.—Reynolds v. Barrett, 83 P.2d 29, 12 C.2d 244.

Otis v. City of Los Angeles, 126 P.2d 954, 52 C.A.2d 605.

Colo.—Heron v. City of Denver, 283 P.2d 647, 131 Colo. 501.

Del.—In re Ceresini, 189 A. 443, 8 W.W.Harr. 134.

Fla.—City of Miami Beach v. Lachman, 71 So.2d 148, appeal dismissed Lachman v. City of Miami Beach, 75 S.Ct. 292, 348 U.S. 906, 99 L.Ed. 711—Segal v. City of Miami, 63 So.2d 496—State ex rel. Office Realty Co. v. Ehinger, 46 So. 2d 601.

Ill.—Anderson v. County of Cook, 138 N.E.2d 485, 9 Ill.2d 568—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507—Du Page County v. Henderson, 83 N.E.2d 720, 403 Ill. 179—Burkholder v. City of Sterling, 46 N.E.2d 45, 381 Ill. 564—Avery v. Village of La Grange, 45 N.E.2d 647, 381 Ill. 432—Reschke v. Village of Winnetka, 2 N.E.2d 718, 363 Ill. 478, certiorari denied Village of Winnetka v. Reschke, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431 and Village of Winnetka v. Erickson, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431.

Baird v. Board of Zoning Appeals of City of Kankakee, 106 N.E.2d 343, 347 Ill.App. 158—Rector v. Board of Appeals Under Zoning Ordinance of City of Danville, 95 N.E.2d 99, 342 Ill.App. 51.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

Ky.—City of Louisville v. Bryan S. McCoy, 286 S.W.2d 546.

Md.—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—Serio v. Mayor and City Council of Baltimore, 119 A.2d 387, 208 Md. 545—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136—Lipsitz v. Farr, 164 A. 743, 164 Md. 222.

Mass.—Town of Concord v. Attorney General, 142 N.E.2d 860—Raymond v. Commissioner of Public Works of Lowell, 131 N.E.2d 189, 333 Mass. 410—Lamarre v. Commissioner of Public Works of Fall River, 87 N.E.2d 211, 324 Mass. 542—Caires v.

but will do so only where the ordinance or resolution is plainly and clearly invalid.⁷⁷ So, where

- Building Com'r of Hingham, 83 N.E.2d 550, 328 Mass. 589—Foster v. Mayor of City of Beverly, 53 N.E.2d 693, 315 Mass. 567, 151 A.L.R. 737—Simon v. Town of Needham, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.
- Mich.—Pere Marquette Ry. Co. v. Township Board of Muskegon Township, 298 N.W. 393, 298 Mich. 31.
- Minn.—State ex rel. Howard v. Village of Roseville, 70 N.W.2d 404, 244 Minn. 343.
- Mo.—Schell v. Kansas City, Mo., 226 S.W.2d 718, 360 Mo. 27—Landau v. Levin, 213 S.W.2d 483, 358 Mo. 77.
- N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.
- Guacildes v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J. Super. 405.
- Appley v. Township Committee of Township of Bernards, 28 A.2d 177, 129 N.J. Law 73.
- N.Y.—Arverne Bay Const. Co. v. Thatcher, 2 N.Y.S.2d 112, 253 App. Div. 285, reversed on other grounds 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.
- Fieldston Garden Apartments v. City of New York, 145 N.Y.S.2d 907, 7 Misc.2d 147, affirmed 163 N.Y.S.2d 402, 3 A.D.2d 903—Corning v. Town of Ontario, 121 N.Y.S.2d 288, 204 Misc. 88.
- Nehrbas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S. 2d 145.
- N.C.—Appeal of Parker, 197 S.E. 706, 214 N.C. 51, appeal dismissed Parker v. City of Greensboro, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358—Elizabeth City v. Aydtlett, 161 S.E. 78, 201 N.C. 602.
- Ohio.—State ex rel. Kangesser Co. v. Village of Beachwood, App., 128 N.E.2d 127—Miesz v. Village of Mayfield Heights, 111 N.E.2d 20, 92 Ohio App. 471.
- Pa.—Steppler v. Board of Adjustment of Radnor Tp., 5 Pa. Dist. & Co.2d 8, 42 Del. Co. 341—Kelechava v. Hanover Tp., 82 Pa. Dist. & Co. 587, 25 Lehigh. 43.
- Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.
- Lamkin v. City of Bellaire, Civ. App., 308 S.W.2d 70—City of Lubbock v. Stubbs, Civ. App., 278 S.W.2d 519—City of University Park v. Hoblitzelle, Civ. App., 150 S.W.2d 169, error dismissed, judgment correct, appeal dismissed and certiorari denied Hoblitzelle v. City of University Park, 62 S.Ct. 806, 315 U.S. 781, 86 L.Ed. 1188—City of Corpus Christi v. Jones, Civ. App., 144 S.W.2d 388, error dismissed, judgment correct.
- Va.—Ciaffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.
- W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.
- Other statements of rule**
- (1) On appeal from zoning board court will reverse only where there are no grounds for reasonable debate or where there are no supporting facts in record to justify legislative action of board.
- Md.—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420—Hedin v. Board of County Com'rs of Prince Georges County, 120 A.2d 663, 209 Md. 113—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136.
- (2) Court may differ with legislative body as to propriety of enacting ordinance, but if question is one on which reasonable minds might differ, court will not interfere with legislative body's determination of policy.
- Cal.—McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644.
- Characterization of property**
- When it is fairly debatable whether property should be characterized as residential or commercial, the question should be resolved by the city council and not by the court.
- Ill.—La Salle Nat. Bank v. City of Chicago, 126 N.E.2d 643, 6 Ill.2d 22—Herzog Bldg. Corp. v. City of Des Plaines, 119 N.E.2d 732, 3 Ill. 2d 206.
- Height Limitations**
- If question of whether height limitations on buildings imposed by amendment to zoning ordinance enacted pursuant to enabling act would result in a real and genuine enhancement of public interests was fairly debatable, court could not substitute its judgment for that of the municipality, but court would not enforce a plainly invalid exercise of the power of municipality to limit height of buildings conferred by act.
- Mass.—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646.
- Decision in other jurisdiction**
- The rule that the construction of a statute by the courts of one state before its enactment by the legislature of another state, although not conclusive, is very persuasive, had no application to a situation where the city of Reno, Nev., adopted an ordinance of the city of Indianapolis, Ind., after a decision of the supreme court of Indiana, holding the ordinance constitutional since the application of the doctrine would substitute the supreme court of Indiana as a tribunal to determine whether the ordinance of the city of Reno transgressed the constitution of Nevada, in place of the supreme court of Nevada.
- Nev.—City of Reno v. Second Judicial District Court in and for Washoe County, 95 P.2d 994, 59 Nev. 416, 125 A.L.R. 948.
77. U.S.—American Wood Products Co. v. City of Minneapolis, C.C.A. Minn., 35 F.2d 657.
- Cal.—Clemmons v. City of Los Angeles, 222 P.2d 439, 36 C.2d 95.
- Conn.—Eden v. Town Plan and Zoning Commission of Town of Bloomfield, 89 A.2d 746, 139 Conn. 59.
- D.C.—Leventhal v. District of Columbia, 100 F.2d 94, 69 App.D.C. 229.
- Fla.—State ex rel. Dixie Inn v. City of Miami, 24 So.2d 705, 156 Fla. 784—City of Miami v. Rosen, 10 So.2d 307, 151 Fla. 677.
- Md.—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136.
- Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381.
- Mo.—Schell v. Kansas City, Mo., 226 S.W.2d 718, 360 Mo. 27.
- N.C.—Appeal of Parker, 197 S.E. 706, 214 N.C. 51, appeal dismissed Parker v. City of Greensboro, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358.
- N.D.—Midgarden v. City of Grand Forks, 54 N.W.2d 659, 79 N.D. 18.
- S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 223 S.C. 165.
- Other statements of rule**
- (1) Challenge to the constitutional validity of zoning ordinance will not be sustained unless court is certain that ordinance is plainly and palpably inadequate and incomplete as to be convinced beyond reasonable doubt that it offends the constitution.
- Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.
- (2) In considering validity of ordinances, courts are inclined to sustain rather than to overthrow them.
- Ga.—Hamilton v. North Ga. Elec. Membership Corp., 40 S.E.2d 750, 201 Ga. 689.
- Observance of statutory restrictions**
- (1) Court properly under record, concluded that zoning commission which extended established industrial zone into area previously zoned as residential did not violate restrictions imposed by statute requiring

there is room for a fair difference of opinion concerning the reasonableness of a particular ordinance, the court will not overthrow the considered findings of the zoning body.⁷⁸ In this respect, a zoning ordinance may be said to be "fairly debatable" when for any reason it is open to dispute or controversy

on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.⁷⁹

The courts will not hold a municipal building or zoning ordinance or regulation invalid unless it is clearly arbitrary,⁸⁰ plainly unreasonable,⁸¹ or un-

zoning regulations to be made with reasonable consideration as to character of district and its peculiar suitability for particular uses, and with view to encouraging most appropriate use of land throughout such municipality, and to be in pursuance of comprehensive plan which would operate to promote general public welfare rather than individual personal advantage.

Conn.—Hills v. Zoning Commission of Town of Newington, 96 A.2d 212, 139 Conn. 603.

(2) Where the question is whether amendment to sixth-class city zoning ordinance bears any substantial relation to the objects set forth in the statute, the court will not hold the amendment invalid unless the evidence shows that there is no such relation.

Ky.—Byrn v. Beechwood Village, 253 S.W.2d 395.

78. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.III, 178 F.2d 214.

Ill.—First Nat. Bank of Lake County, 130 N.E.2d 267, 7 Ill.2d 213—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344—Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill.2d 200—Zillen v. City of Chicago, 114 N.E.2d 717, 415 Ill. 488—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 149, 414 Ill. 162—Kinney v. City of Joliet, 103 N.E.2d 473, 411 Ill. 289—Downey v. Grimshaw, 101 N.E.2d 275, 410 Ill. 21—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81—Jacobson v. Village of Wilmette, 85 N.E.2d 753, 403 Ill. 250—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321.

Grand Trunk Western R. Co. v. City of Chicago, 105 N.E.2d 152, 346 Ill.App. 376—Cassidy v. Triebel, 85 N.E.2d 461, 337 Ill.App. 117.

79. Fla.—City of Miami Beach v. Lachman, 71 So.2d 148, appeal dismissed Lachman v. City of Miami Beach, 75 S.Ct. 292, 348 U.S. 906, 99 L.Ed. 711.

80. U.S.—Nectow v. City of Cambridge, Mass., 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842—Gorlieb v. Fox,

Va., 47 S.Ct. 675, 247 U.S. 603, 71 L.Ed. 1228, 53 A.L.R. 1210.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Ariz.—Ellsworth v. Gercke, 156 P.2d 242, 62 Ariz. 198—City of Tucson v. Arizona Mortuary, 272 P. 923, 34 Ariz. 495.

Cal.—Johnston v. City of Claremont, 323 P.2d 71, 49 C.2d 826—McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 C.2d 379, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644.

D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72—Leventhal v. District of Columbia, 100 F.2d 94, 69 App.D.C. 229—Garity v. District of Columbia, 86 F.2d 207, 66 App.D.C. 256.

Fla.—State ex rel. Dixie Inn v. City of Miami, 24 So.2d 705, 156 Fla. 784—State ex rel. Skillman v. City of Miami, 134 So. 541, 101 Fla. 585—State v. Du Bose, 128 So. 4, 99 Fla. 812.

Ga.—Morgan v. Thomas, 63 S.E.2d 659, 207 Ga. 660—Schofield v. Bishop, 16 S.E.2d 714, 192 Ga. 732.

Awtry & Lowndes Co. v. City of Atlanta, 50 S.E.2d 868, 78 Ga.App. 390, reversed on other grounds 53 S.E.2d 358, 205 Ga. 296, conformed to 54 S.E.2d 277, 79 Ga.App. 487.

Ill.—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—Tower Cabana Club v. City of Chicago, 123 N.E.2d 834, 5 Ill.2d 11—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81—Jacobson v. Village of Wilmette, 85 N.E.2d 753, 403 Ill. 250—Evanston Best & Co. v. Goodman, 16 N.E.2d 131, 369 Ill. 207—State Bank & Trust Co. v. Village of Wilmette, 193 N.E. 131, 358 Ill. 311, 96 A.L.R. 1327.

Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Ky.—City of Louisville v. Puritan Apartment Hotel Co., 264 S.W.2d 888—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.

Md.—Serio v. Mayor and City Council of Baltimore, 119 A.2d 387, 208 Md. 545—Lipsitz v. Farr, 164 A. 743, 164 Md. 222.

Neb.—Davis v. City of Omaha, 45 N.W.2d 172, 153 Neb. 460.

N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397.

Peterson v. Mayor and Council

of Borough of Palisades Park, 21 A.2d 777, 127 N.J.Law 190.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115. Penataquit Ass'n v. Furman, 129 N.Y.S.2d 221, 283 App.Div. 875.

Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736.

Nehrbus v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y. S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y. S.2d 145—Hayes v. City of Yonkers, 143 N.Y.S.2d 699, affirmed 152 N.Y.S.2d 213, 1 A.D.2d 1031—Suburban Tire & Battery Co. v. Village of Mamaroneck, 104 N.Y.S.2d 850, affirmed 113 N.Y.S.2d 449, 279 App.Div. 1084.

Ohio.—Partain v. City of Brooklyn, 133 N.E.2d 616, 101 Ohio App. 279—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258—State ex rel. Snyder v. Yoter, 30 N.E.2d 558, 65 Ohio App. 492.

Okl.—Beveridge v. Harper & Turner Oil Trust, 35 P.2d 435, 168 Okl. 609.

Or.—Shaffner v. City of Salem, 368 P.2d 599, 201 Or. 45—Holt v. City of Salem, 234 P.2d 564, 192 Or. 200.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206. Ciesi v. Northwest Dallas Imp. Ass'n, Civ.App., 263 S.W.2d 820, refused no reversible error—Davis v. Nolte, Civ.App., 231 S.W.2d 471, error refused no reversible error—Lombardo v. City of Dallas, Civ. App., 47 S.W.2d 495, affirmed 78 S.W.2d 475, 124 Tex. 1.

Utah.—Dowse v. Salt Lake City Corp., 255 P.2d 723, 123 Utah 107.

Wash.—Lillions v. Gibbs, 289 P.2d 203, 47 Wash.2d 629—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

81. U.S.—Nectow v. City of Cambridge, Mass., 48 S.Ct. 447, 277 U.S. 183, 72 L.Ed. 842—Gorlieb v. Fox, Va., 47 S.Ct. 675, 247 U.S. 603, 71 L.Ed. 1228.

Sinclair Refining Co. v. City of Chicago, C.A.III, 178 F.2d 214.

Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646—Leary v. Adams, 147 So. 391, 226 Ala. 472.

Ariz.—Ellsworth v. Gercke, 156 P.2d

less such building or zoning ordinance is clearly discriminatory,⁸² or manifestly without substantial relation to the public health, safety, morals, or general welfare;⁸³ decisions of zoning authorities are

- 242, 62 Ariz. 198—City of Tucson v. Arizona Mortuary, 272 P. 923, 34 Ariz. 495.
- Cal.—Johnston v. City of Claremont, 323 P.2d 71, 49 C.2d 826.
- City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442—Price v. Schwafel, 206 P.2d 683, 92 C.A.2d 77.
- Conn.—Young v. Town of West Hartford, 149 A. 205, 111 Conn. 27.
- D.C.—Salver v. McLaughlin, 240 F.2d 891, 100 U.S.App.D.C. 29—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72—Larrabee v. Bell, 10 F.2d 986, 56 App.D.C. 121, certiorari denied U. S. ex rel. Varela v. Bell, 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143, followed in Varela v. Bell, 10 F.2d 989, 56 App.D.C. 124, certiorari denied U. S. ex rel. Varela v. Bell, 46 S.Ct. 484, 271 U.S. 670, 70 L.Ed. 1143.
- Fla.—State ex rel. Dixie Inn v. City of Miami, 24 So.2d 705, 156 Fla. 784—State ex rel. Skillman v. City of Miami, 134 So. 541, 101 Fla. 585—State v. Du Bose, 128 So. 4, 99 Fla. 812.
- Ga.—Morgan v. Thomas, 63 S.E.2d 659, 207 Ga. 680—Schofield v. Bishop, 16 S.E.2d 714, 192 Ga. 732.
- Ill.—Tower Cabana Club v. City of Chicago, 123 N.E.2d 834, 5 Ill.2d 11—Jacobson v. Village of Wilmette, 85 N.E.2d 753, 403 Ill. 250—Speroni v. Board of Appeals of City of Sterling, 15 N.E.2d 302, 368 Ill. 568—State Bank & Trust Co. v. Village of Wilmette, 193 N.E. 131, 358 Ill. 311, 96 A.L.R. 1327.
- City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616.
- Ky.—City of Louisville v. Puritan Apartment Hotel Co., 264 S.W.2d 888—Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.
- La.—State ex rel. Dema Realty Co. v. McDonald, 121 So. 613, 168 La. 172, certiorari denied McDonald v. State of Louisiana ex rel. Dema Realty Co., 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 612.
- State ex rel. Prats v. City Planning & Zoning Commission of City of New Orleans, App., 59 So.2d 832.
- Md.—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.
- N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 82 N.J.Super. 397.
- N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 223, 117 A.L.R. 1110.
- Concordia Collegiate Institute v. Miller, 88 N.Y.S.2d 825, affirmed 93 N.Y.S.2d 922, 276 App.Div. 872, reargument and appeal denied 94 N.Y.S.2d 829, 276 App.Div. 918, reversed on other grounds 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.
- Ohio.—Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258—Criterion Service v. City of East Cleveland, App., 88 N.E.2d 300, appeal dismissed, 89 N.E.2d 475, 152 Ohio St. 416—State ex rel. Snyder v. Yoter, 30 N.E.2d 558, 65 Ohio App. 492.
- Or.—Shaffner v. City of Salem, 268 P. 2d 599, 201 Or. 45—Holt v. City of Salem, 234 P.2d 564, 192 Or. 200.
- Tex.—City of Waxahachie v. Watkins, Civ.App., 265 S.W.2d 843, reversed on other grounds 275 S.W. 2d 477, 154 Tex. 206—Ciesl v. Northwest Dallas Imp. Ass'n, Civ. App., 263 S.W.2d 820, refused no reversible error—Davis v. Nolte, Civ.App., 231 S.W.2d 471, error refused no reversible error—Edge v. City of Bellaire, Civ.App., 200 S.W. 2d 224, error refused.
- Utah.—Dowse v. Salt Lake City Corp., 255 P.2d 723, 123 Utah 107.
- Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.
- Other statements of rule**
- (1) Courts have no power to declare a municipal ordinance void as being unreasonable unless the unreasonableness is so clear, manifest, and undoubted as to amount to a mere arbitrary exercise of legislative power.
- Minn.—State v. United Parking Stations, 50 N.W.2d 50, 235 Minn. 147, 29 A.L.R.2d 852.
- (2) If there is any reasonable basis for exercise of legislative discretion by zoning authority, it cannot be disturbed on judicial review.
- Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.
- (3) If reasonableness is fairly debatable, ordinance will be upheld.
- U.S.—Dennis v. Village of Tonka Bay, C.C.A.Minn., 156 F.2d 672—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U. S. 692, 81 L.Ed. 1348.
- Cal.—Reynolds v. Barrett, 83 P.2d 29, 12 C.2d 244.
- Price v. Schwafel, 206 P.2d 683, 92 C.A.2d 77—Burke v. City of Los Angeles, 156 P.2d 28, 68 C.A.2d 189.
- Fla.—State ex rel. Skillman v. City of Miami, 134 So. 541, 101 Fla. 585.
- Ill.—Du Page County v. Henderson, 83 N.E.2d 730, 402 Ill. 179—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321—Mercer Lumber Cos. v. Village of Glencoe, 60 N.E.2d 913, 390 Ill. 138—People ex rel. Miller v. Gill, 59 N.E.2d 671, 389 Ill. 394—Zadworny v. City of Chicago, 44 N.E.2d 426, 380 Ill. 470—Morgan v. City of Chicago, 18 N.E.2d 872, 370 Ill. 347—Evanston Best & Co. v. Goodman, 16 N.E.2d 131, 369 Ill. 207—Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166—Michigan-Lake Bldg. Corporation v. Hamilton, 173 N.E. 710, 340 Ill. 284—Minkus v. Pond, 158 N.E. 121, 326 Ill. 467.
- Minn.—Gunderson v. Anderson, 251 N.W. 515, 190 Minn. 245.
- N.Y.—Village of Old Westbury v. Foster, 83 N.Y.S.2d 148, 193 Misc. 47.
- Tex.—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.
- Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.
- (4) Decisions of municipal zoning authorities are to be overruled only when it is found that they have not acted fairly, with proper motives, and on valid reasons.
- Conn.—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433.
- Value of property rights destroyed**
- Courts will not interfere unless value of property rights destroyed by zoning ordinance is so great, as compared with benefit, that ordinance is clearly arbitrary and unreasonable.
- Ariz.—City of Tucson v. Arizona Mortuary, 272 P. 923, 34 Ariz. 495.
82. Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.
- Md.—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.
- N.Y.—Nehrbas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145.
- Okl.—Beveridge v. Harper & Turner Oil Trust, 35 P.2d 435, 168 Okl. 609.
- Utah.—Dowse v. Salt Lake City Corp., 255 P.2d 723, 123 Utah 107.
83. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.
- Ariz.—Ellsworth v. Gercke, 156 P.2d 242, 62 Ariz. 198—City of Tucson v. Arizona Mortuary, 272 P. 923, 34 Ariz. 495.
- Cal.—Johnston v. City of Claremont, 323 P.2d 71, 49 C.2d 826—Wilkins v. City of San Bernardino, 175 P. 2d 542, 29 C.2d 332.
- Burke v. City of Los Angeles, 156 P.2d 28, 68 C.A.2d 189—Otis v.

to be overruled only when they have not acted fairly, with proper motives, and on valid reasons.⁸⁴ However, the courts may set aside the work of zoning authorities pro tanto where its application to a particular property is found to be unreasonable and confiscatory.⁸⁵

The court will generally restrict its review of the validity of a zoning ordinance to its validity with respect to the particular property involved in the action,⁸⁶ and an ordinance will not be held invalid as permitting discrimination until a case of discrimination is brought before the courts.⁸⁷ It has been

held that, in passing on the validity of a zoning ordinance containing many provisions, the court will limit itself to the particular provisions involved and will not pass on the general validity of the statute;⁸⁸ but, where a general attack is made on the validity of a zoning ordinance, the court will not examine the ordinance piecemeal to determine the validity of minor provisions.⁸⁹ Questions not raised by the appeal will not be determined.⁹⁰

All the facts and circumstances are to be considered in passing on the validity of municipal building and zoning ordinances.⁹¹ Accordingly, in deter-

City of Los Angeles, 126 P.2d 954, 52 C.A.2d 605.

Conn.—Young v. Town of West Hartford, 149 A. 205, 111 Conn. 27.

D.C.—Leventhal v. District of Columbia, 100 F.2d 94, 69 App.D.C. 229.

Fla.—State ex rel. Skillman v. City of Miami, 134 So. 541, 101 Fla. 585—State v. Du Bose, 128 So. 4, 99 Fla. 812.

Ill.—Tower Cabana Club v. City of Chicago, 123 N.E.2d 834, 5 Ill.2d 11—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81—Dunlap v. City of Woodstock, 91 N.E.2d 434, 405 Ill. 410—Jacobson v. Village of Wilmette, 85 N.E.2d 753, 403 Ill. 250—Evans-ton Best & Co. v. Goodman, 16 N. E.2d 131, 369 Ill. 207—State Bank & Trust Co. v. Village of Wilmette, 193 N.E. 131, 358 Ill. 311, 96 A.L.R. 1327.

City of Watseka v. Blatt, 50 N.E. 2d 589, 320 Ill.App. 191.

Ky.—City of Louisville v. Puritan Apartment Hotel Co., 264 S.W.2d 888—Schloemer v. City of Louisville, 182 S.W.2d 782, 298 Ky. 286.

Md.—R. B. Const. Co. v. Jackson, 137 A. 278, 152 Md. 671.

Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381.

Mo.—State ex rel. Oliver Cadillac Co. v. Christopher, 298 S.W. 720, 317 Mo. 1179, error dismissed Oliver Cadillac Co. v. Christopher, 49 S.Ct. 17, 278 U.S. 662, 73 L.Ed. 569.

Colt v. Bernard, App., 279 S.W.2d 527.

Neb.—Cassel Realty Co. v. City of Omaha, 14 N.W.2d 600, 144 Neb. 753.

Ohio.—State ex rel. Jack v. Russell, 123 N.E.2d 261, 162 Ohio St. 281.

State ex rel. Cook v. Turgeon, App., 77 N.E.2d 283—State ex rel. Snyder v. Yoter, 30 N.E.2d 558, 65 Ohio App. 492.

Okl.—Beveridge v. Harper & Turner Oil Trust, 35 P.2d 435, 168 Okl. 609.

Or.—Shaffner v. City of Salem, 268 P.2d 599, 201 Or. 45—Holt v. City of Salem, 234 P.2d 564, 192 Or. 200.

Tex.—Clesi v. Northwest Dallas Imp. Ass'n, Civ.App., 263 S.W.2d 820, re-

fused no reversible error—Davis v. Nolte, Civ.App., 231 S.W.2d 471, error refused no reversible error—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct—Lombardo v. City of Dallas, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1.

Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

Police power

In order for the court to set aside action of zoning authorities, it must find that the zoning is beyond the police power and deprives a zoning applicant of property without due process of law.

Md.—Montgomery County Council v. Scrimgeour, 127 A.2d 528, 211 Md. 306.

84. Conn.—Longo v. Board of Zoning Appeals of Town of Milford, 122 A.2d 784, 143 Conn. 395—Devaney v. Board of Zoning Appeals of City of New Haven, 122 A.2d 303, 143 Conn. 322—De Mars v. Zoning Commission of Town of Bolton, 115 A.2d 653, 142 Conn. 580—Mal-lory v. Town of West Hartford, 86 A.2d 668, 138 Conn. 497.

Delmar v. Planning and Zoning Bd. of Town of Milford, 109 A.2d 604, 19 Conn.Sup. 21.

85. Pa.—Taylor v. Haverford Tp., 149 A. 639, 299 Pa. 402.

86. Cal.—Otis v. City of Los Angeles, 126 P.2d 954, 52 C.A.2d 605—Hagenburger v. City of Los Angeles, 124 P.2d 345, 51 C.A.2d 161.

Preferential treatment

Where plaintiff's property is properly zoned and the discrimination is confined to a relatively small area owned by another, the remedy is not to set aside the entire ordinance but rather to set aside the preferential treatment of the favored parcel.

N.J.—H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 105 A.2d 894, 31 N.J.Super. 30.

87. U.S.—Gorieb v. Fox, Va., 47 S.Ct. 675, 274 U.S. 603, 71 L.Ed. 1228, 53 A.L.R. 1210.

88. Fla.—State v. Du Bose, 128 So. 4, 99 Fla. 812.

89. Fla.—State v. Du Bose, supra.

A zoning plan must be viewed as a whole and the court will not search out individual cases of discrimination or hardship in order to override legislative determination.

Cal.—Acker v. Baldwin, 115 P.2d 455, 18 C.2d 341.

Price v. Schwafel, 206 P.2d 683, 92 C.A.2d 77.

90. N.Y.—Application of Buckley, 89 N.Y.S.2d 123, 275 App.Div. 853, re-argument and appeal denied 91 N. Y.S.2d 759, 275 App.Div. 1001, appeal dismissed 87 N.E.2d 688, 299 N.Y. 796.

91. U.S.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

Ill.—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—Tews v. Woolhiser, 185 N.E. 827, 352 Ill. 212—City of Watseka v. Blatt, 50 N.E.2d 589, 320 Ill.App. 191.

Mich.—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706—Senefsky v. Lawler, 12 N.W.2d 387, 307 Mich. 728, 149 A.L.R. 1433.

Tex.—Edge v. City of Bellair, Civ. App., 200 S.W.2d 224, error refused.

Matters properly considered

(1) In determining whether board of zoning appeals of county property reclassified two tracts of land from "A" residence zone to "F" light industrial zone, it was proper for court to consider fact that the tracts were near a railroad and property devoted to commercial and industrial uses. Md.—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A. 2d 219, 204 Md. 551.

(2) In determining reasonableness of zoning ordinance, court could consider, among other things, the fact that a very substantial portion of dwellings already erected within the zone do not comply with the ordinance provision, and that the use of a large number of vacant lots within the zone is materially restricted by such ordinance.

mining the law the court will have due regard to all the circumstances of the city, the objects sought to be attained, and the necessity existing for the ordinance.⁹³ Each case involving the validity or constitutionality of zoning laws must be determined on its own facts as they appear in the record before the court.⁹³ In this respect, the constitutionality of a zoning ordinance or of its application to particular property must be determined on the facts and conditions as they existed prior to the time plaintiff proceeded in disregard of the ordinance, and the court must wholly ignore all conditions which resulted from the landowner's action.⁹⁴ The courts will not speculate on whether future conditions, if they come into being, might render a zoning ordinance unconstitutional as applied to such changed condi-

tions, but the ordinance must be unconstitutional as applied to the existing facts in order to be held presently invalid.⁹⁵ In determining whether a zoning ordinance is unreasonable and confiscatory, the degree to which property values are diminished must be considered.⁹⁶

§ 324. — — Questions of Wisdom, Expediency, and Policy

Generally, the courts in passing on the validity of building and zoning ordinances or regulations will not consider questions as to wisdom, expediency, and policy.

As a general rule, questions of wisdom, expediency, and policy will not be considered by the courts in passing on the validity of building and zoning ordinances or regulations.⁹⁷ Similarly, the motives

Mich.—*Senefsky v. Lawler*, 12 N.W. 2d 387, 307 Mich. 728, 149 A.L.R. 1433.

Considerations held not controlling

(1) Neither the study and investigation of zoning commissioners nor the presumptive validity of ordinance is controlling test whether zoning ordinance is reasonable exercise of police power, but such matter must be decided by courts from particular circumstances.

Ill.—*Forbes v. Hubbard*, 180 N.E. 767, 348 Ill. 166.

City of Watscka v. Matt, 50 N.E.2d 589, 320 Ill.App. 191.

(2) Aesthetic considerations are not controlling, but may be considered in determining the reasonableness of a zoning ordinance.

N.C.—*Appeal of Parker*, 197 S.E. 706, 214 N.C. 51, appeal dismissed *Parker v. City of Greensboro*, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358.

(3) Where real estate developer and builder could readily change its plans so as to comply with amended zoning ordinance changing required lot frontage from sixty feet to seventy-five feet without hardship other than loss of some of its anticipated profits from use of smaller lots, such loss was not a controlling factor on question whether refusal of mayor and council to approve recommendation of planning board with respect to developer's revised plan, which did not comply with ordinance, entitled developer to any relief.

N.J.—*Greenway Homes v. Borough of River Edge*, 60 A.2d 811, 137 N.J.Law 453.

92. Tex.—*City of University Park v. Hoblitzelle*, Civ.App., 150 S.W. 2d 169, error dismissed, judgment correct, appeal dismissed and certiorari denied *Hoblitzelle v. City of University Park*, 62 S.Ct. 806, 315 U.S. 781, 86 L.Ed. 1188.

93. Ill.—*Maek v. Cook County*, 142 N.E.2d 785, 11 Ill.2d 310—*Krom*

v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—*Forbes v. Hubbard*, 180 N.E. 767, 348 Ill. 166.

Nev.—*State ex rel. Roman Catholic Bishop of Reno v. Hill*, 90 P.2d 217, 59 Nev. 231.

N.J.—*Interboro Trucking Co. v. Board of Adjustment of City of Perth Amboy*, 53 A.2d 213, 135 N.J. Law 520.

N.Y.—*Bowen v. Hilder*, 37 N.Y.S.2d 76.

W.Va.—*Carter v. City of Bluefield*, 54 S.E.2d 747, 132 W.Va. 881.

94. Cal.—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332.

Benefit from wrongdoing

Property owner, who deliberately violated zoning ordinance restricting area to single-family dwellings by erecting multiple dwelling on property adjacent to small business zone within larger residential zone, would not be permitted to benefit from his own wrongdoing, and could derive no support from finding that the apartments in his building were more adaptable and more useful for multiple dwelling purposes than for a single-family dwelling.

Cal.—*Wilkins v. City of San Bernardino*, *supra*.

95. Cal.—*Lagim v. Krantz*, 232 P.2d 541, 104 C.A.2d 793.

96. U.S.—*Geneva Inv. Co. v. City of St. Louis*, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

Ill.—*Pioneer Trust & Sav. Bank v. Village of Oak Park*, 97 N.E.2d 302, 408 Ill. 458—*Quillet v. Village of Mount Prospect*, 78 N.E.2d 240, 399 Ill. 418—*Reschke v. Village of Winnetka*, 2 N.E.2d 718, 363 Ill. 478, certiorari denied *Village of Winnetka v. Reschke*, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431 and *Village of Winnetka v. Erickson*, 57 S.Ct. 110, 299 U.S. 585, 81 L.Ed. 431—

Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166.

Public gain weighed against individual hardships

In determining validity of zoning ordinance, although extent of change of property values may be considered, profits accruing to individuals if restrictions were removed must be weighed against resulting detriment to public welfare, and no basis for exercise of police power exists if public gain is small compared with individual hardships, but restrictions protecting public health, safety, and welfare must be sustained, even though impairing private interests to some extent.

Ill.—*Evanston Best & Co. v. Goodman*, 16 N.E.2d 131, 369 Ill. 207.

97. U.S.—*Standard Oil Co. v. City of Tallahassee*, C.A.Fla., 183 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647—*Sinclair Refining Co. v. City of Chicago*, C.A. Ill., 178 F.2d 214—*Geneva Inv. Co. v. City of St. Louis*, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348—*Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.*, C.C.A.Mo., 58 F.2d 593.

Fla.—*Godson v. Town of Surfside*, 8 So.2d 497, 150 Fla. 614.

Ill.—*Miller Bros. Lumber Co. v. City of Chicago*, 111 N.E.2d 149, 414 Ill. 163—*Downey v. Grimshaw*, 101 N.E.2d 275, 410 Ill. 21—*Wesemann v. Village of La Grange Park*, 94 N.E.2d 904, 407 Ill. 81—*Du Page County v. Henderson*, 83 N.E.2d 720, 402 Ill. 179—*Mercer Lumber Cos. v. Village of Glencoe*, 80 N.E.2d 913, 390 Ill. 138—*Burkholder v. City of Sterling*, 46 N.E.2d 45, 381 Ill. 564—*Harmon v. City of Peoria*, 27 N.E.2d 525, 373 Ill. 594—*Evanston Best & Co. v. Goodman*, 16 N.E.2d 131, 369 Ill. 207.

City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616.

which prompted the municipal legislative body to enact the ordinances or regulations are not open to consideration by the courts in passing on their validity.⁹⁸ In other words, it is for the legislature, and not the courts, to determine the justice, wisdom, policy, necessity, or expediency of a zoning law, which has been stated to be a question of political policy.⁹⁹ It has been held, however, that, in determining

whether an amendatory zoning ordinance is valid, the court should give due regard to all the circumstances of the city, the object sought to be attained, and the necessity existing for the ordinance.¹ Due regard must be accorded to the collective judgment of those familiar with the locality and the circumstances prevailing in the town, in passing on the validity of a zoning ordinance.²

Iowa.—Hirsch v. City of Muscatine, 10 N.W.2d 71, 233 Iowa 590—Scott v. City of Waterloo, 274 N.W. 897, 223 Iowa 1169.

Ky.—Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018—City of Hazard v. Collins, 200 S.W.2d 933, 304 Ky. 379—City of Louisville v. Koenig, 162 S.W.2d 19, 290 Ky. 562, 140 A.L.R. 1369.

Md.—Hedin v. Board of County Com'rs of Prince Georges County, 120 A.2d 663, 209 Md. 224—Colati v. Jirout, 47 A.2d 613, 186 Md. 652—Anne Arundel County Com'rs v. Ward, 46 A.2d 684, 186 Md. 330.

Mo.—State ex rel. Oliver Cadillac Co. v. Christopher, 298 S.W. 720, 317 Mo. 1179, error dismissed Oliver Cadillac Co. v. Christopher, 49 S. Ct. 17, 278 U.S. 662, 73 L.Ed. 569.

N.Y.—431 Fifth Ave. Corp. v. City of New York, 59 N.Y.S.2d 25, 270 App.Div. 241, affirmed 68 N.E.2d 877, 296 N.Y. 538—Dunne v. Walsh, 256 N.Y.S. 119, 235 App.Div. 72. People v. Perkins, 8 N.Y.S.2d 863, reversed on other grounds 26 N.E.2d 278, 282 N.Y. 329.

Ohio.—State ex rel. Jack v. Russell, 123 N.E.2d 261, 162 Ohio St. 281. Schick v. Ghent Road Inn, App., 132 N.E.2d 479.

R.I.—Doherty v. Town Council of Town of South Kingstown, 200 A. 964, 61 R.I. 248.

Tex.—Skinner v. Reed, Civ.App., 265 S.W.2d 850—Thompson v. City of Carrollton, Civ.App., 211 S.W.2d 970—City of Corpus Christi v. Jones, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

Substitution of judgment

Fact that wisdom of a zoning ordinance provision is debatable does not empower a court to substitute its judgment for that of legislative body. Mass.—Burnham v. Board of Appeals of Gloucester, 128 N.E.2d 772, 333 Mass. 114.

Planning theories

Court will not necessarily interfere with a zoning amendment which fails to follow the better reasoned planning theories and lays boundary line of district along center of street. N.J.—Bogert v. Washington Tp., Bergen County, 131 A.2d 535, 45 N.J. Super. 13.

More change of policy, however unfortunate result may be, will not justify court in declaring void zoning

ordinance which is legitimate exercise of police power.

U.S.—Marblehead Land Co. v. City of Los Angeles, C.C.A.Cal., 47 F. 2d 528, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540.

Height of buildings

Cal.—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15.

98. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.

Dennis v. Village of Tonka Bay, D.C.Minn., 64 F.Supp. 214, affirmed, C.C.A., 156 F.2d 672.

Cal.—Sunny Slope Water Co. v. City of Pasadena, 33 P.2d 672, 1 C.2d 87. Ill.—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138.

Village of Justice v. Jamieson, 129 N.E.2d 269, 7 Ill.App.2d 113.

N.J.—Marie's Launderette v. City of Newark, 110 A.2d 65, 38 N.J. Super. 279, reversed on other grounds 113 A.2d 190, 35 N.J. Super. 94.

N.Y.—Homefield Ass'n of Yonkers v. Frank, 75 N.Y.S.2d 384, 273 App. Div. 788, affirmed 80 N.E.2d 664, 298 N.Y. 524.

Linn v. Town of Hempstead, 170 N.Y.S.2d 217, 10 Misc.2d 774.

Tenn.—White v. Henry, 285 S.W.2d 353, 199 Tenn. 219—Henry v. White, 250 S.W.2d 70, 194 Tenn. 192—Davidson County v. Rogers, 198 S. W.2d 812, 184 Tenn. 327.

Wash.—Lillions v. Gibbs, 289 P.2d 203, 47 Wash.2d 629.

Good faith

(1) In so far as zoning is concerned, ultimate power is vested in council, and its good faith in acting for public welfare cannot be questioned by judicial branch of government.

Mich.—Tel-Craft Civic Ass'n v. City of Detroit, 60 N.W.2d 294, 337 Mich. 326.

(2) Court will not examine into good faith of municipal council in proceeding on petition for amendment to zoning ordinance requirements unless council proceeded in unreasonable, arbitrary, or discriminatory manner under established limitations on police powers.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

Motives, promptings, and procedures

dures in making zoning enactment are not subject to judicial review.

N.Y.—Homefield Ass'n of Yonkers v. Frank, 75 N.Y.S.2d 384, 273 App. Div. 788, affirmed 80 N.E.2d 664, 298 N.Y. 524.

Benefit of particular persons

(1) Fact that zoning ordinance was allegedly passed for the sole reason of protecting particular defendants from erection of particular structure was no defense in suit to enjoin erection of such structure, under rule against judicial inquiry into motives of legislative body.

N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

(2) Fact that rezoning ordinances were passed at behest of interested citizens who hoped to have property converted into public park and playgrounds could be considered in determining weight to be given to testimony of witnesses favoring such ordinances, but not in passing on validity of ordinances.

Ill.—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138.

(3) Ordinance would not be declared void because of alleged fact that one member of the council was instrumental in having the ordinance passed because he wished to erect a filling station on realty.

Va.—Blankenship v. City of Richmond, 49 S.E.2d 321, 188 Va. 97.

99. U.S.—West v. Bank of Commerce & Trusts, C.C.A.Va., 167 F. 2d 664.

Cal.—Foster v. City Council of City of Berkeley, 255 P. 1118, 201 C. 769—Dwyer v. City Council of Berkeley, 253 P. 932, 200 C. 505.

Ky.—Louisville and Jefferson County Planning and Zoning Commission v. Grady, 273 S.W.2d 563.

N.Y.—Flagg v. Murdock, 15 N.Y.S.2d 635, 173 Misc. 1048.

Va.—Fairfax County v. Parker, 44 S. E.2d 9, 186 Va. 675.

Wash.—Hauser v. Arness, 267 P.2d 691, 44 Wash.2d 358.

Wis.—Atkinson v. Piper, 195 N.W. 544, 181 Wis. 519.

1. Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.

2. Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 550, 323 Mass. 589.

§ 325. — — — Classification of Property; Size and Boundaries of Zones

The classification of property for municipal zoning purposes is a legislative rather than a judicial matter, as are the size, extent, and boundaries of zones; and, generally, the courts will not interfere in such matters or substitute their own judgment for that of the zoning authority except to determine whether the action tak-

en is reasonable, arbitrary, discriminatory, confiscatory, or an abuse of discretion.

The classification of property for municipal zoning purposes is a legislative rather than a judicial matter,³ as are the size, extent, and boundaries of zones.⁴ As a general rule, the courts will not interfere in such matters or substitute their own judgment for that of the municipality,⁵ and the

3. U.S.—*De Lano v. City of Tulsa*, C.C.A.Okl., 26 F.2d 640, certiorari denied *De Lano v. City of Tulsa*, 49 S.Ct. 179, 278 U.S. 654, 73 L.Ed. 561.

Cal.—*Beverly Oil Co. v. City of Los Angeles*, 254 P.2d 865, 40 C.2d 552—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744—*Magruder v. Redwood City*, 265 P. 806, 203 C. 665.

Blasey v. City of Burlingame, 15 P.2d 784, 127 C.A. 213.

Colo.—*People ex rel. Grommon v. Hedgcock*, 104 P.2d 607, 106 Colo. 300.

Ill.—*Mundelein Estates v. Village of Mundelein*, 99 N.E.2d 144, 409 Ill. 291—*Zadworny v. City of Chicago* 41 N.E.2d 426, 380 Ill. 470—*Neef v. City of Springfield*, 43 N.E.2d 917, 380 Ill. 275—*Morgan v. City of Chicago*, 18 N.E.2d 872, 370 Ill. 547. *Chambers Guild of Chicago v. City of Chicago*, 37 N.E.2d 857, 312 Ill. App. 102.

Ky.—*Fried v. Louisville and Jefferson County Planning and Zoning Commission*, 258 S.W.2d 466.

Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

Mo.—*Landau v. Levin*, 213 S.W.2d 453, 358 Mo. 77—*City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n*, 213 S.W.2d 479, 358 Mo. 70—*Taylor v. Schlemmer*, 163 S.W.2d 913, 353 Mo. 687.

N.Y.—*Rodgers v. Village of Tarrytown*, 96 N.E.2d 731, 302 N.Y. 115.

Brown v. Village of Owego, 21 N.Y.S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 601, 284 N.Y. 655—*Ward v. Murdock*, 286 N.Y.S. 280, 217 App.Div. 808.

Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736.

Hayes v. City of Yonkers, 143 N.Y.S.2d 699, affirmed 152 N.Y.S.2d 213, 1 A.D.2d 1031—*Huntley Estates, Inc. v. Town of Westchester*, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App. Div. 1090—*Suburban Tire & Battery Co. v. Village of Mamaroneck*, 104 N.Y.S.2d 850, affirmed 113 N.Y.

S.2d 449, 279 App.Div. 1084, affirmed 110 N.E.2d 894, 304 N.Y. 971.

Ohio.—*Cleveland Trust Co. v. Village of Brooklyn*, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

Okl.—*Beveridge v. Harper & Turner Oil Trust*, 35 P.2d 435, 168 Okl. 609. Pa.—*Schmalz v. Buckingham Tp. Bd. of Adjustment*, Com.Pl., 6 Bucks Co. 285, reversed on other grounds 132 A.2d 233, 389 Pa. 295.

Tenn.—*Brooks v. City of Memphis*, 241 S.W.2d 432, 192 Tenn. 371.

Tex.—*City of Dallas v. Lively*, Civ. App., 161 S.W.2d 895, error refused—*City of Corpus Christi v. Jones*, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct—*City of West University Place v. Ellis*, Civ. App., 118 S.W.2d 907, affirmed 134 S.W.2d 1038, 134 Tex. 222.

Utah.—*Dowse v. Salt Lake City Corp.*, 255 P.2d 723, 123 Utah 107.

Industrial use of realty

Where village zoning ordinance provided for residential use, apartment house use, retail business, commercial use, and industrial use, and owner of realty classified for residential use brought action against village to have zoning ordinance declared illegal and void in so far as it applied to his property, court, even if it had right to declare ordinance invalid as to such property, committed prejudicial error in determining that realty should be classified for industrial use, since that was a legislative question. Ohio.—*Cleveland Trust Co. v. Village of Brooklyn*, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

4. Ala.—*White v. Luguire Funeral Home*, 129 So. 84, 221 Ala. 440.

Cal.—*Ex parte Ellis*, 76 P.2d 516, 25 C.A.2d 99—*Wickham v. Becker*, 274 P. 397, 96 C.A. 443.

Conn.—*Eden v. Town Plan and Zoning Commission of Town of Bloomfield*, 89 A.2d 746, 139 Conn. 59.

Ill.—*City of Watska v. Blatt*, 50 N.E.2d 589, 320 Ill.App. 191.

Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

Mo.—*Mueller v. C. Hoffmeister Undertaking & Livery Co.*, 121 S.W.2d 775, 343 Mo. 430.

N.Y.—*Otto v. Steinhilber*, 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681.

Ohio.—*Central Trust Co. v. City of Cincinnati*, 23 N.E.2d 450, 62 Ohio App. 139.

Murdock v. City of Norwood, Com.Pl., 67 N.E.2d 867.

Pa.—*Berman v. Exley*, 50 A.2d 199, 355 Pa. 415.

Wis.—*State ex rel. Normal Hall v. Gurda*, 291 N.W. 350, 234 Wis. 290.

5. Cal.—*Beverly Oil Co. v. City of Los Angeles*, 254 P.2d 865, 40 C.2d 552—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332.

Cohn v. County Bd. of Sup'rs of Los Angeles County, 286 P.2d 836, 135 C.A.2d 180—*Donovan v. City of Santa Monica*, 199 P.2d 51, 88 C.A.2d 386.

Fla.—*City of Miami Beach v. Prevatt*, 97 So.2d 473.

Ga.—*Johnson v. Evangelical Lutheran Church of Messiah*, 54 S.E.2d 723, 79 Ga.App. 671.

Ill.—*Trust Co. of Chicago v. City of Chicago*, 96 N.E.2d 499, 408 Ill. 91—*People ex rel. Miller v. Gill*, 59 N.E.2d 671, 389 Ill. 394.

Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892—*City of Jackson v. McPherson*, 138 So. 604, 162 Miss. 164.

Mo.—*City of St. Louis v. Friedman*, 216 S.W.2d 475, 358 Mo. 681—*Landau v. Levin*, 213 S.W.2d 483, 358 Mo. 77—*City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n*, 213 S.W.2d 479, 358 Mo. 70.

N.J.—*Rogert v. Washington Tp.*, 135 A.2d 1, 25 N.J. 57.

N.Y.—*Rodgers v. Village of Tarrytown*, 96 N.E.2d 731, 302 N.Y. 115.

Ulmer Park Realty Co. v. City of New York, 63 N.Y.S.2d 143, 270 App.Div. 1044, affirmed 77 N.E.2d 797, 297 N.Y. 788.

Ohio.—*Cleveland Trust Co. v. Village of Brooklyn*, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258.

Pa.—*Petition of Standard Investments Corporation*, 19 A.2d 167, 341 Pa. 129.

Appeal of Kanig, 56 Pa.Dist. & Co. 53, 47 Lack.Jur. 69, 37 Mun. L.R. 229.

Appeal of Martin, Com.Pl., 44 Del.Co. 335.

Utah.—*Dowse v. Salt Lake City Corp.*, 255 P.2d 723, 123 Utah 103.

action of the municipality is subject to judicial review only as to whether it is reasonable, arbitrary, discriminatory, confiscatory, or an abuse of discretion.⁶ On the other hand, notwithstanding the general scheme of zoning is valid, the courts may properly inquire whether the scheme of classification

and districting has been applied fairly and impartially in each instance;⁷ and the court may set aside an unreasonable and arbitrary restriction imposed by zoning authorities.⁸

The courts will not set aside a classification if its validity is fairly debatable,⁹ or if there is any sub-

Other statements of rule

(1) Unless the conclusion of city's legislative body in determining use classification to be given any particular area is clearly arbitrary and unreasonable, the supreme court cannot substitute its opinion for that of such body in zoning the property in question and establishing boundary lines.

Mo.—*Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

(2) Determination of zones is duty of city and, although reasonableness of city's classification is doubtful, court should not substitute its judgment as to propriety and reasonableness of the classification.

Mo.—*Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n*, 265 S.W.2d 374.

(3) Fact that the question whether an amendment to a zoning ordinance which reclassified a block of land from residential to apartment use is debatable does not empower the court to substitute its judgment, but every presumption must be made in favor of the ordinance and it will be sustained unless it is shown beyond a reasonable doubt that it conflicts with the statute or constitution.

Mass.—*Cohen v. City of Lynn*, 132 N.E.2d 664, 333 Mass. 699.

(4) As long as a municipal legislative body's judgment establishing classification of district under zoning ordinance is based on substantial factors relevant to proper zoning, the judgment must be sustained.

N.J.—*Bogert v. Washington Tp.*, 135 A.2d 1, 25 N.J. 57.

6. Ark.—*City of Little Rock v. Joyner*, 206 S.W.2d 446, 212 Ark. 508—*City of Little Rock v. Bentley*, 165 S.W.2d 890, 204 Ark. 727.

Cal.—*Beverly Oil Co. v. City of Los Angeles*, 254 P.2d 865, 40 C.2d 553—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332—*Reynolds v. Barrett*, 83 P.2d 29, 12 C.2d 244.

Ga.—*Johnson v. Evangelical Lutheran Church of Messiah*, 54 S.E.2d 722, 79 Ga.App. 671.

Ill.—*Morgan v. City of Chicago*, 18 N.E.2d 872, 370 Ill. 347.

City of Watseka v. Blatt, 50 N.E.2d 589, 320 Ill.App. 191—Clean-

ers Guild of Chicago v. City of Chicago, 37 N.E.2d 857, 312 Ill.App. 102.

Md.—*Wakefield v. Kraft*, 96 A.2d 27, 202 Md. 136.

Mich.—*Tel-Craft Civic Ass'n v. City of Detroit*, 60 N.W.2d 294, 337 Mich. 326.

Miss.—*Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892—*City of Jackson v. McPherson*, 138 So. 604, 162 Miss. 164.

Mo.—*Landau v. Levin*, 213 S.W.2d 483, 358 Mo. 77.

N.Y.—*Greenberg v. City of New Rochelle*, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 384 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736.

Soule v. Town of Perinton, 152 N.Y.S.2d 734, appeal dismissed 156 N.Y.S.2d 986, 2 A.D.2d 834—*Hayes v. City of Yonkers*, 143 N.Y.S.2d 699, affirmed 153 N.Y.S.2d 213, 1 A.D.2d 1031—*Suburban Tire & Battery Co. v. Village of Mamaroneck*, 104 N.Y.S.2d 850, affirmed 113 N.Y.S.2d 449, 279 App.Div. 1084, affirmed 110 N.E.2d 894, 304 N.Y. 971.

Ohio.—*State ex rel. Kangesser Co. v. Village of Beachwood*, App., 128 N.E.2d 127—*Cleveland Trust Co. v. Village of Brooklyn*, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258—*Central Trust Co. v. City of Cincinnati*, 23 N.E.2d 450, 62 Ohio App. 139.

Murdock v. City of Norwood, Com.Pl., 67 N.E.2d 867.

Okl.—*Fletcher v. Board of County Com'rs of Oklahoma County*, 285 P.2d 183.

Pa.—*Petition of Standard Investments Corporation*, 19 A.2d 167, 341 Pa. 129.

Appeal of Kanig, 56 Pa.Dist. & Co. 53, 47 Lack.Jur. 69, 37 Mun.L.R. 229.

Tex.—*Barrington v. City of Sherman*, Civ.App., 155 S.W.2d 1008, error refused—*City of Corpus Christi v. Jones*, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct—*City of West University Place v. Ellis*, Civ.App., 118 S.W.2d 907, affirmed 134 S.W.2d 1038, 134 Tex. 222.

Close scrutiny

Zoning ordinance, which wrenches a lot from its environment and gives it a new rating which disturbs the

tenor of neighborhood in city, deserves the close scrutiny of the courts.

N.J.—*Protomastro v. Board of Adjustment of City of Hoboken*, 70 A.2d 873, 3 N.J. 494.

Test of reasonableness

Test whether city council's refusal to include property within oil zone is so capricious and unreasonable as to amount to arbitrary exercise of power is whether reasonable men could honestly differ as to zoning of such tract for oil, and, if so, question should be determined by council rather than court.

U.S.—*K. & L. Oil Co. v. Oklahoma City*, D.C.Okla., 14 F.Supp. 492.

7. Cal.—*Endara v. City of Culver City*, 294 P.2d 1003, 140 C.A.2d 33.

8. Ark.—*City of Little Rock v. Joyner*, 206 S.W.2d 446, 212 Ark. 508.

9. U.S.—*American Wood Products Co. v. City of Minneapolis*, D.C. Minn., 21 F.2d 440, affirmed, C.C.A., 35 F.2d 657.

Cal.—*Sunny Slope Water Co. v. City of Pasadena*, 33 P.2d 672, 1 C.2d 87. *Smith v. Collison*, 6 P.2d 277, 119 C.A. 180.

Ill.—*Krom v. City of Elmhurst*, 133 N.E.2d 1, 8 Ill.2d 104—*La Salle Nat. Bank v. City of Chicago*, 122 N.E.2d 519, 4 Ill.2d 253—*Herzog Bldg. Corp. v. City of Des Plaines*, 119 N.E.2d 732, 3 Ill.2d 206.

Liebling v. Fradine, 127 N.E.2d 684, 6 Ill.App.2d 409.

Iowa.—*Brackett v. City of Des Moines*, 67 N.W.2d 542, 246 Iowa 249—*Anderson v. Jester*, 221 N.W. 354, 206 Iowa 452.

Mass.—*Cohen v. City of Lynn*, 132 N.E.2d 661, 333 Mass. 699.

Minn.—*Kiges v. City of St. Paul*, 62 N.W.2d 363, 240 Minn. 522.

Miss.—*Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

Mo.—*City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n*, 213 S.W.2d 479, 358 Mo. 70—*Landau v. Levin*, 213 S.W.2d 483, 358 Mo. 77—*City of Richmond Heights v. Richmond Heights Memorial Post Benev. Ass'n*, 213 S.W.2d 479, 358 Mo. 70—*Taylor v. Schleimmer*, 183 S.W.2d 913, 353 Mo. 687—*Mueller v. C. Hoffmeister Undertaking & Livery Co.*, 121 S.W.2d 775, 343 Mo. 430—*Wippler v. Hohn*, 110 S.W.2d 409, 311 Mo. 780.

Neb.—*Dundee Realty Co. v. City of*

stantial evidence to sustain the zoning restriction;¹⁰ but it will do so only if its invalidity is clear.¹¹

§ 326. ——— Change in Zoning Regulations

Generally, it is for the zoning authorities and not the

courts to determine whether there has been such a change of conditions as to warrant a change in the zoning ordinances, and such determination will not be disturbed on judicial review if the question is fairly debatable.

It is for the zoning authorities and not the courts to determine whether there has been such a change of conditions as to warrant a change in the zoning

Omaha, 13 N.W.2d 634, 144 Neb. 448—*Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 213 N.W. 835, 115 Neb. 525.

N.J.—*Thornton v. Village of Ridgewood*, 111 A.2d 899, 17 N.J. 499—*Schmidt v. Board of Adjustment of City of Newark*, 88 A.2d 607, 9 N.J. 405.

Sieber v. Laawe, 109 A.2d 470, 33 N.J.Super. 115.

N.Y.—*Town of Islip v. F. E. Summers Coal & Lumber Co.*, 177 N.E. 409, 257 N.Y. 167.

Ponataquit Ass'n v. Furman, 139 N.Y.S.2d 221, 283 App.Div. 875—*Fleedner v. Village of Great Neck*, 17 N.Y.S.2d 978, 258 App.Div. 1087—*Kraft v. Village of Hastings-On-Hudson*, 17 N.Y.S.2d 630, 258 App.Div. 1060, affirmed 33 N.E.2d 558, 285 N.Y. 639—*Bond v. Cooke*, 262 N.Y.S. 199, 237 App.Div. 229.

Linn v. Town of Hempstead, 170 N.Y.S.2d 217, 10 Misc.2d 774—*Goldston Garden Apartments v. City of New York*, 145 N.Y.S.2d 907, 7 Misc.2d 147, affirmed 163 N.Y.S.2d 492, 3 A.D.2d 903—*Nappi v. LaGuardia*, 55 N.Y.S.2d 80, 184 Misc. 775, affirmed 54 N.Y.S.2d 722, 269 App.Div. 693, affirmed 64 N.E.2d 716, 295 N.Y. 672—*Helmerie v. Village of Bronxville*, 5 N.Y.S.2d 1002, 168 Misc. 788, affirmed 11 N.Y.S.2d 367, 256 App.Div. 993.

Nehrlbas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 146—*Hayes v. City of Yonkers*, 143 N.Y.S.2d 699, affirmed 152 N.Y.S.2d 213, 1 A.D.2d 1031—*Edward A. Laushins, Inc. v. Griffin*, 132 N.Y.S.2d 896—*Huntley Estates, Inc. v. Town of Rochester*, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App.Div. 1090—*Delaware, L. & W. R. Co. v. City of Fulton*, 114 N.Y.S.2d 481, affirmed 121 N.Y.S.2d 582, 281 App.Div. 1005—*Hermann v. Incorporated Village of East Hills*, 101 N.Y.S.2d 592, affirmed 109 N.Y.S.2d 182, 279 App.Div. 753, appeal denied 110 N.Y.S.2d 283, 279 App.Div. 799—*Gedney Estates v. City of White Plains*, 99 N.Y.S.2d 111—*Gilchrest Realty Corp. v. Village of Great Neck Plaza*, 85 N.Y.S.2d 224, reversed on other grounds 90 N.Y.S.2d 740, 275 App.Div. 962, affirmed 90 N.E.2d 485, 300 N.Y. 619.

Ohio.—*State ex rel. Kangasser Co. v. Village of Beachwood*, App., 128 N.

E.2d 127—*Cleveland Trust Co. v. Village of Brooklyn*, 110 N.E.2d 440, 92 Ohio App. 351, appeal dismissed 108 N.E.2d 679, 158 Ohio St. 258—*State ex rel. Cook v. Turgeon*, 77 N.E.2d 283, 84 Ohio App. 287.

Okl.—*Weaver v. Bishop*, 53 P.2d 853, 174 Okl. 492—*Beveridge v. Harper & Turner Oil Trust*, 35 P.2d 435, 168 Okl. 609—*In re Dawson*, 277 P. 226, 136 Okl. 113.

Tenn.—*Davidson County v. Rogers*, 198 S.W.2d 812, 184 Tenn. 327.

Wis.—*City of La Crosse v. Elbertson*, 237 N.W. 99, 205 Wis. 207.

Division line

If choice of county commissioners in establishing division line between residential and commercial zones under zoning regulations was fairly debatable, action of commissioners would be sustained.

Md.—*Francis v. MacGill*, 75 A.2d 91, 196 Md. 77.

Where substantial reason exists to support determination of city council in matters of opinion or policy affecting zoning plans, and propriety of districting classification is fairly debatable in furtherance of community development, courts will not substitute their judgment for that of municipal authority.

Cal.—*McCarthy v. City of Manhattan Beach*, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644.

Minute examination

Appellate court should not be drawn into minute examination of alleged discriminatory operation of zoning ordinances if, broadly considered, reasonable basis of classification exists.

Cal.—*Jones v. City of Los Angeles*, 295 P. 14, 211 C. 304, followed in *Wittman v. City of Los Angeles*, 295 P. 22, 211 C. 778, *Stern v. City of Los Angeles*, 295 P. 23, 211 C. 778, and *Rutherford v. City of Los Angeles*, 295 P. 23, 211 C. 777.

10. Tex.—*Niday v. City of Bellaire*, Civ.App., 251 S.W.2d 747.

11. Ala.—*White v. Luquiere Funeral Home*, 129 So. 84, 221 Ala. 440.

Ark.—*McKinney v. City of Little Rock*, 146 S.W.2d 167, 201 Ark. 618.

Cal.—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332—*Magruder v. Redwood City*, 265 P. 806, 203 C. 665.

Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

Iowa.—*Anderson v. Jester*, 221 N.W. 354, 206 Iowa 452.

La.—*State ex rel. Dema Realty Co. v. McDonald*, 121 So. 613, 168 La. 172, certiorari denied *McDonald v. State of Louisiana ex rel. Dema Realty Co.*, 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 612.

Mass.—*Cohen v. City of Lynn*, 132 N.E.2d 664, 333 Mass. 699.

Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

Mo.—*City of St. Louis v. Friedman*, 216 S.W.2d 475, 358 Mo. 681—*Landau v. Levin*, 213 S.W.2d 483, 358 Mo. 77.

N.Y.—*Rodgers v. Village of Tarrytown*, 96 N.E.2d 731, 302 N.Y. 115.

Soule v. Town of Perinton, 152 N.Y.S.2d 734, appeal dismissed 156 N.Y.S.2d 986, 2 A.D.2d 834.

Ohio.—*State ex rel. Cook v. Turgeon*, App., 77 N.E.2d 283.

Murdock v. City of Norwood, Com.Pl., 67 N.E.2d 867.

Tex.—*City of Dallas v. Lively*, Civ. App., 161 S.W.2d 895, error refused—*City of Corpus Christi v. Jones*, Civ.App., 144 S.W.2d 388, error dismissed, judgment correct.

Wis.—*State ex rel. Normal Hall v. Gurda*, 291 N.W. 350, 234 Wis. 290.

Other statements of rule

(1) Zoning classifications are largely within judgment of legislative body, and exercise of that judgment will not be interfered with by courts except where it is obvious that classification has no substantial relation to public health, safety, morals, or general welfare.

Pa.—*Whitpain Tp. v. Bodine*, 94 A.2d 737, 373 Pa. 509—*Gratton v. Conte*, 73 A.2d 381, 364 Pa. 578.

Appeal of *Llob*, 116 A.2d 860, 179 Pa.Super. 318.

(2) When legislative body determines in first instance that facts or conditions justify particular zoning classification, its judgment on that issue cannot be disturbed in absence of clear showing of no reasonable basis therefor, since law delegates to municipal authorities and not to the courts the power and duty of determining sufficiency of issuable facts in exercise of a purely governmental function.

Tex.—*Clesi v. Northwest Dallas Imp. Ass'n*, Civ.App., 263 S.W.2d 820, refused no reversible error.

ordinances,¹² and while the conclusion that there has been such a change is subject to judicial review,¹³ the determination by the zoning authorities will not be disturbed if the question is fairly debatable.¹⁴ It is only where it is shown that the zoning authorities have violated some specific duty placed on them by statute,¹⁵ or where the change is clearly unreasonable and arbitrary,¹⁶ that the courts will interfere.

An amendment or bylaw effecting a rezoning or reclassification, enacted by the authorized body, is nevertheless subject to judicial review on the issue of whether the measure is within or in excess of the authority conferred by the enabling act;¹⁷ and this is so even though the amendment or reclassifi-

cation was enacted by a town vote.¹⁸

§ 327. — Review of Proceedings and Decisions of Boards or Officers

On review of the proceedings and decisions of zoning boards and officers, the court may inquire into any conduct of the board or officer in rendering a decision which is contrary to law or unauthorized by law; but the court ordinarily will not interfere unless such decision is illegal, arbitrary, or unreasonable as a matter of law.

The proceedings and decisions of zoning boards and officers ordinarily may be judicially reviewed, as discussed supra § 320, and on such review, the court may inquire into any conduct of the board or officer in rendering a decision which is contrary to law or unauthorized by law;¹⁹ but where the review is stat-

12. U.S.—*Wilcox v. City of Pittsburgh*, C.C.A.Pa., 121 F.2d 835.

Ill.—*Buckholder v. City of Sterling*, 46 N.E.2d 45, 381 Ill. 564.

Md.—*Price v. Cohen*, 132 A.2d 125, 213 Md. 457.

Mass.—*McHugh v. Board of Zoning Adjustment of Boston*, 147 N.E.2d 761.

N.J.—*Esso Standard Oil Co. v. Town of Westfield*, 110 A.2d 148, 33 N.J. Super. 324.

N.Y.—*Dicker v. Gulde*, 170 N.Y.S.2d 64.

Or.—*Page v. City of Portland*, 165 P. 2d 280, 178 Or. 632.

Legislative, not quasi-judicial, act
Va.—*Blankenship v. City of Richmond*, 49 S.E.2d 321, 188 Va. 97.

Court of equity

If borough council refuses to amend its zoning ordinance to reclassify property, court of equity does not have power to compel such action.

Pa.—*Schaub v. Brentwood Borough Zoning Bd. of Adjustment*, 118 A.2d 292, 180 Pa. Super. 105.

13. Conn.—*Strain v. Mims*, 193 A. 754, 123 Conn. 275.

Questions presented by appeal

(1) Where there was no evidence of change of conditions when board of zoning commissioners rezoned tract of land from "waterfront" to "suburban," question presented on appeal was whether there were sufficient facts before county commissioners to support their finding that original zoning was a mistake.

Md.—*Board of County Com'rs of Talbot County v. Troxell*, 132 A.2d 845, 214 Md. 135.

(2) In case involving reclassification from residential to "Manufacturing, Restricted," argument as to "spot zoning" and lack of a comprehensive plan was addressed not only to justification for action taken as to subject property in light of facts presented, but to power of commission-

ers to create classification; and validity of regulation under which zoning officials acted was properly before court.

Md.—*Huff v. Board of Zoning Appeals of Baltimore County*, 133 A.2d 83, 214 Md. 48.

Support by evidence

Constitutional and statutory requirement that rezoning action of zoning body must be supported by competent and substantial evidence does not mean that reviewing court may substitute its own judgment on the evidence for that of the zoning body; however, the reviewing court must decide whether the zoning authority could have reasonably made its findings and reached its result on consideration of all the evidence before it, and the reviewing court can set aside decisions clearly contrary to the overwhelming weight of the evidence.

Mo.—*State ex rel. Cooper v. Cowan*, App., 307 S.W.2d 676.

14. N.J.—*Esso Standard Oil Co. v. Town of Westfield*, 110 A.2d 148, 33 N.J. Super. 324.

N.Y.—*Elgar v. S. H. Kress & Co.*, 127 N.E.2d 325, 308 N.Y. 533—*Rodgers v. Village of Tarrytown*, 96 N.E.2d 731, 302 N.Y. 115.

Or.—*Holt v. City of Salem*, 234 P.2d 564, 192 Or. 200—*Page v. City of Portland*, 165 P.2d 280, 178 Or. 632.
Tex.—*Clesi v. Northwest Dallas Imp. Ass'n*, Civ.App., 263 S.W.2d 820, refused no reversible error.

15. Ky.—*Hatch v. Fiscal Court of Fayette County*, 242 S.W.2d 1018.

16. Conn.—*Strain v. Mims*, 193 A. 754, 123 Conn. 275.

Ga.—*Johnson v. Evangelical Lutheran Church of Messiah*, 54 S.E.2d 722, 79 Ga.App. 671.

Ill.—*Burkholder v. City of Sterling*, 46 N.E.2d 45, 381 Ill. 564.

Ky.—*Fried v. Louisville and Jefferson County Planning and Zoning Commission*, 258 S.W.2d 466—*Hatch*

v. Fiscal Court of Fayette County, 242 S.W.2d 1018.

Md.—*Eckes v. Board of Zoning Appeals of Baltimore County*, 121 A. 2d 249, 209 Md. 432.

N.J.—*Esso Standard Oil Co. v. Town of Westfield*, 110 A.2d 148, 33 N.J. Super. 324.

Crow v. Town of Westfield, 56 A. 2d 403, 136 N.J. Law 363.

Or.—*Page v. City of Portland*, 165 P. 2d 280, 178 Or. 632.

Denial of amendment

On appeal, council's order or decision denying amendment to zoning map to change certain premises from single residence to business zone would not be set aside or vacated, except for errors of law, unless court was persuaded by balance of probabilities, on evidence before it, that order or decision was unjust or unreasonable.

N.H.—*City of Keene v. Parenteau*, 112 A.2d 667, 99 N.H. 415.

17. Mass.—*Atherton v. Selectmen of Bourne*, 149 N.E.2d 232.

18. Mass.—*Atherton v. Selectmen of Bourne*, supra.

19. N.Y.—*Nathan v. Murdock*, 62 N. Y.S.2d 415.

Exceeding jurisdiction

In proceeding to review determination of board of adjustment sustaining action of building inspector, trial court had to determine whether board of adjustment had exceeded its jurisdiction or abused its discretion.

Colo.—*Board of Adjustment of City and County of Denver v. Abe Perlmutter Const. Co.*, 280 P.2d 1107, 131 Colo. 230.

Close scrutiny

Action of zoning board which wrenches a lot from its environment and gives it a new rating that disturbs tenor of neighborhood in city, deserves close scrutiny of courts.

N.J.—*Protomastroy v. Board of Adjustment of City of Hoboken*, 70 A. 2d 873, 3 N.J. 494.

utory, the jurisdiction of the court does not extend beyond the power conferred.²⁰ A party attacking the action of a zoning board may join other appropriate claims for relief such as estoppel, or a claim that an ordinance in question is invalid,²¹ and the decisions of the board are reviewable, not only where there has been an erroneous interpretation of the law, but also when they impair personal or property rights protected by the constitution.²² However, where the zoning ordinance or regulation

is neither arbitrary nor confiscatory, the court must limit its inquiry to the meaning and application of the regulation.²³ The court has the duty and responsibility to decide whether the result reached was illegal and not in compliance with the ordinance.²⁴

Ordinarily the courts will not interfere with the action of zoning boards or officers,²⁵ at least in the absence of bad faith,²⁶ unless such action is beyond the powers of the board,²⁷ is illegal, arbitrary, or unreasonable as a matter of law,²⁸ or constitutes a

20. Mo.—State ex rel. Nigro v. Kansas City, 27 S.W.2d 1030, 325 Mo. 95.

McKinney v. Board of Zoning Adjustment of Kansas City, App., 308 S.W.2d 320—Adams v. Board of Zoning Adjustment of Kansas City, App., 241 S.W.2d 35.

Pa.—Penn Wynne, Overbrook Hills, Green Hill Farms Civic Ass'n v. Lower Merion Tp., Quar.Sess., 72 Montg.Co. 37.

21. N.J.—Jantausch v. Borough of Verona, 124 A.2d 14, 41 N.J.Super. 89.

Application to certain property

Ordinarily, a question whether a zoning ordinance as applied to a certain piece of property is invalid, may be raised on appeal from zoning board.

Md.—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294.

Constitutional issues

In action to review a decision of zoning board of appeals under administrative review act constitutional issues could be raised in complaint.

Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, 95 N.E.2d 864, 407 Ill. 588.

22. Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Pa.—Medinger v. Springfield Tp., Com.Pl., 69 Montg.Co. 203.

23. Pa.—Silver v. Zoning Bd. of Adjustment, 112 A.2d 84, 381 Pa. 41.

Wynnewood Civic Ass'n v. Lower Merion Tp., Quar.Sess. 70 Montg.Co. 260.

24. Conn.—Slipperley v. Board of Appeals on Zoning of Town of Westport, 98 A.2d 907, 140 Conn. 164.

Mo.—McKinney v. Board of Zoning Adjustment of Kansas City, App., 308 S.W.2d 320.

Extension of nonconforming use

Issue for common pleas court on appeal from ruling of city board of zoning appeals, granting extension of nonconforming use, was whether board acted arbitrarily, illegally, or so unreasonably as to abuse its discretion.

Conn.—Gunther v. Board of Zoning Appeals of City of New Haven, 71 A.2d 91, 136 Conn. 303.

Question of law

Where determination of whether use of premises in residential area as a synagogue was permitted by ordinance involved interpretation of subdivision of ordinance requiring approval of such use by board of appeals after hearing, and interpretation of subdivision permitting board of appeals to require issuance by building inspector of certificate of occupancy, determination presented question of law rather than question of fact.

N.Y.—Community Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

25. Conn.—Libby v. Board of Zoning Appeals of City of New Haven, 118 A.2d 894, 143 Conn. 46.

Md.—Hoffman v. Mayor and City Council of Baltimore, 51 A.2d 369, 187 Md. 593.

N.Y.—People ex rel. Novick Holding Corporation v. Murdock, 283 N.Y.S. 762, 246 App.Div. 745.

Joyce v. Dobson, 4 N.Y.S.2d 648, 167 Misc. 723, reversed on other grounds 8 N.Y.S.2d 768, 255 App. Div. 348.

Tex.—Freeman v. Board of Adjustment of City of San Antonio, Civ. App., 230 S.W.2d 387, 43 C.J. p 356 note 22.

A court should be cautious about disturbing decision of local zoning board where honest judgment has been reasonably and fairly exercised. Conn.—Stern v. Zoning Bd. of Appeals of City of Norwich, 99 A.2d 130, 140 Conn. 241.

Reasonable debate

Only where there is no room for reasonable debate as to whether facts justified a board of zoning appeal's action or where record is devoid of supporting facts, may court hold action of board void.

Md.—Temmlink v. Board of Zoning Appeals of Baltimore County, 128 A.2d 256, 212 Md. 6.

26. N.Y.—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939—Hall v. Walsh, 243 N.Y.S. 602, 137 Misc. 448, affirmed 222 N.Y.S. 816, 221 App.Div. 756.

Caution

Circumstances and conditions in matters of zone changes and regulations are peculiarly within knowledge of zoning commission, and where it appears that an honest judgment has been reasonably and fairly exercised after a full hearing court should be cautious about disturbing decision of local authority.

Conn.—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290.

27. N.Y.—Altschul v. Ludwig, 111 N.E. 216, 216 N.Y. 459.

Tex.—Freeman v. Board of Adjustment of City of San Antonio, Civ. App., 230 S.W.2d 387.

Action held unauthorized

Board of adjustment's revocation of permit to erect self-service food market in business district largely surrounded by residences on ground that public health, safety, comfort, convenience, and general welfare would be impaired, if erection were permitted, was unauthorized.

N.J.—Leonard Inv. Co. v. Board of Adjustment of City of Trenton, 4 A.2d 768, 123 N.J.Law 308.

28. Ark.—City of Little Rock v. Fausett & Co., 258 S.W.2d 48, 222 Ark. 193—Evans v. City of Little Rock, 253 S.W.2d 347, 221 Ark. 252.

Conn.—Stern v. Zoning Bd. of Appeals of City of Norwich, 99 A.2d 130, 140 Conn. 241.

D.C.—Hyman v. Coe, D.C., 146 F.Supp. 24.

Ky.—Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671.

Md.—Missouri Realty, Inc. v. Ramer, 140 A.2d 655—Erdman v. Board of Zoning Appeals of Baltimore County, 129 A.2d 124, 212 Md. 288.

Neb.—Peterson v. Vasak, 76 N.W.2d 420, 163 Neb. 498—Frank v. Russell, 70 N.W.2d 306, 160 Neb. 354.

N.J.—Cummins v. Board of Adjustment of Borough of Leonia, Bergen County, 121 A.2d 405, 39 N.J.Super. 452—Scerbo v. Board of Adjustment of Jersey City, 67 A.2d 472, 4 N.J.Super. 409.

Ramsbotham v. Board of Public Works of Paterson, 61 A.2d 196, 137 N.J.Law 559, followed in 61

plain or flagrant abuse of discretion.²⁹ In other | words, the court is limited in its functions to the

A.2d 197, 137 N.J.Law 591, reversed on other grounds 65 A.2d 748, 2 N.J. 131.

N.Y.—Allen v. Ferish, 149 N.Y.S.2d 798, 1 A.D.2d 918.

Olsen v. Simkins, 123 N.Y.S.2d 573, 204 Misc. 412—Kovelman v. Plaut, 105 N.Y.S.2d 280, 201 Misc. 473—People ex rel. Home for Hebrew Infants of City of New York v. Walsh, 227 N.Y.S. 570, 131 Misc. 581.

Bayport Civic Ass'n v. Koehler, 138 N.Y.S.2d 524, followed in 138 N.Y.S.2d 532—New York Ambassador, Inc. v. Board of Standards & Appeals of City of New York, 114 N.Y.S.2d 901, reversed on other grounds 119 N.Y.S.2d 805, 281 App. Div. 342, affirmed 113 N.E.2d 302, 305 N.Y. 791—Mosher v. Crowley, 110 N.Y.S.2d 626.

Pa.—Appeal of North End Fire Co. No. 1 of Pottstown, 85 Pa.Dist. & Co. 287, 69 Montg.Co. 46.

Appeal of Wager, Com.Pl., 42 Del.Co. 90—Appeal of Stevens, Com.Pl., 41 Del.Co. 3, exceptions dismissed, 41 Del.Co. 387.

R.I.—Guenther v. Zoning Bd. of Review of City of Warwick, 125 A. 2d 214—Kent v. Zoning Bd. of Review of Town of Barrington, 63 A. 2d 731, 75 R.I. 64.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Tex.—Freeman v. Board of Adjustment of City of San Antonio, Civ. App., 230 S.W.2d 387.

Other statement of rule

Decision of city board of adjustment will not be disturbed unless it is found to be illegal or from standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong.

Neb.—Frank v. Russell, 70 N.W.2d 306, 160 Neb. 354.

Room for reasonable debate

Only where there is no room for reasonable debate as to whether facts justified zoning board decision, or where record is devoid of supporting facts, is court justified in declaring decision of board arbitrary or discriminatory.

Md.—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A. 2d 219, 204 Md. 551.

Statutory right of appeal

In light of statute granting a right of appeal from decisions of local zoning authorities, court cannot take view in every case that discretion exercised by local zoning authority must not be disturbed, for if it did right of appeal would be empty, and court can grant relief on appeal in those cases where local authority has acted arbitrarily or illegally and

consequently has abused discretion entrusted to it.

Conn.—Suffield Heights Corp. v. Town Planning Commission of Town of Manchester, 133 A.2d 612, 144 Conn. 425.

Compliance with legal requirements

Function of board of zoning appeals is to exercise discretion of experts, and court, although it may not arrive at same conclusion, will not disturb a decision on review where board has complied with all legal requirements of notice and hearing, and record shows substantial evidence to sustain finding.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Determination to assume jurisdiction

Determination of zoning board of appeals to assume jurisdiction of appeal from building permit issuance by building inspector may not be interfered with unless such determination is shown to be unreasonable or arbitrary.

N.Y.—Bayport Civic Ass'n v. Koehler, 138 N.Y.S.2d 524, followed in 138 N.Y.S.2d 532—Edward A. Lashins, Inc. v. Griffin, 132 N.Y.S.2d 896.

29. Conn.—Abramson v. Zoning Bd. of Appeals of Town of Westport, 120 A.2d 827, 143 Conn. 211—Piccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449.

Koslow v. Board of Zoning Appeals of City of New Haven, 112 A. 2d 513, 19 Conn.Sup. 303.

Ga.—Gulfas v. Ailor, 57 S.E.2d 834, 81 Ga.App. 13, appeal transferred 55 S.E.2d 582, 206 Ga. 76.

Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295—City of South Bend v. Marckle, 18 N.E.2d 764, 215 Ind. 74.

N.J.—Cummins v. Board of Adjustment of Borough of Leonia, Bergen County, 121 A.2d 405, 39 N.J.Super. 452.

N.Y.—Leone v. Brewer, 182 N.E. 57, 259 N.Y. 386, reargument and motion denied Leone v. Brewer, 184 N.E. 111, 260 N.Y. 604, amended remittitur denied 4 N.E.2d 423, 272 N.Y. 510.

Alexander's Department Stores v. Murdock, 39 N.Y.S.2d 823, 265 App.Div. 517.

Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939—Van Auken v. Kimmey, 252 N.Y.S. 329, 141 Misc. 105.

N.C.—In re Pine Hill Cemeteries, 15 S.E.2d 1, 219 N.C. 735.

Pa.—O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901, 384 Pa. 379—Fleming v. Board of

Adjustment of Borough of Prospect Park, 178 A. 813, 318 Pa. 582.

Moyerman v. Koons, 80 Pa.Dist. & Co. 63—Tornetta v. Whitemarsh Tp., 67 Pa.Dist. & Co. 591, 65 Montg.Co. 49—Drago v. Board of Adjustment of Borough of Norristown, 53 Pa.Dist. & Co. 380, 61 Montg.Co. 139—Appeal of Kerr, 11 D. & C.2d 321, 44 Del.Co. 68, 49 Mun. L.R. 23.

Bryan v. Zoning Bd. of Adjustment, Com.Pl., 2 Bucks Co. 16—Application of Ross, to Zoning of Adjustment of Marple, Tp., Com.Pl., 42 Del.Co. 328—Application of Ericson Memorial Studio, Com.Pl., 29 Erie Co. 279—Appeal of Wolfe, Com.Pl., 26 Erie Co. 236—Boyer v. Zoning Bd., Com.Pl., 27 Lehigh.L.J. 272—In re Zoning Bd., Herman Appeal, Com.Pl., 26 Lehigh.L.J. 362—Sell v. Zoning Bd. of Adjustment, Com.Pl., 25 Lehigh.L.J. 478—Alton Park Homeowner's Group v. Zoning Bd. of Adjustment, Com.Pl., 25 Lehigh.L.J. 474—Appeal of Plymouth Homes, Inc., Com.Pl., 25 Lehigh.L.J. 296—Appeal of Mayer, Com.Pl., 3 Lycoming 305—Appeal of John Albrecht Nurseries, Inc., Com.Pl., 61 Montg. Co. 111—Appeal of Atlantic Refining Co., Com.Pl., 66 York 81.

R.I.—Minnlear v. Zoning Bd. of Review of City of Cranston, 123 A. 2d 198—Nutini v. Zoning Bd. of Review of City of Cranston, 82 A. 2d 883, 78 R.I. 421—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 319—Sweck v. Zoning Bd. of Review of North Kingstown, 72 A.2d 679, 77 R.I. 8—Kent v. Zoning Bd. of Review of Town of Barrington, 63 A. 2d 731, 75 R.I. 64—Spirito v. Zoning Board of Review of City of Cranston, 12 A.2d 727, 64 R.I. 411.

S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Tex.—Freeman v. Board of Adjustment of City of San Antonio, Civ. App., 230 S.W.2d 387.

43 C.J. p 356 note 23.

Nonconforming use

Decision of zoning board of adjustment of township under provision of township zoning ordinance that board shall have discretion to determine what resumption or change of nonconforming use is of same class of use and permissible may not be set aside by court, except for manifest and flagrant abuse of discretion.

Pa.—Mutimer Co. v. Wagner, 103 A. 2d 417, 376 Pa. 576.

Partiality in exercise of discretion by members of city board of zoning appeals is not ground for reversal of their action by court, at least when not shown to have resulted in failure to fulfill their function.

determination of whether the board acted arbitrarily or illegally, or so unreasonably as to have abused its discretion,³⁰ and the court will not interfere with the judgment of a zoning board if there is a reasonable basis for its ruling.³¹ The court will not supervise the discretion of the board,³² or substitute its judgment for that of the board;³³ and the court can

act only in a judicial rather than in an administrative or legislative capacity.³⁴ If the conclusion of the board is correct, it will not be set aside because the reason given therefor is wrong.³⁵

All the facts and circumstances are to be considered in passing on the validity of the administrative action,³⁶ and each case must be determined on its

Md.—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

30. Conn.—Cohen v. Board of Appeals on Zoning of City of Bridgeport, 94 A.2d 793, 139 Conn. 450.

Koslow v. Board of Zoning Appeals of City of New Haven, 112 A.2d 513, 19 Conn.Supp. 303.

Md.—Missouri Realty, Inc. v. Ramer, 140 A.2d 655.

Mo.—Adams v. Board of Zoning Adjustment of Kansas City, App., 241 S.W.2d 35.

N.Y.—Community Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

Pa.—Freed v. Power, 139 A.2d 661, 392 Pa. 195.

Boyer v. Zoning Bd., Com.Pl., 27 Loh.L.J. 272.

Tex.—Hill v. Board of Adjustment of City of Castle Hills, Civ.App., 301 S.W.2d 490.

Application of law

Function or right of court is only to determine whether board of zoning appeals has properly applied governing law to facts.

Md.—Erdman v. Board of Zoning Appeals of Baltimore County, 129 A.2d 124, 212 Md. 288.

31. Mich.—Pere Marquette Ry. Co. v. Township Board of Muskegon Tp., 298 N.W. 393, 298 Mich. 31.

Pa.—Steppeler v. Bd. of Adjustment of Radnor Tp., 5 Pa.Dist. & Co.2d 8, 42 Del.Co. 341.

32. Mo.—State ex rel. Nigro v. Kansas City, 27 S.W.2d 1030, 325 Mo. 95.

Affirmance or reversal

Where zoning body exercises legislative power, jurisdiction cannot be conferred on court on appeal or review to exercise discretion conferred on administrative agency, and court can only affirm or reverse order of agency.

Wis.—State ex rel. Schlock v. Zoning Bd. of Appeals, City of Madison, 35 N.W.2d 312, 254 Wis. 12.

33. Conn.—Talmadge v. Board of Zoning Appeals of City of New Haven, 109 A.2d 253, 141 Conn. 639—Chouinard v. Zoning Commission of Town of East Hartford, 97 A.2d 562, 139 Conn. 728—Peccolo v. Town of West Haven, 181 A. 615, 120 Conn. 449.

Ky.—Louisville and Jefferson County Planning and Zoning Commission v. Grady, 273 S.W.2d 563—

Fried v. Louisville and Jefferson County Planning and Zoning Commission, 258 S.W.2d 466.

Md.—Robertson v. County Board of Appeals, 122 A.2d 751, 210 Md. 190

—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294.

Mich.—Mitchell v. Grewal, 61 N.W.2d 3, 338 Mich. 81.

Mo.—Phillips v. Board of Adjustment of City of Bellefontaine Neighbors, App., 308 S.W.2d 785—Brown v. Gambrel, App., 213 S.W.2d 931.

N.J.—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291.

Beck v. Board of Adjustment of City of East Orange, Essex County, 83 A.2d 720, 15 N.J.Super. 564—Scorbo v. Board of Adjustment of Jersey City, 67 A.2d 472, 4 N.J. Super. 409.

Ramshotham v. Board of Public Works of City of Paterson, 61 A.2d 196, 137 N.J.Law 559, followed in 61 A.2d 197, 137 N.J.Law 591, reversed on other grounds 65 A.2d 748, 2 N.J. 131.

N.Y.—Leone v. Brewer, 182 N.E. 57, 259 N.Y. 386, reargument and motion denied Leone v. Brewer, 184 N.E. 111, 260 N.Y. 601, amended remittitur denied 4 N.E.2d 423, 272 N.Y. 610.

Consolidated Edison Co. of New York v. Gillerist, 127 N.Y.S.2d 365, 283 App.Div. 718, reargument and appeal denied 128 N.Y.S.2d 596, 283 App.Div. 799.

Diocese of Rochester v. Planning Bd. of Town of Brighton, 111 N.Y.S.2d 487, 207 Misc. 1021, affirmed 147 N.Y.S.2d 392, 1 A.D.2d 86, reversed on other grounds Vella v. City Zoning Bd. of Appeals, City of Rochester, 135 N.Y.S.2d 704, 206 Misc. 941—Magde v. Crowley, 102 N.Y.S.2d 271, 200 Misc. 109—O'Heirne v. Kochler, 83 N.Y.S.2d 140, 193 Misc. 101—Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County, 60 N.Y.S.2d 750, 187 Misc. 33—Tishman Realty & Construction Co. v. Walsh, 237 N.Y.S. 237, 185 Misc. 315.

Application of Wender, 89 N.Y.S.2d 41—Great South Bay Marine Corp. v. Norton, 58 N.Y.S.2d 172, affirmed 75 N.Y.S.2d 304, 272 App. Div. 1069—P. & L. Bldg. Corp. v.

Murdock, 58 N.Y.S.2d 114, reversed on other grounds 65 N.Y.S.2d 646, 271 A.D. 830.

N.C.—In re Pine Hill Cemeteries, 15 S.E.2d 1, 219 N.C. 735.

Tenn.—City of Memphis v. Qualls, 64 S.W.2d 548, 16 Tenn.App. 387.

Tex.—Hill v. Board of Adjustment of City of Castle Hills, Civ.App., 301 S.W.2d 490—Rowton v. Alagood, Civ.App., 250 S.W.2d 264.

Different result

An order of city board of zoning appeals is not necessarily erroneous because trial and appellate courts might arrive at different results on same facts, and different result can be imposed by court only if board clearly exceeded its jurisdictional limitations or abused its discretion under statute and ordinance.

Mich.—Mitchell v. Grewal, 61 N.W.2d 3, 338 Mich. 81.

Expert judgment

It is exercise of presumably expert administrative judgment of local boards of adjustment which is tested on judicial review.

N.J.—Izenberg v. Board of Adjustment of City of Paterson, 114 A.2d 732, 35 N.J.Super. 583.

Debatable matter

Court ordinarily will not substitute its judgment for that of an administrative board in a zoning matter, where question presented is fairly debatable.

Fla.—City of Miami v. Hollis, 77 So. 2d 834.

Md.—Missouri Realty, Inc. v. Ramer, 140 A.2d 655—Erdman v. Board of Zoning Appeals of Baltimore County, 129 A.2d 124, 212 Md. 288.

34. Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415.

35. Md.—Hoffman v. Mayor and City Council of Baltimore, 51 A.2d 269, 187 Md. 503.

36. Pa.—Smith v. Bristol Tp. Zoning Bd., Com.Pl., 4 Bucks 131.

Extraneous allegations

In action against board of county commissioners attacking its denial of rezoning petition, allegations of matters extraneous to hearing before board could not be taken into consideration in ruling on validity of denial.

Md.—Hedin v. Board of County Com'rs of Prince Georges County, 120 A.2d 668, 209 Md. 224.

own merits.³⁷ However, the general rule that an appellate court will consider only such questions as were raised and reserved in the lower court applies on review by courts of determinations and orders of zoning agencies or bodies, and ordinarily precludes from consideration on review objections or questions which were not properly raised in the administrative proceedings.³⁸ Where justice demands it, an appeal from the action of a zoning board of adjustment in refusing a variance or special exception will be treated by the court as an appeal from a refusal to change zoning.³⁹

§ 328. — Grant or Refusal of Permits

On review of a decision with respect to a permit or

certificate provided for under the building and zoning laws, the court may determine all questions affecting the legality of the administrative action; but the decision of the board or officer will not be disturbed in the absence of a showing of illegality or abuse of discretion.

Generally, on review of a decision with respect to a permit or certificate provided for under the building and zoning laws for the construction, alteration, or use of a building, the court may determine all questions affecting the legality of the administrative action, including that of validity of the ordinance or regulation governing issuance of the permit or certificate.⁴⁰ The controlling question on such an appeal is whether the body or official whose decision is appealed from acted arbitrarily or illegally or so unreasonably as to have abused its or his discretion,⁴¹ the rule being that the decision will not

Stipulations

(1) In action for a judicial ascertainment that board of adjustment had no jurisdiction on appeal from order of board of county commissioners denying application for variance from zoning regulation, use of quoted word in stipulation reciting that board of adjustment granted a "variance," did not amount to a stipulation of fact but was only a conclusion of law and was not therefore binding on courts in determining whether action of board of adjustment in allowing modification of existing zoning laws was a variance or an act amounting to a rezoning. Fla.—Troup v. Bird, 53 So.2d 717.

(2) Use of quoted words in stipulation reciting that delay in granting permit for excavation and building was working a "great hardship" on defendants, did not amount to a stipulation of facts that literal enforcement of zoning ordinance would result in unnecessary hardship within meaning of statute granting special exception to existing zoning laws and regulations in a specific instance where literal enforcement would force unnecessary hardship on property owner, but was only to effect that delay was working hardship. Fla.—Troup v. Bird, supra.

37. Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.

38. N.Y.—Hickox v. Griffin, 83 N.E.2d 836, 298 N.Y. 365.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 381.

39. Pa.—Moyerman v. Koons, 80 Pa. Dist. & Co. 63.

40. Wyo.—State ex rel. George v. Hull, 199 P.2d 832, 65 Wyo. 251.

What law governs

(1) Decision of court, determining question whether building project for which permit was sought is prohibited by zoning ordinance, is con-

trolled by ordinance in effect at time of decision, not by previous ordinance operative when permit was sought.

N.J.—Tice v. Borough of Woodcliff v. Lake Bergen County, 78 A.2d 825, 12 N.J.Super. 20.

(2) In determining whether applicant for building permit is entitled thereto, status of law at time of decision of court, not at time of application for permit or of application for, or allowance of, rule to show cause, is controlling, and change of law pending administrative hearing or act must be followed by court.

N.J.—Concord Garden Apartments v. Board of Adjustment of City of Englewood, 64 A.2d 355, 1 N.J.Super. 301.

Issues held moot

Where, pending appeal from judgment dismissing complaint which sought review of proceedings before board of adjustment, which had issued permit authorizing construction and operation of market building and parking lot in a residential district, ordinance was amended so as to permit operation of parking lot in any district without consent of eighty per cent of property owners, and a similar permit was granted under amended ordinance to same applicants, and time for review of such action had expired, issues presented by appeal were moot.

Colo.—Cliff v. Billett, 241 P.2d 437, 125 Colo. 138.

Prior construction of ordinance

Where board of adjustment issued zoning permit for construction of motor court hotel in part of city which was similarly zoned as property on which plaintiff sought to build motor court but board had refused plaintiff permit on property, board had, therefore, construed ordinance as giving it power to grant permits for erection and operation of such places of business and this

construction should not be overruled without cogent reason.

S.C.—Purdy v. Moise, 75 S.E.2d 605, 223 S.C. 298.

Estoppel

Where railway company received permit from municipal zoning board to extend its track, on appeal by property owners from that decision, railway company was not estopped by acceptance of permit to assert right to extend track under general statutes of state regardless of provisions of zoning ordinance.

Tex.—Gulf, C. & S. F. Ry. Co. v. White, Civ.App., 281 S.W.2d 441, refused no reversible error.

41. Conn.—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

Ky.—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.

N.Y.—Teschner v. Town of Pittsford, 129 N.Y.S.2d 803, affirmed 137 N.Y.S.2d 640, 285 App.Div. 851.

Ohio.—A. Diccillo & Sons v. Chester Zoning Bd. of Appeals, Com.Pl., 103 N.E.2d 44, motion to certify dismissed 109 N.E.2d 8, 158 Ohio St. 302.

Pa.—Application for Certificate of Occupancy 500 Paxinosa Avenue, Easton, 66 A.2d 225, 362 Pa. 116—Appeal of Crawford, 57 A.2d 862, 358 Pa. 636—Darling v. Zoning Bd. of Adjustment of City of Philadelphia, 54 A.2d 829, 357 Pa. 428.

Appeal of Lord, 77 A.2d 728, 168 Pa.Super. 299, reversed on other grounds 81 A.2d 533, 368 Pa. 121.

Errors in law

Decision of board of adjustment on application for permit to erect nonconforming building is final, subject to right of courts to review errors in law and to give relief against order if it is arbitrary, oppressive, or attended with manifest abuse of discretion.

be disturbed in the absence of a showing of illegality or abuse of discretion.⁴² So, where a proceeding to review the granting of a permit is allowed, the scope of review is limited to determination of errors of law or abuse of discretion;⁴³ and the court will not pass on the wisdom or soundness of the

N.C.—*Lee v. Board of Adjustment of City of Rocky Mount*, 37 S.E.2d 128, 236 N.C. 107, 168 A.L.R. 1.

Attack on validity of ordinance

(1) Building owners seeking review of order of board of adjustment revoking building permits were not entitled to raise for first time on appeal question as to constitutionality of such limitation, since no question of either jurisdiction or public policy was involved.

N.J.—*Dickinson v. Inhabitants of City of Plainfield*, 184 A. 195, 116 N.J.Law 336.

(2) A taxpayer and owners of land in area zoned by city ordinance as residential district may raise question of validity of later ordinance, rezoning single lot in such district as first commercial district, on appeal to city court from ruling of city board of zoning appeals authorizing establishment of filling station on such lot, even though such question was not before board.

Md.—*Ellicott v. Mayor and City Council of Baltimore*, 23 A.2d 649, 180 Md. 176.

42. Cal.—*Wheeler v. Gregg*, 203 P.2d 37, 90 C.A.2d 348.

Colo.—*City of Colorado Springs v. Miller*, 36 P.2d 161, 95 Colo. 337.

Conn.—*Gulf Oil Corp. v. Board of Selectmen of Town of Brookfield*, 127 A.2d 48, 144 Conn. 61.

Fla.—*State ex rel. Taylor v. City of Jacksonville*, 133 So. 114, 101 Fla. 1241, followed in *State ex rel. Hauck Investment Corporation v. City of Jacksonville*, 133 So. 117, first case, 101 Fla. 1247 and *State ex rel. Strapper Realty Corporation v. City of Jacksonville*, 133 So. 117, second case, 101 Fla. 1247.

Ga.—*City of Atlanta v. Awtry & Lowndes Co.*, 53 S.E.2d 358, 205 Ga. 296, opinion conformed to 51 S.E. 2d 277, 79 Ga.App. 487.

Gulfas v. Allor, 57 S.E.2d 834, 81 Ga.App. 13, appeal transferred 55 S.E.2d 582, 206 Ga. 76.

Ky.—*Powder v. Ohler*, 7 S.W.2d 219, 221 Ky. 742.

N.J.—*Linwood Co. v. Board of Adjustment of Town of Bloomfield*, 142 A. 436, 6 N.J.Misc. 606—*Hilt-Wel Co. v. Scott*, 142 A. 434, 6 N.J.Misc. 621—*Steinberg v. Board of Adjustment of Town of Nutley*, 142 A. 431, 6 N.J.Misc. 597, affirmed 146 A. 318, 106 N.J.Law 603, followed in *Paramount Realty & Const. Co. v. Schmitt*, 146 A. 319, 106 N.J.Law 587—*Marilyn Realty Co. v. Zoning Board of Adjustment of Town of West Orange*, 142 A. 428, 6 N.J.Misc. 581, affirmed 146 A. 320, 106

N.J.Law 573—*Urban v. Board of Adjustment of Hillside Tp.*, 142 A. 364, 6 N.J.Misc. 602—*Harrison v. Board of Adjustment of Town of Montclair*, 142 A. 353, 6 N.J.Misc. 570.

N.Y.—*Corbett v. Zoning Bd. of Appeals of City of Rochester*, 128 N.Y.S.2d 12, 283 App.Div. 282.

Turner v. Cook, 168 N.Y.S.2d 556, 9 Misc.2d 850.

Fox v. Adams, 134 N.Y.S.2d 534—*Application of Kunz*, 128 N.Y.S.2d 680—*Mosher v. Crowley*, 110 N.Y.S.2d 626—*Reisberg v. Board of Standards and Appeals of New York City*, 81 N.Y.S.2d 511.

Okl.—*Cash v. Beveridge*, 82 P.2d 665, 183 Okl. 310.

Pa.—*Application of Imperial Asphalt Corp.*, 59 A.2d 121, 359 Pa. 402—*Appeal of Floersheim*, 34 A.2d 62, 348 Pa. 98.

Appeal of Krinks, 194 A. 231, 128 Pa.Super. 405, affirmed 2 A.2d 700, 332 Pa. 236.

Appeal of Lawson, Com.Pl., 4 Lycoming 1—*Appeal of Continental Motor Sales*, Com.Pl., 31 North.Co. 250—*Appeal of Valicenti*, Com.Pl., 94 Pittsb.Leg.J. 439—*Rose Appeal From Bd. of Adjustment*, Com.Pl., 28 Wash.Co. 7.

43 C.J. p 346 note 18.

Unfair action

Zoning board of appeals is possessed of wide discretion, and its decision on application for certificate of approval may be overruled only if defendant board has not acted fairly, or with proper motives, or on valid reasons.

Conn.—*Executive Television Corp. v. Zoning Bd. of Appeals of City of Danbury*, 85 A.2d 904, 138 Conn. 452.

Request to install lights

Where there was no provision in city ordinance which required application to zoning board of appeals of city for permission to install lights in parking lot, and no provision which authorized board to grant such a request, denial of request should not be disturbed in proceeding under the Civil Practice Act.

N.Y.—*Fairchester Realty Corp. v. Choate*, 169 N.Y.S.2d 971, 5 A.D.2d 779.

Abuse of discretion held shown

Ohio.—*State ex rel. Anshe Chesed Congregation v. Bruggemeier*, 115 N.E.2d 65, 97 Ohio App. 67.

Pa.—*Appeal of Lord*, 31 A.2d 533, 368 Pa. 121.

Drake v. Zoning Bd. of Adjustment, 65 Pa.Dist. & Co. 293.

Appeal of Lawson, Com.Pl., 4 Lycoming 1—*Mutimer Co. v. Cheltenham Tp. Bd. of Adjustment*, Com.Pl., 69 Montg.Co. 127.

Abuse of discretion not shown

Cal.—*Felice v. City of Inglewood*, 190 P.2d 317, 84 C.A.2d 263.

Conn.—*Delmar v. Planning and Zoning Bd. of Town of Milford*, 109 A.2d 604, 19 Conn.Sup. 21.

Mo.—*Veal v. Leimkuehler, App.*, 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

N.Y.—*Reisberg v. Board of Standards and Appeals of New York City*, 81 N.Y.S.2d 511.

Pa.—*Overbrook Farms Club v. Zoning Bd. of Adjustment of City of Philadelphia*, 40 A.2d 423, 351 Pa. 77.

Appeal of Hasley, 30 A.2d 187, 151 Pa.Super. 192.

Angert v. Zoning Bd. of Adjustment, 86 Pa.Dist. & Co. 582.

Appeal of Weldon Bocci Club, Com.Pl., 60 Montg.Co. 277—*Appeal of Jennings*, Com.Pl., 86 Pittsb.Leg. J. 282.

Minor discrepancy in opinion held not fatal

Md.—*Gilmor v. Mayor and City Council of Baltimore*, 109 A.2d 739, 205 Md. 557.

43. N.C.—*In re Pine Hill Cemeteries*, 15 S.E.2d 1, 219 N.C. 735.

Pa.—*Bryan v. Zoning Bd. of Adjustment*, Com.Pl., 2 Bucks Co. 16—*Appeal of Suskey*, Com.Pl., 91 Pittsb.Leg.J. 339.

Nonconforming use

In proceeding by village officers to review determination of board of appeals overruling officers' denial of permit for improvement of premises occupied as nonconforming use, function of supreme court was to decide whether determination of board was arbitrary, capricious, or contrary to law, and not to retry matter de novo.

N.Y.—*Fox v. Adams*, 134 N.Y.S.2d 534.

Apartment houses

Fact that decision of board of municipal and zoning appeals approving a permit for construction of apartment houses was not in conformity with good zoning and proposed construction was not in conformity with surrounding architectural design of neighborhood was no ground for appeal, since courts can review only question of whether board's decision is illegal.

Md.—*Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore*, 73 A.2d 531, 195 Md. 383.

judgment of a board in the granting of a permit.⁴⁴ It has been held, however, that where the action of a zoning board in revoking a permit did not involve the exercise of powers essentially administrative, the court is not limited in the review of such action to a determination of whether the board's action was arbitrary, capricious, or unreasonable.⁴⁵

In reviewing administrative action with respect to a permit, all matters contained in the record may be considered by the court;⁴⁶ but extraneous issues not presented to the board or properly brought up for review cannot be determined on such appeal.⁴⁷

44. Iowa.—*Scott v. City of Waterloo*, 274 N.W. 897, 223 Iowa 1169.
Mich.—*Mitchell v. Grewal*, 61 N.W. 2d 3, 338 Mich. 81.

45. N.J.—*Jantausch v. Borough of Verona*, 124 A.2d 14, 41 N.J.Super. 89.

46. Md.—*Hoffman v. Mayor and City Council of Baltimore*, 51 A.2d 269, 187 Md. 593.

47. Mo.—*Colt v. Bernard*, App., 279 S.W.2d 527.

N.J.—*Springfield Tp. v. Bensley*, 88 A.2d 271, 19 N.J.Super. 147.

Okl.—*McGrath v. Brown*, 120 P.2d 624, 190 Okl. 144—*Reinhart & Donovan Co. v. Refiners' Production Co.*, 53 P.2d 1116, 175 Okl. 522.

Wyo.—*In re McInerney*, 34 P.2d 35, 47 Wyo. 258.

48. Ill.—*Morgan v. City of Chicago*, 18 N.E.2d 872, 370 Ill. 347.

N.J.—*Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp.*, 84 A.2d 18, 16 N.J.Super. 113.

G. G. A. Realty Corp. v. Board of Adjustment of Jersey City, 52 A.2d 563, 135 N.J.Law 427.

Saraydar v. Board of Com.'rs of City of Newark, 36 A.2d 289, 134 N.J.Eq. 162.

N.Y.—*Application of Berger*, 101 N.Y.S.2d 330, 277 App.Div. 1142—*McGeachin v. Henne*, 89 N.Y.S.2d 840, 275 App.Div. 955.

Application of American Seminary of The Bible, 104 N.Y.S.2d 660, modified on other grounds 112 N.Y.S.2d 904, 280 App.Div. 792—*Pagnotta v. Roberts*, 101 N.Y.S.2d 836—*Clark v. Board of Zoning Appeals of Town of Hempstead*, 90 N.Y.S.2d 507, affirmed *In re Application of Clark*, 89 N.Y.S.2d 916, 275 App.Div. 930, reargument and appeal denied 91 N.Y.S.2d 838, 275 App.Div. 1001, reversed on other grounds 92 N.E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 881, certiorari denied 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673.

Pa.—*In re Jennings' Estate*, 198 A. 621, 330 Pa. 154.

Perelman v. Board of Adjustment of Borough of Yeadon, 18 A. 2d 438, 144 Pa.Super. 8.

Kleinman v. Zoning Bd. of Appeals, 6 Pa.Dist. & Co.2d 659, 42 Del.Co. 413.

Caution

Where it appears that an honest judgment has been reasonably and fairly exercised after full hearing, courts should be cautious about disturbing decision of local authority in granting zoning variance.

Conn.—*Devaney v. Board of Zoning Appeals of City of New Haven*, 122 A.2d 303, 143 Conn. 322.

More advantage or financial benefit to an applicant for a variance of a zoning ordinance does not warrant judicial interference with administrative board's exercise of its discretion in applying zoning ordinance according to its terms.

Pa.—*Appeal of Mutual Supply Co.*, 77 A.2d 612, 366 Pa. 424.

Appeal of Spencer, Com.Pl., 7 Chest.Co. 107.

Impairment of residential areas

Courts should not, in reviewing grant or denial of zoning variance, lend themselves to impairment of established residential areas and thus undo careful thinking that has gone into zoning arrangement projected by planning board and implemented by action of governing body in passing necessary zoning ordinance.

N.J.—*Tzseses v. Board of Trustees of Village of South Orange*, 91 A.2d 588, 22 N.J.Super. 45.

Reduction of board's power

Under statute conferring in broad terms on zoning board of adjustment right to authorize variances from terms of ordinance, court cannot by judicial legislation restrict power of board to allowance of slight variances from terms of ordinance.

N.H.—*Fortuna v. Zoning Bd. of Adjustment of City of Manchester*, 60 A.2d 133, 95 N.H. 211.

Error held immaterial

Error in computing depth of rear yard required under zoning ordinance at twenty six feet instead of twenty two and five tenths feet did not warrant reversal of decision of city zoning board of appeals refusing to grant a variance in rear yard re-

§ 329. — Grant or Refusal of Exceptions or Variances

Generally, the courts will not interfere with the decisions of zoning authorities on applications for exceptions or variances unless they are plainly illegal, arbitrary, unreasonable, or an abuse of discretion.

On judicial review of the decisions of zoning authorities on applications for exceptions or variances, the courts will not interfere with their action except on adequate grounds,⁴⁸ that is to say, the court will not interfere with the decision unless it is plainly illegal,⁴⁹ arbitrary, unreasonable, or an

quirement, where proposed building would leave a rear yard of only fifteen feet and record indicated that correct computation of required depth would not have affected board's decision.

Wis.—*State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison*, 35 N.W.2d 312, 254 Wis. 42.

49. Conn.—*Plumb v. Board of Zoning Appeals of City of New Haven*, 108 A.2d 899, 141 Conn. 595.

Ind.—*Board of Zoning Appeals of City of Indianapolis v. Moyer*, 27 N.E.2d 905, 108 Ind.App. 198—*Board of Zoning Appeals of City of Indianapolis v. Waltrup*, 193 N.E. 701, 99 Ind.App. 576.

Mo.—*In re Botz*, 159 S.W.2d 367, 236 Mo.App. 566—*State ex rel. Kaegel v. Holckamp*, App., 151 S.W.2d 685.

Neb.—*Weber v. City of Grand Island*, 87 N.W.2d 575, 165 Neb. 827.

Sole power

A board of zoning appeals has the sole power within its discretion to vary a zoning ordinance and its decision is reviewable by courts only for illegality in its proceedings.

Ind.—*Board of Zoning Appeals of City of Mishawaka v. School City of Mishawaka*, 145 N.E.2d 302.

Correction of legal errors

The courts must not trespass on the administrative work of the board of standards and appeals under a zoning ordinance, but must confine their review of board's action to correcting legal errors.

N.Y.—*Hannigan v. Murdock*, 47 N.Y.S.2d 855—*Burke v. Cohen*, 13 N.Y.S.2d 984.

Nonjurisdictional defects

Under statute providing that decision of board of zoning appeals is reviewable only for illegality, courts generally are inclined to treat defects that are not plainly jurisdictional as irregularities rather than as illegalities.

Ind.—*Board of Zoning Appeals of City of Indianapolis v. Moyer*, 27 N.E.2d 905, 108 Ind.App. 198.

Law at time of decision governs

Validity of action of board of adjustment on application for zoning

abuse of discretion,⁵⁰ and ordinarily the scope of | review is restricted to ascertaining whether there

variance must be determined under the law in force when such action was taken without regard to subsequent amendments to zoning statute enlarging board's powers.

N.J.—Ackerman v. Board of Com'rs of Town of Belleville, N.J., 62 A. 2d 476, 1 N.J.Super. 69.

50. Cal.—Flagstad v. City of San Mateo, App., 318 P.2d 825—Bradbeer v. England, 232 P.2d 308, 104 C.A.2d 704—Childs v. City Planning Commission of City of Sacramento, 180 P.2d 433, 79 C.A.2d 808—Otis v. City of Los Angeles, 126 P.2d 954, 52 C.A.2d 605.

Conn.—Culinary Institute of America v. Board of Zoning Appeals of City of New Haven, 121 A.2d 637, 143 Conn. 257—Libby v. Board of Zoning Appeals of City of New Haven, 118 A.2d 894, 143 Conn. 46—Plumb v. Board of Zoning Appeals of City of New Haven, 108 A.2d 899, 141 Conn. 595—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614—Nielsen v. Board of Appeals on Zoning of City of Bridgeport, 27 A.2d 392, 129 Conn. 285—Benson v. Zoning Board of Appeal of City of Hartford, 27 A. 2d 389, 129 Conn. 280—Torello v. Board of Zoning Appeals of New Haven, 16 A.2d 591, 127 Conn. 307—Rommell v. Walsh, 16 A.2d 483, 127 Conn. 272—Levine v. Zoning Board of Appeals of Meriden, 198 A. 173, 124 Conn. 53.

Del.—Appeal of Blackstone, 190 A. 597, 8 W.W.Harr. 230.

Ga.—City of Atlanta v. Awtry & Lowndes Co., 53 S.E.2d 358, 205 Ga. 286, opinion conformed to 54 S.E.2d 277, 79 Ga.App. 487—McCord v. Ed Bond & Condon Co., 165 S.E. 590, 175 Ga. 667, 86 A.L.R. 703.

Ill.—Bullock v. City of Evanston, 123 N.E.2d 840, 5 Ill.2d 22.

Ind.—O'Connor v. Overall Laundry, 183 N.E. 184, 98 Ind.App. 29.

Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Ky.—Stout v. Jenkins, 268 S.W.2d 643—Thomson v. Tafel, 218 S.W. 2d 977, 309 Ky. 753—Crain v. City of Louisville, 182 S.W.2d 787, 298 Ky. 421—Schloemer v. City of Louisville, 182 S.W.2d 782, 298 Ky. 286—Selligman v. Von Allmen Bros., 179 S.W.2d 207, 297 Ky. 121—Bosworth v. City of Lexington, 125 S.W.2d 995, 277 Ky. 90—Smith v. Selligman, 109 S.W.2d 14, 270 Ky. 69.

Md.—Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 187 Md. 296.

Mont.—Freeman v. Board of Adjustment of City of Great Falls, 34 P. 2d 334, 97 Mont. 342.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

N.J.—Ward v. Scott, 105 A.2d 851, 16 N.J. 16—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442—165 Augusta St. v. Collins, 87 A.2d 889, 9 N.J. 259—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64—Home Builders Ass'n of Northern N. J. v. Borough of Paramus, 81 A.2d 753, 7 N.J. 335—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148—Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J. Super. 574—Ardolino v. Board of Adjustment of Borough of Florham Park, Morris County, 125 A.2d 543, 41 N.J.Super. 582—Cummins v. Board of Adjustment of Borough of Leonia, Bergen County, 121 A. 2d 405, 39 N.J.Super. 452—Mistretta v. City of Newark, 109 A.2d 677, 33 N.J.Super. 205—Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J.Super. 164—Preye v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161—Ward v. Scott, 86 A.2d 613, 18 N.J.Super. 36, reversed on other grounds 93 A.2d 385, 11 N.J. 117—Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp., 84 A.2d 18, 16 N.J.Super. 113—Sun Oil Co. v. City of Clifton, 80 A.2d 258, 13 N.J.Super. 89, affirmed 84 A.2d 555, 16 N.J.Super. 265—Marrocco v. Board of Adjustment of City of Passaic, 68 A.2d 470, 5 N.J.Super. 94.

Albright v. Johnson, 50 A.2d 399, 135 N.J.Law 70—Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J.Law 473—Butt Realty Co. v. Board of Adjustment of City of Plainfield, 48 A.2d 826, 134 N.J.Law 619—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367—Aschenbach v. Inhabitants of City of Plainfield, 8 A.2d 579, 123 N.J.Law 265—Dickinson v. Inhabitants of City of Plainfield, 4 A.2d 91, 122 N.J. Law 63—Franklin Sav. Institution of Newark v. City of Newark, 3 A. 2d 801, 121 N.J.Law 595.

N.Y.—People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 26 N.E.2d 952, 282 N.Y. 400.

Diocese of Rochester v. Planning Bd. of Town of Brighton, 147 N.Y.S.2d 392, 1 A.D.2d 86, reversed on other grounds 154 N.Y.S.2d 849, 1 N.Y.2d 508, 136 N.E.2d 827—Application of Di Bari, 113 N.Y.S. 2d 561, 280 App.Div. 810, affirmed Di Bari v. Board of Standards and

Appeals of City of New York, 152 N.Y.S.2d 302, 1 N.Y.2d 756, 135 N.E.2d 54—Application of Douglaston Civic Ass'n v. Board of Standards and Appeals of City of New York, 102 N.Y.S.2d 582, 278 App. Div. 659, affirmed 100 N.E.2d 187, 302 N.Y. 920—Application of Berger, 101 N.Y.S.2d 330, 277 App.Div. 1142—Burlinson v. Zoning Bd. of Appeals of City of Yonkers, 87 N. Y.S.2d 412, 275 App.Div. 723—Ernst v. Board of Appeals on Zoning of City of New Rochelle, 79 N.Y.S.2d 798, 274 App.Div. 809, affirmed 84 N.E.2d 144, 298 N.Y. 831—Hickox v. Griffin, 79 N.Y.S.2d 193, 274 App. Div. 792, reversed on other grounds 83 N.E.2d 836, 298 N.Y. 365—Otto v. Steinhilber, 11 N.Y.S.2d 910, 257 App.Div. 837, reversed on other grounds 24 N.E.2d 851, 282 N.Y. 71, reargument denied 26 N.E.2d 811, 282 N.Y. 681—Falvo v. Kerner, 225 N.Y.S. 747, 222 App.Div. 289.

Application of Arlington Development Corp., 124 N.Y.S.2d 172, 204 Misc. 395, affirmed 128 N.Y.S. 2d 596, 283 App.Div. 799—Spadafora v. Ferguson, 48 N.Y.S.2d 698, 182 Misc. 161, affirmed 50 N.Y.S. 2d 408, 268 App.Div. 820—Esdora Realty Corporation v. Walsh, 240 N.Y.S. 792, 136 Misc. 476, reversed on other grounds 243 N.Y.S. 809, 229 App.Div. 866, affirmed 173 N.E. 883, 254 N.Y. 600—Mazzarell v. Walsh, 238 N.Y.S. 318, 135 Misc. 719.

Application of J. Clarence Davies, Inc., 155 N.Y.S.2d 476—Innet v. Liberman, 155 N.Y.S.2d 383—Crone v. Town of Brighton, 119 N.Y.S.2d 877—Hempstead Bottling Works Corp. v. Patterson, 117 N.Y. S.2d 103, appeal dismissed 126 N.Y. S.2d 619, 282 App.Div. 1083—Application of Furlong, 111 N.Y.S.2d 398—McNeice v. Richter, 88 N.Y.S. 2d 781—140 Riverside Drive v. Murdock, 78 N.Y.S.2d 890—Arditi Realty Co. v. Murdock, 67 N.Y.S.2d 809—In re Fein, 67 N.Y.S.2d 218, affirmed, Fein v. Murdock, 73 N.Y.S. 2d 264, 272 App.Div. 819—In re Cosden, 64 N.Y.S.2d 37, affirmed In re Application of Cosden, 63 N.Y.S. 2d 640, 270 App.Div. 1018—Fleischer v. Murdock, 62 N.Y.S.2d 417, appeal dismissed 77 N.Y.S.2d 393—Hilton v. Board of Appeals of City of Geneva, 13 N.Y.S.2d 213.

Okl.—Torrance v. Bladel, 155 P.2d 546, 195 Okl. 68—Thompson v. Phillips Petroleum Co., 147 P.2d 451, 194 Okl. 77.

Pa.—Appeal of Michener, 115 A.2d 367, 382 Pa. 401—Appeal of Borden, 87 A.2d 465, 369 Pa. 517—Phillips v. Griffiths, 77 A.2d 375, 366 Pa. 468—Application of Imperial Asphalt Corp., 59 A.2d 121, 359 Pa.

has been such illegality or abuse of discretion.⁵¹ | The court will not substitute its judgment for that

402—Application of Devereux Foundation, 41 A.2d 744, 351 Pa. 478, appeal dismissed 66 S.Ct. 89, 326 U.S. 686, 90 L.Ed. 403.

Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66—Perelman v. Board of Adjustment of Borough of Yeadon, 18 A.2d 438, 144 Pa. Super. 5.

Hauss v. Power, 5 Pa. Dist. & Co. 2d 180.

Board of Adjustment of Susquehanna Tp. v. Procasco, Com.Pl., 69 Dauph.Co. 204—In re Radnor Tp. Zoning Ordinance, Com.Pl., 31 Del. Co. 330—McConaghy's v. Haverford Tp. Board of Adjustment Ordinance, Com.Pl., 31 Del.Co. 120—In re Imperial Asphalt Corporation's Zoning Appeal, Com.Pl., 51 Lanc. L.Rev. 9—Dachino v. Plymouth Tp., Com.Pl., 70 Montg.Co. 198—Appeal of Murphy, Com.Pl., 62 Montg.Co. 310—Appeal of Valicenti, Com.Pl., 94 Pittsb.Leg.J. 439—Appeal of Atlantic Refining Co., Com. Pl., 66 York Leg.Rec. 81.

R.I.—Coffin v. Zoning Bd. of Review of City of Providence, 98 A.2d 843, 81 R.I. 112—Petrarca v. Zoning Bd. of Review of City of Warwick, 80 A.2d 156, 78 R.I. 130—Abbott v. Zoning Bd. of Review of City of Warwick, 79 A.2d 620, 78 R.I. 84—Kent v. Zoning Bd. of Review of Town of Barrington, 58 A.2d 623, 74 R.I. 89—Fiske v. Zoning Bd. of Review of Town of East Providence, 50 A.2d 65, 72 R.I. 217, rehearing denied 50 A.2d 779, 72 R.I. 217—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

S.C.—Hodge v. Pollock, 75 S.E.2d 752, 223 S.C. 342.

Wis.—State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison, 35 N.W.2d 312, 254 Wis. 42. 43 C.J. p 356 note 23.

Meaning of term

(1) "Abuse of discretion" means action that is arbitrary or unreasonable, such as in opposition to the intent and policy of the zoning statute and ordinance as applied to the circumstances.

N.J.—Potts v. Board of Adjustment of Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230.

(2) Phrase "arbitrary or capricious" has no opprobrious connotation, but in technical legal significance means an administrative action not supported by evidence or lacking a rational basis.

D.C.—O'Boyle v. Coe, D.C., 155 F. Supp. 581.

Unreasonable conditions

Courts have power to set aside such restrictions or conditions imposed by board as are unreasonable or arbitrary.

Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

Poor exercise of discretion

Where there is power in a zoning ordinance to grant a variance and there is an absence of corruption, caprice and unreason, the court, although conscious that the exercise of discretion was not up to the usual good standard, must bow to the determination of the administrative branch of the government.

N.Y.—Hannigan v. Murdock, 47 N.Y. S.2d 855.

Only reasonable conclusion

On appeal from order of city board of zoning appeals granting permission to extend store building in business zone into adjacent residential zone, trial court could direct judgment for appellants only if sole reasonable conclusion from facts found by court and assumed to be before board would be that extension should not have been granted.

Conn.—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A. 2d 659, 133 Conn. 614.

51. Conn.—Abramson v. Zoning Bd. of Appeals of Town of Westport, 120 A.2d 827, 143 Conn. 211—Parsons v. Board of Zoning Appeals of City of New Haven, 99 A.2d 149, 140 Conn. 290—Celentano v. Zoning Bd. of Appeals of City of Hartford, 73 A.2d 101, 136 Conn. 584—Berkman v. Board of Appeals on Zoning of City of Bridgeport, 64 A.2d 875, 135 Conn. 393—Blake v. Board of Appeals of City of Hartford, 169 A. 195, 117 Conn. 527.

Ind.—Board of Zoning Appeals of City of Indianapolis v. Wheaton, 76 N.E.2d 597, 118 Ind.App. 38—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 117 Ind.App. 314.

N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226—Rexon v. Board of Adjustment of Borough of Haddonfield, 89 A.2d 233, 10 N.J. 1.

Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N.J. Super. 574—Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J. Super. 164—Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp., 84 A.2d 18, 16 N.J. Super. 113.

N.Y.—Del Vecchio v. Tuomey, 130 N.Y.S.2d 481, 283 App.Div. 955, affirmed 125 N.E.2d 107, 308 N.Y. 749, reargument denied 126 N.E.2d 174, 308 N.Y. 834.

McNeice v. Richter, 88 N.Y.S.2d 781—Court Boulevard v. Board of Standards and Appeals of City of New York, 72 N.Y.S.2d 753.

Pa.—Moyerlan v. Glanzberg, 138 A.2d 681, 391 Pa. 387—Richman v. Philadelphia Zoning Bd. of Adjustment,

137 A.2d 280, 391 Pa. 254—Application for Certificate of Occupancy 500 Paxinosa Avenue, Easton, 66 A. 2d 225, 362 Pa. 116—Berman v. Exley, 50 A.2d 199, 355 Pa. 415.

Appeal of Sloan, Com.Pl., 30 Del. Co. 555—Appeal of Livingston Apts., Inc., Com.Pl., 26 Lehigh.L.J. 575—In re Application for Certificate of Occupancy, Com.Pl., 32 North.Co. 31—Appeal of Sukits, Com.Pl., 86 Pittsb.Leg.J. 481.

Tex.—Driskell v. Board of Adjustment, Civ.App., 195 S.W.2d 594, refused no reversible error.

Other statement of rule

On judicial review of local zoning board's making or refusal of recommendation of variance from local zoning ordinance to local governing body question is never what court would have done in circumstances, but whether zoning board abused its authority or departed from law.

N.J.—Cummins v. Board of Adjustment of Borough of Leonia, Bergen County, 121 A.2d 405, 39 N.J. Super. 452.

Inquiry dependent on nature of decision

(1) Where the variance is denied, the only question for the court is whether the petitioner has been illegally oppressed.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

In re Cosden, 64 N.Y.S.2d 37, affirmed 63 N.Y.S.2d 640, 270 App.Div. 1018.

(2) Where the variance is granted, the only question is the power of the board to grant the application.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.

Hickox v. Griffin, 79 N.Y.S.2d 193, 274 App.Div. 793, reversed on other grounds 83 N.E.2d 836, 298 N.Y. 365.

(3) Where court decided that granting of zoning variance on imposition of conditions was an ultra vires act on part of municipality, and consequently resolution permitting erection of a commercial laboratory thereon was illegal and void, it was unnecessary for court to inspect property, to discuss physical surroundings of property or fact that area north of premises was zoned for commercial use, or that a commercial use was being carried on just west of property in question.

N.J.—V. F. Zahodiakin Engineering Corp. v. Zoning Ordinance Bd. of Adjustment of City of Summit, 82 A.2d 493, 14 N.J. Super. 537, affirmed 86 A.2d 127, 8 N.J. 386.

Issues held not involved

N.Y.—Smith v. Hartman, 144 N.Y.S. 2d 13, 208 Misc. 880.

termination of the board are shown to be arbitrary and contrary to the weight of the evidence, in which case the court may and should make its own ruling.⁵⁵ Where a zoning board erred in its application of law in denying a variance, the court on appeal properly considered the matter on the merits.⁵⁶

Under some statutes, the scope of inquiry on appeal is the same as before the board of adjustment.⁵⁷

In particular cases, it has been held, on judicial review of the administrative proceedings and decision, that the board or officer did not abuse its or his discretion in granting a variance,⁵⁸ or in refus-

in way of carrying out strict letter of ordinance, failure of board of zoning appeals in varying ordinance expressly to find practical difficulties or unnecessary hardships would not affect judgment of trial court finding practical difficulty and unnecessary hardship if facts supported such a conclusion.

Conn.—Stavola v. Bulkeley, 56 A.2d 645, 134 Conn. 186.

Supplemental findings

Where parties challenging board of adjustment's determination that variance should be granted had at no time objected to board's filing supplemental findings months after granting of variance, and after institution of action challenging grant; and where supplemental findings did not impair any rights of objectors but would enable court to deal with main issues directly and at once, supplemental findings would be given same effect as though they had been part of board's original action. N.Y.—Tzses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J.Super. 45.

55. Pa.—Perelman v. Board of Adjustment of Borough of Yeadon, 18 A.2d 438, 144 Pa.Super. 5.

Other statement of rule

If it should be made to appear that evidence on which board of zoning appeals acted was devoid of probative value, that quantum of legitimate evidence was so proportionately meager as to lead to conviction that finding does not rest on a rational basis, or that result of hearing must have been substantially influenced by improper considerations, order will be set aside.

Ind.—Board of Zoning Appeals of City of Mishawaka v. School City of Mishawaka, App., 145 N.E.2d 302.

56. Pa.—Dooling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Tp., 89 A.2d 505, 371 Pa. 290—Appeal of Lindquist, 73 A.2d 378, 364 Pa. 561.

Steele v. Lower Moreland Tp., Com.Pl., 71 Montg.Co. 156.

57. Ala.—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.

58. Cal.—Bradbeer v. England, 232 P.2d 308, 104 C.A.2d 704.

Colo.—Board of Adjustment of City and County of Denver v. Handley, 95 P.2d 823, 105 Colo. 180.

Conn.—Goldreyer v. Board of Zoning Appeals of City of Bridgeport, 136 A.2d 789, 144 Conn. 641—Fiorilla v. Zoning Bd. of Appeals of City of Norwalk, 129 A.2d 619, 144 Conn. 275—Devaney v. Board of Zoning Appeals of City of New Haven, 122 A.2d 303, 143 Conn. 322.

Ga.—McCord v. Ed Bond & Condon Co., 125 S.E. 590, 175 Ga. 667, 86 A.L.R. 703.

Ill.—Rector v. Board of Appeals Under Zoning Ordinance of City of Danville, 95 N.E.2d 99, 342 Ill. App. 51—Lucas v. Hamilton, 259 Ill.App. 148.

Ky.—Stout v. Jenkins, 268 S.W.2d 643—Thomson v. Tafel, 218 S.W.2d 977, 309 Ky. 753—Bosworth v. City of Lexington, 125 S.W.2d 995, 277 Ky. 90.

N.Y.—Application of Central Queens Allied Civic Council, 145 N.Y.S.2d 153, 208 Misc. 809—Griest v. Hooey, 128 N.Y.S.2d 341, 205 Misc. 396.

Marks v. Board of Zoning Appeals of City of Dunkirk, 154 N.Y.S.2d 118.

Okl.—Scheutz v. Dossey Lumber Co., 158 P.2d 720, 195 Okl. 439.

Pa.—Moverian v. Glanzberg, 138 A.2d 681, 391 Pa. 387—Appeal of Borden, 87 A.2d 465, 369 Pa. 517—Appeal of Elkins Park Imp. Ass'n, 64 A.2d 783, 361 Pa. 322—Triolo v. Exley, 57 A.2d 878, 358 Pa. 555.

Rorer v. Zoning Bd. of Adjustment, 5 Pa.Dist. & Co.2d 615, 48 Mun.L.R. 15—Stepler v. Board of Adjustment of Radnor Tp., 5 Pa. Dist. & Co.2d 8, 42 Del.Co. 341—Staples v. McShain, 70 Pa.Dist. & Co. 556—Appeal of Grant, 60 Pa. Dist. & Co. 340.

Pasquino v. Keating, Com.Pl., 3 Bucks Co. 302, 68 York Leg.Rec. 37—Board of Adjustment of Susquehanna Tp. v. Procasco, Com.Pl., 69 Dauph.Co. 204—Appeal of Siddall, Com.Pl., 44 Del.Co. 293, exceptions dismissed 45 Del.Co. 38—Garro v. Board of Adjustment of Upper Darby Tp., Com.Pl., 43 Del.Co. 215—Appeal of Hutchinson, Com.Pl., 39 Del.Co. 254—Korylarz v. Zoning Bd. of Adjustment of Clifton Heights, Com.Pl., 38 Del.Co. 435—Hutchinson v. Board of Adjustment of Marple Tp., Com.Pl., 38 Del.Co. 311—Boyer v. Zoning Bd., Com.Pl., 27 Leh.L.J. 272—Appeal of Rorer, Com.Pl., 72 Montg.Co. 58—Staley v. Lower Merion Tp., Com.Pl., 69 Montg.Co. 407—Jeffrey v. Cheltenham Tp.,

Com.Pl., 68 Montg.Co. 312—Borden v. Cheltenham Tp., Com.Pl., 67 Montg.Co. 72—Grant v. Abington Tp., Com.Pl., 63 Montg.Co. 214—Appeal of Landes, Com.Pl., 58 Montg.Co. 396—Appeal of Houlden, Com.Pl., 86 Pittsb.Leg.J. 115—Appeal of Steinmark, Com.Pl., 86 Pittsb.Leg.J. 86.

R.I.—Guenther v. Zoning Bd. of Review of City of Warwick, 125 A.2d 214—Messinger v. Zoning Bd. of Review of Town of East Providence, 99 A.2d 865, 81 R.I. 159—Woodbury v. Zoning Bd. of Review of City of Warwick, 83 A.2d 164, 78 R.I. 319—Petrarca v. Zoning Bd. of Review of City of Warwick, 80 A.2d 156, 78 R.I. 130—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135.

S.C.—Stevenson v. Board of Adjustment of City of Charleston, 96 S.E. 2d 456, 230 S.C. 440.

Tex.—Freeman v. Board of Adjustment of City of San Antonio, Civ. App., 230 S.W.2d 387—Driskell v. Board of Adjustment, Civ.App., 195 S.W.2d 594.

Sale of liquor

Where property on which applicants had conducted a restaurant with a liquor permit had been condemned by city without applicants' fault, action of city zoning board of appeals in granting application for a waiver of zoning regulations respecting use of buildings for sale of liquor so as to permit applicants to resume business at another place was not arbitrary or unreasonable.

Conn.—Nielsen v. Board of Appeals on Zoning of City of Bridgeport, 27 A.2d 392, 129 Conn. 285.

Restaurant

Board of adjustments held authorized, under ordinance giving board power to relax or vary effect of zoning ordinance, to grant temporary permit to restaurant owner to replace frame building with brick building in residential district, where property was in midst of business district when zoning ordinance was adopted, and it was shown that refusal would work undue hardship on owner, that public would not suffer and that spirit of zoning ordinance could still be enforced.

Fla.—Tau Alpha Holding Corporation v. Board of Adjustments of City of Gainesville, 171 So. 819, 126 Fla. 558.

ing a variance;⁵⁹ while under the facts and circumstances of other cases, it has been held that the zoning board or officer abused its or his discretion in granting a variance,⁶⁰ or in denying or revoking

59. Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Ark.—City of Little Rock v. Connerly, 258 S.W.2d 881, 222 Ark. 96.

Conn.—Longo v. Board of Zoning Appeals of Town of Milford, 122 A.2d 784, 143 Conn. 395—Isdale v. Town Plan and Zoning Commission of Town of Orange, 107 A.2d 267, 141 Conn. 509—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161—Benson v. Zoning Board of Appeals of City of Hartford, 27 A.2d 389, 129 Conn. 280—First Nat. Bank & Trust Co. of Port Chester, N. Y., v. Zoning Board of Appeals of Greenwich, 10 A.2d 691, 126 Conn. 228—Greenwich Gas Co. v. Tuthill, 155 A. 850, 113 Conn. 684.

Del.—Appeal of Blackstone, 190 A. 597, 8 W.W.Harr. 230.

Ga.—Cheek v. White, 51 S.E.2d 465, 78 Ga.App. 177.

Ind.—O'Connor v. Overall Laundry, 183 N.E. 134, 98 Ind.App. 29.

Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671—Smith v. Selligman, 109 S.W.2d 14, 270 Ky. 69.

N.J.—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64—V. F. Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 86 A.2d 127, 8 N. J. 386—Home Builders Ass'n of Northern N. J. v. Borough of Paramus, 81 A.2d 753, 7 N.J. 335—National House & Farms Ass'n v. Board of Adjustment of Borough of Oakland, 65 A.2d 518, 3 N.J. 11.

Zahn v. Board of Adjustment of City of Newark, 133 A.2d 358, 45 N.J.Super. 516—Ardolino v. Board of Adjustment of Borough of Florham Park, Morris County, 125 A.2d 543, 41 N.J.Super. 582—Shipman v. Town of Montclair, 84 A.2d 652, 16 N.J.Super. 365—Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp., 84 A.2d 18, 16 N.J.Super. 113—Seerho v. Board of Adjustment of Jersey City, 67 A.2d 472, 4 N.J.Super. 409.

Stegel v. Board of Adjustment of City of Newark, 60 A.2d 626, 137 N.J.Law 423—Garden View Homes v. Board of Adjustment of City of Passaic, 57 A.2d 677, 137 N.J.Law 44—Visco v. City of Plainfield, 57 A.2d 490, 136 N.J.Law 659—Mingo Holding Co. v. Town of Harrison, 48 A.2d 919—Montgomery Engineering Co. v. Jersey City, 48 A.2d 643, 134 N.J.Law 414—Dubin v. Wich, 200 A. 751, 120 N.J.Law 469.

N.Y.—People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 26 N.E.2d 952, 282 N.Y. 400.

Cusberth v. Board of Standards & Appeals of New York City, 83 N.Y.S.2d 258, 274 App.Div. 912—Ernst v. Board of Appeals on Zoning of City of New Rochelle, 79 N.Y.S.2d 798, 274 App.Div. 809, affirmed 84 N.E.2d 144, 298 N.Y. 831.

Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County, 60 N.Y.S.2d 750, 187 Misc. 33.

Delyanis v. Cooper, 75 N.Y.S.2d 751, affirmed Application of Delyanis, 74 N.Y.S.2d 912, 272 App.Div. 1026, appeal denied 75 N.Y.S.2d 302, 272 App.Div. 1062, appeal dismissed 77 N.E.2d 794, 297 N.Y. 782—In re Fein, 67 N.Y.S.2d 218, affirmed Fein v. Murdock, 72 N.Y.S.2d 264, 272 App.Div. 819.

Pa.—Swade v. Zoning Bd. of Adjustment of Springfield Tp., 140 A.2d 597—South Philadelphia Dressed Beef Co. v. Zoning Bd. of Adjustment, 137 A.2d 270, 391 Pa. 111—Smolow v. City of Philadelphia Zoning Bd. of Adjustment, 137 A.2d 251, 391 Pa. 71—Sears, Roebuck & Co. v. Power, 134 A.2d 659, 390 Pa. 206—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374—Appeal of Dunlap, 87 A.2d 299, 370 Pa. 31—Beraman v. Exley, 50 A.2d 199, 355 Pa. 415—Kurman v. Zoning Bd. of Adjustment of City of Philadelphia, 40 A.2d 381, 351 Pa. 247—Appeal of Kerr, 144 A. 81, 294 Pa. 246.

Appeal of Kerr, 11 Pa.Dist. & Co. 2d 321, 44 Del.Co. 68, 49 Mun.L.R. 23—Hewlett v. Zoning Bd. of Adjustment, 8 Pa.Dist. & Co.2d 75, 49 Mun.L.R. 57—Angert v. Zoning Bd. of Adjustment, 86 Pa.Dist. & Co. 582.

Baronoff v. Zoning Bd. of Adjustment, Com.Pl., 4 Bucks Co. 277, reversed on other grounds 123 A.2d 65, 385 Pa. 110—Appeal of Wagner, Com.Pl., 42 Del.Co. 90—Worri- low v. Bd. of Adjustment of Springfield Tp., 37 Del.Co. 269, 43 Mun.L.R. 118—Taraborrelli v. Lyons, Com.Pl., 37 Del.Co. 90—Cline v. Nether Providence Tp. Board of Adjustment, Com.Pl., 33 Del.Co. 293—Appeal of Mayer, Com.Pl., 3 Lycoming 305—White v. Lower Moreland Tp. Bd. of Adjustment, Com. Pl., 73 Montg.Co. 55—Appeal of Volpi, Com.Pl., 73 Montg.Co. 217, 71 York Leg.Rec. 27—Dachino v. Plymouth Tp., Com.Pl., 70 Montg. Co. 198—Schmitz v. Abington Tp., Com.Pl., 68 Montg.Co. 267—Appeal of Felice, Com.Pl., 66 Montg.Co. 62—Appeal of Ricca, Com.Pl., 68 Montg.Co. 32—In re Application for Certificate of Occupancy, Com.Pl., 32 North.Co. 31.

R.I.—Tripp v. Zoning Bd. of Review

of City of Pawtucket, 123 A.2d 144—R. D'Ordine & Son v. Zoning Bd. of Review of Town of East Providence, 90 A.2d 416, 79 R.I. 489—Sweck v. Zoning Bd. of Review of North Kingstown, 72 A.2d 679, 77 R.I. 8—Garreau v. Board of Review of City of Newport, 63 A.2d 214, 75 R.I. 44—D'Acchioli v. Zoning Bd. of Review of City of Cranston, 60 A.2d 707, 74 R.I. 327.

Tex.—Young v. City of Abilene, Civ. App., 195 S.W.2d 838, refused no reversible error.

Wis.—State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison, 35 N.W.2d 312, 254 Wis. 42.

Action as to other property

Mere fact that variances affecting other property in area had been granted by board of standards and appeals would not entitle property owner whose petition for variance had been denied to order annulling board's determination on ground that it was arbitrary and discriminatory. N.Y.—Rosenberg v. Murdock, 139 N.Y.S.2d 468.

60. Conn.—Del Buono v. Board of Zoning Appeals of Town of Stratford, 124 A.2d 915, 143 Conn. 673—Cohen v. Board of Appeals on Zoning of City of Bridgeport, 94 A.2d 793, 139 Conn. 450—Celentano v. Zoning Bd. of Appeals of City of Hartford, 73 A.2d 101, 136 Conn. 584—Delaney v. Zoning Bd. of Appeals of City of Hartford, 56 A.2d 647, 134 Conn. 240—Devaney v. Board of Zoning Appeals of City of New Haven, 45 A.2d 828, 133 Conn. 537.

Iowa.—Zimmerman v. O'Meara, 245 N.W. 715, 215 Iowa 1140.

N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199.

Lacey v. Zoning Bd. of Adjustment of Hamilton Tp., Mercer County, 67 A.2d 466, 4 N.J.Super. 422—Giordano v. City Commission of City of Newark, 64 A.2d 462, 3 N.J.Super. 45, affirmed 67 A.2d 454, 2 N.J. 585.

N.Y.—Clark v. Board of Zoning Appeals of Town of Hempstead, 92 N. E.2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673.

Woltman v. Murdock, 168 N.Y.S. 2d 572, 8 Misc.2d 960—Sherwood Realty Corp. v. Ferioli, 82 N.Y.S.2d 505, 193 Misc. 194.

Ohio.—Neithamer v. Heyer, 177 N.E. 925, 39 Ohio App. 532.

Pa.—Kovacs v. Board of Adjustment of Ross Tp., 95 A.2d 350, 173 Pa. Super. 66—Appeal of Junge, 89 Pa. Super. 543.

a variance.⁶¹

Matters not properly presented for review. On review of a decision with respect to an application for a variance or exception, the reviewing court will not consider or determine extraneous questions or issues not presented to the board or properly brought up for review.⁶² Where a landowner had

merely sought a temporary permit for a certain use of his property rather than a variance, and the administrative body never rendered a decision on the issue of variance, that issue is not before the court notwithstanding the stipulation of the parties that the court might consider an application for a variance to have been made and denied by the administrative body.⁶³

Frabotta v. Zoning Bd. of Adjustment, 6 Pa. Dist. & Co. 2d 400, 14 Law. L.J. 134—*Straessle v. Philadelphia Zoning Bd. of Adjustment*, 71 Pa. Dist. & Co. 266.

Appeal of Deiter, Com. Pl., 58 Lack. Jur. 85—*Appeal of Bowtich*, Com. Pl., 49 Lack. Jur. 210—*Persing v. Zoning Bd.*, Com. Pl., 24 Le. L. J. 194—*Appeal of Becker*, Com. Pl., 68 York Leg. Rec. 174.

R.I.—*Adams v. Zoning Bd. of Review of City of Providence*, 135 A.2d 357—*Harte v. Zoning Bd. of Review of City of Cranston*, 91 A.2d 33, 80 R.I. 43—*Allan v. Zoning Bd. of Review of City of Warwick*, 89 A.2d 364, 79 R.I. 413—*Abbott v. Zoning Bd. of Review of City of Warwick*, 79 A.2d 620, 78 R.I. 84—*Strauss v. Zoning Bd. of Review of City of Warwick*, 48 A.2d 349, 72 R.I. 107.

61. Cal.—*Saks & Co. v. City of Beverly Hills*, 237 P.2d 32, 107 C.A.2d 260.

Colo.—*Bohn v. Board of Adjustment of City and County of Denver*, 271 P.2d 1051, 129 Colo. 539—*Hedcock v. People ex rel. Arden Realty & Investment Co.*, 57 P.2d 891, 98 Colo. 522.

Md.—*Montgomery County v. Merlands Club, Inc.*, 96 A.2d 261, 202 Md. 279.

N.J.—*Home Fuel Oil Co. of Ridgewood v. Board of Adjustment of Borough of Glen Rock, Bergen County*, 68 A.2d 412, 5 N.J. Super. 63.

Schaible v. Board of Adjustment, 49 A.2d 50, 134 N.J. Law 473—*Lumpkin v. Township Committee of Bernards Tp.*, 48 A.2d 798, 134 N.J. Law 428, motion granted 49 A.2d 236, 134 N.J. Law 531—*Hann v. Borough of Sea Girt*, 46 A.2d 47, 134 N.J. Law 74.

Karam v. Wolfe, 26 A.2d 873, 20 N.J. Misc. 368, affirmed 30 A.2d 286, 129 N.J. Law 441.

N.Y.—*Diocese of Rochester v. Planning Bd. of Town of Brighton*, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y. S.2d 849.

Application of Graham, 165 N.Y. S.2d 154, 7 Misc.2d 34.

Gruen v. Simpson, 153 N.Y.S.2d 287, affirmed 161 N.Y.S.2d 843—*Goldberg v. Mackreth*, 142 N.Y.S.2d 281—*Wuttke v. Kramer*, 140 N.Y.S.2d 214—*Rosenberg v. Murdock*, 139 N.Y.S.2d 468—*Northport Water*

Works Co. v. Carl, 133 N.Y.S.2d 859—*Anderson v. Board of Standards and Appeals*, 82 N.Y.S.2d 206.

Pa.—*Appeal of O'Hara*, 131 A.2d 587, 389 Pa. 35—*In re Blararik*, 100 A.2d 53, 375 Pa. 209—*Appeal of Crawford*, 57 A.2d 862, 353 Pa. 636.

Root v. City of Erie Zoning Bd. of Appeals, 118 A.2d 297, 180 Pa. Super. 38.

First Pa. Banking and Trust Co. v. Zoning Bd. of Adjustment, 6 Pa. Dist. & Co. 2d 688—*Koelle-Greenwood Co. v. Zoning Bd. of Adjustment*, 5 Pa. Dist. & Co. 2d 267—*Levinson v. Power*, 3 Pa. Dist. & Co. 2d 170—*Appeal of North End Fire Company No. 1*, 85 Pa. Dist. & Co. 287, 69 Montg. Co. 46—*Reed v. Borough of North Wales*, 83 Pa. Dist. & Co. 69, 68 Montg. Co. 196—*Sunnybrook Inc. v. Upper Dublin Tp.*, 69 Pa. Dist. & Co. 344, 65 Montg. Co. 233.

Miller v. Zoning Bd. of Middletown Tp., Com. Pl., 2 Bucks Co. 237—*Phillips v. Zoning Bd. of Adjustment*, Com. Pl., 1 Bucks Co. 25—*Aldan Memorial Home Ass'n v. Sauers*, Com. Pl., 44 Del. Co. 125—*Appeal of Associated Contractors, Inc.*, Com. Pl., 44 Del. Co. 105, exceptions dismissed 44 Del. Co. 205—*Appeal of Rolling Green Golf Club*, Com. Pl., 39 Del. Co. 249, affirmed 97 A.2d 523, 374 Pa. 450—*Moyerman v. Zoning Bd. of Adjustment of Clifton Heights*, Com. Pl., 39 Del. Co. 87—*Appeal of Lutz*, Com. Pl., 37 Del. Co. 280—*McConaghy's v. Haverford Tp. Board of Adjustment Ordinance*, Com. Pl., 31 Del. Co. 120—*Plichter v. Cheltenham Tp. Board of Adjustment*, Com. Pl., 72 Montg. Co. 479—*Logan Square, Inc. v. Norristown Borough Bd. of Adjustment*, Com. Pl., 72 Montg. Co. 79—*Benner v. Upper Dublin Tp. Bd. of Adjustment*, 71 Montg. Co. 371, exceptions overruled 6 Pa. Dist. & Co. 2d 10—*Steele v. Lower Moreland Tp.*, Com. Pl., 71 Montg. Co. 156—*Congregation Adath Jeshurun v. Cheltenham Tp.*, Com. Pl., 70 Montg. Co. 345—*Cohen v. Cheltenham Tp.*, Com. Pl., 69 Montg. Co. 299—*Appeal of Janke*, Com. Pl., 69 Montg. Co. 87—*Appeal of YMCA*, Com. Pl., 68 Montg. Co. 175—*Nugent v. Whitmarsh Tp.*, Com. Pl., 68 Montg. Co. 98—*Appeal of Berg*, Com. Pl., 66 Montg. Co. 194—*Appeal of Lindquist*, Com. Pl., 66 Montg. Co. 27, affirmed 73 A.2d 378, 364 Pa. 561—

Carlson v. Abington Tp. Board of Adjustment, Com. Pl., 65 Montg. Co. 242—*Petition of Stott*, Com. Pl., 58 Montg. Co. 372—*Case of Sacred Heart Hospital*, Com. Pl., 58 Montg. Co. 123—*Scherger v. Zoning Bd. of Adjustment of Penn Tp.*, Pa. Co., 103 Pittsb. Leg. J. 397.

R.I.—*Lamothe v. Zoning Bd. of Review of Town of Cumberland*, 98 A.2d 918, 81 R.I. 96.

Incorrect legal premise

Where action of county zoning board of appeals in denying application for exception under county zoning ordinance was based on incorrect legal premise and was unsupported by substantial evidence, if any, action was arbitrary and capricious in a legal sense, and so invalid, and could be set aside by court. Md.—*Montgomery County v. Merlands Club, Inc.*, 96 A.2d 261, 202 Md. 279.

Outdoor sign

Determination of township board of adjustment, denying application by corporation, engaged in business of renting advertising space on outdoor billboards owned by it, for permission to erect two outdoor advertising billboard signs on its lot in business district, was improper as arbitrary and capricious.

N.J.—*United Advertising Corp. v. Board of Adjustment of Maplewood Tp.*, 56 A.2d 406, 136 N.J. Law 336.

62. Conn.—*Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich*, 102 A.2d 316, 140 Conn. 527.

N.H.—*Gelinas v. City of Portsmouth*, 85 A.2d 896, 97 N.H. 248.

N.Y.—*Hickox v. Griffin*, 83 N.E.2d 836, 298 N.Y. 365.

Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County, 60 N.Y.S.2d 750, 271 App. Div. 33.

Unsworn witnesses

Though record in proceeding for review of resolution, whereby Zoning Board of Appeals had granted a variance, disclosed that none of witnesses had been sworn, reviewing court would not pass judgment on omission where issue had not been raised.

N.Y.—*Gilbert v. Stevens*, 135 N.Y.S.2d 357, 284 App. Div. 1016.

63. N.Y.—*Cunningham v. Planning Bd.*, 164 N.Y.S.2d 601, 4 A.D.2d 313.

§ 330. ——— Decisions as to Motor Vehicle Service Stations and Garages

On judicial review of zoning decisions as to motor vehicle service stations and garages, the court will confine its consideration to the legality of the decision, and it will not disturb the action taken unless it is under the circumstances unreasonable, arbitrary, or an abuse of discretion.

On review of a decision with respect to an application for a service station or garage permit or variance, the court may inquire into the legality of the decision;⁶⁴ but the decision appealed from will not be disturbed unless it is under the circumstances unreasonable, arbitrary, or an abuse of discretion.⁶⁵

64. Conn.—Watson v. Howard, 86 A.2d 67, 138 Conn. 464.

65. Ark.—City of Fordyce v. Dunn, 220 S.W.2d 430, 215 Ark. 276.

Cal.—Otis v. City of Los Angeles, 126 P.2d 954, 52 C.A.2d 605.

Conn.—Atlantic Refining Co. v. Zoning Bd. of Appeals of Town of Milford, 111 A.2d 1, 142 Conn. 64—Watson v. Howard, 86 A.2d 67, 138 Conn. 464.

Fla.—Broach v. Young, 100 So.2d 411.

Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

Md.—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

N.H.—Jadda v. Manchester, 121 A.2d 803, 100 N.H. 150.

N.J.—Long v. Scott, 133 A. 767, 4 N.J.Misc. 587.

N.Y.—Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead, 24 N.E.2d 319, 281 N.Y. 534, appeal dismissed 60 S.Ct. 719, 309 U.S. 633, 84 L.Ed. 990—People ex rel. Arsekay Syndicate v. Murdock, 191 N.E. 871, 265 N.Y. 158—People ex rel. Fordham Manor Reformed Church v. Walsh, 155 N.E. 575, 244 N.Y. 280.

Sihek v. Suhm, 132 N.Y.S.2d 596—Hilton v. Board of Appeals of City of Geneva, 18 N.Y.S.2d 213.

Ohio.—Storier v. Hensley, 3 N.E.2d 655, 52 Ohio App. 282.

Tex.—City of San Antonio v. Robert Thompson & Co., Civ.App., 23 S.W.2d 796, case dismissed Robert Thompson & Co. v. City of San Antonio, Com.App., 38 S.W.2d 784.

Location of gasoline station

In appeal from action of board of town selectmen in refusing to grant certificate of approval of location of gasoline station, issue before court was whether board could reasonably conclude that presence of gasoline station at location would unduly imperil safety of public, in view of statute providing that certificate shall not be issued unless it is found that proposed location will not imperil safety of public.

Conn.—Gulf Oil Corp. v. Board of Selectmen of Town of Brookfield, 127 A.2d 48, 144 Conn. 61.

Denial held improper

Conn.—Colonial Beacon Oil Co. v. Zoning Board of Appeals of City of Hartford, 23 A.2d 151, 128 Conn. 351.

N.J.—Lehrer v. Board of Adjustment of City of Newark, 58 A.2d 265, 137 N.J.Law 100.

N.Y.—1525 Myrtle Ave. Realty Co. v. Murdock, 280 N.Y.S. 277, 245 App. Div. 749.

Crone v. Town of Brighton, 119 N.Y.S.2d 877.

Pa.—Petition of Standard Investments Corporation, 19 A.2d 167, 341 Pa. 129.

Appeal of Standard Investments Corporation, 22 Berks Co. 257, affirmed Petition of Standard Investments Corporation, 19 A.2d 167, 341 Pa. 129—Tornetta v. White-marsh, Com.Pl., 65 Montg.Co. 49—Wunderle v. Board of Adjustment of Borough of Hatboro, Com.Pl., 62 Montg.Co. 231.

Denial held not improper

Conn.—Gulf Oil Corp. v. Board of Selectmen of Town of Brookfield, 127 A.2d 48, 144 Conn. 61—Mrowka v. Board of Zoning Appeals of Town of Plainville, 55 A.2d 909, 134 Conn. 149.

Md.—Hoffman v. Mayor and City Council of Baltimore, 51 A.2d 269, 187 Md. 593—Engle v. City's Com'rs of Cambridge, 22 A.2d 922, 180 Md. 82—Kramer v. Mayor and City Council of Baltimore, 171 A. 70, 166 Md. 324.

Mich.—Austin v. Older, 278 N.W. 727, 283 Mich. 667.

N.J.—Verniero v. Board of Com'rs of City of Passaic, 45 A.2d 890, 134 N.J.Law 71—Coriell v. Borough of Dunellen, 4 A.2d 396, 122 N.J.Law 172, affirmed 8 A.2d 576, 123 N.J.Law 264—Aschenbach v. Inhabitants of City of Plainfield, 3 A.2d 814, 121 N.J.Law 598, affirmed 8 A.2d 579, 123 N.J.Law 265—Franklin Sav. Institution of Newark v. City of Newark, 3 A.2d 801, 121 N.J.Law 595—Vogel v. Board of Adjustment of Bridgewater Tp., 2 A.2d 189, 121 N.J.Law 236—Phillips Oil Co. v. Municipal Council of City of Clifton, 197 A. 730, 120 N.J.Law 13—Amon v. City of Rahway, 190 A. 506, 117 N.J.Law 589.

Essex Inv. Co. v. Board of Com'rs of City of Newark, 183 A. 478, 14 N.J.Misc. 181.

N.Y.—Goldenberg v. Walsh, 152 N.E. 434, 242 N.Y. 576.

Joyce v. Dobson, 8 N.Y.S.2d 768, 255 App.Div. 348—Dunne v. Walsh, 256 N.Y.S. 119, 235 App.Div. 72—Richardson v. Knapp, 237 N.Y.S. 589, 227 App.Div. 207.

Olp v. Town of Brighton, 19 N.Y.S.2d 546, 173 Misc. 1079, affirmed 29 N.Y.S.2d 956, 262 App.Div. 944.

Hilton v. Board of Appeals of City of Geneva, 18 N.Y.S.2d 213.

Pa.—Fleming v. Board of Adjustment of Borough of Prospect Park, 178 A. 813, 318 Pa. 582.

Appeal of Zimmerman, Com.Pl., 44 Del.Co. 42—Appeal of Atlantic Refining Co., Com.Pl., 66 York Leg. Rec. 81.

R.I.—Ricci v. Zoning Board of Review of City of Cranston, 47 A.2d 923, 72 R.I. 58—Roberts v. Zoning Board of Review of City of Pawtucket, 197 A. 461, 60 R.I. 202.

Tenn.—Collier v. City of Memphis, 176 S.W.2d 818, 180 Tenn. 509.

Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

Grant held improper

A decision of the board of zoning appeals in issuing a permit for the erection of a gas station in a business district must be reversed where the board went outside of the record of the hearing to obtain information which was relied upon in reaching its decision and where in doing so they were not acting on their own knowledge or conducting their own survey but were acquiring information which did not appear in the record. N.Y.—Russo v. Stevens, 173 N.Y.S.2d 344, 10 Misc.2d 530.

Grant held not improper

(1) In general.

Iowa.—Scott v. City of Waterloo, 274 N.W. 897, 223 Iowa 1169.

Md.—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

N.Y.—Allen v. Ferish, 149 N.Y.S.2d 798, 1 A.D.2d 918—Sima v. Board of Standards & Appeals of New York City, 104 N.Y.S.2d 19, 278 App.Div. 785—Application of Douglaston Civic Ass'n v. Board of Standards and Appeals of City of New York, 103 N.Y.S.2d 582, 278 App.Div. 659, affirmed 100 N.E.2d 187, 302 N.Y. 920.

Brainard v. Board of Standards and Appeals of City of New York, 150 N.Y.S.2d 756, 2 Misc.2d 27.

(2) Where one of two grounds relied on was sufficient to sustain refusal of local board to grant certificate of approval of proposed site of gasoline station, alleged insufficiency of second ground could not invalidate decision.

The appeal ordinarily does not involve a transfer of original jurisdiction to the court so as to enable it to pass on the application,⁶⁶ and the court may not substitute its judgment or discretion for that of the board,⁶⁷ although it may direct the board to issue the permit or certificate where the only reasonable conclusion from the record and all the facts of the case is that applicant is entitled to it.⁶⁸ However, it has been stated broadly that courts are disinclined to permit a board of appeals to grant a variance so as to permit the erection of a service station in a prohibited district.⁶⁹

The court will not consider procedural objections which should have, but were not, raised before the board of appeals.⁷⁰ Whether or not a proposed garage comes within a provision permitting certain garages to be constructed or used as accessory buildings is a question for the court to determine in view of the facts proved in the case.⁷¹ On appeal from denial of a permit for insufficiency of affirmative votes of members of the board, the question before the court is not whether there was substantial evidence to support a minority finding against granting the permit, but whether there was a reasonable basis in fact to support refusal of the permit as an exercise of police power.⁷² Hav-

ing invoked a zoning provision as the basis for his application for the permit, applicant cannot on appeal from denial of his application urge the inapplicability of such provision to the proposed filling station or garage.⁷³ On review of an order revoking a permit, the permittee cannot urge his right to a variance, particularly where the revocation was expressly stated to be without prejudice to the right to apply for a variance.⁷⁴

§ 331. — Fact Questions; Trial de Novo

- a. In general
- b. Trial de novo and consideration of additional evidence

a. In General

Unless otherwise provided by constitutional or statutory provision, review of a determination and proceeding of zoning authorities is confined to matters of law, and the determination of facts by the zoning body ordinarily is conclusive where supported by sufficient evidence.

As a general rule, unless otherwise provided by constitutional or statutory provision, review of a determination and proceeding of zoning authorities is confined to matters of law, and the determination of facts by the zoning body ordinarily is conclusive.⁷⁵ Consequently, it has been held that the re-

Conn.—Atlantic Refining Co. v. Zoning Bd. of Appeals of Town of Milford, 111 A.2d 1, 142 Conn. 64.

Divided vote

Where concurring vote of four out of five members of board of zoning appeals was necessary to grant permit to construct gasoline filling station and board was precluded, by a two to three vote, from acting as a fact-finding body, question before court on review was not whether there was substantial evidence before board to support a minority finding against granting of permit but whether there was a reasonable basis in fact to support refusal as an exercise of police power.

Md.—Mayor and Council of City of Baltimore v. Biermann, 50 A.2d 804, 187 Md. 514.

66. Conn.—Colonial Beacon Oil Co. v. Zoning Board of Appeals of City of Hartford, 23 A.2d 151, 128 Conn. 351.

67. Conn.—Mrowka v. Board of Zoning Appeals of Town of Plainville, 55 A.2d 909, 134 Conn. 149—Colonial Beacon Oil Co. v. Zoning Board of Appeals of City of Hartford, 23 A.2d 151, 128 Conn. 351.

Md.—Mayor and Council of City of Baltimore v. Biermann, 50 A.2d 804, 187 Md. 514.

N.J.—Phillips v. City of Paterson, 66 A.2d 65, 3 N.J.Super. 281.

N.Y.—People ex rel. Sullivan v. Mc-

Laughlin, 195 N.E. 181, 266 N.Y. 519.

Conwall Realty Corp. v. Murdock, 138 N.Y.S.2d 195, 285 App.Div. 951—Cirruto v. Board of Standards and Appeals of City of New York, 280 N.Y.S. 606, 245 App.Div. 762, affirmed 200 N.E. 289, 270 N.Y. 499.

Turner v. Cook, 168 N.Y.S.2d 556, 9 Misc.2d 850—Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325.

In re Cosden, 64 N.Y.S.2d 37, affirmed 63 N.Y.S.2d 640, 270 App. Div. 1018.

Weight of evidence

Weight to be given testimony on hearing of application for permission to erect a gasoline filling station in a residential district was for zoning board of review.

R.I.—Roberts v. Zoning Board of Review of City of Pawtucket, 197 A. 461, 60 R.I. 202.

68. Conn.—Colonial Beacon Oil Co. v. Zoning Board of Appeals of City of Hartford, 23 A.2d 151, 128 Conn. 351.

69. N.Y.—Joyce v. Dobson, 8 N.Y.S. 2d 768, 255 App.Div. 348.

70. N.Y.—Esdora Realty Corporation v. Walsh, 240 N.Y.S. 792, 136 Misc. 476, reversed on other grounds 243 N.Y.S. 810, 229 App. Div. 866, affirmed 173 N.E. 883, 254 N.Y. 600.

71. Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

72. Md.—Mayor and Council of City of Baltimore v. Biermann, 50 A.2d 804, 187 Md. 514.

73. N.Y.—F. & L. Bldg. Corp. v. Murdock, 65 N.Y.S.2d 646, 271 App. Div. 830.

74. N.Y.—Tralow Realty Corporation v. Murdock, 24 N.Y.S.2d 561, 261 App.Div. 173.

75. N.Y.—Village of Bronxville v. Francis, 150 N.Y.S.2d 906, 1 A.D.2d 236, affirmed 135 N.E.2d 724, 1 N.Y. 2d 839, 153 N.Y.S.2d 220.

Ohio.—State ex rel. Anshe Chased Congregation v. Bruggemeier, 115 N.E.2d 65, 97 Ohio App. 67.

Wash.—State ex rel. Wenatchee Congregation of Jehovah's Witnesses, 312 P.2d 195, 50 Wash.2d 378.

Nature and use of premises

Questions of fact relating to nature and use of premises are primarily within province of administrative officials and boards appointed to enforce provisions of zoning laws.

Pa.—Appeal of Hasley, 30 A.2d 187, 151 Pa.Super. 192—Appeal of Krinks, 194 A. 231, 128 Pa.Super. 405, affirmed 2 A.2d 700, 332 Pa. 236.

Application of Shade, Pa.Com.Pl., 30 Erie Co. 252—Appeal of Weldon Bocci Club, Pa., Com.Pl., 60 Montg. Co. 277—Appeal of Continental Mo-

viewing court will not weigh the evidence,⁷⁶ and the board's decision on conflicting evidence as to a question of fact will not be disturbed⁷⁷ but will be given the same effect as the verdict of a jury on contested facts.⁷⁸ So, the findings and determination of the zoning body will not be disturbed where the record shows substantial evidence to sustain them,⁷⁹ and the court will determine only whether there was sufficient evidence to support the decision.⁸⁰ Where there is sufficient evidence

to support the finding of the board, the court will not hold the board's action arbitrary,⁸¹ or substitute its judgment for that of the board.⁸²

The court is authorized, however, to decide whether the board reasonably could have made its findings and reached its result on a consideration of all the evidence before it,⁸³ and the conclusions reached may be reviewed to determine whether they have reasonable support in the evidence.⁸⁴ The court will

tor Sales, Pa.Com.Pl., 31 North.Co. 250.

76. Ind.—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 117 Ind.App. 314.

Mo.—McKinney v. Board of Zoning Adjustment of Kansas City, App., 308 S.W.2d 320—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

N.Y.—Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S. 2d 358.

R.I.—Sweck v. Zoning Bd. of Review of North Kingstown, 72 A.2d 679, 77 R.I. 8.

Discretion

Circuit court cannot substitute its own discretion in weighing evidence for discretion of board of adjustment in relation to zoning ordinances, and order of board cannot be set aside solely because court considers evidence in different light, unless action of board is clearly contrary to overwhelming weight of evidence. Mo.—Cunningham v. Leimkuehler, App., 276 S.W.2d 633.

Reasonable evidence

On appeal from decision of board of zoning appeals of city, court of common pleas was not authorized to substitute its finding and conclusion for that of board, where there was evidence before board, on which it could reasonably act.

Conn.—Koslow v. Board of Zoning Appeals of City of New Haven, 112 A.2d 513, 19 Conn.Sup. 303.

77. Cal.—City of South Pasadena v. City of San Gabriel, 25 P.2d 516, 134 C.A. 403, certiorari denied 54 S.Ct. 642, 292 U.S. 602, 78 L.Ed. 1465.

Md.—Hoffman v. Mayor and City Council of Baltimore, 51 A.2d 269, 187 Md. 593.

N.Y.—Joynt v. Zoning Bd. of Appeals of Town of Cicero, 171 N.Y.S.2d 3, 9 Misc.2d 762.

Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S. 2d 358.

Pa.—Appeal of Houlden, Com.Pl., 86 Pittsh.Leg.J. 115.

R.I.—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A.2d 478, 74 R.I. 311.

Wash.—State v. Johnson, 186 P. 671, 109 Wash. 214.

Deemed lawful and reasonable

In proceeding by storekeeper to obtain zoning map amendment by mayor and city council so that storekeeper could operate store in certain house, council's findings on all questions of fact properly before it would be deemed prima facie lawful and reasonable.

N.H.—City of Keene v. Parenteau, 112 A.2d 667, 99 N.H. 415.

78. Pa.—Benner v. Zoning Bd. of Adjustment, 6 Pa.Dist. & Co.2d 10.

Wash.—State v. Johnson, 186 P. 671, 109 Wash. 214.

79. Cal.—Jackson v. City of San Mateo, 307 P.2d 451, 148 C.A.2d 667.

Ind.—Board of Zoning Appeals of City of Mishawaka v. School City of Mishawaka, 145 N.E.2d 302.

Md.—Erdman v. Board of Zoning Appeals of Baltimore County, 129 A.2d 124, 212 Md. 288—Serie v. Mayor and City Council of Baltimore, 119 A.2d 387, 208 Md. 545—Aaron v. City of Baltimore, 114 A.2d 639, 207 Md. 401—Board of Zoning Appeals of Howard County v. Meyer, 114 A.2d 626, 207 Md. 389—Oursler v. Board of Zoning Appeals of Baltimore County, 104 A.2d 568, 204 Md. 397—Hoffman v. Mayor and City Council of Baltimore, 51 A.2d 269, 187 Md. 593.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.

N.J.—Kuwowski v. Board of Adjustment of City of Bayonne, 78 A.2d 429, 11 N.J.Super. 433.

N.Y.—Application of Jonas, 158 N.Y.S.2d 579, 3 A.D.2d 668.

O'Beirne v. Koehler, 83 N.Y.S.2d 140, 193 Misc. 101.

Fox v. Adams, 134 N.Y.S.2d 534.

Pa.—Brodsky v. McShain, 71 Pa.Dist. & Co. 595—Benner v. Zoning Bd. of Adjustment, 6 Pa.Dist. & Co.2d 10—Steppier v. Bd. of Adjustment of Radnor Tp., 5 Pa.Dist. & Co.2d 8, 42 Del.Co. 341.

80. Conn.—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 114 Conn. 15—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

Del.—Searles v. Darling, 83 A.2d 96, 7 Terry 263.

Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827. N.Y.—Magde v. Crowley, 102 N.Y.S. 2d 271, 200 Misc. 109.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107.

Pa.—Freed v. Power, 139 A.2d 661, 392 Pa. 195.

Claim of hardship

In proceeding to review determination of town board of appeals which denied petitioners' application for zoning variance, duty of court was to review proceedings and determine whether or not board acted properly on facts before it, and court could not permit petitioners to by-pass board and present facts in support of claim of hardship to court in first instance.

N.Y.—Teschner v. Town of Pittsford, 129 N.Y.S.2d 803, affirmed 137 N.Y.S.2d 640, 285 App.Div. 851.

Evidence held sufficient

N.J.—National House & Farms Ass'n v. Board of Adjustment of Borough of Oakland, 65 A.2d 518, 2 N.J. 11.

Pa.—Benner v. Zoning Bd. of Adjustment, 6 Pa.Dist. & Co.2d 10.

Evidence held insufficient

N.J.—Moriarty v. Pozner, 121 A.2d 527, 21 N.J. 199.

N.Y.—Lapham v. Roulan, 169 N.Y.S. 2d 346.

81. N.Y.—Astor Village Taxpayers v. Board of Standards and Appeals of City of New York, 134 N.Y.S.2d 5.

82. N.Y.—O'Beirne v. Koehler, 83 N.Y.S.2d 140, 193 Misc. 101.

83. Mo.—McKinney v. Board of Zoning Adjustment of Kansas City, App., 308 S.W.2d 320—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

84. Conn.—Sipperley v. Board of Appeals on Zoning Town of Westport, 98 A.2d 907, 110 Conn. 164—Wadell v. Board of Zoning Appeals of City of New Haven, 68 A.2d 152, 136 Conn. 1.

Mo.—McKinney v. Board of Zoning Adjustment of Kansas City, App., 308 S.W.2d 320.

Minimum standard for review

Provisions of statute and zoning ordinance limiting judicial review by

examine the record for this purpose.⁸⁵ On the other hand, a finding not supported by evidence will be considered arbitrary and will not be sustained,⁸⁶ and the court may set aside decisions not supported by substantial evidence,⁸⁷ or clearly contrary to the overwhelming weight of the evidence.⁸⁸ The court cannot adopt findings not supported by evidence heard and appearing only in the written decision of the board.⁸⁹ The court does not review the personal opinions or knowledge of members of the zoning body, and the question whether the action of the zoning body is arbitrary must be determined from the facts from which the zoning body drew its conclusion, and not from the conclusion itself.⁹⁰

Some statutes providing for an appeal from a zoning board contemplate a review of facts as well as law, and the parties are not restricted to an ap-

peal only on the ground that the zoning order is illegal.⁹¹

b. Trial de Novo and Consideration of Additional Evidence

Generally, the review of the action or proceedings of a zoning body is confined to the record made at the hearing before such body, and the court will not try the case de novo; but under some statutes, the taking and consideration of additional evidence, or a trial de novo, may be proper or necessary and the court may make such decision as under the evidence and applicable principles of law is just and proper.

Generally, the review of the action or proceedings of a zoning body is confined to the record made at the hearing before such body, and the legality of the action taken below must be determined solely by what was adduced at the hearing and not by matters outside the record.⁹² Ordinarily the case will not be tried de novo,⁹³ and it has been held that the

circuit court of orders of city board of adjustment to correction of illegalities must be read in light of minimum standard for review provided by constitution requiring that review of all final decisions of any administrative body in which a hearing is required include determination whether such decisions are supported by competent and substantial evidence on whole record.

Mo.—*Veal v. Leimkuehler*, App., 249 S.W.2d 491, certiorari denied 73 S. Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

85. N.J.—*Marrocco v. Board of Adjustment of City of Passaic*, 68 A.2d 470, 5 N.J.Super. 94.

Grant of variance

In proceeding for review of a determination of town zoning board of appeals granting a variance, in deciding whether petitioners met burden of showing action of board was arbitrary, court would consider answers of board and landowner, copy of map submitted to board showing buildings on owner's property and proposed additions thereto, as a necessary part of record.

N.Y.—*Gerling v. Board of Zoning Appeals of Town of Clay*, 167 N.Y.S.2d 358.

86. N.Y.—*Community Synagogue v. Bates*, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15.

No rational basis for finding

If it should be made to appear that the evidence on which board of zoning appeals acted was devoid of probative value, that quantum of legitimate evidence was so proportionately meager as to lead to the conviction that finding does not rest on a rational basis, or that result of hearing must have been substantially influenced by improper considerations, order will be set aside.

Ind.—*Board of Zoning Appeals of*

City of Mishawaka v. School City of Mishawaka, 145 N.E.2d 302.

87. Md.—*Aaron v. City of Baltimore*, 114 A.2d 639, 207 Md. 401.

N.Y.—*Lathrop v. Feriola*, 101 N.Y.S.2d 161, 277 App.Div. 1131.

Pa.—*Brodsky v. McShain*, 71 Pa.Dist. & Co. 595.

88. Mo.—*McKinney v. Board of Zoning Adjustment of Kansas City*, App., 308 S.W.2d 320—*Veal v. Leimkuehler*, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

N.J.—*Lehrer v. Board of Adjustment of City of Newark*, 58 A.2d 265, 137 N.J.Law 100.

89. Mass.—*Devine v. Zoning Bd. of Appeals of Lynn*, 125 N.E.2d 131, 322 Mass. 319.

90. Md.—*Price v. Cohen*, 132 A.2d 125, 213 Md. 457—*Hardesty v. Board of Zoning Appeals of Baltimore County*, 126 A.2d 621, 211 Md. 172—*Hedin v. Board of County Com'rs of Prince Georges County*, 120 A.2d 663, 209 Md. 224—*Oursler v. Board of Zoning Appeals of Baltimore County*, 104 A.2d 568, 204 Md. 397.

Action of commissioners

In zoning matters, courts review action, not opinion, of commissioners.

Md.—*Temmink v. Board of Zoning Appeals of Baltimore County*, 109 A.2d 85, 205 Md. 489—*American Oil Co. v. Miller*, 102 A.2d 727, 204 Md. 32—*Zang & Sons, Builders, Inc. v. Taylor*, 102 A.2d 723, 203 Md. 628.

91. Neb.—*Frank v. Russell*, 70 N.W.2d 306, 160 Neb. 354.

92. D.C.—*O'Boyle v. Coe*, D.C., 155 F. Supp. 581.

N.J.—*Tomko v. Vissers*, 121 A.2d 502, 21 N.J. 226.

Izenberg v. Board of Adjustment

of City of Paterson, 114 A.2d 732, 35 N.J.Super. 583.

Minutes of hearing

Where minutes of board of adjustment concerning hearing on application for zoning variance purported to be a full recital of substance of proceedings, including testimony of witnesses, they were entitled to presumption of regularity and completeness on their face, and reviewing court took record as it found it.

N.J.—*Izenberg v. Board of Adjustment of City of Paterson*, supra.

93. Conn.—*Suffield Heights Corp. v. Town Planning Commission of Town of Manchester*, 133 A.2d 612, 144 Conn. 425.

Ind.—*Keeling v. Board of Zoning Appeals of City of Indianapolis*, 69 N.E.2d 613, 117 Ind.App. 314.

Ohio.—*A. Dicillo & Sons v. Chester Zoning Bd. of Appeals*, Com.Pl., 98 N.E.2d 352.

Wash.—*State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 312 P.2d 195, 50 Wash.2d 378.

Limited function of court

On appeal from decision of board of zoning appeals, court of common pleas was not required or permitted, by trial de novo, to substitute its finding and conclusion for decision of board, and functions of court were limited to determination of whether board had acted arbitrarily, illegally, or unreasonably so as to have abused its discretion.

Conn.—*Talmadge v. Board of Zoning Appeals of City of New Haven*, 109 A.2d 253, 141 Conn. 639.

Application for exception

Where question whether an application for an exception to zoning ordinance should be granted was committed to sound discretion of

court is limited in its review of the case to the evidence heard by the board, as certified by the board to it.⁹⁴ So, an action to set aside a zoning order does not involve a trial de novo or an appeal on the merits, and the only matter which may be considered is whether the zoning order is unconstitutional.⁹⁵ Where review of the board's decision is sought on the ground that the ordinance under which it acted was invalid for alleged failure to publish a use map, and evidence in the record is unsatisfactory with respect to supporting this contention, the court is not authorized to hear evidence concerning publication of the ordinance for the purpose of supplying the deficiencies in the record, but the deficiencies should be corrected by remanding the matter to the board for further hearing.⁹⁶

Under some statutes, however, on direct review of the action of zoning authorities, the court hears the matter de novo, expressly determines the facts, and rules on the legal validity of the administrative

decision in the light of facts found by the court.⁹⁷ So, under a statute providing for hearings de novo by the court on review of a zoning regulation, the test in the court is not whether the administrative decision finds reasonable support in substantial evidence, but whether or not the court acting as a fact finding body, from consideration of all the evidence heard, is of the opinion that the evidence preponderates against the decision of the commission.⁹⁸ Under other statutes, the court may not try the case de novo in the sense that the court may substitute its discretion for that of the zoning board, but the case may be tried de novo for the purpose of determining whether the order of the board is illegal and whether there has been a manifest abuse of discretion.⁹⁹

While it is sometimes provided that the appeal be tried de novo on the record,¹ under other statutes, the taking and consideration of additional evidence may be proper or necessary,² and the court may

board of zoning adjustment, federal court could not substitute its own judgment for that of board and in an action to set aside an order of board denying an exception could not adjudicate matter de novo.

D.C.—O'Boyle v. Coe, D.C., 155 F. Supp. 581.

94. Ky.—Bosworth v. City of Lexington, 125 S.W.2d 995, 277 Ky. 90.

95. D.C.—American University v. Prentiss, D.C., 113 F.Supp. 389, affirmed Prentiss v. American University, 214 F.2d 282, 94 U.S.App. D.C. 204, certiorari denied Wrather v. American University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Ohio.—A. DiCillo & Sons v. Chester Zoning Bd. of Appeals, Com.Pl., 103 N.E.2d 44, motion to certify dismissed 109 N.E.2d 8, 158 Ohio St. 302—Hardy v. Horst, Com.Pl., 101 N.E.2d 398.

96. Ill.—Rock Island Metal Foundry v. City of Rock Island, 111 N.E.2d 499, 414 Ill. 436.

97. Ala.—White v. Board of Adjustment of City of Birmingham, 15 So.2d 585, 245 Ala. 48.

Fla.—Josephson v. Autrey, 96 So.2d 784.

Ky.—City of Louisville v. Bryan S. McCoy, Inc., 286 S.W.2d 546—Hill v. Kesselring, 220 S.W.2d 858, 310 Ky. 483, 10 A.L.R.2d 1301—Willingby v. Tafel, 190 S.W.2d 475, 300 Ky. 792.

Mass.—McHugh v. Board of Zoning Adjustment of Boston, 147 N.E.2d 761—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378—Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198, 334 Mass. 446—Devine v. Zoning Bd. of Appeals of Lynn, 125 N.E.2d 131,

322 Mass. 319—Bicknell Realty Co. v. Board of Appeal of Boston, 116 N.E.2d 570, 330 Mass. 676—Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston, 101 N.E.2d 888, 328 Mass. 103.

N.H.—Vogel v. Board of Adjustment for City of Manchester, 27 A.2d 105, 92 N.H. 195.

Okl.—Appeal of Fred Jones Co., 220 P.2d 245, 203 Okl. 321.

Trial before reviewing court generally see *infra* § 366.

Action held one for trial de novo

An action brought in district court by timely filing of aggrieved person's petition stating that decision of metropolitan city's zoning board of appeals, permitting erection of store building over entire length of certain lots in zoned second commercial district, is illegal on specified grounds, and seeking decree declaring board's action null and void, is one for trial de novo within limitations of pleadings and evidence taken before court, and constitutes attack on board's action as not within scope of its authority under city's home rule charter or as illegal.

Neb.—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

Similar findings

Where trial court, on appeal from decision of zoning board of appeals granting variance in making findings, which were in substance same as made by board of appeals, made it clear that only facts on which it based decree were those stated in board's decision, although decision had not been admitted for any wider purpose than showing conclusion reached by board, court failed to grant independent determination of fact required under rules, and its de-

cree could not be validated on any theory that findings were voluntary and not a report under statute.

Mass.—Marotta v. Board of Appeals of Revere, 143 N.E.2d 270.

Right not denied

Where trial court heard witnesses and made findings and rulings on evidence, and ruled that he did not act under misapprehension that plaintiff was not entitled to a trial de novo, on plaintiff's appeal from zoning board of adjustment decision denying petition for variance from zoning ordinance, plaintiff was not denied a trial de novo.

N.H.—Mater v. City of Dover, 79 A.2d 844, 97 N.H. 13.

Granting of exception

On appeal from a decision of city government granting a prayer for an exception to a zoning ordinance so as to permit erection of funeral homes in general residential districts, case is to be heard anew and superior court is authorized to substitute its judgment for that of city government if facts warrant it.

N.H.—Scott v. Davis, 45 A.2d 654, 94 N.H. 35.

98. Ky.—Louisville and Jefferson County Planning and Zoning Commission v. Grady, 273 S.W.2d 563.

99. Mo.—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

1. Neb.—Peterson v. Vasak, 76 N.W.2d 420, 163 Neb. 498.

2. D.C.—American University v. Prentiss, 113 F.Supp. 389, affirmed Prentiss v. American University, 214 F.2d 382, 94 U.S.App.D.C. 204, certiorari denied Wrather v. Amer-

have power to hear evidence and make such decision as under the evidence and applicable principles of law is just and proper.³ Under some statutes, the court renders a determination on a combined record of the zoning board and the court, which is the result of neither a trial de novo nor of a mere review and inspection of the board's acts, and the court tests the discretion of the board and the

foundation of fact for its action not only by what was before the board but also by the supplemental evidence before the court.⁴

Under a statute expressly providing that the court may hear additional evidence if it appears necessary for the proper disposition of the matter, the court is not required to accept any proffer of testimony but is allowed some latitude in passing thereon.⁵

ican University, 75 S.Ct. 217, 348 U.S. 898, 99 L.Ed. 705.

Ky.—Hill v. Kesselring, 220 S.W.2d 858, 310 Ky. 483, 10 A.L.R.2d 1301. Neb.—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

N.J.—Dolan v. De Capua, 109 A.2d 615, 16 N.J. 599.

N.Y.—Gscheidle v. Murdock, 111 N.Y.S.2d 740, 280 App.Div. 74.

Theodore Gompers, Inc., v. Craft, 87 N.Y.S.2d 670, 194 Misc. 779.

Gazan v. Corbett, 100 N.Y.S.2d 429, reversed on other grounds 105 N.Y.S.2d 187, 278 App.Div. 953, affirmed 110 N.E.2d 739, 304 N.Y. 920, reargument denied 112 N.E.2d 775, 305 N.Y. 693, certiorari denied 74 S.Ct. 38, 346 U.S. 822, 98 L.Ed. 348.

Pa.—Appeal of Becker, Com.Pl., 68 York Leg.Rec. 174.

Admissibility of evidence generally see *infra* § 364.

Purpose of statute

Purpose of statutory amendment permitting additional evidence on appeal from action of zoning commissions is to allow relevant evidence in order to assist the court in evaluating action of the commission where record is incomplete.

Conn.—Village Builders, Inc. v. Town Plan and Zoning Commission of the Town of Farmington, 140 A.2d 477.

On motion for new trial

Where trial court reversed action and decision of city zoning board of appeals in granting variance under zoning ordinance and board filed petition for rehearing or in alternative for leave to file certified copy of proceedings of city council referring petition for variance to board, same to be part of evidence in record, as case was one of public importance, regardless of who had burden of proof on question and regardless of technical formalities or informalities, in due and speedy administration of justice, trial court in passing on board's motion for a new trial should have admitted in evidence and taken into consideration offered proof.

Ill.—Rector v. Board of Appeals Under Zoning Ordinance of City of Danville, 95 N.E.2d 99, 342 Ill.App. 51.

Discretion of court

(1) On appeal from action of town plan and zoning commission in chang-

ing zone of plaintiff's land, permitting plaintiff to introduce in evidence a topographic map and testimony of two expert witnesses was within discretion of trial court, notwithstanding such evidence had not been introduced before commission.

Conn.—Village Builders, Inc. v. Town Plan and Zoning Commission of the Town of Farmington, 140 A.2d 477.

(2) Where on an appeal from zoning board of appeals record was incomplete court properly took additional evidence to determine what facts and considerations were presumptively in the minds of board when they acted and on such evidence so taken court properly made a finding.

Conn.—Schultz v. Zoning Bd. of Appeals of Town of Berlin, 130 A.2d 789, 144 Conn. 332.

3. Mass.—Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198, 334 Mass. 446—Pendergast v. Board of Appeals of Barnstable, 120 N.E.2d 916, 331 Mass. 555.

Pa.—Pincus v. Power, 101 A.2d 914, 376 Pa. 175—Appeal of Rolling Green Golf Club, 97 A.2d 523, 374 Pa. 450.

Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A.2d 292, 180 Pa.Super. 105.

Schuster v. Board of Zoning Appeals of City of Scranton, Com.Pl., 52 Lack.Jur. 1—Appeal of Berg, Com.Pl., 66 Montg.Co. 194—Appeal of Continental Motor Sales, Com.Pl., 31 North.Co. 250.

Necessity of making findings of fact see *infra* § 366.

Reference

In proceeding to review determination of town zoning board of appeals, granting corporation a variance from town building zone ordinance to permit construction and use of swimming pool on corporation land in one-family residential district, record presented fact issues which could not be decided summarily on mere statements, affidavits not subject to impeachment, and exhibits, but necessitated testimony for proper disposition of matter, so as to require reference of case by supreme court to official referee to hear and report his fact findings and conclusions of law consistent with opinion of court.

N.Y.—Innet v. Liberman, 155 N.Y.S. 2d 383.

4. N.Y.—Theodore Gompers, Inc., v. Craft, 87 N.Y.S.2d 670, 194 Misc. 779.

Bear Ridge Lake Corp. v. Gilchrist, 104 N.Y.S.2d 911.

Tex.—City of San Angelo v. Boehme Bakery, 190 S.W.2d 67, 144 Tex. 281.

Rowton v. Alagood, Civ.App., 250 S.W.2d 264.

Necessity of hearing

Determination as to whether town board's action in denying permission to use property zoned in an industrial district as an open-air, drive-in theater was unconstitutional, capricious, or arbitrary should not be made until after a hearing at which all pertinent facts may be adduced and order dismissing petition to review such denial was reversed.

N.Y.—Lerner v. Young, 146 N.Y.S. 2d 284, 286 App.Div. 1109, appeal denied 148 N.Y.S.2d 460.

5. Md.—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 Md. 623.

Discretion held not abused

(1) In general.

Conn.—Devaney v. Board of Zoning Appeals of City of New Haven, 132 A.2d 303, 143 Conn. 322.

(2) In proceeding by owner of land across street to have land involved declared in second residential district without nonconforming use under zoning ordinance, where all parties interested, and their attorneys, appeared before board of adjustment and were given an opportunity to be fully heard, trial judge's refusal on review to permit landowner to introduce testimony was not an abuse of discretion.

Tex.—Rowton v. Alagood, Civ.App., 250 S.W.2d 264.

Variance

Although record of proceedings by zoning board of adjustment was barren of any evidence to prove unnecessary hardship and to justify grant of a variance, court of common pleas, on appeal from board order revoking variance, could affirm order of revocation without taking testimony.

Pa.—Silverco, Inc. v. Zoning Bd. of Adjustment and Dept. of Licenses

According to some authority only when the record fails to present the zoning hearing in sufficient scope to determine the merits of the appeal, or when some extraordinary reason requires it, should the court hear evidence.⁶ Before the court takes evidence, it should first be informed as to the evidence already taken by the board and findings that the board made on the basis of such evidence.⁷ The court may refuse to hear evidence supplemental to that offered to the zoning board on the original application where the matter is essentially one for administrative determination and the facts in support of petitioner's claim should have been presented to the board.⁸

On a review de novo, while the board's decision has no evidentiary weight with respect to facts relevant to test it,⁹ the decision is necessarily examined to determine what it is that the board purported to do;¹⁰ and an adjudication of the court on appeal that the decision of the board of zoning adjustment to rezone is valid cannot be based on the newly found facts of the court materially at variance with those found by the board, since the discretionary power to zone or rezone is entrusted to the board and not the court.¹¹ It has been held that the decision of the court must be based on the same con-

siderations as the decision of the board.¹² According to some authority, where the court takes additional testimony on appeal from a decision of the board, it is the duty of the court to determine the case on its merits rather than on the issue of whether the board committed a manifest abuse of discretion;¹³ and the finding of the court, if it hears testimony, should be confined to facts established by evidence offered to it.¹⁴ Where it does not appear on an appeal what conclusions were reached by the board which rendered the decision, the court must determine the facts and assume that the board had such facts before it,¹⁵ and such findings of fact by the court are conclusive.¹⁶

§ 332. Record

Every part of the record before the zoning body which is necessary to a review of its decision must be made a part of the record brought before the court, and matters which are to be presented for consideration by the court must be made to appear in the record.

As a general rule, every part of the record before the zoning body which is necessary to a review of its decision must be made a part of the record brought before the court, and matters which are to be presented for consideration by the court must be made to appear in the record.¹⁷ The rec-

and Inspection, City of Philadelphia, 109 A.2d 147, 379 Pa. 497.

6. Conn.—*Beech v. Planning and Zoning Commission of Town of Milford*, 103 A.2d 814, 141 Conn. 79.

N.Y.—*Bear Ridge Lake Corp. v. Gilchrist*, 104 N.Y.S.2d 911.

7. N.Y.—*Application of Furlong*, 111 N.Y.S.2d 398.

8. N.Y.—*Application of Graham*, 158 N.Y.S.2d 97, 7 Misc.2d 30, petition dismissed 165 N.Y.S.2d 154, 7 Misc.2d 34.

Teschner v. Town of Pittsford, 129 N.Y.S.2d 803, affirmed 137 N.Y.S.2d 640, 285 App.Div. 851.

9. Mass.—*McHugh v. Board of Zoning Adjustment of Boston*, 147 N.E.2d 761—*Marotta v. Board of Appeals of Revere*, 143 N.E.2d 270—*Davine v. Zoning Bd. of Appeals of Lynn*, 125 N.E.2d 131, 322 Mass. 319.

Findings of board of appeals in decision granting a permit under exception to zoning ordinance do not serve as evidence.

Mass.—*Lawrence v. Board of Appeals of Lynn*, 142 N.E.2d 378.

10. Mass.—*McHugh v. Board of Zoning Adjustment of Boston*, 147 N.E.2d 761—*Marotta v. Board of Appeals of Revere*, 143 N.E.2d 270.

Reasons for decision

Scope of facts relevant to deter-

mine whether decision of Board of Zoning Adjustment of Boston extending boundaries of zoning district exceeded authority of board, in case of appeal to superior court under statute, was affected by requirement of statute that board set forth reasons, and by board's compliance therewith.

Mass.—*McHugh v. Board of Zoning Adjustment of Boston*, 147 N.E.2d 761.

No stipulation is needed to permit introduction in evidence of decision of board for purpose of showing conclusion which board reached.

Mass.—*Marotta v. Board of Appeals of Revere*, 143 N.E.2d 270.

11. Mass.—*McHugh v. Board of Zoning Adjustment of Boston*, 147 N.E.2d 761.

12. N.H.—*Vogel v. Board of Adjustment for City of Manchester*, 27 A.2d 105, 92 N.H. 195.

Okl.—*Oklahoma City v. Harris*, 126 P.2d 988, 191 Okl. 125.

Scope of inquiry

Statute with respect to variances from terms of zoning ordinance, means that on appeal to circuit court from a decision of board of adjustment, scope of inquiry in circuit court is same as that before board and authority of circuit court on appeal to permit a variance from ordinance is same as that conferred on board.

Ala.—*Board of Zoning Adjustment for City of Lanett v. Boykin*, 92 So.2d 906, 265 Ala. 504.

13. Pa.—*Richman v. Philadelphia Zoning Bd. of Adjustment*, 137 A.2d 280, 391 Pa. 254.

Benner v. Upper Dublin Tp. Bd. of Adjustment, 71 Montg. 371, exceptions overruled 6 Pa. Dist. & Co. 2d 10.

Bryan v. Zoning Bd. of Adjustment, Com.Pl., 2 Bucks Co. 16—*Logan Square, Inc. v. Norristown Borough Bd. of Adjustment, Com.Pl.*, 72 Montg.Co. 79—*Appeal of Volpe, Com.Pl.*, 71 Montg.Co. 79, affirmed 121 A.2d 97, 384 Pa. 374.

14. Conn.—*Wadell v. Board of Zoning Appeals of City of New Haven*, 68 A.2d 152, 136 Conn. 1.

15. Conn.—*Schultz v. Zoning Bd. of Appeals of Town of Berlin*, 130 A.2d 789, 144 Conn. 332—*Berkman v. Board of Appeals on Zoning of City of Bridgeport*, 64 A.2d 875, 135 Conn. 398—*Levine v. Zoning Board of Appeals of Meriden*, 198 A. 173, 124 Conn. 53.

16. Conn.—*Levine v. Zoning Board of Appeals of Meriden*, supra.

17. Ill.—*Strohl v. Macon County Zoning Bd. of Appeals*, 104 N.E.2d 612, 411 Ill. 559.

Review as confined to record see supra § 331 b.

ord before the board should be annexed to, and incorporated by, reference in the answer of the board and, when this is done, it does not become necessary to introduce the record in evidence on the trial of the case unless the correctness of the rec-

ord returned is denied.¹⁸ The record must be sufficient to render an intelligent review possible,¹⁹ and contain adequate findings of fact, and a statement of reasons for the decision;²⁰ and an order of a zoning body may not be sustained where the

Purpose of statute relating to appeals from zoning board of appeal is to require board to file in trial court all of record which is necessary to enable court to pass on propriety of board's action.

Conn.—Cohen v. Board of Appeals on Zoning of City of Bridgeport, 94 A.2d 793, 139 Conn. 450.

Time for sending up record

On appeal from city board of adjustment's denial of a building permit, where petitioner did not ask the county court to stay proceedings appealed from, where board was not a party to the appeal, and where no notice was required to be given to the board, an order, commanding the board to send up record within twenty-one days, allowed sufficient time and board could not complain of procedure followed.

Vt.—Appeal of Maurice, 90 A.2d 440, 117 Vt. 264.

Record held insufficient

(1) In general.

Mass.—Caputo v. Board of Appeals of Somerville, 111 N.E.2d 674, 330 Mass. 107.

(2) Where applicant for permission to erect a building at variance with zoning ordinance submitted no evidence and nothing appeared in record of hearing before the board of adjustment except in informal discussion, a decision of the board denying application would not be disturbed by supreme court.

N.J.—Montgomery Engineering Co. v. Jersey City, 48 A.2d 643, 134 N.J.Law 414.

(3) Record on appeal to superior court from decision of city-county board of zoning appeals, rezoning particular property was incomplete and would not sustain a judgment for appellant, in absence of certification by board of any record in the cause or any decision rendered by board.

Ga.—Fletcher v. Daniels, 86 S.E.2d 232, 211 Ga. 403.

Statements of clerk

In proceeding to set aside order of board of county commissioners approving rezoning recommendation of township zoning board it could not be claimed on appeal that statements of a clerk of rezoning board were binding on the board, where there was nothing in record showing that clerk was the statutory secretary of the board and whatever may have been said by such clerk.

Kan.—Hillebrand v. Board of Coun-

ty Com'rs of Johnson Co., 304 P.2d 517, 180 Kan. 348.

Matters held part of record

Summary of proceedings had by owner with borough department of housing and buildings concerning realty, made by an official of the department from original records on file in the department, was given to city board of standards and appeals for its assistance and was properly a part of the record on petition by owner to review a determination of board denying owner's application for an order permitting a change in occupancy of two-story brick building to a three-family dwelling.

N.Y.—Seinfeld v. Murdock, 148 N.Y.S.2d 359, 2 Misc.2d 525.

18. Conn.—Schultz v. Zoning Bd. of Appeals of Town of Berlin, 130 A.2d 789, 144 Conn. 332.

19. Del.—Searles v. Darling, 83 A.2d 96, 7 Terry 263.

N.Y.—Application of Graham, 158 N.Y.S.2d 97, 7 Misc.2d 30, petition dismissed 165 N.Y.S.2d 154, 7 Misc.2d 34.

Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477.

Pa.—Bary v. Zoning Bd. of Adjustment, Com.Pl., 4 Bucks Co. 269.

Evidentiary material

No adequate judicial review of a decision of the zoning board of appeals is possible unless all essential evidentiary material on which the agency predicates a quasi-judicial determination is in the record and before the court.

N.Y.—Russo v. Stevens, 173 N.Y.S.2d 344, 10 Misc.2d 530.

Minutes of proceedings

In civil action in lieu of prerogative writ to review validity of township committee's resolution granting zoning variance, minutes of proceedings of board of adjustment which recommended approval of the variance should have been part of record submitted to trial court.

N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

Ownership of lot

In proceeding for building permit where permit was refused and constitutionality of zoning ordinance was raised and where there was no proof in record that plaintiff was owner of lot involved and had purchased it under bona fide agreement, supreme court would not assume that plaintiff was bona fide purchaser and

refused to decide constitutionality of ordinance.

R.I.—Dimitri v. Zoning Board of Review of City of Warwick, 200 A.963, 61 R.I. 325.

Undisputed testimony

Record and maps requested by appellate court in exercise of its original jurisdiction which disclosed undisputed physical characteristics of subject premises and surrounding property and resolution of board of adjustment which adopted findings reciting statutory language in granting zoning variance afforded sufficient basis for judicial review of board's action in as much as basic factual findings, which were not made by board, would only have iterated undisputed testimony and were therefore unnecessary.

N.J.—Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148.

Unique circumstances

Where decision of zoning board of appeals granting variance, and board's return in proceeding to review such decision, did not show that owner's plight was due to unique circumstances, decision must be annulled although such fact might have been within personal knowledge of members of the board.

N.Y.—Lathrop v. Feriola, 93 N.Y.S.2d 568, 276 App.Div. 850.

20. Del.—Garden Court Apartments v. Harnett, 65 A.2d 231, 6 Terry 1. N.Y.—Application of Graham, 158 N.Y.S.2d 97, 7 Misc.2d 30, petition dismissed 165 N.Y.S.2d 154, 7 Misc.2d 34.

Basis

Record must show basis of decision.

Pa.—Elvan v. Exley, 58 Pa.Dist. & Co. 538.

Appeal of Peirce, Com.Pl., 15 Beaver 186, reversed on other grounds 119 A.2d 506, 384 Pa. 100.

Inclusion in transcript

Findings of fact and conclusions of law must be included in transcript of journal entries filed in common pleas court on appeal from decision of board.

Ohio.—Hardy v. Horst, Com.Pl., 101 N.E.2d 398—A. Dicio & Sons v. Chester Zoning Bd. of Appeals, Com.Pl., 98 N.E.2d 352.

Findings not part of decision

In proceeding by village officers to review determination of board of appeals overruling officers' denial of permit for improvement of premises occupied as nonconforming use, board's findings of fact, which were

record does not contain the findings of such body.²¹ Where the record on appeal from the decision of a zoning board is incomplete, whether the judge should grant a timely motion requiring the board to send up a certified copy of its judgment and such proceedings as were had before the board is a matter largely within the discretion of the judge.²²

On a review by certiorari, the standard by which the sufficiency of the record returned in response to the writ is measured has been held to be that established by statute, and not that which is applied in a common-law certiorari proceeding.²³ It may be required that the basis on which the board acted clearly appear in the record²⁴ so as to render an

intelligent review possible.²⁵ Ordinarily, the presumption of regularity in proceedings before a board does not waive the necessity of including indispensable features in the record;²⁶ and in the absence of an adequate record the decision will not be sustained.²⁷ It has been held, however, that a decision of the board may be sustained, although it contains no statement of reasons or grounds therefor, where the undisputed evidence in the record supports the conclusion reached.²⁸ On review by certiorari, the record may be such as to require treatment of an application to the board as one for a variance only rather than one for a variance or an exception.²⁹

B. MODE OF REVIEW; NATURE AND SCOPE OF PARTICULAR REMEDIES

§ 333. In General

An appropriate mode of review must be employed to obtain judicial relief from the action or decision of building and zoning authorities; and a special statutory method of appeal and review by the courts of a zoning

decision must be followed to the exclusion of other remedies.

Generally, a party seeking review of the action or decision of building and zoning authorities must follow an appropriate mode of review.³⁰ Proceed-

clearly basis for its decision and which were incorporated in its answer and returned to reviewing court, were accepted by reviewing court as fully effective findings in support of decision, although they were not made part of, or handed down with, the decision.

N.Y.—Fox v. Adams, 134 N.Y.S.2d 534.

21. Del.—Garden Court Apartments v. Hartnett, 65 A.2d 231, 6 Terry 1.

22. Ga.—Fletcher v. Daniels, 86 S.E. 2d 232, 211 Ga. 403.

Correction of error

In proceeding for order to reverse determination of town board in denying application for zone change, claimed error of town clerk in not swearing to statement as to date on which decision was filed in his office could be corrected by court under statute providing that either party may request court to correct omissions or defects of papers.

N.Y.—Firestone v. Town Bd. of Town of Oyster Bay, 134 N.Y.S.2d 882.

23. Del.—Searles v. Darling, 83 A. 2d 96, 7 Terry 263.

24. Del.—Searles v. Darling, supra. Ill.—Foertsch v. Fox, 86 N.E.2d 900, 338 Ill.App. 208.

N.Y.—Muller v. Zoning Bd. of Appeals of Town of Ramapo, Rockland County, N. Y., 75 N.Y.S.2d 192, 272 App.Div. 1074.

Sherwood Realty Corp. v. Feri-ola, 82 N.Y.S.2d 505, 193 Misc. 194. R.I.—Del Toro v. Zoning Bd. of Review of Town of Bristol, 107 A.2d 460, 82 R.I. 317.

Terms of ordinance

Record may be required to contain the terms and provisions of the ordinance under which the zoning board operated.

Ga.—Lewenstein v. Curry, 42 S.E.2d 158, 75 Ga.App. 22.

Record held sufficient

(1) Generally.

N.J.—Berdan v. City of Paterson, 62 A.2d 680, 1 N.J. 199.

(2) Record of proceedings resulting in passage of amendments to zoning ordinances showed proper notices and hearings and was ample for purposes of petition for certiorari to review action.

R.I.—Bates v. Stitley, 125 A.2d 108.

(3) Where record contained undisputed facts sufficiently showing reasons for board's decision, court would be justified in overlooking failure of board to state reasons for decision.

R.I.—Coffin v. Zoning Bd. of Review of City of Providence, 98 A.2d 843, 81 R.I. 112.

25. N.Y.—Collins v. Behan, 33 N.E. 2d 86, 285 N.Y. 187.

Statement of facts

Record of a hearing on an application for a permit, which shows the conclusions of a board, but which omits any statement of the facts on which they are based, has been held to be insufficient.

Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

26. Del.—Searles v. Darling, 83 A.2d 96, 7 Terry 263.

27. N.Y.—Muller v. Zoning Bd. of Appeals of Town of Ramapo, Rockland County, N. Y., 75 N.Y.S.2d 192, 272 App.Div. 1074.

Sherwood Realty Corp. v. Feri-ola, 82 N.Y.S.2d 505, 193 Misc. 194. R.I.—Perrier v. Board of Appeals of City of Pawtucket, 124 A.2d 237.

28. R.I.—Winters v. Zoning Bd. of Review of City of Warwick, 96 A.2d 337, 80 R.I. 275—Petarca v. Zoning Board of Review, 80 A.2d 156, 78 R.I. 130.

29. R.I.—Winters v. Zoning Bd. of Review of City of Warwick, 96 A. 2d 337, 80 R.I. 275—Cardin v. Zoning Bd. of Review of Town of North Providence, 93 A.2d 304, 80 R.I. 136.

30. N.Y.—Holland v. City of Long Beach, 155 N.Y.S.2d 237.

Proceeding held proper

N.Y.—Jetter v. Hofheins, 70 N.Y.S. 2d 808, 190 Misc. 99.

Proceeding on motion

Where zoning board of appeals of town denied application for a special permit to erect a restaurant, tavern and grill, under zoning ordinance, on commercial zoned property, petitioner's remedy, if any, was by proceeding under Article 78 of the Civil Practice Act, in the nature of mandamus, and petitioner was not entitled to have involved section of ordinance declared unconstitutional, and to have resolution denying application for special permit annulled, on motion.

N.Y.—Romig v. Weld, 95 N.Y.S.2d 571, 276 App.Div. 514.

ings for review are provided for by statute, in many jurisdictions,³¹ and the right and scope of review ordinarily are limited to that provided by the statute as the effect of the statute has been construed

and defined by the courts.³² Accordingly, where authorized by statute, appeal is a proper remedy to review the action of a zoning body in promulgating an order or regulation,³³ or in granting or deny-

Remedies other than certiorari

When successful applicant for amendment of town zoning ordinance attempts to take advantage of changes made by town council in way that injures or threatens substantial injury to rights of owners of property adjoining that of applicant in particular zone, other remedies than certiorari are available to such owners, if they can establish that council's action was illegal.

R.I.—Alianiello v. Town Council of Town of East Providence, 117 A. 2d 233.

Particular action to be reviewed

Where zoning commission adopted amendment to zoning regulation which permitted residential development by construction of apartment houses in area zoned B residential, and application of residents of tract zoned B residential to change zone of tract to A residential was denied, if residents desired to claim that regulations were not made in accordance with a comprehensive plan, they should have appealed from commission's action in adopting amendment, and not from denial of their application for change of zone.

Conn.—Wolfpit-Villa Crest Ass'n v. Zoning Commission of City of Norwalk, 135 A.2d 732, 144 Conn. 560.

Order held binding

Where home owner did not seek review of order of local board of appeals denying his application under zoning ordinance for variance to permit use of garage with apartment as independent one-family dwelling, homeowner was bound by board's order.

N.Y.—Griffin v. Reville, 149 N.Y.S.2d 312, 1 Misc.2d 1045.

31. Ind.—Ballman v. Duffecy, 102 N. E.2d 646, 230 Ind. 220.

Mich.—Jones v. De Vries, 40 N.W.2d 317, 326 Mich. 126.

N.Y.—Romig v. Weld, 95 N.Y.S.2d 571, 276 App.Div. 514.

Vangellow v. City of Rochester, 71 N.Y.S.2d 672, 190 Misc. 128.

Pa.—Barth v. Gerson, 119 A.2d 309, 383 Pa. 611.

D. B. S. Bldg. Ass'n v. Dundon, Com.Pl., 36 Erie Co. 201—Wynne-wood Civic Ass'n v. Lower Merion Tp., Quar.Sess., 69 Montg.Co. 317, affirmed 102 A.2d 423, 175 Pa.Super. 20.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

Validity of statute

(1) A statute authorizing the district court to review decisions of the city board of adjustment is within

the power of the legislature and valid.

Wyo.—In re McInerney, 34 P.2d 35, 47 Wyo. 258.

(2) Statute providing that all persons aggrieved by any decision of zoning board of appeal may present to court a verified petition setting forth that decision is illegal, and that court may take evidence and may reverse, affirm, or modify the decision brought up for review, does not violate constitutional prohibition with respect to separation of powers.

Ill.—Illinois Bell Tel. Co. v. Fox, 85 N.E.2d 43, 402 Ill. 617.

Repeal

(1) Provision of Village Law authorizing proceedings before special term to review decisions of village zoning board of appeals was not by implication repealed by provisions of Civil Practice Act relating to proceedings against a body or officer.

N.Y.—Theodore Gompers, Inc., v. Craft, 87 N.Y.S.2d 670, 194 Misc. 779.

(2) Town Law provision authorizing proceeding for review of decision of town zoning board of appeals was not impliedly repealed by provisions of Civil Practice Act relating to proceeding to review orders of a body or officer.

N.Y.—People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 26 N.E.2d 952, 282 N.Y. 400.

Muller v. Zoning Bd. of Appeals of Town of Ramapo, Rockland County, 60 N.Y.S.2d 98, 270 App. Div. 324.

(3) Under statute providing that decision of zoning appeal board shall not become final until expiration of five days from date of entry of such order, right of review of decisions by courts may be had in proceedings instituted within time prescribed, and amendment providing for review on facts and law in circuit court with respect to any decision of board as to continuation of use which was lawful at time zoning ordinance was adopted did not repeal right of review.

Mich.—Jones v. De Vries, 40 N.W.2d 317, 326 Mich. 126.

Particular provisions held controlling

N.Y.—Aisloff v. Murdock, 81 N.Y.S.2d 872, appeal dismissed in part, modified in part on other grounds Application of Aisloff, 94 N.Y.S.2d 226, 276 App.Div. 907.

Home rule charter

Under metropolitan city's statutory home rule charter, persons jointly or severally aggrieved by decision of city zoning board of appeals may present to district court a duly verified petition, stating that decision is illegal in whole or part on specified grounds, within thirty days after filing of decision in board's office.

Neb.—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

Statutory proceeding in lieu of prerogative writ

(1) In general.

N.J.—Carroll v. Board of Adjustment of Jersey City, 83 A.2d 448, 15 N.J. Super. 363.

(2) In action in lieu of prerogative writ, brought by property owners for declaration that a zoning amendment was invalid, relief sought was that which formerly would have been sought by writ of certiorari, and fact that plaintiffs had right to institute such action did not change fact that relief obtainable was discretionary with court and might be refused if it appeared that public interest would suffer or private injustice would be done.

N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 101 A.2d 102, 28 N.J.Super. 483, affirmed 108 A.2d 498, 32 N.J.Super. 397.

32. U.S.—222 East Chestnut St. Corp. v. La Salle Nat. Bank, C.A. Ill., 253 F.2d 484.

Pa.—Crozier v. Canfield, Com.Pl., 70 Montg.Co. 342, 68 York Leg.Rec. 115.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

33. Md.—Kracke v. Weinberg, 79 A. 2d 387, 197 Md. 339—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 367, 197 Md. 294.

General or special zoning laws

Legislative history of statute relating to appeals in zoning cases indicates that the statute was intended to create a right of appeal from every zoning commission in the state, regardless of whether the municipality is acting under general or special zoning laws, and afforded a right of appeal in a zoning case in the town of West Hartford even though special act under which West Hartford received its zoning powers made no provision for appeal; "zoning commissions," within statute is a term of general application, and statute granted right of appeal from town council which was acting as a zoning commission.

Conn.—Sullivan v. Town Council of

ing a permit,³⁴ or an exception or variance.³⁵ Where the appeal is one provided by statute, the court is limited in the scope of its jurisdiction to the provisions of the zoning statutes and ordinances,³⁶ and even though the court might possess general equity jurisdiction, in a zoning appeal it would be unable to apply equitable principles.³⁷

In particular circumstances, review of a zoning decision may be sought in a direct action against the zoning board, on issues made by pleadings as in other cases,³⁸ and where it is claimed that the

entire zoning ordinance is void the remedy may be asserted by direct action.³⁹ In some jurisdictions, a question whether a zoning ordinance as applied to a certain piece of property is invalid may be raised by a bill in equity,⁴⁰ and where there is no provision for appeal from the action of a municipal legislative body in enacting or amending a zoning ordinance, the remedy of aggrieved property owners is such as may be available through resort to the extraordinary equitable jurisdiction of the courts.⁴¹ Equitable relief from the action of a zoning board

Town of West Hartford, 121 A.2d 630, 143 Conn. 280.

Proceeding held one by appeal

(1) Plaintiff's application to court of common pleas which stated that plaintiff was appealing from decision of zoning board of appeals, and which contained all allegations essential to appeal from board, and which set out order appealed from and facts relied on to support allegation of unreasonableness of board's action was an appeal, and court of common pleas erred in dismissing it as action in equity, even though the application did not contain a prayer for reversal of board's decision.

Conn.—Fisher v. Board of Zoning Appeals of the Town of Monroe, 113 A.2d 587, 142 Conn. 275.

(2) Even though plaintiff's application on appeal from decision of zoning board of appeals contained prayers for a temporary and permanent injunction and for a declaratory judgment, which relief could not be granted on appeal, the presence of such prayer in application did not convert the appeal into some other form of action.

Conn.—Fisher v. Board of Zoning Appeals of the Town of Monroe, *supra*.

Statute held inapplicable

(1) Statute providing for appeal generally to superior court from acts of board of county commissioners is inapplicable where board acts under a special law for special purposes.

Wash.—State ex rel. Lyon v. Board of Com'rs of Pierce County, 196 P.2d 997, 31 Wash.2d 366.

(2) Provision in 1947 act making a number of changes in previously existing statutes as to zoning, which authorized an appeal from decision of zoning commission, would not be construed as giving court of common pleas jurisdiction of an appeal from town commission's action in granting a change of zone in a proceeding which had been commenced before effective date of the act.

Conn.—Demarest v. Zoning Commission of Town of Plainville, 59 A.2d 293, 134 Conn. 572.

34. Pa.—Vogt v. Borough of Port

Vue, 85 A.2d 688, 170 Pa.Super. 526.

Statute held not to authorize appeal

R.I.—Order of St. Benedict in Portsmouth v. Town Council of Town of Portsmouth, 125 A.2d 150.

Nature of proceeding

Where action designated a petition in equity was filed against township zoning board of appeals for order reversing board's decision revoking building alteration permit on ground that decision was unreasonable and unlawful, action was an appeal and not an original cause of action.

Ohio.—A. Diccillo & Sons v. Chester Zoning Bd. of Appeals, Com.Pl., 98 N.E.2d 352.

Bulings of city's building inspector
under zoning ordinances, when supported by evidence, cannot be attacked except by appeal as provided in statute.

Tex.—Rosenthal v. City of Dallas, Civ.App., 211 S.W.2d 279, error refused no reversible error.

35. Pa.—Blank v. Board of Adjustment of Borough of West Mifflin, 136 A.2d 695, 390 Pa. 636—Pincus v. Power, 101 A.2d 914, 376 Pa. 175.

Statute held inapplicable

Statute providing for appeal generally to superior court from actions of board of county commissioners did not authorize appeal to superior court from decision of board granting variance permit to operate tavern in highway-use district zoned against such business by county planning commission created by board pursuant to special statute permitting establishment of use districts and general zoning regulations to promote general welfare.

Wash.—State ex rel. Lyon v. Board of Com'rs of Pierce County, 196 P.2d 997, 31 Wash.2d 366.

36. Pa.—Mazelka v. American Oil Co., 118 A.2d 142, 383 Pa. 191.

Repeal of charter provision

Statute providing that appeals may be taken from action of any board of zoning appeals within 30 days after final action of such board superseded or repealed by implication city charter provision that court shall review record and other matters produced by

board pursuant to issuance of a writ and may reverse or modify the decision reviewed, in whole or in part, when it is satisfied that decision of board is contrary to law or that it is arbitrary and constitutes abuse of discretion.

Va.—Wicker Apartments, Inc. v. City of Richmond, 99 S.E.2d 656, 199 Va. 263.

Administrative question

Statutory right of appeal to circuit court for Anne Arundel County from action of county commissioners in zoning matters was not limited to a determination of a legislative rather than an administrative question.

Md.—Board of Com'rs of Anne Arundel County v. Snyder, 46 A.2d 689, 186 Md. 342.

37. Pa.—Mazelka v. American Oil Co., 118 A.2d 142, 383 Pa. 191.

Appeal of Tool & Mfg. Co., Co., 104 Pittsb.Leg.J. 243.

38. Neb.—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

N.J.—Marrocco v. Board of Adjustment of City of Passaic, 68 A.2d 470, 5 N.J.Super. 94.

Lack of notice or hearing

Where board of adjustment gave no notice or hearing to plaintiff who was adjacent property owner before granting variance, and allegedly acted without required consent of eighty per cent of surrounding property owners, plaintiff was not limited to proceedings in nature of certiorari under practice rule and action could proceed on issues made by pleadings as in other cases independent of the rule.

Colo.—Regennitter v. Fowler, 290 P.2d 223, 132 Colo. 489.

39. Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295—City of South Bend v. Marckle, 18 N.E.2d 764, 215 Ind. 74.

40. Md.—Hoffman v. Mayor and City Council of Baltimore, 79 A.2d 397, 197 Md. 294.

Remedy by suit for injunction see *infra* § 340.

41. Ky.—Byrn v. Beechwood Village, 253 S.W.2d 395.

will not be granted, however, where there is a complete and adequate remedy at law.⁴² Under some statutes, a suit in equity to annul a zoning decision is not a permissible mode of review except as authorized by the statute;⁴³ and where an exclusive statutory remedy is provided for, a bill in equity may not be brought to review the validity of a zoning regulation or its application.⁴⁴

Under a statute providing a remedy in lieu of certiorari and mandamus to review "a determination" of a public officer or body, the action or proceeding is not available to review legislative action of a zoning officer or board, as distinguished from administrative action.⁴⁵ Accordingly, such a proceeding is not maintainable to review the denial of a petition to amend or change provisions of a zoning ordinance so as to allow a particular use of petitioner's property.⁴⁶ However, where a legislative body is authorized by special zoning ordinance pro-

vision to grant a special exception or special use permit, its determination on an application therefor is held to involve an exercise of judgment or discretion reviewable in such a statutory proceeding.⁴⁷ It has been held that whether a zoning ordinance is invalid cannot be raised in a proceeding to have the board of zoning appeals vary the ordinance⁴⁸ or in a proceeding by a county park commission to acquire title to land.⁴⁹

Writ of prohibition. In a proper case, a proceeding may properly be maintained for a writ of prohibition against the zoning board;⁵⁰ but where the statutory right of appeal from the action of the board is adequate to raise the matter complained of by the property owner, a writ of prohibition is not justified.⁵¹

Exclusiveness of statutory remedy; collateral attack. Where a statutory remedy is provided for reviewing the validity of a zoning regulation, it is

42. Ga.—Doyal v. Jackson, 41 S.E.2d 152, 201 Ga. 746.

Pa.—Baederwood Center, Inc. v. Putney, 133 A.2d 836, 390 Pa. 53.

Remedy by certiorari

(1) Since fundamental reason for permitting suit in equity attacking constitutionality of zoning resolution is that no other adequate remedy is available, when remedy is procured by writ of certiorari, complaint attacking ordinance will be dismissed. N.Y.—Crone v. Town of Brighton, 119 N.Y.S.2d 877.

(2) Right to have decision of board of zoning appeals, reversing denial of permit, reviewed by superior court on certiorari was a complete and adequate remedy at law precluding equitable relief.

Ga.—Doyal v. Jackson, 41 S.E.2d 152, 201 Ga. 746.

43. Mass.—Reynolds v. Board of Appeal of Springfield, 140 N.E.2d 491, 335 Mass. 464—Fairman v. Board of Appeal of Melrose, 117 N.E.2d 829, 381 Mass. 464.

Decision as to building code

Where bill brought as an appeal from decision of board of appeal authorizing variance of building code and zoning ordinance, by permitting owners of dwelling house to convert it into nursing home, did not state case in equity for relief with respect to building code, fact that appeal from decision in respect to zoning ordinance was within court's jurisdiction did not give court jurisdiction over board's decision as to building code.

Mass.—Reynolds v. Board of Appeal of Springfield, 140 N.E.2d 491, 335 Mass. 464.

44. Pa.—Baer v. Lonsdorf, 135 A.2d 61, 390 Pa. 175—Pittsburg Outdoor

Advertising Co. v. City of Clairton, 133 A.2d 542, 390 Pa. 1.

Where building permit is issued pursuant to a new zoning ordinance, even though plaintiff does not know of such at the time a complaint in equity is filed to have the ordinance declared illegal, unconstitutional and void, the complaint will be dismissed for want of equity jurisdiction, since plaintiff has an exclusive statutory remedy of appeal to the board of adjustment.

Pa.—Strawbridge v. Horsham Tp., 7 Pa. Dist. & Co.2d 161, 72 Montg. Co. 117.

Review of board of appeal

Statute providing for review of action of board of appeal of building department does not contemplate review by bill in equity.

Mass.—Harper v. Board of Appeals of Building Department of City of Boston, 171 N.E. 430, 271 Mass. 482.

45. N.Y.—Parkplain Realty Corp. v. Town Bd. of Town of Hempstead, 137 N.Y.S.2d 474—Firestone v. Town Bd. of Town of Oyster Bay, 134 N.Y.S.2d 882.

46. N.Y.—Pelham Jewish Center v. Board of Trustees of Village of Pelham Manor, 170 N.Y.S.2d 136, 9 Misc.2d 564.

Power as to special exception

Where there was no provision in village zoning ordinance authorizing board of trustees to grant special exception or special use permit with respect to property situate in a residence "A" district, board had no power to act except legislatively by amending ordinance, and its failure to do so could not be made the basis of an article 78 proceeding.

N.Y.—Pelham Jewish Center v. Board of Trustees of Village of Pelham Manor, supra.

47. N.Y.—Pelham Jewish Center v. Board of Trustees of Village of Pelham Manor, supra.

Cunningham v. Planning Bd. and Bd. of Appeals of Town of Brighton, 157 N.Y.S.2d 698, reversed in part and vacated in part on other grounds 164 N.Y.S.2d 601, 4 A.D.2d 313.

Action of common council of city disapproving determination of zoning board of appeals granting a permit for a special exception use was reviewable in an article 78 proceeding.

N.Y.—Alex-Wells, Inc. v. City of Yonkers, 154 N.Y.S.2d 108.

48. Ind.—Board of Zoning Appeals of City of Indianapolis v. Waintrup, 193 N.E. 701, 99 Ind.App. 576. N.Y.—Diocese of Rochester Planning Bd. of Town of Brighton, 147 N.Y.S.2d 392, 1 A.D.2d 86, reversed on other grounds 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y.S.2d 849—Pforzheimer v. Seidman, 103 N.Y.S.2d 886, 278 App.Div. 780.

Application to require cancellation of revocation order

It is too late to question constitutionality of properly adopted zoning ordinance on application to require cancellation of order of revocation of building permit.

N.Y.—Van Auken v. Kimmey, 252 N.Y.S. 329, 141 Misc. 105.

49. N.Y.—Westchester County v. MacEwen, 260 N.Y.S. 875, 237 App. Div. 833.

50. Ohio.—Gochenour v. Herderick, 131 N.E.2d 228, 99 Ohio App. 27.

51. Ohio.—Gochenour v. Herderick, supra.

exclusive;⁵² and under some provisions, all questions involved in the application of zoning ordinances, whether relating to confiscation of property or the effect of provisions of the ordinance, must be heard and considered under the remedy provided by the statute.⁵³ So, as a general rule, a special statutory method of appeal and review by the courts of a decision rendered in the administration of building and zoning laws and regulations must be followed to the exclusion of other remedies.⁵⁴

One failing to pursue his statutory remedy is precluded from attacking a zoning ordinance collaterally on the ground that it is unreasonable and unconstitutional.⁵⁵ Furthermore, a zoning ordinance is not subject to collateral attack by the city

which classified the property.⁵⁶

§ 334. Exhaustion of Administrative Remedies

Ordinarily a property owner must pursue and exhaust the administrative remedy available to him under a zoning ordinance or statute before resorting to the courts for other relief from the action or decision of zoning authorities; but the rule is not absolute and without exceptions, and in various circumstances it may be inapplicable.

Generally, a property owner must first pursue and exhaust the administrative remedy available to him under a zoning ordinance or statute before resorting to the courts for other relief from the action or decision of zoning authorities.⁵⁷ Accordingly,

52. Ind.—State ex rel. Marion County Plan Commission v. Superior Court of Marion County, 135 N.E. 2d 516, 235 Ind. 607.

Pa.—Baer v. Lonsdorf, 135 A.2d 61, 390 Pa. 175—Pittsburg Outdoor Advertising Co. v. City of Clairton, 133 A.2d 542, 390 Pa. 1—Wojnar v. Yale & Towne Mfg. Co., 36 A.2d 321, 348 Pa. 595—Taylor v. Moore, 154 A. 799, 303 Pa. 469.

Schnub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A. 2d 292, 180 Pa.Super. 105.

Tex.—Rosenthal v. City of Dallas, Civ.App., 211 S.W.2d 279.

Based on right

N.Y.—Bronxville Associates v. Brady, 36 N.Y.S.2d 308.

53. Pa.—Taylor v. Moore, 154 A. 799, 303 Pa. 469.

Vogt v. Borough of Port Vue, 85 A.2d 688, 170 Pa.Super. 526—Commonwealth v. De Baldo, 82 A.2d 578, 169 Pa.Super. 363.

Appeal of Geisinger, Com.Pl., 35 Del.Co. 333—D. B. S. Bldg. Ass'n v. Dundon, Cum.Pl., 36 Erie Co. 201.

54. Ga.—Ledbetter v. Roberts, 98 S. E.2d 654, 95 Ga.App. 652.

Mass.—Reynolds v. Board of Appeal of Springfield, 140 N.E.2d 491, 335 Mass. 464.

Neb.—Kelley v. John, 75 N.W.2d 713, 162 Neb. 319.

N.Y.—Sherwood Realty Corp. v. Feri-ola, 93 N.Y.S.2d 750, 197 Misc. 77, transferred, see 101 N.Y.S.2d 236, 277 App.Div. 1049.

Aisloff v. Murdock, 81 N.Y.S.2d 872, appeal dismissed in part and modified in part on other grounds, Application of Aisloff, 94 N.Y.S.2d 226, 276 App.Div. 907.

Pa.—City of Philadelphia v. Wyszynski, 112 A.2d 327, 381 Pa. 153.

Schnub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A. 2d 292, 180 Pa.Super. 105—Appeal of Krinks, 194 A. 231, 128 Pa.Super. 405, affirmed 2 A.2d 700, 332 Pa. 238.

Lewis v. Emmot, Com.Pl., 43 Del. Co. 155, affirmed 122 A.2d 727, 385 Pa. 336—Appeal of Geisinger, Com. Pl., 35 Del.Co. 333.

Wyo.—State ex rel. George v. Hull, 199 P.2d 832, 65 Wyo. 251.

Applicability to pending proceeding
Provision in act making a number of changes in previously existing statutes as to zoning which authorized an appeal from decision of zoning commission would not be construed as giving court jurisdiction of an appeal from town commission's action in granting a change of zone in a proceeding which had been commenced before effective date of the act.

Conn.—Demarest v. Zoning Commission of Town of Plainville, 59 A.2d 293, 134 Conn. 572.

Particular proceedings held not precluded

N.Y.—Isen Contracting Corp. v. Town Bd. of Town of Oyster Bay, 107 N.Y.S.2d 708, 279 App.Div. 607.

55. N.C.—State v. Roberson, 150 S. E. 674, 198 N.C. 70.

In condemnation proceeding, validity of a zoning ordinance in relation to its prospective use as evidence bearing on value of property to be condemned, could not be raised by answer making a collateral attack on such ordinance.

Fla.—Board of Com'rs of State Institutions v. Tallahassee Bank & Trust Co., App., 100 So.2d 67.

56. Ill.—People ex rel. Joseph Lum-ber Co. v. City of Chicago, 83 N. E.2d 592, 403 Ill. 321.

57. U.S.—West v. Bank of Commerce & Trusts, C.C.A.Va., 167 F. 2d 664.

Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249—Mayor and City Council of Baltimore v. Shapiro, 51 A.2d 273, 187 Md. 623.

Mo.—Sculliet v. Stock, 253 S.W.2d 143, 363 Mo. 721.

Neb.—Kelley v. John, 75 N.W.2d 713, 162 Neb. 319.

N.Y.—Vangellow v. City of Rochester, 71 N.Y.S.2d 672, 190 Misc. 128.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

Administrative remedy as precluding relief by:

Declaratory judgment see *infra* § 339.

Injunction see *infra* § 344.

Mandamus see *infra* § 347.

Review by certiorari

(1) Where, under zoning ordinance as amended, pending certiorari to review action of municipal council in denying prosecutor a permit to erect and operate a gas station in business district, all discretion had been removed from municipal council and prosecutor was left to pursue his appropriate remedies before zoning board of adjustment for a variance or exception but no such appeal had been made, certiorari was required to be denied.

N.J.—Krugman v. Municipal Council of City of Clifton, 53 A.2d 803, 136 N.J.Law 32.

(2) Application for certiorari held premature where administrative remedy was not pursued.

N.J.—Payne v. Borough of Sea Bright, 187 A. 627, 14 N.J.Misc. 756.

(3) However, failure of property owners to appeal to board of adjustment from action of building inspector refusing permit to erect a gasoline service station did not require dismissal of writ of certiorari to review action taken, where board's existence was doubtful, and an appeal had been taken to borough council which refused relief.

N.J.—Diller v. Mayor and Council of Borough of Stone Harbor, 3 A.2d 872, 131 N.J.Law 611.

Appeal to board as prerequisite

(1) Where the zoning ordinance is not claimed to be invalid in its entirety but only to be arbitrary in its application to owner's land, and re-

judicial relief may not be sought unless the complaining party has first taken proper proceedings for a zoning reclassification,⁵⁸ or to obtain a permit,⁵⁹ exception, or variance;⁶⁰ and compliance with the statutory provisions for an appeal to an administrative body is required before an appeal can be made to the courts from a revocation of a building permit.⁶¹ A party appealing from a zoning decision of a board of adjustment is not required to apply to the board for a rehearing or new trial in order to exhaust his administrative remedies, but need only make a direct appeal to the court from the decision as rendered by the board.⁶²

The rule that administrative remedies must be exhausted before resort is had to the courts in zon-

ing matters is not absolute and without exceptions, and in various circumstances it has been held inapplicable.⁶³ So it has been held that resort to an administrative remedy is not a prerequisite to judicial relief where the question raised is one of interpretation of a statute;⁶⁴ and where an action to compel the issuance of a building permit raises questions of law only and not matters requiring administrative findings of fact or an exercise of administrative discretion, such action is not premature because of failure of the owner of the realty to appeal the building inspector's denial of the permit to the board of adjustment.⁶⁵ Where no administrative remedy was available to petitioner, a proceeding for judicial relief is not barred by failure to exhaust administrative remedies.⁶⁶

lief may be obtained from a local board of adjustment, the court should ordinarily decline to adjudicate an attack on the ordinance until the owner has exhausted his remedy before the board.

N.J.—Conlon v. Board of Public Works of City of Paterson, 94 A.2d 660, 11 N.J. 363.

(2) Owner who asserts that a zoning ordinance is unconstitutional as it applies to his property must first present issue to board of zoning appeals.

Ind.—Town of Homecroft v. Macbeth, 148 N.E.2d 563.

(3) Under some statutes it is held that, if the ordinance in question has any validity as applied to the particular property, recourse to the board of appeals or adjustment is a condition precedent to a judicial review of the decision on the application for a permit.

Ky.—Goodrich v. Selligman, 183 S.W.2d 625, 298 Ky. 863.

Mass.—Massachusetts Feather Co. v. Aldermen of Chelsea, 120 N.E.2d 766, 331 Mass. 527.

N.J.—Medinets v. Hansen, 109 A.2d 675, 33 N.J. Super. 237.

N.Y.—Seinfeld v. Murdock, 148 N.Y.S.2d 359, 2 Misc.2d 525—Vangellow v. City of Rochester, 71 N.Y.S.2d 672, 190 Misc. 128.

(4) Same rule has been applied to one seeking review of the revocation of his permit.

N.Y.—Caulwal Const. Co. v. Burwell, 240 N.Y.S. 456, 136 Misc. 259.

Administrative remedy held exhausted

Ark.—City of Blytheville v. Lewis, 234 S.W.2d 374, 218 Ark. 83.

Wash.—Shields v. Spokane School Dist. No. 81, 196 P.2d 352, 31 Wash. 2d 247.

58. Ark.—City of Little Rock v. Hunter, 228 S.W.2d 58, 216 Ark. 916—City of Little Rock v. Griffin, 210 S.W.2d 915, 213 Ark. 465.

59. Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.

N.Y.—Platt v. City of New York, 93 N.Y.S.2d 738, 276 App.Div. 873.

Premature suit

Owners of lots, buildings on which were destroyed or dislodged from their foundations by a hurricane, were premature in seeking to invalidate subsequent amendments to town zoning ordinances in certiorari proceedings on ground that amendments prohibited town zoning board from granting such owners permission to rebuild and replace buildings on lots, where board had not actually denied them such permission, though town building inspector had denied permits to some of them in accordance with prior emergency ordinance.

R.I.—Bates v. Stiteley, 125 A.2d 108.

Application to building inspector

Where denial of application by city council for the erection of billboards on a lot in a commercial zone was arbitrary, action of the council was quashable notwithstanding the applicant did not apply to the city council for a permit as provided by the statute where the applicant followed the statutory procedure in first applying for a permit to the building inspector.

R.I.—Newport Poster Advertising Co. v. City Council of City of Newport, 122 A.2d 170.

60. N.J.—Krugman v. Municipal Council of City of Clifton, 53 A.2d 803, 136 N.J. Law 32.

N.Y.—Dicker v. Gulde, 170 N.Y.S.2d 64.

S.C.—Dunbar v. City of Spartanburg, 85 S.E.2d 281, 226 S.C. 360.

61. N.Y.—Radano v. Town of Huntington, 117 N.Y.S.2d 94, 281 App. Div. 682, affirmed 114 N.E.2d 470, 305 N.Y. 911.

62. Ga.—Ledbetter v. Roberts, 98 S.E.2d 654, 95 Ga.App. 652.

63. Mass.—Colabufalo v. Board of

Appeal of City of Newton, 143 N.E.2d 536.

N.J.—Honigfeld v. Byrnes, 103 A.2d 598, 14 N.J. 600.

Conaway v. Atlantic City, 154 A.6, 107 N.J. Law 404.

N.Y.—Saich v. Balint, 167 N.Y.S.2d 545, 9 Misc.2d 11.

Pa.—Appeal of Tredyffrin Const. Co., Com.Pl., 8 Chest.Co. 85.

Appeal taken and dismissed

Court rule requiring exhaustion of remedies before issuance of prerogative writs was not applicable to proceeding to review grant of permit for erection of garage contrary to zoning ordinance, where appeal to board of adjustment had been taken and dismissed.

N.J.—Dolan v. De Capua, 80 A.2d 655, 13 N.J. Super. 500.

64. N.J.—Carroll v. Board of Adjustment of Jersey City, 83 A.2d 448, 15 N.J. Super. 363.

Revocation of permit

Failure to appeal to zoning board of appeals from issuance of building permit to manufacturer would not bar property owners from prosecuting suit for judgment declaring permit revoked by subsequent zoning ordinance amendment rezoning area.

Ill.—Deer Park Civic Ass'n v. City of Chicago, 106 N.E.2d 823, 347 Ill. App. 346.

65. N.J.—Stalford v. Barkalow, 106 A.2d 342, 31 N.J. Super. 193.

66. Cal.—Bernstein v. Smutz, 188 P.2d 48, 83 C.A.2d 108.

Ga.—Toomey v. Norwood Realty Co., 89 S.E.2d 265, 211 Ga. 814.

Absence of provisions for reclassification

One applying to city engineer, pursuant to city ordinance, for permit to construct commercial building on applicant's lot, had right to sue city and its officers for issuance of permit and injunction against interference with use of lot for business purposes, after city council's denial of applica-

Generally, where a constitutional question is involved, equity may act even though by so doing an administrative zoning body is bypassed.⁶⁷ The right to apply for a variance of a zoning ordinance or to review of a determination of a zoning board does not deprive an owner of a cause of action attacking the validity of the zoning ordinance itself,⁶⁸ and the validity of such an ordinance may in a proper case be attacked in a court without first applying to the zoning board of appeals for relief.⁶⁹ Accordingly, a proceeding attacking a zoning ordinance as arbitrary and unreasonable, and as constituting a deprivation of property without due process of law is not subject to objection that the administrative remedy afforded through the local board of adjustment had not been exhausted.⁷⁰

tion, as against contention that plaintiff did not exhaust his administrative remedies by seeking reclassification of property, where ordinance contained no provisions for reclassification, plaintiff having fully exhausted only administrative remedy afforded thereby.

Ark.—City of Blytheville v. Lewis, 234 S.W.2d 374, 218 Ark. 83.

67. Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.
Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

Threatened prosecutions

Plaintiffs were entitled to bring suit for judgment declaring that application of zoning laws to project enlarging swimming pool maintained by them, which project had been commenced prior to enactment of zoning laws, was unconstitutional and that continuance of threatened prosecutions for violation of such laws was abuse of judicial process, without first exhausting administrative remedies before zoning enforcement officials.

Ky.—Goodwin v. City of Louisville, 215 S.W.2d 557, 309 Ky. 11.

68. N.Y.—Curtiss-Wright Corp. v. Incorporated Village of Garden City, 57 N.Y.S.2d 377, 185 Misc. 508, reversed on other grounds 61 N.Y.S.2d 678, 270 App.Div. 936, affirmed 72 N.E.2d 26, 296 N.Y. 839.
Crone v. Town of Brighton, 119 N.Y.S.2d 877.

Appeal from denial of permit

Where property owner objects to restrictive zoning ordinance he is not required to apply to local board of appeals for a variance but as a matter of right may ask board for permit to build and, on denial, make direct application to the court for relief provided restrictive ordinance is only bar to issuance of permit.

§ 335. Certiorari

In the absence of statutory authority therefor, certiorari usually is not a proper remedy to test the legislative action of a municipality as to zoning.

As a general rule, in the absence of statutory authority therefor, certiorari does not lie to review a purely legislative or administrative action of a municipal council in enacting, amending, or repealing a zoning regulation.⁷¹ Accordingly, where the action of a municipality in changing⁷² or refusing to change,⁷³ the classification of property for zoning purposes is legislative in character, it is not subject to review by certiorari, unless the action is clearly in violation, or in excess, of its legal right to proceed under the enabling act.⁷⁴

In the light of these general principles, it has been held in some jurisdictions that the remedy is

N.Y.—Smith v. Hartman, 144 N.Y.S. 2d 13, 208 Misc. 880.

69. U.S.—Village of Euclid, Ohio v. Ambler Realty Co., Ohio, 47 S.Ct. 114, 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016.

Ill.—Phipps v. City of Chicago, 171 N.E. 289, 339 Ill. 315.

Ind.—State ex rel. Municipal City of South Bend v. Saint Joseph Superior Court No. Two of St. Joseph County, 148 N.E.2d 558.

N.J.—Fischer v. Bedminster Tp., Somerset County, 76 A.2d 673, 5 N.J. 534.

Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds, 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

Ulmer Park Realty Co. v. City of New York, 45 N.Y.S.2d 527, 267 App.Div. 291.

Application of Braunsdorf, 111 N.Y.S.2d 507, 203 Misc. 471—Vangellow v. City of Rochester, 71 N.Y.S.2d 672, 190 Misc. 128.

Grounds general to locality

Property owner may directly attack validity of city building ordinance as confiscatory and unconstitutional on grounds that are general to the locality and not unique to a particular property without first applying to Zoning Board of Appeals for a variance, even though he asks for relief only with respect to his own property.

N.Y.—Bronxville Associates v. Brady, 36 N.Y.S.2d 308.

70. N.J.—Fischer v. Bedminster Tp., Somerset County, 76 A.2d 673, 5 N.J. 534.

Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J.

Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

71. N.Y.—Application of Buckley, 89 N.Y.S.2d 123, 275 App.Div. 853, reargument and appeal denied 91 N.Y.S.2d 759, 275 App.Div. 1001, appeal dismissed 87 N.E.2d 688, 299 N.Y. 796.

R.I.—Siegl v. Town Council & Zoning Bd. of Review of North Kingstown, 67 A.2d 369, 75 R.I. 502—R. I. Home Builders v. Hunt, 60 A.2d 496, 74 R.I. 255.

72. R.I.—Alianelli v. Town Council of Town of East Providence, 117 A.2d 233—Siegl v. Town Council & Zoning Bd. of Review of North Kingstown, 67 A.2d 369, 75 R.I. 502.

Statutory certiorari proceeding

Mo.—State ex rel. Croy v. City of Raytown, App., 289 S.W.2d 153.

Relation of classification to public welfare

On certiorari to review reclassification, argument that ordinance must conform to comprehensive plan and be related to public health, safety, and morals cannot be considered, as such questions, under enabling act, are left in first instance to town council as legislative body.

R.I.—Alianelli v. Town Council of Town of East Providence, 117 A.2d 233.

73. R.I.—Lang v. Town Council of Town of North Kingstown, 108 A.2d 166, 82 R.I. 361—Beauregard v. Town Council of Town of South Kingstown, 107 A.2d 283, 82 R.I. 244, reargument denied 108 A.2d 253, 82 R.I. 244.

S.C.—Dunbar v. City of Spartanburg, 85 S.E.2d 281, 226 S.C. 360.

74. R.I.—Alianelli v. Town Council of Town of East Providence, 117 A.2d 233.

not by resort to certiorari where it is claimed that the zoning ordinance is void,⁷⁵ but in other jurisdictions it has been held that certiorari is the appropriate remedy to test the constitutionality or validity of a zoning ordinance⁷⁶ or its reasonableness.⁷⁷ According to some authority, certiorari is not the proper remedy where the entire zoning ordinance is claimed to be invalid,⁷⁸ although a petition for writ of certiorari to review the order of a zoning board is proper procedure to present the question of the unconstitutionality of certain provisions of a zoning ordinance as applied to particular property.⁷⁹

In any event, a question of the validity of a zoning regulation will not be considered unless it is raised by an appropriate allegation in the petition for certiorari.⁸⁰ On certiorari to review an amendment of a zoning ordinance, the court will not investigate facts and weigh evidence which might have been presented to the legislative body at public hearing before it took legislative action.⁸¹ An

allegation of nuisance in the complaint will not be considered by the court.⁸² In a certiorari proceeding, the court will limit consideration to the reasonableness and validity of the ordinance and not to the failure to accord exemption therefrom to the prosecutor.⁸³

Persons entitled to bring proceedings. Persons adversely affected by zoning ordinances may have a status as parties sufficient to entitle them to seek relief in a statutory proceeding in the nature of certiorari.⁸⁴

§ 336. — Review of Administrative Proceedings

Under some statutes and ordinances, administrative proceedings with respect to building and zoning regulations may be reviewed by certiorari, and on such review the taking of additional testimony may be authorized.

Depending on the statutes and ordinances and subject to the rules governing the right to certiorari generally, certiorari may,⁸⁵ under the circum-

75. Ga.—Hardin v. Croft, 60 S.E.2d 395, 207 Ga. 115.

N.Y.—People ex rel. Jeffress v. Brown, 300 N.Y.S. 214, 252 App. Div. 891.

76. N.J.—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

77. N.J.—Appley v. Township Committee of Bernards Tp., Somerset County, 24 A.2d 805, 128 N.J.Law 195, affirmed Appley v. Township Committee of Township of Bernards, 28 A.2d 177, 129 N.J.Law 73.—Brown v. Terhune, 18 A.2d 73, 125 N.J.Law 618, dismissed 23 A.2d 575, 127 N.J.Law 554.

La Mer v. Gill, 187 A. 730, 14 N.J.Misc. 826.

78. Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.—City of South Bend v. Marckle, 18 N.E.2d 764, 215 Ind. 74.

79. Ind.—Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

80. R.I.—Baggs v. Zoning Bd. of Review of Town of Barrington, 86 A.2d 658, 79 R.I. 211.

81. R.I.—Allaniello v. Town Council of Town of East Providence, 117 A.2d 233.

82. N.J.—Menges v. Bernards Tp., 73 A.2d 540, 4 N.J. 556.

83. N.J.—420 Broad Ave. Corp. v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527.

84. Fla.—Josephson v. Autrey, 96 So.2d 784.

Persons entitled to attack validity of zoning ordinance see supra § 20.

85. Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.—City of South Bend v. Marckle, 18 N.E.2d 764, 215 Ind. 74.

Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Mass.—Opinion of the Justices, 73 N.E.2d 881, 321 Mass. 759.

N.J.—J. H. Realty Co. v. Board of Adjustment of City of East Orange, 142 A. 921, 6 N.J.Misc. 540.—Del Campo v. Board of Adjustment of City of Newark, 142 A. 920, 6 N.J.Misc. 539.—Astapoff v. Bigelow, 142 A. 918, 6 N.J.Misc. 541.—Feldman & Pivnick v. Board of Adjustment of City of East Orange, 142 A. 177, 6 N.J.Misc. 520.—Ewald v. Board of Adjustment of Borough of Leonia, 142 A. 42, 6 N.J.Misc. 532.

N.C.—In re Pine Hill Cemeteries, 15 S.E.2d 1, 219 N.C. 735.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

Tex.—City of Dallas v. Halbert, Civ. App., 246 S.W.2d 686, error refused no reversible error.

Wis.—State ex rel. Robst v. Board of Appeals of City of Wauwatosa, 5 N.W.2d 783, 241 Wis. 188. 43 C.J. p 356 note 28.

Court's power of review is statutory and, while its power of inquiry is broader than in common-law certiorari, it cannot be extended to include powers which it has by virtue of its general jurisdiction.

Ill.—Dube v. Allman, 72 N.E.2d 180, 396 Ill. 470, transferred, see, 77 N.E.2d 855, 333 Ill.App. 538.

Regulations affecting motor vehicle service stations and garages

N.J.—Aschenbach v. Inhabitants of City of Plainfield, 3 A.2d 814, 121

N.J.Law 598, affirmed 3 A.2d 579, 123 N.J.Law 265.

Wilson v. Township Committee of Union Tp., 3 A.2d 889, 17 N.J. Misc. 122.

In New York

(1) It has been held that Civ.Pract. Act § 1283, providing a substitute for certiorari, mandamus, and other proceedings, does not repeal provision of town law providing for review of decisions of boards of appeals or adjustment by certiorari, and that certiorari is still a proper remedy.

N.Y.—People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 26 N.E.2d 952, 282 N.Y. 400.

Muller v. Zoning Bd. of Appeals of Town of Ramapo, Rockland County, 60 N.Y.S.2d 98, 270 App. Div. 824.

Watkins v. Gormley, 59 N.Y.S.2d 747.

(2) However, a lower court has held that a decision of town zoning board of appeals is to be reviewed by notice of motion under civil practice act rather than by certiorari under town law.

N.Y.—Caper v. Parker, 53 N.Y.S.2d 874, 185 Misc. 948.

(3) In any event, where allegations of petition are sufficient to support proceeding under civil practice act, it is proper to disregard petitioners' misdesignation of proceeding as one in certiorari.

N.Y.—Muller v. Zoning Bd. of Appeals of Town of Ramapo, Rockland County, supra.

Joyce v. Dobson, 4 N.Y.S.2d 648, 167 Misc. 723, reversed on other grounds 8 N.Y.S.2d 768, 255 App. Div. 348.

stances and in a proper case, or may not⁸⁶ be a proper remedy for obtaining a review of the action of a board of appeals or adjustment with respect to building or zoning regulations. Under some authorities,⁸⁷ but not under others,⁸⁸ the validity of the ordinance under which the administrative proceedings were held may be attacked in certiorari proceedings.

Under a statute so providing, a court may take additional testimony in the certiorari proceedings,⁸⁹ and adjudicate the rights of the parties as determined from the evidence;⁹⁰ but, where additional evidence is not taken, the scope of review of the court is limited to determining whether the agency was guilty of a manifest abuse of discretion, or an error of law.⁹¹ Under some statutes,⁹² but not under others,⁹³ on review of the board's decision by certiorari, a hearing of the matter de novo is provided for; but, where applicant had ample opportunity to present all his evidence on a particular issue to the board of appeals, the court should not appoint a referee to try the issue de novo.⁹⁴

Where a hearing de novo is not provided for by statute, the inquiry is limited to review of alleged errors of law on the evidence presented by the record, and does not extend to review of questions of fact to be determined by evidence outside the record,⁹⁵ and it has been held that the court will investigate the record only to determine whether or not the board legally exercised, and acted within, its powers.⁹⁶ Where findings by the board are necessary only in so far as they embrace facts known to the members of the board which do not appear in the evidence, the court in a certiorari proceeding may examine the evidence before the board to supplement, as well as to sustain, its findings.⁹⁷

Under particular statutory provisions, a court may hear and consider evidence of alleged irregularities in procedure or of unfairness by an agency, which is not shown in the record,⁹⁸ but the court may not weigh the evidence or determine the facts for itself where the judgment of the agency is in issue.⁹⁹

(4) Review by special statutory proceedings see supra § 333.

86. Ga.—Ledbetter v. Roberts, 98 S. E.2d 654, 95 Ga.App. 652.

Mich.—Austin v. Older, 270 N.W. 771, 278 Mich. 518.

87. N.J.—Finn v. Municipal Council of City of Clifton, 53 A.2d 790, 136 N.J.Law 34.

Appropriate allegation of petition is required for question to be raised.

R.I.—Baggs v. Zoning Bd. of Review of Town of Barrington, 86 A.2d 658, 79 R.I. 211.

Writs not bringing up ordinance

Court, on certiorari to review action of township authorities refusing to grant building permit, reviewed question whether zoning ordinance was reasonable exercise of municipal legislative power, although writs did not in terms bring up the zoning ordinance, where facts and proof offered principally concerned validity of ordinance.

N.J.—Dorsey Motors v. Davis, 180 A. 396, 13 N.J.Misc. 620.

88. Mich.—Austin v. Older, 270 N.W. 771, 278 Mich. 518.

89. Ill.—Dube v. Allman, 73 N.E.2d 180, 396 Ill. 470, transferred, see 77 N.E.2d 855, 323 Ill.App. 538.

90. Pa.—Landau Advertising Co. v. Zoning Bd. of Adjustment, 128 A.2d 559, 387 Pa. 552.

Proceeding in nature of certiorari

Under some statutes, in a proceeding in the nature of certiorari to review a decision of a board of appeals, the court is authorized to take evi-

dence on the issues to determine whether on such evidence, together with what is disclosed by the board's return, the determination made by the board was authorized; in view of the provision for the taking of evidence, such a proceeding is more analogous to a tax certiorari than to the common-law certiorari proceeding.

N.Y.—Jetter v. Hofheins, 70 N.Y.S.2d 808, 190 Misc. 99.

91. Pa.—Landau Advertising Co. v. Zoning Bd. of Adjustment, 128 A.2d 559, 387 Pa. 552.

92. Ill.—Flick v. Gately, 65 N.E.2d 137, 328 Ill.App. 81.

Iowa.—Zimmerman v. O'Meara, 245 N.W. 715, 215 Iowa 1140—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

93. Mo.—Dart Truck Co. v. Board of Zoning Adjustment of Kansas City, App., 299 S.W.2d 881.

Statute held repealed

Statute providing for appointment of referee to take additional evidence before reviewing court has been repealed by constitutional provision pertaining to judicial review of action of administrative agencies and by the administrative procedure act. Mo.—State ex rel. Horn v. Randall, App., 275 S.W.2d 758.

Reason for rule

Since purpose of writ of certiorari is to test legality of order of board, review of order by certiorari is not a trial de novo, even though statutes authorize taking of additional testimony.

Mo.—Cunningham v. Leimkuehler, App., 276 S.W.2d 633.

Jury trial

In proceeding to review determination of zoning board, petitioner's motion for jury trial of "issues of fact" was practically a demand for trial de novo which could not be permitted under rule that, although court takes whatever testimony is necessary for proper disposition of proceedings, no trial de novo may be had.

N.Y.—Bear Ridge Lake Corp. v. Gilchrist, 104 N.Y.S.2d 911.

94. N.Y.—Rubel Corporation v. Murdock, 7 N.Y.S.2d 358, 255 App.Div. 224, reargument denied 8 N.Y.S.2d 121, 255 App.Div. 868.

95. N.C.—In re Pine Hill Cemeteries, 15 S.E.2d 1, 219 N.C. 735.

96. Tenn.—Qualls v. City of Memphis, 15 Tenn.App. 575.

Discretion held not abused

Denial of rezoning was not abuse of discretion when based on substantial evidence that rezoning of residential area to business zone would lower value of residential sites in that area.

Mo.—State ex rel. Swofford v. Randall, App., 236 S.W.2d 354.

97. N.Y.—Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 167, 179 Misc. 325.

98. Mo.—State ex rel. Swofford v. Randall, App., 236 S.W.2d 354.

99. Mo.—State ex rel. Horn v. Randall, App., 275 S.W.2d 758.

Persons entitled to bring proceedings. Persons adversely affected by the actions of zoning agencies may have a status as parties sufficient to entitle them to seek relief in a certiorari proceeding.¹ Under provisions entitling "persons aggrieved" to seek judicial review by certiorari, the proceeding may be brought by a municipal corporation,² town board,³ or adjoining landowner;⁴ and "nearby residents" may have the status of "aggrieved persons" at least until the question of such status is properly raised and presented for adjudication in a particular case.⁵

§ 337. — Grant or Refusal of Permits

Depending on the statutes and ordinances, certiorari may be a proper remedy to review the action of an official or board with respect to a permit under a zoning ordinance; and, where authorized by statute, the court on review may receive additional testimony or try the case de novo.

Depending on the statutes and ordinances, and subject to the rules governing the right to certiorari generally, certiorari may lie⁶ or may not lie⁷ from a decision with respect to the issuance of a permit under a zoning ordinance; and it may lie to review the decision of a board of appeals on appeal to it from the action of an administrative body or official.⁸

Where no question of abuse of discretion is presented, the scope of review will be limited to questions of law,⁹ and the court will not substitute its discretion for that of the board.¹⁰ It may be improper for the court to appoint a referee and to decide the case de novo, taking into account the evidence before the referee,¹¹ or for the court to receive additional evidence itself.¹² When it is authorized to do so, however, the court reviewing a decision with respect to a permit may receive addi-

1. Fla.—Josephson v. Autrey, 96 So. 2d 784.

2. N.Y.—Village of Bronxville v. Francis, 134 N.Y.S.2d 59, 206 Misc. 339, modified on other grounds 150 N.Y.S.2d 906, 1 A.D.2d 236, affirmed 135 N.E.2d 724, 1 N.Y.2d 839, 153 N.Y.S.2d 220.

3. N.Y.—Town Bd. of Town of Huntington v. Zoning Bd. of Appeals of Town of Huntington, 165 N.Y.S.2d 954, 7 Misc.2d 210.

4. R.I.—Madden v. Zoning Board of Review of City of Providence, 136 A.2d 493, 48 R.I. 175.

5. N.Y.—Bayport Civic Ass'n v. Koehler, 138 N.Y.S.2d 524, followed in 138 N.Y.S.2d 532.

6. N.J.—Mulleady v. City of Trenton, 156 A. 843, 9 N.J.Misc. 1102, followed in Steward v. City of Trenton, 156 A. 844, 9 N.J.Misc. 1100.

R.I.—Richard v. Zoning Bd. of Review, 130 A. 802, 47 R.I. 102.

Tex.—Washington v. City of Dallas, Civ.App., 159 S.W.2d 579.

Mandamus or certiorari as proper remedy see *infra* § 347.

Decision to reopen proceedings

Town law provision that any person aggrieved by any decision of zoning board of appeals may apply for certiorari order is broad enough to authorize review of board's decision to reopen proceedings and rehear application for extension of temporary permit under discretionary provision of ordinance, and remedy provided therein is exclusive.

N.Y.—Ellsworth Realty Co. v. Kramer, 49 N.Y.S.2d 512, 268 App.Div. 824.

Considerations in testing reasonableness

In certiorari to review action of municipality refusing a permit to erect an awning, the fact that nearby property owners expressed themselves as favoring proposed erection and that none objected could be considered as weighing against reasonableness of refusal.

N.J.—French v. Cooper, 43 A.2d 880, 133 N.J.Law 246.

Allowance discretionary

Granting certiorari writ to review denial of application for gasoline station permit in district zoned for residence purposes is discretionary and requires applicant's bona fides.

N.J.—Schumacher v. Union City, 154 A. 406, 9 N.J.Misc. 492.

7. Ga.—Noland v. Bowen, 148 S.E. 596, 39 Ga.App. 813, 43 C.J. p 349 note 76.

Successive applications

Where court was asked by certiorari and mandamus to compel issuance of a permit after having theretofore twice refused to do so, and present factual situation, except for lease to present prosecution, differed in no material respect from that of previous cases, relief would be denied.

N.J.—Finn v. Municipal Council of City of Clifton, 46 A.2d 443, 135 N.J.Law 98, reversed on ground of invalidity of ordinance, 53 A.2d 790, 136 N.J.Law 34.

Other remedy available

(1) Where inspector of buildings granted building permit in accordance with void order of board of aldermen, proper remedy of aggrieved party was appeal to board of appeals from action of inspector in issuing

permit, and certiorari was not available to quash order of board of aldermen.

Mass.—Massachusetts Feather Co. v. Aldermen of Chelsea, 120 N.E.2d 766, 331 Mass. 527.

(2) Where membership of board of adjustment, which has authority to grant zoning variances, was completed two days after allowance of certiorari to review decision refusing to grant permit on ground that it would violate ordinance, court could properly have dismissed writ without prejudice to plaintiff's right to apply to newly organized board for desired relief.

N.J.—Oliva v. City of Garfield, 62 A. 2d 673, 1 N.J. 184.

8. Ga.—Doyal v. Jackson, 41 S.E.2d 152, 201 Ga. 746.

Ill.—Wolf v. Village of Mt. Prospect, 40 N.E.2d 778, 314 Ill.App. 23.

N.Y.—Jetter v. Hofheins, 70 N.Y.S.2d 808, 190 Misc. 99.

9. N.Y.—F. & L. Bldg. Corp. v. Murdock, 58 N.Y.S.2d 114, reversed on other grounds 65 N.Y.S.2d 646, 271 App.Div. 830.

10. Tex.—Montgomery v. City of Dallas, Civ.App., 245 S.W.2d 753, refused no reversible error.

Rule held not violated

Colo.—Board of Adjustment of City and County of Denver v. Abe Perlmutter Const. Co., 280 P.2d 1107, 131 Colo. 230.

11. Mo.—Dart Truck Co. v. Board of Zoning Adjustment of Kansas City, App., 299 S.W.2d 881.

12. Miss.—Mayor and Bd. of Aldermen of City of Pontotoc v. White, 93 So.2d 852.

tional testimony,¹³ and try the case de novo;¹⁴ and appellant may be entitled as of right to submit evidence to the court where it appears that the board improperly reached its decision without hearing any evidence or affording appellant a hearing.¹⁵

Where contentions of the parties on certiorari are required, by the zoning ordinance, to be specified in the application for the writ, contentions which are not so specified are waived.¹⁶ A court may not consider a contention which was not specified in the application for the writ of certiorari.¹⁷

Since the law in effect at the time of the disposition of the certiorari proceeding governs,¹⁸ the court may be required to consider the matter in the light of an ordinance relating to the issues before it, even though it was enacted after the decision of the administrative agency.¹⁹ The fact that an applicant who has been refused a permit has obtained a writ of certiorari to review the decision does not prevent the administrative official or body whose decision is under review from granting the permit pending the certiorari proceeding.²⁰

Persons entitled to institute proceedings. Property owners and persons having an interest in property affected by the grant of a permit are proper

parties to maintain a certiorari proceeding to review such grant.²¹ On the other hand, a pro forma decree corporation, members of which own property in the affected area, but which itself does not own real property or assets of any kind, is not an aggrieved person within a statute authorizing review of the issuance of permits by certiorari.²² Under a lease permitting the lessee to apply for the necessary permits to engage in the gasoline station business, and conferring on him the right to take such action as he deems advisable to enforce the allowance of a permit if he is refused one by the administrative officials, he has sufficient interest in the matter to enforce his rights by certiorari.²³

§ 338. — Grant or Refusal of Variances

In a proper case certiorari, or a proceeding in the nature of certiorari, will lie from a decision with respect to a variance, and the scope of review as well as the procedure will be governed by the usual rules of certiorari subject to special provisions of statutes or ordinances.

Depending on the statutes in the particular jurisdiction and the rules governing the issuance of writs of certiorari generally, certiorari may²⁴ or may

13. Mo.—State ex rel. Beacon Court, Inc. v. Wind, App. 309 S.W.2d 663. Pa.—Appeal of Brosnan, 198 A. 629, 330 Pa. 161.

Hearing required

Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Ordinary limitations inapplicable

In proceeding under statute providing for allowance of writ of certiorari to review decision of board of adjustment, referring to proceeding as an "appeal," and authorizing taking of testimony, findings of fact, conclusions of law, and reversal or affirmance wholly or partly, or modification, court was not limited to technical procedure or disposition simply as though on a certiorari, as against contention that court could only examine record to determine whether on its face any errors of law were revealed.

Pa.—Appeal of Brosnan, 195 A. 469, 129 Pa.Super. 411, affirmed 198 A. 629, 330 Pa. 161.

14. Iowa.—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1358.

15. Ill.—Flick v. Gately, 65 N.E.2d 137, 328 Ill.App. 81.

16. Mo.—Veal v. Leimkuehler, App. 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

17. Wis.—State ex rel. A. Hynek & Sons Co. v. Board of Appeals of City of Racine, 66 N.W.2d 623, 267 Wis. 309.

18. N.J.—Phillips v. Town of Belleville, 52 A.2d 441, 135 N.J.Law 271.

19. N.J.—Sun Oil Co. v. Borough of Bradley Beach, 55 A.2d 778, 136 N.J.Law 307, affirmed 61 A.2d 236, 137 N.J.Law 658—Ridgewood Air Club v. Board of Adjustment of Village of Ridgewood, Bergen County, 55 A.2d 100, 136 N.J.Law 223—Phillips v. Town of Belleville, 52 A.2d 441, 135 N.J.Law 271.

20. N.J.—Adams v. Jersey City, 151 A. 863, 107 N.J.Law 149, followed in Melosh v. Jersey City, 151 A. 865, 8 N.J.Misc. 802.

21. Miss.—Mayor and Bd. of Aldermen of City of Pontotoc v. White, 93 So.2d 852.

Equitable owner of premises was person aggrieved by determination of zoning board of appeals refusing permit for gasoline station, and as such could initiate certiorari proceeding. N.Y.—Nagaven Realities v. Banzhaf, 267 N.Y.S. 729, 149 Misc. 361.

22. Mo.—Lindenwood Imp. Ass'n v. Lawrence, App., 278 S.W.2d 30.

23. N.J.—Finn v. Municipal Council of City of Clifton, 53 A.2d 790, 136 N.J.Law 34.

24. Del.—In re Ceresini, 189 A. 443, 8 W.W.Harr. 134.

Mass.—Fairman v. Board of Appeal of Melrose, 117 N.E.2d 829, 331 Mass. 160—Kane v. Board of Appeals of City of Medford, 173 N.E. 1, 273 Mass. 97.

N.J.—Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367—Aschenbach v. Inhabitants of City of Plainfield, 3 A.2d 814, 121 N.J.Law 598, affirmed 8 A.2d 579, 123 N.J.Law 265. N.Y.—Long Island Lighting Co. v. Griffin, 72 N.Y.S.2d 712, transferred, see 74 N.Y.S.2d 348, 272 App.Div. 551.

Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35.

Appeal of Sucola, Com.Pl., 92 Pittsb.Leg.J. 345.

R.I.—Cardin v. Zoning Bd. of Review of Town of North Providence, 93 A.2d 304, 80 R.I. 136—Buckminster v. Zoning Board of Review of City of Pawtucket, 30 A.2d 104, 68 R.I. 515.

43 C.J. p 356 note 28.

Exclusive remedy

(1) Under some statutes, certiorari is sole method of reviewing decision of zoning board of appeals on application for variation of zoning ordinance.

N.Y.—Baddour v. City of Long Beach, 18 N.E.2d 18, 279 N.Y. 167, 124 A.L.R. 1003, reargument denied 19 N.E.2d 90, 279 N.Y. 784, appeal dismissed 60 S.Ct. 77, 308 U.S. 503,

not²⁵ lie from a decision on an application for a variance. It has been held that the scope of review on certiorari is limited to a determination of the board's jurisdiction²⁶ and the legality of its acts,²⁷ and does not extend to a review of the exercise of discretion,²⁸ but it has also been held that the

scope of review extends to a determination of whether the board abused its discretion in taking the action it did on the evidence before it.²⁹ In any event, the action of the board should not be disturbed unless such illegality or abuse of discretion is clearly shown on the record.³⁰ Under par-

84 L.Ed. 431—Beckmann v. Talbot, 15 N.E.2d 556, 278 N.Y. 146, rear-gument denied 16 N.E.2d 849, 278 N.Y. 700.

Roosevelt Field v. Town of North Hempstead, 95 N.Y.S.2d 126, 197 Misc. 621, reversed on other grounds 98 N.Y.S.2d 350, 277 App. Div. 839—Curtiss-Wright Corp. v. Incorporated Village of Garden City, 57 N.Y.S.2d 377, 185 Misc. 508, reversed on other grounds 61 N.Y.S.2d 678, 270 App. Div. 936, affirmed 72 N.E.2d 26, 296 N.Y. 839.

Aisloff v. Murdock, 81 N.Y.S.2d 872—Bronxville Associates v. Brady, 36 N.Y.S.2d 308—Inzerilli v. Pitney, 30 N.Y.S.2d 129.

(2) Having failed to obtain statutory certiorari review of adverse decision of board of appeals, property owners were not entitled to review thereof by intervening in equity suit.

III.—Park Ridge Fuel & Material Co. v. City of Park Ridge, 167 N.E. 119, 335 Ill. 509.

Full and complete review

Provision of town law, authorizing certiorari proceedings to review decisions of zoning board of appeals, was adequate to furnish property owner, denied variance by board, with full and complete review, in first instance, of determination of board.

N.Y.—People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 26 N.E.2d 952, 282 N.Y. 400.

Substituted proceeding

Under statutory provisions, method of review of decisions of zoning board of appeals is by special term under procedure substituted for certiorari rather than by appellate division in first instance.

N.Y.—Hopkins v. Board of Appeals of City of Rochester, 33 N.Y.S.2d 396, 178 Misc. 186.

Decision of Emergency Housing Commission

Mass.—Opinion of the Justices, Mass., 73 N.E.2d 881, 321 Mass. 759.

Failure to make findings

Certiorari would lie to review grant of permit for variance where board failed to find that denial of owner's application would cause it unnecessary hardship.

N.J.—Protomastro v. Board of Adjustment of City of Hoboken, 59 A.2d 644, 137 N.J.Law 250.

25. Mich.—Beardsley v. Evangelical Lutheran Bethlehem Church, 246 N.W. 180, 261 Mich. 453.

Where remedy by appeal available

Where building inspector refused to grant permit for variance, and council of city sitting as appeal board voted to grant variance, neighboring landowners had adequate remedy by appeal under statute from decision of board to superior court sitting in equity, and certiorari would not lie to quash proceedings of council sitting as board of appeal.

Mass.—Clap v. Municipal Council of City of Attleboro, 39 N.E.2d 431, 310 Mass. 605.

26. N.D.—Livingston v. Peterson, 228 N.W. 816, 59 N.D. 104, 43 C.J. p 356 note 31.

27. Ind.—Board of Zoning Appeals of City of Indianapolis v. Moyer, 27 N.E.2d 905, 108 Ind.App. 198.

Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Mo.—Superior Press Brick Co. v. City of St. Louis, App., 155 S.W.2d 290—State ex rel. Kaegel v. Holekamp, App., 151 S.W.2d 685.

N.J.—Shaiman v. Mayor, Board of Com'rs and Board of Adjustment of City of Newark, 191 A. 735, 15 N.J.Misc. 437.

Tex.—City of San Angelo v. Boehme Bakery, 190 S.W.2d 67, 144 Tex. 281.

Issues presented

On certiorari to review denial of variance of use district regulations so as to permit erection and operation of gasoline selling station, only questions for court are whether petitioner was illegally oppressed and whether board's action was unjustifiable as matter of law under specific provisions of zoning resolution relied on.

N.Y.—In re Cosden, 64 N.Y.S.2d 37, affirmed In re Application of Cosden, 63 N.Y.S.2d 640, 270 App.Div. 1013.

More unlawfulness

Fact that decision of board of zoning appeals refusing to vary zoning ordinance was unlawful is not a ground for review of decision unless the unlawfulness amounts to illegality.

Ind.—Board of Zoning Appeals of City of Indianapolis v. Waintrup, 193 N.E. 701, 99 Ind.App. 576.

28. N.D.—Livingston v. Peterson, 228 N.W. 816, 59 N.D. 104.

29. Ind.—Board of Zoning Appeals

of City of Indianapolis v. Waintrup, 193 N.E. 701, 99 Ind.App. 576. N.J.—Dubin v. Wich, 200 A. 751, 120 N.J.Law 469.

Shaiman v. Mayor, Board of Com'rs and Board of Adjustment of City of Newark, 191 A. 735, 15 N.J.Misc. 437.

R.I.—Caldarone v. Zoning Bd. of Review of City of Warwick, 60 A.2d 158, 74 R.I. 176—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

30. Colo.—Board of Adjustment of City and County of Denver v. Handley, 95 P.2d 823, 105 Colo. 180. N.J.—Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J.Super. 164.

Ramsbotham v. Board of Public Works of City of Paterson, 61 A.2d 196, 137 N.J.Law 559, followed in 61 A.2d 197, 137 N.J.Law 591—Albright v. Johnson, 50 A.2d 399, 135 N.J.Law 70—Mingo Holding Co. v. Town of Harrison, 48 A.2d 919—Green v. Board of Com'rs of City of Newark, 36 A.2d 610, 131 N.J.Law 336.

Benbak Const. Co. v. Board of Adjustment of City of Orange, 142 A. 357, 6 N.J.Misc. 543—Concord Development Co. v. Dowling, 142 A. 356, 6 N.J.Misc. 552—Kanter v. Board of Adjustment of City of East Orange, 142 A. 342, 6 N.J.Misc. 563—Feldman & Pivnick v. Board of Adjustment of City of East Orange, 142 A. 177, 6 N.J.Misc. 520, followed in Astapoff v. Bigelow, 142 A. 918, 6 N.J.Misc. 541, Del Campo v. Board of Adjustment of City of Newark, 142 A. 920, 6 N.J.Misc. 539, and J. H. Realty Co. v. Board of Adjustment of City of East Orange, 142 A. 921, 6 N.J.Misc. 540.

N.Y.—Calcagno v. Town Board of Town of Webster, 41 N.Y.S.2d 140, 265 App.Div. 687, affirmed 52 N.E.2d 592, 291 N.Y. 701—Joyce v. Dobson, 8 N.Y.S.2d 768, 255 App.Div. 348—People ex rel. Santora v. Kreuter, 1 N.Y.S.2d 879, 253 App. Div. 898—Levy v. Board of Standards and Appeals of City of New York, 276 N.Y.S. 370, 243 App.Div. 609, reversed on other grounds 196 N.E. 284, 267 N.Y. 347—New York & Richmond Gas Co. v. Connell, 272 N.Y.S. 915, 242 App.Div. 691—Dunne v. Walsh, 256 N.Y.S. 119, 235 App.Div. 72.

Vesell v. Board of Standards and Appeals of City of New York, 243

ticular circumstances, the grant of a variance has been held to constitute³¹ or not to constitute³² an abuse of discretion; and, similarly, the denial of an application for a variance has been held to con-

stitute³³ or not to constitute³⁴ an abuse of discretion.

In the absence of statutory provisions to the contrary, only errors of law³⁵ apparent on the face

N.Y.S. 518, 137 Misc. 806, affirmed Vesell v. Walsh, 232 N.Y.S. 904, 225 App.Div. 742—In re Fein, 67 N.Y.S.2d 218, affirmed 72 N.Y.S.2d 264, 272 App.Div. 819—Arditi Realty Co. v. Murdock, 67 N.Y.S.2d 809.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107.

R.I.—Perrier v. Board of Appeals of City of Pawtucket, 134 A.2d 141—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199—Bruzzi v. Board of Appeals of City of Pawtucket, 123 A.2d 877—Kent v. Zoning Bd. of Review of Town of Barrington, 63 A.2d 731, 75 R.I. 64—Fiske v. Zoning Bd. of Review of Town of East Providence, 50 A.2d 65, 72 R.I. 217, rehearing denied 50 A.2d 779, 72 R.I. 217—Olevson v. Zoning Board of Review of Town of Narragansett, 44 A.2d 720, 71 R.I. 303—Fiske v. Zoning Bd. of Review of Town of East Providence, 40 A.2d 435, 70 R.I. 426—Buckminster v. Zoning Board of Review of City of Pawtucket, 33 A.2d 199, 69 R.I. 396—Buckminster v. Zoning Board of Review of City of Pawtucket, 30 A.2d 104, 68 R.I. 515—Dunham v. Zoning Board of Town of Westerly, 26 A.2d 614, 68 R.I. 88—Potter v. Zoning Board of Review of City of Cranston, 14 A.2d 669, 65 R.I. 286—Berg v. Zoning Board of Review of City of Warwick, 12 A.2d 225, 64 R.I. 230—Jacques v. Zoning Board of Review of City of Pawtucket, 12 A.2d 222, 64 R.I. 284—Jenny Mfg. Co. v. Zoning Board of Review of Town of East Providence, 9 A.2d 705, 63 R.I. 477—Roberts v. Zoning Board of Review of City of Pawtucket, 197 A. 461, 60 R.I. 202—McCabe v. Zoning Board of Review of City of Providence, 148 A. 601, 50 R.I. 449—Sundlun v. Zoning Board of Review of City of Pawtucket, 145 A. 451, 50 R.I. 108.

Tex.—Board of Adjustment of City of Fort Worth v. Stovall, 216 S.W.2d 171, 147 Tex. 366—City of San Angelo v. Boehme Bakery, 190 S.W.2d 67, 144 Tex. 281.

Reasons on which the board's action is based are of no concern to the court; its only consideration is whether such action was right or wrong.

N.J.—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J. Law 95.

If there is some evidence in the record on which decision of a zoning board of review may reasonably rest, no abuse of discretion appears.

R.I.—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A.2d 478, 74 R.I. 316.

31. N.J.—Hann v. Borough of Sea Girt, 46 A.2d 47, 134 N.J. Law 74—Scaduto v. Town of Bloomfield, 20 A.2d 649, 127 N.J. Law 1.

N.Y.—Underhill v. Board of Appeals of Town of Oyster Bay, 75 N.Y.S.2d 327, 273 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937.

Pa.—Appeal of Sucola, Com.Pl., 92 Pittsb. Leg. J. 345.

R.I.—Allan v. Zoning Bd. of Review of City of Warwick, 89 A.2d 364, 79 R.I. 413—Abbott v. Zoning Bd. of Review of City of Warwick, 79 A.2d 620, 78 R.I. 84—Strauss v. Zoning Bd. of Review of City of Warwick, 48 A.2d 349, 72 R.I. 107.

32. N.J.—Sandler v. Board of Com'rs of City of Trenton, 19 A.2d 788, 126 N.J. Law 392.

N.Y.—William Borea Contracting Co. v. Murdock, 294 N.Y.S. 19, 250 App. Div. 262, followed in 294 N.Y.S. 21, 250 App.Div. 264.

Reed v. Board of Standards and Appeals of City of New York, 244 N.Y.S. 413, 138 Misc. 187, affirmed 243 N.Y.S. 263, 230 App.Div. 21, affirmed 174 N.E. 301, 255 N.Y. 126—Tishman Realty & Construction Co. v. Walsh, 237 N.Y.S. 237, 135 Misc. 315, affirmed 239 N.Y.S. 759, 228 App.Div. 687.

Pa.—Triolo v. Exley, 57 A.2d 878, 358 Pa. 555.

Appeal of Wallace, Com.Pl., 72 Montg. Co. 312.

R.I.—Miriam Hospital v. Zoning Board of Review of City of Providence, 23 A.2d 191, 67 R.I. 295—Syrian Orthodox Charitable Soc. v. Zoning Board of Review of City of Pawtucket, 165 A. 778, 53 R.I. 232—Morgan v. Zoning Board of Review of Town of Warwick, 160 A. 922, 52 R.I. 338—Roberge v. Zoning Board of Review of Town of East Providence, 157 A. 304.

33. Ind.—Board of Zoning Appeals of City of Indianapolis v. Waintrup, 193 N.E. 701, 99 Ind. App. 576.

Mo.—Berard v. Board of Adjustment of City of St. Louis, App., 138 S.W. 2d 731.

N.J.—Spring Brook Gardens v. Board of Adjustment of Springfield Tp., 60 A.2d 288, 137 N.J. Law 398—Bleloch v. Board of Adjustment of Margate City, 49 A.2d 501, 134 N.J. Law 564—Schablie v. Board of Adjustment, 49 A.2d 50, 134 N.J. Law 473.

Karam v. Wolfe, 26 A.2d 873, 20 N.J. Misc. 368, affirmed 30 A.2d 286, 129 N.J. Law 441.

N.Y.—People ex rel. Saypol v. Griffin, 44 N.Y.S.2d 68, 182 Misc. 454.

Alexander's Department Stores v. Murdock, 37 N.Y.S.2d 319.

Pa.—Appeal of Crawford, 57 A.2d 862, 358 Pa. 636.

Appeal of Lindquist, Com.Pl., 66 Montg. Co. 27, affirmed 73 A.2d 378, 364 Ga. 561.

R.I.—Kent v. Zoning Bd. of Review of Town of Barrington, 58 A.2d 623, 74 R.I. 89.

34. Ga.—City of Atlanta v. Awtry & Lowndes Co., 53 S.E.2d 358, 205 Ga. 296.

N.J.—Visco v. City of Plainfield, 57 A.2d 490, 136 N.J. Law 659—Midland Park Coal & Lumber Co. v. Terhune, 56 A.2d 717, 136 N.J. Law 442, affirmed 61 A.2d 76, 137 N.J. Law 603—G. A. Realty Corp. v. Board of Adjustment of Jersey City, 52 A.2d 563, 135 N.J. Law 427—Montgomery Engineering Co. v. Jersey City, 48 A.2d 643, 134 N.J. Law 414—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J. Law 95—Saraydar v. Board of Com'rs of City of Newark, 36 A.2d 289, 131 N.J. Law 290.

Keiser v. Inhabitants of City of Plainfield, 159 A. 785, 10 N.J. Misc. 496.

N.Y.—Seinfeld v. Murdock, 30 N.Y.S. 2d 464, 259 App.Div. 694, reargument denied 21 N.Y.S.2d 610, 259 App.Div. 1074, affirmed 34 N.E.2d 488, 285 N.Y. 718—People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 11 N.Y.S. 2d 159, 256 App.Div. 1078, affirmed 26 N.E.2d 952, 282 N.Y. 400—People ex rel. Black v. Randall, 5 N.Y.S.2d 40, 254 App.Div. 310—Durke v. Connell, 274 N.Y.S. 745, 242 App.Div. 795—Sagamore Road Corporation v. Lee, 230 N.Y.S. 58, 224 App.Div. 744, affirmed 166 N.E. 313, 250 N.Y. 522.

R.I.—R. D'Ordine & Son v. Zoning Bd. of Review of Town of East Providence, 90 A.2d 416, 79 R.I. 489—Potter v. Zoning Board of Review of City of Cranston, 14 A.2d 669, 65 R.I. 286—Spirito v. Zoning Board of Review of City of Cranston, 12 A.2d 727, 64 R.I. 411.

35. Mass.—Brackett v. Board of Appeal of Building Department of City of Boston, 39 N.E.2d 956, 311 Mass. 52.

Pa.—Appeal of Wallace, Com.Pl., 72 Montg. Co. 312.

43 C.J. p 357 note 33.

of the record³⁶ can be reviewed. Although the court will consider objections which touch on the jurisdiction of the board, which were not presented to that body,³⁷ usually the court will restrict itself to the same question which was before the board³⁸ and will not pass on other matters,³⁹ such as constitutional questions,⁴⁰ including questions as to the constitutionality of the statute under which the ordinance involved was enacted,⁴¹ or as to the constitutionality of the ordinance.⁴² Furthermore, where a particular question is not raised in the petition for certiorari, the court will not consider

contentions of the parties with respect thereto;⁴³ and such rule applies as to questions relating to constitutionality of the act authorizing the zoning ordinance,⁴⁴ or the constitutionality⁴⁵ or validity⁴⁶ of the zoning ordinance.

Findings of fact or conclusions based thereon ordinarily will not be disturbed⁴⁷ unless shown to have been clearly against the great weight of the evidence⁴⁸ or without support in fact or law,⁴⁹ and the court will not substitute its judgment for that of the board⁵⁰ or annul the decision of the board

Abuse of discretion may constitute error of law.

N.J.—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

36. Mass.—*Real Properties v. Board of Appeal of Boston*, 65 N.E.2d 199, 319 Mass. 180—*Coleman v. Board of Appeal of Building Department of Boston*, 183 N.E. 166, 281 Mass. 112.

N.C.—*Lee v. Board of Adjustment of City of Rocky Mount*, 37 S.E.2d 128, 226 N.C. 107.

R.I.—*Flake v. Zoning Bd. of Review of Town of East Providence*, 40 A.2d 435, 70 R.I. 426—*Ralston Purina Co. v. Zoning Board of Town of Westerly*, 12 A.2d 219, 64 R.I. 197.

37. R.I.—*May-Day Realty Corp. v. Zoning Bd. of Review of City of Pawtucket*, 77 A.2d 539, 77 R.I. 469.

Incorrect description in newspaper notice

Where newspaper notice of hearing on application misdescribed property, failure to make objection to misdescription before board did not result in waiver of right, and landowners were not precluded from making such objection in certiorari proceeding, since misdescription could reasonably have misled landowners to inaction.

R.I.—*Abbott v. Zoning Bd. of Review of City of Warwick*, 79 A.2d 620, 78 R.I. 84.

38. R.I.—*Drabble v. Zoning Board of Review of City of Providence*, 159 A.2d 828, 52 R.I. 228—*Heffernan v. Zoning Board of Review of City of Cranston*, 142 A. 479, 49 R.I. 283.

39. N.J.—*Wyndham Const. Co. v. Board of Adjustment of Teaneck Tp.*, 63 A.2d 707, 1 N.J.Super. 197—*Roberts v. Board of Adjustment of Borough of Fort Lee*, 61 A.2d 896, 1 N.J.Super. 29.

R.I.—*Mastrati v. Strauss*, 67 A.2d 29, 75 R.I. 417—*Allen v. Zoning Bd. of Review of City of Warwick*, 66 A.2d 369, 75 R.I. 321—*Caldarone v. Zoning Bd. of Review of City of Warwick*, 60 A.2d 158, 74 R.I. 176.

Wrong paragraph of act

In certiorari proceeding to review a decision of zoning board of review granting an application for an exception or variance under zoning ordinance, contention could not be made for first time that application for variance was based on wrong paragraph of zoning act.

R.I.—*Miriam Hospital v. Zoning Board of Review of City of Providence*, 28 A.2d 191, 67 R.I. 295.

Absence of conclusions and findings

Order of board of zoning adjustment was not illegal because it was not accompanied by conclusions of law and findings of fact in compliance with statute, where applicant made no request for such conclusions and findings at hearings before board.

Mo.—*Carroll Const. Co. v. Kansas City, App.*, 278 S.W.2d 817.

40. R.I.—*R. D'Ordine & Son v. Zoning Bd. of Review of Town of East Providence*, 90 A.2d 416, 79 R.I. 489—*Jenney Mfg. Co. v. Zoning Board of Review of Town of East Providence*, 9 A.2d 705, 63 R.I. 477.

41. R.I.—*Drabble v. Zoning Board of Review of City of Providence*, 159 A. 828, 52 R.I. 228.

42. R.I.—*Ajootian v. Zoning Bd. of Review of City of Providence*, 132 A.2d 836.

43. Mo.—*Carroll Const. Co. v. Kansas City, App.*, 278 S.W.2d 817.

44. R.I.—*Jacques v. Zoning Board of Review of City of Pawtucket*, 12 A.2d 222, 64 R.I. 284.

45. R.I.—*Jacques v. Zoning Board of Review of City of Pawtucket*, supra.

46. R.I.—*Hopkins v. Zoning Bd. of Review of City of Warwick*, 123 A.2d 253—*Harrison v. Zoning Bd. of Review of City of Pawtucket*, 59 A.2d 361, 74 R.I. 135.

47. Mass.—*Miller v. Emergency Housing Commission*, 116 N.E.2d 663, 330 Mass. 693—*Brackett v. Board of Appeal of Building Department of City of Boston*, 39 N.E.2d 956, 311 Mass. 52—*Coleman v. Board of Appeal of Building De-*

partment of Boston, 183 N.E. 166, 281 Mass. 112.

N.J.—*Paramount Realty & Const. Co. v. Schmitt*, 142 A. 247, 6 N.J.Misc. 547, affirmed 146 A. 319, 106 N.J.Law 587—*Levine v. Board of Adjustment of Borough of Rutherford*, 142 A. 234, 6 N.J.Misc. 548.

R.I.—*Costantino v. Zoning Bd. of Review of City of Cranston*, 60 A.2d 478, 74 R.I. 316—*Buckminster v. Zoning Board of Review of City of Pawtucket*, 33 A.2d 199, 69 R.I. 396, 43 C.J. p 357 note 34.

48. N.J.—*Lehrer v. Board of Adjustment of City of Newark*, 58 A.2d 265, 137 N.J.Law 100—*Krilov v. Board of Adjustment of City of Newark*, 57 A.2d 659, 137 N.J.Law 99.

Weight of evidence for board only

(1) Generally.

R.I.—*Baggs v. Zoning Bd. of Review of Town of Barrington*, 86 A.2d 658, 79 R.I. 211—*Sweck v. Zoning Bd. of Review of North Kingstown*, 72 A.2d 679, 77 R.I. 8.

(2) If there is some evidence to support grant of variance by zoning board, court will not weigh it on certiorari.

R.I.—*Taft v. Zoning Bd. of Review of City of Warwick*, 71 A.2d 886, 76 R.I. 443.

(3) In certiorari proceeding to review the action of zoning board of review solely on record before it, it is not for court to determine whether facts were sufficient to preponderate in favor of request for exception.

R.I.—*Costantino v. Zoning Bd. of Review of City of Cranston*, 60 A.2d 478, 74 R.I. 316.

49. N.J.—*Keiser v. Inhabitants of City of Plainfield*, 159 A. 785, 10 N.J.Misc. 496—*Jannarone v. Board of Adjustment of Town of Nutley*, 153 A. 256, 9 N.J.Misc. 210.

Finding held clearly erroneous

R.I.—*Baggs v. Zoning Bd. of Review of Town of Barrington*, 86 A.2d 658, 79 R.I. 211.

50. Mo.—*State ex rel. Swofford v. Randall, App.*, 236 S.W.2d 354—*Berard v. Board of Adjustment of*

where the showing before it afforded a basis for its determination.⁵¹ In the absence of statutory provisions to the contrary, the court will decide the issues only on the record of the proceedings before the board returned by it in response to issuance of the writ;⁵² the court will not hear the matter de novo,⁵³ even if the parties stipulate that it should,⁵⁴ and it will not order a reference.⁵⁵ Accordingly, the petitioners cannot show by evidence outside the record,⁵⁶ as by depositions or affidavits presented in the certiorari proceeding,⁵⁷ that conditions exist which warrant the granting of the variance.

Statutes enacted in a number of jurisdictions providing specially for review of acts of boards of appeal and adjustment by certiorari have been held to grant the court broader powers than those obtaining under common-law certiorari.⁵⁸ Under some statutes a trial de novo is provided for on a review by certiorari.⁵⁹ Under express statutory provisions in a number of jurisdictions the court may receive additional evidence, if that is found necessary for the proper disposition of the case,⁶⁰ and exclusion of competent testimony may consti-

City of St. Louis, App., 138 S.W.2d 731.

N.J.—Albright v. Johnson, 50 A.2d 399, 135 N.J.Law 70.

N.Y.—Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County, 60 N.Y.S. 2d 750, 271 App.Div. 33—Calcagno v. Town Board of Town of Webster, 41 N.Y.S.2d 140, 265 App.Div. 687, affirmed 52 N.E.2d 592, 291 N.Y. 701—Joyce v. Dobson, 8 N.Y.S.2d 768, 255 App.Div. 318—People ex rel. Black v. Randall, 6 N.Y.S.2d 40, 254 App.Div. 310—People ex rel. Santora v. Kreuter, 1 N.Y.S.2d 879, 253 App.Div. 898—Fort Greene Associates v. Murdock, 290 N.Y.S. 886, 249 App.Div. 622, affirmed 6 N.E.2d 426, 273 N.Y. 506—Levy v. Board of Standards and Appeals of City of New York, 276 N.Y.S. 370, 243 App.Div. 609, reversed on other grounds 196 N.E. 284, 267 N.Y. 347.

Hopkins v. Board of Appeals of City of Rochester, 33 N.Y.S.2d 396, 178 Misc. 186.

Chapmald Realty Corp. v. Board of Standards & Appeals of New York City, 76 N.Y.S.2d 296—Arditi Realty Co. v. Murdock, 67 N.Y.S.2d 809—Burke v. Cohen, 13 N.Y.S.2d 984.

R.I.—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135.

Tex.—City of San Angelo v. Boehme Bakery, 190 S.W.2d 67, 144 Tex. 281.

Texas Consol. Theatres v. Pittillo, Civ.App., 204 S.W.2d 396.

Stipulation to contrary ineffectual

N.J.—Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp., 84 A.2d 18, 16 N.J.Super. 113.

51. N.Y.—Levy v. Board of Standards and Appeals of City of New York, 196 N.E. 284, 267 N.Y. 347. Strait v. Murdock, 292 N.Y.S. 456, 249 App.Div. 791—Fort Greene Associates v. Murdock, 290 N.Y.S. 886, 249 App.Div. 622, affirmed 6 N.E.2d 426, 273 N.Y. 506.

Burke v. Cohen, 13 N.Y.S.2d 984.

Tex.—City of San Angelo v. Boehme Bakery, 190 S.W.2d 67, 144 Tex. 281.

Binding effect of determination

Tenn.—Hickerson v. Flannery, 302 S.W.2d 508.

52. R.I.—Taft v. Zoning Bd. of Review of City of Warwick, 71 A.2d 886, 76 R.I. 443—Allen v. Zoning Bd. of Review of City of Warwick, 66 A.2d 369, 75 R.I. 321.

53. Ind.—Board of Zoning Appeals of City of Indianapolis v. Moyer, 27 N.E.2d 905, 108 Ind.App. 198—Board of Zoning Appeals of City of Indianapolis v. Waintrup, 193 N.E. 701, 99 Ind.App. 576—O'Connor v. Overall Laundry, 183 N.E. 134, 98 Ind.App. 29.

N.Y.—People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 26 N.E.2d 952, 282 N.Y. 400.

Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, Monroe County, 60 N.Y.S. 2d 750, 271 App.Div. 33—Calcagno v. Town Board of Town of Webster, 41 N.Y.S.2d 140, 265 App.Div. 687, affirmed 52 N.E.2d 592, 291 N.Y. 701.

People v. Leo, 173 N.Y.S. 217, 105 Misc. 372.

Proceeding held not trial de novo

Even though trial court allowed additional evidence to be introduced to supplement return to writ of certiorari, record established that review in trial court was not a trial de novo.

Ind.—Lutz v. New Albany City Plan Commission, 101 N.E.2d 187, 230 Ind. 74.

54. N.Y.—People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 26 N.E.2d 952, 282 N.Y. 400.

55. N.Y.—People v. Leo, 173 N.Y.S. 217, 105 Misc. 372.

56. Mass.—Bradley v. Boston Bd. of Zoning Adjustment, 150 N.E. 892, 255 Mass. 160.

57. N.J.—G. G. A. Realty Corp. v. Board of Adjustment of Jersey City, 52 A.2d 563, 135 N.J.Law 427—Potts v. Board of Adjustment of

Borough of Princeton, 43 A.2d 850, 133 N.J.Law 230—Franklin Sav. Institution of Newark v. City of Newark, 3 A.2d 801, 121 N.J.Law 595.

Shaiman v. Mayor, Board of Com'rs and Board of Adjustment of City of Newark, 191 A. 735, 15 N.J.Misc. 437.

N.Y.—Reisberg v. Board of Standards and Appeals of New York City, 81 N.Y.S.2d 511.

58. Ind.—O'Connor v. Overall Laundry, 183 N.E. 134, 98 Ind.App. 29.

Tex.—Board of Adjustment of City of Fort Worth v. Stovall, 216 S.W. 2d 171, 147 Tex. 366—City of San Angelo v. Boehme Bakery, 190 S.W.2d 67, 144 Tex. 281.

Nature of proceeding

Tex.—City of San Angelo v. Boehme Bakery, supra.

59. Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

60. Del.—Searles v. Darling, 83 A. 2d 96, 7 Terry 263—In re Ceresini, 189 A. 443, 8 W.W.Harr. 134.

Ind.—Board of Zoning Appeals of City of Indianapolis v. Waintrup, 193 N.E. 701, 99 Ind.App. 576—O'Connor v. Overall Laundry, 183 N.E. 134, 98 Ind.App. 29.

Mo.—Berard v. Board of Adjustment of City of St. Louis, App., 138 S.W.2d 731.

N.Y.—People ex rel. Hudson-Harlem Valley Title & Mortgage Co. v. Walker, 26 N.E.2d 952, 282 N.Y. 400—People ex rel. St. Albans-Springfield Corporation v. Connell, 177 N.E. 313, 257 N.Y. 73.

Tex.—City of San Angelo v. Boehme Bakery, 190 S.W.2d 67, 144 Tex. 281.

Scope and effect of evidence introduced

On certiorari to review order of board of adjustment, court, in passing on legality of board's order, should not base its judgment solely on evidence adduced before it, but should consider board's verified return along with evidence introduced, and from consideration of whole determine whether board abused its discretion, and court is not to put

tute an abuse of discretion.⁶¹ It has been held that a view of the area by the court is independent evidence which the court may consider in arriving at its conclusion.⁶²

While, in the absence of evidence showing the decision of the board to be erroneous, that decision must be accepted as final,⁶³ where additional competent evidence received by the court shows that the board's findings are erroneous the court may overrule them.⁶⁴ It has been said that this power to take additional testimony should be exercised with extreme care where there appears to be a probability that the effect of the additional testimony, if it is received, will be to show that the ruling complained of is erroneous.⁶⁵ On certiorari to review the action of a board in refusing a variance, the court may be required to consider the matter in the light of an ordinance relating to the issues before it, even though it was enacted after the decision of the administrative agency.⁶⁶

Who may institute proceeding. Adjoining and neighboring landowners⁶⁷ whose properties are affected by the decision⁶⁸ are proper persons to in-

stitute a certiorari proceeding; and such persons may petition as "aggrieved parties" without allegations of special damage to them resulting from the granting of the variance in question.⁶⁹

§ 339. Declaratory Judgment

- a. In general
- b. Availability or prior use of other remedy

a. In General

Except where a statute provides a different and exclusive remedy, a property owner may properly seek a judgment declaring his rights, status, or other legal relations under a zoning regulation, or declaring it invalid as to particular property; but he must show an actual controversy.

Except where a statute is construed as providing an exclusive remedy of a different nature, as discussed infra subdivision b of this section, an action for a declaratory judgment is the, or a, proper remedy of a property owner to have declared his rights, status, or other legal relations under a zoning ordinance or regulation,⁷⁰ or to have the

itself in position of board and substitute its discretion for that of board.

Tex.—City of San Angelo v. Boehme Bakery, *supra*.

Necessity of findings by board

On review of determination of zoning board of appeals exempting property from zoning ordinance for unreasonable hardship, where no findings of fact had been made by the board and no evidence was certified, the court cannot proceed to hear new evidence why a variance should be granted without substituting its own discretion for that of the board.

N.Y.—Hopkins v. Board of Appeals of City of Rochester, 33 N.Y.S.2d 396, 178 Misc. 186.

61. Md.—Dorman v. Mayor and City Council of Baltimore, 51 A.2d 653, 187 Md. 678.

62. Cal.—Saks & Co. v. City of Beverly Hills, 237 P.2d 32, 107 C.A.2d 260.

63. Tex.—Gulf, C. & S. F. Ry. Co. v. White, Civ.App., 281 S.W.2d 441, refused no reversible error.

Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358.

Board's discretion as controlling

In granting of variance because of unnecessary hardships and practical difficulties in respect of adapting property to conforming use, discretion to be exercised was that of board of standards and appeals and not of referee acting on new evidence and his personal inspection of premises in proceeding for certiorari

against board, as opposed to similar inspection by members of board in reaching its determination.

N.Y.—Raskin v. Murdock, 276 N.Y.S. 168, 243 App.Div. 561.

64. Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358.

65. N.Y.—People ex rel. St. Albans-Springfield Corporation v. Connell, 177 N.E. 313, 257 N.Y. 78.

Dunne v. Walsh, 256 N.Y.S. 119, 235 App.Div. 72.

66. N.J.—Concord Garden Apartments v. Board of Adjustment of City of Englewood, 64 A.2d 355, 1 N.J.Super. 301.

67. N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J. Law 280.

Gaston v. Ackerman, 142 A. 546, 6 N.J.Misc. 696.

Mortgagees

Where board of standards and appeals amended and affirmed prior grant of variance, a purchase money mortgagee of neighboring land was authorized to petition for certiorari, if not on his own behalf, then as agent of landowner.

N.Y.—Eckerman v. Murdock, 94 N.Y. S.2d 557, 276 App.Div. 927.

68. Miss.—Mayor and Bd. of Aldermen of City of Pontotoc v. White, 93 So.2d 852.

N.C.—Lee v. Board of Adjustment of City of Rocky Mount, 37 S.E.2d 128, 226 N.C. 107.

R.I.—Abbott v. Zoning Bd. of Review of City of Warwick, 79 A.2d 620,

78 R.I. 84—Flynn v. Zoning Bd. of Review of City of Pawtucket, 73 A.2d 808, 77 R.I. 118.

69. N.Y.—Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S.2d 358.

70. Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Cal.—Case v. City of Los Angeles, 298 P.2d 50, 142 C.A.2d 66.

Conn.—Town of Newington v. Maz-zocchi, 48 A.2d 729, 133 Conn. 146.

Mass.—Publico v. Building Inspector of Quincy, 142 N.E.2d 767.

Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

N.H.—Faulkner v. City of Keene, 155 A. 195, 85 N.H. 147.

N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

Dunkirk Aerie, No. 2447, Fraternal Order of Eagles v. City of Dunkirk, 87 N.Y.S.2d 202, 274 App.Div. 685.

Elkind v. City of New Rochelle, 163 N.Y.S.2d 870, 5 Misc.2d 296—McCabe v. City of New York, 10 N.Y.S.2d 383, 170 Misc. 325, reversed on other grounds 13 N.Y.S.2d 676, 257 App.Div. 1010, reversed on other grounds 23 N.E.2d 529, 281 N.Y. 349.

Margo Operating Corp. v. Village of Great Neck, 129 N.Y.S.2d 436.

Ohio.—Village of Bay v. Gelvick, 15 N.E.2d 786, 58 Ohio App. 51.

Pa.—Taylor v. Haverford Tp., 149 A. 639, 299 Pa. 402.

ordinance declared invalid or unconstitutional as applied to particular property.⁷¹ However, a declaration of the invalidity of an ordinance as applied to particular property will not be made where the evidence shows that reasonable men may have a fair difference of opinion concerning the reasonableness of the zoning classification.⁷²

Under a statute empowering courts to declare

rights, status, and other legal relations whether or not further relief is, or could be, claimed, a court has jurisdiction of an action for a declaratory judgment involving a zoning ordinance notwithstanding the petition seeks declaration of rights, status, and other legal relations without further relief.⁷³ A plaintiff seeking declaratory relief has been held not required, in the first instance, to enumerate every statute that may be involved.⁷⁴

Tex.—Waco Federation of Women's Clubs v. Goddard, Civ.App., 275 S. W.2d 541.

Persons entitled to attack validity of zoning ordinance see *supra* § 20.

Rights dependent on construction of ordinance

Cal.—Greenfield v. Board of City Planning Com'rs of Los Angeles, 45 P.2d 219, 6 C.A.2d 515.

Estoppel or waiver not shown

In absence of finding of prejudice to any one from property owner's failure to take steps to determine whether his property was within zoned area, there was no basis for estoppel or waiver which would affect his right to judgment declaring that property was not within zoned area.

Conn.—Kimberly v. Town of Madison, 17 A.2d 504, 127 Conn. 409.

Complaint against action of city council

Complaint that action of city council in granting a conditional use permit by resolution rather than by ordinance deprived land owners of right to vote on matter under city charter, authorizing referendum only on ordinances, should be directed at zoning ordinances rather than at administrative action by council by resolution authorized by ordinances, and did not show that such resolution was void, particularly in absence of allegation of any attempt to secure referendum election on resolution granting permit.

Cal.—Easick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.

71. Ala.—Marshall v. City of Mobile, 35 So.2d 553, 250 Ala. 646.

Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

Romig v. Weld, 95 N.Y.S.2d 571, 276 App.Div. 514.

MacEwen v. City of New Rochelle, 267 N.Y.S. 36, 149 Misc. 251.

Gignoux v. Village of Kings Point, 85 N.Y.S.2d 675, affirmed 85 N.Y.S.2d 516, 274 App.Div. 1003, reargument and appeal denied 86 N.Y.S.2d 469, 274 App.Div. 1065—Bronxville Associates v. Brady, 36 N.Y.S.2d 308.

Ohio.—Henle v. City of Euclid, 125 N.E.2d 355, 97 Ohio App. 258, appeal dismissed 122 N.E.2d 792, 162 Ohio St. 280—Henle v. City of Euclid, App., 118 N.E.2d 682.

Pa.—Barner v. Harman, Com.Pl., 4 Lycoming 246.

Rezoning commercial property for industrial use

Md.—Kracke v. Weinberg, 79 A.2d 387, 197 Md. 339.

Nature of action

(1) An action for judgment declaring unconstitutional amended zoning ordinance under which defendants had applied for permits to construct buildings which plaintiff objected to is in all essentials an action for injunction.

Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

(2) Suit to declare zoning order void is not an appeal on merits of issues presented to zoning commission at its hearing.

D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App.D.C. 72.

Grievance on behalf of large group

Where complaint challenging validity of zoning resolutions could be read as stating grievance on behalf of large group, and more was involved than unique problem of particular land owner, action was premature because plaintiff did not show that he had had any plans under way for new construction or rebuilding, and court could, in exercise of its discretion and on ground of sound public policy, allow remedy of declaratory judgment in order to secure expeditious determination of broad questions presented.

N.Y.—431 Fifth Ave. Corp. v. City of New York, 55 N.Y.S.2d 203, 184 Misc. 1001, modified on other grounds 59 N.Y.S.2d 25, 270 App. Div. 241, affirmed 68 N.E.2d 877, 296 N.Y. 588.

Unapproved sale of property to plaintiff

Fact that sale to plaintiff of property had not been approved by regulatory agency did not bar plaintiff from maintaining action for judgment declaring zoning ordinance and amendment to be unconstitutional.

N.Y.—Vernon Park Realty, Inc. v. City of Mount Vernon, 125 N.Y.S.2d 112, 282 App.Div. 890, appeal de-

nied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.

Grant of variance

Where adjoining property owners attacked, on constitutional grounds, validity of provisions of ordinance under which zoning board of appeals purported to grant a variance, and attacked jurisdiction of board in acting directly on an original application rather than on an appeal from denial of application to board officials, action for a declaratory judgment would lie.

N.Y.—Roosevelt Field v. Town of North Hempstead, 95 N.Y.S.2d 126, 197 Misc. 621, reversed on other grounds 98 N.Y.S.2d 350, 277 App. Div. 889.

72. Ill.—Wehrmeister v. Du Page County, 141 N.E.2d 26, 10 Ill.2d 604. N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115.

Controlling element

Fact that location of dental office in certain neighborhood in residential district in village might be convenient for some of the neighbors was not the controlling element in action by dentist for declaratory judgment that zoning ordinance of village was void as far as it prohibited him from maintaining his dental office in his dwelling.

Ill.—Skrysak v. Village of Mt. Prospect, 148 N.E.2d 721, 13 Ill.2d 329.

73. Ohio.—Village of Bay v. Gelvick, 15 N.E.2d 786, 58 Ohio App. 51.

Sufficiency of pleadings generally see *infra* §§ 356–359.

Relief granted see *infra* §§ 367–372.

74. Cal.—Andrews v. City of Piedmont, 281 P. 78, 100 C.A. 700, followed in Andrews v. Barrett, 281 P. 79, 100 C.A. 801, and Williams v. City of Piedmont, 281 P. 79, 100 C.A. 802.

Construction of statutes and ordinances involved

However, as hearing on cause proceeds, trial court, at proper time, will be called on to construe and interpret each statute or municipal ordinance which may be involved.

Cal.—Andrews v. City of Piedmont, 281 P. 78, 100 C.A. 700, followed in Andrews v. Barrett, 281 P. 79, 100 C.A. 801, and Williams v. City

One purchasing property with full knowledge of zoning restrictions has been held barred by such knowledge from seeking a declaratory judgment declaring the restricting ordinance unconstitutional;⁷⁵ but other authority is to the contrary.⁷⁶ An action for a declaratory judgment as to the constitutionality of a zoning ordinance has been held not barred by the failure to raise the question in a prior certiorari proceeding⁷⁷ by a judgment sustaining the denial, by a board of appeals, of a permit to construct a building,⁷⁸ or by a conviction of the property owner in a prior criminal action for failure to obtain a building permit.⁷⁹

Amendment of ordinance. An action for a declaratory judgment is an appropriate procedure to test the validity of an amendment to a zoning ordinance,⁸⁰ unless the statute provides a different remedy,⁸¹ or for determining rights thereunder.⁸²

Actual controversy; hypothetical grounds. An attack on a zoning ordinance, through an action for a declaratory judgment, requires a showing, or allegation, of an actual controversy involving the ordinance attacked;⁸³ so, a petition seeking a definition by the court of certain terms in a zoning ordinance, with such comment as the court may choose to make, presents no ground for a declaratory judgment, where no controversy, actual or threatened, is involved, there is no principle of law to be passed on or applied, and there is no evidence, stipulation, or exhibits before the court.⁸⁴

A challenge of a zoning classification, in an ordinance, which, of necessity, puts in issue the question whether the exercise of the police power is paramount to the rights of the individual presents a real, substantial, and actual controversy;⁸⁵ and a controversy can be found in the interest which

- of Piedmont, 281 P. 79, 100 C.A. 802.
75. N.Y.—Dillard v. Village of North Hills, 94 N.Y.S.2d 715, 276 App.Div. 969.
Plymouth Builders, Inc., v. Village of Lindenhurst, 117 N.Y.S.2d 583, affirmed 134 N.Y.S.2d 225, 284 App.Div. 895.
76. N.Y.—Vernon Park Realty, Inc. v. City of Mount Vernon, 125 N.Y.S.2d 112, 282 App.Div. 890, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.
Huntley Estates, Inc. v. Town of Eastchester, 121 N.Y.S.2d 504, modified on other grounds 131 N.Y.S.2d 578, 283 App.Div. 1090.
77. N.Y.—Brous v. Town of Hempstead, 69 N.Y.S.2d 258, 272 App.Div. 31, amended on other grounds 70 N.Y.S.2d 576, 272 App.Div. 777.
78. N.Y.—Brous v. Town of Hempstead, 62 N.Y.S.2d 701.
79. N.Y.—Brous v. Town of Hempstead, 62 N.Y.S.2d 701.
80. Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.
- N.J.—Borough of Creskill v. Borough of Dumont, 100 A.2d 182, 28 N.J. Super. 26, affirmed 104 A.2d 441, 15 N.J. 238.
- N.Y.—Vernon Park Realty, Inc., v. City of Mount Vernon, 125 N.Y.S.2d 112, 282 App.Div. 890, appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493.
Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 378, 2 A.D.2d 889, affirmed 145 N.E.2d 28, 3 N.Y.2d 873, 166 N.Y.S.2d 314.
81. Pa.—Logan v. Upper Moreland Tp., 76 Pa.Dist. & Co. 579, 67 Montg. Co. 21.
82. Ill.—Deer Park Civic Ass'n v. City of Chicago, 106 N.E.2d 823, 347 Ill.App. 346.
83. Cal.—C. Dudley De Velbiss Co. v. Krantz, 225 P.2d 969, 101 C.A.2d 613.
- Kan.—West v. City of Wichita, 234 P. 978, 118 Kan. 265.
- Actual controversy held shown**
(1) Generally.
Ala.—Chapman v. City of Troy, 4 So. 2d 1, 241 Ala. 637.
Mich.—Long v. Norton Tp., Muskegon County, 42 N.W.2d 764, 327 Mich. 627.
N.H.—Faulkner v. City of Keene, 155 A. 195, 85 N.H. 147.
N.J.—D'Agostino v. Jaguar Realty Co., 91 A.2d 500, 22 N.J. Super. 74.
(2) Controversy with adjoining owners.
Mich.—C. K. Eddy & Sons v. Tierney, 267 N.W. 852, 276 Mich. 333.
(3) In class action by Negro property owners for declaration that zoning ordinances prohibiting Negroes from residing in certain districts and prohibiting white persons from residing in certain other districts were unconstitutional, particularly where they would be subject to fine and imprisonment under zoning ordinances if they occupied their property in districts reserved for white persons.
U.S.—Monk v. City of Birmingham, D.C. Ala., 87 F. Supp. 538, affirmed, C.A., City of Birmingham v. Monk, 185 F.2d 859, certiorari denied 71 S.Ct. 1001, 341 U.S. 940, 95 L.Ed. 1367.
- Actual controversy held not shown**
(1) Generally.
Fla.—Bullema v. Losey, 84 So.2d 715.
- N.Y.—Rose v. City of New Rochelle, 119 N.Y.S.2d 900.
- Pa.—Blatt v. Schmidt, 48 Pa.Dist. & Co. 43.
(2) In action for declaratory judgment that plaintiffs were entitled to use property for business purposes, in absence of any definite showing that they desired, or were about, to use property for a specific business purpose.
U.S.—West v. Bank of Commerce & Trusts, C.C.A. Va., 153 F.2d 566, 174 A.L.R. 848.
- Information brought by attorney general**
Statute authorizing attorney general to bring information for declaratory decree as to validity of any municipal ordinance or bylaw enacted under statutes conferring general powers on municipalities to enact zoning ordinances and bylaws was intended to create right in him to proceed with no more controversy than that brought about by bringing of information.
Mass.—Attorney General v. Inhabitants of Town of Dover, 100 N.E.2d 1, 327 Mass. 601.
84. N.J.—Johnston v. Board of Adjustment and Town Council of Westfield, 193 A. 457, 118 N.J. Law 298.
85. Ill.—Exchange Nat. Bank of Chicago v. Cook County, 129 N.E. 2d 1, 6 Ill.2d 419.
- Plaintiff's intention to sell land**
Where plaintiffs claimed that ordinance, in restricting use of their land to single-unit residences was invalid because arbitrary and unreasonable, and defendant county refused to rezone property for industrial use, or to further hear matter, dispute was an actual controversy, notwithstanding fact that plaintiffs

the public as a whole has in keeping the zoning regulations of municipalities within lawful bounds, and in not allowing them to become instruments of discrimination or oppression, as opposed to the interest which the municipality may be assumed to have in defending the ordinance which it has, in due form, adopted.⁸⁶

A judgment declaring a zoning ordinance invalid cannot be sought on hypothetical grounds.⁸⁷

b. Availability or Prior Use of Other Remedy

Where a statute provides an exclusive remedy of a different nature, the bringing of an action for a declaratory judgment involving a zoning ordinance is precluded. The prior exhaustion of administrative remedies before zoning enforcement officials is not required, under some statutes, before the bringing of an action for declaratory relief.

Some statutes have been held to provide exclusive remedies so as to preclude the bringing of actions for declaratory judgments involving zoning ordi-

nances;⁸⁸ and declaratory relief has been denied where there is an adequate remedy at law by certiorari or mandamus.⁸⁹ On the other hand, plaintiff is not required to attempt first to seek relief by a legislative change.⁹⁰

Necessity of exhausting administrative remedy. The prior exhaustion of administrative remedies before the zoning enforcement officials,⁹¹ or of remedies allegedly provided by the zoning ordinance,⁹² has been held not required before the bringing of an action for declaratory relief; and, where so provided by statute, a complaint asserting the illegality of a zoning ordinance may be filed in court for, and on behalf of, property owners even though no application for a permit for construction pursuant to the ordinance has been filed.⁹³

The failure to seek a variance does not bar an action to have a zoning ordinance declared unconstitutional where it is attacked in its entirety in so far as it affects an aggrieved party's property;⁹⁴

would sell land once judgment was obtained.

Ill.—Exchange Nat. Bank of Chicago v. Cook County, *supra*.

86. Mass.—Attorney General v. Inhabitants of Town of Dover, 100 N. E.2d 1, 327 Mass. 601.

87. Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 352 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

88. Ind.—City of South Bend v. Marckle, 18 N.E.2d 764, 215 Ind. 74. Md.—Mayor and City Council of Baltimore v. Seabolt, 123 A.2d 207, 210 Md. 199.

Pa.—Jacobs v. Fetzer, 112 A.2d 356, 381 Pa. 262—Castle Shannon Coal Corp. v. Upper St. Clair Tp., 88 A.2d 56, 370 Pa. 211.
Cook v. Ridley Tp., Com.Pl., 28 Del.Co. 244.

89. Cal.—Livingston Rock & Gravel Co. v. Los Angeles County, 272 P.2d 4, 43 C.2d 121.

Minn.—Connor v. Chanhassen Tp., 81 N.W.2d 789, 249 Minn. 205.

Review of planning commission's proceedings

Operators of cement batching plant in light manufacturing district were not entitled to declaratory relief against county's interference with operation of plant after date of regional planning commission's revocation of their automatic exception from restrictions of rezoning ordinance, as they had adequate remedy at law by certiorari or mandamus for review of commission's proceedings.

Cal.—Livingston Rock & Gravel Co. v. Los Angeles County, 272 P.2d 4, 43 C.2d 121.

Grant of variance

Complaint by property owners, in action for declaratory judgment, that there were no facts before board of zoning appeals showing unnecessary hardship and practical difficulty justifying grant of variance, that there were no findings by board, and that its determination was arbitrary and capricious, disclosed matters reviewable by exclusive remedy of certiorari.

N.Y.—Roosevelt Field v. Town of North Hempstead, 95 N.Y.S.2d 126, 197 Misc. 621, reversed on other grounds 98 N.Y.S.2d 350, 277 App. Div. 889.

90. N.Y.—Ulmer Park Realty Co. v. City of New York, 45 N.Y.S.2d 527, 267 App.Div. 291, appeal denied 47 N.Y.S.2d 316, 267 App.Div. 879.

Ohio.—Curtiss v. City of Cleveland, App., 130 N.E.2d 342, reversed on other grounds 144 N.E.2d 177, 166 Ohio St. 509.

91. Ky.—Goodwin v. City of Louisville, 215 S.W.2d 557, 309 Ky. 11.

Ohio.—Curtiss v. City of Cleveland, App., 130 N.E.2d 342, reversed on other grounds 144 N.E.2d 177, 166 Ohio St. 509.

Necessity of exhausting administrative remedies generally see *supra* § 334.

92. Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146 —Long v. Norton Tp., Muskegon County, 42 N.W.2d 764, 327 Mich. 627.

Particular remedies

(1) Procedure before township building inspector and board of appeals as provided in ordinance.

Mich.—Long v. Norton Tp., Muskegon County, *supra*.

(2) By applying for building permit or seeking relief from board of zoning appeals, zoning commission, and common council of city.

Mich.—Long v. City of Highland Park, 45 N.W.2d 10, 329 Mich. 146.

93. N.J.—Lionshead Lake, Inc. v. Wayne Tp., 89 A.2d 693, 10 N.J. 165, appeal dismissed Lionshead Lake v. Wayne Tp., Passaic County, N. J., 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708.

Pa.—Wynnewood Civic Ass'n v. Lower Merion Tp., 102 A.2d 423, 175 Pa.Super. 20.

94. N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642.

Ulmer Park Realty Co. v. City of New York, 45 N.Y.S.2d 527, 267 App.Div. 291, appeal denied 47 N.Y.S.2d 316, 267 App.Div. 879—Hyde v. Incorporated Village of Baxter Estates, 156 N.Y.S.2d 378, 2 A.D.2d 889, affirmed 145 N.E.2d 28, 3 N.Y.2d 873, 166 N.Y.S.2d 314.

Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App. Div. 890, affirmed 121 N.E.2d 517, 307 N.Y. 493—Hoyt v. Incorporated Village of Cedarhurst, 121 N.Y.S.2d 399, affirmed 113 N.Y.S.2d 922, 280 App.Div. 809—Fleetwood Manor, Inc. v. Village of Huntington Bay, 115 N.Y.S.2d 615—Bronxville Associates v. Brady, 36 N.Y.S.2d 308.

Religious school

N.Y.—Levy v. Congregation Beth Shalom, 42 N.Y.S.2d 891, 181 Misc. 877.

Action in nature of class suit

Ordinarily, landowner who is uniquely affected by zoning regula-

and this is particularly true where the amendment attacked was obviously aimed at plaintiff's land.⁹⁵ On the other hand, a landowner seeking a variance from a zoning ordinance has been required to exhaust his administrative remedies before bringing an action for a declaratory judgment determining the force and effect of the ordinance as to his rights.⁹⁶

§ 340. Injunction

Where no other adequate remedy is available and sufficient probability of irreparable injury is shown, injunction may be proper to restrain enforcement of, or official action under, an invalid zoning ordinance.

Broadly speaking, injunction is a proper remedy

to test the validity of a zoning ordinance or regulation,⁹⁷ and under general rules stated in Injunctions § 119, with respect to restraining the enforcement of unconstitutional or invalid statutes or ordinances, injunction may be proper to restrain official action under an invalid zoning ordinance.⁹⁸ Thus where the landowner is not estopped to attack the validity of the enactment,⁹⁹ the enforcement of a zoning ordinance or regulation enacted without statutory authority,¹ or without compliance with the required procedure,² may be enjoined. Likewise, injunction may be proper to prevent the enforcement as to particular property of zoning ordinances which are invalid as applied to such property,³ at

tion of general import and who suffers unusual hardship because of peculiar application of regulation to his property, must apply for variance before judicial action is open to him; but where plaintiff's action challenging validity of regulation was in nature of class suit, attacking generally application of zoning amendments to considerable area embracing many separate parcels, action could not be dismissed as premature in that he had not exhausted administrative remedy provided for unique situations by applying for variance.

N.Y.—431 Fifth Ave. Corp. v. City of New York, 55 N.Y.S.2d 303, 184 Misc. 1001, modified on other grounds 59 N.Y.S.2d 25, 270 App. Div. 241, affirmed 68 N.E.2d 877, 296 N.Y. 588.

95. N.Y.—Hyde v. Incorporated Village of Baxter Estates, 140 N.Y.S.2d 890, affirmed 156 N.Y.S.2d 378, 2 A.D.2d 889, affirmed 145 N.E.2d 28, 3 N.Y.2d 873, 166 N.Y.S.2d 314.

96. Ill.—Bright v. City of Evanston, 139 N.E.2d 270, 10 Ill.2d 178.

East Maine Tp. Community Ass'n v. Pioneer Trust and Sav. Bank, 145 N.E.2d 777, 15 Ill.App.2d 250.

Ind.—City of East Chicago, Ind. v. Sinclair Refining Co., 111 N.E.2d 459, 232 Ind. 295.

97. Ill.—Braiden v. Much, 87 N.E.2d 620, 403 Ill. 507.

98. U.S.—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.

Cal.—Jones v. City of Los Angeles, 295 P. 14, 211 C. 304, followed in Wittman v. City of Los Angeles, 295 P. 22, 211 C. 778, Stern v. City of Los Angeles, 295 P. 23, 211 C. 778, and Rutherford v. City of Los Angeles, 295 P. 23, 211 C. 777.

Hagenburger v. City of Los Angeles, 124 P.2d 345, 51 C.A.2d 161.

Fla.—Snedigar v. Keefer, 179 So. 421, 131 Fla. 191.

Ill.—Ehrlich v. Village of Wilmette, 197 N.E. 587, 361 Ill. 213.

Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

N.Y.—Dowsey v. Village of Kensington, 177 N.E. 427, 257 N.Y. 221, 86 A.L.R. 642—Cordts v. Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936, second case, 241 App.Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

N.C.—Cinard v. City of Winston-Salem, 6 S.E.2d 867, 217 N.C. 119, 126 A.L.R. 634.

Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

Pa.—Padgunas v. Valentine, 6 Pa. Dist. & Co. 667, 23 Luz.Leg.Reg. 417.

Barner v. Harman, Com.Pl., 4 Lycoming 246—Vickerman v. West View Borough, 88 Pittsb.Leg.J. 138. Wyo.—Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202.

99. U.S.—Proffett v. Valley View Village, D.C. Ohio, 123 F.Supp. 339, reversed on other grounds, C.A., Valley View Village v. Proffett, 221 F.2d 412.

Grantee of zoning variances

Where grantee of zoning variances advised city before submission to electors of proposed ordinance revoking all variances that it would contest the legality of such action on ground that variances could not be revoked by such procedure, and city failed to show that any of the facts alleged in its affirmative defense of estoppel were performed by city in reliance on any conduct or representation of grantee, grantee was not estopped to attack the validity of ordinance in action to enjoin its enforcement.

Cal.—Saks & Co. v. City of Beverly Hills, 237 P.2d 32, 107 C.A.2d 260.

1. Ill.—Lake County v. Cuneo, 76 N.E.2d 826, 333 Ill.App. 164.

N.Y.—Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v. Village of Hewlett Bay Park, 107 N.Y.S.2d 858, 279 App. Div. 618, appeal denied 109 N.Y.S.2d 175, 279 App.Div. 746.

2. Conn.—Ribeiro v. Town of Andover, 116 A.2d 769, 19 Conn.Sup. 438.

Miss.—Brooks v. City of Jackson, 51 So.2d 274, 211 Miss. 246.

Pa.—Kline v. City of Harrisburg, 68 A.2d 182, 362 Pa. 438.

Abbott v. Ross Tp., Com.Pl., 98 Pittsb.Leg.J. 483.

3. Ala.—Phillips v. City of Homewood, 50 So.2d 267, 255 Ala. 180.

Fla.—Siegel v. Adams, 44 So.2d 427. Ga.—Humthlett v. Reeves, 90 S.E.2d 14, 212 Ga. 8.

Ill.—Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill.2d 432—Miller Bros. Lumber Co. v. City of Chicago, 111 N.E.2d 140, 414 Ill. 162—Pringle v. City of Chicago, 89 N.E.2d 365, 404 Ill. 473—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138—Harmon v. City of Peoria, 27 N.E.2d 525, 373 Ill. 594—Ehrlich v. Village of Wilmette, 197 N.E. 567, 361 Ill. 213.

Village of Skokie v. Almendinger, 126 N.E.2d 421, 5 Ill.App.2d 522.

Mich.—South Central Imp. Ass'n. v. City of St. Clair Shores, 82 N.W.2d 453, 348 Mich. 153—Industrial Land Co. v. City of Birmingham, 78 N.W.2d 656, 346 Mich. 667—Fenner v. City of Muskegon, 50 N.W.2d 210, 331 Mich. 732—Hitchman v. Oakland Tp., 45 N.W.2d 306, 329 Mich. 331.

Ohio.—Curtiss v. City of Cleveland, App., 130 N.E.2d 742.

Pa.—Bussone v. Lansdowne Borough Officials, 36 Del.Co. 35.

Misjoinder

In action to enjoin enforcement of zoning ordinance by lot owners some of whom had acquired lots subject to ordinance before its passage, and others after passage, where city was not prejudiced by such joinder, there was no misjoinder of plaintiffs.

Mich.—Robyns v. City of Dearborn, 67 N.W.2d 718, 341 Mich. 495.

Proceeding held proper

Where present suit to restrain city

least where no other adequate remedy is available;⁴ but it has been held that a property owner who has an adequate remedy by proceedings for administrative or judicial review is not entitled to an injunction to restrain enforcement of a zoning ordinance even though he asserts that it is invalid as applied to his property.⁵ A property owner having the right to continue a nonconforming use may be entitled to enjoin enforcement of a zoning ordi-

nance with respect to such use.⁶

General rules discussed in Injunctions § 156 et seq apply in determining whether injunction to prevent enforcement of zoning ordinances is improper as enjoining a criminal prosecution.⁷ Thus, where the threatened enforcement would cause irreparable injury, enforcement may be restrained,⁸ until the issue of validity has been determined,⁹ or pending

from enforcing the zoning ordinance whereby plaintiffs' property was restricted to residential use was not filed until after municipal board of appeals had denied present plaintiffs' request for variance that would have authorized the property to be used, but zoning board of appeals record was not before the circuit court in the present suit, the present suit was not an improper attempt to obtain judicial review of decision of zoning board of appeals, but, rather, it called on the court to exercise its traditional role of determining constitutionality of the legislation.
Ill.—*Fox v. City of Springfield*, 139 N.E.2d 732, 10 Ill.2d 198.

Nonconforming use

In action for injunctive relief to prevent defendants from arresting plaintiff tenants on the ground that business carried on by corporate plaintiffs at the property was in violation of a zoning ordinance, where the trial court viewed the premises and the surrounding area, and found that there had been no abandonment of the nonconforming use and that the present use was substantially the same as before the adoption of the ordinance, evidence justified the grant of an injunction.

Cal.—*Endara v. City of Culver City*, 294 P.2d 1003, 140 C.A.2d 33.

4. Pa.—*Duquesne Light Co. v. Upper St. Clair Tp.*, 105 A.2d 287, 377 Pa. 323.

Necessity of exhausting other remedies generally see *infra* § 344.

Particular remedy held inadequate

Where mayor and council members were attempting to enforce void zoning ordinance against landowner, who sought to enjoin mayor and council members from interfering with his erection of a filling station, landowner did not have an adequate and complete remedy at law in form of mandamus.

Ga.—*Tucker v. City of Ocilla*, 71 S.E.2d 652, 209 Ga. 278.

Other particular remedies held adequate

(1) In general.

Cal.—*Triangle Ranch v. Union Oil Co. of Cal.*, 287 P.2d 537, 135 C.A.2d 428.

Ohio.—*Eggers v. Morr*, 124 N.E.2d 115, 162 Ohio St. 521.

Pa.—*Pittsburg Outdoor Advertising Co. v. City of Clairton*, 133 A.2d 542, 390 Pa. 1.

(2) Remedy by certiorari or mandamus.

Cal.—*Livingston Rock & Gravel Co. v. Los Angeles County*, 272 P.2d 4, 43 C.2d 121.

Declaratory judgment

Fact that persons conducting private school on property in city residential district could obtain judicial determination of question whether ordinance amending comprehensive zoning ordinance so as to prohibit use of property in such districts for private schools was arbitrary and discriminatory classification as to such persons by seeking declaratory judgment did not affect their right to injunction against enforcement of amending ordinance, whether in connection with or without seeking declaratory judgment.

Ala.—*Phillips v. City of Homewood*, 50 So.2d 267, 255 Ala. 180.

Part of relief sought available at law

In action to enjoin enforcement of zoning ordinance, by lot owners some of whom had acquired lots subject to ordinance before its passage and others after passage, wherein one lot owner sought, in addition to injunctive relief, the issuance of a building permit, bill was not multifarious, although some of relief sought could have been obtained in law action.

Mich.—*Robyns v. City of Dearborn*, 67 N.W.2d 718, 341 Mich. 495.

5. Pa.—*Jacobs v. Fetzer*, 112 A.2d 356, 381 Pa. 262—*Shender v. City of Philadelphia*, 101 A.2d 667, 375 Pa. 596.

6. Fla.—*Nicholson v. Wyatt*, 77 So.2d 632.

N.Y.—*Town of Somers v. Camarco*, 126 N.Y.S.2d 154, modified on other grounds 135 N.Y.S.2d 42, 284 App. Div. 979, affirmed 127 N.E.2d 327, 308 N.Y. 537, motion denied 128 N.E.2d 813, 309 N.Y. 772.

7. Ga.—*Tucker v. City of Ocilla*, 71 S.E.2d 652, 209 Ga. 278—*Mission Baptist Church v. City of Atlanta*, 37 S.E.2d 377, 200 Ga. 518.

Ohio.—*Fisco v. City of East Cleveland*, App., 99 N.E.2d 615.

Injunction held proper

Suit to enjoin city and its building

inspector from making cases against church, its officers, and pastor, for violations of zoning ordinance, pursuant to inspector's letter stating that he would make cases against "someone in charge of the church" every time service was held therein, was not within rule that equity will not enjoin criminal prosecution, as only person prosecuted would have right to defend and others would have no adequate legal remedy, and hence could resort to equity court to prevent such prosecutions.

Ga.—*New Mission Baptist Church v. City of Atlanta*, 37 S.E.2d 377, 200 Ga. 518.

Injunction held improper

(1) Determination of officials of city that under zoning ordinance plaintiff property owner was entitled to use off-street parking area constructed on his realty during daytime but was prohibited from parking of trucks thereon at night was not arbitrary or shown to be not founded on reason, and plaintiff's doubt as to validity of construction placed on ordinance by city officials was not sufficient warrant for issuance of injunction against criminal proceedings under valid ordinance since plaintiff had adequate remedy of law.

Ohio.—*Fisco v. City of East Cleveland*, App., 99 N.E.2d 615.

(2) Where plaintiffs' building had been classified as a one-family dwelling in 1922, and certificate of occupancy for such use was issued in 1924, and in 1927 building was changed to business and manufacturing use without obtaining certificate of occupancy, and in 1937 premises were again changed for breeding, caring for and selling and boarding dogs, plaintiffs were not entitled to injunction to restrain criminal prosecution against them for violating city ordinance on theory that plaintiffs had a vested right to use the premises for business and residential use.

N.Y.—*Alexion v. City of New York*, 168 N.Y.S.2d 533, 9 Misc.2d 974.

8. Ga.—*Tucker v. City of Ocilla*, 71 S.E.2d 652, 209 Ga. 278.

9. Fla.—*City of Miami Beach v. Silver*, 75 So.2d 817.

N.J.—*Iannella v. Piscataway Tp.*, 49 A.2d 491, 138 N.J.Eq. 598.

an administrative determination and review thereof,¹⁰ notwithstanding the general rule that equity will not enjoin a criminal prosecution; but there is no right to such restraint where the probability of injury is not sufficiently shown.¹¹ It has also been held that a person is not entitled to an injunction to prevent the enforcement of a zoning ordinance where no overt act injuriously affecting his person or property has been committed.¹²

Where the zoning ordinance is not clearly invalid in its application to the petitioner's property, injunctive relief will be denied.¹³ A person is not entitled to an injunction to prevent enforcement of a zoning ordinance on the ground that other violations of the ordinance exist,¹⁴ or on the ground that the acts of administrative officials assured the petitioner that the contemplated use of his property was not prohibited.¹⁵ It has been held that injunction does not lie to prevent the enactment of an ordinance to appropriate property for municipal use, even though the use might violate zoning laws, where no official action directed toward enactment has been taken.¹⁶

Restraining administrative proceedings. The proceedings of administrative bodies in connection with zoning generally will not be restrained unless they are acting without jurisdiction.¹⁷ An administrative board which has statutory jurisdiction to enforce a zoning ordinance will not be prevented by injunction from hearing or acting on a petition to eliminate a violation.¹⁸ An injunction to restrain an administrative board which is validly constituted

from considering an application to rezone property may properly be denied;¹⁹ and a landowner is not entitled to an injunction to prevent an administrative body from reviewing, reversing, or rescinding its action in reclassifying his property.²⁰

Rezoning or change of classification. In a proper case rezoning of an area may be compelled by injunction.²¹ Property owners, even though they have no vested or contractual right to keep adjacent property in its present zoning classification, may challenge the validity of an amendment changing such classification.²² Where, however, the enactment of an ordinance rezoning certain property is within the legislative discretion, a person whose property was not rezoned is not entitled to injunction to prevent its implementation,²³ or to require a different classification of neighboring property.²⁴

§ 341. — Issuance or Revocation of Permits

Injunction may be a proper remedy to compel or prevent the issuance or revocation of permits.

The validity of a statute or ordinance which is made the ground for denial of a permit may be challenged by a proceeding for a mandatory injunction directing issuance of the permit;²⁵ but where a permit has been properly refused under a regulation which became effective after application and before denial, issuance of a permit will not be compelled.²⁶ In general, a person dissatisfied with official action with respect to the issuance or revocation of a permit is not entitled to injunction where an adequate remedy at law is available.²⁷ The issuance of a

N.Y.—East Coast Lumber Terminal v. Town of Babylon, 89 N.Y.S.2d 253, 195 Misc. 516.

Duration of restraint

Complainants, having unsuccessfully exhausted their remedies in state court to test by certiorari the validity of township zoning ordinance, were not entitled to continuance of preliminary restraint against enforcement of ordinance pending appeal to United States Supreme Court, and suit to enjoin enforcement of ordinance should be dismissed.

N.J.—Iannella v. Piscataway Tp., 61 A.2d 687, 142 N.J.Eq. 763.

10. Pa.—Duquesne Light Co. v. Upper St. Clair Tp., 105 A.2d 287, 377 Pa. 323.

11. N.Y.—Mangels v. Village of Rockville Centre, 61 N.Y.S.2d 310, 270 App.Div. 903.

N.D.—Midgarden v. City of Grand Forks, 54 N.W.2d 659, 79 N.D. 18.

12. Ga.—Todd v. City of Dublin, 89 S.E.2d 889, 212 Ga. 36.

13. Fla.—Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach, 82 So.2d 880.

14. Ga.—Barton v. Hardin, 48 S.E. 2d 882, 204 Ga. 108.

Ill.—Cassidy v. Triebel, 85 N.E.2d 461, 337 Ill.App. 117.

Mich.—Jones v. DeVries, 40 N.W.2d 317, 326 Mich. 126.

15. N.Y.—Corning v. Town of Ontario, 121 N.Y.S.2d 288, 204 Misc. 38.

16. Pa.—Roe v. Moon Tp., 7 Pa.Dist. & Co.2d 44, 104 Pittsb.Leg.J. 177.

17. N.Y.—Crotty v. Poersch, 129 N.Y.S.2d 793.

Pa.—McConnell v. Fox, Com.Pl., 37 Del.Co. 162.

18. N.Y.—Crotty v. Poersch, 129 N.Y.S.2d 793.

19. Ga.—Orr v. Hapeville Realty Investments, 85 S.E.2d 20, 211 Ga. 235.

20. Md.—Bogley v. Barber, 72 A.2d 17, 194 Md. 632.

21. Fla.—City of Miami v. Ross, 76 So.2d 152.

22. Mich.—Randall v. Township Bd. of Meridian Tp., Ingham County, 70 N.W.2d 728, 342 Mich. 605.

23. U.S.—Savage v. Iowa Development Co., D.C.Minn., 130 F.Supp. 42, affirmed, C.A., 226 F.2d 936.

24. Md.—Fuller v. County Com'rs of Baltimore County, 133 A.2d 397, 214 Md. 168.

25. Ohio.—Henie v. City of Euclid, App., 118 N.E.2d 652.

26. Md.—Board of Com'rs of Anne Arundel County v. Snyder, 46 A.2d 689, 186 Md. 342.

27. Ga.—Coffey v. City of Marietta, 81 S.E.2d 482, 212 Ga. 189.

Pa.—Wyszynski v. City of Philadelphia, 89 A.2d 355, 370 Pa. 632. Vogt v. Borough of Port Vue, Com.Pl., 100 Pittsb.Leg.J. 8, affirmed 85 A.2d 688, 170 Pa.Super. 526.

permit under an invalid ordinance may be prevented by injunction where no other remedy is available,²⁸ but where a remedy at law is available and the anticipated wrong to petitioner is doubtful he is not entitled to an injunction.²⁹

The issuance of a permit by an administrative body without the approval of another body which is required by the ordinance may be enjoined.³⁰ Injunction may also be proper to compel revocation of a permit which violates the zoning ordinance.³¹

§ 342. — To Prevent Use under Improper Permit

Use of land under an authorization which was im-

properly granted under the building and zoning laws may be enjoined.

Property owners in the vicinity whose rights are or would be affected by construction on, or use of, land under a permit or other official authorization under the building and zoning laws may be entitled to injunctive relief where the permission was improperly granted,³² as on the basis of an improper amendment of the zoning ordinances or regulations.³³ Likewise, injunction may be proper to prevent a use of the property which is not within the permission granted.³⁴ An injunction may be granted in such circumstances only where no other remedy is available,³⁵ or where the remedy at law

22. Pa.—*Barner v. Harman*, Com.Pl., 4 *Lycoming* 246.

29. Pa.—*Barth v. Gorson*, 119 A.2d 309, 383 Pa. 611.

30. Cal.—*Johnston v. Board of Sup'rs of Marin County*, 187 P.2d 686, 31 C.2d 66.

Injunction held proper

An injunction restraining county board of supervisors from issuing use permit for construction of fish reduction plant contrary to zoning ordinance was not excessive as enjoining construction of plant as nuisance, even if allegations with respect to offensive nature of proposed plant could be considered as allegations of a nuisance, where such allegations also formed the basis of right to injunctive relief to prevent issuance of permit contrary to ordinance.

Cal.—*Johnston v. Board of Sup'rs of Marin County*, *supra*.

31. Minn.—*Lowry v. City of Mankato*, 42 N.W.2d 553, 231 Minn. 108.

Statutory remedy as exclusive

Nonresidents of township appearing before township board of adjustment and objecting to grant of permit were required to follow statutory remedy provided and pursue it through court of common pleas, and lost right to proceed in equity for injunction.

Pa.—*White v. Old York Road Country Club*, 178 A. 3, 318 Pa. 346, remanded for rehearing 179 A. 434, 318 Pa. 569.

32. Ga.—*Graham v. Phinizy*, 51 S.E. 2d 451, 204 Ga. 638.

La.—*City of New Orleans v. Leeco*, 53 So.2d 490, 219 La. 550.
Rabalais v. Hillary Builders, App., 62 So.2d 846.

Md.—*Amerelhn v. Kotras*, 71 A.2d 865, 194 Md. 591.

Mass.—*Boyle v. Building Inspector of Malden*, 99 N.E.2d 925, 327 Mass. 564.

N.J.—*Morris v. Borough of Haledon*, 93 A.2d 781, 24 N.J.Super. 171.

Ohio.—*Bloom v. Wides*, 128 N.E.2d 31, 164 Ohio St. 138.

Pa.—*Appeal of Deaner*, Com.Pl., 33 *Erie Co.* 125—*McDonald v. West View Adjustment Bd.*, Com.Pl., 98 *Pittsb.Leg.J.* 191.

S.D.—*Graves v. Johnson*, 63 N.W.2d 341, 75 S.D. 261.

Mandatory injunction

Property owner's substantial showing of probable damages to his own and others' adjoining properties, through increased fire hazard arising from maintenance of nonfireproof building erected in violation of city zoning ordinance under permits granted by city officials, made proper case for equitable relief by mandatory injunction requiring removal of building.

Ark.—*Meyer v. Scifert*, 225 S.W.2d 4, 216 Ark. 293.

Effect of right to declaratory judgment

Complaining property holder who challenged jurisdiction of zoning board of appeals to act could limit his request for relief to issuance of injunction, and his request for declaratory judgment was unnecessary.

Conn.—*Smith v. F. W. Woolworth Co.*, 111 A.2d 553, 142 Conn. 88.

33. R.I.—*R. I. Home Builders v. Budlong Rose Co.*, 74 A.2d 237, 77 R.I. 147.

Injunction held not warranted

(1) Where planning commission approved proposed zoning ordinance amendment prior to lapse of thirty days for consideration and report by the commission as required by zoning ordinance and statute, and substantial purposes of the statute were still accomplished, such deviation alone would not justify the court of appeals to grant injunctive relief.

Ohio.—*Brow v. Sherwin-Williams Co.*, App., 109 N.E.2d 864.

(2) Where builder which, five days prior to effective date of resolution of city planning commission which forbade construction of six-story multiple dwellings in area, had ob-

tained such a permit, conceded that its rights with reference to arguments of petitioner for a restraining order pending litigation were to be resolved on the basis of the status of things as of time of effective date of zoning change, and facts argued by petitioners were controverted, the drastic remedy of an interim restraining order would not be granted, but proceeding was one which should be promptly heard.

N.Y.—*Astor Village Taxpayers v. Board of Standards and Appeals of City of New York*, 129 N.Y.S.2d 781.

34. Ga.—*Reed v. White*, 63 S.E.2d 597, 207 Ga. 623—*Graham v. Phinizy*, 51 S.E.2d 451, 204 Ga. 638.

N.Y.—*Town of Greenburgh v. Buser*, 140 N.Y.S.2d 2, 285 App.Div. 1090, appeal denied 143 N.Y.S.2d 819, 286 App.Div. 879, appeal dismissed 130 N.E.2d 611, 309 N.Y. 808—*Jewell v. Murphy*, 229 N.Y.S. 754, 224 App. Div. 763.

Building permit not in accord with prior permission

Where application to zoning board of appeals for erection of a slaughterhouse stated size of building proposed and that there would be no rendering on premises, even if permit granted by board of zoning appeals were valid, property owners in vicinity were entitled to injunctive relief against structure for which a building permit was issued specifying a building of a different size and that there would be rendering there-in.

Mich.—*Baura v. Thomasma*, 32 N.W. 2d 369, 321 Mich. 139.

35. Pa.—*Behanna v. Polachek*, 3 Pa. Dist. & Co.2d 74, 35 Wash.Co. 156.

Administrative remedy held adequate
Property owners dissatisfied with act of city building inspector in issuing permit to build a church on premises previously zoned for residential use only had an adequate remedy at law by appeal to board of adjustment and could not invoke ex-

would be inadequate.³⁶ It has been held that in order to warrant injunctive relief, the permit holder must have done some act under the permit;³⁷ and an injunction prohibiting use of property will not be granted where no intention to violate the law is shown.³⁸

The holder of an outstanding permit which is not affected by subsequently enacted zoning ordinances may not be prevented by injunction from exercising his rights under the permit.³⁹

§ 343. — Matters and Issues Considered

In an injunction proceeding for relief from building and zoning regulations or decisions, the court should not consider or determine issues exclusively within the province of an administrative body, or which are appropriately determined only in proceedings at law.

In a proceeding to enjoin enforcement of zoning laws the court should not consider or determine issues which are to be determined exclusively by an administrative body,⁴⁰ or which are appropriately determined only in proceedings at law.⁴¹ Likewise, the wisdom of enacting a zoning ordinance, which is a matter for the legislative body, will not be considered,⁴² and the court will not substitute its judgment for that of the legislative body unless its action clearly appears to be arbitrary or unreasonable.⁴³ A suit for injunction in which it is contended that a zoning order is void is not an appeal on the merits of the issues presented to the zoning authorities.⁴⁴

In determining the validity of a zoning ordinance in a proceeding to enjoin its enforcement the effect

of the classification of property on its worth to the owner may be considered,⁴⁵ and the effect of preventing enforcement against petitioner on the rights of other landowners in the vicinity must be considered.⁴⁶ In considering the validity of a zoning amendment, the statutory requirements for notice and hearing which existed at the time proceedings to amend the ordinance were begun will be applied.⁴⁷

Where the proceeding involves a review of the exercise of discretion by a zoning board the court should consider only the record which was before the board,⁴⁸ and should not substitute its discretion for that of the board.⁴⁹ A judgment affirming administrative action denying a permit for a nonconforming use may be conclusive in a subsequent proceeding brought by the applicant to enjoin interference with the applicant's use of the property.⁵⁰

§ 344. — Exhaustion of Other Remedies

In general, a person seeking an injunction in a zoning case must have exhausted other remedies which are available to him unless he contends that the ordinance or administrative action attacked is absolutely void.

A zoning ordinance or a portion thereof which is absolutely invalid may generally be attacked by an injunction proceeding without prior resort to administrative or other legal remedies.⁵¹ Likewise, a property owner who seeks to enjoin use of another's property under permission granted by zoning authorities which is alleged to be absolutely void for lack of jurisdiction is not required to exhaust the remedy by appeal from the official action;⁵² and

traordinary remedy of injunction to prevent erection of church, and interlocutory injunction was erroneously granted.

Ga.—Ledbetter v. Callaway, 87 S.E.2d 317, 211 Ga. 607.

36. N.J.—Morris v. Borough of Haledon, 93 A.2d 781, 24 N.J.Super. 171.

Pa.—Wood v. Goldvarg, 74 A.2d 100, 365 Pa. 92.

37. Ga.—Whipkey v. Turner, 57 S.E. 2d 481, 206 Ga. 410.

38. N.J.—Dolan v. De Capua, 109 A. 2d 615, 16 N.J. 599.

39. Mo.—Fleming v. Moore Bros. Realty Co., 251 S.W.2d 8, 363 Mo. 305.

40. Cal.—Ricciardi v. Los Angeles County, 252 P.2d 773, 115 C.A.2d 569.

41. N.J.—Iannella v. Piscataway Tp., 61 A.2d 687, 142 N.J.Eq. 763.

Validity of ordinance

Where validity of zoning ordinance prohibiting maintenance of slaughterhouse in township as applied to

slaughterhouse operated with approval of municipal authorities for more than three years was debatable, it must be finally determined at law by certiorari and not in equity by permanent injunction against enforcement of ordinance.

N.J.—Iannella v. Piscataway Tp., supra.

42. U.S.—Standard Oil Co. v. City of Tallahassee, Fla., D.C.Fla., 87 F. Supp. 145, affirmed, C.A., 183 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647.

43. Ohio.—Curtiss v. City of Cleveland, App., 130 N.E.2d 342.

44. D.C.—Lewis v. District of Columbia, 190 F.2d 25, 89 U.S.App. D.C. 72—Wolpe v. Poretsky, 144 F. 2d 505, 79 U.S.App.D.C. 141, certiorari denied 65 S.Ct. 190, 323 U.S. 777, 89 L.Ed. 621.

45. Ill.—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81.

46. Mich.—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706.

47. Tex.—Kenny v. Kelly, Civ.App., 254 S.W.2d 535.

48. D.C.—O'Boyle v. Coe, D.C., 155 F.Supp. 581.

49. Mich.—Mitchell v. Grewal, 61 N. W.2d 3, 338 Mich. 81.

50. Md.—Bensel v. Mayor and City Council of Baltimore, 101 A.2d 826, 203 Md. 506.

51. Ark.—City of Little Rock v. Joyner, 206 S.W.2d 446, 212 Ark. 508.

Fla.—City of Miami Beach v. Perell, 52 So.2d 906.

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Stoker, 259 S.W.2d 443—Board of Trustees of Bloomfield v. Bayne, 266 S.W. 885, 206 Ky. 68.

43 C.J. p 554 note 9 [a].
Necessity of exhausting administrative remedies generally see supra § 334.

52. Conn.—Smith v. F. W. Woolworth Co., 111 A.2d 552, 142 Conn. 88.

where the action of an official in attempting to revoke a permit is absolutely void, no appeal from his action is necessary as a prerequisite to a proceeding to enjoin interference with the use of property under the permit.⁵³

On the other hand, where the ordinance or administrative action is invalid only as applied to particular property, the ordinary administrative remedies, followed by judicial review of the administrative action, generally must be exhausted before a petitioner may be entitled to injunctive relief to prevent enforcement,⁵⁴ or to prevent use of property under a permit or other official authorization,⁵⁵ or to compel revocation of a permit.⁵⁶ It has been held, however, that property owners who are not seeking permits are not required to take an administrative appeal to a body which cannot determine the validity of an ordinance as applied to their property before seeking to enjoin enforcement;⁵⁷ and some authorities hold that, while a landowner may not enjoin enforcement of a regulation rezoning land until he has been granted or denied a variance by the board of zoning appeals,⁵⁸ he need not exhaust the remedy of judicial relief by appeal under the zoning law before attacking the validity of the administrative action by proceedings for injunction.⁵⁹

Where it is not shown that the zoning ordinance provides for administrative review of the official action in question,⁶⁰ or where the petitioner is not

one of the persons entitled to the remedy provided,⁶¹ or where, without fault of the petitioner, the remedy provided for by the zoning law is not available,⁶² relief may be obtained in injunction proceedings. Where there is an independent ground of equity jurisdiction, a court may enjoin officials from proceeding under an invalid zoning enactment even though the petitioner has not exhausted his administrative remedies.⁶³

§ 345. Mandamus

Mandamus may lie to compel the performance of official duties with respect to the enactment of zoning ordinances, but such an action does not lie to compel zoning authorities to do an act not within the powers given them by statute, or to perform duties under an invalid ordinance.

As a general rule, mandamus may lie to compel the performance of official duties with respect to the enactment of zoning ordinances.⁶⁴ So, where a municipality has created a housing authority and has obligated itself by contract with the authority to zone and rezone property acquired by the authority, mandamus lies to compel the enactment of the appropriate ordinances.⁶⁵ Mandamus does not lie, however, to compel zoning authorities to do an act not within the powers given them by statute,⁶⁶ or to perform duties under an invalid ordinance.⁶⁷ It has also been held that municipal authorities cannot be compelled by mandamus to enact a rezoning ordinance,⁶⁸ and in the absence of an

53. Ga.—New Mission Baptist Church v. City of Atlanta, 37 S.E.2d 377, 200 Ga. 518.

54. Ark.—City of Little Rock v. Hunter, 228 S.W.2d 58, 216 Ark. 916—City of Little Rock v. Evans, 212 S.W.2d 28, 213 Ark. 522.

Fla.—DeCarlo v. Town of West Miami, 49 So.2d 536—City of Miami v. Rosen, 10 So.2d 307, 151 Fla. 677. Ky.—Bischoff v. Hennessy, 251 S.W.2d 582.

Mo.—Bormann v. City of Richmond Heights, App., 213 S.W.2d 249.

N.Y.—Radano v. Town of Huntington 117 N.Y.S.2d 94, 281 App.Div. 682, affirmed 114 N.E.2d 470, 305 N.Y. 911.

55. Mass.—Nigro v. Jones, 127 N.E.2d 650, 332 Mass. 741—Boyle v. Building Inspector of Malden, 99 N.E.2d 925, 327 Mass. 564.

R.I.—Scott v. Hope-Olney Realty, Inc., 116 A.2d 461.

56. Mass.—Boyle v. Building Inspector of Malden, 99 N.E.2d 925, 327 Mass. 564.

57. Mich.—Robyns v. City of Dearborn, 67 N.W.2d 718, 341 Mich. 495.

58. Conn.—Florentine v. Town of Darien, 115 A.2d 328, 142 Conn. 415.

59. Conn.—Florentine v. Town of Darien, *supra*.

60. Ark.—Parker-Mayflower Dairy Co. v. Collie, 248 S.W.2d 104, 220 Ark. 429.

61. Ind.—Fidelity Trust Co. v. Downing, 68 N.E.2d 789, 234 Ind. 457. Mo.—Evans v. Roth, 201 S.W.2d 357, 356 Mo. 237.

62. Pa.—Behanna v. Polachek, 3 Pa. Dist. & Co.2d 74, 35 Wash.Co. 156.

Creation of board of adjustment after commencement of proceeding to enjoin construction under permit granted without authority did not oust jurisdiction of equity.

Pa.—Behanna v. Polachek, *supra*.

63. Pa.—Kelly v. Philadelphia, 86 Pa. Dist. & Co. 408.

64. Ohio.—State ex rel. Vlach v. Johnson, App., 129 N.E.2d 519. Mandamus to compel enforcement see *infra* § 391.

Certifying petitions

Action in mandamus by taxpayer to compel city clerk to certify to county board of elections referendum petitions as to an ordinance amending zoning ordinance was proper.

Ohio.—State ex rel. Vlach v. Johnson, *supra*.

Approval of ordinance

Mandamus lies to compel attorney general to revoke his order disapproving a town's zoning bylaw.

Mass.—Town of Concord v. Attorney General, 142 N.E.2d 360.

65. Mont.—State ex rel. Great Falls Housing Authority v. City of Great Falls, 100 P.2d 915, 110 Mont. 318.

66. N.Y.—Blum v. Board of Zoning and Appeals of Town of North Hempstead, 146 N.Y.S.2d 325.

Expunging matter from record

Where statute required board of zoning appeals to keep minutes of all actions taken by it, but did not authorize it to expunge record of any such action from minutes, board could not be compelled to expunge allegedly illegal actions from minutes. N.Y.—Blum v. Board of Zoning Appeals of Town of North Hempstead, *supra*.

67. Ga.—Tucker v. City of Ocilla, 71 S.E.2d 652, 209 Ga. 278.

68. Neb.—Kurth v. City of Lincoln, 76 N.W.2d 924, 162 Neb. 643.

Wash.—Besselman v. City of Moses Lake, 280 P.2d 689, 46 Wash.2d 279.

abuse of discretion official action with respect to rezoning will not be reviewed in mandamus proceedings.⁶⁹ Where an ordinance provides for the creation of a special zoning district within a residential district on petition of all the owners within the proposed special district, officials will not be compelled to establish the special district on petition of only some of the property owners.⁷⁰

Licenses. Where the propriety of issuing a license to operate a business depends on whether zoning ordinances would be violated, mandamus will be issued to compel issuance or revocation of such a license only when the applicant for mandamus shows a clear legal right to relief.⁷¹

Scope of inquiry. Where on an application for mandamus the propriety of administrative action based on evidence is questioned, the applicant ordinarily is not entitled to a trial de novo.⁷² If, however, no hearing is required as a prerequisite to the administrative determination, the rule that the court is limited to the record below is inapplicable,⁷³ and, in such case, the court may conduct a full hearing when requested to do so whether or not some sort of hearing was in fact held before the administrative officer.⁷⁴ Where a trial de novo is proper because an administrative agency acted arbitrarily, capriciously, or fraudulently, the court

may consider independent evidence, including a view of the premises.⁷⁵

In a proceeding by mandamus to determine the validity of a statute or ordinance, issues which must be raised by certiorari to review an administrative decision will not be considered.⁷⁶ Where a property owner seeks relief against a city zoning ordinance by mandamus, the question for determination is whether the allegedly unreasonable and confiscatory restriction is general to the locality or peculiar and unique to the petitioner's property.⁷⁷ Where mandamus is sought to compel issuance of a permit on the ground that the ordinance relied on in refusing the permit is invalid, the court is not bound by a determination of the authorities that a permit should not be issued because the use to be made of the property is not permitted by the ordinance.⁷⁸

§ 346. — Issuance of Permits

Where no other adequate remedy is available and a clear right to relief is shown, mandamus may lie to compel official action with respect to the issuance of permits under building and zoning laws or ordinances.

The general rules governing the issuance of mandamus, discussed in Mandamus §§ 17-68, apply as to the issuance of mandamus to compel the grant of a permit required by building and zoning regulations.⁷⁹ Thus, mandamus will not issue unless the

69. Wash.—Lillions v. Gibbs, 289 P. 2d 203, 47 Wash.2d 629.

Matters not justifying relief

(1) Conditions which might prevent a prospective store operator from securing a desirable location in a commercial zone do not justify such prospective proprietor in demanding by mandamus that a particular location in a residential district be opened up for commercial use.

Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

(2) Whether unimproved suburban lot in city residential zone would be of greater value for business use or application of zoning ordinance thereto may lessen value thereof is immaterial in mandamus proceeding to require city to rezone lot from residential to local retail status.

Tex.—Harmon v. City of Dallas, Civ. App., 229 S.W.2d 825, refused no reversible error.

Motives of board

In action by landowner to compel board of county commissioners to rezone land, motives of board in rejecting planning commission's recommendation were not pertinent.

Wash.—Lillions v. Gibbs, 289 P.2d 203, 47 Wash.2d 629.

70. Hawaii.—Andersen v. Arnold, 30 Hawaii 526.

71. Colo.—Fishman v. Tupps, 257 P. 2d 579, 127 Colo. 463.

Fla.—Somlyo v. Schott, 45 So.2d 502 —State ex rel. S. A. Lynch Corp. v. Danner, 33 So.2d 45, 159 Fla. 374.

N.J.—Vacca v. Stika, 122 A.2d 619, 21 N.J. 471.

Michaels v. Township Committee of Pemberton Tp., Burlington County, 67 A.2d 324, 3 N.J.Super. 523.

Tourist home

Where refusal of clerk of city council to issue license to plaintiff to operate a tourist home was based on city council's action in cancelling a previous license and rezoning of plaintiff's property into area zoned for residential purposes, clerk could not seek to defeat plaintiff's right to mandamus requiring issuance of the license on ground that application was not in form prescribed by city ordinances.

Ga.—Richardson v. Passmore, 63 S.E. 2d 392, 207 Ga. 572.

72. Cal.—McLain v. Planning Commission of City of Chico, App., 319 P.2d 24.

73. Cal.—Munns v. Stenman, App., 314 P.2d 67, 152 C.A.2d 543.

74. Cal.—Munns v. Stenman, supra.

75. Cal.—Saks & Co. v. City of Beverly Hills, 237 P.2d 32, 107 C.A.2d 260.

76. Wis.—State ex rel. Miller v. Manders, 86 N.W.2d 469, 2 Wis.2d 355.

77. N.Y.—Bronxville Associates v. Brady, 36 N.Y.S.2d 308.

78. W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

79. Ill.—People ex rel. Baltis v. Village of Westchester, 51 N.E.2d 990, 320 Ill.App. 639.

N.J.—Kessler v. Ackerman, 136 A. 736, 5 N.J.Misc. 403.

Ohio.—State v. Palmer, 165 N.E. 96, 119 Ohio St. 585.

Okl.—Magnolia Petroleum Co. v. City of Tonkawa, 114 P.2d 474, 189 Okl. 125.

Application for certiorari

(1) Refusal to reconsider application for writ of certiorari as application for writ of mandamus was not abuse of discretion.

Mich.—Austin v. Older, 270 N.W. 771, 278 Mich. 518.

(2) If right to building permit is clearly established under writ of certiorari, issuance of permit may be obtained without rehearing under writ of mandamus.

N.J.—Eastern Boulevard Corporation v. Board of Commissioners of

relator establishes a clear legal right⁸⁰ and a clear legal duty on the part of the official against whom the writ is sought,⁸¹ and shows a strict compliance with all the conditions precedent to the exercise of such right.⁸²

The writ will not issue in a case where the relator's right depends on the decision of controverted facts,⁸³ where the controversy has become moot,⁸⁴ or where the effect of the granting of the writ would be to compel the officer or board to allow acts in contravention of statute or ordinance⁸⁵ or to promote a

Town of West New York, 11 A.2d 832, 124 N.J.Law 345.

Change of position

In mandamus proceeding to compel issuance of building permit, fact that applicant had changed position by removing old building and excavating and building foundation walls for new building was immaterial, where old building was not removed because of permit issued or promised and destruction of old and erection of new building were not interdependent.

N.J.—Costa v. Dandrow, 175 A. 205, 12 N.J.Misc. 822.

Fact that building commissioner had not acted on application was held not bar to petition to command him to refuse to grant permit.

Mass.—Bancroft v. Building Commissioner of City of Boston, 153 N.E. 319, 257 Mass. 82.

Res judicata

Decision of supreme court on certiorari, affirming city board of adjustment's refusal of building permit, was held bar to prosecution of mandamus proceedings.

N.J.—Lehmann v. Kaltenbach, 142 A. 555, 6 N.J.Misc. 690.

80. Conn.—Comley v. Boyle, 162 A. 26, 115 Conn. 406.

Ill.—Racln v. Village of Winnetka, 17 N.E.2d 324, 369 Ill. 532.

Ward v. Village of Elmwood Park, 130 N.E.2d 287, 8 Ill.App.2d 37—Gobell v. Braga, 35 N.E.2d 429, 311 Ill.App. 46.

Mass.—Shemeth v. Selectmen of Holden, 58 N.E.2d 6, 317 Mass. 278.

Mich.—Janigan v. City of Dearborn, 57 N.W.2d 876, 336 Mich. 261.

N.J.—Eastern Boulevard Corporation v. Board of Commissioners of Town of West New York, 11 A.2d 832, 124 N.J.Law 345—Provident Institution for Savings v. Castles, 11 A.2d 64, 124 N.J.Law 50.

Capital Homes v. Dandrow, 193 A. 918, 15 N.J.Misc. 634—Jacobs v. Elwell, 151 A. 61, 8 N.J.Misc. 495.

Pa.—Pass v. Lyon, Com.Pl., 61 Dauph.Co. 185—Tulip Realty Co. of Pa. v. Snodgrass, Com.Pl., 61 Dauph.Co. 172.

38 C.J. p 744 note 62.

A questionable right to build on particular land must be established in appropriate proceeding before mandamus will lie to compel issuance of building permit.

N.J.—Rosenbaum v. Butler, 128 A. 578, 3 N.J.Misc. 424.

Validity of statute or ordinance

(1) Mandamus could not issue to compel building inspector to issue building permit, if statute providing therefor was unconstitutional.

Md.—Fulker v. Rider, 144 A. 340, 156 Md. 408.

(2) This is likewise true where zoning ordinances on which plaintiff relied as changing plaintiff's realty from residential zone to business zone were invalid.

Okl.—Voight v. Saunders, 243 P.2d 654, 206 Okl. 318.

Permit not required

Mandamus will not lie to compel city council or other city officers to grant building permit, where there is no ordinance or charter provision prohibiting construction without permit.

W.Va.—Paint Creek Transit Co. v. City of Montgomery, 29 S.E.2d 631, 126 W.Va. 663.

When legal right to permit is settled, resort may be had to mandamus, but right should be settled by certiorari.

N.J.—Progress Holding Co. v. Board of Adjustment of East Orange, 191 A. 799, 118 N.J.Law 135.

Where right is in doubt, mandamus will not lie.

N.J.—City of Asbury Park v. Neptune Tp. in Monmouth County, 143 A. 867, 6 N.J.Misc. 1114—Strauss Const. Co. v. Board of Tenement House Supervision of State of New Jersey, 143 A. 753, 6 N.J.Misc. 1106.

81. Me.—Casino Motor Co. v. Needham, 118 A.2d 781.

N.J.—Costa v. Dandrow, 175 A. 205, 12 N.J.Misc. 822.

Pa.—Mousley v. Williams, 37 Del.Co. 75.

82. Conn.—Herrup v. City of Hartford, 103 A.2d 199, 140 Conn. 622.

Mass.—Karl v. Wolsey Co. v. Building Inspector of Bedford, 86 N.E.2d 644, 324 Mass. 419.

Mich.—City of East Lansing v. Wilson, 50 N.W.2d 730, 332 Mich. 96.

N.J.—Deymann v. Jersey City, 136 A. 602, 5 N.J.Misc. 369.

N.Y.—Haussman v. Oatley, 137 N.Y. S.2d 41, 285 App.Div. 832.

Headley v. Pennell, 210 N.Y.S. 102, 124 Misc. 886, affirmed 210 N.Y. S. 861, 214 App.Div. 810.

Ohio.—State ex rel. Suburban Investors v. Gallo, App., 121 N.E.2d 125.

Pa.—Elkins-Rydal Co. v. Brigham, 69 Montg.Co. 185, exceptions dismissed 84 Pa.Dist. & Co. 136. 38 C.J. p 744 note 63.

Failure to pay fees required was held not to bar relief by mandamus, although issuance of permit would be conditioned on payment of fee. N.J.—Songar Realty Corporation v. Axford, 136 A. 164, 5 N.J.Misc. 220, followed in Burnett v. Axford, 136 A. 925, 5 N.J.Misc. 392.

Incidental permit

Fact that applicant for building permit to erect gasoline filling station had not applied for separate permit for underground tanks was held not to preclude mandamus to compel granting of permit.

Ill.—Tews v. Woolhiser, 185 N.E. 827, 352 Ill. 212.

83. Cal.—Beloin v. Blankenhorn, 218 P.2d 552, 97 C.A.2d 662.

Conn.—State v. Hurley, 48 A. 215, 73 Conn. 536.

N.J.—Provident Institution for Savings v. Castles, 11 A.2d 64, 124 N.J.Law 50.

N.Y.—Haussman v. Oatley, 137 N.Y. S.2d 41, 285 App.Div. 832.

Legal issue only

Where there was no disputed fact and the sole question was construction of language of ordinance, a legal question, mandamus was proper remedy to compel issuance of permit; mere urging of possibility of different construction of zoning ordinance is insufficient to vitiate clear legal right to permit arising from proper legal construction of ordinance and which right calls for no exercise of discretion on part of person or officer charged with duty so as to preclude resort to mandamus.

N.J.—Teeses v. Barbahenn, 17 A.2d 539, 125 N.J.Law 643.

Carroll v. Board of Adjustment of Jersey City, 83 A.2d 448, 15 N.J.Super. 383.

84. Ohio.—State v. Palmer, 169 N.E. 296, 120 Ohio St. 617.

Relief already obtained

Mo.—State ex rel. Myers v. Shinnick, 19 S.W.2d 676.

85. Mass.—Spector v. Building Inspector of Milton, 145 N.E. 265, 250 Mass. 63.

N.Y.—Colonial Beacon Oil Co. v. Finn, 283 N.Y.S. 384, 245 App.Div. 459, affirmed 1 N.E.2d 345, 270 N.Y. 591.

wrong.⁸⁶ Also, relief may be denied where it would permit the petitioner to take advantage of his own inequitable conduct.⁸⁷ So, mandamus will not issue where the only effect would be to permit the relator to do a thing already done without a permit and in violation of law⁸⁸ and thus permit him to take advantage of his own wrongful act.⁸⁹

The ministerial duty of acting on an application for a permit may be enforced by mandamus,⁹⁰ and likewise an administrative agency which has the duty to review the refusal of a permit may be compelled to render a decision.⁹¹ Where a particular use of property does not in fact violate a zoning

ordinance, an official may be compelled to issue a certificate to that effect,⁹² and mandamus may issue in such circumstances to enforce the issuance of a certificate of occupancy.⁹³ However, an officer may not be compelled to act on an application which does not conform to the standards prescribed by the ordinance.⁹⁴

In general, where the right to a permit is made absolute on a showing that there has been a compliance with the requirements of the statutes or municipal ordinances, the duty of boards or officers to issue the permit is ministerial and mandamus will issue to compel the performance of this duty.⁹⁵

W.Va.—Paint Creek Transit Co. v. City of Montgomery, 29 S.E.2d 631, 126 W.Va. 663.

38 C.J. p 744 note 66.

Limitations on title

Peremptory writ of mandate will not be granted to compel building inspector to issue permit for building containing twelve stories, where plaintiff's title is subject to building restrictions, permitting only construction of eleven stories.

Mass.—Spector v. Building Inspector of Milton, 145 N.E. 265, 250 Mass. 63.

86. **Minn.**—State v. Houghton, 190 N.W. 979, 153 Minn. 518.

87. **N.Y.**—Hinna v. Board of Appeals of Town of Hempstead, 170 N.Y.S. 2d 12.

Representation as to use

Where town board was induced by owner to rezone land zoned for residential uses only by placing it in a light manufacturing district on representation that such use would not be disruptive of evening peace and quiet of surrounding residential neighborhood, even though owner established a clear legal right to relief in nature of a mandamus, supreme court would be justified, in its discretion, in denying petition to review determination of board of appeals of town denying owner's application for permit to erect and maintain a motel on such land.

N.Y.—Hinna v. Board of Appeals of Town of Hempstead, *supra*.

88. **Mo.**—State v. Shinnick, 232 S.W. 1053, 208 Mo.App. 284.

N.Y.—Coady v. Thatcher, 131 N.Y.S. 178, 146 App.Div. 585.

89. **N.Y.**—Coady v. Thatcher, *supra*.

90. **Mo.**—*Corpus Juris* quoted in State ex rel. Folkers v. Welsch, 124 S.W.2d 636, 639, 235 Mo.App. 15.

N.J.—Kukowski v. Rath, 143 A. 425, 6 N.J.Misc. 972—Advance Development Corporation v. Mayor and Aldermen of Jersey City, 140 A. 788, 6 N.J.Misc. 238, appeal dismissed 143 A. 447, 105 N.J.Law 234.

N.Y.—Town Bd. of Town of Huntington v. Zoning Bd. of Appeals of Town of Huntington, 165 N.Y.S.2d 954, 7 Misc.2d 210—Village of Sands Point v. Sands Point Country Day School, 148 N.Y.S.2d 312, 2 Misc.2d 886, affirmed 154 N.Y.S. 2d 428, 2 A.D.2d 762—Ballard v. Roth, 253 N.Y.S. 6, 141 Misc. 319—In re Allard Realty Corporation, 244 N.Y.S. 531, 138 Misc. 232.

Application of Kunz, 128 N.Y.S. 2d 680.

W.Va.—Mustard v. City of Bluefield, 45 S.E.2d 326, 130 W.Va. 763.

38 C.J. p 744 note 58.

Unreasonable delay

Even though a building inspector is entitled to a reasonable time in which to examine an application for a permit to build and plans and specifications, where neglect or refusal of inspector to act on such plans was to delay action so as to enable common council to change zoning ordinance of city so as to prohibit erection of building, mandamus will issue to compel issuance of permit.

N.Y.—Calton Court v. Switzer, 223 N.Y.S. 856, 221 App.Div. 799.

91. **N.Y.**—Brachfeld v. Sforza, 118 N.Y.S.2d 631, appeal dismissed 126 N.Y.S.2d 458, 282 App.Div. 1068.

92. **Conn.**—State ex rel. Chatlos v. Rowland, 38 A.2d 785, 131 Conn. 261.

93. **N.Y.**—Canberg v. Kleinert, 232 N.Y.S. 640, 225 App.Div. 875.

94. **N.J.**—Forsythe v. Henshaw, 59 A.2d 617, 37 N.J.Law 249.

95. **Ala.**—Pentecostal Holiness Church of Montgomery v. Dunn, 27 So.2d 561, 248 Ala. 314.

Cal.—Munns v. Stenman, 314 P.2d 67, 152 C.A.2d 543.

Colo.—Hedgcock v. People ex rel. Arden Realty & Investment Co., 57 P.2d 891, 98 Colo. 522.

Ga.—Hadden v. Pierce, 90 S.E.2d 405, 212 Ga. 45.

Ill.—People ex rel. Kohout v. Village of North Riverside, 144 N.E. 2d 828, 141 Ill.App.2d 503.

Ky.—Perkins v. Spicer, 6 S.W.2d 243, 224 Ky. 257.

Mass.—Fellsway Realty Corp. v. Building Com'r of Medford, 125 N.E.2d 791, 332 Mass. 471—Kenney v. Building Com'r of Melrose, 52 N.E. 2d 683, 315 Mass. 291, 150 A.L.R. 490.

Mich.—City of Detroit v. S. Loewenstein & Son, 47 N.W.2d 646, 330 Mich. 359.

Minn.—Minneapolis Honeywell Regulator Co. v. Nadasdy, 76 N.W.2d 670, 247 Minn. 159.

Mo.—*Corpus Juris* quoted in State ex rel. Folkers v. Welsch, 124 S.W.2d 636, 639, 235 Mo.App. 15.

N.J.—Holdsworth v. Hague, 155 A. 892, 9 N.J.Misc. 715, followed in Brengel v. Jersey City, 155 A. 892, 9 N.J.Misc. 717—McAllister v. Moffett, 142 A. 556, 6 N.J.Misc. 692—Goldberg v. Jersey City, 142 A. 355, 6 N.J.Misc. 564—Schwartz v. Jersey City, 141 A. 563, 6 N.J.Misc. 380—Advance Development Corporation v. Mayor and Aldermen of Jersey City, 140 A. 788, 6 N.J.Misc. 238, appeal dismissed 143 A. 447, 105 N.J.Law 234—Kronenberg v. Masters, 140 A. 780, 6 N.J.Misc. 237—Solon v. Scott, 135 A. 811, 5 N.J.Misc. 187—King v. Favier, 130 A. 365, 2 N.J.Misc. 358—Sunoco Service Corporation v. Donnelly, 125 A. 389, 2 N.J.Misc. 655.

N.Y.—Goelet v. Moss, 290 N.Y.S. 573, 248 App.Div. 499, affirmed 6 N.E. 2d 425, 273 N.Y. 503—Fairchild Sons v. Rogers, 272 N.Y.S. 330, 242 App.Div. 651, affirmed 195 N.E. 154, 266 N.Y. 460.

Ohio.—Village of Ottawa v. Odenweller Milling Co., 13 N.E.2d 144, 57 Ohio App. 170.

Okl.—Magnolia Petroleum Co. v. City of Tonkawa, 114 P.2d 474, 189 Okl. 125.

Pa.—Philadelphia Real Estate Inv. Corporation v. Frazier, Com.Pl., 29-

Where, however, the officer must determine the propriety of the issuance of such a permit, his duty is rather to be regarded as discretionary, and hence will not be controlled by mandamus⁹⁶ in the absence of fraud⁹⁷ or abuse of discretion,⁹⁸ as where the permit is refused on an improper ground.⁹⁹

Mandamus will not lie to compel the issuance of a permit denied because the building or use for which permission is sought would violate valid zoning regulations or ordinances.¹ Mandamus may lie, however, where the refusal of a permit is based on a zoning ordinance or regulation which is inapplica-

Del.Co. 460—Sheldrake v. Upper Darby, Com.Pl., 28 Del.Co. 46—Bream v. City of York, Com.Pl., 54 York Leg.Rec. 189.

Tex.—City of Houston v. Freedman, Civ.App., 293 S.W.2d 515, error refused no reversible error.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881—Suduth v. Snyder, 200 S.E. 55, 120 W.Va. 746.

38 C.J. p 744 note 59.

Temporary use

Mandamus was appropriate remedy to compel township zoning board of appeals to permit golf and country club to fill a swampy depression on its land in residential zone with rubbish pursuant to zoning ordinance authorizing board to permit in residential zones temporary buildings or uses incidental to development of property on which located.

Mich.—Plum Hollow Golf and Country Club v. Southfield Tp., 67 N.W.2d 123, 341 Mich. 84.

96. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 303.

Conn.—State ex rel. Quintard Land Co. v. Hagan, 195 A. 616, 123 Conn. 283—Comley v. Boyle, 162 A. 26, 115 Conn. 406.

Fla.—State ex rel. Office Realty Co. v. Ehlinger, 46 So.2d 601.

Iowa.—Hirsch v. City of Muscatine, 10 N.W.2d 71, 233 Iowa 590.

Miss.—City of Jackson v. McPherson, 130 So. 287, 158 Miss. 152.

N.C.—Harden v. City of Raleigh, 135 S.E. 151, 192 N.C. 395.

Ohio.—State ex rel. Hacharedi v. Baxter, 74 N.E.2d 242, 148 Ohio St. 221, appeal dismissed and certiorari denied 68 S.Ct. 209, 332 U.S. 827, 92 L.Ed. 402.

Storier v. Heasley, 3 N.E.2d 655, 52 Ohio App. 282.

Tex.—Coe v. City of Dallas, Civ.App., 266 S.W.2d 181.

W.Va.—Mustard v. City of Bluefield, 45 S.E.2d 326, 130 W.Va. 763.

38 C.J. p 744 note 60.

Legislative action

(1) Village board of trustees in denying applicant a permit to use property as gasoline service station as provided by building zone ordinance was exercising its legislative power, and action could not be reviewed in an Article 78 proceeding.

N.Y.—Birchwood Knolls, Inc. v. Hunter, 144 N.Y.S.2d 606.

(2) Action of town board in refusing to issue a permit to petitioner for removal of fill, subsoil, and gravel from his premises, under zoning ordinance requiring approval of such operations in certain circumstances, was a legislative act not subject to attack in an Article 78 proceeding.

N.Y.—Leichter v. Barrett, 144 N.Y.S.2d 309, 208 Misc. 577.

97. Ohio.—Storier v. Heasley, 3 N.E.2d 655, 52 Ohio App. 282.

98. Colo.—City Council of City and County of Denver v. United Negroes Protective Ass'n, 230 P. 598, 76 Colo. 86.

Conn.—State ex rel. Quintard Land Co. v. Hagan, 195 A. 616, 123 Conn. 283.

N.Y.—People v. Gerus, 69 N.Y.S.2d 283.

Ohio.—Storier v. Heasley, 3 N.E.2d 655, 52 Ohio App. 282.

Wis.—State ex rel. Scandrett v. Nelson, 3 N.W.2d 765, 240 Wis. 438.

38 C.J. p 744 note 61.

Discretion held not abused

Mich.—Stevens v. Royal Oak Tp., Oakland County, 68 N.W.3d 787, 342 Mich. 105.

N.C.—Harden v. City of Raleigh, 135 S.E. 151, 192 N.C. 395.

99. Minn.—Minneapolis-Honeywell Regulator Co. v. Nadassy, 76 N.W.2d 670, 247 Minn. 159.

N.Y.—Empire City Racing Ass'n v. City of Yonkers, 230 N.Y.S. 457, 132 Misc. 816.

Ohio.—State ex rel. Anshe Chessed Congregation v. Bruggemeler, App., 115 N.E.2d 65.

Pa.—Commonwealth v. Devlin, 158 A. 161, 305 Pa. 440.

Tex.—City of West University Place v. Martin, Civ.App., 113 S.W.2d 295, cause dismissed 123 S.W.2d 638, 132 Tex. 354.

1. Fla.—State ex rel. Office Realty Co. v. Ehlinger, 46 So.2d 601.

Ill.—Racine v. Village of Winnetka, 17 N.E.2d 324, 369 Ill. 532.

Neb.—Kurth v. City of Lincoln, 76 N.W.2d 924, 162 Neb. 643.

Nev.—State ex rel. Davie v. Coleman, 224 P.2d 309, 67 Nev. 636.

N.J.—Krugman v. Municipal Council of City of Clifton, 53 A.2d 803, 136 N.J.Law 32—Koplin v. Village of

South Orange, 144 A. 920, 105 N.J.Law 492, followed in Lehmann v. Hersch, 142 A. 556, 6 N.J.Misc. 691, Kantorowitz v. Pancoast, 143 A. 923, 6 N.J.Misc. 1004, Lannagan v. Scott, 143 A. 923, 6 N.J.Misc. 999, Mulcahy v. Pancoast, 143 A. 925, 6 N.J.Misc. 1003, and Sharif v. Scott, 143 A. 926, 6 N.J.Misc. 1000, 1002—Rohrs v. Zabriskie, 133 A. 65, 102 N.J.Law 473.

Progress Improvement Co. v. Williams, 147 A. 649, 7 N.J.Misc. 973—Kastovisky v. Castles, 142 A. 440, 6 N.J.Misc. 599, affirmed 147 A. 461, 106 N.J.Law 368—Hansbury Const. Co. v. Miller, 142 A. 439, 6 N.J.Misc. 604, followed in 142 A. 440, 6 N.J.Misc. 601—Losick v. Greene, 142 A. 429, 6 N.J.Misc. 620—Potters v. Moore, 142 A. 423, 6 N.J.Misc. 593—Johnston v. Hague, 136 A. 407, 2 N.J.Misc. 77—New Jersey Land Co. v. City of East Orange, 134 A. 839, 4 N.J.Misc. 856—Contras v. Jersey City, 134 A. 122, 4 N.J.Misc. 680—Portnoff v. Bigelow, 133 A. 534, 4 N.J.Misc. 539.

N.Y.—Wulfsohn v. Burden, 150 N.E.2d 241 N.Y. 288, 43 A.L.R. 651.

Beckmann v. Talbot, 300 N.Y.S. 6, 252 App.Div. 870, reversed on other grounds 15 N.E.2d 556, 278 N.Y. 146, reargument denied 16 N.E.2d 849, 278 N.Y. 700—Canberg v. Kleinert, 232 N.Y.S. 640, 225 App. Div. 875.

N.Y.—Berger v. Dumper, 160 N.Y.S.2d 530, 7 Misc.2d 183, affirmed 169 N.Y.S.2d 433, 5 A.D.2d 687—In re Borgeaud, 274 N.Y.S. 599, 153 Misc. 546.

Pa.—Devito v. Kropp, Com.Pl., 3 Lycoming 204.

Minor amendable defects

A property owner was not precluded from compelling issuance of permit on ground of noncompliance with zoning ordinance, where owner sought leave to make minor amendments necessary to meet proper objections.

N.J.—Vine v. Zabriskie, 3 A.2d 886, 122 N.J.Law 4.

Inadvertent erroneous issuance of permit to another is no ground for issuing mandamus to compel issuance of building permit for building violative of ordinance.

N.J.—Eggie v. Board of Com'rs of Borough of Audubon, 143 A. 747, 6 N.J.Misc. 1094.

ble,² or which is invalid,³ as applied to the particular use or property involved.⁴ It has been held that if the relator is entitled to mandamus at the time the action is instituted no subsequent action,

such as the adoption of an ordinance under which he would not be entitled to the permit, will deprive him of his right;⁵ but where the petitioner has waived objections to the ordinance on the ground that it was

2. Ky.—Wilkins v. Hubbard, 113 S. W.2d 441, 271 Ky. 780.

N.J.—Aitken v. Borough of Hasbrouck Heights, 136 A. 802, 5 N.J. Misc. 433—Wittkop v. Garner, 132 A. 339, 4 N.J. Misc. 234—Bowen v. Jersey City, 132 A. 834, 4 N.J. Misc. 228.

W.Va.—State v. Meador, 154 S.E. 876, 109 W.Va. 368.

3. Fla.—City of Miami Beach v. State ex rel. Lear, 175 So. 537, 128 Fla. 750.

Ill.—People ex rel. Lind v. City of Rockford, 188 N.E. 446, 354 Ill. 377.

N.J.—Brown v. Terhune, 18 A.2d 73, 125 N.J. Law 618, dismissed 23 A. 2d 575, 127 N.J. Law 554—A. G. Construction Co. v. Scott, 141 A. 760, 104 N.J. Law 596—Oxford Const. Co. v. City of Orange, 137 A. 545, 103 N.J. Law 355.

Payne v. Borough of Sea Bright, 187 A. 627, 14 N.J. Misc. 756—Pine-plot Co. v. City of East Orange, 132 A. 513, 4 N.J. Misc. 341—Finkel v. Kaltenbach, 132 A. 198, 4 N.J. Misc. 137—Finkel v. Kaltenbach, 132 A. 197, 4 N.J. Misc. 135—Rudensev v. Board of Adjustment of Town of Montclair in Essex County, 131 A. 906, 4 N.J. Misc. 103—White v. Bowser, 130 A. 365, 2 N.J. Misc. 357—R. & B. Realty & Construction Co. v. Jelleme, 130 A. 365, 2 N.J. Misc. 356—Huppert v. Hague, 130 A. 364, 2 N.J. Misc. 348—Sonntag v. Schmidt, 130 A. 361, 3 N.J. Misc. 959—Builders' Realty Co. v. Bigelow, 128 A. 837, 3 N.J. Misc. 540, followed in Shapiro v. Brennan, 128 A. 888, 3 N.J. Misc. 543, and affirmed Builders' Realty Corporation v. Bigelow, 131 A. 888, 102 N.J. Law 433—Nelson Bldg. Co. v. Binda, 128 A. 618, 3 N.J. Misc. 420—Falco v. Kaltenbach, 128 A. 394, 3 N.J. Misc. 333—Cooper Lumber Co. v. Dammers, 125 A. 325, 2 N.J. Misc. 289.

N.Y.—Little v. Young, 85 N.Y.S.2d 41, 274 App. Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App. Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699—Davison v. Flanagan, 76 N.Y.S.2d 849, 273 App. Div. 870.

Melita v. Nolan, 213 N.Y.S. 674, 126 Misc. 345.

Ohio.—State ex rel. Kling v. Nielsen, App., 144 N.E.2d 278—State ex rel. Adams v. Pendleton, 135 N.E.2d 458, 100 Ohio App. 1—State ex rel. Gulf Refining Co. v. De France, 100 N.E. 2d 688, 89 Ohio App. 1—State ex rel. Castle National v. Village of Wickliffe, App., 80 N.E.2d 200, appeal

dismissed 74 N.E.2d 270, 148 Ohio St. 410.

W.Va.—State ex rel. Ammerman v. City of Philippi, 65 S.E.2d 713, 136 W.Va. 120.

38 C.J. p 744 note 61 [b].

Zoning ordinance must be clearly shown unreasonable to entitle applicant to mandamus.

N.J.—Priscell v. City of East Orange, 136 A. 803, 5 N.J. Misc. 434.

4. Ill.—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E. 2d 592, 402 Ill. 321.

Mich.—Clark v. Joslin, 82 N.W.2d 433, 348 Mich. 173—Morris G. Laramie & Son v. Gidley, 40 N.W.2d 205, 326 Mich. 410—Hering v. City of Royal Oak, 40 N.W.2d 133, 326 Mich. 232. N.Y.—Eaton v. Sweeny, 177 N.E. 412, 257 N.Y. 176.

Invalidity not shown

Where petition for mandamus attacking county zoning ordinance stated that there was no retail business within three miles from population which petitioner's proposed business would serve, and additional allegation showed that there was area zoned for business within quarter mile of petitioner's premises, even though such area contained no retail businesses, county authorities had performed their duty by providing ample space by ordinance for retail business for district.

Cal.—Lagias v. Kraititz, 232 P.2d 541, 104 C.A.2d 793.

5. Fla.—Aiken v. E. B. Davis, Inc., 143 So. 658, 106 Fla. 675.

Ill.—Rubin v. City of Rockford, 16 N.E.2d 607, 296 Ill. App. 650.

Ohio.—State v. Kreuzweiser, 166 N.E. 228, 120 Ohio St. 352—Hauser v. State, 150 N.E. 42, 113 Ohio St. 662.

State ex rel. Geletka v. City of Campbell, App., 113 N.E.2d 601, appeal dismissed 106 N.E.2d 83, 157 Ohio St. 553.

Pa.—Marlyn Const. Co. v. Upper Darby Tp. Officers, Com.Pl., 23 Del.Co. 297.

In New Jersey

(1) Where applicant for permit had completely established right to permit before adoption of zoning ordinance, his right to permit could not be denied.

N.J.—Sgromolo v. City of Asbury Park, 46 A.2d 661, 134 N.J. Law 195.

(2) A property owner was not precluded from compelling issuance of permit because of pending change in zoning ordinance.

N.J.—Vine v. Zabriskie, 3 A.2d 886, 122 N.J. Law 4.

Deerfield Realty Co. v. Hague, 155 A. 893, 9 N.J. Misc. 857.

(3) It is state of law at time mandamus proceeding is instituted, and not that at time permit is sought, that governs, so that a zoning ordinance enacted before mandamus proceeding will bar mandamus.

N.J.—Eastern Boulevard Corporation v. Willaredt, 8 A.2d 688, 123 N.J. Law 269.

Interstate Oil Co. v. City of Orange, 165 A. 99, 11 N.J. Misc. 89—Builders' Const. Co. v. Daly, 161 A. 189, 10 N.J. Misc. 861—Adelmann v. Williams, 159 A. 148, 10 N.J. Misc. 324.

(4) Mandamus to procure building permit, applied for before constitutional amendment authorizing zoning ordinance, but decided after statute validating prior ordinances, was held properly denied.

N.J.—Kastovisky v. Castles, 147 A. 461, 106 N.J. Law 368.

Freeland v. Sargeant, 143 A. 73, 6 N.J. Misc. 906.

(5) Where constitutional amendment permitting zoning ordinances had been adopted, mandamus to compel issuance of permit would be denied to give municipality time to enact zoning ordinances.

N.J.—Butvinik v. Jersey City, 142 A. 759, 6 N.J. Misc. 803, followed in Lerner v. Jersey City, 142 A. 759, 6 N.J. Misc. 801 and Margulies v. Jersey City, 142 A. 759, 6 N.J. Misc. 792, affirmed 147 A. 911, 105 N.J. Law 635.

(6) Zoning ordinance was held sufficiently near adoption, precluding mandamus for building permit.

N.J.—Horowitz v. Rath, 153 A. 250, 9 N.J. Misc. 203—Linwood Co. v. Gardner, 153 A. 99, 9 N.J. Misc. 139.

(7) Applicant, however, has been held entitled to mandamus to secure building permit without waiting for legislature to enact statutes pursuant to zoning amendments to constitution.

N.J.—Advance Development Corporation v. Mayor and Aldermen of Jersey City, 140 A. 788, 6 N.J. Misc. 238, appeal dismissed 143 A. 447, 105 N.J. Law 234.

(8) Where relator knew before exercising option to purchase premises for use as a filling station that proposed township ordinance would prohibit such use, and ordinance was finally passed shortly after return day of rule to show cause why mandamus directing issuance of permit

enacted after the application for mandamus, the writ will not be issued.⁶

Testing validity of ordinance. Generally, in the absence of estoppel,⁷ the issue of validity of a zoning ordinance may be raised in a proceeding for mandamus to compel the issuance of a permit.⁸

Preventing issuance of permit. Where no other remedy is provided, neighboring landowners may bring mandamus to prevent the granting of a building permit under an allegedly invalid amendment of a zoning bylaw.⁹ Mandamus will be granted to compel the rescission of a resolution or order au-

thorizing issuance of a building permit only where the petitioner shows a clear right to relief.¹⁰

§ 347. — Existence of Other Remedy

Generally, mandamus does not lie to compel, or to restrain, the issuance of a permit provided for by the building and zoning laws where there is another adequate remedy available, as by administrative appeal, unless, under the circumstances, such remedy is unavailable or is inadequate.

As a general rule, mandamus does not lie to compel the issuance of a permit provided for by the building and zoning laws,¹¹ or to restrain such is-

should not issue, writ would be discharged.

N.J.—Socony-Vacuum Oil Co. v. Mount Holly Tp., 51 A.2d 19, 135 N.J.Law 112, 169 A.L.R. 579.

6. Mich.—Highland Oil Corp. v. City of Lathrup Village, 85 N.W.2d 185, 349 Mich. 650.

7. Conn.—La Voie v. Building Commission of Town of Trumbull, 65 A.2d 165, 135 Conn. 415.

Ga.—City of Pearson v. Glidden Co., 55 S.E.2d 125, 205 Ga. 738.

Okl.—Voight v. Saunders, 243 P.2d 654, 206 Okl. 318.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

Circumstances held to raise estoppel

(1) Where landowner sought building permit under town building code, landowner could not, subsequently in mandamus proceeding, claim that building code was unconstitutional because no appeal from building commission was provided.

Conn.—State ex rel. La Voie v. Building Commission of Town of Trumbull, 65 A.2d 165, 135 Conn. 415.

(2) Where city rezoned property from residential to manufacturing use and plaintiff purchased property in reliance on manufacturing classification and thereafter city again rezoned property as residential, city was not permitted to collaterally attack validity of prior rezoning ordinance.

Ill.—People ex rel. Joseph Lumber Co. v. City of Chicago, 83 N.E.2d 592, 402 Ill. 321.

Circumstances held not to work estoppel

(1) In mandamus proceedings by landowner against building inspector of city to compel him to issue a building permit, city was not estopped to deny validity of zoning ordinances, on which landowner relied, because of fact that landowner had made a written offer to city planning commission that he would build a bridge at his own expense if city would grant his request to zone his property for business without a time lim-

it, and city accepted such offer, and improvements were made by landowner.

Okl.—Voight v. Saunders, 243 P.2d 654, 206 Okl. 318.

(2) Action of petitioners in applying to city manager for a zoning permit, in appealing from his adverse ruling to zoning board of adjustment, and in applying without success to board of directors for an amendment of ordinance to permit petitioners to use their property in a residential zone for business purposes, did not estop petitioners to attack validity of ordinance in mandamus proceeding subsequently brought against board of directors of city.

W.Va.—Carter v. City of Bluefield, 54 S.E.2d 747, 132 W.Va. 881.

(3) Petitioner was not estopped to attack validity of an ordinance other than one under which he sought a permit.

Ga.—City of Pearson v. Glidden Co., 55 S.E.2d 125, 205 Ga. 738.

8. Mich.—Hering v. City of Royal Oak, 40 N.W.2d 133, 326 Mich. 232.

N.Y.—Lyle v. Avis, 148 N.Y.S.2d 874.

Okl.—Voight v. Saunders, 243 P.2d 654, 206 Okl. 318.

Issue held not raised

Where township had separate building code and zoning ordinance and two were tied together with single enforcement administrator and a single board of appeals to review action taken by inspector or administrator under either or both ordinances, and zoning ordinance did not require building permit as was required by building code, and city owning land in township made application for building permit under building code and made no application under zoning ordinance, mandamus proceeding by city to compel issuance of building permit raised no issue whether zoning ordinance created valid restriction as to use of city's property but only issue whether permit should have been issued under building code.

Mich.—City of East Lansing v. Wilson, 50 N.W.2d 730, 332 Mich. 96.

9. Mass.—Sunderland v. Building Inspector of North Andover, 105 N.E.2d 471, 328 Mass. 638.

10. N.Y.—Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195, affirmed 158 N.Y.S.2d 306, 3 A.D.2d 663.

Administrative procedure held proper

In proceeding for writ of mandamus to compel city planning commission to set aside decision granting use permit to telephone company for construction of addition to its building in R-3 residential zone, record disclosed that protestants had had a full fair hearing and that commission had not acted summarily.

Cal.—McLain v. Planning Commission of City of Chico, App., 319 P.2d 24.

Final determination on application for alternative writ

Where, on motion for alternative writ of mandate to review decision of county board of supervisors granting cemetery permit and zoning exception, all parties were before court and full transcripts of proceedings before regional planning commission and board were attached as exhibits to petition, trial court could make a final determination as to whether a peremptory writ should issue.

Cal.—Patterson v. Board of Sup'rs of Los Angeles County, 180 P.2d 945, 79 C.A.2d 670.

11. Ga.—Wofford v. Porte, 93 S.E.2d 690, 212 Ga. 533.

Md.—Fulker v. Rider, 144 A. 640, 156 Md. 408.

Pa.—Lewis v. Emmot, 122 A.2d 727, 385 Pa. 336.

Alexander v. Porter, 23 Pa.Dist. 459, 42 Pa.Co. 210.

Declaratory judgment

Right to obtain relief by mandamus could not be denied on theory that owner would have an adequate remedy in an action for declaratory judgment.

Wis.—State ex rel. Scandrett v. Nelson, 3 N.W.2d 765, 240 Wis. 438.

Where no existing statute or ordinance provides for appeal from de-

suance,¹² where there is another adequate remedy available, as where the statute makes provision for an appeal to another governmental or administrative agency.¹³ Where the law and the facts are clear, however, mandamus may lie without first exhausting the administrative appeal, since the rule requiring exhaustion of such remedy is one of policy and discretion rather than of law.¹⁴ Also, the right to mandamus is not barred where, under the circumstances, another remedy, as by administrative

appeal, is unavailable or is inadequate.¹⁵

According to some authorities, where a permit is denied on the basis of a statute or ordinance, the validity of the regulation may be questioned in a direct proceeding for mandamus without resorting to the procedure for administrative review;¹⁶ and resort need not be had to an administrative appellate board before bringing mandamus if such board could not pass on the validity of the ordinance.¹⁷ It has been held, however, that an ap-

cision of adjustment board, mandamus may be maintained to review its refusal of a permit.

Me.—Casino Motor Co. v. Needham, 118 A.2d 781.

12. Mass.—Godfrey v. Building Com'r of City of Boston, 161 N.E. 819, 268 Mass. 589.

13. Mass.—C. & H. Co. v. Building Com'r of City of Medford, 21 N.E. 2d 933, 303 Mass. 499—Bellevue Hotel Co. v. Building Com'r of Boston, 12 N.E.2d 94, 299 Mass. 73.

N.J.—Lutz v. Kaltenbach, 128 A. 421, 101 N.J.Law 316.

Decker v. Moffett, 141 A. 784, 6 N.J.Misc. 510—Elkay Realty Co. v. Redfern, 138 A. 196, 5 N.J.Misc. 717—Raskind v. Dowling, 138 A. 103, 5 N.J.Misc. 715—Bilt-Wel Co. v. Dowling, 135 A. 798, 5 N.J.Misc. 180—Paramount Realty & Construction Co. v. Schmitt, 135 A. 789, 5 N.J.Misc. 177, rehearing denied Paramount Realty & Construction Co. v. Town of Irvington, 136 A. 349, 5 N.J.Misc. 282—Van Winkle v. Quigley, 135 A. 658, 5 N.J.Misc. 103—Eaton v. City of Newark, 128 A. 377, 3 N.J.Misc. 363.

N.Y.—Cherry v. Brumbaugh, 7 N.Y.S. 2d 956, 255 App.Div. 880.

Application of Braunsdorf, 111 N.Y.S.2d 507, 202 Misc. 471.

Application of Yorktown Country Club Estates, 116 N.Y.S.2d 751—Concordia Collegiate Institute v. Miller, 88 N.Y.S.2d 825, affirmed, 93 N.Y.S.2d 922, 276 App.Div. 872, reargument and appeal denied, 94 N.Y.S.2d 829, 276 App.Div. 918, reversed on other grounds 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

N.D.—Midland Produce Co. v. City of Minot, 294 N.W. 192, 70 N.D. 256.

Necessity of exhausting administrative remedies generally see supra § 334.

After adverse decision on administrative appeal, mandamus lies.

N.J.—Builders' Realty Co. v. Bigelow, 128 A. 887, 3 N.J.Misc. 540, followed in Shapiro v. Brennan, 128 A. 888, 3 N.J.Misc. 543, affirmed Builders' Realty Corporation v. Bigelow, 131 A. 888, 102 N.J.Law 433.

Application to amend zoning ordinance, which was discretionary with township committee, was not necessary prior to mandamus to compel issuance of building permit.

N.J.—Margolis v. Maplewood Tp., 135 A. 662, 5 N.J.Misc. 131, affirmed 139 A. 56, 104 N.J.Law 177, certiorari denied Maplewood Tp. v. Margolis, 48 S.Ct. 212 (second case), 276 U.S. 618, 72 L.Ed. 734.

14. N.J.—Lane v. Bigelow, 50 A.2d 633, 135 N.J.Law 195.

Provident Institution for Savings v. Castles, 168 A. 169, 11 N.J. Misc. 773.

15. N.J.—Vine v. Zabriskie, 3 A.2d 886, 122 N.J.Law 4.

Aitken v. Borough of Hasbrouck Heights, 136 A. 802, 5 N.J.Misc. 433—Songar Realty Corporation v. Axford, 136 A. 164, 5 N.J.Misc. 220, followed in Burnett v. Axford, 136 A. 925, 5 N.J.Misc. 392.

Pa.—Crozler v. Canfield, 70 Montg. Co. 342, 68 York Leg.Rec. 115.

Limited review available

Where administrative appellate board could review only some of issues and applicant would have right to go to courts for review of others, court will take jurisdiction of entire controversy even though applicant failed to seek relief from administrative appeal board.

N.Y.—Cherry v. Brumbaugh, 7 N.Y.S. 956, 255 App.Div. 880.

Proof that remedy is available

Mandamus for building permit despite zoning will issue, where neither ordinance nor proof that it provides board of adjustment is before court.

N.J.—Van Winkle v. Quigley, 135 A. 658, 5 N.J.Misc. 103—Haberland v. Maplewood Tp., 135 A. 553, 5 N.J. Misc. 97.

Administrative remedies exhausted

N.J.—Slamowitz v. Jelleme, 130 A. 883, 3 N.J.Misc. 1169.

Ohio.—Young Israel Organization of Cleveland v. Dworkin, App., 133 N.E.2d 174.

Where resort to board would be futile, failure to pursue such remedy will not bar mandamus.

N.J.—Losick v. Binda, 128 A. 619, 3 N.J.Misc. 422, affirmed 130 A. 537, 102 N.J.Law 157.

Zoning ordinance inapplicable

(1) Appeal need not be taken to board established under zoning ordinance where ordinance is not applicable.

N.J.—Sgromolo v. City of Asbury Park, 46 A.2d 661, 134 N.J.Law 195—Piaget-Del Corp. v. Kulik, 45 A.2d 125, 133 N.J.Law 485, petitions denied 46 A.2d 379, 134 N.J.Law 147.

(2) Where permit was denied for reason unconnected with zoning ordinances, mandamus proceeding rather than appeal to board of adjustment was proper.

Pa.—Miller v. Seaman, 8 A.2d 415, 137 Pa.Super. 24.

16. Ga.—Gay v. City of Lyons, 74 S.E.2d 839, 209 Ga. 599.

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Stoker, 259 S.W.2d 443.

N.Y.—Concordia Collegiate Institute v. Miller, 93 N.E.2d 632, 301 N.Y. 189, 21 A.L.R.2d 544.

Consolidated Edison Co. of N. Y. v. Village of Briarcliff Manor, 144 N.Y.S.2d 379, 208 Misc. 295—Application of Braunsdorf, 111 N.Y.S.2d 507, 202 Misc. 471.

Preferable remedy

Even though an appeal from decision on an administrative review might have been better remedy, where ordinance is invalid, mandamus is not improper.

Wyo.—State ex rel. George v. Hull, 199 P.2d 832, 65 Wyo. 251.

17. Colo.—Hedgcock v. People, 13 P. 2d 264, 91 Colo. 155.

Mo.—State ex rel. Kramer v. Schwartz, 82 S.W.2d 63, 336 Mo. 932.

N.J.—Lutz v. Kaltenbach, 131 A. 899, 102 N.J.Law 718—Builders' Realty Corporation v. Bigelow, 131 A. 888, 102 N.J.Law 433—H. Krumgold & Sons v. Jersey City, 130 A. 635, 102 N.J.Law 170.

Steinberg v. Bigelow, 131 A. 114, 3 N.J.Misc. 1228, followed in Chancellor Development Corporation v. Board of Adjustment of City of Newark, 131 A. 116, 3 N.J.Misc. 1231, and Herman & Co. v. Board of Adjustment of City of Newark, 131 A. 116, 3 N.J.Misc. 1233.

N.Y.—Cherry v. Brumbaugh, 7 N.Y.S.2d 956, 255 App.Div. 880—Rad-

pllicant for a building permit whose application was refused because of a zoning ordinance may not secure mandamus compelling issuance of the permit on the ground that the ordinance as a whole is unconstitutional without first exhausting administrative remedies provided by the ordinance if such remedies might enable the applicant to secure the permit.¹⁸

Certiorari or mandamus. Certiorari, where available, may preclude mandamus,¹⁹ and it has been held that certiorari, not mandamus, is the proper method for review of the refusal of a board to grant a permit,²⁰ although in particular circumstances, mandamus rather than certiorari may be the proper remedy.²¹

§ 348. — Revocation of Permits

In a proper case, revocation of permits or restoration of rights under permits improperly revoked may be compelled by mandamus.

Generally, the court has discretion as to the issuance of mandamus to compel the revocation of a permit provided for by the building and zoning laws.²² Mandamus will not issue to compel the

revocation of a building permit for a defect which has been corrected or which the parties are ready and willing to correct.²³ A building inspector will not be compelled by mandamus to revoke a building permit unless the construction authorized by it so clearly violates the building regulations as to endanger public health, safety, or welfare.²⁴

Where another adequate remedy is available, mandamus will not lie to compel the revocation of a permit;²⁵ and an application for mandamus to compel a building superintendent to revoke a building license will be denied in advance of a review of his action by the board of appeals provided for by statute.²⁶ However, where no other remedy is available, mandamus may lie to compel the revocation of a building permit.²⁷ In a mandamus proceeding to revoke a permit defendant may contend that the proposed building is not in violation of the zoning ordinance, even though this issue has not been passed on in any administrative proceeding.²⁸ Where the decision to revoke or not to revoke a permit is discretionary, mandamus will not lie to review the determination unless there has been an abuse of discretion.²⁹

Cliffe v. Livingston, 229 N.Y.S. 20, 223 App.Div. 862.

Wis.—State ex rel. Scandrett v. Nelson, 3 N.W.2d 765, 240 Wis. 438—*State v. Gurda*, 243 N.W. 317, 209 Wis. 63.

Legal or constitutional questions involved in mandamus proceeding to compel issuance of a building permit are not subject matter for determination of zoning board, and hence application for writ of mandamus before resorting to board was not premature.

N.J.—Losick v. Binda, 130 A. 537, 102 N.J.Law 157.

18. Ohio.—State ex rel. Lieux v. Village of Westlake, 96 N.E.2d 414, 154 Ohio St. 412.

19. Minn.—Zion Evangelical Lutheran Church of Detroit Lakes v. City of Detroit Lakes, 21 N.W.2d 203, 231 Minn. 55.

Review by certiorari generally see *supra* § 335.

20. N.J.—Kastovisky v. Castles, 142 A. 440, 6 N.J.Misc. 599, affirmed 147 A. 461, 106 N.J.Law 368—*Hack v. Scales*, 141 A. 4, 6 N.J.Misc. 307—*Letz & Katz v. Ackerman*, 135 A. 667, 5 N.J.Misc. 169.

Violation of ordinance

Mandamus does not lie to compel building commissioner to issue permit in violation of zoning ordinance, since remedy to correct erroneous decisions is by certiorari.

N.Y.—Horwitz v. Schwab, 223 N.Y.S. 638, 130 Misc. 158, motion denied 224 N.Y.S. 41, 130 Misc. 448.

21. Minn.—Minneapolis - Honeywell Regulator Co. v. Nadasdy, 76 N.W. 2d 670, 247 Minn. 159.

N.J.—Goldberg v. Jersey City, 142 A. 355, 6 N.J.Misc. 564—*E. & M. Land Co. v. Board of Adjustment of City of Newark*, 133 A. 413, 4 N.J.Misc. 467, followed in 133 A. 414, 4 N.J. Misc. 469, and *Loretto Realty Co. v. Bigelow*, 133 A. 414, 103 N.J.Law 497, affirmed *E. & M. Land Co. v. Board of Adjustment of City of Newark*, 135 A. 916, 103 N.J.Law 487, and *Loretto Realty Co. v. Bigelow*, 135 A. 918, 103 N.J.Law 497—*Finkel v. Kaltenbach*, 132 A. 198, 4 N.J.Misc. 137—*Finkel v. Kaltenbach*, 132 A. 197, 4 N.J.Misc. 135.

Power of board

Remedy is by mandamus against building inspector, and not by certiorari to review action of board of adjustment, where board had no power to pass on issue.

N.J.—Peshine Realty Co. v. Scott, 135 A. 80, 4 N.J.Misc. 977.

No judgment rendered

Mandamus was held to lie to compel city to issue building permit where certiorari was not available because no judgment had been rendered.

Ga.—Wofford Oil Co. of Georgia v. City of Calhoun, 189 S.E. 5, 183 Ga. 511.

Invalid ordinance

If zoning ordinance was unreasonable, oppressive, and discriminatory, as alleged, mandamus, not certiorari,

was proper remedy after board of appeals' denial of permit.

N.Y.—Ellish v. Zoning Board of Appeals of Town of Ramapo, 253 N.Y. S. 547, 141 Misc. 916.

22. Mass.—Security Co-op. Bank v. Inspector of Buildings of Brockton, 9 N.E.2d 569, 298 Mass. 5.

Writ refused

Ill.—Board of Ed. of School Dist. 85½ v. Idle Motors, 90 N.E.2d 121, 339 Ill.App. 350.

23. Minn.—State v. Nash, 158 N.W. 730, 134 Minn. 73.

24. Minn.—State v. Nash, supra.

25. La.—State ex rel. Kreher v. Quinlan, 162 So. 577, 182 La. 721.

26. N.Y.—People v. Moore, 165 N.Y. S. 840, 179 App.Div. 121.

38 C.J. p 744 note 73.

27. Mass.—Tranfaglia v. Building Commissioner of Winchester, 28 N.E.2d 537, 306 Mass. 495.

Administrative remedy available to one denied permit is not available to one seeking to have permit revoked and does not bar mandamus.

Mass.—Petros v. Superintendent and Inspector of Buildings of City of Lynn, 28 N.E.2d 233, 306 Mass. 368, 128 A.L.R. 1210.

28. N.J.—Carroll v. Board of Adjustment of Jersey City, 83 A.2d 448, 15 N.J.Super. 363.

29. Cal.—Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 144 P.2d 4, 23 C.2d 303.

Relief from improper revocation. Where a building permit has been improperly revoked, mandamus is the proper remedy to compel the issuance of another permit³⁰ unless another adequate remedy is available.³¹ So, where relator has acquired vested property rights in reliance on the permit, mandamus may lie to cancel the revocation and reinstate the permit;³² but a peremptory writ in advance of a trial will not issue where questions of fact have not been determined.³³

§ 349. — Granting of Variances

The exercise of official discretion in deciding whether a variance or exception under the zoning laws should be allowed may be controlled by mandamus only where there has been an abuse of discretion.

Where officials authorized to grant a variance or exception under the zoning laws unreasonably refuse to do so they may be compelled by mandamus;³⁴ but the exercise of official discretion in deciding whether a variance or exception should be

allowed will not be controlled by mandamus in the absence of an abuse of discretion,³⁵ especially where a statutory remedy for review is available.³⁶ Mandamus to compel the granting of a variance is a proper remedy to test the validity of an ordinance which makes no provision for a variance,³⁷ and the applicant need not first seek review by administrative officials who have no power to amend the ordinance.³⁸

On the other hand, according to some authority, where the ordinance provides for the granting of variances or exceptions the validity of the ordinance may not be challenged by mandamus to compel the granting of a variance,³⁹ since the application for a variance admits the validity of the ordinance.⁴⁰ There is also authority, however, that mandamus to require granting of a variance is proper where the ordinance is invalid for want of sufficient standards to guide the exercise of administrative discretion.⁴¹

C. PRACTICE AND PROCEDURE

§ 350. In General

In bringing a zoning decision up for judicial review and in the review itself there must be substantial compliance with provisions governing procedure.

In bringing a decision of a zoning board or officer up for judicial review and in the review itself there must be substantial compliance with provisions governing procedure.⁴² The requirements of the

La.—*State ex rel. Kreher v. Quinlan*, 162 So. 577, 182 La. 721.

30. Ill.—*Hamilton v. Chicago*, 227 Ill.App. 391.

N.Y.—*City of Little Falls v. Fisk*, 24 N.Y.S.2d 460.

S.C.—*Corpus Juris* quoted in *Henderson v. City of Greenwood*, 172 S.E. 689, 691, 172 S.C. 16.

Revocation ineffective

(1) Mandamus was held not to lie to compel zoning commission to issue permit to build, where prior permit was revoked after work was begun, because permit issued, if valid, was still operative.

N.J.—*Peerless Oil Co. of Pennsylvania v. Hague*, 132 A. 332, 4 N.J. Misc. 143.

(2) Where improper revocation of building permit was set aside permit was in full force and effect and mandamus to compel issuance of a new permit would not be necessary.

La.—*State ex rel. Lorraine, Inc., v. Adjustment Bd. of City of Baton Rouge*, 57 So.2d 409, 220 La. 708.

31. N.Y.—*Rosenbush v. Keller*, 2 N.E.2d 659, 271 N.Y. 282.

Radano v. Town of Huntington, 117 N.Y.S.2d 94, 281 App.Div. 682, affirmed 114 N.E.2d 470, 305 N.Y. 911.

32. N.Y.—*Pelham View Apartments*

v. Switzer, 224 N.Y.S. 56, 130 Misc. 545.

Question of validity

Where validity of classification contained in zoning ordinance of city was fairly debatable, legislative judgment was required to be allowed to control in proceeding under Civil Practice Act to direct cancellation of revocation of building permit.

N.Y.—*Halpern v. Dassler*, 135 N.Y.S. 2d 8.

33. N.Y.—*Flower Hill Bldg. Corp. v. Village of Flower Hill, Nassau County*, 100 N.Y.S.2d 903, 199 Misc. 344.

Hasco Elec. Corp. v. Dassler, 143 N.Y.S.2d 240.

34. Mich.—*Faucher v. Sherwood*, 32 N.W.2d 440, 321 Mich. 193.

35. Cal.—*Patterson v. Board of Sup'rs of Los Angeles County*, 180 P.2d 945, 79 C.A.2d 670—*Childs v. City Planning Commission of City of Sacramento*, 180 P.2d 433, 79 C.A. 2d 808.

36. Cal.—*Triangle Ranch v. Union Oil Co. of Cal.*, 287 P.2d 537, 135 C.A.2d 428.

37. Cal.—*Bernstein v. Smutz*, 188 P. 2d 48, 83 C.A.2d 108.

38. Cal.—*Bernstein v. Smutz*, supra.

39. Cal.—*Rubin v. Board of Directors of City of Pasadena*, 104 P.2d 1041, 16 C.2d 117.

Hadden, Inc. v. City of Inglewood, 224 P.2d 913, 101 C.A.2d 125.

40. Cal.—*Rubin v. Board of Directors of City of Pasadena*, 104 P.2d 1041, 16 C.2d 119.

Hadden, Inc. v. City of Inglewood, 224 P.2d 913, 101 C.A.2d 125.

41. Ohio.—*State ex rel. Selected Properties v. Gottfried*, 127 N.E.2d 371, 163 Ohio St. 469.

42. Ga.—*Ledbetter v. Roberts*, 98 S. E.2d 654, 95 Ga.App. 652.

Ind.—*Ballman v. Duffecy*, 102 N.E.2d 646, 230 Ind. 220.

Neb.—*Kelley v. John*, 75 N.W.2d 713, 162 Neb. 319.

N.Y.—*Romig v. Weld*, 87 N.Y.S.2d 580, 194 Misc. 783, affirmed in part and reversed in part on other grounds, 95 N.Y.S.2d 571, 276 App. Div. 514.

Long Island Lighting Co. v. Griffin, 72 N.Y.S.2d 712, application transferred, see 74 N.Y.S.2d 348, 272 App.Div. 551.

Pa.—*Blank v. Board of Adjustment of Borough of West Mifflin*, 136 A. 2d 695, 390 Pa. 636—*Schleifer v. Exley*, 97 A.2d 782, 374 Pa. 277.

Appeal of Deaner, Com.Pl., 33 Erie Co. 125—*Appeal of Deiter, Com.Pl.*, 58 Lack.Jur. 85.

Wis.—*State ex rel. Robst v. Board of Appeals of City of Wauwatosa*, 5 N.W.2d 783, 241 Wis. 188.

statute as to the court where the remedy is to be had, and the time and manner of asserting a right of review have been held to be mandatory and jurisdictional.⁴³ So, where the right to appeal from the decision of a zoning board is conferred by statute, it cannot be created by waiver when it is not exercised in accordance with statute.⁴⁴

It has been held, however, that appeals from decisions of the board of adjustment to the courts are somewhat informal and are not to be measured by the strict rules ordinarily applied to the removal of cases on appeal from court to court;⁴⁵ and where the papers on review are timely served and sufficiently advise the board of the relief sought, any irregularity or defect in form may be disregarded.⁴⁶ Where a statute gives a court jurisdiction of appeals from zoning boards, a failure to comply strictly with the requirements of the statute may render the decision of the court erroneous, but does not de-

prive the court of jurisdiction of the subject matter.⁴⁷

Cost bond or recognizance. Where not required by statute or rule of court, a cost bond need not be filed by a person appealing from a decision of a zoning board of adjustment.⁴⁸ Under a statute allowing costs to the prevailing party on an appeal in a zoning case, it is not mandatory that the court order petitioner to file a recognizance,⁴⁹ and the lack of a recognizance does not defeat the petition.⁵⁰

§ 351. Jurisdiction

Review of zoning action may be had only in courts of competent jurisdiction, and, if these are designated specifically by the statute, no other court may act.

Jurisdiction of particular courts to entertain proceedings for the review of zoning regulations and decisions may be conferred by constitutional or statutory provision,⁵¹ and review may not be had in

An amendment of enabling act by general assembly would override provisions of city ordinance relating to appeal from decision of board of zoning appeals, particularly where amendment to enabling act took effect subsequent to reenactment of ordinance.

Md.—*State Housing, Inc. v. City of Baltimore*, 137 A.2d 708, 215 Md. 294.

Construction as a whole

Sections of statute prescribing procedure for review of a decision of a board of zoning appeals must be interpreted together in order to ascertain legislative intent and whether such sections are in conflict.

Ind.—*Ballman v. Duffecy*, 102 N.E.2d 646, 230 Ind. 375.

Strict compliance

Terms of statute prescribing procedure for review of a decision of board of zoning appeals must be strictly complied with, since proceeding is a statutory proceeding.

Ind.—*Ballman v. Duffecy*, *supra*.

Which statute applicable

Administrative Procedure Act would not govern appellate procedure on appeal from decision of township board of zoning appeals because expressly defined scope of Administrative Procedure Act did not make township boards subject to its provisions; but perfecting of an appeal from decision of board was governed by Appellate Procedure Act.

Ohio.—*A. Diello & Sons v. Chester Zoning Bd. of Appeals*, Com.Pl., 98 N.E.2d 352.

Filing of decision

In proceeding for order to reverse determination of Town Board of Oyster Bay in denying application for zone change, affidavit of petitioner's

attorney that petitioner "questions whether formal decision was ever filed, in view of absence of verified copy of same in the deponent's return" was not sufficient to raise issue of fact as to filing of decision.

N.Y.—*Firestone v. Town Bd. of Town of Oyster Bay*, 134 N.Y.S.2d 882.

Review by indirection

Applicant should not be permitted by indirection to review unacceptable portion of decision of borough board of adjustment, from which no appeal was taken, denying requested variance from zoning ordinance by filing application for identical relief more than a year later and suffering a denial thereof without showing any change in status of applicant or situation or condition of premises, indicative of hardship in strict application of zoning ordinance to an extent not existing at time of earlier application.

N.J.—*Home Builders Ass'n of Northern N. J. v. Borough of Paramus*, 81 A.2d 753, 7 N.J. 335.

43. Ind.—*State ex rel. Marion County Plan Commission v. Superior Court of Marion County*, 135 N.E.2d 516, 235 Ind. 607.

Filing of complaint seeking mandatory injunction requiring county planning and zoning board of adjustments and appeals to make variation in favor of petitioner and service of notice or summons on board could not be regarded as perfecting an appeal from board's decision as prescribed by statute pertaining thereto.

Ky.—*L. LeRoy Highbaugh, Jr., Builder, Inc. v. Louisville & Jefferson County Planning & Zoning Board, of Adjustment & Appeals*, 287 S.W. 2d 169.

44. Md.—*Windsor Hills Imp. Ass'n*

v. Mayor & City Council of Baltimore, 73 A.2d 531, 195 Md. 383.

45. Wyo.—*In re McInerney*, 34 P.2d 35, 47 Wyo. 258.

46. N.Y.—*Kohnberg v. Murdock*, 164 N.Y.S. 870, 4 A.D.2d 750.

47. Ind.—*Board of Zoning Appeals of City of Mishawaka v. School City of Mishawaka*, App., 145 N.E. 2d 302.

48. Ga.—*Ledbetter v. Roberts*, 98 S. E.2d 654, 95 Ga.App. 652.

49. Vt.—*In re Marineau*, 108 A.2d 402, 118 Vt. 262.

50. Vt.—*In re Marineau*, *supra*.

51. Ind.—*Hirschman v. Marion County Plan Commission*, App., 146 N.E.2d 277.

Md.—*Johnson v. Board of Zoning Appeals of Baltimore County*, 76 A.2d 736, 196 Md. 400.

N.Y.—*Theodore Gompers, Inc. v. Craft*, 87 N.Y.S.2d 670, 194 Misc. 779.

Pa.—*Appeal of Rolling Green Golf Club*, 97 A.2d 523, 374 Pa. 450.

Vt.—*Appeal of Maurice*, 90 A.2d 440, 117 Vt. 264.

Finding held sufficient to show jurisdiction

Mass.—*Marotta v. Board of Appeals of Revere*, 143 N.E.2d 270.

Single application

Court of common pleas had jurisdiction of appeal from denial of request for certificate of approval of a location for gasoline station, although such request was joined in a single application to town board of zoning appeals with similar request with respect to business of repairing motor vehicles from which appeal must be taken to superior court and zoning board denied application as a whole.

courts not so authorized.⁵² Prohibition does not lie to prohibit a judge from taking jurisdiction of a mandamus proceeding to compel the city council to repeal a zoning ordinance and to adopt a substitute ordinance where prior litigation has not involved the constitutionality of the ordinance.⁵³

After the zoning board pursuant to notice of appeal from its decision lodges the transcript of the proceedings before it with the court, the court obtains jurisdiction in the matter and may make such orders as are provided for in the statutes covering civil procedure.⁵⁴ Where the court in proceedings to review the decision of a zoning board had jurisdiction over the adverse parties and the board which had notice of the filing of the petition for review, and the parties were before the court when a special judge was selected and qualified, the court had jurisdiction to try the case.⁵⁵ Even though a court has jurisdiction of the case, it is without jurisdiction to make a mandatory order directed to a person not a party to the proceedings.⁵⁶

Preliminary objections. A question of the right of a person to invoke the jurisdiction of a court for the determination of the validity of a zoning

ordinance has been held not to be a proper question to be raised preliminarily under a statute relating to the jurisdiction of a court over defendant or the cause of action.⁵⁷

Transfer of cause. Where so provided by statute, a proceeding to review a determination of a zoning board ordinarily is properly disposed of in the trial court rather than transferred to an intermediate appellate court;⁵⁸ but such a transfer is required under conditions specified in the statute,⁵⁹ as where there was a hearing held and evidence taken by the zoning board and it is claimed that there was a failure to prove facts sufficient to sustain the determination made, or that the determination was contrary to the weight of evidence.⁶⁰ The mere fact that review is sought of a determination of a zoning board following a hearing held pursuant to statutory direction does not require a transfer of jurisdiction under the statute.⁶¹

State or federal court. Whether a federal court will exercise its jurisdiction for the purpose of enjoining the construction of a structure for which authorization has been received from the local zoning authorities is a matter of discretion.⁶² A fed-

Conn.—Mrowka v. Board of Zoning Appeals of Town of Plainville, 55 A.2d 909, 134 Conn. 149.

52. Conn.—Demarest v. Zoning Commission of Town of Plainville, 59 A.2d 293, 134 Conn. 572.

Pa.—Robb v. Luria Engineering Co., Com.Pl., 25 Leh.L.J. 72.

Appeal of Mirro, Quar.Sess., 108 Pittsb.Leg.J. 494.

Conflicting statutes

Special law providing for appeals from decisions of zoning board of appeals to court of common pleas or superior court was required to give way to general statutes giving court of common pleas exclusive jurisdiction of such appeals, and therefore superior court had no jurisdiction thereof.

Conn.—Willard v. Town of West Hartford, 63 A.2d 847, 135 Conn. 303.

53. Fla.—State ex rel. Josephson v. Revels, 100 So.2d 813.

54. Okl.—Board of Adjustment of City of Tulsa v. Shore, 249 P.2d 1011, 207 Okl. 381.

55. Ind.—Town of Homecroft v. Machbeth, 148 N.E.2d 563.

56. Conn.—Herrup v. City of Hartford, 103 A.2d 199, 140 Conn. 622.

57. Pa.—Wynnewood Civic Ass'n v. Lower Merion Tp., 102 A.2d 423, 175 Pa.Super. 20.

58. N.Y.—Schroeder v. Kreuter, 132 N.Y.S.2d 144, 206 Misc. 198, affirmed 135 N.Y.S.2d 637, 284 App.Div.

972, affirmed 127 N.E.2d 845, 308 N.Y. 993—Magde v. Crowley, 102 N.Y.S.2d 271, 200 Misc. 109—Theodore Gompers, Inc., v. Craft, 87 N.Y.S.2d 670, 194 Misc. 779—Hopkins v. Board of Appeals of City of Rochester, 33 N.Y.S.2d 396, 178 Misc. 136.

Objections to petition in point of law
Where proceeding to review decision of town zoning board of appeals must be disposed of on objections to petition in point of law, proceeding must be decided by special term in first instance.

N.Y.—Romig v. Weld, 87 N.Y.S.2d 580, 194 Misc. 783, affirmed in part and reversed in part on other grounds, 95 N.Y.S.2d 571, 276 App. Div. 514.

59. Transfer not prohibited

Provisions of town law with respect to hearings before special term of supreme court on petition to review determination of zoning board of appeals do not prohibit transfer of proceeding to appellate division in proper case.

N.Y.—Little v. Richter, 100 N.Y.S.2d 934, 277 App.Div. 1119.

60. N.Y.—Little v. Richter, supra. Tru-Matic Mach. & Tool Co. v. Bantz, 91 N.Y.S.2d 414, 196 Misc. 82.

Alex-Wells, Inc. v. City of Yonkers, 154 N.Y.S.2d 108—Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477—Freitag v. Marsh, 106 N.

Y.S.2d 927, transferred 115 N.Y.S.2d 838, 280 App.Div. 934.

Questions for trial court

Where challenged determination of board of zoning appeals was made as result of hearing held and at which evidence was taken pursuant to statutory direction, court must determine whether there was any competent proof of all facts necessary to be proved in order to authorize making of determination and whether, on all evidence, there was such preponderance of proof against existence of any necessary fact that a verdict affirming existence of such fact would be set aside as against weight of evidence, and, if either of such issues is raised, order should be made transferring proceeding for disposition to appellate division.

N.Y.—Long Island Lighting Co. v. Griffin, 72 N.Y.S.2d 712, application transferred, see 74 N.Y.S.2d 348, 272 App.Div. 551.

61. N.Y.—Schroeder v. Kreuter, 132 N.Y.S.2d 144, 206 Misc. 198, affirmed 135 N.Y.S.2d 637, 284 App. Div. 972, affirmed 127 N.E.2d 845, 308 N.Y. 993.

Zeltner v. Board of Appeals of Incorporated Village of Great Neck, 136 N.Y.S.2d 351.

62. U.S.—Harris v. Connecticut Light & Power Co., D.C.Conn., 125 F.Supp. 395, affirmed, C.A., 221 F.2d 958.

eral court will not exercise its discretion to enjoin such construction in the absence of a showing that the rights of the parties seeking relief are being prejudiced, and either that there is no adequate machinery in the state system to protect those rights, or that petitioners are prevented from availing themselves of it, or that bias, unfairness, or prejudice in the state system of review prevents a fair and impartial consideration of their claims, or that petitioners will suffer immediate and irreparable injury.⁶³ It has been held that a federal court should in comity decline jurisdiction of an injunction suit involving the administration of a zoning ordinance where an appeal is pending in a state court from a judgment in a suit for the same relief and against the same defendant, and raising the same issues.⁶⁴

§ 352. Parties

Only necessary or proper parties may be joined in a judicial proceeding to review zoning regulations or decisions, and indispensable parties must be joined in order to render the review proceedings valid.

In accordance with the rule governing civil ac-

tions generally, only necessary or proper parties may be joined in a judicial proceeding to review zoning regulations or decisions,⁶⁵ and indispensable parties must be joined in order to render the review proceedings valid.⁶⁶ A statutory requirement that all adverse parties of record to the zoning proceedings be made parties defendant on review is mandatory.⁶⁷ So, where an appeal is taken from a decision of a zoning body granting a permit, the permittee is a necessary and indispensable party.⁶⁸ A declaratory judgment as to the validity of a zoning ordinance or regulation may not be granted where the necessary parties are not brought into the action.⁶⁹

Under some statutes it has been held that neither the members of the zoning board⁷⁰ nor the board itself⁷¹ is a proper party to judicial proceedings to review its decisions; and the board has been held not to be a necessary party to an action against the municipality challenging the validity of the zoning ordinance,⁷² or an action against a property owner to enjoin construction of a building for which a variance was granted.⁷³ Under other statutes it is held that the zoning board is entitled to appear

63. U.S.—Harris v. Connecticut Light & Power Co., *supra*.

64. U.S.—Gregg v. Winchester, C.A. Cal., 173 F.2d 512, certiorari denied 70 S.Ct. 87, 338 U.S. 847, 94 L.Ed. 516.

65. N.Y.—Teschner v. Town of Pittsford, 129 N.Y.S.2d 803, affirmed 137 N.Y.S.2d 640, 285 App.Div. 851.

Persons entitled to bring proceedings to review determinations of zoning bodies see *supra* § 321.

Persons entitled to attack validity of zoning ordinances see *supra* § 20.

66. Conn.—Shulman v. Zoning Bd. of Appeals of City of Hartford, 120 A.2d 550, 143 Conn. 182.

Ribeiro v. Town of Andover, 116 A.2d 769, 19 Conn.Sup. 438.

67. Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, 95 N.E.2d 864, 407 Ill. 588.

Complaint held defective

In action to review decision of board granting variance, complaint was fatally defective in failing to include as defendants all persons other than plaintiffs who were parties of record to administrative proceeding.

Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, *supra*.

68. Conn.—Shulman v. Zoning Bd. of Appeals of City of Hartford, 120 A.2d 550, 143 Conn. 182—Kuehne v. Town Council of Town of East Hartford, 72 A.2d 474, 136 Conn.

452—Devaney v. Board of Zoning Appeals of City of New Haven, 43 A.2d 304, 132 Conn. 218.

Mo.—Hernreich v. Quinn, 168 S.W.2d 1054, 350 Mo. 770.

Real party in interest

N.Y.—Underhill v. Board of Appeals of Town of Oyster Bay, 72 N.Y.S.2d 588, affirmed 75 N.Y.S.2d 327, 273 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937.

69. Conn.—Ribeiro v. Town of Andover, 116 A.2d 769, 19 Conn.Sup. 438.

Mass.—Town of Brookline v. Co-Ray Realty Co., 93 N.E.2d 581, 326 Mass. 206.

Persons held necessary parties

(1) Action to obtain declaratory judgment that ordinance, which purports to change established building line on certain property, was invalid could not be maintained in view of fact that owner of such property had not been made party to action.

Conn.—Charles P. Dunn Co. v. City of Hartford, 111 A.2d 813, 19 Conn. Sup. 291.

(2) Court would not assume jurisdiction of declaratory judgment action, wherein plaintiffs sought to obtain decree that amendment to zoning ordinance was invalid, in view of fact that owners of re-zoned lots were not made parties defendant, but that action was brought against city alone.

N.Y.—Turner v. City of Peekskill, 124 N.Y.S.2d 24.

Persons held not necessary parties

(1) In trucking company's action against municipality for judgment declaring zoning regulation void, other residents and property owners affected by change, if it was void, were not "necessary parties," since municipality represented residents and property owners within its boundaries at least in so far as relief to company was concerned. Conn.—National Transp. Co. v. Toquet, 196 A. 344, 123 Conn. 468.

(2) A trucking company was not entitled to judgment declaring change in zoning regulation void where other property owners affected by change were not made parties to action and were not given notice of pendency thereof, since parties having a direct interest in subject matter of action must be made parties or have reasonable notice thereof, even though their presence is not necessary to a decision of issues between parties of record.

Conn.—National Transp. Co. v. Toquet, *supra*.

70. N.H.—Kearney v. Hazelton, 149 A. 78, 84 N.H. 228.

71. Md.—Miles v. McKinney, 199 A. 540, 174 Md. 551, 117 A.L.R. 207.

N.H.—Mater v. City of Dover, 79 A.2d 844, 97 N.H. 13.

72. Mich.—Comer v. City of Dearborn, 70 N.W.2d 813, 342 Mich. 471.

73. Mich.—Jones v. De Vries, 40 N.W.2d 317, 326 Mich. 126.

and be heard on an appeal from its action or decision,⁷⁴ and the board may properly be made a party defendant.⁷⁵ Where property owners, who are interested in preventing the certification of a petition calling for an initiative election on an ordinance to repeal a zoning ordinance, bring an action to prevent the submission of the petition to the election board, members of the initiating commission have been held entitled, as individuals, and as commission members, to defend the action.⁷⁶

Suits involving the validity of zoning ordinances are usually and properly brought against the enacting municipality itself.⁷⁷ Under some authorities,⁷⁸ but not under others,⁷⁹ a municipality is the proper party defendant on review of a determination of the zoning board of the municipality. It has also been held that while a city is not a necessary or indis-

pensable party to an action to review a decision of a board of adjustment and a resolution of the city council approving the decision, it is a proper party, where it has an interest in the eventual outcome of the proceedings.⁸⁰

Intervention. Property owners in the vicinity of the affected land, and other interested persons may, in a proper case, be permitted to intervene as parties in a proceeding to review a decision of a zoning body⁸¹ or an action for a declaratory judgment as to the validity of a zoning ordinance.⁸² However, the matter is one within the discretion of the court,⁸³ and intervention will not be permitted where it is unnecessary or improper.⁸⁴

Bringing in new parties. Proper practice may require the court to cause a permittee, who is not a

74. Pa.—Appeal of Ward, 137 A. 630, 289 Pa. 458.

75. N.J.—Tomko v. Vißers, 121 A.2d 502, 21 N.J. 226.

Tex.—Board of Adjustment of City of Forth Worth v. Stovall, 216 S. W.2d 171, 147 Tex. 366.

Reasons for rule

City board of adjustment in determining whether zoning variance should be granted is engaged in a delegated policy-making function which is an essential part of proper administration of zoning ordinance; the public, as well as affected private parties, has an interest in upholding board's order if valid; and board itself is proper party to represent this public interest when its order is under review.

Tex.—Board of Adjustment of City of Fort Worth v. Stovall, *supra*.

Parties on both sides

Statute providing that any person aggrieved by a decision of board may appeal contemplates that there will be parties on both sides of suit and that members of board will be made parties.

Mass.—Cefalo v. Board of Appeal of Boston, 124 N.E.2d 247, 332 Mass. 178.

Better practice

In action to review validity of township committee's resolution granting variance, inclusion of record made before board of adjustment did not require that board be denominated an indispensable party, although better practice would have been to make board a party defendant since it was a proper party.

N.J.—Tomko v. Vißers, 121 A.2d 502, 21 N.J. 226.

76. Ohio.—Russell v. Linton, Com. Pl., 115 N.E.2d 429.

77. S.C.—Central Realty Corp. v. Allison, 63 S.E.2d 153, 218 S.C. 435.

78. N.H.—Mater v. City of Dover, 79 A.2d 844, 97 N.H. 13—Kearney v. Hazelton, 149 A. 78, 84 N.H. 228.

79. N.Y.—Teschner v. Town of Pittsford, 129 N.Y.S.2d 803, affirmed 137 N.Y.S.2d 640, 285 App.Div. 851.

Municipality not party of record below

City and county of Denver, which was not a party to record before zoning board of adjustment, could not properly become a party in review proceedings before district court.

Colo.—Board of Adjustment of City and County of Denver v. Kuehn, 290 P.2d 1114, 132 Colo. 348.

80. N.J.—Esso Standard Oil Co. v. City Council of City of Northfield, 123 A.2d 885, 41 N.J.Super. 105.

81. Conn.—Greenwich Gas Co. v. Tuthill, 155 A. 850, 113 Conn. 684. N.Y.—Steers Sand & Gravel Corp. v. Brunn, 116 N.Y.S.2d 879.

Pa.—Appeal of Tredyfrin Const. Co., Com.Pl., 7 Chest.Co. 153—Appeal of Lindquist, Com.Pl., 66 Montg. Co. 27, affirmed 73 A.2d 378, 364 Pa. 561.

Amendment of ordinance

Pa.—Toland v. Newtown Tp., Quar. Sess., 34 Del.Co. 446.

Owner of property for which permit sought

Cal.—Cohn v. County Bd. of Sup'rs of Los Angeles County, 286 P.2d 836, 135 C.A.2d 180.

Pa.—Elvan v. Exley, 58 Pa.Dist. & Co. 538.

Time for application

Where protestant had vigorously participated in hearing before board, and was entitled to appeal from decision both as person aggrieved and as taxpayer, but he attacked board's

decision by late appeal and, after it was apparent that it was to be dismissed, sought, by intervention in timely appeal which had been taken by landowner, to obtain relief which protestant had sought by appeal but lost by his failure to act in time, court did not abuse its discretion in refusing leave to intervene.

Md.—Nyburg v. Solmson, 106 A.2d 483, 205 Md. 150.

82. Ill.—East Maine Tp. Community Ass'n v. Pioneer Trust and Sav. Bank, 145 N.E.2d 777, 15 Ill.App. 2d 250.

Home owners

In action for a declaratory judgment that zoning ordinance was void, home owners whose homes in which they lived were either adjoining, adjacent to, or in immediate vicinity of plaintiffs' properties, and who had purchased their homes in reliance on residential restrictions contained in ordinance attacked, had sufficient interest to be entitled to intervene.

Tex.—Gullo v. City of West University Place, Civ.App., 214 S.W.2d 851, error dismissed.

83. N.Y.—Glenel Realty Corp. v. Worthington, 164 N.Y.S.2d 635.

Pa.—Carroll v. Commissioners of Lower Merion Tp., 59 Pa.Dist. & Co. 158, 63 Montg.Co. 97.

Fairlamb Const. Corp. v. Upper Darby Tp., Com.Pl., 34 Del.Co. 105.

Conditions as prerequisite to intervention properly imposed

N.Y.—Enid Holding Corporation v. Murdock, 8 N.Y.S.2d 568, 255 App. Div. 1020.

84. N.Y.—Miller v. Dassler, 150 N.Y. S.2d 845, 1 A.D.2d 975.

Pa.—Moyerman v. Koons, 80 Pa.Dist. & Co. 63.

Moyerman v. Zoning Bd. of Adjustment of Clifton Heights, Com. Pl., 39 Del.Co. 87.

party to the action, to be cited into the case as a party.⁸⁵ However, it has been held that property owners, who are seeking to compel the issuance of a permit, are not required to cite in adjacent property owners who might be adversely affected by the grant of the permit.⁸⁶ Where a question of traffic hazards is involved in a proceeding to review the grant of a permit, the court may require the municipality concerned with the matter to be made a party.⁸⁷

Representative or class actions. Under some statutes, one or more persons may maintain a representative or class action for a declaratory judgment that a zoning ordinance is unconstitutional for the benefit of himself or themselves and all others similarly situated.⁸⁸ However, an action for a declaratory judgment that a zoning ordinance is unconstitutional is improperly brought as a representative action where no controversy is alleged to exist between anyone except the individual plaintiff and defendant.⁸⁹

Remonstrants. It has been held that remonstrants, who appeared before a zoning board and received a favorable decision therein, are not aggrieved parties entitled to a review of such decisions, but they will be permitted to appear in the discretion of the court.⁹⁰

§ 353. Time for Proceedings

A person seeking judicial review of a regulation or decision of a zoning body must act promptly and seasonably, and the proceedings must be instituted within the time limited by statute.

As a general rule, a person seeking judicial review of a zoning determination of zoning officials, a board of appeals, or a governing body of a municipality,⁹¹ or a determination of the validity of a zoning ordinance,⁹² must act promptly and seasonably in instituting the proceedings for review. So, the action ordinarily must be commenced within the period of time prescribed by statute or rule of court,⁹³ and such regulations as to time for suit

85. Conn.—*Kuehne v. Town Council of Town of East Hartford*, 72 A. 2d 474, 136 Conn. 452.

86. Conn.—*State ex rel. Capurso v. Ellis*, 133 A.2d 901, 144 Conn. 473.

87. Ky.—*Illl v. Kesselring*, 220 S. W.2d 858, 310 Ky. 483, 10 A.L.R.2d 1301.

88. U.S.—*Monk v. City of Birmingham*, D.C.Ala., 87 F.Supp. 538, affirmed, C.A., *City of Birmingham v. Monk*, 185 F.2d 859, certiorari denied 71 S.Ct. 1001, 341 U.S. 910, 95 L.Ed. 1367.

89. N.Y.—*Elbert v. Village of North Hills*, 30 N.Y.S.2d 236, 262 App.Div. 470.

90. Ill.—*M. & L. Die & Tool Co. v. Board of Review of City of Newport*, 71 A.2d 511, 76 Ill. 417.

91. N.J.—*Ackerman v. Board of Com'rs of Town of Belleville*, 62 A.2d 476, 1 N.J.Super. 69.

N.Y.—*Village of Island Park v. Bulk Plants*, 15 N.Y.S.2d 968, 258 App. Div. 185.

Pa.—*Appeal of Todd*, Com.Pl., 56 Montg.Co. 24—*Appeal of Shapiro*, 94 Pittsb.Leg.J. 133—*Appeal of Borough of Dormont*, Com.Pl., 88 Pittsb.Leg.J. 5.

Application held filed within reasonable time

N.J.—*Dickinson v. Inhabitants of City of Plainfield*, 176 A. 716, 13 N.J.Misc. 260, affirmed 184 A. 195, 116 N.J.Law 336.

After issuance of permit

Decision of board of appeals granting building permit could be reviewed, although permit was issued by building inspector.

N.J.—*Gaston v. Ackerman*, 142 A. 546, 6 N.J.Misc. 696.

92. N.J.—*Jones v. Zoning Bd. of Adjustment of Long Beach Tp.*, 101 A.2d 102, 28 N.J.Super. 483, affirmed 108 A.2d 498, 32 N.J.Super. 397.

Action held not barred by court rules

Where remedy invoked was governed exclusively by court rules, proceeding attacking validity of ordinance, which was brought after time set forth in statute, was not barred by court rules which did not prescribe any period of limitation, where no laches appeared.

N.J.—*Fischer v. Bedminster Tp., Somerset County*, 76 A.2d 673, 5 N. J. 534.

93. Ky.—*Bischoff v. Hennessy*, 251 S.W.2d 582.

Md.—*Maryland Clothing Mfg. v. City of Baltimore*, 113 A.2d 743, 207 Md. 165.

N.J.—*Board of Ed. of Borough of Ft. Lee v. Mayor and Council of Borough of Ft. Lee*, 105 A.2d 899, 31 N.J.Super. 22.

Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21—*Tim v. City of Long Branch*, 47 A.2d 4, 134 N. J.Law 285, affirmed 53 A.2d 164, 135 N.J.Law 549, 171 A.L.R. 320.

N.Y.—*Barns v. Osborne*, 36 N.E.2d 638, 286 N.Y. 403.

Fammler v. Board of Zoning Appeals of Town of Hempstead, 4 N. Y.S.2d 760, 254 App.Div. 777.

Tobin v. Waters, 166 N.Y.S.2d 165, 6 Misc.2d 159—*Kohnberg v. Murdock*, 159 N.Y.S.2d 515, 4 Misc. 2d 877—*Griest v. Hooley*, 128 N.Y. S.2d 341, 205 Misc. 396—*Canzano*

v. Hanley, 66 N.Y.S.2d 709, 188 Misc. 167.

Blum v. Board of Zoning and Appeals of Town of North Hempstead, 146 N.Y.S.2d 325—*Firestone v. Town Bd. of Town of Oyster Bay*, 134 N.Y.S.2d 882—*Larson v. Howland*, 108 N.Y.S.2d 231—*Fleischer v. Murdock*, 62 N.Y.S. 2d 417, appeal dismissed 77 N.Y.S. 2d 393—*Nathan v. Murdock*, 62 N.Y.S.2d 415—*In re 521 Fifth Ave. Corp.*, 62 N.Y.S.2d 414.

Ohio.—*Schneller v. Board of County Com'rs of Hamilton County*, 108 N. E.2d 747, 91 Ohio App. 523.

Pa.—*Kuiper v. Upper Merion Tp.*, 134 A.2d 916, 390 Pa. 178—*In re 1632 South Broad St., Philadelphia*, 94 A.2d 773, 372 Pa. 557.

Appeal of Todd, Com.Pl., 56 Montg.Co. 24.

Tenn.—*Arendal v. Rasch*, 268 S.W.2d 102, 196 Tenn. 374.

Wis.—*State ex rel. Schleck v. Zoning Bd. of Appeals, City of Madison*, 35 N.W.2d 312, 254 Wis. 42—*State ex rel. Robst v. Board of Appeals of City of Wauwatosa*, 5 N. W.2d 783, 241 Wis. 188.

Validity of statutory time limit

(1) A reasonable statutory limitation on time within which certiorari may issue to review decision of board of adjustment denying building permit is constitutional.

N.J.—*Sitgreaves v. Board of Adjustment of Town of Nutley*, 54 A.2d 451, 136 N.J.Law 21.

(2) Statute providing limitation within which to apply for certiorari to review a decision of a board of adjustment is reasonable.

have been construed and applied in numerous cases.⁹⁴ While a statutory requirement as to time of suit has been held to be mandatory⁹⁵ and jurisdictional,⁹⁶ some provisions limiting the time for review of the determination of a zoning body have been held not to bar suit where facts are pleaded which show that the zoning authority acted in such an illegal manner as to cause its orders to be void, or that it has upset vested rights in violation of the constitution.⁹⁷

Although there is authority to the contrary ef-

fect,⁹⁸ where a statute requires that a petition for review be presented to a court within a specified time, filing of the petition with the clerk of that court is sufficient to give the court jurisdiction.⁹⁹ Where a statute governing a function of a zoning commission does not make provision for a rehearing of its decision, the time for appeal runs from the date of its original decision, and not from the time an application for a rehearing of the decision is denied;¹ hence, an appeal taken after the expiration of the statutory period following the original order is too late, even though such period has not

N.J.—Peckitt v. Board of Adjustment of Borough of Spring Lake, 56 A.2d 621, 136 N.J.Law 405.

Enabling act provision controlling
(1) Where source of power to pass zoning ordinance was enabling act and limitation of appeals from board of appeals to specified time as provided in subsequently adopted city charter was not found in any provision of enabling act, appeal taken within time provided by zoning ordinance and enabling act was timely.

Md.—Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore, 60 A.2d 192, 191 Md. 155—Scrivner v. Mayor and City Council of Baltimore, 60 A.2d 190, 191 Md. 165.

(2) Enabling act providing for presentation of petition within specified period from date on which board decided matter, superseded earlier ordinance providing that petition shall be presented within specified period after filing of decision in office of board, and appeal entered after expiration of period specified in act was not timely, and could not be maintained.

Md.—State Housing, Inc. v. City of Baltimore, 137 A.2d 708, 215 Md. 294.

94. Conn.—Carbone v. Zoning Board of Appeals of City of Hartford, 13 A.2d 462, 126 Conn. 602.

Ky.—Oertel v. Louisville and Jefferson County Planning and Zoning Commission, 251 S.W.2d 275—Hennessey v. Bischoff, 240 S.W.2d 71.

N.J.—Bruno v. Borough of Shrewsbury, 65 A.2d 131, 2 N.J.Super. 550. Gallo v. Moffett, 148 A. 153, 8 N.J.Misc. 39.

N.Y.—Hercher v. Murdock, 105 N.Y. S.2d 164, 200 Misc. 275.

From recommendation or refusal to recommend

Action of board of adjustment in declining to recommend a variance from terms of zoning ordinance is final and application for writ to review such action must be made within thirty days under statute, but action of board in recommending a

variance is inoperative until approved by the governing body and thirty-day statutory limitation does not apply.

N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

Ackerman v. Board of Com'rs of Town of Belleville, 62 A.2d 476, 1 N.J.Super. 69.

Brandon v. Board of Com'rs of Town of Montclair, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

Applications held seasonably filed

(1) Generally.

N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226.

Phillips v. Borough of East Paterson, 46 A.2d 667, 134 N.J.Law 161, affirmed 50 A.2d 869, 135 N.J. Law 203.

N.Y.—Caponi v. Walsh, 238 N.Y.S. 438, 228 App.Div. 86.

Gignoux v. Village of Kings Point, 85 N.Y.S.2d 675, affirmed 85 N.Y.S.2d 516, 274 App.Div. 1003, reargument and appeal denied 86 N.Y.S.2d 469, 274 App.Div. 1065—Delyanis v. Cooper, 75 N.Y.S.2d 751, affirmed Application of Delyanis, 74 N.Y.S.2d 912, 272 App.Div. 1026, appeal denied 75 N.Y.S.2d 302, 272 App.Div. 1062, appeal dismissed 77 N.E.2d 794, 297 N.Y. 782.

Pa.—Appeal of Mack, 122 A.2d 48, 384 Pa. 586.

Appeal of Estock's Zoning, Com. Pl., 53 Lanc.L.Rev. 203.

(2) Since owner and holder of option on property as to which variance had been granted were not indispensable parties to action by others to review decision of board, action was timely when brought against board within statutory period, but out of time as to intervening owner and option holder.

N.J.—Second Reformed Church v. Board of Adjustment of Borough of Freehold, 104 A.2d 703, 30 N.J. Super. 338.

Nunc pro tunc appeal

Pa.—Blank v. Board of Adjustment of Borough of West Mifflin, 136 A.2d 695, 390 Pa. 636.

Appeal of Castle Shannon Coal Corp., Quar.Sess., 100 Pittsb.Leg.J. 425.

95. Ind.—Ballman v. Duffeey, 102 N.E.2d 646, 230 Ind. 220.

Mass.—Del Grosso v. Board of Appeal of Revere, 110 N.E.2d 836, 330 Mass. 29.

Rules of board in conflict with statute limiting time for appeals are ineffective to extend time for appeal to court from decision of board.

Del.—In re Robelen, 136 A. 279, 3 W.W.Harr., Del., 314.

No power of abatement

Rule limiting period of time in which proceeding may be brought may not be relaxed, hence jurisdiction of court to entertain proceedings could not be invoked after lapse of such time, and court had no power to abate rule in order to permit complaint to stand.

N.J.—Theresa Grotta Home for Convalescents v. Board of Adjustment of Borough of North Caldwell, 88 A.2d 355, 19 N.J.Super. 331.

96. Ind.—Ballman v. Duffeey, 102 N.E.2d 646, 230 Ind. 220.

97. Ky.—Bischoff v. Hennessy, 251 S.W.2d 582.

Review for lack of jurisdiction

Power of court to review proceedings by board of adjustment heard without jurisdiction is unaffected by statutory limitation for bringing certiorari.

N.J.—Hendey v. Ackerman, 136 A. 733, followed in Marvin v. Board of Adjustment of Town of Westfield, 137 A. 924, 5 N.J.Misc. 668.

98. Ind.—Ballman v. Duffeey, 102 N.E.2d 646, 230 Ind. 220.

99. N.Y.—Barns v. Osborne, 36 N.E. 2d 638, 286 N.Y. 403.

Va.—Ross v. County Bd. of Arlington County, 87 S.E.2d 794, 197 Va. 91.

1. Del.—In re Robelen, 136 A. 279, 3 W.W.Harr. 314.

Ky.—Hennessy v. Bischoff, 240 S.W. 2d 71.

N.Y.—Canzano v. Hanley, 66 N.Y.S. 2d 709, 138 Misc. 167.

elapsed since the entry of an order confirming the original order.² The failure to file a required document within the time prescribed by statute may be fatal to an appeal,³ and the defect is not cured by the filing of the document thereafter.⁴

The running of time for taking an appeal is not suspended by appellant electing to pursue a different remedy to which he was not entitled.⁵ Under a statute requiring proceedings for review to be commenced within a stated time after the accrual of the right to such review, it has been held that the time commences to run with the granting of a variance, and not with the granting of a permit pursuant to the variance.⁶ Where a statute authorizes an appeal to be taken within a specified time after the filing of a decision of a zoning board, the time for taking the appeal does not begin to run until the required decision is filed.⁷

Where a statute or court rule provides for judicial review of a decision of a zoning board within a specified number of days after notice of the decision is given to the applicant therefor and the decision is filed and published, in the absence of such notice and filing, the mere denial of the application is insufficient to start the period running.⁸ A statute requiring an appeal from a decision to be taken within a specified time after a stated event has been construed to authorize the appeal to be taken before the event occurs.⁹

Since a zoning ordinance is a restriction on the future use of property, and if it remains unchallenged, a property owner may, at a future time, be regarded as being in laches, an attack on the va-

lidity of an ordinance, brought before any administrative decisions are made thereunder, has been held not to be premature.¹⁰ An action brought to determine the validity of a zoning ordinance is not premature, even though the ordinance does not have legal effect because it was not properly enacted.¹¹

Excuses for delay. The fact that a zoning board in adopting its decision failed to find the required jurisdictional facts therefor does not excuse a delay in commencing review proceedings.¹² The failure of appellant to file a certified copy of a resolution of a zoning authority within a specified time after its adoption is not excused by a delay in the formal adoption of the resolution until shortly before the expiration of that period of time, where appellant had sufficient time thereafter to perfect the appeal,¹³ especially where appellant did not take affirmative action to have the adoption made at an earlier date.¹⁴

Method of raising objections. Under a particular local practice, an objection that a proceeding for review is not timely is required to be made by a motion before pleading, or by a pleading itself,¹⁵ and, where the objection is not so raised, it is deemed to have been waived.¹⁶

Amended petition. Where the record does not disclose a contention that the original petition was not filed in time, and it does not appear that the amended petition states a new cause of action or changes the issues presented by the original petition, the amended petition relates back to the time that the original was filed,¹⁷ and is timely.¹⁸

2. Del.—In re Robelen, 136 A. 279, 3 W.V.Harr. 314.

3. Ky.—Oertel v. Louisville and Jefferson County Planning and Zoning Commission, 251 S.W.2d 275.

4. Ky.—Oertel v. Louisville and Jefferson County Planning and Zoning Commission, supra.

5. Ky.—LeRoy Highbaugh, Jr., Builder, Inc. v. Louisville & Jefferson County Planning & Zoning Board of Adjustment & Appeals, 287 S.W.2d 169.

6. N.J.—Boulevard Imp. Co. v. Academy Associates, 67 A.2d 225, 3 N.J.Super. 506.

7. N.Y.—Brachfeld v. Sforza, 114 N.Y.S.2d 722.

Decision embodying reasons therefor Mass.—Spaulding v. Board of Appeals of Leicester, 138 N.E.2d 367, 334 Mass. 688.

8. N.J.—Esso Standard Oil Co. v. City Council of City of Northfield, 123 A.2d 885, 41 N.J.Super. 105.

Obligation of board

Statute setting forth period of time in which review proceeding shall be commenced does not impose any obligation on plaintiff to learn of action taken, although it makes certain demands of board.

N.J.—Esso Standard Oil Co. v. City Council of City of Northfield, supra.

9. Mass.—Tanzilli v. Casassa, 85 N.E.2d 220, 324 Mass. 113.

N.Y.—J. L. Hennessy Associates, Inc. v. Griffin, 155 N.Y.S.2d 378.

10. N.J.—Lionshead Lake v. Wayne Tp., Passaic County, 74 A.2d 609, 9 N.J.Super. 83.
Ingannamort v. Borough of Fair Lawn, 43 A.2d 684, 133 N.J.Law 194.

11. N.Y.—Merrick Park Home Owners Ass'n v. Town of Hempstead, 142 N.Y.S.2d 636.

12. N.J.—Boulevard Imp. Co. v.

Academy Associates, 67 A.2d 225, 3 N.J.Super. 506.

N.Y.—Canzano v. Hanley, 86 N.Y.S.2d 709, 188 Misc. 167.

13. Ky.—Oertel v. Louisville and Jefferson County Planning and Zoning Commission, 251 S.W.2d 275.

14. Ky.—Oertel v. Louisville and Jefferson County Planning and Zoning Commission, supra.

15. N.Y.—Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, 96 N.Y.S.2d 380, 196 Misc. 1005.

16. N.Y.—Ambrosio v. Zoning Bd. of Appeals of Town of Huntington, supra.

17. Ind.—Hirschman v. Marion County Plan Commission, App., 146 N.E.2d 277.

18. Ind.—Hirschman v. Marion County Plan Commission, supra.

§ 354. — Effect of Delay

Delay for an unreasonable period of time in instituting proceedings for relief from a zoning regulation or decision may constitute laches or inequitable conduct barring judicial relief.

Even apart from any statutory limitation of the time within which to apply for review, delay for an unreasonable period of time in seeking relief from a decision of a zoning body,¹⁹ or in seeking a determination of the invalidity of a properly enacted zoning ordinance,²⁰ may constitute laches or inequitable conduct barring relief. So, a delay in seeking a declaration as to the validity of a properly enacted zoning ordinance until after expenditures are incurred and improvements made in reliance thereon has been held to be inequitable,²¹ and to constitute a basis for estoppel;²² and a municipality which remains silent while improvements are made on property, and expenses incurred, in reliance on a building permit, may be barred by laches from having the permit revoked.²³

On the other hand, mere delay by a party in attacking the validity of a zoning bylaw or regulation, without a showing that any prejudice thereby resulted to the municipality has been held not to constitute laches,²⁴ especially where the bylaw cannot lawfully be applied to the property in question.²⁵ Laches has been held not to preclude a party, complaining of the action of a zoning board, from insisting that it comply with specific applicable provisions of a zoning ordinance.²⁶

§ 355. Process or Other Notice

Mandatory provisions relating to filing or service of process or other notice must be complied with in order to give the court jurisdiction.

Where so provided by statute, an appeal from a zoning regulation or decision is perfected by the proper filing of a notice or claim of appeal;²⁷ and provisions governing the contents of a statement of appeal in a zoning case must be complied with in order to confer jurisdiction on the reviewing court.²⁸ Under a particular statutory provision, a notice of appeal is not required to state the grounds of the appeal,²⁹ but it is required to describe the final order of the zoning board which is being appealed from.³⁰ In a proper case, the court may allow a notice of appeal to be amended.³¹

The notice of appeal or other process may be required to be served on the zoning official or board whose decision is sought to be reviewed,³² as well as on the person granted relief by the zoning body,³³ and neighboring property owners who entered an appearance in the proceedings being reviewed.³⁴ Under a statute which provides for notice to the attorney general or other public officer where the validity of an ordinance is questioned, a failure to give notice of proceedings for a declaratory judgment involving the validity of a zoning ordinance constitutes grounds for a denial of the application for declaratory relief.³⁵ An order of a court commanding respondent to send up a record of proceedings before it and to enter an appearance in court has been held to be in the nature of a citation or

19. Ga.—Whipkey v. Turner, 57 S.E. 2d 481, 206 Ga. 410.

Laches held not shown

(1) In general.

N.J.—Dolan v. DeCapua, 80 A.2d 655, 13 N.J.Super. 500.

(2) Where plaintiffs did not learn of Dec. 31, 1954 rezoning order until Jan. 4, 1955, and successor to commissioner who issued rezoning resolution revoked resolution and permit issued to defendant, plaintiffs, who on March 18, 1955 filed petition to restrain defendant from using his properties in accordance with rezoning order, were not, because of their delay in bringing action, barred by laches from seeking injunctive relief. Ga.—Toomey v. Norwood Realty Co., 89 S.E.2d 265, 211 Ga. 814.

20. N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 101 A. 2d 102, 28 N.J.Super. 483, affirmed 108 A.2d 498, 32 N.J.Super. 397.

21. N.J.—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., supra.

22. N.J.—Jones v. Zoning Bd. of

Adjustment of Long Beach Tp., supra.

Estoppel to attack validity of ordinance generally see supra § 21.

23. N.J.—Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.

24. Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

25. Mass.—Barney & Casey Co. v. Town of Milton, supra.

26. R.I.—Paolella v. Zoning Bd. of Review of City of Providence, 122 A.2d 157.

27. Ky.—Tafel v. Highland Chevrolet Co., 248 S.W.2d 346.

Notice of appeal held sufficient

Va.—Burkhardt v. Board of Zoning Appeals, 66 S.E.2d 565, 192 Va. 606.

28. Ky.—Oertel v. Louisville and Jefferson County Planning and Zoning Commission, 251 S.W.2d 275.

29. Ohio—A. Dicillo & Sons v. Chester Zoning Bd. of Appeals, Com. Pl., 98 N.E.2d 352.

Motion to make petition more definite and certain was treated as motion that plaintiff be ordered to file assignments of error as required under Appellate Procedure Act, and, as such, motion was granted.

Ohio—A. Dicillo & Sons v. Chester Zoning Bd. of Appeals, supra.

30. Ohio—A. Dicillo & Sons v. Chester Zoning Bd. of Appeals, supra.

31. Okl.—Board of Adjustment of City of Tulsa v. Shore, 249 P.2d 1011, 207 Okl. 381.

32. Ind.—Town of Homecroft v. Macbeth, 148 N.E.2d 563.

33. Mo.—Hernreich v. Quinn, 168 S. W.2d 1054, 350 Mo. 770.

34. Ky.—Tafel v. Highland Chevrolet Co., 248 S.W.2d 346—Duncan v. Louisville & Jefferson County Planning & Zoning Commission, 238 S. W.2d 127.

35. N.J.—Johnston v. Board of Adjustment and Town Council of Westfield, 190 A. 782, 15 N.J.Misc. 283.

summons issued on a petition for a new trial, and not to be a service of process for the purpose of bringing it into court as in an independent action.³⁶

Compliance must be had with provisions as to the time for giving parties of record notice of the appeal,³⁷ but where a zoning statute is silent as to the time when, after an appeal is entered, notice shall be given to respondent, it may be given at any reasonable time thereafter.³⁸

An irregularity and defect in the papers served may be disregarded where they are sufficient to advise the party of the relief sought.³⁹ A defect relating to the summons, affecting the jurisdiction of the court, is waived by a general appearance, where counsel for the party complaining of the defect actively engaged in the litigation.⁴⁰

Writ of certiorari to review an order of a board of appeals upholding an order of a building inspector may properly be addressed in the name of the state, directed to the building inspector by name, and to the board as an entity, without naming its members.⁴¹ Service of a writ directed to a board of appeals on its chairman is sufficient where the performance of his official duty will cause the record to be produced.⁴²

§ 356. Pleadings

The propriety and sufficiency of the pleadings in a proceeding for judicial review of zoning determinations

are governed by the rules applicable in civil actions generally.

The rules applicable in civil actions generally govern the propriety and sufficiency of the pleadings in a proceeding for judicial review of a zoning regulation or decision,⁴³ and compliance must be had with all requirements imposed by statute or ordinance.⁴⁴ An objection to the right of a party to maintain a proceeding to review a determination of a zoning body must be made in the manner prescribed by statute.⁴⁵

§ 357. — Petition or Complaint

a. In general

b. In proceedings involving validity of zoning enactment

a. In General

A petition or complaint, in a proceeding to review a determination of a zoning body, must allege sufficient facts to entitle the plaintiff to review, to show the errors complained of, and to entitle the plaintiff to the relief sought.

Generally, where the statutes require a petition or application to institute proceedings for the judicial review of a zoning determination, substantial compliance must be had with respect to the nature of the application which is to be presented.⁴⁶ A petition, complaint, or other application for review or relief must allege sufficient facts to show the error complained of,⁴⁷ and to entitle plaintiff to

36. Vt.—Appeal of Maurice, 90 A.2d 440, 117 Vt. 264.

37. Ky.—Duncan v. Louisville & Jefferson County Planning & Zoning Commission, 238 S.W.2d 127.

38. Vt.—Appeal of Maurice, 90 A.2d 440, 117 Vt. 264.

Lapse of time held not unreasonable

Where petitioner's counsel was informed, forty six days after filing of petition, that it had been filed, formal notice of appeal which was given to him approximately eight months after entry of appeal was not given such an unreasonable time after filing of petition as would require dismissal.

Vt.—In re Marineau, 108 A.2d 402, 118 Vt. 262.

39. N.Y.—Lake Mahopac Heights v. Zoning Bd. of Appeals of Town of Carmel, 103 N.Y.S.2d 950, 278 App. Div. 779.

40. N.J.—Tomko v. Vissers, 131 A.2d 502, 21 N.J. 226.

41. Wis.—State ex rel. Robst v. Board of Appeals of City of Watrous, 5 N.W.2d 783, 241 Wis. 188.

43. Ill.—Moran v. Zoning Bd. of Appeals of City of Chicago, App., 149 N.E.2d 480.

N.Y.—Gruberg v. Henry, 163 N.Y.S.2d 1003, 5 Misc.2d 223.

44. Md.—Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore, 72 A.2d 1, 195 Md. 1.

45. N.Y.—Lehrer v. Michaelis, 171 N.Y.S.2d 679.

46. Fla.—Josephson v. Autrey, 96 So.2d 784.

Complaint

Where party filed complaint in circuit court, although statute provided that person aggrieved might present to court of record verified petition, there was substantial compliance with requirements of statute.

Fla.—Josephson v. Autrey, supra.

47. Cal.—De Luca v. Board of Sup'rs of Los Angeles County, 286 P.2d 395, 134 C.A.2d 606.

Ky.—Daugherty v. City of Lexington, 249 S.W.2d 755.

Pa.—Appeal of Deaner, Com.Pl., 33 Elys. Co. 125.

Petition held insufficient

Md.—Norwood Heights Imp. Ass'n v. Mayor and City Council of Baltimore, 72 A.2d 1, 195 Md. 1.

N.Y.—Buckley v. Fasbender, 118 N.Y.S.2d 799, modified on other grounds 121 N.Y.S.2d 3, 281 App. Div. 985.

Necessary allegations

(1) Generally.

N.Y.—Rose v. City of New Rochelle, 119 N.Y.S.2d 900.

(2) Petition for certiorari to review decision of board of zoning appeals in proceeding to have zoning ordinance varied must allege facts showing that decision was illegal and specify grounds of such illegality.

Ind.—Board of Zoning Appeals of City of Indianapolis v. Waintrup, 193 N.E. 701, 99 Ind.App. 576.

Construction of allegations

(1) In general.

Ohio.—State ex rel. Gulf Refining Co. v. De France, 101 N.E.2d 782, 89 Ohio App. 334.

(2) On appeal from refusal of use registration permit for billboard in commercial district, complaint must

the relief sought.⁴⁸ So, also, petitioner must allege the facts entitling him to review,⁴⁹ such as

such districts and plaintiff could not rely on fact that billboards were not specifically permitted by any section of ordinance.

Pa.—Silver v. Zoning Bd. of Adjustment, 112 A.2d 84, 381 Pa. 41.

48. Ill.—Moran v. Zoning Bd. of Appeals of City of Chicago, App., 149 N.E.2d 480.

N.Y.—Machia v. Bd. of Appeals of the Incorporated Village of Kings Point, 164 N.Y.S.2d 463, 7 Misc.2d 763.

Petition or complaint held to allege cause of action

(1) Generally.

Ga.—Tucker v. City of Ocilla, 71 S.E.2d 652, 209 Ga. 278—Reed v. White, 63 S.E.2d 597, 207 Ga. 623—Barton v. Hardin, 48 S.E.2d 882, 204 Ga. 108—New Mission Baptist Church v. City of Atlanta, 37 S.E.2d 377, 200 Ga. 518.

Ind.—Town of Homeroft v. Macbeth, 148 N.E.2d 563.

N.Y.—Kohnberg v. Murdock, 164 N.Y.S.2d 870, 4 A.D.2d 750—Incorporated Village of Island Park v. Howard, 15 N.Y.S.2d 277, 258 App.Div. 750, reargument denied 16 N.Y.S.2d 708, 258 App.Div. 887, appeal dismissed 25 N.E.2d 142, 282 N.Y. 587. Ohio.—State ex rel. Gulf Refining Co. v. De France, 101 N.E.2d 782, 89 Ohio App. 334.

Wis.—State ex rel. Robst v. Board of Appeals of City of Wauwatosa, 5 N.W.2d 783, 241 Wis. 188.

(2) In proceeding to obtain relief against denial of permit for gasoline and service station, petition alleging that ordinance amendment prohibiting use of land for gasoline station purposes was unlawful because notice of public hearing preliminary to enactment gave no clear notice that amendment concerning gasoline service stations was to be considered was sufficient to allege right to issuance of permit.

N.Y.—Brachfeld v. Sforza, 114 N.Y.S.2d 722.

Petition or complaint held not to allege cause of action

(1) Generally.

Cal.—Taliaferro v. Wampler, 273 P.2d 829, 127 C.A.2d 306.

Ga.—Morgan v. Thomas, 63 S.E.2d 659, 207 Ga. 660—Whipkey v. Turner, 57 S.E.2d 481, 206 Ga. 410.

Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, 95 N.E.2d 864, 407 Ill. 588.

Ky.—Hawkins v. Louisville and Jefferson County Planning and Zoning Commission, 266 S.W.2d 314, 41 A.L.R. 1459—Daugherty v. City of Lexington, 249 S.W.2d 755.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

N.Y.—Buckley v. Fasbender, 121 N.Y.S.2d 3, 281 App.Div. 985—Eschmann v. Village of Flower Hill, 103 N.Y.S.2d 212, 278 App.Div. 709.

Gruberg v. Henry, 163 N.Y.S.2d 1003, 5 Misc.2d 223—Leichter v. Barrett, 144 N.Y.S.2d 309, 208 Misc. 577.

Ohio.—State ex rel. Heinen's Inc. v. Arnold, 105 N.E.2d 638, 157 Ohio St. 425.

(2) A mandamus petition for permit to construct gasoline station driveway over sidewalk, according to plan filed with application, granted by zoning board, for modification of zoning regulations, was defective, in absence of allegation that four members of board concurred in vote to grant variation, as required by statute.

R.I.—Sun Oil Co. v. Macauley, 49 A.2d 917, 72 R.I. 206.

(3) Petition for writ of mandamus to require city to rezone lot from residential to local retail status was insufficient to state cause of action as calling for spot zoning unauthorized by law.

Tex.—Harmon v. City of Dallas, Civ. App., 229 S.W.2d 825, refused no reversible error.

(4) Complaint containing allegations that property might have been more profitably used for commercial than for residential purposes, that property had become unsuited for residential purposes and that much of property in other blocks in neighborhood was zoned for commercial purposes did not show confiscatory, discriminatory, or arbitrary action of authorities which would justify judicial alteration of zoned boundaries.

Utah.—Dowse v. Salt Lake City Corp., 255 P.2d 723.

(5) Where zoning ordinance provided for erection of stores subject to approval of board of trustees on landowner's application accompanied by plan of detailed specification of buildings, and additional buildings not shown therein could not be erected without similar application and approval, trustees could permit erection of additional buildings by amendment of ordinance, and where landowner's petition failed to state that his plan for additional buildings had been given such approval, he was not entitled to any relief against inspector's refusal to issue permit for erection of additional buildings.

N.Y.—Application of Morton Glen Cove Realty Co., 145 N.Y.S.2d 474, 286 App.Div. 1040.

Necessary allegations

(1) In petition to reverse action of board of adjustment in refusing to grant permit for erection of restaurant and tourist cabin above level of

reservoir, allegation that disposal system to be used in connection with such structures was completely adequate, modern, and as satisfactory and safe as was reasonably possible to obtain did not constitute necessary allegation that proposed disposal system would not endanger purity of water in reservoir.

Ky.—Daugherty v. City of Lexington, 249 S.W.2d 755.

(2) In mandamus proceeding to require city to rezone suburban lot from residential to local retail status and issue permit for construction of business building thereon, burden was on plaintiff to allege virtual unsuitability of lot for residential use. Tex.—Harmon v. City of Dallas, Civ. App., 229 S.W.2d 825, refused no reversible error.

49. Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, 95 N.E.2d 864, 407 Ill. 588.

Petition or complaint held sufficient

Colo.—Regennitter v. Fowler, 290 P.2d 223, 132 Colo. 489.

Md.—Crozier v. County Com'rs of Prince George's County, 97 A.2d 296, 202 Md. 501—Heath v. Mayor & City Council of Baltimore, 58 A.2d 896, 190 Md. 478.

Petition or complaint held insufficient

(1) Generally.

Ill.—Moran v. Zoning Bd. of Appeals of City of Chicago, App., 149 N.E.2d 480.

Pa.—Barth v. Gorson, 119 A.2d 309, 383 Pa. 611.

(2) In mandamus proceeding by oil company and land owner for permit to construct gasoline station driveway over sidewalk according to plan filed with company's application, granted by zoning board, for modification of zoning regulations, petition merely reciting that company contracted to purchase land and incorporating contract by reference was defective as not showing that company acquired title to, or clear legal interest in, land, as required to entitle it to make such application.

R.I.—Sun Oil Co. v. Macauley, 49 A.2d 917, 72 R.I. 206.

(3) Where officials of municipality petitioned for review of determination by zoning board, failure to allege that action was authorized by petitioners in their official capacity made petition insufficient as matter of law.

N.Y.—Fox v. Adams, 132 N.Y.S.2d 560, 206 Misc. 236.

(4) Petition, in mandamus proceeding which did not allege that plaintiff had filed application for permit and that plaintiff had complied with all applicable laws and regulations other than those which plaintiff sought to have declared invalid did not show

that he was injured by the acts complained of;⁵⁰ and his allegations must be sufficient to overcome the presumption of regularity and legality of official action.⁵¹

An allegation of plaintiff's status as a party to an appeal from a decision of a zoning official is sufficient as an allegation that plaintiff was a party of record to the proceedings before the zoning board on such appeal.⁵² It has been held not to be necessary for appellant to incorporate proceedings of the zoning board in his petition.⁵³ A prayer for relief may not be required where the relief which may be granted on an appeal is prescribed by statute;⁵⁴ and where plaintiff appeals from a decision of a board approving the grant of building permits, prayers for a declaratory judgment as to the legality of such action, and for damages, are not appropriate.⁵⁵

The theory of a proceeding is determined from the allegations of the petition and its averments, and not from isolated averments, or isolated acts outside of the petition.⁵⁶

Verification and signing. The failure to verify a petition as required by statute is not a jurisdictional defect where the adverse parties do not act

with due diligence to give notice that they elect to treat the petition as a nullity.⁵⁷ Where a statute requires a petition to be verified, but does not require that it be signed, the failure of petitioner to sign it is not jurisdictionally fatal to the appeal.⁵⁸

Amendment of petition. Under statutory authority therefor, an amendment to a petition to review a determination of a zoning body may be allowed in a proper case.⁵⁹ So, where the failure to verify a petition is a nonjurisdictional defect, the court may permit an amendment to the petition to add a verification in the proper form.⁶⁰

Objections to petition or complaint. A petition which is insufficient to state a cause of action may be dismissed on a general demurrer;⁶¹ and a demurrer to the petition may be sustained in part and overruled in part where only part of the petition is insufficient.⁶²

A motion to dismiss a complaint is a proper procedure under some statutory provisions;⁶³ but a bill of complaint, which is sufficient to require an answer, may not be summarily dismissed.⁶⁴ A motion to dismiss for failure to state a cause of action admits the truth of the facts stated therein,⁶⁵ as well as of every favorable inference which

that plaintiff had clear legal right to issuance of permit and petition was premature.

Md.—Martin v. Bucklin, 133 A.2d 426, 214 Md. 140.

50. R.I.—Petrarca v. Zoning Bd. of Review of City of Warwick, 80 A. 2d 156, 78 R.I. 130.

Sufficiency of allegations

(1) In action to review decision granting variance, allegation that plaintiffs were owners of land in vicinity of property involved was not allegation that they were injured by decision; but it was necessary for them to allege that their property was classified in same district as land in question, but that they were not permitted to enjoy use allowed by variance.

Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, 95 N.E.2d 864, 407 Ill. 588.

(2) Where allegations of complaint to enjoin enforcement of zoning ordinance declaring plaintiff's property adjacent to river to be residential area and prohibiting its use as trailer camp were general in character as to injury to plaintiff because of such designation, and set forth no specific facts from which it might be reasonably inferred that plaintiff would suffer irreparable injury, complaint was demurrable.

N.D.—Midgarden v. City of Grand Forks, 54 N.W.2d 659, 79 N.D. 18.

51. Cal.—De Luca v. Board of Sup'rs of Los Angeles County, 286 P.2d 395, 134 C.A.2d 606. Presumption as to regularity and legality of official action see *infra* § 362.

Allegations held insufficient

In proceedings to review grant of variance, petitions which did not allege that petitioners were misled by notice of application to establish, operate, and maintain land reclamation project which was in fact a public dump, or allege facts showing they were entitled to notice or allege that petitioners did not attend hearing and participate therein, were insufficient to overcome presumption.

Cal.—De Luca v. Board of Sup'rs of Los Angeles County, *supra*.

52. Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, 95 N.E. 2d 864, 407 Ill. 588.

53. Ga.—Ledbetter v. Roberts, 98 S. E.2d 654, 95 Ga.App. 652. Record of proceedings below see *supra* § 332.

54. Conn.—Fisher v. Board of Zoning Appeals of the Town of Monroe, 113 A.2d 587, 142 Conn. 275.

55. Conn.—Willard v. Town of West Hartford, 63 A.2d 847, 135 Conn. 303.

56. Ind.—Ballman v. Duffecy, 102 N. E.2d 646, 230 Ind. 220.

Petition held one for certiorari
Ind.—Ballman v. Duffecy, *supra*.

57. N.Y.—Application of Smith, 153 N.Y.S.2d 131, 2 A.D.2d 67.

58. N.Y.—Fox v. Adams, 133 N.Y.S. 2d 560, 206 Misc. 236.

59. N.Y.—Buckley v. Fasbender, 121 N.Y.S.2d 3, 281 App.Div. 985. Fox v. Adams, 133 N.Y.S.2d 560, 206 Misc. 236.

60. N.Y.—Application of Smith, 153 N.Y.S.2d 131, 2 A.D.2d 67.

61. Ga.—Morgan v. Thomas, 63 S.E. 2d 659, 207 Ga. 660—Graham v. Phinizy, 51 S.E.2d 451, 204 Ga. 638.

62. Tenn.—Hickerson v. Flannery, 302 S.W.2d 508.

63. Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, 95 N.E. 2d 864, 407 Ill. 588.

Motion to dismiss proceedings for review see *infra* § 360.

Failure to state cause of action
Pa.—Moyerman v. Glanzberg, Com. Pl., 73 Montg.Co. 212.

64. Fla.—Fortunato v. City of Coral Gables, 47 So.2d 321.

65. N.Y.—Horan v. Board of Appeals, Village of Scarsdale, 166 N. Y.S.2d 463, 8 Misc.2d 663—Paliotto v. Cohalan, 163 N.Y.S.2d 353, 6 Misc.2d 1.

might be drawn therefrom.⁶⁶ Where a zoning commission acted in accordance with the zoning ordinance in issuing a permit, a bill of complaint, seeking to enjoin the erection and operation of a building because the record of the commission's action is insufficient, is properly dismissed.⁶⁷ The dismissal of a petition without affording plaintiff an opportunity to amend is not erroneous where no request to amend is made.⁶⁸

Where a petition is considered to constitute an appeal from a ruling of a board of appeals, rather than an original action, it has been held not subject to a motion that it be made more definite and certain,⁶⁹ such motion has been treated as one to require the filing of assignments of error.⁷⁰ In a proper case, a court may strike immaterial allegations of a petition.⁷¹

b. In Proceedings Involving Validity of Zoning Enactment

It is incumbent on the person making such claim to allege facts to support a claim that a zoning ordinance is invalid, unreasonable, or confiscatory.

It is incumbent on the person seeking relief to allege facts to support a claim that a zoning ordinance is invalid,⁷² unreasonable,⁷³ or confiscatory⁷⁴ in its application to his property, and to state facts sufficient to entitle him to review.⁷⁵ The failure of a complaint to define the amount of property owned by plaintiff has been held not to destroy the efficacy of the complaint or to render it uncertain.⁷⁶

The court has discretion to allow an amendment bringing in additional parties effective as of the date of the original petition.⁷⁷ Moreover, a court may properly order plaintiff to serve an amended

66. N.Y.—*Horan v. Board of Appeals, Village of Scarsdale*, 166 N.Y.S.2d 463, 8 Misc.2d 663.

67. Mich.—*City of Detroit v. S. Loewenstein & Son*, 47 N.W.2d 646, 330 Mich. 359.

68. Tex.—*Harmon v. City of Dallas*, Civ.App., 229 S.W.2d 825, refused no reversible error.

69. Ohio.—*A. DiCillo & Sons v. Chester Zoning Bd. of Appeals*, Com.Pl., 98 N.E.2d 352.

70. Ohio.—*A. DiCillo & Sons v. Chester Zoning Bd. of Appeals*, supra.

71. Va.—*Burkhardt v. Board of Zoning Appeals*, 66 S.E.2d 565, 192 Va. 606.

72. Cal.—*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 579, rehearing denied 70 S.Ct. 342, 338 U.S. 939, 94 L.Ed. 487.

Tex.—*Taylor v. McLennan County Crippled Children's Ass'n*, Civ.App., 206 S.W.2d 632, error refused no reversible error.

Prima facie right

A petition which purported to challenge a zoning ordinance in proceedings under statute must state facts which entitle petitioner prima facie to relief.

N.Y.—*Application of Braunsdorf*, 111 N.Y.S.2d 507, 202 Misc. 471.

Extraordinary burden on plaintiff

One who assails municipal zoning legislation must carry burden of both alleging and proving that enactment is invalid and burden of one who attacks such ordinance is an extraordinary one.

Fla.—*Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach*, 82 So.2d 880—*City of Miami Beach v. Silver*, 67 So.2d 646.

Petition or complaint held to allege cause of action

Cal.—*Bernstein v. Smutz*, 188 P.2d 48, 83 C.A.2d 108.

N.Y.—*Hammond v. Town of Caldwell*, 122 N.Y.S.2d 480, 282 App.Div. 798—*Elbert v. Village of North Hills*, 28 N.Y.S.2d 172, 262 App.Div. 856, reargument denied 29 N.Y.S.2d 152, 262 App.Div. 872.

Ohio.—*State ex rel. Gulf Refining Co. v. De France*, 101 N.E.2d 782, 89 Ohio App. 334—*Village of Bay v. Gelvick*, 15 N.E.2d 786, 58 Ohio App. 51.

Complaint held not to allege cause of action

Ala.—*Moates v. City of Andalusia*, 49 So.2d 294, 254 Ala. 629.

N.Y.—*Levitt v. Incorporated Village of Sands Point*, 148 N.Y.S.2d 788, 3 Misc.2d 92, modified on other grounds 152 N.Y.S.2d 711, 2 A.D.2d 688, reargument and appeal denied 154 N.Y.S.2d 842, 2 A.D.2d 781.

Complaint held not subject to dismissal

Pa.—*Wynnewood Civic Ass'n v. Lower Merion Tp.*, 69 Montg.Co. 317, affirmed 102 A.2d 423, 175 Pa.Super. 20.

Nature of pleading

Pleading filed to strike down amendment to zoning ordinance, entitled a bill for declaratory judgment and petition for writ of certiorari, would be considered as petition for certiorari.

Tenn.—*Brooks v. City of Memphis*, 241 S.W.2d 432, 192 Tenn. 371.

73. Tex.—*City of University Park v. Hoblitzelle*, Civ.App., 150 S.W.2d 169, error dismissed, judgment correct, appeal dismissed and certiorari denied *Hoblitzelle v. City of University Park*, 62 S.Ct. 806, 315 U.S. 781, 86 L.Ed. 1188.

Complaint held sufficient

N.Y.—*Levitt v. Incorporated Village of Sands Point*, 148 N.Y.S.2d 798, 3 Misc. 292, modified on other grounds 152 N.Y.S.2d 711, 2 A.D.2d 688, reargument and appeal denied 154 N.Y.S.2d 842, 2 A.D.2d 781.

Pleading held insufficient

In action for declaratory judgment that zoning ordinance, as applied to property, was void, and for mandamus to compel approval of plans and issuance of permit for construction of gasoline filling station, pleading did not make requisite clear and strong showing that zoning ordinance was unreasonable.

Ill.—*Ward v. Village of Elmwood Park*, 130 N.E.2d 287, 8 Ill.App.2d 37.

74. N.Y.—*Romig v. Weld*, 87 N.Y.S.2d 580, 194 Misc. 783, affirmed in part and reversed in part on other grounds, 95 N.Y.S.2d 571, 276 App. Div. 514.

Petition or complaint held sufficient

(1) Generally.

Fla.—*City of Miami v. Romer*, 73 So. 2d 285.

(2) Property owner's petition, showing that his land lay in a tract that could not be reasonably used for single-family residential purposes, sufficiently alleged that zoning ordinance restricting property to such use was confiscatory and unconstitutional on ground not unique to particular property but general to locality so as to present a triable issue.

N.Y.—*Bronxville Associates v. Brady*, 86 N.Y.S.2d 308.

75. N.Y.—*Rose v. City of New Rochelle*, 119 N.Y.S.2d 900.

76. N.Y.—*Idlehour Artists Colony v. Duryea*, 89 N.Y.S.2d 180.

77. N.H.—*Edgewood Civic Club v. Blaisdell*, 61 A.2d 517, 95 N.H. 244.

pleading where the original pleading fails to state a cause of action because of a misjoinder of parties plaintiff.⁷⁸

Motion to strike amended petition on the ground of misjoinder of parties defendant is improperly granted where the person joined is a proper party defendant.⁷⁹

Motion to dismiss complaint in federal court will not be allowed on the ground that a state court previously ruled on the questions involved in the complaint.⁸⁰

§ 358. — Answer or Return; Reply

Objections to the merits of a petition may be required to be set forth in an answer, and the return of the zoning board or officer whose decision is under attack should include the decision of the board and a transcript of the proceedings. A reply is improper where not authorized by the statute.

Objections to the merits of a petition may be required to be set forth in an answer and the requisite affidavits, and filed with a certified transcript of the proceeding to be reviewed.⁸¹ However, where defendant, by moving to dismiss the complaint, admits the truth of the allegations of the petition, and,

accordingly, no issues of fact remain, a motion for leave to file an answer in the case may be denied.⁸²

Under some statutory provisions, a zoning board or officer whose decision is under attack must file a verified return to the application for review,⁸³ and the return filed should show a legal basis for the decision.⁸⁴ Where respondent gives petitioner due notice of objections to the petition, an answer or return is not required to be filed until the objections have been passed on.⁸⁵ It may be required that the board return to the court on appeal from its decision either the original or certified copy of the petition or application on which the board acted, its minutes of proceedings before it and of its executive action, the transcript of the proceedings if a stenographic record was made, all exhibits considered by it, and a copy of the relevant and material zoning regulations.⁸⁶ However, documents which were not introduced in evidence at any purported hearing before the board have no place in the return.⁸⁷

The failure to verify a return has been held to be an irregularity, rather than an illegality,⁸⁸ and

Amendment held proper

Where civic club appealed from amendment to zoning ordinance and defendant demurred on ground that plaintiff was not a taxpayer or duly constituted voluntary corporation since it had not recorded its articles of agreement with city clerk as required by statute, amendment making forty individual members of club parties plaintiff effective as of date of original petition was allowed even though amendment was retroactive and thirty-day period for appeal had expired.

N.H.—Edgewood Civic Club v. Blaisdell, *supra*.

78. N.Y.—Elbert v. Village of North Hills, 30 N.Y.S.2d 236, 262 App.Div. 470.

79. Ind.—Hirschman v. Marion County Plan Commission, App., 146 N.E.2d 277.

80. U.S.—Wyatt v. City of Miami Beach, D.C.Fla., 67 F.Supp. 271.

Dismissal of proceeding to review see *infra* § 360.

81. N.Y.—Pallotto v. Harwood, 173 N.Y.S.2d 103.

82. N.Y.—Horan v. Board of Appeals, Village of Scarsdale, 166 N.Y.S.2d 463, 3 Misc.2d 663—Pallotto v. Cohan, 163 N.Y.S.2d 353, 6 Misc.2d 1.

83. N.Y.—Gilbert v. Stevens, 135 N.Y.S.2d 357, 284 App.Div. 1016.

Pa.—Appeal of Deiter, Com.Pl., 58 Lack.Jur. 85—Schuster v. Board of

Zoning Appeals of City of Scranton, Com.Pl., 52 Lack.Jur. 1.

Certification

Return of zoning board of appeals of village was not improper because it was certified by chairman of board rather than by village clerk.

N.Y.—Hunter v. Board of Appeals of Village of Saddle Rock, 168 N.Y.S.2d 148, 4 A.D.2d 961.

84. Ill.—Foertsch v. Fox, 86 N.E.2d 900, 338 Ill.App. 208, appeal transferred 84 N.E.2d 388, 402 Ill. 447—Flick v. Gately, 65 N.E.2d 137, 328 Ill.App. 81.

85. N.Y.—Firestone v. Town Bd. of Town of Oyster Bay, 134 N.Y.S.2d 882.

86. Conn.—Cohen v. Board of Appeals on Zoning of City of Bridgeport, 94 A.2d 793, 139 Conn. 450.

Sufficiency of return

Return of zoning board of appeals of village may set forth facts known to its members but not otherwise disclosed, must include definite findings and may not be merely conclusory in form, but it is not required that testimony and statements at hearing held by board be recorded verbatim, nor is there a proscription against a return describing testimony and statements at hearing in narrative form.

N.Y.—Hunter v. Board of Appeals of Village of Saddle Rock, 168 N.Y.S.2d 148, 4 A.D.2d 961.

Evidentiary documents

Petitioner is entitled to have evi-

dentiary documents which board had before it in making its decision included in board's return.

N.Y.—Towne v. Sherk, 9 N.Y.S.2d 931, 256 App.Div. 938, reargument denied 11 N.Y.S.2d 557, 256 App.Div. 1003.

Showing board's own knowledge

Where board acts on facts known to its members but not disclosed by record of its proceedings, it must set forth such facts in its return.

N.Y.—Community Synagogue v. Bates, 136 N.E.2d 488, 1 N.Y.2d 445, 154 N.Y.S.2d 15—Levy v. Board of Standards and Appeals of City of New York, 196 N.E. 284, 267 N.Y. 347—People ex rel. Fordham Manor Reformed Church v. Walsh, 155 N.E. 575, 244 N.Y. 280.

Ryback v. Murdock, 148 N.Y.S. 2d 322, 1 A.D.2d 132—Slater v. Toohill, 84 N.Y.S.2d 182, 274 App. Div. 944—Donegan v. Griffin, 61 N.Y.S.2d 669, 270 App.Div. 937.

Hopkins v. Board of Appeals of City of Rochester, 33 N.Y.S.2d 396, 178 Misc. 186—Riverside St. Clair Corporation v. Walsh, 228 N.Y.S. 88, 131 Misc. 652, affirmed 231 N.Y.S. 869, 231 App.Div. 655.

Innet v. Liberman, 155 N.Y.S.2d 383.

87. Ill.—Flick v. Gately, 65 N.E.2d 137, 328 Ill.App. 81.

88. Mo.—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

such defect is waived by the submission of the cause to a court without objection.⁸⁹

Reply. Where a statute, governing the review of proceedings before a zoning board by certiorari, provides only for a petition and return, it has been held that a reply by petitioner is unauthorized and may be stricken if filed.⁹⁰

§ 359. — Issues, Proof, and Variance

General rules of issues, proof, and variance apply in proceedings for review of determinations of zoning authorities.

The general rules of issues, proof, and variance apply in proceedings for review of determinations of zoning officials or boards.⁹¹ Petitioner must prove the essential allegations of his petition or application for review.⁹² A municipality has been held not estopped to deny the validity of a zoning ordinance on which plaintiff relies, in a proceeding to require the issuance of a permit, where plaintiff does not assert an estoppel in his pleadings or allege facts which constitute an estoppel.⁹³

§ 360. Dismissal

An application to review a determination of a zoning body, or the validity of a zoning enactment, may be dismissed on proper grounds, as where the court lacks jurisdiction of the case, or the application is untimely.

An appeal from a determination of a zoning body, or other proceeding for review, may be dismissed on proper grounds,⁹⁴ such as where the court lacks jurisdiction of the case,⁹⁵ or the questions at issue have become moot;⁹⁶ and where the record that comes to the court fails to disclose any action that would require the court to pass on the zoning ordinance, and there is no judgment, order, or action to be reviewed, the writ will be dismissed.⁹⁷ Under a statute so providing, where no triable issue of fact is raised by an application for review, the proceeding is required to be dismissed;⁹⁸ and dismissal of an appeal from a determination of a zoning body may also be had where appellant fails to prove his case,⁹⁹ or where it is not shown that the decision was arbitrary, capricious, and unreasonable.¹

Dismissal of the review proceeding may be proper or necessary where it was not filed within the time limited by statute.² So, also, the court may

89. Mo.—Veal v. Leimkuehler, *supra*.

90. N.Y.—Aisloff v. Murdock, 81 N.Y.S.2d 872, appeal dismissed in part and modified in part on other grounds Application of Aisloff, 94 N.Y.S.2d 226, 276 App.Div. 907.

91. Pa.—Appeal of Tredyffrin Const. Co., Com.Pl., 8 Chest.Co. 85.
Wis.—State ex rel. A. Hynek & Sons Co. v. Board of Appeals of City of Racine, 66 N.W.2d 623, 267 Wis. 309.

92. Fla.—Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach, 32 So.2d 880—City of Miami Beach v. Silver, 67 So.2d 646.

Ill.—Moran v. Zoning Bd. of Appeals of City of Chicago, App., 149 N.E.2d 480.

93. Okl.—Voight v. Saunders, 243 P.2d 654, 206 Okl. 118.

94. N.J.—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

Pa.—Application of Ericson Memorial Studio, Com.Pl., 29 Erie Co. 279.
R.I.—Hopkins v. Zoning Bd. of Review of City of Warwick, 123 A.2d 258.

95. Conn.—Long v. Zoning Commission of City of Norwalk, 50 A.2d 172, 133 Conn. 248.

Ind.—Ballman v. Duffecy, 102 N.E.2d 646, 230 Ind. 220.

Pa.—Strawbridge v. Horsham Tp., 7 Pa. Dist. & Co.2d 161, 72 Montg.Co. 117.

R.I.—Sun Oil Co. v. Macauley, 49 A.2d 917, 72 R.I. 206.

Dismissal of application for appeal see *supra* § 357.

On filing of briefs

An appeal to common pleas court from city zoning commission's order amending zoning regulations was properly dismissed for lack of jurisdiction, in absence of statutory authority for such appeal, although such question was not raised until briefs were filed at conclusion of trial.

Conn.—Long v. Zoning Commission of City of Norwalk, 50 A.2d 172, 133 Conn. 248.

96. Colo.—Board of Adjustment of Adams County v. Iwerks, 316 P.2d 573, 135 Colo. 578.

Ky.—Louisville & Jefferson County Planning & Zoning Commission v. Fortner, 243 S.W.2d 492.

Dismissal held not warranted

Pa.—Moyerman v. Koons, 80 Pa. Dist. & Co. 63.

97. N.J.—Marlow v. Village of Ridgewood, 52 A.2d 805, 135 N.J. Law 444.

98. N.Y.—Maxwell v. Klaess, 82 N.Y.S.2d 588, 192 Misc. 939, appeal dismissed Siciliano v. Klaess, 84 N.Y.S.2d 922, Maxwell v. Klaess, 85 N.Y.S.2d 330, 274 App.Div. 943 and Goddard v. Klaess, 85 N.Y.S.2d 331.

Conclusion of witness

In action for judgment declaring zoning ordinance unconstitutional in

so far as it affected plaintiff's individual property which was in a buffer or transitional zone, complaint was required to be dismissed where there was no evidence that property could not yield reasonable return if used for a conforming purpose or of any unsuccessful attempt to find a buyer or tenant for any one of permitted uses and all that plaintiff offered was conclusion of his only witness, unsupported by any facts, that property was useless as presently zoned.

N.Y.—Dicker v. Gulde, 170 N.Y.S.2d 64.

99. N.H.—Jadda v. Manchester, 121 A.2d 803, 100 N.H. 150.

1. N.J.—Mistretta v. City of Newark, 109 A.2d 677, 33 N.J.Super. 205.

2. Colo.—Cliff v. Bilett, 241 P.2d 437, 125 Colo. 138.

Ky.—Hennessy v. Bischoff, 240 S.W.2d 71.

N.J.—Boulevard Imp. Co. v. Academy Associates, 67 A.2d 225, 3 N.J.Super. 506.

N.Y.—Griest v. Hooey, 128 N.Y.S.2d 341, 205 Misc. 396.

Fleischer v. Murdock, 63 N.Y.S.2d 417, appeal dismissed 77 N.Y.S.2d 393—Nathan v. Murdock, 62 N.Y.S.2d 415.

Pa.—Blank v. Board of Adjustment of Borough of West Mifflin, 136 A.2d 695, 390 Pa. 636—Kuiper v. Upper Merion Tp., 134 A.2d 916, 390 Pa. 178.

be empowered to dismiss a proceeding to review a determination of a zoning body on the ground of laches in bringing the proceeding;³ but it will be dismissed for laches only if such course will promote substantial justice,⁴ and dismissal on the ground of laches is not warranted where the evidence shows that there was no such undue delay as to constitute laches,⁵ or where none of the parties was prejudiced by the delay.⁶

The fact that a notice to a party to an appeal is faulty has been held not to be a ground for dismissal where a new or alias notice could be granted.⁷ Where a proceeding is brought against several persons, the fact that one of them is not a proper party defendant has been held not to justify dismissal of the proceeding as to all defendants.⁸ An application to review a determination of a zoning body should not be dismissed where the determination was erroneous.⁹

Consideration of affidavits. A court may properly consider affidavits, indicating the necessity for a speedy hearing of the case, on a motion to dismiss for failure of the complaint to state a cause of action.¹⁰

Voluntary dismissal. An order of a trial court, allowing a voluntary dismissal of an appeal from a determination of a zoning commission without giving notice to a party to the cause who had filed an answer and reply, is not erroneous where that party was given a hearing on his motion to set aside the dismissal order.¹¹

§ 361. Evidence

General rules as to the reception of evidence apply in proceedings for the judicial review of zoning matters.

In proceedings for judicial relief with respect to zoning regulations or decisions, the court may be authorized to receive and consider evidence, as discussed supra § 331 b, in which case general rules as to the reception of evidence apply.¹² Where two petitions for a change of zone relating to two separate lots were granted by the zoning authority on the same day, the course pursued by the court in allegedly considering the appeals together, for the purpose of determining the validity of the rezoning, does not constitute reception of other than "legal evidence," although it is the preferable practice for the court to tell counsel in each case of its intention to take judicial notice of the file in the other case.¹³

§ 362. — Presumptions

- a. In general
- b. Acts or decisions of boards or officers

a. In General

All presumptions are indulged in favor of the validity and reasonableness of a zoning ordinance or regulation if it is within the legislative power of the enacting authority.

On judicial review of zoning cases, applicable presumptions will be given effect,¹⁴ but presumptions will not be indulged as to matters not properly the subject thereof.¹⁵ All presumptions must

Sunnybrook, Inc., v. Upper Dublin Tp., 69 Pa.Dist. & Co. 344, 65 Montg.Co. 233.

Borden v. Cheltenham Tp., Com. Pl., 68 Montg.Co. 40.

Tex.—Hall v. Board of Adjustment of City of McAllen, Civ.App., 239 S.W.2d 647.

3. N.J.—Ackerman v. Board of Com'rs of Town of Belleville, 62 A.2d 476, 1 N.J.Super. 69.

4. N.J.—Ackerman v. Board of Com'rs of Town of Belleville, supra.

5. N.J.—Garrow v. Teaneck Tryon Co., 94 A.2d 332, 11 N.J. 294.

6. N.J.—Ackerman v. Board of Com'rs of Town of Belleville, 62 A.2d 476, 1 N.J.Super. 69.

7. Vt.—Appeal of Maurice, 90 A.2d 440, 117 Vt. 264.

8. Ill.—Winston v. Zoning Bd. of Appeals of Peoria County, 95 N.E. 2d 864, 407 Ill. 588.

9. N.Y.—Llehmman v. Richter, 149 N.Y.S.2d 197, 1 A.D.2d 848.

10. U.S.—Savage v. Iowa Development Co., C.A.Minn., 226 F.2d 936.

11. Ky.—Martin v. Bickel, 307 S.W. 2d 909.

12. Wis.—State ex rel. A. Hynck & Sons Co. v. Board of Appeals of City of Racine, 66 N.W.2d 623, 267 Wis. 309.

Inspector as witness

Where city building inspector, who granted building permit to owners for construction of dwelling to be used as a photographic studio as well as dwelling, gave his interpretation of zoning ordinance favorable to owners in hearing before board of appeals of city, and owners made no timely objection when city attorney, who was acting as attorney for those objecting to the granting of the permit, called the building inspector as a witness, the calling of the building inspector as a witness by the city attorney was not reversible error.

Wis.—State ex rel. A. Hynck & Sons Co. v. Board of Appeals of City of Racine, supra.

13. Conn.—Guerriero v. Galasso, 136 A.2d 497, 144 Conn. 800.

14. Pa.—Rowland v. Zoning Bd. of

Adjustment, 2 Pa.Dist. & Co.2d 734. Nugent v. Whitemarsh Tp., Com. Pl., 68 Montg.Co. 98.

Prior ordinance

In action to enjoin enforcement of zoning ordinance restricting a certain area as residential, it would be presumed that no ordinance existed prior to disputed ordinance, in absence of introduction of prior ordinance into evidence.

Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

15. N.Y.—Macchia v. Board of Appeals of the Incorporated Village of Kings Point, 164 N.Y.S.2d 463, 7 Misc.2d 763.

Particular matters not presumed

(1) Court would not presume that membership corporation ostensibly organized to operate private golf club was a sham to carry on a commercial enterprise for profit in violation of zoning ordinance or that the operations of such corporation would transcend legal authority by violating such zoning ordinance, which permitted nonprofit golf clubs in the area concerned.

be indulged in favor of the validity of a zoning ordinance or regulation if it is within the legislative power of the enacting authority,¹⁸ and there is a strong presumption in favor of the validity of the

- N.Y.—*Nelson v. Pierce*, 117 N.Y.S. 2d 61, affirmed 120 N.Y.S.2d 894, 281 App.Div. 994.
- (2) In proceedings to annul provision of permit granting use of building for religious purposes, the supreme court may not assume that municipal authorities will disregard prior decision of court of appeals so as to prevent the holding of congregation's corporate meetings, sisterhood and men's club meetings, or Boy Scout and Girl Scout meetings.
- N.Y.—*Application of Garden City Jewish Center*, 157 N.Y.S.2d 435.
16. U.S.—*Standard Oil Co. v. City of Tallahassee*, C.A.Fla., 183 F.2d 410, certiorari denied 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 647—*Sinclair Refining Co. v. City of Chicago*, C.A. Ill., 178 F.2d 214—*Geneva Inv. Co. v. City of St. Louis*, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.
- Ala.—*Marshall v. City of Mobile*, 35 So.2d 553, 250 Ala. 646.
- Cal.—*McCarthy v. City of Manhattan Beach*, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644—*Clemons v. City of Los Angeles*, 222 P.2d 439, 36 C.2d 95—*Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744—*Wilkins v. City of San Bernardino*, 175 P.2d 542, 29 C.2d 332—*Skalko v. City of Sunnyvale*, 93 P.2d 93, 14 C.2d 213.
- City of Los Angeles v. Gage*, 274 P.2d 34, 127 C.A.2d 442—*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 342, 338 U.S. 939, 94 L.Ed. 579—*O'Rourke v. Teeters*, 146 P.2d 983, 63 C.A.2d 349—*Hagenburger v. City of Los Angeles*, 124 P.2d 345, 51 C.A.2d 161—*Yuba City v. Cherniavsky*, 4 P.2d 299, 117 C.A. 568.
- Conn.—*Murphy, Inc. v. Town of Westport*, 40 A.2d 177, 131 Conn. 292, 156 A.L.R. 568.
- De Mars v. Zoning Commission of Town of Bolton*, 109 A.2d 876, 19 Conn.Supp. 24, affirmed 115 A.2d 653, 142 Conn. 580.
- D.C.—*Golf, Inc. v. District of Columbia*, 67 F.2d 575, 62 App.D.C. 256.
- Fla.—*City of Miami Beach v. Silver*, 67 So.2d 646—*City of Miami v. Rosen*, 10 So.2d 307, 151 Fla. 677—*City of Miami Beach v. Ocean & Inland Co.*, 3 So.2d 364, 147 Fla. 480.
- Ga.—*Hamilton v. North Ga. Elec. Membership Corp.*, 40 S.E.2d 750, 201 Ga. 689.
- Ill.—*Skrysak v. Village of Mt. Prospect*, 148 N.E.2d 721, 13 Ill.2d 329—*Bauske v. City of Des Plaines*, 148 N.E.2d 584, 13 Ill.2d 169—*La Salle Nat. Bank of Chicago v. Cook County*, 145 N.E.2d 65, 12 Ill.2d 40—*Zweifel Mfg. Corp. v. City of Peoria*, 144 N.E.2d 593, 11 Ill.2d 489—*Krom v. City of Elmhurst*, 133 N.E.2d 1, 8 Ill.2d 104—*First Nat. Bank of Lake Forest v. Lake County*, 130 N.E.2d 267, 7 Ill.2d 213—*La Salle Nat. Bank v. City of Chicago*, 126 N.E.2d 643, 6 Ill.2d 22—*Petropoulos v. City of Chicago*, 125 N.E.2d 522, 5 Ill.2d 270—*Northern Trust Co. v. City of Chicago*, 123 N.E.2d 330, 4 Ill.2d 432—*Chicago Title & Trust Co. v. Village of Franklin Park*, 122 N.E.2d 804, 4 Ill.2d 304—*La Salle Nat. Bank v. City of Chicago*, 122 N.E.2d 519, 4 Ill.2d 253—*Hannftin Corp. v. City of Berwyn*, 115 N.E.2d 315, 1 Ill.2d 28—*Zillen v. City of Chicago*, 114 N.E.2d 717, 415 Ill. 488—*Corpus Juris Secundum* cited in *Mundelein Estates v. Village of Mundelein*, 99 N.E.2d 144, 146, 409 Ill. 291—*Trust Co. of Chicago v. City of Chicago*, 96 N.E.2d 499, 408 Ill. 91—*Wesemann v. Village of La Grange Park*, 94 N.E.2d 904, 407 Ill. 81—*Galt v. Cook County*, 91 N.E.2d 395, 405 Ill. 396—*Jacobson v. Village of Wilmette*, 85 N.E.2d 753, 403 Ill. 250—*Du Page County v. Henderson*, 83 N.E.2d 720, 402 Ill. 179—*Quilici v. Village of Mount Prospect*, 78 N.E.2d 240, 399 Ill. 418—*City of Springfield v. Vancil*, 76 N.E.2d 471, 398 Ill. 575—*De Bartolo v. Village of Oak Park*, 71 N.E.2d 693, 396 Ill. 404, certiorari denied 68 S.Ct. 73, 332 U.S. 765, 92 L.Ed. 350—*Zadworny v. City of Chicago*, 44 N.E.2d 426, 380 Ill. 470—*Behnke v. President and Board of Trustees of Village of Brookfield*, 9 N.E.2d 232, 366 Ill. 516—*Rothschild v. Hussey*, 5 N.E.2d 92, 364 Ill. 557—*Forbes v. Hubbard*, 180 N.E. 767, 348 Ill. 166.
- Lieblich v. Fradine*, 127 N.E.2d 684, 6 Ill.App.2d 409—*Deer Park Civic Ass'n v. City of Chicago*, 106 N.E.2d 823, 347 Ill.App. 346—*Grand Trunk Western R. Co. v. City of Chicago*, 105 N.E.2d 152, 346 Ill. App. 376—*City of Waukegan v. Blatt*, 50 N.E.2d 589, 320 Ill.App. 191—*City of Springfield v. Kable*, 29 N.E.2d 675, 306 Ill.App. 616.
- Iowa.—*Brackett v. City of Des Moines*, 67 N.W.2d 542, 246 Iowa 249.
- Ky.—*City of Louisville v. Bryan S. McCoy, Inc.*, 286 S.W.2d 546—*Hatch v. Fiscal Court of Fayette County*, 242 S.W.2d 1018—*Schloemer v. City of Louisville*, 182 S.W. 2d 782, 298 Ky. 286.
- Md.—*Eckes v. Board of Zoning Appeals of Baltimore County*, 121 A. 2d 249, 209 Md. 432—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 434, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—*American Oil Co. v. Miller*, 102 A.2d 727, 204 Md. 32—*Zang & Sons, Builders, Inc. v. Taylor*, 102 A.2d 723, 203 Md. 628—*Wakefield v. Kraft*, 96 A. 2d 27, 202 Md. 136—*Maryland Advertising Co. v. Mayor and City Council of Baltimore*, 86 A.2d 169, 199 Md. 214—*Hoffman v. Mayor and City Council of Baltimore*, 79 A.2d 367, 197 Md. 294.
- Mass.—*Cohen v. City of Lynn*, 132 N.E.2d 664, 333 Mass. 699—*Raymond v. Commissioner of Public Works of Lowell*, 131 N.E.2d 189, 333 Mass. 410—*Burnham v. Board of Appeals of Gloucester*, 128 N.E. 2d 772, 333 Mass. 114—*Kaplan v. City of Boston*, 113 N.E.2d 856, 330 Mass. 381—*Caputo v. Board of Appeals of Somerville*, 111 N.E.2d 674, 330 Mass. 107—*Lundy v. Town of Wayland*, 105 N.E.2d 378, 328 Mass. 581—*Shannon v. Building Inspector of Woburn*, 105 N.E.2d 192, 328 Mass. 633—*Lamarre v. Commissioner of Public Works of Fall River*, 87 N.E.2d 211, 324 Mass. 542—122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13, 323 Mass. 646—*Caires v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589—*Town of Burlington v. Dunn*, 61 N.E.2d 243, 318 Mass. 216, 168 A.L.R. 1181, certiorari denied 66 S.Ct. 51, 326 U.S. 739, 90 L.Ed. 441—*City of Pittsfield v. Oleksak*, 47 N.E.2d 930, 313 Mass. 553.
- Mich.—*Highland Oil Corp. v. City of Lathrup Village*, 85 N.W.2d 185, 349 Mich. 650—*Bassey v. City of Huntington Woods*, 74 N.W.2d 897, 344 Mich. 701—*Anderson v. City of Holland*, 74 N.W.2d 894, 344 Mich. 706—*Anchor Steel & Conveyor Co. v. City of Dearborn*, 70 N.W.2d 753, 342 Mich. 361—*Penning v. Owens*, 65 N.W.2d 831, 340 Mich. 355—*Hammond v. Kephart*, 50 N.W.2d 155, 331 Mich. 551—*Hitchman v. Oakland Tp.*, 45 N.W.2d 306, 329 Mich. 331—*Northwood Properties Co. v. Perkins*, 39 N.W.2d 25, 325 Mich. 419.
- Minn.—*State v. Modern Box Makers*, 13 N.W.2d 731, 217 Minn. 41.
- Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.
- Mo.—*Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 362 Mo.

application of zoning regulations;¹⁷ but these presumptions cannot prevail against unconstitutionality patent on the face of the ordinance or regula-

tion.¹⁸ A zoning ordinance or regulation is presumed to be reasonable¹⁹ and such ordinance or regu-

1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.
Neb.—Graham v. Graybar Elec. Co., 63 N.W.2d 774, 158 Neb. 527—Davis v. City of Omaha, 45 N.W. 2d 173, 153 Neb. 460.

N.J.—Van Corp. v. Mayor and Council of Borough of Ridgefield, 124 A.2d 48, 41 N.J.Super. 74—Town of Belleville v. Kiernan, 121 A.2d 411, 39 N.J.Super. 480—Rockaway Estate v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468—Manning v. Borough of Paramus, 118 A.2d 60, 37 N.J.Super. 574—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J.Super. 324—Lumund v. Board of Adjustment of Borough of Rutherford, 69 A.2d 361, 6 N.J.Super. 474, affirmed 73 A.2d 545, 4 N.J. 577.

Visco v. City of Plainfield, 57 A. 2d 400, 136 N.J.Law 659—Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J.Law 190.

Progress Improvement Co. v. Williams, 147 A. 649, 7 N.J.Misc. 973.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517, 307 N.Y. 493—Town of Islip v. F. E. Summers Coal & Lumber Co., 177 N.E. 409, 257 N.Y. 167—Wulfschlag v. Burden, 150 N.E. 120, 241 N.Y. 288, 43 A.L.R. 651.

Ulmer Park Realty Co. v. City of New York, 63 N.Y.S.2d 143, 270 App.Div. 1044, affirmed 77 N.E.2d 797, 297 N.Y. 788—Brown v. Village of Owego, 81 N.Y.S.2d 905, 260 App.Div. 328, affirmed 80 N.E.2d 604, 284 N.Y. 655—City of Utica v. Ortnier, 10 N.Y.S.2d 729, 256 App. Div. 1039—People ex rel. Jeffress v. Brown, 300 N.Y.S. 214, 352 App. Div. 891—Bond v. Cooke, 262 N.Y.S. 199, 237 App.Div. 229.

Linn v. Town of Hempstead, 170 N.Y.S.2d 217, 10 Misc. 774—Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485—City of Albany v. Anthony, 21 N.Y.S.2d 258, 174 Misc. 470, reversed on other grounds 28 N.Y.S.2d 962, 263 App.Div. 401—Town of Ramapo v. Bockar, 273 N.Y.S. 452, 151 Misc. 613.

Hayes v. City of Yonkers, 143 N.Y.S.2d 699, affirmed 152 N.Y.S.2d 213, 1 A.D.2d 1031—Halpern v. Daasler, 135 N.Y.S.2d 8—Crone v. Town of Brighton, 119 N.Y.S.2d 877—Suburban Tire & Battery Co. v. Village of Mamaroneck, 104 N.Y.S.2d 850, affirmed 113 N.Y.S.2d 449, 279 App.Div. 1084, affirmed 110 N.E.2d 894, 304 N.Y. 971—Harrison v. Reidpath, 98 N.Y.S.2d 568—People v. Calvar Corp., 69 N.Y.S.2d 272,

affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376—Post Brick Co. v. Thompson, 68 N.Y.S.2d 159—Osborne v. Village of East Hampton, 61 N.Y.S.2d 142, affirmed 66 N.Y.S.2d 646, 271 App.Div. 837—People v. Perkins, 8 N.Y.S.2d 868, reversed on other grounds 26 N.E. 2d 278, 282 N.Y. 329.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

N.D.—Midgarden v. City of Grand Forks, 54 N.W.2d 659, 79 N.D. 18.

Ohio.—State ex rel. Kangesser Co. v. Village of Beachwood, App., 128 N.E.2d 127—Miesz v. Village of Mayfield Heights, 111 N.E.2d 20, 92 Ohio App. 471—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.

Loesch Allotment Co. v. Village of Newburgh Heights, Com.Pl., 100 N.E.2d 543.

Or.—Shaffner v. City of Salem, 268 P.2d 599, 201 Or. 45—Shaffner v. City of Salem, 268 P.2d 599, 201 Or. 45.

Pa.—Appeal of Liggett, 139 A. 619, 291 Pa. 109.

Commonwealth v. McLaughlin, 78 A.2d 880, 168 Pa.Super. 442.

R.I.—Baggs v. Zoning Bd. of Review of Town of Barrington, 86 A.2d 658, 79 R.I. 211.

S.C.—Momeiler v. John McAlister, Inc., 99 S.E.2d 177, 231 S.C. 526—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.

Lamkin v. City of Bellaire, Civ. App., 308 S.W.2d 70—City of Lubbock v. Stubbs, Civ.App., 278 S.W. 2d 519—Davis v. Nolte, Civ.App., 231 S.W.2d 471, refused no reversible error—Ham v. Weaver, Civ. App., 227 S.W.2d 286, reversed on other grounds Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309—Edge v. City of Bellaire, Civ.App., 200 S.W. 2d 224, error refused—Simms v. City of Sherman, Civ.App., 181 S.W.2d 100, affirmed 183 S.W.2d 415, 143 Tex. 115—City of Dallas v. Lively, Civ.App., 161 S.W.2d 895, error refused—Connor v. City of University Park, Civ.App., 142 S.W. 2d 706, error refused.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

Wis.—Smith v. City of Brookfield, 74 N.W.2d 770, 273 Wis. 1—Geisenfeld v. Village of Shorewood, 287 N.W. 683, 232 Wis. 410—State ex rel. Newman v. Pagels, 250 N.W. 430, 212 Wis. 475.

Similar to statute

Test for determining whether local zoning authority has abused its discretion is similar to that employed in considering constitutionality of a statute, in that it is court's duty to make every presumption and intendment in favor of the validity of the decision and to sustain it unless its invalidity is beyond a reasonable doubt.

Conn.—Eden v. Town Plan and Zoning Commission of Town of Bloomfield, 89 A.2d 746, 139 Conn. 59.

One seeking mandamus to compel issuance of building permit under section of town building bylaws relating to issuance of such permits must be deemed to have recognized the validity and application of such section, at least in reference to the matter of building permits.

Mass.—Karl V. Wolsey Co. v. Building Inspector of Bedford, 86 N.E.2d 644, 324 Mass. 419.

Presumption held not irrebuttable

Mere conflict in testimony as to the highest and best use of property, impact of proposed land use on areas involved or its effect on property values, does not make irrebuttable the presumption that an ordinance is valid, and a difference of opinion does not render the evidence of one party unbelievable, or require a finding that reasonableness of an ordinance is debatable.

Ill.—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill.2d 169.

17. S.C.—Talbot v. Myrtle Beach Bd. of Adjustment, 72 S.E.2d 66, 222 S.C. 165.

18. Mich.—Osius v. City of St. Clair Shores, 75 N.W.2d 25, 344 Mich. 693.

Tex.—Ham v. Weaver, Civ.App., 227 S.W.2d 286, reversed on other grounds Weaver v. Ham, 232 S.W. 2d 704, 149 Tex. 309.

19. Cal.—Bisacay v. City of Burlingame, 15 P.2d 784, 127 C.A. 213.

Ill.—Anderson v. County of Cook, 138 N.E.2d 485, 9 Ill.2d 568.

Md.—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Wakfield v. Kraft, 96 A.2d 27, 202 Md. 138.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

N.J.—Tomko v. Vlissers, 121 A.2d 502, 21 N.J. 228—Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 11 N.J. 341, 36 A.L.R.2d 639—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182—Oliva v. City of Garfield, 82 A.2d 873, 1 N.J. 184.

ulation is presumed to be for the public good,²⁰ and adapted to promote the public health, safety, | morals, and general welfare.²¹ The presumption of reasonableness must be applied to the facts of

Skaf v. Zoning Bd. of Adjustment of City of Asbury Park, 113 A.2d 843, 35 N.J.Super. 215—*Marie's Launderette v. City of Newark*, 110 A.2d 65, 33 N.J.Super. 279, reversed on other grounds 113 A.2d 190, 35 N.J.Super. 94—*Sieher v. Laawe*, 109 A.2d 470, 33 N.J.Super. 115—*Jones v. Zoning Bd. of Adjustment of Long Beach Tp.*, 103 A.2d 498, 32 N.J.Super. 397—*Dal Roth, Inc. v. Division of Alcoholic Beverage Control, Dept. of Law & Public Safety of N. J.*, 100 A.2d 507, 28 N.J.Super. 246—*Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights in Bergen County*, 99 A.2d 591, 27 N.J.Super. 476, reversed on other grounds 105 A.2d 521, 15 N.J. 447—*Pequanook Tp. v. De Wilds*, 91 A.2d 410, 21 N.J.Super. 517—*Casper v. City of Long Branch*, 86 A.2d 691, 18 N.J.Super. 90—*Struyk v. Samuel Braen's Sons*, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294—*Town of Montclair v. Bryan*, 85 A.2d 231, 16 N.J.Super. 535—*Lionshead Lake v. Wayne Tp., Passaic County*, 80 A.2d 650, 13 N.J.Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708—*Birkfield Realty Co. v. Board of Com'rs of City of Orange*, 79 A.2d 326, 12 N.J.Super. 192—*Guacildes v. Borough of Englewood Cliffs*, 78 A.2d 435, 11 N.J.Super. 405—*Lionshead Lake v. Wayne Tp., Passaic County*, 74 A.2d 609, 9 N.J.Super. 83—*Scerbo v. Board of Adjustment of Jersey City*, 67 A.2d 472, 4 N.J.Super. 409—*Collins v. Board of Adjustment of City of Margate*, 67 A.2d 332, 3 N.J.Super. 553, affirmed 69 A.2d 708, 3 N.J. 200—*Anderson v. Mayor and Council of Town of Bloomfield*, 65 A.2d 270, 2 N.J.Super. 605—*Concord Garden Apartments v. Board of Adjustment of City of Englewood*, 64 A.2d 355, 1 N.J.Super. 301.

420 Broad Ave. Corp. v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527—*Greenway Homes v. Borough of River Edge*, 60 A.2d 811, 137 N.J.Law 453—*United Advertising Corp. v. Board of Adjustment of Maplewood Tp.*, 56 A.2d 406, 136 N.J.Law 336—*Crow v. Town of Westfield*, 56 A.2d 403, 136 N.J.Law 363—*Durrwachter v. Mayor & Council of Borough of Fair Lawn*, 55 A.2d 832, 136 N.J.Law 314—*Ridgewood Air Club v. Board of Adjustment of Village of Ridgewood, Bergen County*, 55 A.2d 100, 136 N.J.Law 222—*Yoemans v. Hillsborough Tp., Somerset County*, 54 A.2d 202, 135 N.J.Law 599—*Albright v. Johnson*, 50 A.2d 399,

135 N.J.Law 70—*Repp v. Shahadi*, 38 A.2d 284, 132 N.J.Law 24—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367—*Richman v. Board of Com'rs of City of Newark*, 4 A.2d 501, 122 N.J.Law 180—*Dickinson v. Inhabitants of City of Plainfield*, 4 A.2d 91, 122 N.J.Law 63.

Frank J. Durkin Lumber Co. v. Fitzsimmons, 143 A. 816, 6 N.J. Misc. 1102, reversed on other grounds 147 A. 555, 106 N.J.Law 183—*Marilyn Realty Co. v. Zoning Board of Adjustment of Town of West Orange*, 142 A. 438, 6 N.J. Misc. 581, affirmed 146 A. 320, 106 N.J.Law 573—*Linwood Co. v. Board of Adjustment of Town of Bloomfield*, 142 A. 436, 6 N.J. Misc. 606—*Bilt-Wel Co. v. Scott*, 142 A. 434, 6 N.J. Misc. 621—*Steinberg v. Board of Adjustment of Town of Nutley*, 142 A. 431, 6 N.J. Misc. 597, affirmed 146 A. 318, 106 N.J.Law 603, followed in *Paramount Realty & Const. Co. v. Schmitt*, 146 A. 319, 106 N.J.Law 587—*Kitay v. Quigley*, 142 A. 427, 6 N.J. Misc. 623—*Urban v. Board of Adjustment of Hillside Tp.*, 142 A. 364, 6 N.J. Misc. 602—*Benbak Const. Co. v. Board of Adjustment of City of Orange*, 142 A. 357, 6 N.J. Misc. 543—*Born v. Board of Adjustment of City of Paterson*, 142 A. 345, 6 N.J. Misc. 551, followed in *Koogan v. Board of Adjustment of City of Paterson*, 142 A. 346, 6 N.J. Misc. 562, and *Markowitz v. Quigley*, 142 A. 346, 6 N.J. Misc. 563—*Kanter v. Board of Adjustment of City of East Orange*, 142 A. 342, 6 N.J. Misc. 568—*Feldman & Pivnick v. Board of Adjustment of City of East Orange*, 142 A. 177, 6 N.J. Misc. 520, followed in *Astapoff v. Bigelow*, 142 A. 918, *Del Campo v. Board of Adjustment of City of Newark*, 142 A. 920, and *J. H. Realty Co. v. Board of Adjustment of City of East Orange*, 142 A. 921, 6 N.J. Misc. 540—*Ewald v. Board of Adjustment of Borough of Leonia*, 142 A. 42, 6 N.J. Misc. 532—*Bellofatto v. Board of Adjustment of Town of Montclair*, 141 A. 781, 6 N.J. Misc. 512, followed in *Burg v. Board of Adjustment of City of Passaic*, 142 A. 919, 6 N.J. Misc. 804, *Claremont Bldg. Co. v. Board of Adjustment of City of Newark*, 142 A. 919, 6 N.J. Misc. 805, *Park & Prospect v. Board of Adjustment of City of Orange*, 142 A. 924, 6 N.J. Misc. 804, and *Crystal Holding Co. v. Town of Westfield*, 147 A. 916, 7 N.J. Misc. 975—*A. G. Construction Co. v. Scott*, 136 A. 207, 5 N.J. Misc. 251, reversed on other grounds 141 A. 760, 104 N.J.

Law 596—*Burg v. Ackerman*, 135 A. 672, 5 N.J. Misc. 96.

N.Y.—Eaton v. Sweeny, 251 N.Y.S. 246, 232 App.Div. 459, reversed on other grounds 177 N.E. 412, 257 N. Y. 176.

Okl.—Weaver v. Bishop, 52 P.2d 853, 174 Okl. 492.

20. *Cal.—Lockard v. City of Los Angeles*, 202 P.2d 38, 33 C.2d 453, 7 A.L.R.2d 990.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 893.

N.J.—Lionshead Lake v. Wayne Tp., Passaic County, 74 A.2d 609, 9 N.J. Super. 83—*Lumund v. Board of Adjustment of Borough of Rutherford*, 69 A.2d 361, 6 N.J.Super. 474, affirmed 73 A.2d 545, 4 N.J. 577.

420 Broad Ave. Corp. v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527.

21. *Cal.—McCarthy v. City of Manhattan Beach*, 264 P.2d 932, 41 C.2d 879, certiorari denied 75 S.Ct. 29, 348 U.S. 817, 99 L.Ed. 644.

Willett & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 C. A.2d 757—*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 203 P.2d 823, 90 C.A. 2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 342, 338 U. S. 939, 94 L.Ed. 579.

Planning

Courts would assume that zoning ordinance was product of far-sighted planning calculated to promote general welfare of city at some future time.

N.Y.—Arverne Bay Const. Co. v. Thatcher, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.

Bove v. Donner-Hanna Coke Corporation, 254 N.Y.S. 403, 142 Misc. 329, affirmed 258 N.Y.S. 229, 236 App.Div. 37, motion denied 258 N. Y.S. 1075, 236 App.Div. 775.

Absence of proof

In determining whether prohibition of lawful use of land by zoning ordinance has real and substantial relationship to public health, safety, morals, or the general welfare, in absence of proof on subject, presumption of existence of such relationship and validity of ordinance is resorted to, but not when there is proof on which a judicial determination thereof can be made, as when the contrary is proved by competent evidence or appears on the face of the enactment.

Mich.—Gust v. Canton Tp., 70 N.W.2d 772, 342 Mich. 486.

the particular case,²² and it applies to rezoning as well as to the original zoning regulation,²³ but not with the same weight,²⁴ the presumption being that the zones are well-planned and arranged and are to be more or less permanent, subject to change only to meet a genuine change in conditions.²⁵

It is presumed that the legislative body investi-

gated and found conditions such that the legislation which it enacted was appropriate,²⁶ and that it acted wisely²⁷ and with full knowledge of the conditions,²⁸ that it intended a reasonable and legal classification,²⁹ and had sufficient reason to make the classification that it made,³⁰ that it did what was necessary to make the ordinance valid,³¹ and com-

22. Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

23. Md.—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Zang & Sons, Builders, Inc. v. Taylor, 102 A.2d 723, 203 Md. 628—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

N.J.—Anderson v. Mayor and Council of Town of Bloomfield, 65 A.2d 270, 2 N.J.Super. 605.

N.Y.—Linn v. Town of Hempstead, 170 N.Y.S.2d 217, 10 Misc.2d 774.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206. Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error—Clesi v. Northwest Dallas Imp. Ass'n, Civ. App., 263 S.W.2d 820, refused no reversible error—McNitt Oil & Refining Co. v. Brooks, Civ.App., 244 S.W.2d 872.

Proper exercise of discretion

City governing body's amendatory ordinance, changing the zoning of certain lands so as to preclude construction of proposed apartment house thereon, was presumably proper exercise of discretion and intended to change zoning districts to conform to comprehensive zoning plan suitable to city.

N.J.—Concord Garden Apartments v. Board of Adjustment of City of Englewood, 64 A.2d 355, 1 N.J.Super. 301.

When presumption disappears

Where facts showed and it was determined by trial court that city acted arbitrarily, unreasonably, and abused its discretion in amending basic zoning ordinance by changing block from single-family residence zone to an apartment house zone, presumption that enactment of amendatory ordinance was valid disappeared.

Tex.—Weaver v. Ham, 232 S.W.2d 704, 149 Tex. 309.

Reclassification

Ky.—Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018.

24. Md.—Eckes v. Board of Zoning Appeals of Baltimore County, 121 A.2d 249, 209 Md. 432—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Zang & Sons, Builders, Inc. v. Taylor, 102 A.2d 723, 203 Md. 628—Kracke v. Weinberg, 79 A.2d 387, 197 Md. 339—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

25. Md.—Board of County Com'rs of Talbot County v. Troxell, 132 A.2d 845, 214 Md. 135—Kroen v. Board of Zoning Appeals of Baltimore County, 121 A.2d 181, 209 Md. 420—Zinn v. Board of Zoning Appeals of Baltimore County, 114 A.2d 614, 207 Md. 355—Temmink v. Board of Zoning Appeals of Baltimore County, 109 A.2d 85, 205 Md. 489—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32—Zang & Sons, Builders, Inc. v. Taylor, 102 A.2d 723, 203 Md. 628—Kracke v. Weinberg, 79 A.2d 387, 197 Md. 339—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

26. U.S.—Dennis v. Village of Tonka Bay, C.C.A.Minn., 156 F.2d 672.

Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A.2d 83, 214 Md. 48.

Minn.—Kiges v. City of St. Paul, 62 N.W.2d 363, 240 Minn. 522.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

N.Y.—Congregation Beth Israel West Side Jewish Center v. Board of Estimate of City of New York, 139 N.Y.S.2d 645, 285 App.Div. 629.

Selection of territory

Legislative body must be presumed to have fairly determined that there was reasonable ground for territory selection made in passing ordinance restricting height of buildings.

Cal.—Brougher v. Board of Public

Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15.

27. Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

Tex.—Thompson v. City of Carrollton, Civ.App., 211 S.W.2d 970.

28. Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

Neb.—Cassel Realty Co. v. City of Omaha, 14 N.W.2d 600, 144 Neb. 753—Dundee Realty Co. v. City of Omaha, 13 N.W.2d 634, 144 Neb. 448.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

In mandamus proceeding to compel issuance of building permits for additional trailer park on township land which had been rezoned residential, it was presumed that all members of township board had in mind general conditions of property in township, and in absence of testimony to contrary, acted on such knowledge in enacting rezoning ordinance, notwithstanding township supervisor's testimony that purpose of ordinance was to prevent incinerator plant.

Mich.—Stevens v. Royal Oak Tp., Oakland County, 68 N.W.2d 787, 342 Mich. 105.

29. Fla.—City of Miami v. Rosen, 10 So.2d 307, 151 Fla. 677.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

30. Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57.

Tex.—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 234—City of Dallas v. Lively, Civ.App., 161 S.W.2d 895, error refused.

31. Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City

plied with all requirements as to the formalities of adoption,³² and that the regulation is in the interest of the community as a whole.³³ There is no presumption that in all circumstances no essential official action was taken merely because of the absence of any relative entry thereof in the minutes prepared by the clerk or secretary at the meeting of the zoning body.³⁴

If any state of facts reasonably can be conceived that would sustain the ordinance, that state of facts is presumed to exist.³⁵ If necessity under the police power³⁶ or considerations of public health, safety, comfort, or general welfare,³⁷ could have justified the zoning ordinance, the court must assume that they did justify it. It must be presumed that a regulation requiring the location of buildings at specified distances from the street was enacted for statutory

police purposes.³⁸ The assumption of validity has been held not to extend, however, to the proscription of churches en masse from residence districts.³⁹ Retroactive operation will not be presumed in the absence of clear and unequivocal language manifesting an intention to give it such operation.⁴⁰

A recital in a zoning ordinance that maps were attached to the ordinance creates a presumption that the maps were attached at the time the ordinance was adopted;⁴¹ and declarations in the ordinance that the provisions thereof constitute the minimum requirements for the promotion of public health, safety, and general welfare of the city are presumed to be correct.⁴² A recital that an amendment is in the general interest is not conclusive in determining whether the amendment is within the police power, but the court must determine for itself

of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

N.J.—Manning v. Borough of Paramus, 118 A.2d 60, 37 N.J.Super. 574.

Official action

Where minutes of meeting of municipal planning board revealed that zoning ordinance was in fact introduced, considered, and finally adopted in an amended form, and the only deficiency in the municipal records was the absence therein of any specific entry relative to official action concerning the amendment, the presumption of occurrence of lawful action by mayor and council prevailed, where evidence was silent in that particular.

N.J.—Manning v. Borough of Paramus, *supra*.

Approval of ordinance

Where township submitted zoning ordinance to the coordinating committee and it was not disapproved, approval of the ordinance by the committee must be conclusively presumed.

Mich.—Ritenour v. Dearborn Tp., 40 N.W.2d 137, 326 Mich. 242.

32. Ga.—Hamilton v. North Ga. Elec. Membership Corp., 40 S.E.2d 750, 201 Ga. 689.

N.Y.—Longo v. Ellers, 93 N.Y.S.2d 517, 196 Misc. 909.

Adoption procedure

Court must assume, in absence of attack on procedure followed in adopting such ordinances, that ordinance providing a zoning plan for city and ordinance amending the first ordinance were submitted to planning commission for consideration before adoption by council in accordance with city charter and were valid with respect to adoption procedure.

Cal.—Elsick v. City of Los Angeles, 213 P.2d 492, 34 C.2d 614.

Vote of town meeting

(1) Every reasonable presumption is to be made in favor of vote of town meeting on amendment to zoning law.

Mass.—Caires v. Building Com'r of Hingham, 83 N.E.2d 650, 323 Mass. 589.

N.J.—Michaels v. Township Committee of Pemberton Tp., Burlington County, 67 A.2d 324, 3 N.J.Super. 523.

(2) In proceeding to determine validity and extent of town zoning law, it could not be assumed that voters, in following recommendations of planning board by adopting law, were activated by unsound reasons mentioned by board, where such reasons dealt with merely one phase of subject under discussion.

Mass.—Simon v. Town of Needham, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

Presumption not conclusive

Presumption of regularity of the passage of an ordinance is not conclusive and may be eradicated by affirmative proof that the ordinance was not enacted in obedience to requisite formalities.

N.J.—Manning v. Borough of Paramus, 118 A.2d 60, 37 N.J.Super. 574.

33. Md.—Kahl v. Consolidated Gas Elec. Light & Power Co. of Baltimore, 60 A.2d 754, 191 Md. 249.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

34. N.J.—Manning v. Borough of Paramus, 118 A.2d 60, 37 N.J.Super. 574.

35. Ill.—City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616.

Classification

If there could have existed a state of facts justifying classification or

restriction complained of, courts will assume that it existed.

Tex.—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224—City of Dallas v. Lively, Civ.App., 161 S.W.2d 895, error refused.

36. Cal.—Clemons v. City of Los Angeles, 222 P.2d 439, 36 C.2d 95. Neb.—Cassel Realty Co. v. City of Omaha, 14 N.W.2d 600, 144 Neb. 753.

37. Cal.—Clemons v. City of Los Angeles, 222 P.2d 439, 36 C.2d 95. La.—State ex rel. Civello v. City of New Orleans, 97 So. 440, 154 La. 271, 33 A.L.R. 260.

Neb.—Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 213 N.W. 835, 115 Neb. 525.

38. Mass.—Slack v. Building Inspector of Town of Wellesley, 160 N. E. 285, 262 Mass. 404.

Presumption not considered

Zoning ordinance which, on its face, operated to exclude churches and schools from entire village, obviated necessity for court, in determining validity of ordinance, to resort to presumption of reasonableness and validity and raised a question for judicial determination.

Mich.—Mooney v. Village of Orchard Lake, 53 N.W.2d 308, 333 Mich. 389.

39. Tex.—Simms v. City of Sherman, Civ.App., 181 S.W.2d 100, affirmed 183 S.W.2d 415, 143 Tex. 115.

40. Cal.—Biscay v. City of Burlingame, 15 P.2d 784, 127 C.A. 213.

41. Minn.—State v. Modern Box Makers, 13 N.W.2d 731, 217 Minn. 41.

42. N.C.—Appeal of Parker, 197 S.E. 706, 214 N.C. 51, appeal dismissed Parker v. City of Greensboro, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358.

whether the amendment conforms to the facts.⁴³ It will not be assumed that the municipality, in adopting a zoning ordinance would not have adopted the zoning plan as a whole if it knew that its treatment of a small segment was invalid.⁴⁴ In a suit to enjoin enforcement of a zoning ordinance, where plaintiff showed several instances of nonconforming uses, it will not be assumed that such uses had not existed before the zoning ordinance was adopted.⁴⁵

b. Acts or Decisions of Boards or Officers

On judicial review of the action or decision of a zoning board or officer, it will be presumed, in the absence of evidence to the contrary, that the action of the board or officer was legal and correct.

On review of the action or decision of a zoning board or commission, in the absence of evidence to the contrary, it will be presumed that the action of the board or officer was legal and correct,⁴⁶ that it was reasonable,⁴⁷ and that the board acted on proper motives.⁴⁸ So it will be presumed that public officials charged with administering building and zoning ordinances will discharge, or have discharged, their duties honestly and in accordance with law,⁴⁹ and it will not be assumed that officials will not comply with applicable regulations.⁵⁰ It will be presumed that the facts necessary to sustain the action of the board or commission were ascertained by it,⁵¹ and that the board had before it sufficient and appropriate evidence to support its find-

43. Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

44. N.J.—H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 105 A.2d 894, 31 N.J.Super. 30.

45. N.J.—Casper v. City of Long Branch, 86 A.2d 691, 18 N.J.Super. 90.

46. Cal.—Rehfeld v. City and County of San Francisco, 21 P.2d 419, 218 Cal. 83.

Conn.—Hills v. Zoning Commission of Town of Newington, 96 A.2d 212, 139 Conn. 603—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614—Levine v. Zoning Board of Appeals of Meriden, 198 A. 173, 124 Conn. 53—Strain v. Mims, 193 A. 754, 123 Conn. 275—Thayer v. Board of Appeals of City of Hartford, 157 A. 273, 114 Conn. 15.

Hamelin v. Zoning Bd. of the Borough of Wallingford, 117 A.2d 86, 19 Conn.Super. 445.

Ky.—Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018—Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 210 S.W.2d 771, 307 Ky. 363—Selligman v. Western & Southern Life Ins. Co., 128 S.W.2d 419, 277 Ky. 551.

Mass.—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403. N.H.—Carrick v. Langtry, 108 A.2d 546, 99 N.H. 251.

N.J.—Stolz v. Ellenstein, 81 A.2d 476, 7 N.J. 291.

Cummins v. Board of Adjustment of Borough of Leonia, Bergen County, 121 A.2d 405, 39 N.J.Super. 452—Gerkin v. Village of Ridgewood, 86 A.2d 275, 17 N.J.Super. 472.

Lehrer v. Board of Adjustment of City of Newark, 58 A.2d 265, 137 N.J.Law 100—Pieretti v. Johnson, 41 A.2d 896, 132 N.J.Law 576—Green v. Board of Com'rs of City

of Newark, 36 A.2d 610, 131 N.J. Law 336.

Mingle v. Board of Adjustment of City of Orange, 142 A. 367, 6 N.J.Misc. 595.

N.Y.—People ex rel. Black v. Randall, 5 N.Y.S.2d 40, 254 App.Div. 310.

Tishman Realty & Construction Co. v. Walsh, 237 N.Y.S. 237, 135 Misc. 315, affirmed 239 N.Y.S. 759, 228 App.Div. 687—People ex rel. Home for Hebrew Infants of City of New York v. Walsh, 227 N.Y.S. 570, 131 Misc. 581.

R.I.—Robinson v. Town Council of Narragansett, 199 A. 308, 60 R.I. 422.

Compliance with rules

Where nothing appeared in the record concerning the rules of the board of zoning adjustment of the city of Boston governing notice and procedure of hearings it was presumed in favor of the regularity of the proceedings of public board that there was a compliance with such rules, if any existed.

Mass.—Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston, 101 N.E.2d 888, 328 Mass. 103.

47. D.C.—Hagans v. District of Columbia, Mun.App., 97 A.2d 922.

Ky.—Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018.

48. Conn.—Strain v. Mims, 193 A. 754, 123 Conn. 275.

N.J.—Aschenbach v. Inhabitants of City of Plainfield, 8 A.2d 579, 123 N.J.Law 265.

Pa.—Appeal of Lord, 77 A.2d 728, 168 Pa.Super. 299, reversed on other grounds 81 A.2d 533, 368 Pa. 121.

Interest of community

In acting in a given case, it is always to be presumed, until it appears to the contrary, that a determination of a board of zoning appeals was regularly and honestly rendered in the interest and welfare of the community.

N.Y.—Fox v. Adams, 134 N.Y.S.2d 534.

49. Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Decision of issues

It is presumed that zoning board will do its duty and decide issues on basis of facts presented.

Wis.—Smith v. City of Brookfield, 74 N.W.2d 770, 272 Wis. 1.

Minutes

On appeal from decision of board of municipal and zoning appeals of municipality approving application to erect an addition to property, reviewing court would assume that board obeyed statutory mandate to keep minutes of its official actions and file them immediately.

Md.—State Housing, Inc. v. City of Baltimore, 137 A.2d 708, 215 Md. 294.

Notice of decision

Appellate court must presume that the planning and zoning commission of a city performed its duty and gave immediate written notice of its decision, adjusting a master zoning plan for unincorporated territory.

Ky.—Hennessy v. Bischoff, 240 S.W. 2d 71.

50. Mass.—Town of Brookline v. Co-Ray Realty Co., 93 N.E.2d 581, 326 Mass. 208.

51. Cal.—Bailey v. Los Angeles County, 293 P.2d 449, 46 C.2d 132. Miller v. Planning Commission of City of Torrance, 292 P.2d 278, 138 C.A.2d 598—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 348—Cantrell v. Board of Sup'rs of Los Angeles County, 197 P.2d 218, 87 C.A.2d 471—Bartholomae Oil Corporation v. Seager, 94 P.2d 814, 35 C.A.2d 77.

N.Y.—William Borea Contracting Co. v. Murdock, 294 N.Y.S. 19, 250 App. Div. 262, followed in 294 N.Y.S. 21, 250 App.Div. 264.

Tex.—Meserole v. Board of Adjustment, City of Dallas, Civ.App., 173 S.W.2d 528.

ings;⁵² and, accordingly, findings of the board on questions of fact properly before it are deemed to be prima facie lawful and reasonable.⁵³ Members of a zoning board are presumed to have special knowledge in those matters which are a part of their administration of the zoning ordinance;⁵⁴ but it will not be presumed that they acted on special knowl-

edge in the absence of disclosure to that effect.⁵⁵

As to permits and variances. In the absence of any indication to the contrary, the action of a zoning board or officer with respect to the granting or denial of a permit will be presumed to be legal and correct.⁵⁶ A similar rule applies with respect to the granting or denial of a variance;⁵⁷ but it has

52. Ohio.—McCauley v. Ash, 124 N. E.2d 739, 97 Ohio App. 208.

53. N.H.—Jadda v. Manchester, 121 A.2d 803, 100 N.H. 150.

54. R.I.—Perrier v. Board of Appeals of City of Pawtucket, 134 A. 2d 141—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A. 2d 164, 78 R.I. 319.

55. R.I.—Perrier v. Board of Appeals of City of Pawtucket, 134 A. 2d 141.

56. Ga.—New Mission Baptist Church v. City of Atlanta, 37 S.E. 2d 377, 200 Ga. 513.

Va.—Hopkins v. O'Meara, 89 S.E.2d 1, 197 Va. 202.

Issuance pursuant to variance

Where no attack was made on validity of action of city building inspector in issuing, pursuant to a variance granted by city planning board, a permit to build a church on premises previously zoned for residential use only, it would be presumed that building inspector acted within his authority and according to rules and regulations of city zoning ordinance.

Ga.—Ledbetter v. Callaway, 87 S.E. 2d 317, 211 Ga. 607.

Denial or revocation

(1) Denial of permit by board of adjustment is, in the absence of evidence to the contrary, presumed right.

N.J.—Wharton Sand & Stone Co. v. Montville Tp., 120 A.2d 858, 39 N. J.Super. 278.

Steinberg v. Board of Adjustment of Town of Nutley, 142 A. 431, 6 N.J.Misc. 597, affirmed 146 A. 318, 106 N.J.Law 603, followed in Paramount Realty & Const. Co. v. Schmitt, 146 A. 319, 106 N.J.Law 587—Marlyn Realty Co. v. Zoning Board of Adjustment of Town of West Orange, 142 A. 428, 6 N.J. Misc. 581, affirmed 146 A. 320, 106 N.J.Law 573—Urban v. Board of Adjustment of Hillside Tp., 142 A. 364, 6 N.J.Misc. 602.

(2) It was presumed that county board of supervisors reviewed record and considered all facts before reversing action of zoning board which had heard witnesses and considered evidence on application for special permit to operate rock quarry and crushing plant, sand and gravel pit, and asphalt plant on land. Cal.—Cohn v. County Bd. of Sup'rs

of Los Angeles County, 286 P.2d 836, 135 C.A.2d 180.

(3) On appeal from revocation of permit, requirements of ordinance with respect to building permits are presumed to have been determined favorably to applicant before granting permit.

Tex.—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed.

Accessory use

Where decision of zoning board of appeals granting a church permission to use a portion of its property for off-street parking made no mention of undue hardship to church and its members, court would not assume that permit was granted as a variance from provisions of zoning ordinance, but would assume that such permission was granted under section of the ordinance authorizing granting of a permit for off-street restricted parking as a customarily incidental accessory use.

Ohio.—Mahrt v. First Church of Christ, Scientist, Com.Pl., 142 N.E. 2d 567, affirmed 142 N.E.2d 678.

57. Conn.—St. Patrick's Church Corporation v. Daniels, 154 A. 343, 113 Conn. 132.

Fla.—Troup v. Bird, 53 So.2d 717.

Md.—Montgomery County v. Merlands Club, Inc., 96 A.2d 261, 203 Md. 279.

Mass.—Roman Catholic Archbishop of Boston v. Board of Appeal of Building Department of City of Boston, 167 N.E. 672, 268 Mass. 416.

N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442—Rexon v. Board of Adjustment of Borough of Haddonfield, 89 A.2d 238, 10 N.J. 1.

Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148—Grimley v. Village of Ridgewood, 133 A.2d 649, 45 N. J.Super. 574—Mistretta v. City of Newark, 109 A.2d 877, 33 N.J.Super. 205—Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J.Super. 164—Gerkin v. Village of Ridgewood, 86 A.2d 275, 17 N.J. Super. 472—Shipman v. Town of Montclair, 84 A.2d 652, 16 N.J.Super. 365—Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp.,

84 A.2d 18, 16 N.J.Super. 113—Marrocco v. Board of Adjustment of City of Passaic, 63 A.2d 470, 5 N.J.Super. 94—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N.J.Super. 607.

Krilov v. Board of Adjustment of City of Newark, 57 A.2d 659, 137 N.J.Law 39—Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451, 136 N.J.Law 21—National Lumber Products Co. v. Ponzio, 42 A.2d 753, 133 N.J.Law 95—Griggs v. City of Paterson, 39 A. 2d 231, 132 N.J.Law 145—Cook v. Board of Adjustment of City of Trenton, 193 A. 191, 118 N.J.Law 372.

Keiser v. Inhabitants of City of Plainfield, 159 A. 785, 10 N.J.Misc. 496—Benbak Const. Co. v. Board of Adjustment of City of Orange, 142 A. 357, 6 N.J.Misc. 543—Born v. Board of Adjustment of City of Paterson, 142 A. 345, 6 N.J.Misc. 551, followed in Koogan v. Board of Adjustment of City of Paterson, 142 A. 346, 6 N.J.Misc. 562, and Markowitz v. Quigley, 142 A. 346, 6 N.J. Misc. 563—Kanter v. Board of Adjustment of City of East Orange, 142 A. 342, 6 N.J.Misc. 568—Feldman & Pivnick v. Board of Adjustment of City of East Orange, 142 A. 177, 6 N.J.Misc. 520, followed in Astapoff v. Bigelow, 142 A. 918, 6 N.J.Misc. 541, Del Campo v. Board of Adjustment of City of Newark, 142 A. 920, 6 N.J.Misc. 539, and J. H. Realty Co. v. Board of Adjustment of City of East Orange, 142 A. 921, 6 N.J.Misc. 540—Ewald v. Board of Adjustment of Borough of Leonia, 142 A. 42, 6 N.J.Misc. 532—Bellofatto v. Board of Adjustment of Town of Montclair, 141 A. 781, 6 N.J.Misc. 512, followed in Burg v. Board of Adjustment of City of Passaic, 142 A. 919, 6 N.J.Misc. 804, Claremont Bldg. Co. v. Board of Adjustment of City of Newark, 142 A. 919, 6 N.J.Misc. 805, Park & Prospect v. Board of Adjustment of City of Orange, 142 A. 924, 6 N.J.Misc. 804, and Crystal Holding Co. v. Town of Westfield, 147 A. 916, 7 N.J.Misc. 975.

N.Y.—Joyce v. Dobson, 8 N.Y.S.2d 768, 255 App.Div. 348—Falvo v.

been held that where a zoning variance was granted after the zoning authority visited the premises and made a personal inspection of existing conditions, the presumption that sufficient reason for the granting of the variance, aside from the record, was revealed by inspection of the locus would not be indulged in by the court.⁵⁸

Decisions with respect to motor vehicle service stations or garages. On review of the decision of a zoning board with respect to the construction and operation of a motor vehicle service station or garage, there is a presumption in favor of the determination of the board.⁵⁹ So on appeal from the action of a board in refusing to grant a certificate of approval for the location of a gasoline station, the court may not assume that the board did not consider and comply with the requirements of stat-

utes as to the conditions necessary for the approval of such location.⁶⁰

§ 363. — Burden of Proof

- a. In general
- b. Acts or decisions of boards or officers

a. In General

Generally, the burden is on the party seeking judicial relief with respect to zoning matters to establish his right to relief; and the one assailing the validity of a zoning ordinance or regulation has the burden of proof to establish that the ordinance is invalid or arbitrary or unreasonable as to his property, that there is no permissible interpretation which justified its adoption, or that it will not promote the safety, order, convenience, prosperity, and general welfare of the public.

As in civil cases generally, the burden is on the party seeking judicial relief with respect to zoning matters to establish his right to relief.⁶¹ The one

Kerner, 225 N.Y.S. 747, 222 App. Div. 239.

Clark v. Board of Zoning Appeals of Town of Hempstead, 90 N.Y.S. 2d 507, affirmed In re Application of Clark, 89 N.Y.S.2d 916, 275 App. Div. 930, reargument and appeal denied Clark v. Board of Zoning Appeals of Town of Hempstead, 91 N.Y.S.2d 838, 275 App. Div. 1001, reversed on other grounds 92 N.E. 2d 903, 301 N.Y. 86, motion denied 95 N.E.2d 44, 301 N.Y. 681, certiorari denied Board of Zoning Appeals of Town of Hempstead v. Clark, 71 S.Ct. 498, 340 U.S. 933, 95 L.Ed. 673—140 Riverside Drive v. Murdock, 78 N.Y.S.2d 890, reversed on other grounds 95 N.Y. S.2d 860, 276 App. Div. 550.

R.I.—Roberts v. Zoning Board of Review of City of Pawtucket, 197 A. 461, 60 R.I. 202.

Action under ordinance

Board of zoning appeals, in granting application for extension of building in business zone into adjacent residence zone in accordance with specified paragraphs of city zoning ordinance, must be assumed to have acted under such paragraphs.

Conn.—Bishop v. Board of Zoning Appeals of City of New Haven, 53 A.2d 659, 133 Conn. 614.

Ascertainment of facts

Granting of a variance or exception from zoning ordinance raises presumption that existence of necessary facts to grant such variance or exception has been ascertained and found.

Cal.—Steiger v. Board of Sup'rs of Los Angeles County, 300 P.2d 210, 143 C.A.2d 352—Miller v. Planning Commission of City of Torrance, 292 P.2d 278, 138 C.A.2d 598.

Inspection of premises

In reviewing determination of city board of standards and appeals deny-

ing application for variance under zoning regulations, court must presume, in absence of report of inspection of premises and surrounding area and in view of undisputed facts concerning character of surrounding area, that inspection merely disclosed such facts.

N.Y.—Arditi Realty Co. v. Murdock, 67 N.Y.S.2d 809.

Special knowledge

Members of zoning board of review are presumed to have special knowledge of matters involved in determining whether allowance of an exception to zoning ordinance would be in harmony with general purpose and intent of ordinance conferring power to grant exception when board deemed exception to be in harmony with character of the district and appropriate to the uses or buildings in district, but that they acted on such special knowledge will not be presumed on certiorari in absence of disclosure in decision to that effect.

R.I.—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A. 2d 361, 74 R.I. 135.

58. N.J.—Stolz v. Ellenstein, 81 A. 2d 476, 7 N.J. 291.

59. Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

Md.—Ellicott v. Mayor and City Council of Baltimore, 23 A.2d 649, 180 Md. 176.

N.H.—Jadda v. Manchester, 121 A.2d 803, 100 N.H. 150.

N.J.—Lehrer v. Board of Adjustment of City of New York, Sup., 58 A.2d 265, 137 N.J.Law 100—Phillips Oil Co. v. Municipal Council of City of Clifton, 197 A. 730, 120 N.J.Law 13.

N.Y.—Hopkins v. Board of Appeals of City of Rochester, Monroe County, 39 N.Y.S.2d 187, 179 Misc. 325.

Hilton v. Board of Appeals of City of Geneva, 18 N.Y.S.2d 213.

Pa.—Appeal of Atlantic Refining Co., Com.Pl., 66 York Leg.Rec. 81.

Divided vote

Where permit to construct gasoline station was required to be approved by board of zoning appeals and a concurring vote of four members of the board was necessary to grant permit, and disapproval rested on mere failure to obtain concurring vote of four out of five members of board, the action could not properly be described as that of a fact-finding body, for purpose of deference accorded findings on judicial review.

Md.—Mayor and Council of City of Baltimore v. Bliermann, 50 A.2d 804, 187 Md. 514.

Notice of ordinance

Without showing required published notice was given before adoption of zoning ordinance, court presumed notice was given and that applicant for gasoline station had knowledge thereof.

N.J.—Schumacher v. Union City, 154 A. 406, 9 N.J.Misc. 492.

Denial of permit

A strong presumption obtains that denial of a permit for filling station whether by legislative or administrative action is within the police power.

Md.—Hoffman v. Mayor and City Council of Baltimore, 51 A.2d 269, 187 Md. 593.

60. Conn.—Gulf Oil Corp. v. Board of Selectmen of Town of Brookfield, 127 A.2d 48, 144 Conn. 61.

61. Md.—Serio v. Mayor and City Council of Baltimore, 119 A.2d 887, 208 Md. 545.

Action for declaratory judgment

Conn.—Glonfriddo v. Town of Windsor, 81 A.2d 266, 137 Conn. 701.

assailing the validity of a zoning ordinance or regulation has the burden of proof to establish that the ordinance or regulation is invalid⁶² or unreasonable or arbitrary⁶³ with respect to the application

- N.Y.—Ulmer Park Realty Co. v. City of New York, 57 N.Y.S.2d 713, reversed on other grounds 63 N.Y.S.2d 143, 270 App.Div. 1044, affirmed 77 N.E.2d 797, 297 N.Y. 788.
62. U.S.—Sinclair Refining Co. v. City of Chicago, C.A.Ill., 178 F.2d 214.
- Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480—City of Guntersville v. Walls, 39 So.2d 567, 252 Ala. 66—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.
- Cal.—Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865, 40 C.2d 552. City of Los Angeles v. Gage, 274 P.2d 34, 127 C.A.2d 442—Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823, 90 C.A.2d 656, appeal dismissed 70 S.Ct. 78, 338 U.S. 805, 94 L.Ed. 487, rehearing denied 70 S.Ct. 342, 338 U.S. 939, 94 L.Ed. 579—Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386—Safe-way Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277—Yuba City v. Cherniavsky, 4 P.2d 299, 117 C.A. 568—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15.
- Conn.—Murphy, Inc., v. Town of Westport, 40 A.2d 177, 131 Conn. 292, 156 A.L.R. 568.
- De Mars v. Zoning Commission of Town of Bolton, 109 A.2d 876, 19 Conn.Sup. 24, affirmed 115 A.2d 653, 142 Conn. 530.
- Fla.—City of Miami Beach v. Silver, 67 So.2d 646.
- Ga.—Hamilton v. North Ga. Elec. Membership Corp., 40 S.E.2d 750, 201 Ga. 689.
- Ill.—Skrysak v. Village of Mt. Prospect, 148 N.E.2d 721, 13 Ill.2d 339—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill.2d 169—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81—Jacobson v. Village of Wilmette, 85 N.E.2d 753, 403 Ill. 250—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179—City of Springfield v. Vancill, 76 N.E.2d 471, 398 Ill. 575—De Bartolo v. Village of Oak Park, 71 N.E.2d 693, 396 Ill. 404. Certiorari denied 68 S.Ct. 72, 332 U.S. 765, 92 L.Ed. 350—Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166.
- Ky.—City of Louisville v. Bryan S. McCoy, 286 S.W.2d 546.
- Md.—Huff v. Board of Zoning Appeals of Baltimore County, 133 A.2d 83, 214 Md. 48—Serio v. Mayor and City Council of Baltimore, 119 A.2d 837, 208 Md. 545—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523—Zang & Sons, Builders, Inc. v. Taylor, 102 A.2d 723, 203 Md. 628—Wakefield v. Kraft, 96 A.2d 27, 202 Md. 136.
- Mich.—Anderson v. City of Holland, 74 N.W.2d 894, 344 Mich. 706.
- Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.
- Neb.—Weber v. City of Grand Island, 87 N.W.2d 575, 165 Neb. 827.
- N.J.—Tomko v. Vissers, 121 A.2d 502, 21 N.J. 226—Fischer v. Bedminster Tp., 93 A.2d 378, 11 N.J. 194—Menges v. Bernards Tps., 73 A.2d 540, 4 N.J. 556.
- Van Corp. v. Mayor and Council of Borough of Ridgefield, 124 A.2d 48, 41 N.J.Super. 74—Rockaway Estate v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468—Manning v. Borough of Paramus, 118 A.2d 60, 37 N.J.Super. 574—Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J.Super. 535.
- Concord Development Co. v. Dowling, 142 A. 356, 6 N.J.Misc. 552.
- N.Y.—Wulfsohn v. Burden, 150 N.E. 120, 241 N.Y. 288, 43 A.L.R. 651.
- New York Trap Rock Corp. v. Town of Clarkstown, 149 N.Y.S.2d 290, 1 A.D.2d 890—City of Albany v. Anthony, 28 N.Y.S.2d 963, 262 App.Div. 401—Bond v. Cooke, 262 N.Y.S. 199, 237 App.Div. 229.
- Linn v. Town of Hempstead, 170 N.Y.S.2d 217, 10 Misc.2d 774—Fieldston Garden Apartments v. City of New York, 145 N.Y.S.2d 907, 7 Misc.2d 147, affirmed 163 N.Y.S.2d 402, 3 A.D.2d 903—Gignoux v. Village of Kings Point, 99 N.Y.S.2d 280, 199 Misc. 485—Harrison v. Reidpath, 93 N.Y.S.2d 569, 197 Misc. 302—Rice v. Van Vranken, 229 N.Y. S. 32, 132 Misc. 82, affirmed 232 N.Y.S. 506, 225 App.Div. 179, affirmed 175 N.E. 304, 255 N.Y. 541.
- Nehrbas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y. S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145—People v. Calvar Corp., 69 N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376—Post Brick Co. v. Thompson, 68 N.Y.S.2d 159—Osborne v. Village of East Hampton, 61 N.Y.S.2d 142, affirmed 66 N.Y.S.2d 646, 271 App. Div. 837.
- N.D.—Midgarden v. City of Grand Forks, 54 N.W.2d 659, 79 N.D. 13.
- Ohio.—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.
- Or.—Shaffner v. City of Salem, 268 P.2d 599, 201 Or. 45.
- Tex.—Lamkin v. City of Bellaire, Civ.App., 308 S.W.2d 70—Skinner v. Reed, Civ.App., 265 S.W.2d 850—Niday v. City of Bellaire, Civ.App., 251 S.W.2d 747—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused.
- Wis.—Smith v. City of Brookfield, 74 N.W.2d 770, 272 Wis. 1—Geisenfeld v. Village of Shorewood, 287 N.W. 683, 232 Wis. 410.
- Change of zone**
- Conn.—Guerriero v. Galasso, 136 A.2d 497, 144 Conn. 600—Mallory v. Town of West Hartford, 86 A.2d 668, 138 Conn. 497.
- Hamelin v. Zoning Bd. of the Borough of Wallingford, 117 A.2d 86, 19 Conn.Sup. 445.
- Report by commission**
- In action by hospital association against borough to have zoning ordinance amendment prohibiting hospitals in residential zones declared invalid and to compel issuance of building permit for construction of hospital, burden was on association to establish that no report was made by planning board with respect to the adoption of the amendment as required by statute.
- N.J.—Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights in Bergen County, 99 A.2d 591, 27 N.J.Super. 476, reversed on other grounds 105 A.2d 521, 15 N.J. 447.
- Protests**
- In suit to enjoin issuance of permit for construction of business building on recently rezoned property, wherein issue was whether rezoning had been protested by sufficient number of landowners to require a three-fourths vote of governing body of city in order to take effect, defendants' denial of plaintiffs' allegation as to sufficiency of protests placed on plaintiffs the burden of proving that 20 per cent. of landowners had signed protest.
- Fla.—Streep v. Sample, 84 So.2d 586.
63. U.S.—American Wood Products Co. v. City of Minneapolis, C.C.A. Minn., 35 F.2d 657.
- Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332—Sunny Slope Water Co. v. City of Pasadena, 33 P.2d 672, 1 C.2d 87.
- Donovan v. City of Santa Monica, App., 199 P.2d 51, 88 C.A.2d 386—Safeway Stores v. City Council of City of San Mateo, App., 194 P.2d 720, 86 C.A.2d 277—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 C.A. 15.

Conn.—Hills v. Zoning Commission of Town of Newington, 96 A.2d 212, 139 Conn. 603.

Ga.—Hunthlett v. Reeves, 90 S.E.2d 14, 212 Ga. 8.

Ill.—Skryszak v. Village of Mt. Prospect, 148 N.E.2d 721, 13 Ill.2d 329—La Salle Nat. Bank of Chicago v. Cook County, 145 N.E.2d 65, 12 Ill.2d 40—Zweifel Mfg. Corp. v. City of Peoria, 144 N.E.2d 593, 11 Ill.2d 489—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—La Salle Nat. Bank v. City of Chicago, 122 N.E.2d 519, 4 Ill.2d 253—Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill.2d 200—Zillien v. City of Chicago, 114 N.E.2d 717, 415 Ill. 488—Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499, 408 Ill. 91—Wesemann v. Village of La Grange Park, 94 N.E.2d 904, 407 Ill. 81—Dunlap v. City of Woodstock, 91 N.E.2d 434, 405 Ill. 410—Galt v. Cook County, 91 N.E.2d 395, 405 Ill. 396—Quilici v. Village of Mount Prospect, 78 N.E.2d 240, 399 Ill. 418—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179—Neef v. City of Springfield, 43 N.E.2d 947, 380 Ill. 275.

City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202.

Ky.—Schloemer v. City of Louisville, 182 S.W.2d 782, 298 Ky. 286.

Mich.—Highland Oil Corp. v. City of Lathrup Village, 85 N.W.2d 185, 349 Mich. 650—McGiverin v. City of Huntington Woods, 72 N.W.2d 105, 343 Mich. 413—Janasick v. City of Detroit, 60 N.W.2d 452, 337 Mich. 549.

Miss.—Corpus Juris Secundum quoted in W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 284, 217 Miss. 892.

Mo.—Flora Realty & Inv. Co. v. City of Ladue, 246 S.W.2d 771, 362 Mo. 1025, appeal dismissed 73 S.Ct. 41, 344 U.S. 802, 97 L.Ed. 626.

N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57—Yanow v. Seven Oaks Park, Inc., 94 A.2d 482, 11 N.J. 341, 36 A.L.R.2d 639—Fischer v. Bedminster Tp., 93 A.2d 378, 11 N.J. 194—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184.

Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324—Marie's Launderette v. City of Newark, 110 A.2d 65, 33 N.J. Super. 279, reversed on other grounds 113 A.2d 190, 35 N.J. Super. 94—Sieber v. Laawe, 109 A.2d 470, 33 N.J. Super. 115—Jones v. Zoning Bd. of Adjustment of Long Beach

Tp., 108 A.2d 498, 32 N.J. Super. 397—Dal Roth, Inc. v. Division of Alcoholic Beverage Control, Dept. of Law & Public Safety of N. J., 100 A.2d 507, 28 N.J. Super. 246—Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights in Bergen County, 99 A.2d 591, 27 N.J. Super. 476, reversed on other grounds 105 A.2d 521, 15 N.J. 447—Closterman v. Cranford Tp., 91 A.2d 646, 22 N.J. Super. 204—Pequanock Tp. v. De Wilde, 91 A.2d 410, 21 N.J. Super. 517—Casper v. City of Long Branch, 86 A.2d 691, 18 N.J. Super. 90—Struyk v. Samuel Brannen's Sons, 85 A.2d 279, 17 N.J. Super. 1, affirmed 88 A.2d 201, 9 N.J. 294—Town of Montclair v. Bryan, 85 A.2d 231, 16 N.J. Super. 535—Lionshead Lake v. Wayne Tp., Passaic County, 80 A.2d 650, 13 N.J. Super. 490, reversed on other grounds 89 A.2d 693, 10 N.J. 165, appeal dismissed 73 S.Ct. 386, 344 U.S. 919, 97 L.Ed. 708—Guacilides v. Borough of Englewood Cliffs, 78 A.2d 435, 11 N.J. Super. 405—Lionshead Lake v. Wayne Tp., Passaic County, 74 A.2d 609, 9 N.J. Super. 83—Scerbo v. Board of Adjustment of Jersey City, 67 A.2d 472, 4 N.J. Super. 409—Collins v. Board of Adjustment of City of Margate, 67 A.2d 323, 3 N.J. Super. 553, affirmed 69 A.2d 708, 3 N.J. 200.

Greenway Homes v. Borough of River Edge, 60 A.2d 811, 137 N.J. Law 453—Ridgewood Air Club v. Board of Adjustment of Village of Ridgewood, Bergen County, 55 A.2d 100, 136 N.J. Law 222—Yoemans v. Hillsborough Tp., Somerset County, 54 A.2d 202, 135 N.J. Law 599—Albright v. Johnson, 50 A.2d 399, 135 N.J. Law 70—Grant v. Board of Adjustment of Borough of Haddon Heights, 45 A.2d 184, 133 N.J. Law 518—Peterson v. Mayor and Council of Borough of Palisades Park, 21 A.2d 777, 127 N.J. Law 190—Eastern Boulevard Corporation v. Willaredt, 14 A.2d 537, 125 N.J. Law 173, affirmed 17 A.2d 173, 125 N.J. Law 511—Eastern Boulevard Corporation v. Willaredt, 8 A.2d 638, 123 N.J. Law 269.

Iannella v. Piscataway Tp., 61 A.2d 687, 142 N.J. Eq. 763.

Robert L. Evans, Inc. v. Williams, 148 A. 206, 8 N.J. Misc. 16—Frank J. Durkin Lumber Co. v. Fitzsimmons, 143 A. 816, 6 N.J. Misc. 1102, reversed on other grounds 147 A. 555, 106 N.J. Law 183—Kitay v. Quigley, 142 A. 427, 6 N.J. Misc. 623—Kanter v. Board of Adjustment of City of East Orange, 142 A. 342, 6 N.J. Misc. 568—A. G. Construction Co. v. Scott, 136 A. 207, 5 N.J. Misc. 251, reversed on other grounds 141 A. 760, 104 N.J. Law 595.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115.

Penataquit Ass'n v. Furman, 129 N.Y.S.2d 221, 283 App.Div. 875—Brown v. Village of Owego, 21 N.Y. S.2d 905, 260 App.Div. 328, affirmed 30 N.E.2d 604, 284 N.Y. 655.

Hewlett v. Town of Hempstead, 133 N.Y.S.2d 690, 3 Misc.2d 945, affirmed 150 N.Y.S.2d 922, 1 A.D.2d 954—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App.Div. 891, appeal dismissed 124 N.E.2d 716, 308 N.Y. 736—Heimerle v. Village of Bronxville, 5 N.Y.S.2d 1002, 168 Misc. 788, affirmed 11 N.Y. S.2d 367, 256 App.Div. 993.

Hayes v. City of Yonkers, 143 N.Y.S.2d 699, affirmed 152 N.Y.S.2d 213, 1 A.D.2d 1031—North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 129 N.Y.S.2d 697, affirmed 153 N.Y.S.2d 579, 1 A.D.2d 1043—Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78, affirmed 125 N.Y.S.2d 112, 282 App.Div. 890, appeal denied 126 N.Y.S.2d 200, 282 App.Div. 958 appeal denied 117 N.E.2d 919, 306 N.Y. 746, affirmed 121 N.E.2d 517, 307 N.Y. 493—Hoyt v. Incorporated Village of Cedarhurst, 121 N.Y.S.2d 399, affirmed 113 N.Y.S.2d 922, 280 App. Div. 809—Suburban Tire & Battery Co. v. Village of Mamaroneck, 104 N.Y.S.2d 850, affirmed 113 N.Y.S.2d 449, 279 App.Div. 1084, affirmed 110 N.E.2d 894, 304 N.Y. 971—Taintor v. Hattermer, 72 N.Y.S.2d 537, modified on other grounds 75 N.Y.S.2d 473, 273 App.Div. 791, appeal denied 76 N.Y.S.2d 294, 273 App.Div. 812—Osborne v. Village of East Hampton, 61 N.Y.S.2d 142, affirmed 66 N.Y.S.2d 646, 271 App.Div. 837—People v. Leighton, 44 N.Y.S.2d 779.

Ohio.—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.

Pa.—Murphy v. Abington Tp., Com.

PL, 67 Montg.Co. 259.

Tex.—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224—City of Dallas v. Lively, Civ.App., 161 S.W.2d 895, error refused—City of University Park v. Hoblitzelle, Civ. App., 150 S.W.2d 169, error dismissed, judgment correct, appeal dismissed and certiorari denied Hoblitzelle v. City of University Park, 62 S.Ct. 806, 315 U.S. 781, 86 L.Ed. 1188—Lombardo v. City of Dallas, Civ.App., 47 S.W.2d 495, affirmed 73 S.W.2d 475, 124 Tex. 1.

Wis.—Geisenfeld v. Village of Shorewood, 287 N.W. 683, 232 Wis. 410—Rowland v. City of Racine, 271 N.W. 36, 38, 223 Wis. 488.

Elements of proof

One assailing validity of zoning ordinance as arbitrary and unreasonable as applied to particular property must prove by clear and affirmative evidence that ordinance constitutes arbitrary, capricious, and unreasonable municipal action, that there is no permissible interpretation which jus-

of such ordinance or regulation to his property,⁶⁴ that there is no permissible interpretation which justified its adoption as a reasonable exercise of the police power of the state,⁶⁵ or that the ordinance will not promote the safety, order, convenience, prosperity, and general welfare of the public.⁶⁶

Accordingly, in the absence of proof to the contrary, there is no duty on the municipality to sustain the reasonableness of the ordinance or regulation⁶⁷ or to prove that it is necessary or desirable.⁶⁸ The burden of proof is on the proponent of a change in a zoning ordinance,⁶⁹ and he has the burden of

tified its adoption or that it will not promote safety and general welfare of public.

Ill.—First Nat. Bank of Lake Forest v. Lake County, 180 N.E.2d 267, 7 Ill.2d 213.

64. Cal.—Lagiss v. Krantz, 232 P.2d 541, 104 C.A.2d 793.

Ill.—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 658, 350 U.S. 1013, 100 L.Ed. 873—*Corpus Juris Secundum* cited in *Mundelein Estates v. Village of Mundelein*, 99 N.E.2d 144, 146, 409 Ill. 291.

Mass.—Patkin v. City of Medford, 124 N.E.2d 249, 332 Mass. 754.

Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

N.Y.—Town of Mount Pleasant v. Van Tassell, 166 N.Y.S.2d 458, 7 Misc.2d 643.

Suburban Tire & Battery Co. v. Village of Mamaroneck, 104 N.Y.S.2d 850, affirmed 113 N.Y.S.2d 449, 279 App.Div. 1084, affirmed 110 N.E.2d 894, 304 N.Y. 971—*Taintor v. Hattemer*, 72 N.Y.S.2d 537, modified 75 N.Y.S.2d 473, 273 App.Div. 791, appeal denied 76 N.Y.S.2d 294, 273 App.Div. 812.

Wis.—Geisenfeld v. Village of Shorewood, 287 N.W. 683, 232 Wis. 410.

"Parties seeking to avoid the effect of a zoning ordinance on the grounds relied upon in this case must show that it is unreasonable in respect to their property, and cannot predicate and sustain their contention on the fact that the ordinance may be unreasonable or discriminatory as to the property of others. Each case, in which the validity of such restrictions is challenged, must be determined on the facts that are directly applicable to the property of the parties complaining."

Wis.—Rowland v. City of Racine, 271 N.W. 36, 38, 223 Wis. 488.

Authorization of variance

Owner of triangular lot in a residential district, attacking validity of zoning ordinance on ground that it was unreasonable, confiscatory, and unconstitutional as applied to his property in that by reason of physical characteristics of such property it could not be used for residential purposes within the limitations imposed by ordinance, had the burden of showing that ordinance did not authorize a variance of general restrictions to permit use of his property for a purpose to which it was

reasonably adapted or that such variance had been refused.

N.Y.—Town of Cortlandt v. McNally, 126 N.Y.S.2d 702, 282 App.Div. 1072, appeal denied 128 N.Y.S.2d 597, 283 App.Div. 800.

65. Ill.—Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill.2d 200—*Corpus Juris Secundum* cited in *Mundelein Estates v. Village of Mundelein*, 99 N.E.2d 144, 146, 409 Ill. 291.

Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115—*Wulfsohn v. Burden*, 150 N.E. 120, 241 N.Y. 288, 43 A.L.R. 651.

Congregation Beth Israel West Side Jewish Center v. Board of Estimate of City of New York, 139 N.Y.S.2d 645, 285 App.Div. 629—*City of Albany v. Anthony*, 28 N.Y.S.2d 963, 262 App.Div. 401.

Fieldston Garden Apartments v. City of New York, 145 N.Y.S.2d 907, 7 Misc.2d 147, affirmed 163 N.Y.S.2d 402, 3 A.D.2d 903—*Corning v. Town of Ontario*, 121 N.Y.S.2d 288, 204 Misc. 38.

Nehrbas v. Incorporated Village of Lloyd Harbor, 147 N.Y.S.2d 738, modified on other grounds 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed, 140 N.E.2d 241, 2 N.Y.2d 190, 159 N.Y.S.2d 145—*Hermann v. Incorporated Village of East Hills*, 104 N.Y.S.2d 592, affirmed 109 N.Y.S.2d 182, 279 App.Div. 753, appeal denied 110 N.Y.S.2d 283, 279 App.Div. 799—*People v. Calvar Corp.*, 69 N.Y.S.2d 272, affirmed 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376—*Post Brick Co. v. Thompson*, 68 N.Y.S.2d 159.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.

Amendment

In action for judgment declaring that amendment to village zoning ordinance which converted the area in which plaintiffs' property was located from mercantile to residential use was unconstitutional, plaintiffs had burden of establishing charge that the amendment was not justified under the police power of state by any reasonable interpretation of the facts.

N.Y.—Shepard v. Village of Skaneateles, 89 N.E.2d 619, 300 N.Y. 115.

66. U.S.—Dennis v. Village of Tonka Bay, C.C.A.Minn., 156 F.2d 672.

City of Anchorage, Alaska, v. Paulk, D.C.Alaska, 113 F.Supp. 698.

Ill.—La Salle Nat. Bank v. City of Chicago, 126 N.E.2d 643, 6 Ill.2d 22—*Hannifin Corp. v. City of Berwyn*, 115 N.E.2d 315, 1 Ill.2d 28—*Corpus Juris Secundum* cited in *Mundelein Estates v. Village of Mundelein*, 99 N.E.2d 144, 146, 409 Ill. 291.

Mass.—Kaplan v. City of Boston, 113 N.E.2d 856, 330 Mass. 381.

Mich.—Highland Oil Corp. v. City of Lathrup Village, 85 N.W.2d 185, 349 Mich. 650—*Basse v. City of Huntington Woods*, 74 N.W.2d 897, 344 Mich. 701—*Anchor Steel & Conveyor Co. v. City of Dearborn*, 70 N.W.2d 753, 342 Mich. 361—*Hammond v. Kephart*, 50 N.W.2d 155, 331 Mich. 551—*Northwood Properties Co. v. Perkins*, 39 N.W.2d 25, 325 Mich. 419.

Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404—*Appeal of Parker*, 197 S.E. 706, 214 N.C. 51, appeal dismissed *Parker v. City of Greensboro*, 59 S.Ct. 150, 305 U.S. 568, 83 L.Ed. 358.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

67. Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

N.J.—Eastern Boulevard Corporation v. Willaredt, 14 A.2d 537, 125 N.J. Law 173, affirmed 17 A.2d 173, 125 N.J. Law 511—*Eastern Boulevard Corporation v. Willaredt*, 8 A.2d 688, 123 N.J. Law 269.

68. Miss.—*Corpus Juris Secundum* quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

Va.—West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 169 Va. 271, appeal dismissed 58 S.Ct. 369, 302 U.S. 658, 82 L.Ed. 508, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.

69. Conn.—Chouinard v. Zoning Commission of Town of East Hartford, 97 A.2d 562, 139 Conn. 728.

Md.—Board of County Com'rs of Talbot County v. Troxell, 132 A.2d 845, 214 Md. 135.

N.J.—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324.

proving a public need for the amendment in question.⁷⁰

Nonconforming use. A person who claims the right to use property in violation of a zoning ordinance as a nonconforming use antedating adoption of the ordinance has the burden of establishing such nonconforming use,⁷¹ and that the prior use of the property was legal and not unlawful.⁷² An owner of property denied a certificate for an existing nonconforming use must meet the burden of establishing that the board acted arbitrarily, capriciously, and unreasonably in refusing such certificate.⁷³

b. Acts or Decisions of Boards or Officers

Generally, the petitioner for judicial relief from the

acts or decisions of zoning boards or officers has the burden of showing such facts as invalidate the action of the board or officer.

Generally, the burden of showing such facts as invalidate the action of the zoning board or commission is on the petitioner for judicial relief;⁷⁴ but under some statutes, the commission has the burden of establishing the validity of its orders and regulations.⁷⁵ Accordingly, on review of the decision of building and zoning authorities in connection with the construction and operation of motor vehicle service stations and garages, the burden of proof is on the party seeking relief.⁷⁶

As to permits and variances. A person assailing the granting of a permit under the building and zoning laws ordinarily bears the burden of proof

70. *Miss.—Corpus Juris Secundum*, quoted in *W. L. Holcomb, Inc. v. City of Clarksdale*, 65 So.2d 281, 284, 217 Miss. 892.

N.H.—*Scott v. Davis*, 45 A.2d 654, 94 N.H. 35.

71. *Mass.—Colahufalo v. Public Bldgs. Com'r of Newton*, 127 N.E. 2d 561, 332 Mass. 748.

Pa.—*Appeal of Continental Motor Sales, Com.Pl.*, 31 North.Co. 250.

Policy

Rule that one who claims nonconforming use is compelled to establish his claim comports with policy of law not to favor such use.

N.J.—*Heagen v. Borough of Allendale*, 127 A.2d 181, 42 N.J.Super. 472.

Enjoyment of permit

On appeal to city board of adjustment from order of building commissioner granting a permit to alter for use as a funeral home premises subsequently rezoned as residential property, permittee had the burden of proving affirmative defense that he had acquired a vested right to continued enjoyment of permit by making and contracting for substantial expenditures in reliance thereon and had established a nonconforming use prior to effective date of rezoning ordinance.

Mo.—*Veal v. Leimkuehler*, App., 249 S.W.2d 491, certiorari denied 73 S. Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

Abandonment or discontinuance of use

Pa.—*Feagley v. Coho*, Com.Pl., 53 Lanc.Rev. 29.

72. *Ga.—Troutman v. Aiken*, 96 S. E.2d 585, 213 Ga. 55.

73. *N.Y.—Joynt v. Zoning Bd. of Appeals of Town of Cicero*, 171 N. Y.S.2d 3, 9 Misc.2d 762.

74. *Conn.—Village Builders, Inc. v. Town Plan and Zoning Commission of the Town of Farmington*,

140 A.2d 477, 145 Conn. 218—*Abramson v. Zoning Bd. of Appeals of Town of Westport*, 120 A.2d 827, 143 Conn. 211—*Talmadge v. Board of Zoning Appeals of City of New Haven*, 109 A.2d 253, 141 Conn. 639—*Hillis v. Zoning Commission of Town of Newington*, 96 A.2d 212, 139 Conn. 603—*Perdue v. Zoning Board of Appeals of City of Norwalk*, 171 A. 26, 118 Conn. 174. *Delmar v. Planning and Zoning Bd. of Town of Milford*, 109 A.2d 604, 19 Conn.Sup. 21.

Kan.—*Konitz v. Board of County Com'rs of Johnson County*, 303 P. 2d 180, 180 Kan. 230.

N.H.—*City of Keene v. Parenteau*, 112 A.2d 667, 99 N.H. 415.

N.Y.—*Application of Graham*, 165 N. Y.S.2d 154, 7 Misc.2d 34.

Pa.—*Staples v. McShain*, 70 Pa.Dist. & Co. 556.

Application of Ericson Memorial Studio, 29 Eric Co. 279—*Appeal of Weldon Bocci Club*, Com.Pl., 60 Montg.Co. 277—*Appeal by Dormont Borough, Co.*, 47 Mun.L.R. 232, 103 Pittsb.Leg.J. 423, affirmed 119 A. 2d 827, 180 Pa.Super. 550.

R.I.—*Perrier v. Board of Appeals of City of Pawtucket*, 134 A.2d 141.

Approval of rezoning

In action by property owners to set aside order of board of county commissioners approving rezoning recommendation of township zoning board, burden was on property owners to show that board acted arbitrarily, capriciously, or unreasonably.

Kan.—*Hillebrand v. Board of County Com'rs of Johnson Co.*, 304 P.2d 517, 180 Kan. 348.

75. *Ky.—Boyd v. Louisville & Jefferson County Planning & Zoning Commission*, 230 S.W.2d 444, 313 Ky. 196.

Order to show cause

Under statute providing for appeals from orders of county zoning

commission by filing of statement of appeal setting forth decision of commission and reasons of appeal and requiring that statement pray that an order to show cause issue against, and be served on, commission and providing that hearings in circuit court shall be de novo and heard by judge, burden is on zoning commission to show in court that public welfare requires the subordination of public rights and that board has constitutionally exercised police power granted in accordance with statutory authority.

Ky.—*Boyd v. Louisville & Jefferson County Planning & Zoning Commission*, 230 S.W.2d 444, 313 Ky. 196.

76. *Conn.—Gulf Oil Corp. v. Board of Selectmen of Town of Brookfield*, 127 A.2d 48, 144 Conn. 61—*Executive Television Corp. v. Zoning Bd. of Appeals of City of Danbury*, 85 A.2d 904, 138 Conn. 452—*Perdue v. Zoning Board of Appeals of City of Norwalk*, 171 A. 26, 118 Conn. 174.

Md.—*Mayor and Council of City of Baltimore v. Biermann*, 50 A.2d 804, 187 Md. 514—*Ellicott v. Mayor and City Council of Baltimore*, 23 A.2d 649, 180 Md. 176.

N.H.—*Jadda v. Manchester*, 131 A. 2d 803, 100 N.H. 150.

N.J.—*Atlantic Refining Co. v. Township of Landis*, 197 A. 722, 120 N.J. Law 60.

Essex Inv. Co. v. Board of Com'rs of City of Newark, 183 A. 478, 14 N.J.Misc. 181—*Long v. Scott*, 133 A. 767, 4 N.J.Misc. 587.

N.Y.—*Cunningham v. Planning Bd.*, 164 N.Y.S.2d 601, 4 A.D.2d 313.

Larson v. Howland, 124 N.Y.S. 2d 754.

Pa.—*Appeal of Atlantic Refining Co.*, Com.Pl., 66 York Leg.Rec. 81.

Tex.—*Montgomery v. City of Dallas*, Civ.App., 245 S.W.2d 753, error refused no reversible error.

to show that the board or official acted improperly in granting the permit.⁷⁷ Likewise, the burden of proving abuse of discretion in denying a permit or revoking one ordinarily is on the applicant.⁷⁸ Where, however, the applicant is entitled to a permit under the ordinance except under specified circumstances, and the board's denial or revocation of the permit is based on such exception, the burden is on the board to establish its applicability.⁷⁹ So, in a mandamus action to compel building authorities to issue a building permit, claims of defendants which were excuses for failure to issue the permits impose the burden of proof on the defendants.⁸⁰

Property owners seeking review by the courts of the decision of a zoning board or officer with re-

spect to the granting or denial of a variance or exception have the burden of establishing that the action of the board or officer was incorrect.⁸¹ So a person seeking reversal of a decision of the board denying a variance has the burden of showing that the applicable provision of the ordinance is not reasonable and justifiable under the police power of the state or that the determination of the board was arbitrary or contrary to law.⁸² Where the ordinance empowered the board to grant variances either where there were practical difficulties or unnecessary hardships or where the effect of application of the ordinance was arbitrary, and plaintiff appealed the board's denial of a variance only on the ground of exceptional difficulty and unusual hardship, the court did not err in holding that

77. Cal.—Wheeler v. Gregg, 203 P. 2d 37, 90 C.A.2d 348.

Conn.—Perdue v. Zoning Board of Appeals of City of Norwalk, 171 A. 26, 118 Conn. 174.

N.J.—Mingle v. Board of Adjustment of City of Orange, 142 A. 367, 6 N.J.Misc. 595.

Residential zone

Persons contesting issuance of building permit for business use on ground that the property involved was zoned as residential had burden of establishing that the property was so zoned.

N.Y.—Adams v. Town of West Seneca, 117 N.Y.S.2d 235, 280 App.Div. 1038, appeal denied 119 N.Y.S.2d 591, 281 App.Div. 942.

78. Conn.—Miller v. Zoning Bd. of Appeals of City of Hartford, 87 A. 2d 808, 138 Conn. 610—De Felice v. Zoning Board of Appeals of Town of East Haven, 32 A.2d 635, 130 Conn. 156, 147 A.L.R. 161.

Ky.—Daugherty v. City of Lexington, 249 S.W.2d 755.

N.J.—Wharton Sand & Stone Co. v. Montville Tp., 120 A.2d 858, 39 N.J. Super. 278.

Lowenthal v. Bratt, 53 A.2d 306, 135 N.J.Law 572.

Kitay v. Quigley, 142 A. 427, 6 N.J.Misc. 623.

N.Y.—Fox v. Adams, 134 N.Y.S.2d 534.

Pa.—Appeal of Continental Motor Sales, Com.Pl., 31 North.Co. 250.

79. N.Y.—Jeffer v. Hofheins, 70 N.Y.S.2d 808, 190 Misc. 99.

Discontinuance of nonconforming use
Board of adjustment revoking certificate to maintain stable had burden to prove use thereof had been discontinued.

Pa.—Appeal of Haller Baking Co., 145 A. 77, 295 Pa. 257.

80. Cal.—Munns v. Stenman, 314 P. 2d 67, 152 C.A.2d 543.

Special defenses

Conn.—State ex rel. Capurso v. Flis, 133 A.2d 901, 144 Conn. 473.

81. Conn.—Goldreyer v. Board of Zoning Appeals of City of Bridgeport, 136 A.2d 789, 144 Conn. 641—Devaney v. Board of Zoning Appeals of City of New Haven, 122 A. 2d 303, 143 Conn. 322—Culinary Institute of America v. Board of Zoning Appeals of City of New Haven, 121 A.2d 637, 143 Conn. 257—Libby v. Board of Zoning Appeals of City of New Haven, 118 A.2d 894, 143 Conn. 46—McMahon v. Board of Zoning Appeals of City of New Haven, 101 A.2d 284, 140 Conn. 433.

Ga.—Lewenstein v. Curry, 42 S.E.2d 158, 75 Ga.App. 22.

Ill.—Baird v. Board of Zoning Appeals of City of Kankakee, 106 N.E.2d 843, 347 Ill.App. 158.

Md.—Robertson v. County Board of Appeals, 122 A.2d 751, 210 Md. 190.

Mich.—Jones v. De Vries, 40 N.W.2d 317, 326 Mich. 126.

N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94—Rexon v. Board of Adjustment of Borough of Haddonfield, 89 A.2d 233, 10 N.J. 1. Bierce v. Gross, 135 A.2d 561, 47 N.J. Super. 148—Ardolino v. Board of Adjustment of Borough of Florham Park, Morris County, 125 A.2d 543, 41 N.J. Super. 582—James v. Board of Adjustment of Town of Montclair, 122 A.2d 660, 40 N.J. Super. 206—Mistretta v. City of Newark, 109 A.2d 677, 33 N.J. Super. 205—Herman v. Board of Adjustment of Parsippany-Troy Hills Tp., Morris County, 102 A.2d 73, 29 N.J. Super. 164—Shipman v. Town of Montclair, 84 A.2d 652, 16 N.J. Super. 365—Brandt v. Zoning Bd. of Adjustment of Mount Holly Tp., 84 A.2d 18, 16 N.J. Super. 113—Marrocco v. Board of Adjustment of City of Passaic, 68 A.2d 470, 5 N.

J. Super. 94—Crompton & Co. v. Borough of Sea Girt, 63 A.2d 834, 1 N.J. Super. 607.

N.Y.—People ex rel. Polcini v. Scofield, 108 N.Y.S.2d 778, 279 App. Div. 762.

Eckerman v. Murdock, 91 N.Y.S. 2d 637, 195 Misc. 280, affirmed 94 N.Y.S.2d 557, 276 App. Div. 927.

Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S.2d 358.

Pa.—Baronoff v. Zoning Bd. of Adjustment of Lower Makefield Tp., 122 A.2d 65, 385 Pa. 110—Appeal of Lindquist, 73 A.2d 378, 364 Pa. 561.

Phillips v. Zoning Bd. of Adjustment, Com.Pl., 1 Bucks Co. 25.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

Va.—Wicker Apartments, Inc. v. City of Richmond, 99 S.E.2d 656, 199 Va. 263.

On review by certiorari, burden of showing abuse of discretion by board is on petitioner.

N.J.—Kindergan v. Board of Adjustment of Borough of River Edge, 59 A.2d 857, 137 N.J. Law 296—Krilov v. Board of Adjustment of City of Newark, 57 A.2d 659, 137 N.J. Law 39—Saraydar v. Board of Com'rs of City of Newark, 36 A.2d 289, 131 N.J. Law 290.

R.I.—Guenther v. Zoning Bd. of Review of City of Warwick, 125 A.2d 214—Lawson v. Zoning Bd. of Review of Town of North Providence, 125 A.2d 199—Nutini v. Zoning Bd. of Review of City of Cranston, 82 A.2d 883, 78 R.I. 421—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 319—Lough v. Zoning Bd. of Review of Town of North Providence, 60 A.2d 839, 74 R.I. 366—Costantino v. Zoning Bd. of Review of City of Cranston, 60 A.2d 478, 74 R.I. 316.

82. N.Y.—Stevens v. Connor, 120 N.Y.S.2d 345.

plaintiff must prove practical difficulties or unnecessary hardship.⁸³

§ 364. — Admissibility

Evidence is admissible with respect to the reasonableness and fairness of a zoning ordinance, but evidence relating to property other than that of the person objecting is inadmissible.

83. Conn.—Talmadge v. Board of Zoning Appeals of City of New Haven, 109 A.2d 253, 141 Conn. 639.

84. Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

Boundary lines

Location of uncertain boundary lines between districts zoned for different uses is a question of fact and may be proved by every kind of evidence admissible to establish any other controverted fact.

Va.—Claffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41.

85. Conn.—Heady v. Zoning Bd. of Appeals for Town of Milford, 94 A.2d 789, 139 Conn. 463.

D.C.—Garrity v. District of Columbia, 86 F.2d 207, 66 App.D.C. 256.

Ill.—Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166.

N.H.—Gellinas v. City of Portsmouth, 85 A.2d 896, 97 N.H. 248.

N.Y.—Cordts v. Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936, second case, 241 App. Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

Wyo.—Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202.

Power of court on review to try case de novo or receive additional evidence see supra § 331 b.

Amendment to minutes

In proceeding on appeal from action of zoning board in granting, on its own view of premises, request for exception to sell beer, amendment which board made to minutes after appeal was taken and which disclosed reason for conclusion was admissible.

Conn.—Illavati v. Board of Adjustment of City of New Britain, 116 A.2d 504, 142 Conn. 659.

Testimony of commissioners

On petition for mandamus to require town commissioners to issue building permit for filling station, testimony of commissioners concerning reasons for denying application for permit and cross-examination of commissioners was competent on issue whether reasons for denial were arbitrary and unlawful.

Md.—Benner v. Tribblitt, 57 A.2d 346, 190 Md. 6.

Improvements

(1) On writ of certiorari to review action of board of adjustment in approving issuance of building permit by city building inspector, trial court

did not err in receiving testimony as to value of improvements completed at time of hearing before court, where building permit was legally issued.

Iowa.—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356.

(2) In action by landowners against county based on theory that amendatory zoning ordinance, which reclassified landowners' land from light industrial to one-family residence, confiscated landowners' property, plan for gasoline service station, which was prepared by petroleum corporation which had purchased part of landowners' property, was admissible to show an invalid attempt by county to interfere with rights which had vested under permit issued by county building inspector to both landowners and petroleum corporation to construct service station.

Cal.—Griffin v. Marin County, App., 321 P.2d 148.

(3) In suit for determination of validity of amending ordinance zoning specified realty to permit erection of multiple dwellings and removing restriction against erection of multiple dwellings, chancellor properly heard testimony from owner of realty involved, although not bearing directly on question of validity of amendatory ordinance, as to owner's contemplated building plans and owner's intention not to use his rights under amendatory ordinance to their fullest extent but, on the contrary, to provide for a population of fewer families than ordinance without amendment would have permitted.

Pa.—Gratton v. Conte, 73 A.2d 381, 364 Pa. 578.

Abuse of discretion

In proceeding to review decision of board of zoning appeals which reversed decision of buildings engineer disallowing application to permit continued use of premises for junk shop which was a nonconforming use, wherein petitioner claimed that nonconforming use had been abandoned or changed to use of a higher classification, exclusion of petitioner's proffers of testimony of witnesses who were discovered as result of search subsequent to hearing before the board was an abuse of discretion by trial court with respect to hearing additional evidence.

Md.—Dorman v. Mayor and City

In proceedings for the judicial review of, or relief from, zoning regulations or decisions, general rules as to the admissibility and reception of evidence apply,⁸⁴ and while competent and relevant evidence is admissible,⁸⁵ evidence which is incompetent or irrelevant to the issues involved is inadmissible.⁸⁶ The courts in trying a zoning case will

Council of Baltimore, 51 A.2d 658, 187 Md. 678.

86. Cal.—Griffin v. Marin County, App., 321 P.2d 148—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277—Kort v. City of Los Angeles, 127 P.2d 66, 52 C.A.2d 804.

Conn.—Hertzsch v. Zoning Bd. of Appeals of Town of Bloomfield, 79 A.2d 767, 137 Conn. 599.

Del.—Klaw v. Pau-Mar Const. Co., 135 A.2d 123.

D.C.—Garrity v. District of Columbia, 86 F.2d 207, 66 App.D.C. 256.

N.Y.—Linn v. Town of Hempstead, 170 N.Y.S.2d 217, 10 Misc.2d 774.

Wis.—State ex rel. Morehouse v. Hunt, 291 N.W. 745, 235 Wis. 358.

Copy of minutes

In mandamus by property owner against city to compel the rezoning of his property for commercial use, exclusion of unauthenticated copy of minutes of planning commission, which document was indefinite and inconclusive, was not error.

Cal.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 C.A.2d 277.

Decision of board of appeal authorizing variance of zoning ordinance by permitting dwelling house in residence A district to be used for nursing home was not evidence that there were conditions especially affecting house but not affecting zoning district, or that owing to such conditions literal enforcement would involve substantial hardship to owner of house.

Mass.—Reynolds v. Board of Appeal of Springfield, 140 N.E.2d 491, 335 Mass. 464.

Expenditures and acts of landowners

In proceeding for an adjudication as to validity of a proposed amendment to town's zoning bylaw, exclusion of evidence of expenditures and acts of landowners in reliance on amendment was proper, since such evidence did not tend to show the existence of a nonconforming use.

Mass.—Fish v. Town of Canton, 77 N.E.2d 231, 322 Mass. 219.

Informal advertisement

In proceeding for an adjudication as to validity of a proposed amendment to town's zoning bylaw, which had been adopted without compliance with statutes relating to procedure for amendment, evidence of informal advertisement in local newspaper and

ordinarily exclude evidence of private restrictions on the ground of immateriality.⁸⁷ Evidence is admissible with respect to the reasonableness and fairness of an ordinance passed pursuant to a law granting general authority to enact zoning ordinances;⁸⁸ but testimony failing to show abuse of legislative discretion in adopting a zoning ordinance may be inadmissible.⁸⁹

Ordinarily, evidence relating to property other than that of the person objecting to the ordinance is inadmissible;⁹⁰ and on review of the denial of a variance, evidence as to the granting of variances to the owners of other property in similar areas is not material and relevant.⁹¹ Where it is claimed that the character of a given locality has been changed through the gradual growth or development of a street or district, it is proper to allow a wide latitude of proof in order that the court may be as fully informed as possible as to the extent

and significance of such changed conditions.⁹² An inspection by the court of the property in issue may be unnecessary.⁹³

§ 365. — Weight and Sufficiency

- a. In general
- b. As to particular matters or proceedings

a. In General

In proceedings involving judicial supervision and review of zoning ordinances, regulations, and administrative determinations, the evidence must be sufficient to support the judgment of the court; and the invalidity or unreasonableness of a zoning ordinance must be clearly shown.

General rules as to the weight and sufficiency of the evidence have been applied in proceedings involving judicial supervision and review of zoning ordinances, regulations, and administrative determinations.⁹⁴ The evidence must be sufficient to

of announcement by sound truck of possible reconsideration of zoning question at adjourned town meeting, was properly excluded, since failure to comply with statutes relating to procedure for amendment of zoning bylaws could not be cured in such manner.

Mass.—*Fish v. Town of Canton*, supra.

Petition

In suit to compel issuance of a building permit, refusal to admit into evidence a petition by about two hundred residents in neighborhood requesting city council to approve erection of building on premises was not error.

Ill.—*Dunlap v. City of Woodstock*, 91 N.E.2d 434, 405 Ill. 410.

Records

Where records of zoning board of appeals were neither part of the record of zoning commission of city nor found by court to be necessary for equitable disposition of appeal from action of commission in denying application for change of zone, records were not admissible in evidence.

Conn.—*Wolfpit-Villa Crest Ass'n v. Zoning Commission of City of Norwalk*, 135 A.2d 732, 144 Conn. 560.

Unsworn statement of attorney for property owner urging invalidity of zoning ordinance because of failure to publish use map without which ordinance was meaningless was not evidence, and could not be regarded as evidence as to the alleged defective publication.

Ill.—*Rock Island Metal Foundry v. City of Rock Island*, 111 N.E.2d 499, 414 Ill. 436.

Depositions

Where village board of adjustment denied petition to use land in village

as a noncommercial airport, depositions taken after allowance of writ of certiorari to reverse action of board could not be used to prove that denial was arbitrary.

N.J.—*Ridgewood Air Club v. Board of Adjustment of Village of Ridgewood*, Bergen County, 55 A.2d 100, 136 N.J.Law 222.

87. Pa.—*Appeal of Michener*, 115 A.2d 367, 382 Pa. 401.

Celia v. Schaefer, Com.Pl., 43 Del. Co. 23.

Covenants

Where unsuccessful applicant for store building permit was denied zoning variance, because deeds to the property involved contained covenants prohibiting store buildings, fact that there were building restrictions in the deeds of the particular property was irrelevant as to the question before the court of whether a variance should have been granted under the zoning ordinance, since such building restrictions were enforceable only by the grantors of the property, their representatives, heirs and assigns, who were not before the court.

Pa.—*Appeal of Michener*, 115 A.2d 367, 382 Pa. 401.

88. N.Y.—*People v. Leighton*, 44 N.Y.S.2d 779.

89. Tenn.—*Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 155 Tenn. 70.

90. Ohio.—*State ex rel. Cook v. Turgeon*, 77 N.E.2d 283, 84 Ohio App. 287.

91. N.J.—*Beck v. Board of Adjustment of City of East Orange*, Essex County, 83 A.2d 720, 15 N.J.Super. 554.

Garage and repair shop

Evidence of other variances granted by zoning board of adjustment in the same and other residential districts had no bearing on legality of certificates of variance for erection and occupancy of garage and repair shop in a residential district and should not have been received in proceeding to review revocation of permits issued pursuant to such certificates, since whether such other variances were properly allowed would necessarily depend on the circumstances in each case.

Pa.—*Ventresca v. Exley*, 56 A.2d 210, 358 Pa. 98.

92. Cal.—*Kort v. City of Los Angeles*, 127 P.2d 66, 52 C.A.2d 804.

93. N.J.—*V. F. Zahodiakin Engineering Corp. v. Zoning Ordinance Bd. of Adjustment of City of Summit*, 82 A.2d 493, 14 N.J.Super. 537, affirmed 86 A.2d 127, 8 N.J. 386.

94. Ill.—*Dube v. Allman*, 77 N.E.2d 855, 333 Ill.App. 538.

Md.—*Northwest Merchants Terminal v. O'Rourke*, 60 A.2d 743, 191 Md. 171.

Waiver of right to hearing

Contention that if village board of appeals were allowed an answer to property owners' petition alleging denial of right to full hearing on zoning matter, board could prove petitioners had waived such right, was negated by documentary evidence and evidentiary facts that petitioners were denied opportunity for full and complete hearing.

N.Y.—*Horan v. Board of Appeals, Village of Scarsdale*, 166 N.Y.S.2d 463, 8 Misc.2d 663.

Probative value of particular testimony

Ill.—*Brotherhood of R. R. Signalmen*

support the judgment of the court,⁹⁵ and relief will be denied where the evidence is insufficient to warrant it.⁹⁶ The party seeking judicial relief must establish his case by a fair preponderance of the evidence.⁹⁷ Accordingly, where the validity of a zoning ordinance or regulation is challenged, invalidity must be shown by clear and satisfactory evidence,⁹⁸ and unreasonableness must be affirmatively and clearly shown.⁹⁹ Similarly, evidence to justify the court in making a change in the zoning classification should be clear and satisfactory;¹ and the evidence must be clear and convincing to warrant the court in reversing the decision of a zoning board or commission.²

Evidence of what is done by surrounding towns in the field of zoning is not decisive that the imposition of a particular restriction is reasonable and proper,³ but it is persuasive that they have deter-

mined that the public interest was best served by the adoption of restrictions identical, or nearly identical, with those under consideration.⁴ Evidence of acts and expenditures in reliance on an invalid zoning law has been held not to tend to show the existence of a nonconforming use of property.⁵ The rule that expert opinions are not conclusive but that their weight is for the consideration of the trier of facts has been applied to opinions as to the benefits of zoning ordinances.⁶

Mere conflict in testimony as to the highest and best use of property, the impact of a proposed use on areas involved, or its effect on property values does not make irrebuttable the presumption that an ordinance is valid, and a difference of opinion does not render the evidence of one party unbelievable, or require a finding that the reasonableness of an ordinance is debatable.⁷

of *America v. Zoning Bd. of Appeals of City of Chicago*, 108 N.E. 2d 43, 348 Ill.App. 106.

95. Conn.—*Celentano v. Zoning Bd. of Appeals of Hartford*, 60 A.2d 510, 135 Conn. 16.

96. Ill.—*Neef v. City of Springfield*, 43 N.E.2d 947, 380 Ill. 275.

Enforcement of zoning bylaw will not be refused unless it is shown beyond reasonable doubt that it conflicts with the constitution or enabling statute.

Mass.—*Calres v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589.

97. N.J.—*Anderson v. Mayor and Council of Town of Bloomfield*, 65 A.2d 270, 2 N.J.Super. 605.

98. Ill.—*Skryszak v. Village of Mt. Prospect*, 148 N.E.2d 721, 13 Ill. 2d 329—*Bauske v. City of Des Plaines*, 148 N.E.2d 584, 13 Ill.2d 169.

Md.—*Eckes v. Board of Zoning Appeals of Baltimore County*, 121 A. 2d 249, 209 Md. 432—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 72 certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792—*American Oil Co. v. Miller*, 102 A.2d 727, 204 Md. 32—*Zang & Sons, Builders, Inc. v. Taylor*, 102 A.2d 723, 203 Md. 628—*Wakefield v. Kraft*, 96 A.2d 27, 202 Md. 136.

Mich.—*Hammond v. Kephart*, 50 N.W.2d 155, 331 Mich. 551—*Northwood Properties Co. v. Perkins*, 39 N.W.2d 25, 325 Mich. 419.

Ohio.—*State ex rel. Cook v. Turgeon*, App. 77 N.E.2d 283.

Wis.—*Geisenfeld v. Village of Shorewood*, 287 N.W. 683, 232 Wis. 410—*State ex rel. Newman v. Pagels*, 250 N.W. 430, 212 Wis. 475.

Evidence held sufficient

N.J.—*West Essex Building & Loan Ass'n v. Borough of Caldwell*, 171 A. 671, 112 N.J.Law 466, affirmed 174 A. 526, 113 N.J.Law 398.

N.Y.—*Devore v. Blake*, 35 N.E.2d 499, 285 N.Y. 826—*Arverne Bay Const. Co. v. Thatcher*, 15 N.E.2d 587, 278 N.Y. 222, 117 A.L.R. 1110.

Other statements of rule

(1) Proof, in order to be sufficient, must do more than make the invalidity of the ordinance doubtful.

Or.—*Shaffner v. City of Salem*, 268 P.2d 599, 201 Or. 45.

(2) Every presumption is in favor of a zoning ordinance, and its enforcement will not be refused unless it is shown beyond reasonable doubt that it conflicts with constitution or enabling statute.

Mass.—*Burnham v. Board of Appeals of Gloucester*, 128 N.E.2d 772, 333 Mass. 114—*Calres v. Building Com'r of Hingham*, 83 N.E.2d 550, 323 Mass. 589.

99. Ga.—*Humthlett v. Reeves*, 90 S.E.2d 14, 212 Ga. 8.

Ill.—*Du Page County v. Henderson*, 83 N.E.2d 720, 402 Ill. 179—*Quillci v. Village of Mount Prospect*, 78 N.E.2d 240, 399 Ill. 418—*City of Springfield v. Vancil*, 76 N.E.2d 471, 398 Ill. 575—*Zadworny v. City of Chicago*, 44 N.E.2d 426, 380 Ill. 470—*Behnke v. President and Board of Trustees of Village of Brookfield*, 9 N.E.2d 232, 366 Ill. 516—*Rothschild v. Hussey*, 5 N.E.2d 92, 364 Ill. 557.

City of Springfield v. Kable, 29 N.E.2d 675, 306 Ill.App. 616.

Md.—*Kroen v. Board of Zoning Appeals of Baltimore County*, 121 A. 2d 181, 209 Md. 420—*Walker v. Board of County Com'rs of Talbot County*, 116 A.2d 393, 208 Md. 72,

certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

N.J.—*Fischer v. Bedminster Tp.*, 93 A.2d 378, 11 N.J. 194.

N.Y.—*Linn v. Town of Hempstead*, 170 N.Y.S.2d 217, 10 Misc.2d 774.

Tex.—*Connor v. City of University Park*, Civ.App., 142 S.W.2d 706, error refused.

1. Ohio.—*Murdock v. City of Norwood*, Com.Pl., 67 N.E.2d 867.

2. N.J.—*Interboro Trucking Co. v. Board of Adjustment of City of Perth Amboy*, 53 A.2d 213, 135 N.J.Law 520.

Permit

Where, in proceeding to review determination denying building permit to erect one-family residence on substandard lot, issue whether the lot had remained held in single and separate ownership from date prior to imposition of zoning ordinance provisions making such lot substandard is raised, it should be met by production of deeds, by certified title search which includes all the contiguous properties, or by other competent proof.

N.Y.—*Long Island Land Research Bureau, Inc. v. Young*, 159 N.Y.S.2d 414, 7 Misc.2d 469.

3. Mass.—*Simon v. Town of Needham*, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

4. Mass.—*Simon v. Town of Needham*, supra.

5. Mass.—*Fish v. Town of Canton*, 77 N.E.2d 231, 322 Mass. 219.

6. Ill.—*State Bank & Trust Co. v. Village of Wilmette*, 193 N.E. 131, 358 Ill. 311, 96 A.L.R. 1327—*Forbes v. Hubbard*, 180 N.E. 767, 348 Ill. 166.

7. Ill.—*Bauske v. City of Des Plaines*, 148 N.E.2d 584, 13 Ill.2d 169.

b. As to Particular Matters or Proceedings

Decisions have adjudicated the sufficiency of evidence to establish particular matters arising on judicial review of zoning cases, as in suits for a declaratory judgment or to restrain the enforcement of zoning ordinances and regulations.

Numerous decisions have adjudicated the sufficiency of evidence to establish particular matters arising on judicial review of zoning cases,⁸ as in suits for a declaratory judgment,⁹ or to restrain the en-

8. Cal.—Donovan v. City of Santa Monica, App., 199 P.2d 51, 88 C.A.2d 386.

Del.—In re Auditorium, Inc., 84 A.2d 593, 7 Terry 30, remanded on other grounds Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Fla.—Frink v. Orleans Corp., 32 So.2d 425, 159 Fla. 646.

Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—Mack v. County of Cook, 142 N.E.2d 785, 11 Ill.2d 310—Forbes v. Hubbard, 180 N.E. 767, 348 Ill. 166.

Moran v. Zoning Bd. of Appeals of City of Chicago, 149 N.E.2d 480, 17 Ill.App.2d 280.

N.J.—Dolan v. De Capua, 109 A.2d 615, 16 N.J. 599.

Springfield Tp. v. Bensley, 88 A.2d 271, 19 N.J.Super. 147.

N.Y.—Jewish Mental Health Soc. v. Village of Hastings, 198 N.E. 30, 268 N.Y. 458, amended 199 N.E. 672, 269 N.Y. 562, appeal dismissed 56 S.Ct. 592, 297 U.S. 696, 80 L.Ed. 987.

Chapman v. Hapeman, 167 N.Y.S. 2d 342, 8 Misc.2d 19.

Hewlett v. Town of Hempstead, 133 N.Y.S.2d 690, affirmed 150 N.Y.S.2d 922, 1 A.D.2d 954—Bowen v. Hider, 87 N.Y.S.2d 76.

Pa.—Appeal of Scranton Lackawanna Indus. Bldg. Co., Com.Pl., 57 Lack. Jur. 173.

Tex.—City of West University Place v. Ellis, 134 S.W.2d 1038, 134 Tex. 222.

Hall v. Board of Adjustment of City of McAllen, Civ.App., 239 S.W. 2d 647.

Evidence held sufficient

(1) To sustain judgment in favor of city.

Cal.—Otis v. City of Los Angeles, 126 P.2d 954, 52 C.A.2d 605.

(2) To sustain finding that proposed use was not objectionable.

Fla.—Frink v. Orleans Corp., 32 So. 2d 425, 159 Fla. 646.

(3) To sustain finding that ordinance restricting use of plaintiffs' property to residential purposes should not apply to that portion of same fronting on certain road to depth of two hundred feet.

Mich.—White v. Southfield Tp., 78 N.W.2d 863, 347 Mich. 548.

(4) To sustain finding that property owner for all intents and purposes sought to make the same use of its property as was made by adjoining property.

Mich.—Morris G. Laramie & Son v. Gidley, 40 N.W.2d 205, 326 Mich. 410.

(5) To establish that petitioners' plan conformed with requirements of building zone ordinance, and that petitioners were entitled to have copy of their plans approved by village building superintendent.

N.Y.—Application of Pondfield Road Co., 125 N.Y.S.2d 770, affirmed 124 N.Y.S.2d 915, 282 App.Div. 892.

(6) To establish that the land was suitable for residential purposes.

N.Y.—New York Trap Rock Corp. v. Town of Clarkstown, 149 N.Y.S.2d 290, 1 A.D.2d 890.

(7) To support finding that lots in question were not suitable for single-family residence, due to excessive traffic noise.

Mich.—Bassey v. City of Huntington Woods, 74 N.W.2d 897, 344 Mich. 701.

(8) To establish that no one in immediate neighborhood of plaintiffs' realty attempted to operate under same circumstances surrounding plaintiffs.

Cal.—Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386.

(9) To establish that description contained in ordinance was sufficient to indicate clearly that legislative intent was to cover apartment house site.

N.Y.—Mallett v. Village of Mamaroneck, 131 N.Y.S.2d 504, 283 App.Div. 1094, affirmed 125 N.E.2d 873, 308 N.Y. 821.

(10) To sustain finding that construction proposed by owners was not a "structural alteration" within prohibition of ordinance.

U.S.—City of Miami v. McCrory Stores Corp., C.A.Fla., 181 F.2d 368.

Evidence held insufficient

(1) In general.

Mass.—Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston, 101 N.E.2d 888, 328 Mass. 103.

N.Y.—Post Brick Co. v. Thompson, 68 N.Y.S.2d 159.

(2) To establish that parties interested were not thoroughly aware of the provisions of the ordinance introduced, or that the description of the rezoned property, both in the advertisement of the ordinance and in the ordinance, was in error.

N.J.—Closterman v. Cranford Tp., 91 A.2d 646, 22 N.J.Super. 204.

(3) To establish that mere comment by two committeemen, to effect

that they thought that they were passing the matter over to the court for determination, affected the members of the township committee in their vote to enact the ordinance on the merits.

N.J.—Closterman v. Cranford Tp., supra.

(4) To establish claim that original zoning map, which amendment sought to cure, was correct as to its delineation of location of industrial zone.

N.J.—Menges v. Bernards Tp., 73 A. 2d 540, 4 N.J. 556.

(5) To overcome presumption that maps were attached to zoning ordinance when it was adopted.

Minn.—State v. Modern Box Makers, 18 N.W.2d 731, 217 Minn. 41.

9. Cal.—Edmonds v. Los Angeles County, 255 P.2d 772, 40 C.2d 642.

Conn.—Kimberly v. Town of Madison, 17 A.2d 504, 127 Conn. 409.

Ill.—Anderson v. Cook County, 138 N.E.2d 485, 9 Ill.2d 568—First Nat. Bank of Lake Forest v. Lake County, 130 N.E.2d 267, 7 Ill.2d 213—Pioneer Trust & Sav. Bank v. Village of Oak Park, 97 N.E.2d 302, 408 Ill. 458.

Kan.—Konitz v. Board of County Com'rs of Johnson County, 303 P. 2d 180, 180 Kan. 230—Kilcoyne v. City of Coffeyville, 269 P.2d 418, 176 Kan. 159.

Mich.—Certain-Teed Products Corp. v. Paris Tp., 88 N.W.2d 705, 351 Mich. 434.

Miss.—W. L. Holcomb, Inc. v. City of Clarksdale, 65 So.2d 281, 217 Miss. 892.

N.Y.—Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517, 307 N.Y. 493.

Mardine Realty Co. v. Village of Dobbs Ferry, 148 N.Y.S.2d 142, 1 A.D.2d 789, affirmed 136 N.E.2d 908, 1 N.Y.2d 902, 154 N.Y.S.2d 962—Ulmer Park Realty Co. v. City of New York, 63 N.Y.S.2d 143, 270 App.Div. 1044, affirmed 77 N.E.2d 797, 297 N.Y. 788.

Marshak v. City of Long Beach, 81 N.Y.S.2d 74, 195 Misc. 125, affirmed 105 N.Y.S.2d 983, 278 App. Div. 966.

Town of Somers v. Camarco, 126 N.Y.S.2d 154, modified on other grounds 135 N.Y.S.2d 42, 284 App. Div. 979, affirmed 127 N.E.2d 327, 308 N.Y. 537, motion denied 128 N.E.2d 813, 309 N.Y. 772.

Va.—Claffone v. Community Shopping Corp., 77 S.E.2d 817, 195 Va. 41, 39 A.L.R.2d 757.

forcement of zoning ordinances and regulations;¹⁰ and particular evidence has been held to warrant the granting of injunctive relief,¹¹ or to sustain or require the denial of such relief.¹² Evidence has been held sufficient or has been held insufficient to

sustain determinations with respect to the validity of zoning regulations generally,¹³ or compliance with statutory provisions governing the enactment of zoning ordinances,¹⁴ or to establish the invalidity of such regulations.¹⁵

10. Fla.—City of Miami Beach v. Perell, 52 So.2d 906—City of West Palm Beach v. Edward U. Roddy Corp., 43 So.2d 709.

Ill.—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 658, 350 U.S. 1013, 100 L.Ed. 873—Pringle v. City of Chicago, 89 N.E.2d 365, 404 Ill. 473—De Bartolo v. Village of Oak Park, 71 N.E.2d 693, 396 Ill. 404, certiorari denied 68 S.Ct. 72, 332 U.S. 765, 92 L.Ed. 350.
Mich.—Redford Moving & Storage Co. v. City of Detroit, 58 N.W.2d 812, 336 Mich. 702—Fenner v. City of Muskegon, 50 N.W.2d 210, 331 Mich. 732.

11. Temporary injunction

In injunction proceeding by property owners association against town in which association attacked as arbitrary, capricious, and confiscatory action of town board in amending zoning ordinances so as to place property of individual defendants in business district instead of in a residential district, evidence warranted temporary injunction to maintain status quo until full disposition of the proceeding.

N.Y.—North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 115 N.Y.S.2d 670.

12. Ark.—Evans v. City of Little Rock, 253 S.W.2d 347, 221 Ark. 252. Fla.—Segal v. City of Miami, 63 So. 2d 496.

Ill.—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

Pollack v. Du Page County, 25 N.E.2d 895, 304 Ill.App. 250, transferred, see 20 N.E.2d 273, 371 Ill. 199.

La.—Charbonnet v. City of New Orleans, 147 So. 345, 176 La. 1050.

N.D.—Russell v. Fargo, 148 N.W. 610, 28 N.D. 300.

Tex.—City of Dallas v. Meserole Bros., (Civ.App., 164 S.W.2d 564, error refused.

13. Evidence held sufficient

(1) To establish that zoning ordinance was reasonable and for public good.

Mich.—Moreland v. Armstrong, 297 N.W. 60, 297 Mich. 32.

N.J.—420 Broad Ave. Corp. v. Borough of Palisades Park, 61 A.2d 23, 137 N.J.Law 527.

Wis.—Higbee v. Chicago, B. & Q. R. Co., 292 N.W. 320, 235 Wis. 91, 128 A.L.R. 734.

(2) To sustain finding that classification was reasonable.

Ark.—City of Little Rock v. Bentley, 165 S.W.2d 890, 204 Ark. 727—McKinney v. City of Little Rock, 146 S.W.2d 167, 201 Ark. 618.

N.J.—H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 105 A.2d 894, 31 N.J.Super. 80.

(3) To show that ordinance, as prepared and adopted, was a product of a comprehensive plan to regulate use of land, in view of facts that physical partition into zones appeared to be reasonable and that the partition in broadest aspects portrayed reasonable planning.

N.J.—Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.

(4) To show a reasonable basis for enactment of ordinance limiting height of buildings to three stories or forty-five feet and the intensity of use to one thousand five hundred square feet per family.

Ill.—Chicago City Bank & Trust Co. v. City of Highland Park, 137 N.E.2d 835, 9 Ill.2d 364, certiorari denied 77 S.Ct. 681, 353 U.S. 922, 1 L.Ed.2d 719.

14. Evidence held sufficient

(1) In general.

Cal.—Willett & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 C.A. 2d 757.

(2) To sustain finding that zoning bylaws had been published as required by statute.

Mass.—Lundy v. Town of Wayland, 105 N.E.2d 378, 328 Mass. 581.

(3) To show that necessary public hearings were held on county zoning ordinance to render it valid under statute.

Md.—Walker v. Board of County Com'rs of Talbot County, 116 A.2d 393, 208 Md. 72, certiorari denied 76 S.Ct. 180, 350 U.S. 902, 100 L.Ed. 792.

Evidence held insufficient

(1) To show noncompliance with statutory requisites.

N.J.—Manning v. Borough of Paramus, 118 A.2d 60, 37 N.J.Super. 574.

(2) To overcome prima facie case established by city by introduction of such ordinances in book or pamphlet form or by a certified copy, notwithstanding the fact that it was stipulated that no record could be found of the giving of notice and holding of hearings for adoption of such ordinances.

Ill.—Liedling v. Fradine, 137 N.E.2d 684, 6 Ill.App.2d 409.

15. Evidence held sufficient

(1) In general.

Fla.—Frink v. Orleans Corp., 32 So.2d 425, 159 Fla. 646.

Ill.—Bauske v. City of Des Plaines, 148 N.E.2d 584, 13 Ill.2d 169—Myers v. City of Elmhurst, 147 N.E.2d 300, 12 Ill.2d 537.

N.J.—Hasbrouck Heights Hospital Ass'n v. Borough of Hasbrouck Heights in Bergen County, 105 A.2d 521, 15 N.J. 447.

N.Y.—Hoyt v. Incorporated Village of Cedarhurst, 121 N.Y.S.2d 399, affirmed 113 N.Y.S.2d 922, 280 App. Div. 809.

(2) To establish that classification was discriminatory.

Fla.—Frink v. Orleans Corp., 32 So.2d 425, 159 Fla. 646.

(3) To support finding that zoning ordinance was unreasonable and arbitrary.

Ark.—City of Little Rock v. Joyner, 206 S.W.2d 446, 212 Ark. 508.

Fla.—City of Miami Beach v. Daoud, 6 So.2d 247, 149 Fla. 514.

Ill.—Kennedy v. City of Evanston, 181 N.E. 312, 348 Ill. 426.

N.J.—A. G. Construction Co. v. Scott, 141 A. 760, 104 N.J.Law 596.

Wis.—Geisenfeld v. Village of Shorewood, 287 N.W. 683, 232 Wis. 410.

Evidence held insufficient

(1) In general.

Cal.—Wilkins v. City of San Bernardino, 175 P.2d 542, 29 C.2d 332.

Ill.—Skrysak v. Village of Mt. Prospect, 148 N.E.2d 721, 13 Ill.2d 329—Honeck v. Cook County, 146 N.E.2d 35, 12 Ill.2d 257—Chicago City Bank & Trust Co. v. City of Highland Park, 137 N.E.2d 835, 9 Ill.2d 364, certiorari denied 77 S.Ct. 681, 353 U.S. 922, 1 L.Ed. 719—Bullock v. City of Evanston, 123 N.E.2d 840, 5 Ill.2d 22—Mundelein Estates v. Village of Mundelein, 99 N.E.2d 144, 409 Ill. 291.

N.J.—Oliva v. City of Garfield, 62 A. 2d 673, 1 N.J. 184.

N.Y.—Brous v. Town of Hempstead, 69 N.Y.S.2d 258, 272 App.Div. 31, opinion amended on other grounds 70 N.Y.S.2d 576, 272 App.Div. 777.

Hewlett v. Town of Hempstead, 133 N.Y.S.2d 690, affirmed 150 N.Y. S.2d 922, 1 A.D.2d 954—Post Brick Co. v. Thompson, 68 N.Y.S.2d 159.

N.C.—Kinney v. Sutton, 53 S.E.2d 306, 230 N.C. 404.

Ohio.—State ex rel. Di Carlo Mason Bldg. Co. v. Gallo, App., 145 N.E.2d 916.

Tex.—City of Dallas v. Lively, Civ. App., 161 S.W.2d 895, error refused.

Also, adjudications have been had as to the sufficiency of evidence to sustain determinations with respect to matters involving a change of zoning or proceedings therefor,¹⁶ such as a determination that a zoning amendment or change was valid,¹⁷ or that the zoning body had acted illegally, arbitrarily, or

(2) To establish unconstitutionality of zoning ordinance as being arbitrary and based on purely esthetic considerations.

N.Y.—Post Brick Co. v. Thompson, 68 N.Y.S.2d 159.

(3) To show that zoning ordinance was unreasonable.

Cal.—Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386.

Ill.—La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 5 Ill.2d 344.

Mass.—Patkin v. City of Medford, 124 N.E.2d 249, 332 Mass. 754.

Mich.—M. and S. Builders v. City of Dearborn, 73 N.W.2d 283, 344 Mich. 17.—Northwood Properties Co. v. Perkins, 39 N.W.2d 25, 325 Mich. 419.

N.J.—Fischer v. Bedminster Tp., 93 A.2d 378, 11 N.J. 194—Oliva v. City of Garfield, 62 A.2d 673, 1 N.J. 184. Casper v. City of Long Branch, 86 A.2d 691, 18 N.J.Super. 90.—Struyk v. Samuel Braen's Sons, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294.

Yoemans v. Hillsborough Tp., Somerset County, 54 A.2d 202, 135 N.J.Law 599—Repp v. Shahadi, 88 A.2d 284, 132 N.J.Law 24.

Kitay v. Quigley, 142 A. 427, 6 N.J.Misc. 623.

Ohio.—State ex rel. Cook v. Turgeon, App., 77 N.E.2d 283.

Tex.—Niday v. City of Bellaire, Civ. App., 251 S.W.2d 747—Edge v. City of Bellaire, Civ.App., 200 S.W.2d 224, error refused.

(4) To overcome presumption of validity.

Ill.—Dunlap v. City of Woodstock, 91 N.E.2d 434, 405 Ill. 410.

N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154.

Piass v. Town of Bloomfield, 49 A.2d 476, 134 N.J.Law 580.

N.Y.—Hewlett v. Town of Hempstead, 133 N.Y.S.2d 690, affirmed 150 N.Y.S.2d 922, 1 A.D.2d 954—Town of Somers v. Camarco, 126 N.Y.S.2d 154, modified on other grounds 135 N.Y.S.2d 42, 284 App. Div. 979, affirmed 127 N.E.2d 327, 308 N.Y. 537, motion denied 128 N.E.2d 813, 309 N.Y. 772.

Tex.—Moody v. City of University Park, Civ.App., 278 S.W.2d 912, refused no reversible error.

(5) To establish that zoning ordinance was not enacted in the exercise of the police power.

N.Y.—Post Brick Co. v. Thompson, 68 N.Y.S.2d 159.

(6) To show that exclusion of business development from particular area by zoning ordinance was so

clearly arbitrary and unreasonable in relation to relator's premises in the area as to have no substantial relation to public health, safety, morals, and general welfare.

Ohio.—State ex rel. Cook v. Turgeon, 77 N.E.2d 283, 84 Ohio App. 287.

(7) To warrant finding that the ordinance in question was aimed solely at plaintiff's land or designed to discriminate against it arbitrarily.

N.J.—Rockaway Estates v. Rockaway Tp., 119 A.2d 461, 38 N.J.Super. 468.

(8) To show such nonexistence in geographical region of areas suitable for industrial development as would invalidate zoning ordinance placing defendant's property, which was suitable for industrial use, in a residential zone.

N.J.—Struyk v. Samuel Braen's Sons, 85 A.2d 279, 17 N.J.Super. 1, affirmed 88 A.2d 201, 9 N.J. 294.

16. Conn.—Levinsky v. Zoning Commission of City of Bridgeport, 127 A.2d 822, 144 Conn. 117.

N.J.—Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 26 N.J. 320.

Or.—Holt v. City of Salem, 234 P.2d 564, 192 Or. 200.

Evidence held sufficient

N.J.—Birkfield Realty Co. v. Board of Com'rs of City of Orange, 79 A.2d 326, 12 N.J.Super. 192.

Greenway Homes v. Borough of River Edge, 60 A.2d 811, 137 N.J. Law 453.

Evidence held insufficient

(1) To support or require rezoning.

Md.—Zinn v. Board of Zoning Appeals of Baltimore County, 114 A.2d 614, 207 Md. 355.

N.J.—Esso Standard Oil Co. v. Town of Westfield, 110 A.2d 148, 33 N.J. Super. 324—Birkfield Realty Co. v. Board of Com'rs of City of Orange, 79 A.2d 326, 12 N.J.Super. 192.

N.Y.—Dicker v. Gulde, 170 N.Y.S.2d 64.

(2) To sustain burden on petitioner of establishing that denial of petition for amendment was unreasonable or unlawful.

N.H.—City of Keene v. Parenteau, 112 A.2d 667, 99 N.H. 415.

Prima facie case

In landowner's action to set aside decision of municipal governing body denying, without stating the reasons, the board of adjustment's recommendation as to use to which land may be put, landowner may make out a prima facie case by so analyzing the matter as to lay before court every substantial consideration

which governing body might have relied on and by then establishing that such considerations did not reasonably support governing body's decision.

N.J.—Wharton Sand & Stone Co. v. Montville Tp., 120 A.2d 858, 39 N.J.Super. 278.

17. Evidence held sufficient

(1) In general.

Cal.—Case v. City of Los Angeles, 298 P.2d 50, 142 C.A.2d 66.

Fla.—Frink v. Orleans Corp., 32 So.2d 425, 159 Fla. 646.

Ill.—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

Kan.—Hillebrand v. Board of County Com'rs of Johnson Co., 304 P.2d 517, 180 Kan. 348.

N.J.—Bogert v. Washington Tp., 135 A.2d 1, 25 N.J. 57—Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9, 9 N.J. 64.

Jones v. Zoning Bd. of Adjustment of Long Beach Tp., 108 A.2d 498, 32 N.J.Super. 397—H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny, 105 A.2d 894, 31 N.J.Super. 30.

N.Y.—Fieldston Garden Apartments v. City of New York, 145 N.Y.S.2d 907, 7 Misc.2d 147, affirmed 163 N.Y.S.2d 402, 3 A.D.2d 903.

(2) To justify amendments of zoning ordinance.

Fla.—Frink v. Orleans Corp., Fla., 32 So.2d 425, 159 Fla. 646.

(3) To sustain finding that amendment of zoning ordinance was valid and reasonable.

Kan.—Simmonds v. Meyn, 7 P.2d 506, 134 Kan. 419.

(4) To sustain rezoning as necessary for public health, safety, comfort, or general welfare.

Neb.—Cassel Realty Co. v. City of Omaha, 14 N.W.2d 600, 144 Neb. 753.

(5) To sustain finding of town council that the character of rezoned district was suitable for business development and that the business zone should be greatly enlarged at that time.

Conn.—Mallory v. Town of West Hartford, 86 A.2d 668, 138 Conn. 497.

(6) To sustain order of board of zoning appeals of county reclassifying two tracts of land from "A" residence zone to "F" light industrial zone.

Md.—Offutt v. Board of Zoning Appeals of Baltimore County, 105 A.2d 219, 204 Md. 551.

unreasonably in rezoning property.¹⁸ Evidence has been held sufficient or has been held insufficient to show that a particular business or structure was permissible in a certain area under the terms of the zoning law as construed by the court,¹⁹ or to show

the existence and legality of a nonconforming use antedating the promulgation of the zoning law, permitting a use of property other than as prescribed by such law.²⁰

The courts have adjudicated the sufficiency of

(7) To establish that an amendment of an ordinance so as to change to industrial an area previously classified as residential was not prohibited spot zoning.

Mass.—Raymond v. Commissioner of Public Works of Lowell, 131 N.E. 2d 189, 333 Mass. 410.

Pa.—Schmidt v. Philadelphia Zoning Bd. of Adjustment, 114 A.2d 902, 382 Pa. 521.

(8) To sustain finding that ordinance rezoning and reclassifying lots had been adopted after reasonable and substantial compliance with requirements of statute and of general zoning ordinance of city.

La.—Archer v. City of Shreveport, App., 85 So.2d 337, appeal transferred 81 So.2d 428, 228 La. 13.

(9) To sustain finding that amendatory zoning ordinance had been enacted in accordance with a comprehensive plan.

Iowa.—Brackett v. City of Des Moines, 67 N.W.2d 542, 246 Iowa 249.

(10) To negative any claim that amendments were designed solely for advantage of any particular owner.

N.Y.—Rodgers v. Village of Tarrytown, 96 N.E.2d 731, 302 N.Y. 115.

18. Evidence held sufficient

(1) In general.

Fla.—City of Miami v. Hollis, 77 So. 2d 834.

Ill.—Krom v. City of Elmhurst, 133 N.E.2d 1, 8 Ill.2d 104—Northern Trust Co. v. City of Chicago, 123 N.E.2d 330, 4 Ill.2d 432—Metropolitan Life Ins. Co. v. City of Chicago, 84 N.E.2d 825, 402 Ill. 581.

American Smelting & Refining Co. v. City of Chicago, 105 N.E.2d 803, 347 Ill.App. 32.

Kan.—Appleby v. Board of Com'rs of Johnson County, 203 P.2d 224, 166 Kan. 494.

Md.—Northwest Merchants Terminal v. O'Rourke, 60 A.2d 743, 191 Md. 171.

N.J.—Scarborough Apartments v. City of Englewood, 87 A.2d 537, 9 N.J. 182.

Wis.—State ex rel. Schroedel v. Pagels, 43 N.W.2d 349, 257 Wis. 376.

(2) To establish that amendment had effect of depreciating value of district's realty without corresponding benefit to public generally.

Ill.—Tower Cabana Club v. City of Chicago, 123 N.E.2d 834, 5 Ill.2d 11.

(3) To sustain plaintiffs' contention that legislation constituted "spot zoning."

N.Y.—Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

(4) To establish that service station proposed to be constructed on rezoned property would seriously reduce value of residential properties in the neighborhood.

Md.—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32.

Evidence held insufficient

(1) In general.

Ark.—City of Little Rock v. Fausett & Co., 258 S.W.2d 48, 222 Ark. 193.

Ill.—People ex rel. Alco Deree Co. v. City of Chicago, 118 N.E.2d 20, 2 Ill.2d 350—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507.

Iowa.—Keller v. City of Council Bluffs, 66 N.W.2d 113, 246 Iowa 202, 51 A.L.R.2d 251.

Mass.—Morgan v. Banas, 122 N.E.2d 369, 331 Mass. 694—Co-Ray Realty Co. v. Board of Zoning Adjustment of Boston, 101 N.E.2d 888, 328 Mass. 103.

N.J.—Oliva v. City of Garfield, 62 A. 2d 673, 1 N.J. 184.

Anderson v. Mayor and Council of Town of Bloomfield, 65 A.2d 270, 2 N.J.Super. 605.

N.Y.—Linn v. Town of Hempstead, 170 N.Y.S.2d 217, 10 Misc.2d 774—Greenberg v. City of New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, affirmed 134 N.Y.S.2d 593, 284 App. Div. 891, appeal dismissed 124 N.E. 2d 716, 308 N.Y. 736.

North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 129 N.Y.S.2d 697, affirmed 153 N.Y.S.2d 579, 1 A.D.2d 1043.

Ohio.—State ex rel. Kangesser Co. v. Village of Beachwood, App., 128 N.E.2d 127.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.

(2) To establish that amendment was directed at property owner, or not passed as a reasonable exercise of police power in public interest.

Tenn.—Brooks v. City of Memphis, 241 S.W.2d 432, 192 Tenn. 371.

(3) To show that the topography of the property was such that original zoning as "Agricultural" was error.

Md.—American Oil Co. v. Miller, 102 A.2d 727, 204 Md. 32.

19. Tex.—Waco Federation of Women's Clubs v. Goddard, Civ.App., 275 S.W.2d 541.

20. Md.—Higgins v. City of Baltimore, 110 A.2d 503, 206 Md. 89.

N.Y.—Gscheldle v. Murdock, 106 N.Y.S.2d 770, reversed on other

grounds 111 N.Y.S.2d 740, 280 App. Div. 74.

Evidence held sufficient

(1) In general.

Fla.—Segal v. City of Miami, 63 So. 2d 496.

Ill.—Brown v. Gerhardt, 125 N.E.2d 53, 5 Ill.2d 106.

Neb.—City of Omaha v. Glissmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

N.Y.—Jetter v. Hofheins, 70 N.Y.S. 2d 808, 190 Misc. 99.

(2) To establish that petitioners who built prior to amendment to zoning regulation acquired substantial vested rights, deprivation of which would result in serious loss and hardship to them.

N.Y.—Application of Rogers, 144 N.Y.S.2d 869, 208 Misc. 785.

(3) To establish that plaintiff's present use of property was same as that to which property was subjected prior to passage of amendatory ordinance rezoning premises but authorizing continuation of nonconforming use.

Ill.—Goldman v. City of Chicago, 113 N.E.2d 480, 351 Ill.App. 111.

(4) To sustain finding that permittees had not established a prior nonconforming use.

Mo.—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S.Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

Evidence held insufficient

(1) In general.

Ill.—Eleopoulos v. City of Chicago, 120 N.E.2d 555, 3 Ill.2d 247.

N.Y.—Joynt v. Zoning Bd. of Appeals of Town of Cicero, 171 N.Y.S.2d 3, 9 Misc.2d 762.

Tex.—Caruthers v. Board of Adjustment of the City of Bunker Hill Village, Civ.App., 280 S.W.2d 340.

Wash.—Park v. Stoizheise, 167 P.2d 412, 24 Wash.2d 781.

(2) To warrant reviewing court in holding that finding of board of municipal and zoning appeals that a nonconforming storage use at time of adoption of ordinance had not been established was unsupported by the evidence.

Md.—Higgins v. City of Baltimore, 110 A.2d 503, 206 Md. 89.

Abandonment of use

La.—State ex rel. Harz v. City of New Orleans, 44 So.2d 889, 216 La. 849.

particular evidence to warrant findings or determinations as to the propriety of administrative proceedings generally,²¹ or to establish various matters

arising in a proceeding to obtain a variance,²² such as that the board or commission properly granted a variance,²³ or that the board or commission prop-

Md.—Higgins v. City of Baltimore, 110 A.2d 503, 206 Md. 89.

Tex.—Rowton v. Alagood, Civ.App., 250 S.W.2d 264.

Change or expansion of use

Ill.—Dube v. City of Chicago, 131 N.E.2d 9, 7 Ill.2d 313, certiorari denied 76 S.Ct. 658, 350 U.S. 1013, 100 L.Ed. 873—Schneider v. Board of Appeals of City of Ottawa, 84 N.E.2d 428, 402 Ill. 536.

Wash.—Coleman v. City of Walla Walla, 266 P.2d 1034, 44 Wash.2d 296.

21. Mo.—State ex rel. Swofford v. Randall, App., 236 S.W.2d 354.

Evidence held sufficient

(1) In general.

Conn.—Isdale v. Town Plan and Zoning Commission of Town of Orange, 107 A.2d 267, 141 Conn. 509.

(2) To support determination that commission had not acted arbitrarily or illegally or so unreasonably as to have abused its discretion.

Conn.—De Palma v. Town Plan Commission of Greenwich, 193 A. 868, 123 Conn. 257.

Evidence held insufficient

(1) To establish that remonstrants did not have a fair and impartial board or that they were not given a fair and impartial hearing.

R.I.—Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston, 138 A.2d 818.

(2) To show that one of members of board of appeals who voted to grant zoning variance acted without knowledge of the material evidence, notwithstanding that such member was not present at public hearing on the application and did not read transcript of the record thereof.

N.Y.—Taub v. Pirnie, 160 N.Y.S.2d 447, 3 A.D.2d 753.

22. Mo.—Fey v. Woermann, 230 S.W.2d 681, 360 Mo. 728.

Pa.—Silverco, Inc. v. Zoning Bd. of Adjustment and Dept. of Licenses and Inspection, City of Philadelphia, 109 A.2d 147, 379 Pa. 497.

Evidence held sufficient

(1) In general.

Mass.—Lambert v. Board of Appeals of City of Lowell, 3 N.E.2d 784, 295 Mass. 224.

N.H.—Vogel v. Board of Adjustment for City of Manchester, 27 A.2d 105, 92 N.H. 195.

N.Y.—Syosset Holding Corp. v. Schlamm, 159 N.Y.S.2d 88, modified on other grounds 164 N.Y.S.2d 890, 4 A.D.2d 766.

R.I.—Woodbury v. Zoning Bd. of Review of City of Warwick, 82 A.2d 164, 78 R.I. 319.

(2) To sustain finding that land was unsuited to continued operation of a grocery store which had been erected thereon prior to passage of zoning ordinance.

Ind.—Town of Homecroft v. Macbeth, 148 N.E.2d 563.

(3) To sustain finding that alleged hostility of commission toward applicant did not enter into final vote of commission.

Conn.—Isdale v. Town Plan and Zoning Commission of Town of Orange, 107 A.2d 267, 141 Conn. 509.

(4) To show that minutes of board were written up in longhand on date that it granted the exception, and that such minutes were typed into board's minute book the following day.

Tex.—Hall v. Board of Adjustment of City of McAllen, Civ.App., 239 S.W.2d 647.

Evidence held insufficient

(1) In general.

N.J.—Ranney v. Istituto Pontificio Delle Maestre Filippini, 119 A.2d 142, 20 N.J. 189.

N.Y.—Little v. Young, 82 N.Y.S.2d 909, affirmed 85 N.Y.S.2d 41, 274 App.Div. 1005, reargument and appeal denied 86 N.Y.S.2d 288, 274 App.Div. 1065, motion denied 85 N.E.2d 61, 298 N.Y. 918, affirmed 87 N.E.2d 74, 299 N.Y. 699.

Pa.—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254.

R.I.—School Committee of City of Pawtucket v. Zoning Bd. of Review of City of Pawtucket, 133 A.2d 734.

(2) To sustain action of board revoking a variance.

Cal.—Saks & Co. v. City of Beverly Hills, 237 P.2d 32, 107 C.A.2d 260.

Pa.—Silverco, Inc. v. Zoning Bd. of Adjustment and Dept. of Licenses and Inspection, City of Philadelphia, 109 A.2d 147, 379 Pa. 497.

(3) To show that persons opposing variance were prejudiced by fact that city council did not have witnesses sworn, where there was no requirement therefor in the ordinance.

Cal.—Jackson v. City of San Mateo, 307 P.2d 451, 148 C.A.2d 667.

(4) To establish that zoning regulation which prohibited subdividing applicant's property into two lots was an undue hardship on him within statute providing for zoning variances.

N.J.—Bierce v. Gross, 135 A.2d 561, 47 N.J.Super. 148.

23. Conn.—West Hartford Methodist Church v. Zoning Bd. of Appeals

of Town of West Hartford, 121 A.2d 640, 143 Conn. 263.

Evidence held sufficient

(1) In general.

Cal.—Jackson v. City of San Mateo, 307 P.2d 451, 148 C.A.2d 667.

Ind.—Keeling v. Board of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 117 Ind.App. 314.

Md.—Board of Zoning Appeals of Howard County v. Meyer, 114 A.2d 626, 207 Md. 389.

N.Y.—Burlinson v. Zoning Bd. of Appeals of City of Yonkers, 87 N.Y.S.2d 412, 275 App.Div. 723.

Kessel v. Michaelis, 159 N.Y.S.2d 109, affirmed 167 N.Y.S.2d 1004, 4 A.D.2d 884.

R.I.—Barbara Realty Co. v. Zoning Bd. of Review of City of Cranston, 138 A.2d 818—Guenther v. Zoning Bd. of Review of City of Warwick, 125 A.2d 214—Baggs v. Zoning Bd. of Review of Town of Barrington, 86 A.2d 658, 79 R.I. 211—Taft v. Zoning Bd. of Review of City of Warwick, 71 A.2d 886, 76 R.I. 443.

Va.—Wicker Apartments, Inc. v. City of Richmond, 99 S.E.2d 656, 199 Va. 263.

(2) To support findings that variance would be for the public good and would benefit both town and neighborhood, that residential use of land was impracticable, and that variance would not produce deterioration in value of properties or substantial impairment of general zoning plan.

N.J.—Ward v. Scott, 105 A.2d 851, 16 N.J. 16.

(3) To establish that board did not commit any abuse of its discretion in granting variance.

Pa.—Freed v. Power, 139 A.2d 661, 392 Pa. 195.

(4) To establish that petitioners, who were nearby property owners, received personal notice and notice by publication of application for an exception.

R.I.—Harrison v. Zoning Bd. of Review of City of Pawtucket, 59 A.2d 361, 74 R.I. 135.

(5) To support findings that land was not suitable for residential purposes, that to refuse application would create unnecessary hardship on owner, and that refusal of variance was not required by general scheme of zoning ordinance.

R.I.—School Committee of City of Pawtucket v. Zoning Bd. of Review of City of Pawtucket, 133 A.2d 734.

Evidence held insufficient

Mass.—Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198, 334 Mass. 446.

erly denied a variance²⁴ or abused its discretion in doing so.²⁵ The weight and sufficiency of evidence have also been adjudicated as to matters in- volving the granting, denial, or revocation of a permit required under the building and zoning laws.²⁶

N.J.—Ward v. Scott, 93 A.2d 385, 11 N.J. 117.

Prey v. Board of Adjustment of North Bergen Tp., 91 A.2d 597, 22 N.J.Super. 161.

N.Y.—Miller v. Silver, 105 N.Y.S.2d 474, 278 App.Div. 962.

Lapham v. Roulan, 169 N.Y.S.2d 346, 10 Misc.2d 152.

Bach v. Board of Zoning & Appeals of Town of North Hempstead, 118 N.Y.S.2d 202, modified on other grounds 124 N.Y.S.2d 744, 282 App.Div. 879.

24. Mass.—Reynolds v. Board of Appeal of Springfield, 140 N.E.2d 491, 335 Mass. 464.

Evidence held sufficient

Md.—Robertson v. County Board of Appeals, 123 A.2d 751, 210 Md. 190 —Serio v. Mayor and City Council of Baltimore, 119 A.2d 387, 208 Md. 515.

N.Y.—People ex rel. Polcini v. Scofield, 108 N.Y.S.2d 778, 279 App.Div. 762—Pforzheimer v. Seidman, 103 N.Y.S.2d 886, 278 App.Div. 780.

Rochester Transit Corp. v. Crowley, 131 N.Y.S.2d 493, 205 Misc. 933. Chapmald Realty Corp. v. Board of Standards & Appeals of New York City, 76 N.Y.S.2d 296.

Pa.—Broadlawn Inc. v. Bd. of Adjustment of Radnor Tp., Com.Pl., 40 Del.Co. 259.

Evidence held insufficient

D.C.—O'Boyle v. Coe, D.C., 155 F. Supp. 581.

Pa.—Silverco, Inc. v. Zoning Bd. of Adjustment and Dept. of Licenses and Inspection, City of Philadelphia, 109 A.2d 147, 379 Pa. 497.

Tex.—Congregation Committee, North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

25. Evidence held sufficient

(1) In general.

Fla.—Harlem, Jr., Inc. v. Mount Sinai Baptist Church, App., 100 So.2d 437.

N.J.—Tzses v. Board of Trustees of Village of South Orange, 91 A.2d 588, 22 N.J.Super. 45.

(2) To establish that there were no special conditions affecting house but not affecting zoning district generally, or that enforcement of zoning law would involve substantial hardship to owner of house.

Mass.—Reynolds v. Board of Appeal of Springfield, 140 N.E.2d 491, 335 Mass. 464.

(3) To establish that property owners would be deprived of all beneficial use of property if terms of ordinance were literally applied.

R.I.—Denton v. Zoning Bd. of Review of City of Warwick, 133 A.2d 718.

Evidence held insufficient

Cal.—Childs v. City Planning Commission of City of Sacramento, 180 P.2d 433, 79 C.A.2d 808.

Kan.—Duggins v. Board of County Com'rs in Johnson County, 293 P.2d 258, 179 Kan. 101.

N.H.—Suprenant v. Nashua, 131 A.2d 632, 101 N.H. 43.

N.J.—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442.

Shipman v. Town of Montclair, 84 A.2d 652, 16 N.J.Super. 365.

Ridgewood Air Club v. Board of Adjustment of Village of Ridgewood, Bergen County, 55 A.2d 100, 136 N.J.Law 222.

N.Y.—Pforzheimer v. Seidman, 103 N.Y.S.2d 886, 278 App.Div. 780—Hassall v. Murdock, 285 N.Y.S. 54, 246 App.Div. 845.

Theodore Gompers, Inc., v. Craft, 87 N.Y.S.2d 670, 194 Misc. 779.

Gerling v. Board of Zoning Appeals of Town of Clay, 167 N.Y.S.2d 358.

R.I.—Sweck v. Zoning Bd. of Review of North Kingstown, 72 A.2d 679, 77 R.I. 8—Ricci v. Zoning Board of Review of City of Cranston, 47 A.2d 923, 72 R.I. 58.

Va.—Wicker Apartments, Inc. v. City of Richmond, 99 S.E.2d 656, 199 Va. 263.

26. Cal.—Munns v. Stenman, 314 P.2d 67, 152 C.A.2d 543.

Del.—In re Auditorium, Inc., 84 A.2d 598, 7 Terry 430, remanded on other grounds Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Mass.—Karl v. Wolsey Co. v. Building Inspector of Bedford, 86 N.E.2d 644, 324 Mass. 419.

N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y.S.2d 849.

Evidence held sufficient

(1) In general.

Cal.—Gray v. Board of Sup'rs of Stanislaus County, 316 P.2d 678, 154 C.A.2d 700.

D.C.—Selden v. Capitol Hill Southeast Citizens Ass'n, 219 F.2d 33, 95 U.S.App.D.C. 62, certiorari denied Capitol Hill Southeast Citizens Ass'n v. Coe, 75 S.Ct. 873, 349 U.S. 944, 99 L.Ed. 1271.

Ga.—City of Rome v. Shadyside Memorial Gardens, Inc., 92 S.E.2d 734, 93 Ga.App. 759.

Md.—City of Baltimore v. Cohn, 105 A.2d 482, 204 Md. 523.

Mich.—McGiverin v. City of Huntington Woods, 72 N.W.2d 105, 343 Mich. 413.

Mo.—Carroll Const. Co. v. Kansas City, App., 278 S.W.2d 817.

N.J.—Roselle v. Wright, 117 A.2d 661, 37 N.J.Super. 507, affirmed 122 A.2d 506, 21 N.J. 400.

N.Y.—Cunningham v. Planning Bd. and Bd. of Appeals of Town of Brighton, 164 N.Y.S.2d 601, 4 A.D.2d 313—Commercial Properties v. Griffin, 131 N.Y.S.2d 619, 283 App. Div. 1109—Shoen v. Bowne, 79 N.Y.S.2d 292, 273 App.Div. 1020, affirmed 81 N.E.2d 350, 298 N.Y. 611. Brainard v. Board of Standards and Appeals of City of New York, 150 N.Y.S.2d 756, 2 Misc.2d 27.

Okl.—Town of Nichols Hills v. Adershold, 250 P.2d 36, 207 Okl. 396.

Tex.—Young v. City of Abilene, Civ. App., 195 S.W.2d 838, refused no reversible error.

(2) To show that landowners had adequate forewarning of pending ordinance requiring setback of all property six feet from property line when they applied for and received building permit.

Fla.—Sharrow v. City of Dania, 83 So.2d 274.

(3) To sustain finding that petitioner's building plans conformed to village ordinance as it existed at time applications for permits were filed.

Wis.—State ex rel. Schroedel v. Fagels, 43 N.W.2d 349, 257 Wis. 376.

(4) To establish that applicant had fully complied with building code and had completely established his right to a permit prior to adoption of zoning ordinance.

N.J.—Sgromolo v. City of Asbury Park, 46 A.2d 661, 134 N.J.Law 195.

(5) To establish that proposed building did not violate the zoning ordinance.

N.J.—Zeltner v. Watson, 81 A.2d 199, 14 N.J.Super. 127.

(6) To establish that denial of permit was arbitrary and unlawful.

Md.—Benner v. Tribbitt, 57 A.2d 346, 190 Md. 6.

(7) To establish that plaintiff's proposed alteration of second floor over garage which had been used as living quarters for tenants of principal building into a modern efficiency apartment for commercial renting would violate zoning ordinance forbidding residences in rear yard except under certain conditions.

Ky.—Moore v. City of Lexington, 218 S.W.2d 7, 309 Ky. 671.

§ 366. Trial or Hearing

On judicial review of zoning regulations or decisions, the parties may be entitled to a hearing or trial on the issues involved, and the court may be required to make findings of fact.

Interested parties may be entitled to a hearing by the court on review of zoning regulations or decisions,²⁷ and the statutory remedy for attacking the validity of a zoning ordinance may entitle the owner

to a court trial on questions of fact;²⁸ but where no question of fact is presented to the court, it may dispose of the matter without the necessity of a trial.²⁹ General rules as to trial apply in such proceedings.³⁰ Findings of fact by the court may not be required when the appeal is heard solely on the record before the zoning board;³¹ but the court may be required to make findings where issues of fact are raised by the pleadings,³² and additional

(8) To sustain finding that conditional use permit was not repugnant to master plan for development of city.

Cal.—Wheeler v. Gregg, 203 P.2d 37, 90 C.A.2d 343.

(9) To sustain finding that an adjoining property owner made his complaint as to issuance of the permit within period of time provided for appeals by rules of the zoning board.

N.H.—Dumais v. Somersworth, 134 A. 2d 700.

(10) To sustain finding that permittee and corporation organized by him to operate enterprise had acquired vested rights in use permits by virtue of substantial expenditures made and liabilities incurred in good faith reliance on permits.

Pa.—Shapiro v. Zoning Bd. of Adjustment, 105 A.2d 299, 377 Pa. 621.

(11) To support finding that proposed use of premises as a drugstore would be more detrimental to character of residential district than existing nonconforming use of property as a grocery or general store.

Mass.—Donovan Drug Corp. v. Board of Appeals of Hingham, 142 N.E.2d 354.

(12) To support finding that status of the neighborhood would be improved by establishment of a funeral home instead of having houses remain unoccupied and unsold until it became unsightly or a derelict.

Mass.—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378.

(13) To sustain determination of board of public utility commissioners that location of proposed water tank in residential section of borough in violation of zoning ordinance was "reasonably necessary" within meaning of statute and could be constructed by utility.

N.J.—Application of Hackensack Water Co., 125 A.2d 281, 41 N.J. Super. 408.

(14) To sustain finding of city board of adjustment that substantial alterations had not been made in reliance on permit so as to give permittee a vested right to continued enjoyment of permit.

Mo.—Veal v. Leimkuehler, App., 249 S.W.2d 491, certiorari denied 73 S. Ct. 336, 344 U.S. 913, 97 L.Ed. 704.

(15) To justify conclusion that map relied on in revoking building permit was published and accompanied zoning ordinance and was adopted by city's governing body.

N.J.—Breesse v. Hutchins, 165 A. 94, 11 N.J. Misc. 74.

Evidence held insufficient

(1) In general.

Ill.—Chicago City Bank & Trust Co. v. City of Highland Park, 137 N.E. 2d 835, 9 Ill.2d 364, certiorari denied 77 S.Ct. 681, 353 U.S. 922, 1 L. Ed.2d 719.

Baird v. Board of Zoning Appeals of City of Kankakee, 106 N.E.2d 343, 347 Ill.App. 158.

N.H.—Jadda v. Manchester, 121 A.2d 803, 100 N.H. 150.

N.J.—Rodes v. Lee, 81 A.2d 517, 14 N. J. Super. 188.

N.Y.—Glass v. Zoning Bd. of Appeals of City of Yonkers, 173 N.Y.S.2d 448, 5 A.D.2d 991—Adams v. Town of West Seneca, 117 N.Y.S.2d 235, 280 App.Div. 1038, appeal denied 119 N.Y.S.2d 591, 281 App.Div. 942—Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 272 App.Div. 551, affirmed 79 N.E.2d 738, 297 N. Y. 897.

De Angelis v. Minor, 166 N.Y.S.2d 568, 8 Misc.2d 994.

Tex.—Congregation Committee North Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City, Civ.App., 287 S.W.2d 700.

(2) To support conclusion that proposed use was in fact adverse to public welfare so as to justify denial of permit.

Md.—Benner v. Tribbitt, 57 A.2d 346, 190 Md. 6.

(3) To justify finding that applicant's proposed parking lot would necessarily constitute a nuisance, notwithstanding traffic congestion and hazards would be somewhat increased in area.

Ky.—Parkrite Auto Park v. Shea, 235 S.W.2d 986, 314 Ky. 520.

(4) To warrant holding that board had abused its discretion by refusing to reopen matter on ground of surprise, mistake, or inadvertence.

Md.—Maryland Clothing Mfg. v. City of Baltimore, 113 A.2d 743, 207 Md. 165.

(5) To establish proposed forty-four-foot rotary beam antenna tower was an accessory use customarily incidental to a highly classified residential area and that zoning ordinance under which a permit for construction for such tower was denied was unconstitutional as so applied.

N.Y.—Presnell v. Leslie, 144 N.E.2d 381, 3 N.Y.2d 384, 165 N.Y.S.2d 488.

27. Conn.—Kuehne v. Town Council of Town of East Hartford, 73 A.2d 474, 136 Conn. 452.

Review as permitting or requiring trial de novo see supra § 331.

28. N.Y.—Bronxville Associates v. Brady, 36 N.Y.S.2d 308.

29. N.Y.—Von Der Heide v. Zoning Bd. of Appeals of Town of Somers, Westchester County, 123 N.Y.S.2d 726, 204 Misc. 746, affirmed 126 N.Y. S.2d 852, 282 App.Div. 1076, reargument and appeal denied 127 N.Y.S. 2d 852, 283 App.Div. 713.

30. N.Y.—Wilmot Service Corp. v. Ferraro, 138 N.Y.S.2d 73.

Pa.—Appeal of Hutchinson, Com.Pl., 39 Del.Co. 254—Appeal of Hutchinson, Com.Pl., 39 Del.Co. 1.

31. Conn.—Cohen v. Board of Appeals on Zoning of City of Bridgeport, 94 A.2d 793, 139 Conn. 450—Delaney v. Zoning Bd. of Appeals of City of Hartford, 56 A.2d 647, 134 Conn. 240.

Pa.—Boyer v. Zoning Bd., Com.Pl., 27 Lehigh 273.

32. Cal.—Beloin v. Blankenhorn, App., 218 P.2d 552.

Findings construed

Md.—Robertson v. County Board of Appeals for Montgomery County, 122 A.2d 751, 210 Md. 190.

Pa.—York Housing Authority v. York Zoning Bd., Com.Pl., 68 York Leg.Rec. 162.

Finding held insufficient to support decree

Finding by court that material facts on which finding, ruling and order of court for decree were made were based on testimony and that board had acted in good faith, and that its decision was not arbitrary, inconsistent, or unreasonable was insufficient to support a decree.

Mass.—Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198, 334 Mass. 446.

evidence is received.³³ Where the court is authorized to receive additional evidence, it may appoint a referee to take such evidence as it may direct.³⁴ Under some statutory provisions, the findings of the court should only contain facts which it finds on the basis of the evidence which it admitted, and not facts which appear in the record of the zoning body.³⁵

Under a statute so providing, the court has power to dispose of the case on a demurrer to the statement of appeal.³⁶ The right of a zoning board to defend an action against it carries with it the right to file a demurrer to plaintiff's evidence.³⁷ A motion to dismiss a case at the close of plaintiff's evidence is improperly granted where plaintiff's evidence is sufficient to withstand the motion.³⁸

The fact that a judge hearing an appeal is related to one of the members of the zoning body from which the appeal is taken has been held not to disqualify him to try the case, where it is essentially a proceeding in rem, with which the relative is not personally concerned.³⁹ Where the prosecutors were allowed a writ to attack the zoning ordinance and to review other proceedings, but the statement of the case does not contain the ordinance and the prosecutors do not argue the invalidity thereof in their brief, the point relating to invalidity is deemed abandoned.⁴⁰ If one of several petitioners dies before argument and the executor of his estate does not wish to be substituted,

the proceeding, as far as the deceased petitioner is concerned, will be severed.⁴¹

Jury trial. An application for a jury trial, on review of a determination of a zoning board of appeals, which does not seek a settlement and statement of the issues to be presented to the jury, or present any proposed issues for settlement and statement, is insufficient.⁴² Where the evidence is insufficient to show as a matter of law that the action of a governing body in enacting a zoning ordinance is arbitrary, unreasonable, or capricious, the court may not withdraw the case from the jury.⁴³

Questions of law and fact. Where an attack is made on the validity of a zoning ordinance, in so far as its provisions apply to limit and restrict particular property, it has been said that in each case a mixed question of law and fact is presented.⁴⁴ According to some decisions, it is a question of law for the court to determine whether a particular zoning ordinance is reasonable or arbitrary,⁴⁵ whether the power conferred on a governmental agent of a municipality is arbitrarily exercised,⁴⁶ and whether some of the members of a zoning board were disqualified to rule on the matters before them.⁴⁷

On the other hand, it has been held that the validity of a zoning ordinance presents a question of fact,⁴⁸ and that whether a zoning regulation is reasonable⁴⁹ and conducive to the public welfare

33. Conn.—*Isdale v. Town Plan and Zoning Commission of Town of Orange*, 107 A.2d 267, 141 Conn. 509.

34. N.Y.—*Theodore Gompers, Inc. v. Craft*, 37 N.Y.S.2d 670, 194 Misc. 779.

35. Conn.—*Isdale v. Town Plan and Zoning Commission of Town of Orange*, 107 A.2d 267, 141 Conn. 509 —*Kuehne v. Town Council of Town of East Hartford*, 72 A.2d 474, 136 Conn. 452 —*Wadell v. Board of Zoning Appeals of City of New Haven*, 68 A.2d 152, 136 Conn. 1.

36. Ky.—*Thomson v. Tafel*, 218 S.W.2d 977, 309 Ky. 753.

37. Kan.—*Appleby v. Board of Com'rs of Johnson County*, 203 P.2d 224, 166 Kan. 494.

38. N.J.—*Garrou v. Teaneck Tryon Co.*, 94 A.2d 332, 11 N.J. 294.

39. Ky.—*Hill v. Kesselring*, 220 S.W.2d 558, 310 Ky. 453.

40. N.J.—*Cortese v. Board of Adjustment of City of Summit*, 56 A.2d 714, 136 N.J.Law 455, affirmed 61 A.2d 238, 137 N.J.Law 609.

Downs v. Borough of Sea Bright, 169 A. 342, 12 N.J.Misc. 11.

41. N.Y.—*Hickox v. Griffin*, 79 N.Y.S.2d 193, 274 App.Div. 792, reversed on other grounds 83 N.E.2d 836, 298 N.J. 365.

42. N.Y.—*Bear Ridge Lake Corp. v. Gilchrist*, 104 N.Y.S.2d 911.

43. Tex.—*McNutt Oil & Refining Co. v. Brooks*, Civ.App., 244 S.W.2d 872.

44. Fla.—*Mayer v. Dade County*, 82 So.2d 513 —*Forde v. City of Miami Beach*, 1 So.2d 642, 146 Fla. 676.

45. Fla.—*Mayer v. Dade County*, 82 So.2d 513.

Tex.—*City of Dallas v. Rosenthal*, Civ.App., 239 S.W.2d 636, error refused no reversible error—*Edge v. City of Bellaire*, Civ.App., 200 S.W.2d 224, error refused—*City of University Park v. Hoblitzelle*, Civ.App., 150 S.W.2d 169, error dismissed, judgment correct, appeal dismissed and certiorari denied *Hoblitzelle v. City of University Park*, 63 S.Ct. 806, 315 U.S. 781, 86 L.Ed. 1188.

46. Tex.—*Edge v. City of Bellaire*, Civ.App., 200 S.W.2d 224, error refused—*City of University Park v. Hoblitzelle*, Civ.App., 150 S.W.2d 169, error dismissed, judgment cor-

rect, appeal dismissed and certiorari denied *Hoblitzelle v. City of University Park*, 62 S.Ct. 806, 315 U.S. 781, 86 L.Ed. 1188.

Capricious action amounting to abuse of discretion

Tex.—*Moody v. City of University Park*, Civ.App., 278 S.W.2d 912, refused no reversible error.

47. Tex.—*Moody v. City of University Park*, supra.

48. N.Y.—*Bowen v. Hider*, 37 N.Y.S.2d 76.

Improper enactment

Allegation that zoning ordinance was invalid in that there had been failure to publish use map which by reference was made part of ordinance, raised issue which was primarily one of fact, to be determined from evidence.

Ill.—*Rock Island Metal Foundry v. City of Rock Island*, 111 N.E.2d 499, 414 Ill. 436.

49. N.J.—*Scarborough Apartments v. City of Englewood*, 87 A.2d 537, 9 N.J. 182.

Lionshead Lake v. Wayne Tp., Passaic County, 74 A.2d 609, 9 N.J.Super. 83.

and bears a substantial relation to the public health, safety, or general welfare⁵⁰ are also questions of fact. Although there is authority to the effect that the question whether a particular use of property is within the terms of a zoning ordinance permitting such use is one of law,⁵¹ it has also been held that

the question whether a particular use is within the terms of an ordinance prohibiting it is one of fact.⁵² Also, the question whether a particular nonconforming use was the same both before and after the passage of a zoning ordinance is a question of fact.⁵³

D. RELIEF GRANTED OR DETERMINATION

§ 367. In General

On review of the determination of a zoning body, the court must act within the bounds of statutory provisions governing the determination and disposition of such causes; the imposition of costs may rest in the discretion of the court.

On review of the determination of a zoning body, generally, the court must act within the bounds of statutory provisions governing the determination and disposition of such causes,⁵⁴ and ordinarily the court is limited to a determination of matters which are within the issues of the case.⁵⁵ Under some statutory provisions, the court has power to reverse or affirm, wholly or partly, or modify the determination of the zoning body,⁵⁶ at least where it has taken and considered additional evidence;⁵⁷ but under other provisions where the court reviewing the proceedings on certiorari disapproves of the decision below, it may not make a further order in the proceedings other than one quashing the decision.⁵⁸

Where the power of the reviewing court is limited to the correction of illegality in the board's decision, although it may not substitute its own discretion for that of the board, it may make such disposition of the case as will correct the illegality.⁵⁹ However, a correction of the determination may not be made where to do so would involve an interference with the exercise of discretion by the zoning body.⁶⁰ Where the court orders a change of a building plan on modification and affirmance of a decision, it is not required to make the actual clerical and professional adjustment of the plan.⁶¹ If the board has adopted a resolution by proper vote but its determination is not shown in the minutes, the court will order the clerical procedure necessary to effectuate the resolution.⁶²

Under some provisions, the court is required to enter such a decree as justice and equity require in accordance with its determination of the law and facts;⁶³ and the decree in a proceeding to review

N.Y.—Hudson v. Town of Oyster Bay, 288 N.Y.S. 627, 248 App.Div. 737.

Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

People v. Leighton, 44 N.Y.S.2d 779.

50. N.Y.—Hudson v. Town of Oyster Bay, 288 N.Y.S. 627, 248 App.Div. 737.

Freeman v. City of Yonkers, 129 N.Y.S.2d 703, 205 Misc. 947.

People v. Leighton, 44 N.Y.S.2d 779.

51. Pa.—Bregman v. Exley, 46 A.2d 272, 354 Pa. 25.

52. Tex.—Young v. City of Abilene, Civ.App., 195 S.W.2d 838, refused no reversible error.

53. Cal.—People v. Johnson, 277 P. 2d 45, 129 C.A.2d 1.

54. Ind.—Board of Zoning Appeals of City of Indianapolis v. Roll, 95 N.E.2d 713, 120 Ind.App. 671.

N.J.—Cobble Close Farm v. Board of Adjustment of Middletown Tp., 92 A.2d 4, 10 N.J. 442.

Pa.—Appeal of Tredyffrin Const. Co., Com.Pl., 8 Chest.Co. 85—Appeal of Huhshman, Com.Pl., 51 Lack.Jur. 251.

Determination held proper

N.J.—Cox v. Wall Tp., 120 A.2d 779, 39 N.J.Super. 243.

55. N.J.—Lionshead Lake v. Wayne Tp., Passaic County, 74 A.2d 609, 9 N.J.Super. 83.

Validity of ordinance

In action for declaratory judgment that zoning ordinance was unconstitutional in so far as it prohibited use of certain property for school purposes, issue which court should have determined was whether ordinance in so far as it pertained to that property was arbitrary, unreasonable, capricious, and void.

Ill.—Ray Schools-Chicago v. City of Chicago, 86 N.E.2d 139, 337 Ill. App. 312.

56. Ind.—O'Connor v. Overall Laundry, 183 N.E. 134, 98 Ind.App. 29. Mo.—Adams v. Board of Zoning Adjustment of Kansas City, App., 241 S.W.2d 35.

Neb.—Roncka v. Fogarty, 41 N.W.2d 745, 152 Neb. 467.

Pa.—Appeal of Livingston Apts., Inc., Com.Pl., 26 Lehigh.J. 575.

Power to make independent disposition of proceeding see *infra* § 368.

57. Pa.—Landau Advertising Co.

v. Zoning Bd. of Adjustment, 138 A.2d 559, 387 Pa. 552—Appeal of Garbev, Inc., 122 A.2d 682, 385 Pa. 328.

58. R.I.—Newport Pester Advertising Co. v. City Council of City of Newport, 122 A.2d 170.

59. Mo.—In re Botz, 159 S.W.2d 367, 236 Mo.App. 566—Superior Press Brick Co. v. City of St. Louis, App., 155 S.W.2d 290—State ex rel. Kaegel v. Holekamp, App., 151 S.W.2d 685.

60. N.Y.—Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20.

61. Md.—Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore, 73 A.2d 531, 195 Md. 383.

62. N.Y.—Pierce v. Mannion, 47 N.Y.S.2d 205, 267 App.Div. 958.

63. Mass.—Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198, 334 Mass. 446—Devine v. Zoning Board of Appeals of Lynn, 125 N.E.2d 131, 332 Mass. 319—Pendergast v. Board of Appeals of Barnstable, 120 N.E.2d 916, 331 Mass. 555—Bicknell Realty Co. v. Board of Appeal of Boston, 116 N.E.2d 570, 330 Mass. 676.

the action of a zoning board should adequately provide for all the relief to which the successful party is entitled.⁶⁴ However, where there is nothing in the findings of the court to show that the zoning board was under a legal compulsion to grant particular discretionary relief, the court may not enter a decree granting such relief,⁶⁵ or order the board to grant it.⁶⁶ Where the court finds that the action of the zoning board is not erroneous, the decree of the court should not be in the form of a decree of dismissal, but the decree should state that the decision of the board did not exceed its authority and that no modification of it is required.⁶⁷

A ruling dismissing a petition testing the validity of a zoning ordinance has been held to include an implied ruling sustaining the validity of the ordinance.⁶⁸ The court may not, as a condition precedent to any further relief, require an aggrieved party to restore his property to a particular use at once, without the right of appeal from the decision.⁶⁹

Default. Even though a zoning body fails to file an answer, a return, and a certification of the evidence before it, it has been held to be undesirable to permit plaintiff to proceed as on a default where the court is reviewing an action of the body involving the exercise of discretion.⁷⁰

Summary judgment may not be granted where factual questions remain unresolved.⁷¹

Enforcement of judgment. Where attorneys of a

municipality were without authority to enter into a consent judgment in a suit involving the application of a zoning ordinance, and the municipality subsequently enacted a new ordinance, the rights of parties bringing a subsequent suit to enforce the prior judgment are governed by the new ordinance.⁷²

Costs and attorney's fees. Under some statutes, the allowance of costs on review of the orders or decisions of a zoning board of appeals may rest in the discretion of the court.⁷³ Costs may be ordered paid by appellant on dismissal of the proceedings for review.⁷⁴ Attorney fees may be allowed, under some statutory provisions, in a taxpayer's suit, as part of plaintiff's costs.⁷⁵

§ 368. Final or Independent Decision

Under some statutory provisions, particularly where the case is heard de novo, a court reviewing a determination of a zoning body is empowered to make a final and independent disposition of the proceeding.

Under some statutory provisions, a court on appeal from a determination of a zoning body is empowered to make a final and independent disposition of the proceeding.⁷⁶ So, under some statutory provisions, where the matter is heard de novo, the court is authorized to make its own rulings on the matter at issue,⁷⁷ or it may render such judgment, and make such orders, as the zoning body should have made.⁷⁸ The court may have authority, in a proper case, to grant a variance.⁷⁹ Where the stat-

64. Mass.—Turner v. Board of Appeals of Town of Milton, 25 N.E.2d 203, 305 Mass. 189.

65. Mass.—Sheehan v. Board of Appeals of Saugus, 124 N.E.2d 253, 333 Mass. 188.

66. Mass.—Pendergast v. Board of Appeals of Burnstable, 120 N.E.2d 918, 331 Mass. 555.

67. Mass.—Co-Itay Realty Co. v. Board of Zoning Adjustment of Boston, 101 N.E.2d 888, 328 Mass. 103.

68. Mass.—Simon v. Town of Needham, 42 N.E.2d 516, 311 Mass. 560, 141 A.L.R. 688.

69. Fla.—Segal v. City of Miami, 63 So.2d 486.

70. N.Y.—Application of Furlong, 111 N.Y.S.2d 398.

71. N.J.—Lionshead Lake v. Wayne Tp., Passaic County, 74 A.2d 609, 9 N.J.Super. 83.

72. U.S.—West v. Bank of Commerce & Trusts, C.C.A.Va., 167 F.2d 664.

73. Md.—Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore, 73 A.2d 531, 195 Md. 383.

74. Pa.—Appeal of Becker, Com.Pl., 68 York Leg.Rec. 174—York Housing

Authority v. York Zoning Bd., Com.Pl., 68 York Leg.Rec. 162.

Apportionment of costs

In proceeding by corporation to enforce enforcement of zoning resolution, costs should not have been taxed against parties to litigation in their capacity as public officials but should have been limited to judgment for taxation of costs against county, without ordering issuance of execution therefor; however, as case involved a close legal question of vital importance and litigation was in good faith, costs would be apportioned equally between corporation and county.

Ill.—Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275, 1 Ill. 2d 200.

Bad faith of board

Willful denial of application for building permit because board of adjustment believed that zoning commission and board of aldermen had acted improperly in approving subdivision in which lot was located constituted sufficient evidence of bad faith for court to assess costs against board.

Mo.—Phillips v. Board of Adjustment

of City of Bellefontaine Neighbors, App., 308 S.W.2d 765.

74. Md.—Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore, 73 A.2d 531, 195 Md. 383.

N.J.—Marlow v. Village of Ridgewood, 52 A.2d 805, 135 N.J.Law 444.

75. Ohio.—State ex rel. Vlach v. Johnson, App., 129 N.E.2d 519.

Amount held reasonable

Ohio.—State ex rel. Vlach v. Johnson, App., 129 N.E.2d 519.

76. Okl.—Appeal of Fred Jones Co., 220 P.2d 245, 203 Okl. 321.

Pa.—Dooling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Tp., 89 A.2d 505, 371 Pa. 290.

77. Pa.—Pincus v. Power, 101 A.2d 914, 376 Pa. 175—Appeal of Rolling Green Golf Club, 97 A.2d 523, 374 Pa. 450—Appeal of Lindquist, 73 A.2d 378, 364 Pa. 561.

Phillips v. Zoning Bd. of Adjustment, Com.Pl., 1 Bucks Co. 25—Appeal of Hilltop Swim Club, Com.Pl., 43 Del.Co. 142.

78. Okl.—Appeal of Fred Jones Co., 220 P.2d 245, 203 Okl. 321.

79. Ala.—Board of Zoning Adjustment for City of Lanett v. Boykin,

ute prescribes a trial de novo, it is not proper for the court to dismiss the appeal; the court should enter an independent judgment.⁸⁰

§ 369. Affirmance

Generally, the court reviewing the determination of a zoning body will affirm or confirm that determination where it is lawful and reasonable.

Generally, the court will affirm or confirm a decision or order of a zoning body where it is lawful and reasonable.⁸¹ On affirmance, the court will not rule on immaterial issues, even though requested to do so by one of the parties.⁸²

§ 370. Reversal

The court may reverse an erroneous determination of a zoning body, as well as a determination which reflects an abuse of discretion, or is arbitrary and capricious.

On review of the determination of a zoning body, the court may reverse the determination where there is error.⁸³ Thus, the court may reverse where the exercise of the discretion of the zoning body is abused,⁸⁴ or is arbitrary and capricious,⁸⁵ or the de-

termination is illegal.⁸⁶

§ 371. Annulment, Vacation, or Setting Aside of Decision or Order

Except as such action may be limited by statute, on review of a determination of a zoning body the court may, in a proper case, annul, vacate, or set aside the determination.

Except as such action may be limited by statute, on review of a decision or order of a zoning body, the court may, in a proper case, annul, vacate, or set aside the determination.⁸⁷ Thus, a decision or order may be annulled or set aside for an error of law,⁸⁸ or for the lack of findings in support of the decision.⁸⁹ The court will also annul or set aside an unreasonable or unlawful decision or order.⁹⁰ Where the action appealed from was beyond the jurisdiction of the board, the court may set it aside despite a change of position and expenditure of money in reliance thereon.⁹¹

However, a determination will not be annulled merely for a failure of the zoning body to keep, and return to a reviewing court, a complete record

92 So.2d 906, 265 Ala. 564—Nelson v. Donaldson, 50 So.2d 244, 255 Ala. 76.

Pa.—Dooling's Windy HNL v. Zoning Bd. of Adjustment of Springfield Tp., 89 A.2d 505, 371 Pa. 290.

80. Ky.—Willoughby v. Tafel, 190 S. W.2d 475, 300 Ky. 792.

81. N.Y.—McGeachin v. Henne, 89 N.Y.S.2d 840, 275 App.Div. 955.

Turner v. Cook, 168 N.Y.S.2d 556.
Pa.—Hewlett v. Zoning Bd. of Adjustment, 8 Pa.Dist. & Co.2d 75, 49 Mun. L.R. 57—Nasuti v. Zoning Bd. of Adjustment, 1 Pa.Dist. & Co.2d 750.
Cella v. Schaefer, Com.Pl., 43 Del. Co. 23—Schwartz v. Wagner, Com.Pl., 72 Montg.Co. 470, 48 Mun.L.R. 134, affirmed 123 A.2d 417, 385 Pa. 364—Appeal of Kiker, Com.Pl., 72 Montg.Co. 161—Appeal of Lowden, Com.Pl., 96 Pittsb.Leg.J. 153.

Reversal not required

Pa.—Baronoff v. Zoning Bd. of Adjustment, Com.Pl., 4 Bucks Co. 277, reversed on other grounds 122 A.2d 65, 385 Pa. 110.

82. N.H.—Mater v. City of Dover, 79 A.2d 844, 97 N.H. 13.

83. N.J.—Finn v. Municipal Council of City of Clifton, 58 A.2d 790, 136 N.J.Law 34.

Pa.—Shore v. Zoning Bd. of Adjustment, 3 Pa.Dist. & Co.2d 14.

Appeal of Kase, Com.Pl., 3 Lycoming 179—Transicoll Corp. v. Worcester Tp. Bd. of Adjustment, Com.Pl., 72 Montg.Co. 155—Appeal of Talenfeld, Com.Pl., 96 Pittsb. Leg.J. 448.

84. Pa.—Moyerman v. Koons, 80 Pa. Dist. & Co. 63.
Rochelle v. Whitmarsh Tp., Com.Pl., 69 Montg.Co. 328.

85. Pa.—Lavelle v. Zoning Bd. of Adjustment, 4 Pa.Dist. & Co.2d 361.

86. Ind.—Board of Zoning Appeals of Decatur v. Decatur Ind. Co. of Jehovah's Witnesses, 117 N.E.2d 115, 233 Ind. 83.

87. N.Y.—Application of Furlong, 111 N.Y.S.2d 398.
R.I.—Gustafson v. Zoning Bd. of Review of City of Warwick, 73 A.2d 366, 77 R.I. 73.

Faulty permit

Where building permit, allowing construction of building for expansion of business in multiple residential district, did not contain limitations specified by board of appeals in granting variance its invalidity was ground for vacating permit.

N.Y.—Lapham v. Roulan, 169 N.Y.S. 2d 346, 10 Misc.2d 152.

Insufficient proceedings by board

(1) In proceeding to review and annul determination of town board denying application for variance, and to direct issuance of permit, absence from record of any statement showing basis on which board refused application required that determination be annulled.

N.Y.—Application of Graham, 158 N.Y.S.2d 97, 7 Misc.2d 30, petition dismissed 165 N.Y.S.2d 154, 7 Misc. 2d 34.

Hampstead Bottling Works Corp. v. Patterson, 117 N.Y.S.2d 103, ap-

peal dismissed 126 N.Y.S.2d 619, 282 App.Div. 1063.

(2) Variance granted by board of zoning appeals could not be sustained where there was no evidence in minutes on which decision could have been founded and it apparently did not sign anything purporting to be a decision.

N.Y.—Sherwood Realty Corp. v. Feriolo, 82 N.Y.S.2d 505, 193 Misc. 194.

88. N.Y.—Underhill v. Board of Appeals of Town of Oyster Bay, 75 N.Y.S.2d 327, 273 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937.
Chad Homes, Inc. v. Board of Appeals of City of Rochester, Monroe County, 159 N.Y.S.2d 383, 5 Misc.2d 20.

R.I.—Paolella v. Zoning Bd. of Review of City of Providence, 122 A. 2d 157.

89. N.Y.—Lapham v. Roulan, 169 N.Y.S.2d 346, 10 Misc.2d 152—Sherwood Realty Corp. v. Feriolo, 82 N.Y.S.2d 505, 193 Misc. 194.

90. Mo.—State ex rel. Barr v. Fleming, App., 259 S.W.2d 417.

N.Y.—Underhill v. Board of Appeals of Town of Oyster Bay, 75 N.Y.S.2d 327, 273 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937.

Turner v. Cook, 168 N.Y.S.2d 556, 9 Misc.2d 850.

Alexander's Department Stores v. Murdock, 37 N.Y.S.2d 319.

91. N.J.—Lynch v. Borough of Hillsdale, 54 A.2d 723, 136 N.J.Law 129, affirmed 59 A.2d 622, 137 N.J. Law 280.

of its proceedings.⁹² The court will not set aside the determination of a zoning body on a discretionary matter where it is not unwarranted.⁹³

§ 372. Remand

On review of the determination of a zoning body, the court may have authority to remand the case for various proceedings by the zoning body, such as a consideration on the merits, a hearing, or the making of findings of fact.

Under some authorities, a court reviewing a decision or order of a zoning body may not remand the case to that body in the absence of statutory authority therefor.⁹⁴ Generally, however, the court may⁹⁵ or must,⁹⁶ in a proper case, remand the matter to the board, with directions, for further proceedings. So, the case may be remanded for

the consideration of the issues on the merits,⁹⁷ the holding of a hearing, the taking of testimony, and the making of findings based on the evidence,⁹⁸ the making of a summary of the evidence and the determination of specific relevant facts,⁹⁹ or for the making of detailed findings of fact.¹ The case may also be remanded for the holding of a rehearing prior to a disposition of the case by the court,² or for the clarification and completion of the decision of the zoning body.³

In remanding a case to a zoning authority with directions, the court may not encroach on the administrative function of the government,⁴ or interfere with the exercise of administrative discretion.⁵ Where the zoning body did not state the

92. N.Y.—*Fox v. Adams*, 134 N.Y.S. 2d 534.

93. N.J.—*Butt Realty Co. v. Board of Adjustment of City of Plainfield*, 48 A.2d 826, 134 N.J.Law 619.

94. Del.—*Searles v. Darling*, 83 A.2d 96, 46 Del. 263.

Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

95. N.Y.—*Collins v. Behan*, 33 N.E. 2d 86, 285 N.Y. 187.

French v. Livingston, 26 N.Y.S.2d 593, 261 App.Div. 1049.

Application of Graham, 158 N.Y.S.2d 97, 7 Misc.2d 30, petition dismissed 165 N.Y.S.2d 154, 7 Misc.2d 34.

Pa.—*Floishon v. Zoning Bd. of Adjustment*, 2 Pa.Dist. & Co.2d 45, affirmed 132 A.2d 673, 385 Pa. 295—*Larhun v. Power*, 88 Pa.Dist. & Co. 48—*Elvan v. Exley*, 58 Pa.Dist. & Co. 538.

Appeal of Carbide & Carbon Chemicals Corp., Com.Pl., 65 Montg. Co. 173—*Gibson v. Borough of Wilkinsburg, Com.Pl.*, 98 Pittsb.Leg.J. 439.

Return or record of board

N.Y.—*Sherwood Realty Corp. v. Feriola*, 82 N.Y.S.2d 505, 193 Misc. 194. Pa.—*Appeal of Hutchinson, Com.Pl.*, 39 Del.Co. 1.

96. N.Y.—*Clinco v. Murdock*, 26 N.Y.S.2d 613, 261 App.Div. 570.

Brachfeld v. Sforza, 118 N.Y.S.2d 631, appeal dismissed 126 N.Y.S.2d 458, 282 App.Div. 1068.

Insufficient proceedings by board

(1) Absence from record of any statement showing basis on which zoning board refused application for variance requires that proceeding be remitted to board for further consideration and a determination stating reasons in support thereof.

N.Y.—*Hempstead Bottling Works Corp. v. Patterson*, 117 N.Y.S.2d 103,

appeal dismissed 126 N.Y.S.2d 619, 282 App.Div. 1063.

(2) Where failure of board of appeals to keep and return complete record of its proceedings, including transcript of evidence on which it acted, is coupled with lack of adequate findings by board supporting its determination, remission of matter to board is generally necessary. N.Y.—*Fox v. Adams*, 134 N.Y.S.2d 534.

(3) Where, in proceeding on application for variance, little, if any, formal proof was taken at public hearing, and board, apparently acting at a closed session, decided to grant variance and later notified petitioner of such by letter, but decision was never actually filed, matter would have to be remitted to board for making and filing of a formal decision.

N.Y.—*Wernert v. McHaffie*, 158 N.Y.S.2d 438.

97. N.J.—*Ward v. Scott*, 93 A.2d 385, 11 N.J. 117.

N.Y.—*De Flavis v. Hill*, 158 N.Y.S.2d 436—*Lyle v. Avis*, 148 N.Y.S.2d 874.

Pa.—*Triolo v. Zoning Bd. of Adjustment*, 59 Pa.Dist. & Co. 211.

Heiser v. Spring Tp., Com.Pl., 46 Berks Co. 151—*Appeal of Ricca, Com.Pl.*, 66 Montg.Co. 32.

R.I.—*Ajootian v. Zoning Bd. of Review of City of Providence*, 132 A.2d 836—*Kent v. Zoning Bd. of Review of Town of Barrington*, 58 A.2d 623, 74 R.I. 89.

Board's mistake as to applicable test

Where return to writ of certiorari did not exhibit reason for granting of variance from terms of zoning ordinance to permit construction of apartments but proceeding before board of adjustment and governing body indicated that controlling factor was lack of market for lands if subdivided in accordance with the zoning regulations and the local need for such apartment houses, cause would

be remitted for re-examination and determination in accordance with correct principles.

N.J.—*Brandon v. Board of Com'rs of Town of Montclair*, 11 A.2d 304, 124 N.J.Law 135, affirmed 15 A.2d 598, 125 N.J.Law 367.

98. D.C.—*Hyman v. Coe, D.C.*, 102 F. Supp. 254.

Pa.—*Corsino v. Zoning Bd. of Adjustment*, 73 Pa.Dist. & Co. 500.

Ordinance not requiring hearing

Where village ordinance on which landowner's application to village board of trustees for permission to rebuild a nonconforming building that had been partially destroyed by fire was based, made no provision for public hearing, court implied requirement of notice and hearing, and remitted matter to board for hearing, and to give applicant opportunity to cross-examine witnesses, inspect documents and offer evidence in explanation or rebuttal.

N.Y.—*Branche v. Board of Trustees of Incorporated Village of Great Neck*, 141 N.Y.S.2d 477.

99. Pa.—*Kellman v. Philadelphia Zoning Bd. of Adjustment*, 75 Pa. Dist. & Co. 504.

1. N.Y.—*Application of Furlong*, 111 N.Y.S.2d 398.

Pa.—*Appeal of Peirce, Com.Pl.*, 15 Beaver 186, reversed on other grounds 119 A.2d 506, 384 Pa. 100.

2. N.Y.—*Rose v. Zoning Bd. of Appeals of Town of New Castle*, 143 N.Y.S.2d 740.

3. R.I.—*Perrier v. Board of Appeals of City of Pawtucket*, 124 A.2d 237.

4. Conn.—*Watson v. Howard*, 86 A.2d 67, 138 Conn. 464.

5. N.Y.—*In re Cosden*, 64 N.Y.S.2d 37, affirmed *In re Application of Cosden*, 63 N.Y.S.2d 640, 270 App. Div. 1018.

grounds for its decision, but the record shows that the decision was either correct or erroneous, the case will not be remanded.⁶ Under some practice, the court may, in a proper case, sustain the appeal rather than remand the matter to the zoning authority.⁷

Where the court is unable to render a decision on the record which was transmitted to it, but, because of a change in the governing statute, the zoning body which rendered the decision appealed from no longer exists, so that the case cannot be remanded to it, the court will return the record to a successor body without prejudice to petitioner's right to present a petition to that body for such relief as he deems advisable.⁸

§ 373. Effect of Decision

A judgment restraining the enforcement of an invalid zoning ordinance does not prevent the enactment of other zoning ordinances affecting the same property which are reasonable under changed conditions; and reversal of a grant of a variance on the ground of misinterpretation of the ordinance does not prevent the board from granting a variance on proper grounds on a second application.

An injunction restraining the enforcement of an invalid zoning ordinance does not prevent a municipality from enacting other zoning ordinances affecting the same property if conditions so change as to warrant a rezoning that will not be arbitrary and unreasonable.⁹ A decree enjoining a municipality from interfering with the construction of a particular type of building notwithstanding the terms of a zoning ordinance does not prevent the application of the ordinance to the property in question so as to allow construction which violates the ordinance in other respects.¹⁰

A variance granted by a zoning board remains in full force and effect when it is affirmed by a reviewing court.¹¹ Reversal of a grant of a variance on the ground that the board has misinterpreted the ordinance does not prevent the board from granting a variance on proper grounds on a second applica-

tion.¹² Similarly, where a structure is erected pending an appeal from the decision granting a variance for its use contrary to a zoning ordinance, on reversal of the decision granting the variance, the structure, although it may not be put to the prohibited use, may be put to any permissible use under the zoning regulations and need not be removed.¹³

Where a permit issued by a zoning board, building permits, and certificates of occupancy under which a business is constructed and operated are annulled by a court order, the law of the case has been held to be that all activities involved in the construction and operation of the business had at all times been illegal.¹⁴ Where plans for a house, which did not conform to a zoning ordinance, are revised to conform to it, such defect in the original plans is cured by a decree approving the revised plans.¹⁵

Res judicata. A prior decision sustaining the validity of a zoning regulation does not preclude a landowner from showing that the regulation cannot be lawfully applied to a specific parcel of land in the peculiar circumstances connected with that parcel.¹⁶ A finding, in a prior action between neighboring property owners and a zoning board in which a particular landowner assisted in the defense but exercised no control over the conduct of the suit, is not *res judicata* as to the landowner in a subsequent suit involving the same issue.¹⁷ A decree which is not binding on a party because it is based on a stipulation that a zoning ordinance is illegal is not *res judicata* in a subsequent suit to enforce it.¹⁸

§ 374. Further Proceedings by Zoning Body

On remand of a case to a zoning body, it is incumbent on that body to execute the judgment embodied in the mandate of the court.

When a case is remanded to a zoning board by a reviewing court it is incumbent on the board to execute the judgment embodied in the mandate of the

6. R.I.—*Winters v. Zoning Bd. of Review of City of Warwick*, 96 A. 2d 337, 80 R.I. 275.

7. Conn.—*Guerriero v. Galasso*, 136 A.2d 497, 144 Conn. 600.

8. R.I.—*Heroux v. Zoning Bd. of Review of City of Pawtucket*, 107 A.2d 303, 82 R.I. 237.

9. Ill.—2700 Irving Park Bldg. Corp. v. City of Chicago, 69 N.E.2d 827, 395 Ill. 138.

10. Ark.—*City of Little Rock v. Hunter*, 228 S.W.2d 53, 216 Ark. 916.

11. U.S.—222 East Chestnut St.

Corp. v. La Salle Nat. Bank, C.A. Ill., 253 F.2d 484.

12. Pa.—*Triolo v. Exley*, 57 A.2d 878, 358 Pa. 555.

13. Md.—*Heath v. Mayor & City Council of Baltimore*, 58 A.2d 896, 190 Md. 896.

14. N.Y.—*Underhill v. Board of Appeals of Town of Oyster Bay*, 72 N.Y.S.2d 588, affirmed 75 N.Y.S.2d 327, 278 App.Div. 788, affirmed 80 N.E.2d 342, 297 N.Y. 937.

15. Ark.—*City of Little Rock v. Southwest Builders*, 276 S.W.2d 679, 224 Ark. 871.

16. Mass.—*Barney & Casey Co. v. Town of Milton*, 87 N.E.2d 9, 324 Mass. 440.

Effect of invalidity of portion of zoning ordinance see *supra* § 23.

17. Mass.—*Pioneer Insulation & Modernizing Corp. v. City of Lynn*, 120 N.E.2d 913, 331 Mass. 560.

Persuasiveness of former opinion
Pa.—*Freeman v. Lansdowne Borough, Quar. Sec.*, 34 Del.Co. 449.

18. U.S.—*West v. Bank of Commerce & Trusts, C.C.A. Va.*, 167 F.2d 664.

court,¹⁹ and where there is nothing in the opinion or mandate of the court which narrows the jurisdiction of the board, it may open the case for the taking of further proof.²⁰ Where an order of a court, on a motion to correct and amend a resolution of a zoning board, grants the motion and remits the matter to the board without any limiting language, the board is not required to hold a hearing de novo on the merits.²¹

Notice. Generally, further proceedings before a zoning board on remand require that proper notice and an opportunity to be heard be given to the parties,²² and, where the case assumes its original status before the board, so that the party who instituted the proceedings is reestablished as applicant, any burden imposed by statute as to notice of the hearing on remand is on such party.²³

E. SUBSEQUENT REVIEW

§ 375. In General

A review of a judgment or order of a court which reviewed an order or decision of a zoning body may be had in a proper case.

Under some statutes an appeal may be taken in a proper case from the decision of a court reviewing a decision of an administrative body with respect to zoning.²⁴ Although an appeal may lie from the issuance of a writ of certiorari by a court acting in its original common-law capacity,²⁵ in the absence of a statute authorizing it, there is no right of further review of a decision or order of a court on review, under statutory authority, of a decision or order of a zoning body unless the court acted without jurisdiction, or exceeded its statutory authority.²⁶

Writ of error coram nobis is not available to correct errors of law in the lower court.²⁷

§ 376. Jurisdiction

Constitutional and statutory provisions may limit the particular courts which may assume jurisdiction of an appeal from a decision of a lower court on review of a determination of a zoning body.

Jurisdiction of appeals from determinations of a court on review of a decision or order of a zoning body is controlled by constitutional and statutory provisions, and only appellate courts authorized by such provisions may exercise jurisdiction.²⁸

Transfer of cause. Under a statute so providing, where a case is not properly before a particular court on review of a determination of an inferior

19. N.J.—*Protomastro v. Board of Adjustment of City of Hoboken*, 67 A.2d 231, 3 N.J.Super. 539, reversed on other grounds 70 A.2d 873, 3 N.J. 494.

Procedure held proper

Where court entered mandate setting aside resolution of board granting variance because of absence of finding of unnecessary hardship, and remitted matter for further action, board could properly adopt corrective resolution granting variance and stating existence of hardship as basis therefor after first voting against variance on an improper interpretation of mandate.

N.J.—*Protomastro v. Board of Adjustment of City of Hoboken*, supra.

20. N.J.—*Protomastro v. Board of Adjustment of City of Hoboken*, 70 A.2d 873, 3 N.J. 494.

21. N.Y.—*Eckerman v. Murdock*, 91 N.Y.S.2d 637, 195 Misc. 280, affirmed 94 N.Y.S.2d 557, 276 App. Div. 927.

22. N.J.—*Protomastro v. Board of Adjustment of City of Hoboken*, 70 A.2d 873, 3 N.J. 494.

23. N.J.—*Protomastro v. Board of Adjustment of City of Hoboken*, supra.

24. Va.—*Burkhardt v. Board of Zoning Appeals*, 66 S.E.2d 565, 192 Va. 606.

Waiver of appeal

Village building board of zoning appeals cannot contend that it did not consent to waiver of appeal, where record on pleas of release of errors showed board had not authorized appeal in its behalf from order. Ill.—*Dreher v. Baker*, 253 Ill.App. 583.

25. Md.—*Johnson v. Board of Zoning Appeals of Baltimore County*, 76 A.2d 736, 196 Md. 400.

26. Md.—*Johnson v. Board of Zoning Appeals of Baltimore County*, supra.

27. Mo.—*Veal v. Leimkuehler*, App. 267 S.W.2d 387.

28. Conn.—*Bardes v. Zoning Bd. of City of Stamford*, 106 A.2d 160, 141 Conn. 317.

N.J.—*Giordano v. City Commission of City of Newark*, 67 A.2d 454, 2 N.J. 585.

Va.—*Burkhardt v. Board of Zoning Appeals*, 66 S.E.2d 565, 192 Va. 606.

Constitutional questions

(1) Where no question of constitutionality of zoning ordinance is involved, intermediate appellate court

is not deprived of jurisdiction of appeal on ground that it has no jurisdiction to try constitutional questions.

Ill.—*People ex rel. Danielson v. City of Rockford*, 87 N.E.2d 660, 338 Ill. App. 347.

Mo.—*Bormann v. City of Richmond Heights*, App. 213 S.W.2d 249.

(2) Where issue of constitutionality of zoning ordinance was presented to, and decided by, trial court, invalidity of ordinance was primary object of suit, and direct appeal to supreme court from judgment of unconstitutionality was authorized, although trial court judgment was possible only because court first decided that suit was not barred by res judicata, and this was only question on appeal.

Ill.—*Whitsel v. Cook County*, 122 N.E.2d 564, 4 Ill.2d 269.

(3) Where contention that ordinances under which board of zoning appeals was operating were void, on ground that they offended constitutional provisions, was not properly raised for decision on writ of error, supreme court had no jurisdiction on ground that question of constitutional law was involved.

Ga.—*Galfas v. Ailor*, 55 S.E.2d 582, 206 Ga. 76, appeal transferred, see 57 S.E.2d 834, 81 Ga.App. 13.

court, it must be transferred to an intermediate appellate court.²⁹ Where the sole question on appeal is the construction of a zoning ordinance, and there is no showing that the loss to the property owner will exceed the monetary jurisdiction of the court if the ordinance is construed contrary to his views, the cause will not be transferred to another court.³⁰

§ 377. Decisions Reviewable

In general, the judgment or order of the court below, on review of a determination of a zoning body, must be final in order to be reviewable.

As in civil actions generally, except as may otherwise be provided by statute, the decision of the lower court on review of the determination of a zoning body must be final to be appealable.³¹ An order denying a motion for reargument of a petition for certiorari has been held not appealable,³² and an order of a lower court remitting the proceeding to the zoning board for further consideration and determination has likewise been held not appealable.³³ An appeal may not be had from a decision of a court which is declared by the governing statute to be conclusive.³⁴

§ 378. Who May Appeal

Generally, persons aggrieved by a decision of a court

on review of a determination of a zoning authority may appeal therefrom.

In accordance with general rules, persons who are properly parties to the proceedings for review of orders or decisions of a zoning official or board usually may appeal from the determination therein.³⁵ Parties who are aggrieved by the decision of the court below may seek a review of, or may appeal from, the adverse decision;³⁶ but a corporation is not an aggrieved or interested party entitled to appeal merely because its members are aggrieved or interested persons.³⁷

Under some statutes, which do not by their terms confer a right of appeal, zoning officials may not appeal from decisions of a court reversing or overruling their orders or decisions.³⁸ Under other statutes, where a zoning agency is a party to the review proceedings, it may appeal from an adverse decision therein,³⁹ especially where it represents the public interest.⁴⁰ According to some authority, a municipal corporation may prosecute an appeal from the decision of a court reviewing the decision of an administrative body with respect to the granting, denial, or revocation of a permit.⁴¹ On the other hand, a municipality, which was not a party to the record before a board of appeals or adjust-

29. Ga.—*Cheek v. White*, 49 S.E.2d 819, 204 Ga. 321, appeal transferred, see 51 S.E.2d 465, 78 Ga.App. 476.

30. Mo.—*Royal Meat Products Co. v. Kansas City*, Mo.App., 214 S.W.2d 713.

31. Conn.—*Watson v. Howard*, 86 A.2d 67, 138 Conn. 464.

32. N.Y.—*Application of Aisloff*, 94 N.Y.S.2d 226.

33. N.Y.—*Hempstead Bottling Works Corp. v. Patterson*, 126 N.Y.S.2d 619, 282 App.Div. 1063—*Brachfeld v. Sforza*, 126 N.Y.S.2d 453, 282 App.Div. 1068.

Interlocutory order

Order of court, which reversed, and remanded case to board, was not such an order that fully decided and determined case, but was in nature of interlocutory order from which appeal would not lie although it could be considered on later appeal from final order.

Md.—*Nuova Realty Co. v. Mayor and City Council of Baltimore City*, 78 A.2d 765, 197 Md. 266.

34. Pa.—*Wynnewood Civic Ass'n v. Lower Merion Tp.*, 119 A.2d 799, 180 Pa.Super. 453.

35. Conn.—*Devaney v. Board of Zoning Appeals of City of New Haven*, 43 A.2d 304, 132 Conn. 218.

Md.—*Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore*, 73 A.2d 531, 195 Md. 383.

36. Ill.—*East Maine Tp. Community Ass'n v. Pioneer Trust and Sav. Bank*, 145 N.E.2d 777, 15 Ill.App.2d 250.

Ohio.—*Ohio State Students Trailer Park Co-op. v. Franklin County*, Ohio App., 123 N.E.2d 542.

37. Md.—*Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore*, 73 A.2d 531, 195 Md. 383.

38. Colo.—*Board of Adjustment of City and County of Denver v. Kuehn*, 290 P.2d 1114, 132 Colo. 348. Ga.—*Gilliam v. Etheridge*, 21 S.E.2d 556, 67 Ga.App. 731.

La.—*State ex rel. Hurley v. Zoning Board of Appeal and Adjustment*, 4 So.2d 822, 198 La. 766—*State ex rel. Bringham v. Zoning Board of Appeal and Adjustment*, 4 So.2d 820, 198 La. 758.

Md.—*Roeder v. Brown*, 65 A.2d 333, 192 Md. 639—*Miles v. McKinney*, 199 A. 540, 174 Md. 551, 117 A.L.R. 207.

Ohio.—*A. Di Cillo & Sons v. Chester Zoning Bd. of Appeals*, 109 N.E.2d 8, 158 Ohio St. 302.

Minn.—*Minnis v. Hamilton County Bd. of Zoning Appeals*, 101 N.E.2d 388, 89 Ohio App. 289.

Pa.—*Appeal of Edwards*, 140 A.2d 110, 392 Pa. 188—*Appeal of Board of Adjustment, Lansdowne Borough*, 170 A. 867, 313 Pa. 523.

Steele v. Lower Moreland Tp., Com.Pl., 71 Montg. Co. 156.

Reason for rule

Board itself has no standing to appeal since it is merely an administrative agency exercising quasi-judicial and legislative functions and has no interest personal or official in matters which come before it other than to decide them according to law and proved facts.

Md.—*Roeder v. Brown*, 65 A.2d 334, 192 Md. 639—*Board of Zoning Appeals v. McKinney*, 199 A. 540, 174 Md. 551, 117 A.L.R. 207.

Building inspector has no right of appeal from judgment reversing orders of board of zoning appeals.

Ohio.—*Union Cemetery Ass'n v. Franklin County Bd. of Zoning Appeals*, App., 125 N.E.2d 378.

39. Mass.—*Cefalo v. Board of Appeal of Boston*, 124 N.E.2d 247, 332 Mass. 178.

Mo.—*Cunningham v. Leimkuehler*, App., 276 S.W.2d 633.

N.Y.—*Corbett v. Zoning Bd. of Appeals of City of Rochester*, 128 N.Y.S.2d 12, 283 App.Div. 282.

40. Conn.—*Rommell v. Walsh*, 15 A.2d 6, 127 Conn. 16.

Tex.—*Board of Adjustment of City of Fort Worth v. Stovall*, 216 S.W.2d 171, 147 Tex. 366.

41. Md.—*Mayor and City Council of Baltimore v. Shapiro*, 51 A.2d 273, 187 Md. 623.

ment, may not prosecute a writ of error in its own name from a decision on review of the determination of the board, even though it was an intervenor in the review proceedings,⁴² although it may, through its attorneys, seek review of the decision of the court in the name of its employee on whom the decision acts directly.⁴³

§ 379. Presentation and Reservation Below of Grounds for Review

Except for Jurisdictional matters, questions which were not raised in the court below on review of a determination of a zoning authority will not be considered on further review.

Generally, questions or objections which were not raised or urged in the original proceedings for review of a decision or order of a zoning official or board will not be considered on further review.⁴⁴ Accordingly, constitutional questions not properly raised below will not be considered on the appeal.⁴⁵ It has been held, however, that objections to the jurisdiction of the lower court to review the action of the zoning board may be raised for the first time in the higher appellate court.⁴⁶

§ 380. Stay of Proceedings

A stay of proceedings on further review of a determination of a zoning board may not be had if irreparable damage would result if it were granted.

In the case of an appeal by a zoning board from a determination upsetting its order, an application by the board for a stay of the determination will be denied if the adversary may suffer irreparable loss from a stay, while the board will suffer no material or substantial injury from a denial of a stay.⁴⁷ An order of a lower court, vacating a stay pending appeal from a judgment setting aside a zoning ordi-

nance, is intended to be effective at once, even though it is not signed by the court, where it accompanies a simultaneous dismissal of defendant's cross appeal to which the stay was incident, and it is announced in open court in the presence of counsel for the parties.⁴⁸

§ 381. Taking and Perfecting Proceedings for Review

The time for taking and perfecting an appeal from a judgment on review of a determination of a zoning body may be governed by statutory provisions.

The time for an appeal from a judgment or appealable order of a court on review of a determination of a zoning body may be governed by statutory provisions.⁴⁹

Appeal bond. Under a statute permitting a board of adjustment to appeal from adverse decisions on review of its orders, the board is considered to be a governmental agency exempted from the requirement of filing an appeal bond.⁵⁰

Briefs. Matters which were not before a zoning board or the trial court have been held to be improperly included in an appendix to a brief filed on appeal from a review of a determination of such board.⁵¹

§ 382. Record

The record on appeal from a decision of a trial court on review of the determination of a zoning body may and should contain such matters as are essential to a proper consideration of the questions raised for review.

On appeal from a decision of a trial court reviewing the action of a board of appeal or adjustment, the usual rules of appeal and error govern the requirements as to the record.⁵² Thus, the

Pa.—Appeal of Edwards, 140 A.2d 110, 392 Pa. 188.

Perelman v. Board of Adjustment of Borough of Yeadon, 18 A.2d 438, 144 Pa.Super. 5.

42. Colo.—Board of Adjustment of City and County of Denver v. Kuehn, 290 P.2d 1114, 132 Colo. 348.

43. Colo.—Board of Adjustment of City and County of Denver v. Kuehn, *supra*.

44. Conn.—Guerrero v. Galasso, 136 A.2d 497, 144 Conn. 600.

Va.—Ross v. County Bd. of Arlington County, 87 S.E.2d 794, 197 Va. 91.

45. N.Y.—Robusto v. Tibbetts, 100 N.Y.S.2d 370, 277 App.Div. 1008—Eckerman v. Murdock, 94 N.Y.S.2d 557, 276 App.Div. 927—Thomas v. Board of Standards and Appeals of City of New York, 33 N.Y.S.2d 219,

263 App.Div. 352, reversed on other grounds 48 N.E.2d 284, 290 N.Y. 109. N.C.—Wilson Realty Co. v. City and County Planning Bd. for City of Winston-Salem and Forsyth County, 92 S.E.2d 82, 243 N.C. 648.

46. Conn.—Bardes v. Zoning Bd. of City of Stamford, 106 A.2d 160, 141 Conn. 317.

Mass.—Marotta v. Board of Appeals of Revere, 143 N.E.2d 270.

47. N.Y.—Chandler v. Corbett, 85 N.Y.S.2d 490.

48. N.J.—Roselle v. Mayor and Council of Borough of Moonachie, 139 A.2d 42, 49 N.J.Super. 35.

49. Ky.—Freeman v. Louisville & Jefferson County Planning & Zoning Commission, 214 S.W.2d 582, 308 Ky. 360.

Pa.—Appeal from Zoning Ordinance of Upper St. Clair Tp., 94 A.2d 91, 172 Pa.Super. 295.

Appeal held diligently prosecuted Conn.—Rommell v. Walsh, 15 A.2d 6, 127 Conn. 10.

Reduction of time

Legislature could reduce the time in which appeals could be prosecuted in zoning cases where the act so doing gives all litigants a reasonable time for prosecuting the appeal.

Ky.—Freeman v. Louisville & Jefferson County Planning & Zoning Commission, 214 S.W.2d 582, 308 Ky. 360.

50. Tex.—Board of Adjustment of City of Fort Worth v. Stovall, 216 S.W.2d 171, 147 Tex. 866.

51. Md.—Hedin v. Board of County Com'rs of Prince Georges County, 130 A.2d 663, 209 Md. 224.

52. Pa.—Wolfe v. Zoning Board of City of Erie, 54 Pa.Dist. & Co. 565, 28 Erie Co. 147.

record may and should contain such matters as are essential to a proper consideration of the questions presented for review.⁵³ Where minutes of proceedings of the zoning board of adjustment should have been part of the record submitted to the lower court but were not so submitted, the appellate court will consider such minutes as a part of the record before it.⁵⁴ The decision of the lower court is deemed to be part of the record on subsequent review.⁵⁵

§ 383. Dismissal

An appeal from a decision on review of an order of a zoning body is subject to dismissal for various reasons, including lack of jurisdiction on the part of the appellate court, and the fact that the questions involved have become moot.

An appeal from a decision on review of an order of a zoning body will be dismissed for proper cause,⁵⁶ as where the appeal was not taken within the required time,⁵⁷ or where there has been a failure to comply with court rules governing appellate procedure.⁵⁸ An appeal will also be dismissed where appellant fails to show that he is a party authorized, under the governing statute, to

appeal,⁵⁹ or where the questions involved therein have become moot;⁶⁰ but a dismissal of a case as moot may be made without prejudice to the future litigation of any question that was decided by the lower court.⁶¹

Costs. Under some statutes costs on dismissal of a case on further review must be paid by appellant.⁶²

§ 384. Scope and Extent of Review

On appeal from a decision on review of a zoning matter, an appellate court will consider only matters which form the basis of the decision appealed from, and unless the decision is palpably wrong, it will not be disturbed.

The scope and extent of inquiry on subsequent review of zoning cases is governed by the usual rules applicable to such matters in civil cases.⁶³ Usually, the appellate court will not consider, or make a ruling on, matters other than those forming the basis of the decision appealed from,⁶⁴ and it will decline to rule on an issue in the appeal where the person who will be affected by its determination is not a party to the appeal.⁶⁵ So, if

Exhibits held properly part of record
Ohio.—*Cassell v. Lexington Tp. Bd. of Zoning Appeals*, 127 N.E.2d 11, 163 Ohio St. 340.

53. S.C.—*Stevenson v. Board of Adjustment of City of Charleston*, 96 S.E.2d 456, 230 S.C. 440.

54. N.J.—*Tomko v. Vißers*, 121 A.2d 502, 21 N.J. 226.

55. Mass.—*Barney & Casey Co. v. Town of Milton*, 87 N.E.2d 9, 324 Mass. 440.

56. Md.—*Lake Falls Ass'n v. Board of Zoning Appeals of Baltimore County*, 121 A.2d 809, 209 Md. 561.

Ground for dismissal held not shown
Md.—*Mayor and City Council of Baltimore v. Shapiro*, 51 A.2d 273, 187 Md. 623.

57. Ky.—*Freeman v. Louisville & Jefferson County Planning & Zoning Commission*, 214 S.W.2d 582, 308 Ky. 380.

58. Mo.—*Beeler v. Board of Adjustment of City of Joplin, App.*, 298 S.W.2d 481.

59. Md.—*Norwood Heights Imp. Ass'n v. Mayor & City Council of Baltimore*, 73 A.2d 529, 195 Md. 368.

60. Ind.—*Schacht v. Board of Zoning Appeals of City of Indianapolis*, 132 N.E.2d 924, 126 Ind.App. 543.
Md.—*Banner v. Home Sales Co. D.*, 94 A.2d 264, 201 Md. 425.

Public interest held not involved
Where zoning classification of lot was changed and subsequent to appeal, property was rezoned, appeal did not involve questions of such

general public interest as would preclude dismissal on ground that controversy was moot, since questions related to a particular lot, and answers thereto would not have abstract application, and there was no reason to anticipate revival of original classification of property.
Md.—*Lake Falls Ass'n v. Board of Zoning Appeals of Baltimore County*, 121 A.2d 809, 209 Md. 561.

Appeal held not dismissable as moot
Ky.—*City of Louisville v. Puritan Apartment Hotel Co.*, 264 S.W.2d 888.

Mass.—*Massachusetts Feather Co. v. Aldermen of Chelsea*, 120 N.E.2d 766, 331 Mass. 527.

S.D.—*Dodds v. Bickle*, 85 N.W.2d 284.

61. Md.—*Lake Falls Ass'n v. Board of Zoning Appeals of Baltimore County*, 121 A.2d 809, 209 Md. 561.

62. Md.—*Lake Falls Ass'n v. Board of Zoning Appeals of Baltimore County*, supra.

Costs on further review generally see infra § 389.

63. Fla.—*Miami Shores Village v. Bessemer Properties*, 54 So.2d 108.

Construction of pleading
Ky.—*Hennessy v. Bischoff*, 240 S.W.2d 71.

Ruling below as establishing law of case

Conn.—*Hutchison v. Board of Zoning Appeals of Town of Stratford*, 83 A.2d 201, 138 Conn. 247.

Immaterial issue

Whether city was proper party was immaterial where all questions raised

by city were also raised by other petitioners.

Mass.—*Miller v. Emergency Housing Commission*, 116 N.E.2d 663, 330 Mass. 693.

64. Del.—*Rowen v. Emmett S. Hickman Co.*, 115 A.2d 320.

Md.—*Hedin v. Board of County Com'rs of Prince Georges County*, 120 A.2d 663, 209 Md. 224—*Windsor Hills Imp. Ass'n v. Mayor & City Council of Baltimore*, 73 A.2d 531, 195 Md. 383.

Mass.—*Lawrence v. Board of Appeals of Lynn*, 142 N.E.2d 378—*Real Property v. Board of Appeal of Boston*, 42 N.E.2d 499, 311 Mass. 430.

N.J.—*Concord Garden Apartments v. Board of Adjustment of City of Englewood*, 64 A.2d 355, 1 N.J. Super. 301.

Wis.—*State ex rel. A. Hynek & Sons Co. v. Board of Appeals of City of Racine*, 86 N.W.2d 623, 267 Wis. 309.

Amended statute

Supreme court will not consider amendment which materially altered zoning statute in favor of one of parties and which became effective after proceedings were initiated and hearing was held by board of adjustment.

N.J.—*National House & Farms Ass'n v. Board of Adjustment of Borough of Oakland*, 65 A.2d 518, 2 N.J. 11.

65. N.J.—*H. Behlen & Bros., Inc. v. Mayor and Council of Town of Kearny*, 105 A.2d 894, 31 N.J. Super. 30.

a case is tried on a particular theory in the court below, the appellate court will determine the case on the same theory.⁶⁶

Unless it was palpably wrong,⁶⁷ the decision of the court below will not be disturbed,⁶⁸ at least where the trial therein was de novo.⁶⁹ Where the appeal below was heard on the record and the court made no additional findings of fact, the question on appeal from the judgment is whether the court was warranted on the record in reaching the conclusion it did.⁷⁰

Where the proceedings in the court below are taken under a statute which is silent as to the right

to appeal to a higher court, the scope of review on appeal has been held to be as limited as on certiorari.⁷¹ Accordingly, the record will be examined with a view to determining whether the proceeding is free from mistakes of law,⁷² or whether there was a violation of law;⁷³ but only where the record clearly establishes an arbitrary, capricious, or unreasonable determination, or a clear violation of positive law, will the appellate court interfere with the exercise of an administrative duty by the agency intrusted therewith.⁷⁴ So, the decision of the lower court will not be disturbed where there is adequate evidence to support the findings below, and the proceeding is free from error of law, and

66. Conn.—*Treat v. Town Plan and Zoning Commission of Town of Orange*, 139 A.2d 601.

67. Conn.—*Blake v. Board of Appeals of City of Hartford*, 169 A. 195, 117 Conn. 527.

Logic and law

Appellate court, in reviewing action of lower court, has to decide whether lower court can, in logic and in law, reach conclusion that decision of zoning body should be overruled.

Conn.—*Suffield Heights Corp. v. Town Planning Commission of Town of Manchester*, 133 A.2d 612, 144 Conn. 425.

68. Fla.—*City of Miami Beach v. Prevatt*, 97 So.2d 473—*City of Miami v. Ross*, 76 So.2d 152.

Pa.—*Todd v. McLaughlin*, 12 A.2d 18, 337 Pa. 431—*Philadelphia Fairfax Corporation v. McLaughlin*, 9 A.2d 538, 336 Pa. 342.

69. Ala.—*White v. Board of Adjustment of City of Birmingham*, 15 So. 2d 585, 245 Ala. 48.

Ky.—*Louisville and Jefferson County Planning and Zoning Commission v. Grady*, 273 S.W.2d 563—*Tafel v. Highland Chevrolet Co.*, 248 S.W.2d 346.

Okl.—*Application of Shadid*, 238 P.2d 794, 205 Okl. 462.

70. Conn.—*Rafala v. Zoning Bd. of Appeals of City of Hartford*, 62 A.2d 337, 135 Conn. 142.

71. Pa.—*Appeal of O'Hara*, 131 A.2d 587, 389 Pa. 35—*Garner v. Zoning Bd. of Adjustment of City of Philadelphia*, 130 A.2d 148, 388 Pa. 98—*Appeal of Garbev, Inc.*, 122 A. 2d 682, 385 Pa. 328—*Food Corp. v. Zoning Bd. of Adjustment of City of Philadelphia*, 121 A.2d 94, 384 Pa. 288—*Walker v. Zoning Bd. of Adjustment*, 110 A.2d 414, 380 Pa. 228—*Appeal of Rolling Green Golf Club*, 97 A.2d 523, 374 Pa. 450—*Application for Certificate of Occupancy 500 Paximosa Avenue, Easton*, 66 A.2d 225, 362 Pa. 116—*Application of Imperial Asphalt*

Corp., 59 A.2d 121, 359 Pa. 402—*Triolo v. Exley*, 57 A.2d 878, 358 Pa. 555—*Appeal of Crawford*, 57 A.2d 862, 358 Pa. 636—*Appeal of Veltri*, 49 A.2d 369, 355 Pa. 135.

Root v. City of Erie Zoning Bd. of Appeals, 118 A.2d 297, 180 Pa. Super. 38—*Schaub v. Brentwood Borough Zoning Bd. of Adjustment*, 118 A.2d 292, 180 Pa. Super. 105—*Deane v. Board of Adjustment of Zoning Board of Borough of Edgeworth*, 94 A.2d 112, 172 Pa. Super. 502—*Gish v. Exley*, 34 A.2d 925, 158 Pa. Super. 653.

Broad or narrow certiorari

(1) According to some decisions, scope of review is as on broad certiorari.

Pa.—*Nicholson v. Zoning Bd. of Adjustment of City of Allentown*, 140 A.2d 604—*Appeal of Edwards*, 140 A.2d 110, 392 Pa. 188—*Fagan v. Philadelphia Zoning Bd. of Adjustment*, 132 A.2d 279, 389 Pa. 99—*Landau Advertising Co. v. Zoning Bd. of Adjustment*, 128 A.2d 559, 387 Pa. 552—*Schmidt v. Philadelphia Zoning Bd. of Adjustment*, 114 A.2d 902, 382 Pa. 521—*Fleming v. Prospect Park Board of Adjustment*, 178 A. 813, 318 Pa. 582.

Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit, 130 A.2d 240, 183 Pa. Super. 219, appeal dismissed *Swift v. Borough of Bethel, Pa.*, 78 S.Ct. 120, 355 U.S. 40, 2 L.Ed.2d 71.

(2) Where statute did not provide for appeal from lower court on zoning questions, review was as on broadest certiorari, and this would be so whether or not testimony on issue had been taken below, scope of inquiry of court being determined by breadth of certiorari issued by it and not by power exercised by court below.

Pa.—*Landau Advertising Co. v. Zoning Bd. of Adjustment*, 128 A.2d 559, 387 Pa. 552—*Schmidt v. Philadelphia Zoning Bd. of Adjustment*, 114 A.2d 902, 382 Pa. 521.

(3) It has been held, however, that on property owner's appeal from

dismissal of complaint questioning validity of zoning ordinance amendment, superior court would have to consider case as on narrow certiorari. Pa.—*Appeal of Lieb*, 116 A.2d 860, 179 Pa. Super. 318.

72. Pa.—*Appeal of Edwards*, 140 A. 2d 110, 392 Pa. 188—*Dooling's Windy Hill v. Zoning Bd. of Adjustment of Springfield Tp.*, 89 A.2d 505, 371 Pa. 290—*Appeal of Lindquist*, 73 A.2d 378, 364 Pa. 561—*Application of Imperial Asphalt Corp.*, 59 A.2d 121, 359 Pa. 402—*Fleming v. Prospect Park Board of Adjustment*, 178 A. 813, 318 Pa. 582.

Additional evidence heard by court below

Pa.—*O'Neill v. Philadelphia Zoning Bd. of Adjustment*, 120 A.2d 901, 384 Pa. 379.

73. Pa.—*Nicholson v. Zoning Bd. of Adjustment of City of Allentown*, 140 A.2d 604—*Fagan v. Philadelphia Zoning Bd. of Adjustment*, 132 A.2d 279, 389 Pa. 99—*Garner v. Zoning Bd. of Adjustment of City of Philadelphia*, 130 A.2d 148, 388 Pa. 98—*Landau Advertising Co. v. Zoning Bd. of Adjustment*, 128 A. 2d 559, 387 Pa. 552—*Food Corp. v. Zoning Bd. of Adjustment of City of Philadelphia*, 121 A.2d 94, 384 Pa. 288—*Schmidt v. Philadelphia Zoning Bd. of Adjustment*, 114 A.2d 902, 382 Pa. 521—*Walker v. Zoning Bd. of Adjustment*, 110 A.2d 414, 380 Pa. 228.

Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit, 130 A.2d 240, 183 Pa. Super. 219, appeal dismissed *Swift v. Borough of Bethel, Pa.*, 78 S.Ct. 120, 355 U.S. 40, 2 L.Ed.2d 71.

74. Pa.—*Katzin v. McShain*, 89 A.2d 519, 371 Pa. 251—*Application for Certificate of Occupancy 500 Paximosa Avenue, Easton*, 66 A.2d 225, 362 Pa. 116—*Fleming v. Prospect Park Board of Adjustment*, 178 A. 813, 318 Pa. 582.

there has been no manifest abuse of discretion on the part of the lower court.⁷⁵ Where the legality of a zoning ordinance or resolution is the subject of the review proceedings, the court will consider only the questions of jurisdiction and the regularity of the proceedings,⁷⁶ and the court will not consider the merits of the controversy.⁷⁷

Under a statute requiring the trial court to try zoning appeals de novo, where the trial court relies on the findings and the order of the zoning commission, instead of following the statutory requirements, and the entire record is before the appellate court, it will consider the case as though the trial court had decided it independently.⁷⁸ In such event, a court rule as to the credence to be given findings of fact by a trial court has been held not to be fully applicable.⁷⁹ Undisputed evidence which was erroneously excluded by the lower court may be considered on further review.⁸⁰ On the other hand, where the lower court is not authorized to consider additional evidence in reviewing a decision of a zoning agency, on review, the appellate court will eliminate such additional evidence from consideration in determining whether the order of the agency is supported by competent and substantial evidence.⁸¹

A provision of the decree of the court below which is improper will be treated as surplusage on appeal.⁸² Where the courts lack authority to rezone property after holding a zoning ordinance void, the appellate court will interpret an ambiguous decree below as leaving the way open for the zoning authorities themselves to do the rezoning.⁸³ Where a case was not properly before the zoning

board of appeals, the appellate court, on review of the decision of the trial court reviewing the board's action, may not consider the merits of the case.⁸⁴

Judicial notice. An appellate court may take judicial notice of a zoning ordinance and its amendments,⁸⁵ and of the fact that members of a zoning body are familiar with local conditions.⁸⁶

Questions of law. On review of a decision of a lower court on a zoning matter, an appellate court may consider questions of law.⁸⁷ Where the trial court, on hearing an appeal from action of the zoning board, took additional testimony, the test used by an appellate court is not whether the board committed an error of law, but whether the trial court did so.⁸⁸ It has been held that the basic question on review of a dismissal of a proceeding by the lower court is whether that court erred as a matter of law in dismissing the case.⁸⁹ Where the appellate court affirms the judgment appealed from on the merits, it will not rule on procedural questions which do not affect the merits.⁹⁰

Moot questions. On further review, the appellate court will not consider questions which have become moot.⁹¹

§ 385. — Presumptions

Presumptions in favor of the correctness of the ruling of a trial court on review of a determination of a zoning body will be indulged on further review.

An appellate court, on appeal from a decision of a lower court reviewing a decision or order of a zoning official or board, will indulge all reasonable presumptions in favor of the correctness of the decision appealed from,⁹² and the presumption in fa-

75. Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35—Appeal of Garbev, Inc., 122 A.2d 682, 385 Pa. 328—Appeal of Rolling Green Golf Club, 97 A.2d 523, 374 Pa. 450.

Root v. City of Erie Zoning Bd. of Appeals, 118 A.2d 297, 180 Pa. Super. 38—Schaub v. Brentwood Borough Zoning Bd. of Adjustment, 118 A.2d 292, 180 Pa. Super. 105.

76. Pa.—Wynnewood Civic Ass'n v. Lower Merion Tp., 119 A.2d 799, 180 Pa. Super. 453—Appeal of Lieb, 116 A.2d 860, 179 Pa. Super. 318.

77. Pa.—Appeal of Lieb, supra.

78. Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434.

79. Ky.—Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Commission, supra.

80. Ill.—Rector v. Board of Appeals Under Zoning Ordinance of City of Danville, 95 N.E.2d 99, 342 Ill. App. 51.

81. Mo.—State ex rel. Horn v. Randall, App., 275 S.W.2d 758.

82. Fla.—Segal v. City of Miami, 63 So.2d 496.

83. Fla.—Quattrocchi v. MacVicar, 82 So.2d 873.

84. Wis.—State ex rel. Russell v. Board of Appeals of Village of Prairie du Sac, 27 N.W.2d 378, 250 Wis. 394.

85. Ala.—Shell Oil Co. v. Edwards, 81 So.2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 885, 100 L.Ed. 780.

Comprehensive nature of ordinance
Ala.—Shell Oil Co. v. Edwards, supra.

86. Conn.—Kutcher v. Town Planning Commission of Town of Manchester, 88 A.2d 538, 138 Conn. 705.

87. Tenn.—Hickerson v. Flannery, 302 S.W.2d 508.

Question held one of law
Question whether there were con-

troversial or issuable facts which would authorize city council to exercise its discretion to enact amendatory zoning ordinance, presented question of law and not question of fact.

Tex.—City of Waxahachie v. Watkins, 275 S.W.2d 477, 154 Tex. 206.

On appeal from trial de novo
Mass.—Rodenstein v. Board of Appeals of Boston, 149 N.E.2d 382.

88. Pa.—Appeal of O'Hara, 131 A.2d 587, 389 Pa. 35—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374.

89. N.H.—Gellinas v. City of Portsmouth, 85 A.2d 896, 97 N.H. 248.

90. Ga.—Galfas v. Allor, 57 S.E.2d 834, 81 Ga. App. 13.

91. Ga.—Orr v. Hapeville Realty Co., 94 S.E.2d 682, 212 Ga. 649.

92. Va.—Wicker Apartments, Inc. v. City of Richmond, 99 S.E.2d 656, 199 Va. 262.

vor of the correctness of the determination by the board, when affirmed by the lower court, should be given great weight on further review in an appellate court.⁹³ Where a zoning board of appeals is not required to hear evidence on the questions before it, the court on appeal may not assume that it acted illegally, arbitrarily, and capriciously in not holding a formal hearing before making its determination.⁹⁴

§ 386. — Matters of Discretion

On further review the appellate court ordinarily does not review or interfere with the exercise of discretion by the court below or by the zoning body whose determination is being reviewed.

As a general rule, the exercise of discretion by a court on review of a zoning determination will not be disturbed on a subsequent review of the decision of such court.⁹⁵ However, the appellate court will examine the record to determine whether there was a manifest abuse of discretion by the court below,⁹⁶ regardless of whether or not the court below heard additional testimony;⁹⁷ and the action of that court may be set aside for such abuse of discretion.⁹⁸ Likewise, except for a clear abuse of discretion,⁹⁹

the exercise of discretion by a zoning official or board will not be reviewed or disturbed on subsequent review,¹ especially where it has been upheld by the lower court.² The appellate court has been held limited to determination of the question whether the zoning board was guilty of a manifest and flagrant abuse of discretion.³

In any event, the appellate court may not substitute its discretion for that of the zoning board where the governing ordinance declares the decision of the board involving the exercise of discretion to be final.⁴

§ 387. — Questions of Fact; Findings

On appeal from the decision of a lower court reviewing a zoning determination, the appellate court will not try the case de novo or make independent findings, and it will examine the fact findings of the trial court only to determine whether they are supported by sufficient or substantial evidence.

On appeal from the decision of a lower court reviewing the determination of a zoning body, the appellate court as a general rule will not try the case de novo or make independent findings.⁵ So, the court of higher review does not consider the

93. Okl.—Application of Shadid, 238 P.2d 794, 205 Okl. 462—Torrance v. Bladel, 155 P.2d 546, 195 Okl. 68—Thompson v. Phillips Petroleum Co., 147 P.2d 451, 194 Okl. 77.

94. Ky.—Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018.

95. Okl.—Application of Shadid, 238 P.2d 794, 205 Okl. 462.

Pa.—Smolow v. City of Philadelphia Zoning Bd. of Adjustment, 137 A.2d 251, 391 Pa. 71—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374.

Tex.—Blythe v. City of Graham, Civ. App., 303 S.W.2d 881—Gullo v. City of West University Place, Civ.App., 214 S.W.2d 851, error dismissed.

96. Pa.—Nicholson v. Zoning Bd. of Adjustment of City of Allentown, 140 A.2d 604—Appeal of Edwards, 140 A.2d 110, 392 Pa. 188—Fagan v. Philadelphia Zoning Bd. of Adjustment, 132 A.2d 279, 389 Pa. 99—Garner v. Zoning Bd. of Adjustment of City of Philadelphia, 130 A.2d 148, 388 Pa. 98—Landau Advertising Co. v. Zoning Bd. of Adjustment, 128 A.2d 559, 387 Pa. 552—Food Corp. v. Zoning Bd. of Adjustment of City of Philadelphia, 121 A.2d 94, 384 Pa. 288—Schmidt v. Philadelphia Zoning Bd. of Adjustment, 114 A.2d 902, 382 Pa. 521—Walker v. Zoning Bd. of Adjustment, 110 A.2d 414, 380 Pa. 228—Philadelphia Fairfax Corporation v. McLaughlin, 9 A.2d 538, 336 Pa. 342.

Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel

Unit, 130 A.2d 240, 183 Pa.Super. 219, appeal dismissed Swift v. Borough of Bethel, Pa., 78 S.Ct. 120, 355 U.S. 40, 2 L.Ed.2d 71.

On appeal from trial de novo

Mass.—Rodenstein v. Board of Appeal of Boston, 149 N.E.2d 382.

97. Pa.—Landau Advertising Co. v. Zoning Bd. of Adjustment, 128 A.2d 559, 387 Pa. 553—O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901, 384 Pa. 379.

Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit, 130 A.2d 240, 183 Pa.Super. 219, appeal dismissed Swift v. Borough of Bethel, Pa., 78 S.Ct. 120, 355 U.S. 40, 2 L.Ed.2d 71.

Test

Where trial court took additional testimony, test, on review of its determination, is not whether board, but whether court, abused its discretion.

Pa.—Richman v. Philadelphia Zoning Bd. of Adjustment, 137 A.2d 280, 391 Pa. 254—Appeal of O'Hara, 131 A.2d 537, 389 Pa. 35—Appeal of Volpe, 121 A.2d 97, 384 Pa. 374.

98. Okl.—Fletcher v. Board of County Com'rs of Oklahoma County, 285 P.2d 183.

Pa.—Appeal of Edwards, 140 A.2d 110, 392 Pa. 188.

Findings supported by evidence

Pa.—Philadelphia Fairfax Corporation v. McLaughlin, 9 A.2d 538, 336 Pa. 342—Calvary Presbyterian

Church v. Jones, 185 A. 267, 322 Pa. 77.

99. Okl.—Application of Shadid, 238 P.2d 794, 205 Okl. 462—Thompson v. Phillips Petroleum Co., 147 P.2d 451, 194 Okl. 77.

Pa.—Phillips v. Griffiths, 77 A.2d 375, 366 Pa. 468.

Wash.—State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195, 50 Wash.2d 378.

1. Okl.—Application of Shadid, 238 P.2d 794, 205 Okl. 462—Thompson v. Phillips Petroleum Co., 147 P.2d 451, 194 Okl. 77.

Pa.—Phillips v. Griffiths, 77 A.2d 375, 366 Pa. 468.

Wash.—State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195, 50 Wash.2d 378.

2. Okl.—Application of Shadid, 238 P.2d 794, 205 Okl. 462—Thompson v. Phillips Petroleum Co., 147 P.2d 451, 194 Okl. 77.

Wash.—State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195, 50 Wash.2d 378.

3. Pa.—Appeal of Mutual Supply Co., 77 A.2d 612, 366 Pa. 424—Appeal of Crawford, 57 A.2d 862, 358 Pa. 636.

4. Mich.—Mitchell v. Grewal, 61 N. W.2d 3, 338 Mich. 81.

5. Iowa.—Granger v. Board of Adjustment of City of Des Moines, 44 N.W.2d 399, 241 Iowa 1356.

credibility of the witnesses or the weight of the evidence,⁶ and the hearing before such court is on assigned errors, with the finding of the lower court having the force of a verdict.⁷ While the appellate court will examine the record to see whether there is sufficient competent evidence to support the findings or conclusions of the court below,⁸

and it will set aside findings of the lower court which are against the great weight of the evidence,⁹ where there is substantial or sufficient competent evidence to authorize or support the findings or conclusions of the court below, they will not be disturbed.¹⁰ Where the evidence in the lower court is not reported, the findings of that court will not

6. Ohio.—*Davis v. Miller*, 126 N.E. 2d 49, 163 Ohio St. 91.

Legitimate differences in opinion

Where evidence in proceeding disclosed legitimate differences in opinion concerning reasonableness of challenged zoning classification and differences of opinion on question of whether benefits to public should prevail over gain to one seeking change of classification, rule that where evidence is conflicting credibility of witnesses and weight to be afforded their testimony should be determined in trial court, had little, if any, application.

III.—*Kennedy v. City of Chicago*, 142 N.E.2d 697, 11 Ill.2d 302.

7. Iowa.—*Granger v. Board of Adjustment of City of Des Moines*, 44 N.W.2d 399, 241 Iowa 1356.

8. Ohio.—*Davis v. Miller*, 126 N.E. 2d 49, 163 Ohio St. 91.

Pa.—*Nicholson v. Zoning Bd. of Adjustment of City of Allentown*, 140 A.2d 604—*Appeal of Edwards*, 140 A.2d 110—*Fagan v. Philadelphia Zoning Bd. of Adjustment*, 132 A.2d 279, 389 Pa. 99—*Garner v. Zoning Bd. of Adjustment of City of Philadelphia*, 130 A.2d 148, 388 Pa. 98—*Food Corp. v. Zoning Bd. of Adjustment of City of Philadelphia*, 121 A.2d 94, 384 Pa. 288—*Schmidt v. Philadelphia Zoning Bd. of Adjustment*, 114 A.2d 902, 382 Pa. 521—*Walker v. Zoning Bd. of Adjustment*, 110 A.2d 414, 380 Pa. 228—*In re Anderle*, 39 A.2d 829, 350 Pa. 589—*Philadelphia Fairfax Corporation v. McLaughlin*, 9 A.2d 538, 336 Pa. 342—*Fleming v. Prospect Park Board of Adjustment*, 178 A. 813, 318 Pa. 582.

Deane v. Board of Adjustment of Zoning Bd. of Borough of Edgeworth, 94 A.2d 112, 172 Pa.Super. 502—*Gish v. Exley*, 34 A.2d 925, 153 Pa.Super. 653.

Receipt of additional testimony below immaterial

Pa.—*Landau Advertising Co. v. Zoning Bd. of Adjustment*, 128 A.2d 559, 387 Pa. 552.

Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit, 130 A.2d 240, 183 Pa.Super. 219, appeal dismissed *Swift v. Borough of Bethel, Pa.*, 78 S.Ct. 120, 355 U.S. 40, 2 L.Ed.2d 71.

9. Conn.—*Celentano v. Zoning Bd. of Appeals of Hartford*, 60 A.2d 510, 135 Conn. 16.

III.—*Liebling v. Fradine*, 127 N.E.2d 684, 6 Ill.App.2d 409.

Ky.—*City of Louisville v. Bryan S. McCoy, Inc.*, 286 S.W.2d 546.

Mass.—*Rodenstein v. Board of Appeal of Boston*, 149 N.E.2d 382.

Pa.—*Appeal of Catholic Cemeteries Ass'n of the Diocese of Pittsburgh*, 109 A.2d 537, 379 Pa. 516.

Tenn.—*Hickerson v. Flannery*, 302 S.W.2d 508.

10. Ark.—*City of Blytheville v. Lewis*, 234 S.W.2d 374, 218 Ark. 83.

Cal.—*Saks & Co. v. City of Beverly Hills*, 237 P.2d 32, 107 C.A.2d 260.

Colo.—*Board of Adjustment of City and County of Denver v. Abe Perlmutter Const. Co.*, 280 P.2d 1107, 131 Colo. 230.

Conn.—*Guerriero v. Galasso*, 136 A.2d 497, 144 Conn. 600—*State ex rel. Capurso v. Flis*, 133 A.2d 901, 144 Conn. 473—*Piccirillo v. Board of Appeals on Zoning of City of Bridgeport*, 90 A.2d 647, 139 Conn. 116—*Saporiti v. Zoning Bd. of Appeals of Town of Manchester*, 78 A.2d 741, 137 Conn. 478.

III.—*Braden v. Much*, 87 N.E.2d 620, 403 Ill. 507.

Iowa.—*Granger v. Board of Adjustment of City of Des Moines*, 44 N.W.2d 399, 241 Iowa 1356.

Kan.—*Spurgeon v. Board of Com'rs of Shawnee County*, 317 P.2d 798, 181 Kan. 1008—*Hillebrand v. Board of County Com'rs of Johnson Co.*, 304 P.2d 517, 180 Kan. 348.

La.—*State ex rel. Lorraine, Inc., v. Adjustment Bd. of City of Baton Rouge*, 57 So.2d 409, 220 La. 703.

Md.—*Marino v. City of Baltimore*, 137 A.2d 198, 215 Md. 206—*Gilmore v. Mayer and City Council of Baltimore*, 109 A.2d 739, 205 Md. 557—*Daniels v. Board of Zoning Appeals of Baltimore County*, 106 A.2d 57, 205 Md. 36—*City of Baltimore v. Weinberg*, 103 A.2d 567, 204 Md. 257—*Kracke v. Weinberg*, 79 A.2d 387, 197 Md. 339.

Mass.—*Todd v. Board of Appeals of Yarmouth*, 148 N.E.2d 880—*Kaplan v. City of Boston*, 113 N.E.2d 856, 330 Mass. 381—*Barney & Casey Co. v. Town of Milton*, 87 N.E.2d 9, 324 Mass. 440.

N.H.—*Mater v. City of Dover*, 79 A. 2d 844, 97 N.H. 13.

Pa.—*Food Corp. v. Zoning Bd. of Adjustment of City of Philadelphia*, 121 A.2d 94, 384 Pa. 288—*Pincus v. Power*, 101 A.2d 914, 376 Pa. 175—*Gratton v. Conte*, 78 A.2d 381,

364 Pa. 578—*Appeal of Lindquist*, 73 A.2d 378, 364 Pa. 561—*Berman v. Exley*, 50 A.2d 199, 355 Pa. 415—*Appeal of Fisher*, 49 A.2d 626, 355 Pa. 364—*In re Anderle*, 39 A.2d 829, 350 Pa. 589.

D. B. S. Bldg. Ass'n v. City of Erie, 111 A.2d 367, 177 Pa.Super. 487.

Tex.—*Moody v. City of University Park, Civ.App.*, 278 S.W.2d 912, error refused, no reversible error—*Montgomery v. City of Dallas, Civ. App.*, 245 S.W.2d 753, refused no reversible error.

Superior position of trial court

In proceeding to determine constitutionality of zoning ordinance, wherein testimony was conflicting, and credibility accorded to witnesses, as well as weight of their opinions concerning values of property affected by ordinance, may have been determining factors in decision of trial court, position of trier of facts was superior to that of reviewing court. III.—*Myers v. City of Elmhurst*, 147 N.E.2d 300, 12 Ill.2d 537.

Additional evidence taken by lower court

Pa.—*Appeal of Volpe*, 121 A.2d 97, 384 Pa. 374.

Decision sustained by preponderance of evidence

Ark.—*City of Little Rock v. Henson*, 249 S.W.2d 118, 220 Ark. 663—*City of Little Rock v. Hocott*, 247 S.W. 2d 1012, 220 Ark. 421—*City of Little Rock v. Joyner*, 206 S.W.2d 446, 212 Ark. 508.

Substitution of judgment held error

Tex.—*Weaver v. Ham*, 232 S.W.2d 704, 149 Tex. 309.

Requested finding held not justified by record

On appeal seeking to review action of town plan commission in changing zoning regulations so as to permit erection of incinerator on a certain site and in suit for injunction, finding that erection of incinerator would take property without due process of law and without compensation was not justified, under record showing that resulting damage would be such as is not considered a taking of property for which compensation must be made.

Conn.—*De Palma v. Town Plan Commission of Greenwich*, 193 A. 868, 123 Conn. 257.

be disturbed unless they are inconsistent with each other.¹¹

Under some authorities, on appeal from a trial de novo in the court below on review of a determination of a zoning body, all questions of fact are open for review,¹² and the appellate court may make independent findings of fact,¹³ although the findings of the trial judge will not be disturbed unless plainly wrong.¹⁴ In at least one jurisdiction, the appellate court disregards the evidence offered in the trial court, and bases its decision on the record before it and the findings of fact made by the zoning board.¹⁵ On appeal from a judgment declaring certain provisions of a zoning ordinance invalid, findings and conclusions of the trial court as to reasonableness are not binding on the appellate court if the record shows that the question is debatable, but the appellate court may look beyond such determinations and consider the basic physical facts appearing in the record to determine whether the question of reasonableness is fairly debatable.¹⁶

On appeal from the action of a zoning board which has been affirmed by the court below, the appellate court will review the circumstances of the case,¹⁷ and the action of the board will be sustained in the absence of an affirmative showing that it was unreasonable, arbitrary, or capricious.¹⁸ The appellate court may be bound by the order of the zoning board which was appealed from where it is supported by material evidence.¹⁹ So, where findings of a zoning board amount to a judgment of a legislative department, the appellate court may not interfere with them unless they are manifestly against

the weight of the evidence.²⁰ Where the determination of the board is supported by competent evidence, the appellate court will not reverse that determination because of an error in the admission of evidence by the board.²¹ In determining whether there is sufficient evidence to support the findings or order of the zoning body, the evidence presented in the court below is to be construed most favorably to uphold the ruling of the board.²²

§ 388. — Harmless or Prejudicial Error

On further review of determinations of zoning bodies, errors which are harmless or not prejudicial will not justify disturbance of the decision of the trial court.

As in other civil cases, on further review of proceedings before zoning officials or boards errors which are harmless or not prejudicial will not justify disturbance of the decision of the lower court.²³ An erroneous conclusion of the court below is harmless where there are other valid grounds to support its judgment.²⁴ Prejudicial error, however, is ground for reversal.²⁵

§ 389. Determination and Disposition

On appeal from a decision of a lower court reviewing a determination of a zoning body, an appellate court may affirm or reverse the decision, or remand the case to the lower court with directions, or for further proceedings; in a proper case, costs may be awarded to the prevailing party.

A judgment or decree of a lower court, on review of a determination of a zoning official or board, which is correct, will be affirmed on further review.²⁶ However, the decision of the lower court

11. Mass.—Daniel Webster Imp. Ass'n v. Board of Appeals of Town of Marshfield, 107 N.E.2d 314, 329 Mass. 159.

12. Mass.—Rodenstein v. Board of Appeal of Boston, 149 N.E.2d 382.

13. Mass.—Rodenstein v. Board of Appeal of Boston, *supra*.

14. Mass.—Rodenstein v. Board of Appeal of Boston, *supra*.

15. Colo.—Bohn v. Board of Adjustment of City and County of Denver, 271 P.2d 1051, 129 Colo. 539.

16. Cal.—Johnston v. City of Claremont, 323 P.2d 71—Lockard v. City of Los Angeles, 202 P.2d 38, 33 C. 2d 453, 7 A.L.R.2d 990, certiorari denied 69 S.Ct. 1516, 337 U.S. 939, 93 L.Ed. 1744.

Okl.—Fletcher v. Board of County Com'rs of Oklahoma County, 285 P.2d 183.

17. N.J.—Ardolino v. Board of Adjustment of Borough of Florham Park, 130 A.2d 847, 24 N.J. 94.

18. N.J.—Ardolino v. Board of Ad-

justment of Borough of Florham Park, *supra*—Rexon v. Board of Adjustment of Borough of Haddonfield, 89 A.2d 505, 10 N.J. 1.

19. Tenn.—Hickerson v. Flannery, 302 S.W.2d 508.

20. Ill.—Baird v. Board of Zoning Appeals of City of Kankakee, 106 N.E.2d 343, 347 Ill.App. 158.

21. Wis.—State ex rel. A. Hynek & Sons Co. v. Board of Appeals of City of Racine, 66 N.W.2d 623, 267 Wis. 309.

22. Conn.—Grady v. Katz, 1 A.2d 137, 124 Conn. 525.

23. Cal.—Griffin v. Marin County, App., 321 P.2d 148—Munns v. Stenman, 314 P.2d 67, 152 C.A.2d 543.

Conn.—Wolfpit-Villa Crest Ass'n v. Zoning Commission of City of Norwalk, 135 A.2d 732, 144 Conn. 560—Spencer v. Board of Zoning Appeals of City of New Haven, 104 A.2d 373, 141 Conn. 155.

N.J.—Beirn v. Morris, 103 A.2d 361, 14 N.J. 529.

24. Conn.—Chouinard v. Zoning

Commission of Town of East Hartford, 97 A.2d 562, 139 Conn. 728.

25. Cal.—Beloin v. Blankenhorn, 218 P.2d 552, 97 C.A.2d 662.

26. Md.—Colati v. Jirout, 47 A.2d 613, 186 Md. 652.

Mass.—Miller v. Emergency Housing Commission, 116 N.E.2d 663, 330 Mass. 693.

N.J.—Second Reformed Church v. Board of Adjustment of Borough of Freehold, 104 A.2d 703, 30 N.J. Super. 338.

N.Y.—Family Auction Markets v. Hill, 129 N.Y.S.2d 209, 283 App.Div. 824.

N.C.—In re Groves, 71 S.E.2d 119, 235 N.C. 756.

Affirmance required

(1) Where, on appeal from dismissal of complaint questioning validity of zoning ordinance amendment was considered as on certiorari, and jurisdiction of trial court and regularity of its proceedings were not questioned, its order would have to be affirmed.

is subject to reversal where it is erroneous,²⁷ as where one of the conclusions of the lower court as to the validity of a zoning bylaw as applied to a particular parcel is inconsistent with the basic facts appearing in the decision.²⁸ As in civil cases generally, the reviewing court may, in a proper case, remand the cause to the lower court with directions²⁹ as to the form of a decree to be entered below,³⁰ or for further proceedings.³¹ In a proper case the proceeding may be remanded to the zoning body for further proceedings.³²

Where the decree or order appealed from is not in the proper form, the appellate court may amend it.³³ So, where the appellate court is unable to determine from a resolution of the zoning board whether the board made a particular finding, the court will amend the order of the lower court by

adding a provision thereto that the proceeding be remitted to the board with instructions that it make fact findings to support its determination.³⁴

A finding by the trial court may, in a proper case, be corrected,³⁵ but it has been held that a finding of the trial court as to what the evidence was on which the decision was based is not subject to correction.³⁶ A finding of a lower court has been held not subject to correction on the basis of testimony before the lower court which was not established as an admitted or undisputed fact.³⁷ In a proper case, the appellate court may annul the determination of the zoning body, without prejudice to a further application for relief to that body.³⁸

Costs. On affirmance of the determination of the court below, the appellate court may award costs to appellee.³⁹ However, costs ordinarily will not

Pa.—Appeal of Lieb, 116 A.2d 860, 179 Pa.Super. 318.

(2) Where question at issue below was fairly debatable, on further review order of lower court approving action of zoning board may be required to be affirmed.

Md.—Marino v. City of Baltimore, 137 A.2d 198, 215 Md. 206.

27. Mass.—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378—Devine v. Zoning Bd. of Appeals of Lynn, 125 N.E.2d 131, 332 Mass. 319.

N.J.—Raskin v. Town of Morristown, 121 A.2d 378, 21 N.J. 180.

N.Y.—Application of Dengeles, 160 N.Y.S.2d 83, 3 A.D.2d 758—Lerner v. Young, 146 N.Y.S.2d 284, 286 App.Div. 1109, appeal denied 148 N.Y.S.2d 460, 1 A.D.2d 776—Application of Rosenberg, 144 N.Y.S.2d 769, 286 App.Div. 1019—Golden City Park Corp. v. Board of Standards and Appeals of City of New York, 31 N.Y.S.2d 411, 263 App.Div. 52, appeal dismissed 41 N.E.2d 933, 288 N.Y. 531, affirmed 46 N.E.2d 345, 289 N.Y. 720.

Nunc pro tunc decision

Where petitioner died prior to date court rendered its decision on appeal taken by him and other petitioners, decision by court would be entered nunc pro tunc as of date it last recessed, a date prior to such petitioners' death.

N.Y.—Diocese of Rochester v. Planning Bd. of Town of Brighton, 136 N.E.2d 827, 1 N.Y.2d 508, 154 N.Y. S.2d 849.

28. Mass.—Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 324 Mass. 440.

29. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Ill.—Strohl v. Macon County Zoning Bd. of Appeals, 104 N.E.2d 612, 411 Ill. 559.

Mo.—Dart Truck Co. v. Board of Zoning Adjustment of Kansas City, App., 299 S.W.2d 881.

30. Mass.—Lawrence v. Board of Appeals of Lynn, 142 N.E.2d 378—Spaulding v. Board of Appeals of Leicester, 138 N.E.2d 367, 334 Mass. 688—Atherton v. Board of Appeals of Town of Bourne, 136 N.E.2d 201, 334 Mass. 451—Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198, 334 Mass. 446.

31. Del.—Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528, 8 Terry 373.

Ill.—Strohl v. Macon County Zoning Bd. of Appeals, 104 N.E.2d 612, 411 Ill. 559.

Md.—Temmink v. Board of Zoning Appeals of Baltimore County, 109 A.2d 85, 205 Md. 489—Oursler v. Board of Zoning Appeals of Baltimore County, 104 A.2d 568, 204 Md. 397.

N.J.—Wharton Sand & Stone Co. v. Montville Tp., 120 A.2d 858, 39 N.J. Super. 278—Tice v. Borough of Woodcliff Lake, Bergen County, 78 A.2d 825, 12 N.J.Super. 20.

Giving of proper notice

Where city was not given proper notice of appeal to lower court, appeal would not be dismissed, but case would be remanded so that proper notice could be given.

Vt.—Appeal of Maurice, 90 A.2d 440, 117 Vt. 264.

32. N.Y.—Syosset Holding Corp. v. Schlimm, 164 N.Y.S.2d 890, 4 A.D. 2d 766.

33. Mass.—Daniel Webster Imp. Ass'n v. Board of Appeals of Town of Marshfield, 107 N.E.2d 314, 329 Mass. 159.

N.Y.—Claremont Gardens, Inc. v. Barker, 126 N.Y.S.2d 640, 282 App. Div. 1069.

34. N.Y.—Bach v. Board of Zoning & Appeals of Town of North Hempstead, 124 N.Y.S.2d 744, 282 App. Div. 879.

35. Conn.—Levine v. Zoning Board of Appeals of Meriden, 198 A. 173, 124 Conn. 53.

Decision equivalent to finding

Judge's holding that denial and dismissal by board of appeal of application for building permit, were within jurisdiction of board and that therefore its decision should not be "annulled," amounted only to finding that its decision did not exceed its authority, and, to dispose of merits, words "and that no modification of it is required" would be added after word "annulled."

Mass.—Olson v. Zoning Bd. of Appeal of Attleboro, 84 N.E.2d 544, 324 Mass. 57, 7 A.L.R.2d 591.

36. Conn.—Grady v. Katz, 1 A.2d 137, 124 Conn. 525.

37. Conn.—Chouinard v. Zoning Commission of Town of East Hartford, 97 A.2d 562, 139 Conn. 728.

38. N.Y.—Bayley v. Adams, 105 N.Y. S.2d 652, 278 App.Div. 962, affirmed 106 N.E.2d 57, 303 N.Y. 967—Donegan v. Griffin, 61 N.Y.S.2d 669, 270 App.Div. 937.

Remand to board

N.Y.—Application of American Seminary of Bible, 112 N.Y.S.2d 904, 280 App.Div. 792—Application of Alsloff, 94 N.Y.S.2d 226, 276 App.Div. 907.

39. Mich.—Hammond v. Kephart, 50 N.W.2d 155, 331 Mich. 551—Long v. City of Highland Park, 45 N.W. 2d 10, 329 Mich. 146.

Costs on dismissal of proceeding for further review see *supra* § 383.

be allowed in the appellate court where the construction of a zoning ordinance,⁴⁰ or the public interest,⁴¹ is involved.

Proceedings after remand. After a cause has

been remanded to the lower court for further proceedings, a party may amend his pleading in the lower court to present the issues which are to be ruled on.⁴²

X. ENFORCEMENT OF ZONING REGULATIONS; OFFENSES AND PENALTIES

A. IN GENERAL

§ 390. General Principles

A municipality may, and is under a duty to, institute any appropriate action to enforce zoning regulations and prevent violations thereof; and it is not estopped by failure to enforce the regulations in the past. A property owner may, in certain circumstances, have the right to take steps to enforce a zoning regulation.

In general, under zoning statutes, a municipality is authorized to institute any appropriate action to enforce zoning regulations and prevent violations thereof,⁴³ generally by a suit for injunction, as discussed infra § 394, or by actions and prosecutions for fines or other penalties for such violations, as discussed infra § 417. Indeed, it is the duty of the municipality or the proper officials to enforce its zoning regulations,⁴⁴ and proceedings in the nature of mandamus may be brought to compel the performance of this duty, as discussed infra § 391.

Estoppel to enforce ordinance. A municipality cannot be estopped to enforce a zoning regulation against a violator by the conduct of its officials in encouraging or permitting such violator or others to violate the ordinance in the past,⁴⁵ since in the enforcement of a zoning ordinance, bylaw, regula-

tion, or restriction a municipality or other governmental subdivision acts in its governmental capacity as distinguished from its proprietary capacity, so that the doctrine of estoppel cannot be applied against it.⁴⁶

The effect on the validity of zoning laws of a failure to enforce them is discussed supra § 44.

Right of property owners to enforce regulations. While the rights of a property owner may, in certain circumstances, include the right to take steps to enforce a zoning regulation,⁴⁷ this right is not a private right, but exists only by virtue of statute;⁴⁸ and the zoning laws do not permit a proprietor who is not protected in his own zone to appropriate to himself the protection accorded to others in a more protected zone.⁴⁹

Review of zoning orders enjoining violations. Rules governing proceedings for judicial review of administrative proceedings generally have been applied to proceedings for the judicial review of orders of zoning authorities purporting to enjoin a violation of a zoning regulation.⁵⁰

40. Mich.—Boissonneault v. Saginaw County Agr. Soc., 47 N.W.2d 53, 330 Mich. 143.

41. Mich.—Plum Hollow Golf and Country Club v. Southfield Tp., 67 N.W.2d 122, 341 Mich. 84—Mooney v. Village of Orchard Lake, 53 N.W.2d 308, 333 Mich. 389.

42. N.J.—Tice v. Borough of Woodcliff Lake, Bergen County, 78 A.2d 825, 12 N.J.Super. 20.

43. Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 536.

Ill.—Drueck v. Peterson, 91 N.E.2d 124, 340 Ill.App. 164.

44. N.H.—Carrick v. Langtry, 108 A.2d 546, 99 N.H. 251.

Power to rezone area as immaterial. Fact that city might have rezoned area where alleged violation of zoning ordinance occurred does not alter its obligation to enforce existing regulations.

Mo.—Kansas City v. Wilhoit, App., 237 S.W.2d 919.

45. Kan.—Leigh v. City of Wichita, 83 P.2d 644, 148 Kan. 607, 119 A.L.R. 1503.

Mo.—Kansas City v. Wilhoit, App., 237 S.W.2d 919.

N.C.—City of Raleigh v. Fisher, 61 S.E.2d 897, 232 N.C. 629.

"The failure to enforce the ordinance in the past cannot be made the basis for its continued disregard." N.J.—Murray v. Borough of Avon-by-the-Sea, 58 A.2d 228, 230, 137 N.J. Law 106.

Knowledge of intended violation

Knowledge on part of city official that defendant intends to violate zoning restriction will not estop city to enforce law.

Ohio.—City of Cleveland Heights v. Gowe, App., 97 N.E.2d 226.

46. Mo.—Adams v. Board of Zoning Adjustment of Kansas City, App., 241 S.W.2d 35.

N.C.—City of Raleigh v. Fisher, 61 S.E.2d 897, 232 N.C. 629.

Tex.—Edge v. City of Bellaire, Civ. App., 200 S.W.2d 224, error refused.

47. Mass.—Circle Lounge & Grille v. Board of Appeal of Boston, 86 N.E.2d 920, 324 Mass. 427.

48. Mass.—Circle Lounge & Grille

v. Board of Appeal of Boston, supra.

49. Mass.—Circle Lounge & Grille v. Board of Appeal of Boston, supra.

50. In whose name petition for review brought

Where title and body of petition in proceeding to review determination of town zoning board of appeals, which was rendered on appeal by owners of a development from a cease and desist order of zoning inspector of town directing them permanently to discontinue certain alleged unlawful use of premises, clearly indicated petition was by corporate owners, and it was clear that officer and stockholder of corporate owners who signed petition presented petition on behalf of corporate owners, alleged irregularity that petition was not made by an aggrieved person could be disregarded, but petition would be amended by court to state that it was made and signed by corporate owners.

N.Y.—Lake Mohopac Heights, Inc.

§ 391. Proceedings to Compel Enforcement; Mandamus

The duty of a municipality and its officials to enforce its zoning regulations may, in a proper case, be enforced by a proceeding in the nature of mandamus or by other remedies provided by statute.

The duty of a municipality and its officials to enforce its zoning regulations, discussed supra § 390, may, in a proper case, be enforced by a proceeding in the nature of mandamus against the officials,⁵¹ or by other remedies, where provided by statute.⁵²

Mandamus will lie where the applicant is aggrieved by the failure to enforce the law;⁵³ but it has been held that officials may not be compelled to enforce a penalty provision of a zoning ordinance in the absence of a statute imposing a duty of enforcement and liability for failure to enforce,⁵⁴ especially where a permit was granted at a time when the ordinance was not in force.⁵⁵ Where in the exercise of quasi-judicial or discretionary power officials permit a nonconforming or accessory use, the decision may not be reversed in a proceeding seeking mandamus to compel enforcement of the zoning law,⁵⁶ unless an abuse of discretion is shown.⁵⁷

It has been held that mandamus will not issue to compel officials to stop construction undertaken under a permit issued by them.⁵⁸

Existence of other remedies on right to mandamus. The existence of statutory remedies to review actions of zoning authorities and for enforcement of zoning laws and regulations by proceedings by taxpayers against violators of zoning laws when officials fail to act has been held not to prevent the maintenance of mandamus to compel officials to seek the removal of violations of a zoning ordinance;⁵⁹ but it has been held that mandamus does not lie to compel municipal authorities to enforce a zoning ordinance where the applicant has an adequate remedy by injunction against the persons alleged to be violating the ordinance,⁶⁰ or by an administrative appeal from the refusal of an official to enforce the ordinance.⁶¹

Procedure in mandamus proceedings. Rules governing proceedings in mandamus generally, discussed in Mandamus §§ 240-381, have, where appropriate, been applied in mandamus proceedings to compel the enforcement of zoning regulations.⁶² A statute providing that a proceeding which affects

v. Zoning Bd. of Appeals of Town of Carmel, 119 N.Y.S.2d 809.

Burden of proof

In proceedings in which building owners had appealed a cease and desist order by commissioner of buildings and inspections, burden of proving, by competent and substantial evidence, the existence of a lawful nonconforming use rested on owners. Mo.—Bartholomew v. Board of Zoning Adjustment, App., 307 S.W.2d 730.

51. Idaho.—Moerder v. City of Moscow, 283 P.2d 993, 74 Idaho 410. Mass.—Atherton v. Selectmen of Bourne, 149 N.E.2d 232—Colabufalo v. Public Bldgs. Com'r of Newton, 127 N.E.2d 564, 332 Mass. 748—Whittemore v. Town Clerk of Falmouth, 12 N.E.2d 187, 299 Mass. 64—Siegemund v. Building Com'r of City of Boston, 156 N.E. 852, 259 Mass. 329.

N.J.—Thornton v. Village of Ridgewood, 111 A.2d 899, 17 N.J. 499.

Murray v. Borough of Avon-by-the-Sea, 58 A.2d 228, 137 N.J.Law 106.

Discretion of court

Where use of property was violative of zoning ordinance and no reason appeared why mandamus should not issue commanding enforcement of the ordinance, contention that as matter of discretion the writ of mandamus should not issue was without merit.

Mass.—Colabufalo v. Public Bldgs.

Com'r of Newton, 127 N.E.2d 564, 332 Mass. 748.

Discretion of inspector

Where the determination of an inspector of buildings that the use of property was a permissible nonconforming use was an exercise of discretion, it could not be reviewed or overturned on mandamus.

N.H.—Carrick v. Langtry, 108 A.2d 546, 99 N.H. 251.

52. N.H.—Carrick v. Langtry, supra. Statutory proceedings held exclusive N.H.—Carrick v. Langtry, supra.

N.Y.—Isen Contracting Corp. v. Town Bd. of Town of Oyster Bay, 107 N.Y.S.2d 708, 279 App.Div. 607.

53. Mass.—Sunderland v. Building Inspector of North Andover, 105 N.E.2d 471, 328 Mass. 638—Siegemund v. Building Com'r of City of Boston, 156 N.E. 852, 259 Mass. 329—Wood v. Building Com'r of City of Boston, 152 N.E. 63, 256 Mass. 238.

54. N.J.—Kilburg v. Township Committee of Hillside Tp., 82 A.2d 499, 14 N.J.Super. 533—Giordano v. City Commission of City of Newark, 78 A.2d 317, 11 N.J.Super. 276.

55. N.J.—Borshesky v. Board of Works of City of Elizabeth, 150 A.237, 8 N.J.Misc. 386.

56. Cal.App.—Blankenship v. Michalski, 318 P.2d 727, 155 C.A.2d 672. N.H.—Carrick v. Langtry, 108 A.2d 546, 99 N.H. 251.

57. N.H.—Carrick v. Langtry, supra.

58. Ill.—Board of Ed. of School Dist. 85½ v. Idle Motors, 90 N.E.2d 121, 339 Ill.App. 350.

59. N.Y.—Isen Contracting Corp. v. Town Bd. of Town of Oyster Bay, 107 N.Y.S.2d 708, 279 App.Div. 607.

60. N.Y.—In re Dunphy, 133 N.Y.S. 2d 561.

61. N.H.—Carrick v. Langtry, 108 A.2d 546, 99 N.H. 251.

Absence of appealable "order or decision"

Where only building permit was issued by board of selectmen before office of building inspector was created and before he assumed office, and only act which building inspector performed after passage of zoning amendment reclassifying land was removal of stop order which had theretofore restrained construction work on the land, there was no "order or decision" from which aggrieved landowners could appeal, and it was therefore their right to bring petition for writ of mandamus requiring board of appeals and building inspector to enforce zoning bylaw as it stood before amendment.

Mass.—Atherton v. Selectmen of Bourne, 149 N.E.2d 232.

62. N.Y.—In re Dunphy, 133 N.Y.S. 2d 561.

Burden of proof

Applicant for mandamus has burden of demonstrating necessity and propriety of its use.

N.Y.—In re Dunphy, supra.

the title to real property shall not have any effect except against the parties thereto and persons having actual notice thereof until a memorandum is recorded does not apply to a proceeding for mandamus to compel enforcement of a zoning law.⁶³

Judgment. The judgment granting mandamus and commanding the public officials to enforce the provisions of the zoning ordinance must be directed to the issue on which the case was tried,⁶⁴ and must be sufficiently specific to put an end to the violative use.⁶⁵ The judgment should not be too broad,⁶⁶ and it need not pass on, or spell out, permissible uses which appear never to have been exercised and may never be exercised.⁶⁷

Review. On review of a proceeding in mandamus to compel a public official to enforce a zoning regulation, the reviewing court is guided by principles applicable on review generally.⁶⁸ On an appeal by some parties from an order directing a town board and others to remove certain alleged variances and violations of zoning ordinances, the order, in so far as the board is affected, will not be disturbed, where the board did not join in the appeal.⁶⁹

§ 392. — Joinder of Zoning Violator

The property owner violating the zoning regulation may be joined as a party in the mandamus proceeding to compel enforcement, and where so joined he is bound by the judgment, and may be subject to contempt for failure to obey it.

In a proper case the property owner violating the zoning regulation may be joined as a party in the mandamus proceeding to compel enforcement, as the real party respondent;⁷⁰ and, where he is so joined, he will be bound by the judgment and may

be subject to contempt for failure to obey it.⁷¹

It is no defense to the proceeding to adjudge the respondent in contempt that the zoning body had granted a "variance" extending the time within which he must comply with the mandamus judgment,⁷² since the zoning authorities cannot determine, in the guise of an exercise of the power to grant a variance, when defendant should comply with the judgment requiring compliance with the zoning ordinance.⁷³

§ 393. Declaratory Relief

In some jurisdictions a violation of a zoning ordinance may be remediable by way of an action for declaratory relief.

In some jurisdictions a violation of a zoning ordinance may be remediable by way of an action for declaratory relief,⁷⁴ notwithstanding other remedies therefor are available,⁷⁵ at least where the statute provides that the remedy provided by way of declaratory relief is cumulative.⁷⁶

Under such statutes, a zoning ordinance or regulation providing a remedy for its violation does not provide an exclusive remedy, so as to preclude the bringing of an action for declaratory relief;⁷⁷ nor is resort to an action for a declaratory judgment improper on the ground that plaintiff should have resorted to mandamus to compel the enforcement of the ordinance by the proper authorities.⁷⁸ On the other hand, it has been held that a declaratory judgment will not be granted delineating the extent of operation which will be permitted on the part of defendant under a zoning ordinance.⁷⁹

In any event, before a court may deny declaratory relief on the ground that other remedies exist, it

63. Mass.—Siegemund v. Building Com'rs of City of Boston, 160 N.E. 795, 263 Mass. 212.

64. Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, 127 N.E. 3d 564, 332 Mass. 748.

65. Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, supra.

66. Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, supra.

67. Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, supra.

68. Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, supra.

Findings

Finding of trial court, in action to compel public buildings commissioner to enforce zoning ordinance, that use of property in violation of zoning ordinance was not a nonconforming use which antedated adoption of ordinance was not plainly wrong, and would be upheld on appeal.

Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, supra.

Determination

Where trial court had granted petition for writ of mandamus against inspector of buildings to compel him to remove alleged zoning violations but action of trial court was overturned by reviewing court because mandamus would not lie, reviewing court would express no opinion as to accuracy of inspector's determination.

N.H.—Carrick v. Langtry, 108 A.2d 546, 99 N.H. 251.

69. N.Y.—Isen Contracting Corp. v. Town Bd. of Town of Oyster Bay, 107 N.Y.S.2d 708, 279 App.Div. 607.

70. Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, 143 N.E.2d 477.

71. Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, supra.

72. Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, supra.

73. Mass.—Colabufalo v. Public Bldgs. Com'r of Newton, supra.

74. Cal.—Jones v. Robertson, 180 P. 2d 929, 79 C.A.2d 813.

75. Cal.—Jones v. Robertson, supra.

76. Cal.—Jones v. Robertson, supra.

77. Cal.—Jones v. Robertson, supra.

78. Cal.—Jones v. Robertson, supra.

79. N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, 102 A.2d 84, 29 N.J.Super. 154.

Reason for rule

Declaratory Judgments Act does not justify any such excursion into future.

N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, supra.

must clearly appear that the asserted alternative remedies are available to plaintiff and that they are speedy and adequate or as well suited to plaintiff's needs as declaratory relief.⁸⁰

B. INJUNCTIONS AGAINST VIOLATIONS

§ 394. In General

The violation of zoning regulations may in a proper case be enjoined, particularly under statutes or constitutional provisions to that effect.

The violation of zoning regulations may in a proper case be enjoined,⁸¹ even though an injunction is not specifically permitted or authorized by the ordinance.⁸² Certainly, the violation of a zoning regulation may be enjoined under various statutes which confer on municipalities power to en-

act zoning ordinances or bylaws and also authorize an injunction to restrain violations of such ordinances or bylaws;⁸³ and, under a constitutional provision authorizing municipalities to enforce police, sanitary, and other regulations, a municipality may maintain a suit for an injunction to prevent or restrain the violation of a zoning ordinance.⁸⁴

On the other hand, an injunction will be denied where facts justifying the issuance of an injunction do not appear;⁸⁵ and the legality of the zon-

80. Cal.—Jones v. Robertson, 180 P. 2d 929, 79 C.A.2d 813.

81. Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.

Cal.—Cooper v. Los Angeles County, 170 P.2d 49, 75 C.A.2d 75—Smith v. Collison, 6 P.2d 277, 119 C.A. 180—Sapiro v. Frisbie, 270 P. 280, 93 C.A. 299.

Fla.—Larkin v. Tsavaris, 85 So.2d 731.

Ga.—Morris v. Lunsford, 167 S.E. 297, 176 Ga. 49.

Idaho.—Boise City v. Better Homes, 243 P.2d 303, 72 Idaho 441.

Ill.—Braden v. Much, 87 N.E.2d 620, 403 Ill. 507.

Ind.—Fidelity Trust Co. v. Dowling, 68 N.E.2d 789, 224 Ind. 457.

Iowa.—Boardman v. Davis, 3 N.W.2d 608, 231 Iowa 1227.

Ky.—Kaelin v. City of Indian Hills, 286 S.W.2d 898.

La.—City of New Orleans v. Liberty Shop, 101 So. 799, 157 La. 26, 40 A.L.R. 1136.

Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

Mo.—Fleming v. Moore Bros. Realty Co., 251 S.W.2d 8, 363 Mo. 305—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681—Evans v. Roth, 201 S.W.2d 357, 356 Mo. 237.

N.H.—City of Keene v. Parenteau, 112 A.2d 667, 99 N.H. 415.

N.J.—Morris v. Borough of Haledon, 90 A.2d 113, 20 N.J.Super. 433, reversed on other grounds 93 A.2d 781, 24 N.J.Super. 171.

N.Y.—Marcus v. Village of Mamaroneck, 28 N.E.2d 856, 283 N.Y. 325. Kaltenbach v. Benisch, 299 N.Y. S. 276, 252 App.Div. 788.

Town of Ramapo v. Bockar, 273 N.Y.S. 452, 151 Misc. 613—Rice v. Van Vranken, 229 N.Y.S. 32, 132

Misc. 82, affirmed 232 N.Y.S. 506, 225 App.Div. 179, affirmed 175 N.E. 804, 255 N.Y. 541.

Village of Old Westbury v. Hoblin, 141 N.Y.S.2d 186.

N.C.—City of Raleigh v. Morand, 100 S.E.2d 870, 247 N.C. 363.

Ohio.—Howell v. Cooper, 168 N.E. 757, 33 Ohio App. 287.

Esckridge v. City of Sandusky, Com.Pl., 136 N.E.2d 465.

Pa.—Lower Merion Tp. v. 34 Derwen Road, 80 A.2d 797, 367 Pa. 265.

Spring Tp. v. Heiser, Com.Pl., 44 Berks Co. 161, 44 Mun.L.R. 137 exceptions dismissed 47 Berks Co. 105

—Buckingham Tp. v. Schmalz, Com. Pl., 6 Bucks Co. 299—Willis v. Baldwin, 14 Erie Co. 18—City of Williamsport v. Miller, Com.Pl., 4

Lycoming 85—Moyerman v. Glanzberg, Com.Pl., 73 Mont.Co. 212—

Rodgers v. Bennett Bldg. Co., 89 Pittsb.Leg.J. 359.

S.C.—Momeier v. John McAlister, Inc., 27 S.E.2d 504, 203 S.C. 353.

S.D.—Graves v. Johnson, 63 N.W.2d 341, 75 S.D. 261.

Tenn.—City of Knoxville v. Peters, 191 S.W.2d 164, 183 Tenn. 93.

Equities not favoring violator

Where landowner commenced operation of piggery after being advised of ordinance prohibiting such use and after being advised injunction against such use would be sought, the equities did not favor landowner.

Pa.—Whitpain Tp. v. Bodine, 94 A.2d 737, 372 Pa. 509.

82. Ga.—Graham v. Phinizy, 51 S.E. 2d 451, 204 Ga. 638.

83. Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 536.

Mass.—Pitman v. City of Medford, 45 N.E.2d 973, 312 Mass. 618—Town of Lexington v. Govanar, 3 N.E.2d 19, 295 Mass. 31.

N.J.—Mayor & Council of Borough of Alpine v. Brewster, 80 A.2d 297, 7 N.J. 42.

Yanow v. Seven Oaks Park, 83 A.2d 28, 15 N.J.Super. 73.

N.C.—Elizabeth City v. Aydlott, 156 S.E. 163 (first case), 200 N.C. 58, followed in 156 S.E. 163 (second case), 200 N.C. 796.

Tex.—Hill v. City of Castle Hills, Civ.App., 282 S.W.2d 891, error refused—City of Dallas v. Rosenthal, Civ.App., 239 S.W.2d 636, refused no reversible error.

Purpose of statute

Statute empowering local governing board to prevent unlawful structures in violation of zoning statute or ordinance and to correct or abate such violation is intended to render the injunctive process available to the local authority for the enforcement of a statutory zoning policy and local regulations made under the statute, and not to punish criminal offenses as such, and the process of injunction is invoked in aid of the zoning power and not to enforce the law's penalties for a crime.

N.J.—Mayor & Council of Brewster, 80 A.2d 297, 7 N.J. 42.

No private right

A town seeking an injunction to prevent violation of its zoning bylaw is not asserting any private right but is merely seeking compliance with its local regulations adopted in furtherance of public interest.

Mass.—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403.

Suit by township of first class

Pa.—Township of Haverford v. Bruno, 29 Del.Co. 307, 31 Mun.L.R. 152.

84. Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 C.A. 277.

Ordinance not prescribing penalty

Cal.—City of Stockton v. Frisbie & Latta, supra.

85. Ill.—Hurt v. Hejhal, 259 Ill.App. 221.

Mass.—Building Com'r of Medford v. McGrath, 45 N.E.2d 265, 312 Mass. 461.

N.J.—Dolan v. De Capua, 109 A.2d 615, 16 N.J. 599.

Srager v. Mintz, 158 A. 471, 109 N.J.Eq. 544.

ing law must be established before a violation thereof will be enjoined.⁸⁶ Thus, an injunction will be denied where it appears that the statute authorizing the suit for injunction is inapplicable,⁸⁷ or the zoning ordinance is unreasonable⁸⁸ or was not duly adopted in conformity with the provisions of the governing statute.⁸⁹

In determining whether an injunction should issue against violations or threatened violations of zoning laws, the facts to be considered are the facts existing at the time of the final hearing.⁹⁰

Discretion of court. As a general rule, the granting or refusal of an injunction to restrain the violation of a zoning regulation is a matter for the discretion of the court;⁹¹ but it has been held that the court may not refuse an injunction where there has been established a violation of the zoning ordinance, the legality of which has not been attacked.⁹²

Nature and form of proceedings. An action to enjoin the occupation or use of a building in violation of a zoning ordinance, to direct the removal of the business, and to restrain its alleged unlawful manner of operation, is an action in equity for an injunction, and not an action at law for a nuisance,⁹³ and should be placed on the appropriate calendar.⁹⁴

Jurisdiction. Zoning authorities do not have jurisdiction to enjoin property owners from violating zoning laws, that prerogative belonging to the courts.⁹⁵ Moreover, the action must be brought in the court having the jurisdiction of the cause.⁹⁶

Service of process. In the case of an action against a nonresident owner of property and his tenants to enjoin a use of the property which is in violation of the zoning regulations, service of proc-

N.Y.—*Village of Sands Point v. Sands Point Country Day School*, 148 N.Y.S.2d 312, 2 Misc.2d 885, affirmed 154 N.Y.S.2d 428, 2 A.D.2d 769.

Pilling v. Davison, 30 N.Y.S.2d 97, affirmed 35 N.Y.S.2d 163, 264 App.Div. 737, appeal denied 36 N.Y.S.2d 240, 264 App.Div. 781.

Ohio.—*Brow v. Sherwin-Williams Co.*, App., 109 N.E.2d 864.

Eskridge v. City of Sandusky, Com.Pl., 136 N.E.2d 465.

Okl.—*Dorris v. Hawk*, 292 P.2d 417.

Pa.—*Phoenixville v. Lachman*, Com.

Pl., 6 Chest.Co. 146—*Borough of*

Norwood v. Gaskill, 36 Del.Co. 123.

Tex.—*Sisk v. Richards*, Civ.App., 130 S.W.2d 1076.

Possibility of rezoning

In determining whether a particular use of property should be enjoined as a violation of a zoning regulation, the fact that the rezoning plan could be perfected in the future is immaterial.

La.—*City of New Orleans v. Leeco*, 53 So.2d 490, 219 La. 550.

36. N.Y.—*Village of Granville v. Krause*, 228 N.Y.S. 204, 131 Misc. 752.

37. N.C.—*Town of Clinton v. Ross*, 40 S.E.2d 593, 226 N.C. 682.

38. N.Y.—*Cordis v. Hutton Co.*, 262 N.Y.S. 539, 146 Misc. 10, affirmed 269 N.Y.S. 936 (second case), 241 App.Div. 648, affirmed 195 N.E. 124, 266 N.Y. 399.

39. N.Y.—*Village of Mill Neck v. Nolan*, 182 N.E. 196, 259 N.Y. 596.

90. N.H.—*Stone v. Cray*, 200 A. 517, 89 N.H. 483.

Amendment of ordinance

N.H.—*Stone v. Cray*, supra.

91. La.—*City of New Orleans v. Leeco, Inc.*, 76 So.2d 387, 226 La. 335.

Discretion of court as to granting of preliminary injunction see infra § 412.

Grant of injunction held not abuse of discretion

(1) In action between adjoining landowners, wherein chancellor found that defendants, in violation of zoning laws, converted outbuilding to apartment for commercial purposes and that they removed wheels from house trailer and attached trailer to their home without first obtaining permission of city, in violation of ordinances, and that such actions caused plaintiff's adjoining property to deteriorate in value, chancellor did not abuse his discretion in enjoining such uses.

Fla.—*Larkin v. Tsavaris*, 85 So.2d 731.

(2) Where action of board of adjustment in granting owner of store a variation in zoning ordinance in order to permit him to make improvements on store was illegal because made only by three members of board, but no such permission could have been granted by full board, because such variation was not authorized by zoning ordinance, court did not err in refusing to refrain from entering decree for mandatory injunction to require owner of store to remove improvements because full board might act on application of owner of store for variation.

Ala.—*Moore v. Pettus*, 71 So.2d 814, 260 Ala. 616.

Refusal of injunction held not abuse of discretion

Where trial judge, after careful investigation, found as a fact that defendants had complied substantially with all city ordinances pertaining to use and operation of their building as theater, decision permitting defend-

ants to use building as theater was not abuse of discretion.

La.—*City of New Orleans v. Leeco, Inc.*, 76 So.2d 387, 226 La. 335.

92. La.—*City of New Orleans v. Leeco*, 53 So.2d 490, 219 La. 550.

93. N.Y.—*Stiger v. Village of Hewlett Bay Park*, 108 N.Y.S.2d 728, 279 App.Div. 767.

94. N.Y.—*Stiger v. Village of Hewlett Bay Park*, supra.

95. R.I.—*Lamothe v. Zoning Bd. of Review of Town of Cumberland*, 98 A.2d 918, 81 R.I. 96.

Cease and desist order by zoning inspector

Provisions of town zoning ordinance empowering zoning inspector to order remedied a condition found to exist in a building, structure, place, or premises, in violation of town zoning ordinance, and declaring violation of order to be a misdemeanor, does not authorize zoning inspector to issue a cease and desist order directing owners of realty to discontinue alleged unlawful use of premises.

N.Y.—*Lake Mohopac Heights, Inc. v. Zoning Bd. of Appeals of Town of Carmel*, 119 N.Y.S.2d 809.

96. Idaho.—*Boise City v. Better Homes*, 243 P.2d 303, 72 Idaho 441.

Court held to have jurisdiction

Under statutes authorizing a city to maintain action to enjoin construction of a building in violation of any city ordinance, county court had jurisdiction of action by city to enjoin construction of a building allegedly in violation of zoning ordinance prohibiting erection of more than one main building on a single lot and defining an accessory building as one subordinate to the main building and used for a purpose incidental to permitted use of main building.

ess on the tenants may be sufficient to sustain the action.⁹⁷

§ 395. Availability of Other Remedies

An Injunction against a zoning violation will ordinarily be granted when, and only when, there is no other adequate remedy.

An injunction against a violation of a zoning ordinance will ordinarily be granted where there is no other adequate remedy for enforcement of the regulation.⁹⁸ On the other hand, there is generally no right to an injunction if there is another adequate remedy available,⁹⁹ although it has been held that an action to enjoin a county from erecting buildings in violation of a zoning ordinance is not improper merely because other remedies might have been available to plaintiffs.¹

§ 396. — Criminal Prosecutions

The fact that a zoning violation is also a penal offense does not ordinarily preclude an injunction, since the criminal penalty is generally not considered as an adequate remedy.

The fact that the violation of a zoning law is, at the same time, a violation of a criminal or penal provision of a statute or ordinance does not ordinarily take away the authority of a court of civil jurisdiction to prevent or terminate the violation,² or preclude the obtaining of an injunction against

such violation,³ since the criminal penalty is generally not considered an adequate remedy.⁴ Under this view, where a zoning ordinance provides that a violation shall constitute a criminal offense, two courses are open to the municipality, which are not mutually antagonistic; a prosecution may lie for the violation, and an injunction may issue to prevent further violations.⁵ The fact that criminal proceedings were pending against the city officials does not deprive the court of jurisdiction to enjoin the violation of a zoning ordinance.⁶

On the other hand, it has been held by some authorities that equity will not interfere by injunction to restrain the violation of a zoning law, which violation is made a penal offense, punishable by fine,⁷ at least where such violation does not threaten injury to the property of a person in the vicinity;⁸ and this is true regardless of whether the injunction is sought by a private party or the municipality or governmental entity.⁹ Where the remedy by prosecution for violations of a zoning law or ordinance is adequate, it has been held that a violation will not be restrained.¹⁰

In any event, where the statute or ordinance contains no provision for a penalty for a violation thereof, injunction is a proper remedy to prevent substantial public injury.¹¹

Wis.—City of Lake Mills v. Veldhuizen, 56 N.W.2d 491, 263 Wis. 49.

97. Tenants as "principal defendants"

In suit to restrain tenants and non-resident owner from use of premises for multiple dwelling purposes contrary to zoning ordinance and written agreement, tenants were "principal defendants" within statute providing for service on nonresidents when court has acquired jurisdiction of subject matter in controversy by service of process on one or more of the principal defendants, so as to justify service of process on such nonresident owner particularly, in view of fact that proceeding to enforce a zoning regulation is directed primarily against the land itself and the use thereof and only incidentally against the owner.

Pa.—Lower Merion Tp. v. 34 Derwen Road, 66 A.2d 293, 362 Pa. 149.

98. Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 880, 92 L.Ed. 1757.

Other remedy held not to preclude injunctive relief

Zoning ordinance and statutes empowering building inspector to en-

force the ordinance, with provisions for appeal, were not a plain, complete, and adequate remedy precluding injunctive relief to adjacent property owners against use of building as an apartment.

Mo.—Evans v. Roth, 201 S.W.2d 357, 356 Mo. 237.

99. Mass.—Boyle v. Building Inspector of Malden, 99 N.E.2d 925, 327 Mass. 564.

Pa.—Northrop v. Steinberg, Com.Pl., 72 Montg.Co. 263.

1. Cal.—Cooper v. Los Angeles County, 170 P.2d 49, 75 C.A.2d 75.

2. Ga.—Graham v. Phinzy, 51 S.E. 2d 451, 204 Ga. 638.

La.—City of New Orleans v. Lafon, App., 61 So.2d 270.

3. Cal.—Donovan v. City of Santa Monica, 199 P.2d 51, 88 C.A.2d 386.

4. Idaho.—Boise City v. Better Homes, 243 P.2d 303, 72 Idaho 441.

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

Tex.—Hill v. City of Castle Hills, Civ.App., 282 S.W.2d 891, error refused—City of Waco v. Marsteller, Civ.App., 271 S.W.2d 722.

Property right not protected by criminal prosecution

Where violation of statute involves property right which would not be

adequately protected by criminal prosecution, right to injunction vests regardless of whether there may also be a criminal prosecution.

La.—City of New Orleans v. Lafon, App., 61 So.2d 270.

5. La.—City of New Orleans v. Lafon, supra.

6. Cal.—Donovan v. Superior Court in and for Los Angeles County, App., 224 P.2d 911.

7. Ohio.—City of Canton v. Fedco, Inc., 17 Ohio Supp. 219, 33 O.O. 131.

Failure to enforce penal laws

Fact that officers whose duty it is to enforce penal laws fail or refuse to act does not require an injunction to issue against the criminal act.

Ohio.—City of Canton v. Fedco, Inc., supra.

8. Ohio.—City of Canton v. Fedco, Inc., supra.

9. Ohio.—City of Canton v. Fedco, Inc., supra.

10. N.J.—Town of Montclair v. Kip, 160 A. 677, 110 N.J.Eq. 506—Dinkins v. Kip, 160 A. 676, 110 N.J.Eq. 486—Sragar v. Mintz, 158 A. 471, 109 N.J.Eq. 544.

11. Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 C.A. 277.

§ 397. Particular Subjects of Injunctive Relief

Injunction has been held to lie to restrain the construction of a structure or the use of premises in violation of a zoning ordinance, and to enjoin various other zoning violations such as violations of permit restrictions, violations by a tenant, and extensions of nonconforming uses; but various uses and structures have been held not subject to restraint by injunction.

In accordance with the general rules, discussed supra §§ 394-396, an injunction has been held to be the proper remedy to restrain the construction of a structure,¹² or the use of a building or property,¹³ in violation of a zoning ordinance. Thus, an injunction has been held to lie to enjoin, in residential zones, commercial uses,¹⁴ an undertaking business,¹⁵ a business involving the use and movement of commercial vehicles¹⁶ or trailers and tractors,¹⁷ and the use of a residence in a family residence

zone for the housing of the members of a cooperative association.¹⁸

On the other hand, various uses and structures have, under the particular circumstances, been held not subject to restraint by injunction,¹⁹ such as the construction of multiple dwellings,²⁰ and the use of premises for a public service or governmental purposes.²¹ It has been held that a use of property which is not in violation of the zoning ordinance cannot be enjoined merely because it substantially depreciates the value of nearby property.²²

Violations of permit restrictions. An injunction may be granted where a property owner, to whom a permit has been issued, fails to use the premises in accordance with restrictions contained in the permit,²³ as where the permit limits the use to certain hours of the day.²⁴

Conn.—*Town of Darien v. Webb*, 162 A. 690, 115 Conn. 581—*Coombs v. Larson*, 152 A. 297, 112 Conn. 236.

22. N.C.—*City of Goldsboro v. W. P. Rose Builders' Supply Co.*, 157 S.E. 58, 200 N.C. 405—*Elizabeth City v. Aydtlett*, 156 S.E. 163, 200 N.C. 58.

Tex.—*Westwood Development Co. v. City of Abilene*, Civ.App., 273 S.W. 2d 652, refused no reversible error—*Crumph v. Perryman*, Civ.App., 193 S.W.2d 233.

Violations of set-back regulations

Iowa.—*Boardman v. Davis*, 3 N.W.2d 608, 231 Iowa 1227.

13. Ga.—*Barton v. Hardin*, 48 S.E.2d 882, 204 Ga. 108.

Ky.—*City of Louisville v. Koenig*, 162 S.W.2d 19, 290 Ky. 562, 140 A.L.R. 1369.

Mass.—*City of Newburyport v. Thurlow*, 84 N.E.2d 450, 324 Mass. 40.

Pa.—*Phillips v. Griffiths*, 77 A.2d 375, 366 Pa. 468.

Ordering the removal or demolition of offending buildings or structures as permissible relief see *infra* § 411.

Removal of loam from land in violation of town zoning bylaw was enjoined.

Mass.—*Town of Lexington v. Montomy Trust Co.*, 23 N.E.2d 559, 304 Mass. 283.

14. Activity held not "home occupation"

Md.—*Maurer v. Snyder*, 87 A.2d 612, 199 Md. 551.

15. Cal.—*Sapiro v. Frisbie*, 270 P. 280, 93 C.A. 299.

16. Garage business

Daily movement of commercial vehicles from street and across lot in residential zone to garage building on adjoining lot was part of business of garaging vehicles, as was use of lot

for storage of gasoline tanks and a parking place, and such uses of lot were an integral and essential part of "garage business" and could be enjoined as nonresidential.

N.Y.—*City of Yonkers v. Rentways, Inc.*, 109 N.E.2d 597, 304 N.Y. 499.

17. N.Y.—*President and Trustees of Village of Ossining v. Meredith*, 88 N.Y.S.2d 775, 275 App.Div. 850.

18. Ill.—*Drucek v. Peterson*, 91 N.E. 2d 124, 340 Ill.App. 164.

19. Mich.—*Tel-Craft Civic Ass'n v. City of Detroit*, 60 N.W.2d 294, 337 Mich. 326.

20. Area rezoned

Where city planning commission had tentatively recommended that parcel be zoned for single residence purposes only, but petition had been filed with council requesting that area be differently zoned in order that it might be used as site for orphans' home, and council, giving favorable consideration to petition, had given area a classification permitting nine separate and distinct uses, including use as site for multiple dwellings and also as site for orphans' home, subsequent grantees would not be enjoined from constructing multiple dwellings on parcel.

Mich.—*Tel-Craft Civic Ass'n v. City of Detroit*, 60 N.W.2d 294, 337 Mich. 326.

Permit unjustifiably withheld

Where owner of structure which was partially destroyed by fire had the right to rebuild notwithstanding the existence of a zoning ordinance, and he was informed by village authorities that permit required by zoning ordinance for restoration of structure would be refused, his restoration thereof without permit did not jus-

tify injunction requiring removal of structure.

N.Y.—*Incorporated Village of North Hornell v. Rauber*, 40 N.Y.S.2d 938, 181 Misc. 546.

21. Ga.—*McCallum v. Bryant*, 84 S. E.2d 39, 211 Ga. 98.

Use for village purposes

N.Y.—*Nehrbas v. Incorporated Village of Lloyd Harbor*, 152 N.Y.S.2d 28, 1 A.D.2d 1034, affirmed 140 N.E. 2d 141, 2 N.Y.2d 190, 159 N.Y.S.2d 145.

22. Tenn.—*Red Acres Imp. Club v. Burkhalter*, 241 S.W.2d 921, 193 Tenn. 79.

Filling station

Mere fact of depreciation or diminution of value, without more, is unavailing as ground for equitable relief to enjoin operation of a filling station.

Ala.—*Shell Oil Co. v. Edwards*, 81 So. 2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 885, 100 L.Ed. 780.

23. N.J.—*Hrycenko v. Board of Adjustment of City of Elizabeth*, 99 A.2d 430, 27 N.J.Super. 376.

24. N.J.—*Hrycenko v. Board of Adjustment of City of Elizabeth*, *supra*.

Welding shop

Where board of adjustment issued building permit allowing owner to construct a welding shop, but restricted owner in his use of shop to operations after 7 A. M. and before 6 P. M., and owner did not object at the time of issuance of the permit, and owner admitted that he had done some work outside of the stipulated times, the court would restrain owner from carrying on welding operations, including hammering, after 7 P. M.

N.J.—*Hrycenko v. Board of Adjustment of City of Elizabeth*, *supra*.

Time limitations in permit for construction. An injunction will be granted to restrain the construction of a building under a permit, where the work thereon was not undertaken or performed in accordance with provisions with respect to the time therefor.²⁵

Tenant's use of building. A tenant's use of a building in violation of zoning regulations or by-laws, with the consent of the landlord, may be enjoined,²⁶ particularly where the landlord has the right to terminate the tenancy.²⁷

Nonconforming uses; extensions and replacements. In the case of property subject to a nonconforming use, an injunction may be granted against the violation of a zoning ordinance by the extension of such use.²⁸ So also, where buildings are used in a business constituting a nonconforming use, in a zone in which such business would

otherwise be prohibited, the court may properly enjoin the replacement of destroyed buildings in so far as the new buildings may involve a size or use other than that previously existing.²⁹ On the other hand, a use or construction in connection with a nonconforming use will not be enjoined where such use or construction is not regarded as constituting an enlargement or extension of the nonconforming use,³⁰ or is not such an enlargement or extension as will violate the zoning regulation.³¹

§ 398. — Use or Structure Constituting Nuisance

A use or structure violating a zoning regulation will be enjoined where it constitutes a nuisance or is regarded as a nuisance per se, and in some instances not otherwise.

The violation of a zoning regulation will be enjoined where the use or structure constitutes a

25. Ga.—Best v. Truitt, 92 S.E.2d 5, 212 Ga. 296.

Failure to begin construction within six months

Where applicant for building permit did not comply with ordinance requiring construction of property in compliance with a permit lawfully issued, to have been begun within six months from the effective date of the amendment, in that the permit was issued on the last day of the six months period and no actual construction was begun thereunder until later, the applicant was properly enjoined from erection of the building on the premises involved. Ga.—Best v. Truitt, supra.

Late application for new permit after suspension of work

Where permit for construction of filling station provided for expiration if work was suspended for sixty days, but building code provided that permittee could apply for new permit to recommence work if period of suspension had not exceeded one year, permittee who had suspended construction for more than sixty days and who had not made timely application for new permit lost whatever rights he had to compel issuance of new permit because of work and labor extended in reliance on original permit, and would be enjoined from continuing construction or obtaining a new permit because of change in zoning law making filling station a nonconforming use. Utah.—Judkins v. Fronk, 234 P.2d 849, 120 Utah 359.

26. Food supply business

Where tenants presumably with knowledge and consent of landlord used premises in residential districts as food supply depot, and carried on business therein involving cooking of meats, washing, packaging, and proc-

essing of vegetables and other food products for sale at stores remote from the premises and also carried on manufacture, painting and repair of equipment for the stores, use could be enjoined by public building commissioner even if use was no more detrimental to neighborhood than former permissible nonconforming use as a dairy farm.

Mass.—Public Bldg. Com'r of Newton v. Star Market Co., 84 N.E.2d 529, 324 Mass. 75.

27. Mass.—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547.

28. Storage of objects without power of locomotion

Where lot in residence zone was subject to nonconforming use for storage of poles, cables, and pipe, storage of trailers and other objects without power of locomotion was not sufficiently different to authorize issuance of an injunction against violation of zoning ordinance, but storage of motor vehicles, such as a freight truck or a bus, was sufficiently different to warrant such an injunction.

N.Y.—President and Trustees of Village of Ossining v. Meredith, 73 N.Y.S.2d 897, 190 Misc. 142.

29. Petroleum business

Where buildings of company conducting business of buying and selling various petroleum products as a nonconforming use in a zone in which its business would otherwise be prohibited were destroyed by fire, trial court properly enjoined reconstruction of any of the buildings other than of the size and use of those buildings which existed on premises when zoning ordinance was enacted, in absence of zoning permit from bureau of engineering, surveys and zoning in accordance with zoning ordinance.

N.Y.—Driscoll v. Brunner, 64 N.Y.S. 2d 161, affirmed 63 N.Y.S.2d 644, 270 App.Div. 1025.

Pa.—Humphreys v. Stuart Realty Corp., 73 A.2d 407, 364 Pa. 616.

30. Fire protection

Building of water tank for defendant's plant was not an extension of a nonconforming use under which defendant was permitted to engage in certain light industrial work, and hence borough was not entitled to injunction restraining the use of the tank, where the sole purpose of tank was to provide adequate fire protection.

N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, Inc., 92 A.2d 851, 23 N.J.Super. 255, refused 102 A.2d 84, 29 N.J.Super. 154.

Changes within purview of discussion

Fact that repairs to building were more extensive than contemplated did not entitle city to an injunction on ground of an enlargement of a prior nonconforming use, where changes were within purview of initial discussion between building inspector and property owner and inspections were made by city in the course of the work.

Tex.—City of Dallas v. Rosenthal, Civ.App., 239 S.W.2d 636, refused no reversible error.

Convalescent home changed to school for mental defectives

N.Y.—Rogers v. Association For the Help of Retarded Children, 123 N.E.2d 806, 308 N.Y. 126.

31. Two-family house made into three-family house

Ill.—Village of Round Lake Park v. Dice, 127 N.E.2d 875, 6 Ill.App.2d 408.

nuisance,³² or such use or structure is, by statute, regarded as a nuisance per se;³³ and it has been held that threatened violation of a zoning ordinance will not be enjoined, even at the suit of the municipality, unless the violation to be restrained will constitute a nuisance.³⁴

Where a particular use, such as a garage or filling station, is not excluded from an area by the zoning regulations, and a permit therefor is granted, whether such use may nevertheless be enjoined on the ground that, because of the particular nature of the use and the proximity to a residential zone, it will constitute a nuisance is governed by principles relating to the granting of injunctions for nuisances generally.³⁵ Thus, where its construction is not a violation per se, and whether it will eventually constitute a violation or a nuisance depends on the manner in which it is used, the question of violation or

nuisance is speculative, and does not warrant the intervention by a court of equity by way of injunction.³⁶

§ 399. Defenses

Matters which are germane to the cause of action for the injunction and present a legal reason why the plaintiff should not succeed therein may constitute good defenses.

In accordance with general rules, matters which are germane to the cause of action for the injunction and present a legal reason why plaintiff should not succeed therein may constitute good defenses,³⁷ except where circumstances are such that defendant is precluded from asserting the defense by waiver or estoppel.³⁸ The invalidity of the zoning ordinance violated may be a valid defense;³⁹ and the fact that the zoning authority had reclassified the

32. Stores

In action by city against property owner in which it was contended that zoning ordinance was violated by creation of noise and confusion and by disturbing peace of neighbors through operation of stores in single-family residence district, evidence required conclusion that use of two lots by defendant was within ordinance providing that nonconforming use shall not be continued if by reason of noise or otherwise it shall become a nuisance to residents. Fla.—Perkins v. City of Coral Gables, 57 So.2d 663.

33. Cal.—People v. Johnson, 277 P. 2d 45, 129 C.A.2d 1.

Mich.—Portage Tp. v. Full Salvation Union, 29 N.W.2d 297, 318 Mich. 693, appeal dismissed 68 S.Ct. 735, 333 U.S. 851, 92 L.Ed. 1133, rehearing denied 68 S.Ct. 1336, 334 U.S. 830, 92 L.Ed. 1757.

34. N.J.—Mansaro v. Cigolini, 65 A. 2d 83, 1 N.J.Super. 484.
Sragar v. Mintz, 158 A. 471, 109 N.J.Eq. 544.

35. Ga.—Rushing v. Thigpen, 37 S. E.2d 180, 200 Ga. 313.

36. Ala.—Shell Oil Co. v. Edwards, 81 So.2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 885, 100 L.Ed. 780.

Ga.—Rushing v. Thigpen, 37 S.E.2d 180, 200 Ga. 313.

Ill.—Board of Ed. of School Dist. 85½ v. Idle Motors, 90 N.E.2d 121, 339 Ill.App. 359.

37. Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

Defenses held unavailable by agreement

Defendant, who had acknowledged zoning provisions limiting density of population, had entered into an agree-

ment to comply with such ordinance at termination of war emergency situation, and had acted thereon to his benefit, could not subsequently repudiate his agreement and avail himself of defenses of laches, estoppel, and one-year statute of limitations in action to enjoin violation of zoning provisions.

Colo.—Di Salle v. Giggall, 261 P.2d 499, 128 Colo. 275.

Matters held not defenses

(1) City's issuance of permit is no defense, in action to enjoin construction of private garage in violation of ordinance.

Tex.—Woods v. Kiersky, Tex.Com. App., 14 S.W.2d 825.

(2) Good faith is no defense where the existence of good faith is not shown.

U.S.—Welton v. 40 East Oak St. Bldg. Corporation, C.C.A.Ill., 70 F.2d 377, certiorari denied Chicago Title & Trust Co. v. Welton, 55 S.Ct. 105, 293 U.S. 590, 79 L.Ed. 685.

(3) Even if statute granting county zoning board of appeals power to grant a variation from zoning ordinance was in that respect unconstitutional, any denial of application for such variation would not excuse past, present, or continued violation of the zoning ordinance.

Ill.—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

38. Tex.—Newton v. Town of Highland Park, Civ.App., 282 S.W.2d 266, error refused no reversible error.

Facts held to constitute waiver or estoppel

(1) Where, for twenty-one years, the public acquiesced in and permitted enforcement of city zoning ordinance without objection, and city had

granted more than four hundred building permits, and, in reliance on validity of ordinance, there had been changes in conditions involving extensive property interests, property owner was estopped to contend that ordinance was ineffective because of alleged failure to comply strictly with statute requiring publication of ordinance after its adoption.

Iowa.—City of Creston v. Center Milk Products Co., 51 N.W.2d 463.

(2) Where property owner applies for building permit for erection of business building in district in which business uses are prohibited by zoning ordinance, and property owner does not appeal ruling denying permit to board of adjustment but secures permit to erect residential building, property owner waives right to assert as defense in action to enjoin him from using the property for a prohibited use, that he is entitled to use new building for business purposes because of some prior nonconforming use, and successor in title to property owner is in no better position to assert such defense.

Wis.—Jefferson County v. Timmel, 51 N.W.2d 518, 261 Wis. 39.

(3) Defendant, proceeding on theory that village zoning ordinance, which he was charged with violating, was valid, but inapplicable to him, and not attempting to attack its constitutionality until he filed motions in arrest of judgment and for new trial six days after rendition of judgment against him, waived right to question validity of ordinance.

Ill.—Village of Riverside v. Kuhne, 73 N.E.2d 286, 397 Ill. 108, transferred, see, 82 N.E.2d 500, 335 Ill. App. 547.

39. Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

property so as to make the use or construction proper may also constitute a valid defense.⁴⁰

Failure of defendant to appeal or seek relief. The failure of a lot owner to apply to the board of adjustment for relief against restrictions placed on his property by a zoning ordinance does not preclude him from asserting matters of defense available to him, in the municipality's action against him to enjoin the violation of the ordinance;⁴¹ and he may raise the defense that the ordinance was unreasonable and discriminatory against him.⁴² Where, prior to the expiration of a reasonable time for appeal by a property owner from an order prohibiting further alteration of the premises by such owner, the municipality instituted a suit to enjoin the use of the property in violation of the zoning regulations, the failure of the property owner to take an appeal from the order does not preclude him from asserting defenses and litigating issues involved in the municipality's suit.⁴³

§ 400. — Determination in Criminal Proceeding

The determination in a criminal proceeding involving a zoning violation is not *res judicata* in a civil proceeding for an injunction.

The determination in a criminal proceeding in-

volving a zoning violation is not *res judicata* in a civil proceeding for an injunction,⁴⁴ even where the charge in both proceedings is the same.⁴⁵ Thus, the fact that a criminal prosecution fails does not mean that an injunction in the civil courts may not be applied for, even where the criminal charge is based on the same alleged violation as is the petition for injunction.⁴⁶

The operation and effect generally of a judgment in an action for penalties for violation of a zoning ordinance or regulation are discussed *infra* § 421.

§ 401. — Estoppel or Laches

A municipality is not ordinarily barred by estoppel from maintaining an action to enjoin a zoning violation, although an individual may be barred by estoppel or laches; and it is no defense that there has been no enforcement of the ordinance in the past or that others may also be violating the ordinance.

Since, in enforcing zoning regulations, a municipality acts as a governmental agency, and exercises the police power of the state,⁴⁷ it is not ordinarily precluded from maintaining an action to enjoin a violation or threatened violation of the zoning law by estoppel,⁴⁸ at least where some of the essential elements of estoppel are lacking.⁴⁹ Ac-

40. No authority to reclassify

Where the zoning board did not have authority to reclassify the property, as claimed in the defense, the fact that plan for rezoning residential area to commercial area could be perfected in future was immaterial in determining whether or not the use of a building constructed in violation of present zoning law could be enjoined.

La.—City of New Orleans v. Leeco, 53 So.2d 490, 219 La. 550.

41. Tex.—City of West University Place v. Ellis, Civ.App., 118 S.W.2d 907, affirmed 134 S.W.2d 1038, 134 Tex. 222.

42. Tex.—City of West University Place v. Ellis, *supra*.

43. Tex.—City of Dallas v. Rosenthal, Civ.App., 239 S.W.2d 636, error refused no reversible error.

44. La.—City of New Orleans v. Lafon, App., 61 So.2d 270.

45. Different charges

Where charge in criminal prosecution was that operator of house trailer court had more than one building on any one lot in violation of zoning law, and charge seeking injunction was that operator was conducting commercial establishment in zoned area where such establishments were prohibited, dismissal of criminal charge on holding that trailers were not buildings did not preclude issu-

ance of injunction on ground that case was *res judicata*.

La.—City of New Orleans v. Lafon, *supra*.

46. La.—City of New Orleans v. Lafon, *supra*.

47. N.C.—City of Raleigh v. Fisher, 61 S.E.2d 897, 232 N.C. 629.

48. N.C.—City of Raleigh v. Fisher, *supra*.

Estoppel of municipality to enforce ordinance generally see *supra* § 390.

Facts held not to create estoppel

(1) Delay of over three years in bringing suit to enjoin use of property in violation of zoning law did not estop city to maintain the suit.

R.I.—City of Warwick v. Campbell, 107 A.2d 334, 82 R.I. 300.

(2) Town was not estopped to enforce a zoning ordinance against the use of plaintiff's property as a cemetery and crematory where substantially all the improvements of the land made in 1938 had gone to waste, and the expenditures made by the present developers had been made when they had notice that the adoption of a zoning ordinance prohibiting the use of the property as a cemetery and crematory was pending.

Conn.—Fairlawns Cemetery Ass'n v. Zoning Commission of Town of Bethel, 86 A.2d 74, 138 Conn. 434.

No estoppel as to adjoining properties

Where zoning commission issued permit to allow corporation to rebuild destroyed factory, which was a nonconforming industrial use contrary to zoning ordinance, zoning commission was not estopped to enjoin corporation from using parcels of realty which adjoined original factory, for parking area in violation of zoning ordinance, since permit only allowed reconstruction of factory on lots where it stood, and corporation had aggravated its problem by enlarging factory.

Ohio.—Gwynn v. Trimedge, Inc., 109 N.E.2d 1, 158 Ohio St. 307.

Waiver of claim of estoppel

Where owners had agreed with town officials to remove a certain structure as a condition of their obtaining a building permit to erect other structures, they waived any claim of estoppel against town's enforcement of zoning ordinance and building code against structure.

Tex.—Newton v. Town of Highland Park, Civ.App., 282 S.W.2d 266, refused no reversible error.

49. N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, Inc., 102 A.2d 84, 29 N.J.Super. 154.

Opposition by municipality known; permit unauthorized

In view of fact that company,

cordingly, the fact that the officials of a municipality had encouraged or permitted defendants to violate the zoning regulation in times past does not estop the municipality to obtain an injunction against further violation;⁵⁰ and, where defendant knew that his use of property was unlawful and in violation of zoning regulations, the municipality may enforce the law and, despite its inactivity and failure to object, is not chargeable with laches and is not estopped.⁵¹ On the other hand, the right of an individual to maintain an action to enjoin the violation of a zoning regulation may be lost, where the requisite elements are present, by estoppel⁵² or laches.⁵³

In general, the fact that there had been, in the

past, no enforcement of the zoning ordinance, and no steps taken to prevent violations thereof, is no defense to an action to enjoin such violation.⁵⁴ Thus, the fact that others may also be violating a zoning ordinance in the same manner as defendant is no defense to an action to enjoin the violation;⁵⁵ and the fact that defendant himself had been using the property in the same way is similarly no defense.⁵⁶ The holder of a building permit who commenced construction and incurred liabilities before the adoption of the zoning ordinance will not be restrained.⁵⁷

The fact that plaintiff had himself formerly violated the regulation does not preclude him from obtaining injunctive relief.⁵⁸

which was operating manufacturing business pursuant to nonconforming use authorizing light industrial work, knew of opposition by municipality to extension of water mains, and in view of fact that building inspector had no authority to sanction enlargement of nonconforming use by issuing permit for construction of water tank and water mains to be used in fire protection system, municipality was not, because of such permit, estopped to obtain injunction to restrain such enlargement, even though the fire protection system had been substantially completed at great expense.

N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, Inc., *supra*.

50. N.C.—City of Raleigh v. Fisher, 61 S.E.2d 897, 233 N.C. 629.

No objection for ten years

N.C.—City of Raleigh v. Fisher, *supra*.

51. N.Y.—Town of Eastchester v. Noble, 148 N.Y.S.2d 592, 2 Misc.2d 1034, affirmed 153 N.Y.S.2d 600, 2 A.D.2d 714.

52. Pa.—Szcepaniak v. McGlone, 60 A.2d 382, 163 Pa.Super. 11.

Tex.—Barkdale v. Allison, Civ.App., 210 S.W.2d 616.

Facts held to create estoppel

(1) One who acquiesces in violation of building restriction has no standing in equity to restrain such violation.

Pa.—Szcepaniak v. McGlone, 60 A.2d 382, 163 Pa.Super. 11.

(2) Where plaintiffs, who lived on lot adjoining that of the defendants, knew that defendant was locating and constructing garage in violation of zoning ordinance and learned, when they complained to mayor, that defendant had been issued building permit for such location on which he was relying, but made no protest to defendant or to his contractor before garage was completed, they were thereafter estopped to have maintenance of garage enjoined as a nuisance in violation of statute.

Iowa.—McCartney v. Schuette, 54 N.W.2d 462, 243 Iowa 1358.

Right held not barred by estoppel

Where ordinance establishing setback line had not been violated subsequent to plaintiff's acquisition of their property, and conditions were unchanged except that some violations of ordinance had been permitted prior to plaintiff's acquisition of their property, plaintiffs were entitled to have ordinance enforced against person erecting building in violation thereof.

Minn.—McCavic v. DeLuca, 46 N.W.2d 873, 233 Minn. 372.

53. N.Y.—Solof v. Heitner, 125 N.Y.S.2d 67, modified on other grounds 122 N.Y.S.2d 365, 282 App.Div. 738.

Tex.—Barksdale v. Allison, Civ.App., 210 S.W.2d 616.

Right held barred by laches

Action to enjoin as a private nuisance alteration of building for use as an undertaking establishment and operation of undertaking business on premises zoned for business was barred by laches, where neighboring home owners and tenants made no protest until several months after learning of proposed use of premises and owner had spent substantial sums for purchase and alteration of building.

N.Y.—Devereux v. Grand-Americas Junior Corp., 85 N.Y.S.2d 783.

Right held not barred by laches

(1) Where realty owner repeatedly made efforts to secure enforcement by municipality of zoning ordinance, and was frustrated by municipal inaction, he was not barred by laches from seeking to enjoin violation of ordinance.

N.J.—Morris v. Borough of Haledon, 93 A.2d 781, 24 N.J.Super. 171.

(2) Where store, on which improvements were made in violation of zoning ordinance, was in same condition when suit in equity for man-

datory injunction was brought to compel removal of improvements as when improvements were completed, delay of owners of adjoining realty in bringing the suit did not constitute laches.

Ala.—Moore v. Pettus, 71 So.2d 814, 260 Ala. 616.

54. Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

Pa.—In re Application for Certificate of Occupancy, Com.Pl., 32 North. Co. 31.

Failure to proceed against others

Injunction suit against carrying on restaurant or commercial business in residence district is not wanting in equity because of failure to proceed against school maintaining cafeterias.

Neb.—City of Lincoln v. Foss, 230 N.W. 592, 119 Neb. 666.

55. Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

S.C.—Momeier v. John McAllister, Inc., 27 S.E.2d 504, 203 S.C. 353.

Set-back lines

Fact that other buildings in block violated ordinance establishing setback line did not preclude enforcement of ordinance by injunction against defendant erecting a building in violation of ordinance.

Minn.—McCavic v. DeLuca, 46 N.W.2d 873, 233 Minn. 372.

56. Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

57. N.Y.—Rice v. Van Vranken, 232 N.Y.S. 506, 225 App.Div. 179, affirmed 175 N.E. 304, 255 N.Y. 541.

58. Ohio.—Lavin v. Barbini, App., 88 N.E.2d 417.

Public garage

In action permanently to enjoin commercial garage owner from constructing entrance to garage addition within fifty feet of plaintiff's residence in violation of zoning ordi-

§ 402. Parties

All who must be bound by the injunction to make it finally effective are proper parties to be joined, and the municipality and nearby property owners may be proper parties; but persons having no legal interest in the action may not be joined.

The general rules governing proper and necessary parties in civil actions apply in actions for an injunction for violations, or threatened violations, of zoning regulations.⁵⁹ Thus, all who must be bound by the injunction to make it finally effective and so avoid the recurrence of litigation on the same subject matter are proper parties to be joined;⁶⁰ and under this rule tenants of the property in issue may be properly joined as parties defendant.⁶¹

The zoning board or commission and the municipality or governmental entity are primarily interested in the enforcement of the zoning regulations, and hence are the real parties in interest to an action to enjoin their violation;⁶² and both the individuals affected and the municipality may be parties plaintiff.⁶³ Adjoining or nearby property owners or owners of property within the zoning use district may be proper parties in an action to enjoin the violation of a zoning ordinance.⁶⁴ However, persons having no legal interest in the subject matter of the action may not be joined as parties.⁶⁵

An injunction proceeding may properly name as a party, and the person to be enjoined, the general manager of a business rather than the owner, where the owner is a nonresident.⁶⁶

§ 403. — Who May or Must Sue

An action to enjoin the violation of a zoning ordinance ordinarily may or must be instituted by the municipality or in its name.

In general an action to enjoin the violation of a zoning ordinance may be instituted by the municipality,⁶⁷ or in its name,⁶⁸ by the proper, authorized officials.⁶⁹

While the right of a private individual to maintain an action to enjoin a zoning violation has been recognized in some jurisdictions under certain circumstances, as discussed infra § 404, it has also been held that such an action must be brought by the public authorities,⁷⁰ and must be in the name of the municipality as the real party,⁷¹ and cannot be maintained simply as a taxpayers' suit.⁷²

§ 404. — Private Individuals; Property Owners

An action to enjoin the violation of a zoning ordinance may be maintained by a private individual, such as a nearby property owner, if the use or structure constitutes a nuisance, or if the individual has suffered or is threatened with special damages.

In accordance with the general rule that, where the injury complained of is in fact a public injury, and the right violated is a public right, an individual cannot maintain a suit for an injunction unless he suffers a special injury different from that suffered by the public at large, discussed in Injunctions § 22 b, a private individual, such as a nearby property owner,

nance, fact that plaintiff had a public garage on his premises previous to enactment of zoning ordinance did not prevent plaintiff from obtaining injunctive relief.

Ohio.—Lavin v. Barbini, *supra*.

59. Tenn.—City of Knoxville v. Peters, 191 S.W.2d 164, 183 Tenn. 93.

60. Tenn.—City of Knoxville v. Peters, *supra*.

61. Tenn.—City of Knoxville v. Peters, *supra*.

62. Ky.—Durning v. Summerfield, 235 S.W.2d 761, 314 Ky. 318.

63. N.C.—Vance S. Harrington & Co. v. Renner, 72 S.E.2d 838, 236 N.C. 321.

64. Md.—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348.

Property owners residing in same block in which was located lot on which defendant maintained four-family apartment house were proper parties in action to prevent by injunction the impairment or destruction of benefits to be derived from zoning restriction permitting only two-family residences in block.

Ky.—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

65. Ky.—Durning v. Summerfield, 235 S.W.2d 761, 314 Ky. 318.

Other city held not necessary or proper party

Ky.—Durning v. Summerfield, *supra*.

Complaint held demurrable

Where complaint in action by municipal corporation and certain individuals to enforce zoning ordinance failed to show that the individuals were in any way interested in subject matter of action, or were citizens or property owners of plaintiff city, or would be injuriously affected by the nonconforming use of defendants' property, complaint was demurrable as to individual plaintiffs.

N.C.—City of Shelby v. Lackey, 72 S.E.2d 757, 236 N.C. 369.

66. Ky.—Durning v. Summerfield, 235 S.W.2d 761, 314 Ky. 318.

67. Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.

Cal.—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 C.A. 277.

Idaho.—Boise City v. Better Homes, 243 P.2d 303, 72 Idaho 441.

N.J.—Morris v. Borough of Haledon,

93 A.2d 781, 24 N.J.Super. 171—Frizen v. Poppy, 86 A.2d 134, 17 N.J.Super. 390.

N.Y.—Village of Old Westbury v. Hoblin, 141 N.Y.S.2d 186.

68. Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.

69. N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

Mayor and city attorney, as authorized by commission council, were proper city officials to bring suit to enjoin operation of house trailer court in violation of zoning law.

La.—City of New Orleans v. Lafon, App., 61 So.2d 270.

Building inspector

N.Y.—Griffin v. Reville, 149 N.Y.S.2d 312.

70. Md.—Weinberg v. Kracke, 55 A.2d 797, 189 Md. 275.

71. Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

72. Md.—Weinberg v. Kracke, 55 A. 2d 797, 189 Md. 275.

er, cannot ordinarily maintain an action to restrain the violation of a zoning regulation,⁷³ unless the use or structure constitutes a nuisance,⁷⁴ or the individual falls within the category of those whom the ordinance purports to protect,⁷⁵ or unless, even though the use or structure will not be a nuisance

per se,⁷⁶ the individual has suffered, or is threatened with, special damage, that is, injury or threat of injury of a special and peculiar nature, constituting a private wrong affecting his personal or property rights,⁷⁷ and there is no other remedy available to

73. Conn.—Lehmaier v. Wadsworth, 191 A. 539, 122 Conn. 571.

Ill.—222 East Chestnut St. Corp. v. La Salle Nat. Bank, 146 N.E.2d 717, 15 Ill.App. 460.

Mass.—Nigro v. Jones, 127 N.E.2d 650, 332 Mass. 741—Boyle v. Building Inspector of Malden, 99 N.E.2d 925, 327 Mass. 564.

Mich.—Bane v. Pontiac Tp., Oakland County, 72 N.W.2d 134, 343 Mich. 481.

Mo.—Killian v. Brith Sholom Congregation, App., 154 S.W.2d 387.

N.J.—Morris v. Borough of Haledon, 90 A.2d 113, 20 N.J.Super. 433, reversed on other grounds 93 A.2d 781, 24 N.J.Super. 171.

N.Y.—Bazinsky v. Kesbec, Inc., 19 N.Y.S.2d 716, 259 App.Div. 467, affirmed 36 N.E.2d 694, 286 N.Y. 655, remittitur amended 37 N.E.2d 456, 286 N.Y. 723—Buckley v. Baldwin, 244 N.Y.S. 295, 230 App.Div. 245—Atkins v. West, 226 N.Y.S. 335, 222 App.Div. 308.

Ohio.—Connolly v. Morris, Com.Pl., 125 N.E.2d 765.

Wash.—Desimone v. City of Seattle, 213 P.2d 948, 35 Wash.2d 579.

Wis.—Oeland v. Woldenberg, 201 N.W. 807, 185 Wis. 610.

Joinder of several individuals

(1) With respect to right of property owners to complain in equity of corporation's violation of zoning ordinances, rights are not enlarged because several individuals have joined together as plaintiffs.

Mass.—Mullholland v. State Racing Commission, 3 N.E.2d 773, 295 Mass. 286.

(2) Suit to enjoin construction on, or operation of, premises illegal under zoning ordinance must be taken by public authorities and not by group of taxpayers.

Md.—Weinberg v. Kracke, 55 A.2d 797, 189 Md. 275.

(3) Right of owner of property to restrain acts made illegal by zoning ordinance is based on his own injury and damages, and not on that of his neighbors, and bringing in other property owners neither adds nor detracts from that right.

Md.—Weinberg v. Kracke, supra.

74. Mass.—Old Colony Trust Co. v. Merchant Enterprises, 126 N.E.2d 112, 332 Mass. 484.

Noise during nighttime operation

Where truck freight terminal was located in manufacturing zone, but zoning bylaw provided that no building should be used for any purpose

offensive to neighborhood by emission of noise, and it appeared that employees at terminal worked all night loading and unloading and repairing trucks, making loud noises so as to interfere with sleep of persons in the area, there was a "nuisance" authorizing injunction enjoining operation of terminal between hours of twelve P.M. and six A.M. in such a manner as to cause noises to emanate therefrom so as to interfere with ability of other persons in area to sleep even though night work was necessary for terminal business.

Mass.—Malm v. Dubrey, 88 N.E.2d 900, 325 Mass. 63.

75. N.Y.—Wike v. Herms, 61 N.Y.S. 2d 244, 187 Misc. 111.

Places of public assembly

Under zoning ordinance so providing, theaters, auditoriums, or other places of public assembly seating over one hundred persons or used as a church, hospital, college, school, or institution for dependents or children, are protected from close proximity of filling stations or public garages accommodating more than five motor vehicles.

N.Y.—Wike v. Herms, supra.

Plaintiff's property in two zones

Where substantial portion of plaintiff's lot adjacent to defendants' business building, which had been erected flush with boundary line, was located in business district of village, plaintiff was not entitled to protection of provisions of village ordinance that on every plot, which is used for a business building or purpose, and which abuts on boundary of a residence district, a side yard at least fifteen feet in width shall be maintained along boundary, and therefore plaintiff was not entitled to mandatory injunction directing removal by defendants of the building.

N.Y.—Stellato v. Palmietto, 144 N.Y.S.2d 279.

76. Ind.—Fidelity Trust Co. v. Downing, 68 N.E.2d 789, 224 Ind. 457.

Wis.—Douchard v. Zetley, 220 N.W. 209, 196 Wis. 635—Holzbauer v. Ritter, 198 N.W. 552, 184 Wis. 35.

77. Ala.—Moore v. Pettus, 71 So.2d 814, 260 Ala. 616.

Ark.—Meyer v. Seifert, 235 S.W.2d 4. Ind.—Anderson Lumber & Supply Co. v. Fletcher, 89 N.E.2d 449, 238 Ind. 383—Fidelity Trust Co. v. Downing, 68 N.E.2d 789, 224 Ind. 457.

Ky.—Polk v. Axton, 208 S.W.2d 497, 306 Ky. 498.

Md.—Kulbitsky v. Zimnoch, 77 A.2d 14, 196 Md. 504—Cassel v. Mayor and City Council of Baltimore, 73 A.2d 486, 195 Md. 348—Weinberg v. Kracke, 55 A.2d 797, 189 Md. 275.

N.J.—Garrou v. Teaneck Tryon Co., 94 A.2d 332, 11 N.J. 294.

Morris v. Borough of Haledon, 93 A.2d 781, 24 N.J.Super. 171—Frisen v. Poppy, 86 A.2d 134, 17 N.J. Super. 390.

N.Y.—Rice v. Van Vranken, 232 N.Y.S. 506, 225 App.Div. 179, affirmed 175 N.E. 304, 255 N.Y. 541.

Armstrong v. Gibson & Cushman, 117 N.Y.S.2d 185, 202 Misc. 399, appeal dismissed 116 N.Y.S.2d 135, 280 App.Div. 939—Keenly v. McCarty, 244 N.Y.S. 63, 137 Misc. 524.

Ohio.—Connolly v. Morris, Com.Pl., 125 N.E.2d 765.

Pa.—Aiken v. Conti, 5 Chest.Co. 163. Tex.—City of Graham v. Wheelless, Civ.App., 89 S.W.2d 792.

Wash.—Desimone v. City of Seattle, 213 P.2d 948, 35 Wash.2d 579—Park v. Stolzheise, 167 P.2d 412, 24 Wash.2d 781.

Express power granted in zoning ordinance for maintenance of suit by aggrieved individuals, independently of city, to enjoin threatened violation of zoning laws was merely cumulative of power already possessed by a property owner on showing of special damage to himself and property.

Tex.—Crump v. Perryman, Civ.App., 193 S.W.2d 233.

Specific financial loss not necessary

It is not necessary for plaintiff, in suit to enjoin zoning ordinance violation, to show pecuniary damage, since landowners are entitled to benefits which accrue to them from observance of general zoning regulations by their neighbors, even though they suffer no specific financial loss, and their special damage affords sound basis for injunctive relief.

Ky.—Parker v. Rash, 236 S.W.2d 687, 314 Ky. 609.

Irreparable damages

N.J.—Massaro v. Gigolini, 65 A.2d 83, 1 N.J.Super. 484.

Where adjoining property owner can show that his property is damaged as result of violation of zoning regulation, he has right to appeal to court for aid in enjoining continuing infraction of law.

Pa.—Phillips v. Griffiths, 77 A.2d 375, 366 Pa. 468.

such private individual to correct the wrong.⁷⁸

It has been held that any property owner in the zoning district has, by virtue of the threatened violation, suffered special damages and may bring the action;⁷⁹ and it has also been held that a property owner residing in that portion of a municipality where a zoning ordinance is in force may properly apply for an injunction against the use of an exist-

ing structure within the restricted area, where such use is in violation of the zoning ordinance, without showing special damages,⁸⁰ and is not relegated to a writ of certiorari or other remedy to review action of the zoning authority to which he objects.⁸¹ This is particularly true as to adjoining or nearby property owners,⁸² at least where the violation of a zoning regulation is regarded as a nuisance;⁸³ and injunctions have been granted to private property

Authority vested in official

Provision in a zoning ordinance that an official of the village should enforce it did not prevent a private property owner who suffered special damage by reason of a violation of the ordinance from maintaining an action for redress.

N.Y.—*Marcus v. Village of Mamaroneck*, 23 N.E.2d 856, 283 N.Y. 325.

Facts held to warrant injunctive relief

(1) In general.

N.J.—*Morris v. Borough of Haledon*, 93 A.2d 781, 24 N.J.Super. 171.

(2) Material damage in pecuniary value of property entitled owners thereof to maintain action to enjoin use of other property as a school for mentally retarded children in alleged violation of village zoning ordinance. N.Y.—*Rogers v. Association for Help of Retarded Children*, 120 N.Y.S.2d 329, 281 App.Div. 978, affirmed 123 N.E.2d 806, 308 N.Y. 126.

(3) Where church owning property in residential zone was attempting to sell such property for commercial purposes, there was an impending threat of substantial injury to other owners of property in such zone sufficient to entitle them to relief enjoining such sale.

Miss.—*Brooks v. City of Jackson*, 51 So.2d 274, 211 Miss. 246.

(4) If sales of alcoholic liquor under restaurant beer permit issued by liquor control commission are in violation of town zoning ordinance, any party whose justiciable interests were injured thereby would, in a proper case, be entitled to seek redress in an action for injunctive relief.

Conn.—*Town of Newington v. Mazzone*, 48 A.2d 729, 133 Conn. 146.

Facts held insufficient to authorize injunctive relief

(1) In general.

Pa.—*Duty v. Vacuum Oil Co.*, 175 A. 522, 317 Pa. 15.

(2) Showing of diminution of residence values, less enjoyment of resident property, noisy environment, traffic congestion, and increased fire hazards with respect to the erection of a gasoline filling station and garage in a business zone adjacent to plaintiffs' property which they used for residential purposes, was not

sufficient to authorize injunctive relief.

N.Y.—*Wike v. Herms*, 61 N.Y.S.2d 244, 187 Misc. 111.

78. N.Y.—*Keenly v. McCarty*, 244 N.Y.S. 63, 137 Misc. 524.

Demand on authorities

Plaintiffs, before seeking equitable relief with respect to violation of zoning ordinance, should allege and prove demand on municipal authorities.

N.Y.—*Keenly v. McCarty*, supra.

Availability of money judgment held no bar

In suit in equity by owners of realty in area zoned as residential district for mandatory injunction requiring owner of store, which could be used under zoning ordinance as a store because such use existed at time ordinance became effective, to remove improvements made in violation of ordinance wherein it was established that owner of store did not act innocently in making improvements but acted in such a manner as to invite trouble, injunctive relief would not be denied on ground that owners of adjoining realty could be compensated by a money judgment.

Ala.—*Moore v. Pettus*, 71 So.2d 814, 260 Ala. 616.

79. N.J.—*Stokes v. Jenkins*, 152 A. 383, 107 N.J.Eq. 318.

"If other property owners within the same zone and subject to the same zoning restriction be permitted to violate that restriction, the plaintiffs nonetheless continue bound by the restriction while suffering deprivation in the enjoyment of their property and impairment in the economic value thereof. These are special damages for which even a proceeding by the municipality to enforce a penalty against the violators will furnish no adequate relief to the injured plaintiffs."

N.J.—*Yanow v. Seven Oaks Park*, 83 A.2d 28, 32, 15 N.J.Super. 73.

80. Ga.—*White v. Griggs*, 80 S.E.2d 163, 210 Ga. 364—*Sirota v. Kay Homes, Inc.*, 65 S.E.2d 597, 208 Ga. 113—*Hardin v. Croft*, 60 S.E.2d 395, 207 Ga. 115—*Barton v. Hardin*, 48 S.E.2d 882, 204 Ga. 108, 204 Ga. 638—*Snow v. Johnson*, 28 S.E.2d 270, 197 Ga. 146.

81. Ga.—*Sirota v. Kay Homes, Inc.*, 65 S.E.2d 597, 208 Ga. 113—*Hardin v. Croft*, 60 S.E.2d 395, 207 Ga. 115.

Owners not parties to administrative proceeding

Property owners were not precluded from maintaining suit to enjoin completion of construction of building in violation of zoning ordinance on ground that they had not exhausted their administrative remedy, since the statute relating to appeals by persons aggrieved does not apply to property owners who are not parties to proceeding for obtaining of construction permit. Ind.—*Fidelity Trust Co. v. Dowling*, 68 N.E.2d 789, 224 Ind. 457.

82. Minn.—*McCavic v. De Luca*, 46 N.W.2d 873, 233 Minn. 372—*Newcomb v. Teske*, 30 N.W.2d 354, 225 Minn. 223.

Miss.—*Graham v. Phinizy*, 51 S.E.2d 451, 211 Miss. 246.

83. Mass.—*Malm v. Dubrey*, 88 N.E. 2d 900, 325 Mass. 63.

N.J.—*Yanow v. Seven Oaks Park*, 83 A.2d 28, 15 N.J.Super. 73.

Particular violation held "nuisance"

Where cement mixing plant was being operated in general commercial district where such use was not permitted, it was not error to hold concrete mixing plant to be a public and private nuisance without evidence of employment of unnecessary and injurious methods of operation, since codal provision prohibiting injunctions was only applicable where business was operated in its appropriate zoning district.

Cal.—*Markey v. Danville Warehouse & Lumber, Inc.*, 259 P.2d 19, 119 C.A.2d 1.

Must be nuisance in fact to adjoining landowner

Mich.—*Bane v. Pontiac Tp., Oakland County*, 72 N.W.2d 134, 343 Mich. 481.

Particular enterprises held not nuisances per se

Pa.—*Liddell v. Swarthmore Swim Club*, 2 Pa.Dist. & Co.2d 468, 42 Del.Co. 89, 46 Mun.L.R. 237.

Hannum v. Oak Lane Shopping Center, Inc., Com.Pl., 70 Montg.Co. 221, affirmed 119 A.2d 213, 383 Pa. 618.

owners without reference to a showing of special injury.⁸⁴

While depreciation of property values has been held to constitute special damage as a basis for enjoining the violation of a zoning ordinance,⁸⁵ a showing of depreciation of value is not essential to maintenance of the action since it is not the only special damage which a property owner may suffer;⁸⁶ and the interest of a property owner in the continuation and observance of the zoning classification or restriction may be sufficient to entitle him to the equitable remedy of injunction.⁸⁷ It has been held, however, that diminution of property value is not enough, of itself, to authorize injunctive relief.⁸⁸

A provision of an ordinance to the effect that owners of property within a specified distance of a proposed conditional use shall be notified thereof does not prevent the owners of property located more than such distance from the premises to be

so used from maintaining an action to enjoin the use as a violation of the zoning ordinance.⁸⁹

Tenants. Where the tenants of property are specially damaged by a violation of a zoning ordinance, they can maintain an action to restrain the violation.⁹⁰

§ 405. — Substitution and Intervention

In general, affected property owners may intervene in an action by a municipality or another property owner to enjoin a zoning violation, and a municipality may intervene in an action by a property owner.

Rules governing the substitution and intervention of parties in civil actions generally apply in actions to enjoin violations of zoning regulations.⁹¹ Thus, property owners affected by a violation of a zoning ordinance may intervene in an action to enjoin the violation instituted by another property owner⁹² or by the municipality or the zoning authority;⁹³ and similarly, the municipality may intervene, in a proper case, in an action brought by a property owner.⁹⁴

84. S.D.—Graves v. Johnson, 63 N. W.2d 341, 75 S.D. 261.

85. Mo.—Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n, 265 S.W.2d 374.

S.C.—Momeier v. John McAlister, Inc., 27 S.E.2d 504, 203 S.C. 353.

86. Mo.—Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n, 265 S.W.2d 374.

87. Mo.—Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n, supra.

Single-family district

Property owners in single-family zoning district had an interest in continuation of that classification and, as such, were entitled to maintain suit to enjoin violation of zoning regulations.

Mo.—Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n, supra.

88. N.Y.—Wike v. Herms, 61 N.Y. S.2d 244, 187 Misc. 111.

89. Use for Little League baseball field

Provision of town zoning ordinance requiring that, when a conditional use of realty is sought, owners and occupants of lands within a two hundred foot radius must be notified of the application by registered mail did not prevent owners of realty located more than two hundred feet from premises used as a Little League baseball field from maintaining action to enjoin the use of the baseball field in a manner contrary to conditions and regulations laid down by board of zoning and appeals of town.

N.Y.—Babcock v. Port Washington Little League, 144 N.Y.S.2d 179.

90. N.Y.—Daub v. Popkin, 171 N.Y.S. 2d 513, 5 A.D.2d 283.

Tenants under leasing agreements

"Tenants who have possession of real property by virtue of leasing agreements, as distinguished from statutory tenants, have personal or property rights in the demised premises sufficient to maintain an action to enjoin the violation of a zoning regulation, provided that such tenants suffer or are likely to incur special damages from a continuation of the violation."

N.Y.—Daub v. Popkin, supra.

Commercial uses of building

Tenants of building in an area zoned for residential purposes only could maintain an action to restrain use of building for commercial purposes.

N.Y.—Lustgarten v. 36 C. P. S. Inc., 101 N.Y.S.2d 709.

91. Substitution of city in action by commissioner

Where defendant was using his land for a dump without permit from building commissioner in violation of ordinance, and without permit from board of health, but building commissioner was sole plaintiff in suit for injunction, an amendment could be allowed substituting the city as party plaintiff so that city could enforce the zoning ordinance and regulation of board of health.

Mass.—Building Com'r of Medford v. C. & H. Co., 65 N.E.2d 537, 319 Mass. 273.

92. Intervention held proper

Intervenors, as owners of neigh-

boring property, had vital interest in action to enjoin defendant's use of his property as sanitarium for mental cases in violation of county zoning resolution and were entitled to intervene in the action.

Wash.—Park v. Stolzheise, 167 P.2d 412, 24 Wash.2d 781.

93. Neb.—City of Omaha v. Gliasmann, 39 N.W.2d 828, 151 Neb. 895, appeal dismissed 70 S.Ct. 1002, 339 U.S. 960, 94 L.Ed. 1370, rehearing denied 71 S.Ct. 15, 340 U.S. 847, 95 L.Ed. 621.

Right of intervenors to appeal

After adverse judgment against municipality and intervenors, in action to enjoin use of building constructed in violation of zoning ordinance, intervenors as residents and property owners had an interest independent of municipality to abate by injunction any business establishment conducted in violation of zoning ordinance and were entitled to bring appeal from adverse judgment.

La.—City of New Orleans v. Leeco, 53 So.2d 490, 219 La. 550.

94. N.J.—Yanow v. Seven Oaks Park, 83 A.2d 28, 15 N.J.Super. 73.

Rights of original parties not prejudiced

N.J.—Yanow v. Seven Oaks Park, supra.

Violation enjoined

In suit, brought by private citizens to enjoin operation of machine shop at premises adjoining their home, wherein municipality intervened and filed a bill of complaint alleging, in general, that nuisance set forth in plaintiffs' complaint also constituted violation of municipal zoning ordi-

§ 406. Pleadings

The complaint or petition must state a cause of action for the injunctive relief sought and must properly plead the ordinance violated; and the defendant's pleading must contain matters of defense. Determinable issues are those presented by the pleadings.

The general rules governing questions as to pleadings in injunction proceedings apply in proceedings to enjoin the violation of a zoning regulation.⁹⁵ Accordingly, the complaint or petition must allege facts sufficient to state a cause of action for the injunctive relief sought.⁹⁶ Thus, plaintiff's pleading must allege sufficient facts as to the violation of the ordinance,⁹⁷ and the ordinance must be properly pleaded⁹⁸ or sufficiently identified,⁹⁹ although the ordinance need not be set out in *hæc verba* in the bill of complaint.¹ The municipality is not required

affirmatively to aver or show that the ordinance included the whole municipality in a comprehensive zoning plan even though a zoning ordinance which is not so applicable is invalid.² Erroneous reference to the authorizing statute will not render a pleading insufficient where it is clear from other parts of the record which statute was intended.³

Where plaintiff in the injunction suit discovers new matter after the filing of the original bill a supplemental bill setting it out may be filed on motion.⁴

Special damage or injury. In an action by a city, governmental entity, or zoning authority to restrain the violation of a zoning ordinance, no special damage or injury to the city or public need be alleged,⁵

nance, defendant's operations could be enjoined as violative of law, even though the business was not so conducted as to constitute a private nuisance as to the individual plaintiffs and without regard to whether or not the individual plaintiffs would be entitled to enforce zoning law. Pa.—Molner v. George B. Henne & Co., 105 A.2d 325, 377 Pa. 571.

95. Md.—Kahl v. Consolidated Gas Elec. Light & Power Co. of Baltimore, 57 A.2d 331, 189 Md. 655.

Decision on demurrer reserved

In suits to restrain power company from constructing an overhead transmission line without having first obtained a special zoning permit, chancellor did not abuse discretion in reserving decision on complainants' demurrers to answers until after a hearing on the merits. Md.—Kahl v. Consolidated Gas Elec. Light & Power Co. of Baltimore, *supra*.

Demurrer held not sustainable

Where property owners sought to restrain adjacent property owner from constructing garages on property in area allegedly restrictively zoned, demurrer, on ground that property owners had adequate remedy of law under ordinance without provisions of ordinance having been proved, could not be sustained. Mass.—Boyle v. Building Inspector of Malden, 99 N.E.2d 925, 327 Mass. 564.

Prayer for general relief

Prayer for general relief is sufficient to warrant any decree supported by facts alleged in the complaint if those facts are proved by evidence.

Ill.—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

96. Pa.—City of Erie v. Baldwin, Com.Pl., 31 Erie Co. 101.

Pleadings held sufficient

(1) In general.

Ala.—Bobo v. City of Florence, 69 So.2d 463.

Ga.—White v. Griggs, 80 S.E.2d 163, 210 Ga. 364.

Ill.—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

(2) In action in equity for injunction restraining violations of a zoning ordinance, where complaint alleged both personal injury from noxious odors and property damage from trespass, motion to dismiss the complaint on ground that it did not state facts sufficient to constitute a cause of action would be denied.

N.Y.—Barnum v. Rome, 61 N.Y.S.2d 426, affirmed 61 N.Y.S.2d 519, 270 App.Div. 853.

Pleading held insufficient

Ga.—Lanier v. Richmond County, 45 S.E.2d 415, 203 Ga. 39.

Amendment held good

In action to enjoin defendant from operating a lumber manufacturing plant in violation of zoning laws and ordinances, second count added to petition by amendment, alleging in more detail contention that permit for business, under circumstances it was issued to defendant, did not authorize defendant to operate lumber manufacturing plant using machines, and amplifying details and circumstances of transaction declared on, was sufficient to satisfy rule of enough to amend by, and was good against general demurrer.

Ga.—Reed v. White, 63 S.E.2d 597, 207 Ga. 623.

97. Ala.—Bobo v. City of Florence, 69 So.2d 463, 260 Ala. 239.

Pa.—Byers v. Conner, Com.Pl., 2 Lebanon 276—Moyerman v. Glanzberg, Com.Pl., 73 Montg.Co. 212.

Conjunctive statement

Allegations in several paragraphs, conjunctively stated, that together

showed a violation of the ordinance were sufficient.

Ala.—Bobo v. City of Florence, 69 So.2d 463, 260 Ala. 239.

98. Cal.—Taliaferro v. Wampler, 273 P.2d 829, 127 C.A.2d 306.

99. Cal.—Taliaferro v. Wampler, *supra*.

Title and day of passage

If plaintiff asserting violation of city ordinance by defendant elects not to allege adoption and effect of ordinance in detail he must allege its title and day of its passage.

Cal.—Taliaferro v. Wampler, *supra*.

Complaint held insufficient

Where complaint seeking permanent injunction to restrain defendants from continuance of alleged violation of building zone ordinance failed either to allege at large the portion of ordinance which had been violated or state substance thereof in sufficient detail to identify it and to show primary fact that defendant's continuance of airfield was a violation of the ordinance, complaint was insufficient to state cause of action.

N.Y.—Town of Oyster Bay v. Hicksville Air Park, 94 N.Y.S.2d 393.

1. Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.

2. Ala.—Rose v. City of Andalusia, *supra*.

3. Errors treated as typographical errors

N.C.—City of Raleigh v. Morand, 100 S.E.2d 870, 247 N.C. 363.

4. N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.

Amendment of ordinance

N.H.—Stone v. Cray, *supra*.

5. N.Y.—City of Utica v. Ortnier, 10 N.Y.S.2d 729, 256 App.Div. 1039. Village of Old Westbury v. Hoblin, 141 N.Y.S.2d 186.

although there is some authority to the contrary;⁶ but in an action by a private individual, such as a property owner, special damage must be alleged in some jurisdictions,⁷ although not in others.⁸

Defendant's pleadings. Matters of defense must be contained and sufficiently set forth in defendant's pleading.⁹ Defendant may plead as many separate defenses as he has;¹⁰ and he can plead a denial of a violation of the ordinance and also plead the invalidity of the ordinance.¹¹

Issues, proof and variance. In accordance with rules governing such matters in proceedings for injunctions generally, discussed in Injunctions § 188, the issues properly determinable by the court are those presented by the pleadings,¹² and issues which are outside the scope of the case as presented by the

pleadings are not before the court for determination.¹³ The proof must correspond with the pleadings and relate to the issues.¹⁴

§ 407. Evidence

The general rules of evidence apply in actions for an injunction against the violation of a zoning ordinance or regulation.

The general rules governing questions relating to evidence in civil actions have been applied in actions for an injunction against the violation of a zoning ordinance or regulation.¹⁵ Thus, the general rule that any otherwise competent evidence which is relevant and material is admissible and that evidence which is irrelevant, immaterial, or directed to collateral issues will be excluded, has been applied in such proceedings.¹⁶

Action by building inspector

N.Y.—Griffin v. Reville, 149 N.Y.S. 2d 312, 1 Misc.2d 1045.

6. Petition held insufficient

Petition which failed to show how or in what manner the operation of a second filling station on premises would damage those members of the public who came within sphere of its operation and which did not show that the public might sustain some degree of inconvenience or annoyance or that the gasoline tanks were calculated to produce a dangerous situation did not state a cause of action authorizing the solicitor general to proceed as for the abatement of a public nuisance.

Ga.—Webb v. Alexander, 43 S.E.2d 668, 202 Ga. 436.

7. Md.—Weinberg v. Kracke, 55 A.2d 797, 189 Md. 275.

Pleading held sufficient

In suit in equity by owners of realty in area zoned as residential district for mandatory injunction requiring owner of store, which could be used under zoning ordinance as a store because such use existed at time ordinance became effective, to remove improvements made in violation of ordinance, averments of bill that property of owners of realty and owner of store adjoined were sufficient, in absence of demurrer, to allege facts showing that owners of realty sustained special damage, so as to entitle them to maintain the suit.

Ala.—Moore v. Pettus, 71 So.2d 814, 260 Ala. 616.

Allegation held insufficient

Property owner's allegation that use by defendants of property for purpose of automobile wrecking yard and for storage and sale of motor vehicles prohibited by ordinance would seriously endanger health, safety, morals, and general welfare of owners did not allege any dam-

age to owners differing from that of general public so as to entitle owners to an injunction on proof of allegation.

Md.—Weinberg v. Kracke, 55 A.2d 797, 189 Md. 275.

8. Ga.—Graham v. Phinazy, 51 S.E. 2d 451, 204 Ga. 638.

9. Tex.—Taylor v. McLennan County Crippled Children's Ass'n, Civ. App., 206 S.W.2d 632, refused no reversible error.

Defense set up by amendment

In suit for injunctive relief against erection of filling station in violation of zoning ordinance, defendant could amend original answer to set up defense that county zoning authorities had, since suit was filed, rezoned the area so as to permit erection and operation of filling stations therein.

Ga.—Atlantic Refining Co. v. Spears, 80 S.E.2d 177, 211 Ga. 787.

Estoppel to enforce ordinance

Tex.—Newton v. Town of Highland Park, Civ.App., 282 S.W.2d 266, refused no reversible error.

10. Mo.—City of St. Louis v. Friedman, 216 S.W.2d 475, 358 Mo. 681.

11. Mo.—City of St. Louis v. Friedman, supra.

Allegations held insufficient to show invalidity of ordinance.

Tex.—Taylor v. McLennan County Crippled Children's Ass'n, Civ.App., 206 S.W.2d 632, refused no reversible error.

12. Ill.—Winnebago County v. Harrington, 68 N.E.2d 619, 329 Ill.App. 344, appeal transferred 63 N.E.2d 6, 391 Ill. 267.

13. N.Y.—President and Trustees of Village of Ossining v. Meredith, 73 N.Y.S.2d 897, 190 Misc. 142.

Remedy not sought by pleadings

Injunction against nuisance, even though nuisance was established by

evidence, would not be granted in an action where sole remedy sought was for an injunction against a violation of zoning ordinance.

N.Y.—President and Trustees of Village of Ossining v. Meredith, supra.

Contention as to one not party to suit

In action to enjoin use of building constructed in violation of zoning ordinance, contention of defendants that building could be used as a church could not be considered since no one having authority to represent a church was made a party to the action.

La.—City of New Orleans v. Leeco, 53 So.2d 490, 219 La. 550.

14. Ga.—Reed v. White, 63 S.E.2d 597, 207 Ga. 623.

Ill.—Winnebago County v. Harrington, 68 N.E.2d 619, 329 Ill.App. 344.

Issues raised by general denial

In suit to enjoin violation of zoning ordinance, where complaint alleged that nonconforming use commenced after restrictions became effective, general denial put in issue question of prior existence of nonconforming use, and, therefore, it was error to exclude evidence offered by defendant as to when its use was established.

Idaho.—Boise City v. Better Homes, 243 P.2d 303, 72 Idaho 441.

15. Ga.—White v. Griggs, 80 S.E.2d 163, 210 Ga. 364.

16. Ga.—White v. Griggs, supra.

Evidence held admissible

(1) In general.

Cal.—Smith v. Collison, 6 P.2d 277, 119 C.A. 180.

Ga.—Reed v. White, 63 S.E.2d 597, 207 Ga. 623.

(2) In suit to enjoin building of church in violation of alleged restriction for residential purposes, tri-

§ 408. — Presumptions and Burden of Proof

The court will indulge in the usual presumptions in an action for an injunction against a zoning violation; and the plaintiff has the burden of proving his cause of action and the defendant must prove his defenses.

In accordance with rules governing presumptions and burden of proof in civil actions generally, presumptions obtaining in civil proceedings generally, such as presumptions of regularity of governmental proceedings, arise in actions for an injunction against the violation of a zoning regulation;¹⁷ plaintiff has the burden of proving the facts constituting his cause of action for an injunction¹⁸ and defendant must prove all the defenses on which he relies which are not admitted.¹⁹ When plaintiff has met the burden of proof and made out a prima facie case, the burden of going forward with the evidence shifts to defendant.²⁰

al court properly took testimony to determine whether enforcement of restriction would be of value to plaintiffs.

Mich.—Smith v. First United Presbyterian Church, 52 N.W.2d 568, 333 Mich. 1.

(3) Ordinance, in ordinance book, held admissible.

Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Evidence held inadmissible

(1) In general.

Cal.—Diederichsen v. Sutch, 118 P.2d 863, 47 C.A.2d 646.

Mass.—Town of Lexington v. Bean, 172 N.E. 867, 272 Mass. 547.

(2) In suit to enjoin use of structure as apartment house in zoned dwelling house district, testimony of witness as to other persons in same general area renting rooms to lodgers was properly excluded as irrelevant to issue as to whether defendants were operating their building as apartment house.

Ga.—White v. Griggs, 80 S.E.2d 163, 210 Ga. 364.

(3) In proceeding to enjoin use of residential property for automobile repair garage in violation of zoning ordinance, testimony that property owners in vicinity of alleged violation did not object to such use of property was immaterial and irrelevant to any issue involved on hearing and did not tend in any way to show that zoning ordinance was invalid or that defendant was not violating the same.

Tex.—City of Waco v. Marstaller, Civ.App., 271 S.W.2d 722.

17. Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Lapse of time since origin of violation.

Where town officials acquiesced in

completed accessory building with respect to alterations made eighteen years previously without a building permit, and alterations caused building to violate zoning ordinance, in action to enforce zoning ordinance, presumption would obtain that after such lapse of time extension was consistent with the ordinance, and not that there was a violation, and alteration would be construed as extension of a use to building which was designed for such nonconforming use at time ordinance was passed.

Tex.—Town of Highland Park v. Marshall, Civ.App., 235 S.W.2d 658, error refused no reversible error.

18. Idaho.—Boise City v. Better Homes, 243 P.2d 303, 72 Idaho 441.

Violation

(1) Plaintiff has the burden of proving the violation or impending violation of a zoning ordinance or regulation.

N.Y.—Wike v. Herms, 61 N.Y.S.2d 244, 187 Misc. 111.

Tenn.—Red Acres Imp. Club v. Burkhalter, 241 S.W.2d 921.

(2) Plaintiff municipality has burden of establishing the ordinance that was violated.

Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Nonexistence of nonconforming use

In suit to enjoin violation of ordinance, burden would be on city to show not only that zone restrictions were in effect in area including defendant's property, but that nonconforming use complained of did not exist at time such restrictions became effective.

Idaho.—Boise City v. Better Homes, 243 P.2d 303, 72 Idaho 441.

19. Idaho.—City of Idaho Falls v.

Validity of ordinance or regulation violated. In general, where the zoning ordinance or regulation allegedly violated is not invalid on its face it is presumed, or is prima facie held, to be valid,²¹ and the burden of proving its invalidity and the facts showing its invalidity is on defendant, the party making such claim,²² and not on plaintiff municipality or adjoining landowner.²³

Special damage. A municipality or zoning authority bringing suit for injunction for violation of its zoning regulations is not required to show special damage;²⁴ but in some jurisdictions a private person is not entitled to recover where he has not shown that he would suffer any special damage or injury by reason of the violation,²⁵ although the rule may be otherwise under some circumstances in other jurisdictions.²⁶

Injunction sought in cross action. The situation

Grimmett, 117 P.2d 461, 63 Idaho 90.

Ill.—City of Napierville v. Steining-er, 89 N.E.2d 840, 339 Ill.App. 294.

Exception in ordinance

It is incumbent on defendant to prove that he is within an exception in the ordinance.

Idaho.—City of Idaho Falls v. Grimmett, 117 P.2d 461, 63 Idaho 90.

Estoppel to enforce ordinance

In action by owner and occupant of private residential property to enjoin as a nuisance the maintenance of garage built by adjoining landowner in violation of zoning ordinance, defendant had burden of proving the facts of the estoppel which he had pleaded as a defense.

Iowa.—McCartney v. Schuette, 54 N.W.2d 462, 243 Iowa 1358.

Tex.—Newton v. Town of Highland Park, Civ.App., 282 S.W.2d 266, refused no reversible error.

20. Ala.—City of Guntersville v. Walls, 39 So.2d 567, 252 Ala. 66.

21. Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

22. Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.

Idaho.—City of Idaho Falls v. Grimmett, 117 P.2d 461, 63 Idaho 90.

23. Ala.—Rose v. City of Andalusia, 31 So.2d 66, 249 Ala. 333.

24. Ill.—Drueck v. Peterson, 91 N.E.2d 124, 340 Ill.App. 164.

N.Y.—Griffin v. Reville, 149 N.Y.S.2d 312, 1 Misc.2d 1045.

25. Ill.—222 East Chestnut St. Corp. v. La Salle Nat. Bank, 146 N.E.2d 717, 15 Ill.App.2d 460.

N.Y.—Wike v. Herms, 61 N.Y.S.2d 244, 187 Misc. 111.

26. Ky.—Parker v. Rash, 236 S.W.2d 687, 214 Ky. 609.

of the parties and the burden of proof may be reversed where the injunction against violations of a zoning ordinance is sought in a cross action.²⁷ Hence, in such circumstances, the burden of proving the invalidity of the zoning ordinance allegedly violated is on plaintiff.²⁸

§ 409. — Weight and Sufficiency

General rules apply in determining the weight and sufficiency of evidence in proceedings to enjoin violations or threatened violations of zoning ordinances or regulations.

Rules governing the weight and sufficiency of evi-

dence in civil actions generally have been applied in proceedings to enjoin violations or threatened violations of zoning ordinances or regulations.²⁹ Thus, in various cases, evidence has been held sufficient to warrant the issuance of an injunction or to establish incidental facts necessary to its issuance,³⁰ or sufficient to warrant the refusal of an injunction or insufficient to warrant its issuance or to establish incidental facts necessary to its issuance.³¹

More specifically, the sufficiency of the evidence has been determined with respect to proof of the violation of a zoning ordinance,³² the validity of

27. Tex.—Edge v. City of Bellaire, Civ.App., 200 S.W.2d 224, error refused.

28. Invalidity not shown

Plaintiff seeking to enjoin interference with operation of restaurant in residential zone failed to show that ordinance zoning for residential purposes property which had for several years been used only for such purpose was unreasonable, discriminatory, or arbitrary, and hence court properly enjoined use of the property in violation of zoning ordinance, notwithstanding jury's finding that inclusion of property in residential zone was unreasonable and arbitrary.

Tex.—Edge v. City of Bellaire, supra.

29. Mich.—Rockenbach v. Apostle, 47 N.W.2d 636, 330 Mich. 338.

Weight of conclusion of city engineer

In action to enjoin construction of a house in violation of city zoning ordinance requiring that residences be set back from property line a sufficient distance to conform to general pattern of setback of existing residences on any street, court was not bound by conclusion of city engineer, in whose office ordinance was prepared, that it would not be violated by construction of proposed house, where engineer's testimony disclosed that his conclusion was based on fact that side of building on corner lot facing intersecting street was scarcely ten feet from property line on street in question without regard to fact that all other houses in block were set much farther back from street.

La.—Rabalais v. Hillary Builders, App., 62 So.2d 846.

Proof of ordinance violated

In suit by city to enjoin violation of zoning ordinance, burden of proving the ordinance was discharged by introduction of ordinance book containing the zoning ordinance with statutory certificate under hand of city clerk with respect to adoption, publication, and existence of the ordinance.

Ala.—Walls v. City of Guntersville, 45 So.2d 468, 253 Ala. 480.

Grant of exception

In suit to enjoin defendants' use of premises as a parking lot, evidence sustained finding of trial court that zoning board of appeals, under all circumstances, was justified in granting exception to defendants to use three lots as a nonprofit, customer, or employee parking lot.

Ohio.—Steisapir v. Sears Roebuck & Co., App., 112 N.E.2d 548.

Purpose of violation

In action by tenant to enjoin continued commercial use of building in violation of zoning law, evidence was sufficient to establish that acts of landlords and curtailment of various services previously rendered tenants were designed to make continued presence of residential tenants enjoying protection of the statutory rent laws so untenable as to force their eviction in order to make possible introduction of new commercial tenants at vastly increased rents.

N.Y.—Lustgarten v. 36 C. P. S. Inc., 101 N.Y.S.2d 709, 9 Misc.2d 684.

30. Cal.—Smith v. Collison, 6 P.2d 277, 119 C.A. 180.

Ga.—White v. Griggs, 80 S.E.2d 163, 210 Ga. 364.—Reed v. White, 63 S.E.2d 597, 207 Ga. 623.

Idaho.—City of Idaho Falls v. Grimmer, 117 P.2d 461, 63 Idaho 90.

Ill.—Du Page County v. Henderson, 83 N.E.2d 720, 402 Ill. 179.

City of Highland Park v. Calder, 269 Ill.App. 255.

Md.—Maurer v. Snyder, 37 A.2d 612, 199 Md. 551.

Mich.—City of Howell v. Kaal, 67 N.W.2d 704, 341 Mich. 585.—Rockenbach v. Apostle, 47 N.W.2d 636, 330 Mich. 338.

N.H.—City of Manchester v. Webster, 128 A.2d 924, 100 N.H. 409.

N.J.—Heagen v. Borough of Alledale, 127 A.2d 181, 42 N.J.Super. 472.

Va.—Cherrydale Cement Block Co. v. Arlington County Board, 23 S.E.2d 158, 180 Va. 443.

Prior use

In action by county plan commis-

sion to enjoin operation of trailer coach park in alleged violation of county zoning ordinance, evidence was sufficient to sustain finding that land involved had not been used as trailer park prior to enactment of ordinance, within meaning of exemption clause of ordinance.

Ind.—Tomlinson v. Marion County Plan Commission, 122 N.E.2d 852, 234 Ind. 88.

31. Cal.—Eckles v. E. D. Delaney, Inc., 279 P.2d 798, 130 C.A.2d 676.—McNeill v. Redington, 154 P.2d 428, 67 C.A.2d 315.

Ill.—Irving-Austin Bldg. Corporation v. Village Homebuilders, 37 N.E.2d 927, 312 Ill.App. 179.

Iowa.—Gilliland v. Leiter, 47 N.W.2d 142, 242 Iowa 497.

Mich.—Tel-Craft Civic Ass'n v. City of Detroit, 60 N.W.2d 294, 337 Mich. 326.

Minn.—Village of St. Louis Park v. Casey, 16 N.W.2d 459, 218 Minn. 394, 155 A.L.R. 1128.

N.J.—Borough of Rockleigh, Bergen County v. Astral Industries, Inc., 92 A.2d 851, 23 N.J.Super. 255, refused 102 A.2d 84, 29 N.J.Super. 154.

N.Y.—Chapman v. Hapeman, 167 N.Y.S.2d 342, 8 Misc.2d 19.

R.I.—Clemence v. Mazika, 54 A.2d 379, 73 R.I. 254.

Tex.—City of Grand Prairie v. Finch, Civ.App., 294 S.W.2d 851.

Va.—Delta Oil Sales Co. v. Holmes, 42 S.E.2d 262, 186 Va. 301.

Setback regulations

Evidence that building being erected was set back from lines of adjoining landowners' several buildings in violation of municipal zoning ordinance would not justify injunction to restrain erection of building, where adjoining landowners did not prove that their rights would be invaded and it did not appear that irreparable damage to their properties would result.

N.J.—Massaro v. Cigolini, 65 A.2d 83, 1 N.J.Super. 484.

32. Ohio.—Brow v. Sherwin-Williams Co., App., 109 N.E.2d 364,

the ordinance or regulation,³³ whether a particular use constituted or would constitute a nuisance,³⁴ and whether a property owner suffered or was threatened with special damage by the violation,

so as to entitle him to maintain the suit.³⁵ Cases have also adjudicated the sufficiency of the evidence to establish matters of defense,³⁶ whether property was subject to a nonconforming use,³⁷ and wheth-

Evidence held sufficient

(1) To show violation or threatened violation of zoning regulation. La.—Ramsey v. Fontenot, App., 36 So.2d 861.

Mass.—Town of Seekonk v. John J. McHale & Sons, 90 N.E.2d 325, 325 Mass. 271.

Mich.—Jones v. De Vries, 40 N.W. 2d 317, 326 Mich. 126.

Mo.—Evans v. Roth, 201 S.W.2d 357, 356 Mo. 237.

Tex.—City of Amarillo v. Meade, Civ.App., 286 S.W.2d 276.

(2) To show no violation.

Cal.—People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

Ohio.—Brow v. Sherwin-Williams Co., App., 109 N.E.2d 864.

(3) To warrant conclusion that violation by defendants and any damages sustained by plaintiffs were too trivial to warrant injunctive relief. N.Y.—Solof v. Heitner, 125 N.Y.S.2d 67, modified on other grounds 122 N.Y.S.2d 365, 282 App.Div. 738.

Evidence held insufficient

(1) To show violation.

Iowa.—Gilliland v. Leiter, 47 N.W. 2d 142, 242 Iowa 497.

N.Y.—Wike v. Herms, 61 N.Y.S.2d 244, 187 Misc. 111.

Pa.—Township of Whitemarsh v. Chemical Concentrates Corp., Com. Pl., 62 Montg.Co. 258.

Tenn.—Red Acres Imp. Club v. Burkhalter, 241 S.W.2d 921, 193 Tenn. 79.

(2) To sustain plaintiffs' contention that construction of multiple dwellings would nullify intended purpose of zoning ordinance which was to lessen congestion, disorder, and danger inherent in unregulated municipal development and to prevent overcrowding of land and undue concentration of population.

Mich.—Tel-Craft Civic Ass'n v. City of Detroit, 60 N.W.2d 294, 337 Mich. 326.

33. Evidence held sufficient

To sustain finding that the ordinances were unreasonable, arbitrary, discriminatory and void, in so far as they affected defendant's land. Cal.—San Diego County v. Williams, 272 P.2d 519, 126 C.A.2d 804.

Evidence held insufficient

To establish invalidity of ordinances or regulations.

N.Y.—Town of Eastchester v. Noble, 148 N.Y.S.2d 592, affirmed 153 N.Y.S.2d 600, 2 A.D.2d 714.

34. Evidence held sufficient

(1) To sustain finding that use would constitute a nuisance.

Ark.—Phillips v. Adams, 309 S.W.2d 205.

(2) To show that particular use was not a nuisance.

Cal.—Eckles v. E. D. Delaney, Inc., 279 P.2d 798, 130 C.A.2d 676.

35. Evidence held sufficient

Ala.—Moore v. Pettus, 71 So.2d 814, 260 Ala. 616.

Ill.—Drueck v. Peterson, 91 N.E.2d 124, 340 Ill.App. 164.

Evidence held insufficient

Wyo.—Knight v. City of Riverton, 259 P.2d 748, 750, 71 Wyo. 459.

36. N.J.—Garrou v. Teaneck Tryon Co., 94 A.2d 332, 11 N.J. 294.

Evidence held sufficient

(1) To sustain finding that owners' property zoned for business and commercial purposes substantially represented part of land which was used by owners for business or commercial purposes.

Tex.—Storm Bros. v. Town of Balcones Heights, Civ.App., 239 S.W. 2d 842, refused no reversible error.

(2) To sustain finding that drive-in theater construction, sought to be enjoined, had been commenced in good faith prior to adoption of zoning ordinance it was alleged to violate.

N.Y.—McNary v. Airport Drive-In Theatre, 120 N.Y.S.2d 594, 281 App. Div. 1002, reargument and appeal denied 123 N.Y.S.2d 415, 281 App. Div. 1060.

Evidence held insufficient

(1) To establish matters of defense generally.

N.Y.—City of Yonkers v. Rentways, Inc., 109 N.E.2d 597, 304 N.Y. 499.

Driscoll v. Brunner, 64 N.Y.S.2d 161, affirmed 63 N.Y.S.2d 644, 270 App.Div. 1025.

(2) To show such undue delay as would justify dismissing action for laches.

N.J.—Garrou v. Teaneck Tryon Co., 94 A.2d 332, 11 N.J. 294.

(3) To establish that city had not attempted to enforce ordinance against others and that attempted enforcement against milk company was discriminatory, improper, or in contravention of the equal protection clauses of the state and federal constitutions.

Iowa.—City of Creston v. Center Milk Products Co., 51 N.W.2d 463, 243 Iowa 611.

37. Evidence held sufficient

(1) To show that there had been

a nonconforming use which defendant could continue.

La.—Audubon Area Zoning Ass'n v. Krushevski, App., 82 So.2d 460—City of New Orleans v. Buffa, App., 69 So.2d 140.

N.Y.—Town of North Hempstead v. De Pasquale Bros., 116 N.Y.S.2d 564, 280 App.Div. 991, appeal denied 118 N.Y.S.2d 557, 281 App.Div. 709.

City of Syracuse v. Bronner, 133 N.Y.S.2d 153.

Tex.—Town of Highland Park v. Marshall, Civ.App., 235 S.W.2d 658, refused no reversible error.

(2) To show that there was no existing nonconforming use at the time the ordinance or regulation became effective.

Ind.—Anderson Lumber & Supply Co. v. Fletcher, 89 N.E.2d 449, 228 Ind. 383.

N.Y.—Incorporated Village of Laurel Hollow v. Laverne Originals, Inc., 128 N.Y.S.2d 326, 283 App. Div. 795, reargument and appeal denied 129 N.Y.S.2d 242, 283 App.Div. 815, affirmed 121 N.E.2d 618, 307 N.Y. 784.

(3) To show that right to use premises for nonconforming purpose had been lost or abandoned.

La.—Onorato v. Rossignol, 47 So.2d 489, 217 La. 751.

Pa.—Whitpain Tp. v. Bodine, 94 A. 2d 737, 372 Pa. 509.

(4) To show that defendant's use of land was not the same nonconforming use as that made of the premises when the ordinance was passed.

N.Y.—City of Buffalo v. Doran, 114 N.Y.S.2d 220, 280 App.Div. 874.

Evidence held insufficient

(1) To establish pre-existing nonconforming use.

Ky.—Durning v. Summerfield, 235 S.W.2d 761, 314 Ky. 318.

N.Y.—Town of Perinton v. Muzeka, 141 N.Y.S.2d 607, appeal dismissed 149 N.Y.S.2d 251, 252, 1 A.D.2d 795, four cases, appeal dismissed 149 N.Y.S.2d 252, 1 A.D.2d 795, amended on other grounds 151 N.Y.S.2d 622, 2 A.D.2d 647.

(2) To establish that nonconforming use had been altered or discontinued since enactment of zoning law.

N.Y.—Town of North Hempstead v. De Pasquale Bros., 116 N.Y.S.2d 564, 280 App.Div. 991, appeal denied 118 N.Y.S.2d 557, 281 App.Div. 709.

er defendant had a valid counterclaim.³⁸

§ 410. Trial

General rules govern matters as to trial in actions to enjoin violations or threatened violations of zoning regulations, such as questions of law and fact, the submission of questions to the jury, and findings.

Rules governing matters relating to trial and trial procedure in civil actions generally have been applied in actions for injunctions to restrain violations or threatened violations of zoning regulations,³⁹ as with respect to questions of law and fact,⁴⁰ the submission of questions to the jury,⁴¹ and the necessity and sufficiency of findings.⁴²

38. Evidence held insufficient

In action by town to enforce zoning bylaw forbidding use of certain realty for industry, trade, manufacturing or commercial purposes but not preventing continued use of any realty for purpose for which it was used at time bylaw was adopted, evidence by defendants in support of claim for damages on ground that one to whom they had contracted to sell gravel held them responsible in damages for breach of contract was insufficient to prove any damages. Mass.—Town of Wayland v. Lee, 91 N.E.2d 835, 325 Mass. 637.

39. Ind.—Tomlinson v. Marion County Plan Commission, 122 N.E.2d 852, 234 Ind. 88.

40. Question held one of fact

Filling station is not a nuisance per se, and whether a particular station, when put in operation, will be so situated as to constitute a nuisance is a question of fact.

Ark.—Phillips v. Adams, 309 S.W.2d 205.

41. Evidence held to warrant submission of case to jury

In action by city to enjoin construction of a building allegedly in violation of zoning ordinance, evidence that defendants proposed to erect a building to be used as a garage, office, and warehouse from which to conduct a vending machine business on the same lot as a building used by defendants' tenants for conducting a variety store and for dwelling purposes made out a submissible case on question of violation of zoning ordinance prohibiting erection of more than one main building on a single lot and defining an accessory building as one subordinate to main building and used for a purpose incidental to permitted use of main building.

Wis.—City of Lake Mills v. Veldhuizen, 56 N.W.2d 491, 263 Wis. 49.

42. Tex.—Edge v. City of Bellaire, Civ.App., 200 S.W.2d 224, error reversed.

Findings must conform to proof

Tex.—Edge v. City of Bellaire, Civ.App., 200 S.W.2d 224, refused no reversible error.

Findings held not erroneous or unwarranted

Tenn.—Pointer v. Davis, 241 S.W.2d 1000, 193 Tenn. 41.

Special finding not required

Where trial court made special finding not required by statute and not requested by parties, it was considered general finding.

Ind.—Tomlinson v. Marion County Plan Commission, 122 N.E.2d 852, 234 Ind. 88.

43. Cal.—People v. Johnson, 277 P.2d 45, 129 C.A.2d 1.

Default judgment and proceedings thereafter

Where city sued to enjoin violation of zoning ordinances, defendant's motion to amend petition by showing provisions of involved ordinances was overruled and defendant was given ten days to plead further, defendant did not comply with order and on following day filed motion to require plaintiff to separately state and number causes of action, and approximately six months later plaintiff moved for default judgment, trial court under record properly granted plaintiff's motion and refused to permit defendant to plead further on ground that defendant merely meant to delay final judgment and to protract litigation unnecessarily.

Wyo.—City of Casper v. Simpson, 247 P.2d 154, 70 Wyo. 215.

Summary judgment; triable issue

Where defendant in action by town to enjoin him from making alterations or additions to building in a residential zone attacked validity of zoning ordinance on ground that it was unreasonable, confiscatory, and unconstitutional as applied to his property in that by reason of physical characteristics of such property it could not be used for residential purposes within the limitations imposed by ordinance, triable issue of fact as to whether such property was reasonably adapted for residential

§ 411. Judgment or Decree; Relief Granted

The judgment or decree must conform to the issues and the findings; and the relief granted, which may, in addition to the injunction, include damages suffered prior to the injunction, is a matter for the discretion of the court.

Rules governing the judgment or decree in proceedings for injunctions generally, discussed in Injunctions §§ 211-220, have been applied in actions for injunctions to restrain violations or threatened violations of zoning ordinances or regulations.⁴³ The decree must conform to the issues, as made by the pleadings and proof,⁴⁴ and similarly, the decree

use precluded summary judgment for defendant, in view of provision in ordinance for granting a variance as to such of the restrictions applicable to zone as would otherwise prevent such use.

N.Y.—Town of Cortlandt v. McNally, 126 N.Y.S.2d 702, 282 App.Div. 1072, appeal denied 128 N.Y.S.2d 597, 283 App.Div. 800.

Motion to open judgment after term

Where court of common pleas, after trial, entered judgment enjoining owners of realty from using their realty in violation of zoning regulations of city, and after term of court during which judgment was rendered, owners of realty moved to open the judgment, claiming that zoning commission was illegally constituted and that regulations were not valid and legal, court of common pleas did not have power to grant the motion and did not err in denying motion.

Conn.—Poneleit v. Dudas, 106 A.2d 479, 141 Conn. 413.

Correction of judgment by amendment

Where city zoning ordinance prohibited construction of a building closer to side property line than three feet, enjoining construction of a house nearer than five and one-half feet to side property line was error and judgment should be amended so as to conform to restriction imposed by ordinance.

La.—Rabalais v. Hillary Builders, App., 62 So.2d 846.

44. Ill.—Winnebago County v. Harrington, 68 N.E.2d 619, 329 Ill.App. 344.

Matters not in issue

(1) In action to enjoin operation of trailer coach park in alleged violation of county zoning ordinance, wherein plan commission prevailed on permanent injunction issue, all else in finding and judgment was surplusage and would be disregarded, with exception of costs, which followed judgment as matter of law.

Ind.—Tomlinson v. Marion County Plan Commission, 122 N.E.2d 852, 234 Ind. 88.

must conform to the findings;⁴⁵ and it should provide for such relief as, in view of the facts, circumstances, and situation in the particular case, is warranted.⁴⁶ Whether or not the private citizens who joined with the municipality in the suit to enjoin the zoning violation were entitled to relief does not affect the city's right to relief.⁴⁷

Damages. In a proper case, the relief granted in an action for an injunction to restrain violations of zoning regulations may include damages incurred prior to the granting of the injunctive relief.⁴⁸

Restoration of conditions; removal of buildings. Where defendant has fully completed the zoning violation sought to be restrained, after the filing of the bill but before the issuance of any order or decree, the court has power to compel by mandatory injunction the restoration of the former condition of things,⁴⁹ as by ordering the removal or demolition of offending buildings or structures.⁵⁰ On the other hand, a court has refused a mandatory in-

junction to require the removal of certain structures, the court preferring to leave to the officials of the local building department the ordinary and customary means of compelling the removal of condemned and illegal buildings.⁵¹ So also, where a building which is to be used in violation of the zoning law may also possibly be used in conformity with the law it is inequitable to require it to be dismantled.⁵²

§ 412. — Preliminary Injunction

A preliminary, temporary, or interlocutory injunction, until final determination is made, may be granted in the discretion of the court on motion therefor made before trial.

A preliminary, temporary, or interlocutory injunction, until final determination is made, may be granted in a proper case on motion therefor made before trial.⁵³ The question whether such an injunction should be granted is generally discretionary;⁵⁴ but in some circumstances there is no room

(2) In suit to enjoin construction of filling station in residential subdivision, where pleadings did not put in issue any question with respect to southwest corner of certain block, conclusion, implicit in decree enjoining construction of filling station on southeast corner but not southwest corner, that southwest corner was only corner on which station could be built without harm was only valuable as finding of fact and had no other force.

Ala.—Shell Oil Co. v. Edwards, 81 So. 2d 535, 263 Ala. 4, certiorari denied 76 S.Ct. 139, 350 U.S. 885, 100 L. Ed. 780.

45. Findings held to support denial of injunction

Mont.—Jones v. Continental Oil Co., 300 P.2d 518, 130 Mont. 267.

46. Utah.—Benjamin v. Lietz, 211 P. 2d 449, 116 Utah 476.

47. Tenn.—City of Knoxville v. Peters, 191 S.W.2d 164, 183 Tenn. 93.

48. N.J.—Garrou v. Teaneck Tryon Co., 94 A.2d 332, 11 N.J. 294.

Incident of exercise of equitable jurisdiction

Any damage which has been incurred prior to granting of injunctive relief in suit to enjoin violation of zoning ordinance can readily be determined by trial court, as incident to exercise of its equitable jurisdiction and without impairment of any constitutional right to trial by jury.

N.J.—Garrou v. Teaneck Tryon Co., supra.

No damages suffered yet; reference denied

Where defendants violated zoning ordinance by starting construction of race track on realty zoned for resi-

dences, but adjacent property owners had not as yet suffered any actual positive damages, reference of issue of damages would be denied.

N.Y.—Long v. Longo, 93 N.Y.S.2d 523.

49. Wis.—Bouchard v. Zetley, 220 N. W. 209, 196 Wis. 635.

50. Wis.—Bouchard v. Zetley, supra. Injunction held properly granted

Mandatory injunction compelling partial destruction of buildings erected after notice of defendants' violation of zoning ordinance was properly granted, notwithstanding claim that money judgment would sufficiently compensate plaintiffs.

Wis.—Bouchard v. Zetley, supra.

51. N.Y.—Longo v. Eilers, 93 N.Y.S. 2d 517, 196 Misc. 909.

52. Warehouse

Where construction by partners of warehouse to be used in their business was an unlawful extension of a nonconforming use in violation of county zoning ordinance, because partners proposed to use the warehouse in connection with their business, but it was possible that warehouse could be used for a conforming use under the ordinance, it was inequitable to require partners to dismantle partially constructed warehouse, even though partners proceeded with construction of warehouse after notice that construction of warehouse was an unlawful extension of a nonconforming use.

Md.—Shannahan v. Ringgold, 129 A. 2d 797, 212 Md. 481.

53. Tex.—Parrino v. Dubois, Civ. App., 220 S.W.2d 305, refused no reversible error.

54. Tex.—Weaver v. Van Wagner, Civ.App., 259 S.W.2d 348.

Refusal held not abuse of discretion

(1) Where use appeared to be a mere continuation by property owner of residential use of his property. Tex.—Weaver v. Van Wagner, supra.

(2) Where defendant agreed to maintain the status quo. Md.—Kahl v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 57 A.2d 331, 189 Md. 655.

Grant held not abuse of discretion

(1) In general. Tex.—Parrino v. Dubois, Civ.App., 220 S.W.2d 305, refused no reversible error.

(2) In suit on behalf of city to enjoin landowner from using part of land as a lumber yard in alleged violation of zoning ordinance, granting preliminary injunction against such use was not an abuse of discretion, but landowner should be allowed to sell lumber remaining on premises in regular course of business pending trial, without replacing it with other lumber.

R.I.—Miller v. Tanenbaum, 200 A. 449, 61 R.I. 92.

(3) In suit to enjoin city from erecting fire station on property owned by city in area zoned for other purposes on ground that city had abused discretion in selecting site and that land had already been dedicated for park purposes, granting of temporary injunction was within discretion of trial court where evidence was conflicting.

Ga.—Mayor, etc., of Savannah v. Collins, 84 S.E.2d 454, 211 Ga. 191.

for the exercise of judicial discretion and plaintiff may be entitled to such relief as a matter of right.⁵⁵ In determining whether a temporary injunction should be granted, if the relief sought by way of a temporary injunction is the same as may ultimately be obtained after trial, the temporary restraint will be granted with great caution and only where necessity requires it.⁵⁶

Duration of temporary injunction. A temporary injunction generally continues in effect until it is dissolved or until a hearing is had on it.⁵⁷ Thus, in the absence of a hearing thereon, the language of the trial judge continuing in effect a temporary restraining order previously granted has no effect on the previous order and does not supersede it.⁵⁸

§ 413. Costs and Fees

Under a permissive statute a successful plaintiff in a suit to enjoin the violation of a zoning ordinance may recover an attorney's fee as costs.

Rules governing the allowance of costs and fees

Residents entitled to interlocutory injunction

Residents of area zoned for operation of filling stations conducted wholly within a building except for off-street loading and delivery vehicles which are incidental thereto were entitled to interlocutory injunction restraining erection of filling station which was to be conducted largely outside building.

Ga.—Atlantic Refining Co. v. Spears, 89 S.E.2d 177, 211 Ga. 787.

55. La.—City of New Orleans v. Leeco, 53 So.2d 490, 219 La. 550.

Refusal held error

In proceeding to enjoin use of residential property for automobile repair garage in violation of zoning ordinance, where undisputed evidence showed that defendant was thus violating the ordinance, trial court erred to prejudice of municipality in denying its application for temporary injunction.

Tex.—City of Waco v. Marstaller, Civ.App., 271 S.W.2d 722.

56. No showing of irreparable injury

In action by villages to restrain town from constructing public beaches within village areas zoned for residential purposes only wherein villages attacked statute authorizing towns to construct such beaches as unconstitutional because it permits towns to construct beaches in violation of zoning ordinances, villages failed to make necessary showing on motion for temporary injunction pending trial, that immediate establishment of beaches would be destructive of their rights or cause material and irreparable injury, and therefore motion was denied.

N.Y.—Incorporated Village of Lloyd Harbor v. Town of Huntington, 143 N.Y.S.2d 797.

57. Ga.—Parker & Co. v. Village of North Atlanta, 91 S.E.2d 355, 212 Ga. 177.

58. Ga.—Parker & Co. v. Village of North Atlanta, supra.

59. N.Y.—Solof v. Heitner, 123 N.Y.S.2d 365, 282 App.Div. 738.

Costs denied

In action for removal of that part of defendants' garage, which was erected within area restricted by covenants and building zone ordinance of town, and for damages, wherein judgment was rendered in favor of defendants dismissing complaint on ground that violations were insignificant, that damage sustained was too trivial for relief, and that plaintiffs were guilty of laches, defendants should not have been awarded costs.

N.Y.—Solof v. Heitner, supra.

60. Statute held valid

Statute providing that successful plaintiff in a suit to enjoin violation of zoning ordinance may recover attorney's fee as costs is not violative of constitutional provision prohibiting creation of special privileges and immunities.

Ill.—Pasfield v. Donovan, 181 N.E.2d 504, 7 Ill.2d 563.

61. Ill.—Pasfield v. Donovan, supra.

62. Wash.—Park v. Stolzheise, 167 P.2d 412, 24 Wash.2d 781.

Costs and attorney's fees allowed

Intervenors, as owners of neighboring property, had vital interest in action to enjoin defendant's use of his property as sanitarium for mental cases in violation of county zon-

ing resolution and were entitled to intervene in the action and, hence, intervenors should be allowed their costs for filing their complaints in intervention and their statutory attorney's fees.

Wash.—Park v. Stolzheise, supra.

Witness fees to intervenors disallowed

Intervenors, as litigants, were not entitled to have taxed as part of costs fees to intervenors as witnesses.

Wash.—Park v. Stolzheise, supra.

63. Tex.—Storm Bros. v. Town of Balcones Heights, Civ.App., 239 S.W.2d 842, refused no reversible error.

Time for appeal

Pa.—Appeal of Estock's Zoning, Com. Pl., 53 Lanc.Rev. 203.

Question not raised in lower court

Where action to enjoin violation of zoning ordinance was tried at all times as if a certain ordinance were applicable, property owners could not raise, for first time in motion for rehearing before reviewing court, contention that the ordinance in question was not applicable.

Tex.—Newton v. Town of Highland Park, Civ.App., 282 S.W.2d 266, error refused no reversible error.

Error not objected to in lower court

In suit by city to enjoin violation of zoning ordinance, where zone location of property was not in dispute and introduction of ordinance was not objected to on the ground that boundaries of the districts zoned did not appear from the ordinance but only by reference to map which was referred to therein but was not introduced, alleged error in admission of

on appeal.⁶⁴ The review proceeding must be brought in the appellate court having jurisdiction over the case.⁶⁵ In some states, where the proceedings do not properly involve or raise a constitutional question the supreme court does not have jurisdiction of a direct appeal.⁶⁶

§ 416. Violation of Injunction; Punishment

The violation of an injunction to prevent a zoning violation may be punishable as a contempt of court.

The violation of an injunction or restraining order to prevent the violation of a zoning ordinance

or regulation may be punishable as a contempt of court;⁶⁷ and the punishment for the violation may be determined on a motion to punish for contempt.⁶⁸

§ 416. Liability for Securing Wrongful Issuance of Injunction

The fact that a municipality or other governmental entity securing the issuance of an injunction against a zoning violation does so wrongfully does not render it liable in damages to the party restrained; nor is there any liability where the defendant had been negligent.

While it is a general rule in injunction suits that

ordinance could not be predicated on that ground.

Ala.—*Walls v. City of Gunterville*, 45 So.2d 468, 253 Ala. 480.

Future grant of variance not convincing

In suit to enjoin defendants' use of coach house as residence in violation of zoning ordinance of city, where appellate court found plaintiffs entitled to relief sought, but defendants contended that their violation of ordinance should be overlooked because variance would be granted by board of adjustment anyhow if defendant took correct procedural steps to obtain it, record failed to convince appellate court that defendants could persuade board to reconsider its decision denying such variance to defendants' predecessor in title and grant variance to defendants.

Pa.—*Phillips v. Griffiths*, 77 A.2d 375, 366 Pa. 468.

Evidence not reported

Evidence not having been reported, there was no adequate basis for testing trial judge's conclusion that new bin was not a "structure" within prohibition of zoning bylaw forbidding replacement of nonconforming buildings without a permit, and his decree would be affirmed.

Mass.—*Town of Manchester v. Leahy*, 143 N.E.2d 198.

64. Mich.—*Wolff v. Steiner*, 87 N.W.2d 85, 350 Mich. 615.

Affirmance by equally divided court
Mich.—*Wolff v. Steiner*, supra.

Grant of injunction sustained

(1) Where construction of filling station as and where complainant proposed would constitute a nuisance, that ordinance prohibiting erection of filling stations in area was repealed would not entitle him to erect station, and did not authorize review of injunction on ground of newly discovered evidence.

Tenn.—*Pointer v. Davis*, 241 S.W.2d 1000, 193 Tenn. 41.

(2) Where city was granted injunction restraining church member from conducting services in private residence district from which church-

es were excluded without use permit by zoning ordinance, and where church member failed to exhaust his administrative remedy by applying to city for use permit, injunction restraining member from conducting church services in zoned district would be affirmed.

Cal.—*City of Chico v. First Ave. Baptist Church of Chico*, 238 P.2d 587, 108 C.A.2d 297.

Indefinite record; partial affirmance

Where trailer park of plaintiffs not obtaining consent of adjoining property owners was located partly in commercial zone and partly in multiple building zone, and ordinance required no consent of adjoining property owners for park in commercial zone if park conformed to certain requirements but did require consent for park in multiple building zone, and decree appealed from enjoined operation of park without regard to different zones, and record was too indefinite to permit supreme court to determine if park conformed with requirement for a park in commercial zone, supreme court would affirm decree as far as it applied to multiple building zone but would remand with respect to commercial zone.

Iowa.—*Huff v. City of Des Moines*, 56 N.W.2d 54, 244 Iowa 89.

65. Mo.—*City of St. Louis v. Friedman*, 216 S.W.2d 475.

City held not political subdivision of state

City of St. Louis, as a city, was not a "political subdivision" of state, so as to give supreme court jurisdiction of appeal in city's action to enjoin property owner from using his realty in a manner in violation of city's zoning ordinance.

Mo.—*City of St. Louis v. Friedman*, supra.

66. Ill.—*City of Chicago v. Krema Trucking Co.*, 82 N.E.2d 338, 401 Ill. 411, appeal transferred 86 N.E.2d 431, 337 Ill.App. 662.

Tex.—*McGraw v. Teichman*, 214 S.W.2d 282, 147 Tex. 142.

Constitutional question held not involved

Where property owners on certiorari attacked unsuccessfully decision

of board of appeals directing abatement of their alleged violation of zoning ordinance because of noise produced by their factory on ground that decision would amount to taking their property without due process of law, case, which involved primarily question of whether present operations could be continued as a nonconforming use, did not involve a constitutional question which would support direct appeal to supreme court.

Ill.—*Dube v. Allman*, 72 N.E.2d 180, 396 Ill. 470, appeal transferred 77 N.E.2d 855, 333 Ill.App. 538.

67. N.Y.—*Town of Greenburgh v. Buser*, 148 N.Y.S.2d 550, 4 Misc.2d 513.

Injunction held not violated

(1) In general.

La.—*Salerno v. De Lucca*, 30 So.2d 678, 211 La. 659.

(2) An application to village zoning board of appeals for variance, permitting maintenance of riding school and stable in residence district, was not violation of injunction against applicant's conduct of such business in violation of zoning ordinance, although granting of variance rendered injunction futile.

N.Y.—*Banister v. Board of Appeals of Village of East Hampton*, 65 N.Y.S.2d 15.

68. Motion adjourned

On motion of town to punish persons for contempt of final judgment invalidating building permit and certificate of occupancy and enjoining use of building until it conformed to ordinance, wherein a defense was that defendants had unsuccessfully petitioned town board for interpretation of ordinance, even though defendants had committed several infractions of building ordinance, in view of fact that a finding that they had willfully neglected to comply would substantially destroy their property and in view of fact that they had petitioned board, court would adjourn motion for thirty days to afford town board opportunity to weigh matter.

N.Y.—*Town of Greenburgh v. Buser*, 148 N.Y.S.2d 550, 4 Misc.2d 513.

persons who have been wrongfully enjoined and have, in consequence, suffered loss may claim and recover damages in certain circumstances, as discussed in Injunctions §§ 278-316, the fact that a municipality or other governmental entity securing the issuance of an injunction to restrain con-

struction on the ground that it was in violation of a zoning ordinance does so wrongfully does not render it liable in damages to the party restrained,⁶⁹ and damages cannot be so recovered where defendant had been negligent or did not exercise due diligence.⁷⁰

C. OFFENSES AND PENALTIES

§ 417. In General

Under some statutes or ordinances the violation of a zoning regulation may constitute an offense for which an action for a penalty may be prosecuted, and the power of municipalities to enact such ordinances depends on their statutory authorization. Whether the proceeding to recover a penalty is civil or criminal depends on the particular statute involved.

Under various statutes or ordinances so provid-

ing, the violation of a zoning regulation may constitute an offense for which an action for a penalty may be prosecuted.⁷¹ However, in the absence of statutes so providing, there is no mandatory duty imposed on a municipality to prosecute for alleged violation of its zoning ordinances,⁷² and no liability is imposed on a municipality for failure to do so.⁷³

69. Ill.—Lake County v. Cuneo, 100 N.E.2d 521, 344 Ill.App. 242.

Affirmative wrong

Fact that wrong committed by county in wrongfully issuing injunction restraining builder's construction was affirmative in character, rather than mere failure to observe a duty, made no difference in testing liability of county.

Ill.—Lake County v. Cuneo, supra.

70. Reimbursement for construction denied

Surrounding property owners suing to restrain defendant from building a filling station on town lot on ground that it would create a nuisance were not required to reimburse defendant for money spent on construction up to time injunction was issued, where trial court found that defendant and oil company's representatives who were working with him did not exercise diligence that would be expected of experienced businessmen.

Ark.—Phillips v. Adams, 309 S.W.2d 205.

71. Ill.—City of Chicago v. Krema Trucking Co., 86 N.E.2d 431, 337 Ill.App. 662.

N.Y.—People v. Gold, 6 N.Y.S.2d 264.

Particular violations held subject to prosecution

(1) Defendant was properly convicted for constructing wooden structure within fire limits of city in violation of ordinance.

Ill.—City of Chicago v. Bernstein, 86 N.E.2d 286, 337 Ill.App. 649.

(2) Municipal zoning ordinance permitting only specified uses in business district, including that of public garage for purposes of auto repair and warehousing, under certain limitations, did not authorize the operation in such district of a transfer depot and truck terminal, and operation of truck terminal therein warranted conviction for violation of ordinance.

N.J.—Borough of West Caldwell v. Zell, 91 A.2d 763, 22 N.J.Super. 188.

(3) Landowner, who was granted permit to build greenhouse in residential area pursuant to exception in zoning ordinance which limited height of smokestack built in conjunction with such greenhouse to forty feet, and who, believing that a fifty-foot stack would be necessary for his operation, did not apply to local board of adjustment for variance or amendment to ordinance but instead proceeded to build fifty-foot stack, was properly convicted of violation of the ordinance.

N.J.—Pequannock Tp. v. De Wilde, 91 A.2d 410, 21 N.J.Super. 517.

(4) Other violations.

N.Y.—People v. Hein, 65 N.Y.S.2d 318, 187 Misc. 6.

Pa.—Commonwealth v. Cieslak, 115 A.2d 418, 179 Pa.Super. 441.

Commonwealth v. Jekyll, Quar. Sess., 71 Montg.Co. 5—Commonwealth v. Reitz, Quar.Sess., 25 Northumb.Leg.J. 212.

Responsibility of trustee

In prosecution for violation of municipal zoning ordinance, where the deed lodged the title to land in defendant individually, and application for permission to proceed under the zoning ordinance was made by defendant individually, defendant individually was responsible to the law for infractions by him of zoning ordinance, even though his relationship to the title was only that of trustee.

N.J.—Town of Montclair v. Stanoyevich, 79 A.2d 288, 6 N.J. 479.

Prosecution held unwarranted

(1) Where addition to an existing building had long since been erected pursuant to a building permit issued by the building inspector and was presently occupied and used by the petitioner in the conduct of its business, and controversy with respect to revocation of the building permit

appeared to have resulted more from laxity by the board of appeals than from any transgression of the petitioner, prosecution of criminal proceedings for alleged violations of a building zone ordinance were unwarranted.

N.Y.—Capitol Distributors Corp. v. Jones, 148 N.Y.S.2d 382, 2 Misc.2d 816.

(2) Defendant who took into his home each week-day morning a number of preschool age children for supervised play either within or without the house, depending on the weather, was operating a "school" within meaning of village zoning ordinance which permitted schools within a residence A zone.

N.Y.—People v. Collins, 83 N.Y.S.2d 124, 191 Misc. 553.

(3) Where a city ordinance requires that a property owner, on due notice by the city building inspector, must repair or demolish a building found to be unsafe by the inspector, and further provides for the imposition of a fine by a magistrate for failure to obey such notice, a property owner will not be required to pay such fine if he fails to comply with a notice which orders demolition of the building but does not give him the alternative of making necessary repairs.

Pa.—City of Harrisburg v. Ensminger, 88 Pa.Dist. & Co. 307, 66 Dauph.Co. 101.

72. N.J.—Lanni v. City of Bayonne, 72 A.2d 397, 7 N.J.Super. 169.

73. Liability to person who prosecuted case

Municipality, which had received and accepted a fine paid on conviction of violation of its zoning ordinance, was not liable on quasi contract to person who, claiming to be aggrieved by such violation, had successfully conducted the prosecution therefor after his demand made on

Criminal liability of landlords. It has been held that a landlord is not subject to criminal liability for maintaining the use of the premises in a manner forbidden by the zoning laws where he has sought and been unable to terminate the use by evicting the tenants;⁷⁴ but a contrary result has been reached where the lease was specifically for the forbidden use.⁷⁵

Power to impose, and validity of, penalties. To the extent authorized by the legislature, a municipality may enact ordinances and provide against their violation by penalties;⁷⁶ but where the legislature has directed the manner in which ordinances are to be enforced or the penalty to be imposed for their violation, it thereby negatives the right of the municipality to provide for any other penalty.⁷⁷ Accordingly, penalties provided in a zoning ordinance are valid and can be applied only to the extent that they do not exceed the penalties provided by the statute.⁷⁸

Use of unapproved plan. Under a statute so providing, it is a punishable offense for an owner of land to sell, transfer, or agree to sell any land by reference to, or exhibition of, or by other use of a plan of a subdivision, before it has been approved by the planning commission.⁷⁹

Character and form of proceedings. While under some statutes the proceeding to recover a penalty for the violation of a zoning ordinance is a civil suit, and not a criminal prosecution,⁸⁰ under other statutes such a proceeding is a criminal one and not governed by rules applicable in civil cases.⁸¹

Determination of validity of regulation. Where a remedy for determining the validity of a zoning regulation is provided by the zoning acts, the question of its validity cannot be determined in a prosecution for the violation of the zoning ordinance.⁸² The court is not required to determine the question of the validity of a provision which has no application to the case in issue.⁸³

Nature and extent of punishment. The nature and extent of punishment for violation of zoning laws depend on the provisions of the ordinances, statutes, and constitutional provisions.⁸⁴

§ 418. Defenses

Various defenses are available in criminal actions for violation of a zoning regulation, provided the accused is not precluded from asserting a defense. Prior failure to enforce the regulation, and the employment of a civil remedy to enforce it, are not defenses against prosecution.

Various defenses may be available in criminal actions for the violation of a zoning regulation,⁸⁵

municipality for prosecution by it had been refused, since no statute imposed on municipality a mandatory duty to prosecute for violation of zoning ordinance or any liability for failure to do so.

N.J.—Lanni v. City of Bayonne, *supra*.

74. N.Y.—People v. Broadway-Sheridan Arms, Inc., 90 N.Y.S.2d 445, 275 App.Div. 352, affirmed 89 N.E.2d 522, 300 N.Y. 559.

75. N.Y.—People v. Mortiran Realty Corp., 128 N.Y.S.2d 687.

76. N.J.—State v. Laurel Mills Sewerage Corp., 134 A.2d 720, 40 N.J. Super. 331.

Pa.—Commonwealth ex rel. v. Kinsey, 59 Pa.Dist. & Co. 576.

77. N.J.—State v. Laurel Mills Sewerage Corp., 134 A.2d 720, 40 N.J. Super. 331.

78. N.J.—State v. Laurel Mills Sewerage Corp., *supra*.

N.Y.—People v. Gold, 6 N.Y.S.2d 264.

79. Pa.—Commonwealth v. Tapley, 10 Pa.Dist. & Co.2d 392, 6 Bucks 239.

80. Ill.—Village of Riverside v. Kuhne, 82 N.E.2d 500, 335 Ill.App. 547.

81. Ohio.—City of Columbus v. Baldasaro, App., 123 N.E.2d 290.

Rules of criminal practice govern. Under provisions to that effect,

proceedings in the municipal courts for violations of zoning ordinances are governed by rules governing practice in local criminal courts.

N.J.—City of Newark v. Pulverman, 95 A.2d 889, 12 N.J. 105.

Nature of punishment or indictability immaterial

Procedurally and within the intendment of the rule providing for appeals from judgment of conviction in the inferior courts of limited jurisdiction to county court, a prosecution for the violation of an ordinance is essentially criminal in nature irrespective of whether the penal section of the ordinance provides for a fine only or for both fine and imprisonment and even though such violation does not constitute an indictable offense.

N.J.—State v. Yaccarino, 70 A.2d 84, 3 N.J. 291.

82. Pa.—Commonwealth v. De Baldo, 82 A.2d 578, 169 Pa.Super. 363.

On certiorari to review conviction. Owners of slaughterhouse, having failed to appeal within time allowed by statute from denial of their application to township adjustment board for extension of permit to operate slaughterhouse, were not entitled to collateral review of the validity of zoning ordinance prohibiting business of slaughtering animals throughout the township through cer-

tiorari to review conviction for violation of ordinance.

N.J.—Iannella v. Johnson, 56 A.2d 894, 136 N.J.Law 514, affirmed 61 A.2d 237, 137 N.J.Law 659, appeal dismissed 69 S.Ct. 749, 336 U.S. 932, 93 L.Ed. 1092.

83. Md.—Laque v. State, 113 A.2d 893, 207 Md. 242, certiorari denied 76 S.Ct. 105, 350 U.S. 863, 100 L. Ed. 765.

84. Pa.—Commonwealth ex rel. Kinsey, 59 Pa.Dist. & Co. 576.

Punishment held not excessive

Fine of one hundred dollars for violation of a municipal zoning ordinance was not excessive as a cruel or unusual punishment.

N.J.—Town of Montclair v. Stanoyevich, 79 A.2d 288, 6 N.J. 479.

Fines, but not imprisonment, authorized

Pa.—Commonwealth ex rel. v. Kinsey, 59 Pa.Dist. & Co. 576.

85. N.J.—Sea Isle City v. Vinci, 112 A.2d 18, 34 N.J.Super. 273.

Matters held defenses

Under city ordinance providing no person shall erect or construct any building without first obtaining permit from building inspector, municipality could not delegate authority to building inspector arbitrarily to fix life of building permit, and accused, who apparently did not com-

including the defense that the regulation being enforced is invalid,⁸⁶ except where the circumstances are such that accused is precluded from asserting the defense by waiver or estoppel.⁸⁷

Prior failure to enforce regulation. It is no defense to a prosecution for the violation of a zoning ordinance that the authorities had failed to enforce the ordinance in the past and that other persons have been permitted to violate it without prosecution or punishment;⁸⁸ and the fact that the municipal or zoning officials knew or permitted past violations by accused or others will not estop the municipality or the zoning authority subsequently to enforce the regulation.⁸⁹

Employment of civil remedy. The fact that a civil remedy, such as injunction, was employed for the enforcement of the zoning regulation does not

afford absolution from any criminal responsibility there may be.⁹⁰

§ 419. Pleadings

While a complaint may not be necessary in the prosecution of a zoning violation before a police magistrate or justice of the peace, in proceedings before other tribunals the indictment, information, or other pleading must sufficiently state the elements of the accusation and contain all essential facts.

While a complaint may not be necessary to the prosecution of a suit before a police magistrate or justice of the peace for violation of a zoning ordinance,⁹¹ in proceedings before other tribunals the indictment, information, or other pleading charging the offense must sufficiently state the essential elements of the accusation and contain all essential facts.⁹² However, it need not contain matters of proof;⁹³ nor need it anticipate or negative a possible defense.⁹⁴

plete construction of garage within time fixed by building inspector in building permit, was not guilty of violating ordinance.

N.J.—*Sea Isle City v. Vinci*, supra.

Matters held not defenses

(1) Existence of housing shortage did not give accused the legal right to furnish lodging for more than four persons in a private residence in violation of the zoning ordinance. Mo.—*Kansas City v. Wilhoit*, App., 237 S.W.2d 919.

(2) Where accused neither owned nor leased premises, but apparently occupied them solely through sufferance, and had erected no buildings on the premises in which he conducted a junk yard, the fact that he had been annually granted a license to operate the junk yard by the municipal license inspector constituted no defense to prosecution for operating junk yard contrary to zoning ordinance.

N.J.—*State v. Yaccarino*, 70 A.2d 84, 3 N.J. 291.

(3) Where construction of garage violated provisions of zoning ordinance fixing side yard distances, accused was guilty of violating ordinance notwithstanding fact that he had submitted drawings and locations of proposed garage, for which building inspector had issued a building permit and that he had expended money in construction thereof.

N.J.—*Sea Isle City v. Vinci*, 112 A.2d 18, 34 N.J.Super. 273.

(4) City was not precluded from prosecuting landowners for beginning construction of building without first securing zoning permit required by city ordinance by fact that landowners were delayed in proceeding with construction until after enactment of zoning ordinance, in ab-

sence of any showing that city was in collusion with landowners' neighbors in prosecuting injunction suits which caused delay or that city deliberately attempted to delay issuance of building permit until new ordinance could be enacted.

Pa.—*City of Harrisburg v. Pass*, 93 A.2d 447, 372 Pa. 318.

86. Md.—*Laque v. State*, 113 A.2d 893, 207 Md. 242, certiorari denied 76 S.Ct. 105, 350 U.S. 863, 100 L.Ed. 765.

87. Md.—*Laque v. State*, supra.

Accused held not estopped

Accused who applied to the board of zoning appeals for a variation from a zoning ordinance as a nonconforming use was not estopped to contend, when action against him was brought by city for violation of the ordinance, that the present use was permissible as nonconforming.

Ill.—*City of Chicago v. Krema Trucking Co.*, 86 N.E.2d 431, 337 Ill. 662.

Failure sooner to litigate question

Where accused attempted to secure from board of appeals a special exception permit under county zoning ordinance to operate a junk yard, but his application was denied and he made no attempt to take an appeal from that adverse decision, he was not entitled to attack validity of provision of ordinance dealing with special exceptions in prosecutions for violating the zoning ordinance by operating a junk yard or salvage yard without a special exception permit.

Md.—*Laque v. State*, 113 A.2d 893, 207 Md. 242, certiorari denied 76 S.Ct. 105, 350 U.S. 863, 100 L.Ed. 765.

88. Colo.—*Flinn v. Treadwell*, 207 P. 2d 967, 120 Colo. 117.

Ill.—*City of Chicago v. Bernstein*, 86 N.E.2d 286, 337 Ill.App. 649.

Mo.—*Kansas City v. Wilhoit*, App., 237 S.W.2d 919.

89. Filing registration blank showing violation

Fact that when purchaser bought property in single-family dwelling district, purchaser received rooming house registration blank from city, filled it out, and filed it setting forth number of roomers in excess of those permitted by zoning restrictions did not estop city subsequently to enforce ordinance.

Ohio.—*City of Cleveland Heights v. Glowe*, App., 97 N.E.2d 226.

90. N.J.—*Mayor etc., of Alpine Borough v. Brewster*, 80 A.2d 297, 7 N.J. 42.

Yanow v. Seven Oaks Park, 83 A.2d 28, 15 N.J.Super. 73.

91. Ill.—*Village of Riverside v. Kuhne*, 82 N.E.2d 500, 335 Ill.App. 547.

92. Ga.—*Flynn v. State*, 76 S.E.2d 38, 88 Ga.App. 52.

Pa.—*Commonwealth v. De Baldo*, 82 A.2d 578, 169 Pa.Super. 383.

Complaint held sufficient

N.J.—*Rupprecht v. Draney*, 61 A.2d 220, 137 N.J.Law 564, affirmed 64 A.2d 66, 1 N.J. 407.

Complaint held insufficient

N.J.—*Town of Belleville v. Kiernan*, 121 A.2d 411, 39 N.J.Super. 480.

93. Ga.—*Flynn v. State*, 76 S.E.2d 38, 88 Ga.App. 52.

94. Accused not within exception

Indictment charging accused with violating zoning regulation was not insufficient because it failed to allege that accused did not come within exception contained in regulation.

Ga.—*Flynn v. State*, supra.

Plea of not guilty to a charge of violating a zoning ordinance denies all material allegations in the warrant or complaint and imposes on the municipality the burden of proving beyond a reasonable doubt every essential fact necessary to establish guilt.⁹⁵

§ 420. Evidence

The municipality has the burden of proving a violation by accused of the zoning regulation and every other element essential to establish guilt, and accused has the burden of establishing matters of defense. In some cases the prosecution is required to prove guilt beyond a reasonable doubt.

In a prosecution for the violation of a zoning ordinance, the municipality has the burden of prov-

ing a violation by accused of the zoning regulation,⁹⁶ and every other element essential to establish guilt;⁹⁷ and accused has the burden of establishing matters of defense to the charges.⁹⁸

The zoning ordinance violated must be introduced in evidence, since the court cannot take judicial notice of city ordinances.⁹⁹

Admissibility and sufficiency. Rules governing such questions in proceedings to enforce ordinances generally, discussed in Municipal Corporations § 341, have been applied, in actions to enforce and punish the violation of zoning ordinances, to questions relating to the admissibility¹ and sufficiency² of evidence.

95. Va.—Washington & Old Dominion R. R. v. City of Alexandria, 60 S.E.2d 40, 191 Va. 184.

96. Exception

In prosecution for violation of zoning ordinance, burden was on zoning authority to show that accused did not come within any exception to the ordinance.

Ohio.—State v. Pierce, 132 N.E.2d 102, 164 Ohio St. 482.

97. Va.—Washington & Old Dominion R. R. v. City of Alexandria, 60 S.E.2d 40, 191 Va. 184.

Matter not required to be proved

In prosecution under ordinance prohibiting maintenance of junk yard within borough limits, wherein the validity or reasonableness of the ordinance was not questioned, the only proof necessary was the existence of the junk yard maintained by accused, and the prosecution was not required to show that the junk yard was a nuisance in fact or per se, notwithstanding the ordinance declared the maintenance of a junk yard within borough limits to be a public nuisance.

Pa.—Commonwealth v. Baker, 53 A.2d 829, 160 Pa.Super. 640.

98. Nonconforming use and continuance thereof

In prosecution for violation of a zoning ordinance, where provision that a nonconforming use existing at the time of the passage of the ordinance might be continued was not a part of the enacting clause of the zoning ordinance or part of the description of the offense involved, and provision appeared in a separate section of the ordinance, accused had the burden of proving the nonconforming use of his property and a continuance of such use until the dates of the alleged violations.

Mo.—Kansas City v. Wilhoit, App., 287 S.W.2d 919.

99. Mo.—Kansas City v. McLendon, App., 197 S.W.2d 713.

Violation not open to consideration

Where there was no ordinance or

section of ordinance in record prohibiting use of a building in particular zone for more than one family, court, in prosecution for zoning violation, could not consider any evidence tending to prove violation of such omitted ordinance or section.

Mo.—Kansas City v. McLendon, supra.

Entire ordinance was held properly placed in evidence.

N.Y.—People v. Gold, 6 N.Y.S.2d 264.

1. Evidence held inadmissible

(1) In prosecution for violation of a zoning ordinance by use of a residence for furnishing lodging or boarding for more than four persons, evidence of a housing shortage in the city and request of city authorities to house owners to alleviate the shortage was inadmissible since such was not a defense.

Mo.—Kansas City v. Wilhoit, App., 237 S.W.2d 919.

(2) In prosecution for violation of ordinance regulating size, number of buildings, and position thereof on rear lots and of ordinance prohibiting conversion of buildings for use by more than one family, evidence of violations of ordinances by others was properly excluded, as was also evidence that the mayor and commissioners had orally approved the conversion of buildings.

N.J.—State v. Giller, 68 A.2d 489, 5 N.J.Super. 130.

Matter held irrelevant

In prosecution for violation of village zoning ordinance which permitted maintenance of schools in zone, failure of defendant to register his institution for training and care of preschool age children under terms of Education Law was irrelevant to a determination of whether institution was a school within meaning of ordinance.

N.Y.—People v. Collins, 83 N.Y.S.2d 124, 191 Misc. 553.

2. Evidence held sufficient

(1) To show that removal of coal from commercial district constituted

mining operations prohibited by zoning ordinance and not merely the reclamation of land for housing development.

Pa.—Commonwealth v. De Baldo, 82 A.2d 578, 169 Pa.Super. 363.

(2) To establish proof of ownership by accused as of the critical date, where deed to him of the premises was put in evidence, which deed was dated and recorded several years before the violation, thereby establishing presumption of continuance of ownership.

N.Y.—People v. Scandore, 148 N.E.2d 872, 3 N.Y.2d 681, 171 N.Y.S.2d 808.

Evidence held to sustain conviction

(1) For violating a zoning ordinance, in that accused was carrying on a business in a residential area.

N.Y.—City of New Rochelle, on Complaint of Dassler, v. Dandry, 79 N.Y.S.2d 126, 191 Misc. 977—City of New Rochelle, on Complaint of Dassler, v. Friedman, 78 N.Y.S.2d 681, 190 Misc. 654.

(2) For violation of zoning ordinance by operation of prohibited junk yards.

N.J.—State v. Yaccarino, 70 A.2d 84, 3 N.J. 291.

(3) For allowing use of premises as dumping ground in violation of zoning ordinance in that such use constituted expansion of original nonconforming use permitted under ordinance.

Ill.—People v. Triem Steel & Processing, Inc., 125 N.E.2d 678, 5 Ill. App.2d 371.

Evidence held insufficient

To establish the defense of a nonconforming use existing lawfully at the time of the passage of the zoning ordinance.

Mo.—Kansas City v. Wilhoit, App., 237 S.W.2d 919.

N.Y.—City of New Rochelle, on Complaint of Dassler, v. Dandry, 79 N.Y.S.2d 126, 191 Misc. 977—People v. Hein, 65 N.Y.S.2d 318, 187 Misc. 6.

The prosecution has been required to establish the case against accused by proof beyond a reasonable doubt.³ So, in a criminal proceeding under a statute making it a punishable offense for an owner of land to sell, transfer, or agree to sell any land by reference to, or exhibition of, or by other use of a plan of a subdivision, before it has been approved by the planning commission, a valid conviction must be supported by proof of the essential elements of the offense beyond a reasonable doubt.⁴

§ 421. Judgment

General rules govern the requisites and sufficiency, and operation and effect, of judgments in actions for penalties for violation of zoning ordinances or regulations.

The requisites and sufficiency,⁵ and operation and effect,⁶ of judgments in actions for penalties for violation of zoning ordinances or regulations are governed by rules applicable to judgments in actions to enforce ordinances generally, discussed in Municipal Corporations §§ 351-360.

Evidence held to justify acquittal

(1) In prosecution of owner of building for alleged violation of city zoning ordinance in permitting operation of tailor shop in residence district, wherein accused set up defense of a nonconforming use in existence at time of adoption of ordinance, evidence was held insufficient to establish any violation of ordinance with respect to tailor shop. N.Y.—People v. Sudier Realty Corp., 101 N.Y.S.2d 792.

(2) In prosecution for unlawfully and willfully altering and enlarging a dwelling for use other than as a one-family dwelling in violation of zoning ordinance, evidence justified acquittal. Mo.—Kansas City v. McLendon, App., 197 S.W.2d 713.

3. Va.—Washington & Old Dominion R. R. v. City of Alexandria, 60 S.E.2d 40, 191 Va. 184.

4. Pa.—Commonwealth v. Tapley, 10 Pa. Dist. & Co.2d 392, 6 Bucks Co. 230.

5. Ohio.—City of Columbus v. Baldasaro, App., 123 N.E.2d 290.

Conformity to evidence and issues

(1) Judgment finding accused guilty of a violation of zoning ordinance by operating manufacturing plant in residential district was not open to attack on ground that it was not responsive to the evidence, where question to be determined was whether the nonconforming use was lawful under a prior ordinance and, on finding that it was not lawful, the court could find a violation of the later ordinance.

Ill.—City of Chicago v. Reuter Bros.

Iron Works, 75 N.E.2d 355, 398 Ill. 202, 173 A.L.R. 266.

(2) In prosecution for use of dwelling as rooming house without permit, in violation of city ordinance, finding of guilt was contrary to evidence.

Ohio.—City of Columbus v. Baldasaro, App., 123 N.E.2d 290.

Status of judge

Under constitutional provision, court rule, and the evidence, criminal court judgment finding accused guilty of violating zoning ordinance was not void on ground that judge was not a judge of the criminal court on date of judgment.

Ill.—Village of Riverside v. Kuhne, 82 N.E.2d 500, 335 Ill.App. 547.

Separate findings and conclusions not required

Ohio.—City of Columbus v. Baldasaro, App., 123 N.E.2d 290.

6. Ill.—City of Chicago v. Krema Trucking Co., 86 N.E.2d 431, 337 Ill.App. 662.

Res judicata

(1) Judgment of not guilty in suit against an individual for violation of zoning ordinance in use of a vacant lot was not res judicata nor did it constitute estoppel by verdict in a subsequent quasi-criminal action for the same violation against a corporation in which the individual defendant was the larger stockholder, where the individual was sued personally and the corporation was not legally involved.

Ill.—City of Chicago v. Krema Trucking Co., supra.

(2) Judgment of conviction of plaintiff for violation of zoning ordi-

The effect, in a civil proceeding for an injunction, of the determination in a criminal proceeding for the violation of a zoning ordinance is discussed supra § 400.

§ 422. Review

While under some statutes the review of a prosecution for a zoning violation is by trial de novo, the review proceedings ordinarily are governed by the general rules.

Rules governing review procedure in actions to enforce ordinances and regulations generally, discussed in Municipal Corporations §§ 361-379, have been applied in proceedings to review prosecutions for violations of zoning ordinances and regulations;⁷ and the applicable rules and statutes in force at the time of the entry of the judgment of conviction and the filing of the notice of appeal are controlling.⁸

The appellate court cannot, or will not, ordinarily review questions not raised in the lower court,⁹ or matters not in issue in the case.¹⁰ However, the

nance was only prima facie evidence of facts involved, in action against city and officials for judgment recognizing use of premises as proper. N.Y.—Marshak v. City of Long Beach, 81 N.Y.S.2d 74, 195 Misc. 125, affirmed 105 N.Y.S.2d 983, 278 App.Div. 966.

7. N.J.—State v. Yaccarino, 70 A.2d 84, 3 N.J. 291.

Pa.—Commonwealth v. De Baldo, 82 A.2d 578, 169 Pa.Super. 363.

Commonwealth v. Booth, Quar. Sess., 63 Montg.Co. 133.

Review of evidence

In reviewing a conviction approved by trial court of violating a city zoning ordinance, the evidence must be viewed in light most favorable to city.

Va.—Washington & Old Dominion R. R. v. City of Alexandria, 60 S.E.2d 40, 191 Va. 184.

8. N.J.—State v. Yaccarino, 70 A.2d 84, 3 N.J. 291.

Rules and laws promulgated thereafter held inapplicable

N.J.—State v. Yaccarino, supra.

9. Ill.—City of Chicago v. Bernstein, 86 N.E.2d 286, 337 Ill.App. 649.

Validity of ordinance violated cannot be raised for the first time on appeal.

N.J.—State v. Giller, 68 A.2d 489, 5 N.J.Super. 130.

Pa.—Appeal of Miller, 80 Pa. Dist. & Co. 370, 39 Del.Co. 37.

10. Nonconforming use

Person convicted of using property in residential zone for purpose not permitted in such zone by ordinance, which purpose did not constitute a pre-existing nonconforming use per-

appellate court may consider a question not raised below, where it deems the issue one of important public concern,¹¹ and may even do so sua sponte, where the question was not raised in the briefs on the appeal.¹² The zoning ordinance must be preserved in the transcript, since the appellate court cannot take judicial notice of city ordinances.¹³

On appeal from a conviction for violation of a zoning ordinance, the court will not review a deter-

mination of the city's board of appeals refusing a permit for a use which constitutes a violation, or determine whether the ordinance has been administered in a manner so unreasonable that enforcement would constitute an unlawful taking of accused's property.¹⁴

Trial de novo on appeal. Under some statutes the review on appeal is by trial de novo.¹⁵

ZOSTER. A term which is derived from the Greek word "zosta" meaning a belt or girdle;¹ and used in the expression "herpes zoster capitis," another name for the disease popularly called "shingles."²

ZYGOMA. The bone that leads across in front of the ear.³

ZYGOTE. The fertilized human ovum. It is a one-celled individual, and it contains all the potentialities of the new individual who is to develop from it.⁴

mitted under ordinance, and of using property without obtaining required certificate could not complain that he was not convicted of a violation of a nonconforming use.

N.J.—*Rupprecht v. Draney*, 61 A.2d 220, 137 N.J.Law 564, affirmed 64 A.2d 66, 1 N.J. 407.

11. N.J.—*State v. Laurel Mills Sewerage Corp.*, 134 A.2d 720, 46 N.J. Super. 331.

Validity of penalty provision

Point whether penalty provision of zoning ordinance was invalid as exceeding statutory authority for imposition of fines and penalties for violation of municipal ordinance was of sufficient public concern to permit the superior court, appellate division, to consider the question sua sponte even though the question was not raised before the magistrate or before the county court or in original briefs on appeal from judgment of conviction for violation of zoning ordinance.

N.J.—*State v. Laurel Mills Sewerage Corp.*, *supra*.

12. N.J.—*State v. Laurel Mills Sewerage Corp.*, *supra*.

13. Mo.—*Kansas City v. McLendon*, App., 197 S.W.2d 713.

14. N.Y.—*People v. Calvar Corporation*, 36 N.E.2d 644, 286 N.Y. 419, 136 A.L.R. 1376.

15. N.J.—*City of Newark v. Pulverman*, 95 A.2d 889, 12 N.J. 105.

Pa.—*Commonwealth v. De Baldo*, 82 A.2d 573, 169 Pa.Super. 363.

Appellate judgment as controlling; subsequent review

(1) Where accused, convicted in municipal court of violating zoning ordinance, appealed to county court and was therein found not guilty after a trial de novo, judgment of county court constituted an acquittal and nullified original judgment in municipal court.

N.J.—*City of Newark v. Pulverman*, 95 A.2d 889, 12 N.J. 105.

(2) Trial de novo in county court of undertaker, accused of violating zoning ordinance in conducting funeral business in private residence located in area zoned residential, nullified judgment of municipal court, and, on appeal to superior court from conviction in county court, judgment under review was that of county court.

N.J.—*Town of Belleville v. Kiernan*, 121 A.2d 411, 39 N.J. Super. 480.

Cure of pleadings on trial de novo

Under rule relating to effect of appeal from municipal court and trial de novo in county court, the mere taking of the appeal by accused from the conviction in municipal court does not have effect of curing deficiency in complaint; effect of appeal would be only to confer consent on county court to amend complaint to cure deficiency.

N.J.—*Town of Belleville v. Kiernan*, *supra*.

Trial without jury

Where accused was found guilty of violation of a municipal zoning ordinance and he appealed to the county court and made a demand for trial by jury, case was properly put to trial de novo before county court without a jury.

N.J.—*Town of Montclair v. Stanoyevich*, 79 A.2d 288, 6 N.J. 479.

Validity of ordinance considered

Constitutionality of village zoning ordinance could have been raised on appeal by owner of land from conviction by police justice of violation of ordinance, but such conviction was not binding on supreme court in action by owner for a declaratory judgment that zoning ordinance was void as applied to his property.

N.Y.—*Fleetwood Manor, Inc. v. Village of Huntington Bay*, 115 N.Y. S.2d 615.

1. N.Y.—*Tooker v. Security Trust Co.*, 49 N.Y.S. 814, 817, 26 App.Div. 372.

2. N.Y.—*Tooker v. Security Trust Co.*, *supra*.
"Herpes zoster" or "Herpes zoster capitis" see the C.J.S. definition Herpes.

3. Pa.—*Farrelly v. City of Pittsburgh*, 17 A.2d 191, 194, 340 Pa. 516.

4. D.C.—*Bonbrest v. Kotz*, D.C., 65 F.Supp. 138, 141.

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- Vt.—Smith v. Winhall Planning Commission, 436 A.2d 760, 140 Vt. 178.

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- Mich.—Rasmussen v. Penfield Tp., 304 N.W.2d 581, 104 Mich.App. 361.

33. U.S.—Claridge House One, Inc. v. Borough of Verona, D.C.N.J., 490 F.Supp. 706.

- Ariz.—Levitz v. State, 613 P.2d 1259, 126 Ariz. 203, overruling State v. Jacobson, 121 Ariz. 65, 588 P.2d 358.

- Cal.—Pan Pac. Properties, Inc. v. Santa Cruz County, 146 Cal.Rptr. 428, 81 C.A.3d 244.

- Idaho—Gumprecht v. City of Coeur D'Alene, 661 P.2d 1214, 104 Idaho 615.

- Ill.—McHenry County v. Sternaman, 380 N.E.2d 540, 20 Ill.Dec. 562, 63 Ill.App.3d 679.

- Ind.—Strange v. Board of Zoning Appeals of Shelby County, App., 428 N.E.2d 1328.

- Mich.—Brandon Tp. v. North-Oakland Residential Services, Inc., 312 N.W.2d 238, 110 Mich.App. 300.

- N.H.—Town of Tuftonboro v. Lakeside Colony, Inc., 403 A.2d 410, 119 N.H. 445.

- N.J.—Garden State Farms, Inc. v. Bay, 390 A.2d 1177, 77 N.J. 439.

- N.Y.—Wambat Realty Corp. v. State, 362 N.E.2d 581, 41 N.Y.2d 490, 393 N.Y.S.2d 949.

- Or.—City of Pendleton v. Kerns, 643 P.2d 658, 56 Or.App. 818, aff'd. 653 P.2d 992, 294 Or. 126.

- Pa.—Greene Tp. v. Kuhl, 379 A.2d 1383, 32 Pa. Cmwlth. 592.

- R.I.—Montgomery v. Bevilacqua, 432 A.2d 661.

- Tex.—San Pedro North, Ltd. v. City of San Antonio, Civ.App., 562 S.W.2d 260, err. ref. no rev. err., cert. den. 99 S.Ct. 616, 439 U.S. 1004, 58 L.Ed.2d 680, reh. den. 99 S.Ct. 1060, 439 U.S. 1135, 59 L.Ed.2d 98.

- Wash.—Snohomish County v. State, 648 P.2d 430, 97 Wash.2d 646.

- Wis.—Town of Ringle v. Marathon County, App., 299 N.W.2d 284, 99 Wis.2d 394, aff'd. 311 N.W.2d 595, 104 Wis.2d 297.

34. U.S.—Columbia Basin Land Protection Ass'n v. Schlesinger, C.A.Wash., 643 F.2d 585.

- Ala.—Riverbend Partnership v. City of Mobile, 457 So.2d 371.

- Ariz.—City of Scottsdale v. Scottsdale Associated Merchants, Inc., 583 P.2d 891, 120 Ariz. 4.

- Cal.—Benny v. City of Alameda, 164 Cal.Rptr. 776, 105 C.A.3d 1006.

- Fla.—General Elec. Credit Corp. of Georgia v. Metropolitan Dade County, App., 346 So.2d 1049.

- Ill.—McHenry County v. Sternaman, 380 N.E.2d 540, 20 Ill.Dec. 562, 63 Ill.App.3d 679.

- Iowa—Brock v. Dickinson County Bd. of Adjustment, 287 N.W.2d 566.

- Mich.—Brandon Tp. v. North-Oakland Residential Services, Inc., 312 N.W.2d 238, 110 Mich.App. 300.

- Mo.—Union Elec. Co. v. City of Crestwood, 562 S.W.2d 344.

- Ohio—Sun Oil Co. of Pennsylvania v. City of Upper Arlington, 379 N.E.2d 266, 55 Ohio App.2d 27, 9 O.O.3d 196—State ex rel. Cities Service Oil Co. v. Orteca, 409 N.E.2d 1018, 63 Ohio St.2d 295, 17 O.O.3d 189.

- S.D.—State Theatre Co. v. Smith, 276 N.W.2d 259.

- Vt.—Morse v. Vermont Division of State Bldgs., 388 A.2d 371, 136 Vt. 253.

Ordinance restricting development of rental housing

- Cal.—Bruce v. City of Alameda, 1 Dist., 212 Cal.Rptr. 304, 166 C.A.3d 18.

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35. Vt.—State v. Sanguinetti, 449 A.2d 922, 141 Vt. 349.

36. Alaska—Kenai Peninsula Borough v. Kenai Peninsula Bd. of Realtors, Inc., 652 P.2d 471.

- Cal.—City of Torrance v. Transitional Living Centers for Los Angeles, Inc., 179 Cal.Rptr. 907, 638 P.2d 1304, 30 C.3d 516.

- Colo.—Brubaker v. Board of County Com'rs, El Paso County, 652 P.2d 1050.

- Ill.—Village of Union v. Southern California Chemical Co., 375 N.E.2d 489, 16 Ill.Dec. 616, 59 Ill.App.3d 373.

- Ky.—Green v. Bourbon County Joint Planning Com'n, 637 S.W.2d 626.

- Mich.—Dingeman Advertising, Inc. v. Saginaw Tp., 285 N.W.2d 440, 92 Mich.App. 735.

- N.H.—Region 10 Client Management, Inc. v. Town of Hampstead, 424 A.2d 207, 120 N.H. 885.

- N.J.—Home Builders League of South Jersey, Inc. v. Evesham Tp., 416 A.2d 81, 174 N.J.Super. 252.

37. Ariz.—Levitz v. State, 613 P.2d 1259, 126 Ariz. 203.

Residential facilities for mentally ill

- Minn.—Northwest Residence, Inc. v. City of Brooklyn Center, App., 352 N.W.2d 764, review den.

38. Colo.—Board of County Com'rs of Adams County v. City of Thornton, 629 P.2d 605.

- Ill.—City of Urbana v. Champaign County, 389 N.E.2d 1185, 27 Ill.Dec. 777, 76 Ill.2d 63.

- Minn.—Berggren v. Town of Duluth, 304 N.W.2d 24.

- Mo.—City of Kirkwood v. City of Sunset Hills, App., 589 S.W.2d 31.

- N.Y.—People v. Agatha Home for Children, 389 N.E.2d 1098, 47 N.Y.2d 46, 416 N.Y.S.2d 577, cert. den. 100 S.Ct. 145, 444 U.S. 869, 62 L.Ed.2d 94.

- Or.—Jackson County v. Bear Creek Valley Sanitary Authority, 645 P.2d 532, 293 Or. 121.

- S.D.—Lincoln County v. Johnson, 257 N.W.2d 453.

- Tex.—City of Addison v. Dallas Independent School Dist., App. 5 Dist., 632 S.W.2d 771, err. ref. no rev. err.

- Wis.—Town of Ringle v. Marathon County, 311 N.W.2d 595, 104 Wis.2d 297.

41. Conn.—Town of Colchester v. Reduction Associates, Inc., Conn.Pl., 382 A.2d 1333, 34 Conn.Sup. 177.

N.J.—Little Falls Tp. v. Bardin, 414 A.2d 559, 173 N.J.Super. 397.

Hazardous waste

Mich.—Cascade Tp. v. Cascade Resource Recovery, Inc., 325 N.W.2d 500, 118 Mich.App. 580, app. held in abeyance, Sup., 335 N.W.2d 472, remd. 367 N.W.2d 68, 422 Mich. 881.

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47. U.S.—Greenwich Tp. v. Mobil Oil Corp., D.C. N.J., 504 F.Supp. 1275—Klarnat v. Chicago County, D.C.Minn., 564 F.Supp. 1089.

Ala.—In re Opinion of The Justices, 370 So.2d 1373. Cal.—Pines v. City of Santa Monica, 175 Cal.Rptr. 336, 630 P.2d 521, 29 C.3d 656.

Conn.—Curry v. Planning and Zoning Commission of Town of Guilford, Conn.Pl., 376 A.2d 79, 34 Conn. Sup. 52.

Fla.—City of Lake Wales v. Lamar Advertising Ass'n of Lakeland, App., 399 So.2d 981, approved in part, disapproved in part, Sup., 414 So.2d 1030.

Ga.—Pope v. City of Atlanta, 240 S.E.2d 241, 240 Ga. 177, app. after remand 249 S.E.2d 16, 242 Ga. 331, cert. den. 99 S.Ct. 1281, 440 U.S. 936, 59 L.Ed.2d 494.

Ill.—Union Nat. Bank and Trust Co. v. Board of Sup'rs of Kendall County, 382 N.E.2d 1382, 22 Ill.Dec. 627, 65 Ill.App.3d 1004.

Ind.—Indiana Waste Systems, Inc. v. Board of Com'rs of Howard County, 389 N.E.2d 52, 180 Ind.App. 385.

La.—City of Baton Rouge v. Hebert, App., 378 So.2d 144, writ den., Sup., 380 So.2d 1210.

Md.—Exxon, Inc. v. City of Frederick, 375 A.2d 34, 36 Md.App. 703.

Mass.—V.S.H. Realty, Inc. v. License Bd. of Worcester, 435 N.E.2d 1035, 13 Mass.App. 666, review den., 438 N.E.2d 75, 386 Mass. 1105.

Mich.—People v. Llewellyn, 257 N.W.2d 902, 401 Mich. 314, cert. den. 98 S.Ct. 1879, 435 U.S. 1008, 56 L.Ed.2d 390.

Mont.—State ex rel. Swart v. Molitor, 621 P.2d 1100.

Neb.—Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc., 302 N.W.2d 379, 208 Neb. 110, app. after remand 329 N.W.2d 335, 213 Neb. 234.

N.H.—Derry Sand & Gravel, Inc. v. Town of Londonderry, 431 A.2d 139, 121 N.H. 501.

N.J.—State v. C.I.B. Intern., 416 A.2d 362, 83 N.J. 262.

N.D.—City of Minot v. Central Ave. News, Inc., 308 N.W.2d 851, app. diam. 102 S.Ct. 961, app. after remand, Sup., 325 N.W.2d 243.

Or.—Damascus Community Church v. Clackamas County Bd. of Com'rs, 573 P.2d 726, 32 Or.App. 3.

Pa.—Kavanagh v. London Grove Tp., 382 A.2d 148, 33 Pa.Cmwlth. 420, aff'd. 404 A.2d 393, 486 Pa. 133, app. diam. 100 S.Ct. 725, 444 U.S. 1041, 62 L.Ed.2d 726.

Tex.—City of Beaumont v. Jones, Civ.App., 560 S.W.2d 710, err. ref. no rev. err.

Vt.—In re Patch, 437 A.2d 121, 140 Vt. 158.

W.Va.—Longwell v. Hodge, 297 S.E.2d 820.

Regulations not in conflict with statute

(1) N.Y.—Scoppelliti v. Board of Zoning Appeals of Town of Hempstead, 479 N.Y.S.2d 941, 125 Misc.2d 586, aff'd. 496 N.Y.S.2d 488.

Wis.—State v. Village of Lake Delton, App., 286 N.W.2d 622, 93 Wis.2d 78.

(3) Mich.—Gackler Land Co., Inc. v. Yankee Springs Tp., 359 N.W.2d 226, 138 Mich.App. 1.

(10) As applied to group home for handicapped persons.

La.—City of Kenner v. Normal Life of Louisiana, Inc., App., 465 So.2d 82, writ gr. 470 So.2d 115.

No carte blanche exemption for agricultural land

Idaho—Olson v. Ada County, 665 P.2d 717, 105 Idaho 18.

48. R.I.—Matunuck Beach Hotel, Inc. v. Sheldon, 399 A.2d 489, 121 R.I. 386.

A state statute may not unreasonably and unlawfully limit the enforcement by municipalities of a local zoning ordinance enacted under police powers authorized by the state constitution to municipalities.^{49.5}

49.5. Ohio—Garcia v. Siffirin Residential Ass'n, 407 N.E.2d 1369, 63 Ohio St.2d 259, 17 O.O.3d 167, cert. den. 101 S.Ct. 1349, 450 U.S. 911, 67 L.Ed.2d 334.

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51. U.S.—Matter of White, Bkrtcy. Mich., 2 B.R. 656. N.Y.—Bloom v. Town Bd. of Town of Yorktown, 424 N.Y.S.2d 983, 102 Misc.2d 938, mod. on oth. grds. 436 N.Y.S.2d 355, 80 A.D.2d 823, app. after remand 450 N.Y.S.2d 603, 88 A.D.2d 895.

§ 12. Manner of Exercising Power; Procedural Requirements

52. U.S.—U.S. v. Town of Windsor, Conn., D.C. Conn., 496 F.Supp. 581.

Ind.—Jacobs v. Mishawaka Bd. of Zoning Appeals, 395 N.E.2d 834, 182 Ind.App. 500.

Kan.—City of Salina v. Jagger, 612 P.2d 618, 228 Kan. 155.

Or.—Fifth Ave. Corp. v. Washington County, By and Through Bd. of Com'rs, 581 P.2d 50, 282 Or. 591.

53. Ill.—Cook County v. John Sexton Contractors Co., 389 N.E.2d 553, 27 Ill.Dec. 489, 75 Ill.2d 494, app. after remand 408 N.E.2d 236, 41 Ill.Dec. 814, 86 Ill.App.3d 673.

Ind.—Town of Merrillville v. Collins, 382 N.E.2d 188, 178 Ind.App. 358—Wilson v. Brown, App. 3 Dist., 461 N.E.2d 1162, op. changed 464 N.E.2d 1332.

Minn.—State, by Rochester Ass'n of Neighborhoods v. City of Rochester, 268 N.W.2d 885.

Miss.—City of Carthage v. Walters, 375 So.2d 228.

N.J.—Pascack Ass'n, Ltd. v. Mayor and Council of Washington Tp., Bergen County, 379 A.2d 6, 74 N.J. 470.

N.Y.—Leisure Time Sales, Inc. v. Waring, 398 N.Y.S.2d 493, 91 Misc.2d 633.

N.C.—Johnson v. Town of Longview, 245 S.E.2d 516, 37 N.C.App. 61, cert. den. 248 S.E.2d 727, 295 N.C. 550.

Or.—Fifth Ave. Corp. v. Washington County, By and Through Bd. of Com'rs, 581 P.2d 50, 282 Or. 591.

Tex.—Hannan v. City of Coppell, Civ.App., 583 S.W.2d 817, err. ref. no rev. err.

Wash.—Ullock v. City of Bremerton, 565 P.2d 1179, 17 Wash.App. 573.

Map

(1) Other statements.

N.H.—Town of Nottingham v. Harvey, 424 A.2d 1125, 120 N.H. 889.

Vt.—McLaughry v. Town of Norwich, 433 A.2d 319, 140 Vt. 49.

(2) Zoning ordinance was invalid by reason of city council's failure to comply strictly with statutory requirement that zoning map, incorporated by reference in ordinance, be certified; substantial compliance by attaching uncertified map or plan was insufficient.

Wash.—Stockwell v. City of Ritzville, 663 P.2d 151, 34 Wash.App. 526.

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55. Kan.—Board of County Com'rs of Lincoln County v. Berner, 613 P.2d 676, 5 Kan.App.2d 104.

56. Mass.—Lovequist v. Conservation Commission of Town of Dennis, 393 N.E.2d 858, 379 Mass. 7.

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65. D.C.—Citizens Ass'n of Georgetown v. District of Columbia Bd. of Zoning Adjustment, App., 403 A.2d 737.

The actions of a zoning body in applying general rules or policies to specific individuals, interests, or situations are quasi-judicial acts requiring procedural due process.^{65.5}

65.5. Idaho—Cooper v. Bd. of County Com'rs of Ada County, 614 P.2d 947, 101 Idaho 407 overruling prior inconsistent decisions.

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71. Cal.—Benny v. City of Alameda, 164 Cal.Rptr. 776, 105 C.A.3d 1006.

80. Or.—Fifth Ave. Corp. v. Washington County, By and Through Bd. of Com'rs, 581 P.2d 50, 282 Or. 591.

Tex.—Conway v. Hospital Corp. of America, Civ.App., 577 S.W.2d 534, err. ref. no rev. err. app. diam. 100 S.Ct. 22, 444 U.S. 803, 62 L.Ed.2d 16.

81. Neb.—Hansen v. City of Norfolk, 267 N.W.2d 537, 201 Neb. 352.

N.J.—Pop Realty Corp. v. Springfield Bd. of Adjustment of Springfield Tp., 423 A.2d 688, 176 N.J.Super. 441.

N.Y.—Leisure Time Sales, Inc. v. Waring, 398 N.Y.S.2d 493, 91 Misc.2d 633.

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82. Fla.—O'Connor v. Dade County, App. 3 Dist., 410 So.2d 605.

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88. Mass.—Sturges v. Town of Chilmark, 402 N.E.2d 1346, 380 Mass. 246.

Colo.—Theobald v. Board of County Com'rs, Summit County, 644 P.2d 942.

Utah—Wright Development v. City of Wellsville, 608 P.2d 232.

Wash.—D.E.B.T., Ltd., v. Board of Clallam County Com'rs, 600 P.2d 628, 24 Wash.App. 136.

§ 13. — Notice and Hearing

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13. Due process requirements met

Kan.—Board of County Com'rs of Lincoln County v. Berner, 613 P.2d 676, 5 Kan.App.2d 104.

16. Notice

(4) Publication in English of notice of public hearing on land use proceeding was sufficient to meet requirement for notice specified in section of the city charter, even though many affected parties did not speak English.

N.Y.—Lei Chun Chan Jin v. Board of Estimate of City of New York, 460 N.Y.S.2d 28, 92 A.D.2d 218, dismissal den. 437 N.E.2d 805, 60 N.Y.2d 797, 469 N.Y.S.2d 698, app. after remand 474 N.Y.S.2d 504, 101 A.D.2d 97, aff'd. 467 N.E.2d 523, 62 N.Y.2d 900, 478 N.Y.S.2d 839.

§ 14. — Voting; Initiative and Referendum

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A requirement that a zoning ordinance be subject to approval by the voters is not per se unreasonable.^{39.5}

39.5. Colo.—Marco Lounge, Inc. v. City of Federal Heights, 625 P.2d 982.

40. N.H.—Town of Hampton v. Brust, 446 A.2d 458, 122 N.H. 463.

44. S.D.—City of Colton v. Corbly, 318 N.W.2d 136.

50. Colo.—Margolis v. District Court, In and For Arapahoe County, 638 P.2d 297.

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54. Colo.—Margolis v. District Court, In and For Arapahoe County, 638 P.2d 297.

§ 14 ZONING

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Fla.—City of Winter Springs v. Florida Land Co., App. 5 Dist., 413 So.2d 84, approved 427 So.2d 170.

§ 15. — Filing, Recording, or Publication of Regulation after Adoption

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62. N.J.—Lawrence M. Krain Associates, Inc. v. Mayor and Council of Maple Shade Tp., 448 A.2d 522, 185 N.J.Super. 336.

N.Y.—Village of Sevana v. Soles, 446 N.Y.S.2d 639, 84 A.D.2d 683.

Or.—City of Medford v. Jackson County, 643 P.2d 1353, 57 Or.App. 155.

66. Ill.—Von Bokel v. City of Breese, 427 N.E.2d 322, 56 Ill.Dec. 242, 100 Ill.App.3d 956.

Iowa—Renda v. Polk County, 319 N.W.2d 250.

Minn.—Pilgrim v. City of Winona, 256 N.W.2d 266.

Miss.—City of Carthage v. Walters, 375 So.2d 228.

Publication sufficient

(1) S.D.—City of Colton v. Corbly, 318 N.W.2d 136.

Section not applicable

Ill.—City of Champaign v. Kroger Co., 410 N.E.2d 661, 43 Ill.Dec. 661, 88 Ill.App.3d 498.

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68. N.M.—Nesbit v. City of Albuquerque, 575 P.2d 1340, 91 N.M. 455.

Tex.—City of Wichita Falls v. L.J. & Frances Streetman, Civ.App., 607 S.W.2d 644.

§ 16. Temporary or Emergency Regulation

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76. Va.—Matthews v. Board of Zoning Appeals of Greene County, 237 S.E.2d 128, 218 Va. 270.

78. Tex.—Haynes v. City of Quanah, Civ.App., 610 S.W.2d 842, err. ref. no rev. err.

80. Wash.—Mayer Built Homes, Inc. v. Town of Steilacoom, 564 P.2d 1170, 17 Wash.App. 558.

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90. Tex.—Haynes v. City of Quanah, Civ.App., 610 S.W.2d 842, err. ref. no rev. err.

§ 17. Knowledge or Notice of Regulations or Orders

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96. Utah—Wright Development v. City of Wellsville, 608 P.2d 232.

§ 18. General Considerations

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14. Minn.—Pine County v. State, Dept. of Natural Resources, 280 N.W.2d 623.

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38. Mass.—Framingham Clinic, Inc. v. Board of Selectmen of Southborough, 367 N.E.2d 606, 373 Mass. 279.

45. Me.—Keith v. Saco River Corridor Com'n, 464 A.2d 150.

Ohio—Hummel v. Grande, 456 N.E.2d 516, 8 Ohio App.3d 87, 8 O.B.R. 120.

§ 19. Validity as Dependent on Conditions, Circumstances, and Application to Particular Property

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69. Mass.—Searges v. Town of Chilmart, 402 N.E.2d 1346, 380 Mass. 246.

49. Ill.—Amalgamated Trust and Sav. Bank v. Cook County, 402 N.E.2d 719, 37 Ill.Dec. 717, 82 Ill. App.3d 370.

51. U.S.—Matter of White, Bkrcty. Mich., 2 B.R. 656. Ill.—Chicago Title & Trust Co. v. Village of Skokie, Cook County, 377 N.E.2d 1253, 18 Ill.Dec. 617, 61 Ill.App.3d 219.

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56. Idaho—Dawson Enterprises, Inc. v. Blaine County, 567 P.2d 1257, 98 Idaho 506.

§ 20. Relation of Regulation to Police Power

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71. Pa.—Calvanese v. Zoning Bd. of Adjustment, Cmwltth., 414 A.2d 406.

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78. Pa.—Fisher v. Com., 414 A.2d 743, 51 Pa. Cmwltth. 404.

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92. N.J.—State v. C.I.B. Intern., 416 A.2d 362, 83 N.J. 262.

93. Ala.—Hall v. Jefferson County, 450 So.2d 792. Fla.—C.J.S. cited in Fox v. Town of Bay Harbor Islands, App., 450 So.2d 559, 560.

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§ 21. Limits on Exercise of Zoning Power in General

Library References

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24. Colo.—Theobald v. Board of County Com'rs, Summit County, 644 P.2d 942.

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25. Cal.—Kriebel v. City of San Diego, City Council, 169 Cal.Rptr. 342, 112 C.A.3d 693.

Colo.—Tracy v. City of Boulder, App., 635 P.2d 907. Conn.—Kosinski v. Lawlor, 418 A.2d 66, 177 Conn. 420.

Colo.—Pennobscot, Inc. v. Board of County Commissioners of Pitkin County, Colorado, 642 P.2d 915.

N.J.—Drozdzow v. Mayor and City Council of City of Vineland, 400 A.2d 522, 167 N.J.Super. 76.

26. Realistic

N.J.—Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 456 A.2d 390, 92 N.J. 158.

27. U.S.—Creative Environments, Inc. v. Estabrook, D.C.Mass., 491 F.Supp. 547, aff'd, C.A., 680 F.2d 822, cert. den. 103 S.Ct. 345, 459 U.S. 989, 74 L.Ed.2d 385.

28. Cal.—Camp v. Mendocino County Bd. of Sup'rs, 176 Cal.Rptr. 620, 123 C.A.3d 334.

29. Mass.—Vitale v. Planning Bd. of Newburyport, 409 N.E.2d 237, 410 Mass.App. 483.

Or.—Alexanderson v. Board of Com'rs for Polk County, 616 P.2d 459, 289 Or. 427, reh. den. 619 P.2d 212, 290 Or. 137.

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30. Cal.—Resource Defense Fund v. Santa Cruz County, 184 Cal.Rptr. 371, 133 C.A.3d 800.

Ga.—East Lands, Inc. v. Floyd County, 262 S.E.2d 51, 244 Ga. 761.

Mass.—North Landers Corp. v. Planning Bd. of Falmouth, 416 N.E.2d 934, 382 Mass. 432.

Mont.—State ex rel. Swart v. Molitor, 621 P.2d 1100.

N.Y.—Town of Olive v. Martins, 435 N.Y.S.2d 153, 79 A.D.2d 822.

Ohio—Burger v. Board of Trustees of Montville Tp., 389 N.E.2d 866, 58 Ohio Misc. 21, 12 O.O.3d 222.

Or.—1000 Friends of Oregon v. Land Conservation and Development Commission, 642 P.2d 1158, 292 Or. 735, mod. on oth. grds. 681 P.2d 124, 297 Or. 142.

Tenn.—Nichols v. Tullahoma Open Door, Inc., App., 640 S.W.2d 13.

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32. Tex.—City of San Antonio v. Lanier, Civ.App., 542 S.W.2d 232, err. ref. no rev. err.

33. Vt.—In re Patch, 437 A.2d 121, 140 Vt. 158.

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34. Cal.—Camp v. Mendocino County Bd. of Sup'rs, 176 Cal.Rptr. 620, 123 C.A.3d 334.

35. Colo.—Theobald v. Board of County Com'rs, Summit County, 644 P.2d 942.

36. Mass.—North Landers Corp. v. Planning Bd. of Falmouth, 416 N.E.2d 934, 382 Mass. 432.

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39. Or.—McIntyre-Cooper Co. v. Board of Com'rs of Washington County, 637 P.2d 201, 55 Or.App. 78, review den. 644 P.2d 1130, 292 Or. 589.

42. Ill.—Cleys v. Village of Palatine, 411 N.E.2d 1161, 44 Ill.Dec. 795, 89 Ill.App.3d 630.

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49. Ind.—Adams v. City of Fort Wayne, App., 423 N.E.2d 647.

Ky.—City of Elizabethtown v. Hadin County Fiscal Court, App., 551 S.W.2d 252.

N.M.—Board of County Com'rs of San Miguel County v. City of Las Vegas, 622 P.2d 695, 95 N.M. 387.

50. Ill.—People ex rel. Aurora Nat. Bank v. City of Batavia, 414 N.E.2d 916, 46 Ill.Dec. 863, 91 Ill. App.3d 716.

Md.—Harbor Island Marina, Inc. v. Board of County Com'rs of Calvert County, Md., 407 A.2d 738, 286 Md. 303.

N.C.—Sellers v. City of Asheville, 236 S.E.2d 283, 33 N.C.App. 544.

§ 22. Constitutional Restrictions

54. Ill.—Welch v. City of Evanston, 382 N.E.2d 615, 22 Ill.Dec. 295, 65 Ill.App.3d 249.

56. Nev.—City of Sparks v. Best, 605 P.2d 638, 96 Nev. 134.

First Amendment; overbreadth

U.S.—Amico v. New Castle County, D.C.Del., 101 F.R.D. 472, aff'd 770 F.2d 1066.

§ 23. — Due Process and Equal Protection of Laws

Library References

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59. Ala.—C.J.S. cited in Lynnwood Property Owners Ass'n v. Lands Described in Complaint, 359 So.2d 357, 359.

N.J.—State v. Baker, 405 A.2d 368, 81 N.J. 99—Home Builders League of South Jersey, Inc. v. Berlin Tp., 405 A.2d 381, 81 N.J. 127.

Due process protections apply not only to the enactment of zoning laws, but to the decisions made in the application of the laws.^{95,3}

59.5. Wash.—Norco Const., Inc. v. King County, 649 P.2d 103, 97 Wash.2d 680.

60. U.S.—Stansberry v. Holmes, C.A.Tex., 613 F.2d 1285, rehearing denied 616 F.2d 568, certiorari denied 101 S.Ct. 240, 449 U.S. 886, 66 L.Ed.2d 112.

Me.—Warren v. Municipal Officers of Town of Gorham, 431 A.2d 624—Penobscot Area Housing Development Corp. v. City of Brewer, 434 A.2d 14, 32 A.L.R.4th 1002.

Ohio—Mintz v. Village of Pepper Pike, 386 N.E.2d 849, 57 Ohio App.2d 185, 11 O.O.3d 180.

R.I.—Santini v. Lyons, 448 A.2d 124.

Tex.—Helton v. City of Burkburnett, App., 619 S.W.2d 23, err. ref. no rev. err., app. dism. 102 S.Ct. 2002, 456 U.S. 940, 72 L.Ed.2d 462.

Population restrictions not arbitrary

U.S.—Rogin v. Bensalem Tp., C.A.Pa., 616 F.2d 680, cert. den. 101 S.Ct. 1737, 450 U.S. 1029, 68 L.Ed.2d 223.

Reasonable basis

Mich.—Robinson Tp. v. Knoll, 302 N.W.2d 146, 410 Mich. 293, 17 A.L.R.4th 79.

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61. N.J.—Sheerr v. Eveham Tp., 445 A.2d 46, 184 N.J.Super. 11.

Ohio—Mintz v. Village of Pepper Pike, 386 N.E.2d 849, 57 Ohio App.2d 185, 11 O.O.3d 180.

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64. N.Y.—Seidner v. Town of Islip, 439 N.E.2d 352, 56 N.Y.2d 1004, 453 N.Y.S.2d 636.

65. U.S.—Rogin v. Bensalem Tp., C.A.Pa., 616 F.2d 680, cert. den. 101 S.Ct. 1737, 450 U.S. 1029, 68 L.Ed.2d 223.

66. La.—Hernandez v. City of Lafayette, App., 399 So.2d 1179, app. dism. 102 S.Ct. 1242, 455 U.S. 901, 71 L.Ed.2d 440.

68. Mo.—Loomstein v. St. Louis County, App., 609 S.W.2d 443—Despotis v. City of Sunset Hills, App., 619 S.W.2d 814.

Pa.—Zoning Hearing Bd. of Willistown Tp. v. Lenox Homes, Inc., 439 A.2d 218, 64 Pa.Cmwlth. 74.

74. No notice

Ohio—Ciorrella, Inc. v. Jerusalem Tp. Bd. of Zoning Appeals, 392 N.E.2d 574, 59 Ohio App.2d 31, 13 O.O.3d 99.

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75. U.S.—Sachetti v. Blair, D.C.N.Y., 536 F.Supp. 636.

76. Height of buildings

U.S.—Amdur v. City of Chicago, C.A.Ill., 638 F.2d 37, cert. den. 101 S.Ct. 3031, 452 U.S. 905, 69 L.Ed.2d 406.

77. N.J.—State v. C.I.B. Intern., 416 A.2d 362, 83 N.J. 262.

Moratorium on permits for fast-food restaurants
U.S.—Schafer v. City of New Orleans, C.A.La., 743 F.2d 1086.

79. U.S.—Beasley v. Potter, D.C.Mich., 493 F.Supp. 1059.

Ala.—Sigler v. City of Mobile, 387 So.2d 813.

Colo.—City of Commerce City v. Cooper, 609 P.2d 106, 198 Colo. 553, cert. den. 100 S.Ct. 1842, 446 U.S. 912, 64 L.Ed.2d 265, reh. den. 100 S.Ct. 3004, 447 U.S. 916, 64 L.Ed.2d 865.

Ill.—First Nat. Bank of Des Plaines v. City of Des Plaines, 410 N.E.2d 190, 43 Ill.Dec. 190, 87 Ill. App.3d 791.

Ind.—Dandy Co., Inc. v. Civil City of South Bend, County-City Complex, App., 401 N.E.2d 1380.

Mass.—Vitale v. Planning Bd. of Newburyport, 409 N.E.2d 237, 10 Mass.App. 483.

Tex.—Marriott v. City of Dallas, App. 5 Dist., 635 S.W.2d 561, affd. 644 S.W.2d 469.

Nuisance ordinance invalid

Mid.—Miller v. Maloney Concrete Co., 491 A.2d 1218, 63 Md.App. 38.

80. Colo.—City of Commerce City v. Cooper, 609 P.2d 106, 198 Colo. 553, cert. den. 100 S.Ct. 1842, 446 U.S. 912, 64 L.Ed.2d 265, reh. den. 100 S.Ct. 3004, 447 U.S. 916, 64 L.Ed.2d 865.

Ind.—Field v. Area Plan Commission of Grant County, Ind., App., 421 N.E.2d 1132.

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86. Va.—City of Manassas v. Rosson, 294 S.E.2d 799, 224 Va. 12, app. dism. 103 S.Ct. 809, 459 U.S. 1166, 74 L.Ed.2d 1009.

88. N.J.—Trombetta v. Mayor and Com'rs of City of Atlantic City, 436 A.2d 1349, 181 N.J.Super. 203, affd. 454 A.2d 900, 187 N.J.Super. 351.

R.I.—Santini v. Lyons, 448 A.2d 124.

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89. N.J.—Trombetta v. Mayor and Com'rs of City of Atlantic City, 436 A.2d 1349, 181 N.J.Super. 203, affd. 454 A.2d 900, 187 N.J.Super. 351.

Lack of rational basis

R.I.—Johnson & Wales College v. Di Prete, 448 A.2d 1271.

The existence of a grandfather clause in a zoning ordinance under which pre-existing uses are continued does not deny equal protection to the persons subject to terms of the ordinance.^{89.5}

89.5. Ala.—Bingham v. City of Tuscaloosa, 383 So.2d 542.

W.Va.—DeCoals, Inc. v. Board of Zoning Appeals of City of Westover, 284 S.E.2d 856.

92. Mich.—Belkin v. City of Birmingham, 276 N.W.2d 465, 87 Mich.App. 690, mod., on oth. grds., 278 N.W.2d 43, 406 Mich. 949.

94. U.S.—Purple Onion, Inc. v. Jackson, D.C.Ga., 511 F.Supp. 1207.

99. Ind.—Jones v. Hendricks County Plan Commission, App., 435 N.E.2d 82.

1. Ga.—Gouge v. City of Snellville, 287 S.E.2d 539, 249 Ga. 91.

Discriminatory enforcement not shown

R.I.—Santini v. Lyons, 448 A.2d 124.

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3. N.J.—Matter of Egg Harbor Associates, 449 A.2d 1324, 185 N.J.Super. 507, affd. 464 A.2d 1115, 94 N.J. 358.

N.Y.—McMinn v. Town of Oyster Bay, 445 N.Y.S.2d 859, 111 Misc.2d 1046, mod. on oth. grds. and affd., 482 N.Y.S.2d 773, 105 A.D.2d 46.

Christmas light display restrictions

La.—Rodrigue v. Copeland, App. 5 Cir., 465 So.2d 67, revd. on oth. grds. 475 So.2d 1071, contempt gr. 479 So.2d 356, issued 479 So.2d 911.

4. Multi-family dwelling

U.S.—Metropolitan Housing Development Corp. v. Village of Arlington Heights, D.C.Ill., 373 F.Supp. 208, revd. on oth. grds. C.A., 517 F.2d 409, revd. on oth. grds. 97 S.Ct. 355, 429 U.S. 252, 50 L.Ed.2d 450, on remand C.A., 538 F.2d 1283, cert. den. 98 S.Ct. 752, 434 U.S. 1025, 54 L.Ed.2d 772, on remand D.C., 469 F.Supp. 836, affd. C.A., 616 F.2d 1006.

5. Utah—Thurston v. Cache County, 626 P.2d 440.

Requiring special permit for mentally retarded group home

U.S.—City of Cleburne, Tex. v. Cleburne Living Center, Tex., 105 S.Ct. 3249, 87 L.Ed.2d 313.

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6. Va.—City of Staunton v. Cash, 263 S.E.2d 45, 220 Va. 742.

Denial of variance not discriminatory

Cal.—Court House Plaza Co. v. City of Palo Alto, 173 Cal.Rptr. 161, 117 C.A.3d 871, app. dism., cert. den. 102 S.Ct. 623, 454 U.S. 1074, 70 L.Ed.2d 607.

Ohio—Brown v. City of Cleveland, 420 N.E.2d 103, 66 Ohio St.2d 93, 20 O.O.3d 88.

7. U.S.—Purple Onion, Inc. v. Jackson, D.C.Ga., 511 F.Supp. 1207—America's Best Family Showplace Corp. v. City of New York, Dept. of Bldg., D.C.N.Y., 536 F.Supp. 170.

Ind.—Hills v. Area Plan Commission of Vermillion County, App., 416 N.E.2d 456.

La.—Folsom Road Civic Ass'n v. St. Tammany Parish, 407 So.2d 1219.

Ohio—Gerzeny v. Richfield Tp., 405 N.E.2d 1034, 62 Ohio St.2d 339, 16 O.O.3d 396.

Wis.—Brookhill Development, Ltd. v. City of Waukesha, 299 N.W.2d 610, 99 Wis.2d 485, affd. 307 N.W.2d 242, 103 Wis.2d 27.

Sale or storage of automobiles

Ga.—Puckett v. Paulding County, 265 S.E.2d 579, 245 Ga. 439, cert. den. 101 S.Ct. 111, 449 U.S. 836, 66 L.Ed.2d 43.

8. Va.—City of Manassas v. Rosson, 294 S.E.2d 799, 224 Va. 12, app. dism. 103 S.Ct. 809, 459 U.S. 1166, 74 L.Ed.2d 1009.

11. Ark.—Yarborough v. Arkansas State Highway Commission, 539 S.W.2d 419, 260 Ark. 161.

Cal.—People ex rel. Dept. of Transp. v. Desert Outdoor Advertising, Inc., 137 Cal.Rptr. 221, 68 C.A.3d 440.

Colo.—Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 575 P.2d 835, 195 Colo. 44, app. dism. 99 S.Ct. 66, 439 U.S. 809, 58 L.Ed.2d 101.

Ga.—National Advertising Co. v. State Highway Dept., 195 S.E.2d 895, 230 Ga. 119.

Ill.—Rent-A-Sign v. City of Rockford, 406 N.E.2d 943, 40 Ill.Dec. 740, 85 Ill.App.3d 453.

La.—Inn of Hammond, Inc. v. State, Dept. of Transp. and Development, 376 So.2d 1318.

Me.—State By and Through Dept. of Transp. v. National Advertising Co., 387 A.2d 745.

Md.—Gosman v. Prince George's County, 397 A.2d 630, 41 Md.App. 479.

Minn.—State, by Spannaus v. Lutsen Resorts, Inc., 310 N.W.2d 495.

Miss.—Mississippi State Highway Commission v. Roberts Enterprises, Inc., 304 So.2d 637, 81 A.L.R.3d 557.

N.Y.—Suffolk Outdoor Advertising Co., Inc. v. Hulse, 393 N.Y.S.2d 416, 56 A.D.2d 365, mod. on oth. grds. 373 N.E.2d 263, 43 N.Y.2d 483, 402 N.Y. S.2d 368, app. dism. 99 S.Ct. 66, 439 U.S. 808, 58 L.Ed.2d 101, revd. on oth. grds. 383 N.E.2d 876, 45 N.Y.2d 922, 411 N.Y.S.2d 230.

N.C.—Cumberland County v. Eastern Federal Corp., 269 S.E.2d 672, 48 N.C.App. 518, review den. 273 S.E.2d 453, 301 N.C. 527—R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388, 58 N.C.App. 697, app. dism., cert. den. 297 S.E.2d 400, 307 N.C. 127.

Or.—Van v. Travel Information Council, 628 P.2d 1217, 52 Or.App. 399.

Wash.—Markham Advertising Co. v. State, 439 P.2d 248, 73 Wash.2d 405, app. dism. 89 S.Ct. 553, 393 U.S. 316, 21 L.Ed.2d 512, reh. den. 89 S.Ct. 854, 393 U.S. 1112, 21 L.Ed.2d 813—Ackley Communications, Inc. v. City of Seattle, 602 P.2d 1177, 92 Wash.2d 905, app. dism., cert. den. 101 S.Ct. 49, two cases, 449 U.S. 804, 66 L.Ed.2d 7—State v. Yard Birds, Inc., 513 P.2d 1030, 9 Wash.App. 514.

§ 24. — Taking of Property without Compensation

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12. Minimum age requirement

N.J.—Taxpayers Ass'n of Weymouth Tp., Inc. v. Weymouth Tp., 364 A.2d 1016, 80 N.J. 6, 83 A.L.R.3d 1051, cert. den. 98 S.Ct. 1672, 430 U.S. 977, 52 L.Ed.2d 373.

Size of mobile home

N.C.—Currituck County v. Willey, 266 S.E.2d 52, 46 N.C.App. 835, review den. 283 S.E.2d 131, 301 N.C. 234.

14. U.S.—Agins v. City of Tiburon, Cal., 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106.

American Sav. and Loan Ass'n v. Marin County, C.A.Cal., 653 F.2d 364.

Mich.—Belkin v. City of Birmingham, 276 N.W.2d 465, 87 Mich.App. 690, mod. on oth. grds. 278 N.W.2d 43, 406 Mich. 949.

Tenn.—McClurkan v. Board of Zoning Appeals for Metropolitan Government of Nashville and Davidson County, App., 565 S.W.2d 495.

Use for public purposes

(3) Other instances.

- Minn.—McShane v. City of Faribault, 292 N.W.2d 253, 18 A.L.R.4th 531.
Neb.—Simpson v. City of North Platte, 292 N.W.2d 297, 206 Neb. 240, app. after remand 338 N.W.2d 450, 215 Neb. 351.

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15. Mass.—MacNeil v. Town of Avon, 435 N.E.2d 1043, 386 Mass. 339.

Standard of substantial diminution in value of property

- Minn.—McShane v. City of Faribault, 292 N.W.2d 253, 18 A.L.R.4th 531.

16. U.S.—Agins v. City of Tiburon, Cal., 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106.

- Cal.—People v. Superior Court of Sonoma County, 154 Cal.Rptr. 54, 91 C.A.3d 95.

- W.Va.—Trovato v. Town of Star City, 276 S.E.2d 834.

17. U.S.—Kinzli v. City of Santa Cruz, D.C.Cal., 539 F.Supp. 887.

- D.C.—Citizens Committee to Save Historic Rhodes Tavern v. District of Columbia Dept. of Housing and Community Development, App., 432 A.2d 710, cert. den. 102 S.Ct. 599, 454 U.S. 1054, 70 L.Ed.2d 590.

- La.—Trustees Under Will of Pomeroy v. Town of Westlake, App., 357 So.2d 1299, writ den., Sup., 359 So.2d 205.

- Mass.—MacNeil v. Town of Avon, 435 N.E.2d 1043, 386 Mass. 339.

Zoned solely for governmental uses

- N.D.—Rippley v. City of Lincoln, 330 N.W.2d 505.

19. U.S.—Agins v. City of Tiburon, Cal., 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106.

- Hotel Cosmo Springs, Inc. v. Colon, D.C.Puerto Rico, 539 F.Supp. 1008.

- Cal.—Gilliland v. Los Angeles County, 179 Cal.Rptr. 73, 126 C.A.3d 610, app. dism. 102 S.Ct. 2227, 456 U.S. 967, 72 L.Ed.2d 840.

- Fla.—Dade County v. Yumbo, S.A., App., 348 So.2d 392—Smith v. City of Clearwater, App., 383 So.2d 681, 19 A.L.R.4th 745, review dism., Sup., 403 So.2d 407.

- Ga.—City of Smyrna v. Parks, 242 S.E.2d 73, 240 Ga. 699, 1 A.L.R.4th 364.

- Ill.—City of Chillicothe v. Stoecker, 374 N.E.2d 259, 15 Ill.Dec. 824, 58 Ill.App.3d 303.

- Mass.—MacNeil v. Town of Avon, 435 N.E.2d 1043, 386 Mass. 339.

- N.J.—Usdin v. State, Dept. of Environmental Protection, Division of Water Resources, 414 A.2d 280, 173 N.J.Super. 311, aff'd. 430 A.2d 949, 179 N.J.Super. 113.

- N.M.—Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565, 98 N.M. 138.

- Tenn.—Mobile Home City of Chattanooga v. Hamilton County, 352 S.W.2d 86, cert. den. 97 S.Ct. 2678, 431 U.S. 956, 53 L.Ed.2d 273.

- Wash.—J & B Development Co., Inc. v. King County, 631 P.2d 1002, 29 Wash.App. 942, aff'd. 669 P.2d 468, 100 Wash.2d 299.

Nexus test

- Neb.—Simpson v. City of North Platte, 292 N.W.2d 297, 206 Neb. 240, app. after remand 338 N.W.2d 450, 215 Neb. 351.

Prohibition on cutting trees

- Me.—Seven Islands Land Co. v. Maine Land Use Regulation Com'n, 450 A.2d 475.

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- Me.—Shiley v. Inhabitants of Town of Wells, 462 A.2d 27.

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21. U.S.—Conf v. DeBlaker, C.A.Fla., 652 F.2d 585, cert. den. 102 S.Ct. 1278, 455 U.S. 921, 71 L.Ed.2d 462.

- Cal.—Orsatti v. City of Fremont, 146 Cal.Rptr. 75, 80 C.A.3d 806.

- Conn.—Curry v. Planning and Zoning Commission of Town of Guilford, Conn. Pl., 376 A.2d 79, 34 Conn.Supp. 52.

- Fla.—Moviematic Industries Corp. v. Board of County Com'rs of Metropolitan Dade County, App., 349 So.2d 667.

- Mich.—Schwartz v. City of Flint, 285 N.W.2d 344, 92 Mich.App. 495, app. after remand 329 N.W.2d 26, 120 Mich.App. 449.

Inability to receive reasonable return on investment insufficient

- U.S.—Park Ave. Tower Associates v. City of New York, C.A.N.Y., 746 F.2d 135, cert. den. 105 S.Ct. 1854.

22. U.S.—Agins v. City of Tiburon, Cal., 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106.

23. U.S.—Kinzli v. City of Santa Cruz, D.C.Cal., 539 F.Supp. 887.

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24. Deprivation economically viable use of property not shown

- Tenn.—City of Clarksville v. Moore, 688 S.W.2d 428.

- Tenn.—City of Clarksville v. Moore, 688 S.W.2d 428.

§ 25. Reasonableness and Equitable Application

26. Cal.—Benny v. City of Alameda, 164 Cal.Rptr. 776, 105 C.A.3d 1006.

- Conn.—Raybestor-Manhattan, Inc. v. Planning & Zoning Commission of Town of Trumbull, 442 A.2d 65, 186 Conn. 466.

- Ill.—Ward v. Cook County, 386 N.E.2d 309, 25 Ill.Dec. 38, 68 Ill.App.3d 563.

- Ky.—Lampton v. Pinaire, App., 610 S.W.2d 915.

27. N.Y.—Welt v. Town of Islip, 432 N.Y.S.2d 214, 78 A.D.2d 638.

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32. La.—Trustees Under Will of Pomeroy v. Town of Westlake, App., 357 So.2d 1299, writ den., Sup., 359 So.2d 205.

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43. Mass.—Bible Speaks v. Board of Appeals of Lenox, 391 N.E.2d 279, 8 Mass.App. 19.

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45. No valid governmental objective served

- La.—Special Children's Village, Inc. v. City of Baton Rouge, App. 1 Cir., 472 So.2d 233.

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53. Ga.—Gouge v. City of Snellville, 287 S.E.2d 539, 249 Ga. 91.

§ 26. — Considerations Involved in Determination

58. D.C.—Citizens Ass'n of Georgetown v. District of Columbia Bd. of Zoning Adjustment, App., 403 A.2d 737.

Moratorium law void for exceeding reasonable time

- N.Y.—Lakeview Apartments of Hunns Lake, Inc. v. Town of Stamford, 2 Dept., 485 N.Y.S.2d 801, 108 A.D.2d 914.

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60. Ill.—Smith v. County Bd. of Madison County, 408 N.E.2d 452, 42 Ill.Dec. 74, 86 Ill.App.3d 708.

63. Ill.—Ward v. Cook County, 386 N.E.2d 309, 25 Ill.Dec. 38, 68 Ill.App.3d 563.

67. Ill.—Village of Glenview v. Velasquez, App. 1 Dist., 463 N.E.2d 873, 79 Ill.Dec. 319, 123 Ill. App.3d 806.

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73. Ill.—Kluse v. City of Calumet City, 371 N.E.2d 61, 13 Ill.Dec. 366, 55 Ill.App.3d 403.

79. Cal.—Friedman v. City of Fairfax, 146 Cal.Rptr. 687, 81 C.A.3d 667.

§ 27. Discrimination

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91. U.S.—Penn Cent. Transp. Co. v. City of New York, N.Y., 98 S.Ct. 2646, 438 U.S. 104, 57 L.Ed.2d 631, reh. den. 99 S.Ct. 226, 439 U.S. 883, 58 L.Ed.2d 198.

- N.J.—State v. Baker, 405 A.2d 368, 81 N.J. 99.

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92. Obligation to zone for low to moderate income housing

- N.Y.—Asian American for Equality v. Koch, 492 N.Y. S.2d 837, 129 Misc.2d 67.

98. N.J.—Washington Tp. v. Central Bergen Community Mental Health Center, Inc., 383 A.2d 1194, 156 N.J.Super. 388.

Local pressures and improper influences on government officials are proper subjects for court to consider in determining whether or not a party has been deprived of procedural due process in a zoning matter.^{2,3}

- 2.5. U.S.—Matter of White, Bkrtcy. Mich., 2 B.R. 656.

§ 28. Certainty and Definiteness of Regulation

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6. Ill.—City of Chicago v. Scandia Books, Inc., 430 N.E.2d 14, 58 Ill.Dec. 72, 102 Ill.App.3d 292.

- Mass.—North Landers Corp. v. Planning Bd. of Falmouth, 416 N.E.2d 934, 382 Mass. 432.

- N.H.—Durant v. Town of Dunbarton, 430 A.2d 140, 121 N.H. 352.

§ 29. Delegation of Zoning Power in General

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17. Tex.—Southern Nat. Bank of Houston v. City of Austin, Civ.App., 582 S.W.2d 229, err. ref. no rev. err.

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21. Ga.—Clark v. International Horizons, Inc., 252 S.E.2d 488, 243 Ga. 63.

- Md.—Montgomery County v. Woodward & Lothrop, Inc., 376 A.2d 483, 280 Md. 686, cert. den. 98 S.Ct. 1245, 434 U.S. 1067, 55 L.Ed. 769.

- N.Y.—Dur-Bar Realty Co. v. City of Utica, 394 N.Y. S.2d 913, 57 A.D.2d 51, app. den. 367 N.E.2d 51, 42 N.Y.2d 960, 398 N.Y.S.2d 146, aff'd. 380 N.E.2d 328, 44 N.Y.2d 1002, 408 N.Y.S.2d 502.

- R.I.—Dean v. Zoning Bd. of Review of City of Warwick, 390 A.2d 382, 120 R.I. 825.

- Wash.—West Slope Community Council v. City of Tacoma, 569 P.2d 1183, 18 Wash.App. 328.

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28. Ind.—Tippecanoe County Area Plan Commission v. Sheffield Developers, Inc., 394 N.E.2d 176, 181 Ind.App. 586.

33. Pa.—Hook v. Zoning Hearing Bd. for Harvey's Lake Borough, 397 A.2d 15, 39 Pa.Cmwlth. 570.

§ 30. Requirement of Consent of Property Owners

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37. S.D.—State Theatre Co. v. Smith, 276 N.W.2d 239.
38. Ill.—Lakin v. City of Peoria, 3 Dist., 472 N.E.2d 1233, 84 Ill.Dec. 837, 129 Ill.App.3d 651.
- N.Y.—Town of Gardiner v. Stanley Orchards, Inc., 432 N.Y.S.2d 335, 105 Misc.2d 460.

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41. N.Y.—Macmillan, Inc. v. CF Lex Associates, 437 N.E.2d 1134, 56 N.Y.2d 386, 452 N.Y.S.2d 377.
44. S.D.—State Theatre Co. v. Smith, 276 N.W.2d 239.

§ 31. Standards Governing Conduct of Administrative Officials

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57. Colo.—Tri-State Generation and Transmission Co. v. City of Thornton, 647 P.2d 670.
- Conn.—Sonn v. Planning Commission of City of Bristol, 374 A.2d 159, 172 Conn. 156.
- Ill.—Kramer v. City of Chicago, 374 N.E.2d 932, 16 Ill.Dec. 157, 58 Ill.App.3d 592.
- Md.—Stewart Inv. Co. v. Board of Com'rs, St. Mary's County, 381 A.2d 1174, 38 Md.App. 381.
- Mich.—Michigan Nat. Bank v. Windsor Charter Tp., 272 N.W.2d 330, 86 Mich.App. 35.
- N.H.—Derry Sand & Gravel, Inc. v. Town of Londonderry, 431 A.2d 139, 121 N.H. 501.
- N.J.—Value Oil Co. v. Town of Irvington, 377 A.2d 1225, 152 N.J.Super. 354, aff'd. 396 A.2d 1149, 164 N.J.Super. 419.
- N.M.—Parker v. Board of County Com'rs of Dona Ana County, 603 P.2d 1098, 93 N.M. 641.
58. Mo.—Treme v. St. Louis County, App., 609 S.W.2d 706.

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59. Ind.—Tippecanoe County Area Plan Commission v. Sheffield Developers, Inc., 394 N.E.2d 176, 181 Ind.App. 586.
- Ky.—Carlton v. Taylor, App., 569 S.W.2d 679.
- La.—Furr v. Mayor and City Council of Baker, 408 So.2d 248.
- Mont.—Schanz v. City of Billings, 597 P.2d 67, 182 Mont. 328.
- W.Va.—Singer v. Davenport, 264 S.E.2d 637, 164 W.Va. 665.
60. Utah—Thurston v. Cache County, 626 P.2d 440.
61. U.S.—Deerfield Medical Center v. City of Deerfield Beach, C.A.Fla., 661 F.2d 328.
64. N.Y.—Suffolk Outdoor Advertising Co., Inc. v. Hules, 393 N.Y.S.2d 416, 56 A.D.2d 365, mod. on oth. grds. 373 N.E.2d 263, 43 N.Y.2d 483, 402 N.Y.S.2d 368, app. diss. 99 S.Ct. 66, 439 L.Ed.2d 101, rev'd. on oth. grds. 383 N.E.2d 876, 45 N.Y.2d 922, 411 N.Y.S.2d 230—Carlstein v. Zoning Bd. of Appeals of Town of Union, 419 N.Y.S.2d 307, 71 A.D.2d 768.

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66. N.Y.—Suffolk Outdoor Advertising Co., Inc. v. Hules, 393 N.Y.S.2d 416, 56 A.D.2d 365, mod. on oth. grds. 373 N.E.2d 263, app. diss. 99 S.Ct. 66, 439 U.S. 808, 58 L.Ed.2d 101, rev'd. on oth. grds. 383 N.E.2d 876, 45 N.Y.2d 922, 411 N.Y.S.2d 230.
70. Colo.—Tri-State Generation and Transmission Co. v. City of Thornton, 647 P.2d 670.
- Md.—Stewart Inv. Co. v. Board of Com'rs, St. Mary's County, 381 A.2d 1174, 38 Md.App. 381.
- N.Y.—Carroll v. Ingram, 397 N.Y.S.2d 220, 59 A.D.2d 85, app. den. 372 N.E.2d 580, 43 N.Y.2d 642, 401 N.Y.S.2d 1027, app. diss. 380 N.E.2d 352, 44 N.Y.2d 948, 408 N.Y.S.2d 1029.

§ 33. Violation of, or Failure to Enforce, Regulations

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81. Colo.—Board of County Com'rs of Boulder County v. Echternacht, 572 P.2d 143, 194 Colo. 311.
- D.C.—Wieck v. District of Columbia, Bd. of Zoning Adjustment, App., 383 A.2d 7—Hilton Hotels Corp. v. District of Columbia Bd. of Zoning Adjustment, App., 435 A.2d 1062.
- Fla.—Pasco County v. Tampa Development Corp., App., 364 So.2d 830.
- Ill.—City of Chillicothe v. Stoecker, 374 N.E.2d 259, 15 Ill.Dec. 824, 58 Ill.App.3d 303.
- Kan.—Colonial Inv. Co., Inc. v. City of Leawood, 646 P.2d 1149, 7 Kan.App.2d 660.

Vested right

(3) Fact that city had delayed some years in enforcing its zoning ordinance against improper use of property by landowners did not give rise to a vested right on the part of landowners to continue their improper use of the property.

Pa.—Marzo v. Zoning Hearing Bd. of Abington Tp., 373 A.2d 463, 30 Pa.Cmwlth. 225.

82. U.S.—Cook v. City of Price, Carbon County, Utah, C.A.Utah, 566 F.2d 699.

Utah—Provo City v. Hansen, 585 P.2d 461.

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84. D.C.—Hilton Hotels Corp. v. District of Columbia Bd. of Zoning Adjustment, App., 435 A.2d 1062.
- Ill.—Von Bokel v. City of Breese, 427 N.E.2d 322, 56 Ill.Dec. 242, 100 Ill.App.3d 956.
- Mass.—Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Palmouth, 431 N.E.2d 213, 385 Mass. 205, app. after remand 446 N.E.2d 1070, 388 Mass. 1013.
85. Vt.—Fleury v. Town of Essex Zoning Bd. of Adjustment, 449 A.2d 958, 141 Vt. 411.
86. Ill.—Lipaki v. Smyth, 373 N.E.2d 463, 15 Ill.Dec. 117, 57 Ill.App.3d 491.

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88. Colo.—Hargreaves v. Skrbina, App., 635 P.2d 221, aff'd. in part, rev'd. in part on oth. grds. Sup., 662 P.2d 1078.
- D.C.—Wieck v. District of Columbia Bd. of Zoning Adjustment, App., 383 A.2d 7.
- Fla.—Pasco County v. Tampa Development Corp., App., 364 So.2d 830.
- Hawaii—Life of the Land, Inc. v. City Council of City and County of Honolulu, 592 P.2d 26, 60 Haw. 446.
- Ill.—Truchon v. City of Streator, 388 N.E.2d 249, 26 Ill.Dec. 625, 70 Ill.App.3d 89.
- N.H.—J. E. D. Associates, Inc. v. Town of Danville, 444 A.2d 493, 122 N.H. 234.
- N.J.—City of Trenton v. Calvary Apostolic Temple, Inc., 399 A.2d 311, 166 N.J.Super. 145.
- N.Y.—303 West 42nd St. Corp. v. Klein, 389 N.E.2d 815, 46 N.Y.2d 686, 416 N.Y.S.2d 219.
- Utah—Utah County v. Baxter, 635 P.2d 61.

§ 34. Who May Attack Validity of Regulations

- 88.5. U.S.—Haskell v. Washington Tp., D.C. Ohio, 588 F.Supp. 528.
- Ga.—Smith v. Gwinnett County, 286 S.E.2d 739, 248 Ga. 882—Dunaway v. City of Marietta, 308 S.E.2d 823, 251 Ga. 727.

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- 88.30. Iowa—Hawkeye Outdoor Advertising, Inc. v. Board of Adjustment of City of Algona, 356 N.W.2d 544.
- 88.40. U.S.—Bossier City Medical Suite, Inc. v. City of Bossier City, D.C.La., 483 F.Supp. 633.
- Cal.—Stocks v. City of Irvine, 170 Cal.Rptr. 724, 114 C.A.3d 520.

Fla.—Save Brickell Ave., Inc. v. City of Miami, App., 395 So.2d 246.

Ind.—Church of Christ in Indianapolis v. Metropolitan Bd. of Zoning Appeals of Marion County (Division I), 371 N.E.2d 1331, 175 Ind.App. 346.

Or.—Stewart v. City of Eugene, 646 P.2d 74, 57 Or. App. 627, adhered to 653 P.2d 1017, 60 Or.App. 356.

89. Ga.—City of Rome v. Pilgrim, 271 S.E.2d 189, 246 Ga. 281.

Ill.—Edgemont Bank & Trust Co. v. City of Belleville, 407 N.E.2d 159, 40 Ill.Dec. 928, 85 Ill.App.3d 665.

90. Ill.—Fay v. City of Chicago, 390 N.E.2d 125, 28 Ill.Dec. 143, 71 Ill.App.3d 603.

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2. Wash.—Ackerley Communications, Inc. v. City of Seattle, 602 P.2d 1177, 92 Wash.2d 905, app. diss., cert. den. 101 S.Ct. 49, two cases, 449 U.S. 804, 66 L.Ed.2d 7.

§ 35. — Waiver, Estoppel, or Laches

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8. Estoppel not shown
- Ga.—Guhl v. Tuggle, 249 S.E.2d 219, 242 Ga. 412.
- Minn.—Pilgrim v. City of Winona, 256 N.W.2d 266.
11. Kan.—Amerine v. Board of County Com'rs of Jefferson County, 644 P.2d 477, 7 Kan.App.2d 491.

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17. Tex.—Leach v. City of North Richland Hills, App. 2 Dist., 627 S.W.2d 854.
21. Me.—Begin v. Inhabitants of Town of Sebattus, 409 A.2d 1269.

§ 37. — Partial Invalidity

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55. U.S.—15192 Thirteen Mile Rd. v. City of Warren, D.C.Mich., 593 F.Supp. 147.

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Pa.—Appeal of Kasorex, 452 A.2d 921, 70 Pa.Cmwlth. 193.

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57. Reasonable result not effected by severing ordinance
- Pa.—Hopewell Tp. Bd. of Sup'rs v. Golia, 452 A.2d 1337, 499 Pa. 246.

§ 38. In General

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64. Or.—Jurgenson v. County Court for Union County, 600 P.2d 1241, 42 Or.App. 505.
65. N.H.—In re Sayewich's Estate, 413 A.2d 581, 120 N.H. 237.
- W.Va.—Singer v. Davenport, 264 S.E.2d 637, 164 W.Va. 665.
69. Ind.—Tippecanoe County Area Plan Commission v. Sheffield Developers, Inc., 394 N.E.2d 176, 181 Ind.App. 586.
- N.J.—Chirichello v. Zoning Bd. of Adjustment of Borough of Monmouth Beach, 397 A.2d 646, 78 N.J. 544.
- S.D.—Herrmann v. Board of Com'rs of City of Aberdeen, 285 N.W.2d 855.
- Wis.—State ex rel. Columbia Corp. v. Town Bd. of Town of Pacific, App., 286 N.W.2d 130, 92 Wis.2d 767.

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72. Cal.—City of Chula Vista v. Superior Court of San Diego County, 183 Cal.Rptr. 909, 133 C.A.3d 472.
- Mass.—MacNeil v. Town of Avon, 435 N.E.2d 1043, 386 Mass. 339.
- N.J.—Mindel v. Township Council of Franklin Tp., 400 A.2d 1244, 167 N.J.Super. 461.
- Or.—Anderson v. Peden, 569 P.2d 633, 30 Or.App. 1063, affd. 587 P.2d 59, 284 Or. 313.
73. Cal.—City of Chula Vista v. Pagard, 171 Cal. Rptr. 738, 115 C.A.3d 785.
- N.Y.—Mackay v. Mayhall, 401 N.Y.S.2d 679, 92 Misc.2d 868.
74. N.H.—Beck v. Town of Raymond, 394 A.2d 847, 118 N.H. 793.
75. Pa.—Zajac v. Zoning Hearing Bd. of Mifflin Tp., 398 A.2d 244, 41 Pa.Cmwith. 7.
77. Mo.—Technical & Professional Services, Inc. v. Board of Zoning Adjustment of Jackson County, App., 558 S.W.2d 798, 96 A.L.R.3d 911.
- Pa.—Overbrook Farms Club v. Zoning Bd. of Adjustment of Philadelphia, 405 A.2d 580, 45 Pa.Cmwith. 96.

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80. Ill.—Willis v. Menard County Bd. of Com'rs, 370 N.E.2d 636, 112 Ill.Dec. 832, 55 Ill.App.3d 26.
- N.Y.—Unger v. Brandt, 397 N.Y.S.2d 278, 58 A.D.2d 1020.
81. U.S.—Besardanes v. City of Galveston, C.A.Tex., 682 F.2d 1203.
- Iowa—Montgomery v. Bremer County Bd. of Sup'rs, 299 N.W.2d 687.
- Environmental or ecological considerations
- Cal.—Sierra Club v. Kern County Bd. of Sup'rs, 179 Cal.Rptr. 261, 126 C.A.3d 698.
- Mont.—Montana Wildlife Federation v. Sager, 620 P.2d 1189.
- N.J.—Albano v. Mayor and Tp. Committee of Washington Tp., 476 A.2d 852, 194 N.J.Super. 265.
- W.Va.—DeCoats, Inc. v. Board of Zoning Appeals of City of Westover, 284 S.E.2d 856.
84. Mo.—Treme v. St. Louis County, App., 609 S.W.2d 706.

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86. Ill.—Pay v. City of Chicago, 390 N.E.2d 125, 28 Ill.Dec. 143, 71 Ill.App.3d 603.
88. Ill.—La Grange State Bank v. Cook County, 388 N.E.2d 388, 26 Ill.Dec. 673, 75 Ill.2d 301.
- W.Va.—Singer v. Davenport, 264 S.E.2d 637, 164 W.Va. 665.

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93. Ga.—Kopper Corp. v. Griswell, 272 S.E.2d 272, 246 Ga. 539.
94. Ill.—Wright v. Winnebago County, 391 N.E.2d 772, 29 Ill.Dec. 347, 73 Ill.App.3d 337.
95. Fla.—Alachua County v. Reddick, App., 368 So.2d 653.
- Mass.—Sturges v. Town of Chilmack, 402 N.E.2d 1346, 380 Mass. 246.
- N.Y.—Town of Huntington v. Park Shore Country Day Camp of Dix Hills, Inc., 390 N.E.2d 282, 47 N.Y.2d 61, 416 N.Y.S.2d 774, rearg. den. 394 N.E.2d 308, 47 N.Y.2d 1012, 420 N.Y.S.2d 1025.

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- (2) Pa.—Board of Sup'rs of Northampton Tp. v. Gentich, Cmwith., 414 A.2d 1102, 51 Pa.Cmwith. 455.

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4. Ill.—Parkway Bank & Trust Co. v. City of Chicago, 437 N.E.2d 753, 63 Ill.Dec. 104, 107 Ill.App.3d 222.
- W.Va.—Singer v. Davenport, 264 S.E.2d 637, 164 W.Va. 665.
- Fla.—Hawes v. Village of Hinesdale, 386 N.E.2d 122, 44 Ill.Dec. 918, 68 Ill.App.3d 226.

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N.Y.—Holmes v. Planning Bd. of Town of New Castle, 433 N.Y.S.2d 587, 78 A.D.2d 1.

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16. Cal.—Carmel Valley View, Ltd. v. Maggini, 155 Cal.Rptr. 208, 91 C.A.3d 318.
- Fla.—Wolff v. Dade County, App., 370 So.2d 839.
- Ill.—Wilson v. McHenry County, 416 N.E.2d 426, 48 Ill.Dec. 395, 92 Ill.App.3d 997.
- Md.—Mraz v. County Com'rs of Cecil County, 433 A.2d 771, 291 Md. 81.
- Mont.—State ex rel. Dept. of Health and Environmental Sciences v. Lesorte, 596 P.2d 477, 182 Mont. 267.
- N.H.—Keene v. Town of Meredith, 402 A.2d 166, 119 N.H. 379.
- N.M.—Board of County Com'rs of San Miguel County v. City of Las Vegas, 622 P.2d 695, 95 N.M. 387.
- Or.—Golf Holding Co. v. McEachron, 593 P.2d 1202, 39 Or.App. 675, reconsideration den. 596 P.2d 576, 40 Or.App. 643.
- Vt.—Kalakowski v. John A. Russell Corp., 401 A.2d 906, 137 Vt. 219.
17. U.S.—Penn Cent. Transp. Co. v. City of New York, N.Y., 98 S.Ct. 2646, 438 U.S. 104, 57 L.Ed.2d 631, reh. den. 99 S.Ct. 226, 439 U.S. 883, 58 L.Ed.2d 198.
- Ariz.—Levitz v. State, 613 P.2d 1259, 126 Ariz. 203.
- Colo.—Wright v. City of Lakewood, 608 P.2d 361, 43 Colo.App. 480, affd. in part, revd. in part on oth. grds., Sup., 638 P.2d 297.
- D.C.—Citizens Ass'n of Georgetown v. Zoning Commission of Dist. of Columbia, App., 392 A.2d 1027.
- Ga.—East Lands, Inc. v. Floyd County, 262 S.E.2d 51, 244 Ga. 761.
- Ill.—City of Urbana v. Champaign County, 389 N.E.2d 1185, 27 Ill.Dec. 777, 76 Ill.2d 63.
- La.—West v. City of Lake Charles, App., 375 So.2d 206, writ den., Sup., 378 So.2d 435.
- N.Y.—Curtis-Wright Corp. v. Town of East Hampton, 442 N.Y.S.2d 125, 82 A.D.2d 551.
- N.C.—A-S-P Associates v. City of Raleigh, 258 S.E.2d 444, 298 N.C. 207.
- Ohio—Garcia v. Siffria Residential Ass'n, 407 N.E.2d 1369, 63 Ohio St.2d 259, 17 O.O.3d 167, cert. den. 101 S.Ct. 1349, 450 U.S. 911, 67 L.Ed.2d 334.
- Or.—Heilman v. City of Roseburg, 591 P.2d 390, 39 Or.App. 71.
- R.I.—Masolella v. City of Providence, 439 A.2d 1370.
- Wash.—Olympic View-Mukilteo Action Group v. City of Mukilteo, 649 P.2d 116, 97 Wash.2d 707.
- South Hill Sewer Dist. v. Pierce County, 591 P.2d 877, 22 Wash.App. 738.
- W.Va.—Singer v. Davenport, 264 S.E.2d 637, 164 W.Va. 665.

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(2) Plan is guideline and not binding.

- Neb.—Simpson v. City of North Platte, 292 N.W.2d 297, 206 Neb. 240, app. after remand 338 N.W.2d 450, 215 Neb. 351.

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18. Cal.—Stevens v. City of Glendale, 178 Cal.Rptr. 367, 125 C.A.3d 986.
- Idaho—Dawson Enterprises, Inc. v. Blaine County, 567 P.2d 1257, 98 Idaho 506.
19. Ill.—Parkway Bank and Trust Co. v. Lake County, 389 N.E.2d 882, 27 Ill.Dec. 651, 71 Ill.App.3d 421.
- Mont.—Allen v. Flathead County, 601 P.2d 399, 184 Mont. 58.
20. Md.—Kaner v. Montgomery County Council, 373 A.2d 5, 35 Md.App. 715.
- Vt.—Smith v. Winkhall Planning Commission, 436 A.2d 760, 140 Vt. 178.
- Wash.—South Hill Sewer Dist. v. Pierce County, 591 P.2d 877, 22 Wash.App. 738—West Hall Citizens

for Controlled Development Density v. King County Council, 627 P.2d 1002, 29 Wash.App. 168.

23. Neb.—Holmgren v. City of Lincoln, 256 N.W.2d 686, 199 Neb. 178.

Or.—Willamette University v. Land Conservation and Development Commission, 608 P.2d 1178, 45 Or. App. 355.

Pa.—Klem v. Zoning Hearing Bd. of Jackson Tp., 387 A.2d 667, 35 Pa.Cmwith. 560.

24. Ohio—Central Motors Corp. v. City of Pepper Pike, 409 N.E.2d 258, 63 Ohio App.2d 34, 17 O.O.3d 240, app. after remand 457 N.E.2d 1178, 9 Ohio App.3d 18, 9 O.B.R. 19.

25. Ky.—Fiscal Court of Jefferson County v. Ogden, App., 556 S.W.2d 899.

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Mich.—Orion Tp. v. Weber, 269 N.W.2d 275, 83 Mich. App. 712.

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26. Ill.—City of Urbana v. Champaign County, 389 N.E.2d 1185, 27 Ill.Dec. 777, 76 Ill.2d 63.
- Md.—Howard County, Md. v. Dorsey, 438 A.2d 1339, 292 Md. 351.
36. N.C.—A-S-P Associates v. City of Raleigh, 258 S.E.2d 444, 298 N.C. 207.
39. Idaho—State v. City of Hailey, 633 P.2d 576, 102 Idaho 511.
40. Ky.—Bryan v. Salmon Corp., App., 554 S.W.2d 912.

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49. Idaho—Dawson Enterprises, Inc. v. Blaine County, 567 P.2d 1257, 98 Idaho 506.
- Tex.—City of Brookside Village v. Comeau, 633 S.W.2d 790, cert. den. 103 S.Ct. 570, 459 U.S. 1087, 74 L.Ed.2d 932.

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- (1) N.Y.—Herrington v. Town of Mexico, 398 N.Y. S.2d 818, 91 Misc.2d 861.
50. Idaho—Dawson Enterprises, Inc. v. Blaine County, 567 P.2d 1257, 98 Idaho 506.

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- Md.—Cardon Investments v. Town of New Market, 485 A.2d 678, 302 Md. 77.
51. N.H.—Town of Nottingham v. Harvey, 424 A.2d 1125, 120 N.H. 889.

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52. Tex.—Bernard v. City of Bedford, Civ.App., 593 S.W.2d 809, err. ref. no rev. err.
55. N.Y.—Herrington v. Town of Mexico, 398 N.Y. S.2d 818, 91 Misc.2d 861.

§ 41. — Boundary Lines

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72. Mont.—Montana Wildlife Federation v. Sager, 620 P.2d 1189.
- N.C.—Adams v. North Carolina Dept. of Natural and Economic Resources, 249 S.E.2d 402, 295 N.C. 683.
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73. Pa.—Appeal of Donofrio, 377 A.2d 1017, 31 Pa. Cmwith. 579.
79. Ill.—Heller v. City of Chicago, 387 N.E.2d 745, 25 Ill.Dec. 869, 69 Ill.App.3d 815.

81. Fla.—Allapattah Community Ass'n, Inc. of Florida v. City of Miami, App., 379 So.2d 387.

Ill.—Edgemont Bank & Trust Co. v. City of Belleville, 407 N.E.2d 159, 40 Ill.Dec. 928, 85 Ill.App.3d 665.

82. Ill.—Concerned Citizens for McHenry, Inc. v. City of McHenry, 395 N.E.2d 944, 32 Ill.Dec. 563, 76 Ill.App.3d 798.

85. Ill.—Matlob v. Village of Cahokia, 405 N.E.2d 396, 39 Ill.Dec. 643, 84 Ill.App.3d 319.

§ 42. — Floating Zones; Planned Unit Developments

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90. Md.—Kaner v. Montgomery County Council, 373 A.2d 5, 35 Md.App. 715.

§ 43. Propriety of Classification and Uniformity of Operation in General

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99. Ill.—La Grange State Bank v. Cook County, 388 N.E.2d 388, 26 Ill.Dec. 673, 75 Ill.2d 301.

1. Md.—Prince George's County v. Equitable Trust Co., Inc., 408 A.2d 737, 44 Md.App. 272.

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(1) Ariz.—Wait v. City of Scottsdale, 618 P.2d 601, 127 Ariz. 107.

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3. Ill.—Wilson v. McHenry County, 416 N.E.2d 426, 48 Ill.Dec. 395, 92 Ill.App.3d 997.

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6. Colo.—Board of County Com'rs of Jefferson County v. Mountain Air Ranch, 563 P.2d 341, 192 Colo. 364.

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Minn.—Northwestern College v. City of Arden Hills, 281 N.W.2d 865.

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7. N.Y.—Town of Huntington v. Park Shore Country Day Camp of Dix Hills, Inc., 390 N.E.2d 282, 47 N.Y.2d 61, 416 N.Y.S.2d 774, rearg. den. 394 N.E.2d 308, 47 N.Y.2d 1012, 420 N.Y.S.2d 1025.

8. Ill.—Welch v. City of Evanston, 382 N.E.2d 615, 22 Ill.Dec. 295, 65 Ill.App.3d 249.

9. Cal.—Viso v. State, 154 Cal.Rptr. 580, 92 C.A.3d 15.

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La.—Trustees Under Will of Pomeroy v. Town of Westlake, App., 357 So.2d 1299, writ den., Sup., 359 So.2d 205.

10. Ill.—Oak Park Trust and Sav. Bank v. Village of Palos Park, Cook County, 435 N.E.2d 1265, 62 Ill.Dec. 293, 106 Ill.App.3d 394.

11. Cal.—J-Marion Co., Inc. v. Sacramento County, Bd. of Sup'rs, 142 Cal.Rptr. 723, 76 C.A.3d 517.

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14. Ill.—Kluse v. City of Calumet City, 371 N.E.2d 61, 13 Ill.Dec. 366, 55 Ill.App.3d 403—Georgen v. Village of Mount Prospect, 382 N.E.2d 523, 22 Ill.Dec. 203, 65 Ill.App.3d 512.

16. Ill.—American Nat. Bank & Trust Co. of Rockford v. City of Rockford, 371 N.E.2d 337, 13 Ill.Dec. 620, 55 Ill.App.3d 806.

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18. Ill.—American Nat. Bank and Trust Co. of Chicago v. Village of Oak Lawn, 401 N.E.2d 963, 36 Ill.Dec. 825, 81 Ill.App.3d 952.

22. Ill.—Scandrol v. City of Rockford, 408 N.E.2d 436, 32 Ill.Dec. 58, 86 Ill.App.3d 999.

§ 44. Spot Zoning

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26. Cal.—Viso v. State, 154 Cal.Rptr. 580, 92 C.A.3d 15.

D.C.—Citizens Ass'n of Georgetown, Inc. v. District of Columbia Zoning Commission, App., 402 A.2d 36.

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Wis.—Howard v. Village of Elm Grove, 257 N.W.2d 850, 80 Wis.2d 33.

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27. Ill.—Chicago Title & Trust Co. v. Village of Skokie, Cook County, 376 N.E.2d 313, 17 Ill.Dec. 314, 60 Ill.App.3d 221.

Wash.—Cathcart-Malby-Clearview Community Council v. Snohomish County, 634 P.2d 853, 96 Wash.2d 201.

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(1) Other statements.

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28. La.—Trustees Under Will of Pomeroy v. Town of Westlake, App., 357 So.2d 1299, writ den., Sup., 359 So.2d 205.

Neb.—Holmgren v. City of Lincoln, 256 N.W.2d 686, 199 Neb. 178.

Va.—Board of Sup'rs of Henrico County v. Fralin and Waldron, Inc., 278 S.E.2d 859, 222 Va. 218.

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29. D.C.—Friendship Neighborhood Coalition v. District of Columbia Bd. of Zoning Adjustment, App., 403 A.2d 291.

Ga.—Hyde v. Smith, 265 S.E.2d 853, 153 Ga.App. 521.

Idaho.—Dawson Enterprises, Inc. v. Blaine County, 567 P.2d 1257, 98 Idaho 506.

La.—C.J.S., cited in Hardy v. Mayor and Bd. of Aldermen, City of Eunice, App., 348 So.2d 143, 147, writ den., Sup., 350 So.2d 1212.

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§ 46. Density of Population or Use; Exclusionary Zoning

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 Mass.—Goldman v. Town of Dennis, 375 N.E.2d 1212, 375 Mass. 197.
 15. Ark.—Taylor v. City of Little Rock, 583 S.W.2d 72, 266 Ark. 384.
 Cal.—Agins v. City of Tiburon, 157 Cal.Rptr. 372, 598 P.2d 25, 24 C.3d 266, aff'd. 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106.
 Ga.—DeKalb County v. Chamblee Dunwoody Hotel Partnership, 281 S.E.2d 525, 248 Ga. 186.
 Ill.—Georgan v. Village of Mount Prospect, 382 N.E.2d 523, 22 Ill.Dec. 203, 65 Ill.App.3d 512.
 Me.—Penobscot Area Housing Development Corp. v. City of Brewer, 434 A.2d 14, 32 A.L.R.4th 1002.
 Mo.—Clarkson Valley Estates, Inc. v. Village of Clarkson Valley, App., 630 S.W.2d 151.
 N.Y.—Group House of Port Washington, Inc. v. Board of Zoning and Appeals of Town of North Hemp-

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stead, 380 N.E.2d 207, 45 N.Y.2d 266, 408 N.Y. S.2d 377.

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16. Ill.—LaSalle Nat. Bank and Trust Co. v. Cook County, 418 N.E.2d 932, 49 Ill.Dec. 912, 94 Ill. App.3d 341.
17. N.H.—Heary and Murphy, Inc. v. Town of Alkenstown, 424 A.2d 1132, 120 N.H. 910.
18. Ill.—Du Page Trust Co. v. Village of Glen Ellyn, 376 N.E.2d 1049, 17 Ill.Dec. 720, 60 Ill.App.3d 409.
- N.J.—Pascack Ass'n, Ltd. v. Mayor and Council of Washington Tp., Bergen County, 379 A.2d 6, 74 N.J. 470.
20. Ill.—Doty v. City of Rockford, 391 N.E.2d 586, 29 Ill.Dec. 323, 73 Ill.App.3d 255.
- N.H.—Carbonneau v. Town of Exeter, 401 A.2d 675, 119 N.H. 259.

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21. Ill.—Georgen v. Village of Mount Prospect, 382 N.E.2d 523, 22 Ill.Dec. 203, 65 Ill.App.3d 512.
25. Proper factor
 - (3) Existence of heavy traffic conditions on thoroughfare scarcely constitutes an argument in support of residential zoning classification, especially single family housing.
- Ill.—Oak Park Trust and Sav. Bank v. Village of Palos Park, Cook County, 435 N.E.2d 1265, 62 Ill.Dec. 293, 106 Ill.App.3d 394.
26. Ill.—Georgen v. Village of Mount Prospect, 382 N.E.2d 523, 22 Ill.Dec. 203, 65 Ill.App.3d 512.

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30. Fla.—City of Boca Raton v. Arvida Corp., 371 So.2d 160, cert. den. 101 S.Ct. 86, 449 U.S. 824, 66 L.Ed.2d 27.
- Ill.—LaSalle Nat. Bank v. Du Page County, 396 N.E.2d 48, 32 Ill.Dec. 935, 77 Ill.App.3d 562.
- La.—Trapani v. City of Kenner, App., 357 So.2d 910, writ den., Supr., 359 So.2d 1307.
- Mich.—Ed Zaagman, Inc. v. City of Kentwood, 277 N.W.2d 475, 406 Mich. 137.
- Ohio—Mayfield-Dorah, Inc. v. City of South Euclid, 429 N.E.2d 159, 68 Ohio St.2d 156, 22 O.O.3d 388.
- Pa.—Application of Wetherill, 406 A.2d 827, 45 Pa. Cmwith. 303.

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34. Pa.—Snyder v. Railroad Borough, 430 A.2d 339, 59 Pa.Cmwith. 385.
36. Ill.—Oak Park Trust and Sav. Bank v. Village of Palos Park, Cook County, 435 N.E.2d 1265, 62 Ill.Dec. 293, 106 Ill.App.3d 394.
37. Ga.—Guhl v. Pinkard, 252 S.E.2d 612, 243 Ga. 129.
41. N.J.—Glenview Development Co. v. Franklin Tp., 397 A.2d 384, 164 N.J.Super. 563, affd. in part, revd. in part on oth. grds. 456 A.2d 390, 92 N.J. 158.
- Pa.—Martin v. Millcreek Tp., 413 A.2d 764, 50 Pa. Cmwith. 249.

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43. Or.—City of Portland v. Carriage Inn, 676 P.2d 943, 67 Or.App. 44.
 - Pa.—Hostetter v. North Londonderry Tp., 437 A.2d 806, 63 Pa.Cmwith. 122.
 44. Pa.—Board of Sup'rs of Northampton Tp. v. Gentech, 414 A.2d 1102, 51 Pa.Cmwith. 435.
 46. Va.—Cole v. City Council of City of Waynesboro, 241 S.E.2d 765, 218 Va. 827.
- Dormitories**
- R.I.—Johnson & Wales College v. DiPrete, 448 A.2d 1271.
48. N.J.—Swiss Village Associates v. Municipal Council of Wayne Tp., 392 A.2d 596, 162 N.J.Super. 138.

N.Y.—Suffolk Housing Services v. Town of Brookhaven, 397 N.Y.S.2d 302, 91 Misc.2d 80, affd. and mod. on oth. grds. 405 N.Y.S.2d 302, 63 A.D.2d 731.

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49. N.J.—Montgomery Associates v. Montgomery Tp., 374 A.2d 86, 149 N.J.Super. 536, affd. 389 A.2d 503, 160 N.J.Super. 219.
 50. Pa.—Application of Friday, 381 A.2d 504, 33 Pa.Cmwith. 256.
- Public housing projects**
- (3) Other statements.
- N.J.—Drozow v. Mayor and City Council of City of Vineland, 400 A.2d 522, 167 N.J.Super. 76.
51. N.J.—Windmill Estates, Inc. v. Zoning Bd. of Adjustment of Borough of Totowa, 385 A.2d 924, 158 N.J.Super. 179.

Mall area undeveloped

- (2) N.J.—Windmill Estates, Inc. v. Zoning Bd. of Adjustment of Borough of Totowa, 370 A.2d 541, 147 N.J.Super. 65, revd. on oth. grds. 385 A.2d 924, 158 N.J.Super. 179.

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57. Test
 - (2) Other tests.
 - Pa.—Surrick v. Zoning Hearing Bd. of Upper Providence Tp., 382 A.2d 105, 476 Pa. 182.
- Buffer zone policy**
- U.S.—Metropolitan Housing Development Corp. v. Village of Arlington Heights, C.A.Ill., 517 F.2d 409, revd. on oth. grds. 97 S.Ct. 555, 429 U.S. 252, 50 L.Ed.2d 450, on remand C.A., 558 F.2d 1283, cert. den. 98 S.Ct. 752, 434 U.S. 1023, 54 L.Ed.2d 772, on remand D.C., 469 F.Supp. 836, affd., C.A., 616 F.2d 1006.
58. Not exclusionary
 - (3) Ordinance which placed density and lot size restrictions on development of multifamily dwellings was not exclusionary, but rather, provided its fair share of multifamily dwellings.
 - Pa.—Caste v. Zoning Hearing Bd. of Whitehall Borough, 453 A.2d 69, 70 Pa.Cmwith. 368.
 60. Pa.—Appeal of Abeon, Inc., 387 A.2d 1303, 35 Pa.Cmwith. 589.
 62. Pa.—Chester County Mall, Inc. v. Board of Sup'rs of West Goshen Tp., 402 A.2d 1160, 44 Pa. Cmwith. 119.
 63. Pa.—Chester County Mall, Inc. v. Board of Sup'rs of West Goshen Tp., 402 A.2d 1160, 44 Pa. Cmwith. 119.
 65. Pa.—Appeal of Thiokol Corp. From Bd. of Com'rs of Bristol Tp., 443 A.2d 1332, 66 Pa. Cmwith. 26.

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66. Possibility of disapproval
 - Pa.—Application of Blouch, 362 A.2d 1139, 26 Pa. Cmwith. 147.
67. N.J.—Washington Tp. v. Central Bergen Community Mental Health Center, Inc., 383 A.2d 1194, 156 N.J.Super. 388.
- Pa.—Heulen v. State College Zoning Hearing Bd., 430 A.2d 1236, 60 A.L.R.4th 190.

Five unrelated persons

- Hawaii—Mariland v. International Soc. for Krishna Consciousness, 657 P.2d 1035, 66 Haw. 119, app. dism. 104 S.Ct. 52, 464 U.S. 805, 78 L.Ed.2d 72.
- 68. Statutory definition of community home**
- La.—City of Kenner v. Normal Life of Louisiana, Inc., App., 465 So.2d 82, writ gr. 470 So.2d 82.

In order for a group of unrelated persons to constitute a single family in terms of a zoning regulation, they must exhibit the kind of stability, permanency and functional lifestyle equiv-

alent to that of a traditional family unit.^{69.5}

- 69.5 N.J.—Open Door Alcoholism Program, Inc. v. Board of Adjustment of City of New Brunswick, 491 A.2d 17, 200 N.J.Super. 191.
70. Foster homes
 - (2) Other statements.
- Pa.—Children's Home of Easton v. City of Easton, 417 A.2d 830, 53 Pa.Cmwith. 216.
72. Cal.—City of Santa Barbara v. Adamson, 164 Cal.Rptr. 539, 610 P.2d 436, 27 C.3d 123, 12 A.L.R.4th 219.
- N.J.—Washington Tp. v. Central Bergen Community Mental Health Center, Inc., 383 A.2d 1194, 156 N.J.Super. 388.
74. N.Y.—McMinn v. Town of Oyster Bay, 445 N.Y. S.2d 839, 111 Misc.2d 1046, affd. as mod. on oth. grds., 482 N.Y.S.2d 773, 105 A.D.2d 46.

§ 53. — House Trailers and Mobile Homes

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76. Colo.—Board of County Com'rs of Jefferson County v. Mountain Air Ranch, 563 P.2d 341, 192 Colo. 364.
79. Wash.—Duckworth v. City of Bonney Lake, 586 P.2d 860, 91 Wash.2d 19.
81. No denial of equal protection
 - Tex.—City of Brookside Village v. Comann, 633 S.W.2d 790, cert. den. 103 S.Ct. 570, 459 U.S. 1087, 74 L.Ed.2d 932.
82. N.J.—Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 391 A.2d 935, 161 N.J.Super. 317, affd. in part, revd. in part on oth. grds. 456 A.2d 390, 92 N.J. 158.

§ 54. — Off-Street Parking

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88. N.Y.—Ballroom Productions, Inc. v. Abrams, 446 N.Y.S.2d 393, 86 A.D.2d 661.
94. Ill.—Thomas v. Zoning Bd. of Appeals for City of Peoria, 391 N.E.2d 540, 29 Ill.Dec. 277, 72 Ill. App.3d 934.
95. Fla.—Proctor v. City of Coral Springs, App., 396 So.2d 771.

§ 55. Use of Property in General

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97. U.S.—Penn Cent. Transp. Co. v. City of New York, N.Y., 98 S.Ct. 2646, 438 U.S. 104, 57 L.Ed.2d 631, reh. den. 99 S.Ct. 226, 439 U.S. 883, 58 L.Ed.2d 198.
- Besiarides v. City of Galveston, C.A.Tex., 682 F.2d 1203.
- Ala.—Indian Rivers Community Health Center v. City of Tuscaloosa, 443 So.2d 894.
- Cal.—Benny v. City of Alameda, 164 Cal.Rptr. 776, 105 C.A.3d 1006.
- Conn.—Raybestos-Manhattan, Inc. v. Planning & Zoning Commission of Town of Trumbull, 442 A.2d 65, 186 Conn. 466.
- Ga.—City of Smyrna v. Parks, 242 S.E.2d 73, 240 Ga. 698, 1 A.L.R.4th 364.
- Ill.—Ward v. Cook County, 386 N.E.2d 309, 25 Ill.Dec. 38, 68 Ill.App.3d 563.
- Ind.—C.J.S. etted in Field v. Area Plan Commission of Grant County, Ind., App., 421 N.E.2d 1132, 1138.
- Minn.—Ramsey County v. Stevens, 283 N.W.2d 918.
- N.Y.—Society for Ethical Culture in City of New York v. Spatt, 416 N.Y.S.2d 246, 68 A.D.2d 112, affd. 415 N.E.2d 922, 51 N.Y.2d 499, 434 N.Y.S.2d 932.
- N.C.—State v. Jones, 290 S.E.2d 673, 305 N.C. 520.
- Pa.—Goldstein v. Upper Merion Tp., 403 A.2d 211, 44 Pa.Cmwith. 201.
- Wis.—State v. Village of Lake Delton, App., 286 N.W.2d 622, 93 Wis.2d 78.

"Use;" "land use"

(4) Term "use," as employed in context of zoning, is word of art denoting purpose for which building is designed, arranged or intended, or for which it is occupied or maintained.

Ind.—Pleasureland Museum, Inc. v. Dailey, App., 422 N.E.2d 754.

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98. U.S.—Hanky v. City of Richmond, D.C.Va., 532 F.Supp. 1298.

Ga.—Board of Com'rs of Hall County v. Skelton, 286 S.E.2d 729, 248 Ga. 855.

La.—Furr v. Mayor and City Council of Baker, 408 So.2d 248.

Md.—Howard County, Md. v. Dorsey, 438 A.2d 1339, 292 Md. 351.

Ohio—Kanter Corp. v. City of Forest Park, 371 N.E.2d 848, 53 Ohio Misc. 4, 7 O.O.3d 77.

Va.—City of Norfolk v. Tiny House, Inc., 281 S.E.2d 836, 222 Va. 414.

However, a municipality does not have the power to regulate the manner of ownership of a legal estate.^{98.5}

98.5 N.Y.—FGL & L Property Corp. v. City of Rye, 2 Dept., 486 N.Y.S.2d 333, 109 A.D.2d 814, aff'd. 485 N.E.2d 986, 66 N.Y.2d 111, 495 N.Y.S.2d 321.

N.C.—Graham Court Associates v. Town Council of Town of Chapel Hill, 281 S.E.2d 418, 53 N.C.App. 543.

Pa.—Fayette v. Coswell, 430 A.2d 1226, 60 Pa.Cmwlth. 202.

99. Wash.—Murphy v. City of Seattle, 647 P.2d 540, 32 Wash.App. 386.

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7. U.S.—Stansberry v. Holmes, C.A.Tex., 613 F.2d 1283, reh. den. 616 F.2d 568, cert. den. 101 S.Ct. 240, 449 U.S. 886, 66 L.Ed.2d 112.

Idaho—Wyckoff v. Board of County Com'rs of Ada County, 607 P.2d 1066, 101 Idaho 12.

Ill.—Tufte v. Kane County, 394 N.E.2d 896, 31 Ill. Dec. 694, 76 Ill.App.3d 128.

Kan.—Blauvelt v. Board of County Com'rs of Leavenworth County, 605 P.2d 132, 227 Kan. 110.

Mo.—City of Kirkwood v. City of Sunset Hills, App., 589 S.W.2d 31.

N.J.—Borough of Kinnelon v. South Gate Associates, 411 A.2d 724, 172 N.J.Super. 216.

N.C.—A-S-P Associates v. City of Raleigh, 258 S.E.2d 444, 296 N.C. 207.

W.Va.—Stephens v. Raleigh County Bd. of Ed., 257 S.E.2d 175, 163 W.Va. 434.

Condominiums

(2) Pa.—Kaufman & Broad, Inc. v. Board of Sup'rs of West Whiteland Tp., 340 A.2d 909, 20 Pa.Cmwlth 116, appeal after remand Katamoonchink Corp. v. Board of Sup'rs of West Whiteland Tp., 376 A.2d 305, 31 Pa.Cmwlth. 315 and 442 A.2d 1220, 65 Pa.Cmwlth 469.

(3) Other matters.

N.Y.—FGL & L Property Corp. v. City of Rye, 2 Dept., 486 N.Y.S.2d 333, 109 A.D.2d 814, aff'd. 485 N.E.2d 986, 66 N.Y.2d 111, 495 N.Y.S.2d 321.

8. U.S.—Basildarides v. City of Galveston, C.A.Tex., 682 F.2d 1203.

Cal.—Caster v. City of Oakland, 180 Cal.Rptr. 682, 129 C.A.3d 94.

Ill.—Cook County v. World Wide News Agency, 424 N.E.2d 1173, 54 Ill.Dec. 270, 98 Ill.App.3d 1094.

N.Y.—Consolidated Edison Co. of New York, Inc. v. Hoffman, 374 N.E.2d 105, 43 N.Y.2d 598, 403 N.Y.S.2d 193.

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9. Cal.—Kuhns v. Santa Cruz County Bd. of Sup'rs, 181 Cal.Rptr. 1, 128 C.A.3d 369.

Md.—Stump v. Grand Lodge of Ancient, Free and Accepted Masons of Maryland, 412 A.2d 1305, 45 Md.App. 263.

N.J.—Mindel v. Township Council of Franklin Tp., 400 A.2d 1244, 167 N.J.Super. 461.

N.Y.—Herrington v. Town of Mexico, 398 N.Y.S.2d 818, 91 Misc.2d 861.

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10. Cal.—Aguin v. City of Tiburon, 157 Cal.Rptr. 372, 598 P.2d 25, 24 C.3d 266, aff'd. 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106.

La.—Trustees Under Will of Pomeroy v. Town of Westlake, App., 357 So.2d 1299, writ den., Sup., 359 So.2d 205.

N.Y.—Dun-Bar Realty Co. v. City of Utica, 394 N.Y.S.2d 913, 57 A.D.2d 51, app. den. 367 N.E.2d 51, 42 N.Y.2d 960, 398 N.Y.S.2d 146, aff'd. 380 N.E.2d 328, 44 N.Y.2d 1002, 408 N.Y.S.2d 502.

Pa.—Borough Council of Churchill Borough v. Pagal, Inc., 460 A.2d 1214, 74 Pa.Cmwlth. 601.

R.I.—Weaver v. United Congregational Church, 388 A.2d 11, 120 R.I. 419.

12. Ariz.—Pima County v. Arizona Title Ins. & Trust Co., App., 565 P.2d 524, 115 Ariz. 344.

Ill.—La Grange State Bank v. Cook County, 388 N.E.2d 388, 26 Ill.Dec. 673, 75 Ill.2d 301.

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13. N.J.—Swiss Village Associates v. Municipal Council of Wayne Tp., 392 A.2d 596, 162 N.J.Super. 138.

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22. U.S.—Schad v. Borough of Mount Ephraim, N.J., 101 S.Ct. 2176, 452 U.S. 61, 68 L.Ed.2d 671.

Avalon Cinema Corp. v. Thompson, C.A.Ark., 667 F.2d 659.

Mo.—Lafayette Park Baptist Church v. Scott, App., 553 S.W.2d 856.

N.J.—America on Wheels, Eatontown, Inc. v. Board of Adjustment of Borough of Eatontown, 428 A.2d 532, 178 N.J.Super. 155.

Pa.—Sugarloaf Sanitary Landfill, Inc. v. Armitage, 395 A.2d 678, 39 Pa.Cmwlth. 411.

23. N.J.—Urban Farms, Inc. v. Borough of Franklin Lakes, 431 A.2d 163, 179 N.J.Super. 203.

26. Mass.—Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg, 406 N.E.2d 1006, 380 Mass. 869.

27. U.S.—Bayside Enterprises, Inc. v. Carson, D.C. Fla., 450 F.Supp. 696.

Pa.—Hammermill Paper Co. v. Greene Tp., 395 A.2d 618, 39 Pa.Cmwlth. 212.

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30. La.—Furr v. Mayor and City Council of Baker, 408 So.2d 248.

N.J.—Swiss Village Associates v. Municipal Council of Wayne Tp., 392 A.2d 596, 162 N.J.Super. 138.

Pa.—Kavanaugh v. London Grove Tp., 382 A.2d 148, 33 Pa.Cmwlth. 420, aff'd., 404 A.2d 393, 486 Pa. 133, app. diss. 100 S.Ct. 725, 444 U.S. 1041, 62 L.Ed.2d 726.

33. Pa.—Bluebell Associates v. Township Engineer For Whippain Tp., 405 A.2d 1070, 45 Pa.Cmwlth. 599.

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36. Ill.—Pettee v. DeKalb County, 376 N.E.2d 720, 17 Ill.Dec. 574, 60 Ill.App.3d 304.

Mo.—City of Kirkwood v. City of Sunset Hills, App., 589 S.W.2d 31.

Ohio—Kanter Corp. v. City of Forest Park, 371 N.E.2d 848, 53 Ohio Misc. 4, 7 O.O.3d 77.

Wis.—State v. Village of Lake Delton, App., 286 N.W.2d 622, 93 Wis.2d 78.

39. Or.—Hillcrest Vineyard v. Board of Com'rs of Douglas County, 608 P.2d 201, 45 Or.App. 285.

44. Wis.—State v. Village of Lake Delton, App., 286 N.W.2d 622, 93 Wis.2d 78.

45. Ga.—Barrett v. Hal W. Lamb & Associates, Inc., 255 S.E.2d 61, 243 Ga. 567.

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47. Ill.—Chicago Title & Trust Co. v. Village of Skokie, Cook County, 17 Ill.Dec. 314, 376 N.E.2d 313, 17 Ill.Dec. 314, 60 Ill.App.3d 221.

49. Ill.—Amalgamated Trust and Sav. Bank v. Cook County, 402 N.E.2d 719, 37 Ill.Dec. 717, 82 Ill. App.3d 370.

Mich.—Michigan Nat. Bank v. Windsor Charter Tp., 272 N.W.2d 330, 86 Mich.App. 35.

53. Fla.—Garden State Properties, Inc. v. Dade County, Fla., App. 3 Dist., 410 So.2d 655.

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55. Ill.—Stanek v. Lake County, 17 Ill.Dec. 597, 376 N.E.2d 743, 17 Ill.Dec. 597, 60 Ill.App.3d 357.

57. Iowa—Peterson v. City of Decorah, App., 259 N.W.2d 553.

Mo.—Despotis v. City of Sunset Hills, App., 619 S.W.2d 814.

58. Colo.—Landmark Universal, Inc. v. Pitkin County Bd. of Adjustment, 579 F.2d 1184, 40 Colo. App. 444.

Fla.—Moviematic Industries Corp. v. Board of County Com'rs of Metropolitan Dade County, App., 349 So.2d 667.

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59. Ga.—Board of Com'rs of Hall County v. Skelton, 286 S.E.2d 729, 248 Ga. 855.

61. U.S.—Stansberry v. Holmes, C.A.Tex., 613 F.2d 1285, reh. den. 616 F.2d 568, cert. den. 101 S.Ct. 240, 449 U.S. 886, 66 L.Ed.2d 112.

Cal.—Walnut Properties, Inc. v. Long Beach City Council, 161 Cal.Rptr. 411, 100 C.A.3d 1018, cert. den. 101 S.Ct. 109, 449 U.S. 836, 66 L.Ed.2d 42.

Ga.—Rockdale County v. Mitchell's Used Auto, Inc., 254 S.E.2d 846, 243 Ga. 465.

N.J.—Washington Tp. v. Central Bergen Community Mental Health Center, Inc., 383 A.2d 1194, 156 N.J.Super. 388.

N.Y.—Town of Huntington v. Park Shore Country Day Camp of Dix Hills, Inc., 390 N.E.2d 282, 47 N.Y.2d 61, 416 N.Y.S.2d 774, rearg. den. 394 N.E.2d 308, 47 N.Y.2d 1012, 420 N.Y.S.2d 1025.

Junkyard or automobile graveyard

N.C.—State v. Jones, 281 S.E.2d 91, 53 N.C.App. 466, aff'd. 290 S.E.2d 675, 305 N.C. 520.

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62. U.S.—Bayou Landing, Ltd. v. Watts, C.A.La., 563 F.2d 1172, cert. den. 99 S.Ct. 79, 439 U.S. 818, 58 L.Ed.2d 109.

Ill.—Lake County v. First Nat. Bank of Lake Forest, 402 N.E.2d 591, 37 Ill.Dec. 589, 79 Ill.2d 221.

Mass.—Framingham Clinic, Inc. v. Board of Selectmen of Southborough, 367 N.E.2d 606, 373 Mass. 279.

§ 56. Residence Districts

63. U.S.—Tasby v. Estes, D.C.Tex., 412 F.Supp. 1185, aff'd., C.A., 572 F.2d 1010, reh. den. 573 F.2d 300, cert. diss. 100 S.Ct. 716, 444 U.S. 437, 62 L.Ed.2d 626, on remand, D.C., 498 F.Supp. 1130.

La.—Folsom Road Civic Ass'n v. St. Tammany Parish, 407 So.2d 1219.

N.J.—State v. Baker, 405 A.2d 368, 81 N.J. 99.

Ohio—Carroll v. Washington Tp. Zoning Commission, 408 N.E.2d 191, 63 Ohio St.2d 249, 17 O.O.3d 161.

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65. Mont.—Cutone v. Anaconda Deer Lodge, 610 P.2d 691, 187 Mont. 515.

67. Ordinance excluding proposed expansion of educational use

N.Y.—Cornell University v. Bagmardi, 3 Dept., 486 N.Y.S.2d 964, 107 A.D.2d 398.

§ 57. — Classification of Uses Permitted

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95. U.S.—Genusa v. City of Peoria, C.A.Ill., 619 F.2d 1203.
97. Ala.—DeShazo v. City of Huntsville, Cr.App., 416 So.2d 1100.
99. N.J.—State v. J. & J. Painting, 400 A.2d 1204, 167 N.J.Super. 384.
- N.Y.—City of Albany v. Lee, 428 N.Y.S.2d 758, 76 A.D.2d 978, affd. 420 N.E.2d 974, 53 N.Y.2d 633, 438 N.Y.S.2d 782.
- Pa.—Appeal of McGinnis, 448 A.2d 108, 68 Pa. Cmwlth. 57, cert. den. 103 S.Ct. 2121, 461 U.S. 944, 77 L.Ed.2d 1301.
- Tex.—Goode v. City of Dallas, Civ.App., 554 S.W.2d 753.

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2. Tenn.—State ex rel. Collier v. City of Pigeon Forge, 599 S.W.2d 545.

Optometrist

(1) Exclusion of optometrists from zoning ordinance which permits physician, dentist or surgeon to maintain an office in their home in residential district is constitutionally permissible.

Mo.—City of St. Ann v. Elam, App., 661 S.W.2d 632.

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7. N.Y.—City of Albany v. Lee, 428 N.Y.S.2d 758, 76 A.D.2d 978, affd. 420 N.E.2d 974, 53 N.Y.2d 633, 438 N.Y.S.2d 782.

Ohio—Carroll v. Washington Tp. Zoning Commission, 408 N.E.2d 191, 63 Ohio St.2d 249, 17 O.O.3d 161.

Junk yard

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43. Hawaii—State v. Maxwell, 617 P.2d 816, 62 Haw. 556.

§ 58. — Reasonableness and Validity of Districting

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49. Ga.—Guhl v. Tuggle, 249 S.E.2d 219, 242 Ga. 412.

Ill.—Parkway Bank and Trust Co. v. Lake County, 389 N.E.2d 882, 27 Ill.Dec. 651, 71 Ill.App.3d 421.

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51. Ill.—Concerned Citizens for McHenry, Inc. v. City of McHenry, 395 N.E.2d 944, 32 Ill.Dec. 563, 76 Ill.App.3d 798.

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56. Ill.—Concerned Citizens for McHenry, Inc. v. City of McHenry, 395 N.E.2d 944, 32 Ill.Dec. 563, 76 Ill.App.3d 798.

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93. Ill.—Amalgamated Trust and Sav. Bank v. Cook County, 402 N.E.2d 719, 37 Ill.Dec. 717, 82 Ill. App.3d 370.

94. Ill.—Amalgamated Trust and Sav. Bank v. Cook County, 402 N.E.2d 719, 37 Ill.Dec. 717, 82 Ill. App.3d 370.

§ 59. Business, Commercial, and Industrial Districts

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98. U.S.—New Motor Vehicle Bd. of California v. Orrin W. Fox Co., Cal., 99 S.Ct. 403, 439 U.S. 96, 58 L.Ed.2d 361.

Fla.—Alachua County v. Reddick, App., 368 So.2d 653.

Ga.—Ochopee Land Development Corp. v. Mayor & Council of Wrightsville, 281 S.E.2d 529, 248 Ga. 96.

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4. Ga.—Board of Com'rs of Hall County v. Skelton, 286 S.E.2d 729, 248 Ga. 855.

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Ohio—Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 433 N.E.2d 198, 69 Ohio St.2d 539, 23 O.O.3d 462.

92. Colo.—Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 575 P.2d 835, 195 Colo. 44, app. diss. 99 S.Ct. 66, 439 U.S. 809, 58 L.Ed.2d 101.

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97. Colo.—City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52.

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99. Colo.—Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 575 P.2d 835, 195 Colo. 44, app. diss. 99 S.Ct. 66, 439 U.S. 809, 58 L.Ed.2d 101.

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2. N.H.—Loundsbury v. City of Keene, 453 A.2d 1278, 122 N.H. 1006.

N.M.—Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565, 98 N.M. 138.

3. U.S.—Dills v. City of Marietta, Ga., C.A.Ga., 674 F.2d 1377, cert. den. 103 S.Ct. 1873, 461 U.S. 905, 76 L.Ed.2d 806.

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7. U.S.—Metromedia, Inc. v. City of San Diego, Cal., 101 S.Ct. 2882, 453 U.S. 490, 69 L.Ed.2d 800, on remand 185 Cal.Rptr. 260, 649 P.2d 902, 32 C.3d 180.

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Since the publication of the bound volume, the case of *Vickers v. Gloucester*, 37 N.J. 232, 181 A.2d 129 has been overruled the court holding that the absolute ban of mobile homes no longer permissible.

N.J.—So. Burlington City. N.A.A.C.P. v. Mt. Laurel Tp., 456 A.2d 390, 92 N.J. 158.

23. Pa.—Gravatt v. Borough of Latrobe, 404 A.2d 729, 44 Pa.Cmwith. 475, app. diss., 421 A.2d 210, 491 Pa. 424.

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N.J.—So. Burlington City. N.A.A.C.P. v. Mt. Laurel Tp., 456 A.2d 390, 92 N.J. 158.

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34. Pa.—Colonial Park for Mobile Homes, Inc. v. New Britain Tp., 408 A.2d 1160, 47 Pa.Cmwith. 459.

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Pa.—Paradise Tp. v. Mt. Airy Lodge, Inc., 449 A.2d 849, 68 Pa.Cmwith. 548.

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- Or.—Miller v. City of Portland, 639 P.2d 680, 55 Or.App. 633, review den. 648 P.2d 849, 292 Or. 825.

70. D.C.—Capitol Hill Restoration Soc. v. Zoning Commission, App., 380 A.2d 174.

- Mont.—Little v. Board of County Com'rs of Flathead County, 631 P.2d 1282.

- Wash.—Barrie v. Kitsap County, 613 P.2d 1148, 93 Wash.2d 843.

- W.Va.—State ex rel. MacQueen v. City of Dunbar, 278 S.E.2d 636.

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- Md.—Montgomery v. Horman, 418 A.2d 1249, 46 Md. App. 491.

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71. Fla.—City of Cape Canaveral v. Mosher, App. 9 Dist., 467 So.2d 468.

- N.Y.—Northeastern Environmental Developers, Inc. v. Town of Colonie, 422 N.Y.S.2d 144, 72 A.D.2d 881.

- R.I.—Barber v. Town of North Kingstown, 372 A.2d 1269, 118 R.I. 169.

73. Conn.—Parks v. Planning and Zoning Commission of Town of Southington, 425 A.2d 100, 178 Conn. 657.

74. Ky.—Bryan v. Salmon Corp., App., 554 S.W.2d 912.

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79. Or.—South of Sunnyside Neighborhood League v. Board of Com'rs of Clackamas County, 569 P.2d 1063, 280 Or. 3.

§ 74. Spot Zoning

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98. Md.—Miraz v. County Com'rs of Cecil County, 433 A.2d 771, 291 Md. 81.

- Wash.—Wiggers v. Skagit County, 596 P.2d 1345, 23 Wash.App. 207.

Power of governing authorities

(2) Since the publication of the bound volume the case of Crawford v. Brewster, 169 S.E.2d 317, 225 Ga. 404, has been expressly overruled to the extent it rejected spot-zoning arguments on the ground that such matters be determined by the local governing authorities and not the courts.

- Ga.—East Lands, Inc. v. Floyd County, 262 S.E.2d 51, 244 Ga. 761, also expressly overruling Orr v. Hapeville Realty Invest. Co., 85 S.E.2d 20, 211 Ga. 235, Hardin v. Croft, 60 S.E.2d 395, 207 Ga. 115, Snow v. Johnston, 28 S.E.2d 270, 197 Ga. 146 and Vulcan Materials Co. v. Griffith, 114 S.E.2d 29, 215 Ga. 811.

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13. Mo.—Treme v. St. Louis County, App., 609 S.W.2d 706.

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17. Colo.—Information Please, Inc. v. Board of County Com'rs of Morgan County, 600 P.2d 86, 42 Colo.App. 392.
- III.—Concerned Citizens for McHenry, Inc. v. City of McHenry, 395 N.E.2d 944, 32 Ill.Dec. 563, 76 Ill.App.3d 798.

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30. Ill.—Chicago Title & Trust Co. v. Village of Skokie, Cook County, 376 N.E.2d 313, 17 Ill.Dec. 314, 60 Ill.App.3d 221.
- Md.—Tennison v. Shomette, 379 A.2d 187, 38 Md.App. 1.
- N.Y.—Mahoney v. O'Shea Funeral Homes, Inc., 395 N.Y.S.2d 662, 58 A.D.2d 583, affd. 380 N.E.2d 297, 45 N.Y.2d 719, 408 N.Y.S.2d 470.

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36. D.C.—Capitol Hill Restoration Soc. v. Zoning Commission, App., 380 A.2d 174.
- Md.—Tennison v. Shomette, 379 A.2d 187, 38 Md.App. 1.

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42. Fla.—Broward County v. Griffey, App., 366 So.2d 869.
47. Agreement to create zoning district
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48. U.S.—Germalles B.V. v. City of Greenwood Village, D.C.Colo., 583 F.Supp. 830.
- Cal.—Sierra Club v. City of Hayward, 171 Cal.Rptr. 619, 623 P.2d 180, 28 C.3d 840.
53. Md.—Montgomery County v. Woodward & Lothrop, Inc., 376 A.2d 483, 280 Md. 686, cert. den. 98 S.Ct. 1245, 434 U.S. 1067, 55 L.Ed.2d 769.
- N.J.—Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 391 A.2d 935, 161 N.J.Super. 317, affd. in part, revd. in part on oth. grds. 456 A.2d 390, 92 N.J. 158.

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54. Ga.—Cross v. Hall County, 235 S.E.2d 379, 238 Ga. 709.
- Ill.—Nolan v. City of Taylorville, 51 Ill.Dec. 479, 420 N.E.2d 1037, 51 Ill.Dec. 479, 95 Ill.App.3d 1099.
55. Colo.—City of Colorado Springs v. Smartt, 620 P.2d 1060.
- N.Y.—Collard v. Incorporated Village of Flower Hill, 427 N.Y.S.2d 301, 75 A.D.2d 631, affd. 421 N.E.2d 818, 52 N.Y.2d 594, 439 N.Y.S.2d 326.
56. N.Y.—Collard v. Incorporated Village of Flower Hill, 421 N.E.2d 818, 52 N.Y.2d 594, 439 N.Y.S.2d 326.
57. Ga.—Johnson v. Glenn, 273 S.E.2d 1, 246 Ga. 685.

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- N.J.—Washington Tp. v. Central Bergen Community Mental Health Center, Inc., 383 A.2d 1194, 156 N.J.Super. 388.

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98. Mich.—Ed Zagsman, Inc. v. City of Kentwood, 233 N.W.2d 146, 61 Mich.App. 693, affd. 277 N.W.2d 475, 406 Mich. 137.

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18. Ga.—Flournoy v. City of Brunswick, 285 S.E.2d 16, 248 Ga. 573.
- Mass.—Marshall v. Town of Topsfield, 433 N.E.2d 1244, 13 Mass.App. 425.

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21. Ariz.—Bartolomeo v. Town of Paradise Valley, App., 631 P.2d 564, 129 Ariz. 409.
- Fla.—Alachua County v. Reddick, App., 368 So.2d 653.

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26. Colo.—City of Colorado Springs v. Smartt, 620 P.2d 1060.
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35. U.S.—Joseph Stilken & Co. v. City of Toledo, C.A. Ohio, 558 F.2d 350, cert. den. 98 S.Ct. 611, 434 U.S. 985, 54 L.Ed.2d 479, reh. den. 98 S.Ct. 904, 434 U.S. 1051, 54 L.Ed.2d 805.
- Cal.—Karison v. City of Camarillo, 161 Cal.Rptr. 260, 100 C.A.3d 789.
- Fla.—City of New Smyrna Beach v. Barton, App. 3 Dist., 414 So.2d 542, review den. 424 So.2d 760.
- Ga.—Columbia County v. Fleming, 241 S.E.2d 833, 240 Ga. 604.
- Ill.—Kamysz v. Village of Wheeling, 382 N.E.2d 349, 22 Ill.Dec. 29, 65 Ill.App.3d 629.
- Kan.—Golden v. City of Overland Park, 584 P.2d 130, 224 Kan. 591.
- Md.—Tennison v. Shomette, 379 A.2d 187, 38 Md.App. 1.
- Minn.—Ramsey County v. Stevens, 283 N.W.2d 918.
- Mo.—Despotis v. City of Sunset Hills, App., 619 S.W.2d 814.
- N.Y.—Marcus Associates, Inc. v. Town of Huntington, 382 N.E.2d 1323, 45 N.Y.2d 501, 410 N.Y.S.2d 546.
- N.C.—Graham v. City of Raleigh, 284 S.E.2d 742, 55 N.C.App. 107, review den. 290 S.E.2d 702, 305 N.C. 299.
- Okla.—Garrett v. City of Oklahoma City, 594 P.2d 764.
- Or.—Lemmon v. Clemens, 646 P.2d 633, 57 Or.App. 583, review den. 652 P.2d 810, 293 Or. 634.
- Pa.—Horst v. Com., Dept. of Labor and Industry, 403 A.2d 218, 44 Pa.Cmwlth. 218.
- Tex.—Conway v. Hospital Corp. of America, Civ.App., 577 S.W.2d 534, err. ref. no rev. err. app. den. 100 S.Ct. 22, 444 U.S. 803, 62 L.Ed.2d 16.
- Wash.—Cathcart-Maltby-Clearview Community Council v. Snohomish County, 634 P.2d 853, 96 Wash.2d 201.
36. Ala.—City of Gadsden v. Downs, 412 So.2d 267.

- Ark.—Washington St. Property Owners Ass'n v. City of Camden, 566 S.W.2d 733, 263 Ark. 649.

- D.C.—Citizens Ass'n of Georgetown, Inc. v. District of Columbia Zoning Commission, App., 402 A.2d 36.

- Ga.—Bobo v. Cherokee County, Ga., 285 S.E.2d 177, 248 Ga. 554.

- Ind.—Cunningham v. Hiles, 395 N.E.2d 851, 182 Ind. App. 511, mod. on oth. grds. 402 N.E.2d 17.

- Mass.—Farmer v. Town of Billerica, 409 N.E.2d 762, 381 Mass. 775.

- Mo.—Despotis v. City of Sunset Hills, App., 619 S.W.2d 814.

- N.Y.—Mahoney v. O'Shea Funeral Homes, Inc., 380 N.E.2d 297, 45 N.Y.2d 719, 408 N.Y.S.2d 470.

- Pa.—Goodman v. Board of Com'rs of South Whitehall Tp., 411 A.2d 838, 49 Pa.Cmwlth. 35.

- Tenn.—Campbell v. Nance, App., 555 S.W.2d 407.

- Tex.—Midway Protective League v. City of Dallas, Civ.App., 552 S.W.2d 170, 7 A.L.R.4th 725, err. ref. no rev. err.

- Wash.—Mayer Built Homes, Inc. v. Town of Steilacoom, 564 P.2d 1170, 17 Wash.App. 558.

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37. Ga.—Cross v. Hall County, 235 S.E.2d 379, 238 Ga. 709.

- Ill.—Exchange Nat. Bank of Chicago v. Village of Hoffman Estates, 363 N.E.2d 69, 6 Ill.Dec. 540, 48 Ill.App.3d 475.

- La.—Trustees Under Will of Pomeroy v. Town of Westlake, App., 357 So.2d 1299, writ den. Sup., 359 So.2d 205.

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47. Ky.—Fiscal Court of Jefferson County v. Ogden, App., 556 S.W.2d 899.

48. Cal.—Environmental Council of Sacramento v. Board of Sup'rs of Sacramento County, 185 Cal. Rptr. 363, 135 C.A.3d 428.

- Ill.—Pierson v. Henry County, 417 N.E.2d 234, 48 Ill.Dec. 832, 93 Ill.App.3d 320.

- Ky.—Bryan v. Salmon Corp., App., 554 S.W.2d 912.

- Md.—Runyon v. Glackin, 413 A.2d 291, 45 Md.App. 457.

- Or.—South of Sunnyside Neighborhood League v. Board of Com'rs of Clackamas County, 569 P.2d 1063, 280 Or. 3.

49. Mo.—Treme v. St. Louis County, App., 609 S.W.2d 706.

50. Fla.—Moviematic Industries Corp. v. Board of County Com'rs of Metropolitan Dade County, App., 349 So.2d 667.

51. Ill.—Lurie v. Village of Skokie, 380 N.E.2d 1120, 20 Ill.Dec. 911, 64 Ill.App.3d 217.

- Mo.—Clarkson Valley Estates, Inc. v. Village of Clarkson Valley, App., 630 S.W.2d 151.

- N.Y.—Dodge Mill Land, Corp. v. Town of Amherst, 402 N.Y.S.2d 670, 61 A.D.2d 216.

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61. Fla.—Alachua County v. Reddick, App., 368 So.2d 653.

- Ill.—Jesey v. City of Taylorville, 401 N.E.2d 627, 36 Ill.Dec. 786, 81 Ill.App.3d 442.

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 66. Conn.—Calandro v. Zoning Commission of City of Bridgeport, 408 A.2d 229, 176 Conn. 439.
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 67. Ill.—Parkway Bank and Trust Co. v. Lake County, 389 N.E.2d 882, 27 Ill.Dec. 651, 71 Ill.App.3d 421.
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4. U.S.—Metropolitan Housing Development Corp. v. Village of Arlington Heights, D.C.III., 469 F.Supp. 836, aff'd., C.A., 616 F.2d 1006.

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 33. Cal.—Carty v. City of Ojai, 143 Cal.Rptr. 506, 77 C.A.3d 329.
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 34. La.—West v. City of Lake Charles, App., 375 So.2d 206, writ den., Sup., 378 So.2d 433.
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Or.—Roth v. Land Conservation and Development Com'n, 646 P.2d 85, 57 Or.App. 611.

13. N.C.—George v. Town of Edenton, 242 S.E.2d 877, 294 N.C. 679.

14. Ill.—Thompson v. Cook County Zoning Bd. of Appeals, 421 N.E.2d 285, 51 Ill.App. 777, 96 Ill.App.3d 561.

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16. Del.—Carl M. Freeman Associates, Inc. v. Green, 447 A.2d 1179.

Mass.—Doebelin v. Tinkham Development Corp., 389 N.E.2d 1044, 7 Mass.App. 720.

N.J.—Sheerr v. Evesham Tp., 445 A.2d 46, 184 N.J. Super. 11.

Tex.—Midway Protective League v. City of Dallas, Civ.App., 552 S.W.2d 170, 7 A.L.R.4th 725, err. ref. no rev. err.

19. Ind.—Pruden v. Trabits, App., 370 N.E.2d 959.

Md.—Kaner v. Montgomery County Council, 373 A.2d 5, 35 Md.App. 715.

Neb.—Hansen v. City of Norfolk, 267 N.W.2d 537, 201 Neb. 352.

N.Y.—Bloom v. Town Bd. of Town of Yorktown, 424 N.Y.S.2d 983, 102 Misc.2d 938, mod. on oth. grds. 436 N.Y.S.2d 355, 80 A.D.2d 823, mod. on oth. grds. 450 N.Y.S.2d 603, app. after remand 450 N.Y.S.2d 603, 88 A.D.2d 895.

21. Kan.—Reeves v. Board of County Com'rs of Johnson County, 602 P.2d 93, 226 Kan. 397.

N.C.—George v. Town of Edenton, 242 S.E.2d 877, 294 N.C. 679.

Or.—Roth v. Land Conservation and Development Com'n, 646 P.2d 85, 57 Or.App. 611.

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22. Mont.—Little v. Board of County Com'rs of Flathead county, 631 P.2d 1282.

25. Ala.—Smith v. City of Mobile, 374 So.2d 305.

Ark.—Taylor v. City of Little Rock, 583 S.W.2d 72, 266 Ark. 384.

Fla.—Broward County v. Capeletti Bros., Inc., App., 375 So.2d 313.

Ind.—Pruden v. Trabits, App., 370 N.E.2d 959.

Ky.—City of Beechwood Village v. Council of and City of St. Matthews, App., 574 S.W.2d 322.

Md.—Kaner v. Montgomery County Council, 373 A.2d 5, 35 Md.App. 715.

N.Y.—Hale v. City of Utica, 403 N.Y.S.2d 374, 61 A.D.2d 885.

Or.—Greb v. Board of Com'rs for Klamath County, 573 P.2d 733, 32 Or.App. 39.

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33. Ind.—Pruden v. Trabits, App., 370 N.E.2d 959.

34. Ind.—Pruden v. Trabits, App., 370 N.E.2d 959.

§ 88. — Hearing and Notice

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48. Ky.—City of Beechwood Village v. Council of and City of St. Matthews, App., 574 S.W.2d 322.

51. Fla.—City of Cape Canaveral v. Mosher, App. 5 Dist., 467 So.2d 468.

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5. Or.—South of Sunnyside Neighborhood League v. Board of Com'rs of Clackamas County, 569 P.2d 1063, 280 Or. 3.

12. Comment—argument hearing sufficient

Iowa—Montgomery v. Bremer County Bd. of Sup'rs, 299 N.W.2d 687.

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20. Fla.—City of Ft. Pierce v. Davis, App., 400 So.2d 1242.

§ 89. — Evidence and Findings

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51. Ill.—Spielman v. Rock Island County, 431 N.E.2d 770, 59 Ill.Dec. 269, 103 Ill.App.3d 514.

Kan.—Golden v. City of Overland Park, 584 P.2d 130, 224 Kan. 591.

N.Y.—Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay, 453 N.Y.S.2d 732, 88 A.D.2d 484.

Or.—Heilman v. City of Roseburg, 591 P.2d 390, 39 Or.App. 71.

Wash.—West Slope Community Council v. City of Tacoma, 569 P.2d 1183, 18 Wash.App. 328.

Findings not required

(2) In rezoning property, governing authority acts in a legislative capacity and need not enter findings and conclusions justifying decision to rezone.

Ga.—City of Atlanta v. McLennan, 240 S.E.2d 881, 240 Ga. 407.

(3) Other statements.

Ill.—Thompson v. Cook County Zoning Bd. of Appeals, 421 N.E.2d 285, 51 Ill.Dec. 777, 96 Ill.App.3d 561.

Reasons for decision

Minn.—Honn v. City of Coon Rapids, 313 N.W.2d 409.

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53. Reasons not required

N.Y.—Bloom v. Town Bd. of Town of Yorktown, 436 N.Y.S.2d 355, 80 A.D.2d 823, app. after remand 450 N.Y.S.2d 603, 88 A.D.2d 895.

54. Findings adequate

Md.—Chesapeake Ranch Club, Inc. v. Fulcher, 426 A.2d 428, 48 Md.App. 223.

58. Presumption

Ala.—Jefferson County v. O'Rourke, 394 So.2d 937.

59. Ky.—City of Beechwood Village v. Council of and City of St. Matthews, App., 574 S.W.2d 322.

Md.—Fitzgerald v. Montgomery County, 376 A.2d 1125, 37 Md.App. 148, cert. den. 99 S.Ct. 164, 439 U.S. 854, 58 L.Ed.2d 160.

Or.—Heilman v. City of Roseburg, 591 P.2d 390, 39 Or.App. 71.

Findings sufficient

(1) Wash.—Hayden v. City of Port Townsend, 622 P.2d 1291, 28 Wash.App. 192.

§ 90. — Promulgation of Ordinance or Resolution; Map Changes

63. Md.—Martin Marietta Aggregates v. Citizens for Preservation of South Mountain-Antietam Environment, 395 A.2d 179, 41 Md.App. 26.

N.C.—Sellers v. City of Asheville, 236 S.E.2d 283, 33 N.C.App. 544.

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64. Md.—County Council for Prince George's County v. Carl M. Freeman Associates, Inc., 376 A.2d 860, 281 Md. 70.

N.Y.—Bloom v. Town Bd. of Town of Yorktown, 424 N.Y.S.2d 983, 102 Misc.2d 938, mod. on oth. grds. 436 N.Y.S.2d 355, 80 A.D.2d 823, mod. on oth. grds. 450 N.Y.S.2d 603, 88 A.D.2d 895.

65. Ill.—Scanlon v. Fritz, 328 N.E.2d 40, 27 Ill. App.3d 1072, app. after remand 373 N.E.2d 614, 15 Ill.Dec. 268, 57 Ill.App.3d 649, affd. 389 N.E.2d 571, 27 Ill.Dec. 507, 75 Ill.2d 472.

67. Minn.—Pilgrim v. City of Winona, 256 N.W.2d 266.

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78. Del.—Carl M. Freeman Associates, Inc. v. Green, 447 A.2d 1179.

N.Y.—Eckstein v. Glimm, 444 N.Y.S.2d 474, 84 A.D.2d 839.

§ 91. — Meetings of Governing Body, Deliberations, and Vote Required

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83. D.C.—Capitol Hill Restoration Soc. v. Zoning Commission, App., 380 A.2d 174.

Ill.—Scandrol v. City of Rockford, 408 N.E.2d 436, 42 Ill.Dec. 58, 86 Ill.App.3d 999.

Ind.—Pruden v. Trabits, App., 370 N.E.2d 959.

Md.—Zellinger v. CRC Development Corp., 380 A.2d 1064, 281 Md. 614.

N.J.—Levin v. Parsippany-Troy Hills Tp., 411 A.2d 704, 82 N.J. 174.

N.Y.—Bliet v. Town of Webster, 429 N.Y.S.2d 811, 104 Misc.2d 852—Lower East Side Joint Planning

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Council v. New York City Bd. of Estimate, 441 N.Y.S.2d 453, 83 A.D.2d 526, affd. 436 N.E.2d 1329, 56 N.Y.2d 417, 451 N.Y.S.2d 727.

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96. Or.—Miller v. City of Portland, 639 P.2d 680, 55 Or.App. 633, review den. 648 P.2d 849, 292 Or. 825.

Wash.—Save a Valuable Environment (SAVE) v. City of Bothell, 576 P.2d 401, 89 Wash.2d 862.

97. N.Y.—Webster Associates v. Town of Webster, 447 N.Y.S.2d 401, 112 Misc.2d 396.

Tenn.—Fiser v. City of Knoxville, App., 584 S.W.2d 659.

3. Fla.—C.J.S. cited in Hope v. City of Gainesville, 355 So.2d 1172, 1173, app. after remand App., 377 So.2d 736.

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8. Ind.—Town of Merrillville v. Collins, 382 N.E.2d 188, 178 Ind.App. 358.

N.Y.—Lower East Side Joint Planning Council v. New York City Bd. of Estimate, 436 N.E.2d 1329, 56 N.Y.2d 717, 451 N.Y.S.2d 727.

Three fourths of all members

Mo.—State ex rel. Stewart v. King, App., 562 S.W.2d 704.

Requirement held invalid

Tex.—City of San Antonio v. Lanier, Civ.App., 542 S.W.2d 232, err. ref. no rev. err.

Disapproval by planning commission

Tex.—City of San Antonio v. Lanier, Civ.App., 542 S.W.2d 232, err. ref. no rev. err.

9. N.H.—Bourgeois v. Town of Bedford, 412 A.2d 1021, 120 N.H. 145.

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11. Tex.—City of San Antonio v. Lanier, Civ.App., 542 S.W.2d 232, err. ref. no rev. err.

15. N.H.—Bourgeois v. Town of Bedford, 412 A.2d 1021, 120 N.H. 145.

N.J.—Levin v. Parsippany-Troy Hills Tp., 411 A.2d 704, 82 N.J. 174.

Tex.—Midway Protective League v. City of Dallas, Civ.App., 552 S.W.2d 170, 7 A.L.R.4th 725, err. ref. no rev. err.

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24. "Frontage" defined

Ill.—Thompson v. Cook County Zoning Bd. of Appeals, 51 Ill.Dec. 777, 421 N.E.2d 285, 51 Ill.Dec. 777, 96 Ill.App.3d 561.

§ 92. — Initiative and Referendum

30. Ohio—State ex rel. English v. Geauga County Bd. of Elections, 369 N.E.2d 11, 52 Ohio St.2d 49, 6 O.O.3d 190.

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32. Utah—Wilson v. Manning, 657 P.2d 251.

§ 93. Exercise of Power by Board or Commission

43. Ariz.—Croff v. Evans, App., 636 P.2d 131, 130 Ariz. 353.

D.C.—Schneider v. District of Columbia Zoning Commission, App., 383 A.2d 324.

Fla.—City of Gainesville v. Cone, App., 365 So.2d 737.

Ill.—Elmckley-Big Rock School Dist. No. 429 v. Village of Sugar Grove, 435 N.E.2d 216, 61 Ill.Dec. 727, 105 Ill.App.3d 959.

N.Y.—Malone v. Town of Clarkstown, 462 N.Y.S.2d 248, 94 A.D.2d 716.

Utah—Western Land Equities, Inc. v. City of Logan, 617 P.2d 388.

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44. Kan.—Golden v. City of Overland Park, 584 P.2d 130, 224 Kan. 591.

Md.—Potomac Valley League v. County Council for Montgomery County, 403 A.2d 388, 43 Md.App. 56.

Or.—Heilman v. City of Roseburg, 591 P.2d 390, 39 Or.App. 71.

45. Pa.—Lieberman v. Board of Com'rs of Salisbury Tp., 415 A.2d 918, 52 Pa.Cmwith. 34.

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54. Wash.—South Capitol Neighborhood Ass'n v. City of Olympia, 595 P.2d 58, 23 Wash.App. 260.

56. Conn.—Calandro v. Zoning Commission of City of Bridgeport, 408 A.2d 229, 176 Conn. 439.

57. D.C.—Capitol Hill Restoration Soc. v. Zoning Commission, App., 380 A.2d 174.

Kan.—Golden v. City of Overland Park, 584 P.2d 130, 224 Kan. 591.

Or.—Hill v. County Court for Union County, 601 P.2d 905, 42 Or.App. 883.

59. Limited procedural due process

U.S.—Rogin v. Bensalem Tp., C.A.Cal., 616 F.2d 680, cert. den. 101 S.Ct. 1737, 450 U.S. 1029, 68 L.Ed.2d 223.

N.J.—Kelly v. Hackensack Meadowlands Development Commission, 411 A.2d 727, 172 N.J.Super. 223, certification den. 425 A.2d 267, 85 N.J. 104.

60. Iowa—Montgomery v. Bremer County Bd. of Sup'rs, 299 N.W.2d 687.

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67. N.H.—Board of Selectmen of Town of Merrimack v. Planning Bd. of Town of Merrimack, 383 A.2d 1122, 118 N.H. 150.

69. Fla.—City of Gainesville v. Cone, App., 365 So.2d 737.

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75. N.H.—Board of Selectmen of Town of Merrimack v. Planning Bd. of Town of Merrimack, 383 A.2d 1122, 118 N.H. 150.

Review by different board or commission. Under a statutory provision, a decision of a zoning board may be appealable to a special adjudicatory commission, where the zoning decision concerns an area of critical state concern.^{79.5}

79.5 Land and water adjudicatory commission

Fla.—Cabrera v. Department of Community Affairs, App. 1 Dist., 465 So.2d 547.

§ 94. — Report or Approval of Other Bodies; Consent of Property Owners

80. D.C.—Citizens Ass'n of Georgetown, Inc. v. District of Columbia Zoning Commission, App., 402 A.2d 36.

Fla.—South Florida Regional Planning Council v. Florida Division of State Planning, App., 370 So.2d 447.

N.Y.—Voelckers v. Guelli, 446 N.E.2d 764, 58 N.Y.2d 170, 460 N.Y.S.2d 8.

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82. Tex.—Conway v. Hospital Corp. of America, Civ. App., 577 S.W.2d 534, err. ref. no rev. err. app. dism. 100 S.Ct. 22, 444 U.S. 803, 62 L.Ed.2d 16.

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§ 95. — Hearing and Notice

94. Notice defective or inadequate

N.Y.—Gardiner v. Lo Grande, 459 N.Y.S.2d 804, 92 A.D.2d 611, dismissal den. 451 N.E.2d 502, 59

N.Y.2d 839, 464 N.Y.S.2d 755, app. dism. 453 N.E.2d 1256, 59 N.Y.2d 607, 60 N.Y.S.2d 587, affd. 455 N.E.2d 663, 60 N.Y.2d 673, 468 N.Y.S.2d 104.

Due process requirements

Ariz.—Chess v. Pima County, App., 613 P.2d 1289, 126 Ariz. 233.

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3. Not required for design review

Wash.—Zehring v. City of Bellevue, 694 P.2d 638, 103 Wash.2d 588.

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7. Opportunity to present and rebut evidence

Or.—Clinkscales v. City of Lake Oswego, 615 P.2d 1164, 47 Or.App. 1117.

Procedural due process denied

Idaho—Cooper v. Bd. of County Com'rs of Ada County, 614 P.2d 947, 101 Idaho 407.

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§ 97. Meetings; Number of Votes Required

29. Ariz.—Croff v. Evans, App., 636 P.2d 131, 130 Ariz. 353.

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On the other hand, it has been held under a statutory provision that members of a zoning board who were absent from the hearings on a rezoning request could not participate in the decision, regardless of their familiarity with the testimony.^{34.5}

34.5 Md.—Howard County v. Bay Harvestore System, Inc., 478 A.2d 1172, 60 Md.App. 19.

38. Conn.—Thorne v. Zoning Commission of Town of Old Saybrook, 423 A.2d 861, 178 Conn. 198.

Disqualification not shown

(1) Fla.—Isaak Walton League of America v. Monroe County, App., 448 So.2d 1170.

39. Conn.—Thorne v. Zoning Commission of Town of Old Saybrook, 423 A.2d 861, 178 Conn. 198.

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48. Fla.—C.J.S. cited in Hope v. City of Gainesville, 355 So.2d 1172, 1173, app. after remand app., 377 So.2d 736.

N.Y.—Lower East Side Joint Planning Council v. New York City Bd. of Estimate, 436 N.E.2d 1329, 56 N.Y.2d 717, 451 N.Y.S.2d 727.

§ 98. In General

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61. Ohio—J. P. Sand & Gravel Co. v. State, 367 N.E.2d 54, 51 Ohio App.2d 83, 5 O.O.3d 239.

Pa.—O'Hey Yoh v. Board of Com'rs of West Norriton Tp., 388 A.2d 1156, 37 Pa.Cmwith. 91.

§ 99. Manner of Effecting Repeal

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75. Pa.—Horsham Tp. Council v. Mintz, 395 A.2d 677, 39 Pa.Cmwith. 408.

76. U.S.—Martin v. Wray, D.C.Wis., 473 F.Supp. 1131.

§ 101. Construction of Zoning Regulations in General

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88. Va.—Board of Sup'rs of Loudoun County v. Lerner, 267 S.E.2d 100, 221 Va. 30.
89. Ind.—C.J.S. cited in Metro. Development Com'n of Marion County v. Villages, Inc., App., 464 N.E.2d 367, 369, cert. den. 105 S.Ct. 1879, 85 L.Ed.2d 171.
91. Colo.—Tri-State Generation and Transmission Co. v. City of Thornton, 647 P.2d 670.
- Kan.—Colonial Inv. Co., Inc. v. City of Leawood, 646 P.2d 1149, 7 Kan.App.2d 660.
- Me.—Board of Environmental Protection v. Bergeron, 434 A.2d 25.
- N.H.—Johnston v. Town of Exeter, 436 A.2d 1147, 121 N.H. 938.
- Vt.—In re Agency of Administration, State Bldgs. Division, 444 A.2d 1349, 141 Vt. 68.
92. U.S.—L'Enfant Plaza Properties, Inc. v. U. S., 678 F.2d 167, 230 Ct.Cl. 447.
- Mass.—Smalley v. Planning Bd. of Harwich, 410 N.E.2d 1219, 10 Mass.App. 599.
- Mo.—Land Title Ins. Co. of St. Louis v. Eisenhauer, App., 625 S.W.2d 208.

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93. Ga.—Martin v. Hatfield, 308 S.E.2d 833, 251 Ga. 638.
- Or.—Byrd v. Stringer, 652 P.2d 1276, 60 Or.App. 1, affd. 666 P.2d 1332, 295 Or. 311.
94. Ga.—Murray County v. Calfee, 290 S.E.2d 279, 249 Ga. 270.
96. Me.—Planning Bd. of Town of Naples v. Michaud, 444 A.2d 40.
- N.J.—Matter of Egg Harbor Associates, 449 A.2d 1324, 185 N.J.Super. 507, affd. 464 A.2d 1115, 94 N.J. 358.
- Tex.—Lacy v. Hoff, App. 14, Dist., 633 S.W.2d 605, err. ref. no rev. err.

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2. Cal.—Camp v. Mendocino County Bd. of Sup'rs, 176 Cal.Rptr. 620, 123 C.A.3d 334.
- Pa.—Anderson v. Board of Sup'rs of Price Tp., Monroe County, Pa., 437 A.2d 1308, 63 Pa.Cmwlth. 335.

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24. Drafting error
- Tex.—Marriott v. City of Dallas, 644 S.W.2d 469.

§ 103. Meaning of Words

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99. Iowa—Linn County v. City of Hiawatha, 311 N.W.2d 95.
- Statutory definitions ignored
- Cal.—Georgia-Pacific Corp. v. California Coastal Com'n, 183 Cal.Rptr. 395, 132 C.A.3d 678.

§ 104. Operation and Effect of Zoning Regulations Generally

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96. Fla.—Compass Lake Hills Development Corp. v. State, Dept. of Community Affairs, Division of State Planning App., 379 So.2d 376.
- Mass.—Sturges v. Town of Chilmark, 402 N.E.2d 1346, 380 Mass. 246.
- N.H.—In re Seyewich's Estate, 413 A.2d 581, 120 N.H. 237.
- N.Y.—Miracle Mile Associates v. Department of Environmental Conservation, 423 N.Y.S.2d 732, 73 A.D.2d 807.
- N.C.—Woodhouse v. Board of Com'rs of Town of Nags Head, 261 S.E.2d 882, 299 N.C. 211.
2. Md.—Williams v. William T. Burnett & Co., Inc., 462 A.2d 66, 296 Md. 214.

§ 108. — Governmental Bodies

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54. Valid exemption required from municipality
- Colo.—Clark v. Town of Estes Park, 686 P.2d 777.
58. Ga.—Evans v. Just Open Government, 251 S.E.2d 546, 242 Ga. 834.
- Mich.—Kelswetter v. City of Potoskey, 335 N.W.2d 94, 124 Mich.App. 590.
- N.Y.—Hongisto v. Mercure, 421 N.Y.S.2d 690, 72 A.D.2d 850.

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60. Md.—City of Baltimore v. State Dept. of Health and Mental Hygiene, 381 A.2d 1188, 38 Md.App. 570.

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75. Pa.—City of Pittsburgh v. Com., 360 A.2d 607, 468 Pa. 174, on remand 379 A.2d 1388, 32 Pa.Cmwlth. 596, affd. 400 A.2d 1301, 485 Pa. 40.
78. Pa.—City of Pittsburgh v. Com., 360 A.2d 607, 468 Pa. 174, on remand 379 A.2d 1388, 32 Pa.Cmwlth. 596, affd. 400 A.2d 1301, 485 Pa. 40.
79. Pa.—City of Pittsburgh v. Com., 360 A.2d 607, 468 Pa. 174, on remand 379 A.2d 1388, 32 Pa.Cmwlth. 596, affd. 400 A.2d 1301, 485 Pa. 40.
82. Pa.—City of Pittsburgh v. Com., 360 A.2d 607, 468 Pa. 174, on remand 379 A.2d 1388, 32 Pa.Cmwlth. 596, affd. 400 A.2d 1301, 485 Pa. 40.

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85. Pre-release center
- Pa.—City of Pittsburgh v. Com., 360 A.2d 607, 468 Pa. 174, on remand 379 A.2d 1388, 32 Pa.Cmwlth. 596, affd. 400 A.2d 1301, 485 Pa. 40.

However, other courts have rejected the balancing of interests test.^{86.5}

86.5. Private group performing government services

- Ga.—Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Com'n, 314 S.E.2d 218, 252 Ga. 484, app. diss. 105 S.Ct. 57, 83 L.Ed.2d 8.

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However, the grant of eminent domain power to an agency does not invariably indicate a legislative intent that the agency may act without regard for local zoning regulations.^{91.5}

- 91.5 Pa.—Com., Dept. of General Services v. Ogontz Area Neighbors Ass'n, 483 A.2d 448, 505 Pa. 614 overruling City of Pittsburgh v. Commonwealth, 468 Pa. 174, 360 A.2d 607 in so far as it is inconsistent.

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9. Cal.—Trent Meredith, Inc. v. City of Oxnard, 170 Cal.Rptr. 685, 114 C.A.3d 317.
- Fla.—City of Orlando v. School Bd. of Orange County, App., 362 So.2d 694.
10. N.Y.—Jewish Bd. of Family and Children's Services, Inc. v. Zoning Bd. of Appeals of Town of Mount Pleasant, 433 N.Y.S.2d 840, 79 A.D.2d 657.

Lease of empty school building for use as business offices and gymnastic school

- N.Y.—Village of Camillus v. West Side Gymnastics School, Inc., 440 N.Y.S.2d 822, 109 Misc.2d 609.
14. U.S.—Middletown Tp. v. N/E Regional Office, U.S. Postal Service, D.C.N.J., 601 F.Supp. 125.
18. Ohio—Board of Trs. Trustees of Mountville Tp. v. WDBN, Inc., 461 N.E.2d 1345, 10 Ohio App.3d 284, 10 O.B.R. 400.

§ 109. — Public Utilities

Geographically separated site

- Iowa—Reid v. Iowa State Commerce Com'n, 357 N.W.2d 588.

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26. Disposal site for power plant

- Iowa—Reid v. Iowa State Commerce Com'n, 357 N.W.2d 588.

§ 111. — Eminent Domain

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71. Ind.—C.J.S. cited in Indianapolis Power & Light Co. v. Barnard, 371 N.E.2d 408, 412, 175 Ind. App. 308.

74. U.S.—C.J.S. quoted in City of Flint v. Chesapeake & O. Ry. Co., D.C.Mich., 464 F.Supp. 423, 425.

§ 114. — Restrictions Imposed by Act of Parties

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4. Ill.—J. C. Penney Co., Inc. v. Andrews, 386 N.E.2d 923, 25 Ill.Dec. 449, 68 Ill.App.3d 901.
- La.—C.J.S. cited in Hammonds v. Parish of East Baton Rouge Parish, Dept. of Public Works, Permit Div., App., 461 So.2d 1225, 1227.

§ 115. In General

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12. U.S.—Penn Cent. Transp. Co. v. City of New York, N.Y., 98 S.Ct. 2646, 438 U.S. 104, 57 L.Ed.2d 631, reh. den. 99 S.Ct. 226, 439 U.S. 883, 58 L.Ed.2d 198.
- Kan.—City of DeSoto v. Centurion Homes, Inc., 573 P.2d 1081, 1 Kan.App.2d 634.
13. Mass.—Herald v. Zoning Bd. of Appeals of Greenfield, 387 N.E.2d 170, 7 Mass.App. 286.
- N.H.—Price v. Planning Bd. City of Keene, 417 A.2d 997, 120 N.H. 481.

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14. Wis.—Bur v. Schwarten, 264 N.W.2d 721, 83 Wis.2d 1.
20. Mass.—Arrigo v. Planning Bd. of Franklin, 429 N.E.2d 355, 12 Mass.App. 802, review den. 440 N.E.2d 1173, 385 Mass. 1101.
- N.H.—Metzger v. Town of Brentwood, 374 A.2d 954, 117 N.H. 497.
- Pa.—Trush v. Bensalem Tp., 424 A.2d 988, 56 Pa. Cmwlth. 232.
23. Mich.—Cody Park Ass'n v. Royal Oak School Dist., 321 N.W.2d 855, 116 Mich.App. 103.

Radio tower subject to restriction

- Ill.—Rode v. Village of Northbrook, 462 N.E.2d 843, 78 Ill.Dec. 724, 123 Ill.App.3d 436.

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25. Wash.—State, Dept. of Ecology v. Pacesetter Const. Co., Inc., 571 P.2d 196, 88 Wash.2d 203.

§ 116. Dimensions and Density of Building Sites

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- 33.—34. Ariz.—Fox v. Town of Oro Valley, App., 633 P.2d 428, 130 Ariz. 19.
- Ma.—LaPointe v. City of Saco, 419 A.2d 1013.
- Mass.—Girard v. Board of Appeals of Easton, 439 N.E.2d 308, 14 Mass.App. 334.
- Mich.—Cody Park Ass'n v. Royal Oak School Dist., 321 N.W.2d 855, 116 Mich.App. 103.
- N.H.—Meadowbrook Inn Corp. v. Sheridan, 419 A.2d 1072, 120 N.H. 613.

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Vt.—Smith v. Winhall Planning Commission, 436 A.2d 760, 140 Vt. 178.

"Lots of record"

Me.—Camplin v. Town of York, 471 A.2d 1035.

35. Tennis courts

(3) Other matters.

N.Y.—Farrell v. Board of Zoning and Appeals of Inc. Village of Old Westbury, 431 N.Y.S.2d 52, 77 A.D.2d 875.

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42. Ill.—Ganley v. City of Chicago, 401 N.E.2d 1184, 37 Ill.Dec. 91, 81 Ill.App.3d 877.

48. Funeral home

(1) Other matters.

Pa.—Angelone v. Zoning Hearing Bd., 419 A.2d 231, 53 Pa.Cmwlth. 639.

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64. R.I.—Holmes v. Dowling, 413 A.2d 95.

69. D.C.—Russell v. District of Columbia Bd. of Zoning Adjustment, App., 402 A.2d 1231.

Ga.—Connell v. Long, 286 S.E.2d 287, 248 Ga. 716.
N.H.—Town of Seabrook v. Tra-Sea Corp., 410 A.2d 240, 119 N.H. 937.

§ 117. Building or Setback Lines

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83. Ill.—Hazelton v. Zoning Bd. of Appeals of City of Hickory Hills, Cook County, 363 N.E.2d 44, 6 Ill.Dec. 515, 48 Ill.App.3d 348.

Pa.—Trush v. Bensalem Tp., 424 A.2d 988, 56 Pa.Cmwlth. 232.

Tex.—Reiter v. City of Keene, Civ.App., 601 S.W.2d 547, cert. den. 101 S.Ct. 3118, 452 U.S. 965, 69 L.Ed.2d 977, reh. den. 102 S.Ct. 891, 453 U.S. 928, 69 L.Ed.2d 1024.

Purpose

(1) Other purposes.

Ind.—Bird v. Delaware Muncie Metropolitan Plan Commission, App., 416 N.E.2d 482.

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91. Pa.—McCoy v. Zoning Hearing Bd. of Radnor Tp., 387 A.2d 1332, 36 Pa.Cmwlth. 332.

98. Ind.—Bird v. Delaware Muncie Metropolitan Plan Commission, App., 416 N.E.2d 482.

Tiki hut

Fla.—Nash v. Fort Lauderdale Bd. of Adjustment, App. 4 Dist., 462 So.2d 88.

99. Mobile homes held as part of dealer's inventory

Colo.—City of Federal Heights v. Knights Mobile Homes, App., 640 P.2d 244.

§ 118. Yards

2. Ill.—Scandrol v. City of Rockford, 408 N.E.2d 436, 42 Ill.Dec. 58, 86 Ill.App.3d 999.

Wis.—Bur v. Schwarten, 264 N.W.2d 721, 83 Wis.2d 1.

§ 119. Single-Family or Multiple Dwellings

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19. Kan.—City of DeSoto v. Centurion Homes, Inc., 573 P.2d 1081, 1 Kan.App.2d 634.

Multiple family dwelling

(1) Housing project was use permitted outright in city's multifamily zone under definition of multifamily dwelling contained in zoning ordinance.

Or.—City of Hillsboro v. Housing Development Corp. of Washington County, 657 P.2d 726, 61 Or.App. 484.

Use by different family each week

Wis.—State ex rel. Harding v. Door County Bd. of Adjustment, App., 371 N.W.2d 403, 125 Wis.2d 269.

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29. N.Y.—Incorporated Village of Freeport v. Association for Help of Retarded Children, 406 N.Y.S.2d 221, 94 Misc.2d 1048, affd. 400 N.Y.S.2d 724.

30. Tenants allowed to organize into such units

N.Y.—Buck v. Moran, 485 N.Y.S.2d 421, 126 Misc.2d 836.

39. N.Y.—Group House of Port Washington, Inc. v. Board of Zoning and Appeals of Town of North Hempstead, 380 N.E.2d 207, 45 N.Y.2d 266, 408 N.Y.S.2d 377.

Residential facility for aged

Minn.—Good Neighbor Care Center v. City of Little Canada, App., 357 N.W.2d 159, review den.

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40. Tex.—Collins v. City of El Campo, App. 13 Dist., 684 S.W.2d 756, err. ref. no rev. err.

43. N.H.—Region 10 Client Management, Inc. v. Town of Hampstead, 424 A.2d 207, 120 N.H. 885.

44. Ind.—Metropolitan Development Com'n of Marion County v. Villages, Inc., App. 3 Dist., 464 N.E.2d 367, cert. den. 105 S.Ct. 1879, 85 L.Ed.2d 171.

§ 121. House Trailers and Mobile Homes

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66. Wis.—Hansman v. Oneida County, App., 366 N.W.2d 901, 123 Wis.2d 511.

§ 122. General Rules

page 418

70. U.S.—Deerfield Medical Center v. City of Deerfield Beach, C.A.Fla., 661 F.2d 328.

Cal.—City of Torrance v. Transitional Living Centers for Los Angeles, Inc., 179 Cal.Rptr. 907, 638 P.2d 1304, 30 C.3d 516.

Ga.—Thurman's Auto Parts & Wrecker Service, Inc. v. Cobb County, 286 S.E.2d 707, 248 Ga. 826.

Ill.—Village of Maywood v. Health, Inc., 433 N.E.2d 951, 60 Ill.Dec. 713, 104 Ill.App.3d 948.

Me.—Town of Kittery v. White, 435 A.2d 405.

Md.—Mayor and City Council of Baltimore v. Bruce, 420 A.2d 1272, 46 Md.App. 704.

Mass.—Fox v. Board of Appeals of Ayer, 432 N.E.2d 738, 13 Mass.App. 999.

Mich.—Brandon Tp. v. North-Oakland Residential Services, Inc., 312 N.W.2d 238, 110 Mich.App. 300.

Minn.—Costley v. Caromin House, Inc., 313 N.W.2d 21.

Mo.—State ex rel. Rybolt v. Easley, App., 600 S.W.2d 601.

N.M.—Texas Nat. Theatres, Inc. v. City of Albuquerque, 639 P.2d 569, 97 N.M. 282.

N.Y.—Incorporated Village of Lynbrook v. Pellegrino, 443 N.Y.S.2d 889, 84 A.D.2d 779.

Or.—Willamette University v. Land Conservation and Development Commission, 608 P.2d 1178, 45 Or. App. 355.

Pa.—Kaufman & Broad, Inc. v. Board of Sup'rs of West Whiteland Tp., 340 A.2d 909, 20 Pa.Cmwlth. 116, appeal after remand 376 A.2d 305, 31 Pa.Cmwlth. 315 and 442 A.2d 1220, 65 Pa.Cmwlth. 469.

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86. Boundaries

(1) Kan.—City of DeSoto v. Centurion Homes, Inc., 573 P.2d 1081, 1 Kan.App.2d 634.

La.—City of New Orleans v. Girard, App., 346 So.2d 1113, writ den., Sup., 349 So.2d 884, and 362 So.2d 579.

§ 123. Residential Districts

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98. Ga.—C.J.S. quoted in Douglas County Resources, Inc. v. Daniel, 280 S.E.2d 734, 735, 247 Ga. 785.

Mass.—Heald v. Zoning Bd. of Appeals of Greenfield, 387 N.E.2d 170, 7 Mass.App. 286.

Okla.—City of Cherokee v. Tatro, 636 P.2d 337.

Wash.—City of Seattle v. Koh, 614 P.2d 665, 26 Wash. App. 708.

"Domestic bond"

Me.—Penobscot Area Housing Development Corp. v. City of Brewer, 434 A.2d 14, 32 A.L.R.4th 1002.

6. Fla.—Halifax Area Council on Alcoholism v. City of Daytona Beach, App., 385 So.2d 184.

Hawaii—State v. Maxwell, 617 P.2d 816, 62 Haw. 556.

Ill.—Palella v. Leyden Family Service & Mental Health Center, 404 N.E.2d 228, 38 Ill.Dec. 804, 79 Ill.2d 493.

N.Y.—Nassau Children's House, Inc. v. Board of Zoning Appeals of Inc. Village of Mineola, 430 N.Y. S.2d 683, 77 A.D.2d 898.

Ohio—Carroll v. Washington Tp. Zoning Commission, 408 N.E.2d 191, 63 Ohio St.2d 249, 17 O.O.3d 161.

Pa.—Board of Sup'rs of Buckingham Tp., Land Use Task Force v. Barnes, 382 A.2d 140, 33 Pa.Cmwlth. 364, cert. den. 99 S.Ct. 1021, 439 U.S. 1116, 59 L.Ed.2d 74.

Vt.—Vermont Division of State Bldgs. v. Town of Castleton Bd. of Adjustment, 415 A.2d 188, 138 Vt. 250.

Uses excluded or not permitted

(5) Denying occupancy permit for group home for retarded persons in low-density, single-family residential district reasonable.

Me.—Penobscot Area Housing Development Corp. v. City of Brewer, 434 A.2d 14, 32 A.L.R.4th 1002.

Denial of all methods of disposal of waste unconstitutional

Fla.—Fischer v. Board of County Com'rs of Orange County, App. 5 Dist., 462 So.2d 480, review den. 472 So.2d 1181.

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16. La.—Norton v. Lay, App., 360 So.2d 239.

Where residential property is located in a transitional zone in which both residential and commercial uses are permitted, the landowners' right to use their property for professional office space is conditional, not absolute.^{16.5}

18.5 Conforming to access and other requirements

Va.—Board of Zoning Appeals, City of Falls Church v. O'Malley, 331 S.E.2d 481, 229 Va. 605.

§ 126. Industrial and Manufacturing Districts

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63. Neb.—Hansen v. City of Norfolk, 267 N.W.2d 537, 201 Neb. 352.

N.Y.—SCA Chemical Waste Services, Inc. v. Board of Appeals of Town of Porter, 427 N.Y.S.2d 1017, 75 A.D.2d 106, affd. 419 N.E.2d 872, 52 N.Y.2d 963, 437 N.Y.S.2d 969.

Animal shelter

Mich.—Szluba v. Charter Tp. of Avon, App., 340 N.W.2d 105, 128 Mich.App. 402.

§ 127. Use Within Specified Distance of Particular Premises

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77. Cal.—Pringle v. City of Covina, 171 Cal.Rptr. 251, 115 C.A.3d 151.

§ 128. Specific Terms and Uses

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89. U.S.—Elk City Neighborhood Preservation Ass'n, Inc. v. Southwestern Bell Tel. Co., D.C.Okla., 466 F.Supp. 32.
Matter of White, Bkrtcy.Mich., 2 B.R. 656.
Cal.—Toeh v. California Coastal Commission, 160 Cal. Rptr. 170, 99 C.A.3d 388.
Colo.—Board of County Com'rs of Jefferson County v. Mountain Air Ranch, 563 P.2d 341, 192 Colo. 364.
D.C.—Keefe Co. v. District of Columbia Bd. of Zoning Adjustment, App., 409 A.2d 624.
Fla.—King v. City of Coral Gables, App., 363 So.2d 389.
Idaho—Wyckoff v. Board of County Com'rs of Ada County, 607 P.2d 1066, 101 Idaho 12.
Ill.—City of Urbana v. Champaign County, 389 N.E.2d 1185, 27 Ill.Dec. 777, 76 Ill.2d 63.
Iowa—Linn County v. City of Hiawatha, 311 N.W.2d 95.
La.—City of Kenner v. Kenner Academy, App., 373 So.2d 197.
Me.—Town of Arundel v. Swain, 374 A.2d 317.
Mass.—McCausland v. Board of Appeals of Salisbury, 375 N.E.2d 335, 6 Mass.App. 288.
Mich.—Peacock Tp. v. Panetta, 265 N.W.2d 810, 81 Mich.App. 733.
Minn.—Ramsey County v. Stevens, 283 N.W.2d 918.
Neb.—Kittrell v. Board of Adjustment of City of Hastings, 266 N.W.2d 724, 201 Neb. 130.
N.H.—Town of Tuftonboro v. Lakeside Colony, Inc., 403 A.2d 410, 119 N.H. 445.
N.J.—American Dredging Co. v. State, Dept. of Environmental Protection, 404 A.2d 42, 169 N.J.Super. 18.
N.Y.—Highpoint Enterprises, Inc. v. Board of Estimate of City of New York, 413 N.Y.S.2d 155, 67 A.D.2d 914, aff'd. 393 N.E.2d 1041, 47 N.Y.2d 935, 419 N.Y.S.2d 969.
Ohio—City of Pepper Pike v. Landskroner, 371 N.E.2d 579, 53 Ohio App.2d 63, 7 O.O.3d 44, 95 A.L.R.3d 364.
Or.—Thunderbird Motel, Inc. v. City of Portland, 596 P.2d 994, 40 Or.App. 697.
Pa.—St. Luke Evangelical Lutheran Church v. Zoning Hearing Bd. of Easttown Tp., 403 A.2d 128, 43 Pa.Cmwith. 159.
Tex.—City of Beaumont v. Jones, Civ.App., 560 S.W.2d 710, err. ref. no rev. err.
Vt.—Kakowski v. John A. Russell Corp., 401 A.2d 906, 137 Vt. 219.
Va.—WANY, Inc. v. Houff, 244 S.E.2d 760, 219 Va. 57.
Wash.—Wiggers v. Skagit County, 596 P.2d 1345, 23 Wash.App. 207.
Wis.—Citizens for Sensible Zoning, Inc. v. Department of Natural Resources, Columbia County, 280 N.W.2d 702, 90 Wis.2d 804.
- Particular terms or uses**
(1) Me.—Waxler v. City of Portland, 454 A.2d 344.
- Recreation**
Pa.—Mt. Laurel Racing Ass'n v. Zoning Hearing Bd., Municipality of Monroeville, 458 A.2d 1043, 73 Pa.Cmwith. 531.
- Family use**
Ala.—Civilians Care, Inc. v. Board of Adjustment of City of Huntsville, Civ.App., 437 So.2d 540.

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99. **Distribution center**
N.Y.—Town of Huntington v. Barracuda Transp. Co., Inc., 435 N.Y.S.2d 354, 80 A.D.2d 555.
5. Ill.—Richardson v. Kitchin, 394 N.E.2d 796, 31 Ill.Dec. 594, 75 Ill.App.3d 961.
26. Ind.—Pleasureland Museum, Inc. v. Dailey, App., 422 N.E.2d 754.
29. Mass.—Langwin v. Superintendent of Public Bldgs. of Worcester, 369 N.E.2d 739, 5 Mass.App. 892.

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36. Mich.—Village of Mackinac City v. Union Terminal Pier, 302 N.W.2d 326, 103 Mich.App. 60.
39. N.Y.—People v. Cully Realty, Inc., 442 N.Y.S.2d 847, 109 Misc.2d 169.
40. Mo.—City of St. Ann v. Crump, App., 607 S.W.2d 706.
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45. Colo.—Board of County Com'rs of Boulder County v. Echternacht, 572 P.2d 143, 194 Colo. 311.
Mass.—Foster Masonry Products, Inc. v. Board of Appeals of Acton, 434 N.E.2d 1301, 13 Mass.App. 546, review den., Sup., 438 N.E.2d 75, 386 Mass. 1105.
Mo.—Missouri Rock, Inc. v. Winholtz, App., 614 S.W.2d 734.
Or.—Ruhnke v. Cantrell, 570 P.2d 652, 280 Or. 297.
47. Pa.—Lonzetta v. Hazle Tp., 374 A.2d 743, 30 Pa.Cmwith. 503.

§ 129. — Agricultural Use; Farm; Nursery; Greenhouse

50. Ky.—McCord v. Pineway Farms, App., 569 S.W.2d 690.
Or.—1000 Friends of Oregon v. Board of County Com'rs, Benton County, 575 P.2d 651, 32 Or.App. 413, petition den. 584 P.2d 1371, 284 Or. 41.
Pa.—Farmland Industries, Inc. v. Zoning Hearing Bd. of Pequea Tp., 442 A.2d 395, 65 Pa.Cmwith. 288.
S.D.—Save Centennial Valley Ass'n, Inc. v. Schultz, 284 N.W.2d 452.
Tex.—Marriott v. City of Dallas, App. 5 Dist., 635 S.W.2d 561, aff'd, Sup., 644 S.W.2d 469.
54. Pa.—Farmland Industries, Inc. v. Zoning Hearing Bd. of Pequea Tp., 442 A.2d 395, 65 Pa.Cmwith. 288.

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63. Ill.—Tuftee v. Kane County, 394 N.E.2d 896, 31 Ill.Dec. 694, 76 Ill.App.3d 128.
Or.—Meyer v. Lord, 586 P.2d 367, 37 Or.App. 59.
Pa.—Barnhart v. Zoning Hearing Bd. of Nottingham Tp., Washington County, 411 A.2d 1266, 49 Pa.Cmwith. 481.
65. Pa.—Appeal of Lowney, 406 A.2d 1160, 46 Pa.Cmwith. 213.
- Uses not within provisions**
(2) Other uses.
Me.—Gignere v. Inhabitants of City of Auburn, 390 A.2d 514.

66. Or.—Still v. Board of County Com'rs of Marion County, 600 P.2d 433, 42 Or.App. 115—Hillcrest Vineyard v. Board of Com'rs of Douglas County, 608 P.2d 201, 45 Or.App. 285.

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70. N.C.—Development Associates, Inc. v. Wake County Bd. of Adjustment, 269 N.E.2d 700, 48 N.C.App. 541, review den. 274 S.E.2d 227, 301 N.C. 719.
82. Minn.—Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604.

§ 130. — Billboard; Sign

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98. Colo.—Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 575 P.2d 835, 195 Colo. 44, app. dism. 99 S.Ct. 66, 439 U.S. 809, 58 L.Ed.2d 101.
Fla.—Harrison v. State, Dept. of Transp., App., 349 So.2d 720.
Me.—Matheson v. Zoning Bd. of Appeals of City of Saco, 387 A.2d 218.
Md.—Gosman v. Prince George's County, 397 A.2d 630, 41 Md.App. 479.
Minn.—State by Spannaus v. Hopf, 323 N.W.2d 746.
N.M.—Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565, 98 N.M. 138.

Size of sign

- (1) Pa.—David Aaron, Ltd. v. Borough of Jenkinson, 439 A.2d 1322, 63 Pa.Cmwith. 577.

§ 131. — Boarding House; Hotel; Motel

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12. **Shelter care group home**
Mo.—City of Vinita Park By and Through Bd. of Directors v. Girls Sheltercare, Inc., 664 S.W.2d 256.
16. N.J.—Washington Tp. v. Central Bergen Community Mental Health Center, Inc., 383 A.2d 1194, 156 N.J.Super. 388.
18. Ala.—City of Guntersville v. Shull, 355 So.2d 361, 100 A.L.R.3d 871.
21. Iowa—Linn County v. City of Hiawatha, 311 N.W.2d 95.

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27. Ga.—Merrin v. Plaza Towers Ltd. Partnership, 287 S.E.2d 771, 161 Ga.App. 543.
28. Hawaii—Maui County v. Puanana Management Corp., 631 P.2d 1215, 2 Haw.App. 352.
36. Fla.—City of Hallandale v. Prospect Hall College, Inc., App. 4 Dist., 414 So.2d 239.

However, the offering of individually owned condominium units for short-term vacation rental with available convenient services to the tenants does not operate to convert such units to a motel operation forbidden in the zoning classification.^{36.5}

- 36.5 S.C.—Landing Development Corp. v. City of Myrtle Beach, 329 S.E.2d 423, 285 S.C. 216.

§ 132. — Building; Structure

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43. **Truck not "building"**
N.Y.—Bookis v. Kayser, 2 Dept., 491 N.Y.S.2d 438, 112 A.D.2d 222.
47. Me.—Inhabitants of Town of Boothbay Harbor v. Russell, 410 A.2d 554.
Wis.—Columbia County v. Bylewski, 288 N.W.2d 129, 94 Wis.2d 153.

§ 133. — Business; Trade; Industry

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49. N.Y.—Ecology Action v. Van Cort, 417 N.Y.S.2d 165, 99 Misc.2d 664.
- Drive-in business**
Wash.—Seattle-First Nat. Bank v. Snell, 629 P.2d 454, 29 Wash.App. 500.
50. Pa.—Board of Adjustment of City of Pittsburgh v. Brandi, 387 A.2d 1016, 36 Pa.Cmwith. 377.

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67. N.Y.—C. DeMasco Scrap Iron & Metal Corp. v. Zirk, 405 N.Y.S.2d 260, 62 A.D.2d 92, aff'd. 387 N.E.2d 227, 46 N.Y.2d 864, 414 N.Y.S.2d 516.

§ 134. — Church; Convent; Religious Use

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70. Ill.—Twin-City Bible Church v. Zoning Bd. of Appeals of City of Urbana, 365 N.E.2d 1381, 8 Ill.Dec. 919, 50 Ill.App.3d 924.
76. N.Y.—Application of Covenant Community Church, Inc., 444 N.Y.S.2d 415, 111 Misc.2d 537.
78. N.H.—City of Concord v. New T. stament Baptist Church, 382 A.2d 377, 116 N.H. 56.

§ 134 ZONING

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80. Ill.—Diakonian Soc. v. City of Chicago Zoning Bd. of Appeals, 380 N.E.2d 843, 20 Ill.Dec. 634, 63 Ill.App.3d 823.

82. Mass.—Cambridge Buddhist Ass'n, Inc. v. City of Cambridge, 414 N.E.2d 1002, 382 Mass. 687.

N.Y.—Application of Covenant Community Church, Inc., 444 N.Y.S.2d 415, 111 Misc.2d 537.

"Monastery," for zoning purposes, means that residents of the property live monastic life-style as exhibited by a central religious faith, attachment to an organized church, shared living quarters and an ordered, disciplined life-style.^{86.5}

86.5. Minn.—City of Minneapolis v. Church Universal and Triumphant, 339 N.W.2d 880.

§ 135. — Club; Fraternity

88. Pa.—Pittsburgh Keystone Moose Lodge No. 256 v. Com., 402 A.2d 1107, 43 Pa.Cmwith. 367.

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89. D.C.—Association For Preservation of 1700 Block of N St., N.W. and Vicinity v. District of Columbia Bd. of Zoning Adjustment, App., 384 A.2d 668.

§ 136. — Garage; Service Station; Car Wash

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16. Okl.—Robison v. Ray, 637 P.2d 108.

20. Mass.—D'Orlando v. Board of Appeals of Danvers, 362 N.E.2d 937, 5 Mass.App. 824.

28. Minn.—Southland Corp. v. City of Minneapolis, 279 N.W.2d 822.

N.Y.—Genesee Farms, Inc. v. Scopano, 431 N.Y.S.2d 219, 77 A.D.2d 784.

"Automobile" gasoline filling station not limited to passenger cars

Colo.—Lombardi v. Board of Adjustment (Zoning) of City and County of Denver, App., 675 P.2d 21.

§ 137. — Hospital; Nursing Home; Treatment Center

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52. Ill.—City of Chicago Heights v. Old Orchard Bank Trust Co., 422 N.E.2d 69, 52 Ill.Dec. 388, 96 Ill.App.3d 789.

Other adjudications have been made with respect to clinics.^{60.5}

60.5. Gynecological services

Mass.—Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham, 415 N.E.2d 840, 382 Mass. 283.

§ 139. — Junk yard; Automobile Wrecking Yard

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92. Ala.—Jaffe Corp., Inc. v. Board of Adjustment of City of Sheffield, Civ.App., 361 So.2d 556, writ quashed, Sup., 361 So.2d 563.

Colo.—Board of County Com'rs of Boulder County v. Eichentacht, 572 P.2d 143, 194 Colo. 311.

Ill.—Lake County v. First Nat. Bank of Lake Forest, 386 N.E.2d 594, 25 Ill.Dec. 123, 68 Ill.App.3d 693, aff'd, 402 N.E.2d 591, 37 Ill.Dec. 589, 79 Ill.2d 221.

Ind.—Field v. Area Plan Commission of Grant County, Ind., App., 421 N.E.2d 1132.

N.C.—State v. Jones, 290 S.E.2d 675, 305 N.C. 520.

Indoor junkyard

Ind.—Board of Zoning Appeals of Bartholomew County v. Freeman, App., 437 N.E.2d 1035.

96. N.Y.—C. DeMasco Scrap Iron & Metal Corp. v. Zirk, 405 N.Y.S.2d 260, 62 A.D.2d 92, aff'd, 387 N.E.2d 227, 46 N.Y.2d 864, 414 N.Y.S.2d 516.

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§ 141. — Manufacturing

21. Rock quarrying and crushing

Mo.—Coots v. J. A. Tobin Const. Co., App., 634 S.W.2d 249.

§ 142. — Mobile Home or Trailer; Camps or Parks

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25. Colo.—Board of County Com'rs of Jefferson County v. Mountain Air Ranch, 563 P.2d 341, 192 Colo. 364.

La.—Rue Lafayette Mortg. Corp. v. Wenger, App., 366 So.2d 1059.

Or.—Clackamas County v. Dunham, 579 P.2d 223, 282 Or. 419.

Self-propelled motor home not included

Ohio—City of Pepper Pike v. Landskroner, 371 N.E.2d 579, 53 Ohio App.2d 63, 7 O.O.3d 44, 95 A.L.R.3d 364.

28. Wis.—Columbia County v. Bylewski, 288 N.W.2d 129, 94 Wis.2d 153.

37. Conn.—Fedorich v. Zoning Bd. of Appeals of Town of Torrington, 424 A.2d 289, 178 Conn. 610.

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42. Mass.—Town of Auburn v. Johnson, 421 N.E.2d 88, 11 Mass.App. 1037.

Pa.—Colonial Park for Mobile Homes, Inc. v. New Britain Tp., 408 A.2d 1160, 47 Pa.Cmwith. 459.

§ 143. — Parking; Vehicle Storage; Sales Lot

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59. Ga.—Warren v. City of Marietta, 288 S.E.2d 562, 249 Ga. 205.

Ill.—Heerey v. Zoning Bd. of Appeals of City of Chicago, 403 N.E.2d 617, 38 Ill.Dec. 386, 82 Ill.App.3d 1088.

Md.—Anderson v. Associated Professors of Loyola College in City of Baltimore, 385 A.2d 1203, 39 Md. App. 345.

Mass.—McDonald's Corp. v. Board of Selectmen of Randolph, 399 N.E.2d 38, 9 Mass.App. 830.

N.Y.—Cohalan v. Lechtrecke, 443 N.Y.S.2d 892, 84 A.D.2d 775, aff'd, 438 N.E.2d 1142, 56 N.Y.2d 861, 453 N.Y.S.2d 421.

N.C.—Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 261 S.E.2d 520, 44 N.C.App. 539, petition den. 267 S.E.2d 663, 299 N.C. 737.

Or.—Collins v. Rathbun, 604 P.2d 441, 43 Or.App. 857.

Pa.—Appeal of Hoffman, 444 A.2d 764, 66 Pa.Cmwith. 7.

63. Ill.—Nonnenmann v. Lucky Stores, Inc., 368 N.E.2d 200, 10 Ill.Dec. 714, 53 Ill.App.3d 509.

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67. Md.—Hofmeister v. Frank Realty Co., 373 A.2d 273, 35 Md.App. 691.

72. Restaurant's outdoor terrace area

Me.—Town of Ogunquit v. Brazer, 489 A.2d 505.

77. Pa.—Galliford v. Com., 430 A.2d 1222, 60 Pa. Cmwith. 175.

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87. Pa.—Cook v. Zoning Hearing Bd. of Ridley Tp., 408 A.2d 1157, 47 Pa.Cmwith. 160.

83. Storage services permitted

Ga.—Thurman's Auto Parts & Wrecker Service, Inc. v. Cobb County, 286 S.E.2d 707, 248 Ga. 826.

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§ 144. — Restaurant; Drive-In Restaurant

94. Pa.—Appeal of Haff, 448 A.2d 120, 68 Pa. Cmwith. 112.

95. Mo.—State ex rel. C. C. G. Management Corp. v. City of Overland, App., 624 S.W.2d 50.

1. Kan.—Mouber v. City of Prairie Village, 637 P.2d 424, 6 Kan.App.2d 972.

§ 146. — School; Educational Institution or Use

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29. N.Y.—Rorie v. Woodmere Academy, 418 N.E.2d 659, 52 N.Y.2d 193, 437 N.Y.S.2d 63, on remand 439 N.Y.S.2d 690, 80 A.D.2d 276.

30. Mass.—Bible Speaks v. Board of Appeals of Lenox, 391 N.E.2d 279, 8 Mass.App. 19.

R.I.—City of Providence v. O'Neill, 445 A.2d 290.

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40. U.S.—Stansberry v. Holmes, C.A.Tex., 613 F.2d 1283, reh. den. 616 F.2d 568, cert. den. 101 S.Ct. 240, 449 U.S. 886, 66 L.Ed.2d 112.

N.J.—Areba School Corp. v. Mayor and Council of Randolph Tp., 376 A.2d 1273, 151 N.J.Super. 336.

41. Mass.—Harbor Schools, Inc. v. Board of Appeals of Haverhill, 366 N.E.2d 764, 5 Mass.App. 600.

42. Pa.—Evans v. Zoning Hearing Bd. of Easttown Tp., 396 A.2d 889, 40 Pa.Cmwith. 103.

43. Museums

Fla.—City of Kissimmee v. Ellis, App. 5 Dist., 431 So.2d 283.

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46. Pa.—Warminster Area Child Day Care Ass'n, Inc. v. Upper Southampton Tp. Zoning Hearing Bd., 386 A.2d 1076, 35 Pa.Cmwith. 541.

47. N.Y.—Rorie v. Woodmere Academy, 417 N.Y. S.2d 299, 70 A.D.2d 908, app. diss. 397 N.E.2d 1334, 48 N.Y.2d 753, 422 N.Y.S.2d 667, app. after remand 426 N.Y.S.2d 1011, 74 A.D.2d 866, aff'd, 418 N.E.2d 659, 52 N.Y.2d 200, 437 N.Y.S.2d 66.

56. Md.—Anderson v. Associated Professors of Loyola College in City of Baltimore, 385 A.2d 1203, 39 Md.App. 345.

57. Wash.—East v. King County, 589 P.2d 805, 22 Wash.App. 247.

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62. Wash.—East v. King County, 589 P.2d 805, 22 Wash.App. 247.

§ 147. — Warehouse; Storage

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74. N.Y.—Town of Huntington v. Barracuda Transp. Co., Inc., 435 N.Y.S.2d 354, 80 A.D.2d 555.

§ 148. Accessory Uses in General

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79. Ind.—Board of Zoning Appeals of Elkhart County v. New Testament Bible Church, Inc., App., 411 N.E.2d 681.

Neb.—Kittrell v. Board of Adjustment of City of Hastings, 266 N.W.2d 724, 201 Neb. 130.

Pa.—Klein v. Lower Macungie Tp., 395 A.2d 609, 39 Pa.Cmwith. 81—McGeehan v. Zoning Hearing Bd. of Springfield Tp., 407 A.2d 56, 45 Pa.Cmwith. 403.

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82. Mo.—Schaefer v. Neumann, App., 561 S.W.2d 416.

83. Mass.—Town of Foxborough v. Bay State Harness Horse Racing and Breeding Ass'n, Inc., 366 N.E.2d 773, 5 Mass.App. 613.

88. Ill.—Lake County v. LaSalle Nat. Bank, 395 N.E.2d 392, 32 Ill.Dec. 282, 76 Ill.App.3d 179.
- Iowa—C.J.S. cited in Grandview Baptist Church v. Zoning Bd. Adjustment of City of Davenport, 301 N.W.2d 704, 709.
- Neb.—Kitrell v. Board of Adjustment of City of Hastings, 266 N.W.2d 724, 201 Neb. 130.
- N.J.—State v. P.T. & L. Const. Co., Inc., 389 A.2d 448, 77 N.J. 20.
- Pa.—Champaigne v. Zoning Hearing Bd. of East Bradford Tp., 374 A.2d 752, 30 Pa.Cmwith. 544.
89. N.J.—State v. P.T. & L. Const. Co., Inc., 389 A.2d 448, 77 N.J. 20.
90. N.H.—Becker v. Town of Hampton Falls, 374 A.2d 653, 117 N.H. 437.
91. Mass.—Town of Foxborough v. Bay State Harness Horse Racing and Breeding Ass'n, Inc., 366 N.E.2d 773, 5 Mass.App. 613.

§ 149. — Particular Uses Permitted

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98. Colo.—Baysinger v. City of Northglenn, 575 P.2d 425, 195 Colo. 99.
- Ill.—Tollway North Office Center Central Nat. Bank in Chicago v. Streicher, 403 N.E.2d 1246, 38 Ill.Dec. 642, 83 Ill.App.3d 239.
- La.—Plaquemines Parish Commission Council v. Hero Lands Co., App., 380 So.2d 722, affd. in part, revd. in part on oth. grds., Sup., 388 So.2d 790.
- Neb.—Kitrell v. Board of Adjustment of City of Hastings, 266 N.W.2d 724, 201 Neb. 130.
- N.J.—State v. P.T. & L. Const. Co., Inc., 389 A.2d 448, 77 N.J. 20.
- Ohio—Brown v. City of Cleveland, 420 N.E.2d 103, 66 Ohio St.2d 93, 20 O.O.3d 88.
- R.I.—Hardy v. Zoning Bd. of Review of Town of Coventry, 382 A.2d 520, 119 R.I. 533.
- Tex.—Parks v. Board of Adjustment of City of Killeen, Civ.App., 566 S.W.2d 365, err. ref. no rev. err.

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15. Hawaii—City and County of Honolulu v. Ambler, 623 P.2d 92, 1 Haw.App. 589.
- Mass.—Town of Chelmsford v. Byrne, 372 N.E.2d 1307, 6 Mass.App. 848.
- Me.—Singal v. City of Bangor, 440 A.2d 1048.
- Mich.—Groveland Tp. v. Jennings, 308 N.W.2d 259, 106 Mass.App. 504, affd. 358 N.W.2d 888, 419 Mich. 719.
- Mo.—Schaefer v. Neumann, App., 561 S.W.2d 416.
- N.Y.—Garcia v. Holze, 462 N.Y.S.2d 700, 94 A.D.2d 759—7-11 Tours, Inc. v. Board of Zoning Appeals of Town of Smithtown, 454 N.Y.S.2d 477, 90 A.D.2d 486.
- N.C.—Coastal Ready-Mix Concrete Co., Inc. v. Board of Com'rs of Town of Nags Head, 265 S.E.2d 379, 299 N.C. 620, reh. den. 270 S.E.2d 106, 300 N.C. 562.
- Pa.—Champaigne v. Zoning Hearing Bd. of East Bradford Tp., 374 A.2d 752, 30 Pa.Cmwith. 544.
- Vt.—In re Porter Medical Associates Use Change Permit, 423 A.2d 491, 139 Vt. 132.

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28. Ohio—University Circle, Inc. v. City of Cleveland, 383 N.E.2d 139, 56 Ohio St.2d 180, 10 O.O.3d 346.

§ 150. Uses Accessory to Residence

39. Colo.—Holcomb v. City and County of Denver, 606 P.2d 858, 199 Colo. 251.
- Mass.—Bell v. Zoning Bd. of Appeals of Cohasset, 437 N.E.2d 532, 14 Mass.App. 97, review den. 440 N.E.2d 21, 387 Mass. 1101.
45. Housing mentally retarded adults as family
- Ohio—White v. Board of Zoning Appeals of Madison Tp., 451 N.E.2d 756, 6 Ohio St.3d 68, 6 O.B.R. 111.

46. Pa.—Taddeo v. Com., 412 A.2d 212, 49 Pa.Cmwith. 485.

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49. Mass.—Bell v. Zoning Bd. of Appeals of Cohasset, 437 N.E.2d 532, 14 Mass.App. 97, review den. 440 N.E.2d 21, 387 Mass. 1101.
- Pa.—Klein v. Lower Macungie Tp., 395 A.2d 609, 39 Pa.Cmwith. 81.
- Tex.—Currey v. Kimple, Civ.App., 577 S.W.2d 508, err. ref. no rev. err.
57. N.H.—Town of Salem v. Durrett, 480 A.2d 9, 126 N.H. 29.

§ 151. — Professional Office, Studio, or Home Occupation

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73. Limitation on employees
- (1) Dentist's use of assistants in business of carrying out dental practice at home violated ordinance.
- Ala.—DeShazo v. City of Huntsville, Cr.App., 416 So.2d 1100.
- Engineering and architectural office
- Pa.—Kemp v. White Oak Zoning Hearing Bd., 453 A.2d 66, 70 Pa.Cmwith. 362.
74. N.H.—Town of Milford v. Bottazzi, 433 A.2d 1269, 121 N.H. 636.

Occupation as commercial activity

Since the publication of the bound volume the more restrictive standard implied by Westminster Presbyterian Church v. Turner, 343 A.2d 604 has been abandoned the court holding that in determining what is "customary home occupation" within meaning of zoning ordinance regulating commercial activities in residential district, reference is to that which is done on a state-wide basis.

- Del.—Commissioners of Bellefonte v. Coppola, 453 A.2d 457.

Excluded occupations

- (3) Counseling services in home in single-family area.
- Ill.—DuPage County v. Elliott, 406 N.E.2d 592, 40 Ill.Dec. 586, 85 Ill.App.3d 225.
- (4) Pa.—Page v. Zoning Hearing Bd. of Walker Tp., 471 A.2d 1348, 80 Pa.Cmwith. 589.

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75. Mich.—Lerner v. Bloomfield Tp., 308 N.W.2d 701, 106 Mich.App. 809.
76. Ind.—Metropolitan Development Commission of Marion County v. Mullin, App., 399 N.E.2d 751.
77. Pa.—Green v. Zoning Bd. of Adjustment of City of Pittsburgh, 490 A.2d 488, 88 Pa.Cmwith. 469.
87. Ceramics factory not authorized
- Pa.—Draving v. Lower Southampton Tp. Zoning Hearing Bd., 397 A.2d 54, 40 Pa.Cmwith. 243.

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90. Pa.—Good v. Zoning Hearing Bd. of Haverford Tp., 384 A.2d 1374, 35 Pa.Cmwith. 155.
91. Pa.—Good v. Zoning Hearing Bd. of Haverford Tp., 384 A.2d 1374, 35 Pa.Cmwith. 155.

It has also been held that a provision of a zoning ordinance permitting certain home occupations for consultation and treatment contemplated the use of a home for calls and contacts with clients in connection with a real estate business.^{92,5}

- 92.5 Iowa—Vaisel v. Board of Adjustment of Cedar Rapids, App., 372 N.W.2d 316.
98. N.H.—Liolis v. Franklin Zoning Bd. of Adjustment, 395 A.2d 1255, 118 N.H. 928.

§ 152. Accessory Buildings

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11. Me.—Giguere v. Inhabitants of City of Auburn, 390 A.2d 514.
- N.H.—Becker v. Town of Hampton Falls, 374 A.2d 653, 117 N.H. 437.
- Unauthorized in certain residential zone
- R.I.—Zeistra v. Barrington Zoning Bd. of Review, 417 A.2d 303.
12. Pa.—Oliver v. Zoning Hearing Bd. of South Londonderry Tp., Lebanon County, 392 A.2d 350, 38 Pa.Cmwith. 213.
18. Kan.—Trent v. City of Pittsburg, 619 P.2d 1171, 5 Kan.App.2d 543.
22. Not required to have kitchen facilities
- N.Y.—Malerba v. Warren, 438 N.Y.S.2d 936, 108 Misc.2d 785, mod. on oth. grds. 464 N.Y.S.2d 835, 96 A.D.2d 529.

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§ 153. — Garage

24. N.Y.—Eckstein v. Glimm, 444 N.Y.S.2d 474, 84 A.D.2d 839.

§ 154. General Rule as to Continuation

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32. Me.—Town of Kittery v. White, 435 A.2d 405.
- Mass.—Sturges v. Town of Chilmark, 402 N.E.2d 1346, 380 Mass. 246.
- N.H.—Town of Seabrook v. Tra-Sea Corp., 410 A.2d 240, 119 N.H. 937.

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37. Ill.—City of Belleville v. Keeler, 428 N.E.2d 617, 57 Ill.Dec. 67, 101 Ill.App.3d 710.
- Nev.—Board of Clark County Com'rs v. Excite Corp., 643 P.2d 1209, 98 Nev. 153.
38. Or.—Eklund v. Clackamas County, 583 P.2d 567, 36 Or.App. 73.

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A zoning ordinance is unconstitutional-ally vague and violative of due process where it provides no standards or guidelines indicating what constitutes sufficient proof to establish a valid nonconforming use before the zoning authority.^{49,5}

- 49.5 Conn.—Helbig v. Zoning Commission of Noank Fire Dist., 440 A.2d 940, 185 Conn. 294.

§ 155. — Basis and Policy of Rule

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70. Mo.—Boyce Industries, Inc. v. Missouri Highway and Transp. Com'n, App., 670 S.W.2d 147.
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79. U.S.—League to Save Lake Tahoe v. Crystal Enterprises, D.C.Nev., 490 F.Supp. 995, affd., C.A., 685 F.2d 1142.

§ 156. — Application to Particular Uses or Structures

84. Pa.—McGeehan v. Zoning Hearing Bd. of Springfield Tp., 407 A.2d 56, 45 Pa.Cmwith. 403.

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11. Or.—Columbia Hills Development Co. v. Land Conservation and Development Commission, 624 P.2d 157, 50 Or.App. 483.

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§ 157. Governmental Regulation and Restriction

14. Mo.—Boyce Industries, Inc. v. Missouri Highway and Transp. Com'n, App., 670 S.W.2d 147.
 17. Ariz.—C.J.S. cited in *Watanabe v. City of Phoenix*, App., 683 P.2d 1177, 1179, 140 Ariz. 575.

§ 158. — Termination of Use; Amortization Period

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22. U.S.—Purple Onion, Inc. v. Jackson, D.C.Ga., 511 F.Supp. 1207.
 Ind.—Jacobs v. Mishawaka Bd. of Zoning Appeals, 395 N.E.2d 834, 182 Ind.App. 500.
 N.Y.—Syracuse Aggregate Corp. v. Weise, 424 N.Y.S.2d 556, 72 A.D.2d 254, aff'd. 414 N.E.2d 651, 51 N.Y.2d 278, 434 N.Y.S.2d 150.
 Tex.—Board of Adjustment of City of San Antonio v. Nelson, Civ.App., 577 S.W.2d 783, err. ref. no rev. err., 584 S.W.2d 701.
 23. Iowa—State v. Bates, 305 N.W.2d 426.
 24. N.C.—Cumberland County v. Eastern Federal Corp., 269 S.E.2d 672, 48 N.C.App. 518, review den. 273 S.E.2d 453, 301 N.C. 527.
 Vt.—State v. Sanguinetti, 449 A.2d 922, 141 Vt. 349.

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26. Tenn.—Rives v. City of Clarksville, App., 618 S.W.2d 502.
 32. Cal.—United Business Commission v. City of San Diego, 154 Cal.Rptr. 263, 91 C.A.3d 156.
 Colo.—Wyatt v. Board of Adjustment-Zoning of City and County of Denver, App., 622 P.2d 85.
 Iowa—Renda v. Polk County, 319 N.W.2d 250.
 N.M.—Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565, 98 N.M. 138.
 N.Y.—Suffolk Outdoor Advertising Co., Inc. v. Town of Southampton, 449 N.Y.S.2d 766, 88 A.D.2d 601, motion diss. 442 N.E.2d 67, 57 N.Y.2d 860, 455 N.Y.S.2d 770, and 442 N.E.2d 68, 57 N.Y.2d 862, 455 N.Y.S.2d 771, app. diss. 444 N.E.2d 37, 57 N.Y.2d 1045, 457 N.Y.S.2d 787, dismissal den. 444 N.E.2d 38, 57 N.Y.2d 1047, 457 N.Y.S.2d 788, rearrangement ordered 453 N.E.2d 545, two cases, 59 N.Y.2d 890, 466 N.Y.S.2d 316, aff'd. 455 N.E.2d 1245, 60 N.Y.2d 70, 468 N.Y.S.2d 450, rearr. den. 460 N.E.2d 232, two cases, 61 N.Y.2d 670, 472 N.Y.S.2d 1028.

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33. Cal.—United Business Commission v. City of San Diego, 154 Cal.Rptr. 263, 91 C.A.3d 156.
 38. Amortization provision does not constitute just compensation
 N.M.—Battaglini v. Town of Red River, 669 P.2d 1082, 100 N.M. 287.

§ 159. Persons Entitled to Maintain Nonconforming Use

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48. Mass.—Fitz-Inn Auto Parks, Inc. v. City of Boston, 448 N.E.2d 1258, 389 Mass. 79.
 49. N.Y.—Taken Liquor Store, Inc. v. Bonisteel, 425 N.Y.S.2d 252, 103 Misc.2d 34.

§ 160. Necessity and Sufficiency of Existing Use

50. La.—Rue Lafayette Mortg. Corp. v. Wenger, App., 366 So.2d 1039.
 Mich.—Long Island Court Homemakers Ass'n v. Methner, 254 N.W.2d 57, 74 Mich.App. 383.
 Mo.—Schaefer v. Neumann, App., 561 S.W.2d 416.
 N.J.—Washington Tp. v. Central Bergen Community Mental Health Center, Inc., 383 A.2d 1194, 156 N.J.Super. 388.

N.Y.—Paukovits v. Zoning Bd. of Appeals of Town of Blooming Grove, 412 N.Y.S.2d 167, 67 A.D.2d 683.

Pa.—Appeal of Kates, 393 A.2d 499, 38 Pa.Cmwith. 145.

Vt.—Town of Shelburne v. Kaelin, 415 A.2d 194, 138 Vt. 247.

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51. Nonconforming use cannot be transferred
 Pa.—Bachman v. Zoning Hearing Bd. of Bern Tp., 474 A.2d 406, 82 Pa.Cmwith. 51, aff'd. 494 A.2d 1102.

A landowner may continue to use a structure constructed in reliance upon a zoning ordinance as a nonconforming use when the ordinance is subsequently invalidated by a court.^{54.5}

- 54.5 N.C.—Godfrey v. Zoning Bd. of Adjustment of Union County, 326 S.E.2d 113, 73 N.C.App. 299, review all. 332 S.E.2d 178, 313 N.C. 600.

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59. Va.—Knowlton v. Browning-Ferris Industries of Virginia, Inc., 260 S.E.2d 232, 220 Va. 571.

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79. Ga.—Cobb County v. Peavy, 286 S.E.2d 732, 248 Ga. 870.

N.Y.—Paukovits v. Zoning Bd. of Appeals of Town of Blooming Grove, 412 N.Y.S.2d 167, 67 A.D.2d 683.

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81. Pa.—Krum v. Montour County Zoning Hearing Bd., 452 A.2d 306, 70 Pa.Cmwith. 76.

§ 161. — Contemplated or Intended Use

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96. N.Y.—Chautauqua Inv. Co. v. Town of Chautauqua, 446 N.Y.S.2d 724, 84 A.D.2d 959, aff'd. 437 N.E.2d 284, 56 N.Y.2d 775, 452 N.Y.S.2d 25.
 N.D.—Minch v. City of Fargo, 332 N.W.2d 71, cert. den. 104 S.Ct. 105, 464 U.S. 829, 78 L.Ed.2d 108.
 Vt.—Town of Chester v. Country Lounge, Inc., 375 A.2d 414, 135 Vt. 165.
 98. Ala.—C.J.S. cited in *Olinger v. Collins*, 470 So.2d 1183, 1186.

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5. La.—Petersen v. Town of Abita Springs, App. 1 Cir., 417 So.2d 3.

§ 162. — Building or Use in Course of Construction

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18. U.S.—Amico v. New Castle County, D.C.Del., 101 F.R.D. 472, aff'd., 770 F.2d 1066.
 Cal.—Carty v. City of Ojai, 143 Cal.Rptr. 506, 77 C.A.3d 329.

La.—Petersen v. Town of Abita Springs, App. 1 Cir., 417 So.2d 3.

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24. Conn.—Farrington v. Zoning Bd. of Appeals of Noank Fire Dist., 413 A.2d 817, 177 Conn. 186.

§ 163. — Prior Abandoned Use

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42. U.S.—League to Save Lake Tahoe v. Crystal Enterprises, C.A.Nev., 685 F.2d 1142.
 Ill.—Welch v. City of Evanston, 409 N.E.2d 450, 42 Ill.Dec. 835, 87 Ill.App.3d 1017.
 Mass.—Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Falmouth, 431 N.E.2d 213, 385 Mass. 205,

app. after remand 446 N.E.2d 1070, 388 Mass. 1013.

N.M.—Texas Nat. Theatres, Inc. v. City of Albuquerque, 639 P.2d 569, 97 N.M. 282.

N.Y.—Concerned Citizens of Montauk, Inc. v. Lester, 404 N.Y.S.2d 360, 62 A.D.2d 171.

§ 164. — Unlawful Use

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51. Colo.—Board of County Com'rs of Boulder County v. Echtenacht, 572 P.2d 143, 194 Colo. 311.
 Ill.—Carroll v. Hurst, 431 N.E.2d 1344, 59 Ill.Dec. 587, 103 Ill.App.3d 984.
 Ohio—Petti v. City of Richmond Heights, 449 N.E.2d 768, 5 Ohio St.3d 129, 5 O.B.R. 263.
 Pa.—Pushnik v. Hempfield Tp., 402 A.2d 318, 43 Pa. Cmwith. 332.

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56. Ill.—Carroll v. Hurst, 431 N.E.2d 1344, 59 Ill. Dec. 587, 103 Ill.App.3d 984.
 Mass.—Gamache v. Town of Acushnet, 438 N.E.2d 82, 14 Mass.App. 215.
 Pa.—McGeehan v. Zoning Hearing Bd. of Springfield Tp., 407 A.2d 56, 45 Pa.Cmwith. 403.

§ 165. Continuance of Same or Different Use

64. N.Y.—James H. Maloy, Inc. v. Town Bd. of Town of Guilderland, 461 N.Y.S.2d 529, 92 A.D.2d 1056.

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65. Va.—Knowlton v. Browning-Ferris Industries of Virginia, Inc., 260 S.E.2d 232, 220 Va. 571.
 67. Not applicable if operating pursuant to variance
 N.Y.—Atlantic Richfield Co. v. Senn, 4 Dept., 482 N.Y.S.2d 380, 105 A.D.2d 1074.
 68. Va.—Board of Zoning Appeals of Spotsylvania County v. McCalley, 300 S.E.2d 790, 225 Va. 196.

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74. Pa.—Ramsey v. Zoning Hearing Bd. of Borough of Dormont, 466 A.2d 267, 77 Pa.Cmwith. 456.
 80. Pa.—Bruni v. Zoning Hearing Bd. of Plymouth Tp., 416 A.2d 111, 52 Pa.Cmwith. 526.
 81. N.Y.—Roshar Co. v. Board of Appeals of City of Long Beach, Nassau County, 429 N.Y.S.2d 910, 77 A.D.2d 568.

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89. Ind.—Taylor v. Metropolitan Development Com'n of Marion County, App., 436 N.E.2d 1157.
 Mass.—Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Falmouth, 431 N.E.2d 213, 385 Mass. 205, app. after remand 446 N.E.2d 1070, 388 Mass. 1013.

§ 166. — Change Permitted by Regulations

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4. Ill.—Ortolini v. Zoning Bd. of Appeals of Chicago, App., 374 N.E.2d 776, 16 Ill.Dec. 1, 58 Ill.App.3d 435.
 Md.—McKemy v. Baltimore County, 385 A.2d 96, 39 Md.App. 257.
 Va.—Knowlton v. Browning-Ferris Industries of Virginia, Inc., 260 S.E.2d 232, 220 Va. 571.
 Conversion to condominium not change from one nonconforming use to another
 S.C.—Baker v. Town of Sullivan's Island, App., 310 S.E.2d 433, 279 S.C. 581.

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6. Conn.—Petruzzi v. Zoning Bd. of Appeals of Town of Oxford, 408 A.2d 243, 176 Conn. 479.

N.Y.—*Aboud v. Wallace*, 463 N.Y.S.2d 572, 94 A.D.2d 874.

Pa.—*Naimoli v. Zoning Hearing Bd. of Chester Tp.*, 425 A.2d 36, 56 Pa.Cmwlth. 337—*Collis v. Zoning Hearing Bd. of Wilkes-Barre*, 465 A.2d 53, 77 Pa.Cmwlth. 4.

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8. Ill.—*People ex rel. Wordell v. City of Chicago*, 384 N.E.2d 894, 24 Ill.Dec. 27, 67 Ill.App.3d 321.

La.—*City of Lake Charles v. Frank, App.*, 350 So.2d 233.

Md.—*McKemy v. Baltimore County*, 385 A.2d 96, 39 Md.App. 257.

N.Y.—*Phillips v. Village of Oriskany*, 394 N.Y.S.2d 941, 57 A.D.2d 110.

Pa.—*Evans v. Zoning Hearing Bd. of Easttown Tp.*, 396 A.2d 889, 40 Pa.Cmwlth. 103.

9. Mich.—*Village of Holly v. Gromak*, 265 N.W.2d 107, 81 Mich.App. 241.

12. Pa.—*Appeal of Atlantic Richfield Co. from Decision of Newton Tp. Zoning Hearing Bd.*, 465 A.2d 1077, 77 Pa.Cmwlth. 310.

§ 167. Enlargement or Extension of Use

17. N.Y.—*Incorporated Village of Old Westbury v. Alljay Farms, Inc.*, 476 N.E.2d 315, 64 N.Y.2d 798, 486 N.Y.S.2d 916.

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26. Right protected by due process clause

Pa.—*Jenkintown Towing Service v. Zoning Hearing Bd. of Upper Merion Tp.*, 446 A.2d 716, 67 Pa.Cmwlth. 183.

§ 168. — Area of Use

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56. La.—*C.J.S. cited in Langford v. Calcasieu Parish Police Jury, App.*, 396 So.2d 956, 960—*Redfearn v. Creppell, App. 4 Cir.*, 436 So.2d 1210, *affd. in part, revd. in part on oth. grds.* 455 So.2d 1356.

§ 170. Use of New Instrumentalities

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4. Me.—*Gagne v. Lewiston Crushed Stone Co., Inc.*, 367 A.2d 613, *app. after remand* 431 A.2d 1313.

5. Pa.—*Kelly Tp. v. Zoning Hearing Bd. of Kelly Tp.*, 388 A.2d 347, 36 Pa.Cmwlth. 509.

6. Pa.—*Kelly Tp. v. Zoning Hearing Bd. of Kelly Tp.*, 388 A.2d 347, 36 Pa.Cmwlth. 509.

Vt.—*Town of Chester v. Country Lounge, Inc.*, 375 A.2d 414, 135 Vt. 165.

§ 171. Repair, Alteration, or Reconstruction of Buildings

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13. Md.—*County Council of Prince George's County v. E. L. Gardner, Inc.*, 443 A.2d 114, 293 Md. 259.

N.J.—*State v. C.L.B. Intern.*, 416 A.2d 362, 83 N.J. 262.

Pa.—*Logan Square Neighborhood Ass'n v. Zoning Bd. of Adjustment of City of Philadelphia*, 379 A.2d 632, 32 Pa.Cmwlth. 277.

14. N.Y.—*Rosher Co. v. Board of Appeals of City of Long Beach, Nassau County*, 412 N.Y.S.2d 641, 67 A.D.2d 709, *app. after remand* 429 N.Y.S.2d 910, 77 A.D.2d 568, *affd.* 420 N.E.2d 969, 53 N.Y.2d 623, 438 N.Y.S.2d 777.

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23. N.H.—*Colby v. Town of Rye*, 453 A.2d 1270, 122 N.H. 991.

§ 172. — New Buildings

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35. Pa.—*Muse v. Zoning Hearing Bd. of Ben Avon Heights Borough*, 415 A.2d 1255, 52 Pa.Cmwlth. 287.

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43. Mass.—*Angus v. Miller*, 363 N.E.2d 1349, 5 Mass.App. 470.

§ 173. — Restoration and Repair of Damaged or Destroyed Buildings

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53. Ohio.—*Cicerella, Inc. v. Jerusalem Tp. Bd. of Zoning Appeals*, 392 N.E.2d 574, 59 Ohio App.2d 31, 13 O.O.3d 99.

Pa.—*Zeiders v. Zoning Hearing Bd. of Adjustment of West Hanover Tp.*, 397 A.2d 20, 39 Pa.Cmwlth. 645.

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56. Pa.—*Naimoli v. Zoning Hearing Bd. of Chester Tp.*, 425 A.2d 36, 56 Pa.Cmwlth. 337.

61. Ga.—*Fayette County v. Seagraves*, 264 S.E.2d 13, 245 Ga. 196.

Iowa.—*Incorporated City of Denison v. Clabough*, 306 N.W.2d 748.

Ohio.—*Cicerella, Inc. v. Jerusalem Tp. Bd. of Zoning Appeals*, 392 N.E.2d 574, 59 Ohio App.2d 31, 13 O.O.3d 99.

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75. Ill.—*City of Chicago v. Cohen*, 364 N.E.2d 335, 7 Ill.Dec. 174, 49 Ill.App.3d 342.

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S.C.—*Union Oil of California v. City of Columbia*, Zoning Bd. of Adjustment, 281 S.E.2d 479, 276 S.C. 678.

76. D.C.—*Lange v. District of Columbia Bd. of Zoning Adjustment, App.*, 407 A.2d 1058.

N.Y.—*People v. Waring*, 441 N.Y.S.2d 872, 110 Misc.2d 392.

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77. Pa.—*Kuhl v. Zoning Hearing Bd. of Greene Tp.*, 415 A.2d 954, 52 Pa.Cmwlth. 249.

78. Ind.—*Jacobs v. Mishawaka Bd. of Zoning Appeals*, 395 N.E.2d 834, 182 Ind.App. 500.

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79. D.C.—*George Washington University v. District of Columbia Bd. of Zoning Adjustment, App.*, 429 A.2d 1342.

Ind.—*Dandy Co., Inc. v. Civil City of South Bend, County-City Complex, App.*, 401 N.E.2d 1380.

Mich.—*Norton Shores v. Carr*, 265 N.W.2d 802, 81 Mich.App. 715.

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82. Tex.—*McDonald v. Board of Adjustment, City of San Antonio, Civ.App.*, 561 S.W.2d 218.

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83. Mass.—*Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Falmouth*, 431 N.E.2d 213, 385 Mass. 205, *app. after remand* 446 N.E.2d 1070, 388 Mass. 1013.

85. Conn.—*Blum v. Lisbon Leasing Corp., Inc.*, 377 A.2d 280, 173 Conn. 175.

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90. Conn.—*Blum v. Lisbon Leasing Corp., Inc.*, 377 A.2d 280, 173 Conn. 175.

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96. Pa.—*Schaefer v. Zoning Bd. of Adjustment of City of Pittsburgh*, 435 A.2d 289, 62 Pa.Cmwlth. 104.

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2. Conn.—*Point O'Woods Ass'n, Inc. v. Zoning Bd. of Appeals of Town of Old Lyme*, 423 A.2d 90, 178 Conn. 364.

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N.H.—*Stevens v. Town of Rye*, 448 A.2d 426, 122 N.H. 688.

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5. Pa.—*Kuhl v. Zoning Hearing Bd. of Greene Tp.*, 415 A.2d 954, 52 Pa.Cmwlth. 249.

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7. Conn.—*Magnano v. Zoning Bd. of Appeals of Town of Westbrook*, 449 A.2d 148, 188 Conn. 225.

D.C.—*Silverstone v. District of Columbia Bd. of Zoning Adjustment, App.*, 372 A.2d 1286, *vac. in part on oth. grds. and amended* 396 A.2d 992.

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9. W.Va.—*Longwell v. Hodge*, 297 S.E.2d 820.

10. U.S.—*Ellentuck v. Klein, C.A.N.Y.*, 570 F.2d 414.

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12. N.Y.—*Carlington Corp. v. Sigal*, 402 N.Y.S.2d 46, 61 A.D.2d 813.

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19. Pa.—*Miorelli v. Zoning Hearing Bd. of Hazleton*, 373 A.2d 1158, 30 Pa.Cmwith. 330.

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22. Colo.—*Wyatt v. Board of Adjustment-Zoning of City and County of Denver*, App., 622 P.2d 85.
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30. Ala.—*Hudson-Thompson, Inc. v. Leslie C. King Co., Inc.*, 361 So.2d 541.

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31. Mass.—*Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Falmouth*, 431 N.E.2d 213, 385 Mass. 205, app. after remand 446 N.E.2d 1070, 388 Mass. 1013.
33. Conn.—*Magnano v. Zoning Bd. of Appeals of Town of Westbrook*, 449 A.2d 148, 188 Conn. 225.
36. Change permitted
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41. Ind.—*Tippacanoe County Area Plan Commission v. Sheffield Developers, Inc.*, 394 N.E.2d 176, 181 Ind.App. 586.
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- Mont.—*Shannon v. City of Forsyth*, 666 P.2d 750.
42. N.H.—*Marino v. Goss*, 418 A.2d 1271, 120 N.H. 511.

44. Pa.—*Hecknauer v. Coder*, 379 A.2d 638, 32 Pa.Cmwith. 308.

- Wyo.—*Schoeller v. Board of County Com'rs of Park County*, 568 P.2d 869.

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- Conn.—*Carruthers v. Vumbacco*, 493 A.2d 259, 4 Conn.App. 168.

46. Conn.—*Thorne v. Zoning Commission of Town of Old Saybrook*, 423 A.2d 861, 178 Conn. 198.
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- Pa.—*Sultanik v. Board of Sup'rs of Worcester Tp.*, 488 A.2d 1197, 88 Pa.Cmwith. 214.

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47. U.S.—*Sternaman v. McHenry County*, D.C.Ill., 454 F.Supp. 240.

- Alaska.—*Wilcox Associates v. Fairbanks N. Star Borough*, 603 P.2d 903.

- Cal.—*California Coastal Commission v. Quanta Inv. Corp.*, 170 Cal.Rptr. 263, 113 C.A.3d 579.

- Conn.—*Manchester Environmental Coalition v. Stockton*, 441 A.2d 68, 184 Conn. 51.

- D.C.—*Citizens Ass'n of Georgetown v. Zoning Commission of Dist. of Columbia*, App., 392 A.2d 1027.

- Ill.—*Parkview Colonial Manor Inv. Corp. v. Board of Zoning Appeals of City of O'Fallon*, 388 N.E.2d 877, 26 Ill.Dec. 876, 70 Ill.App.3d 577.

- Kan.—*Golden v. City of Overland Park*, 584 P.2d 130, 224 Kan. 591.

- Ky.—*Landgrave v. Watson*, App., 593 S.W.2d 875.
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- Mass.—*Wheatley v. Planning Bd. of Hingham*, 388 N.E.2d 315, 7 Mass.App. 435, app. after remand 409 N.E.2d 247, 10 Mass.App. 884.

- N.H.—*Conway v. Town of Stratham*, 414 A.2d 539, 120 N.H. 257.

- N.J.—*Yousefian v. Municipal Council of Wayne Tp.*, 377 A.2d 796, 152 N.J.Super. 111, affd. 388 A.2d 1331, 160 N.J.Super. 145.

- N.M.—*Mitchell v. Hedden*, 610 P.2d 752, 94 N.M. 348.
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- Ohio.—*Gerzeny v. Richfield Tp.*, 405 N.E.2d 1034, 62 Ohio St.2d 339, 16 O.O.3d 396.

- Or.—*Jackson County v. Bear Creek Valley Sanitary Authority*, 645 P.2d 532, 293 Or. 121.

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- Tex.—*Lacy v. Hoff*, App. 14 Dist., 633 S.W.2d 605, err. ref. no rev. err.

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- Wyo.—*Schoeller v. Board of County Com'rs of Park County*, 568 P.2d 869.

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- Ky.—*City of Lakeside Park v. Quinn*, 672 S.W.2d 666.

48. Mass.—*Vitale v. Planning Bd. of Newburyport*, 409 N.E.2d 237, 10 Mass.App. 483.

- Or.—*Meyer v. Lord*, 586 P.2d 367, 37 Or.App. 59.
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51. Ala.—*Sigler v. City of Mobile*, 387 So.2d 813.
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- Conn.—*Goldberg v. Zoning Commission of Town of Simsbury*, 376 A.2d 385, 173 Conn. 23.

- Pa.—*Zajac v. Zoning Hearing Bd. of Mifflin Tp.*, 398 A.2d 244, 41 Pa.Cmwith. 7.

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69. U.S.—*Hyde v. Land-of-Sky Regional Council*, C.A.N.C., 572 F.2d 988.

- Cal.—*Walter H. Leimont Co. v. State*, ex rel. California Coastal Com'n., 5 Dist., 196 Cal.Rptr. 739, 149 C.A.3d 222.

- Mich.—*Armstrong v. Ross Tp.*, 266 N.W.2d 674, 82 Mich.App. 77.

- N.J.—*Centennial Land and Development Co. v. Medford Tp.*, 397 A.2d 1136, 165 N.J.Super. 220.

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- Colo.—*Winters v. City of Commerce City*, App., 648 P.2d 175.

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73. N.H.—*Chiplin Enterprises, Inc. v. City of Lebanon*, 411 A.2d 1130, 120 N.H. 124.

- N.J.—*Value Oil Co. v. Town of Irvington*, 377 A.2d 1225, 152 N.J.Super. 354, affd. 396 A.2d 1149, 164 N.J.Super. 419.

- N.Y.—*De Sena v. Board of Zoning Appeals of Inc. Village of Hempstead*, 379 N.E.2d 1144, 45 N.Y.2d 105, 408 N.Y.S.2d 14.

- Or.—*Meyer v. Lord*, 586 P.2d 367, 37 Or.App. 59.

- Pa.—*Calvanese v. Zoning Bd. of Adjustment*, Cmwith., 414 A.2d 406.

74. N.Y.—*Rickett v. Hackbarth*, 414 N.Y.S.2d 988, 98 Misc.2d 790, affd. in part, mod. in part on oth. grds. 418 N.Y.S.2d 827, 69 A.D.2d 222.

77. N.Y.—*Cowan v. Kern*, 363 N.E.2d 305, 41 N.Y.2d 591, 394 N.Y.S.2d 579.

78. U.S.—*Lakeside Community Hospital v. Tahoe Regional Planning Agency*, D.C.Nev., 461 F.Supp. 1150.

- N.Y.—*Tuxedo Conservation & Taxpayers Ass'n v. Town Bd. of Town of Tuxedo*, 418 N.Y.S.2d 638, 69 A.D.2d 320.

- Wash.—*West Slope Community Council v. City of Tacoma*, 569 P.2d 1183, 18 Wash.App. 328.

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- U.S.—*California Tahoe Regional Planning Agency v. Sahara Tahoe Corp.*, D.C.Nev., 504 F.Supp. 753.

79. Ill.—*U-Haul Co. of Chicago Metroplex v. Town of Cicero*, 410 N.E.2d 286, 43 Ill.Dec. 286, 87 Ill.App.3d 915.

- N.H.—*Marino v. Goss*, 418 A.2d 1271, 120 N.H. 511.

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- U.S.—*Conf v. DeBlaker*, C.A.Fla., 652 F.2d 585, cert. den. 102 S.Ct. 1278, 455 U.S. 921, 71 L.Ed.2d 462.

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86. Me.—*Fletcher v. Feeney*, 400 A.2d 1084.

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90. Me.—*Levesque v. Inhabitants of Town of Eliot*, 448 A.2d 876.

- Wash.—*Messer v. Snohomish County Bd. of Adjustment*, 578 P.2d 50, 19 Wash.App. 780.

91. La.—*Lambert v. Parish of Jefferson*, 390 So.2d 515.

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98. Ga.—*Bentley v. Chastain*, 249 S.E.2d 38, 242 Ga. 348.

- N.J.—*Dover Tp. v. Board of Adjustment of Dover Tp.*, 386 A.2d 421, 158 N.J.Super. 401.

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- N.Y.—*Orange County Publications Division of Ottawa Newspapers, Inc. v. Council of City of Newburgh*, 393 N.Y.S.2d 298, 89 Misc.2d 847, mod. on oth. grds. and affd. 401 N.Y.S.2d 84, 60 A.D.2d 409, affd. 383 N.E.2d 1157, 45 N.Y.2d 947, 411 N.Y.S.2d 564.

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2. N.J.—*Springsteel v. Town of West Orange*, 373 A.2d 415, 149 N.J.Super. 107.

4. Ga.—*C.J.S. cited in Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals*, 248 S.E.2d 196, 198, 147 Ga.App. 128.

- N.J.—*Geiger v. Levco Route 46 Associates, Ltd.*, 437 A.2d 336, 181 N.J.Super. 278.

6. Mass.—*Yaro v. Board of Appeals of Newburyport*, 410 N.E.2d 725, 10 Mass.App. 587.

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22. D.C.—Wheeler v. District of Columbia Bd. of Zoning Adjustment, App., 395 A.2d 85.

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23. La.—Hardy v. Mayor and Bd. of Aldermen, City of Eunice, App., 348 So.2d 143, writ den., Sup., 350 So.2d 1212.

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24. N.J.—Dover Tp. v. Board of Adjustment of Dover Tp., 386 A.2d 421, 158 N.J.Super. 401.

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56. N.J.—Centennial Land and Development Co. v. Mayfield Tp., 397 A.2d 1136, 165 N.J.Super. 220.

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57. Mont.—Little v. Board of County Com'rs of Flathead County, 631 P.2d 1282.

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66. Ariz.—P.F. West, Inc. v. Superior Court of State of Ariz., In and For Pima County, App., 676 P.2d 665, 139 Ariz. 31.

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75. Pa.—Pheasant Run Civic Organization v. Board of Com'rs of Penn Tp., 430 A.2d 1231, 60 Pa.Cmwith. 216.

78. Wash.—Andrew v. King County, 586 P.2d 509, 21 Wash.App. 566.

81. Md.—National Institutes of Health Federal Credit Union v. Hawk, 422 A.2d 55, 47 Md.App. 189.

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98. Hawaii—Life of the Land, Inc. v. West Beach Development Corp., 631 P.2d 588, 63 Haw. 529.

Km.—Board of County Com'rs of Lincoln County v. Berner, 613 P.2d 676, 5 Kan.App.2d 104.

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6. Iowa—Arkac Development, Inc. v. Zoning Bd. of Adjustment of City of Ames, 312 N.W.2d 574.

7. D.C.—Dupont Circle Citizens Ass'n v. District of Columbia Zoning Commission, App., 426 A.2d 327.

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11. Ill.—Bruer v. Livingston County Bd. of Zoning Appeals, 383 N.E.2d 1016, 23 Ill.Dec. 145, 66 Ill.App.3d 938.

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U.S.—Sachetti v. Blair, D.C.N.Y., 536 F.Supp. 636.

26. N.Y.—Orange County Publications, Division of Ottaway Newspapers, Inc. v. Council of City of Newburgh, 401 N.Y.S.2d 84, 60 A.D.2d 409, affd. 383 N.E.2d 1157, 45 N.Y.2d 947, 411 N.Y.S.2d 564.

"Executive session"

(4) Zoning board of appeals acted properly in deciding to close executive session to public where purpose of session was judicial in nature rather than legislative.

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30. Or.—Peterson v. City of Council For City of Lake Oswego, 574 P.2d 326, 52 Or.App. 181.

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47. Pa.—Overbrook Farms Club v. Zoning Bd. of Adjustment of Philadelphia, 405 A.2d 580, 45 Pa.Cmwith. 96.

48. Or.—Hill v. County Court for Union County, 601 P.2d 905, 42 Or.App. 883.

Wash.—Messer v. Snohomish County Bd. of Adjustment, 578 P.2d 50, 19 Wash.App. 780.

52. Mass.—Wheatley v. Planning Bd. of Hingham, 388 N.E.2d 315, 7 Mass.App. 435, app. after remand 409 N.E.2d 247, 10 Mass.App. 584.

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- Wash.—West Slope Community Council v. City of Tacoma, 569 P.2d 1183, 18 Wash.App. 328.
54. D.C.—Wheeler v. District of Columbia Bd. of Zoning Adjustment, App., 395 A.2d 85.
- Me.—Cunningham v. Kittery Planning Bd., 400 A.2d 1070.
- Or.—Still v. Board of County Com'rs of Marion County, 600 P.2d 433, 42 Or.App. 115.
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55. Colo.—Murray v. Board of Adjustment, Larimer County, 594 P.2d 596, 42 Colo.App. 113.
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- Or.—Still v. Board of County Com'rs of Marion County, 600 P.2d 433, 42 Or.App. 115.

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64. Ill.—Melrose Park Nat. Bank v. Zoning Bd. of Appeals of City of Chicago, 398 N.E.2d 252, 34 Ill.Dec. 577, 79 Ill.App.3d 56.
- Ind.—Carpenter v. Whitley County Plan Commission, 367 N.E.2d 1156, 174 Ind.App. 412.
- N.J.—Aurentz v. Planning Bd. of Little Egg Harbor Tp., 408 A.2d 140, 171 N.J.Super. 135.
66. Conn.—C.J.S. cited in Mursach v. Planning & Zoning Com'rs of New London, 491 A.2d 1058, 1066, 196 Conn. 192.
73. Pa.—Heisterkamp v. Zoning Hearing Bd. of City of Lancaster, 383 A.2d 1311, 34 Pa.Cmwlth. 539.

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80. N.Y.—Alper v. Nowakowski, 397 N.Y.S.2d 42, 58 A.D.2d 1012.
81. Nonnecessity of written decision within prescribed time
- Mass.—O'Kane v. Board of Appeals of Hingham, 478 N.E.2d 962, 20 Mass.App. 162.
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34. N.H.—Beck v. Town of Raymond, 394 A.2d 847, 118 N.H. 793.
- Due process not denied
- U.S.—Rogin v. Bensalem Tp., C.A.Pa., 616 F.2d 680, cert. den. 101 S.Ct. 1737, 450 U.S. 1029, 68 L.Ed.2d 223.

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37. La.—Kirk v. Town of Westlake, 387 So.2d 1157, app. after remand, App. 3 Cir., 421 So.2d 473.

An ordinance requiring a special use permit for homes for the mentally retarded violates the equal protection clause where the requirement appears to rest on an irrational prejudice against the mentally retarded.^{37.5}

- 37.5 U.S.—City of Cleburne, Tex. v. Cleburne Living Center, Tex., 105 S.Ct. 3249, 87 L.Ed.2d 313.

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42. Mich.—Orion Tp. v. Weber, 269 N.W.2d 275, 83 Mich.App. 712.
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54. Ill.—City of Champaign v. Kroger Co., 410 N.E.2d 661, 43 Ill.Dec. 661, 88 Ill.App.3d 498.
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76. Me.—Gagne v. Lewiston Crushed Stone Co., Inc., 367 A.2d 613, app. after remand 431 A.2d 1313.
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30. Pa.—Brentwood Borough v. Cooper, Cmwith., 431 A.2d 1177.

34. N.C.—Woodhouse v. Board of Com'rs of Town of Nags Head, 261 S.E.2d 882, 299 N.C. 211.

Pa.—Goodman v. Board of Com'rs of South Whitehall Tp., 411 A.2d 838, 49 Pa.Cmwith. 35.

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47. Pa.—Washington Tp. v. State Belt Vehicle Recycling Center, Inc., 428 A.2d 753, 58 Pa.Cmwith. 620.

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Pa.—Washington Tp. v. State Belt Vehicle Recycling Center, Inc., 428 A.2d 753, 58 Pa.Cmwith. 620.

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49. S.C.—Sherman v. Reavis, 257 S.E.2d 735, 273 S.C. 542.

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54. Ariz.—Davis v. Hidden, App., 606 P.2d 36, 124 Ariz. 546.
- Colo.—Reynolds v. City Council of Longmont, App., 680 P.2d 1350.
- Mass.—Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham, 415 N.E.2d 840, 382 Mass. 283.
- Mich.—Carlson v. City of Troy, 282 N.W.2d 387, 90 Mich.App. 543.
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58. U.S.—Greene v. Town of Blooming Grove, D.C. N.Y., 483 F.Supp. 804.

§ 197. Conditions Attached to Permission

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Special use permit

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Only if accepted by applicant

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Breach of condition

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62. U.S.—U.S. v. Board of Sup'rs of Arlington County, C.A.Va., 611 F.2d 1367.
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64. Me.—Seven Islands Land Co. v. Maine Land Use Regulation Com'n, 450 A.2d 475.
65. U.S.—Sternman v. McHenry County, D.C.Ill., 454 F.Supp. 240.
- N.M.—Mechem v. City of Santa Fe, 634 P.2d 690, 96 N.M. 668.
- R.I.—Town of Coventry v. Glickman, 429 A.2d 440.
- Wis.—Brookhill Development, Ltd. v. City of Waukesha, App., 299 N.W.2d 610, 99 Wis.2d 485, aff'd. 307 N.W.2d 242, 103 Wis.2d 27.

Land dedication requirements, etc.

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Special use permit

- (1) N.Y.—Summit School v. Neugent, 442 N.Y.S.2d 73, 82 A.D.2d 463.

- 66-67. Mass.—Shalbey v. Board of Appeal of Norwood, 378 N.E.2d 1001, 6 Mass.App. 521.

- N.Y.—South Woodbury Taxpayers Ass'n, Inc. v. American Institute of Physics, Inc., 428 N.Y.S.2d 158, 104 Misc.2d 254.

- Vt.—Appeal of Farrell & Desantele, Inc., 383 A.2d 619, 135 Vt. 614.

- Wis.—State ex rel. Columbia Corp. v. Town Bd. of Town of Pacific, App., 286 N.W.2d 130, 92 Wis.2d 767.

Special use permit

- (1) Mass.—Bals v. Board of Appeals of Plymouth, 432 N.E.2d 742, 13 Mass.App. 995.

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61. Statute construed

- N.J.—Matter of Egg Harbor Associates, 449 A.2d 1324, 185 N.J.Super. 507, aff'd. 464 A.2d 1115, 94 N.J. 358.

71. Pa.—Montgomery Tp. v. Franchise Realty Interstate Corp., 422 A.2d 897, 54 Pa.Cmwith. 535.

Recreational use permit

- Me.—Kittery Water Dist. v. Town of York, 489 A.2d 1091.

72. N.Y.—Summit School v. Neugent, 442 N.Y.S.2d 73, 82 A.D.2d 463.

73. Cal.—El Patio v. Permanent Rent Control Bd. of City of Santa Monica, 168 Cal.Rptr. 276, 110 C.A.3d 915.

- Neb.—Briar West, Inc. v. City of Lincoln, 291 N.W.2d 730, 206 Neb. 172.

- N.Y.—Lopes v. Fire Bd. of Appeals of Town of Clarkstown, Rockland County, 394 N.Y.S.2d 126, 90 Misc.2d 250.

Posting of bonds

(2) Other statements.

- U.S.—Delight, Inc. v. Baltimore County, C.A.Md., 624 F.2d 12.

Special use permit

- N.Y.—Summit School v. Neugent, 442 N.Y.S.2d 73, 82 A.D.2d 463.

The zoning authority may impose conditions involving property outside their jurisdiction if it conditions that requirement on annexation or the consent of the government having jurisdiction.^{73.5}

- 73.5 Wash.—Miller v. City of Port Angeles, 691 P.2d 229, 38 Wash.App. 904.

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81. Mass.—Richard v. Planning Bd. of Acushnet, 406 N.E.2d 728, 10 Mass.App. 216.

- N.Y.—Nassau Children's House, Inc. v. Board of Zoning Appeals of Inc. Village of Mineola, 430 N.Y. S.2d 683, 77 A.D.2d 898.

- Tenn.—Foley v. Hamilton, App., 603 S.W.2d 151.

- Wash.—J & B Development Co., Inc. v. King County, 631 P.2d 1002, 29 Wash.App. 942, aff'd. 669 P.2d 468, 100 Wash.2d 299.

Conditional approval does not create protected property interest

- U.S.—Molgaard v. Town of Caledonia, D.C.Wis., 527 F.Supp. 1073, aff'd. 696 F.2d 58.

§ 198. Who May Procure

83. Standing to apply shown

- Ind.—City of Hammond v. Red Top Trucking Co., Inc., App., 409 N.E.2d 655.

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89. Ala.—Cotton States Mut. Ins. Co. v. Conner, 387 So.2d 125.

Lessee has sufficient interest

- Cal.—Shell Oil Co. v. City and County of San Francisco, 189 Cal.Rptr. 276, 139 C.A.3d 917.

90. Me.—Murray v. Inhabitants of the Town of Lincolnville, 462 A.2d 40.

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§ 199. Change of Regulations as Affecting Rights

2. N.H.—Grondin v. Town of Hinsdale, 451 A.2d 1299, 122 N.H. 882.

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3. Expenditures includes labor as well as materials

- Wis.—Sauk County v. Trager, 346 N.W.2d 756, 118 Wis.2d 204.

6. Substantial expenditure not shown

- Cal.—Santa Monica Pines, Ltd. v. Rent Control Bd. of City of Santa Monica, 201 Cal.Rptr. 593, 679 P.2d 27, 35 C.3d 858.

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17. Due process right

- U.S.—Southern Co-op. Development Fund v. Driggers, D.C.Fla., 527 F.Supp. 927, aff'd, 696 F.2d 1347, reh. den. 703 F.2d 582, cert. den. 103 S.Ct. 3539, 463 U.S. 1208, 77 L.Ed.2d 1389.

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An attempt to revoke an existing, legitimate permit by application of a subsequently enacted ordinance has been held confiscatory and violative of due process.^{23,5}

- 23.5. U.S.—Wheeler v. City of Pleasant Grove, C.A. Ala., 664 F.2d 99, cert.den. 102 S.Ct. 2236, 456 U.S. 973, 72 L.Ed.2d 847, app. after remand 746 F.2d 1437.

§ 200. Application of Rules to Particular Structures or Uses

24. U.S.—Deerfield Medical Center v. City of Deerfield Beach, C.A.Fla., 661 F.2d 328.

- Cal.—Pricco Land & Min. Co. v. State, 141 Cal.Rptr. 820, 74 C.A.3d 736, cert. den. 98 S.Ct. 2263, 436 U.S. 918, 56 L.Ed.2d 758.

- Colo.—City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52.

- Conn.—Manor Development Corp. v. Conservation Commission of Town of Simsbury, 433 A.2d 999, 180 Conn. 692.

- Ga.—Thurman's Auto Parts & Wrecker Service, Inc. v. Cobb County, 286 S.E.2d 707, 248 Ga. 826.

- Ill.—Paschen v. Village of Winnetka, 392 N.E.2d 306, 29 Ill.Dec. 749, 73 Ill.App.3d 1023.

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- La.—Furr v. Mayor and City Council of Baker, 408 So.2d 248.

- Mich.—Huron Advertising Co. v. Charter Tp. of Pittsfield, 313 N.W.2d 132, 110 Mich.App. 398.

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- Vt.—Vermont Division of State Bldgs. v. Town of Castleton Bd. of Adjustment, 415 A.2d 188, 138 Vt. 250.

- Wash.—South Hill Sewer Dist. v. Pierce County, 591 P.2d 877, 22 Wash.App. 738.

Off-street parking

- U.S.—L'Enfant Plaza Properties, Inc. v. U. S., 678 F.2d 167, 230 Ct.Cl. 447.

Searchlights

- Kan.—Robert L. Rieke Bldg. Co., Inc. v. City of Overland Park, 657 P.2d 1121, 232 Kan. 634.

25. Conn.—Dowling v. Zoning Bd. of Appeals of Town of Old Lyme, 447 A.2d 1172, 187 Conn. 689.

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- Or.—Anderson v. Peden, 569 P.2d 633, 30 Or.App. 1063, aff'd, 587 P.2d 59, 284 Or. 313.

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Area and frontage requirements

- Ariz.—Davis v. Hidden, App., 606 P.2d 36, 124 Ariz. 546.

- Mass.—Spalke v. Board of Appeals of Plymouth, 389 N.E.2d 788, 7 Mass.App. 683.

- R.I.—Holmes v. Dowling, 413 A.2d 95.

26. Me.—Your Home, Inc. v. City of Portland, 432 A.2d 1250, app. after remand 483 A.2d 735 and 499 A.2d 145.

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- Or.—Feinstein v. City of Salem, 613 P.2d 489, 46 Or.App. 815.

- Pa.—Borough of Phoenixville v. Kovach, 449 A.2d 793, 68 Pa.Cmwlth. 441.

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27. U.S.—Coward v. City of Ocala, Fla., D.C.Fla., 478 F.Supp. 774.

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- Conn.—Bell v. Planning and Zoning Commission of Town of Westport, 377 A.2d 299, 173 Conn. 223.

- Ill.—Parkview Colonial Manor Inv. Corp. v. Board of Zoning Appeals of City of O'Fallon, 388 N.E.2d 877, 26 Ill.Dec. 876, 70 Ill.App.3d 577.

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- N.Y.—Mason v. Zoning Bd. of Appeals of Town of Clifton Park, 422 N.Y.S.2d 166, 72 A.D.2d 889.

- Or.—Miller v. Council of City of Grants Pass, 592 P.2d 1088, 39 Or.App. 589.

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- Pa.—Chester County Mall, Inc. v. Board of Sup'rs of West Goshen Tp., 402 A.2d 1160, 44 Pa.Cmwlth. 119.

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- N.Y.—Shepard v. Zoning Bd. of Appeals of City of Johnstown, 448 N.Y.S.2d 1011, 113 Misc.2d 413, aff'd, 461 N.Y.S.2d 479, 92 A.D.2d 993.

- Pa.—Brentwood Borough v. Cooper, Cmwlth., 431 A.2d 1177.

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- Fla.—Ocean's Edge Development Corp. v. Town of Juno Beach, App., 4 Dist., 430 So.2d 472, review den. 436 So.2d 101.

30. Mass.—Zoning Bd. of Appeals of Wellesley v. Housing Appeals Committee, 433 N.E.2d 873, 385 Mass. 651.

32. Mass.—Ranney v. Board of Appeals of Nantucket, 414 N.E.2d 373, 11 Mass.App. 112—Kinchla v. Bd. of Appeals of Falmouth, 415 N.E.2d 882, 11 Mass.App. 927.

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34. N.Y.—Nassau Children's House, Inc. v. Board of Zoning Appeals of Inc. Village of Mineola, 430 N.Y.S.2d 683, 77 A.D.2d 898.

35. Cal.—City of Torrance v. Transitional Living Centers for Los Angeles, Inc., 179 Cal.Rptr. 907, 638 P.2d 1304, 30 C.3d 516.

- Colo.—Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster, 580 P.2d 1246, 196 Colo. 79.

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37. U.S.—Molgaard v. Town of Caledonia, D.C.Wis., 527 F.Supp. 1073, aff'd, C.A., 696 F.2d 58.

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- Me.—Your Home, Inc. v. City of Portland, 432 A.2d 1250, app. after remand 483 A.2d 735 and 499 A.2d 145.

- N.H.—Dearborn v. Town of Milford, 411 A.2d 1132, 120 N.H. 82.

- N.Y.—Pleasant Valley Home Const., Ltd. v. Van Wagner, 363 N.E.2d 1376, 41 N.Y.2d 1028, 395 N.Y. S.2d 631.

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- Or.—Damasus Community Church v. Clackamas County, 610 P.2d 273, 45 Or.App. 1065, app. dismissed, 101 S.Ct. 1336, 450 U.S. 902, 67 L.Ed.2d 326.

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40. Mass.—Commissioner of Code Inspection of Worcester v. Worcester Dynamite, Inc., 413 N.E.2d 1151, 11 Mass.App. 97.

41. Minn.—Northwestern College v. City of Arden Hills, 281 N.W.2d 865.

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- R.I.—City of Providence v. O'Neill, 445 A.2d 290.

45. Idaho—Lewis-Clark Memorial Gardens v. City of Lewiston, 587 P.2d 821, 99 Idaho 680.

46. Ala.—Bingham v. City of Tuscaloosa, 383 So.2d 542.
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48. N.Y.—People v. Gulf Oil Corp., 399 N.Y.S.2d 558, 92 Misc.2d 107.
50. Cal.—Stanson v. San Diego Coast Regional Commission, 161 Cal.Rptr. 392, 101 C.A.3d 38.
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53. Ga.—McKnight v. Mitchell, 240 S.E.2d 313, 144 Ga.App. 109.
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54. Ala.—Ex parte Bd. of Zoning Adjustment of Hueytown, Civ.App., 383 So.2d 179, writ den., Sup., 383 So.2d 183.
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56. N.Y.—Marriott Corp. v. Zoning Bd. of Appeals of Town of Huntington, 394 N.Y.S.2d 46, 57 A.D.2d 840.

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59. U.S.—Sternman v. McHenry County, D.C.Ill., 454 F.Supp. 240.
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Ordinance invalid

- Pa.—Moyer's Landfill, Inc. v. Zoning Hearing Bd. of Lower Providence Tp., 430 A.2d 273, 69 Pa. Cmwith. 47, cert. den. 105 S.Ct. 2325, 85 L.Ed.2d 843.
63. Hawaii.—Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Commission, 639 P.2d 1097, 64 Haw. 265.
- La.—Furr v. Mayor and City Council of Baker, App., 394 So.2d 654, affd., 408 So.2d 248.
- N.Y.—Peter Pan Games of Bayside, Ltd. v. Board of Estimate of City of New York, 413 N.Y.S.2d 164, 67 A.D.2d 925.
67. U.S.—Contra Costa Theatre, Inc. v. City of Concord, D.C.Cal., 511 F.Supp. 87, affd., C.A., 686 F.2d 798, cert. den. 103 S.Ct. 1777, 460 U.S. 1085, 76 L.Ed.2d 349.
- Ill.—Thomas v. Zoning Bd. of Appeals for City of Peoria, 391 N.E.2d 540, 29 Ill.Dec. 277, 72 Ill. App.3d 934.

70. Fla.—Board of County Com'rs of Metropolitan Dade County v. Lowas, App., 348 So.2d 13.

§ 201. — Automobile Service, Garages, and Parking Lots

74. Reason for conditional use treatment
- N.J.—Exxon Co., U.S.A. v. Livingston Tp. in Essex County, 489 A.2d 1218, 199 N.J.Super. 470.
75. Vt.—Town of Castleton v. Fucci, 431 A.2d 486, 139 Vt. 598.

80. N.Y.—Gershowitz v. Planning Bd. of Town of Brookhaven, 417 N.E.2d 1000, 52 N.Y.2d 763, 436 N.Y.S.2d 612.

§ 202. — Right to Permit and Discretion of Authorities

88. Mass.—V.S.H. Realty, Inc. v. License Bd. of Worcester, 435 N.E.2d 1055, 13 Mass.App. 586, review den., Sup., 438 N.E.2d 75, 386 Mass. 1105.
92. Mass.—D'Orlando v. Board of Appeals of Danvers, 362 N.E.2d 937, 5 Mass.App. 824.
- Vt.—Fleury v. Town of Essex Zoning Bd. of Adjustment, 449 A.2d 958, 141 Vt. 411.
93. U.S.—California Tahoe Regional Planning Agency v. Sahara Tahoe Corp., D.C.Nev., 504 F.Supp. 753.
- Ill.—Reedy v. City of Wheaton, 430 N.E.2d 273, 58 Ill.Dec. 331, 102 Ill.App.3d 1082.
- N.Y.—Hausman v. Common Council of City of Syracuse, 400 N.Y.S.2d 963, 60 A.D.2d 770.

4. Ill.—Heery v. Zoning Bd. of Appeals of City of Chicago, App., 403 N.E.2d 617, 38 Ill.Dec. 386.
7. Mass.—Garvey v. Board of Appeals of Amherst, 400 N.E.2d 880, 9 Mass.App. 856.
- N.Y.—Long Island Gasoline Retailers Ass'n, Inc. v. Board of Standards and Appeals of City of New York, 404 N.Y.S.2d 136, 62 A.D.2d 105.
- Utah.—Western Land Equities, Inc. v. City of Logan, 617 P.2d 388.
8. Ind.—Metropolitan Bd. of Zoning Appeals of Marion County v. Shell Oil Co., 395 N.E.2d 1283, 182 Ind.App. 604.

9. N.J.—Value Oil Co. v. Town of Irvington, 377 A.2d 1225, 152 N.J.Super. 354, affd., 396 A.2d 1149, 164 N.J.Super. 419.

16. Mass.—Falcone v. Zoning Bd. of Appeals of Brockton, 389 N.E.2d 1032, 7 Mass.App. 710.

20. Md.—B.P. Oil, Inc. v. County Bd. of Appeals for Montgomery County, 401 A.2d 1054, 42 Md.App. 576.
- Mass.—V.S.H. Realty, Inc. v. License Bd. of Worcester, 435 N.E.2d 1055, 13 Mass.App. 586, review den., Sup., 438 N.E.2d 75, 386 Mass. 1105.
- N.Y.—Hausman v. Common Council of City of Syracuse, 400 N.Y.S.2d 963, 60 A.D.2d 770.
- Pa.—Food Bag, Inc. v. Mahoning Tp. Zoning Bd. of Adjustment, 414 A.2d 421, 51 Pa.Cmwith. 304.

§ 203. Permits for Nonconforming Uses

28. N.Y.—Mackay v. Mayhall, 401 N.Y.S.2d 679, 92 Misc.2d 868.
29. Mo.—State ex rel. C. C. G. Management Corp. v. City of Overland, App., 624 S.W.2d 50.
- Or.—Flury v. Land Use Bd. of Appeals, App., 623 P.2d 671.

§ 204. In General

44. Minn.—Chanhasen Estates Residents Ass'n v. City of Chanhasen, 342 N.W.2d 335.
45. Ga.—Westbrook v. Albany Planning Commission, 251 S.E.2d 110, 148 Ga.App. 338.
- Ill.—Scanlon v. Faiz, 373 N.E.2d 614, 15 Ill.Dec. 268, 57 Ill.App.3d 649, affd., 389 N.E.2d 571, 27 Ill.Dec. 507, 75 Ill.2d 472.
- Ind.—Metropolitan Bd. of Zoning Appeals of Marion County v. Shell Oil Co., 395 N.E.2d 1283, 182 Ind.App. 604.
- Kan.—International Villages, Inc. of America v. Board of County Com'rs of Jefferson County, 585 P.2d 999, 224 Kan. 654.
- Mass.—Shalvey v. Board of Appeal of Norwood, 378 N.E.2d 1001, 6 Mass.App. 521.
- Minn.—Barton Contracting Co., Inc. v. City of Afton, 268 N.W.2d 712.
- Mo.—State ex rel. Steak n Shake, Inc. v. City of Richmond Heights, App., 560 S.W.2d 373.
- Or.—Anderson v. Peden, 587 P.2d 59, 284 Or. 313.
- Pa.—Board of Com'rs of Lower Merion Tp. v. Haelett, 450 A.2d 298, 69 Pa.Cmwith. 1.
46. Prior approval of planning board
- N.Y.—Webster Associates v. Town of Webster, 451 N.E.2d 189, 59 N.Y.2d 220, 464 N.Y.S.2d 431.

51. Iowa.—Citizens Against Lewis and Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment, 277 N.W.2d 921.

§ 205. Application

60. Fla.—Compass Lake Hills Development Corp. v. State, Dept. of Community Affairs, Division of State Planning, App., 379 So.2d 376.
- Ill.—Grotto v. Little Friends, Inc., 432 N.E.2d 634, 59 Ill.Dec. 848, 104 Ill.App.3d 105.
- Mo.—State ex rel. Missouri Highway and Transp. Commission v. Bank of St. Ann, App., 631 S.W.2d 73.
- Pa.—Bobiak v. Richland Tp. Planning Commission, 412 A.2d 202, 50 Pa.Cmwith. 77.
- R.I.—Wood v. Lussier, 416 A.2d 690.

Effect

(3) Application that is in compliance with all articulated requirements of applicable ordinance does not automatically gain tentative approval.

- Pa.—Michaels Development Co., Inc. v. Benzinger Tp. Bd. of Sup'rs, 413 A.2d 743, 50 Pa.Cmwith. 281.

Withdrawal of application

- Pa.—Appeal of David Fiori, Realtor, Inc., 422 A.2d 1207, 55 Pa.Cmwith. 59.

Material misrepresentation

- Ill.—O'Connell Home Builders, Inc. v. City of Chicago, 425 N.E.2d 1339, 55 Ill.Dec. 166, 99 Ill.App.3d 1054.

62. Ind.—Nelson v. Valparaiso Bd. of Zoning Appeals, 391 N.E.2d 649, 181 Ind.App. 252.
- Pa.—Board of Com'rs of Abington Tp. v. Quaker Const. Co., 441 A.2d 801, 65 Pa.Cmwith. 8.
- Tex.—J. D. Abrams, Inc. v. Sebastian, Civ.App., 570 S.W.2d 81, err. ref. no rev. err.
- Wash.—Mercer Enterprises, Inc. v. City of Bremerton, 611 P.2d 1237, 93 Wash.2d 624.

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64. Mich.—Orion Tp. v. Weber, 269 N.W.2d 275, 83 Mich.App. 712.

§ 206. Plans and Specifications

Library References

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80. Fla.—David v. B & J Holding Corp., 349 So.2d 676.
- Pa.—Gary D. Reihart, Inc. v. Carroll Tp., 409 A.2d 1167, 487 Pa. 461.
81. Ohio—In re Decertification of Eastlake, 422 N.E.2d 598, 66 Ohio St.2d 363, 20 O.O.3d 327, cert. den. 102 S.Ct. 570, 454 U.S. 1032, 70 L.Ed.2d 476.
83. U.S.—City and County of San Francisco v. U.S., C.A.Cal., 615 F.2d 498.
- Cal.—Billings v. California Coastal Commission, 163 Cal.Rptr. 288, 103 C.A.3d 729.
- Colo.—Spiker v. City of Lakewood, 603 P.2d 130, 198 Colo. 528.
- Mass.—Doolin v. Tinkham Development Corp., 389 N.E.2d 1044, 7 Mass.App. 720.
- Mo.—Allen v. City of Fredericktown, App., 591 S.W.2d 723.
- N.J.—Kelly v. Hackensack Meadowlands Development Commission, 411 A.2d 727, 172 N.J.Super. 223, certification den. 425 A.2d 267, 85 N.J. 104.
- N.Y.—H.O.M.E.S. v. New York State Urban Development Corp., 418 N.Y.S.2d 827, 69 A.D.2d 222.
- Ohio—P.H. English, Inc. v. Koster, 399 N.E.2d 72, 61 Ohio St.2d 17, 15 O.O.3d 9.

Site plan

- N.J.—Burcam Corp. v. Planning Bd. of Medford Tp., 403 A.2d 921, 168 N.J.Super. 508.

§ 207. Consents to Erection, Alteration, or Use of Property

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92. Fla.—Suwannee River Area Council Boy Scouts of America v. State, Department of Community Affairs, App., 384 So.2d 1369.
- Pa.—Michaels Development Co., Inc. v. Benzinger Tp. Bd. of Sup'rs, 413 A.2d 743, 50 Pa.Cmwith. 281.
- Board not bound by agreement of adversaries
- N.Y.—North Ridge Enterprises, Inc. v. Town of Westfield, 490 N.Y.S.2d 112, 87 A.D.2d 985, affd. 442 N.E.2d 1274, 57 N.Y.2d 906, 436 N.Y.S.2d 763.

§ 208. Notice

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98. U.S.—O'Neill v. Town of Nantucket, C.A.Mass., 711 F.2d 469.
- C.J.S. cited in Coleman v. Court of Appeals, Div. No. Two of State of Okl., D.C.Okla., 550 F.Supp. 681, 686.
- Hawaii—Chang v. Planning Commission of Maui County, 643 P.2d 55, 64 Haw. 431.
- Mont.—State ex rel. Diehl Co. v. City of Helena, 593 P.2d 458, 181 Mont. 306.
- Pa.—Bucks County Housing Development Corp. v. Zoning Hearing Bd. of Plumstead Tp., 406 A.2d 832, 45 Pa.Cmwith. 332.
- Wash.—Seattle Shorelines Coalition v. Justen, 609 P.2d 1371, 93 Wash.2d 390.

Procedural due process

- Minn.—Kletschka v. Le Sueur County Bd. of Com'rs, 277 N.W.2d 404.
99. Cal.—Kennedy v. City of Hayward, 165 Cal.Rptr. 132, 105 C.A.3d 953.
- D.C.—Shifflett v. District of Columbia Bd. of Appeals and Review, App., 431 A.2d 9.
- Or.—Lemmon v. Clemens, App., 646 P.2d 633, 57 Or.App. 583, review den., 652 P.2d 810, 293 Or. 634.
1. D.C.—Dupont Circle Citizens Ass'n v. District of Columbia Zoning Commission, App., 431 A.2d 560.
2. N.J.—Burcam Corp. v. Planning Bd. of Medford Tp., 403 A.2d 921, 168 N.J.Super. 508.

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4. Mass.—Ranney v. Board of Appeals of Nantucket, 414 N.E.2d 373, 11 Mass.App. 112.
- Or.—Menges v. Board of County Com'rs of Jackson County, 606 P.2d 681, 44 Or.App. 603, on reconsideration 609 P.2d 847, 45 Or.App. 797, affd., 621 P.2d 562, 290 Or. 251.
- Pa.—Appeal of Conners, 454 A.2d 233, 71 Pa.Cmwith. 213, app. after remand 491 A.2d 304, 88 Pa.Cmwith. 625.
- Wash.—Seattle Shorelines Coalition v. Justen, 609 P.2d 1371, 93 Wash.2d 390.
5. Fla.—Hillsboro-Windsor Condominium Ass'n v. Department of Natural Resources, App. 1 Dist., 418 So.2d 359.
- Minn.—Barton Contracting Co., Inc. v. City of Afton, 268 N.W.2d 712.
- Vt.—In re Great Waters of America, Inc., 435 A.2d 956, 140 Vt. 105.

Notices sufficient

- (1) U.S.—Molgaard v. Town of Caledonia, D.C.Wis., 527 F.Supp. 1073, affd., C.A., 696 F.2d 58.
- Hawaii—Chang v. Planning Commission of Maui County, 643 P.2d 55, 64 Haw. 431.
- Ind.—Nelson v. Valparaiso Bd. of Zoning Appeals, 391 N.E.2d 649, 181 Ind.App. 252.
- La.—Inniswold-Jefferson Terrace Civic Ass'n, Inc. v. Louisiana Health Services & Indem. Co., Inc., App., 396 So.2d 348.
- Mo.—Murphy v. Board of Zoning Adjustment of City of Kansas City, App., 593 S.W.2d 549.

Notices insufficient

- La.—Shenadosh Park Civic Ass'n, Inc. v. Elizey, App. 1 Cir., 409 So.2d 354.

Special use permit

- (1) Ariz.—Sandblom v. Cortin, App., 608 P.2d 317, 125 Ariz. 178.
6. Ill.—Grotto v. Little Friends, Inc., 432 N.E.2d 634, 59 Ill.Dec. 848, 104 Ill.App.3d 105.
- N.J.—Precision Indus. Design Co., Inc. v. Beckwith, 447 A.2d 186, 185 N.J.Super. 9.
- Deprivation of due process
- Cal.—Kennedy v. City of Hayward, 165 Cal.Rptr. 132, 105 C.A.3d 953.

§ 209. Evidence

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35. Fla.—Board of County Com'rs of Pinellas County v. City of Clearwater, App. 2 Dist., 440 So.2d 497.

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§ 210. Hearing

Library References

Zoning and Planning ⇨438.5.

Other authority has held that swearing in^{42,5} and cross examination of witnesses in a proceeding involving issuance of a conditional or special use permit was not mandated by due process of law.^{42,10}

- 62.5. Minn.—Kletschka v. Le Sueur County Bd. of Com'rs, 277 N.W.2d 404.

- 62.10. Minn.—Barton Contracting Co., Inc. v. City of Afton, 268 N.W.2d 712—Kletschka v. Le Sueur County Bd. of Com'rs, 277 N.W.2d 404.

63. Or.—Merrill v. Van Volkinburg, 636 P.2d 466, 54 Or.App. 873.

§ 211. Determination

Library References

Zoning and Planning ⇨439.5.

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69. Requirement of "record of the public hearing" satisfied

- N.C.—Piney Mountain Neighborhood Ass'n, Inc. v. Town of Chapel Hill, 304 S.E.2d 251, 63 N.C.App. 244.

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80. Mass.—Richard v. Planning Bd. of Acushnet, 406 N.E.2d 728, 10 Mass.App. 216.

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88. Extension of time

- Hawaii—Hui Malama Aina O Ko'olau v. Pacarro, 666 P.2d 177, 4 Hawaii App. 304.

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1. Conn.—Viking Const. Co. v. Town Planning Commission of Town of Simsbury, 435 A.2d 29, 181 Conn. 243.

- N.H.—Savage v. Town of Rye, 415 A.2d 873, 120 N.H. 409.

- N.J.—Burcam Corp. v. Planning Bd. of Medford Tp., 403 A.2d 921, 168 N.J.Super. 508.

- Ohio—P.H. English, Inc. v. Koster, 399 N.E.2d 72, 61 Ohio St.2d 17, 15 O.O.3d 9.

- Pa.—Hopewell Tp. v. Wilson, 406 A.2d 610, 46 Pa.Cmwith. 425.

- Wash.—Norco Const. Inc. v. King County, 649 P.2d 103, 97 Wash.2d 680.

- Norco Const., Inc. v. King County, 627 P.2d 988, 29 Wash.App. 179, mod. on oth. grds. 649 P.2d 103, 97 Wash.2d 680.

Provision inapplicable

- (2) Other instances.

- Pa.—Raccoon Mountain, Inc. v. Perry County Planning Commission, 413 A.2d 1170, 50 Pa.Cmwith. 623.

Rejection of application untimely

- Pa.—Appeal of David Fiori, Realtor, Inc., 422 A.2d 1207, 55 Pa.Cmwith. 59.

3. Cal.—Benny v. City of Alameda, 164 Cal.Rptr. 776, 105 C.A.3d 1006.

- Conn.—Viking Const. Co. v. Town Planning Commission of Town of Simsbury, 435 A.2d 29, 181 Conn. 243.

- N.H.—Dearborn v. Town of Milford, 411 A.2d 1132, 120 N.H. 82.

- N.J.—Precision Indus. Design Co., Inc. v. Beckwith, 447 A.2d 186, 185 N.J.Super. 9.

- Pa.—O'Hara Tp. v. DiSilvio, 413 A.2d 1174, 51 Pa.Cmwith. 50—Board of Sup'rs of Highland Tp. v. Manos, 457 A.2d 210, 73 Pa.Cmwith. 10.

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17. Finding easement practicable within condition period required

- Cal.—Georgia-Pacific Corp. v. California Coastal Com'n, 183 Cal.Rptr. 395, 132 C.A.3d 678.

- Finding easement practicable within condition period not required

- Cal.—Grupe v. California Coastal Com'n, 1 Dist., 222 Cal.Rptr. 578, 166 C.A.3d 148, declining to follow Georgia-Pacific Corp. v. California Coastal Com'n, 183 Cal.Rptr. 395, 132 Cal.App.3d 678.

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§ 212. — Finality; Successive Applications

22. Mass.—Cape Ann Land Development Corp. v. City Council of Gloucester, 373 N.E.2d 218, 374 Mass. 825.

23. Vt.—Appeal of Farrell & Desautels, Inc., 383 A.2d 619, 135 Vt. 614.

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28. Conn.—Manor Development Corp. v. Conservation Commission of Town of Simsbury, 433 A.2d 999, 180 Conn. 692.

Mass.—Shalvey v. Board of Appeal of Norwood, 378 N.E.2d 1001, 6 Mass.App. 521.

29. Mass.—Rumney v. Board of Appeals of Nantucket, 414 N.E.2d 373, 11 Mass.App. 112.

Ohio—Wade v. City of Cleveland, 456 N.E.2d 829, 8 Ohio App.3d 176, 8 O.B.R. 236.

Utah—Cottonwood Heights Citizen Ass'n v. Board of Com'rs of Salt Lake County, 593 P.2d 138.

30. N.Y.—Freeman v. Town of Ithaca Zoning Bd. of Appeals, 403 N.Y.S.2d 142, 61 A.D.2d 1070.

§ 213. Administrative Review

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34. Mo.—State ex rel. J. S. Alberici, Inc. v. City of Fenton, App., 576 S.W.2d 574.

N.Y.—Living Resources Corp. v. Burns, 398 N.Y.S.2d 928, 91 Misc.2d 919.

Pa.—Appeal of Gilbert, 383 A.2d 556, 34 Pa.Cmwith. 299.

35. Party found aggrieved

Or.—Lamb v. Lane County, 689 P.2d 1049, 70 Or.App. 364.

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43. N.Y.—Diocese of Buffalo v. Buczkowski, 456 N.Y.S.2d 909, 90 A.D.2d 994.

Pa.—Greene Landfill, Inc. v. Greene Tp. Zoning Hearing Bd., 407 A.2d 903, 46 Pa.Cmwith. 602.

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55. Mo.—State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Bd. of Adjustment, App., 553 S.W.2d 721.

§ 215. — Procedure

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80. Pa.—Appeal of Hoak, 403 A.2d 639, 44 Pa.Cmwith. 108.

81. Mo.—State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Bd. of Adjustment, App., 553 S.W.2d 721.

Pa.—Appeal of Gilbert, 383 A.2d 556, 34 Pa.Cmwith. 299.

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84. Mo.—State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Bd. of Adjustment, App., 553 S.W.2d 721.

N.J.—Trenkamp v. Burlington Tp., 406 A.2d 218, 170 N.J.Super. 251.

87. Pa.—Appeal of Gilbert, 383 A.2d 556, 34 Pa.Cmwith. 299.

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94. Cal.—Edwards v. Steele, 158 Cal.Rptr. 662, 599 P.2d 1365, 25 C.3d 406.

§ 216. — Determination and Disposition

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25. Mass.—Spilke v. Board of Appeals of Plymouth, 389 N.E.2d 788, 7 Mass.App. 683.

§ 217. Form, Requisites, and Validity of Permit

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45. Mich.—Adrian Mobile Home Park v. City of Adrian, 288 N.W.2d 402, 94 Mich.App. 194.

Va.—Town of Blacksburg v. Price, 266 S.E.2d 899, 221 Va. 168.

54. Or.—1000 Friends of Oregon v. Board of Commissioners of Clackamas County, 595 P.2d 1273, 40 Or.App. 529.

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Thus, although there is authority to the contrary,^{62.5} a sign which violates statutory location provisions may properly be ordered removed without compensation despite the fact that the county had issued a permit for the sign.^{62.10}

62.5 Mo.—State ex rel. Missouri Highway Transportation Commission v. Bank of St. Ann, App., 631 S.W.2d 73.

62.10 Mo.—Osage Outdoor Advertising, Inc. v. State Highway Com'n of Missouri, App., 687 S.W.2d 566, declining to follow State ex rel. Missouri Highway Transportation Commission v. Bank of St. Ann, 631 S.W.2d 73.

§ 218. Operation and Effect

Library References

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66. "Under permit" construed

Mass.—Zoning Bd. of Appeals of Greenfield v. Housing Appeals Committee, 446 N.E.2d 748, 15 Mass.App. 553.

79. Mass.—Arrigo v. Planning Bd. of Franklin, 429 N.E.2d 355, 12 Mass.App. 802, review den. 440 N.E.2d 1173, 385 Mass. 1101.

82. N.Y.—Rejman v. Welch, 4 Dept., 492 N.Y.S.2d 295, 112 A.D.2d 795.

Or.—Lemke v. Lane County, 643 P.2d 1306, 57 Or. App. 55, review den. 650 P.2d 927, 293 Or. 394.

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86. Conn.—Whittaker v. Zoning Bd. of Appeals of Town of Trumbull, 427 A.2d 1346, 179 Conn. 650.

Or.—1000 Friends of Oregon v. Board of County Com'rs, Clackamas County, 564 P.2d 1080, 29 Or.App. 617.

87. Ky.—Muser v. Leon Coal Processing Co., Inc., App., 560 S.W.2d 833.

§ 219. — Time for Exercise of Privilege

92. U.S.—League to Save Lake Tahoe v. Crystal Enterprises, C.A.Nev., 685 F.2d 1142.

League to Save Lake Tahoe v. Crystal Enterprises, D.C.Nev., 490 F.Supp. 995, aff'd, C.A., 685 F.2d 1142.

Or.—Solberg v. City of Newberg, 641 P.2d 44, 56 Or.App. 23.

Pa.—Lucia v. Zoning Hearing Bd. of Upper St. Clair Tp., 437 A.2d 1294, 63 Pa.Cmwith. 272.

Wis.—Village of Sister Bay v. Hockers, App., 317 N.W.2d 505, 106 Wis.2d 474.

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93. N.J.—Bleznek v. Eveham Tp., 406 A.2d 201, 170 N.J.Super. 216.

§ 220. — Construction; Privileges Embraced

Library References

Zoning and Planning ¶464.1.

99. Mass.—Arrigo v. Planning Bd. of Franklin, 429 N.E.2d 355, 12 Mass.App. 802, review den. 440 N.E.2d 1173, 385 Mass. 1101.

N.C.—Woodhouse v. Board of Com'rs of Town of Nags Head, 261 S.E.2d 882, 299 N.C. 211.

Binding contract

N.Y.—Holmes v. Planning Bd. of Town of New Castle, 433 N.Y.S.2d 587, 78 A.D.2d 1.

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4. Ark.—Abram v. City of Fayetteville, 661 S.W.2d 371, 281 Ark. 63.

§ 222. — Vested or Property Rights

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27. Minn.—Ridgewood Development Co. v. State, 294 N.W.2d 288.

28. Permit not issued

Pa.—York-Green Associates v. Board of Sup'rs of South Hanover Tp., Dauphin County, 486 A.2d 561, 87 Pa.Cmwith. 93.

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29. Mich.—Schubiner v. West Bloomfield Tp., 351 N.W.2d 214, 133 Mich.App. 490.

30. Ga.—Schulman v. Fulton County, 295 S.E.2d 102, 249 Ga. 852.

Ill.—Leisuretime Recreation Center VI, Inc. v. Byrne, 417 N.E.2d 658, 48 Ill.Dec. 926, 93 Ill.App.3d 489.

Nev.—City of Reno v. Nevada First Thrift, 686 P.2d 231.

Pa.—Turner v. Martz, 401 A.2d 585, 42 Pa.Cmwith. 328.

Good faith reliance not shown

La.—Pallet v. City of New Orleans, Dept. of Safety and Permits, App., 4 Cr., 433 So.2d 1091, writ den. Sup., 440 So.2d 757.

Pa.—Appeal of Girolamo, 410 A.2d 940, 49 Pa.Cmwith. 159.

31. Ill.—Karmeen v. City of Peoria, 382 N.E.2d 1374, 22 Ill.Dec. 619, 65 Ill.App.3d 969.

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35. N.H.—Henry and Murphy, Inc. v. Town of Alenstown, 424 A.2d 1132, 120 N.H. 910.

38. Pa.—Zoning Hearing Bd. of Upper Chichester Tp., Delaware County v. Petrosky, 365 A.2d 184, 26 Pa.Cmwith. 614, vac. on oth. grds. 402 A.2d 1385, 485 Pa. 501.

§ 223. Revocation, Nullification, or Change

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39. Iowa—Arlace Development, Inc. v. Zoning Bd. of Adjustment of City of Ames, 312 N.W.2d 574.

La.—Brennan v. Board of Zoning Adjustments of City of New Orleans, App., 371 So.2d 324.

Mass.—Carstensen v. Cambridge Zoning Bd. of Appeals, 416 N.E.2d 522, 11 Mass.App. 348.

N.Y.—Hayes v. Gibbs, 453 N.Y.S.2d 262, 89 A.D.2d 656.

Pa.—Bogush v. Zoning Hearing Bd. of Borough of Coplay, 437 A.2d 1086, 63 Pa.Cmwith. 280.

W.Va.—DeCoals, Inc. v. Board of Zoning Appeals of City of Westover, 284 S.E.2d 856.

41. N.J.—Burcam Corp. v. Planning Bd. of Medford Tp., 403 A.2d 921, 168 N.J.Super. 508.

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48. Ky.—Lampton v. Pinaire, App., 610 S.W.2d 915.

N.Y.—Tafnet Realty Corp. v. New York City Dept. of Bldgs., 455 N.Y.S.2d 341, 116 Misc.2d 609, rearg. den. 460 N.Y.S.2d 729, 118 Misc.2d 498.

Pa.—Borough of Middletown v. Agway Petroleum Co., 400 A.2d 647, 41 Pa.Cmwith. 436.

49. N.Y.—C & S Golf & Country Club Corp. v. Stevens, 400 N.Y.S.2d 572, 60 A.D.2d 841.

50. N.J.—Ocean Acres, Inc. v. State, Dept. of Environmental Protection, 403 A.2d 967, 168 N.J.Super. 397.

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- Co. v. Zoning Bd. of Adjustment of City of Pittsburgh, 452 A.2d 605, 70 Pa.Cmwith. 83.

- R.I.—*Rhode Island Hospital Trust Nat. Bank v. East Providence Zoning Bd. of Review*, 444 A.2d 862.

- Wash.—*Douglas v. City of Spokane*, 609 P.2d 979, 25 Wash.App. 823.

Exception or special exception

- Ind.—*Metropolitan Bd. of Zoning Appeals, Div. II, Marion County v. Gunn, App.*, 477 N.E.2d 289.

- Pa.—*Hannon v. Zoning Hearing Bd. of City of Wilkes-Barre*, 379 A.2d 641, 32 Pa.Cmwith. 356.

47. N.J.—*Fobe Associates v. Mayor and Council and Bd. of Adjustment of Borough of Demarest*, 379 A.2d 31, 74 N.J. 519.

48. D.C.—*Kenmore Joint Venture v. District of Columbia Bd. of Zoning Adjustment, App.*, 391 A.2d 269.

49. Conn.—*Wells v. Zoning Bd. of Appeals of City of Shelton*, 429 A.2d 467, 180 Conn. 193.

- Pa.—*Overstreet v. Zoning Hearing Bd. of Schuylkill Tp.*, 412 A.2d 169, 49 Pa.Cmwith. 397.

- Special exception

- (1) Pa.—*Zajac v. Zoning Hearing Bd. of Mifflin Tp.*, 398 A.2d 244, 41 Pa.Cmwith. 7—*Glencrest Realty Co. v. Zoning Hearing Bd. of Washington Tp., Cmwith.*, 406 A.2d 836, 46 Pa.Cmwith. 177.

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50. Cal.—*Miller v. Board of Sup'ns of Santa Barbara County*, 176 Cal.Rptr. 136, 122 C.A.3d 539.

- Ga.—*Contris v. Richmond County*, 235 S.E.2d 19, 238 Ga. 731.

- Ind.—*Metropolitan Bd. of Zoning Appeals of Marion County, Division III v. Zaphiriou*, 376 N.E.2d 110, 176 Ind.App. 422.

- La.—*State ex rel. Maple Area Residents, Inc. v. Board of Zoning Adjustments, App.*, 365 So.2d 891.

- Mass.—*Cavanaugh v. DiFlumera*, 401 N.E.2d 867, 9 Mass.App. 396.

- N.H.—*Carbourn v. Town of Exeter*, 401 A.2d 675, 119 N.H. 259.

- N.J.—*Kessler v. Bowker*, 417 A.2d 34, 174 N.J. Super. 478, 10 A.L.R.4th 1112, certification den. 425 A.2d 264, 85 N.J. 99.

- N.Y.—*Armill Realty Corp. v. Board of Estimate of City of New York*, 411 N.Y.S.2d 678, 66 A.D.2d 888, aff'd. 397 N.E.2d 1332, 48 N.Y.2d 741, 422 N.Y.S.2d 665—*Houghwot v. Town of Kimbome*, 416 N.Y.S.2d 677, 69 A.D.2d 1011.

- Pa.—*Driving v. Lower Southampton Tp. Zoning Hearing Bd.*, 397 A.2d 54, 40 Pa.Cmwith. 243.

51. Pa.—*Kopelman v. Zoning Hearing Bd. of City of New Kensington*, 423 A.2d 761, 55 Pa.Cmwith. 306.

- Vt.—*Sorg v. North Hero Zoning Bd. of Adjustment*, 378 A.2d 98, 135 Vt. 423.

- Special exception

- Pa.—*Riddle Paddock, Inc. v. Zoning Hearing Bd. of Middletown Tp.*, 374 A.2d 98, 30 Pa.Cmwith. 481.

52. N.Y.—*South Woodbury Taxpayers Ass'n, Inc. v. American Institute of Physics, Inc.*, 428 N.Y.S.2d 158, 104 Misc.2d 254.

53. Pa.—*Cook v. Marple Tp. Zoning Hearing Bd.*, 423 A.2d 1105, 55 Pa.Cmwith. 535.

55. Me.—*Thornton v. Lothridge*, 447 A.2d 473.

- Child day care center

- Pa.—*Seidita v. Board of Zoning Appeals of City of Scranton*, 399 A.2d 156, 41 Pa.Cmwith. 340.

- Special exception

- Pa.—*Seidita v. Board of Zoning Appeals of City of Scranton*, 399 A.2d 156, 41 Pa.Cmwith. 340.

- Nursing home

- N.J.—*Urban Farms, Inc. v. Borough of Franklin Lakes*, 431 A.2d 163, 179 N.J. Super. 203.

56. Fla.—*Dade County v. Florida Min. and Materials Corp., App.*, 364 So.2d 31.

- Ga.—*McKnight v. Mitchell*, 240 S.E.2d 313, 144 Ga. App. 109.

- Idaho—*Gordon Paving Co. v. Blaine County Bd. of County Com'rs*, 572 P.2d 164, 98 Idaho 730.

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57. Ala.—Pipes v. Adams, Civ.App., 381 So.2d 86.
Conn.—Diugos v. Zoning Bd. of Appeals of Trumbull, 416 A.2d 180, 36 Conn.Supp. 217.
D.C.—Wheeler v. District of Columbia Bd. of Zoning Adjustment, App., 395 A.2d 85.
Mass.—Rafferty v. Santa Maria Hospital, 367 N.E.2d 856, 5 Mass.App. 624.
N.Y.—Martino v. Zoning Bd. of Appeals, Town of Smithtown, 396 N.Y.S.2d 452, 58 A.D.2d 826.
Pa.—Evans v. Zoning Hearing Bd. of Easttown Tp., 396 A.2d 889, 40 Pa.Cmwith. 103.
R.I.—Toohy v. Kilday, 415 A.2d 732.
58. N.Y.—Consolidated Edison Co. of New York, Inc. v. Hoffman, 374 N.E.2d 105, 43 N.Y.2d 598, 403 N.Y.S.2d 193.
Tex.—Zoning Bd. of Adjustment of City of El Paso v. Knapp, Civ.App., 618 S.W.2d 137.

Special exception

- Me.—Friede's Corner Concerned Citizens' Ass'n v. Westbrook Bd. of Zoning Appeals, 398 A.2d 415.
59. N.Y.—Foster v. Saylor, 447 N.Y.S.2d 75, 85 A.D.2d 876.

Special exception

- (1) Pa.—Dale v. Zoning Hearing Bd. of Tredyffrin Tp., Cmwith., 496 A.2d 1321.
60. Pa.—Marlowe v. Zoning Hearing Bd. of Haverford Tp., 415 A.2d 946, 52 Pa.Cmwith. 224.
61. Special exception
Md.—Schultz v. Pritts, 432 A.2d 1319, 291 Md. 1.
62. Pa.—Application of Burroughs Corp., 422 A.2d 1183, 54 Pa.Cmwith. 514.

§ 248. — Automobile Service, Garages, and Parking Lots

63. D.C.—Friendship Neighborhood Coalition v. District of Columbia Bd. of Zoning Adjustment, App., 403 A.2d 291.
La.—Coleman Zoning Ass'n, Inc. v. Board of Zoning Adjustments of City of New Orleans, App., 374 So.2d 177.
N.J.—Durrell v. Governing Body of Clark Tp., 413 A.2d 610, 82 N.J. 426.
Pa.—Jenkintown Towing Service v. Zoning Hearing Bd. of Upper Merion Township, 446 A.2d 716, 67 Pa.Cmwith. 183.
S.C.—Union Oil of California v. City of Columbia Zoning Bd. of Adjustment, 281 S.E.2d 479, 276 S.C. 678.
S.D.—Britt v. City of Sioux Falls, 291 N.W.2d 784.

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78. Vt.—In re Zoning Variance Application of Ray Reilly Tire Mart, Inc., 449 A.2d 910, 141 Vt. 330.
Special exception
N.J.—Brown Boveri, Inc. v. Township Committee of North Brunswick Tp., 389 A.2d 483, 160 N.J.Super. 179.

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64. D.C.—First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment, App., 432 A.2d 695.
Special exception
N.Y.—Corsetti v. Zoning Bd. of Appeals of Town of Henrietta, 399 N.Y.S.2d 751, 59 A.D.2d 1018.
65. Mass.—Rafferty v. Santa Maria Hospital, 367 N.E.2d 856, 5 Mass.App. 624.
Pa.—Pae v. Hilltown Tp. Zoning Hearing Bd., 385 A.2d 616, 35 Pa.Cmwith. 229.—Zoning Hearing Bd. of Upper Chichester Tp., Delaware County v. Petrovsky, 365 A.2d 184, 26 Pa.Cmwith. 614, vac. on oth. grds. 402 A.2d 1385, 485 Pa. 501.

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66. N.Y.—Tandem Holding Corp. v. Board of Zoning Appeals of Town of Hempstead, 373 N.E.2d 232, 80 N.Y.2d 801, 402 N.Y.S.2d 388.

69. Mass.—Simone v. Board of Appeals of Haverhill, 380 N.E.2d 718, 6 Mass.App. 601.
N.Y.—Eichenbaum v. Arred, 420 N.Y.S.2d 749, 72 A.D.2d 563.
Pa.—BP Oil, Inc. v. Zoning Hearing Bd. of Borough of Brookhaven, 389 A.2d 1220, 37 Pa.Cmwith. 258.
R.I.—V.S.H. Realty, Inc. v. Zoning Bd. of Review of Town of East Greenwich, 390 A.2d 378, 120 R.I. 785.
Special exception
N.J.—Brown Boveri, Inc. v. Township Committee of North Brunswick Tp., 389 A.2d 483, 160 N.J.Super. 179.

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70. Mo.—St. Louis County v. Pfizner, App., 657 S.W.2d 262.

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77. Ind.—Board of Zoning Appeals of Town of Newburgh v. Eberle, App., 403 N.E.2d 1114.
79. Pa.—Mattero v. Upper Chichester Tp. Zoning Hearing Bd., 395 A.2d 584, 38 Pa.Cmwith. 322.

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82. N.Y.—Croissant v. Zoning Bd. of Appeals of Town of Woodstock, Ulster County, 442 N.Y.S.2d 235, 83 A.D.2d 673.
Pa.—Hankin v. Zoning Hearing Bd. of West Norriton Tp., 384 A.2d 1386, 35 Pa.Cmwith. 164.
83. Pa.—Civers v. Zoning Bd. of Adjustment, 395 A.2d 700, 39 Pa.Cmwith. 499.
Va.—Hendrix v. Board of Zoning Appeals of City of Virginia Beach, 278 S.E.2d 814, 222 Va. 57.
84. Alaska—City and Borough of Juneau v. Thibodeau, 595 P.2d 626.

§ 249. Procedure in General

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93. Ohio—Cleveland Elec. Illuminating Co. v. Village of Mayfield, 371 N.E.2d 567, 53 Ohio App.2d 37, 7 O.O.3d 29.
94. D.C.—Wolf v. District of Columbia Bd. of Zoning Adjustment, App., 397 A.2d 936.
Ga.—Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals, 248 S.E.2d 196, 147 Ga.App. 128.
Ill.—Scanlon v. Faiz, 15 Ill.Dec. 268, 373 N.E.2d 614, 15 Ill.Dec. 268, 57 Ill.App.3d 649, aff'd. 389 N.E.2d 571, 27 Ill.Dec. 507, 75 Ill.2d 472.
Md.—Martin Marietta Aggregates v. Citizens for Preservation of South Mountain-Antietam Environment, 395 A.2d 179, 41 Md.App. 26.
N.H.—Lavalley v. Britt, 383 A.2d 709, 118 N.H. 131.
N.J.—Fobe Associates v. Mayor and Council and Bd. of Adjustment of Borough of Demarest, 379 A.2d 31, 74 N.J. 519.
Or.—Brenz v. City of Dayton, 566 P.2d 904, 29 Or.App. 761.
Pa.—Hankin v. Zoning Hearing Bd. of West Norriton Tp., 384 A.2d 1386, 35 Pa.Cmwith. 164.

§ 250. Who May Apply

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3. N.J.—Springsteel v. Town of West Orange, 373 A.2d 415, 149 N.J.Super. 107.
4. Conn.—Kolak v. Zoning Bd. of Appeals of City of Stamford, 440 A.2d 183, 184 Conn. 479.
Pa.—Cook v. Marple Tp. Zoning Hearing Bd., 423 A.2d 1105, 55 Pa.Cmwith. 535.

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5. Colo.—Landmark Universal, Inc. v. Pitkin County Bd. of Adjustment, 579 P.2d 1184, 40 Colo.App. 444.
Pa.—Appeal of Grace Bldg. Co., Inc., 395 A.2d 1049, 39 Pa.Cmwith. 552.
11. Pa.—Logan Square Neighborhood Ass'n v. Zoning Bd. of Adjustment of City of Philadelphia, 379 A.2d 632, 32 Pa.Cmwith. 277.

12. Ill.—Thompson v. Cook County Zoning Bd. of Appeals, 421 N.E.2d 285, 51 Ill.Dec. 777, 96 Ill.App.3d 561.

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16. N.Y.—Emmi v. Zoning Bd. of Appeals of Town of Salina, 472 N.E.2d 39, 63 N.Y.2d 853, 482 N.Y.S.2d 263.
Pa.—Application of Burroughs Corp., 422 A.2d 1183, 54 Pa.Cmwith. 514.
22. Kan.—C.J.S. cited in Martin Marietta Aggregates v. Board of County Com'rs of Leavenworth County, 625 P.2d 516, 522, 5 Kan.App.2d 774.

§ 251. Application

28. Appropriate Board

- Pa.—Application of Blouch, 362 A.2d 1139, 26 Pa.Cmwith. 147.

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50. Pa.—Application of Blouch, 362 A.2d 1139, 26 Pa.Cmwith. 147.

54. Due process requirement

- Idaho—Gay v. County Com'rs of Bonneville County, App., 651 P.2d 560, 103 Idaho 626.

§ 253. Hearing

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97. Due process requirement

- Idaho—Gay v. County Com'rs of Bonneville County, App., 651 P.2d 560, 103 Idaho 626.

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6. Pa.—Wright v. Zoning Hearing Bd. of Bridgeville, 485 A.2d 870, 86 Pa.Cmwith. 528.
9. N.Y.—Addesso v. Sharpe, 379 N.E.2d 1138, 44 N.Y.2d 925, 408 N.Y.S.2d 8.
Pa.—Pae v. Hilltown Tp. Zoning Hearing Bd., 385 A.2d 616, 35 Pa.Cmwith. 229.

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On the other hand, depending on the position taken and the role played, due process has been held not denied by the fact that same solicitor served as solicitor for both the township and the zoning hearing board.^{18,5}

- 18.5. Pa.—Appeal of Dodge, 402 A.2d 273, 43 Pa.Cmwith. 65.—Spencer v. Hemlock Tp., Columbia County, 402 A.2d 1067, 43 Pa.Cmwith. 36.

§ 254. — Bias or Disqualification of Member

An action by a planning board, one of whose members is disqualified to act, is voidable if the disqualifying member participates, without reference to the fact whether the result is produced by his vote.^{27,5}

- 27.5. N.H.—Winalow v. Town of Holderness Planning Bd., 480 A.2d 114, 125 N.H. 262 overruling Levesque v. Hudson, 106 N.H. 470, 214 A.2d 533 and rejecting Totty v. Grantham Planning Board, 120 N.H. 388, 415 A.2d 687 to extent they are inconsistent.

§ 255. Evidence

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55. Pa.—Zoning Hearing Bd. of Upper Chichester Tp., Delaware County v. Petrovsky, 365 A.2d 184, 26 Pa.Cmwith. 614, vac. on oth. grds. 402 A.2d 1385, 485 Pa. 501.

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57. Hardship unique to property

Pa.—Zoning Hearing Bd. of Upper Chichester Tp., Delaware County v. Petrosky, 365 A.2d 184, 26 Pa.Cmwith. 614, vac. on oth. grds. 402 A.2d 1385, 485 Pa. 501.

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§ 257. Determination

43. Pa.—Appeal of M.G.H. Enterprises from Decision of West Coalco Tp. Zoning Hearing Bd., 480 A.2d 394, 85 Pa.Cmwith. 68.

§ 258. — Findings of statement of reasons

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50. Due process requirement

Idaho—Gay v. County Com'rs of Bonneville County, App. 651 P.2d 560, 103 Idaho 626.

§ 259. — Vote of Members of Board

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36. Ind.—C.J.S. cited in Boffo v. Boone Cty. Bd. of Zoning Appeals, App., 421 N.E.2d 1119, 1129.

§ 260. — Construction, Operation, and Effect

91. Mich.—Kethman v. Oceola Tp., 276 N.W.2d 529, 38 Mich.App. 94.

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96. Sufficient change in condition

Pa.—Serban v. Zoning Hearing Bd. of City of Bethlehem, 480 A.2d 362, 84 Pa.Cmwith. 558.

1. Mass.—Hunters Brook Realty Corp. v. Zoning Bd. of Appeals of Bourne, 436 N.E.2d 978, 14 Mass. App. 76.

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13. La.—Roy v. Kurtz, App., 357 So.2d 1354, writ den., Sup., 359 So.2d 1307.

18. Colo.—Fitz Motors, Inc. v. City of Northglenn, 602 P.2d 890, 43 Colo.App. 137.

§ 261. Record

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20. Due process requirement

Idaho—Gay v. County Com'rs of Bonneville County, App. 651 P.2d 560, 103 Idaho 626.

§ 262. Reconsideration, Modification, or Revocation**31. Equitable estoppel**

Fla.—Town of Longboat Key v. Mezrah, App. 2 Dist., 467 So.2d 488.

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41. D.C.—Interdonato v. District of Columbia Bd. of Zoning Adjustment, App., 429 A.2d 1000.

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§ 263. — New Application

55. Md.—Jack v. Foster Branch Homeowners Ass'n No. 1, Inc., 452 A.2d 1306, 53 Md.App. 325.

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60. Ind.—Pequinot v. Allen County Board of Zoning Appeals, App., 446 N.E.2d 1021.

Md.—Jack v. Foster Branch Homeowners Ass'n No. 1, Inc., 452 A.2d 1306, 53 Md.App. 325.

62. Automobile service station

Pa.—Amoco Oil Co. v. Zoning Hearing Bd. of Middletown Tp., 463 A.2d 103, 76 Pa.Cmwith. 35.

§ 265. General Principles

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84. Pa.—Meyers v. Board of Sup'rs of Lower Makefield Tp., 402 A.2d 278, 43 Pa.Cmwith. 196.

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94. U.S.—California Tahoe Regional Planning Agency v. Jennings, C.A.Nev., 594 F.2d 181, cert. den. 100 S.Ct. 133, 444 U.S. 864, 62 L.Ed.2d 86.

Conn.—Bell v. Planning and Zoning Commission of Town of Westport, 391 A.2d 154, 174 Conn. 493.

95. Necessity of reasons to be eligible for review

R.I.—Thorpe v. Zoning Bd. of Review of Town of North Kingstown, 492 A.2d 1236.

98. U.S.—Land Associates v. Metropolitan Airport Authority, D.C.Tenn., 547 F.Supp. 1128, aff'd. 712 F.2d 248.

§ 266. Right of Review and Persons Entitled Thereto

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12. Citizens generally

Fla.—Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, Inc., 450 So.2d 204.

Challenges of zoning board decisions by proceedings in nature by mandamus are governed by the same statutory standing requirements for appealing zoning decisions.^{21.5}

21.5. Vt.—Garzo v. Stowe Bd. of Adjustment, 476 A.2d 125, 144 Vt. 198.

§ 267. — Persons Aggrieved or Affected

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28. Ala.—Hudson v. Mobile County, Civ.App., 439 So.2d 1304.

29. Contingent interest in possible future lease
Pa.—Metzger v. Zoning Hearing Bd. of Warrington Tp., 481 A.2d 1234, 85 Pa.Cmwith. 301.

31. Title insurer's economic interest

Alaska—Kenai Peninsula Borough v. Kenai Peninsula Bd. of Realtors, Inc., 652 P.2d 471.

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33. Life tenant

Conn.—Smith v. Planning and Zoning Bd. of City of Milford, 490 A.2d 539, 3 Conn.App. 590, certification gr. 494 A.2d 906, 196 Conn. 809.

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44. Pa.—Lower Paxton Tp. v. Fieseler Neon Signs, 391 A.2d 720, 37 Pa.Cmwith. 506.

§ 269. Nature and Scope of Review in General

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87. U.S.—Delight, Inc. v. Baltimore County, Md., D.C.Md., 475 F.Supp. 754, aff'd. C.A., 624 F.2d 12.

88. Or.—Jurgenson v. County Court for Union County, 600 P.2d 1241, 42 Or.App. 505.

91. U.S.—Stratford v. State-House, Inc., D.C.Ky., 542 F.Supp. 1008.

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94. U.S.—Stratford v. State-House, Inc., D.C.Ky., 542 F.Supp. 1008.

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96. U.S.—Stratford v. State-House, Inc., D.C.Ky., 542 F.Supp. 1008.

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6. Mich.—Ed Zaagman, Inc. v. City of Kentwood, 233 N.W.2d 146, 61 Mich.App. 693, aff'd. 277 N.W.2d 475, 406 Mich. 137.

§ 270. — Matters of judgment, discretion, wisdom, and policy

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31. Planned unit development

(1) Other matters.

Wash.—Kenart & Associates v. Skagit County, 680 P.2d 439, 37 Wash.App. 295.

§ 271. — Classification of Property; Size and Boundaries of Zones

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39. Test

La.—Hernandez v. City of Lafayette, App., 399 So.2d 1179, app. diss. 102 S.Ct. 1242, 455 U.S. 901, 71 L.Ed.2d 440.

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42. N.Y.—Maldini v. Ambro, 330 N.E.2d 403, 36 N.Y.2d 481, 369 N.Y.S.2d 385, app. diss., cert. den. 96 S.Ct. 419, 423 U.S. 993, 46 L.Ed.2d 367.

§ 273. Scope of Review of Administrative Action and Proceedings

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88. N.Y.—City of Syracuse v. Hneber, 383 N.Y.S.2d 774, 52 A.D.2d 341.

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93. N.Y.—City of Syracuse v. Hneber, 383 N.Y.S.2d 774, 52 A.D.2d 341.

§ 275. — Variances, Exceptions, and Special or Conditional Uses

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28. Utah—C.J.S. cited in Thurston v. Cache County, 626 P.2d 440, 445.

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34. Improper standard applied

Since the publication of the bound volume the case of Allstate Mortgage Corp. v. City of Miami Beach, 308 So.2d 629, cert. denied, 317 So.2d 763, has been disapproved the court holding that the "fairly debatable" test should be used to review legislative-type zoning enactments, while variance seeker must demonstrate a "unique hardship" in order to qualify for a variance. Fla.—Nance v. Town of Indialantic, 419 So.2d 1041.

§ 278. — Trial de novo and consideration of additional evidence

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83. La.—Hernandez v. City of Lafayette, App., 399 So.2d 1179, app. diss. 102 S.Ct. 1242, 455 U.S. 901, 71 L.Ed.2d 440.

§ 280 ZONING

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§ 280. General Considerations

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8. Wash.—Keller v. City of Bellingham, 578 P.2d 881, 20 Wash.App. 1, affd. 600 P.2d 1276, 92 Wash.2d 726.

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9. Cal.—Pan Pac. Properties, Inc. v. Santa Cruz County, 146 Cal.Rptr. 428, 81 C.A.3d 244.
Conn.—Sheehan v. Zoning Commission of Town of Old Saybrook, 378 A.2d 519, 173 Conn. 408.
Pa.—Hammermill Paper Co. v. Greene Tp., 395 A.2d 618, 39 Pa.Cmwith. 212.
10. Cal.—Concerned Citizens of Murphys v. Jackson, 140 Cal.Rptr. 531, 72 C.A.3d 1021.
N.D.—Eck v. City of Bismarck, 283 N.W.2d 193, app. after remand 302 N.W.2d 739.
Pa.—City of Pittsburgh v. Com., 400 A.2d 1301, 485 Pa. 40.

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12. U.S.—Ligon v. State of Md., D.C.Md., 448 F.Supp. 935.
Conn.—Rosnick v. Zoning Commission of Town of Southbury, 374 A.2d 245, 172 Conn. 306.
Fla.—General Elec. Credit Corp. of Georgia v. Metropolitan Dade County, App., 346 So.2d 1049.
14. Ga.—Contris v. Richmond County, 235 S.E.2d 19, 238 Ga. 731.

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15. Md.—County Council for Prince George's County v. Carl M. Freeman Associates, Inc., 376 A.2d 860, 281 Md. 70.
18. Pa.—Borough of West Chester v. Lal, 387 A.2d 929, 35 Pa.Cmwith. 620.
23. N.Y.—Webster Associates v. Town of Webster, 462 N.Y.S.2d 796, 119 Misc.2d 533.
27. Tex.—Midway Protective League v. City of Dallas, Civ.App., 552 S.W.2d 170, 7 A.L.R.4th 725, err. ref. no rev. err.

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30. N.Y.—Vestal-Penn Enterprises v. Cohen, 397 N.Y.S.2d 466, 59 A.D.2d 594.
37. N.Y.—Cotroneo v. Klein, 405 N.Y.S.2d 483, 62 A.D.2d 493.

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49. Idaho—Bone v. City of Lewiston, 693 P.2d 1046, 107 Idaho 844.
51. Lack of notice
Me.—Gagne v. Lewiston Crushed Stone Co., Inc., 367 A.2d 613, app. after remand 431 A.2d 1313.
54. Ill.—Chicago Park Dist. v. Kenroy, Inc., 374 N.E.2d 670, 15 Ill.Dec. 887, 58 Ill.App.3d 879, affd. in part, revd. in part on oth. grds. 402 N.E.2d 181, 37 Ill.Dec. 291, 78 Ill.2d 555, app. after remand 437 N.E.2d 783, 63 Ill.Dec. 134, 107 Ill.App.3d 222.

§ 281. Exhaustion of Administrative Remedies

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58. Cal.—Call v. Feher, 155 Cal.Rptr. 387, 93 C.A.3d 434—Taylor v. Swanson, 187 Cal.Rptr. 111, 137 C.A.3d 416.
Ill.—Northwestern University v. City of Evanston, 383 N.E.2d 964, 23 Ill.Dec. 93, 74 Ill.2d 80.
Me.—Cunningham v. Kittery Planning Bd., 400 A.2d 1070.
Mo.—Westside Enterprises, Inc. v. City of Dexter, App., 359 S.W.2d 638.
Ohio—Gates Mills Inv. Co. v. Village of Pepper Pike, 392 N.E.2d 1316, 59 Ohio App.2d 155, 13 O.O.3d 191.
Or.—Turner v. Lane County, 665 P.2d 370, 63 Or.App. 611.

Vt.—Shortle v. Board of Zoning Adjustment of City of Rutland, 388 A.2d 430, 136 Vt. 202.

Wis.—Nodell Inv. Corp. v. City of Glendale, Milwaukee County, 254 N.W.2d 310, 78 Wis.2d 416.

Review by certiorari

(2) Fla.—General Elec. Credit Corp. of Georgia v. Metropolitan Dade County, App., 346 So.2d 1049.

Procedure to satisfy requirement set forth

Me.—Cushing v. Smith, 457 A.2d 816, modifying Fletcher v. Feehey, 400 A.2d 1084.

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60. Or.—Fifth Ave. Corp. v. Washington County, By and Through Bd. of Com'rs, 581 P.2d 50, 282 Or. 591.
62. Cal.—Pan Pac. Properties, Inc. v. Santa Cruz County, 146 Cal.Rptr. 428, 81 C.A.3d 244.
N.H.—V.S.H. Realty, Inc. v. City of Rochester, 394 A.2d 317, 118 N.H. 778.
N.Y.—Hartsdale Venture Co. v. Greenburgh, 399 N.Y. S.2d 137, 59 A.D.2d 903.

Injunctive relief power lacking

Me.—Gagne v. Lewiston Crushed Stone Co., Inc., 367 A.2d 613, app. after remand 431 A.2d 1313.

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63. Cal.—Pan Pac. Properties, Inc. v. Santa Cruz County, 146 Cal.Rptr. 428, 81 C.A.3d 244.
Minn.—Pine County v. State, Dept. of Natural Resources, 280 N.W.2d 625.
Ohio—Gates Mills Inv. Co. v. Village of Pepper Pike, 392 N.E.2d 1316, 59 Ohio App.2d 155, 13 O.O.3d 191.
66. Tex.—Currey v. Kimple, Civ.App., 577 S.W.2d 508, err. ref. no rev. err.
70. N.H.—Shaw v. City of Manchester, 384 A.2d 491, 118 N.H. 158.

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72. Md.—Stewart Inv. Co. v. Board of Com'rs, St. Mary's County, 381 A.2d 1174, 38 Md.App. 381.
73. N.J.—Trenkamp v. Burlington Tp., 406 A.2d 218, 170 N.J.Super. 251.

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79. Ohio—Gates Mills Inv. Co. v. Village of Pepper Pike, 392 N.E.2d 1316, 59 Ohio App.2d 155, 13 O.O.3d 191.
80. Ill.—Wheeling Trust and Sav. Bank v. Village of Mount Prospect, 382 N.E.2d 128, 21 Ill.Dec. 834, 64 Ill.App.3d 1038.

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88. Colo.—Board of County Com'rs of Delta County v. Goldenrod Corp., 601 P.2d 360, 43 Colo.App. 221.

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89. Ill.—Northwestern University v. City of Evanston, 383 N.E.2d 964, 23 Ill.Dec. 93, 74 Ill.2d 80.
R.L.—Annicelli v. Town of South Kingstown, 463 A.2d 133.
Wis.—Nodell Inv. Corp. v. City of Glendale, Milwaukee County, 254 N.W.2d 310, 78 Wis.2d 416.
90. Ind.—Church of Christ in Indianapolis v. Metropolitan Bd. of Zoning Appeals of Marion County (Division I), 371 N.E.2d 1331, 175 Ind.App. 346.
Okla.—Morland Development Co., Inc. v. City of Tulsa, 596 P.2d 1255.

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95. Cal.—Mountain View Chamber of Commerce v. City of Mountain View, 143 Cal.Rptr. 441, 77 C.A.3d 82.
Ill.—Northwestern University v. City of Evanston, 383 N.E.2d 964, 23 Ill.Dec. 93, 74 Ill.2d 80.
Ind.—English v. City of Carmel, 381 N.E.2d 540, 178 Ind.App. 140.
Pa.—Appeal of GFM Associates, 373 A.2d 1370, 30 Pa.Cmwith. 476.

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96. Wis.—Nodell Inv. Corp. v. City of Glendale, Milwaukee County, 254 N.W.2d 310, 78 Wis.2d 416.
97. Pa.—Kaufman & Broad, Inc. v. Board of Sup'rs of West Whiteland Tp., 340 A.2d 909, 20 Pa. Cmwith. 116, appeal after remand Katamoonchina Corp. v. Board of Sup'rs of West Whiteland Tp., 376 A.2d 305, 31 Pa.Cmwith. 315 and 442 A.2d 1220, 65 Pa.Cmwith. 469.

§ 282. Suit in Equity

3. Pa.—Reed v. Zoning Hearing Bd. of West Deer Tp., 377 A.2d 1020, 31 Pa.Cmwith. 605.
6. Fla.—Bama Investors, Inc. v. Metropolitan Dade County, App., 349 So.2d 207.
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13. Ga.—Brock v. Hall County, 236 S.E.2d 90, 239 Ga. 160.
17. Me.—Gagne v. Lewiston Crushed Stone Co., Inc., 367 A.2d 613, app. after remand 431 A.2d 1313.

§ 283. Certiorari

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23. Review authorized
Md.—County Council for Prince George's County v. Carl M. Freeman Associates, Inc., 376 A.2d 860, 281 Md. 70.

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27. Tex.—Currey v. Kimple, Civ.App., 577 S.W.2d 508, err. ref. no rev. err.
29. Colo.—Westlund v. Carter, 565 P.2d 920, 193 Colo. 129.

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42. Overruled case

Since the publication of the bound volume the case of Peterson v. Dade County, 329 So.2d 47, has been overruled to the extent contrary, the court holding that certiorari was not exclusive method to challenge zoning resolution.

Fla.—Bama Investors, Inc. v. Metropolitan Dade County, App., 349 So.2d 207.

§ 284. — Review of Administrative Proceedings

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57. Colo.—Norby v. City of Boulder, 577 P.2d 277, 195 Colo. 231.
Fla.—General Elec. Credit Corp. of Georgia v. Metropolitan Dade County, App., 346 So.2d 1049.

§ 285. — Grant or Refusal of Permits

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81. Mo.—State ex rel. J. S. Alberici, Inc. v. City of Fenton, App., 576 S.W.2d 574.
82. Other remedy available
(1) Other statements.
N.Y.—Lemp v. Town Bd. of Town of Ilip, 394 N.Y. S.2d 517, 90 Misc.2d 360.

§ 287. Declaratory Judgment

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51. Cal.—Friedman v. City of Fairfax, 146 Cal.Rptr. 687, 81 C.A.3d 667.
Mo.—Ackerman v. City of Creve Coeur, App., 553 S.W.2d 490.
Review of decision on rezoning
Minn.—Honn v. City of Coon Rapids, 313 N.W.2d 409.

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52. Ariz.—Davis v. Pima County, 590 P.2d 459, 121 Ariz. 343, cert. den. 99 S.Ct. 2885, 442 U.S. 942, 61 L.Ed.2d 312.
- Cal.—Viso v. State, 154 Cal.Rptr. 580, 92 C.A.3d 15, N.C.—Graham v. City of Raleigh, 284 S.E.2d 742, 53 N.C.App. 107, review den. 290 S.E.2d 702, 305 N.C. 299.

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66. Or.—City of Lake Oswego v. Grimm's Fuel Co., 577 P.2d 1360, 34 Or.App. 67.

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The owners of property adjacent to a zoned tract which is within city limits have standing to seek declaratory relief invalidating a zoning ordinance, notwithstanding that they reside outside the city limits.^{73.5}

- 73.5. Ind.—Stokes v. City of Mishawaka, App., 441 N.E.2d 24.

§ 288. — Existence of Actual and Justiciable Controversy

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75. Ariz.—City of Scottsdale v. Arizona Sign Ass'n, Inc., App., 564 P.2d 922, 115 Ariz. 233.
79. Ark.—Sebastian County Ass'n for Retarded Citizens v. Board of Zoning Adjustment of City of Fort Smith, 577 S.W.2d 394, 265 Ark. 175.

Reasoning requires concrete controversy

- Cal.—Gilliland v. Los Angeles County, 179 Cal.Rptr. 73, 126 C.A.3d 610, app. dism. 102 S.Ct. 2227, 456 U.S. 967, 72 L.Ed.2d 840.

§ 289. — Availability or Use of Other Remedy

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95. Mo.—Hart v. Board of Adjustment of City of Marshall, App., 616 S.W.2d 111.

Variance

- Cal.—PMI Montg. Ins. Co. v. City of Pacific Grove, 179 Cal.Rptr. 185, 128 C.A.3d 724.

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12. N.Y.—Dar-Bar Realty Co. v. City of Utica, 394 N.Y.S.2d 913, 57 A.D.2d 51, app. den. 367 N.E.2d 51, 42 N.Y.2d 960, 398 N.Y.S.2d 146, affd. 380 N.E.2d 328, 44 N.Y.2d 1002, 408 N.Y.S.2d 502.

§ 290. Injunction

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28. Cal.—Viso v. State, 154 Cal.Rptr. 580, 92 C.A.3d 15.
- Ill.—First Nat. Bank of Chicago Heights v. City of Chicago Heights, 381 N.E.2d 446, 21 Ill.Dec. 337, 63 Ill.App.3d 963.
- Minn.—Holaway v. City of Pipestone, 269 N.W.2d 28.
- Okla.—Garrett v. City of Oklahoma City, 594 P.2d 764.

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29. Fla.—Bama Investors, Inc. v. Metropolitan Dade County, App., 349 So.2d 207.
- Ga.—Columbus, Ga. v. Granco, Inc., 242 S.E.2d 607, 240 Ga. 850.
- Ill.—City of Chicago v. Harris Trust & Sav. Bank, 371 N.E.2d 1182, 14 Ill.Dec. 129, 36 Ill.App.3d 651.
- Minn.—Holaway v. City of Pipestone, 269 N.W.2d 28.
- Okla.—Garrett v. City of Oklahoma City, App., 590 P.2d 1195.
32. Ill.—Welch v. City of Evanston, 382 N.E.2d 615, 22 Ill.Dec. 293, 65 Ill.App.3d 249.

- Mich.—Telegraph-Lone Pine Venture Co. v. Bloomfield Tp., 272 N.W.2d 136, 85 Mich.App. 560, mod. on oth. grds., 277 N.W.2d 643, 406 Mich. 948.

- Okla.—Garrett v. City of Oklahoma City, App., 590 P.2d 1195.

33. Okla.—Garrett v. City of Oklahoma City, App., 590 P.2d 1195.

34. U.S.—Metropolitan Housing Development Corp. v. Village of Arlington Heights, D.C.Ill., 469 F.Supp. 836, affd., C.A., 616 F.2d 1006.

35. Ill.—Pallela v. Leyden Family Service & Mental Health Center, 391 N.E.2d 785, 29 Ill.Dec. 360, 73 Ill.App.3d 134, revd. 404 N.E.2d 228, 38 Ill.Dec. 804, 79 Ill.2d 493.

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44. Cal.—Viso v. State, 154 Cal.Rptr. 580, 92 C.A.3d 15.

Overruled case

Since the publication of the bound volume the case of Peterson v. Dade County, 329 So.2d 47, has been overruled to the extent contrary, the court holding that the trial court had subject matter jurisdiction over suit instituted by owner of real property seeking to enjoin county from enforcing zoning ordinance under which property was zoned single family or two family residential and requesting that they be permitted to develop property in accordance with uses permitted under a classification as neighborhood business district.

- Fla.—Bama Investors, Inc. v. Metropolitan Dade County, App., 349 So.2d 207.

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54. N.Y.—Community Bd. 3 v. State, 420 N.Y.S.2d 607, 101 Misc.2d 189.
56. U.S.—Wiggins Inc. v. Fruchtmann, D.C.N.Y., 482 F.Supp. 681, affd. with directions, C.A., 628 F.2d 1346, cert. den. 101 S.Ct. 122, 449 U.S. 842, 66 L.Ed.2d 50.

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57. U.S.—West Side Women's Services, Inc. v. City of Cleveland, D.C.Ohio, 450 F.Supp. 796, affd. and remd. C.A., 582 F.2d 1281, cert. den. 99 S.Ct. 572, 439 U.S. 983, 58 L.Ed.2d 654, on remand, D.C., 573 F.Supp. 504.

58. Okla.—Garrett v. City of Oklahoma City, App., 590 P.2d 1195.

- Or.—1000 Friends of Oregon v. Board of County Com'n, Clackamas County, 564 P.2d 1080, 29 Or.App. 617.

§ 291. — Restraining or Compelling Administrative or Legislative Proceedings

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99. Mich.—Telegraph-Lone Pine Venture Co. v. Bloomfield Tp., 272 N.W.2d 136, 85 Mich.App. 560, mod. on oth. grds. 277 N.W.2d 643, 406 Mich. 948.

§ 293. — Exhaustion of Other Remedies

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21. N.H.—V.S.H. Realty, Inc. v. City of Rochester, 394 A.2d 317, 118 N.H. 778.

§ 294. Mandamus

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31. Ky.—Stratford v. Crossman, App., 655 S.W.2d 500.

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36. Cal.—Gilliland v. Los Angeles County, 179 Cal. Rptr. 73, 126 C.A.3d 610, app. dism. 102 S.Ct. 2227, 456 U.S. 967, 72 L.Ed.2d 840.

The denial of a rezoning application is reviewable under ordinary mandamus.^{38.5}

- 38.5. Cal.—Toso v. City of Santa Barbara, 162 Cal. Rptr. 210, 101 C.A.3d 934, cert. den. 101 S.Ct. 271, 449 U.S. 901, 66 L.Ed.2d 131.

- Minn.—Honn v. City of Coon Rapids, 313 N.W.2d 409.

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46. Cal.—Toso v. City of Santa Barbara 162 Cal.Rptr. 210, 101 C.A.3d 934, cert. den. 101 S.Ct. 271, 449 U.S. 901, 66 L.Ed.2d 131.

§ 295. — Issuance of Permits

50. U.S.—Southpark Square Ltd. v. City of Jackson, Miss., D.C.Miss., 565 F.2d 338, reh. den. 568 F.2d 1367, cert. den. 98 S.Ct. 2849, 436 U.S. 946, 56 L.Ed.2d 787.

- Conn.—Viking Const. Co. v. Town Planning Commission of Town of Simsbury, 435 A.2d 29, 181 Conn. 243.

- Ill.—Pioneer Trust and Sav. Bank v. Cook County, 377 N.E.2d 21, 17 Ill.Dec. 831, 71 Ill.2d 510.

- Pa.—Lindy Homes, Inc. v. Sabatini, 453 A.2d 972, 499 Pa. 478.

Not proper where application for permit not made

- Or.—Wendlick v. City Council of Gearhart, Or., 670 P.2d 176, 65 Or.App. 51, review den. 675 P.2d 491, 296 Or. 237.

51. Minn.—Curtis Oil v. City of North Branch, App., 364 N.W.2d 880.

54. Wash.—Norco Const., Inc. v. King County, 649 P.2d 103, 97 Wash.2d 680.

56. Idaho—Wyckoff v. Board of County Com'n's of Ada County, 607 P.2d 1066, 101 Idaho 12.

- Ill.—People ex rel. Wordell v. City of Chicago, 384 N.E.2d 894, 24 Ill.Dec. 27, 67 Ill.App.3d 321.

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59. Idaho—Wyckoff v. Board of County Com'n's of Ada County, 607 P.2d 1066, 101 Idaho 12.

- Ill.—People ex rel. Wordell v. City of Chicago, 384 N.E.2d 894, 24 Ill.Dec. 27, 67 Ill.App.3d 321.

Change in facts since prior approval

- Ohio—State ex rel. Westchester Estates, Inc. v. Bacon, 399 N.E.2d 81, 61 Ohio St.2d 42, 15 O.O.3d 53.

61. Cal.—C.Y. Development Co. v. City of Redlands, 187 Cal.Rptr. 370, 137 C.A.3d 926.

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80. Subdivision plan

- Pa.—Bobiak v. Richland Tp. Planning Commission, 412 A.2d 202, 50 Pa.Cmwith. 77.

- Wash.—Hillis Homes, Inc. v. Snohomish County, 647 P.2d 43, 32 Wash.App. 279.

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88. Fla.—City of Miami Beach v. Mr. Samuel's, Inc., 351 So.2d 719, conf. to, App., 352 So.2d 930.

- La.—Elliott v. East Carroll Parish Police Jury, App. 2 Cir., 421 So.2d 1196.

- Mont.—Foster v. City Commission of and for City of Bozeman, 614 P.2d 1072.

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94. Nev.—City of Reno v. Nevada First Thrift, 686 P.2d 231.

96. No vested right in zoning

- Minn.—Property Research and Development Co. v. City of Eagan, 289 N.W.2d 157.

Pending zoning change

- N.D.—Newman Signs, Inc. v. Hjelle, 300 N.W.2d 868.

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99. Pa.—Lindy Homes, Inc. v. Sabatini, 453 A.2d 972, 499 Pa. 478.

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§ 296. — Revocation, Renewal, and Reinstatement of Permits

12. Pa.—Lindy Homes, Inc. v. Sabatini, 453 A.2d 972, 499 Pa. 478.
15. Pa.—Bakerstown Liquid Burners, Inc. v. Richland Tp., 447 A.2d 1071, 67 Pa.Cmwith. 559.

§ 297. — Granting of Variances or Exceptions

17. Cal.—FMI Mortg. Ins. Co. v. City of Pacific Grove, 179 Cal.Rptr. 185, 128 C.A.3d 724.

§ 298. — Existence of other remedy

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35. Ga.—Martin v. Hatfield, 308 S.E.2d 833, 251 Ga. 638.

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40. "Unger" decision limited

- Pa.—Lindy Homes, Inc. v. Sabatini, 453 A.2d 972, 499 Pa. 478.

45. Ga.—International Funeral Services, Inc. v. DeKalb County, 261 S.E.2d 625, 244 Ga. 707.

§ 299. In General

49. Mass.—Devine v. Town of Saugus, 368 N.E.2d 1226, 5 Mass.App. 885.
N.Y.—Hooker v. Town Bd. of Town of Guilderland, 399 N.Y.S.2d 935, 60 A.D.2d 684.
Pa.—Appeal of H & K Materials, Inc., 403 A.2d 134, 43 Pa.Cmwith. 320.
Wash.—Messer v. Snohomish County Bd. of Adjustment, 578 P.2d 30, 19 Wash.App. 780.

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50. Ala.—Lindsey v. Board of Adjustment, City of Gadsden, Civ., 358 So.2d 469.

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56. Cal.—Venice Canals Resident Home Owners Ass'n v. Superior Court In and For Los Angeles County, 140 Cal.Rptr. 361, 72 C.A.3d 675.
Conn.—Sheehan v. Zoning Commission of Town of Old Saybrook, 378 A.2d 519, 173 Conn. 408.
Pa.—In re Warren Borough Zoning Ordinance No. 1127, 401 A.2d 383, 42 Pa.Cmwith. 211.
60. Pa.—In re Schwacke, 411 A.2d 271, 49 Pa. Cmwith. 114.
65. Pa.—In re Warren Borough Zoning Ordinance No. 1127, 401 A.2d 383, 42 Pa.Cmwith. 211.

§ 300. Jurisdiction

69. Ala.—City of Birmingham v. Norris, 374 So.2d 834.
Ga.—City of Atlanta v. International Soc. For Krishna Consciousness of Atlanta, Inc., 239 S.E.2d 515, 240 Ga. 96.
Me.—Cunningham v. Kittery Planning Bd., 400 A.2d 1070.
Mass.—Twomey v. Board of Appeals of Medford, 390 N.E.2d 272, 7 Mass.App. 770.
N.H.—Town of Derry v. Simonsen, 380 A.2d 1101, 117 N.H. 1010.
N.Y.—Hausman v. Common Council of City of Syracuse, 400 N.Y.S.2d 963, 60 A.D.2d 770.
Or.—Forman v. Clatsop County, 665 P.2d 365, 63 Or.App. 617, aff'd. 681 P.2d 786, 297 Or. 129, overruling to extent contrary, Eagle Creek Rock Prod. v. Clackamas Co., 27 Or.App. 371, 556 P.2d 150, rev. den. 278 Or. 157; 1000 Friends of Oregon v. Clackamas Co. Comm., 29 Or.App. 617, 564 P.2d 1080; Eklund v. Clackamas County, 36 Or. App. 73, 583 P.2d 567.

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70. Me.—Fletcher v. Feeney, 400 A.2d 1084.
Md.—Klein v. Colonial Pipeline Co., 400 A.2d 768, 285 Md. 76.
N.Y.—Hausman v. Common Council of City of Syracuse, 400 N.Y.S.2d 963, 60 A.D.2d 770.
Pa.—City of Pittsburgh v. Com., 400 A.2d 1301, 485 Pa. 40.
Since the publication of the bound volume, the case of Eagle Creek Rock Prod. v. Clackamas Co., 27 Or.App. 371, 556 P.2d 150, rev. den. 278 Or. 157, has been overruled to extent contrary the court holding that decision of land use board may be appealed to Court of Appeals.
Or.—Forman v. Clatsop County, 665 P.2d 365, 63 Or.App. 617, aff'd. 681 P.2d 786, 297 Or. 129, also overruling to extent contrary 1000 Friends of Oregon v. Clackamas Co. Comm., 29 Or.App. 617, 564 P.2d 1080, Eklund v. Clackamas County, 36 Or. App. 73, 583 P.2d 567.
71. Conn.—Sheehan v. Zoning Commission of Town of Old Saybrook, 378 A.2d 519, 173 Conn. 408.
Iowa.—Wegman v. City of Iowa City, 279 N.W.2d 261.
Or.—A & X, Inc. v. Common Council of City of Eugene, 597 P.2d 851, 41 Or.App. 171.

§ 301. Parties

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81. U.S.—Bruce v. Riddle, D.C.S.C., 464 F.Supp. 745, aff'd, C.A., 631 F.2d 272.
Colo.—Harmelink v. City of Arvada, 580 P.2d 841, 41 Colo.App. 122.
Ga.—Lindsey Creek Area Civic Ass'n v. Consolidated Government of Columbus, 292 S.E.2d 61, 249 Ga. 488.
Ky.—City of Beechwood Village v. Council of and City of St. Matthews, App., 574 S.W.2d 322.
N.H.—Town of Bethlehem v. Tucker, 409 A.2d 1334, 119 N.H. 927.
N.Y.—Phillips v. Village of Oriskany, 394 N.Y.S.2d 941, 57 A.D.2d 110.
Or.—Lane County v. Oregon Builders, Inc., 606 P.2d 676, 44 Or.App. 591.
Wash.—North St. Ass'n v. City of Olympia, 635 P.2d 721, 96 Wash.2d 359.
Held necessary or proper parties
Cal.—Viso v. State, 154 Cal.Rptr. 580, 92 C.A.3d 15.
N.Y.—Ozols v. Henley, 438 N.Y.S.2d 349, 81 A.D.2d 670, app. diss. 430 N.E.2d 1316, 54 N.Y.2d 1023, 446 N.Y.S.2d 263.
Time
(1) Applicant must be joined within limit.
Colo.—Thorne v. Board of County Com'rs of Fremont County, 638 P.2d 69.

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82. Colo.—Harmelink v. City of Arvada, 580 P.2d 841, 41 Colo.App. 122.
Ky.—Board of Adjustments of City of Richmond v. Flood, 581 S.W.2d 1.
Wash.—Cathcart-Maltby-Clearview Community Council v. Snohomish County, 634 P.2d 853, 96 Wash.2d 201.
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Alaska.—Anchorage v. McCabe, 568 P.2d 986.
Cal.—Camp v. Mendocino County Bd. of Sup'rs, 176 Cal.Rptr. 620, 123 C.A.3d 334.
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85. Colo.—Westlund v. Carter, 565 P.2d 920, 193 Colo. 129.
Wash.—Vardale Valley Citizens' Planning Committee v. Board of Com'rs of Spokane County, 588 P.2d 750, 22 Wash.App. 229.
89. Me.—Inhabitants of Town of Boothbay Harbor v. Russell, 410 A.2d 554.

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93. Ga.—Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals, 248 S.E.2d 196, 147 Ga.App. 128.
95. Colo.—Dahman v. City of Lakewood, 610 P.2d 1357, 44 Colo.App. 261.
Ky.—Greater Cincinnati Marine Service, Inc. v. City of Ludlow, 602 S.W.2d 427.
N.Y.—Nassau Children's House, Inc. v. Board of Zoning Appeals of Inc. Village of Mineola, 430 N.Y. S.2d 683, 77 A.D.2d 898.
2. Colo.—Harmelink v. City of Arvada, 580 P.2d 841, 41 Colo.App. 122.
D.C.—Goto v. District of Columbia Bd. of Zoning Adjustment, App., 423 A.2d 917.
Ill.—University Square, Ltd. v. City of Chicago, 392 N.E.2d 136, 29 Ill.Dec. 579, 73 Ill.App.3d 872.
N.J.—Evesham Tp. Zoning Bd. of Adjustment v. Evesham Tp. Council, 430 A.2d 922, 86 N.J. 295.
N.Y.—Myerlin 30 Realty Development Corp. v. Oehler, 440 N.Y.S.2d 688, 82 A.D.2d 913.
Or.—Ruegg v. Board of County Com'rs, Clackamas County, 573 P.2d 740, 32 Or.App. 77.
Pa.—Grove v. Zoning Hearing Bd. of Thornbury Tp., 397 A.2d 22, 40 Pa.Cmwith. 47.
Wash.—Corbin Dist. Property Owners Ass'n v. Spokane County Bd. of Adjustment, 614 P.2d 1313, 26 Wash.App. 913.
Time for application
(4) Held timely.
Ill.—Standard Bank & Trust Co. v. Village of Oak Lawn, 377 N.E.2d 1152, 18 Ill.Dec. 516, 61 Ill. App.3d 174.
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(5) Held not timely.
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4. Md.—Department of State Planning v. Mayor and Council of City of Hagerstown, 415 A.2d 296, 288 Md. 9.
5. Md.—Department of State Planning v. Mayor and Council of City of Hagerstown, 415 A.2d 296, 288 Md. 9.
6. Pa.—Grove v. Zoning Hearing Bd. of Thornbury Tp., 397 A.2d 22, 40 Pa.Cmwith. 47.
7. Fla.—South Florida Regional Planning Council v. Florida Division of State Planning, App., 370 So.2d 447—Brynwood Condominium, Inc. v. Harbour Club Villas Condominium Ass'n, App. 3 Dist., 436 So.2d 1080.
Ga.—DeKalb County v. Post Properties, Inc., 263 S.E.2d 905, 245 Ga. 214.
Ill.—Mississippi Bluff Motel Inc. v. Rock Island County, 420 N.E.2d 748, 51 Ill.Dec. 334, 96 Ill.App.3d 31.
Ky.—Pearman v. Schlaak, 575 S.W.2d 462.
Me.—Brown v. Zoning Bd. of Appeals of Town of Hampden, 391 A.2d 348.
Mass.—Rafferty v. Sancta Maria Hospital, 367 N.E.2d 856, 5 Mass.App. 624.
Mo.—State ex rel. Dolgin's, Inc. v. Bolin, App., 589 S.W.2d 106.
Pa.—Florida First Bon Capital Corp. v. Zoning Hearing Bd. of Borough of Lansdale, 397 A.2d 838, 40 Pa.Cmwith. 448.
R.I.—Martez Corp. v. Zoning Bd. of Review of City of Warwick, 425 A.2d 1240.

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10. Wash.—Miller v. Issaquah Corp., 657 P.2d 334, 33 Wash.App. 641.

§ 302. Time for Proceedings

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19. Discretion of court absent statute
N.C.—White Oak Properties, Inc. v. Town of Carrboro, 327 S.E.2d 882, 313 N.C. 306, on remand 328 S.E.2d 907, 74 N.C.App. 605, review den. 333 S.E.2d 497, 314 N.C. 336.

21. Limitation inapplicable to independent proceeding

Ky.—Fiscal Court of Jefferson County v. Don Ridge Land Developing Co., Inc., 669 S.W.2d 922, overruling Musser v. Leon Coal Processing Company, 560 S.W.2d 833.

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33. Wis.—Reynolds v. Waukesha County Park and Planning Com'n, App., 324 N.W.2d 897, 109 Wis.2d 56.

35. Written notification constitutes entry of decision

Ohio—Farnacci v. City of Twinsburg, 469 N.E.2d 987, 14 Ohio App.3d 20, 14 O.B.R. 23.

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42. N.M.—Bolin v. City of Portales, 548 P.2d 1210, 89 N.M. 192.

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§ 303. —Effect of Delay

47. La.—Kaplan Telephone Co. v. City of Kaplan Bd. of Adjustment, App. 3 Cir., 458 So.2d 664, writ den. 462 So.2d 210.

§ 305. Pleadings

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96. Conn.—Noel v. Planning and Zoning Com'n of Town Southington, 466 A.2d 332, 39 Conn.Stp. 426.

§ 310. —Presumptions

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98. Md.—Mayor and Aldermen of City of Annapolis v. Annapolis Waterfront Co., 396 A.2d 1080, 284 Md. 383.

Mich.—Ed Zaagman, Inc. v. City of Kentwood, 233 N.W.2d 146, 61 Mich.App. 693, affd. 277 N.W.2d 473, 406 Mich. 137.

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§ 311. —Burden of Proof

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62. Ga.—Gouge v. City of Snellville, 287 S.E.2d 539, 249 Ga. 91.

Mich.—Ed Zaagman, Inc. v. City of Kentwood, 233 N.W.2d 146, 61 Mich.App. 693, affd. 277 N.W.2d 473, 406 Mich. 137.

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64. Mich.—Ed Zaagman, Inc. v. City of Kentwood, 233 N.W.2d 146, 61 Mich.App. 693, affd. 277 N.W.2d 473, 406 Mich. 137.

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76. Must prove purposeful discrimination on equal protection claim

U.S.—Gissman v. Falls Tp., D.C.Pa., 547 F.Supp. 362, affd. 723 F.2d 897.

§ 312. —Weight and Sufficiency

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7. Ga.—Wyman v. Popham, 312 S.E.2d 795, 252 Ga. 247.

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Those who claim fraud or corruption in the promulgation and administration of zoning ordinances are required to prove their claim only by a preponderance of the evidence.^{14,5}

16.5. Ga.—Wyman v. Popham, 312 S.E.2d 795, 252 Ga. 247.

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22. Mobile home park

(1) Mich.—Ed Zaagman, Inc. v. City of Kentwood, 233 N.W.2d 146, 61 Mich.App. 693, affd. 277 N.W.2d 473, 406 Mich. 137.

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24. Mich.—Ed Zaagman, Inc. v. City of Kentwood, 233 N.W.2d 146, 61 Mich.App. 693, affd. 277 N.W.2d 473, 406 Mich. 137.

Low and moderate income housing

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27. Tex.—City of San Antonio v. Lanier, Civ.App., 542 S.W.2d 232, err. ref. no rev. err.

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28. Denial of due process

Ga.—Robo v. Cherokee County, 285 S.E.2d 177, 248 Ga. 554.

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36. Rebuilding of fire-damaged structure

N.Y.—154 East Park Ave. Corp. v. City of Long Beach, 374 N.Y.S.2d 569, 49 A.D.2d 949, affd. 420 N.E.2d 86, 52 N.Y.2d 991, 438 N.Y.S.2d 288, cert. den. 102 S.Ct. 310, 454 U.S. 858, 70 L.Ed.2d 155.

§ 313. Trial or Hearing

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37. N.Y.—Pader Realty Co., Inc. v. Klein, 400 N.Y. S.2d 46, 60 A.D.2d 533.

42. Ind.—Town of Schererville v. Vavrus, 389 N.E.2d 346, 180 Ind.App. 500.

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52. Ga.—Guhl v. Pinkard, 252 S.E.2d 612, 243 Ga. 129.

§ 314. In General

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Pa.—Joe's Enterprises of Stroudsburg, Inc. v. City of Schuylkill, 457 A.2d 607, 73 Pa.Cmwith. 124.

Determination not based on competent evidence
Mich.—Keating Intern. Corp. v. Orion Tp., 214 N.W.2d 551, 51 Mich.App. 122, affd. 236 N.W.2d 409, 395 Mich. 539.

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2. Article 78 proceeding

N.Y.—Holy Spirit Ass'n for Unification of World Christianity v. Carle, 456 N.Y.S.2d 195, 90 A.D.2d 591.

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41. Public interest litigation

Alaska—Oceanview Homeowners Ass'n, Inc. v. Quadrant Const. and Engineering, 680 P.2d 793.

44. Contractual provision

Wyo.—Coulter v. City of Rawlins, 662 P.2d 888.

§ 319. Remand

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11. N.Y.—154 East Park Ave. Corp. v. City of Long Beach, 374 N.Y.S.2d 569, 49 A.D.2d 949, affd. 420 N.E.2d 86, 52 N.Y.2d 991, 438 N.Y.S.2d 288, cert. den. 102 S.Ct. 310, 454 U.S. 858, 70 L.Ed.2d 155.

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13. Pa.—Kaufman & Broad, Inc. v. Board of Sup'rs of West Whiteland Tp., 340 A.2d 909, 20 Pa.Cmwith. 116, appeal after remand Katamoonchina Corp. v. Board of Sup'rs of West Whiteland Tp.,

376 A.2d 305, 31 Pa.Cmwith. 315 and 442 A.2d 1220, 65 Pa.Cmwith. 469.

§ 320. Effect of Decision

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Principles of res judicata do not apply where such proceedings concern the perpetuation of legal error by an administrative body.^{2,5}

52.5 Md.—Klein v. Colonial Pipeline Co., 462 A.2d 546, 55 Md.App. 324.

54. Time

Pa.—Jones v. North Huntingdon Tp. Zoning Hearing Bd., 467 A.2d 1206, 78 Pa.Cmwith. 505.

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Where a case is remanded for correction of a procedural defect which can be remedied without additional hearings, due process is not denied by the board in not holding further evidentiary hearings.^{4,5}

56.5. Ind.—Boffo v. Boone County Bd. of Zoning Appeals, App., 421 N.E.2d 1119.

§ 322. In General

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66. Ind.—St. Joseph Medical Bldg. Associates v. City of Fort Wayne, App., 434 N.E.2d 130.

N.Y.—Swartz v. Wallace, 450 N.Y.S.2d 65, 87 A.D.2d 926.

Pa.—Graybill v. Fricke, 416 A.2d 626, 53 Pa.Cmwith. 8.

Justiciable case

Or.—Milcrest Corp. v. Clackamas County, 650 P.2d 963, 59 Or.App. 177.

67. Curative amendment to ordinance

Pa.—Kaufman & Broad, Inc. v. Board of Sup'rs of West Whiteland Tp., 340 A.2d 909, 20 Pa.Cmwith. 116, appeal after remand Katamoonchina Corp. v. Board of Sup'rs of West Whiteland Tp., 376 A.2d 305, 31 Pa.Cmwith. 315 and 442 A.2d 1220, 65 Pa.Cmwith. 469.

70. R.I.—Apostolou v. Genovesi, 388 A.2d 821, 120 R.I. 501.

§ 323. Decisions Reviewable

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87. Fla.—The Florida Companies v. Orange County, Fla., App. 5 Dist., 411 So.2d 1008.

95. Mass.—J. & C. Homes, Inc. v. Planning Bd. of Groton, 391 N.E.2d 1252, 8 Mass.App. 123.

Pa.—In re Hoak, Cmwith., 391 A.2d 1092.

96. Pa.—Upper Allen Tp. v. Zoning Hearing Bd. of Upper Allen Tp., 466 A.2d 292, 77 Pa.Cmwith. 582.

§ 324. Who May Appeal

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2. R.I.—Apostolou v. Genovesi, 388 A.2d 821, 120 R.I. 501.

3. Md.—People's Counsel for Baltimore County v. Williams, 415 A.2d 585, 45 Md.App. 617.

N.H.—Win-Tach Corp. v. Town of Merrimack, 411 A.2d 144, 120 N.H. 6.

Parties held not aggrieved

(1) Ill.—Allender v. City of Chicago Zoning Bd. of Appeals, 381 N.E.2d 4, 21 Ill.Dec. 69, 63 Ill.App.3d 204.

5. Ill.—Speck v. Zoning Bd. of Appeals of City of Chicago, 433 N.E.2d 685, 60 Ill.Dec. 643, 89 Ill.2d 482.

§ 324 ZONING

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Pa.—National Development Corp. v. Harrison Tp., 438 A.2d 1053, 64 Pa.Cmwlth. 54.

Rule applied prospectively to municipality

Pa.—Gilbert v. Montgomery Tp. Zoning Hearing Bd., 427 A.2d 776, 58 Pa.Cmwlth. 296.

6. Pa.—Hankin v. Zoning Hearing Bd. of West Norriton Tp., 384 A.2d 1386, 35 Pa.Cmwlth. 164.

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8. Ill.—Speck v. Zoning Bd. of Appeals of City of Chicago, 433 N.E.2d 685, 60 Ill.Dec. 643, 89 Ill.2d 482.

Md.—Howard County v. Mangione, 423 A.2d 263, 47 Md.App. 350, 13 A.L.R.4th 1123.

R.I.—Town of East Greenwich v. Day, 375 A.2d 953, 119 R.I. 1.

§ 326. Taking and Perfecting Proceedings for Review; Stay

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45. N.J.—Pascack Ass'n, Ltd. v. Mayor and Council of Washington Tp., Bergen County, 379 A.2d 6, 74 N.J. 470.

48. Pa.—Szura v. Zoning Hearing Bd. of Wyoming Borough, 397 A.2d 33, 40 Pa.Cmwlth. 172.

§ 327. Record, Assignments of Error, and Briefs

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73. Conn.—Curry v. Planning and Zoning Commission of Town of Guilford, Com.Pl., 376 A.2d 79, 34 Conn.Sup. 52.

§ 328. Dismissal

79. Md.—Board of County Com'rs of St. Mary's County v. Gwyther, 389 A.2d 1372, 40 Md.App. 244.

§ 329. Scope and Extent of Review

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89. Conn.—Rosenick v. Zoning Commission of Town of Southbury, 374 A.2d 245, 172 Conn. 306.

Pa.—In re Hoak, Cmwlth., 391 A.2d 1092.

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45. Md.—County Council for Prince George's County v. Carl M. Freeman Associates, Inc., 376 A.2d 860, 281 Md. 70.

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§ 330. — Matters of Discretion

59. Pa.—Kaufman & Broad, Inc. v. Board of Sup'rs of West Whiteland Tp., 340 A.2d 909, 20 Pa. Cmwlth. 116, app. after remand *Katamoonchina Corp. v. Board of Sup'rs of West Whiteland Tp.*, 376 A.2d 305, 31 Pa.Cmwlth. 315 and 442 A.2d 1220, 65 Pa.Cmwlth. 469.

§ 331. — Trial de Novo; Questions of Fact; Findings

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9. Mich.—Ed Zaagman, Inc. v. City of Kentwood, 233 N.W.2d 146, 61 Mich.App. 693, *affd.* 277 N.W.2d 473, 406 Mich. 137.

§ 333. Determination and Disposition

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36. Mich.—Turkish v. City of Warren, 232 N.W.2d 732, 61 Mich.App. 435, *mod. on oth. grds.* 277 N.W.2d 475, 406 Mich. 137.

§ 334. General Principles

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71. U.S.—America's Best Family Showplace Corp. v. City of New York, Dept. of Bldgs., D.C.N.Y., 536 F.Supp. 170.

Matter of White, Bkrcy.Mich., 2 B.R. 656.

Cal.—City of Santa Clara v. Paris, 142 Cal.Rptr. 818, 76 C.A.3d 338.

Fla.—Groh v. Hasencamp, App. 3 Dist., 407 So.2d 949, *review den.* 415 So.2d 1360.

Ga.—Lindsey Creek Area Civic Ass'n v. Consolidated Government of Columbus, 292 S.E.2d 61, 249 Ga. 488.

Idaho—Cox v. Mountain Vistas, Inc., 639 P.2d 12, 102 Idaho 714.

Ind.—Metropolitan Development Commission of Marion County v. Douglas, 390 N.E.2d 663, 180 Ind. App. 567.

La.—State Through Dept. of Highways v. National Advertising Co., App., 356 So.2d 557.

Mass.—Gattozzi v. Director of Inspection Services of Melrose, App., 376 N.E.2d 1266.

Minn.—Scinocca v. St. Louis County Bd. of Com'rs, 281 N.W.2d 659.

N.Y.—Little Joseph Realty, Inc. v. Town of Babylon, 363 N.E.2d 1163, 41 N.Y.2d 738, 395 N.Y.S.2d 428.

City of New York v. Victory Van Lines, Inc., 418 N.Y.S.2d 792, 69 A.D.2d 605.

N.D.—R. B. J. Apartments Inc. v. Gate City Sav. & Loan Ass'n, 315 N.W.2d 284.

Ohio—Johnson's Island, Inc. v. Board of Tp. Trustees of Danbury Tp., 431 N.E.2d 672, 69 Ohio St.2d 241, 23 O.O.3d 243.

Pa.—In re Terracino, 440 A.2d 1265, 64 Pa.Cmwlth. 448.

R.I.—Zelstra v. Barrington Zoning Bd. of Review, 417 A.2d 303.

Tenn.—Davis v. Metropolitan Government of Nashville and Davidson County, App., 620 S.W.2d 532.

Vt.—Kalakowski v. John A. Russell Corp., 401 A.2d 906.

Wis.—Columbia County v. Bylewski, 288 N.W.2d 129, 94 Wis.2d 153.

Abatement of nuisance

N.J.—State v. C.L.B. Intern., 416 A.2d 362, 83 N.J. 262.

72. U.S.—Crocker v. Hakes, C.A.Ga., 616 F.2d 237.

Ariz.—State v. Owens, App., 562 P.2d 738, 114 Ariz. 565.

Cal.—City of Santa Clara v. Paris, 142 Cal.Rptr. 818, 76 C.A.3d 338.

Ill.—Fay v. City of Chicago, 390 N.E.2d 125, 28 Ill. Dec. 143, 71 Ill.App.3d 603.

Ind.—Metropolitan Development Commission of Marion County v. Douglas, 390 N.E.2d 663, 180 Ind. App. 567.

Mass.—Morganelli v. Building Inspector of Canton, 388 N.E.2d 708, 7 Mass.App. 475.

N.J.—State v. C.L.B. Intern., 416 A.2d 362, 83 N.J. 262.

N.Y.—Taksen Liquor Store, Inc. v. Bonisteel, 425 N.Y. S.2d 252, 103 Misc.2d 34.

N.D.—Munch v. City of Mott, 311 N.W.2d 17.

Pa.—Elizabeth Township v. Power Maintenance Corp., 417 A.2d 1285, 53 Pa.Cmwlth. 270.

Va.—Knowlton v. Browning-Ferris Industries of Virginia, Inc., 260 S.E.2d 232, 220 Va. 571.

Wis.—Columbia County v. Bylewski, 288 N.W.2d 129, 94 Wis.2d 153.

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73. Wash.—Douglass v. City of Spokane, 609 P.2d 979, 25 Wash.App. 823.

74. Tex.—City of Pharr v. Tippitt, 616 S.W.2d 173.

75. U.S.—Cook v. City of Price, Carbon County, Utah, C.A.Utah, 566 F.2d 699.

Colo.—Zoning of City and County of Denver, App., 622 P.2d 85.

Fla.—Whittenton v. City of New Smyrna Beach, App., 351 So.2d 738—Dade County v. Gayer, App., 388 So.2d 1292.

Ill.—Cleys v. Village of Palatine, 411 N.E.2d 1161, 44 Ill.Dec. 793, 89 Ill.App.3d 630.

Md.—National Institutes of Health Federal Credit Union v. Hawk, 422 A.2d 55, 47 Md.App. 189.

Mass.—Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Falmouth, 431 N.E.2d 213, 385 Mass. 205, *app. after remand* 446 N.E.2d 1070, 388 Mass. 1013.

Mich.—Grand Haven Tp. v. Brummel, 274 N.W.2d 814, 87 Mich.App. 442.

N.Y.—Cowser v. Mongin, 450 N.Y.S.2d 81, 87 A.D.2d 932, *app. diss.*, *cert. den.* 103.Ct. 712, 459 U.S. 1095, 74 L.Ed.2d 943—Alpert v. Town of Carmel Zoning Bd. of Appeals, 453 N.Y.S.2d 200, 89 A.D.2d 853.

Pa.—Visual-Educational Devices, Inc. v. Springettsbury Tp., 422 A.2d 235, 54 Pa.Cmwlth. 529.

R.I.—Town of Charlestown v. Beattie, 422 A.2d 1250.

Vt.—Fleury v. Town of Essex Zoning Bd. of Adjustment, 449 A.2d 958, 141 Vt. 411.

76. Minn.—Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604.

Tex.—Marriott v. City of Dallas, App. 5 Dist., 635 S.W.2d 361, *affd.*, *Sup.*, 644 S.W.2d 469.

Even if a municipality was itself violating a zoning ordinance, such fact would not serve to estop the municipality from enforcing the ordinance against others.^{77.5}

77.5. Mich.—Walker's Amusements, Inc. v. City of Lathrup Village, 298 N.W.2d 878, 100 Mich.App. 36.

78. U.S.—Crocker v. Hakes, C.A.Ga., 616 F.2d 237.

La.—Babin v. Cole, App., 5 Cir., 419 So.2d 1283, *writ den.*, *Sup.*, 423 So.2d 1181, *reconsideration den.* 427 So.2d 866.

N.Y.—Forget v. Raymer, 410 N.Y.S.2d 483, 65 A.D.2d 953.

R.I.—Hardy v. Zoning Bd. of Review of Town of Coventry, 382 A.2d 520, 119 R.I. 533.

82. Ga.—Tate v. Stephens, 265 S.E.2d 811, 245 Ga. 519.

83. Fla.—Skaggs-Albertson's v. ABC Liquors, Inc., 363 So.2d 1082.

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84. Mass.—Morganelli v. Building Inspector of Canton, 388 N.E.2d 708, 7 Mass.App. 475.

N.M.—City of Santa Fe v. Baker, App., 620 P.2d 892, 95 N.M. 238.

W.Va.—Grady v. City of St. Albans, 297 S.E.2d 424.

85. Md.—Prince George's County v. Blumberg, 407 A.2d 1151, 44 Md.App. 79, *affd. in part, revd. in part on oth. grds.* 418 A.2d 1155, 288 Md. 275, *cert. den.* 101 S.Ct. 869, 449 U.S. 1083, 66 L.Ed.2d 808.

Minn.—LaValle v. Kulkay, 277 N.W.2d 400.

N.H.—Win-Tech Corp. v. Town of Merrimack, 411 A.2d 144, 120 N.H. 6.

§ 335. Proceedings to Compel Enforcement; Mandamus

87. Ky.—Stratford v. Croesman, App., 655 S.W.2d 500.

Ordinance amended pending action for mandamus

N.M.—State ex rel. Edwards v. City of Clovis, 607 P.2d 1154, 94 N.M. 136.

La.—Folsom Road Civic Ass'n v. Parish of St. Tammany Through St. Tammany Parish Council, App., 1 Cir., 425 So.2d 1318.

92. Citizen taxpayer lacks standing

Vt.—Garzo v. Stowe Bd. of Adjustment, 476 A.2d 125, 144 Vt. 198.

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16. Cal.—Friends of "B" Street v. City of Hayward, 165 Cal.Rptr. 514, 106 C.A.3d 988.
- N.Y.—South Woodbury Taxpayers Ass'n, Inc. v. American Institute of Physics, Inc., 428 N.Y.S.2d 158, 104 Misc.2d 254.
- Okl.—City of Tulsa v. Crain, 573 P.2d 707.
- Pa.—Board of Sup'rs of West Brandywine Tp. v. Matlack, 394 A.2d 639, 38 Pa.Cmwith. 366.
- S.D.—Brown County v. Meidinger, 271 N.W.2d 15.

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24. Okl.—Morland Development Co., Inc. v. City of Tulsa, 596 P.2d 1255.

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32. Pa.—South Fayette Tp. v. Com., 385 A.2d 344, 47 Pa. 574.
33. Cal.—People v. Synanon Foundation, Inc., 151 Cal.Rptr. 757, 88 C.A.3d 304.

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43. U.S.—Holy Spirit Ass'n for the Unification of World Christianity v. Town of New Castle, D.C. N.Y., 480 F.Supp. 1212.

§ 338. Availability of Other Remedies

46. Conn.—Blum v. Lisbon Leasing Corp., Inc., 377 A.2d 280, 173 Conn. 175.
47. Ark.—City of Paragould v. Leath, 583 S.W.2d 76, 266 Ark. 390.

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49. Ind.—Metropolitan Development Commission of Marion County v. Waffle House, Inc., App., 424 N.E.2d 184.
50. Pa.—Bradley v. South Londonderry Tp., 440 A.2d 665, 64 Pa.Cmwith. 395.
52. Ind.—Metropolitan Development Com'n of Marion County v. I. Ching, Inc., App. 4 Dist., 460 N.E.2d 1236, reh. den. 463 N.E.2d 498.
- Mass.—William C. Bearce Corp. v. Building Inspector of Brockton, 416 N.E.2d 509, 11 Mass.App. 930.
55. Idaho—Wyckoff v. Board of County Com'rs of Ada County, 607 P.2d 1066, 101 Idaho 12.
- Minn.—City of Minneapolis v. F and R, Inc., 300 N.W.2d 2.
- Utah—Utah County v. Baxter, 635 P.2d 61.

§ 339. Particular Subjects of Injunctive Relief

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62. Minn.—Itasca County v. Rodenz, 268 N.W.2d 423.
- N.Y.—Little Joseph Realty, Inc. v. Town of Babylon, 363 N.E.2d 1163, 41 N.Y.2d 738, 395 N.Y.S.2d 428.
- S.D.—City of Colton v. Corbly, 318 N.W.2d 136.
63. Fla.—Town v. State ex rel. Reno, 377 So.2d 648, app. diss., cert. den. 101 S.Ct. 48, 449 U.S. 803, 6 L.Ed.2d 7, reh. den. 101 S.Ct. 546, 449 U.S. 1004, 66 L.Ed.2d 302.
- Idaho—Wyckoff v. Board of County Com'rs of Ada County, 607 P.2d 1066, 101 Idaho 12.
- Ill.—Nonnenmann v. Lucky Stores, Inc., 368 N.E.2d 200, 10 Ill.Dec. 714, 53 Ill.App.3d 509.
- Ind.—Metropolitan Development Commission of Marion County v. Douglas, 390 N.E.2d 663, 180 Ind. App. 567.
- La.—City of Baton Rouge v. Causey, App., 380 So.2d 136, writ den., Sup., 383 So.2d 24—City of New Orleans v. National Polyfab Corp., App., 4 Cir., 420 So.2d 727.
- Mich.—Norton Shores v. Carr, 265 N.W.2d 802, 81 Mich.App. 715.

- N.Y.—City of Albany v. Lee, 428 N.Y.S.2d 758, 76 A.D.2d 978, affd. 420 N.E.2d 974, 53 N.Y.2d 633, 438 N.Y.S.2d 782—Queens County Business Alliance, Inc. v. New York State Racing Ass'n, Inc., 454 N.Y.S.2d 544, 89 A.D.2d 46, app. after remand 469 N.Y.S.2d 448, 98 A.D.2d 743—Village of Pelham Manor v. Crea, 2 Dept., 492 N.Y.S.2d 74, 112 A.D.2d 415.

- Ohio—Lyman v. Chester Tp. Bd. of Trustees, 407 N.E.2d 511, 63 Ohio St.2d 208, 17 O.O.3d 128.
- Pa.—City of Pittsburgh v. Com., 379 A.2d 1388, 32 Pa.Cmwith. 596, affd. 400 A.2d 1301, 485 Pa. 40.
- Tex.—Hitchcock v. City of Killen, Civ.App., 553 S.W.2d 22.

- Wash.—City of Burlington v. Kutzer, 597 P.2d 1387, 23 Wash.App. 677, a A.L.R.4th 456.

- Limitation on amount of people in group home
- La.—City of Kenner v. Normal Life of Louisiana, Inc., App., 465 So.2d 82, writ gr. 470 So.2d 115.

64. Ga.—Thurman's Auto Parts & Wrecker Service, Inc. v. Cobb County, 286 S.E.2d 707, 248 Ga. 826.

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65. Conn.—Blum v. Lisbon Leasing Corp., Inc., 377 A.2d 280, 173 Conn. 175.

- Ga.—Cawthon v. Douglas County, 286 S.E.2d 30, 248 Ga. 760.

- Ind.—Spurling v. Area Plan Commission of Evansville, 381 N.E.2d 507, 178 Ind.App. 41.

- N.Y.—Town of Huntington v. Park Shore County Day Camp of Dix Hills, Inc., 403 N.Y.S.2d 98, 61 A.D.2d 1030, affd. 390 N.E.2d 282, 47 N.Y.2d 61, 416 N.Y.S.2d 774, rearg. den. 394 N.E.2d 308, 47 N.Y.2d 1012, 420 N.Y.S.2d 1012.

- Or.—Ruhke v. Cantrell, 570 P.2d 652, 280 Or. 297.

- S.D.—City of Aberdeen v. Herrmann, 301 N.W.2d 674.

66. Miss.—Travis v. Moore, 377 So.2d 609, 8 A.L.R.4th 317.

70. Iowa—Reynolds v. Dittmer, App., 312 N.W.2d 75.

71. Alaska—Vogler v. Fairbanks North Star Borough, 635 P.2d 462.

73. Cal.—City of Santa Clara v. Paris, 142 Cal.Rptr. 818, 76 C.A.3d 338.

75. Ariz.—Northeast Phoenix Homeowners' Ass'n v. Scottsdale Municipal Airport, App., 636 P.2d 1269, 130 Ariz. 487.

- Conn.—Town of Colchester v. Reduction Associates, Inc., Com.Pl., 382 A.2d 1333, 34 Conn.Sup. 177.

- Fla.—White v. Nasir, App., 381 So.2d 335.

- Ga.—Cocroft v. Peters, 244 S.E.2d 6, 241 Ga. 115.

- Md.—Zoning Adm'n of Carroll County v. Ireland, 418 A.2d 221, 49 Md.App. 429.

- Minn.—Costley v. Caronin House, Inc., 313 N.W.2d 21.

- N.Y.—Lezmac Sand & Stone Corp. v. Anderson, 395 N.Y.S.2d 54, 57 A.D.2d 916.

- Wash.—City of Sumner v. First Baptist Church of Sumner, Wash., 639 P.2d 1358, 97 Wash.2d 1.

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77. Neb.—Witzel v. Village of Brainard, 302 N.W.2d 723, 208 Neb. 231.

81. Pa.—Pushnik v. Hempfield Tp., 402 A.2d 318, 43 Pa.Cmwith. 332.

§ 340. — Permits and Nonconforming Uses

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86. Ill.—City of Champaign v. Kroger Co., 410 N.E.2d 661, 43 Ill.Dec. 661, 88 Ill.App.3d 498.

91. Pa.—Board of Sup'rs of West Brandywine Tp. v. Matlack, 394 A.2d 639, 38 Pa.Cmwith. 366.

- Vt.—Town of Bennington v. Hanson-Walbridge Funeral Home, Inc., 427 A.2d 365, 139 Vt. 288.

Storage of objects

- (1) Storage of discarded and deteriorating automobiles properly prohibited.

- Pa.—Bradley v. South Londonderry Tp., 440 A.2d 665, 64 Pa.Cmwith. 395.

92. Iowa—Incorporated City of Denison v. Clabough, 306 N.W.2d 748.

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94. Prior nonconforming use

- N.H.—Town of Merrimack v. Spade, 426 A.2d 19, 120 N.H. 922.

- Pa.—Fayette County v. Cosell, 430 A.2d 1226, 60 Pa.Cmwith. 202.

§ 341. Defenses

96. La.—City of New Orleans v. State, 364 So.2d 1020.

- N.H.—Town of Nottingham v. Lee Homes, Inc., 388 A.2d 940, 118 N.H. 438.

- N.J.—Trenkamp v. Burlington Tp., 406 A.2d 218, 170 N.J.Super. 251.

- N.Y.—City of New York v. Victory Van Lines, Inc., 418 N.Y.S.2d 792, 69 A.D.2d 605.

- Ohio—Village of Columbiana v. Keister, 449 N.E.2d 465, 5 Ohio App.3d 81, 5 O.B.R. 194.

- Or.—Collins v. Ruthbun, 604 P.2d 441, 43 Or.App. 857.

1. N.C.—City of Elizabeth City v. LFM Enterprises, Inc., 269 S.E.2d 260, 48 N.C.App. 408.

2. W.Va.—Singer v. Davenport, 264 S.E.2d 637, 164 W.Va. 665.

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3. La.—Schwegmann Bros. Giant Super Markets v. Donsion, App., 383 So.2d 433, writ den., Sup., 385 So.2d 274.

7. Ind.—Dandy Co., Inc. v. Civil City South Bend, County-City Complex, App., 401 N.E.2d 1380.

- Mo.—Murphy v. Board of Zoning Adjustment of City of Kansas City, App., 593 S.W.2d 549.

- Pa.—Fayette County v. Cosell, 430 A.2d 1226, 60 Pa.Cmwith. 202.

- Vt.—Town of Shelburne v. Kaelin, 388 A.2d 398, 136 Vt. 248, app. after remand 415 A.2d 194.

10. Colo.—Parrack v. Town of Estes Park, 628 P.2d 1014.

- Ind.—Metropolitan Development Commission of Marion County v. Douglas, 390 N.E.2d 663, 180 Ind. App. 567.

- Md.—Joy v. Anne Arundel County, 451 A.2d 1237, 52 Md.App. 653.

- N.Y.—Ilson v. Incorporated Village of Ocean Beach, 434 N.Y.S.2d 272, 79 A.D.2d 697.

- N.C.—City of Hickory v. Calawba Valley Machinery, 249 S.E.2d 851, 39 N.C.App. 236.

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- Conn.—Russo v. Town of East Hartford, 425 A.2d 1282, 179 Conn. 250, app. diss., cert. den. 100 S.Ct. 1334, 445 U.S. 940, 63 L.Ed.2d 773.

- D.C.—Interdonato v. District of Columbia Bd. of Zoning Adjustment, App., 429 A.2d 1000.

- Fla.—Holladay v. City of Coral Gables, App., 382 So.2d 92.

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- Pa.—Rendin v. Zoning Hearing Bd. of Borough of Media, 483 A.2d 391, 83 Pa.Cmwlth. 37.
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- Fla.—Pasco County v. Tampa Development Corp., App., 364 So.2d 850.
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35. Ala.—Baker v. State Bd. of Health of Alabama, Civ.App., 404 So.2d 1098.
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- N.H.—Town of Rye v. McMahon, 379 A.2d 807, 117 N.H. 857.
39. Cal.—Court House Plaza Co. v. City of Palo Alto, 173 Cal.Rptr. 161, 117 C.A.3d 871, app. diss., cert. den. 102 S.Ct. 623, 454 U.S. 1074, 70 L.Ed.2d 607.
41. Nev.—Farris v. City of Las Vegas, 620 P.2d 864, 96 Nev. 912.
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8. Ala.—Billups v. City of Birmingham, Cr.App., 367 So.2d 518, writ quashed, Sup., 367 So.2d 524.

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